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I. INTRODUCTION

I would like to begin by describing a case which is well known, perhaps even beyond the borders of West Germany. This case arose in the year 1899, nearly thirty years after the Criminal Code of the German Reich was enacted.[1] Section 2, paragraph 1 of this Code contains the following provision, which is rich in tradition: "An act may be punished only if the punishment was statutorily determined before the act was committed."[2] The facts of the 1899 case are as follows: A man rented an apartment that was furnished with electricity. A meter measured the amount of current which was consumed; however, the tenant, a clever handyman, withdrew the current before it reached the meter. Criminal proceedings for theft were eventually brought against him and the accused tenant was found guilty. On appeal, however, the Reichsgericht, the highest German court at the time,[3] acquitted the accused.[4]

The court, in a careful and rather formal opinion, wrote that theft, according to the text of section 242 of the Criminal Code, can be perpetrated only upon "things." The concept of a thing, according to the court, was subject to interpretation and interpretation required an exploration of prior linguistic usage in legal settings. The court found that "things," according to the concept of German and Roman law, are physical objects which occupy a given space. Since case law was bound to this historical juristic meaning of the word, electricity could not be conceived of as a "thing" but only as a flowing force.[5]

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* Dr. jur., Kiel, 1959; Habil., Kiel, 1964; Richter, Oberlandesgericht; o. Prof., Kiel, 1964; Frankfurt am Main, 1971.

1. STRAFGESETZBUCH FÜR DAS DEUTSCHE REICH [RStGB] (1871).

2. RStGB § 2(1).

3. The Reichsgericht was the highest German court between 1879 and 1945.

4. Judgment of May 1, 1899, Reichsgericht, Ger., 32 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 165.

5. *Id.*

The Reichsgericht did recognize that one could proceed with a more liberal interpretation and define electricity as a thing; however, it deliberately refused to resort to that possibility,[6] and instead relied on the fact that German criminal law is constrained by statute. Thus, in the opinion of the court, liberally construing the concept of a thing would have constituted an impermissible extension of the law by analogy, to the detriment of the accused, and would therefore have been unlawful.

The court continued with some general remarks that show the heart of the problem with the borderline between interpretation and extending the law by analogy in criminal law. While it pointed out the trend toward broadened interpretation and toward analogous application of criminal law provisions, the court expressly opposed this trend, holding that applying criminal statutes to new developments in living conditions without altering the statutes was out of the question. In the court's view, criminal law could only guarantee law and order and personal freedom if it were administered according to the original historical juristic meaning of words. Thus, when strict interpretation allowed gaps in the Criminal Code to emerge, the legislature was required to handle the problem.[7]

In fact, at the beginning of the twentieth century, the German legislature considered the problem of appropriating electricity before it reached the meter. The result was a new statutory provision concerning extent of punishment for appropriation, as opposed to theft, of electrical energy.[8]

II. The Contrast Between Interpretation and Analogy

In the 1899 decision one can see, in concentrated form, a complete doctrinal structure (*Lehrgebäude*) which houses one of criminal law's fundamental problems. This doctrinal structure is by no means limited to the confines of Middle Europe. The following discussion summarizes its essential features.

Punishment may be inflicted only upon the basis of a statute:[9] *nullum crimen/nulla poena sine lege.* The notion of statu-

6. *Id.* at 185-86.

7. *Id.* at 165 ff.

8. Strafgesetzbuch [StGB] § 248(c) (W. Ger).

9. The German word translated here as "statute" is "*Gesetz.*" German distinguishes between *Gesetz* (positive enacted law or statute) and *Recht* (law as the overall legal order; law as objective right). In what follows, "statute" or "statutory law" will be used to translate "*Gesetz*" where the meaning might otherwise be unclear. The term "law" is

tory law assumed by this doctrine, however, is not merely something that is arbitrarily posited in accordance with formal requirements. When the word "statute" is used in this doctrine, it is assumed that the statute is rational, and that the reason of the law (*die Vernunft des Gesetzes*) is intended. Thus, "statute" stands for reasonable, correct law (vernünftiges, richtiges Gesetz). Given this setting, one can understand the equation of statutory law with guaranteeing freedom and law and order. Kant's statement "a state is the union of a mass of people under just statutes"[10] is not far off the mark.

