

## Facets of control: Criminal justice regimes in analysis

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»I'll be right back.« These are the words Solon, ruler of Athens, wrote at the top of Athen's first comprehensive positive law. Around 594 B.C.—the traditional yet controversial date—he set his laws into writing. And then he left. The citizens had no other choice than to tackle the legal provisions on their own. For Solon had obtained a ten-year break from the Athenians in order to avoid the stampede of people who, when

the laws of Solon [were] put into operation [...] would come to him every day with praise or censure of them, or with advice to insert something into the documents, or take something out. *Very numerous, too, were those who came to him with inquiries and questions about them, urging him to teach and make clear to them the meaning and purpose of each several item.* (Plut. Sol. 25.4–5;<sup>1</sup> emphasis A.K.)

The law, as we learn from Plutarch's biography of Solon, had to necessarily, if only preliminarily, be interpreted *by the citizens themselves* during the temporary absence of the lawmaker.

It is barely different from determining the relationship between the »force of law« (Derrida 1991) and that institution whose role it is to enforce penal law: the police. Legal norms are always abstract and require substantiation—whereby in contemporary constitutional systems, the police, it must be emphasized, has no competence at all in the further development of laws. A central insight of the Labeling Theory developed by social science oriented, self-proclaimed critical criminologists of the

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1 See also <http://perseus.uchicago.edu/perseus-cgi/citequery3.pl?dbname=GreekFeb2011&getid=1&query=Plut%20Sol.%2015>, accessed April 18, 2013.

1970s and 1980s in the USA, Germany, and other countries was, however, to show that the police—regardless of the restraints of the separation of powers in a modern state—themselves have a share in the constitution of their subject matter (see, for example, Becker 1981; Sack 1979). If we reduce the subject matter of criminology to »law-making, law-breaking and reactions to law-breaking« (Sutherland and Cressey 1974, 21) then the »reactions to law-breaking« as a dependent variable were, from then on, called into question inasmuch as they were mere reactions. In continuation of this argument, researchers, especially those arguing from a post-structuralist perspective, stressed the fact that the police themselves contribute indirectly to the maintenance, genesis or transformation of criminal law, legal proceedings or also implementation of norms (see Hempel 2010; Krasmann 2008). This argument is based on the observation that police activity must always be described as a normative and standardizing activity. Every activity that checks and observes—the rough description of police work throughout history and today—refers to a rule which necessarily assumes a measure of evaluation. Without a norm, as Emile Durkheim showed early on ([1895] 1984, 141–64), there is no deviation and control becomes unfeasible. Thus there are certain ideas of norm and deviation—and of security and danger—which suggest either problems or, to the contrary, that everything is safe and corresponds to the intended order (Kretschmann 2012, 321–22). It was Michel Foucault who showed that (police) control always assumes knowledge—conceptions of people, for example, that lend information about »criminals«—in order to generate, in the same vein, permanent knowledge (Foucault 1977). The etymology of the concept of control is significant in this context. »Contra« (against) and »rolatus« (roll, register)—literally »against the roll,« or »against the register«—was the Latin term for a recording practice of double bookkeeping in the Middle Ages. By the end of the 12th century, it was translated as »contre-rôle« (Fr.) or »counter role« (Engl.), and indicated the person responsible for checking the records of the export and import of funds and goods (Kluge 2001, 525). The term refers to the creation and storage of information according to a certain pattern and entered into a register so that the information can later be retrieved for the purpose of comparison. In

short, it describes the creation of an archive. To this end, many historical and contemporary studies from the field of cultural science refer to the central importance of techniques and artefacts such as files, forms or databases as essential controlling and ordering techniques for modern societies (e.g. Becker 1990; 2002; 2005; Habermas 2008; Meßner 2010; Vismann 2000). Such material artefacts demand specific patterns of action on the part of the controllers and thus become an integral component of social practice. They therefore contribute to a practical sense (Bourdieu 1987) about the whether, when and how of police investigations and interventions, and their implementation.<sup>2</sup> Similar to Plutarch's description of Solon, the lawmaker here appears to be temporarily absent, while its voice seems to echo loudly (see Vismann 2012, 30–40). The police (just as any other criminal justice actor) are not to be understood as »pure« legal addressees within the state administration, who merely enforce the law as laid down by the lawmakers. Rather, their activities are associated with the constitution of those laws which they think they are only following. Based on penal regulations, it is determined how to deal with »criminals,« while the police and/or criminal justice practice actually creates the law enforcement »needs« by means of their own activities. Although such »interpretations« by the police, in contrast to the situation of the ancient Greeks, may be determined by the courts, police control must in this respect, beyond the street level of police practice, be ascribed all meanings of the word: to dominate, to direct, to manage (cf. Boudon and Bourricaud 1991).

