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At the outset of his paper, Professor Burkhardt enumerates the problems facing the researcher who examines the question whether accomplished crimes should be distinguished from attempted crimes for the purpose of punishment.[1] In the wake of Burkhardt's excellent and comprehensive article, the problems of arriving at an unambiguous, satisfactory answer and raising new arguments are greatly increased. The following is devoted to the claim that it is possible to present a justification, more forcefully than Burkhardt did, for distinguishing between the punishment of accomplished crimes and the punishment of attempts. However, I would first like to make a number of observations concerning the nature and the characteristics of the question.

First, what makes the question at hand so captivating is the apparent gap between the socio-legal consciousness and the conclusions that arise from a rational examination of the penal considerations. A rational, or psychoanalytical, examination yields a conclusion that favors making no distinction in the penal response between accomplished crimes and attempts. Yet many people[2] and, indeed, many legal systems,[3] tend to distinguish between the two with regard to punishment.

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* A first draft of this comment was presented to the German Anglo-American Workshop organized by the Max Planck Institute for Foreign and International Criminal Law in Freiburg on the 19th of July 1984. I am grateful to the Workshop's participants for their remarks. Burkhardt's paper to the Workshop, together with the other papers of the German participants, was published in 1986 B.Y.U. L. Rev. 553 (1986). Although this comment is related to Burkhardt's article, it can also be read independently.

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1. Burkhardt, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely than an Attempted Crime?*, 1986 B.Y.U. L. Rev. 553 (1986).

2. For example, raising this question before my students in two criminal law classes (one class of law students and one of criminology students) yielded a finding that 80% were of the opinion that the penalty for attempt should be distinguished from the penalty for the accomplished crime. Carr reports a similar tendency; *see* Carr, *Punishing Attempts*, 62 Pac. Phil. Q. 61, 62 (1981).

3. For example, English common law and other legal systems inspired by English law, such

Some are of the opinion that it is impossible to reconcile current theories of penal objectives with the traditional distinction between the punishment of accomplished crimes and attempts and who therefore hold that "either the theories are unsatisfactory or our practices should be changed."[4]

The approach that distinguishes accomplished crimes from attempts may, perhaps, be explained as follows: First, results generally influence our viewpoint and our judgment in daily life,[5] politics and historical analysis[6]; and, second, historical criminal law influences the social consciousness.[7] Early criminal law considered results because it replaced the "private" law of revenge and taking the law into one's own hands, which by their nature centered upon the negative results of criminal conduct.[8] Of course, this early approach changed with the gradual recognition of other grounds for criminal responsibility, such as the mental element, but it has not entirely disappeared and remains firmly rooted in the normative system of the criminal law. Today, as in the past, this approach influences society's evaluations, intuitions and judgment.[9]

In addition, the importance of the question under discussion depends, to a great extent, upon the degree of leeway that the law gives to the process of individualizing punishment, that is, to the normative framework of the penalty established for an offense. In a legal system that provides only, or primarily, maximum penalties, distinguishing attempts from accomplished crimes is less significant than in a system that provides both maximum and minimum penalties. The question assumes its greatest significance in a system of fixed penalties, especially severe ones, such as death and mandatory life imprisonment. Furthermore, our question's primary significance extends beyond its seemingly narrow limits. It includes the issue of the scope of punishment of attempt (for example, if attempt is not to be distinguished from the ac-

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as Israeli, Canadian and New Zealand law, require leniency in the punishment of attempts; German, Swiss and Japanese law allow for leniency in the case of attempt.

4. Dworkin & Blumenfeld, *Punishment for Intentions*, 75 MIND 396, 404 (1966); *but see* Marshall, *Punishment for Intentions*, 80 MIND 597 (1971).

5. *See* B. WILLIAMS, MORAL LUCK 22, 23 (1981).

6. Compare in this regard the effect upon the public consciousness in the free world of the successful Entebbe hostage rescue to the effect of the unsuccessful attempt to free American hostages held in Teheran.

7. *See generally* Marshall, *supra* note 4.

