

# From "Golden Rule" to "False Proposition" -- Re Understanding of Criminal Defenses

Kangning Zou

School of Law, People's Public Security University of China, Beijing, China

## Abstract

**In the concept of criminal intent, the criminal intent stipulated in China's criminal law includes both cognitive and willpower factors, among which there is different debate on how to understand the cognitive factors of criminal intent in China in various theories, both ancient and modern. What is particularly crucial is that under the hierarchy system, does criminal intent belong to the elements of constitutive elements or does the element of criminal responsibility constitute a crime in determining the behavior of the perpetrator? Do we need to bear criminal responsibility? In addition, while discussing the concept of criminal intent, we cannot ignore the proposition of Criminal defenses awareness. There seems to be a tangled relationship between Criminal defenses awareness and criminal intent. At present, China's trial practice mostly ignores the existence of Criminal defenses awareness, but the discussion on the definition of Criminal defenses awareness in the academic community is becoming increasingly fierce, and a hundred schools of thought contend and begin to have an impact on the trial practice.**

## Keywords

**Criminal intent; Awareness of Criminal defenses; Knowingly.**

## 1. Formulation of the Problem

Looking back at the history of the legal systems of China and the West, whether it is the Roman law of the Western world or the Chinese legal system, which is typified by the Tang Law Review, the two worlds have coincidentally formed the criminal code of "ignorance of the law does not exempt one from responsibility". Both worlds have coincidentally formed the criminal code of "not knowing the law does not exempt one from responsibility" in their criminal laws, and this code has deeply influenced the development of criminal laws and criminal justice in the world. It is worth pointing out that, after the civil law system countries based on Roman law entered the modern era, Germany and Japan, as representatives, gradually adopted a hierarchical system of criminalization. In the development process of its crime system, for what elements belong to the unlawful; what elements belong to the responsibility of the discussion is endless, which for the criminal intent and unlawfulness awareness of the discussion is particularly intense. Unlike the understanding of criminal intent, the hierarchical attribution of the understanding of wrongfulness reflects an impact on traditional criminal norms.

Compared with Germany, Japan and other countries, China has a special legal system. First of all, our country has long been influenced by the former Soviet Union four elements of crime system, the understanding of the criminal composition of the "plane type" of addition, subtraction, multiplication and division of the elements of the addition, therefore, for the four elements of crime system, each element for the establishment of the crime have a role in influencing the wrongdoing and responsibility. That is to say, in the former Soviet Union, under the four elements of the criminal system, each element of the crime constitutes the function of confirmation of wrongdoing and responsibility. However, with the influence of the hierarchical

system of criminal composition advocated by professors such as Richard Chang and Zhou Guangquan, the irrationality and inapplicability of the traditional four-element system of criminal composition gradually appeared. Under the hierarchical criminal system, the elements of crime are divided into two camps: "wrongfulness" and "responsibility". The elements of the "wrongful" camp are responsible for determining that the perpetrator's conduct is unlawful; the "responsible" class is responsible for determining that the perpetrator is liable for his or her conduct. It is therefore important to make a precise distinction between the connotations of the wrongful class and the responsible class, as well as between the elements of the latter, in view of the different responsibilities of the wrongful class and the responsible class.

For a long time, unlawfulness awareness in China's judicial practice, a kind of adherence to the "do not know the law does not exempt its responsibility" principle, that is, the perpetrator does not subjectively know that their own behavior violates the criminal law does not exempt the perpetrator because of its behavior to bear criminal responsibility. But with the social development of new economic crimes represented by new forms of crime impact "do not know the law is not exempt from its responsibility" of the old criminal law application. At present, two major performance in judicial practice requires us to re-examine the understanding of illegality, one is in the public security organs in the investigation process, the subjective whether the perpetrator is intentional, the perpetrator of their own behavior in violation of criminal law whether they have knowledge (i.e., awareness of the illegality of the investigators to become the first consideration and focus on the issue of consideration, in which the perpetrator of their own behavior in violation of the law whether they have knowledge (awareness of illegality) is the investigation stage of the case of the case, the perpetrator of their own behavior in violation of the law, the perpetrator of the case is the most important thing. Recognition) is the key to the characterization of the case at the investigation stage. Secondly, in the course of a criminal trial, when faced with a defendant and his or her defender's claim that the defendant subjectively does not have knowledge of the illegality of the law, although the court still adheres to the guideline that "ignorance of the law does not exempt him or her from responsibility", the court does not pass over the issue of knowledge of the illegality of the law, but rather analyzes the applicability of the knowledge of the illegality of the law. What is more noteworthy is that many courts on this issue is more through the subjective and objective facts of the case that the perpetrator subjectively has the knowledge of illegality, which also fully explains the issue of awareness of illegality of China's judicial practice, although adhering to the "do not know the law is not exempt from liability" golden rule, but the issue of thinking has never stopped.

