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## **SECURING PRISON THROUGH HUMAN RIGHTS: UNANTICIPATED IMPLICATIONS OF RIGHTS-BASED PENAL GOVERNANCE**

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*Abstract: Human rights are a dominant framework for regulating prisons. However, there is little critical interrogation of human rights as they are actually translated into tools for governance. This article develops a critique of human rights by analysing and considering policy as a means of realising rights. It urges sustained and ethnographic attention to policy settings, arguing that policy exerts a form of agency. The article revisits critical criminological claims that reform expands penal control, examining this specifically in the context of human rights governance of prisons. To do so, it draws on the anthropology of policy and science and technology studies (STS) suggesting that these fields offer useful tools and insights in the study of policy. In the final part the discussion turns to three examples of human rights issues in the Scottish penal context to problematise rights-driven penal policy and suggest directions for research.*

**Keywords:** anthropology of policy; human rights; prisons; science and technology studies (STS); Scotland

This article advances a substantive claim about, and suggests a methodological addition to, the study of human rights in prisons. The substantive claim is that rights-led prison reform contributes to prison bureaucratisation and through this, transforms, extends, and legitimates, forms of penal control. The methodological addition is applying ethnographic approaches to mundane and ‘boring’ (Star 1999, p.377) aspects of prisons – namely policy reform and legal cases, exploring the documentary representation of life lived in cells – to show this. Neither this claim nor this methodological approach is entirely novel, but they are drawn together here in an attempt to show how ethnographic attention to bureaucratic spaces of punishment can develop and advance understanding about the nature of punishment and control in contemporary times. In particular, work of anthropologists of law, policy and science (Riles 2005; Shore and Wright 1997; Star 1999; Strathern 2000) offers new insights, especially about the material and cultural dimensions of something like penal policy, that, in turn, can show how policy articulation of human rights facilitates increasing power of prison relative to

prisoners. The article seeks to complement the rare but valuable ethnographies of criminal justice bureaucracy (for example, Annison 2015; Souhami 2012) that have brought to life the people who write, interpret, and act, through policy, by focusing alternatively on the way policy writes, interprets, and acts through people.

A simple conundrum provides the impetus of the analysis: given the widespread acceptance among liberal democratic states of human rights frameworks for the regulation of prisons (Coyle 2009; Van Zyl Smit and Snacken 2009), why do we still find evidence of the kinds of conditions that gave rise to rights standards in the first place? Even in countries that have actively embraced a human rights approach to prison management, such as Scotland, the jurisdictional focus of the present article, the evidence on the success of rights, is mixed. It remains standard for many Scottish prisoners to be kept in cells for 22 hours per day (HM Inspectorate of Prisons for Scotland (HMIPS) 2017), and increasingly common for long-term prisoners to remain in detention for years, and in some cases decades, past the completion of their sentences (Scottish Prisoner Advocacy and Research Collective (SPARC) 2018). In 2013, the latest year in which the cause of death has been determined for all deaths in Scottish prison custody (this fact alone raising questions about the transparency and accountability of prisons) seven of the 24 deaths were classified as suicide, a rate only slightly lower than that of England and Wales in 2013, and actually higher than the proportion of suicides taking place there in 2017, a period in which the prison system is recognised as being in turmoil.<sup>1</sup>

One might argue that while there is always room for improvement, the direction of travel in Europe is the right one, moving towards the achievement of rights-respecting institutions. This suggests current reform efforts should continue as before to develop, improve, and implement, rights-informed penal policies, such as by keeping prisoners active and healthy, and limiting unnecessary use of prison. However, these are precisely the policies that were put in place starting over six years ago in 2012, when the Scottish Prison Service (SPS) rolled out an aspirational, rehabilitation focused vision called ‘Unlocking Potential, Transforming Lives’, and over a decade ago when the Scottish Government adopted nearly every recommendation put forward by an independent Scottish Prisons Commission (Scottish Prisons Commission (SPC) 2008). The Scottish experience is not unique, with recent (Calavita and Jenness 2015) and not so recent (Feeley and Rubin 2000; Feeley and Swearingen

2004) studies of rights-based reform in American prisons finding that rights-driven reform has in some ways strengthened penal control. The conclusions of these studies seem to offer evidence of Foucault's (1990[1977]) critique that reform serves to sustain and expand the penitentiary. And yet, if there is any point to scholarship, it might be to contribute to understanding that might help avoid a nihilistic fate of simply repeating the past and continuing to reproduce policies that extend penal control.

A starting point for the present analysis, therefore, is that it is important to elucidate *how* penal policy and human rights work, before it makes sense to assess how *well* they work. Specifically, the questions organising the analysis are: How does a human rights approach to prison policy contribute to prison experience? How does penal policy interact with human rights and with what effects for prison and prisoners? Human rights are a dominant ideology in the governance of prisons but rarely are they directly the target of critical inquiry. Similarly, policy is an important pathway by which human rights enter prison and by which States demonstrate rights compliance. Human rights failures in prison often are attributed to bad, poorly implemented, or absent, policy, but rarely are questions raised about the technicalities of policy and how these shape particular means of operationalising a rights ideal. Hence, this article attempts to problematise both rights and policy in respect of prisons. This is not to say it advocates that one ought to, or can, abandon rights or policy. Rather, it centres human rights and policy, and especially the materials through which they visibilise the prison and its problems, as objects for social study, refusing to take them for granted as self-evident goals or neutral tools.

