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An Insider's Perspective on the Significance of the German Criminal Theory's General System for Analyzing Criminal Acts

*Professor Dr. Wolfgang Naucke**

I. INTRODUCTION

Over the past several years, increasing attention has been paid in the United States to German criminal law and criminal theory. This is a reflection not only of the preeminent position of German criminal law in countries outside the common law orbit,¹ but also of the burgeoning literature on the German criminal system in the United States.² This article explores one of the

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1. See Hall & Wagner, *Foreword to Symposium: The New German Penal Code*, 24 AM. J. COMP. L. 589, 589 (1976); Durham, Book Review, 1979 UTAH L. REV. 629, 634.

2. See, e.g., G. FLETCHER, *RETHINKING CRIMINAL LAW* (1978); J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* (1977); Arzt, *Responses to the Growth of Crime in the United States and West Germany: A Comparison of Changes in Criminal Law and Societal Attitudes*, 12 CORNELL INT'L L.J. 43 (1979); Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032 (1983); Clausnitzer, *The Statute of Limitations for Murder in the Federal Republic of Germany*, 29 INT'L & COMP. L.Q. 473 (1980); Daly, *Intoxication and Crime: A Comparative Approach*, 27 INT'L & COMP. L.Q. 378 (1978); Damaska, *The Reality of Prosecutorial Discretion: Comments on a German Monograph*, 29 AM. J. COMP. L. 119 (1981); Eser, *The Politics of Criminal Law Reform: Germany*, 21 AM. J. COMP. L. 245 (1973); Felstiner, *Plea Contracts in West Germany*, 13 LAW & SOC'Y REV. 309 (1979); Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293 (1975); Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISRAEL L. REV. 367 (1973); Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401 (1971); Goldstein & Marcus, *Comment on Continental Criminal Procedure*, 87 YALE L.J. 1570 (1978); Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977); Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468 (1974); Horton, *Life Imprisonment and Pardons in the German Federal Republic*, 29 INT'L & COMP. L.Q. 530 (1980); Horton, *Abortion Law Reform in the Ger-*

central structural features of German criminal law, which can be described as the German theory's "general system for analyzing criminal acts." (The underlying German term, *Straftatsystem*, has no precise English equivalent and can also be translated as the "general system for structuring criminal analysis," or more briefly, as the "general analytical system" or as the "criminal analysis structure."³ These phrases will be used interchangeably

man Federal Republic, 28 INT'L & COMP. L.Q. 288 (1979); Hoskins, *A Comparative Analysis of the Crime of Conspiracy in Germany, France and the United States*, 6 N.Y.U. J. INT'L L. & POL. 245 (1973); Hughes, *Pleas Without Bargains*, 33 RUTGERS L. REV. 753 (1981); Johnson & Drew, *This Nation Has Money for Everything—Except Its Courts*, 17 JUDGES' J., Summer 1978, at 8; Kappel & Leuteritz, *Wife Battering in the Federal Republic of Germany*, 5 VICTIMOLOGY 225 (1980); Langbein, *Judging Foreign Judges Badly: Nose Counting Isn't Enough*, 18 JUDGES' J. 4 (1979); Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979); Langbein & Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978); McGehee, *Child Abuse in the Federal Republic of Germany*, 6 VICTIMOLOGY 215 (1981); O'Keefe & Czeniek, *A Study of the Drug Laws of the Federal Republic of Germany*, 32 FOOD DRUG COSM. L.J. 488 (1977); Peltzer, *The Criminal Responsibility and Personal Liability of the Director in the Bankruptcy of His Company: Germany*, 9 INT'L BUS. LAW. 33 (1981); Scheerer, *The New Dutch and German Drug Laws: Social and Political Conditions for Criminalization and Decriminalization*, 12 L. & Soc'y REV. 585 (1978); Silving, *Comments on Reform of the Federal Criminal Laws—A Comparative Analysis*, 34 REVISTA DEL COLEGIO DE ABOGADOS DE P.R. 107 (1973); *Symposium: The New German Penal Code*, 24 AM. J. COMP. L. 589 (1976) (articles by Arzt, Binavince, Darby, Eser, Fletcher, Hall, Herrmann, Luderssen, Oehler, Ryu, Silving, and Wagner); Teske & Arnold, *Comparison of the Criminal Statistics of the United States and the Federal Republic of Germany*, 10 J. CRIM. JUST. 359 (1982); Volkmann-Schluck, *Continental European Criminal Procedures: True or Illusive Model?*, 9 AM. J. CRIM. L. 1 (1981); Weigend, *Sentencing in West Germany*, 42 MD. L. REV. 37 (1983); Note, *Anti-Terrorism: The West German Approach*, 3 FORDHAM INT'L L.F. 167 (1980); Note, *Positivist Roots of Criminal Law and the West German Criminal Law Reform*, 10 RUT.-CAM. L.J. 613 (1979); Comment, *The West German Day-Fine System: A Possibility for the United States?*, 50 U. CHI. L. REV. 281 (1983).

