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Editors' Introduction to the Special Issue, "Governing Through Human Rights and Critical Criminology"

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Since the Cold War, human rights[1] have become the global embodiment of a contemporary "ethics of progress" or "secular religion" (Cohen 1993: 491) and a vital framing with which criminology needs to engage. Yet, under globalization, and as the United States—at least temporarily—abandons its role as a human rights defender, these rights face deep challenges, not least due to post-9/11 drives toward securitization. Some even predict rights may have entered their "end times" (Gearty 2017; Moyn 2018). This special issue of *Critical Criminology: An International Journal* advances critical approaches to the human rights "turn" in criminology (Whitty and Murphy 2013) by examining rights not only as a resource of resistance, but also as a means of governance. This special issue does so by considering links between human rights and "governmental criminology"—a "variable approach to criminology influenced by Foucault" (O'Malley 2009; see also Garland 1997; Williams and Lippert 2006)—and with its notion of "governing through" rights.

Critical criminology and this journal constitute a key space to explore rights in relation to crime and harm, as well as to pause and contemplate the seeming rush to embrace human rights among criminologists. Due to its roots in neo-Marxist political economy, critical criminology long has been circumspect of human rights—from its earliest days of viewing rights (and forms of law) as ideological camouflage for class oppression and exploitation under capitalism within structuralist accounts. Radicals viewed the close link between rights and liberalism as an ideology with suspicion, although more nuanced perspectives on human rights influenced by Marx have since emerged (see, e.g., Marks 2008). Critical criminology, as it has appeared in this journal, has also evolved into a rich array of perspectives concerned with a broad spectrum of harms not limited to those stemming from capitalism. Critical criminology has come to include attention to inequities and

[1] We define "human rights" as the "fundamental rights that humans have by virtue of being human." We appreciate, however, that the scope and justification of human rights are highly contested and subject to different interpretations.

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injustices among *inter-alia* different ethnicities/races, genders, physical abilities and sexual orientations (Brisman 2019). Consonant with these developments, critical criminologists in recent years "have developed an interest in and appreciation of victims of human rights violations" (DeKeseredy 2017: 161).

Yet, we wonder whether critical criminology's role is necessarily to be the *immediate* "guardian" of human rights (Mehozay 2018), particularly if the need to protect human rights in all instances is taken as self-evident. Indeed, most empirical inquiries featured in this issue reveal the introduction of rights in ways that signal a danger in adopting this role. Thus, we agree with Jeff Ferrell's recent (2019) defense of resistance in this journal in which he unequivocally states: "As critical criminologists… our role is to defend the practice of resistance…." Articles in this issue, however, show that human rights are not always obviously introduced or practiced as a form of resistance. Moreover, if critical criminology as a form of knowledge supports human rights protection automatically and without reflection, as laudable a goal this may be in some corners of criminology, it raises questions about the extent to which critical criminology becomes a form of power/knowledge (Foucault 1977) in search of the truth of human rights. To what extent does critical criminology as immediate protector begin to generate space for the exercise of state domination in ways identified in the articles that follow? Would critical criminology more fruitfully foment resistance by lending itself to fulfilling human *needs* rather than immediately protecting human *rights* (see Lippert 2006: 95) in any instance, especially given the "illimitability of rights" in Foucault's thought (Golder and Fitzpatrick 2009: 124)? These are difficult questions, too lofty and complex to be answered in an issue introduction. But in introducing this issue and the articles comprising it that reveal how human rights may be "governed through," there is a sense in which, at least, some human rights may nonetheless ultimately gain some protection from nefarious deployments, such as when they become inserted and deeply entangled in a web of state counter-terrorism measures (see Hamilton and Lippert 2020).

