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Statutory Appendix

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This appendix contains German and English versions of the perpetration and complicity provisions of the German Criminal Code of 1871, the 1943 Regulation modifying these provisions and section 28 of the current Criminal Code. These were prepared by Professor Cole Durham. Following these provisions, an English translation of selected provisions of the 1871 and 1975 Criminal Codes, with comments, are also included. These translations are by Professor George Fletcher.

Reichsstrafgesetzbuch of 1871

Dritter Abschnitt. Theilnahme.

47. Wenn Mehrere eine strafbare Handlung gemeinschaftlich ausfuehren, so wird Jeder als Thaeter bestraft.

ENGLISH: If a number of individuals carry out a punishable action jointly, each will be punished as a perpetrator.

48. Als Anstifter wird bestraft, wer einen Anderen zu der von demselben begangenen strafbaren Handlung durch Geschenke oder Versprechen, durch Drohung, durch Missbrauch des Ansehens oder der Gewalt, durch absichtliche Herbeifuehrung oder Befoerderung eines Irrthums oder durch andere Mittel vorsaetzlich bestimmt hat. Die Strafe des Anstifters ist nach demjenigen Gesetze festzusetzen, welches auf die Handlung Anwendung findet, zu welcher er wissentlich angestiftet hat.

ENGLISH: Whoever intentionally determines another to commit a punishable action by giving a gift or promise, by threat, by abuse of reputation or force, by purposefully bringing about or fostering a mistake, or by other means, is to be punished as an instigator.

The punishment of an instigator is to be set in accordance with the law that applies to the action which he knowingly instigated.

49. Als Gehuelfe wird bestraft, wer dem Thaeter zur Begehung des Verbrechens oder Vergehens durch Rath oder That wissentlich Huelfe geleistet hat.

Die Strafe des Gehuelfen ist nach demjenigen Gesetze festzusetzen, welches auf die Handlung Anwendung findet, zu

welcher er wissentlich Huelfe geleistet hat, jedoch nach den ueber die Bestrafung des Versuches aufgestellten Grundsaetzen zu ermaessigen.

ENGLISH: Whoever knowingly renders assistance to the perpetrator's commission of a crime or misdemeanor by word or deed is to be punished as a facilitator.

The punishment of the facilitator is to be set in accordance with the law that applies to the offense to which he knowingly rendered assistance; however, the punishment is to be reduced in accordance with the principles that have been established governing punishment of attempts.

Verordnung vom 29. Mai 1943

50. Sind mehrere an einer Tat beteiligt, so ist jeder ohne Ruecksicht auf die Schuld des anderen nach seiner Schuld strafbar.

Bestimmt das Gesetz, dass besondere persoenlich Eigenschaften oder Verhaeltnisse die Strafe schaerfen, mildern oder ausschliessen, so gilt dies nur fuer den Taeter oder Teilnehmer, bei dem sie vorliegen.

ENGLISH: If several individuals participate in an offense, each person is to be punished without consideration of the culpability of the others according to his own culpability.

If the law provides that special personal characteristics or relationships result in enhanced or mitigated punishment, or in non-liability, this holds only for the perpetrator or accessory who possesses the relevant characteristics.

SECTION 28 STGB

Besondere persoenliche Merkmale. (1) Fehlen besondere persoenliche Merkmale § 14 Abs. 1), welche die Strafbarkeit des Taeters begruenden, beim Teilnehmer (Anstifter oder Gehilfe), so ist dessen Strafe nach § 49 Abs. 1 zu mildern.

(2) Bestimmt das Gesetz, dass besondere persoenliche Merkmale die Strafe schaerfen, mildern oder ausschliessen, so gilt das nur fuer den Beteiligten (Taeter oder Teilnehmer), bei dem sie vorleigen.

ENGLISH: Special Personal Elements.[1] (1) If an accessory (instigator or facilitator) lacks special personal characteristics[1] which serve as the basis for the punishability of the perpetrator,

his punishment is to be mitigated in accordance with Section 49(1).

