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The issue to be addressed is whether there is a rational justification for punishing an accomplished crime more severely than an attempted crime. I hesitate to take up this subject because everything I have to say about it has already been said, in one form or another, and because I have no thoroughly satisfactory resolution to the issue.

This problem has concerned and occupied generations of philosophers and jurists. Yet, in my opinion, hardly any significant progress has been made in this area in the last two hundred years. To substantiate this, I will first walk through a short historical overview in Section I. Next, in Section II, I will describe how this problem has been handled in the German Criminal Code. Finally, in Section III, I will examine the four standard arguments which play a significant role in current analysis. Throughout this discussion, I will limit myself to whether it is correct to punish the *completed* attempt less severely than the consummated offense. I consider an attempt to be "complete" when the perpetrator has done all of the requisite acts, from his point of view, and is thus no longer in control of the result of his conduct. I define "result" as every consequence of the prohibited act which both constitutes a statutory element of the offense and goes beyond the actual execution of the act.[1]

I. An Irregularity in the Sentiments of All Men, and a Consequent Relaxation of Discipline in the Laws of All Nations

A. *Irregularity of Sentiments*

In Adam Smith's *Theory of Moral Sentiments*, there is a

* Dr. jur., Bielefeld, 1973; Habil., Tübingen, 1980; Prof., Göttingen, 1980.

1. 1 G. Stratenwerth, Strafrecht: Allgemeiner Teil I 83 (3d ed. 1981).

somewhat long section entitled "Of the Influence of Fortune upon the Sentiments of Mankind, with Regard to the Merit or Demerit of Actions."[2] In this section, Smith speaks of an "Irregularity of Sentiments." In the abstract, Smith wrote, everyone agrees that the only appropriate object of praise and censure is an individual's *will*. When considering real situations, however, it quickly becomes apparent that actual consequences which fortuitously arise from an act have a great influence on perceptions concerning the merit or reprehensibility of conduct.

Smith gave numerous examples to substantiate his finding. The most easily recognized example is when someone, with the intent to kill, fires a pistol at his intended victim but misses. The actual wrongdoing is not lessened by the absence of the intended result, since the intent is equally as criminal. Nevertheless, there are few if any legal systems which impose the death penalty for an unsuccessful murder attempt. Our retributivist sentiments are seldom so strong toward the person who has merely attempted to harm us that we would inflict upon him the same punishment that we would regard as appropriate had it been a successful attempt.

The explanation that Adam Smith gives for this "Irregularity of Sentiments" is as simple as it is plausible:

> As what gives pleasure or pain, either in one way or another, is the sole exciting cause of gratitude and resentment; though the intentions of any person should be ever so proper and beneficent on the one hand, or ever so improper and malevolent on the other; yet, if he has failed in producing either the good or the evil which he intended, less gratitude seems due to him in the one, and less resentment in the other . . . . And, as the consequences of actions are altogether under the empire of Fortune, hence arises her influence upon the sentiments of mankind with regard to merit and demerit.[3]

B. Illustrating the Paradox

Generations of jurists have sought to take into account what Adam Smith designated "Irregularity of Sentiments" and what Thomas Nagel, two hundred years later, still calls a "paradox."[4] A legal opinion of the law faculty of the Royal Prussian Univer-

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2. A. SMITH, THEORY OF MORAL SENTIMENTS 92-108 (A. Macfie & D. Raphael eds. 1976).

3. *Id.* at 96-97.

4. Nagel, *Moral Luck*, 50 ARISTOTELIAN SOC'Y 137, 146 (Supp. 1976).

sity at Frankfurt an der Oder (Germany) in 1806 furnished a particularly interesting illustration of this paradox. In 1806, Leopold Wilhelm Leberecht was sentenced to death because he twice attempted to poison his father, his brother, and his uncle. The first attempt failed because the poisoned food, rancid and unattractive, was discarded before anyone ate it. The second attempt was also frustrated. Although the intended victim in each instance took a bite of the poisoned cake, because of a burning pain he felt, each spit the cake out without swallowing it.

Leberecht's death sentence was revoked by a court of appeals after obtaining a legal opinion from the law faculty at Frankfurt an der Oder. The sentence was lessened to ten years hard labor. The faculty members took the view that an attempted murder, even one so close to consummation, nevertheless had harmless results. An attempted poisoning, even an attempted patricide, did not justify the death sentence under positive law, Roman law, or the "legal-philosophical" point of view. The faculty justified its position, inter alia, by making the following points.

1. The relationship of punishment to deed

Punishment must stand in strict proportional relationship not only to the actor's intention, but also to the resultant harm. To maintain proportionality, a mere attempt must be punished less severely than a consummated crime. Those who wish to punish the unsuccessful murder attempt as severely as the consummated murder must either degenerate to a harsh misuse of the death penalty, or become entangled in contradictions. When one focuses solely and exclusively on the malicious intent and character of a person, one must punish with death the person who, for example, places a cube of sugar in his father's coffee, thinking the sugar to be arsenic. Hardly any jurist would advocate the death sentence in such a case.

