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Victims and Self-Liability in Criminal Law: Beyond Contributive Negligence and Foreseeability (Without Blaming the Victim)

Manuel Cancio Meliá*

I. Introduction: A Day in the Life of Citizen C

Victims and perpetrators interact in many different ways within criminal law. The mere fact that someone has been injured in social interaction with another individual does not mean that the law considers them “victim” and “perpetrator,” because the phenomenological configuration of the case can adopt multiple forms. If we consider the external appearance of the facts of the case, the “contributions” or different behaviors of the “victim” and “perpetrator” can adopt very different meanings. In many cases it shall be clear that the actions of the victim or perpetrator lack legal and criminal relevance. Yet, in others, the evaluation of the behaviors of the perpetrator and victim are not unequivocal, the behavior of both actors might be legally irrelevant or relevant. Perhaps a regular working day of a more or less normal citizen, citizen C, can illustrate the aforementioned.

Citizen C suffers from a serious pulmonary disease. C wakes up one day and asks his neighbor, who knows of his disease, for a cigarette, which citizen C starts smoking. Afterwards, the bricklayer C had hired on the previous day appears in the doorway to change some damaged tiles. C welcomes him in and opens a window for him to go up to the roof to perform his task. As C has noticed from the beginning, the bricklayer hardly can perform any task; he is an old man who is only able to make few movements. Therefore, C and his neighbor (who

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was there at the request of C) help him to change the tiles that were in poor condition, throwing them in the heap of rubble located in C's garden. However, the neighbor has forgotten to move away his luxurious garden furniture. Some of the tiles, (thrown by the bricklayer, C, and his neighbor) strike them. Later on, as he does every morning, C takes the tram to work. The tram driver, as C states, is still very affected by the alcoholic beverages he consumed during the previous night. In the office a workmate, not particularly skillful, who is carrying a huge pile of files, unluckily stumbles, and the files hit C on his head causing a flesh wound. Despite the insistence of his workmate, C does not want to use the first-aid kit of the company to disinfect the wound. From C's point of view, the flesh wound is "just a small scratch." After work, C meets a friend and both consume large quantities of alcohol, which the waiter is refilling obligingly. Then they go to a nearby park, where the friend offers C a certain amount of a South American narcotic, which C gratefully accepts and consumes immediately. Subsequently, the friend suggests a short boat trip in the nearby river. C agrees to take the boat trip. Together they walk towards the seashore of the river. The two take a boat which had a clear leakage, as it is half sunken. Both get into the boat and C lies down on the plank forming the bank of the boat. Meanwhile, his friend rows to the river core. Due to the leak, the boat sinks quickly when it reaches the strong current flowing at the river core. C and his friend swim towards the seashore. C, who is completely wet, wishes to get home as early as possible. As he sees a vehicle coming closer, C suddenly jumps in the road, believing it is a taxi cab, attempting to stop the driver by waving his arms about. However, this driver was immersed in a deep meditation about the concept of "Abstract Law" in Hegel and only steps on the brakes at the last moment. C's position was very careless; however, he could have dodged the vehicle. Once C arrives home, C and his wife, after an initial dispute about C's condition, start a process which ends with the consummation of their marriage. C suffers a particularly dangerous disease which may cause infection in the case of unprotected sexual relations. This fact was conveyed to C's wife. Nonetheless, she has forgotten it. C goes to sleep.

The aforementioned events may easily have resulted in injuries, which may have been caused by the several intervening parties. It seems evident that at least the concurrence of criminal behavior may have been raised in the individual, who in each case has contributed (the "perpetrator") to the hypothetical injuries of others. But one also has the intuitive impression that in the narrated cases the behavior of the injured person may have some relevance in determining whether the other person has committed a type of criminal infringement.

II. Risky Joint Activities: A Starting Point

The phenomenon of dangerous activities in which someone has somewhat intervened and later on has been injured (the "victim") and another individual who is not harmed by the risky behavior (the "perpetrator"), has always existed. Consequently, these various fact patterns are the subject of study in criminal law, both in practice and in the theoretical analysis. In this respect, Silva Sánchez has reasonably affirmed that the doctrinal theses approaching the problem are not "a radical novelty within the framework of our legislation, doctrine and case law, but, at most, what happens is that these proceed to theorize, or to 'rationalize', something that, in a different level, has been yet taken into account, even though in an unconscious or intuitive way."¹ It has even been correctly stated (from the point of view adopted herein) that the consideration of the victim's behavior is not the product of the imagination separate from reality. Otherwise, the evaluation of the victim's behavior is present in criminal law, although in "disguise."²

However, the traditional position both of the praxis and the theory in criminal law has been to deny the relevance of the victim's behavior. It is said that criminal law is made to protect those who are harmed. The input of the victim, given the responsibility of the offender, must be put aside. Particularly, in

1. See Jesús-María Silva Sánchez, *La consideración del comportamiento de la víctima en la teoría jurídica del delito: Observaciones doctrinales y jurisprudenciales sobre la 'víctima dogmática'*, in *LA VICTIMOLOGÍA* 19 (Consejo General del Poder Judicial ed., 1993). See also Georg Kleinfeller, *Die Anreizung des Täters durch den Angegriffenen*, in *MÜNCHENER FESTGABE FÜR KARL VON BIRKMEYER* 13 (1917).

2. Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1226 (1994).

the field of the dangerous activities created by several individuals (by whom one is finally injured), the situation in Continental Europe and the countries sharing an Anglo-Saxon legal framework was, until recently, astonishingly proximate, taking into account the strong differences in both groups' legal theory.³ After the resonant bang to the question of the contribution of the victim, solemnly declaring there is no contributory negligence in criminal law (unlike in tort law), the door silently opens a little later. This legal admission of contribution is usually made through some considerations. On the one hand, it can happen that the behavior of the victim becomes the sole relevant cause, waiving all responsibility for the other individual, or at least that this has an impact with such intensity so as to diminish the responsibility of the perpetrator at the time of the sentencing. On the other hand, the conduct of the victim may have influenced the negligence of the causer, resulting in the damage becoming unforeseeable and eliminating the responsibility of the wrongdoer.

In applying these traditional solutions, when estimating many of the events of the before mentioned C's day in criminal law, a conclusion shall be drawn that the behavior of the victim (provided we are dealing with a liable person) is relevant. C's neighbor shall not be taken to court if the cigarette he gives to C sets off a respiratory crisis causing his death. C shall not, from a criminal law perspective, be deemed responsible for allowing the old bricklayer to work on the roof when he suffers an accident. Neither C nor the bricklayer should be punished for throwing the tiles onto the furniture of the neighbor and destroying it. Nor should the office workmate be responsible for scratching C if the scratch becomes infected and causes a serious injury. Finally, the waiter who served alcohol to C and his friend should not be held responsible if the intoxication pro-

3. The image drawn by Fletcher is still viable. He characterizes Western criminal legal thought as fractured between the Anglo-Saxon tradition and that stemming from the European continent. This later group is heavily influenced by German criminal law. See George P. Fletcher, *Deutsche Strafrechtsdogmatik aus ausländischer Sicht*, in *DIE DEUTSCHE STRAFRECHTSWISSENSCHAFT VOR DER JAHRTAUSENDWENDE: RÜCKBESINNUNG UND AUSBLICK* 235 (Albin Eser et al. eds., 2000). The practical identity of the structures in both legal networks for these constellations makes one think on a common historic origin previous to French Revolution and codification.

vokes something more than a headache. The courts on both shores of the Atlantic Ocean (and the English Channel) enforcing these traditional structures shall sentence to homicide by negligence, but shall moderate the liability of the friend of C if the boat sinks in the river, or that of the driver who, when driving carelessly, runs into C who suddenly jumps to the roadway. But these courts shall find guilty, probably without restraint, if C dies in an accident caused by the drunkenness of the tram driver, or when consuming cocaine invited by his friend, or if the wife of C suffers any injury from being infected.

Nonetheless, the situation is starting to change. In some countries within the legal continental frame (Germany and Spain, above all), both the courts and the theoretical scholars of criminal law have begun to expressly abandon the traditional solutions. They apply certain theories that in all cases imply to restrain the scope of the causer's liability, conferring more importance to the self-responsible conduct of the person being injured.

In the theory of criminal law, after several influential articles, highlighted by various primary assessments of Claus Roxin published in the beginning of the 1970s, a clear surge of publications has been unleashed. In the 1990s and in Spain alone, four prolific books were published on the matter.⁴ In the courts,⁵ there are nowadays some decisions which may not have occurred some years ago. By way of illustration, it is worth mentioning the following three leading cases.

In the *Syringe Case* (German Federal Supreme Court),⁶ the defendant, a drug addict, met a friend on the day in question.

4. For references mostly of German, Spanish and Italian works, see MANUEL CANCIO MELIÁ, *CONDUCTA DE LA VÍCTIMA E IMPUTACIÓN OBJETIVA EN DERECHO PENAL. ESTUDIO SOBRE LOS ÁMBITOS DE RESPONSABILIDAD DE VÍCTIMA Y AUTOR EN ACTIVIDADES ARRIESGADAS* 89, 375 (2d ed. 2001) [hereinafter MANUEL CANCIO MELIÁ, *CONDUCTA DE LA VÍCTIMA*]. See also Manuel Cancio Meliá, *Victim Behavior and Offender Liability: A European Perspective*, 7 *BUFF. CRIM. L. REV.* 513, 515 (2004) [hereinafter Manuel Cancio Meliá, *Victim Behavior and Offender Liability*].

5. For case references in Spanish, German, Swiss, British, Italian and United States courts, see MANUEL CANCIO MELIÁ, *CONDUCTA DE LA VÍCTIMA*, *supra* note 4, at 24, 96, 147, 179.

6. Bundesgerichtshof [BGH] [Federal Court of Justice] 1984, 32 *Entscheidungen des Bundesgerichtshofes in Strafsgericht* [BGHSt] 262-267 (F.R.G.). See also Manuel Cancio Meliá, *Victim Behavior and Offender Liability*, *supra* note 4, at 515 n.9 (2004) (referencing several commentaries on the decision).