This paper will interpret the perception of illegality in terms of the necessity of its existence, illegality and criminal intent.

## **2. The "Past and Present" of The Perception of Illegality**

### **2.1. "Ignorance of the law does not exempt one from liability", from ancient Rome.**

As we all know, the principle of "ignorance of the law does not exempt one from responsibility" originated in ancient Roman law. With the Twelve Copper Tables Law as a typical representative of the ancient Roman law, it is mainly private law in nature, which can be said to be "criminal and civil are not differentiated, and the people are the main focus". From this characteristic of ancient Roman law, ancient Roman law for the understanding of responsibility is always from the civil liability, then in this sense that the ancient Roman law in the provisions of its content and can not be strictly that the content of its criminal content, or that ancient Rome in essence belongs to the civil law, which is related to the "criminal law", "Criminal sanctions" part of the content of the law belongs to the part of the tort and tort liability law.

Only with a correct characterization of ancient Roman law can a correct judgment be made on "not knowing the law does not exempt it from responsibility".

As mentioned above, the norm of "ignorance of the law does not exempt one from responsibility" originated in ancient Roman law, which was civil in nature. Therefore, the "responsibility" in "ignorance of the law does not exempt one from responsibility" should be understood as a kind of civil responsibility rather than criminal responsibility. "Since civil liability is objective, as long as there is a violation and damage is caused, there must be a remedy, regardless of whether the perpetrator has an awareness of the illegality of his objective violation, i.e., whether he has "knowledge of the law"." Civil liability is a kind of objective liability which is different from criminal liability and administrative liability, civil liability does not require the subjective awareness of the unlawfulness of the perpetrator's own behavior, regardless of whether the perpetrator knows that his or her behavior violates the civil law, and regardless of whether he or she knows that his or her behavior infringes on the interests of others. Based only on the behavior of the actor in the objective violation of the legitimate rights and interests of others this objective fact, the tortfeasor will need to their own objective infringement of for the corresponding tort liability. As mentioned above, the ancient Roman law on the criminal part of the provisions, only covers the criminal provisions of the appearance but is essentially the content of the law of tort liability. Therefore, in the whole of the ancient Roman law, its emphasis on the responsibility is the civil law of the strict liability and does not require the subjective behavior of the perpetrator of their own behavior to have knowledge of what kind of law, that is, "do not know the law is not exempt from its responsibility."

Another important reason why ancient Roman law emphasized that "ignorance of the law does not exempt one from responsibility" lies in the unity of morality and law in content in ancient Roman times. In the distant ancient Roman times, the duty of care embodied in the legal provisions in the content of the people's daily life gradually formed, commonly known as moral obligations. People's violation of the obligations required by the law is a violation of moral obligations, and the legal sanctions people receive for their behavior are the sanctions they receive for violating their moral obligations. Moral obligation requires that no matter what class of society one is in, no matter whether one is a legal professional or not, and no matter when or where one is, one should be "familiar" with the requirements of morality and "practiced in the practice of morality" in observing moral norms. Therefore, in an era when morality and law are not separate, to require people to abide by the law is to require people to abide by morality. The punishment received for the violation of morality does not require the subjective knowledge of morality, and the content of the moral requirements does not necessarily cause the subjective "mistake of awareness of illegality" of the perpetrator.

Looking back at the ancient codes of our country, the typical feature of the ancient codes of our country was that "the criminal and the civil were not separated, and the criminal was the mainstay". However, in ancient times, China still promoted strict objectivism, because of the "lack of distinction between morality and law" mentioned above. Actors do not know the law is not know morality, because "do not know morality and will be exempted from responsibility" such remarks in today's society is very alarming, not to mention in the morality and the law mixed with the ancient code period. As the German scholar Wiltzel puts it: "For a large number of norms in the criminal code, it is precisely because the behavior described by these norms is a flagrant and intolerable violation of the moral order that we consider it unlawful. Here, the violation of the common order and the violation of the moral order overlap, so that once an actor has the possibility of recognizing the latter, this necessarily implies that he also has the possibility of recognizing the former."

