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Interpreting Action with Norms: Responsibility and the Twofold Nature of the Ought-Implies-Can Principle

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Abstract. This article examines the application of the ought-implies-can principle in the legal domain, especially in the relationship between obligations and responsibility. It addresses the challenge of cases in which an agent cannot do what is required of her, and yet it seems plausible to say that she has an obligation. To deal with these cases, two parallel distinctions are made: between rules of conduct and rules of imputation, and between doings and things done. It is proposed that these distinctions show that the principle operates in two different but complementary ways: as part of prescriptive relations and as part of responsibility practices.

> For what the king fundamentally insisted upon was that his authority should be respected. He tolerated no disobedience. He was an absolute monarch. But, because he was a very good man, he made his orders reasonable.
> "If I ordered a general," he would say, by way of example, "if I ordered a general to change himself into a sea bird, and if the general did not obey me, that would not be the fault of the general. It would be my fault."
> —Antoine de Saint-Exupéry, *The Little Prince* (1943)

1. Introduction: Legal Obligations and Liability-Responsibility

In the modern age, law is structured into legal systems understood as institutional normative orders that organise an important part of social life. With the help of legal norms, people can guide their own behaviour, assess behaviour as lawful or unlawful, and hold others responsible for unlawful behaviour. The following pages focus on how we can interpret some of the relationships between these ideas, with an emphasis on

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how the principle of "ought implies can" (hereafter OIC) can be understood in a legal context.[1]

The OIC principle states that whenever we identify an obligation, it must be *possible* to fulfil this obligation. Consequently, judgments expressed in statements such as "It is forbidden to do that," "She did wrong," or "You should not have done that" are correct only if the object of the judgment is something that *can* be done. In this sense, the principle introduces some constraints in determining the meaning of ought statements.

There are some features of modern law that make the application of this principle dubious. Modern law is highly institutionalised, and the shaping of legal norms bears this signature. On the one hand, we have access to legal norms primarily through texts enacted by public authorities. These texts express what is required of people, but they do not contain substantive reasons or implicit principles that justify them. On the other hand, the authorities are political sovereigns and there are in principle no limits to what they can demand of the people. What the law requires can therefore change depending on the goals and interests of the authorities. The difference with morality is that moral requirements do not change just because people's goals change. This, together with the level of arbitrariness with which legal authorities are allowed to act, suggests that some constraints on the content of legal obligations (such as those of OIC) are not applicable.

In the following, I will deal with statutory law, because the above-mentioned characteristics are clearly evident in that legal source. I will understand the creation of legal obligations through statutory law as being configured by what Bruno Celano (2013, 134–5) has called a "prescriptive relationship."[2] Legal authorities enact legal texts that are understood as an expression of requirements for citizens. These requirements help people to know what is legally expected of them and others. Since they are normative authorities, the requirements are interpreted as prohibitions, obligations, and permissions that define what is legally permissible. I will focus on the obligations that arise from legal rules that require people to do certain things.

As far as the concept of responsibility is concerned, I will deal with what H. L. A. Hart called legal liability-responsibility, on which responsibility is so understood: "When legal rules require men to act or abstain from action, one who breaks the law is usually liable, according to other legal rules, to punishment for his misdeeds, or to make compensation to persons injured thereby, and very often he is liable to both punishment and enforced compensation" (Hart 1967, 349). Thus, when we say that someone is responsible, we are saying that she is liable to punishment because she has failed to fulfil a legal requirement.[3]

[1] This is a text on legal theory and although I will analyse some arguments developed in ethics, I am not concerned here with how the principle is to be understood in normative ethics or applied ethics. I am not sure whether the argument presented here can be valid in those fields of practical philosophy.

[2] Celano is following Georg von Wright's notion of prescription (von Wright 1963, chap. 5) and describes it as "the kind of relationship which comes into being, by virtue of the happy issuing of a prescription, between a lawgiver, on the one hand, and those to whom her prescription is addressed, on the other hand" (Celano 2013, 135). For the sake of simplicity, I will refer to normative subjects as citizens.

[3] For the sake of simplicity, I will only take into account cases of direct subjective (personal) responsibility for actions in which the person who is liable to a sanction is the same person who has violated a duty with those actions (on strict liability, see Gardner 2019, 176; Vranas 2007, 199 n. 6).

Hart (1967) distinguishes between legal liability and moral blame (cf. Shoemaker 2013). Although both legal liability and moral blame have a similar structure and both presuppose a wrong as a necessary condition for responsibility (Figueroa Rubio 2019, chap. 5), there are some differences we might want to consider. The first of these is that legal liability does not presuppose a moral assessment of the person responsible, nor does legal sanction have to express such an assessment. The second difference has to do with the norms that play a role in defining wrongdoing. In cases of legal liability, the existence of wrongdoing is understood as a violation of a legal norm and not as a violation of a moral principle. Finally, in modern legal systems, some authorities, such as judges and juries, determine who is responsible for a wrongdoing and determine the appropriate sanction. Moral blame does not require such authorities. In light of these facts, in the following I will understand responsibility as *legal liability* and use the terms *responsibility* and *liability* interchangeably.[4]

Responsibility is important for understanding OIC because it is in our responsibility practises and judgments that we can define that something wrong has happened. Arguably, if it is impossible to identify an obligation, it is not correct to affirm that someone can be held responsible for violating that obligation. On the other hand, the most basic normative consequence of violating an obligation is to be liable to a sanction (e.g., to be punished or to pay compensation). If we cannot stablish that someone was even *able* to violate the obligation, they cannot be held responsible for it. This shows a very important link between *ought* and *can* that will be discussed in greater detail in the following sections.

