Human Dignity and the Principle of Culpability

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The paper describes the origins and implications of the principle of culpability in Germany and Israel. The comparison shows that the principle of culpability is more closely related to human dignity in German law and that it carries more weight there than in Israeli law. However, the adoption of the Basic Law: Human Dignity and Liberty and the new General Part of the Israeli Criminal Code in the 1990's have increased the role and impact of the principle of culpability in Israeli law.

I. The Basic Meaning of the Principle of Culpability

Criminal liability should not be imposed upon an individual when it cannot be reasonably and fairly expected of him to have acted lawfully. The structure of criminal liability in German law consists of three stages: the definition of the offense, wrongdoing (lack of justifying grounds), and culpability (lack of excuses). Considerations should not be limited to culpability in the narrow sense as the third stage of "criminal responsibility structure," but should rather be understood in a manner that sees culpability as being dependent on the former stages, so that the full structure of criminal responsibility in its entirety is referred to, including the elements of the definition of the offense and the lack of situations that negate wrongdoing. The notion of culpability is needed to prevent harsh outcomes that are incompatible with human dignity, such as imposing criminal liability when no behavior at all can be attributed to the accused or when his conduct was not voluntary (e.g., because he had no control over his act). Adherence to the culpability principle also requires limiting the punishment for an offense to what is deserved according to the offender's culpability.

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We would like to thank all the participants in the workshops on "Human Dignity and Criminal Law" for their helpful comments. Our thanks also go to the German-Israeli Foundation for Scientific Research and Development for funding this research project.

https://doi.org/10.1017/S0021223700000984 Published online by Cambridge University Press

II. THE PRINCIPLE OF CULPABILITY IN GERMAN AND ISRAELI LAW

Even a superficial examination of the two legal systems in Germany and Israel immediately reveals that whereas in the German system deliberations on the issue of culpability and the connection between culpability and human dignity are significant and substantive, Israeli law gives rise to little similar discussion. It is therefore appropriate to use the way the topic has been developed in German law as a starting point.

Nevertheless, before discussing the issue, three reasons for this difference between the two systems should be mentioned.

The first reason derives from the difference in age between the Israeli Basic Law: Human Dignity and Liberty[1] and the German Basic Law.[2] The German legal system enjoys a seniority of approximately sixty years in terms of the development of the concept of human dignity as a key constitutional concept. Although the Israeli legal system recognized human dignity as a right in administrative law prior to the adoption of the Basic Law, human dignity in the Israeli context was not recognized in constitutional law and was not accorded the same significance as in the German legal system. This may be explained by the special and supreme status of human dignity within the German Constitution.

Secondly, the Israeli legal system has not developed clear distinctions between dangerousness and culpability and between punishment and preventive measures, and some of the preventive measures that exist in German law do not exist in Israeli law. The above-mentioned German "distinction" consists of both punishments and preventive measures, which are treated separately within the boundaries of criminal law. Punishment is based on culpability, while preventive measures are based on dangerousness. Preventive measures, such as depriving a dangerous offender of his liberty, are relevant in cases in which dangerous offenders act out of reduced culpability.[3] In such cases, the punishment imposed on the perpetrator according to the principle of culpability may not be sufficient to protect society from his dangerous-

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[1] Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391.

[2] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I.

[3] *See, e.g.*, STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BGBL. I at 3322, as amended, §§ 63, 64. It is also possible to impose preventive detention on highly dangerous offenders who have acted in a fully culpable way (*Sicherungsverwahrung*), *id.* §§ 66, 66a, 66b. At present, there is an ongoing battle between the European Court of Human Rights and the German courts about the question whether preventive detention may be applied retroactively. If the answer is no, dangerous persons must be released immediately. *See* M v. Germany, Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 17, 2009, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 240, 2011. However, this dispute is not about preventive detention in general. The European Court has no general objections against preventive detention, provided that the court that convicts also decides about preventive detention at the time of conviction.

https://doi.org/10.1017/S0021223700000984 Published online by Cambridge University Press

ness. It might be necessary in such a case to use preventive measures, in addition to the punishment, in order to protect society. Since one of the purposes of criminal law—in the broad sense—is to maintain public order and to protect society, it is justified to make use of preventive measures (as opposed to punishment), which are not based on culpability, for the protection of society against danger. As a result, in the Israeli system, in the absence of preventive measures aimed at dealing effectively with dangers to society, it is very difficult, perhaps almost impossible, for the public prosecutor's office and the courts, which act out of responsibility to the public, to base the imposition of criminal liability and its measures of punishment solely on culpability.[4] A typical example is the punishment of offenders who act out of internal and powerful abnormal impulses, which make it especially difficult for them to obey the law, as compared with "normal" criminals. At the same time, these strong impulses have contrasting implications for culpability and dangerousness, as they simultaneously reduce culpability and increase dangerousness. Israeli criminal law lacks a legal solution for this profound problem in all cases that are not insanity cases, in which forced hospitalization can be imposed. In a system that does not have relevant preventive measures, it would be very difficult for the court not to take into account, when determining the punishment, the extra dangerousness of such an offender. This may explain the extreme caution and reservation Israeli courts take when they approach the possibility of a lenient punishment in cases of mental illness that border on insanity, despite the fact that section 300A(a) of the Israeli Penal Code does allow the courts full discretion in imposing lenient punishments in murder cases when the offender who committed the offense was in a state of severe mental disturbance bordering on full insanity.[5]

The insanity exemption in the Israeli Penal Code (§ 34H) exempts from liability individuals who (1) suffer from an illness affecting their psyche or from a defect in their intellectual ability; or who (2) because of this illness or defect are unable to understand what they are doing or the wrongness of their act or to refrain from performing the said act.[6] The language of the exemption clause includes the alternative of "insanity of the will"—a case where the offender acts out of an irresistible impulse that arises as a result of a mental illness (a psychosis).[7] The Israeli Supreme Court has ruled that an accused who acted out of an irresistible impulse will be exempted only if, at the time of the act, the accused suffered from a mental illness.[8] According to this interpretation, an accused who suffered from any other mental

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[4] CrimA 476/81 Eisenberg v. the State of Israel 37(1) PD 819 [1983].

[5] *See* Penal Code, 5737-1977, SH No. 2302, § 300A(a).

[6] *Id.* § 34H.

[7] This alternative was only inserted into the Israeli Penal Code (in § 34H) by Amendment No. 39 in 1994, but the norm had been recognized by the Supreme Court since the 1950's. *See, e.g.*, CrimA 118/53 Zalman Mandelbrot v. Attorney General 10(1) PD 281, 287 [1956].

[8] *Eisenberg*, *supra* note 4.

https://doi.org/10.1017/S0021223700000984 Published online by Cambridge University Press

disturbance during the time of the act may not enjoy an exemption from criminal responsibility and, in the case of murders carried out before section 300A(a) was introduced, was fully liable for his actions, even if the impulse that pushed him to act was irresistible.[9] An example of this approach can be found in the *Eisenberg* case, a murder case in which all the experts (including the prosecution's witnesses) who examined the accused and gave expert opinions about her mental state determined that the accused acted out of a powerful and abnormal irresistible impulse. Nevertheless, once the court came to the conclusion that her impulse was not caused by a mental illness (as her condition did not reach the level of a mental illness), she was convicted of murder and was sentenced to life imprisonment, despite unanimous agreement that the accused could not have acted differently.[10] This is a problematic ruling that contradicts the principle of culpability. Ms. Eisenberg was not culpable in any sense and yet was convicted of murder and sentenced to life imprisonment.[11] Convicting and sentencing an individual who *could not* have acted differently is incompatible with the Israeli conception of criminal liability, which is based on the culpability principle.[12]

German criminal law paints a somewhat broader picture concerning the emotional disorder that is required and sufficient in order to enjoy the exemption. A "pathological mental disorder," "profound consciousness disorder," "debility," or "any other serious mental abnormality" during the time of the act will exempt the offender from criminal liability according to section 20 of the German Penal Code.[13] This wording clarifies that, according to German law (and in contrast to Israeli law), even an individual who did not suffer at the time of the act from a mental disorder that reached the level of a psychosis can enjoy the exemption. A permanent serious mental abnormality (e.g., psychopathy or neurosis) may suffice.

