The theory of crime in Latin America and the influence of the European theoretical tradition

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Abstract 1

The reception of European theory of crime in Latin America is often taken to be the history of thought on the so-called General Part of Criminal Law itself. This essay presents an overview of the theory of crime in Latin America, taking the influence of the European tradition into particular account. We will go through the different historic phases of this development, from the first half of the 20th century up to our time.

I. Introduction

In much of Latin America, Criminal Law is taught in universities and dealt 2
with in the courts on the basis of concepts that have been inherited – transplanted, so to speak[1] – from continental European and particularly German thought. Elements of the offence (*Tatbestand*), wrongfulness and culpability are concepts shared from Argentina to Mexico – a fact that requires explanation, especially to English-speaking readers, who are less familiar with this kind of consensus.

After some preliminary considerations, which will specify the objective 3
of the present paper (below, II.), this article will attempt a panoramic description of the theory of crime in Latin America that pays particular attention to the influence of the European theoretical tradition (III.).

II. Preliminary considerations: the objective of the present paper

This paper does not intend to offer an exhaustive overview of Latin Amer- 4
ican criminal law scholarship. There are several reasons for this. For one, no

1 See Watson, *Legal Transplants* (2nd edn, Athens/London 1993).

proper Latin American theory of crime exists.[2] The theory of crime that is taught and used in Latin America is, in large part, European theory, mainly Italian, Spanish and German in origin; accordingly, speaking of a Latin American theory of crime to a large extent means referring to the reception and adaptation of European theories of crime.

5 It would be equally inappropriate to speak of a theory of crime (even a European one) in Latin America. The geographical and cultural unit "Latin America" does not correspond to a single, unified scientific sphere. The virtually non-existent language barrier between Latin American countries does not necessarily lead to scientific exchange; an article published in one country may not resonate in another. If we are not to end up with a vast and messy mosaic, we cannot avoid making a selection – in full awareness that that this selection will never be completely fair. At any rate, we have thus decided to give greater prominence to Argentina, Brazil, Chile, Colombia and Peru.

6 Accordingly, this paper will attempt a synthesis: we will try to sketch a panorama, focusing on the said countries, even if this entails generalizations that will not completely satisfy those who better understand the context of a certain country.

7 Moreover, we are not concerned with criminal law as a whole, but only with the so-called theory of crime, i.e., the field referred to as *Straftatlehre* or *teoría del delito*, which sets out the general conditions that have to be satisfied so that an act may be considered criminal by the respective adjudicator.

III. The theory of crime in Latin America and the influence of the European theoretical tradition

1. Origins

8 Latin American theory of crime is not the product of a spontaneous parthenogenesis, but, as pointed out above, emerged under the influence of the European tradition. From the 19th century onwards, a growing influence of German theory can be detected, mostly by way of Spanish contri-

2 For some notable exceptions, see fn. 124 ff.

butions.[3] Italy exerted considerable sway, too, especially up until the first half of the 20th century, but its significance has since waned, while Spanish criminal-law doctrine is now more dominant. The impact of Portuguese criminal law is minor and limited to Brazil. French and English-language doctrine remains quite marginal.

German theory's influence on the development of Latin America's theory of crime is visible primarily in the reception of the tripartite structure of the crime – elements of the offence (*Tatbestand*), wrongfulness and culpability – stemming from the writings of von Liszt and Beling, to the detriment of the French/Italian and Anglo-American (actus reus, mens rea) distinction between objective and subjective elements. 9

2. Development

We now move on to a panoramic description of the reception of these theories.[4] Roughly speaking, we can distinguish three periods: the first, lasting from the early 20th century to the 1970s, which we will call the technical-legal causalist synthesis; a second, lasting roughly from the 1970s to the 1990s, which sees the reception of finalist thinking; and, most recently, from the 1990s onwards, a period in which the debate concerning functionalism has come to the fore, but which has also given rise to alternative perspectives. 10

a) The Latin American technical-legal causalist synthesis

Accounts of the history of the modern theory of crime often start with the causal-naturalist system[5] established under the influence of Beling and von Liszt. In this system, the theory of crime is based on empirical, value-free criteria. The basic distinction is, therefore, between the objective and the subjective: objective elements pertain to the elements of the offence, while subjective ones concern culpability. This means that the elements 11

3 Matus Acuña, 'Por qué citamos a los alemanes y otros apuntes metodológicos' [2008] Política Criminal 32.

4 For a more detailed account Ambos, '100 Jahre Belings „Lehre vom Verbrechen": Renaissance des kausalen Verbrechensbegriffs auf internationaler Ebene?' [2006] ZIS 464; Spanish version available here: http://criminet.ugr.es/recpc/09/recpc09-05.pdf.

5 Roxin/Greco, *Strafrecht Allgemeiner Teil* (5th edn, Munich 2020) § 7 mn. 14.

of the offence contain objective and descriptive elements only; culpability comprises intent and negligence (psychological concept of culpability). Naturalism was succeeded by neo-Kantianism[6], which advocated reorienting the system according to a value-based method; the work of Mezger[7] is particularly relevant here. This method did not lead to a complete revision of the theory of crime, but relativised the content of each systematic category: the elements of the offence were complemented, albeit only in exceptional cases, by subjective and normative elements; culpability, for its part, began to be understood as a judgement expressing disapproval (psychological-normative concept of culpability).

12 The reception of these German development in Latin America can be situated historically in the period from the first half of the 20th century until the 1960s and 1970s. This reception took place in a distinctive way, however.

13 (1) First of all, it is possible to say that in Latin America both naturalist and neo-Kantian perspectives arrived in an already amalgamated form. One could use the rubric of "causalism" to denote them – a term that strictly speaking is pejorative, coined by a later generation of theorists (who referred to themselves as finalists).[8] The philosophical foundations on which the two perspectives were based attracted less attention; we do not know of any Latin American criminal law scholar who declared himself *neo-Kantian*, even if he was an ardent follower of Mezger. In Latin America, unlike in Germany in the second and third decade of the 20th century, the Liszt-Beling model was not replaced by the neo-Kantian system.

14 This philosophical parsimony is also evident, albeit to a lesser extent, with regard to naturalist thinking. It is true that, from the 19th century onwards, there was a strong empiricist-naturalist-positivist movement in Latin American legal scholarship, which was infused with the same spirit that had birthed the Liszt-Beling system. However, the authors of the 20th century, even though many of them were self-proclaimed positivists, pursued this approach not so much because they believed in naturalist empiricism but rather because they did not believe in natural law. Liszt's positivism was a scientific positivism, a thesis on the meaning of science, holding that this science should be understood as an activity with an empiricist-naturalist

6 Roxin/Greco (n 5) § 7 mn. 16.

7 Especially Mezger, *Strafrecht. Ein Lehrbuch* (3rd edn, Berlin 1949).

8 For an example see Zaffaroni, 'Acerca del concepto finalista de la conducta en la teoría general del delito' [1982] Nuevo Foro Penal 982.

bent; the positivism of Latin American theory of crime is, in general, a legal, formal positivism, a thesis solely about legal science, which should be limited to the statutes as they stand or to reflections of a logical-structural nature. In general, the Latin American advocates of scientific positivism were not interested in the theory of crime, but rather in the issues on the agenda of the then incipient movement of penological positivism, as represented by the influential Italian *Scuola Positiva*[9]: classifications of offenders and sanctions (in particular, the call for alternative sanctions[10] and indeterminate sanctions).

