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An analytic approach

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# The structure of criminal attempts

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## 1 The anomaly of liability for attempts

- 1 To engage in a productive comparison between Anglo-American and continental jurisprudence, one must reach a level of abstraction that enables the commensuration of the doctrinal discourse produced in both contexts. In the realm of criminal law theory, such a shared conceptual scheme can be found in the widely acknowledged distinction between two sets of legal rules or standards, by reference to which it is possible to make explicit the ‘depth grammar’ of the language-game of ascribing —and thus grounding— criminal responsibility. Although one encounters major terminological diversity at this point, the two sets of rules or standards are identifiable through the labels ‘conduct rules’ and ‘imputation rules’.<sup>1</sup> In the sense relevant here, imputation rules correspond to what Robinson calls ‘principles of adjudication’ or —more precisely— ‘principles of liability assignment’, and not to what he identifies as ‘principles of imputation’.<sup>2</sup>
- 2 Any particular crime-token can be formally identified with a particular instance of unjustified and unexcused realization, through the behaviour of a responsible agent, of the description that specifies the corresponding offense-type. Under the relevant *sanction rule*, the unjustified and unexcused realization of the given description counts as the operative fact to which the sanction specified in that same rule is attached. As Hart argued, such sanction rules, which link some instance of criminal behaviour with a corresponding sanction, can be understood as *adjudication rules*.<sup>3</sup> However, and as Hart also observed, this interpretation of the function of the given rule critically depends on the possibility of justifying the claim that the legal consequence specified in the adjudication rule should be understood as a sanction, and more precisely, as a form of punishment. If such an interpretation can not be sustained, one is not entitled to the claim that the pretended sanction rule could be differentiated from, say, a taxation rule. Since the payment of a given amount of money can count both as a tax and the ‘hard

treatment' that corresponds to a certain form of punishment (namely, a criminal fine),<sup>4</sup> there is no *structural* difference between a rule of the former and a rule of the latter kind.

- 3 To produce a substantive distinction between a criminal sanction rule and a tax rule, the critical move lies in recognizing that criminal sanction rules must be functionally characterized as *secondary* rules in reference to a given set of *primary* rules. Sanction rules are secondary because their function consists in attaching some form and amount of punishment to the *transgression* of one or more primary rules.<sup>5</sup> Only under this assumption can one make sense of the idea that the legal consequence imposed on a person held responsible for some behaviour-token counts as punishment, that is, as a coercive reaction grounded, at least partially, on the *legal wrongfulness* exhibited by that behaviour-token. This gives supports a further claim that the given consequence counts as punishment because its imposition expresses *deserved censure*. Since the primary rules that are to be enforced through the application of the given secondary sanction rules fulfil a *regulation function*, prohibiting or requiring actions of a certain type, they can be thought of as 'obligation rules'. In the language favoured by contemporary criminal law theory, they are more often known as 'conduct rules'.
- 4 The correctness of the claim that conduct rules can and should be understood as *obligation* rules depends on the possibility of giving plausible content to the proposition that the specific function fulfilled by those rules is to serve as grounds for obligations, or, more properly put, as *premises for duties*. This can be pursued by means of an argument, which goes from a structural characterization of such rules to their functional assessment as reasons for action.
- 5 The legal wrongfulness of a behaviour-token, which can constitute the *actus reus* of a *commission* offense, can be formally identified with the violation of a conduct rule that *prohibits* actions of a certain type. The legal wrongfulness of a behaviour-token, which can constitute the *actus reus* of an *omission* offense, can be formally identified with the violation of a conduct rule that *requires* actions of a certain type.<sup>6</sup> Hence, a conduct rule enforced through one or more criminal adjudication rules may have the structure of a *prohibition* or of a *requirement*. And, the rule's structure will be determined, in its more basic form, by the combination (or 'correlation') of the given deontic operator —namely, 'prohibited' or 'required'— and a corresponding action-type.<sup>7</sup>
- 6 Following H.L.A. Hart, a prohibition can be understood as a content-independent and peremptory reason for *omitting* actions of the relevant type, whilst a requirement can be understood as a content-independent and peremptory reason for *performing* actions of the relevant type.<sup>8</sup> In this context, 'to omit' and 'to perform' are used as transitive verbs, the grammatical object of which is constituted by an action-token that instantiates a certain action-type,<sup>9</sup> specified through a corresponding action-description.
- 7 Within this framework, the claim I want to make is that the specific structure of liability at stake when a person is held responsible for an attempted offense is fixed by a deficit as its distinctive mark. The behaviour-token a person is held responsible for when convicted of an attempted offense does not exemplify the set of properties the conjunction of which constitutes the behaviour-type legally acknowledged, or instituted, as wrongful. In this paper, I present the theoretical premises that lead to such an understanding of criminal attempts and to explore some of that understanding's implications with regard to some major questions that dominate the doctrinal debate concerning the law of attempts. Specifically, I address the biggest question: which relevant *means rea* requirement should control the ascription of responsibility for an attempted offense?

- 8 In order to make sense of such an anomalous nature of the liability for attempts, one first needs to sketch the way in which the criminal responsibility for the transgression of a conduct rule is constituted. The presentation of a general account, grounded upon the model of the so called ‘practical syllogism’, is offered in section 2. It is then possible to lay down the argument for the imperfect nature of attempts *qua* rule-violations, which is the target of section 3. The paper ends with a brief exploration of some implications of the account previously defended with regard to three major issues concerning the law of attempts.

## 2 The syllogistic constitution of criminal responsibility

### 2.1 The model of practical syllogism

- 9 Since the practical function of a prohibition or requirement consists in its serving as a reason for omitting or performing actions of a certain type, its liability-grounding transgression is to be identified with its *non-recognition* as a binding reason for omitting or performing a certain action-token, which we can symbolize as ‘ $\varphi$ ’. The target now should be to clarify the meaning of the proposition that the norm in question constitutes a reason for, respectively, omitting or performing  $\varphi$ , so that we can justify the claim that, in that same context, the omission or performance of  $\varphi$  can be identified with a duty which, under proper conditions,<sup>10</sup> would be imposed through that norm *qua* obligation rule.
- 10 The sense in which a conduct rule constitutes a reason for omitting or performing  $\varphi$  can be clarified by means of a particular application of the model of so called ‘practical syllogism’. In a nutshell, a practical syllogism is an inference, the distinctive feature of which is that, in contrast to a theoretical syllogism, its conclusion does not consist in a proposition, but in the performance or omission of a certain action.<sup>11</sup>
- 11 Thus, the model of a so called ‘practical syllogism’ is of interest here inasmuch as it provides us with a schematic representation of the structure that sustains the grounding of a ‘forbearance duty’ (a duty to omit  $\varphi$ ) or an ‘action duty’ (a duty to perform  $\varphi$ ) from a prohibition or requirement that can occupy the place of the major premise of the corresponding practical inference.<sup>12</sup> Thus, if the norm in question is constituted by the correlation of the prohibition operator and the action-type specified through the description ‘the killing of another human being’, then that norm would have to count as a reason for omitting each action-token that instantiates that action-type. That is, as a reason to omit every action-token which exemplifies the set of properties that specify the meaning of the description ‘the killing another human being’.
- 12 Say, for example two people, A and B, find themselves taking a walk along the shore of a lake of considerable depth, when B isn’t capable of swimming. In this situation, under the ‘major’ premise that (for any agent) killing another human being is prohibited,<sup>13</sup> and under the ‘minor’ premise that pushing B into the sea would causally lead, *ceteris paribus*, to B’s death by drowning, then the conclusion follows that A *ought* to refrain from pushing B into the river.<sup>14</sup>
- 13 This very simple example is useful enough to illustrate an interesting asymmetry that exists between a syllogism premised on a prohibition and a syllogism premised on a requirement, inasmuch as the agent counts with two or more *action-possibilities* that are

equally relevant under the norm in question.<sup>15</sup> An agent who finds herself in a situation in which the prohibition of killing another human being is applicable, ought to omit *every* action that (*ex post*) could be truthfully described as ‘producing the death of another human being’. This means that the conclusion of a syllogism premised on a prohibition is potentially *conjunctive*. In contrast, the agent to whom —due to a special obligation or responsibility towards the potential victim— the requirement of preventing the death of another human being is applicable, insofar as this human being’s life is at peril, ought to perform *any one* of some set of actions that (*ex post*) could be truthfully described, in reference to the person whose life is at stake, as ‘preventing the death of another human being’. This means that the conclusion of a syllogism premised on a requirement is potentially *disjunctive*. In the remaining part of this section, and for reasons of simplicity, I will restrict the analysis to prohibitions, that is, norms that can ground duties to omit actions of a certain type.

