

## AGENCY AND LEGAL RESPONSIBILITY: EPISTEMIC AND MORAL CONSIDERATIONS\*

### *AGENCIA Y RESPONSABILIDAD LEGAL: CONSIDERACIONES EPISTÉMICAS Y MORALES*

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#### **Abstract:**

*What kind of agency is required for legal standing? What are the cognitive and rational requirements assumed by legal systems about the subjects of the law? How is it that humans comply with these requirements? In previous work,<sup>1</sup> we argued that these questions require a new approach to legal theory, based on recent findings in cognitive science, and which goes beyond extant neuro-legal approaches. We now elaborate on this proposal, now focusing on issues regarding agency and normativity, including types of agency that are relevant for social epistemology. The main conclusion of the paper is that the high cognitive demands on the explicit rational capacities of agents assumed by legal philosophy are not only incompatible with findings in psychology, but also that a careful and systematic analysis of moral and epistemic agency is required to fully comprehend legal normativity.*

*Our main argument is that forms of collective agency, moral and epistemic, differ from individual agency, which must also be distinguished as moral and epistemic. Crucially, collective agency differs from individual*

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<sup>1</sup> E Cáceres and C Montemayor, 'Pasos hacia una naturalización cognitiva en la filosofía del derecho (Steps Towards a Cognitive Naturalization of Legal Philosophy)' (2016) 10 Problema.

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*agency not merely because of differences in rational standards, but fundamentally because of constraints on the cognitive integration of information. Several consequences of this approach are assessed, including aspects of information integration for judgment and decision-making, reliable communication in epistemic agency, and the integration of moral considerations in legal reasoning. A thorough revision of the notion of “autonomy” is justified under the present proposal, partly because the standard requirements for legal standing and autonomy are too demanding and unrealistic in many cases, and partly because collective agency needs to be taken into consideration as a fundamental kind of legally responsible agency for processes of information integration. By relying on the distinction between epistemic and moral forms of reasoning, we explain how legal systems demand high levels of cognitive integration for legal responsibility at the collective level.*

### **Keywords:**

*Attention, Moral Agency, Epistemic Agency, Consciousness and Attention Dissociation, Collective Agency.*

### **Resumen:**

¿Qué tipo de agencia es necesaria para la personalidad jurídica? ¿Cuáles son los requisitos cognitivos y racionales que los sistemas legales asumen acerca de los sujetos de la ley? ¿Cómo es que los seres humanos cumplen con estos requisitos? En trabajo previo (Cáceres y Montemayor, 2016), hemos argumentado que estas preguntas requieren un nuevo acercamiento a la teoría del derecho, basado en hallazgos recientes en ciencia cognitiva, que van más allá de tratamientos teóricos neuro-legales contemporáneos. Aquí construimos sobre esta propuesta, ahora enfocándonos en cuestiones de agencia y normatividad, incluyendo tipos de agencia que son relevantes para la epistemología social. La conclusión principal del artículo es que los muy estrictos requisitos cognitivos que se asumen sobre las capacidades explícitas de racionalidad de los agentes cognitivos, presupuestos por la ley, no sólo son incompatibles con los hallazgos en psicología, sino que un análisis sistemático de la agencia moral y epistémica también es necesario para poder entender la normatividad legal.

El argumento principal es que tipos de agencia colectiva, moral y epistémica, difieren de la agencia individual, la cual también debe distinguirse como moral y epistémica. Fundamentalmente, la agencia colectiva difiere de la individual no sólo con base en diferencias con respecto a la racionalidad,

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sino también con base en los criterios de integración informativa. Varias consecuencias de este análisis son evaluadas, incluyendo aspectos concernientes a integración informativa para juicios y decisiones, comunicación fiable para la agencia epistémica, y la integración de consideraciones morales en el razonamiento jurídico. Una revisión comprensiva de la noción de “autonomía” es justificada por esta propuesta, en parte porque los requisitos comunes para la personalidad y autonomía jurídica son muy demandantes e inadecuados en muchos casos, y en parte porque la agencia colectiva debe tomarse en consideración como un tipo fundamental de agencia legal responsable para procesos de integración informativa. Basándonos en la distinción entre formas epistémicas y morales de razonamiento, explicamos cómo los sistemas legales necesitan de altos niveles de integración cognitiva para la responsabilidad legal a nivel colectivo.

### **Palabras clave:**

Atención, agencia moral, agencia epistémica, disociación entre consciencia y atención, agencia colectiva.

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SUMMARY: I. *Agency and Legal Standing*. II. *Types of Agency*. III. *Epistemic and Moral Agency*. IV. *Collective and Individual Agency: Autonomy as Condition and as Capacity*. V. *Law, Collective Action and Collective Monitoring*. VI. *Conclusion*. VII. *References*.

## I. AGENCY AND LEGAL STANDING

That agency is required for legal standing is a truism. Legal standing requires at least some degree of autonomy in decision-making and therefore, a non-trivial degree of agency for intentional action. Several areas of the law, for instance civil and criminal law, assume autonomy and agency for legal standing. This assumption is so universal that it plays a critical role in legal philosophy, for instance, in the foundational notions of a legal system —personhood, legal efficacy, and legal validity. This notion of autonomy and agency is also fundamental in political philosophy and ethics (it suffices to mention the work of Kant and Rousseau, particularly their notions of freedom and legitimate authority).

Because of recent developments in the cognitive sciences, however, an interesting question is what *kind* of agency is required for legal standing. Research in behavioral economics shows that human decision making departs from ideal standards of rationality in significant ways, presenting worrisome challenges for the assumption that rational reflection is a fundamental requirement for legal autonomy and optimal choice.<sup>2</sup> If the idealized agency assumed by Kantian notions of personhood and autonomous rationality, explicitly endorsed by John Rawls' notion of "reflective equilibrium," cannot be verified as a distinctive feature of human rational capacities, then a pressing issue is to determine what kind of agency is at stake in legal normativity.

