Imputation in Criminal Law and the Conditions for Norm Validity

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ABSTRACT

(1) The validity of the norms that determine society's identity needs to be guaranteed. The reason is that there are other alternatives to this society. The guarantee is accomplished when it is valid that each person has the duty to comply with the norms (law) and that sanctioning occurs in case of not complying. Sanctioning therefore means confirming the identity of society. The confirmation is totally accomplished with the sanction. (2) On the contrary, there's no alternative to the rules that refer to the social environment; therefore they stabilize themselves. Here lies the basis for lower sanctions in case of reckless acts due to mistakes—not due to indifference. (3) The disturbance of validity occurs in the same manner as its guarantee: by meaning, not by nature. Natural events, such as causal courses or psychological facts are not, per se, components of criminal behavior. They do so as symbol carriers. (4) Imputation begins with the distribution of competence between the offender, the victim, and third parties. (5) The so-called subjective imputation proves itself to be more a specified-personal imputation. It's an imputation which focuses on the law-abiding citizen as a criterion person. (6) The science of criminal law arises from the distinction between meaning (culpability) and nature. Every single dogmatic concept can be traced to this distinction. The sanction contradicts the meaning of the criminal act (the norm isn't valid). Meaningless, blameless behaviors should not (cannot) be contradicted.

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I. FOUNDATIONS

A. Norm Validity

Society exists when at least one norm is valid. "Norm" is to be understood as the expectation that a person will behave in a certain way in a certain situation, surely not as a result of a calculation between satisfaction and reluctance, but only because of his Being-a-Person (Person-Sein).[1] In other words, a norm does not order the world under the scheme of satisfaction/reluctance, but under the scheme of the person's duties/freedoms. Therefore it considers the person as a role carrier. Let's explain this with an example: When a strong individual considers using pain to force a weak individual to action, then this situation remains under the scheme of satisfaction/reluctance. This has as little to do with the existence of norms and society as urging on a workhorse. On the contrary, in Schiller's case,[2] the thieves keep their driver—Mohr—from returning into a lawful life by only referring to his oath and their stigma. This action falls within the scheme of duty and freedom and even though a thief society is taking place, it's a society nevertheless.

This example should already show that we don't pretend an apotheosis of society, nor to horrify the world of the individuals. Rather, if (1) norm is not only to be another name for a certain regularity in the individual's environment and (2) validity not only another

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1. See Günther Jakobs, Norm, Person, Gesellschaft 63-70 (1997) [hereinafter Jakobs, Norm]; Günther Jakobs, Das Strafrecht zwischen Funktionalismus und "alteuropäischem" Prinzipiendenken. Oder: Verabschiedung des "alteuropäischen" Strafrechts?, 107 ZStW 843, 867-76 (1995); Niklas Luhmann, Die Form "Person," in Soziologische Aufklärung 6, at 142-54 (Niklas Luhmann ed., 1995). See also Günther Jakobs, Strafrecht, Allgemeiner Teil §§ 20/20-29 (2d ed. 1991) [hereinafter Jakobs, Strafrecht].

2. The famous German poet Friedrich Schiller (1759-1805) wrote the play "The Robbers" (Die Räuber) in 1781. Here, the main character, Karl Mohr, comes from a noble family and gets involved in the leadership of a band of robbers. When he tries to free himself from the band, the thieves do not let him because of the once created normative (!) common ground. Friedrich Schiller, Die Räuber act 5, sc. 2 (1781).

denomination for a "possible effect," that is, if "ought" (Sollen) shouldn't be dissolved in "is" (Sein), then we have to take a look at something else rather than human individuals.

A norm is valid whenever it determines the content of possible communication, i.e., whenever the expectation directed to a person is stable. Whether the norm understood as an imperative[3] is effective or not has no relevance for its validity. From the prior statement that valid norms have meaning according to the scheme of the person's duty/freedom, not according to the individual's satisfaction/reluctance, it follows that, when dealing with validity, the norm determines the communication. Therefore communication is determined neither by the gain that results from complying with the norm nor by the harm that derives from infringing it. As long as we keep looking into the scheme satisfaction/reluctance to determine whether a norm should be followed or not, then the level of normativity (of the duty/freedom scheme), that is, of the "ought," is not reached. That a fulfillment of duties is expected constitutes a statement about the societal world. On the contrary, that an intelligent costs/benefits calculation suggests a certain behavior is a statement about the world of acting individuals, not about the world of social beings, that is, of persons.[4]

This distinction between (1) a "norm" determined by personality and (2) an "intelligence" determined by individuality is clearly stated in Ludwig Feuerbach's critique of Hobbes. The individuals from Hobbes subdue themselves to an overlord in order to better overcome their individual preferences, especially their need for protection. Feuerbach states that a state founded this way is nothing

3. For the conception of law as an imperative see H.L.A Hart, The Concept of Law 19-25, 280-83 (2d ed. 1994). For instance: the person who murders does not follow the imperative "you shall not murder," but the sanction taking place after and due to the murder confirms the authoritativeness of the imperative (it confirms the validity of the norm, the norm's command) and shows with it the unauthoritativeness of the infringement.

