Attempting the Impossible: Impossibility in Criminal Law Theory and the Constructivist Discourse-Theoretical Concept of Law

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From the perspective of criminal law theory, the notion of impossibility continues to fascinate. The paper outlines core ideas of objectivist and subjectivist accounts and identifies conceptual problems that arise when someone attempts the impossible. Neither objectivist nor subjectivist accounts offer a conceptually satisfying answer on how to deal with impossibility. The majoritarian view does not fit either position and lacks a conceptually viable normtheoretical foundation. However, there is a way out of this predicament. The proposed solution consists of two elements: the (meta-level) relational theory of basic rights and a constructivist discourse-theoretical concept of law. This approach leads to the conclusion that the question of whether there is a breach of a behavioural norm is not the core problem – the focus shifts to the question of whether there is a need to react to a norm breach. The agent is (generally) criminally liable if he or the observer understands the agent's behaviour to be in breach of an incriminated behavioural norm. A breach of a behavioural norm is a necessary but not a sufficient condition for punishment.

I. Introduction

The attempt at an impossible crime and its punishability have been thoroughly discussed throughout the years.[1] The positions are clear and consolidated; the arguments are exchanged. Nevertheless, the topic captures our fascination. It is continuously addressed in paper after paper, this one included. Is this ongoing involvement just a phenomenon that accompanies the academic generational turnover? That might be part of it, but I doubt that it is all there is. There seems to be a deep-seated irritation that does not fully fade away despite the well-rounded, seemingly conclusive answers which at least some of the different criminal law theories offer. My hypothesis is that this irritation has something to do with the nature of law itself and that we will not overcome it as long as we conceptualise law, i.e. normative contents, as something external to the interpreter. The constructivist discourse-theoretical concept of law[2] sheds a different light on the topic and might enable us to better understand whether there is a breach of the behavioural norm and what it means if there is.

This paper addresses conceptual issues of criminal law theory which are highlighted when it comes to the notion of impossibility. In what way criminal law deals with it and if being liable for attempting the impossible is even conceptually conceivable cannot be discussed without referring to criminal law theory:[3] criminal law theory determines the understanding of the behavioural norm, and whether or not there was a breach of a behavioural norm seems to determine criminal liability.[4] However, the question of how criminal law should be conceptualised has been controversially discussed for centuries. There is a wide variety of approaches. Generally, one can differentiate between subjectivist and objectivist accounts,[5] but there are also approaches that show characteristics of both. Because it is debatable what exactly makes an account "objectivist" or "subjectivist",[6] different interpreters might disagree about whether to place an approach within the subjectivist or objectivist column. However, there seems to be some clarity in reference to the categorisation of some criteria.

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[1] For an insight into the historical (German) debate see *Wachter*, Das Unrecht der versuchten Tat, 2015, passim; *Struensee*, ZStW 102 (1990), 21; for the historical English debate cf. *Tauzin*, Lousiana Law Review 26 (1966), 426.

[2] See *Behrendt*, Rechtstheorie 51 (2020), 171. The approach shares a lot of similarities with the concept which *Becker*, Was bleibt?, Recht und Postmoderne – Ein rechtstheoretischer Essay, 2014, p. 73, 104 et seq., has brought forward under the term "ironic behaviourism of law".

[3] Cf. *Frisch*, in: Hilgendorf/Lerman/Córdoba (eds.), Brücken bauen, Festschrift für Marcelo Sancinetti zum 70. Geburtstag, 2020, p. 347 (362).

[4] Cf. e.g. *Duff*, The Realm of Criminal Law, 2018, p. 14; *v. Hirsch*, Criminal Law Forum 1 (1990), 259 (275 et seq.); *Freund*, in: Erb/Schäfer (eds.), Münchener Kommentar zum Strafgesetzbuch, vol. 1, 4th ed. 2020, Vor § 13 paras 133 et seq. and § 13 para. 17; *Rostalski*, in: Hilgendorf/Lerman/Córdoba (fn. 3), p. 635 (636). This paper is based on a dualist conception of criminal law, i.e. the notion that the norm which addresses sanctionability needs an underlying behavioural norm. The contrasting position argues for a monist understanding of criminal law according to which norms addressing sanctionability are the *only* ones there are. For a more thorough discussion of this question see – each with further references – *Hörnle*, in: Hilgendorf/Kudlich/Valerius (eds.), Handbuch des Strafrechts, vol. 1, 2019, § 12 paras. 27 et seq.; *Roxin*/ *Greco*, Strafrecht, Allgemeiner Teil, Vol. 1, 5th ed. 2020, § 7 para. 33c.

[5] Subjectivist accounts: see e.g. *Yaffe*, Attempts: In the Philosophy of Action and the Criminal Law, 2010; *Alexander*/ *Ferzan*, Crime and Culpability: A Theory of Criminal Law, 2009; *Zielinski*, Handlungs- und Erfolgsunwert im Unrechtsbegriff: Untersuchungen zur Struktur von Unrechtsbegründung und Unrechtsausschluß, 1973; *Sancinetti*, Subjektive Unrechtsbegründung und Rücktritt vom Versuch, Zugleich eine Untersuchung der Unrechtslehre von Günther Jakobs, 1995. Objectivist accounts: See e.g. *Duff*, Criminal Attempts, 1996; *Wachter* (fn. 1); *Roxin*/*Greco* (fn. 4), § 10 paras 96 et seq.; *Jakobs*, Strafrecht, Allgemeiner Teil, 2nd ed. 1993, sec. 6 para. 73 (p. 166); *Neumann*, in: Hilgendorf/Lerman/ Córdoba (fn. 3), p. 119 (126).

[6] See also *Sancinetti* (fn. 5), p. 281.

This makes it possible to give an account of the respective "purified" theoretical positions.[7]

This paper consists of two main parts. In the first part, I explain that objectivist and the existing subjectivist accounts fail to conceptualise criminal law in a satisfying manner. The mixed approach (which is favoured by the majority) might lead to "acceptable results", but it lacks a theoretical foundation, which calls its legitimacy into question. The second part elaborates on how one would approach the topic based on the constructivist discourse-theoretical concept of law. I argue that this theoretical foundation can provide the results at which the majority stance aims. The normtheoretical deficits of existing subjectivist accounts can be overcome by dispensing with the view that law is something external to the interpreter. The proposed concept softens the objectivist-subjectivist controversy because it shifts the attention from criminal liability to the need for a formal response.

Before we begin, there is the matter of terminology. Complex problems and a thorough, lively debate tend to lead to a number of terms and a disparate use of them within the discourse. This topic is no exception. Both the Anglo-American and the German discourse are conducted with reference to certain categories. The most important differentiation is the one between factual and legal impossibility.[8] Furthermore, one can differentiate between an inapt attempt, an attempt by "extraordinary means" (e.g. witchcraft), an irrational/a foolish attempt and/or (an attempt at) a crime of delusion (meaning that contrary to the agent's assumption, the legal order does not incriminate the act). The Anglo-American discourse differs from the German in terminology even though similar arguments and questions are raised. For example, the German distinction between an irrational attempt and a crime of delusion does not translate into the Anglo-American discourse. What is meant by these terms might seem fairly obvious to a versed reader from the respective legal community. However, whether these categories lead to precisely the intended differentiation or at least to a convincingly contoured class of cases has been controversially discussed for years in both legal communities.[9] When it comes to matters of terminology, we should be clear as to what function we expect the term to fulfil: Should it only describe a certain class of cases that share key characteristics? Or should it also work as a qualifying instrument that decides the legal fate of the specific case? At least the practical German legal discourse is currently mostly expecting the latter: a concrete case is categorised alongside the aforementioned terms, and this decides the legal fate. This seems to point to the core problem because a disagreement about the preferable terminology or the correct label for a specific case can implicitly be a disagreement about the "correct" criminal theory. For this reason, this paper focuses on the conceptual controversy and not on terminology.

II. Outlining the conceptual problems of punishable attempts at an impossible crime

1. Objectivist accounts

A purely objectivist account is based on a (completely) determinist worldview. Incrimination would be based on harm.[10] Every incriminated attempt would – in time – need to result in harm to the protected legal interest.[11] That is not the case if the perpetrator has not undertaken all the objectively necessary steps for causing harm[12] or if the attempt, for whatever reason, cannot succeed. A purely objectivist account cannot

[7] The main focus of this paper is the normtheoretical conceptualisation of the behavioural norm and its relevance for criminal liability. For this reason, some aspects which are central to the discussion of criminal law theory and the subjectivist-objectivist controversy will not be addressed here. Among these aspects is the question of whether the result of an action can influence blameworthiness. Since it is intertwined with the topic under discussion here, this requires an explanation: the position that harm is considered to enhance blameworthiness is an objectivist one, but an objectivist conceptualisation of the behavioural norm does *not necessarily* lead to this stance.

