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The elements of insanity under section 20 of the German Criminal Code and the methods of ascertaining their presence have long been the subjects of controversy in the Federal Republic of Germany. The matter is debated not only by theoreticians and practitioners of the criminal law but also by social scientists employing very different approaches.[1] Within the con-

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* Dr. jur., Richter, Landgericht, Bonn & Köln; Ref. im Bundesministeriums der Justiz, Bonn, 1950; o. Prof., Heidelberg, 1963; Emeritierung, 1982.

1. *See* W. DE BOOR, BEWUSSTSEIN UND BEWUSSTSEINSSTÖRUNGEN (1966); K. SCHNEIDER, DIE BEURTEILUNG DER ZURECHNUNGSFÄHIGKEIT (4th ed. 1961); H. WEGENER, EINFÜHRUNG IN DIE FORENSISCHE PSYCHOLOGIE (1981); Bresser, *Probleme bei der Schuldfähigkeits- und Schuldbeurteilung*, 31 NEUE JURISTICHE WOCHENSCHRIFT [NJW] 1188 (1978); Erhardt, *Die Schuldfähigkeit in psychiatrisch-psychologischer Sicht*, in SCHULD-VERANTWORTUNG-STRAFE 227 (E. Frey ed. 1964); Glatzel, *Tiefgreifende Bewusstseinsstörung nur bei der sogenannten Affekttat?*, 3 STRAFVERTEIDIGER [STVERT] 339 (1983); Glatzel, *Zur forensisch-psychiatrischen Problematik der tiefgreifenden Bewusstseinsstörung*, 2 STVERT 434 (1982); Haddenbrock, *Forensische Psychiatrie und die Zweispurigkeit unseres Kriminalrechts*, 32 NJW 1235 (1979); Haddenbrock, *Freiheit und Unfreiheit der Menschen im Aspekt der forensischen Psychiatrie*, 24 JURISTENZEITUNG [JZ] 121 (1969); Haddenbrock, *Das Paradox von Ideologie und Pragmatik des § 51 StGB*, 20 NJW 285 (1967); Haddenbrock, *Psychiatrisches Krankheitsparadigma und strafrechtliche Schuldfähigkeit*, in FESTSCHRIFT FÜR WERNER SARSTEDT ZUM 70. GERURTSTAG 35 (R. Hamm ed. 1981); Mende, *Die "tiefgreifende Bewusstseinsstörung" in der forensisch-psychiatrischen Diagnostik*, in FESTSCHRIFT FÜR PAUL BOCKELMANN ZUM 70. GEBURTSTAG 311 (A. Kaufmann, G. Bemmann, D. Krauss & K. Volk eds. 1979); Meyer, *Psychiatrische Diagnosen und ihre Bedeutung für die Schuldfähigkeit i.S.d. § 20 StGB*, 88 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZSTW] 46 (1976); Rasch, *Angst vor der Abartigkeit*, 2 NEUE ZEITSCHRIFT FÜR STRAFRECHT [NZST] 177 (1982); Rasch, *Richtige und falsche psychiatrische Gutachten*, 65 MONATSSCHRIFT FÜR KRIMINOLOGIE UND STRAFRECHTSREFORM [MSCHRKRIM] 257 (1982); Rasch, *Die psychologisch-psychiatrische Beurteilung von Affektdelikten*, 33 NJW 1309 (1980) [hereinafter Rasch, *Affektdelikten*]; Rasch, *Die Zuordnung der psychiatrische-psychologischen Diagnosen zu den vier psychischen Merkmalen der §§ 20, 21 StGB*, 4 STVERT 264 (1984); Rauch, *Nochmals: Gutachterliche Kompetenz bei der Klärung der Schuldunfähigkeit oder: der Streit zwischen Psychiatrie und Psychologie*, 4 NZST 497 (1984); Schumacher, *Die Beurteilung der Schuldfähigkeit bei nicht-stoffgebundenen Abhängigkeit (Spielleidenschaft, Fetischismen, Hörigkeit)*, in FESTSCHRIFT FÜR WERNER SARSTEDT ZUM 70. GEBURTSTAG, *supra*, at 361; Schumacher, *Gruppendynamik und Straftat: ein Beitrag zur Integration von Strafrecht und empirischer Wissenschaft*, 33 NJW 1880 (1980); Undeutsch, *Zur Problematik des psychologischen Sachverständigen*,

tributions of each of the social sciences, the definition of the legal concept of insanity, the criteria for determining its scope, and the weight to be accorded expert testimony depend largely on the starting point and theoretical foundation of the particular discipline. This divergence of scientific views has lead to communication problems in the interdisciplinary discussion and in the day-to-day exchange between judges and experts.[2] These difficulties impede an understanding of the material and hamper judicial unanimity. This article will show that the tendency of the debate to enter the area of fundamental scientific dispute is neither factually nor logically necessary. An examination of the theoretical discussion in post-war Germany on the principle of culpability reveals a general tendency toward an emphatically normative and restrictive definition of insanity. Though their starting-points differ greatly, the models that explain and give structure to the concept of culpability, have (at least in the area of insanity) created practical guidelines that lead largely to duplicate or at least similar practical results. When applied to specific offenders, these different guidelines reveal a remarkable consensus in German criminal theory.

Culpability, the foundation for this discussion, must be understood as an element of the concept of crime. Our (in principle) nearly unanimously-accepted conception of the structure of crime presupposes that an act fulfilling all conditions of liability satisfies the statutory definition of a crime and is wrongful and culpable (*tatbestandsmässige, rechtswidrige und schuldhafte Handlung*). First, an allegedly criminal act must satisfy the statutory elements of a crime—that is, it must correspond to a specific paradigmatic crime circumscribed by a statute. Our Consti-

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in FESTSCHRIFT FÜR RICHARD LANGE ZUM 70. GEBURTSTAG 703 (G. Warda, H. Waider, R. von Hippel & D. Meurer eds. 1976); Venzlaff, *Ist die Restaurierung eines "engen" Krankheitsbegriffs erforderlich, um kriminalpolitische Gefahren abzuwenden?*, 88 ZStW 57 (1976) [hereinafter Venzlaff, *Restaurierung*]; Venzlaff, *Fehler und Irrtümer im psychiatrischen Gutachten*, 3 NZSt 199 (1983); Venzlaff, *Die Mitwirkung des psychiatrischen Sachverständigen bei der Beurteilung der Schuldfähigkeit*, in FESTSCHRIFT AUS ANLASS DES 10JÄHRIGEN BESTEHENS DER DEUTSCHEN RICHTERAKADEMIE 277 (W. Schmidt-Hieber & R. Wassermann eds. 1983); Witter, *Die Bedeutung des psychiatrischen Krankheitsbegriffs für das Strafrecht*, in FESTSCHRIFT FÜR RICHARD LANGE ZUM 70. GEBURTSTAG, *supra*, 723 [hereinafter Witter, *Die Bedeutung*]; Witter, *Richtige oder falsche psychiatrische Gutachten?*, 66 MSCHRKRIM 253 (1983); Witter, *Zum "kritischen Dialog zwischen Strafrecht und Kriminalpsychiatrie,"* 28 NJW 563 (1975); Wolff, *Gutachterliche Kompetenz bei der Klärung der Schuldunfähigkeit oder: der Streit zwischen Psychiatrie und Psychologie*, 3 NZSt 537 (1983).