This special issue of *Critical Criminology: An International Journal* features seven articles about the exercise of human rights as enshrined in national instruments, as well as in international conventions. Aligned with *Critical Criminology: An International Journal*'s aim to encourage alternative perspectives, this special issue provides cutting-edge analysis of human rights in relation to criminalization and securitization. While critical criminologists hold various views on human rights, the articles in this special issue provide new space for critical engagement via innovative perspectives in some way informed by the tools of "governmental criminology." Previously, criminologists have embraced the notion of "governing through" as a key theme in work ranging from Valverde's (2001) "governing through security" to Jonathan Simon's (2007) extensive work on "governing through crime." Other examples abound. Here, criminologists have sought to demonstrate how security and crime categories are deployed to extend control in one way or other. Of special importance, given the paradoxical rise of human rights in tandem with securitizing and criminalizing processes (Hamilton 2018, 2019), is that rights can be "governed through" and potentially extend governance as they simultaneously emancipate (Sokhi-Bulley 2016). For example, Lippert and Walby (2016) have argued that the discourse of privacy rights, implicit in public notification of proliferating video surveillance in public space, while serving to reinforce those rights, also produces conditions for authoritarian governing practices to expand. The issue of "governing through" rights also raises questions about rights that act less as a means of combatting oppression and more as a "technology of governmentality" (Sokhi-Bulley 2016). If, as some contend, these objectives can produce negative consequences (see, e.g., Sandy2013), there may be cause for considering a contraction rather than expansion of rights. This would be a *release* rather than an *embrace* of

rights, thus reversing the trend toward greater rights recognition evident in recent decades consistent with liberalism, and perhaps supporting, though not without its own dangers, what Foucault (1988) discussed as "pastoral" needs instead.

"Governmental criminology" continues its influence (Lippert 2017), including in this journal (see Laurie and Maglione 2019), but we believe its themes, conceptual tools, and focus on governing practices can be reinvigorated and extended to engage with rights in critical criminology and beyond. We think this special issue breathes some fresh air into governmental criminology especially if, as Walters (2012: 54) writing about governmentality studies, more broadly, remarks, it is viewed as a "living research field and not merely a footnote or annex to the work of Foucault the thinker." Foucault's influence remains and, as an elusive thinker, his ideas were constantly evolving. Legal scholars, such as Golder (2011: 286), have detected in his later work a "critical affirmation" of rights discourse, according to which he neither rejects nor embraces rights, but rather engages "critically within and against existing rights discourse." In this regard, a governmental approach to rights can pry open possibilities for a politically richer and more self-reflexive rights discourse. Here, we would also note Valverde's (2017) recent work on Foucault that holds up *governmentality*—not *discipline* and/or *surveillance*, as is often assumed—as this theorist's main legacy for criminology. She points criminologists (and socio-legal scholars) in the direction of fresh analytical pathways that resonate with newer areas of inquiry like green criminology (see Fitzgerald and Spencer 2020). We agree, more broadly, that governmental criminology and its potential analytical value is nowhere near exhausted. While criminology has begun to engage with human rights, as evidenced by recent books (e.g., Amatrudo and Blake2014; Savelsberg 2010; Weber et al. 2016) and articles (e.g., Mehozay 2018; Whitty and Murphy 2013), to date, governmental criminology's themes and concepts have not been used much in the vast human rights field (Lippert 2016).

One reason for governmental criminology's continued relevance is its ostensible capacity to inquire beyond traditional criminal justice and prevention realms, which is a feature of critical criminology too (Brisman 2019) and which is exemplified in the contributions to this special issue that range from undercover policing to corporate harm to counter-terrorism programs. This special issue seeks to push the boundaries of our knowledge about human rights discourses and criminology and, at the same time, help revitalize governmental criminology that can, at a minimum, assist "social contestation" (O'Malley 2009) and resistance. Several articles demonstrate that governmental criminology can embrace, or at least shake hands with, normativity, in what constitutes crime and what is revealed through deploying its concepts and themes. This is evident in several articles in this issue that adopt a governmentality analytic in relation to rights, but which then combine it with additional perspectives, such as structural violence and green criminology, to augment analyses. At least one article elicits a more agnostic view on the surface, but by choosing a particular subject matter, ultimately makes overtures to a normativity friendly to critical criminology.

