Post-offence Conduct and Deserved Mitigation: Confession as a Funcitonal Equivalent of Retributive Punishment

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Abstract 1

The view presented in this essay is that voluntary confession constitutes a form of post-offence behaviour that should be considered as a functional equivalent of the duty to bear the punitive reaction, to the extent that this reaction is defined as an expression of deserved censure. From this perspective, it is possible to arrive at a coherent explanation of the requirements of this approach, namely the conditions required by legislators to mitigate punishment by virtue of a confession, and, as a result, define its scope of application with greater precision.

I. Introduction

In extremely simplified terms, performing a functional comparative law analysis involves taking a specific legal problem as a starting point to identify the rules and institutions (and their characteristics) that have been established in different normative systems in an attempt to solve it.[1] It then becomes essential to begin with a description, or rather a re-construction, of the legal problem. Within the limits of this essay, this first step can be summarised by noting that any State that censures the commission of criminal acts (through punitive reactions) will eventually have to determine, impose and enforce specific punishments upon a liable offender. While almost every State has established at least some rules in this regard, different 2

1 K. Ambos, 'The Current State and Future of Comparative Criminal Law – A German Perspective' (2020), 24, *UCLA Journal of International Law and Foreign Affairs*, 9–47 (p. 25 ff.), M. Siems, *Comparative Law,* (2nd ed., CUP, 2022), p. 31 ff. R. Michaels, 'The Functional Method of Comparative Law', in M. Reinmann – R. Zimmermann (ed.), *The Oxford Handbook of Comparative Law* (2nd ed., OUP, 2019), p. 339 ff.; L. Chiesa, 'Comparative Criminal Law', in M. Dubber – T. Hörnle, *Oxford Handbook of Criminal Law* (OUP, 2014), p. 1089 ff.; T. Weigend, 'Criminal Law and Criminal Procedure', in M. J. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing, 2012), p. 261 ff.

regulatory systems have approached this issue by applying a wide variety of solutions. This has resulted in some systems employing maximum regulation models while others have embraced absolute flexibility, although most regulatory systems fall somewhere between these two extremes.

3 In States adopting the common law system, these rules are typically referred to as guidelines in sentencing,[2] whereas in States adopting the continental legal system they are known as "reglas para la determinación de la pena" (Strafzumessungsrecht).[3] Some of these rules establish which circumstances are relevant in determining the nature and quantum of punishment that may be imposed on an offender. These circumstances, in turn, are further classified into two groups, depending on the effect they have. The first group is comprised of circumstances that call for a more intense punitive reaction (aggravating circumstances) whereas the second group consists of circumstances that may justify a less intense penal response (mitigating circumstances).[4] For example, according to Art. 22.3 of the Spanish Penal Code (hereinafter SPC), a perpetrator committing a crime for a reward should be considered an aggravating circumstance as it worsens the scale on which the specific punishment must be determined; in contrast, Article 21.4 of the SPC states that, in some cases, the confession of a crime should be considered as a mitigating circumstance that attenuates the scale of punishment.

4 The purpose of this essay is to provide a new theoretical framework for a very specific mitigating circumstance: the confession of a crime. To achieve this, section II offers a series of conceptual references to clarify from the outset what should be understood by the 'mitigating circumstance of confession'. Section III details the specific regulations in play in the main

2 See A.P. Simester, *Fundamentals of Criminal Law* (OUP, 2021); J. V. Roberts – N. Padfield, 'Sentencing in England and Wales'; R. Hester, 'Sentencing in US-American Jurisdiction' both in: K. Ambos (Hg.), *Strafzumessung* (GUP, 2020), p. 71 ff. and p. 151 ff.; K. Ambos, '¿Una medición de la pena más uniforme y transparente a través de lineamientos para la medición de la pena? Las Sentencing Guidelines inglesas como objeto de investigación valioso' (2020), 46, Revista Penal, p. 5–16.

3 Frisch, 'Gegenwärtiger Stand und Zukunftsperspektiven der Strafzumessungsdogmatik' (1987), 99–3, ZStW, p. 349 ff.; C. Roxin, *Culpabilidad y prevención en el derecho penal* (Reus, 1981), p. 93 ff.

4 See, P. Robinson – M. Sarahne, 'After the Crime: Rewarding Offenders' Positive Post-Offence Conduct' (2021) 24–3, *New Criminal Law Review*, p. 367 ff.; J. Roberts – H. Maslen, 'After the Crime: Post-Offence Conduct and Penal Censure', in A.P. Simester et al. (eds.), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart Publishing, 2015), p. 87 ff.; J. Jacobson – M. Hough, *Mitigation: The Role of Personal Factors in Sentencing* (London, Prison Reform Trust, 2007), 9–11.

legal systems in regard to confession (and selects a reference jurisdiction among them). In section IV, a critical assessment is made regarding the reasons why reducing the punishment of offenders who confess may be justified given that the prevailing opinion about this -the utilitarian approach- seems rather deficient because it fails to offer a satisfactory explanation for the central elements of the confession. As a consequence, the utilitarian approach also lacks an appropriate theoretical framework for its jurisdictional application. Section V seeks to redress this gap and puts forward a suggestion for a different theoretical approach that may prove fruitful.

II. Conceptual Approach

In layman's terms, confessing is the act by which an agent acknowledges having done something that, in some sense, is deemed a wrong or transgression.[5] In criminal law, this generic definition can be refined based on a traditional distinction, recently emphasised by Frister.[6] The confession of a crime may be considered as a plain admission of the *factum*, which is an object of imputation; but it may also be considered as a personal recognition of culpability for the commission of a criminal act. Two different dimensions can then be distinguished: a procedural dimension, where the confession represents a valid piece of evidence, and a substantial dimension, where the offender recognises their culpability for the crime committed. 5

5 See https://dictionary.cambridge.org/; K. Ambos – S. Thaman, 'Cooperation Agreements in Germany and the United States', in: K. Ambos et al. (eds.), *Core Concepts in Criminal Law and Criminal Justice*, v. II (CUP, 2022), p. 260–346.

6 H. Frister, 'Zur Strafmildernde Wirkung eines schuldanerkennenden Geständnis', in B. Hecker (eds.), *FS-Rengier* (Beck, 2018), p. 377 ff. See also S. Hönig, *Die strafmildernde Wirkung des Geständnisses im Lichte des Strafzwecke* (Peter Lang, 2004), p. 15 ff., p. 57–58; J. Hauer, *Geständnis und Absprache* (Duncker & Humblot, 2007), p. 19; Hsu, *Die Bewertung des Geständnis in der Strafzumessung und in der Beweisausnahme als Sonderproblem der Urteilabsprache* (Selbstdruck, 2007), p. 1 ff.; Dencker, ‚Zum Geständnis im Straf- und Strafprozeßrecht' (1990), 102–1, *ZStW*, p. 51 ff. In the Spanish literature, J. De Vicente Remesal, *El comportamiento postdelictivo* (Publicaciones Universidad de León, 1985), p. 102 ff., p. 148 ff.; E. Garro Carrera – A. Asúa Batarrita, *Atenuantes de reparación y confesión* (Tirant lo Blanch, 2008), p. 83 ff.; E. Garro Carrera, 'La atenuante de confesión de la infracción: discusión sobre su fundamento', en A. Asúa Batarrita – E. Garro Carrera (eds.), *Hechos postdelictivos y sistema de individualización de la pena* (Universidad del País Vasco, 2009), p. 157 ff.

