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# **Risk, responsibility and reconfiguration**

## **Penal adaptation and misadaptation**

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### **Abstract**

This article draws on the findings of an ethnographic study of social enquiry and sentencing in the Scottish courts. It explores the nature of the practice of social enquiry (that is, of social workers preparing reports to assist sentencers) and explores the extent to which this practice is being reconfigured in line with the recent accounts of penal transformation. In so doing, we problematize and explore what we term the ‘governmentality gap’; meaning, a lacuna in the existing penological scholarship which concerns the contingent relationships between changing governmental rationalities and technologies on the one hand and the construction of penalty-in-practice on the other. The findings suggest that although policy discourses have, in many respects, changed in the way that these accounts elucidate and anticipate, evidence of changes in penal discourses and practices is much more partial. Drawing on Bourdieu, we suggest that this may be best understood not as a counter-example to accounts of penal transformation but as evidence of an incompleteness in their analyses which reflects the ‘governmentality gap’ and requires the development of more fully cultural penology drawing on ethnographies of penalty.

### **Key Words**

Bourdieu • governmentality • probation • risk • sentencing

## **INTRODUCTION**

This article reports some of the findings of an ethnographic study of the nature of the practice of ‘social enquiry’ in which criminal justice social workers prepare pre-sentence reports to assist judges in the Scottish courts.<sup>1</sup> The aim here is to explore what this study reveals about the extent to which this particular penal practice is being reconfigured in

Line with recent accounts of penal transformation. Since most readers will be very familiar with this literature, we begin by providing only a brief outline of the most relevant aspects of these accounts and of ensuing debates. In so doing, we point to what we term the ‘governmentality gap’; meaning, a lacuna in the existing penological scholarship which concerns the contingent relationships between changing governmental rationalities and technologies on the one hand and the construction of penality-in-practice on the other. We argue that the work of Pierre Bourdieu provides some important and useful conceptual resources with which to plug this gap. The article then outlines the contexts and methods of the Scottish study and presents findings that elucidate how discourses and practices of risk (a key feature of the new penology) are constructed in the production of pre-sentence reports. Finally, in our discussion of these findings, we show how enduring concerns about responsibility and moral character interact with discourses of risk, and argue that evidence of the transformation of penality-in-practice remains partial. Drawing on Bourdieu, we suggest that this may be best understood not as a counterexample to accounts of penal transformation but as evidence of an incompleteness in their analyses which reflects the ‘governmentality gap’ and requires the development of more fully cultural penology drawing on ethnographies of penality.

## **REHABILITATION, RISK AND RECONFIGURATION**

Accounts of penal transformation or reconfiguration in late modern western societies (principally focused on England and Wales and the USA) highlight the significance of the shift from a ‘penal welfarism’ pre-occupied with the rehabilitation of offenders to a ‘new penology’ pre-occupied with the management of crime and risk. Most relevant here are the implications of this transformation for how societies, cultures and individuals construct and are constructed by penal practices – in particular those practices associated with rehabilitation. Feeley and Simon (1994: 173, see also Feeley and Simon, 1992) have argued that ‘old penology’ centred on individuals – their culpability, their guilt, the diagnosis of their deviance, discovering and applying the proper treatment: ‘one of its central aims is to ascertain the nature of the responsibility of the accused and hold the guilty accountable’. ‘New penology’ in contrast focuses on groups, and is ‘concerned with techniques for identifying, classifying and managing groups assorted by levels of dangerousness’ (1994: 173).

For Garland (2001), the origins of the eclipse of penal welfarism, the loss of faith in rehabilitation and the emergence of these new strategies of control lie in the social, economic and political dynamics of late modernity. Though complex and multi-layered, his account centres on the central predicament of the late modern state; a ‘crisis of sovereignty’, linked to the State’s impotence in the face of high crime rates, which provokes a ‘schizoid’ reaction involving the development of two contrasting strategies. The ‘sovereign state strategy’, characterized by ‘hysterical denial’, deploys a criminology ‘of the alien other’, different from ‘us’, to create a ‘suitable enemy’ for the State to attack expressively and punitively (see also Pratt, 2000). This stands in stark contrast to the ‘criminology of the self’ which underlies more pragmatic, ‘adaptive strategies’ typified in recent approaches to crime prevention and reduction. Traditional rehabilitation fits comfortably with neither of these criminologies nor with their related penal strategies; as Garland (1996: 461–2)

notes: 'the excluded middle ground here is precisely the once-dominant welfarist criminology which depicted the offender as disadvantaged or poorly socialized and made it a state responsibility . . . to take positive steps of a remedial kind'.

According to Garland, welfarist criminology came to be excluded partly because of its perceived failure; a perception which produced a profound loss of faith in the legitimacy of the traditional rehabilitative aims and purposes of probation – at least among policy makers if not practitioners (Zedner, 2002; Vanstone, 2004). This loss of faith resonated particularly powerfully in terms of *public* mentalities and sensibilities about crime and punishment; the eclipse of welfarism, Garland argues, owes much to declining support among the middle classes, now increasingly insecure as they navigate the risks and uncertainties of late modernity and increasingly distrustful of the claimed expertise of penal professionals (Garland, 2000, 2001). The resulting decline of collective provision and the privatization of risks mean that rehabilitation's traditional justification – as a means of reclaiming or helping disadvantaged people – has lost its cultural purchase (Bauman, 1997; McCulloch and McNeill, 2007). To the extent that rehabilitation endures at all, it survives only in a hollowed out managerialized form, not as an over-riding purpose but as a subordinate means. Garland (1997a: 6) argues that probation 'staff now emphasise that "rehabilitation" is necessary for the protection of the public. It is future victims who are now "rescued" by rehabilitative work, rather than the offenders themselves.'

Garland's (2001) broader thesis in *The culture of control* has been carefully examined and critiqued by numerous commentators (see, for example, Feeley, 2002; Zedner, 2002; Braithwaite, 2003; O'Malley, 2004; Matthews, 2005). Most relevant in the context however, are those studies of penal policies and practices in various jurisdictions that have examined his arguments about the reconfiguration of penalty both conceptually and empirically (for example, Lynch, 1998, 2000; McAra, 1999, 2005; Kemshall and Maguire, 2001; Robinson, 2002, 2003; Hannah-Moffat, 2005; Tata, 2007a). Inevitably, such studies have tended, to varying degrees, to produce only qualified evidence of transformation. The significance of such empirical evidence is much disputed. Garland (2001) explicitly warns readers of *The culture of control* at the outset that there is no straightforward relationship between the broad socio-penal trends that he describes and the situated practices of specific penal actors operating within particular social, professional and institutional cultures. Penal professional cultures and actors can be both co-opted and (sometimes simultaneously) misadapted and resistant to changing governmental rationalities and technologies (Robinson, 2002; Cheliotis, 2006). In an important earlier article on governmentality, Garland (1997b: 204) is particularly explicit on this question:

an effective history of the present must go beyond the reconstruction of abstracted rationalities and enquire about the ways in which the rationalities and technologies of government are instantiated in the actual practices and discourses that make up the field.