8. *See Exodus* 21:17-23; *see also* Marshall, *supra* note 4, at 597-98.

9. In a discussion held in my class on the question of the distinction, for example, many students offered the "reason" that "the law distinguishes attempts from accomplished crimes with respect to penalty."

complished crime, should the scope of its punishment be limited?).[10] The question also raises the issue of the place and status of results in the criminal law, including its implications for the laws of negligence and accessories. In approaching the question, we must also consider such fundamental issues as the place and importance of the mental element in crime, the nature and purpose of punishment and penal law, and the relationship between law and morality. In this context, we should note that with Burkhardt's approach, which distinguishes between successful and unsuccessful attempts, danger—and not its chance realization—is the basis for attributing criminal responsibility. Burkhardt's is not the only approach that rejects making the realization of results a yardstick in criminal law. Another approach views the mental attitude of the perpetrator as the "end all," and thus does not distinguish between the creation of the danger (i.e., possible attempt) and an absence of danger (i.e., impossible attempt).[11]

Moreover, as stated earlier, it is arguable that in this matter our intuitions are influenced by legal reality. Nevertheless, these intuitions should be empirically investigated by an examination of the penalties imposed by the courts and the reasoned opinions of a cross section of the public.[12] Through such an examination we may hope to discover the underlying criteria (mental element, degree of danger, etc.) and the generality and consistency of approach to the various mental elements and different offenses.[13]

Finally, it should be kept in mind that the response to the question may be influenced by its phrasing. Consider, for example, the difference between: Is it justified to punish an accomplished crime more severely than an attempt? and: Is it justified to punish attempt less severely than an accomplished crime?[14] Similarly, differences in approach may arise with regard to partially successful attempts (e.g., the victim is wounded), as opposed to unsuccessful completed attempts (e.g., all the bullets missed the victim).

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10. In this respect, English law, which punished attempted felonies and misdemeanors, differs from German law, under which only attempted felonies are punishable, while attempted misdemeanors are only punishable if so specified in the Code.

11. Stratenwerth, *Handlunqs und Erfolgsunwert im Strafrecht,* 79 SCHW. ZEITS. F. STRAFR. 16 (1963).

12. It would be interesting to examine to what extent intuition is influenced by the legal system in force.

13. It is possible that greater importance would be assigned to the result of less severe offenses (e.g., theft) in comparison to more severe offenses (e.g., causing bodily harm and murder).

14. The approach requiring equal penalties for attempts and accomplished crimes does not necessarily mandate that penalties for attempts be raised; the goal could also be achieved by lowering the penalties for accomplished crimes. Moreover, if it is held that the result is entirely a matter of chance, one method of evaluation is to disregard that result.

I will now address the question itself and attempt to show that an approach that distinguishes between the punishment of accomplished crimes and the punishment of attempted crimes can be justified. I begin by considering the claim that rational judgment must disregard differences born of chance.

I. Rationality, Chance and the Punishment of Attempt

The issue of chance may be discussed in light of the following propositions:

A. Moral judgment does not disregard the element of chance.

B. Judgment in criminal law is not identical to moral judgment, and the evaluation of chance differences is not foreign to judgment in criminal law.

C. The difference between an accomplished offense and an attempt to commit that offense is not one of chance.

A. Chance and Moral Judgment

One of the strongest arguments in favor of a nondifferentiating approach is that the opposite, differentiating, approach makes punishment conditional in a manner not consistent with the rational approach. Thus, proponents of a rational approach would argue that moral values are immune to luck and are not dependent upon it, or in the words of Bernard Williams: "Anything which is the product of happy or unhappy contingency is no proper object of moral assessment, and no proper determinant of it either."[15] This idea reflects a basic sense that is deeply rooted in our moral judgment system. Nonetheless, we should bear in mind that a decision to act—including a decision to perpetrate an offense—and the carrying out of such a decision are often contingent upon fortuitous circumstances, such as temptation, provocation, and abetment (not to mention such chance factors as heredity and environment which may also influence moral disposition). An insistence upon the absolute disregard of chance factors makes moral judgement almost impossible.[16] In practice, we make moral judgments notwithstanding the influence of chance factors.

