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Beitrag

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RphZ – Rechtsphilosophie

Zeitschrift für die Grundlagen des Rechts

Editorial

Zu den zentralen Aufgaben des Rechts gehört es, Bereiche rechtlich geschützter Freiheit zuzuteilen und Verantwortlichkeit zuzuweisen. Wie der alte Rechtsgrundsatz „casum sentit dominus“ nahelegt, hängen beide Aufgaben miteinander zusammen. Kurz: Das Schwerpunktthema dieses Heftes, „Recht und Verantwortung“, betrifft die Grundlagen des Rechts. Für die Organisation der Beiträge bedanken wir uns herzlich bei Giulia Battistoni, Claudia Wirsing und Sabrina Zucca-Soest. Sie stellen auch den Inhalt des Schwerpunkts vor.

„Außer der Reihe“ widmet sich Eva Herzog dem unvermindert aktuellen Thema des rechtlichen Umgangs mit Migration.[1] Sie kritisiert die verbreitete Vorstellung, souveräne Staaten dürften Migranten an der Einreise hindern, ebenso wie Grundstückseigentümer Fremde vom Zutritt zu ihrem Grundstück ausschließen dürften. Diese schlichte Eigentumsanalogie suggeriere ein schrankenloses Dispositionsrecht des Eigentümers, so als ob es keine Einschränkungen etwa im Notstand oder durch die Sozialbindung des Eigentümers gäbe.

Im Rezensionsteil stellt Gottfried Gabriel die methodischen Reflexionen von Hans-Joachim Strauch über die richterliche Urteilsfindung vor. Eckhard Jesse diskutiert die Dissertation von Dominik Pokora über eine Revision des Parteiverbots.

Ausnahmsweise wird das Thema des nächsten Heftes an dieser Stelle noch nicht verraten. Weiterhin aber freuen wir uns auf Anregungen und auf Beiträge, die bitte möglichst zahlreich in elektronischer Form bei renzikowski@jura.uni-halle.de eingereicht werden können.

Erlangen/Halle/Heidelberg/Wien, März 2025

Alexander Aichele
Martin Borowski
Andreas Funke
Elisabeth Holzleithner
Joachim Renzikowski

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[1] S. dazu auch schon RphZ 2021/1 und 2021/3.

The "Hegelian issue" in Günther Jakobs' Theory of Criminal Intent (dolus)

Gabriele Civello

Abstract

The essay concerns the theory of penal functionalism and in particular the Hegelian roots of the theory of intention developed by Günther Jakobs and recently analyzed in *Kritik des Vorsatzbegriffs* (2020). In particular, the author highlights the aporias and critical issues of a purely functionalist foundation of intention.

Keywords: dolus eventualis – dolus indirectus – Günther Jakobs – intent – penal functionalism – theory of crime

I. Introductory Considerations

The present essay aims to highlight the reception of Hegel's thought, and specifically Hegel's "imputation theory"[1] within the criminal theory of intent [*dolus*] formulated by the German jurist Günther Jakobs,[2] the father of the so-called "penal functiona-

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[1] On this point, among all, see the works of *Menegoni*, Soggetto e Struttura dell'Agire in Hegel, 1993; *Quante*, Hegels Begriff der Handlung, 1993; *Caspers*, "Schuld" im Kontext der Handlungslehre, 2012; *Derbolav*, Hegels Theorie der Handlung, Hegel-Studien 3 (1965), 209 ff.; *Stepelevich/Lamb* (ed.), Hegel's Philosophy of Action, 1983; *Battistoni*, Azione e Imputazione in G.W.F. Hegel alla Luce dell'Interpretazione di K.L. Michelet, 2020; *Battistoni*, Hegels Zurechnungslehre mit Rücksicht auf ihre juristischen Implikationen, Hegel-Jahrbuch 1 (2019), 623; *Battistoni*, Die Möglichkeit des Wissens als Grundlage der Zurechnung: Die Lehre der Imputation in K.L. Michelet und K. Larenz auf der Grundlage von Hegels Handlungstheorie, RphZ 2017, 380; *Battistoni* (ed.), Fondamenti per un Agire Responsabile. Riflessioni a partire dalla Filosofia Classica Tedesca, 2020.

[2] For the incorporation of Hegelian ideas in the legal field, of course, the primary reference is first and foremost *Michelet*, De Doli et Culpae in Jure Criminali Notionibus, 1824; *Michelet*, Die Ethik des Aristoteles in Ihrem Verhältnisse zum Systeme der Moral, 1827; and *Michelet*, Das System der Philosophischen Moral, 1828. The texts of the so-called Hegelian criminal law scholars, in which Hegel's *Zurechnungslehre* was incorporated into criminal law, were essentially the following: *Abegg*, Lehrbuch der Strafrechts-Wissenschaft, 1836, § 78; *Köstlin*, Neue Revision der Grundbegriffe des Criminalrechts, 1845, § 99; *Berner*, Grundlinien der Criminalistischen Imputationslehre, 1843, 227; *Berner*, Die Lehre von der Teilnahme am Verbrechen und die Neueren Controversen über Dolus und Culpa, 1847, 153. See also the fundamental work of *Radbruch*, Der Handlungsbegriff in seiner Bedeutung für das Strafrechtssystem, 1903; more recently, *Vieweg,* Das Denken der Freiheit, 2012; *Seelmann*, Hegels Zurechnungslehre, in: Kubiciel/Pawlik/Seelmann (eds.), Hegels Erben? Strafrechtliche Hegelianer vom 19. bis zum 21. Jahrhundert, 2017, 43 ff.

lism".[3] The *focus* of these reflections is not *stricto sensu* philosophical but legal, though they are grounded in legal-philosophical premises.

In Italy, Günther Jakobs' thought has mainly been examined in relation to his famous and controversial doctrine of the "Criminal Law of the Enemy" [*Feindstrafrecht*] and the associated theory of punishment, which have been heavily criticized from political and ideological perspectives, even before being questioned on legal grounds.

The part of Jakobs' system that seems to receive less attention for example in Italy is his theory of crime in a strict sense and, more generally, of criminal imputation. This is likely due to two factors: the partial incompatibility between functionalist theses and the Italian current legal system (both criminal and, even earlier, constitutional), as well as the "cultural" distance between Jakobs' theoretical framework and the doctrines more widely accepted within our scientific community.

The recent publication of a book by Günther Jakobs titled *Kritik des Vorsatzbegriffs*[4] – for which I am currently preparing the Italian translation for release in 2025 – provides an opportunity to reflect on the conceptual structure of the so-called "functional conception" of intent [*dolus*], with particular reference to its stated Hegelian or neo-Hegelian roots.

The perspective adopted in this essay is that of Italian criminal law. While Jakobs' criminal theory originated within the German legal system and was therefore developed in the context of German criminal law, the question we now wish to pose and examine is whether this doctrine — with its explicitly Hegelian roots — might find any resonance or acceptance within the Italian legal framework, thereby offering a contribution to the study of the reception of German law beyond Germany.

II. Jakobs' Doctrine of Intent (dolus) and its Declared Hegelian Roots

In analyzing the history of the concept of "*dolus*," Jakobs revisits Hegel's critique of Anselm Feuerbach's criminal theory. Feuerbach, in fact, had built his theory of crime on the "theoretical basis" of the material individual and their contingent, accidental psychic-mental conditions. In contrast, Hegel – anticipating Kelsen's idea of the "legal person" – aims to emphasize that criminal imputation does not concern the concrete, "flesh-and-blood" person, but rather the social person as a *universal, thinking being*.[5]

Within the framework of a functionalist foundation of the theory of *dolus*, Jakobs recovers several passages from Hegel's *Grundlinien der Philosophie des Rechts* (1820),[6] which are considered partially relevant and concretely "applicable" within contemporary criminal law. Jakobs offers a substantially normativistic, objectivist, and "cognitivist" interpretation of these Hegelian paragraphs, following the celebrated

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[3] Jakobs' criminal functionalism, in turn, is linked to the sociological functionalism of Niklas Luhmann: see *Valitutti*, Normativismo e Funzionalismo Penale. Saggi sulla Teoria Giuridica di Günther Jakobs, 2020; as well as *Febbrajo*, Funzionalismo Strutturale e Sociologia del Diritto nell'Opera di Niklas Luhmann, 1975.

[4] *Jakobs*, Kritik des Vorsatzbegriffs, 2020. The passages below are in my translation.

[5] See *Valitutti*, Normativismo e Funzionalismo Penale, 2020, 21 ff.

[6] On Jakobs' theory of imputation and its Hegelian derivation, see ibid., 145 ff.

1927 work by Karl Larenz,[7] moving through the civil lawyer Richard Honig,[8] and reaching the "mother texts" of *objektive Zurechnung des Erfolgs*, and specifically *Gedanken zur Problematik von Zurechnung im Strafrecht* by Claus Roxin.[9]

In particular – as Jakobs observes – the famous § 117 of Hegel's *Elements* asserts emphatically that

> "the right of the will [*das Recht des Willens*] [is] to recognize as its *action* [*Handlung*], and to accept *responsibility* for, only those aspects of its deed [*That*] which it knew to be presupposed within its end [*in seinem Zwecke*], and which were present in its *purpose* [*Vorsatze*]".[10]

This part of the *Grundlinien*, in fact, seems to limit moral and legal imputation to strictly intentional aspects, that is, those that are the object of purpose [*Vorsatz*], and from this comes the famous dispute among Hegelians about the theoretical justification for the punishability of negligent or reckless acts.[11]

Nevertheless – the German criminal lawyer adds – Hegel himself immediately distinguishes between the *necessary* consequences and the purely *accidental* consequences of human actions: the former would be the effects that normally arise from the material conduct, as it possesses certain intrinsic characteristics (today we would say: as it is *offensive*); the latter, on the other hand, would be purely accidental and random consequences, not attributable to the agent's *Schuld*.