The interstices between governmental rationalities and technologies and ‘the actual practices and discourses that make up the field’ constitute what we refer to as the ‘governmentality gap’. We mean by this term *both* the frequently observed space between ‘official’ and ‘frontline’ discourses and practices (much discussed in studies of policy implementation and its failures, most notably by Lipsky, 1980) *and* an analytical lacuna that arises from examining reconfiguration principally through the lens of govern-mentality. We recognize, of course, that governmentality studies are diverse and varied, and that governmentality itself is a contested term (O’Malley et al., 1997). For the sake of clarity, we intend neither to criticize such scholarship nor to engage directly with its claims. Clearly, many governmentality scholars would argue that to the extent that governmentality is about rationalities and technologies principally as *ideal-type* constructions, empirical findings that reveal apparently misaligned discourses and practices are to be expected. That said, to the extent that studying reconfiguration is (also) about exploring the development of penalty-in-practice, we need to understand more than ‘just’ rationalities, programmes and technologies and how they construct, circulate within and suffuse the penal field. We must also explore how the interstices between rationalities, programmes and technologies and actual discourses and practices are differently constituted not just in different places and times, but in every different space where penalty is situated and on every different occasion when penalty is enacted in the interactions and engagements between the punishers and the punished. Such work is best conceived not as an alternative to governmentality-based analyses, but rather as a necessary complement to them.

Given that our own study was not longitudinal in nature, using it to make sense of reconfiguration requires us to place our findings in historical and jurisdictional context. Scotland represents a particularly interesting site in which to study penal transformation. Although a constituent part of the UK, Scotland has had a separate system of law and criminal justice since before the Act of Union in 1707 created the United Kingdom. Despite its close geographical and political proximities to England and Wales, penal policy and penal institutions in Scotland have always been distinct from (though related to) those in England and Wales – and this distinctiveness is something of which Scottish penal policy makers and practitioners tend to be proudly aware. The advent of a devolved Scottish Parliament and Scottish Executive in 1999 has altered the institutional basis of this distinctiveness – as well as exposing Scottish criminal justice to much more intense political and media scrutiny (McAra, 2005, 2008).

At first sight, the history of probation in Scotland appears consistent with aspects of Garland's analysis. McNeill's (2005) analysis of documentary sources about Scottish probation recounts the shifting discourses that are revealed in five main eras characterized respectively by disciplinary supervision (1905–31), psycho-social treatment (1931–68), the promotion of social welfare (1969–91), the responsabilization of offenders (1991–8) and the pursuit of public protection through the assessment and management of risks (1998 onwards) (see also McNeill and Whyte, 2007). Perhaps the most peculiar aspect of this history arises from the decision to subsume probation organizations and functions within generic social work departments at the start of the 1970s; departments that were charged with 'promoting social welfare' (Social Work (Scotland) Act 1968 (section 12)). This duty existed irrespective of the type of client in question, placing offenders (both juvenile *and* adult) on a par with, for example, neglected and abused children, disabled adults and frail older people. Though this was in part a triumph for welfarist principles, it was also the result of much more pragmatic considerations around workloads, staff skills and training (McNeill and Whyte, 2007). The welfarist approach has proved unusually durable in Scotland – even in relation to adult offender services, there was little evidence of any significant revision of that philosophy until the 1990s; Scotland seems to have been relatively immune to the loss of faith in the rehabilitative ideal reported elsewhere (McAra, 1999, 2005). Even now, it remains the case that those who write social enquiry reports, supervise offenders on community sanctions and resettle released prisoners are registered social workers who have undertaken degree-level (or post-graduate) generic social work courses and who work in social work services.

That said, it is clear from recent empirical studies that, by the mid-to-late 1990s, governmental action linking ring-fenced funding to the introduction of new National Standards had already provoked significant changes in criminal justice social work, partly in line with Garland's thesis. There is some evidence, for example, that a 'responsibility model' (Paterson and Tombs, 1998) had taken root, at least in that workers' definitions of effectiveness prioritized reduced reoffending, changed attitudes in offenders and increased victim empathy (McNeill, 2000). Again partly in line with Garland's thesis, Robinson and McNeill (2004), reporting a Scottish study conducted in 2001–2, suggested that Scottish practitioners' accounts of their purposes confirmed the emergence of public protection as their 'meta-narrative' or super-ordinate purpose. However, they also found evidence that practitioners interpreted and operationalized this purpose in particular ways; insisting that it was best achieved through helping offenders via social work methods centred on relationship-building and recognizing the significance of offenders' *social* contexts and problems. Thus there is at least some evidence in Scotland (as O'Malley, 2004 and Hannah-Moffat, 2005 have suggested in Australia and Canada respectively) that while criminal justice social workers are increasingly willing to deploy the discourses of risk and protection, they do this in particular ways and for particular purposes, sometimes in defence of the traditional practices of penal welfarism. In other words, at least in so far as this is revealed in their *accounts* of their practices, partly reconfigured purposes seem to be pursued alongside and through more traditional priorities and techniques.

## **THE CONTEXT OF THE STUDY**

The business of social work, probation or corrections staff providing reports to assist judges is part of the sentencing process in many jurisdictions, though it is often overlooked by penological researchers and scholars who perhaps assume that it is peripheral to the core business of sentencing and punishment. Admittedly, different legal and cultural contexts shape such practices in different ways, serving to mute or to amplify their significance and influence. Indeed, some American scholars have argued that the Pre-Sentence Investigation Report (PSIR) continues to exist only as a marginalized discourse and an institutionalized form of the 'myth of individualized justice' (Hagan et al., 1979; Walsh, 1985; Rosecrance, 1988). More recently, following research in California (admittedly a somewhat exceptional state in penal terms), Kingsnorth et al. (1999) have argued that PSIRs are no longer needed to conceal punitive agendas and thus to uphold the 'myth of individualized justice' because punitive values are now openly acknowledged. This produces a 'dramatic role transformation' for the probation officer – 'from being an "agent of individualisation" to being an "agent of the state" – fully committed to contemporary norms of punishment and incapacitation, and recognized as such by all court room participants' (Kingsnorth et al., 1999: 271). The issue of the professional identities and allegiances of criminal justice social workers is one to which we will return.