Moreover, it would seem that our moral sense is not affronted even if a difference in attitude is founded upon a chance distinction. Consider the following: two men are provoked in an extreme manner. Experience shows that their immediate reaction to such provocation is one of violent outburst. But this time, one of them gets something in his

15. B. Williams, *supra* note 5, at 20.

16. *Id.* at 21.

eye, and in the course of removing the foreign object he cools off. His friend, not similarly detained, seriously injures his provoker. Our tendency is to distinguish the two in moral terms, not merely in terms of legal judgment. Another example is our reaction to a successful thief who makes off with a fortune, as opposed to our reaction to a less successful thief who finds but a trifle.[17] Both thieves may have intended to take whatever they might find, and it was only the hand of fate that brought one a treasure and the other a mere pittance. As the ancient Hebrew saying goes: "Everything in the world depends on fortune, even the scroll of the Law in the Temple." Though it be difficult to accept and disconcerting, it is an inescapable reality.

B. Moral Judgment and Judgment in Criminal Law

Even were moral judgments entirely free of the factor of chance, we would, nevertheless, have to examine whether moral judgment and criminal law judgment are one and the same. Do moral judgments serve as our sole and supreme criteria, or does this granting of exclusivity and unlimited application to "purely moral motivations" bring about what Williams describes as "no life of one's own, except perhaps for some small area, hygienically allotted, of meaningless privacy"?[18]

Whatever the case may be in the realm of personal judgment, purely moral judgment and judgment in the sphere of criminal law are not congruent.[19] The difference between the two derives from the purpose of criminal law, which is first and foremost the defense of those interests necessary to the existence and development of society, and not the total adoption of moral norms and their transformation into norms of criminal law by the appending of sanctions. The primary function of moral judgment within the criminal law framework is to filter and delimit criminal responsibility; this as distinct from obliging or justifying the assignment of criminal responsibility. The norms of criminal law, whose purpose is to safeguard vital societal interests, must also be moral norms. But a moral transgression that does not threaten a societal interest need not be a criminal offense. In the absence of moral blameworthiness, there should be no punishment, though moral blameworthiness in and of itself does not justify punishment. Punishment should not be meted out in excess of what is warranted by our moral sense, though we need not reach the upper limit of punishment tolerated by that moral sense. For example, even if we hold that there is no

17. Consider another example: two bank robbers are "surprised," one by an unexpected withdrawal, the other by an extraordinary unforeseen deposit.

18. B. WILLIAMS, *supra* note 5, at 38.

19. It is not my intention to treat this complex issue exhaustively or comprehensively.

moral difference between a successful offender and one whose purpose is thwarted by circumstances beyond his control, there can be little doubt that there is a significant difference between the two in the eyes of the criminal law. Though numerous examples of this proposition might be advanced, a few should suffice.

Consider the case of a nephew designing his uncle's death. To attain his intended purpose, the nephew sends his uncle for a walk in the woods on a stormy night or books him a flight on an airline of questionable repute. Although the nephew's evil intent in no way differs from that of a murderer, still he will not be held criminally responsible for his uncle's death.[20] Morally, there is no difference between an unrealistic attempted murder (such as by absurd means, where the perpetrator is aware of the physical quality of his actions, e.g., magic or prayer) and any other attempts, though the former is not subject to criminal sanction. The criminal law similarly treats conduct fortuitously interrupted in its preparatory stage, though but a single step remains in putting that preparation into effect (in the case of preparation that is not itself unlawful). Yet the same conduct, if not interrupted, becomes a punishable attempt with the taking of that single step. If we distinguish between complete and incomplete attempts (e.g., with respect to punishment), we introduce still another distinction that may result from chance. The ability to take that additional step that distinguishes the completed attempt from the incomplete attempt depends, *inter alia,* upon the non-intervention of the police at the critical stage. Such is also the case with possible—as opposed to impossible—attempts, since success and failure are often dependent on chance (e.g., the intended victim dies a natural death an instant before an attempt is made on his life).