The significance of themes like "governing through," frequently invoked in the criminological literature, is in making more intelligible the detailed workings of human rights claims and decision-making in the crime, criminal justice and security fields, how they are changing, as well as how they are made possible. One of us noted recently in the *Routledge International Handbook of Criminology and Human Rights* (Lippert 2016) that examining human rights from within governmental criminology may provide more detail about subjectivities, mentalities and mundane means driving these developments, thereby rendering practices amenable to (while not guaranteeing) progressive intervention and reform. This may be achieved by, for example, revealing political barriers to rights engagement or showing how human rights become peculiarly and nefariously intertwined with criminalization

and securitization, thereby offering better understandings of these troubling processes. This special issue features critical, cutting-edge articles that vary widely in their substantive topics but share a common embrace of the governmental criminology toolkit (Lippert 2017). They cover a remarkably rich range of domains, revealing the expanse of critical criminology and exciting possibilities for further inquiry consistent with some tenets and tools of "governmental criminology." These include counter-terrorism; environmental harm; risk, securitization and audits; technology, privacy and surveillance; and undercover policing regulation—all of which are arguably among the most cutting-edge domains of criminology today. The contributions are decidedly international, showing the wide relevance of governmental criminology, with articles about Australia, Canada, England and Wales, Mexico, Scotland and the United Nations (UN).

Broadly speaking, all articles in this issue engage with forms of "human rights proofing mechanisms" now imbricated in states' implementation of, and compliance with, rights obligations. One such mechanism is, of course, the regulatory body, charged either directly or indirectly with monitoring rights compliance, and which, as Molnar and Warren (2020) observe in their article in this issue, have proliferated in recent years with the advent of "new public management." In the surveillance sphere, these types of "once removed" (Hunt and Wickham 1994) forms of regulation oblige state authorities to report on their use of surveillance powers in ways that ensure liberal principles of human rights, including privacy rights, are upheld. As Molnar and Warren argue, however, these reports are simultaneously integral to the reproduction of domination, through processes of quantification and (obscure) classification, which reveal little about the actual scopic regime of visibility specific to apparatuses of surveillance. By privileging lawful compliance with second-order accountability regimes, security governance audits both deflect attention away from the construction of dangerousness by the state and legitimize a broader apparatus of security governance, thus providing an important "avenue for how the state renders itself morally legible toward the question of rights."

A similar emphasis on accountability mechanisms as a governmental technology can be found in Estévez's moving account of criminal and state violence in Mexico. Drawing on the postcolonial notion of necropolitics, Estévez (2020) argues that in Mexico, human rights discourses have become a technology used to regulate and normalize the consequences of criminal and state violence, while administrating mass produced death. Like Molnar and Warren, Estévez identifies how the "institutional complex" in Mexico (the Mechanism for the Protection of Human Rights Defenders and Journalists and the National System for Victim Support) shifts attention from root causes of the violence to the correct functioning of this apparatus. This is achieved through the complexity of the institutional machinery, the construction of expert and victim subjectivities, the collection of statistics, and the reification of justice via material goods, such as panic buttons, scholarships and stipends. In short, Estévez contends that Mexican necropolitical governmentality instrumentalizes human rights discourse through what she calls the "apparatus for the management of suffering."

The limits of regulation as a governmental technique for ensuring rights compliance are also starkly illustrated in Fitzgerald and Spencer's (2020) article on the Volkswagen emissions fraud case (also known as "Diesel gate" and "Emissions gate," which began in September 2015) and the governance of emissions in relation to automobile users and producers. The authors use the case to show how the failure of the Canadian state to monitor and punish emissions violators, including the failure to enforce even modest procedural rights within the regulatory framework, casts doubt over the extent to which rights discourses can reconfigure existing approaches to environmental violence. What is especially

interesting about their analysis is the extent to which regulatory techniques, such as those in the area of environmental protection, are permeated with neoliberal rationalities concerned with not governing and/or intervening too much. This approach, reflecting that of Estévez, eschews examination of deeper structural problems or "moral justice" in favor of attempts to "govern through individuals." Thus, in Canada, reliance is placed on civil environmental lawsuits and nongovernmental organizations (NGOs) in lieu of adequate regulatory enforcement, while in Mexico, victims are encouraged to pursue financial compensation over punishment of the guilty.