6 This distinction proves useful for at least two reasons. First, it helps separate the requirements that must be met by each dimension; i.e. as evidence, the perpetrator's statement is subject to requirements that are different from those of the mitigating circumstance of confession. As a piece of evidence, a confession can be made at any stage of a criminal trial and does not have a conclusive effect (further incriminating evidence is still usually required). As a later section [III] below will show, as a mitigating circumstance, a confession cannot simply be made at any stage of an investigation. Moreover, its effects are usually mandatory in that, in almost every relevant piece of legislation, a voluntary confession attenuates the scale used by judges to decide on the specific punishment. Second, this distinction serves to dissociate the legal consequences of each dimension. While the procedural dimension helps determine the *factum* of the case, the substantive dimension has an impact on the intensity of the punitive reaction, i.e. admitting to culpability does not necessarily help to clarify the facts, nor does the mitigating effect of confession mean that the offender has necessarily contributed to such clarification.[7]

7 The subject of this essay is limited to the substantial dimension, i.e. considering the confession as a mitigating circumstance only (its foundations, requirements and scope of application). Nevertheless, before examining this aspect any further, it may be beneficial to recall two features of this mitigating circumstance. Firstly, making a confession is 'doing something above and beyond what is due or required', i.e. it is a supererogatory act.[8] The supererogatory nature of this 'post-offence conduct' (hereinafter POC, further discussed below) is well-established in every State that accepts the fundamental guarantee known as *nemo tenetur*.[9] Since there is no normative system that could force the offender (impose upon them a real duty) to acknowledge their criminal liability, whoever does so is acting beyond the limits of what is required by law.[10]

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7 In most cases, of course, both consequences will be present simultaneously. However, this does not mean they are necessarily linked; J. P. Mañalich, 'El comportamiento supererogatorio como atenuante de la responsabilidad penal', (2015), XXVIII-2, *Revista de Derecho*, p. 234.

8 J. Hruschka, 'Supererogation and Meritorious Duties' (1998), 6, *Law and Ethics*, p. 94.

9 M. Peralta, 'Nemo tenetur y derecho procesal penal preventivo, in: K. Ambos et al. (eds.), *Prevención e imputación* (Marcial Pons, 2017).

10 J. P. Mañalich, 'El comportamiento supererogatorio del imputado como base de atenuación de la responsabilidad' (2015), XXVIII-2, *Revista de Derecho*, p. 239.

Secondly, according to the prevailing opinion, confessing is an act which may be performed only after having manifested some type of wrongful behaviour, which makes it POC. However, at least in those countries that have adopted the continental legal system, this term (in German, *Nachtatverhalten*) carries two different meanings.[11] In a broad sense, POC encompasses all conduct carried out by a perpetrator following the early stages of a criminal attempt. In a more restricted sense, POC only includes the conduct that took place after a crime was completed. Whether the broad or restricted sense of POC is applicable depends on the meaning assigned to the term 'offence' in the relevant criminal law code.[12] Simply put, 'offence' is to be understood in this chapter as culpable wrongdoing (i.e. the blameworthy violation of a rule of conduct), so any reference to POC here is to be construed in a broad sense. Therefore, the mitigation of punishment for POC can also be applied to cases of criminal attempts. Since confessing means admitting to one's culpability in an earlier violation of a norm, it is completely irrelevant whether this violation can be defined as an attempted or a completed crime. 8

According to the above, the substantial dimension of a confession can be defined as a positive POC of a supererogatory nature, carried out by an agent liable for an offence and credited with mitigating the effects of the punitive censure duly formulated by the State (by restricting the agent's freedom or property). This mitigating circumstance is so widely recognised by doctrine and jurisprudence that it has been described as a 'universal phenomenon'.[13] This is also the reason why it has also been incorporated into the legislation of multiple States. The following section reviews some of the most important regulations in this regard. 9

11 W. Bottke, *Strafrechtswissenschaftliche Methodik und Systematik bei der Lehre vom strafbefreienden und strafmildernden Täterverhalten* (Gremer, 1979), p. 668 ff.; J. De Vicente Remesal, *El comportamiento postdelictivo* (Publicaciones Universidad de León, 1985), p. 39 ff., 62 ss. and 94 ss.

12 F. Rostalski, *Der Tatbegriff im Strafrecht* (Mohr Siebeck, 2019), p. 372 ff. and 399 ff. If 'offence' means culpable wrongdoing, then we are dealing with the broad sense of POC. If 'offence' means completed crime, we are dealing with a restricted use of POC.

13 J. Hauer, *Geständnis und Absprache* (Duncker & Humblot, 2007), p. 81.

III. The Mitigating Circumstance of Confession in Positive Law

10 The mitigating circumstance of confession has been recognised, directly or indirectly, in the legislation of most Western States. In continental Europe, confession is expressly mentioned as a mitigating factor for criminal punishment in, for example, the wording of § 34.17 of the Austrian Penal Code (hereinafter ÖStGB); Chapter 6, Section 8.a. of the Finnish Penal Code; and Article 21.4 of the SPC, with the latter text being used as the reference jurisdiction in this essay. The German Penal Code (Strafgesetzbuch, hereinafter StGB) does not have a specific rule explicitly mentioning confession as a mitigating factor, however, § 46.2 StGB states that POC is an important factor when deciding upon a specific punishment.[14] Additionally, German scholars claim, without exception, that making a voluntary confession is one of the most important forms of POC that judges should take into account.[15] In § 48.d of the Swiss Penal Code (hereinafter, SwPC) the possibility of punishment mitigation is allowed when "the perpetrator expresses sincere remorse" and, according to the prevailing opinion, a voluntary confession constitutes the most paradigmatic form of expressing such remorse.[16] A similar formula can be found in the Penal Codes of Portugal (Article 72.2.c) and Italy (Articles 62 and 133.II.3).[17]

11 In Latin American legislation, the mitigating circumstance of confession has also been explicitly regulated in the Penal Codes of Peru (Article

14 Unanimously supported by German doctrine; K. Kunz, ‚Vorleben und Nachtatverhalten als Strafzumessungstatsachen', in W. Frisch (ed.), *Grundfragen des Strafzumessungsrecht aus deutscher und japanischer Sicht* (Mohr Siebeck, 2011), p. 135; T. Hertz, *Das Verhalten des Täters nach der Tat* (De Gruyter, 1973).

15 In the *Grundsatzentscheidung* of the 4th Senat, the BGH widely recognised the mitigating effect of confession. See J. Hauer, *Geständnis und Absprache* (Duncker & Humblot, 2007), p. 81 f.; W. Rieß, 'Gedanken über das Geständnis im Strafverfahren', in: E. Kempf *et al.* (eds.), *FS-Richter* (Nomos, 2006), V. II, p. 433 ff.; R. Moos, *Das Geständnis im Strafverfahren und in der Strafzumessung* (Klose, 1980), p. 119.

16 G. Stratenwerth – W. Wohlers, *Schweizerisches Strafgesetzbuch. Handkommentar* (Stämpfli, 2009), § 48.

17 J. A. Rodrigues da Cunha, 'A colaboração do arguido com a justiça – A confissão e o arrependimento no sistema penal português' (2017), 32, *Julgar,* p. 45 ff.; G. Lattanzi, *Codice Penal annotato con la giurisprudenza* (4th ed. Giuffré, 2004), p. 273 ff., 281 ff., 463 ff.

