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Contrology and Criminal Law: Genesis, Current State, Perspectives

Kontrologia a prawo karne. Geneza, stan obecny, perspektywy

ABSTRACT

The present day brings a number of significant challenges for the state and the law, especially in the context of questions about the relationship between the state and the citizen. The development of science and technology provides wide opportunities for extending the methods of surveillance and control. State control, which is exercised through the instruments of criminal law, has been a subject of interest in criminology and criminal law for a long time. During the crisis of criminal law and criminology, which has been going on for over four decades, the question of the future of criminal law and criminology becomes utterly relevant. Progressive dehumanization causes that a person becomes a passive object of influence. In the long term, the belief in dealing with crime and effective crime management is consolidated, and in fact the phenomenon of delaying solutions is exacerbated. Social costs are rising. Automated technological justice is established. Doubts about the verification of control mechanisms are deepening. Who will control the controllers? Will the science of criminal law and criminology be replaced by a new science – contrology? Do questions about the etiology of crime, and especially the philosophical and ethical dimensions of punishment, lose their sense?

Keywords: contrology; criminology; crime; state control

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INTRODUCTION

The article attempts to answer the question of the future of criminal law and criminology. Nowadays, a number of important, fundamental questions are being asked in this area of interest. What is the future of criminal penalties and therefore of criminal law? Will criminal law be reduced to a specific law of risk management and crime problems? Has the study of the causes of crime at the threshold of the 21st century lost its relevance? Will criminology be reduced to a subsidiary role in state's activities related to preventing and combating crime?

The first two issues arise from critical reflection on criminal punishment. The dispute between retributivists and utilitarians over two centuries has not brought a satisfactory resolution. Reflections found in Anglo-Saxon philosophy and legal doctrine, which seem to be the most responsive to contemporary problems, are most distinctive in this respect. The Anglo-Saxon contribution to the development of penitentiary thought is undeniable.[1] For over two centuries, Europe referred to America in this regard, but interesting data and conclusions come from Europe as well – and they deserve examination.

The year 1987 was an important moment in the development of Western criminal law theory, when the US Federal Sentencing Guidelines were issued. An interesting strategy was adopted in the guidelines. Recognizing the internal contradiction between utilitarian and retributivist theories, the attempts to combine concepts or ultimately opt for one of the sides of the dispute were abandoned. In its introduction, the Federal Commission that drafted the guidelines acknowledges the difficulties in defining the purpose of punishment. Indeed, it is stated that: "A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment". The Commission continues:

> Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of "just deserts". Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical "crime control" considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.[2]

The Commission stated that it was able to avoid this philosophical deadlock: "[…] as a practical matter, however, this choice was unnecessary because in most

[1] Cf. W. Zalewski, *Czy rzeczywiście istnieje „polski model zakładu karnego"? Uwagi historyczne i prawno-porównawcze*, „Humanistyczne Zeszyty Naukowe" 2019, no. 22(1), p. 203 ff. and the literature on the subject cited therein.

[2] As cited in W.R.P. Kaufman, *Honor and Revenge: A Theory of Punishment*, Dordrecht – Heidelberg – New York – London 2013, p. 19 ff.

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sentencing decisions the application of either philosophy will produce the same or similar results".[3] As you can see, the lowest common denominator of both concepts is set at the inch level of crime control.

Another reason for taking up the topic are the fundamental questions about the sense of the existence of a science related to criminal law – criminology. Some authors question significancy, and even the sense of this science, with the justification that it has not yet developed a uniform methodology.[4] It is pointed out that while we can talk about certain segments of criminological issues within the framework of law, psychology, sociology, pedagogy, etc., devoted to deviations or crime, there can be questioned a separate science – criminology. Criminologists were called "kings without land"[5] because, as pointed out by critics, there was no common denominator, no glue that would bind the indicated fragments into a separate science.

GENESIS: ON THE IMPORTANCE OF THE BREAKTHROUGH IN THE 1970S AND 1980S

It has been indicated for some time[6] that in the late 1970s and early 1980s criminology began to depart from its sources, i.e. the study of the etiology of criminal behavior of individual perpetrators. Many researchers have turned their attention to predicting behavior using a variety of predictive techniques. Some have noted that while the main concern of twentieth-century "criminal modernism" was to understand and scientifically correct criminals, at the end of the previous century, they were increasingly abandoned to focus on managing their behavior,[7] controlling their behavior, and minimizing the harm they generated. Criminals began to be perceived almost exclusively as objects. However, after several decades of studies, their effects are bound to surprise. Further examination shows that history seemingly came full circle, ultimately boiling down rehabilitation and counteracting recidivism.[8]

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[3] *Ibidem*.