3. Literally translated, "*Straftatsystem*" means simply "criminal act system," but this translation fails to convey the structural and methodological significance of the *Straftatsystem* as a basic organizing principle of German criminal law. No translation of the term can be fully adequate, since there is no precise equivalent to the *Straftatsystem* within the American legal system and American legal practice. Thus, any set of English words will fail to adequately convey what is involved because of the lack of a corresponding institutional referent within American legal culture. In an effort to bridge this language gap, it has proven useful to employ a number of English terms that would not be obvious choices at the level of literal translation. The word "general" is added to indicate the expectation that the *Straftatsystem* is the method of analysis to be applied in all cases. Moreover, the *Straftatsystem* is general in the same sense that the "general part" (*allgemeiner Teil*) of criminal law is general: it relates to features of criminal conduct that go beyond the specific crimes of the "special part" (*besonderer Teil*). Not surprisingly, German texts on the general part are typically organized around the basic features of the general system for structuring criminal analysis. See, e.g., J. BAUMANN, STRAFRECHT: ALLGEMEINER TEIL (8th ed. 1977); H. JESCHECK, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL (3d ed. 1978); R. MAURACH, DEUTSCHES STRAFRECHT: ALLGEMEINER

in this article to refer to the German *Straftatsystem*.) This system is an intellectual framework that defines and delimits the approach that a German jurist adopts in determining whether particular conduct violates the norms of the substantive criminal law. It is parallel in systemic significance to the Model Penal Code's innovative "element analysis" methodology,⁴ but has much deeper philosophical and cultural roots. This article will

TEIL (4th ed. 1971); E. SCHMIDHÄUSER, STRAFRECHT: ALLGEMEINER TEIL (2d ed. 1975); G. STRATENWERTH, STRAFRECHT: ALLGEMEINER TEIL (3d ed. 1981).

The terms "analyzing" and "analytical" are used because the *Straftatsystem* is fundamentally concerned with what American lawyers would describe as legal analysis. More particularly, the *Straftatsystem* provides a structure for analyzing the basic constituents of criminal liability: whether the relevant prohibitory norm has been violated, whether justificatory circumstances are present, and whether culpability or accountability is negated by pertinent excusing conditions. Technically, it might be more accurate to think of the *Straftatsystem* as an effort at "synthesis" rather than "analysis," since its key function is to bring together the various constituents of liability and the wider values that shape our thought about criminal norms, justifications, and excuses in a structured methodology for resolving particular cases. But Americans tend to use the term "analysis" indiscriminately to cover both the "breaking down" (analytic) and the "gathering together" (synthetic) aspects of the process of reasoning used in deciding cases. "Analysis" is thus the better term to use in conveying the meaning of *Straftatsystem* to American lawyers.

The terms "structure" and "structuring" used in two of the suggested translations reflect the fact that the *Straftatsystem* constitutes not only a method of analysis, but a structure or structuring of thought. Perhaps these come to the same thing, but there are contexts in which the structural dimension of the *Straftatsystem* is not adequately evoked by the English word "system." The term *System* in German has stronger structural overtones than the cognate English term.

One further point about the term *System* must be made. The *Straftatsystem* is not to be thought of as a system of criminal law in the sense that one might speak of a "philosophical system"—i.e., as a theoretical or metaphysical construct accounting for a particular sector of thought or reality. This is not to say that German criminal theorists have not utilized the *Straftatsystem* as a central feature of comprehensive accounts of German criminal law. They have. Indeed, as noted above, most texts on the "general part" of German criminal law are organized around the basic features of the *Straftatsystem*. Moreover, as this article contends, the general system for analyzing criminal acts does reflect a constellation of values connected with the ideal of rule of law (*Rechtsstaatlichkeit*). Conceivably, in an age more conducive to philosophical system building, a criminal theorist might attempt to construct a system embodying these values. The point for present purposes, however, is that *Straftatsystem* is to be thought of as a practical, systematic method for structuring analysis of liability for criminal actions, rather than as some particular thinker's philosophical systematization of criminal law.

German criminal law scholars often refer not only to the *Straftatsystem*, but also to the *Straftatlehre* (literally, "criminal act doctrine"). The latter is merely the body of doctrine or theory about the former. No effort has been made to distinguish between translations of these two terms in this article, since from the perspective of American readers, the two blend together as a linked theoretical approach to analyzing criminal liability.

4. See generally Robinson & Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

describe how the general analytical system operates in practice and will then explore the deeper values it reflects and protects. My aim is to provide an overview of a central feature of German criminal methodology, and then to reflect at a more general level on the relationship between legal methodology and legal values.

