

Datenschutz, the Defense of Law, and the Debate over Precautionary Surveillance: The Reform of Police Law and the Changing Parameters of State Action in West Germany

Larry Frohman

ABSTRACT

This essay uses the development of police law in the 1970s and 1980s to assess the extent to which new forms of police surveillance were transforming a state based on the rule of law into a postliberal preventive or precautionary surveillance state. It argues that *Datenschutz* served as the primary means for theorizing the problems with new surveillance practices and defending both the idea of law and a liberal economy of informational restraint against the transgressive logic of precautionary surveillance. However, liberal principles were never abandoned completely, and at the turn of 1990s police law was shaped by the unresolved conflict between two competing conceptions of the role of the state.

At an April 1967 meeting of state and federal police officials, Berlin *Kriminaloberrat* Hans Kaleth noted that experiments with police use of electronic data processing for criminalistic purposes had largely focused on improving the functioning of the national crime reporting system. However, he warned that this narrow focus did not do justice to either the technology itself or to the ways the police could use it. “The domain of criminal investigation encompasses more than simply the idea of a crime reporting system,” Kaleth explained. “It includes the crime and the criminal in the fullest sense. The goal must, therefore, be to acquire an instrument that can be applied to the entire spectrum of criminality. The alpha and omega of criminalistic labor is the exploitation of information.”¹

Kaleth’s pronouncement was, at once, a restatement of the *sensus communis* of the criminalistic community, a manifesto on behalf of the potential role of electronic data

processing for police work, and a warning about the problems that had to be solved before such technologies could be deployed on a widespread basis. However, hidden within this initial enthusiasm for the new information technologies were a number of issues that would only gradually become explicit as the public became more sensitive to both state surveillance and privacy protection. From the 1970s through the early 1990s the West German public was deeply divided over the questions of precisely what personal information the police could collect, the conditions under which this information could be gathered, the surveillance practices and technologies that could be employed to obtain, store, and analyze it, and the uses to which it could be put. As Horst Herold, the President of the Federal Criminal Police (Bundeskriminalamt) in the 1970s, noted shortly after he left office, “the pioneer era of modern technology has just commenced. . . . The information question will define the parameters of debate for the coming decade.”²

Public debate over policing, technology, and “the information question” was contentious not only because of the intrinsic sensitivity and complexity of the issue and the mutual mistrust between the state and many of its citizens, but also because it raised the question of whether the extension of police surveillance was eroding long-established constitutional limits on state power and thereby transforming a state based on the rule of law (*Rechtsstaat*) into a postliberal preventive or precautionary surveillance state. In the following pages I will use the reform of police law to argue that in the security field, as in other areas, the development of such precautionary surveillance led to a partial transformation of the West German state, and I will illustrate how these shifts in the informational relations between the state and its citizens—that is, the conditions under which the state may gather and make use of personal information about these persons—sought to strike a new balance between privacy, liberty, and security as the police responded to both the new problems of the postwar welfare state and new expectations concerning the role of the state, and the police, in solving them.



From late 1974 to the fall of 1977, the Federal Republic was rocked by a wave of political violence. During this period the search for appropriate strategies for combating terrorism accelerated the ongoing modernization of the police and led to a major burst of innovation in the area of police surveillance. Many of these new surveillance practices made use of the national police information system INPOL, which had been built out since 1972 under Herold’s leadership. They were designed to make the individual members of the radical milieu, which was the most important source of political support, logistical support, and new recruits for the hard core of active terrorists, more visible, and thus more accessible, to the police. These practices included the systematic surveillance of both the people who visited or corresponded

with individuals convicted of terrorism related offenses and the organizations that defended their rights, as well as the use of a new INPOL system known as PIOS, which enabled the police to establish suspicion by mapping the relations between the individual members of the radical milieu.³ They also included “passive observation” or *beobachtende Fahndung* (BEFA) of targeted individuals whenever they encountered the police or the border police, computer matching for criminalistic purposes (*Rasterfahndung*), the application of “technical means” for the targeted observation of individuals, and the employment of undercover agents and informers. Like the present-day use of stealth pings to track cell phone users,⁴ these surveillance practices were neither authorized nor prohibited by law, and, consequently, they developed in a legal grey area. Their distinguishing characteristic was that they called into question the central principles of liberal police law and its logic of state limitation by systematically targeting individuals and groups who did not either pose a concrete threat or represent the object of well-founded suspicion.

Initially, security officials insisted that these surveillance practices did not violate privacy rights. However, such arguments were undermined by the 1976/77 Federal Privacy Protection Law (*Bundesdatenschutzgesetz*, BDSG), which made it possible to argue that the collection and use of personal information by the state had to be explicitly authorized by the legislature because it constituted an infringement upon the liberty of the individual and an intrusion into personal privacy, and a 1978 privacy audit of the Federal Criminal Police and its information system by the Interior Ministry pushed into the foreground the problem of the legislative authorization of these preventive surveillance practices. The codification of a right to informational self-determination by the Constitutional Court in its December 1983 ruling on the legal challenges to the decennial census made it clear that the federal and state legislatures would have to revise a number of important laws to bring them into conformity with this decision. These included the packet of security laws that was the top domestic priority of the Kohl administration; the country’s statistical, census, and archive laws; the laws regulating the country’s population information and identification system (the national population registration law, the ID card law, the passport law); the Code of Criminal Procedure; and the country’s police laws.

From the mid-1970s to the mid-1980s there was a wide-ranging debate over whether the Federal Republic was becoming an authoritarian surveillance or security state (*Überwachungs- or Sicherheitsstaat*).⁵ However, these concepts captured only one dimension of what was meant by “preventive” or “precautionary” surveillance. During these years, the concept of “prevention” was widely used to theorize the ongoing transformation of the German state.⁶ In the domains of social, environmental, and criminal policy, the welfare state was becoming increasingly reflective. That is, the state no longer limited itself to responding to the consequences of social change only after they had given rise to social problems. Rather, this reflectivity manifested itself in

the desire to identify all possible predelinquent or prepathological conditions, which could then—in a sort of temporal paradox whose resolution represented the Holy Grail of social planning—be made the object of state intervention before they could coalesce into concrete dangers for the individual and the community. This preventive or precautionary imperative was derived from both older ideas about the role of the state in social governance (i.e., *gute Polizei*) and the welfare provisions of the country's postwar constitution, which charged the state with both promoting the development of the individual personality and protecting against external threats to this process. The terms used in this discourse were not “surveillance” in the pejorative sense of the term (*überwachen*), but rather “prevention” (*vorbeugen*) and “precaution” (*vorsorgen*), both of which emphasized the utopian promise of reflective modernity.

Liberal police law was designed to limit the scope of state authority by permitting the police to act only to protect against a concrete danger or to follow up on a well-grounded suspicion of a specific individual. Concrete dangers were defined as a state of affairs in which a threat had already materialized or where there was a relatively high degree of certainty that, in the absence of external intervention, the normal course of events would lead to the commission of a crime. The primary means employed by the police to combat such dangers were commands to cease and desist and the use of force, which was only employed as a last resort to protect against immediate threats to public security and the rights or property of others. Preventive or precautionary state intervention, on the other hand, was directed against dangers that were abstract or potential, rather than concrete. Such abstract dangers were then transformed into risks through the calculations that underlay such preemptive action, and the primary mechanism employed in the prevention of such risks was the collection of personal information and the formulation of planned anticipatory action based on the social scientific or criminalistic analysis of this data.