(2) If the law provides that special personal characteristics lead to enhanced or mitigated punishment, or to non-liability, it applies only with respect to participants (perpetrators or accessories) who possess the characteristics.

Note 1: The term "Merkmal" can be translated either as "element" or "characteristic". A criminal statute lists various elements (Merkmale) that correspond to various characteristics (Merkmale) that an individual may have. In its first occurrence, I have translated the term as "elements," to make it clear that Section 28 refers to elements of various offenses established by the Special Part. In the text of the Code provisions, however, it seems preferable to speak of the "characteristics" that individuals may have that may be dealt with by application of Section 28.

THE GERMAN CRIMINAL CODE OF 1871: SELECTED PROVISIONS

§ 3 *Application to German nationals.* (1) German criminal law applies to the acts of Germans, whether the acts are committed at home or abroad.

(2) As to acts committed abroad that are not punished according to the local law, German criminal law does not apply if the act, in view of the circumstances of the place of acting, is not a *wrong worthy of punishment*![1]

(3) [this clarifies the term "place of acting"]

Note 1: The German text refers to "*Unrecht* worthy of punishment." This term obviously required interpretation in every case. Therefore a considerable amount of uncertainty pervaded the jurisdictional question when Germans would be liable for acts committed in places where those acts were not prohibited locally. In place of this wage standard, the new Code adopts in § 5 a detailed list of crimes committed abroad but nonetheless subject to prosecution in Germany.

§ 43. *Concept of attempt.* (1) Whoever confirms his decision to commit a felony or misdemeanor by an act that *includes*[1] the beginning of the execution of the felony or misdemeanor, is liable for an attempt, provided that the intended felony or misdemeanor does not reach consummation.

(2) An attempted misdemeanor is punishable only in those cases in which a statute expressly so provides.

Note 1: This provision actually requires that the act include the beginning of the execution of the offense. Compare § 22 in the 1975 Code, which provides merely that the actor think that he is beginning the execution of the offense.

§ 44. *Punishment for an attempt.* (1) The attempted felony or misdemeanor can be punished more leniently.

(2) If the consummated offense is threatened with life imprisonment in a penitentiary, the penalty can be reduced to no less than three years in the penitentiary.

(3) In other cases, the penalty can be reduced up to one quarter of the minimal penalty, either imprisonment or fine, applicable to the consummated felony or misdemeanor. [last, technical sentence deleted].

§ 51. *Insanity. Diminished capacity.* (1) There is no *punishable act*[1] if on the basis of (a) a disturbance of consciousness, (B) a diseased disturbance of mental activity or (c) mental defect, the actor, at the time of the act, is incapable of *understanding*[2] the *impermissible nature*[3] of his act or to act according to this understanding.

(2) If on the basis of the aformentioned grounds, the actor's capacity to understanding the impermissible nature of his act or to act according to this understanding, was substantially diminished, the punishment can be mitigated in accordance with the provision governing the punishment of attempts.

Note 1: This phrase "There is no punishable act" is the general legislative technique in this Code for identifying defenses. There is no distinction made between claims of justification and of excuse. That distinction was worked out in the theoretical literature after this Code was enacted.

Note 2: This word is the same as that used in § 20 of the 1975 Code. *See* § 20, note 1.

Note 3: Instead of referring at this juncture to the wrong that the actor commits (compare the 1975 Code § 20, note 2), this earlier provision refers to the actor's understanding that the act is impermissible (*unerlaubt*).

§ 52. *Duress.* (1) There is no criminal act if as a result of irresistible force or a threat, connected with an imminent, otherwise unavoidable danger to the life or limb of the act or to a relative, the actor is compelled to commit the act.

(2) Relatives in the sense of this statute are those who are related by blood and by marriage, in ascending and descending

lines, adopted parents and children, foster parents and children, married couples and their siblings, siblings and their spouses and a finance(e).

In General: There are two provisions in this Code that correspond to § 35 of the 1975 Code. This provisions refers to dangers emanating from human sources; § 54 refers to dangers emanating from natural sources. Neither provision makes it clear that the recognition of the defense depends upon an evaluation of what the actor could be fairly expected to resist under the circumstances. Of course, this evaluative question is implicit. Compare the explicit invocation of the concept *Zumutbarkeit* in § 35 of the 1975 Code.

