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intersentia

Peter-Alexis Albrecht
Securitized Societies
The Rule of Law:
History of a Free Fall

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Foreword

During my career as a criminologist and penologist, I have always regretted not having used the scientific methods at my disposal to adequately describe and teach the social realities with which I have been confronted. I am making a new attempt. A scientific-biographic account is what I would like to provide – my own. I hope to thus capture the erosions of rule-of-law penal law both concretely and analytically. Collecting is part of the scientific arsenal of methods for the criminologist: collecting data, conflicts, experiences, and impressions. Computers have replaced the index card system, but the analytical methods remain the same. Building blocks of insight grow out of layered experiences and from experienced disappointments. At the same time, that sharpens one's eye for contexts and temporal processes. I would like to take the readers down this path. They might be motivated to use associative conflict situations of the described manner to take a closer look at some of the papers and share my conclusions or weight them differently, or to reject them. The developments which led to the securitized society, however, cannot be ignored. These are determining the future of the global societies. Germany can serve as a negative example, as a paradigmatic case study: A mixture of opportunistic submission to the unfolding of unilateral power and the failure to learn from its own destructive history.

My thanks go to my colleague *Wolfgang Naucke*, who gave me friendly encouragement to travel down the novel path described here and who helpfully stood by my side. I would also like to thank *Michael Voß*, with whom I traveled down part of the academic path. He helped me to cover empathy with a scientific façade. I thank *Ruth Tessmar*, Professor for Artistic Praxis in Menzeldach at Humboldt University, who brought dry texts to life using associative leaps. She understands how to set the scene for scientific methodology and thereby awaken curiosity. Without the tireless help of my academic assistants *Mareike Jeschke*, *Katharina Schermuly*, *Charlotte Schultz*, and *Marc Fornauf* – and finally also *Kristina Voßberg* – the work would have probably come to a halt at some point. Young academics' elan is contagious and motivates one to continue. For that I thank all of them. Finally, I would like to thank the stimulating and helpful publisher *Volker Schwarz* and his assistants *Brigitta Weiss* and *Claudia Delfs*, who, with their constructive help and perseverance, gave me the courage necessary to make it through my everyday tasks in addition to the effort required to produce this book.

Without the willing cooperation of *Kelly Neudorfer*, I would not have ventured the translation into English. She demonstrated an interest in the language and content that gave this edition the linguistic sensitivity of a native speaker.

“Human dignity also applies to discussions and encounters with one’s closest family members!” I must thank *Julia Albrecht-Henschel* for this exhortation, as she handed me a piece of paper with this truth one beautiful, busy, and irritating day. How right she was! I’m sorry that I can only excuse myself in retrospect to many people. I should have taken different things more seriously. If I could start over, however, I am afraid that I would make the same mistakes again.

Frankfurt, July 2011

Peter-Alexis Albrecht

Contents

Prologue	On the Intentions of this Book	1
Part One	The Predominant Paradigm of Prevention in Criminal Law and University Teaching	5
Part Two	The Socio-Integrative Penal Law of the Social State – The Appearance of Human Rights in the Late 1960s and 1970s –	35
Part Three	The Turn to a Preventive State – From Social to Homeland Security in the 1980s and 90s –	71
Part Four	Approaches of a Counter-reform: Normative De-criminalization and Social Security in the Penal System – On the Futile Attempt to Relieve Penal Law and the Criminal Justice System in the 1990s –	177
Part Five	From a Preventive State to a Securitized Society – Beyond Rule-of-Law Penal Law after the Turn of the Millennium –	217
Part Six	Europe as a Beacon of Hope? – On the Efforts to Secure the Rule-of-Law State at the European Level –	259
Part Seven	Searching for State-Critical Absolute Rules – On the Hope of a Protection of Human Rights which Erects Absolute Political Barriers –	307

Table of Contents

Prologue	On the Intentions of this Book	1
	<i>Traditional aspects ▫ “Intentional intentions” ▫ Biographical intentions ▫ Drawing a balance ▫ Experiences ▫ Further intentions ▫ Basics ▫ Intro duction to the book</i>	
PART ONE	THE PREDOMINANT PARADIGM OF PREVEN- TION IN CRIMINAL LAW AND UNIVERSITY TEACHING	5
First Section	Biographical Introduction	5
	A. Experienced Ambivalence in 40 Years: Scientific Challenges and the Failure of University Teaching	5
	B. The Wealth of Academic Teaching Challenges for Criminal Law	6
	<i>Outline of knowledge to be gained ▫ Scientific foundation of the punish ing state ▫ The academic need for theories ▫ Different uses of crimino logical theories ▫ Academic focus on systematic goals of criminal law</i>	
	C. The Failures of Instructing Scientific Methods in University Legal Education	9
	<i>The traditional legal education at universities ▫ Formalities dictated from outside the subject area and inadequate scientific work ▫ The suc cessful and yet abandoned interdisciplinary one stage legal education system ▫ Excellent experiences with reforms ▫ Alienation effects feared by politicians ▫ Law makers' misunderstanding of reflective teaching for the praxis</i>	
Second Section	Contribution	
	Theories of Criminality and Criminalization	14
	<i>The Interdisciplinary Preventive Context of Criminality and Criminali zation, published as: Der interdisziplinäre präventive Kontext von Kriminalität und Kriminalisierung, Kriminologie Eine Grundlegung zum Strafrecht, 1st to 3rd Edition, 1999 2005, §§ 3 and 4, p. 22 45 (ab stract) (contribution 1)</i>	
	A. Theories of Criminality and Prevention	15
	I. Etiological-Individual Approaches	16
	<i>Link to preventive criminology: Deviant personalities ▫ Goals of preven tion from the perspective of etiological individual theories: Reduction of deviant behavior and Stabilization of the social status quo</i>	

