Imputation

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CONTENTS

I. ON THE LANGUAGE OF IMPUTATION

In this article I will consider some basic categories of a particular language and several of its grammatical structures. It is the language we use in the treatment and judgment of criminal law problems. It is not restricted to this one field, however, but

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rather has a wide range of application. It is the language of morals, whereby the word "morals" is to be understood in its broad sense as it was used during the seventeenth and eighteenth centuries and not in its narrow sense as often employed today.[1]

The language of morals is the language of daily human relationships. It includes not only descriptive but also evaluative, prescriptive, and ascriptive elements. Its prescriptive and evaluative elements were analyzed by Professor Hare in *The Language of Morals*.[2] In this article I will emphasize its ascriptive aspects which were discussed long before Professor Hart wrote *The Ascription of Responsibility and Rights*.[3] In fact, the practical philosophers of the Enlightenment already had given the ascriptive aspects of the language of morals considerable attention. Because the approach of these philosophers has become relatively unfamiliar, I will rely strongly on them when discussing the problems of ascription or imputation.

The main German philosophers of this period were Pufendorf, Wolff, Daries, and Kant.[4] The works of these authors were of both national and international importance to practical philosophy. For example, the international influence of Pufendorf's theory of imputation is evidenced by the pertinent articles of one of the main works of the Enlightenment, Diderot's and d'Alembert's famous *Encyclopédie, ou Dictionnaire Raisonné des Sciences, des Arts et des Métiers*. His theory was also adopted, or at least directly and indirectly criticized, by the professors of moral philosophy in the Glasgow chair during the eighteenth century. In keeping with the nature of the Freiburg Symposium for which the first draft of this article was written I will discuss not only the above referenced German authors, but also some of the English speaking critics and followers of Pufendorf such as Carmichael, Hutcheson, and Reid, all of whom were predecessors or successors to the more well-known Adam Smith in the Glasgow chair.[5]

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1. Pufendorf, for example, used the adjective "moral" generally to describe human action. *See* S. PUFENDORF, ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO (Hagae-Comitis 1660)(*passim*; *see, e.g.*, Lib. I Def. 1 § 2: "*actio humana seu moralis*").

2. R. HARE, THE LANGUAGE OF MORALS (1952).

3. Hart, *The Ascription of Responsibility and Rights*, 49 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 171 (New Series 1948-1949).

4. Samuel Pufendorf (1632-1694); Christian Wolff (1679-1754); Johann Georg Daries (1714-1791); Immanuel Kant (1724-1804).

5. Gershom Carmichael (1672-1729); Francis Hutcheson (1694-1747); Thomas Reid

It is impossible to exaggerate the influence of Pufendorf, Wolff, Daries and Kant on German legal theory. Although Kant's contribution has always been recognized, that of the others has almost been forgotten. Koch, one of the most influential criminal lawyers in the eighteenth century, and Feuerbach,[6] often called the founder of modern German criminal law doctrine, used the categories developed by Pufendorf and his successors. Koch[7] employed Wolff's principle, which I will consider next. Feuerbach[8] adopted Daries' theory of imputation. Many of the basic theses maintained today can be traced to these sources. In this Article, however, I will discuss only one aspect of the *historical* connection between the practical philosophy of the Enlightenment and modern criminal law.[9]

Regardless of its historical elements, this article is directed primarily toward substantive issues. It is concerned with developing a system of categories which are instrumental in the language of ascription. Initially, in Parts II through VI I will discuss the historical and theoretical procedure of distinguishing the two different levels of imputation from the concept of applying a law to a deed.[10] This distinction is the basis for the important difference between justification and excuse.[11] I will attempt to relate the retrospectivity of these concepts to their prospective counterparts, and will include in my discussion the concepts of "supererogatory" and "praiseworthy", which are opposite and parallel concepts to "contrary to duty" and "blameworthy". These concepts may appear to be prima facie irrelevant for the narrow field of criminal law. I would like to suggest, however, that although this distinction extends far beyond the boundaries of

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(1710-1796).

6. Johann Christoph Koch (1732-1808); Paul Johann Anselm Feuerbach (1775-1833).

7. J. KOCH, INSTITUTIONES IURIS CRIMINALIS Lib. I § 12 scholium 1 (Jenae 1758) (criticizing his former teacher J. R. Engau). Koch also alluded to the difference between ordinary and extraordinary imputation, thereby making use of the terminology of Daries, who had distinguished between "*actio libera*" and "*actio ad libertatem relata*". *See id.* Lib. I § 36 scholium.

8. *See* P.J.A. FEUERBACH, REVISION DER GRUNDSÄTZE UND GRUNDBEGRIFFE DES POSITIVEN PEINLICHEN RECHTS Erster Theil 150 (Erfurt 1799) (expressing the difference between "*imputatio facti*" and "*imputatio iuris*"). *See also* P.J.A. FEUERBACH, KRITIK DES KLEINSCHRODISCHEN ENTWURFS Erster Theil 80 (Giessen 1804) (employing the difference between ordinary and extraordinary imputation in Daries' terminology).

9. *See infra* notes 48-60 and accompanying text (discussing the history of the expression "*actio libera in causa*").

10. *See infra* notes 17-47 and accompanying text.

11. *See infra* note 80 and accompanying text.

criminal law, the conceptual contrast still provides arguments of importance thereto.[12] In addition to the difference between the two *levels* of imputation, I will also, in Parts VII through IX, distinguish between two different *types* of imputation.[13] This distinction provides categories for excluding imputation on both levels, one of which is the group of "excuses". In Parts XI through XIII I hope to provide an intact system of conceptual contrasts,[14] with an interim consideration of the theory of mistake in Part X.[15] Finally, in Part XIV I will suggest that speaking the language of imputation implies freedom as opposed to determinism.[16]

II. Application of Law Implies First Level Imputation

In *Philosophia Practica Universalis*, Wolff wrote that "[f]rom the application of a law to a deed it is clearly indicated that the (deed is an) event of such nature that it can be imputed."[17] This thesis both assumes a difference between the application of a law to an event and the imputation of this event, and also indicates an implicative relation between these two concepts. Applying a law to an event means also imputing the event as a deed. In other words, every application of a law to a deed implies the imputation of that deed.

Wolff did not create the concepts "application of a law to a deed" and "imputation". The former seems to have originated with Thomasius and its meaning is fairly clear.[18] Wolff defined it

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12. *See infra* notes 77-79 and accompanying text.
13. *See infra* notes 48-73 and accompanying text.
14. *See infra* notes 77-81 and accompanying text.
15. *See infra* notes 74-76 and accompanying text.
16. *See infra* notes 82-87 and accompanying text.
17. C. Wolff, Philosophia Practica Universalis Pars Prima § 598 (Francofurti et Lipsiae 1738 & reprint 1971) (". . . *ex applicatione legis ad factum intelligitur, actionem esse talem, quae imputari possit.*").

The word "*factum*", the perfect participle of "*facere*" or "to do", is to be understood in its original meaning as "deed". Wolff expressly differentiated between "*factum commissionis*" and "*factum omissionis*", i.e., commission and omission of an act. *Id.* at § 24. The modern English word "facts" or the modern German word "*Faktum*" cannot be viewed as appropriate translations of "*factum*" from the eighteenth century texts.

The word "*actio*" is to be understood as "event", for Wolff differentiated between "*actiones naturales vel necessariae*", which are mere physical events and "*actiones liberae*", which are events that are to be regarded as commissions of an act. *Id.* at § 12. When "*actio*" is used without any addition, therefore, it cannot be translated by its modern English counterpart "action".

18. C. Thomasius, Institutiones Jurisprudentiae Divinae Lib. III Cap. XI (Francofurti et Lipsiae 1688).

as follows: "One who applies a law to any particular deed judges whether the deed corresponds to the law or not."[19]

The concept "imputation" was introduced into jurisprudence by Pufendorf and is worthy of some explanation.[20] Kant, who in this respect was in agreement with Wolff and Pufendorf, provided the best known definition of the concept in his *Metaphysische Anfangsgründe der Rechtslehre*: "Imputation . . . is the judgment through which one is seen as the author (free cause) of an event, which is then called a deed and is subject to the law."[21] Accordingly, the application of a law to a deed and the imputation of that deed harmonize in that both are propositions or judgments in the logical sense of the word. The nature of the distinction between these two judgments, however, also is suggested in the above Kant quotation. To start off with, its statement that an event is called a "deed" if and because it "is subject to the law" is illuminating. Imputation of the deed thereby is distinguished from the application of the law, the former being the judgment that an event, as a "deed", is the possible object of the application of a law. Substituting this part of Kant's definition into the first cited quotation from Wolff makes Wolff's principle seem trivial; that is, every application of a law to a deed implies that the object of the application of the law is also judged to be a *possible* object for the application of that law. Stated differently, every subsumption of an event under a

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19. *See* C. WOLFF, *supra* note 17, § 598 scholium ("*Qui . . . legem ad factum aliquod applicat, is de ejus convenientia vel disconvenientia cum lege judicat.*").

This formula is similar to Locke's concept of moral relation and may be historically dependent thereon. *See* J. LOCKE, AN ESSAY CONCERNING HUMANE UNDERSTANDING Book II Chap. XXVIII § 4 (1694; 4th ed., London 1700), in COLLECTED ESSAYS at 350 (P. Nidditch ed. 1975).

20. *See* S. PUFENDORF, *supra* note 1, Lib. II, texts to Axioma I.

21. I. KANT, METAPHYSISCHE ANFANGSGRÜNDE DER RECHTSLEHRE (Königsberg 1797), *in* 6 KANT'S GESAMMELTE SCHRIFTEN 227 (Preussische Akademie der Wissenschaften ed. 1907) [hereinafter AKADEMIE AUSGABE] ("*Zurechnung (imputatio) . . . ist das Urtheil, wodurch jemand als Urheber (causa libera) einer Handlung, die alsdann That (factum) heisst und unter Gesetzen steht, angesehen wird.*").

Kant's use of the word "*Handlung*" is often ambiguous. Although the word "*Handlung*" in modern German means "act", correctly it must be translated as "event", since in this context Kant employed the word in the same manner as Wolff used the word "*actio*". *See supra* note 17. This use of the word "Handlung" was permissible in the eighteenth century. *See, e.g.*, C. WOLFF, GRUNDSÄTZE DES NATUR- UND VÖLCKERRECHTS § 1 (Halle 1754 & reprint 1980) (distinguishing "*natürliche (nothwendige) Handlungen*" and "*freye Handlungen*"). Only the latter are acts; the former are merely natural events.

law implies the judgment that the event *can be* subsumed under that law.

Wolff's thesis, however, only appears to be trivial for it leads to the question of when an event becomes the possible object of the application of a law. Realizing that the object of the application of a law is called a "deed" offers a first indication of the answer. A deed is something which is *done*. It follows that the possible object of the application of a law, in present terminology, is the commission or omission of an act.