Mention of the materiality of policy and human rights frameworks reflects the methodological and epistemological orientation adopted herein. This draws on anthropological perspectives (Shore and Wright 1997; Strathern 2000) which treat policy as a cultural phenomenon and where the interest is in tracing how 'policies "work" as instruments of governance' (Shore and Wright 1997, p.3). By placing the word in quotation marks, Shore and Wright signal a governmentality influence but also an anthropological sensibility in approaching policy as a field of sitework for digging in the dirt. There has been a growth of interest by anthropologists in bureaucratic settings, like policymaking, and this shows growing awareness of the importance of addressing the materiality of these sites:

‘anthropologists ... until recently have “discovered all sorts of interesting and important things looking *through* paperwork, but seldom paused to look *at* it”’ (Hull 2012, p.2, quoting Kafka 2009, italics in original). Hence, I approach the question of human rights and penal policy through the specific material practices of translating a general notion of rights into policy via a range of various documents and practices.

This builds on the methodological approach that evolved during a prior research project, ‘Ethnography of Penal Policy’ (ESRC funded, 2008–10), a two-year study of penal reform in Scotland. Although I followed a more conventional ethnographic route at the start of that project, following policymakers in their day-to-day work lives, I increasingly came to focus on the lives and journeys of policy documents, as these emerged as crucial and neglected actors in the policy process. I was particularly struck by the messiness of policy processes (not on its own a particularly original discovery) juxtaposed with the orderliness of policy instruments and texts. Legislative Bills, policy memoranda, statistical reports, white papers, conference PowerPoints, conferred coherence and narrative structure on situations that often felt like barely contained chaos. Not only did such texts present penal policymaking as organised, thoughtful, evidence-informed, and focused, they also presented the world of prison as one amenable to State-directed improvement evocative of the utopian state building projects recounted in Scott (1999). Such images of order contrast sharply with the representation of prisons to be found in other accounts of imprisonment, such as prison ethnography, where order is a complicated and negotiated prospect, and where ideals of rehabilitation (which dominate the contemporary Scottish policy discourse) are constantly undermined in practice by dynamics and demands of institutional life. I came to understand these documentary depictions of prison and the policy process not as false representations; rather, they perform and produce a penal reality that has tangible effects both in the offices of civil servants and the cells of inmates (Armstrong 2017; Carlen 2008).

Producing an ordered narrative of penal change demonstrates the generative power of policy materials. In what follows, I draw on the literature on Europe and the US and examples of rights-based reforms and disputes in Scotland to consider additional ways in which policy acts. Throughout, I develop the argument that human rights articulated through penal law and policy not only

bureaucratizes prison governance (Feeley and Swearingen 2004; Murphy and Whitty 2007) but through this strengthens penal power and creates new possibilities of literal and symbolic prison violence.

The article is organised as follows: after revisiting classic work on the role of reform in penal expansion, I discuss how research directions in anthropology and science and technology studies (STS) are opening up the possibility of gaining new traction developing these ideas, through an interest in the intricate dynamics of the technicalities of law and policy. The article then applies this to human rights in penal contexts considering how these have been articulated through particular law and policy instruments and studied in contemporary scholarship. This shows a process by which general principles of human rights are technically and institutionally specified as procedures and processes of bureaucracy which largely advantage prison authorities in the struggle to frame State conduct as rights violating or compliant. The final section introduces three examples from Scotland to suggest some possible directions for exploring these themes to assess how human rights-led bureaucratisation might be understood as securing penal power and legitimating acts of penal violence.

### **Reform as a Strategy of Penal Expansion**

That prison reform is connected to penal expansion is a critique well established by Foucault ([1990]1977) who famously observed that the birth of the penitentiary happened simultaneously with the emergence of penal reform. ‘For 200 years everybody has been saying, “Prisons are failing; all they do is produce new criminals.” I would say on the other hand, “They are a success, since that is what has been asked of them”’ (Droit 1975; and see Foucault 1990[1977]). Reform is one of the prison’s means of securing its existence: the failure of the prison becomes a justification for further investment. Cohen (1983, 1985) worked a similar line of critique, for example writing about the reform-driven emergence and spread of community-based punishments as thinning the mesh and widening the nets of control. Both theorists emphasised the importance of discourse in the production of penal knowledge and subjectivities, with the prison constituting a specialist setting in which both expert and deviant identities are formed (Cohen 1983; Foucault 1990[1977]).

Foucault and Cohen's work, influential even in fairly mainstream criminology during the 1980s and 1990s, seems to have fallen out of fashion somewhat in a discipline with a renewed faith in rehabilitation and desistance (dutifully cited but otherwise not engaged even in critique of contemporary penal trends).<sup>2</sup> Lacombe (1996) identifies a possible reason for this: if 'every attempt to reform society ... ineluctably becomes its opposite – a technique of domination' (p.336), empirical investigation becomes pointless and social change impossible. Cohen himself seemed to have felt trapped by the cul-de-sac exposed by his own work: 'Every attempt I ever made to distance myself from the subject [of punishment], to criticize it, even to question its very right to exist, has only got me more involved in its inner life' (Cohen 1988, p.8).

The trap Cohen identifies is the one that besets reform: to criticise the prison means almost inevitably to engage it on its own terms, and thereby to be forced to see (some renewed form of) it as the solution to itself (Armstrong and Jefferson 2017). For example, it is difficult to challenge prison's failure to reduce recidivism without being drawn into a discussion about how rehabilitation might be better supported in prison. Hence, unless one adopts abolition at the outset, understandings of the purpose and practice of punishment are shaped by the dominant institution of punishment, including its language and logic. Professional discourses of care, control, order, security, are part of this, and so, too, are the technical and administrative discourses of statistics, annual reports, and budget forecasts. Foucault's later development of the governmentality concept emphasises the technical as a strategy of undermining political contestation and foreclosing resistance: 'the underlying strategy of governance ... is to take political problems and render them technical and bureaucratic' (Hetherington 2011, p.5).

