Prevention and Intervention in Childhood and Adolescence 3

Special Research Unit 227 - Prevention and Intervention in Childhood and Adolescence

An interdisciplinary project of the University of Bielefeld

conducted by *Prof. Dr. Günter Albrecht, Prof. Dr. Peter-Alexis Albrecht, Prof. Dr. Otto Backes, Prof. Dr. Michael Brambring, Prof. Dr. Klaus Hurrelmann, Prof. Dr. Franz-Xaver Kaufmann, Prof. Dr. Friedrich Lösel, Prof. Dr. Hans-Uwe Otto, Prof. Dr. Helmut Skowronek*

Crime Prevention and Intervention

Legal and Ethical Problems

Edited by
Peter-Alexis Albrecht, Otto Backes

Walter de Gruyter · Berlin · New York 1989

Peter-Alexis Albrecht
Professor of Law, University of Bielefeld

Otto Backes
Professor of Law, University of Bielefeld

Library of Congress Cataloging in Publication Data

Crime preventation and intervention.
(Prevention and intervention in childhood and adolescence ; 3)
Bibliography: p.
1. Crime prevention. 2. Juvenile delinquency--Prevention. I. Albrecht, Peter-Alexis. II. Backes, Otto, 1936- . III. Series.
HV7431.C723 1989 364.3'6 88-31093
ISBN 0-89925-497-7 (U.S.)

Deutsche Bibliothek in Cataloging in Publication Data

Crime prevention and intervention : legal and eth. problems / ed. by Peter-Alexis Albrecht ; Otto Backes. - Berlin ; New York : de Gruyter, 1988
(Preventation and intervention in childhood and adolescence ; 3)
ISBN 3-11-011741-X
NE: Albrecht, Peter-Alexis [Hrsg.]; GT

Printing: Gerike GmbH, Berlin. - Binding: Lüderitz & Bauer, Berlin. - Cover Design: Hansbernd Lindemann, Berlin.

Contents

Part III
Inquiry into the Ethical Aspects of Prevention

Contributors

Albrecht, Günter, Dr. phil., Professor of Sociology, Department of Sociology,
University of Bielefeld, Universitätsstr. 25,
4800 Bielefeld, West Germany

Albrecht, Peter–Alexis, Dr. iur., Professor of Penal Law, Department of Law,
University of Bielefeld, Universitätsstr. 25,
4800 Bielefeld, West Germany

Backes, Otto, Dr. iur., Professor of Penal Law, Department of Law,
University of Bielefeld, Universitätsstr. 25,
4800 Bielefeld, West Germany

Bettmer, Franz, Dipl. Soz., Special Research Unit 227, Prevention and Intervention,
University of Bielefeld, Universitätsstr. 25,
4800 Bielefeld, West Germany

Büllesbach, Alfred, Dr. iur., Dipl. sc. pol., Landesbeauftragter für den Datenschutz
des Bundeslandes Freie Hansestadt Bremen, Arndtstr. 1,
2850 Bremerhaven, West Germany

Böllert, Karin, Dipl. Päd., Special Research Unit 227, Prevention and Intervention,
University of Bielefeld, Universitätsstr. 25,
4800 Bielefeld, West Germany

Denninger, Erhard, Dr. iur., Professor of Constitutional and Administrative Law,
Department of Law, University of Frankfurt, Senckenberganlage 31
6000 Frankfurt 1, West Germany

Engel, Uwe, Dr. phil., Special Research Unit 227, Prevention and Intervention,
University of Bielefeld, Universitätsstr. 25,
4800 Bielefeld, West Germany

Galaway, Burt, Ph.D., Professor, School of Social Work, University of Minnesota,
400 Ford Hall, 224 Church Street S.E., Minneapolis,
Minn. 55455, USA

Grimm, Dieter, Dr. iur., L.L.M.(Harvard), Justice of the Federal Constitutional Court,
Professor of Constitutional Law, Department of Law,
University of Bielefeld, Universitätsstr. 25
4800 Bielefeld, West Germany

Grönfors, Martti, Dr., Department of General Jurisprudential Studies,
Helsinki University, Lastenkodinkatu 2 F 3,
00100 Helsinki, Finland

Josef, Norma C., M.D., Department of Psychiatry and Lafayette Clinic,
Wayne State University, Detroit,
Mich. 48202, USA

Herbort, Ursula, Dipl. Soz., Special Research Unit 227, Prevention and Intervention,
University of Bielefeld, Universitätsstr. 25,
4800 Bielefeld, West Germany

Hurrelmann, Klaus, Dr. sc. pol., Professor of Sociology and Education, Department of Education,
University of Bielefeld, Universitätsstr. 25,
4800 Bielefeld, West Germany

Karstedt–Henke, Susanne, Dr. soz. wiss., Special Research Unit 227, Prevention and Intervention
University of Bielefeld, Universitätsstr. 25,
4800 Bielefeld, West Germany

Kinkel, R.John, Ph.D., Department of Sociology and Adjunct Graduate Faculty,
Department of Management, Wayne State University,
Detroit, Mich. 48202, USA

Mathiesen, Thomas, Dr., Professor of Sociology of Law, Department of Sociology of Law,
University of Oslo, St. Olavgst. 29,
0166 Oslo 1, Norway

Messmer, Heinz, Dipl. Soz., Special Research Unit 227, Prevention and Intervention,
University of Bielefeld, Universitätsstr. 25,
4800 Bielefeld, West Germany

Otto, Hans–Uwe, Dr. soz. wiss., Professor of Social Work and Welfare Administration,
Department of Education, University of Bielefeld, Universitätsstr. 25,
4800 Bielefeld, West Germany

Polk, Kenneth, Ph.D., Professor, Department of Criminology, University of Melbourne,
Parkville Victoria 3052, Australia

Rzepka, Dorothea, Department of Law, University of Bielefeld, Universitätsstr. 25,
4800 Bielefeld, West Germany

Schumann, Karl. F., Dr. phil., Professor of Criminology, Department of Law,
University of Bremen, Bibliothekstr.
2800 Bremen 1, West Germany

Voss, Silvia, Department of Law, University of Bielefeld, Universitätsstr. 25,
4800 Bielefeld, West Germany

Introduction

The Special Research Unit 227 (Prevention and Intervention in Childhood and Adolescence, SFB 227) held its third international symposium between the 14th and 16th of October, 1987 at the University of Bielefeld (West Germany). The papers in this volume present the scientific discussion on the subject of the symposium: legal and ethical problems of prevention and intervention, with particular reference to adolescence. At this point we want to express our thanks to the German Research Association (Deutsche Forschungsgemeinschaft) which is funding the SFB 227 and thus has enabled us to go on this interdisciplinary excursion with international participation to the largely unexplored fields of prevention and intervention.