	II. Etiological-Structural Approaches	17
	<i>Criminology that understands ▫ Goal of prevention for etiological structural approaches: Changes in group norms and living circumstances</i>	
	III. Individual-Oriented Labeling Approaches	18
	<i>Criminality as ascribed social meaning ▫ Action as a characteristic or as social meaning ▫ Focus of the labeling approach ▫ Premises of the labeling approach ▫ Goals of prevention from the perspective of individual oriented labeling theories: Avoidance of stigmatizing actions and Re organization of interactions and communication in the criminal justice system</i>	
	IV. Socially-Oriented Definitional Approaches	21
	<i>Attributing criminality as a social method of asserting power ▫ Sociological foundation of the labeling approach ▫ Criminality as institutionally directed labeling ▫ Labeling as a social process of securing power ▫ Goals of prevention from the perspective of the labeling theories oriented toward social theories: Social policy and Consciousness for alternative models of society</i>	
	B. Theory of Criminalization and Prevention	23
	I. Theories of Peno-Legal Criminal Controls as Creators of Legitimacy for Criminal Law	23
	II. Restitution and Retribution	24
	<i>Weaknesses in the concept of guilt: Cannot be empirically proven and Metaphysics of retribution ▫ Guilt as a normative construct for limiting penal law</i>	
	III. Specific Deterrence	26
	<i>Utility as a “modern” social principle ▫ Target: The individual</i>	
	IV. General Prevention	27
	<i>Deterrence ▫ General prevention for the purpose of stabilizing norms: Entitlement to global societal protection and Amendments from depth psychology</i>	
	V. Unification “Theory” and Integration Prevention	28
	<i>The Federal Constitutional Court’s Position ▫ General prevention as a protection for reliance on existing law ▫ Integration prevention and judicial formalities ▫ From protection of individual interest to protection of functional complexes</i>	
Third Section	Conclusions on Theories of Criminality and Criminalization and Their (Lack of) Instruction in Academic Teaching	31

	I. Criminology's Approach to Prevention	31
	<i>Causal approaches ▫ The individual labeling approach ▫ Socio theoretical labeling approaches ▫ Peno legal sociology ▫ Free understanding of penal law</i>	
	II. Penal Law's Approach to Prevention	32
	<i>No empirical evidence for justification of punishment ▫ Negative general prevention ▫ Integrative prevention ▫ Penal theories: More approach es of belief than knowledge ▫ On the political utility of prevention</i>	
	III. On the Disadvantage of the Retreat and the Necessity of the Continuance of the Empirical Legal Education at Universities	33
	<i>Empirical science as a requirement for understanding ▫ Necessity of a broad legal education ▫ Inter disciplinary aspects of legal education ▫ International focus of the legal education in connection with reflection on the effects for the praxis ▫ Socio theoretical basis for the legal education</i>	
PART TWO	THE SOCIO-INTEGRATIVE PENAL LAW OF THE SOCIAL STATE	35
	– The Appearance of Human Rights in the Late 1960s and 1970s –	
First Section	Biographical Introduction	35
	<i>Outrage as a driving force ▫ A new era in the penal system ▫ Pardons for those serving life sentences ▫ Ideas about the nature of humankind in the penal system ▫ Distorting labels hide the people ▫ Negative effects of the penal system ▫ Human rights and how they can be guaranteed ▫ Getting to the heart of the experience ▫ Reports for pardons ▫ Researching in a foreign way of life ▫ A very unique meeting ▫ Key insights ▫ The will to live as a survival factor ▫ Upward social mobility ▫ Impressive encounters: Judicial stereotypes versus social empathy ▫ Irrelevance of prison behavior on recidivism ▫ Further Research Interests: Input and output of the criminal justice system</i>	
Second Section	Contributions	
	Social Therapy and The Juvenile Penal System	46
	<i>Friendlier Walls? On the Critique of Social Therapy in the Penal System, published as: Scheinbar freundlichere Mauern Zur Kritik an der Sozialtherapie im Strafvollzug , in: Lutherische Monatshefte 1982, p. 121 ff. (contribution 2)</i>	47
	<i>The Juvenile Penal System and Crime Prevention Structures and Problems of Juvenile Sentencing for 14 and 15 Year Olds , published as: Jugendstrafvollzug und Kriminalprävention Strukturen und Probleme der Jugendstrafe an 14 /15jährigen , in: Jugend und Kriminalität (edition suhrkamp), 1983, p. 156 ff. (contribution 3)</i>	55