An even more important guide to answering the question can be found in Kant's definition of imputation. Imputed events are seen as deeds which thereby are traced to a person as their author, whose decisive characteristic consists of being the free cause thereof.[22] "Free cause" was a technical term used during the seventeenth and eighteenth centuries. For example, Clauberg, Spinoza, Pufendorf and Leibniz used this term. Wolff wrote that "[f]ree cause is called one who acts freely, regardless of whether one considers the commission or omission of an act."[23] The judgment of deed imputation, therefore, is equivalent to the declaration that a concrete event is to be traced to a person who was the free cause thereof. A relatively unknown statement by Kant illustrates this point: "We impute something when it simply is assigned to a person, i.e., when it is conceived of *as having originated in freedom.*"[24] Consequently, Wolff must be interpreted as stating that any application of a law implies a judgment of imputation, i.e., the judgment that the event to which the law is applied is to be traced to a (particular) person as its free cause.

It is of particular interest to recognize the historical and intellectual framework surrounding Wolff's principle. In order to understand this aspect, one first must realize that the concepts "deed" and "application of a law to a deed" have a completely *neutral* meaning. This neutrality with respect to these concepts is obvious from the fact that the application of a law to a deed can result in the deed either corresponding or not corresponding

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22. *See also* 6 AKADEMIE AUSGABE, *supra* note 21, at 223 ("*Person ist dasjenige Subject, dessen Handlungen einer Zurechnung fähig sind.*") [A person is that subject whose acts are capable of imputation.].

23. *See* C. WOLFF, *supra* note 17, § 526 ("*Causa libera dicitur, quae libere agit, sive actio fuerit positiva, sive privativa.*").

24. *See* 19 AKADEMIE AUSGABE, *supra* note 21, at 157, reflexion 6775 ("*wir rechnen es (etwas) zu, wenn es simpliciter zugeeignet, d.i. als aus freyheit entsprungen vorgestelt wird.*").

with the law applied. The term "imputation" is also neutral. Contemporaneous to Wolff's *Philosophia Practica Universalis*, Hutcheson expressly determined that "imputation" is "one of the voces mediae".[25] Hutcheson uses the word "to impute", therefore, not only when an "action" is imputed to a person as "vitious", but also when it is imputed as "virtuous".[26]

Next, one must consider that the concept "application of a law to a deed", at least primarily, concerns the application of law *after* the deed has happened. Imputation also usually takes place *retrospectively*, or at most *simultaneously*, but never prior to the imputed performance or forbearance. One cannot speak of "imputation" in relation to an act that has neither been committed nor omitted.

By considering the neutrality and retrospectivity of these concepts it becomes clear that Wolff's quotation, written approximately four decades before Kant's critical philosophy, formulates an implication that is parallel to the maxim that " 'ought' implies 'can' ", a recurring theme in today's moral philosophy and deontic logic, the first articulation of which is often attributed to Kant.[27] The formula " 'ought' implies 'can' ", to-

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25. F. HUTCHESON, A SYSTEM OF MORAL PHILOSOPHY (posthumous London 1755), *in* 5 COLLECTED WORKS OF FRANCIS HUTCHESON 228 (B. Fabian ed. 1969) [hereinafter COLLECTED WORKS].

26. F. HUTCHESON, A SHORT INTRODUCTION TO MORAL PHILOSOPHY (Glasgow 1747), *in* 4 COLLECTED WORKS, *supra* note 25, at 125.

27. References to pertinent passages in Kant's works can be found in L. BECK, A COMMENTARY ON KANT'S CRITIQUE OF PRACTICAL REASON 200 n.74 (1963). One of the most famous passages is not quoted by Professor Beck:

> *Die Moral ist schon an sich selbst betrachtet eine Praxis in objectiver Bedeutung, als Inbegriff von unbedingt gebietenden Gesetzen, nach denen wir handeln sollen, und es ist offenbare Ungereimtheit, nachdem man diesem Pflichtbegriff seine Autorität zugestanden hat, noch sagen zu wollen, dass man es doch nicht könne. Denn alsdann fällt dieser Begriff aus der Moral von selbst weg (ultra posse nemo obligatur).* [Morality in itself is a practice in the objective meaning of the word, a unity of unconditionally prescribing laws according to which we *ought* to perform, and after having admitted the authority of such a concept of obligation, it is obvious absurdity to say that one *cannot* do it, because in the latter case this concept of obligation would dissolve (*ultra posse nemo obligatur*).]

I. KANT, ZUM EWIGEN FRIEDEN (Königsberg 1795), *in* 8 AKADEMIE AUSGABE, *supra* note 21, at 370.

However, it is not true that the inference from "ought" to "can" was first formulated by Kant. Rather, the argument seems to have been employed in the eighteenth century by several writers. H. ACTON, KANT'S MORAL PHILOSOPHY 48 (1970), refers to Reid's *Essays on the Active Powers of Man* (1788). Indeed, Reid wrote in these essays: "Our counsels, exhortation, and commands imply a belief of active power in those to whom they are addressed." *See* THE WORKS OF THOMAS REID 517 (W. Hamilton ed., 5th ed. Edin-

gether with Schiller's ingenious distortion "Du kannst, denn du sollst!" (you can, since you ought!),[28] reflects the *pro*spective consideration of a deed. It relates to the present and future and means that every obligation, in the active sense of the word,[29] implies the judgment that the person thereby obligated *can do* or *will be able to do* what is required. The quotation of Wolff, on the other hand, concerns the *retro*spective consideration of an act. It relates to the past and states that every application of a law implies the judgment that the occurrence or non-occurrence of the event in question was the *free* performance or forbearance of an act, i.e., that the person involved *could* have avoided committing or omitting it.

III. Merit and Demerit: Second Level Imputation

Wolff's differentiation between "application of a law to a deed" and "imputation", and his simultaneous determination of the implicative relation between these two concepts constituted

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burgh 1858); *see also id.* at 447. George Turnball, Reid's teacher at Marischall College, Aberdeen, wrote as early as 1740:

> With respect to our natural disposition to approve or disapprove actions, or our sense of good and ill desert, it necessarily implies in it, or carries along with it, a persuasion of its being in the power of the person blamed or commended, to have done, or not done the action approved or disapproved.

G. Turnball, The Principles of Moral Philosophy I, 18 (London 1740 & reprint 1976).

28. Schiller, *Die Philosophen* (1796).

29. As interpreted by Richard Cumberland in R. Cumberland, De Legibus Naturae, Disquisitio Philosophica Ch. V § 27 (2nd ed. Lubeca et Francofurti 1683) (1st ed. 1672). "*Obligatio est actus Legislatoris, quo actiones Legi suae conformes eis quibus lex fertur necessarias esse indicat.*" [Obligation is that act of a legislator by which he declares that actions conformable to his law are necessary to those for whom the law is made.] R. Cumberland, A Philosophical Inquiry into the Laws of Nature (J. Maxwell trans. London 1727 & reprint 1978).

Cumberland's definition of obligation was recognized in Europe almost immediately. Pufendorf, although not adopting it, quoted it as early as 1684 in S. Pufendorf, De Jure Naturae et Gentium libri octo Lib. I Cap. VI § 5 (2d ed. Francofurti 1684). Wolff, in the eighteenth century, distinguished between active and passive obligation, the latter being the older definition of obligation used in Roman Law. *See* C. Wolff, *supra* note 17, § 118. Wolff's distinction was widely accepted and employed by others, including Kant. *See* I. Kant, Metaphysische Anfangsgründe der Tugendlehre (Königsberg 1797), *in* 6 Akademie Ausgabe, *supra* note 21, at 417.

I am inclined to think, even from an historical point of view, that the modern formula " 'ought' implies 'can' " presupposes Cumberland's definition of obligation. A much older insight, of course, is that there is a connection between the "ought" and the "can". It appears, however, that before Cumberland it was usually said that "can" is a necessary condition for "ought". The conclusion that "ought" is a sufficient condition for "can", contrarily, was not drawn. *See also infra* notes 48-60 and accompanying text (discussing another aspect of the connection between these conditional propositions).

an important step in the analysis of retrospective judgments concerning performances and forbearances. Daries, in *Institutiones Jurisprudentiae Universalis*,[30] took a further step by differentiating between "first level" and "second level" imputation.[31]

In order to appreciate the entire impact of Daries' distinction it is useful to consider the concept of supererogation.[32] Although Kant's moral philosophy allegedly did not acknowledge supererogatory acts, he did place the corresponding concept in a systematic framework. For our purposes the following quotation is sufficient:

> What one does . . . that is more than one can be compelled to do by the law is meritorious (*meritum*); what one does that is only in accordance therewith is indebtedness (*debitum*); finally what one does that is less than the latter requires, is . . . demerit (*demeritum*). The legal effect of demeritorious conduct is punishment (poena); of meritorious conduct, reward (*praemium*) . . . ; the correspondence of conduct to indebtedness has no legal effect.[33]

The citation presupposes the concept of application of a law to a deed and the thereby implied concept of imputation and provides that the complete application of a law can have only one of three possible results. It may be determined that a particular

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30. J. DARIES, INSTITUTIONES JURISPRUDENTIAE UNIVERSALIS, *Introductionis ad Jus Naturae et Gentium Pars Generalis* § 211 (Jenae 1740).

31. Daries used the terminology "*imputatio facti*" and "*imputatio iuris*".

32. The long-neglected concept of supererogation was revived in Urmson, *Saints and Heroes*, in ESSAYS IN MORAL PHILOSOPHY 198 (A. Melden ed. 1958). A more recent examination of the concept can be found in D. HEYD, SUPEREROGATION (1982).

33. *Was jemand . . . mehr thut, als wozu er nach dem Gesetze gezwungen werden kann, ist verdienstlich (meritum); was er nur gerade dem letzteren angemessen thut, ist Schuldigkeit (debitum); was er endlich weniger thut, als die letztere fordert, ist moralische Verschuldung (demeritum). Der rechtliche Effect einer Verschuldung ist die Strafe (poena); der einer verdienstlichen That Belohnung (praemium) . . . ; die Angemessenheit des Verfahrens zur Schuldigkeit hat gar keinen rechtlichen Effect.*

See 6 AKADEMIE AUSGABE, *supra* note 21, at 227. Kant's distinction is historically dependent on a similar differentiation made by Pufendorf. *See supra* note 1, Lib. I Def. XIX *et seq*. Pufendorf distinguished between good actions, profitable and not owed; actions the performance of which is owed (*debitum*); and bad actions. The "material effect" of the first kind of action is merit (*meritum*) and the "material effect" of the third kind is demerit (*demeritum*), while the second kind of action has no "material effect". Pufendorf's distinction is superior to Kant's because it does not mix the trichotomy of the different kinds of actions with the trichotomy of their "material effects" or non-effects, as Kant's distinction seems to do.

person has (1) done more, (2) precisely as much, or (3) less than the particular law requires of him.

Two examples illustrate how this determination is reached. First, in Germany, the Criminal Code requires one to render aid if the interest to be protected substantially outweighs the interest that will be damaged through the rescue.[34] Assume that *A* is drowning and *B* is his possible rescuer. *B* does more than the law requires if he risks his own life to save *A*. *B* fulfills his legal obligation if he interrupts an afternoon walk to save *A*. *B* does not fulfill his duty if he does not save *A* even though he would only have to interrupt his afternoon walk to do so. Second, it is generally forbidden to kill other human beings, although in certain situations, e.g., in self-defense, killing may be permissible. Under this law, *D* does not fulfill his duty if he kills *C* while not acting in self-defense. He fulfills his duty if he does not kill *C* in any normal situation. He does more than the law requires if he does not kill *C* even though in the particular situation he would be permitted to in self-defense.

