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Governing Through Human Rights in Counter-terrorism: Proofing, Problematization and Securitization

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Abstract
Human rights are commonly regarded as the antidote to criminalization and securitization. Yet, since 9/11, at both the national and international levels, human rights law has largely accommodated the security-oriented changes deemed necessary to combat terrorism, including the use of torture and the erection of a "shadow" system of justice through the use of coercive non-trial-based measures (Gearty 2017; Hamilton 2018). In this article, we examine taken-for-granted features of modern legal adjudication and "human rights proofing" (forms of human rights protection) that dilute the restraining power of human rights law and extend security measures. Informed by a "governmental criminological" analysis of human rights in the security field, we present two case studies to illustrate these arguments. The first considers "human rights proofing" mechanisms in the United Nations counter-terrorism assemblage which, we argue, have been rendered "technical" (Sokhi-Bulley 2016) through the complexity of the structures deployed to protect rights and the forms of knowledge privileged by experts. The second case study draws on use of control orders—Terrorism Prevention and Investigation Measures (TPIMs) in the United Kingdom—and examines two governmental "techniques," namely, the judicial "balancing test" and the European Convention on Human Rights "memos" put to parliamentary committees scrutinizing counter-terrorist legislation. At both national and international levels, how human rights are being institutionalized has affected the operation of power: we are being governed *through* rights (Golder 2011) in ways consistent with conditions of authoritarian liberalism (Dean 2007).

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Introduction: Governmental Criminology and Governing through Human Rights

Despite an increased focus on human rights in criminology (Savelsberg 2010; Weber et al. 2016; Whitty and Murphy 2013), "governmental criminology's" analytical value remains largely unexplored in the rights domain (Lippert 2016). Governmental criminology is not a tidy approach so much as a loose toolbox of concepts informed by Michel Foucault's writings and lectures on governmentality (1991, 2007; see also O'Malley 2009), as well as by the large volume of work that has deployed and refined these concepts in criminology and beyond (see, e.g., Brady and Lippert 2016; Garland 1997; Lippert and Stenson 2010; Rose and Valverde 1998; Simon 2007). From within governmental criminology, a Foucault-inspired conception of human rights is more ambivalent, circumspect and political than how human rights tend to be understood elsewhere, including in earlier critical criminology (e.g. Barak 1990; Cohen 1993). Such a conception permits analysts to pause and contemplate the deployment of rights in any instance of governance in a way that is mostly lacking in critical criminology; it presumes neither that rights are self-evidently resistant to processes like securitization nor that rights are another blunt form of ideology camouflaging such troubling processes. Instead, this article views rights as potentially *extending* governance and securitization, even as they are claimed to emancipate and protect often vulnerable lives. In line with this, we seek to elaborate and deploy the notion of "governing through rights."

Criminologists have used "governing through" in work ranging from "governing through crime" (Simon 2007) to "governing through privacy" (Lippert and Walby 2016) and "governing through security" (Valverde 2001). Governing here, following Foucault, is understood broadly as "action upon action" (Rose 1999)—of "conducting conduct"—and in each instance of governance, something is typically accomplished beyond what is claimed to be governed. Yet, crime, privacy and security in these examples are neither mere excuses to achieve other outcomes nor sheer legitimation of their accomplishment. In other words, it is not that these programs reveal no effort to achieve, for example, violent crime reduction, enhanced personal privacy, enhanced physical security, and so on. Rather, these aims are intimately constituted, preserved and "worked through" as they are governed, and they yield other outcomes along the way.

To invoke "governing through rights" is not to suggest that rights are empty of value or lacking efficacy and that they serve only as cover for systematic state domination, exploitation and similar practices. In order to understand our position better, it is useful to contrast it with the old neo-Marxist understanding of rights. For neo-Marxists, the universality of rights (and the rule of law more broadly) suggested to the citizenry—the working class and everyone else—that the state, by respecting and protecting rights, was acting in their interests rather than that of capital only (see Brickey and Comack 1987)—and, importantly, that this was a key means of maintaining long-term legitimacy amidst obvious and enduring unequal class relations of capitalist society. The neo-Marxist perspective is deeply suspicious of human rights and liberalism, and it entails seeing rights (and the rule of law) as ideological camouflage for class inequality within a structuralist worldview of capitalism. As Rose and Valverde (1998: 543) noted more than twenty years ago, the main point is that