<sup>2</sup> E Cáceres and C Montemayor, 'Pasos hacia una naturalización cognitiva en la filosofía del derecho; (Steps Towards a Cognitive Naturalization of Legal Philosophy)' (2016) 10 Problema 137.

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This question concerning the type of agency required for legal standing is, therefore, no trivial matter. Until recently, it received no attention in legal studies (and to this day, it receives almost no attention at all). In fact, even in philosophical approaches to this topic, it was almost universally accepted that some kind of a priori, explicit and conscious capacity for judgment was essential to have legal standing and autonomy. Much of these requirements were taken from moral philosophy. Epistemology played some role, but not a central role. Thus, one finds enshrined in many legal codes requirements for autonomy or legal standing that resemble the requirements for autonomy defended by Kant: they require conscious assessment of consequences, explicit evaluation of such consequences, and consciously guided obedience to universalizable principles and norms, such as the categorical imperative. Fundamental legal principles derive from this conception of legal autonomy and agency (e.g., ignorance of the law does not allow for its disobedience, parties to a contract must declare that they fully understand the terms of the agreement and they must be fully capable of rational judgment).

Similar requirements were assumed in economics. In the field of economics, however, these assumptions were tested with empirical evidence —an area of economics now known as “behavioral economics”. As mentioned, findings in behavioral economics and rationality show that humans don’t really comply with the rational and coherentist requirements of idealized normative theories assumed in economics. In fact, in many circumstances, humans violate basic rules of rationality, evidence updating and probability theory. In previous work,<sup>3</sup> we discussed the importance of this research for legal theory.<sup>4</sup> What we want to emphasize now is how these find-

<sup>3</sup> Ibid.

<sup>4</sup> See A Fairweather and C Montemayor, ‘Inferential Abilities and Common Epistemic Goods’ in A Fairweather (ed), *Virtue Epistemology Naturalized: Bridges Between Virtue Epistemology and Philosophy of Science* (Synthese Library 366, Springer 2014) 123-142; A Fairweather and C Montemayor, *Knowledge, Dexterity, and Attention: A Theory of Epistemic Agency* (Cambridge University Press 2017); and A Morton, *Bounded Thinking: Intellectual Virtues for Limited Agents* (Oxford University Press 2012), for why this research does not have negative implications for epistemic normativity. What the empirical findings show is that idealized normative

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ings put into question the assumption that there is a single kind of agency that is necessary for legal standing—a kind of agency that is ideally rational and quasi-omniscient about legal principles and their consequences. To the extent that the present approach is an inquiry into the cognitive requirements for legally relevant agency, this paper can be considered as an exercise in legal anthropology. More precisely, we aim to offer an account of legally relevant agency that takes into consideration recent findings in cognitive science, and which takes epistemic agency as seriously as moral agency. In this respect, the present approach differs significantly from naturalistic approaches that focus exclusively on neuroscience.

A key conclusion of this paper is that different kinds of agency play distinctive roles in a legal system, at different levels of information integration—one cannot assume that there is a simple kind of agency or autonomy for legal subjects across the board. In particular, the Kantian or neo-Kantian (e.g., Rawlsian) conception of agency is too demanding for most forms of legal agency and too narrow to capture the complexity of legal systems. Explaining exactly what this means, in the context of legal theory, is one of the main goals of this paper. In doing so, we hope to explain why legal theory should start taking findings in the psychology of agency much more seriously. This new approach to legal theory could help identify institutional reforms that facilitate the implementation of legal norms by contextualizing their application in accordance with specific forms of agency.

Evidence in cognitive science will play an important role in the present analysis. But so will epistemology. In fact, a crucial part of our proposal concerns how social epistemology is fundamental to understand the manner in which various kinds of agency play different roles in the integration of a legal system. We will use insights from social epistemology, based partly on Fairweather and Montemayor,<sup>5</sup> as well as novel approaches regarding the distinction between consciousness and attention. We explain why different forms of collective agency, moral and epistemic, must be distinguished from in-

assumptions are not descriptively adequate or true of human psychology.

<sup>5</sup> Fairweather and Montemayor, *Knowledge...* (n 4).

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dividualistic agency, which must also be differentiated in terms of moral and epistemic. We argue that collective agency in legal systems differs from individual agency not merely because of differences in rational standards, but fundamentally because of the type of constraints on the process of information integration. We seek to justify a revision of the notion of “autonomy,” partly because the standard requirements for legal standing and autonomy are too demanding and unrealistic in many cases, and partly because collective agency needs to be taken into consideration as a fundamental kind of legally responsible agency for processes of information integration.

The views defended here are meant to satisfy the kind of naturalistic approach that has become influential in many areas of philosophy, including legal philosophy.<sup>6</sup> But the main goal of our paper is to present a naturalistic approach that takes *intentional action* as its main focus. This “agency-first” approach that takes the capacities of agents, or more precisely *agency*, as a fundamental target of analysis in legal theory is critical to understand the situated interests of the subjects of the law —an approach that has been the focus of recent literature.<sup>7</sup> We take this agency approach as a central commitment. Naturalism and the agency-first approach frame the analysis we present here, and we hope to provide new insights with respect to both.

Finally, we want to clarify from the outset that our view does not entail a systematic or pervasive differentiation between epistemic and moral agency. The relation between moral and epistemic norms, and the psychological processes required to follow these norms, are issues that demand thorough investigation, theoretically and experimentally. Following legal norms requires both epistemic and moral capacities, and agents succeed at complying with legal precepts because of these capacities. All we claim here is that epistemic and moral capacities differ in some important respects, and as we illustrate below, these capacities can pull in opposite directions.

<sup>6</sup> B Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press 2007).

<sup>7</sup> V Rodriguez-Blanco, *Law and Authority under the Guise of the Good* (Hart Publishing 2014).