Likewise, the criminal responsibility of accomplices is not always in accord with our moral sense. Morally, there is no difference between aiding a person who commits an accomplished crime and aiding a person who *does not* actually commit the planned offense, though the criminal law may assign responsibility only for the former.

Legal provisions which allow for retreat from an attempt and nonpunishment in the case of retreat make for yet another distinction: they distinguish an offender who retreats from one who does not enjoy the opportunity. For example, an incited person zealously carries out the offense before the repentant inciter can dissuade him; or the victim returns home earlier than expected and sets off the bomb while the perpetrator is on his way to disarm it.

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20. This, at least, is the position of German law; *see* C. ROXIN, HONIG-FESTSCHRIFT 135.

Classifying offenses in terms of their relative severity (death, bodily harm, theft, etc.) reflects, above all, the relative societal importance of the various interests defended by the legal prohibitions. While, on the other hand, the differences in the importance of the protected interest create differences in the severity of the mental attitude of the perpetrators.

C. Success of the Accomplished Crime and Failure of the Attempt—A Matter of Chance? The Factor of Individual Deterrence

A primary assumption of our discussion up to this point has been that the factor differentiating a completed attempt from an accomplished crime is chance. This is indeed the ineluctable conclusion to be drawn from the comparison of individual situations. However, it may be assumed that an examination of all the cases of success and failure would show that they generally differ as follows: among the cases of success we will find more instances of careful planning and high-level performance than among the cases of failure. Conceivably, more and more of the factors upon which success depends can be controlled by the perpetrator through appropriate planning and competent performance. Thus, the margins of uncertainty and the probability of failure can be lessened. Among the factors that may improve the chances of a murder, for example, we might mention physical control of the victim, isolated location, lethality of the means (a knife as opposed to bare hands, a rifle as opposed to a knife, a high-caliber automatic weapon with a telescopic sight and ample ammunition as opposed to a rifle), expertise in the use of the chosen means, repeated use at close range, and guarantee of the results. Indeed, according to the findings of Frank Zimring, "[t]he rate of knife deaths per 100 reported knife attacks was less than 1/5 the rate of gun deaths per 100 gun attacks."[21] It is possible to imagine a continuum where well-planned and performed successes stand at one end and poorly-planned and performed failures stand at the other, while in between are those instances in which the correlation between the quality of planning and performance and the degree of success or failure is less clear. The result of such an approach would be that we might view the failure of an attempt as a substantial indicator of the failure in the planning or performance and, therefore, as an indication that the perpetrator posed a lesser threat than his successful counterpart. This consideration of the potential danger

21. Zimring, *Is Gun Control Likely to Reduce Violent Killing?* 35 U. CHI. L. REV. 721, 728 (1967/1968); *see also* Zimring, *The Medium is the Message: Firearm Caliber a Determinant of Death from Assault,* 1 J. LEGAL STUD. 97, 105 (1972).

presented by the perpetrator is significant in the context of individual deterrence as an object of punishment.

When the above factors are not considered, it is generally felt that there is no justification for distinguishing accomplished crimes from attempts for the purpose of punishment. However, where offenses carrying fixed penalties are concerned, the difference in potential danger between the attempter and the successful perpetrator can justify distinguishing between the two. Whether a similar distinction would be justified with regard to other offenses would seem to depend on how strong the correlation is between the elements of planning and performance and those of success and failure. The empirical data gathered to date are not sufficient for a decision. Zimring's studies did not focus upon perpetrators acting with intent to bring about a result, nor did they consider all the factors that contribute to the probability of success, such as the range from which the weapon was used and the degree of the perpetrator's expertise in the handling of the weapon. That contrary examples (excellent plans that failed and questionable plans that succeeded) exist does not preclude at least a facultative consideration of a sufficiently clear correlate. Legal distinctions in the matter of punishment are, after all, generally based upon the common cases and are not dependent upon absolute accuracy as expressed by appropriateness in every imaginable case.[22] Thus we may conclude that the consideration of individual deterrence does not necessarily oblige equal punishment of accomplished crimes and attempts.