### **Policy Ethnography: Taking on the Technicalities<sup>3</sup>**

A governmentality perspective of penalty suggests the futility of a conventional reform concern with 'getting policy right; with exerting influence over policy, linking research to policy, and of course with implementing policy' (Mosse 2004, p.639). This is because policy is the very mechanism by which politics is dissipated and displaced into the 'technical and bureaucratic', not through bad policy or ideological policy, but through a cultural and social system of knowledge production called policy. Foucault's work, again, offers a resource, through his notion of the *dispositif*, generally translated in

English as ‘apparatus’, and similar to the actor-network-theory concept (Latour 1987) of a ‘centre of calculation’, defining it as:

a thoroughly heterogeneous ensemble consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions – in short, the said as much as the unsaid. Such are the elements of the apparatus. The apparatus itself is the system of relations that can be established between these elements. (Gordon 1980, p.194)

Again, the point is not to give up on policy, just as it cannot (yet) be to try for better policy, but to understand the complexity, flow, and interactions of ideas, words and materials as they move through different spaces and forms designated as sites of policymaking. The reason for doing so is to trace how the political is present in seemingly neutral objects and reasoning processes, as well as to explore how neutral objects and processes have their own politics. It is important, as Riles (2005) wrote, ‘to bring the technical into view not as an effect or byproduct, a tool of more important agents and forces, but as the protagonist of its own account’ (p.985). Riles was writing about technical aspects of law, encouraging legal scholars to investigate the form, aesthetics and conventions of doctrinal reasoning in addition to the content of decisions and rules. Writing about another context, Star (1999) calls for sociologies of computing and other scientific endeavours to consider infrastructure as social as the people who code: ‘Study a city and neglect its sewers and power supplies ... and you miss essential aspects of distributional justice and planning power. Study an information system and neglect its standards, wires, and settings, and you miss equally essential aspects of aesthetics, justice, and change’ (p.379). Hers was a ‘a call to study boring things’ – ‘to restore narrative to what appear to be dead lists’ things like ‘numbers and technical specifications’ (p.377).

Penal policies are regularly the subject of research and critique, including the ways ‘policy increasingly shapes the way individuals construct themselves as subjects, [recognising that t]hrough policy, the individual is categorized and given such statuses as “subject”, “citizen”, “professional”, “national”, “criminal”, and “deviant”’ (Shore and Wright 1997, p.4). Less attention, though, is devoted to some of the most ‘boring’ corners of penality that might further reveal how such statuses are produced, ingrained and subdivided. The implication for prison ethnography is that key concerns



about justice and violence cannot be found solely in thick descriptions of inmates and the people and buildings that hold them in place. It is necessary also to incorporate in such accounts, mundane practices and conventions like the recording standard of prison populations. One small example of this is the way prison populations (not least in Scotland) are reported as ‘average daily populations (ADPs)’, which emphasises a measure of stock, the number in prison on average on any given day, over a measure of prison flow, which is the number of prisoners moving into and out of prison custody. A stock standard of measurement makes more visible people who are in prison for longer periods; for example, a prisoner serving one year ‘counts’ the same as twelve people serving one month each – both show up as one prisoner in an ADP table. A characteristic of the Scottish prison population is the high proportion of people serving very short sentences – in 2007, for example, over 83% of people sentenced to custody received a sentence of six months or less (meaning that they actually would serve three months or less). These short sentenced prisoners thus, arguably, are less visible because of the way they are counted. Their backgrounds, needs, and treatment in prison subsequently are less of a policy focus with treatment programmes, education, and release planning being focused on prisoners staying for years. The year 2007 is used as this was the reference point for the Scottish Prisons Commission, which studied prison populations using 2007 data as evidence in recommending the creation of a presumption against short prison sentences (Scottish Prisons Commission (SPC) 2008).<sup>4</sup> While it is possible to argue that having a statistical category of very short sentenced prisoners, allowed them to be targeted and, if policy reform succeeds, removed from prison populations, the category also allowed them to be, as Carlen (1983) wrote about women inmates, *denied* as prisoners, not considered ‘real’ inmates and so not worthy of organising prison services around, even in a system where they comprise, when measured in terms of flow, a dominant segment. Since the presumption of custodial sentences of three months or less was enacted, this population has declined in ADP measures, but there has been a rise in those sentenced to four months or more, suggesting, yet again, a measure seeking penal minimalism has led to a degree of uptariffing.

The example of prison population measurement shows how something like a statistical report might be considered to ‘act’. It is a form (compared to a novel, a film, or a protest march) that secures legitimacy by appearing to privilege ‘things that are seen as objective’ (Engle Merry 2016, p.214).

These can be and 'are measured, and [combined with other objects which in turn] become accepted as measurable over time: they become real, not just constructs. As Desrosières puts it, at some point, collective objects or aggregates of individuals come to "hold", to be accepted as real, at least for a while ... Once they are accepted, they come to seem real' (Engle Merry 2016, p.214, quoting Desrosières 1998, p.101). Engle Merry was writing about the rise of quantitative indicators – of national happiness levels, gendered violence, trafficking, GDP, and so on – noting how these artificial constructs gain traction as empirical phenomena themselves, independently determinative of national pride or shame. In the same way, statistically constructed prison subpopulations came to be seen in this policy process as real, empirical animals with distinctive demographic and behavioural qualities, as well as normative force in determining if a prison system is 'working' or not (see Armstrong 2013). And policy reports that take up these statistical constructs also became actors in penal reform and policy development, objective indicators of excessive or adequate levels of punishment (Scottish Prisons Commission (SPC) 2008).

Having suggested what it means and why one would want to take on the technicalities, we now can consider this for human rights in prison governance.