The jurist must therefore take the law very seriously, making sure he does not expose it to haphazard political change. Consequently, he must interpret statutes very narrowly, according to the statute's innate legal reason, in other words, according to a reasonable sense of the text. That which does not correspond to the historical juristic sense of the text does not fall within the statute. Beyond this historical juristic and reasonable sense of the text, extending the law by analogy begins. Within this doctrinal structure, analogy is nothing other than an arbitrary administration of justice which threatens freedom. Whereas interpretation secures freedom in the face of constant political change, analogical extension of law not only endangers freedom but also endangers the independence of the administration of justice. This independence is necessary not only for the sake of the administration of justice but also in order that the freedom-safeguarding effect of reasonable statutes can be protected. When the administration of justice becomes involved in adjusting statutes, it must also become involved with interests that seek such adjustments. Such a development marks the end of the independent administration of justice. Extending the law by analogy is thus forbidden because it endangers freedom—including the freedom of independent administration of justice.[11]

The borderline between interpretation and analogy is thus sharply drawn—not conceptually, with the help of refined analytical techniques, but rather on the basis of determinations that

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also used to translate "*Gesetz*" where it is fairly clear from the context that a positive law is involved and no confusion is likely to result.

10. I. KANT, METAPHYSIK DER SITTEN 135 (Ausgabe der Philosophischen Bibliothek) ("*Ein Staat ist die Vereinigung einer Menge von Menschen unter Rechtsgesetzen.*").

11. Note that in this context, "analogy" always means an analogy which works to the detriment of the accused. An analogy which benefits the accused is permissible.

arise from legal and political philosophy. In the 1899 decision of the Reichsgericht, the borderline between interpretation and analogy follows from just such a determination, namely, the duty to protect law and freedom.

III. The Weakening Border Between Interpretation and Analogy

The Reichsgericht decision of 1899 enjoys complete respect in West German jurisprudence. It is constantly cited as a leading case and West German students regard the decision with respectful awe. Despite this, the decision has very little effect on the daily business of the criminal jurist. The respect which is shown for this decision is comparable to the respect given a valuable exhibit in a museum: a beautiful piece, but out of a bygone world. Translated into legal parlance, this means: In West German textbooks and commentaries, no passage clearly and concisely states: "In its 1899 decision, the Reichsgericht, with superlative reasoning, separated interpretation and analogy; the result and the reasoning are still valid today."

In fact, the reception of this decision is rather different; it has not been completely accepted. One starts, of course, with the assumption that the criminal law is subject to the constraint of legality (*Gesetzlichkeit*). And yet, even at this step, the first omission already appears. A philosophical grounding of legality—e.g., as a rational guarantor of freedom—has not occurred. The legality or positivity of the criminal law seems to be something that is obviously purposive. It becomes apparent, however, that since the statute is often unclear, it must be interpreted in many cases. One is then reminded of the maxim from the Reichsgericht that interpretation must be based upon the literal sense of the text. But the Reichsgericht's opinion, that the meaning of the text lies in precisely traced historical juristic linguistic usage, has not been adopted. Instead, demand for discovery of an objective, current sense of the text appears.[12] Nevertheless, one can

12. In German theory, appeal to the original (subjective) intention of the legislature to resolve ambiguity is referred to as "subjective" interpretation. "Objective" interpretation, in contrast, assumes that once a statute has been passed, it acquires a life of its own and its meaning must be found immanent within the objective meaning that the statute acquires over time. *See* K. Larenz, Methodenlehre der Rechtswissenschaft 302-03 (4th ed. 1979). The use of the subjective/objective distinction is precisely the opposite of what an American reader might expect. Subjective interpretation tends to be more tightly bound to the text and original meaning of a statute; objective interpretation is

still discern the main thrust of the Reichsgericht's doctrine that statutorily bound criminal law compels precise interpretation.

A significant deviation from the doctrinal structure that is exemplified by the Reichsgericht's decision is found in the common statement: When interpreting criminal statutes, one must, of course, take note of the border leading to extension of liability by analogy; however, no one knows exactly where this border lies. In general, there are no complaints about this condition. On the contrary, the fluid borderline between interpretation and analogy is viewed as an advantage since it makes the criminal statute adaptable.

