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Critical Reflections on the Theory of Objective Imputation: Towards a Renewed Classical View of Causality and Criminal Culpability

Il saggio contiene una critica al naturalismo penale tedesco e alle teorie dell'imputazione oggettiva dell'evento, nel tentativo di fondare una solida teoria della causalità penale. In ultima analisi, gli Autori si sforzano di scoprire i presupposti teorici delle concezioni empiristiche e idealistiche della causalità penale e di indicare i vantaggi della concezione classica di matrice aristotelica.

This paper is a critique of German criminal naturalism and of the objective imputation theories and an attempt to lay the foundations for a sound theory of criminal causality. In the latter task, it strives to uncover the philosophical presuppositions of the empiricist and idealistic conceptions of criminal causality and to point out the advantages of the classical, Aristotelian conception.

1. Introduction

In the following pages[3] we will demonstrate that the current conceptions of criminal "causality" and "imputation" are inadequate and the reasons why; we also show that there is a need to get back to the classical conception, in order to maintain the "right sense" of criminal law. Furthermore, some of the most relevant current views will be presented and we will ascend towards the remote genealogical origins of these current conceptions; we will establish these theories' insufficiency and the cause of such insufficiency; and we will end by indicating how the classical conception solves the problems generated by these contemporary views.

2. The State of Criminal law Teachings on Causality and Its Roots

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[3] The paper was presented within the *IV Congreso Internacional de Filosofía Tomista*, Chile, Universidad Santo Tomás, July 2018.

Empiricism and Idealism have strongly influenced current theories on criminal causality. These two influences are not in conflict. In fact, since Kant assumed as his the most essential tenets of Hume concerning human experience and placed them within the wider framework of transcendental Idealism, empiricism has prevailed over one face of the dualism that lives in the various idealistic systems. In this area of criminal causality and imputation, John Stuart Mill's view on physical causality has been prevalent within the different idealistic conceptions of the causal link between man's external conduct and the kind of damages that the legal order supposedly wills to prevent. Only the way of conceiving the imputation to the subject of such physical causality has changed according to the varying influence of diverse idealist authors (mainly Kant and Hegel). Let us unfold this observation by a brief scrutiny of the development of the doctrine of criminal causality and imputation in German criminal law.

A) German Criminal Naturalism

The most prominent author who dealt with the problem of causality was Maximilian von Buri[4] (1825-1902), whose theory of the *conditio sine qua non* is the foundation on which the German theory of the causal link was built. The roots of von Buri's theory go back at least to both the works of GWF Hegel and John Stuart Mill, although he probably did not read the latter´s work. Von Buri received, therefore, the influence of two thinkers who took anti-metaphysical paths (but remember that anti-metaphysics is a form of crypto-metaphysics).

According to the British thinker, the cause must be identified with the set and sum of the conditions that had produced a given consequence and cannot be identified with any of them considered isolated from the others. Von Buri, instead, came to hold that each of these individual conditions could be called "cause" isolated from the others. This is the last consequence of the aban-

[4] Von BURI, *Zur Lehre von der Teilnahme an dem Verbrechen und der Begünstigung*, Giessen, 1860, 1 ff.; also ID., *Über Causalität und deren Verantwortung*, Leipzig, 1873, 1 ff. ("*Unter Causalzusammenhang wird man wohl den Proceß der Entstehung einer Erscheinung begreifen dürfen. Will man den Causalzusammenhang einer concreten Erscheinung ermitteln, so muß man in geordneter Reihenfolge sämmtliche Kräfte feststellen, welche für die Entstehung der Erscheinung irgend eine Wirksamkeit geäußert haben. Die ganze Summe dieser Kräfte ist dann als die Ursache der Erscheinung anzusehen. Mit demselben Rechte läßt sich aber auch jede einzelne dieser Kräfte für sich allein schon als die Ursache der Erscheinung betrachten, denn die Existenz derselben hängt so sehr von jeder Einzelnkraft ab, daß, wenn man aus dem Causalzusammenhang auch nur eine einzige Einzelnkraft ausscheidet, die Erscheinung selbst zusammenfällt*"); ID., *Die Causalität und ihre strafrechtlichen Beziehungen*, in *Der Gerichtssaal*, XXXVII, 1885.

donment of the realistic notion of *cause*, as a real entity that in truth originates a change. *Cause* is understood as a mere phenomenon and causality as a relation between phenomena[5]. This is, moreover, a doctrine received from the *Elements of the Philosophy of Right*, n. 115, where Hegel claims that in the finitude of the subjective will, the act originates a change in given existence. But in that realm of given existence the circumstances are infinite in number, and every condition, foundation and/or cause of any of those circumstances can be considered as the total (or partial) cause of the complex event.