(2) Secondly, the reception of the German theories coincides with a huge interest in developments in Italy, especially regarding the movement that became known as *tecnicismo giuridico*, associated with names such as Rocco[11] and Manzini[12]. The central thesis of this movement is that crime is a legal-positive entity, a view that entails a rejection of both naturalism (be it biological, psychological or sociological – such as the naturalism defended by the followers of the *Scuola Positiva*) and idealism (paradigm: the so-called *Scuola Classica*[13]), as well as of any more political kind of attitude. This movement's theorisation of crime is actually a theorisation of positive law. The legal-technicist movement thus provides a theoretical framework that serves to justify a lack of interest in fundamental questions.[14] This lack of interest should not be seen as a purely negative affair; it also offered a way to escape the dangerousness positivism that was more prominent in Latin America than in Germany thanks to the Italian influence. To put it crudely: the naturalist Liszt did criminal law theory (*Dogmatik*); the naturalist Ferri did not. To do Dogmatik (mainly German), even taking a (legal-)positivistic approach, amounted to leaving dangerousness positivism[15] behind.

9 Ferri, *La scuola positiva di diritto criminale* (Siena 1883).

10 Ferri, *Dei sostitutivi penali* (Torino 1880).

11 Rocco, 'Il problema e il metodo della scienza del diritto penale' in *Opere Giuridiche* (Roma 1933, first published in 1910) 263.

12 Manzini, *Trattato di Diritto penale italiano* vol I (5th edn, Torino 1981; first published in 1908).

13 For reference Carrara, *Programma del corso di diritto criminale*, *Parte Generale* (3rd edn, Lucca 1867).

14 Donini, (2011) 7 Nuevo Foro Penal 51.

15 For a similar account focusing on Argentina, Bacigalupo, 'Welzel y la generación argentina del finalismo' in Hirsch/Cerezo Mir/Donna (ed.), *Hans Welzel en el pensamiento penal de la modernidad* (Buenos Aires/Santa Fé 2005) 15, 25; Zaffaroni/Croxatto, (2014) 22 Rechtsgeschichte – Legal History 203.

16 (3) Accordingly, the criminal-legal theory found in Latin America in the period in question seems most aptly designated by the term *technical-legal causalist synthesis*, which we use as the title of this section.

17 We now move on to some key figures of this era. Any account of Latin American criminal theory must reserve a place of honour for the Spaniard Jiménez de Asúa[16], who went into exile in Argentina in 1939 after fleeing the Franco dictatorship. It seems to have been Asúa, who translated von Liszt[17], and thus was the first in the Latin American context to adopt the tripartite concept of crime. In Brazil, pride of place must go to Hungria[18], Bruno[19] and the young Fragoso[20]; in Argentina, the outstanding figures are Soler, who not only wrote the seminal textbook of his generation[21], but also dedicated a critical monograph to dangerousness positivism[22], as well as Nuñez[23] and Fontán Balestra[24]. In Chile[25], we should mention[26] del Rio[27],

16 Jiménez de Asúa, *La Teoría Jurídica del Delito* (Madrid 2008, originally 1931); for an impressively detailed account, Jiménez de Asúa, *Principios de derecho penal. La ley y el delito* (3rd edn, Buenos Aires 1958); and *Tratado de Derecho Penal* (8 volumes), especially vol. III (5th edn, Buenos Aires 1965) – the most impressive criminal law treatise to date in any language.

17 Cf. n 41.

18 Hungria/Fragoso, *Comentários ao Código Penal*, vol. 1 Tomo II (5th edn, Rio de Janeiro 1978) 9, 25.

19 Bruno, *Direito Penal Parte Geral, Tomo I* (Rio de Janeiro 1978), 296, 306; *Tomo II* (Rio de Janeiro, 1978) 32. Revisting Bruno's opus Ambos/Sousa Mendes, eds., *O passado e o futuro na teoría do delito de Anibal Bruno* (Sao Paulo 2017).

20 Fragoso, *Conduta punível* (São Paulo 1961) 176, 201.

21 Soler, *Derecho Penal Argentino* (5th edn, 10th print, Buenos Aires 1992) 275 (1st edn 1940).

22 Soler, *Exposición y crítica de la teoria del estado peligroso* (Buenos Aires 1929).

23 Nuñez, *Derecho penal argentino, Tomo I, Parte General* (Buenos Aires 1959) 230; *Manual de Derecho Penal* (5th edn, updated by: R. Spinka, Córdoba 2009) 119 (1st edn 1972).

24 Fontán Balestra, *Tratado de Derecho Penal, Parte General*, (2nd edn, Buenos Aires 1995) 440; vol. II, 247 et seq., 275 et seq. (1st edn 1966); *Derecho Penal, Introducción y Parte General* (Buenos Aires 1998) 181, 315. Frias Caballero/Codino/Codino, *Teoría del delito* (Buenos Aires 1993) 131, 368, 387.

25 Ambos (n 4) 469.

26 Matus Acuña, *Evolución histórica de la doctrina penal chilena desde 1874 hasta nuestros días* (Santiago, 2011) 83; Carnevali, 'La ciencia penal italiana y su influencia en Chile' (2008) 6 Política Criminal 1.

27 *Manual de derecho penal* (Santiago 1947) 93.

Ortíz Muñoz[28], Fontecilla[29], and Novoa Monreal[30]; in Colombia[31], Gaitán Mahecha[32], Pérez[33], Soto[34], Ruiz[35], and Reyes Echandia[36]; and in Peru, Peña Cabrera[37] and the young Hurtado Pozo[38].

The many important translations of German writings[39] represent a mile- 18
stone in the reception of European theories. Von Liszt's German Treatise on Criminal Law was published in Portuguese in 1899, translated by José Higino[40], and in Spanish in 1909, translated by Quintiliano Saldaña and Jiménez de Asúa.[41] Both *Grundzüge des Strafrechts* and *Lehre vom*

28 Ortíz Muñoz, *Nociones Generales de Derecho Penal, Tomo II* (Santiago 1937) 17.

29 We did not access any of this author's works; for reference, see Matus Acuña, 'Origen, consolidación y vigencia de la Nueva Dogmática Chilena (ca. 1955–1970)' (2016) 10 Revista Penal México 109.

30 Novoa Monreal, *Causalismo y finalismo en derecho penal* (2nd edn Bogotá 1982). Also the important *Curso de Derecho Penal Chileno*, tomo I (3rd edn, Santiago 2005). Revisiting Novoa's opus Ambos/Guzmán Dalbora, eds., *Derecho y Cambio Social Estudios Críticos en Homenaje a Eduardo Novoa Monrea* (Santiago de Chile 2018).

31 For other developments that we will address, cf. the instructive work of Sánchez Zapata, 'La conducta punible en el Derecho Penal colombiano' (2014) 42 Revista de Derecho Universidad del Norte 33.