An especially precise current summary of this doctrine is found in the fifteenth edition of Lackner's Criminal Code commentary:

> [According to German criminal law] analogy cannot form the basis of criminal liability and punishment . . . . The antithesis [of analogy] constitutes interpretation . . . . The borders between analogy and interpretation are fluid because judicial holding does not exhaust itself in acts of subsumption, but rather, according to the dominant view, contains elements of law making . . . . In addition, clarifying the meaning of a statute by means of . . . interpretation is . . . only possible in a procedure which works with analogical reasoning.[13]

In every direction one looks, one finds that this view is shared—in textbooks,[14] in commentaries,[15] in monographs,[16] and

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more open-ended. *Cf.* Naucke, *Der Nutzen der subjektiven Auslegung im Strafrecht,* in FESTSCHRIFT FÜR KARL ENGISCH 274 (1969).

13. K. LACKNER, STRAFGESETZBUCH § 1 n.1(d) (15th ed. 1983).

14. H. BLEI, STRAFRECHT I 30 ff. (18th ed. 1983); H. JESCHECK, STRAFRECHT: ALLGEMEINER TEIL 106-07 (3d ed. 1978); 1 R. MAURACH & H. ZIPF, STRAFRECHT: ALLGEMEINER TEIL §§ 9-10 (6th ed. 1983); E. SCHMIDHÄUSER, STRAFRECHT 40 ff. (1975); G. STRATENWERTH, STRAFRECHT: ALLGEMEINER TEIL I 48 ff. (3d ed. 1981); J. WESSELS, STRAFRECHT: ALLGEMEINER TEIL 10-11 (13th ed. 1983).

15. E. DREHER & H. TRÖNDLE, STRAFGESETZBUCH § 1, Marginal No. 10 (41st ed. 1983); H.-J. RUDOLPHI, SYSTEMATISCHER KOMMENTAR ZUM STRAFGESETZBUCH § 1, Marginal No. 22 ff. (3d ed. 1984); A. SCHÖNKE, H. SCHRÖDER, T. LENCKNER, P. CRAMER, A. ESER & W. STREE, STRAFGESETZBUCH: KOMMENTAR § 1, 26 ff., 38 ff. (21st ed. 1982).

16. P. CRAMER, VERMÖGENSBEGRIFF UND VERMÖGENSSCHADEN IM STRAFRECHT 28 ff. (1968); V. KREY, STUDIEN ZUM GESETZESVORBEHALT IM STRAFRECHT 80 ff., 206 ff. (1977); H.-P. LEMMEL, UNBESTIMMTE STRAFBARKEITSVORAUSSETZUNGEN IM BESONDEREN TEIL DES STRAFRECHTS UND DER SATZ NULLUM CRIMEN SINE LEGE 201 ff. (1969); H.-L. SCHREIBER, GESETZ UND RICHTER 227 ff. (1976); Höpfel, *Zu Sinn und Tragweite des sogenannten*

in highly esteemed court opinions.[17]

IV. Variations from the Prevailing View

This prevailing view is accompanied by others which differ in their emphasis. I will attempt at least to intimate the range of views.

On one side is found a viewpoint that approximates the doctrinal structure of the 1899 Reichsgericht decision and emphasizes the sharp division between interpretation and analogy. This viewpoint is not frequently represented. One finds it expressed only by isolated authors,[18] and in a few court decisions.[19]

More widespread is a radical development of the prevailing view. This new development denies, with great acumen, the very possibility of any distinction between interpretation and analogy. Under this view, interpretation of a statute always involves analogical reasoning, and for that reason analogy does not violate the principle of legality.[20] The prevailing view approaches these radical variations with considerable tolerance. The narrower viewpoint emphasizing the division between analogy and interpretation, however, is regarded as outdated by the prevailing view.

From these different perspectives one can conclude that the prevailing view dominates the juridical field and is still gaining strength. The doctrine that has the sympathy of most German criminal law scholars is the one that holds that there is no firm border between interpretation and analogy, and that the process

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Analogieverbots, in Juristische Blätter 505 ff., 575 ff. (1979); Stratenwerth, *Zum Streit der Auslegungstheorien,* in Festschrift für Germann 257 ff. (1969).

17. Judgment of January 17, 1978, Bundesverfassungsgericht, W. Ger., 47 Bundesverfassungsgericht [BVerfG] 109, 120 ff.; Judgment of January 29, 1957, Bundesgerichtshof, Senat [Bundesgerichtshof], W. Ger., 10 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 157; Judgment of May 7, 1953, Bundesverfassungsgericht, W. Ger., 2 BVerfG 266.