[4] More on the critique of the scientific nature of criminology and its critics, see K.-L. Kunz, *Criminology – a scientific field of its own? Thoughts on the discursive formation of a discipline*, 2011, www.researchgate.net/publication/316990498 [access: 11.02.2021].

[5] As in H. Mannheim, *Pioneers in Criminology*, New Jersey 1972, p. 1.

[6] Cf. P. O'Malley, *Crime and Risk*, London 2010, p. 1 ff.

[7] Cf. S. Cohen, *Visions of Social Control: Crime, Punishment and Classification*, Oxford 1985; J. Simon, *The emergence of a risk society: Insurance law and the state*, "Socialist Review" 1987, no. 95, pp. 61–89; idem, *The ideological effect of actuarial practices*, "Law and Society Review" 1988, vol. 22(4), pp. 771–800.

[8] See literature review in D. Wójcik, *Stosowanie w postępowaniu karnym narzędzi diagnostyczno-prognostycznych służących oszacowaniu ryzyka powrotności do przestępstwa*, „Prawo w Działaniu. Sprawy Karne" 2013, no. 16, p. 59 ff.

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It is impossible to fully understand the current situation in the presented area without referring to the 1960s and 1970s and to what happened then in criminology and law. Poland, under the totalitarian communist regime, did not participate directly in these changes, but it still left an impact, and even many years later, it is impossible to fully comprehend the current understanding of the subject without referring to them, even if briefly.

The aforementioned time is a period of deep crisis in criminology. Leading criminologist D. Garland pointed out, that what had happened at the time and what happened afterward exceeded expectations. As he wrote: "[…] rereading the government documents, research reports and expert commentaries of that period, one finds a set of assumptions and expectations that have been completely confounded by subsequent events".[9] The dimensions of the crisis were enormous and its effects continue to do so today. The previous criminological consensus in particular has collapsed nearly entirely.

Until the 1970s, everything has been clear, more or less. To quote D. Garland again:

> As recently as 1970, those involved in the business of crime control shared a common set of assumptions about the frameworks that shaped criminal justice and penal practice. There was a relatively settled, selfconscious, institutional field and the debates and disagreements that occurred operated within wellestablished boundaries.[10]

It is argued that there is no such agreement today. The criminal policy is unstable, with an unprecedented amount of legislative action, with many discrepancies in the ranks of theorists and practitioners, and with many conflicts between experts and politicians. The lines of the debate seem blurry and change rapidly. Nobody is sure about fundamental issues like which views are radical and which are reactionary today.[11]

It can be argued whether it is really impossible to distinguish between the lines of divisions of views on crime, especially left-wing and right-wing views. Nevertheless, it is true that the criminological consensus has been eroded. From the perspective of half a century, it seems that this fact should not be assessed negatively. Years later, the debate was enriched, especially with neurobiological elements,[12] but the message from criminologists to lawmakers has not been, and still remains, not identical. The lack of a unified opinion as to the causes of crime

[9] D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*, New York 2002, pp. 3–4.

[10] *Ibidem*, p. 4.

[11] See *ibidem*, p. 4 ff.

[12] For example, see W. Zalewski, *Biologiczne i biosocjologiczne uwarunkowania przestępczości*, [in:] *Nowe kierunki w kryminologii*, eds. E. Drzazga, M. Grzyb, Warszawa 2018, p. 27 ff.

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was one of the circumstances that contributed to the change in the way criminal policy is shaped, in which experts remain overshadowed by politicians. The modern approach to crime can be seen as a form of populism.[13]

Until the 1970s, the sociological approach was central to criminology, especially in its positivist trend, highlighting the social causes of crime. E. Sutherland's theory of differential associations was dominant, R. Merton's theory of anomie was popularized, the conflict of cultures and the conflict of classes were pointed out, etc.[14]

At the same time, however, from the 1950s onwards, new criminologists, with a different approach, criticizing earlier etiological research began to appear in opposition to the aforementioned trend.[15]

Their findings, especially in the field of criminal statistics, forced the verification of the current picture of deviation and crime. It was argued that the fascination with the possibilities offered by statistical methods was a thing of the past. The prevailing opinion was that crime statistics in every country are incomplete and easy to manipulate. In fact, the quantitative data collected tells more about the activities of law enforcement agencies, rather than about actual crime. A significant number of prohibited acts is not included in statistical statements, for various reasons, and becomes the so-called dark number. Conclusions drawn from the findings mentioned before led to the assumption, that the focus of scientific interest should be the functioning of a social system of crime control, mainly courts, prosecutors, police and prisons. The emerging sociology of the judiciary began to supplant traditional criminology, which was perceived to be on the decline.[16]

The social stigma that had emerged in this period shifted the focus of criminological research. The search for answers to the question about the causes of crime changed to the study of mechanisms of social control, the functioning of the judiciary and the theory of criminalization. The latest manifestation of this approach was the attempt to rename criminology into "contrology".[17]

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[13] See idem, *Populizm penalny – próba zdefiniowania zjawiska*, [in:] *Populizm penalny i jego przejawy w Polsce*, eds. Z. Sienkiewicz, R. Kokot, Wrocław 2009, p. 24 ff.