In reliance on these examples, I would suggest defining every commission or omission of an act as "supererogatory" when an individual does more than the law requires, as "according to duty" when he does exactly what the law requires, and as "contrary to duty" when he does not do what the law requires. Consequently, a sufficient condition for the judgment that an act is supererogatory is the actor doing more than what the law requires of him; a sufficient condition for the judgment that an act is according to duty is the actor doing exactly what the law requires of him; and a sufficient condition for the judgment that an act is contrary to duty is the actor doing less than the law requires of him.

It is not within the scope of this Article to consider whether Kant and some of his predecessors, e.g., Pufendorf,[35] were right in their thesis that the mere fulfillment of a duty has "no legal effect". I intend to limit this discussion to supererogatory acts on the one hand and acts contrary to duty on the other. From the Kant citation it is clear that he held doing more than required not only to be a sufficient condition for the supererogatory character of the act judged, but also to be a sufficient condition for speaking of merit. Similarly, he saw doing less than

34. STRAFGESETZBUCH [StGB] § 323(c).

35. *See supra* note 33.

required not only to be a sufficient condition for speaking of an act being contrary to duty, but also to be a sufficient condition for speaking of demerit. By viewing the matter this way, Kant overlooked the importance of Daries' distinction between first level imputation, application of a law to a deed and second level imputation.[36]

According to Daries, first level imputation, i.e., the "declaration that someone is the author of a deed",[37] precedes the application of a law to the deed. On the other hand, second level imputation, i.e., the "judgment as to the merit of the deed",[38] succeeds the application of the law.[39] This sequence implies that the judgment as to the merit or demerit of a deed, i.e., second level imputation, is logically different from the application of the law to that deed and its possible result (supererogation, fulfillment of duty, or violation of duty). Consequently, the supererogatory nature of an act may be a necessary, but is not a sufficient, condition for the assumption of merit, and an act being contrary to duty may be a necessary, but is not a sufficient, condition for the assumption of demerit.

Daries' thesis corresponds more closely than Kant's to the way in which we form our own (moral) judgments. The consequence of Kant's tenet is that neither duress, i.e., being forced through threats, as opposed to irresistible physical compulsion, nor intoxication, i.e., being heavily as opposed to totally intoxicated, affect merit or demerit. Since duress and heavy intoxication neither affect first level imputation of our performances and forbearances[40] nor influence the purport of the requirements placed upon a person, they do not exclude the supererogatory nature of an act or its character as being contrary to duty. It follows that, according to Kant's thesis, duress and heavy intoxication do not exclude merit for a supererogatory act or demerit for a violation of duty since supererogation is a sufficient condition for merit, and violation of duty is a sufficient condition for demerit.[41]

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36. "*Imputatio facti*", "*applicatio legis ad factum*", "*imputatio iuris*". The first and third expressions became widely used technical terms in the jurisprudence of the eighteenth and even nineteenth centuries.

37. *See* DARIES, *supra* note 30, at § 213 ("*declaratio quod aliquis sit auctor facti*").

38. *Id.* at § 218 ("*iudicium de merito facti*").

39. *Id.* at § 225 scholium.

40. *See infra* text Part V.

41. I do not think that Kant actually intended these inferences. Nevertheless, the conclusion drawn in the text follows from the quoted Kant passage.

It is easy to demonstrate, however, that disregarding duress and heavy intoxication is counterintuitive when determining merit or demerit. For example, if without being obligated to do so *B* risks his own life to save *A* because he is being forced at gunpoint or because he is under the influence of a drug, then, although the act is clearly supererogatory, doubt exists as to its merit. At least there would seem to be no particular reason for praising the actor's "heroism". The same conclusion must be reached for the opposite case. If *D* unlawfully kills *C* because he is being forced at gunpoint or because he is under the influence of a drug, then, although the act is clearly in violation of duty, doubt exists as to its demerit. In other words, as expressed within criminal law terminology, doubt exists as to its blameworthiness. In these cases we see reasons for excluding second level imputation regardless of the fact that the act is supererogatory or contrary to duty.

Accordingly, one must distinguish not only between the application of a law to a deed and imputation of that deed, as developed by Wolff, but also between application of a law to a deed and imputation of its merit or demerit and, therefore, between two levels of imputation, as elaborated by Daries.

IV. On the Difference Between the Law and the Rules of Imputation

The considerations in Part III reveal the necessity of distinguishing strictly between the law with respect to which we judge a concrete act as being supererogatory, according to, or contrary to duty, on the one hand, and the rules relevant to determining whether the act can be imputed on each of the two levels of imputation, on the other. This problem will be discussed presently. In addition, one must compare and contrast the rules for imputation on the first level with the rules for imputation on the second level. This latter problem will be discussed in Part V.[42]

The difference between the applicable law and the set of rules of imputation becomes clear when one considers that, at least primarily, each is addressed to a different party. The law necessarily has a *pro*spective character. It tells me what I have to do or not to do in the present or future. It, therefore, consists of prescriptive sentences in the narrow sense, i.e., of norms which demand or forbid certain types of acts such as, "Thou

42. *See infra* text accompanying notes 45-46.

shalt render aid!" or, "Thou shalt not kill!" which consequently are addressed directly only toward the party who thereby is placed under a duty. In addition, the law contains rules of exception, namely, rules releasing a person from a duty to act and rules permitting certain conduct which is otherwise forbidden. These rules necessarily belong to the same set of norms as the prescriptive sentences since they cancel or nullify the latter in specified cases. The norms of exception, therefore, also are addressed directly only toward the duty bound party. Contrarily, when a judge, in the broadest sense of the word,[43] uses the norms within the law, they lose their prospective character. The norms then are employed *retro*spectively in order to determine whether the duty bound party exceeded, exactly fulfilled, or did not fulfill the relevant requirements. This loss is also evident from the grammatical form in which the law is relevant to the judge. Retrospectively, as the laws are applied, they can be expressed only in the subjunctive and perhaps as a question, "Was he released of his duty to render aid?" or, "Was he permitted to kill him?" This grammatical form illustrates the somewhat parasitic nature of the means employed in applying the law and shows that the law is addressed to the judge only indirectly.

In contrast, the rules of imputation are addressed exclusively to the judge.[44] He alone can ask whether an event is a deed to which he can apply the law, and whether an act evaluated as supererogatory or contrary to duty is deserving of merit or demerit. These questions are not and *cannot* be relevant for the duty bound party since prospectively that party can ask only what he ought or ought not to do. He cannot ask whether an event that has not yet occurred is a deed, and therefore, he also cannot ask whether a deed which has not yet occurred is deserving of merit or demerit. He could ask in a fictitious and subjunctive manner, "What if I did (not) do . . .?" This formulation also illustrates that the rules of imputation are directed only toward the retrospective determination of the judge.[45]

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43. *See infra* note 44.

44. 6 AKADEMIE AUSGABE, *supra* note 21, at 227. Kant expressly differentiated between "*rechtskräftige*" and "*nur beurteilende Zurechnung*" ["judicial" and "merely decisional imputation"], thereby indicating that a judge who can apply a law and make judgments of imputation need not be a public officer, but can be anyone who "judges" an event to be a possible deed. It is obvious that a judge in this sense can also be the duty bound party after the deed has been committed.

45. When Fletcher writes that "there is at least one structural principle immanent in the criminal law, the distinction between wrongdoing and attribution," he refers pre-

It should be noted, therefore, that the rules of imputation do not belong to the "law" as the term is used in our context. Instead, the two sets of norms, i.e., those pertaining to the law and those pertaining to the rules of imputation, are completely different. It does not matter that they are often combined within the same "legal system" because they are thereby united in a merely external manner.

V. On the Difference Between the Two Levels of Imputation

The word "deed", within the context of the expressions "application of a law to a deed" and "imputation of a deed", may seem confusing, and its Latin counterpart likely caused some problems in the past. We, therefore, should ask how first level imputation functions in the process of making a (moral) judgment about an act. It is clear that first level imputation prepares for the application of the law to the act. Stated more precisely, the judgment to impute on the first level constitutes the object to which the law can and will be applied.

First, the judgment of first level imputation declares that the event in question, to which the law is to be applied, is a deed, i.e., the commission or omission of an (human) act. Not every conceivable event can be subsumed under law. For example, an avalanche which leads to the death of a human being is not the "commission of an act" causing death. The norms remain inapplicable if and because the occurrence cannot be imputed to anyone. Similarly, *E* does not commit a battery, at least prima facie, when *F*, with irresistible physical compulsion, pushes *E*'s elbow into the face of another individual. Here too, the prohibition against battery (for *E*) is inapplicable. The same is true of an individual who is so intoxicated that he cannot con-

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cisely to the distinction between the law to be applied and the rule of imputation within the narrower scope of criminal law. G. Fletcher, Rethinking Criminal Law 515 (1978). The following quotation shows that he also relies on the difference between the addressees of the different sets of rules:

> The question of wrongdoing is resolved under the set of primary legal norms, prohibiting or requiring particular acts, as supplemented by norms of justification, which provide a license to violate the primary norms. The question of attribution is resolved under an entirely distinct set of norms, which are directed not to the class of potential violators, but to the judges and jurors charged with the task of assessing whether individuals are liable for their wrongful acts.

Id. at 491-92.

trol his physical movements and who falls through a window. In this case the prohibition against property damage is also inapplicable. Every application of a law to the occurrence or the non-occurrence of an event assumes that we can speak of a "deed". The judgment to impute the event or its non-occurrence to an individual as a "deed" has the purpose of making it suitable for the application of a law.

First level imputation, however, does not declare merely that a particular event is to be seen as a deed. It is never a pure "deed" separate from its context which is subsumed under a law, but rather it is a deed *in all of its relevant aspects and in the relevant situation in which it was done.* The relevancy of particular aspects of the deed and situation can be seen from the law to be applied. Referring to the previous examples involving rescue and self-defense, the relevant aspects of a rescue, according to the law to be applied, are not only the rescue itself, but also the circumstances under which it took place, e.g., the rescue could be undertaken only if the rescuer risked his own life or only if he interrupted his afternoon walk. Furthermore, the relevant aspects of a homicide, according to the law to be applied, are not only the killing itself, but also the circumstances under which it took place, e.g., the actor acted in self-defense. These circumstances, therefore, also play a role in first level imputation.

The judgment of first level imputation then is a judgment that includes a unity of ascriptive and descriptive elements. From a multitude of existing facts, particular facts are selected, and in view of the forthcoming application of the particular law in question, interpreted as being a relevant deed in a relevant situation. First level imputation usually occurs in the description that someone passing judgment gives of even the most rudimentary of cases. When one says, "Smith risked his own life to save Jones from drowning!" or, "Mitchell killed Miller even though Miller did not attack him!" one imputes to Smith and Mitchell a group of physical occurrences as a particular act. This imputation, of course, occurs in light of the applicable law for which certain circumstances are relevant and other circumstances are (still) irrelevant.