II. AN OVERVIEW OF GERMAN METHODOLOGY IN ANALYZING CRIMINAL LIABILITY

A. "Wild Postering": A Representative Problem

For those familiar with the significance of the "general theory for analyzing criminal acts"⁵ in German criminal thought, the topic addressed by this article may sound extremely broad. I think, however, that the subject is central to a number of significant theoretical and practical issues. The nature of the subject may become more clear if I begin with a legal issue that is currently the subject of frequent debate in Germany.

German courts are time and again confronted by the following set of facts: A group of young people has difficulty gaining public attention for their political views, and to remedy this problem they decide to "advertise." They have some posters printed and paste them up as firmly as possible in as many locations as they see fit.⁶ The modern glues are quite permanent, and the material is often bonded to the surface to which it is attached. It is usually a tremendous inconvenience to remove the posters or fliers, and is sometimes impossible.

Under German criminal law, the question is whether the foregoing conduct is sufficient to constitute the crime of damaging property under section 303 of the German Criminal Code.⁷ There are conflicting opinions, and the courts⁸ and scholars⁹ de-

5. See *supra* note 3.

6. In Germany this is called *wildes Plakatieren*, which may be translated as "wild postering," or more tamely, as "unauthorized advertising."

7. Section 303 provides, "Wer rechtswidrig eine fremde Sache beschädigt oder zerstört, wird mit Freiheitsstrafe bis zu zwei Jahren oder mit Geldstrafe bestraft." STRAFGESETZBUCH [StGB] § 303 (W. Ger.). This may be translated as follows: "Whoever wrongfully damages or destroys an object not belonging to him shall be punished by imprisonment for a term not to exceed two years or by a fine."

8. See Oberlandesgericht [OLG], Oldenburg, W. Ger., 1978 JURISTEN ZEITUNG [JZ] 70; OLG, Karlsruhe, W. Ger., 1978 JZ 72; OLG, Oldenburg, W. Ger., 1978 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1656; OLG, Karlsruhe, W. Ger., 1978 NJW 1636; see also 1978 NJW 1637-42; Judgment of Nov. 13, 1979, Bundesgerichtshof in Strafsachen [BGHSt], W. Ger., 29 BGHSt 129.

9. See, e.g., 1 R. MAURACH & F. SCHRÖDER, STRAFRECHT: BESONDERER TEIL 267 (6th

fend their views with numerous arguments. It is unsettled whether firmly pasting a flier or poster on an object damages that object. Those who believe that it does must turn to further questions. Conceivably, such property damage is justified by the right to freedom of speech. Even someone who does not accept the argument that free speech rights legitimize property damage might still argue that the young people should not be punished because they (mistakenly) thought that their right to freedom of speech justified their actions. These are difficult legal issues in Germany and they place great demands on the breadth and precision of analysis.

B. Fundamental Tools of Legal Analysis in the German System

The German lawyer must have total command of two fundamental and distinct tools of legal analysis to discuss properly the question of the punishability of unauthorized advertising: knowledge of the pertinent code sections and mastery of the general system for analyzing criminal acts.

1. Knowledge of code provisions

Knowledge of the the pertinent code sections entails knowledge not only of the wording of the applicable statutory texts but also a sound understanding of how they are to be interpreted. In the "wild postering" situation, one must know the text of section 303 of the German Criminal Code. According to the text of section 303, the damage or destruction of an object is a prerequisite for liability. The German lawyer must be aware that, according to the accepted interpretation of section 303, cases of unauthorized advertising fall within the statute's prohibition of "damaging" as opposed to "destroying" property.¹⁰ He or she must also be conscious of the various legal interpretations of the word "damage." Interpretations of this term are associ-

ed. 1977); STREE, STRAFGESETZBUCH: KOMMENTAR, § 303, Marginal No. 8 (A. Schönte & H. Schröder, 21st ed. 1982). For a summary of the various positions, see Dolling, *Sachbeschädigung durch Plakatieren vom Gebrauchsgegenständen*, 1981 NJW 207; Gossel, *Wildes Plakatieren und Sachbeschädigung im Sinne des § 303 StGB*, 1980 JURISTISCHE RUNDSCHAU [JR] 184; Maiwald, *Unbefugtes Plakatieren ohne Substanzverletzung keine Sachbeschädigung?*, 1980 JZ 256; Thoss, *Sachbeschädigung durch unbefugtes Plakatieren?*, 1978 NJW 1612; Katzer, *Das unbefugte Plakatieren als Auslegungsproblem der Sachbeschädigung (§ 303 StGB)* (Diss. Frankfurt a.M. 1982).