46.1.g.),[18] Brazil (Article 65.III.d),[19] Uruguay (Article 46.9)[20] and Colombia (Article 55.7).[21] The Penal Codes of Paraguay (Article 65.6) and Mexico (Article 52.VI) are very similar to their German counterpart since those laws only refer to POC (implicit regulation). Within common law tradition, New Zealand's sentencing guidelines also mention, as a source of punishment mitigation, POC such as early confessions or compensating the victim. England's sentencing guidelines, in turn, recognise that POC can "reduce the seriousness of the offence or reflect personal mitigation". In the United States, as it is widely known, many sentencing guidelines mention this POC as a mitigating factor.[22]

12 Despite its wide legislative reception and doctrinal recognition, the mitigating circumstance of confession is not exempt from considerable debate as the reasons for justifying reduced punishment for every POC can be the source of many intense discussions.[23] This is not a trivial issue because the nature of mitigating circumstances impacts the requirements that are demanded to reduce punitive censure; i.e. changing the grounds for confession also modifies its scope of application.[24]

13 This discussion will be taken up in the following section, however, prior to doing so, it may be useful to take a specific legal regulation (regarding this mitigating circumstance) as a reference point. As previously

18 The punishment is mitigated when the agent "voluntarily presents himself to the authorities after having committed the punishable act in order to admit his liability".

19 The fact that the agent has "spontaneously confessed, before the authorities, the authorship of the crime, always mitigates the punishment".

20 The punishment is mitigated when the agent has "presented himself before the authorities, confessing the crime".

21 The punishment is mitigated if the agent "voluntarily presents himself to the authorities after having committed the punishable act or avoids the false accusation of third parties".

22 P. Robinson – M. Sarahne, 'After the Crime: Rewarding Offenders' Positive Post-Offense Conduct' (2021), 24–3, *New Criminal Law Review*, p. 367 ff.; J. Roberts and H. Maslen, 'After the Crime. Post-Offense Conduct and Penal Censure', in J. P. Simester *et al.* (eds.), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart Publishing, 2015), p. 90–91.

23 Highlighting this controversial point, H. Frister, 'Zur strafmildernden Wirkung eines schuldanerkennenden Geständnisses', in: B. Hecker *et al.* (eds.), *FS-Rengier* (Beck, 2018), p. 377; K. L. Kunz, 'Vorleben und Nachtatverhalten als Strafzumessungstatsachen', in: W. Frisch (ed.), *Grundfragen des Strafzumessungsrechts aus deutscher und japanischer Sicht* (Mohr Siebeck, 2011), p. 135; L. Pozuelo Pérez, *El desistimiento de la tentativa y la conducta postdelictiva* (Tirant Lo Blanch, 2003), p. 319 ff.

24 Agrees, J. De Vicente Remesal, *El comportamiento postdelictivo* (Publicaciones Universidad de León, 1985), p. 42–43.

mentioned, Article 21.4 of the SPC will be used as this chapter's template when considering a mitigating circumstance as "the fact that the guilty party, before knowing that the judicial procedure is being directed against him, confessed to the violation before the authorities". Three key elements may now be identified: a confession must be made a) by the offender; b) before knowing there is an ongoing investigation implicating them as responsible agents; and c) this must be done before a legal authority.

IV. Fundamentals of the Mitigating Circumstance of Confession

1. Utilitarian approach

14 The prevailing opinion claims that the reasons to justify punishment mitigation by virtue of confession must be based on the useful effects potentially brought about by this conduct. From this approach, two different lines of argumentation have been further developed and are detailed below.

a) Confession as a contribution to the administration of justice[25]

15 Advocates of this argument embrace an economy-based perspective of punitive *praxis* whereby punishment mitigation, in the event of confession, is nothing more than a compensatory payment (awarded by the State) in exchange for the evidence provided by the offender. According to this perspective, to reduce "evidence problems" and/or "the workload" of those administering justice, legislators can offer a share of impunity for sale and, in so doing, encourage offenders to confess (*Anreizfunktion*).[26] It is easy to see how this perspective merges the previously separated dimensions in the sense that the mitigation of punishment (the substantial dimension) is justified by virtue of the probative effects (the procedural dimension) eventually produced by the agent's statement. In other words, mitigation

25 See K. Ambos – S. Thaman, 'Cooperation Agreements in Germany and the United States', in: K. Ambos et al. (eds.), *Core Concepts in Criminal Law and Criminal Justice*, v. II (CUP, 2022), p. 260–346.

26 J. Hauer, *Geständnis und Absprache* (Duncker und Humblot, 2007), p. 96, claims that this feature represents "an essential aspect in order for the court to reduce the sentence".

becomes subordinated to the actual evidentiary value of the information supplied by those who confess.[27]

16 In Germany, a number of scholars have developed a slightly different version of this argument and justify the mitigating circumstance by referring to § 46.2 of the StGB, i.e. appealing to the idea of 'a reduction in the effects of crime'. In brief, this means that if the criminal procedure is defined as one of the effects produced by the perpetration of a crime, whoever facilitates the conclusion of that procedure (in this case, by confessing) will help minimise those effects.[28] However, the main idea underpinning this argument has been widely rejected since, strictly speaking, a criminal procedure cannot be defined as an effect of a crime.

b) Confession as a useful contribution to witnesses and victims

17 Also based on a utilitarian approach, a different line of argument claims that mitigation of punishment can only be justified insofar as the offender's confession satisfies the personal interests of other implicated individuals -namely, witnesses and victims. Since testifying normally represents an 'unpleasant duty', if an offender confesses and relieves the witness of this burden, they should be rewarded.[29] When a witness is also a victim, the benefits further increase because, generally, crime has traumatic effects on them, which are brought back to life when they testify in court.[30] In summary, this perspective argues that if the perpetrator confesses and this

27 V. Baeza Avallone, 'El arrepentimiento espontáneo' [1979] *Cuadernos de Política Criminal*, p. 32–33; J. Muñoz Cuesta, *Las circunstancias atenuantes en el Código penal de 1995* (Aranzadi, 1997), p. 63; F. Muñoz Conde – M. García Arán, *Derecho penal. Parte General* (8ª ed., Tirant lo Blanch, 2010), p. 507.

28 The argument is that if obstructing the judicial investigation of certain facts is a crime against the administration of justice, whoever contributes to such investigation should receive a benefit; see Kinzig, § 46, in: Schönke – Schröder, *Strafgesetzbuch Kommentar* (30. ed., 2019). The argument is, however, extremely weak: the existence of this crime (obstruction of justice), of controversial application to the perpetrator of the act under investigation, does not allow us to conclude that any collaboration from the offender that helps with the investigation into his/her own crime should be rewarded with a punitive benefit.

29 J. Hauer, *Geständnis und Absprache* (Duncker und Humblot, 2007), p. 90 ff.

30 G. Jerouschek, 'Jenseits von Gut und Böse: Das Geständnis und seine Bedeutung im Strafrecht' (2000), 4, *Juristische Zeitung*, p. 185, 188 and 190.

prevents any episodes of re-victimisation, then being rewarded seems to be justified.[31]

18 In this scenario, the grounds for this mitigating factor seem to be no longer linked to substantive criminal law. The aim is rather to reward the offender's voluntary refusal to exercise (in a 'combative manner') a legitimate right that forms part of their defence. By ceasing to contest a charge in court, an offender voluntarily chooses not to harm certain rights of the victim which, allegedly, justifies a lesser degree of punitive censure.