2. *See supra* note 1.

tution requires that such definitions be recorded in written laws, which are contained primarily in the Special Part of the Criminal Code, but also in various regulations. Furthermore, the conduct must be wrongful—that is, censured by the law because it offends the overall legal order. A finding that a so-called justificatory ground such as self-defense permits the conduct by way of exception is a finding that the wrongfulness requirement is unsatisfied. Only after wrongfulness is determined or, to use the language of the Criminal Code, only when a "wrongful act" is committed, does the issue of the accused's culpability—that is, the issue of whether he should be held accountable for his act—present itself.

The concept of culpability governs accountability and the conditions under which it can be imposed. The following overview of the current discourse, which for reasons of space is much simplified, elucidates this concept of moral culpability. A personal evaluation of the various and often conflicting standpoints is purposely eschewed to focus on general trends in the development of the doctrine of culpability and to show that these trends oppose broadening the concept of insanity.

I. Culpability in Post-War Germany

Largely in reaction to the horrors of Nazi rule and to Germany's total defeat in World War II, our criminal courts went through a process of sustained reflection on various areas of the natural law.[3] The concept of culpability was the most important judicial development to emerge from this post-war reflection. Culpability functions, first, to justify censure of criminal behavior and, second, to hold the perpetrator accountable only for what he deserves in a highly personal-ethical sense.[4] In its leading decision on the issue of mistake of law, the Bundesgerichtshof best expressed this basic position in the proposition that culpability may be imputed to individual conduct because "man is constituted for free, responsible, and ethical self-determina-

3. *See* Address by Max Güde, former general counsel of the federal government (speaking regarding the administration of justice in yesterday's shadow, "Die Rechtsprechung im Schatten von gestern"), *reprinted in* Bulletin des Presse- und Informationsamtes der Bundesregierung, No. 230 (1958); Address by Hermann Weinkauff, former president of the Bundesgerichtshof (speaking regarding the right to resist ["Über das Widerstandsrecht"]), *reprinted in* Juristische Studiengesellschaft in Karlsruhe, Booklet 20 (1957).

4. *See* G. Stratenwerth, Leitprinzipien der Strafrechtsreform 8 (1970).

tion and is therefore capable of deciding in favor of the law and against wrongfulness."[5] Scholars generally agree that this focus on moral culpability—and thus of man's freedom, responsibility, and dignity—is a reaction to the perversion of the criminal law under National Socialism. It sought to counteract any possibility that punishment would again become a mere instrument in pursuit of political ends.[6]

This cautionary attitude persisted throughout the ensuing lengthy debate over how to adapt the criminal law to the needs of modern mass-society. It is noteworthy that efforts to completely overhaul the criminal law resumed in 1953 and continued without major interruption far into the 1970s.[7] Numerous theoretical and practical contributions clearly influenced the legislative process during this period. However, the radical demand that a purely preventive criminal system completely replace the established system based on culpability had little influence.[8] Thus the 1962 draft by the commission for a new criminal code (E 1962) still echoed previous case law:

> This draft adopts a criminal law based on culpability. This means that punishment, which embodies a moral judgment of unworthiness and will always be perceived as such, may be imposed only when and, in principle, to the extent that the actor can be held morally accountable for his conduct. To punish without assessing culpability would contravene the purpose of punishment and render it an ethically neutral measure which could be misused for political ends.[9]

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5. Judgment of March 18, 1952, Bundesgerichtshof, Grosser Senat für Strafsachen [Bundesgerichtshof, Gr. Sen. St.], W. Ger., 2 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 194, 200.

6. *See* G. STRATENWERTH, DIE ZUKUNFT DES STRAFRECHTLICHEN SCHULDPRINZIPS 8 (1977).

7. The literature on reform efforts in the post-war era is vast. *See, e.g.*, H. HORSTKOTTE, G. KAISER & W. SARSTEDT, TENDENZEN IN DER ENTWICKLUNG DES HEUTIGEN STRAFRECHTS (1973); STRAFRECHT UND STRAFRECHTSREFORM (K. Madlener, D. Papenfuss & W. Schöne eds. 1974); Jescheck, *Das neue deutsche Strafrecht in der Bewährung*, 1980 JAHRBUCH 18 (Max-Planck-Gesellschaft); Sturm, *Grundlinien der neueren Strafrechtsreform*, in FESTSCHRIFT FÜR EDUARD DREHER ZUM 70. GEBURTSTAG 513 (H.-H. Jescheck & H. Lüttger eds. 1977).

8. The influence of Franz von Liszt and the European criminal-political movement *defense sociale* led to such models being discussed in post-war Germany. Some have even survived in part to the present. But with the advance of reform, they have increasingly been ignored. *See* F. BAUER, DAS VERBRECHEN IN DER GELLSCHAFT (1957); A. PLACK, PLÄDOYER FÜR DIE ABSCHAFFUNG DES STRAFRECHTS (1974); Foth, *Das Schuldprinzip und der Satz vom zureichenden Gründe*, ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 249; Gramatica, *Grundlagen der defense sociale*, 18 KRIMINOLOGISCHE SCHRIFTENREIHE (1965).

9. ENTWURF EINES STRAFGESETZBUCHES MIT BEGRÜNDUNG, Bundestags-Drucksache

When finally enacted in 1969, the General Part of the Criminal Code included an express recognition of the principle of culpability: "The criminal's culpability is the basis for assessing punishment."[10] Though this so-called foundational formula has been severely criticized in several respects and described as a failure,[11] criticism rarely intended the elimination of the culpability principle. In the criminal case law, the conception of culpability as a highly personal and ethical censure of the criminal remains unshaken to this day. The Bundesverfassungsgericht recognizes culpability, though absent from the text of the Constitution, as a fundamental constitutional principle with an equally pronounced social-ethical dimension.[12]

The position of the Bundesgerichtshof has not, however, remained unchallenged. According to widespread opinion, that position embodies a recognition of man's freedom of will which, though not unconditional, leaves the individual a margin of autonomous decision-making capacity in the midst of external and internal impulses. This is clearly the view of the 1962 draft which states in connection with provisions defining culpability: "Accountability requires that the criminal was capable, at the time of the crime, of avoiding the state of will necessary for commission of the crime."[13] This drew heavy criticism because of two unavoidable and fundamental observations. First, the epistemological and scientific dispute over freedom of the will cannot validly be resolved in indeterminism, even if only in a moderate form. Consequently, the earlier and widespread view that an ethical imputation of culpability can be based in man's remaining "margin of freedom"[14] has taken the defensive.[15] Its un-

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IV/650, 96 (1962).

10. STRAFGESETZBUCH [StGB] § 46(1) (W. Ger.).

11. *See* G. STRATENWERTH, TATSCHULD UND STRAFZUMESSUNG, (1972) (Booklet 406-07 in the series *Recht und Staat* (1972)); Lackner, *§ 13 StGB—eine Fehlleistung des Gesetzgebers*, in FESTSCHRIFT FÜR WILHELM GALLAS ZUM 70. GEBURTSTAG 117 (K. Lackner, H. Leferenz, E. Schmidt, J. Welp & E. Wolff eds. 1973).