This friend, who was also addicted to drugs, consumed with the defendant a certain amount of heroin in the possession of the latter. To this purpose the friend asked the defendant to get some syringes, as the friend was a well-known consumer of narcotics and could not possibly obtain them. Once the defendant obtained the syringes, they both consumed the heroine. After injecting the heroine, both lost consciousness. When a doctor arrived, the friend had died due to a cardio-respiratory arrest produced by the injection.⁷

The Juvenile Court sentenced the defendant to a crime against public health and homicide by negligence, declaring that by obtaining the syringes the defendant had contributed a condition for the death of his friend. The German Federal Supreme Court (GFSC) reversed the decision, holding that irrespective of the evidence of a causal relationship and foreseeability, the behavior of the defendant only established a mode of participation in a dangerous, self-responsible self-endangerment. Whether or not the act was negligent, the defendant must not be punishable in absence of the typified main matter of fact. In any event, according to the GFSC, punishability may arise in these assumptions from the time when the participant apprehends the risk better than the one who puts himself under risk because he has a deeper knowledge on the subject matter. However, there was no evidence of these facts when applied in the case.⁸

In the *Vehicle Jump Case* (Spanish Supreme Court),⁹ the defendant had picked up the victim, who was hitch-hiking. Once the victim stepped into the car, the accused asked the victim to give him the money he had. The accused then asked for the watch the hitchhiker was wearing, threatening the hitchhiker with the use of a pocket knife he stated he had (although this fact was not proven). Faced with this kind greeting, the hitchhiker asked the defendant to stop the vehicle and allow him to remove the watch, proclaiming (while opening the door of the car) that he would otherwise throw himself out of the car

7. *Syringe Case*, BGH 1984, 32 BHGSt 262-67.

8. *Id.*

9. STS, Feb. 26, 2000. See also 4 REVISTA DE DERECHO Y PROCESO PENAL 1 (2000).

at full speed. After the defendant declined to stop, the victim threw himself off the car, suffering injuries due to the impact.¹⁰

The trial court convicted the accused of attempted robbery and for the injuries suffered by the victim. The Supreme Court reversed the conviction on the last charge, holding that the charge did not apply because the victim, in deciding to jump out of the moving car, had made an incorrect weighting of the goods at stake (the property of the watch versus the life or physical integrity at risk due to the jump). In the court's opinion, these facts excluded the possibility of charging the perpetrator with injuring the victim.¹¹

In the *Bridge Case*¹² (Supreme Court of Perú), the defendant had organized a concert over a promenade located next to a river. Over the river there was a home-made suspension bridge, built with ropes and small bits of wood. To carry out the party, the indicted asked for a prior authorization from the mayor's office of the sector. The party also had a police support unit. The festival elapsed with normality along the day. However, at nightfall a group of forty drunken people, motivated by the passion of the party, started to dance over the bridge. The bridge collapsed causing all of those on the bridge to fall into the water. Two people drowned, while the other thirty-eight suffered injuries.¹³

The trial court convicted the organizer of the party for negligent homicide. The court determined that the organizer failed to uphold his duty in adopting the necessary care to avoid the result. The Supreme Court, on the contrary, acquitted the defendant from criminal liability basing its reasoning, among other grounds, on the notion that a suspension bridge is an access way to the traffic of persons and not a dance platform. The victims, in choosing to dance on the suspension bridge, created their own risk and were to accept the consequences of their actions.¹⁴

10. *Vehicle Jump Case*, STS.

11. *Id.*

12. STSJ, Apr. 13, 1998 (4288-97).

13. *Id.*

14. *Id.* See also MANUEL CANCIO MELIÁ, CONDUCTA DE LA VÍCTIMA, *supra* note 4.

It appears that a discussion of this question is also starting to take place in the United States. In the last few years, it has been highlighted by, on one hand, the proposal of Alon Harel,¹⁵ and, on the other hand, the deep, general analysis of Vera Bergelson.¹⁶ Even though the scope of both approaches is very different,¹⁷ they both share the opinion that the victim's behavior should be taken into consideration.

Within the context of the vivid attention paid by the theory in the field of Civil Law to the problem of the behavior of the victim in criminal law in the last years, I have formulated in several articles a proposal for the treatment in question on the basis of the principle of self-liability,¹⁸ a proposal I have tried to synthesize on basic principles for the North American discussion in another publication.¹⁹ In the present paper, I shall try to refer to what is still the status quo of criminal law in the United States and what it was not long ago in the continental field, highlighting why the traditional view does not seem to work smoothly on the problem, particularly in the approaches based on causation.²⁰ It may be expected that the analysis shows the insufficiency of these instruments and, therewith, the need of a

15. Harel, *supra* note 2, at 1181-82.

16. See Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385 (2005). See also Heidi M. Hurd, *Blaming the Victim: A Response to the Proposal That Criminal Law Recognize a General Defense of Contributory Responsibility*, 8 BUFF. CRIM. L. REV. 503 (2005).

17. Harel bases his proposal on efficiency consideration, close to what has been called the "victim-dogmatic hypothesis." See Harel, *supra* note 2. This view is supported by Bernd Schünemann and others who advance the continental view of criminal legal theory. See MANUEL CANCIO MELIÁ, CONDUCTA DE LA VÍCTIMA, *supra* note 4, at 237, 242, 253, 259 (critiquing the doctrine and discussing Harel's work). Bergelson builds a normative approach based on the "principle of conditionality of rights," according to which the behavior of the victim has influence on the liability of the doer. Bergelson, *supra* note 16, at 390.

