

Preventive Law: A Methodology for Preventing Problems¹

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I. Basic Principles of Preventive Law

A. Preventing a problem from occurring is generally easier, cheaper and better service to a client than waiting to react to a problem that arises.

B. Not all planning is preventive. Planning to win a dispute is not necessarily planning to prevent a problem from arising.²

C. Thinking *preventively* is different from thinking *solutionally*. Thinking solutionally about a problem focuses on gathering up the resources to meet unmet needs, or reaching agreement on how limited resources should be allocated among competing needs. Preventive thinking, in contrast, focuses on reducing the emergence of needs.

D. Solutional thinking asks important questions. But preventive thinking can be a helpful supplement to solutional thinking by reducing the need for it. In other words, effective preventive thinking can reduce the incidence or severity of problems that require resources for solution. The fewer resources a problem requires for solution, the easier it tends to be to solve.

II. A Methodology for Preventive Problems

A. Distinguish Carefully Between Preventive and Solutional Thinking

¹ Copyright Thomas D. Barton, 2002. All rights reserved. This paper is taken directly from Thomas D. Barton, *Preventive Law for Three-Dimensional Lawyers*, 19 PREVENTIVE LAW REPORTER 29 (2001).

² James G. Frierson, *Essay: Pre-Action Advice May Not Be Preventive Law Advice*, found in the Essays page of www.preventivelawyer.org.

Assume that you are in the position of advising on policies to prevent a society- wide problem. How should you proceed? As stated above, always focus on the *emergence* of needs rather than on the *meeting* of needs. Understanding how needs arise, rather than what it takes to solves needs, is what distinguishes preventive thought from traditional problem solving. Any need that never emerges, need never be solved.

B. Follow the Five Steps of Preventive Thinking

Talking effectively about reducing the emergence of needs requires taking the following steps:

1. Understand problems as troublesome relations between people and their environments (social, physical, biological, or financial).

2. Identify the various elements in those relationships.

a. This will always include a person or persons? the *problem holders*.

b. However, it will likely include a *social environment*--other people with whom the problem holders do, or do not, interact.

c. Finally, there will usually also be aspects of a *non-social environment*--issues about the physical world, or people's biological needs, or financial markets, etc.

3. Understand the chronic or typical *dynamics* between the problem holders and their social and non-social environments that create the problem.

4. Describe what gives each element of this problem dynamic its peculiar *importance*; and finally:

5. Imagine all the possible ways that the problem dynamic could be broken or slowed through conscious intervention.

III. Teaching the Methodology

A. First, lay a foundation for the exercise by describing preventive thinking and its advantages.

Distinguishing preventive thinking from "solutional" thinking can provide a breakthrough for many people. When presented with the difference, suddenly students may realize how

frequently they analyze problems through the perspective of meeting needs through generating or allocating resources. Those who are more psychologically oriented may realize that they typically frame problems as the need to manage discord or reorient cognitively about some issue.

Preventive thinking does not seek to do either of these: not to manage either resources or emotions. Instead, it attempts to understand the antecedents to problems and to suggest interventions that will prevent the emergence of needs.

One easy example illustrating the difference between solutional and preventive thinking is the energy problem that crops up periodically, most recently in California. Talking about meeting the need for energy through building more powerplants or securing long term supply contracts is solutional thinking. Talking instead about conservation measures that will reduce energy consumption, and hence the need for energy, is more preventive. Even more dramatically preventive is talk about the *antecedents* for energy needs, which have to do with social patterns like suburban sprawl and consequent commuting requirements.

B. Introduce the Five Steps of Preventive Thinking

To introduce the five steps of preventive thinking, try to supply multiple illustrations. This will keep the class more engaged and communicate the breadth of the concepts. Once one understands the methodology, generating new illustrations is not difficult.

1. Understand problems as troublesome relations between people and their environments (social, physical, biological, or financial).