In particular, in § 118 of the *Grundlinien*, it is stated that

> "in so far as the consequences are the proper and immanent *shape* of the action, they manifest only its nature and are nothing other than the action itself; for this reason, the action cannot repudiate or disregard them",

since the agent has surrendered [*preis(ge)geben*] to this law, that is, the fact that a particular action is capable of producing not only the event explicitly intended by the agent, but also a series of effects which, although additional and "collateral," still fall within the immanent configuration of the action (the modern criminal lawyer would say: within its risk area or its offensive charge).

Up to this point, the Hegelian passages cited by Jakobs concern mainly the individual dimension of morality as an expression of the acting subjectivity: while § 117 seemed to limit attribution to only those events explicitly affected by the "fire" of knowledge and purpose, the subsequent § 118 immediately clarifies – albeit in a wholly generic and preliminary manner – that the agent cannot "disown" the necessary and

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[7] *Larenz*, Hegels Zurechnungslehre und der Begriff der objektiven Zurechnung, 1927, especially 50 ff.; regarding the legal neo-Hegelism of Göttingen, see *Schirmer*, Die Göttinger Hegel-Schule. Julius Binder, Karl Larenz, Martin Busse, Gerhard Dulckeit und der juristische Neuhegelianismus in den 1930er Jahren, 2016.

[8] *Honig*, Kausalität und objektive Zurechnung, FG Frank, 1930, 174 ff.

[9] *Roxin*, Gedanken zur Problematik von Zurechnung im Strafrecht, FS Honig, 1970, 133 ff.

[10] *Hegel*, Elements of the Philosophy of Right, 1991 [trans. Nisbet]. Hereafter abbreviated as *EPR*, followed by the number of the paragraph. The German terms in square brackets have been added by me. For the legal-philosophical interpretation of Hegel's § 117, see finally, *Battistoni*, Azione e Imputazione in G.W.F. Hegel alla Luce dell'Interpretazione di K.L. Michelet, 2020, 33 ff.

[11] In this regard, it is now essential to refer to the collective work edited by *Kubiciel*/*Pawlik*/*Seelmann* (eds.), Hegels Erben? Strafrechtliche Hegelianer vom 19. bis zum 21. Jahrhundert, 2017.

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immanent consequences of their action, simply because they did not explicitly know or intend them.

I say "wholly generic and preliminary," because Hegel does not specifically clarify that these necessary and additional consequences of the action should be imputed to the agent as either intentional [*dolus*], negligent [*culpa*], or for some other reason; he only asserts that the agent cannot *ipso facto* disown them or reject them as "not their own," while the question of the specific *legal title* of their imputation remains open (as we will see in the following, this preliminary clarification becomes particularly important in the "logical thread" of this argument).

At this point in the reflection, within the *Kritik des Vorsatzbegriffs*, Jakobs addresses the crucial issue found in two further Hegelian paragraphs, § 119 and § 132 of the *Elements*, in which the German jurist identifies a kind of "social foundation" – rather than merely an individual one – of intentional responsibility related to the *dolus*.

In particular, in the complex § 119, which has been the subject of numerous and conflicting interpretations in philosophical and legal literature, Hegel asserts that while *Vorsatz* (purpose) pertains to the concrete and particular aspects of the action, *Absicht* (intention) concerns the universal and general nature of the behavior. In the first case, the occurrence can be somewhat fragmented into a series of *singularities*, whereas in the second case, the act is viewed from the "unifying" and holistic perspective of *universal* rationality. For example, as the German philosopher observes, any fire begins with a single spark that hits a limited part of the inflammable body; however, from this, a series of further consequences propagate, which can only be traced back to the initial action – the ignition of the spark – through a general and "panoramic" view.

In response to this Hegelian paragraph, Jakobs comments:

> "In the second part, entitled *Intention and Welfare*, the Hegelian social perspective dominates; here, in fact, the universal and general aspect of the action is addressed (*GL, § 119*), which, in modern language, can be translated as the *objective* connection (*objektiver Zusammenhang*) of the action and its universal or general meaning (…)."

"This means", says Jakobs,

> "that the agent cannot 'cut out' individual parts of the entire factual event as they see fit (the agent, in other words, cannot expect to succeed in what Hegel calls '*fragmentation into multiple singularities and consequences*' [*GL, § 119 A*]), but rather 'the right of the *objectivity* of the action' (*GL, § 120*) imposes itself against the right of subjective will".

This is a highly relevant aspect of the imputation theory developed by Hegel and "recovered" by Jakobs: in fact, it sees two spheres constantly in dialectical opposition, namely the rights of *subjectivity* (which Hegel calls the "right of knowledge" and "the right of the will") and the right of the *objectivity* of the action,[12] two spheres destined

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[12] As is well known, in Hegel's philosophy of objective spirit, objectivity is meant to prevail in Abstract right, while in the Morality section the centrality of the "subjective" side takes over. In the Ethical life, the two spheres are destined to be dialectically reconciled in the *Aufhebung* of their unilateral and intellectualistic opposition. Cf. *Battistoni*, Action and Imputation between Morality and Ethical Life: Hegel, in: Illettereati/Manchisi et al. (eds.), Morale, Etica, Religione tra Filosofia Classica Tedesca e Pensiero Contemporaneo. Studi in Onore di Francesca Menegoni, 2020, 440 ff.

to be reconciled only through the *Aufhebung* in the Ethical Life and, in particular, in the State.[13]

In the first case, in brief, we have an acting *subject* who claims the right to have only those acts imputed to him that he had actually *represented* to himself and, therefore, had actually *intended*; in the second case, however, we are confronted with the *objective* reality, which includes harmful or dangerous consequences not explicitly foreseen or desired by the agent, but which nevertheless demand attention and impose – under certain conditions – the attribution of certain events (even if) unknown or unintended by the agent *in actu*.

Ultimately – Jakobs adds – the possible knowledge of the "*universal quality*" [*Das Allgemeine*] of the action, that is, the knowledge of its social meaning, contrasts with the need to represent this meaning "psychologically" and *in actu* as precisely and exactly such, a tension that Hegel seeks to reconcile in the *Grundlinien* by emphasizing the necessity of addressing the agent as a "*thinking*" subject, and not merely as the individual agent with his accidental psychological states (*EPR,* § 120):

> "What predominates is the obligation to know the social meaning (and in this sense *objective*) of the act: one must always assume (…) – if one is to honor the human being – that he knew the crime from the side of its universality and generality";[14]

where "human being" here refers to one who is capable of imputation not through "predetermined conditions" (*GL, § 110 Anm.*).

This, then, is Jakobs' commentary on Hegel's § 132:

> "The acting subject may not reflect on this 'rational' element, but still, due to a given capacity for imputation (otherwise, he would not be a 'subject'), he possesses a 'knowledge understood as *familiarity* with what is notorious and well-known' (*Kenntniß als Bekanntschaft*) (*GL, § 132 A*). There is no better definition of *dolus indirectus*: what is notorious and well-known does not become 'unknown' simply because it is not currently (*in actu*) thought about by the acting subject at a given moment, just as a person we know does not automatically become a 'stranger' simply because we are not actively thinking about them at that particular instant. The demand, for the purposes of *dolus*, for clearer and more distinct representations regarding the illicit act and its punishability – even from Feuerbach – indeed means denying the acting subject 'his intrinsic intelligent nature' (*GL, § 132 A*)."[15]

Based on these Hegelian fragments and their interpretation from a criminal law perspective, after an extensive discussion that cannot be further summarized here, Jakobs outlines his conclusions regarding the relationship between *Gekanntes* (what is known) and *Bekanntes* (what is notorious) within the doctrine of *dolus*.

For the purposes of *dolus*, the German author argues,

> "it does not matter whether the acting person 'thinks' a given situation in the current moment and knows (*kennt*) it in this sense, but only that the situation is – not necessarily in all its details – *known* and *notorious* (*bekannt*) to them (*Bekanntschaft* here understood as knowledge that is not necessarily current, but always capable of being actualized). (…) If a person engages in a certain conduct that is *universally* understood as criminal, but at the same time believes they can prevent the occurrence of

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[13] Cf. *Alessio*, Azione ed Eticità in Hegel. Saggio sulla Filosofia del Diritto, 1996, 153 ff.; *Vieweg,* Das Denken der Freiheit, 2012, 156 ff.

[14] *Jakobs*, Kritik des Vorsatzbegriffs, 2020, 19.

[15] Ibid.