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## II. TYPES OF AGENCY

Agency is a complex phenomenon. It requires cognitive integration, working memory, and goal directed intentional action. Intentional action can be either implicit (i.e., automatic and without much conscious access or effort) or explicit (i.e., consciously integrated action with declarative and inferential knowledge). Evidence shows that intentional action may occur automatically in many cases, without awareness or declarative knowledge, and that some types of reasoning require more effortful conscious attention.<sup>8</sup> In addition, voluntary action can be decomposed into conscious and unconscious cognitive processes,<sup>9</sup> as well as predictive and postdictive elements, which can be understood statistically.<sup>10</sup> The available evidence shows that all kinds of agency, either implicit or explicit (largely automatic or conscious) require a “person-level” integration of information, like the type of integration provided by guided *attention*. But there are very important distinctions between these kinds of agency, and only a few of them fall under the typically assumed type of agency at work in much philosophical analysis: conscious reflective agency.

There are well-documented consequences of these different types of agency that corroborate the complexity of epistemic and moral agency. Here we will highlight a particularly revealing one. Evidence shows that there is a compression of perceived intervals between an action and its consequences that only affects *intentional action*, called “intentional binding”.<sup>11</sup> Intentional action slightly alters time perception because of the way in which causally related

<sup>8</sup> See D Kahneman, *Attention and Effort* (Prentice-Hall 1973); B Hommel, ‘Grounding Attention in Action Control: The intentional control of selection’ in B Bruya (ed), *Effortless Attention: A New Perspective in the Cognitive Science of Attention and Action* (MIT Press 2010) 121-40; and C Montemayor and H Haladjian, *Consciousness, Attention, and Conscious Attention* (MIT Press 2015).

<sup>9</sup> LC Krisst, C Montemayor and E Morsella, ‘Deconstructing Voluntary Action: Unconscious and Conscious Component Processes’ (2015). In P.

<sup>10</sup> JW Moore and P Haggard, ‘Awareness of Action: Inference and Prediction’ (2008) 17(1) *Consciousness and Cognition* 136-144.

<sup>11</sup> P Haggard, S Clark and J Kalogeras, ‘Voluntary action and conscious awareness’ (2002) 5 *Nature Neuroscience* 382-385.

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consequences of goal oriented, self-initiated action, are cognitively integrated with other sensorial information. It takes ingenuity and rigorous analysis to figure this out. This is not something subjects are typically consciously aware of at any point in time. This kind of agency effect is implicit and unconscious, as are many kinds of agency we use daily to navigate the world without much cognitive effort (e.g., prudential, epistemic, moral). This does not mean that intentional action can be fully unconscious; it only means that many sub-components of an intentional action can be unconscious, and in most cases *must* be, unconscious.<sup>12</sup> We do not have to reflectively judge our explicit intentions and then tell ourselves what we should do with our body when we typically intend to act. We very rarely do so, and when we do, it is only when we want to determine the overall goal of a process involving many sub-processes, bodily and cognitive, which are mostly automatic. In fact, in some cases of highly skillful performance, consciously reflecting on our actions has the opposite effect of paralyzing us into inaction (think of a gymnast who is constantly thinking on the implications of every one of her moves).

It is not just the scientific evidence that reveals the importance of the distinction between implicit and explicit kinds of agency. Philosophical analysis, particularly with respect to the varieties of intentional action, also justifies this distinction. There is a neglected but longstanding tradition in philosophy that gives implicit agency a fundamental role in guiding us towards having a *virtuous life*. For instance, skilled action of an implicit kind was valued in ancient Chinese philosophy because of its automatic effects on personal flourishing, which requires habituation without consciously explicit effort to command and justify action.<sup>13</sup> The idea is that the virtuous person should act virtuously without much thought or judgment. In daily life, automatic agency also plays a fundamental role. Artistic and athletic performances of the highest complexity require an

<sup>12</sup> See Fairweather and Montemayor, *Knowledge...* (n 4); *ibid*, for further elucidation.

<sup>13</sup> E Singerland, *Effortless Action: Wu-wei as Conceptual Metaphor and Spiritual Idea in Early China* (Oxford University Press 2003).

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enormous amount of cognitive coordination and intentional planning. Yet, performers experience little consciously reflective effort in executing such complex intentional actions. In fact, most performers report experiencing a kind of joyous abandonment of their consciously attentive self in executing these largely automatic complex actions. It seems that if conscious attention to plans were necessary for this kind of skillful agency, performers would be too distracted by these conscious inferences and commands, and would not be capable of skillful execution. As mentioned, in these cases of highly virtuous or skillful performance, conscious reflective agency is highly counterproductive.

This kind of attention required to achieve goals without much conscious awareness of rules and the principles concerning how to follow these rules is fundamental for *epistemic agency*, from learning how to speak a language to executing skillful performances concerning communication, and it plays a clear and intuitive role in making our perceptual and inferential capacities reliable.<sup>14</sup> We must make a distinction between the phenomenally conscious experience of selfless joy associated with effortless performance (what artists and athletes describe as “being in the zone”) and the “access” that conscious awareness provides to explicit rules, semantic contents, and inferential deliberations.<sup>15</sup> In other words, the type of attention that guides intentional action does not demand explicit access to rules and inferences concerning how to execute perceptual or inferential routines.

Attention routines during highly skilled performance are interesting because they present a seemingly paradoxical type of agency. So-called “effortless attention” is the kind of attention that, as the

<sup>14</sup> See Fairweather and Montemayor, *Knowledge...* (n 4); Fairweather and Montemayor, ‘Inferential...’ (n 4).

<sup>15</sup> See N Block, *On a Confusion About a Function of Consciousness* (1995) 18 (2) *Behavioral and Brain Sciences* 227-47; and N Block, ‘On a Confusion About a Function of Consciousness’ in Ned Block, Owen J Flanagan and Güven Güzeldere (ed), *The Nature of Consciousness: Philosophical Debates* (MIT Press 1997) 375-415, for the distinction between access and phenomenal consciousness; and see Montemayor and Haladjian (n 8), for a theoretical framework that justifies and elucidates the dissociation between consciousness and attention.