2. Punishment as prevention

The purpose of punishment is the prevention of crime. Assuming the death penalty prevents murders, the death penalty would appear to be just and proportional in light of the harm caused by a murder. However, since the threat of death for unsuccessful and harmless murder attempts does not help prevent murders, the death penalty is inappropriate. Imposing the death

penalty for murder attempts violates the principle of using the least severe measures available. Since premeditating murderers intend to be successful, there is no deterrent effect achieved by punishing murder attempts with death. The murderer does not calculate that he might be punished less severely if his deed miscarries and fails. To decree the death penalty in the absence of necessity is contrary to legal philosophy and natural rights.

3. Incentive to desist

It is unwise to impose the death penalty for attempted murders because it would, in some circumstances, hinder the incentive to desist once the act had been initiated. As has been said: "No matter how seldom the case, 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."[5]

4. Public sentiment

In the final analysis, the appropriateness of punishment depends upon the impression the punishment will make on public sentiments. Suppose someone had intended, but did not actually inflict, an appalling amount of harm. As a result of his intent, suppose this person were punished with death. To those whose sentiments are not entirely numb, this could result in sympathy toward the criminal and dissatisfaction with the criminal justice system. Thus, an entirely different impression of societal values would be created than that which the criminal justice system should project.

C. Two Hundred Years Later

Considering the views of Adam Smith on the one hand and those of the law faculty of Frankfurt an der Oder on the other hand, it appears that little progress has been made toward a solution of this issue in the last two hundred years. The arguments of the past still dominate contemporary discussion. Certainly, deliberation on this topic has become more subtle; efforts have increased. Yet hardly anything of substance has been added. In

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5. *See* J. MEISTER, URTEILE UND GUTACHTEN IN PEINLICHEN UND ANDEREN STRAFFÄLLEN 409 ff. (1808).

the final analysis, it is questionable whether a compelling and rational argument on this issue is possible.

II. Treatment of the Problem in the German Criminal Code

The age-old controversy over whether it is right to punish attempts less severely than consummated crimes is reflected in various German statutory regulations. In these regulations, laws which make equal punishment the rule have always been in the minority.

A. Mandatory or Discretionary Mitigation of Punishment

The history of German criminal code reform demonstrates the long-running nature of this controversy. In the 1871 criminal code of the German Reich, a mandatory mitigation of punishment was prescribed for a mere attempt. With reference to "volition-oriented penal law,"[6] this obligatory mitigation of punishment was replaced in 1943 by discretionary mitigation. Discretionary mitigation of punishment has remained in the penal law down to the present, despite various proposals for change.[7] In connection with the criminal reform statute of 1970, this retention was justified as follows:

> [D]iscretionary mitigation of punishment is a logical consequence of the subjective theory of attempts and is explicitly recognized in the new criminal code. If, according to this view, the criminal intent and thus the dangerousness of the perpetrator are the dominant reasons for punishing an attempt, then it can make no difference in principle whether the anticipated result has taken place or, because of reasons independent of the perpetrator's will, has not occurred.[8]

Discretionary mitigation of punishment has been criticized. It has been deemed an unpleasant, even lazy, compromise, in which responsibility is once again placed on the judge's shoul-

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6. *See* Nagler, *Die Neuordnung der Strafbarkeit von Versuch und Beihilfe,* 115 Der Gerichtssaal 24 ff. (1941).

7. *See* Alternativ-Entwurf eines Strafgesetzbuches: Allgemeiner Teil II § 25 (1966).

8. Zweiter Schriftlicher Bericht des Sonderausschlusses für die Strafrechtsreform zu dem Entwurf eines Strafgesetzbuches, Bundesstags-Drucksache V/4095; *see also* Judgment of May 24, 1880, Reichsgericht, Ger., 1 Entscheidungen des Reichsgerichts in Strafsachen 439.

ders. Legal uncertainty is the result.[9] Some commentators demand a return to obligatory mitigation of punishment. Conversely, others believe that an imperative equality of punishment for accomplished crimes and completed attempts is the correct approach.[10] Section 5.05 of the American Model Penal Code, for example, adopts such an approach with except with respect to the most serious class of felonies carrying correspondingly high sentences.[11]

B. An Approach from the Late Middle Ages

A curiosity on this subject should be mentioned. There were regulations during the Middle Ages (15th and 16th centuries) which provided for a more severe punishment for the throw of a stone which missed its target than for a throw which hit its mark. Professor His explained this provision as follows: There is a need to punish dangerous acts. In determining punishment, an objective was to focus on the damage that was caused. If there were no tangible damages, however, then the most extreme consequences which could have possibly resulted were envisioned in order to encompass all possible cases, and ensure adequate punishment for harm that could have been caused.[12]

III. ARGUMENTS AND COUNTERARGUMENTS

What might be said for or against an obligatory mitigation of punishment or an imperative equality of punishment? To list all possible arguments, along with their premises and implications, including the doctrines of criminal negligence and complicity, would be entirely impossible. Therefore, four arguments, which admittedly overlap, will be treated. The arguments are (1) the appeal to the concept of wrongdoing, (2) the recourse to the "controlling values of social life," (3) the reference to the principle of culpability, and (4) the reliance on the principle of necessity (the principle of the "most frugal" means).