> the event through means of action that are communicatively irrelevant, they are *still* acting with dolus, simply because the universal meaning of their conduct is notorious and well-known (*bekannt*) to them. If the event occurs, despite the agent's greatest astonishment and surprise, only the individual can be said to be 'surprised' in strict terms, whereas the '*thinking*' person is well aware of the danger of the event by virtue of universal judgment, and thus, for them, the occurrence of the event is nothing to be surprised about (…). *In the end, dolus is the knowledge of the general evaluation of one's own behavior or at least its 'notoriety'* [*Vorsatz ist demgemäß die Kenntnis der allgemeinen Beurteilung des eigenen Verhaltens oder die Bekanntschaft damit*]."[16]

Finally, in the conclusions of the text, Jakobs succinctly states: "What is currently thought [*das Bedachte*] and, in this sense, known [*das Gekannte*] is integrated, in *dolus indirectus*, by what is notorious or well-known [*das Bekannte*]".[17] In other words, for the purposes of intent [*dolus*], known facts and notorious facts are essentially equivalent, except for their internal gradation – for the purpose of sentencing – in terms of the higher or lower intensity of the "intentional attitude".

III. The Aporias and Ambiguities of a Hegelian Foundation of the Functionalist Doctrine of Vorsatz

The functionalist foundation of intent [*dolus*], recently reaffirmed in Jakobs' 2020 treatise *Kritik des Vorsatzbegriffs*, arouses some critical observations, particularly when attempting to validate it in light of Hegel's *auctoritas*. In fact, the comparison between the numerous passages from the *Grundlinien* cited above and the conclusions drawn by the father of contemporary penal functionalism can raise some problematic considerations.

The thesis that we humbly aim to advance here is as follows: while it seems possible to derive interesting insights from both ancient and modern doctrines of moral imputation – including Hegel's doctrine repeatedly referenced by Jakobs – for studying the "lower threshold" between what is negligent and what is purely accidental or fortuitous, it appears much more problematic to build upon these doctrines a general theory of "criminal intent" [*dolus*], and even more so, a theory that defines the "upper threshold" between conscious negligence and eventual intent [*dolus eventualis*].

As is well known, Hegel's doctrine of *Zurechnung* is contained within that part of the *Elements* that Hegel titles *Moralität*, which is the central section of his *Philosophy of Right*, preceded by the so-called Abstract right and followed by Ethical life. In Hegel's legal-philosophical system, Abstract right and Morality represent respectively the thesis and the antithesis of objective spirit, destined to culminate in the *synthesis* of Ethical life.[18]

Abstract right, in particular, is the section of the *Philosophy of Right* where Hegel places the concepts of property (and real rights in general), contract, and unlawful acts (both civil and criminal). It is the domain in which human will operates in a substantially individualistic, unilateral, and almost "selfish" manner – that is, in an indefinite, un*restricted* way.

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[16] Ibid., 34.

[17] Ibid., 51.

[18] On the relationship between the *Philosophy of Spirit* and the *Philosophy of Right* in Hegel, see *Quante*, La Realtà dello Spirito. Studi su Hegel, 2016, 146 ff., 214 ff.

Morality [*Moralität*],[19] on the other hand, is the second moment of objective spirit, in which will and freedom are no longer *in itself* – that is, closed within the monad of the isolated individual – but *for itself*, as they open up to the will of others, to the objective world, and to social relations. In comparison to Abstract right, Morality represents a higher and more "evolved" stage, where will is no longer infinite or limitless but is constrained by what is "objective". In it, however, the individual's will, although opening itself to objectivity, remains in opposition to it in a "one-sided" way, still caught in the unresolved dilemma between the individual's inner reasons and the "external" reasons of the objective world.[20]

Only in the third moment of objective spirit, that of Ethical life [*Sittlichkeit*], would the true dialectical synthesis occur between subject and object, between individual will, the will of others, and the entire political community, ultimately between the good and the free will of the human being. This is the domain in which freedom is no longer given by the opposition between part (the individual) and whole (others, society), but by their *real synthesis*, through family, civil society, and especially the state. In the Ethical life, it is not that subjectivity disappears, but its one-sidedness and purely individual and internal dimension disappear, being appropriately reconciled with the ethical realities that culminate in the State.

In light of this, it is significant to recall that Hegel's investigation into *Zurechnung* – which is situated in the second section of the *Elements*, namely the section on *Moralität* – is characterized by a continuous reciprocal exchange between *law* and *morality*. The inquiry into "morality" follows a lengthy discussion of abstract right, in which, as mentioned, there already exists a "will", but it is still reduced to pure solipsistic and indefinite arbitrariness. Following this, the first two sections of *Moralität* are titled *Der Vorsatz und die Schuld* (*Purpose and Responsibility*) and *Die Absicht und das Wohl* (*Intention and Welfare*). Even these titles demonstrate the inextricable intertwining of law and morality, not only because "purpose" and "intention" are first and foremost ethical-moral concepts, but also because they are paired by Hegel with *Schuld* and *Wohl* ("well-being", synonymous with "happiness": cf. § 123), notions primarily drawn from the ethics of responsibility and bliss. Finally, the third section, which leads from Morality to Ethical life, is titled *Das Gute und das Gewissen* (*The Good and the Conscience*), and is almost exclusively focused on strictly ethical-moral concepts.

All this is to highlight that Hegel's treatment of *Moralität*, long cited by proponents of objective imputation and later of penal functionalism as the true theoretical source and philosophical *auctoritas* of their approach, does not originate as a purely legal inquiry but rather as a broadly "moral" one.

Moreover, in my opinion, the Jakobsian statement quoted above, that "in the second part, titled *Intention and Welfare*, the Hegelian social perspective dominates", should be read with particular caution. As mentioned, in fact, the "true" part of Hegel's *Philosophy of Right* in which "sociality" is destined to fully develop and be realized is the third expression of objective spirit, namely Ethical life. In the Morality section, certain aspects of the social dimension are indeed anticipated – especially where

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[19] For the transition from Abstract right, to Morality, to Ethical life, cf. *Ilting*, Hegel Diverso, 1977, 5 ff.

[20] On the concept of *Handlung* as "concrete expression of the unity of what is internal and what is external", *Menegoni*, Handlungen und Tätigkeiten in Hegels Philosophie des objektiven und des absoluten Geistes, in Oehl/Kok (eds.), Objektiver und absoluter Geist nach Hegel. Kunst, Religion und Philosophie innerhalb und außerhalb von Gesellschaft und Geschichte, 2018, 125.

subjective will begins to confront and, at times, adjust to the "rights of objectivity", that is, the claims of the will of others. However, as noted, it is only in Ethical life that the political-social realm reaches its full moment of concrete realization[21] (on this point, see §§ 218 et seq. of the *Elements* on criminal law in civil society and, more generally, on the administration of justice within Ethical life).

Even if one were to emphasize the "socio-legal soul" of Hegel's theory of imputation, as opposed to its purely "ethical-moral" soul, it is still not certain that, within *Moralität*, Hegel intended to establish a specific theory of *Zurechnung* that is properly criminal, since much of the concepts expressed in this chapter apply in general to any form of ethical-legal attribution, even outside the context of criminal law.

For these reasons, the Morality section (§§ 105–141), which has long been cited by Hegelians – and today by Jakobs – as the "primordial source" of the doctrine of imputation in criminal law, cannot be said to contain a *legal treatise* on the modern concepts of guilt, pre-intent, and *dolus*: Hegel – who was clearly not a jurist – was concerned with developing the notions of *objective spirit*, which in turn are expressions of the logical categories of his thought (cf. §§ 109–110), with the aim of arriving at a complete and self-sufficient political system, culminating in the theory of the State. It would therefore be a first methodological mistake to read Hegel's reflections on *Vorsatz* and *Absicht* as though they were paragraphs from a criminal law textbook.

To confirm this methodological *caveat*, we can observe how Hegel's investigation does not focus solely on the penal aspect. In fact, among the very first paragraphs of *Morality*, there is the "mysterious" § 116, which addresses the problem – primarily a civil law issue[22] – of responsibility for things in custody, similar to Article 2051 of the Italian Civil Code (*C.C.*), which states: "Anyone is responsible for the damage caused by things in their custody, unless they prove a case of force majeure".[23] In this case, even the author of the *Elements* seems to suggest a legal-moral responsibility without a *Handlung* and without even a real *Tat*, i. e., without a personal act attributable to subjective will, which appears radically incompatible with our current conception of personal criminal responsibility under Article 27 of the Italian Constitution, i. e., responsibility for one's own and culpable act (significant in this regard is Hegel's annotation in the margin of

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[21] On the "transition" from Morality to Ethical life, with particular reference to the themes of action and imputability, cf. *Battistoni*, Action and Imputation between Morality and Ethical Life: Hegel, 2020, 435 ff.