Third Section	Conclusions on the Welfare State's Penal Law	63
	I. The Availability of Criminological Knowledge for a Liberty-Oriented Criminal Policy of Reason and Human Dignity in the Welfare State	63
	<i>Importance of upward social mobility for re integration ▫ Prosperity of the post war era as a natural experiment ▫ Importance of the feeling of security found in family ▫ Social assistance is absolutely essential for every prisoner ▫ Disastrous conditions in hospital order treatment institutions ▫ Hospitalization as the fate of social classes ▫ Omission of social treatment as a human rights violation ▫ Political marketing of the threat scenario "juvenile delinquency" ▫ Social structures, not nationality, de classes and criminalizes ▫ Societal ignorance of socio scientific insights ▫ The increase of fear of criminality during the dismantling of the welfare state</i>	
	II. The Integrative Model in the Context of the Welfare State Economy	66
	<i>General principles ▫ Main goal ▫ Standards ▫ Dangers</i>	
	III. The End of the Welfare State at the Beginning of the 1980s	66
	<i>Conditions for the dissolutions ▫ Deconstruction of the ideal ▫ Comprehensive transformation process ▫ A new focus of social control: Administration of crime ▫ The path to an administrative state ▫ The counter reformation ▫ The loss of the state's guarantees and the revival of committals</i>	
	IV. State Guarantees as Respect of Human Dignity and Human Rights	68
	<i>Human rights are valid in their own right ▫ Human rights exist before law ▫ Making human dignity concrete ▫ The Federal Constitutional Court as guardian ▫ Human rights as a protection for autonomy ▫ Human rights as limits of interpretation for behavior in prison ▫ The requirement of states to guarantee human rights</i>	
PART THREE	THE TURN TO A PREVENTIVE STATE	71
	– From Social to Homeland Security in the 1980s and 90s –	
First Section	Biographical Introduction	71
	<i>My early experiences in the USA with the preventive paradigm ▫ Prevention: Magic word and argumentative fix all ▫ On the social fronts of the USA ▫ Social reality versus preventive ideology</i>	
Second Section	Contributions on the Prevention Paradigm	75

I. The Prevention Paradigm and Empirical and Theoretical Skepticism	75
1. Introduction	75
<i>U.S. prevention: Only cleaning up the shards ▫ The construction of threat scenarios ▫ The turn from a repressive limiting to a preventive creating model of governing ▫ The socio theoretical abstinence of dogmatic penal law</i>	
2. Contribution	
Prevention: Problematic Objective	78
<i>Prevention as a Problematic Objective in the Criminal Justice System, published as: Prävention als problematische Zielbestimmung im Kriminaljustizsystem, in: Kritisches Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 1986, p. 54 ff. (contribution 4)</i>	
	79
II. The Prevention Paradigm in Juvenile Penal Law Put to the Test by Critical Theory and Empiricism	105
1. Introduction	105
<i>Juvenile penal law as a preventive outrider ▫ "Education" as a preventive door opener and questionable pedagogy ▫ Diversion as an administrative strategy of judicial economy ▫ Restorative justice as an informal, intermediate penal law ▫ The public prosecutor as a judge before the judge ▫ Diversion as a self regulation process of the executive (= executive law) ▫ Special research program phase I (1986 1988): Executive law of the state prosecutor's office ▫ A (futile) stopgap: Normative formalization of diversion ▫ Special research program phase II (1989 1991): Court failures ▫ No increase in procedural rationality through diversion ▫ No increase in result rationality through diversion ▫ Prevention: Parameter for administrative judicial economy ▫ The irrelevance of the uncovered realities for criminal policy</i>	
2. Contribution	
Education: Specific Prevention	110
<i>Education as Specific Prevention The Questionable Guiding Principle, published as: Erziehung als Spezialprävention Das fragwürdige Leitprinzip, in: Jugendstrafrecht, 1st to 3rd Edition, 1987 2000, §§ 8 and 9, p. 65 85 (contribution 5)</i>	
	111
III. The Prevention Paradigm and the Pathologization of Individual Conflicts	131
1. Introduction	131
<i>Justice that individualizes and psychiatry that pathologizes ▫ The forensic expert as salesperson: "Measuring gas usage in yards" (Rasch) ▫ Criminological political renaissance of hospital order treatment ▫ Pathologization instead of law ▫ "Lock them up for good!" (Gerhard Schröder) ▫ Indignant protest from an academic group: A letter to the editor</i>	