§ 53. *Necessary defense.* (1) There is no criminal act if the act is required by necessary defense.

(2) "Necessary defense" refers to a defense that is necessary in order to ward off an imminent attack against oneself or from another.

(3) Excessive force is not punishable if the actor exceeds the limits [of necessary force] in a state of confusion, fear or alarm.

In General: This provision corresponds, almost word by word, to the definition of necessary defense in § 32 of the 1975 Code. Note, however, that part 1 of this section does not specify whether the act committed in necessary defense is itself justified.

§ 54. *Necessity.* There is no criminal act if in a case other than necessary defense, the act is committed in a state of faultless, otherwise inescapable necessity, in order to rescue the actor or one of his relatives from an imminent, otherwise unavoidable danger to life and limb.

§ 59. *Mistake.* (1) If in the commission of a criminal act, the actor is not aware of circumstances belonging to the definition of the offense or that raise the level of punishment, these circumstances are not to be *attributed*[1] to him.

(2) In punishing negligently committed offense, this provision applies only so far as the actor's ignorance it itself culpable on the basis of negligence.

Note 1: The concept of attribution should be understood as a condition for responsibility. If the circumstances are not attributable to the actor, that means that the actor is not responsible for having brought them about. Note that the 1975 Code § 16 reaches the same conclusion by specifying that the

actor shall be deemed not to have intended the particular circumstance about which he was mistaken.

THE GERMAN CRIMINAL CODE OF 1975: SELECTED PROVISIONS

§ 1. *Nulla poena sine lege.* An act can be punished, only if its punishability is statutorily[1] prescribed before the act is committed.

Note 1: The German word is *gesetzlich*, the adjectival form of *Gesetz*. The prohibition must be based on a statute. It would not be sufficient to ground the prohibition in case law or in general principles of law (*Recht*).

§ 11. [This section contains a number of definitions; only relevant terms are translated here.]
§ 11(5). A wrongful[1] act must realize[2] the definition of an offense[3] prescribed by a penal statute.[4]

Note 1: The German term is *rechtswidrig*. Literally, this term means contrary to *Recht* (law in the sense of sound or just law). The translation could be either "unlawful" or "wrongful". The former risks a positivist misunderstanding. The German term conveys a normative point. *Rechtswidrig* means something more than a violation of enacted law. It connotes that the act is wrong. In order to highlight this normative point, I have chosen "wrongful" as the translation. The weakness of this translation is that it fails to capture the legal dimension of the wrong.

Note 2: The German term *verwirklichen* conveys the idea of "manifesting" or "realizing" in practice. The comparable American idiom would be "satisfying" in the phrase "satisfy the elements of the offense". The German word confirms "paradigm" as the proper translation. One can talk about "realizing the paradigm" but not about "satisfying the paradigm". Why not?

Note 3: The German *Tatbestand* is translated here as "definition of an offense". One could also say "definition of *the* offense" or simply "definition." Some people prefer "elements of the offense" as the translation. Others think "prohibited act" better does the job. The former term has received a special and broader construction in MODEL PENAL CODE § 1.13(9). As a result, its usage here would probably be misleading. "Prohibited act" would be all right, except that it implies that the prohibition is constitutive of the *Tatbestand*. If that were the case, the additional reference in § 11(5) to "prohibition by a penal statute" would be redundant. Another possible transla-

tion would be "paradigm of the offense". The point of the German term is to refer those elements of the offense that constitute the prima facie case of wrongdoing. The prima facie case states the normal case or paradigm. The exceptional cases receive consideration in the analysis of defenses—claims of justification and of excuse. The Spanish translation is *Tipo*—which, I take it, connotes the notion of "type" or paradigm.