19 This argument will not be considered further here for two reasons. First, for a 'positivist reason', since this essay has taken the Spanish legislation as a reference point and, within this legal framework, such an argument is unsustainable.[32] Second, there is a 'theoretical reason', since the viability of the argument relies on the evidentiary weight assigned to the confession. In other words, the argument can only be valid provided that the confession in question has such evidentiary status that its existence could relieve the prosecution of its duty to produce more evidence. However, in reality, a confession is not considered a decisive piece of evidence in most legal systems and its existence is not sufficient by itself to secure a conviction (with the exception of a plea bargain).

2. Critical review

20 Before summarising the limitations of the utilitarian approach, it is important to clarify that if an agent confesses and reveals important information about the facts, it is clear that the agent is cooperating with the investigation.[33] However, this does not necessarily mean that the fundamental ground for this mitigating circumstance must be based on the potential

31 Dencker, 'Zum Geständnis im Straf- und Strafprozeßrecht' (1990), 102–1, *ZStW*, p. 60 ff.

32 In this approach, it only makes sense to mitigate a penalty when the judicial procedure has already started and the accused is aware of this circumstance, which is in direct contradiction with the conditions required by the Article 21.4 of the SPC.

33 Similarly, E. Garro Carrera, 'La atenuante de confesión: discusión sobre su fundamento', in A. Asúa Batarrita – E. Garro Carrera (eds.), *Hechos postdelictivos y sistema de individualización de la pena* (Universidad del País Vasco, 2009), p. 161; E. Garro Carrera – A. Asúa Batarrita, *Atenuantes de reparación y confesión* (Tirant lo Blanch, 2008), p. 152.

useful effects for that investigation.[34] Indeed, many scholars have regularly pointed out the serious shortcomings of this approach.

a) The utilitarian approach is confusing and weak

Since the mitigation of punishment is only justifiable by virtue of the evidentiary value offered by a confession, the utilitarian approach intends to merge the two dimensions of confession, which creates some difficulty when trying to differentiate this mitigating circumstance from other completely different figures (e.g., mitigation received by the informer). Moreover, it has been pointed out that the utilitarian approach is a weak argument because, firstly, it sidesteps the main debate through an 'is/ought fallacy': the reason why the offender 'ought' to see their punishment reduced when they confess cannot be directly deduced from whether or not there 'is' real evidentiary value in the information supplied by them. Secondly, since not all confessions are actually useful to an investigation, this line of argumentation will rest on the occurrence of an effect that is entirely contingent and, for that reason, the argument reveals itself as normatively weak.[35] 21

b) The utilitarian approach leads to a deficient jurisprudential application of the figure

Those who follow a utilitarian approach define the group of cases in which punishment may be reasonably mitigated by confession in an under- and over-inclusive manner: Under-inclusively because this perspective must deny the mitigation of punishment for any confession that fails to provide anything useful to the investigation. Whereas over-inclusive cases occur because they must grant mitigation whenever an agent provides useful information to the relevant investigation, regardless of whether or not this takes place voluntarily. This shortcoming, without a doubt, is the practical 22

34 Meier, 'Nachtatverhalt und Strafzumessung', *Goltdammer's Archiv für Strafrecht* (2015), 8, p. 450.

35 This contingent feature of this argument has been noted subtly, albeit on several occasions, by some scholars: utility comes only "as a general rule"; the real contribution is something that the assumption of liability "**may** come to fulfill"; E. Garro Carrera – A. Asúa Batarrita, *Atenuantes de reparación y confesión* (Tirant lo Blanch, 2008), p. 85 and 102, respectively.

consequence of a theoretical weakness that is discussed in the following section.

c) The utilitarian approach fails to explain the requirements of the confession

23 Advocates of this approach have serious problems trying to explain which requirements the law imposes to grant a mitigating effect for confession and how these requirements are to be interpreted. As has been previously pointed out, to provide such an explanation, the fundamentals of the figure play the most important role. This is why those who advocate a utilitarian approach claim that the confession requirements should be structured in such a way that the information revealed can truly contribute to the investigation.[36] Spanish scholars demand two basic conditions: that the information provided be truthful (objective element) and that the statement be made within a given time limit (chronological element). From this perspective, both requirements are designed to ensure the evidentiary value of the information revealed[37] and, as such, a confession can only avoid "the always costly procedures of a criminal investigation" insofar as the confessor offers truthful and previously unknown information to the legal authorities.[38]

24 However, problems emerge as soon as one tries to assess the meaning of these requirements. Those who assume a 'radical' utilitarian perspective will demand total accuracy and completeness, i.e., what is being investigated must be completely clarified through confession, without the need to look for further evidence.[39] This interpretation has generally been rejected as it demands that the perpetrator reveal information about every fact investigated and in relation to every agent involved in those facts. This goes beyond a personal assumption of criminal liability and, moreover,

36 Muñoz Cuesta (coord.), *Las circunstancias atenuantes en el Código penal de 1995* (Aranzadi, 1997), p. 63.

37 L. Pozuelo Pérez, 'La elasticidad interpretativa de las circunstancias modificativas: el cambiante efecto atenuante de la colaboración con la justicia' (2020), 22–17, *Revista Electrónica de Ciencia penal y Criminología*; p. 3 ff.

38 J. Muñoz Ruiz, *Las circunstancias atenuantes muy cualificadas* (Aranzadi, 2016), p. 104; J. Goyena Huerta, 'Artículo 21', in M. Gómez Tomillo (dir.), *Comentarios prácticos al Código penal* (Aranzadi, 2015), v. I, p. 187.

39 J. A. Alonso Fernández, *Las atenuantes de confesión de la infracción y reparación o disminución del daño*, (Bosch, 1999), p. 52–53.

completely erases the distinction between the mitigating circumstance of confession and the mitigation of punishment that may be granted to informants and collaborators. These problems have prompted the prevailing opinion to embrace a 'moderate' version of the argument, whereby, the legislator would only require an agent's confession to be truthful 'in substance', without the need for an offender to disclose information about any co-offenders.[40]

25 It may be argued that the 'moderate' version also does not address all the problems that can arise. Firstly, because one could argue about what exactly 'substantial' means and, secondly, even if that were to be clear, the utilitarian approach fails to resolve the other and even more important feature of this figure, namely the temporal issue. According to Article 21.4 of the SPC, confession can only mitigate the punishment if the offender makes it "before knowing that judicial proceedings are being directed against him". Advocates of the utilitarian approach claim that this requirement should be interpreted as an objective-temporal element of the confession —a deadline designed to ensure that the information revealed is truly useful. In other words, once the deadline has passed, mitigating punishment is no longer an option because the statement can no longer deliver anything useful to the investigation.

26 At this point, two questions emerge. First, assuming the truly important feature of confession is to facilitate an investigation into the facts, how and why can an agent be requested to confess before knowing about the existence of an ongoing investigation that implicates him/her? If a legislator's intention was to ensure the evidentiary value of information being delivered by an agent, a different distinction would be drawn, namely, between those who confess before and those who confess after the investigation has begun. However, the distinction is made between those who know and those who do not know about the existence of an investigation that suspects them to be perpetrators of a crime. In this sense, the legislator has clearly decided in favour of a subjective-cognitive element; however, advocates of the utilitarian approach seek to transform this into an objective-temporal element. The second question involved is whether an offender's awareness of an investigation immediately renders any information revealed as useless. Logic dictates this is probably not the case as the offender's knowledge about the existence of an ongoing investigation does not

40 J. Muñoz Cuesta (coord.), *Las circunstancias atenuantes en el Código penal de 1995* (Aranzadi, 1997), p. 129 ff.

necessarily exclude the probative value of the information provided. A few examples are provided further on in this essay to support this statement.

