

HARM AND PUNISHMENT: A CRITIQUE OF EMPHASIS ON THE RESULTS OF CONDUCT IN THE CRIMINAL LAW

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I. INTRODUCTION

The criminal law attributes major significance to the harm actually caused by a defendant's conduct, as distinguished from the harm intended or risked. If, for example, a person attacks his wife and tries to kill her, he will be guilty of assault and attempted murder even if she escapes unharmed. He will also commit a battery if she is injured, mayhem if the injury is of certain especially serious types, and murder if she dies. The applicable penalties generally increase accordingly.

Yet both the defendant's state of mind and his actions may have been identical in all four of the cases supposed. The precise location of a knife or gunshot wound, the speed of intervention by neighbors or the police, these and many other factors wholly outside the knowledge or control of the defendant may determine the ultimate result. Accordingly, the differences in legal treatment would seem at first blush inconsistent with such purposes of the criminal law as deterrence, rehabilitation, isolation of the dangerous, and even retribution—in the sense of punishment in accordance with moral blame.

The illustration given is nevertheless typical of the many instances in which every American criminal code relates the gravity of the offense to the actual results of conduct. In most states, attempts are punished less severely than the completed crime,¹ and the same pattern of emphasis on harm prevails

¹ See Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy* (pts. 1-2), 61 COLUM. L. REV. 571, 957, at 1022-24 & nn. 289-316 (1961).

if the result is greater than that intended.²

This pattern of emphasis on the actual result likewise permeates the Model Penal Code. Reckless conduct creating a risk of serious injury is a misdemeanor if no harm occurs, or even if bodily injury occurs, but it is manslaughter—a felony of the second degree—if death results.³ Negligent conduct, not criminal in the absence of harm, becomes a misdemeanor if bodily injury occurs under some limited circumstances, and a felony of the third degree if death results.⁴ In addition to different grading of the same underlying conduct, according to the result, the Code thus teaches that “negligently” causing death, a felony of the third degree, is a more serious crime than “recklessly” placing a person in danger of death, which is only a misdemeanor even when serious injury (short of death) in fact occurs. The Code does eliminate most of the traditional importance of the result in the law of attempts, by providing that attempts are generally subject to the same penalties as the completed crimes. An attempt to commit a felony of the first degree, however, is only a felony of the second degree.⁵

Emphasis on the harm caused can, of course, be understood as a vestige of the criminal law's early role as an instrument of official vengeance.⁶ Actual damage was once prerequisite to the existence of a crime,⁷ and the doctrine that an attempt to commit a crime was in itself criminal developed slowly.⁸ The “eye for an eye” principle was sometimes carried

² A defendant who causes death while committing a felony can be guilty of murder without regard to his intention to kill, even if the death is purely accidental. *See, e.g., Commonwealth v. Waddy*, 447 Pa. 262, 290 A.2d 238 (1972). Reckless or “criminally” negligent conduct is at most a minor offense unless injury occurs; then it becomes assault and battery. *See, e.g., Senters v. Commonwealth*, 275 S.W.2d 786 (Ky. 1955); *State v. Sudderth*, 184 N.C. 753, 114 S.E. 828 (1922). If the injury proves fatal, the crime is manslaughter or negligent homicide, usually a felony. *See Note, Homicide by Motor Vehicle—A Survey and Proposal*, 44 IOWA L. REV. 558 (1959).

³ MODEL PENAL CODE §§ 211.1(1)(a), 211.2, 210.3 (Official Draft 1962).

⁴ *Id.* §§ 211.1(1)(b), 210.4. There are numerous other examples. Conduct recklessly threatening major damage to property (“catastrophe”) is a misdemeanor if no harm is caused, but it is a felony of the third degree if the catastrophe occurs. *Id.* § 220.2. *See also id.* § 223.1(2) (grading of theft offenses).

⁵ *Id.* § 5.05(1).

⁶ *See* J. MICHAEL & M. ADLER, CRIME, LAW AND SOCIAL SCIENCE 340 n.7 (1933).

⁷ 2 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 508 n.4 (2d ed. 1959); *see* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 560-74 (2d ed. 1960).

⁸ *See* Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821 (1928). It has, however, been suggested that the development of a general law of attempts was retarded by the availability of other devices for deterring those who exhibited dangerous tendencies and by the existence of many substantive crimes covering conduct that in

to shocking, if logical, extremes; the ancient penalty for mayhem was mutilation, with the defendant being maimed to the same extent as his victim.⁹ It may be that even today's law can be justified only in terms of vengeance. Glanville Williams has written: "The only theory of punishment that explains the present law [punishing attempts less severely than the completed crime] is a crude retaliation theory, where the degree of punishment is linked rather to the amount of damage done than to the intention of the actor."¹⁰ But retaliation in this sense has been widely rejected as a legitimate purpose of the criminal law. Commentators¹¹ and judges¹² have denounced it as an unacceptable policy, and the draftsmen of legislative codes have excluded it from consideration.¹³ A few state con-

effect was an attempt to cause some more serious harm. J. HALL, *supra* note 7, at 573; 2 J. STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 223 (1883).

⁹ R. PERKINS, *CRIMINAL LAW* 188 (2d ed. 1969).

¹⁰ G. WILLIAMS, *CRIMINAL LAW—THE GENERAL PART* § 49, at 136 (2d ed. 1961). Similarly, in discussing the difference between manslaughter and third degree assault under New York law, the New York Law Revision Commission wrote:

Save for the actual result in the particular case, the elements of both crimes are identical It is difficult to escape the feeling that in this instance, at least, criminal justice is retributive, that in a measure the punishment inflicted is the price of the life that was lost.

N.Y. LAW REVISION COMM'N, *COMMUNICATION AND STUDY RELATING TO HOMICIDE* 267 (1937).

¹¹ H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 130-31 (1968); O.W. HOLMES, *THE COMMON LAW* 37 (M. Howe ed. 1963); J. MICHAEL & M. ADLER, *supra* note 6, at 352; Michael & Wechsler, *A Rationale of the Law of Homicide* (pts. 1-2), 37 *COLUM. L. REV.* 701, 1261, at 730 n.126 (1937).

¹² *Collins v. Brown*, 268 F. Supp. 198, 201 (D.D.C. 1967); *Abernathy v. People*, 123 Ill. App. 2d 263, 271, 259 N.E.2d 363, 368 (1970); *Gabriel v. Brame*, 200 Miss. 767, 773, 28 So. 2d 581, 582-83 (1947); *Aabel v. State*, 86 Neb. 711, 721, 126 N.W. 316, 320 (1910); *People ex rel. Carter v. Warden*, 62 Misc. 2d 191, 193, 308 N.Y.S.2d 552, 555 (Sup. Ct. 1970); *People v. Oliver*, 1 N.Y.2d 152, 160, 134 N.E. 2d 197, 201-02, 151 N.Y.S.2d 367, 373 (1956); *Tuel v. Gladden*, 234 Ore. 1, 6, 379 P.2d 553, 555 (1963); *Commonwealth v. Koczwar*, 397 Pa. 575, 580 n.1, 155 A.2d 825, 827 n.1 (1959), *cert. denied*, 363 U.S. 848 (1960); *Wilson v. State*, 220 Tenn. 565, 571, 421 S.W.2d 91, 94 (1967). *Cf.* *Rudolph v. Alabama*, 375 U.S. 889, 891 (1963) (Goldberg, J., dissenting); *Trop v. Dulles*, 356 U.S. 86, 112 (1958) (Brennan, J., concurring).

¹³ MODEL PENAL CODE § 1.02 (Official Draft 1962) (by implication); NATIONAL COMM. ON REFORM OF FEDERAL CRIMINAL LAWS, *STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE* 2-3 (1970). *See also* SPECIAL COMM. OF THE MICH. STATE BAR FOR THE REVISION OF THE CRIMINAL CODE, *MICHIGAN REVISED CRIMINAL CODE: FINAL DRAFT* 3-4 (1967); N.Y. LAW REVISION COMM'N, *supra* note 10, at 17; *id.* pp. 156-57; JOINT STATE GOVERNMENT COMM'N, PA. GENERAL ASSEMBLY, *PROPOSED CRIMES CODE FOR PENNSYLVANIA* 16-17 (1967).

For statutes which appear to exclude retaliation from the permissible purposes of the state's criminal law, *see, e.g.*, GA. CODE ANN. §§ 26-102 (1972); ILL. ANN. STAT. ch. 38, § 1-2 (Smith-Hurd 1972); KAN. STAT. ANN. § 21-4601 (Supp. 1973); MINN. STAT. ANN. § 609.01 (1964); N.Y. PENAL LAW § 1.05 (McKinney 1967). Proposals to enact the Model Penal Code provision to similar effect are presently pending in a number of other states.

stitutions explicitly prohibit reliance on it.¹⁴ Despite all this, the basic pattern of attributing importance to results remains largely unchallenged. Some efforts have been made to formulate theories to replace the vengeance rationale, but occasionally even then refusal to reject the present pattern of the law and inability to develop a convincing rationale for it are, almost apologetically, admitted.¹⁵

The problem, moreover, is not simply one of theoretical inconsistency; the law's emphasis on the occurrence of harm has major practical consequences. This is particularly clear in the case of conduct involving relatively slight culpability—for example, careless driving that may be found "criminally" negligent or reckless. Emphasis on results has meant that such conduct is subject to little or no penalty in the absence of harm. But where a death occurs, the penalty frequently amounts to five years in prison or more.¹⁶ Dangerous driving has even been the basis for second-degree murder convictions in numerous cases,¹⁷ and in at least a few of these cases, the "reckless" motorist found himself sentenced to life imprisonment.¹⁸

The structure of the law thus not only makes harsh punishments possible but may even encourage them by mandating

¹⁴ See, e.g., IND. CONST. art. 1, § 18; MONT. CONST. art. III, § 24; ORE. CONST. art. I, § 15.

¹⁵ H.L.A. HART & A. HONORÉ, CAUSATION IN THE LAW 355 (1959): "To this obstinate sense of a difference the law should defer . . ." See also MODEL PENAL CODE § 2.03, Comment at 134 (Tent. Draft No. 4, 1955); Weinreb, *Comment on Basis of Criminal Liability; Culpability; Causation*, in 1 NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 105, 147 & n.14 (1970).

¹⁶ *Sanford v. State*, 38 Ala. App. 332, 83 So. 2d 254 (1955) (8 year sentence); *Patton v. People*, 114 Colo. 534, 168 P.2d 266 (1946) (6-8 year sentence); *Anderson v. State*, 150 Neb. 116, 33 N.W.2d 362 (1948) (5 year sentence); *State v. McLean*, 234 N.C. 283, 67 S.E.2d 75 (1951) (5-7 year sentence); *Long v. State*, 154 Tex. Crim. 587, 229 S.W.2d 366 (1950) (5 year sentence). Cf. *Commonwealth v. Welansky*, 316 Mass. 383, 55 N.E.2d 902 (1944) (reckless disregard of fire hazard resulting in several hundred deaths; defendant sentenced to 12-15 years at hard labor).

Of the 59 defendants convicted of involuntary manslaughter in Philadelphia during the period 1948-52, only 17% were placed on probation; 83% received some sort of prison sentence, and 15% received a sentence of two years or more. See M. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 306 (1958). Such data are imprecise for present purposes, however, as they do not indicate to what extent reckless or negligent conduct may have led to conviction for a higher degree of homicide and (perhaps more importantly) to what extent the "involuntary manslaughter" convictions were based on instances of essentially intentional homicide.

¹⁷ E.g., *Nestlerode v. United States*, 122 F.2d 56 (D.C. Cir. 1941); *Smith v. State*, 204 Ga. 184, 48 S.E.2d 860 (1948); *Staggs v. State*, 210 Tenn. 175, 357 S.W.2d 52 (1962). Other cases of this kind are collected in Annot., 21 A.L.R.3d 116 (1968). See also O.W. HOLMES, *supra* note 11, at 50.

¹⁸ *Woods v. State*, 222 Ga. 321, 149 S.E.2d 674 (1966), *cert. denied*, 386 U.S. 994 (1967); *Powell v. State*, 193 Ga. 398, 18 S.E.2d 678 (1942); *State v. Patterson*, 172 Ohio St. 319, 175 N.E.2d 741 (1961).

low penalties in the absence of harm. The resulting severity is not always tolerated by the appellate courts, but cases reversing convictions of this kind are nevertheless revealing. The law is clear, for example, that a defendant who fails to conform to the applicable standard of conduct should not avoid conviction because of "contributory negligence" on the part of his victim.¹⁹ Yet many courts have reversed convictions on something approaching this basis,²⁰ one court even going so far as to state that "the deceased when crossing the highway was charged with the exercise of such care as was necessary for her own self preservation."²¹ Manslaughter or "reckless" murder cases likewise are the setting for decisions adding no little confusion to the law of principals and accessories,²² not to mention that of proximate cause.²³ Even when death occurs in the course of a major crime—armed robbery, burglary, and the like—the same phenomenon can be observed; witness the chaotic state of the law with respect to implied malice, transferred intent, and the felony-murder rule.²⁴

¹⁹ *Penix v. Commonwealth*, 313 Ky. 587, 233 S.W.2d 89 (1950); *Commonwealth v. Atencio*, 345 Mass. 627, 189 N.E.2d 223 (1963); *R. PERKINS*, *supra* note 9, at 701-02.

²⁰ *Smith v. State*, 65 So. 2d 303 (Fla. 1953); *Thacker v. State*, 103 Ga. App. 36, 117 S.E.2d 913 (1961); *People v. Crego*, 395 Ill. 451, 70 N.E.2d 578 (1946); *Idol v. State*, 233 Ind. 307, 119 N.E.2d 428 (1954); *State v. Oliver*, 107 N.J.L. 319, 153 A. 399 (Ct. Err. & App. 1931).

²¹ *Russ v. State*, 140 Fla. 217, 224, 191 So. 296, 299 (1939).

²² *E.g.*, *People v. Marshall*, 362 Mich. 170, 106 N.W.2d 842 (1961). *Compare* *Stacy v. State*, 228 Ark. 260, 306 S.W.2d 852 (1957); MODEL PENAL CODE § 2.04(2)(a), Comment at 17 (Tent. Draft No. 1, 1953).

²³ *E.g.*, *Commonwealth v. Root*, 403 Pa. 571, 170 A.2d 310 (1961).

²⁴ The felony-murder rule is still alive and well, even in courts that recently implied its imminent demise. *Compare* *Commonwealth v. Waddy*, 447 Pa. 262, 290 A.2d 238 (1972) *with* *Commonwealth ex rel. Smith v. Meyers*, 438 Pa. 218, 225-27, 261 A.2d 550, 553-55 (1970). The rule is supposedly inapplicable when the fatal shot is fired by someone acting in opposition to the felons. *Commonwealth ex rel. Smith v. Meyers*, *supra*; *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965). But the felons may be viewed as having provoked such shots by simply carrying out the felony in a "reckless" manner, and this may support a finding of the "implied malice" sufficient for murder. *Taylor v. Superior Court*, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970). The typical degrees-of-homicide statute will then make this first-degree murder without regard to premeditation or even an intent to kill. *Id.* at 583 n.2, 477 P.2d at 134 n.2, 91 Cal. Rptr. at 278 n.2.

Even stranger is the so-called merger doctrine, which bars use of the felony-murder rule where the underlying felony is not "independent" of the homicide, as in the case of an assault with intent to kill. *E.g.*, *People v. Moran*, 246 N.Y. 100, 158 N.E. 35 (1927). *Contra*, *State v. Harris*, 69 Wash. 2d 928, 421 P.2d 662 (1966). The limitation has been considered necessary to preserve the distinctions among the degrees of homicide. But as a result, if a woman dies at the hands of a would-be rapist, the attacker is automatically guilty of first-degree murder, while if the attacker had intended to kill, the crime may be only second-degree murder or even man-

Such confusion and inconsistency seem due less to the intrinsic difficulty of the concepts than to the fact that courts will often reject retaliation in practice as well as in theory, and that other reasons for attributing any significance to the actual results of conduct have not been convincingly articulated. A full-scale rethinking of this aspect of the criminal law seems necessary. This Article can only attempt to set the stage.

After a brief comment on previous efforts to come to grips with this problem, and a section defining terms that will recur throughout the Article, I will attempt to assess the arguments that have been or might be offered in support of relating punishment to harm caused, and to offer tentative conclusions as to the implications of the analysis for a criminal code based on acceptable policies.

—*The Literature on Harm and Punishment.* The problem of emphasis on harm caused has frequently been raised in discussions of criminal law theory,²⁵ numerous articles on specific issues have adverted to it,²⁶ and a number of commentators have written pieces addressed primarily to the question.²⁷ In addition to all this, articles and cases involving the law of attempts or the question of strict liability must deal to some degree with the problem, if only by implication. And it should

slaughter. See *People v. Draper*, 278 App. Div. 298, 104 N.Y.S.2d 703, *aff'd*, 303 N.Y. 653, 101 N.E.2d 763 (1951). In New York, the merger doctrine has been held inapplicable where the death results accidentally from an assault upon someone other than the homicide victim; such a case is automatically murder under a felony-murder theory. *People v. Wagner*, 245 N.Y. 143, 156 N.E. 644 (1927). The California courts reach the opposite result, finding it "anomalous to place the person who intends to attack one person and . . . kills another inadvertently . . . in a worse position than the person who from the outset intended to attack both persons and killed one or both." *People v. Sears*, 2 Cal. 3d 180, 189, 465 P.2d 847, 852, 84 Cal. Rptr. 711, 716, (1970). But *Sears* simply shifts the anomaly to another point; it leaves the person who enters a home intending merely to steal a TV set but who accidentally kills an occupant in a worse position than a person who entered the home intending from the outset to assault or kill anyone in the house. The New York and California decisions are also in conflict on other applications of the merger doctrine. Compare *People v. Miller*, 32 N.Y.2d 157, 344 N.Y.S.2d 342 (1973), with *People v. Wilson*, 1 Cal. 3d 431, 462 P.2d 22, 82 Cal. Rptr. 494 (1969).

²⁵ See, e.g., J. HALL, *supra* note 7, at 212-95; H.L.A. HART, *supra* note 11, at 234; O.W. HOLMES, *supra* note 11, at 48-49; G. WILLIAMS, *supra* note 10, § 49.

²⁶ See, e.g., Michael & Wechsler, *supra* note 11, at 1294-98; Mueller, *Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence and Criminal Theory*, 34 IND. L. J. 206 (1959); Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773, 797-98 (1958); Ryu, *Contemporary Problems of Criminal Attempts*, 32 N.Y.U.L. REV. 1170, 1174 (1957).

²⁷ See, e.g., Becker, *Criminal Attempt and the Theory of the Law of Crimes*, 3 PHIL. & PUB. AFFAIRS 262 (1974); Eser, *The Principle of Harm in the Concept of Crime: A Com-*

scarcely be possible to discuss causation without considering why occurrence of a harmful result should matter, though a surprising number of courts and commentators almost manage to do it.²⁸

A detailed critique of this literature would provide fascinating insights into the ways legal thought grows or fails to grow, and in some instances degenerates. Unfortunately, however, such an exercise would do little to illuminate the merits of emphasis on results. The principal discussions have too much in common to warrant separate analysis of each. Too often a rationale is hinted at but never clearly expressed. The same notions are mentioned time and again without being fully developed, and frequently the author's treatment of the subject adds nothing to work done decades before.²⁹ It will therefore be more fruitful to proceed by an analysis of the underlying arguments themselves, adding new arguments where possible, paraphrasing and restating the old ones where necessary to eliminate overlap or ambiguity. This presentation may do violence to the complexity of a particular scholar's thinking, but should provide a better basis for evaluating the merits of the various arguments and determining whether my own framework omits any important consideration.

—*Definitions.* The pages that follow will focus upon the question whether criminal punishment should appropriately vary according to the harm that the defendant actually caused, as distinguished from harm he may have intended or risked. Though the central concern is with the notion of "harm," a precise definition of that concept is for the most part unnecessary. The question is whether a defendant who caused harm, however that "harm" is understood, should be treated differently from one who intended or risked the same harm without actually bringing it to pass. Certain arguments for attributing significance to the occurrence of harm are, however, built

parative Analysis of the Criminally Protected Legal Interests, 4 DUQ. L. REV. 345 (1966); Smith, *The Element of Chance in Criminal Liability*, 1971 CRIM. L. REV. 63; Comment, *The Fallacy and Fortuity of Motor Vehicle Homicide*, 41 NEB. L. REV. 793 (1962).

A major international symposium on criminal negligence included this as one of the problems to be discussed in each of the papers presented. ASSOCIATION INTERNATIONALE DE DROIT PÉNAL, *Les Problèmes Posés dans le Droit Pénal Moderne par le Développement des Infractions Non Intentionnelles*, 32 REV. INT. D.P. 761, 793 (1961).

²⁸ E.g., *Commonwealth v. Root*, 403 Pa. 571, 170 A.2d 310 (1961); R. PERKINS, *supra* note 9, at 685-738. Even Glanville Williams' useful article *Causation in Homicide* (pts. 1-2), 1957 CRIM. L. REV. 429, 510, must be included in this category.

²⁹ Compare the work of Ryu, *supra* note 26, and Smith, *supra* note 27, with Michael & Wechsler, *supra* note 11.

upon a particular notion of what "harm" means. It will therefore be convenient to have at our disposal terms that clearly differentiate among various conceptions.

We will reserve the general term *harm* to describe the kind of damage or injury to a legally protected interest which would ordinarily be compensable in a civil action. This will usually mean damage or injury to a specific individual, but it also includes for our purposes injury to the interests of the collectivity—failure to pay taxes or conform to price control rules, pollution of the air, interference with the operation of government, and so on.³⁰

Analysis of the criminal law and its functions often focuses upon a specific kind of harm, the harm or injury that a particular criminal law is intended to prevent. The law against murder is designed to safeguard human life, and the same is true of the laws against attempted murder, the sale of impure food or dangerous drugs, and many other crimes. The death of a human being is the *ultimate harm* that all these laws seek to prevent, even though less important sorts of harm may also be associated with such crimes.

The concern of this Article is not necessarily limited to what may be described as an ultimate harm, nor is it limited even to harm in its more general sense. The same basic issue is posed whenever the criminal law attributes significance to the occurrence of a certain consequence, as distinguished from the threat of the same consequence. The consequence in question may fall far short of a meaningful injury to a legally protected interest, but if the criminal law attributes significance to the occurrence of such a result, it will be of interest to us. Any consequence of conduct which is a necessary element of a given offense, as defined by law, will therefore be described as a *statutory harm*.³¹

A *statutory harm* may also be an ultimate harm, as with the death necessary for murder. Characterization of a particular injury as an ultimate harm depends, however, upon the way in which the purposes served by a criminal law are evaluated.

³⁰ Harm in this sense is a concept independent of particular laws defining crimes and specifying punishments; its content is determined by the general principles which identify interests entitled to legal protection, invasions of which give rise to legal injury.

³¹ A consequence is a "necessary element" in this sense if, in the absence of the consequence, the conduct loses its criminal character under the law, remains criminal under an offense of a different name, or remains an offense to which the same name but a different range of penalties attaches.

In connection with burglary, for example, an entry into a building might be considered the kind of injury sufficiently important to be described as an ultimate harm. But since burglary usually requires an entry with intent to commit a felony, it might seem more plausible to regard the harm associated with that latter felony as the ultimate harm which the law seeks to prevent. Whether or not regarded as an ultimate harm, however, the entry clearly would be a *statutory* harm for our purposes.

Not all crimes have a statutory harm; a criminal attempt is one obvious example. In such cases the crime is defined as a certain kind of conduct, without regard to its actual consequences. It is sometimes suggested that such crimes do cause actual as well as potential injury, in that the attempt itself upsets the social equilibrium, giving rise to a certain tension or disorder.³² This injury to the social fabric would not, however, be a statutory harm, since the legal definition of the offense does not require proof that it actually occurred.

The term *attempt* will be used to designate any conduct that is regarded as a punishable attempt under present law. Where the result actually occurs, the case is often said to involve a completed crime rather than an attempt, but for our purposes it will frequently be convenient to refer to such a case as a *successful attempt* (or a *completed crime*) to contrast it to the case of an *unsuccessful attempt*. Attempts may also be either *complete* or *incomplete*. A *completed attempt* involves conduct in which the actor has taken all steps that he believes necessary to bring about the intended result without further action on his part. In an *incompleted attempt*, the actor, though having gone beyond "mere preparation," has yet to carry out some step that he knows to be necessary in order to achieve the forbidden result.³³ A completed attempt may of course be successful (and thus a completed crime), but we will also be dealing extensively with completed *attempts* that are unsuccessful and hence *not* completed *crimes*.

It will also be convenient to distinguish among the different kinds of culpability associated with underlying conduct. The

³² E.g., Becker, *supra* note 27; Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. REV. 962, 969-71 (1930).

³³ See R. PERKINS, *supra* note 9, at 557-61. The Model Penal Code definition of attempts similarly differentiates between completed and incompleted attempts. See MODEL PENAL CODE §§ 5.01(1), 5.02 (Official Draft 1962).

proscribed conduct will be referred to as *intentional* only if the law requires that the defendant intend to bring about the statutory harm. Thus, a statute making it an offense to drive on the wrong side of the road punishes *intentional* conduct if it must be shown that the defendant actually intended to drive in this way. The conduct is intentional with respect to the statutory harm, even though the acts might well be described as "careless" or "negligent" with respect to the risk of death or injury. Conversely, a statute defining murder to include any killing in the course of a felony would not here be described as punishing *intentional* conduct with respect to the statutory harm of death; the law might require an intent to commit the felony, but it does not require an intent to cause the death.

Similarly, conduct is *reckless* if the defendant must consciously disregard a substantial risk that the statutory harm will occur, and *negligent* if culpability requires only that the defendant should have been aware of such a risk. Conduct is punishable on a *strict liability* basis if occurrence of the statutory harm is sufficient for conviction, without regard to the defendant's intent, recklessness, or negligence with respect to that harm.

II. SOME BASIC JUSTIFICATIONS

Dozens of efforts to justify emphasis on results can be found; dozens more can be conceived. Each rests ultimately on a particular view of what the criminal law is supposed to accomplish. The temptation is therefore great to begin with a clear statement of my own conception of the legitimate aims of the criminal law and the appropriate priorities among them. It would then be possible to outline the structure of penalties called for by these objectives and to determine the role, if any, to be accorded the harm caused. Such an approach would be tidy but in the end inconclusive, since disagreement would inevitably remain over first principles.

Similar difficulties would attend an effort to approach the problem in terms of the institutional process by which individual sentences are ultimately determined. It would no doubt be instructive to establish guiding principles as to the responsibility of legislatures, prosecutors, courts, and correctional authorities for determining general categories of punishment and fixing penalties in specific cases. The significance of the actual result could then be assessed from the viewpoint of

each decision-maker in the resulting structure.³⁴ Here again, however, disagreement would remain over the appropriate allocation of power among the institutions that do or could play a part in the sentencing process. Our concern is with the reasons that might lead *any* decision-maker, in *any* institutional system, to attribute significance to the actual result. Consideration must be given to those institutional concerns (such as a desire to minimize official discretion) that would make reliance on the actual result especially useful, but a more systematic treatment of the institutional aspects of the grading and sentencing process would only distract us from our primary task.

Of necessity, the analysis must be eclectic, considering, without regard to any particular ideology or model, all the reasons that might justify emphasis on results. For convenience, the justifications are grouped according to the objective or philosophy of criminal law that they purport to fulfill. We begin with arguments based on the retaliatory and retributive purposes of the criminal law, and then turn to several relatively complex arguments to the effect that emphasis on results provides greater deterrence. Finally, we consider arguments that seek to relate actual harm to the dangerousness of the offender or his offense, a factor that may be relevant not only to retribution and deterrence, but also to decisions concerning the need for isolation and treatment of the offender.

A. *Retaliation*

The view that it is desirable for punishments to vary according to the harm caused should not be dismissed as simply barbaric or medieval. Kant argued forcefully that "the Right of Retaliation . . . is the only principle which . . . can definitely assign both the quality and the quantity of a just penalty"; any other approach would be inhuman, treating one man "merely as a means subservient to the purpose of another."³⁵ Whether Kant would have considered it permissible to base retaliation on a purely fortuitous harm, whether—if so—he would have described as "just" a penalty which served no identifiable social purposes, whether indeed Kant actually meant that an individual's interests could *never* be sacrificed for the social good, these and other problems with the "Kantian" rationale have

³⁴ Cf. H.M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958).

³⁵ I. KANT, *THE PHILOSOPHY OF LAW*, pt. 2, § 49, at 195-97 (W. Hastie transl. 1887).

been frequently aired.³⁶ Suffice it to say that such a categorical refusal to tolerate treating human beings as "means to an end" has been almost universally rejected as a requirement of legal policy.³⁷ As Holmes put it: "No society has ever admitted that it could not sacrifice individual welfare to its own existence [No] civilized government sacrifices the citizen more than it can help, but [it] still sacrific[es] his will and his welfare to that of the rest."³⁸

Some contemporary analysts of the criminal law have also urged that a correlation between punishment and harm caused is desirable for its own sake. Professor Jerome Hall has argued that the principle of harm is "an essential organizational construct" of the criminal law; a theory emphasizing results permits "systematization" of the law by explaining causation and the differentiation between punishments.³⁹ As a description of the criminal law, Hall's theory is probably accurate in a general way. Even so, it fails to account for the growing minority of States which hold that attempts should be punished as severely as the completed crime.⁴⁰ It fails as well to account for the many instances in which resistance to emphasis on harm has produced confusion or inconsistency in the law.⁴¹ More fundamentally, Hall's analysis is inadequate for present purposes because it fails to do more than explain what exists; it offers no justification why this pattern *should* prevail. "Penal law theorists, who think that theory is the exposition of the law, can hardly ask that legislation be so framed that it will

³⁶ See H.L.A. HART, *supra* note 11, at 244.

³⁷ See O.W. HOLMES, *supra* note 11, at 37-41; J. MICHAEL & M. ADLER, *supra* note 6, at 349-52; E. PINCOFFS, *THE RATIONALE OF LEGAL PUNISHMENT* (1966).

³⁸ O.W. HOLMES, *supra* note 11, at 37.

³⁹ J. HALL, *supra* note 7, at 221-22. See also Eser, *supra* note 27.

