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Analysis of Records in Historical Research on Criminal Law. Criminal Records on Male Homosexuality in Paris in the 18th Century

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Key words: serial sources, longitudinal section of a determination analysis, conflicting bodies of definition, ego-document, experience-based adoption of norms

Abstract: Historians traditionally view records, i.e. texts of Modern History handed down in series, as the most reliable and frequently only database for elucidating the genesis of exercise of power in bureaucratic contexts. Hence, an analysis of records is of crucial importance for criminology-related historical longitudinal studies, for analyzing definition processes and for studies on the continuity or breaks in the course of determining norms and deviations. Moreover, records are suitable sources for historians because an analysis of the contents and contexts they provide helps researchers to grasp the interactive complexity or contingency of a field that is perceived as monolithic: the body of judicial definitions. Cross-sectional studies of records from institutions involved in providing a definition of a "violation of norms" on the one hand reveal widely varying and sometimes conflicting motives and objectives of those defining a violation of norms in the fields of legislature, judiciary and police administration; on the other hand, criminal records that have been analyzed in terms of their rhetorical purpose can be re-interpreted as ego-documents. The records provide information on the experience-based adoption of criminal norms, which also have a strong defining power, not only because they contain quotations and paraphrases from statements of those incriminated but also through the reports they contain on crime reconstruction.

In this paper legislative, judicial and criminal records on homosexuality among men in Paris in the 18th century will be used to present these three different approaches in interpreting such records.

Table of Contents

References

Author

Citation

"Quod non est in actis, non est in mundo." This basic claim, introduced with the Roman Law and the practice of documenting legal proceedings, neatly summarizes the interests that brought about the development of record-keeping since the High Middle Ages: Records document the efforts of the powers to map, fix and memorize social environments. What is not kept in records does not exist. Historical research often took this claim literally and used records in this way to reconstruct social environments. If records would document just that—or indeed everything—which exists, then a catalogue of records, as complete as possible, would constitute an appropriate analysis of these records. An analysis based on the aforementioned claim could and should be a purely quantifying one. However, "Quod non est in actis, non est in mundo" means much more to the powers keeping records than just depicting the world as it is. The history of record-keeping is deeply intertwined with the genesis of exercise of power in bureaucratic contexts and the will to appropriate the world by force. What is kept in records corresponds to the claim to power, confirms it, obstructs it or even contradicts it—it therefore exists as constituted to exist in this capacity. In consequence, even a complete additive catalogue of records does not yield more

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than a highly condensed documentation of a construction of reality: It yields a "pattern of interpretation of social reality" (LEXIKON ZUR SOZIOLOGIE 1994, "Aktenanalyse"). These constructions give rise to many questions that cannot be answered through statistical analysis: What or who brings forth these constructions? Are they motivated by interested intent or at least a quest for truth? In which way can they serve as an indication of something beyond these constructions? These questions can only be answered by a discussion of these records—where "discussion" is understood in the mathematical sense, as a division in diverging factors by means of qualitative analysis. With respect to the world of the record-keepers, the claim that what is not kept in records does not exist, does hereby not loose its validity. If the sources do not provide reliable evidence about the explicitly depicted world, the conditions of constituting these records and the analysis of these conditions might at least give some approximation to experience-based behavior. [1]

The 13th century saw the advent of a massively growing amount of records. These came to supplement the documents ("Urkunden") ruling and registering the relatively simple social environments in relatively small territories. The serial record, the "prêt à porter"-version of the "haute couture"-document, is best understood as a reaction to the growing need to articulate and realize power and/or rule increasingly complex social environments and increasingly wider circles of addressees. The shift in political structure in the Late Middle Ages, expanding cities, the territorial and seigniorial consolidation of power, a territorial judicial system based on Roman Law—all these elements demanded a horizontally interconnected and vertically effective administration. The "haute couture"-documents, intended for individual events and persons, and individual oral interaction are in every respect replaced (SCHMID 1994, p.51): by serial records. The research on sources shows that from the 15/16th century onwards, the whole written tradition is dominated by records and record-like documentation. In the course of the 18th century, the keeping of records reached its first climax—and, with respect to its systems, its final formation (SCHMID 1994, p.52). This understanding attaches the record firmly to the absolute state and ruler—i.e. a will to regulate that goes far beyond the necessities engendered by the size and complexity of power in Early Modern Time. The administration of absolute states is as a rule of generous size; besides it often shows a remarkable degree of organizational complexity. Both characteristics multiply the amount of internal communication between departments and the points of contact between the administrators and the "administrated". They therefore lead to the establishment of efficient techniques of communication and the rapid spread of procedures based on written documents: in other word record-keeping. Administrative procedures are increasingly based on written documents which in turn serve a long-term interest in preserving information and power to the advantage of following (dynastic) generations. But even these benefits do not in themselves suffice to explain the proliferation of this new administrative tool, and give rise to further questions: What is the rationale behind this multiplication of state authorities, what is the use of the ongoing specialization of positions within the bureaucracy? In short: What drives the metastasis of the bureaucratic apparatus and its inclination to record large quantities of highly differentiated data? [2]