This mechanism seems to develop particular force during times in which police measures generate a certain focus on prevention, as we have been

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2 A reservation must be added to »whether« here, since the principle of legality is in force for the police in some judicial systems. In Germany, for example, every initial suspicion held by the police *must* be pursued according to Section 152 of the German Code of Criminal Procedure (the StPO). But even in such countries, there is some leeway: for example socially marginalized groups such as immigrants are checked by the police far more often than are Germans (Mansel and Albrecht 2003). Another example is the police pragmatically looking the other way in matters of petty crimes in order to lessen their workload.

able to see in basically all Western countries for the last three decades or so. Along with profound transformations in law, statehood, and the understanding of (internal) security (Belina et al. 2012), more intensively than ever attempts are being made to recognize and prevent the arise of criminal activity (Edwards and Hughes 2005, 353)—of course with differences in intensity depending on the type of offence (Dollinger and Kretschmann 2013). According to Ulrich Bröckling (2008, 40), »(p)recautionary practices« may be »presumably as old as mankind.«<sup>3</sup> The systematization of precaution must however be classified as a phenomenon specific to modernity. It was not until the seventeenth century that populations could be counted with the aid of statistical surveys, which allowed the consideration of people as a social entity (Hacking 1990). A »sense of danger« surrounding the government of the people (Engell, Siegert and Vogl 2009) succeeded in breaking through in the nineteenth century, parallel to industrialization and the corresponding rise in population. From this point on the people, in keeping with the development of the concept of a welfare state, are assumed to be in need of support and protection.

Since the end of the 1970s and the beginning of the 1980s, however, this understanding of the social as ensuring the welfare of the populace has been subject to a transformation—as has, concomitantly, criminal policy. Social scientists describe this in terms of a detachment from the inclusive, welfare-state direction of the criminal justice system (for one example of many see Garland 2001).<sup>4</sup> If what is known as penal welfarism

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3 Translations from the German by A.K. unless noted otherwise.

4 Criminal policy cannot be seen here as an isolated aspect. It »is bound to paradigms which are broadly anchored in culture and also characterize the dealings with other social problems, such as poverty or unemployment« (Dollinger and Kretschmann, forthcoming). Social and criminal policies in particular form a »single policy regime aimed at the governance of social marginality« (Beckett and Western 2001, 46). The development outlined here must therefore, regardless of the specifics of changes in different countries, be brought together with a more general development: that of the incipient reconstruction of the regime of the welfare state (see Lessenich 2009).

was aimed primarily at insuring individuals »against risks that society imposed upon them«—for example against the unequal distribution of resources—the need for the »defense of society against the individual who threatens it« has now moved to the foreground (Donzelot 1995, 54–55; see Selmini 2005, 309). The importance of individual diagnostics decreases; instead, monitoring gains relevance in (potentially) dangerous settings; of spaces or situations as well as of dangerous populations. In short, the concern for the individual yields to the primacy of the creation of security. Therefore, along with the regulation of the »objective« security situation, from the 80s onward, measures have emerged that are designed to deal with the population's feeling of security (see Peters 1998; Maillard and Rocheé 2004; Pauwels and Pleysie 2005; Massumi 2010). The expressed goal of such criminal policies is to create a social climate in which order and a trust in norms is rebuilt and in which no one feels unsafe. It is a criminal policy that puts much more than delinquency into the actors' field of vision: begging, idling at consumer-oriented spaces without consuming anything, any behavior which could be considered »disorderly,« »noticeable« or »abnormal«—all become public or private policing tasks (for one example of many see Legnaro 1997). The criminal justice system increasingly operates in a regulatory manner through this focus on such »incivilities« (van Swaaningen 2005, 294).