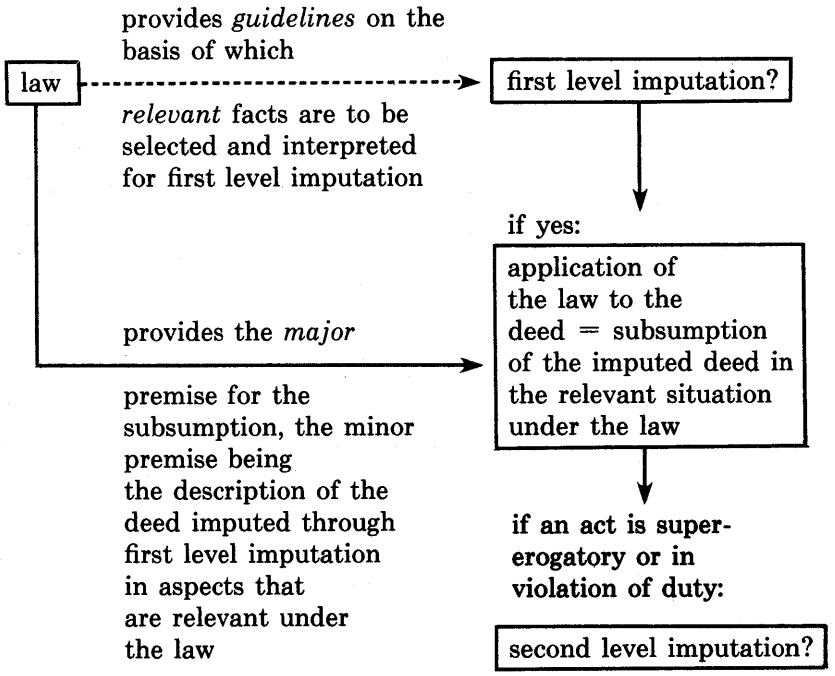
Contrarily, the circumstances of the situation in which an act was committed which indicate duress or heavy intoxication are not mentioned in the judgment of *first level* imputation. Although these circumstances may be relevant for the final judg-

ment as to act and agent, they do not affect the determination of whether an act is supererogatory, according to, or contrary to duty. The judgment of *first level* imputation concerns only those aspects of the deed that are relevant to answer *this latter* question. After the application of law, if the result of this application is that the act is either supererogatory or contrary to duty, the question of *second level* imputation is raised and possibly answered in the negative, for instance, in certain cases of duress and intoxication. As a result, a supererogatory rescue undertaken in a situation of duress or under the influence of alcohol perhaps will not be imputed to the rescuer as merit. A homicide, which is in violation of duty, committed in similar circumstances perhaps will not be imputed to the actor as demerit, i.e., the act in the latter case may be excused. Contrarily, a supererogatory rescue, for which no reason exists to exclude imputation to merit will be imputed to the rescuer also on the second level, i.e., the act is seen as meritorious and the actor, therefore, will be praised and possibly rewarded. A homicide in violation of duty, for which no excuse exists, will also be imputed to the actor on the second level, i.e., the act is seen as "blameworthy" and the actor, therefore, will be reprimanded and punished. Second level imputation of a supererogatory act is the praise awarded and of an act in violation of duty is the reprimand given.

VI. Review of Topics

The following table provides a review of the sequence of questions asked and answered in connection with imputation and the application of law. A system of *pre*scriptions and the pertinent exceptions is provided and applied *retro*spectively. This system is called "law" and the sequence of the process is indicated by arrows:

TABLE ONE



The judgments we make when we view an act retrospectively are represented on the right side of Table One. Every application of law is necessarily preceded by first level imputation. Second level imputation is dependent on the application of the law to the extent that certain results are reached; that is, the deed is judged to be supererogatory, or contrary to duty. In addition, Table One indicates a particular point of difficulty, namely, that the law is not only important at the time of its application but also at a preceding stage of the evaluation. The law gives the standard for determining which facts under what circumstances are to be selected for first level imputation. This stage is often overlooked, since many legal discussions begin with facts, which have been preselected and interpreted according to the relevant law, and which are organized into more or less complete case descriptions. This problem was discussed in the eighteenth century under the terminology "deed species",[46]

46. "*Species facti*". *See, e.g.*, J. DARIES, *supra* note 30, at § 212; 2 J. DARIES, OBSERVATIONES JURIS NATURALIS, Obs. 46 (Jenae 1754); K. v. MARTINI, DE LEGE NATURALI EXERCITATIONES SEX § 174 scholium (*editio nova* Vindobonae 1770).

and at least Kant recognized the relevance of the law for the constitution of the deed to be subsumed thereunder when he wrote:

> In establishing the circumstances of the deed . . . it is necessary to consider the law even though it has not yet been applied since it contributes to a more complete determination of the deed.[47]

VII. Extraordinary Imputation: The Classic Problem and Solution

As is clear from Kant's definition,[48] the ascriptive element, through which a person is determined to be the free cause of a deed, is undoubtedly the most important, although not the only[49] element of first level imputation. Every explicit or implicit imputation assumes that the person to whom a deed is imputed, in committing that deed, acted freely. It follows that no event can be imputed as the commission of an act if it is judged to have been physically necessary. Similarly, no inactivity can be imputed as the omission of an act if the corresponding activity is judged to have been physically impossible. Hutcheson referred to the statement, "The impossible and the necessary cannot be imputed", as a "common maxim".[50]

This maxim is logically connected to the classic formula from the *Digest*: "As to the impossible there is no obligation".[51] If one expands upon this formula to include not only the impossible but also the necessary, then it states that possibility and

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47. "*Bey Ausmittelung der circumstantiarum in facto ist es . . . schon nöthig, auf das Gesetz Rücksicht zu nehmen, da, wenngleich hier das Gesetz noch nicht imputirt wird, es doch zur völligeren Bestimmung des facti selbst beyträgt.*" *See* 27.2,1 Akademie Ausgabe, *supra* note 21, at 563. This quotation is from Kant's lecture on the metaphysics of morals according to Vigilantius. *Id.* at 475-732.

Kant's expression for the application of a law to a deed was "*imputatio legis*". *See, e.g.*, 27.1 Akademie Ausgabe, *supra* note 21, at 159. This citation is from Kant's lecture on practical philosophy according to Powalski. *Id.* at 91-235. Kant followed Alexander Gottlieb Baumgarten in using this terminology. A. Baumgarten, Initia Philosophiae Practicae § 125 (Halae Magdeburgicae 1760). *See* 19 Akademie Ausgabe, *supra* note 21, at 61. To avoid misunderstanding it was necessary to translate Kant's expression "*das Gesetz (wird) noch nicht imputirt*" as it has been in the text.

48. *See supra* notes 17-29 and accompanying text.

49. *See supra* text Part V.

50. *See* 5 F. Hutcheson, *supra* note 25, at 229. Hutcheson used the Latin sentence "*Impossibilium et necessariorum nulla est imputatio.*"

51. "*Impossibilium nulla obligatio est*"; *see* Celsus D. 50.17.185 (*in* Corpus Iuris Civilis).

contingency, i.e., non-necessity, are necessary conditions for every obligation. It follows that every act of obligation is a sufficient condition for the assumption that the person placing the obligation sees what he requires to be both possible and contingent. This latter proposition is valid for the prospective consideration of law and is tantamount to the formula " 'ought' implies 'can' ". If we change it into the retrospective, it states that every application of a law to a deed is a sufficient condition for the assumption that the deed imputed is seen by the judge to have been both possible and contingent—a proposition tantamount to Wolff's maxim.[52] Only the possible and contingent, therefore, can be imputed. It follows that the impossible and the necessary cannot be imputed—Hutcheson's "common maxim"!

This maxim gives rise to the problem of how to deal with cases in which, although the particular event in question was physically necessary or impossible, the necessity or the impossibility is imputable to the individual concerned. The problem is presented in the same manner for both supererogatory acts and acts contrary to duty. Depending upon the relevant law and the concrete circumstances of the case, breaking a window may be prohibited. On the other hand, it may be demanded or neither prohibited nor demanded but perhaps more than required. It may be demanded, for example, to save a person threatened by a gas leak. It may be more than required if the glass can be broken only by risking one's own life. This act, therefore, could be judged as a violation of duty, a fulfillment of duty, or as a supererogatory act. Assuming, however, that a person's elbow was pushed with irresistible physical compulsion through the window, then at least prima facie one cannot impute this occurrence to the individual. It cannot be determined, therefore, to be contrary to duty, according to duty, or supererogatory. In such a case, the question of the imputability of the event is presented in a different manner. If the individual is judged to be "responsible" for the fact that he found himself in a situation of irresistible physical compulsion, then one must ask whether imputation of breaking the window is permissible *regardless* of the actual coercion since the *situation* is imputable to the individual involved.

The classic solution to this problem is connected with the expression "*actio libera in causa*" which is still commonly used

52. *See supra* notes 17-29 and accompanying text.

among criminal lawyers today.[53] Although this solution is of earlier origin, it was elaborated on by the writers of the seventeenth and eighteenth centuries, in particular by Pufendorf. In his *Elementorum Jurisprudentiae Universalis libri duo*,[54] Pufendorf distinguished between "what in itself was in the power of an individual to do or not to do", "what in itself was not in the power of an individual but in its cause was in his power" and "what neither in itself nor in its cause was in the power of an individual".[55] If a person who was not irresistibly coerced broke a window, then the act would be "what in itself was in the power of an individual to do or not to do". If, on the other hand, that person was irresistibly coerced to a movement, the outcome of which was the broken window, then the event would be "what in itself was not in the power of an individual". "What in itself was not in the power of an individual", nonetheless can be "what in its cause was in his power", which according to Pufendorf, is the case when the state of being irresistibly compelled is to be imputed to the individual concerned. On the other hand, it could be that the state of being irresistibly coerced is not imputable to that individual. In such a case breaking the window is "what neither in itself nor in its cause was in the power of the individual". In the eighteenth century Pufendorf's somewhat awkward phrase "what was in the power of an individual to do or not to do" was translated into "*actio libera*" (free act), which permitted a distinction exactly parallel to Pufendorf's to be made. The distinction was between "*actio libera in se*" (act free in itself), "*actio non in se, sed tamen in sua causa libera*" (act not free in itself but free in its cause), and "*actio neque in se, neque in sua causa libera*" (act neither free in itself nor free in its cause). The current term "*actio libera in causa*" (act free in its cause), is merely an abridgment of the second phrase used in expressing this distinction.[56] Removed from its conceptual context, it is

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53. In addition to the vast European literature employing the expression, see, e.g., M. GUR-ARYE, ACTIO LIBERA IN CAUSA IN CRIMINAL LAW (1984) (Israel); 1 E. BURCHELL & P. HUNT, SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE 291 (2d ed. 1983); C. SNYMAN, CRIMINAL LAW 135 (1984) (South Africa); J.C. DE WET & SWANEPOEL, STRAFREG 122 (4th ed. 1985) (South Africa).