	2. Contribution	
	In Dubio pro Securitate	138
	<i>Granting of Privileges in Hospital Ordered Treatment (Sec. 63 StGB) a "Calculated Risk"?, published as: Lockerung im Maßregelvollzug (§ 63 StGB) ein „kalkuliertes“ Risiko?, in: Neue Zeitschrift für Strafrecht 1991, p. 64 ff. (contribution 6)</i>	139
	IV. The Prevention Paradigm and the Pathologization of Social Conflicts	155
	1. Introduction	155
	<i>"Concealed violence" outside of preventive perspectives ▫ Reduced in individualization of violence ▫ The criminal "foreigner" a social pathologization ▫ The pathologized "victim" as the subject of the trial ▫ The privatization of the victim as state deregulation ▫ Apparently value free ascertaining of the truth in the prevention paradigm</i>	
	2. Contribution	
	Cognitive Interest: Traditional vs. Reflexive	158
	<i>Penal Law's Approach to Criminology, published as: Der Zugriff des Strafrechts auf die Kriminologie, in: Festschrift für E. A. Wolff, 1998, p. 1 ff. (contribution 7)</i>	159
Third Section	Conclusions on the Preventive State	173
	I. Massive Transformation Processes in Rule-of-Law Penal Law Due to Prevention	173
	<i>Increased demands for protecting the system break rule of law based penal law ▫ Symbolic demands abuse rule of law penal law</i>	
	II. The Preventive State Changes the Form of Social Controls	174
	<i>From the integration to the administration of deviance ▫ From harm to risk ▫ From the trial to the expectation clause ▫ Operative prevention before a legal violation ▫ The informalization of the law as the hour of the executive</i>	
	III. Consequences for a Rule-of-Law Penal Law and Criminal Justice System	175
	<i>Social repair shop versus protection of freedom ▫ Symbols versus material justice ▫ Selectivity versus equality ▫ Enemy versus citizen ▫ Problem administrating versus problem solving ▫ Pathologization versus individualization ▫ Individual assistance versus combating problematic situations ▫ Preventive dissolution of limits versus human rights ▫ Prevention versus material rule of law state</i>	

PART FOUR	APPROACHES OF A COUNTER-REFORM: NORMATIVE DE-CRIMINALIZATION AND SOCIAL SECURITY IN THE PENAL SYSTEM	177
	– On the Futile Attempt to Relieve Penal Law and the Criminal Justice System in the 1990s –	
First Section	Biographical Introduction	177
	<i>Reform commission on penal law in Lower Saxony</i> ◻ <i>Basic rights versus preventive intervention</i> ◻ <i>Judicial economy</i> ◻ <i>Reform commission on pe nal law in Hesse</i> ◻ <i>Material de criminalization</i> ◻ <i>Improved security of objects of legal protection through de criminalization</i> ◻ <i>Public backlash</i> ◻ <i>Hopes in the cellar</i> ◻ <i>Security in the penal system as a political prom ise</i> ◻ <i>No revision of the anti terrorism legislation and the penal system at a dead end</i>	
Second Section	Contributions	
	Political Topic: De-criminalization and Terrorism and Rationality	184
	<i>Formalization versus Flexibilization: Penal Law Quo Vadis?, published as: Formalisierung versus Flexibilisierung: Strafrecht quo vadis?, in: Vom Guten, dass stets noch das Böse schafft: kriminalwissenschaftliche Essays zu Ehren von Herbert Jäger, 1993, p. 255 ff. (contribution 8)</i>	185
	<i>Criminological Socio Scientific Assessment for the Penitentiary Celle I on the Question of the Legal Prognosis for Mr. Karl Heinz Dellwo, orig inally: Kriminologisch sozialwissenschaftliches Gutachten für die Jus tizvollzugsanstalt Celle I zur Frage der Legalprognose für Herrn Karl Heinz Dellwo (contribution 9)</i>	195
Third Section	Conclusion on Normative De-criminalization and Social Security in the Penal System	213
	I. Normative De-criminalization	213
	<i>Goal: Protection of human and basic rights</i> ◻ <i>Goal: The core of penal law</i> ◻ <i>Goal: Strengthening civil liberties</i> ◻ <i>Goal: Protection of rule of law criminal proceedings</i> ◻ <i>Goal: Revoking de liberalizing laws</i>	
	II. Social Security in the Penal System	214
	<i>Basis for security</i> ◻ <i>Conditions for re socialization</i> ◻ <i>Danger of instru mentalization</i> ◻ <i>Realistic disillusionment with treatments</i> ◻ <i>Open prison as normal prison</i> ◻ <i>Decisions on the penal system are the responsibility of the third power</i> ◻ <i>Security versus preventive custody</i>	
	III. The Wrong Approach of Current Criminal Policy: Too Much Control, Too Much Security	215
	<i>Efficiency versus justice</i> ◻ <i>Informalization versus justice</i> ◻ <i>Symbolic pe nal law versus justice</i> ◻ <i>Flexibilization versus justice</i> ◻ <i>Consensualiza tion versus justice</i> ◻ <i>Inadequate medium of control versus justice</i> ◻ <i>Symbolic policies made from a distance versus justice</i>	