Note 4 (in general): This provision prescribes a relationship among three ideas: (1) wrongful acts, (2) paradigmatic offenses and (3) legislative prohibition. The provision holds that (1) presupposes both (2) and (3). A wrongful act is only one that is both a paradigmatic offense and one that is prohibited by statute. That (1) presupposes (2) is a conceptual point, long maintained as a matter of criminal theory. An act must be a paradigmatic offense before it can be wrongful. That (1) presupposes (3) follows from a political judgment about legislative supremacy in shaping the criminal law. This judgment did not hold under National Socialism: courts could punish "wrongful acts" that were not legislatively prohibited. Note that § 1 makes the same political point about legislative supremacy. But it does not follow from either § 1 or § 11(5) that legislative action is sufficient to determine that acts are wrongful; the code merely prescribes that legislative action is necessary.

§ 13. *Commission by omission.* (1) Whoever omits to prevent a result from occurring when that result represents the element of a definition[1] prohibited by statute, is liable under this code if he was legally[2] responsible for preventing the result from occurring, provided that the omission corresponds in gravity to the active realization of the statutory definition.

(2) The punishment can be mitigated according to § 49(1).

Note 1: See § 11(5) note 2.

Note 2: Surprisingly, the German word in this context is *rechtlich* not *gesetzlich* (these two words are the adjectival forms of *Recht* and *Gesetz* respectively).

§ 17. *Mistake of law.*[1] If in committing[2] the act, the actor lacks the understanding[3] that he is doing wrong[4] and if he could not avoid this mistake[5], he acts without culpability.[6] If he could have avoided the mistake, the punishment can be mitigated according to § 49(1).[7]

Note 1: The German phrase is *Verbotsirrtum*; neither word for law appears in the heading. Yet "mistake of law" is the only corresponding phrase in legal English. The issue posed in this section pertains to any mistake about the prohibited

nature of the act, including mistakes about whether the act is justified.

Note 2: The notion of "committing" includes omissions as well as acts.

Note 3: The German word is *Einsicht*, which literally means "insight". The term "understanding" seems more apt.

Note 4: The German word *Unrecht* refers to the antithesis of *Recht*. It connotes a substantive wrong — in a material not merely a formal sense. Even if the actor knew that he was violating the positive law, he might, in principle, lack "the understanding that he is doing wrong." *Cf.* § 20 note 2 *infra*.

Note 5: Even though the provision refers here to mistakes, it is clear from the introductory phrases that ignorance would be included along with affirmative mistakes.

Note 6: The German phrase *ohne Schuld* could be translated as "without guilt". The term "culpability" is preferred in order to underscore the legal significance of the mistake: an unavoidable mistake of law precludes our attributing culpability in a normative sense to the actor. We cannot blame him for doing wrong. Although the Code does not specify the procedural consequence of finding that the actor acted "without culpability", it is assumed in the German system that this conclusion entails an acquittal.

Note 7 (in general): The terms "avoidable" and "unavoidable" are used in this provision in a seemingly value-free way. Everyone understands, however, that the issue of avoidability is patently normative. One could as well speak of non-negligent and negligent mistakes. The notion of avoidability harks back to the Catholic distinction between vincible and invincible mistakes.

§ 18. *Aggravated punishment as a result of special consequences.* If a statute stipulates an aggravated punishment for a particular consequence of the act, this provision would apply as against the actor or an accessory, only if the particular person was chargeable with at least negligence relative to the special consequence.

§ 19. *Incapacity of children.* No one who is not yet fourteen years old is capable[1] of being culpable for his acts.

Note 1: This provision is formulated in terms of capacity in general, rather than culpability for a particular act. It follows from this lack of capacity that the juvenile would not be convicted. His case would be referred to a juvenile court, regulated by a special statute.

§ 20. *Incapacity on the basis of mental disturbances.*[1] If on the basis of (1) diseased mental disturbance, (2) a deep-seated disturbance of consciousness, (3) imbecility or (4) another serious mental aberration, the actor is incapable at the time of acting of understanding[2] the wrong[3] of his act or to act in accordance with this understanding,[2] the actor acts without culpability.[4]

Note 1 (in general): The structure of this provision corresponds to § 17. The central question in both cases is whether the actor understands the wrong that he or she is committing. Knowledge that the actor is transgressing the positive law should not be enough to establish this knowledge. (But does it not have to be sufficient for purposes of § 17?)