54. *See* S. PUFENDORF, *supra* note 1, Lib. II, Axioma I and its accompanying text.

55. "*Id quod in se penes aliquem fuit*"; "*id quod non in se, sed tamen in sua causa penes aliquem fuit*"; "*id quod neque in se neque in sua causa penes aliquem fuit*".

56. As I have shown elsewhere, the modern use of the expression is historically dependent on Pufendorf's distinction. *See* Hruschka, *Ordentliche und ausserordentliche Zurechnung bei Pufendorf*, 96 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT

often misunderstood today and sometimes used merely as a catch-word.

The thesis underlying Pufendorf's distinction is that an individual may be imputed with both what in itself was within his power and what in its cause was within his power. Only what neither in itself nor in its cause was within his power cannot be imputed. Stated in the terminology of the eighteenth century, an individual may be imputed with both an *actio libera in se* and an *actio non in se, sed tamen in sua causa libera*. Only an *actio neque in se, neque in sua causa libera* cannot be imputed. Pufendorf expressly declared: "Not only those events which *at the present time* are within our power as to their occurrence or non-occurrence can be imputed to us, but also those, the faculty of performing which *previously* were within our power if through our own fault we lost control thereof."[57]

This tenet was quickly accepted in Europe. Hutcheson in obvious reliance on Pufendorf wrote:

> These alone are the necessary and wholly unimputable events which neither any present desire or action of ours can prevent, nor could they have been prevented by any prior diligence or care which we ought to have had about such matters. Such as prior forethought and care could have prevented, tho' they be now unavoidable, are in some measure voluntary and imputable.

The same is valid for inactivities:

> So the omissions of actions now impossible are justly imputed, when they might have been possible, had that previous diligence been exerted which becomes a good man.[58]

The writers of the seventeenth and eighteenth centuries had the requisite vocabulary to state the relevant problem.[59] In order

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661 (1984).

57. *See* S. PUFENDORF, *supra* note 1, Lib. II Axioma I § 7 ("*Possunt . . . imputari non ea tantem quae pro praesenti tempore ut fiant vel non fiant in nostra sunt potestate, sed etiam, quorum perficiendorum facultas nobis antea adfuit, nostra autem culpa est amissa.*").

58. *See* 5 F. HUTCHESON, *supra* note 25, at 229.

59. It should be noted that the writers of the seventeenth and eighteenth centuries did not attempt to invent a rigid terminology. Pufendorf sometimes differentiated between "*coactum in se, sed non in sua causa*" [what is compelled in itself but not in its cause] and "*coactum in se et in sua causa simul*" [what is compelled both in itself and in its cause], which require "*non-coactum*" [what is not compelled] as the starting point for the trichotomy. *See* S. PUFENDORF, *supra* note 1, Lib. II Obs. II, § 4. Hutcheson juxtaposed "*involuntaria in se, sed non in sua causa*" [things which are involuntary in them-

to display this problem and its possible solutions in a language coherent with the language of imputation used in this Article, however, it is necessary to introduce a new terminology. I suggest, therefore, differentiating between two types of imputation, *ordinary* and *extraordinary* imputation of an event or inactivity as the commission or omission of an act. An occurrence (breaking a window and thereby causing property damage) is imputed as the commission of an act *ordinarily* when it is judged to have been contingent at the time it happened for the individual to whom it is to be imputed. Similarly, an inactivity (not breaking a window and thereby not saving another threatened by escaping gas) is imputed as the omission of an act *ordinarily* when it is judged that the corresponding act was possible at the time it was not performed by the individual to whom the inactivity is to be imputed. On the other hand, if the occurrence was physically necessary (his elbow was irresistibly forced through the glass), or impossible (he was irresistibly prevented from breaking the glass), then by definition ordinary imputation cannot take place. The question, however, still remains whether one can *extraordinarily* impute the occurrence or non-occurrence of the event as the commission or omission of an act because the situation of necessity or impossibility is imputable to the individual involved. As is evident from the quotations provided,[60] the classic answer to that question was in the affirmative. Pufendorf and many other writers of the seventeenth and eighteenth centuries acknowledged the possibility of extraordinary imputation.

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selves but not in their cause] and "*involuntaria in se, et in sua cause*" [things which are involuntary in themselves and in their cause], which require "*non-involuntaria*" [things which are not involuntary] as the starting point for the trichotomy. *See* 5 F. HUTCHESON, *supra* note 25, at 229. These distinctions, the distinction Pufendorf preferred in the formulation of his first axiom, and the distinction between "*actio libera in se*", "*actio non in se, sed tamen in sua causa libera*" and "*actio neque in se neque in sua causa libera*", are all applicable to the broken window case. The vocabulary employed in the former two examples is exactly the opposite of that employed by the latter distinctions. The latter start with the affirmation of power or liberty, whereas the former start with the negation of powerlessness or involuntariness.

60. *See also* C. WOLFF, *supra* note 17, at §§ 529, 534 ("*Quoniam homini imputari nequeunt actiones nisi liberae, actiones autem naturales liberae non sunt; actiones naturales per se homini imputari non possunt . . . . Si actiones, quae in se spectatae naturales sunt, quomodocunque a libertate hominis dependent; eaedem homini imputari possunt.*") [Since only those occurrences (*actiones*) that are free actions can be imputed, and natural events are not free, then natural events as such cannot be imputed to a person . . . . If, however, occurrences which in themselves are natural events in some way are dependent on the freedom of a person then these occurrences can be imputed to the person.].

VIII. Extraordinary Imputation: Traditional Criticism

The question, of course, must be raised whether *extraordinary* imputation of an event or inactivity is permissible. In fact, one may ask whether it is even logically conceivable once it has been determined that the event to be imputed *in itself* was physically necessary or that the occurrence of an event, the non-occurrence of which is to be imputed, *in itself* was physically impossible.

Although Hutcheson accepted Pufendorf's solution, Carmichael, Hutcheson's predecessor in the Glasgow chair, had criticized it approximately twenty years previously:

> The consequences of our free actions and omissions, which are said by Pufendorf to be within our power in their cause, are not imputed to us . . . but rather are the starting point for the imputation of the previous action or omission from which they result.[61]

Carmichael, therefore, recognized *actiones liberae in se* as imputable deeds but not *actiones liberae in sua causa*, which he maintained were not *actiones liberae*, i.e., not really deeds. He accepted ordinary but rejected extraordinary imputation[62] and thought it correct instead to impute those preceding performances or forbearances which result in the state excluding ordinary imputation of the later events, since the preceding performances or forbearances could not be doubted to be *actiones liberae in se*.

Carmichael did not provide any reason for rejecting Pufendorf's model. To my knowledge it was Reid five decades later who first attempted to advance an argument. Reid stated:

> Another thing implied in the notion of a moral and accountable being, is *power to do what he is accountable for.* - That no man can be under a moral obligation to do what is impossible for him to do, or to forbear what is impossible for him to forbear, is an axiom as self-evident as any in mathematics. It cannot be contradicted, without overturning all notion of

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61. S. Pufendorfii De Officio Hominis et Civis juxta Legem Naturalem libri duo. Supplementis et Observationibus . . . auxit et illustravit G. Carmichael Obs. 2 ad Lib. I Cap. I § 17 (2nd ed. Edinburgi 1724) ("*Quod attinet ad liberarum nostrarum actionum vel omissionum consequentia, quae Auctori dicuntur esse penes nos in sua causa; haec, non tam ipsa nobis imputantur . . . , quam actionis vel omissionis praecedentis, ex qua fluunt, . . . imputationem, ingrediuntur.*").

62. At least, if things were reduced to their core—". . . *ad vivum omnes rationes resecantur*"—which, according to Carmichael, is not done in the human forum.

> moral obligation; nor can there be any exception to it, when it is rightly understood. - Some moralists have mentioned what they conceived to be an exception to this maxim. The exception is this. When a man, by his own fault, has disabled himself from doing his duty, his obligation, they say, remains, though he is now unable to discharge it. Thus, if a man by sumptuous living has become bankrupt, his inability to pay his debt does not take away his obligation.[63]

Reid's admittedly weak example reveals that his criticism is directed toward Hutcheson who previously presented the same example.[64] In fact, one cannot avoid the recognition that an obligation dissolves when the person obligated no longer is able to perform even if he did exclude the possibility of his own performance. For this reason, the individual whose elbow is pushed with irresistible compulsion through a window cannot have a duty not to destroy the glass. The maxim "As to the impossible there is no obligation" is unconditional.

Hutcheson, and to the extent of my knowledge, the other writers of the seventeenth and eighteenth centuries, however, did not maintain otherwise. Instead Hutcheson, relying on Pufendorf, affirmed merely the *imputability* of the occurrence of the necessary event or of the non-occurrence of the impossible act stating: "A slothful profuse man cannot now discharge his debts, yet as a prior course of prudent oeconomy would have prevented this injury to his creditors, the non-payment is imputable."[65] This approach is completely different from that criticized. It appears that Reid confused the prospective view, to which the maxim "As to the impossible there is no obligation" is applicable, with the retrospective view through which the imputation of events is undertaken to make the *subsequent* application of a law possible. No principle requires the prospective and the retrospective to be congruent. Hence, one cannot conclude that only such occurrences or non-occurrences can be imputed with respect to which a duty could have existed at the time they occurred or did not occur.

Extraordinary imputation, therefore, is conceivable without inconsistency.[66] Moreover, it seems to be necessary. Imputation

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63. *See* T. REID, *supra* note 27, at 621.

64. *See* passage quoted at note 65 *infra*. Reid is listed among the subscribers of Hutcheson's *System of Moral Philosophy*.

65. *See* 5 F. HUTCHESON, *supra* note 25, at 230.

66. In order to avoid misunderstanding, I would like to point out that when ex-

of the preceding performances or forbearances at least provides no sufficient substitute for extraordinary imputation of the commission or omission of the necessary or impossible act.

Two examples may illustrate my point. If lifeguard A_1 is incapable of rescuing drowning B because of lack of sufficient strength from the consumption of too much alcohol the previous night, then only his inactivity during the dangerous situation can be called the "omission of a rescue", if the expression is to make any sense at all. Not until this point in time can one say that the duty to rescue was violated. Getting intoxicated the evening before, although doubtless subject to criticism, cannot be called the "omission of a rescue". The prescription to rescue has not yet been violated, at least not directly, since B is not on the verge of drowning. Indubitably, it could also be that on the following day neither B nor anyone else drowns—in which case one could not maintain that A_1 violated the requirement to rescue by getting intoxicated regardless of how reproachable his conduct may otherwise be.