10. See *supra* note 7.

ated with three different views of the interests protected by section 303. The interests protected by this statute might reflect concerns with (1) the physical integrity of the object; (2) the object's functional capacities; or (3) the authority of the owner to determine what can and cannot be done with the object.¹¹ If the protected interest is seen as the physical integrity or the functional capacity of the property, unauthorized advertising does not constitute damaging property. Pasting up a placard usually destroys neither the physical integrity nor the functional capacity of an object. If, on the other hand, the interest protected by making it a crime to damage property is the owner's authority over the object, then unauthorized advertising does constitute damaging property. Indeed, unauthorized advertising unavoidably invades the authority of the owner over his property.

Familiarity with, and the ability to discuss, these issues are part of the knowledge of the code that is required for a German jurist to work effectively with section 303.

2. *The general system for analyzing criminal acts*

Familiarity with the code, however, does not provide the German lawyer with enough knowledge to make a thorough legal analysis of unauthorized advertising. He must also be master of the second tool of legal analysis, the general system for analyzing criminal acts. In this general analytical system are collected those features of crime that are common to all crimes, whether it be damaging property, theft, murder, or anything else.¹² If, therefore, unauthorized advertising is to be punishable under German law, it must be found to exhibit the general paradigmatic features of crime as determined by German criminal theory, as well as the particular elements of section 303 established by statute.

By pouring the question of liability for specific conduct through the filter of the general system for analyzing criminal acts, we are adding something—and not just a little some-

11. See, e.g., G. ARZT, STRAFRECHT. BESONDERER TEIL, VERMÖGENSDELIKTE 9 ff. 1978; 1 R. MAURACH & F. SCHRÖDER, STRAFRECHT, BESONDERER TEIL 265 ff. (6th ed. 1977) ("Das Wesen der Sachbeschädigung").

12. For an overview of the West German literature, see BAUMANN, STRAFRECHT: ALLGEMEINER TEIL 171 ff. (8th ed. 1977); H. JESCHECK, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL 155 ff. (3d ed. 1978); 1 R. MAURACH & H. ZIPF, STRAFRECHT: ALLGEMEINER TEIL 157 ff. (6th ed. 1983); E. SCHMIDHÄUSER, STRAFRECHT: ALLGEMEINER TEIL 22 ff., 139 ff. (2d ed. 1975); G. STRATENWERTH, STRAFRECHT: ALLGEMEINER TEIL I 57 ff. (3d ed. 1981).

thing—to the law as written by the legislature. My central concern in this article is this “filling out” of the code’s text by the general analytical system. In order to appreciate how this “filling out” process operates, we turn first to a brief description of the main elements of the system.

The general analytical system describes the main features of criminal action with the German terms *Tatbestandsmäßigkeit* (definition of the offense), *Rechtswidrigkeit* (wrongfulness), and *Schuld* (culpability).¹³ Whatever the governing code provision may be, every criminal act must be wrongful and culpable conduct that conforms to (i.e., is violative of) the definition of the offense. Unauthorized advertising can only be punished if it violates the definition, is wrongful, and is culpable. These central elements are discussed with much effort and pomp in Germany.

13. These translations of the German terminology are necessarily rough and imperfect. The basic structural features of criminal action they identify and the contrasts between them have been explored at length by Professor George P. Fletcher. See G. FLETCHER, *RETHINKING CRIMINAL LAW* 454-504, 552-69, 575-79 (1978); see also Durham, Book Review, 1979 UTAH L. REV. 629, 634-40. In the main, the translations I am using follow those used by Professor Fletcher, but a few comments are in order.

First, *Tatbestandsmäßigkeit* connotes more than what American lawyers normally mean by the definition of an offense. The first part of the word, *Tatbestand*, means “that of which the [criminal] act consists.” The suffix *-mäßigkeit* means “the state or condition of being subject to.” In actuality, then, the German term refers not to the definition of an offense itself, but to the state of being subject to or in conformity with (i.e., in violation of) the definition or prohibitory norm (which specifies what the criminal act consists of). In many ways, the phrase “elements of an offense” constitutes a better translation of the core term *Tatbestand*, since it preserves the German term’s ambiguous reference to both the norm and the prohibited conduct. One could thus translate *Tatbestandsmäßigkeit* as “the state or condition of fulfilling the defined elements of a criminal offense.” It is simpler, however, to refer to this feature of criminal acts as the definition of the offense, or as the state of fulfilling or violating the definition.

Turning to *Rechtswidrigkeit*, I prefer the translation “wrongfulness” to Fletcher’s rendition of the term as “wrongdoing.” A literal translation would be “the state or condition of being against the law” or more simply “unlawfulness.” I share Fletcher’s view that this is inadequate because, to an American reader, this might suggest that *Rechtswidrigkeit* has to do only with the state or condition of being inconsistent with positive law. The German term *Recht*, which means both “law” and “right” has moral overtones that are independent of positive law. While I thus agree with Fletcher on the major translation issue here—namely, that an unduly positivistic rendition should be avoided—I prefer “wrongfulness” to “wrongdoing” because the former preserves the sense that *Rechtswidrigkeit* is a characteristic of actions, rather than the “doing” itself.