12. *See* Judgment of Oct. 25, 1966, Bundesverfassungsgericht, W. Ger., 20 Bundesverfassungsgericht [BVerfGE] 323, 331; Judgment of Jan. 16, 1979, Bundesverfassungsgericht, W. Ger., 50 BVerfGE 125, 133; Judgment of Jan. 17, 1979, Bundesverfassungsgericht, W. Ger., 50 BVerfGE 205, 214.

13. ENTWURF EINES STRAFGESETZBUCHES MIT BEGRÜNDUNG, *supra* note 9, at 137.

14. As espoused by numerous authors, primarily through evaluating anthropological research of empirical-theoretical dimension. *See, e.g.*, A. KAUFMANN, DAS SCHULDPRINZIP 279 (2d ed. 1976); Lange, *Hirnforschung und Kriminologie*, 97 ZStW 121 (1985); Mangakis, *Über das Verhältnis von Strafrechtsschuld und Willensfreiheit*, 75 ZStW 523 (1963); Mezger, *Über Willensfreiheit*, 9 SITZUNGSBERICHTE DER BAYERISCHER AKADEMIE DER WISSENSCHAFTEN 1944-46 13 (1947).

derlying assumption—that mental processes do not conform to the principle of causality which otherwise prevails in nature, but that those processes involve spontaneous and thus autonomous acts of will—is overwhelmingly regarded today as unprovable; it is, therefore, unsuitable to ground human responsibility directly on man's individual freedom.[16] Second, the current level of knowledge does not and probably will not supply a method to arrive at scientifically verifiable conclusions about a given individual's ability to avoid a particular act in a particular situation.[17] This sobering observation is also no longer seriously contested.[18]

II. Recent Trends: Moral Culpability and Prevention

These objections have engendered a long-lasting debate over the concept of culpability. Insofar as this debate occurred within the domain of the criminal law—that is, under the theoretical and practical guidelines of the discipline—two tendencies appeared clearly in the foreground: first, the desire to retain the principal and, second, the desire to relate it to criminal law's preventive aims.

Despite all the difficulties in its theoretical foundation and all differences of opinion, the desire was often expressed to retain the principle of culpability in the form in which it is relevant to legal practice: as the basis of legal "disapproval" of criminal behavior bearing directly on the criminal and as a safeguard against "undeserved" government encroachment. That appeared to be possible only if one could overcome established objections to an indeterminist understanding of culpability and find explanations and, where necessary, limitations that could dispose of the apparent contradiction with the current state of scientific

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15. There are numerous jurisprudential, scientific and criminal theoretical contributions which attempt to show the impossibility of proving a margin of autonomous decision-making in the indeterminist sense. *See, e.g.*, M. Danner, Gibt es einen freien Willen? (4th ed. 1977); K. Engisch, Die Lehre von der Willensfreiheit in der strafrechtlichen Doktrin der Gegenwart (2d ed. 1970); Bockelmann, *Willensfreiheit und Zurechnungsfähigkeit*, 75 ZStW 372 (1963); Foth, *supra* note 8; Haddenbrock, *Freiheit und Unfreiheit der Menschen im Aspekt der forensischen Psychiatrie*, 24 JZ 121 (1969); Neufelder, *Schuldbegriff und Verfassung*, 1974 Goltdammer's Archiv für Strafrecht [GA] 289; Nowakowski, *Freiheit, Schuld, Vergeltung*, in Festschrift für Theodor Rittler zum 80. Geburtstag 58 (S. Hohenleitner, L. Lindner & F. Nowakowski eds. 1957).

16. *See supra* note 15.

17. *See* K. Engisch, *supra* note 15, at 64.

18. *See* Roxin, *Zur Problematik des Schuldstrafrechts*, 96 ZStW 641, 642 (1984).

knowledge. This point seems to have been settled by compromise. Without going into the many different ways of reaching the conclusion, the overwhelming consensus today reflects the compatibilist view that the basis for judgments of culpability lies in man's capacity to be motivated (or determined) by laws—i.e., in his ability (which need not be understood in an indeterminist sense) to monitor the impulses impinging upon him, to process them rationally, and as part of that process, to take into account relevant legal and moral rules.[19] I will return to this subject later.[20]

A second tendency emerged from the debate: the desire to analyze the principle of culpability, not in isolation, but in close relation to the preventive aims of criminal law. The clearer it became that a legal order based on the values of a free society must limit itself to protecting essential legal interests—purely preventive protection—the more important it became to integrate the culpability principle, which does not form part of that protective enterprise, into the overall system. This integration needed, on the one hand, to fulfill culpabilty's designated function and, on the other, to avoid unduly impeding the preventive function of the penal system.[21]

A. First Tendency: The Emergence of Compatibilist Conceptions of Culpability

Starting with the first of these tendencies, the following synopsis of the culpability principle's development attempts to give some measure of support to my essentially subjective evaluation of the current situation. It would be of little use to outline the development chronologically. More clarity will result from a summary and grouping of the various conceptions according to their relative distance from traditional indeterministic positions.

We first encounter conceptions which view the individual's freedom to decide as culpability's logical prerequisite: only if the basic freedom to act exists can the individual be held responsible for failure to control his criminal impulses.[22] Advocates of

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19. *See* Kaufmann, *Schuldfähigkeit und Verbotsirrtum*, in FESTSCHRIFT FÜR EBERHARD SCHMIDT ZUM 70. GEBURTSTAG 319-20 (P. Bockelmann & W. Gallas eds. 1961) ("[T]he ability to be determined by a legal duty, *Rechtspflicht*, to act in accordance with the law is the common denominator underlying the modern doctrine of culpability.").

20. *See infra* notes 22-39 and accompanying text.

21. *See infra* notes 40-67 and accompanying text.

22. This starting-point is espoused and more rigorously justified by, e.g., H. JES-

these doctrines argue (taking into account all differences in ethical derivations) that the ability of the average person to control environmental and physiological impulses, to classify them according to meaning, values, and standards, and, in general, to guide those impulses according to the dictates of law, is empirically observable and therefore not seriously contestable. Only the following two issues are unresolved: first, how man can avoid illegal acts and, second, whether the general ability of the human species to be self-directing applies to any given individual in a concrete situation. For this reason, accountability of an individual must be assessed by measuring the criminal's conduct against that of a normal person of reasonable intelligence and ability: would such a person—possibly exerting greater willpower than the criminal—have acted differently under the same circumstances? This presupposes that a biologically normal actor can muster the will power necessary to overcome criminal temptation. Such self-control is not posited as empirically provable, but as society's normative demand on the criminal, who is measured against a responsible and law-abiding citizen representing the generally responsible nature of mankind. This kind of subjective accountability is both necessary and justified in a legal system based on freedom, because the responsibility of the psychologically normal adult is an unquestionable ingredient of our social and moral consciousness.[23] Even proponents of similar doctrines who do not support or who even verbally reject this assertion agree that an evaluation of individual culpability must,