32 Gaitán Mahecha, 'El Derecho penal conforme a las concepciones modernas' (1983) 19 Nuevo Foro Penal 331 (re-publication of a pioneering work first published in 1953 that does not develop a real system of concepts); *Curso de Derecho Penal General* (1st edn, Bogotá 1963).

33 *Tratado de derecho penal, tomo I* (Bogotá 1967) 461, calling his perspective "pure legal theory", indicating the technicist influence.

34 Romero Soto, *Derecho Penal, Parte General, vol. I* (Bogotá 1969) 231; vol. II 61, 131.

35 Ruiz, *La Concepción del delito en el Código Penal* (Bogotá 1983) 15; *Teoría del hecho punible* (Bogotá 1980) 67.

36 Reyes Echandía, *Derecho Penal* (11th edn, Bogotá 1987) 91, 206 (1st edn 1964).

37 Peña Cabrera, *Derecho penal peruano. Parte general* (Lima, s/f, 1977), 187; the volume *Tratado de Derecho Penal, Estudio Programatico de la Parte General* (3rd edn, Lima 1997), posthumously published and updated by a group of Peña Cabrera's disciples, adopts an eclectic systematics. On the author, also cf. Cabrera Freire et al (ed.), *Libro homenaje al professor Raúl Peña Cabrera*, Vol. I-II (Lima 2006).

38 Hurtado Pozo, *Manual de Derecho Penal. Parte General* (Lima 1978) 199; on the author, cf. Prado Saldarriaga (ed.), *Libro homenaje al Profesor José Hurtado Pozo. El penalista de dos mundos* (Lima 2013).

39 Bacigalupo, 'La recepción de la dogmática penal alemana en España y Latinoamérica' (2019) 2 InDret 1, 5.

40 v. Liszt, *Tratado de Direito Penal Allemão*, Tomo I (Rio de Janeiro 1899) (translated from the 7th German ed.).

41 v. Liszt, *Tratado de Derecho Penal Alemán*, (Madrid 1909); Bacigalupo (n 39), 2 begins his study on the reception of German dogmatics with this translation.

Verbrechen by Beling were translated into Spanish by Soler[42]. Rodríguez Muñoz' Spanish translation of Mezger's *Lehrbuch* was published in 1935; the translation also contained valuable footnotes, which definitely contributed to the fact that this work remained state of the art for decades.[43] Italian works have not been translated to the same extent, mainly because they are more easily accessible in their original language.[44]

b) Latin American finalism

From the 1970s onwards, German finalism began to arrive in Latin America. This occurred at a time when the interest in Italian doctrine – in which Bettiol had become a leading figure – was waning and when Spain, too, was resolutely turning its attention to Germany.

aa) German finalism

19 Finalism can be conceptualised on two levels – a more fundamental one, which concerns its philosophical, ontological and methodological premises, and a more concrete one, which concerns its tangible dogmatic consequences.

20 At the fundamental level, finalism claims that aspects of reality, such as the final structure of human action or human freedom as the power-to-act-differently, bind any legislator setting out to regulate this reality.[45] A legislator who attempts to achieve a certain goal ignoring these logical-real structures (*sachlogische Strukturen*), by prohibiting or commanding phe-

42 Beling, *Esquema de Derecho penal. La Doctrina del Delito-Tipo*, (Buenos Aires 2002, first published 1944).

43 Mezger, *Tratado de Derecho Penal, 2 vols.* (2nd edn, Madrid 1946); also the translation of Studienbuch by Finzi: Mezger, *Derecho Penal. Libro de estudio, Parte General*, (Buenos Aires 1958).

44 Nonetheless, some textbooks are frequently cited: Maggiore, *Derecho penal, Parte General*, transl. J. Ortega Torres (Bogotá 1971); Bettiol, *Direito penal, vol. 1*, transl. Costa Júnior/Silva Franco (São Paulo 1977).

45 Welzel, 'Naturalismus und Wertphilosophie im Strafrecht', in *Abhandlungen zum Strafrecht und zur Rechtsphilosophie* (Berlin-New York 1975) 29, 79.

nomena other than/different from final actions, will fail. Any such attempt would necessarily be "inadequate, contradictory and flawed".[46]

At the more concrete level, finalists derive from their fundamental claim 21
a whole series of consequences for the theory of crime, seven of which are worthy of particular mention.[47] (1) The defence of a determined concept of action – action as the exercise of final (ends-focused) activity. (2)The repositioning of intent (as well as negligence) in the definitional elements of the offence (*Tatbestand*). (3)The enabling of a "normative" culpability – intent and negligence cease to incorporate culpability, which loses its so-called psychological component and becomes purely normative. (4) intent is a "natural intent", not a *dolus malus*; it does not presuppose knowledge of wrongfulness, and the latter matters only to culpability (called the theory of culpability, Schuldtheorie). (5) The presence of objective grounds of justification is not enough to undermine wrongfulness; a subjective element is also required. (6) There are only two types of mistakes, mistakes regarding an element of the offence and mistakes of law, and that the erroneous assumption of the existence of objective (factual) grounds of justification is a mere mistake of law that does not affect intent (called the strict theory of culpability). (7) The perpetrator is the one who has (final) control over the act (Tatherrschaft). It is noted that most of these consequences – the second to the fourth – relate, in a very evident manner, to intent; so does the sixth consequence, strictly speaking, albeit in a less obvious way.

bb) The reception of finalism

Although the number of outstanding authors calling themselves finalists is 22
proportionally greater in Latin America than in Germany (where the finalists have always remained a minority), the complex development described was absorbed and adopted only in part. The more profound (philosophical) dimensions of finalism had considerably less impact.[48] Likewise, the seven consequences or claims identified above did not achieve reception

46 Welzel, *Aktuelle Strafrechtsprobleme im Rahmen der finalen Handlungslehre* (Karlsruhe 1953) 4 (sachwidrig, widerspruchsvoll und lückenhaft). Transl. by authors.

47 See, without any identification of these theses, but with multiple references to their supporters, Cerezo Mir, 'La influencia de Welzel y del finalismo, en general, en la Ciencia del Derecho penal española y en la de los países iberoamericanos' [2009] ZIS 203.

48 Zaffaroni, 'Qué queda del finalismo en Latinoamérica?' in *En torno de la cuestión penal* (Buenos Aires/Montevideo 2013) 131. In Argentina, Zaffaroni/Croxatto (n. 15)

across the continent. To limit ourselves to the example of Brazil, their reception was initially limited to the first five consequences, that is, to the concept of action and to those that we identified as referring to intent. It was the adoption of these five claims – final action, intent as an element of the offence, intent as outside the framework of culpability, "natural" intent, subjective grounds of justification – that made someone as a finalist.

23 To mention some authors: in Brazil, the writings of Mestieri[49], Reale Jr.[50], Dotti[51], Fragoso[52], Luisi[53], Jesus[54], Assis Toledo[55] and Bitencourt[56] are relevant in this regard. In Colombia, we can refer to Agudelo Betancur[57] and Estrada Vélez[58], and in Peru the young Villavicencio Terreros[59]; in

201. This seems to have been the case for the Spanish origin, Bacigalupo (n 39) 15 – making an important distinction in respect to Cerezo Mir (for an autobiographical account of the latter, cf. Cerezo Mir (n. 47) 202).