- 14 It is worth noting that, until this point, the conclusion of the respective inference has been linguistically *represented* by means of some sentence containing the word ‘ought’. One can wonder, however, if such a formulation is strong enough to serve as a mark of what von Wright calls ‘subjective practical necessity’, which has to be exhibited by an inference of the relevant pattern so that the inference can actually deserve its labelling as ‘practical’.<sup>16</sup> According to von Wright, the proper verbal representation of that mark should be not an ‘ought’-clause, but rather a ‘must’-clause.
- 15 Among the conditions of such subjective practical necessity, figures that the syllogism be construed in the first person —in contrast to the third person— perspective.<sup>17</sup> But this is only a necessary, not a sufficient condition. For, it is also necessary that the agent adopts a certain ‘practical-critical attitude’ toward the relevant norm as binding a standard of behaviour.<sup>18</sup> Thus, the duty to omit  $\varphi$ , specified through the conclusion of a practical inference, the major premise of which is to be identified with a prohibition as ‘external’ reason for action, will only exhibit the mark of subjective practical necessity insofar as that very norm is acknowledged by the agent as a reason for omitting  $\varphi$ .
- 16 The key insight here can be found in the following remark offered by von Wright:
- Challenges I shall call *outer* or *external* reasons for action. Unlike internal reasons, challenges are *contingently*, and not *necessarily*, reasons. This means the following: Even though an agent recognizes the challenge and has learnt or otherwise knows how to respond to it, he need not *acknowledge* it as a reason *for him* to act upon. External reasons can thus be said to “exist” in two different senses. As *instituted* and presented to members of a community they exist, so to speak, “objectively”. As *acknowledged* by individual agents as reasons for their acting they exist “subjectively”. Their subjective existence cannot be inferred, in the individual case, from their objective existence.<sup>19</sup>
- 17 Hence, the fact that a norm has the status of an ‘objectively existent’ reason does not warrant its (contingent) motivational force as a possible premise of a practical inference. Such motivational force depends on whether the norm is ‘subjectively acknowledged’ as such by the agent whose behaviour is ‘challenged’ by it. From the sole fact that  $\varphi$  was not omitted by an agent who found herself in a situation in which the norm in question served as ground for a duty to omit  $\varphi$ , one can conclude —in the *tollendo tollens* mode— that the corresponding practical inference did not occur, that is, that the norm was not subjectively acknowledged by the agent as a binding standard of behaviour. If we verify that A did indeed push B (who was incapable of swimming) into the lake from a boat, under circumstances such that the pushing of B into the lake would lead, *ceteris paribus*, to

B's death, then we can conclude that A did not in fact arrive at the conclusion to which she would have arrived, if A had acknowledged the prohibition of killing another human being as binding premise, namely, the conclusion consisting in her omission of the pushing of B into the lake.

## 2.2 Foresight as primary fault element

- 18 Yet, the verification of such a shortfall of a practical inference premised upon the relevant norm does not yet warrant the conclusion that A deserves *blame* for her failure to subjectively acknowledge that same norm as a binding reason.<sup>20</sup> For it is possible, first of all, that the non-realization of the practical conclusion ought to be explained by the fact that a condition for the inference's effectiveness failed, namely that the agent 'challenged' by the norm be physically capable of omitting  $\varphi$  in accordance with the prohibition. If, as a consequence of suddenly fainting, A had tumbled down right behind B and thus pushed B into the lake, one could not hold A responsible for not having omitted pushing B into the water, due to A's physical incapability of omitting such an action. On the other hand, the non-realization of the practical conclusion could also be explained by the fact that the syllogism's minor premise, constructed from the first person perspective, did not hold. If A was ignorant of B's incapability to swim, she could not, upon her eventual acknowledgement of the prohibition of killing another human being as a binding reason, form the intention to refrain from pushing B into the lake, which would preclude an ascription of responsibility to A for not having omitted an action which in fact can be described as the killing of B.
- 19 It is important to note that both cases are equivalent in the sense that in each one, a specific precondition of the agent's capability to intentionally omit  $\varphi$  fails to be in place. Whereas  $\varphi$ , as *ex post* established, indeed instantiates the action-type to which the prohibition operator is attached. The point is that only an agent who actually possesses this capacity will be in position to fulfil an intention through a behaviour-token that can be interpreted as the agent's realization of a practical commitment premised upon the relevant prohibition.
- 20 This last remark provides an insight into the question about the role played by the concept of intention in the context of the syllogistic schematization of the way in which a prohibition can situationally ground a concrete duty to omit a given action. For, insofar as the agent's omission of  $\varphi$  were to be explained as the practically necessary conclusion following from her acknowledgment of that norm as a binding reason, such omission of  $\varphi$  would indeed be intentional. For, any behaviour-token that can actually be explained as guided by a certain reason will be identified, in the context of that same explanation, under a description that makes it intentional by reference to that guiding reason.<sup>21</sup> Hence, if A in fact acknowledges the prohibition of killing another human being as a binding (or 'guiding') reason, then A must in fact *intentionally* omit pushing B into the lake, insofar as A is physically capable of this and realizes that, by pushing B into the lake, she (A) would be performing an action that would, *ceteris paribus*, cause the death of another human being.
- 21 The reason for this lies in the distinctive role played by intentions in practical reasoning. Following Brandom, intentions can be conceptualized as *practical commitments*, that is, as commitments that follow from the acknowledgment of reasons as *entitlements* for the performance or omission of some action.<sup>22</sup> On this basis, the *practical* character of a given

sylogism can be more precisely highlighted if we draw a well-known distinction in the philosophy of intention, namely the distinction between ‘intention-in-action’, on the one side, and ‘prior intention’, on the other.<sup>23</sup> For the mark of the practical nature of a *genuinely practical* syllogism can be identified with the fact that its conclusion does not consist in the formation of a prior or ‘pure’ intention, anticipatorily referred to the future performance or omission of a certain action, but rather with the actual intentional performance or omission of such action.<sup>24</sup>

- 22 But, if this is the role played by the concept of intention in the context of the syllogistic schema just sketched, it follows that that same concept does not need to perform any *positive* function in the language-game of the ascription of criminal responsibility for the transgression of some conduct rule. The intentional character of the omission of  $\varphi$  is what marks the way such a behaviour-token can be rationalized as guided by the given prohibition as a subjectively acknowledged reason. The very context for an ascription of responsibility for the agent’s transgression of such a norm is determined by the fact that the practical conclusion of the expected inference did *not* take place.
- 23 Hence, such an ascription of responsibility can be understood as motivated by the question of why the agent in fact failed to deliver the practical conclusion that she would have had to deliver if she had been capable of transforming her *counterfactually expected* acknowledgment of the norm into some intentional behaviour-token. We can call this the ‘principle of counter-facticity of imputation’. Under this principle, what needs to be established is whether the agent was in fact capable of effectively transforming her acknowledgment of the applicable prohibition into the intentional omission of  $\varphi$ . If we can properly assert that the agent was capable of intentionally omitting  $\varphi$ , although she did not in fact intentionally omit  $\varphi$ , then we can conclude—in the *tollendo tollens* mode—that she did not in fact acknowledge the applicable prohibition as a binding reason.
- 24 We already noted that, besides its physical component, the agent’s capability of intentionally omitting  $\varphi$  depends on whether she actually *realizes* that  $\varphi$  is an action-token that shall, *ceteris paribus*, instantiate the action-type placed under prohibition. But what does ‘realizing’ mean here? That  $\varphi$  is an action-token that shall, *ceteris paribus*, instantiate the relevant action-type means that  $\varphi$  shall, *ceteris paribus*, exemplify those properties the conjunction of which is constitutive of that same action-type. And the agent realizes that  $\varphi$  shall, *ceteris paribus*, exemplify that set of properties if and only if she *predictively believes* that  $\varphi$  is to exemplify each and every one of those wrongfulness-constitutive properties.<sup>25</sup> And ‘predictive belief’ is but a more technical expression with which we mean ‘foresight’.<sup>26</sup>
- 25 Of course, this doesn’t settle the very difficult question concerning the precise degree with which the agent must predictively believe that  $\varphi$  shall exemplify the set of wrongfulness-constitutive properties. The crucial consideration hereto, however, is that this question is an irreducibly normative one. For the answer depends on the extent to which it can be expected that the agent display her own capacities in order to fulfil the duty of omitting  $\varphi$ . One could imagine, for instance, a legal system under which the agent’s predictive belief concerning the exemplification of the relevant wrongfulness-constitutive properties would need to be a qualified belief, such that the agent would have to take for *certain* that her behaviour-token will indeed exemplify those properties. Most legal systems, however, tend to require much less. In jurisdictions belonging to the tradition of continental or ‘civil’ law, a belief qualified through a relevant degree of