A second possible situation could be that lifeguard A_2, again because of excessive consumption of alcohol the previous night, is unable to rescue drowning B. If, at the same moment, child C is also in danger of drowning and A_2, regardless of his weakened condition, is able to and actually does rescue C, but could not have rescued both B and C even if he were in perfect condition, then one cannot see A_2's rescue of C but omission to rescue B as a violation of duty. A_2, even though weakened by alcohol, cannot be denied the same treatment that one would provide him *in exactly the same situation* if he had not been weakened by alcohol and still could save only C or B. If in the latter case he actually rescued C, one would have to confirm that he acted correctly and, therefore, one could not deny that he also acted correctly in the former case. Excluding a judgment of duty violation, i.e., justifying the act, however, is *conceivable* only if one considers A_2's inactivity at the time B was in danger of drowning. Determinative for this type of justification is the conflict of duties in which

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traordinary imputation is permissible it is in no sense imputation of a lower order. It would therefore be nonsense to say: "I am not satisfied with extraordinary imputation; I want to impute ordinarily." The only difference in order between the two types of imputation is a logical one, namely, one can consider extraordinary imputation only after ordinary imputation has been excluded. For this reason, the possibility of ordinary imputation has already been negated when the person passing judgment asks about the possibility of extraordinary imputation in a particular case.

A_2, even if physically intact, could be required to save either B *or* C and this situation exists *only* at the point in time in which both B and C are in danger. If one considers the violation of duty (to save B) to be A_2's inebriation the previous evening, then A_2's act is not justified. The definition of a conflict of duties is that the fulfillment of one duty necessarily implies the violation of another duty. At the time of the intoxication this conflict certainly cannot be said to have existed.

My first example indicates that the act in question can be described adequately only through extraordinary imputation, which is not a goal in itself but rather necessary to determine *which* norm is violated, fulfilled, or exceeded. This example is not an isolated case but rather parallel to a multitude of cases. The second example shows that the judgment that an act is supererogatory, in accordance with, or contrary to duty, can be based only on the extraordinarily imputed act and not on the preceding behavior. It is the principle of simultaneity which is applicable in this case. It requires that the apparent violation of duty through omitting to rescue B and the justifying circumstances exist simultaneously because otherwise the basis for the appropriate justification would be lacking.[67]

IX. Extraordinary Imputation: Its Range of Application

Extraordinary imputation is not limited to cases in which an event is necessary or impossible. Instead, it may be made with respect to *all* elements that are imputed on *both* levels of imputation. As mentioned earlier,[68] our every day moral intuitions postulate that the actor acts freely and not under duress or the influence of drugs, as prima facie conditions of merit or demerit. Consequently, ordinary imputation of a supererogatory act as meritorious or ordinary imputation of an act contrary to duty as demeritorious are excluded when the agent acted under duress or when he was (heavily) intoxicated. One nevertheless can consider extraordinary imputation to merit or demerit if the agent puts himself in the situation of duress in order to be forced to commit the act or if he took an intoxicating drug to gain the courage to do so. If a legal system recognizes as excuses only *involuntary* duress and *involuntary* intoxication, it, in fact,

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67. For an elaboration of the principle of simultaneity, see J. Hruschka, Strafrecht nach logisch-analytischer Methode chs. 1, 4 (1983).

68. *See supra* notes 30-41 and accompanying text.

recognizes extraordinary (second level) imputation. If the German legal system allegedly recognizes (heavy) voluntary intoxication as an excuse, it does not recognize extraordinary (second level) imputation, at least in this respect.[69]

Another prima facie prerequisite of a meritorious or demeritorious deed seems to be the actor's knowledge of what he is doing or leaving undone. Problems involving the agent's lack of knowledge, therefore, are relevant in this context. Hutcheson wrote:

> Ignorance of the tendency or effects of actions, affects their morality differently, according to the different causes of the ignorance or error, and the difficulty, greater or less, of coming to the knowledge of the truth. If the ignorance or error be absolutely invincible by any present, or any prior diligence, evil consequences thus unknown cannot be imputed.[70]

In these cases, however, one must differentiate not only between ordinary and extraordinary imputation but also between two different reasons for extraordinary imputation. Imputation is ordinary when the judgment is made that the agent possessed the required knowledge. Accordingly, imputation is extraordinary when the agent did not have this knowledge but the lack thereof can be imputed to him. This imputation, however, may be possible for two reasons. It may be that the lack of knowledge existing *at the time* of committing or omitting the act in question was *avoidable*.[71] It may also be the case that the ignorance existing *at the time* of committing or omitting the act was *unavoidable*, but that this unavoidability is imputed to the actor.[72] Accordingly, extraordinary imputation is excluded only if the ig-

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69. Section 20 of the German Criminal Code, which provides an excuse for the intoxicated actor, is not restricted to cases of involuntary drunkenness. As a matter of fact, however, German courts, in agreement with the theoretical literature, do convict for deeds committed during a state of intoxication if the actor is responsible for being in that state. Consequently, in this respect extraordinary imputation *is* recognized in Germany. This fact is often misunderstood and the expression "*actio libera in causa*", detached from its historical context and semantic meaning, sometimes is used as a mere catch-word to deal with the problem.

70. *See* 5 F. HUTCHESON, *supra* note 25, at 232.

71. *See* 4 F. HUTCHESON, *supra* note 25, at 128 ("Voluntary or vincible ignorance is either *affected*, when men directly design to avoid knowing the truth with some apprehensions of it: or what arises from gross *negligence* or sloth; when men have little solicitude about their duty, and take little thought about their conduct.").

72. *See id.* ("when at present, and in the midst of action, men cannot discover the truth, tho' they earnestly desire it; but had they formerly used the diligence required of good men they might have known it.").

norance was unavoidable in both respects, or in Pufendorf's terminology, in cases of "ignorance invincible both in itself and in its cause".[73]

X. Interlude on Mistake Theory

We are almost prepared to display the system of norms and rules underlying the different distinctions developed by the writers of the seventeenth and eighteenth centuries. One question, however, is still unanswered. It was a point of controversy among German criminal lawyers in the fifties and sixties of this century. The question concerns the agent's knowledge and the level of imputation on which it is relevant. Although hardly advancing my argument, the question nevertheless must be answered.

One must differentiate between imputation of knowledge in relation to the *facts which are relevant under the applicable law* on the one hand, and imputation of knowledge in relation to the *law or its relevancy for the act in question* on the other. Imputation of knowledge in relation to facts that are relevant under the law occurs on the *first* level of imputation. The reason is apparent when one compares all the cases in which, according to outside appearances, a person seems to have followed a *practical rule*, the following of which was forbidden, or does not seem to have followed a practical rule, the following of which was demanded by the law. When a man's elbow comes in contact with another man's face and hurts it, the occurrence suggests that the man followed the practical rule of how-to-hit-another-man. If we think that the man "acted" under irresistible physical compulsion[74] we assume that he did not follow that rule and accordingly exclude ordinary imputation on the *first* level. Similarly, when a lawyer who is anesthetized during an operation babbles out the secrets which he learned from his clients, the external occurrences suggest that the lawyer followed the practical rule of how-to-reveal-one's-clients'-secrets. If we think that he "did" so only because of the anesthetization we assume that he did not follow that rule and again exclude ordinary imputation on the *first* level. Cases of ignorance of the facts which are

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73. *See* S. Pufendorf, *supra* note 1, Lib. II, Obs. II § 9 ("*Ignorantia invincibilis in se et in sua causa simul*"). *See also* 4 Hutcheson, *supra* note 25, at 128 (Hutcheson, like other authors, adopted this terminology).

74. *See supra* text Part V.

relevant under a law, however, are often either cases of ignorance of the outside appearances which suggest the following of a practical rule or even cases of ignorance of the practical rules themselves which, according to outside appearances, the persons involved seem to have followed. For example, when a man throws a stone into the air which hits another man the event suggests that the man followed the practical rule of how-to-hit-another-man. If we think that he did not see the other man and, therefore, did not see the possibility of hitting him we assume that he did not follow that rule. Moreover, when we suppose the practical rule to be valid that waving one's handkerchief in the mountains indicates danger and the need for help, and a man walking in the mountains waves his handkerchief, the external event suggests that he followed the practical rule of how-to-alarm-the-rescue-organization. If we think that he waved his handkerchief just for fun, not knowing that he would cause alarm, we assume that he did not follow the practical rule in question. Consequently, in these cases it must be ordinary imputation on the *first* level which is excluded.

Norms which require the performance or forbearance of acts, however, are different from practical rules of behavior. Though they are rules, they are rules of a different order. They are rules which demand or forbid the application of certain other rules, namely, the practical rules. Ignorance of these norms or of their relevancy, therefore, cannot be equated with irresistible physical compulsion or anesthetization.

Another argument leads to the same conclusion. Consider a case in which a potentially duty bound individual unavoidably does not recognize a circumstance relevant under the law. This person cannot follow the law *in the same sense* of the expression "cannot follow" (although for another reason) as when one cannot follow a legal requirement because of physical incapacity. In the case of physical incapacity, however, the principle, "As to the impossible there is no obligation", is applicable with the consequence that the individual is not legally required to undertake the act in question. Consequently, we exclude ordinary and extraordinary imputation on the *first* level when we regard an individual as having been neither capable of performing the act nor responsible for his incapability. It follows that we must also exclude ordinary and extraordinary imputation on the *first* level when we regard an individual as unavoidably not having recog-

nized a circumstance relevant under the law if he also cannot be held responsible for the unavoidability.

No similar argument can be made with respect to recognition of the law or of its relevancy. Superficially, one might say that an individual who unavoidably does not know of a prescription cannot follow it. In this sentence, however, "cannot follow" has a different meaning than it has in the following sentence: "*P* cannot follow the prescription because of physical incapacity or because of unavoidable ignorance of a relevant circumstance." There can be no doubt that an individual *can do* what the law requires, i.e., undertake a certain act, regardless of unavoidable ignorance of the legal requirement. *X* can rescue *Y* even though he may not know that he is required to do so. He can omit to kill *Z* even though he may not know of the prohibition against killing. The duty to rescue and the prohibition against killing require nothing impossible. For this reason, the principle, "As to the impossible there is no obligation", is not applicable. As a consequence, ignorance of the law or of its relevancy excludes neither ordinary nor extraordinary first level imputation.

Instead, one may consider exclusion of *second* level imputation. In fact, only this latter consideration could make sense from the standpoint of the individual passing judgment since he must first have determined that the act is contrary to duty, i.e., he must have applied the law to the act and concluded it was unlawful, before he may ask sensibly whether the actor was aware of this unlawfulness. It is, therefore, necessary to differentiate between ignorance of facts relevant under the law and ignorance of the unlawfulness of the act. Reid's statement[75] that the axiom, "Invincible ignorance takes away all blame", was only a particular case of the general axiom that there can be no moral obligation to do what is impossible, is only partially correct even if one were to ignore the above criticized mixture of prospective and retrospective viewpoints.[76] The statement is correct when one considers the unavoidable ignorance of a circumstance relevant under the law. It is incorrect when one considers the unavoidable ignorance of the law or of its relevancy for the act.

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75. *See* T. REID, *supra* note 27, at 621.

76. *See supra* notes 61-67 and accompanying text.

XI. The Rules for Excluding Imputation

We now may derive the following model for the exclusion of imputation:

Ordinary imputation is excluded on the *first* level:

(a) in cases of physical necessity and impossibility, e.g., in cases of irresistible physical compulsion or of total intoxication which render what happened or did not happen to be nothing else but the occurrence or non-occurrence of a physical event;

(b) in cases of ignorance of an aspect of the deed which is relevant under the applicable law; in cases of the mistaken assumption of circumstances that would alter a prima facie supererogatory to a non-supererogatory act;[77] and in cases of the mistaken assumption of justifying circumstances which would alter a prima facie violation of duty to a non-violation of duty.[78]

Extraordinary imputation is excluded on the *first* level in cases in which the individual involved did not imputably cause or fail to avoid the reason for excluding ordinary imputation.