In these introductory paragraphs I have set the context in which the discussion is situated. In what follows, I will first define more precisely how OIC can be understood and how this informs our understanding of the relationship between responsibility and obligations (Section 2). Second, I will present a case that casts doubt on how strong the relationship is (Section 3). To deal with this case, I present two distinctions. The first is the distinction between rules of conduct and rules of imputation (Section 4) and the second between doings and things done (Section 5). The two distinctions are analyzed to show that actions are interpreted in different ways using norms (Section 6). I then turn to some consequences of the idea that we can identify constraints on the use of OIC in prescriptive relationships (Section 7). In the final section, I suggest that these distinctions show that OIC functions in two different but complementary ways.

2. Responsibility and Obligations: The Role of the Ought-Implies-Can Principle

A pithy statement of the link between the concepts treated in the previous section comes from James Brown (1977, 206): "Does 'ought' imply 'can'? Surely it does.

[4] In some of the passages I will be quoting from moral philosophers, the word *blame* is used. I think that in all such cases, given the structural and normative similarities mentioned, the word *blame* can also be replaced by the word *liability*. What is relevant to these pages is that both moral blame and legal liability are part of what Gary Watson (2004, chap. 9) has identified as "accountability-responsibility" and are not directly related to attributability-responsibility. However, when a distinction is relevant, it will be emphasised and explained.

For we do not hold a person to blame for not doing something he was unable to do."

The quotation expresses a connection between responsibility and OIC that is usually taken for granted. The point is that when we attribute responsibility, we assume that the person being held responsible could have acted differently (at least in the specific sense in which she was required to act). Hence, if someone is held responsible for failing to comply with some requirement they couldn't possibly have complied with, the OIC principle applies. For we do not pass a negative judgment on someone who was unable to do what was required of them (i.e., we do not think that they have acted wrongly, contrary to what was required). Thus, it can be said that in order for someone to be held responsible for some action they are required to do, it must be the case that what is required is something they can do.

This relationship can also be interpreted differently by saying that the conditions under which we can hold someone responsible (as when they can exercise control over their own behaviour) reflect the conditions under which it makes sense to say that someone is acting wrongly. In that vein, following a common idea in the literature, Robert Stern (2004, 46) points out that the most plausible argument in favour of OIC is that it "is simply wrong to blame someone for something that they cannot control." This way of seeing things can be said to capture the principle that liability implies can (hereafter LIC).[5]

As mentioned, OIC expresses the idea that whenever we identify an obligation, it must be possible to fulfil that obligation. This possibility of fulfilment, expressed in *can*, is presented as a necessary condition for the existence of the obligation, expressed in *ought*. Because the terms *ought*, *implication*, and *can* can be understood in several ways, the principle has been interpreted in different ways (see Fox and Feis 2017, 3–8; Frankena 1950; Gardner 2013; Hare 1965, sec. 4.2; Kahn 2019, chap. 1; Sinnott-Armstrong 1984; Vranas 2007, 167–73). I should therefore specify how I will understand these terms.

I will first focus on a deontic use of *ought*, not an evaluative, axiological, or epistemic ought. This kind of *ought* fits better with the idea of obligation in the context of responsibility.[6] On the one hand, the presence of legal norms that express prescriptions indicates that something is forbidden, mandatory, or permitted. On the other hand, those who act contrary to what is required are candidates

[5] As we can see, this principle in general introduces constraints on the correct use of statements of the form "You should not have done that." In the moral literature, the principle is referred to as "blame implies can" (see Buckwalter and Turri 2015; Chevarie-Cossette 2024; Stern 2004). I call it "liability implies can" for the reasons outlined in Section 1.

[6] On that distinction see Anscombe 1958; Smith 2005; and Tappolet 2013. As Michael Smith (2005, 10) points out: "Roughly speaking, those normative claims that entail the possibility of holding some agent responsible are deontic, whereas normative claims that do not entail such a possibility are evaluative."

for punishment because they are responsible for *wrongdoing*.[7] Additionally, legal obligations are general, i.e., they are addressed to a group of agents and require, prohibit, or permit certain types of actions, even though their fulfilment is performed by individuals in particular situations. The term *can* is usually understood to imply a combination of the opportunity and the ability to comply with the rule on the part of those to whom the rule is addressed. In this sense, it refers to the possibility of acting in a certain way. Finally, there is disagreement as to whether the term *implies* should be understood as an entailment, a presupposition, or an implicature.

More about how the terms are to be understood will be explained in more detail in the following sections. In the meantime, two different interpretations of OIC can be derived from what has been said (see Caracciolo 2018, 2.2; Kahn 2019, 23; and Stern 2004, 47). According to a strong interpretation, OIC requires that we focus our attention on the exercise of the capacities of agents in their circumstances "and adjust our accounts of what is right and wrong accordingly" (Stern 2004, 44). On a weak interpretation, by contrast, OIC demands us to focus our attention on the kind of *action* that is required, rather than on the abilities and circumstances of the agents, in determining what kind of constraint applies in satisfying the ought in question.

To return to the connection between responsibility and obligation, OIC can say in simplified terms that an unfulfilled obligation is arguably a necessary condition for holding someone responsible, and that nonfulfilment of an obligation, in turn, is grounds for being held responsible. In this scenario, OIC can be read as establishing a close link between the two concepts, a link that can be presented by reasoning as follows:[8]

(i) If S is liable for not having performed action *a*, then S ought to have performed action *a*.
(ii) If S ought to have performed an action *a*, then S could have performed action *a*.

Therefore

(iii) If S is liable for not having performed action *a*, then S could have performed action *a*.