[14] Cf. especially A. Siemaszko, Siemaszko, *Granice tolerancji. O teoriach zachowań dewiacyjnych*, Warszawa 1993; J. Błahut, A. Gaberle, K. Krajewski, *Kryminologia*, Gdańsk 2004. From foreign works, especially see R.L. Akers, Ch.S. Sellers, *Criminological Theories: Introduction, Evaluation, and Application*, New York – Oxford 2009.

[15] From the Polish literature, see more in L. Falandysz, *W kręgu kryminologii radykalnej*, Warszawa 1986.

[16] Cf. *ibidem*, pp. 23–25.

[17] This proposal is not new. See J. Ditton, *Controlology: Beyond the New Criminology*, London–Basingstoke 1979. Although, as can be seen, it is still about neologism "controlology". Recently, the term was reactivated by shortening it and filling it with a slightly different content, proposed by R. Reiner.

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SEMANTIC DRIFT – FROM LABELING AND "CONTROLOLOGY" TO CONTROLOGY AND RISK MANAGEMENT IN CRIMINAL LAW

J. Ditton began his 1979 book with an ambitious statement that "the neologism 'controlology' was stylistically and analytically designed to replace criminology".[18] The author wanted to restore meaning and rank to the theory of marking. As he wrote:

> I hope to analytically reground the labeling approach. I think it is possible as labeling is vilified not so much because of its analytical inabilities, but rather because it has become an institutional failure. Since institutional failings are easier to correct than analytic ones are to patch up, there is still a chance that the magnificently imaginative scope of the labeling perspective might be refashioned as an intellectually and institutionally competent theory.[19]

In Ditton's eyes, critics of the stigma theory rejected criminology. In his mind, it should be replaced with their original proposition instead, the best-conceived "contrological" approach, proposing systematization of views. According to Ditton, the social taint was a failure, because it has never attained the status of a formal theory.[20] Unfortunately, there is no room here to explain the details of the *Controlology* author's views. In time, the name he invented began to acquire a different, more relevant meaning for these considerations, as discussed below.

Nearly 30 years after the publication of Ditton's work, R. Reiner proposed to distance the definition of contrology from the "labeling" theory that views crime as a phenomenon shaped by control (of state, of society, etc.). Reiner shortened the term itself and used it in a different sense. By "contrology" (and not Ditton's "controlology") he refers to more conservative theories in criminology, similar in their desire to directly control crime rather than analyzing its causes.[21]

By the time the Scot J. Ditton presented his theory, labeling was on the retreat. His theses about the waves of exclusion seemed outdated and derivative. Today, more complex implications of the labeling theory are being brought up. Focusing the labeling theory on social responses makes it clear, that the response to offences plays a role in socially constructing the criminal nature of behavior. The labeling perspective has come to a conclusion, that state intervention may have a paradoxical and unexpected effect of causing the behavior it was originally intended to suppress. Research increasingly shows, that state intervention, especially the use

[18] *Ibidem*, p. 1.
[19] *Ibidem*.
[20] *Ibidem*.
[21] See R. Reiner, *Beyond Risk: A Lament for Social Democratic Criminology*, [in:] *The Politics of Crime Control: Essays in Honour of David Downes*, eds. T. Newburn, P. Rock, Oxford 2009, p. 7 ff. (the first edition was published in 2006, 27 years after Ditton's book). Reiner's analysis is interesting because it shows the clash of the vision of the approach to crime at the dawn of the 21st century.

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of imprisonment, contributes to the empowerment of certain types of criminals in their criminal careers, and that the effects of criminal sanctions are complex and may conflict with common sense. "This warning assumes significance when we consider policy makers' repeated assurances that the panacea for the crime problem can be found in widening the reach of the criminal law and in the enormous expansion of prison populations".[22]

The breakdown of the social rehabilitation ideal in the early 1970s and the criticism of the criminological certainties mentioned above had an unexpected effect. The crisis triggered a return to what is certain and constant. It referred to the basic assumptions of criminal law, to classicism,[23] and then turned to conservative theories, and finally to penal populism.