49 Mestieri, *Manual de Direito Penal*, vol. 1 (Rio de Janeiro 1999) 112, 158.

50 Reale Júnior, *Dos estados de necessidade* (São Paulo 1971), 5; recently *Fundamentos de Direito Penal* (5th edn, Rio de Janeiro 2020) 101. The author defends the thesis – hardly compatible with finalism – that imputability is also an element of action.

51 Dotti, *O Incesto* (Curitiba 1976) 85.

52 Fragoso, *Licões de Direito Penal Parte Geral* (5th edn, Rio de Janeiro 1983, 1st edn 1976) 152.

53 Luisi, *O tipo penal, a teoria finalista e a nova legislação penal* (Porto Alegre 1987) 37.

54 Jesus, *Parte Geral* (31st edn São Paulo 2010) 7, 273.

55 Assis Toledo, *Princípios básicos de direito penal* (5th edn, São Paulo 1994) 83, 95, 271, 286.

56 Bitencourt, *Erro de tipo e erro de proibição* (3rd edn, São Paulo 2003) 8, 69.

57 Agudelo Betancur, 'Diversos contenidos de la estructura del delito' (2016) 1 Nuevo Foro Penal 1 (in spite of the fact that the author indicates the need to respect certain ontological structures, e.g., p. 20 note 51); *Curso de Derecho Penal (Esquemas del delito)* (3rd edn (reprint), Bogotá 2004, 1st edn 1992) 52 (1st edn 1992).

58 Estrada Vélez, *Derecho Penal, Parte General* (Bogotá, 1981) who defends a finalist concept of action (p. 95), but leaves intent and negligence as elements of culpability (p. 299 et seq.).

59 Villavicencio Terreros, *Lecciones de derecho penal. Parte general* (Lima, 1990), p 120 et seq., p. 198.

Argentina[60] the young Bacigalupo[61]; in Chile[62] Etcheberry[63], Montt[64] and the young Bustos Ramírez[65]. While it may legitimately be asked whether Latin American finalism is a true and "profound" finalism or only a "shallow" one, we should remember that in Germany, too, the second great finalist school, that of Maurach, did not commit itself fully to the most fundamental premises defended by Welzel either.

There are, however, notable exceptions to this philosophical parsimony: 24
Cury Urzúa[66] in Chile and the young Zaffaroni[67] in Argentina. The latter initially published a theory of crime, which was followed by an impressive *Tratado de Derecho Penal*[68]; the theory of crime ended up being translated into Portuguese (and adapted to Brazilian law) two decades later, exerting great influence.[69] Zaffaroni fully accepted the finalist approach, both at the level of its ontological-methodological foundation and at the level of its doctrinal consequences. Nonetheless, his reception of finalist thinking was marked by several innovations, among which we highlight Zaffaroni's

60 Zaffaroni, *Tratado de derecho penal*, *vol. 3* (Buenos Aires 1980) 39; in greater depth, Bacigalupo (n 15); Righi, 'La influencia de Welzel en la evolución del Derecho Penal argentino' in Hirsch et al (eds.), *Hans Welzel en el pensamiento penal de la modernidad* (Buenos Aires/Santa Fé 2005) 15, 223.

61 Bacigalupo, *Culpabilidad, dolo y participación* (Buenos Aires 1966) 23, 35; *Tipo y error* (Buenos Aires 1973) 42, 69; *Lineamientos de la teoría del delito* (Buenos Aires 1974) 7. During the last two decades, the author has shifted towards Jakobs' theories. *Derecho Penal, Parte General* (2nd edn, Argentina 1999) 197.

62 On Chilean finalism in greater detail Matus Acuña (n 29) 127.

63 Etcheberry, *Derecho Penal, Tomo I: Parte General* (3rd edn, Santiago 1997) 175 (1st edn 1964).

64 Garrido Montt, *Derecho penal, Parte General, Tomo II*, (4th edn, Santiago 2005) 47.

65 Bustos Ramírez, *Culpa y finalidade* (Santiago 1967) 27. In later works the author proposes a material theory of elements of the offence based on the idea of legal interest (*Rechtsgut*) and the theory of objective imputation. Bustos Ramírez/Hormazábal Malarée, 'Significación social y tipicidade' (1980–81) 5 *Estudios penales y criminológicos* 9, 22, 34; *Lecciones de Derecho Penal*, vol. 2 (Madrid 1999) 21. On the author Hormazábal Malarée, 'Injusto e culpabilidad en el pensamiento de Juan Bustos Ramírez' (2009) LXII Anuario de Derecho Penal y Ciencias Penales 5.

66 Cury Urzúa, *Derecho Penal, Parte General*, (3ª edn Santiago 2011) 259 (1st edn 1982).

67 In Colombia, the studies of Agudelo (n 57) and Villa Alzate, *Fundamentos metodológicos de la nueva teoría del delito*, (Bogotá 1991) 58.

68 Zaffaroni, *Teoría del delito* (Buenos Aires 1973) 73, 95; *Tratado de Derecho Penal, Parte General*, vols. I-V (Buenos Aires 1980) (cited from the 4th reprint of 2000).

69 Zaffaroni/Pierangeli, *Manual de Direito Penal Parte Geral* (São Paulo 1997) (currently in its 14th edn).

anthropological foundation of the science of criminal law[70], and, on a more doctrinal level, the idea of co-culpability.[71]

25 Translations became even more important during this period.[72] The Argentinean Fontán Balestra translated Welzel's textbook as early as 1956[73], and in 1964 a translation of the 4th edition of *Das neue Bild des Strafrechtssystems* was published by the Spaniard Cerezo Mir[74]. The Chileans Bustos Ramírez and Yáñes Pérez translated the last edition of the textbook[75]. The Spanish Córdoba Roda's translation of Maurach's Treatise was also very important[76]; translations of Stratenwerth's textbook (by Gladys Romero[77]) and of Armin Kaufmann's works[78] do not seem to have circulated as widely. The studies of Spanish authors also had an impact – from the critical works of Rodríguez Muñoz, who, as we have seen, translated Mezger[79], to publications by Córdoba Roda[80] and Cerezo Mir[81]. The latter, together with his disciple Gracia Martín[82], had founded an important Span-

70 Tratado, vol. 2, 421.

71 Tratado, vol. 4, 65; another original idea, albeit less relevant, was the so called *tipicidade conglobante*, Tratado, vol. 3, 235, 502. On this, critically, Rusconi, *Imputación, tipo y tipicidade conglobante* (Buenos Aires 2005).

72 Cerezo Mir (n 47) 200.

73 Welzel, *Derecho Penal Parte General* (Buenos Aires 1956) (transl. Fontán Balestra); on the importance of this translation, Bacigalupo (n 15), 16, 27, observing that the book had its title changed, removing the explicit reference to a country (original title: Das *deutsche* Strafrecht), and that Welzel seemed to have written the foreword to the translation with the clear intention of challenging technicism. Also, Welzel, *Estudios de Derecho Penal* (Montevideo 2015) (transl. Eduardo Aboso/Löw).