## 2.2. Towards a modern understanding of illegality

Unlike the Roman era, which was characterized by a code of law that "did not differentiate between criminal and civil matters and was primarily civil in nature" and by a system that "overlapped morality and the law", the modern form of law not only distinguishes clearly between the various codes of law, but also establishes a clear and precise boundary between morality and the law. Different laws provide different principles of accountability for behavior that violates their norms. While civil law still adheres to the principle of objectivism, and accountability for torts is still based on the objective facts of the act without regard to subjective knowledge, criminal liability requires a combination of objective facts of the act and subjective knowledge.

Throughout the criminal legislation of countries around the world, the provisions on subjective awareness of illegality are stipulated by many countries in their criminal laws. Article 17 of the German Penal Code provides that: "If the perpetrator was not aware of the unlawfulness of his act at the time of the act, he shall not be liable for his act if the error was unavoidable. If the mistake was avoidable, liability is reduced in accordance with the provisions of article 49, paragraph 1, of this Code." , French Penal Code: "The perpetrator is not criminally liable if he proves that he acted as a result of some unavoidable misunderstanding of the law, believing that it was lawful to accomplish his act." Article 9, paragraph 1, of the Austrian Penal Code states: "The perpetrator is not criminally liable for an act which he did not realize was wrongful because of a mistake in law, if the mistake was unavoidable." , the Model Penal Code of the United States states: "The exemption from liability for errors in knowledge of wrongfulness is expressed as the principle of reasonable reliance." As can be seen from the legislation of the above countries, the modern legislation of various countries has abandoned the traditional "not knowing the law is not exempt from liability" creed, when the perpetrator of their own behavior whether the violation of criminal law to produce knowledge of the error and the error is unavoidable, the perpetrator does not need to bear criminal responsibility for their acts. The reason for this is that, in addition to the changes in the form of legislation and the gradual separation of morality and law as discussed above, the proposal of criminal responsibility doctrine is also an important theoretical support for the necessity of unlawful cognition. "Criminal responsibility doctrine should be taken as the basic principle to know the practice of dealing with the mistake of recognizing illegality of administrative offenders." The so-called criminal responsibility doctrine means that, for the acts committed by the actor, the criminal responsibility of the actor can be determined only when the actor has the capacity of criminal responsibility and the subjective criminal intent or negligence, and the actor can be criminally wronged. In short, criminal responsibility is "no responsibility, no penalty". The German scholar Wilzel pointed out: "the actor does not have the possibility of recognizing the illegality of the act, we can not condemn the actor for the illegal resolution of the act, otherwise it violates the principle of responsibility". It is a common saying in Japanese academic circles that "the justification of punishment lies in the fact that it is not enough to punish the perpetrator merely because he has committed an act against the rights and interests of another person, but it should be taken into account whether the perpetrator has responsibility. If the perpetrator is punished without being liable, people will be in a constant state of fear that they will be subjected to a criminal proceeding, and it is only through the doctrine of liability that penalties can have their proper effect, safeguarding people's lawful rights and interests and guaranteeing the possibility of predicting their behavior."

## 2.3. Our differences

Similarly, in China, scholars who support the necessity of unlawfulness awareness also discuss the application of unlawfulness awareness from a position of responsibility, "the traditional notion that ignorance of the law does not exempt one from responsibility is not conducive to

the realization of the preventive mechanism of the criminal law, and the realization of the preventive function of the criminal law requires that the citizenry be convinced of and agree with the criminal law, and that the citizenry's belief in the authority of the criminal law as well as their agreement with the implementation of the criminal law require the implementation of the principle of responsibility." But in China's current judicial practice, unlawful cognition do not say is still the mainstream view. The scholars who advocate the unlawfulness of knowledge do not say that, adhere to the unlawfulness of knowledge do not say that there are two reasons: First, in our country the content of the law and the spirit of the performance and public perception of consistency; Second, the law has the effect of mandatory and the form of objectivity. The so-called content of the law and the spirit of consistency with the public perception means that in our country, such as the criminal law and other basic laws are formulated, amended and interpreted by the National People's Congress (or the Standing Committee of the National People's Congress) on behalf of the will of the masses of the people, so that the norms of the criminal law and the will of the masses of the people's behavior, behavioral value of the judgment, as well as on the perception of the rights and wrongs of the things and the judgement of the consistency of the criminal law norms on behalf of the masses of the people. The norms of criminal law represent the will of the masses. Therefore, the scholars who advocate the "illegal cognition don't say" think that all kinds of prohibited behaviors stipulated in the criminal law norms are cognizable by the citizens who have normal reasoning and thinking ability to make judgments. The so-called law has the effect of mandatory and formal objectivity is that the formulation of legal norms with national consistency, its implementation with the state coercive force as a guarantee, and criminal legal norms once issued is the objective existence, is not subject to the transfer of human will, regardless of whether the citizens of the existence of its existence of whether there is a correct and clear understanding of the people once issued will become the masses of people's basic Behavioral norms. The "Do Not Say" theory holds that affirming the existence of unlawful awareness will shake the objectivity and mandatory nature of criminal legal norms, and that advocating unlawful awareness will negate the objective existence of criminal legal norms with the subjectivity of the perpetrator, giving the perpetrator an excuse to exclude culpability on the basis of a lack of subjective awareness.

