CRIMINAL RESPONSIBILITY WITHOUT ALTERNATIVE POSSIBILITIES? THE DILEMMA OF FREEDOM AND THE STRUCTURE OF ASCRIPTION

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Abstract: This essay is about some connections between the idea according to which free will and determinism are mutually compatible and the fundamentals of criminal imputation. It is sustained that the Principle of Alternative Possibilities remains indispensable as a starting point, without damage to its integration into a broader model, able to cover those situations where the moral agent intentionally (at least by negligence) produces (or do not avoid) the conditions of his own lack of liability in ordinary or general terms.

Keywords: criminal responsibility; free will; indeterminism; determinism; compatibilism; freedom of action; freedom of motivation; Principle of Alternative Possibilities (PAP); Source Model (SM); causing the conditions of one's own lack of liability; extraordinary imputation.

Resumo: Este artigo trata de algumas conexões entre a tese de que o livre arbítrio e o determinismo são mutuamente compatíveis e os fundamentos da imputação criminal. Sustenta-se que o princípio das possibilidades alternativas continua a ser um ponto de partida indispensável, sem prejuízo da sua integração num modelo mais amplo, capaz de abranger as situações em que o agente moral intencionalmente (pelo menos a título de negligência) produz (ou não evita) as condições da sua própria falta de responsabilidade em termos gerais.

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Palavras-chave: responsabilidade criminal; livre arbítrio; indeterminismo; determinismo; compatibilismo; liberdade de ação; liberdade de motivação; Princípio das Possibilidades Alternativas (PPA); Modelo da Fonte (MF); exclusão da responsabilidade provocada pelo próprio agente; imputação extraordinária.

1. Introduction

One of the most permanent (and therefore always current) challenges of moral philosophy is to approach the freedom (updated at the time of conduct) of who has done something wrong, so carrying out a bad action. Beyond question, this issue resounds in the field of Law, where the challenge of assigning responsibilities is faced as well.

Namely in those branches of legal system which have a sanctioning feature, in accordance with a subjective responsibility pattern, based on a voluntary act performed with intent (dolus or negligence) and other culpability requirements. Especially in Criminal Law, where the agent is reproached for having an illicit behavior which reveals a misuse of his freedom of action and motivation.

In this background, starting from a brief comment about the dispute between indeterminism, determinism and compatibilism (2), the next few pages try to discuss the meaning of the Principle of Alternative Possibilities (PAP) and its importance for the structure of criminal ascription (3 and 4).

Attention is drawn to the need to integrate the PAP into a broader normative model, capable of assimilating the cases in which the agent himself is responsible for the occurrence of conditions which exclude his liability in ordinary or general terms (5). Along these lines, it is intended to remember that Criminal Law is not only a set of rules which restrict the citizen liberty, but also (onto-anthropologically speaking) *a normative order of freedom.*[1]

2. Indeterminism, determinism and compatibilism

Basically, there are three kinds of answers to the general problem of freedom[2]. While indeterminism postulates an absolute freedom, conceived

1 Indeed, although more visible in Criminal Law, this is the matrix paradox of Law: a normative order which restricts freedom just to protect (enhance) freedom. With an onto-anthropological basis: José de Faria Costa, *Direito Penal* (Lisboa: Imprensa Nacional, 2017), 25: "freedom is a right which materializes and becomes denser when, based on it, we are able to deepen our own freedom, in a self-reflection from freedom to freedom".

2 The jusphilosofical literature on the problem of freedom in moral agency is practically inexhaustible. *Brevitatis causa*, is not my purpose to offer a complete and detailed picture of all the relevant

as the unconditional power to take an undifferentiated decision in its content (*liberum arbitrium indiferentiae*), determinism asserts the total absence of decision alternatives. In its turn, beyond of that strict dualism, the so-called "compatibilism" (also known as "determinism in a weak sense") tries to conciliate those two previous perspectives in a bigger picture, maybe closer to the practical reason.

Against the hard indeterminism speaks a widely shared belief that freedom, if it exists, can no longer assume an absolute feature, completely indifferent to the content of the agent's choice and to the circumstances which draw the concrete horizon of action. Because freedom is a *relative concept.*[3] In other words: its meaning depends intentionally on the reference to the specific type of action whose performance capacity is concerned. The same person can be free in relation to a certain mode of conduct and not be free in relation to another. Thus, e.g., a paraplegic is (physically, bodily) free to say whatever he wants, but he is not free to walk.

On the other hand, the determinist assessment has been boosted, in more recent times, by the discoveries of neuroscience[4]. In this regard, it is already common to talk about *neurodeterminism.*[5] In fact, there is some tendency towards the rehabilitation of determinism based on neuroscientific studies, especially those where it is postulated or admitted that human behavior would be preceded and predetermined by a "readiness potential" (RP): any

doctrines in this context and its variations, but just a condensed image, sufficient for the proposed discussion (cf. below, footnote 19).

3 Essentially, that contrast is widely recognized in the field of moral philosophy, especially in the model with works with staggered (first-order and second-order) intentions (desires). Instead of several, while renouncing the Principle of Alternative Possibilities (PAP): Harry G. Frankfurt, *Taking Ourselves Seriously & Getting It Right* (Stanford: Stanford University Press, 2006), 15, where it is underlined the controversy over freedom is directly related to a straightforward "parallel between a free action and a free will. Just as we act freely when what we do is what we want to do so, so we will freely when what we want is what we want to want – that is, when the will behind what we do is exactly the will by which we want our action to be moved".

4 For a summary of its most interesting (from the standpoint of community of Law) conclusions: Kurt Seelmann, "Sind die Grundannahmen einer Rechtsgesellschaft mit den Resultaten der modernen Hirnforschung vereinbar?", Marcel Seen / Dániel Puskás (Ed.), *Gehirnforschung und rechtliche Verantwortung* (Stuttgart: Franz Steiner, 2006), 94 f.

5 To a brief overview of the features of this standpoint, albeit in a critical manner: Eduardo Demétrio Crespo, "'Humanistischer Kompatibilismus'. Ein Versöhnungsvorschlag zwischen Neurowissenschaften und Strafrecht", *Goltdammer's Archiv für Strafrecht* 160 (2013), 16 f.

decision would take place even before the activation of the muscle involved in the respective physical movement and the awareness of this same bodily performance.

According to the best known and most influential research in this context, in voluntary actions[6], such as the banal act of flexing the wrist, the agent's consciousness appears approximately 550 milliseconds after the brain impulse which programs and commands its execution.[7] However, there is some agreement in the sense of recognizing that the scientific results obtained in this field still do not offer a sufficiently clear and conclusive portrait of the – yet mysterious[8] – functioning of the human mind.