Schuld could be literally translated as “guilt,” but the question of guilt tends to be thought of in English as the final determination that a defendant is criminally liable, not as a more limited issue about whether the defendant may fairly be held accountable for his conduct. “Culpability,” with its overtones of accountability and moral responsibility, is a closer translation.

The discussion, however, has not achieved a conclusive result.¹⁴ A few main points, however, are undisputed.

a. The definition of an offense. The word *Tatbestandsmässigkeit* embraces all of the elements of a particular crime that are found in the applicable code section. A rough American equivalent would be the phrase "elements of the offense."¹⁵ There is a *Tatbestand* or definition of theft, homicide, fraud, and so on. The problems of interpretation mentioned earlier¹⁶ that arise in connection with applying section 303 to "wild postering" are questions about whether such conduct fits within the scope of the definition of damaging property. A German law student writing an exam on this issue, or for that matter, a German judge deciding a "wild postering" case, would be regarded as engaging in improper analysis if he or she tried to treat these questions at a different stage of the analysis—i.e., as an issue of wrongfulness or culpability.

Demanding that the problem of determining which legal interest is protected by section 303 be treated as a problem of the definition of damaging property affects more than the mere formal ordering of legal analysis. This demand also aids the decision of substantive issues. The content of the definition of a crime cannot be extended beyond that formulated by the legislature. In the context of section 303, for example, the authority of the property owner to determine what may happen to his property is protected only to the extent this authority is asserted to prevent damage to, or destruction of, the property. From this perspective it would take a strained interpretation to hold unauthorized advertising to be a violation of section 303, since such conduct leaves the property intact and intrudes solely upon the owner's authority. Further, the notion of *Tatbestandsmässigkeit* itself, in its German usage, necessarily implies that the perpetrator's deed (*Tat*) be unambiguously and conspicuously antisocial. If, however, the definition of the crime of damaging property were tied to the authority of the owner to control his property, the determination of whether a particular act satisfied the elements of the definition would be dependent upon whether the property owner viewed the act as an incursion upon his author-

14. See H. JESCHECK, *LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL* 159-72 (3d ed. 1978); E. SCHMIDHÄUSER, *STRAFRECHT: ALLGEMEINER TEIL* 159 ff. (2d ed. 1975).

15. See *supra* note 13.

16. See *supra* text accompanying note 11.

ity. But this latter definition does not comport with accepted theory concerning the nature of the definition of criminal acts. Thus, this theory makes it more difficult to punish "wild poster-ing" as a violation of section 303.¹⁷

b. *Wrongfulness. Rechtswidrigkeit*, or wrongfulness, embraces all the statutory and extrastatutory general grounds for holding that conduct which is violative of the definition may still be found to be justified, thereby escaping punishment. Self-defense is a classic justification that negates the wrongfulness of an act. The right to free speech, which some "wild posterers" cite as the source of the legitimacy of their activity, is a doubtful justification in their case;¹⁸ but it is in any event an argument that must be legally analyzed under the heading of wrongfulness. The category of wrongfulness in the general analytical system not only provides the proper place for the discussion of such justifications but also provokes the discussion of doubtful justification.

c. *Culpability*. The first task of the element of *Schuld* or culpability in the general analytical system is to secure the status of culpability as an indispensable prerequisite to punishment. A result of the culpability requirement is that the lawyer must carefully consider possible grounds for excusing the actor, even though his conduct is violative of the definition of the crime and is wrongful. Insanity and duress are illuminating examples of the doctrines that serve to negate culpability in this manner. A party availing himself of either of these defenses typically claims that while he has engaged in conduct specified in the definition of some crime, and though he has done so without justification, he cannot fairly be held responsible for what he did.

Legal discussions of unauthorized advertising commonly encounter the view that this conduct conforms to the definition of damaging property and is wrongful. Those who defend this position are not, however, finished with their analysis. They must take up the further problem presented by the possibility that the actor thought he had a right to paste up posters. In the terms of the theory of the general analytical system, this is a

17. See OLG, Karlsruhe, W.Ger., 1978 JZ 72; Thoss, *supra* note 9, at 1613.

18. Just as in the United States, free speech rights in West Germany constitute constraints on state action, and do not confer unfettered license to encroach on the rights of others.

problem of culpability. A perhaps overly simplistic formulation is that the category of culpability marshals all of the arguments favoring a finding of not guilty that are based on the subjective state of the accused and insures that they are considered in every case.