Note 2: The German basis for this translation is the same as that for § 17 note 3. *Einsehen* might be: "perceiving", "grasping", or "appreciating."

Note 3: The normative dimensions of this word *Unrecht* are the same as in § 17 note 4.

Note 4: For the implications of this phrase, see § 17 note 6.

§ 21. *Diminished capacity.* If on the basis of the grounds enumerated in § 20, the capacity of the actor to understand the wrong of his act or to act in accordance with this understanding is, in the commission of the act, substantially diminished, the punishment can be mitigated according to § 49(1).

Attempts

§ 22. *Definition of the concept*: Someone attempts a criminal act, if according to his conception of the act, he is beginning[1] directly to realize the definition[2] of the offense.

Note 1: The German *ansetzen* is translated here in the present progressive tense—a tense that does not exist in German. The point of this provision is that liability attaches only if according to the actor's own understanding of what he is doing, he is about to commit the offense.

Note 2: The difficulties of translating *Verwirklichung des Tatbestandes* are set forth in § 14 note 4.

§ 23. *Punishment of attempts.* (1) An attempt of a felony[1] is always punishable; an attempt of a misdemeanor[2] is punishable only if a statute so prescribes.

(2) The attempt can be punished more leniently than the consummated offense (§ 49(1)).

(3) If on the basis of gross misunderstanding the actor failed

to recognize that because of the nature of the object on which or the means with which the act was to be committed, his attempt could not lead to consummation, the court can waive the entire punishment or, in its discretion, mitigate the punishment (§ 49(II)).

Note 1: The concept of felony is defined in § 12(1): a wrongful act for which the threatened sanction is at least one year imprisonment.

Note 2: The concept of misdemeanor is defined in § 12(2): a wrongful act for which the threatened sanction is less than one year or a fine.

§ 24. *Abandonment.* No one will be punished for an attempt who voluntarily abandons the further execution of the act or who prevents consummation [of the crime]. If the act cannot be consummated without the contribution of the party abandoning the attempt, the latter is exempt from liability if he makes a voluntary and earnest effort to prevent the consummation.

(2) If several people are involved in the act, no one who voluntarily prevents the consummation will be liable for the attempt. If the act cannot be consummated without his contribution or if it is committed independently of his prior contribution, the actor will be exempt from punishment if he engages in a voluntary and earnest effort to prevent consummation.

Perpetration and Complicity

§ 25. *Perpetration.* (1) The person who commits the act himself or by means of another person, is punished as a perpetrator.

(2) If several people commit a criminal act together, each is punished as a perpetrator (joint-perpetrators).

§ 26. *Instigation.* Whoever intentionally has induced[1] another person to engage in an intentional, wrongful act, is, as an instigator, punished like a perpetrator.[2]

Note 1: The German word *bestimmen* is difficult to translate. Literally, it means "to determine" or "to cause". In this context, the translation should take account of the overall sense of the legal provision. The point is not to focus on people who cause others to commit crimes—say by hypnotizing them or drugging them. Rather, the purpose is to penalize people who convince, induce or persuade other people to engage in criminal acts. It should be recalled, however, that the German verb carries a force that is stronger than "induce." Note that in

this provision, as contrasted with § 25, the tense of the verb shifts. In § 25, the drafters relied upon the present tense; in this provision they used the present perfect.

Note 2: It is difficult to capture the German syntax in this translation. Literally, the German provision defines who will be punished as an instigator. It also stipulates that the punishment for an instigator should be the same as that for a perpetrator.

§ 27. *Accessoryship.* (1) Whoever intentionally renders aid to another person in the commission of an intentional, wrongful act, is punished as an accessory.

(2) Punishment of the accessory is based on the sanction provided in the case of perpetration. It should be[1] mitigated according to § 49(1).

Note 1: The German text says simply that "the punishment is mitigated . . . ." The point is that the mitigation is obligatory. This phrasing contrasts with "can be mitigated", which leaves the matter to judicial evaluation.