In the Scottish context, according to the relevant National Standards:

Social enquiry reports are intended to *assist* sentencing. They provide information about offenders and their circumstances of general relevance to the courts. On the basis of a risk and needs assessment, they also advise the courts on the suitability of offenders for those community based disposals . . . (Scottish Executive, 2004: paragraph 1.2, emphasis added)

Typically reports provide information, advice and professional opinion about the personal and social history of the accused person, about his or her current domestic, financial and employment circumstances, about any relevant physical or mental health or substance use problems, about any previous offending history, about the current offence or offences and his or her views or attitudes towards them, and about his or her suitability for a range of different sentencing options. Working under common law and in the absence of matrices and guidelines, Scottish judges enjoy wide discretion in sentencing. Our study restricted its focus to ‘summary’ (that is, non-jury triable) cases in Scotland’s intermediate sheriff courts – where over 75 per cent of all criminal cases are heard (Tata, 2007b), and to which 88 per cent of all Social Enquiry Reports (SERs) are submitted (Scottish Executive, 2007). Sheriff court judges, who are known by the term ‘sheriffs’, are lawyers by experience and background;<sup>2</sup> they are simply judges by another name.<sup>3</sup>

Scotland has witnessed a significant escalation in the number of reports requested by the courts and submitted to them.<sup>4</sup> Between the years 2001 and 2006, a total of 194,703 reports were completed (Scottish Executive, 2007):<sup>5</sup> an increase of 80 per cent on the numbers during 1991–6 (Social Work Services Inspectorate, 1996). This dramatic rise is in spite of the fact that over this period in Scotland the number of cases coming before the courts has been broadly stable (McNeill and Whyte, 2007; Tata, 2007b). The concomitant level of financial investment reflects policy makers’ recognition of the pivotal role that SERs play in pursuit of governmental objectives for social work services to the criminal justice system. Despite the emergence of public protection as a priority, these objectives still include reducing the use of custody by offering credible community-based alternatives. Since reports are both the key entry point to community penalties and the prime opportunity to encourage consideration of the use of these sanctions, it is easy to see why they attract this level of investment and policy attention<sup>6</sup> (see Tata et al., 2008).

## **METHODS**

The research, undertaken between 2003 and 2005, examined the construction and use of pre-sentence reports from the perspectives of both report writers (social workers) and judges (sheriffs). The aim of the research was to explore in depth the communication processes between the producers of reports and their principal consumers. The study comprised four complementary parts, the first of which is most salient here. This was an ethnographic study of criminal justice social work in two sites examining the routine social production of SERs. This included observations of the working environments in which and routine processes through which reports were produced, as well as observations of social workers’ interviews with the subjects of reports whether in social work offices or (much more rarely) in

offenders' homes. The ethnography also initiated a technique known as 'shadow report-writing' in which the field-based researcher prepared shadow reports based on the same information as was available to the social work report writer; basically, the referral information and observation of the interviews (Halliday et al., 2008). This enabled a comparison between the shadow report and the real report, providing a particularly valuable means of eliciting from and discussing with the report writer not only what s/he intended to convey in any given report but how and why s/he sought to communicate it. We also conducted post-fieldwork interviews with the social workers to explore and refine our emerging analyses of observational data.

The two criminal justice social work offices served their respective local sheriff courts. We have called these sites 'Southpark' and 'Westwood'. 'Southpark' is a provincial town where the staff of a relatively small-medium criminal justice social work office wrote reports for a smaller court than the team in 'Westwood', an inner-city neighbourhood where workers served a much larger (and more anonymous) city court. The social work teams in both sites included both recently qualified and more experienced social workers, a small number of whom were involved in the training of social work students or were involved in other professional development activities. Though main grade social workers in both sites felt heavily burdened by the increasing demand for reports, and were frustrated at what they perceived to be a lack of senior management support, and though some of them betrayed a certain world-weariness and reflected some aspects of alienation as 'street-level bureaucrats' (Lipsky, 1980; Halliday et al., forthcoming), they could not be construed by any means as an unusually disengaged or disaffected workforce. On the basis of our broader experience of this field, we have no reason to consider them atypical of criminal justice social workers in Scotland.

The other parts of the study included an observational and interview-based study with sheriff court judges (sheriffs), prosecutors and defence lawyers in the corresponding sites, examining the interpretation and use of the Southpark and Westwood reports in sentencing; a series of focus group discussions with sheriffs throughout Scotland discussing general and specific issues relating to SERs whose production had already been observed; and a series of 'moot' (or simulated) sentencing diets based on Southpark and Westwood cases whose production had already been observed and involving pre- and post-interviews with sheriffs and defence lawyers (solicitors).<sup>7</sup> The main sources of data comprised transcripts of five separate focus groups with sheriffs discussing specific cases; five moot sentencing exercise transcripts; 55 interview transcriptions comprising 22 social worker interviews which took place after the participant-observation; 17 interviews with sheriffs after sentencing diets had been observed; 11 defence solicitor interviews; five interviews with defence solicitors before and after the moot sentencing diets; 10 court observation diaries; 43 weekly fieldwork diary returns; 29 shadow reports; and 29 original reports with their attached papers. The main research participants were 22 report writers, 26 sheriffs and 11 defence solicitors

## **REPORTS AND RISK IN SOUTHPARK AND WESTWOOD**

This article is less concerned with the ways that judges read and use reports (see Tata et al., 2008) than with the ways that social workers construct them in practice.

Accordingly, we draw here mainly on the data from our ethnography of the production of social enquiry reports. Given the centrality of discourses of risk (and public protection) in accounts of penal transformation, our specific focus is on how discourses and practices of risk assessment are constructed in the production of pre-sentence reports. Though the complexities of the narrative construction of risk are best explored through the use of the case studies to which we will turn shortly, we begin with an overview of our findings about the construction of the reports in general and, more specifically, about the place of risk within them.

Our data revealed that in both sites a process of typification and simplification began even before the social worker and the offender met, when the paperwork related to the SER request was generated and when the narratives already apparent in existing records began to be reviewed, re-deployed and refined. In the interview itself we found that, always under pressure of time, social workers used a variety of strategies and approaches to elicit the requisite information; for example, in the way that they worked to more or less routine interview agendas. These agendas, partly based on the National Standards and professional training but also reflecting processes of socialization firmly rooted in local team cultures and practices, tended to pre-structure and constrain the narratives that they built. Moreover, the narrative was also influenced by their degree of engagement in social work intervention (that is, seeking to help offenders) in the process of social enquiry; by how their emerging narratives were affected by their observations of and engagement with offenders; and by issues of cooperation, compliance and trustworthiness that arose during and after the interviews. In relation to the range of typical 'offender stories' that the social workers developed, they routinely edited the narratives suggested *by* offenders, sometimes subtly suggesting alternative narratives *to* offenders. Some offenders appeared to have learned to acquiesce by providing the required responses, permitting social workers to develop or sustain coherent narratives about them. These narratives tended to require consonance not only with the 'facts' of the case; they also needed to assemble a logic linking an analysis of the reasons for offending with an appropriate response or solution; that is, the narrative itself (implicitly) had to suggest a particular sentencing outcome.