[8] The distinction between factual and legal impossibility has dominated the Anglo-American debate for a long time (and is still referred to in literature) but seems to be dismissed nowadays, cf. *Yaffe*, The Yale Law Journal 124 (2014), 92 (133); *Alexander*, in: Cruft/Kramer/Reiff (eds.), Crime, Punishment and Responsibility: The Jurisprudence of Anthony Duff, 2011, p. 215 (230 et seq.); *Ashworth*, Attempts, in: Deigh/Dolinko (eds.), The Oxford Handbook of Philosophy of Criminal Law, 2011, pp. 125 (137–140). It seems to be replaced more and more by the question whether the agent has formed the necessary mens rea, cf. *Yaffe*, The Yale Law Journal 124 (2014), 92 (133). However, this new formula can also be understood as a clarification of what is meant by legal impossibility, *Hasnas*, Hastings Law Journal 54 (2002), 1 (9, 12). If so, the portrayal of the prevailing opinion within the Anglo-American discourse is (still) correct. The same is true for the differentiation of circumstantially and inherently impossible attempts. At least as long as we understand "factual impossibility" and "legal impossibility" as a definiens which is exchangeable with other terms without altering the definiendum, the assessment given in the text is apt.

[9] *Cahill*, in: Hörnle/Dubber (eds.), The Oxford Handbook of Criminal Law, 2014, p. 512 (522); *Yaffe*, The Yale Law Journal 124 (2014), 92 (132 et seq.); *Donnelly-Lazarov*, A Philosophy of Criminal Attempts, 2015, p. 135; *Hasnas*, Hastings Law Journal 54 (2002), 1 (5); *Alexander* (fn. 8), p. 231, 233.

[10] The German discourse mostly refers to "legal goods". However, there is a long-standing debate as to what exactly constitutes a "legal good", see e.g. *Hörnle*, in: Hörnle/Dubber (eds.), The Oxford Handbook of Criminal Law, 2014, pp. 679 (686 et seq.). The term is misleading because the only thing that matters is if there exists a legally protected interest and whether it is harmed. Keeping this in mind, the German and the Anglo-American discourse – which generally does not take this "detour", see *Hörnle*, ibid., p. 679 (687) – are more alike than the differences in terminology suggest.

[11] Cf. *Jakobs* (fn. 5), sec. 6 para. 70.

[12] This constitutes an incomplete (i.e. inchoate) attempt from an objectivist point of view.

differentiate between cases of inaptness and cases of superstitious or delusionary beliefs, nor would it matter if the lack of impact is due to natural causal relations or the intervening actions of a third party. Every attempt that turns out to have been impossible would not be incriminated. Such an account would need to argue that neither the objectively incomplete attempt nor the failed attempt at accomplishing a harmful result is punishable.[13]

Such a view seems to be too restrictive for most advocators of objectivist accounts.[14] They argue for incriminating an unsuccessful attempt in the following cases: (a) the attempt would have resulted in harm if no third party had intervened or (b) the offender's assumption that the causal relation would have led to harm was reasonable.[15] By taking this stance, the perspective has shifted. The focus is no longer solely on the protected legal interest. It has moved to the abstract behavioural norm that aims to protect said legal interest. Such an account could still be called "objectivist" because the only relevant criterion for the incrimination would be whether the objectively construed behavioural norm has been broken. Whenever the behaviour poses no "risk", there would be no incriminated attempt.[16] In comparison to a purely objectivist theory, this approach acknowledges the fact that we are generally unable to tell how a situation will develop.[17] Risks are a core conceptual element to this sort of objectivist accounts: the behavioural norm is conceptualised by taking epistemic limits into account and by declaring the ex-ante perspective of an objective third party to be crucial. A risk can be assumed even in cases where there will be no harmful event. Criminal liability hinges on an infringement of this behavioural norm.[18] Whether the behaviour of the subject constitutes a breach of the respective behavioural norm would be a matter of the (somewhat blurry) ascription.[19]

In contrast to what the majority stance within the German legal discourse states, the solution to the core problem of whose assessment is crucial cannot be to leave it to the "objective third party". Obviously, there is not really an objective third party, and no one claims that there is. It is a normative fiction. However, even if we make it a mental exercise to try to determine whether someone with "average knowledge" – whatever that means – would assess a relevant risk under the concrete circumstances, we would need to assume a lot of other things, e.g. that this person would have taken notice of all the relevant circumstances. Since that "objective third party" would be human, the result might be far less than ideal[20] since we would need to assume a knowledge base and an assessment which is the result of diligent behaviour. In comparison to a purely objective assessment of the behavioural norm as stated above, there might be a significant discrepancy. Assessing risks by referring to the "objective third party" might lead to assuming a (relevant) risk where a better-than-average party would not assume risk, and vice versa.[21] As a result, a behaviour might be forbidden even though there would be no risk according to the assessment of a party with better knowledge of the circumstances (much less when measured against the truth). The "objective third party" is a figure by which legal doctrine blurs the standards and hides uncertainties. To be blunt: the assessment of an "objective third party" seems to become whatever someone says it is as long as it is somewhat plausible; it makes a mockery out of the notion of objectivity to call a thus conceived behavioural norm "objective".[22]

The notion of risk is only conceptually conceivable because there is a lack of knowledge. Since the knowledge base

[13] *Sancinetti* (fn. 5), p. 37.

[14] Cf. e.g. *Feinberg*, Criminal Attempts, in: Feinberg (ed.) Problems at the Roots of Law, 2003, p. 77 (82); *Weigend*, DePaul Law Review 27 (1978), 231 (268 et seq.); *Duff* (fn. 5), p. 348; *Roxin*, GA 164 (2017), 656 (658); *Hirsch*, in: Schünemann/Achenbach/Bottke/Haffke/Rudolphi (eds.), Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001, 2001, p. 711 (717); *Kindhäuser*, in: Safferling/Kett-Straub/Jäger/Kudlich (eds.), Festschrift für Franz Streng zum 70. Geburtstag, 2017, p. 325 (327, 337 et seq.); *Wachter* (fn. 1), p. 149, 170 f., 173.

[15] *Duff* (fn. 5), ch. 11–13; *Weigend*, DePaul Law Review 27 (1978), 231 (268 et seq.).

[16] *Hirsch* (fn. 14), pp. 716–720, 725; *Duff* (fn. 5), pp. 374, 384. It should be noted that *Duff* advocates for understanding the law of attempts as a law of attacks, *not* as a law of endangerments (cf. ibid., p. 371–374). For *Duff's* understanding of what constitutes an attack see ibid., p. 227 et seq.

[17] Conceptually, it makes a difference whether we talk about "risks" from a non-deterministic or a deterministic point of view. The notion of risk is a core conceptual element of a non-determinist perspective. When it comes to a determinist point of view, the use of the term "risks" only makes sense if one takes epistemic limitations into account. Those limitations establish the significance of the risk paradigm. Since causality requires determination, I understand the term "risk" to be based on the latter paradigm.

[18] Cf. *Duff* (fn. 5), p. 364; *Weigend*, DePaul Law Review 27 (1978), 231 (268 et seq.).

[19] Cf. *Roxin*/*Greco* (fn. 4), § 10 para. 98 (p. 423). Criminal theories that build on the notion of communication typically ask what communicative content is ascribed to the behaviour, cf. *Jakobs* (fn. 5), p. 166; *Puppe*, in: Samson/Dencker/Frisch/Frister/Reiß (eds.), Festschrift für Gerald Grünwald zum siebzigsten Geburtstag, 1999, p. 469 (473 et seq.); *Günther*, in: du Bois-Pedain (ed.), Criminal Theory, Essays for Andreas von Hirsch, 2004, p. 123 (127).

[20] Cf. *Kindhäuser*, JRE 13 (2005), 527 (530).

[21] Cf. *de Murillo*, in: Heinrich/Jäger/Schünemann (Hrsg.), Strafrecht als Scientia Universalis, Festschrift für Claus Roxin zum 80. Geburtstag am 15. Mai 2011, 2011, p. 345 (352 et seq.); *H. Schumann*/*A. Schumann*, in: Hettinger/Hillenkamp/Köhler (Hrsg.), Festschrift für Wilfried Küper zum 70. Geburtstag, 2007, p. 546 (558 et seq.).