The claims of the scholars of the Do Not Say Illegal Person Recognition doctrine seem to be from the perspective of the state, arguing that adherence to the Do Not Say Illegal Person Recognition doctrine is conducive to the maintenance of the efficacy and stability of the law, and the safeguarding of state coercive power, but this extreme statism tends to put the principle of responsibility on the back burner. According to Professor Chen Xuan, affirming the existence of the awareness of illegality and its impact on the assumption of criminal responsibility is essentially a sharing of risk between the state subject and the individual citizen. The basis of the insistence on the non-disclosure of the awareness of illegality is that once a legal norm is issued and comes into effect, the individual citizen is obliged to know, understand and comply with it. Regardless of whether the legal system is reasonable, "good law" or "bad law", the state only undertakes to formulate and publish the functions of the popularization of the law and compliance fall on the shoulders of the people, once the citizens do not comply with the obligation to know, understand and comply, it is inevitable that the citizens will have to share the risk between the subject and the citizens. Once a citizen fails to comply with his or her obligation to know, understand and abide by the law, he or she is bound to be punished by the State and to bear the corresponding criminal responsibility.

However, the legal recourse to the perpetrator's conduct presupposes that the perpetrator has the possibility of avoiding the legally prohibited conduct that he or she commits, and the possibility of avoidance presupposes that the perpetrator subjectively needs to be aware of the anti-value nature of the conduct that he or she commits, i.e., it is required that the perpetrator

has awareness or the possibility of awareness of the relevant criminal law norms. If the perpetrator has no subjective knowledge or possibility of knowledge of the criminal law norms regulating the act, the perpetrator is not subject to an effective obligation to avoid the anti-value nature of the act committed by the perpetrator. The imputation of responsibility for the results of the failure of a citizen who is not obliged to do so is clearly contrary to the concept of the "principle of responsibility" of criminal law. The perpetrator's awareness of the unlawfulness of his or her conduct is the basic premise for determining whether his or her conduct is anti-value and whether liability is to be attributed on the basis of that anti-value.

The perception of illegality is not to be confused with the objective existence of a legal norm and the criminal law "principle of responsibility". Objective existence indicates whether the law is in force, whether a certain type of behavior is denied by the criminal law to evaluate the problem; criminal law "principle of responsibility" is in the definition, the implementation of what kind of behavior will be denied by the criminal law, as well as denied the behavior of the perpetrator of criminal responsibility will be how to assume the problem. One is the static level of existence, and the other is the dynamic level of passive application. As Professor Chen Xuan said, the innocence of the perpetrator is possible both because the perpetrator has committed this act which is itself lawful, and because the act itself is unlawful, but for some reason not attributable to the perpetrator. Recognition of the existence of illegal knowledge will not deny the objective existence of legal norms and national mandatory, on the contrary, we are exploring the existence of illegal knowledge is precisely to recognize and adhere to the objective existence of legal norms and national mandatory as a prerequisite, if the denial of legal norms of the objective existence of the basis of national mandatory, then there is no discussion of illegal knowledge of the existence of the necessity of the illegal or not. The attribution of responsibility itself is also in the legal norms under the premise of regulation, the existence and validity of legal norms is the behavior of the basis of attribution of responsibility, between the two is a matter of high and low rank. "Respect for the validity of the law is not the same as the necessity of a guilty verdict."

To sum up, adherence to the principle of necessity of recognition of illegality is in accordance with the principle of responsibility and is conducive to the realization of the preventive function of criminal law. At the same time, insisting on the necessity of the recognition of illegality will not lead to the impact of the criminal law norms of coercive force, and the violation of state coercive force, on the contrary, only insisting on the necessity of the recognition of illegality can better guarantee the implementation of criminal law.