18. See MANUEL CANCIO MELIÁ, CONDUCTA DE LA VÍCTIMA, *supra* note 4; MANUEL CANCIO MELIÁ, LA EXCLUSIÓN DE LA TIPICIDAD POR LA RESPONSABILIDAD DE LA VÍCTIMA (1998); Manuel Cancio Meliá, *Reflexiones sobre la 'victimodogmática' en la teoría del delito*, 25 Revista Brasileira de Ciências Criminais 23 (1999); Manuel Cancio Meliá, *Opferverhalten und objektive Zurechnung*, 111 ZStW 357 (1999).

19. See Manuel Cancio Meliá, *Victim Behavior and Offender Liability*, *supra* note 4.

20. See *infra* Part III.

normative, comprehensive approach, whose basic guidelines I shall present.²¹

Irrespective of sharing the positions adopted within the framework of the current deliberations, I hope this article shall be a humble contribution to a dialogue among the academic scholars of the United States and the legal continental field. This is specifically necessary in a period in which the real internationalization of criminal law and the political communication on crime and criminal law goes boldly forward, and, of course, it is not waiting for the theoretical analysis.²² It is specifically needful at this time when the question of the victim has aroused a decisive importance in criminal legislative politics within the Western countries, and in which the use and abuse of the figure of the victim is a day-to-day debate on both shores of the Atlantic Ocean and is used as a spearhead²³ for what has been called "criminal law for enemies."²⁴ In this matter, we have to take into account the idea that certain positions in the theory of the criminal law which imply blaming the victim have a particularly intense criminal charge.

III. Causation: Contributory Negligence and Concurrent Negligence

A. "Concurrent Negligence" and Causation in a Continental System: Spanish Jurisdiction

The case law *praxis* of the Spanish Supreme Court in the estimation of the victim's behavior contributing to his injuries has developed its own doctrine, called "concurrent negligence" or "contributory negligence." This theory was used for a long period of time (starting in 1990, it began to be replaced by other

21. See *infra* Part IV.

22. See Manuel Cancio Meliá, *Internationalisierung der Kriminalpolitik: Überlegungen zum strafrechtlichen Kampf gegen den Terrorismus*, in STRAFRECHT UND WIRTSCHAFTSSTRAFRECHT: DOGMATIK, RECHTSVERGLEICH, RECHTSTATSACHEN 1513 (Ulrich Sieber et al. eds., 2008).

23. See, e.g., MARKUS D. DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS (2002); SILVA SÁNCHEZ, LA EXPANSIÓN DEL DERECHO PENAL: POLÍTICA CRIMINAL EN LAS SOCIEDADES POSTINDUSTRIALES 52 (2001).

24. See GÜNTHER JAKOBS & MANUEL CANCIO MELIÁ, DERECHO PENAL DEL ENEMIGO (2006) (discussing a wide range of ideas from scholars of many countries on the topic of "criminal law for enemies"). See also 2 EL DISCURSO PENAL DE LA EXCLUSIÓN (Manuel Cancio Meliá & Carlos Gómez-Jara eds., 2006).

theoretical structures). In the following pages, I shall try to outline the basic elements of this legal guideline and then submit it to a brief test.

Under the flag of the affirmation that there is no compensation for negligence in criminal law,²⁵ the Spanish Supreme Court refused for a long time to recognize, at least from an open view, any influence to the intervention of the victim in the genesis of risk.²⁶ However, under the appearance of a total rejection for any other consideration tending to mitigate the liability of the doer pursuant to the intervention of the victim in the genesis of the risk, there was a *praxis* in the case law that involved the attribution of the behavioral relevance in the victim at the time of the establishment of the legal and criminal liability of the perpetrator. Under this legal approach, the subject matter of causality is located under the heading of the “*contributory negligence*” or the “*concurrent negligence*” doctrine. As the court stated:

It is a repeated doctrine of this Court that whether the compensation for negligence is not of application in the criminal law as the private law of the compensation of obligations, it is lawful and obliged to value the concurrent behaviors of all the main characters of the facts, included the proper victim²⁷

According to the Spanish Supreme Court, it is necessary to determine, through a comparative weighting in the causal axis, whether any of the behaviors has had “prevailing efficiency, analogous or in inferiority, well understood that these shall be considered primary or prevailing in the legal field those reputed truly as genuine or driving units in the beginning of the events, having a secondary nature those merely in favour thereof”²⁸ In this sense, it is understood that to apply this reasoning, the different concurrent causes have to be personalized and applied with the general criteria of experience. Due to this evaluation, it was possible that the responsibility of the other intervening individual was diminished and, in some cases, even completely disappeared.