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[9] Compare to German law: section 20 of the German Penal Code presupposes that the offender is capable of "appreciating the unlawfulness of his action and to act in accordance with such an appreciation" (*Einsichts- und Steuerungsfähigkeit*). This psychological background constitutes culpability in a narrower sense. If a pathological mental disorder, a serious consciousness disorder, debility, or any other serious mental disorder precluded that the offender could appreciate the unlawfulness or act accordingly, he acts without guilt (StGB § 20).

[10] *Eisenberg*, *supra* note 4.

[11] It should be noted that the court ruling was given before the addition of section 300A(a) to the Israeli Penal Code (*see supra* note 5), so once the defendant was convicted of murder, the judges did not have any choice but to impose life imprisonment. However, our disagreement with the ruling concerns the conviction itself—the punishment only enhances the injustice.

[12] See the words of Supreme Court Justice Agranat in the *Mandelbrot* case (*supra* note 7). According to Agranat, it is not reasonable to convict and punish a person who could not act differently than he did. The conviction or punishment of such a person would not be useful as a preventive element. Even if it was, judges must make their decisions based on justice and not on utility.

[13] *See* THE GERMAN CRIMINAL CODE: A MODERN ENGLISH TRANSLATION (Michal Bohlander trans., 2008).

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As mentioned above, we believe that one of the reasons for the position of the Israeli Supreme Court is the lack of preventive measures aimed at coping with the dangerousness of the offender.[14] The irresistible impulse out of which the accused acted reduced her culpability but on the other hand increased her dangerousness. In the Israeli legal system, it is quite difficult for the court to ignore the accused's dangerousness while determining his responsibility and punishment.

The third reason for the differences between German and Israeli law as regards the issue of culpability is the historical affiliation of the Israeli legal system to the Anglo-American legal system. This system is characterized by a utilitarian, non-deontological approach to criminal responsibility and punishment that emphasizes utilitarian considerations such as positive and negative prevention rather than retribution based upon culpability. There are several examples of this trend in Anglo-American law, such as the concept of absolute liability, the exclusive objective test for negligence, the resistance to recognizing necessity and duress as defenses to criminal liability in cases of life versus life,[15] the resistance to recognizing mistake

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[14] *See* Adi Parush, *The Claim of Irresistible Desire and the Agranat Doctrine*, 27 ISR. L. REV. 139 (1993). Parush presents another reason for the current situation. According to Parush, the courts are concerned that if the law exempts every person who was not able to conquer his impulse from criminal responsibility and does not minimize the exemption to cases in which the impulse is a cause of mental illness, it will create a breach in the law that may be abused by other defendants and severely harm the power of the law's deterrence. Parush continues and criticizes this assumption by saying that these situations are so rare that it would be extremely hard to assume that it would have a severe effect. Not to mention the fact that, if an accused acted illegally only due to this situation, without culpability, it is unfair to convict and punish him for his behavior regardless of whether he suffered from a psychotic disruption or any other disruption at the time of the act.

[15] The defenses of duress and necessity in relation to murder are extremely limited in England. The English courts have excluded murder from the boundaries of the defense all together. *See, e.g.*, R. v. Gotts [1992] 2 AC 412; R. v. Howe, 85 Crim. App. 32 (1987); and R. v. Dudley and Stephens (1884) 14 QBD 273, 15 Cox CC 624 (Eng. QB). For a different viewpoint, see LAW COMMISSION, PARTIAL DEFENCES TO MURDER: FINAL REPORT (2004), http://www.justice.gov.uk/lawcommission/docs/lc290_Partial_Defences_to_Murder.pdf (last visited Mar. 8, 2010).

In the United States of America, in most states, it was determined, either by legislation or by the courts, that the necessity defense shall not apply in cases of murder, though the defense does apply to murder cases in the Model Penal Code (§ 2.09). For states that have a legislation on this matter, see ARIZ. REV. STAT. ANN. § 13-412(C) (2001); COLO. REV. STAT. ANN. § 18-1-708 (West 2004); GA. CODE ANN. § 16-3-26 (2003); IND. CODE ANN. § 35-41-3-8 (LexisNexis 2004); KAN. STAT. ANN. § 21-3209 (1995); LA. REV. STAT. ANN. § 14:18(6) (1997); ME. REV. STAT. ANN. tit. 17-A, § 103-A (1983); MO. ANN. STAT. § 562.071 (West 2004); OR. REV. STAT. § 161.270 (2003); WASH. REV. CODE ANN. § 9A.16.060 (West 2004); *see also* CAL. PENAL CODE § 26 (West 1999) (disallowing duress defense for capital crimes); IDAHO CODE ANN. § 18-201 (4) (2004) (same); 720 ILL. COMP. STAT. ANN. 5/7-11 (West 1993) (same); MONT. CODE ANN. § 94-3-110 (2005) (same); NEV. REV. STAT. ANN § 194.010(7) (LexisNexis 2004) (same). For states where the matter was determined by the courts, see, for example, Pittman v. State, 460 So.2d 232 (Ala.Crim.App. 1984) (duress not a defense to murder); Brewer v. State, 72 Ark. 145, 78 S.W. 773 (Ark. 1904) (same); Luther v. State, 255 Ga. 706, 342 S.E.2d 316 (Ga. 1986) (legislature's exclusion of murder from crimes to which coercion defense applies does not violate equal protection); People v. Doss,

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of law as a general ground for an exemption from criminal responsibility,[16] and the imposition of punishments that exceed the offender's level of culpability.[17] On all these issues, German law differs in its strict adherence to the principle of culpability. German criminal law does not include offenses of absolute liability and accepts duress as an excuse even in the case of killings (§ 35 StGB). A mistake of law may exempt an offender from punishment, but only if this mistake was unavoidable (§ 17 StGB). Punishment for negligence requires that the offender can be blamed for not acting differently, with due regard to his personal capabilities.[18] Also, the Federal Constitutional Court requires that sentences must be proportionate to the severity of the offense and the degree of the offender's culpability.[19]

Another example of the application of the Anglo-American trend in Israel's legal system is the difference between the Israeli and German legal systems in dealing with the crime of murder. The Israeli courts have expanded the scope of the offense of murder, despite the fact that the legislator has imposed a severe mandatory punishment of life imprisonment.[20] The expansion was achieved by applying a broad, and some would say even creative, interpretation of the elements of premeditated murder, in a manner that de facto nullified the meaning of the "premeditation" concept and changed it into "regular intention," including spontaneous intention with the exception of very rare cases.[21] An attempt to understand the considerations

574 N.E.2d 806 (Ill.App.Ct. 1991); McCune v. State, 491 N.E.2d 993 (Ind. 1986); Kee v. State, 438 N.E.2d 993, 994 (Ind. 1982) (defense not available for attempted murder); State v. LeCompte, 327 N.W.2d 221 (Iowa 1982) (defense not available for aiding and abetting murder); State v. Chism, 436 So.2d 464 (La. 1983) (accessory after the fact to murder); State v. Capaci, 154 So. 419 (La. 1934) (capital offenses); Wentworth v. State, 349 A.2d 421 (Md. 1975); People v. Dittis, 403 N.W.2d 94 (Mich.Ct.App. 1987) (first degree murder); Watson v. State, 55 So.2d 441 (Miss. 1951); State v. Perkins, 364 N.W.2d 20 (Neb. 1985) (first degree murder); State v. Finnell, 688 P.2d 769 (N.M. 1984) (first degree murder and attempted murder); State v. Cheek, 520 S.E.2d 545 (N.C. 1999); Pugliese v. Commonwealth, 428 S.E.2d 16 (Va. 1993); State v. Ng, 750 P.2d 632 (Wash. 1988); Burnett v. State, 997 P.2d 1023 (Wyo. 2000).

16 *See* MODEL PENAL CODE § 2.02(9) (1985); *but see* Bruce R. Grace, Note, *Ignorance of the Law as an Excuse*, 86 COLUM. L. REV. 1392 (1986) (discussing a development in the US courts' rulings).

17 JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 43-62 (2005); *see also* Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV 323 (2005).

18 *See, e.g.*, BGH, Apr. 9, 2010, NJW 2595, 2010. However, the courts also punish for negligence if the offender who lacks competence for a certain task should not have accepted the task in the first place.

19 6 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] [DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT] 389 (439); 45 BVERFGE 187 (228); 50 BVERFGE 205 (215); 86 BVERFGE 288 (313); 96 BVERFGE 245 (249); 120 BVERFGE 224 (254).