In the 21st century, the approach in risk management changed. Preventing and combating crime, rather than investigating the causes of deviant behavior, began to dominate in criminology. It was argued that society should "condemn a little more and understand a little less" and justifying criminal behavior and effectively punishing them more severely.[24] Crime control became the focus of interest of not only law enforcement practitioners and criminologists, but politicians.

CONSOLIDATION OF THE MODEL CHANGE: TOWARDS NEOCLASSICAL PENAL LAW AND CRIMINOLOGY FREE FROM EXPLORATION OF THE ETIOLOGY OF DEVIATION

The debate between J.Q. Wilson and E. Currie in 1986, published several times, is a perfect illustration of the turning point that took place at the end of the last century.[25] Currie, a supporter of the liberal approach, raised a number of accusations against Wilson, whom he considered to be the main representative of the reborn conservative trend in criminology in the 1970s. Curie's accusations can be summarized in four points: 1) conservatives are not serious about researching

[22] Cf. J.R. Lilly, F.T. Cullen, R.A. Ball, *Criminological Theory, Context and Consequences*, Los Angeles – London – New Delhi – Singapore – Washington 2015, pp. 174–175.

[23] Cf. A. Marek, *„Nowy realizm" w polityce kryminalnej Stanów Zjednoczonych – założenia i efekty*, „Państwo i Prawo" 1980, no. 4.

[24] John Major, the Prime Minister of Great Britain, put it in 1993 as follows: "[…] society needs to condemn a little more and understand a little less" (quoted after A. Raymond, *The Influence of Neoliberalism on the Development of the English Youth Justice System under New Labour*, [in:] *Organising Neoliberalism: Markets, Privatisation and Justice*, eds. Ph. Whitehead, P. Crawshaw, London 2012, p. 140).

[25] See *The Politics of Crime: The American Experience. A Debate between Elliott Currie and James Q. Wilson*, [in:] *The Politics of Crime Control*, eds. K. Stenson, D. Cowell, London – Thousand Oaks – New Delhi 1998, p. 33 ff. Originally published in 1985 and 1986, and then again in 1991 and 1995.

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the causes of crime; 2) conservatives do not explain why crime numbers in the US are so significantly different from those in Europe; 3) conservatives' main idea of combating crime using widespread imprisonment does not work; 4) explaining the reason for an increase in crime, in the context of cultural change, is false and is leading criminologists astray.

In his response to Currie, Wilson avoided confrontation and tried to get rid of his conservative image. He distanced himself from both sides of the dispute writing that "both sides of the dispute are wrong". He pointed out that the liberals were wrong when they believed that the causes of crime should be tackled first and foremost, mainly by improving society's general material condition, and therefore, limiting material deprivation, as without it, perpetrators cannot be reasonably rehabilitated. A human being is not entirely a product of the environment in which he is brought up. The notion of the need to combat the causes of crime has far-reaching consequences. It results in a comprehensive change that goes far beyond the limits of criminal law. Reducing crime by fighting its causes should result in the reconstruction of society as a whole, but it seems what liberals actually want (lit. not to reduce crime but to remake society). It is easy, as Wilson argued, to show the weaknesses of conservatives' thinking as well. They postulate, that for the desired effect of criminal policies, it is enough to strengthen the police, restore the death penalty, increase the severity of penalties, and appoint an appropriate and strict prosecutor general. But, neither the Attorney General nor the central government have much to do with fighting crime. Crime prevention is a local problem. Many conservative theses are also based on a naive belief in technological quick fix of crime, but the evidence contradicts this. There is no easy solution.[26] Wilson recognizes the complex factors that influence crime. He believes that the increase in crime cannot be explained by some sudden increase in an individual psychological or biological predisposition to crime.[27] He declares: "I am, or at least I try to be, pragmatic". He tries to maintain scientific objectivity and not to directly support either side of the dispute. So what does he propose? He admits that research into the causes of crime should not be overestimated. Knowledge about the causes of crime is of little use. Criminologists that came afterward have failed in this field. It was not possible to create a universal etiological theory explaining every type of crime, or more broadly, every type of deviation.[28]

Wilson's proposal is way more complex. He proposes a specific cultural reconstruction of the whole society. Going back to the old rules, especially to "traditional" family. According to Wilson, the reason for an increase in crime, and evil in general,

[26] See *The Politics of Crime*...

[27] J.Q. Wilson, *Crime and Public Policy*, [in:] *Crime and Public Policy*, eds. J.Q. Wilson, J. Petersilia, Oxford – New York 2011, p. 619.

[28] See *The Politics of Crime*...

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is "the triumph of self-realization over self-control". He also writes: "[…] we have learned to value rights above duties, spontaneity above fidelity, tolerance above adaptation, authenticity above convention".[29] Wilson states that deterrence works, but above all, that the cost of crime should increase, perpetrators should calculate more.