⁴⁰ Prior to the completion of the Model Penal Code, only three states apparently authorized equal penalties for attempts and completed crimes. See MODEL PENAL CODE § 5.05, Comment at 174-75 (Tent. Draft No. 10, 1960). Since then several of the States adopting new codes, patterned on the Model Penal Code, have followed the ALI recommendation that attempts to commit crimes (other than felonies of the first degree) should be graded as seriously as the corresponding substantive offense. See CONN. GEN. STAT. ANN. § 53a-51 (1971); N.H. REV. STAT. ANN. § 629:1, pt. IV (Supp. 1972); PA. STAT. ANN. tit. 18, § 905 (1973).

More commonly, however, the ALI proposal has been rejected. See COLO. REV. STAT. ANN. § 40-2-101 (1972); GA. CODE ANN. § 26-1006 (1972); KAN. STAT. ANN. § 21-3301 (Supp. 1973); KY. REV. STAT. ANN. § 431.065 (1971); MINN. STAT. ANN. § 609.17 (1964); N.M. STAT. ANN. § 40A-28-1 (1972); N.Y. PENAL LAW § 110.05 (McKinney Supp. 1973) (the commentary notes that the new provision brings punishment for attempts and completed crimes closer than did the prior law); ORE. REV. STAT. § 161.405(2) (1973).

⁴¹ See text accompanying notes 19-24 *supra*.

simplify their work."⁴²

When all is said and done, the support for retaliation as an affirmative value remains rather thin, and this is so despite the continuing debate over the legitimacy of *retribution*, a debate recently revived in *Furman v. Georgia*.⁴³ References to retribution or "retributive justice" are seldom precise about the meaning of the term. Often it is associated with the concept of vengeance or retaliation for injuries caused, the "eye for an eye" principle.⁴⁴ The term retribution is also used to refer to a theory of punishment based upon moral blameworthiness,⁴⁵ which is quite another matter. In this latter sense, retribution has found thoughtful defenders,⁴⁶ while many others would accord it little place in our penal system⁴⁷ or none at all.⁴⁸ Although many judicial statements express approval for "retribution," it is difficult to find ones in which the idea of retaliation is clearly intended. In some cases courts have recognized the ambiguity and specified that while retribution in some of its senses may be a permissible goal, its retaliation element is not.⁴⁹

This is not to deny that retaliation for its own sake might still be considered legitimate in some jurisdictions. No useful purpose would be served, however, by re-opening here the much-debated question whether such a judgment is morally sound or constitutionally permissible. For present purposes, we may assume that in any such jurisdiction, the pattern of emphasis on harm could be defended.⁵⁰ The fact remains that most American jurisdictions exclude retaliation from the legitimate goals of the criminal law, and legal theorists are virtually

⁴² Wechsler, *Foreword—Symposium on the Model Penal Code*, 63 COLUM. L. REV. 589, 593 (1963).

⁴³ 408 U.S. 238 (1972).

⁴⁴ *E.g.*, *United States v. Brawner*, 471 F.2d 969, 988 (D.C. Cir. 1972); H.L.A. HART, *supra* note 11, at 233-34; H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 37-39 (1968).

⁴⁵ *E.g.*, H.L.A. HART, *supra* note 11, at 9, 231; H. PACKER, *supra* note 44, at 37.

⁴⁶ H. PACKER, *supra* note 44, at 62; H.M. Hart, *supra* note 34.

⁴⁷ *See, e.g.*, *Williams v. New York*, 337 U.S. 241, 247-48 (1949); *People v. Brust*, 47 Cal.2d 776, 791 n.8, 306 P.2d 480, 488 n.8 (1957).

⁴⁸ *See, e.g.*, *Furman v. Georgia*, 408 U.S. 238, 343, 363 (1972) (Marshall, J., concurring); *Rudolph v. Alabama*, 375 U.S. 889, 891 (1964) (Goldberg, J., dissenting); J. MICHAEL & H. WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* 10-11 (1940).

⁴⁹ *People v. Love*, 53 Cal. 2d 843, 856 n.3, 350 P.2d 705, 713 n.3, 3 Cal. Rptr. 665, 673 n.3 (1960).

⁵⁰ It would remain necessary, in such a jurisdiction, to determine that the value of the retaliation policy in this context was sufficient to offset its costs in terms of other policies and interests that such a jurisdiction might recognize as legitimate.

unanimous in applauding the judgment.⁵¹ Our problem, therefore, is to determine the extent to which the pervasive pattern of emphasis upon harm caused can be justified consistent with this widespread view.

B. *Retaliation as a Means to an End*

Most of the proponents of a retaliation theory do not argue that retaliation is affirmatively desirable. They rather suggest that deference to desires for vengeance, on the part of victims or the public generally, is necessary to promote some other value. Thus it is claimed that official retaliation may be necessary as an alternative to the greater evil of mob violence.⁵² The argument is first and foremost a plea for a legalized death penalty. But even where the most heinous offenses are involved, the death penalty does not appear necessary to prevent private lynching.⁵³ And if life imprisonment is sufficient to forestall mob action in this class of cases, particularly life imprisonment "as presently administered,"⁵⁴ there is little basis for believing that lynch-law, or even more subtle forms of private vengeance, would break out in response to moderate adjustments in the maximum prison sentence.

When we turn from the very few crimes of this type, the "lynch-law" danger becomes increasingly unrealistic. Penalties we consider appropriate for other reasons would almost certainly satisfy enough of the appetite for vengeance to forestall private retaliation.⁵⁵ Indeed the "breaking-point" level

⁵¹ See text accompanying notes 11-14 *supra*.

⁵² O.W. HOLMES, *supra* note 11, at 36; H.M. Hart, *supra* note 34, at 401. Cf., *Furman v. Georgia*, 408 U.S. at 308 (Stewart, J., concurring).

⁵³ See *Furman v. Georgia*, 408 U.S. at 303 (Brennan, J., concurring). Cf. *Eacret v. Holmes*, 215 Ore. 121, 333 P.2d 741 (1958), where parents of a murder victim sued for a declaratory judgment limiting the grounds upon which the Governor might exercise his discretion to commute the death sentence of their son's killer. In denying relief, the court held:

It must be at once apparent that the plaintiffs have no standing to maintain this suit. The wrong of which they complain—if there be a wrong—is public in character The fact that it was their son for whose murder Nunn has been sentenced to die does not alter the case, even though it be natural that they should feel more deeply upon the subject than other members of the general public. Punishment for crime is not a matter of private vengeance, but of public policy.

Id. at 124-25, 333 P.2d at 742-43 (alternative holding).

⁵⁴ Cf. *Furman v. Georgia*, 408 U.S. at 312 (White, J., concurring).

⁵⁵ Or at least so much of such retaliation as *can* be forestalled by adjustments of the applicable penalty. The possibility of impulsive vengeance by private parties would be present to some degree even when the law permits or requires the death penalty.

of punishment, below which mob violence could become a problem, is probably rather low. Most European countries treat involuntary manslaughter with far less severity than we do;⁵⁶ this does not appear to have prompted private retaliation, even under the most tragic circumstances.⁵⁷ Even if popular resentment would not lead to mob violence, it can be argued that giving an outlet for this resentment will contribute to the psychological health of the community. The argument is somewhat complex, involving both the need to reinforce the citizen's repression of his own impulses to do wrong, and the need to satisfy the instinctive urge to strike back at an attacker.⁵⁸ For many purposes these two elements point to consistent policies, but in the present context they seem rather to conflict. The latter notion, the urge to strike back, truly supports a retaliation approach, while the former element suggests instead that it is the decision to do wrong which must be punished.⁵⁹ The psychologically disturbing effects of allowing the distribution of severe penalties to be affected by factors that may be perceived as capricious might or might not offset the psychological benefits of retaliation; in the final analysis the psychological argument, at least in its present state of refinement, provides little firm guidance for the solution of our problem.⁶⁰

⁵⁶ See, e.g., M. ANCEL, *LES CODES PÉNAUX EUROPÉENS* 680 (4 vols. 1956-71) (French Penal Code art. 319—maximum sentence of two years for involuntary homicide by negligence); *id.* 7, 55 (German Penal Code arts. 16, 222—maximum of five years for homicide by negligence); *id.* 1836 (Swedish Penal Code ch. III, art. 7—maximum of two years for involuntary homicide by negligence; four year maximum if by gross negligence); *id.* 1926, 1949 (Swiss Penal Code arts. 26, 117—maximum of three years for homicide by negligence).

⁵⁷ See Schulhofer, *The Vagaries of Vengeance: A Case Study* (on file, Biddle Law Library, University of Pennsylvania).

⁵⁸ See F. ALEXANDER & H. STAUB, *THE CRIMINAL, THE JUDGE AND THE PUBLIC* 214-33 (1956).

⁵⁹ Thus, "the power of the Superego over our instinctive life is undermined, not only when someone is punished unjustly and too severely, but also when the offender escapes punishment and thus fails to pay for his offense." *Id.* 214.

⁶⁰ Survival of the present pattern of penalties may suggest that the net psychological impact is not seriously adverse, but would not seem to permit an inference of affirmative psychological benefit. In any case such benefits, if any, could probably be attained by less wasteful means. Liability in tort may have the same psychological effect and would also help repair some of the physical harm. If the defendant cannot respond in damages, a period of probation to enable him to make reparation, see Ohlin & Remington, *Sentencing Structure: Its Effect upon Systems for the Administration of Criminal Justice*, 23 *LAW & CONTEMP. PROB.* 495 (1958), might do much to assuage the feelings of both the victim and society at large, and would do it in a far more constructive way. Even a state-financed system of compensation would provide a more meaningful response to resentment by the victims of crime. See generally *Symposium—Governmental Compensation for Victims of Violence*, 43 *S. CAL. L. REV.* 1 (1970). Victims were paid \$4.9 million under a British victim-compensation program

Deference to popular desires for retaliation has also been urged on the ground that adherence to the common sense of justice is necessary to maintain respect for the law.⁶¹ But this should prompt inquiry into just what this common sense of justice is. The fact that criminal codes presently emphasize harm is, of course, relevant; the typical reaction of victims is also important.⁶² But such indications of public feeling are relatively unfocused. Popular tolerance of emphasis on harm caused may simply be due to a failure to perceive that lack of success in certain cases was due to a fortuitous rather than a relevant factor.⁶³ Moreover, attitudes undoubtedly vary depending on the particular penalties involved. A legal system which imposes the same criminal penalty on two equally negligent defendants, while requiring the one who has caused greater harm to pay greater compensation to his victim,⁶⁴ may well satisfy the public desire for retaliation and win respect for "the law" as a whole.

In addition, attitudes which once justified the present pattern of law may no longer be prevalent.⁶⁵ If, for example, there ever was a feeling that those who commit strict liability crimes were somehow morally responsible for the harm they caused, that feeling has probably been dispelled today: if anything, punishment of these crimes may tend to weaken respect for law⁶⁶ and must be justified on other grounds. Likewise, with increasing general understanding of the causes of automobile accidents, public reaction may now frequently depend

in the 1970-71 fiscal year, and a total of \$3 million has been paid under a similar program in New York, N.Y. Times, Nov. 29, 1972, at 2, col. 4. At least seven other states have enacted victim-compensation programs. *Id.*

⁶¹ *E.g.*, Goodhart, *Note*, 80 L.Q. REV. 18 (1964).

⁶² *See id.*

⁶³ *See* Michael & Wechsler, *supra* note 11, at 1297-98 n.87.

⁶⁴ The argument that it is unjust to base the extent of liability on the harm actually caused could also be raised in the law of torts. Theoretically, it would be more appropriate for everyone to pay into an insurance fund a premium based on the risks he creates in the course of his activities. Those who suffer injury would then seek compensation from the fund rather than attempting to impose the entire loss on the negligent defendants who happened to cause their particular injuries. We in fact approximate this result in connection with automobile accidents, as insurance premiums commonly vary according to the degree of risk creation (frequency of driving, safety record, etc.). In the absence of such a framework, however, the law of torts can properly treat those who cause harm differently from those who do not, in order to allocate fairly the loss which has befallen the victim. This allocation of the loss, fortuitous as between risk-creators, is preferable to an allocation of the loss which would be fortuitous as between faultless victims.

⁶⁵ *See* N.Y. LAW REVISION COMM'N, *supra* note 10, at 17.

⁶⁶ G. WILLIAMS, *supra* note 10, § 89, at 259; H.M. Hart, *supra* note 34, at 422-25.

more on "the intrinsic nature of the act of negligence than [on] the results that it may happen to have produced."⁶⁷

Accordingly, there is reason to believe that abandoning emphasis on the harm caused, at least for most crimes, would not significantly dissipate public respect for the law and would in many instances enhance it. And this exposes the most basic weakness of the "respect" argument, for even respect for law is not an end in itself. Those who urge maintenance of such respect do so primarily so that the criminal law can play an affirmative role in "sharpening . . . the community's sense of right and wrong,"⁶⁸ drawing on its store of respect—dissipating some of it where necessary—to obtain compliance with socially established norms. Unless it can be shown that a departure from emphasis on results would substantially undermine respect for the law, it would seem that popular attitudes as such should be ignored, and the approach adopted should be the one that is considered sound in principle.

C. Retribution

A number of commentators have sought to justify the law's emphasis on the occurrence of harm by arguing that moral fault, the touchstone in the retributive grading of offenses, cannot be measured exclusively by an actor's conduct and state of mind. Resort is had to the "largely intuitive judgment" that "[t]he successful criminal and the person who engaged in an unsuccessful attempt are in some sense not of equal culpability."⁶⁹

The argument is troublesome on several levels. Not the least is its basic anti-rationality. A policy so pervasive and important as the law's emphasis upon results might reasonably be expected to stand upon some fairly weighty reasons capable of coherent explanation. Still, conceding that it might be a mistake to insist on a full articulation of the reasons for every

⁶⁷ G. WILLIAMS, *supra* note 10, § 42, at 116. *Accord*, Leuret, *Les Rapports Posés dans le Droit Pénal Moderne par le Développement des Infractions Non-Intentionnelles (Par Faute)*, 32 REV. INT. D.P. 1059, 1061-62 (1961); Salingardes, *Les Problèmes Posés dans le Droit Pénal Moderne par le Développement des Infractions Non Intentionnelles (Par Faute)*, 32 REV. INT. D.P. 1193, 1199 (1961).

⁶⁸ H.M. Hart, *supra* note 34, at 401. See J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 134 (1947). Respect for law may also lead to some marginal improvement in voluntary compliance. See Fried, *Moral Causation*, 77 HARV. L. REV. 1258 (1964). To the extent that this is a factor, the present pattern of law may tend to impede rather than promote voluntary compliance.

⁶⁹ Mansfield, *Hart and Honoré, Causation in the Law—A Comment*, 17 VAND. L. REV. 487, 495 (1964). See also note 15 *supra*.

social policy, and conceding that intuitive notions, if widely felt, could sometimes be taken as valid answers to a human problem, there nevertheless remains a major difficulty. The "intuitive judgment" as to culpability cannot claim anything approaching widespread appeal. As we attempt to fill out the fact situations upon which the judgment is made, the notion of a difference in culpability seems more and more implausible. For example, suppose that *A* and *B* both shoot their wives, intending to kill. The bullets lodge in precisely the same area of the brain in both cases, but while *A*'s wife dies, *B*'s wife is saved by a miraculous feat of surgery. Is *A* more culpable than *B*? More to the point, can we say with any confidence that there would be uniform and fairly widespread agreement with the intuitive proposition that *A* is more culpable than *B*? Surely not.

The example, moreover, is far too kind to existing law; we might well have supposed quite different conduct by *A* and *B* after the shooting. Suppose that *A*, who intended to kill at the time he shot, suddenly decides he has done a terrible thing, immediately calls a hospital for help, has the country's best neurosurgeon flown in from a great distance to perform the operation, and does all else in his power to save his wife. In spite of everything, she dies. *B* meanwhile does everything possible to prevent his wounded wife from being discovered or treated. But neighbors have heard the shot, the police get her to the hospital in time, and she recovers. Is *A* still more culpable than *B*? Insistence that there simply is a difference in culpability will not convince those who neither "feel" this difference nor comprehend the basis of this feeling in others, and this group is altogether too large to be ignored.⁷⁰

Doubts about the soundness of the "intuitive judgment" are in any event only half of the story. The proposition that if *A* is more culpable than *B*, he should be punished more severely than *B* (other things being equal), can be valid only if retribution (in the sense of condemnation of moral fault) is accepted as a legitimate function of the criminal law.⁷¹ And even for those who believe that moral culpability should affect

⁷⁰ See O.W. HOLMES, *supra* note 11, at 39; N.Y. LAW REVISION COMM'N, *supra* note 10, at 262; MODEL PENAL CODE § 210.3, Comment at 44 (Tent. Draft No. 9, 1959) (criticizing misdemeanor-manslaughter rule); Goodhart, *supra* note 61, at 19 (quoting Streatfeild, J.); Comment, *The Fallacy and Fortuity of Motor Vehicle Homicide*, 41 NEB. L. REV. 793 (1962). See also text accompanying notes 19-24 *supra*.

⁷¹ For the large body of opinion which rejects retribution, the culpability theory obviously cannot provide a satisfactory explanation. See notes 47-48 *supra*.

the severity of punishment, it seems far from evident that this particular moral judgment, the judgment that *A* is more culpable than *B*, is one deserving of propagation and reinforcement through the office of the criminal law.

Where we are dealing with the notion that it is wrong to steal, or the notion that it is even more wrong to steal by the use of force, it may make sense to use the criminal law for "sharpening . . . the community's sense of right and wrong."⁷² Perhaps there is a value in teaching that it is wrong to cause harm, and that those who do are blameworthy. But the proposition that *A* is more culpable than *B* says much more than this. It says that of those who commit the *same* acts, with the *same* intentions and the *same* perceptions as to the risks and consequences of their conduct, the one who actually causes harm is more culpable than the one who, for whatever reason, does not. It says, in effect, that the moral quality of an act is determined not only by factors within an actor's knowledge and control, but also by unseen and unseeable circumstances, by the invisible hand of Fate.⁷³ To stress the role of an uncontrollable Fate in determining our moral accountability for the harms we cause seems an unlikely way to serve the utilitarian objective of preventing harm and the conduct that causes it. But even in strictly retributive terms, it would seem a perversion of a theory conceived out of concern for moral judgments of some moment, to use the criminal law for "teaching" the soundness of a concept of this sort.

One effort to give content to notions of a difference in culpability has been made with respect to crimes based on reckless or negligent conduct. The argument is that an actor who creates a risk "ought to pay if the gamble with the lives of

⁷² H.M. Hart, *supra* note 34, at 401.

⁷³ It might be objected that this formulation of the proposition is too highly refined, that the average citizen is unlikely to draw from the criminal law more than the crude principle that it is wrong to cause harm. It would in fact be useful to have a study of public perceptions with respect to this point, as well as other moral "lessons" which are said to be communicated by the criminal law. Such a study could have interesting implications for the "retributive" theory of the criminal law. In the absence of such a study, it seems reasonable to assume that in the concrete factual settings in which the problem of emphasis upon results is presented, a good many of those involved will perceive, however inarticulately, the importance of fortuitous circumstances in determining legal consequences.

As to the efficacy of the criminal law in changing public morality, or its outward manifestations in behavior, see P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 S. CAL. L. REV. 588 (1968); Zimring & Hawkins, *The Legal Threat as an Instrument of Social Change*, 27 J. SOCIAL ISSUES, No. 2, at 33 (1971).

others does not come off," but if his gamble proves successful, he cannot fairly be subjected to the same penalty.⁷⁴ In one sense this suggestion may be taken to state simply that the governing test of fair punishment is proportionality to the harm done; in this sense the argument adds nothing to the retaliation theories already considered. But viewed as an independent guide to fairness, the argument seems misconceived. The creation of crimes based on recklessness or negligence must involve a judgment that the advantages of leaving people free to create certain risks are outweighed by the inevitable social costs. Whether varying policy reasons prompt us to subject the underlying conduct, in the absence of a harmful result, to substantial penalties, to only light penalties, or to no penalty at all, the decision is the same—that these risks ought not to be taken. Accordingly, the actor cannot be regarded as morally free to determine for himself whether the danger is worth risking.⁷⁵ When viewed in this light, the culpability of the actor must stem from his having taken the forbidden risk, and he cannot claim that fairness requires imposition of a milder penalty simply because the ultimate harm did not materialize.

III. THE DETERRENCE JUSTIFICATIONS

A number of arguments have been advanced to establish that emphasis on the harm caused is desirable in terms of deterrence. An effort to assess these arguments in any but the most speculative terms faces enormous difficulties, for there is no solid proof of even the most elementary propositions concerning deterrence. Whether punishment deters certain kinds of crimes at all, whether more severe penalties produce greater deterrence, even these basic questions cannot be answered with confidence.⁷⁶ Nor is it clear, even on a purely theoretical

⁷⁴ Goodhart, *supra* note 61, at 21; Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 743 (1960).

⁷⁵ Whatever the merits of the "bad man" theory in an area such as contract or tort law, *see, e.g.*, Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897), true criminal penalties are not ordinarily regarded as merely the price of engaging in forbidden behavior. And it would be particularly inconsistent to view criminal penalties in this way for purposes of a theory in which punishment is determined by moral culpability rather than utilitarian considerations. Possible utilitarian arguments for a criminal penalty which is simply the price of causing a particular harm are considered below. In the case of strict liability crimes, for example, the underlying conduct is often not condemned as such, and if monetary penalties, whether denominated 'civil' or 'criminal', are properly calculated, they may appropriately serve to fix a price for engaging in the activity. *See* note 291 *infra*.

⁷⁶ *See* F. ZIMRING, PERSPECTIVES ON DETERRENCE 10-13 (1971); Bailey & Smith, *Punishment: Its Severity and Certainty*, 63 J. CRIM. L.C. & P.S. 530, 530-31 (1972).

level, how we should decide just what level of deterrence is optimal; and if we knew that, we would still face an infinity of choices as to how to attain it, each option involving a particular penalty or set of different penalties and a particular distribution of these penalties over the group of all offenders. Different principles might in turn guide our choice from among this multiplicity of alternatives—we might choose the one that minimizes public expenditures (including police, court, and prison costs), or the one that minimizes inequalities in punishment, or the one that will most easily win legislative approval. Even if a single principle of selection could be chosen, we might and probably would find that a number of different deterrence strategies would be equally “optimal” in terms of this principle.

Present law embodies just one of these strategies. It may be viewed as a specification of three ranges of penalties for any type of crime (a high range for causing harm, an intermediate range for attempting or risking the harm, and no penalty for offenders not apprehended or convicted) together with a tacit decision as to the proportion of offenders in each of these categories. We have no assurance that this particular strategy could qualify as an optimal one, and indeed it would be rather surprising if it did. In any event, a strategy not involving the distinction based on harm (but some other mix of penalties and distributions) could well be every bit as close to optimal, and the theory would provide no basis for preferring one of these strategies to the other. It therefore seems unlikely that any rigorous analysis of deterrence policy could clearly favor (or disfavor) emphasis on results, or provide any theoretically satisfying overview of optimal policy on this issue.

Analysis of the advantages and disadvantages of present law and the arguments for emphasis on results must therefore proceed on a level more akin to minor tinkering with third-rate equipment. Deterrence strategies of all kinds presumably seek to influence potential offenders at a point at which they embark on a certain course of conduct, with certain perceptions as to the likely consequences of that conduct. There is therefore at least some basis for starting with an assumption that where the conduct and the actor's perceptions as to its consequences are the same, the penalty should be the same. The present section aspires only to examine with the limited tools available the possible reasons for departing from this assumption, in an effort to determine whether the arguments are at

least valid in their own terms or whether they instead suggest reasons for ignoring rather than emphasizing the actual result.

A. "Characteristicalness"

Though of little practical importance, a point made by Bentham deserves brief mention. He argued that punishment should, where possible, have the attribute of "characteristicalness": a penalty analogous to the harm done to the victim will be less easily forgotten and thus will better serve as a moral lesson, reducing the likelihood of repetition.⁷⁷ As Bentham himself conceded, however, imposition of an "analogous" penalty is likely to be impractical or too harsh in most cases.⁷⁸ And although penalties will perhaps be forgotten if they are too mild, it may be doubted whether a criminal will forget more quickly the experience of being imprisoned or of paying a substantial fine merely because it is unlike the experience suffered by his victim.

B. *The Incentive to Desist*

A more substantial argument is that by punishing more severely when greater harm is caused, the law provides an incentive for the actor to desist from his unlawful course of conduct. This argument is most often advanced to justify higher penalties for completed crimes than for *incompleted* attempts.⁷⁹ The argument might also be thought to justify less severe punishment for reckless or negligent conduct that does not produce harm, and even for *completed* but unsuccessful attempts. In both cases the law would provide an incentive, even at the last moment, for the actor to change his course of action in order to avoid or mitigate the harm—by restraining a blow, shifting his aim, or taking other steps that might in themselves be too ambiguous or imperceptible to prove a change of purpose.⁸⁰ The incentive would also be preserved

⁷⁷ J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 192-93 (Oxford ed. 1876).

⁷⁸ *Id.* 193.

⁷⁹ See text accompanying note 33 *supra*.

⁸⁰ The possible ambiguity of such actions might also suggest that the conduct of an unsuccessful actor was less dangerous from the viewpoint of the actor himself than the conduct of the successful actor even though the discernible facts (apart from the result) indicate that the conduct was the same. The implications of this reasoning are explored below. See text accompanying notes 293-334 *infra*. The

beyond the "last" moment, giving the actor a reason to aid his own victim, as in the case of our attempters *A* and *B*,⁸¹ at a time when the attempt itself might be considered "complete" and punishable regardless of any change of heart by the actor.⁸²

Although it is desirable that there be some incentive to desist, considerations other than the potential penalty already provide very substantial incentives. For some types of crime (violation of health and safety regulations, for example) the occurrence of harm can greatly increase the chances of apprehension and prosecution. Similarly, potential liability in tort may be a significant deterrent for some types of conduct and for some kinds of actors. Most important of all, when the decision to desist can actually be proved, the actor will usually have a complete defense to the charge of attempt; he is then subject to no criminal penalty at all.⁸³ In view of these factors, the additional incentive provided by differences between the penalty for the successful crime and the unsuccessful attempt may have very little impact on conduct.⁸⁴ Moreover, whatever

present argument focuses not on the question whether the successful actor or his conduct can be considered more dangerous, but rather on the question whether the structure of penalties can itself influence the likelihood of success.

⁸¹ See text accompanying note 70 *supra*.

⁸² Perkins urges recognition of "abandonment" of purpose as a defense to a charge of attempt, provided the abandonment is voluntary and not prompted by external factors such as discovery by the police. But he notes:

There are definite limitations of course. Attempted murder cannot be purged after the victim has been wounded, no matter what may cause the plan to be abandoned. And probably the same is true after a shot has been fired with intent to kill.

R. PERKINS, *supra* note 9, at 590. The Model Penal Code defense of "renunciation of criminal purpose," § 5.01(4), could be read as available even after shooting or wounding of the victim, but the commentary states:

[B]ecause of the importance of encouraging desistance in the final stages of the attempt, the defense is allowed even where the last proximate act has occurred but the criminal result can be avoided—*e.g.*, where the fuse has been lit but can still be stamped out. If, however, the actor has gone so far that he has put in motion forces which he is powerless to stop [wounding??], then the attempt has been completed and cannot be abandoned. In accord with existing law, the actor can gain no immunity for this completed effort (*e.g.*, firing at the intended victim and missing); all he can do is desist from making a second attempt.

MODEL PENAL CODE § 5.01(4), Comment at 73 (Tent. Draft No. 10, 1960) (footnote omitted).

⁸³ See R. PERKINS, *supra* note 9, at 589-90; MODEL PENAL CODE § 5.01(4) (Official Draft 1962).

⁸⁴ Each added incentive should make it somewhat more likely that the actor will desist. Cf. Wälder, *The Principle of Multiple Function: Observations on Over-Determination*, 5 PSYCHOANALYTIC Q. 45 (1936). For present purposes, however, the crucial question

impact may exist must be considered in light of the possibility that mitigation of the penalty where no harm occurs could tend to decrease deterrence under some circumstances.⁸⁵ Whether this effect will outweigh the tendency of the lower penalty to induce a decision to desist under other circumstances is by no means clear as an intuitive matter, and empirical evidence as to the net impact of a lower penalty is lacking.

These weaknesses in the incentive-to-desist rationale may not be conclusive in the case of the incompleting attempt. The inducement has a direct impact upon conduct because the actor can easily take it into consideration when deciding whether to take the final necessary step; the deterrence sacrificed by treating such cases less severely is probably minimal since those who do not desist will pass this stage and hold no hope of qualifying for its milder penalties.

Mitigation in this case cannot, however, be attributed simply to the lack of harm; rather, the differentiating factor is the lack of an act that the defendant knows to be necessary. Although the defendant cannot prove actual renunciation of purpose, his conduct is less dangerous and his intention to complete the crime necessarily less definitely fixed when he has not carried out the final essential act.⁸⁶

Where this final step has been taken, the justification for a lower penalty as an incentive to desist becomes much weaker. In cases of so-called "extrinsic impossibility"—such as the attempt to pick an empty pocket—failure could not be ascribed to a last-minute decision to desist under any circumstances. With respect to reckless or negligent conduct, the motivation to desist is probably very strong in any event; the actor, to the extent that he is aware of the danger at all, will still wish to avoid tort liability for injury to others, not to mention the possibility of injury to himself. And even if recklessness or negligence is a crime as such, the chances of apprehension and prosecution no doubt increase substantially when harm is caused. For some purposeful crimes, perhaps murder under some circumstances, the actor's chance of avoiding detection may be greater if he is successful and there may accordingly

is whether the added likelihood is significant enough to offset the disadvantages of leniency.

⁸⁵ See text accompanying note 149 *infra*.

⁸⁶ See *Powell v. Texas*, 392 U.S. 514, 543-44 (1968) (Black, J., concurring); G. WILLIAMS, *supra* note 10, §§ 1,2 (general reasons for the requirement of an act).

be a special need to provide an inducement to desist. But on the whole such situations are likely to be rare.⁸⁷ Unless workable categories can be pinpointed, it would seem better to treat all completed attempts as a group for grading purposes, and a lower penalty for this group would on the whole be unnecessary (if not counterproductive) as an incentive to desist.