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CHECK, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL 328 (3d ed. 1978); A. KAUFMANN, *supra* note 14, at 127, 279; A. KAUFMANN, STRAFRECHTDOGMATIK ZWISCHEN SEIN UND WERT 263 (1982); G. STRATENWERTH, STRAFRECHT: ALLGEMEINER TEIL I, Marginal No. 507 ff. (3d ed. 1981); Lenckner, *Strafe, Schuld und Schuldfähigkeit*, in 1 HANDBUCH DER FORENSISCHEN PSYCHIATRIE 35 (H. Göppinger & H. Witter eds. 1972). *See also* H. ACHENBACH, HISTORISCHE UND DOGMATISCHE GRUNDLAGEN DER STRAFRECHTSSYSTEMATISCHEN SCHULDLEHRE (1974)(discussing the theoretical history of the doctrines of culpability); Krümpelmann, *Dietrich Lang—Hinrichsen zum Gedächtnis*, 88 ZStW 1 (1976); Krümpelmann, *Dogmatische und empirische Probleme des Sozialen Schuldbegriffs*, 1983 GA 337 [hereinafter Krümpelmann, *Dogmatische und empirische Probleme*]; Roxin, *"Schuld" und "Verantwortlichkeit" als strafrechtliche Systemkategorien*, in FESTSCHRIFT FÜR HEINRICH HENKEL ZUM 70. GEBURTSTAG 171 (C. Roxin, H. Bruns & H. Jäger eds. 1974) [hereinafter Roxin, *"Schuld"*]; Roxin, *Zur jüngsten Diskussion über Schuld, Prävention und Verantwortlichkeit im Strafrecht*, in FESTSCHRIFT FÜR PAUL BOCKELMANN ZUM 70. GEBURTSTAG, *supra* note 1, at 279 [hereinafter Roxin, *Zur jüngsten Diskussion*]; Roxin, *supra* note 18.

23. *See* H. JESCHECK, *supra* note 22, at 328; Krümpelmann, *Dogmatische und empirische Probleme*, *supra* note 22.

due to the freedom issue's irresolvable nature, involve reference to some type of fictional standard (e.g., a reasonable man).[24]

Of course, this interpretation was not accepted without criticism. Arguably, transferring the culpability evaluation from the actor to a standard figure, however constituted, does not yield an evaluation tied to the actor's personal responsibility. For this reason, a sizable group of commentators concludes that the blame associated with culpability does not have the high moral intensity implied by an indeterminist philosophy. They hold that only the fact of social disapproval can be established, and that such disapproval merely expresses the fact that the offender's conduct contravenes rules essential to the functioning of a free society. Put simply—i.e., putting aside the various versions of this more or less agnostic position—this means that the assumption that man has social responsibility for the legal community is a concededly unprovable but nonetheless necessary presupposition in order for it to be possible to base a human order on the idea of freedom. Ascription of responsibility thus does not signify an individual moral reproach for an offense, but rather a negative societal assessment of the act in a freedom-based system of social life. What remains is disapproval that has been transformed from personal into social blame, which this body of opinion has collectively termed the "social concept of culpability" (*sozialer Schuldbegriff*).[25] Under this view, culpability's function is retained intact—that is, as the basis for disapproval and as protection against "undeserved" government encroachment (even if it is undeserved only in the light of social relationships).

There are also some views which, unlike those already described, attempt to justify man's ability to resist criminal temptation on more than merely normative grounds. They adopt the

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24. *See* A. KAUFMANN, *supra* note 14, at 282; G. STRATENWERTH, *supra* note 22, at Margin No. 513; Lenckner, *supra* note 22, at 98.

25. *See, e.g.*, Bockelmann, *supra* note 15; Schreiber, *Schuld und Schuldfähigkeit im Strafrecht*, in FESTSCHRIFT AUS ANLASS DES 10JÄHRIGEN BESTEHENS DER DEUTSCHEN RICHTERAKADEMIE, *supra* note 1, at 73; Schreiber, *Was heisst heute strafrechtliche Schuld und wie hat der Psychiater bei ihrer Feststellung mitzuwirken?*, 48 DER NERVENARZT 242 (1977). Krümpelmann's doctrine, *see supra* note 22, lies between the two schools of opinion. The concept of culpability espoused by Albrecht, *Unsicherheitszonen des Schuldstrafrechts*, 1983 GA 193, has a decidedly "pragmatic-empirical" dimension. The element of "social" censure is weighted far differently according to this view, and in part becomes highly relativized, because the function of the concept of culpability depends exclusively on its effect in limiting punishment. *See, e.g.*, Roxin, *Sinn und Grenzen Staatlicher Strafe*, 6 JURISTISCHE SCHULUNG 377 (1966).

view—partly by using a strongly deterministic method—that man is largely responsible for what he becomes—that is, for his character—and therefore ought to be held accountable under the criminal law.[26] To go into more detail on these doctrines is hardly necessary since their practical results differ insignificantly from that which the social concept of culpability admits.

Most of what has been published in recent decades in support of the principle of culpability and its application points to the principle already recognized by the Bundesgerichtshof in its 1952 mistake of law decision, namely, that criminal responsibility is based on the offender's ability to be guided by his legal duty to act in conformity with norms.[27] This formula, however, no longer rests primarily on doctrines of indeterminism, but is seen as the normatively explainable or at least legally necessary requirement for a liberal society. That the literature contains several different descriptions of culpability does not gainsay the acceptability of the general principle. The great majority of those descriptions easily fit within this widely demarcated category.[28] Although the various grounds may differ, each description ultimately asserts, albeit with various nuances, the actor's ability to act differently: the offender decided to disobey the law when he had the ability to act in accordance with it; he formed his will contrary to the demands of the law;[29] he was insufficiently bound to a legally protected interest and therefore to the values of the legal order;[30] or he must be held accountable for his action because his attitude[31] or conduct[32] threatened a legal interest. Lying in the background is always the ability, whether interpreted agnostically or indeterministically, to be motivated by the law. Only a minority still conceives of culpability in a moderately indeterministic sense, while the majority bases it on

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26. *See* Burkhardt, *Charaktermängel und Charakterschuld,* in VOM NUTZEN UND NACHTEIL DER SOZIALWISSENSCHAFTEN FÜR DAS STRAFRECHT 87 (K. Lüderssen & F. Sack eds. 1980); K. ENGISCH, *supra* note 15; Dias, *Schuld und Persönlichkeit,* 95 ZStW 230 (1983).

27. *Cf. supra* note 19.

28. *See* R. MAURACH & H. ZIPF, STRAFRECHT: ALLGEMEINER TEIL I 392 (6th ed. 1982).

29. *See* RUDOLPHI, in SYSTEMATISCHER KOMMENTAR ZUM STRAFGESETZBUCH: ALLGEMEINER TEIL § 19, Marginal No. 1 preliminary note (4th ed. 1984).

30. *See* Nowakowski, *Rechtsfeindlichkeit, Schuld, Vorsatz,* 65 ZStW 380 (1953).

31. H. JESCHECK, *supra* note 22, at 344; J. WESSELS, STRAFRECHT: ALLGEMEINER TEIL 102 (14th ed. 1984); Gallas, *Zum gegenwärtigen Stand der Lehre vom Verbrechen,* 67 ZStW 1 (1955).

32. *See* E. SCHMIDHÄUSER, STRAFRECHT: ALLGEMEINER TEIL, STUDIENBUCH 61, 188 (2d ed. 1984).

the empirically observable human ability to reason (to perceive, evaluate, and decide to act) and recoin it as a necessary postulate of "civil freedom."