4. See Jakobs, Norm, supra note 1, at 29-50.

but an amusing variation of the estate of nature. "According to the substantial concept . . . the difference between State and estate of nature is another time neutralized,"[5] which means that norms as the structure of society are not given yet.

Feuerbach's critique of Hobbes can also be brought forth against Kelsen, this time with a limitation. If, according to Kelsen, a system of rules becomes an order of norms (Normordnung) when the system is overall effectively established—because in that precise moment a basic norm (Grundnorm) should be arranged[6]—then this should be the case only for some of the people involved: those who benefit from the system or at least can bear with it. They simply feel inclined to take the system for granted, to accept a constitution. These people understand the system of rules as a system of duties, therefore behaving themselves as persons and not as determined individuals who act according to the satisfaction/reluctance scheme. But for other people also involved who recognize in the system of rules nothing but a willfully established, harmful environment, it's not possible to establish the foundations of the communicative "binding force" (Verbindlichkeit), that is, the need to accept a constitution. They will point out that oppression through regularity does not change the concept. When in such a situation no communication gets through, it has nothing to do with society. If the addressees of the system of rules prevail, then the oppressed will be treated as persons, therefore obliged to some performance whether they understand it or not.

B. Norm Infringement

A legal norm is also valid when it is infringed—when it fails—as long as norm infringement is represented as such

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5. Ludwig Feuerbach, Geschichte der neueren Philosophie, in 4 Ludwig Feuerbach, Sämtliche Werke 111 (1847).

6. Hans Kelsen, Reine Rechtslehre 196-209 (2d ed. 1960). See also Michael Pawlik, Die Lehre von der Grundnorm als eine Theorie der Beobachtung zweiter Ordnung, 25 Rechtstheorie 451 (1994); Jakobs, Norm, supra note 1, at 57.

in communication: what can be infringed must stand as valid. In the case of norm infringement, the expectation outlasts the imperative. However, what does it mean to "infringe the norm"? In an abstract sense, we could say that norm infringement must take place in the same system where (1) norm validity is its prerequisite and (2) the sanction its consequence. Neither norm infringement nor norm validity can be produced by sheer acts of force. Therefore, sanctioning should not be reduced to sheer force. Rather, the infringement—and also the sanction—must be understood as a communicative behavior, because norm validity emerges through communication and not through sheer force. The following sequence takes place: (1) The dominating communication considers the norm to be correct. (2) The offender deviates from this general consideration through an operative, objective assertion, i.e., the criminal act. (3) His assertion is rejected through a likewise operative, objective counter-assertion.

Before I deal with the configuration of the act, I shall outline how the sanction is to be understood.[7] It's a response to an act, which should be conceived of as a protest against the validity of the norm, i.e. against the configuration of society.[8] This response does not pursue an indirect confirmation of the societal context, but is the direct confirmation itself. When society sanctions, it refuses to think about modifying its configuration—that is, to think about a criminal act as an evolutionary act, as a possible option. Rather, society insists against this proposal to change by remaining in the status quo. To the same extent that a person rejects a request that does not fit with his character, society rejects the proposal of giving away the unfulfilled expectation and confirms its identity by doing it.

7. Jakobs, Norm, supra note 1, at 98-111.

8. The criminal act and the criminal sanction are (also) to be understood as communicative contributions, definitely as speech and answer. The problem remains to determine why the answer takes place as an infliction of pain. See Andrew von Hirsch, Censure and Sanctions 9-14 (1993). A detailed explanation, specially of the Anglo-American discussion, can be found in Hanno Kaiser, Widerspruch und harte Behandlung 167-86 (1999).

Socio-psychological consequences of various types can be linked with this confirmation, and it's practical not to refuse them if society wants to continue. For example, it's certainly practical that the motivation to comply with the law[9] becomes more and more obvious. These consequences, however, do not belong to the concept of sanction, nor does their opposite (a psychological disorientation, a general lament) belong to the concept of a criminal act.

