

The Fault Element in the History of German Criminal Theory: With Some General Conclusions for the Rules of Imputation in a Legal System

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Abstract This paper tries to explain against the backdrop of the history of German criminal theory why and in which way the fault elements are seen differently in Germany and in Anglo-American countries. It shows how Feuerbach's psychological model of guilt convinced Feuerbach's German contemporaries in the 19th century that the suppression of the actual will to violate a criminal prohibition must be the reason for punishment. For such deterrence theory, direct intention is the central criterion of imputation. There is no room for extensions like indirect intention. The resulting gap was filled by representatives of the will theory who created *dolus eventualis* as a criterion of imputation. The paper then concentrates on the gradual change which *dolus eventualis* has undergone due to the development of a 'normative' concept of guilt, i.e. a perception of guilt as a failure to live up to certain expected standards. It is outlined how the normative concept of guilt has facilitated Welzel's decision to transplant *dolus* from the guilt level to the level of definitional elements. Transferring *dolus* to the definitional level led to a further change from a primarily voluntative to a cognitive content of the notion. It became appropriate to view *dolus eventualis* as acceptance of the prohibited state of affairs. For reasons of clarification the terms *dolus eventualis* and recklessness are compared in an annex to the paper.

Keywords *Mens rea* · *Dolus eventualis* · Recklessness · Risk taking

Introduction

The following paper intends to provide answers to the question why the fault element has taken various turns during the past 200 years of German history. I believe that the

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