Preface to Law, Science and Rationality

Preface

In The Morality of Law, Lon Fuller tells the story of King Rex who tries – and spectacularly fails in numerous ways – to make law for his subjects: his rules are not made public, they are contradictory or incomprehensible, there is no consistency between the rules and their application and so on, with Rex's subjects complaining that they cannot follow rules like this. The story ends with Rex dying, deeply disillusioned, and his successor, Rex II, deciding to place the powers of government in the hands of psychologists and public relations experts, in order to make his subjects happy without the need for rules. But what, one might ask, do psychologists have to do with law?

There are different views on what law actually is – is it a social phenomenon, something that can be analysed by means of 'practical sociology', is it an answer to the question what we should do, or some alternative? If we take law to be something that has the purpose of guiding (human) behaviour, as Fuller's tale suggests, if we regard law as a means to an end, we need to know how and in what way law can best fulfil its purpose. How do we find out?

First, we need to know in what direction to guide (human) behaviour, of course – what purpose or end do we want to achieve? This question is philosophical, ethical, and/or political in nature and not the focus of the present volume, although Rex II seems to consider that the purpose is making people happy. Second, and irrespective of the purpose or end, we need to know what legal measures will influence (human) behaviour in what way. This is where, in Fuller's tale, the psychologists come in. Arguably, in our day and age, not only psychology, but the much broader multidisciplinary field of the cognitive sciences (including but not limited to cognitive psychology) can tell us a great deal about (human) behaviour and decision-making. Rex II considers replacing all lawyers with psychologists and public relations experts – but is that the right choice, or too hasty? As a discipline, law has a different (normative) function, is independent of the cognitive sciences and defines its own concepts. Should these be informed, adapted or even replaced, in light of insights from the cognitive sciences?

All the questions we have raised thus far relate to something more fundamental, namely the relationship between law and the cognitive sciences and more specifically, the following two questions: what is that relationship and what should it be?

These questions form the starting point and rationale for this edited volume, which is divided into two parts. The first part addresses these questions from a more general, theo-

retical perspective, for example by asking in what way and to what extent insights from the cognitive sciences can and should impact legal concepts, rules and paradigms. The second part uses the field of criminal responsibility to illuminate and exemplify the relationship between law and the cognitive sciences, with several authors analysing specific elements of criminal responsibility in light of insights from the cognitive sciences.

The following sets out a brief reading guide of this volume, indicating the subject matter each chapter deals with, and offers some notes on the focal question of this volume, namely the relationship between the cognitive sciences and law.

In the first part, Jan Christoph Bublitz approaches the relationship between law and the cognitive sciences by asking what (if anything) is wrong with hungry judges, referring to the trope of Legal Realism that justice is what the judge had for breakfast and a recent study by Danziger et al. that seems to confirm this trope. Specifically, he looks into whether findings about the cognitive processes underlying a legal decision provide grounds to challenge, review or appeal those decisions. He finds that the study shows skewed patterns of judgments that remain unobservable from a traditional legal perspective that looks predominantly at individual cases, written documents and records. New perspectives like those offered by the Danziger *et al.* study are valuable to social institutions in pursuit of justice, because they offer new vantage points.

In his chapter, Jaap Hage takes insights from the cognitive sciences to critically assess the law of contracts. Using the anchoring bias as an example, he argues that there are good reasons to assume that the conclusion of a contract is often not a rational event, yet the law seems to presuppose that it is. There are two ways in which the law of contract can deal with the fact that it is not: use existing tools to deal with the irrationality, or redesign substantive parts of contract law. After analysing possible justifications for the phenomenon that contracts create legally enforceable obligations, he comes to the conclusion that relying on existing tools would be justified if subjective preferences are generally formed in a rational manner. This is the kind of question that the cognitive sciences can answer.

In her chapter, Antonia Waltermann considers the possibility to regard non-human entities as agents in the law. She argues that different non-human entities have been regarded as legal agents at different times. Analysing the conceptualisation of legal agency and legal acts underlying the different legal agents reveals that this is sometimes done for metaphysical reasons and sometimes for normative reasons. Cognitive science offers grounds to question the metaphysical reasons, which can have an impact on what (kinds of) entities are regarded as agents for what reasons. According to Waltermann, there are three broad topics that need to be investigated in future research: (i) the metaphysical presuppositions

that underlie the law need to be explicated, which is a task for legal scholars; (ii) the accuracy of these metaphysical presuppositions needs to be investigated, which is a task for cognitive scientists broadly understood; and (iii) a normative theory according to which law regards a non-human entity as a legal agent is required, taking into account the insights from (i) and (ii), which is a task for legal scholars and legal decision makers.