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9. *See* J. BAUMANN & U. WEBER, STRAFRECHT: ALLGEMEINER TEIL 477 (9th ed. 1985).

10. *See, e.g.*, D. ZIELINSKI, HANDLUNGS- UND ERFOLGSUNWERT IM UNRECHTSBEGRIFF 216 (1973); Kaufmann, *Die Dogmatik im Alternativ-Entwurf*, 80 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 34, 50 ff. (1968).

11. MODEL PENAL CODE § 5.05 (1974).

12. R. HIS, DAS STRAFRECHT DES DEUTSCHEN MITTELALTERS 178 (1920).

A. *The Appeal to the Concept of Wrongdoing*

In recent German criminal law literature, the dispute over the mitigation of punishment for attempts primarily manifests itself as a controversy over the concept of wrongdoing. Upon closer examination, however, it becomes apparent that the conflict over the concept of wrongdoing itself has multiple aspects.

Severity of punishment is determined by the magnitude of the wrongdoing. When the wrongdoing is less severe, punishment must also—*ceteris paribus*—be correspondingly less. The ultimate question, therefore, is whether the success of an act increases the wrongdoing of the actor.

1. *Competing concepts of wrongdoing*

With allowance for some degree of inaccuracy, there are, at the present time, two major concepts of wrongdoing competing with each other.[13]

a. The monistic-subjective concept of wrongdoing. According to this concept, criminal wrongdoing consists of wrongfulness of action or, more precisely, wrongfulness of intention. Criminal wrongdoing exhausts itself in the wrongful action. The success of the act does not increase the wrongdoing, and the absence of success does not diminish it.[14] Consequently, the wrongfulness of a completed attempt is not less than that of the accomplished offense. Thus, under the aspect of wrongdoing there is no reason to mitigate punishment. Whether other aspects might call for such a mitigation is not yet established. In short, the monistic-subjective conception of wrongdoing does not require mandatory mitigation of punishment.

b. The dualistic concept of wrongdoing. This concept states that the wrongdoing is only fully established when the negative aspects of the act and its consequences are present.[15] Therefore,

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13. *See generally* C. MYLONOPOULOS, ÜBER DAS VERHÄLTNIS VON HANDLUNGS- UND ERFOLGSUNWERT IM STRAFRECHT 91 (1981).

14. *See* E. HORN, KONKRETE GEFÄHRDUNGSDELIKTE 78 ff. (1973); W. MÜNZBERG, VERHALTEN UND ERFOLG ALS GRUNDLAGEN DER RECHTSWIDRIGKEIT UND HAFTUNG 50 ff., 67 ff. (1966); D. ZIELINSKI, *supra* note 10, at 128 ff.; Lüderssen, *Erfolgszurechnung und "Kriminalisierung,"* in VOM NUTZEN UND NACHTEIL DER SOZIALWISSENSCHAFTEN FÜR DAS STRAFRECHT 13 ff. (K. Lüderssen & F. Sack eds. 1980); Kaufmann, *Das fahrlässige Delikt*, 5 ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG 41 (1964); Zippelius, *Erfolgsunrecht oder Handlungsunrecht*, NEUE JURISTISCHE WOCHENSCHRIFT 1707 (1957).

15. *See, e.g.*, H. JESCHECK, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL 190 (3d ed. 1978); Gallas, *Zur Struktur des strafrechtlichen Unrechtsbegriffes*, in FESTSCHRIFT FÜR PAUL BOCKELMANN ZUM 70. GEBURTSTAG 155 ff. (A. Kaufmann, G. Bemmann, D.

in the case of an attempt, the wrongdoing is always less. The punishment in such a case must—*ceteris paribus*—be mitigated.[16]

2. Which concept of wrongdoing is correct?

Defining the competing concepts of wrongdoing does not determine which is better. Which of the two concepts of wrongdoing is correct?

a. Monistic-subjective. The fact that commands and prohibitions of criminal law are imperative norms ("principles guiding behavior," *Bestimmungsnormen, Verhaltensnormen, Imperative*) is used to support the monistic-subjective concept of wrongdoing. Imperative norms cannot prohibit a *result* as such; they can only prohibit *behavior*. That is, protection of legal interests is attained indirectly via human motivation (or in classical terminology, via the will or desire). The fact that conduct can be regulated by norms presupposes that the conduct can be motivated. If these premises are accepted, then it follows that behavior contrary to norms must be understood as a willed contradiction of the norm, and wrongdoing is in the violation of the prohibition; that is, in the actualization of the prohibited behavior.[17] As stated by Lüderssen:

> Only actions may be prohibited. People can be instructed not to strive for certain results and, in addition, to attempt to avoid the unintentional occurrence of certain results. Because other causal factors may intervene, it may so happen that the result does not occur, despite the disregard of the above instruction (e.g., attempt, negligence without consequences). This does not, however, change anything with regard to the violation of the prohibition. Therefore, the occurrence of a certain result is not a matter to be included in the substance of the prohibition, and accordingly is not part of the wrongdoing.