Prevention and intervention necessarily represent an intrusion into the social world of the clients. The transition from postoperative problem intervention to the preventive control of causes shifts the theoretical and practical focus from a directed control of the manifest problem case to an anticipatory control of clients who only have potential problems. Prevention has to work with assumptions about probability, whereas postoperative intervention is used to proceeding from secure basic principles for action. It thus introduces elements of uncertainty into public social activity that give rise to ethical, legal, and normative problems.
The basic problem contained in this uncertainty, which links up with any preshift of public intervention into the field of prevention, lies in the attendant danger of an uncontrolled diffusion of state control over societal processes and behavior.
The symposium addressed the various dimensions of this problem, and paid particular attention to the following aspects:

1. Can the legal system provide the means for a rational limitation of practical prevention?
2. Are the different rationalities applied by the clients, the administration, the legal system and last but not least the research community compatible when it comes to the implementation of preventive programs?
3. To what extent must research on prevention and intervention take into account ethical and normative limitations?
4. What is the relation between theoretical concepts of prevention guided by sociological and psychological concepts of social problems and their practical implementation in administrative settings?

In the present volume, these questions are dealt with in three sections: A first, theoretical section (I) discusses the legal basic elements of prevention and intervention. A second, empirical section (II) discusses various programs in West German and international practice. A third section (III) addresses the ethical problems.

Part I.
The Foundations of Prevention and Intervention in Law and Criminal Justice Policy

A legal consideration of preventive social activity must lead to a – to some extent fundamental – discussion of the structure and regulatory role of the law in the modern social welfare state.
Preventive activity is generally an expression of a much higher level of societal planning than that represented by a purely reactive intervention in a given social problem. Prevention represents and also promotes an extension of the public involvement in the living conditions of the citizen, and thereby confronts the law with the task of developing independent parameters to evaluate the changes this creates in the basic principles of the relationship between the citizen and the state.

From a constitutional perspective, *Dieter Grimm* describes the expansion and reorientation of preventive government activity, that, in trying to avoid single threats to freedom, threatens to limit the freedom of the social order in general as well as democratic and constitutional guarantees. Prevention – in this way becoming a problem of constitutional law – is viewed from the perspective of its historical development; changes in goals, and the range and intensity of preventive government activity are analyzed as a function of the change in the role of the state and scientific and technological progress. Grimm does not consider the question of whether the state is authorized to apply preventive measures as being problematic; the problem is only for what purpose, to what extent, and under what preconditions should the state be allowed to intervene. Linked to this problem, he sketches – on the basis of the existing stock of legal principles – the constitutional frameworks that permit a control of preventive government activity by applying the principle of just proportion to prevention as a protection of liberty and – correspondingly – as an interference with liberty.

Erhard Denninger also deals with the change in the substance of state activity in his article. He characterizes this as a shift in emphasis from a system of legal security to a system of security of legally protected interests (= prevention). He uses these two guiding principles to undertake an inventory of the earlier and current status of the law and the state (bourgeois-liberal constitutional state as a legal security state versus democratic social state as a "security of the objects of legal protection state" = prevention state). According to Denninger, the majority of West German doctrine of constitutional law has dogmatically paid absolutely none or not enough attention to the

problems involved in the reaccentuation within the idea of law. He offers no pat solution for the problem of the conflicting goals of a "security of the objects of legal protection state" (provision for existence, legal security, risk provision, and social justice), but considers that the democratic legislator is required to overcome the lack of "universal" laws; "universal" in the sense that they apply to all persons and to all persons equally and in the sense that there is a clear allocation of responsibility for the various duties of a preventive state.

Peter-Alexis Albrecht and *Otto Backes* use an application of criminal law and the law of criminal procedure to illustrate these constitutional approaches.
Against the background of a change in the function of the state and a subsequent extension of control claimed by the criminal law to the resolution of systemic conflicts, *Albrecht* investigates the question of the function of prevention in the criminal justice system. He uses concrete preventive phenomena in three subsystems of the criminal justice system, the police, criminal courts, and the prison system, to analyze the change in the paradigm of social control.
On the system level, he notes a reversal of the legitimizing basis of the regulatory system of criminal law, namely, from an orientation toward constraint and reconciliation to a preventive and planning orientation. On the organization level of the criminal justice system this produces, according to Albrecht, a problematic increase in instrumental efficiency at the expense of guarantees of constitutional rights. On the action level, the implementation of preventive strategies leads to questionable efforts at harmonization and, as a consequence of this, a clandestine loss of autonomy for the clients.
Albrecht contrasts the noticeable trend toward a preventive optimization of control with the activation of traditional constitutional lines of defence.

Backes also sees prevention as a threat to constitutional rights in his conclusion. He clarifies this position with two examples of criminal proceedings that initially appear to indicate opposing developments but then share a covert detachment of criminal justice policy from legislative acts and apportionments of competence through the appeal for prevention: the prosecutor's practice of dismissal in preliminary proceedings and the practice of police intervention in the field of the preventive control of crime; here the procurement and processing of information. Backes notes, on the one hand, an increase in the power and competences of the police, on the other hand, a turning away from legally regulated, precise, (interventional) preconditions in favor of flexible, more easily managed alternatives. This development can be seen in both fields: in the prosecutor's office through a modification of criminal law by generalizing internal directives; in the police through the abolishment of the preconditions for intervention of "concrete danger" or "suspicion of crime" in a new police law that is being negotiated between the West German states. Like Denninger, Backes assigns the responsibility for preventive concepts – in this case, those of criminal justice policy – to the legislator.