20 It is reasonable to presume that judges have been affected by their knowledge that in practice a life sentence is not life imprisonment, just as they were influenced by the very broad nature of the manslaughter felony, which took away from it the nature of a felony of great severity.

21 *See* CrimA 46/54 General Attorney v. Segal 9 PD 393, 395 [1955]; CrimA 686/80 Siman Tov v. the State of Israel 36(2) PD 253; *see also* Mordechai Kremnitzer, *Premeditation or Normal*

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that led the Israeli courts to take this position brings us to educational and preventive considerations—aiming to elevate the value of human life and to condemn a person who intentionally deprived another person of his life in an unequivocal and severe manner. The concern expressed by the courts is that an acquittal of murder—even in the case of a manslaughter conviction—may convey a demeaning message as to the value of human life. Perhaps it could be argued that there is a different explanation for the Israeli courts' approach, namely that spontaneous killing represents a severe degree of culpability that is equal to—and perhaps even higher than—the culpability in a premeditated murder. This alternative explanation is not convincing. Cases of an extremely reprehensible spontaneous killing—such as when a person sees a boy on a bridge and decides spontaneously with no reason to push him into the water and cause his death—are rare and a-typical of spontaneous killings. The paradigmatic cases of spontaneous killings, and these were also the cases that were before the Israeli courts, were cases of provocation in which the perpetrator lost his temper and control and killed in hot blood. The courts decided that this was not enough to nullify premeditation and that the provocation had to be of the kind or degree that would cause a reasonable person, as a normative figure of reference, to act similarly or at least to create such a possibility. It is clear that in these cases the degree of culpability is lower than in a premeditated killing, and the concerns of the courts that led to the expansion of the offense of murder were therefore preventive and educational in nature.

In contrast, there are some cases in the German legal system that indicate an opposite trend of avoiding murder convictions and life sentence in cases where the deserved punishment, according to the culpability of the offender, is less severe. There are two ways in which this goal was achieved. Older judgments maintained that under special circumstances it might be possible to refrain from imposing a mandatory life sentence (!) even if the verdict was "murder." This has been done in exceptional cases, when after taking into account the culpability of the offender, the life sentence exceeded the deserved punishment.[22] The courts have not often used the possibility of ignoring the mandatory life sentence after the crime has been defined as murder. Rather, a newer trend is to avoid labeling the act as murder by applying a narrow interpretation of the description of the offense in section 211 of the German Penal Code.[23]

Intent—Murder with Premeditation—On the Element of "Without Provocation" in Murder Premeditation, 1 CRIMINAL LAW, CRIMINOLOGY, AND POLICE SCIENCE 10 (1987). The courts acted in this manner despite the fact that in other situations the judicial attitude toward legislative restriction of judges' discretion in sentencing was the opposite—interpreting the restrictions narrowly in order to minimize their effect.

[22] *See* 30 BGHST 105; 45 BVERFGE 187.

[23] *See, e.g.*, 48 BGHST 207.

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III. THE RELATIONSHIP BETWEEN CULPABILITY AND THE RIGHT TO HUMAN DIGNITY

According to the German Constitutional Court, the principle of culpability has three roots: the rule of law (*Rechtsstaatsprinzip*), the right to autonomy (art. 2 GG) and human dignity (art. 1 GG).[24] The principle of culpability is seen as a separate, more specific individual right than the right to human dignity. From this point of view, the culpability principle is not identical to human dignity, although it stems from the right to have one's dignity respected. The concept of human dignity, as referred to in common liberal state theories, has two theoretical underpinnings. According to the first, the individual person is the foundation of the existence of an organized society. Society was established for the well-being of the individual and not vice versa. The individual has to be recognized as an end in itself, and it is forbidden to treat the individual as if he were only a means for achieving any external purpose or to view him as a mere tool or object.[25] According to the second theory, the individual is perceived as a moral agent who is able to distinguish between good and evil, between what is forbidden and what is permitted, and who is able to choose that which is good and behave accordingly. Human dignity is based, inter alia, on such an attitude toward the individual. If the state's criminal law theory is based on these assumptions, then imposing criminal responsibility upon an individual who is not culpable, or punishing him more severely than he deserves according to the degree of his culpability, means that the state is using the individual as a means for achieving a purpose external to him (such as preventive, deterrent, or educational objectives). Adopting such an approach infringes the individual's right to human dignity.[26] Overlooking the actual capacity of the individual to reach and follow moral decisions affronts his basic right to human dignity. In the absence of such capacity, there is a denial of justice when the offender is accused of committing the act, condemned for the act, and punished for it.[27]

Moreover, some of the rationales behind the concept of human dignity might even justify absolute protection. First, a deontological barrier protecting the individual against utilitarian (cost-benefit) considerations may be necessary to reduce legislators' and judges' temptation to impose harsh and even cruel treatment on offenders. The development of punishment in the American system during the last decade

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[24] *See* 45 BVERFGE 187 (259-60); 95 BVERFGE 96 (130-31); 109 BVERFGE 133 (171).

[25] IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 421 (Lewis White Beck trans., 1969) (1785) (the page number refers to the page numbers of the so-called Akademie edition).

[26] *See* Mordechai Kremnitzer & Khalid Ghanayim, Book Review, 34 ISR. L. REV. 302, 315 (2000) (reviewing HANS-HEINRICH JESCHENCK & THOMAS WEIGEND, LEHRBUCH DES STRAFRECHTS ALLGEMEINER TEIL (5th ed. 1996)).

[27] *See* KANT, *supra* note 25 ("counter-utilitarian idea that there is a difference between preferences and values and that considerations of individual rights temper calculations of aggregate utility").

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may serve as a good example of the realization of these fears.[28] Second, a civilized society has the obligation to protect the basic rights of every one of its citizens, even those who have committed a crime. One should not forget that we are dealing with individuals whose basic rights are in need of special protection. Offenders, as opposed to other sectors of society, do not enjoy the same natural intuitive inclination to have their basic rights protected. Those who are accused of performing a criminal act—and even more so those who are convicted—belong to a category of banished people who do not arouse our sympathy. Therefore, it cannot be taken for granted that their rights will be safeguarded, and it is not difficult to imagine an excessive tendency to punish them more severely than they deserve.

IV. The Scope and Measurement of Culpability

It appears that the scope of the principle is related to the nature of the protection of the principle, which is either absolute (as part of an absolute right to human dignity) or relative. If culpability is protected in an absolute manner, then once an infringement of culpability has been recognized it has to be automatically rejected without even examining possible justifications for such an infringement. In such cases, a moderate approach and a narrower view of the concept are called for, so that the conclusion that culpability has been infringed will not be made too easily. If culpability is protected as a relative principle, its meaning can be broader.[29]

The measurement of the degree of culpability is a complicated task. The case of killing a person in order to hide a crime or to escape from criminal liability could help to exemplify this point. At first glance, it could be argued that this is a case of diminished culpability that should accordingly be treated leniently.[30] Can the perpe-

[28] For an assessment of the dramatic increase in the imposition of life sentences in US courts, see MARC MAUER, RYAN S. KING & MALCOLM C. YOUNG, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT (2004). For a detailed discussion on indeterminate sentencing by US courts, see NICHOLAS N. KITTRIE, ELYCE H. ZENOFF & VINCENT A. ENG, SENTENCING, SANCTIONS, AND CORRECTIONS: FEDERAL AND STATE LAW, POLICY, AND PRACTICE 209 (2d ed. 2002); *see also* WHITMAN, *supra* note 17, at 43-62.

[29] Even in this case, the special importance of human dignity (even when not absolute) should not be ignored.

[30] The practice of most states is to treat this case with special severity. For example, in Israeli law, killing intentionally in order to ensure escape from arrest or punishment for committing another crime is one of the alternatives constituting murder (Penal Code, 5737-1977, SH No. 2302, § 300(a)(4)). In German law, killing in order to cover up the commission of another crime is part of the definition of murder, as opposed to voluntary homicide (STGB § 211). In French law, a murder committed in order to escape after committing another crime is one of the aggravated forms of *meurtre*, which is punishable by a life sentence (CODE PÉNAL [C. PÉN.] art. 221-2). In the Netherlands, manslaughter committed while seeking impunity from another criminal offense is punishable by life imprisonment, like murder (Wetboek van Strafrecht (Sr) (Criminal Code) § 288). The California Penal Code sets a mandatory life sentence without parole for murder in the first degree committed for the purpose of avoiding lawful arrest (CAL. PENAL CODE § 190.2 (West 1999)).