[22] Regarding § 116 of the *Grundlinien*, "rivers of ink" have been spilled over the past two hundred years by philosophers and legal scholars, who have provided the most diverse interpretations of this paragraph (among others, cf. *Caspers*, "Schuld" im Kontext der Handlungslehre, 2012, 192; *Battistoni*, Azione e Imputazione in G.W.F. Hegel alla Luce dell'Interpretazione di K.L. Michelet, 2020, 153 ff.). Nevertheless, at least in the eyes of the contemporary jurist, the distinctly *civil* nature of the theme of responsibility for things in custody cannot be overlooked. According to the most authoritative doctrine, this paragraph appears to have been added and interpolated by Hegel only at a later stage, demonstrating that it seems like a sort of "foreign body" within the Hegelian Morality. According to this interpretation, which I personally share, § 116 was inserted into the section on Morality purely for contingent reasons, but it essentially refers to *civil* liability of a compensatory nature, more properly attributable to Abstract Right and, in particular, to its third part, that concerning "individual" torts, or even to the first part dealing with property. In fact, § 116 concerns the attribution of damages caused by things owned by the individual, as can be seen from the opening of the fragment ("Meine eigene Tat ist es zwar nicht, wenn Dinge, deren Eigentümer Ich bin..."). Cf. *EPR*, § 116.

[23] Art. 2051 C.C.

§ 116, referring to the civil law *actio noxalis* of Roman origin,[24] as well as the treatise by the civilist Heineccius, Johann Gottlieb Heinecke from 1735).

It is therefore no coincidence that, within the *Elements*, Hegel cites the polymath and eclectic jurist Ernst Ferdinand Klein (1744–1810). He was, in fact, the author of writings on both jusphilosophical and civil law topics (*Freyheit und Eigenthum*, *Grundsätze der natürlichen Rechtswissenschaft nebst einer Geschichte derselben*), as well as penal law (*Grundsätze des gemeinen deutschen und preußischen peinlichen Rechts*). This reflects the fact that, in Hegel's time, legal doctrine was not always "dichotomized" as it is today.

IV. Other Aspects of the "Hegelian Problem" in Jakobs' Functionalism

Moving forward with the analysis, another peculiar aspect of Hegel's treatment, referenced by Jakobs in his discussion on *dolus*, can be observed: in Hegel's work, numerous forms of imputability are extensively mixed and "interwoven", whereas, in contemporary criminal law, these must be kept rigorously distinct.

The reason for this is evident: within the *Morality* section, Hegel does not seem interested in developing an analytical theory of the so-called "psychological element of the crime". Instead, he presents a general overview of the forms of manifestation of both subjective and objective spirit within *praxis*. In fact, in these paragraphs, the German idealist even studies the concept of "cause", reflecting on the causes of the French Revolution, a historical event – also mentioned in his rich notes on the *Philosophy of History* (1821–1831, published posthumously in 1837) – which is of an obviously "collective" nature, rather than an individual act caused by a single person.

This seems to be the reason why, in §§ 105 to 141 of the *Elements*, Hegel addresses global issues that, from a penal law perspective, appear entirely heterogeneous:

- from the problem of *suitas*[25] (in § 116) to that of the causal nexus[26] (§§ 115[27]–116[28] and, more generally, the distinction between *Tat* and *Handlung*);[29]
- from the theme of the capacity to understand and will (the "children, idiots, and madmen" mentioned in § 120) to guilt as an all-encompassing category of *Schuld*

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[24] *Larenz*, Hegels Zurechnungslehre und der Begriff der Objektiven Zurechnung, 1927, 56.

[25] It is the "conscience and will" mentioned in Art. 42 of the Italian Penal Code: "No one can be punished for an act or omission foreseen by law as a crime, unless they have committed it with conscience and will".

[26] On this point, Art. 40 of the Italian Penal Code states the following: "No one can be punished for an act foreseen by law as a crime, if the harmful or dangerous event, from which the existence of the crime depends, is not a consequence of their action or omission".

[27] From § 115 of the *Grundlinien*: "The *deed* posits an alteration to this given existence [*Dasein*], and the will is entirely *responsible* for it in so far as the abstract predicate '*mine'* attaches to the existence so altered. An event, or a situation which has arisen, is a *concrete* external actuality which accordingly has an indeterminable number of attendant circumstances. Every individual moment which is shown to have been a *condition*, *ground*, or *cause* of some such circumstance and has thereby contributed *its share* to it may be regarded as being *wholly*, or at least *partly*, responsible for it". Cf. *Battistoni*, Azione e Imputazione in G.W.F. Hegel alla Luce dell'Interpretazione di K.L. Michelet, 2020, 69 ff.

[28] In § 116 of the *Grundlinien*, there is a reference to "causing harm [*Schaden verursachen*]" through an object or an animal of one's own property.

[29] On the distinction between *Handlung* and *Tätigkeit*, see *Menegoni*, Handlungen und Tätigkeiten in Hegels Philosophie des Objektiven und des Absoluten Geistes, 2018; *Vieweg*, Das Denken der

(which includes all the so-called "subjective elements" of the crime, both cognitive and volitional, *in actu* such as foresight and intention, but also merely *in potentia* such as foreseeability or knowledge);
– from the issue of motives for committing a crime (e. g., stealing "to do good" for the poor, in § 140) to the problem of the excusing or justifying state of necessity (§ 127).

In conclusion, if the functionalist penal theorist today intends to find in Hegel's *Morality* chapter a detailed theory of criminal imputation, he will soon encounter a largely eccentric philosophical-ethical treatment that is legally "unfeasible", at least from the systematic and analytical perspective of contemporary penal law scholars, who are accustomed to or even required to distinguish between *suitas*, imputability, unlawfulness, criminal typicity, negligent typicity, preterintentionality, and so on.

In Hegel's treatment, two further aspects of penal theory, today kept distinct by the *communis opinio* and current legislation, are even conflated: the knowability of the legal precept[30] and the subjective element (*rectius*, the cognitive element) of the typical act.[31] For instance, in § 132 of the *Grundlinien*,[32] it might seem *prima facie* as though Hegel is still examining the *Zurechnung* of the act in the strict sense, including the related representational and volitional elements. In reality, however, the focus of the discussion is on the presumption of knowledge of the legal precept by the agent.

At first sight, Jakobs appears to explicitly reference this Hegelian paragraph to support his thesis of a "universalizing" – that is, normativizing – interpretation of *dolus*. Specifically, starting from § 132 and the fragment in which Hegel equates current knowledge [*Kenntnis*] with *Bekanntschaft* (i. e., the notoriety of "well-known things"), Jakobs constructs his concept of *dolus indirectus*, effectively introducing a form of *praesumptio doli* analogous to the presumption of knowledge of the law.

In reality, Hegel's reference to the publicity of laws contained in the immediately following lines, as the foundation for the presumption of knowledge of the precept, helps us understand that, in this paragraph, Hegel did not intend to immediately introduce a broad concept of *Vorsatz*, but rather to address the collateral issue of *error iuris*. Similar considerations apply to §§ 209 and following, and in particular to § 215 of the Ethical life section.[33]

Freiheit, 2012, 154 ff.; *Alessio*, Azione ed Eticità in Hegel, 1996, 42 ff.; as well as *Battistoni*, Azione e Imputazione in G.W.F. Hegel, 2020, 72 ff.; *Battistoni*, RphZ 2017, 382.

[30] On this point, Art. 5 of the Italian Penal Code states: "No one may invoke ignorance of the criminal law as an excuse". However, the Constitutional Court, in its ruling no. 24 of March 1988, no. 364, declared Art. 5 constitutionally illegitimate "in so far as it does not exclude from the inescapability of ignorance of the criminal law the case of unavoidable ignorance".

[31] On this point, Art. 43 of the Italian Penal Code states: "A crime is intentional, or based on intent (dolus), when the harmful or dangerous event, which is the result of the action or omission and upon which the law depends to establish the existence of the crime, is foreseen and desired by the agent as a consequence of their action or omission".

[32] On Hegel's § 132, cf. *Battistoni*, Action and Imputation between Morality and Ethical Life: Hegel, 2020, 454.

[33] On this point, cf. ibid., 446 ff.; regarding the fact that, with the term *Bekanntschaft*, Hegel intended to refer to the presumption of knowledge of the law and not of the criminal act itself, cf. Hotho's statement: "Die Bekanntschaft also mit den Gesetzen und die Möglichkeit derselben fordert das Recht des subjectiven Willens". PR 1822/23, § 215, 976 (in *Hegel*, Gesammelte Werke Bd. 26,2,

In light of this, it is no coincidence that Jakobs – even in his recent treatise on *dolus*, as in his previous and well-known works – radically challenges the dichotomy, still accepted and consolidated in *communis opinio*, between error as to the law (*error iuris*) and error as to the fact [*error facti*].[34] Here, the German penal theorist seems to recover Hegel's treatment of the inexcusability of *error iuris*, extending it to *error facti* and imagining a kind of *dolus in re ipsa* in cases where the agent claims to have been ignorant of factual circumstances of which ignorance cannot be admitted.