PART FIVE	FROM A PREVENTIVE STATE TO A SECURITIZED SOCIETY	217
	– Beyond Rule-of-Law Penal Law after the Turn of the Millennium –	
First Section	Biographical Introduction	217
	<i>Transformation processes for a securitized society ▫ Dominance of economic logic ▫ Retreat of the state ▫ Creation of a new class living in a precarious situation ▫ 9/11: Not the reason but the catalyst ▫ Preventive torture: The path to state terrorism ▫ Legal lines of argumentation “pro torture”: Implementation is still open ▫ Weimar analogy: Destruction of life “not worth living” ▫ Tribute of the securitized society ▫ Empirically untenable “myth of fear” as the basis of political organization ▫ Consequences of a fixation on security: Deconstruction of law ▫ Open questions: Causes of global legal erosion ▫ Hour of the executive ▫ The death of critical scholarship ▫ Executive self understanding: The principle of the “secret” ▫ Consequences of secrecy: Pressure for consensus (consensualization) ▫ Judges and criminal defense lawyers: Managers of consensus ▫ Price for loss of certainty: “Flexible principles” ▫ The profile of the destruction of rule of law criminal proceedings ▫ Forgotten: The lessons from Weimar ▫ ‘Lex Emminger’ – Prototype for the de formalization of criminal proceedings ▫ The end of the Weimar Republic – Presidential cabinet’s program of edicts</i>	
Second Section	Contribution	
	U.S. Unilateralism and Violence	234
	<i>Causes of Global Legal Erosion Paths for Continual Dissolution of Law</i> , published as: <i>Ursachen globaler Rechtsauflösung Wege kontinuierlicher Erosion des Rechts</i> , in: <i>Festschrift für Winfried Hassemer</i> , 2010, p. 3 ff. (contribution 10)	235
Third Section	Conclusions on the Securitized Society	249
	I. Causes of the Securitized Society’s Development	249
	<i>9/11 not the reason but the catalyst for the securitized society ▫ U.S. unilateralism ▫ Protagonists of change ▫ Dissolution of traditional institutions ▫ Global insecurity as a principle ▫ Privatization consumes freedom</i>	
	II. Forms and Methods of the Securitized Society	250
	<i>Combatting risks ▫ Discourse of insecurity ▫ The dominance of theories for election campaign purposes ▫ The principle of the secret police and their surveillance technologies ▫ Deconstruction of the concept of danger in “prepression” ▫ Retreat from public law and the principle of <i>ex officio</i> proceedings ▫ Exclusion instead of integration ▫ Deconstruction of legal principles</i>	

	III. Consequences of the Securitized Society	251
	<i>Dominance of existential fear ▫ Regulation versus defense ▫ No effective legal protection ▫ Consequences of privatization: Deregulation and consensualization</i>	
	IV. The Novelty of the Securitized Society	251
	<i>Novelty: Vicious cycle of security and insecurity ▫ Novelty: Existential fear of threats and risks ▫ Novelty: Tendency toward complete permeation of society ▫ Novelty: Acceptance by the majority of society ▫ Novelty: Consensualization as the price of the loss of certainty ▫ Novelty: Goal is "security" ▫ Novelty: The dangerous entirety of the normative production of security ▫ Normative security inflation as legislative paranoia</i>	
PART SIX	EUROPE AS A BEACON OF HOPE?	259
	– On the Efforts to Secure the Rule-of-Law State at the European Level –	
First Section	Biographical Introduction	259
	I. European Human Rights Convention (ECHR) and the Treaties of the EU: Human Rights versus Economic Integration	260
	<i>ECHR: Reaction to massive experiences of injustice ▫ The EU's integration movement: Erosion of peno legal principles ▫ Contingency and blurring of boundaries in intra national law ▫ Dominance of the executives</i>	
	II. Four Reasons why Penal Law Guided by Rule-of-Law Principles May Not Be "Communitized"	264
	<i>First Argument Penal law: Powerful and destructive legal coercion ▫ Second Argument Systemic protection through penal law: A self destructive task ▫ Example: Diffusiveness of the corpus delicti ▫ Penal law is not a social repair shop ▫ Third Argument Punishability as the "culture of freedom": A lack of a European consensus ▫ The principle of legality (Art. 103 Para. 2 GG): A forgotten prescription ▫ Fourth Argument Condition for rule of law penal law: Basic reform of national democracy</i>	
	III. The Decision of the Federal Constitutional Court on the Treaty of Lisbon: A European Drumbeat	269
	IV. After the Lisbon Decision of the Federal Constitutional Court	271
	<i>Strengthening the national parliaments' consultation rights ▫ Guide posts of European peno legal development: The primacy of human rights</i>	

Second Section	Contributions	
	Rule of Law and the European Union <i>and</i> Strengthen the Judiciary's Independence!	274
	<i>11 Propositions toward the Development of Legal Foundations for European Criminal Law, in collaboration with S. Braum, G. Frankenberg, K. Günther, W. Naucke, S. Simitis, in: Kritische Vierteljahreschrift für Gesetzgebung und Rechtswissenschaft 2001, p. 269 ff. (contribution 11)</i>	275
	<i>Could an Independent Judiciary Be a Counterbalance to the Erosion of European Principles of Criminal Law?, in: Strengthen the Judiciary's Independence in Europe!, 2009, p. 19 ff. (contribution 12)</i>	285
Third Section	Conclusions on European Penal Law as Penal Legality Guided by Principles – There Is Hope	303
	I. Expectations for European Integration: Institutionalized Penal Legality	303
	<i>Indispensable, non negotiable principles of penal law ° European penal law based on penal legality versus administrative sanction law</i>	
	II. Expectations for a European Penal Law Based on Penal Legality: The Free Core of Penal Law	303
	<i>The demand: Core European penal law based on penal legality</i>	
	III. Expectations for a Criminal Justice System of Penal Legality: Fair Trial and Rule-of-Law Ideals	304
	<i>European wide reforms of the national criminal justice systems: European police, European state prosecutor's offices, European criminal defense, and European autonomous and independent third power ° Limits to absoluteness for legislative and executive in the judicature of the Federal Constitutional Court ° The Lisbon decision as an important milestone of European constitutional traditions</i>	
PART SEVEN	SEARCHING FOR STATE-CRITICAL ABSOLUTE RULES	307
	– On the Hope of a Protection of Human Rights which Erects Absolute Political Barriers –	
First Section	Biographical Introduction	307
	I. The Development	307
	<i>Social integrative penal law ° The path to the preventive state ° A securitized society which destroys the law</i>	