The criminal act is the expectation's deception itself. With a traditional formulation the criminal act consists in a blameworthy behavior, not in the psychological consequences this behavior causes in other people. Therefore, the confirmation of the norm's existence belongs to the concept of sanction. Sanction is the contradiction against the act that questions this existence. Nothing more, but nothing less.

The sanction has a function without causing any psychological effects. Even if right after an act and its sanctioning the next act comes, the sanction has fulfilled its function as long as the next act *is* the next act. It's not the deception of some kind of private expectation, but of an expectation that belongs to the social configuration.

II. NORM VALIDITY AND THE VALIDITY OF THE RULES FOR NORM APPLICATION

A society is defined by the validity of at least one norm. But the validity of a norm only leads to clear results if there is consensus on the conditions for applying it, i.e., on the rules for its application. This means that the rules must be valid for all cases *in this respect*. The conditions for application in modern society are a question of the rules of logic and mathematics, of the rules of a worldview oriented towards the rational-natural sciences. These rules not only concern the environment of society, but are also

9. This is the so-called "positive general prevention." Sanctioning over and over again makes the criminal conduct appear as an alternative not worth considering. See Jakobs, Strafrecht, supra note 1, §§ 1/9-16. See also Bernd Schünemann et al., Positive Generalprävention (1998).

the conditions for applying the societal norms. The reason for this is that society must "get along" with its environment as long as it separates the outside spheres of the persons, i.e., as long as persons can only deal with each other in their outside spheres. An example for this statement: The rules three plus three equals six, a man cannot survive without oxygen, to call a saint for help is of no use (at least it does not bring help for sure) are by no means immediate social norms, but they determine the meaning of communication over these norms. Whoever asserts that he is giving eight units after multiplying two times three, violates the prohibition to deceive; whoever deprives another person of his possibility to breath violates the prohibition to kill somebody; parents who in the case of a child's serious disease content themselves with calling a saint violate their duty to provide sufficient help.

We are talking about an act only as long as the result is that a societal norm is violated. The isolated violation of the rules that relate to the environment is not an act. For instance: Mistakes made when calculating mathematical problems can be due to a lack of knowledge or an insufficient concentration, but they'll never be seen as an attack against the rules of math. The construction of an act against the rules of math and the other rules which generate the rational-natural science worldview is superfluous because a person does not have to worry about the correct application of these rules. Every individual will watch them closely when trying to optimize the outcome of his satisfaction/reluctance balance. In other words, society can rely on the following: in nature there is already enough disposition for the application of rules, and society can be built upon the comparable circumstance that there is enough food and reproduction. These rules need no normative support. An active protest against them transfers the one who makes the protest—an individual—into an impossible world and brings with it sooner or later a *poena naturalis*. This means that the protest brings the individual a disadvantage (reluctance instead of satisfaction) and usually the irrelevance of his behavior. In

other words: the individual cannot escape from the rules that relate to the environment, and because of this, there's no need for imposing a duty on a person.[10]

The described capacity for self-stabilization distinguishes those rules from the norms of society because whoever infringes the norms of society does not risk *per se* his well-being, at least not as long as the other persons generally stand by the norms. Compared to the rules relating society's environment, the norms of society suffer from a weakness: their preference is not fixed *ex ante*. To compensate for this deficit, the norms of society need a non-natural, societal warranty in order to become *leges perfectae*. Therefore, there is a task imposed on every person: they have to develop a will to comply with the norm. Persons do not have to engage in questioning a given society beyond the procedures already established for society's change. What *can* not be undertaken due to its opposition against the rules relating to the societal environment, *should* not be undertaken against the norms of society, indeed because a rejection of these norms is possible. And because it's possible, nature does not straighten out the contortion of the societal norms. Moreover, due to the type of contortion—that is, a protest against the validity of the norm—the contortion cannot be straightened out through "natural means." This can only be done in a communicative sense: the protest against society's norms is contradicted through the sanction. It means it's confirmed that these norms belong to an adequate configuration of society and that the contrary proposal propagates a non-adequate (but factually possible) configuration.

