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ORIGINAL ARTICLE

Progressive penality as performance

Jamie Buchan[1] | **Fergus McNeill**[2]

[1]Jamie Buchan is Lecturer in Criminology, Edinburgh Napier University

[2]Fergus McNeill is Professor of Criminology and Social Work, University of Glasgow

Correspondence
Jamie Buchan, Lecturer in Criminology, Edinburgh Napier University.
Email: j.buchan@napier.ac.uk

Funding information
University of Edinburgh

Abstract

Scotland's prison population remains stubbornly high despite reforms to sentencing and community penalties (most recently in 2016). Seeking to advance the debate on punishment in Scotland, we use empirical data to support a novel theoretical synthesis of the 'agonistic framework' and 'performative regulation'. We argue that these reforms appear oriented towards decarceration, without substantively engaging with the drivers of imprisonment, and hence exemplify the 'performative' nature of much Scottish penal policy. The 'performance' is shaped by countervailing political constraints on the Scottish Nationalist government, amid continued debate over independence – but truly progressive penal policy requires radical and substantive responses to the problems that punishment seeks to address.

KEYWORDS

agonistic framework, community justice, community penalties, penal field, penal policy, performative regulation, probation, Scotland

1 | INTRODUCTION

In terms of its penal field (Page, 2013), Scotland has been described both as an anachronism and as a paradox. The anachronism rests in the apparent durability of a penal-welfarist ethos long into late modernity (McNeill, 2015). In some respects at least, this contrasts with analyses of the emergence of a 'culture of control' (Garland, 2001) or 'a new punitiveness' (Pratt et al., 2005) in

some other Western jurisdictions, notably Scotland's nearest neighbour, England and Wales.[1] The paradox, however, comes into sharp focus when scholars analyse the gap between penal-welfarist rhetoric and punitive practices; thus, for example, while Scottish penal policy has sustained a commitment to penal reductionism for much of the last 120 years, Scotland today has the highest pro rata total correctional population in Western Europe (i.e., the number of people currently either incarcerated or under penal supervision in the community, whether as part of community penalties or after imprisonment) (Aebi & Hashimoto, 2018; McNeill, 2018;). This led one of our colleagues, Sarah Armstrong, pithily to dub Scotland as 'the Texas of Europe'.

In an effort to better understand the failure of penal reductionism in Scotland, in this article we aim to draw together two conceptual developments: one from our own field, and one from a quite different area of criminological enquiry. The first of these is the 'agonistic perspective' on penal change outlined in Goodman, Page & Phelps's (2017) book, *Breaking the pendulum*. The second is the concept of 'performative regulation' developed by Mackenzie & Green (2008) in their study of efforts to regulate the trade in illicit antiquities.

The 'agonistic framework' advanced by Goodman, Page & Phelps (2015, 2017) draws on Bourdieusian analyses of penal change. The three 'axioms' of the agonistic framework emphasise the role of constant but often covert struggle in the penal field. They argue, first, that '[p]enal development is the product of struggle between actors with different types and amounts of power'; second, that '[c]ontestation over how (and who) to punish is constant; consensus over penal orientations is illusory'; and, third, that '[l]arge-scale trends in the economy, politics, social sentiments, intergroup relations, demographics and crime affect (or condition) – but do not determine – struggles over punishment and, ultimately, penal outcomes' (Goodman, Page & Phelps, 2017, pp.8–13).

While originally focused on the development of criminal justice in the USA, and particularly California, the agonistic framework – with its emphasis on hidden political conflict and the role of emerging professions and civil society associations – has more recently been applied to the history of probation in Scotland (McNeill, 2019).

The agonistic framework tends to emphasise struggles that substantively concern penal issues – what punishment should be or do, for example, the conflict between 'custody' and 'treatment' orientations in California's prisons (Goodman, Page & Phelps, 2015). However, Buchan (2020), drawing on Koehler (2019), has argued that, in the Scottish case, consensus at the political level over the need to reduce imprisonment has served to shut out more radical voices – which might pose difficult questions over why and how we punish – from struggles in the penal field, in favour of more technocratic policy fixes. We seek therefore to emphasise that while contestation is certainly still present (although often covert), it may not be substantively addressed to the penal issues ostensibly under consideration.