[22] For a critical perspective on the notion of objectivity and the way in which it is used cf. e.g. *Arm. Kaufmann*, in: Vogler (ed.), Festschrift für Hans-Heinrich Jescheck zum 70. Geburtstag, 1985, p. 251 (259 f., 271); *Duttge*, Erb/Schäfer (fn. 4), § 15 paras 95 et seq., 105 ff.; *Kindhäuser*, GA 2007, 447 (456 et seq.).

can vary from subject to subject, this kind of objectivist approach leads to an arbitrary adjudication of cases. This arbitrariness is hard to recognise when punishability is hardly ever off the table. If punishability is repudiated solely in cases in which only a fool would assume that the attempt might succeed, the distinction might seem clear-cut. Nevertheless, the arbitrariness is undeniably there: whether something appears to be foolish is a matter of perspective and insight. Furthermore, the fact that such a line is drawn at all raises the following question: Why are you allowed to try to kill someone as long as you are behaving particularly stupidly but not when you act in a manner that shows at least a certain degree of reasonableness? Some have tried to solve this problem by adding another conceptual prerequisite: a normatively relevant disturbance. The agent's behaviour would need to challenge the validity of a behavioural norm.[23] If the attempt is exceptionally stupid, the members of the legal community will not be shaken in their belief in the validity of the more abstract behavioural norm "do not kill people". No one else will feel as if it is an infringement of the law,[24] and since the rule of law remains undisturbed, there is no need to react. However, this answer is unsatisfying because the agent still thought he was killing someone. If the agent is legally responsible for his decision, why can his behaviour not be understood to be an infringement of the law?[25] Has he not expressed his willingness to infringe upon the law according to which it is prohibited to kill someone? It isn't very convincing to dismiss a communicative relevance just because another person disagrees with the assessment. In addition, these questions highlight that the connection of the behavioural norm with the decision of the individual is blurred in objectivist accounts.

It might be noteworthy that there is some room for a subjectively conceptualised behavioural norm even for objectivist accounts. A subjectively conceptualised behavioural norm would need to be understood as something external – i.e. alien – to the discipline of criminal law; criminal liability would be construed separately. Whether the individual is in breach of the "alien" behavioural norm would be irrelevant from the perspective of criminal law.[26] The subjectively conceptualised behavioural norm could be used to understand an agent's misconception of law, but it would not serve any other function.

To summarise, there are several problems with objectivist accounts: the connection of the behavioural norm with the decision of the individual is somewhat blurred. By acknowledging the fact that there are epistemic limits to our insight into harmful acts, the focus of interest shifts to whether the agent creates a relevant risk. The assessment of whether a certain behaviour poses a relevant risk is influenced by the knowledge base and this leads to arbitrary adjudication. The idea of measuring an assessment of risk against an imaginary "objective third party" should be repudiated.

2. Subjectivist accounts

Subjectivist accounts shine when it comes to conceptualising criminal law in a manner that connects law with the behavioural decision of a subject. They argue that a behavioural norm is aimed at influencing the behavioural decisions of its addressees and therefore only the perspective of the individual matters.[27] If the intended behaviour constitutes a breach of the behavioural norm in the eyes of the addressee and he acted upon it nevertheless, he would have carried out an incriminated attempt. According to a purely subjectivist account, even the legally impossible attempt would be incriminated.

However, subjectivist accounts do not go this far. Most accounts refute the notion that the attempt by "extraordinary means" (i.e. means that are inherently incapable of succeeding, e.g. witchcraft) constitutes an incriminated attempt.[28]

[23] For a more detailed description of this so-called "Eindruckstheorie" see *Murmann*, in: Cirener/Radtke/Rissing-van Saan/Rönnau/Schluckebier (eds.), Strafgesetzbuch, Leipziger Kommentar, vol. 2, 13th ed. 2021, Vor §§ 22 ff. paras 83 et seq.; *Wachter* (fn. 1), p. 56 et seq. (*Wachter* gives an account of the different variations and similar approaches); see also *Eser/Bosch*, in: Schönke/Schröder, Strafgesetzbuch, Kommentar, 30th ed. 2019, Vor § 22 para. 22; *Frister*, Strafrecht, Allgemeiner Teil, 9th ed. 2020, ch. 23 para. 4; *Jakobs* (fn. 6), sec. 25 paras 21 et seq.; *Freund*/*Rostalski*, Strafrecht, Allgemeiner Teil, 3rd ed. 2019, § 8 paras 10 et seq.; *Kindhäuser*/*Zimmermann*, Strafrecht, Allgemeiner Teil, 10th ed. 2022, § 30 paras 9 et seq. This notion does not rise to the level of a full, stand-alone concept of criminal law, but it amends objectivist or subjectivist concepts. One could understand those amalgamations as forming a new sort of theoretical concept – even then, these theories would just be a variation of an objectivist or subjectivist concept.

[24] Cf. e.g. *Frisch* (fn. 3), p. 352; *Jakobs* (fn. 5), sec. 25 paras 22 et seq.

[25] A similar thought is expressed by *Kudlich*, in: Hilgendorf/Kudlich/Valerius (eds.), Handbuch des Strafrechts, vol. 3, § 57 para. 50; *Murmann* (fn. 23), Vor §§ 22 ff. para. 79. For a further critique of the so-called "Eindruckstheorie" see *Murmann*, ibid., Vor §§ 22 ff. paras 84 et seq.; *Hirsch* (fn. 14), p. 714 ff.; *Wachter* (fn. 1), p. 58 et seq.

[26] Cf. *Frisch* (fn. 3), p. 353.

[27] *Zielinski* (fn. 5), p. 121 et seq., 251; *Alexander*/*Ferzan* (fn. 5), p. 6, 172; *Yaffe* (fn. 5), p. 21; *id*., The Yale Law Journal 124 (2014), 92 (110, 132).

[28] Cf. *Sancinetti* (fn. 5), p. 47, 199–201; *Struensee*, ZStW 102 (1990), 21. See also *Alexander*/*Ferzan* (fn. 5), p. 195: "And just as the criminal law does not punish the pure legally impossible attempt, so too would we exempt from punishment those who believe themselves to be culpable but who are not. There are, in our schema, no 'attempts to be culpable'." When it comes to attempts by extraordinary means, *Yaffe* (fn. 5), p. 254, wants "to acquit on grounds of 'inherent impossibility' […] because where there is good reason to doubt the agent's practical competence, there is reasonable doubt that he is actually attempting the crime. There are not good grounds for guilt for attempt, in such cases, even if the defendant did indeed commit one." However, the criterion that

Furthermore, subjectivist accounts do not consider attempting to commit a crime to be a breach of the behavioural norm if such a crime is not legally recognised as such. They argue that nomologically those cases could not constitute a criminal attempt because the acting agent only thinks that he is infringing upon a behavioural norm; in truth, his mindset would not be directed at a crime.[29] Since there is no behavioural norm that prohibits the agent's behaviour, the agent's mindset cannot have been directed at committing a crime. This argumentation seems neat and convincing because it would prevent subjectivist accounts from "overreaching". Holding the agent criminally liable solely because of his erroneous legal assessment would seem hardly justifiable.[30]

Critics argue that (most) subjectivist accounts fail to follow through on their own approach.[31] A purely subjectivist account would need to acknowledge that the behavioural norm is construed by the acting agent himself and therefore subjectivist accounts could only argue that the question if the norm breach deserves to be punished needs to be addressed separately.[32] Those subjectivist accounts that are represented in the discourse would disagree: according to these, criminal liability does not hinge on an actual infringement of a behavioural norm – it is sufficient that the mindset of the agent was directed at its infringement and that he acted upon it. The opening statement would need to be reformulated: criminal liability would not require an infringement of a behavioural norm, only the expression of a volition that is directed at such an infringement. To justify this concept of criminal liability, proponents of subjectivist accounts refer to the arguments we have already discussed here: the whole point of behavioural norms is to influence the behaviour of their addressees,[33] and since the subject can only decide on the basis of whatever he/she knows about the relevant circumstances, criminal liability needs to be tied to the decision and its implementation. Even though this seems to be a valid point, it is certainly noteworthy that – from this perspective – it would be irrelevant whether there is an actual "objective" infringement of a behavioural norm. Furthermore, this approach cannot satisfyingly answer the question as to why in some cases there would be no criminal liability: if the violation of a behavioural norm is solely determined from a subjective perspective, why should it matter that the behavioural norm does not forbid the intended behaviour or that a behavioural norm that bears any resemblance to the one the agent imagined does not even exist? Subjectivist accounts can either claim to be coherent in the way they conceptualise wrongful behaviour – then they need to claim that an agent is also criminally liable for a legally impossible attempt – or they need to acknowledge that the behavioural norm itself is conceptualised by the subject as well, and then there simply are no legally impossible attempts.

3. The mixed approach of the majority

The majority within the legal discourse disagrees with objectivist as well as subjectivist concepts. Most participants argue for an incriminated attempt even in cases in which the offender did not create an objectively relevant risk for the protected legal interest as long as (1.) he thought that he did and (2.) he would have created a relevant risk if his mental picture had been correct.[34] An attempt would therefore be punishable even in cases in which the "objective" behavioural norm has not been breached. In that respect, their stance can only be explained with a subjectivist element. However, subjectivist accounts do not fit the prevalent opinion either. If they adhere to the thesis that the behavioural norm is conceptualised objectively, then there would be no behavioural norm that prohibits it – the subjectivist conception would be directed at a non-existent behavioural norm. If they acknowledge the necessity to construe the behavioural norm subjectively or dispense with the notion that criminal liability hinges on an actual breach of a behavioural norm and declare the imagined violation of a behavioural norm to be crucial, then they cannot explain why there would be no criminal liability for legally impossible attempts. Because the majority stance rejects the incrimination of "legally impossible attempts",[35] subjectivist accounts offer no theoretical basis for the majority stance.