On the contrary, a protest against the rules relating to the environment is not understood as an attack against the societal configuration because the protest proposes a factually impossible world. This means that the perceptions of the offender, which contradict natural

10. Günther Jakobs, Über die Behandlung von Wollensfehlern und von Wissensfehlern, 101 ZStW 516 (1989).

science's worldview, cannot represent a relevant communication in society and cannot be interpreted as a contribution of a person. Moreover, the usually lower sanctioning or even the impunity in cases of reckless acts can be explained with the aforementioned material.[11] An intentional offender finds himself in harmony with the worldview of natural sciences. He proposes a possible world, and that's what is so threatening about his behavior. His proposal contradicts the configuration of society, showing society a possible alternative. On the contrary, a reckless offender usually contradicts a rule of knowledge generally known and recognized. He contradicts that it's beneficial to carefully consider the consequences of a behavior and to avoid acting without thinking in a letting-it-go, what-comes-will-come fashion. This will bring nothing to the reckless person, and he cannot be taken as a competent partner in social life. This is due to the fact that the inadequacy of his way of calculating how to perform his acts is objectivized, i.e., objectively contained, in the results. Usually, as soon as the reckless person sets his eyes on his world proposal, saying "I didn't want that to happen," he will withdraw this world proposal himself. This means that wanting (*Wollen*) and acting (*Handeln*) do not agree, and therefore acting has been inadequate. The negligent offender can exonerate himself by referring to the fact that he has brought himself into an unknown context, into a harmful course; the only mistake subject to discussion is that he could not certainly exclude from the beginning the possibility of bringing himself to that point.

An unforeseeable mistake needs to be sanctioned only to the extent of making it clear that dealing with the other people is no experimental field of life experiences. The

11. According to German criminal law the offender who does not know (but could know) the legal consequences of his behavior receives a considerably lower sanction than the offender who does have that knowledge, i.e., killing with knowledge leads to a minimum of five years of prison; killing without knowledge (but the offender could have known) leads to a maximum of five years of years or a fine. Moreover, it can even lead to an acquittal, i.e., damage to property or unlawful detention can only be punished if there's actual knowledge.

results of these life experiences will require more than avoiding the negligent act as long as it's punishable according to valid law. But such an act is not the right way to learn the benefits of reasonable behavior. Due to the fact that the offender follows the wrong path, his act not only disregards the rules relating to the environment, but also lacks taking into consideration the configuration of society.[12]

This can be summarized as follows: Since the rules of society's environment are effective with no possibility of change, they need no stabilization due to this effectiveness. Not even when they indirectly refer to society. On the other side, as society's norms are effective with a possibility of change, they must be stabilized against the possibility of an arbitrary change as long as social systems are to exist. If society's norms were understood as unchangeable, then we wouldn't be talking about society at all, but about gathering with angels, including God.

III. IMPUTATION

A. *The Meaning of Behavior*

Our conclusions up to this point read: Only a protest against direct social norms is an imputable act, i.e., it can be imputed to a person. A protest against the conditions of application remains communicatively irrelevant. Since the criminal act has to be conceived of as a communicative contribution, as a meaningful expression, we have to determine when a person does express a certain meaning. On the contrary, a protest against the rules of the environment must be understood as a meaningless expression. It should not be deduced that a criminal act is only something spiritual (*Geistiges*) and that it has nothing to do with the concrete "real" world. Rather, persons cannot only express meaning through their behavior in the "real" world: talking and writing are external behaviors.

12. See Jakobs, supra note 6, at 527-33.

The criminal act is always a meaningful assertion produced in the external reality. The meaning is only deduced from this production. As an example, if the meaningful claim is taken out of "killing someone," then there is no prohibition to kill. The criminal act as a meaningful claim deals with an activity in the concrete "real" world and thus necessarily deals with the rules of the environment. Therefore, these rules can be socially relevant at least in an indirect way, as we have already explained.

Following the path of the "real" concrete world has led us to determine, according to those rules, not only what has happened but also what meaning it has. A behavior should have the meaning of homicide or damage when it becomes the cause of the death of an individual. The European criminal law scholar will easily acknowledge in this outline the *Causalismus* model.[13] The so-called *Finalismus*[14] introduces another category of the environment without figuring its way to society:[15] causality's anticipation is a psychological *factum*, nothing more (it went from pure causality to an anticipated causality in consciousness, thus from blindly causing to foreseeably configuring).

If we want to find out the meaning, then those causes fall short and even lead in the wrong direction. The meaning of a behavior can only be determined when we take into consideration its position in the social context.[16] It's not enough to only take into consideration the causing

13. Franz von Liszt, Lehrbuch des Deutschen Strafrechts § 28 I (4th ed. 1891); Ernst Beling, Grundzüge des Strafrechts § 14 (10th ed. 1928); Gustav Radbruch, Der Handlungsbegriff in seiner Bedeutung für das Strafrechtssystem (1904).