On the other side of the "proofing" coin, one finds the judiciary, who are usually called upon to adjudicate *ex post facto* deployments of powers implicating human rights. Engaging with the issue of the legal governance of rights, Murphy (2020) explores how the architecture of law promoting rights operates to reveal "rights claims as hollow, impeachable and ephemeral." Using the regulation of undercover police operations as an example, Murphy considers the intersection among three core rationalities within legal systems—rights, derogation and authorization—as critical moments in the governance of rights. The article's key contribution is its discussion of how law subjectifies or constructs identity. For Murphy, the construction of a normative framework through which the process of adjudication can take place is not just *in personam*; it also extends to a composite of *temporal* (*ex ante*, *ex post*), *spatial* (crime scene, location of operation) and *epistemic* (reasonableness, risk) localities. As he argues, without this process of identification the critical binary logic of legal assessment (e.g., lawful/unlawful; guilty/not guilty; suspect/citizen) would be far less efficient.

A similar focus on law's capacity to subjectify, and thus "read down" rights, is featured in Armstrong's (2020) article on governing through rights in the Scottish penal context. Focusing on a key UK Supreme Court case, *Brown v The Parole Board for Scotland et al.* (UKSC 2017), she examines how Brown, convicted of manslaughter when he was sixteen years old, failed in his claim of unlawful detention (in violation of Article 5 of the European Convention on Human Rights (ECHR)), despite being unable to access the offender behavior courses he was told to take to reduce his risk. Armstrong draws on frameworks of governmentality and structural violence to show how human rights can become part of a punitive tool of penal control. In her analysis, this is achieved via two judicial subjectivities—the first, a particular concept of rehabilitation that is driven by a logic of the responsibilized prisoner (and facilitated by a balancing test that moderates the state's duty by the prisoner's conduct) and the second, the sentence itself as an idealized subject. In this way, rights frameworks, combined with a peculiar conception of rehabilitation or care, are seen to encourage and constitute repressive and intrusive practices of confinement.

Another key Foucauldian concept deserving of attention in the judicial sphere is "technologies" or the methodical and material ways of allowing forms of governance to operate (Lippert 2016). As Jochelson and his co-authors (2020) rightly point out in their article, a legal test is one such technology. The authors describe the creation and deployment of *ex post facto* ancillary police powers by the Canadian Supreme Court, largely as a "gap filling" measure to meet ad hoc interests of the police. The Canadian Charter of Rights and Freedoms, while held up as bulwark against state intrusion, in fact facilitates intervention, with the new legal test created by the Canadian Supreme Court acting as a "technology of precrime."

Straddling both judicial and regulatory arenas is Hamilton and Lippert's (2020) article that examines, in the counter-terrorism context, features of both modern legal adjudication and "human rights proofing" mechanisms that simultaneously contain governmental interference and entrench securitization. The article uses two case studies—the role of human

rights within the UN after 9/11 and use of coercive non-trial-based measures in the UK—to illustrate the emergence of rights as a response to a given crisis or "problem of government." Similar to Estévez, Hamilton and Lippert explore "tactics" like the complexity of the assemblage and expert knowledges through which rights may be transformed into an apolitical *technical* issue. Hamilton and Lippert identify two governmental "techniques"—the judicial "balancing test" and "ECHR memos" put to parliamentary committees scrutinizing counter-terrorist legislation—that help bring these measures into being.

Together, the articles in this special issue paint a stark picture that shows that when it comes to crime, policing and security, rights contort to befit new arrangements and demands. For governmental criminologists, the key question must be *how* this is made possible, and their task is to identify some answers to this question. The notions of *identification* and *subjectification* in Murphy's piece, for example, provide a clue for how critical criminologists can begin to solve the puzzle presented by the "binary logic of legal assessment." Related concepts of *proportionality* and *balance*, elaborated by Hamilton and Lippert, Armstrong and Jochelson and his co-authors, and so embedded within the legal and judicial calculus, demand more historical and sociological investigation. In their articles on monitoring bodies, Estévez, Molnar and Warren, Fitzgerald and Spencer, and Hamilton and Lippert offer vital insights, too. They direct attention to the administration of rights through regulatory bodies, not least through careful inquiry into conditions that made these rights solutions possible and the seemingly mundane processes of classification, quantification, through which rights are rendered *technical*, and thus *governmental* (Sokhi-Bulley 2016).

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