probability suffices for the ascription of so called '*dolus eventualis*'. Although this is a highly controversial issue, what is to be taken as a relevant degree of probability should be determined through an appeal to the (counterfactual) standard of a rational and reasonable law-abiding person.<sup>27</sup>

- 26 This means: if the agent performed  $\varphi$  believing that  $\varphi$  would, with a given degree of probability,<sup>28</sup> come to exemplify the properties that would make  $\varphi$  an instance of the prohibited action-type, such that upon that same belief-degree a law-abiding person would have intentionally omitted  $\varphi$ , we can impute to him the non-omission of  $\varphi$  as a liability-grounding breach of duty.
- 27 The pertinence of the recourse to such a standard becomes easier to grasp if one adopts the 'disposition account of belief' recently put forward by Stark, to explain the praxis of ascription of the belief regarding the existence of the relevant risk.<sup>29</sup> The key feature of Stark's account lies in the claim that the ascription of a belief to some agent can only be intelligibly explained in terms of the coherence of that agent's dispositions with a certain 'dispositional stereotype',<sup>30</sup> whereas this is to be understood as 'a set of dispositions that ordinary people would expect agents who hold the particular belief to conform to, at least ordinarily'.<sup>31</sup>
- 28 The most workable version of such an account of the minimal sufficient fault element draws upon the application of a fixed set of so called 'indicators' of *dolus eventualis*. These are (doctrinally and judicially) codified descriptions of standardized *risk-syndromes*,<sup>32</sup> whereas the relevant *risk* is to be understood as the possibility of the actual instantiation of the specific wrongful behaviour-type.<sup>33</sup> Although I cannot go into detail here, such a move is of some importance insofar as it leads to redefining *dolus eventualis* as nothing more—but also nothing less—than *awareness in risk-taking*.<sup>34</sup> This is important because it suggests a path for the conceptual commensuration of *dolus eventualis* and ('subjective') recklessness,<sup>35</sup> understood as the properly ascribable belief that a risk that the given behaviour will come to exemplify the properties that would objectively make it an instance of the relevant unlawful behaviour-type exists.<sup>36</sup>
- 29 Beyond this, it is crucial to make explicit a further feature of the ascription of the respective fault-constitutive belief, which tends to be overlooked. This feature concerns what might be called, following von Wright, the 'situational' component of the relevant belief, the proper context of which must be identified with an 'occasion' that constitutes the corresponding 'action-opportunity', that is, the opportunity to omit or to perform the action-token in question.<sup>37</sup> In von Wright's own words:
- We shall say that an occasion constitutes an opportunity for the happening of a certain generic event or for the doing of act of a certain category, when the occasion has some generic feature which makes the happening of this event or the doing of this act (logically) possible on that occasion. For example: Only on an occasion when the window is closed, is there an opportunity for opening it.<sup>38</sup>
- 30 Now, an action's mark of success can be understood as the occurrence—if the action is of a productive or of a destructive kind—or not-occurrence—if the action is of a preservative or of a preventive kind—of a certain change, inasmuch as this 'positive' or 'negative' result is brought about by that same action.<sup>39</sup> For only then will the action instantiate the corresponding action-type. It follows that the corresponding 'action-opportunity' will be constituted by a situation—or 'occasion'—in which it is (logically) possible to bring about that (positive or negative) result. Hence, the fault-constitutive



belief with which the agent has to omit or perform the action must be also the belief that the circumstances that constitute this ‘duty-triggering’ situation are in place.

### 2.3 Negligence as ‘compensatory’ fault element

31 Summarizing the model’s presentation to this point: an agent A can be held responsible for a particular instance of criminally wrongful behaviour —say, for the non-omission of  $\varphi$ — if and only if (1)  $\varphi$  is an action-token that A was physically capable of omitting and (2) the fact that  $\varphi$  would instantiate the action-type put under prohibition, was actually foreseen by A, with the relevant degree of probability. These two conditions are jointly constitutive of A’s capability of intentionally omitting  $\varphi$ , whereas if A were not situationally capable of omitting  $\varphi$  as a conclusion of a practical syllogism premised upon the respective prohibition, an ascription of responsibility for that norm’s transgression would be excluded, insofar as ‘ought implies can’: *ultra posse nemo obligatur*.<sup>40</sup>

32

Under most criminal law systems, however, this last claim would certainly be a defeasible one. For it is possible that, although being situationally incapable of adjusting her behaviour to the practical ‘challenge’ represented by the applicable prohibition, A be nevertheless held responsible for not having omitted  $\varphi$ . This possibility critically depends upon the agent being properly accountable for not having assured, within a reasonable measure, her own capability to intentionally omit  $\varphi$ . Such *secondary responsibility* for one’s own situational incapability is grounded through an ascription of *negligence*.<sup>41</sup> Thus, if A could be expected to have prevented her fainting, which led her to (involuntarily) fall upon B and consequently push B into the lake, then A can be held responsible for not having omitted her (*ex post*) lethal pushing of B into the water. This move implies a disavow of A’s possible discharge, grounded on the ‘ought implies can’ principle, of having been situational incapable of omitting that very action.

33 Such disavow would be grounded upon the corresponding ascription of negligence, which can be schematically represented in the form of a *secondary syllogism*.<sup>42</sup> Its major premise would be constituted by the agent’s goal of assuring her own capability of omitting  $\varphi$ , whereas the omission of  $\varphi$  would constitute the conclusion of the respectively primary syllogism under the proper circumstances. The practical conclusion of that secondary syllogism would consist in the agent’s undertaking of a certain ‘precaution measure’, the adoption of which was ‘practically necessary’, according to the agent’s beliefs expressed in the minor premise of the secondary syllogism, for the assurance of her situational capability of omitting  $\varphi$ .

34 Hence, the *prima facie* ascription of responsibility for the criminal transgression of a prohibition or requirement can be grounded either on the fact that the agent was situationally capable of omitting or performing  $\varphi$ , on the one hand, or on the fact that the agent failed to assure, within a reasonable measure, his situational capability of omitting or performing  $\varphi$ , on the other. In each case, the non-omission or the non-performance of  $\varphi$  will be indicative of the agent’s failure of subjectively acknowledging the norm as a premise of practical deliberation. And, inasmuch as the agent has not been motivationally impaired (e.g., due to a condition of insanity) or has not found herself in a situation in which the motivation in accordance to the norm would have been beyond what can be

properly expected from a law-abiding person (e.g., a situation of duress), the agent can be properly blamed for his (definitively) *culpable* wrongful behaviour.<sup>43</sup>