The boundaries of the principle of police control seem to have blurred—temporally, spatially and even in terms of personnel. This becomes clear in expressions that act as prognoses and diagnoses of the present such as »security society« (Legnaro 1997; Singelstein and Stolle 2008) or »culture of control« (Garland 2001). The vision of the enlightened criminal law reformer Cesare Beccaria of a penal law that extends far beyond itself—understood as a power that should »follow every citizen as does a shadow the body« ([1966] 1988, 138) seems surprisingly contemporary. When criminal justice measures begin long before breaches of law take place or even function completely independently, judicial terms remain necessarily underdetermined due to the vagueness of policing activities, and are situatively variable as regards

the will of the lawmaker. One example is the figure of the potential offender (Gefährder, literally »endangerer«) in German criminal policy. Any person categorized as such may be put under observation without their knowledge, although there is no concrete threat or suspicion that would be relevant in a court of law. It is enough »when certain facts justify the assumption that they will commit a politically motivated serious criminal offence, especially as defined in Section 100a StPO,«<sup>5</sup> whereby Section 100a of the StPO, the German Code of Criminal Procedure names twenty different groups of criminal offences. In such cases, what is systematically missing in the law is a »clearer and more exact message and mediability,« as Larenz ([1960] 1991, 313) formulates in his juristic methodology for the interpretation of law—which makes the aspect of reference to extrajudicial norms even more central as regards police work.

Within the context of the impressions made by this—without a question—remarkable extension of the »police principle,« one current trend in research must be taken into account. Said tendency presents criminal policy developments in a peculiar coherence, so that the impression is created that crime and insecurity function permanently as a trump card that will always win in a securitized discourse (see Fuchs and Kretschmann 2012, 421). Especially in sociology, but also in history—of course always in reference to and in interaction with interdisciplinary and postdisciplinary research fields such as security studies, urban studies, migration studies or surveillance studies—in many scientific works, criminal policies and crime control appear to be relatively one-dimensional and self-contained. Not only are they depicted in relatively identical ways in different fields, but they also constantly and inevitably seem to amalgamate into the social (for a critical analysis of this trend see Fuchs and Kretschmann 2012; Kreissl and Ostermeier 2010; Rothe and Schmieder 2010; Wiedemann 2011; Zedner 2001). Such analyses, however, which in extreme cases transport, albeit with critical intentions, a narrative of a threatening world of total control, do not always do justice

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5 *German Bundestag Document* 16/3965, December 22, 2006.

to the complexity of the developments in the field of criminal justice, including police work. Neither does the security society exist, and here we conform to the argumentation of the prognosticators and diagnosticians named above as regards content, nor is there a complete culture of control (see Kreissl and Ostermeier 2007). Not only is the resonating voice of the lawmaker hardly ever heard uniformly within police institutions; measures are not at all uniformly implemented, and there are always problems in implementation.

But how can this analytical tendency towards uniformity and dystopian visions be explained? Certainly not without a look at the favored theories and dynamics in this field of research; namely, a series of poststructuralistic approaches, at whose center lies an especially broad concept of power, as well as a special interest in, simply put, internalized forms of control.

Neither the theoretical approaches nor the research interests are problematic in themselves. For a long time they even served to fill a gap in social science criminology, and functioned for a while as a corrective, which is why they became so influential in this field and even, as in Germany, hegemonic. In this respect, in terms of the history of the discipline, they had an important function. First and foremost the Foucauldian concept of power as a strategic and productive resource went far beyond Max Weber's notion of the same. Functioning as a dynamic element within as well as outside of the state apparatus, power could be seen as an element »which is permanently created even in the smallest cells of society« (Schroer 2000, 113), power could be viewed initially as a strategic and productive resource. The focus was no longer only on how the actors of the state monopoly of violence enforce the state institutionalized »will, also against the resistance of others,« to use Max Weber's words (1980, 28), but rather how state and quasi-state institutions managed to norm bodies and identities (see Foucault 1977). The police and other criminal justice practitioners were from now on analyzable not only by means of negative sanctions, but could also be associated with subjects' embodiment of criminal justice specifications. Following the Foucault's late governmentality studies (for example Dean

1999; Rose and Miller 1992; Rose 1999; Lemke 2011), an equally broad but somewhat differently expressed concept of power moved into focus—namely governing as leading or managing people (Menschenführung). It was the strength of this broad concept of government that it could highlight »the connection between abstract political rationalities and the microtechniques of everyday life« (Lemke 2000, 40) as the correlation of external control and self-regulation. By shifting »the reciprocal constitution and systematic coupling of power techniques, forms of knowledge, and subjectification processes into the center of the investigation« (Lemke 2000, 31), it could be shown how policies and politics of crime and security were able to motivate actions on the micro-level in line with a specific governmental rationality. With this concept of a responsible readiness for self-normalization, which Niklas Rose famously designated »governing by freedom,« it was possible to analyze the way in which control undergoes an intensification by not only remaining effective far beyond the moment of controlling observation, but also by inciting independent assimilative actions in regard to permanently changing normalities. By the same token, it was possible to recognize and analyze, against this backdrop, how the logic of governing »through crime« (Simon 2007) or »security« (Valverde 2001) could surface in other areas of society, far from the fields originally associated with policing.