In spite of the relatively concrete factors that could justify a distinction between completed and incompleted attempts for grading purposes, present law does not appear to make this distinction.⁸⁸ The same is true even under the Model Penal Code, which treats both completed and incompleted attempts as equal in seriousness to the completed crime in most instances.⁸⁹ A lower penalty for completed but unsuccessful attempts than for successful attempts seems even less justified as an incentive, in view of the potential adverse effects in terms of deterrence and the highly speculative possibility that a decision to desist was made when no evidence apart from the lack of harm supports this inference.

C. *Jury Nullification*

Probably the most important justification based on deterrence is the one advanced by the American Law Institute in its Model Penal Code. The argument deserves careful attention and is worth quoting in full:

How far a Model Code ought to attribute importance in the grading of offenses to the actual result of conduct, as distinguished from results attempted or threatened, presents an issue of some difficulty which is of general importance in the Code. It may be said, however, that distinctions of this order are to some extent essential, at least when the severest sanctions are involved. For juries will not lightly find convictions that will lead to the severest types of sentences unless the resentments caused by the infliction of important injuries have been aroused. Whatever abstract logic may suggest, a prudent legislator cannot disregard these facts of life in the enactment of a penal code.

⁸⁷ See Wechsler, Jones & Korn, *supra* note 1, at 572.

⁸⁸ See R. PERKINS, *supra* note 9, at 557-61. The soundness of this position is a question beyond the scope of this Article since the two categories do not involve conduct that is (from the actor's perspective) identical.

⁸⁹ MODEL PENAL CODE §§ 5.01(1), 5.05(1) (Official Draft 1962).

It may be added that attributing importance to the actual result does not substantially detract from the deterrent efficacy of the law, at least in dealing with cases of purposeful misconduct. One who attempts to kill and thus expects to bring about the result punishable by the gravest penalty, is unlikely to be influenced in his behavior by the treatment that the law provides for those who fail in such attempts; his expectation is that he is going to succeed.⁹⁰

The first paragraph of the ALI argument asserts that a penal code should not establish standards that may be nullified in practice by the jury, and that in order to achieve the necessary level of deterrence while avoiding jury nullification, heavy penalties must be limited to cases in which harm occurs. This position requires some comment. After all, still greater deterrence might be achieved by authorizing the heavier range of penalties across the board; frequent nullification would not prevent occasional convictions even when no harm results. But nullification would generate disrespect for the law, disguise the standards that are operative in practice, and could lead to acquittals where conviction on a lesser ("attempt") charge might have been had.⁹¹

Where nullification did not occur, moreover, the unsuccessful attempters singled out for punishment might tend to be members of particular racial or social groups. If the element of harm is no more relevant to punishment than the color of the defendant's skin, penalties imposed on the basis of harm would be as discriminatory in principle as those imposed according to racial prejudices of the jury. An uneven distribution of penalties, even if purely random, raises difficult equal protection problems, which cannot be casually relegated to the domain of "abstract logic."⁹² And what we have here is not entirely random, but rather the result of unleashing the jury's emotional response to an irrelevant factor. A legislature that permits this to occur so that juries will "lightly find convictions [*sic*]" should perhaps not be commended for its prudence. There is, however, an undoubted difference of degree. Discrimination on the basis of race or social class is

⁹⁰ MODEL PENAL CODE § 2.03, Comment at 134 (Tent. Draft No. 4, 1955) (citation omitted). For a more detailed presentation of the argument, see Michael & Wechsler, *supra* note 11, at 1295-98.

⁹¹ See Michael & Wechsler, *supra* note 11, at 1265, 1268.

⁹² See text accompanying notes 226-81 *infra*.

discrimination of a particularly sensitive kind; in this context it would universally be regarded as invidious. It therefore seems appropriate, while seeking to increase deterrence, to avoid any approach that would involve frequent jury nullification.

The ALI argument nevertheless turns upon two essentially factual assumptions—first, that jury nullification would actually become commonplace if penalties of the necessary severity were applicable across the board; and second, that in these cases, imposing the more severe penalty where harm occurs will produce a significantly greater deterrent effect than imposing the milder penalty across the board. Both of these assumptions must be valid in order to justify the ALI position, yet virtually no evidence is offered with respect to either one. It therefore seems worthwhile to examine each of them in some detail.

The sections that follow consider these questions at length. One conclusion that emerges is that additional deterrence can often be gained, as the ALI claims, by imposing an added penalty where harm occurs, and jury nullification is indeed a serious problem in many areas of the law. To this extent the analysis provides strong support for the ALI argument. But we will also find that the nullification and deterrence assumptions are rarely satisfied simultaneously—in situations, for example, where nullification does appear likely, added deterrence through the extra penalty appears relatively unlikely. As a result, the analysis suggests that in only a few cases can the ALI argument provide a satisfying justification for emphasis on results.

1. A Note on Nullification

The problem of nullification is probably most serious in the case of crimes subject to the death penalty. During Coke's time, efforts were occasionally made to punish unsuccessful attempts to kill as murder, but this approach was considered too severe and was soon abandoned.⁹³ The effort was apparently based on the doctrine that "the will was to be taken for the deed when it was accomplished by overt acts clearly indicating the intention."⁹⁴ In effect, therefore, murder had been equated not only with completed attempts, but also with in-

⁹³ 2 J. STEPHEN, *supra* note 8, at 222-23.

⁹⁴ *Id.* 222.

completed attempts and perhaps even with conduct that would today be considered "mere preparation." The feeling of excessive severity was probably due as much to the lack of sufficiently dangerous behavior as to the lack of actual harm.⁹⁵

Today, the death penalty, particularly if mandatory, would probably be thought too harsh a punishment for most serious crimes, and frequent jury nullification might result unless its applicability was limited to cases in which death actually occurred. A few crimes involving serious danger might be well enough understood by the general public that juries would not recoil from the death penalty, even in the absence of proof of actual deaths. Espionage for a foreign power during wartime has always been punishable by death;⁹⁶ the danger to the nation and the risk that lives may be lost has been considered sufficient to justify the supreme penalty, in selected cases, even in the absence of proof as to the actual harm.⁹⁷ But instances such as these may be explained in part by an assumption by judge or jury that deaths have in fact occurred. For example, in imposing the death penalty after the espionage conviction of Julius and Ethel Rosenberg, the trial judge stated:

I believe your conduct in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused, in my opinion, the Communist aggression in Korea, with the resultant casualties exceeding 50,000⁹⁸

Severe punishment for crimes such as espionage may therefore reflect little more than a common retaliatory response, coupled with a desire to avoid the elusive problems of causation and proof that would be presented if loss of life were formally made an element of the offense. Where the actual consequences of high-risk criminal conduct are readily ascertainable—as in the case of "skyjacking," for example—jury resistance to the death penalty might still be significant unless death has in fact resulted.

⁹⁵ See text accompanying note 86 *supra*.

⁹⁶ War and National Defense Act, ch. 30, tit. I, § 2, 40 Stat. 218 (1917), as amended, 18 U.S.C. § 794(a)-(b) (1970) (imprisonment for any number of years is also available).

⁹⁷ Recent proposals that sellers of hard drugs be punished more severely than murderers (although not by the death penalty, see *N.Y. Times*, Jan. 4, 1973, § 1, at 1, col. 8) seem to embody a similar recognition that the magnitude of the danger justifies the most stringent penalties, regardless of actual harm.

⁹⁸ *United States v. Rosenberg*, 195 F.2d 583, 605-06 n.28 (2d Cir.), cert. denied, 344 U.S. 838 (1952).

Apart from the capital crimes, there are few intentional crimes for which jury nullification would be likely to pose a significant problem in the absence of harm. The danger seems remote where the statutory harm required for the completed crime does not prompt the emotional response associated with death or bodily injury; an attempt to bribe, for example, might well arouse as much public resentment as successful bribery later discovered. Moreover, in the case of crimes involving serious moral fault, the defendant's culpability alone may arouse sufficient resentment to permit imposition of most non-capital penalties.⁹⁹

Nullification is most often said to pose a significant problem when reckless or negligent conduct is made criminal. In vehicle homicide cases, for example, the penalties imposed for manslaughter were thought far too severe in relation to the culpability of the defendants, and the reluctance of juries to convict created serious enforcement problems.¹⁰⁰ The English experience was similar.¹⁰¹ These, however, are situations in which harm *did* occur. Far from supporting the ALI view as to the likelihood of jury resistance in the absence of harm, they suggest that the legislature's freedom to prescribe punishment is greatly circumscribed even for cases in which death or serious injury results. Given these limitations, the extent to which the penalties that can be imposed for causing harm will exceed the penalties possible in the absence of harm may have been exaggerated. Nevertheless, the penalties likely to strike a jury as too harsh in a reckless driving case, if no harm has occurred, are probably lower than those that would represent the borderline of acceptability in a vehicle homicide case.

⁹⁹ Thus many statutes authorize very severe penalties for certain attempts, and in numerous cases heavy penalties have been imposed under them. Indeed, defendants convicted of an attempt have sometimes received sentences in excess of those authorized for the corresponding completed crime. *See, e.g.,* *Hobbs v. State*, 252 N.E.2d 498 (Ind. 1969) (defendant sentenced to ten years' imprisonment for "entering to commit a felony"; maximum sentence applicable to the completed crime would have been five years); *Cannon v. Gladden*, 203 Ore. 629, 281 P.2d 233 (1955) (defendant sentenced to life imprisonment for assault with intent to rape; maximum sentence for rape was 20 years); *cf. Dembowski v. State*, 240 N.E.2d 498 (Ind. 1968) (defendant sentenced to 25 years' imprisonment for robbery; maximum sentence for armed robbery was 20 years). In both *Hobbs* and *Cannon*, the appellate courts refused to allow the sentence to exceed the maximum applicable to the completed crime, and in *Dembowski* the court refused to allow the sentence for a lesser completed offense to exceed the maximum for a greater offense.

¹⁰⁰ *See* MODEL PENAL CODE § 201.4, Comment at 53-54 (Tent. Draft No. 9, 1959).

¹⁰¹ *See* G. WILLIAMS, *supra* note 10, § 42, at 120 & n.20. *See also* Fitzgerald, *Crime, Sin and Negligence*, 79 L.Q. REV. 351 (1963).

Thus for many crimes involving recklessness or negligence, the penalties possible without nullification probably are significantly greater for conduct causing harm.

A more comprehensive picture of the nullification problem is provided by the Kalven and Zeisel study of jury trials in criminal cases.¹⁰² Taking the disposition that the judge would have made as a baseline that reasonably reflects "the law,"¹⁰³ they found that the jury "nullifies" the law in twenty-eight percent of all cases, being more lenient in twenty-four percent of the cases and more severe in four percent.¹⁰⁴ Although significant differences among various crimes do appear, nullification occurs frequently for almost all crimes.¹⁰⁵ The study examines a number of other factors, 227 in all, that might account for judge-jury disagreements. The factors fall into five broad categories—evidence factors, facts only the judge knew, disparity of counsel, jury sentiments about the individual defendant, and jury sentiments about the law. All five seem to play some role in accounting for judge-jury disagreements, with several different reasons usually combining to help explain a given instance of disagreement.¹⁰⁶ The evidence factors were by far the most important, but usually appeared together with some other factor; apparently the "closeness" of the evidence frequently had the effect of "liberating" the jury to respond to other elements in the case.¹⁰⁷ Of particular interest to us is the pattern of nullification in cases involving certain jury sentiments about the law, in particular notions related to severity of punishment, to the absence of harm, and to the unpopularity of the crime.

¹⁰² H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966). The study, designed specifically to yield information on the reasons why juries frequently decide cases differently from the way the judge would have decided them, was based on an analysis of 3,576 criminal jury trials conducted during 1954-55 and 1958, and chosen essentially at random. *Id.* 33 & nn.1, 34.

¹⁰³ *Id.* 10.

¹⁰⁴ *Id.* 68.

¹⁰⁵ *Id.* 69-75. Judge-jury disagreement reaches 31% for drunken driving cases (jury leniency representing 28%), *id.* 71, but where serious harm has occurred (the penalties ordinarily being higher), the results are similar. Disagreement is 30% for negligent homicide cases (jury leniency 28%), *id.* 69, and reaches 41% in both manslaughter and murder prosecutions (jury leniency 35% for each), *id.* 69. Kalven and Zeisel conclude: "[W]hat disagreement exists today between judge and jury does not arise because of the impact of one or two particularly unpopular crime categories. Rather, the jury's disagreement is distributed widely and diffusely over all crime categories. The jury's war with the law is now a polite one." *Id.* 76 (footnote omitted).

¹⁰⁶ *See id.* 104-16. On the possibility that disagreements were over-determined, see *id.* 99-100.

¹⁰⁷ *See id.* 163-67.

Severity of the threatened punishment was found to be a frequent reason for judge-jury disagreements. A factor for a variety of crimes, it was particularly obvious in negligent homicide cases, and evidence that it played a role in drunken driving cases was found "substantial and striking."¹⁰⁸ It was also noted, however, that the jury's assumptions about the potential penalty were frequently misguided. Ordinarily the jury was not officially advised about the penalty, even in the rare trials (one and a half percent of the total) in which specific inquiry about it was made.¹⁰⁹ In a group of negligent homicide cases, the study found the jury to be guessing at the sanctions and assuming, erroneously in fact, that "since death is involved, [the penalty] will be serious."¹¹⁰

The study unfortunately lumps together jurisdictions having a wide variety of potential maximum sentences. It does not permit us to determine whether higher penalties for negligent homicide in some states were associated with a higher incidence of nullification, and if so, how much the penalties that seem acceptable exceed the penalties acceptable in drunken driving cases not involving harm. One very revealing indication, however, is provided by repeated evidence of jury resistance to conviction in drunken driving cases if the sanctions included mandatory loss of the driver's license for a full year. As drivers themselves, the jurors were generally aware of this requirement and viewed it as a severe hardship, particularly where the defendant needed his car for work.¹¹¹ It seems most unlikely that license suspension would prompt jury resistance in negligent homicide cases, although even here, nullification apparently did in some instances result from jury feelings that a conviction would interfere with job or education.¹¹²

Another jury sentiment that frequently helped account for nullification was the notion that the wrong or injury in a particular case was *de minimis*. Surprisingly, however, cases in which the jury apparently considered the harm trivial were distributed widely over the various crime categories; about seventy-five percent of these *de minimis* reactions occurred in prosecutions for serious crimes (including murder, which

¹⁰⁸ *Id.* 308.

¹⁰⁹ *Id.* 307 & n.4.

¹¹⁰ *Id.* 308.

¹¹¹ *See id.* 309-10.

¹¹² *See id.* 306-07 & n.2.

alone accounted for ten percent of the de minimis disagreements).¹¹³ Nullification occurred where death or serious injuries resulted from drunken brawls, barroom fights, or even where "one Indian kill[ed] another Indian."¹¹⁴ Nullification where the victim was "contributorily negligent" or "assumed the risk"¹¹⁵ seems to reflect a similar view that the harm to the community was trivial because of the character or behavior of the victim.

Of special interest are the de minimis disagreements in cases where the dangerousness of the act was high but the actual harm was small or non-existent, for example, where the defendant made restitution or where the charge was limited to drunken or reckless driving. In these situations significant nullification due to the lack of serious harm was observed.¹¹⁶ The de minimis disagreements did not, however, show up very clearly in connection with unsuccessful attempts. Although Kalven and Zeisel state that the no-harm rationale might be expected to extend to such cases, "[i]n only an occasional case . . . can we detect this type of jury reaction."¹¹⁷ Only three such de minimis disagreements are in fact noted, and in two of them the attempt was not even "complete"; in one of the incompleting attempts the judge explained the disagreement by noting "no harm done," but also observed, "Jury felt that [victim] was not in real danger."¹¹⁸

The final factor of relevance for present purposes is jury dislike for certain laws. Here drunken driving is high on the list.¹¹⁹ Laws punishing inadvertent conduct, such as vehicle homicide statutes, also were subject to significant jury hostility. Occasionally this sentiment was mixed with a reaction to the evidentiary problems of proving "wanton negligence," or with a lack of sympathy for a contributorily negligent victim.¹²⁰ But frequently it was clear that refusal to convict resulted from a more general jury hostility to condemning negligent conduct

¹¹³ *Id.* 260-61.

¹¹⁴ *Id.* 282-84.

¹¹⁵ *See id.* 242-57.

¹¹⁶ *See id.* 263-64, 266-70.

¹¹⁷ *Id.* 267.

¹¹⁸ *Id.*

¹¹⁹ Judges reported that in 20% of the cases the law is regarded as "too severe" in their communities. *Id.* 287. Excessive severity is apparently seen not only in the penalties prescribed, but also in the low alcohol level considered sufficient to establish "intoxication," in hostility to the use of drunkometers to obtain evidence, and in the failure to require proof of actually dangerous driving. *See id.* 294.

¹²⁰ *Id.* 325.

as criminal, in a case of death or serious injury.¹²¹

We have thus far discussed only the factors that help to account for jury leniency. It is also interesting to examine the cases in which jury "nullification" took the form of a verdict more severe than that which "the law" (as seen by the judge) called for. These cases of greater jury severity represented four percent of all cases tried (jury leniency accounted for twenty-four percent and judge-jury agreement for seventy-two percent),¹²² and the severity usually stuck, since, surprisingly, the more severe jury verdicts were only rarely set aside by the judge.¹²³

The severity cases reveal an interesting ambivalence in the jury's attitude toward inadvertent conduct. As previously mentioned, jury leniency in negligent homicide cases was frequently attributed to a reluctance to view such conduct as criminal. But negligent homicide cases were also the occasion for jury severity, usually in the form of convictions on evidence the judge considered inadequate. "The circumstance in these cases that alienates the jury is obvious: harm is done."¹²⁴

Use of the Kalven and Zeisel findings for present purposes presents a number of difficulties.¹²⁵ The study only describes reaction to existing laws; it does not and cannot provide accurate data on what nullification *would* look like if existing penalties for attempt, for drunken driving, or for negligent homicide were radically changed. In addition, the study was designed to provide systematic data only on the reasons for disagreements. Many of the factors (such as contributory negli-

¹²¹ See *id.* 326-28.

¹²² *Id.* 68.

¹²³ Verdicts are set aside in only 10% of the jury severity cases, *id.* 412, possibly because evidentiary factors are present in nearly all of them, *id.* 378. Apparently, the evidentiary doubts not only "liberate" the jury, as in the leniency cases, to respond to legally irrelevant elements in the case, see *id.* 495, but also tend to insulate even this more severe "nullification" from correction by the judge.

¹²⁴ *Id.* 407.

¹²⁵ First, of course, is the question whether the 3,576 cases studied present an accurate picture of the roughly 60,000 criminal jury trials conducted in the United States during the period studied. *Id.* 12. On this score, there is strong reason to believe that the sample is a valid one. See *id.* 33-441. There is also a semantic question whether the judge-jury disagreements reported by Kalven and Zeisel represent "nullification" at all, since most of these disagreements involved close cases, not jury defiance of the clear dictates of the evidence. Still, 21% of the disagreements came in cases where the facts were clear, and another 45% involved evidentiary factors that merely "liberated" the jury to respond to legally irrelevant factors. *Id.* 116. These situations involve precisely the kind of jury resistance to conviction that was of concern to the ALL.

gence) may also have been present in *agreement* cases, but the study does not indicate how often this was so, except where the presence or absence of the particular factor is obvious from the nature of the crime itself, as the factor of a death in a homicide case.¹²⁶ Thus we can get a rough idea of the portion of the disagreement cases explained by a certain factor, but there is generally no way to tell how often that factor will lead to "nullification" rather than agreement in the cases where it is present.¹²⁷

The Kalven and Zeisel findings nevertheless provide a number of important insights into the nullification process. Nullification is clearly not a phenomenon that occurs only when pickpockets are subject to the death penalty or when careless drivers are subject to long prison sentences. Nullification occurs with substantial frequency in virtually all crime categories. It is not explained solely by penalties perceived as too severe, but by a great variety of factors that evoke a sympathetic or hostile jury response. Some of these factors, such as the race of the defendant and victim, could not be given explicit recognition in a civilized penal code. Other factors could conceivably be incorporated as aggravating or mitigating elements, but often are not. The occurrence of harm is undoubtedly among these factors, as are a whole host of others. Juries apparently will not "lightly find convictions" where the victim was contributorily negligent or where the defendant has made restitution, but we ordinarily proceed on the theory that some nullification is better than a departure from sound policy in all cases. Against this background, the specter of nullification can hardly suffice, in and of itself, to justify deference to community attitudes with respect to harm caused. What is required is a careful evaluation of just how often nullification is likely to occur, in cases not involving harm, and in what ways it is likely to differ from the garden-variety nullification that is such a common feature of the jury-trial system.

In this connection it seems significant that virtually no nullification was attributed to lack of harm in prosecutions

¹²⁶ The study does not separately identify attempts in its analysis of specific crimes. Attempted robbery would be included in the robbery category; attempted murder, on the other hand, was probably listed in most instances as "aggravated assault," a category that can include completed attempts to kill as well as serious cases of assault and battery that do not actually endanger life.

¹²⁷ See H. KALVEN & H. ZEISEL, *supra* note 102, at 102 & n.33.

for attempt.¹²⁸ This could simply mean that the common practice of punishing attempts less severely is well attuned to community attitudes; but given the wide variety of approaches to attempt penalties in the different states, we should expect on this hypothesis to see some nullification emerging somewhere. That we do not lends strong support to the intuitive conclusion¹²⁹ that absence of harm is unlikely to lead to nullification in the case of intentional crimes.

With respect to crimes of recklessness or negligence, the Kalven and Zeisel findings tell a different story. Absence of harm emerged as a definite obstacle to conviction in drunken driving cases, particularly when lengthy license suspension was involved; presumably the nullification rate would be substantially higher if the sanctions involved in negligent homicide cases were applicable. Even so, the sanction of license suspension seemed to have particular impact because so many jurors knew about it; the effect of longer prison sentences in drunken driving cases might be less acute because jurors might not be so familiar with the sanction.¹³⁰

Attributing significance to harm caused in these negligence cases not only prevented undue jury leniency in some instances but, as we have seen, led to undue jury severity in others. The incidence of these jury-severity cases was of course quite small, only two percent of the negligent homicide cases, for example.¹³¹ Yet only fifty-two percent of the negligent homicide cases resulted in "proper" convictions, on which judge and jury agreed.¹³² Even if we assume that reliance on the harm that occurred was necessary to obtain *every one* of these convictions, we are in the position of convicting one "innocent" defendant (one whom the judge would not have convicted) for every twenty-six "guilty" defendants (those the judge would

¹²⁸ The study unfortunately does not indicate whether a significant number of attempts was covered in the sample, nor does it provide any comparison of completed to uncompleted attempts.

¹²⁹ See text accompanying note 99 *supra*.

¹³⁰ To the extent that this is true and that jurors would be at least as knowledgeable on this subject as the population as a whole, the deterrent efficacy of such sentences would, of course, be called to question.

¹³¹ H. KALVEN & H. ZEISEL, *supra* note 102, at 69. The result in this instance is apparently not statistically significant, but since jury severity occurs in all crime categories (averaging 4% overall) it seems plausible to expect jury severity of at least this magnitude in the negligent homicide cases.

¹³² *Id.* The figure includes the 5% of the cases in which the jury convicted of a lesser offense while the judge would have convicted on a more serious charge. Only 47% of the cases resulted in complete judge-jury agreement for conviction.

have convicted),¹³³ an uncomfortable ratio in terms of the lip service usually given to the number of guilty people we should be willing to let free to avoid a single unjust conviction. The ALI's expression of a desire for juries that "lightly find convictions" thus turns out to be not simply an unfortunate choice of words but rather an accurate and revealing indication of what can take place when the law attempts to make use of the resentments aroused by serious injuries.¹³⁴

This analysis of nullification suggests that the problem is not likely to arise with any significant frequency in certain important situations, notably prosecutions for unsuccessful attempts, and the likelihood of nullification seems particularly small where the completed crime would not involve serious physical injury in any event. On the other hand, the nullification danger does appear serious in cases not involving major harm, if the crime is based on recklessness or negligence, or if the crime is subject to the death penalty. We turn now to an examination of the second ALI assumption—that imposition of an added penalty where harm occurs will yield greater deterrence than imposition of the penalty applicable to cases not involving harm.

2. A Note on Deterrence

The ALI rationale set forth at the beginning of this section argues that imposing a lower penalty in the absence of actual harm will not substantially reduce the deterrent impact of the law, "at least in dealing with cases of purposeful misconduct."¹³⁵ The qualification is a curious one, since for most cases of purposeful misconduct the penalty provided by the Code does *not* vary according to the actual result; attempts are generally made subject to the same sanction as the completed crime.¹³⁶

¹³³ For every 100 cases, there were 46 acquittals and 54 convictions, of which two convictions were "wrong" in terms of what the judge would have done, and 52 were "proper." Thus two out of every 52 convictions (or one out of every 26) involved an "innocent" defendant.

¹³⁴ Jury "severity" of this kind might persist, even if the actual result were made irrelevant to the grading of the offense, so long as the jury continued to learn the extent of the harm caused. Evidence of the actual harm could, however, be excluded as immaterial, unless it was relevant in evaluating the dangerousness of the underlying conduct. Cf. text accompanying notes 322-34 *infra*.

¹³⁵ See text accompanying note 90 *supra*.

¹³⁶ MODEL PENAL CODE § 5.05(1) (Official Draft 1962). The provision states, however, that an attempt to commit a felony of the first degree constitutes only a

Rather than focusing on possible inconsistencies in the Code, however, it seems more useful to examine the deterrence assumption comprehensively. To do so we will refer to the ALI view just stated as the *equal deterrence* hypothesis—namely, that imposition of a given penalty X for cases involving harm and a lower penalty (say $\frac{1}{2}X$) for similar cases not involving harm will yield substantially the same deterrence as imposition of the same penalty X for all such cases, whether or not harm occurs. It is apparent, however, that the ALI's jury nullification argument can have force even if this stringent condition is not satisfied: so long as the higher penalty X applicable where harm occurs yields more deterrence than could be obtained by imposing the lower sanction ($\frac{1}{2}X$) across the board, there remains some reason for distinguishing on the basis of results. The *added deterrence* hypothesis holds that this less stringent condition can be satisfied. The confirmed opponent of emphasis on results must deny the validity of both the equal deterrence and added deterrence hypotheses. His *harm hater's* hypothesis maintains that the amount of deterrence achieved is solely a function of the penalty applicable to the underlying conduct in the absence of harm.

These warring views can be summarized by the following table, which presents a hypothetical crime rate asserted to result from each of three different penalty structures.

Table 1

Penalty Structure		Crimes per 100,000 Population			
		Equal Deterrence Hypothesis	Added Deterrence Hypothesis	Harm Hater's Hypothesis	
Harm	No Harm				
P-1	2 years	2 years	40	40	40
P-2	2 years	1 year	40	45	50
P-3	1 year	1 year	50	50	50

As the table shows, the ALI's equal deterrence hypothesis asserts that P-2 yields the same deterrence as P-1 and is thus preferable (being less severe). But in the context of the jury nullification argument, P-1 by hypothesis involves an unaccept-

felony of the second degree. The rationale for this exception is discussed in connection with the "frugality" concept, at text accompanying notes 221-86 *infra*.

able level of nullification and is thus excluded in any event.¹³⁷ The issue is whether P-2 is preferable to P-3. Since the added deterrence hypothesis provides a more general basis for believing that it is, this hypothesis must be our ultimate concern in the present section. We will have occasion to focus exclusively on the more restrictive equal deterrence hypothesis in considering the "frugality" arguments for preferring P-1 to P-2 in cases where P-1 is indeed a workable alternative.¹³⁸ For present purposes it is worth bearing in mind that despite the notion of leniency implicit in the ALI rationale, the jury nullification argument does not necessarily imply mitigation of harsh penalties but rather a preference for P-2, with its allegedly greater deterrent effect (and *greater* severity), over P-3.

In view of the lack of firm knowledge as to even the more elementary questions about deterrence, an evaluation of the relatively complex added deterrence hypothesis can aspire only to rather modest goals. Still, we can indicate those areas in which the probable validity or invalidity of the hypothesis is strong enough to serve as a basis for sensible judgment. The pages that follow suggest that while the added deterrence hypothesis appears quite likely to be valid in the case of intentional crimes, it seems unlikely to hold for crimes of recklessness, negligence, or strict liability. These conclusions, together with those reached with respect to nullification, provide the basis for the overall assessment of the jury nullification argument that will be made in section 3.¹³⁹

a. *Deterrence and the Death Penalty*

We begin our examination with the somewhat special problem of capital punishment. Studies have usually focused on the question whether the death penalty provides a more effective deterrent than life imprisonment for a given type of crime. For our purposes the issue is somewhat different, since the claim is that whatever the penalty applicable to a given type of conduct (life imprisonment or something less), the deterrent effect can be increased by imposing the death penalty where the conduct causes death. In these terms, however, the issue fails to focus on the special nature of the death penalty—if there is an added deterrent effect, the same effect might have been produced by a penalty of life imprisonment

¹³⁷ See text accompanying note 92 *supra*.

¹³⁸ See text accompanying notes 282-86 *infra*.

¹³⁹ Text accompanying notes 202-05 *infra*.

where the conduct causes death. It will be convenient, therefore, to limit ourselves for the moment to the traditional question whether the death penalty—where harm occurs—yields more deterrence than life imprisonment—where harm occurs. We will then proceed to consider the question whether life imprisonment or any other harsh sentence—where harm occurs—can yield more deterrence than the more lenient penalty applicable in the absence of harm.

The debate over the deterrent effect of capital punishment has been extensive and the conclusions are generally well known.¹⁴⁰ Intuitive reasoning strongly suggests that the death penalty must be a more effective deterrent than life imprisonment, at least for certain categories of offenders and for certain types of crimes. Various surveys showing that convicted felons claim they went unarmed or tried to avoid lethal actions, out of fear of the death penalty, tend to confirm this view.¹⁴¹ On the other hand, a great number of empirical studies have been done on the question and not one of them confirms this reasoning; the studies all fail to provide evidence that the death penalty has a significant deterrent effect.¹⁴² It has been argued that the studies provide affirmative evidence to the contrary—that the death penalty has no deterrent effect,¹⁴³ but most observers refuse to go this far, stressing that the studies are imperfect in various respects and cannot provide definitive conclusions.¹⁴⁴ The studies, moreover, deal almost exclusively with the effect of the death penalty on the *homicide* rate. It has been noted that there is no research whatsoever on the possible deterrent effect of the death penalty for such crimes as rape, kidnapping, or airplane hijacking.¹⁴⁵ With so many studies, done in so many different ways, all pointing in the same direction, a majority of the Supreme

¹⁴⁰ See generally *Furman v. Georgia*, 408 U.S. 238, 345-54 (1972) (Marshall, J., concurring); Bedau, *Deterrence and the Death Penalty: A Reconsideration*, 61 J. CRIM. L.C. & P.S. 539 (1970).