Wilson's theses laid the foundations for other conservative criminological theories[30] and, as a result, for penal managerialism, well known in Poland.[31] Theories developed in subsequent years: the theory of rational choice (rational choice theory),[32] the theory of routine activities (the routine activity approach),[33] and finally, the so-called administrative criminology,[34] realized in practice in Britain, which focuses on managing crime without going into its causes. In contrast to all of the aforementioned theories, Wilson's concept seems to be an etiological theory. The core of all these concepts is the assumption that an effective intervention against crime can be undertaken if the criminal is understood as a rational consumer. The idea of treating people as individuals motivated by their drive to maximize profits has a long tradition in the field of economics. The idea is that individuals make rational decisions based on a cost-benefit analysis of alternative approaches. Criminals try to benefit from criminal behavior, hence their choices should be appropriately influenced by discouraging criminal sanctions.[35]

CRIMINAL LAW AS A RISK MANAGEMENT: CONSOLIDATION OF THE CONTROLOGICAL APPROACH

However, the economization of approach to criminal law, which does not violate its fundamental principles,[36] was not the last stage of development. It is argued today that

[29] J.Q. Wilson, *Thinking about Crime*, New York 1975, p. 88.

[30] See S. Walklate, *Understanding Criminology: Current Theoretical Debates*, Philadelphia 2003 (especially chapter 3 entitled *Understanding "right realism"*, p. 33 ff.).

[31] Cf. B. Stańdo-Kawecka, *Polityka karna i penitencjarna między punitywizmem i menadżeryzmem*, Warszawa 2020.

[32] For example, see D. Cornish, R.V. Clarke, *The Reasoning Criminal: Rational Choice Perspectives on Offending*, New York 1986.

[33] First of all, see L.E. Cohen, M. Felson, *Social change and crime rate trends: A routine activity approach*, "American Sociological Review" 1979, vol. 44(4), pp. 588–608; M. Felson, *Crime and Everyday Life*, London 2002.

[34] For more information see P. Mayhew, M. Hough, *The British Crime Survey: Origins and Impact*, [in:] *Victims of Crime: A New Deal?*, eds. M. Maguire, J. Pointing, Milton Keynes 1988.

[35] See M. Szczepaniec, *Teoria ekonomiczna w prawie karnym*, Warszawa 2012 (see the literature discussed therein, especially chapter III entitled *Economic Models of Crime*, p. 202 ff.).

[36] Cf. *ibidem*, p. 379 ff. The author argues that "the traditional understanding of crime does not raise problems in the field of economic analysis of law. […] Dogmatic analysis quickly showed that

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> we are rapidly moving towards an increasingly automated justice system, that undermines the safeguards implemented in the traditional criminal justice model. This system favors efficiency and effectiveness when compared to safety devices used in a traditional process, and takes a life of its own as it is increasingly mediated by certain types of technology that minimize the human factor.[37]

A. Marks, B. Bowling, and C. Keenan argue that a system of "automatic justice" is emerging.

Automation affects various stages of the procedure. This includes the methods of collecting and analyzing data in criminal proceedings at the preparatory stage, punishment without trial in the "fair-to-fault" mode, plea bargaining, imposing economically profitable sanctions based on technical and medical control (entries in criminal registers, electronic supervision, chemical castration, biometric measures), to the implementation of penalties and reaction measures based on cost reduction and privatization of penal services, not only in terms of imprisonment but also social work supervised by private entities.[38] Criminal justice is to be cheap and effective, the police force, prosecution, and courts are to "do more with less". Costs are optimized based on the commercial ethos being introduced into public services. It is pointed out that

> we are witnessing a gradual movement away from the traditional, retrospective, individualized model of criminal justice, which prioritized a deliberated and personalized approach to pursuing justice and truth, towards a prospective, aggregated model, which involves a more ostensibly efficient, yet impersonal and distanced, approach.[39]

Evermore visible "actuarial justice" is based on "risk management" in the areas of crime regulation and justice.

As one can see, the contrological model has at least several key aspects. In terms of the theory of punishment, "crime control" seems to have become the simplest explanation for the purpose of punishment, although the very idea of punishing, especially by the means of imprisonment, is contested today.[40]

The breakdown of the etiological model in criminology resulted in a transition to contrology, in the sense of searching for the most effective method of interaction and asking the question: What works? People want security and are ready to make

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the act of unlawfulness, punishment, culpability and guilt, defined in the traditional sense, can also be transposed into the field of economic analyzes of criminal law" (*ibidem*).