II. RETRIBUTION

The other central consideration justifying equality in the punishment of attempts and accomplished crimes is that of retribution. In terms of retribution, there is no difference between the moral blameworthiness of the successful perpetrator and the attempter, at least in the case of a completed attempt. Indeed, it must be admitted that if we do not take account of the subconscious and base ourselves upon a premise of retribution for moral blameworthiness, then there is no place for a distinction between the cases. However, moral blameworthiness is not the sole basis for retribution. The following presents other possibilities.

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22. Thus, for example, a distinction is justified between (1) the penalties for active conduct that brings about a result and for passive conduct that brings about the same result through a breach of a legal duty, and (2) primary offenders and accessories. However, there may be cases where it is justified to make the penalties for omission or aid equal to those for commission or primary conduct.

A. *Retribution as Social Censure*

Social censure is another basis for retribution. If the retributive approach is apprehended as one seeking to express social censure of the act (an approach closer to the historical view of retribution),[23] then the occurrence or non-occurrence of the result may properly be taken into account, because it is a factor that influences the extent and intensity of society's reaction to the act.[24]

B. *The Retributive Approach Based upon the Concept of the Social Contract*

According to the social contract approach developed by Herbert Morris,[25] obedience to penal norms is based upon "moral equilibrium" between benefits and burdens. The benefits are expressed as "non-interference by others with what each person values, such matters as continuance of life and bodily security."[26] The benefits are dependent upon the "assumption of burdens," where "the burden consists of the exercise of self-restraint by individuals at a point where, were they not to exercise it, others would in the normal course of events be harmed."[27] In this light, "if a person fails to exercise self-restraint even though he might have, he relinquishes a burden which others have voluntarily assumed and thus *gains an advantage which others, who have restrained themselves,* do not possess."[28] In such a case, the equilibrium is violated, and re-establishing it requires deprivation of the benefit unlawfully acquired. If this is not done, others will have no interest in exercising self-restraint, and the system will collapse.

According to this approach, "the consummator owes more because he has taken and acquired more. He has not just the satisfaction attendant upon relinquishing the burden of self-restraint, but he has the *satisfaction attendant upon realization of his desires.*"[29] One who has stolen successfully benefits more than one who has failed to achieve the same objective, and the penalty must reflect the excess benefit enjoyed by the successful, as opposed to the unsuccessful, thief. The same conclusion is reached if we focus upon the harm caused society by that

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23. J. FEINBERG, DOING AND DESERVING 95 (1970); Hart, *Criminal Punishment as Public Condemnation* in CONTEMPORARY PUNISHMENT 12 (R. Gerber & P. McAnany eds. 1972).

24. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 153, 154 (2d ed. 1823).

25. H. MORRIS, ON GUILT AND INNOCENCE 126 (1976).

26. *Id.* at 126.

27. *Id.* at 126-27.

28. *Id.* at 127.

29. *Id.*; *see* Carr, *supra* note 2, at 63 (emphasis added).

unlawfully gained benefit. The extent of the harm caused is proportional to the extent of the benefit gained by the perpetrator, and in order to restore equilibrium, the penalty must correspond to the degree of harm caused.

From the foregoing, we may conclude that in terms of the retributive approach as well, a distinction between the punishment of attempts and the punishment of accomplished crimes is justifiable.

III. Utilitarian Considerations

A. *General Deterrence*

In utilitarian terms, leniency in the treatment of attempt does not undermine the deterrent and preventative value of the penalty. A person entertaining the possibility of committing a criminal offense views his planned conduct from the perspective of success and not of failure and arrest. Therefore, the penalty for attempt, as distinguished from the penalty for the accomplished crime, bears no significance in the decision whether to commit a crime or to refrain from commission. Prevention must be acquired at the lowest possible cost, or in the words of Bentham, "at as cheap a rate as possible."[30] This because "punishment . . . is in itself an expense: it is itself an evil."[31]

The conclusion to be drawn from the above two considerations is that the penalty for attempted crime should be reduced as much as possible without hampering the function of deterring the individual offender, after the fact, from repeating his criminal conduct.