The majority stance raises the question of whether there is an additional normtheoretical approach. There should be one because it cannot be explained by the concepts we have just discussed, and it needs to be based on a coherent theoretical foundation. If there is no theoretical foundation, it cannot legitimately guide our ruling on cases – at least it would need

Yaffe refers to bears no relevance to criminal liability. It does not matter if the offender might resort to other means (at least until he does). Otherwise, we would hold him liable for no other reason than our fear of him. *Armin Kaufmann*, in: Stratenwerth/Kaufmann/Geilen/Hirsch/Schreiber/Jakobs/Loos (eds.), Festschrift für Hans Welzel zum 70. Geburtstag am 25. März 1974, 1974, p. 393 (403), and *Zielinski* (fn. 5), p. 134 fn. 14, argue that the attempt by extraordinary means is incriminated even though there might be no need for punishment. *Zielinski* (fn. 5), p. 161, rejects the notion that one can infringe a behavioural norm that does not objectively exist.

[29] Cf. *Yaffe*, The Yale Law Journal 124 (2014), 92 (120); *Struensee*, ZStW 102 (1990), 21; *Zielinski* (fn. 5), p. 124–127, 161; *Sancinetti* (fn. 5), p. 54, 228 et seq.

[30] Cf. *Wachter* (fn. 1), p. 210 et seq.; *Cahill* (fn. 9), p. 516.

[31] Cf. e.g. *Duff* (fn. 5), p. 156 et seq.

[32] Cf. *Kaufmann* (fn. 28), p. 403. *Zielinski* (fn. 5), p. 134 fn. 14, points this out by arguing that an attempt which is based on superstitious or grossly irrational beliefs cannot be ruled out by denying a legal wrong – but there might be no need for punishment.

[33] Cf. e.g. *Alexander*/*Ferzan* (fn. 5), p. 172 et seq.

[34] Cf. e.g. *Hoffmann-Holland*, in: Erb/Schäfer (fn. 4), § 22 para. 48; *Jäger*, in: Wolter (ed.), Systematischer Kommentar zum Strafgesetzbuch, vol. 1, 9th ed., 2017, § 22 para. 45; *Wachter* (fn. 1), p. 186 et seq.; *Yaffe*, The Yale Law Journal 124 (2014), 92 (133).

[35] Cf. *Wachter* (fn. 1), p. 207–209; *Kudlich* (fn. 25), § 57 para. 38; *Zaczyk*, in: Kindhäuser/Neumann/Paeffgen (eds.), Nomos Kommentar, Strafgesetzbuch, vol. 1, 5th ed. 2017, § 22 para. 40; *Yaffe*, The Yale Law Journal 124 (2014), 92 (133 f., 141); *Hasnas*, Hastings Law Journal 54 (2002), 1 (9).

to be explained why we can base our legal practice on concepts that conflict with each other. Therefore, we need to assess whether there is a way to reach a coherent normtheoretical basis.

One might consider whether the position of the majority can be explained by a subjectivist account which incorporates an objectivist element with respect to punishability: the behavioural norm would be conceptualised in a subjectivist manner, but a breach of the respective behavioural norm would only constitute a necessary, not a sufficient condition for criminal liability.[36] An objective element (e.g. an objective risk) would need to be fulfilled in addition. This explanation does not fit the prevalent opinion either: first, their proponents argue for punishability even in cases in which the offender did not create an objectively relevant risk for the protected legal interest. Second, such an account would not justify criminal liability in cases in which the agent believes that his actions were perfectly legal.

Merging subjectivist and objectivist accounts does not seem feasible either. One cannot build a homogenous concept of law by combining incompatible elements. In addition, neither subjectivist nor objectivist accounts offer convincing concepts of criminal liability. Trying to conceive criminal liability by acknowledging both cumulatively does not rectify these deficiencies.

4. Interim result

Looking at the dispute from a distance, I cannot help but feel as if we are stuck between a rock and a hard place: the objectivist stance should be refuted because criminal liability needs to be based on the behavioural decision that the agent made and not on some external factor. An objectivist account that conceptualises criminal liability by basing the notion of risk on an understanding that takes epistemic limits into account and by declaring the ex-ante perspective to be crucial can be highly speculative and leads to arbitrary results. Subjectivist accounts seem to get it right when it comes to the normtheoretical approach[37] – at least to some extent. Because the concretisation of the behavioural norm aims to influence the individual in his decisions on behavioural options,[38] the crucial question for criminal liability needs to be how the individual deals with the information and the behavioural options he has. However, this fails, inter alia, when it comes to criminal liability in cases in which the agent believes to act in compliance with the law.

The majority stance seems to enable practitioners to come to adequate results. Why would we punish someone for behaviour that we do not perceive as criminally relevant? A legal community that prides itself on being secular and that celebrates reason and restraint in the use of criminal law (ultima-ratio-principle) should not resort to punishment all too quickly. The assumption seems valid that there must be a normtheoretical basis for criminal liability in those cases in which the offender did not create an objectively relevant risk for the protected legal interest but (1) thought that he did and (2) would have created a relevant risk if his mental picture had been correct. The individual decides on what he perceives of the world and if he thinks he is shooting with a loaded gun at a person, then that should make him criminally liable for attempting to kill someone. However, there seems to be no theoretical basis for this thesis posited by the majority.

The bottom line seems to be that – however we look at it – there is just no conceptually viable solution. Or is there?

III. Drafting a way out

There might be a way out of this conceptual predicament: criminal liability could be approached on the basis of the constructivist discourse-theoretical conception of law against the theoretical backdrop of the relational theory of basic rights as a meta-concept.

The constructivist discourse-theoretical conception of law[39] dismisses the conventional assumption that law (or to be more precise: a normative content) is something "objective" generated either by the legislator or by some kind of intersubjective consensus and that an interpreter's task is to "find" the law.[40] It argues that normativity is not external to the interpreter: normative contents "exist" only as a cognitive creation

[36] Cf. *Roxin*/*Greco* (fn. 4), § 10 para. 95.

[37] This is supported by the notion that even objectivist accounts agree that law aims to influence behaviour and that we are "paradigmatically responsible for our intended actions," *Duff* (fn. 5), p. 363, 371 et seq.

[38] Cf. e.g. *Alexander*/*Ferzan* (fn. 5), ch. 5; *Kaufmann*, Lebendiges und Totes in Bindings Normentheorie, Normlogik und moderne Strafrechtsdogmatik, 1954, p. 67 et seq., 102–108; *Zielinski* (fn. 5), p. 121, 251.

[39] See *Behrendt*, Rechtstheorie 51 (2020), 171. Similarly: *Becker* (fn. 2), p. 104 et seq. With a focus on the process of building law as a system cf. *Lee*, Die Struktur der juristischen Entscheidung aus konstruktivistischer Sicht, 2010, p. 97 et seq., 152 et seq.; *id.*, in: Bung/Valerius/Zimmermann (eds.), Normativität und Rechtskritik, 2007, p. 179 (184 et seq.).

[40] The discrepancies of this notion begin with the assumption that the legislator issues the norm itself (and not only the norm text) and are continued with the thesis that those normative contents are only applied by the interpreter, cf. *Wischmeyer*, JZ 2015, 957 (959 – methodically, the concept of the legislator's volition is broadly understood as a relic of an old and relinquished mentality); *Müller*/*Christensen*, Juristische Methodik, vol. 1, 11th ed. 2013, p. 519 f.; *Christensen*/*Kudlich*, Gesetzesbindung: Vom vertikalen zum horizontalen Verhältnis, 2008, pp. 20, 146; *Barth*, in: Bäcker/Klatt/Zucca-Soest (eds.), Sprache – Recht – Gesellschaft, 2012, p. 211 (219): "Understanding a legal text is not a process of discovering meaning but one with which the recipient produces meaning"; *Neumann*, in: Senn/Fritschi (eds.), Rechtswissenschaft und Hermeneutik, 2009, p. 87: "The appearance of objectivity in legal interpretation is destroyed completely and irrevocably by philosophical hermeneutics", all translations by the *author* of this text. For a thorough analysis of the question with a focus on postmodern linguistics see *Becker* (fn. 3).

of the interpreter.[41] The concept does not argue against the possibility of consensus, it argues against a conception of legal oughts and normative contents that takes a substantial consensus as a prerequisite. When applied to the issue of criminal liability, the concept would not lead to a purely subjectivist stance. Criminal liability would be perceived as an interpreter-relative issue that needs to be appreciated against the backdrop of the multitude of interpreters.