### 3. Recognition of Illegality and Criminal Intent

The problem of unlawfulness awareness and criminal intent refers to the problem of the systemic position of unlawfulness awareness. The systemic position of unlawfulness awareness has two main views in the academic world: intentionality and responsibility. Intentionally say that the illegal cognition belongs to the constituent elements of criminal intent, behavior illegal is the subjective intent of the perpetrator to recognize the content. In the claim of intentionality, the subjective awareness of the wrongfulness of the perpetrator will produce the same effect as the constitutive element of the error, that is, to prevent the establishment of criminal intent; if the perpetrator of the wrongfulness of the awareness of the wrongfulness of the ability to avoid but did not avoid the criminal law penalty for the corresponding behavioral negligence culpability, the perpetrator's behavior in accordance with the negligence of the crime penalty. Liability theory advocates that illegal knowledge belongs to the responsibility element and belongs to the same level with intentional and negligence in the same independent responsibility element, criminal intent is the subjective image of the actor's own objective behavior, the actor's subjective awareness of the illegality of their behavior will not affect the

establishment of criminal intent. The presence or absence of awareness of illegality only affects the size of the responsibility borne by the perpetrator.

### **3.1. Attribution of the perception of unlawfulness affects the breadth of penal sanctions**

Under the premise of recognizing the existence of unlawful awareness, the legal consequence that the perpetrator is not criminally liable arises under the premise that there is an error of unlawful awareness or no possibility of avoiding the error of unlawful awareness. However, when the perpetrator subjectively exists the possibility of avoiding illegal cognition or the possibility of illegal cognition, the scope of intentionality is wider than that of responsibility for the perpetrator to be held accountable.

Intentionality theory advocates that awareness of unlawfulness is one of the elements of criminal intent, and that when the perpetrator subjectively lacks awareness of unlawfulness or does not have the possibility of avoiding an error in awareness of unlawfulness, it will produce the same legal consequences as an error in factual awareness, i.e., it will hinder the establishment of criminal intent. However, hindering the establishment of criminal intent does not mean that the perpetrator does not need to bear criminal responsibility for the act, for the perpetrator does not subjectively have the knowledge of illegality, but has the possibility of knowledge of illegality or the possibility of avoiding the mistake of knowledge of illegality, although the establishment of criminal intent is ruled out in this case, in the case of punishment for negligence as stipulated in the provisions of the criminal law sub-rule, the perpetrator is still to be held liable for the negligence of his/her perpetrator.

The theory of responsibility asserts that awareness of illegality is an element of responsibility independent of intent and negligence, and that the presence or absence of awareness of illegality does not preclude the establishment of criminal intent or negligence, but is a factor in determining whether or not the perpetrator is to be held liable at the end of the judgment of intent. Specifically, in the case where the perpetrator does not have the knowledge of illegality (including not having the knowledge of illegality or the possibility of avoiding the mistake of the knowledge of illegality, as well as having the possibility of the knowledge of illegality and the possibility of avoiding the mistake of the knowledge of illegality), the presence or absence of the knowledge of illegality does not affect the judgment of whether or not the perpetrator has intentionally or negligently subjectively, but rather, it is the decision of the presence or absence of the knowledge of illegality that determines whether or not the perpetrator should be held criminally liable on the basis of such intent or negligence. If the perpetrator does not have the awareness of the illegality, he or she does not need to bear the criminal responsibility.

By way of comparison, the scope of criminal punishment in the doctrine of intent is broader than that in the doctrine of responsibility, and in the doctrine of intent the error of knowledge of illegality and the error of knowledge of fact produce the same consequence - the exclusion of the establishment of intent; in the doctrine of responsibility the error of knowledge of illegality and the error of knowledge of fact produce different legal consequences, and the error of knowledge of illegality prevents the perpetrator from assuming the responsibility for the crime, and the error of knowledge of fact excludes the establishment of criminal intent. In the theory of responsibility, errors of knowledge of illegality and errors of knowledge of fact have different legal consequences.

### **3.2. Criticism of Intentionality**

Compared with the theory of responsibility, the theory of intentionality holds that the object of knowledge of intentionality should not be a pure fact of conduct separate from normative evaluation. Scholars who support the view that awareness of illegality is a constituent element

of criminal intent believe that the object of awareness of intent should not be a pure fact separate from value evaluation, either from the theory of criminal law or from the provisions of Article 14 of the Criminal Law of China on intentional crimes. Supporters of the intentionality theory attack the inadequacy of the responsibility theory by the treatment of permissible errors of knowledge of the constituent elements: scholars in support of the intentionality theory believe that, in the treatment of hypothetical self-defense, traditional supporters of the responsibility theory advocate the "limitation of responsibility theory," i.e., due to the perpetrator's misunderstanding as to whether or not he has suffered from the violation of the law and criminal acts, based on that misunderstanding, he believes that he has committed the act is justified. The "limitation of liability" makes hypothetical self-defense culpable for negligence, based on the misconception that the act was justified and carried out in accordance with the norms of the law, and that therefore the act is not subject to intentional culpability.