Krauss & K. Volk eds. 1979); Kraft, *Die philosophischen Grundlagen der Kriminalpolitik*, 18 ARCHIV FÜR RECHTS- UND WIRTSCHAFTSPHILOSOPHIE 193 ff., 221, 224 (1924-25); Stratenwerth, *Zur Relevanz des Erfolgsunrechts im Strafrecht*, in FESTSCHRIFT FÜR FRIEDRICH SCHAFFSTEIN 177 ff. (G. Grünwald ed. 1975); *cf.* Hirsch, *Der Streit um Handlungs- und Unrechtslehre*, 94 ZSTW 241 (1982).

16. Gallas, *supra* note 15, at 164.

17. *Cf.* Dedes, *Rechtsnorm(theorien) und Strafrecht*, 62 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE [ARSP] 349 (1976); Kraft, *supra* note 15, at 192 ff., 204 ff., 219 ff., 238.

> A wrong committed by a person can only consist of the fact that he has not regulated his behavior properly.[18]

The substance of this theory does not go much beyond the classical observation that the only appropriate object of praise and censure is the will.[19] This theory is far older than the teleological doctrine of actions (*finale Handlungslehre*)[20] with which it is usually associated. It is also older than the theory of imperatives developed by Thon.[21] As early as 1818, in Oersted's *Basic Principles of Penal Legislation*,[22] one can read that the law cannot be premised on the natural results of human actions. Since law should accomplish its goals solely through its effect on the capacity of desire (i.e., motivation), it follows that law can only be based upon a free activity directed toward a certain result such as a teleological (*finale*) act. If this activity is present in full measure, then full punishment is incurred. Even though Providence charitably averts the intended result, that cannot have an influence on the diminution of the punishment any more than there could be an influence toward increasing the punishment if the action had more consequences than the perpetrator intended or could have expected.

b. Dualistic. The proponents of the dualistic concept of wrongdoing reply that the legal norm is not merely an imperative norm, but also an evaluative norm.[23] Those who one-sidedly ascribe importance to the imperative norm overlook vitally important functions of criminal law—affirmation of the validity of the violated law, stabilization of behavioral expectations, reparation, prevention of persons taking the law into their own hands, etc. These functions do not emerge until after the breach of the norm.[24] The law is not merely a means of prevention, but also—and perhaps primarily—an instrument for settlement of already existing social conflict. Under this view, social consequences of crime are decisive.

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18. Lüderssen, *supra* note 14, at 14.

19. *See* A. SMITH, *supra* note 2, at 138; E. WESTERMARCK, URSPRUNG UND ENTWICKLUNG DER MORALBEGRIFFE 186 (1907).

20. *See* Kraft, *supra* note 15, at 208, 238.

21. A. THON, RECHTSNORM UND SUBJECTIVES RECHT (1878).

22. A. OERSTED, ÜBER DIE GRUNDREGELN DER STRAFGESETZGEBUNG 164 (1818).

23. *See, e.g.*, H. JESCHECK, *supra* note 15, at 189; Gallas, *supra* note 15, at 160. For a discussion of the distinction between imperative norms and evaluative norms, see J. RAZ, THE CONCEPT OF A LEGAL SYSTEM 121-67 (2d ed. 1980).

24. *See* G. JAKOBS, STRAFRECHT: ALLGEMEINER TEIL 139 (3d ed. 1983); Dedes, *supra* note 17, at 357; Stratenwerth, *supra* note 15, at 185.

3. Other considerations

It seems likely that the function of criminal law cannot be adequately grasped through the concept of the motivationally-related imperative norm. Also, one cannot seriously dispute, from the victim's point of view (this is the crux of the evaluative norm),[25] whether it makes a difference if the deed were successful.[26] All this, however, still does not determine what significance *should* be ascribed to the fortuitous absence of a harmful result.[27] It is obvious that there is no concern for the elimination or reparation of the individual injury (homicide, defamation, injury to property); in contrast to a "composition" system, punishment does not provide compensation for the injured. Punishment is concerned much more with the "indignation of the legal community" or the "need for retributive punishment."[28] Application of the evaluative norm makes it possible to take into account this indignation, but it does not justify it. In other words, the entire intellectual effort with the concept of wrongdoing boils down to whether and to what extent it is correct to take into account pressures for the results of criminal conduct.