[5] Actually, in his system, Mill soon enough clearly makes a point that is culturally and strategically very important for our current research: he states that everywhere he discusses the "causes" of phenomena, he has understood such causes themselves as phenomena: "*I do not mean a cause which is not itself a phenomenon*". The *System of Logic Ratiocinative and Inductive*, moreover, will not deal with the ultimate, ontological causes ("*I make no research into the ultimate or ontological cause of anything*"). This is a necessary consequence of Mill's empiricism. Since he follows Locke and Hume in claiming that anything our mind receives from reality is received through a merely sensorial experience, Mill must postulate that we have no experience of substance, essence or cause, because these are realities grasped exclusively by the intellect, since they are sensible only *per accidens*. Mill states once and for all: "To adopt a distinction familiar in the writings of the Scot metaphysicians, and especially of Reid, the causes with which I concern myself are not *efficient*, but *physical* causes. They are causes in that sense alone, in which one physical fact is said to be the cause of another. Of the efficient causes of phenomena, or whether any such causes exist at all, I am not called upon to give an opinion. The notion of causation is deemed by the schools of metaphysics most in vogue at the present moment, to imply a mysterious and most powerful tie, such as cannot, or at least does not, exist between any physical fact and that other physical fact on which it is invariably consequent, and which is popularly termed its cause: and thence is deduced the supposed necessity of ascending higher, into the essences and inherent constitution of things, to find the true cause, the cause that is not only followed by, but actually produces the effect. No such necessity exists for the purposes of the present inquiry; nor will any such doctrine be found in the following pages. The only notion of a cause, which the theory of induction requires, is such a notion as can be gained from experience." MILL, *System of Logic Ratiocinative and Inductive*, New York, Harper and Brothers Publishers, 1886, Book III "Of Induction," Chapter V "Of the Law of Universal Causation," § 1. Again, here "experience" is understood in an empiricist way. Thus, John Stuart Mill fully embraces the Anglo-Scottish empiricism rejecting any research into the real efficient cause of the "things in themselves" (as if it were a ghost of the dark metaphysics of his time). But the metaphysics that Mill rejects is not classical metaphysics, since the classics, Aristotle and Aquinas for example, knew that not all causes are necessary. Moreover, according to these classical authors, the physical causes of our daily experience *are not* necessary. On this point, they are at odds with the Hobbesian conception of causality, according to which a "sufficient cause" is that from which the effect necessarily follows. (On Hobbes' doctrine, see HOBBES, *Of Liberty and Necessity*, § 31). On Aquinas' doctrine, see *De malo* q. 6, ad 15m. Although Mill rejects the existence of necessary causes, he, contradicting himself, states: "That every fact which begins to exist has a cause, and that this cause must be found in some fact or concourse of facts that immediately preceded the occurrence, may be taken for certain. The whole of the present facts are the infallible result of all past facts, and more immediately of all the facts that existed at the moment previous. Here, then, is a great sequence, which we know to be uniform. If the whole prior state of the entire universe could again recur, it would again be followed by the present state" (MILL, *System of Logic Ratiocinative*, Part III "Of Induction," Chapter 7 "On Observation and Experiment," § 1).

It is well known that through von Buri the idea of causal equivalence was introduced into German criminal law theory. According to such idea, given a set of pre-conditions of a material effect, each condition must be considered *de jure* as equivalent to the others[6]. But it was Franz von Liszt (1851-1919) who consolidated the dogma of causal equivalence and, therefore, who laid the foundation of German naturalism. The central thesis of such naturalism is that the object of the human will is action understood as physical movement. Thus, the object would not be the external event, since this is foreign to the "sphere of influence" of the will[7]. Von Liszt drew from this premise the following consequence: the criminally relevant action would be that which can be reduced to the will of man[8], the causation of a change in the external world (a conduct) that cannot be mentally suppressed without at the same time suppressing a *typical* effect[9] or event[10]. In such a case one can hold that there is a "causal link." This doctrine has been adopted in articles 40 and 41 of the Italian Criminal Code.
"In this way," as Mauro Ronco teaches, "the causal relation between the will and its effect is descriptively replaced [...] by the causal relation in the style of a nomological causality between events in which the terms of the relation are not the agent and his action, but the corporeal movement based in voluntary impulse, taken as a physical event, on the one hand, and the external event, on the other"[11].

This causal paradigm has produced the following important consequences:

(1) First, a doctrinal imbalance that bends towards the event, and an underestimating of the importance and centrality of human action in the theory of crime. Thus, for example, the conduct that intends to cause death and produces it would not be the homicidal conduct, but just that conduct that cannot be mentally suppressed without suppressing the death of the killed person[12]. A

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[6] On the footprints of the principle of causal equivalence, the current article 41 of the Italian Criminal Code, for example, states: "il concorso di cause preesistenti o simultanee o sopravvenute, anche se indipendenti dall'azione od omissione del colpevole, non esclude il rapporto di causalità fra la azione od omissione e l'evento."
[7] F. von LISZT, *Lehrbuch des Deutschen Strafrecths, 23. Auflage*, Berlin, 1903, § 28, 125.
[8] F. von LISZT, *Lehrbuch des Deutschen Strafrecths, 3. Auflage*, Berlin, 1888, § 27, 116.
[9] *Ibidem.*
[10] *Ibidem*, § 27, 118.
[11] RONCO, *Descrizioni penali d'azione*, in *Studi in onore di Marcello Gallo*, Torino, 2004, now in ID., *Scritti patavini*, Tomo II, Torino, 2017, 1050.
[12] This paradigm repeats Hume's old thesis according to which the causal link is not rooted in a thing's power to cause or determine certain effects but only in the relation between ideas that man has formed

frequently used example could be helpful: a nephew hopes to receive his uncle's inheritance. For this reason, the nephew has his uncle board an airplane desiring that, although there is normal weather, a storm be suddenly unleashed, and a lightning bolt strike down the airplane so that his uncle would be killed. Even if such coincidence were to happen, and even if the death of the uncle would be mentally suppressed if the nephew's act of persuading his uncle to board the airplane were mentally eliminated, despite this, the conduct of the nephew would not be homicidal.

2) Second, this paradigm makes difficult the phenomenological establishment of the causal link in cases in which the event entails a long span of time and/or the intervention of several con-causal but heterogeneous factors.

3) Third, as a consequence of the lack of proper study of human conduct in criminal doctrine, the interest in the author, in man as the true efficient cause of crime, is diminished or even lost. Hence, the connection between material and intellectual authorship becomes a very hard theoretical problem.

B) Theories of the "Objective Imputation of the Event"

The criminal theory that attempted to overcome the aporia of the nineteenth century's causal naturalism was called the *theory of the objective imputation of the event*, which was the work of Karl Larenz and Richard Honig. Karl Larenz laid the foundations of the theory in his doctoral dissertation, making use of Hegelian and post-Hegelian philosophy[13], and of a critical examination of the way in which Kantian criticism dealt with the problem of imputation[14]. At the outset in his introduction he opposes this new theory against that of causal naturalism[15], and states that he hopes to form a teleological framework[16].