[37] Cf. A. Marks, B. Bowling, C. Keenan, *Automatic Justice? Technology, Crime and Social Control*, [in:] *The Oxford Handbook of the Law and Regulation of Technology*, eds. R. Brownsword, E. Scotford, K. Yeung, Oxford 2017, p. 705 ff.

[38] See more B. Kędzierski, W. Zalewski, *Prywatyzacja więziennictwa – problem stary czy nowy? Perspektywa dla Polski*, [in:] *Kara kryminalna. Perspektywa historyczna i penologiczna*, eds. T. Maciejewski, W. Zalewski, Gdańsk 2019, pp. 239–256.

[39] A. Marks, B. Bowling, C. Keenan, *op. cit*.

[40] See V. Ruggiero, *Penal Abolitionism*, Oxford 2010.

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many sacrifices in its name, including limiting their own freedom. Crime appears to be easier to deal with than other types of modern threats. Politicians build their political strategies on the thirst for security. Fear of violence, terrorism, loss of property and other threats is often used in election campaigns by penal populists. Politicians say they are able to assess the risk and present allegedly effective, but in fact unproven, methods of counteracting crime.[41]

Risk assessment becomes a fetish, it takes a form of a new comforting religion. The 20th and 21st centuries are, according to many, the age of the risk society.[42] U. Beck divides the history of mankind into three phases: pre-industrial, industrial, and present – post-industrial. Each of them had different risks. The present day is characterized by the fact that the risk is generated by the very system of modernity, and thus by people and their technologies. Contemporary risks are often global in nature, cannot be calculated (uncalculable),[43] are impossible to reverse, and cannot be remedied, so they are not compensated. Beck is a pessimist in this regard. As a result of changes, the so-called "organized system of irresponsibility"[44] comes into effect. This system, by adhering to inadequate rules of action and risk determination, typical of the previous epoch, creates only a mere appearance and impression of controlling threats. Risk management is, in fact, a system of rituals that relies on inadequate risk assessment practice and serves as a cover for ignorance.[45]

Obviously, Beck's vision relates to universal, global threats, and not only crime or deviation. This is why the observation, that risk estimation has never been easy, is correct. The risk of crime and other threats is difficult to calculate, often irreversible in their consequences and irreparable.

The literature has long indicated that risk prediction technology may be statistically accurate, in relation to aggregate cases, but remains inaccurate in relation to a given case (the issue of aggregate rationality vs. individual cases).[46] It should be emphasized, that the possibility of constructing an individual criminological forecast, reliable enough to become the basis for determining the penalty for a specific perpetrator, is often rejected. The accuracy of a diagnostic and prognostic decision

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[41] For more, see W. Zalewski, *Ocena ryzyka w kryminologii – zarys problematyki*, [in:] *Pojęcie ryzyka a przestępczość ubezpieczeniowa*, ed. W. Zalewski, Gdańsk 2018.

[42] Cf. U. Beck, *Społeczeństwo ryzyka*, Warszawa 2004.

[43] For more, see P. Stankiewicz, *W świecie ryzyka. Niekończąca się opowieść Ulricha Becka*, „Studia Socjologiczne" 2008, no. 3, p. 120 ff.

[44] Discussed in U. Beck, *Gegengifte: Die organisierte Unverantwortlichkeit*, Frankfurt am Main 1988. See synthesis of views in P. Stankiewicz, *W świecie ryzyka…*

[45] See P. Stankiewicz, *W świecie ryzyka…*, p. 128; idem, *Niewidzialne ryzyko. O społecznej konstrukcji bezpieczeństwa*, 2013, https://repozytorium.umk.pl/bitstream/handle/item/1021/P.%20Stankiewicz%2C%20Niewidzialne%20ryzyko.pdf?sequence=1 [access: 10.03.2021].

[46] See J. Byrne, G. Marx, *Technological Innovations in Crime Prevention and Policing: A Review of the Research on Implementation and Impact*, "Cahiers Politiestudies Jaargang" 2011, no. 20, pp. 33–34.

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does not depend on whether we are able to determine the behavior of one particular person, but on whether the criteria adopted for the assessment allow to manage the population of perpetrators in such a way, as to significantly reduce the risk and damage caused by crime in a way that is the least costly for society. The center of gravity and perspective changes here.[47]

It may come as a surprise that risk management techniques came so late in crime control, as similar procedures had been developed in related areas, such as fire prevention, nearly a century earlier.[48]

Referring to the category of risk measurement is becoming more common in the applicable law. In Polish law,[49] first of all, the Act of 22 November 2013 on dealing with people with mental disorders posing a threat to life, health or sexual freedom of other people,[50] should be indicated. Other regulations include the provisions of the Act of 20 March 2009 on the safety of mass events,[51] in which, for example, in Article 3 point 5 a high-risk mass event is listed.[52] Formalized risk assessment methods are also typical for Banking Law.[53] The Act of 6 June 1997 – Executive Penal Code,[54] obliges probation officers to determine the risk of returning to crime. Article 169b EPC divides these risks into three groups: A – reduced risk, B – basic, C – increased risk.