B. The Recourse to the "Controlling Values of Social Life"

Nearly all authors who advocate less severe punishment for completed attempts refer, in one form or another, to the "common perception of justice," the "natural sense of justice," the "controlling values of social life," or, as it was earlier called, the "demand of the soul of the people."[29] Despite considerations of criminal law policy, the "natural sense of justice" suggests that the disturbance of the peace caused by an attempt is not on the same level of criminality as the accomplished offense.[30] Even if most people cannot explain their reasons for this "natural sense," criminal law, which directly affects the general public, simply "cannot refuse to consider such instinctive and generally

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25. *See* Dedes, *supra* note 17, at 352, 356; Schöneborn, *Zum "Erfolgsunwert" Im Lichte der Sozialpsychologischen Attributionstheorie*, GOLTDAMMER'S ARCHIV FÜR STRAFRECHT [GA] 70, 81, 86 (1981).

26. *See* Bayles, *Punishment for Attempts*, 8 SOC. THEORY & PRAC. 21, 23 (1982).

27. *See* G. FLETCHER, RETHINKING CRIMINAL LAW 480 (1978).

28. Gallas, *supra* note 15, at 164; Stratenwerth, *supra* note 15, at 185.

29. *See* E. DELAQUIS, DER UNTAUGLICHE VERSUCH 215 (1904); C. MYLONOPOULOS, *supra* note 13, at 91; Gallas, *supra* note 15, at 161, 165.

30. Frank, *Vollendung und Versuch*, 5 VERGLEICHENDE DARSTELLUNG DES DEUTSCHEN UND AUSLÄNDISCHEN STRAFRECHTS: ALLGEMEINER TEIL 226 (1908).

prevailing public views."[31] Recourse to the "controlling values of social life" raises a whole new set of questions.

1. *The empirical argument*

Adam Smith observed that "common sense" assesses good and evil human deeds according to their consequences. This tenet may be correct on the whole. Sociopsychological investigations, to the extent that they exist, support this finding: "In general, the greater the harm, the greater the punishment reaction."[32] Accordingly, it is interesting to note that the General Prussian Common Law of 1794 contained a rule that appears to be an exact reflection of this viewpoint: "The greater and more unavoidable the harm or the danger which arises from a crime . . . the more severely the crime must be punished."[33]

2. *The normative argument*

If the phrase "controlling values of social life" is to develop any independent meaning, then, in my opinion, it must be understood as follows:

> Society's values must be taken into account despite a certain irrationality, and despite a conflict with fixed principles of law (e.g., the principle that culpability is a necessary condition for punishnment) or with fixed objectives of criminal law policy (e.g., special prevention).

This assertion, of course, is in need of justification. If the "natural sense of justice" classifies an attempted disturbance of the peace as less severe, a less severe punishment for that disturbance is still not justified. Any other view involves what is referred to in philosophy as a "naturalistic fallacy."[34] In reference to that "certain irrationality," (which is in part conceded), it has

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31. H. ZACHARIÄ, DIE LEHRE VOM VERSUCHE DER VERBRECHEN 51, 73 (1836); A. SCHÖNKE, H. SCHRÖDER, T. LENCKNER, P. CRAMER, A. ESER & W. STREE, STRAFGESETZBUCH: KOMMENTAR § 129 (21st ed. 1982); *See also* H. HART, PUNISHMENT AND RESPONSIBILITY 131 (1968); H. HART & T. HONORE, CAUSATION IN THE LAW 394-98 (1985); Brady, *Punishing Attempts*, 63 MONIST 247, 255 (1980); Smith, *The Element of Chance in Criminal Liability*, 1971 CRIM. L. REV. 63 (1971).

32. Miller & Vidmar, *The Social Psychology of Punishment Reactions*, in THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR 145, 158 (M. Lerner & S. Lerner eds. 1981).

33. ALLGEMEINES LANDRECHT FÜR DIE PREUSSISCHEN STAATEN Part II, Title 20, § 25 (Prussia) (1794).

34. U. TÄHTINEN, THE THEORIES OF PUNISHMENT STUDIED FROM THE POINT OF VIEW OF NON-VIOLENCE 66, 69, 108 (1963).

been argued that the legislator's purpose is to "bridle the passions of the people and to refrain from giving in to them. His precise task is to gradually impress his value judgments upon the people, so that the people do not yield to their agitated emotions, but rather, accustom themselves to judging objectively."[35]

The reasons for considering common values are partly skeptical, partly fundamental, and partly pragmatic.

a. Nagler's view. Nagler argues that "theoretical speculation" about correct punishment has proven extremely fragile.[36] He believes that the measure of the reprehensibility of an action is decided exclusively by the common perception of justice. Such a viewpoint, however, overshoots the mark. It is unacceptable if only because it conflicts with common practice. Skepticism toward theories which collide with accepted patterns of behavior is certainly appropriate. These patterns of behavior, however, must be measured by normative models and must be open to change in the direction of such models.[37]

b. Fletcher's view. George Fletcher operates from the premise that "[p]unishment is just only if it is regarded as just by those who suffer it." From this point, he proceeds to the conclusion "that those who cause harm would be more inclined to regard a more severe punishment as appropriate and just; those who fail to cause harm would be outraged if they were punished as though they had."[38]