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in his mind by witnessing a repeated series of external, phenomenal, events.

[13] LARENZ, *Hegels Zurechnungslehre und der Begriff der objektiven Zurechnung: ein Beitrag zur Rechtsphilosophie des kritischen Idealismus und zur Lehre von der „juristischen Kausalität"*, Leipzig, 1927; see also ID., *Zum heutigen Stand der Lehre von der objektiven Zurechnung im Schadensersatzrecht*, in *FS für R. Honig*, Göttingen, 1970, 79 ff. An interesting examination of the consequences of Larenz's thought in the wider context of the theory of objective imputation can be found in RONCO, *Alle origini dell'imputazione oggettiva*, in *Studi in onore di Sergio Moccia*, Napoli, 2017, 487ff.

[14] LARENZ, *Hegels Zurechnungslehre*, cit., 1-29. It is interesting to note that the author cites Kant's work with the intention of valuing and praising the texts in which Kant had delved into the intrinsically teleological structure of Nature. Larenz demonstrates in their light that the *Kritik der Urteilskraft* is the bridgehead that leads from Kantian criticism to 19th century Idealism.

[15] On p. 60, Larenz gives a general definition of "objective imputation": "*Als objektive Zurechnung bezeichneten wir das Urteil über die Frage, ob ein Geschehen Tat eines Subjekts sei*" ("we have called 'objective imputation' the judgment on whether certain fact is a deed 'owned' by a man").

[16] LARENZ, *Hegels Zurechnungslehre*, cit., VII-VIII: "*Demgegenüber wird hier versucht, im Anschluß an die Lehren des kritischen Idealismus und besonders an Hegels Zurechnungslehre den teleologi-*

Larenz deems essential the recovery of the idealistic opposition of Nature understood as a sequence of causal facts arranged by a strict necessity, on the one hand, and the human will, which works according to the so called "causality of purpose" (*Kausalität des Zwecks*), on the other, in order to distinguish between a fortuitous event and an imputable act, the act owned by man.[17] In particular, taking explicit inspiration from §§ 117-119 of Hegel's *Elements of the Philosophy of Right*[18], Larenz draws a juridical principle which deeply affects the fate of Modern objective imputation: "only those consequences which along with action form a set, an indivisible whole which can be controlled by purpose, can be imputed to the agent"[19]; and afterward he adds: "it is the will's right that only such consequences be imputed to it, since only those are 'willed'"[20].

The acceptance by Larenz of the doctrines contained in the *Elements of the Philosophy of Right* made him into an heir of the problem formulated there concerning the possibility of imputing to man the non-willed, collateral consequences of his act. Moreover, a careful review of both relevant chapters of the Hegelian work ("Abstract Right" and "Morality") leads to the following conclusions: (a) in his presentation of the problem of the relationship between imputation and causality, Hegel deliberately ignores the classical conception (although he mentions the classical tragedies on Oedipus) and, for

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schen Charakter der objektiven Zurechnung"; see p. 63: "*Nur der Wille beherrscht den Kausalverlauf, nur für ihn gibt es daher die Möglichkeit, die zufällige Aufeinanderfolge in die eigene Tat zu verwandelt. Zurechnung zur Tat ist Beziehung eines Geschehens au den Willen*".

[17] LARENZ, *Hegels Zurechnungslehre*, cit., p. 44: "*Die Natur kennt nur die zufällige Aufeinanderfolge der bloßen Kausalität, der blinden Notwendigkeit; der Wille schafft die Kausalität des Zwecks, das planvolle Geschehen, die eigene Tat*".

[18] See HEGEL, *Grundlinien der Philosophie des Rechts* (*Elements of the Philosophy of Law, Cambridge*), Cambridge University Press, 1991, § 113: "[...] that aspect of crime which has its source in the subjective will, and the manner of its existence [Existenz] in that will, only now come into consideration." See also §§ 117-118: "The autonomously acting will [*der selbst handelnde Wille*], in the ends which it pursues in relation to the existence [Dasein] it has before it, has an *idea* [*Vorstellung*] *of the circumstances which that existence involves*. [...] It is, however, the right of the will to recognize as its *action*, and to accept *responsibility* for [*Schuld*], only those aspects of its *deed* [*Tat*] which it knew [*weiß*] to be presupposed within its *end* [*Zwecke*], and which were present in its *purpose* [*in seinem Vorsatze*]. – I can be made *accountable* for a deed only if my will was responsible for it [*die Tat kann nur als Schuld des Willens zugerechnet werden*] – *the right of knowledge* [*Recht des Wissens*] [...]. The will thus has the right to accept responsibility [*zuzurechnen*] only for the first set of consequences [of its deed], since they alone were part of its *purpose* [*in seinem Vorsatze*]." See also § 118: "in so far as the consequences are the proper and *immanent* shape of the action, they manifest only its nature and are nothing other than the action itself; for this reason, the action cannot repudiate or disregard them. But conversely, the consequences also include external interventions and contingent additions which have nothing to do with the nature of action itself."

[19] LARENZ, *Hegels Zurechnungslehre*, cit., 54.

[20] *Ibidem*.

this reason, he can claim as a great novelty his demand that only be imputed to man those actions which lie under the power of his will (§§ 106, 110, 117). (b) Hegel starts with the Kantian conception and, for this reason, he opposes the empirical world, the world of causality (of responsibility), on the one hand, and the world of freedom, of the good, on the other (§§ 114, 115, 120, 121, 123). (c) In the empirical world and in relation to human action, the way of measuring the expedience of action is the Utilitarian way, human action's order to one's own wellbeing and the wellbeing of others (§§ 112, 114, 118, 120, 125, 126). For this reason, Hegel confuses the Utilitarian "consequences" with the "circumstances" of the action (§§ 118, 119) and, therefore, for him, the way to understand the unity of action through the classical elements, "end," "object" and "circumstances" is blocked. (d) He attempts, however, to reduce action to unity through his idealistic dialectics and through the reduction of the consequences to the purpose of the rational agent. But he fails. And because he fails, he must claim, unlike the Greek classics and scholastics, that necessity morally forces the agent to commit unjust actions (§ 127).