C. Application of the General Analytical System

Knowledge of the statute and the general system for analyzing criminal acts are the two tools of analysis that the German criminal lawyer must employ in order to decide every case. The law student must, from the very beginning of his studies, become sure of his ability to handle both. The practicing criminal lawyer is, for the most part, uninterested in the subtleties of the academic discussion of refinements in the theory of the general analytical system, but he recognizes that the basic elements of the structure guide his work. This can be seen in the German courts' decisions on unauthorized advertising. Judges apply the general analytical system as a matter of course as the framework for analyzing and deciding cases.¹⁹

The use of these two tools of analysis is made more interesting by a further feature of the legal landscape. The power to decide cases is not evenly distributed between the statute and the general analytical system. Rather, the latter is given priority. Law students learn, for example, that a statute can only be applied in a manner permitted by the system. Every statute must submit to being reordered and reinterpreted by way of the general analytical system before it can be applied. The statute as formulated by the legislature is not applied directly; prior to application the statute is passed through the sieve of this system and undergoes a structural metamorphosis in that process.

Thus, the provision of the German Criminal Code covering damage to property is not applied directly and verbatim to the case of unauthorized advertising. It must first be subjected to the strict regimen of the general analytical system. Its provisions must first be dissected into the categories of the definition, wrongfulness, and culpability, and only then applied.

19. See, e.g., OLG, Oldenburg, W. Ger., 1978 JZ 70; OLG, Karlsruhe, W. Ger., 1978 NJW 1636; 29 BGHSr 129.

III. THE RELATIONSHIP BETWEEN POSITIVE LAW AND THE GENERAL ANALYTICAL SYSTEM

It can be concluded from the discussion to this point that the general system for analyzing criminal acts is successfully able to force conformity with its dictates upon criminal statutes. Its structuring of legal materials and legal analysis transcends the dictates of the positive law. This is a rather remarkable state of affairs. In accord with the tradition in Europe since the Renaissance, German criminal law is inseparably bound to legislation. The maxim *nulla poena sine lege*, with its requirements of prospectivity and fair warning by statute, is a zealously guarded constitutional principle in West Germany;²⁰ and yet, the same criminal law that is supposedly bound to and by legislation yields to the nonlegislated general system for analyzing criminal acts.

I want to discuss some troubling aspects of this relationship between legislation and the general analytical system. The goal is to justify, if possible, the preeminent position of this system vis-à-vis legislation.

A. *Transpositive Features of the General Analytical System*

The German Criminal Code itself does not require that attention be paid to the general system for analyzing criminal acts. The Code does presuppose application of the system at many points. The words for definition, wrongfulness, and culpability are repeatedly used.²¹ But this is not a consistent legislative practice. No provision exists from which one could derive the legislative intent that the structure be used in applying the Code's sections.

German scholars of the nineteenth and early twentieth centuries thought that they could derive the main features of the general structure by studying the text of the Code.²² They thought of the Code as a kind of physical object, and hoped that by constantly observing it they could discover its inner order.

20. GRUNDGESETZ [GG] art. 103 abs. 2 (W. Ger.); StGB § 1 (W. Ger.); see P. BOCK-ELMANN, STRAFRECHT: ALLGEMEINER TEIL 10 ff. (3d ed. 1979); J. WESSELS, STRAFRECHT: ALLGEMEINER TEIL 8 ff. (12th ed. 1982).

21. See, e.g., StGB § 11 abs. 1 nr. 5 (W. Ger.); see also *id.* §§ 13, 17, 20, 32, 34, 35.

22. See, e.g., E. BELING, DIE LEHRE VOM VERBRECHEN (1906); K. BINDING, DIE NORMEN UND IHRE ÜBERTRETUNG (1872); F. VON LISZT, LEHRBUCH DES DEUTSCHEN STRAFRECHTS 116 ff. (14th ed. 1905).

The structure of offenses seemed to be a kind of scientific discovery. The requirement of respect for the structure was founded on its status as a law of nature.

This justification of the preeminence of the general analytical system underestimates, however, the nature of the claim that this system makes. This justification rests on the notion that the main features of the general system are an intrinsic part of the Code;²³ but the argument has a scarcely acceptable consequence. Another set of statutes—for example, a code that did not recognize wrongfulness or culpability as prerequisites of punishment—would of necessity lead quickly and unswervingly to another theory of the structure of offenses. This is precisely what the general analytical system will not allow. It is not tied to a given body of positive law. Rather, the theory of the general analytical system requires that all positive legislation conform to it.