74 Welzel, *El nuevo sistema del Derecho Penal, Una introducción a la doctrina de la acción finalista* (1964 (transl. José Cerezo Mir).

75 Welzel, *Derecho penal alemán* (Santiago 1976).

76 Maurach, *Tratado de derecho penal* (Barcelona 1962).

77 *Derecho Penal, Parte General I: El hecho punible* (transl. from the 2nd German edn, Madrid 1976).

78 *Teoría de las normas. Fundamentos de la dogmática penal moderna*, transl. Bacigalupo/Garzón Valdés (Buenos Aires 1977).

79 Rodríguez Muñoz, *La doctrina de la acción finalista* (2nd edn 1978, 1st edn 1953); on its importance in Spain Cerezo Mir (n 47) 200); also, 'Consideraciones sobre la doctrina de la acción finalista' [1953] Anuario de Derecho Penal y Ciencias Penales 207; and his notes on finalism in the translation of Mezger (n 43).

80 Cordoba Roda, *Una nueva concepcion del delito. La doctrina finalista*, (Buenos Aires 2014, first published in 1963); *El conocimiento de la antijuridicidad en la teoría del delito*, (Barcelona 1962) 111.

81 Cerezo Mir, *Problemas fundamentales del derecho penal*, (Madrid 1982).

82 Gracia Martín, *Fundamentos de dogmática penal. Una introducción a la concepción finalista de la responsabilidad penal* (Lima 2005).

ish finalist school in Zaragoza, where many subsequent generations of Latin finalists studied.

c) The Latin American debate concerning functionalism

aa) The German context

In Germany, finalism has been succeeded by models that for the most part accept the concrete doctrinal claims defended by this approach (apart from the concept of action and the strict theory of culpability), but that question its fundamental premise that the legislator and Dogmatik are subject to certain structures of reality. The approaches that do not limit themselves (negatively) to this sceptical attitude, but instead (positively) propose to reconstruct the theory of crime based on the purposes or functions of criminal law, can be referred to as functionalism.[83] As is well known, the most prominent functionalist German authors are Roxin, Schünemann and Jakobs.[84] It is common to differentiate between the so-called "teleological functionalism" established by Roxin and the "systemic or normativist functionalism" that follows Jakobs' school of thought. Of the many differences between these two perspectives, two in particular are worth highlighting, the first substantial and the second methodological. While Roxin's approach understands the ultimate purpose of criminal law to be the protection of legal interests (Rechtsgüter), Jakobs sees criminal law as reaffirming the validity of the violated norm. As far as method is concerned, Jakobs' approach is decidedly normativist, that is, it denies any relevance to empirical facts (which it disqualifies as "naturalisms"), while Roxin's perspective recognizes from the outset an imperative to take into account the "legal matter" (*Rechtsstoff*), the "resistance of the thing" (*Widerstand der Sache*) or even some logical-real structures (albeit with less emphasis than the finalists did). 26

bb) The Latin American debate

It is interesting to note that, unlike in previous periods, where the reception process seems to have been understood as a process of updating – being a 27

83 For a panorama Roxin/Greco (n 5) § 7 nm. 57.
84 On the works by these three authors, see fn. 87 ff.

finalist in 1980–1990 was less a matter of opinion than of not being out of date – functionalism was received enthusiastically by some and met with resistance by others. This resistance, as well as the developments to which it gave rise, deserve our attention.

28 There are other noteworthy differences, too. While in previous generations the reception of foreign theory primarily took place indirectly, through books and translations, an emerging generation of Latin American scholars now began to travel to Germany in order to study under the great masters in person – which does not mean, however, that the indirect reception of German theories lost its relevance. One key route of transmission of "German functionalism" to the Latin American world seems to have been the monograph *Aproximación al derecho penal contemporáneo* by the Spaniard Silva Sánchez.[85]

29 Jakobs' thought[86] became popular in Latin America first and foremost through professors linked to the *Universidad Autónoma de Madrid*, including the bilingual Cancio Meliá, who tirelessly translated numerous works by Jakobs[87]. Jakobs' textbook was translated by Cuello Contreras and González de Murillo[88]. Jakobs had many Latin American disciples: in Peru (Caro John[89]), in Chile (van Weezel[90]) and in Colombia (Montealegre Lynett[91], Perdomo Torres[92], Reyes Alvarado[93]), and his indirect influence was even greater, mediated by Spanish authors close to Jakobs (such as

85 Silva Sánchez, *Aproximación al derecho penal contemporáneo* (Barcelona 1992) 67 ff.

86 Silva Sánchez, 'La influencia de la obra de Günther Jakobs en el espacio jurídico-penal hispanohablante' (2019) 1 InDret.

87 Jakobs, *Estudios de Derecho Penal* (transl. Peñaranda/Suárez González/Cancio Meliá) (Madrid 1997), gathering the most important studies published up to that point by the German author, as well as an enlightening introduction by the three translators, whose importance in the dissemination of Jakobs' work is immense; also Peñaranda Ramos, 'Sobre la influencia del funcionalismo y la teoria de sistemas en las actuales concepciones de la pena y del delito' in Díaz y García/García Amado (ed.), *Estudios de filosofia del derecho penal* (Bogotá 2006) 231.

88 *Derecho Penal, Parte General* (2nd edn, Madrid 2003).

89 Caro John/M. Polaino-Orts, *Derecho penal funcionalista: aspectos fundamentales* (México D.F. 2009).

90 *Límites de la imputación penal. Estudios 2000–2010* (Bogotá 2011).

91 Montealegre Lynett/Perdomo Torres, *Funcionalismo y normativismo penal. Una introducción a la obra de Günther Jakobs* (Bogotá 2006).

92 Perdomo Torres, *Posición de garante en virtude de confianza legítima especial* (Bogotá 2008).

93 Reyes Alvarado, *Imputación objetiva* (3rd edn, Bogotá 2005; 1st edn, Bogotá 1992); *El delito de tentativa* (Montevideo/Buenos Aires 2016).

Silva Sánchez, who influenced the Argentinean Palermo[94] and the Chilean Piña Rochefort[95]; or Polaino Navarrete[96] and his son, Polaino-Orts[97]). Special mention is due to the Argentinean Sancinetti, who tried to develop a theory of crime based on the act, according to which the prototype of the crime was the completed attempt, following more rigorous finalists such as Zielinski[98], but relying not on finalist premises, but (predominantly) on Jakobsian ones. The very distinction between direct and indirect followers is blurry, since most of those we have just qualified as "indirect" disciples undertook research visits to Jakobs' department.