The »discovery« of such »soft« forms of control in criminal justice shaped certain research interests for a long time and these aimed to identify this principle in all possible areas of society. At the same time, having established »ruling system(s) and counter-regime(s) on the same level« (van Dyk 2012, 206) clearly complicated the analysis of elements such as »not-control.« The assumption that programs and rationalities concerned with the creation of conformity incorporate themselves in individuals makes it nearly impossible »to (still) distinguish the active, self-determined subject from a socialized member of society« (Bröckling and Krasmann 2010, 31). It is almost as if the problem of the criminological theorists of social control in the 1970s and 1980s—the analytical delimitation of social control—is repeating itself; of course in a changed, updated form. At that time too, a theoretical innovation—the designa-



tion of people as criminals—caused stigmatizing effects and after-effects that harbor the danger of ultimately making us unable to distinguish social control from social order or social organization. Just which of the countless designation processes, including subsequent self-reinforcing tendencies, had control character and which did not could hardly be determined analytically. For this reason Stanley Cohen (1985, 2) criticized the concept of social control as an insignificant »Mickey Mouse concept« and, like many scientists of that time, insisted on discarding it completely as a sociological concept (see for example Lowman et al. 1987, 4).

Of course, neither critical criminology nor, before it, the sociology or history of deviance and social control can be reduced to the Labeling Theory. Nor can current related research within history and sociology be broken down into the various »Foucaults.« Nevertheless a certain tendency can be perceived, illustrated by the social science research on criminal and security policy outlined briefly above, and for the argumentative goals of this text this is the decisive point. For in light of this background, it can be shown that the broad Foucauldian understanding of power, at first so revolutionary for the results of research on crime and security, seems to have created a phenomenon that Thomas Lemke, in another context, termed »implicit finalism.« This denotes the problem of assuming »a continuous rationalization and making more effective« of (self-)control (Lemke 2000, 41), and thus suggesting an increasingly deterministic tendency in the character of strategies of (self)regulatory power. Additionally, in other studies police control and/or principles of police control seem to be reflected upon in the same way in various social fields or in regard to various social groups. Conversely, in the same manner these research-specific dynamics occasionally inspire works without any special theoretical implications »as long as the relevant scientific community accepts without question the particular problem-solution« (Kuhn [1962] 2012, 47), to put it with Kuhn in his early paradigm theory—especially when they are similar to common sense ideas or images presented by the media. The relevance of the analysis of »liberal« forms of control is at present undisputed; as

quite a lot of very important studies show. It does however seem that in certain dynamics its banalization has overshoot its corrective function.

Counter-tendencies therefore prove the rule. In the past years, more and more attempts have been made to counteract this development—even inside of the above-mentioned theoretical paradigms—and many papers, even those by social scientists dedicated to this paradigm, were never part of the problem illustrated here. For in contrast to earlier conceptions of social control, subjects in the Foucauldian conception of power are not conceived as »reactive fools« (von Trotha 1977). In the words of Foucault, power, because it is ubiquitous and not tied to a certain class, is unimaginable without resistance (Foucault 1987, 255–56 and 259–61). In a similar manner, Judith Butler has shown that being »subjected« both subjugates and empowers individuals at the same time (2001, 17). It becomes clear against this backdrop that the »sur-veilled« individual, despite the controlling interrogation and observance carried out »from above« that the term appears to suggest, can be conceptualized not only as an object of control, but also as an active element in a complex context. On the one hand, this »subject« paradoxically practices social control him- or herself (sometimes by an individual interpretation of the law) and on the other hand the individual uses techniques that could expand his or her scope of action. Similarly, Andreas Reckwitz has shown that discursive and non-discursive patterns of order must remain hybrid in their constitution (2006). Contradictions, objections, and counter-projects, as well as quiet moments of refusal, rather form a part of the constitution of practices of control and of political programs. And contradictions exist not only between controller and those controlled, but also between and within controlling institutions and their actors. Capturing the plurality of criminal justice programs and measures and the willfulness of the subjects addressed by social control is therefore essential to providing information about the power of controlling activities, about problems in their execution or also the conditions of their »success.« Polyphonies are constitutive for the governing of crime and security in an agonistic way; rather than blocking one another, they enter into a mutual battle and mutual incitement (see Foucault 1987, 256;

O'Malley 1996). In execution as well as in resistance, control has many facets.