### **Human Rights and Bureaucratisation**

While the European Convention on Human Rights (ECHR) came into force in 1953, setting out rights of the individual against degrading or inhumane treatment (Article 3) and rights to security and liberty (Article 5), the solidification of human rights governance of prisons developed more recently through an increase in rights-based case decisions, laws, rules, and standards (see Coyle 2006, pp.101–32). The European Prison Rules (2006), are a crucial framework within Europe, and reflect the influence of the principles, and significantly, the organisational style of, the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMRT). The UNSMRT are internationally influential, including in Scotland (via the European Prison Rules), where The Prisons and Young Offenders Institutions (Scotland) Rules have been acted as law, most recently revised in 2011. Since this time, the UNSMRT went through a five-year revision process to their current version, published in 2015, and are referred to now as The Mandela Rules. Copious texts have been produced to document these rights

frameworks in practice, offering European case law summaries, collected volumes of all key rules, conventions and standards applicable in prisons, and so on, offering fertile ground for analysis.

It is recognised that the operationalisation of broad statements of principle requires translations into increasingly technical and specific guidance capable of being monitored, and this has particular effects. '[T]ranslation shifts human rights from a legal discourse with a broad and flexible vision of justice and rights to a technocratic one of economics and management ... transform[ing] abstract legal concepts into specific policy prescriptions' (Engle Merry 2016, p.162). Such a shift is evident as one moves from the European Prison Rules (2006) to the Scottish Prison Rules (2011). For instance, European Prison Rule 1 sets out the general and fundamental principle, readily accessible to a lay person, that:

All persons deprived of their liberty shall be treated with respect for their human rights.  
(Council of Europe 2006)

But how is this translated into day-to-day regulation of prisons? Scottish Prison Rule 31 offers one specification of this: 'An untried or civil prisoner may wear his or her own clothing'. The right to wear one's own clothing can be understood without difficulty as an issue of dignity and humanisation, and the rule comports with the spirit of the European Prison Rules and the Mandela Rules. However, Rule 31 is qualified by 20 conditions and exceptions, which illustrates the channelling of general principles into myriad capillary rules. The list of exceptions is worth presenting verbatim simply to convey its semiotic power (see Riles 2006; Valverde 2006):

(2) Paragraph (1) does not apply if – (a) the prisoner has received a punishment under rule 114(1)(e); or (b) the Governor has ordered the prisoner to wear other appropriate clothing for any of the reasons specified in paragraph (4). (3) The Governor may revoke any order under paragraph 2(b) when it is appropriate to do so. (4) For the purposes of paragraph (2)(b) the reasons are that (a) the Governor considers that the prisoner's clothing (i) is in poor condition or too unsanitary to clean; (ii) may be prejudicial to security, good order or discipline within the prison; or (iii) is incompatible with the facilities at, or management of, the prison; (b) the Governor receives advice from a healthcare professional that (i) the prisoner's clothing is prejudicial to the prisoner's health; or (ii) special clothing is required on health grounds; (c) special or protective clothing is required for particular work or activities being undertaken by

the prisoner; (d) particular clothing is or may be required for the purposes of legal proceedings; or (e) a direction made under paragraph (5) is in force. (5) The Scottish Ministers may make a direction for the purposes of specifying (a) the types of clothes that a prisoner may or may not wear; (b) whether it is appropriate to allow prisoners to wear or be prohibited from wearing their own clothing; (c) that the matters in sub-paragraphs (a) and (b) apply to specific prisoners, categories or classes of prisoner; and 26 (d) that the matters in sub-paragraphs (a) and (b) apply to parts of a prison, within a particular prison or across a class of prisons. (*The Prisons and Young Offenders Institutions (Scotland) Rules 2011*)

One of the regular circumstances in which a Rule 31 exception is invoked (to be technical, falling under (4)(a)(ii) ‘may be prejudicial to security, good order or discipline’) is during visiting times, when the prisoner must wear their colour-coded polo shirt or pullover in order to distinguish them from their friends and families dressed in ordinary clothes. It is worth pointing out here that the Scottish prison uniform is almost identical to the Scottish primary school uniform, also consisting of a polo shirt and coloured sweatshirt (and additionally including trousers and shoes in a designated colour, while prisoners may wear their own versions of these). The technical reason for the uniform requirement is to maintain security, presumably allowing for quick identification of who should and should not remain in prison at the end of the visit, but a simultaneous effect is the infantilisation of prisoners, in visual terms, compounding all the other ways in which institutionalisation in this setting diminishes the adult dignity of inmates, as Goffman noted long ago (Goffman 1961).

Security is the ultimate trump card for prison authorities and creates the discretionary space for practices motivated by disciplinary, vindictive reasons as well as practical ones, to be rendered rights compliant. The ‘Mandela Rules’ (UN Office on Drugs and Crime (UNODC) 2015), appears to confront this issue explicitly, containing a clause not present in previous versions of the UNSMRT. Its Rule 1 states:

All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, *for which no circumstances whatsoever may be invoked as a justification*. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times. (UN Office on Drugs and Crime (UNODC) 2015, p.2, italics added)

The highlighted phrase is remarkable; it confers an unconditional status to the guarantee of protection against torture and inhumane treatment. Its inclusion attempts to pre-empt the get out clause in rights-based prison frameworks, where the human rights of a detainee may be suspended or limited when these are in conflict with the legitimate needs of a State actor to maintain security and order, or the necessary consequence of legitimate detention. However, while one sentence takes away the trump card another re-deals it: the last words of Rule 1 imply the power to dilute the unconditional guarantee by bringing back in the language of safety and security. No human rights framework seems able to escape this hedging mixture of offering and circumscribing rights, nor can they avoid the cascade from the grand principles dividing into infinite and infinitesimal mundane technicalities, each of which might be enforceable but collectively may not add up to protection from inhuman and degrading treatment.

The Mandela Rules provide, for the most part, a simple and clear form of guidance, but because of this must be interpreted and applied by those in authority in particular national, institutional and policy spaces.