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According to WEBER, records constitute one of the main characteristics of "modern administration", which in turn constitutes the single most important characteristic of "bureaucratic rule". Bureaucratic rule develops with monetary economy, large states and mass parties. "When it comes to bureaucracy, the expansion with regard to intensiveness and quality and the internal development of administration and its duties is even more important than the expansion of administrative duties with regard to extensiveness and quantity" (WEBER 1964, p.715). The decline of anachronistic, ecclesiastical and feudal authorities on the one hand and the multifariously expanding consumptive needs on the other hand force the secular central powers in Europe since the 17th century to accept their role as economic and social coordinators. They become the moderators of a first thrust of modernization (RAEFF 1986, pp.310ff.). It is their aim to centralize and maximize material and ideological resources and to distribute and deploy these resources in the interest of public welfare. This, it is hoped, will influence every citizen to the point that he/she is willing to work for a solid and effective social network. Indispensable in this scheme is the systematic expansion and dynamization of the state's functions in military, economic, legal and cultural matters: the centralization and standardization of the respective procedures. To set these procedures into action, to form, evaluate and to regulate them, mediating agencies are needed, "a staff of specialized employees and a set of new administrative techniques" (RAEFF 1986, p.319). Absolute power becomes bureaucratic rule—in the shape of the "well-ordered police state" (RAEFF 1986, 1983). But effectively this "prototype of a modern mechanism of rule" achieves more than a monopoly on social control. By means of administration, this mechanism "changed the moral and psychological structure of people with regard to politics, the military and economics" (OESTREICH 1969, p.188). The dislocated, pauperized masses set free at the beginning of Early Modern Time without any sense of location, tradition or authority become forced into a specific pattern of conduct from the end of the 16th century onwards. They go through "neo-socialization," giving them a new "sense of useful social and political conduct" (OESTREICH 1976, p.19). Such "social disciplining [Sozialdisziplinierung]" (OESTREICH 1969, 1976), reaching its climax in the 18th century in the "fundamental discipline [Fundamentaldisziplin]", is aimed at all people collectively and also at the individual level" (OESTREICH 1969, p.64). As a result of "power consolidation process [Vermachtungsprozeß]", it is desired that voluntary subjects would regard themselves as citizens and "embody a dynamism bound by morality and rationality" (OESTREICH 1969, p.64). A demanding educational program including extensive techniques of control and effective agents of control is established to correctly identify and correct deviant behaviors from "useful social conduct". Power since the 17th century has been mutating into "Bio-Power", "grasping life, intensifying and multiplying it" (FOUCAULT 1992a, p.163). The exploitation, the skimming off, the consumption of human life, accepting its loss in this process, gives way to the urgent wish to keep human life as exploitable, usable and consumable as possible. The access to human life is guaranteed by the "power procedures of the disciplines: political anatomy of the human body" (FOUCAULT 1992a, p.166). Bio-Power works with a closed chain of norm-processing mechanisms that we now call administration without noticing how we are constantly controlled, normed and normalized. The administration

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forces us into a "nexus of habits" (FOUCAULT 1976, p.122). By practicing these habits or by having these habits, it reflects that we are members of a specific society. At the same time, these habits become a catalogue of norms.

> "Habits imposed upon certain societal groups in the 19th century effectively served as tools of power. This enabled those in power to dispense with their earlier efforts. Power is thus craftily embodied in the mundane form of a norm, and is not apparent as power, but presents itself as society" (FOUCAULT 1992a, p.172). [3]

This is a long road. It is paved with a multitude of bureaucratic agencies complete with a multitude of functions, competencies that give access to the most trifle—and yet most secret and intimate—details of acting and thinking. All these agencies collect information on everything, document it, and put it on record. In the end, there is no place, no step, no thought that is not controlled and possibly sanctioned by the administrative bodies. This administration is part of the state's monopoly on power—it exercises micro- and metadiscipline by submitting all and everything to the will to know and the disciplining force (FOUCAULT 1992b, pp.273ff.). Bureaucracy "as a tool to 'socialize' of rule" is seen by WEBER as a "first rate power resource". Thus, once completely implemented, bureaucracy turns the established relationships of rule to something sacrosanct. Two tools of bureaucratic authority make this rule immune and guarantee its never ending existence: records and discipline (WEBER 1964, p.727). [4]

Absolutism, understood in terms of historical and political research, presents itself as bureaucratic rule or as a "well-ordered police state". It strives for complete appropriation of world and people. This appropriation, if conducted by force, necessarily suffers from frictional losses. Therefore, this appropriation comes as a "soft" strategy of adoption. Absolutism as a strategy to exploit the disposition of its victims according to its own needs without destroying them is forced to take the constitution of its subjects into account, to be curious, to scrutinize them carefully, to accumulate and record this knowledge. The system of records provides the contemporaries with information concerning the potentials of Bio-Power and informs them with regard to pockets of resistance. Records are able to show them which set of habits should be confirmed to, which sort of behavior should be normal or normalized and where there is need for modification. Historical research, however, is presented with a picture of things that has been distorted, filtered and segmented by documentation and designation that has changed throughout the course of history. Records therefore primarily document the result of a selective perception process governed by specific relevant criteria—the criteria of those engaged in ruling or shaping the world. [5]

The specific mode of constituting this sort of rule in a given historical context—by forceful acculturation conducted by the social elites in combination with "compulsion and supervision" (MUCHEMBLED 1990, p.141); by preventive social control, as planned "socialization" trying to anticipate and suppress deviant behavior (BREUER 1986, p.62); whether the specific mode of rule is the contingent result of "productive relations of power" or "power games" (FOUCAULT 1976) and to which degree its success depends on experience-