The narratives that were thus developed prior to and through the interview process were then confirmed or disputed through processes of corroboration in which the accounts of other professionals (for example, doctors, other social workers or drugs workers) emerged as being more authoritative than offenders' own accounts of their lives and circumstances. Indeed, offenders' narratives were frequently judged with reference to professional accounts. Dissonance between offenders' accounts and professional accounts called into question the trustworthiness of the offender and evoked more negative assessments (more of which below). When these confirmed or disputed accounts were finally committed to paper, social workers engaged in a complex process of editing which often aimed to weed out both irrelevant and incongruent information in an effort to construct a plausible and persuasive narrative (for more detail see Tata et al., 2008).

With respect to the place of risk in these processes of narrative construction, as we noted above, since the mid-1990s a series of policy statements have placed increasing emphasis on assessing, managing and reducing risk in order to better

protect the public. By coincidence, both of the local authorities in which Westwood and Southpark are located were subject to performance inspections during our study.<sup>8</sup> Evidently, such regulatory practices represent one important means of attempting to ensure the effective implementation of policy – and one of the mechanisms by which changing governmental rationalities and technologies *might* reconfigure penal cultures and practice.

The following quotation from a Southpark social worker captures the hasty attempts of the local management to attend to the risk agenda in advance of the inspection:

prior to them coming there was this whole like flurry of activity round risk assessment because obviously they [the local management] knew that the inspection team were coming so there was this mass flurry and that was at the point where, you know, we were told to change our assessment to risk assessment, it has to incorporate LSI-R [the Level of Service Inventory – Revised, a particular risk and needs assessment instrument<sup>9</sup>], it had to be of greater detail but that was just, that information was just given out in a team meeting really, it was like this is what you need to do, you know . . . And there was a whole lot of, I don't know, it was a difficult time because we were just told that that was implemented and there was no, there was nothing, there was no training on it or, you know, it was just like this is what you need to do, you know. (Southpark Social Worker 1)

Given the apparent nature of these belated managerial attempts to drive through changes in the face of imminent inspection, it is perhaps unsurprising that in both sites the inspectors complained about the underuse of the risk assessment tool (LSI-R) and about what they judged to be limitations in the quality of the risk assessments undertaken. They noted that practitioners were ambivalent and sometimes confused about carrying out structured assessments using LSI-R, with many seeing it as an exercise in form-filling that merely confirmed what practitioners already knew rather than as a significant new resource for them in practice.

Like those conducted by the inspectors, our own post-observation interviews with social workers revealed mixed views about the emergence and development of risk assessment. When, in discussing their work in the abstract, they were asked to identify the most significant recent changes in policy and practice, risk assessment was frequently mentioned:

if you can get any reports going back 20 years, it's really quite incredible what we said and what we got away with. Public protection wasn't the major issue in those days, it was just, you know, protecting the client [i.e. offender] mainly. (Westwood Senior Social Worker)

the risk assessment, with the emphasis on carrying out risk assessments I think has been the biggest change and trying to define how I do assess a person's attitude towards their offending . . . [T]he drive from the [Scottish government] about risk assessment I think has filtered down and [the service] have tried to kind of organize themselves. (Westwood Social Worker 2)

But in discussion of their actual practices of risk assessment (just as in the practice we observed and in the reports we reviewed), the picture that emerged was one of much more qualified and gradual change:

I guess [LSI-R is] a number, but it was a number that I knew when I looked at the information that I had from the court, my own skills told me roughly what we were going to follow  
– you're low, you're medium and you're high, you know it just depends on how serious the offence is, what's his previous [offending], all that sort of stuff. You've

got a rough guess, you know, so what it does is it formalizes it by giving that a number . . . [A]ll it does is confirm. (Westwood Social Worker 5)

Despite our general impression that the influence of risk-based rationalities and technologies might remain somewhat limited in practice, in returning to the data for the purposes of this article we were nonetheless somewhat surprised to find that of the 16 Westwood reports for which multiple data sources were available (including the reports themselves, records of the observations and, in some cases, shadow reports), only six deployed the word 'risk' at all. The position in Southpark was somewhat different, perhaps partly because of the ongoing inspection.<sup>10</sup> Here, 18 out of 24 reports explicitly discussed risk and those cases in which it was not discussed seemed to be less serious, perhaps suggesting an implicit judgement that explicit risk assessment was not required. Perhaps more importantly, across both sites, in those reports where risk was mentioned, the term was used in very different ways.<sup>11</sup> In general, the focus was more on risk of reoffending (a judgement of probability) than risk of harm (an assessment of the potential impact or consequences of further offending). As one might expect, being 'high risk' (of reoffending) was sometimes used as a contraindication for community sanctions and therefore as an implicit rationale for condemnation, whereas being 'low risk' was sometimes used as a rationale for leniency. But, as we will see below, being 'high risk' was also sometimes used as a positive indication for community penalties and as a rationale for leniency.

More generally, our analysis of the available reports from both sites revealed that despite the increasing emphasis on risk assessment in policy documents, inspection regimes and (to a lesser extent) in workers' practice discourses, even where risk assessments were included in reports, risk assessment remained a fairly peripheral concern in most cases – or at least it was not an *explicit* central concern of most of the reports. Rather, in both sites, the principal focus of social enquiry seemed to be on assessing the offender's responsibility, character, attitudes, motivation to change and likely compliance with community sanctions:

I'm trying to communicate whether the person – whether I think the person will comply with probation or not . . . I'm trying – sometimes I feel that the sheriff needs a flavour of what the interview was like and whether the person complied with that and what impact that might have on compliance in the future with anything else, so I might say that openly. (Westwood Social Worker 4)

But I think that's very significant, what people are saying, whether they willingly show any victim empathy and remorse or whether you kind of have to prise that out of them, in which case I don't think it's very genuine if you actually have to direct them to come out with that sort of thing. (Westwood Social Worker 6)

Unlike policy discourses around risk therefore, rather than evincing an economic or actuarial rationality underpinning a pseudo-scientific, neutral and technical form of risk assessment devoid of narrative (Franko Aas, 2004), it seemed as if criminal justice social workers continued to be engaged in a form of assessment that combined technical and moral judgements to arrive at a professional opinion and to construct a credible story about the incorrigibility or redeemability of the offender. Though the linguistic terms of this assessment have been modernized, the business of selecting and de-selecting offenders for leniency – a task that has characterized probation throughout its history



– seems to endure (Vanstone, 2004). This narrative construction of good and bad character is best demonstrated through a brief discussion of two similar but contrasting case studies.<sup>12</sup>

## **Redeeming Patrick**

At the time of the preparation of his court report, ‘Patrick Swan’ was a white man in his early 20s. He had over 40 previous convictions and a history of chronic substance use. He was interviewed while remanded in custody prior to sentencing for possession of drugs, theft and possession of an offensive weapon.<sup>13</sup> These offences meant that he was in breach of previously imposed bail conditions, in breach of an existing probation order and in breach of a release licence from a previous custodial sentence. As one sheriff remarked in a subsequent focus group, he was ‘a very, very bad offender’ and a ‘hopeless case’; a near certainty for a further custodial sentence.