In this article, we draw on empirical evidence from the Scottish context to account for this phenomenon, and expand the agonistic approach by connecting it with a second theoretical concept – 'performative regulation'. This is described by Mackenzie & Green (2008) as regulation: 'which in appearance serves political ends but in practice effects an inconsequential level of control' (p.138). They developed this concept to explain the ability of business interests to influence the legislative process in relation to regulating the trade in antiquities. In this context, they describe a situation of mixed consensus and conflict in which antiquities-trade interests (many of them at least *complicit* in the looting of cultural property) were able to influence the process of lawmaking such that regulatory legislation did not apply to them. The prominence of trade interests in a related advisory panel allowed them to set the agenda, so that legislation was developed to be acceptable to the trade rather than to serve the public interest. The result was an Act which *appeared* to be addressing the problem of the illicit trade, but which in fact imposed only minimal burdens of

due diligence on traders. It criminalised antiquities trading only when the trader *provably knew or believed* the object was illicitly acquired.

Obviously, our article is concerned with a quite different field – penal policy in Scotland – and we do not claim that culturally elite white-collar offenders have been able to influence it. However, we draw from Mackenzie & Green the idea that penal policy in Scotland may also be 'performative' – concerned less with finding the best solution to a problem than with being *seen* to do something about it. Members of both the Scottish Parliament (the focus of our study) and the UK Parliament (the focus of Mackenzie and Green's) are subject to short-term electoral pressures (see Croall, 2006) which include the pressure to 'perform'. In the context of Scotland, and particularly given the progressive nation-building agenda of the Scottish National Party (SNP) government which has held power since 2007, the required performance is one that convincingly positions Scotland as distinct from England and Wales, including in penal matters, and, like many other small neighbouring countries like Ireland and Norway, as capable of competent and progressive self-government (Brangan, 2019; MacLennan, 2016).

Mackenzie & Green add that the 'performance' of regulation not only diminishes the possibility of substantive progress but also creates the impression of consensus on a given issue, even papering over the conflict between trade interests and activists which had hindered legislative progress in the first place. Furthermore, performative regulation allows interest groups 'to influence the conceptual policy terrain on which battles to resolve conflict are fought' (Mackenzie & Green, 2008, p.151), and thus to forestall more radical reform.

A further connection relates to the social context of the policy process. Mackenzie & Green describe antiquities regulation as arising from a small network of politicians, civil servants and experts created by secondments, alliances and mutual interests. This network is characterised not by full consensus, but by institutional interchange and a desire to produce regulation that is mutually acceptable rather than effective.

The policy network surrounding criminal justice in Scotland is similarly small and characterised by significant collaboration and interchange between institutions with (ostensibly) very different goals. McAra (2017) has discussed the close relationships between some policymakers, politicians and academics in Scottish criminal justice – even warning of the dangers of 'clientelism' (p.774) in relations between academics and institutional leaders. Similarly, Buchan (2020) argues that the small size of Scotland's policy network was a factor in creating (apparent) consensus and 'crowding out' more radical approaches to the problem of high imprisonment. Here, rather than focusing on imprisonment, we focus on a specific community justice reform *itself* as a 'mutually acceptable' and performative 'solution' to the agonistic manœuvrings around Scottish decarceration.

After a short comment on our methods, we briefly explain the reforms that took place under the Community Justice (Scotland) Act 2016, following two reports that were critical of the previous community justice system (Audit Scotland, 2012; Commission on Women Offenders, 2012), amid Scotland's continued failure to reduce its high rate of imprisonment. We argue that there were systemic issues in community justice which needed to be resolved, but that through the policymaking process, the reforms came to be yoked instead to a bigger and more complex goal – the reduction of imprisonment. We then show that these reforms could not, and did not, address the prison population, and – further – that approximately contemporaneous sentencing reforms also missed the mark; both were more performative than substantive. By bringing together our two theoretical concepts, we explain how struggles over penal policy can produce performative rather than substantive outcomes, in the particularly constrained political context of contemporary Scotland, particularly Scotland's unsettled constitutional question – its status as a devolved

country within the UK whose political sphere is dominated by the issue of full independence from it. To develop the implications of this analysis, in the conclusion, we briefly consider what a truly progressive approach to penal policy in Scotland would require.

1.1 | Methods

This article combines reporting on empirical research on a specific area of Scottish justice policy, with a more theoretical analysis of Scottish criminal justice policy in general.

The next part of this article draws on empirical research on the 2016 community justice reforms – interviews conducted by one author (Buchan, 2017) in 2014–2015 with 21 practitioners and policymakers in and around community justice in Scotland, of varying ages and lengths of service. These interviews were audio-recorded and transcribed manually, and then analysed using thematic analysis (Braun & Clarke, 2006) with the aid of QSR NVivo software.

Subsequently our argument builds on this material to analyse broader features of the Scottish penal policy approach theoretically. We argue that Scotland's ostensibly progressive penality is in fact only *performatively* progressive – it affects the appearance of distinctiveness and welfarism without making substantive moves in this direction. The framing of administrative reforms to community justice as a solution to the problem of decarceration is a principal element of this 'performance' and one which a straightforwardly agonistic approach fails to fully explain.