### 3 Attempted offenses as 'imperfect' offenses

#### 3.1 The criminal significance of attempts

- 35 Until this point, no explicit reference has been made to the question regarding the consummated or attempted nature of the offense for which an agent can be held responsible under the conditions made explicit through the syllogistic account presented above. It is critical, however, to identify the logical place to which this question belongs. In terms of that same account, the consummation of an offense consists in the fact that the agent did not omit or did not perform an action that exemplifies the properties whose conjunction is constitutive of the action-type put under prohibition or requirement - that is, the properties that make its non-omission or non-performance an instance of the corresponding wrongful behaviour-type. 'Consummation' is thus an action-type category,<sup>44</sup> since it concerns the satisfaction or non-satisfaction of a certain description, which specifies some action-type.
- 36 It follows that the distinction between a consummated and an attempted offense cannot be properly understood as a distinction between a 'complete' and an 'incomplete' offense. The notion of completeness must be applied to some process that begins at some point and ends at a different point, wherein it becomes completed. In the present context, that can only be meaningfully predicated of the performance of some particular action, which will begin at some point and will end at some different point. Whereas this last point is the one in which the action's performance, if not interrupted, will be complete. In contrast to 'consummation', 'completeness' is thus an action-token category, since it concerns the process of execution of some particular action,<sup>45</sup> irrespective of the set of alternative descriptions that may be true of that same action.<sup>46</sup>
- 37 The important point here is that the notion of an attempted offense belongs to the same logical space as the notion of a consummated offense. More precisely, the notion of an attempted offense is the notion of a non-consummated offense, precisely because an attempted offense does not come to instantiate the corresponding offense-type.<sup>47</sup> Since the notion of a consummated offense designates the *paradigm* of criminal behaviour, the crucial mark of an attempted offense must lie in the features that make it a non-paradigmatic instance of criminal behaviour.<sup>48</sup> But what supports the purported status of consummation as the paradigmatic form of criminal behaviour? One can try to answer this question by pinning down the possible criminality of some behaviour-token as its possible *criminal significance*. Under this last aspect, the idea that consummation is the mark of a 'perfect' offense becomes intelligible,<sup>49</sup> so that we can understand lack of consummation as 'imperfection'.<sup>50</sup>
- 38 The criminal significance of some behaviour-token can be analysed by characterizing a given instance of criminal behaviour as an instance of *implicit performative* behaviour, and more precisely, as an implicit declaration.<sup>51</sup> By not omitting  $\varphi$  when the omission of  $\varphi$  would be practically necessary for someone who subjectively acknowledges the relevant prohibition as a binding reason, the agent conclusively declares that she does not acknowledge that very norm as a practical premise. But it is crucial to highlight the *implicit* nature of such a criminally significant declaration, which must be seen as

embodied in the behaviour-token through which the non-acknowledgment of the norm is expressed.<sup>52</sup> Such declaration will be perfect, in a performative sense, if and only if that behaviour-token consists in the non-omission of an action that exemplifies the properties that make it an instance of an action-type subject to prohibition, that is, the properties which define the corresponding wrongful behaviour-type. In less abstract terms: the performatively perfect way of not acknowledging the prohibition of killing another human being as a binding reason is to execute, and thus not omit, an action which in fact comes to be truthfully describable as the killing of another human being. For only in this case will the objective configuration of the given behaviour-token be *perfectly congruent* with the declarative value to which its specific criminal significance is attached.

- 39 Now, such perfect performative congruence is precisely what a criminally significant behaviour-token lacks when it constitutes only an attempted offense. For it is constitutive of an attempted offense that the given behaviour-token, through which the agent's failure to acknowledge the norm as a binding reason is expressed, does not exemplify the properties that constitute the specific wrongfulness that defines the corresponding offense-type.<sup>53</sup> This should make clear that, against Yaffe's argument in favour of a so called 'transfer principle',<sup>54</sup> the criminalization of an attempted offense cannot be 'implicit' in the criminalization of the corresponding consummated offense.
- 40 This means that it is constitutive of the structure of a criminal attempt that a *discrepancy* exists between the agent's subjective attitude towards the satisfaction, through her behaviour, of the description that specifies the corresponding wrongful behaviour-type and the way the world turns out to be with regard to the objective satisfaction of that same description by the agent's behaviour. This is why, already in 1881, the German scholar Hugo Hälschner could assert that the 'attempt-action' has, in every case, 'a mistake of the agent' as a necessary conceptual element.<sup>55</sup> And precisely this same thought is expressed through Moore's claim that liability for an attempted offense is defined by the fact that the agent's desert base is restricted to 'culpability without wrongdoing'.<sup>56</sup> This presupposes, as Moore himself makes explicit, that 'wrongdoing' be understood as 'wrongdoing in the *actual* world, not in a *possible* world', whereas the only, and precisely parasitic sense, in which one could say that wrongdoing is present as desert-base for a given attempted offense is the sense in which culpability implies wrongdoing, namely: 'wrongdoing in the possible world created by our representational states'.<sup>57</sup>

### 3.2 'Attempt' as mark of practical failure

- 41 The view just sketched leads to a further clarification of the concept of a criminal attempt. Although this is often overlooked, the satisfaction of the conditions of liability for an attempted offense can only be asserted from an *ex post* perspective.<sup>58</sup> For only thus can one claim that non-consummation is a constitutive element of the concept of attempt. This was very exactly put by Hälschner, when he stated that
- as attempt, the action can only appear in its relation to that which was intended to be consummated, the concept of attempt can only be negatively determined, as the action which did not lead to the consummation of the intended.<sup>59</sup>
- 42 Although one should, as will be later argued, avoid the reference to that which the attempt's agents 'intends' to consummate, from Hälschner's observation it is possible to extract the proposition that the criminal significance of an offense's attempt is

derivative, in the sense that it is only derivable from the criminal significance of the corresponding consummated offense. This is fully acknowledged in Winch's following remark:

We may of course say that trying to murder a man was something terrible, horrible, wicked; but the possibility of saying this derives from what we can say about the character of the act itself of murdering somebody. This wickedness is, as it were, reflected on to the attempt from what it was an attempt to do.<sup>60</sup>

- 43 On this basis, it becomes patent that the very idea that the notion of an attempted offense could be understood as primary in relation to the notion of the (corresponding) consummated offense is nothing but the result of putting the true description of that relation upside down. The idea that the notion of an attempted offense could be the primary one in the context of that relation leads to the proposition that the (eventual) consummation of the given offense would be just the mark of success of *the corresponding attempt*.<sup>61</sup> But this is quite incompatible with the idea that the notion of an attempted offense is the notion of an 'unsuccessful' —because imperfect— offense, whereas the criteria for 'success' are identical with the conditions upon which the *offense's* —and not the attempt's— consummation depends. For in this context, the very notion of a 'consummated attempt' is, strictly speaking, a *contradictio in adjecto*.
- 44 That the notion of a consummated offense is conceptually primary to the notion of an attempted offense finds further support in that fact that, more basically, the notion of *doing X* is primary to the notion of *trying to do X*.<sup>62</sup> Although the meaning of the technical notion of an attempted offense is *not* fixed by the meaning that the verb 'to attempt' shows in ordinary speech, so that one cannot assume that each attempted offense would rest upon being the case that the agent *tried* to perform or to omit a certain action,<sup>63</sup> there is a relevant analogy between the relation that holds between the ordinary concepts of doing and trying, on the one side, and the relation that holds between the juridical concepts of a consummated offense and an attempted offense, on the other.
- 45 The basis of such analogy is nothing but the fact that both the ordinary notion of trying and the technical notion of an attempted offense are indicators of (potential or actual) *practical failure*. This notion can be understood as indicating that the world's situation resulting from the omission or the performance of the given action by the agent, comes to be congruent with some propositional attitude we attribute to her so as to set the world's situation that the agent herself could expect to obtain as a result of her behaviour. Hence, the relevant notion cannot be identified with that of a practical failure *in a strong sense*, consisting in the lack of realization of some intention that could have oriented the agent's behaviour. Rather, the relevant notion is that of a practical failure *in a weak sense*, consisting in the fact that world's situation resulting from the agent's behaviour does not match an expectation, which the agent *could have* formed due to her doxastic representation of the circumstances.<sup>64</sup> More accurately put, this means that a practical failure in the weak sense is entirely dependent on a propositional attitude with the mind-to-world direction of fit:<sup>65</sup> the actual world, existent as a consequence of the agent's behaviour, diverges from the possible world represented by the agent as one that could have obtained upon that same behaviour, independently of whether she did or did not intentionally pursue its obtainment.
- 46 With regard to the ordinary notion of trying, the point is very neatly put by von Wright:
- It would be a mistake to think that whenever an agent has successfully accomplished an act he has also tried to accomplish it. A similar remark can be

made of activity. Normally, when I shut a door or walk or read I cannot be said to try, successfully, to shut the door or to move my legs or to read out the words. To construe every act as a result or consequence of trying to act would be a distortion.