In the argument, premise (i) expresses the aforementioned connection between obligations and responsibility, the former being a condition for the latter. Failure to do what is

[7] Nevertheless, some, however much indirect, connections by which to evaluative concepts can be recognized. Thus, what is required by a prescription is presented as desirable in a pragmatic, narrow sense (e.g., if an authority issues a rule forbidding causing the death of another person, it can be said that causing the death of another person is presented as something undesirable), and this judgment can carry over to the evaluation of an action that does not fulfil the requirement (e.g., Jenny causing the death of Max is seen as something undesirable). This is a narrow sense because it does not imply that there are substantial reasons (e.g., moral principles) that support the content. In the legal realm, it is not clear that every requirement is supported by substantive normative reasons. What makes the required act desirable is the fact that it has been presented as required by the authority. Further discussion might centre on what reasons support the validity of the requirement (e.g., the reasons that support the authority of the legislature or the reasons that establish an obligation to obey the law). But such a discussion would go far beyond the scope of this text.

[8] A similar presentation in Nelkin 2011, 100.

required is precisely what the person is responsible for. OIC is expressed in premise (ii), at least in a version that needs further clarification. And (iii) expresses LIC.

Different interpretations of the premises may show different interpretations of the meaning of OIC in the relationship between obligations and responsibility. As mentioned, for some, LIC is the only plausible meaning of OIC. Accordingly, proposition (ii) aggregates nothing relevant to (iii), since the correct determination that someone has committed a wrong is possible through the formation of a correct responsibility judgment. This interpretation casts OIC in a strong sense, and the circumstances that may affect responsibility (e.g., a temporary loss of bodily control) also affect what is required. This interpretation might lead us to the claim that the conditions for identifying an ought are the conditions for holding someone responsible. If this is correct, (ii) seems trivial. For LIC does not refer to the presence of a preexisting concept of obligation, but only asserts a condition for holding someone responsible, and says nothing about the conditions under which OIC can be seen as related to obligations. Furthermore, if we assume that the concept of obligation is irrelevant, or if we are sceptical about the existence of independent obligations,[9] LIC can be seen as a rejection of OIC. In this scenario, some interpretation of (ii) as expressing OIC independently of LIC must be presented, at least in a weak sense, in order to preserve what the reasoning supposedly shows. Some ideas along these lines will be presented in Section 6. Before going into that discussion, I will consider a deeper challenge that some cases pose to the connections the reasoning purports to show.

3. Challenging Cases

In contrast with what has been said, we can cast doubt on how solid the connections are between the premises and the conclusion of the reasoning presented in the previous section by imagining cases in which (ii) is false but (iii) remains true. Let me illustrate this with an example.

> On the battlefield, a soldier is severely injured and the commander of the platoon orders the platoon's medic to treat the injured soldier:
> Commander. "Medic, take care of your comrade; he's bleeding to death!"
> Medic. "Sir, I can't do it."
> Commander. "What do you mean you can't do it? You're the medic of this platoon and I just gave you an order to take care of your fellow soldier. He's going to die."
> Medic. "Sir, I know I should, and I would if I could, but I can't."
> In this case, unbeknownst to the commander, the medic is paralyzed by fear because the platoon is under heavy fire, and so he is unable to bring himself to help his fellow soldier. Nevertheless, both the commander and the medic know that the latter ought to treat the wounded soldier. Hence, in this case, it's true that the medic ought to treat the wounded soldier […] even though it's false that he can actually do so. (Mizrahi 2009, 21–2)

In this case, we can reasonably say that the medic has an obligation to treat the soldier even if she is unable to do so. This can be seen as a negation of premise (ii), for there is an obligation even if it cannot be fulfilled, i.e., it is not the case that the

[9] In legal theory, this scepticism is found among advocates of some types of rule-scepticism, according to which there is no wrong until a judge establishes that something wrong has happened and there is no prior obligation that defines that wrong (see Hart 2012, chap. 7).

medic could have performed the required action, since she lacked control over her own body. Furthermore, in this case, precisely because the medic had no control over her own body, we can reasonably say that she is not responsible for failing to treat the soldier. This is consistent with (iii). As we can see, this type of case presents a challenge to the purported connection between OIC and the concepts of obligation and liability, at least as presented in the previous section, and casts doubt on the link between LIC and OIC.

I think the problem presented by the case of the medic can be solved by paying attention to the way norms operate, and especially to the variety of ways in which they are used to interpret actions. Before I begin to explain this, however, I would like to comment briefly on the case. As can be seen, although the medic example is not a case involving statutory law, it can easily be transferred to that area of application. A central aspect of the example is that there is an order from an authority to a subject, which is part of the prescriptive relationship that holds in statutory law. Nevertheless, two differences should be noted. Firstly, paradigmatically, and as is the case in this example, in statutory law there is no face-to-face interaction between the authority and the subject; and secondly, legislators usually do not issue particular orders but general rules.[10] The presence of a legal ought in this kind of relationship is recognized by the identification of validly enacted provisions. In this sense, I would assume that a valid legal norm that prescribes something to the addressee generates an obligation, which means that what is required is as obligatory as the commander's order.[11] The example would therefore have its counterpart in an obligation arising from a military code or an act requiring medics to provide emergency care to injured soldiers.

4. Responsibility and Norms

I think that the analysis of the argument presented in Section 1 relies on an ambiguity that has not been clearly noted in the literature. More precisely, it involves two different ways of understanding the relation between rules and actions, with implications for the notion of *can* at play. Since the distinction is usually overlooked, examples such as the medic's seemingly show that the connection between ought and can claimed by the OIC principle is false, but I think that this is not entirely true. To explain this, I propose that we distinguish between two ways of interpreting actions with norms. In order to do so, I will introduce a distinction between two kinds of norms that was developed in criminal law but is part of

[10] See Hart 2012, chap. 2. These two characteristics of the prescriptive relationship are of central importance for the principle of legality in criminal law. Against this background, the case of the medic as presented in the original example is similar to a valid order by a judge or an administrative official in a legal context.