As I have written previously, “‘problems’ do not exist in a purely natural realm. Whatever turbulence or destruction or deprivation may occur in nature is simply part of natural processes, inappropriate for the label ‘problem.’ This is so because only humans can construct their environments in alternative ways, and only humans can respond to their environments by significantly changing them.”³

As an example of this general point: “A fire that burns in a wilderness will certainly alter the survival chances of the plants and creatures living within it, but without human intervention nothing can be done to change the odds. Nature will simply take its course. The fire and its implications are not strictly speaking ‘problems,’ because the very idea of a problem implies the capability of conscious adjustment to the physical, social, relational, or psychological environment in which the problem arises. By making problems exclusively human and by tying that human quality to the ability to manipulate the environment, an encompassing definition of problems

³ Thomas D. Barton, *Creative Problem Solving: Purpose, Meaning, and Values*, 34 Cal. W. L. Rev. 273, 273 (1998).

suggests itself: ***Problems are mismatches between environment and human purpose.***”⁴

2. *Identify the various elements in those relationships.*

a. *This will always include a person or persons - the problem holders.*

b. *However, it will likely include a social environment--other people with whom the problem holders do, or do not, interact.*

c. *Finally, there will usually also be aspects of a non-social environment--issues about the physical world, or people's biological needs, or financial markets, etc.*

Consider here the example of affordable housing. In many major cities, not more than 20-30% of households can purchase a home at the prevailing median price of homes. Here are the elements of the problem. First, the problem-holders, which are people needing shelter in a particular place. The social environment includes, however, real estate developers and government officials, usually planning or zoning board members but perhaps legislators as well. The non-social environment in play here is the urban physical environment, consisting of both open space and shelter.

3. *Understand the chronic or typical dynamics between the problem holders and their social and non-social environments that create the problem.*

Consider the example of how to protect African elephants from being made extinct because of widespread poaching. The elements of the problem here are poachers, villagers, the elephants, and the outside world wanting to preserve this species.

Understanding the *dynamics* among these elements is key to finding a possible solution. Thinking of this problem solutionally, as attempting to meet the need for better law enforcement, is largely ineffective. A solutional, law enforcement model focuses on the poacher and the elephant. If, however, one expands the inquiry into the *antecedents* of the problem, one sees an important dynamic between the poachers and the villagers. This relationship between villagers and poachers is too often symbiotic: poor, hungry villagers eat the meat left behind by ivory-stealing poachers. To make real progress toward saving elephants, we must break the link between the poachers and the villagers. This can be done by enclosing portions of the elephants' range into a national park. Within this vast park, eco-tourism can flourish with the right infrastructural developments (a dynamic between the elephants, villagers, and the outside world.) The result can be strong incentives for the villagers to preserve, rather than eat, the elephants. The villagers are then willing to assist in stopping poaching. The dynamic between the villagers

⁴ Id.

and poachers - a link that permitted the poachers to avoid law enforcement efforts - is now constructively changed.

4. *Describe what gives each element of this problem dynamic its peculiar importance.*

In the affordable housing example, here is what seems most salient to each element:

(a) the people needing shelter (the problem-holders) are attracted to a given location, usually because of employment opportunities, but sometimes for aesthetic or family resources.

(b) real estate developers have inadequate financial incentive, or inadequate ability under existing housing regulations, to build housing for low or moderate income families.

(c) government official either have contributed to the problem by zoning and planning regulations that effectively discourage low-income housing, or they have failed to take adequate measures to offset the lack of financial incentives in the private sector for such housing to be built.

(d) as to the physical environment, it is a scarce resource. Increasing the supply of space is virtually impossible. Yet the demand for housing is inevitable: the population is growing.

5. *Imagine all the possible ways that the problem dynamic could be broken or slowed through conscious intervention.*

Problem prevention requires understanding a system and its dynamics. Then, imaginative alternatives for breaking apart pathologies must be generated. If alternative possibilities are not imagined through brainstorming or re-framing one's understanding of the problem, *then even solid, rational fact investigation may be of no avail.*

(a) The elephant problem is a good example. So long as people are captured by a law enforcement framing of the problem-seeking to solve the problem merely by detecting and capturing the poachers-the problem will not will solved *durably*. Given the underlying symbiotic relationship between the villagers and the poachers, new poachers could be recruited as fast as existing poachers are jailed. So simply seeking information about the identities and whereabouts of the poachers - a good, rational fact investigation - will not help much. Successful solution requires changing the underlying incentives that create the pathological dynamic among the villagers and poachers.