The social worker writing the report already knew Patrick because she had been supervising him on the existing probation order. ‘Geena’ was a white woman in her 20s who had been qualified for three years and was a well-read, enthusiastic and dedicated practitioner and practice teacher. Geena had been surprised to find a new report request for Patrick; she thought he had been doing well on probation. The record of the observation of the prison interview highlights the strong working relationship between Patrick and Geena, as well as a clear sense of mutual loyalty and shared disappointment at Patrick’s further offending. It was an emotional interview; Patrick’s sense of regret and failure – as well as his recognition that he has jeopardized his relationship with his partner Debbie and their children – brought him to tears. Responding to his distress, Geena tried to reinforce the progress he had been making and to find and communicate grounds for hope and optimism. Despite the seriousness of Patrick’s predicament, Geena decided in the report to try to make a case for a further probation order. The following extracts from her report (WW19) illustrate and summarize the argument that Geena tried to build:

Mr Swan was open and honest about his drug use and at our last probation meeting [prior to his arrest] expressed a willingness to engage with the addiction services. However, he was incarcerated before he had the opportunity to speak to a trained drug counsellor.

According to Mr Swan his offending behaviour has mainly been influenced by his drug dependency problems. With regards to the offences before the court, Mr Swan has accepted all responsibility for all charges. He frankly admits that he offended on the [date] by stealing a quantity of personal goods for financial gain. Mr Swan was able to demonstrate a degree of regret and remorse for the offence committed. He was able to understand the direct correlation between his drug dependency and his offending.

It is the author’s opinion that Mr Swan remains at high risk of re-offending if he does not address his addiction difficulties and breaks his cycle of offending behaviour.

The writer has informed Mr Swan that she is prepared to work with him during probation, however, if he were to miss any appointments or fail to engage with the addiction services she would alert the court to this.

The fieldwork diary, completed after the process of shadow-writing and the exchange and discussion of Geena's and the fieldworker's reports, notes that:

Patrick's drug use is the main issue for her, from which his offending stems. Geena is trying to tell the sheriff that he is motivated and by noting his 'honesty' in telling her about drugs, she is trying to show that he wants help. (Fieldwork diary: week 12)

Her mentioning of the two [previous] probation orders shows that she 'is not daft' and is being realistic with the court. (Fieldwork diary: week 12).

Geena tells me that she is showing that she is 'accountable to the court' and that she will do her job to ensure that Patrick complies. (Fieldwork diary: week 12).

Ultimately Geena was unsuccessful and Patrick did receive the expected custodial sentence. But the interesting feature of this case is the way that Geena turns the high risk of reoffending that he represents into a rationale not just for leniency but for welfare. Her argument is that Patrick's risk of reoffending will remain high until and unless his drug addiction is addressed. Until and unless his needs are met, the risks he poses to others will endure. Probation rather than prison is the way to tackle his drug problems and reduce risk. Protecting 'us' (the potential victims) requires the court to help him.

### **Condemning Tom**

Tom Wolf, who was in his late 30s at the time of his interview, also pled guilty to possessing an offensive weapon and was also already on probation under the supervision of Jo, a white women in her late 30s with 18 months' experience as a qualified social worker. Like Geena, Jo was a well-read, enthusiastic and hard-working criminal justice social worker. Like Patrick, Tom had a long history of substance use; he was a small scale user-dealer and had a long criminal history with over 30 previous convictions. His new offence placed him in breach of probation, but his order had already been breached because of his failure to comply. He also had several other outstanding charges. Jo had written the previous report which recommended and led to the existing probation order after interviewing Tom while he had been remanded in custody, but once released Tom had not shown up for probation appointments or kept in touch with Jo. He also failed to attend the first court report interview he was offered. Tom attended a second interview with his partner but was half an hour late. On the way to the interview Jo commented to the fieldworker that she was 'not in the mood to be mucked around' (Fieldwork diary: week 4). Jo's disposition towards Tom was sceptical from the outset.

Throughout the interview, Tom was deferential and apologetic towards Jo. He repeatedly told her that he was not going to try to 'tell her a story' (that is, mislead her) and that he needed a Drug Treatment and Testing Order (DTTO) to be imposed so that he could straighten out and 'get his boys back' (from placement in foster care). Although Jo came across as somewhat world-weary and sceptical throughout the interview, she did convey sympathy and concern about the difficulties Tom had faced in the past year (homelessness, violence, depression, separation from his sons). Tom was remarkably candid about his drug use and his drug dealing. The interview ended with Jo agreeing to arrange a DTTO assessment.

However, a week later, the fieldworker discussed Tom's case again with Jo and with Rosie – another social worker in the team with previous experience of Tom. Jo had also checked out with the social worker for Tom's sons what contact there had been between him and the boys:

Jo looks annoyed as she begins to rhyme off all the things Tom has not done. She uses her fingers to effect here: 'hasn't seen them since last June, not a call, not a birthday card . . .' finishing with pointing out that he 'made out' the kids 'were his focus'. Jo says she is going for [that is, proposing] a D'TTO [in the report] but she is unsure she will get it . . . Jo notes that she 'will be laying it on thick in the report that he is not suitable for probation', adding that 'I won't be recommending custody but I will'. Rosie agrees with this decision telling Jo that he 'fooled me' the first time but that 'he has been housebreaking<sup>14</sup> all over apparently' . . . She continues 'he's a serious offender . . . selling loads of shit . . . and he should be locked up, it's nothing personal'. Jo nods and tells us that it is 'hard to keep a positive regard' of a client like Tom. (Fieldwork diary: week 5).

In the report itself, Jo wrote:

Although on the face of it Mr Wolf agreed that carrying weapons was unacceptable, attempts by the writer to discuss with him why such offences are viewed seriously by the courts elicited no apparent understanding or desire to understand this. This, combined with his high level of heroin use and the general instability of his lifestyle, implies a high risk of reoffending . . .

Mr Wolf claimed at interview that his life had changed and that he hopes to get a new flat away from the area where he has recently had problems with a view to regaining care of his children and presented this as a case for reduction in his risk of reoffending. The writer would question the credibility of this claim given Mr Wolf's similar claims of positive lifestyle changes at interview for court [eight months previously] . . . and his lack of any contact with his children over the past 14 months.

Three applications for breach proceedings have been submitted by the writer in respect of the probation order made [eight months previously]; many of his convictions have been committed while on bail. This suggests a lack of commitment on Mr Wolf's part to community disposals.