The relational theory of basic rights[42] serves as a reference point on a meta-level. It has little to do with the constructivist discourse theory of law, but it serves as a theoretical backdrop for those normative contents which are positively acknowledged by an agent in assessing the positive law. Both are needed to make a case for a change in our outlook on law.

1. The (meta-level) relational theory of human rights and the objectivist-subjectivist controversy

According to the relational theory of basic rights, every member has a prima facie claim against every other member to assist in realising his interests and to desist from harming them. Every member is correspondingly prima facie obligated to do so. Whenever someone behaves in a way that infringes on that prima facie obligation, he also impairs this other member's claim to be recognised as an equal. However, the agent himself also has a claim against the other member to assist in realising the agent's interest. This conflict of prima facie norms needs to be solved by balancing: whether it would definitely be a violation of the other member's rights or whether it would be the other member who needs to tolerate the impairment of his interests is decided by balancing the interests (which is a complex endeavour, as we all know). Conflicting interests are considered only when it comes to assessing the level of what is the definitely valid norm.[43]

This model does not yet solve the objectivist-subjectivist controversy. Prima facie claims and prima facie obligations can be conceived as purely objectivist if we look at them on the basis of a determinist worldview: a member only has a claim against another member to undertake a specific action if it furthers his interest and he only has a claim to refrain from undertaking a specific action if it leads to harm.

However, that does not mean that a member cannot attempt to violate another member's claim to be recognised as an equal. Because members have claims against each other to assist in the upkeep and the realisation of interests, we need to be able to tell if the other member infringes on those claims or behaves in accordance with his obligations. This requires that his actions and omissions are normatively relevant. They only are normatively relevant if they are based on what is commonly referred to as an autonomous decision of the subject.[44] This standard needs to take into account that there are epistemic limitations and that the decision-making process is essentially a cognitive (data) process which is determined by biochemical, physical and biological processes. If we accept this, a normatively relevant decision and its

[41] *Behrendt*, Rechtstheorie 51 (2020), 171 (179). The hermeneutical quality of the process of "reconstructing" the normative content is generally not even disputed by authors who argue in favour of the common narrative. Cf. e.g. *Jestaedt*, in: Bumke (ed.), Richterrecht zwischen Gesetzesrecht und Rechtsgestaltung, 2012, pp. 49 (62 et seq.). For a hermeneutical conception of law and a defence of the notion that the law is issued by the legislator see *Poscher*, in: v. Hein/Merkt/Meier/Bruns/Bu/Vöneky/Pawlik/Takahashi (eds.), Relationship between the Legislature and the Judiciary, 2017, p. 41 (43, 46); *id*., in: The Cambridge Companion to Hermeneutics, 2019, p. 326 (332 et seq., 337 et seq.); *id*., Droit & Philosophie 9 (2018), 121.

[42] See *Behrendt*, Entzauberung des Rechts auf informationelle Selbstbestimmung, Eine Untersuchung zu den Grundlagen der Grundrechte, 2023, ch. 19. It shares some resemblance to recognition theory but, in contrast to the latter, it is not based on the notion of reason. Recognition theory has deep philosophical roots that can be traced back to thoughts expressed by Fichte, Hegel and Kant, cf. *Behrendt*, ibid., ch. 19 A. II. 1. a), with references. Within contemporary philosophical literature, *Axel Honneth* is probably the most prominent advocate of a philosophy that builds on the recognition paradigm. Recognition theory is represented in the literature on constitutional law and on criminal law, see e.g. *Rothhaar*, Die Menschenwürde als Prinzip des Rechts, 2015, p. 207 et seq.; *Hofmann*, AöR 118 (1993), 353 (364); *Wolff*, in: Hassemer (ed.), Strafrechtspolitik, Bedingungen der Strafrechtsreform 1987, p. 137 (182 et seq.); *Köhler*, ZStW 104 (1992), 3 (15); *Zaczyk*, in: Landwehr (ed.), Freiheit, Gleichheit, Selbstständigkeit, Zur Aktualität der Rechtsphilosophie Kants für die Gerechtigkeit in der modernen Gesellschaft, 1999, p. 73 (80 et seq.); *id*., Das Unrecht der versuchten Tat, 1989, S. 250.

[43] The differentiation of two levels of validity (prima facie validity and definitive validity) and the importance of balancing is based on *Robert Alexy's* work on basic rights, i.e. principles theory, see e.g. *Alexy*, International Journal of Constitutional Law 16 (2018), 871; *id*., Revus 2014, 51; *id*., A Theory of Constitutional Rights, 2002. *Alexy's* theory builds on a normtheoretical dualism of rules and principles. The viability of this dualism is challenged by many, cf. e.g. *Poscher*, Grundrechte als Abwehrrechte, 2003, p. 73 et seq.; *id*., in: de Oliveira/Paulson/Trivisonno (eds.), Alexy's Theory of Law, 2015, p. 129 et seq.; *id*., Ratio Juris 33 (2020), 134; *Jestaedt*, in: Depenheuer/Heintzen/Jestaedt/Axer (eds.), Staat im Wort, Festschrift für Josef Isensee, 2007, p. 253 (260); *id*., Grundrechtsentfaltung im Gesetz, 1999, p. 206–260. The *relational theory of basic rights* does not share Alexy's normtheoretical dualism, see *Behrendt* (fn. 42), ch. 12. The two levels of constitutional rights arise because of their basic nature as rights of an individual which must always undergo some sort of social mediation. Furthermore, the proposed concept aims at a positivist conception of law, see *Behrendt*, ibid., ch. 19. This is another fundamental difference to *Alexy's* theory. *Alexy* argues for a non-positivist understanding of law, and his principles theory and his non-positivist conception are not separable from one another, cf. *Alexy*, Ratio Juris 23 (2010), 167; *id*., Der Staat 50 (2011), 389 (404).

[44] Cf. *Jakobs*, System der strafrechtlichen Zurechnung, 2012, p. 59 f.

implementation can only require that the decision-making process is sufficiently complex. That a member can (attempt to) infringe and violate another member's claim to be recognised as an equal is a result of the thesis that a member's behaviour is only legally relevant if it is built on a sufficiently complex, i.e. sufficiently reasonable, decision. Since this standard takes epistemic limitations into account, a behaviour can infringe on an obligation to omit an action even if objectively there is no such obligation (because the action does not lead to harm). If there is normatively relevant behaviour, there may be an attempt to violate another member's claim to be recognised as an equal even though objectively the action itself constitutes no infringement. The behaviour might even be in accordance with what the agent was supposed to do because it helps to realise a member's interests. However, the agent is not responsible for complying with his duties if his behaviour is not based on a sufficiently complex decision about creating this chance.

Within this concept, responsibility is understood as a decision which the agent reached through a sufficiently complex process and which is conceptually linked to risks and chances. This might be conceived as somewhat of a contortion by members of the legal discourse who are used to more common narratives. At least within the German legal discourse concerning criminal law, we are accustomed to a narrative which poses the question of responsibility only when it comes to wrongful behaviour. Due to the disciplinary focus, the responsibility for compliance, i.e. law-abiding behaviour, is simply not of interest. Of course, this cannot be counted as an oversight since criminal law only deals with wrongful behaviour. Furthermore, it depends on the interpreter's norm-theoretical approach whether this question is even worth his while – one could also argue that the law only aims at preventing unlawful behaviour (proponents of a framework narrative or of what is called a liberal concept of freedom would argue along these lines).

What does this mean with respect to the subjectivist-objectivist controversy? The argumentation makes a case for a subjectivist account (deliberately attempting to violate an obligation is an attempt to violate another member's claim to be recognised as an equal), but there are a few issues which challenge the applicability. Firstly, the deliberation only pertains to the meta-level. When it comes to positive law, we need an explanation that takes into account that positive law does not need to acknowledge human rights. A positive legal order may be based on protecting the interests and needs of society as such and of its individual members, but it can also be based on protecting the interests and needs of only some members or even of only one member. Basic rights – understood as rights of individuals – might make a case for the relevance of an agent's mental picture and for connecting the agent's behaviour in light of the subjectively construed behavioural norm with the other members' claim to be respected as an equal, but that does not necessarily support the thesis that a breach of that behavioural norm results in criminal liability. What behavioural norms are positively acknowledged needs to be taken into account. Secondly, the argumentation can hardly pertain to criminal law. The model is too broad because not every attempt at violating another member's claim to be recognised as an equal constitutes criminal liability. On the basis of a positivist understanding of law, which violations deserve to be punished hinges first and foremost on the norm texts issued by the legislator. Not every behavioural obligation is protected by criminal law.

Furthermore, this model does not solve the issue of criminal liability from the perspective of the majority stance because it does not understand it as a multiple-interpreter problem and because it lacks the societal dimension as long as it is perceived only as a horizontal bilateral concept.