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based adoption of norms and "social practice" (LÜDTKE 1991)—can only be determined on the strength of thorough qualitative analysis of the sources: the records. It is clear that social control based on criminal law yields the most relevant records. These sources reveal the idiosyncratic worldview of those in power and those exercising social control on multiple levels, in condensed form and in actual practice. Different institutions—ideally legislature, police administration and judiciary—define normality and constitute deviance in relation to the actually favored "useful social conduct". The affinity of historical research on criminal law towards the interaction-based approach of contemporary criminal sociology, the "control paradigm" or "labeling approach" does not have to be considered as a makeshift solution born of necessity. Neither scarcity of sources nor the genuine historical interest in "distant realities and historical changes" as suggested by SCHWERHOFF (1999, p.78), let historical research on criminal law in the recent past go beyond etiological questions and purely quantifying analysis. Neither strategic reasons nor consideration of opportunity (with respect to academia) restrict the choice of theories and methods available to historic research on criminal law and on the accompanying processes of modernization. Social control by criminal law relies heavily on written records. Records are not only the main mode of administration in use today, but are also deeply intertwined with the formation of bureaucratic rule, police administration, social disciplining and Bio-Power. Because of this specific complexity the related research needs to be based on a sound theoretical foundation and to adhere to a clearly defined method. [6]

According to WEBER, records and discipline characterize and support the takeoff of bureaucratic rule. They are also tools for securing this rule, with discipline having even more reliable and deeper effects. Records documenting social control by criminal law primarily and directly seek to establish discipline. The ever increasing use of records is motivated by changes in the handling of judicial cases in the Late Middle Ages, the practice of keeping written records introduced by the Holy Inquisition and the duplication of administrative acts facilitated by the expanding use of printing since the late 17th century (SCHWERHOFF 1999, chapter 3). On the other hand, the volume of this special body of sources is also deeply affected by the ongoing condensation and depersonalization of rule in Europe and its organization along territorial boundaries as shown above for the whole body of transmitted records. The volume of criminal records increases significantly with urbanization and the establishment of monarchies and territorial rule. Interpreting this fact according to the "challenge response"-scheme seems to be a most natural thing to do: Records reflect the efforts of the administration to pacify the criminal energies brought on by higher density of population and denser settlement. However, if historic research does not go beyond a purely quantitative analysis, it will yield nothing but a confirmation of the original hypothesis. This tells us nothing about criminals and the cultural history or micro-history of criminality. This constitutes the starting point of poststructuralist critique of such constructs and correlations concerning processes of modernization (see BLASIUS 1981 and 1988). We are told little more about rule but nothing about power. Rule understood in terms of a purely defensive reaction becomes predictable in terms of size. Rule then appears to be a dependent variable and at

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the same time as a monopoly on power, as a monolithic apparatus of power that without contenders and single-mindedly tries to defend society and the public welfare against destabilizing deviations. The construction of rule as a defensive strategy of modernization as employed by historical research on criminal law encounters essential problems concerning sources and continuity, if relying exclusively on documents dating from "Sattelzeit" (18th/19th century) and onwards. Not only do the informative procedural records disappear with the end of the Inquisition around the middle of the 19th century (in the Germanic territories); records produced in the judiciary institutions take on an increasingly tabular form. Furthermore, a discovery stemming from the 17th century now finds practical application: "The notion that law is based on an order issued by the sovereign" developed in the times of Absolutism, prepares for a turn towards modernity, the turn to offensive and constructive criminal policy. "Only relatively recently can a phenomenon be discerned that we could call a 'social discourse on criminality'" (SCHWERHOFF 1999, pp.40f.). Is it only recently that criminality is perceived and systematically addressed by the authorities? Is it only recently that legislature has become a productive power, making law, defining the norm and deviations from the norm that constitute criminality? Is it only recently that the monolithic, repetitive resistance to de facto social disorder has dissolved into a multifarious, discursive, creative analysis of appropriate preventive means to secure rule and order? Is it only now that power comes from everywhere? (FOUCAULT 1992a, p.114) Is it only now "social groups [create] deviation by defining rules that, if violated, constitute deviation and by applying these rules to certain people thereby label them 'outsiders'" (BECKER 1981, p.8)? How should such break in continuity then come about? This last question is easy to evade if this break is understood as historic change. It is even easier to evade if the historian interested in "processes of historical change" interprets this break as "change", using the labeling approach to serve his interests and his interpretation of the altered historical conditions as change. Maneuvers of this kind are superfluous. Records on the one hand and social discipline and control on the other hand are deeply intertwined in a shared chronology that shows no break at all. Records are manifestations and have for a long time been means of social disciplining and control. Records express an official will of the authorities to define and establish norms—no matter if kept by city agents, territorial authorities or state institutions. They have done so ever since they were first employed and continue to do so. Moreover, records contain traces of disparate powers or attempts at power that differ from the official claim to rule and thus might be considered quite idiosyncratic. It is of no use just to count the criminal acts kept in records and to understand records purely as reaction by the authorities. Records have to be understood as acts of labeling some behavior as "criminal". Records register not just behavior or conduct but a complex pattern of labeling some behavior. To examine in depth the multiplicity of this labeling, to understand the differentiated nature of the forces and interests behind this labeling, in short: to analyze the relations of power that influence the constitution of criminality and keep the same in a state of constant flux, several qualitative interpretative examinations of single (bodies of) records are needed. [7]