¹⁴¹ See THE DEATH PENALTY IN AMERICA 120 n.1 (H. Bedau ed. 1964).

¹⁴² See *Furman v. Georgia*, 408 U.S. at 353-54 & n.124 (Marshall, J., concurring); Bedau, *The Question of Deterrence*, in THE DEATH PENALTY IN AMERICA 258-74 (H. Bedau ed. 1964). Recent research, as yet unpublished, may have detected a very slight deterrent effect of the death penalty upon the *rate of change* in the homicide rate. See Ehrlich, *Capital Punishment and Deterrence*, 1973 (unpublished paper in School of Business Management, University of Chicago).

¹⁴³ E.g., T. SELLIN, THE DEATH PENALTY (1959); Bedau, *supra* note 140.

¹⁴⁴ See, e.g., H.L.A. HART, *supra* note 11, at 54-89; Van den Haag, *On Deterrence and the Death Penalty*, 60 J. CRIM. L.C. & P.S. 141 (1969).

¹⁴⁵ Bedau, *supra* note 142.

Court concluded in *Furman v. Georgia*¹⁴⁶ that the deterrent effect of capital punishment, as then administered, could not be regarded as significant for purposes of constitutional decision. Even many of those who question the propriety of the *Furman* decision would agree that, from a legislative perspective, the death penalty should not be regarded as an effective deterrent.¹⁴⁷ Whatever the need for more information and more refined studies, this seems the only prudent course in the present state of knowledge. Returning to our added deterrence hypothesis, therefore, for purposes of determining penal policy we should assume that the death penalty, as administered at the time of *Furman*, provides no deterrent effect beyond that produced by life imprisonment.

Whether the added deterrence hypothesis could be sustained under other systems of administering capital punishment is a different question. None of the empirical studies indicates whether a *mandatory* death penalty would have a measurable deterrent effect. On this point we are therefore reduced to almost purely intuitive speculation. If a mandatory death penalty were in fact imposed about as frequently as the former discretionary penalties—either because of jury nullification or other resistance within the criminal justice system¹⁴⁸—and if this were perceived by those who might commit capital crimes, the deterrent effect would most likely be no greater than that produced by the pre-*Furman* system. If, on the other hand, the mandatory death sentence were frequently applied in a given class of cases, the deterrent effect could conceivably be greater than that produced by life imprisonment. For purposes of the present analysis, it will therefore be assumed that a mandatory death penalty could have an added deterrent effect, though the lack of any recent experience with such penalties makes it impossible to know whether this would prove true and if so, for which categories of crimes.

We turn next to a consideration of the factors that bear on the validity of the added deterrence hypothesis in the case of criminal sanctions generally.

¹⁴⁶ 408 U.S. 238 (1972).

¹⁴⁷ *Id.* at 375 (Burger, C.J., dissenting); *id.* at 405 (Blackmun, J., dissenting).

¹⁴⁸ Such factors have been cited as major reasons for abolition or restriction of the mandatory death sentence. See, e.g., R. BYE, CAPITAL PUNISHMENT IN THE UNITED STATES 47-56 (1919); Bedau, *Death Sentences in New Jersey, 1907-1960*, 19 RUTGERS L. REV. 1, 28-35 (1964); Shapley, *Does Capital Punishment Prevent Convictions?*, 43 AM. L. REV. 321 (1909); Note, *The Penalty in Pennsylvania for Murder in the First Degree*, 7 TEMPLE L. Q. 330 (1933).

b. *Deterrence and Intentional Crimes*

The case of intentional crimes should be considered separately. Here the ALI and the Michael and Wechsler article on which it relies espouse the extreme equal deterrence hypothesis—that imposition of a lower penalty for the unsuccessful attempt will not weaken deterrence to any substantial degree since the actor expects to succeed. Undeterred by the penalty applicable to the completed crime, he is not likely to be deterred by the prospect of being punished just as severely if he fails. Though intuitively plausible, the argument requires a number of qualifications. For one thing, the penalty applicable to an attempt might prompt reflection that would otherwise be postponed until too late; or it might be influential if, as is true in many murder situations, the chances of apprehension are low when the actor succeeds but high when he fails.¹⁴⁹

It is hard to know just how many murder situations present a higher risk of apprehension in the event of failure, but in these cases the ALI approach would seem to yield less effective deterrence. Similarly, the risk of apprehension may substantially increase with failure in the case of crimes frequently investigated by police decoys or related techniques, crimes such as prostitution and drug offenses. Here apprehension may be unlikely unless the prospective “victim” turns out to be a policeman or informant, but then there will be no “harm,” and the charge will have to be framed in terms of attempt or a related inchoate offense. Again, the penalty applicable to the unsuccessful attempt could play a major role in establishing the deterrent effect.

More generally, the penalty applicable to an attempt would seem significant in any calculus of the benefits and risks of a given criminal plan. An opportunity involving great benefits and great risks in the case of success, with smaller risks in case of failure, is obviously more attractive than an opportunity involving great risks and benefits in the case of success and equally great risks in case of failure. Whether the logic of this situation would have an impact on behavior in many cases may be questioned, but the point probably has force for economic crimes, where it is perhaps more common for a plan to be carefully thought out.¹⁵⁰

¹⁴⁹ The ALI apparently was aware of the need for these qualifications, but considered them of minor importance, see Wechsler, Jones & Korn, *supra* note 1, at 972.

¹⁵⁰ See Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L.C. & P.S. 176, 191-92 (1952).

In light of all these possibilities, it seems most difficult to accept the equal deterrence hypothesis—that a policy of more lenient punishment for attempts would have no significant cost in terms of deterrence. On the other hand, it does seem reasonable to assume that such a policy would yield a considerably greater deterrent effect than a policy of imposing the more lenient sanction for all intentional crimes, whether successful or not. The added deterrence hypothesis therefore seems quite plausible for this category of crimes.

c. *Deterrence and Crimes of Recklessness, Negligence, and Strict Liability*

It is sometimes argued that the equal deterrence hypothesis holds even when the actor is merely reckless, negligent, or not demonstrably careless at all with respect to the possibility of causing a statutory harm.¹⁵¹ This seems to overstate the case considerably. Where the actor behaves recklessly, consciously creating an unjustifiable risk but expecting that harm will not result, he will also expect to avoid the penalty for causing harm. The severity of the latter penalty could affect his willingness to take the risk, but as the risk of harm diminishes, the actor's risk of suffering the penalty applicable in case of harm inevitably diminishes too. Hence even an actor who is fully aware of the applicable sanctions, and fully rational in his response to them, will tend to be less affected by the penalty for harm as the risk of harm diminishes.

Moreover, the tendency for the deterrent effect to diminish as the risk of harm diminishes is probably reinforced by the natural inclinations of at least many people to discount

¹⁵¹ *E.g.*, 3 J. STEPHEN, *supra* note 8, at 311-12; Goodhart, *supra* note 61, at 21. With respect to "reckless" conduct, the position of Michael and Wechsler is unclear. They begin by claiming that the equal deterrence hypothesis "holds to some extent in the case of those who may consciously create unjustifiable risks of death, although they do not intend to kill." They then divide this class of persons into two categories—those who "act on the supposition that the result will be fortunate rather than unfortunate," and those who "expect death to occur while hoping that it will not." For the former group, Michael and Wechsler find a substantial loss of deterrence in not punishing as severely in the absence of harm; for the latter group they find no significant loss of deterrence. See Michael and Wechsler, *supra* note 11, at 1295-96. But only the former type of conduct would be considered "reckless" as that term is used here and in the Model Penal Code. Conduct of the latter kind is "intentional" for purposes of our analysis ("knowing" under the Code). In present terms, therefore, the Michael and Wechsler argument simply reiterates their position with respect to intentional conduct and does not claim validity for the equal deterrence hypothesis in the case of reckless conduct. They do, however, assert that the equal deterrence hypothesis holds with respect to negligent conduct. *Id.* 1296-97.

even the perceived risks and to assume that they personally will not be the ones to suffer misfortunes that are, for the group, statistically inevitable. Their subjective perception of the probability of suffering the penalty in question may be far lower than the facts warrant. Deterrence theory has taken account of this instinct at least since the time of Beccaria, who observed: "[I]t is the nature of mankind to be terrified at the approach of the smallest inevitable evil, whilst hope, the best gift of Heaven, hath the power of dispelling the apprehension of a greater"¹⁵² Of course, not everyone will react this way; people may be naturally optimistic or pessimistic. The way in which they evaluate or "discount" a potential sanction may differ considerably.¹⁵³ But many psychologists apparently believe that true pessimists are relatively few, and that most people tend to be overly optimistic in assessing their chances of avoiding misfortune.¹⁵⁴

Some people, moreover, will regard the very absence of severe penalties for the underlying conduct as authorizing the commission of such acts by anyone willing to take his chances on avoiding the ultimate harm. Indeed, this viewpoint is implicit in the erroneous but nonetheless revealing argument that an actor who takes his chances and luckily avoids harm is somehow less culpable than the one who causes injury.¹⁵⁵ In view of all these factors, it seems clear that more lenient treatment of reckless conduct when it does not cause harm will have a definite cost in terms of deterrence.

A similar analysis would seem to apply to those who create risks inadvertently. Michael and Wechsler considered it "hardly likely that the legal threat will be a much more efficacious deterrent if persons of that sort know that they will be punished as severely if their acts do not have fatal results as if they do."¹⁵⁶ This seems erroneous. Admittedly, the deterrent potential of legal sanctions is generally much weaker here than in the case of reckless conduct. In the latter case the actor is actually aware of the facts that would subject him to liability. Critics of offenses based on negligence and strict liability have

¹⁵² C. BECCARIA, ON CRIMES AND PUNISHMENTS 94 (1872).

¹⁵³ See F. ZIMRING & G. HAWKINS, DETERRENCE 101-04 (1973).

¹⁵⁴ See G. CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 56-57 (1970). See also B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR 190-91 (1953) on the importance of consistency and the consequences of imposing punishment only in an intermittent fashion.

¹⁵⁵ See text accompanying note 74 *supra*.

¹⁵⁶ Michael & Wechsler, *supra* note 11, at 1297.

argued that if the actor does not advert to a given risk, penalizing his conduct cannot force him to be more careful.¹⁵⁷ But if it is assumed that penalizing carelessness can force people to be more alert,¹⁵⁸ it seems likely that the deterrent impact of a penalty would tend to be less when the penalty is contingent, even in terms of facts the actor should have realized, than when the penalty is certain from the same viewpoint. In addition, it would seem that the deterrent effect of a penalty imposed only for causing harm would tend to diminish as the risk of harm (in terms of circumstances of which the actor should be aware) diminishes and as the extent to which the actor actually adverts to this risk diminishes. Finally, this tendency of deterrence to diminish as the degree of risk and the degree of the actor's advertence to the risk diminishes will presumably be reinforced by the natural tendency of many people to discount such contingencies.¹⁵⁹

These principles apply with equal force in the case of strict liability crimes.¹⁶⁰ When the actor's failure to perceive the risk of harm is altogether reasonable, it seems very doubtful (for the reasons indicated previously) that his conduct will be affected by penalties imposed for causing harm. On the other hand, the alternative of simply relying upon the penalty applicable to the underlying conduct is not ordinarily available here, as it was for reckless or negligent conduct, since the apparently careful conduct may violate no definable legal norm. As a result, the very small or even imperceptible gain in deterrence could be thought preferable (apart from the constraints of other principles) to the alternative of no deterrence at all for this class of cases.

Apart from this limited exception, however, the alternative of punishing the underlying conduct will ordinarily be avail-

¹⁵⁷ E.g., G. WILLIAMS, *supra* note 10, at 122-24; Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 641-42 (1963); H.M. HART, *supra* note 34, at 421-22.

¹⁵⁸ See, e.g., MODEL PENAL CODE § 2.02, Comment at 126-27 (Tent. Draft No. 4, 1955); Michael & Wechsler, *supra* note 11, at 749-51; cf. Wasserstrom, *supra* note 74, at 735-37 (strict liability can add to deterrence).

¹⁵⁹ See text accompanying notes 152-54 *supra*.

¹⁶⁰ Strict liability penalties may be applicable to those who have *consciously* created an unjustifiable risk, and the deterrent impact upon people in this class could be even greater (due to ease in obtaining convictions) than that resulting from a crime requiring proof of recklessness. But aside from the advantages of a less difficult burden of proof, an issue that will be separately considered (see text accompanying notes 287-91 *infra*), the deterrent impact upon conduct of this kind is analytically much the same as the deterrent impact on penalties for recklessness.

able, and it seems clear that punishing such conduct less severely, or not at all, will have a definite cost in terms of deterrence. The difficult problem is to determine just how great this cost is likely to be.

As we have seen, the deterrent effect of a sanction applicable only when harm occurs appears likely to diminish as the risk of harm and the extent to which the actor adverts to this risk diminish. For a group of cases where the risk of harm (in terms of the circumstances of which the actor should be aware) is the same, the deterrent effect of such a sanction will tend to be greatest upon reckless conduct, less upon negligent conduct, and still less upon conduct without fault. It is less easy to generalize about variations in the degree of risk over various categories of crimes. It is instructive, however, to examine two of the most important areas, vehicle homicide and felony murder.

Felony murder is perhaps the one strict liability crime for which we assume a high probability that one engaging "carefully" in the underlying activity will nevertheless cause harm. Here the activity, usually one of the particularly dangerous felonies, is thought to involve a special risk of killing even though the actor (or even those who view the event after the fact) may not perceive this risk as particularly high.

As Holmes somewhat half-heartedly put it:

If the object of the [felony-murder] rule is to prevent such [fatal] accidents, it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot.

Still, the law is intelligible as it stands. . . . If certain acts are regarded as peculiarly dangerous under certain circumstances, a legislator may make them punishable if done under these circumstances, although the danger was not generally known.¹⁶¹

In fact, however, even those felonies that are supposed to be "peculiarly dangerous" result in fatalities only very infrequently. Although national statistics on this point apparently are not available, surveys by the District of Columbia Crime Commission showed that only about one percent of all forcible rapes, and less than one-half of one percent of all robberies

¹⁶¹ O.W. HOLMES, *supra* note 11, at 48-49.

end in homicide.¹⁶² With respect to burglary, figures on fatalities are not available, but the statistics show that nationally only two and a half percent of the residential burglaries lead to any confrontation with the occupant.¹⁶³ Even for those engaged in "dangerous" felonies, therefore, the risk of causing a fatality, and thus facing felony-murder sanctions, seems quite low.

The risk of harm is probably smaller still in vehicle homicide situations. An accident involving personal injury occurs roughly only once in every 225,000 vehicle miles, and a fatality only once in every 18,000,000 vehicle miles.¹⁶⁴ The frequency would no doubt be much higher in terms of fatalities per mile of criminally negligent driving, but it still seems likely that the odds of a fatality occurring are quite low. Drunken driving alone led to roughly 556,000 arrests in 1970,¹⁶⁵ and yet the total number of traffic fatalities attributed to excessive drinking was estimated between 18,000 and 28,000.¹⁶⁶ There was thus at most only a five percent chance that conduct of this sort would result in death, and this ignores all the instances of drunken driving that did not lead to an arrest.¹⁶⁷ Under these circumstances, the deterrent impact of a sanction applicable only when harm occurs would seem to be extremely attenuated.

The deterrent effect of criminal penalties is further attenuated by one other factor, probably unique to the traffic offense situation. In the event of a serious collision, the "punishment" to be expected includes, apart from any of the legal sanctions, damage to the defendant's own property, and the likelihood of serious physical injury to himself. In fact, the driver who creates a homicidal risk ordinarily endangers his

¹⁶² PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 19 (1967).

¹⁶³ *Id.* Another estimate, based on Philadelphia statistics for 1948-52, showed that only 0.59% of all robberies, 0.35% of all rapes, and 0.0036% of all burglaries ended in a homicide. MODEL PENAL CODE, § 201.2(1)(b), Comment at 38 (Tent. Draft No. 9, 1959).

¹⁶⁴ See Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421, 431-32 (1969).

¹⁶⁵ FEDERAL BUREAU OF INVESTIGATION, *UNIFORM CRIME REPORTS FOR THE UNITED STATES—1970*, at 119 [hereinafter cited as *UNIFORM CRIME REPORTS*].

¹⁶⁶ See F. ZIMRING & G. HAWKINS, *supra* note 153, at 343.

¹⁶⁷ The 5% ratio of deaths to drunken driving is, of course, improperly understated to the extent that the arrests include instances of drunken driving that did not present any risk of fatal injury. But it seems unlikely that such cases were more numerous than the many instances of drunken and highly dangerous driving that went undetected. In addition, the 5% ratio is overstated to the extent that single instances of drunken driving caused more than one fatality.

own life as much as that of third parties. Such a driver presumably considers the risk of an accident exceedingly remote, if he thinks of it at all.¹⁶⁸ If these potentially disastrous consequences have been insufficient to deter him, it seems most implausible that he could be influenced by any additional sanction, even lengthy imprisonment, also applicable only upon the occurrence of harm.¹⁶⁹ Under these circumstances the extreme harm hater's hypothesis appears to hold—penalties applicable only in the event of a fatality seem to add virtually nothing to the deterrence achieved by penalties applicable to the underlying offense.

It is much more difficult to reach firm conclusions as to the validity of the added deterrence hypothesis with respect to crimes of recklessness, negligence, and strict liability in general. In effect, the issue is an aspect of the broader question of the importance of certainty and severity in determining the deterrent effect of sanctions. Research on this problem has not reached anything approaching a precise answer, but it is worth outlining briefly the extent to which the available information bears on the special problem of emphasis on results.

d. *Certainty vs. Severity*

Deterrence theory has generally assumed that more severe sanctions yield greater deterrence, other things being equal. Likewise, more effective methods of detecting and solving crime, of proving guilt, and of obtaining convictions are assumed to increase the perceived certainty of punishment and thereby increase the deterrent impact of the law. The problem is to determine the relative importance of these two clearly significant factors.

To facilitate the analysis, we will draw upon recent efforts to specify with greater precision the variables that should affect the deterrent impact of a sanction under classic deterrence theory. An individual's personal evaluation of the seriousness of a particular legal threat can usefully be viewed as his *expected disutility* from the threatened sanction. Classic deterrence theory assumes that the greater the expected disutility, the greater the deterrent effect. The expected disutility is assumed to depend in turn upon at least two factors: the individual's

¹⁶⁸ Cramton, *supra* note 164, at 432.

¹⁶⁹ Significantly, one very thorough analysis of the factors contributing to deterrence of dangerous driving does not even mention the sanctions applicable for manslaughter or vehicle homicide. *See id.*

perception of the severity of the sanction (*perceived severity*), and his perception of the probability of its imposition (*perceived certainty*). Recent theory introduces a third factor, the individual's personal attitude toward risk (*risk preference*). Two legal threats, one perceived as involving a one-tenth chance of a ten-year prison sentence and the other perceived as involving certain imposition of a one-year prison sentence, may not be viewed as equally undesirable (that is, having equal expected disutility) by all individuals. Those who prefer the one-tenth chance of a ten-year sentence are thought of as *risk-preferring*, those who prefer a one-year sentence for sure are thought of as *risk-averse*, and those who are indifferent between the two threats are thought of as *risk-neutral*.¹⁷⁰ The final factors are the two most subject to manipulation by public policy—the *actual severity* and *actual certainty* of the threatened sanction. Perceived certainty and severity are usually assumed to depend upon actual certainty and severity,¹⁷¹ but the concepts are by no means identical.

The claim of the equal deterrence hypothesis is, in these terms, that imposing a sanction only when harm occurs can produce essentially the same expected disutility as punishing the underlying conduct to the same extent in the absence of harm. The actual severity under the two alternatives will be the same, and it seems reasonable to assume that the perceived severity will also be the same. The actual certainty is not the same. In the case of attempts, the perceived certainty could be the same (in some situations)¹⁷² since the actor "expects to succeed." But with respect to nonintentional crimes, the actor's expectation is not to cause harm, and therefore, whatever the relation between actual and perceived certainty, it seems necessary to suppose that the perceived certainty would be greater when the additional penalty applies in all cases than when it applies only if harm occurs.¹⁷³

¹⁷⁰ See Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 178 (1968). In some analyses, an attempt is made to compare the severity of sanctions in terms of their effective monetary cost (representing lost earnings and other factors). E.g., Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. LEGAL STUDIES 259, 262-63 (1972). Risk preference is then determined with reference to the monetary severity of the sanction.

¹⁷¹ Becker appears to ignore the distinction altogether. Becker, *supra* note 170, at 176-79. Ehrlich assumes that actual and perceived certainty are linearly related. Ehrlich, *supra* note 170, at 263 n.11.

¹⁷² See text accompanying note 149 *supra*.

¹⁷³ See text accompanying notes 151-55 *supra*.

Since perceived severity is the same for the two alternatives, while perceived certainty is greater when the penalty applies in all cases, the expected disutility must also be greater in the latter situation, other things being equal. The conclusion holds, moreover, regardless of the actor's attitude toward risk—even the risk-averse individual presumably prefers a situation offering greater hope of avoiding a given penalty to one offering less hope of avoiding the same penalty.

While the implausibility of the equal deterrence hypothesis is easily seen when it is put in these terms, it is not so simple to evaluate the added deterrence hypothesis and determine the *extent* to which imposition of relatively severe penalties, on a relatively infrequent basis, can have a meaningful deterrent effect. Three sources help shed light on this question—historical evidence, statistical analysis, and risk preference analysis.

(i) Historical Evidence

Past experience in observing the effects of changes in enforcement policy has repeatedly suggested that actual certainty of punishment is far more important than actual severity in achieving effective deterrence. In nineteenth century England, for example, inefficient law enforcement provided significant chances for pickpockets to avoid apprehension. Petty crime multiplied even though anyone who was caught faced, and often suffered, the death penalty. The solution apparently lay in making the penalties milder but less easily avoided.¹⁷⁴ The importance of certainty was dramatically exemplified in Denmark during the Second World War. German occupation forces arrested the Copenhagen police en masse, and citizen groups then established vigilante committees to detect and apprehend offenders. Although the penalties either remained the same or increased, the crime rate soared. This was particularly true in the case of crimes such as robbery and burglary, where the victim could rarely identify the offender, making apprehension difficult. The crime rate for categories in which the offender was more easily identified did not increase markedly.¹⁷⁵ Several other experiences that similarly support the importance of certainty have been recorded, although none of

¹⁷⁴ See 3 L. RADZINOWICZ, *A HISTORY OF THE ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, at 452-56 (1956).

¹⁷⁵ See F. ZIMRING & G. HAWKINS, *supra* note 153, at 68; Andenaes, *supra* note 150, at 962.

them permits a full understanding of the variables that might account for the changes observed.¹⁷⁶

(ii) Statistical Analysis

Recently, a number of studies have made use of statistical techniques in an attempt to determine with greater precision the relative importance of severity and certainty. These studies have engendered further skepticism as to the value of severity and prompted recommendations of much greater reliance upon certainty of punishment to achieve desired levels of deterrence.¹⁷⁷ The studies therefore warrant careful consideration in terms of the present problem, although they prove in the end somewhat inconclusive for our purposes.

The essence of the approach, known as regression analysis, is to postulate a precise mathematical relationship among the variables to be studied and then compute the degree to which the postulated relationship fits the actual data.¹⁷⁸ The statistician obtains an index, called R^2 , of how good this approximation or "fit" is, with R^2 close to 1.00 for a very good fit and close to zero for a very poor fit. An R^2 of 0.20 would mean, for example, that a postulated equation explains at most only twenty percent of the observed changes in the crime rate; the equation thus must omit significant variables or misrepresent the way they interact.

Among the first of these attempts was a series of studies of certainty, severity, and the crime rate for murder.¹⁷⁹ All the studies found an inverse correlation between murder rates and both certainty and severity; higher indices of severity and certainty tended to be associated with lower murder rates,

¹⁷⁶ F. ZIMRING & G. HAWKINS, *supra* note 153, at 68-70.

¹⁷⁷ E.g., Wilson, *If Every Criminal Knew He Would Be Punished If Caught . . .*, N.Y. Times, Jan. 28, 1973 § 6 (Magazine), at 9.

¹⁷⁸ For example, one might suppose that the crime rate C for a given offense could be determined by an equation in the form:

$$C = a + bP + dS$$

where P is the probability of punishment (certainty), S is the severity of punishment, and a, b, and d represent constants (b and d determining the relative weights of P and S). Using the observed values for C, P, and S, the statistician then computes the values of a, b, and d for which the equation will most closely approximate the observed data. See generally J. JOHNSTON, *ECONOMETRIC METHODS* (2d ed. 1972). A cogent summary of the procedure appears in Finkelstein, *Regression Models in Administrative Proceedings*, 86 HARV. L. REV. 1442, 1444-45 (1973).

¹⁷⁹ Gibbs, *Crime, Punishment, and Deterrence*, 48 SOCIAL SCIENCE Q. 515 (1968); Gray & Martin, *Punishment and Deterrence: Another Analysis of Gibbs' Data*, 50 SOCIAL SCIENCE Q. 389 (1969); Bean & Cushing, *Criminal Homicide, Punishment, and Deterrence: Methodological and Substantive Reconsiderations*, 52 SOCIAL SCIENCE Q. 277 (1971).

and the certainty and severity variables were found about equal in importance. But the correlations were only of moderate strength—high indices of severity and certainty were by no means consistently and invariably associated with low crime rates.

In a 1969 study, Tittle attempted to apply a similar approach to an analysis of the seven FBI "Index Crimes"—murder, rape, robbery, assault, burglary, larceny, and auto theft.¹⁸⁰ This time the results were more surprising, for while the study confirmed the negative correlation between certainty and the seven crime rates, and between severity and the murder rate, it found a *positive* correlation between severity and the rates for all six of the other index crimes. The greater the severity, in other words, the *higher* the crime rate was. At least four follow-up studies, employing a variety of statistical refinements, sought to pin down these conclusions and to explain the surprising results obtained with respect to severity.¹⁸¹ The confusing and often contradictory conclusions of these studies may stem in part from their use of relatively simple linear equations¹⁸² and from their narrow focus upon only two of the many factors that could influence crime rates. R² values for these models are uniformly low, generally less than 0.30. Policy recommendations can scarcely be drawn from such inconclusive studies.

Standing on somewhat firmer ground is the work of Isaac Ehrlich.¹⁸³ Ehrlich develops an economic model of criminal behavior, analogizing the offender's decision to commit a crime to a business firm's decision to supply a product. He then postulates an equation in the form of a non-linear "Cobb-Douglas" production function,¹⁸⁴ as a model of the "supply of crimes" function, and includes a great variety of factors that could

¹⁸⁰ Tittle, *Crime Rates and Legal Sanctions*, 16 SOCIAL PROBLEMS 409 (1969).

¹⁸¹ Antunes & Hunt, *The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis*, 1972 (unpublished paper of the Center for Urban Affairs, Northwestern University); Bailey & Smith, *Punishment: Its Severity and Certainty*, 63 J. CRIM. L.C. & P.S. 530 (1972); Chiricos & Waldo, *Punishment and Crime: An Examination of Some Empirical Evidence*, 18 SOCIAL PROBLEMS 200 (1970); Logan, *General Deterrent Effects of Imprisonment*, 51 SOCIAL FORCES 64 (1972).

¹⁸² In a few instances, somewhat more complex relationships were investigated. E.g., Logan, *supra* note 181, at 65-66.

¹⁸³ Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. POL. ECON. 521 (1973). See also Ehrlich, *supra* note 170.

¹⁸⁴ See generally J. HENDERSON & R. QUANDT, *MICROECONOMIC THEORY: A MATHEMATICAL APPROACH* 79-88 (2d ed. 1971).

influence differences in crime rates among the states.¹⁸⁵ Perhaps surprisingly, Ehrlich's econometric model actually seems to work. Using 1960 statistics, for example, he reports an R^2 of .87 for murder and .70 for the seven Index Crimes combined.¹⁸⁶ In view of these results, Ehrlich's computations deserve careful consideration. His figures are summarized in Table 2, which sets forth the coefficients (or relative weights) associated with the certainty and severity variables.¹⁸⁷

Table 2

*Coefficients Associated with Certainty and Severity
by Offense, 1960 data.*

<i>Offense</i>	<i>Certainty</i>	<i>Severity</i>
Murder	-0.85	-0.09
Rape	-0.90	-0.40
Assault	-0.72	-0.98
Robbery	-1.30	-0.37
Burglary	-0.72	-1.13
Larceny	-0.37	-0.60
Auto Theft	-0.41	-0.25

As the table shows, the coefficients for severity are quite low for several crime categories, but they are substantial for many others—the coefficient of -0.60 for larceny means, for example, that for every ten percent increase in the average penalty for larceny, the crime rate should (according to the model) decrease by six percent. The coefficients for certainty are more uniformly substantial and are far greater than the se-

¹⁸⁵ In addition to differences in certainty and severity, Ehrlich considers levels of income, unemployment, and education; racial, age, and sex composition of the population; as well as regional and urban/rural variables. Ehrlich, *supra* note 183, at 544.

¹⁸⁶ *Id.* 546.

¹⁸⁷ *Id.* 550-51. The coefficients presented are those resulting from the "two-stage least-squares" (2SLS) analysis. Technically speaking, the R^2 figures cited in the text are derived from an "ordinary least-squares" (OLS) analysis and apply only to the coefficients reported for this analysis. The 2SLS procedure introduces refinements that make its coefficients more reliable than those of the OLS, but it is not possible to obtain an R^2 measurement for this approach. Note also that these coefficients do not represent simple linear coefficients of the kind discussed in note 178 *supra*. Here each coefficient represents an "elasticity," or percentage change in the dependent variable that will result from a given percentage change in the independent variable.

verity coefficients in the cases of murder, rape, robbery, and auto theft. But it appears difficult to generalize. The importance of severity seems roughly to equal that of certainty in the assault category, and it substantially exceeds that of certainty for cases of larceny and burglary.