The problem was that precautionary surveillance appeared, almost by definition, to violate the liberal logic of state limitation and to follow, instead, an alternate logic, which required the state, independent of any concrete danger or social problem, to collect all of the information that could possibly be of use in the discovery and preemption of abstract risks.⁷ This notion of precautionary risk prevention was more encompassing than what was traditionally meant by “preventing” crime, and it implied a very different role for the state than was the case in classical liberal thought. The central question was whether these preventive or precautionary measures, especially those in the security field, could be subjected to legal norms and thus made consistent with the rule of law. This challenge was complicated by the fact that such anticipatory planning was so complex, situational, and conditional that all of the intermediate steps necessary to realize the general goals of security and welfare could never be exhaustively anticipated and thus made into the object of explicit regulation by the legislature. Moreover, the expanding role of the executive branch in translating

broad statements of principle into concrete policies also meant that the preventive or precautionary state increasingly came to operate in a normatively attenuated space, where the absence of explicit standards made it progressively more difficult to apply the criteria by which the legality of state action had traditionally been measured.⁸

The reform of West German police law from the mid-1970s through the early 1990s was shaped by the clash between the increasingly categorical claims made on behalf of the right to informational self-determination and those made on behalf of a new logic of internal security, which sought not to apologize for the new surveillance practices as exceptions to the liberal logic of state limitation or to limit their scope, but rather which celebrated the freedom from these constraints as the basis for a new concept of precautionary information collection (*Informationvorsorge*) that was needed to police terrorism, organized crime, and, more generally, the abstract dangers characteristic of the risk society.⁹ In this debate, the language of privacy protection or *Datenschutz* served as the primary means for theorizing the problems arising out of the separation of police informational authority from the constraints of liberal police law and defending both the idea of law and a liberal economy of informational restraint against the expansive, transgressive logic of precautionary surveillance. In contrast, precautionary action defined internal security in terms of the anticipation and preemption of possible dangers, rather than as security from arbitrary intervention by the state. This led to a situation in which privacy protection was increasingly invoked in a paradoxical effort to impose legal norms on precautionary surveillance practices that could no more be subject to such positive delimitation than could the ostensible “right to security,” which such surveillance was intended to promote. In the end, the attempt to provide an explicit legal foundation for precautionary surveillance transformed police laws into information laws, which simultaneously authorized the police to engage in precautionary surveillance and imposed limits upon these practices. In so doing it set in motion an apparently irreversible process of juridification, which has created a situation in which more than half of the text of the laws currently governing the police and intelligence agencies consists of provisions regulating the collection, use, and exchange of personal information.¹⁰



One of the goals of the Program for the Internal Security of the Federal Republic, which was adopted in 1972 by the Conference of State and Federal Interior Ministers, was the standardization of the country’s fragmented state police laws.¹¹ The vehicle for achieving this goal was the Model Draft of a Uniform Police Law for Federal and State Government, which was drawn up at the request of the Conference and which was supposed to provide a common template for the reform of police law by the various state legislatures. This harmonization was intended to facilitate the mutual support of state police forces in controlling large-scale social protest by establishing

a common, comprehensive catalog of the typical coercive measures that the police were authorized to employ under given conditions.¹² The positive enumeration of permissible coercive measures by the Model Draft reflected the spirit of the country's constitution, which had specified that substantive interventions into individual rights had to be authorized by the legislature. However, in so doing it raised the question of the extent to which the police could rely upon the subsidiary general charge to protect public security—which played a much larger role in Prussian police law than in that of the South German states—to legitimate measures that were not explicitly sanctioned by the legislature. Although there was a consensus regarding most of the coercive measures to be employed by the police, the approval of the Model Draft was initially bogged down by a rancorous public discussion over whether the police should be permitted to kill an offender, such as a kidnapper, if this were the only way to save the life of other individuals and whether machine guns and hand grenades should be included among the standard weaponry available to the police. These and other minor issues delayed the final approval of the Model Draft by the Conference of Interior Ministers from 1974 to 1977.¹³

However, the rubric of harmonization also served as a cover for the codification of the actual practice of the police and their perceived needs, both of which went beyond what was authorized by current law.¹⁴ Most of the controversies aroused by the Model Draft centered on those paragraphs dealing with the authority of the police to stop individuals to determine their identity (§9) and to fingerprint, photograph, and measure these persons in order to carry out this task (§10). However, even before the Model Draft had been disseminated, Baden-Württemberg had passed a law that further expanded police authority in several important respects.¹⁵ Even though these measures were criticized by both the authors of the Model Draft and liberal politicians, the Conference of Interior Ministers agreed to consider these Baden-Württemberg innovations in any future revisions of the Model Draft. On the other hand, in 1979 a group of liberal academics published a competing Alternative Draft, which charted a different path for the reform of police law.¹⁶ Like other critics, the authors of the Alternative Draft were concerned that the Model Draft was not simply harmonizing state police laws, but rather altering their basic principles. They warned that uncoupling police authority from concrete dangers and individual suspects would deprive these laws of any intrinsic principle for limiting the scope of police action. And they proposed more restrictive conditions on identity checks and wide area searches than did the Model Draft.¹⁷

But the real importance of the Alternative Draft lay in the fact that it grasped the connection between preventive policing and the collection and processing of personal information, which it characterized as “the most general, comprehensive, and—in highly industrialized societies based on the division of labor—one of the most effective mechanisms for the exercise of state domination.” The authors of the Alternative Draft

argued that BEFA exemplified a tendency, which was beginning to reach far beyond the problem of terrorism, to use electronic data processing to monitor broad domains of social life for precautionary purposes, and one of their main goals was to regulate the use of electronic surveillance by the police.¹⁸ Many of the individual provisions of the Alternative Draft—such as those dealing with the exchange of information among police forces and between the police and the civilian administration, the deletion of such information, and the public’s right to learn about the information held on them by the police—mimicked the language used in the BDSG to balance between competing interests. The Alternative Draft also included provisions regulating many of the new surveillance practices, including the systematic observation of an individual, the construction of personality profiles (which had been the focus of much privacy discussion since the 1969 microcensus decision of the Constitutional Court), and the use of “technical means” to record sound and pictures of public meetings and demonstrations. These practices were particularly in need of regulation because, in contrast to traditional policing methods, preventive surveillance often took place without the knowledge of the people being monitored, thereby depriving them of the opportunity to assert their rights. Although the Alternative Draft represented the first attempt to limit the use of the new information technologies by the police, officials continued to insist on the legality of these surveillance practices, and the ideas advanced by the Alternative Draft would only be given serious consideration after the census decision.¹⁹