Part II.
The Evaluation of Institutional Approaches to Crime Prevention

The concrete prevention programs reported in the second section are on the one hand linked to the theoretical approaches sketched in section I. On the other hand, they attempt to indicate ways of rationally limiting preventive state activity. The clearest characteristic of these programs is experimentation, muddling through. This appears to guarantee that the "total prevention state" has yet to become a perfected reality and is more a vision of the future – though a threatening one.

The contributions from *Burt Galaway*, *Martti Grönfors*, and *Franz Bettmer et al.* share an interest in the evaluation of victim-offender mediation programs.
Burt Galaway presents the concept and experiences of a victim-offender reconciliation or mediation project (VORP) in the USA. This has been operating in Minneapolis-St. Paul, Minnesota since 1985, and primarily serves juvenile burglars and their victims. Like other American projects, the Minneapolis-St. Paul program practices a face-to-face meeting between the victim and the offender in the presence of a mediator to discuss the victimization/offence and to prepare a mutually acceptable plan for the offender to make redress to the victim. After two years of experience, Galaway judges the concept to be feasible. He points out that the Minneapolis-St. Paul project provides a form of intervention with juvenile offenders which is logically related to the offence, provides direct accountability to victims, offers a specific and concrete way for offenders to make amends, and results in active offender participation in their own programs. According to Galaway the issues that should be addressed in future program development include decreasing rather than increasing state intrusiveness, responding to offenders who are denied an opportunity to participate because of victim decisions, specifying goals and outcome measures for the projects, and clarifying the theoretical rationale for these projects as part of juvenile and criminal rather than civil justice systems.

The mediation project reported by *Martti Grönfors* was started in 1984 as an alternative to the official system in the Finnish city of Vantaa. Grönfors presents general basic principles that work out the opportunities but also the limitations of a successful mediation and reconciliation. These are developed from the initially tentative results of a qualitative, processual analysis of interviews and documents/files during a 2-year experimental phase. He does not select the concrete result of the mediation meeting compared to the decision that could be expected from the official system as a measure for a successful mediation or – as he expresses it – a just mediation. His research interest focuses on the various cases examined as a process, looking for the significant points of interest in each case. According to this, the amount of satisfaction felt by the participants after a successful mediation session seems to make the system more "just" than the official one. At present, Grönfors considers the success of the mediation experiments still limited to individual cases, in which people's conflicts were transfered back to them. In his opinion, the idea of applying mediation as an alternative to official proceedings in criminal cases has been

unjustly ignored. Realistically, he shows the dangers of an uncritical expansion of mediation, and of the co-option into the official system.

The paper from *Franz Bettmer*, *Heinz Messmer*, and *Hans-Uwe Otto* opens the series of workshop reports from the SFB 227. *Bettmer et al.* study the implementation and practical course of a model to informalize criminal social control (diversion) for 14- to 20-year-old suspects that was set up in the middle of 1986 by the youth welfare office of the city of Bielefeld in cooperation with the prosecutor's office. The present article gives an insight into the conception and practice of the informalization model and offers first – even though tentative – results for discussion. Bettmer et al.'s research addresses the mostly unexplained questions of under which conditions and with which restrictions administrative social work can contribute to the informalization of social control particularly within the framework of a victim-offender reconciliation, and which decisionmaking processes are used in this field. The experiment in the Bielefeld youth welfare office seems to be a further positive support for the success of programs like those from Galaway and Grönfors. The freedom of planning in informalized procedures at the youth welfare office mostly runs on an interaction level that is oriented at mediation. Within this interaction framework, the juvenile has enough freedom to introduce his/her information into the mediation process according to his/her own perceptions; an opportunity that is not ignored.

Subproject C1 of the SFB 227 deals with changes in the decisionmaking structure of the criminal justice system limited to juvenile criminal procedures. *Ursula Herbort*, *Dorothea Rzepka*, and *Silvia Voss* address one of two research approaches in their article: the evaluation of an administrative pilot project implemented by the Bielefeld prosecutor's office and the police. The Juvenile Court Act (JGG) allows for different forms of pretrial diversion at the level of the prosecutor. Such dismissal of cases is seen as a way of preventing disproportionate public reactions as well as negative effects of stigmatization and criminalization on the side of the juvenile clientel. On the basis of intensive interviews with juvenile prosecutors, Herbort et al. were able to determine that these legal possibilities of preventive dismissal of cases are primarily only used for certain petty crimes and are regulated with formal criteria. The area of semi-serious crime is excluded because of a lack of sufficient information. It is hoped that the Bielefeld pilot project in which the police purposefully gather prevention-related information and have a right of recommendation with regard to the prosecutor's decision will remove the current information deficits and lead to an increase in, factually correct, dismissals of cases. The present state of analysis shows that the information form introduced by the officials for this purpose appears to fulfill the prosecutor's need for improved information.

The contribution from *Uwe Engel* and *Klaus Hurrelmann* is based on a study carried out in 1987 in the SFB 227. Forms of delinquent behavior were surveyed in a sample of 7th-and 9th-grade students from the different types of secondary school. The analysis is based on the assumption that anomic and socially disintegrative behavior in adolescence should be viewed as a function of social-structural conditions and as a way of expressing

insecurity. This behavior is mainly directed toward the environment, it attacks social bonds, and destroys social relationships because of its destructive and aggressive character. From their studies the authors conclude that a high risk of downward social mobility is the consequence of failure at school, feelings of injustice regarding one's own assignment of status, the anticipation of unfavorable mobility chances, status uncertainty, and status disequilibrium in everyday life at school. In addition, Engel and Hurrelmann address the question – on the basis of different individual and environment intervention programs – of the implications of strategies to prevent delinquency in schools. They start with the hypothesis that preventive and reactive interventions can only be effective if they focus on early stages in the development of delinquency and strengthen both personal and social resources.

Kenneth Polk's paper on prevention and intervention in schools is linked to the subject of the paper from Engel and Hurrelmann. The title, "School Delinquency Prevention as Management of Rabble" clearly reflects misdirected tasks that Polk sees being assigned to schools or at least special educational units in the future. He investigates the causes that he anticipates will lead to the inclusion of schools in the social control of criminality and even its prevention. He traces a development from changes in the labor market to the occurence of various forms of troubles including troubles at school. The school's response to troublesome behavior, particularly in lower-status forms of education, is that the misbehavior is fundamentally individual in character, that the forms of trouble must be classified, and that once classified students should be segregated into special units, and that they may be "helped". In Polk's opinion, the programs of these special units are potentially harmful in that they stigmatize and denigrate students, and that their removal from mainstream education further reduces their later life chances of successful adult careers. Despite his pessimistic appraisal of trends of schools, Polk sees alternatives that, however, demand a turning away from individual interpretations of youthful marginality and a reorientation of prevention programs toward structural problems.