As a result of this idealistic influence, when asked which are the consequences that fall under the agent's power through purpose, and which can be imputed to him, Larenz must clarify the following:

i) that knowledge of the concrete fact in its entirety, with all the infinite consequences which will follow the conduct, is not necessary in order to make the imputation possible. Knowledge of "the general nature of the action" is sufficient[21];

ii) that the objective side of the imputation is sufficient to contain the connection of the fact to the subject and his will[22];

iii) that in this aspect one must be interested not in man as a "being of nature" but, rather, as a "being of reason," that is to say, "as the subject of a supra-individual and universal reason"[23]. This point comes directly from Hegel: §§

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[21] LARENZ, *Hegels Zurechnungslehre*, cit., 55: "*Dabei soll es nach Hegel nicht darauf ankommen, ob der Täter die Folgen einzeln vorausgesehen hat, denn „er muß die allgemeine Natur der Tat kennen". Mit der Tat als Ganzem muß er sich das Einzelne zurechnen lassen, einerlei, ob es in seinem Wissen lag. Es genügt, daß er die allgemeine Natur der Handlung kennt*".

[22] LARENZ, *Hegels Zurechnungslehre*, cit., 58: "*Die objektive Seite der Zurechnung enthält an sich schon die Beziehung auf ein Subjekt, auf den Willen al die übergreifende Einheit*".

[23] *Ibidem*: "*Person ist der Mensch nicht als Naturwesen, sondern als Vernunftwesen, als Träger der überindividuellen Vernunft, als Subjekt und Geist*". On p. 24, one finds a critique of Kelsen's notion of "person" (in *Hauptprobleme des Staatsrechts*), understood as the mere product of a juridical construction ("*Produkt einer juristischen Konstruktion*"). See DEUTSCH, *Zurechnung und Haftung im zivilen Deliktsrecht*, in *FS für R. Honig*, Göttingen, 1970, 35: "*Die [objektive] Zurechnung erfaßt nicht diese besondere Einzelperson, sondern den Menschen überhaupt. Im Vordergrund steht hei die kollektivistische Existenz des Menschen. Einer von der Individualität abstrahierten Person wird zugerechnet*".

119-120;
iv) that the concept of "purpose," which constitutes the ground for imputation, must not be understood in a subjective sense, referring to what the subject *knew and willed* when he acted, but *in an objective sense*, that is to say, considering what the subject could have known and what could have been the object of his "universal will."[24] This latter point also comes from Hegel: §§ 118-120, who makes only the following exceptions: children, imbeciles and mad persons, because in any other case to exclude responsibility for the action's general consequences would be offensive to the agent.
All the above led Larenz to a disturbing conclusion, which would impress upon the future developments of the theory of imputation a trend towards a normative and value-oriented direction. Indeed, the theory of imputation tends to extirpate imputation from the realm of real facts and confine it within the realm of posterior judgment by the court[25], a judgment based no longer on the concrete ability or capacity or knowledge of the agent, but on a general and objective measure, typical of "reasonable man"[26]. In this way the theory received the Hegelian concept of *intention* which, unlike *purpose*, does not refer to the action in its concrete and direct manifestation, but in its universal meaning (see §§ 117-120 of the *Elements*). Thus, imputation includes everything that has to do with the objective teleological orientation of conduct, but excludes a concrete, subjective and personalized teleological tendency (in act and/or in potency). It excludes, crucially, in consequence, the agent's individual and personal states of mind. What must be established is whether an event which can causally be linked to human conduct has in fact created an objective situation of danger[27]. The connection between the event and the dangerous situation, on the one hand, and the cognitive and volitional operations and characteristics of the concrete persons, on the other, is held as irrelevant[28].

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[24] LARENZ, *Hegels Zurechnungslehre*, cit., 68: "*Die Zurechnung als das Urteil über die Tat ist demnach nicht ein kausales, sondern ein teleologisches Urteil. Nur darf man dem Zweckbegriff hier nicht subjektive, sondern muß ihn objektiv fassen; d.h. man darf nicht dabei stehen bleiben, dasjenige zuzurechnen, was gewußt und gewollt war, sondern muß auch das zurechnen, was gewußt und damit vom Willen umspannt werden konnte, was als Gegenstand des Willens möglich war*".
[25] LARENZ, *Hegels Zurechnungslehre*, cit., 82-83: "*Ob irgendein Ereignis als „wahrscheinlich" oder nicht erscheint, das hängt ganz von dem Standpunkt und den Kenntnissen des Beurteilers ab*".
[26] LARENZ, *Hegels Zurechnungslehre*, cit., 84.
[27] LARENZ, *Hegels Zurechnungslehre*, cit., 56 e 68.
[28] LARENZ, *Hegels Zurechnungslehre*, cit., 92: "*Weil die objektive Zurechnung und die objektive Rechtswidrigkeit ein Urteil über die Tat als über die objektive Seite des Willens darstellen, so setzen sie nur voraus, daß ein Geschehen auf eine Person als Täter bezogen ist, nicht aber, daß es dem wirklichen Willen des Täters entspricht, daß es ihm nach seiner individuellen Einsicht und Absicht auch subjektiv*

According to this, the subject of imputation is not the individual man, but the abstract concept of "a man" of normal abilities and volitions. Or, rather, the individual considered in his general nature, as a being of reason, as person.[29] Larenz holds that this is the proper juridical approach to reality, to abstract from the factual morass the elements of the *actus reus* (a legally defined crime), to take into consideration not the individual person, but the abstract person[30], although to examine the concrete subject will be later necessary in order to determine, by a separate and posterior judgment, his personal culpability[31].