2 | RESTRUCTURING COMMUNITY JUSTICE IN SCOTLAND

This section describes key elements of criminal justice policy in Scotland as it relates to attempts to reduce imprisonment. After briefly setting the context of struggles within and around Scotland's penal field, we discuss specific reforms to community justice, drawing on empirical data to consider their implications for criminal justice practitioners and the challenges for policymakers.

Here we use the Scottish Government (2014, p.1) definition of 'community justice' as:

> [t]he collection of agencies and services in Scotland that individually and in partnership work to manage offenders, prevent offending and reduce reoffending and the harm that it causes, to promote social inclusion, citizenship and desistance

– comprising a range of public and third sector services, but centring on Justice Social Work (JSW),[2] the Scottish equivalent of probation services found elsewhere.

2.1 | Penal policy under the SNP

Scotland has been a devolved part of the UK, with its own parliament and government, since 1999, but has always been a separate criminal law jurisdiction, with its own laws and criminal justice institutions. The SNP, a centre-left political party in favour of Scottish independence from the UK, has been in power in Scotland since the 2007 election; at the time of writing, it is in its fourth term in government. After an initial post-devolution period of apparent convergence with penal policies in England and Wales between 1999 and 2007 (McAra, 2006), with New Labour governments at

both Westminster and Holyrood, the rise of the SNP has been described as a return to Scottish distinctiveness in penal matters or 're-tartanisation' (Mooney et al., 2015).

The 2011 Scottish election saw the SNP break expectations by winning an overall majority – despite the Scottish Parliament running on an Additional Member electoral system designed to prevent precisely this possibility – with constituency Members elected on a first-past-the-post system, but a group of Members for each of eight regions elected on a proportional representation basis. This led directly to the 2014 Scottish independence referendum (which the SNP-led 'Yes' campaign lost), but this period was also notable for a series of structural reforms to various parts of Scottish criminal justice – the centralisation of Scottish policing, restructuring of the courts system and an organisational review within the Scottish Prison Service (Fyfe & Scott, 2013; Scottish Prison Service, 2013). While these have not always been initiated by the SNP government, they are highlighted here as examples of the 're-tartanising' tendency.

The report of the Scottish Prisons Commission (2008), *Scotland's choice*, has been particularly influential in shaping criminal justice priorities and the 'mood' of penal policy under the SNP. It recommended a dramatic reduction in Scotland's prison population, and a criminal justice system in which 'paying back in the community should become the default position in dealing with less serious offenders' (p.3).

While reducing the rate of imprisonment had long been a concern for Scottish criminal justice (McNeill, 2015, 2018), the Scottish Prisons Commission's report was particularly influential in the context of a government looking to reassert Scottish distinctiveness in criminal justice matters while also faced with impending public sector budget cuts implemented by a Conservative-led *UK* Government which was generally unpopular in Scotland. The report also, notably, drew comparisons between the UK jurisdictions, but also between Scotland and nations such as Norway, Finland and Ireland – chiming with the SNP emphasis on Scotland's distinctiveness and separateness from England.

The Scottish Prisons Commission's report led to a series of efforts to shift punishment away from prison and towards community penalties. The most prominent of these was the Criminal Justice and Licencing (Scotland) Act 2010, which had three principal effects on sentencing:

- First, the simplification of community sentences, with several pre-existing community sentencing options being merged into the community payback order (CPO), a single sentence which can be 'tailored' to individuals under sentence through a 'menu' of requirements from which the sentencer, advised by JSW, can choose. This was intended to provide a 'robust' community sentence option that sentencers can feel confident in choosing over prison.
- Second, the establishment of the 'presumption against short (prison) sentences' (PASS), a legal presumption against imposing custodial sentences of three months or less, on the basis that these sentences were long enough to damage the person sentenced but not long enough for rehabilitative activities to take place. Notably, this was originally to be six months but was reduced following resistance from Scotland's judiciary, an elite group with significant power in the Scottish penal field. Imprisonment statistics from this period show a sharp fall in 0–3 month prison sentences accompanied by a similar rise in 3–6 month prison sentences (Scottish Government, 2021a). The remand population also grew, meaning that PASS has had limited impact on the overall prison population.
- Third, and closely related to PASS, the establishment of a Scottish Sentencing Council, which came into being after lengthy negotiations in 2015. The Council produces sentencing guidelines but is less interventionist than similar bodies in many other jurisdictions. Both the delay and

the limited powers of the Council can be attributed to the power of the judiciary within the Scottish penal field.