	II. Four Hopes	308
	<i>First Postulate of a just social order ▫ Second Postulate of individual freedom ▫ Third Postulate of principles of core penal law to secure freedom ▫ Fourth Postulate of strengthening the judiciary's autonomy and independence</i>	
Second Section	Contributions	
	Topic: Freedom and The Threat to the Third Power by Law	316
	<i>Protection of Freedom: Task of European Penology, published as: Freiheitsschutz: Aufgabe europäischer Strafrechtswissenschaften, in: Festschrift für Ioannis Manoledakis, Volume II, 2007, p. 3 ff. (contribution 13)</i>	317
	<i>The Threat to the Third Power by Irrational Security Policy, published as: Die Bedrohung der Dritten Gewalt durch irrationale Sicherheitspolitik, in: Deutsche Richterzeitung 1998, p. 326 ff. (contribution 14)</i>	329
Third Section	Conclusions on the Search for State-Critical Absolute Rules	341
	I. Law Is Disintegrating: Little Hope of Reversal	341
	<i>The strong protagonists of legal disintegration ▫ Penal law is always a tool of governance ▫ The economic system defies the control of the judicial system particularly internationally ▫ Penal law as a mirror of social realities ▫ Academic critique of peno legal intervention as a permanent task</i>	
	II. The Attempt to Obtain Protection of Freedom with Law and Its Principles	342
	<i>Critique of the limited definition of freedom ▫ Critique of the formal definition of the rule of law state ▫ The defensive function of human and basic rights</i>	
	III. State-Critical Absolute Limits	343
	<i>Drawing the limits in penal law ▫ The forensic battle for human rights which cannot be traded off ▫ Penal law as a public program for securing freedom ▫ The claim to granting justice as a bastion of public penal law ▫ Judicial independence as a guarantor of public warranty ▫ Program for a European rule of law state with peno legal law making competencies ▫ Constitutionally secured right to resist</i>	

Prologue: On the Intentions of this Book

Traditional aspects

It would be more of a formal and traditional – and thus also legitimate and understandable but rather boring – exercise to collect, order, and present the widely scattered thoughts on criminal law and criminology that I have developed in my 40 years as a jurist, criminologist, and professor.

“Intentional intentions”

Collecting and presenting material on many different topics based on chronologically changing forms of social control and societal developments is more challenging than a simple documentation. This is all the more true when the thesis of a continual erosion of fundamental legal principles can be seen and the material provides evidence in support of it. This will not be as extreme in all legal areas, as civil law and public law are more constructive than the legal areas dealing with abnormal societal behavior. Penal law and criminal policies are unfortunately the predestined domains for an erosion of law, a fact which is hard to bear for penologists who feel obligated to the principles of the rule of law.

Biographical intentions

For the researcher to sketch out the biographical context of his academic development is – as far as I have seen – relatively uncommon, but possibly enlightening for the reader. At the least, it will show how personal academic involvement develops. Academic careers and theoretical paradigms are usually implicitly presented as stringent products or logical deductions. I, on the other hand, confess as well to the principles of coincidence, personal experience, and experienced nearness to those who could not avoid the grasp of penal law.

But I also confess to the mistake of a scientist who not seldomly runs into various dependencies in the dark – usually with good intentions. Disappointments cannot be avoided, but they can contribute to self-discovery and focus. This is what I wish to document in the context of my thesis on the continuity of the erosion of law. I will present structural insights based on the development of law in thesis form at the end of each of the seven parts of this book.

Drawing a balance

Finally, one other intention drives me to this project. I would like to draw a balance of what the independence of research and teaching in my time in academia since the 1970s, in other words in almost 40 years, made possible for an independent professor of the “old school”: For me, that is, through the personnel and material possibilities provided to me

by the liberal academic system. This use of resources belongs to the past. The “university as a business” (or “entrepreneurial university,” as I will refer to it later) would decide that much of the insights and deductions to be presented here are “unprofitable” and would therefore cut all funding.

Experiences

I have personally followed three phases of the historical development of criminal law:

- The social-integrative criminal law of social states (part two) in the 1970s,
- The beginnings of the preventive state (part three) since the 1980s and 90s, and
- The development of the security society since the turn of the millenium (part five).
- The continual erosion of human rights was the consequence and result of these developments.

Further intentions

Together with others, I have attempted to support and secure the rule-of-law state through normative de-criminalization and enforcement of sentences in criminal policy activities in four criminal policy and enforcement committees (part four). These efforts at changing criminal policy were not successful.

Increasingly, I have taken on the position of a legal sociologist, observing from a distance at a university. In this position, I have broadened my focus to look at European legal developments and their faults (part six).

Today I am convinced that penal law in rule-of-law states must permanently take on the role of limiting the rights of crime fighting (Naucke), and that state-critical limits to absolute power (part seven) are (still) the only available constitutional way to protect human dignity and freedom – at least in their core areas.