Roxin attempts to make Honig's theory more precise, yet he only pushes it farther in the direction of emphasizing more and more the creation of an objectively dangerous situation (the theory of risk). According to him, in fact, "if the legal system does not forbid A to send on board a person during an electric storm so that a lighting bolt hits that person, this is so not because the legal system may not forbid such action. The legal system does not forbid it because 'such conduct does not create a measurable risk of damaging a legally relevant good.' [...] This element is independent of and precedes the qualification of the conduct as intentional or culpable".[32]

Starting with Roxin, criminal doctrine in Germany has widely developed the revolutionary potential contained in the original theory proposed by Larenz. Many authors there state "as the general principle of objective imputation the following one: a result caused by a conduct is objectively imputable only when the said conduct has given origin to a legally relevant risk, which has been concretized in a legally defined result [actus *reus*] which the zone of protection of the defining norm intended to avoid."[33]

Many critiques can be addressed to the theory of objective imputation.

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zugerechnet werden kann".

[29] LARENZ, *Hegels Zurechnungslehre*, cit., 94: "*Das Subjekt des Zurechnungsurteils ist also nicht der besondere konkrete Mensch, sondern der abstrakte Begriff eines Menschen von normaler Fähigkeit, oder vielmehr: der besondere Mensch lediglich seiner allgemeinen Natur nach, sofern er ein vernünftiges Wesen, Person ist*".

[30] *Ibidem*.

[31] LARENZ, *Hegels Zurechnungslehre*, cit., 95. One could ask to what extent this addition by Larenz is compatible with Hegel's *Elements of the Philosophy of Law*, §120. Furthermore, Larenz observes that in Civil law, because there is no concept comparable to the criminal guilt [*Schuld*], the concept of objective imputation was destined to achieve greater importance than in criminal law.

[32] NÁQUIRA RIVEROS, *Derecho penal chileno. Parte general, Santiago: Thomson Reuters*, Volume I 2015, 161. He quotes ROXIN, *Reflexiones sobre la problemática de la imputación en el Derecho penal*, Madrid: Editorial Reus, 1976, 130, n. 5.

[33] NÁQUIRA RIVEROS, *Derecho penal chileno*, cit., 162. Náquira uses ROXIN, *Strafrecht. Allgemeiner Teil – Band 1. Grundlagen. Der Aufbau der Verbrechenslehre, 4. Auflage*, München, Verlag C.H. Beck, 2006, § 11, n. a m. 47, p. 372. In the Spanish edition: (1997), § 11, n. a m. 46, 366-367.

Among them we include, for example, the following:
1) It accepts in its entirety the criminal theory of naturalist inclination held by von Buri and Liszt, introducing a correction that touches neither the naturalist causal dogma nor the purport of achieving an "objective imputation" before and independently from a consideration of the intention or culpability.
2) It inherits from Idealism the separation between subject and object, between the realm of freedom and the realm of nature, with the consequences we have already pointed out.
3) As a consequence of neglecting the particularities of concrete actions, the illegitimate notion of risk (consented to or not) enters the theory of crime. The intrinsic nature of crime is no longer regarded, but criminal action is conceived as a relation of risk established through statistical and epistemological considerations.
4) The tendencies that could emanate from this theory, which we have named theory "of risk" are very dangerous for human dignity. Up to the present time, according to Náquira Riveros, these theories still require for the constitution of crime that the agent be culpable or malicious (p. 175). However, is this necessary? Is it inconceivable that the theory stops requiring culpability or intention if a norm imputes a criminal punishment to an objectively risky conduct? We seem to be sliding towards a doctrine that attempts to impose no longer "retributive punishments" but "security measures" against those whose conduct matches a legally established one as "criminal," with or without intention, with or without culpability, just because those who wield power take that conduct as "risky."

3. Towards a Profound Revision of Criminal Causality

Causality is a metaphysical concept connected to the very foundations of rationality. All rational inquiries presuppose that every change has a proportionate cause. However, the consideration of causality is different in each discipline. In determining moral or legal liability, the use of the notion of causality is necessary, but this use is framed within the practical nature of these disciplines. Here, causality cannot be taken as a logical concept divorced from the goods whose protection or promotion leads to the use of the concept. However, the legal and/or moral uses depend on the primordial metaphysical use and are connected to the way in which other sciences use "causality."
Keeping this in mind, we will proceed (a) to assess the theories explained above and (b) to delineate the points in which we think criminal causality should be subject to revision and our conception of its connection to the notion of culpability.

A) Assessment of Empiricist and Idealistic Theories of Criminal Action

The theories of criminal causality have been built upon a basis of crypto-metaphysical theories that are insufficient to give account of the true nature of crime and punishment. A wrong metaphysical conception could radically alter the way of understanding imputation in a gradual, almost imperceptible manner, without the need of legal reform. It is necessary, therefore, to bring to light the metaphysical theses that lie behind the naturalist theories of causation and the theory of objective imputation.

In the first place, "physical causality" itself has been understood inadequately because John Stuart Mill's anti-metaphysical theory has been adopted, which considers the causes as mere *phenomena* which constantly precede another *phenomenon*. In fact, Mill's influence is what leads to the inability to integrate the moral agents' particular way of causation with physical causation because it is obvious that the will is not a *phenomenon*.

In the second place, the dualism inherent to German Idealism is the most basic problem of the theory of objective imputation. The said dualism has the following characteristics:

(a) "Facts," "things" are conceived as morally neutral. Morality and legality are produced by the spirit, by universal reason. Therefore, only universal reason can bestow relevance on "facts."