Closely scrutinized, records and documents traditionally associated with social control by criminal law present us with three distinct steps of constituting criminality: generating or arguing norms, acting out or interpreting norms and appropriating norms. Before law was codified towards the end of the 18th century, only criminal records gave reliable information on the process of defining norms. They are thereby also the only sources depicting the discourse on legislative competencies and their retroactive effect with regard to the specific shaping of norms. Some primary sources—as collections of verdicts—give, independently of their origin, some insight into trends concerning the relation of conduct and criminality. The same goes for secondary sources, for sources containing earlier sentences in unrelated cases. Such longitudinal studies also give some information on the background of why some types of behavior were found problematic, what was done to regulate this behavior and what was thought to be achieved by these regulations. One obvious point of interest would be of course a change in how a given deviation was sanctioned and how this new sanction was justified. This would also include situations in which different institutions would try to enact differing or even conflicting sentences concerning a given set of deviations. Why, it remains to be asked, does one way of sanctioning become the predominant or even exclusive way of sanctioning? Normative actions of particular, e.g. regional judiciary take place within a very specific frame of reference that differs widely from that being relevant to state organs. Episcopal courts use a theoretical framework that is completely different from that employed by secular courts, even where the same deviation is concerned. Arguments about who exactly should be allowed to define norms in a given field—economy for instance, or vice or a definite change in who is given the task to define norms—the replacement of one authority by another—almost always indicate a major shift in the interests motivating the definition of norms and the regulation of conduct. [8]

Given that law is basically perceived as "order by the sovereign" and that criminal justice is basically perceived as labeling certain behavior as "criminal", norms and deviations have to be understood as products or effects of these institutions. These norms and deviations in turn are documented in records. Viewed superficially, norms and deviations therefore seem to be products of rule. Viewed closer, they are products of power. Rule, according to FOUCAULT, is "a strategic situation that developed in a long lasting historical argument and is established to endure" (FOUCAULT n.d., p.47). The powers or authorities responsible for the definition of justice and injustice can at best serve as a catchword to define secular trends in constituting criminality. However, to put this process of constituting criminality into action is a matter of power or, to be more precise: of powers. To hasten this process is a means to an end in power games that present themselves as applying, interpreting or appropriating norms. While rule can be best described as an exception, as a relation of power or powers sedimented into a structure, fleeting relations of power generally form the rule and basis of social existence and historical dynamism. Power itself has no place, "neither in specific institutions nor in the state apparatus" and definitely no center (FOUCAULT 1976, p.38). No one owns or possesses. "Power is everywhere not because it embraces everything but because it comes from everywhere" (FOUCAULT 1992a, p.114). FOUCAULT describes power as a fatality inherent in

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every interaction. As soon as one subject in a certain field of action comes across another subject, they both exercise power, they both begin a game of power, they both enter into a relation of power in trying to influence the other's actions. Each relation taken up by subjects brings power into a game that even if this game exhausts itself in the deployment of power does not generally ends up in an inflexible structure of power. For not only can power not be possessed by anyone, therefore (therefore just does not fit here, it is better to keep the old version with a slight modification, see below) it can be used as a "permanent strategy" endlessly, as a never ending provocation—fuel for uninterrupted civil war (FOUCAULT 1978, pp.71f.). Not only can power not be possessed by anyone, it cannot be used as a "permanent strategy", as a never ending provocation—fuel for uninterrupted civil war. This understanding of power makes the scenario every analysis of criminal records has to deal with even more complex; this understanding multiplies the number of players that have to be taken into account by each interpretation of these records. Longitudinal studies of records, concentrating on the definition and discussion of norms primarily focus on the relatively rare manifestations of the will of the sovereign in the creation of criminality. An analysis of power on the other hand demands cross sections that are as fine as they are deep to unveil the traces of all the players in this power game on norm and deviation, to follow all the branches of power in this specific field of action, to imagine the whole spectrum of convoluted interests and aims motivating the different players and their actions. The whole norm-defining apparatus can be broken down into single players—meaning: single positions of power. This means (apart from those who apply or interpret norms) not only those players that practically revise norms in approaching problematic conduct in a new way that best suits their own interests and objectives but it also means to take those into account that are labeled deviant. Even if they are generally coerced into these power games, even while they seem to be mere objects, passive agents or victims, supernumeraries, they nevertheless exercise power themselves. Their reaction whether offensive or tolerant to efforts to structurally shape their scope of behavior in itself necessarily contains some element of power: Whatever they do, they influence the possibilities available to those deploying and enacting norms. That is why they too play a role in constituting criminality, that's why criminal records are also indicative of a process of appropriation—and this makes them ego-documents.[1] [9]

In this section I will present some results of an analysis of criminal records based on such a wide understanding of power, the synopsis of an already completed study (TAEGER 1999, 2000) on criminalizing and de-sanctioning male to male sexuality in 18th century Paris—or *sodomie* in the vernacular of that time. Normally a "sodomite" in 18th century Paris would be brought before a competent commissaire, the examining magistrate responsible for a certain quarter, some specified public department or a certain group of crimes or violations on the strength of a police investigation, a complaint or a denunciation by a third party.