Seen as a whole, the above-described viewpoints largely cover the spectrum of the legal literature. Culpability, limited to a function meaningful to legal practice, is recognized unanimously (ignoring the differences in its theoretical justifications) as a fundamental requirement of punishability. Some additional conceptions have arisen recently in culpability doctrine fringe areas and in close connection with them, but their practical effects show no significant deviations. Since they can best be described in conjunction with our upcoming discussion on the aims of punishment, we will return to them later.[33] Only outside the domain which accepts a general doctrine of culpability does one confront fundamentally different conceptions. No special emphasis need be given here to the occasional efforts to eliminate the principle of culpability entirely and to establish in its place a system of pure prevention.[34] Even though such efforts have a long history in our criminal law and the idea of resocialization is highly valued in our current culpability-based criminal law,[35] these efforts will not bear fruit today. The general trend is clearly opposed.[36] However, objections to the culpability principle characterized by a deep-rooted criticism of a criminal law based on sociological methodology should be taken more seriously. More recent criminological approaches of varied origins, currently under discussion throughout the world, seek to interpret deviant conduct as part of the social system and, for this reason, question the principle of attributing that conduct to the individual agent.[37] This model blames the culpability principle for obfuscating the social causes of criminality and for personalizing the wrongdoing by selectively attributing disturbances in

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33. *See infra* notes 55-67 and accompanying text.

34. *See supra* note 8 and accompanying text.

35. Many criminal legal theorists maintain that the principle of culpability is justified only if resocialization is effectively realized at all levels of the criminal process, i.e., legislation, evidence, judgment and execution of sentence. *See, e.g.*, A. KAUFMANN, *supra* note 14, at 271; Krümpelmann, *Dogmatische und empirische Probleme, supra* note 22, at 341.

36. *See* Bockelmann, *Zur Kritik der Stafrechtskritik*, FESTSCHRIFT FÜR RICHARD LANGE ZUM 70. GEBURTSTAG, *supra* note 1, at 1.

37. *See* Barratta, *Strafrechtsdogmatik und Kriminologie*, 92 ZSTW 107 (1980); Hilbers & Lange, *Abkehr von der Behandlungsideologie*, 5 KRIMINOLOGISCHES JOURNAL 52 (1973); Sack, *Die gesellschaftliche Reaktion auf Kriminalität*, 1 SEMINAR: ABWEICHENDES VERHALTEN II 346 (1975).

the system to the weakest members of the social fabric—most often those of the lower class.[38] Incontestably, these approaches have helped to expose obvious weaknesses in almost all existing systems of criminal law, and the dialogue should proceed. But one must keep in mind, as Stratenwerth aptly stated some time ago (though in a somewhat different context):

> At our stage of societal development, there are no even approximate points of orientation—let alone a working model—for trying to circumscribe conduct violating legal norms under any other than a principle of personal responsibility.[39]

Until such deep-rooted criticism of the moral culpability principle offers an alternative model with a concrete response to deviant behavior, those criticisms are not viable alternatives; they are at best suited to influence the development of the present system through individual adjudications.

B. Second Tendency: Culpability and Prevention

The clear advantages to retaining the principle of culpability and the equally strong agreement over its core meaning have shifted the focus of discussion in the last decade. This brings us to the second tendency in the prevailing debate—integrating culpability into the overall system of safeguarding legal interests so that the principle can best perform its proper function without unduly disturbing the preventive aim of the criminal legal order.

That there is a fundamental tension here that can be removed only with difficulty is easy to see. According to the overwhelming weight of authority, today's criminal law—like all law—is essentially a law of protection: the state may only use it as a means of guaranteeing peaceful coexistence.[40] The intended protective impact consists of averting future infringement of legal interests by creating and implementing legal norms. This preventive impact can be striven for at the level of general prevention by stabilizing general awareness of values or by deter-

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38. *See* W. KARGL, KRITIK DES SCHULDPRINZIPS: EINE RECHTSSOZIOLOGISCHE STUDIE ZUM STRAFRECHT (1982).

39. G. STRATENWERTH, *supra* note 6, at 40.

40. *See* K. AMELUNG, RECHTSGÜTERSCHUTZ UND SCHUTZ DER GESELLSCHAFT (1972); W. HASSEMER, THEORIE UND SOZIOLOGIE DES VERBRECHENS (1973); H. MÜLLER-DEITZ, STRAFE UND STAAT (1973); Gallas, in BEITRÄGE ZUR VERBRECHENSLEHRE (1968); Roxin, *supra* note 25.

ring others from commiting crimes and, at the level of specific prevention, by resocializing, disciplining or merely detaining the offender. This only describes how to prevent infringement of legal interests by reacting to acts already committed. The question of which means the law ought to make available to achieve these preventive objectives depends on the suitability of those means for achieving the desired end and is therefore a matter of criminological and criminal policy judgment.

More essentially, the state, in choosing its methods, must remember the recipient of its compulsory measures—namely the individual conceived as an autonomous human being in a free political society. This recognition of the necessity of respecting the individual has provided the strongest impetus for the triumph of the principle of culpability. Concededly, legal theorists often note that a criminal law characterized by fairness and patently oriented to justice most effectively acts to stabilize the general legal consciousness and to make the individual offender aware of the injury suffered.[41] From this they conclude that a solution that respects the culpability principle should be preferred above all others on both general and specific preventive grounds. Yet it is doubtful that this conclusion is empirically verifiable. In any event, it is useful only as a reinforcing argument because the recognition of the culpability principle follows directly from our picture of man and cannot be dispensed with, regardless of preventive consequences.

In view of the foregoing, the possibility of tension between the requirements of culpability and the demands of prevention is virtually programmed in advance. The difficulties in this regard result not only from the impossibility of making a methodically verifiable assertion about whether a particular criminal in particular circumstances was able to avoid a certain act; it is hardly less significant that one can only guess at the features of the average man postulated by the social concept of culpability. The critical question in relation to insanity is to determine within what limits the actor's overall psychological condition at the time of the crime can vary and still permit his classification as a biologically normal individual who can control his criminal impulses. Theoretically one can only answer as follows: the limits are exceeded when the hypothetical person—who, we assume, was in the same anomalous mental condition as the crimi-

41. *See* A. KAUFMANN, *supra* note 14, at 271.

nal—can no longer be motivated by legal norms. The formula used in the German Criminal Code, which refers to the capacity to recognize the wrongfulness of the offense and to act accordingly,[42] provides at best an approximate rendering of the limits. But who can answer this question? Agnostic psychiatrists do not think an answer is possible at all and therefore generally impugn their competence to assess capacity to be motivated.[43] In any case, the result—whether for the judge or for the expert—is a broad gray area of great uncertainty.

As the development of our forensic practice indicates, the problems associated with this gray area drew little attention in the past. On the whole, however, issues were resolved in a way that could be reconciled with the criminal law's general preventive aims. In the first stage of its development, classical psychiatry recognized only the true mental illnesses—the so-called psychoses—as anomalous mental conditions having an unquestionable bearing on criminal responsibility. Their overriding significance was revealed unmistakably in the relatively straightforward diagnosis that—certainly in the acute stages—the core of the personality was either totally destroyed or severely altered by the intervention of an unknown process.[44] The special position occupied by the psychoses has led to two results that were significant for future development. First, it became almost a convention in the criminal courts to find a man insane without any additional test of capacity when his illness was classified among the psychoses.[45] Second, psychiatric science has developed a specific conception of illness which classifies as mental illnesses only those aberrations that stem from somatic (organic) processes (exogenous psychoses) or in which such a process can be inferred from exterior appearance, as in schizophrenia and cyclothymia (endogenous psychoses). Under the influence of the pointedly agnostic research of the psychiatrist Kurt Schneider and his school, this so-called psychiatric conception of illness (*psychiatrischer Krankheitsbegriff*) has for many years been

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42. StGB §§ 20-21.