However, and as in previous periods (Morrison, 2015), the pressure to reduce prison numbers – with further impetus coming from the 2008 financial crisis and the UK Government's resulting pursuit of austerity measures – would also bring further attention to the *organisation* of community justice services. The structure of the community justice field would come under scrutiny once again — very soon after the previous restructuring.

2.2 | Community justice: the need for reform

During the 2003 Scottish parliamentary elections, a Scottish Labour Party manifesto proposal to merge JSW with the Scottish Prison Service provoked considerable controversy and debate (McNeill, 2005). This was only one development in a series of conflicts between Scottish local and central government over where control of community justice should lie – in local government with social work, or at the national level alongside other justice agencies (Morrison, 2015). During the parliamentary session that followed, the Management of Offenders etc. (Scotland) Act 2005 provided a compromise solution; one that aimed to better balance central and local control of JSW by establishing eight regional Community Justice Authorities (CJAs).

CJAs combined features of local democracy – their official members being locally elected councillors, and the minutes of meetings being publicly available – with those of public sector management and contemporary partnership approaches to crime control (Hughes, 2007). In practice, much of the work of CJAs centred on commissioning services, managing partnerships, and allocating budgets between local authority social work departments in their regions. Although enabled by the 2005 legislation to report local authorities who failed to meet performance targets, CJAs had little real power; rather than compelling compliance, they needed to rely on good working relationships to persuade partners to co-operate (Buchan & Morrison, 2020).

The impetus for the 2016 reforms arose in 2012, with the publication of two reports highly critical of the CJA system. The Angiolini Report (Commission on Women Offenders, 2012) dealt only very briefly with community justice among its sweeping recommendations to address the challenging social needs and extreme vulnerability of women who offend and women prisoners. However, it did point to a range of problems in community justice including the 'cluttered landscape' of service provision, short-term and inconsistent funding, and a lack of accountability and leadership, arguing that CJAs should be replaced with a national community justice service. Audit Scotland's (2012) report *Reducing reoffending in Scotland* made no such recommendation but went into considerable depth in highlighting administrative and budgetary challenges within the system, including short-term and inconsistently allocated funding and a lack of rigorous evaluation of the CJAs.

These issues were largely acknowledged in the empirical data by the interviewees, who had themselves had to deal with funding-related challenges and 'silo working'. Among policymakers and practitioners, including CJA staff, there was also acceptance of criticism of the existing CJA system as an awkward 'fudge' between central and local interests:

> I've always known that they weren't really an ideal setup, they were a sort of slightly weird creation to keep everybody happy. (CJA chief officer)

> Well, my recollection is, and I think the past history was, I think the present system was a sort of a system cobbled together I think a few years ago as a sort of compromise system. (CJA elected member)

> There's no doubt that collectively there's an acknowledgement that the CJAs didn't work particularly well, effectively. But it goes back to the point I made – it was never designed to work well and effectively. The hard endeavour of working out the detail wasn't completed, and I think too often when public policy's created, they don't do the boring stuff, the checks to ensure that the linkages are right, the right people onside, and that power to direct is absent. And politicians don't like the hard question that they've got to give a yes-no answer to. They'd rather fudge that and say 'we'll leave that to the discretion of the professionals', and in the committee under a good chair that'll sort itself out, well my experience is that doesn't happen. (Member of the Scottish Parliament)

Furthermore, interviewees acknowledged that CJAs were compromised from the beginning by overlapping constraints placed on them during their initial set-up, and by uncertainty over their relationships with local government:

> Our only teeth, if you like, is that if any partners are not working to the agreed area plan, we have a board, and the board should then hold the partner to account. And if the board is unable, or the board fails in its duty we have a responsibility to report that to the Cabinet Secretary. Never used that power. And there's a good reason for never using it, which is that as soon as you do, you kill what you really have, which is influence, partnership, respect, and those are the powers – the tools of the trade, if you like, that we have had to use, which is to put the reasoned case. (CJA chief officer)

> But the CJAs when they started were – they were set up with a degree of optimism but really for the first two years of their life they did absolutely nothing, they didn't get the co-operation from local authorities, no one was quite sure what they were doing, and by and large they were chaired – or their principal officers were local authority people, almost without exception. What happened two or three years ago, I think, was that a number of those people stood down and were replaced by effective civil servants … And suddenly the CJAs, as a result of that the CJAs became a lot more open, they became a lot more accessible, they started thinking broader. (third sector manager)

There was some resistance to the strongest criticisms, particularly those found in the Commission on Women Offenders (2012) report. As Buchan & Morrison (2020) have argued, the CJAs were able to find a place and to develop a role in Scottish criminal justice, albeit not quite the one intended for them:

> CJAs were able to take a different perspective to local authorities, in that they were able to – and maybe it's a question of duties and responsibilities, in that criminal justice social workers are so under pressure in terms of budget, in terms of fulfilling statutory obligations – CJAs were able to take that step back and look a bit more

> broadly, and think a bit more creatively, and that's where some of the answers are found, you know? (third sector manager/ex-CJA employee)

Consultation on the reforms began in 2012 and concluded in 2014. After extensive negotiations between advocates of localism and centralisation, the eventual result was *another* compromise between local and central interests (Buchan & Morrison, 2020). The Community Justice (Scotland) Act 2016 abolished the CJAs, passing their responsibilities to new partnerships at local authority level. It also founded the new national leadership organisation Community Justice Scotland. At the same time, a new National Strategy for Community Justice (Scottish Government, 2016) was developed and disseminated.

Whether the new arrangements have resolved the organisational problems that plagued CJAs and community justice more generally is outside the scope of this article, but it is notable that the Scottish Government is already consulting on further reforms, including the possibility of merging JSW with other social work and social care under a single National Care Service (Scottish Government, 2021b).

As discussed by Buchan (2020), the agonistic framework highlights the role played by conflict and compromise between various actors in the penal field in the lead-up to the 2016 reforms. As we argue below, however, what makes the 2016 reforms an example of performative policy is the way in which they were yoked to a bigger and more complex goal that they had little hope of achieving.

3 | MISSING THE MARK

As they developed, the community justice reforms were increasingly justified in terms of reducing imprisonment, rather than fixing the systemic issues with community justice itself. However, we argue in this section that they did not, and could not, address the rates of imprisonment in Scotland. Furthermore, other recent policies (particularly around sentencing), which ostensibly sought to reduce imprisonment, have also largely missed the real drivers of the prison population.

There were real, substantive issues in the running of the community justice system, which needed to be addressed – in particular, the continued inadequate and locally unequal allocation of funding was a significant barrier to the development of JSW (Audit Scotland, 2012). These were identified in the first of the consultation documents (Scottish Government, 2012) and formed much of the initial focus of the reforms.

Yet as the impetus towards decarceration became stronger, amid the financial crisis and the rise of public sector austerity, the political rhetoric around the community justice reforms increasingly justified them in terms of reducing imprisonment by 'making more effective use of robust community sentences to reduce reoffending' (Scottish Government, 2017, p.13). Similarly, the National Strategy (Scottish Government, 2016) stated:

> Evidence shows that short-term prison sentences do not work in terms of rehabilitating people or reducing and preventing further offending. More than this, they disrupt families and communities as well as greatly affecting employment opportunities and stable housing – the very things that support desistance from offending.

> That is not a good use of public resources and it is a waste of human potential. Instead, our focus should be on community-based interventions that evidence shows are effective at reducing and preventing further offending. (p.30)

Within the electoral sphere, the SNP manifesto for 2016 stated:

> We will establish Community Justice Scotland to provide leadership and strategic direction in the planning and delivery of community sentences. This will support the rehabilitation of offenders and reduce reoffending. (Scottish National Party, 2016, p.38)

As Professor Andrew Coyle (2003, p.2, cited in McNeill, 2005) had remarked of the *previous* restructuring (which had created CJAs in the first place), there 'is no evidence that particular organisational arrangements for the delivery of criminal justice provision in any one country lead to higher or lower use of imprisonment or affect re-offending rates'.

The reforms under the Community Justice (Scotland) Act 2016, and the Criminal Justice and Licencing (Scotland) Act 2010 before it, did have the effect of increasing the 'share' of community sentences, but this was at the expense of financial penalties, not imprisonment (see McNeill, 2018). The 2016 reforms cannot address decarceration 'head on', because community justice professionals do not decide whether a person is sentenced to custody (or remanded); this is the exclusive preserve of sentencers.

The logic of the 2016 community justice reforms (like many previous reforms – see McNeill, 2018; McNeill & Whyte, 2007) is slightly more indirect – it suggests that if community sentences are well organised they will appear to be 'legitimate' and 'effective' then sentencers will choose to use them. Not only has this not been realised, we argue that it is based on a flawed model of how sentencing happens.

Millie, Tombs & Hough (2007) discuss the process by which custodial sentences are imposed in 'borderline' cases (i.e., those which might attract a community penalty or a short period of custody), not because the sentencer believes custody will 'work', but as a 'last resort' because other sentences, including community sentences, are seen as having 'failed' or are simply as not being appropriate (see also Velasquez Valenzuela, 2018). More fundamentally, both among advocates of penal restraint and among punitively-oriented conservatives, there exists a conceptual model of sentencing which is underpinned by an assumption of 'property-owning autonomous individualism'; one that downplays the social and relational character of the sentencer's decision-making process *and* that individualises the social and structural problems implicated in offending (Jamieson, 2021; Tata, 2020; Velasquez Valenzuela, 2018).