On this point, I would like to focus my main critique of Jakobs' theory of *dolus*: Jakobs argues that, for the purposes of *dolus* (at least *dolus indirectus*), actual knowledge of all the concrete circumstances of the act is not necessary *in actu*; rather, universal notoriety [*Bekanntschaft*] of those circumstances is sufficient. The German author states:

> "Between knowledge as current mental representation and, at the opposite extreme, a state of complete ignorance, lies what, although not represented *in actu* [*nicht Vergegenwärtigtes*], is nonetheless notorious and well-known [*Bekanntes*],[35] that is, what, with a minimum effort, would surface in the current awareness of the agent, even though the agent does not actually make this effort. (…) The *dolus indirectus* here discussed is distinguished by the fact that the agent, in determining his behavior, excludes at least partially – or perhaps it would be more correct to say 'does not include' – that which, although notorious and well-known, is not the object of explicit current reflection. (…) Even the fact that not fully explored areas of action can present dangers is well-known and notorious; in other words, everything *that is not completely known as generally 'harmless' falls into the category of notoriously and potentially dangerous*."[36]

Among the various examples of *dolus indirectus* for ignorance of what is "notorious and well-known", Jakobs articulates the following:

> "In a second constellation of cases, the offender – perhaps due to a form of 'habituation' – is confident that he can neglect (at least partially) the correct management of his organizational sphere without suffering harm to himself, and, after a certain period, what was a well-known defect no longer strikes him. For example, a person burdened with 'positive obligations' repeatedly neglects the person under

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2015). And again: "Die Gesetze sollen mir bekannt sein, also das Erlaubte und Verbotene. Daß mein Bewußtsein übereinstimmt, nicht sich unterscheidet vom Gesetz, diese Einigkeit soll vorhanden sein. Dieß ist das Recht des subjectiven Bewußtseins". PR 1822/23, § 225, 986 (in *Hegel*, Gesammelte Werke Bd. 26,2, 2015).

[34] Also in *Michelet*, System der philosophischen Moral mit Rücksicht auf die juristische Imputation, die Geschichte der Moral und das Christliche Moralprinzip, 1828, 48 ff., the distinction between *ignorantia facti* (which *non nocet*, i. e., is excusable or at least excludes intent) and *ignorantia iuris* (which *nocet*, i. e., is tendentially inexcusable) is taken for granted.

[35] This is the footnote by Jakobs: "Kennen" (actual knowledge) and "Bekanntschaft" (knowledge "capable of being actualized") are often considered equivalent, especially in non-legal language. This underlies some of the possibilities, often discussed in the past, of determining the necessary intensity of cognitive states in intentional liability (in Jakobs, AT, 8/10 ff. with citations). – In *Goethe's* Wilhelm Meisters Lehrjahre (at the beginning of Chapter 3, Works of Goethe, Hamburg Edition, Vol. VII, 145), in its three-stanza song, Mignon asks six times: "Do you know...? (Kennst du?)", not in the sense of: "Is it currently known to you [aktuell bewusst]...", but rather in the sense of: "Is it well-known or generally known to you [bekannt], is it "available" to you...?". *Jakobs*, Kritik des Vorsatzbegriffs, 2020, 32.

[36] *Jakobs*, Kritik des Vorsatzbegriffs, 2020, 32.

his charge; or again, a car dealer drives uninsured vehicles for years, no longer paying attention to the persistent irregularity of his behavior; and other categories of similar cases could also arise."[37]

This is the most delicate point in Jakobs' discussion of *dolus indirectus*: in my opinion, ignorance of notorious and well-known facts (i. e., known to everyone or most people) cannot automatically lead to a criminal charge of *dolus*; rather, in some cases, such ignorance of what is "notorious" may precisely constitute a case of *culpa* with foresight or even "unconscious"[38] (but not necessarily slight) negligence, and not *dolus* (even if indirect or eventual). Similar reasoning leads me to believe that the so-called *state of doubt* is still fully compatible with *culpa*, as it must be determined on a case-by-case basis whether, in the face of such doubt, the agent has truly *accepted* the event or, conversely, has excluded or rejected it as a consequence of their action or omission.

In the already cited passage of the *Kritik des Vorsatzbegriffs*, Jakobs asserts that "everything that is not completely known as generally 'harmless' falls into the category of notoriously and potentially dangerous".[39] However, if this statement is taken literally and *de plano* imported into the theory of *dolus* – even *dolus indirectus* – it risks including within the area of criminal responsibility any conduct that is "*notoriously and potentially dangerous*", forgetting that it is precisely "*culpa* with foresight" that is meant to encompass this kind of phenomenon. In any case, for there to be *dolus*, the damage that occurred – which constitutes the material realization of the aforementioned danger – must have been desired or at least *accepted*, even if only as a probable consequence of the action or omission.

Furthermore, this Jakobsian statement ("Everything that is not completely known as generally 'harmless' falls into the category of notoriously and potentially dangerous") seems excessively conditioned by the so-called *worst-case analysis*, almost suggesting that any action, circumstance, or situation, for which the evident and obvious harmlessness cannot be affirmed, should *eo ipso* be presumed as dangerous. However, if this principle is applied too rigidly to the theory of *dolus* (and even *culpa*), it risks fostering a form of epistemological and practical pessimism, thereby unnecessarily broadening the area of criminal reproach. In procedural terms, this statement could flip the burden of proof onto the defendant, who would be tasked with proving that a given action, circumstance, or situation had, at the time of the act, the aforementioned characteristics of "manifest harmlessness" (whereas, in reality, it should be the full burden of the prosecutor to demonstrate what constitutes risk, danger, or harm within the framework of the specific *typical fact sub iudice*).

In fact, if we assert that the crime is certainly (indirectly or eventually) *dolus* if the agent knowingly performs an action "*notoriously and potentially dangerous*", without investigating the actual and concrete will (or at least acceptance) of the event, it could mean transforming *dolus* of harm into *dolus* of danger (which, in reality, is mostly pure *culpa* with representation), thus unreasonably extending the very structure of intentional conduct.

As the more astute criminal law scholarship affirms,

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[37] Ibid., 35.

[38] On the essentially culpable nature of the so-called "indirect intent", see *Ronco*, Le radici metagiuridiche del dolo eventuale, in: Bertolino/Eusebi/Forti (eds.), Studi in onore di Mario Romano, 2011, 1209.

[39] *Jakobs*, Kritik des Vorsatzbegriffs, 2020, 34.

> "one acts with dolus when, knowing the essential elements of the typical fact and attributing the cause of the fact to themselves, they direct their intention towards the harm of the protected interest, choosing the appropriate means to achieve it".[40]

In this light, the situation in which the agent appears to ignore "well known" or "notorious" circumstances seems notably ambiguous and not marked by unequivocal signs of authentically dolus responsibility.

It is true that the so-called "*ThyssenKrupp*" ruling by the Court of Cassation in 2014 included,[41] among the "indicators" of dolus, "the remoteness of the standard conduct" ("The more serious and extreme the negligence, the more the path opens to a cautious consideration of the dolus perspective"):[42] however, as is evident, this is merely an *indicator*, a rhetorical or topical argument that, together with all the other "parameters" of the fact (such as the intrinsic offensiveness of the action, the motive, the conduct following the act, etc.), can lead to the determination of *dolus* only after careful prudential reasoning, and not by resorting to inadmissible presumptions of dolus, such as: "*since* your conduct is seriously non-compliant, *then* you must be guilty of dolus".

Finally, if, as we have seen, Jakobs intends to build a notion of "criminal dolus" that is strictly cognitive, drawing from the aforementioned Hegelian passages in the Morality section, it must be borne in mind that the "culmination" of Hegel's *Philosophy of Right* is always reached within the realm of Ethical life:[43] here – particularly in § 227 – though in a rather concise and convoluted way, the philosopher clarifies that

> "The essential factor in categorizing an action is the subjective moment of the agent's insight and intention [das *subjektive Moment der Einsicht und Absicht des Handelns*] (…); besides, proof is concerned not with objects [*Gegenstände*] of reason or abstract objects of the understanding, but only with details, circumstances, and objects of sensuous intuition and subjective certainty, so that it does not involve any absolutely objective determination" (*EPR*, § 227).

While this is an enigmatic fragment and not easily deciphered, it seems to emerge – within Ethical life – a concept of judicial imputation that is neither objectified, generalized, nor purely cognitive and intellectualistic: indeed, in the aforementioned passage, one can note Hegel's insistence (also) on strictly subjective, individual, and intentional aspects.[44]

V. Hegel's Zurechnungslehre as the Study of the "Minimum Degree" of Human Agency

However, the most significant aspect to emphasize in this context is that, despite the explicit reference to the "technical" and elevated concepts of *Vorsatz* and *Absicht*, the core of Hegel's investigation into juridical-moral imputation does not seem to be focu-

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[40] *Ronco*, Riflessioni sulla struttura del dolo, 2015, 589.

[41] Cass. Pen., Sez. Unite, 24 April 2014, n. 38343, in Database of Italian Court of Cassation.

[42] Ibid., 184.

[43] For the aspects of the 'theory of action' discussed in the context of Ethical life, see *Alessio*, Azione ed Eticità in Hegel. Saggio sulla Filosofia del Diritto, 1996.

[44] On § 227, see *Battistoni*, Action and Imputation between Morality and Ethical Life, 2020, 451. On the function of punishment in Ethical life, with the "transformation" of revenge into ethical state punishment, § 220 of Hegel's *Grundlinien* is fundamental.

sed on *dolus* and intentionality in the strict sense. When examining the entire moral discussion, which is framed between Abstract right and Ethical life, one can notice that what truly interests the author of the *Grundlinien* is to achieve a very general definition of "human action", beneath which lie only brute forces, natural events, or morally irrelevant physical occurrences[45] (a similar reasoning appears in Larenz's 1927 study on *Hegels Zurechnungslehre und der Begriff der objektiven Zurechnung*).