However, even if traditional liability scholars do not put forward the "limited" liability theory, the hypothetical defense can still be treated as negligence. First of all, according to the viewpoint of responsibility, illegal cognition is an independent responsibility element, the object of knowledge of criminal intent is the actor's own behavior and results and related factors of the objective facts. In the hypothetical defense objectively the perpetrator has implemented the harmful act, caused the harmful result, but subjectively the perpetrator has the knowledge of the objective act which he has implemented, but because the perpetrator subjectively misunderstands the nature of his own perpetrator, and mistakenly thinks that his own act is the lawful act based on the legal permission which he has implemented, so the perpetrator does not have the knowledge of the harmful result which his own act has produced or may produce. Because the perpetrator does not have a complete and correct understanding of the objective elements of his own behavior, the perpetrator will not be subjectively established intentionally. Therefore, the hypothetical defense is to exclude the establishment of the perpetrator's criminal intent, in the criminal law sub-principles of the provisions of the punishment of the act of negligence, the perpetrator of the hypothetical defense bear the corresponding negligence of the culpability. The above demonstrates that even if there is no restriction on the theory of responsibility, it will not affect the determination of the assumption of negligence for the hypothetical defense.

With respect to statutory offenses, the perception of statutory offenses as unlawful is the main battleground in the debate between the intentionality and responsibility doctrines. Some scholars believe that the criminal law provides a large number of statutory offenses, most of these statutory offenses in the form of blank crime provisions, purely recognize the facts of the constituent elements is not enough to make oneself produce to prevent oneself from committing the ongoing unlawful acts of the reactionary motivation, and the illegality of the awareness of the perpetrator of the unlawfulness of their own behavior to produce awareness of the only way, it is precisely because the perpetrator subjectively has the illegality of knowledge It is because of the subjective awareness of illegality of the actor will produce their own behavior to inhibit the reactionary motivation, in this regard, the claim of intentionality is better than the responsibility of the determination of the statutory crime. There are also some scholars think that in the judgment of the natural crime to take the responsibility theory, and the judgment of the statutory crime to take the intentional point of view, but the scholars who hold this kind of view in an attempt to split the norms of criminal law as a whole, originally in the natural crime in the awareness of the illegalities of the law outside the intentional, why in the statutory crime to join the intentional "camp", but the criminal behavior that exists in the same code of law, but not the intentional, and the intentional. It is puzzling that a criminal act that exists in the same code should be defined and analyzed in two different ways.

The above problem arises from the fact that both these scholars of the willfulness doctrine and the proponents of the tradition of the liability doctrine have attempted to mechanically explain



the disputes in the willfulness and liability doctrines. However, the key to explaining a problem lies in finding the source of the problem and solving it from the foundation in order to get the optimal solution to the problem. In addition, Prof. Chen Xuan believes that the object of knowledge of criminal intent advocated by the responsibility theory is limited to the knowledge of objective facts that conform to the constitutive elements is generally consistent with the German Criminal Law, but it is difficult to conform with the provisions on criminal intent in Article 14 of the Intentional Crimes of China's Criminal Law. Professor Chen Xuan that China's Criminal Law, Article 14 of the establishment of criminal intent to "know that their actions will occur harmful to society", which "harmful to society" results can be illustrated, China's criminal law on criminal intent is a substantive provisions, Normative concept of willfulness. However, scholars of responsibility theory put forward a different opinion: "Intention is the object of responsibility, and the awareness of illegality is the responsibility itself". For the provisions of Article 14 of the Criminal Law, it is generally believed that the establishment of criminal intent requires the perpetrator to recognize the social harm of the act (legal benefit infringement), and the scholars of intentionality claim that the social harm of the act is a substantive illegality, and the perpetrator will be able to recognize the form of illegality (illegality awareness) if he or she realizes the substantive illegality, even in the case of statutory crime and administrative crime when the perpetrator Recognize the social harm of the act (substantive awareness of illegality) when we can be presumed to have the form of illegality (awareness of illegality), only when the perpetrator has a counter-evidence and counter-evidence is established in order to overthrow the perpetrator subjectively does not have the awareness of illegality. Therefore, scholars of intentionality believe that the awareness of the illegality of the act is an indispensable factor in the establishment of criminal intent.