[11] By accepting this connection, I do not problematize the links between different meanings of *validity* that increase the complexity of the scenario (see Bulygin 2015, chaps. 2, 3, 4, 10). I am not sure that this inclusion could change anything in the conclusions of this text. Second, I accept that we can identify the formal validity of a norm with its bindingness, but I do not assume a substantive thesis about how this is justified. I think the idea is very common and consistent with various views about the nature of law and practical reasoning. Finally, while it is true that a valid norm implies an obligation, that is not the whole story. In the next sections, I will add some complexity to the picture by drawing attention to the function of rules in our practices.

all responsibility practices: the distinction between rules of conduct and rules of imputation (see Dan-Cohen 2002, chap. 2; Figueroa Rubio 2024; Hruschka 1986; Mañalich 2019; Robinson 1990).

Rules of conduct are those that are primarily addressed to citizens and state that certain conducts are required of them. These rules have the structure of a categorical standard, prescribing what should or should not be done. Following Joachim Hruschka (1986), we can say that these rules have two different functions. First, they have a *configuration function*, meaning that they are designed to influence and shape people's lives. This is done by telling them what they must or must not do (i.e., what is required of them and what can they require of others), or what is expected of them and what they can expect, thereby guiding their behaviour. When a commander gives an order or a lawgiver enacts a rule they are employing the deontic discourse in a directive use, their purpose being "to cause people to act or to refrain from acting in certain ways" (Forrester 1989, 35).[12] This is a prospective function of norms because it refers to the possible future actions that people might perform.

Furthermore, rules of conduct also have a *measurement scale function*. In this sense, the rule is directed primarily at the person who assesses events *ex post facto*. The rule provides a yardstick for identifying something, at least *prima facie*, as a possible violation of an obligation. This second function is retrospective, because it relates to what has already happened. In the case of the medic, there is a rule of conduct that could be articulated as "It is mandatory to treat injured soldiers." This rule helps people know what to expect from the platoon medic and tells her what to do if a soldier suffers an injury. Also, if a platoon soldier is injured and no medic helps him, the situation can *prima facie* be interpreted to mean that the medic violated the rule of conduct.

After we became aware of an event that can *prima facie* be regarded as a violation of an obligation, we can ask under what conditions that event can be imputed to someone. This is the realm of rules of imputation, which govern ascriptive judgments, providing guidelines for attributing the breach of an obligation to a person.[13] More precisely, in responsibility practices these norms entitle someone to say, on the one hand, that something that has happened is someone's deed and, on the other, that something wrong can be attributed to a person as the author of a culpable action. In the legal domain these rules are addressed to those persons who are empowered to decide whether someone has committed a wrong (e.g., judges and juries). These norms are retrospective, because they govern the way we are to interpret what has already happened in order to attribute an occurrence to someone.

[12] This function can also be explained in terms of the generation of guiding reasons (see Gardner 2007, chap. 5; 2019, chap. 6).

[13] The idea of ascriptive judgments is related to the view known as ascriptivism. There are two important theses in ascriptivist views. The first is that the primary function of sentences such as "She did it" is ascriptive, meaning that the language of action plays a similar role to the language of property, i.e., it is used to attribute things to persons and to express that something belongs to someone (see Hart 1949). Secondly, ascribing an action also means attributing responsibility for that action. There are different ways in which we can ascribe responsibility for an action (Feinberg 1970, chap. 6); here I am concerned with responsibility as liability. On the relationship between ascriptivism and the distinction between rules of conduct and rules of imputation, see Figueroa Rubio 2024.

In summary, as Juan Pablo Mañalich has pointed out:

> The two following questions must therefore be clearly differentiated. First: what may be eventually imputed to someone? And second: in virtue of what may something be properly imputed to someone? While the answer to the first question, which aims at the object of a possible imputation, is given by the relevant set of conduct rules, which jointly identify the types of wrongful behavior for the realization of which a person may be criminally responsible, the answer to the second question is provided by the relevant set of imputation rules, which fix the (positive and negative) bases or grounds for the ascription of responsibility for some criminally significant behavior-token. (Mañalich 2019, 412)

The distinction between these two questions illuminates the relationship between the two kinds of rules: While the existence of rules of conduct (understood in its retrospective function) is a condition for the use of rules of imputation, because the former set the standard in light of which a violation is attributed, rules of imputation make it possible to apply rules of conduct to specific cases to generate an appropriate responsibility judgment. This relationship between norms in turn connect prescriptive relationships with responsibility practices.

Likewise, the distinction between these two types of rules reveals an important feature of our responsibility practices: Saying that something wrong happened (i.e., something contrary to what a rule of conduct requires or what can be expected from it) is different from saying that someone is responsible for it. This does not mean that there is some kind of complementarity between the two kinds of norms. On the one hand, knowing how something might be ascribed to us (applying rules of imputation) can help us direct our own behaviour in such a way as to avoid the consequences of that ascription. On the other hand, when a wrong is ascribed, those who apply a rule of imputation might look to the meaning of the corresponding rule of conduct as a guide in interpreting the specific situation. Finally, rules of conduct may include properties in light of which to identify the wrong, and these properties may in turn include some elements that can help in classifying the specific situation in which the wrong occurs, taking into account some elements of that situation. The inclusion of these properties does not contradict the idea that these rules are general, because they can be applied to any person who is in the situation under consideration. In any case, the functional distinction helps us to recognize that it is one thing to identify something for which someone can be held responsible, and another to say that a specific person is responsible for it.[14] When something wrong happens, we search for an explanation for it, and sometimes that explanation leads us to someone. In some cases, however, we simply have no one to hold responsible.

[14] Since the distinction is functional and there are different connections between the functions, there is no sharp line that separates the two types of norms (see Robinson, Garvey, and Ferzan 2009, chap. 1).