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performance gets more complicated and the requirements for goal completion get more demanding, the less the agent experiences consciously reflective effort. This is not a precise linear relation, but the main characteristic of effortless attention for our purposes is that as tasks increase in information-integration demands, consciously effortful attention to explicit instructions decreases. This is a very familiar experience for anyone who has learned how to ride a bicycle: at first, one must consciously reflect on and attend to bodily balance and movement, but once one has learned the basics, one stops thinking about bodily movements.

A philosopher that fully appreciated the importance of the automatic and implicit aspects of agency was Elizabeth Anscombe. Automaticity in intentional action is not only the mark of skill but also a basic feature of how we experience our own bodies as we act in order to achieve a goal. This does not mean that we are always acting automatically and without deliberation. What it means is that deliberation of the explicit, inferential kind, plays only a minor role in guiding processes that are largely automatic, skillful, and habitual. Attentional guidance has these characteristics. When one guides attention to satisfy a need, one rarely is conscious of all the information required to satisfy that need. In fact, the goal one wants to achieve guides action in a way that irrelevant information and not immediately urgent information is *suppressed* from entering conscious awareness. This is a property of agents that makes them reliable in the satisfaction of their needs, and it is an essential aspect of intentional action. In *Intention*,<sup>16</sup> Anscombe writes:

What distinguishes actions which are intentional from those which are not? The answer that I shall suggest is that they are the actions to which a certain sense of the question ‘Why?’ is given application; the sense is of course that in which the answer, if positive, gives a reason for acting. But this is not a sufficient statement, because the question “What is the relevant sense of the question ‘Why?’” and “What is meant by ‘reason for acting?’” are one and the same.

<sup>16</sup> GEM Anscombe, *Intention* (first published 1957, Harvard University Press 2000).

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There is much to say about Anscombe's account of intentional action, and we shall not delve into it here. What is important for present purposes is that, for Anscombe, one does not need to represent explicitly these "Why" questions about goals and reasons for action separately, or ask whether the action that coincides with the movements of our bodies also complies with how we are representing the rule or goal guiding the action. Obviously there is a level at which some sense of why we initiated an action features in conscious awareness, but this could merely be attentional guidance that is anchored automatically (as in most perceptual routines geared towards action), rather than explicit inferential reasoning. In addition, in many cases, attentional guidance is effortless. There seems to be, therefore, at least two broad kinds of agency: one implicit and largely unconscious, compatible with attention routines for action and motor-control, and an explicit or declarative one, associated with working memory and access consciousness to semantic contents and explicitly formulated rules. The key question, then, is what does this mean for legal agency and autonomy—or what does it mean for *legal standing*.

The traditional assumption that legal standing requires full knowledge and rational autonomy is problematic for three reasons. First, it idealizes human rationality and freedom in a way that makes it incompatible with actual human capacities. This disadvantage is not merely an empirical shortcoming of the Enlightenment view of humankind; it also has morally negative consequences for those who lack the capacity for explicit and declarative intentional action. This is why the revised notion of autonomy we present here has implications for a defense of *neurodiversity*—the notion that "non-standard" psychological conditions should not be stigmatized as abnormal or defective. Depriving these individuals of legal standing is one of the most concrete and dramatic forms of social stigmatization.

Second, the idealized notion of human autonomy is problematic because, as we argue below, collective agency plays a critical role in the guidance of social behavior regulated by the law. The focus on individuals, rather than collectives, of the standard assumptions of autonomy and rationality thus oversimplify the layered structure of agency in legal systems. Finally, the idealized view also *de-con-*

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*textualizes* action in an implausible way by making it dependent on abstract forms of rule-following, rather than on the concrete needs that agents have and must immediately satisfy at any given time. An aspect of this de-contextualization is that the idealized view blurs important distinctions. One of them is the distinction between implicit and explicit agency. Another fundamental one is the distinction between epistemic and moral agency.

### III. EPISTEMIC AND MORAL AGENCY

Agency is always constrained by specific problems that require adequate enough solutions in order to achieve goals, given a limited amount of information and resources. The intentional actions regulated by law are not different, and they comply with this basic agential structure—they regulate the behavior of agents at specific contexts for action, with concrete goals, and with a limited amount of information and resources. Access to information is always limited, and this must be taken into consideration in explaining legal efficacy, autonomy, and legal standing.

One way to address this problem has already been highlighted—the distinction between implicit and explicit agency. Implicit agency is attention guided, responsive to immediate needs, and reliable in eliminating unnecessary information by using only the relevant information required to solve specific problems. It is implicit because this kind of agency, pervasive in our intentional actions, does not require the conscious and reflective judgment (or endorsement) of declaratively postulated rules. Vast areas of the behavior regulated by legal systems fall under this kind of agency: paying a subway ticket, or getting money out of a cash machine do not require conscious reflection on the civil legislation governing these transactions. Obviously, intentional actions can be legally described explicitly, through declarative judgments—this is what lawyers and judges do. But this does not mean that the subjects of the law *need* to do this. It is actually implausible, theoretically and empirically, to assume this generalization.

Here, it is important to make a further distinction. Besides implicit and explicit agency, there is a distinction between epistemic

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and moral agency. The easiest way to illustrate the contrast between epistemic and moral agency is through cases in which epistemic normativity clashes with moral normativity. From a financial and epistemic point of view, it is justified to increase value by paying less to workers, or even by enslaving them. But from a moral point of view this is unacceptable. A clearer example is provided by the Nuremberg trials. Testing vaccines on children who will suffer and die painful deaths from conducting scientific research is epistemically justified because it will help produce more medical knowledge, thereby increasing our scientific understanding of the human body. But from a moral point of view, this is appalling and unjustified. In many difficult legal cases, what is justified from an epistemic point of view is unjustified from a moral point of view (and vice versa). This is the source of the conflicting intuitions and judgments that judges must ponder in their decisions regarding difficult cases.

There are, therefore, four relevant types of agency in legal systems. There is implicit and explicit epistemic agency, and there is implicit and explicit moral agency. There are many problems surrounding these distinctions that we shall not discuss here. The main point we want to make is that these types of agency play a critical role in legal intentional action and judgment. In the next section, we introduce a further distinction, namely that between *individual and collective agency*. For now, we focus on further developing the distinction between epistemic and moral agency.