25. Hurd, *supra* note 16, at 503 (calling these expressions “mantras”).

26. See MANUEL CANCIO MELIÁ, *CONDUCTA DE LA VÍCTIMA*, *supra* note 4, at 95.

27. STS, Dec. 26, 1989.

28. STS, Feb. 25, 1991.

B. *Causation and Contribution of the Victim in the Anglo-Saxon Field*

From the continental perspective, and from my point of view, in the Anglo-Saxon criminal law there are legal theories that are very close to the aforementioned approach. Following this line, it can be said schematically that, on the one hand, any relevance of the doctrines similar to the continental “*compensation for negligence*,” known as “*contributory negligence*” and “*contributory fault*” in tort law,²⁹ are refuted. In legal words:

Contributory negligence is not ordinarily available as a defense in a criminal prosecution; it cannot purge an act otherwise constituting a public offense of its criminal character. Specifically, one who is guilty of criminal negligence is not relieved from criminal responsibility by the contributory negligence of the person injured or killed.³⁰

Similarly, “contributory negligence on the part of the person killed, although sufficient to bar a civil action . . . does not relieve the latter from criminal responsibility for having caused the death.”³¹

However, the evolution of doctrine and case law³² has led to a valuation carried out in the causation axis of the victim’s behavior, arguing that this may turn the initial injury in a “too much remote cause.”³³ In this sense, it is affirmed in some doctrinal areas that a particular “voluntary” behavior of the victim may block the causation relationship.³⁴ It has also been argued that whether the behavior of the victim is “abnormal” or “not reasonable,” it is the only cause³⁵ of the damage.³⁶ However,

29. Meanwhile by virtue of the doctrine of *contributory negligence*, the compensation to the aggrieved individual can be reduced when he has behaved with negligence. The doctrine of the *comparative fault*, on the other hand, measures the liability of the wrong-doer in cases of careless conduct of the injured party. See, e.g., H. L. A. HART & M. A. HONORÉ, CAUSATION IN THE LAW 190 (1973); Harel, *supra* note 2, at 1191-92 (concerning American law).

30. 21 AM. JUR. 2D *Criminal Law* § 470 (2008).

31. 40 AM. JUR. 2D *Homicide* § 107 (2008).

32. See, e.g., Glanville Williams, *Causation in Homicide*, 3 CRIM. L. REV. 429, 510 (1957) (discussing the evolution of the causation doctrine in this field in the Anglo-Saxon doctrine and case law).

33. *Id.* at 514.

34. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 208 (2006).

35. 40 AM. JUR. 2D *Homicide* § 107 (2008) (“In some cases, the conduct of the decedent is regarded as material to the extent that it bears upon the question

from the author's point of view, the victim's behavior should never be the "direct cause."³⁷

The acceptance of these considerations in the legal *praxis* seems to have been quite unequal. It is worth mentioning that the courts of the United States are more favorable to this trend. This is exemplified in the case of *State v. Preslar*.³⁸

In *Preslar*, a woman, after having been battered by her husband, left the marital home. Before her arrival to her father's home, where she would have been welcomed, she decided to spend the night outdoors and consequently froze to death. The court found that the woman's voluntary behavior broke the causation relationship.³⁹

whether, und all the circumstances of the case, the defendant was negligent, or whether the defendant's negligence was the proximate cause of the death."). "The contributory negligence of a victim is not a defense to vehicular homicide, *absent a showing that the victim's conduct was an independent intervening cause of death*, i.e., one which the defendant could not foresee and which is more than a contributing cause of the injury." COLO. REV. STAT. ANN. § 18-3-106 (1)(b) (emphasis added). See also *People v. McAfee*, 104 P.3d 226, 230 (Colo. Ct. App. 2004). The Court in the New Zealand case, *R. v. Storey* (1931), falls within this principle, in the argument of the relevance of a careless conduct of the victim after a traffic accident caused by the negligent action of the doer. See MANUEL CANCIO MELIÁ, CONDUCTA DE LA VÍCTIMA, *supra* note 4, at 106, 117, 334; RUPERT CROSS & PHILIP ASTERLEY JONES, AN INTRODUCTION TO CRIMINAL LAW 123 (1968); HART & HONORÉ, *supra* note 29, at 309, 319, 406 (suggesting a distinction between gross and ordinary negligence by the victim).

36. See HART & HONORÉ, *supra* note 29, at 318, and JOHN SMITH & BRIAN HOGAN, CRIMINAL LAW 50 (10th ed. 2002), for discussions in which this argument was not taken into account and thus supporting the idea of holding a defendant totally liable for causing a wound that the victim subsequently neglects to care for.

37. See *Velázquez v. State*, 561 So. 2d 347 (Fla. Dist. Ct. App. 1990); *Pennsylvania v. Root*, 170 A.2d 310 (Pa. 1961) quoted in MARKUS D. DUBBER & MARK G. KELMAN, AMERICAN CRIMINAL LAW: CASES, STATUTES, AND COMMENTS 421 (2005). In *Root*, the victim had challenged the accused to a car race in a public roadway. During the race, the victim, trying to overtake the defendant, crashed into an oncoming truck. The victim died in the crash. *Root*, 170 A.2d at 573. The court held that due to the victim's negligence, "the defendant's reckless conduct was not a sufficiently direct cause" of the victim's death. *Id.* at 580. See also *Commonwealth v. Uhrinek*, 544 A.2d 947, 952 (Pa. 1988) (holding that "evidence of a deceased pedestrian's intoxication is admissible in a homicide by vehicle prosecution, if relevant to the defendant's theory of the cause of the accident . . ."); DRESSLER, *supra* note 34, at 208; Vivian S. McCardell, *Victim's Intoxication in Vehicular Homicide*, 62 TEMP. L. REV. 784 (1989).