27 In addition to the foregoing, the utilitarian approach fails to convincingly justify the need for a subjective identity between an offender and a confessor (i.e., the person who confesses must be the agent liable for the offence). If the only reason to mitigate the punishment is the evidentiary value of the information revealed, why should the person liable for the offence be the only one able to reveal it by means of their confession?

28 Finally, advocates of this model also fail to draw coherent consequences from their own premises since they also recognise the possibility of mitigating punishment when a confession does not reveal anything useful to the investigation. To this end, they argue that the mitigation of punishment should also be granted in such cases because "it encourages the offender to collaborate with justice".[41] However, the core of the utilitarian approach then seems to fall apart because it is not so much a matter of buying evidence with impunity (evidentiary value is no longer truly important) as it is a matter of encouraging a type of behaviour that, from a statistical point of view, would normally provide useful information. All of these considerations highlight the fact that this model is based on a regulatory approach to criminal law where offering a reward need not be linked to the real utility (or valuable nature of behaviour itself) but to statistical success.[42]

IV. Volutary Confession as a Functional Equivalent of Retribute Punishment

1. Starting point: the link between retributive punishment and confession

29 In light of the above-cited disadvantages, this section will explore a different approach. A significant number of scholars consider that the grounds for this mitigating circumstance should be found in the justification of punitive *praxis*. Based on this premise, different lines of argumentation have been developed, some are preventive while others are retributive in nature.

41 L. Pozuelo Pérez, 'La elasticidad interpretativa de las circunstancias modificativas: el cambiante efecto atenuante de la colaboración con la justicia' (2020), 22–17, *Revista electrónica de Ciencia penal y Criminología*, p. 20. Bold is mine.

42 I would like to thank Prof. J. M. Silva Sánchez for clarifying this issue.

Within the framework of confession, Hönig's work is the most illustrative 30
in using the idea of an offender's rehabilitation. According to her, this mitigating circumstance can only be justified if criminal responsibility recognition is understood as a personal acceptance (a sort of embracement) of the "opportunity for social rehabilitation and, therefore, as an expression of positive special prevention". As such, confession should be considered an externalisation or "outflow of the offender's personality", a POC which is only "significant for the prognosis of future danger" that a justice system forms about an offender.[43] Other scholars, such as Frisch, Jerouschek and Eser in Germany, as well as Garro Carrera – Asúa Batarrita in Spain, rely on the idea of general prevention.[44] These authors claim that this mitigating circumstance must be justified by the idea of a lesser need to punish the perpetrator, i.e. that acknowledging criminal responsibility favours "the pacification of the commotion associated with the contempt of the violated norm".[45] More recently, a number of academic contributions have approached the attenuating circumstance of confession through a series of retributivist ideas. Along these lines, the work conducted by Silva Sánchez, Rostalski and Mañalich is worth highlighting.[46] Indeed, it is this line of argumentation that will be defended in this essay, although it will be blended with a few personal overtones.

The extensive details of the expressive justification theory subscribed 31
to herein cannot, of course, be properly developed within the scope of this text, although its basic argumentative structure can be outlined. The starting point is to recognise that, by definition, rules of conduct divide the

43 S. Hönig, *Die strafmildernde Wirkung des Geständnisses im Lichte der Strafzwecke* (Peter Lang, 2004), p. 138 f. and p. 169. Similarly, Dölling, '*Zur Bedeutung des Nachtatverhaltens des Täters für die Strafzumessung*', in G. Freund et al. (eds.), *FS-Frisch* (Duncker & Humblot, 2013), p. 1183 and 1186.

44 W. Frisch, 'Gegenwärtige Stand und Zukunftsperspektiven der Strafzumessungsdogmatik' (1987), 99–3, *ZStW,* p. 349 ff.; G. Jerouschek, 'Jenseits von Gut und Böse: Das Geständnis und seine Bedeutung im Strafrecht' (1990), 102, *JZ*, p. 793 ff.; A. Eser, 'Absehen von Strafe', in F. C. Schröder *et al.* (eds.), *FS-Maurach* (Müller, 1972), p. 257 ff.; R. Moos, *Das Geständnis im Strafverfahren und in der Strafzumessung* (Klose, 1980), p. 151 ff.; J. A. Sickor, *Das Geständnis* (Mohr Siebeck, 2014), p. 327 ff.

45 E. Garro Carrera – A. Asúa Batarrita, *Atenuantes de reparación y confesión* (Tirant lo Blanch, 2008), p. 104.

46 J. M. Silva Sánchez, *Malum passionis. Mitigar el dolor del Derecho penal* (Atelier, 2018), p. 123 ff.; F. Rostalski, *Der Tatbegriff im Strafrecht* (Mohr Siebeck, 2019), p. 212, and p. 401 ff.; J. P. Mañalich, 'El comportamiento supererogatorio del imputado como base de atenuación de responsabilidad' (2015), XXVIII-2, *Revista de Derecho*, p. 237–238.

world of the addressee into two broad categories of action: infringement or compliance. When citizens adjust their behaviour to what is legally prescribed by a norm, they fulfil an important contribution, specifically, the original duty of obedience and, to that extent, they cooperate in the construction of the collective *praxis* known as (criminal) law.[47] Conversely, if a culpable agent violates a rule of conduct, sanction rules will modify the material content of the duty originally demanded from that agent who is now expected to cooperate by complying with a 'duty' to bear the resultant punishment. It is important to remember that so-called 'sanction rules' are not, strictly speaking, truly norms as they do not impose 'real duties'. Moreover, they are entitlement (or decision) rules that only allow the State to impose punishments and, as a consequence, create a correlative position of subjugation to the punishment of the perpetrator, which henceforth will be referred to in this essay as a duty to bear the punitive reaction. In other words, sanction rules transform the original 'right to obedience' of the State into 'a right to punish'.[48]

32 This variation is only possible insofar as both types of behaviour, namely obeying and bearing the punishment, are understood as functionally equivalent, yet specifically different expressions of the same prototypical civic duty.[49] This generic duty is vested upon every citizen and demands from them cooperation to maintain the legally recognised state of liberties. From this perspective, acting, as is required by the primary rule, or bearing the punitive action, pragmatically realises one and the same functional

47 This kind of justification for punishment necessarily demands that law be considered as something dynamic: it is not *poiesis* but *praxis,* collectively constructed by citizens in their different roles as addressees, legislators and judges. See M. Pawlik, *Normbestätigung und Identitätsbalance* (Nomos, 2017), Spanish version available: M. Pawlik, *Confirmación de la norma y equilibrio en la identidad* (Atelier, 2019).

48 K. Binding, *Die Normen und ihre Übertretung*, t. I (2nd ed., Engelmann, 1890), p. 427, p. 499; K. Binding, *Grundriß des Deutschen Strafrechts* (8nd ed., Engelmann, 1913), p. 232. G. Freund – F. Rostalski, 'Normkonkretisierung und Normbefolgung' (2018), *GA*, p. 264 ff. (using the word *'Entscheidunsgnorm*); G. Freund – F. Rostalski, 'Warum Normentheorie?' (2020), *GA*, p. 620–621; R. Robles Planas, *Teoría de las normas y sistema del delito* (Atelier, 2021), p. 19, p. 75 ff.; R. Robles Planas, 'Coacción, retribución, demostración. Sobre la teoría de la pena en Binding', in A. I. Pérez Machío – J. L. Cuesta Arzamendi (dirs.), *Contra la política criminal de tolerancia cero. Libro Homenaje al Prof. Dr. Ignacio Muñagorri* (Aranzadi, 2021); J. P. Mañalich, 'Retribución como coacción punitiva' (2010), 16–1, *Derecho y Humanidades*, p. 61 ff.