43. K. Schneider, *supra* note 1, at 43.

44. Lange, in Strafgesetzbuch: Leipziger Kommentar §§ 20-21, Marginal Nos. 17-20 (H. Jescheck, W. Russ & G. Willms 10th ed. 1985).

45. Krümpelmann, *Die Neugestaltung der Vorschriften über die Schuldfähigkeit durch das zweite Strafrechtsreformgesetz vom 4. Juli 1969*, 88 ZStW 6 (1976); Lange, *supra* note 44, §§ 20-21, Marginal No. 63 preliminary note; Lenckner, *supra* note 22, at 105.

controlling in Germany and has only recently come under a serious attack.[46]

Obviously, forensic practice could not afford to stop at this conception which exculpates psychotic criminals alone. Even under the old law—that is, before the new General Part went into effect—the so-called legal concept of illness (*juristischer Krankheitsbegriff*) took root in the courts. This concept also encompassed conditions that are non-pathological in the psychiatric sense, such as psychopathologies, neuroses, and impulse disturbances, and made them part of the test for culpability.[47] This was done in a way that aimed to limit the range of applicability of this special exculpation. Possibly it can be explained only historically—by the then-dominant position of psychiatry in providing expert testimony—that courts adopted in this field the so-called "disease-value" ("*Kranksheitswert*") as the decisive criterion. That means: though not in fact pathological, the actor's clinical condition had to resemble or be "equivalent" ("*gleichwertig*") to the psychoses in its degree and the intensity of its effects on the core of personality.[48] This satisfied two objectives. First, exculpation was limited to serious cases of mental defects because these cases only rarely present a rationally unexplainable disruption of the connection between behavior and underlying impulses. This is confirmed by the case law. Cases of complete excuse involving the psychopathologies, neuroses, and impulse disturbances were statistically insignificant; at most (and much more frequently), diminished criminal capacity was accepted. This did not negate responsibility, but merely warranted mitigated punishment.[49] Second, the "disease-value" criterion required that a psychiatrist be consulted as a competent expert even in cases involving non-pathological disturbances, since at bottom only he could determine whether a

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46. *See* ENTWURF EINES STRAFGESETZBUCHES MIT BEGRÜNDUNG, supra note 9, at 137; Krümpelmann, *supra* note 45, at 15; Lange, *supra* note 44, §§ 20-21, Marginal No. 14 preliminary note; Schreiber, *Bedeutung und Auswirkungen der neugefassten Bestimmungen über die Schuldfähigkeit*, 1 NZST 46 (1981); Venzlaff, *Restaurierung, supra* note 1; Witter, *Die Bedeutung, supra* note 1, at 723.

47. *See* Judgment of Nov. 21, 1969, Bundesgerichtshof, Senat [Bundesgerichtshof], W. Ger., 23 BGHSt 176; Judgment of Dec. 13, 1963, Bundesgerichtshof, W. Ger., 19 BGHSt 201; Judgment of Nov. 25, 1959, Bundesgerichtshof, W. Ger., 14 BGHSt 30.

48. *See* Judgment of June 7, 1966, Bundesgerichtshof, W. Ger., 19 NJW 1871 (1966); Judgment of Apr. 17, 1958, Bundesgerichtshof, W. Ger., 11 NJW 2123 (1958); Judgment of June 27, 1955, Bundesgerichtshof, W. Ger., 8 NJW 1726 (1955); Lenckner, *supra* note 22, at 105.

49. *See* Schreiber, *supra* note 46.

mental defect resulted in a condition equivalent to a mental illness in a psychiatric sense.

Furthermore, it is significant that legislative hearings on revising the culpability provisions were intensely concerned with whether it was necessary and objectively justifiable to retain and codify the limiting tendency of prior law. This is precisely what happened, or, more accurately, an even greater limitation resulted from the preliminary hearings leading to the 1962 draft.[50] At that stage of reform, it appeared especially important in describing mentally aberrant conditions to distinguish carefully between mental disease as understood by the then-prevailing psychiatric conception of disease and all non-pathological abnormalities. As a result, the concept of diseased psychological disturbance (as the psychoses were described statutorily) was contrasted with the equivalent disturbances of consciousness: feeble-mindedness and other severe psychic aberrations (*schwere seelische Abartigkeit*). What is most conspicuous here is that the element of "equivalency"[51] surfaces again in conjunction with disturbance of consciousness, whereas a corresponding characterization was lacking in connection with the hotly disputed category of severe psychic aberrations—i.e., psychopathic disorders, neuroses, and impulse disorders. The reason is straightforward: the exceptional conditions covered by this collective concept were not believed worthy of exculpation at all. Instead, they were only deemed to establish diminished capacity and therefore to warrant mitigated punishment. This also allowed the application of specific individual or social therapeutic measures.[52] The reason for this limited stance was openly acknowledged: it was intended to prevent the law's culpability

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50. ENTWURF EINES STRAFGESETZBUCHES MIT BEGRÜNDUNG, *supra* note 9, §§ 24-25 and explanatory note, at 137.

51. *Id.* The explanatory note provides:

> According to the draft, the non-pathological disturbances of consciousness should be considered as precluding criminal capacity only if they are "equivalent" to a pathological mental disorder. Herein lies a purposeful limitation of the value of disturbances of consciousness. All those disturbances are to be excluded that lie within the margin of normalcy . . . . But once the disorder reaches such a degree that it undermines the criminal's ability to act rationally, the question of whether the offender's ability to understand and control the particular action should be posed. Herein lies the meaning of the concept "equivalent." It signifies, although not pathological, nevertheless a similar degree of impairment (destruction or concussion) of the personality complex as that which occurs in a pathological mental disorder.

52. *Id.* at 141.

analysis from being overwhelmed by the growing "psychologization" of the criminal law.[53] However, the model enunciated by the 1962 draft was not enacted due to resistance from certain psychologists. In the final version, the requirement of "equivalent" disturbance of consciousness was less clearly expressed, and other severe psychic disorders were recognized as additional exculpatory grounds. The legislative history clearly indicates, however, that this action was not intended to reverse the court's earlier restrictive approach.[54]

Whoever studies contemporary literature on German criminal theory encounters the very recent and intensive discussion about the relationship between culpability and prevention, about the interconnection of the two, and in general, about the instrumental or purposive features of the concept of culpability in present German criminal law. It is now fairly well-settled that culpability has such a purposive dimension and that the concept of culpability can only be understood in light of its function in a system aimed at providing protection for legal interests.[55] The internal connection between culpability and prevention is apparent in the behavior-directing appeal necessarily imminent in every ethical or social censure: an appeal that makes rational sense only insofar as it is directed at actors able to understand it. This connection was recently developed convincingly by Krümpelmann,[56] and before him by Burkhardt.[57] Some newer conceptions, which were not mentioned in this article's earlier overview of the development of the concept of culpability, stress the purposive dimension of culpability to such an extent that they abandon altogether its traditional content (moral accountability), and proceed in a purely utilitarian fashion. Such conceptions construe culpability exclusively in terms of whether the particular offender is a member of a class that can reasonably be expected to be deterred by penal norms.[58] At the level of theory,

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53. This is not only expressed in the explanation to the 1962 draft, *see supra* notes 9, 13, 50-52, but constitutes a guideline in all preparatory and parliamentary hearings for those responsible for those enacting legislation. *See* ZWEITER SCHRIFTLICHER BERICHT DES SONDERAUSSCHUSSES FÜR DIE STRAFRECHTSREFORM ZU DEM ENTWURF EINES STRAFGESETZBUCHES, Bundestags-Drucksache V/4095, 10 (1968).