Burkhardt conjectures that "this argument for more lenient punishment will hardly convince anyone who is not already, for other reasons, convinced of its correctness."[32] In my opinion, Burkhardt's statement is an inadequate evaluation of the argument. The assertion that there is a "deficiency in the verification of its empirical premises"[33] is correct, but its significance is limited. After all, the same argument can be raised with regard to virtually every proposition in the field of general deterrence. On its face, the proposition seems quite reasonable that, in general (with the exception of particularly cunning economic offenses), the scenario of failure and arrest is not foremost in the mind of the person planning the commission of an offense.

Schulhofer's assertion, cited with approval by Burkhardt, is also not immune to critical appraisal. The assertion is that "from a deter-

30. J. Bentham, *supra* note 24 at 178.
31. *Id.* at 179.
32. *Supra* note 1, at 571.
33. *Id.* at 570.

rence perspective, the frugality approach requires acceptance of the very troublesome position that general deterrence, unsupported by other goals, can be the sole rationale for an additional sanction. . . ."[34] This assertion is based upon a retributive theory according to which "offenders *should* be punished with severity corresponding to the moral gravity of their offense."[35] However, as Schulhofer himself admits, few support such a retributive theory,[36] and the majority views retribution as an upper limit to penalty. Within the bounds of penalties possible in terms of retribution, utilitarian considerations come into play, among them general deterrence. Where the penalty does not deviate from that justified by retribution (and as stated, the distinction between attempt and accomplished crime is justifiable in retributive terms), general deterrence is not the sole rationale for an additional sanction.[37] What is concerned is a utilitarian consideration that justifies reducing the penalty for attempts where the penalty for the completed offense does not deviate from that flowing from the retributive element.

As for any claimed harm to the principle of equality that may be perceived in a differential approach to attempts and accomplished crimes, the relationship between the penal objectives and considerations and the principle of equality is too complex to be treated at any length within the framework of this paper.[38] However, if by *equality* we mean that sense of equality that we perceive in reality (as opposed to normative, ideal, or abstract equality), we doubt whether the public would view a differentiating approach as being unequal or discriminatory. (It may be assumed that a non-differentiating approach would be considered to be unjustified in granting equal treatment to non-equals.) Even when viewed from the perspective of the offenders themselves, it is not altogether clear that the differential approach would be considered unjust. This would appear to be so, owing to the stronger sense of guilt (as opposed to moral blameworthiness) in the case of success.[39] According to this approach, the sense of guilt is not a direct consideration in the setting of the penalty, but it is a relevant consideration in negating the fear of any perceived inequality arising from the distinction between the punishment of attempts and accomplished crimes.

As for Burkhardt's reliance on the fact that this claim has been

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34. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law,* 122 U. PA. L. REV. 1497, 1581 (1974).

35. *Id.* at 1571 (emphasis added).

36. *Id.*

37. *Id.* at 1575.

38. Morris, *Punishment, Desert and Rehabilitation,* SENTENCING 257 (H. Gross & A. von Hirsch eds. 1981); *see* Schulhofer, *supra* note 34, at 1569.

39. H. MORRIS, *supra* note 25, at 120.

unsuccessfully advanced for two hundred years, it is doubtful whether this is a strong argument against its validity. Moreover, we cannot know to what extent the claim has influenced those legal systems that do distinguish attempts from accomplished crimes.

In terms of the effect of the penalty actually enforced (as distinct from the effect of the penalty established in the law) on the level of general deterrence, the dramatic element is generally greater in trials for accomplished crimes than in trials for attempts. Thus, there is greater curiosity, interest and effect in trials of the former kind, and therefore the influence, too, is greater. This supports, to some extent, the claim that there is nothing to fear from mitigating the penalty for attempt with respect to general deterrence.