Even the relatively successful Ehrlich model must, in any event, be approached with great caution. Like all the studies, its data are drawn from the *Uniform Crime Reports*. The statistics thus suffer from understatement, improper categorization, lack of comparability between states, and other imperfections.¹⁸⁸ The ratios used to measure certainty and severity are imprecise in other respects.¹⁸⁹ "Spurious" and "serial" correlations¹⁹⁰ may also render the results misleading; the Ehrlich study goes to great lengths to filter out these effects, but it is impossible to know whether all possible causal interrelationships have been properly accounted for. Under these circumstances it is difficult to have confidence in the precise values of the certainty and severity coefficients.¹⁹¹ It nevertheless seems possible to conclude, contrary to some of the previous statistical studies, that severity does have a significant deterrent effect (and one more important than that of certainty) for several of the crimes examined. To this extent, the added

¹⁸⁸ See Wolfgang, *Uniform Crime Reports: A Critical Appraisal*, 111 U. PA. L. REV. 708 (1963).

¹⁸⁹ See Bailey & Smith, *supra* note 181, at 533-35.

¹⁹⁰ Spurious correlations arise when systematic relationships among the variables result from the arithmetic alone. The crime rate C , for example, is computed by dividing the number of crimes Q by the population N . But certainty P is computed by dividing the number of convictions K by the number of crimes—the same Q . Thus, an underestimation of Q necessarily lowers C and raises P ; lower crimes rates will tend to be associated with higher certainty rates without regard to any causal connection between the two.

As the result of a serial correlation, an observed correlation may be the net result of relationships between cause and effect running in two opposing directions, not simply one causal effect in the direction supposed. For example, a high crime rate might itself be a cause of low certainty rates. As more crimes are committed, the additional burden on police, prosecutors, and courts could cause the percentage of offenders apprehended, tried, and convicted to fall; the higher crime rate would be associated with a lower certainty rate even though the drop in certainty of conviction did not, by weakening deterrence, "cause" the rise in crime. Similarly, a high crime rate could cause low severity rates. Rising absolute numbers of convictions might lead to overcrowding in the jails and pressure on judges and parole boards to impose shorter average sentences. The resulting lower index of severity would be correlated with the higher crime rate, but the leniency did not "cause" crime to increase.

¹⁹¹ Not only do the 2SLS and OLS techniques, *see* note 187 *supra*, yield differing values for the coefficients, but Ehrlich makes use of a third technique, apparently a refinement on the 2SLS procedure, that produces still different figures. The orders of magnitude are generally (though not uniformly) consistent.

deterrence hypothesis finds important confirmation. On the other hand, there are several crime categories for which certainty does appear far more important, and for which drastic increases in severity would seem necessary to produce a meaningful decrease in the crime rate.

Unfortunately, none of the studies considers crimes other than the seven FBI Index Crimes. There remains an acute need for direct focus upon crimes of negligence and strict liability.¹⁹² One approach would be simply to replicate the previous statistical studies, using data for negligent manslaughter or any other non-intentional crime for which statistics could be obtained. It would be of great interest to determine the extent to which a behavioral model like that used by Ehrlich retains its explanatory power when applied to crimes of negligence, and to consider in this light the relevance of deterrence theory for conduct of this kind. Such a model could also be compared to one in which an offense like vehicle homicide is treated as *sui generis*, with the "crime" rate postulated to be a function of factors specially related to highway safety. Analysis of this kind might provide a basis for confirming the intuitive conclusion¹⁹³ that penalties applicable to vehicle homicide can add little or nothing to whatever deterrence may be achieved by the certainty and severity of punishment for the underlying risk-creation offenses.¹⁹⁴

(iii) Risk Preference Analysis

The concept of risk preference provides another basis for studying the relative importance of certainty and severity. It can be shown that a fifty percent increase in perceived severity, together with an equivalent decrease in perceived certainty, will decrease the expected disutility for a risk-preferring individual while increasing it for a risk-avoider.¹⁹⁵ Accordingly, by investigating the attitudes of potential offenders toward risk, we can obtain useful information as to the likely relative effectiveness of increasing certainty or severity.

¹⁹² The social toll exacted by such crimes is substantial in relation to other criminal activity; traffic fatalities attributable to alcohol are estimated, for example, to represent twice the number of all non-vehicle homicides. See F. ZIMRING & G. HAWKINS, *supra* note 153, at 343.

¹⁹³ See text accompanying notes 164-69 *supra*.

¹⁹⁴ For a comprehensive discussion of research possibilities in this area, see F. ZIMRING & G. HAWKINS, *supra* note 153, at 343-46, 356-59; Cramton, *supra* note 164, at 449-52.

¹⁹⁵ Becker, *supra* note 170, at 178.

One effort to apply such an approach is a recent analysis of the question whether more effective antitrust enforcement could be achieved by raising fines or raising the probability of conviction.¹⁹⁶ The authors, both economists, survey the literature from Schumpeter to Galbraith, dealing with the evolution of the entrepreneurial spirit in corporate managers. They note the recurrent conclusion that today's businessmen, particularly in the larger firms, are primarily concerned with minimizing risk, not embarking on bold adventures with the hope of fabulous returns. Sociologists and political scientists who have made similar findings are also cited. On this basis, the authors conclude:

In terms of our earlier analysis, these factors have caused the risk preferrers of the late nineteenth century to become the risk avoiders of the 1970's.

The implications of this attitudinal change for antitrust policy are clear. Policy designers should be highly sensitive to this change in risk attitude, realizing in line with our earlier analysis that a risk averse management is more likely to be deterred by high financial penalties than by a high probability of detection and conviction with accompanying penalties not severe. Thus, in the framework of current attitudes toward risk, the deterrent benefits of a policy of raised fines far outweigh the deterrent benefits of expending additional enforcement resources.¹⁹⁷

Unfortunately, as a guide to enforcement policy, such an analysis seems seriously flawed. A trend toward more and more cautious attitudes cannot tell us whether corporate managers have passed from a state of risk preference, over the line of risk neutrality, to a state of risk aversion in its technical sense. Conceivably nineteenth century managers could have been very strongly risk preferring while those of today could exhibit attitudes only slightly to the risk preference side of perfect neutrality.

Even if we can assume that corporate managers do indeed exhibit attitudes of risk aversion in the technical sense, there remains a basic non sequitur, for few if any individuals are risk averse in all ways and at all times. Risk aversion is defined

¹⁹⁶ Breit & Elzinga, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis*, 86 HARV. L. REV. 693 (1973).

¹⁹⁷ *Id.* 705-06.

with respect to a particular set of penalties or rewards. There is no guarantee that an individual who is risk averse in his attitude toward one set of consequences will be risk averse in his attitude toward all others, or even that someone risk averse with respect to very large monetary losses will also be risk averse with respect to small ones. A single individual may, for example, purchase insurance against fire (thus exhibiting risk aversion) and at the same time buy a state lottery ticket (thus exhibiting risk preference).¹⁹⁸

Accordingly, even if corporate managers are indeed risk averse with respect to the behavior studied (presumably their investment decisions in pursuit of business profits), the sources relied upon cannot tell us whether these managers will also be risk averse with respect to different behavior—compliance with legal rules in order to avoid criminal fines. There may even be reasons for risk attitudes to be quite different—the corporate community may not condemn failure to avoid anti-trust violations as severely as failure to avoid costly mistakes of business judgment, or antitrust penalties (at least for some kinds of violations) might come home to roost much too slowly to jeopardize the careers of the corporate managers involved.¹⁹⁹

Another difficulty results from the failure of this sort of risk preference approach to consider the relationship between *perceived* and *actual* certainty and severity. As previously indicated, an individual is defined to be risk averse if an increase in the perceived severity of punishment produces a greater deterrent effect (greater expected disutility) than an equal increase in perceived certainty. Individuals who are risk averse in this technical sense are *by definition* more effectively deterred by a given increase in perceived severity than by the same increase in perceived certainty. But the risk preference analysis attempts to move from this tautological truth to the further

¹⁹⁸ If the insurance company has properly computed its premiums, the amount paid for insurance should exceed the discounted value of potential loss. Similarly, in a properly managed lottery, the amount paid for a ticket should exceed the discounted value of the potential prize.

¹⁹⁹ The authors themselves argue for fining the company rather than the individuals responsible for the violation, because the latter might be too difficult to identify. Breit & Elzinga, *supra* note 196, at 709-10. This difficulty of pinpointing responsibility could substantially affect the risk attitudes of the individuals concerned. If individual penalties were contemplated, the risk preference analysis would again need to be refined, since a manager's risk attitudes in acts potentially affecting his employer could be quite different from his risk attitudes in actions that might affect him personally.

proposition that for proportionate changes in *actual* certainty and severity, risk-averse individuals are more effectively deterred by changes in the latter. This second proposition is valid only if perceived certainty and severity respond in the same way to changes in actual certainty and severity, and we have strong grounds for believing that this is not the case.²⁰⁰ It may be that significant increases in actual certainty generate disproportionately large increases in perceived certainty. Similarly, where actual certainty is sharply reduced, perceived certainty may reach such a low level that, for practical purposes, even risk averse individuals are virtually unaffected by changes in severity.

If this is true, then the risk preference analysis remains incomplete. An effort to evaluate deterrence policies on the basis of attitudes toward risk would have to include careful study not only of risk preference but also of perceptions as to certainty and severity,²⁰¹ and the sensitivity of these perceptions to changes in actual enforcement policy. An analysis of this kind might indeed indicate that where risk aversion predominates, greater severity in sanctions would yield substantial additional deterrence. But it might also suggest that such an effect is more likely to be achieved, even given risk aversion, by small improvements in actual certainty or simply by publicity and related measures designed to affect perceived certainty directly. Studies of this kind would provide a promising avenue for evaluating alternative approaches to improving the deterrent effectiveness of the law.

3. Some Conclusions with Respect to Jury Nullification and Deterrence

We have seen that a major rationale for emphasis on results, the one we have called the "jury nullification" or "ALI" argument, rests upon two factual premises. The first is that

²⁰⁰ See text accompanying notes 152-54 *supra*. Ehrlich assumes, in order to provide a basis for empirically testing his model, that actual certainty (for which there is data) is linearly related to perceived certainty (which is the relevant concept in his theory). See Ehrlich, *supra* note 170, at 263 n.11. If this assumption is false, his conclusions as to the risk attitudes of various classes of criminals, see, e.g., Ehrlich, *supra* note 183, at 552-53, could be erroneous.

²⁰¹ See, e.g., Claster, *Comparison of Risk Perception between Delinquents and Non-Delinquents*, 58 J. CRIM. L.C. & P.S. 80 (1967); Waldo & Chiricos, *Perceived Penal Sanction and Self-Reported Criminality: A Neglected Approach to Deterrence Research*, 19 SOCIAL PROBLEMS 522 (1972).

where severe penalties are applicable to conduct not causing harm, juries will nullify the law by refusing to convict in a substantial percentage of the cases. The second is that a policy of invoking severe penalties in those cases in which harm occurs will yield significantly greater deterrence than a policy of applying only a milder sanction (one not likely to prompt nullification) in all cases whether or not involving harm.

We have also seen that the nullification premise and the added deterrence premise must *both* be valid in any given situation in order to justify a result-oriented structure of penalties. If severe penalties across the board would prompt nullification, but severe penalties limited to cases of harm do not increase deterrence, then the additional penalty for causing harm serves no purpose. Nullification can be avoided, while achieving the same level of deterrence, by simply applying the milder penalty across the board.²⁰² Conversely, if an additional penalty in cases of harm will provide additional deterrence, but extension of this penalty to cases not involving harm will not prompt nullification, the rationale again fails to provide a reason for not treating both situations alike, here by simply applying the more severe penalties across the board. Some other reason would be needed to justify the distinction.

When our conclusions with respect to jury nullification and added deterrence are studied from this viewpoint, the lack of symmetry between the two premises is striking. If the crime requires intent to cause harm, the additional penalty can be efficacious in terms of deterrence, but this very intent may arouse sufficient resentment to make nullification unlikely (except where the death penalty is authorized). The difficulty is just the reverse where the defendant is merely reckless, negligent, or not careless at all with respect to the possibility of harm. Here the resentments aroused by the occurrence of harm will be helpful in preventing nullification, but the gain in terms of deterrence is likely to be small.

As a result, the two crucial premises apparently can be satisfied simultaneously only in a few special situations. This can be seen in greater detail by examination of Table 3, which summarizes the conclusions reached in the preceding pages

²⁰² Purposes other than deterrence, such as rehabilitation or isolation of the dangerous, might make use of the milder penalty unwise; but such purposes would presumably make a longer sentence appropriate whether the particular offender caused harm or not.

with respect to the various categories of offenses. Column (1) describes the risk of nullification in the event that the more severe penalty were applicable to the underlying conduct, whether or not harm occurred. Column (2) describes the additional deterrence gained, in comparison to a system of mild penalties across the board, where the added penalty applies to conduct resulting in harm. Column (3) states whether both

Table 3

Summary of Conclusions with Respect to ALI Premises

	(1) <i>Risk of Nullification</i>	(2) <i>Added Deterrence</i>	(3) <i>ALI Assumptions Satisfied?</i>
<i>Intentional Crimes</i>			
-Mandatory death penalty	Very High	Possible	Yes
-Discretionary death penalty	High	Very Low or Zero	No
-Other penalties: crimes against person or property	Very Low	High	No
-Other penalties: other crimes	Very Low or Zero	High	No
<i>Crimes of Recklessness and Negligence</i>			
-Vehicle Homicide	High	Very Low or Zero	No
-Other	High	Low	Yes (marginally)
<i>Strict Liability—Felony Murder</i>			
-Mandatory death penalty	Very High	Possible	Yes
-Discretionary death penalty	High	Very Low or Zero	No
-Other penalties	Very Low or Zero	Low	No
<i>Strict Liability—Other</i> ²⁰³	---	Low, Zero, or Negative	No

²⁰³ For crimes in this category, the risk of nullification cannot be evaluated because by definition the underlying conduct is not culpable and cannot be made subject to punishment "across-the-board." Added deterrence here refers to the deterrence gained by the strict liability approach, beyond that which would result from a policy of punishing negligent conduct by a milder penalty across the board. For the possibility of a negative effect, *i.e.*, a net decrease in the deterrent effect, see text accompanying notes 290-91 *infra*.

ALI assumptions are simultaneously satisfied to a significant extent.

The table makes clear that the "jury nullification" argument cannot claim general validity as an explanation of the many instances in which the law presently relates punishment to the harm caused. The argument does seem to hold for crimes subject to a mandatory death penalty. Here the risk of nullification is very high, and there could be some additional deterrent effect (though we have no evidence). The argument may also hold for crimes of recklessness and negligence, other than vehicle homicide. Here too the risk of nullification is high, and available evidence does not exclude the possibility of some added deterrence, though there is reason to suspect that the effect would not be substantial. For these two groups of cases, therefore, the jury nullification argument is not demonstrably fallacious, though of course it remains necessary to consider whether the somewhat speculative possibility of a gain in deterrence justifies the burden of the added penalty upon the defendants who cause harm. In any event these two categories account for only a small part of the problem; mandatory death penalties remain rare,²⁰⁴ and only a tiny fraction of involuntary manslaughter prosecutions involve cases other than vehicle homicide.²⁰⁵

In all the remaining situations, at least one of the crucial premises seems essentially erroneous. With respect to discretionary death penalties, available evidence suggests that additional deterrence is exceedingly low, if not non-existent. The same appears to be true for vehicle homicide cases, and for strict liability crimes (other than felony murder). This leaves only the felony murder and intentional crime situations in which penalties other than death apply, and for both of these categories it is the danger of nullification that appears exceedingly low or non-existent. In all these situations, therefore, the jury nullification argument falls far short of offering a satisfying justification for emphasis on results.

D. *Administrative Discretion*

The requirement of harm may serve to prevent discrimination not only by juries but also by police, prosecutors, and

²⁰⁴ See note 253 *infra*.

²⁰⁵ See note 326 *infra*. Conceivably, however, the negligence category could include large numbers of situations involving some statutory harm other than death.

others with discretion in the criminal justice system. Even when the crime can be narrowly defined without a statutory harm,²⁰⁶ budgetary and related constraints may prevent prosecution of all known violators.²⁰⁷ Under such circumstances, the dangers are similar to those present when jury nullification is likely; in particular, social prejudice or the whims of individual prosecutors could play an important role in determining which violators are selected to suffer punishment. If, instead, the heavy penalties on which society relies for deterrence are applied only when harm occurs, the very fortuitousness of the result will insure that punishments are distributed impartially. Of course such randomness raises problems of its own,²⁰⁸ but it seems clear that if uneven law enforcement is unavoidable, random inequalities are to be preferred to those that reflect social or individual bias.²⁰⁹

Even when prosecution of all offenders in a given category is feasible, the absence of actual harm could prompt a kind of "nullification" by victims, prosecutors, and even judges. However irrational it might be for such people to be less concerned by certain cases of dangerous conduct not causing harm, their likely reactions must be considered.

With respect to victims, it seems likely that a person exposed to a serious risk, or the object of an unsuccessful attempt, would tend to be less insistent on prosecution when he has not suffered harm. In some cases the potential victim may not even be known, though the offender has been caught; this would be true in cases of reckless driving, attempts to bomb buildings, and so on. Much as we insist in theory that the victim has no special rights or interests in the outcome of a criminal prosecution,²¹⁰ the willingness of the victim to prosecute remains an important factor in determining whether a prosecution is likely to be brought.²¹¹

The importance of this factor can vary considerably. Prosecution of an unsuccessful bombing or hijacking attempt is unlikely to be deterred by the lack of a specific victim. In other

²⁰⁶ See text accompanying notes 322-26 *infra*.

²⁰⁷ See Goldstein, *Police Discretion Not to Invoke the Criminal Process*, 69 YALE L.J. 543, 560-62 (1960).

²⁰⁸ See text accompanying notes 226-81 *infra*.

²⁰⁹ See text accompanying note 92 *supra*.

²¹⁰ See, e.g., *S. v. D.*, 410 U.S. 614, 619 (1973).

²¹¹ Goldstein, *supra* note 207, at 573-74 & nn.63-64. Only a few police departments indicated a policy of willingness to prosecute despite an uncooperative victim. *Id.* 577-79.

instances the victim may have suffered very serious injuries, though not the statutory harm that would have made the "attempt" successful. Here failure of the attempt will hardly mean the lack of a seriously concerned victim. But there certainly would be many instances in which the lack of a victim would prompt a higher incidence of non-prosecution.

Unlike the jury nullification problem, however, the likely reaction of the victim does not in itself seem to warrant special treatment by law in cases involving harm. Even though no harm has occurred, some threatened "victims" may well be anxious to prosecute, especially where the threatening conduct could be repeated with greater chances of success. Distinctions that might result from greater desires of the victim to prosecute in such cases would seem legitimate in terms of the "general" and "special" deterrence purposes²¹² of the criminal law.

With respect to the official participants in the system—police, prosecutors, and judges—the danger of "nullification" poses a more serious problem. Decisions whether to drop charges, accept a plea to a lesser charge, recommend a light sentence, or, at the judicial level, set a light sentence, all could be influenced by an emotional response to the actual harm. Leniency may therefore be less likely in cases involving serious injuries, even though responsible public officials should ideally be just as concerned by cases where only a chance factor caused similar injuries to be averted. If leniency would become common in cases not involving harm, then there is a serious danger, as with respect to jury nullification, that those denied leniency would be the victims of social prejudice or individual whim. Limiting the more severe penalties to cases in which serious harm occurs could provide benefits in terms of deterrence while substantially reducing the occasions for such discrimination.

Although this argument seems defensible in some important areas, the difficulties considered with respect to the jury nullification problem are equally relevant here. First is the need to consider the likelihood of administrative "nullification" if the harm requirement should be eliminated. The problem would be a serious one for most crimes based on negligence, where violations probably far exceed the enforcement capabilities with which police and prosecutors are ever likely to be

²¹² See note 254 *infra*.

endowed.²¹³ Where major sanctions are applicable to negligent conduct, the nullification problem may be further aggravated. Two studies of efforts to crack down on drunken or reckless driving through short mandatory jail sentences found evidence that prosecutorial and judicial leniency increased markedly in response to the crackdown, in effect nullifying the supposedly mandatory penalties.²¹⁴

Selective enforcement may also be inevitable for some intentional crimes. Ordinary assault, for example, may be committed so frequently and prosecuted so infrequently²¹⁵ that major penalties could well be reserved for the cases in which serious injuries happen to occur. In the case of most major felonies the problem is somewhat different. Here prosecutions are much less likely to be dropped altogether, but substantial scope for discrimination remains in connection with decisions as to plea bargaining, sentencing, and the like.

The deterrent effect will, as previously indicated, vary considerably according to the nature of the crime.²¹⁶ The administrative discretion rationale therefore has its greatest force with respect to intentional crimes. In other areas, a harm-oriented penalty structure does cut down on discretion, but provides little or no deterrence beyond that resulting from the penalties applicable to the underlying conduct. If enforcement of these underlying sanctions is considered too haphazard or discriminatory, a number of solutions are possible. More resources could be devoted to enforcement, or the scope of the crime itself could be narrowed by more specific prohibitions and higher standards of culpability.²¹⁷ If neither of these approaches seems feasible, then at the very least, efforts can and must be made to develop rational enforcement priorities and to ensure that these are observed by increasing the visibil-

²¹³ H.M. Hart, *supra* note 34, at 423 & n.56; Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROB. 64, 83-84 (1948).

²¹⁴ Campbell & Ross, *The Connecticut Crackdown on Speeding: Time Series Data in Quasi-Experimental Analysis*, 3 LAW & SOC. REV. 33 (1968); Robertson, Rich & Ross, *Jail Sentences for Driving While Intoxicated in Chicago: A Judicial Policy That Failed*, 8 LAW & SOC. REV. 55 (1973); cf. Little, *An Empirical Description of Administration of Justice in Drunk Driving Cases*, 7 LAW & SOC. REV. 473, 486 (1973).

²¹⁵ Goldstein, *supra* note 207, at 574-75.

²¹⁶ Extra penalties in the event of harm should substantially increase deterrence in the case of some intentional crimes, but seem likely to add very little, perhaps nothing of significance, in the case of crimes of recklessness, negligence, or strict liability. See text accompanying notes 149-60 *supra*.

²¹⁷ See, e.g., COMM. ON ENFORCEMENT, PRESIDENT'S HIGHWAY SAFETY CONFERENCE, REPORT 4 (1949); COMM. ON LAWS AND ORDINANCES, PRESIDENT'S HIGHWAY SAFETY CONFERENCE, REPORT 26 (1949). See also text accompanying note 325 *infra*.

ity and reviewability of prosecutorial decisions.²¹⁸ Failing this, we must be prepared either to continue tolerating possible discrimination in the enforcement of the milder sanctions or to abandon entirely the effort to punish for mere negligence. The harm-oriented structure of penalties itself affords little or no advantage in terms of deterrence. At the same time, use of more severe penalties where harm does occur introduces dangers of its own with respect to the application of these more severe penalties. It appears, for example, that only a fraction of the automobile fatalities resulting from criminal negligence actually become the subject of a homicide prosecution.²¹⁹ Selectivity in enforcement therefore remains high even after the harm requirement has narrowed the class of offenders, while the increased penalty only renders far more serious the impact of any abuse of discretion.

Even in the area of intentional crimes, where the policy of focusing on harm can be most effective, it scarcely seems realistic to regard such a policy as helping in any meaningful way to solve the underlying difficulties of discretion. Uneven enforcement, the haphazard or inequitable results of plea bargaining, disparate and discriminatory sentencing, these are all commonplace even where a required statutory harm is present. Again, these problems may even be more acute in such cases, since under present law the maximum punishment is more severe and the scope of discretion ordinarily wider. As with the problems of selective prosecution, a number of ways can be found to deal with excessive discretion in the charging and sentencing of those who are prosecuted.²²⁰ In the context of such efforts, the occurrence of harm could conceivably be made one of the factors that would determine, more or less automatically, whether a certain specific penalty was applicable. But short of a major change in our methods of administering the criminal justice system, emphasis on harm

²¹⁸ Goldstein, *supra* note 207, at 586-88.

²¹⁹ It has been estimated that of the 55,300 deaths from automobile accidents in 1970, between one-third and one-half were attributable to excessive drinking, and traffic violations were said to be involved in eighty percent of all fatal accidents (based on 1968 data). F. ZIMRING & G. HAWKINS, *supra* note 153, at 343, 356. Yet there were only 4,190 arrests for negligent homicide (including non-vehicle cases) in 1970. UNIFORM CRIME REPORTS—1970, *supra* note 165, at 119.

²²⁰ The incidence of plea bargaining can be reduced, and where it exists it can be made subject to standards and review. Sentencing discretion can be drastically curtailed and again subjected to review. Whether such reforms should in fact be undertaken is not our concern here. The point is simply that ways such as these represent the only meaningful approach to the problem of administrative discretion.

caused, even with respect to intentional crimes, makes little or no contribution to solving the problems of discretion.

E. *Frugality in Punishment*

Another argument of major importance is based on the "frugality" principle, probably first stressed by Bentham. Since punishment is conceived to be undesirable for its own sake, it can be justified only by necessity and should be no greater than is required to achieve its goal.²²¹ Hence, assuming that no deterrence is sacrificed, a moderate penalty for those who do not cause harm would be preferable even if juries were willing to cooperate in the imposition of a more severe sanction. This argument has been mentioned by the ALI only in its discussion of attempts to commit first degree felonies, where "the heaviest and most afflictive sanctions [the death sentence or life imprisonment]," would otherwise be applicable.²²² It has been advanced by others to justify mitigation of punishment in the case of attempts generally²²³ and in the case of negligent conduct not resulting in harm.²²⁴

Even in Bentham's relatively abstract terms, the frugality notion has great appeal; and in light of ever-increasing evidence that prisons serve far less to reform than to aggravate anti-social propensities,²²⁵ the point takes on new importance and urgency. Several facets of the argument nevertheless require careful exploration. The argument explicitly rests on the assumption that mitigation of punishment where no harm occurs will not diminish the deterrent impact of the law. This factual question must be examined in detail. But it will also be necessary to consider a more fundamental matter, for the frugality approach involves at least one basic value judgment that might not be universally shared—the principle of selective frugality inherently conflicts with the principle of equal treatment for all who are similarly situated. The frugality argument itself points to no relevant differences between offenders who

²²¹ J. BENTHAM, *supra* note 77, at 194. See also *Rudolph v. Alabama*, 375 U.S. 889, 891 & n.7 (1963) (Goldberg, J., dissenting); C. BECCARIA, *supra* note 152, at 17-19.

²²² MODEL PENAL CODE § 5.05(1), Comment at 179 (Tent. Draft No. 10, 1960); see Wechsler, Jones & Korn, *supra* note 1, at 1029.

²²³ Michael & Wechsler, *supra* note 11, at 1295-97 & n.86; Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773, 797 (1958); Ryu, *Contemporary Problems of Criminal Attempts*, 32 N.Y.U.L. REV. 1170, 1174 (1957).

²²⁴ 3 J. STEPHEN, *supra* note 8, at 311-13; Michael & Wechsler, *supra* note 11, at 1296-97 & n.86.

²²⁵ See, e.g., AMERICAN FRIENDS SERVICE COMM., *THE STRUGGLE FOR JUSTICE* (1971).

cause harm and those who do not. It simply maintains that the ends of the law can be achieved without punishing all of them severely, so some should be selected in a random way, here by the fortuitous occurrence of harm, to be relieved of the most severe penalty.

"Arbitrariness" of this kind might not be thought a subject of serious concern since it is totally insulated from the dangers of individual discretion and the possibilities of social bias which give rise to most equal protection problems. Here, the arbitrariness has been "purified" by eliminating all human factors from the process of choice. Nevertheless, even "pure" arbitrariness involves the treatment of two presumably indistinguishable individuals in different ways. The choice between them is made not on the basis of any considerations rationally related to a valid policy, but instead on the basis of pure chance, the very antithesis of rationality. The legitimacy of such an approach can scarcely be taken for granted. It therefore seems necessary to examine with some care the question whether "pure" arbitrariness is compatible with constitutional requirements, as well as with general ethical principles that guide the ways in which criminal punishment ought to be distributed.

The pages that follow suggest that despite the "arbitrariness" implicit in the frugality approach, the inequalities should not ordinarily be regarded as contrary to the requirements of due process or equal protection. The analysis also suggests that even in terms of non-constitutional values, the notion of "equality" in punishment remains rather poorly specified and may be entitled to relatively little weight. In a final section, however, the analysis focuses upon the assumptions about deterrence that underlie the frugality argument, and it is here that the argument proves most vulnerable.

1. Frugality and the Problem of Equal Treatment

Despite frequent invocation of the frugality rationale by thoughtful writers, little attention has been paid to its implications for the principle of equality.²²⁶ It therefore seems

²²⁶ The treatment of this problem by Michael and Wechsler probably represents the high point for the level of discourse on this subject:

[I]nequality of this sort appears to be justifiable only so long as treatment involves a severity which is unnecessary as a means to incapacitation and reformation and is therefore an evil inflicted upon the offender solely as a means to the deterrence of potential offenders. The inequality may, in other

necessary to examine the value of equality in this context and the considerations that might justify the sacrifice of equality rather than one of the other objectives at stake—maximum deterrence and minimum severity.²²⁷

a. *The Minimum Requirements of Due Process and Equal Protection*

The constitutionality of “pure” arbitrariness has been the subject of virtually no legal analysis or judicial decision. This is not surprising, however, in as much as our system rarely uses overt lotteries as a decision-making mechanism, particularly where something of importance is at stake.²²⁸ Nevertheless, the Supreme Court’s approach to arbitrariness in general casts serious doubt on the permissibility of pure arbitrariness.

The equal protection clause requires, in the language of one classic statement, that classifications “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”²²⁹ Similarly, “the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real

words, be preferable to an unnecessary sacrifice of actual offenders for the sake of deterrence. But if that is the justification for tolerating the inequality it follows that a mitigation of penalties on the ground that death has not occurred should not be carried to the point where it disserves other ends of treatment, such as incapacitation, unless it is necessary to go that far to avoid nullification.

Michael & Wechsler, *supra* note 11, at 1297-98 (footnotes omitted).