In this regard, the general definition of "moral action" found in § 113 of the *Grundlinien* is significant: "The expression of the will as *subjective* or *moral* is *action*"; and a few lines later, it is reiterated: "Only with the expression of the moral will do we come to *action*". From this, the most respected Hegelian legal scholarship has deduced that, for there to be a human action susceptible to imputation, it is both *necessary* and *sufficient* that there is an externalization of subjective will.[46] Similar considerations apply to the awareness of the "objective value" of an action as the foundation of imputation, as contained in § 132 of the *Grundlinien*, a "generic" passage perfectly compatible with a hypothetical form of responsibility that is either negligent, preterintentional, or intentional.[47]

For example, when in the famous § 117 of the *Grundlinien*, Hegel states that "I can be made *accountable* for a deed [That] only if *my will was responsible* for it [*als Schuld des Willens*] –the right of knowledge [*das Recht des Wissens*]",[48] the reference to these epistemic and volitional elements – knowledge and will – appears absolutely general and non-specific. This leaves it open to multiple potential interpretations that legal scholars would later distinguish into categories such as unconscious negligence, conscious negligence, preterintentional fault, eventual *dolus*, direct *dolus*, and intentional *dolus*.

Ultimately, in the "theory of action" – which is laid out in the *Morality* section and later emphasized by functionalists like Jakobs in order to build a purely representational theory of criminal *dolus* – Hegel's actual interest seems to be in identifying

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[45] See *Alessio*, Azione ed Eticità in Hegel, 1996, 40 f.: "First of all, it must be noted how the very term "action" acquires, for the first time in Hegel, a clear sphere of meaning, capable of distinguishing the *Handlung* itself from any other form of activity (…). It is precisely the *structure of action as such* that intervenes and is, indeed, constitutively present in the unfolding of the ethics of action. (…) From the moral standpoint, it is not so much a matter of determining a type of action among others, but rather of grasping its underlying principles, principles that will continue to play a fundamental role in the Ethical life, where action will finally be able to unfold in its concreteness." My translation.

[46] *Quante*, Il Concetto Hegeliano di Azione, 2011, 23.

[47] From § 132 of Hegel's *Grundlinien*: "The right of the subjective will is that whatever it is to recognize as valid

should be perceived by it as good, and that it should be held responsible for an action – as its aim translated into external objectivity – as right or wrong, good or evil, legal or illegal, according to its cognizance [*Kenntnis*] of the value which that action has in this objectivity" (*EPR*, § 132). As can be seen, Hegel speaks generally of the pairs lawful/unlawful, good/bad, legal/illegal, meaning that his statement applies both to morality and to law; furthermore, the entire passage of § 132 is so broad that the reference to will and knowledge can be understood as pertaining to both the area of so-called "unconscious fault" and "conscious fault", as well as to the various forms of intent [*dolus*] that we know today.

[48] On the *Recht des Wissens* for the purposes of imputation, see *Vieweg*, Das Denken der Freiheit, 2012, 159 ff.

the "minimum degree" of morally and legally relevant *Handlung*,[49] which presupposes the capacity to understand and will, and which lies in the gap between *suitas* – the "general" consciousness and will of the action or omission – and the most minimal, unconscious fault, integrated by the abstract predictability of a given event.

Even when Hegel distinguishes between the necessary (intrinsic) consequences of actions and purely accidental or fortuitous consequences, this distinction operates primarily on the objective level of the *offensiveness* of the conduct and, possibly, the so-called "interruption of the causal link".[50] This is because the German philosopher does not delve further into the thorny issue of the "total basis" or the "partial basis" of such a judgment of necessity/accidentality. To directly "short-circuit" this dichotomy with the (quite different) distinction between *dolus* and *culpa*, as if to say that the necessary consequences of an action, precisely because they are necessary, would always and *ipso iure* fall within the scope of *dolus*, could eventually imply inadmissible forms of *dolus in re ipsa* or *praesumptio doli*. On the other hand, even in the face of objectively necessary consequences of conduct, there is still room to consider that conscious or "represented" negligence exists, insofar as the subject, while having foreseen those consequences, did not accept them, let alone desire them, due to factors that are not purely personal or conjectural, but rather objectively substantial.

This is the reason why Hegel's Morality section and his related theory of imputation have a fundamentally *cognitivist*[51] and intellectualist foundation, which places almost exclusive emphasis on the aspects that criminal lawyers refer to as "representational", while seemingly relegating to the background the more authentically volitional aspects. In fact, as mentioned, Hegel does not seem particularly interested in exploring the intra-systemic nuances of *Schuld*, including the problematic boundaries between *dolus* and *culpa*, as well as the various "internal degrees" within *dolus* itself. Instead, the German philosopher is concerned with studying the lower tier, that is, the minimum level of *culpa* below which no imputation is possible. This "tier", as noted, has an eminently cognitive nature, focusing on the concepts of foreseeability and avoidability *in potentia* that distinguish, precisely, unconscious negligence as a liminal form of criminal responsibility.

Further: in § 119 of the *Grundlinien*, Hegel uses the example of a fire and says: in the case of a fire,

> "reality is touched only at a single point – for example: the fire immediately affects only a small point – and this gives rise to a proposition, not a judgment. However, the universal nature of this point contains its expansion" (*EPR*, § 119).

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[49] It is the "*Spontaneität*" discussed also by *Larenz*, Hegels Zurechnungslehre und der Begriff der objektiven Zurechnung, 1927, 89 ff.; on the basic concept of action, see *Alznauer*, Hegel's Theory of Responsibility, 2015, 100 ff.

[50] Art. 41 of the Italian Penal Code states: "The concurrence of pre-existing, simultaneous, or subsequent causes, even if independent of the action or omission of the perpetrator, does not exclude the causal relationship between the action or omission and the event. Subsequent causes exclude the causal relationship when they are sufficient on their own to determine the event. In such cases, if the action or omission previously committed constitutes an offense in itself, the penalty provided for this offense shall apply.".

[51] In his recent volume on *Pragmatistic Anthropology*, Michael Quante interprets Hegel's *Philosophy of Right* as a "cognitivist ascriptivism" and as a reconstruction of our social praxis of ascription of responsibility (*Quante*, Antropologia Pragmatista, 2020).

However, this potential sequence of events is essentially objective in nature, and is still fully compatible with both the corresponding negligent figure, the preterintentional, and the intentional, in the sense that Hegel is not so much interested in discussing the various degrees of *culpa*, but in showing the connection between the singular and the universal, between the specific act, the overall action, and the global consequences. The message seems to be as follows: setting a small part of a material body on fire can make one responsible for the entire fire as well as the subsequent events that follow from it; but this statement holds true whether the first spark was ignited intentionally or negligently (for example, by carelessly dropping a cigarette butt)![52]

VI. A Brief Interim Conclusion on the Functionalist Conception of Dolus

To conclude these reflections, the thesis that was intended to be supported was the following: Jakobs' project of finding in Hegel's doctrine of moral action and imputation a kind of "skeleton" or confirmation of the functionalist-normativistic conception of *dolus* seems to present certain critical issues.

In fact, Jakobs attempts to find in Hegel's *Grundlinien* a theoretical foothold to demonstrate that *dolus* is not necessarily the effective and concrete knowledge and will of the entire offensive act, but is almost entirely saturated by cognitive aspects having a universal and generalizing nature. These, in turn, heavily compress the volitional side of *dolus*, which increasingly flattens into forms of *dolus in re ipsa* linked to epistemic-intellectual aspects that are equally assumed, based not on the actual knowledge of the concrete agent, but on facts that are known and notorious to the "rational human being" or the universal human being.

As a result, Jakobs develops a conception of *dolus* that is purely *cognitivist and representational*, which values or even exacerbates the intellectual aspects of practical agency, in which even strictly volitional-intentional profiles, when present, are mostly tied back to the predominant intellectual-representational factor (almost suggesting that an event, precisely because it is well represented in the agent's mind, can only be said to be *eo ipso* willed by him).

In fact, Hegel's own system of morality has been described by experts as a system of cognitive ethics, almost entirely focused on the epistemic-representational aspects of human agency. But this – and this is the pivotal point already anticipated above – is due to the fact that Hegel's "philosophical intent" does not seem to be to analytically explore the *higher* areas of subjective imputation typical of criminal law, i. e., intentional *dolus* and premeditated *dolus*, but rather the lower, almost liminal areas of human action (i. e., the lower boundary with natural or brute facts), where, in fact, the volitional-intentional elements remain more in the background, almost entirely overshadowed or even absorbed by the representational elements, which are mostly framed in a potential rather than actual key.

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[52] As clearly stated in *Battistoni*, Azione e imputazione in G.W.F. Hegel, 2020, 75, "in Hegel's lexicon [there are acts that] are not intentional but are somehow connected to the will: they are performed voluntarily, though not consciously, as Pippin himself acknowledges (voluntarily but not knowingly)". With reference to *Pippin*, Hegel's Social Theory of Agency: The 'Inner-Outer' Problem, Rivista di Filosofia 1 (2008), 3.