The problems inherent in articulating legal norms to govern preventive surveillance practices directed against abstract dangers continued to vex security officials. For example, the Lower Saxony Interior Minister Egbert Möcklinghoff (CDU) warned his colleagues that the collection of information for preventive purposes—such as BEFA and targeted observation—entailed intrusions into individual rights that went beyond what was authorized by the Model Draft. Möcklinghoff suggested that this problem could be solved by having the states include the necessary provisions in their police laws.²⁰ However, Karl Krampol, a senior police official in the Bavarian Interior Ministry, argued that the solution was not as straightforward as Möcklinghoff believed. Krampol reminded the interior ministers that, when the Model Draft was being drafted, they had broken off the debate over what legal norms to apply to preventive surveillance because they had come to the realization that such labors were futile. “Under these circumstances,” Krampol warned, “a renewed attempt . . . to find a normative regulation will hardly be promising,” and he urged his colleagues to do everything in their power to stem the trend to regard every informational activity of the police as an intrusion into individual privacy rights requiring legal authorization.²¹

By the turn of 1979, every state except Hamburg had either reformed its police law or was in the process of drafting such legislation.²² The basic structure of all of these state laws followed that of the Model Draft, though they differed on individual points.

Bremen was the only state to incorporate provisions—modeled on the Alternative Draft—regulating information processing by the police.²³ However, the December 1983 census decision forced all of the states to revisit their police laws, and the inclusion of detailed regulations on information collection and processing transformed laws that had heretofore focused on regulating the use of coercive force into information laws and accelerated that inflationary juridification of police informational activity against which Krampol had warned.

Immediately after the census decision, the Conference of Interior Ministers began drafting model provisions to authorize and delimit information collection and processing by the police, and in March 1986 the group approved the final version what came to be known as the Preliminary Draft for the Amendment of the Model Draft.²⁴ Although the conservative parties that came to power in 1982/83 held a majority in the Conference of Interior Ministers, both the Social Democrats and the Liberals, who together governed in several states, called for greater limitations on police authority. These differences led to the inclusion in the Preliminary Draft of a number of alternate formulations designed to minimize the differences that were bound to arise in the reform of state police laws. These differences can be seen most clearly in the debates over the revision of the Hessian police law, which was consciously conceived as an alternative to the Preliminary Draft by officials of the state that in 1970 had passed the country's first computer privacy law.

The most important innovation of Preliminary Draft was the codification of information collection and processing for preventive purposes. As part of the basic task of protecting public security and order, the police were charged with (§1) “tak[ing] precautions for the [future] prosecution of crimes and preventing crime (the preventive combatting of crime) and making the necessary preparations needed to defend against future dangers (preparation for the defense against dangers).”²⁵ The Preliminary Draft also raised the question of how to distinguish what the police could do on their own authority to protect public security against impending dangers from what they were expected to do to investigate crimes that had been committed and to aid in the prosecution of the perpetrators. This led to a turf war between police and prosecutors. However, it is important to recognize that the Preliminary Draft was a guideline for the revision of police law (rather than the revision of the parts of the Code of Criminal Procedure regulating the role of the police in investigating crime, which was being undertaken by a separate group) and that, as a result, it could only authorize police informational activity insofar as it could be regarded as a means of protecting against dangers.²⁶ Nevertheless, the Preliminary Draft appeared to operate with a broader conception of surveillance. Not only did it include the collection of information for both the protection against dangers and the prosecution of future crime. By separating the right to collect this information from any specific future use, it also pointed towards a conception of precautionary information collection that transcended this distinction.

Precautionary surveillance shifted the focus of police informational activity from concrete dangers into the *Vorfeld*, that is, into a domain of anteriority and conditionality. This can be conceptualized as a shift from a liberal concept of policing, where the very concreteness, immediateness, and certainty of the danger systematically limited state action, to a postliberal, precautionary approach, in which the anticipatory search for security virtually required the state to engage in theoretically unlimited informational activity in the hope of reducing uncertainty and preventing or forestalling abstract dangers. The problem, as the jurist Erhard Denninger has argued, is that the concept of a *Vorfeld* of potential dangers contained no intrinsic criteria by which it, or the actions to be taken by the police to prevent the materialization of these dangers, could be limited, “either with respect to the determination of the sphere of risky persons, the means that can be employed to learn about and defend against these risks, or the goals of those measures to be taken in the interest of security.” The new field of action marked out by the search for security against risk constitutes, Denninger argues, “the proper domain of the precautionary state [*Präventionsstaat*].”²⁷

Supporters of such a conception of preventive or precautionary surveillance have argued that the police had always been engaged in such anticipatory information collection beyond the strict limits imposed by concrete dangers and well-founded individual suspicions. After all, dangers had to be discovered before they could be protected against or preventively combatted, and it was necessary to have at least a provisional knowledge of the identity and location of potential suspects before they could be investigated and apprehended.²⁸ However, to conclude from this practical need that the police have always enjoyed the right—as part of the general charge to protect against dangers—to engage in unlimited precautionary surveillance involves dubious reasoning that ignores a century of legislative efforts to subject the police to the constraints of the rule of law.²⁹

The Preliminary Draft permitted the police to collect (§8a–d) personal information for precautionary purposes on individuals (and their contact persons³⁰) if they had concrete reasons to believe that these persons would commit serious crimes (i.e., if there were indications, or *Anhaltspunkte*, to this effect), and it allowed them to store, exchange, and make use of (§10a–h) such information if this were necessary to fulfill their legal duties. However, since the precise scope of these duties was what was at issue, the privacy commissioners argued that this last provision should be formulated more restrictively to permit the use of information only for purposes specifically authorized by law, rather than whenever the police deemed them “necessary.” The Preliminary Draft also allowed the police to retain personal information collected in the course of criminal investigations—regardless of the eventual guilt or innocence of the person—for preventive purposes. The stipulation that the least invasive means possible be employed in the collection of such information meant that, in principle, the police were required to collect information openly from the concerned individual. However, the Preliminary Draft also permitted them to gather information from

other public agencies or third parties, or to employ covert means, where such open collection was not possible, where it was not possible without disproportionate effort, or where this would either render the task of the police substantially more difficult or endanger its success.

The Preliminary Draft also sought to put an end to doubts about the legality of such measures by explicitly authorizing the covert use of cameras and microphones for targeted observation and the use of undercover agents and informers. However, while the Preliminary Draft permitted the use of these practices in order to protect against serious crime, an alternate formulation proposed that such measures only be permitted in the private space of the home if they were essential to protect against an imminent danger for the life, limb, or freedom of an individual or to prevent a substantial loss of property. *Polizeiliche Beobachtung* (the new name for BEFA) was also permitted for preventive purposes under similar conditions. Subsequent debates at the state and national level would pivot not on whether such precautionary policing would be permitted, but rather on the conditions under which these measures could be employed.