»The Politics of Control and Resistance« is therefore the topic of this special issue. With it, we wish to take a critical look at the analysis of internal and external losses of control, oppositions, resistances, etc. in empirical analyses of criminal justice systems and of police practice in particular. For tendencies—in the most extreme cases—of certain negative teleologies of control and progress in some analyses, or the standardizing identification of the implementation of the same control principle in different social areas, hold the danger of mirroring external conditions in the research instead of, as Heinz Steinert expressed it (2008, 162), using the perspective of research to reflect on what appears to be completely normalized or self-evident. That applies e.g. to »crime« or »criminals,« but also to non-articulations of certain aspects of criminal justice. In both cases, a requisite, object-related openness for perspectives, concepts, and categories is sometimes missing. Research activities in criminal justice are thus not constituted in a way that enables empirical data to oppose and irritate theory. The central question is therefore: how can an alternative picture be drawn that is capable of making visible the heterogeneity and/or the hybrid character of ideas, programs, and measures of control? And: How can we work on criminological topics without analytically obstructing spaces of possibility for resistance, opposition etc.?

The articles in this issue attempt to give answers to these questions. Some contributions have a strong theoretical focus, but articles are also included with a clearly empirical aim regarding the analysis of criminal justice regimes. The authors make allowance for the historical and current developments mentioned above when they ask how police or criminal justice control has been carried out historically and how it is carried out in the present. They investigate the consequences and effects of law enforcement beyond changes in laws and crimes; also taking into account the fact that (police) control always also comprises inconsistencies, contradictions and oppositions, just as it will always be confronted with covert or open resistance from different social sectors.

Just as interesting as analyses of the manner in which controlling measures and reflectivity function are investigations that focus on the malfunctioning or failure of controlling activities. Intended or unintended breakdowns of the controlling process, functional errors, inconsistencies, and overt or covert opposition constitute only a few examples. In all contributions, attention is paid to the reverberating voice of the lawmaker, with all of its ambivalence and inconsistencies.

The first article devotes itself to the topic in a mainly theoretical manner. **Matthias Rothe** refers to the interminability of sovereign control. His article therefore focuses on the critique of the concept of sovereignty of the kind that has evolved as a result of the reception of Carl Schmitt, Walter Benjamin and Giorgio Agamben. Within the field of analysis of the criminal justice system, this concept lies at the heart of a »critical sovereignty discourse,« wherein it is a key concept. Rothe shows that a crucial stage of the genealogy of this discourse is Kant's attempt to supplant the element of personal force, traditionally the hallmark of sovereignty, with the law. Borrowing from Jacques Derrida and late Michel Foucault, he therefore calls for a modification of the concept of sovereignty. He argues that the present »critical sovereignty discourse« would profit by applying the assumption of the ontological impossibility of sovereign power. Rothe illustrates this by taking two aspects of the US criminal justice system—prosecutorial discretion and mandatory sentencing—as an example. **Tiffany Bergin's** article shows how certain rationalities and practices can become dense. It critically assesses the reception and application of cost-benefit analysis (CBA) in penal and criminal justice in the Anglo-American countries, which have found a heightened relevance within the last three decades. Today, economic thinking plays an important role in the way cases in the criminal justice systems are handled—whether or not this happens on the basis of theory-led incentive programs or has other roots. Bergin begins with the history of CBA in different policy domains and deals in more depth with ways of applying CBA in criminal justice. In contrast to Bergin, problems of control are the point of departure of **Klaus Weinhauer's** historical contribution. He draws on police culture and police practice in West

Germany and England in the period from the 1960s to the 1980s. In his analysis, the author shows how police practices were assailed in the 1980s by local protests that had transformed into urban protest while tenacious police cultures made it impossible to rashly convert police tactics. The threat of a loss of control could be dealt with only at a very late stage. However, in the end, the case studies in Weinbauer's paper demonstrate the successful adjustment of police control tactics to social change. Weinbauer's comparative study enables him to mark differences between police cultures and practices, but also to show similarities. The contribution of **Andreas Glaeser**, in contrast, illustrates a process that in the end led to a collapse of control. His example is the secret police of the former GDR, known as the »Stasi.« As is well-known, in 1989 the civil rights movement released the crucial impulse that led to the fall of the GDR. Glaeser develops an understanding of institutions as being constituted through ongoing and dialogic, knowledge-based negotiations that can condense within a certain logic, but at the same time always stay polyphonic. Against this background, Glaeser can argue that the knowledge produced by the Stasi and the coercion it exercised did little to enhance the power of the ruling party. To the contrary, its actions helped to nourish a fantasy of control which ultimately undermined the party state's intelligence capabilities and aided the radicalization of dissidents.

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