Parts 2 through 6 are a description of the stages of development in crimino-legal social control. The seventh part should be read as a central postulation arising from these stages of development. The situation described here is therefore not a new development but rather one that would be expected and yet has remained absent to the present.

Basics

The paradigm of prevention has been the predominant one in crimino-political development since the 1980s and is the primary topic of this book. The systematizing and explicating introductory chapter is therefore focused on this aspect (part one). Without an understanding for criminal and criminalizing theories, the essays would be difficult to contextualize – particularly because the term “prevention” cannot be properly defined without the theory-dependent, completely different preventative conclusions and crimino-political alternatives. I hope the knowledgeable reader will bear with me on this, a decision which arose from my experience teaching criminology.

At the same time, it will make the socio-scientific dilemma in teaching law clear. It pits different concepts of science against each other, the basics of which, let alone the complexities of, can hardly be grasped by the novice. Insisting on a separation of criminology and social science in the context of a legal education is only an ostensive distancing.

Law is more capable of getting along without reflecting on its application (although it then seems unenlightened and blind) than a social scientist is of blocking out law: The social sciences would be lost without a principle of separation from the subject of reflection. As a result of this dialectic, (criminal) legal sociology must understand itself as a science of reflection, as a science which elucidates the creation and application of the law, and is therefore extraordinarily useful for (penal) law and its application.

Introduction to the book

What awaits the reader? In the seven sections of this book, the reader can expect a current, academic-biographical introduction to the topic, followed by an example of published works on the topic in the respective section and, finally, a recent statement on the issue. These statements are based on personal conclusions from the essays presented and many others. They are based on my experiences in and with the criminal justice system and can now – in retrospect – be seen in another context.

Part One

The Predominant Paradigm of Prevention in Criminal Law and University Teaching

First Section

Biographical Introduction

A. Experienced Ambivalence in 40 Years: Scientific Challenges and the Failure of University Teaching

This book is intended to prepare and present the thesis of the *continual erosion of law* in an academic-biographical manner. Bringing up the predominant paradigm of prevention in the context of criminality and criminalization at the very beginning demands the reader's good will and trust in the didactic aptitude of the author, the university professor. My hope is that the reader will take on the role of a freshman student of law. That will help in better understanding the text in the second section of the first part because it will illustrate the problem the university professor has in conveying these concepts to students.

In general, young students are willing and able to encounter the unknown at the beginning of an eagerly awaited new phase in their lives. We, the university teachers, usually bitterly disappoint these expectations. We do not offer to lead them into unknown worlds of experiences and knowledge, but instead expect them to conform to formal procedures and memorize boring mountains of facts until, at the latest during the second semester, they feel like a deer in the headlights. At this point, the university has already lost, and society loses, the unbelievable potential found in the youth's quest for knowledge and readiness to engage. Shaking their heads in disappointment, the active and creative students turn away from law.

If we were to have the courage to carry out a comprehensive and necessary structural reform of the legal education, these serious losses of human and societal eagerness could be transformed into socially useful and general progress. Amongst the political and academic decision-makers, however, the will to take this step is lacking. But it is an incredible intellectual challenge to intensively occupy oneself with academic perspectives in the development of criminality and criminalization, that is, with the knowledge of cause and punishment. Nothing of the sort can be found, though, as the legal education at universities and other institutions do not offer this. Applied knowledge, in other words memorizing paragraphs and trying to fit them to bizarre cases, is offered ubiquitously – the formal subsumption of artificial circumstances into the 358 norms contained in the criminal code.

For 40 years, I suffered under this ambivalence of a rich, absorbing wealth of knowledge gained and inadequate teaching resources in everyday university life, aside from the oc-

casional attempt at reform and a few great moments of unity between research and teaching which were the exception rather than the rule. This suffering is also the subject of the following sections, but first the incredible discrepancy between the wealth of knowledge gained in other fundamental academic areas and the inadequacy of their instruction in the context of legal education should be made clearer. Not until the second section will I turn to the subject of causes of criminality and criminalization conditions.

B. The Wealth of Academic Teaching Challenges for Criminal Law

In the 20th century, criminal law developed from a normative science – that is, a kind of applied law – to a complex social science studying social controls. Politicians, the public, and the media place numerous demands on the criminal justice system. Police, public prosecutors, courts, and the penal system are viewed as a comprehensive project to clean up society, and high expectations of control are projected onto this system.

Outline of knowledge to be gained

How are law students introduced to these demands during the course of their university education? Is it even realistic for criminal law to meet these demands? Are they the focus of the university education? One quickly realizes that explanations for the socio-scientific function of criminal law are not easy to give. They are not at all evident, and I had to work hard to answer these questions. They were not part of my legal education, so after studying law, I had to complete a social science education as well. Even there, however, I only received tools I could use to answer the questions, and a second course of studies is not to be recommended simply because the time needed is unjustifiable.

Criminal jurists must know in the praxis whether their duties can affect society in terms of the application of law and – especially – what they can achieve when exercising their profession. What are the effects of sanctions such as fines and prison sentences? Do they help the victims? Do they help the perpetrators? Do they help society? How far should the state be allowed to go in its demands on its citizens regarding criminal law? Are there limits? Is the utility for society the limit or does human dignity mark the limit of state activities of norm-setting and norm-enforcing?