Later, Jo discussed her report with the fieldworker:<sup>15</sup>

She tells me that this is the 'worst' SER she has ever written in that she didn't have much positive to say about the person.<sup>16</sup> She asks for my opinion. I say that I am not sure and she begins to tell me how Tom is 'quite manipulative' and 'dangerous' . . . Jo feels bad that she has written the report but feels that it is accurate. (Fieldwork diary: week 5)

It seems clear that Jo's report on Tom was in large part a product of a problem of trust. Through Jo's earlier report eight months previously, the court had already given Tom an opportunity to redeem himself; and this was only the most recent in a series of such opportunities. Although Jo's scepticism towards Tom mellowed in the interview itself in response to his account of his personal problems, her later inquiries and discussions with social work colleagues called into question for Jo the credibility of the way he presented himself. In this case, as in many others that we observed, it was not an assessment of risk of reoffending or risk of harm that

determined the nature of the narrative that the report writer constructed. Rather, the differences between Geena's construction of Patrick and Jo's construction of Tom hinged on the social workers' differing assessments of the offenders' trustworthiness and credibility; the central issue is not their level of risk per se (both were deemed to be 'high risk') but rather their *moral* character (Halliday et al., 2008). Geena decided that, in spite of everything, Patrick may yet make good and was prepared to take a risk with her reputation and credibility. Jo decided that Tom's (alleged) dishonesty meant that such reputational risk was not justified; tellingly, she also cast his (alleged) duplicity as evidence of dangerousness and hence risk to the public. But this was not based on some abstracted risk classification system or tool; rather it was her assessment of his character; in part instinctive and in part reflective.

## RISK, RESPONSIBILITY AND (BAD) CHARACTER

Kelly Hannah-Moffat (2005) has already made a compelling case that contemporary practices of risk assessment are concerned with the construction of 'transformative risk subjects'. Rather than creating fixed actuarial risk subjects to be merely managed, she suggests that discourses of risk are fluid and flexible and that they 'fuse' with discourses of need in local penal narratives to support a variety of penal strategies – including 'correctional treatment' as a form of risk minimization. The specific technologies of risk assessment (specifically the LSI-R) that Hannah-Moffat (2005) discusses have travelled from Canada to Scotland and there are other aspects of our penal histories and cultures that are similar, so it is perhaps unsurprising that our findings resonate with hers. However, our ethnography sheds further light on how practitioners make determinations about who can and cannot be constructed as a 'transformative' (or transformable) risk subject; more to the point, the data reveal how perceptions of deceit and/or non-compliance on the part of offenders affect penal actors' essentially moral judgements about who *should* and *should not* be deemed worthy of that status. We have also hinted at how such judgements relate to both issues of responsibility (in the attitudes that offenders display in relation to their current and past offences) and of potential for future responsabilization.

In an important recent paper, Nicola Lacey (2007) provides a wide-ranging analysis of the concept of responsibility in modern English law. Lacey's analysis reveals that the linking of criminal responsibility to questions of human capacity, rooted in turn in ideas of human agency, is a product of the Enlightenment, and that other ways of conceptualizing responsibility based on 'an evaluative assessment of the moral character displayed in putatively criminal conduct' (Lacey, 2007: 15) have a longer history. Here the judgement of responsibility is less about the capacity to act freely and more about what particular actions reveal about moral character more broadly. Lacey (2007: 35) argues that:

the history of post-eighteenth-century English criminal justice is characterised by a gradual development and strengthening of capacity-based principles within the criminal law, necessitated by imperatives of legitimation and fostered by the increased capacity of the trial system to handle evidence about choice or opportunity combined with its diminished capacity to draw on local knowledge about character or reputation.

As industrialization rendered individual subjects more anonymous and their moral characters more opaque, the criminal law focused on a more technical conception of responsibility in the act rather than the more diffuse concept of the alleged offender as a responsible (or irresponsible) moral actor. However, Lacey notes that there has been a recent revival of character-based approaches to responsibility both in legal theory (for example, Tadros, 2005) and in criminal justice policy and practice. In the latter connection, she points to developments in the UK and the USA including three strikes laws, mandatory sentences for certain types of offences and other 'dangerous offender' policies and practices. Lacey notes that Pillsbury (2002) has described such measures as amounting to punishment for bad character; and, worse still, punishment for bad character that is seen as 'fixed' and inflexible, cutting against both individualized justice and the centrality of treating defendants as agents.

Lacey makes brief reference to Garland's (2001) work, posing the question of whether the re-emergence of character-based attributions of responsibility represents another manifestation of a 'culture of control'.<sup>17</sup> Although an assessment of what our evidence might say to such questions is beyond the scope of this article, the contemporary salience of such enquiry is clear. As Lacey (2007) recognizes, it has long been the case in English-speaking adversarial criminal law systems that once guilt is established due process rights (essentially around the inadmissibility of character evidence) change or diminish; sentencing deliberations bring character centre-stage in the decision-making process whether through the presentation of criminal record, pleas in mitigation, psychiatric assessments or pre-sentence reports. However, in relation to the specific role of risk assessment in this process, Hannah-Moffat's (2005) analysis and our own evidence might suggest that Pillsbury is only half right; where risk assessment leads to *de-selection* for leniency it may amount to punishment for bad character. But the idea of the (sometimes) transformative risk subject suggests that bad character is not always as fixed or inflexible as may have been supposed. To the extent that risk-based rationalities and technologies, at least in their hybridized risk-needs versions, contribute to professional judgements about the mutability of bad character, they do not treat character as 'fixed' or inflexible in the manner that Pillsbury supposed. Thus the scientifically, actuarially and/or technologically deterministic construction of risk subjects implied in the new penology turns out, on our analysis, to be much more familiar and qualified than some have feared.

## FILLING THE GOVERNMENTALITY GAP

Lacey (2007: 36) closes her paper with the claim that 'any intelligent analysis of today's criminal process needs to be grounded in an account of its history and path to its current position'. Returning to the need we articulated at the outset to address the 'governmentality gap' in analyses of penal transformation, our evidence suggests that making sense of the reconfiguration of penalty-in-practice requires just such an appreciation of the historically and locally situated nature not just of penal policies but of penal cultures and practices. In pursuit of this, Pierre Bourdieu's work provides some conceptual resources with which to make sense of reconfiguration and its limits.

Bourdieu developed and deployed the concepts of *field*, *habitus* and *capital* to explain how social practices are constructed in and through the relations within particular areas of social life. The three concepts are complex and interconnected but essentially a *field* is a 'site of struggle' in which various social actors compete over, contest and construct influence and power. *Habitus* refers to the 'durable dispositions' that social actors form as a result of their histories within and across social fields; in other words, the habitus is constructed through the influence on the actor over time of the wider conditions of the social fields in and through which they exist and move. *Capital* refers to the resources and assets within particular fields which actors struggle to acquire and through which they 'play the game' within each field. Bourdieu distinguishes between economic capital, cultural capital, social capital and symbolic capital, although he stresses the interactions between them.