Karin Böllert and *Hans-Uwe Otto* present a further subproject of the SFB 227 in their paper. They use an institution analysis approach to investigate the preventive orientation of the problem-solving strategies used by social workers for the example of youth services. Starting with social work's function of securing and reproducing socially constituted normality, Böllert and Otto analyze the societal framing conditions of this normalizing work from the perspective of the changes in the premises of family and employment. They use the results of this analysis to develop a concept of prevention that by actively designing life-styles, should enable the target persons to adopt a constructive, autonomous approach to their problem environments. The current goal of the research project is to study possible ways of implementing this concept of prevention in the practice of youth services. After describing the project, the authors discuss the first findings and preliminary trends of preventive youth services from the perspectives of problem definition, goal definition, etc. They stress their results with a preliminary conclusion that, on the one hand, underlines the necessity of professionalization of social workers, on the other hand, states an obvious lack of methodical procedures enabling

social workers to realize their respective stores of knowledge in the interaction with addressees.

Part III.
Inquiry into the Ethical Aspects of Prevention

The intrusions into the personal integrity of a citizen in the form of preventive measures, the attendant collection of personal and psychological data, both on the state of a problem person who has been identified not only as a result of early screening but also because of their entire psychosocial environment, and random selection in treatment research raise a series of ethical problems. Already in the run-up of prevention, research on prevention and intervention has to consider ethical matters. The state of the discussion on the ethics of empirical social research can be characterized with the help of headings such as "scientification" and "intrusion in the life world". Section III. focuses on a broad range of perspectives on ethical and moral questions.

The possibilities of gaining access to the data in criminal files or police records have been recently limited for German criminological research by administrative laws in favor of the right to privacy and informational self-determination. The researcher *Karl F. Schumann* critically discusses this problem in his paper without sharing the standpoint of unlimited access preferred by his colleagues. Schumann starts with a general overview on the situation of data access in German criminological research, which, in his experience – supported by numerous examples – is characterized by a discrimination against university researchers and a preference toward researchers who are supported by the state. However, this hostility between university and state researchers appears to be vanishing, partly because all criminologists are confronted with the "ombudsmen" for the protection of individual data. Schumann then pointedly asks, "if it would be a good idea for critical criminology to join forces with the conservatives and the state researchers against the protection of private data by authorized agencies": a question that he personally dismisses on objective grounds. He contrasts the two possibilities of always or never having to obtain consent from the persons on file with a double-standard regulation by which only etiological research would have to obtain the consent from the persons whose data are held in the files but not research on control agencies.

Alfred Büllesbach, from his point of view as an "ombudsman" for the protection of individual data, also picks up the conflict between data protection and the personal right of informational self-determination. Doing so, he mainly deals with those legal questions that are connected through science with the obtaining and safeguarding of data. He discusses the basic decision of the Federal Constitutional Court, the so-called Census Decision, and its consequences for the transitional period, in which the legislator has not yet reacted to the principles that were laid down by the Federal Constitutional Court. Against the background of a permanent development of informational systems and present concepts of prevention, especially in the area of delinquency, Büllesbach draws the picture

of a society in which every person is estimated as suspect and as a risk, and therefore has to underly permanent control. Considering this, to Büllesbach data protection is protection of the citizens as well as of democracy. In his point of view, the right of informational self-determination – combined with exactly defined exceptions – demands from each researcher to obtain the consent to the data survey from the person concerned, that is, in a written form after the research project and the intended application of the data have been explained.

R. John Kinkel and *Norma C. Josef* examine in their paper the ethical questions encountered when studying adolescent problems (e.g., drug abuse, suicidal tendencies, child abuse). Typically these studies deal with the prevalence of some phenomenon under consideration and subsequently assess the need and kind of prevention and intervention program to reduce the problem. Kinkel and Josef consider the ethics of informed consent for these studies to be uneven and ill-defined. The paper outlines various ways U.S. researchers have applied the ethical principles of informed consent in adolescent survey research (age 12–18). After examining the general meaning of informed consent, the authors discuss how these principles apply to research with minors; studies involving substantial risks to subjects; invasion of privacy; school related research. They point out the negative consequences for research when one follows the federal regulations literally, namely, when investigators seek to obtain parental/guardian consent when minors are subjects (e.g., serious influences by race and other factors). As a solution to the dilemma Kinkel and Josef suggest "reasonable" accomodations which under certain preconditions schedule an informed consent.

The subproject C3 of the SFB 227, within the frame of a panel study, examines the effects alternative conflict solutions and sanctioning methods have on juvenile offenders. Under the headword "colonization of life worlds" *Günter Albrecht* and *Susanne Karstedt-Henke* pick up ethical problems and questions of the validity of research in general, and relating to the interviews of their sample. First of all, the article of Albrecht and Karstedt-Henke endeavours to clarify the approach to the problem in terms, and by doing so, the concept of interaction rituals and "territories of the self" (Goffman) proves to be a suitable measure for empirical analysis of the interaction between the researcher and the subject of research. As potential problem areas of their own research the (repeated) access to juvenile offenders and embarrassing questions are problematized and checked by using various data instruments according to ethical and methodological criteria. In their paper the authors present first tentative results on the problems of stigmatization by research and the interviewers' access and contact to the juveniles. Following them, the juvenile as the person who for most parts offers the access to an interview is self-confident enough to decide whether he/she wants to allow or refuse it. Against this background negative consequences of the interview for the juvenile cannot be stated. With regard to methodical standards a systematical distortion of the sample is unlikely to occur because the decision for or against an interview seems to depend on individual family situations.