This paper argues that the establishment of criminal intent does not require knowledge of the unlawfulness of the act and does not require knowledge of the normative evaluation of the result of social harm.

First of all, we have to make it clear that the "social harm" in article 14 of the Criminal Law on intentional crimes is different from social harm in the general sense, and that it is "social harm" with the attributes of the State's will and defined by the criminal law norms. This social harm is a national standard. This social harm is a national standard, which is a definition of the nature of the perpetrator's behavior and its results made by the law on behalf of the state's will. The public is not the authority of the legal profession group, not every member of the public have received professional legal education, and even a member of the legal profession group or received professional legal education "professionals" is not possible to have a clear understanding of the social hazards of each received criminal legal norms regulation of the behavior, The social harm of each act regulated by the criminal law is not clearly and unambiguously recognized. If, according to the general view of the doctrine, the perpetrator does not subjectively recognize the social harm of his acts, then he cannot be considered to have criminal intent, which leads to the fact that the more professional knowledge of the law a person has, the more intentional the establishment of the crime. On the contrary, the more people do not understand the law, the more indifference to the law, the more likely because of the perpetrator of the social harm of their behavior does not recognize and impede the establishment of subjective criminal intent, and then to avoid intentional culpability. As Professor Cha Hao points out, the object of the actor's awareness is only the result in the factual sense. As to whether this result is 'harmful to society', belongs to a normative evaluation, he is completed through the legislation of the legislator and the judicial referee, and does not require that the perpetrator must be cognizant of ".

Second, from the concept of criminal intent. Criminal willfulness means "knowing that one's behavior will result in harm to society, and hoping or letting the result happen." This includes both cognitive and volitional factors. From this definition, the reason why the criminal law

norms should punish the criminal intent of the perpetrator is not because the perpetrator recognizes the behavior he is committing or will commit and the result of the behavior, what should be punished is that the perpetrator, after recognizing his own behavior and its result, still chooses to engage in the behavior, and actively pursues his own volitional dominant behavior and its result and takes the corresponding behavior to implement, promote the process of causing the result of the behavior. It is precisely this positive behavior, which is led by the will of the perpetrator, that is regulated by the norms of criminal law. As for the nature of this behavior, is defined by the criminal law norms, criminal law norms are different from the moral norms, moral norms are formed in the process of social development, not the public's subjective will for the transfer of a kind of ideology. But the law will change with the development of society or changes in judicial practice. What behavior is socially dangerous, what behavior is not socially dangerous, in different periods, different regions, different subjects will produce different judgments, the same behavior by different subjects will produce different judgment results.

Therefore, the traditional view that social harm is the subjective intention of the actor should be aware of the content, on the contrary, we should think that social harm is the criminal law norms of the legal nature of the criminal law of a certain type of behavior should be subject to criminal punishment. In short, the actor has a clear cognition of his own behavior and the result, that is, clearly know what he is committing what kind of behavior will produce what kind of result, then the actor subjectively has the intention, if this kind of behavior and the result happens to be regulated by the criminal law, criminal law norms behind the will of the state represents that it has the social harm, then this kind of intention rises to crime Intentionality. Therefore, whether the subjective intention of the perpetrator is criminal intent does not require the perpetrator to qualify his own behavior, but rather the subjective determination of the facts and the criminal law norms of the "attitude" of the perpetrator to determine the joint. As to the question of how to determine the cognitive content of the criminal intent of administrative offenders, most of the provisions of the Criminal Law of China for administrative offenders take the form of blank indictment. There are different interpretations as to whether the contents of the relevant administrative regulations stipulated in the blank charges belong to the cognitive content of intent. Among them, the German general theory is that the content of the blank offense in the criminal law about the statutory offense is replaced with the specific content of the norms that need to be supplemented, and then evaluated by applying the general theory of error. According to the German general theory, as long as the perpetrator in the act of recognizing the existence of specific acts and results of the fact, then the blank crime contained in the administrative law norms do not have knowledge of the act does not affect the subjective criminal intent of the establishment of the perpetrator. The provisions of the German general theory have their certain reasoning, but just through the actor's awareness of the objective facts can ignore the awareness of the administrative law norms in the blank charge, and thus the establishment of criminal intent is not rigorous enough.