In the second part of this volume, Federica Coppola critically examines the punitive responses to violence in criminal law, drawing on insights from a robust body of behavioural and neuroscientific studies regarding the significance of emotion in moral and social behaviour. These insights indicate, inter alia, that harsh punitive measures promote violence instead of preventing it. How should such insights be incorporated into criminal law? Coppola argues that they can foster a more comprehensive understanding of violent crimes, especially when it comes to the culpability and punishment of violent perpetrators, but that this requires a normative reform of the general standard of culpability first. Such reform could promote the social rehabilitation of violent perpetrators.

In his chapter, Gerben Meynen begins by considering the relevance of free will, rationality, and Aristotle for legal insanity. He argues that rather than free will and rationality, the Aristotelean model for responsibility offers a straightforward way to explain the insanity defence and proposes to include in the insanity criteria the elements of knowledge (to be interpreted morally) and control. In particular with regard to the latter element, control, the behavioural sciences and moral philosophy play a role, as the term is commonly used there as well, bringing these disciplines and criminal law together.

In his chapter, Sjors Ligthart considers the relationship between new technologies such as neuroimaging and the protection of (human) rights, focusing in particular on coercive neuroimaging in criminal justice. He argues that coercive forensic neuroimaging is comparable to compulsory medical interventions to obtain evidence of a crime in the context of article 3 of the European Convention on Human Rights, that is, the prohibition of torture and inhuman or degrading treatment. Whether a specific case of coercive forensic neuroimaging violates the prohibition of ill-treatment depends on factors such as necessity, proportionality, subsidiarity, and the health risks involved. This chapter provides an analysis of the limits a legal system can set to the use and impact of insights or methods from the cognitive sciences within the law: the relationship between law and the cognitive sciences goes both ways.

In his chapter, Paul Catley uses insights from cognitive sciences to plead for a change in English criminal law: his chapter explores situations where brain lesions are associated with changes in personality that lead to criminal behaviour. English law operates a binary

divide of responsible or not-responsible with no room for gradations of responsibility for the determination of guilt or innocence, with tests that would lead to judgments of not-responsible based on medico-scientific knowledge of the 1800s. He argues that introducing a partial diminished capacity defence would not only bring this aspect of English criminal law into the 21st century, but that it would also be desirable on normative grounds, such as reducing stigma.

In their chapter, Anna Goldberg and David Roef offer a comparative analysis of the role addiction plays when it comes to capacities and criminal responsibility, looking at the common law system of England and Wales, and the civil law systems of Germany and the Netherlands. In doing so, they show that the latter allow for a more realistic and flexible assessment of addiction in criminal law cases, and that neuroscientific insights on the impaired capacities of addicts can help us to inform the criminal policy regarding addiction. They come to the conclusion that a defence of diminished responsibility is the most suitable approach to addicted defendants. This links their chapter to the previous one in its recommendation, although the two chapters address different grounds for (a lack of) criminal responsibility.

In her chapter, Lisa Claydon uses insights from the cognitive sciences to critically assess the criminal culpability of those who are ordered or coerced into committing a criminal act. These insights indicate that coercion changes the sense of agency of individuals. Claydon focuses in particular on the situation of individuals who have suffered long term abuse and are, within this context, coerced into committing a criminal act, highlighting a tension in the law between fairly recognising the negative experience of those in such a situation and protecting society from the dangers such an individual may represent. Claydon suggests that cognitive neuroscience has a part to play in helping the law establish greater consistency in its reasoning regarding culpability.

Lastly, Marieke Hopman and Dorris de Vocht focus on the criminal responsibility of children in the Netherlands. They analyse how Dutch judges distinguish between child and adult defendants in light of the Criminal Law for Young Adults which allows judges a certain amount of discretion in deciding if a juvenile defendant should be tried as an adult or a young adult defendant as a juvenile. Critically assessing these findings from the perspective of sociology of childhood, they find that the judicial treatment of these cases is linked more to folk psychological intuitions than to scientific findings.

This volume suggests that there is a mutually beneficial relationship between law and the cognitive sciences. The cognitive sciences can offer insights that lead to a critical assessment and rethinking of legal concepts (such as agency or criminal responsibility) or entire fields

of law (such as the law of contracts), inviting a viewpoint external to the law. At the same time, insights from the cognitive sciences can be used within the law, subject to the conditions of the law (which is an internal legal viewpoint). In turn, law can pinpoint specific issues for further research by cognitive scientists, such as the accuracy of presuppositions underlying the law, and set limits to the permissible use of insights, methods, and technologies emerging from the cognitive sciences. Each chapter of this volume highlights a different aspect of this relationship.

Antonia M. Waltermann

David Roef

Jaap Hage

Marko Jelicic

Maastricht 2019