The Preliminary Draft did not itself attempt to provide a theoretical justification for the measures that it authorized. However, public debate on police law was informed by the influential defense of precautionary surveillance that had been set out the year after the census decision by the jurists Rupert Scholz, who later served briefly as defense minister under Helmut Kohl, and Rainer Pitschas.³¹ Their argument began with the intuitively evident claim that the state, and the modern social state in particular, had to be able to collect the information needed to carry out its diverse responsibilities. While the Constitutional Court had regarded the right to informational self-determination as a means of protecting the personality rights of the individual, Scholz and Pitschas gave the Court's ruling a peculiar turn by arguing that the development of the personality depended on the prior success of the state in a) creating the conditions for its unfolding and b) fending off the dangers that threatened this process. In this way, they were able to derive from the social mandate of the state and the postulated "constitutional right to security" a positive obligation, which they called the state's "informational responsibility" (*Informationsverantwortung*) to collect all of the personal information required for such precautionary risk prevention (a process they called *Informationsvorsorge*). The result was to turn the right to informational self-determination on its head and use it to legitimate the very precautionary collection of information by the state that the Constitutional Court had sought to limit when it codified the right.

In addition, in the census decision, the Constitutional Court had ruled that citizens could only be compelled to reveal their personal information if the legislature had specified how this information would be used and if it had taken precautions to insure that the constitutional obligation of the different departments of government

to provide each other with information needed to perform their duties (*Amtshilfe*) could not be invoked to alienate such information for use for a purpose other than that for which it had originally been collected. In theory, this purpose specification or finality principle (*Zweckbindung*) represented an absolute bar to the precautionary collection of personal information (*Vorratsdatenspeicherung*), and the privacy commissioners invoked these arguments to demand the comprehensive juridification of police informational activity.³²

Scholz and Pitschas, however, argued that the juridification called for by the privacy commissioners was based on a misinterpretation of the census decision. They maintained that the duty to promote the development of the individual personality and protect it from external dangers meant that the police had what they called an “independent state mandate to engage in precautionary information collection,” which existed prior to and independent of the positive legal authorization that the privacy commissioners read out of the census decision. Since the informational needs of the police were always situationally determined, these practical needs would always exceed the capacity of the legislature to exhaustively codify them in advance. “The legislator would be completely incapable of devising regulations of sufficient detail and comprehensiveness,” they insisted, “if he wanted, or were expected, to attempt to establish in advance concrete criteria or norms [*Maßstäbe*]” for such surveillance. As a result, the independent informational responsibility of the police, Scholz and Pitschas argued, preceded positive legislation and, in a certain sense, rendered it superfluous.

However, they also claimed that the appeal to the purpose specification or finality principle to limit the exchange and use of personal information by the police rested on a different misreading. The BDSG was widely interpreted to mean that, since the ministries, agencies, and departments that collectively made up the public administration represented functionally distinct entities, the exchange of information between them required explicit legal authorization. This was known as the division of informational powers. Scholz and Pitschas, however, inverted this reasoning and maintained that sections of the public administration could be considered to form a functional unit within whose organizational borders information could be freely exchanged. They did not say just how these functional units were to be defined or how far they might extend, and there was nothing in this argumentation to preclude people from arguing, as they had at the turn of the 1970s, that the entire public administration represented a single informational entity. However, Scholz and Pitschas only went so far as to speak of the “functional identity of the security agencies.”³³

Opinion was sharply divided on precautionary surveillance. Conservatives supported the conclusions of Scholz and Pitschas without reservation. By the time the CDU/CSU had come to power in coalition with the FDP, they had abandoned their earlier support for privacy protection legislation, and, were it not for the census decision, they would have left the planned revision of the BDSG to die on the vine.³⁴ They

held a narrow conception of *Datenschutz*, which called for the protection of certain categories of personal information while insisting that such protection must not entail any substantive restrictions on the collection and use of such information by the state. These ideas were expressed with all desirable bluntness by Federal Prosecutor Kurt Rebmann, who insisted that “security must have priority over privacy protection—not the other way around. It would be a misguided notion if we wanted to assume that the control of state activity were more important than state action itself. Especially in the so-called security field it is a question of vital communal interests, which are far more important than privacy protection.”³⁵

For their part, the privacy commissioners were angered by the hubris of security officials, who refused to engage in substantive debate over the principles of precautionary surveillance,³⁶ and they were baffled by the idea of the precautionary collection of purely abstract or theoretical dangers. For example, Reinhold Baumann, who in 1983 succeeded Hans Peter Bull as Federal Privacy Commissioner, doubted “whether it would be possible to arrive at anything even approaching a clear definition of the concept of the precautionary protection against dangers [*Gefahrenvorsorge*], which would not entail an expansion of unforeseeable scope of the authority to process information.”³⁷

Critics further to the left regarded the preventive combatting of crime as the original sin of all post-1983 police law. The Green party, which had won its first seats in the Bundestag in 1983, argued that such surveillance served to repress legitimate protest by the only groups that were critical of the existing social order. They warned that the fetishizing of law, order, and security was leading to the demise of personal liberty, not its protection (“*Freiheit stirbt mit Sicherheit*”), and they cautioned against the consequences that would inevitably follow once the police were freed from the constraints imposed by the principle of concrete dangers. As the Hessian Greens argued with regard to the draft revision of that state’s police law, “this new law cuts itself off from this principle, which corresponds to our tradition of the rule of law. It permits police actions in advance of a concrete danger [*im Vorfeld*], erodes limitations on police action, and displaces ‘concrete danger,’ which was the classical precondition for the police to employ force, into the domain of merely abstract endangerment or even a mere risk to ‘public security and order.’”³⁸ The National Working Group of Critical Police Officers, a civil liberties group closely associated with the Greens, warned that “in a state governed by the rule of law not everything that increases the efficiency of the police must be allowed. The means employed by the security agencies must be proportional to the intended goal, namely the preservation of a safe space for the constitutional rights [of the individual] in a democratic society. Total security—even assuming that such a thing is actually possible in human society—would mean total unfreedom.”³⁹ “The night watchman state is dead,” they concluded. “Long live the precautionary state [*Präventions-Staat*]!”⁴⁰ Although the Greens and their supporters

tried to mobilize the public against the new information technologies, cable commerce, cybernetic governance, and the security laws under consideration at the time, they never enjoyed as much success with establishing a social movement around these issues as they had in mobilizing the population against the 1983/87 censuses and the machine-readable ID card.⁴¹



The Preliminary Draft was the primary point of reference for the reform of state police laws in the late 1980s and early 1990s (including those of the new federal states in the former East Germany). Although it is impossible to communicate in abstract terms precisely how the Preliminary Draft sought to balance between the authorization of the new surveillance practices and their delimitation, any attempt to examine all of these measures in detail would hopelessly overtax the reader without necessarily leading to a clear understanding of the main issues. Nevertheless, as Denninger has noted, “not only the devil is in the details, but also conformity with the rule of law,”⁴² and the debate over *Rasterfahndung* can be used as a representative case to clarify what was at stake in the often hermetic controversies over the alternate ways of phrasing specific provisions of the Preliminary Draft.