18. J. Baumann, Strafrecht: Allgemeiner Teil 148 ff. (8th ed. 1977); H. Mayer, Strafrecht: Allgemeiner Teil 83 ff. (1953); W. Naucke, Zur Lehre vom strafbaren Betrug 182 ff. (1964); B. Schünemann, Nulla poena sine lege? (1978); Grünwald, *Bedeutung und Begründung des Satzes "nulla poena sine lege",* 76 Zeitschrift für die Gesamte Strafrechtswissenschaft 1 ff. (1964).

19. Judgment of Feb. 3, 1960, Bundesgerichtshof, W. Ger., 14 BGHSt 114, 119 ff.; Oberlandesgericht, Hamm, W. Ger., 1977 Goltdammer's Archiv für Strafrecht 56-57.

20. W. Hassemer, Einführung in die Grundlagen des Strafrechts 252 ff. (1981); W. Hassemer, Tatbestand und Typus 160 ff. (1968); G. Jakobs, Strafrecht: Allgemeiner Teil 60 ff., 68 ff. (1983); A. Kaufmann, Analogie und Natur der Sache (1965); W. Sax, Das strafrechtliche "Analogieverbot" (1953).

of analogous application of law is not only compatible with the principle of legality, but has made statutes more adaptable in a desirable way.

V. The Significance of the Relationship Between Interpretation and Analogy for the Principal of Legality

In what follows, I will explore what the collapse of the distinction between interpretation and analogy means for the principle of legality in criminal law. First, however, it is of interest to determine whether the current prevailing view merely reflects the appropriate development and evolution of an older doctrine, or whether the older doctrine has been ousted by a completely new one. A few examples from the period after World War II will show the practical change which has taken place, a change most noticeable when compared with the 1899 Reichsgericht decision concerning the criminality of tapping electrical energy.

A. The "Natural View"

Example 1: An accused has, through trickery, given his victim a narcotic in his drink. When the victim has fallen fast asleep, the accused takes away property belonging to the victim.[21] The legal question for West German law is whether the accused can be convicted of robbery. Robbery, under the language of the pertinent statute,[22] presupposes a taking by force. According to historical juristic usage, force is the overt use of power or strength to overcome resistance. In a case like the above example the Bundesgerichtshof, successor to the Reichsgericht as the highest West German court of appeals in criminal cases, freed itself from this established usage and construed the administration of narcotics to a victim by trick as "force." The court expressly indicated that one must take into account changed social circumstances, and described its method as a "natural view."[23] Under the old doctrine, this was forbidden expansion of liability by analogy and on the whole, the analogical approach employed in applying the "natural view" would have been a juristic scandal. Under the more modern doctrine, however, this is simply the obvious result of the fluid borderline between interpretation and analogy.

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21. Judgment of Apr. 5, 1951, Bundesgerichtshof, W. Ger., 1 BGHSt 145-148.
22. StGB § 249.
23. Judgment of Apr. 5, 1951, Bundesgerichtshof, W. Ger., 1 BGHSt 147.

B. Furthering the Public Interest

Example 2: An older version of the statutory penal provisions concerning hit-and-run accidents limited criminality literally to the "flight" from the scene of the accident.[24] Contemporary courts have not hesitated to conclude that "flight" includes deceit concerning the course of events leading to the accident by one who remains on the scene. In one case, the perpetrator had remained at the scene of the accident, and therefore had not fled in the technical sense. Nevertheless, the opinion of the court was that in view of the perpetrator's deception, he had indeed "fled." The justification is inadequate, and exhausts itself in the court's conclusory indication that it is sensible to punish flight after a traffic accident.[25]

"Flight" has also been viewed as the act of not returning to the scene of the accident. In one case the accused had not noticed the accident and had driven on. Someone followed him and, far from the scene, informed him of the accident. The accused, however, drove on. The court held that whoever first learns of an accident after he has left the scene must return to the place of the accident. Whoever violates the duty to return to the scene is viewed as "fleeing." The justification, noted in a terse opinion, was that this interpretation furthered the public interest.[26] Again, under the old doctrine this is a forbidden analogy; under the more modern doctrine, it is an appropriate and permissible manipulation of the statute.