Moreover, the rules increasingly participate directly in a technocratic version of governance. Mandela Rule 6 for example, states that:

There shall be a standardized prisoner file management system in every place where persons are imprisoned. Such a system may be an electronic database of records or a registration book with numbered and signed pages. Procedures shall be in place to ensure a secure audit trail and to prevent unauthorized access to or modification of any information contained in the system. (UN Office on Drugs and Crime (UNODC) 2015, pp.3–4)

Rule 6 is one in a subset of rules about ‘file management’ and covers detailed categories of data collection and monitoring, with Rule 10 identifying the purpose of this: ‘... to generate reliable data about trends relating to and characteristics of the prison population, including occupancy rates, in order to create a basis for evidence-based decision-making’ (UN Office on Drugs and Crime (UNODC) 2015, p.5). Rules about file systems show a duality in the subjectivity of rights enforcement and monitoring: the implicit subject of grand principles – the inherently rights bearing

individual – and the subject of rights compliance management – penal populations, the trends in which will form the basis for policy and practice evidence.

For the most part, prisons researchers have advocated the adoption of human rights frameworks uncritically. This is neither surprising or unreasonable (in the absence of systems for standardising or monitoring treatment of prisoners in a world where extreme prison abuses remain common). However, now that such frameworks and standards have taken hold and come to be *the* means of understanding good penal policy and practice, it is timely to consider their productive capacity, such as in constituting ‘prison populations’ through the creation of audit trails (cf. Jefferson and Gaborit 2015). Andrew Coyle, a former prison governor and renowned prison rights scholar, has been especially influential in the adoption of human rights as a basis of prison governance. In the updated 2009 version of his book, *A Human Rights Approach to Prison Management*, he notes that it has been translated into 16 languages and downloaded 70,000 times (Coyle 2009, p.3). In addition to it being ‘the right thing to do’, Coyle gives a pragmatic reason for the adoption of a human rights approach in prisons governance: ‘this style of management is the most effective and safest way of managing prisons’ (p.8). The book organises its material in a similar manner to human rights frameworks themselves, with a first part setting out general principles (for example, on dignity and prohibition of torture) and later sections addressing specific aspects of management and categories of prisoners (‘health care’, ‘disciplinary procedures’, ‘women prisoners’, ‘juvenile and young prisoners’, and ‘life and long-term prisoners’, etc.). Van Zyl Smit and Snacken’s (2009) key European reference text on prisons and human rights, roughly follows the same structure, moving from general to specific matters of prison management, but their contribution is significant for bringing to bear empirical research on the effects of prison to inform how human rights might be harnessed and given force, particularly by focusing on the status of prisoners as citizens.

In both academic work and advocacy about human rights and prisons, this translation of, as Engle Merry (2016, p.162) put it, ‘a broad and flexible vision of justice and rights’ into ‘specific policy prescriptions’, creates a tension between the aspirational and the more day-to-day administrative considerations of prison management. How this tension is managed and resolved is crucial for the state of penal conditions and understanding how human rights operate in practice. I

argue that this tension is not simply an imbalance in emphasis or a mistaken technical focus of a policy but is fundamental to the nature of policy itself. In these times of audit culture (a particularly compelling elaboration of neoliberalism and managerialism, see Power (1999), and Strathern (2000)), policy speaks its own, hegemonic language that conceptualises in terms of narrowly defined outcomes and relies on technical specifications to address contradiction and dispute.

Murphy and Whitty (2007) were among the first to point out a disjuncture in the language of rights and the language of penal governance. They asked why lawyers talk about rights while criminologists (and prison governors) talk about risks. They concluded that prison governance imposes disciplinary incentives and constraints that lead to a focus on ‘the material demands of penal administration’ (p.800, quoting Brown and Pratt 2000). Their analysis draws attention to the way that risk and rights have their own discourses that tend to preclude the other, and the empirical work of prison scholars suggests that this is a function of institutional and organisational contexts and cultures. Whitty (2010) further noted that criminological scholarship often sets rights against risk, as counterbalances and limits to each other, arguing this binary is false, obscuring how prison governance internalises rights as a form of organisational risk. Rights become just one more thing the prison has to manage in order to protect the security of both its operations and reputation (Power 2004). The language of risk has become embedded in human rights instruments themselves, with the technical specifications and population management concerns in both the European Prison Rules and the Mandela Rules standing in contrast to broad principle-based rights language, thus priming the very subordination that Whitty observes.

Prison grievance procedures have provided the ground for recent work exploring how rights work in practice within specific penal systems. Calavita and Jenness (2015) conducted a major empirical study of the prisoner grievance process in California tracing the process of subordination and technical-isation. Their examination of hundreds of internal prisoner grievances included analysing case files and interviewing prisoners and staff. They found that prisoners tended to speak in terms of rights as fundamental principles. Specifically, ‘prisoners and the CDCR [the state prisons agency] rarely spoke the same legal language, with the former far more likely to refer to constitutional rights, federal lawsuits, and even international law, while the latter almost uniformly drew on local

policies and procedures such as those stipulated in Title 15, the DOM, and administrative bulletins' (p.161).

Similarly, an empirical study of rights awareness in Dutch and English prisons (Karamalidou 2017) found in 'interviews [with prisoners] the dominant themes were prisoners' humanity and personhood. They were human beings with their own individuality, characteristics and needs like any other human being' (p.116). Both of these studies point to the prison's organisational monopoly on technical knowledge and discourses of rules, laws and policies surrounding rights. For example, Karamalidou (2017) writes: 'With a few exceptions, while participants identified a good number of civil, political, social, economic and subsistence (human) rights either by name or through examples, they were generally uncertain about whether they were legally entitled to some of them. Asked if they knew of or thought that there was an English human rights law, their replies ranged from *I do not know* to *I imagine so*' (pp.116–17, italics in original). Of the 34 English prisoners interviewed, 'Only one participant named the 1998 Human Rights Act' (p.117; see also Naylor (2015), and for grievance processes in a French prison, see, Fernandez (2015)).