5. Two Ways of Interpreting Actions

The distinction between norms discussed in the last section can be complemented by introducing another distinction, this one relating to the way we speak and think about actions. This is the distinction between *doings* and *things done*,[15] or, more precisely, between "particular doings and repeatable things that you and I might both do" (Sandis 2017, 109). In the latter case we are speaking in terms of *things done*, referring to something that can be repeated and shared. To heal a wound, for example, is something that can be done in different situations by different people, but when Max heals Jenny's wound with alcohol, he is healing a specific wound in a specific way in a specific situation. Now we are speaking of an action in terms of a *doing*, "a particular agent's acting in a certain way" (Payton 2021, 12). This second way of speaking of actions brings the agent and the agent's circumstances into the picture in interpreting what has happened (see Hornsby 1997, 90; 2013; von Wright 1963, 36–7).

The latter way of referring to actions (as doings) introduces elements of the context in which the specific action was performed, which can make a difference in assessing what happened. Constantine Sandis shows one way in which this difference comes about. He writes: "Acted wrongly is at best itself ambiguous between doing the wrong thing and doing something (right or wrong) for the wrong reasons or out of a wrong motive" (Sandis 2017, 111). We can see this in a nonlegal example. Arguably, causing the death of a person without her consent is wrong, but our judgment of the wrongness of an action that causes the death of another person without her consent might change if we know the motives of the doer. Imagine Max causing the death of Jenny in a hospital in order to take away the pain that a terminal illness is causing her, while Mariah causes the death of John in the next room in order to get his inheritance.[16] We can say that both *did the same wrong thing* (viz., to kill another person without their consent), but arguably one

[15] For more detail about how this distinction operates and bears on the philosophy of action, see Hornsby 1997, chap. 5; 2013; Payton 2021, chap. 1; Sandis 2012, 30–5, 142–54; 2017; 2022. This distinction is similar to the distinction between generic acts and individual acts proposed by Georg von Wright 1963, 35–7. I thank an anonymous reviewer for drawing my attention to this overlap.

[16] A similar example is developed by Sandis. In this example, two persons donate to charity, and while the motive of the first person is to help others, the motive of the second is to impress onlookers. According to Sandis (2022, 473): "One's act of donating to charity may also be correctly described as one's trying to impress the onlookers, this doesn't give us a reason to deny that in so acting a person may do (at least) two things: Donate to charity and impress the onlookers, one of which is right and the other wrong." Cf. Hornsby 2013, 7–8.
We can find cases with similar structures in the area of law. One example concerns how *mens rea* can affect the way we assess what has happened. Let us imagine that in the same hospital, a nurse caring for the lives of her patients causes the death of a patient by injecting him with a lethal dose of a drug because she accidentally miscalculated—she was wearing dirty glasses that did not allow her to see properly—while in the room next door, another nurse intentionally causes the death of a person by injecting him with a lethal dose of a drug. The difference between the two cases lies not in what they have done—both have done the same thing, namely, causing someone's death without their consent—but in how they did it (i.e., in their *doings*). In one case the person acted *negligently*; in the other, the nurse acted *intentionally*. In the law, this last consideration usually leads to the two acts being assessed differently, even if both may be deemed as having done the same thing (same thing done).

did something wrong *acting rightly*, whereas the other did something wrong *acting wrongly*.

Let me explain this last idea better. One might think that it is incoherent to claim that someone has done something wrong acting rightly, that an action has or doesn't have the property of wrongfulness.[17] I think this apparent incoherence can be avoided by appealing to the various functions that rules have in identifying something as wrong.

In *Moral Dimensions*, Thomas Scanlon describes two ways of using moral principles: as guides to deliberation and as standards of criticism. As guides to deliberation, principles answer the question of whether an action is permissible or not, and they do so by pointing out the considerations that speak decisively for or against the action. When principles are used as standards of criticism, they are used to assess the way in which the agent went about deciding what to do in the given circumstances by referring to the specific mental states that led her to act as she did (see Scanlon 2008, 20–36). With this distinction in mind, Scanlon says:

> Since principles tell agents which considerations count for or against an action, it is natural to say that agents follow these principles when they take these considerations as reasons, and that when they do not, their failure to do so makes their actions wrong. But what makes an action wrong is the consideration or considerations that count decisively against it, not the agent's failure to give these considerations the proper weight. (Ibid., 23)[18]

The crucial point here is that the specific reasons by which an agent is moved to act do not define the permissibility of the action. We can critically evaluate these reasons as wrong reasons, but this implies a different use of principles. In this sense, when we identify an action that we consider from the perspective of its permissibility, we interpret it as a thing that is done. So if, in a deliberative stance, we conclude that it is wrong to cause someone's death without their consent, then it is wrong to cause someone's death without her consent regardless of the motives that lead them to do so in particular circumstances.[19] In contrast, what motivates an agent to act under the given circumstances is part of the *doing*, which is why we can critically evaluate such actions using principles. In this critical use we need not consider the agent's moral character: We can concern ourselves exclusively with whether or not her doing is wrong.

The idea behind this distinction is that we cannot rely on what motivates agents to act in each concrete situation in order to identify what is required of them. At the

[17] I am grateful to an anonymous reviewer for having raised this objection.

[18] In the same vein, he also comments that this "distinction is frequently overlooked. In explaining why certain actions are impermissible, people often refer to intent—to an agent's reasons for acting—when in fact what makes these actions wrong is the considerations that count against it, not the agent's view of those considerations" (ibid., 2008, 37).

[19] One might think that this depends on the assumption that it is always wrong to cause someone's death without their consent, but we can also think of cases where it may be *justified* to do so, as might be the case if this were done to spare them suffering. I think that accepting this does not affect Scanlon's reasoning, as this is part of a reasoning that uses principles as guides to deliberation, at which point we have a new rule that says that it is not wrong to cause someone's death if this is done to spare them suffering. In certain situations, then, we can act according to this principle for different motives, and some of these motives can be evaluated as wrong. In making determinations of this latter sort, we use principles as standards of criticism.

same time, however, our assessment of an agent's concrete performance must respond to how contextual elements determine what happens.[20] In some cases, this can lead us to form ambivalent judgments about what has happened. I think that this ambivalence is part of our practices and is related to how norms function in responsibility.[21] To explain this, in the next section I will translate these ideas into the distinctions presented in the previous sections.