The minimum level of imputation of the human act, in fact, is the pure cognizability or avoidability of the personal act and of the possible external event,[53] an area where the contemporary concept of unconscious or unrepresented negligence resides (on the condition, of course, that the mentioned *Können* is clearly accompanied by a *Sollen* with a legal-normative foundation). This is what Hegel seems to refer to when studying the "minimum step" of moral and then legal attribution. Deducing from such preliminary and extreme investigations about what constitutes "human action" a cluster of principles, almost a "conceptual skeleton", on which to build the specific criminal concept of *dolus* was, in my opinion, the possible mistake made by criminal functionalists – foremost among them Jakobs – and, even before that, by the theorists of *objektive Zurechnung des Erfolgs*.

On the other hand, it is the very "philosophy of action" that has always dealt with the "minimum step" of moral and legal imputation, rather than with the highest degrees of voluntariness and intentionality. For example, in the *Nicomachean Ethics*, Aristotle concludes that it can be considered "human action" only the act which depends on the epistemic, volitional, and executive powers of the human being (these are the famous Aristotelian arguments of "*ἐφ' ἡμῖν*" and "*ἡ ἀρχὴ ἐν αὐτῷ*", thoroughly analyzed *inter alios* by Richard Loening).[54]

As is evident, this concept of "*dependence on*" is still perfectly compatible with both negligent and intentional (and preterintentional) offenses: in an intentional crime, it *depended on the agent* whether or not to decide to kill someone; in a negligent crime, it *depended on the agent* whether or not to respect the precautionary rules of diligence, caution, or expertise, which, once followed, could avert the event or at least reduce the risk of it. The "base character" common to both *dolus* and *culpa* thus seems to be that sufficient level of *control* over the event, which has always been considered the minimum requirement for an external event to be attributed to human agency and not to other "forces" such as chance, destiny, fatality, or accident.

This is the reason why Aristotle,[55] within the macro-concept of *ἑκούσιον* (*hekousion*), i. e., what is generally "voluntary and spontaneous", places both acts committed purposefully and intentionally [*προαίρεσις* and *βούλησις*], as well as actions carried out due to mere negligence and carelessness [*δι'ἀμέλειαν*]. For Aristotle, as for Hegel, the primary interest was to distinguish between spontaneous human actions and simple, uncontrollable misfortunes (*ἀτύχημα*; events that happen *παραλόγως*, i.e., against all reasonable expectation). At this point, the sub-distinction between premeditated, merely intentional, consciously negligent, or unconsciously negligent actions was of lesser interest to the philosopher, as these were considered "psychological" categories entrusted to the discretion of the legislator. In fact, in the notion opposite to *volunta-*

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[53] See *Battistoni*, Die Möglichkeit des Wissens als Grundlage der Zurechnung: Die Lehre der Imputation in K. L. Michelet und K. Larenz auf der Grundlage von Hegels Handlungstheorie, 2017, 380 ff.

[54] *Loening*, Die Zurechnungslehre des Aristoteles, 1903. Similar considerations were later made by Pufendorf in the famous work *De culpa commentatio iuris naturalis et civilis*, Utrecht, ed. 1773, II, IV, § XL, 76; *De jure naturae et gentium*, I, V; as well as *De Officio Hominis et Civis*, I, 1, 2.

[55] *Aristotele*, Nicomachean Ethics, III,1114a 19; 1113b, 6-19; 1114a, 11-25. Cf. *Thomas Aquinas*, S. Th., I-II, q. 1, a. 1: "Aliquid dicitur voluntarium non solum quia cadit super ipsum actus voluntatis, sed quia in potestate nostra est ut fiat vel non fiat. (...) Unde etiam ipsum non velle potest dici voluntarium, inquantum in potestate hominis est velle et non velle.".

rium [*ἑκούσιον*], namely *involuntarium* [*ἀκούσιον*], Aristotle placed indiscriminately and "massively" what was neither intentional nor negligent, so that the distinction between intentional acts and negligent acts had an "internal" nature: it was not on this that the real *discrimen* between imputable and non-imputable acts was made.[56]

On the other hand, it was precisely Hegel's disciple, the jurist Karl Ludwig Michelet (1801–1893),[57] who demonstrated the partial derivation of Hegel's *Zurechnungslehre* from Aristotle's doctrine of imputation,[58] connecting the notion of *Freiwilligkeit* to the Greek concept of "spontaneity" [*ἑκούσιον*] and showing that Hegel's system of imputation readily accepts both negligent and intentional offenses. This once again calls for a re-reading of Hegel's *Grundlinien* along the lines of *philosophia perennis*, which has its roots in the thought of the Stagirite (cf. K.L. Michelet's doctoral dissertation *De doli et culpae in jure criminali notionibus* of 1824, which was praised and endorsed by Hegel himself,[59] as well as his *Habilitationsschrift* titled *Die Ethik des Aristoteles in Ihrem Verhältnisse zum Systeme der Moral* of 1827, and finally *Das System der philosophischen Moral* of 1828).

I believe a misunderstanding may have arisen when Michelet, in his *System der philosophischen Moral*, citing concepts already expressed by Kant in his *Metaphysics of Morals*, asserts:

> "This voluntariness [*Freiwilligkeit*] or spontaneity (the *ἑκούσιον* of Aristotle), as the first mode in which subjective freedom exists, is seen by jurists justly in this: that the human being is the free cause of the deed [*That*] (*libera causa facti*); for it is not enough that he has been merely the cause, but he must have wanted to be the cause."[60]

In this statement, if not correctly interpreted, I believe the possible misunderstanding lies between voluntariness as the "minimum step" of imputation – i. e., spontaneity/voluntariness understood Aristotelically as *ἑκούσιον* – and voluntariness understood as intentionality/*dolus*.

However, Michelet's overall treatment – from his dissertation *De doli et culpae in jure criminali notionibus* onward – is very clear: within the general concept of "voluntariness", it is possible to clearly distinguish *dolus* from *culpa*. *Dolus*, in fact, exists

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[56] Indeed, as clearly reiterated in *Battistoni*, Azione e Imputazione in G.W.F. Hegel, 2020, 75, note 122, "in Aristotle, the subject can be blamed or praised even for the voluntary act alone, while intentionality is something that can be added to it." My translation.

[57] On the figure of the jurist Michelet, a student of Hegel, see *Moser*, Hegels Schüler C.L. Michelet: Recht und Geschichte jenseits der Schulteilung, 2003.

[58] On the relationship between Hegel's thought and Aristotle's philosophy, see *Chiereghin*, Tempo e Storia: Aristotele, Hegel, Heidegger, 2000; *Ferrarin*, Hegel and Aristotle, 2001; *Pedlebury*, Action and Ethics in Aristotle and Hegel: Escaping the Malign Influence of Kant, 2006; *Dangle*, Hegel und die Geistmetaphysik des Aristoteles, 2013; *Giacone*, La Possibilità Necessaria. Aristotele nella Dottrina dell'Essenza di Hegel, 2017.

[59] Cfr. *Battistoni*, Azione e Imputazione in G.W.F. Hegel alla Luce dell'Interpretazione di K.L. Michelet, 2020, 26.

[60] *Michelet*, System der Philosophischen Moral, 1828, 23, cited in *Battistoni*, Azione e Imputazione in G.W.F. Hegel, 2020, 98; for the clear distinction between the dichotomy voluntary/involuntary and the three "degrees" of dolus, negligence, and pure *Zufall*, see *Battistoni*, Azione e Imputazione in G.W.F. Hegel, 2020, 111 ff.

when the act is known and "intended" by the agent;[61] by contrast, the mere knowledge of the act (*scientiae vera possibilitas*) constitutes mere negligent responsibility.[62]

If we consider that, as previously mentioned, Michelet's dissertation received full praise and approval from his master Hegel, I believe it is possible to affirm that the "sub-distinction" between *dolus* and *culpa* – the latter being integrated by the mere knowledge of the act – was already implicitly present in Hegel's treatment of *Zurechnung* or, at the very least, is not incompatible with it; otherwise, Hegel would very likely have raised objections to his student's discussion.

In his subsequent work *System der philosophischen Moral mit Rücksicht auf die juristische Imputation* (1828), Michelet explains very well that, while in *dolus* the volitional-intentional element is at the forefront and directly impacts the criminal decision, in *culpa* the representational element (even if purely potential) takes precedence, although the volitional domain remains intact, albeit in the *indirect* form,[63] i. e., the possibility that the will properly guides the agent toward diligent or prudent behavior. However, it must be admitted that Michelet's treatment tends to significantly expand the area of intentional responsibility, according to an interpretation of *Vorsatz* that today appears essentially cognitivist.[64]

From an overall and panoramic reading of Hegel's *Zurechnungslehre*, I think it is essentially impossible to argue that, for the father of German Idealism, negligent, imprudent, or unskilled conduct did not deserve imputation or punishment: Hegel could

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[61] *Michelet*, De Doli et Culpae in Jure Criminali Notionibus, 1824, 34f.: "Dolus est intentio ejus actionis, cujus substantia juris laesio est, dolosumque crimen ea juris laesio intenta, quae actionis substantia continetur".