Fletcher's conclusion may be correct. The premise, however, is not the subject of common agreement. For example, consider the following argument: That which is perceived as just is either just or it is unjust. If it is just, then the idea that it is *unjust* is incorrect. If, however, it is *unjust*, then the idea that it is just is incorrect. Whether something is just or not, therefore, cannot depend upon whether it is perceived as being just.[39]

Fletcher brings into play a further consideration to which independent significance may be ascribed. He suggests that we should ask ourselves whether we, as affected parties, would find it right to be punished as severely in the case of an action with-

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35. von Liszt, in 9 MITTEILUNGEN DER INTERNATIONALEN KRIMINALISTISCHEN VEREINIGUNG 142 (1902); *see also* Parker, *Blame, Punishment, and the Role of Result*, 21 AM. PHIL. Q. 269, 274 (1984); Schünemann, *Neue Horizonte in der Fahrlässigkeitsdogmatik*, in FESTSCHRIFT FÜR FRIEDRICH SCHAFFSTEIN, *supra* note 15, at 172 ff.

36. Nagler, *supra* note 6, at 27, 30.

37. W. HASSEMER, THEORIE UND SOZIOLOGIE DES VERBRECHENS 223 (1973).

38. G. FLETCHER, *supra* note 27, at 483.

39. *Cf.* L. NELSON, KRITIK DER PRAKTISCHEN VERNUNFT § 99 (1917).

out consequences as we would in the case of a successful offense. Fletcher assumes that the answer would be no. If the answer were no, then we could scarcely defend the viewpoint that others should be treated differently than we would treat ourselves.

Even this consideration, based on the "Golden Rule" or the "argument of generalization," does not help in the final analysis.[40] It simply ignores the fact that some people would accept equality of punishment.

c. Remaining observations. What remains are these correct but abstract observations:

1) It is a precarious and, in the long run, scarcely endurable situation when the law stands in opposition to the controlling values of social life.[41]

2) The institution of criminal law alone is simply not in a position to alter values rooted in social life, values which determine the institutions and not vice versa.[42]

3) Negative consequences may result if criminal law becomes too far removed from these values. Generally speaking, these negative consequences would be expressed in dwindling respect for laws which are perceived as unjust. The accuracy of this perception is irrelevant.[43]

It must be remembered that police officers, public prosecutors, and judges do not stand outside the "controlling values of social life;" rather, they are part of those values. It is more than a theoretical possibility that the judiciary will develop "avoidance strategies" toward regulations that are perceived as unjust.[44] Schulhofer has comprehensively and skeptically examined this tendency under the catchwords "jury nullification" and "administrative discretion."[45]

Avoidance strategies cannot be examined closely here. However, the following should be noted: Whether an equal punishment for completed attempts and accomplished crime would undermine respect for the law and lead to avoidance strategies cannot be completely affirmed or denied. There are many exam-

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40. *See* Bayles, *supra* note 26, at 25.

41. E. RIEZLER, DAS RECHTSGEFÜHL 151 (1946).

42. W. HASSEMER, EINFÜHRUNG IN DIE GRUNDLAGEN DES STRAFRECHTS 205 (1981).

43. *See* J. MEISTER, *supra* note 5, at 414.

44. *See* Eser, *Empfiehlt es sich, die Straftatbestände des Mordes, des Totschlags und der Kindestötung (§§ 211-213, 217* StGB) *neu abzufassen?*, in GUTACHTEN FÜR DEN 53. DEUTSCHEN JURISTENTAG 53 (1980).

45. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1554-62 (1974).

ples in the realm of impossible murder attempts for which life imprisonment would appear to be a "barbaric consequence."[46] Characteristically, these examples are thoroughly exhausted by proponents of mitigation of punishment. Similarly, it is not difficult to fashion examples demonstrating the opposite premise, that an equal punishment would scarcely come into conflict with the "natural sense of justice."[47] In this light, it is an open question whether a fundamental equality of punishment excepting certain offenses (e.g., murder) and certain types of cases (e.g., impossible attempts), as propounded by the American Model Penal Code, is preferable. Whether it is preferable depends upon how much credence is given to other arguments for or against a mitigation of punishment.

C. The Reference to the Principle of Culpability

From time immemorial it has been maintained that a less severe punishment for a "fortuitously" harmless deed cannot be reconciled with the principle of culpability. Obviously, this argument has always been criticized. A satisfactory solution to this problem is not in sight.

1. Equal punishment for attempt under principles of guilt and chance

The principle of culpability is usually based upon the following reasoning: "In the same manner as an accidental result which was unintended cannot be imputed to any person, the chance nonoccurrence of an intended result cannot diminish culpability."[48] This reasoning should be examined more closely. To aid this examination, two observations are important:

1) Under this reasoning, as with the reasoning of Adam Smith, the notion of chance is critical. Culpability and chance collide on a conceptual plane, since, according to conventional understanding, culpability is bound to controllability, and what

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46. Stratenwerth, *supra* note 15, at 186.

47. *See* A. MIRICKA, DIE FORMEN DER STRAFESSCHULD UND IHRE GESETZLICHE REGELUNG 217 (1903).