2. The constructivist discourse-theoretical concept of law and the positively acknowledged behavioural norm

Normative contents "exist" only as a cognitive creation by an interpreter. What normative content is positively set forth is postulated by the interpreter.[45] As a result, there is no unified legal order.[46] There are only norm texts, communicative acts about law (both of which are subject to interpretation) and the pursuit of a consensus,[47] approval[48] and coherence[49]. Acts of communication which refer to the law, i.e. to normative contents, make up the legal discourse.[50] What is perceived as an act of communication about the law is determined by the interpreter: if an agent understands an occurrence to convey meaning, he will perceive it as an act of communication,[51] and if he comprehends it to convey a statement regarding normative contents, the agent understands it to be a remark on the law.[52] Therefore, different interpreters might have different assessments about the width of the legal discourse or the one on specific normative contents[53] and what ought is positively acknowledged. One cannot simply dismiss the

[45] *Christensen*/*Kudlich* (fn. 40), p. 216; *Becker* (fn. 2), p. 125; *Behrendt*, Rechtstheorie 51 (2020), 171 (179).
[46] *Behrendt*, Rechtstheorie 51 (2020), 171 (180).
[47] *Becker* (fn. 2), p. 114; *Behrendt*, Rechtstheorie 51 (2020), 171 (181, 191).
[48] Cf. e.g. *Lee* (fn. 39), p. 148, 155; *Becker* (fn. 2), p. 87, 112–114.
[49] See e.g. *Balkin*, The Yale Law Journal 103 (1993), 105; *MacCormick*, in: Krawietz/Schelsky/Winkler/Schramm (eds.), Theorie der Normen, Festgabe für Ota Weinberger zum 65. Geburtstag, 1984, p. 37 et seq.; *Becker* (fn. 2), p. 113 et seq. Cf. *Dworkin*, Law's Empire, 1986 (reprint 1998), p. 225 et seq.
[50] Cf. e.g. *Morlok*, in: Blankenagel/Pernice/Schulze-Fielitz (eds.), Verfassung im Diskurs der Welt, Liber Amicorum für Peter Häberle zum siebzigsten Geburtstag, 2004, p. 93; *Christensen*, in: Krüper/Merten/Morlok (eds.), An den Grenzen der Rechtsdogmatik, 2010, p. 127 (129 et seq.); *Müller*/*Christensen*/*Sokolowski*, Rechtstext und Textarbeit, 1997, p. 83, 86; *I. Augsberg*, Rechtstheorie 40 (2009), p. 71.
[51] Cf. e.g. *Poscher* (fn. 41 – Relationship), p. 51; *Behrendt*, Rechtstheorie 51 (2020), 171 (182).
[52] *Behrendt*, Rechtstheorie 51 (2020), 171 (182 et seq.).
[53] This is an issue which relates to the question of why we need to react to some infringements of behavioural norms at all. This question will be addressed later.

perspective of one agent because he is a layman or not as skilled as another interpreter. This is not to say that the authority of the interpreter and the matter of whose judgement holds sway in case of conflicting opinions about the law would not be conceptually relevant when looking at a broader social concept. There is a need to solve conflicts and thereby to acknowledge being bound by someone else's ruling and for society to enforce some judgement by force, if necessary. These problems do not call into question that normative contents are created by the interpreter. Whether people accept being bound by someone else's ruling is an ontological question. Acceptance cannot be built into the legal order – which is why gaining acceptance and trust is an ongoing challenge for any legal order. Power and force can substitute acceptance to some extent, but it is usually not a good idea to substitute acceptance over the long term.

If we take a step back and re-address the problem of transferring the meta-level solution to the level of positive law, we can conclude that an infringement of another person's claim to be recognised as an equal can be conceived even without an "actual" breach of a behavioural norm because it is sufficient that the acting agent (or another interpreter) assumes a positively acknowledged behavioural norm. More precisely: the existence of an "actual" breach is inherently interpreter-relative.

3. Reformulating the concept of criminal law in general

If the agent conceives an incriminated behavioural norm and acts in breach of it,[54] he would be criminally liable according to his own standard. This would mean that a legally impossible attempt would be (ironically) conceptually impossible. Within the concept of criminal law as a social practice, there could not be a factually or legally impossible attempt when it comes to the perspective of the acting agent – these verdicts can only be given by an observer due to superior knowledge (or better reasoning) or from an ex-post perspective.[55]

The behavioural decision is based on what the agent perceives of the world, what his needs, goals and interests are and what methods he has at his disposal to fulfil them. It is also influenced by what the agent knows or assumes to know about how a situation will develop and how his behaviour will influence this. The law aims to influence this behavioural decision. Even though there is no such thing as "the law" in a unitary sense, we measure our behaviour and those of other persons by the law. An agent capable of behaving in a legally relevant fashion should be aware that his behaviour can be judged by other people in respect to its lawfulness. This is why conceiving the behavioural norm is non-arbitrary. The discourse works as a controlling instance,[56] and the anticipation of discourse has a pre-effect on the conception of behavioural norms. "The law" provides guidance because of the knowledge that one's own conception of what the law dictates in the concrete case can be reviewed by others – maybe even state officials with the authority to punish – if one acts according to one's conception.

Therefore, the agent has reason to assess whether his intended behaviour might cause harm to a protected legal interest (i.e. the object which is representing the legal interest). That entails an assessment of which interests are legally protected and whether the intended behaviour might lead to harming them. If the agent concludes that his intended behaviour might harm a legally protected interest, he has to assess in what way the intended behaviour furthers his own interests (and maybe that of other people) and whether these interests outweigh the interests which might be harmed. An agent usually forms his conviction about the concrete behavioural norm based on what other people and society have taught him about how he should behave. (The agent is rarely aware of these processes, but awareness is not relevant.) Maybe in some rare cases, he additionally engages with the norm text issued by the legislator and/or might be aware of some of the relevant jurisprudence since some decisions are communicated by the press. The acting agent is usually not a professional "interpreter" of law and calling him an interpreter rather stretches the meaning of the word since the agent rarely engages with the relevant norm texts, but this does not mean that he cannot be conceived as an interpreter of law in a broader sense.

Others might agree or disagree with the agent's assessment of risks and the law. (Dis)Agreement can pertain to different levels and steps within the process of conceiving the definitively valid behavioural norm. The last part refers to the level of concretisation[57] of the law: the observer (e.g. a public prosecutor or a judge) and the acting agent might be in agreement when it comes to the more abstract behavioural norm. For example: they might agree that killing people is forbidden, but only the acting agent thinks that he can kill a specific person by using mint tea. If the agent serves that person mint tea, he infringes on what he perceives to be a concrete behavioural norm which derives from the more abstract behavioural norm "do not kill people". The observer would assess that this is not an infringement of the behav-

[54] This already refers to the level of definitive validity. If the agent assumes to act in his own interest because doing so outweighs conflicting interests or due to exonerating circumstances, he would not be criminally liable according to his own standard as long as he believes this to be "what the law dictates" in this case.

[55] Cf. e.g. *Donnelly-Lazarov* (fn. 9), p. 88 et seq.; *Freund*/*Rostalski* (fn. 23), p. 324.

[56] Cf. *Becker* (fn. 2), p. 103 (when it comes to communicating a thesis about law within the professional discourse, control is brought about by the discourse itself), 114 ff.

[57] The connection between the abstract norm and its concretisation has enjoyed much attention esp. within the field of German legal theory, legal philosophy and constitutional law, cf. e.g. *Jestaedt*, Grundrechtsentfaltung im Gesetz, 1999, passim; *id.*, in: Bumke (ed.), Richterrecht zwischen Gesetzesrecht und Rechtsgestaltung, 2012, pp. 49 ff; *Poscher*, Legal Construction (note 41), p. 41 (42). In *Behrendt*, Entzauberung (note 42), ch. 12 B.V.1 and 3, I take a normtheoretical approach that focuses on a substantial structural connection.

ioural norm because serving mint tea is not an apt way to kill that person, and even if it creates any risks, creating them would be allowed. In this case, the observer would not think that the agent's behavioural decision and its implementation constitute a norm breach and therefore disagree with the acting agent when it comes to the concrete behavioural norm. The observer would also refute the notion that this is an infringement of the abstract behavioural norm if he assumes that the abstract norm consists of the sum of its concretisations.[58] The concept needs to explain, if – and if so, when and why – the acting agent is criminally liable in these cases. Furthermore, it might be the other way around: pursuant to his own legal assessments, the acting agent might assume that he is behaving in accordance with the law and the observer disagrees. There is also the need to explain if – and if so, under which circumstances and why – the acting agent is criminally liable in these cases despite the fact that normative contents are construed subjectively.