The fact that the positive criminal law of a particular country at a particular time happens to give credence to the categories of definition, wrongfulness, and culpability is a political accident. A theory of the general structure of crimes cannot be founded on such an accident. Put another way, the general system for analyzing crimes demands to be recognized even when the positive criminal law does not conform to it. Legal theory then becomes criticism of nonconforming positive law. At any rate, it is clear that the general analytical system is not derived from the positive law; on the contrary, it comes before and sets itself above positive law.

B. The Propriety of Placing the General Analytical System Above the Positive Law

We are left with the question of whether such patronizing treatment of legislation is acceptable in a legal system in which statute is supreme. With respect to this question, the credentials of the general system for structuring criminal analysis are impressive. The system is often praised in German literature as the guarantor of order, certainty, and impartiality in the application of individual statutes.²⁴ These credentials provide some insight

23. See, e.g., H. JESCHECK, *LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL* 157 (3d ed. 1978); H. WELZEL, *DAS DEUTSCHE STRAFRECHT* 37-38 (11th ed. 1969); H. MAYER, *STRAFRECHT: ALLGEMEINER TEIL* 41-42 (1953).

24. See H. JESCHECK, *LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL* 155-57 (3d ed.

into the vastness of the claim staked out by the general analytical structure on the landscape of the criminal law. In Germany, this general analytical system is the hallmark of sophisticated lawyerly professionalism. Let legislators write the statutes as they please—our structure insures at least order, certainty, and impartiality in the statutes' application. This is the first clear signal that the general analytical system entails more than a formal model that helps one better organize and explicate statutory language. Embodied within the general system for structuring criminal analysis are certain basic elements that are essential to any process that calls itself just.

Admittedly, an explanation of why the general analytical system developed its particular structural features (i.e., violation of the definition, wrongfulness, and culpability) is still required. A continuing respect for these elements promotes order, certainty, and impartiality in the administration of justice. But these goals are attainable in other ways. One could, for example, number the characteristics of a particular crime arbitrarily, beginning with number one and ending when each characteristic had been assigned a number. Order, certainty, and impartiality could be insured by requiring courts to work down this checklist in every case.²⁵

However, much more than the simple, formal ordering of the process of deciding an individual criminal case is sought in German criminal law by invoking the general system for analyzing criminal acts and, in particular, by structuring analysis in terms of the categories of violation of the definition, wrongfulness, and culpability. These categories seek rather to impose certain substantive values in connection with the making of particular decisions—values that are not necessarily contained in the individual criminal statutes being applied.

The substance imparted by the three main categories of the general analytical structure is different for each category. The category of violation of the definition seeks to insure that the criminal justice system does not impose criminal liability without first establishing that a precise statutory rule has been broken by the perpetrator. The category of wrongfulness seeks to

1978); Welzel, *Zur Dogmatik im Strafrecht*, in *FESTSCHRIFT FÜR MAURACH* 3 (1972).

25. Element analysis under the American Law Institute's MODEL PENAL CODE proceeds in essentially this fashion. It assumes that the process of carving up the characteristics of a crime is essentially arbitrary, and that the only genuine issue to be faced in making a determination of liability is whether all the elements have been satisfied.

insure that general justificatory exceptions militating against liability are sought, clarified, and considered in every case. The category of culpability seeks to insure that punishment does not follow on the mere showing that, objectively viewed, a rule has been violated without justification. It forces attention to the person of the perpetrator and requires special attention to the excuses he offers for his conduct.²⁶

Clearly, then, the substantive values of the general analytical structure entail a precise legal program. In order to shore up this program against the ever present risk of legislation that runs afoul of its dictates, and especially to safeguard its authority in times when the positive legislation of a country tends toward disregarding it, secure foundations must be found to justify and protect the program.

In Germany, as in the United States, constitutional principles are cited for this purpose. The category of violation of the definition as a general characteristic of crime is commonly thought to be founded on the provision in the West German Basic Law (*Grundgesetz*, the West German constitutional document) that punishment can only be legislatively prescribed.²⁷ Another commonly defended position attempts to ground the status of culpability as a general prerequisite of punishment on the article of the Basic Law that declares the dignity of the person to be inviolable.²⁸

But these efforts to derive some of the features of the general analytical system from constitutional provisions are not so much genuine justifications as displays of the European tendency to argue for every legal conception as if it had legislative origins. In fact, West Germany has no constitutional provision requiring that, for conduct to be punishable, it must, in addition to being violative of a statute, satisfy the various categories of the general system for analyzing criminal acts. That is, the insistence that criminal liability attaches only where conduct violates a definition and is wrongful and culpable is not rooted exclusively in constitutional provisions. The most that one can say is

26. See *supra* note 12.

27. GG art. 103, abs. 2.

28. GG art. 1, abs. 1. Compare H. JESCHECK, *LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL* 99 ff. (3d ed. 1978); W. NAUCKE, *STRAFRECHT. EINE EINFÜHRUNG* 102 ff. (4th ed. 1982).

that the cited West German constitutional provisions and the general structure of offenses can be traced back to a common legal tradition.