B. Lowering the Penalty for Attempt as an Incentive to Desist

In the opinion of the law faculty of Frankfurt upon Oder, we find a consideration of the possibility that equal penalties for attempts and accomplished crimes may, in certain circumstances, prevent the perpetrator from desisting from his conduct.[40] This possibility is difficult to deny. In fact, the contrary claim does not deny the possibility itself, but detracts from its importance. The contrary claim is that the possibility that equal punishment prevents the perpetrator from desisting only surfaces and is only effective in but a small number of cases. Thus H.L.A. Hart writes: "Such cases are, of course, realities; but they are surely very rare, if only because in the law of most systems in order to be guilty of an attempt one has to get very near to the completion of the full offense and the questions of a second shot may arise only seldom."[41]

Without taking a firm stand on the matter, it may still be asserted that there is some room for doubt as to the correctness of Hart's estimation of the rarity of the phenomena. As for Hart's first premise, it is correct that attempt must approach the relevant conduct, but not, necessarily, completion of the crime (as, for example, in the case of poisoning in stages). At least in English law, there has been a change since the above argument was advanced, and the area of attempt now extends to conduct that goes beyond the preparatory stage.[42] As for the second premise, Zimring's findings show that "in 72 percent of all non-fatal firearms attacks the offender did not inflict more than one wound, in spite of his ordinary ability to do so."[43] Zimring is of the opinion that

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40. Burkhardt, *supra* note 1, at 556.

41. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 130 (1968).

42. Criminal Attempts Act, 1981, ch. 1 § I.

43. Zimring, *The Medium is the Message: Firearm Caliber as a Determinant of Death from*

"while there is evidence that the objective of a serious attack is ambiguous at the outset and remains so throughout its course, there is also some indication that the desired result of an attack may very well change during its enactment." This is so, Zimring continues, because "firing a shot that finds its mark can be an emotional release" and because "inflicting a wound has transformed the consequences of assault from the realm of fantasy to that of palpable and unpleasant reality; if the reality of deadly attack does not square with its fantasy significance . . . the attack may be aborted. . . ."[44] The extent of the chances of influencing the attempter to desist though a mitigation of the penalty is another question. The members of the Frankfurt law faculty offered this opinion: "A legislative enactment which, in itself and in its structure and application induces and creates the possibility of an actual murder *even in one out of a thousand cases,* is an enactment which always will be incompatible with legal philosophy."[45]

To my mind, the members of the Frankfurt law faculty are correct. In a situation where a perpetrator has reached a crossroad (the need to continue firing in order to kill his victim, or to take up a knife to finish the job), powerful forces may drive him to proceed toward the attainment of his objective. Among these driving forces are his original objective, the possibility that the steps already taken have brought him so close to fulfillment that he is propelled by inertia, the wish to rid himself of the victim (in the case of homicide) and the possibility that the victim may testify against him. Making the penalty for the attempt equal to the penalty for the accomplished crime in such a situation is tantamount to adding an incentive to carry out the deadly objective. Even if the influence of a distinction in penalty be small, we must not concede it where a person's life or another important interest may be at stake.

It should be noted that an offender may act to prevent the results of his conduct even after completing the attempt (e.g., by aiding an injured victim and by taking steps to save him). Even at this stage, the distinction between the punishment of attempts and that of accomplished crimes may exert some influence. Clearly, this consideration is more important in legal systems that do not recognize retreat from an attempt as conduct that discharges the offender from penalty, though even in systems that do recognize retreat, the distinction is important in those cases where the retreat is not voluntary.

We have already mentioned the consideration of distinguishing be-

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Assault, 1 J. LEGAL STUD. 97, 111 (1972).

44. *Id.* at 112.

45. Burkhardt, *supra* note 1, at 556 (emphasis added).

tween attempts and accomplished crimes in terms of inherent danger and the consequences for individual deterrence. In light of our findings concerning general deterrence and the above discussion of retreat and the incentive to desist, it would appear that it is possible to justify distinguishing attempt from accomplished crime in terms of utility.