Ordinary and extraordinary imputation on the *first* level are not excluded when the agent acted under duress, heavy intoxication, or in ignorance of the relevant law or of its relevancy for the act. In these cases no doubt exists as to whether the event in question or its non-occurrence was a "deed".

Ordinary imputation is excluded on the *second* level:

(a) in cases of non-physical "necessity" and "impossibility",[79] e.g., in cases of duress or of heavy, as opposed to total, intoxication in which the agent's freedom of decision, although not excluded, is limited;

(b) in cases of supererogatory acts when the agent mistakenly thinks he is obligated to perform the act; in cases of

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77. A pertinent example is the man who risks his own life to save a child whom he mistakenly believes to be his own, if we presuppose that the law demands one to risk one's own life to save one's own child but does not demand one to do so to save another person's child.

78. The treatment of this latter case is still controversial among German criminal theorists. My arguments for ordering on the first level can be found in J. Hruschka, *supra* note 67, at ch. 3.

79. Provided that, in cases of prima facie violations of duty, the performance or forbearance is not justified under a lesser evils theory. *See* G. Fletcher, *supra* note 45, at 774.

> supererogatory omissions when the agent mistakenly thinks the act is forbidden; in cases of violations of duty through commission when the agent mistakenly thinks the act is not forbidden; in cases of violation of duty through omission when the agent mistakenly thinks the act is not demanded. In these cases a decisive motive is lacking for the violations of duty and is excessive for the supererogatory actions. The agent's freedom of decision here too is limited.
>
> *Extraordinary* imputation is excluded on the *second* level in cases in which the individual involved did not imputably cause or fail to avoid the reason for excluding ordinary imputation.

This model is both simple and intellectually satisfying not only because of the consistency of differentiation between ordinary and extraordinary imputation but also because of the parallelism in reasons for excluding imputation on both levels. Moreover, it provides arguments for consistent criminal law codification.

Obviously, the reasons for excluding second level imputation of unlawful acts are less cogent than the reasons for excluding first level imputation. It is by no means a mere coincidence that they were, and to some extent still are, being disputed. If we accept duress as an excuse it is just by dint of the analogy to irresistible physical compulsion. We recognize that we ourselves are no heroes. We are inclined, therefore, to excuse ourselves and others for violating duties in the face of duress. Intoxication of such a degree that it does not exclude the assumption that the intoxicated person acted (e.g., followed the rules of how-to-hit-a-man) but nevertheless suggests a weakened ability to be guided by the relevant norm (i.e., "Thou shalt not hit other people!") is an excuse by virtue of its parallelism to the exclusion of imputation we accept for the anesthetized lawyer. Ignorance of the law, recognized as an excuse in Germany today, is nothing but an analogy to the exclusion of imputation recognized because of ignorance of the relevant facts. If examined closely, the latter is an exclusion because of lack of knowledge which, if it were not lacking, would lead to the conclusion that the person in question followed the rules of how-to-give-alarm-to-the-rescue-organization or of how-to-hit-a-man-with-a-stone.

A comparison of supererogatory acts and acts contrary to duty may also be helpful. If we tend toward denying merit for supererogatory acts committed under duress or under the influ-

ence of a drug, or if we think that merit is excluded when the actor mistook himself to be under an obligation to commit the supererogatory act, then we have arguments for recognizing duress, heavy intoxication, and ignorance of the law or of its relevancy as grounds for excusing acts contrary to duty.

XII. Remarks upon Our Present Moral Vocabulary

As can be seen from the difficulties in displaying a few fairly simple relationships, our present moral terminology is deficient in several respects. In particular, we do not have the appropriate vocabulary for the various possibilities of excluding imputation on the different levels. The word "excuse" can or, at least to avoid misconceptions, should be used only for *violations* of duty that are not imputed on the *second* level of imputation. The exclusion of imputation of supererogatory acts on the second level, however, has no technical term to denote it, nor does the exclusion of imputation on the first level in general. We do speak of "negligence", however, when *violations* of duty cannot be imputed *ordinarily* on the first level because of the actor's ignorance of a circumstance relevant under the applicable law, but which may be imputed *extraordinarily* because the actor should have known of this circumstance.

A different problem, one of subsumption under the law rather than of imputation, is presented when the individual passing judgment applies the law to the act which has been imputed on the first level. *Exceptions* to rules in the law also concern the application of this law since these exceptions are a part thereof, as noted in part IV above. If we are concerned with an exception to the existing rules in a *prima facie* case of *duty violation*, then we speak of "justification". The application of grounds for justification is merely the retrospective application of prospectively formulated norms of exception, i.e., killing another human being is a prima facie violation of duty but can be justified in a situation of self-defense and exceptionally seen as not a violation of duty. With respect to the application of exceptions to the rules defining a *prima facie supererogatory* act we again have no adequate vocabulary. A process similar to justification, however, occurs which can be illustrated through consideration of sections 94 and 95 of the Austrian Criminal Code, according to which risking one's own life to rescue a drowning person is *prima facie* supererogatory but can be required as an

exception and, therefore, not be supererogatory if the rescuer caused the danger.

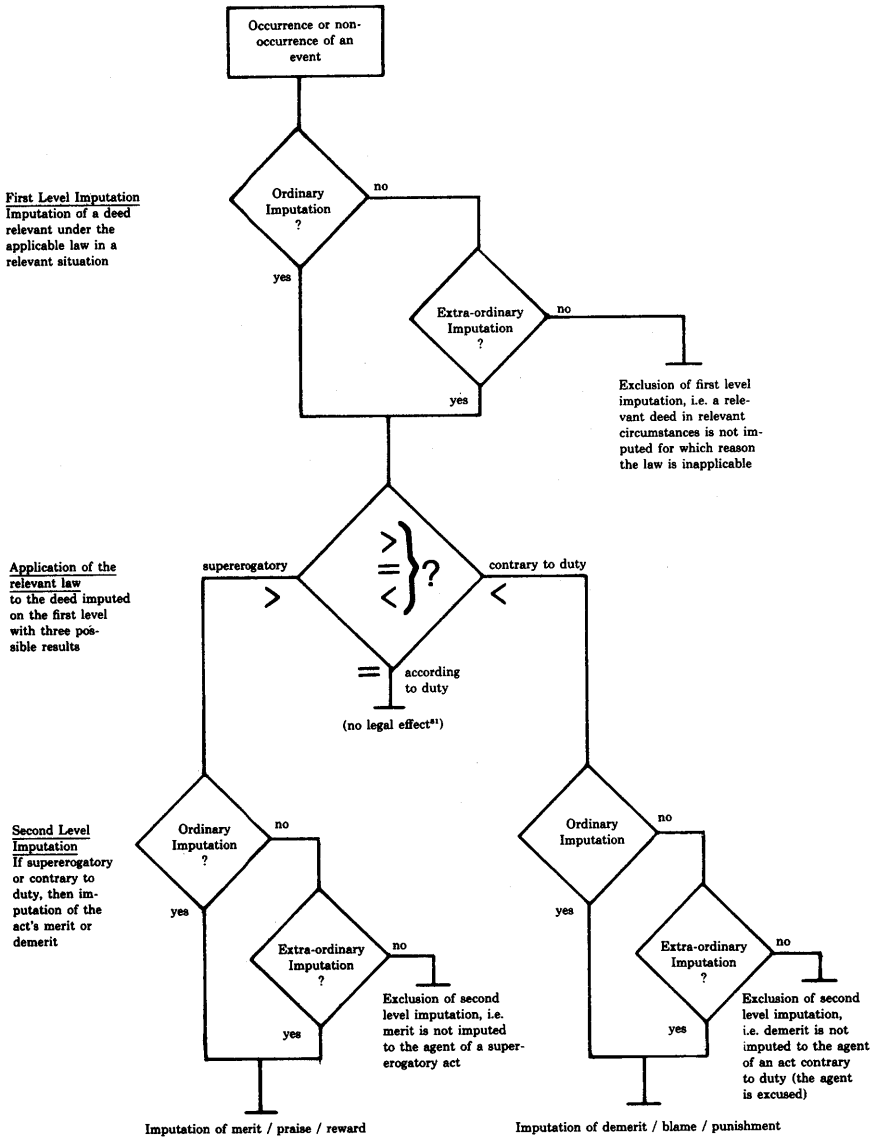
From the above it is clear that the distinction between justification and excuse is based on the more fundamental difference between the applicable law and the rules of imputation and, *therefore*, must be seen as "secondary" and "derived". On the other hand, it is exactly this difference between justification and excuse that most clearly indicates the distinction between the applicable law and the rules of imputation.[80] For this reason, any mixture of the two "defenses" must be followed by a fundamental confusion of the basic rules of grammar of our moral vocabulary.

XIII. Second Review of Topics

The sequence of questions that the individual passing judgment must ask and answer may be seen in Table Two. This table is essentially an expansion and refinement of the right side of Table One.

80. *See also* G. Fletcher, *supra* note 45, at 810 ("The nature of a justification is that the claim is grounded in an implicit exception to the prohibitory norm. The 'right' of self-defense carves out a set of cases in which violation of the norm is permissible . . . . Excuses bear a totally different relationship to prohibitory norms. They do not constitute exceptions or modifications of the norm, but rather a judgment in the particular case that an individual cannot be fairly held accountable for violating the norm.").

TABLE TWO



81. *See supra* notes 30-41 and accompanying text.

XIV. FREEDOM

Although many modern writers so believe, by now it must be clear that it is not primarily second level imputation with its rules on attributing and denying merit or demerit that gives rise to the problem of freedom. It is not praiseworthiness and blameworthiness that raises this problem but rather the assumption that we are concerned with *deeds*, i.e., with *acts* committed or omitted. The problem is raised by the concepts of merit and demerit only indirectly. Every imputation to merit or demerit implies the preceding application of a law to a deed. The latter implies first level imputation of that deed and the determination that the individual was the *free* cause thereof.

One has to differentiate carefully to avoid the ambiguity in the word "free". Certainly the agent acting under duress in *some* sense acts "unfreely". For this reason the question arises whether he should be denied merit for supererogatory acts or be excused for violations of duty. Exclusion of merit or demerit, however, still presupposes that the agent had an alternative, i.e., a choice to succumb to the duress or not. In this sense, therefore, the agent was "free" to commit or omit the act. If he is not assumed to be "free", then first level imputation could not have taken place. The same conclusion must be reached when merit or demerit is denied to one who is heavily intoxicated, or in ignorance of the relevant norm or of the norm's relevancy. All of these agents may act unfreely in *some* sense, but in the decisive sense they are assumed to be *free*, namely, free causes of their deeds.