Even enthusiasts of that experimental account and its consequences warn that it is not accurate to exclude, from the start and safely, that the conscience can critically develop, through its learning capacity (even from the subconsciousness), a significant "veto power". Indeed, this predispositional attitude towards control not only corresponds to our daily experience but can be detected and mapped through the identification – with current medical imaging technology – of a measurable change in the mentioned RP (readiness potential).[9]

Actually, there are good reasons to believe that veto power increases as the decision-making process becomes more intricate and morally charged, especially when a legally disapproved (illicit) behavior is at stake.[10] At least, it

6 Therefore, in behaviors which are something more than a mechanical (reflex, automatic) movement in response to a certain stimulus or impulse.

7 In an experimental philosophy framework: Benjamin Libet, "Do We Have Free Will?", Robert Kane (Ed.), *The Oxford Handbook of Free Will* (Oxford: Oxford University Press, 2005), 551 f.

8 Recognizing the "mystery 'Human Being'" means accepting the autonomy of citizen's decision as a true bastion of the individual's emancipation in contemporary societies. In fact, the only thing we can predict is the unpredictability of human decision. This makes the rationalist (intellectualist) image of "being a person" a fiction detached from reality: at most, each one can only count on the fallibility of himself and others. For this point of view: Christoph Burchard, *"Irren ist menschlich". Vorsatz und Tatbestandsirrtum im Lichte der Verantwortungsethik und der Emanzipation des angegriffenen Mitmenschen*, Tübingen: Mohr Siebeck (2008), 41, 42, 52, 384 f., 489 f.

9 Reference above, in footnote 7 (p. 556 f.).

10 On the methodological weaknesses of that experiment and its conclusions, by remembering that feelings of volition are neither necessary nor sufficient to assert a voluntary movement: M. R. Bennet / P. M. S. Hacker, *Philosophical Foundations of Neuroscience*, Malden: Blackwell (2003), 228 f., where it is summarized: "We should also remember that a large range of acts

is enough to think about aggressions against individual legal interests which belong to the core of personal integrity. Therefore, what may have some meaning for simple and ethically neutral decisions of everyday, which only ask for a *procedural memory*, cannot be transferred without further analysis to complex and ethically relevant motivational processes, which ask for an *episodic memory*.

Consequently, with the application of hypnosis methods, for instance, the hypnotized person may well perform acts without any moral or axiological content: to imitate a chicken or bark, sing or dance, assume another personality and so forth. But the agent under hypnosis does not carry out highly disapproved (from the viewpoint of social ethics) instructions or commands (v.g., kill someone), unless he was already inclined ("decided") to do so.[11]

In contrast, compatibilism hold that freedom and determination are not mutually exclusive: they are two categories fully compatible with each other, nothing preventing their harmonization in a comprehensive reading of the intentional avoidability. Thus, determinism no longer means fatalism. In favor of this compromise solution is the widespread belief already pointed out: the morally relevant decisions are always taken in a highly variable circumstances scenario, which brings together moments of indeterminacy and determination.

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are decided on in advance. Reflecting on whether to *V* this evening, next week or next month, we weigh the reasons for and against *V*'ing, and decide to *V* (or not to *V*). So, when the time approaches (assuming that we have not forgotten and do not change our mind), we *V*. But to *V* thus intentionally, in accordance with our antecedent plans and intentions, could not require that we 'feel an intention' (there being no such thing as a feeling of intention), and does not require that we 'feel a desire'. We simply act in order to fulfil our plans, and the relevant movements we make are accordingly voluntary and intentional". Moreover, it is there (96 f., 133 f.) very clear – especially in the debate on the nature of consciousness – that neuroscience does not operate only in a merely cognitive (descriptive-corroborative) framework, but likewise develops a normative dimension which validates certain conceptual commitments established as logical premises and therefore insusceptible to empirical-experimental confirmation: it is about defining the bases for *assign* psychological predicates to the human being (or other animals) and the bases for *not assign* psychological predicates to an internal entity (the brain, for example). This should be useful to dismantle the superficial opinion (still widespread nowadays) which gives the terms "psychologistic" and "psychologism" a necessarily pejorative connotation, associated with the term's "naturalist" and "naturalism".

11 Christian Jäger, "Willensfreiheit, Kausalität und Determination. Stirbt das moderne Schuldstrafrecht durch die moderne Gehirnforschung?", *Goltdammer's Archiv für Strafrecht* 160 (2013), 5-6 and 8-9.

A traditional illustration to the (lasting and sharp) problem of free will can be found in the famous *Locke's room*, which has long been discussed in the field of moral philosophy:

> *1.* P_1 is taken to a rest room, where falls asleep. After waking up, P_1 wants to stay in that closed place, by having found an old friend he wants to talk to. With this in mind and resolved to carry out this purpose, P_1 does not engage any behavior in order to get out of there. Notwithstanding, what he does not know is that the door is actually locked from the outside.[12]

In any case, P_1 could not leave the room, even if his will was directed in this specific direction. In other words: the conduct of staying is not accompanied by a real opportunity to choose effectively between at least two different options (stay or get out). It was not in P_1's the factual power to leave the room if he wanted to do so. Following the usual terminology: he could not have done otherwise. Thereby, his hypothetically intended want (desire) would be useless to produce an alternative state of affairs. But we can invoke more sophisticated examples, maybe (for now) with some dose of science fiction:

> *2.* In an election, P_2 votes for candidate P_3. P_2 has decided autonomously, without any kind of external intervention or constriction, coming from a third party. Nevertheless, unbeknownst to him, at the time of choice he was being monitored by P_4, a neurosurgeon[13], who had installed a chip in his brain, to ensure that P_3 was the chosen one. If were perceived any electromagnetic signal (neuronal trigger) of a vote for a different candidate, P_4 would be ready to send a contrary stimulus, through a computer device, causing P_2 to choose P_3.

12 John Locke, *An Essay Concerning Human Understanding* (1690) (Philadelphia: The Pennsylvania State University, 1999), 223, by sustaining the idea of freedom does not refer to the power (capacity) of volition (preference) but to the power (capacity) to do or to abstain (thereby based on the PAP).

13 The technical-scientific developments in the field of psychosurgery (or functional surgery) – especially the deep brain stimulation to reverse behavior disorders, from the identification of abnormal activity patterns, through specific neurophysiological biomarkers of certain pathologies – has raised some ethical questions for which the postulate *melius ancepts remedium quam nullum* seems not to be enough.

Objectively, P_2 did not have any alternative conduct, as his choice would always be the same. Again, following the usual terminology: he could not have done otherwise, even if he wanted to vote for a different candidate. Therefore, his hypothetically intended want (desire) would not have the slightest impact in terms of effectiveness for your action.[14] Anyway, this last scenario shows two peculiarities in comparison with the preceding example.