This indicated, exemplary calculation shows that the risk and its assessment have become a permanent part of the law. However, various doubts about risk assessment techniques have since risen.[55] They are concerned about the adopted methods and their effectiveness, reliability, accuracy of probability estimates, the possibility of them violating human rights, being abused by politicians, etc.

The sentence: "If we could control ourselves, we wouldn't need any of this technology" is often cited. However, means of technical control are not cheap, just as there are no cheap alternatives to imprisonment, which clearly does not contribute to reducing either control or crime.[56]

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[47] Cf. J. Utrat-Milecki, *Podstawy penologii. Teoria kary*, Warszawa 2006, p. 151.

[48] Cf. P. O'Malley, *op. cit*.

[49] Cf. literature review in L.K. Paprzycki, *Orzekanie o przymusowym umieszczeniu w zakładzie zamkniętym osób stwarzających niebezpieczeństwo dla porządku prawnego – w postępowaniu karnym czy cywilnym?*, [in:] *Polski proces karny i materialne prawo karne w świetle nowelizacji z 2013 roku. Księga jubileuszowa dedykowana Profesorowi Januszowi Tylmanowi z okazji Jego 90. urodzin*, ed. T. Grzegorczyk, Warszawa 2014, p. 281 eff.

[50] Consolidated text Journal of Laws 2020, item 1346.

[51] Consolidated text Journal of Laws 2019, item 2171.

[52] Judgement of the Supreme Administrative Court of 17 October 2014, I OSK 2055/2014.

[53] Act of 29 August 1997 – Banking Law (consolidated text Journal of Laws 2020, item 1896).

[54] Consolidated text Journal of Laws 2020, items 523, 568, hereinafter: EPC.

[55] Cf. analysis of charges carried out in D. Wójcik, *op. cit.*; W. Zalewski, *Ocena ryzyka…*

[56] See J. Byrne, G. Marx, *op. cit.*, p. 33.

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Interesting conclusions can be drawn from research concerning the search for an alternative to prison. M. Aebi, alongside a group of associates, summarized data collected in several European countries on the use of Community Sanctions Measures (CSM) as an alternative to prison. The author concludes:

> The data analysed in this article show that the number of persons serving CSM has rapidly increased in Europe during the 1990s and 2000s. Prison populations have also increased during the same period. Crime trends cannot explain such trends [because crime was decreasing at that time – W.Z.]. As a consequence, it is possible to conclude that the increased use of community sanctions and measures did not lead to a decrease of prison populations across Europe. […] In sum, instead of being alternatives to imprisonment, community sanctions and measures have contributed to widening the net of the European criminal justice systems. […] These results suggest that CSM have become one of the instruments of an increasingly punitive approach to crime control.[57]

An interesting paradox begins to emerge; instead of looking for an alternative to prison, extending control. Control is becoming commonplace, more and more often the phenomenon of transcarceration[58] is being talked about, which is understood as an expansion of the network of formal and informal control over citizens, by means of various technical methods, freedom sentences, as well as probation and other measures. The phenomenon of the net widening effect is revealing itself.

The contemporary criminal policy is measured more by the scale of budget expenditures, rather than by the social effectiveness of implemented programs, which are often financially immeasurable. A good example is the British "Payment by Results" performance policy, which is a manifestation of cost containment. The Transforming Rehabilitation (TR) Agenda assumes the financing of only those services, which bring measurable results, and often paradoxically – the results brought by those methods, that are based on individual and socially rehabilitative interaction.

There are three basic principles, that define the degree of identifying needs and responding to risk (the Risk-Need-Responsivity, RNR): 1) indicate the level of risk of recurrence in a given case, and define an adequate program (risk principle); 2) assess criminogenic needs and select a therapy model (need principle); 3) maximize the perpetrator's ability to learn and assimilate impact, including the usage of cognitive-behavioral therapy models (responsivity principle).[59]

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[57] M.F. Aebi, N. Delgrande, Y. Marguet, *Have community sanctions and measures widened the net of the European criminal justice systems?*, "Punishment & Society" 2014, vol. 17(5), p. 589.

[58] See *Transcarceration: Essays in the Sociology of Social Control*, eds. J. Lowman, R. Menzies, T. Palys, Brookfield 1987; F. McNeill, *Pervasive Punishment: Making Sense of Mass Supervision*, Bingley 2019, p. 24 ff.