6. Actions and Norms

As noted, in the responsibility process we can identify two types of norms in relation to their functions: rules of conduct and rules of imputation. I would now like to show how what has been said in the previous sections can be interpreted using this distinction, especially when thinking about legal responsibility.

Going back to Scanlon's distinction between two uses of moral principles—as guides to deliberation and as standards of criticism—the permissibility of an act in the case of statutory law is primarily defined by legislative enactment.[22] The deliberative use of norms is limited to what the authoritative text says, rather than to the (other) substantive reasons that can be applied to the situation. Thus, if we can establish that it is forbidden under the criminal code to cause the death of others, we can guide our own deliberation on that basis. The assessment in this regard is determined by rules of conduct. As far as the critical use of norms is concerned, we can generally rely on the retrospective function of rules of conduct and imputation. The latter enable us to attribute what has happened to an agent. To this end, these norms respond to the circumstances under which the agent performs the action (e.g., whether the agent acted intentionally or negligently).[23]

If we apply this framework to the case of the medic, we can recognize a similar structure. When we use rules of conduct, we speak of actions and omissions in two different ways, depending on the function of the rule. On the one hand, in the prospective function, we speak of possible future actions. So when we say, "It is obligatory to treat injured soldiers," we are alluding to possible situations in which a soldier is injured. On the other hand, if someone has been injured and no one helps them, we could say that, *prima facie*, the obligation to help an injured soldier has been violated, that an expectation has gone unmet. If this obligation applies to a specific person—in virtue of a role she is performing, for example—we could say

[20] Motives are only one of the contextual elements that may become normatively relevant. Another element that could play this role as well is abilities (see Nelkin 2011; Sher 2009), but there are many other elements, such as the actions of others and catastrophes, that influence the possible and relevant descriptions of what has happened.

[21] See Watson 2004, chap. 8. This ambivalence can change or be maintained depending on how the judgments are formed in concrete cases. As we shall see, I think that both kinds of norms complement each other, for sometimes something that *prima facie* appears to be a wrong can definitely be interpreted as *not* being a wrong.

[22] Even if legislators do not define the final meaning of the text they enact, the enactment is a necessary condition for the existence of a legal norm, and the interpretation of those who apply the norm is anchored to the meaning of the text.

[23] But note that rules of imputation have a broader application. They refer not only to an agent's intentions but also to other elements of the circumstances that may play a role in determining whether what has happened is to be attributed to the agent.

something like "The medic's obligation has been violated."[24] This is a retrospective way of speaking.

The next question is whether or not it is appropriate to ascribe that violation to the medic. The reasoning that deals with this question is governed by rules of imputation. These rules govern the way in which what has happened can be entered into an agent's record as her deed and, more to the point, they force us to speak of the situation in terms of past *doings* (see Feinberg 1970, 124–6).

Only by using these rules are we entitled to say that the person could be held responsible for the wrong. While in the process of reasoning with these rules, we may be led by exculpatory circumstances to not impute something to someone as a wrongful action they have committed, but once we form a nondefeated ascription, we have a person responsible for violating a rule of conduct. Thus, in the running example, since the medic had no control over her body, we cannot attribute a culpable omission to her. Consequently, while we can say that the medic did not help the soldier, we cannot ascribe to her the wrongful action of not helping the soldier, since she had no control over her body at that moment.

When we use a rule of conduct to assess a past event, we ask whether the event has the same properties as the content of the rule. If, on the other hand, we use rules of imputation to assess the event, we ask whether what happened can be attributed to a person as something wrong she did. In the first case, we interpret the action as a thing done; in the second case, as her doing. The latter assessment is important in responsibility processes. Sometimes, for example, the defence is to claim that what happened is not what the rule forbids (e.g., we might say, "I didn't do x; I did *y*"); in other cases, the defence is not to deny that the wrong happened, but to say that what happened is not a doing (e.g., "I was unable to do x") or to bring in some contextual elements to show that the event cannot be attributed to her in making her liable (e.g., "Yes, I did do x, but under circumstances D") (see Duarte d'Almeida 2015, chap. 7). These issues are incorporated in norms that contemplate the possibility of claiming these defences. Applying this reasoning to our example, we can say that an exculpatory defence is in order and that, although the medic did not fulfil her obligation, she should not be held liable for it. The same event, then, can be interpreted differently under different types of norms. This has implications for whether someone can be held responsible, and it can in some cases lead to ambivalent judgments about what happened.

In sum, when an agent's behaviour is assessed using a rule of conduct, we use an abstract standard given by the content of the rule. This content is what is required to be done (i.e., what is permissible), what is expected to happen. When we use a rule of conduct to interpret happenings, we see what happened as something that corresponds (or does not correspond) to this content and opens the door for us to accordingly assess an event as right or wrong. In contrast, when using a rule of imputation, behaviour is interpreted as something that can be attributed to the agent as such under the given circumstances. In the latter case, the temporal, spatial, and motivational elements that determine the doing can be decisive and can influence our

[24] Thus, rules serve as bases of possible descriptions and ascriptions of actions (see Hart 1983, 382–85; Tiffany 2022).

evaluative judgments.[25] As Scanlon points out, norms (be they moral principles or legal statutes) may help us to identify what is permissible, but also to critically asses the way in which an agent has conducted herself.

7. Prescriptive Relationships and the Ought-Implies-Can Principle

With the elements we have gathered, we can now consider how we can interpret OIC in its relation to LIC, we can also say something about the way in which OIC bears on the relation between legal obligations and legal responsibility, and how the "can" aspect of the principle introduces constraints on "ought" judgments. In this section I deal with the possibility of defending a weak sense of OIC; in the next section I will say something about its relation to LIC.