While the papers introduced up to now discussed the ethic of research, looking from the point of view of its possible limitations, the paper of *Thomas Mathiesen* deals with the theoretical scientific problem of how research results are handled by the state. As a starting point for his considerations on prevention and intervention Mathiesen chooses a true story that happened to an important research project dealing i.a. with police violence in the Norwegian city of Bergen. He attaches special importance to a detailed description of the events, i.e., steadily made topical until the publication of this volume, in order to gain an international public, as one aspect of political struggle, for a national conflict between research and state. By using the course of the conflict Mathiesen demonstrates with which strategies and tactics the state opposes the delegitimizing research results. From his observations on this case he draws the conclusion that "legalization" which means "the employment of State organized legal institutions such as the police, the courts etc.. to evaluate the conflict" transforms the conflict into something else, into a legal issue involving a different set of criteria. Relating to prevention of state crime, following Mathiesen, legalization fulfils the function of an important weapon against "preventive" measures.

The Editors

Part I
The Foundations of Prevention and Intervention in Law and Criminal Justice Policy

1.
Constitutional Observations on the Subject of Prevention

Dieter Grimm

I. The Dilemma of Prevention

Prevention has always been an indispensible part of public authority. Even the liberal state allowed its police to patrol and not merely to wait in the precinct for reports of perpetrated crimes, just as conversely no totalitarian state is able to organize the precautions against insubordination so perfectly that it could completely do without repression. Yet the rule of thumb has long held true that systems which allow individual freedom of choice only within the narrow frame of superindividually-defined material public weal resort more heavily to preventive measures than systems which see the public weal precisely in safe-guarding and enabling individual development. It is true that in such systems freedom is likewise not unlimited. It ceases in principle, however, only with the same freedom of others, and this limit, which is generally and abstractly drawn up in the law, must, according to the liberal view of the state, have been exceeded or directly threatened in a concrete situation, before the public authority could impose sanctions. Prevention was not then an independent government strategy for controlling societal development, but only repression shifted ahead in time in order to avert imminent unlawful damage. As for the rest, the preventive effect was no more than that which emanates from the mere existence of the apparatus of repression.

For some time, nevertheless, an expansion and reorientation of prevention can be observed even in states which stand in the liberal tradition. In addition to the traditional fields of application of crime prevention and protection against dangers, especially in food and drugs as well as in technological facilities and equipment, extended government precautions have come into effect against the onset of sickness and want, deviant behavior and social protest, unemployment and economic stagnation, environmental pollution and the depletion of resources. In the course of this development, prevention becomes considerably detached from its reference to legally defined injustice and is employed to avoid undesired situations of every type. This change occurs relatively smoothly, even though it fundamentally remodels the relationship of state and society. The explanation is probably to be found in the fact that almost every preventive act is able to show an evident benefit. Successfully applied, it saves the individual disadvantages which at best may be compensated for by means of repression, but for which often no reparation is possible, and it saves the entire society burdens and conflicts which are usually more expensive than timely prevention. As scientific- technological progress is always opening

up new issues for prevention, it is also increasingly demanded from the state. In the end, a reversal of the liberal principle of distribution emerges, so that repression only retains its justification as a catch basin for failed prevention.

It would, of course, be an illusion to assume that the advantages of prevention are to be had for free. The costs result, however, less directly and less concretely than does the benefit. Therefore they are rarely considered in decision-making calculations. They come at the cost of the self-determination of the individual and of the possibilities of freedom of the entire system. In contrast to a state which sees itself primarily as an authority of repression and therefore can wait for the onset of a socially detrimental event in order then to react, the preventively oriented state must track down possible crises in the beginning and try to smother them before they erupt. Not only concrete dangers, but also abstract risks call the state into action under these conditions. The individual is not able to keep the state at a distance by means of legal conduct. What is more, governmental control of citizens and citizens' behavior inevitably expands. That applies in a quantitative as well as a qualitative respect. The control increases quantitatively because the sources of dangers are always considerably more numerous than the cases of damage which actually occur. It intensifies qualitatively because the roots of social risks go far into the structure of personality and the sphere of communication, so that prevention, if it is to be effective, must penetrate into the areas of personal views, life-style and social contacts.

At the same time preventive government activity eludes the traditional controls of public authority to a much greater extent than repressive acticity does. Governmental repression expresses itself in the intervention in manifest disturbances of a legally determined condition of normality with the goal of its reinstatement. It therefore acts reactively and selectively. Yet as such it is normatively relatively easily determinable by legal norms. The norm fixes abstractly what is to be considered a disturbance of order and stipulates which measures the state may resort to in order to reinstate the disturbed order.

The program of action can be formulated in a discursive public process which can be organized in such a way that the persons concerned have the opportunity to announce their interests, raise objections and suggest alternatives, so that acceptable results appear possible. The government administration is bound to this normative program. It can only examine whether the statutorily defined preconditions for its intervention exist in a given case and impose the designated legal consequence. Its decision appears then merely as an act of execution in which, however, due to the incomplete binding force of norms, elements of decision-making are always entailed. As a normatively programmed act, the administrative decision in turn is subject to the control of lawfulness by independent courts which investigate on demand of the persons concerned, whether or not the state complied with the norm.

In contrast, preventive government activity presents itself as the avoidance of undesired developments and events. Consequently, it acts prospectively and covers a broad base. Such a future-oriented and complex activity can not be completely intellectually antici-

pated and therefore can be partially captured in general and abstract norms. As a rule, prevention norms are limited to the assignment of goals and the listing of viewpoints which must be given precedence in the pursuit of goals. This means, however, that the program guiding administrative agencies is only to a small extent the product of the democratic process. The acting administration must complete or correct it from one situation to the next. In this way it programs itself to a large extent without applying specifically normative techniques. The possibility of court control, which depends on the existence of binding norms, is weakened to the same degree. Preventive government activity therefore leads to a dilemma. In the course of preventing individual dangers to freedom, it threatens to reduce the possibilities of freedom of the social order as a whole and at the same time partially undermines the precautions of the democratic and constitutional state which have been developed in order to limit state power in the interest of individual freedom. It is this circumstance which makes prevention a problem of constitutional law.