²²⁷ In the sections that follow, the frugality approach is frequently discussed as if it operated not through the presumably random element of harm, but instead through a literally random mechanism such as a lottery. Holmes in fact proposed that a genuine lottery be used as an alternative to reliance on harm caused. *See* text accompanying note 161 *supra*. Where necessary, we will consider how the conclusions applicable to a real lottery might be affected when the randomness results indirectly from reliance upon harm.

²²⁸ Even the recent selective service lottery was in effect for only a short period. *See* 50 U.S.C. App. § 455(d); Presidential Proclamation No. 3945, 34 Fed. Reg. 19017 (1969). Several courts rejected arguments to the effect that the drawings were not in fact sufficiently random. *United States v. Kotrlík*, 5 SEL. SERV. L. RPT. 3693 (9th Cir. 1972); *Stodolsky v. Hershey*, 2 SEL. SERV. L. RPT. 3527 (W.D. Wis. 1969). But apparently no court reached the question whether perfect randomness would itself be unconstitutional. *Id.* n.2. At least one court has upheld the constitutionality of randomness in choosing subjects for a social experiment, *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), though there the court regarded the effects of the lottery in determining rights to welfare payments as not implicating a fundamental interest. *Id.* at 1109.

²²⁹ *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

and substantial relation to the object sought to be attained.”²³⁰ It is unfortunately not feasible to do justice, within the confines of the present study, to the implications of these constitutional principles for the problem of pure arbitrariness. In a separate paper I have attempted to indicate some of the broad outlines of an approach to this question.²³¹ A threshold matter for consideration is the set of arguments that stresses the “purity” of lotteries, their insulation from possibilities for human discrimination, and seeks on this basis to reconcile their use with due process and equal protection requirements as a general matter. One such argument is that lottery systems provide “equal protection” because everyone involved is given precisely the same chance, the condition sometimes referred to as “ex ante” equality.²³² A similar argument is that if a lottery serves the goals of administrative convenience and efficiency, then the distinctions it produces are “rationally related to a legitimate state interest.” These arguments prove to be overbroad and unsatisfying as general propositions. Not only do they lead to results that seem utterly unacceptable as an intuitive matter, but they prove unresponsive to society’s interest in ensuring that governmental power make itself felt in accordance with rational and predictable patterns, and that citizens be able to plan their lives and their activities on the basis of reasonable expectations as to the content of the legal order as it applies to them.²³³

The punishment lottery implicit in a frugality approach need not, however, be defended in terms of unqualified approval for “pure” arbitrariness in all its forms. It can be contended, as Michael and Wechsler suggest,²³⁴ that the resulting inequalities are indeed undesirable, but constitutionally permissible in light of the alternatives of either less effective deterrence (when the extra penalty for causing harm is eliminated) or greater severity (when the extra penalty is extended to all). This approach, focusing on the particular advantages of the

²³⁰ *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

²³¹ See Schulhofer, *Arbitrariness Purified: The Constitutionality of Decision-Making by Lottery* (unpublished paper in Biddle Law Library, University of Pennsylvania).

²³² See, e.g., Breit & Elzinga, *supra* note 196, at 707-08.

²³³ Cf. H.L.A. HART, *supra* note 11, at 44-48 (need for foreseeability as a basis for rules on mistake and other excuses); Winston, *On Treating Like Cases Alike*, 62 CAL. L. REV. 1, 37 (1974). See also J. RAWLS, *A THEORY OF JUSTICE* 235 (1971).

²³⁴ See note 226 *supra*.

lottery in the punishment context, raises new difficulties with respect to its special implications for the notion of "punishment."²³⁵ But even in the narrower due process and equal protection terms, the approach invites, at the very least, an evaluation of the nature of the alternatives to inequality, and their comparative costs and consequences.

As the basis for such an analysis, let us suppose that a legislature, wishing to implement a frugality policy, decides that of all those who attempt (successfully or unsuccessfully) to commit murder, a given number will be spared the maximum sentence authorized by law and instead sentenced in accordance with a much lower penalty range. Suppose the individuals to benefit from the milder range of sanctions are selected at random from all the defendants convicted of attempted or successful murder each year. Suppose further that the legislature has the benefit of a remarkable study demonstrating, in scientifically impeccable fashion, that the deterrent impact of the law will be exactly the same regardless of whether the maximum penalty is applied to all offenders or whether the given number chosen at random face only the milder range of sanctions. Would it be constitutional to implement a frugality approach of this kind?²³⁶

²³⁵ See text accompanying notes 241-81 *infra*. Some of these problems may also rise to the constitutional level, especially in terms of "cruel and unusual punishment."

²³⁶ There may be a feeling that a defendant lacks standing to seek reduction of his sentence on the ground that others should have been punished with equal severity. As a general proposition, however, this cannot be sound. A black defendant who is concededly guilty and was concededly sentenced in accordance with statutory limits can, for example, have his sentence reduced on showing systematic leniency in favor of white defendants. See Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103 (1961). The same principle should apply for constitutional purposes even outside the especially sensitive area of race, whenever the difference in treatment is held to be without reasonable basis. Cf. Cannon v. Gladden, 203 Ore. 629, 281 P.2d 233 (1955). For example, where property taxes were attacked on the ground that other taxpayers were enjoying lower assessments, the Court held:

[T]he right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.

Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 446 (1923).

The property tax situation differs because the relief given to some taxpayers must in the long run result in higher taxes for the others if the same revenue is to be produced. This is not true under our hypothetical deterrence study, but in reality frugality ordinarily will have some cost in terms of deterrence, see text accompanying notes 282-83 *infra*. Hence defendants who bear the greater penalties are punished

To determine whether circumstances justifying pure arbitrariness are present, we should consider first the kinds of reasons that argue against equal treatment for all. Here it is not simply a matter of administrative convenience but rather a desire, clearly legitimate in and of itself, to minimize the social costs of punishment, combined with a desire, equally legitimate, to attain the optimum level of deterrence. Exactly how great these deterrence and frugality benefits would be, and exactly what value we attribute to equality, are the core questions, and they are not answered by the very preliminary analysis attempted here. Instead, we can only move on to a second aspect of the search for alternatives, namely whether selections could be made in some non-random way.

We assume that selection of those who cause harm is a kind of lottery, just as selection of those born on certain days, determined at random, would be a kind of lottery. But those in the class who seemed least culpable, or least dangerous for the future, could be selected for the milder penalties. A non-random approach of this kind seems clearly better suited to achieving the usual objectives of the criminal law. On what basis might the state want to reject it here? One possibility is the ever-present "efficiency" rationale. It might be thought too costly and time-consuming to conduct detailed inquiries in order to make the necessary selection. Such an argument is always a troubling one, but it proves particularly inapt in the punishment context, where attention must in any event be paid to questions of culpability and dangerousness at the sentencing stage, and where state policy continues to claim the existence of relevant distinctions in these terms among offenders.

A more substantial reason for preferring randomness could be that a non-random approach might not ensure against a loss of deterrence. Conceivably under the non-random approach some offenders would hold out strong hopes of qualifying for the mild penalties, and the deterrent impact of the law would therefore be diminished. As a practical matter, however, the deterrence consequences of non-random selection are difficult to estimate. Refusing to differentiate between murderers and attempters on arbitrary grounds, but instead differentiating in terms of the intensity of the intent, the dan-

somewhat more than would be necessary to produce the same level of deterrence under a pattern of equality.

gerousness of the act under the known circumstances, and so on, conceivably might even be more effective than an arbitrary standard (including harm caused) in deterring the most dangerous kinds of conduct. A careful canvassing of this question would be necessary.

The intensity of the search for alternatives is of course affected by the consequences of the lottery for those subject to it.²³⁷ Two situations are possible. The more troubling one, which would be excluded if our hypothetical deterrence study were valid, arises when the selective lottery fails to yield exactly the same deterrent effect as imposing the maximum penalty on *all* offenders. Since some deterrence is lost, it should be possible to achieve as much deterrence as under the lottery by reducing somewhat the maximum penalty and then applying it to all. This could be a disastrous policy from a frugality perspective—suppose that instead of imprisoning a single offender for twenty years and allowing a thousand other offenders to go free, we were required to imprison all 1,001 offenders for nineteen and a half years to achieve the same level of deterrence. Nevertheless, a lottery approach in this situation implies not only that the one chosen is less well off than his lucky fellow-offenders, but also that he himself is less well off than he would have been under a policy of equal treatment. This feature adds a further note of potential unfairness, the special consequences of which need to be separately considered.²³⁸

In the second situation, more easily defended, we can assume that the lottery has *no* deterrence cost and that the offender therefore suffers exactly the same penalty that he would face if all were treated alike. It nevertheless remains true that the offender chosen by lot is treated differently from others similarly situated. To place our search for alternatives in proper perspective, we must focus on exactly what this difference is.

At least in so far as we are focusing on prison sentences, and this is after all the principal concern from a frugality perspective, it is clear that the penal lottery will always affect a fundamental interest—liberty itself.²³⁹ The impact could be de

²³⁷ *Cf.* Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Board of Elections, 383 U.S. 663 (1966).

²³⁸ See text accompanying notes 282-86 *infra*.

²³⁹ *But cf.* Marshall v. United States, 94 S. Ct. 700 (1974), where the Court, in rejecting equal protection attacks upon the Narcotic Rehabilitation Act, 18 U.S.C.

minimis in some situations; the difference between a nineteen and a half- and a twenty-year sentence might not seem so great as to call for close scrutiny of the reasons for inequality. But such de minimis situations will rarely arise, for the frugality policy itself comes into play precisely where the differences are ones that count. In the twenty-year case previously considered, for example, the difference determined by the lottery was a difference between a twenty-year sentence and no prison sentence at all. Indeed, the ALI deliberately confines its frugality policy to the area in which "the heaviest and most afflictive sanctions," death and life imprisonment, are involved.²⁴⁰ Paradoxically, this is the area where inequalities are most likely to seem offensive. The prospect of choosing one offender to suffer the death penalty or even life imprisonment, rather than some shorter term, by the mere spin of a wheel is certainly not a pretty one.

The difficulty is that the very factors that call for closer scrutiny simultaneously make the justifications more compelling. Certainly the prospect of equal treatment, imposing the death penalty on all offenders, is not very pretty either. Here again we remain faced with the need to evaluate the importance of frugality, deterrence, and equality and their relationship to one another. This can be attempted only by establishing priorities among the objectives of the criminal law, a step I have been reluctant to take in the context of evaluating emphasis on results under any acceptable formulation of the ends of the criminal law. From this limited perspective, the frugality argument does not seem to violate due process and equal protection principles, so long as certain factual conditions are satisfied.

b. *The Implicit Value Judgments*

(i) *The Retributive Perspective*

Though our overall approach has been deliberately eclectic, it seems appropriate to consider exactly what kinds of value judgments are implicit in the frugality argument. Perhaps the most perplexing paradox of the frugality approach is its acceptance, in the context of a system of punishment normally based

§§ 4251-55 (1970), assumed that assignment of offenders to prison rather than to a treatment program (with a potentially shorter period of confinement) did not implicate a fundamental interest.

²⁴⁰ MODEL PENAL CODE § 5.05(1), Comment at 179 (Tent. Draft No. 10, 1960).

on fault, of radically different penalties for two defendants who are equally culpable and indistinguishable in terms of other factors related to their personalities and actions. In spite of prevalent inequalities in prosecution and sentencing in the criminal law, non-random inequalities at that, the notion remains deep-seated that criminal punishment at least *ought* to be rationally determined and deserved. Overt acceptance and utilization of pure chance either to determine criminal liability *vel non*, or even to fix the amount of punishment, would scarcely be understood as a feature of a humane and civilized system of criminal justice.

The frugality approach based on harm differs significantly from an overt lottery, since its random features are less readily perceived. Indeed, in some contexts, the harm element might be rationally related to acceptable criteria of punishment. But we are dealing here, by hypothesis, with situations in which a rational relationship does not exist, in which the harm element is truly random. Frequently it will be perceived as such, by the public as well as by students and analysts of the criminal law.²⁴¹ One observer studying the dangerousness of armed attacks in fact suggested that homicide might be described as no more than the result of a "lethal lottery."²⁴² The question in such situations is whether reliance upon an obviously random mechanism, such as a lottery, should be viewed differently from reliance upon a harm element that is equally random but less often perceived to be so.

My own view is that we should not consider these two systems as fundamentally different. This position could be defended on the basis that management of public opinion and popular perceptions is a job for politicians and legislators, not for the theorist outlining the content of an ideal criminal law. But this is very definitely not my perspective. The answers I am seeking are ones suitable for actual implementation. In the present context, public indignation over the use of an overt lottery would probably bar adoption of this approach, while a disguised lottery based on harm would not be utterly out of the question—indeed we have one already in many areas. But the question remains whether the disguised lottery should in fact be used. If the instinctive disapproval of overt lotteries

²⁴¹ See text accompanying note 67 *supra*; O.W. HOLMES, *supra* note 11, at 48; Goodhart, *supra* note 61, at 19.

²⁴² Zimring, *The Medium is the Message: Firearm Caliber as a Determinant of Death from Assault*, 1 J. LEGAL STUDIES 97, 114 (1972).

is in fact justified, it could hardly be claimed that the mere political feasibility of the disguised lottery constitutes the reason for having it.

Part of the difficulty in assessing attitudes toward a punishment lottery may result from ambivalence about what we mean by the retributive purpose of the criminal law. We have already seen that retribution is sometimes used to describe the notion that punishment should be related to the harm done.²⁴³ We have used the term retaliation to identify this idea, and restricted the use of "retribution" to the concept that punishment should be related to the culpability of the defendant. Even in this narrower sense, however, retribution can have a variety of meanings.²⁴⁴ It may be only a negative, limiting principle (that moral guilt is a necessary but not sufficient condition for punishment) or it may be a rule of affirmative action (that the morally guilty *should* be punished). In either sense, retribution may apply only to questions of distribution—who should be punished—or it may also apply to proportion—how much punishment should be imposed. Those who have sought to clarify this subject have taken a variety of positions as to which of these senses for retribution would constitute a legitimate purpose or theory of the criminal law.²⁴⁵ For our purposes it seems sufficient to note that the distribution theory of retribution²⁴⁶ would not be inconsistent with the frugality approach, nor would a proportion theory of the *negative* type. Only a theory of retribution holding that it should affirmatively dictate proportion, that offenders *should* be punished with severity corresponding to the moral gravity of their offense, would tend to conflict with frugality. The clash does not seem particularly troubling, since this version, though usually taken to represent the classic retributivist position,²⁴⁷ finds few advocates today.²⁴⁸ The Benthamite notion of punishment as evil in itself, justified only to the extent necessary to achieve particular social goals,²⁴⁹ seems more congenial to

²⁴³ See text accompanying note 44 *supra*.

²⁴⁴ See generally H.L.A. HART, *supra* note 11, at 230-37.

²⁴⁵ Compare *id.* 8-13 with H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 16, 62-70 (1968), and Wasserstrom, *H.L.A. Hart and the Doctrines of Mens Rea and Criminal Responsibility*, 35 U. CHI. L. REV. 109 (1967).

²⁴⁶ This seems, for example, to be the thrust of H.L.A. Hart's theory, H.L.A. HART, *supra* note 11, at 11, 24-27.

²⁴⁷ See *id.* 231, 233; H. PACKER, *supra* note 245, at 38; E. PINCOFFS, *supra* note 37, at 3-4.

²⁴⁸ See H.L.A. HART, *supra* note 11, at 231-32.

²⁴⁹ See text accompanying note 221 *supra*.

modern views of the purposes of the criminal law. If it is this concept of retribution that accounts for aversion to a punishment lottery, then contemporary theorists would apparently be led to conclude that the objection is essentially unsound.

Yet there remains something deeply offensive in the calculated use of randomness to assign criminal penalties, particularly severe ones. In *Furman v. Georgia*,²⁵⁰ the Supreme Court found capital punishment as then administered to be cruel and unusual punishment, largely because of the arbitrariness that seemed to determine its incidence. To be sure, this was not arbitrariness of the "purified" kind, far from it, but Mr. Justice Stewart remarked in a concurring opinion that "[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."²⁵¹ The analogy was perhaps not intended to cast doubt on the validity of "pure" arbitrariness in capital punishment,²⁵² but it seems altogether proper that it should. A lottery, whether disguised or overt, hardly seems a just or enlightened way to determine who shall live and who shall be executed by the State. This may well suggest that even the affirmative proportion theory of retribution still retains validity, that at least some penalties, such as capital punishment, may be appropriate only if they can be considered *deserved* in relation to the moral culpability of the offender and as a morally necessary response to that culpability. These and other implications of a penalty lottery for the theory of punishment do not seem to have been considered by those interested in the philosophy of the criminal law. This is particularly unfortunate since capital punishment and other severe penalties continue to be widely authorized on a lottery basis.²⁵³

(ii) The Deterrence Perspective

Another way of looking at the same problem is to focus on the deterrence rationale itself. The frugality argument assumes that the non-deterrence objectives of punishment—

²⁵⁰ 408 U.S. 238 (1972).

²⁵¹ *Id.* at 309 (Stewart, J., concurring).

²⁵² Justice Stewart mentioned the possibility that the selection for the death penalty had been made on the impermissible basis of race but stated explicitly that since racial discrimination had not been proved, he was not considering this aspect. *Id.* at 310.

²⁵³ The clearest example is, of course, felony murder, though even where an intent to kill exists in fact, an element of chance determines whether the crime will be murder or only assault with intent to kill. See text accompanying notes 313-21 *infra*. As a result of *Furman*, the penalty in such cases ordinarily will not exceed life

whether retribution, rehabilitation, isolation of the dangerous, or any others—are satisfied by the penalty applied to the unsuccessful attempt. The additional penalty for the completed crime is justified solely for purposes of general deterrence.²⁵⁴ This might not seem to be a source of difficulty, for deterrence is probably the most readily accepted of all the goals of the criminal law. Yet when other objectives are no longer inextricably linked with it, when deterrence is stripped of the support of other purposes and stands alone as the *exclusive* reason for punishment, serious difficulties arise. The extra sanction is applied to an offender who has already paid his “debt” to society—a penalty suitable in terms of the moral gravity of his offense, the possibilities of reforming him, the need to confine him, and even the need to deter him from committing a crime in the future. It becomes clear that he must suffer the extra sanction not for any of these reasons related to *his* offense or *his* personality, but solely to prevent *others* in society from violating the law. As Zimring and Hawkins put it, “Why should his grief pay for their moral education?”²⁵⁵

This is not an easy question to answer, but it is at least equally troubling to reject general deterrence as a goal of the criminal law. Zimring and Hawkins’ resolution of the question is indicative of its difficulty:

Our preliminary statement regarding this problem is simply the rather weak one that if this is the only way in which we can reduce the crime rate, the practice seems inevitable, and can be more easily justified than if alternative methods of crime control were available.²⁵⁶

The dilemma is of course presented not only in the case of punishment lotteries, but whenever penalties are justified

imprisonment, but a number of states have enacted mandatory death penalty statutes whose applicability will depend on this sort of “lottery.” Capital punishment is also authorized, on a lottery basis, under a number of pre-*Furnam* mandatory death statutes. *E.g.*, MASS. ANN. LAWS, ch. 265, § 2 (1968) (murder in the course of rape or attempted rape); R.I. GEN. LAWS ANN. § 11-23-2 (1970), *as amended*, R.I. GEN. LAWS ANN. § 11-23-2 (Supp. 1973) (murder by life term prisoner); S.C. CODE ANN. § 17-553.1 (1962) (fourth conviction for crimes optionally punishable by death); VA. CODE ANN. § 53-291 (1960) (killing of prison employee by convict).

²⁵⁴“General deterrence” is used here to refer to the preventive effect of the sanction upon the population at large. The objective of discouraging further crime by the offender punished, sometimes called “special deterrence,” would presumably call for similar treatment of attempters and completers.

²⁵⁵ F. ZIMRING & G. HAWKINS, *supra* note 153, at 38.

²⁵⁶ *Id.* 40.

solely for purposes of deterrence.²⁵⁷ Yet the nature of a punishment lottery alters the dimensions of the dilemma in important ways and may ultimately render it more acute.

In the first place, the utter lack of nondeterrence justifications for punishment is starkly clear in the lottery context. In other situations we may not know what the legislative justification in fact was,²⁵⁸ and even from a normative viewpoint, an assessment of the penalty required for adequate deterrence is linked with the question of how hard we should try to deter, and thus to the question of how costly an offense is to society, and thus in turn to the question of how we should rank the gravity of the conduct from a "moral" viewpoint.²⁵⁹ As a result it will seldom be clear, with respect to across-the-board penalties, that a part of the sanction serves only deterrence objectives and has no retributive underpinnings.²⁶⁰ This feature no doubt helps dampen our intuitive sympathy for the plight of the offender-as-deterrence-object, and makes more tolerable the pragmatic decision to ignore his complaint. The ethical implications of punishing one offender solely to deter others become much harder to ignore when, as in the lottery context, there is no implicit blending of deterrent and retributive goals.

The most common philosophical defense of deterrence appears, like the pragmatic defense, more difficult to accept in the lottery context. Here again the concepts of deterrence and retribution become intertwined. For this school, retribution should not by itself justify punishment; deterrence, with its

²⁵⁷ In this sense, the difficulty involved in the lottery case would only be exacerbated by eliminating inequalities and applying the more severe sanction across the board—by hypothesis the non-deterrence goals of punishment had, for all the offenders, been satisfied by the milder punishment.

²⁵⁸ Deterrence may appear the predominant motivation, at least if "the reasons given for legislative and judicial change in policy are taken at face value." F. ZIMRING & G. HAWKINS, *supra* note 153, at 39.

²⁵⁹ For this reason, the stock example of a case where utilitarianism in the grading of offenses supposedly breaks down—capital punishment for parking violators—seems misleading. Capital punishment in this context is not optimal, even in narrow utilitarian terms, because its costs presumably outweigh the social advantages of improved or even perfect compliance. Conversely, if illegal parking came, for some reason, to pose a serious threat to life (blocking the emergency entrance to a hospital, for example), the offense would presumably be regarded as serious in moral terms; both utilitarianism and retribution might call for a rather stiff penalty.

²⁶⁰ This is not to say that lotteries simply make manifest what is veiled when deterrence penalties are applied across the board; I continue to assume that disguised injustices are no less objectionable than the obvious ones. Across-the-board penalties do not hide from the casual observer motivations that a careful student could discern, but rather render it virtually impossible for any observer to identify the actual motivations with confidence, or even to be sure that he has successfully isolated deterrence from retributive objectives in his own normative evaluation.

utilitarian cast, can. But retribution can validly serve to *limit* the penalties that society is entitled to impose in pursuit of its deterrence objective. So long as the offender suffers no more than his "just deserts," that is, the punishment corresponding to the moral gravity of his offense, he cannot complain that his penalty is excessive or unjust.²⁶¹ An important category of cruel and unusual punishment cases reflects the converse of this principle; penalties rationally related to the state's deterrence objective are nevertheless unconstitutional when "disproportionate" to the gravity of the offense.²⁶²

This defense of penalties designed for deterrence encounters serious difficulty when invoked in the lottery context. To be sure, it can still be argued that the just deserts concept is only a limiting principle, that it in no way requires that an offender in fact bear the penalty found to be the retributive maximum.²⁶³ But the argument nevertheless requires acceptance of the proposition that the highest penalty imposed by the lottery does not exceed the just deserts limitation. If it is the lower penalty that correctly reflects the moral gravity of the offense, then the additional sanction imposed by lottery not only reflects a "pure deterrence" motivation, but also *exceeds* the retributive maximum.²⁶⁴

This difficulty is easy enough to avoid on the theoretical level, since a frugality proponent need simply impose a condition that the highest penalty applicable under his lottery should in no event exceed the just deserts for the conduct in question. It then becomes necessary, however, to investigate the actual situations in which punishment lotteries are being used (that is, where disparities between the penalties for inchoate and completed crimes are defended solely on a frugality basis), in

²⁶¹ H.L.A. HART, *supra* note 11, at 237; H. PACKER, *supra* note 245, at 62-70; see F. ZIMRING & G. HAWKINS, *supra* note 153, at 35 & n.41.

²⁶² *E.g.*, *Weems v. United States*, 217 U.S. 349 (1910).

²⁶³ In these terms, the principle is equivalent to the "negative proportion" version of retribution. See text accompanying note 244 *supra*. Hart argues that there is no way of correlating the gravity of punishment to the gravity of an offense, and that the only meaningful requirement is one of a correlation between the relative severity of penalties for a series of offenses and the relative gravity of these offenses. H.L.A. HART, *supra* note 11, at 233-34. On this view the defense of pure deterrence fails altogether in the lottery context.

²⁶⁴ Curiously, Michael and Wechsler themselves seem to assume that something approaching the just deserts concept is to be reflected in setting the lower penalty (where no harm occurs) rather than the higher one, since the additional sanction is "based upon factors which are unrelated . . . to the undesirability of the act . . ." Michael & Wechsler, *supra* note 11, at 1297. If so, their version of the frugality theory would appear unacceptable in terms of the just deserts analysis.

order to determine whether the highest penalties invoked are in fact within the just deserts limit. Can it be said, for example, that the "heaviest and most afflictive sanctions," distributed by the ALI on a lottery basis,²⁶⁵ in fact conform to our notion of the moral gravity of the corresponding crimes? Perhaps it can. The just deserts notion is certainly vague enough to permit a variety of responses to this question.²⁶⁶ It nevertheless appears to be a serious defect of the ALI formulation, and of the frugality argument in general, that the need to confront and answer this question is scarcely recognized. Severe sanctions are justified solely in terms of deterrence, the only limiting condition apparently being that the penalties not be more than the public will tolerate, even for the wrong (retaliatory) reasons.

This is not to say that public feelings are irrelevant in seeking the appropriate just deserts limit. On the contrary, community attitudes toward the gravity of offenses would be entitled to considerable weight. The problem is that the mere acceptability of the status quo conveys an ambiguous message. It could be based on a well-informed evaluation of the seriousness of an offense, but other explanations are also possible.²⁶⁷

Once we do confront the just deserts issue squarely, with these difficulties in mind, it is by no means clear that the "heaviest and most afflictive sanctions" will conform to the just deserts limit. They may do so, for example, in the case of premeditated murder, where leniency for the unsuccessful attempter can easily be viewed as punishment well below what was deserved. But it is far more difficult to reach this conclusion in the felony-murder context, where a punishment lottery may involve the death penalty or life imprisonment if a death occurs purely by accident in the course of an ordinary burglary. In such a situation it would seem preferable to reduce the penalty to the just deserts maximum (conceivably

²⁶⁵ See text accompanying note 222 *supra*.

²⁶⁶ See H.L.A. HART, *supra* note 11, at 233-34; E. PINCOFFS, *supra* note 37, at 15.

²⁶⁷ Michael and Wechsler suggested some in a related context:

It would be informative to know to what extent this tolerance is due to a failure to perceive that in the cases under discussion behavior which has not resulted in death differs from that which has, in an accidental rather than an essential aspect, [and] to what extent the popular demand for equality [or for present purposes the popular assessment of just deserts for the underlying behavior] is merely subordinated to a popular sentiment in favor of retaliation and, finally, to what extent there is some popular recognition of the Benthamic point.

Michael & Wechsler, *supra* note 11, at 1298 n.87.

eliminating the lottery entirely) even though this involves sacrificing deterrence that, given public attitudes, could have been achieved.

(iii) The Equality Perspective

Even a pure Benthamite, who attaches no importance to retribution as an affirmative value or to just deserts as a limiting principle, still presumably attributes some value to equality itself. Faced with the concrete advantage of frugality—diminished pain and suffering for those who benefit by more lenient sentences—he may consider the principle of equality as an abstract notion of little practical value in this context. Moreover, the inequality here does not involve the kind of uncertainty that ordinarily renders lotteries undesirable in a well-organized legal system.²⁶⁸ Here the randomness does not interfere with the planning of legitimate activity but, on the contrary, penalizes precisely those who have chosen illegal lines of endeavor. If anything, the “uncertainty cost” for such individuals contributes to the total sanctioning effect sought by society.²⁶⁹

Nevertheless, there are other kinds of costs associated with randomness. Inequalities may make it possible for society to accept a policy that is wrong in principle and would be readily rejected as intolerable if it were applied wherever logically applicable. The inequality mitigates the essential “wrongness” of the policy, but it may well postpone the day when the injustice is recognized for what it is and eliminated in its entirety. In this sense a policy of strict equality presents certain *risks* to frugality objectives, but does not *inevitably* clash with them. An equality requirement may result in more severe punishment for attempters, but it could also lead in the long run to less severe punishment for both attempters and completers, making it the preferred approach even from a frugality viewpoint.

The ALI and other frugality advocates do not seem to consider this possibility. Their position may simply reflect an implicit judgment that the risk is not worth taking, a judgment that might well be politically sound. Even so, it is by no means clear that this will be true for all crimes and for all penalties,

²⁶⁸ See text accompanying note 233 *supra*.

²⁶⁹ The point, however, seems inapplicable in the case of most strict liability crimes (other than felony murder) and probably even for many crimes of negligence, since the activity involved is not illegal as such. The point also seems inapplicable in the case of those who are risk preferrers. *Cf.* text accompanying note 170 *supra*.

or at all times. *Furman* itself involved precisely the same choice. Progressive introduction of greater and greater discretion into the process of imposing the death penalty had gradually reduced its incidence to quite a low level; there was hope that this process, if allowed to continue, would lead to the virtual abolition of capital punishment in the United States within a decade. The Court's decision restricting or perhaps eliminating discretion brought an abrupt halt to this process, and aroused fears, expressed by several of the dissenting Justices, that the result would be an increase, rather than a decrease, in the number of executions.²⁷⁰ It is of course possible to read the decision as treating such an increase as desirable, inasmuch as it would establish a principled and even-handed distribution of the death penalty. But in view of the expressed personal opposition to the death penalty by all nine of the Justices,²⁷¹ it would be most surprising if they had not given considerable thought to the possible "frugality" advantages of their judgment. Equality, in short, not only has independent value as a social goal; it can serve in important ways to further the interest in frugality.