As we have seen, rules of conduct are primarily aimed at citizens and are intended as guides for their behaviour and as yardsticks for the subsequent interpretation of events, whereas rules of imputation are primarily aimed at those who apply rules of conduct in responsibility processes and help them to decide whether or not someone should be imputed with a wrong. Rules of conduct may be used in a prospective way, referring to possible future actions. On the other hand, rules of conduct as well as rules of imputation can be used retrospectively, referring to specific past happenings.

An important point I would like to consider now in relation to the two kinds of rules is that they are related to two different meanings of *can*. When used in connection with rules of conduct, the word *can* refers to a generic way of talking about abilities and opportunities, whereas in connection with rules of imputation, it refers to the specific abilities and circumstances that define what an agent is able to do in a given situation. Let me say a bit more about the former.

Rules of conduct are general and the obligations they give rise to are not defined by the specific abilities and opportunities of particular agents in their specific circumstances. In their configuration function, these rules express (or otherwise presuppose) in a general way the abilities required for their observance and the circumstances in which these abilities should be exercised. If no one has these abilities, the rule of conduct cannot fulfil its configuration function and does not give rise to obligations. The same goes if the opportunity for compliance will never arise. Therefore, it must be possible for there to exist an action that can be described using the content of the norm.[26]

I think this is an appropriate way of expressing the OIC principle. It is a weak interpretation of the principle, as it need not refer to an agent's specific situation (the abilities and opportunities specifically available to the agent) in determining whether

[25] Following Ralph Wedgwood (2007, chap. 4), we can say that two senses of *ought* are at play. The first is what he calls the "ought of general desirability," which refers to possible types of states that are presented as desirable. The second is the practical ought, which is indexed to a particular agent at a particular time and is situational. These two types of ought involve different conditions for correcting an evaluative judgment and can have different consequences. A similar point in Pereboom 2013, 196–201, and Schroeder 2011.

[26] Von Wright 1963, 110–1. I cannot develop the specific argument here, but what is required should be logically, metaphysically, and physically possible as a type of action—an idea encompassed by what Celano (2013, 141) describes as the "humanly possible."

or not an obligation exists. Even so, the principle, so interpreted, does specify an appropriate relation between obligations, opportunities, and abilities.

This weak interpretation of OIC is supported by the configuration function of rules of conduct. And yet their measurement scale function could conceivably be fulfilled by a legal authority enacting a rule requiring something impossible. For example, a law requiring the killing of dead people might be used as a basis for saying that anyone who does not kill the dead isn't fulfilling what is required under this rule.[27] As Celano pointed out, this use of the authority to prescribe might be aimed at achieving nonstandard or abnormal legislative intentions, such as creating anxiety or inducing fear in the rule's addressees.[28] Nevertheless, this possibility brings to light a central aspect of the meaning of prescriptive relationships in our lives, an aspect described by Celano as follows:

> The institution of prescribing would not exist, standard and nonstandard cases alike, were it not commonly and (usually) rightly assumed, when prescriptions are issued, that the lawgiver wants that the subject perform the prescribed action, and he wants, by prescribing her to perform it, to make her perform the action. (Celano 2013, 139)[29]

From a pragmatic perspective, this idea is echoed in the two parties of the prescriptive relationship. On the authority's side, a sincere expression of a prescription implies that what is required can be done (this is the generic *can*).[30] This implication is closely bound up with the fact that prescriptive language is primarily used in a directive way, since the scenario in which a prescription is addressed to someone usually presupposes that the prescribed action is in some way desired by the authority and, moreover, that the authority intends there to be an actual change in the social environment (e.g., the performance of certain types of actions). Legislative intentions and nondirective uses of prescriptive language can be said to be parasitic on those involving the configurative function (see Celano 2013; Forrester 1989, chap. 3).

On the other hand, for the subject of the ought (its addressee), the existence of this relationship implies that, in the presence of a prescription, "certain kinds of human conduct are no longer optional" (Hart 2012, 6). David Copp (2003, 274) expresses this idea as follows:

> If an agent is morally required to do *A* in a particular situation, then all other options she faces are morally ruled out. If the agent cannot do *A*, then doing *A* is not among her options. Hence, if an agent is morally required to do *A* but cannot do *A*, then *all* of her options are morally ruled out. But information that an agent is morally required to do something provides her with guidance among her options by distinguishing between options that are morally ruled out and

[27] The same would hold if a king were to order a general to transform himself into a seabird, as happens in *The Little Prince*.

[28] See Celano 2013. This characteristic of law pushes legal theorists to frame the OIC principle as part of the axiological and structural aspects of modern legal systems, and to accordingly find a place for the principle within such systems (see Fox and Feis 2017).

[29] For a sustained account about how this works in law, see Rodríguez-Blanco 2014.

[30] For James Forrester (1989, 30–4), this means that the OIC principle operates as a conversational implicature (see also Sinnott-Armstrong 1984). Since the conversational model cannot be easily transferred to the legal domain (see Chiassoni 2019, chap. 3; Poggi 2020; Sandro 2022, chap. 5), I will not follow this lead here.

options that are not morally ruled out. If all of an agent's options are morally ruled out by a moral requirement, then information about the requirement cannot provide her with such guidance.[31]

If rules of conduct shape people's lives, once an obligation is identified, there is no longer the option of performing or refraining from certain behaviours. This has an impact on practical reasoning. Thus, if rules are normally prescribed to guide peoples' behaviour, what they require must be something that can be done. If what the rules require to do is inherently impossible (beyond the scope of what can be done), there is no option and we cannot adjust our practical reasoning to it. Furthermore, if it is impossible to describe the behaviour as intentional using the content of the norm, people cannot shape their behaviour accordingly.[32] This is probably the most basic way to understand the idea that rules guide people's behaviour. The requirement to do something that cannot be done therefore does not lead to an "ought" in the sense that one "ought to do what is required."