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trator be fairly expected to act otherwise? What instinct is more powerful then the instinct of self-preservation? Do legal systems that treat this case with special severity violate the principle of culpability and the right to human dignity? A second look reveals a different landscape. It could be argued that taking account of this kind of pressure, which the perpetrator brought upon himself by carrying out his crime, would mean that the legal system gives favorable consideration to engagement in criminal activity. Moreover, preferring the selfish interests of the evil-doer, which only arose as a result of his evil actions, over the existential interests of an innocent witness or a police officer is extremely unjust. It is true that, in general, the difficulty of acting according to the legal norm reduces culpability. But this is not always the case. When the difficulty stems from criminal conduct, there is no place for such a reduction. On the contrary, the demand to act in accordance with the law becomes more powerful in such cases. The legal system and all the innocent persons who might be harmed are entitled to show zero tolerance for this kind of risk. Favoring the perpetrator over the victim in such situations will result in a decline in the public's confidence in the actual validity of the norms protecting life and limb. This necessary and justified need to adopt a normative rather than psychological approach (otherwise the norms protecting life and limb will fail to achieve their aim) does not trespass the limits dictated by the principle of culpability, nor is it unfair toward the perpetrator. Faced with the specific risk that the perpetrator created through his crime, the safety of innocent potential victims takes clear precedence over the perpetrator's right of liberty.

The vocabulary of the subjective element and the vocabulary of negligence do not cover in a full and exhaustive manner all mental data relevant for culpability, nor do they cover all anti-social choices and their significance that are necessary for a full account of accountability. Take, for example, the general awareness of co-perpetrators that, in the course of committing the crime, they might encounter difficulties that will require the commission of a different or additional crime to the planned crime. Unless they ponder more specifically on these possibilities, this mental state is not covered by the traditional categories. Is it irrelevant for the measurement of their culpability? Moreover, the perpetrators may have "good" reasons to refrain from such probing, for example because they could not care less, they do not want to complicate their legal situation ("it is better to know less"), they trust themselves to be capable of overcoming all obstacles, or they want to ensure that they will not "chicken out." Is such refraining (which may mean negligence) less culpable in a significant way than its opposite (which means the subjective element)? Is it not legitimate or even necessary that the legal order take steps to motivate perpetrators against this convenient (for them) lack of attention to the possible results of their criminal endeavor?

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It is clear that negligence implies less culpability than intention and indifference toward the result of the act. But is it always less culpable than recklessness? This is less evident and may depend on the motivation of the negligent actor for not making the required mental effort. The culpability ingrained in negligence is not always of the same volume. One type of special negligence is the above-mentioned kind, where negligence resides in the second floor while the first floor is occupied by a general awareness of the possibility of committing a non-specified different or additional offense.

Another case of special negligence is that of gross negligence. Negligence may become gross negligence because of an excessive deviation from the dictates of the duty of care from an objective point of view or because the perpetrator failed to observe what was entirely obvious and easy to discern, so that even a child could have been aware of it.

An additional distinction can be made between normal negligence, that of a driver or medical doctor, and negligence in the course of committing a crime that is related to the same crime. In the second case, the conduct is devoid of any social utility, a utility that characterizes the normal negligence ensuing from normative behavior. As already mentioned, such negligence calls for an attitude of zero tolerance. This kind of attitude may explain the very significant increase in punishment in German law for negligent or grossly negligent killing committed in relation to some serious crimes, such as bodily injury, rape, or robbery, where the punishment is increased dramatically if the crime caused the death of the victim. In the case of rape or robbery, the sentence range for the basic crime—1-15 years' imprisonment—is sharply increased to 10 years' to life imprisonment if death was caused as a result of at least gross negligence in the commission of the basic crime.[31] In the case of bodily injury, sentences ranging from a mere fine to five years' imprisonment for the basic crime go up to 3-15 years' imprisonment when death was caused negligently through the act.[32]

It is clear that responsibility is not measured only according to the mental element. Other components are also relevant, including the strength of the normative demand (when the motivation to commit a crime stems from criminal activity the normative demand to obey the law is enhanced), the kind of risk created by the actor, the degree of risk, and the nature of the risk (whether it is on the border of a tolerable risk or whether it is an entirely illegitimate risk).

Another example of an alleged violation of human dignity can be found in the contribution of our respected colleagues Gur-Arye and Weigend to this volume concerning section 34A of the Israeli Penal Code 1977.[33] The typical case concerning

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[31] STGB §§ 178, 251.

[32] *Id.* § 227.

[33] Miriam Gur-Aryeh & Thomas Weigend, *Constitutional Review of Criminal Prohibitions Affecting Human Dignity and Liberty: German and Israeli Perspectives*, 44 ISR. L. REV. 63 (2011).

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this provision is an act of killing committed by one of two robbers during a robbery in which both of them, or at least one of them with the knowledge of the other, carried a loaded weapon, while having agreed that the loaded weapon would not be used except as a threat. The section deals with the responsibility of the robber who did not fire the weapon in a case where his partner did use the loaded weapon to kill a person in the course of committing the robbery and in relation to the killing. According to section 34A(b), if the additional crime is a crime of regular mens rea requirement (not intention or purpose), then if the other co-perpetrator, as a person from the community, could have foreseen the above-mentioned development (i.e., had the mental element of negligence), he is liable for the additional crime. In this case, the mandatory sentence of life imprisonment for murder is the maximum sentence. Under German law, if it was clearly foreseeable that this could happen, section 251 of the German Penal Code would apply to the co-perpetrator (punishment from 10 years to life imprisonment). Some would argue that this is a disproportional sanction, especially when it involves a conviction of murder.[34] We accept that it is possible to have different views concerning this issue, but it seems exaggerated to us to claim that it is a violation of the principle of culpability and the right to human dignity.

In fact, it may be argued that this is in fact a case of implied consent—contrary to a verbal agreement—to use the weapon as a lethal weapon. Otherwise, why carry a loaded weapon? Since for the sake of a threat there is no need to load the weapon, the only reasonable interpretation is that the perpetrators expressed in their agreement to use the weapon only as a threat their wish not to have to use the arm as a deadly weapon. Perhaps the meaning of their agreement was even that the weapon should be used only as a last resort. But their agreement cannot be understood to mean that they entirely ruled out the possibility of using the weapon. If their life was in danger, is it not clear that they would have killed in order not to be killed? The verbal agreement taken at face value is no more than a pretense for "legal needs." Moreover, according to section 34A(b), the punitive outcome of a conviction of murder in this case can be freely mitigated. In fact, an Israeli court may in such cases impose a much lower sentence than the German court is obliged to under section 251 of the German Penal Code. Reluctance to convict for murder stems mainly from the mandatory and especially severe sanction of life imprisonment. This concern

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[34] *See* CrimA 4424/98 Pedro Silgado v. the State of Israel 56(5) PD 529 [2002]. The result of the case is the outcome of a peculiarity in the General Part of the Israeli Penal Code, according to which one of the forms of murder is killing *in the course* of performing another offense, while not requiring any specific purpose with regard to the other offense. If the law of murder is amended in such a way that a requirement of this nature is added, such cases will no longer automatically result in a murder conviction. For a general criticism of section 34A, see Daniel Ohana, *The Natural and Probable Consequence Rule in Complicity: Section 34A of the Israeli Penal Law, Part I*, 34 ISR. L. REV. 321 (2000) and *Part II*, 34 ISR. L. REV. 453 (2000).

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does not apply here, as life imprisonment is a maximum, not a mandatory, sentence in this case.

In addition, the issue of the attachment of the murderer stigma to the co-perpetrator and the normative framework for a severe sentence can be explained as follows. Joint perpetration creates a special risk for the commission of an additional crime for the common purpose of success of the criminal endeavor. When a loaded weapon is carried by one of the perpetrators with the knowledge of his partner, the risk is further increased and both are responsible for this increased risk. There is a strong—mutually created—dependency between co-perpetrators. One of them may ensure the success of their venture by shrewdly overcoming an obstacle without committing an additional crime. In this case, his partner benefits from his improvisation. It is therefore not unjust to make the partner responsible for an improvisation performed for the sake of ensuring the success of the venture when it involves an additional crime. The identity of the co-perpetrator who identifies the risk is often accidental. The lethal use of the weapon is directly or indirectly related to the participation of the other robber in the robbery (e.g., it may result from an effort to protect him). The incentive to use the weapon in this manner may be extremely strong. The legal system owes it to the innocent victim to make the utmost effort to protect his or her life.