38. 48 N.C. 421 (1856). See, e.g., DRESSLER, *supra* note 34, at 207.

39. *Id.* See HART & HONORÉ, *supra* note 29, at 293, 324; McCardell, *supra* note 37.

This theory has also come to exclude the responsibility of the doer in assumptions in which there are simultaneous behaviors of victim and doer, such as in cases of unlawful car races.⁴⁰ On the other hand, British courts dealing with this same issue of the causation relationship seem to be more restrictive, sometimes reaching decisions which seem difficult to understand from the continental perspective.

For example, in the very well-known 1975 British case *R. v. Blaue*, a young woman died of a stab wound as she refused to have a blood transfusion because she was a Jehovah's Witness. The court declared that there was no interruption of the causal relation due to the rule of "*take the victim as you find her*," whose content may be summarized as "the 'abnormal pattern (obviously not as it is understood regularly, but in its broadest sense, as religious beliefs are comprised therein) of the victim does not interrupt the causal relationship.'"⁴¹

On the same line, it is worth mentioning the recent case *R. v. Dear*.⁴² In *Dear*, the defendant injured the victim with a bladed weapon. Before the defendant's appeal on the basis that the victim had "interrupted the causal link" by reopening his wounds or not taking care to avoid the bleeding as the wounds opened spontaneously, the Court held that the cause of the death was the bleeding of the artery sectioned by the perpetrator, irrespective of the reappearance or the continuation of the bleeding caused willfully by the victim.⁴³

This matter is sometimes raised in both legal circles from the subjective point of view *ex ante* of the causer, arguing that the later behavior of the victim was not "predictable." Thus, pursuant to the common law system, the defendant lacked *mens rea*, or, in continental terms, negligence or intention.⁴⁴ In any event, it is necessary to consider that the Anglo-Saxon doctrine tradition is alien to the categorical modern continental separation between objective-material (material causation),

40. See sources cited *supra* note 37.

41. See DRESSLER, *supra* note 34, at 208 n.63 (for a critique of this position); ALAN NORRIE, CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW 145 (1993); SMITH & HOGAN, *supra* note 36, at 50.

42. See SMITH & HOGAN, *supra* note 36.

43. See *id.*

44. See MANUEL CANCIO MELIÁ, CONDUCTA DE LA VÍCTIMA, *supra* note 4, at 131.

normative ("objective imputation") and subjective issues (foreseeability). Therefore, under the heading of "causation" there are also carried out some positions which in the continental current are considered of subjective nature and are deemed alien to that question.⁴⁵ As Robinson puts it:

In contrast to the scientific inquiry of the factual cause requirement, the proximate (legal) cause requirement presents *essentially a normative inquiry*. Deciding whether a result is "too remote or accidental in its occurrence" or "too dependent on another's volitional act" *obviously calls for an exercise of intuitive judgement*. The inquiry cannot be resolved by examining the facts more closely or having scientific experts analyze the situation.⁴⁶

C. Critique: Causation, Equity and "Hidden Normativity"

The development of this doctrinal case law, under the sign of "causation," gives way to constraining arguments of liability on the grounds of material reasons of normative nature: the causation axis is approached only from the nominal perspective. In fact, nowadays it is a unanimous opinion in continental theory and practice that the approach to these matters within the field of causation is wrong. Causation exists or does not exist. It is a matter of empirical evidence, and it does not deal with assessed normative weights.⁴⁷ Therefore, a seemingly technical and legal cover is offered on the basis of equity.

It is this tacit normative base which allows one to "solve" the enigma or, rather, to understand the true scope of how the "negligence" of both victim and causer can "be concurrent in causation." This terminology does not mean in any way anything but a behavior *attributable* to the victim, which may give rise to the influence of this behavior on the decisions of criminal courts. Only this implied normative assessment⁴⁸ and not the literality of the Spanish Supreme Court doctrine, the "powerful"

45. See HART & HONORÉ, *supra* note 29, at 385.

46. PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES & CONTROVERSIES 301-02 (2005) (emphasis added) (underlining the vagueness of these standards). See also FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 64, 71 (1998).

47. See MANUEL CANCIO MELIÁ, CONDUCTA DE LA VÍCTIMA, *supra* note 4, at 106, 126.

48. FLETCHER, *supra* note 46, at 70-71 (discussing "Ideology and Causation").

or "prevailing" causes, etc., is what allows the Spanish Supreme Court and United States courts to discriminate, quite matter-of-factly, those cases in which the "concurrence of negligence" is of application from other assumptions in which there is a necessary and relevant cooperation of the victim, with a deep "causal influence," as the case may be. But because the behavior of the victim is not attributable, there is no "negligence" of the victim. It is exactly this underlying normative nature which makes these approaches become something different than a mere "balance" of negligences within the framework of culpability⁴⁹ and, at the same time, the reason of the location of the concurrence of negligences within the field of causation. It is also a "hidden normativity" which explains the astonishing coincidences found in the Anglo-Saxon doctrine concerning the approach of the Spanish Supreme Court.