If a third party blocks the agent's remaining alternative – allowing the last one to act only within the possibility which the outsider wishes to see carried out – *and* if the agent chooses precisely this path on his own, the disposition (availability) of the third party to intervene in case of an opposite sign – preventing the choice for the alternative he does not wish to see carried out – is fully irrelevant. There may be circumstances which make it impossible to avoid performing an action, but this does not always mean that these same circumstances properly have made (caused) the action to be performed.[15]

Furthermore, it is not so obvious that an alternative conduct was absolutely inaccessible for P_2. Indeed, it is not excluded – from the beginning and with an assurance degree near to certainty – that he could exhibit an alternative pattern of neuronal firing culminating in an equally alternative decision. And if this possibility actually came to fruition (becomes real by the performance of action), its fact would in no way be described as something that happened against his will.[16]

Of course, this control mechanism can be considered for more serious behaviors, such as homicide or bodily injury.[17] Regardless, in these both examples the conduct was determined externally, either through an already operating circumstance or due a real-time (remote) interference system. And

14 John Martin Fischer, "Compatibilism", AA.VV., *Four Views on Free Will* (Malden: Blackwell, 2007), 58.

15 Carlos J. Moya, "Moral Responsibility without Alternative Possibilities?", *The Journal of Philosophy* 104 (2007), 476 f., highlighting this irrelevance thesis.

16 Nadine Elzein, "Frankfurt-Style Counterexamples and the Importance of Alternative Possibilities", *Acta Analytica* 32 (2017), 182.

17 See the example scanned by John Martin Fischer / Mark Ravizza, *Responsibility and Control. A Theory of Moral Responsibility* (Cambridge: Cambridge University Press, 1998), 29 f.

the agent could have stipulated (*formed*) his secondary intention (setting up his desire) in another direction, even though he could not have done (*performed*) otherwise.

These ideas prepare a crucial question not just for our moral concerns, but for the legal responsibility as well, mostly in criminal ascription: for the imputation of a fact as an expression of an individual's freedom, it is enough for the agent to feel free or to do exactly what he has wanted to do or is it also necessary for him to have a concrete opportunity to choose a different behavior, i.e., that he still has at least one alternative (eventually restricted) for not to do just what he want to do (a possibility to perform another conduct)?

3. The Principle of Alternative Possibilities (PAP) and the liberty of spontaneity

For classical compatibilism, the will is determined. However, and unlike hard determinism, does not mean that the agent cannot want his will as his own.[18] Because without a minimum of (self)determination – a sufficient conditionality of conduct by the agent himself – there is no way to ascribe a behavior as an authentic manifestation of his person. Hence, the attribution of an event as an updated expression of the agent's freedom depends on his possibility of determining its occurrence.

Indeterminacy brings "chance" (random) and therefore cannot be a valid criterion for assessment to free will and personal responsibility. In this sense, freedom is broadly assumed as self-determination, that is, as determination by the agent himself, as someone who defines his identity based on the critical self-identification of the preferences constitutive of his "I". Hence, the "power" to action must be conditionally formulated: a person acts freely when can act otherwise, *if* (in case) wants to do so.

Although, the fact that a person is at the same time determined and free does not imply giving up the practical requirement of an alternative

18 Classical compatibilists (soft determinists), like Thomas Hobbes (1588-1679) and David Hume (1711-1776), conceive freedom as lack of external constraints (acting without coercion).

possibility to behave. The old principle *ultra posse nemo obligatur* remains valid, now in its ascriptive value: in relation to the impossible there can be no imputation (*impossibilium nulla est imputatio*). So, in the examples 1 and 2, the conclusion would be that P_1 and P_2 did not act freely.

On the other hand, the so-called *semi-compatibilism* considers an alternative opportunity for action to be needless.[19] In a more subjective version, such theory is satisfied with the "feeling" or "experience" of freedom. For this introspective and emotional understanding, it is enough that the agent believes to act freely at the time of the action or that he has done precisely what he wanted to do, without being relevant or necessary to inquire about the real existence of another possibility of conduct in the concrete situation.[20]

In a more normative version (contrary to any kind of affective self-absorption), semi-compatibilism sees freedom as an intersubjectively shared construction[21], making a relational dimension lived and learned in a communication network.[22] It is the set of "representations we have about our behavior and the behavior of others" which "allows us to consider ourselves free and liable to accountability", inasmuch as the individual only "understands his own freedom when putting himself in the other's shoes, changing roles".[23]

19 With an exhaustive overview of the various relevant theories in this field: Michael McKenna / D. Justin Coates, "Compatibilism", Edward N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (2021 edition), available in <https://plato.stanford.edu/archives/spr2021/entries/compatibilism/>. The Frankfurt's attack on the PAP led to a wide and heated discussion of his arguments, for example, through the studies collected in Monika Betzler / Barbara Guckes (Ed.), *Autonomes Handeln Beiträge zur Philosophie von Harry G. Frankfurt*, Berlin: Akademie Verlag, 2001.

20 Björn Burkhardt, "Thesen zu den Auswirkungen des neurophysiologischen Determinismus auf die Grundannahmen der Rechtsgesellschaft", Marcel Senn / Dániel Puskás (Ed.), *Gehirnforschung und rechtliche Verantwortung* (Stuttgart: Franz Steiner, 2006), 87-88.

21 On the connections between the "first person" and the "second person" perspectives and the "triangulation" as a tree-way relation among two speakers and a common world, mainly from an epistemological point of view: Donald Davidson, *Subjective, Intersubjective, Objective* (Oxford: Clarendon Press, 2001), 3 f., 108 f., 205 f.

22 In this direction, by underlining an explanatory aspect (based on a sufficient condition): Harry G. Frankfurt, "Alternate Possibilities and Moral Responsibility", *The Journal of Philosophy* 66 (1969), 830 f., 836 f.

23 Wagner Marteleto, "O quarto de Locke e a culpa penal. Breves reflexões sobre liberdade, determinismo e responsabilidade", *Anatomia do Crime* 1 (2015), 188 and 189, although waiving the requirement of a behavioral alternative only in the horizon of crimes perpetrated by action (positive conduct): "with regard to omission, *not wanting to act* (freedom of spontaneity) is not enough for imputation, as far as this last one, given its relational structure, requires an *effective power to act* (or a general capacity for action), with ability to save the legal interest from the danger to which it is exposed

This is the thesis of the *liberty of spontaneity*: the (legally) relevant freedom is the freedom of desire, the one where it is worth desiring. According to this viewpoint, although does not have control over the "if" of his conduct, the agent is responsible because it is in his power at least the "how" to do it[24]: by himself or through intervention of an external control mechanism. All that matters is the existence of a "power to want to act", i.e., that the person has been able to *form* his secondary intention (setting up his desire) in another direction, even if he was not able to *perform* something different from what he has done. Therefore, in the examples 1 and 2 the conclusion would be that P_1 e P_2 have acted freely.[25]

But it is seriously doubtful that the spontaneity can be enough, in general, to affirm freedom of the will and sustain legal (mainly criminal) liability. By definition, Law and legal reasoning presuppose an alternative-based thought, guided by the hypothesis of the counterfactuality of any "other possible world", precisely that one which the legislator wants to see achieved (or avoided)[26/27]. Furthermore, there is some noteworthy lack of clarity in defining the moral (ir)relevance of the concretely available alternatives to the agent.