At the turn of the 1980s, *Rasterfahndung* had been used primarily to locate individuals already identified as suspects, and at the time debate focused primarily on whether the practice constituted an infringement on the privacy rights of nonsuspect populations, whose information was reviewed by computer in the search for individuals meeting predetermined criteria. In contrast, the Preliminary Draft was based on the assumption that *Rasterfahndung* was a moderately intrusive measure, whose degree of intrusiveness fell somewhere between that of covert surveillance and that of such open measures as the execution of a search warrant. To insure that *Rasterfahndung* was employed only to investigate offenses whose seriousness was proportionate to the intrusiveness of the practice, the Preliminary Draft proposed that the police only be allowed to make use of external databases for matching purposes in cases where there was a concrete danger either to the security of the nation or one of its states or to the life, limb, or liberty of an individual, and where there were factual indications that such matching was necessary to protect against this danger. To guard against the use of *Rasterfahndung* as a fishing expedition to gather information that might be of use for other purposes, the Preliminary Draft stipulated that the information to be made available for such matching had to be limited to the basic identifying data needed to distinguish one individual from another and to the supplementary information that was to be the basis of the proposed matching. Once a body of suspects had been identified or it had been established that the matching process would not yield the desired results, the information that had been used to carry out the matching was to be destroyed. While the preferred formulation stipulated that

Rasterfahndung could only be ordered by the head of the police force seeking access to external information, an alternate formulation proposed—in order to insure that the police would not be both judge and jury in their request for information—that the measure was to be predicated on judicial approval and that, in addition, the relevant privacy commissioner was to be informed so that he or she could offer advice on the legality of the measure.

State debate on whether to permit *Rasterfahndung* and, if so, under what conditions focused on five specific issues: 1) Should *Rasterfahndung* be permitted for precautionary purposes or should it be restricted to protecting against more concrete dangers? 2) Did the interest that was to be protected have to be as important as the protection of national security/life and limb, or could matching be used to prevent or prosecute less serious offenses? 3) Was matching to be permitted only if there were no other way for the police to carry out their responsibilities, or could it be used simply to make life easier for the police? 4) Was authority to order the measure to lie with the police (as in the Preliminary Draft), with the elected officials of the executive branch, or with the judiciary? 5) Were the police to be permitted to make use of information that was discovered by chance during the process, but that was not directly related to the purpose for which the matching had originally been approved?

Between the late 1980s and 2001, all but three of the federal states approved *Rasterfahndung*. They did so in the name of preventing serious crime, but they defined such offenses differently. Some states focused on specific kinds of offenses; others focused on the manner in which the offense was committed; and some focused on the nature of the interest endangered by the act. Some permitted *Rasterfahndung* to protect against such crime if there were “factual indications” of such a danger, while others imposed no additional material preconditions. Four states, including North Rhine-Westphalia, which had incorporated a right to privacy into its constitution, permitted *Rasterfahndung* only in case of a concrete danger to these interests. A half-dozen states stipulated that it could only be used on a subsidiary basis if it were not possible to protect against the stated danger in any other way. In most states the decision to permit the police to obtain external databases rested with the executive branch, most often with the interior minister, while the remainder required judicial approval. Similarly, most states required that the official ordering a government office or private firm to turn over such information specify as precisely as possible what information was to be provided, and most states also specified that information obtained from such matching could only be used for the specific purpose for which the measure had been authorized (though they sometimes allowed this information to be used either for purposes closely related to the original investigation or to prosecute one of a number of serious crimes, even if these were not related to the original offense).⁴³

It is, however, difficult to arrive at an overall assessment of the extent to which these reforms succeeded in harmonizing and standardizing West German police law.

These laws were clearly more uniform at the end of this process than at the beginning. However, it would have been foolish to have expected the states to adopt either the Model Draft or the Preliminary Draft without alteration, and perhaps the answer to the question depends on the expectations that one had going into the process.

The governing conservative parties had little truck with these limitations and qualifications, and one can get a sense of their priorities from the comments of Bavarian officials on a draft law regulating police information collection under the Code of Criminal Procedure, which was circulated by the federal Justice Ministry in the summer of 1986.⁴⁴ The Bavarians criticized the draft because it lacked a general clause authorizing the collection and use of personal information for preventive purposes—and because the absence of such a clause in effect limited police authority to the specific activities enumerated in the proposal. In contrast to the privacy commissioners, the Bavarian officials demanded that, even if a person were acquitted at trial, the police should be permitted to retain for possible future use all of the information gathered in the course of a criminal investigation. The Bavarians also complained that the Justice Ministry draft limited BEFA and *Rasterfahndung* to people accused of terrorism or subversion and that it had mandated judicial consent to employ these practices, and they objected to the proposed limitation of BEFA to border crossings and to the prosecution of a small number of serious crimes: “The limitation [of BEFA] to enumerated offenses makes no sense as a matter of principle.” They also found the proposed regulations on computer matching to be problematic in a number of respects. They could not understand “why *Rasterfahndung* should not be used to combat such white collar crime as counterfeiting of money and securities, robbery and extortion, property crimes, assault and battery, and sex crimes.” “In view of the limited resources available to the security agencies,” they argued, “it must be possible to employ *Rasterfahndung* as a general method of crime prevention.” They had equally little understanding of the provision stipulating that, in issuing a warrant approving the use of computer matching, the judge also had to approve the specific parameters of the search, and they were absolutely livid about the provision stating that information not directly related to the purpose for which the matching had been authorized could not (except under narrow circumstances) be used to prosecute other individuals or retained for preventive purposes.⁴⁵



The reform of state police laws was an ongoing process, and there is no clearly demarcated end to the developments set in motion by the census decision.⁴⁶ However, there was one event that might be considered to mark the provisional culmination of the reform and informational transformation of police law in the 1970s and 1980s. After reunification, all of the new federal states in the former East Germany, which had been chastened by their experience with the country’s secret police, passed their

own privacy protection (and freedom of information laws) and revised their police laws based on West German models. In 1995 a group of legislators asked Saxony's constitutional court to rule on the constitutionality of a number of provisions of the state's police law. The court expressed no reservations in principle concerning the constitutionality of *Rasterfahndung* for precautionary purposes. However, it ruled that in practice the requirement—which was set out in the state law—that such matching be necessary for preventing serious crime could only be satisfied if in each instance there were “factual indications” that serious offenses, for which the law authorized the use of the practice, were being planned. Mere fears or presumptions on the part of the police, the Court insisted, did not satisfy the criterion of proportionality.⁴⁷ In this way, the criterion of “factual indications,” in conjunction with more or less precise definitions of what constituted a serious crime, came to define and delimit, at least for a brief period, the extent to which the traditional liberal principles of concrete dangers and well-grounded individual suspicion could be attenuated to facilitate precautionary surveillance and the preventive combatting of abstract risks. How well this criterion balanced between individual privacy rights and the common interest in greater security through effective crime prevention is a different question.