48. X. LELIÈVRE, DE CONATU DELINQUENDI 358 (1828) (quoting Barbacovius); *see* H. BRUNS, STRAFZUMESSUNGSRECHT 439 (2d ed. 1974); A. KAUFMANN, DAS SCHULDPRINZIP 258 (1961); A. MIŘIČKA, *supra* note 47, at 217; Kadečka, *Verkappte Zufallshaftung*, 22 MONATSSCHRIFT FÜR KRIMINALPSYCHOLOGIE UND STRAFRECHTSREFORM 67 (1931); In Anglo-American literature, see H. GROSS, A THEORY OF CRIMINAL JUSTICE 433 (1979); Parker, *supra* note 35, at 272; Schulhofer, *supra* note 45, at 1570.

is uncontrollable for the actor is looked upon as relatively accidental.

2) This reasoning suggests a connection between two rules. The first rule, "an accidental result which was unintended cannot be imputed to any person," has a long tradition.[49] This rule is recognized in German criminal theory, and receives constitutional protection under the principle of culpability. The matter would thus be relatively simple if the second rule, "the chance nonoccurrence of an intended result cannot diminish culpability," logically followed from the first. Such is not the case. On the contrary, a connection between these two rules may only be established if one formulates and accepts a superior third rule: Chance may not determine whether and to what extent a person should be punished.

It is arguable that this third rule constitutes a type of general rule of reason, against which, as Adam Smith has stated, hardly anything in abstract can be said. Practical reasoning would compromise itself if it made judgments dependent upon contingent and accidental factors. For this reason, Schulhofer denounced the contrary position, which views the accidental nonoccurrence of a result as grounds for mitigation of punishment, as a penal lottery.[50]

2. Mitigation of punishment for attempt under principles of culpability and chance

The reasons which are advanced for the counter-position, under the aspect of culpability and chance, appear at first glance to be meager. The principle of culpability, it is said, does not demand correspondence between culpability and punishment; rather, it requires only that the quantum of punishment not exceed the extent of the culpability.[51] This corresponds with the assertion that there is no law which prevents chance from benefitting the offender.[52] To quote Bayles:

> In the world of practical affairs, although good reasons exist to aid victims of bad luck and thus promote human well-being, the benefits of good luck may be allowed to rest where they

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49. *See* DIGEST OF JUSTINIAN 50.17.23 ("*Casus a nullo praestantur;*" "*Quae sine culpa accidunt, a nullo praestantur.*").

50. *See* Schulhofer, *supra* note 45, at 1564-69.

51. *See* J. KRUMPELMANN, DIE BAGATELLDELIKTE 101 (1966).

52. *See* G. JAKOBS, *supra* note 24, at 616 (1983).

> fall. A few would-be murderers and arsonists may benefit, but only in proportion to the benefits of their victims. To let everyone benefit from his or her non-deserved good luck is not unjust and will not . . . make the world a worse place in which to live.[53]

This statement seems unsatisfactory, but there is no reason to explore it further, since there is a more important classical objection which leads to the heart of the problem: It is impossible to banish chance from the sphere of criminal law.[54] This objection may at first appear inadequate. The fact that it is impossible to completely exclude the influence of chance cannot be a reason for attaching importance to chance when it may be readily eliminated. Such a reply, however, misses the point of the objection. The critical point becomes evident when serious and deep thought is given to the consequences of the rule that "factors dependent upon chance may not play a role."

3. No satisfactory solution?

From a philosophical perspective, Nagel points out that the acts for which people are morally judged are determined by chance to a much greater extent than one would first presume. He describes three aspects which contribute to this element of chance:

1) the phenomenon of constitutive luck (the kind of person you are)

2) luck in one's circumstances (the kind of problems and situations one faces)

3) luck with respect to the causes and effects of actions.[55]

According to Nagel, the attempt to make only those things which are controllable by the actor the objects of moral judgment leads to a paradox which has its roots in the concept of responsibility itself.[56]

Such an attempt threatens to undermine most of the moral

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53. Bayles, *supra* note 26, at 27-28.

54. *See e.g.*, 1 A. BAUER, ANMERKUNGEN ZUM ENTWURF EINES STRAFGESETZBUCHES FÜR DAS KÖNIGREICH HANNOVER 392 (1826); G. JAKOBS, *supra* note 24, at 140; H. ZACHARIÄ, *supra* note 31, at 71; Stratenwerth, *Die fakultative Strafmilderung beim Versuch*, in FESTGABE ZUM SCHWEIZERISCHEN JURISTENTAG 254 (Juristische Fakultät der Universität Basel, Baseler Juristenverein eds. 1963).

