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The Grammar of Imputation

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I. Norm-Theory as Grammar

In order 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 distinction between two sets of legal rules or standards, in 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 in this point, the two sets of rules or standards can be identified through the labels, favored by Joachim Hruschka, of “conduct rules” and “imputation rules”.¹ In the sense relevant here, imputation rules correspond to what Robinson calls “principles of adjudication” or “principles of liability assignment”,² and not to what he identifies, more narrowly, as “principles of imputation”.³

It is well acknowledged that a functional distinction between different sets of rules or standards can become a powerful analytical tool for the comparative reconstruction of institutionalized systems of criminal law.⁴ To a significant extent, the analytical output of such distinction is linked to the fact that so-called “norm-theory” can serve as a bridge between the doctrinal elaboration of criminal law, on the one side, and the general theory of legal systems, on the other.⁵

In this paper, I would like to make two central claims. The first is that it is critical not to confuse the distinction, already raised, between conduct rules and

¹ Hruschka, “Imputation”, *Brigham Young University Law Review* (1986), 669, 672 ff.

² Robinson, *Structure and Function in Criminal Law*, Oxford: Clarendon Press, 1997, 8, 127 ff.

³ *Ibid.*, 57 ff.

⁴ See, among others, *Dan-Cohen*, *Harmful Thoughts. Essays on Law, Self, and Morality*, Princeton and Oxford: Princeton University Press, 2002, 37 ff.; Eser, “Verhaltensregeln und Behandlungsnormen”, in: Eser/Schittenhelm/Schumann (ed.), *Festschrift für Theodor Lencker*, München: C.H. Beck, 1998, 25, 31 ff., 36 ff.; Renzikowski, “Normentheorie und Strafrechtsdogmatik”, in: Alexy (ed.), *Juristische Grundlagenforschung, ARSP Beiheft 104*, Stuttgart: Franz Steiner, 2005, 115, 117 ff.

⁵ Renzikowski, “Normentheorie als Brücke zwischen Strafrechtsdogmatik und Allgemeiner Rechtslehre”, *Archiv für Rechts- und Sozialphilosophie* 87 (2001), 110 ff.