"the discourse of rights and justice is more than merely an ideological mask."[1] Our methodological and epistemological approach—inspired by governmentality studies and Foucault's work—sees rights as holding the potential to be rendered technical and, as such, to govern conduct in specific ways. This approach demands attention to mundane mechanisms and forms of knowledge and how they both emerge and converge, as well as to discerning the broad discourses present there as *constituting*, as much as masking, governmental practice. As Sokhi-Bulley (2016: 16) remarks, "rights become governmental" by assembling elements "to measure, disseminate and thus define what rights are and what the right way to do rights is." Thus, in this article, we do not suggest that rights are necessarily or only camouflage or legitimation for accelerating securitization in counter-terrorism efforts nationally and internationally. Rights do more than render more palatable all those distasteful measures created to satisfy the ravenous appetite for enhancing counter-terrorism and national security. While we *do* think rights tend to legitimize and extend these arrangements, we are concerned with understanding *how* rights emerge and work as governing devices under these conditions. Taken together, we suggest this emergence under these conditions befits the Foucauldian scholar Mitchell Dean's (2007) concept of "authoritarian liberalism."

The remainder of this article unfolds in four sections. First, we discuss further our conceptual approach to rights in criminology, building on and developing previous work on "governing through rights" beyond the discipline (Sokhi-Bulley 2016), as well as on Dean's (2007) notion of "authoritarian liberalism." The next two sections present two case studies of governing through rights in the counter-terrorism domain and provide the article's empirical focus. These cases were chosen as among the more egregious departures from human rights, at an international and national level, since 9/11. The first examines the role of human rights within the United Nations (UN) given that the impact of the UN Security Council resolutions on the laws of member states has been nothing short of "momentous" (Roach 2015: 3), including the introduction of controversial blacklisting of suspected terrorists. The second case study, which examines coercive non-trial-based measures in the United Kingdom (UK), has met similar controversy, particularly given the violence such measures enact on basic assumptions of the criminal justice system (Zedner 2014). Both illustrate, we argue, the emergence of human rights as a response to a given crisis or "problem of government" and their subsequent deployment as a means of governance. The fourth section discusses the implications of the case studies for governmental criminology and concludes the article. Our analysis suggests the need for closer attention to the many ways by which human rights in relation to security, via various legal and political "proofing" mechanisms, may be transformed into an apolitical *technical* issue.

Conceptual Approach: Rights as Governmental Technology

Governmental criminology typically draws on several overarching concepts, with governmentalities (rationalities), technologies and problematizations arguably being the most vital. "Rationalities" are "changing discursive fields within which the exercise of power is conceptualized" (Lippert 2006: 4; see also Foucault 2007). A defining feature of liberalism in its Foucauldian understanding as a rationality (rather than as a political philosophy or as

[1] In invoking this contrast, we are not suggesting that some legal scholars that draw on Marx have not developed more nuanced views of human rights as politically ambivalent and as more than ideological cover (see, e.g., Knox 2009; Marks 2008). We thank an astute reviewer for this point.

the moniker of a political party) is that it presumes "a conception of limited government by the rule of law that would secure the rights of individual citizens" (Dean 2010: 173). Liberal (and other) rationalities are understood to shape and constitute governing practices and effectively bring them into being in conjunction with technologies and problematizations. Rationalities, however, have received more attention in governmentality analyses than technologies (Lippert 2010).

"Technology" is often employed loosely in the governmentality literature, following Foucault's rather free use of the concept in his writings and lectures, as in "technologies of power" and "technologies of the self" (Walters 2012). As Sokhi-Bulley (2016) recognizes, there is much to the concept of "technology." Her research about the European Union (EU) Fundamental Rights Agency describes the "tactics, techniques and functionings" (2016: 17) of a general strategy of governing through rights. In a similar fashion, we focus on "tactics" and "techniques" as much as technologies in exploring security/counter-terrorism programmes.