The Scottish judicial profession is particularly resistant to efforts to impose any restriction or regulation on sentencing decisions. To date, the Sentencing Council established in 2015 (i.e., five years after the Act which was meant to establish it, largely as a result of continued resistance from the judiciary) has been able to publish only two guidelines on sentencing; below, we discuss further relationship between the judiciary and the government.

Furthermore, the highly managerial and administrative character of the reforms has meant that an opportunity to reassess the highly risk-focused character of much JSW practice has been missed (Nellis, 2016). There is real interest within the social work profession in pursuing innovative approaches to working with people who have offended, yet the reality of most JSW practice remains highly bureaucratic and risk-driven, servicing a system of 'mass supervision' (McNeill, 2018). This was a frustration voiced by some respondents as well:

> I feel that every so often they just rejig the structures just to sort of try and do something differently, but there's never any vision or different worldview, it's just piddling about at the edges, to put it frankly, so, yeah, I'm unconvinced it's going to have a positive impact. (CJA chief officer)

Finally, recent evidence suggests that even on the administrative side, the 2016 reforms have had relatively little impact; Audit Scotland's (2021) report *Community justice: sustainable alternatives to custody* stated that there was insufficient data to know whether the reforms had improved the accountability or effectiveness of the system.

3.1 | The drivers of imprisonment

The 2016 reforms were justified by a faulty logic of decarceration; that is, that sentencing itself can be shaped by improving community sentences. They failed to bring about a reduction in the prison population. There were also sentencing reforms which might have been expected to be more successful; but here, too, the progressiveness of Scottish penal policy seems more performative than substantive.

The sentencing reforms have been focused on reducing specifically *short* prison sentences. This is the rationale for PASS, introduced under the Criminal Justice and Licencing (Scotland) Act 2010, and extended in 2019 to custodial sentences of under twelve months. Throughout the manœuvrings around community justice reform, community penalties have been presented as alternatives specifically to *short* prison sentences – premised on the assumption that only offences punishable by short sentences are suitable to be punished by community penalties.

The Scottish Government (2015) review *What works to reduce reoffending* suggests that short sentences fail to reduce reoffending by 'putting people's lives on hold but not helping them overcome their problems' (p.106). This, however, seems to imply that *longer* periods in prison *will* help people overcome their problems, or, indeed, that the Scottish prison is a good environment for this to happen.

Notably, the Scandinavian jurisdictions sometimes seen as an aspirational example for Scottish penality actually have far *shorter* average prison sentences (Lappi-Seppälä, 2019), and also have far lower rates of reconviction. This may be accounted for by shorter sentence lengths overall, by smaller prisons with lower ratios of prisoners to officers, by a culture of greater trust and humanity towards prisoners and hence, by regimes that are more able to help prisoners overcome their problems (Johnsen, Granheim & Helgesen, 2011). Efforts to develop smaller prisons in Scotland, particularly the 'Community Custody Units' advocated by the Commission on Women Offenders (2012), have stalled while larger prisons have been built.

Finally, the reforms around sentencing fail to address a number of other drivers of the prison population. The use of remand in Scotland is very high, accounting for 79% of arrivals to prison and around a quarter of the prison population; fewer than half of these prisoners go on to receive a custodial sentence (Scottish Government, 2021c). Hence, reducing remand could truly be a 'quick win' for reducing the prison population, and one with a clear moral justification given the extreme vulnerability of remand prisoners.

At the other end of the scale of sentencing, the number of life-sentenced prisoners in Scotland (948 as of 2019–2020 – Scottish Government (2021c)) is proportionally the highest in Europe; this is only partly driven by the use of mandatory life sentences for murder in the jurisdictions of the UK following the abolition of the death penalty. Unlike the churn of short-sentenced prisoners tar-

geted by PASS and (ostensibly) by the community justice reforms, life-sentenced prisoners enter prison in relatively small numbers but remain there for a long time; once released they can be recalled to prison at any time for any breach of their parole conditions, and may remain imprisoned indeterminately. As Van zyl Smit & Morrison (2020) argue, the number of life-sentenced prisoners challenges the conception of Scotland as 'welfarist' in penal matters; reducing the number of life-sentenced people in prison could bring about a much more sustainable reduction in prison numbers.

Thus the administrative reforms to community justice appear, alongside PASS, as performative policies which seem to be doing something about Scotland's overuse of imprisonment, but which have only a very tenuous causal relationship with the actual drivers of Scotland's prison population. We turn now to the political question of why this has happened.