At first glance, these issues seem to be all about criminal liability. However, criminal liability might not be the core problem if we accept the premise that criminal liability (only) requires a breach of a behavioural norm and link it to the proposed concept: in those cases in which criminal liability is discussed there would be a breach of a behavioural norm either according to the acting agent himself or according to the observer.[59]

As a consequence, a conceptualisation of criminal law that is based on the proposed concept of law would need to be interested in what happens once there is a breach of a behavioural norm: because of the conceptual turn, it becomes questionable whether criminal liability is linked to the necessity of formally responding to a breach. If an observer concludes – in contrast to the acting agent – that the behaviour is not in violation of a criminally relevant behavioural norm, is it (il)legitimate to punish? If it is the other way around, how can punishing the acting agent be justified if his behaviour was lawful according to his own assessment? Is it at all legitimate to react with censure, i.e. a "moral reproach", and even with punishment in cases in which there could not have been a breach of a behavioural norm according to a purely objectivist stance? The breach of a behavioural norm cannot be enough to explain why these reactions are – generally – legitimate. These questions are not issues of criminal liability. They pertain to the legitimacy of addressing a norm breach with censure and maybe even with punishment.

A sound concept of criminal law would need to have answers to those questions. They can be found in theories of criminal law that perceive both crime and punishment as communication.[60] According to these approaches, "punishment […] expresses moral condemnation to the degree of 'the blameworthiness of the conduct'" and "indignation about and moral disapproval of the crime".[61] Even though the focus is mostly on the communicative nature of punishment,[62] crime can be perceived in the same manner.[63] Behaviour can have a communicative character. It is communicative if we ascribe sense to it and are justified in doing so – that is the case if the behaviour is normatively relevant in the above-mentioned sense.[64] Since the individual needs to abide by the law, every action can be interpreted as a remark on the law implying that said action is lawful. Therefore, we attribute a claim to (legal) correctness to behaviour.[65] Even shooting someone in cold blood can be interpreted as such a remark on the law. If we take this into consideration, the missing piece seems to be that there needs to be a reason to communicatively respond to the breach of a behavioural norm. Hence, the theory which perceives crime and punishment as communication is core to the understanding of criminal law and in harmony with the constructivist discourse theory of law and its conceptual implications for criminal law.

4. Spelling it out

The concept needs to be spelt out if we are to assess it properly. With respect to the construed behavioural norm and the agent's decision on his behaviour, we can differentiate several constellations. If the acting agent has thought about whether his intended behaviour might cause harm to a protected legal interest (i.e. the object which is representing the legal interest), he will have formed an opinion regarding aptness,[66] i.e.

[58] See *Behrendt*, Entzauberung (note 42), ch. 12 B.V.1.

[59] This shows also why the proposed concept differs from subjectivist approaches. The same applies to the so-called "personale Straftatlehre": According to it, the intended project of the acting agent is measured against the law, cf. *Freund*/*Rostalski* (fn. 23), § 8 para 4, 35 (p. 324, 333 et seq.), and could thus be attributed to the column of subjectivist accounts.

[60] See e.g. *Günther* (fn. 19), p. 123 et seq.; *Hörnle*/*v. Hirsch*, GA 1995, 261 (266 et seq.); *Duff*, Punishment, Communication, and Community, 2001; *id*., The Realm of Criminal Law, 2018, p. 19, 37 f.; see also *id.*, Ethic Theory Moral Practice 2018, 775, regarding a relational concept of accountability that is in harmony with an expressivist account of criminal law.

[61] *Günther* (fn. 19), p. 124. See also *Frisch*, GA 2019, 537 (547 et seq.).

[62] See e.g. *Hörnle*/*v. Hirsch*, GA 1995, 261 (266 et seq.); *Frisch*, GA 2019, 537 (544, 547 et seq.).

[63] *Günther* (fn. 19), p. 127; *Feinberg*, The Monist 49 (1965), 397.

[64] *Jakobs*, Der strafrechtliche Handlungsbegriff, 1992, p. 44; *id*. (fn. 44), p. 22 et seq.; *Günther* (fn. 19), p. 127; *Pawlik*, Normbestätigung und Identitätsbalance, Über die Legitimation staatlichen Strafens, 2017, p. 22; *Behrendt*, Rechtstheorie 51 (2020), 171 (182); see also *Puppe* (fn. 19), p. 469 et seq.

[65] See *Jakobs* (note 44), p. 13, 15 et seq., 20 (with further references), 22 et seq. This thought can be traced back to Hegel, see *Günther* (fn. 19), p. 129 f.; *Seelmann*, Anerkennungsverlust und Selbstsubsumtion, Hegels Straftheorien, 1995, p. 88.

[66] He might not have thought about whether his intended behaviour creates a risk for the respective legal interest. This topic will be addressed in a different paper and based on a

whether the action creates a risk.[67] This leads to the following constellations:

Constellation 1a: If the agent thinks that the intended behaviour might lead to harm to a legally protected interest and that it would create an unlawful risk,[68] his assessment of the law will lead him to the conclusion that he is not allowed to behave as intended. If he carries it out nevertheless (opt. 1), he is wilfully in breach of what he considers to be the behavioural norm. The offender would not uphold the law, i.e. his version of the law. He would not follow the concrete behavioural norm he had created. He interprets his action as being in breach of what he perceives to be the behavioural norm. According to the acting agent himself, the claim of correctness which is attributed to his behaviour is wrong. In a way, he acknowledges and denies the generated behavioural norm at the same time. If he omits the intended behaviour (opt. 2), he behaves in accordance with his conception of the law. Therefore, there is no breach of a behavioural norm according to the acting agent, and the claim to correctness which is attributed to his behaviour would be justified.

Constellation 1b: If the agent thinks that it would be legally allowed to create the risk, his assessment of the law would result in the thesis that behaving as intended is allowed even though it creates a risk for legally protected interests. In the event that he acts as intended, the ascribed claim of correctness would be true according to the agent himself. If he omits the behaviour nevertheless, then he would behave in compliance with the law as well – assuming that there is no obligation to undertake the action.

Constellation 2: If the agent thinks that the action is incapable of causing harm to a legally protected interest, he has no reason to doubt the lawfulness of his behaviour. His legal opinion is therefore the same as in constellation 1b.

a) The acting agent is in breach of his own assessment of the law

In those cases in which the issue of impossibility arises, the acting agent usually thinks that his behaviour constitutes an incriminated attempt (constellation 1a opt. 1). If the observer agrees, he categorises the behaviour as punishable. Both agree therefore that the claim to correctness which is ascribed to the offender's behaviour is false. Therefore, they would rationally need to infer that the preservation of the law demands a response with which the communicated correctness is repudiated.

If the observer disagrees, he does not share the assessment that the mindset of the offender is directed at a breach of the behavioural norm and that the offender has infringed the law by behaving in the way that he did. For example, the observer might not share the delusion that a hex or serving camomile tea can cause someone else's death. With respect to the validity of the norm, the observer would not see a need to react to the offender's action because he does not consider it to be a breach of the behavioural norm that he has created himself. Therefore, he would not perceive the claim to correctness ascribed to the behaviour to be false. There would be no need to proclaim the validity of what he perceives to be the law.

Nevertheless, one can assume a necessity to communicate a response for a different reason: the observer might not ascribe a claim to the behaviour that would need to be repudiated, but the acting agent does. According to the latter, his behaviour is claiming something untrue because he regards his behaviour to be unlawful. In the eyes of the observer, this is not the case, but even he would need to acknowledge that the respective agent has put his willingness to infringe on an incriminated behavioural norm into action. Therefore, there is still cause to respond if the acting agent has (implicitly or explicitly) communicated that he perceives his behaviour to be in breach of criminal law. In this case, it is not the behaviour itself which gives occasion to respond (at least not the behaviour by which the acting agent oversteps the threshold to criminality according to his own assessment). Instead, it is the knowledge about the acting agent's subjective assessment regarding said action which calls for a response (because the observer takes notice of the breach of the subjectively construed behavioural norm).

The necessity for a response is rooted in a notion concerning norm hierarchy. Because the concrete behavioural norm is contained in the abstract behavioural norm, the offender has implicitly infringed on the abstract behavioural norm. Since the norm (at least) consists of the sum of its concretisations, to be in breach in one case means to have eroded the norm in its abstract form.[69] If the observer agrees that there is an abstract behavioural norm according to which it is forbidden to create unlawful risks for the protected interest[70] and if the acting agent has communicated an infringement of this abstract behavioural norm, then there are grounds for responding and engaging with the question of whether and how one reacts to the implemented infringement of the subjectively created behavioural norm. If there is no agreement about such

concept of human rights which has been developed in *Behrendt* (fn. 42), ch. 19.

[67] His assessment might be *objectively* wrong because the empirical facts are different than the agent assumed. Objectively, a real danger for the legal interest does not exist in either of the cases broached by this topic. When success is impossible, the attempt is harmless. Shooting with an unloaded gun or praying for someone's death creates the same level of risk towards the intended victim: no risk at all. See for instance *Alexander*/*Ferzan* (fn. 5), p. 195.