"Tactics," on the one hand, have been interpreted by Foucault as retaining their normal meaning, namely, "to arrange things in such a way that, through a certain number of means, such and such ends may be achieved" (Burchell et al. 1991: 95), and this is the approach adopted here. "Techniques," on the other hand, are more specific and mundane practices and devices, aiding the realm of thinking. The notion of technology might, therefore, be understood as encompassing collections of tactics and minor techniques, including those we explore below. Approaching rights as a "technology of governmentality" (Sokhi-Bulley 2016)—and thus as an instrument or device of governing—is an excellent conceptual point of departure. In this article, however, we wish to refine this notion for future research. In considering tactics and techniques, we seek to add to the governmentality toolbox in criminology to understand how governing through rights works. In addition, we think it is inadequate to indicate only that rights are being "governed through" and serve as a "technology" in any instance of governance. We need to identify more precisely *how* this process is constituted and made possible by focusing on "problematizations" (see Koopman 2013; May 2014).

As Lippert and Stenson (2010: 480) write, for analysts, "[n]othing is assumed inherently problematic… rather a complex configuration of forces comprising authorities or official agents and associated discourses and practices is seen to render it so." In this context, we seek to discern what set of contingent circumstances emerged to permit commencement or acceleration of governing through rights, and how this response was shaped accordingly within counter-terrorism programmes. While Koopman argues that these problematizations in Foucault's work are free of normativity, May (2014) has countered to suggest that this separation is too strict. Indeed, our focus on counter-terrorism here, as opposed to some other domain, implies a normative link. We also insist on becoming cognizant of rationalities and knowledges in relation to governing through rights. "Technologies" and "rationalities" do not reflect a distinction between "material practices" and "discourses," as Valverde (1996: 358) explains, because technologies "do not express or implement a previously constituted arrangement of knowledge/power" and "can be used for different purposes depending on their articulation with specific rationalities." There is no necessary "one-to-one" relation between the two (Valverde 1996). Rather, they are historically contingent and form what are best termed "assemblages"[2] (Lippert and O'Connor 2003)—or loose collections

[2] Regarding security, one of us has remarked previously that the "notion of assemblage is … derived from the Foucaultian conception of the apparatus" (Lippert and O'Connor 2003: 333). Although "assemblage" is more closely associated with Deleuze and Guattari, we prefer it to Foucault's concept of "apparatus" not

of elements that emerge to work together to govern. Rationalities can begin to be inferred from an analysis of technologies and problematizations in sites.

In a recent account of the relevance of Foucault's work to criminology, Valverde (2017: 150) discusses his description of "the witness's oath" as "one of the many taken-for-granted legal techniques of truth" in legal assemblages. Following Valverde (2017), we also seek here to examine taken-for-granted features of counter-terrorism arrangements, spanning both legal and political mechanisms for the protection of rights—or what we refer to as "human rights proofing" mechanisms. Below, we take up the various forms of "proofing" as an effort to verify rights compliance. These tactics and techniques are the very "stuff" of governing through rights—the oft-overlooked little mechanisms and means that create and allow it to happen and which deserve closer scholarly attention. These seemingly ordinary details matter because they emerge— sometimes more contingently and less by design than it seems—and come to work together to constitute thinking about and acting upon rights, literally bringing rights into being. Directing our attention to these matters can also lend broader insight into liberal government that deploys human rights.

While authoritarian securitization is evident in the UK in our second case study, our first case study also suggests that it is evident in international governance of UN member states. Authoritarian modes, sometimes entailing coercive practices, confront those thought to be irredeemable and incapable of becoming liberal subjects (e.g., criminals, colonized peoples, mentally ill people (see Dean 2007: 120)) or those who are, in fact, often defined (correctly or not) by their opposition to what is conventionally thought of as liberal freedom (e.g., terrorists), including opposition to liberal approaches in international governance consistent with UN principles. Here, not only entire targeted member states (Sokhi-Bulley 2016), but also targeted individuals and groups within nations, are assumed incapable of becoming or remaining liberal nations and citizens, respectively. There is a sense in which counter-terrorism measures are directed at nations and their inhabitants simultaneously with an authoritarian aim, and that this is accomplished partially through deploying rights.