The influence of Roxin – and of his great disciple Schünemann, both based in Munich – was also transmitted by the most influential Spanish authors of the last quarter of the 20th century, such as Luzón Peña[99], Gimbernat[100], Muñoz Conde[101] and Mir Puig[102]. All accept the basic premises

94 Omar Palermo, *La legítima defensa: una revisión normativista* (Barcelona 2006) especially 209.

95 Piña Rochefort, *Rol social y sistema de imputación* (Barcelona, 2005).

96 Polaino Navarrete, *Derecho Penal, Parte General* (5th edn, Barcelona 2004) 38.

97 Polaino-Orts, *Funcionalismo normativo* (México D.F. 2014).

98 Mainly Sancinetti, *Teoria del delito y disvalor de acción*, (Buenos Aires 2005, 2nd reprint; first edition 1991); 'El disvalor de acción como fundamento de una dogmática jurídico-penal racional' (2017) 1 Indret; *Responsabilidad por acciones o responsabilidade por resultados?,* (Bogotá 2002); *Subjetivismo e imputación objetiva em derecho penal* (Bogotá 1996) 55. The author has also translated Zielinski's work, *Disvalor de acción y disvalor de resultado en el concepto de ilícito* (Buenos Aires 1990). On the repercussion of these theses in the Spanish-American context, cf. Cerezo Mir (n 47) 206 n. 67.

99 More recently, his *Lecciones de Derecho Penal, Parte General* (3ª edn, Valencia 2016) (published in a number of Latin American countries with their respective adaptations, e.g., Nicaragua, Managua, 2017).

100 Particularly noteworthy publications include "Tiene un futuro la dogmática juridicopenal?" and "El sistema del derecho penal en la actualidad", both republished in Gimbernat, *Estudios de derecho penal* (3rd edn, Madrid 1990) 140, 162; and his *Concepto y método de la ciencia del derecho penal* (Madrid 1999) 97 (critical of finalism) 108.

101 In *Introducción al derecho penal* (2nd edn, Montevideo/Buenos Aires 2001, 1st edn 1971), Muñoz Conde radicalised Roxin's critique of the excesses of systematic thinking (268) and outlined the "foundation of a critical doctrine of criminal law" (279), also with a Marxist bent, which resonated in Latin America.

102 Author of the most disseminated criminal law manual, Mir Puig, *Derecho Penal, Parte General*, (10th edn, Barcelona 2016, 1st edn 1984), especially Lección 5; cfr., prior to this, 'Función de la pena y teoría del delito en el Estado social y democrático de derecho' in *El derecho penal en el Estado social y democrático de derecho* (Barcelona 1994) 29.

outlined by Roxin, with varying degrees of modification. Given that Roxin's ideas are not presented as a closed model, they can be disseminated without an author needing to identify with a particular school. Roxin's ideas, especially his version of the theory of objective attribution and the theory of control of the act (*Tatherrschaftslehre*), have become almost common currency, and one does not have to declare oneself a Roxinian to accept them.[103]

31 The many translations have been of particular importance here. Of these, we can highlight those made by Muñoz Conde[104] and, above all, by Luzón Peña[105] and the school he led: to these scholars, we owe nothing less than the translation of the two volumes of Roxin's treatise[106]. The monumental *Autoria y domínio del hecho* was translated into Spanish by Cuello Contreras and Serrano González[107]. Many other of Roxin's writings have been translated by many different scholars.[108] Schünemann's works likewise have been available in translation for decades.[109] Important compilations

103 Roxin's influence is discernible in various authors with an eclectic perspective, see n 119.

104 Roxin, *Política criminal y sistema del derecho penal* (Barcelona 1972) (we refer to the 2nd edn, Buenos Aires 2000).

105 *Problemas básicos del derecho penal* (Madrid 1976); also translated into Portuguese by Natscheradetz, Palma e Figueiredo, *Problemas Fundamentais de Direito Penal* (2nd edn Lisboa 1993). This book represents the first contact the first author of this studies had with Roxin's ideas.

106 *Derecho Penal, Parte General, Tomo I,* (Madrid 1997) (transl. from the 2nd German edn of 1994 by Luzón Peña/Díaz y García/Javier de Vicente); *Derecho Penal, Parte General, Tomo II* (Madrid 2014), transl. Luzón Peña et al.

107 Roxin, *Autoría y dominio del hecho en derecho penal* (Madrid 2016); based on the 9th German edn of 2015.

108 Roxin, *La teoria del delito en la discusión actual*, transl. Abanto Vásquez (Lima 2007); *Estudos de Direito Penal*, transl. Greco (2nd edn, Rio de Janeiro 2008); *Fundamentos político-criminales del Derecho penal,* (Buenos Aires 2008); *Sistema del hecho punible/1*, (Buenos Aires 2013); *Novos Estudos de Direito Penal* (São Paulo 2014); *Sistema del hecho punible/2* (Buenos Aires 2015).

109 Schünemann, *Fundamento y límites de los delitos de omisión impropia*, by Cuello Contreras/Serrano González de Murillo (Madrid/Barcelona/Buenos Aires 2009); *Temas actuales y permanentes del Derecho penal después del milenio* (Madrid 2002); *Estudos de Direito penal, Direito processual penal e filosofía do Direito* (São Paulo 2013); *Obras, Tomo I e II* (Santa Fé 2009); *Aspectos puntuales de la dogmática penal* (Bogotá 2007); *Direito penal, racionalidade e dogmática*, transl. Teixeira (São Paulo 2018).

of both Roxin's and Schünemann's essays have paid tribute to these two authors.[110]

It is in Brazil, however, that Roxin's thought has had the greatest scientific impact, both through numerous translations[111] as well as through a genuine offshoot of his school, represented by the first author of this essay[112]. Two central ideas of his school are the assertion on absolute limits ("deontological side constraints") to the State's power to punish[113] and a universal science of criminal law[114]. 32

cc) Alternatives to functionalism

Here, we no longer speak of reception, but of debate, because functionalist ideas are resolutely rejected. The criminologically inspired criticism of the Italian theorist Alessandro Baratta[115] played a fundamental role in this rejection. Baratta saw functionalism (especially in its the systemic variety) as technocratic and legitimist in nature. This criticism was embraced by some former finalists, among whom the aforementioned Zaffaroni was 33

110 Lascano (ed.), *Nuevas formulaciones en las ciencias penales. Homenaje al prof. Claus Roxin* (Córdoba, 2001); Ontiveros Alonso/Peláez Ferrusca (ed.), *La influencia de la ciencia penal alemana em Iberoamérica. En homenaje a Claus Roxin* (México D.F. 2003); Luzón Peña (ed.), *Libro homenaje a Claus Roxin por su nombramiento como Doctor Honoris Causa por la Universidad Inca Garcilaso de la Vega* (Lima 2018); Gimbernat *et al* (ed.), *Dogmática del derecho penal. Homenaje a Bernd Schünemann por su 70º aniversario*, Tomo I-II (Lima 2014).

111 *Política Criminal e Sistema Jurídico Penal*, transl. Greco (Rio de Janeiro 2002); *Estudos de Direito Penal*, transl. Greco (2nd edn, Rio de Janeiro 2008); *Novos Estudos de Direito Penal,* ed. Leite (São Paulo 2014).