The four types of agency sketched above allow us to provide an outline of the framework required to explain contextuality in legal action.<sup>17</sup> On the semantic understanding of contextuality, information is made more precise by the agent's interests, goals, and situations. Similarly, information about legal principles and rules is made concrete by the situations that agents find themselves in. The assumption has been, based on the Enlightenment model, that there is a reflective process on general and abstract legal rules and principles that then concludes with the explicit judgment and endorsement, moral or epistemic, of a norm that is then used to guide an

<sup>17</sup> See Cáceres and Montemayor (n 1); *ibid*, for details on how contextuality is necessary to explain the actions of subjects of the law.

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explicit intention to act in a concrete situation, time and place. This model gets things backward. Agents act, for the most part, based on implicit forms of epistemic and moral agency to satisfy their basic needs. It is only at the judicial and legislative levels that the explicit endorsement of norms *as such* becomes necessary. The point is not merely that explicit judgment is not necessary at the situated and contextualized action level, but rather that such an endorsement would be counterproductive and unrealistic in most cases. Furthermore, as mentioned above, it could also be immoral, because it precludes subjects that lack these reflectively demanding capacities from having legal standing.

A legal system is not constituted merely by principles and rules that require the endorsement of idealized subjects according to explicitly formulated rules of rational guidance. A legal system is most fundamentally determined by concrete intentional actions, at the individual and collective level. These actions, individual and collective, are best understood in terms of attention routines that aim at the satisfaction of concrete social needs, rather than the achievement of an optimal reflective endorsement regarding an explicitly formulated intention. But one can actually go further. Even the reflective endorsements pronounced by officials and institutions, according to the explicit wisdom of the canons of jurisprudence, are a kind of attention routine in which explicit agency is being exercised. What one is *attending to*, as an official, may be a principle or norm, but that doesn't change the fact that attention is guiding these pronouncements. In other words, attention is also guided toward the satisfaction of concrete social needs, of a more explicit kind, in these cases.

The consciousness and attention dissociation helps explain these types of attention and agency.<sup>18</sup> Implicit epistemic agency is best understood in terms of perceptual attention that does not necessitate conscious awareness for its reliability and precision. Access to information (explicitly formulating an inference) may also be dissociated from phenomenally conscious attention (attention to the phenomenology or qualitative character of an experience). In this way, one may say that many intentional actions by legal subjects are of an

<sup>18</sup> Montemayor and Haladjian (n 8); *ibid*.

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epistemic-implicit kind —riding the subway, paying the mortgage, or getting a loan. Other actions, particularly in criminal law, seem to demand more consciously reflective intentions. But subjects follow legal norms mostly implicitly, and it is mostly officials who pay attention to explicit and consciously reflective endorsements of such norms. It is only in this more “fragmented” way that legal efficacy becomes possible.

Since this kind of empirically based and more realistic approach is necessary to make sense of legal validity and also to account for how the actual capacities of subjects underlie legal norms, it follows that a layered structure of different types of agency is required to determine and constitute a legal system. This type of cognitive integration can only occur through collective forms of agency, which is the topic of the next section. At this point, it is crucial to highlight the consequences of our approach for the notions of autonomy and legal standing. Autonomy should not require the explicit endorsement of reflectively accessed information about norms and their consequences. It requires only the condition that the capacities of subjects are operating in the right contexts, where they are reliable without being manipulated, coerced or otherwise impeded. We expand on this below.

With respect to information integration, the structure of legal systems is such that only judges and a select set of legal operators need to represent norms explicitly and deliberately —the way most ethicists and legal theorist assume. Most of what happens at many offices where the law governs both operators and subjects is basic instrumental rationality, and operating at these contexts may depend almost exclusively on implicit skills that satisfy immediate needs. There must be coordination between these intentional actions and the letter of the law and obviously, there is ample room for dissonance, as one finds in corrupt governments. The reason why these deviations do not seriously threaten the validity of a legal system as a whole is because *on average* the behavior of subjects conforms to general legal norms, based on the subjects’ reliable skills (moral and epistemic), which do not require reflecting on the content of norms as reasons for action. Thus, contrary to the assumptions of most prevailing views, the majority of subjects of legal norms never think

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of them explicitly in order to act intentionally and in a normatively determined way, in order to satisfy the social goals that the law also seeks to satisfy.

How is this coordination between the law, the explicit judgments of judges and lawyers, and the implicit intentional actions of subjects achieved? To a first approximation, it works similarly to the “coordination” between the explicit rules of syntax identified by professional linguists and the rules of syntax children all around the world learn implicitly at a very early age, when they first learn a language.<sup>19</sup> It is by *cognitively integrating* attention guided goals that the explicit matches the implicit —the declarative matches the reliable attentive guidance of skills. Explicit attention to norms is thus coordinated with implicit attention to concrete needs and goals. In the case of legal systems, collective agency through legal institutions is critical to achieve this kind of coordination.

Some forms of cognitive integration for legal normativity-coordination are moral. Family law regulates many moral principles that guide subjects implicitly, in their satisfaction of basic personal needs. Criminal law, however, with its emphasis on conscious intent, regulates behavior in which breaches to moral principles and other anti-social behaviors must guide subjects more explicitly, in order for them to have the required “guilty mind” or *mens rea*. An analysis of criminal law in terms of how *explicit* intent must be in the guidance of criminal behavior is a promising path the present analysis opens. For instance, strict liability approaches to criminal law may be considered as views that favor dispensing with explicit intent for criminal agency, while responsibilist approaches necessitate more

<sup>19</sup> Interestingly (and ironically), John Rawls (1971, section 9) proposed a “linguistic analogy” in order to explain how there could be rules that one follows innately. Since one learns syntax without explicitly judging and endorsing the rules of syntax, this analogy goes very much against Rawls’ views on reflective endorsement and reflective equilibrium. For a similar tension in epistemology and its resolution based on reliable skills rather than explicit judgments see Fairweather and Montemayor, *Knowledge...* (n 4). See Mikhail, *Elements of Moral Cognition: Rawls’ Linguistic Analogy and the Cognitive Science of Moral and Legal Judgment* (Cambridge University Press 2011), for a thorough development of Rawls’ analogy.