Of particular interest in seeking to make sense of reconfiguring fields – and of the data we have presented above – is Bourdieu's (1990: 116, emphases in original) brief discussion of the 'hysteresis effect', where a particular effect lags behind its cause:

the persistence of the effects of primary conditioning, in the form of the *habitus*, accounts equally well for cases in which dispositions function out of phase and practices are objectively ill-adapted to suit the present conditions because they are objectively adjusted to conditions that no longer obtain. The tendency of groups to persist in their ways, due *inter alia* to the fact that they are composed of individuals with durable dispositions that can outlive the economic and social conditions in which they were produced, can be the source of misadaptation as well as adaptation, revolt as well as resignation.

In other words, hysteresis occurs in a given field when the field changes in some significant way but the habituses of certain actors within the field, precisely because they are the *durable* products of individual and shared *histories*, are slow to adapt.

There are several ways that these concepts might be deployed in understanding the ongoing process of reconfiguration revealed in our ethnography (and within penal-professional cultures more generally).<sup>18</sup> First, while we can conceive of criminal justice social work as a field in itself, it also represents an intersection between the relatively discrete fields of criminal justice and social work. Bourdieu's account of social practice allows for struggles *between* fields, at their margins and intersections, as well as *within* fields. So, whereas in many jurisdictions probation (or correctional) services are a part of the justice system (perhaps best characterized as a sub-field within it) and thus subject to its own particular vicissitudes, in Scotland, the position of criminal justice social work is more complex. Criminal justice social workers are not merely penal actors; they remain professional social workers working in locally based social services.

The wider social changes affecting the field of penalty so well articulated by Garland (2001) mean that those welfare discourses and techniques that previously provided the capital in and through which social workers have traded have lost their political and cultural purchase (McCulloch and McNeill, 2007). Penal policy discourses and public debates lead social workers to believe that their welfare affiliations are a liability that must be offset by adapting to a risk management and protection ethos. Thus, criminal justice social workers gradually come to invest, some more reluctantly than others, in new discourses and techniques of risk assessment, management and reduction; discourses and techniques that represent new forms of capital through which some of them perhaps sense that they might maintain or acquire influence from their marginal position within penalty. Nonetheless, this strategy sits uneasily with their existing habituses, in many cases framed in earlier eras. Their individual and shared histories at the intersections between the fields of justice and welfare seem to produce habituses that predictably retain much more than a residualized commitment to penal welfarism; thus, even where the need to trade or invest discursively in risk and protection is recognized, the meanings of risk and protection are themselves reframed; existing practices are re-legitimated in new ways. In this, there may be, in Bourdieu's terms, a significant

degree of 'resignation' about and 'adaptation' to the risk agenda in relation to purposes and objectives, but there is also 'misadaptation' and 'revolt' in relation to techniques and practices. That both cases discussed above involved relatively recently qualified social workers who had been educated both about the emergence of risk and its associated technologies *and* about criminal justice social work's welfare traditions underlines the durability of the latter influence on the profession and its practices – or at least it suggests that the eclipse of welfarism might require the passage of considerable time, or some more violent rupture in the development of the profession.<sup>19</sup>

Although Bourdieu's account of habitus has been unfairly criticized for inadequately recognizing human agency (de Certeau, 1984; Jenkins, 2002), principally because the notion of habitus implies the taken-for-granted un-reflective assumptions that shape and structure our practices, his position is more subtle than this:

it is likely that those who are 'in their right place' in the social world can abandon or entrust themselves more, and more completely, to their dispositions (this is the ease of the well-born) than those who occupy awkward positions, such as the parvenus and the déclassés, and the latter are more likely to bring to consciousness that which, for others, is taken for granted, because they are forced to keep watch on themselves and consciously correct the 'first movements' of a habitus that generates inappropriate or misplaced behaviours. (Bourdieu, 2000: 163)

Criminal justice social work is undeniably in just such an awkward position – social workers are both relative parvenus (recently arrived) and déclassés (lacking in status) in the field of criminal justice.<sup>20</sup> In this context, the criminal justice social workers' unease is less about policy changes and more about tensions in their day-to-day engagements with other more established criminal justice practitioners, particularly judges, though these two stresses interact.<sup>21</sup> Indeed, one of the clearest findings from our study concerned the marginalized position that criminal justice social workers inhabit and the professional insecurity that this generates (see Halliday et al., forthcoming). Arguably, with the awkwardness of this position come consciousness and, perhaps, the capacity for reflection and resistance. With respect to risk assessment, one of the most ironic findings of our study was that social workers' appeals to risk discourses often went unheeded because judges have had less need and less inclination to adapt to changing policy discourses around risk and protection. The insulation of the judges from the policy pressures that afflict social workers is a result of their constitutional independence from the executive and of the high degree of discretion afforded them in the Scottish context. But in Bourdieu's terms, it also reflects their position as 'well-born' insiders rich in social, cultural and symbolic capital in their field. Predictably perhaps, the judges in our study trusted neither the outcomes of risk assessment instruments nor the professional judgements of social workers, preferring to trust their own skills in judging offenders, and continuing to see risk as but one issue among many issues involved in the proper determination of sentence (Tata et al., 2008). Thus although *policy* discourses may lead social workers to hope to find in their manipulation of risk-based rationalities and technologies the potential to acquire the cultural capital that they need, to the extent that they understand or intuit judicial resistance to risk, the ambivalence of their own relationship with these rationalities and technologies is exacerbated.

To the extent then that Scottish penalty is revealed in our study, it emerges as a field in which different legal and penal habituses are mismatching and misfiring. For different penal actors with different histories in the field and different sources of capital, transformations are differently paced, configured and experienced, and differently accommodated, resisted and subverted. Moreover, we find that different actors are more and less conscious and reflective in relation to different forms and degrees of unease about wider penal-political changes and new rationalities and technologies. A hysteresis in the process of reconfiguration is one among many forms or consequences of adaptation or misadaptation that may be revealed when the interstices within the penal field are uncovered by ethnographies of practice.