8. Concluding Remarks: The Twofold Nature of the Ought-Implies-Can Principle

In the previous section, I offered an interpretation of the OIC principle based on the way we can interpret actions with norms in the legal realm. In doing so, I focussed on the different functions that rules play in prescriptive relationships as well as in responsibility practices.

Accordingly, when a prescription is given, the rules of conduct so generated have a configuration function that helps us to know what we should do and what we can expect from others. This leads to possible descriptions and attributions of actions. Once we have an obligation, rules of conduct, by their measurement scale function, help us to identify when this obligation has been breached. In this context, the rule helps us to interpret concrete happenings in such a way that they exhibit the properties envisaged by the content of the norm.

Norms of imputation, on the other hand, refer to the agent's abilities and opportunities in the concrete situation. Since these norms have the function of governing the correct ascription of a wrong to an agent, the agent's specific abilities and opportunities are of central importance. In this context, "can" is defined by what is required to correctly attribute a particular action to an agent. This different kind of "can" is present in LIC because, as discussed, in order for someone to be held responsible for a wrong, that wrong must be attributed to them as an agent, and this means that both kinds of rules must be applied retrospectively. As we have seen, this means that different kinds of norms make it possible to interpret actions in different ways depending on the various functions the norms can fulfil, with different consequences when the norms are correctly applied in view of those functions.

[31] A similar argument from the phenomenological tradition and the cognitive sciences in Gallagher 2020, 35–7.

[32] The point here is that the prescribed behaviour is one the addressees should be able to perform intentionally. This is not about an agent's specific intention in the sense discussed in Section 5, relating to the motivation that explains her doing (see Scanlon 2008, chaps. 1 and 2).

According to the interpretation of OIC set out in this text, it must first be possible to for an obligation to be fulfilled in generic terms (i.e., without regard to the agent's specific circumstances and abilities) before the corresponding action is even performed. Secondly, in a context in which the rule is applicable and an action is performed, it should be contextually possible to act in accordance with the obligation. If the circumstances make it impossible to comply with the obligation (i.e., doing what is required), the addressee is excused, but the obligation remains applicable to her (i.e., to what she has done). The example of the medic could be read as falling under this type of case: The rule of conduct satisfies the weak version of OIC, but what happened does not satisfy LIC.[33]

We can see how this works if we recall an argument by G. E. Moore presented by J. L. Austin. In Austin's words:

> With his usual shrewdness Moore begins by insisting that there is at least *one* proper sense in which we can say that a man can do something he does not do or could have done something he did not do—even though there may perhaps be *other* senses of *can* and *could have* in which we cannot say such things. This sense he illustrates by the sentence "I could have walked a mile in 20 minutes this morning, but I certainly could not have run two miles in 5 minutes": we are to take it that in fact the speaker did not do either of the two things mentioned, but this in no way hinders us from drawing the very common and necessary distinction between undone acts that we could have done and undone acts that we could not have done. So it is certain that, at least in *some* sense, we often could have done things that we did not actually do. (Austin 1979, 206)

The argument shows that we can distinguish things that *can* be done (to walk a mile in twenty minutes) from those that *cannot* be done (to run two miles in five minutes, which seems to be *humanly impossible*). If we think in terms of the relationship between "ought" and "can" present in prescriptions, OIC says that there is an obligation only if what is required *can* be done. These actions are repeatable and shareable, and in prescriptions they are presented as hypothetical future actions. The second part of the argument says that in the actual world, people sometimes do not do things that can be done, and when we see this in a retrospective way, we are justified in saying that someone could have done something that they did not do. The latter way of speaking of actions introduces a different notion of "can" applied to doings. In this sense, agents are sometimes unable to do things that can be done. To evaluate these situations, we need norms that refer to the elements of the context that determines why an action that can be done was not done. This is the role played by rules of imputation. In the example of the medic, she could have helped her comrade, but she was unable to do so and that is why she did not. In this case, LIC is applicable (using rules of imputation).

We can now go back to the reasoning presented in Section 2, and in light of the foregoing discussion we can see that, in propositions (ii) and (iii), the meaning of *can* expressed by "could have performed" is not the same. In (ii) we have a generic *can* that outlines a weak version of OIC, while in (iii) we have a concrete "can" that is part of LIC. In (ii) the ought is related to how the generic notion of "can" constrains the identification

[33] This conclusion is in line with what Bernard Williams (1973, 179, 183–4) calls the "moral remainder," the moral burden or cost that comes as a result of noncompliance with an ought. In our example, the medic might feel guilty or have some such reaction because, as much as she may know that she is unable to help her comrade, she also knows that she *must* do so.

of what obligations we have, while the concrete "can" present in (iii) constrains the way in which responsibility judgments identify some specific doing as a wrong. The medic example can accordingly be read as follows: The obligation can be fulfilled (OIC is maintained), but given the situation at hand, the medic cannot do what is required, so even though something wrong happened, the medic should not be blamed for it (LIC applies). Whereas OIC is for abstract and prospective (hypothetical) analysis, LIC is for retrospective analysis of concrete situations. By this, proposition (i) is not denied, while (ii) and (iii) express the principle's twofold nature.

As noted, the problems discussed here are particularly critical in the legal domain. Indeed, for one thing, legal authorities sometimes use their normative powers to manipulate people or to instil fear in some members of the population (to which end they deliberately prescribe the impossible). The complexity of social power is embedded in oppressive contexts that operate in various ways. And, for another thing, prescriptive language has a variety uses apart from its standard directive use: It can also be used to make judgments or to express censure, for example. These crucial aspects of our legal and social institutional practices do not affect the role of the OIC principle, but they do help us determine its place in these practices, especially when it comes to clarifying what it means to have a legal obligation.

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