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explicit guidance. The type of implicit and explicit agency in these cases is mostly *moral* in nature.

Contract law regulates behaviors that satisfy economic and financial needs. Many of these behaviors can occur implicitly. For example, vast areas of economic behavior are implicitly guided by needs that require their reliable satisfaction for basic survival (e.g., housing, feeding, or health). Only at the regulatory level, more specifically, at the collective-agency level, can one find systematic forms of explicit normativity guiding contract law. The type of implicit and explicit agency in these cases is mostly *epistemic* in nature. For this reason, it seems that the proper scope of the economic analysis of law concerns epistemic forms of agency, rather than moral types. This is obviously an area of research that requires further investigation.<sup>20</sup>

We hope it is clear by now that the reflective and explicit form of intention to act as declaratively endorsed judgment, assumed in Kantian conceptions of autonomy, is insufficient to accurately describe the complexity of legal systems, the notion of legal validity and the way in which subjects obey the law. It is also unjustified to use it as the sole standard for legal standing. Epistemic or moral agency need not be explicit and declarative. This offers the opportunity to define “autonomy” and “legal standing” in more flexible and realistic ways, with an eye toward social justice.

How to understand autonomy and legal standing in systems that require collective forms of integration, such as legal systems? If moral and epistemic agency, manifest in the behavior regulated by law, need not occur by explicit knowledge of rules one must judge and follow, it seems that autonomy also splits into implicit and explicit. But what exactly does this mean? Here is a tentative answer. The autonomy required for legal standing in most cases simply means that the reliable forms of attention guidance, moral and epistemic, that allow subjects to satisfy their social needs, which are governed by law, are *properly manifested*, without unnecessary ex-

<sup>20</sup> See Fairweather and Montemayor, *Knowledge...* (n 4) chapter 7, for an analysis of Hayek’s “economic problem” that shows why collective epistemic agency is necessary to solve this problem.

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traneous manipulation or oppression. The more explicit kind of autonomy, championed by the Kantian conception, is necessary only in rare cases, mostly concerning serious consequences to one's own life or integrity, as in criminal procedures, or when one is fulfilling an official role, as in the cases of judges, legislators or lawyers. Guaranteeing the respect for these two kinds of autonomy depends on the adequate integration of collective action through legal institutions.

IV. COLLECTIVE AND INDIVIDUAL AGENCY: AUTONOMY AS CONDITION AND AS CAPACITY

It is not immediately obvious to the lay person that legal systems require what H. L. A. Hart<sup>21</sup> calls "secondary rules." Actually, the view that legal systems are based on coercion is so intuitive that it served as the foundation for legal validity and as the distinctive legal characteristic of a system of norms.<sup>22</sup> The legal point of view of normativity is the point of view of an accepted system of sanctions, which according to positivism, is independent of moral authority. But secondary rules were crucial to fully understand the distinctiveness of legal systems from a clearer conceptual perspective. The justification for secondary rules in the present account is provided by the explicit judgments and attention to rules that officials must perform. The requirement that these rules must be independent from morality or religion is perfectly compatible with the present proposal. However, the notion that legal systems must be constituted without any type moral agency is *incompatible* with our proposal. As mentioned, many of the intentional actions governed by law are based on implicit needs that need to be satisfied, moral and epistemic. On our account, the need for secondary rules is based on the need for explicit judgments at the official level, which plays the role of cog-

<sup>21</sup> HLA Hart, *The Concept of Law* (2nd edn with postscript by J. Raz & P. Bulloch eds, Clarendon Press 1961) (Oxford University Press, 1994).

<sup>22</sup> H Kelsen, *Pure Theory of Law* (M Knight tr, University of California Press 1960/1967); see F Schauer, *The Force of Law* (Harvard University Press 2015), for a contemporary version of this thesis, based on findings in sociology and psychology, among other disciplines.

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nitively integrating collective intentions and judgments, according to recognized norms of the system (e.g., from courts, administrative offices or investigative panels). The explicit judgment that a norm is part of the system thus plays a fundamental *integrative role*.

Collective agency is also moral or epistemic —an issue that we further elucidate in the next section. In some instances, a collective agent will investigate the truth of a claim, thus pursuing a collective epistemic goal. In other cases, a collective agent will seek to provide justice to a victim, thereby pursuing a moral goal. These are not incompatible goals, although epistemic and moral intentional actions are not the same and they *can* be incompatible, as explained above. Thus, the explicit and implicit agency distinction provides a new way of understanding the roles a legal system plays at different levels. Many of these roles will depend on implicit attention guidance. Only instances of norm integration, validation or demotion (associated with secondary rules) will depend on the explicit judgment of recognizing rules as norms of the system —presumably a strictly epistemic task. This collective goal of explicitly recognizing the limits of the normative system serves a publicly valuable function, and it is fully compatible with our account.

It is also not immediately obvious that normative force could be derived only from conventions about secondary rules. Normative force, on the present account, derives from attention to needs and the implicit or explicit intentions of agents, and not merely by explicit convention. This approach has the advantage of *situating normative force* in the concrete needs and attention routines of agents. The distinction between implicit and explicit intentional actions allows for immediate and automatic guidance in subjects that need to act in order to satisfy personal needs. The explicit acceptance and endorsement of rules at the official level plays a similar role —it satisfies the needs of the institutions responsible for implementing the law, including public needs for the recognition of rules.<sup>23</sup> Coordination of implicit and explicit intentional actions, individual and

<sup>23</sup> For a thorough defense of the view that there are collective epistemic agents that satisfy collective epistemic needs see Fairweather and Montemayor, *Knowledge...* (n 4) chapter 7.

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collective, is provided by cognitively integrating the attention-like routines to goals at the individual level with the public endorsement concerning similar public needs at a societal level.