<sup>66</sup>

- 47 One can offer a semantical interpretation of this claim. As Duff has remarked, ‘Try’ functions adverbially, rather than substantively [sic]. ‘A tried to do X’ does not describe a component of doing X; it modifies or contextualizes our description of A’s actions.<sup>67</sup>
- 48 This explains the fact that to say of an agent that he has *unsuccessfully* done X would be to incur in a *contradictio in adjecto*, while we would normally say that an agent has tried to do X when he has failed at doing X.<sup>68</sup> The point can be further elucidated by considering the analogy which, according to Brandom, exists between the language of ‘trying’ and the language of ‘seeming’:

The cost of treating these degenerate cases as representational paradigms is to render unintelligible in the ordinary fallible cases the relation between doxastic or practical representings and the represented states of affairs known or brought about by them. These temptations are best avoided by correctly diagnosing the source of noniterability of the ‘seems’ or ‘tries’ operator, which is the phenomenon that originally motivates this disastrous metaphysics of the mental. For then grasp of what is expressed by both ‘seems’ and ‘tries’ talk is seen to depend on grasp of what is expressed in ordinary fallible ‘is’ talk; one cannot withhold endorsements one cannot undertake or attribute, and a further disavowal of an endorsement once disavowed is without effect. So understood, neither the cognitive infallibility of seemings nor the practical infallibility of tryings is eligible to serve a foundational role. A subject conceived as contracted to these activities alone cannot be coherently thought of as a grasping or accomplishing anything, hence not as a subject at all.<sup>69</sup>

- 49 What Brandom criticizes as the ‘disastrous metaphysics of the mental’ implied in the claim that ‘trying to do X’ would be primary to (simply) ‘doing X’, which is just what Duff denounces as the crucial error of the so called ‘trying doctrine’, rooted in an alienated understanding of agency.<sup>70</sup> Such an alienated understanding lies at the core of the intuition, much generalized among criminal law scholars, that the amount of censure and thus of punishment deserved by a person responsible for an attempted offense should be, *ceteris paribus*, the same amount deserved by a person responsible for the corresponding consummated offense.

### 3.3 Outcome, luck, and blame

- 50 In a nutshell, this last proposition finds support in the (allegedly) retributivist desideratum that the amount of punishment deserved by a defendant be fixed by no other factor than the degree of the ‘culpability for choice’ manifested through her behaviour.<sup>71</sup> This should ground the belief that the magnitude of blame, and thus of punishment, deserved by a person responsible of a complete (or ‘last act’) attempt ought to be the same, *ceteris paribus*, as the one deserved by a person responsible for the corresponding consummated offense.<sup>72</sup> To claim otherwise would mean —so it is argued— to make the amount of blame deserved by the agent dependent on a random factor, placed beyond the agent’s control, constituted by the contingency of whether the world’s situation resultant of her behaviour is one that satisfies the (causally or constitutively) complex description which fixes the given offense-type.<sup>73</sup> This line of thought seeks to ground a charge of irrationality addressed to those who recognize relevance to so called

'moral luck',<sup>74</sup> specified here in the form of so called 'outcome luck',<sup>75</sup> when it comes to determining the magnitude of blame deserved by someone. The denouncement of such irrationality should lead one to adopt the thesis of the equivalence between consummation and attempt with regard to deserved blame.<sup>76</sup>

- 51 It is not, however, clear how one should construe the term 'for' in the context of the phrase 'culpability *for* choice'.<sup>77</sup> This formula is systematically ambiguous with regard to the distinction that, following Dan-Cohen, can be stated between the *object* and the *ground* of personal responsibility,<sup>78</sup> which comes very close to the distinction, made by Zimmerman, between the *scope* and the *degree* of culpability.<sup>79</sup> The interpretation needed to sustain the desert-equivalence thesis takes 'choice' to designate the *object* of the responsibility ascribed to the offender, that is, as something included in the scope of her culpability. But this misreads the function that should be assigned to the category of choice under the principle of subjective responsibility.<sup>80</sup> For 'choice' can be rather understood as designating a factor that warrants the ascription of the doing or not-doing of something by the agent, inasmuch as the agent has chosen so. Under this reading, 'choice' designates a (legitimacy-conferring) *ground* for an ascription of responsibility, thus determining the *degree* to which the agent is culpable, whereas the object of such responsibility will be constituted by some behaviour-token 'chosen' by the agent, the reach of which is codetermined by the set of beliefs effectively attributable to him.<sup>81</sup> Although the choice that grounds an ascription of responsibility for an offense can be exactly the same whether or not the offense has reached consummation, the token-behaviour that constitutes the object of the responsibility so ascribed, will certainly be of a *different kind* when the offense has reached consummation and when it has not, from the point of view of the descriptions which are true of it. For an offense's consummation is nothing but the fact that the behaviour-token for which the agent is held responsible objectively satisfies the description that specifies the wrongfulness distinctive of the corresponding offense-type.
- 52 Hence, wrongfulness is a category that concerns the object of responsibility, whereas choice constitutes a possible ground for an ascription of responsibility. So understood, the ground for an ascription of responsibility can be identified with the so called 'fault element' as a structural component of the offense in question.<sup>82</sup> And, if 'wrongfulness' and 'fault' designate two different desert-bases for criminal behaviour, then we reach the conclusion that, as desert-base, wrongfulness is privative of consummation, whereas the fault element that grounds responsibility is common to any consummated offense *and* its corresponding attempted version. In Scanlon's terms, this means that whilst the perpetrator of a consummated offense and the perpetrator of a corresponding attempt may well be equally *blameworthy*, the *blame* each one deserves is not the same.<sup>83</sup> In Zimmerman's terms, this means that while a person who is responsible for an attempted offense may be culpable 'to the same degree' as a person responsible for the corresponding consummated offense, the culpability of each has a different scope.<sup>84</sup> Thus, the asymmetry between consummation and attempt, given the diversity of the desert-bases that becomes relevant in each case, sustains the claim of non-equivalence between them with regard to the amount of blame deserved by the given offender.<sup>85</sup>



### 3.4 The sufficiency of foresight as fault element

- 53 As was already observed, the essence of an attempted offense lies in the discrepancy between the agent's subjective attitude towards the satisfaction of the description that specifies the corresponding wrongful behaviour-type, on the one hand, and the way the world turns out to be with regard to the objective satisfaction of that same description by the agent's behaviour, on the other. The question that now arises concerns the kind of subjective attitude relevant here. If we identify the notion of fault with what Moore calls '*prima facie* culpability', then we find an important insight in his remark: 'The key notion is that we are *prima facie* culpable when we act under a representation of the world that would make our action morally wrongful if the representation were true'.<sup>86</sup>
- 54 This suggests that the attitude in question must be a *doxastic* one. That is, it must consist in the agent *taking* something to be *true*.<sup>87</sup> And the basic form of such doxastic attitude is belief. This is of great importance, since it suggests that what counts as the ordinarily minimal sufficient fault criterion for the ascription of responsibility for a consummated offense, namely foresight, should perform that very same function when it comes to the ascription of responsibility for an attempted offense.
- 55 This last claim finds unequivocal support in the way in which the model of practical syllogism contributes to schematize the ascription of responsibility for a criminal attempt. As was stated above, the subjective practical necessity of the conclusion of a practical syllogism depends, among other factors, on the inference being constructed from the first person perspective. As von Wright showed, a particularity of such a syllogism 'in the first person' is that the practical necessity of the conclusion does not depend on the actual truth of the belief expressed in the inference's minor premise. The lack of truth of the agent's belief leaves the *subjective* practical necessity of the conclusion unaffected.<sup>88</sup> This means that if A falsely believes that B is incapable of swimming, so that B would probably die by drowning if he were pushed into the lake, then A must refrain from pushing B into the lake if she subjectively acknowledges the prohibition of killing another human being as a binding reason. Further, if under that same belief, A in fact pushes B into the lake, we can conclude—in the *tollendo tollens* mode—that A indeed did not subjectively acknowledge that norm as a binding reason, notwithstanding the fact that B in fact did not get killed because of his capability—unknown to A—of swimming out of the lake by himself.
- 56 In this last case, the pushing of B into the lake counts as a behaviour-token that can be imputed to A as the breach of a duty imposed upon him by the prohibition of killing another human being, although the action performed—and thus not omitted—by A does not come to instantiate the action-type to which the prohibition operator is attached. Hence, we encounter here the above mentioned discrepancy, which is constitutive of an attempt's structure, between the agent's belief concerning the (more or less likely) satisfaction of the description specifying the corresponding behaviour-type, , and the objective lack of satisfaction of that same description by the agent's behaviour. This discrepancy is precisely what defines a case in which an agent can properly be said to be 'at fault' for not having omitted or not having performed some action  $\varphi$ , although the non-omission or non-performance of  $\varphi$ , *qua* behaviour-token, does not come to exemplify the wrongfulness-constitutive properties that define the corresponding offense-type. This is due to the fact that  $\varphi$  does not come to exemplify the description that would make