A different approach places the commitment of the legal system to life and limb in doubt. In order to protect the potential victim, it is justified to impose a duty on the other robber to intervene and prevent such use of the weapon. If this duty is taken seriously, it has to be powerful enough to cause the co-perpetrator to overcome his motivation to complete the joint criminal venture and remain loyal to his partner.[35] Since the co-perpetrator is responsible for the initial risk, the increased risk and the failure to neutralize the risk, a very severe sanction is not disproportionate. Although the terminology of negligence is used in the provision, this is not a regular case of negligence. The risk has no bearing on legal activity, and every robber knows (not only ought to know) that the successful perpetration of a robbery may require the commission of additional crimes. At the same time, he has a strong incentive not to think about these possibilities in detail, for instance for the sake of diminishing his level of responsibility. The legal system would be ill advised to respect and reward this kind of attitude.

To sum up this example from a normative perspective of culpability, each robber chose voluntarily to participate in a criminal endeavor involving a high risk to human life—a risk that was in fact realized. The robber who knew that his partner was carrying a loaded gun put the life of innocent people at the mercy of his partner

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[35] It is clear that adding three years of imprisonment (the maximum punishment for negligent killing under Israeli law) to the 20-year sentence "gained" for the armed robbery has no chance of influencing the behavior of the other perpetrator.

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and placed his own destiny in the same hands. It seems to us that the level of his culpability in relation to the fatal result exceeds by far the level of negligent killings and that it is not illegitimate to hold him accountable for the act of killing committed by his partner.

V. ASPECTS OF THE PRINCIPLE OF CULPABILITY

Judgments about reasonable and fair expectations presuppose examinations on different levels.

A. VOLUNTARY PERSONAL ACTION

First, one has to ask whether the offender acted himself, which is a minimum requirement for control. The behavior which is deemed a "wrongdoing" must be an action voluntarily carried out by the offender (or resulting from his own omission). In a case of absolute physical involuntariness, there is obviously no culpability, because the necessary voluntary action is lacking. The principle of culpability also negates the concept of collective punishment. Punishment of those who were not involved and took no part in the criminal act, despite belonging to the offender's family or friends, cannot be justified. In this respect, questions relating to the classification of different sanctions can arise, such as the controversial measure of demolishing the house of a terrorist's family in response to his participation in a terrorist act,[36] including cases where the terrorist who carried out the attack was killed during the attack (or was a suicide bomber). Should we consider such measures as an administrative-preventive step or a punitive-criminal sanction that has the nature of a collective punishment? In the latter case, we are blaming some for the conduct of others, which is a violation of their human dignity. Culpability is necessarily personal.

In an early decision, Germany's highest court in criminal matters, the Bundesgerichtshof, coined a famous description that captures the notion:

> Culpability means to be blameable. The blaming act which ascribes culpability reproaches the offender for the illegal act, for making a decision in favour of wrongdoing although he could have acted legally, although he could have made a decision in favour of the law. The inner reason for the judgement of culpability is that human beings are capable to act in a free, responsible and moral way and thus capable to decide in favour of the law and against wrongdoing.[37]

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[36] *See* David Kretzmer, *Judicial Review of Demolition and Sealing of Houses in the Occupied Territories*, KLINGHOFFER BOOK ON PUBLIC LAW 305-57 (Itzhak Zamir ed., 1993).

[37] "Schuld ist Vorwerfbarkeit. Mit dem Unwerturteil der Schuld wird dem Taeter vorgeworfen, dass er sich nicht rechtmaessig verhalten, dass er sich fuer das Unrecht entschieden hat, obwohl er

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Punishing a person not for his own actions but for the conduct of another, however close that person is to him, means using this person for the purpose of deterrence and thus violating his or her human dignity.

The basic assumption of the principle of culpability is that criminal liability should not be imposed upon an individual unless the prohibited act can be attributed to that individual. According to this assumption, a collective punishment imposed against those who were not involved and took no part in the relevant criminal act violates the principle of culpability.

Is the demolition of houses exercised by Israel in the Occupied Territories and East Jerusalem a violation of this rule?[38] In order to answer this question, a preliminary question has to be answered. Do such demolitions constitute punishment?[39] In the case of the Israeli sanction of "house demolitions,"[40] the British mandatory authorities defined this sanction as an administrative action. The Israeli Supreme Court has also stated that the sanction is an administrative action, since its aim is preventative.[41]

We are inclined to think that the demolition of houses is a punitive sanction. Prevention is also one of the objectives of a punitive sanction. Therefore, the fact that the aim of a certain sanction that causes suffering, inconvenience, and a deprivation of rights is prevention does not automatically mean that it is not a punitive one. "House demolitions" include all the elements that are required in order to be defined as a "judicial penalty." An essential and necessary part of the sanction's goal is to cause suffering to the residents of the demolished house. This suffering is *not only* an unavoidable side effect. Without this element of suffering, the sanction cannot fulfill its preventive aim. The fact that an administrative body decides to enforce this sanction does not necessarily mean that the sanction is merely administrative. The categorization of a sanction is not decided by the type of entity that has the power to

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sich rechtmaessig verhalten, sich fuer das Recht haette entscheiden koennen. Der innere Grund des Schuldvorwurfs liegt darin, dass der Mensch auf freie, verantwortliche, sittliche Selbstbestimmung angelegt und deshalb befaehigt ist, sich fuer das Recht und gegen das Unrecht zu entscheiden." 2 BGHST 200.

[38] For a broad discussion of the history and legality of the measure of home demolitions in the Occupied Territories, see ELAD GIL, YOGEV TUVAL & INBAL LEVI, EXCEPTIONAL MEASURES IN THE STRUGGLE AGAINST TERRORISM: ADMINISTRATIVE DETENTION, HOME DEMOLITIONS AND "ASSIGNED RESIDENCE" 189-254 (2010); Brian Farrell, *Israeli Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation*, 28 BROOK. J. INT'L L. 871 (2003); Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 YALE J. INT'L L. 1 (1994); Martin B. Carroll, *The Israeli Demolition of Palestinian Houses in the Occupied Territories: An Analysis of Its Legality in International Law*, 11 MICH. J. INT'L L. 1195 (1990).

[39] There is no such sanction in the German Penal Code, and it would be considered a serious violation of the culpability principle.

[40] Defence (Emergency) Regulations (1945), § 119.

[41] *See, e.g.*, HCJ 2006/97 Ganimat v. Head of the IDF Central Command 51(2) PD 651, 652-55 [1997].

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enforce it. A sanction that aims to cause suffering, damage, or any other worsening of a person's situation as a response to an illegal action should be regarded as a penalty. We can find support for our argument in the Israeli Supreme Court's repeated statements throughout the 1970's and 1980's that confirm the "penalty" nature of the sanction.[42] The argument that the demolitions are an administrative preventive sanction was raised for the first time by Justice Barak in the *Abu-Alaan* case[43] and was presented later on in the *Shukri* case in these words:

> The authority which is given to the military commander by article 119, is not an authority to execute a collective punishment; its activation is not designed to punish the appellant family members. The authority is administrative and its activation is meant to prevent and by this to maintain the public order.[44]

The *Shukri* ruling is the leading ruling today and is used consistently by the Court. As stated above, we do not find the reasoning of the Court in this ruling convincing.

Over the years, another effort made by the Israeli Supreme Court to deal with claims that were raised against the collective punishment nature of house demolitions was to deny their collective nature. In the *Daglas* case (1985), the Supreme Court stated that the house demolition sanction was similar to a prison sentence imposed on the head of the family—a father of minors whose imprisonment would leave them without a supporter.[45] The comparison was made based on the fact that in both cases the family members will suffer. We think that the comparison between the suffering of a prisoner's family and the suffering of a family whose house has been demolished is not convincing. The immediate aim of a prison sentence is to negate the offender's freedom. The suffering of family members is an unavoidable result of the sanction but not its purpose. In contrast, the immediate aim of a house demolition is to make family members suffer, in the hope that this suffering will prevent others from subjecting their families to similar sanctions in the future.