14. Hans Welzel, Das Deutsche Strafrecht § 8 I (11th ed 1969).

15. But see Hans Welzel, Studien zum System des Strafrechts, 58 ZStW 491, 495-503 (1938); see also Manuel Cancio Meliá, Finale Handlungslehre und objective Zurechnung Dogmengesichtliche Betrachtungen zur Lehre von der Sozialadäquanz, 95 GA 179 (1995). In the '50s there was an intense discussion in Germany regarding which should be the basic case of criminal wrongdoing: the bare causation of the elements of the crime (*Kausalismus*) or the "goal-orientated" "final" causation (*Finalismus*, Theory of the personal wrongdoing). Nowadays it is not considered to be a matter of the concept of wrongdoing, but a question of the didactical explanation of the crime.

16. Against Luhmann's assumption in 2 Niklas Luhmann, Die Gesellschaft der Gesellschaft 776-89 (1997), see Jakobs, Norm, supra note 1, at 115-20. See also Fritz Loos, Literaturbericht: Rechtsphilosophie, 110 ZStW 350 (1998).

person even if we take account of his psychological events. We must focus our attention on the victim and on other persons too. Afterwards we must decide whether to attribute the event in the real world to his/her act or his/her unluckiness. This behavior's interpretation along with its causal consequences in the social context occurs under the new doctrine of the "objective imputation" (a name which does not give enough information though). In our context it's the theory of the behavior's meaning.[17]

When harm or risk occurs, for example an injury that threatens a human being's life, this can be due to the misbehavior of a person, for instance one person running into another person with his car. But it can also be that a third person is responsible for this situation, let us say an engineer that connected the traffic light incorrectly. Of course, maybe the victim failed to observe his duties, for example crossing the street without looking. Finally, maybe all of the participants behaved correctly: the damage is then to be considered the result of unluckiness and it has to be borne by the victim. Faulty behavior of a person, faulty behavior of another person, faulty behavior of the victim, or unluckiness are the possible explanations for the tragic situation.[18] Almost nothing is achieved by inquiring about causality. The car driver, the engineer, the victim, and many other persons have caused the

17. The theory of the objective imputation can be traced back to the first half of the twentieth century. The theory is mainly divided into two separate parts: (1) non-permitted behavior (driving according to the code, though dangerous, is permitted; in some cases, driving drunk is not much more dangerous than driving according to the code, but it is not permitted); (2) relationship between the non-permitted behavior and the result (the prohibition of driving drunk refers to the avoidance of the drunkenness' consequences, not to the one's threatening normal driving). In the text we shall be dealing with the first part of this theory. See Wolfgang Frisch, Tatbestandsmässiges Verhalten und Zurechnung des Erfolgs 9-22, 33-44 (1988); Günther Jakobs, Bemerkungen zur objektiven Zurechnung, in Festschrift für Hans Joachim Hirsch 45 (Thomas Weigend & Georg Küpper ed., 1999).

18. See Niklas Luhmann, Erleben und Handeln, in Soziologische Aufklärung 3, at 68-69 (Niklas Luhmann ed., 1981); Klaus Günther, Der strafrechtliche Schuldbegriff als Gegenstand einer Politik der Erinnerung in der Demokratie, in Amnestie oder Die Politik der Erinnerung in der Demokratie 48 (Gary Smith & Avishai Margalit eds., 1997).

constellation through their behavior and even if they did not, it's possible that they do have a duty to rescue. In this dense network of causation and possibilities of rescuing, the strings that have the *meaning* of infringing the norm should be isolated. This can be done thanks to the rules of the objective imputation taken as principles of a screen's construction. In this screen only some of the strings in the middle of the "storm" of events will show a meaning. This is, for example, what happens with the screen of the language in the "storm" of the sound waves: only some of them have a meaning. Therefore some well-known risky projects can remain unaffected by the stigma of having expressed a lack of respect against norms, while some even less dangerous projects must carry this stigma. In this sense, the organizer of a big party becomes the cause of hundreds of drunken drivers (perhaps one could even see that coming). However, his behavior, i.e., organizing a party, does not have the meaning of a lack of respect for the norm, even though just one drunken driver's behavior exhibits this meaning already.

The basic assumption of the objective imputation theory says that the right to behave in a certain way cannot be determined by considering an isolated individual and a norm. On the contrary, this must always be determined only in the light of persons, i.e., of certain rules of a society. This basic assumption can be developed into three principles[19] when related to the negative duties, i.e., the "not to harm" duties. The positive duties, i.e., the duties to "build something together," won't be developed here.[20]

The first principle has to do with the equality of persons: everyone must demand as much behavioral

19. For further explanation, see Frisch, supra note 17, at 69-506; Claus Roxin, Strafrecht, Allgemeiner Teil §§ 11/36-112 (3d ed. 1997); Jakobs, Strafrecht, supra note 1, §§ 7/4-71, 24/13-21.