112 Cf. the following works: Leite, *Dúvida e erro sobre a proibição no direito penal* (2nd edn, São Paulo 2014); Teixeira, *Teoria da aplicação da pena. Fundamentos de uma determinação judicial da pena proporcional ao fato* (São Paulo 2015); Horta, *Elementos normativos das leis penais e conteúdo intelectual do dolo* (São Paulo 2016); Viana, *Dolo como compromisso cognitivo* (São Paulo 2017); Siqueira, *Autonomia, consentimento e Direito Penal da Medicina* (São Paulo 2019); Stoco, *Culpabilidade e medida da pena. Uma contribuição à teoria da aplicação da pena proporcional ao fato* (São Paulo 2019).

113 Greco, *Lebendiges und Totes in Feuerbachs Straftheorie* (Berlin 2009) 122.

114 Greco, *Strafprozesstheorie und materielle Rechtskraft,* (Berlin 2015) 41; also Schünemann, 'Strafrechtsdogmatik als Wissenschaft' in *Festschrift für Claus Roxin* (Berlin 2001) 1.

115 Baratta, 'Integración-Prevención: una 'nueva' fundamentación de la pena dentro de la teoría sistémica' (1985) 8/29 Revista Doctrina Penal 9.

indisputably the most prominent. The works of the few German finalists of the following generation seem to have been less relevant.[116] There are still authors (albeit fewer in number) whose orientation could, according to finalist terminology,[117] be qualified as causalist.[118]

34 To conclude the current panorama, besides the authors adopting a functional approach and the many eclectic authors[119] who are actually Roxinian despite not always explicitly identifying as such, there is also a group of scholars we could call "reactive" finalists and another one that follows the perspective established by Zaffaroni. This author also has a major influence on the scholars belonging to the second, i.e. finalist group. The fundamental idea that unites these two latter perspectives is the conviction that functionalism, by insisting on the preventive purpose of criminal law, is technocratic and dangerous, and its consequences are even more serious in a context such as that of Latin America.

35 For *reactive finalism*, containing these perils would require the restoration of the previous limits to the power of the legislator. We would include in this group the Argentinean Righi,[120] the Brazilian Cirino dos Santos,[121] the Peruvian Villavicencio[122] and the Colobian Velásquez Velásquez[123]. In general, this finalism is open to constructions of a functional kind, such as the theory of objective attribution.

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116 Hirsch, *Derecho penal, Obras completas, Tomos I e II* (Buenos Aires 2000).

117 See above fn 8.

118 In Chile, Politoff/Matus Acuña/Ramírez, *Lecciones de derecho penal chileno, Parte General* (Santiago, 2004) 163, 254, 282; Matus Acuña/Ramírez, *Manual de derecho penal chileno, Parte General* (Valencia 2021) 260, 396, 417; in Argentina Creus, *Derecho Penal, Parte General* (5th edn, Buenos Aires/Bogotá 2012) 138, 146.

119 Worthy of mention are, in Brazil, Martinelli/de Bem, *Lições fundamentais de direito penal, Parte Geral* (3rd edn, São Paulo 2018) Lição 21; in Argentina Rusconi, *Derecho Penal Parte General* (2nd edn, Buenos Aires 2009) 260; Lascano et al, *Derecho Penal, Parte General* (Córdoba 2005); in Peru Peña Cabrera, *Derecho penal peruano* (Lima/Chiclayo 2004) 80 (not to be confused with the author referred to in fn. 37); Reátegui Sánchez, *Derecho Penal Parte General* (Lima 2009); in Chile Balmaceda Hoyos, *Manual de Derecho Penal, Parte General* (2nd edn, Santiago 2016).

120 Righi (n 60) 223.

121 *A moderna teoria do fato punível* (4th edn, Rio de Janeiro 2000) 14, 30; *Direito Penal, Parte Geral* (5th edn, Florianópolis 2012) 85, 99. The author sustains a finalist concept of action, but welcomes the theory of objective attribution, elaborating an original proposal regarding the concept of culpability (based on a so-called principle of alterity), also inspired by his Marxist criminological perspective.

122 Villavicencio Terreros, *Derecho Penal Parte General* (Lima 2006) 242.

123 Velásquez Velásquez, *Fundamentos de Derecho Penal, Parte General* (4th edn, Bogotá 2021), 303, 321.

It is to Zaffaroni, however, that the title of undisputed prince of Latin 36
American criminal law[124] must be conceded. He abandoned a good part of the finalist convictions of his youth in favour of what he calls a functional reductive (or conflictive functional) systematics, the basic idea of which is that sanctions, especially in the Latin context, are illegitimate acts of violence, and accordingly that the task of criminal law, especially the theory of crime, is to reduce them.[125] Several authors adopt a similar perspective.[126] The attempts of various scholars to rethink the idea of culpability[127] deserve to be highlighted; these efforts culminated in the instigating figure of vulnerability-based culpability proposed by Zaffaroni.[128]

Finally, it is worth noting the growing interest in the ideas of Ger- 37
man authors who are not on the Roxin/Schünemann vs. Jakobs axis, such as Frisch[129] (who has been an important point of reference for

124 For authors with interesting ideas, in Chile, Bustos Ramírez (n 65); in Colombia, Fernández Carrasquilla, *Delito y error* (2nd edn Bogotá 2007) 10; Velázquez Velázquez (n 122); Gómez Pavajeau, *Estudios de dogmática en el nuevo Código Penal* (Medellín 2002) 195; Salazar Marín, *Teoría del delito con fundamento en la escuela dialéctia del derecho penal* (Bogotá 2007) 166, attempting to move towards a dialectic conception inspired by Hegel (see also *Injusto penal y error. Hacia una nueva concepción del delito* (Bogotá 2003), especially p. 295); in Argentina *Creus, Introducción a la nueva doctrina penal. La teoria del hecho ilícito como marco de la teoría del delito* (Buenos Aires/Santa Fé 2003) 134; Donna, *Derecho Penal, Parte General, Tomo I* (Buenos Aires 2008) 29, based on an idealist theory of attribution; in Peru, the abovementioned Villavicencio (n 122), García Cavero, *Derecho Penal, Parte General* (2nd edn, Lima 2012) 340; in Brazil *Cirino dos Santos* (n 121).

125 The turn came in Zaffaroni's pragmatic study, *En busca de las penas perdidas* (3rd reprint, Buenos Aires 2003, first published in 1989); also 'Política y dogmática jurídico-penal' and 'La critica al derecho penal y el porvenir de la dogmática jurídica' both in Zaffaroni (n 48), 71, 97.

126 In Brazil Tavares, *Teoria do injusto penal* (2nd edn, Belo Horizonte 2002), 125 (1st edn 2000); *idem*, *Teoria do crime culposo*, 3rd edn (Rio de Janeiro 2009) 71, 183, 193, adding elements taken from Habermas; Merolli, *Fundamentos críticos de direito penal* (Rio de Janeiro 2010) 324.

127 Fernández Carrasquilla, 'Hacia una dogmática penal sin culpabilidad' (1982) IV/16 Nuevo Foro Penal 954; Bustos Ramírez, proposing the overcoming of the theory of culpability in favour of a "theory of the responsible subject": 'Esquema para una teoría del sujeto responsable' in *Obras completas, Tomo I* (Lima 2004) 651; also *El delito culposo* (Santiago 1995) 98. In Uruguay, Fernández, *Culpabilidad y teoría del delito* (Montevideo/Buenos Aires 1995) 127.