(b) Causality (understood in Mill's sense) belongs to the world of "facts." The will of an agent cannot inform the causality of his body. For this reason, imputation is attributed to causality in an "objective" or "general," that is to say, extrinsic manner. After having completed this extrinsic operation, only then does it become possible to consider the agent's will and to add the "subjective imputation."

Idealist dualism since Kant denies empirical man's free will. Hegel attempts to reunify the empirical dimension of conduct with the realm of freedom, but he fails because his point of departure precludes that. Instead of an *intention* which informs the situation's nature (the *relevant circumstances*) in order to form the *object*, what Hegel arrives at is a *purpose* that considers the *consequences* that generally follow an *event*, so that the *purpose* may become *intention* while the general consequences become the *form* or *type* of action (§§ 117-125 of the *Elements*). For this reason, the idealist influence on criminal doctrine tends in the long run to transform penalties into safety measures rather than retributive punishments, despite Hegel's protestations to the contra-

ry (§§ 99-100)[34]. Curiously enough, metaphysical materialism (Mill's, for example), which also denies free will,[35] often adopts a methodological dualism,[36] and ends up coming to the same results as Idealism. Thus, the conceptual and orientational changes of the criminal judge, born either from idealist dualism or from metaphysical materialism combined with methodological dualism, are giving rise to a pernicious revolution in this area.

We do not intend to attempt now a refutation of the basic metaphysical tenets; however, we will demonstrate how the adopted metaphysical doctrine thoroughly affects the conception of causality and its relation to culpability and intention. We will adopt a metaphysical perspective that we deem correct, namely, an Aristotelian one. From this perspective, we will then proceed to establish a type of phenomenology of the relations between the will and its causality. In doing this, we will endeavor to manifest the truth of the matter, and also indicate what causes have made plausible the theories we have examined.

B) Towards an Integral Theory of Criminal Causality

Unlike causal empiricism and dualism, we hold that actions contain in themselves their moral and juridical dimension: they are not mere *facts*. Within them, the will can inform causes of a lower rank so that the latter become its "instruments" and/or its "expressions." For this reason, intention and culpability are relevant in establishing causality although they are not identical to it. When the will intends to use proportionate means in order to bring about an action that is legally criminal, intention and causality might concur. –But they actually concur only when the agent is cunning (so that he adequately disposes the means to the end) and neither makes mistakes nor suffers unforeseeable mishaps. Otherwise, causality, on the one hand, and intention or culpability, on the other, might be disconnected.

We cannot now begin to develop a philosophical anthropology, but it must be noted that our approach presupposes that the human being is one unified substance, composed of matter and form;[37] that the soul is the form of the

[34] The protestations themselves manifest Idealism's inadequacy to understand Criminal law. In order to justify punishment, Idealism has to state that punishment is implicitly *willed* by the criminal, which is, to say the least, paradoxical.

[35] MILL, *Utilitarianism*, p. 219, in PLAMENATZ, *The English Utilitarians*, Oxford, Basil Blakcwell, 1949, 161-228.

[36] Mill divides mind and its sensations from bodies. See MILL, *System of Logic Ratiocinative and Inductive*, 1886, book I, chapter III, II, § 8.

[37] Concerning the unity of form and matter in general, see *Metaphysics* H 3, 1043b5-18; and 6, 1045a7-30 and 1045b8-24. See also CASANOVA, *El estatuto ontológico de las categorías*, in *Pensamiento*, vol.

human body although once it begins to exist the soul is in possession of a being that is not destroyed by the body's death; and that the human body is substantial in the sense of being a composite of soul as form, on the one hand, and matter, on the other[38]. Only this anthropological conception allows one to understand that the human intellect can inform the senses and perceive with them the intelligible structures embedded in matter, including the goods and ends which proportionally or disproportionally can move the will[39]; and that the human will can find an adequate measure in goods which are embedded in sensible reality and, for this reason, the will can find and will or reject the order intrinsic to reality (with its sensible and supra-sensible aspects) and inform the external human action, becoming thus the true efficient cause not only of the acts commanded by the will to other human faculties, but also of the causal courses which occur in sensible reality and which can be considered as crimes[40].

The most important moral and legal causality is contained within the ethical and legal notion of "action." In action, the end or intention play a central role. Moral and legal causality cannot be seriously considered without considering at the same time the end. What is or is not a moral cause depends in great measure on the particular agent's end. If one abandons ontological and methodological dualisms, and accepts the hylomorphic unitarian constitution of man, then one sees that *intention* (the willing by the will of a good or of an end proposed by intelligence) may inform the *matter* which human action molds. In this way, intention and matter may constitute one *species* of action[41] (a juridical or moral *object*, *what* is chosen).[42] This informing of *matter* might be more or less full according to whether the will uses reason and the other faculties and human instruments adequately or not, in order to achieve what it intends. When this matter is effectively informed by intention, the human

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71, núm. 268, 803-826, in particular 818. In a seminal way the same doctrine can be found in LOWE, *The Four-Category Ontology: A Metaphysical Foundation for Natural Science*, Oxford, Oxford University Press, 2006, 48.

[38] See CASANOVA, *El hombre: frontera entre lo inteligible y lo sensible*, Santiago, Ediciones UC, 2010, 15-36, 75-94.

[39] *Ibidem*, 75-94.

[40] Concerning the general theory of action here presupposed, see *Summa theologiae* I-II, qq. 6-21.

[41] On the constitution of the moral object by intention informing the essential circumstances, see I-II q. 18, a. 6, c. The reality towards which the acts of the will and those of the soul's executive powers are directed, and the proportion or lack of proportion between all of them (reality and acts) to what the agent wills to do and what he effectively does, constitute the object. See I-II q. 18, a. 2 ad 1m: "licet res exteriores sint in seipsis bonae, tamen non semper habent debitam proportionem ad hanc vel illam actionem. Et ideo inquantum considerantur ut obiecta talium actionum, non habent rationem boni."