1 Winfried SCHULZE (1996a, p.319ff.) gives some general information in "Zur Ergiebigkeit von Zeugenbefragungen und Verhören als Ego-Dokumente". Two case studies from Helga SCHNABEL-SCHÜLE and Wolfgang BEHRINGER given in the same volume (SCHULZE 1996b) tell us about the difficulties extracting ego-documents from criminal records

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The examining magistrate would record the case brought before him, establish the crime committed and the accompanying circumstances and take the delinquent into custody. Relying on his investigations, the procureur général du roi, acting as Crown's Attorney, would charge the delinquent and initiate proceedings. The proceedings were conducted at the criminal division of the Châtelet. According to the regulations for proceedings in force during the 18th century, capital crimes must pass a second instance. The review is conducted by the Tournelle of the Parliament of Paris. A case following these lines is frequently registered but almost never comprehensively documented. The records containing details of a case ending with a guilty verdict and a death sentence are, as a rule, burned together with the delinquent to erase the crime without trace. On the other hand, records giving notice, albeit short and formalized, of the case passing different courts are transmitted in relatively comprehensive fashion. What is described here as a rule in 18th century Paris does not, however, apply to *sodomie*. Court records mention *sodomie* extremely rarely. But then again, hundreds of men accused of *sodomie* were brought before the Parisian Chief of Police and never turned over to an ordinary court. Here, a police investigator searches for sodomites and finds them, a police inspector takes care of arrest, interrogation and custody, a lieutenant général de police then passes a judgement. Here, the police does not act in assistance to law courts, not as executive force to some public prosecutor. The police here does not act as a purely investigative force. That is the reason why no traces of the police's action are found among those registries that document ordinary proceedings and executing of sentence. Since 1717, all police records are kept in the "archives secrètes de la Maison du Roi et de la Lieutenance de police" (FUNCK-BRENTANO 1895, p.4); all records concerning vice—"2°Bureau de police": Discipline des mœurs—are now accessible at the Bibliothèque de l'Arsenal (Ms. 10.234ff.). All police material regarding vice from about 1715 and onwards is contained here—as are the records documenting those sodomites seen only by the police: Reports of investigators, protocols of interrogations (partly commentated!), sentences, reference to former sentences, and petitions by intercessors. [10]

Analyzing the criminal treatment of *sodomie* in 18th century Paris first of all has to start with a longitudinal study examining the process of defining norms. The activities of all legal institutions in charge of deviating sexuality have to be taken into account. Documents constituting the history of law—from Roman Law to the Code pénal and all court records concerning *sodomie*—have to be evaluated with special attention to the character of the respective organs or institutions, the respective sentences dealt out and the respective justifications given to the sentences. This analysis gives some overview on the genesis of procedures for treating male to male sexuality in criminal justice up to the 18th century. This constitutes the available discursive repertoire on *sodomie* shaping records of the relevant period of time. A second step, the main part of the study, consists of cross studies dissecting the whole body of records on male to male sexuality during the 18th century. Several questions guide these studies: Which authorities are involved in the definition of *sodomie* as a criminal act? Do the different chains of argument having their share in constituting this crime concur with or

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complement each other? Do the participants follow traditional patterns and do new participants propose new and creative interpretations of outdated norms? And finally which interests and motives drive these innovations? Each of these questions supposes a break in continuity so that an analysis of the relevant records will first of all have to look for and document such breaks. Significant changes in the structure of the body of records—that may be the replacement of one dominant institution by another, the volume of the relevant body of records, the style of recording or even the content of records—serve as starting point for a more detailed analysis. This analysis brings together the findings extracted from the sources, especially the breakages, the actual disposition of the administrative and judicial organs as well as the historical background behind relations of power and rule. This step aims at elucidating the specific logic of the prevailing norm-defining institutions or the processes of constituting norms themselves, respectively. It also serves at putting these institutions and their interplay in historic context. Finally, it will be examined to which degree this logic and the arguments employed by the authorities acting on the rather limited field of power regarding criminal justice are self-referential, monologic or at best dialogic. To form a picture of whether and how (if at all) the delinquents labeled "sexually deviant" take a stance with regard to the alleged actions, their actions and their recorded statements have to be correlated. The recorded statements have to be carefully scrutinized with attention to the interests and aims of the registering institution before they can possibly be of any use in documenting processes of appropriation. [11]

On the whole, the history of *sodomie* as criminal act is a rather unspectacular one and shows no historical breaks. Applicable not only in France and relevant for the majority of Europe is Episcopal and Roman Law. Both legal orders are quite clear when it comes to male to male sexuality. Roman Law punishes acts of male to male sexuality by death. Episcopal Law brings together sexual and theological deviance: Deviant sexuality is theological heresy—and heretics are to be burned. Because of its quality/character heresy is to be prosecuted by the Church. In these cases the reach of Episcopal Law—normally limited to the clergy—is broadened to include laymen. But this extends only to investigation of the crime and to passing of sentence: Following the basic rule "ecclesia abhorret a sanguine" the church leaves the task of executing the (death-) sentence to the worldly authorities. This is not the least of reasons why the judiciary of the central authority since the High Middle Ages could usurp more and more competencies in the field of criminal justice from the Church. The burning of homosexuals became the rule—in secular criminal law as well. Apart from one undated Carolingian order (De peccatoribus diversorum malorum), central authority for a long time refrained from taking legislative action against homosexuality. There are structural reasons for this lack of engagement: Pre-Revolutionary criminal law basically did not exist in form of statute law but developed throughout the Middle Ages side by side with Roman and Episcopal Law as an arbitrary conglomeration of sentences, i.e. case law. These collections became known as "coutumes" and constituted the body of law binding for a given region. A multitude of particular laws thus governed criminal justice in France for a long time and in many respects. Everywhere the same violations are treated as the most harmful ones,