Despite the controversy that had raged around it in the 1980s, *Rasterfahndung* fell into relative desuetude during the 1990s. However, since 2001 it has reemerged as a favorite tool in the search against presumed sleepers, and these attempts to use computer matching to identify potential perpetrators within a population from which they are not readily distinguished has called into question the provisional compromise of the 1990s and raised new questions about the extent to which the use of *Rasterfahndung* to combat abstract risks can be reconciled with the rule of law.⁴⁸

By the early 1990s, all of these debates had coalesced around the question of whether the piecemeal codification of precautionary surveillance had led to a paradigm shift that marked the “end” of classical police law.⁴⁹ Such criticisms focused on the erosion of procedural protections of individual privacy rights in the name of more flexible and effective prevention, the blurring or *Entgrenzung* of the institutional boundaries that had been established to insure that police power did not again degenerate into an instrument for totalitarian rule, and the restructuring of the country's “security architecture.”⁵⁰ It is undeniable that the central principles of liberal police law, which underlay the logic of state limitation, have been eroded by the new precautionary surveillance practices.⁵¹ Critics have argued that this partial institutionalization of the precautionary principle in the security field entailed the normalization of the state of exception, the “unprecedented generalization of the paradigm of security as the normal technique of government,” and ultimately the establishment of a postliberal form of social governance in which security policy comes to colonize social policy and instrumentalize it for its own ends.⁵² The surveillance state debate of the 1970s and 1980s drew its energy and plausibility from an awareness of the ways in which

these developments were shifting the parameters of state action and the fear that the expansion of police surveillance would be used to repress legitimate social protest that could not be integrated through democratic means.

Pitschas has argued that, when taken to its logical conclusion, “precautionary competencies become independent of central elements of the protection of [individual] liberty in police law influenced by the traditional rule of law.”⁵³ Or, in other words, when precautionary surveillance is allowed to develop in accordance with its own inner principles, the constraints on state action imposed by the liberal rule of law, together with the liberal conception of security as security *from* illegitimate state intervention in the private sphere, are swallowed up by an alternate conception, which defines security in terms of the preemption of possible dangers at their point of origin. However, nowhere has precautionary surveillance completely supplanted the principles of liberal police law and cut itself entirely adrift from the anchor provided by the concepts of concrete danger and well-grounded individual suspicion. This was certainly not the case at the turn of the 1990s, and recent literature has noted—sometimes approvingly, sometimes with regret—that the dogmatic form of liberal police law has become disorganized, but that it has not yet been replaced by a coherent and generally accepted alternative.⁵⁴ This state of affairs still prevails today. The nation’s highest courts have sanctioned preventive surveillance practices, which have attenuated the connection to concrete dangers and individual suspects, while at the same time insisting that such connections be preserved in ways consistent with the rule of law—though without themselves explaining precisely how this circle is to be squared.

In the 1970s and 1980s new technologies, new kinds of crime, and new surveillance practices made it more necessary than ever to renegotiate the informational relations between the state and its citizens in the fields of welfare and security. However, sharp divisions in public opinion over the question of political violence—by both terrorists and the state itself—made this a decidedly inauspicious time to reach a consensus on such issues. The result was not only the transformation of police law into informational access and privacy law. The clash between the precautionary principle and the right to informational self-determination has also led to the proliferation of detailed privacy regulations, which have never fully succeeded in channeling and delimiting those precautionary surveillance practices that, by definition, are not amenable to such normalization. At the same time, both security officials and privacy advocates have been increasingly frustrated by the need to engage in extended legal casuistry—which can never claim broad public legitimacy—in the hope of using formal criteria (proportionality, normative clarity, and finality of use) to resolve substantive differences of opinion regarding security and privacy, that is, issues on which—in the poisonous political atmosphere of the 1970s and 1980s—the legislature itself had been unable to reach a consensus.

Notes

1. Kriminaloberrat Hans Kaleth in 48. Tagung der Arbeitsgemeinschaft der Leiter der LKÄ mit dem BKA (April 5–6, 1967), Bayerisches Hauptstaatsarchiv (München) MIInn Aktenzeichen ICI-490-1.
2. Interview with Horst Herold, “Die Polizei als gesellschaftliches Diagnoseinstrument,” *CILIP: Bürgerrechte und Polizei* 16, no. 3 (1983), reprinted in *Die neue Sicherheit. Vom Notstand zur Sozialen Kontrolle*, ed. Roland Appel et al. (Cologne: Kölner Volksblatt, 1988), 89 (Appel).
3. PIOS was an acronym for Persons, Institutions (such as organizations or groups, including the above-mentioned prisoners’ rights groups), Objects (such as addresses, hideouts and phone numbers), and Things (in German, *Sachen*, such as vehicles, weapons, or other tools used by terrorists).
4. “Trotz Kritik: Bundesbehörden wollen Mobiltelefone weiterhin ohne eigenes Gesetz als Ortungswanzen benutzen,” MMnews, <http://www.mmnews.de/index.php/net-news/22434-trotz-kritik-bundesbehörden-wollen-mobiltelefone-weiterhin-ohne-eigenes-gesetz-als-ortungswanzen-benutzen>.
5. A Google N-gram of the term Überwachungsstaat shows the usage of the term rising from near zero in 1975 to a peak in 1986/87.
6. Dieter Grimm, *Die Zukunft der Verfassung* (Frankfurt am Main: Suhrkamp, 1991); Erhard Denninger, “Der Präventions-Staat,” *Kritische Justiz* 21, no. 1 (1988): 1–15; Peter-Alexis Albrecht, “Prävention als problematische Zielbestimmung im Kriminaljustizsystem,” *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, 69, no. 1 (1986): 55–82; and Peter-Alexis Albrecht and Otto Backes, eds., *Crime Prevention and Intervention* (Berlin: de Gruyter, 1988).
7. Denninger, “Freiheit durch Sicherheit? Wie viel Schutz der inneren Sicherheit verlangt und verträgt das deutsche Grundgesetz?” *Kritische Justiz* 35, no. 4 (2002): 474–475.
8. Grimm, *Die Zukunft der Verfassung*.
9. Volkmar Götz, “Die Entwicklung des allgemeinen Polizei- und Ordnungsrechts (1987 bis 1989),” *Neue Zeitschrift für Verwaltungsrecht* 9, no. 8 (1990): 727–728.
10. Heiner Busch, “Hilfloser Datenschutz. Verrechtlichung, Individualisierung, Entpolitisierung,” *CILIP: Bürgerrechte & Polizei* 85, no. 3 (2006): 3–9.
11. “Programm für die Innere Sicherheit der Bundesrepublik Deutschland—Teil 1,” Beilage zum *Gemeinsames Ministerialblatt* no. 31 (1972): 20.
12. Albrecht Funk and Falco Werkentin, “Der Musterentwurf für ein einheitliches Polizeigesetz—ein Muster exekutiven Rechtsstaatsverständnisses,” *Kritische Justiz* 9, no. 4 (1976): 407–422. The article situates the Model Draft in relation to the reorganization of the police, the Border Police, and the armed forces that followed the passage of the 1968 Emergency Laws.
13. Gerd Heise and Reinhard Riegel, *Musterentwurf eines einheitlichen Polizeigesetzes mit Begründungen und Anmerkungen*, 2nd ed. (Stuttgart: Richard Boorberg, 1978). On the drafting of the Model Draft, see the materials in Staatsarchiv Hamburg 136-1, no. 461–467.
14. See Funk and Werkentin, “Der Musterentwurf für ein einheitliches Polizeigesetz,” 420; and the interview with Heinz Schwarz (CDU), the interior minister of Rhineland-Pfalz, “Ich kann ja die Handgranate danebenwerfen,” in *Der Spiegel* (August 2, 1976), especially 29.
15. Interior Minister Baden-Württemberg to Innenministerkonferenz, Betr.: Entwurf eines Gesetzes zur Änderung des Polizeigesetzes für Baden-Württemberg (June 11, 1975), Staatsarchiv Hamburg 136-1, Nr. 467 and Landesarchiv Nordrhein-Westfalen (Düsseldorf) NW 595, Nr. 120; Heise, Betr.: Entwurf eines Gesetzes zur Änderung des Polizeigesetzes für Baden-Württemberg, and Peter Müller to Burkhard Hirsch and Andreas von Schoeler, Betr.: Beratung Polizeigesetz in Baden-Württemberg (February 19, 1976), both in Landesarchiv Nordrhein-Westfalen NW 595, Nr. 120.
16. Arbeitskreis Polizeirecht, *Alternativentwurf einheitlicher Polizeigesetze des Bundes und der Länder* (Darmstadt: Luchterhand, 1979).
17. Arbeitskreis Polizeirecht, *Alternativentwurf*, vii.