(hypothetical causality of omission)". It seems difficult to agree with this opinion, because also in commissive crimes the formation of duty depends on the ability to avoid the fulfilling of the offense legal description (*ad impossibilia nemo tenetur*).

24 With emphasis on this aspect, in the compatibilist horizon, underlining the inconclusiveness of Libet's experiment (above, footnotes 7 and 9): Klaus Lüderssen, "Spontaneität und Freiheit. Neue Aspekte moderner Hirnforschung für Strafrecht und Kriminologie?", Hans-Ullrich Paeffgen, et al. (Hrsg.), *Festschrift für Ingeborg Puppe* (Berlin: Duncker & Humblot, 2011), 66-67 and 70-71.

25 Another illustration. In a production line, *P* is responsible for placing certain objects that will be cut by the blades of a large machine. For his own safety, he is tied to chains with restricted movements, preventing his hands from invading the cutting area as the blades descend. Whenever *P* does not intentionally withdraw his hands, the system immediately pulls his arms back. In this case, the worker's hands will always be removed from the danger zone, even if *P* does not guide his will in this direction. The only thing belongs to his (factual) power is to decide "how" it will be done: whether by himself or by the machine. Vide Daniel Dennet, *Elbow Room: The Varieties of Free Will Worth Wanting* (Oxford: Oxford University Press, 1984), 116.

26 Quite clearly, though already in the causation assessment: Urs Kindhäuser "Zur Alternativstruktur des strafrechtlichen Kausalbegriffs. Zugleich eine Entgegnung auf Puppes Kritik der condicio per quam", *Zeitschrift für Internationale Strafrechtsdogmatik* 11 (2016), 574 f., 585 f.

27 Regarding the criminal liability for omission: José de Faria Costa, "A analítica, a dogmática e o injusto: reflexões a partir da conduta omissiva imprópria e da desistência da conduta tentada", *Idem et al.* (Orgs.), *Estudos em Homenagem ao Prof. Doutor Manuel da Costa Andrade*, Vol. I (Coimbra: Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra, 2017), 370 and 371.

Indeed, at the origin of the rejection of the PAP is an idea of responsibility which conceives the reproof for the misuse of freedom as a broader and undifferentiated moral evaluation of the agent's negative qualities or behaviors. All things considered, this approach mixes two quite different aspects: (i) the agent behaved badly and has no excuse (explanation) for what happened; (ii) the agent behaved badly but it was not expected, under the circumstances, he would act otherwise (correctly).

So, e.g., the witness of a criminal offense who refrains from calling the police just because he does not want to get into trouble, even without knowing that the entire telephone service network was not working at that very moment, can be reproached (blameworthy) – as someone who selfishly prefers his own interests – for not had wanted to call the police, since he has no excuse (explanation) for not doing so. Nonetheless, he is not reproached (blameworthy) – as someone who has misused his freedom – for not making the call, since under the circumstances he could not have done what was expected.[28]

Now let us think about a specific example of Criminal Law:

> *3.* P_5 drives a car down a very sloped street. On the way, he sees P_6, a hated neighbor, who is drunk, wandering through the middle of the road. Decided to take the life of his enemy, P_5 stomps on the gas pedal to the ground and runs deadly over P_6. However, what P_5 did not know is that P_7 has prepared the car to ensure that P_6 was run over by P_5 anyway. In fact, P_7 has installed a monitor which allowed him to observe each of P_5 singular acts of driving and immediately block the brake and steering commands, if necessary, as soon as he noticed any P_5 movement towards them.

In the compatibilist account, P_5 is responsible for the killing action in the same terms as he would be responsible if he had acted without any supervision from P_7. The (potential) control by P_7 only means that P_5 could not prevent his murderous action. However, the availability

28 David Widerker, "Frankfurt's Attack on the Principle of Alternative Possibilities. A Further Look", *Philosophical Perspectives* 14 (2000), 195 f. a

(disposition) of P_7 does not explain why P_5 did what it did.[29] Consequently, the claim that P_5 could not have acted otherwise is (from the viewpoint of ascription) irrelevant.[30]

Nevertheless, the methodological difficulty is yet to come: the identification of a conduct ascribable as a sort of action depends on how this conduct is described.[31] Therefore, we must recognize the relativity of action description.[32] In this context, what is crucial for the intentional understanding is the more general distinction between acting and not acting.

If he had applied the brake or turned the steering wheel, P_5 would have realized that it would be impossible to avoid the running over of P_6. In this case, continuing to drive would no longer be ascribable as an action. And not braking or not turning the steering wheel would no longer be ascribable as an omission (abstention from due behavior). With the effort to avoid the fatal result, P_5 would have performed a no-action. In comparison with an action, a non-action is another-action, even when externally both are exactly the same.[33]

P_5 could have acted otherwise, at the discretion of his own will, even if the outcome would not the expected one (different).[34] Thereby, the real problem with the PAP is not properly in the field of the *capacity for action* (being able to act otherwise), that is, in the first level of intentionality. But at another dimension, more precisely in the *capacity*

29 In causal terms: if actually performed, the intervention of P_7 would be a *sufficient* condition for P_5 to commit a criminal offense, but not a *necessary* condition for this.

30 Besides, in causal perspective is in general recognized the irrelevance of the hypothetical behavior of third parties who would be available to act if the agent had not acted at all.

31 For instance: if the description is "P_5 has consciously killed P_6", there is no possible alternative behavior. In a diverse way, if the description is "P_5 has consciously and willingly killed P_6", there is a possible alternative for his behavior, insofar as P_5 could have consciously but not willingly killed P_6.

32 Urs Kindhäuser, *Intentionale Handlung. Sprachphilosophische Untersuchungen zum Verständnis von Handlung im Strafrecht* (Berlin: Duncker & Humblot, 1980), 157-159.

33 So P_5 is liable for consummated murder. In any case, under the Portuguese Penal Code, the opposing opinion should at least admit punishment for an impossible attempt (Art. 23, Nº 3).