Coordination occurs because reasons for acting can be either implicit or explicit. As Anscombe would say, the relevant sense of the question “Why?” and “What is meant by ‘reason for acting?’” are one and the same. Coordination occurs not because of a miraculous match between reflective judgment and the actions of subjects that largely ignore the content of the laws that govern them. Rather, coordination occurs because goals and needs need to be satisfied, and collective action is necessary for the satisfaction of many of these social needs.

With respect to autonomy, the explicit judgments of a court are autonomous to the extent that they manifest rationality because of the aggregated capacities of individuals that constitute the court. This is a rational and reflective capacity. This capacity, as explained before, is assumed in Kantian accounts of autonomy, but subjects need not rely on this capacity, and actually are unlikely to do so because acting would become too difficult or even impossible given the amount of information and inferences subjects would need to access at any given time. Autonomy in the reflective sense is required of judges and other officials that implement and apply the law. This is because their goals must be explicitly stated, their decisions must be publicly justified, and their actions must be implemented by collective coercive methods.

The autonomy of individuals, by contrast, need not be explicit in this way, and it is very rare when individuals engage in this kind of reflective exercise as they comply with the law. Autonomy here is best understood as a *condition*, rather than a *reflective capacity*. Obviously, individuals rely on epistemic and moral capacities in order to achieve their social goals and satisfy their needs, but the autonomy they require is not a capacity to reflect. Rather, their autonomy is based on the condition of not being obstructed to manifest their more implicit and less reflective capacities.

Notice that the implicit and explicit dimensions of legal normativity are compatible with reflective judgments of a moral kind on the part of agents as well as with reflective epistemic endorsements.

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What is crucial is that these *need not* be reflective judgments of legal norms and their application to concrete cases. But the most plausible way to understand the intentional actions of individual subjects is that they need not consciously reflect on norms and goals *in general*, regardless of whether the type of agency they engage in is moral or epistemic. In any case, the thesis defended here is that there is no reflective endorsement of legal norms for subjects of the law in most cases in which their behavior is governed by law.

The coordination and informational integration between implicit and explicit actions depends on *collective action*. This coordination is based on collective need-satisfaction, similarly to what happens in markets. The difference is that legal systems satisfy the most urgent social needs that require integration of moral and epistemic information. Markets are not like this, as the slave trade dramatically shows. In satisfying the most important social needs, moral and epistemic needs must be satisfied in unison. This requires collective action from courts, legislative bodies, ministries and specialized agencies. Satisfying the needs of individuals in a market need not imply the satisfaction of needs concerning justice. The satisfaction of moral and epistemic needs that seeks to create a just society is a very distinctive and important constraint on legal systems. It may even be that this constraint is what is unique about legal systems, because the satisfaction of moral and epistemic needs in unison does not seem to be a constraint of other systems —at least not in the reliable, transparent, and socially coordinated way that characterizes legal systems.

To satisfy their urgent social needs, individuals pay attention to social threats, forms of social domination and hierarchy, and social cues about access to goods, moral and epistemic. They rarely pay attention to principles and rules as such —this is the job of judges and legal officials. Subjects may attend to angry people at a window office, piles of paperwork, cues about social hierarchy, shortcuts to facilitate procedures and other socially relevant features that guide their intentional actions governed by law. Even the bureaucrat at the booth pays attention mostly to socially salient features, rather than to explicit formulations of laws and principles, in accordance to reflective jurisprudence. It is really just at the judicial level

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that one finds such an explicit kind of attention to rules and their consequences. The content of the law, with its language of rights, property or federal taxes is perceived by the lay person in terms of threats and deadlines by concrete subjects embedded in very specific cultures and hierarchies, which guide their intentional actions. It is likely that the very notion of a legal norm, as something judges need to pay attention to, was something that came into being very recently, but we shall not argue for that claim here.

How exactly are moral and epistemic needs collectively satisfied in unison within a legal system? We provide an example of moral and epistemic goal-integration based on how collective epistemic agents “mask” their epistemic dispositions in legal systems.<sup>24</sup> This example captures two important aspects of the epistemic and moral agency distinction. On the one hand, it shows that epistemic and moral agency can, and actually must, occur at the collective level in order to satisfy urgent social needs. On the other hand, it illustrates the importance of moral goals in order to curtail collective epistemic agency, which without these controls, would produce injustice.

## V. LAW, COLLECTIVE ACTION AND COLLECTIVE MONITORING

Dworkin’s influential work<sup>25</sup> presents compelling reasons to justify the need of moral principles and moral reasoning in judicial decisions. A key feature of what makes moral principles relevant, in his view, is that they contribute to reaching adequate decisions in cases where the law is not decisive or in which rules cannot be simply applied in terms of a recognition-principle plus some facts that justify their application. Weighing and pondering —reflective practices concerning moral value— become important ingredients of good judicial judgment, and the judge needs to pay attention not only to salient legal issues, but also to salient moral issues. This has been discussed in the context of criticisms to legal positivism, particularly

<sup>24</sup> Based on Fairweather and Montemayor, *Knowledge...* (n 4).

<sup>25</sup> R Dworkin, *Taking Rights Seriously* (Duckworth 1977); and R Dworkin, *Law’s Empire* (Harvard University Press 1986).

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Hart's contention that legal systems are systems of rules. But the distinctions between implicit and explicit, as well as moral and epistemic agency, allow for more psychological nuances here.

The interpretation of the law in a hard case may require principles, besides rules, but this issue should not be reduced to whether or not the law is fully captured by social rules or social rules *plus* moral principles. Although this is clearly an important debate, there is more to judicial deliberation in a hard case than the debate between positivism and its critics. More specifically, the interpretation of the law by a judge requires explicit, public and declarative deliberation about the epistemic and moral aspects constitutive of a social practice. Paying attention to what is salient in these cases requires the epistemic and moral capacities of the judge, and the collective epistemic and moral deliberations of courts.