49 F. Montero, 'Desistimiento de la tentativa. Su consideración a la luz de la distinción entre norma de comportamiento y norma de sanción' (2021), v. LXXIV, *Anuario de Derecho penal y Ciencias penales*, p. 735 ff.

feature: the dynamic confirmation of the rule of law through the positive recognition of the norm as a binding behavioural standard.[50]

This argumentative structure is a fertile ground for a comparative method known as functionalism of equivalences,[51] where the aim is to identify POC and ascribe to it a communicative meaning that is similar to the message expressed by the duty to bear the punitive action, i.e. searching for the 'functional equivalents of retributive punishment'. Within this framework, a POC may be considered as a functional equivalent of a punitive reaction when the offender actually expresses a positive recognition of the norm through its realisation. Admittedly, the nature of this explanation is rather brief and incomplete, but to proceed with the argument, accepting these ideas as a theoretical premise is necessary.[52] 33

Voluntary confession, in this context, can be understood as a POC by which the perpetrator expresses, after committing a crime, to have adopted a revisionist position about the previous violation of the norm. With this POC, the perpetrator can then characterise their offence as a wrongful act and, therefore, communicate a positive recognition of the previously violated rule. In order to ensure that the confession expresses such a message, legislators normally restrict the application of this mitigating circumstance by imposing a series of requirements. 34

2. Requirements of confession considered as a functional equivalent to retributive punishment

Establishing the grounds for every mitigating circumstance is essential to shape the features of the figure. In the case of confession, a different approach has been suggested that entails the abandonment of the transactional paradigm used by the prevailing opinion (purchasing evidence in exchange for impunity). Confession requirements should be understood here as those conditions meant to ensure that this POC actually expresses a positive recognition of the violated norm. Through this lens, a more consistent view of confession requirements can be achieved which provides the 35

50 M. Pawlik, *Normbestätigung und Identitätsbalance* (Nomos, 2017), *passim*; J. P. Mañalich, 'La pena como retribución' (2007), 108, *Estudios Públicos* p. 117–205.

51 N. Luhmann, *Ilustración sociológica* (Sur, 1973), p. 9 ff.; P. Bringewat, *Funktionales denken im Strafrecht* (Duncker & Humblot, 1974), p. 62 ff.

52 F. Montero, 'La regularización tributaria como equivalente funcional de la pena retributiva' (2020), 2, *InDret*, p. 304–349.

figure with a consonant harmonic structure. As it is not possible to develop all of these features in detail here, this essay will only explore its voluntary nature in greater detail since this constitutes the most problematic feature of confession. However, before doing so, this subsection will briefly examine the impact of adopting this approach in relation to two basic requirements of confession.

36 Regarding the objective elements, although the Spanish legislation does not explicitly require any, I have already mentioned that both doctrine and jurisprudence call for a "truthful and complete" confession. From a utilitarian approach, it is difficult to provide a rational interpretation of these requirements. In the face of this, an alternate view has been suggested that may prove useful: if confession is considered a functional equivalent of retributive punishment, all an offender needs to do is provide information regarding their acknowledgement of responsibility for the previous violation of that specific norm.[53] Therefore, an agent does not need to reveal any other perpetrator's identity (or the specific contribution made by them) or confess to other offences that are a part of the same investigation. From a negative point of view, this means that mitigation of punishment can only be denied when an offender's confession ends up distorting the facts or tries to hide their responsibility.

37 Regarding the subjective elements, two features need to be considered at this point. First, the aforementioned 'identity requirement', i.e. the person who confesses must be the perpetrator of the relevant crime.[54] This requirement gains strong theoretical support in this framework: the duty to bear the punitive action has a personal nature, so it seems logical to demand that the functional equivalent confession be also attributable to the agent. This does not necessarily mean, however, that the statement must be factually made by the perpetrator. In fact, to decide whether a statement is personally attributable, normative criteria are needed, otherwise, its scope of application will become unnecessarily restricted and no satisfactory solutions may be found for difficult cases. This may occur when, for example, an agent is factually unable to confess or, despite being in a position to do so, the

53 P. Faraldo Cabana, 'La aplicación analógica de las atenuantes de comportamiento postdelictivo positivo' (1998), 1, *Anuario de Facultade de Dereito da Universidade da Coruña*, p. 248.

54 Our reference legislation (Article 21.4 SPC) mentions the person *'guilty'* of the crime. The § 46.II StGB, § 34 ÖStGB, § 48.d SchStGB and the Article 65.2 PC of Paraguay refers to the *'perpetrator'*. The Article 65.III.d PC of Brazil and Article 46.9 PC of Uruguay refer to the *'agent'*.

best way to do it requires the help of a third party.[55] The second feature addresses the voluntary nature of this POC, an element that is required by nearly the entire scholarship and, most notably, has been explicitly mentioned in many of the legal texts previously referred to. However, this is also the most controversial feature of confession and deserves to be analysed in greater detail.

3. The voluntary nature of the mitigating circumstance of confession

Spanish law allows the mitigation of punishment only when a perpetrator confesses "before knowing that a legal procedure is directed against him".[56] The utilitarian approach interprets this requirement in objective and chronological terms as its advocates that this is a deadline imposed by the law to ensure the evidentiary value of the information being provided by an agent. This makes for a very problematic definition because the perpetrator's knowledge about the existence of an investigation does not necessarily impact the evidentiary value of the supplied information. In fact, it is perfectly reasonable to argue that this information, even if supplied by the perpetrator after the 'deadline', may still be crucial in clarifying the facts.[57] 38

The alternative approach suggested herein offers many advantages in this respect since it recognises the evidently subjective nature of the requirement. If confession is no longer framed as a way to buy impunity by supplying evidence but as a POC functionally equivalent to retributive punishment, this feature may be easily justified and interpreted. By using this as a requirement, a legislator demonstrates the intent to ensure, not 39

55 For example, securing the confession of an economic crime that has particularly complex factual details may be impossible if the offender does not have the special knowledge necessary to explain the criminal maneuver in detail.

56 ÖStGB also requires the offender expresses that they have become "aware of their guilt" (*reumütiges Geständnis*).

57 It is surprising that, according to the advocates of this approach, the evidentiary value is also the *ratio* that justifies the mitigation of punishment granted in cases of 'late confession' (to those who speak once the deadline has passed). These scholars channel this mitigation through the 'mitigating circumstance by analogy' regulated in Article 21.7 of the SPC. Without going into details, it should be noted that this last statement creates an inevitable contradiction, as it cannot be stated that confession as a requirement is designed to ensure the probative value of the information while also claiming that the *ratio* for the mitigation of punishment is also the evidentiary value of the information being provided.

the evidentiary value of the information being supplied, but the voluntary nature of this POC.[58] In fact, under this approach, voluntariness becomes the key element of this mitigating circumstance, although it should be noted that, using this framework, law needs to be understood as a practical order that can be real only insofar as it is actually exercised by the citizen in question. Therefore, it is a product of the rational will of the subjects involved in its construction and development, in effect, a collectively constructed *praxis*.[59] The voluntary nature of confession becomes, then, a necessary element to achieve the positive recognition of the norm previously violated.