3.2 | The progressive performance

The Commission on Women Offenders (2012) and Audit Scotland (2012) reports had created pressure for reform, and there was some consensus about the organisational and structural problems these reports had identified. At the same time, though, the impetus to reduce the prison population was heightened by austerity spending cuts which made imprisonment a good target for spending reductions. These two things are clearly different, but came to be conflated in the 2016 reforms. They did not address fundamental questions about the proper uses of imprisonment, but were 'performed' as though they would nonetheless change sentencing.

One way of explaining this, following the agonistic approach (Goodman, Page & Phelps, 2017), would be to argue that, within Scotland's criminal justice field, relative to other actors, judges possess sufficient symbolic and social capital to resist more radical attempts at sentencing reform. Indeed, one of the most commonly heard claims in related debates is that the constitutional independence of judges in interpreting and implementing the law must be preserved; and that this, in turn, entails preserving wide discretion for judges in sentencing (Jamieson, 2021). Hence, for example, the P in PASS stands for 'presumption'; judges retain the power and the authority to depart from the presumption where they deem it appropriate to do so.

But, crucially, in the Scottish context judicial independence (and the capital it provides) is also connected to the ongoing potency of constitutional questions within the political field itself. It has been clear for some time – and accepted by the SNP governments – that the prison population needed to be reduced (Scottish Prisons Commission, 2008). However, particularly in the context of an approaching independence referendum which the SNP hoped to win, any perceived attack on judicial independence risked alienating wavering voters sensitive to the importance of constitutional checks and balances. Certainly, the relationship between the SNP and the judiciary was strained around the early- to mid-2010s (MacLennan, 2016). This arose not just from the debate about sentencing reform and the creation of the Sentencing Council, but also from a wider range of actual and proposed reforms to the criminal legal system, reductions to legal aid and the proposed abolition of corroboration in certain sexual offence trials. In this context, the SNP's unwillingness to challenge the judiciary or be seen to further restrict its cherished independence (Jamieson, 2021) makes political sense.

Criticism of any attack on judicial independence would very likely have been tied to 'soft on crime' accusations that have been predictably deployed by opposition parties: both Scottish Labour in the early years of devolution (MacLennan, 2016), and more recently from the Scottish Conservatives (Greene, 2021). Indeed, welfarist approaches to offending and punishment

were largely absent from a Scottish independence campaign which had otherwise been characterised by an imagining of a future independent Scotland as a social democratic 'welfare nation', in contradistinction to the austerity and punitiveness of the Conservative-led UK (Mooney & Scott, 2016). Notably, despite related rulings of the European Court for Human Rights about the illegality of the blanket ban on prisoners voting (Tripkovic, 2019), all people in prison were excluded from participation in the referendum, despite calls from some groups for their inclusion in such a crucial vote (Howard League Scotland, 2013).

Further back, the hesitancy and half-heartedness around Scottish 'penal welfarism' was also evident even in the political language around the CPO, which emphasised the labour-intensive character of 'payback' rather than any implications for offenders' welfare, or for reoffending:

> Instead of using prisons to give low-level offenders free bed and board for a few months, we can now use prison for keeping dangerous criminals off our streets. Under the SNP, those who commit serious crimes are going to prison for longer. (Scottish National Party, 2011, p.18)

This generally takes place in a context of what Holloway (2015, cited in McCulloch & Smith, 2017) has described as a 'Caledonian antisyzygy' – borrowing the term from studies of Scottish literature which emphasise the theme of opposite characters conflicting within the same person (most famously in Stevenson's *Dr Jekyll and Mr Hyde*). In the penal context, the term describes a situation in which liberal and welfarist ideas duel with an unwillingness *not* to punish offending. This is an important distinction – Scotland is not positioned as punitive, yet the Scottish Government has done little to question the assumption that prison is the most appropriate punishment for a range of offences; and that longer and longer sentences (including life sentences) are appropriate for more serious offences that cause public outcry.

Amid these pressures and conflicts, structural reform of community justice may appear as a low-hanging fruit to which the 'goal' of reducing imprisonment can be attached, even if well-informed analysts and policymakers suspected that it was never likely to achieve it. This was perhaps preferable to more radical but more politically difficult interventions, which would risk being seen as 'soft' on crime and further imperil relationships with sentencers.

This section has shown, through a discussion of the 2016 community justice reforms and policy developments around sentencing, that Scottish penal policy is justified by the language of decarceration but has failed to address the actual drivers of imprisonment. This has occurred because of two countervailing political pressures on the SNP – the need to be seen to address the imprisonment problem, without appearing soft on crime.