[59] Cf., e.g., the Canadian *Risk-need-responsivity model for offender assessment and rehabilitation*, www.publicsafety.gc.ca/cnt/rsrcs/pblctns/rsk-nd-rspnsvty/index-en.aspx [access: 12.02.2021].

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CONCLUSION

First of all, it is worth recalling the skepticism of J.Q. Wilson, regarding the possibility of reacting to crime through technology. The father of conservative thinking in criminology at the end of the 20th century criticized the naive belief in technology (technological quick fix of crime). Secondly, it should be emphasized that the two ways of understanding contrology outlined in the beginning do not seem to contradict each other completely. They can be seen as complementary. The way these approaches complement each other is expressed in the fact that both refer to a common set of designates – subjects, objects and deviation control mechanisms, but in a slightly different way and scope.

E. Lamert is known for his frequently quoted thesis that social control leads to deviation.[60] The thesis he announced became the center of the stigma theory. J. Ditton refers to its simplified version, assuming that control breeds crime. However, science rightly points out,[61] that the idea of criminal justice intervening may result in an increase in crime was not originally developed by labeling theorists of the 1960s, but was known much earlier. Prison has long been perceived as "a breeding ground for crime". F. Tannenbaum was probably the one scientist, who first revealed the essence of the marking mechanism. He pointed out that state intervention generates crime because it "dramatizes evil".[62] The contemporary criminal law and a contrologically oriented criminal policy seem to deepen this phenomenon.

The basic question that arises to whether increased control reduces crime? The answer from the research is not surprising – there is no direct evidence for this. It has been noticed that the introduction of, for example, electronic monitoring or registering criminals reduces the number of crimes committed, but for a short time and in an insignificant way.

The following threats from contrology should be considered as well. First o all, it is dehumanization. Man becomes a passive object of influence. In the long run, the myth of dealing with crime is born, and in fact the phenomenon of procrastinating solutions increases. Social costs are rising. Automated technological justice is established. There are growing doubts about the verification of control mechanisms. Who will control the controllers? Can criminology depart from investigating the causes of crime?

Questioning the sense of investigating the causes of crime became characteristic of the criminal policy in the 1980s. Criminology was going through a deep crisis. It needed quick and decisive reactions. However, the situation seems to be changing recently. The multi-factorial approach in etiology is again considered appropri-

[60] E. Lemert, *Human Deviance, Social Problems, & Social Control*, Englewood Cliffs 1967, p. V.
[61] See R. Lilly, F.T. Cullen, R.A. Ball, *op. cit.*, p. 153 ff.
[62] See F. Tannenbaum, *Crime and the Community*, New York – London 1938, p. 19.

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ate.[63] M. Heidegger's thesis is still valid in his protest against modern science and technology: "[…] a man absorbed in the search for results, effectiveness loses the sense of what is most important – that's why the desert grows".[64]

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[63] W. Zalewski, *Biologiczne i biosocjologiczne uwarunkowania…*

[64] See M. Rebes, *Filozoficzny protest Heideggera wobec współczesnej nauki i techniki*, „Roczniki Kulturoznawcze" 2016, vol. 7(1), p. 144.

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ABSTRAKT

Współczesność niesie szereg istotnych wyzwań dla państwa i prawa, zwłaszcza w kontekście pytań o relacje między państwem a obywatelem. Rozwój nauki i technologii daje szerokie możliwości w zakresie poszerzania sposobów inwigilacji i kontroli. Kontrola państwowa, którą realizuje się za pomocą instrumentarium prawa karnego, jest przedmiotem zainteresowania kryminologii i prawa karnego od dawna. W czasie trwającego już przeszło cztery dekady kryzysu prawa karnego i kryminologii pytanie o przyszłość prawa karnego i kryminologii staje się jaskrawo aktualne. Postępująca dehumanizacja powoduje, że człowiek staje się biernym obiektem oddziaływań. W długiej perspektywie utrwala się przekonanie o radzeniu sobie z przestępstwem, o efektywnym zarządzaniu przestępczością, a w rzeczywistości pogłębia się zjawisko odwlekania rozwiązań. Rosną koszty społeczne. Powstaje zautomatyzowana sprawiedliwość technologiczna (*technological justice*). Pogłębiają się wątpliwości odnośnie do weryfikacji mechanizmów kontroli. Kto będzie kontrolował kontrolujących? Czy naukę prawa karnego i kryminologię zastąpi nowa nauka – kontrologia? Czy pytania o etiologię przestępczości, a zwłaszcza o filozoficzny i etyczny wymiar karania, tracą sens?

Słowa kluczowe: kontrologia; kryminologia; przestępczość; kontrola państwowa