40 To conceive confession as a functional equivalent of retributive punishment not only helps to explain the existence of this requirement, but also provides a solid framework to determine when an agent's confession can be considered voluntary. In this regard, it should be noted first and foremost that a concept of voluntariness cannot be understood strictly psychological. Instead, this concept is best explained from a normative point of view.[60] Secondly, this normativisation process can be achieved by distinguishing between two separate dimensions. In its 'quantitative dimension', voluntary confession requires POC to be undertaken in the absence of legally meaningful coercion.[61] In its 'qualitative dimension', it requires that the agent's POC does not express a message with content that is contradictory to the

58 Emphasising this element, P. Faraldo Cabana, *Las causas de levantamiento de pena* (Tirant lo Blanch, 2000), p. 28–29; P. Faraldo Cabana, 'La aplicación analógica de las atenuantes de comportamiento postdelictivo positivo' (1998), 1, *Anuario de Facultade de Dereito da Universidade da Coruña*, p. 245 ff.; J. De Vicente Remesal, *El comportamiento postdelictivo* (Publicaciones Universidad de León, 1985), p. 66–68; similar, E. Garro Carrera, 'La atenuante de confesión: discusión sobre su fundamento', in A. Asúa Batarrita – E. Garro Carrera (eds.), *Hechos postdelictivos y sistema de individualización de la pena* (Universidad del País Vasco, 2009), p. 106.

59 See *supra* IV.1

60 E. J. Lampe, 'Rücktritt vom Versuch «mangels Interesses' (1989), *JuS*, p. 614: "voluntariness is not only a concept susceptible to normative interpretation, but this normative interpretation is required as a necessity". This normativisation should begin with the idea of freedom as a capacity conferred to the agent: in the context of criminal law, freedom of will is not a biological fact but a programmatic assumption for the *praxis* of assigning responsibility. See M. Pawlik, *Normbestätigung und Identitätsbalance* (Nomos, 2017), p. 11.

61 About the *'strafrechtlich relevanter Zwang'*, K. Amelung, 'Zur Theorie der Freiwilligkeit eines strafbefreienden Rücktritts vom Versuch' (2008), 120–2, *ZStW*, p. 221 ff.

content expressed by the punitive actions. The subsection below addresses these ideas in greater detail.

a) The 'quantitative dimension'

The scholarship is unanimous in asserting that confession must be the result of an agent's free choice, i.e. a decision taken in the absence of legally meaningful coercion.[62] In the context of confession, this general premise can be specified as the agent's POC being performed in the absence of the material influence of an explicitly regulated coercive factor.[63] By virtue of this, the agent's ability to perform certain actions (so-called 'freedom to' – '*Freiheit wozu*' in German) may be separated from the coercive factors that, eventually, may affect the voluntary nature of the action (so-called 'freedom from' – '*Freiheit wovon*').[64] In other words, there are, on the one hand, [a] actions by which an agent confesses and [b] factors for which the coercive effect must be excluded to consider the action in question voluntary, on the other. Unfortunately, these actions cannot be explored in further detail in this chapter given its space and scope restrictions. Nevertheless, it is worth highlighting that, in the framework of functional equivalents of retributive punishment, the agent's knowledge about the existence of a legal procedure against them constitutes a coercive factor explicitly mentioned by the Spanish legislation. 41

Having said that, it may be useful to draw yet another distinction within the 'quantitative dimension', this time between an objective element and a subjective element. The former is the existence of a legal procedure against an agent, while the latter is an agent's knowledge of the existence of such. Some scholars suggest that the former should be subordinated to the latter, claiming that the objective element is "only a reference that must be 42

62 P. Faraldo Cabana, 'La aplicación analógica de las atenuantes de comportamiento postdelictivo positivo' (1998), 1, *Anuario de Facultade de Dereito da Universidade da Coruña*, p. 245.

63 K. Amelung, 'Zur Theorie der Freiwilligkeit eines strafbefreienden Rücktritts vom Versuch' (2008), 120–2, *ZStW*, p. 222: it is the "socially granted possibility to act without the undesired influx of other subjects or influencing factors".

64 Regarding this distinction, see A. Gutmann, *Die Freiwilligkeit beim Rücktritt vom Versuch und bei der tätigen Reue* (Hansischer Gildenverlag, 1963), p. 140.

viewed through the prism of the subjective-cognitive requirement".[65] This, however, may not be the best approach, as a more ideal situation would be to create a meaningful relationship between both elements.

43 To this end, two large groups of cases should be identified: a group of cases in which the objective and subjective elements match [$ø_1$ and π_1]; and one in which these elements diverge [$ø_2$ and π_2]. The first group may be considered to encompass 'easy cases', while the second one would normally contain 'hard cases'. The distinction is important because, to decide whether or not the coercive factor is present in the latter group of cases, it is necessary to resort to the criterion of epistemic rationality (communicative rationality of the knowledge).[66]

Ø) If the investigation has not yet started or, if it has, it is not directed against the agent in question, it may be the case that:

$ø_1$) The subject is fully aware of this circumstance and, nevertheless, confesses. This is an explicitly regulated case and, therefore, such a confession must be considered voluntary.

$ø_2$) The agent is mistaken about this circumstance and, therefore, wrongly believes that there is an investigation in which they are considered a suspect.[67] Since this is a case of objective-subjective discordance, applying epistemic rationality as a criterion can help distinguish between the two different scenarios cited below:

$ø_{2.1}$) An agent's belief has an epistemic justification: from an inter-subjective approach, an agent has valid reasons to believe that an investigation has been initiated against them, which would indicate there is a legally meaningful coercive factor and, consequently, the confession should be considered non-voluntary.

For example, one of the offenders (O) knows that, as part of the investigation initiated against their arrested accomplice (C), the authorities have offered the accomplice a punishment mitigation in exchange for information leading to the arrest of the offender

65 E. Garro Carrera, 'La atenuante de confesión: discusión sobre su fundamento', in A. Asúa Batarrita – E. Garro Carrera (eds.), *Hechos postdelictivos y sistema de individualización de la pena* (Universidad del País Vasco, 2009), p. 106–107.

66 By epistemic or communicative rationality, I understand the way or manner of knowing something that can be considered rational from an inter-subjective point of view. See, G. Pérez Barberá, *El dolo eventual* (Hammurabi, 2011), p. 762.

67 E. Garro Carrera, 'La atenuante de confesión: discusión sobre su fundamento', in A. Asúa Batarrita – E. Garro Carrera (eds.), *Hechos postdelictivos y sistema de individualización de la pena* (Universidad del País Vasco, 2009), p. 142 ff.

(informing on the offender). The coercion to which offender O is exposed must be considered legally relevant and, therefore, the confession of (O) should be deemed non-voluntary. That conclusion must stand even if (O) confesses before the authority receives any useful information from (C). Otherwise, this would result in a position that would be very difficult to sustain, i.e., the mitigation of punishment by confession of (O) would depend exclusively on the cooperative behaviour undertaken by (C).