II. The State's Change of Function and the Role of Prevention

1. The anti-prevention liberal state

A constitutional assessment of this development can not be undertaken without knowledge of its origins and conditions. For the degree to which it can be normatively influenced and where constitutional control can begin depends on these factors. If one traces the origins, one is struck by the parallels between the growth of preventive policy and the evolution of the modern welfare state. Thus the key to prevention might also be found in the causes which brought about the welfare state. Its beginnings coincide with the failure of the reductionist liberal state model. Liberalism believed it could drastically reduce the function of the state because it assumed that societal life, not unlike nature, was ruled by laws which, if they only came into force unimpededly, would automatically result in prosperity and justice. The consequence of this premise was the uncoupling of the various social systems, first of all the economy, from politics, which up until then had claimed for itself the right to regulate the entire private and public life according to its own ideal. The right to preventive measures had always been included therein because the truth advocated by the state demanded absolute validity, and potential endangerments had to be defendend against in advance. Now each social system should be able to develop according to its criteria of rationality and precisely in this way, even more reliably achieve the public weal after which the absolute state had vainly striven. The sole prerequisite was the freedom of the individual from governmental, estate and corporative compulsion. This freedom found its limit only in the same freedom of all others. In this system reoriented from truth to freedom, prosperity should increase because the creative power of the individual was rewarded through the fruits of one's own achievement. Justice was expected to appear since equal freedom allowed no one-sided domination, but only mutual agreements which protected everybody from being overpowered and enabled a better

balance of interests than centralized, authoritarian regulation had done. The construction excluded neither social differences nor poverty and want, yet in such a system which offered everyone the same chance to develop, those factors did not seem to be externally imposed, but rather individually attributable and in this respect not unjust. The self-regulating ability of society did not, however, render the state superfluous, because the atomized society of free individuals was unable to secure the prerequisites for the success of the model, freedom and equality, within itself. For this it required a further authority, located outside itself and invested with power, namely the state. But its function reduced itself to the guarantee for the presupposed, quasi-natural order, whereas it no longer needed a government provision for the general welfare in view of the public weal that automatically resulted from the free play of forces. The state fulfilled its duty by suppressing the restrictions of liberty and made use of the traditional government means of command and compulsion to do so. But in the face of the fundamental principle of societal autonomy, every repressive act of the state became "intervention", and the constructive efforts of the bourgeois society centered on the neutralization of the danger potential inherent in intervention for the autonomy of subsystems and its medium, individual freedom. The solution was found in the constitution by which the government apparatus authorized to create and enforce law was, in turn, subjected to legal commitments. Civil rights marked the area of societal autonomy in which not the reasons of state, but rather the will of the individual, was decisive. Intervention in this area could not take place at the discretion of the state, but only in the interest of society. Therefore the state needed an authorization for each intervention which the representatives of society granted in general form in the law. The purpose of the construction lay precisely in limiting government power to the combatting of disturbances. Its existence may have acted preventively, but the goal-oriented use of preventive regulation of societal developments was adverse to the system, which, of course, did not preclude that the liberal state likewise resorted to such means when it benefited the ruling class. The law laid down definitively the criteria for a disturbance as well as the admissible reaction. The government executive was bound to the law. An act that appeared as intervention without having legal backing was therefore regarded as illegal and allowed the person concerned to demand forebearance and if necessary to enforce his claim with the aid of independent courts. It was precisely this restriction of the state to exactly charaterized cases of repression which seemed to guarantee the freedom of the individual most effectively.

2. The crisis of liberalism and the expansion of state functions

It is well-known that the liberal model was not able to fulfill the expectations associated with it. It is true that freeing society from the external ties of the social order of the estates and those of the absolute state led to an unleashing of productivity and an increase of prosperity. But social justice did not appear to the same extent. The reason for that was that a just balance of interests under the conditions of private autonomy can only come into being if a balance of power prevails in society. If this is lacking, that same

freedom virtually changes into the law of the strongest and the state, restricted to protection against danger, unintentionally becomes the guarantee of private oppression.

The deception of liberalism consisted in the fact that it already saw a sufficient condition for social justice in the dissolution of the barriers of the feudal system and in the abolition of privileges in favor of equality before the law, whereas in reality it only shifted the roots of injustice from legal status to the, admittedly less rigid, economic situation. Thus even before the Industrial Revolution there was mass poverty that was not caused by the individual failure taken into account by the liberal model, but rather was structurally determined. The Industrial Revolution then finally destroyed the preconditions for a societal balance of powers and created the "social question" as a consequence of the system, since the older system of social security had fallen under liberalism. With that, the liberal model was deprived of its legitimacy. The counter-movement triggered a reactivation of the state which no longer solely had to guarantee a just presupposed order, but once again had to plan the order methodically with a view to social justice. The expansion of state functions that this set off can typically be divided into three phases, without maintaining sharply divided, historical caesurae. In the first stage the state began to suppress the most evident and legitimacy-consuming abuses of freedom. As it was the civil law that had served as the vehicle of private rule by discharging the individual from the material demands for justice and completely relying on private autonomy with its two major pillars, the freedom of ownership and the freedom of contract, the reaction began with revisions of private autonomy. The powers of disposition, which were connected to property, were again restricted; certain contracts, namely those of labor law, were once again subjected to substantive requirements. This change was less effected by amendments of the civil law itself than by special commercial, labor and administrative laws which while basically leaving the civil law untouched, narrowed its area of applicability. This explains why the search for preventive elements in the German civil code (BGB) will remain fruitless. In special civil law, on the other hand, preventive attempts can already be found in this first phase, and the German attempt at solving the "social question", Bismarckian Social Security, is clearly of preventive nature. In the second stage the state proceeded to intervene in emergencies and crises and to afford compensation of relief by public means. In contrast to the measures of the first stage, however, it could no longer satisfy itself with revisions of the law, but rather had to make real contributions in the form of financial and material means. Yet its reactive use did not yet allow prevention to become a prominent part of government activity in this phase either, even if it did increase noticeably, such as in industrial safety. With the growing differentiation of social structures and functions that made society more productive but also more susceptible to disturbances, reactive crisis-management no longer seemed sufficient for securing the existence and further development of the system. Thus the state proceeded in the third stage to track down potential crises at the very beginning, to stop their emergence by preventive measures and to improve the basic conditions for growth and developement. Since then, its legitimacy has depended on successes in this field. Consequently the state no longer has a principle option. Rather it carries the global responsibility for economic, social and cultural development. Inherent limits do not exist, for the capitalist society with

its inbuilt pressure for growth constantly produces new trouble spots which the democratic party state, dependent on the voters' favor, must preventively pursue if it does not want to risk a withdrawal of loyality.