34 Reinhard Merkel, *Willensfreiheit und rechtliche Schuld. Eine strafrechtsphilosophische Untersuchung*. 2. Aufl. (Baden-Baden: Nomos, 2014), 97-99, proposing the example under analysis.

of self-motivation (being able to want otherwise), that is, in the second level of intentionality.[35]

This becomes more visible if we can vary example 3 in similar terms to example 2, bringing the control instance into P_5's brain, in order to allow not only the control of his action, but also the control of his will. In this example 4, P_7 could correct the P_5's original RP to brake or deviate the vehicle, creating a RP to run over P_6.

If P_5, by himself, lets his "bad" RP operate, P_7 does not need to intervene to suppress any "good" RP. However, at first glance, as P_5 could not have wanted otherwise, there was no place for an alternative decision. *Prima vista*, at most, he could only respond by criminal attempt (inchoate crime).[36] However, he decided *from the beginning* (positively) for the wrongdoing and deserves to be blamed (punished).

This moral perception (intuition) suggests that criminal responsibility does not require a "power to want otherwise". And – with more or stronger reason – neither would it be necessary a "power to act otherwise". But here we can observe the weakness of this reasoning. It disrespects a requisite of application of the PAP: an alternative course of facts cannot be mentally (discursively) *introduced* (added) in the analysis of what really happened, since the basic conditions of the decision must remain unchanged.[37]

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35 Cf. Harry G. Frankfurt, *The importance of what we care about* (Cambridge: Cambridge University Press, 1998), 3 f., 36 f., 95 f., claiming that if someone who had already decided to act is – just before his effective undertaking – morally constrained (through serious threat) by another person to perform the very same action, must remain the conclusion that the coerced agent has acted freely, because his previous decision was never affected by the coercion. Notwithstanding, by assuming that coercion had no relevance to the agent's motivation (once the previous decision would *hypothetically* lead to the same outcome), this reasoning disrespects a requisite of application of the PAP (see the text below, referring to the footnote 37).

36 It's also worth remembering (about the impossibility as the structure of attempted crime) that, in general, the different legal systems tend "to agree that impossible attempts are punishable if the behavior itself produces apprehension or generates apprehension in the mind of an ideal observer": Georg P. Fletcher, *Basic Concepts of Criminal Law* (Oxford: Oxford University Press, 1998), 177.

37 For this criticism in cases of (potential) overdetermination of will: Juan Pablo Mañalich, *Nötigung und Verantwortung. Rechtstheoretische Untersuchungen zum präskriptiven und askriptiven Nötigungsbegriff um Strafrecht* (Baden-Baden: Nomos, 2009), 289-290. In more general terms, on the prohibition of invoking unreal (imaginary) circumstances, in the context of so-called "hypothetical consent": Bruno de Oliveira Moura, "Consentimento 'hipotético' em Direito Penal? A irrelevância da vontade fictícia da vítima para excluir a punição do autor", José de Faria Costa, et al. (Orgs.), *Estudos em Homenagem ao Prof. Doutor Manuel da Costa Andrade*, Vol. I (Coimbra: Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra, 2017), 891-895.

4. A REFLEXIVE SCHEME OF INTENTIONS: THE PROMISE AS A PARADIGMATIC CASE

In fact, the compatibilism thesis is enriched with a staggered intentions model, structured on two levels.[38] At least for a subjective liability (based on dolus or negligence), the ascription mirrors two intentionally relevant capacities. On the one hand, it is necessary that the agent is able to form, in an effective way for the action, the intention to do or not do something about it (more exactly: the prohibited act).

On the other hand, it is necessary for the agent to be in a position to form, in an effective way for the action, in view of the respective norm, the intention to carry out the required behavior, eventually with departure of rival intentions. This last intentionality could be defined as *meta-intention*. It is a *second-order intention*, which finds its reference object precisely in a *first-order intention.*[39] While first-order intent refers to the capacity (ability) for action, second-order intent refers to the capacity (ability) for motivation.[40]

In Criminal Law, this structure corresponds to the old analytical difference[41] between *imputatio facti* – the ascription of a conduct as an *action*, based on the *freedom to act* – and *imputatio iuris* – the ascription of an action in *blame* mode, based on the *freedom to decide accordingly or*

38 Intentionality must be understood not as an unfathomable psychic phenomenon, but as an interpretative scheme which is elaborated in the intersubjective reference to an object, offering a praxiological explanation of the binding motives for action (see reference in footnote 32, p. 146 f.).

39 Stressing out this reflective dimension (in layers or levels) of intentions (desires): Peter Bieri, *Das Handwerk der Freiheit. Über die Entdeckung des eigenen Willens*, 11. Aufl. (Frankfurt am Main: Fischer Verlag, 2013), 103 f.

40 This stratification can likewise be understood from the traditional split between the two well-known forms of coercion: while the *vis absoluta* (as a coercion not mediated by the will of the person coerced) affects the first level of imputation (which, in a broad sense, includes the error or ignorance of factual circumstances), the *vis compulsiva* (as coercion mediated by the will of the person coerced) affects the second level of imputation (below, footnote 43). For those concepts: Dominik Düber, "Defining Paternalism", Thomas Schramme, *New Perspectives on Paternalism and Health Care* (Heidelberg: Springer, 2015), 40 f, concluding that (p. 41) "*vis absoluta* should cover those kinds of interferences that do not leave the person coerced an option in influencing the run of events, i.e., cases in which his will does not play a mediating role".

41 Rooted in Joachim Georg Daries (1714-1791).

against the norm.[42] The predication of both levels of freedom in ascriptive sense (*libertas facti* and *libertas iuris*)[43] is quite clear in the case of making a promise.[44]

As is well known, the promise is nothing more than a self-placed norm: whoever promises something not only enunciate the type of action to be carried out, but also the will to carry it out at the relevant time. Thereby, he states the intent to carry a single intention out, i.e., the will to prefer this very specific intent at the expense of other rival intents, which may possibly compete at the decisive moment for action.[45]

Therefore, even here (in a multidimensional unity) the reflexivity which marks the 'I' and the thought of the Law as an order of freedom is revealed. At best, animals can pursue their desire, forming an instrumental will to choose, v.g., between the possibility of drinking water in a lake and the possibility of hiding from a threat which surrounds the place. But this does not mean that they can have the desire not wanting a choice.[46]

42 With references: Bruno de Oliveira Moura, "The 'Depth Grammar' of Criminal Law. The Case Rule and the Distincion between Norm and Ascription", J. M. Aroso Linhares, et al. (Ed.), *Jurist's Law and European Identity. Dogmatic-Institutional, Methodological and Legal-Philosophical Problems* (Coimbra: Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra, 2019), 137 f.