54. *See id.*

55. Rudolphi, *supra* note 29, § 19, Marginal Nos. 1a, 1b preliminary note (with additional references).

56. Krümpelmann, *Dogmatische und empirische Probleme, supra* note 22.

57. Burkhardt, *Das Zweckmoment im Schuldbegriff*, 1976 GA 321.

58. *See* Jäger, *Strafrecht und psychoanalytische Theorie*, in FESTSCHRIFT FÜR

such views appear to involve abandoning the principle of culpability. But in practical terms, nothing fundamental changes as far as the scope of criminal capacity is concerned, since use of legal norms for preventive purposes makes sense only to those who can be motivated by the norms—that is, to those who deserve to be censured according to the conventional conception. The same holds for the doctrines of Jakobs[59] and Achenbach,[60] who have developed a radically new concept of culpability. They conceive of culpability as the direct derivative of general prevention, but admit—and this is critical here—that justifying punishment on general grounds of prevention and of instilling "obedience to the law" does not apply to offenders who, because of their biological condition, cannot be directed by norms.[61]

Even after a critical evaluation one would maintain that the more recent literature, by recognizing culpability's instrumental character, postulates a certain mutual limitation on the requirement of culpability and the need for prevention. This idea is expressed in countless statements concerning culpability as a fundamental category of criminal analysis. Such statements range from the basic but unparticularized recognition of limitations to fully developed models. Yet there is still much disagreement over the weight to be accorded each of these (in many respects conflicting) views concerning the nature and systemic implications of culpability. Nevertheless, a minimal consensus is discernible as to the "smallest common denominator." Stratenwerth, for example, argues, without going into detail, that the concept of culpability should incorporate criminal policy principles and that, until now, it has not satisfied the re-

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HEINRICH HENKEL ZUM 70. GEBURTSTAG, *supra* note 22, at 125, 134; Ordeig, *Zur Strafrechtssystematik auf der Grundlage der Nichtbeweisbarkeit der Willensfreiheit*, in FESTSCHRIFT FÜR HEINRICH HENKEL ZUM 70. GEBURTSTAG, *supra* note 22, at 151, 159. On limiting insanity, see Roxin, *supra* note 18, at 652.

59. G. JAKOBS, SCHULD UND PRÄVENTION (1976); *see also* G. JAKOBS, STRAFRECHT: ALLGEMEINER TEIL § 17, Marginal No. 18 ff. (1983).

60. Achenbach, *Individuelle Zurechnung, Verantwortlichkeit, Schuld*, in GRUNDFRAGEN DES MODERNEN STRAFRECHTSSYSTEMS 135 (Schünemann ed. 1984).

61. G. JAKOBS, STRAFRECHT: ALLGEMEINER TEIL, *supra* note 59, § 18, Marginal No. 5. Supporters of a functional concept of culpability based on depth-psychology argue in a very similar fashion. Even they conceive of culpability as deriving from the general-preventive purpose of punishment. *Cf.* Haffke, *Die Bedeutung der sozialpsychologischen Funktion von Schuld und Schuldunfähigkeit für die strafrechtliche Schuldlehre*, in 3 SOZIALWISSENSCHAFTEN IM STUDIUM DES RECHTS 153, 178 (W. Hassemer & K. Lüderssen eds. 1978); Streng, *Schuld, Vergeltung, Generalprävention*, 92 ZStW 637, 650 (1980); Streng, *Unterlassene Hilfeleistung als Rauschtat*, 39 JZ 114, 119 (1984).

quirements of general prevention.[62] A limiting principle appears more concretely in several descriptions of culpability which emphasize that exceptions to the normative command to resist criminal temptation can be granted only when the offender's act or personality is somehow "exceptional."[63] Krümpelmann gives a more precise description:

> The social concept of culpability avoids in principle the difficulties and obscurities of the margin of motivatibility, and serves both the norm's claim to validity and the norm-postulate's command of obedience. It not only allows, but even requires—and this is its most important practical function—elaboration in exceptional cases when observance of the norm is generally not possible.[64]

Roxin expresses this thought even more pointedly from the standpoint of his system of criminal law[65] by making a virtue of the insanity concept's problematic vagueness:

> This area of uncertainty finds statutory expression in the broadness of such terms as "deep-seated disturbance of consciousness" and "serious psychic disorder." In practice, however, general and specific criteria of prevention . . . mitigate the uncertainty, so that the concept of culpability itself, . . . and not first an independent, mediating notion of responsibility, is determined by criminal policy objectives.[66]

One can conclude from the sum of these tendencies that the scholarly literature finds justified (though to an extent not yet fully resolved) and, for the most part, necessary the mutual interpenetration and limitation of the concept of culpability and of the objectives of prevention. As a result, the gray area, which necessarily exists in assessing criminal culpability on the basis of capacity, can be occupied by preventive considerations. This leads to a further consideration. Forgetting for the moment the school that rejects in its totality the notion of a criminal law based on personal responsibility, a widespread conviction exists that, in a liberal policy, social conflicts occurring at the criminal level should be processed and resolved as far as possible under

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62. G. STRATENWERTH, *supra* note 6, at 16, 18.

63. *See* H. JESCHECK, *supra* note 22, at 331.

64. Krümpelmann, *Dogmatische und empirische Probleme, supra* note 22, at 348.

65. Roxin, *Franz von Liszt und die kriminalpolitische Konzeption des Alternativentwurfs*, 81 ZStW 613, 627 (1969); Roxin, *Kriminalpolitische Überlegungen zum Schuldprinzip*, 56 MschrKrim 316 (1973); Roxin, *"Schuld", supra* note 22, at 171.

66. Roxin, *Zur jüngsten Diskussion, supra* note 22, at 279, 293.

the assumption that the participants are responsible members of the legal community. This assumption should prevail for reasons of both general and specific prevention. Our statutory law supports that assumption by taking human responsibility as given in principle and by allowing responsibility to be negated only when the specific requirements detailing the conditions for non-responsibility are met.[67]

III. The Scientific and Legal Outlook

This sketch of the trends in penal practice, legislation, and criminology invites further thought.