C. The 1899 Case Under the Modern View

Example 3: It is useful to postulate what would happen today if a decision were to be made concerning the criminality of withdrawing electrical energy under theft provisions. Most certainly a court would have no second thoughts about convicting on the basis of theft. Doing so would be viewed simply as adapting a statutory penal provision to new and changed circumstances. Numerous scholarly voices consider the venerable 1899 Reichsgericht decision about the criminality of tapping electrical energy to be "petty and formal."[27] This view describes the over-

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24. StGB § 142 (pre-1975 version).

25. Judgment of Apr. 8, 1960, Bundesgerichtshof, W. Ger., 14 BGHSt 213.

26. Judgment of Sept. 26, 1962, Bundesgerichtshof, W. Ger., 18 BGHSt 114.

27. H. Welzel, Das deutsche Strafrecht 22 (11th. ed. 1969). *See* G. Jakobs, *supra* note 20, at 69 n.62; H. Tröndle, Strafgesetzbuch: Leipziger Kommentar § 1, Marginal

all climate in which the discussion concerning the borderline between interpretation and analogy is taking place in West Germany. No one wants to incur the reproach of being petty and formal. By interpreting the law, one proves oneself open minded and flexible.

D. Implications for the Principal of Legality

With these examples in mind, we can turn to the question of what this modern conception of interpretation means for the principle of legality in criminal law. In what follows I will attempt to demonstrate that the present development does not constitute a mere modernization of the principal of legality. Rather, at least in West German criminal law, two profoundly different conceptions of legality in criminal law are in tension with one another. Indeed, these two views are politically at war with each other. The drawing of different borderlines between analogy and interpretation provides an especially notable context in which to observe this struggle. In all likelihood, more is at stake in the struggle than just the dispute over the borderline between analogy and interpretation. The underlying tension lies at the core of a variety of key disputes concerning basic criminal law concepts: for example, the fundamental debates about the nature of wrongdoing (*Rechtswidrigkeit*) and culpability (*Schuld*) in German criminal theory.

VI. Incompatible Doctrines: Criminal Law With and Without Clear Borders

There are two profoundly different views on legality in criminal law. At first glance, it seems as though the doctrine of the sharp borderline between interpretation and analogy has further developed into the doctrine of an indistinct borderline. The acceptance of a "development" corresponds to an impression that criminal law scholars generally hold in common. Scholars believe that under the pressure of new realizations, they must further develop their doctrines. At least with the interpretation/analogy problem, their belief is incorrect. This is not a case of a doctrine being further developed. It is not a case of a false doctrine being replaced by a truer one. Instead, two doc-

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Nos. 32, 50 (10th ed. 1975); Haft, *Generalklauseln und unbestimmte Begriffe im Strafrecht*, Juristische Schulung [JuS] 478, 482 (1975).

trines are battling against each other for precedence in the activities of jurists. The new doctrine is not a development of the old one but is the open adversary of the old doctrine and seeks to displace it. Within the prevailing view—i.e., the view that one must start with a statute, that the statute must be interpreted, and that the borderline between interpretation and analogy is fluid—are contained two irreconcilable opinions. These two opinions are set out side by side in the following discussion.

A. The Older Doctrine: A Sharp Boundary Between Interpretation and Analogy

The old doctrine arrives at the commitment to a clear division between interpretation and analogy in the following manner. The old doctrine begins with a strict separation of powers. Legislation, administration, and adjudication are sharply divorced. In the German tradition, the legislative process is treated as if it were inspired by reason. It is trusted to create well thought-out, unequivocably formulated statutes. It is expected that the scope of criminal law will be limited and that the so-called fragmentary character of criminal law[28] will be strictly respected. Criminal law only intervenes when freedom is endangered and when the necessity for legal intervention is clear; thus, criminal law is not subject to the winds of politics: it is not at the beck and call of changing perceptions of societal needs. On the contrary, it limits the tendency to respond to every shift in perceived social needs with new criminal law. In essence, criminal law is a stable element in a dynamic process of social development. Fear of arbitrariness in criminal law is great, and for this reason, the criminal justice system is made independent of directives from the administration and is made subject to rationally framed statutes. Criminal law plays a purely retributive role; it does not itself act in politically expedient ways, e.g. as a vehicle for implementing policies (politics) of deterrence. In such a doctrine, a narrow (but not heartlessly narrow) conception of interpretation is natural. Narrow interpretation, according to the historical juristic sense of the words, is the extension