III. Distinguishing Attempts from Accomplished Crimes for Educational Purposes

The distinction under discussion can also be justified as a symbolic expression, or reminder, of the primary function of criminal law, that is the defense of vital societal interests. This function is at the root of punishing attempts and offenses which create danger. In an imaginary world in which all attempts and potential dangers do not ripen into forbidden results, there is no point in punishing such offenses.[46] A legal system that does not distinguish attempts from accomplished crimes runs the risk that this basic orientation concerning the purpose of the criminal law may be forgotten or blurred, only to be supplanted by a conception of the criminal law as the normative expression of morality.

Since punishment is a practical matter as well as a symbolic one, there must, of course, be some other justification for the distinction, in addition to the symbolic or educational concern. This additional justification can be found in the other considerations already discussed. To these considerations we may add yet another—one of Burkhardt's own: "the function of criminal law cannot be adequately grasped through the concept of the motivationally-related imperative norm."[47]

The criminal norm is also an "evaluation norm" (*Bewertungsnorm*), an "instrument of settlement." It follows, therefore, that the evaluation expressed by the norm should relate to a greater injury to society in the case of an accomplished offense—both in the concrete terms of an injury to a material object or a direct injury to a protected interest, as well as in the abstract sense of greater harm to the social fabric and the socio-legal order (i.e., a stronger sense of fear and insecurity within the society and a greater mistrust in the factual validity of the specific norm and the legal order as a whole). The additional severity of the accomplished crime justifies increased severity of penalty, just as severity in punishment is justified by other considerations of the severity of the harm caused (as where the particularly great emotional trauma suffered by the victim of rape justifies more severe punishment

46. It may be appropriate to punish for offenses with respect to the degree of fear caused, though the character and weight of this reason differ entirely from the reasons that justify the punishment of offenses.

47. Burkhardt, *supra* note 1, at 562.

of that form of assault).[48]

Yet another educational consideration is that a non-differentiation approach may be viewed or interpreted[49] as being unconcerned with the plight of the victim and indifferent to his fate. Such an approach undermines the importance of the protected social values represented by the victim of the offense.

IV. A Conclusion—But Not the End

Does this approach reflect a firm conviction in the justification of differentiating accomplished crimes from attempts? Not necessarily, and an expression of the problematic character of the issue can be found in the Israeli draft for the general part of a new Criminal Law. The draft offers two alternative provisions, reflecting both approaches, in the matter of punishing attempt (sec. 27). One suggestion is that the penalty established for the accomplished offense ". . . be greater than that established for attempts." The other suggestion is that the penalties for attempts and accomplished crimes be identical.

In any event, it is my belief that in the matter of making the punishment of attempts equal to that of the accomplished crime, the burden of proof rests upon the shoulders of those who urge more severe punishment of attempt.[50] To date, that burden has not been met.

But has the debate surrounding this issue progressed significantly over the years? I am not at all certain that it has. Plato's position was that:

> One who has a purpose and intention to slay another who is not his enemy and whom the law does not permit him to slay and he wounds him, but is unable to kill him should be regarded as a murderer and be tried for murder. But from respect for "fortune" and "providence" and as a "thank offering to this deity, and in order not to oppose his will" the death penalty should not be remitted and banishment for life, together with compensation for the injury, substituted.[51]
>
> In comparing Plato's view to our modern examinations, one gets the feeling that we are faced by an insoluble riddle.

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48. I have assumed that the emotional harm caused in this case is covered (at least generally) by the perpetrator's awareness, just as there may be contemplation of this possibility in the case of rape when no special emotional harm was caused the victim. This approach is a variation of the view expressed by Herbert Morris, presented *supra* text accompanying note 25.

49. May be interpreted even if the interpretation does not accurately reflect the approach, which rather seeks to emphasize the importance of the protected interest (though it does not miss the mark when leniency is urged for the accomplished crime because the chance element of the occurrence of the result should be disregarded).

50. Not because they urge change, but because they argue for severity.

51. Plato, The Laws of Plato §§ 876d-877a (T. Pangle trans. 1980).