$ø_{2.2}$) An agent's belief has no epistemic justification: there are no valid reasons for an agent to assume that an investigation has been initiated against them. These erroneous beliefs, regardless of the actual psychological pressure they have exerted on an agent, cannot be considered a legally meaningful coercive factor.[68] To further illustrate this, the following literary example may be useful:
The dreadfully nervous but meticulous murderer kills and dismembers his victim and then confesses his crime to the police authorities voluntarily. The low, dull, quick sound of the dead old man's heart which, according to the perpetrator, the police officers also hear beating under the floorboards, is not a rational belief (in epistemic terms). Therefore, it cannot be considered a legally meaningful coercive factor and his confession is, by all means, voluntary.

π) If an investigation is directed against an offender, it may be the case that:

$π_1$) The subject is fully aware of this circumstance and any confession must be considered non-voluntary since the coercive factor explicitly mentioned by the legislation is met.[69]

$π_2$) An agent is not aware of this circumstance, which leads to a new objective-subjective discordance. Once again, applying the criterion of epistemic rationality may help identify the two different scenarios cited below:

$π_{2.1}$) An agent's lack of knowledge is justified in epistemic terms: there are valid reasons for him/her to believe that an investigation has

68 The image of a crucifix can exert enormous psychological pressure on a given offender, who may even feel, by virtue of it, compelled to confess to the crime. However, such pressure cannot be considered a legally meaningful coercive factor.

69 There seems to be no room here for belief to be considered unjustified in epistemic terms. The existence of a legal procedure against the perpetrator cannot be deemed irrelevant.

not been initiated against them. Once again, this is an explicitly regulated case: despite the existence of a legal procedure against them, the perpetrator is (rationally) unaware of this circumstance and, therefore, their confession must be considered voluntary.

$\pi_{2.2}$) The agent's lack of knowledge is not justified in epistemic terms, since there are no valid reasons to explain it. In this scenario, confession should not be considered a voluntary act.
For example: if an agent has committed a crime on a public street, in front of many witnesses and video-surveillance cameras (commonly known to be there), a coercive factor is present. If, in this scenario, the agent in question does not believe that the investigation will be undertaken with him/her as its focus, that person simply has irrational and groundless expectations. Their behaviour, therefore, cannot be considered a voluntary confession that is functionally equivalent to retributive punishment but rather a mere act of surrender.

b) The 'qualitative dimension'

44 As established earlier, the absence of relevant coercion ('quantitative dimension') must be separated from the expressive message delivered by the confession ('qualitative dimension'). Under this 'qualitative dimension', confession should be considered voluntary when a perpetrator expresses, through this behaviour, a positive recognition of the specific norm that has been violated. However, it is important to emphasise the following: doing so does not imply a metanoic experience or something similar to an unrestricted attachment to the esoteric morality of the law. Put in negative terms, the 'qualitative dimension' only excludes the voluntary nature of confession when, through this POC, an agent explicitly expresses a lack of citizen willingness to collaborate with the collective construction of the law.[70]

45 This last dimension provides a coherent solution to those cases in which the confession, although not affected by the legally meaningful coercive factor ('quantitative dimension'), expresses a completely contradictory mes-

70 For insights, see R. Alcácer Guirao, 'La reparación en Derecho penal y la atenuante del art. 23.5 CP. Reparación y desistimiento como actos de revocación' (2001), 63, *Revista del Poder Judicial,* p. 108.

sage concerning the one expressed through punitive actions. For example, in many crimes committed by criminal organisations, especially those involving terrorist attacks, it is common for their leaders to release public statements to claim intellectual and/or material responsibility for the crime.[71] In this theoretical framework, although such statements can be considered a voluntary act in quantitative terms, they fail to express a revisionist position regarding the previous violation of the norm. On the contrary, it is clear that they represent a sustained reaffirmation of their previous stance initially expressed through the offence. Therefore, these 'confessions' do not constitute POC that could be considered a functional equivalent to retributive punishment under the above-cited approach.

V. Conclusions

1. In criminal law, confession has two different facets. Its procedural dimension helps with the crime's investigation while its substantive dimension helps mitigate the intensity of the punitive reaction, with confession representing a POC that has a supererogatory nature and is attributable to the agent responsible for violating a norm.
2. The prevailing opinion among legal scholars is that this mitigating circumstance has a utilitarian base from which two lines of arguments emerge:
   2.1. From a cooperation logic, punishment is mitigated by virtue of the useful evidence that a confession provides to those administering justice. From this perspective, the mitigating circumstance of a confession constitutes a form of compensation awarded by a State to a perpetrator for their statement, provided that it alleviates the evidentiary burden and reduces the workload of the criminal investigation.
   2.2. Punishment is mitigated by virtue of the benefits that a confession provides to the personal interests of the witnesses and victims of the crime in question. If a perpetrator confesses, they release any witnesses from their own (difficult) duty to testify and the victim is spared being re-victimised by having to publicly re-live the trauma.

71 The fact that these statements are not made before an authority (or accompanied by a voluntary surrender) is irrelevant. Even if they were, they would still not give rise to any mitigation of punishment as a result of a confession.

3. The utilitarian approach has significant shortcomings:
   3.1. It merges the two dimensions of confession, making it very difficult to distinguish between this and other mitigating circumstances.
   3.2. It is based on an 'is/ought fallacy': the normative reason to reduce the severity of a punishment is directly deduced from the real evidentiary value of the information being supplied, which also makes the argument normatively weak as mitigation depends on an entirely contingent effect (which may or may not be present).
   3.3. It fails to properly explain why the law demands certain requirements to mitigate punishment by confession and how these elements should be interpreted. Because of this theoretical defect, the group of cases in which punishment is mitigated by virtue of confession is ultimately defined in either an under- or over-inclusive manner.
   3.4. Its advocates fail to address incoherent consequences, for example, by granting punishment mitigation when an agent who confesses does not reveal anything useful to the relevant investigation.
4. This chapter has proposed a different theoretical framework, i.e., considering the mitigating circumstance of confession as a functional equivalent of retributive punishment, treating it as a POC that mitigates the punitive censure because, through their voluntary confession, a perpetrator expresses a positive recognition of a previously violated norm.
5. In order to ensure that a confession actually expresses such recognition, most jurisdictions have imposed a number of requirements. The perspective proposed in this text sought to achieve a more coherent view of these requirements and, therefore, endeavoured to provide this mitigating circumstance with consistency and harmony.
   5.1. Regarding objective elements, an offender only needs to provide information about the relevant facts to recognise their responsibility for the specific foregoing violation of a norm.
   5.2. Regarding subjective elements, the requirement of the identity of the confessor and perpetrator must be met, however, this should be understood in normative terms. The most important and problematic requirement of confession still lies in determining its voluntary nature.
6. In Spanish law, the voluntary nature of this POC is ensured through the requirement that the agent must confess "before knowing that a legal procedure is directed against him".

7. The voluntary nature of a confession can be best assessed on the grounds of normative, rather than psychological, criteria. This process of normativisation should be carried out by clearly differentiating between two dimensions of voluntariness, namely:
   7.1. In its 'quantitative dimension', where a voluntary nature requires the absence of a legally meaningful coercive factor (before being aware that the investigation is directed against them). A further distinction between an objective and a subjective element should be made: the former is the existence of a legal procedure against the agent in question, while the latter is the said agent's knowledge about the former. Once this distinction is drawn, it is easy to identify those cases where both elements match and those where the elements diverge. In order to determine voluntariness in the divergent cases, the criterion of the epistemic rationality of knowledge may be used.
   7.2. In its 'qualitative dimension', a confession should be considered voluntary when a perpetrator expresses, through this POC, a positive recognition of the concrete norm previously violated.

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Further Reading

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