28. The German notion that the criminal law is "fragmentary" in character is intended to suggest that criminal law applies only to certain fragments of social life (i.e., those covered by precisely defined statutes). Criminal law in this view is not to be thought of as a comprehensive web in which all wrongdoing is suspect, as crimes represent only the most salient examples of potential liability.

of this doctrine in the application of law through an independent justice system. Analogy, in contrast, is the sign of everything that one wants to avoid in a system of justice. Moreover, the demarcation between interpretation and analogy can be grasped as a practical matter without creating great theoretical difficulties. One only needs to accept sympathetically the older doctrine in its totality, with all its connected assumptions, and the borderline between interpretation and analogy will become impassable. This is substantiated by the 1899 Reichsgericht decision.

B. The Younger Doctrine: Blurring the Border Between Interpretation and Analogy

If one only hints that the borderline between interpretation and analogy is fluid, one has not merely "developed" the old doctrine of criminal law, but has completely abandoned it, and has perhaps even betrayed it in favor of its complete opposite. This opposite doctrine appears as follows: Separation of powers is not taken seriously. Legislation, administration, and adjudication merge together. Legislation, even in the area of criminal law, becomes a means of political control in the hands of the majority where it may, but need not, follow the path of reason. Opinions of the majority are often vague in their content and consequently, statutes are also vague, inexact, and replete with general clauses and open-ended standards. The legislature leaves the task of interpreting unclear statutes to the judiciary and the judiciary is not averse to this task.

The volume of criminal law depends on the political climate. A small amount of criminal law is no more desirable than a large amount. Fear of arbitrariness in criminal law disappears and the independence of the criminal justice system becomes faded. Safeguarding freedom becomes only one of many possible goals in the fostering of criminal law. Other goals are the complete and effective protection of legal rights, and the battling of political adversaries. The sense that criminal law is fragmentary in character disappears. Criminal law itself becomes political in nature, adapting to changing political needs and becoming a dynamic instrument within the framework of rapid societal development. Criminal law is transformed into a mere purposive instrumentality of the state aimed at prevention of crime.

Within such a doctrine, narrow interpretation and the drawing of boundaries between interpretation and analogy appear to

be misguided, bothersome, and even senseless. Narrow interpretation is not possible for any statute. Analogical extension of liability and interpretation are undifferentiable. The prohibition of analogy becomes meaningless, because there is nothing that it can apply to short of the entire judicial enterprise. In the place of interpreting words according to historical juristic meaning, there exists the search for possible current meaning of the statute, a search in which many state and societal interest groups can participate. The entire scheme depicted with the words "borderline between interpretation and analogy" breaks down. The management of statutes demands skills other than the ability to interpret precisely historical juristic meaning—for example, the ability to ascertain the beginning of an analogy. One must be able, in effect, to adapt the statute to the changing present situation as a sovereign would—i.e., without recognition of any absolutely binding commitments. In West Germany this is called "objective interpretation." That is, however, merely a linguistically unsuccessful euphemism for the fact that the prohibition of analogy is disregarded as disturbing, and for the view that narrow interpretation is inexpedient.

VII. The Choice Between Rival Doctrines

Several grounds exist for supporting one or the other of these doctrines and inevitably, each and every jurist must make a decision between them. Refined philosophical approaches derived from contemporary legal theory must be used to fix the borderline between interpretation and analogy. To do so, however, one must separate this problem from its political context. One must also expose this problem to tests of current academic theory, especially those tests drawing upon linguistic theory and philosophy of language. While there is a wealth of interesting and insightful literature,[29] it does not adequately deal with the problem. The professional coolness and distance of theory-based analytical precision is not appropriate for the question that must be dealt with in this case.

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29. *E.g.*, M. Herberger & D. Simon, Wissenschaftstheorie für Juristen 205 ff. (1980); Haft, *supra* note 27, at 478 ff. (1975); Herberger, in Juristische Methodenlehre und analytische Philosophie 124 (H. Koch ed. 1976); Neumann, in Juristische Dogmatik und Wissenschaftstheorie 42 (von Savigny ed. 1976); Priester, *Zum Analogieverbot im Strafrecht*, in Juristische Methodenlehre und analytische Philosophie 155 (H. J. Koch ed. 1976); Rahlf, in Juristische Dogmatik und Wissenschaftstheorie 14 (von Savigny ed. 1976).