Scientific foundation of the punishing state

Question upon question can be posed when students begin their legal education. But the same questions are posed when the path of criminal law in the 20th century and beyond is traced and – as is the case in this book – examined at certain points. Both students and readers have a right to have the societal and judicial contexts sketched out by those who require them to listen or read. In the *first part* of this book I will therefore unfurl and present the term *prevention*, the central category on the path to a securitized society, first from the perspective of theoretical criminology and also penal theory (theories of crimi-

nalization). Only then can one see where the upper limits of criminal law and social control lie and how fragile the theoretical foundation of the "punishing state" is. Once you have realized, experienced, and proven this, the demands on the social control functions of criminal law will become more modest, and more caution will be exercised when calling for the application of criminal law. The warning to have more caution is often the only thing that a teacher of criminal law can effectively pass on. When looking at the criminal justice system, however, even that task seems like accomplishing quite a lot. Through the daily routine of practicing law, however, this recommendation for restraint in applying the law is often quickly forgotten.

The academic need for theories

The crimino-legal demand for criminological causal analysis requires scientific theories which explain individual or social behavior. Traditional criminologists did not develop any theories of their own for this, but instead borrowed from other related areas: medicine, psychiatry, biology, psychology, or sociology. "Criminological theories" of the traditional kind are characterized by their use of behavior-explaining theories which were developed in other disciplines to explain abnormal behavior. The added value of a scientific theory for explaining whatever kind of behavior lies in the requirement of cutting oneself free of everyday viewpoints. Criminal jurists who must assume *free will* (according to criminal law) may be forced by a socio-scientific learning theory, for example, to see criminal behavior as actions which are "correct" according to learned rules.

Different uses of criminological theories

The interests of criminal law in the explanation of criminality can be separated into two segments: instrumental and symbolic.

First, there is a demand for *instrumentally* useful insights – in other words, empirical evidence made available for the *purpose of crime-fighting* – on the causes of criminality and the effectiveness of criminal law controls. Here the issue is the efficiency of measures for criminal prosecution, something which primarily concerns the legal practitioner. On the instrumental level of crimino-legal use of criminological results, criminality is traditionally viewed as an *individual phenomenon* which must be *exactly attributed*. In this area, *approaches which focus on individually-based causes* (etiological-individualistic) are needed. These are best used in the dogmatic areas of criminal law (*corpus delicti*, illegality, guilt, etc). Since criminal law requires decisions and is therefore not an open system of negotiation, there is relatively little leeway for these explanatory models.

Secondly, there is a need for *symbolically useful* criminological knowledge, that is, knowledge which is useful for *political argumentation*. This need is also based on the explanation and control of criminality, but is centered on the political profits of criminal prosecution for the state. In this area, explanations which focus on the individual criminal will make socio-political measures seem unnecessary. This is the primary area of criminal policy.

The already limited capacity to include theories in criminal law is further exacerbated by the increasing “*sociologization*” of numerous theoretical approaches. When socio-structural explanations are brought into the theoretical analysis, the crimino-legal emphasis on personal accountability cannot be upheld. The plausibility of the crimino-legal explanations based on *actus reus*, *mens rea*, illegality, and guilt which students of law learn in the first years of their studies in order to check criminal liability is lessened more and more by the growing number of social theories making their way into criminological explanations.

Academic focus on systematic goals of criminal law

Socio-scientific explanations of abnormal behavior have also sensitized criminal law to the extent that it can no longer avoid addressing structural conditions of criminality despite its individually-oriented goals:

- *Destruction of the environment for economic reasons,*
- *Economic harm caused by excessive focus on profit, and*
- *Migration trends and related deviance due to economic need.*

The maker of criminal policy and the control institutions know that these kinds of problems and risks of the “post-modern” society cannot be countered with traditional criminal law which is based on the requirement of personal guilt. As is fitting for the theoretical explanation of deviance as structural problems which can no longer be directly linked to culpable actions,

- in *criminal legislation* we witness a shift from result crimes to endangerment (especially in environmental and economic penal law), meaning that proving concrete damages were caused is no longer essential. Instead, in order to criminally prosecute it is enough to show that the rights of others were endangered;
- in *jurisprudence* an easing of the attribution level, in other words no longer scientifically proven causality, but mere assumptions are sufficient for peno-legal reactions;
- and increased obligations for the citizens, although the developments in the areas of failure to act and torts of negligence cause a decrease in result crimes and tacitly replace results-based criminal law with risk-based.

In general, the access of the criminal justice system is being considerably expanded to the detriment of criminal legality and its principles of freedom.

The use of structural criminological insights, which were originally seen only as being critical to criminal law, quickly led to the paradoxical consequences of a modernization and rationalization of criminal law’s social controls.¹ The *socio-scientific criminological knowledge* of criminal policy led to an increase in possibilities to *preventatively inter-*

1 Cf. Kreissl, Staatsforschung und staatsaugliche Forschung in der Kriminologie, KrimJ 1983, p. 110 ff. and Kreissl., Soziologie und soziale Kontrolle, 1986.