In sum, the merit of penal ethnographies is that they can reveal not just the empirical ‘governmentality gap’ between official and frontline discourses and practices, but also the analytical lacuna that results from relying too much on studies of accounts and discourses to reveal the changing nature of penalty. This is not just a problem of relying on policy accounts and discourses; it is also a problem in relying on the accounts and discourses of practitioners which may tend to mimic the governmental rationalities to which they are exposed. Where this analytical gap is undetected or unexamined, the heterogeneity within penal reconfiguration and the heterogeneous processes of cooptation, adaptation, resistance and subversion that it breeds remain understated and under-theorized. For us, this confirms the need for more ethnographic work studying how penalty is enacted in practice; in broader terms, our analysis contributes to the case for the development of a more fully cultural penology. Such modes of enquiry and analyses need to be directed towards advancing our understandings not just of penalty-in-practice but of *how and why* penal-professional cultures, practices and habituses change and resist change. There is existing work in this area, some of it directly deploying Bourdieu’s concepts (see, for example, Chan, 1996; Hughes and Gilling, 2004; Hutton, 2006), but more needs to be done in order to develop our grasp of the heterogeneities *within* and *across* penal cultures – both over the course of *time* and in

22

different *places*.

## Notes

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2 This is in contrast to the situation in England and Wales where such ‘cusp’ cases are mainly heard by lay magistrates.

3 In reporting the specific methods and findings of the study the term ‘sheriff’ is used

(since this is used in quotations). In discussing the implications of the findings beyond Scotland we revert to the generic term ‘judge’. As explained, the terms ‘judge’ and ‘sheriff’ are practically synonymous.

4 Sheriffs can call for reports in any case, but there is also a range of circumstances

where the law requires that the court obtain a report before passing sentence; prior to imposing most community penalties, prior to imposing any custodial sentence on those under 21 years of age and prior to imposing a first custodial sentence on any offender. In Scotland, such reports – known as Social Enquiry Reports (SERs)

are written primarily for judges by social workers. Unlike their counterparts in many other jurisdictions, report writers in Scotland are not routinely provided with witness statements and police reports; however, they do receive information about the current charges (the complaint or indictment) and about previous convictions.

5 During the same period the courts requested 227,464 SERs.

6 The initial imperative to promote the use of community penalties came from concerns about the rising prison population in the 1980s (see McNeill and Whyte, 2007). Currently, Scotland's prison population is again the subject of major political concern (see Scottish Prisons Commission, 2008).

7 As in many other common law countries, there are two basic branches of the legal profession in Scotland: 'solicitors' (who undertake, inter alia, the vast majority of defence and prosecution work and all summary criminal work) and a much smaller cohort of 'advocates' (who conduct work in the superior and appeal courts).

8 We cannot quote directly from these reports or reference them as this would risk the anonymity and thus the confidentiality of the sites and of the research participants.

9 The LSI-R is a technology sometimes associated with actuarial justice and the new penology (Franko Aas, 2004), although Hannah-Moffat (2005) and Maurutto and Hannah-Moffat (2006) have revealed that its use in fact represents a hybridization of risk and need.

10 Westwood's inspection had followed the observational part of our fieldwork, but preceded our follow-up interviews.

11 Clearly it is possible to both indicate and mitigate risk without talking about it directly – thus the use or lack of use of the term 'risk' is not in and of itself evidence of the progress or lack of progress of risk rationalities and technologies. This is a theme to which we return in the discussion.

12 Though both of these studies are drawn from the Westwood fieldwork, similar examples of the narrative construction of good and bad character exist in the Southpark data. The decision to compare two similar Westwood cases is intended to show how practices can vary significantly even within the same local context.

13 'Offensive weapon' in this context, and in the second case, means a knife or other bladed or blunt instrument, not a firearm.

14 'Housebreaking' is the Scottish term for burglary.

15 The report on Tom was observed and written early in the fieldwork in Westwood and before the practice of shadow-writing commenced.

16 Although this comment may suggest that the case of Tom Wolf is an unusual example of the development of a condemnatory narrative, we found several similar examples in both sites. Moreover, for the purposes of this article, the degree to which this case is an 'outlier' from routine practice is not the point; as with the case of Patrick Swan its salience here rests in the ways in which it uses and fails to use risk as a mechanism of redemption or condemnation.

17 It is interesting to ask in this regard whether risk technologies might represent a late-modern attempt to render the post-industrial anonymous subject as knowable as his pre-industrial forebears may have been; what is very different is the form of knowing at issue. Indeed, Franko Aas (2004) might suggest that the risk subject is

not so much 'known' (in a narrative and holistic sense) as informed upon (through the fixed categories of the instrument or the database). That said, our evidence suggests that, in Scotland at least, to characterize pre-sentence report writers as purveyors of mere de-contextualized information would be to misunderstand seriously their construction in practice. They remain very much narrative devices, rooted in their local contexts.

- 18 Indeed, the development of this type of analysis might help to address one of Zedner's (2002) most telling criticisms of the 'Culture of Control'; that is, Garland's (2001) failure to develop and apply an adequate or consistent account of culture (but see also Garland, 2006).
- 19 There are, of course, jurisdictions where such 'violent ruptures' have been manufactured precisely to shift professional cultures that were seen to be too wedded to welfarist ideals. The abandonment of social work training and qualifications for probation officers in England and Wales in the mid-1990s is one such example.
- 20 After one of the moot sentencing diets, one of the researchers asked a judge whether it was important to have the content of the court report summarized and used by the defence lawyer in the plea in mitigation. His memorable response betrayed the significance of cultural and symbolic capital in the field of criminal justice: 'Put it this way, why would I want to listen to the local rep [theatre company] when I can have the Royal Shakespeare Company?'
- 21 Arguably, these two tensions experienced by social workers reflect instances of two ongoing internecine struggles within the State, as described by Loïc Wacquant (2009) in *Punishing the poor*. Wacquant, developing Bourdieu's analysis of the State as a bureaucratic field, argues that the first struggle sets the 'lower state nobility', those that enact government as practitioners within the agencies of the State and that tend to hold to their traditional missions, against the 'higher state nobility' comprised of policy makers and officials promoting market-based reforms as part of their struggle to reassert state sovereignty. The second sets the 'left hand' or feminine side of Leviathan, offering protections to the disadvantaged (through education, health, housing, social security and welfare services), against its masculine 'right hand', which enforces the State's new economic disciplines. Wacquant's view is that criminal justice agencies have become 'core constituents' of this right hand, moving centre stage in the wider project of government. In this vein, it might be argued that in many jurisdictions, the higher state nobility has sought to compel probation or corrections or even criminal justice social work to negotiate an ideological traverse from the left to the right hand of the State.
- 22 It can, of course, be argued that Scotland is an exceptional case, for reasons implicit in the account of the jurisdiction outlined within the article, and thus a poor locus for a study of generalized accounts of transformation. Were we trying to refute or dismiss such accounts, this is a charge with which we would engage seriously. But since our intention is to expose a gap in such analyses, it matters less whether the jurisdiction is more or less welfarist than most. We argue that while the dimensions and character of the 'governmentality gap' will vary within and across jurisdictions, it will exist everywhere, and that understanding its dimensions and character is critical to understanding how penalty is constructed everywhere.



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