∅ an instance of the prohibited or required action-type under the relevant conduct rule.<sup>89</sup> Such discrepancy is nothing but the consequence of the fact that, as Hart observed, the technique of enforcing some set of conduct rules through some set of criminal sanction rules ‘is that the members of society are left to discover the rules and conform their behaviour to them; in this sense they “apply” the rules themselves to themselves’.<sup>90</sup> At this level of abstraction, the view just outlined appears to be fully expressible in the conceptual apparatus forwarded in Yaffe’s account of the grounds for liability for an attempted offense.

- 57 On Yaffe’s account, a ‘faulty mode of recognition and response to reasons’ is shared by a consummated offense and the corresponding attempted offense, as stated through the so called ‘transfer principle’.<sup>91</sup> Although he initially argued that such understanding would only be compatible with a definition of the criminal law’s concept of attempt in terms of the (philosophically spelled out) notion of *trying*, so that an attempted offense would necessarily require intention as form of *mens rea*,<sup>92</sup> he has more recently conceded that a conception of attempts as instances of trying is not sufficiently supported by the reference to a faulty mode of recognition and response to reasons.<sup>93</sup> As Yaffe himself has asserted, this change of mind is explained by objections raised by some critics, who have argued that this same criterion in fact favours an account according to which foresight, meaning “recklessness” in the already qualified sense, should suffice as fault element.<sup>94</sup>
- 58 Therefore, and partially following a suggestion made by Duff,<sup>95</sup> Yaffe now claims that an additional premise is required to defend the trying-conception of criminal attempts (under the scope of the transfer principle), namely that the criminalized behaviour-tokens that ‘fall short’ of consummation still implicate ‘the legally protected interests that completions –more precisely, consummated offenses of the corresponding kind, JPM – violate’.<sup>96</sup> This additional condition would be satisfied by an attempt only if the concept of an attempt is understood, in the sense of the trying conception, as requiring intention. For only then would attempts be ‘intentional under a description that mentions the completed crime’, so that ‘they implicate the same set of legally protected interests that the completed crime implicates’.<sup>97</sup>
- 59 But this is a *non sequitur*, for what links a behaviour-token that ‘falls short’ of consummation, and for which the agent can be held responsible, with the wrongful behaviour-type that would be instantiated by that behaviour-token had the offense reached consummation, is the representational content of the agent’s subjective attitude consisting in her taking that description to be eventually true of that same behaviour-token.<sup>98</sup> The fact that such can be the representational content of an intention of the agent does not imply that only an intention of the agent could have that content.<sup>99</sup> Rather, a doxastic attitude consisting in a belief of the agent, can have that same representational content. Moreover, predictive belief is minimally sufficient to assert the agent’s capability of intentionally omitting or performing an action the omission or performance of which would have been practically necessary for a person who had subjectively acknowledged the relevant prohibition or requirement as a binding reason.

## 4 Three applications

- 60 The argument just offered sought to undermine what Cahill has critically analysed as the ‘intention intuition’ with regard to the definition of the concept of a criminal attempt.<sup>100</sup> I would like to conclude by stating three implications of the syllogistic account here,

proposed in reference to some further problems that surround the law of criminal attempts.

- 61 The first problem consists in determining the threshold that marks the line separating attempt from mere preparation. In both common law and ‘continental’ jurisdictions one encounters a large set of so called ‘formulas’ aimed at fixing that line.<sup>101</sup> Rather than thoroughly defend one of these formulas in particular, one should simply point out that the syllogistic account of imputation imposes a very significant structural constraint on the possible answers to that question. For it was already established that the grounding of a (forbearance or action) duty premised on the corresponding prohibition or requirement involves a ‘situational’ component that fixes the context of the fault-constitutive belief. This means that, in order to be attempting the offense in question, the agent must believe that she finds herself in a situation that confers a relevant action-opportunity - the opportunity to omit or perform the action which shall, with the minimally sufficient degree of probability, exemplify the properties that make an action-token an instance of the action-type put under prohibition or requirement. The crucial consideration hereto, is that a situation in which A has an opportunity to omit or perform  $\varphi$  is—in von Wright’s terms— *logically different* from a situation in which A can bring about the conditions for her future performance or omission of  $\varphi$ , that is, in which A can prepare her future norm-transgression.<sup>102</sup>
- 62 Of course, the agent’s belief can be false, also with regard to the objective existence of the duty-triggering situation. Nevertheless, without such situational reference, the agent’s subjective attitudes cannot license an interpretation of her behaviour as expressing an actual failure to undertake the practical commitment that would have followed from a subjective acknowledgment of the given norm as a binding reason. As Hälschner rightly framed the issue, an objectified expression of the agent’s disavowal of the relevant legal standard of behaviour does not play a merely *evidential* role here,<sup>103</sup> but is rather *constitutive* of the subjective fault element which can ground an ascription of responsibility for a criminal attempt.<sup>104</sup> It is from this perspective that the distinction between an incomplete and a complete attempt becomes significant. The fact that the agent has fully or definitively—that is, ‘completely’— performed or omitted the action, which under his representation he would have had to omit or perform in order to adjust his behaviour to the given norm, is conclusively expressive, by itself, of his failure to subjectively acknowledge that norm as a binding reason. In contrast, if the agent has not come to fully or definitively perform or omit such action, an additional intrinsic indicator, and not merely an evidential symptom, of his *actual* failure to subjectively acknowledge the norm is needed. In continental doctrinal parlance, such an indicator is defined as the agent’s ‘resolution’ to perform or omit the action under the circumstances that he takes to be in place;<sup>105</sup> in common law jurisdictions, such an indicator is usually identified with a ‘specific purpose’ or ‘specific intent’, which should not be confused, however, with the ‘general’ subjective state that minimally suffices for the offense’s fault element.<sup>106</sup>
- 63 But the specific understanding of such fault-constitutive belief, outlined above, has a further application regarding the possible solution of a second problem that is also prominent in the theoretical elaboration of the law of attempts. This second problem concerns so called ‘inherent factual impossibility’ as an obstacle to liability for an attempted offense.<sup>107</sup> The cases typically discussed under this label in common law jurisdictions are also known to scholars who work in the realm of ‘continental’ legal

systems, namely as cases of ‘unreal’ or ‘superstitious’ attempts. Through the method previously proposed for determining whether the general fault element necessary for an ascription of responsibility for a criminally significant behaviour-token can be upheld, one gets a very simple solution to the problem. For that method consists in identifying standardized *risk-syndromes*, which can serve as generalized indicators of the respective fault-constitutive belief, so that this subjective state can be ascribed to the agent if its proved —under the applicable standard of proof— that the agent took it to be true that the circumstances constitutive of the corresponding risk-syndrome were present, whether or not this was objectively the case.