20. For the distinction between positive and negative duties, see Günther Jakobs, Die strafrechtliche Zurechnung von Tun und Unterlassen (1996); Javier Sánchez-Vera, Pflichtdelikt und Beteiligung: Zugleich ein Beitrag zur Einheitlichkeit der Zurechnung bei Tun und Unterlassen (1999).

freedom as every other person demands on a daily basis. This principle lays the foundations for the allowed risk or, from the opposite perspective, the beginning of the unlawful behavior beyond this allowed risk. This means that, for example, driving according to the driving code, though risky, is allowed.

The second principle states: others are also responsible persons for their part. The world affected by our own behavior is a responsibly built world, which means one can be confident about its correct configuration. As a consequence, the main concepts are (1) the "confidence's principle" and (2) "acting at one's own risk" (here the confidence's sender is the victim). Once again an example: it must be trusted that a car driver, driving on the other side of a two-way street and coming towards us, will fulfill his duties well enough. And this is not only in attention to the possible harm he may cause to other people (confidence's principle) but also in consideration to the harm he may cause to himself (acting at one's own risk).

The third principle is formulated as follows: common interests with another person are always only limited common interests. When a person behaves incorrectly, then we hold him accountable as long as the common interest refers to this misbehavior. Otherwise the liability of the first person is excluded: redress prohibition. If the first person is also the victim, then we are talking, once again, about acting at one's own risk. Yet another example: selling a knife does not establish the liability of the seller if the buyer intentionally or recklessly stabs a victim, or even himself.

Obviously these three principles are describing roles; they stereotype the expectations in certain situations. Allowed risk does not exclude behavioral freedom. Otherwise every person can limit himself to the administration of his own organizational sphere. If extremely anonymous contacts are to be possible, one must proceed as follows: what the other person brings into and makes out of the situation cannot be quite reliably prognosticated; therefore the real constitution of the other

person is taken out of our own calculation.[21] This means that the other person is inserted as a stereotype, i.e., as a sufficient law-abiding person (*rechtstreue Person*) and as a citizen, although experience teaches us that this presumption is not always to be found in reality.

B. Imputation and Psychological Facts

Now, this so-called objective imputation establishes no complete imputation. Rather, as we have already seen, it distributes the competence for an event among various people, i.e., a potential offender, a victim, a third party or, in cases of no competence, it offers a possible explanation: "unluckiness." This competence establishes the expectation that the person will administrate his sphere according to the standards regardless of the preconditions for prior "capacities," about which we shall talk right now. Normally one talks about subjective imputation, which is a misleading expression because it can be misunderstood—and it's indeed usually misunderstood—as an "individualizing" imputation. It should be conceived of as a "personal imputation."

The reason for calling this personalization "subjective" is a complex proceeding: a process of rationalization, of world demystification for which the philosophical epoch of the Enlightenment stands. The demystification had emptied the world from every immanent meaning.[22] The world runs blind and according to the rules of nature. Being involved in this running is per se meaningless. Stating something else over contingent factors such as origin or human gender rather than the fact that they are this way or that way is totally excluded from this point of view, and the same applies for their position in the network of causality. The world of the Enlightenment is neither good nor bad: it is the way it is and nothing else can be said

21. See Jakobs, Strafrecht, supra note 1, §§ 11/49-50.

22. See Max Weber, Gesammelte Aufsätze zur Wissenschaftslehre 582-94 (Johannes Winckelmann ed., 3d ed. 1968) (we can dominate the world thanks to "technology and calculation," "but this means the demystification of the world").

about it. Therefore it can be used as an instrument, but due to its hidden nature only with certain errors. In case of an unavoidable mistake over the elements of the crime, i.e., the offender though he tried could not forecast the consequences of his behavior, the world's nature prevails over the instrumental understanding. What was planned as a human work, as an act, becomes a natural event; it can be neither good nor bad. In this manner, the possibility of avoidance (*Vermeidbarkeit*) understood as intent or recklessness becomes an obvious prerequisite of the imputation in a demystified world.