Apart from its implications for frugality, inequality is thought to involve significant costs of its own. Perhaps foremost is the offense to a sense of justice entailed in allowing a random or irrelevant factor to determine the punishment to be imposed. We have already considered this point in terms of the philosophies of deterrence and retribution, but the same notion is often presented as an independent requirement of justice—that like cases be treated alike.²⁷² The Model Penal Code emphasizes the point by including among its guiding purposes the goal "to differentiate on reasonable grounds between serious and minor offenses."²⁷³

Of course, the problem remains to determine what is a "reasonable ground," or when we are dealing with "like cases." It has quite rightly been pointed out that the commentators who invoke the principle of equality are rarely clear about what it means.²⁷⁴ But whatever the difficulties of definition,

²⁷⁰ 408 U.S. at 397, 401 (Burger, C.J., dissenting); *id.* at 413 (Blackmun, J., dissenting).

²⁷¹ All of the dissenting Justices joined in the Chief Justice's statement to this effect. *Id.* at 375 (Burger, C.J., dissenting). See also *id.* at 406, 410 (Blackmun, J., dissenting).

²⁷² H.L.A. HART, *supra* note 11, at 24; H.M. Hart, *supra* note 34, at 439.

²⁷³ MODEL PENAL CODE § 1.02(1)(e) (Official Draft 1962).

²⁷⁴ F. ZIMRING & G. HAWKINS, *supra* note 153, at 49.

there would presumably be agreement that two cases, otherwise identical, would remain "alike" after one was selected by lottery for special treatment. Whether two cases distinguished only by the occurrence of harm in one should be regarded as "alike" has been a concern throughout this Article, but in the context of the frugality argument we are entitled to assume that the occurrence of harm is essentially fortuitous and therefore that the two cases do remain essentially alike. There has not, in any event, been a serious effort to resolve the equality issue on the ground that the two situations are dissimilar.²⁷⁵ The commentary to the Model Penal Code provisions dealing with the grading of attempts makes clear, for example, that the notion of equality is thought implicated even where differentiation results from "purified" random choice, and even where the differentiating factor is the occurrence of harm:

[W]hen the actor's failure to commit the substantive offense is due to a fortuity, as when the bullet misses in attempted murder or when the expected response to solicitation is withheld, his exculpation on that ground would involve inequality of treatment that would shock the common sense of justice. Such a situation is unthinkable in any mature system, designed to serve the proper goals of penal law.²⁷⁶

Despite the currency of such statements, there has been little, if any, effort to explain precisely *why* such inequality shocks "the common sense of justice," or should. This is all the more unfortunate since the nearly universal acceptance of the principle that like cases should be treated alike is accompanied by nearly universal acceptance of blatant violations of this principle, not only with respect to emphasis on harm but in a wide variety of other contexts.²⁷⁷ Often there is no recognition whatever of the inconsistency, or of the need to accept trade-offs among competing values. The Model Penal Code itself, after its ringing statement in support of equality, pro-

²⁷⁵ H.L.A. Hart dismisses as simply retributive the notion that the occurrence of harm renders a completed crime greater in gravity than a similar attempt. H.L.A. HART, *supra* note 11, at 234. Cf. F. ZIMRING & G. HAWKINS, *supra* note 153, at 47.

²⁷⁶ MODEL PENAL CODE Art. 5, Comment at 25 (Tent. Draft No. 10, 1960).

²⁷⁷ Examples include differences in sentence resulting from the attitudes of different judges toward an identical case, and exemplary sentences to provide special publicity and greater deterrence on a particular occasion. See H.L.A. HART, *supra* note 11, at 24-25; F. ZIMRING & G. HAWKINS, *supra* note 153, at 46-50.

ceeds in the commentaries to the very same section to defend on frugality grounds the leniency for attempts to commit first degree felonies, without even mentioning inequality as a drawback.²⁷⁸ In a few instances conflict between equality and some other desirable value has been recognized, but conclusions are then expressed as to which is more weighty without any effort to elucidate the costs that inequality might entail.²⁷⁹

The problem of explaining the reasons for valuing equality in punishment appears, therefore, to be a major unsolved question in criminal law theory. Even in terms of its vaguest general formulation, the notion of equality has not won universal acceptance—Thurmond Arnold dismissed the idea as “essentially a religious one”²⁸⁰ unsuited for consideration by the practical social engineer. But more importantly for the many who accept the notion as intuitively sound, we have no basis for identifying the situations in which equality should be sacrificed to some competing value.²⁸¹

The notion of equality thus remains a troubling one. It provides no firm basis for assessing whether the advantages of a penalty “lottery” would outweigh its equality costs, but it nevertheless leaves us in considerable discomfort concerning the “justice” or “fairness” of randomness in punishment.

(iv) Conclusion

We have attempted in the preceding pages to indicate ways in which the frugality approach requires the sacrifice of values often thought important in the administration of criminal law. From a retributive perspective, the approach is incon-

²⁷⁸ MODEL PENAL CODE § 5.05, Comment at 178-79 (Tent. Draft No. 10, 1960).

²⁷⁹ See note 226 *supra*. To the same effect, see H.L.A. HART, *supra* note 11, at 24-25; F. ZIMRING & G. HAWKINS, *supra* note 153, at 49. One effort to give content to the notion appears in H.L.A. HART's treatment of the related principle that offenses of different gravity not be punished with the same severity—this, he notes, would create “a risk of either confusing common morality or flouting it and bringing the law into contempt.” H.L.A. HART, *supra* note 11, at 25. But this concern would hardly be a pressing one in all instances, and it seems fair to conclude, even without knowing the essence of the notion of equality, that this somehow fails to capture it. For an examination of the equality concept as a general requirement in a system of law, see Winston, *supra* note 233.

²⁸⁰ Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 7 (1932).

²⁸¹ One avenue for studying this question would be to examine the idea of equality as a requirement that may emerge from a retributive or deterrent theory of punishment. See text accompanying notes 241-67 *supra*. Another approach would be to consider the difficulties resulting when randomness confronts the citizen with uncertainty as to the legal consequences of his actions. See text accompanying notes 233 & 268-69 *supra*. But even this would not tell the whole story since some inequalities

sistent with the notion that criminal penalties are a morally necessary response to wrongful conduct. This notion no longer commands wide support, but it may well retain validity in the case of offenses to which the most severe sanctions apply. This is of course precisely the area in which the frugality approach is most often urged. 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. And even if this position is accepted, frugality will frequently conflict with the view that deterrence ought not be pursued where it becomes necessary to make an offender suffer, as an object lesson to others, more than his "just deserts." Finally, from an equality perspective, the frugality approach involves offense, albeit of uncertain content, to notions of justice, and could in the long run disserve the goal of frugality itself.

These values sacrificed under a frugality approach may not outweigh its benefits. If the alternative is more widespread use of severe sanctions, it might be preferable to live with the various costs outlined here. Another alternative, however, is to achieve equality by reducing the higher penalty. This involves the sacrifice of some deterrence, but it is far from clear that this is more costly than the various drawbacks of the frugality approach itself. Certainly there is widespread agreement that pursuit of deterrence does not justify exceeding the just deserts limits, and this may be true as well where other values are placed in jeopardy. Assessment of such choices requires at the very least a careful evaluation of the extent to which the promise of greater deterrence central to the frugality argument is in fact fulfilled.

2. Frugality and the Equal Deterrence Assumption

We saw at the very outset of our consideration of the frugality argument that its advocates base their view on the assumption that leniency for those actors who cause no harm will not diminish the deterrent impact of the sanction applicable to the completed crime. We have seen that the "pure" arbitrariness implicit in the frugality approach raises serious

would not involve uncertainty costs, as where legislative categories differentiate between two types of activity that are in fact "alike," any differences between them being irrelevant to the purposes of the law. *See, e.g., Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1941).

questions of fairness even if this assumption is in fact true. It is now necessary to consider the factual validity or invalidity of this crucial assumption.

We have already had occasion to evaluate the assumption, in slightly different form, in connection with the jury nullification argument. We saw that this argument rests on an "added deterrence" hypothesis—that use of a severe penalty where harm occurs can add to the deterrence produced by the milder sanctions applicable to the underlying conduct. In evaluating this theory we were led to consider the more extravagant "equal deterrence" hypothesis advanced by Michael and Wechsler and by the ALI—that the harm-oriented structure of penalties would produce substantially the same deterrent effect as across-the-board imposition of the more severe sanction. It is this equal deterrence hypothesis which must be valid if the frugality argument is to be sustained.

As we have seen, however, the equal deterrence hypothesis does not withstand analysis. With respect to intentional crimes, the sanction applicable to the completed crime does add very substantially to the deterrence produced by penalties for an unsuccessful attempt; but even here, still greater deterrence could be obtained by increasing the attempt penalty as well.²⁸² Or, to put it in terms of the frugality perspective, more lenient treatment of unsuccessful attempts does involve a definite sacrifice of deterrence. With respect to crimes of recklessness and negligence the equal deterrence hypothesis is even weaker. Here, it is doubtful whether penalties applicable only when harm occurs add significantly at all to the deterrent effect of the underlying sanctions, and certainly it is clear that more lenient treatment of conduct not causing harm has a very substantial cost in terms of deterrence.²⁸³ Accordingly, the frugality principle, as usually formulated, cannot justify emphasis on results.

The frugality argument might, however, be treated as a more modest theory, calling only for recognition of the need to weigh the advantages of punishment against social costs that are too easily overlooked. In these terms the argument makes a very important point, but even then the claim that leniency should depend on the presence or absence of harm does not fare especially well. Let us suppose that a reduction in the

²⁸² See text accompanying notes 149-50 *supra*.

²⁸³ See text accompanying notes 151-60 *supra*.

penalty applicable to an inchoate crime will be less costly in terms of deterrence than the same reduction in the penalty applicable to the completed crime; the preceding analysis suggests that this is true in a number of important situations. The frugality argument could then be presented as follows: First, the penalty for the completed crime should be set at the optimal point, which (at least under certain simplifying conditions) is attained at the level at which the marginal benefits of added punishment (in terms of deterrence and other factors) no longer exceed its marginal social cost.²⁸⁴ To be sure, any attempt to determine actual marginal benefits and costs is almost hopelessly speculative, but our desire nevertheless must be to approximate this optimal point. Next, the frugality advocate notes our supposition that a reduction in the penalty applicable to the inchoate crime is less costly in terms of deterrence than the same reduction in the penalty applicable to the completed crime; in other words, the marginal benefits of punishment (assuming that the non-deterrence benefits are constant) are greater for completed crimes than for the corresponding inchoate crimes. It follows, therefore, that the optimal punishment level for the inchoate crime must necessarily be lower than the optimum level for the completed crime, at least if—on the cost side—the social harm associated with punishment is the same in the case of attempters as in the case of completers.

An important difficulty with this formulation of the argument is that the leniency for attempters not only implies an “arbitrary” distinction between attempters and completers, but also subjects the completers to more severe penalties than they themselves would have faced if both attempters and completers had been treated alike. As previously noted, “pure” arbitrariness seems particularly unfair under these circumstances. But even on a purely factual level, the reformulated frugality argument still embodies serious weaknesses, for the “cost equation” may very well be different for completed and inchoate crimes. From a frugality perspective, a reduction in a penalty reduces the overall social cost of punishment by an amount that must be a function of the number of defendants to whom the penalty applies. If the number sentenced for a completed crime is greater than the number sentenced for an inchoate crime, then the “marginal cost” of a given increase in

²⁸⁴ See generally Becker, *supra* note 170.

penalty would be less for the latter. In other words, at a given penalty level the lower marginal benefit from punishing inchoate crimes does not *necessarily* imply a lower optimal level of punishment, because the marginal social cost of punishing these crimes may be lower as well. Thus, even with all the simplifying of assumptions our frugality advocate was forced to make, he has still failed to establish that the optimal level of punishment is necessarily greater for completed than for inchoate crimes. It could be greater or the same, or it could even be lower. The answer depends in part on whether completers outnumber attempters and if so by how much.

Although we have little hope for quantifying the marginal deterrence benefits of added punishment, we can add some additional perspective by considering differences in the numbers exposed to punishment for inchoate and completed crimes. Intentional crimes are probably the group for which success is most likely; the ratio of completers to attempters should therefore be relatively high in this category. The ratio of *convicted* completers to *convicted* attempters is probably larger still since it seems likely that failure to report or to follow through on prosecution is higher for the latter. Although comprehensive statistics are not available,²⁸⁵ it seems quite possible that convicted completers are in fact much more numerous than convicted attempters.²⁸⁶ If this is true, the frugality argument suffers from a serious flaw, since the equal deterrence hypothesis was most nearly valid for intentional crimes. Though a reduced penalty for the unsuccessful attempt costs relatively little in terms of deterrence, it may be of little value in terms of frugality because a relatively small group benefits from the leniency. A smaller reduction in the penalty for the completed crime could have the same deterrence cost but make more sense in terms of frugality, because a much larger group of defendants could benefit by it.

With respect to crimes of negligence, the difficulty is just the reverse. Here, "attempters" (those who create the risk) are no doubt far more numerous than completers. Although fewer

²⁸⁵ The Uniform Crime Reports, for example, report attempts together with completed crimes as a single figure in the various offense categories. See, e.g., UNIFORM CRIME REPORTS-1971, *supra* note 165, at 6, 10, 12, 14, 18, 25.

²⁸⁶ The situation no doubt varies from crime to crime. In the case of murder, fatal assaults may in fact be much less numerous than non-fatal assaults involving sufficient intent to kill to be considered attempted murder. See text accompanying note 318 *infra*.

of the former are likely to be prosecuted, convicted "attempts" still far outnumber convicted completers. Here, therefore, a lower penalty in the absence of harm produces a very meaningful frugality gain, but it is precisely in this area that the lower penalty also involves a very substantial loss of deterrence. Here again, the frugality viewpoint might in fact require lowering the very substantial penalties applicable to the completed crime, penalties that have relatively little deterrence value.

This is not, of course, intended to suggest that the frugality argument is logically invalid under all conceivable sets of facts and circumstances. Whether lower penalties for inchoate crimes are justified depends on an assessment of the marginal deterrence benefits and marginal social costs of punishment, matters on which we can hardly claim to have precise knowledge. The important point is rather the converse—that there is nothing inherently valid about the frugality argument either. As usually formulated, the frugality argument purports to proceed from intuitively obvious premises to a logically ineluctible conclusion, justifying milder sanctions in the absence of harm. The argument conceals debatable and perhaps unacceptable moral judgments, but even more decisively, it simply seems wrong on its facts. From a frugality perspective, lower penalties for inchoate crimes could logically be bad or good. In general, we lack sufficient facts to know, and in quite a few instances such leniency seems much more likely to be harmful.

F. *Efficiency in Regulation*

In certain limited contexts, punishment based upon actual results might be viewed as a less intrusive or more efficient means of regulating conduct than other means available to the law. It could be claimed that this approach makes it possible to achieve the desired level of deterrence without resort to more restrictive techniques. Although the defenders of emphasis on results have not developed this argument, the notion is occasionally implicit, particularly in connection with the defense of strict liability offenses.

This type of argument is not, however, applicable in most of the situations we have considered, since emphasis on results rarely implies that the underlying conduct itself is not proscribed; rather the issue is simply one of the severity of pun-

ishment. And even if the underlying conduct is not criminal in the absence of a harmful result, as is sometimes true of negligent homicide, a judgment is nevertheless involved that the conduct is undesirable as such.²⁸⁷ In the case of many strict liability crimes, however, the conduct is not wrongful in itself, and it may even have affirmative social value. It is positively desirable, for example, that businessmen sell drugs to the public, exercising due care to insure that they are not impure. Only when harm occurs, when the drugs turn out to be adulterated, is the conduct condemned at all.²⁸⁸ In this situation the deterrence achieved by penalties requiring proof of negligence may be deemed insufficient, yet the underlying conduct cannot be prohibited outright. And supervising the qualifications of all who engage in the activity, or excluding particular groups considered dangerous, may be impractical.

One solution is to make the crime one of strict liability, an approach that necessarily implies emphasis upon actual results.²⁸⁹ Apart from its potential advantages in terms of deterrence, this approach could be viewed as a "less restrictive alternative," allowing most people greater freedom to engage in socially important endeavors than would be possible under more direct means of regulation.

The argument is not fallacious as far as it goes—the strict liability crime is indeed less restrictive than direct regulation, and it could well prove more efficient than any available alternative. Nevertheless, the factual underpinning of the argument seems inadequate to justify a strict liability approach with any generality. Those who continue to engage in the

²⁸⁷ See text accompanying notes 74-75 *supra*.

²⁸⁸ *E.g.*, *United States v. Dotterweich*, 320 U.S. 277 (1943).

²⁸⁹ A form of argument in defense of such an approach has been suggested by Wasserstrom:

To the extent to which the function of the criminal law is conceived to be that of regulating various kinds of conduct, it becomes relevant to ask whether this particular way of regulating conduct [strict liability] leads to more desirable results than possible alternative procedures . . .

. . . One of the deleterious consequences of strict liability offenses is the possibility that certain socially desirable institutions will be weakened or will disappear. The problem is twofold: first one must decide whether the additional deterrent effect of the strict liability statutes will markedly reduce the occurrence of those events which the statute seeks quite properly to prevent. And second, one must decide whether this additional reduction in undesirable consequences is more beneficial to society than the possible deleterious effects upon otherwise desirable activities such as banking or drug distribution.

Wasserstrom, *supra* note 74, at 738-39.

activity may be those who believe they can be careful enough, but there is no guarantee that these will be the ones who are in fact the most careful. Indeed, there is some reason to suspect that those who are most confident of their ability to avoid causing harm may be just the ones who are most likely to be especially careless.²⁹⁰ Thus, the strict liability crime may exclude a few accident-prone people from the activity, but it may well fail to select out most of those about whom the law should be most concerned. At the same time, it may exclude from the activity many others who could play a valuable social role but are unwilling to face the risk of suffering criminal penalties for reasons beyond their control. Indeed, if the penalties are serious, those who are careful and make provision for risks may be the most likely to take the sensible precaution of not engaging in this activity at all.²⁹¹

As a regulatory device, therefore, the strict liability approach is less restrictive only in a very mechanical sense; functionally it may tend to restrict precisely the wrong conduct. Likewise, the effect in reducing harm is clear only in the short run; the dynamic effect, under plausible assumptions about human behavior, could be to increase the total harm caused by increasing the proportion of those engaged in the activity who are relatively careless. It would be of interest to study from this perspective the effect of strict liability sanctions upon corporate and individual behavior. For the time being, the relevant empirical evidence remains unclear, and it would perhaps not be unnatural for a legislature simply to assume that the facts crucial to the validity of this argument are true.²⁹² Nevertheless, in the present state of knowledge, there appears to be little basis for urging that a legislature *should* make such an assumption.

²⁹⁰ This confidence may be one reason why such people are dangerous; if they were concerned about the danger, they would not be inadvertent so often. The argument does hold for those who are aware of their carelessness but are unable to control their failing. Whether this pattern is more common among those who are careless is a question on which psychological inquiry might be useful.

²⁹¹ This defect would not be present if the only penalty were a monetary fine calculated to approximate the total harm to society caused by the defendant's conduct. In this case, the fact that "payment of fines [may be] treated merely as a license to continue in operation . . ." would—far from being a drawback—ensure that the most efficient and careful actors, rather than those most easily intimidated by the threat of criminal sanctions, will survive and predominate. Wasserstrom, *supra* note 74, at 737; see Calabresi, *The Decision for Accidents: An Approach to Non-fault Allocation of Costs*, 78 HARV. L. REV. 713 (1965).

²⁹² Wasserstrom, *supra* note 74, at 739-40.

IV. THE DANGEROUSNESS JUSTIFICATION

One justification for emphasis on results advanced by many commentators is that the harm caused may provide some indication of the dangerousness of the conduct. In the case of reckless and negligent conduct, in particular, the risk created can never be measured with precision, and the harm actually caused may be an important measure of what this risk in fact was. Packer, for example, argues that even the much-criticized felony-murder rule at least embodies "a valuable insight drawn from common experience": that the felon who shot his victim manifested extreme recklessness.²⁹³ And Glanville Williams suggests that the failure of an attempt may reflect lack of cunning or careful planning; "a would-be criminal who constantly fails is less dangerous than one who constantly succeeds."²⁹⁴ Sir James Stephen, on the other hand, considers the dangerousness argument but seems to reject it.²⁹⁵

Courts seldom consider the dangerousness argument, since they are ordinarily content to apply present law without seeking to justify it. Nevertheless, cases can be found in which judges too have refused to regard the harm caused as a significant indication of dangerousness.²⁹⁶ In other instances, decisions reflect acceptance of the dangerousness argument, at least tacitly. In Texas, for example, the phrase "without due caution or circumspection" has been held unconstitutionally vague as the standard of liability in a reckless driving statute,²⁹⁷ but the same language has been held sufficiently specific in laws proscribing vehicle homicide²⁹⁸ and reckless

²⁹³ Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 598 (1963).

²⁹⁴ G. WILLIAMS, *supra* note 10, § 49, at 137. See also Note, *Why Do Criminal Attempts Fail? A New Defense*, 70 YALE L.J. 160, 166 (1960).

²⁹⁵ 3 J. STEPHEN, *supra* note 8, at 119. Looking to the result instead of to the actor's intent "seems to be a far less satisfactory test both of the moral guilt and of the public danger of an act of violence." *Id.* This criticism was directed to the French Code, in which penalties were related to the harm caused to an even greater extent than under the English law of Stephen's day.

²⁹⁶ In an English prosecution for reckless driving, the judge remarked: "The fact that a death resulted from a piece of dangerous driving did not make the dangerous driving any more or less [so]. It would be quite wrong for the court to measure a man's culpability by the amount of damage he did." Goodhart, *supra* note 61, at 19 (quoting *Burns v. Currell*, [1963] 2 Q.B. 433 (Streatfeild, J.)).

²⁹⁷ *Ex parte Chernosky*, 217 S.W.2d 673 (Tex. Crim. App. 1949). This is, of course, contrary to the great weight of authority. See, e.g., *People v. Grogan*, 260 N.Y. 138, 183 N.E. 273 (1932); *State ex rel. Zent v. Yanny*, 244 Wis. 342, 12 N.W.2d 45 (1943). See also *Nash v. United States*, 229 U.S. 373, 376-78 (1913).

²⁹⁸ *Pehl v. State*, 223 S.W.2d 238 (Tex. Crim. App. 1949).

causing of a collision.²⁹⁹ The cases can perhaps be reconciled on the ground that the decision as to when conduct involves a lack of "due caution" becomes too open-ended when no harm has in fact occurred.

A feeling that the harm requirement serves to confirm dangerousness may also underlie cases treating contributory fault of the victim as an "intervening cause" sufficient to exculpate the defendant.³⁰⁰ This is certainly hard to justify in terms of the traditional theory of criminal liability—the state has an independent interest in preventing loss of life, and conduct creating a foreseeable risk of injury should be deterred even if the victim has further accentuated the risk. In fact, the great majority of the cases have taken this view and rejected contributory negligence as a defense.³⁰¹ But the minority viewpoint could be justified on the theory that a result apparently within the foreseeable risk would not necessarily confirm the dangerousness of the defendant's conduct if the victim's behavior increased the likelihood of harm.

The validity of the dangerousness theory is in one sense clear. Suppose we group together all those whose conduct appears to have created the same risk, so far as this risk can be estimated on the basis of actions alone, and then divide this group into two classes—one consisting of those who have caused harm and the other consisting of those who have not. It is statistically inevitable that those who have caused harm will on the average have created higher risks, in terms of circumstances of which they should have been aware, than those who did not cause harm. The harmful result thus serves two functions under the dangerousness theory. First, it confirms the dangerousness of conduct so difficult to evaluate that we would otherwise be reluctant to condemn it. Secondly, even if we are confident enough of our appraisal to condemn the conduct in both situations, it is relevant to the grading of the offenses that those who did not cause harm had, as a class, created lower risks than those who did cause harm.

²⁹⁹ *Ex parte* Dickson, 261 S.W.2d 709, 710 (Tex. Crim. App. 1953) (*Chernosky*, *supra* note 297, involves "an entirely different offense which, insofar as the statute is valid, is complete without the occurrence of any collision").

³⁰⁰ See text accompanying notes 20-21 *supra*.

³⁰¹ See note 19 *supra*. It is sometimes stated that contributory negligence will constitute an intervening cause if it "looms so large in comparison with the [negligence of the defendant], that the [latter] is not to be regarded as a substantial factor in the final result." R. PERKINS, *supra* note 9, at 703.

A slightly different dimension is added by psychological theories concerning the interplay between conscious and unconscious intentions. Freud argued that divergence between an actor's conscious purpose and the results he actually achieves will often be explained by an unconscious intention to further a different purpose.³⁰² A defendant who attempted to shoot his victim but missed may, of course, have failed because of his inherent lack of skill or because the victim suddenly moved away. But he also may have failed because an unconscious desire not to kill interfered with his conscious purpose, causing him to aim poorly and miss a shot that would have given him no difficulty under other circumstances. And even the first group of explanations is not inconsistent with the possibility that the defendant's intention was ambivalent. If the defendant had always been a poor shot, his decision not to choose a weapon better suited to his talents may have been influenced by an unconscious intention that the plan fail; similarly, the victim may be lucky enough to move out of the way only because the defendant waited unnecessarily long before firing. Even if success is prevented only by police intervention at the last moment, it cannot always be said that the defendant's intention was unequivocal; he may have purposefully, though unconsciously, chosen to execute his plan at a time when apprehension was especially likely.³⁰³

The psychological implications of the harm caused are relevant to punishment in some of the same ways as the purely statistical implications. The occurrence of harm tends to confirm that the defendant intended to commit a crime, and those who cause harm will, as a group, have had intentions less equivocal than those who do not. But the psychological implications are different in a way that may be fundamental. While the strictly statistical approach suggests that the intent or inadvertence of actors in the two classes may be different, it does not distinguish between conscious and unconscious levels of thought. The Freudian approach, in turn, suggests that we cannot generalize about a difference in the conscious intentions of the classes of successful and unsuccessful actors. It could be, for example, that among the "successful" actors, those who unconsciously desire to cause harm and do so with-

³⁰² Freud, *Introductory Lectures on Psychoanalysis*, in *THE COMPLETE INTRODUCTORY LECTURES ON PSYCHOANALYSIS* 15-79 (J. Strachey ed. 1966).

³⁰³ Cf. E. STENDEL & N. COOK, *ATTEMPTED SUICIDE, ITS SOCIAL SIGNIFICANCE AND EFFECTS* 84 (1958); Note, *supra* note 294, at 166.

out conscious intent are much more numerous than those who unconsciously wish to avoid harm but succeed because of a conscious purpose to do so; unconscious purposes might similarly tend to prevail in the class of unsuccessful actors.

If this is true, the *conscious* intentions of the successful actors might not be more dangerous on the average than those of the unsuccessful actors. To the extent that it is considered appropriate to assess punishment solely on the basis of the conscious state of mind, different treatment of successful and unsuccessful actors would not necessarily be warranted. On the other hand, the psychological insights reinforce the statistical implications concerning the dangerousness of the actor's conduct. Accordingly, if it is considered proper to impose greater punishment on those whose conduct was more dangerous (or who are believed more likely to be dangerous in the future),³⁰⁴ both the psychological and statistical approaches provide a basis for greater punishment in the cases where harm occurs,³⁰⁵ even though culpability and deterrability, if gauged in terms of the conscious state of mind, would be considered equivalent for the two classes.

Even if conscious intentions are not controlling, the dangerousness theory is not entirely satisfying as an explanation for emphasis on the harm caused. In the first place, crimes that require proof of harm are often graded as more serious than those that do not, even when the culpability required for the inchoate crime is significantly greater. Thus, in most states the penalties provided for vehicle homicide caused by negligence are substantially greater than the penalties provided for reckless driving that does not cause harm,³⁰⁶ this is also true under the Model Penal Code.³⁰⁷

³⁰⁴ There is, of course, some question whether an exercise of unconscious controls in one instance can support a prediction that such controls will predominate in the future. Apart from this, fixing punishment on the basis of dangerousness, in the sense of predicted future dangerousness, could be attacked as an impermissible form of preventive detention. For present purposes, however, the legitimacy of this objective is assumed. See text accompanying note 335 *infra*.

³⁰⁵ It would also be possible to consider dangerous unconscious desires irrelevant to punishment when the conscious intentions are lawful, but to treat unconscious control as a mitigating factor when the conscious intention is unlawful.

³⁰⁶ See, e.g., D.C. CODE ANN. §§ 40-605, 606 (1968) (up to three months—reckless and no harm; up to one year—careless and death).

³⁰⁷ Reckless conduct creating a risk of death is a misdemeanor if no harm results, MODEL PENAL CODE § 211.2 (Official Draft 1962), and even if bodily injury but not death is caused, *id.* § 211.1(1)(a). Negligent creation of a homicidal risk is a felony of the third degree if death results. *Id.* § 210.4.

Similarly, penalties authorized for assault with intent to kill are almost invariably lower than those provided for second-degree murder.³⁰⁸ Yet the former crime requires a specific intent to take human life³⁰⁹ while the *mens rea* for second degree murder is satisfied merely by a reckless disregard for life, or even a reckless threatening of a serious bodily injury.³¹⁰ The differences in penalty cannot be justified on a dangerousness theory if we continue to take seriously the distinctions between these descriptions of the underlying conduct.

Even if the law were adjusted to eliminate these glaring disparities between dangerousness and the applicable sanction, the dangerousness argument remains troubling. The argument calls for more severe sanctions for the *class* that causes harm, on the basis of its greater dangerousness on the average; but of course we know that the class will contain some who were no more dangerous, and perhaps much less dangerous, than many in the "less dangerous" class. The use of harm as a sorting factor means, in other words, that the "less dangerous" class will be at once overinclusive and underinclusive. Unfortunately we have little basis for judging the extent of this mis-sorting. Criminology studies ordinarily focus on behavior that results in harm; similar conduct not culminating in a completed offense is usually ignored.³¹¹ The F.B.I. crime statistics do not even distinguish between attempts and completed crimes in the various offense categories.³¹² This void must be filled if we are to have any basis for judgment as to the dangerousness of various types of behavior and the actual value of harm as a sorting factor.

A series of studies on fatal and non-fatal assaults in the city of Chicago provides one source of information of this kind. The first study compared the fatality rate in knife attacks to that in gun attacks;³¹³ a second compared fatality rates in

³⁰⁸ See, e.g., MODEL PENAL CODE §§ 5.05(1), 210.2(2), 211.1(2) (Official Draft 1962); PA. STAT. ANN. tit. 18, §§ 905(a), 2502(b) (1973). See also MODEL PENAL CODE § 5.05, Comment at 186-97 (Tent. Draft No. 10, 1960).