The problem of freedom cannot be avoided by merely maintaining that imputation only implies freedom of spontaneity. The epileptic who breaks a window during a seizure cannot be imputed (ordinarily) with this occurrence as a deed. The event, therefore, cannot be viewed as a violation of duty and blameworthy even though property was damaged. Furthermore, it cannot be viewed as supererogatory and praiseworthy even though a life was rescued. The epileptic's liberty of spontaneity, which is defined merely as being "oppos'd to violence",[82] however, can hardly be doubted. The freedom which is assumed in the imputation of an occurrence or non-occurrence as the commission or omission of an act is certainly not only liberty of spontaneity but

82. *See* D. HUME, A TREATISE OF HUMAN NATURE (1739/1740), *in* 2 THE PHILOSOPHICAL WORKS 188 (T. Green & T. Grose ed. 1882-1886 & reprint 1964).

also liberty of indifference which, according to Hume, "means a negation of necessity and causes."[83] This definition corresponds with the meaning Kant and his predecessors gave to the concept of imputation. In the judgment of imputation the person in question is seen as the *free cause* of the event. "Free cause" in this connection can mean only "primary cause", i.e., "cause that is uncaused".

The modern version of the determinism-indeterminism debate, which arose during the Enlightenment and has continued to the present, involves the conflict between this concept of imputation on the one hand and Newtonian physics on the other. Essentially, it is a controversy between necessitarianism and non-necessitarianism.[84] To ask the usual question whether freedom of indifference "*exists*", however, would give the problem an entirely incorrect orientation. The consistent causal-mechanical necessitation of all occurrences in the world is not a recognition but rather a presupposition of Newtonian physics. Similarly, freedom of indifference is a presupposition about the person to whom occurrences and non-occurrences are imputed as deeds to which laws are applicable. Wolff's principle,[85] according to which the application of a law to an event implies that the event is imputed to a person as the free cause thereof, states exactly this presupposition.

Maintaining this implication, however, is not inventing a dubious fiction merely to salvage law and morals. Its relevance is far more expansive as illustrated by the four steps of the following argument:

1. It cannot be the case that legal or moral rules are essen-

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83. *Id.*

84. All other current forms of determinism, particularly psychological and sociological determinism, are parasitic to necessitarianism, which reflects a rigorously consistent application of the methods employed by Newtonian physics. If a man raises his arm, no doubt there is a physiological and cerebral process taking place which, if seen in connection with the man's present and former physical environment, provides a complete explanation for the arm rising. No psychological and sociological explanations would be needed. The latter types of explanation are merely the consequence of our ignorance of the laws of physics governing the arm rising, and particularly of our ignorance of the physiological and other physical causes which preceded the arm-raising. If we only knew enough about physical laws and facts, e.g., physical influences from the physical environment, physical inputs and outputs of the human body, physical cause-effect relationships, etc., every psychological and sociological explanation would be reduced to a physiological-physical explanation and psychology and sociology would dissolve into physics just as chemistry did.

85. *See supra* notes 17-29 and accompanying text.

tially different from other rules, i.e., the rules of logic and grammar; the rules determining the semantic meaning of words and sequences of words; the rules of rational argumentation; the rules of a game; the rules based on experience; methods; legends; operating instructions; and all other rules which provide standards for human conduct. If it is correct that every application of legal or moral laws to an event implies that the event is imputed to a person as the free cause thereof, then it must be correct not only of the application of legal and moral rules but also of the application of all conceivable rules. The application of any of these rules to an event must also imply the assumption that the event can be traced to a person who is the free cause thereof. For example, when a speech act is criticized as illogical or contrary to the rules of grammar, or when a mechanical procedure is criticized as a violation of the operating instructions, this criticism implies the assumption that the speech act or mechanical procedure can be traced to a person as the free cause of that act or procedure.

2. The foregoing raises certain problems for necessitarianism. Every argument for necessitarian theory, even every mere statement of the necessitarian's claim, can be considered only in light of the rules of logic and grammar, the rules determining the semantic meaning of words, the rules of rational methodical argumentation, etc. Consequently, such claims can be considered as being semantically meaningful only if we assume that they can be traced to a person who is the free cause thereof. Similarly, every criticism of necessitarian theses, regardless of whether its outcome is in the affirmative or negative, has the same implication, namely, liberty of indifference.

3. Of course this inference (2) is merely the application of the above (1) stated extension of Wolff's principle to the necessitarian's particular situation. It is clear that the necessitarian has to deny it, for if it were correct, it would make his position self-contradictory. It is necessary, therefore, tentatively to make the very opposite assumption, i.e., to suppose that *no* line of reasoning *nor any* statement is to be traced to a person as the free cause thereof. This supposition implies that the necessitarian, in making his claim and supporting it, did not "obey" the rules of logic, grammar, semantics, and rational methodical argumentation because obeying these rules entails his liberty to disobey them. It implies that instead the necessitarian, being only one of many pure, though complicated, physical systems inside the to-

tal physical system called "the universe", was inevitably caused to make his claim and arguments. In giving his reasons, he reacted, at best, to a state of his brain and nervous system that corresponded to what we usually call "knowledge of" and "ability to apply" these rules. In any case, his utterances were entirely necessitated by foregoing causes, i.e., they were produced by his inherited physiological equipment and the environmental physical influences he was exposed to up to the moment of his "statement" and "reasoning".

These implications, however, make the necessitarian's position similar to that of the Cretan Liar. His claim, if judged to be true, renders his statement and reasoning semantically meaningless since then they are *nothing else* but the physical output of a physical system into the system of its physical surroundings.

This paradox can be seen if one realizes that the semantic meaning of a word, or of other means to express meaning, cannot be a part of a physical system or of its states and processes however complicated its mechanism may be. Provided that a "word" is either a physical event like a sound or a physical state like a few peculiarly shaped lines on a piece of paper, the meaning of a word can be identified neither with the word as a whole nor with a part of the word of which it is the meaning. Otherwise, the meaning of a word would not be the meaning of the word separate from its meaning but rather the meaning of the word including its meaning. In the latter case, the meaning of the word also would be the meaning of the meaning and in due course it would be the meaning of the meaning's meaning ad infinitum. The meaning of a word, therefore, necessarily must be external to the word itself. It is not a coincidence that we say that a word "symbolizes" its meaning for "symbolizing" implies a difference between the symbol and the symbolized.

On the other hand, the meaning of a word cannot be another part of the physical system by which the word is produced or a part of the system's states or processes. Furthermore, it cannot be a part of the physical system within which the word is produced or a part of that system's states and processes. In such cases we would not need the word to express the meaning but could make use of the meaning itself detached from the word. It seems to be impossible, however, to make use of a word's meaning without employing the word or a synonym or some other physical surrogate which is not the meaning of the word itself but rather different from its meaning. It follows that the mean-

ing of a word cannot be found *inside* the physical system or systems by or within which the word is ejected. The same is true for the same reasons for any other means of expressing meaning. Consequently, meaning, i.e., plain semantic meaning, cannot be produced by or within pure physical systems because nothing can be brought about by or within such a system which in principle is not a part of the system.

It cannot be argued that there *are* pure physical systems which incontestably produce meaningful words, e.g., a machine constructed to print cards which apparently do convey some meaning. It is only words which are produced by the machine. To say that these words are semantically meaningful implies an approach which in principle is *external* to the machine and its physical environment. It implies that a *meta*language is employed which does not belong to the physical system, parts of which are declared to be meaningful by using that language. Otherwise, the declaration itself would be a meaningless ejection which cannot confer any meaning to other states or processes of the physical system of which it is supposed to be a part.

Accordingly, if necessitarianism were true, every discussion of it would be meaningless. People in "discussing" that theory would not even contradict each other for all their utterings would be nothing but consequences of their inherited physiological equipment and of the environmental physical influences they were exposed to up to the very moment of their utterances. Of course, each of them would produce sequences of odd little noises differing from those produced by the other. It is beyond doubt that they would affect each other's nervous systems which may or may not produce considerable changes in the states of their brains. They would be different from and affect one another in the same way an oak and an apple tree are different from and may affect one another. The oak tree and the apple tree do not contradict each other. Similarly, if necessitarianism were true, it could not be the case that people contradict each other.[86]

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86. I believe that I received the best parts of the foregoing argument from Norman Malcolm's article. *See* Malcolm, *The Conceivability of Mechanism*, 77 PHIL. REV. 45-72 (1968). Of course, Malcolm is not responsible if I have made a mistake. An introduction into other formulations of the determinist's paradox can be found in J. BOYLE, G. GRISEZ & O. TOLLEFSEN, FREE CHOICE, A SELF-REFERENTIAL ARGUMENT (1976).

It cannot be argued that the non-necessitarian is exposed to exactly the same problems as the necessitarian, by maintaining that if necessitarianism cannot be stated with semantically meaningful words, its negation could not be stated meaningfully ei-

For this reason the necessitarian's reasoning and statement can be considered to be semantically meaningful only if removed from their own range of application. The tenet that the critical application of the rules to be followed in stating and elaborating necessitarianism implies first level imputation and therewith liberty of indifference of the necessitarian to the extent that he has made his claim is merely the removal of that statement and elaboration from their own range of application.

4. The basis of the claim that the application of any particular rule, and therewith first level imputation, implies liberty of indifference of the person to whom the criticized occurrence is to be imputed is now clear. What is to be presupposed for the application of those rules that make the necessitarian's doctrine possible is to be presupposed for the application of *all* rules and, therefore, also for the application of legal and moral rules. In any event, it cannot be the case that only the application of the rules that make the reasoning and statement of necessitarianism possible can be removed from the range of application of determinism for *such* a move would be purely arbitrary.

It follows that necessitarianism does not affect imputation and freedom. If it is a rational theory, i.e., a theory open to critical application of logical, grammatical, and other rules, it implies imputation and freedom. If it is an irrational theory, it is to be dismissed without further consideration. Consequently, Kant's statement that "all men attribute to themselves freedom of will",[87] which was and still is often misunderstood as an empirical ascertainment, is the expression of logical necessity. We cannot hold necessitarianism to be true without committing grave inconsistencies and, therefore, we behave like non-neccessitarians. We think and speak about ourselves in the metalanguage of rules and acts guided by rules and not in the object language of effects produced by foregoing causes in accordance with the laws of Newtonian physics. The difference between object- and metalanguage, which indicates the difficulties with necessitarian-

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ther. The difficulties arise only on the side of the necessitarian. They are to be compared to the difficulties arising for the Cretan Liar. The Cretan who maintains that all Cretans always lie creates a paradox, while his conceivable opponent, a Cretan who maintains that all Cretans always speak the truth, does not create a paradox at all. Similarly, it is not the non-necessitarian's claim which creates a paradox, and the non-necessitarian is not answerable for the necessitarian's problems.

87. I. KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN (Riga 1785), *in* 4 AKADEMIE AUSGABE, *supra* note 21, at 455 ("*Alle Menschen denken sich dem Willen nach als frei.*").

ism, was developed only recently to avoid a paradox such as that presented by the Cretan Liar. Although Epimenides contrived the Liar's paradox some 2,500 years ago and more than two millennia were needed to solve the problem, nevertheless, during the whole period something seemed to be awry with the Cretan Liar. We need not be professional logicians to think logically.