43 Jan C. Joerden, *Strukturen des strafrechtlichen Verantwortungsbegriff: Relationen und ihre Verkettungen* (Berlin: Duncker & Humblot, 1988), 31-35, by illustrating the (positive) contrast between *imputatio facti* and *imputatio iuris* from the (negative) contrast between *vis absoluta* and *vis compulsiva*.

44 Moreover, it is not by chance that the ability to promise is precisely what makes the person (in his autonomy) as an ethical center of responsibility: António Castanheira Neves, "Pessoa, Direito e Responsabilidade", *Revista Portuguesa de Ciência Criminal* 6 (1996): 33 e 36; Fernando José Bronze, "A responsabilidade hoje. Algumas considerações introdutórias", Fernando Alves Correia, et. al. (Orgs.), *Estudos em homenagem ao Prof. Doutor José Joaquim Gomes Canotilho*, Vol. I (Coimbra: Coimbra Editora, 2012), 185.

45 On the promise as a self-placed norm and a heuristic starting point for a model of staggered intentions: Bruno de Oliveira Moura, *A não-punibilidade do excesso na legítima defesa* (Coimbra: Coimbra Editora, 2013), 110 f., 119 f.

46 Again, with his division between "first-order desires" and "second-order desires", holding that no animal has the capacity for reflexive self-assessment in the formation of second-order desires: Harry G. Frankfurt, "Freedom of the Will and The Concept of a Person", *The Journal of Philosophy* 68 (1971), 7 f., although with the conclusion that, in extreme, there can also be human beings without this capacity, who (just for that reason) would no longer deserve the name "person", but only the name "wanton". All this in spite of being recognized the arbitrariness of those terminological options (p. 11, footnote 5). Apparently in agreement, also with a higher-order intentions assessment: Daniel Dennet, "Conditions of Personhood", Amélie Rorty (Ed.), *The Identities of Persons* (Berkeley: University of California Press, 1976), 192-193. Nevertheless, in a Democratic State of Law based on the human dignity, "individual", "private", "particular", "citizen" and "person" are perfectly interchangeable synonyms and always designate the same creature: the being-there.

In this framework, considering the two intentionally relevant capacities, it is worth saying that someone is only free when he can act in another way, if wants to do so.

The most convincing parameter is to know whether the agent could have done something else, instead of performing the prohibited act, if he would had had the intention (second order) of having had another intention (first order), precisely the one which legal norm intends to establish as preferential for its addressee. Whereas classical compatibilism gives a deterministic meaning to second-order intentionality (as self-determination), more recent compatibilism tends to assign a deterministic meaning to first-order intentionality, in this way denying the Principle of Alternative Possibilities.

This scheme reminds there is no sole and absolute concept of freedom, as liberty of indifference, nowadays supported by sophisticated libertarian positions. The relevant ascriptive capacities are always relative. They are aptitudes for a specific class of behavior. There is a freedom in relation to the fact (*libertas facti*) and there is another freedom in relation to the attitude (disclosed in the action) towards the Law (*libertas iuris*).

Both are equally important for understanding the structure and foundation of subjective liability, mainly in Criminal Law[47], where is usual to distinguish[48] between wrongdoing (justification) and culpability (excuse).[49] Differently (by exception), in the field of objective legal liability (whether in Civil or Administrative Law) – a sort of responsibility for risks – freedom has no importance as a current avoidance capacity of the disvalued result, but

47 The PAP remains crucial in this normative area, due to the severity of the legal consequences imposed by the State: Maria Fernanda Palma, *O princípio da desculpa em Direito Penal* (Coimbra: Almedina, 2005), 78 f., likewise starting from Locke's room controversy.

48 In fact, wrongdoing (justification) and culpability (excuse) are two fundamental concepts of the Legal Science: Johann Braun, *Einführung in die Rechtsphilosophie*, 2. Aufl. (Tübingen: Mohr Siebeck, 2011), 398.

49 In the last decades even in the Anglo-Saxon legal perspective. Instead of many: Heidi M. Hurd, "Justification and Excuse, Wrongdoing and Culpability", *Notre Dame Law Review* 74 (1999), 1551 f., 1557 f., mainly on the cases where an agent wrongly (but in a reasonable way) believe that his act is justified. With a comprehensive script of the dispute since the 1970s: Mitchell N. Berman, "Justification and Excuse, Law and Morality", *Duke Law Journal* 53 (2003), 3 f., summarizing the structural (conceptual, analytical) role of the distinction (p. 76): "justification defenses qualify the offenses to provide that certain conduct is not criminal, all things considered; excuse defenses specify the circumstances under which an offender cannot be punished for having violated the criminal law".

only as a category which operates in the prior field (*Vorfeld*). The fact that the person legitimately enjoys a margin of free configuration of his legal sphere corresponds to the obligation to bear, regardless of its will, the cost of the harmful consequences that the management of particularly dangerous goods throws on the legal sphere of third parties.[50]

5. Source Model (SM) and extraordinary imputation (above all the *actio libera in causa*)

Let us return to examples 2 and 4. The key to the solution is to identify the *reason* which makes it impossible *to want otherwise*. On this assumption, it is convenient to differentiate two hypotheses. First, if the other (potential) will is impossible *because* there is an instance of external control which *prevents* (*blocks*) its formation, we can assert the agent's freedom and responsibility *when* his concrete will arises only from himself.

On the other hand, if the other potential will is impossible because there is an instance of external control which produces in the agent the concrete will revealed in the action, we can no longer affirm his freedom and responsibility. Thus, criminal liability does not require the *negative* freedom (opportunity to have an alternative will), it is enough the *positive* freedom (the use of opportunity to create the volition which became effective for action).[51] This conclusion forward to what some call "Source Model" (SM).

The PAP regards freedom as a "*Garden of Forking Paths model of control*": free will is analyzed in terms of ability to choose between two (or more) roads, in sense of an agent's future as a garden of forking paths branching off from a single past, insomuch a person acts of his own free will only when he could have acted otherwise. By contrast, a SM prefers another notion of control, more oriented towards the origin of

50 In the context of justification by defensive necessity: Michael Pawlik, *Der rechtfertigende Notstand. Zugleich ein Beitrag zum Problem strafrechtlicher Solidaritätspflichten* (Berlin: Walter de Gruyter, 2002), 321-327.