The question of the borderline between interpretation and analogy raises intensely practical questions of more or less punishment—questions that are highly emotional, if not dramatic. Moreover, debates about interpretation and analogy that are inspired by logic and linguistic theory do not adequately consider that the type of language involved is already a matter of politics. It makes a great deal of difference whether linguistic theory is applied to an exact and narrowly formulated text or an imprecise and loosely formulated text. As the language of criminal law becomes more inexact, academically supported efforts to draw a borderline between interpretation and analogy become more intensive. This course of events raises the value of imprecision in the language of criminal law.[30] Academically, this inexact quality of the language of criminal law is taken very seriously, and this protects the inexactness from sharp criticism. I do not wish to strengthen this line of thought.

The question then arises whether something more than resignation remains; or whether, on the other hand, one must defect to the camp of those who consider all investigations of the historical juristic meaning of the text and all efforts toward exact boundaries between interpretation and analogy to be undesirable. I should like once again to assemble the arguments which consider as unavoidable the emergence of an inexact criminal law and, with it, a displacing or even an obliteration of the border between analogy and interpretation. Assembling the arguments helps to show that the arguments are rather weak.

First, there is the argument of trends. Criminal law is viewed as currently developing in a direction that erodes the prohibition of extending criminal liability by analogy. This is the suggestion of the school of factual determinism (*des Faktischen*)—i.e., that because this trend is a reality it must therefore be followed. Jurists seem blithely to succumb to this argument, and in numbers which are probably increasing in modern times.

Coupled with the first argument is the fact that many jurists not only recognize this trend, but also find it agreeable. The feeling that one may or even must sympathize with the trend toward inexact criminal law has several bases. It is generally felt to be beneficial that criminal law has become instrumental (*zweckmässig*). Instrumental criminal law and inexact criminal

30. *See* Priester, *supra* note 29, at 183.

law are complementary phenomena in that if one desires instrumental criminal law, one cannot reject inexact criminal law.

Many reasons may be advanced in turn for supporting instrumental criminal law. Strangely enough, instrumental criminal law is considered an especially successful form of socially responsive criminal law. Instrumental criminal law is the only form of criminal law which is, as desired, adaptable. Additionally, the various branches of the legal profession view their roles as being enhanced in their importance by instrumental criminal law, since through the carrying out of that which is instrumental, they make a significant contribution to organizing society. And finally, one need not after all completely renounce the prohibition of analogy; when it is instrumental, one may observe it.

Consider one further example.[31] A man is accused of forest theft (*Forstdiebstahl*). The statute from the end of the previous century provides for more severe punishment if a "harnessed cart" is used to commit the forest theft.[32] But at the time of the incident, in the 1950s, the accused used a motor vehicle in committing the theft. The court (the Bundesgerichtshof), took the position that the clear wording of the applicable statute was not binding. The prohibition of analogy? It was not even considered worth noting! No legislator could demand that an able court do something impractical! After all, one identifies oneself with the community. The court decided the perpetrator *must* be punished for aggravated forest theft. This is, of course, not required by the statute, but it is required by the court's extrapolation from that statute.

This is the foundation upon which the trend toward disregarding the prohibition of analogy rests. One asks oneself what is so strong about this foundation.

Resignation to this view is unnecessary; much may be said against this trend and its defense. The first objection is an empirical one. The trend is not as clear as it is represented to be. At any rate, it exists at varying levels of strength in different fields of criminal law. The more serious the criminal offense, the greater the probability that extension of liability by analogy will be prohibited. Yet even in the context of moderate and petty offenses, the previously described stricter view on formulating

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31. The example comes from Judgment of Sept. 13, 1957, Bundesgerichtshof, W. Ger., 10 BGHSt 375-76.

32. Preussisches Gesetz betreffend den Forstdiebstahl § 3(1) no. 6 (Prussia).

and handling criminal law confirms its vitality again and again in legislation, legal literature, and court decisions.