3. The role of prevention

It is obvious that it took this change of the state's function to pave the way ultimately for prevention. Yet its amazing boom can not only be accounted for in this way. Rather it is the scientific-technological progress which comes into it as a driving force. That becomes immediately evident in situations where it creates security risks of unheard of scope or depletes natural resources. But scientific-technological progress also has indirect effects on the need for prevention. In economic competition its results are customarily commercially utilized or employed for purposes of rationalization and cost-saving. The resulting problems connected herewith: the progressive destruction of nature, the ever increasingly machine-adapted redesigning of the living environment, the growing strain on the human organism due to environmental irritations and chemical products, and the accelerated supplanting of interpersonal communication by machine-transmitted anonymous communication have meanwhile crossed thresholds beyond which they are no longer credited to progress but rather considered by many as an impoverishment and a threat. Indeed, the scepticism about progress could never have spread so rapidly, had not the socialization conditions of industrial society been changed by the rationalization process as well. The decreasing need for personell in the economy alongside the increasing qualification requirements for the employed is leading everywhere to a lengthening of the training and a shortening of the (weekly and life-long) work hours and for some years now to higher unemployment as well. Consequently, the proportion of the population which is subject to the imperatives of the production process and accepts its set of values is shrinking. In this way, long entrenched patterns of thinking are beginning to change. A portion of those concerned lose the will to perform, work discipline and consumer motivation and begin to turn to other values that seem irrational from the standpoint of the industrial society. Others sense a loss of meaning in life that they try to escape by means of drugs, acts of violence or diseases. The increasingly unstable families caught up in this process are not able to compensate for the deficit in socialization. Thus, in addition to the sharply registered, old disadvantages, new degradations arise which are felt to be unjust in the face of the given possibilities of relief or compensation in a prosperous society. Taken together, all these factors unfold a socially disintegrating effect. Consequently, they mount up to political problems for the state for which public solutions are expected. Thus the state becomes subjected to contradictory demands. On the one hand, in order to be able to fulfill the growing societal demands and to retain mass loyalty, it is dependent on economic growth and therefore compelled to promote it. On the other hand, it must also stem the growth in order to head off its disintegrating effects. In this connection the priority can be placed either on one side or the other according to the political view. But no political view can avoid this dilemma. The worse that can be concealed, the more frequently the state itself becomes the subject of citizen protest, as the growing civil

disobedience far from criminal circles indicates. The performance and planning state's need for approval, which, due to the multifarious consternation it creates, is much greater anyway than that of the liberal state, increases in this way over and over again. Under this pressure, policy side-steps into secondary strategies. The appearance that the state has the situation under control is propagated by a symbolic policy. Lowering costs, especially in the performance systems of social security, should expand its room for action. Finally, the disintegrating potential, whose social causes did not appear rectifiable, must be neutralized in its individual effects. In this connection prevention gains new importance. For one, it offers the state the prospect of reducing social burdens, such as by the early diagnosis of diseases or dispositions to diseases, timely retraining, and so forth. Futhermore, it promises to nip deviant behavior in the bud and to hinder its actualization. Scientific-technological progress proves itself once again to be the prime mover here in that it also constantly expands and improves the preventive repertoire. The government prevention of dangers thus changes in two respects. On the one hand, it is shifted to an earlier time period. Whereas before it only acted on the acute or in any case present danger, now it already becomes effective against the sources of danger. The government focus has thus become increasingly directed to pre-delinquent, prepathological and presubversive phenomena. On the other hand, it is also being thematically reoriented. If the old prevention of danger was primarily aimed at material risks in order to protect the people, the new prevention refers primarily to human risks and favors institutions or systems.

4. The preventive set of instruments

The already classic "realprevention" in the area of technical safety could fulfill its function with the specifically governmental means of command and compulsion which the order state reduced to the protection against dangers had typically used. Facilities that from the very beginning constituted a risk for the general public were only approved with the inclusion of special safety precautions; facilities which later posed a concrete danger were shut down. Modern personal prevention can only partially reach its goal with these means. As this prevention is not so much concerned with averting immediate dangers as with tracking down potential ones, ascertaining and eliminating them preventively, it is inevitably bound up with an increased need for information. The more personal data which is accessible and may be combined, the more reliably can trouble spots be located. The compulsory census of person-related data, of course, quickly comes up against legal and actual boundaries. The state therefore resorts to other ways of gathering information. Where a data survey is virtually made very difficult, such as in the milieu of deviant behavior, it begins its own inquiries. Where it meets with legal obstacles, such as with the early diagnosis of diseases by means of detective tests or similar procedures, it creates incentives to the voluntary disclosure of data. But also the preventive measures themselves which follow the localization of danger can only be enforced to a limited extent by means of command and compulsion. In this way they resemble numerous other regulatory activities that have accrued to the state in the course of the expansion of its

function. That has diverse reasons. First, the multiplication of government duties was not accompanied by a corresponding enlargement of the powers of intervention. On the contrary, regardless of the global responsibilty of the state for economic prosperity and social justice, civil rights assure the individual a continued high degree of self-determination and thus the social subsystems a relatively great autonomy. Secondly, imperative regulatory means are bound to fail, even if they were legally admissible, whenever a governmentally desired behavior depends on specific abilities, attitudes or sets of values of the citizens. Finally, there are a number of social spheres in which the use of command and compulsion is indeed admissible and actually possible, but appears to cost too much. Costs here are not only to be understood as financial, such as for example those of an extensive surveillance system, but also political, such as in the form of unified counter-pressure or the threat of loss of votes. In all these cases the state is dependent on the cooperation of autonomous decision makers in order to reach its goals and therefore must try to persuade them to show the desired behavior or dissuade them from showing the undesired one. The means of motivation are numerous. They can consist in mere information on the benefit and harm of a certain behavior, but can also be extended to the care and treatment of groups or people at risk. Here is the connection between reorientation of the police and the intensification of psychology and pedagogy in social work with which the conference deals. However, governmentally desired behavior can also be emphasized by the tightening or loosening of entrance requirements, and the expansion or reduction of capacities such as in the field of education. But the state most frequently depends on material incentives and deterents with which it rewards the desired behavior with tax concessions, premiums or the supply of goods and services and penalizes the undesired behavior with additional taxes. The intensity of the effect is extremly various yet can approach that of imperative regulation if the legally existing possibility of choice has actually been reduced to an extreme. This is not infrequently the case in the combination of public welfare with preventive control as is increasingly being applied in social policy. The allocation of government services according to need and amount is then made dependent on a legally nonenforcable equivalent performance on the part of those benefited which can consist in the disclosure of information, the consent to a treatment, or the performance of services. In this way the recourse to means of motivation which act indirectly almost always results in preventive control extending beyond the legally allowed scope of intervention and thus procuring the state entry into previously private zones.