55. Nagel, *supra* note 4, at 137 ff.; *cf.* G. RÜMELIN, ÜBER DEN ZUFALL: REDEN UND AUFSÄTZE 278 ff. (3. Folge 1894).

56. *But see* Andre, *Nagel, Williams, and Moral Luck*, 43 ANALYSIS 202 (1982); Jensen, *Morality and Luck*, 59 PHILOSOPHY 323 (1981).

judgments we consider self-evident. If this is correct, we must face the question whether the general rule of reason described above is actually reasonable, and whether it would be reasonable to change the present system of praise and blame as a whole. Strawson has suggested in a similar context that such concerns are a product of over-intellectualization. He contends that "[i]t is useless to ask whether it would be rational for us to do what it is not in our nature to do."[57] Strawson argues that we are bound to certain interpersonal behaviors and that this link is part of the unalterable general framework of human life.

It is possible that even the consideration of the results of an action is a partial manifestation of these interpersonal behaviors and this general framework. This idea has merit. The personal consequences of an action depend upon legal and moral disapproval, personal resentment, and self-reactive behaviors (pricks of conscience, feelings of guilt).[58] This is embodied in our concepts of criminal law. As Fletcher observed:

> The notions of causing harm, injuring others, feeling guilt, and making amends are all part of the patterns by which human relationships are disturbed and then restored. The notion of guilt cannot be lifted out of context and fitted to cases where there is merely a risk of harm and no concrete impact on the lives of others.[59]

Observations of this type are, of course, somewhat problematic because they tend to upgrade historically and culturally dependent behaviors to the level of immutable facts. These observations do not solve the problem at hand. Perhaps, however, they are suitable for more precisely defining the problem. Additionally, they demonstrate that the reference to the principle of culpability raises many more questions than it resolves.

D. The Reliance on the Principle of Necessity

As was mentioned, the Royal Prussian law faculty at Frankfurt an der Oder relied upon the principle of necessity (also referred to as the mildest means, the prohibition of excess, the principle of minimizing pain, or the frugality approach) in order to substantiate a mitigation of punishment for completed attempts. Under this principle, when faced with a number of pos-

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57. P. STRAWSON, FREEDOM AND RESENTMENT 13, 18, 23 (1974).
58. *See* Winch, *Trying and Attempting*, 45 ARISTOTELIAN SOC'Y 209 (Supp. 1971).
59. G. FLETCHER, *supra* note 27, at 482.

sible means to reach an end, means should be chosen which give rise to the least drastic consequences. Since the mitigation of punishment for attempted crimes does not negatively affect general preventive measures, attempts should be punished less severely.[60]

Because of a lack of firm empirical data, the theory that mitigation of punishment does not minimize deterrent effects is based solely upon considerations of plausibility. It is reasonable to assume that perpetrators expect their conduct will be successful. Consequently, if a perpetrator considers punishment at all, he considers the punishment for the completed offense. If this does not deter him, then he will not be deterred by an equal punishment for the mere attempt.

In contrast to Anglo-American literature, this argument plays a comparatively limited role in recent German criminal literature.[61] The principal reason for this may be that in West Germany the concept of *negative* general prevention is not highly esteemed.[62] Moreover, the argument does not merely suffer a deficiency in the verification of its empirical premises. Complex normative problems are also involved, as Schulhofer showed in his very fundamental and critical investigation of harm and punishment.[63] The argument is problematically related to the principle of culpability and the tenet of equal treatment. As Schulhofer noted:

> From a retributive perspective, the [frugality] approach is inconsistent with the notion that criminal penalties are a morally necessary response to wrongful conduct . . . . From a deterrence perspective, the frugality approach requires acceptance of the troublesome position that general deterrence, unsupported by other goals, can be the sole rationale for an additional sanction . . . . Finally, from an equality perspective, the frugality approach involves offense, albeit of uncertain content, to notions of justice, and could eventually disserve the goal of frugality itself.[64]

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60. *See* X. LELIÈVRE, *supra* note 48, at 359 ff.

61. *See* Bayles, *supra* note 26; Becker, *Criminal Attempt and the Theory of the Law of Crimes*, 3 PHIL. & PUB. AFF. 262 (1974); Brady, *supra* note 31; Smith, *supra* note 31, at 75; Schulhofer, *supra* note 45, at 1562-85.

62. *See* G. JAKOBS, *supra* note 24, at 14.

63. Schulhofer, supra note 45; *see also* Kadečka, *supra* note 48, at 67; Parker, *supra* note 35, at 274.

64. Schulhofer, *supra* note 45, at 1580-81.

Therefore, this argument will hardly convince any person who is not, for other reasons, already convinced that a more lenient punishment is correct. This opinion is also supported by the fact that the argument has simply been reiterated, more or less unsuccessfully, for almost two hundred years.

IV. Conclusion

Is there a rational justification for punishing a completed crime more severely than an attempted crime? I am not certain that the reasons which are given for a less severe punishment are "rational." On the other hand, the arguments for an obligatory equality of punishment are not compelling. There are examples, particularly in the area of impossible attempts, in which an equal punishment would offend my own personal "sense of justice." But, there are other examples for which this is not the case. For these reasons, I am persuaded to lean toward a discretionary mitigation of punishment, with all its disadvantages, as contained in section 23 of the German Criminal Code. *Via trita, via tuta*: a well-worn path is a safe path. That is certainly not a substantiation, but rather, a confession.