Falling within this principle, it is not a coincidence that the Spanish Supreme Court has developed the doctrine of the concurrence of negligence in line with the behavior of the victim: it involves the implied acknowledgement of a modality from the normative axis which should correspond to the intervention of that person who contributes to the damage of its own goods. This has even more relevance if we bear in mind that the case law structure is not only applied to the assumptions in which there is a mere "confluence" of risk-generating conducts in the harmful result, but also to those others in which the victim and doer jointly configure the behavioral pattern which lastly damages the first. In any event, it has to be highlighted with a special interest the idea of the "allotment" of liabilities underlying in the statement that not only in assumptions of a complete discharge of the agent, but also to cases of "degradation" in negligence. As it seems difficult to establish some legal grounds on how the concurrence of the negligent behavior of one of the individuals may have an impact on the "negligence" of the other intervening party, from the material view, some existing assumptions are stated in which the behavior of the victim may

49. See Ulfrid Neuman, *Die Stellung des Opfers im Strafrecht*, in STRAFRECHTSPOLITIK: BEDINGUNGEN DER STRAFRECHTSREFORM, 230 (Winfried Hassemer ed., 1987).

mitigate the responsibility of the doer, but without excluding it at all.⁵⁰

The modern scientific doctrine, nonetheless, is more focused on a pattern which mainly tries to exclude or state liability. However, there exists a specific set of assumptions in which this seeming "allotment" of liabilities solution is correctly reached. Thus, there are cases in which one cannot state that it is exclusively one of the intervening parties (victim or author) that is responsible for the produced damage. In this regard, it may be thought that from the view of the physical consequences concerning this subject matter, these legal solutions should be positively evaluated, at least with respect to a specific set of cases.

We can conclude this brief essay of the traditional approaches with the confirmation that what is forbidden in the main entrance of the home is permitted at the back door: we must also bear in mind the victim's behavior to mitigate or exclude the wrongfulness of the causer's behavior. As it seems obvious, such a doctrine does not talk about its actions and therefore affects its legal safety: it should be replaced by a more coherent theory. Next, I offer in a short thesis a proposal to this aim.

IV. A Proposal: The Imputation to the Victim's Liability Domain on the Basis of the Self-liability Principle

1. *Foundations: the Principle of Self-Liability*

Personal freedom is a foundational structure in our societies; it implies the right of every citizen to develop his or her personality freely. This right cannot be understood outside a system that acknowledges citizens as autonomous individuals. In addition to the adjudication of each individual's autonomy, a special place should be assigned to the person whose interests are protected by criminal law. Given, first, that criminal law imposes no restrictions on the sacrifice of such interests by their owner, and second, that the acts of third parties in self-endangering or self-harming activities are only incriminated in exceptional circumstances (as it is the case in most countries with

50. See MANUEL CANCIO MELIÁ, CONDUCTA DE LA VÍCTIMA, *supra* note 4, at 130, 345.

aiding a suicide), then it is up to the owner of those interests to behave in such manner that his own interests are eventually put at risk. The consequence of such freedom is that this person should assume, in a *preferential way*, the negative outcome of his own behavior. The special link that binds the person with his or her own interests is more intense than any link to the interests of others and implies a dynamic connection between the freedom to act and liability for the outcome of one's acts. The opposite would mean denying this person's organizational freedom and would impose on the other people a sort of "guardian" duty that is not specifically defined in the law and therefore does not exist.

The self-liability principle consists in acknowledging freedom to organize one's own interests and, in correspondence with it, in attributing a "preferential" liability to the person whose interests are involved.⁵¹ Which outlines can be excerpted from the duality autonomy/liability for the criminal law theory and practice? Let me answer not with many case studies, but with a few abstract theses.

2. *Unilateral Approaches Do Not Work*

The vast majority of legal commentators in continental discussion try to solve the problem of victim behavior with the help of the institution of *consent*. This approach does not lead to satisfactory results. The application of the institution of consent (we must look for a general solution, fitting also to *endangerment* offenses, not only to *result* offenses), even by the "minor consent" implied in "assumption of risk" schemes, fails due to the practical impossibility of proving consent and to the denaturalization of the institution itself to which such deformations lead. This is just a consequence of the idea that mental diagnosis cannot be the decisive element in solving the problem, and this affects all theoretical proposals embracing any kind of principle of consent as their basic element. It only leads to a partial image of the whole spectrum of consequences which may be caused by victim behavior. Criminal law imputation can by no means solely take into consideration one of the conscious per-

51. See MANUEL CANCIO MELIÁ, *CONDUCTA DE LA VÍCTIMA*, *supra* note 4, at 261; Manuel Cancio Meliá, *Victim Behavior and Offender Liability*, *supra* note 4, at 529.

spectives. A definition of the offender's liability domain has to be reached, and this definition cannot depend simply on what the victim knows or doesn't know, whether she consents or not.⁵²

Another frequent approach discussed recently in Europe distinguishes between (1) "self-endangering" (i.e., putting oneself at risk), which is, following this construction, *not* subject to punishment, and (2) "endangering someone else" (i.e., putting others at risk), which would deserve punishment. This distinction has become common ground in the subject not only in Germany, but also in other countries. An analysis of both theory and practice of this distinction approach reveals that the whole classification is to be called into question, and that the distinction becomes too often a mere *topos* and fails to provide adequate solutions. In the end, classifying the event as "self-endangering" or as "endangering someone else" should not pre-judge the solution.⁵³