The restrictive tendency in insanity assessment, apparent in the case law and in legislative efforts at reform that resulted in the new German Criminal Code[68] were, on the whole, not mistaken. Originally, there were only the classical psychoses which, as an anomalous group and on the basis of psychiatric knowledge, could easily be shown to incapacitate the patient/offender so that he could no longer be motivated by legal norms. This was a safe and fairly incontestable basis for legal insanity. But as soon as one ventured outside this domain, not only did scientific knowledge become more amorphous, but the number of possible interpretations also increased and the significance of expert testimony declined. So we sought a dependable criterion to solve problems in this frontier area. That criterion was found by tying the necessary extension of exculpatory possibilities beyond the psychoses to the external stereotypical conditions of these relatively clearly definable illnesses.[69] This at least applied to disturbances of consciousness and those abnormalities which current law embraces under the term "severe psychic aberrations." The "disease-value" criterion was a useful measure in these problem cases because it prevented an undesirable expansion of exculpation and maintained the preeminent position of the psychiatrist as an expert. Why this measure is no longer acceptable is easily explained: it does not conform to the facts.[70] Sciences of the human mind have reached a level of knowledge that does not allow for the distorting and oversimplified description of the structure of mental disorders inherent in a culpability assess-

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67. *See* StGB §§ 20-21.
68. *See supra* notes 55-67 and accompanying text.
69. *See supra* notes 44-54 and accompanying text.
70. *See* Krümpelmann, *supra* note 45, at 6, 25; Schreiber, *supra* note 46, at 46, 48.

ment tied to the psychoses. This cannot be seriously contested. However, it is not as clear that the needed alternative criterion is sufficiently universal to guarantee results when applied to the plethora of mental phenomena that satisfy the requirements of both culpability and prevention. Two conditions complicate the situation. First, the psycho-sciences (understood in the broadest sense) have in recent decades become increasingly specialized and have developed increasingly differentiated methods and procedures. On the basis of exploration, tests, longitudinal and cross-sectional analyses, depth-psychological interactions, and so forth, they yield increasingly profound insights into the causes of human instincts, the correlations among them, and their transformation into action. Consequently, we are becoming better able to sketch with certainty the internal and external causal network responsible for human action. The human sciences are in a better position than before to elucidate and recreate the process of formation of will. They have therefore become able to explain a given individual's conduct—how that conduct was triggered and what psychological condition caused it. Unfortunately, an improvement in the possibilities for scientific explanation also entails a mounting flood of scientific material which often confounds the layperson—and hence also the judge. A second factor adds to the complexity: increased specialization makes for increased differentiation in research orientation, which in turn leads to problems concerning the commensurability of results. This in turn gives rise to particularly intense scientific controversy in the disciplines relevant here and has unfortunately resulted in whole categories of forensic experts being classified, according to their fields, as pro or con with respect to exculpation.

Given this complicated state of affairs, it may be doubted whether anything at all can be accomplished in arriving at a reasonably consistent normative structure for dealing with insanity. But the attempt must be made. The basic reason for the vagueness of the insanity provision of the German Criminal Code (section 20), as explained more fully above, lies in the fact that a scientifically provable assertion about a given offender's ability to avoid a certain act is in principle impossible.[71] It must be remembered, however, that our ability to clarify the correlations between mental processes by using increasingly refined methods and to understand why illegal acts form part of human life does

71. *See supra* notes 13-18 and accompanying text.

not make it any easier to find the mental point at which motivatibility through legal norms ends. Our knowledge is of course systematizable, but it only indicates whether a specific mental disorder made a violation of legal demands more or less likely—not whether that violation, according to general experience, was inevitable. Our general inquiry into the limits of human motivatibility must therefore, to a great extent, remain unanswered—either because it is in principle unanswerable or because our present knowledge, while considerable, is limited. Given this problematic state of affairs, it would be irresponsible from a criminal policy point of view to eliminate this gray area simply by invoking something like the presumption of innocence.[72] The objective is not to allay factual doubts by giving the accused a more advantageous legal position, but to answer the question of how to process legally a phenomenon that cannot be explained, or at least not mastered, scientifically. Preventive considerations require that all citizens be treated in principle as responsible members of the legal community unless the contrary is unambiguously proven. But this can be proven only in exceptional cases. Only if two conditions are met can one respond with scientific conviction to the crucial question of whether a certain mental abnormality is outside the gray zone. First, each discipline requires empirical data showing the frequency with which comparable disorders occur. Second, the condition must typically curtail the mind's control over the action-compelling instincts such that the perpetrator, according to scientific knowledge, could not have avoided the act. Therefore, cases of insanity are only those that, like the classical psychoses, conform to a paradigm in which the consistent absence of motivatibility can be illustrated with methodological rigor.[73] Recent research demonstrates that such paradigms can be developed independently of the "disease-value" criterion. Criteria have been developed, for example, for certain extreme emotional states[74] and for certain impulse disorders[75] reinforced by addiction that at least approximate the demands of typicality. In many other areas,

72. *But see* Albrecht, *supra* note 25, at 202.

73. *Cf.* Krümpelmann, *Dogmatische und Empirische Probleme, supra* note 22.

74. Regarding research on effects and their treatment in the criminal law, see Krümpelmann, *Motivation und Handlung im Affekt*, in FESTSCHRIFT FÜR HANS WELZEL ZUM 70. GEBURTSTAG 327 (G. Stratenwerth, A. Kaufmann, G. Geilen, H. Hirsch, H.-L. Schreiber & F. Loos eds. 1974); Moos, *Die Tötung im Affekt im neuen österreichischen Strafrecht*, 89 ZStW 796 (1977); Rasch, *Affektdelikten, supra* note 1, at 1309.

75. Judgment of Nov. 21, 1969, Bundesgerichtshof, W. Ger., 23 BGHSt 176.

however, there still exists great uncertainty which only the interdisciplinary collaboration of criminology, criminal practice, and the relevant human sciences can overcome. Here, the most important step is to make the normative aspects of the concept of culpability understandable to the expert, thereby limiting his role to that which is legally relevant. Scientific squabbling will then be peripheral at most.

If one follows this conception—which I consciously have not presented as my own, but which derives from the current theoretical and criminal policy discussion in the Federal Republic of Germany—the requirements of insanity (except where the classical psychoses exist) remain strict. Judges and experts need not reduce the number of exculpations but must conform their reasoning to modern knowledge. Above all, the role and purpose of the expert—whether a psychiatrist, psychologist, psychoanalyst, or member of another psycho-scientific discipline—must be defined more precisely, so that an evaluation of culpability concentrates on the legally relevant and does not indulge in trivial "explanations" of psychological relationships. By the same token, the citizen who has violated a criminal statute can usually avoid the dubious advantage of being treated as a patient because, even in that event, he would usually be protected by specific provisions of the Criminal Code.[76]

IV. Conclusion

This overview of the present state of opinion on the doctrine of culpability and its consequences for the concept of insanity may have conveyed the impression that the problem is unique to the German legal system. But I am confident that this is not the case. In truth, it constitutes a basic problem in the criminal law of every legal system, regardless of its theoretical guise. This problem of when one should not, because of his mental condition, be held responsible under the criminal law probably moves us all in the same way.

Furthermore, I am aware that this article has captured only a narrow section of the whole problem arising from the connection between culpability and prevention. Considerations discussed here, however, may suggest how to resolve analogous questions in the area of justification and excuse. Consequently, it cannot be doubted, for example, that the Bundesgerichtshof

76. StGB §§ 63, 64.

in 1952 resolved conflicting theories by deciding for a general-preventive theory of culpability, or that the legislature followed suit for the same reasons by introducing section 17 of the Criminal Code. Additionally, general-preventive considerations prompted the legislature in section 35 of the Criminal Code to require greater self-mastery of one in a situation of duress who brought about the situation or who is especially qualified to resist the particular danger. It is clear that an excuse's range of application varies with the need for general preventive protection. To explore such phenomena in greater detail would certainly be challenging, but would require a different order of presentation and would therefore exceed the scope of this article.