These empirical investigations of human rights tools, reveal that the policies and legal decisions meant to achieve humane penal practice, support distinct, and competing, means of constructing rights and their violations. It is not simply that discourses do not engage each other, but that they produce separate realities about what is at stake: prisoner and staff 'participants speak past each other, as their two languages of [humanistic] needs and bureaucratic mandates entail not only distinct vocabulary but altogether different syntaxes of meaning' (Calavita and Jenness 2015, p.169). Moreover, opposing meanings register at distinct scales of power; 'legal rhetoric is a weapon in the struggle to control meaning' but 'it is a weapon that is loaded unequally' (p.179).

Technical discourses privilege organisations and experts relative to individuals and ordinary citizens. Those who can articulate and document the 20 exceptions to the basic principle of wearing one's own clothes in prison are harnessing the power of the technical, which is a characteristic quality of policy settings. Policy settings, moreover, render a lay discourse of rights, with complaints handwritten on paper and appealing to holistic concerns about care and compassion, as amateurish and lacking relevance compared with highly detailed and lengthy paperwork appealing to recognised



rules (see Armstrong 2014); it is no wonder that Calavita and Jenness (2015) observed prison inmates on the losing side of administrative complaints more than 90% of the time. Human rights efforts have produced major infrastructures of compliance and enforcement in prisons, as well as become reflected in some penal system mission statements, without generally altering the basic situation of prisoners.

This work documents the extent and effects of bureaucratisation of rights in prison management in largely negative terms for prisoners. A more balanced view of bureaucratisation can be found in work by Feeley and colleagues. Feeley and Rubin (2000) conducted a large-scale review of prison reform litigation concluding that court decisions led the way in instituting standardised models of acceptable penal practice, and this played an important role in improving overall prison conditions across the US. This research offers a useful corrective to the tendency to dismiss standardisation and other processes of bureaucratisation as bad. However, they also found courts systematically affirming the legality of some of the most extreme conditions of supermax prisons, such as denying all human contact to prisoners held in cells with 24-hour fluorescent lighting. While raising the minimum quality of prison conditions meant that older buildings were condemned, it also established standards that made it more difficult to challenge new forms of prisoner treatment enabled through modern architecture that arguably constitute torture and inhumane treatment, like the isolation and aesthetic brutality of supermaxes. Feeley and Swearingen (2004, p.465) credit rights-led reform with increasingly technocratic forms of penal governance: The 'U.S. prison system has been bureaucratized in response to the prisoners' rights movement' but cautioned that '[e]ven as it protects and limits against arbitrary power, bureaucracy can also enhance and mask authority' (p.466). Ultimately, they conclude that 'the reforms ordered by the courts not only extended protections and services for inmates, it increased the efficiency and effectiveness of prison administrators as well' (p.466)

Hence the success of the US prison reform cases led also to processes of bureaucratisation that had mixed results for prisoners' experiences of confinement, and ability to mount challenges to authorities. Formal grievance processes in prisons emerged partly as a strategy of limiting the availability of court action as an option for prisoners (Prison Litigation Reform Act of 1996, and see Calavita and Jenness 2015), and so the 'success' of rights litigation produced new forms of penal

governance that limit the possibility of similar success in the future. Although the tradition of court activism in shaping penal policy is less well established in Europe, the European Prison Rules also seem to discourage lawsuits as a main strategy of monitoring rights in prisons, setting a preference for mediation (Rule 56.2) and its use as a first resort for prisoners before legal action is taken (Rule 70.2). Mediation processes may be less costly and time-consuming than lawsuits, but they also further internalise rights enforcement to prison systems themselves, and with the conclusion of researchers that this ultimately strengthens ‘the prison administration's capacity to control’ (Feeley and Swearingen 2004, p.468).

### **Human Rights and Scottish Prisons**

In this final section, I bring the discussion to bear on three examples of contemporary Scottish penal policy and practice. Each presents a distinct challenge or concern of human rights in relation to penal policy showing different potential implications for prison conditions and prisoner voice. These are included to suggest, if only tentatively at this point, the potential for further analysis of bureaucratic spaces of rights disputes in prison illustrating the potential for human rights to facilitate penal control.

#### *Napier v. Ministers (2005)*

The first example considers the aftermath of one of Scotland’s most high-profile prison rights cases – the so-called slopping-out case of *Napier v. Ministers* (2005), where lack of in-cell toilets was found to have violated a prisoner’s Article 3 right (ECHR, prohibiting cruel and degrading treatment). After losing in lower courts, the appellate Court of Session found for the petitioner, a prisoner in Glasgow, holding the Scottish Government and SPS liable. Murphy and Whitty (2007) attribute the legal result in *Napier* to a business miscalculation by the government, noting that it had reabsorbed refurbishment funds previously set aside for the SPS to upgrade prison accommodation in the lead up to the lawsuit. Whitty (2010, p.13) concludes that the *Napier* case triggered in prison authorities, awareness of the importance of rights but operationalised them in terms of (organisational) risk management leading to a fixation on addressing potential rights concerns in technical ways. Because of *Napier* ‘[h]uman rights compliance’, he writes, ‘is now directly linked to SPS operational goals’ (p.13).