§ 29. *Independent sanctioning of the participants.* Every participant is to be punished according to his own culpability[1] without regard to the culpability of the other participants.

Note 1: It is also possible to translate *Schuld* as guilt. It would be tragic, however, to punish some people, say Woody Allen, according to their level of guilt. The reference here is captured better by "culpability" or "blameworthiness".

§ 30. *Attempted participation.* Whoever tries to induce[1] another person to commit a felony or to instigate someone else to commit it,[2] is punished according to the provisions on attempted felonies. The punishment, however, should be[3] mitigated according to § 49(1). Section 23(3) applies *mutatis mutandis*.[4]

(2) In the same manner are punished those who declare themselves ready, those who accept the solicitation of another and those who agree with others to commit a felony or to induce another person to commit it.

Note 1: See § 26 note 1.

Note 2: The U.S. army translation of this phrase garbles the point. The statute has in mind two forms of attempted instigation. A might induce B to commit a crime; or A might try to get B to induce C to commit it. Both of these variations are covered explicitly by the statutory language.

Note 3: See § 27 note 1.

Note 4: Admittedly, it is odd to use Latin in translating German into English. The point is that the section about attempts should apply in this context "if the appropriate changes are made."

§ 31. *Abandoning attempted participation.* (1) Exempt from § 30 are those who voluntarily:

1. give up the attempt to induce another to commit the offense or who counteract an existing danger that another will commit the offense,
2. give up the plan to commit an offense, after having declared themselves ready to do it,
3. prevent the felony from occurring after having agreed to commit it or having accepted the solicitation of another to commit it.

(2) If the act would not occur without the contribution of the person abandoning the attempt or if it is committed regardless of his prior conduct, it is sufficient to exempt him from punishment that he engage in a voluntary and earnest effort to prevent the act from occurring.

Necessity and Necessary Defense

§ 32. *Necessary defense.*[1] Whoever commits an act required[2] as necessary defense, acts not-wrongfully.[3]

(2) "Necessary defense" refers to a defense that is necessary to ward off an imminent wrongful[4] attack from oneself or from another.

Note 1: This is the basic provision on self-defense, but it is misleading to translate the name of the defense as "self-defense." The provision also encompasses the defense of others, the defense of property and indeed the use of force as a defense against any threatened violation of one's rights.

Note 2: The German word *geboten* is the opposite of the familiar *verboten.* It means, literally, that an act is "affirmatively commanded." The translation "required" seems to be more appropriate in this context.

Note 3: There may not be more graceful way of translating the German term *nicht rechtswidrig.* The double negative is purposeful. The Code does not say that acting in self-defense is right, but merely that it is not wrong. It is permissible. The implication of saying that the defensive conduct is not wrongful is that the actor cannot be convicted of any crime on the

basis of the defensive act. That the act is not wrongful follows from necessary defense functioning as a justification.

Note 4: The German term again is *rechtswidrig.* Note the way in which the two halves of the provision are interrelated. If an act in self-defense is not wrongful, it follows that no one can exercise self-defense against an act justified under § 32(2).

§ 33. *Excessive force.* If acting out of confusion, fear or alarm, the actor exceeds the limits of necessary force, he is not to be punished.[1]

Note 1: In this as in the other provisions stating what we call "defenses" it is important to note the legal inference from the defense's applying. There are three possibilities: (1) a conclusion that the act is not wrongful, (2) a conclusion that the actor acts without culpability and (3) a simple statement that the actor is not to be punished. Note that § 33 falls under the latter category. There is no explanation as to why the act is exempt from liability.

§ 34. *Necessity as a justification.*[1] Whoever in a situation of imminent, or otherwise unavoidable danger to the life, limb,[2] liberty, property or other legal interest[3] commits an act in order to ward off the danger from himself or from another, acts not-wrongfully,[4] provided that in balancing the competing interests, namely the potentially affected legal interests and the degree of danger that they will be affected, the interest to be protected must substantially[5] outweigh the interest impinged upon. This provision applies, however, only so far as the act is an *appropriate*[6] means for warding off the danger.