[42] Cfr. *S. th.* I-II q. 12 a. 4 c.

agent becomes *author* and the main cause of that species or type of action[43]. This causal structure of moral action is transferable to crime, *mutatis mutandis*[44].

The effect, "what is done," is the action according to its species or type. The species encompasses several elements. The situation over which the agent acts, the essential circumstances, are its *matter*[45]. The end immediately intended by the agent in connection to what he effectively does (*finis operis*) constitutes its *form*. The intention (the non-immediate end) is its *final cause*. And its *efficient cause* is the agent himself, with his will[46].

What matters most for intention to inform what *effectively the author does* is that he acts rationally, that he finds the due proportion between what he effectively does and what he wants to do and achieve. Here we have to introduce the category of "cunning" or "rationality" (a criminal cannot be prudent but he can be "rational" in a secondary sense): if there is *proportion* between the intended conduct or omission, on the one hand, and the intended damage, on the other, in such way that a prudent or rational man can judge that from the conduct or omission the damage will probably follow, then one can say that there is a legal-criminal causal relation between the will and the effect. If the damage results from an accident, foreseeable or unforeseeable, then the defendant could be the cause of the damage if in the real situation there is effective proportion between what the defendant did and the result (for example, to run over a small child due to an action of the victim which would be imprudent if done by an adult). But, in this latter case, the defendant could be not guilty and the causality does not start in the will. We hold that this way of understanding the problem is Aristotelian. Indeed, in the *Nicomachean Eth-*

[43] Here, we could develop a complete typology, but it would take us too astray. For example: the human agent may have the duty to attempt to do something and, despite this, he may abstain from doing so. In such case, he could be held responsible for the omission. It may be as well that, attempting one thing, the agent accomplishes something else due to his imprudence or lack of due skill, so that he can be held responsible as the guilty but not the intentional author of a crime, and so on and so forth.

[44] Because intention informs the external action as well, this exteriority ordinarily manifests the intention, so that if someone claims that he did not intend to do what he did, he has to produce some kind of evidence for the judge to take seriously his claim.

[45] See I-II q. 18, a. 5, ad 4m: "circumstantia quandoque sumitur ut differentia essentialis obiecti, secundum quod ad rationem comparatur, et tunc potest dare speciem actui morali. Et hoc oportet esse, quandocumque circumstantia transmutat actum de bonitate in malitiam, non enim circumstantia faceret actum malum, nisi per hoc quod rationi repugnat."

[46] See *S. th.* I-II q. 7, a. 3 c.: "Ex parte autem effectus, ut cum consideratur quid aliquis fecerit. Ex parte vero causae actus, quantum ad causam finalem, accipitur propter quid; ex parte autem causae materialis, sive obiecti, accipitur circa quid; ex parte vero causae agentis principalis, accipitur quis egerit; ex parte vero causae agentis instrumentalis, accipitur quibus auxiliis." The Will as appetitive power is principle of human action. See I-II q. 18, a. 2 ad 3m.

ics Aristotle states that ignorance and force exclude voluntariness and, consequently, exclude the imputation to the agent of the effective type of the action. When either an accident occurs, or an agent ignores a relevant circumstance, or one is constrained to act by sheer force, in all these cases, what Aristotle excludes is not causality but culpability,[47] what the Chilean criminal jurist Náquira Riveros would call the subjective dimension of action. We argue that in this way, we can take as ours what is true in the theory of objective imputation and in the naturalistic theories, without sliding down the slope into the theory of risk. Indeed:

- Causality can be severed from intention and from culpability, as von Buri thought. If, for instance, a man inflicts a small wound to a stranger, and the stranger dies because he suffers from hemophilia, we could say that the prudent or rational man would judge that the small cut was the cause of death, but there is no culpability and the death cannot be imputed to the author of the cut.[48]
- The assessment of the action must use as a type concept the notion of "prudent man" in order to judge whether the effect is proportionate to what the agent has effectively done.

But with what we have said we also topple the causal theories which put asun-

[47] *Ethica Nicomachea* III 1, 1110b1-1111a24; y V 8, 1135a23-1135b20.

[48] In the *via analytica*, searching for the elements and causes of a matter of fact, the court could come to know the intention of an agent before knowing the causality as in the example of the nephew given above; or it could come to know first the apparent causality before knowing the intention. However, in the *via synthetica* or *via judicii* the court should be able to determine the connections or disconnections between causality and intention. However, since the will may give its form or nature to the external action or conduct, the court could be able to perceive *prima facie* whether such conduct is homicidal or not. In the example of the nephew, the intention did not give form to the action in any reasonable way, so that the conduct is not homicidal even if the intention was. Moreover, finally, in most external actions the will is clearly manifested so that, when the conduct is proven, the inference to the intention is immediate, unless the defendant can prove an exception such as a blameless state of insanity. According to Alasdair MacIntyre, often we do not even need to "infer" the reasons for which somebody has acted. "What kind of knowledge is this? It is a form of practical knowledge, a knowing how to interpret, that arises from those complex social interactions with others in which our responses to others and their responses to our responses generate a recognition by them and by us of what thoughts and feelings it is to which each is responding. Of course, both they and we sometimes make mistakes [...], but the ability to recognize such mistakes itself presupposes an ability to be aware of what others think and feel. Interpretative knowledge of others derives from and is inseparable from involvement with others and the possibility of Cartesian doubt about the thoughts and feelings of others can arise only for those deprived of such involvement either by some grave psychological defect, or, as in the case of Descartes, by the power of some philosophical theory. Knowledge of others, that is, is a matter of responsive sympathy and empathy elicited through action and interaction and without these we could not, as we often do, impute to those others the kind of reasons for their actions that, by making their actions intelligible to us, enable us to respond to them in ways that they too can find intelligible (MACINTYRE, *Dependent Rational Animals*, London, Duckworth, 2009, 14).