Even if we accept the claim that house demolitions are not a collective punishment, there cannot be any doubt that the demolition of a house in these circum-

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[42] In the *Sahwil* case, for example, the Court indicated that we are dealing with "an unconventional penalty act." HCJ 434/79 Sahwil v. IDF Commander in Judea and Samaria 34(1) PD 464 [1979]. Furthermore, in the *Hamri* case, the Court ruled that "we're dealing with a 'penalty provision.'" HCJ 361/82 Hamri v. IDF Commander in Judea and Samaria 36(3) PD 439 [1982]. In a case involving the Association for Civil Rights in Israel, the Court repeated this and indicated that "everybody agrees that a demolition of a building is a tough and severe penalty measure. The preventive power which is concealed inside property demolition does not change the fact that the sanction is punitive." HCJ 358/88 The Association for Civil Rights in Israel v. Head of the IDF Central Command 43(2) PD 529 [1989].

[43] HCJ 126/83 Abu Alaan v. Minister of Defense 37(2) PD 169 [1983].

[44] HCJ 798/89 Shukri v. Minister of Defense [1990] (unpublished).

[45] HCJ 698/85 Daglas v. IDF Commander in Judea and Samaria 40(2) PD 42 [1986].

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stances violates the principle of "personal responsibility." This principle, which forbids the infliction of intentional harm on those who were not involved nor took any part in the criminal act, is one of the cornerstones of all advanced law systems. The idea could be phrased as follows: no sanction of any kind (either penal or otherwise) should be imposed on a person except on the basis of his personal culpability or dangerousness. According to this principle, it is forbidden to impose sanctions that are not based on culpability or dangerousness, even if these sanctions have a deterrent potential. Furthermore, the principle of personal responsibility forbids harming innocent people. The idea of personal responsibility is not based on naivety or lack of awareness regarding the deterrent effect of harming the innocent. On the contrary, the principle was created in order to create a moral barrier to prevent the use of the individual as a tool in order to achieve purposes beyond this individual (however important those purposes might be).

B. State of Mind

In order to determine culpability, we must take into account the psychological situation of the offender. The offender's state of mind at the time of the offense must connect him to the harm or danger he created, thus enabling him to make a different choice. We therefore require some degree of knowledge or intention concerning the outcome, or at least the possibility that the offender could have foreseen it, had he taken more care. If it is questionable whether this was the case (e.g., in cases of absolute liability or some instances of negligence—see the next section), a conviction for preventive purposes (to deter or to support norms for public benefit) is not compatible with the convicted person's right to human dignity.

C. Other Conditions for Penal Liability

A wider perception of culpability requires more than the aforementioned requirements of a voluntary personal act and certain psychological preconditions. Even if an offender had the choice to act differently in both a factual and a psychological sense, it might still be unreasonable to expect him to do so (for example, if the offender acted under duress—see section VII below).

D. Culpability as a Measure of Punishment

The culpability concept is also significant at the sentencing stage of the trial. It requires that the severity of the punishment reflect what the offender deserves from a retributive perspective and that it match the degree of culpability of the offender (see section VIII below).

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VI. THE PRINCIPLE OF CULPABILITY AND ITS CHALLENGES

In this section, we will briefly discuss two issues concerning the relationship between the principle of culpability and the conditions for imposing criminal liability that appear to challenge the principle of culpability: the concept of absolute liability and the concept of negligence.

A. ABSOLUTE LIABILITY

Absolute liability as a form of criminal liability is contradictory to the principle of culpability, since liability is imposed without the need to prove any kind of mental element. This means that liability will also be imposed on a person who acted without subjective mens rea or negligence (i.e., accidentally). In such a case, a person who could not have been expected to act lawfully will still incur penal liability. A former Chief Justice of the Israeli Supreme Court, Shimon Agranat, interpreted this issue in a similar manner in the *Gadisi* case:

> Undoubtedly this doctrine [absolute liability] stands in contradiction to the foundations of the criminal law. As we know, criminal law encompasses the idea of just punishment, and the sense of justice opposes having a human being punished in vain, meaning to say without bearing any moral blame for behavior infringing a prohibition by law.[46]

It is worth noting that John Rawls, who cannot be suspected of being insensitive to the idea of justice, supported a kind of absolute liability in cases of emergency. As a principle, Rawls believed that "each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others."[47] Nevertheless, he also wrote:

> Suppose that, aroused by sharp religious antagonisms, members of rival sects are collecting weapons and forming armed bands in preparation for civil strife. Confronted with this situation the government may enact a statute forbidding the possession of firearms.... And the law may hold that sufficient evidence for conviction is that the weapons are found in the defendant's house or property, unless he can establish that they were put there by another. Except for this proviso, the absence of intent or knowledge of possession, and conformity to reasonable standards of care, are declared irrelevant.... Now, although this statute trespasses upon the precept ought implies can, it might be ac-

[46] AdminA 11/65 Gadisi v. Attorney General 20(1) PD 57, 68 [1965].
[47] JOHN RAWLS, A THEORY OF JUSTICE 3-4 (1971).

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> cepted by the representative citizen as a lesser loss of liberty, at least if the penalties imposed are not too severe.... Citizens may affirm the law as the lesser of two evils, resigning themselves to the fact that while they may be held guilty for things that they have not done, the risks to their liberty on any other course would be worse.[48]

Rawls' argument demonstrates how important it is to create a real barrier to this kind of approach. This is not to say that there should be no countermeasures taken by the state against citizens who are forming armed gangs and preparing for civil war. However, beyond the area of administrative law and the preventive measures administrative law allows, if we turn to criminal law the principle of culpability must be obeyed. Culpability, as derived from the absolute right of human dignity, is important because it serves as such a barrier.

The Israeli legislator has taken a significant step toward minimizing the infringement of human dignity caused by the concept of absolute liability. First, Amendment No. 39 (1994) to the Israeli Penal Code stated that new offenses of strict liability may be created solely by way of legislation. It would thus no longer be possible to identify this type of offense by means of judicial interpretation of the aim or the nature of an enactment. Second, Amendment No. 39 abolished the concept of absolute liability in Israeli criminal law and replaced it with the concept of strict liability.[49] All offenses classified as absolute liability offenses before the adoption of Amendment No. 39 were formally redefined as offenses of strict liability. Amendment No. 39 required offenses of strict liability to have a mental element as a matter of principle, and in this sense they are "normal" offenses. However, there is a presumption that a person who fulfills the actus reus of these offenses acted at least with negligence. Unlike absolute liability, which is based on non-refutable presumptions, strict liability is based upon refutable presumptions. The accused will be acquitted if he can prove that he: (i) acted without mens rea; (ii) acted without negligence; and (iii) took all steps to prevent the offense. In our view, "all steps" means "all reasonable steps." The amendment also restricts the legislator's ability to create offenses of strict liability: there must be a convincing justification for imposing this extreme kind of liability and for shifting the onus of proof upon the accused. Third, in order for a prison sentence to be imposed in respect of an offense of strict liability, the offense must be restored to the category of ordinary offenses, and it must be proven that the offense was committed with mens rea or negligence. Otherwise, a less severe penalty must be imposed.

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[48] *Id.* at 242. It is true that such a prohibition is not entirely absolute, since it opens an outlet for the defendant to prove that the firearm was put in his house by another. But suppose that he is unable to prove it. In such a case, the prohibition becomes absolute.

[49] Shneur Z. Feller & Mordechai Kremnitzer, *Proposal for a General Part of a New Penal Law—Introduction*, 30 ISR. L. REV. 36, 52 (1996).

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German law does not have similar exemptions from the ordinary rules of proof. German penal theorists would abhor the idea of both absolute and strict liability. According to the laws on the books, defendants never have to prove anything and the state has to bear the burden of proof. However, one might expect, for example with respect to possession offenses (e.g., possession of child pornography), that judges do presuppose that people know what they possess (e.g., what is stored on the hard disc of their personal computer in their private home). The differences between the legal systems are therefore not as pronounced in practice as they are in theory.