The multiplier effect of eco-tourism successfully changes these incentives for the villagers, and thus changes the underlying problem dynamic. Furthermore, we may notice a nice side-

benefit of the new dynamic: *non-endangered* wildlife sharing the same habitat as elephants may be made more plentiful due to the creation of the elephant reserves.

(b) In the affordable housing example, possible interventions changing the underlying problem dynamic could include:

(i) taking measures to avoid urbanization. This could be done by offering strong tax incentives at the state level for businesses to locate in rural areas (note this is done in some European countries)

(ii) improving the existing infrastructure in older neighborhoods, especially schools, public safety, and public transportation. This will help existing housing from being abandoned and blighted.

(iii) increasing the housing density permitted by the planning & zoning codes, while making the aesthetic design aspects of those codes more stringent.

IV. Engaging the Class in a New Example: The Elderly and Nursing Homes/Assisted Living

As an in-class exercise, consider the social problem of an aging population in America, many of whom can be projected to require expensive nursing home care or assisted living. This is surely a most significant problem: older people are often afflicted by feelings of loneliness, helplessness, dependence, and even desperation about their inability to continue to live in their own homes.

A. Know When You are Thinking Solutionally, and Expand on It to Think Preventively

First, after simply stating the problem, have the students offer their initial thoughts about possible ways of dealing with it. They are likely to generate “solutional” rather than “preventive” approaches, which then gives a good opportunity to explain the differences between these two types of thinking.

As a start, listen for the students to *frame* this social problem in a solutional way. This would be something like: “How can we ensure that nursing home care will be available when older people will need it?” Addressing the problem in this way represents solutional thinking because the question itself assumes that a need exists.

Framing the issue in a solutional way will likely generate only “meeting needs” sorts of solutions - not preventive approaches. If the students have framed the issue in terms of meeting the need for assisted living housing, then listen for the following sorts of suggested solutions,

which illustrate yet more “solutional” thinking:

- ?? government insurance programs that would pay for individual housing needs; or
- ?? widespread private nursing home insurance as an employment benefit; or
- ?? better supply and affordable pricing through more competition among private nursing home facilities.

Each of these suggestions may be effective in meeting a need. They may be good solutional thinking, in other words. But preventive thought would focus on avoiding the *emergence* of the needs.

A preventive framing of the issue would be “How can elderly people be helped to continue to live on their own, in their own homes?”

Now move to the five-step methodology of prevention in the context of this particular problem. For each step, clearly articulate each step. To save time, however, the first three steps of this particular problem may be considered together by the students. Break the students into small groups (three or four in a group) to attempt to generate responses to the first three steps of the methodology. After five to ten minutes, reconvene the class as a whole and solicit volunteers to describe the ideas generated within their group.

The feedback to the ideas can focus on the degree to which preventive thinking has actually been achieved.

In the paragraphs below, I offer my own responses to the issues raised by applying the five step method to the elderly housing problem. These responses may be used in comparison or contrast with the ideas generated within the student groups.

B. Apply the Five Step Methodology for Preventive Thinking

1. Understand problems as troublesome relations between people and their environments (social, physical, biological, or financial).

Here, I would not consider the problem merely to be one of either elderly people, or their frailty. Instead, I would be looking for the *relationships* between elderly people (the “problem holders”) and their social and non-social environments.

The students may fail to think about the issue dynamically. The problem is not just advancing age, or not even just being old and alone. It is both of these elements in relation to a physical environment (their dwelling).