- 64 Hence, if a person takes it to be true that by stabbing a wax dummy he will kill his purported victim, we cannot ascribe to him a fault-constitutive belief that could ground responsibility for an attempted homicide.<sup>108</sup> For the representation of the stabbing of a wax dummy is *not* the representation of a syndrome of a homicide-related risk. Of course, this depends upon an important qualification of the characterization of the relevant fault element as a *subjective* condition of criminal responsibility, that is, as *mens rea*. The subjective nature of the fault element is grounded on the fact that fault is built upon some set of the agent’s cognitive states. But this does not mean that the *relevant level of description* of the (intentional) object of those same cognitive states should be also fixed by the agent.<sup>109</sup> It is the law, and not the agent, that defines which *true* description of the content of the agent’s relevant set of beliefs is picked out to eventually ground an ascription of criminal responsibility for her behaviour.
- 65 Last but not least, a third question to which the syllogistic account here displayed seems to give a straightforward answer, is the following: can there be such thing as a *negligent* criminal attempt? The answer is negative. For as was previously suggested, negligence should be understood as a *secondary* —because compensatory— fault element in contrast to foresight (*qua* subjective risk-taking), consisting in a failure to undertake a precaution measure, the adoption of which would have assured the agent’s situational capability of omitting or performing a certain action-token that she would have had to omit or perform in order to adapt her behaviour to the relevant prohibition or requirement. But the concrete precaution measure, through the adoption of which the agent could have assured that capability, cannot be properly determined without a reference to the normatively relevant description of the action which the agent was in fact incapable of omitting or performing. And this description is fixed by the properties which would make such action an instance of the prohibited or required action-type.
- 66 As Moore has rightly observed, the crucial point here is precisely that ‘in cases of mere negligence there is no description of some action A (that morality makes wrong) that is object of the actor’s beliefs’.<sup>110</sup> Hence, and as Hälschner realized,<sup>111</sup> without the objective satisfaction of the description that specifies the relevant wrongful behaviour-type, it is not possible to establish the concrete precaution measure that the agent would indeed have had to adopt in order to be capable of intentionally omitting or performing a certain action in a situation in which the relevant norm could have grounded a duty to omit or perform that very action. This is why negligence is only compatible with consummation.

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## NOTES

1. Hruschka 1986: 672-684.
2. Robinson 1997: 57-67, 129-142.
3. Hart 1994: 97-98; see Mañalich 2012: 580-582.
4. Feinberg 1970: 95-118, in reference to what he aptly defined as the 'expressive function' of punishment.
5. Of course, such punishment may be subsequently determined and fixed as an exact instance of punishment through the application of grading rules and sentencing standards.
6. See Black 1962: 106-108.
7. To simplify the analysis, I leave 'activity-norms' and 'state-norms' —that is, rules which prohibit or require some activity or some state, and which can be understood as 'syllogistic opaque'— undiscussed; see, Mañalich 2014: 28-32.
8. See Hart 1982: 243-262.
9. See, von Wright 1963a: 36-37; von Wright 1983: 112-115; Goldman 1970: 10-19; Moore 1993: 280-292.
10. The meaning of 'proper conditions' is elucidated in the next section.
11. See, von Wright 1963b: 160-174; von Wright 1971: 96-118; von Wright 1983: 1-34; Anscombe 1963: 57-72; Kenny 1966; Kindhäuser 1980: 146-152. Of great importance for the argument here displayed is the account offered by Brandom (1994: 245-253), who defends the possibility of the fully practical conclusiveness of a syllogism the major premise of which is constituted by an obligation rule.
12. Raz 1990: 28-35. See also Kindhäuser 1989: 54-60; Mañalich 2009: 54-56; Mañalich 2014: 17-28.
13. Notice that the 'deontic sentence', which takes the place of the major premise of the inference can be interpreted both as the *formulation* of the given norm and as a *normative statement* which informs about the norm's existence; see von Wright 1963a: 93-105. That a norm can be formulated through the same sentence through which a normative statement concerning its existence can be made, is enough to put away the worry —shared by Raz (1990: 23-24, 51), and by Schauer (1991: 51-52, n. 117)— that, strictly speaking, a norm or rule could not function as a reason for action, but only the fact that such norm or rule exists. This worry rests upon the notion that only a proposition-like entity —for instance, a fact (that X is the case)— could have the status of a reason. But that worry should vanish once we realize that a norm or rule can be properly formulated through a linguistic device that, as a sentence, exhibits propositional structure.
14. See, von Wright 1983: 13-15.
15. See Mañalich 2014: 22-23.
16. Von Wright 1983: 4-7.
17. See von Wright 1963b: 166-168; von Wright 1983: 3-6, 8-9, 19-21, 24-27.
18. Raz 1990: 32-33.
19. Von Wright 1983: 54. The distinction is equivalent to the one between a reason *with* which someone performs or omits  $\varphi$ , and a reason *for* which someone performs or omits  $\varphi$ ; see Brandom 1994: 259-262.
20. For an analysis of the notion of blame as a category of ordinary moral practices, see Scanlon 2008: 122-214.
21. Brandom 1994: 243-245, 253-256.
22. Brandom 1994: 253-271. The truly *practical* nature of the commitment in which an intention consists can make Yaffe's distinction between 'commitment' and 'guidance', understood as two



different components of 'trying', problematic. See Yaffe 2010: 72-74, 82-98. For criticism see Moore 2013: 144-148.

23. Searle 1983: 83-98; Davidson 2001: 83-102; Brandom 1994: 256-259. See also Bratman 1999: 111-138; Moore 2011: 185-189.

24. This claim finds direct support in what Pippin (2008: 147-179) aptly describes as Hegel's 'expressivist' conception of action and agency.

25. It should be noted that among such properties one can expect to find so called 'negative properties'. For an assessment of the ontology of such properties, see Zangwill 2011; Baron et al. 2013.

26. See Hart 2008: 116-122; Moore 1997: 409-411.

27. Kindhäuser 2007: 456-457, 466-467.

28. The relevant notion of probability concerns the likelihood that a certain assertive sentence is true, as judged from the agent's point of view, and thus is of practical, rather than of theoretical nature. Of fundamental importance here is Toulmin 2003: 41-86; see also Stuckenberg 2007: 289-292.

29. Stark 2016: 103-105.

30. Stark 2016: 103.

31. Stark 2016: 103.

32. For an explanation of how the ascription of beliefs and other doxastic attitudes with relevance for the grounding of criminal responsibility rests upon public criteria concerning the linguistic and extra-linguistic behaviour of the person to whom they are ascribed, see Pardo & Paterson 2013: 130-140.

33. Kindhäuser 2007: 464-466. See also Puppe 2011: 32-41, who rightly emphasizes that the rational applicability of such indicators depends on whether they are conceptually determined by the normative definition of *dolus eventualis*, that is, of what they are indicators of.

34. Puppe 1991: 14-18.

35. See Hart 2008: 119-122; Robinson 1997: 42-44. In reference to the equivalence of recklessness and *dolus eventualis*, see Stuckenberg 2007: 311-317.

36. See Stark 2016: 90-111.

37. Von Wright 1963a: 37; von Wright 1983: 170-171.

38. Von Wright 1963a: 37.

39. Von Wright 1963a: 42-45.

40. Mañalich 2009: 45-46, 48-54.

41. See Hart 2008: 145-157; Hruschka 1986: 686-690, 694-696; Kindhäuser 1989: 62-69, 102-105.

42. See von Wright 1983: 8, 12-13, 16-17. For the application of the notion of a secondary syllogism to the grounding of negligence as fault element, see Kindhäuser 1989: 73-76; Mañalich 2009: 68-74.

43. For the distinction between the notions of *prima facie* and definitive culpability, see Moore 1997: 403-404.

44. Moore 1993: 296-297, n. 45; see also Bennett 1988: 197-198.

45. This is one way of interpreting von Wright (1963a: 41) when he observes that '[a]ction may be said to presuppose or require activity', insofar as it holds that '[a]s acts are related to *events*, so are activities related to *processes*'.

46. This is why the distinction between completeness and incompleteness is properly applied *within* the category of attempt; see Duff 1996: 119-120.

47. Beling 1930: 17-20.

48. See Fletcher 1998: 171-176; Cahill 2012: 753-755.

49. This does not amount to negating that, in the historical evolution of legal doctrine on this matter, the concepts of consummated offense and perfect offense have not always been regarded

as synonymic. See Hruschka 1999: 237-242, who illustrates the classical identification of the notion of *delictum perfectum* with the notion of a completed (or 'last act') attempt.