In our opinion, the concept of strict liability, as opposed to absolute liability, can be defended. When in the eyes of any reasonable person the objective circumstances point at least to negligent conduct, shifting the onus of proof to the defendant may be justified, provided that the accused is acquitted if, at the end of the day, reasonable doubt remains as to whether he was negligent. This is based on the idea that the defendant, who claims very unusual circumstances, can be expected to bear the onus of proof if he is in a singular position to shed light upon the course of events.

B. Negligence

Responsibility for negligence depends on an objective element (in Israeli law conduct that creates an unreasonable risk, in German law a violation of the duty to act as a careful person would) and the ability to foresee the harm that has occurred. Tension exists between negligence and the principle of culpability. There are two areas of potential conflict between the two: in determining the objective standards of careful behavior and in ignoring the limited foresight people have in real life. Courts display a tendency to raise both the level of expected capability and the level of foresight due to various factors. For example, wisdom based on hindsight is extremely misleading—it easily turns what has happened into what could have been anticipated. In addition, the desire to provide strong and broad protection to the protected interest, especially when the interest is a vital one (such as life and limb), causes the level of "reasonable" careful behavior to be set extremely high. This idea was expressed explicitly by Israeli Supreme Court Justice H.H. Cohen in the *Bash* case: "When the Court is about to determine this standard, it may be strict, to prevent someone from being killed."[50] In this case, the Court found that the owner of a refrigerator who left it in a yard could have foreseen that children would take out the shelves of the refrigerator and climb into it, and that the door might close, causing their suffocation.

German courts have demanded unrealistic standards of care in households where people smoke cigarettes. According to these standards, in order to prevent fires, using an ashtray is not sufficient. Before leaving one's apartment, one must examine

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[50] CrimA 196/64 Attorney General v. Bash 18(4) PD 568, 572 [1964].

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carpets, furniture, and so forth to detect smoldering remains of cigarettes.[51] Israeli Supreme Court Justice Dov Levine expressed a similar approach in the *Ovnat* case by stating:

> Moreover, sometimes these terms became a way for expressing approaches and levels of caution in society, according to the outlook of those sitting in judgment, while recognizing that the required standards of behavior and which under the circumstances have been defined as reasonable, are in fact more severe in their requirements than those that the average person is used to.[52]

These statements indicate that the German and Israeli courts have in fact created a normative element that assumes an elevated ability to foresee.

In some sense, any causal relationship between acts and their effects that is within available knowledge is foreseeable. However, if courts do not limit the reasonable foresight to what can reasonably and fairly be expected from an average person, the judicial standards of foresight may become very high. An interesting example is the Israeli *Yaakobov* case, in which the Court ruled that a husband who abused his wife should have taken into consideration the possibility that as a result she may take her own life, even though there were no early suicidal indications and despite the fact that there was no precedent of such an outcome in Israel.[53] In order to establish such a presumption, the Court was forced to rely on cases that occurred in Israel where abusers were killed by their abused wives (although it is not at all clear that such incidents could create a basis for predicting suicide), as well as on foreign scientific publications indicating the possibility of a connection between abuse and suicide. Justice Cheshin, in his decision not to grant permission for an additional hearing of the appeal before the Supreme Court, basically identified the reasonable man with a judge, and turned the ruling into one of a pure normative nature, detached from reality, and full of emotive-moral tones emphasizing the reprehensible nature of the conduct of the offender.[54]

These cases raise interesting questions. First, is it possible and appropriate to channel the normative "appetite" of the judiciary into determining the relevant behavioral rule? The second question is related to the first. When determining a standard of behavior, is the court obliged to consider the state of knowledge at the time of the act or can the rule be shaped based on hindsight? If the behavioral rule is applied to the defendant, then adherence to the principle of culpability requires—in

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[51] Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 1, 2005, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NSTZ] 446, 2005.

[52] CrimA 385/89 Ovnat v. the State of Israel 46(1) PD 1, 7 [1991].

[53] CrimA 7832/00 Yaakobov v. the State of Israel 56(2) PD 534 [2002].

[54] CrimFH 983/02 Yaakobov v. the State of Israel 56(4) PD 385, 393 [2002].

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our view—that the rule be based on the state of knowledge at the time of the act. No one should be expected to be a prophet.

In addition, disregarding certain features of the offender does not comply with the principle of culpability, because it may lead to the imposition of criminal liability on a person who exhausted his mental capacity and was still not able to foresee the danger. This may occur in cases where mental retardation that does not reach the level that entails full exemption from criminal liability is not taken into consideration. This is also the case when the limited experience of the accused (e.g., in the field of driving or medicine) is not taken into consideration. Sometimes the responsibility of such an accused lies in the mere fact that he started the action, for example by driving or conducting surgery, but there may be cases in which there is no fault in the mere action. Of course, the consideration of personal characteristics cannot be unlimited. The law is entitled, and even obliged, not to take into account an inability to foresee when it is caused by an attitude of disrespect or disregard toward others and their interests. In other words, the criterion of the "law-abiding person" who has internalized the basic values of the legal system is justified and necessary.

Under German law, convicting someone of a negligent crime presupposes individual fault. If the defendant, due to personal shortcomings at the time of his act or omission, was not able to evaluate a situation or to foresee a risk, he cannot be punished. However, in real life he often will be found guilty because he culpably brought himself into the situation where he was incapable of acting carefully. The legal situation in Israel is more complicated. The bill that brought about Amendment No. 39 of the Israeli Penal Code suggested two alternatives for the issue of the accused's mental state in cases of negligence. The first alternative remained loyal to the objective test of the average person's ability to foresee, and the second adopted an individual test of the accused himself. The Israeli Knesset chose the first option.[55] Nonetheless, potential for change in the approach toward this subject can be found (but at the same time it also enables the following of existing precedents) in the text concerning the definition of negligence: the term "reasonable person" was replaced with "a person from the community (society)"—a term closer in its linguistic meaning to an "average person." In addition, the term "under the circumstances" allows for the inclusion of certain personal circumstances.

It is still too early to evaluate the influence of these changes on the rulings of courts. The general impression is that the Supreme Court tends to follow previous decisions.[56] Even so, sometimes the phrasing used by the Court is such that it may

[55] Bill to Amend the Penal Code (Amendment No. 39) (General Part) July 25, 1994, Book No. 40, 9826.

[56] *See, e.g.*, CrimFH 983/02 Yaakobov v. the State of Israel 56(4) PD 385, 393-94 [2002]; CrimA 7183/04 Yakirevitch v. the State of Israel [2007] (unpublished), para. 58; CrimA 9826/05 Mahajane v. the State of Israel [2008] (unpublished), paras. 14-15.

https://doi.org/10.1017/S0021223700000984 Published online by Cambridge University Press

allow greater consideration of the individual's capability of foresight. An example of this is the phrasing used by Justice Dorner in the *Yaakobov* case:

> The reasonable anticipation, which is the basis for determining the standard of conduct, is not separated from the perpetrator's capability of foresight. There is a legal presumption that the perpetrator has the capabilities of a normal person, which enables him to foresee the danger which his conduct causes to life and to be aware of the necessity to abstain from such behavior or to take reasonable steps in order to prevent the realization of such danger.... When the accused was not aware of the aforesaid in spite of his capability, then he bears criminal liability for the fatal result.... In the matter before us the question is, therefore, whether the accused, if he were to act as a reasonable man, should have foreseen the causal relation, which is part of the factual element.[57]

If we assume that the above legal presumption is not a conclusive one but one that may be rebutted, then it creates a basis for moderating criminal responsibility when based upon negligence and establishing it on foundations of law and justice. Indeed, according to Justice Dorner's ruling, "[w]hen the accused was not aware of the aforesaid ... in spite of his capability," this statement could imply that when the accused lacks such capability, he shall not bear criminal responsibility.

VII. THE PRINCIPLE OF CULPABILITY AND EXEMPTIONS FROM CRIMINAL LIABILITY

The principle of culpability also has implications for the nature and scope of the exemptions from criminal liability. It has particular importance when utilitarian considerations or concerns about the dangerousness of the offender cause unease about exemptions that negate the culpability (in the narrow sense) of the offender (excuses as distinguished from justifications). In this context, it is appropriate to mention the insanity defense, which often arouses strong resistance. This format of defense includes, among other things, insanity in the form of an irresistible impulse (and not only cognitive insanity). This defense was first recognized in Israel through judicial innovation out of loyalty to the principle of culpability. The same applies to necessity and duress defenses in situations where the offender has no choice but to kill someone as the only means to save his own life.[58]

If we accept that it is impossible to expect someone whose life is in danger to refrain from killing another when it is the only way to save his life (at least insofar

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[57] CrimA 7832/00 Yaakobov v. the State of Israel 56(2) PD 534, 547 [2002].