This leads to almost absurd situations, which occur only infrequently in jurisprudence, and then only in important disputes. The following situation is illustrative. In 1935, two years after the Nazis gained control in Germany, the provision of the criminal code forbidding analogy was deleted. It was replaced by broad and unbounded interpretation, which permitted extension of liability by analogy. At the time, the event was hardly sensational. Something else was more conspicuous. In 1933, the Reichsgericht had refused to punish using counterfeit money in pay telephones as fraud.[33] The reasoning ran along the lines of the 1899 Reichsgericht decision which has previously been noted. The Reichsgericht of 1933 was of the opinion that such misuse of a pay telephone did not fall within provisions concerning punishment of fraud because it lacked the requisite element of deceiving a person. It could only be viewed as fraud if one were very liberal with the provision. Such liberality, however, could not be permitted. The legislator would have to intervene. And in the statute which in 1935 abolished the provision prohibiting analogy,[34] a new penal provision concerning the misuse of automatic machines was enacted[35]—a provision which was only necessary if prohibition of analogical extension of liability was acknowledged.

This is the best evidence of incompatibility in the joint use of both a strict and a less strict view of legality in criminal law. Subsequent events add similar convincing evidence. The principle of strict legality was strengthened in West Germany by its adoption in the constitution in 1949. A provision with the following wording was adopted: "An act may only be punished when the criminality was statutorily determined before the act was perpetrated."[36]

The trend toward inexact criminal law without a prohibition of analogy is thus not only a strong trend but also an uncertain one. Perhaps its self-confident airs lack substance.

The uncertainty of this trend is reinforced by the insight that expedient, socially responsive, and adaptable criminal law,

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33. Judgment of Dec. 18, 1933, Reichsgericht, Ger., 68 RGSt 65.

34. Gesetz zur Änderung des Strafgesetzbuches, 1935 Reichsgesetzblatt [RGBl], Ger., art. I, at 839.

35. StGB § 265 (pre-1975 version).

36. Grundgesetz, art. 103, § 2.

which tends to erode the prohibition of analogy, may well lack many advantages that are often ascribed to it. The first problem is that expediency cannot be restricted. Even brutal criminal law is expedient criminal law. Moreover, expedient criminal law may easily develop into criminal law which is politically opportunistic and dependent upon party politics. Further, the positive social effects of an expedient criminal law may be as much happenstance as anything else, and the negative side effects of well-intended criminal measures are apparently uncontrollable. Criminal law with socially beneficial aims typically benefit one group of offenders, but put another group, or the victim at a disadvantage. An increase in the significance of occupations in the legal field is paid for with the loss of independence. And the oft-praised adaptability of criminal law is, in the end, merely the dependence of criminal law on the respective domestic or foreign political climate. This adaptability leaves little of "law" (*Recht*) in the expression "criminal law" (*Strafrecht*). The adaptability of criminal law converts the criminal law into a powerful political rule which can exert might through punishments.

VIII. Conclusion

Perhaps a politically independent and exact criminal law, which would be marked by respect for the prohibition of analogy, would have very little practical capacity to attract support. Yet one cannot easily dispose of this criminal law that is independent of party politics, exact, and observant of the borderline between interpretation and analogy. Criminal law incorporating strict legality shows what criminal law is capable of being. Criminal law incorporating strict legality also warns that criminal law with weakened legality should not be pursued too far. Suppose that the court in the example of the forest theft had said: "Aggravated forest theft exists only when a harnessed cart is used; the accused, however, used another method of transportation, so only simple forest theft exists." The court might have been ridiculed for such a decision, but such ridicule would have been ridicule of loyalty to principles. As such, it would be something of a distinction—a distinction for legal reason which clearly and impressively distinguishes itself from legal opportunism.

Observance of the prohibition of analogy is always possible. When dealing with a statute's clear historical juristic wording, the prohibition of analogy is observed by not overstepping the bounds of this wording. When dealing with a statute that lacks

clear historical juristic wording, the prohibition of analogy is observed by not undertaking to exonerate the legislator by rendering a more precise formulation of the statute. Observing the prohibition of analogy compels a distance from current political concerns which tend to manipulate criminal law. Only observance of the prohibition of analogy makes it possible to exercise a legal style which differs from current politics. Only observance of the prohibition of analogy makes jurists independent. The question is not whether there is a borderline between interpretation and analogy but rather, whether such a borderline is desirable. Where the borderline is desired, it will exist.