By requiring the possibility of avoidance, limits are introduced into the imputation for the possibility of instrumentalizing nature's "mechanism." Of course, the instrumental behavior shows as little meaning per se as a working machine by itself, or otherwise expressed: dealing instrumentally with nature is per se no communicating behavior. However, the spirit (*Geist*) that knows the meaninglessness of nature must not passively conform itself with this. Rather, with the knowledge of a lack of meaning, it has to gain the possibility of placing some meaning where it does not find a naturally immanent meaning. As we have already seen, this must be *placed*; not proved but asserted. Due to the fragility of meaning, freedom as self-administration can only agree with a corresponding society when there's a warranty that everyone who is free will absolutely recognize the meaning placed. Or that otherwise the meaning of their behavior will be marginalized through a sanction. For the latter we have to assume the validity of the norms established through the placing of meaning. Therefore, it has no relevance whether the norms are valid for the subjects in relationship to themselves or not—it does not deal with duties to themselves (even if one could think of such duties). Only social validity counts, i.e., validity in the communication between persons. As far as persons' legal duties are concerned, all of these duties are established according to the role of a citizen in the state and therefore they are objectively determined. "Subjectivization" of the

imputation, in the sense of an "individualization," is not the correct concept for this matter. The correct one would be a "special personification (shaped according to the citizen)." In other words, the will of complying with the norm is absolutely *standardized*.

Full capacity for imputation (culpability) cannot be described as a collection of psychological facts, but only as a lack of these standards. If someone misses the standard, he is guilty. That is, if someone does not fully provide the standard of the good citizen, then he has failed. This does not deal with measuring something in order to determine *its* size and to be happy about it. Rather, it tries to figure out if it corresponds to an "ought" size or not. A "subjectivizing" speech, which insists upon individual psychological events and dispositions, would miss the main point: the person's objectivity, from which we expect the capacity for sufficient law-abidance (*Rechtstreue*).[23]

It is absolutely meaningless to consider both "knowing" and "being able to know" only as psychological facts and dispositions. They are given or not, and this itself has no meaning. They gain meaning whenever they are released from an individual consciousness and can be conceived of as a part of a communicative event. Relating this to criminal meaning, it follows that intention and recklessness (knowing or being able to know what is unlawful) are not facts and dispositions of an individual consciousness or parts of a criminal behavior. They are outside carriers of behavior's meaning; they are symbol carriers[24] just like causality and hypothetical causality. Psychological facts belong to the criminal act only within this relationship to behavior's meaning, i.e., as carriers of a person's expression of meaning; the same holds for the victim. It's not

23. This is a mandatory consequence of the normative concept of culpability, i.e., culpability conceived of as blaming, which today dominates German scholarship. The norm is an objective claim, which is not at a person's disposal. For a short review of this development see Welzel, supra note 14, at 139-40. See also an in depth analysis by Hans Achenbach, Historische und dogmatische Grundlagen der strafrechtssystematischen Schuldlehre (1974).

24. See Günther Jakobs, Der strafrechtliche Handlungsbegriff 39-40 (1992).

forbidden that an individual intentionally or recklessly injures physically another individual. Rather, it's forbidden that a *person* neglects another *person*, as he denies what is common for both of them: the validity of the norm, which limits or links—for instance, the relationship between parents and children—their outside spheres. Because a person is only a person thanks to another person, we can reduce the prohibition of neglecting to the following simple prohibition: do not abandon the role of a person. "Remain in the role of a member of society"—that is the trivial basic norm of every society.

C. Meaning versus Nature

The opposition between "Person in Law" and "not a Person in Law" corresponds in the offender's side to the one of "Meaning" and "Nature,"[25] society and environment. We shall explain the relevance of this distinction for the category of culpability:

1. Those who are not capable of culpability do not participate in the production of common meaning. Their disappointing behavior seems to concern a normative expectation, but a closer look shows that no competent contradiction of the norm was produced. Only a natural, therefore meaningless, event took place. This is not to say that a mentally disabled man or a child is nature in every respect. Rather, they are indeed nature due to their lack of competence for delivering projects of the societal world and because of that they can have no culpability. Therefore, to the same extent that they cannot support norm's validity they cannot contradict it.

2. The foundation for the relieving effect of an unavoidable law's ignorance is not so easy to establish. This relief can

25. For the consequences relating the theory of complicity, see Günther Jakobs, Akzessorietät. Zu den Voraussetzungen gemeinsamer Organisation, 96 GA 253 (1996); Günther Jakobs, Objektive Zurechnung bei mittelbarer Täterschaft durch ein vorsatzloses Werkzeug, 97 GA 553 (1997).