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the coutumes treated all these violations in very much the same way and passed out very much the same sentences. The leveling influence of Episcopal Law and a small number of coutumes serving as models is clearly discernible. All coutumes state the same verdict: The homosexual heretic deserves to burn. Up to the first codification of the French criminal law during the Revolution the droit coutumier stayed in force, relatively untouched by the legislative power of central authority. There is in fact only one reason why central authority can and should deal with a given crime—if it surpasses the framework of private law taken governed by the droit coutumier. If some action is oriented against état or pouvoir, if it violates regal law or endangers the public order, then central authority can declare this deviation a cas royal. The first source specifying such a case is the Ordonnance criminelle (1670), and indeed the Ordonnance counts acts of *sodomie* as cas royeaux. (Recueil général des anciennes lois françaises, XVIII, pp.371ff.) The last third of the 17th century finally saw the replacement of the traditional religion-based condemnation of male to male sexuality by a more rational understanding of this conduct as an infringement of public interest. *Sodomie* is no longer seen as a feud with God but as direct attack—on public and state order and on the existing relations of power. In 1670, central authority claims its right to take legislative action for its own benefit or in the public interest and to suspend particular law. To safeguard public peace and security, central authority asks its judiciary to control and sanction acts of *sodomie*. However, nothing changes when it comes to the sentence normally passed on homosexual acts—at least not from a legislative point of view. Nevertheless, the shifting of competencies does indeed constitute a major change: obviously the whole administrative and judicial apparatus is restructured, and the new regulation might indicate a new understanding of homosexuality in the context of criminal justice. Now organs other than those previously committed to a deeply Christian ethics of sexuality pass out sentences based on the assessment of new dangers to public order as represented by sexual deviance. It is a certain department of royal jurisdiction that is to take care of this special breach and other violations of sûreté and tranquillité publique—it is an extraordinary one: the police. As deviant conduct, homosexuality by the end of the 17th century begins to lead a double life: *Sodomie* remains a crime in the eyes of the jurisdiction. But the respective efforts to control *sodomie* by legal action become held up by routine work and become more and more obsolete against the background of a concurring power of definition at work: royal legislature enforced by means of the police. As indicated by the ordonnance of 1670, these organs are much more interested in homosexual acts and are the much more innovative force when it comes to regulating these actions. [12]

Without the French Enlightenment playing a prominent role in that process, the long tradition of passing hard sentences on *sodomie* apparently comes to an abrupt end in 1791. Like all other "crimes contre nature" *sodomie* is no longer conceived of as a criminal act (Archives parlementaires 19. septembre 1791)—and has remained unknown to French criminal law until recent times. As a challenge to God, as violation of man's nature, as a heretic deadly sin, *sodomie* first set the world on fire. Human judges and worldly system of sanction could do nothing about this impudent provocation—apart from destroying the delinquent to

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avoid God's own vengeance. What is at stake here is a whole world order, God's world order and universal Christian morals. Treating *sodomie* as endangering public peace, security and order is a much more modest enterprise. Seen from this point of view, sexual deviance threatens human normality—understood here as a set of rules made by man himself. But in the end, this catalogue of norms appears to loose importance—or are these norms now so deeply implemented that they appear as lived normality? The efforts to protect a public apparently seen as homogeneous and bound to a specific place and time against destabilizing influences decrease with the end of the Ancien Regime. The French Revolution labeled vice as "crimes contre les personnes", a group that also included murder and manslaughter (Code pénal 1791) or "crimes et délits contre les personnes" (Code criminel an XI). Parallel to this, the Commission des Projet de Code criminel an XI created a section entitled "Crimes et Délits contre la Paix Publique" and a subsection called "Attentats publics aux mœurs". This subsection contains a violation that only seemingly was unknown to the old Law: "outrage public à la pudeur". In fact the regulations issued by the Ordonnance criminelle regarding homosexuality anticipate the concern expressed by the Commission of the year XI. It is precisely because sodomites are supposed to threaten public order and security that the royal force needs to take care of them. Pre-Revolutionary law was therefore familiar with "public nuisance"—as it knew secular order and morals. Still it remains decisive whether this knowledge is put into practice and when and how this knowledge becomes relevant. [13]

According to the records constituting criminal law in the 18th century, *sodomie* might be prosecuted by a number of different organs, on a number of different charges and with very different consequences. As of 1670, the police basically treats *sodomie* as a cas royal. Nevertheless, *sodomie* may only be treated and sanctioned by the police as a summary offense. If, however, a specific case of *sodomie* is identified as capital offense, the delinquent must be brought before the judge. Only judges are entitled to pass corporal and capital punishment—and in this case, traditional law demands capital punishment. Which attitude shapes the practical approach to criminal law in the 18th century? Is it the anachronistic-traditional one of the coutumes or is it the anachronistic-revolutionary one of the royal legislative power? [14]

In 18th century Paris, *sodomie* was no matter of small importance. *Sodomie* was a phenomenon of some social relevance that, as a breach of norms, was closely supervised by the law and its sanctions. According to estimates, the cases not brought to court but dealt with by the police in the years 1700 to 1780 number at about 40,000. The delinquents were investigated for quite some time, arrested, identified, interrogated and were then—with or without the help of influential friends—set free again. This astonishing activity by the administrative authorities is complemented by only nine court proceedings in the 18th century involving sodomites. In five of these cases, the death sentence was passed. But only one of these death sentences was passed by a Parisian court for *sodomie* proper, the other four remaining executions being legitimized by other serious crimes: Murder, rape, child slavery, blackmail, robbery or blasphemy. In the year 1750, Jean Diot and Bruno Lenoir are sentenced to death in Paris by ordinary courts for