128 Zaffaroni/Alagia/Slokar, *Derecho Penal Parte General* (2nd edn, Buenos Aires 2002) 650. In Brazil Albuquerque Mello, *O conceito material de culpabilidade* (Salvador 2010) 317; Tangerino, *Culpabilidade* (2nd edn, São Paulo 2014) 182.

129 Frisch, *Comportamiento típico e imputación del resultado*, transl Cuello Contreras/González de Murillo, (Madrid 2004); *Tipo penal e imputación objetiva*, transl.

some time now); Puppe, whose reflections on a cognitivist concept of intent are gaining importance in the Latin American context[130]; Pawlik[131], whose Chilean disciple Wilenmann has produced perhaps the most impressive monograph on grounds of justification written in any language[132]; Renzikowski[133]; Hörnle[134]; Kindhäuser[135], whose main spokesman is the Chilean Mañalich[136] (who is very close to Hruschka[137], whose ideas are taken forward by the Spaniard Sánchez-Ostíz[138]); and Hilgendorf[139]. There is also some interest in the so-called significant perspectives, the greatest proponent of which is the Spanish Vives Antón – the Brazilian Busato[140] stands out here; or in the Heideggerian model constructed by the Portuguese Faria Costa[141] – the Brazilian D'Ávila[142] deserves a mention in

Cancio Meliá/de la Gándara Vallejo/Jaén Vallejo/Reyes Alvarado (2nd edn, Montevideo/Buenos Aires 2020).

130 Puppe, *A distinção entre dolo e culpa*, transl. Greco (Barueri 2004); *La imputación del resultado en derecho penal*, transl. García Cavero (Lima 2003); *Estudos sobre imputação objetiva e subjetiva no direito penal*, transl. Camargo/Marteleto Filho (São Paulo 2019).

131 Pawlik, *La libertad institucionalizada: Estudios de Filosofía jurídica y Derecho Penal*, transl. Bacigalupo et al (Madrid 2010); *Teoria da Ciência do Direito Penal, Filosofia e Terrorismo*, org. Saad-Diniz (São Paulo 2012). Recently, Perez Barberá (ed), *Pena, ilícito y culpabilidad: Una discusión con Michael Pawlik* (Madrid 2022).

132 Wilenmann, *La justificación de un delito en situaciones de necesidad* (Madrid/Buenos Aires 2017).

133 Renzikowski, *Direito penal e teoria das normas*, transl. Leite/Teixeira/Assis (São Paulo 2017).

134 Hörnle, *Determinación de la pena y culpabilidad: Notas sobre la Teoría de la Determinación de la Pena en Alemania*, transl. Fanchini/Lorenzo/Alfaro (Buenos Aires 2013); *Teorias de la pena*, transl. Nuria Pastor (Bogotá 2015); *Dois estudos: Teorías da pena e culpabilidade*, org. and transl. Stoco (São Paulo 2020).

135 Kindhäuser, *Derecho penal de la culpabilidad y conducta peligros*, transl. López Diaz (Bogotá 1996); *Cuestiones fundamentales de Derecho penal* (Santiago 2021); *Dogmática penal no Estado democrático de direito*, org. and transl. Camargo/Godinho/Moura (São Paulo 2020).

136 *Norma, causalidad y acción* (Madrid 2014).

137 Hruschka, *Imputación y derecho penal* (Navarra 2005).

138 Sánchez-Ostíz, *Imputación y teoría del delito* (Montevideo/Buenos Aires 2008) 383.

139 Hilgendorf/Valerius, *Direito Penal Parte Geral*, transl. Gleizer (São Paulo 2019); Hilgendorf, *Introdução ao Direito Penal da Medicina* (São Paulo 2019).

140 Busato, *Direito Penal Parte Geral* (4th edn, São Paulo 2018); *Direito Penal e ação significativa* (Rio de Janeiro 2005).

141 Faria Costa, *O perigo em direito penal* (Coimbra, 2000); *Direito Penal* (Lisboa 2017).

142 D'Ávila, *Ofensidade e crimes omissivos próprios* (Coimbra 2005); Moura, *Ilicitude penal e justificação*, (Coimbra 2015); *Scalcon*, Ilícito e pena (Rio de Janeiro 2013).

this regard. We definitely should not forget the Argentinean Carlos Nino, one of the few scholars who sought a dialogue with the English-speaking tradition of (liberal) political philosophy, whose ideas hitherto remain undiscovered.[143] The Italian Bricola[144] is a tremendously important figure, although this is barely acknowledged. Bricola began to recur to the constitution as a way of taming authoritarian law[145] and advanced various *topoi* that are still of great significance in the Latin American debate (principally the idea of offensiveness). In general, Latin American doctrine refers to the constitution much more than German doctrine does.[146]

Lastly, we mention some themes in which Latin American doctrine has 38
followed its own paths – whether correctly or not is a debate for another occasion. There has been an effort to recognize the importance of other cultures, especially for the dogma of the mistake of law; this has led to the coining of the figure of the culturally conditioned mistake.[147] Another interesting development is the handling of the principle of insignificance, which in much of the continent is defended as a ground of exclusion of the offence.[148]

143 Nino, *Los limites de la responsabilidade penal* (Buenos Aires 1980). His proposal to base the legitimation of punishment on the consent of the criminal is taken up by Greco (n 113).

144 Particularly the entry 'Teoria generale del reato' in Azara/Eula (ed.), *Novissimo Digesto Italiano*, tomo XIX (Torino 1973) 7; on its relevance in Italy, Donini, 'La herencia de Bricola y el constitucionalismo penal como método (2011) 77 Nuevo Foro Penal 43; Fornasari, 'Constitución y derecho penal: la herencia de Franco Bricola en la interpretación del derecho penal' in Cabezas/Corn (ed.), *Derecho penal y nueva constitución* (Santiago 2021).

145 Carnevali (n 26) 17.

146 Velásquez/Vargas Lozano, *Derecho penal y constitución* (Bogotá 2014); Guzmán Dalbora, *El derecho penal en la constitución* (Santiago 2021); Rafecas, *Derecho Penal sobre bases constitucionales* (Buenos Aires 2021).

147 Villavicencio Terreros, *Diversidad Cultural y Derecho Penal* (Lima 2017); H Pozo, 'Art. 15 del Código Penal Peruano: Incapacidad de culpabilidade por razones culturales o error de comprensión culturalmente condicionado?', in Meini Méndez (ed.), *Aspectos fundamentales de la Parte General del Código Penal Peruano* (Lima 2003) 357; Zaffaroni/Alagia/Slokar (n 127), § 49 IV; further examples and criticism in Roxin/Greco (n 5) § 78.

148 Guzmán Dalbora, 'La insignificância: especificación y reducción valorativas em el ámbito de lo injusto típico' in *Cultura y delito* (Bogotá 2010) 35, 57; Cornejo, *Teoría de la insignificancia* (Buenos Aires/Santa Fé 2006).

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