4 | CONCLUSIONS: FROM PERFORMATIVE TO PROGRESSIVE?

We hope that this analysis shows how struggles in the penal field produced compromise outcomes for community justice reforms and the presumption against short sentences, in line with Goodman, Page & Phelps's (2015) agonistic framework (see Buchan, 2020). Introducing Mackenzie & Green's (2008) notion of performative regulation to this framework highlights that these reforms are shaped not only by conflicts *within* the penal field, but also by wider constraints which require the *performance* of progressiveness but constrain its *substantive* realisation. Thus, the Scottish Government can appear to be contesting and addressing excessive rates of imprisonment, but without paying the political price of really doing so.

In this way, we have sought to develop and enrich agonistic accounts of penal development. The agonistic framework highlights the importance of hidden struggles in penal fields but perhaps emphasises conflicts centred on the substance of penal challenges. Our example illustrates, within particular political contexts, that the struggle can sometimes take a more performative form, just as in the debates over antiquities regulation that provoked Mackenzie & Green's (2008) work on performative regulation. By bringing these two concepts together, we highlight the importance of analysing the performative dimension of struggles in and around the penal field.

This analysis also raises the questions of whether, when and how a more *substantively* progressive penal policy might emerge in Scotland. Returning to the conceptual resources with which we began this article, it seems that, in Scotland, contestation within the penal field is profoundly affected by constitutional contestation within the wider political field. Putting this another way, the penal state in Scotland (meaning the political and professional leaders of the penal system), possesses a relatively low level of autonomy within the wider state (Garland, 2013). In essence, this has hamstrung efforts within the field to reduce the prison population. Sector leaders have followed their political masters in avoiding the controversies that more radical but arguably necessary reforms – for example, of sentencing itself, or to address the relentless upward creep in sentence lengths – might provoke. As Clear & Austin (2017) argue with reference to tackling mass incarceration in the USA, reducing the prison population requires not only sending fewer people to prison, but also reducing the lengths of time that they spend there – particularly if Scotland truly seeks to imitate Scandinavian social democracies (Lappi-Seppälä, 2019). In this context, it could reasonably be argued that confronting both the upward drifts in sentence lengths in particular and the excessive use of imprisonment more generally will only become possible in Scotland if and when the constitutional question is settled.

That said, it could also be argued that a much more radical vision of penal reform (and even abolition) might be advanced as part of the wider pro-independence movement. Indeed, we would argue that if Scotland is to change its position as the Texas of Europe and to realise its apparent Nordic social democratic aspirations, then just such a much more radical vision for a downsizing of criminal justice is required. Across most categories, crime has been falling or stable in Scotland since the mid-1980s, yet penal populations have risen. It seems we are criminalising and penalising more; perhaps precisely because of the hope that our 'welfarist' approaches can do some good to those we draw into the penal net. As McNeill (2018) has argued, if we misunderstand and misrepresent punishment, whether in the community or in the prison, as benign, as productive, as rehabilitative, or indeed *as welfare*, then we are more likely to abandon restraint in its use. Perhaps then, *penal welfarism* itself is the problem. The solution, however, is not the abandonment of welfarism but rather its reinvention as part of a much more radical project of social justice; one that builds *both* political *and* public support for such progressive aspirations to shape penal policy much more thoroughly that they have done so far.

As we write, the Scottish Government is consulting on yet further structural reforms to community justice. Consultation is underway for a new National Care Service, which would potentially unite a range of health, social care and social work roles under a single organisation. Part of the consultation asks whether JSW should be incorporated in the new service – with Scotland's persistently high imprisonment rates adduced, once again, as a justification (Scottish Government, 2021b, p.71). But all of these developments now rest in the shadow of its roadmap towards a second independence referendum, and thus their contestation will likely be subordinated to that larger struggle.

Yet the reality is that, with the justice system still facing a backlog of court cases and sentences very much exacerbated (but not, in fact, created) by the Covid-19 pandemic, Scotland cannot wait

for a constitutional resolution before attending to its penal crisis. We now face a choice – between merely performing progressive penality and enacting it by radically reimagining how we respond to crime and social harm.

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ORCID

Jamie Buchan https://orcid.org/0000-0003-2002-4491
Fergus McNeill https://orcid.org/0000-0003-3547-6482

ENDNOTES

[1] We note however the growing calls for devolution of Welsh criminal justice, notably from the Commission on Justice in Wales (2019).

[2] Also known as Criminal Justice Social Work/CJSW; Justice Social Work/JSW is increasingly preferred. Since the Social Work (Scotland) Act 1968, probation work in Scotland has been carried out by social workers within local authorities, rather than a probation service sitting entirely within the justice system.

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