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Peter-Alexis Albrecht

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Bibliographic information published by the Deutsche Nationalbibliothek

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data are available in the internet at http://dnb.d-nb.de.

ISBN 978-3-8305-2706-0

Originally published in Germany as „Der Weg in die Sicherheitsgesellschaft“. Translated by Kelly Neudorfer.

Images on the cover were created by Jürgen Schäfer (Groß-Brütz, Mecklenburg).
Front cover: „Finale“ (1989)
Back cover: „Menschenmenge“ (1989)
(www. kunstscheune-barnstorf.de)

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

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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 polices 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 contribue 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 by 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 staatstaugliche Forschung in der Kriminologie, KrimJ 1983, p. 110 ff. and Kreissl., Soziologie und soziale Kontrolle, 1986.