50. See Berman 2012: 2-4.

51. Mañalich 2011: 93-96.

52. The reason for this is that a speaker's explicit declaration of not acknowledging a norm as a binding reason lacks the practical nature that could warrant an interpretation of that same declaration as a contradiction of the norm as a *practical* binding reason. Hence, if someone ('merely') says that he does not acknowledge the prohibition of killing another human being as a binding reason, he does not, plainly by saying that, in fact fail to acknowledge it as a binding reason, insofar as he doesn't kill anyone.

53. This presupposes a refined theoretical apparatus for the individuation of offense-types, for the development of which the capital work in German scholarship is Beling 1906; see especially 110-296.

54. See Yaffe 2010: 21-25; Yaffe 2012b: 56; Yaffe 2013: 211-212.

55. Hälschner 1881: 344.

56. Moore 1997: 191-193.

57. Moore 1997: 405.

58. But see Donnelly-Lazarov 2015: 135-138.

59. Hälschner 1881: 332.

60. Winch 1971: 220.

61. So, however, argues Donnelly-Lazarov (2015 59-65, 81-85), acknowledging a distinction between 'successful attempts' and 'mere attempts'.

62. Thoroughly see Duff 1996: 285-292.

63. See Enoch 2012: 32-35, as well as Dahan-Katz 2012: 36-39, both arguing against Yaffe's effort to determine the concept of an attempted offense through the analysis of the concept of trying. Against determining the reach of the legal notion of attempt by means of the ordinary concept of trying, see Heath 1971: 204-205. See also Berman 2012: 3-4, arguing in the same vein for the theoretical convenience of the terminology of 'imperfect offenses'.

64. Which means that that which makes a practical failure in the weak sense recognizable consists in an expectation that the agent need not have formed, but that he could have formed, in virtue of his relevant predictive belief. This is certainly also the case when the agent did have the intention to bring about the state of affairs, which ultimately did not come to exist, which licenses the conclusion that every practical failure in the strong sense implies a practical failure in the weak sense, but not vice versa. See Duff 2007: 64-65, illustrating the sense that the question 'why did you do it?' can have regarding the production of collateral effects merely foreseen, and not intended.

65. See Searle 1983: 7-9; Searle 2010: 27-29.

66. Von Wright 1963a: 51.

67. Duff 1996: 289.

68. As explained in Duff 1996: 289, the other two proper standard contexts for talk of 'trying' correspond to situations in which it is doubtful whether the agent can do X or in which the doing of X requires a high amount of effort by the agent. Interestingly, the first context is defined by the uncertainty of success, while the second concerns the difficulty of success. See further the detailed analysis, offered by Heath (1971: 195-203), of the connection between the notions of succeeding and trying.

69. Brandom 1994: 295, who in reference to the parasitic nature of the 'seeming' jargon draws upon the analysis offered by Sellars (1997: 32-53).

70. Duff 1996: 290-292. See also Winch 1971: 211-213.

71. See Alexander & Kessler Ferzan 2009: 171-196. But see Hart 2008: 129-131, denouncing the 'illogical' version of retributive theory which would argue for the solution of less severe punishment for attempts.
72. See Alexander & Kessler Ferzan 2009: 171-196; Ashworth 1988: 738-744, 770-772; Feinberg 2003: 77-102. See also Hart 2008: 127-131. There are also accounts that accept the equivalence thesis regarding the blame-desert question, while rejecting the claim in favour of equal punishment for a consummate offense and the corresponding attempt. See Yaffe 2010: 310-313, 316-331; Donnelly-Lazarov 2015: 169-175.
73. The distinction between causally and constitutively complex action-descriptions can be found in Searle 2010: 36-37.
74. Groundbreaking Nagel 1979: 24-38. See also Williams 1981: 20-39; Scanlon 2008: 125-129. See further Malamud 2008: 39-74; Moore 1997: 211-218, who aptly questions the characterization of the sort of luck here involved as a *moral* one. For an insightful analysis regarding the relation between the notions of *moral* and *legal* luck, see Enoch 2010: 48-52.
75. Following the seminal analysis offered by Nagel (1979: 28-35), it has become common place to distinguish, (1) constitutive luck, (2) circumstantial luck, (3) luck regarding antecedent factors, and (4) outcome luck as species of the genus of moral luck.
76. See Donnelly-Lazarov 2015: 156-166; Malamud 2008: 39-43, 77-80, who redefines the equivalence-thesis as a so called 'irrelevance-thesis'.
77. See Feinberg 2003: 83-84, although reaching conclusions entirely divergent from those that follow from the argument presented here.
78. Dan-Cohen 2002: 202-204, who puts the distinction in terms of 'object-responsibility' and 'subject-responsibility'. See also Moore (1997) 36-43; Duff 2007: 82-83.
79. Zimmerman 2015: 136-142.
80. See Hart 2008: 173-185.
81. For a glimpse into the way in which beliefs properly attributable to an agent define the field of what she can choose, see Stark 2016: 141-147.
82. For this notion of 'fault element', see Duff 1996: 5-32, 362-378; also Brudner 2009: 59-81.
83. Scanlon 2008: 128-129, 145-146.
84. Zimmerman 2015: 140-142.
85. See Duff 1996: 327-347, 350-362; Moore 1997: 218-246; Brudner 2009: 131-135, 141-150. See further Malamud 2008: 121-123, 131-152.
86. Moore 1997: 405.
87. Brandom 1994: 153-159, 286-291.
88. Von Wright 1971: 96-97; von Wright 1983: 23-24.
89. In Scanlon's terminology, this means that a criminal attempt consists in some instance of behaviour for which someone can be blamed, but which does not come to be impermissible; see Scanlon 2008: 124-125.
90. Hart 1994: 39.
91. Yaffe 2010: 31-45.
92. Yaffe 2010: 47-61.
93. Yaffe 2012a: 435-437; Yaffe 2012b: 58-59; Yaffe 2013: 213-214.
94. Duff 2012: 416-421; Dahan-Katz 2012: 39-43; Moore 2013: 142-144.
95. Duff 2012: 420.
96. Yaffe 2012a: 436-437.
97. Yaffe 2012a: 436.
98. Moore 1997: 413.
99. See Moore 1997: 409-411, who nevertheless claims that only intention, and not belief, would be 'sufficient for the most serious levels of culpability'. But as Dahan-Katz (2012: 42) rightly

observes, '[w]hat matters is whether the mode of recognition and reasons [sic] is faulty enough to justify criminalization as attempt'.

100. Cahill 2007: 896-907.

101. On the common law side, see Duff 1996: 33-61; Yaffe 2010: 255-283; on the continental side, see Alcácer 2001: 24-82.

102. Although for different purposes, a very close distinction is made by Mele 2012: 391-393, 397-398.

103. As argued in Yaffe 2010: 215-236.

104. Hälschner 1881: 342-343. See Duff 1996: 313-317; Duff 2012: 412-416. See also Hart 1981: 162-164.

105. Hruschka 1999: 242-245. See also Jakobs 1991: 717-719.

106. Robinson 1997: 131, 157-164; Cahill 2012: 754-755.

107. See Duff 1996: 106-176; Yaffe 2010: 237-254.

108. See Duff 1996: 84.

109. In this context, 'intentional' does not mean 'with intention', in the ordinary sense, but rather designates a distinctive property of some mental states, which consists in their 'aboutness', that is, in the fact that those states distinctively refer to (or 'are about') something which is beyond those same states, whether or not that to which the given state refers —namely: its 'intentional object'— in fact exists. See Searle 1983: 1-37; Searle 2004: 19-20, 112-135.

110. Moore 1997: 413.

111. Hälschner 1881: 332-334. See also Kindhäuser 1989: 93-94.

## ABSTRACTS

The paper offers a conception of criminal attempts, grounded upon an analytically oriented theory of norms that identifies the wrongfulness-deficit of the behaviour imputable to the agent as its differentiating mark. Such 'offense-imperfection' is explained as a lack of full performative congruence between the objective configuration of the agent's behaviour and its declarative value. This is then related to the debate regarding the problem of so called 'outcome luck'. The argument so displayed makes recognizable the centrality of the concept of *dolus* for the clarification of the concept of attempt, as well as the sufficiency of *dolus eventualis* as the relevant 'fault' criterion.

## INDEX

**Keywords:** attempt and consummation, theory of norms, *dolus*, moral luck

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