51 Reinhard Merkel, *Willensfreiheit und rechtliche Schuld*, 100-101.

the action, faced as a product of one's agency: "control is understood as one's being the source whence her actions emanate. On this model, a Source model of control, one's actions issue from oneself (in a suitable manner)".[52] Thereby, we are facing a free action when the agent himself provides a source for his action. A source which is not originated outside of him, but also an *ultimate* source.[53]

It should be noted that SM is not strange to Criminal Law. It is enough to underline the classic discussion on situations in which the agent is responsible for the absence of some liability condition at the time of the fact, namely in the *actio libera in causa* (*lato sensu*) scenario.[54] In this framework, it is necessary to distinguish two moments.[55]

At first sight, the agent cannot respond in ordinary terms, since at the time of action (t_2) there is a deficit of liability, due to the lack of an imputation requirement, whether the capacity for action (e.g., in case of an involuntary fall on somebody else)[56] or the capacity to self-motivation (for instance, in case of drunkenness in a level which affects self-judgment).[57]

Nevertheless, it is concluded that, by his behavior at a previous moment (t_1), the agent has produced (or did not prevent, with a duty to do it) in a

52 Michael McKenna / D. Justin Coates, *The Stanford Encyclopedia of Philosophy* (2021), items 2.1 and 2.2., showing developments for several (incompatibilist and compatibilist) accounts of Source Model.

53 Reference in the preceding footnote.

54 Extending the *a.l.i.c.* formula to all elements of crime: Reinhart Maurach, "Fragen der actio libera in causa", *JuS* 1 (1961), 373 f.

55 On the different arguments invoked to legitimize responsibility due to a previous behavior (*Vorfeldverhalten*), although with a smaller scope: Ulfrid Neumann, *Zurechnung und „Vorverschulden ". Vorstudien zu einem dialogischen Modell strafrechtlicher Zurechnung* (Berlin: Duncker & Humblot, 1985), 26 f. See also Henning Leupold, *Die Tathandlung der reinen Erfolgsdelikte und das Tatbestandsmodell der „actio libera in causa" im Lichte verfassungsrechtlicher Schranken* (Berlin: Duncker & Humblot, 2005), 54 f.

56 For instance, when a mother, while breastfeeding her child in her own bed (t_1), ends up falling asleep from fatigue over the child body (t_2), who dies asphyxiated by her weight, being objectively predictable (t_1) that this could happen.

57 For instance, when the agent gets drunk (t_1) to gain the courage to take someone else's life and ends up committing the crime (t_2) as planned (t_1).

responsible way[58] the defective situation (the lack of relevant capabilities) and must respond in extraordinary terms[59]. In spite of not acting freely in the decisive moment to avoid the harmful conduct at t_2, the agent is considered free at the origin[60] of offense at t_1 and is held liable for the fact occurred later.[61]

In accordance with the doctrine of *culpa in causa* (in a broad sense)[62], "[a]n actor may be held reliable for an offence, even if he does not satisfy the elements of the offence definition, if he satisfies the requirements of a doctrine of imputation that impute to him the missing element".[63] This can have a special relevance, for example, precisely in traffic offenses, v.g., if the driver falls asleep, causing an accident with damage to another person, a scenario where liability is often sustained on the driver's failure to stop when feeling drowsy.

For this understanding, an earlier conduct (prior fault) can be analyzed – under strict circumstances[64] – as the founding element for the imposition of criminal liability, as long as exists a "struggle to strike a fair balance between the need for public protection and fairness to the individual who lacked voluntary control over his actions. The courts are well aware that lack of (voluntary) control is relatively easy to assert and as it amounts to a denial

58 At least by negligence.

59 Jan C. Joerden, *Logik im Recht* (Heidelberg: Springer, 2005), 249-251.

60 When he creates (or does not avoid) his incapacity, wanting (albeit indirectly) to practice the subsequent aggression or knowing (or even because he should know) that it would probably happen.

61 For the distinction between "ordinary" and "extraordinary" imputation, as well the two levels of ascription (adjudication of an event as a "deed" and adjudication of a deed as "blameworthy"): Joachim Hruschka, "Imputation", *Brigham Young University Law Review* 11 (1986), 682 f., 686 f. Likewise: Tobias Rudolph, *Das Korrespondenzprinzip im Strafrecht. Der Vorrang von ex-ante Betrachtungen gegenüber ex-post-Betrachtungen bei der strafrechtlichen Zurechnung* (Berlin: Duncker & Humblot, 2006), 26 f., 78 f. Critically, by considering superfluous that first differentiation: Christoph Hübner, *Die Entwicklung der objektiven Zurechnung* (Berlin: Duncker & Humblot, 2004), 106 f.

62 With an interesting approach to different situations in which the agent provoke, in his favor, the incidence of a justification (like self-defense or lesser evil) or an excuse (like duress or mistake of law), especially in cases of voluntary (or self-induced) intoxication: Paul H. Robinson, "Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine", *Virginia Law Review* 71 (1985), p. 2 f., without forgetting to point out the problems faced with the principle of legality and the difficulties of proof.

63 Paul H. Robinson, *Structure and Function in Criminal Law* (Oxford: Clarendon Press, 1997), 13.

64 And under express legal provision. In Portuguese Penal Code, e.g., arts. 15, 17, n.º 2 and 20, n.º 4.

of the actus reus element might result in a complete acquittal no matter how serious the charge".[65]

6. Final remarks on the alternativism: somewhere between PA and SM

In order to be coherent and provide useful conclusions in the field of Criminal Law, the discussion on PA cannot be detached from a rigid distinction between the two relevant capacities for the imputation: the ability to act in accordance with the norm and the ability to make the norm the preferred motivation for conduct.

On this assumption, the controversy over PA is not so much about freedom of action, but mainly about freedom of will: the potential external blockage of an alternative second order desire does not rule out imputation if the agent came to decide for himself against this higher intentional possibility.

Howsoever, in any of both levels of imputation (*libertas facti* or *libertas iuris*) the question raised in the title of this article can be answered in the affirmative. Nonetheless, not in cases of (potential) overdetermination of will (examples 2, 3 and 4)[66], because adding a hypothetical (counterfactual) course of events in the attribution judgment is a violation of PAP's methodological requirements.[67] But only when someone (in an attributable

65 Johannes Keiler, "Commission versus Omission", Idem / David Roef (Eds.), *Comparative Concepts of Criminal Law*, 2nd edition (Cambridge: Intersentia, 2016), 80.

66 The example 1 is rather different, because the impossibility of leaving the room is already current (present), not depending on any (future) overdetermination of will. So, because an alternative possibility is *ab initio* lacking, the action of staying there (or the omission of getting out) is not a free behavior.

67 Even if in these cases were recognized the impossibility for the person to do otherwise, the Criminal Law should assert the responsibility of the agent, because in the end, despite the lack of intentional avoidance, there is a correspondence (also intentional) between the event ultimately produced by the agent and the will that he has externalized (in an effective way for action) in his conduct. In this sense, Frankfurt's theory is at least correct in its conclusion: a (moral) agent is who constitutes a sufficient condition for a certain action to be performed. Similar in definition (*condicio per quam*), though claiming precisely an alternative possibility for the behavior: Urs Kindhäuser, in the work cited in the footnote 26, 576 f., 588 f. To reinforce that consequence, we could directly employ the "sum of criminal disvalue" formula: a "disvalue of outcome" (harm to

manner) causes (or does not prevent, with a duty to do it) the conditions of his own lack of liability.