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sodomie. In the year 1749, the police arrest 234 men for *sodomie*. All of these men are interrogated, some of them taken into custody for a short time, in most cases they are set free immediately. The Diot/Lenoir-case is the last instance where the anachronistic and obsolete perspectives on *sodomie* as breach of an order as universal as unforgiving shows its whole force. The reality of criminal justice then moved on and did not allow these perspectives to leave any distinct traces anymore. As a rule, by 1750, the enactment of proceedings by the royal judiciary has become obsolete, the severe sentences and even any punishment seems to have become inadequate. All this was replaced by an administrative handling of *sodomie* as the breach of a norm. The secular moral established by the Ordonnance criminelle therefore prevailed. *Sodomie* is now seen as merely a public nuisance—a conduct the police investigates on a large scale, but also a conduct that is not really punished any more. If the danger presented by *sodomie* was deemed so insignificant that *sodomie* was not punished anymore—why then were sodomites prosecuted so harshly in the 18th century? If the police was obviously no longer so interested in sanctioning moral misdemeanors—what else made them prosecute *sodomie* to such a degree? [15]

The Paris police came into existence by a royal decree issued on March 15th, 1667 (Bibliothèque Nationale de France, Fonds français 21.573, f.271f.). This decree demands the establishment of a new official post: that of the Lieutenance générale de police de Paris, and transfers the responsibility for securing public order and security in the Capitale to that post. Besides, the Lieutenance générale de police de Paris is equipped with far-reaching powers as a judge. In the long run, it was intended that the police would support the mercantile self-renovation of absolute monarchy and drive social disciplining. The police is responsible for assessing available or potential resources and for preparing their rational exploitation. This in turn gives the police access to each and everyone. The police has to investigate and record the most common and trifling details, thereby allowing the central disciplining force to take hold of these "private" activities (FARGE & FOUCAULT 1982; PIAZENSA 1990). It is in this context that the police takes an interest in *sodomie*. In the 18th century, sexual habits become important everyday activities and sexual characteristics are no longer seen as something that could possibly be left to the nonchalant management of the anachronistic magistracy. The interpretation and enforcement of laws concerning *sodomie* and the experiences shaping the everyday practices of those male individuals labeled deviant and thus persecuted are forthwith controlled by the police—following idiosyncratic lines of order, security, normality and neo-absolutistic welfare: Special squads exclusively investigating cases of *sodomie* were established. These squads only partly work within the institutionalized frame of the police apparatus. Masses of freelance informers infiltrate the circles known to engage in relevant activities. They collect the information and condense these into records. They arrange for arrests thereby delivering the precondition for extended interrogations, which in turn make further investigation possible. Special agents coordinate this extensive research, organize the material collected by the undercover agents into detailed records. The Paris police does what it can to discover sodomites—but one thing the police almost never dealt out was punishment. The police obviously is not interested in extinguishing sexuality

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labeled deviant behavior. The police is only interested in discovering, recording and statistically documenting as many sodomites as possible. The last third of the 18th century sees the police not only not punishing *sodomie*, but also refraining from individual investigations, arrests and interrogations. With the start of the 1870s, the investigative activity of the police is confined to a nightly round by an agent visiting the regular meeting places of sodomites and, as a rule, with only one result—a notice in a record saying: "Nothing out of the ordinary!" (Archives Nationales Y 13.408) While the constabulary is thus less and less interested in stopping acts of *sodomie* through punishment, it is at the same time more and more interested in general information concerning *sodomie*. This fact, clearly to be seen from the records themselves, is followed up by another finding: The more lenient the police's engagement to restrict *sodomie* as breach of norm, the better the position of the representatives of the institution working that field. As noticed by the agents themselves in the notes kept in the records, they initially work on private contracts issued by the Lieutenant général de police. Then they are given the official position of inspecteur par commission and are finally put in regular budgeted posts. The more lenient the police's approach to restricting *sodomie* as breach of norm, the better the position of the representatives of the institution working in that field: Putting it the other way around, the picture becomes clear. The initiative of the police recedes as the apparatus gains in profile and recognition. This gain is achieved by the Lieutenance générale intentionally: Systematically, the police seeks conflict with the magistracy, the police dramatizes irregularities especially in such areas that fall under the authority of both the police as well as the judiciary. This is where *sodomie* comes into play. The numerous and detailed reports on investigations are used by the police to show the extreme popularity of hedonistic, unproductive sexual practices defying mercantilism as well as the inactivity and inability of the ordinary courts to control these practices, which, it goes on to argue, might endanger the very state itself. Put against this backdrop, the police only seemingly without a special effort on their part gains recognition as the sole reliable controlling body and rational constabulary. [16]