This paper argues that the content of administrative legal norms is also in essence an objective fact, and that in the determination of intentionality of an administrative offence, the perpetrator must not only be cognizant of the act he or she is committing and its consequences. Similarly the prerequisites of the objective facts stipulated in the administrative legal norms required by the blanket offense also need to be recognized. It can also be said that the facts stipulated in the administrative legal norms are the prerequisites for the perpetrator's behavioral facts and results, and the awareness of the implementation of the prerequisites and the awareness of the implementation of the act together constitute the factual awareness of the criminal intent, and both are indispensable for the judgment of the perpetrator's criminal intent.

Let us take the crime of illegal hunting as an example. The crime of illegal hunting refers to the violation of hunting laws and regulations, hunting in prohibited areas, during prohibited

periods or with prohibited tools or methods, destroying wildlife resources, and if the circumstances are serious, the penalty shall be fixed-term imprisonment of not more than three years, criminal detention, control or a fine. As a prerequisite, the administrative legal norms are the relevant hunting regulations, which stipulate the prohibited hunting areas, prohibited hunting periods and other provisions. In essence, the content of these provisions is a kind of objective fact, is the actor to carry out the hunting behavior of the fact of the prerequisite facts. Behavior of hunting behavior, we can only think that the perpetrator subjective hunting intention, as to whether the perpetrator subjective criminal intent also need to judge the perpetrator as the fact of the act of the fact of the basis of the fact of whether there is knowledge, that is, the perpetrator of their own not in the hunting area, hunting ban period of fact have knowledge. Only in the case of simultaneous possession of the prerequisite facts and knowledge of the facts of the act, can the establishment of criminal intent be recognized.

#### 4. Concluding Remarks

As the old saying goes: "If the punishment is heavy and the intention is not fearful, then the order will not be carried out; if the killings are numerous and the heart is not convinced, then the position of authority will be jeopardized". Modern criminal law is more demanding is the precision of sentencing and the implementation of penalties produced by the actual effectiveness of the penalties pursued is shifting from punishment to education and prevention. Such a shift requires us to face up to the role of the awareness of illegality, and to seriously consider the positioning of the awareness of illegality in the hierarchical system of criminal identification. Adhere to the criminal law responsibility doctrine, the main no blame no penalty, there is responsibility must be punished. Although there is no explicit provision in China's criminal legislation for the recognition of illegality, its existence and role should not be ignored in the theory of criminal law as well as in the practice of criminal justice. "Do not know the law does not exempt its responsibility" of the golden rule in the modern era of criminal law is still a new "pseudo-proposition", in the judicial discard the old theory to accept the process of new ideas is painful, but can not be because of such a difficult problem so as to give up on the recognition of the illegality of the acceptance and application of. Application. Compared with the intentional theory, the theory of responsibility for the recognition of illegality is more in line with the provisions of China's criminal law, and is simpler and more refined for the determination of crimes and the determination of penalties under the hierarchical system of criminal identification, so it should be adhered to the stance of the theory of responsibility and be carried out and applied in the judicial practice.

#### References

- [1] TIAN Hongjie. Toward a modern criminal law: The normative development of the recognition of illegality[J]. Politics and Law Forum,2021,39(01):68-80.
- [2] Zhang Zetao. The unavoidable judicial determination of the mistake of recognizing the illegality of administrative offenders and its treatment[J]. Politics and Law Forum,2022,40(01):179-191.
- [3] Chen Xuan. Principle of Responsibility, Precautionary Policy and Recognition of Illegality[J]. Tsinghua Law,2018,12(05):89-111.
- [4] Zhou Guangquan. Recognition of illegality is not an element of willfulness[J]. Chinese Jurisprudence, 2006 (01): 165-175.
- [5] CHA Hao. Mistakes in Recognizing Illegality in the Era of Statutory Offenses[J]. Tsinghua Law, 2015, 9(04): 22-46.

- [6] Tong D.H.. Positional Reset and Functional Reconstruction of the Possibility of Recognizing Illegality[J]. Jurist,2022(03):146-159+195-196.
- [7] Li Lifeng. Clarification and application of the "elemental analysis" model of criminal intent--Analysis of jurors' parallel evaluation of behavioral norm attributes[J]. Legal Science (Journal of Northwest University of Political Science and Law),2020,38(01):179-190.
- [8] Liu Zhixiong. The Criminal Law Theory Alienation and Common Sense Return of the Recognition of Illegality--An Analysis Based on Interpreting the Substantive Connotation of Criminal Intent [J]. Law and Business Research, The 2019,36(04):89-101.
- [9] Fu Yuming. Interpretation of factual understanding and content of criminal intent[J]. Chinese Journal of Criminal Law,2016(06):81-95.