der causality and intentionality as if they were realities which can never form a unified reality. In the hylemorphic world in which we live, the will can be the first cause of a causal chain that ends at the death of the victim. That is to say, the will can use as its instruments physical realities, and even spiritual realities. The brothers Mazeaud very well exemplify this point in their work *Elements of Civil Liability*. Let us suppose that a person "A" with the intention of causing prejudice knows that the victim is negligent when performing a dangerous activity. What can be said if "A" uses that knowledge to cause the prejudice and then to claim that the cause was the victim's fault? According to the Mazeaud brothers, in such case: "it is necessary to examine the causal relation. We see then that the intentional fault of the sued person is the only real cause of the prejudice."[49] Inversely, the victim could have used the fault of the sued person to cause the prejudice and in such case the moral causality corresponds to the victim, although the sued person and/or his instruments (of transportation, for example) are the physical cause of the prejudice. "[...] the person who, wishing to commit suicide, chooses in order to jump under its tires an automobile which is moving beyond the speed limit, so as to ensure that the accident could not be avoided, makes use of the imprudence of the driver as of an instrument. Such person could have used equally a rope or a gun. Thus, the person deprives the imprudence of the driver of any true [moral] causal role in the production of the prejudice"[50].

We only have to show now the relation between non-intentional culpability and causal chains of a moral or legal kind. Against the greater part of the "enlightened" criminal doctrine, which starts with Pufendorf, we must say that the will plays a central causal role in non-intentional but culpable crimes. It is true that in such crimes the criminal intention is missing, but it is also true that the border between non-imputable error and culpable action (due to negligence, incompetence or imprudence) lies in the will. As Aristotle explained, ignorance not always excuses one from guilt. Only that ignorance the principle of which does not depend on the agent can excuse from guilt. Whoever acts *because of ignorance*, due to invincible error, is not imputable. However, who acts *with ignorance*, if such ignorance had its origin in negligence, incompetence, imprudence, etc., may be guilty. In these cases, if a criminally punisha-

[49] The text continues: "Without a doubt the prejudice would not have occurred without the fault of the victim; but, in willing the prejudice, the defendant has made of the victim's guilt an instrument. Through the guilt of the victim the defendant has reached his goal. [...] The defendant has directed the events and therefore he is the only true cause." MAZEAUD BROTHERS, *Elementos de la responsabilidad civil*, Santiago, Editorial Parlamento S. A.. Edited by Pröschle and Soto, 2008, 482.

[50] *Ibidem*.

ble damage results as a consequence of an imprudent conduct or omission, one could hold that the causal chain starts at the agent's will, even if this will is not as intensely criminal as the one which is intentionally so.[51] However, determining the culpability requires to take into account not only the type concept (for example, *good father of family*) but also all the relevant aspects of the defendant's subjectivity including those which are particularly his.

With these simple observations, one can understand how the classical theory could resolve all problems related to the causal link and to its connection with culpability. Even those which appear as utterly unsolvable by alternative theories, such as, for example, the problem of intellectual authorship and/or the authorship in crimes where the damaging results occur long after the performance of the criminal action.

In addition, thanks to this theory one can better understand why Criminal law must keep its retributive orientation: for it is the only aim that truly respects

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[51] There is a traditional objection opposed to those who try to find a voluntary root of non-intentional crimes. There are cases in which the guilt is not conscious so that the psychological element is entirely absent from the mind of the agent. In such case, the objector claims, the only theoretical instrument to assign guilt to the agent is the objective lack of observance of a precautionary rule or, within the theory of objective imputation, the surpassing by the agent of the threshold of permissible risk. To this objection we reply the following: it is a mistaken presupposition that the only possible subjective root of an event is a state of conscience *in actu*, that is to say, active and fully displayed in the agent's conscience. The classical distinction between act and potency (Aristotle, *Metaphysics*, Book Θ) allows us to answer the old problem. In case of unconscious guilt, the agent has or had the intellectual and volitional power to control the event (in the present or in the past), although he does not or did not actuate such power. If he did not have such power, then he could not be made responsible for the event. To deny reality to the non-actuated power leads to missing the true personal core of negligence as a source of culpability. Indeed, the agent who could have foreseen the event is *toto coelo* different from the agent for whom to foresee the event was not possible, as the agent who could have avoided the event is entirely different from the agent for whom avoiding the event was impossible. Thus, even in the case of "unconscious guilt" there must be a conscious and voluntary conduct, as the Italian Criminal Code requires (art. 42, co. 1. See RONCO, *Il reato: modello teorico e struttura del fatto tipico*, in RONCO [editor], *Il reato. Struttura del fatto tipico. Presupposti oggettivi e soggettivi dell'imputazione penale. Il requisito dell'offensività del fatto*, Bologna: Zanichelli Editore, 2011, 128. However, of course, guilt or culpability cannot be reduced to just being conscious of and willing the conduct. It is necessary to examine the fact in order to establish if it was *in its complexity* the direct expression of a conscious and willed act or at least it was foreseeable and avoidable by the agent. As Pessina clearly states: "the fact of 'not having foreseen', although negative, is however an imputable fact because it finds its root in man's will. When a thing depends on the activity of a being so that the thing is possible through that being, the only obstacle for becoming real [*actual*] what is only possible is the absence of the will". PESSINA, *Elementi di diritto penale*, Napoli, 1870, 167. Aristotle also made an interesting distinction: ignorance not always excludes culpability. It does so only when the relevant ignorance cannot be imputed to the agent's fault. Thus, for example, the drunkard, the incompetent and the negligent are responsible for their state of ignorance. See *Nicomachean Ethics* III 1, 1110b24-1111a2; and V 8, 1136a6-9.

the dignity of the human person because it acknowledges his free will and his power to be or not to be the author of outlawed actions. Moreover, this theory does not exclude whatever is true in rival theories.