[62] Ibid., 37 f.: "Culposum eum crimen juris laesio est non intenta et ex actione, ut media consequentia, proveniens, cujus scientiae vera possibilitas in animo est (i. e., quam debita diligentia victoque, cujus ipso autor sum, errore providere potuissem)"; ibid., 77, with reference to § 28 of Title XX of the *Allgemeines Landrecht für die Preußischen Staaten*, second part, according to which: "Wer bey Uebertretung des Strafgesetzes zwar die gesetzwidrige Folge seiner Handlung nicht wirklich vorausgesehen hat; doch aber bey gehöriger Aufmerksamkeit und Ueberlegung hätte voraussehen können; der hat sich eines Verbrechens aus Fahrläßigkeit schuldig gemacht". Cf. *Michelet*, System der Philosophischen Moral, 1828, 62: "Die Möglichkeit des Wissens (denn der Irrthum konnte abgewendet werden), hat der Handelnde nicht, wie er sollte, zum wirklichen Wissen erhoben. Diese Verpflichtung ist die obligatio ad diligentiam der Juristen". On the "possibility of foreseeability" as the basis of imputation, see *Larenz*, Hegels Zurechnungslehre und der Begriff der objektiven Zurechnung, 1927, 75 ff.

[63] *Michelet*, System der Philosophischen Moral, 1828, 57: "Wir haben so eine neue, von den früheren ganz verschiedene Stufe der Imputation erreicht; und weil hier ursprünglich der Fehler im Bewußtsein, und nur mittelbar im Willen liegt, so erhält diese Schuld den Namen des Versehns. Das durch das Versehn Bewirkte ist aber eine real mögliche und deshalb imputable Folge der Handlung". Here, Michelet refers to a "new" level of imputation, based on an intellectual defect directly and an indirect flaw in the will (see also ibid., 73); in reality, this is nothing more than the ancient concept of negligence, well known both in Greek philosophy and in the law of ancient Rome. The "novelty" probably lies in the fact that the concept of *Versehen* had remained only implicit and "latent" in Hegel's treatment, awaiting development and clarification by the jurist student Michelet. On *Versehen* in Michelet, see Battistoni, Azione e Imputazione in G.W.F. Hegel, 2020, 118 ff.

[64] In particular, in *Michelet*, System der Philosophischen Moral, 1828, 74, while engaging with the penal thought of Grolman, the author places within the realm of intent (dolus) also cases of pure foresight (without will) of the act, and even situations in which the agent could have foreseen that, in order to achieve their goal, it would be necessary to engage in an unlawful act.

never have asserted that a person who accidentally kills someone while cleaning their gun is completely immune from any reproach. This is especially true because such an exclusion of responsibility would have contradicted the two-thousand-year moral tradition that stretched from Aristotle to Thomas Aquinas, all the way to Pufendorf and Kant – a tradition that Hegel never shows any inclination to refute or set aside.

Simply put, in his treatment in the *Grundlinien*, Hegel did not explicitly analyze the difference between actual knowledge *in actu* and knowledge *in potentia*, limiting himself to stating, more generally, that the imputation of an action requires the grounding of the act in the intellectual and volitional powers of the agent. This sub-distinction was, as previously mentioned, examined by his disciple Michelet, who – I believe – did not introduce radically new and incompatible elements into Hegel's treatment (as Larenz seems to suggest when he speaks of a "defect" or "lack" in Hegel's theory of imputation),[65] but rather simply developed the master's ideas and made explicit a distinction (between *dolus* and *culpa*) that was already implicitly contained in Hegel's treatment.[66]

That negligence responsibility (*culpa*) was very well known and admitted by Hegel is, in my opinion, clearly evident reading the controversial § 116: whether this is understood – as I believe – as a hypothesis of civil liability of a compensatory nature, or whether it is interpreted as a hypothesis of (also) criminal responsibility for the possession of a thing or the carrying out of a risky activity, in this paragraph Hegel is clearly imagining a liability for the violation of "care" obligations ("*Aufmerksamkeit*", as stated in § 116). Furthermore, the philosopher says that the owner of the thing will be liable more or less [*mehr oder weniger*] for the damages caused by it, and this phrasing could suggest that the responsibility depends, from case to case, on whether the agent has violated the obligations of diligence and prudence [*Aufmerksamkeit*] resting upon them. Ultimately, it implies a sort of presumption of liability, unless the owner can prove that the event was unavoidable even with the utmost vigilance.[67]

On point, the example noted by Hegel in the margin of § 120 is very interesting; in the note, the philosopher writes:

> "Stuhl, Bierkanne auf den Kopf schlagen – mit bewaffneter Hand – Aber Recht der Absicht an den denkenden Menschen, die Natur der Handlung zu kennen, zu wissen, daß sie eine Möglichkeit der Tötung ist. Wenn auch nicht diese bestimmte Handlung – Mord – in diesem Augenblicke im Vorsatz bewußt vorhanden war, – so weiß er, daß in solchem Benehmen solches liegt" (EPR, § 120 am Rande).

Here, as is evident, Hegel is stating that the person who intentionally strikes the victim's head with a chair or a beer *can foresee* the victim's death and, thus, will be

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[65] *Larenz*, Hegels Zurechnungslehre und der Begriff der Objektiven Zurechnung, 1927, 52 ff.

[66] On this point, I fully agree with *Battistoni*, Die Möglichkeit des Wissens als Grundlage der Zurechnung, 2017, 394 ("Die Voraussetzungen dafür waren nach meiner Meinung schon bei Hegel vorhanden, obwohl nicht immer in expliziter Weise […]. Das bringt verschiedene Arten oder Stufen der Zurechnung mit sich, die schon ansatzweise bei Hegel vorhanden waren"). In this regard, even in the annotation to § 118 of the *Grundlinien*, Hegel clearly speaks of consequences that were not expressly foreseen but were nonetheless foreseeable and "to be foreseen" (as also noted in *Larenz*, Hegels Zurechnungslehre und der Begriff der Objektiven Zurechnung, 55).

[67] On this point, it should be noted that Article 2051 of the Italian Civil Code, previously cited, states that "everyone is responsible for damage caused by things they have in their custody, unless they prove that it was caused by force majeure.".

held accountable for this event (today, we would say preterintentional liability, not *dolus*, if the intent to kill is absent). However, if the initial act is not intentional, and if, for example, the victim's head is struck negligently or imprudently – say, by awkwardly moving a chair – there is no clear evidence to suggest that Hegel would have meant to support the presence of *dolus* (even if indirect) instead of *culpa* in this scenario.

Identical considerations could be made with respect to Aristotle's example of throwing a stone, which was later referenced by Gans in the *Grundlinien* notes:

> "(…) but not now, when he has thrown away his chance, just as when you have let a stone go it is too late to recover it; but yet it was in your power to throw it, since the moving principle was in you."[68]

Here, Aristotle is saying that the person who throws a stone cannot then disclaim or reject the consequences caused by the throw; but once again, the philosophical treatment implicitly and "involuntarily" leaves unaddressed the distinction between *dolus* and *culpa*. Clearly, the Stagirite would have had no difficulty distinguishing the case of one who throws a stone in order to harm or kill someone, from that of someone who accidentally lets a stone or vase fall from a window, injuring or killing a passerby for mere negligence.[69]

Such statements are also perfectly reflected in the Italian Penal Code, specifically in Articles 43 and 61, n. 3: in the first provision, the negligent [*culposus*] offense is defined as one in which the event, even though foreseen, was not intended by the agent; while the intentional (*dolosus*) offense is one in which the event is both foreseen and intended. The second article establishes an increase in the penalty (up to one third) if, in the case of negligent [*colposo*] crime, the event was indeed foreseen (even though, obviously, not intended, otherwise it would fall under *dolus*).

From the interplay of these concepts, it is possible to derive three "levels" of subjective attribution in the Italian Penal Code: the so-called "unconscious" *culpa* (when the event is neither intended nor foreseen, but merely foreseeable); the so-called "conscious" *culpa* (when the event, although not intended, was actually foreseen by the agent); and finally, *dolus* (when the event, in addition to being foreseen, was actually intended).

The peculiar thing is that the legal definition of *culpa* contained in Article 43 of the Italian Penal Code seems to construct the reproach solely on the objective violation of a rule or standard of behavior, without explicitly mentioning the concepts of foreseeability and avoidability. It was only the doctrine and jurisprudence – for example, the Constitutional Court in the famous ruling No. 364/1988 on *error iuris* – that firmly asserted that there can be no true *culpa* without the actual foreseeability and avoidability of the event by the agent.

For these reasons, and to conclude, a theory of *dolus* built on the "skeleton" of Hegel's doctrine of action seems to show a possible conceptual limit, at least from the point of view of the Italian legal system: in fact, it builds *Vorsatz* starting from purely representational elements, and even only potential elements, which actually belong to the realm of *culpa* and even to the "fringes" of unconscious *culpa* or *culpa* without representation. These are precisely and exactly those "minimal" cognitive elements –

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[68] *Aristotle*, Nicomachean Ethics, 1114a 16–21.

[69] This case is specifically mentioned in *Michelet*, De doli et culpae in jure criminali notionibus, 1824, 37, as a clear example of *homicidium culposum*.

the notorious, the "generally known" – which, when carefully considered, constitute the dividing line between culpable human conduct and fortuitous events, and which Jakobs valorizes to construct the notion of "*dolus indirectus*".

I therefore believe that a purely cognitivist interpretation of criminal *dolus*, which neglects the volitional and intentional aspects, is not only contrary to the above mentioned Article 43 of the Italian Penal Code, but also finds no sufficient foundation or adequate validation in Hegel's theory of imputation contained in the *Grundlinien*.

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