Anticipating thousands of lawsuits after *Napier*, tens of millions of pounds were estimated as required to be set aside to manage these lawsuits. Each year following the 2005 judgment, the SPS estimated an increasing amount to cover its liability: £49 million in 2004–05; £58 million in 2005–06; £67 million in 2008; and £79 million in 2009 (Scottish Prison Service (SPS) 2005, 2006, 2008, 2010). The actual costs of settlements in slopping-out cases never reached anywhere near these levels. The total annual cost of settlements on *Napier*-related litigation was reported as £500,000 (*The Herald* 2007).<sup>5</sup> The smaller than expected financial impact of *Napier* is partly attributable to the SPS setting up an internal administrative scheme for managing slopping-out claims thus avoiding legal costs which were by far the biggest expense element.<sup>6</sup> Of 3,000 claims made through this administrative scheme, only 670 were upheld (by the SPS), with the remainder ‘repudiated’ (Scottish Prison Service (SPS) 2008, p.9). The average damages awarded through the internal scheme was in hundreds of pounds, while the average settlement of legal cases processed through courts post-*Napier* was £2,000, about the same sum as *Napier* himself received (£2,400). In 2015 and 2016 combined, there were only ten challenges related to slopping-out with a total compensation cost of these amounting to around £15,000 (Herbert 2017).<sup>7</sup>

The overestimate of *Napier*’s costs (which continued even after the creation of the internal administrative claims process which had demonstrably reduced the financial cost of these cases) might be characterised as a panicked response to a legal loss. It was a productive and useful panic. It gave a sharp lesson to the government that a relatively small amount of money to refurbish antiquated prison cells (£13 million according to *The Herald* (2007)) could trigger reputational and financial costs to the government many times greater. The fear of another *Napier* meant that the SPS was able to leverage the decision into securing unquestioning support of its high estimates of future lawsuit costs, simultaneously building a case for unprecedented prison infrastructure investment. In 2008, the Scottish Government (2008) forecast that the SPS would require \$531 million of infrastructure funding over three years, nearly twice as much as all other planned justice infrastructure investment combined. This investment was built on a vision of modernising prison buildings by ‘replacing unfit accommodation and facilities with new fit-for-purpose facilities’ (p.75), implicitly referencing *Napier*

as a rationale, citing the ‘need to take account of emerging legal requirements in relation to the standard of facilities to be provided to prisoners during custody’ (p.80).

Human rights success for Robert Napier was worth £2,400, while human rights failure for the SPS was worth over half a billion pounds. I do not mean to underplay the dilapidated conditions of many Scottish prisons at that time, and the real need to address them. The point remains that a human rights litigation loss facilitated penal budget expansion. Feeley and Swearingen (2004, pp.469–70) give a similar example about the Alameda County (California) jail, where, in 1982, and in the face of a looming consent decree (court ordered supervision and improvement), submitted a proposed jail construction and modernisation plan that ‘went well beyond anything the court would have ordered’. The authors’ conclusion about this story is that legal pressure allowed for prison expansion, but also improvement in the quality of buildings in which prisoners were held, showing that the effects are not always clear-cut. In Scotland, increased capital funding has supported the construction of two new prisons and substantial refurbishment of most of the existing ones.

### *Gender Identity and Reassignment Policy*

Under its current leadership, the SPS has been at the forefront of seeking to be a part of modernised governance in which respect for rights and equality is an essential component. In 2014, the chief executive of the SPS, in a foreword to a new policy targeting transgender staff and prisoners, stated he was ‘delighted to’:

present this policy in support of our commitment to increase engagement with our employees and people in custody to improve the working and living environment by ensuring it is free of any transphobic and homophobic behaviour, bullying, harassment, victimisation and discrimination. (Scottish Prison Service (SPS) 2014, p.2)

This policy was drawn up in close collaboration with the Scottish Transgender Alliance, a representative of which said: ‘We are very pleased that the Scottish Prison Service has a more progressive and humane policy around trans people than the English prison service’ (Strickland 2016, p.12). A key difference between English and Scottish penal treatment of trans and non-binary people is that Scotland has never required a Gender Recognition Certificate (a validated document produced

by medical professionals attesting to a person's gender and seen as an obstructive and stigmatising requirement by some trans advocates) meaning that a prisoner's own statement as to their gender identity is taken as the basis for housing them in the men's or women's estate (p.12). The endorsement of the SPS by a leading trans people's organisation confers political and cultural capital on the prison service.

This recent policy covering trans people is one of a number of additional equality and diversity policies recently put out by the SPS, many drafted around, or just prior to, passage of the UK-wide Equality Act of 2010. These include policies promoting equality and acceptance of sexual orientation (no date), disability (drafted in 2009 with prison staff unions), race (2008), and gender (2008). Both prison staff and inmates are covered by these policies. In this way, equality and diversity policies draw together prisoners and prison staff as part of the same community, one with a shared interest and need of rights protection and equality recognition. This is quite different from the way in which human rights frameworks organise institutions. The European Prison Rules and the ECHR separate prisoners from their keepers, dividing the penal environment into those whose liberty can be/is infringed and those who can infringe/are infringing it. Policies like Gender Identity and Reassignment (Scottish Prison Service (SPS) 2014), in contrast, reconstitute the classic rights binary of the individual against the State into a new social grouping where State penal actors and their detainees are all part of the same progressive unit having common values and interests.

Equality and diversity policy thus both makes and unmakes social groups having particular relations and interests. The risk, however, is that treating all people in prisons from governors to inmates as equally bound by a duty and protected by a right, obscures the power differences between these two positions and creates new ways for these underlying hierarchies to be maintained and for human rights disputes to be decided in favour of prison authorities. For example, prisoners conceivably reduce their chances of raising awareness of a prison rights violation, and, instead, be held to have breached the rights to respect and dignity of staff if they complain about their confinement conditions while uttering a race- or gender-based epithet. Might a staff defence to ignoring a legitimate complaint be acceptable if the staff can claim they have been racially abused? Might the SPS deflect a human rights claim made by a prisoner by offering up its equality policies as

a demonstrable commitment to respecting the rights of others? Feeley and Swearingen (2004) considered a similar possibility applying organisational research to prisons reform, noting that ‘institutionalizing rights in an organizational setting’ through ‘internal regulations and grievance procedures ... are often empty shells’ but that ‘courts tend to defer to ... employers whenever it appears that well developed policies and procedures have been put in place. The courts are reluctant to peer beneath the surface’ (p.471).