18. Arbeitskreis Polizeirecht, *Alternativentwurf*, 113.
19. Reinhard Riegel, "Stand und Entwicklungstendenzen des informationellen Befugnisrechts zur polizeilichen Aufgabenerfüllung: Licht, Schatten und Hoffnung," *Die öffentliche Verwaltung* 47, no. 19 (1994): see especially 814.
20. Niedersächsischer Minister des Innern to Arbeitsgemeinschaft der Innenministerien, Betr.: Musterentwurf (August 31, 1978), Staatsarchiv Hamburg 136-1, Nr. 2431.
21. Krampol/Bayer. Staatsministerium des Innern to Arbeitsgemeinschaft der Innenministerien, Betr.: Musterentwurf (October 6, 1978), Staatsarchiv Hamburg 136-1, Nr. 2431.
22. "Zum Stand der Polizeigesetzgebung in den Ländern," *Kriminalistik* 15, no. 1 (1979): 27–28.
23. Bremische Bürgerschaft Drs. 10/945, and *Gesetzblatt der Freien Hansestadt Bremen*, 1983, no. 15 (April 11, 1983): 141.
24. Michael Kniesel and Jürgen Vahle, *VE ME PolG. Musterentwurf eines einheitlichen Polizeigesetzes in der Fassung des Vorentwurfs zur Änderung des ME PolG. Text und amtliche Begründung* (Berlin: Kriminalistik-Verlag, 1990); and Kniesel and Vahle, *Polizeiliche Informationsverarbeitung und Datenschutz im künftigen Polizeirecht. Kommentierung der einschlägigen Bestimmungen des Vorentwurfs zur Änderung des ME PolG* (Berlin: Kriminalistik-Verlag, 1990). The final version of the Preliminary Draft is more easily accessible in *CILIP: Bürgerrechte & Polizei* 29, no. 1 (1988): 168–176.
25. "Die Polizei hat im Rahmen dieser Aufgabe [i.e. Gefahren für die öffentliche Sicherheit oder Ordnung abzuwehren] auch für die Verfolgung von Straftaten vorzusorgen und Straftaten zu verhüten (vorbeugende Bekämpfung von Straftaten) sowie Vorbereitungen zu treffen, um künftige Gefahren abwehren zu können (Vorbereitung auf die Gefahrenabwehr)."
26. Dietmar Peitsch, "Vorbeugende Bekämpfung von Straftaten und Vorbereitung auf die Gefahrenabwehr . . .," *Die Polizei* 81, no. 9 (1990): 213–219.
27. Denninger, "Prävention und Freiheit. Von der Ordnung der Freiheit," in *Vom Rechtsstaat zum Präventionsstaat*, ed. Stefan Huster and Karsten Rudolph (Frankfurt am Main: Suhrkamp, 2008), 85–106, citation 94–95.
28. Markus Möstl, "Die neue dogmatische Gestalt des Polizeirechts," *Deutsches Verwaltungsblatt* 122, no. 10 (2007): 581–589, especially 581–582.
29. As Peitsch, "Vorbeugende Bekämpfung von Straftaten," 219 notes, even the recognition of the need for, and of the right to engage in, such precautionary information collection does not say anything about the permissible scope of such surveillance.
30. The issue of contact persons has recently surfaced in relation to NSA collection of telephone metadata. Here the question does not relate to physical proximity. Rather, the NSA has been collecting, and then acting upon, information on callers as many as three steps removed from the suspect number being monitored. See David Cole, "We Kill People Based on Metadata," *New York Review of Books*, <http://www.nybooks.com/blogs/nyrblog/2014/may/10/we-kill-people-based-metadata>.
31. Rupert Scholz and Rainer Pitschas, *Informationelle Selbstbestimmung und staatliche Informationsvorsorge* (Berlin: Duncker & Humblot, 1984). They, in turn, drew on Josef Isensee, *Das Grundrecht auf Sicherheit. Zu den Schutzpflichten des freiheitlichen Verfassungsstaates* (Berlin: De Gruyter, 1983).
32. Anforderungen an Datenschutzregelungen im Polizeirecht. Beschluß der Konferenz der Datenschutzbeauftragten des Bundes und der Länder (January 24, 1985), which is available as Berlin Abgeordnetenhaus, Drucksache 10/424, and "Der Grundsatz der Verhältnismäßigkeit muß gewahrt sein," *Frankfurter Rundschau*, February 18, 1985, 14.
33. Scholz and Pitschas, *Informationelle Selbstbestimmung und staatliche Informationsvorsorge*, citations 104, 175, and 188.
34. For a good account of the political constellation at that moment, see Horst Bieber, "Droht der Schnüffelstaat? Die Koalition will das Volkszählungsurteil aus den Angeln heben," *Die Zeit*, September 27, 1985.