[68] The agent's opinion on whether he is *legally allowed* to carry out the intended behaviour can depend on a multitude of factors. Because the omission or execution of the action usually needs to be regarded within a multitude of legal relationships, cf. *Behrendt* (fn. 42), ch. 19 E., the agent can be obligated to execute or omit the action for other reasons than those of the bilateral relationship to the subject whose legal interests are in question.

[69] *Behrendt* (fn. 42), ch. 12 B. V. 1. and 3., 19 C. II.

[70] This would be the case if the observer's disagreement pertains only to the classification of the concrete behaviour with respect to the abstract behavioural norm.

an abstract behavioural norm, then there is no need to respond to the agent's norm breach.

As a result, criminal liability would not be decided by classifying a case as an attempt by superstition, an attempt at an imagined crime, a legally or factually impossible attempt or some other category. Criminal liability would be established by a norm breach. In all of the aforementioned categories, there would be a norm breach at least when it comes to the acting agent's perspective. However, if one understands criminal liability in this manner, it cannot justify punishment or censure as a response by itself. There needs to be some sort of a communicative necessity to react in this manner because punishment and censure have a communicative nature that goes beyond the legal relationship with the acting agent. There are other – social or informal – forms of responding which might suffice if the event does not rise to a societal level. A formal response would only be necessary if the more abstract behavioural norm is substantially called into question by the event. If the members of society dismiss the event as being non-relevant (e.g. witchcraft, maybe also some cases that might be categorised as irrational attempts), there is no need for a formal response. Society would need to refrain from imposing punishment – perhaps even refrain from instigating or prolonging a criminal investigation. A formal response to an attempt at something impossible would always be under a higher burden of justification, but these issues go beyond the scope of this paper.

b) The acting agent is complying with his own assessment of the law

The problem presents itself differently if the acting agent behaves in accordance with his own assessment of the law. These cases are usually not in question when it comes to the issue of impossibility. As *Struensee* notes: "Usually, it is the agent's opinion of doing something unlawful that gives rise to reviewing the case with regard to punishability; a crime of delusion without the presumption of unlawfulness – i.e. a crime of delusion under an error of law – seems to be a non-word."[71] However, the proposed concept needs to be able to address these cases as well. If it cannot offer a satisfying solution, it would fail conceptually.

According to the agent's conceptualisation of the norm, there is no breach of the behavioural norm in these cases. After all, he thought that his intended behaviour would not be legally wrongful. If the observer agrees, there is no problem. Obviously, this is different if the observer, e.g. the prosecution/the judge, takes a different stance regarding the criminal relevance of the agent's behaviour: according to the observer's understanding, the offender's mindset would have been directed at performing an act by which he would infringe on the concrete (incriminated) behavioural norm. From the observer's point of view, the offender failed to contribute to the validity of the norm if he behaved as intended. The acting agent and the observer would therefore be in disagreement as to whether the (ascribed) claim of correctness is true or false. With respect to the validity of the behavioural norm, the observer would see a need to react to the offender's action because he considers it to be a breach of the behavioural norm that he has created himself. This raises two important conceptual questions: (1) Why can the competent representative of the state claim that his interpretation is valid and binding and overrule a conflicting interpretation? (2) How can a formal response (e.g. imposing punishment) be legitimate if the acting agent behaved in accordance with what he perceived to be the law?

The proposed concept can lead to the existence of rivalling interpretations. If an observer claims to be justified in reproaching the acting agent by stating that his assessment of the law was wrong, there needs to be a justification for why his own interpretation holds sway over that of the acting agent. This question pertains to the question of who can claim authority on legal interpretation and whose assessment unfolds a binding force. While the individual can be perceived as an interpreter of the law, his interpretation generally does not bind another person. This is different when it comes to the opinion of the judge who is called upon to decide the case.[72] If society creates courts and empowers them to rule about what the law dictates, then society imparts the authority of legal interpretation to the courts and decides to be bound by their decisions. Correspondingly, the same would apply to the institutionalisation of criminal courts and bestowing the competence of responding to crime on the state. This would explain why the competent judge is legitimised by society to formally respond to the breach of a behavioural norm.

Additionally, the justification of censure as a formal reproach needs to take into account that the legal community can only expect its members to behave in accordance with a behavioural norm if they can perceive it. This notion, which is expressed by the core principle "nullum crimen, nulla poena sine lege scripta, praevia, certa, stricta", is codified within the German constitution (Art. 103 para. 2 GG) and has a long and rich historical background.[73] If the competent judge conceptualises the norm differently than the offender and the result is a disagreement about the categorisation of the offender's behaviour, the judge needs to ask whether he can hold the agent responsible for having conceptualised the behavioural norm wrongly. Therefore, the following question needs to be answered: Could and should the offender have known that his interpretation will be perceived as a mistake of law[74] by the competent judge? If he could not have known, he cannot be blamed for the breach of the behavioural norm which was conceptualised by the court. The so-called mistake of law only bridges the difference between the two concep-

[71] *Struensee*, ZStW 102 (1990), 21 (42), translated by the *author* of this paper.

[72] A judge who is not institutionally authorised to decide on the matter cannot claim a binding force of his view on the matter. This topic is elaborated in *Behrendt*, Rechtstheorie 51 (2020), 171.

[73] Cf. *Kreß*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, 2nd ed. 2012, para. 2 et seq.; *Roxin*/*Greco* (fn. 4), § 5 paras 18 et seq.

[74] In the German Criminal Code, the mistake of law is addressed in § 17 StGB.

tions of law (the one of the offender and the one of the observer).[75] The proposed concept therefore leads to a shift in the understanding of the mistake of law. According to the proposed concept, the term would be misleading. The perpetrator can only be mistaken in his legal assessment if the law would be something objective or intersubjective and the proposed concept dismisses such an understanding. According to the constructivist discourse-theoretical concept of law, the phenomenon would pertain to accountability for not having conceptualised the behavioural norm in the way the judge did (or at least with a similar result). The question of whether the offender could have assessed the law "correctly" has always been somewhat of a stretch in difficult cases. However, there is no lack of awareness of the problems of predictability and their connection to the legitimacy of punishment. The constructivist discourse-theoretical concept of law only omits to mask these problems.

IV. Concluding remarks

The proposed concept would lead to a shift in the concept of criminal law. It provides a necessary normtheoretical element for subjectivist stances which cannot be fathomed under the assumption that law is something external. Criminal liability as it is understood in this paper only requires the breach of a behavioural norm. Impossibility does not factor in the concept of criminal liability: in all those cases which raise the issue of impossibility, there is a criminal liability since there would at least be a breach of a behavioural norm according to the perpetrator himself. Hence, it does not matter if a case is categorised as an attempt at a crime of delusion or as an irrational attempt. Criminal liability is not determined by whether it is a case of factual or legal impossibility.

The crucial question is not whether there is an infringement of a behavioural norm – this is only a necessary but not a sufficient condition for censure and punishment. There needs to be a communicative necessity to respond to the norm breach as well. To this extent, the concept gives the majoritarian stance a conceptual background.

As a consequence of the proposed concept, whether the observing agent understands the attempt to be based on superstition or whether he considers it to be a factually or a legally impossible attempt loses a lot of importance. These categories would not decide criminal liability. However, they do not lose their relevance altogether because they might factor in the question of whether there is a necessity for a formal response.

The proposed concept does not necessarily conflict with the results to which objectivist stances lead. It would be misleading to call any position about normative contents objectivist because any interpretation is unavoidably subjective. Since there is no objectivity to be had, the claim to objectivity only disguises the subjective character of the assessment and distorts a healthy professional legal discourse.[76] However, there is no reason why the observer could not take objective factual circumstances or a better knowledge of causality and the laws of nature into account when conceiving the behavioural norm and assess the need to respond. On the contrary, there are grounds to assume that he is obliged to do so – but this is not the topic under discussion in this paper. What I have laid out here only addresses the normtheoretical conceptual basis.

In conclusion, the notion of impossibility in criminal law theory is an intricate topic that cannot be understood without referring to criminal law theory. However, the proposed concept shows that it is possible to conceive criminal liability without dealing with questions of impossibility. Law might have a sense of irony after all.

[75] Therefore, one needs to differentiate between (a) the responsibility for not having created the respective behavioural norm in a manner which does not conflict with the one the judge created and (b) culpability as such. Culpability needs to be understood as the ability for sufficiently complex cognitive processes, see *Frister* (fn. 23) ch. 18 paras 12–14; *id*., Die Struktur des „voluntativen Schuldelements", Zugleich eine Analyse des Verhältnisses von Schuld und positiver Generalprävention, 1993, p. 126 et seq.; *id*., in: Freund/Murmann/Bloy/Perron (eds.), Grundlagen und Dogmatik des gesamten Strafrechtssystems, Festschrift für Wolfgang Frisch zum 70. Geburtstag, 2013, p. 533 (546–548); *Behrendt* (fn. 42), ch. 19 A. II. 4.

[76] See also *Becker* (fn. 2), p. 17, 72, 124 et seq.