In light of this struggle for power between the established and the upcoming ruling elites, male homosexuality is increasingly acknowledged as a social problem. At the same time and exactly to the degree the self-staging of the police becomes successful, male homosexuality looses its status as violation of law. On January 18th, 1781, inspecteur Noël, in charge of the nightly "patrouilles de pédérastie", arrests three men identified as sodomites. He releases them on the spot, because, as he remarks in the records, "we cannot recognize any offence". But, on April 11th, he "sur la clameur publique" again arrests four sodomites, "poursuivis par la populace." The "charge directe" lacking in January is now present: The four arrested are charged with "public nuisance" (Archives Nationales Y 13.408). Their sexual orientation is obviously of importance to the police only as long as it causes public unrest. Sexually deviant men acting discreetly might not stay unwatched, but they are certainly not punished anymore. Out of a political quest for power, out of concern for discipline and order—for keeping or gaining positions, the central authority treats *sodomie* casually whereas the police does so systematically. Handled by these two institutions,

sodomie is no longer a deadly sin but a mere summary offense. Thus, if the documents of the Parisian police concerning *sodomie* have to be understood as rhetoric media of self-staging, the question that remains, how can these sources be used as sources on social history. What is at stake is the authenticity of these records and the extent to which they can still be understood as ego-documents. Are they fiction, dramatized documentation or are they, nevertheless, still product of a non-ideological record-keeping practice? In terms of how widespread *sodomie* actually was, the will to depict reality truthfully on the side of the police efforts as documented in police records cannot be questioned enough. Not only is massive evidence of extensive sodomitic activity of importance to legitimize the whole apparatus, the whole income of each special agent and of each of his employees was totally dependent on the number of reported incidents: i.e. they were all paid according to the number of sodomites exposed. The records contain numerous complaints on arbitrariness, duress, false evidence, provocation and arrests without any reason at all on the part of the special *sodomie* squads. These complaints extend well into the second half of the century. But there is yet another aspect of police records that opens up an indirect but not consciously misleading insight into the world of sodomites: The undercover agents did some thorough research into the lives and habits of the men concerned. Their reports frequently, extensively and in details mention the conduct of sodomites: their incautious attempts at establishing contact, the unambiguous expression of their desire, even towards undercover agents acting as agents provocateurs, sexual interaction in public places frequented by unknown people, the innocent depictions of their "careers" as sodomites. All this is reliable evidence indicating a distinct lack of consciousness of "guilt" or awareness that there might be a social "problem" at all on the part of the person arrested. All this is more an indication of the inertia of a culture of unregulated sexuality than actual evidence pointing to the formation of a subculture evading the pressures of sexual dictates. The paraphrases of self-evidence by homosexual men contained in records of 18th century Paris indicate an ongoing practice of self-confident and "natural" sexuality. And this self-confidence that can be extracted from the observational reports of the police as a historical fact, immediately makes sense when viewed within the context of the nonchalant handling of these idiosyncratic men by the police and penal practice: This self-confidence, this "relaxed being-at-one-with-oneself [unangestrengtes Bei-sich-selbst-Sein]" (LÜDTKE 1984, p.332) can be interpreted as civil disobedience in the face of criminal law that is both strict but powerless. Therefore, the conceited critique by the police concerning the inefficiency of the old procedures of sanction and punishment and the processes of putting morals into practice touches upon the truth—without being entirely truthful. [17]

"Power is everywhere not because it embraces everything but because it comes from everywhere" (FOUCAULT 1992a, p.114)—and it shows that the constitution of criminality is not only shaped by very different players and very diverse motives, but also that even those who are supposed to lack all power can, by just "being-at-one-with-oneself" profit by the struggle for power between the established and the upcoming ruling elites. Their persistent disobedience and its uncoordinated and unintentional interplay together with the quest for

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professionalism by the police and the struggle for power by central authority makes it unsuitable to regulate sexuality of the traditional ruling elites. In "organizing an unstable field of power constantly being reordered" as BURGUIERE (1994, p.114) defines the "sphere of the politics", "the exercise of power comes as reward for those who understand to exploit the potentials of any given situation and to benefit by the contradictions and tensions characterizing the field of the social". Those rewarded by the fight on norming sexuality in 18th century Paris include not only the Parisian police that managed to gain a higher profile compared to the magistracy, but also the many sodomites that got away unpunished. Without having anything in common, both groups find themselves suddenly forming an alliance—without purpose, but in the long-term victorious: The sodomites are used by the police as a tool; in return the police, needing this tool, has to be lenient on the sodomites. Unintentionally, the police thus applying norms paves the way towards a legalization of deviance. At the same time the practice employed by the police changes conceptions of sexuality and the handling of sexuality which further accelerates the aforementioned process. The numerous sodomites are presented as dangerous criminals only in very few instances—and only to serve the interests of the police. In general the police treats sodomites as mere "disturbers of the peace." In effect, after the 18th century it becomes impossible to classify sodomie as a crime in the criminal system. With the turn of the 19th century, homo- and heterosexual acts are treated basically in the same way in France: Homosexual acts are only prosecuted if they damage the honor, the freedom or the right to remain uninjured of third parties, i.e. if committed in public and provocative to members of the public, if they involve violence or minors.[2] Post-revolutionary French criminal justice does not consider homosexuality as a crime in itself. Nevertheless, for a long time every sodomite could in principle get charged with "outrage public à la pudeur". The law defines homosexuality as a sexual variation that, if realized in public and reported to the police, is prosecuted as a breach of norm and as such has to be punished.[3] What has long been simply a policy practiced by the police and then became everyday social conduct now sediments into criminal law. The Parisian police turned a norm-breaking social conduct into an at least theoretically acceptable variant of sexuality—with the exception that the experience of homosexuality has to stay confined within the private sphere. [18]

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2 Code pénal 25.9./6.10.1791; Projet de Code criminel de correction et de police an XI; Code pénal 22.2.1810.

3 Code pénal 1810, Artikel 330; ordonnance royale 28.4.1832; loi 13.5.1863; loi 29.7.1881; loi 11.4.1908.

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