Note 1: The defense is labeled a justification—*Rechtfertigungs grund.* It follows that if the defense applies, the act is not wrongful.

Note 2: The German term *Leib* refers broadly to all interests in bodily security. I think that we have the same broad scope in mind when we refer to life and "limb".

Note 3: The German concept *Rechtsgut* is an important starting point in German legal theory. Note that the notion of law involved in this reference is law as *Recht.* That a statute protects a particular interest is not sufficient—unless you are a strict positivist—to hold that the interest is a *Rechtsgut.*

Note 4: See § 32 note 3.

Note 5: The German term *wesentlich* could also be translated as "essentially".

Note 6: This is a good translation of the German term *angemessenes.* Yet the German phrase "appropriate means"

carries far more powerful normative force than its English equivalent. Some people doubt whether this last sentence is necessary, whether it adds anything to the first sentence of the section. So far as it has a point, it is to eliminate certain clearly immoral acts, e.g., killing innocent persons, as permissible means for protecting other legal interests.

§ 35. *Necessity as an excuse.* (1) Whoever in a situation of imminent, otherwise unavoidable danger to life, limb or liberty commits a wrongful act in order to ward off the danger from himself, a relative or other person close[1] to him, acts without culpability. This provision does not apply if it can be fairly expected[2] from the actor under the circumstances—namely if he caused the danger himself or because he stands in a particular legal relationship—that he expose himself[3] to the danger. The punishment can be mitigated according to § 49(1), however, if in view of his particular legal relationship the actor must expose himself to the danger.

(2) If in committing the act, the actor mistakenly assumes the existence of circumstances that would excuse him according to part (1) of this provision, he is to be punished only if he could avoid making the mistake. The punishment should be mitigated according to § 49(1).

Note 1: The German term *nahestehend* refers literally to people who stand close to the defendant. It seems clear that the intended meaning is not physical but emotional proximity.

Note 2: This is a translation of an important German concept *Zumutbarkeit*, which refers to the state of having something fairly expected of someone else. The syntax of the German differs entirely from English and therefore the phrase is particularly difficult to translate. The suggested translation captures the meaning of the German original. The use of this phrase functions as a signal that what is at stake in the particular provision is an excuse rather than a justification. Or at least this is generally true.

Note 3: The German term *hinnehmen* literally means accept in the sense of "lumping" an untoward situation. The suggested translation is not exact but it might be as close as one can get in legal English.

§ 46. *Abandonment.* The attempt as such is exempt from punishment if the actor:

(1) has given up the execution of the intended act without

being hindered in this execution by circumstances independent of his will, or

(2) with his own acts has prevented the occurrence of the result constituting the felony or misdemeanor at a time prior to the discovery of the attempt.

§ 49. *Mitigation of punishment.* (1) If mitigation of punishment is either required or permitted according to this provision, the following [guidelines] apply:

1. In place of life imprisonment, the sentence should be not less than three years.
2. In the case of a term of imprisonment, the highest allowable sentence would be three-fourths of the threatened maximum sentence. The same principle applies in calculating the maximum number of day-fines.[1]
3. The increased minimum term of confinement is reduced as follows:
   - in the case of a minimum of ten or five years, to a minimum of two years.
   - in the case of a minimum of three or two years, to a minimum of six months,
   - in case of a minimum of one year, to a minimum of three months,
   - in all other cases, to the statutory minimum.

(2) If the statute referring to this provision permits the court to mitigate the punishment in its discretion, the court may reduce the penalty to the statutory minimum or instead of imprisonment impose a fine.

Note 1: The notion of the day-fine is an innovation of the 1975 Code. According to § 40, the number of day-fines can vary from 5 to 360. The amount of the day-fine is computed with a view to the personal and economic circumstances of the defendant. The basic guideline is that one day-fine should be equal to the average net income that the actor receives or could receive in one day. The amount may range from two to ten thousand DM. The overall assets and unearned income of the actor may be considered in setting this amount.