only take place when the ignorance of law is compatible with the recognition of law's validity. For a person who recognizes law's validity, not complying with the norm is an inconsistency to be avoided in his own interest—that's why there is no need for sanctioning. For instance: the person who thoroughly wants to stick to the norms of a religion and therefore is open to every instruction can only assert with his behavior that he sees the normative situation in a certain way, but not that it should be seen this way. According to his comprehension, to determine how this situation ought to be is something pointed out by the objective circumstances of religion. In case that he unavoidably behaves mistakenly, his behavior does not have the meaning of a counter-project against the established religion, but a mistaken attempt of affecting this religion. Of course, we cannot speak about certainty when it gets to legal regulation, but we can certainly talk about a correct attitude towards the law: an unconditioned will to comply with the norm. If someone shows this will to comply, then he creates no opposite model of society; rather, he uselessly tries to affect the "is-situation." The foundation of law's validity is not affected by those behaviors. The pretended meaning of his behavior is the correct one. But since the person needs an external side, i.e., he is also nature and his overall capacities remain dependent on it, then nature occurs indeed by mistake.

Another question is how a legal system can be created in order to be able to recognize an unavoidable mistake according to its own understanding.[26] A legal system that pretends to be written in the hearts of everyone can recognize no unavoidable mistake, while this should be easily recognized in a system which is regulated and changeable from its own understanding. This holds as long as law's ignorance is not based upon indifference to law's validity, but upon a mistaken evaluation of the situation. No wonder that in the era of positivism there was a broad

26. Gerhard Timpe, Strafmilderungen des Allgemeinen Teils des StGB und das Doppelverwertungsverbot (1983); Jakobs, supra note 6, at 15-19; Jakobs, Strafrecht, supra note 1, §§ 19/6-13.

recognition of the relieving effect of law's ignorance.[27] Nowadays this recognition only affects marginal legislation and the disposable margins of the "core" legislation, but not the central area, i.e., it affects the field of practiced positivity and not the merely nominal positive area. Within this core, no mistake per se can ever exculpate; rather, it needs to be linked to a very special cause, like a mental illness or an "exotic" socialization, the latter only in extreme cases.

3. The content of a functional concept of culpability related to the validity of the norm can be shown in cases of excluded or reduced reasonableness: extenuating circumstance,[28] self-defense,[29] and the problem of the offender by conscience.[30] Since there is abundant information relating these subjects, I choose instead the problem of the ambivalence of a tempting situation—barely discussed—in order to develop my thesis that the judgment over culpability has nothing to do with "individualization" but with special "personalization."

According to German criminal law—and the same holds true for every legal system—the burglar who steals, taking advantage of a helpless victim in case of a fire or an accident, is punished harder. On the contrary, there will be mitigation if he takes advantage of the carelessness of the victim: he steals when the victim, without need, leaves

27. German criminal law distinguishes between (1) knowledge (or possibility to know) of the facts contained within the criminal prohibition and (2) knowledge (or possibility to know) of the wrongdoing itself. While in the first case, the possibility to know leads to a milder sanction, in the second case, the possibility to know *can* lead to a milder sanction, but it *does not have to*. This distinction brings considerable difficulties when one tries to define boundaries and, though it can be explained historically ("error iuris nocet"), it can no longer be supported academically.

28. Timpe, supra note 26, 297-316; Gerhard Timpe, Grundfälle zum entschuldigenden Notstand (§ 35 I StGB) und zum Notwehrexzess (§ 33 StGB), 24 JuS 859 (1984); Claus Roxin, Der entschuldigende Notstand nach § 35 StGB (Teil 1), 22 JA 97 (1990)

29. Claus Roxin, Über den Notwehrexzess, in Festschrift für Friedrich Schaffstein 105, 116, 120 (Gerald Grünwald et al. eds., 1975); Gerhard Timpe, Grundfälle zum entschuldigenden Notstand (§ 35 I StGB) und zum Notwehrexzess (§ 33 StGB), 25 JuS 117 (1985).

30. Jakobs, Strafrecht, supra note 1, §§ 20/20-27.

the object unattended. We can clearly imagine both situations: a person leaves his camera unattended because (1) he faints or (2) he's taking a look at the Duty-free shop. This way the situation is the same for the psyche of a person that has no respect for someone else's property. What justifies a different treatment? Obviously not the individuality of the offender. The first time the justification is society's need to provide sufficient protection for a helpless person; the second time it is the lack of legitimation to provide this protection to a victim who has given up such protection. The more the victim can legitimately demand for a will to comply with the norm, the more urgent it is for the offender to care for it. And vice versa: he can yield stronger to his natural impulses to possess, the less the offender's natural impulses to posses disturb society. The more his behavior disturbs, the more society will hold onto the meaning of his behavior. In other words: the offender is treated as a social impulse, as a person with the role of a citizen—this is something trivial, but today's speech about "individualizing" culpability's judgment misses it, at least verbally.