In general, the agent's responsibility depends at least one alternative possibility in addition to the one which took place in the choice made. He does not respond if he has not had the chance to act or to want otherwise. Unless this alternative possibility has been eliminated (or has not been obtained, against the expected) by an intentional (*lato sensu*) action (or omission) of the agent himself.[68] In this case, he remains responsible for the misuse of freedom. That is why alternativism can not provide all the answers to moral agency.

Compared to PA, SM has the heuristic advantage of accommodating both ways of ascription (ordinary and extraordinary). However, in its purity, the SM is not in a position to exclude a responsibility (freedom) based on the character of the agent, i.e., in a broad examination of its moral biography over time.[69]

As a result, it is necessary to find a criterion which is somewhere between the PA and the SM, according to an intentionality parameter mediated by the concept of fact. With regard to the ability to self-motivation, the basic question becomes another one. Could the agent have *positively*[70] formed another will? When can we say that someone could have triggered an alternative second-order intention?

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other) plus a "disvalue of intention" (bad willing) generate an entire (full) axiological (negative) content of the fact. With these concepts: José de Faria Costa, in the work cited in the footnote 27, 373-374.

68 That is, when somebody brings about the conditions of his own defense (justification or excuse). The responsibility for the occurrence of requirements which exclude the own responsibility in ordinary terms is a reason to maintain the responsibility for the very same fact, now in extraordinary terms.

69 This last drift is very close to the belief that freedom only exists within a center of functions which precedes the will, in the "personal I-Self": Ernst-Joachim Lampe, "Willenstrafrecht und strafrechtliche Unrechtslehre", *Zeitschrift für die gesamte Strafrechtswissenschaft* 118 (2006), p. 29. Well before, with a solid philosophical insight: Jorge de Figueiredo Dias, *Liberdade. Culpa. Direito Penal*, 3.ª ed. (Coimbra: Coimbra Editora, 1995), 117 f., 155 f., favoring a doctrine of "the person's blameworthiness".

70 In a somewhat different sense, it is common to distinguish between *negative* freedom as a formal sphere of emancipation which deserves to be protected (against public and private power abuses) by legal norms and *positive* freedom as a material domain which covers the intentional capabilities related to certain types of action, like make contracts, get married, drive a car, construct a building, practice a profession, sue someone else in court, etc. Cf. Stephan Kirste, *Rechtsphilosophie. Einführung*, 2. Aufl. (Baden-Baden: Nomos, 2020), 181 f.

Despite being reinforced by neuroscience studies, the thesis of the nonexistence behavioral alternatives still faces a tough challenge, as seen above. For the rest, hypothetically speaking, even in the worst scenario (for humanity as a whole and for the Law) – if it were obtained, beyond any reasonable doubt, a proof that each ones's brain is the true author of the acts of his person – no legal system would be willing to renounce the principle of freedom. Because this would imply the impossibility of making any critical judgment on human action.

Hence, freedom can be onto-anthropologically grounded[71], in the care-of-danger relationship which constitutes our specific way-of-being-with-others, based on the understanding of the possibilities of self-realization situationally available to the "being-there" (*Dasein*)[72]. It is worth remembering: neurodeterminism tries to preserve the assumption that, when acting, the agent is always completely determined by its predispositions and the surrounding circumstances. However, if it were correct, this starting statement should also be understood in the sense of hard determinism itself: as a speech act totally determined by the speaker's propensities and by his environment.

And there would simply be no way to check the correctness (validity) of the statement: the evaluation and its results would be indistinguishably defined likewise by those same factors. By escaping any critical analysis, the statement of determinism is shaky. When hard determinists consider their thesis rational, this means that they at least presuppose themselves as free subjects, which is clearly contradictory to its premise. As an attitude of

71 José de Faria Costa, *O perigo em Direito Penal. Contributo para a sua fundamentação e compreensão dogmáticas* (Coimbra: Coimbra Editora, 1992), 251, 297, 421 (footnote 129) and 423.

72 Agnes Wulff, *Die Existenziale Schuld. Der fundamentalontologische Schuldbegriff Martin Heideggers und seine Bedeutung für das Strafrecht* (Münster: LIT, 2008), 104 f., 229 f. Remarkably similar: Siegfried Haddenbrock, "Das rechtliche Schuldprinzip in wissenschaftlich-anthropologischer (=global akzeptabler) Sicht", *Goltdammer's Archiv für Strafrecht* 150 (2003), 522 f., 528 f. Also starting from the Heideggerian approach, but later integrating the reproof judgment in a Wittgensteinian-style analytical philosophy: Walter Grasnick, *Über Schuld, Strafe und Sprache. Systematische Studien zu den Grundlagen der Punktstrafen- und Spielraumtheorie* (Tübingen: Mohr Siebeck, 1987), 136 f. For the aprioristic-existential side of being-guilty as a kind of call to self-awareness of the "I": Roland Wittmann, "Der existenzialontologische Begriff des Verstehens und das Problem der Hermeneutik", Winfried Hassemer (Hrsg.), *Dimensionen der Hermeneutik* (Heidelberg: Decker & Müller, 1984), 45, where is emphasized that "existential analytic of *Dasein* is a philosophy of possibility" (47).

detachment or overcoming in the face of naturalistic conditions, freedom continues to shape the moral specificity – a crucial point for Criminal Law – of the being-there.

We may not know the subject who acts in a concrete situational horizon, but we are able to recognize and accept him. We may not know your freedom, but we are able to recognize it. By saying that everything is determined, the hard determinism acts like the Cretan liar: forbidding recognition of freedom implies the author of the prohibition has adopted, in this normative act, exactly the perspective he intends to see prohibited.[73]

73 Joachim Hruschka, *Strukturen der Zurechnung* (Berlin: Walter de Gruyter, 1976), 38 f. From an onto-anthropological point of view, what is claimed is a relational understanding able to intersubjectively overcome the dilemma between an (impractical) judgment of empirical verification presupposed by a substance ontology and a (utilitarian) judgment of formal imputation allegedly legitimated by functional needs of prevention. For a recent analysis of the constructive possibilities in this horizon, also favoring an intersubjective aspect, despite now with a different theoretical framework (discourse ethics): Bruno Buonicore, *Freiheit und Schuld als Anerkennung* (Frankfurt am Main: Klostermann, 2020), 3 f., where neurodeterminism is discussed from the tension between incompatibilism and compatibilism (p. 28 f.), in favor of a (kind of) normative alternativism based on personal (mutual) recognition of citizen indeterminacy (possibility) in a Democratic State of Law.