Finally, points of view introducing the "deserving protection" idea through the so-called "victimological principle" also have to be rejected. The intent to develop a "victimological perspective" in the legal doctrine has serious inconveniences. Some argue that it could open the door to an inversion of the penal system or "blaming the victim." This is the consequence of the lack of an adequate normative basis. It is not possible to obtain normative solutions in criminal law just on the ground of factual possibilities of self-protection. The mere invocation of the victimological doctrine perspective cannot solve the problem of the influence of victim behavior within the criminal imputation system. We may argue that before the denomination was even invented, a "victimological" doctrine already existed in different institutions of the offense theory. Putting it differently,

52. See MANUEL CANCIO MELIÁ, *CONDUCTA DE LA VÍCTIMA*, *supra* note 4, at 147, 164, 175; Manuel Cancio Meliá, *Victim Behavior and Offender Liability*, *supra* note 4, at 522.

53. See MANUEL CANCIO MELIÁ, *CONDUCTA DE LA VÍCTIMA*, *supra* note 4, at 179, 207; Manuel Cancio Meliá, *Victim Behavior and Offender Liability*, *supra* note 4, at 522-24 (for a critique). For a theory similar to the endangerment solution, see DUBBER & KELMAN, *supra* note 37, at 422.

it is not necessary to create a special *victim* doctrine; the existing doctrine should be able to solve the problem.⁵⁴

3. *The Imputation to the Victim's Liability Domain*

Risky activities should be imputed to the victim's liability domain whenever (1) the action remains within the domain of what was organized jointly by victim and offender, (2) the victim's behavior was not instrumentalized by the offender (i.e., he did not take advantage of the victim's lack of sufficient knowledge to be considered self-liable), and (3) the offender does not have a specific duty to protect the victim's interests.⁵⁵

Once the mutual activity of offender and victim is defined, the act should be imputed, at first, to the victim's liability domain. The reason for this is that the victim's sphere of autonomy results in a preferential harm allocation to his own liability domain. Taking into account the preferential nature of victim liability, harm allocation cannot follow the same guidelines that determine different degrees of liability for principals and accessories due to the commission of an offense against a third party. Once it is stated that the risky activity is a consequence of the interaction between victim and offender, the joint activity cannot be fragmented into contributions of greater or lesser range depending on either.⁵⁶

Once the joint performance of victim and offender is defined, the imputation of that performance to the victim's liability domain can be framed in *objective* terms. This is due to a special feature in this type of case: the interaction between offender and victim. Victim and offender create the risk together. From this perspective, there is no use in questioning the offender's or the victim's thought processes. Thus, the horizon that is relevant to confirm or deny criminal liability of the perpetrator is given by the joint performance (i.e., through an ob-

54. See MANUEL CANCIO MELIÁ, CONDUCTA DE LA VÍCTIMA, *supra* note 4, at 221, 242; Manuel Cancio Meliá, *Victim Behavior and Offender Liability*, *supra* note 4, at 526-27.

55. See MANUEL CANCIO MELIÁ, CONDUCTA DE LA VÍCTIMA, *supra* note 4, at 284; Manuel Cancio Meliá, *Victim Behavior and Offender Liability*, *supra* note 4, at 532.

56. See MANUEL CANCIO MELIÁ, CONDUCTA DE LA VÍCTIMA, *supra* note 4, at 287; Manuel Cancio Meliá, *Victim Behavior and Offender Liability*, *supra* note 4, at 533.

jective perspective). Why? Because according to the interactive structure of these cases, these events can be properly classified if, and only if, the common perspective of victim and offender is introduced: just because the victim decides to go ahead regardless of a risk, we may not conclude that the other person behaves unlawfully.⁵⁷

The concept of joint organization must not hide a “versari in interactio” for the victim (i.e., a kind of “strict liability” or “versari in re illicita”). It is not a process of “blaming the victim.” Of course, a joint organization does not exist when we are dealing with merely statistical risks, even if these are very high and known to the victim. A person who goes for a walk in a forest in which it is commonly known that a gang of poachers use their shot-guns with great negligence should not assume the risk of a firearm wound. A woman does not consent to rape if she invites a man, known for his incorrect behavior, for dinner. In all these cases there is no jointly organized risk activity. Nor is there when the offender’s behavior introduces an additional element into the common context or when the situation itself somehow contains a risk factor that does not belong to the joint organization. Finally, we cannot consider that the harm is within the victim’s liability domain whenever the joint organization has a task distribution that implies controlling certain risk elements where one of those elements harms the victim.⁵⁸

Let me finish these reflections by coming back to our citizen C, possible perpetrator and victim of different offenses (if the different risks were to end up badly). From my point of view, all his activities on day X are irrelevant. There is no criminal wrongfulness in the risks he sets. Nor does he suffer jointly with the other intervenists. This statement might hopefully summarize our debate.

57. See MANUEL CANCIO MELIÁ, *CONDUCTA DE LA VÍCTIMA*, *supra* note 4, at 289; Manuel Cancio Meliá, *Victim Behavior and Offender Liability*, *supra* note 4, at 535.

58. See MANUEL CANCIO MELIÁ, *CONDUCTA DE LA VÍCTIMA*, *supra* note 4, at 292, 310; Manuel Cancio Meliá, *Victim Behavior and Offender Liability*, *supra* note 4, at 539.