C. The General Analytical System and Just Punishment

This tradition is the real foundation for the demand that the positive law only be applied as the general analytical structure allows. The structure represents the results of lengthy deliberations in the realms of political and moral philosophy, as well as the result of numerous experiments in real world politics.

This is, to be sure, a rather sweeping statement. We would do well to try to flesh out more precisely the meaning of the contention that the general system for analyzing criminal acts imparts the most durable results of prolonged endeavors in political and moral theory and practice.

What is meant is primarily that this general analytical structure is not merely a scholarly or legislative construction. It is instead a reservoir of political experience gained during lengthy periods of legal history. One could probably show that the basic features of the theory were already known and valued long before the beginning of the modern history of criminal law.

The political experience that the general analytical structure of offenses seeks to secure for the decision of every case can, in my opinion, be described more or less as follows: Deviation from the accepted norms of society should not be responded to with uncontrolled violence. The first reaction, rather, should be to try to gain distance from the deviant event. This distance is attained by binding oneself to a definite and formal pattern of analysis.

To phrase the idea pointedly, applying the statute according to the program of the general analytical structure is a contrasting image to a violent act as well as to any summary execution of punishment. The general system for analyzing criminal acts reflects the discursive, objective way in which Western philosophical tradition thinks about a subject—crime and punishment—that offers resistance to the tendency to react to breaches of established norms with unfettered and arbitrary power. The degree to which a theory of the general structure of offenses like the German theory is followed is an indication, I believe, of the distance that a system of criminal law has put between itself and the direct, forceful, and manipulative imposition of the will of the majority on deviant individuals in society. The general ana-

lytical structure, or its functional equivalent, is thus not only a practical criterion to be applied in deciding particular cases, but also an indicator of the level of criminal law culture a particular society has attained.

From the vantage point of the general analytical structure and its use, one is able to specify the position of the criminal in the criminal process. The structure, whose main features I have described, guarantees that the criminal is in a precisely definable legal position regardless of the exact construction of a particular statute. The general structure guarantees (1) that the particular statutory violation must be established (fulfillment of the requirements of the definition); (2) that the criminal can defend himself with general justifications of his conduct (wrongfulness); and (3) that attention is devoted to the accused as a person by allowing him to raise any relevant excusing conditions (culpability).

The theory of the general system for analyzing criminal acts thus contains the minimum conditions that must be maintained if punishment is to be just. The demand that the positive law only be enforced within the framework described by the structure is nothing more than the demand that the minimum conditions for just punishment be preserved.²⁹

IV. CONCLUSION

The foregoing discussion has established that the relationship between the German criminal theory's general analytical structure and the positive law has a number of important features.

First, whatever the content of everchanging criminal laws may be, the structure of offenses imbues the decision of every case with the results of long-term, extrastatutory considerations of justice that constitute some of our deepest traditions in criminal law. The general structure represents politically, philosophically, and morally proven traditions in a quickly evolving world of expedient legislation. There is much in the considerations that have shaped the theory of the general analytical structure that is traceable to particular European or German developments. I believe some of these developments to be responses to

29. See W. NAUCKE, STRAFRECHT: EINE EINFÜHRUNG 240 ff. (4th ed. 1982); W. NAUCKE, GRUNDLINIEN EINER RECHTSSTAATLICHPRAKTISCHEN ALLGEMEINEN STRAFTATLEHRE (1979).

issues that are distinctively German and that do not have broader ramifications for other legal cultures. But it would be premature to treat problems concerning the general analytical structure as problems of a single country's law.³⁰ Discussions with American colleagues have convinced me that the basic features of the structure are clearly perceptible in American law. This lends credence to the view that the values implicit in the general system for analyzing criminal acts have a natural lawlike character that transcends national boundaries.

Second, it appears that, at least to some extent, the emergence of a general system for analyzing criminal acts depends on accidents of national, political, legal, and, in particular, procedural developments. But if, as I have argued, the recognition and application of the general analytical system is an indicator of the level of criminal law culture a particular society has attained, then work on refining and developing the theory of such systems of analysis cannot be limited by national boundaries.

Finally, while linguistic usage and legal conceptualization in the theory of general systems for structuring legal analysis may differ from country to country, it should not be difficult to examine the results of national discussions of such issues in fruitful ways. By focusing on the contribution these discussions make to clarifying and refining the place of the criminal law in a democracy, we can make joint strides toward a larger objective: the furtherance of justice in punishment.

30. For an extended analysis of the features of the general analytical structure discernible in common law approaches to criminal law, see G. FLETCHER, *RETHINKING CRIMINAL LAW* 391-875 (1978).