[58] Penal Code, 5737-1977, SH No. 2302, §§ 34(11)-34(12).

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as the expectation should be fair and relate to "normal" people rather than "heroes" or especially righteous people),[59] then exemption from criminal responsibility seems required. The mere fact that he may have been physically capable of acting differently does not justify his conviction. It may be possible to reach a similar result based on consideration of utility and prevention. Nevertheless, it is not obvious that exemption will be granted without reference to the principle of culpability (as there might be concern that this would convey the wrong message concerning the value of human life).

In contrast to the preceding law concerning the duress defense, Amendment No. 39 may be interpreted as permitting the conclusion that killing a person in circumstances of duress, if seen as complying with the criterion of reasonableness, exempts from criminal liability.[60] Within German criminal law, section 35 of the Penal Code (excusing necessity) allows for the same result.

Whether the legal system distinguishes between justifications and excuses, as it does in the case of German law, or not, as it does in the case of Israeli law, is less essential than the need for any legal system that adheres to the principle of culpability to refrain from imposing criminal liability on actors who could not have been expected—with reasonableness and fairness—to act otherwise. The question whether to include the distinction between justifications and excuses in the criminal code depends on various considerations, such as the tendency of the legal system to emphasize legal distinctions, the evaluation of the ease or difficulty encountered by the courts in the application of such distinctions, and the assessment whether the legal system could convey such complex messages to the public.[61]

A follow-up question that must be asked is whether it is appropriate to recognize absence of culpability as a general principle, beyond the specific exemptions from criminal liability. A positive answer is seemingly appropriate since reality is richer than human imagination and human experience. In addition, an offense may be committed under unusual circumstances that render the perpetrator blameless even though these exceptional circumstances are not covered by the listed excuses. In fact, the Israeli legal system contains legal frameworks that facilitate this positive

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[59] As it appears that the judges in the cases of Dudley and Stephens assumed (R v. Dudley and Stephens [1884] 14 QBD 273 DC).

[60] Penal Code, 5737-1977, SH No. 2302, § 34(12).

[61] The discussion regarding the relationship between the principles of the culpability doctrine and the exemptions from criminal liability is not exhausted within the range of this paper. There are other contexts that are relevant to the discussion, such as: minority; self-defense as an excuse that by interpretation may be considered within the realm of self-defense under Israeli law; the conflict between opposing duties that, according to the Israeli law, are not recognized as a separate defense but instead are viewed as a form of necessity; justification due to obedience to a military command; and an error in law that could not have been reasonably avoided. *See, e.g.*, Penal Code, 5737-1977, SH No. 2302, § 34(13).

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approach. We refer to the "de minimis exemption" and the "cause of justice" defense. The principle of culpability not only influences the issue of imposing criminal liability but also reflects on the extent of the criminal liability. We shall devote the next section of this paper to this issue.

VIII. THE PRINCIPLE OF CULPABILITY AND SENTENCING

One of the most important principles of a just system of criminal law is that an imposed punishment should not exceed the culpability of the offender. The German Federal Constitutional Court recognizes the relevance of the culpability principle for the question of appropriate punishment. In many rulings over decades, the Court has upheld that punishment must stand in "just proportion to the severity of the crime and the offender's culpability."[62] If the punishment is disproportionate with regard to culpability, the offender is used as a means for external educational and preventive purposes.

If one turns to details of sentencing theory, the issue raises complex questions. How does one evaluate culpability and mete out an appropriate punishment? What weight should be given to the outcome of the offense compared with the mental element of the offender and the background and circumstances under which the offense was carried out? When considering the appropriate punishment, is it permissible to take into account the fact that a specific offense has become widespread—a "national calamity"—or is this only appropriate when the fact that it is a national calamity is common knowledge? What elements should be taken into consideration against the offender? Does this only apply to aggravating elements that he was in fact aware of, or should elements that he was capable of being aware of or perhaps only those elements that "any infant in the shoes of the offender" would be aware of also be considered? Should special and exceptional damages sustained by the victim be taken into account? Does culpability also dictate the lowest threshold that should not be crossed or should it only constitute an absolute upper limit? Should the lower and upper limits be given equal significance?

German courts have adopted as the major rule for sentencing that culpability determines the lower and upper limits.[63] In contrast to this solution, Israeli courts do not rule that it is forbidden to punish the offender more severely than he deserves according to his culpability. The accepted approach in Israel is made up of a multiplicity of purposes and considerations that are balanced without determining a general hierarchy. A committee that was nominated to examine methods to structure

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[62] 6 BVERFGE 389 (439); 45 BVERFGE 187 (228); 50 BVERFGE 205 (215); 86 BVERFGE 288 (313); 96 BVERFGE 245 (249); 120 BVERFGE 224 (254).

[63] 20 BGHST 264 (266-67); 24 BGHST 132 (134).

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judicial discretion in sentencing (the Goldberg committee)[64] expressed its opinion (not unanimously) that courts should not diverge from the appropriate punishment (i.e., that they should not impose a more severe punishment for the purpose of general deterrence). At the same time, the committee allowed a deviation from the appropriate punishment (either more or less severe) in certain defined contexts. The deviation toward leniency is based upon considerations of rehabilitation and is relevant where the act and the perpetrator's culpability are not severe and there is a real potential for rehabilitation. The deviation toward aggravation is allowed based on two criteria. The first criterion relates to the severity of the crime—a serious crime may reflect that the perpetrator has adopted a "lifestyle" or "attitude," as may be the case with offenses that involve violence in the family. The second criterion is that of recidivism—when a perpetrator has been convicted three or more times for committing similar offenses in the course of seven years. Several years ago work began on transforming the committee's majority opinion into law.

IX. FURTHER ISSUES CONCERNING SENTENCING

The prohibition against cruel, degrading, or inhuman punishment also derives from the concept of human dignity.[65] In this context, the question of the constitutionality of capital punishment arises. There are various opinions concerning the question whether the death penalty stands in contradiction to human dignity in its pure sense. The German Constitution declares the abolition of the death penalty (art. 102 GG). It is unclear whether it would be permissible to change the German Constitution (with the necessary two-thirds majority)[66] or whether the human dignity clause in article 1 of the Constitution categorically prohibits any reintroduction of the death penalty.[67] In examining the positions of the German Federal Constitutional Court, one can find approaches leading to contradictory conclusions. If the human dignity principle entails the idea of the uniqueness of the human being as one who is able to change, as well as the concept that every criminal should have the opportunity to do so (which is the position that the Court took in the decision regarding lifelong imprisonment),[68] then it is clear that capital punishment negates such an opportunity. If, however, one adopts the common "mere object" formula, one could conclude that the offender is not treated as a mere object—if he chose to commit a capital crime he

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[64] REPORT OF THE COMMITTEE FOR EXAMINING METHODS FOR STRUCTURING JUDICIAL DISCRETION IN SENTENCING (Government Press, 1997) (in Hebrew).

[65] *See* 45 BVERFGE 187 (228); 109 BVERFGE 133 (150); 113 BVERFGE 154 (162).

[66] The German Constitution lists modes of and limits on constitutional change. *See* GG art. 79.

[67] *See, e.g.*, Christoph Degenhart, *in* GRUNDGESETZ KOMMENTAR art. 102, nos. 7-8 (Michael Sachs ed., 2d ed. 1999).

[68] 45 BVERFGE 187.

https://doi.org/10.1017/S0021223700000984 Published online by Cambridge University Press

is not being abused for deterrent purposes but is made responsible for his own choice.[69]

According to German constitutional law, imposing a life sentence is constitutional only if further judicial review during incarceration examines the possibility of replacing the life sentence with a limited sentence.[70]

[69] Kant, who created the "merely as a means" approach, was strongly in favor of the death penalty. *See* IMMANUEL KANT, METAPHYSIK DER SITTEN, RECHTSLEHRE, E. VOM STRAF- UND BEGNADIGUNGSRECHT (1797).

[70] 45 BVERFGE 187.

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