Here is our concrete proposal.<sup>26</sup> A “mask” is a way of preventing the normal manifestation of a disposition or ability. An antidote, for example, masks the effects of a poison. Analogously, a court and legal systems in general need to mask typical epistemic dispositions of courts and legal offices to achieve fair results. Consider the “moral masks” imposed on the epistemic dispositions to obtain information in order to settle the facts of a case. There are many instances of this kind of masking. A court cannot consider information obtained illegally, or against procedure, even if the information is veridical. The court is actually legally justified to ignore veridical information (required by law to do so), which is clearly *unjustified* from an epistemic point of view. In this case, a principle of fairness concerning due process (a human right of citizens) prevents the reliable dispositions of the court to deliver veridical information.<sup>27</sup>

How does this analysis help with hard cases? In *Brown v. Board of Education*, there were facts about market value, financial issues and other economic factors that the court could have considered suffi-

<sup>26</sup> Based on Fairweather and Montemayor, *Knowledge...* (n 4).

<sup>27</sup> An interesting issue is whether this type of masking plays a role in the implementation of human rights more generally, in particular with respect to the clash between civil and political rights versus social, economic, and cultural rights. For an illustration of this clash and its relevance for international law see C Montemayor, *La unificación conceptual de los derechos humanos* (Porrúa 2002).

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cient to hold a “business as usual” approach, based on precedent. Its capacity to assess these financial and social facts as decisive, however, was masked by a larger, much more important consideration: the equal protection of subjects under the law. Without such masks, legal systems as a whole would simply monitor, control, oppress and justify their collective control by means of facts about markets or public safety. A legal system cannot simply oppress and control in this way. Part of what makes a case hard difficult is the extent to which a moral mask should prevent the collective epistemic capacities of legal institutions, including courts.

This issue has consequences for other contemporary topics regarding information gathering and the police force. In the context of the United States, alleged social facts about safety and crime reduction have produced an unfair system of incarceration that is biased towards minorities, in particular the African-American and Hispanic communities. It is not only the difference in incarceration rates, but also the harassment of these communities by the police that creates substantial differences in how people in minority communities live their lives. This collective monitoring of the population is justified from an epistemic point of view, in order to establish facts about crimes that must be investigated, and to identify statistical correlations between types of individuals and the likelihood of criminal behavior. But when such collective monitoring is so invasive and insidious, it must be masked by morality, just the way the collection of information is masked for the purposes of privacy, even if the information is accurate.

Human rights may compete with one another. The right to privacy may compete with the right to information; the right to property may compete with the right to public health. But in general, human rights are forms of masking the collective control exercised by the state. As mentioned previously, markets and other social systems lack this structure (although it is an interesting question which other systems resemble legal systems in this respect). Having principled ways of masking collective monitoring and policing is crucial to achieve better collective legal action. At least some legal principles concerning justice and fairness can be captured in this way. To repeat, explicit discourse and rationality occur at the collective and

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official level, and non-epistemic (in fact, anti-epistemic) masks are imposed in order to curtail the abrasive effects of collective epistemic agents on the lives of citizens. At this collective level, the judge is not speaking for herself —she is representing a collective. This social “fiction” of the judge representing the state is not theatrical. The judge truly is manifesting a *different type of agency* than the one she manifests at home: it is an explicit kind of agency, which must comply with the demands of *public responsible discourse*. Courts and other collective bodies also display this kind of agency. Legal systems manifest the most complex forms of collective epistemic and moral agency for this reason.

The subject of the law does not consciously know the specific text of the law that prohibits murder, then reflects on it, and intends to follow the rule. The subject of the law simply knows, in an intuitive and implicit way, that killing is wrong, and that is what *guides* her behavior. The judiciary and legislative bodies must reflect explicitly, and take the text of the law as the basis of their judgments in considering murder cases. But this is not to guide the behavior of subjects; it is to guarantee that there is public and transparent disclosure of the explicit action taken collectively by the state in order to socially control subjects. As mentioned, coordination happens not because of a miraculous connection between explicit texts approved by congress and the actions of subjects. Coordination occurs because of the individual and collective satisfaction of the same social needs, urgently required to have a democratic process and a fair system of courts. These needs are the same for individuals and legal collectives, but they are satisfied implicitly or explicitly. These are two types of justification, one of which is private and has normative “grip” on subjects; the other one is public and has normative force because of the public commitments of a fair and open society.

What is distinctive of legal systems, as opposed to markets, religions, and other forms of collective epistemic or moral agency, is that legal systems are uniquely *complex* in their integration of intentional actions for achieving socially valuable goods. This is an intuitive idea, and it shouldn't be too surprising. Historically, markets, commerce, religion, and moral systems emerged first, and only after the explicit and declarative (interpretative) integration of social goals were

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made public with a specific intent, can one find clear examples of legal systems. We propose that the influence of morality, as “masking” epistemic collective decisions from institutions, is a fruitful way of understanding the complexity of legal systems and also of how information is integrated within legal systems at different levels.

## VI. CONCLUSION

We started by considering evidence from the cognitive sciences concerning the importance of agency in different domains. We emphasized the importance of the distinction, established by the empirical findings, between explicit and implicit agency. We then explained the importance of this distinction for the notions of autonomy and legal standing. We proposed that, in light of this distinction, it seems important to update and expand the notion of autonomy in order to take into consideration findings in cognitive science and to adopt a more realistic view of the human subject. These are issues informed by the naturalistic approach mentioned at the beginning of the paper.

We also emphasized the importance of two kinds of agency, epistemic and moral, as well as their interplay in legal systems. This emphasis on agency was expanded further with an analysis of how the implicit and explicit distinction relates to the individual and collective kinds of agency. An agency-first approach highlights the kind of situated and need-based kind of intentional action required for most social behaviors and also the more explicit kind of agency required in public deliberation.

The combination of these two approaches, we argued, opens new avenues of investigation that directly involve other areas of philosophy, most directly philosophy of mind and epistemology. The proposal of understanding the interaction between moral and epistemic agency in terms of masks is one of them, and the revision of the notions of autonomy and legal standing is another.<sup>28</sup>

<sup>28</sup> We are grateful to an anonymous reviewer for valuable comments that helped us improve this paper.

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