³⁰⁹ See, e.g., *Regina v. Grimwood*, [1962] 2 Q.B. 621; MODEL PENAL CODE § 5.01(1) (b) (Official Draft 1962). See also R. PERKINS, *supra* note 9, at 573-74, 763.

³¹⁰ See MODEL PENAL CODE § 210.2(b) (Official Draft 1962); N.Y. PENAL LAW § 125.25(2) (McKinney 1967). See also R. PERKINS, *supra* note 9, at 46, 763.

³¹¹ Zimring, *supra* note 242, at 109-10. An exception appears to be Pittman & Handy, *Patterns in Criminal Aggravated Assault*, 55 J. CRIM. L.C. & P.S. 462 (1964).

³¹² See note 285 *supra*.

³¹³ Zimring, *Is Gun Control Likely to Reduce Violent Killings?*, 35 U. CHI. L. REV. 721 (1968).

attacks with guns of various calibers.³¹⁴ In both cases it proved true that the fatal attacks included a higher proportion of the most dangerous types of attacks (wounds to vital areas, multiple wounds and more dangerous weapons) than the non-fatal attacks. But surprisingly, most of the fatalities resulted from attacks of relatively low dangerousness (such as single-wound shootings), and when the attacks were analyzed by available indicia of dangerousness, substantial percentages of fatal and non-fatal results were found in virtually all categories. As a result, the comparison of knife and gun attacks suggested the conclusion that:

Many nonfatal attacks with knives and guns are apparently indistinguishable in motive, intent and dangerousness from many fatal attacks. Indeed, the overlap between fatal and nonfatal assaults with knives and guns is much more impressive than any differences that were noted.³¹⁵

Even more striking support for this observation is found in the study of weapon caliber. The estimated death rate from gun attack, by wound location, number of wounds, and gun caliber, is shown in the table below.³¹⁶

As the table shows, the type of attack that seems intuitively most dangerous—multiple wounds to the head or chest with a .38 caliber weapon—is indeed fatal much more often (sixty-eight percent of the time)—than an apparently low-dangerousness attack—such as a single .22 caliber wound to the abdomen, back or neck (seventeen percent). But what is striking is that even these relatively precise tests of dangerousness still fail to explain a great many of the actual outcomes; in one of the most dangerous categories, thirty-two percent of the attacks were not fatal, while in one of the least dangerous, seventeen percent resulted in deaths.³¹⁷ Nor does Freudian theory pro-

³¹⁴ Zimring, *supra* note 242.

³¹⁵ *Id.* 97

³¹⁶ *Id.* 104.

³¹⁷ The categories could, at least in theory, be narrowed by specifying more precisely the wound area and number of wounds, as well as by taking account of the distance between victim and assailant, and so on. Conceivably, a more refined table of this kind might explain, in terms of dangerousness, why at least some of the attacks involving multiple head or chest wounds with a .38 caliber weapon did not result in death. But the patterns revealed in Table 4 strongly suggest that no amount of further refinement could ever perfectly separate the fatal and non-fatal assaults, and that the bulk of the categories, no matter how narrow, would still contain some cases of each type, differentiated solely by chance.

Table 4

*Estimated Death Rate from Gun Attacks by Wound Location,
Number of Wounds, and Gun Caliber*

	<i>Single wound</i>				
	.22	.25	.32	.38	>.38
Head and chest	16%	50%	44%	55%	63%
	(69)	(14)	(18)	(40)	(8)
Abdomen, back, neck	17%	13%	4%	20%	25%
	(52)	(15)	(24)	(25)	(4)
Shoulder, arm, leg	0%	2%	0%	0%	0%
	(170)	(71)	(52)	(83)	(11)
Total	7%	10%	10%	18%	27%
	(291)	(100)	(94)	(148)	(23)
	<i>Multiple wound</i>				
	.22	.25	.32	.38	>.38
Head and chest	28%	25%	35%	68%	100%
	(19)	(4)	(17)	(25)	(2)
Abdomen, back, neck	0%	33%	18%	18%	—
	(11)	(3)	(11)	(11)	
Shoulder, arm, leg	0%	0%	—	0%	—
	(6)	(3)		(22)	
Total	14%	20%	29%	40%	100%
	(36)	(10)	(28)	(58)	(2)

vide any apparent basis for explanation; conflicting conscious and unconscious intentions cannot explain why some shots that find their mark in the head or chest prove fatal while many others do not. Yet under present law the nonfatal attacks would necessarily be treated as relatively “nondangerous” attempts, while the others would presumably be the subject of murder prosecutions. Though it has long been recognized that such anomalies *could* arise, the Chicago studies emphasize that they arise in very significant numbers.³¹⁸ As the gun-caliber study concludes:

[T]here is a good deal of overlap between the structure, intention and motivational background

³¹⁸ The gun caliber study involved a total of 1,115 gun attacks resulting in 156 fatalities, all occurring during a period of a little over four months. Zimring, *supra* note 242, at 98.

of most serious but nonfatal attacks and most homicides in Chicago [W]hatever else may separate fatal from nonfatal firearm attacks, the element of chance must play an important role, because all attacks to the head and trunk can cause death (but less than a majority do) and more than 60% of all lethal attacks are single-wound shootings [T]here is a strong suggestion that most people who attack with guns act in ways that are distinguishable only on the basis of result.³¹⁹

It remains true, of course, that the class of cases resulting in a fatality involves more dangerous conduct, on the average, than the class of cases not resulting in a fatality. But even in the former, "high-dangerousness" class, *most* of the conduct in fact appears to fall in the "low dangerousness" category. Conduct involving a relatively slight chance of death is so much more common than conduct involving a high risk of death that most homicides appear to be the result of the "low-risk" behavior. In other words, if we accept harm as a proxy for "high dangerousness," we find ourselves misled more than half the time.³²⁰ Such evidence casts considerable doubt on the value of harm as a sorting device, at least with respect to cases of violent assault.³²¹

Even if harm can be shown a much more reliable guide to the risk created, it would at best seem useful only as the basis for a presumption that the defendant's conduct was especially dangerous and therefore warrants an aggravated penalty. Indeed, present law could be viewed as adopting precisely this presumption, and endowing it with irrebuttable status. If dangerousness is the concern, however, it seems inappropriate to make the presumption irrebuttable, and it might even be subject to constitutional attack in these terms.³²² Using harm as the basis for a *rebuttable* presumption of aggra-

³¹⁹ *Id.* 110-11.

³²⁰ If absence of a fatality is assumed to be a proxy for "low dangerousness," the assumption will of course prove accurate in a high percentage of the cases. The difficulty is that in *both* the harm category and the no-harm category, *most* cases appear to involve low-risk behavior. Mitigation of punishment for the no-harm category cannot be based on the characteristic of low dangerousness common to this class, if the same characteristic is present in the majority of cases in the harm category.

³²¹ It would be instructive to attempt a comparable study of dangerousness for fatal and non-fatal motor vehicle accidents.

³²² *Cf.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

vated dangerousness would give recognition to the legitimate significance of harm³²³ without stifling a complete and meaningful evaluation of the actual dangerousness of the defendant's conduct. It would become possible for a defendant to avoid the most severe sanctions by showing that despite the occurrence of death, his conduct was not of the most dangerous kind. It could also be made permissible for the prosecution to establish the aggravating factor of extreme dangerousness even where harm has not occurred.³²⁴ As the Chicago studies show, such cases would be far from rare in connection with knife and gun assaults. Even for crimes based on negligence, the difficulty of proving dangerousness by clear, objective evidence is easily exaggerated; independent proof of dangerousness is relatively easy to obtain in careless driving cases,³²⁵ and these account for the overwhelming major-

³²³ Such a presumption would itself be subject to constitutional scrutiny, and the Chicago studies suggest there might be doubt in some contexts as to whether the "rationality" requirement would be satisfied. *Cf.* *United States v. Romano*, 382 U.S. 136 (1965); *Tot v. United States*, 319 U.S. 463 (1943). The ALI proposal for a presumption of this kind in felony-murder situations, *see* text accompanying note 328 *infra*, could well be vulnerable in these terms. *Cf.* text accompanying notes 162-63 *supra*.

³²⁴ Formally, the aggravating factor might be defined as, for example, acting "recklessly under circumstances manifesting extreme indifference to the value of human life." *Cf.* MODEL PENAL CODE § 210.2(1)(b) (Official Draft 1962). A defendant who acted with this state of mind and caused or attempted to cause serious injury would be guilty of either homicide or aggravated assault, depending on whether death occurred. The authorized penalties would in either event be the same, but the occurrence of death would have the effect of raising a presumption that the defendant had indeed acted "recklessly under circumstances manifesting extreme indifference to the value of human life." The presumption could be rebutted in spite of the occurrence of death (in which case the defendant would at most be guilty only of a lesser degree of assault). Conversely the element of extreme recklessness necessary to establish the aggravated assault could be proved in appropriate circumstances even in the absence of death.

Similarly, offenses might be graded by a variety of mixtures of intent, result, and dangerousness, with dangerousness specified by "objective criteria" such as weapon type, number of wounds inflicted or attempted, and so on. *See* Zimring, *supra* note 242, at 113-18. Such an approach would, like use of a rebuttable presumption, permit an offense to be treated as very serious even in the absence of death (where objective criteria of high dangerousness were fulfilled) but require an offense to be treated as less serious, even given a death together with an "intent to kill," where all objective criteria of high dangerousness were absent.

Since wound location is itself a kind of result that may or may not reflect factors within the defendant's knowledge or control, it would not be made a "statutory harm," with irrebuttable significance. Like death or any other result, wound location would, however, be relevant as evidence of dangerousness or intent.

³²⁵ *See* COMM. ON ENFORCEMENT, PRESIDENT'S HIGHWAY SAFETY CONFERENCE, *supra* note 217, at 12. It might be desirable to require, in the absence of harm, that the evidence strongly corroborate dangerousness. *Cf.* MODEL PENAL CODE § 5.01(a) (Official Draft 1962).

ity of all manslaughter prosecutions.³²⁶

A rebuttable presumption of the kind suggested would hardly be a legal novelty. The law already presumes that the defendant intended "the natural and probable consequences" of his act, that is, the harm he caused, and this presumption is generally rebuttable.³²⁷ Similarly, the ALI, in recommending repeal of the felony-murder rule, proposed that recklessness be presumed (subject to rebuttal) where the actor is engaged in committing a dangerous felony.³²⁸ A shift from present law to a rebuttable presumption of dangerousness would have the virtue of eliminating rigid emphasis on results without radically changing the contours of the criminal law. The change would nonetheless be one of substance, permitting meaningful inquiry into the precise nature of the act, allowing mitigation in many cases where harm occurs, and permitting greater severity, if deserved, where highly dangerous behavior fortuitously failed to cause harm.

It might be argued that such an inquiry into the precise degree of dangerousness is difficult and a waste of time, since most of those who cause harm are in fact sufficiently culpable—whatever the objective dangerousness of their conduct, they had the requisite intent to kill. But of course the same sort of culpability is apparently present in most of those whose behavior under similar circumstances does not cause death. And in any case, the Chicago studies suggest that what the law regards as the "intent to kill" is an indiscriminate guide to the relevant state of mind. There is a wide difference in intention between the defendant who inflicts a single knife or gunshot wound to a non-vital area and the one who pumps six bullets into his victim's brain. In the former case the intent to kill may be fleeting and ambivalent, but the law considers that culpability has been adequately established. And cases of

³²⁶ It has been estimated that vehicle homicides account for about 99% of all cases of manslaughter by negligence. See MODEL PENAL CODE § 201.4, Comment at 53 & n.6 (Tent. Draft No. 9, 1959).

³²⁷ See Collings, *Negligent Murder—Some Stateside Footnotes to Director of Public Prosecutions v. Smith*, 49 CAL. L. REV. 254, 264 (1961).

³²⁸ MODEL PENAL CODE § 201.2(1)(b) (Tent. Draft No. 9, 1959). The converse problem arises in economic crimes when the defendant makes restitution prior to initiation of a prosecution. Although the usual concern with the harm caused might suggest that restitution would be allowed as a defense, the cases sensibly reject this approach. See, e.g., *Savitt v. United States*, 59 F.2d 541 (3d Cir. 1932). At the same time, however, it is recognized that repayment is relevant to the question whether there was an intent to misappropriate funds in the first place. See, e.g., *United States v. Wicoff*, 187 F.2d 886 (7th Cir. 1951).

this type appear to be the predominant source of deaths from violent attack. The knife-gun study found that "[m]ost homicide is not the result of a single-minded intention to kill at all cost."³²⁹ Similarly, the gun caliber study concluded:

[M]ost violent attacks with deadly weapons, whether fatal or nonfatal, are pursued with ambiguous intentions as to whether the victim should die In 62 percent of all fatal firearm attacks, . . . the offender did not inflict more than one wound, in spite of his ordinary ability to do so.³³⁰

As a result, there is little basis for assuming that the occurrence of harm obviates the need for further detailed inquiry into defendant's actual intentions.

In any event, evidence of this nature would undoubtedly be introduced wherever intent or negligence is in issue. Even if such evidence could be excluded at the trial, as would be the case for strict liability crimes, it would have to be considered in determining sentence, so that no time or trouble would be saved,³³¹ while the scope for discretion in sentencing would suffer further expansion. Finally, perhaps most fundamentally, careful inquiry into the defendant's state of mind and his conduct should never be barred on grounds of inconvenience in a system that supposedly punishes for fault and takes seriously the presumption of innocence.³³²

Another sort of objection to the rebuttable presumption concept concerns its potential for aggravation of penalties. When this approach permits a defendant who caused harm to avoid the most severe penalties, the concept has great appeal. When it is asserted, however, that the same indicia of dangerousness might point the way to an aggravated penalty even in the absence of harm, objections are more likely to be raised. The frugality element of this concern has already

³²⁹ Zimring, *supra* note 242, at 97.

³³⁰ *Id.* 111.

³³¹ See G. WILLIAMS, *supra* note 10, § 89, at 257. The prosecution, of course, benefits by the relaxation of strict evidentiary rules at the sentencing stage. Williams v. New York, 337 U.S. 241 (1949). This makes it all the more appropriate that dangerousness be aired in connection with the trial of guilt or innocence, since the nature of the issue calls for a full adversary proceeding rather than an open-ended sentencing inquiry.

³³² In recommending repeal of the objective test of intention required by Director of Public Prosecutions v. Smith, [1961] A.C. 290, the British Law Commission noted that "the inquiry into the state of mind of a man accused of such a serious crime as murder must necessarily be a searching one and . . . its difficulties must be faced." BRITISH LAW COMM'N, IMPUTED CRIMINAL INTENT ¶ 18(a), at 15 (1967).

been considered.³³³ But in terms of the dangerousness argument itself, such objections seem ill-founded. For present purposes there is no need to insist that differentiations in dangerousness *ought* to be made or that more severe penalties *ought* to be imposed in cases of aggravated dangerousness. This is indeed a troublesome position,³³⁴ but it is not necessary to argue it here. The point is simply that the law does make this differentiation now, using harm as the determinant of aggravated penalties. This appears to be an utterly unsatisfactory method of identifying the most dangerous sorts of offenders, and for those who regard the objective as an important one, the alternative of a rebuttable presumption is available. For those who balk at the potential aggravation of penalties, it seems fair to ask whether the dangerousness theory is indeed the basis for their willingness to attribute significance to the occurrence of a harmful result.

V. CONCLUSION

A. *Limited Scope of the Study*

Before summarizing our conclusions with respect to the various justifications for emphasis on results, it would be well to stress the very limited nature of the issue that has preoccupied us in this Article. We have ranged widely over the corpus of the criminal law, touching on the vagaries of *mens rea*, the law of homicide, attempts, causation, strict liability, responsibility for negligence, and many other issues that have concerned commentators for centuries and will likely be of interest for centuries to come. We have considered many of the asserted goals of the criminal law, some of them—such as retribution, deterrence and isolation of the dangerous—highly controversial in terms of their philosophical basis and empirical foundations. Yet with the sole exception of the issue of emphasis on results, this Article takes no position on any of the very live questions that might be raised with respect to such matters. Our concern has been to see whether there is *any* perspective (other than the purely retaliatory one), no matter how controversial or idiosyncratic, from which distinctions based on harm can be justified.³³⁵

³³³ See text accompanying notes 221-86 *supra*.

³³⁴ See Zimring, *supra* note 242, at 113-22. See also note 304 *supra*.

³³⁵ See text accompanying note 34 *supra*. An exception was made in the effort

Similarly, no effort has been made to establish precisely where emphasis on results involves penalties that should be deemed excessively severe rather than excessively lenient. This question can be thought of as one of choice among our three paradigmatic penalty structures—P-1, involving severe penalties across the board; P-2, involving severe penalties only when harm occurs; and P-3, involving milder penalties across the board.³³⁶ The analysis has centered on the question whether P-2 can be considered preferable to *either* P-1 or P-3, and we have found that in quite a number of instances, from quite a number of different perspectives, P-2 in fact is demonstrably inferior to *both*. This leaves for consideration the question whether P-1 should be preferred to P-3, whether rejection of P-2 will or should lead to greater or less severity in punishment. In a few instances, the analysis has shed light on this issue, but for the most part the question remains unanswered. This lacuna may prevent some readers from deciding whether they are happy or unhappy with the conclusions reached, but it should not obscure the soundness or unsoundness of the conclusions themselves. Whether P-1 should ultimately be preferred to P-3, whether severe penalties are better than milder ones, can ordinarily be determined only by fixing priorities among goals, and even then the question will remain clouded by uncertainties and differences in values. Here again, the present Article refrains from taking a position on the issue, important though it is.

In this sense, the focus of the present Article is exceedingly narrow. Many of the central questions concerning punishment and the grading of offenses remain to be considered. The justification for emphasis on results is only one small part of this larger problem.

B. *The Case for Equal Treatment*

Our examination of the justifications for emphasis on results has placed the burden of proof squarely on the defenders of the status quo. We have noted that attributing importance to harm caused seems on its face anomalous, and we have therefore simply assumed that emphasis on results requires

to explore the values implicated by the notion of frugality in punishment. See text accompanying notes 241-81 *supra*.

³³⁶ See text accompanying notes 137-39 *supra*.

some justification, without pausing to consider whether there are any affirmative reasons for ignoring the actual result. In fact, the affirmative reasons for equal treatment are rather obvious ones, but it is nevertheless worthwhile to have them clearly before us. First, of course, is the general principle that like cases ought to be treated alike. This maxim, however, proves a rather weak reason for equal treatment. It cannot come into play at all until we are persuaded that cases differing only with respect to harm caused are indeed "alike," and consideration of this question simply reopens all the arguments for emphasis on results. In any event, even if we regard such cases as essentially "alike," we are left uncertain whether the maxim should be followed or, as in so many other areas, politely ignored.³³⁷ Perhaps the most that can be said is that following the maxim enhances the apparent justice and fairness of the criminal law, and that this benefit ought not be sacrificed without some compensation. The defenders of the status quo may at least be asked what this compensation is.

The essence of the case for equal treatment rests not on the precept of treating like cases alike, but rather on the objectives of the criminal law itself. These objectives are variously formulated. They may include retribution (in the sense of punishment in accordance with moral fault), general deterrence of the population at large, specific deterrence of the individual offender, reformation and treatment of the offender, and isolation of dangerous offenders.³³⁸ In pursuit of any of these objectives, or of several in combination, the lawmaker might wish to make punishment turn on a variety of factors. But the occurrence of harm would not seem, at least at first glance, to be among those to be considered. The proper disposition for purposes of specific deterrence or rehabilitation would presumably turn on the defendant's background, personality, psychological problems, and related factors, not even in part on whether harm was caused. Similarly, a sentence designed to isolate a defendant thought potentially dangerous for the future would be based on an evaluation of personality, past conduct, and other factors related to predicting behavior. Harm might be an indirect guide to future dangerousness, but it is not obvious a priori whether a harmful result should be an

³³⁷ See text accompanying notes 277-79 *supra*.

³³⁸ Retaliation has been deliberately excluded. See text accompanying notes 50-51 *supra*.

aggravating or mitigating factor,³³⁹ its significance must be shown. For purposes of deterrence, sanctions are assumed to influence people at the point at which they embark on a given course of antisocial conduct, with certain perceptions as to its potential consequences. Accordingly, there is again some reason at least to begin with the assumption that where conduct and the actor's perceptions as to its consequences are the same, the penalty should be the same, regardless of the actual outcome.³⁴⁰ Finally, in terms of retribution, the reasons for equal treatment are clearer still. Moral culpability may turn on the nature of the acts committed, the offender's motives and intent, extenuating circumstances, and so on, but the occurrence of harm has no apparent bearing on the degree of moral blameworthiness.

When the law prevents imposition of the same penalty, as present law ordinarily does, the objectives of the criminal law are necessarily disserved. If, for example, the penalty for attempted murder is appropriate in terms of rehabilitation, or deterrence, or retribution, then the greater penalty for successful murder is necessarily too severe in terms of these goals. Conversely, it could be that the penalty for murder is in fact the optimal one for cases of this kind; then the more lenient sanction for attempted murder would appear inadequate to serve society's interests in retribution, deterrence, and rehabilitation.³⁴¹

Thus, the essence of the case for equal treatment is that inequalities imply failure to pursue the goals of the criminal law in the best possible way. In some cases the sanction will be far too low for adequate deterrence, for example. In others, perhaps more frequently, the penalty for causing harm, largely a holdover from the days of retaliatory justice, is excessively severe in terms of deterrence or any other presently accept-

³³⁹ The very failure of an attempt to kill may render a repeat attempt more likely. Harm may, of course, be taken as an indication of the "objective" dangerousness of the act itself, but it proves a very crude guide for this purpose, *see* text accompanying notes 302-21 *supra*, and the dangerousness of the act is in turn only a crude guide to the potential dangerousness of the actor in the future.

³⁴⁰ *See* text accompanying note 76 *supra*.

³⁴¹ The authorized sanction must of course be viewed as reflecting the compromise of competing goals, but emphasis on results is still necessarily inconsistent with whatever values and priorities have been established. If the penalty for attempted murder reflects the proper adjustment of such objectives as deterrence, rehabilitation, and retribution, and provides the optimum sanction for cases of this kind, then the penalty for murder is necessarily too severe in terms of the relative values assigned to these goals.

able objective. In either event, the inequalities necessarily frustrate the retributive objective of ensuring that differences in punishment correspond to differences in moral blameworthiness. Such a situation is not only "anomalous" or "irrational" but also extremely costly in impeding achievement of the goals of the criminal law. The defenders of emphasis on results can quite properly be asked to explain in what ways the distinctions based on the occurrence of harm serve a useful purpose.

C. *The Justification for Emphasis on Results*

Of the arguments we have considered, a number provide no tenable reason for emphasis on results. These include the justifications in terms of retribution, "characteristicalness," the incentive to desist, and retaliation as a means to an end. The justification of efficiency in regulation could conceivably provide a basis for emphasis on results in the very limited area of strict liability offenses of a public welfare nature, but even this rationale cannot be considered either sound or unsound in the absence of studies of the actual impact of strict liability on risk creation in this context. The dangerousness argument supports at most only a rebuttable presumption of an aggravated offense where harm occurs, and even this presumption could be challenged as irrational in certain contexts.

None of the remaining arguments—jury nullification, frugality, and administrative discretion—proves persuasive as a general explanation for relating punishment to harm caused, although some of them do seem valid with respect to some crimes, under some circumstances and given some assumptions. From this it could, perhaps, be concluded that there is something to the notion of emphasis on results after all, that the various arguments do have a certain cumulative force, and that the present pattern of the law is not so irrational as it might appear. It seems unnecessary, however, to limit any conclusion on the matter to such general terms. Despite the many questions left unresolved, either because more empirical information is needed or because conflicting interests may provoke legitimate differences of opinion, the proper approach in some areas does emerge with reasonable clarity.

With respect to intentional crimes, we should consider first the case of a mandatory death penalty. Because there has never been experience with such a penalty's being truly mandatory, it is impossible to know to what extent it could be a

better deterrent than any alternative sanction, but it seems plausible to assume that such a penalty would provide significant additional deterrence. On this assumption, the jury nullification argument would justify limiting the penalty to cases in which the relevant harm (presumably death) occurs. The applicability of the administrative discretion rationale is unclear, since we do not know how the law can in fact ensure the truly mandatory nature of the death penalty—excluding possibilities for plea bargaining, decisions to charge only a lesser offense, and so forth. If all possible discretion can in fact be eliminated, this rationale becomes irrelevant; if not, it would of course offer a strong basis for limiting the supposedly “mandatory” penalty to cases in which harm occurs. The relevance of the frugality argument is also unclear. From one perspective, emphasis on results appears to spare from the death penalty those who attempt and fail; they may face only twenty years’ imprisonment or life imprisonment with the possibility of parole. But if the same deterrent effect could be achieved by punishing the attempters more severely, and completers less severely (life imprisonment without parole for both), the net result might be viewed as a frugality gain, especially if completers outnumber attempters. Nevertheless, at least under some assumptions, the frugality argument would support emphasis on results with respect to a mandatory death penalty.³⁴²

In the case of the other penalties applicable to intentional crimes, neither jury nullification nor frugality provides a plausible basis for emphasis on results. Higher penalties where harm occurs can have a significant additional deterrent effect (except apparently in the case of a discretionary death penalty), but juries are unlikely to resist conviction, and there is no necessary frugality gain since in many instances the larger group of defendants may be the completers, who suffer penalties *more severe* than they would have to face (to provide the same level of deterrence) if attempters and completers were treated equally. In these instances emphasis on results appears highly objectionable in terms of the concern for frugality in punishment.

³⁴² Such a penalty would, of course, remain vulnerable under the eighth amendment. Apart from the cruelty of the death penalty itself, such a system of administering capital punishment might be deemed cruel and unusual because those subject to the death penalty (having caused death) would be separated from those who were not (non-murdering felons or unsuccessful attempters) solely by the arbitrary “lottery” mechanism of harm. See text accompanying notes 250-53 *supra*.

The administrative discretion rationale does justify emphasis on results with respect to petty intentional crimes, such as simple assault. For more serious offenses, discretion in choosing to prosecute is unlikely to be a factor. Discretion with respect to plea bargaining and imposition of sentence may be somewhat curtailed by emphasis on results, assuming equal treatment would subject attempts to a more severe penalty, but even then the contribution to solving the fundamental problems of discretion seems rather minor. Moreover, where a requirement of equal treatment would lead to less severe sanctions for the completed crime, emphasis on results serves only to aggravate the problems of discretion.

With respect to crimes of recklessness or negligence, jury nullification, frugality, and administrative discretion all prove inadequate to justify emphasis on results. Additional penalties where harm occurs could produce some additional deterrence, but on existing evidence it seems most unlikely that the gain is significant, particularly with respect to the motor vehicle offenses that comprise the great bulk of such cases. As a result, the additional sanction for causing harm appears, if anything, to violate the frugality principle, and to exacerbate the dangers of administrative discretion. Essentially the same deterrence could be achieved, without risk of nullification, by simply eliminating this additional penalty.

For strict liability crimes, we should again consider first the special case of a mandatory death penalty, a distinct possibility with respect to felony-murder. As previously mentioned, such a penalty might have some additional deterrent effect, though the gain, in terms of deterring either the underlying felony or the loss of life, seems much more speculative here than in the case of intentional crimes. If we do assume some deterrence benefit, then emphasis on results in this situation would be supported by the jury nullification rationale. The administrative discretion and frugality arguments might also be applicable, subject to the qualifications already discussed in connection with use of the death penalty for intentional crimes. Apart from the rather special case of a mandatory death penalty for felony-murder, emphasis on results does not seem justified for other strict liability situations. The gain in terms of deterrence seems too slight to bring either the jury nullification, administrative discretion, or frugality rationales into play.

This somewhat sketchy review of the conclusions reached

should make clear that emphasis on results appears justifiable only in a very limited number of areas. Widespread changes must therefore be made in the definition and grading of specific offenses in order to bring the content of the criminal law into harmony with its stated goals. One example that emerges with particular clarity is the case of the felony-murder rule. Except with respect to mandatory death penalties, the emphasis on results implicit in the rule finds no support in any of the arguments considered. And it seems fairly clear that the appropriate way to eliminate the inequality here is by reducing the penalty applicable for causing death, not by raising the penalty applicable in the absence of death. The felony-murder rule should therefore be abolished.³⁴³

Another obvious candidate for immediate reform is vehicle homicide by recklessness or negligence. Here too, emphasis on results seems devoid of support in the arguments considered. While, as always, the relevant empirical information remains imperfect, the available facts provide ample basis for responsible judgment. In theory the inequality might be eliminated by authorizing substantial prison terms for reckless driving not resulting in death, but this approach is clearly foreclosed by the danger of jury and administrative nullification. Equality should therefore be achieved by invoking only the relatively mild sanctions now authorized for reckless driving. Experiments might be attempted involving some increase in these penalties, within the limits imposed by the nullification problem, but distinctions should no longer be drawn solely on the basis of death.³⁴⁴ The crime of vehicle homicide or involuntary manslaughter should for practical purposes disappear from the statute books.

Total elimination of emphasis on results, along these lines, appears appropriate for a great many other crimes. The precise form and direction of the changes required merits careful

³⁴³ The occurrence of harm could conceivably be made the basis for a presumption of extreme dangerousness, or as in the ALI formulation, the mere act of engaging in the felony might raise a presumption of "extreme indifference to the value of human life." See note 324 *supra*. Both of these presumptions seem vulnerable to attack on due process grounds, however. See note 323 *supra*.

³⁴⁴ It would presumably be proper to make the occurrence of death (or more appropriately, the occurrence of a serious collision) the basis for a rebuttable presumption of extreme dangerousness, or reckless indifference to life. But the penalty applicable when these elements are established should still be rather low, and it should remain open to the prosecution to establish such elements even in the absence of death.

study. On the other hand, emphasis on results seems altogether defensible in some areas and from some perspectives. In these situations, reexamination of existing law, in terms of the present analysis, nevertheless remains a necessity. As indicated at the outset, many problems associated with *mens rea* and the law of attempts have never been resolved satisfactorily, due to the absence of acceptable or coherent reasons for attributing significance to the harm caused; the entire field of causation in criminal law is utterly bankrupt for the same reason.³⁴⁵ Identification of the precise policies served by emphasis on results should provide a basis for more meaningful efforts to tackle these problems.

³⁴⁵ See Weinreb, *supra* note 15, at 147 & n.14.