*Brown v. Ministers (2017)*

The last, and most recent, example involves a technical dispute about the right to prison rehabilitation. Article 5 of the ECHR (guaranteeing the right to liberty and security of the person) has been interpreted by UK courts to include an ‘ancillary duty’ to ‘facilitate rehabilitation and release’. This case involved an extended sentence prisoner who spent a five-year period in prison, while imprisoned for a parole recall sentence of 40 days, due to unavailability of particular treatment programmes and risk assessments. He claimed that this constituted a failure of the prison’s ancillary duty to provide opportunities of rehabilitation.<sup>8</sup> The Parole Board continuously refused to recommend Brown’s release finding that he represented a risk of harm to the public, mainly due to his not having taken the required courses. The case involved a technical issue of sentencing, and specifically whether the Scottish extended sentence (which works like a partially suspended sentence and was created to target those convicted of violent and sexual offending) is a determinate (not covered by the Article 5 ancillary duty) or indeterminate (that is, analogous to a life sentence, and covered by Article 5) sentence.

The oral arguments before the Supreme Court in Edinburgh in June 2017 were dominated by this technical dispute about the categorisation of a sentence. In November 2017, the Supreme Court issued its decision in favour of the government, finding that an extended sentence is determinate and not covered by the Article 3 duty, and that in any case there had been opportunities of rehabilitation made available to the petitioner. It also pointed out instances of Brown’s own misbehaviour in prison which supported the Parole Board’s continual refusal to release him until the total period of the extended sentence expired.

The case will become important for how it has drawn lines around the circumstances that confer a duty on prison authorities to rehabilitate. Just as interesting are the features of the oral presentations and decision which were never in dispute or were removed from dispute. On the latter point, the court declined to concern itself whether five years in prison despite a 40-day recall sentence was, *prima facie*, excessive. It thus has an effect not only in the areas covered by its decision, but in the areas that it excluded from its review. This evokes an observation of Riles (2005) about the manoeuvrings, not of lawyers, but of law itself: ‘Legal knowledge defines its own outside from the point of view of the inside even as it is presented as a “function” of other interests’ (p.1020). The fact that Brown had occasional access to some of the required ‘offender behaviour’ courses while in prison over five years evidenced the provision of rehabilitative opportunity in Scottish prisons.

It has been noted that the ECHR is moving towards a more deferential approach in prison rights cases where prisons demonstrate a rehabilitative, as against a punitive, purpose of sentences (Kisic and King 2014). The risk is that through litigation like the *Brown* case, human rights confer power to prisons in defining what constitutes a helpful and supportive experience of confinement (providing rehabilitative courses) and deflecting attention from (‘defining outside’ of law) the innate damage of detention itself and how this should be balanced against the prison services that claim to support people’s rehabilitation. ‘Rehabilitation’ is coming to have a similar role to security in providing a trump card that works to cover and to excuse the arbitrary exercise of power.

### **Conclusion**

In this article I have argued that human rights principles, when translated for adoption in particular institutional settings have become highly technical devices allowing for managerial governance within prisons that secures and expands the power of penal authorities. There is no conspiratorial cabal that has planned this. Rather, a powerful set of norms, styles and resources that are inherent in modernity’s dominant technique of governance – policy – tend to shore up power on the side of the powerful. ‘[P]olicy is an increasingly central concept and instrument in the organization of contemporary societies ... on a par with other key organizing concepts such as “family” and “society” and having “significance for the creation of subjects”’ (Strathern 2000, p.281, quoting Shore and Wright 1997,

p.4). In particular, policy brings together forms of knowledge (like statistics and documents) with powerful actors to produce authoritative representations of the social. Human rights standards increasingly provide the foundation to embed these representations in penal governance structures. While this account is consistent with the work of Foucault and Cohen, it urges the continued study of penal settings. As Barbara Hudson (2006) urged, there is still ‘the need to investigate the ways in which specific rights are defended, undermined or withdrawn in punishment practices’, and that criminologists can assist this effort by investigating how policy processes participate in this (p.137).

This is a call to action and for creativity in employing methods like ethnography that have been used effectively by prison scholars to produce powerful and transformative understanding about the nature of punishment, but to apply these to the ordinary spaces and materials of governance. Shifting the ethnographic gaze to the human and non-human actors of penal policy will not reveal magic potions of how to make ‘good’ policy or humane prisons, but it will offer a chance to anticipate the risks and expose the nuances of power as it moves through dry, sanitised spaces of justice, recognising that these, too, are sites of violence (Cover 1986).<sup>9</sup>

### Notes

<sup>1</sup> According to the Ministry of Justice (2018), there were 76 self-inflicted deaths in 2013 (in a prison population of just over 80,000), and 70 in 2017 (in a population of circa 84,000) in England and Wales. Scottish deaths in prison are reported on the SPS website:

<http://www.sps.gov.uk/Corporate/Information/PrisonerDeaths.aspx> (accessed 25 May 2018), and this is compared against a total prison population of around 7,600 in 2013 and 7,500 in 2017.

<sup>2</sup> Of course, both Foucault and Cohen remain standard references in criminology, but their arguments seem less influential of mainstream prisons debate, and even to have become less crucial to critical criminology, where arguments such as abolitionism, are now turning to less pessimistic perspectives, such as utopianism, in building critique (see Scott 2018).

<sup>3</sup> From the title of Riles (2005).

<sup>4</sup> In 2010, a presumption against sentences of three months or less was enacted, and in 2018 the government intends to extend a similar presumption to cover all sentences up to twelve months.

<sup>5</sup> It is not made clear, however, if this includes legal costs, and I was unable to obtain data on this.

<sup>6</sup> For example, Robert Napier received £2,400 in damages while legal costs borne by the State in his case were estimated as £1.5 million (*The Herald* 2007).



<sup>7</sup> In 2009, a one-year time bar on claims also significantly reduced the number of cases.

<sup>8</sup> Brown had completed a mandated minimum period of imprisonment for culpable homicide, the crime leading to the extended sentence.

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