III. The Leading Principles of the Constitution and Governmental Prevention

1. The standard of the Basic Law

According to the previous statements, the expansion and reorientation of preventive government activities can not be comprehended as a fleeting trend. It proves to be a political reaction to social change and in this respect is structurally conditioned, at least in

regard to its essence, and therefore not capable of being rescinded without changing the basic structures. In the face of the unchecked scientific-technological progress from which it derives, an increase is, on the contrary, more probable than a decrease. For constitutional law the consequence is that it can neither ignore nor put an end to prevention. On the contrary, the doctrine of constitutional law must focus its attention on prevention and, guided by constitutional goals and related to the logic of prevention, develop suitable legal standards out of the given set of norms, similarly as recently occurred in the census decision of the Federal Constitutional Court for the new information technologies. With the multitude of possible subjects, forms and means of prevention on the one hand, as well as the normative points of reference on the other, that can not be done generally. Surveillance of protest groups is to be judged differently than the protection against hijacking and this in turn differently than the early diagnosis of epilepsy. That can not be expounded upon here in detail. But the constitutional framework in which the various phenomena can be dogmatically classified may well be defined. This framework is briefly sketched here. If one first makes sure of the constitutional standard values, one has to proceed from the human dignity that the Basic Law elevates to the highest principle of social order and declares to be inviolable in Art. 1, par.1, sec. 1. The state is related to human dignity in sec. 2 and assumes in relation to it a serving function with its means of power. Human dignity itself is not conceived, as the connection with human rights in par. 2 indicates and the following civil rights provisions make evident, in a submission of the individual to a given transcendentally or worldly legitimated ideal of an individual or social process of perfecting, with the result that out of human dignity the governmentally enforcable duty of the individual arises to approach this ideal to the best of his ability. The Basic Law understands dignity rather as an always existing fundamental right of man from which the right of the individual autonomously to decide on life plans and ideas of happiness follows and in those cases in which this autonomy in the early developmental stage of man has not yet or may never be realized due to serious mental or physical defects, the right to be respected as a member of the genus man. The Basic Law supports personal autonomy in the following articles in points which proved to be especially threatened in the past by concrete guarantees of freedom in the form of the free development of personality in Art. 2, par. 1, and then formulates this general freedom in individual, specifically designated freedoms. In this connection Art. 3 adds, not as an individual freedom but as a modality of the guarantees of freedom, that the dignity that expresses itself in personal autonomy and is concretely protected by civil liberties applies to everyone in the same way. Therefore autonomy can not comprise the right to destroy or curtail the autonomy of others. That results in bounds to self-determination, not, however, in the interest of a superindividual collective value, but rather in the interest of enabling the peaceful coexistence of autonomous yet socially related individuals. For the sake of this possibility is state authority necessary and authorized to the limitation of freedom. Yet the Basic Law establishes the state in Art. 20 et seq. in such a way that it remains oligated to the fundamental principle of human dignity and must legitimate the exercise of power according to it. Not the civil liberties section alone but also the organization section of the constitution is to be read as a formulation of Art. 1, par. 1, sec. 1. This is served by the principle of democracy in that it links public authority to a

commission of those ruled and only issues this commission in a manner restricted in time, subject and function, since diverse opinions legitimately exist on its fulfillment under the condition of individual freedom. This is served by the principle of the constitutional state in that it does not leave the exercise of domination to the discretion of each function bearer, but rather binds it to fixed standards, that have been legally determined in advance and must serve the aim of freedom, so that the possibility of individually responsible planning and conduct of life is preserved for the individual even under the conditions of governmentally regulated freedom. This is further served by the principle of the social state in that it guarantees that the freedom which results from dignity not only exists formally but is also tangibly effective. Finally, this is served by federalism in that it enlarges the range of variations of political organization and also vertically divides state authority in order to limit its power.

2. Prevention as a protection of liberty

If one attempts to integrate government prevention into the value system of constitutional law, a question comes to the fore of how it effects the self-determination of the individual which follows from human dignity and is concretized in civil rights. From the start there is not a clearly positive or negative answer to this question. Positive and negative elements have the habit, on the contrary, of commingly, and the mixing ratio varies according to the circumstances. But the evident use, which may be put forward for almost all preventive measures, regularly shows favorably in the books on the credit side in terms of civil rights. Every prevented act of violence, every disease that did not break out, every nuclear reactor that did not burst, works out as safeguarding freedom on the side of the potential victims. If one takes that into account, prevention itself has a support based on civil rights. Today civil rights are no longer understood exclusively as a means of defense against the state. Since it has been known that the freedom protected by civil rights can not only be threatened by the state and therefore can not be sufficiently preserved by mere guarantees of private areas safe from the state, the radius of civil rights has expanded to an all around safeguarding of freedom. It is true that they still unfold their direct effect only vis-à-vis the state. But as a result of civil rights the state is not only obliged to refrain from infringements of freedom, but also actively to protect the freedoms guaranteed by civil liberties from encroachments by a third party. With regard to other individuals the protection of civil rights is put into practice mediated by state law. The state had, of course, arranged for such a protection of freedom long before the construction of a civil rights protection of freedom urged it constitutionally to do so. Practically the entire criminal law and large sections of private law serve the protection of individual freedom from illegal encroachments by third parties. A civil rights duty to protect was not needed in this respect. However, for its function it is revealing that it was adapted into the practice of the constitutional courts on the occasion of the repeal of a threat of punishment for abortion. The constitutional protection acts on the one hand, as one can see from this, as a guarantee for the existence of precautions that are essential for securing civil rights. It demands on the other hand that such precautions be made by