2. Identify the various elements in those relationship.

When the issue is “elderly people who can no longer seem to live in their own homes,” I identify three elements:

- a. The problem holders themselves (here, elderly people);
- b. A social environment (here, the frequent *absence* of other people who could help the problem holders in various aspects of the problem holders’ lives); and
- c. A non-social environment (here, the physical environment of a home).

3. Understand the chronic or typical dynamics between the problem holders and their social and non-social environments that create the problem.

Here, the typical dynamic is that the inherent demands of a traditional home environment become more than an elderly person living alone can manage.

The next two steps of the method will occupy more time, and require far more imagination. Do each of the last two steps separately. For each, have the students again break up into their groups, and articulate responses. I would give at least ten minutes of student interaction time to each of these two steps.

When the entire class reconvenes to report their conclusions on each step, the thoughts below can once again be used as a baseline for preventive thinking. In responding to any particular idea offered by the spokesperson for a group, instructor feedback can particularly stress the mental skills demanded by the systems analysis of preventive thinking: imagination, flexibility, ability to move from abstraction to particularity, and an understanding of personal motives and the benefits of multiple forms of communication.

4. Describe what gives each element of this problem dynamic its peculiar importance.

- a. Here, the older person is made vulnerable by the vicissitudes of age: **reduced mobility, strength, cognition, memory, and physical balance.**
- b. The absence of another person, or “help” comes up in:
 - i. **doing commonplace tasks** (like cooking, grocery shopping, cleaning, paying bills, lawn care);
 - ii. **everyday friendship** and conversation;
 - iii. **summoning help** in case of an emergency; and

iv. giving actual **emergency care**.

c. The typical home environment makes demands of:

i. **access** (as in staircases that must be climbed to reach bedrooms, or bathtubs that are slippery);

ii. **manipulation** (of appliances, faucets, jar-lids, valves);

iii. **discernment of information** (as in understanding and paying household bills, thermostat and stove settings); and

iv. **repairs**.

5. Imagine all the possible ways that the problem dynamic could be broken or slowed through conscious intervention.

a. One could first think about interventions to correct misplaced perceptions. Are there stereotypes at work here concerning older people and their capabilities? Or, similarly, is there “learned helplessness” on the part of older people? If so, educational programs in which older people model their real potential for independent living could help to alter those perceptions, and thus prevent the “need” from arising. Relatives of the older person, who often are the decision-makers about nursing home care, could be shown the full range of possible measures to permit the elderly to stay in their homes.

b. Next, one could take each aspect of the problem dynamic - the vulnerable person, the demanding environment, and the lack of another person’s physical presence - and brainstorm possible interventions.

Generally speaking, the problem dynamic of expensive nursing home care is prevented by:

i. Making the vulnerable person more capable; or

ii. Making the environment less demanding; or

iii. Bringing in people (or a substitute for an actual person) to help perform the functions that make the absence of people problematic.

First, a person can be made more capable along the dimensions of mobility, strength, cognition, memory, and physical balance through a host of means: walking aids; light, simple tools for various household tasks; exercise equipment designed specifically for older people;

frequent game playing and journal writing to prevent cognitive slippage; and bio-feedback devices for helping balance.

Second, the home can be made less demanding along the dimensions of access, manipulation, discernment of information and repairs by: installing ramps, seat-elevators, or hand grabs; making dials, buttons, and display information larger; making appliances responsive to voice commands; and by purchasing appliance repair insurance.

Finally, supplying “another” for commonplace tasks, friendship, summoning help, and giving emergency care can come in the form of: Automated direct-payment of bills through banks; volunteer lawyers who do tax returns and give financial help; pooling transportation money to bring small groups of older people together on a daily basis; therapy pets; home delivery of groceries; meals on wheels programs; monitoring bracelets that wirelessly broadcast vital sign information to health care providers; and organizing neighbors to look in.

In giving feedback to students on this final step of the method, stress that more options are generated by separating out each of the three elements. For each element, review what gives that element its particular salience in the pathological dynamic. Then attempt to imagine re-working the incentives that drive that pathology, or consider offering substitutes for the element that would not carry the undesirable dynamic with the other elements.