35. Cited in Bieber, "Droht der Schnüffelstaat?" See also Friedrich Zimmermann, "Grundgedanken zu Fragen der Inneren Sicherheit für 1989," *Die Polizei* 80, no. 1 (1989): 1–4.
36. "Anforderungen an Datenschutzregelungen im Polizeirecht," and Ruth Leuze (Baden-Württemberg privacy commissioner) to the state interior ministry, Betr.: Vorentwurf zur Änderung des Musterentwurfs (Stand: 8. Februar 1985), (August 29, 1985), both in Berlin Beauftragter für Datenschutz und Informationsfreiheit Aktenzeichen 055/72.
37. Federal Privacy Commissioner to BMI, Betr.: Vorentwurf . . . (August 6, 1985), Berlin Beauftragter für Datenschutz und Informationsfreiheit Aktenzeichen 055/72. Similar criticisms were made by the Deutscher Richterbund; see "DRB lehnt Musterentwurf ab," *Deutsche Richterzeitung* 64, no. 6 (1986): 234–235.
38. Die Grünen im Landtag, Gutachten zu dem Gesetzentwurf zur Änderung des HSOG (February 21, 1986), Hessisches Hauptstaatsarchiv (Wiesbaden) Abt. 502, Nr. 12504a.
39. Bundesarbeitsgemeinschaft Kritischer Polizistinnen und Polizisten, Landesgruppe Landesarchiv Nordrhein-Westfalen (November 23, 1989), Archiv Grünes Gedächtnis (Berlin) Bestand A-Manfred Such, Nr. 155.
40. Bundesarbeitsgemeinschaft Kritischer Polizistinnen und Polizisten, Kritikforum Polizeirecht (April 23, 1991), Archiv Grünes Gedächtnis Bestand B.II.2, Nr. 644(2).
41. Nieders. Bündnis gegen den Überwachungsstaat, Protokoll des 1. Treffens vom 23.3.1986; Aufruf zur Bildung einer Hamburger Initiative gegen den Überwachungsstaat (undated); Berliner Koordinationstreffen gegen Überwachung (undated); Roland Appel, Bericht vom Kongress "Kein Staat mit diesem Staat?" in Bielefeld . . . (23.6.1986); Kabyron. Ein Gespräch mit dem AK Rationalisierung über Sicherheitsgesetze . . . (5. Juli 1986), all in Archiv Grünes Gedächtnis G.01 FU-Berlin, Spezialarchiv "Die Grünen," Nr. 115.
42. Denninger, "Freiheit durch Sicherheit? Anmerkungen zum Terrorismusbekämpfungsgesetz," *Aus Politik und Zeitgeschichte* 10/11 (2002): 22–30, citation 28.
43. Stefan Middel, *Innere Sicherheit und präventive Terrorismusbekämpfung* (Berlin: Nomos, 2007), 124; Sönke Hilbrans, "Grundlage und Problematik der Rasterfahndung," in *Innere Sicherheit als Gefahr*, ed. Nils Leopold et al. (Berlin: Humanistische Union, 2003), 268–285; and Christoph Gusy, "Rasterfahndung nach Polizeirecht," *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 85, no. 4 (2002), 474–490.
44. Arbeitsentwurf eines Gesetzes zur Regelung der rechtlichen Grundlagen für Fahndungsmaßnahmen, Fahndungshilfsmittel und für die Akteneinsicht im Strafverfahren (Stand: 31. July 1986), Berlin Beauftragter für Datenschutz und Informationsfreiheit Aktenzeichen 055–100.
45. Aktenvermerk: zum Arbeitsentwurf der BMJ zur Novellierung des StPO (undated); and Sachgebiet IC5, Informationsgespräch mit dem BDK (December 29, 1986), both in Bayerisches Hauptstaatsarchiv MInn, Nr. 97094. This Justice Ministry proposal, however, was clearly running against the *Zeitgeist*, and heavy criticism forced the ministry to withdraw it before the end of the year. Bayer. Staatsministerium der Justiz, Leitlinien für Änderungen der Strafprozeßordnung . . . (December 10, 1986), Bayerisches Hauptstaatsarchiv MInn, Nr. 97094.
46. Debate on information and privacy provisions for the Federal Criminal Police lasted a full decade, and the law was not revised until 1997. See "Entwurf eines Gesetzes über das Bundeskriminalamt. . . (Stand: 1. August 1988)," *CILIP: Bürgerrechte & Polizei* 31, no. 3 (1988): 28–54; *Bundesgesetzblatt* (1997), 1650; and Anicee Abbühl, *Der Aufgabenwandel des Bundeskriminalamtes. Von der Zentralstelle zur multifunktionalen Intelligence-Behörde des Bundes* (Berlin: Boorberg, 2010), 176–188. The 1992 Organized Crime Law, *Bundesgesetzblatt* (1992), 1302, authorized the use of *Rasterfahndung* for the prosecution of a wide variety of serious offenses.
47. *Sächsische Verwaltungsblätter*, 1996, 160 (187), the annual report of the Saxon privacy commissioner (Saxon Landtag Drs. 2/6035, 111–113); and "Nicht vereinbar," *Der Spiegel*, May 20, 1996, 78–79.

48. Helmuth Schulze-Fielitz, "Nach dem 11. September: An den Leistungsgrenzen eines verfassungsstaatlichen Polizeirechts?," in *Recht im Pluralismus. Festschrift für Walter Schmitt Glaeser*, ed. Hans-Detlef Horn (Berlin: Duncker & Humblot, 2003), 407–434, especially 421. This has been accompanied by a parallel debate, which is only of secondary importance in the present context, over whether *Rasterfahndung* is primarily a police or a prosecutorial measure and over the legal bases for its use for each of these purposes.
49. Rainer Pitschas, "Kriminalistik durch Informationsvorsorge. Abschied vom klassischen Polizeirecht und Krise des traditionellen Datenschutzkonzeptes," *Kriminalistik* 45, no. 12 (1991): 774–778; Pitschas, "Fortentwicklung des Polizeirechts und Legitimität des Staates," in *Polizeirecht heute. Schriftenreihe der Polizei-Führungsakademie*, no. 4 (1991): 7–31; Pitschas, "Auf dem Weg zu einem neuen Polizeirecht," *Kriminalistik*, 53, no. 3 (1999): 153–159; Josef Aulehner, *Polizeiliche Gefahren- und Informationsvorsorge* (Berlin: Duncker & Humblot, 1998), 356; and Friedrich Schoch, "Abschied vom Polizeirecht des liberalen Rechtsstaates. Vom Kreuzberg-Urteil des preussischen Oberverwaltungsgerichts zu den Terrorismusbekämpfungsgesetzen unserer Tage," *Der Staat* 43 (2004): 347–369.
50. Manfred Baldus, "Entgrenzungen des Sicherheitsrechts—Neue Polizeirechtsdogmatik?" *Die Verwaltung* 47, no. 1 (2014): 1–23; Markus Thiel, *Die "Entgrenzung" der Gefahrenabwehr* (Tübingen: Mohr Siebeck, 2011); Middel, *Innere Sicherheit*; and Byungwoog Park, *Wandel des klassischen Polizeirechts zum neuen Sicherheitsrecht* (Berlin: Berliner Wissenschafts-Verlag, 2013).
51. Schulze-Fielitz, "Nach dem 11. September."
52. Richard Ericson, *Crime in an Insecure World* (New York: Polity, 2007), 1–35; the citation is from Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005), 14, cited by Ericson, 26. See also Günter Frankenberg, *Political Technology and the Erosion of the Rule of Law. Normalizing the State of Exception* (Northampton, MA: Elgar, 2014), and Peter-Alexis Albrecht, *Securitized Societies. The Rule of Law: History of a Free Fall* (Berlin: Berliner Wissenschafts-Verlag, 2011).
53. Pitschas, "Kriminalistik durch Informationsvorsorge," 776.
54. Möstl, "Die neue dogmatische Gestalt des Polizeirechts," 581.