Case Study I: The UN, Counter-Terrorism and Human Rights

The first case study concerns "human rights proofing" mechanisms in the UN counter-terrorism assemblage. While counter-terrorism efforts were concentrated predominantly at the national level during the twentieth century, 9/11 marked a major shift in the capacity of international organizations, such as the UN Security Council ("UNSC" or the "Security Council"), to make and enforce the laws for the international community. In the immediate aftermath of 9/11, the Security Council used its mandatory powers under Chapter VII of the UN Charter (officially, the "Charter of the United Nations" of 1945—the foundational treaty of the UN) to enact Security Council Resolution 1373 requiring all states to ensure that terrorism and terrorism financing were treated as serious crimes, but without guidance on defining "terrorism" (Roach 2015). This represented an "unprecedented … legislative sweep" (Flynn 2007: 376), resulting in an explosion of counter-terrorism laws globally.

Footnote 2 (continued)
only because it is derivative, but also because of its wider familiarity (e.g., Wilkinson and Lippert 2012), its allowance for more elements for incorporation (Lippert and O'Connor 2003: 333) and its implied open-ended activity—to assemble—(Lippert 2019: 16). "Apparatus," on the other hand, "signals closure" (Brady and Lippert 2016: 15). As such, we contend that the internal dynamics of these assemblages in question are political and constituted by liberal rationalities and rights.

Controversial measures included travel bans and freezing individual assets without any intervening judicial process that could ensure a suspected terrorist was identified correctly. A second resolution (Security Council Resolution 2178), adopted in the face of advances by the Islamic State of Iraq and the Levant (ISIL) in Syria and Iraq in 2014, triggered another wave of legislation among member states, this time requiring the criminalization of so-called "foreign terrorist fighters" (FTFs) intending to travel to plan, provide or receive terrorist training (Roach 2015). These actions have been accompanied by the creation of a UN bureaucracy called the Counter-Terrorism Committee (CTC), which, in addition to monitoring and evaluating compliance with obligations set out in counter-terrorism resolutions, provides a list of best practices for domestic counter-terrorism legislation (Powell 2007).

The consequences for human rights have been significant with virtually all member states of the UN changing their laws since 9/11 to comply with UNSC Resolution 1373 and subsequent Security Council edicts. In this regard, Sheppele (2011) has observed striking similarities across counter-terrorism laws in Argentina, China, Europe, India and North America:

> [V]irtually all of the laws criminalize terrorism, ease restrictions on surveillance on domestic publics, increase monitoring of financial transactions, beef up the security services, make it easier to monitor and prosecute those who may be associated, however loosely, with suspicious persons and groups, and use immigration law to crack down on non-citizens. Given that this is what Resolution 1373 ordered states to do, the similarities are not coincidental.

Human Rights Watch (2018) has also noted that the need to comply with the most recent UNSC Resolution on FTFs (2178) has led to at least forty-seven nations passing "foreign terrorist fighter" laws since 2013—the largest wave of counter-terrorism measures since the immediate aftermath of 9/11.

The decidedly authoritarian direction in which the UNSC has been pushing states with respect to counter-terrorism raises questions about the relationship between human rights and these types of security regimes: what conditions made possible the transformation of securitization into a general "problem" for which human rights became the solution? (see Foucault 1998). Evidently, the human rights deficit in the initial legislation created problems for the UN. UNSC Resolution 1373, which established the CTC, made no reference to respecting human rights in the design and implementation of counter-terrorism measures (except regarding refugee status), leading to almost immediate calls to integrate a human rights dimension into its work programme (Flynn 2007). Moreover, as 9/11 receded from view, some states complained that the UNSC was acting as a global legislator and that its sanctions were infringing on fundamental human rights (Blanco 2014). The UNSC also received pushback from UN special rapporteurs and independent experts, who adopted a joint statement (E/CN.4/2004/4, annex I) in Geneva in June 2003, expressing profound concern at the multiplication of counter-terrorist laws, policies and practices being adopted by many nations which, in their view, were affecting human rights negatively. In short, the new arrangements had become problematized.

The UNSC responded by passing UNSC Resolutions 1456 (in 2003) and 1624 (in 2005), requiring member states to "ensure that any measure taken to combat terrorism comply with… international human rights, refugee and humanitarian law." Recognition of human rights violations by states related to national and international counter-terrorism initiatives also led to two notable developments. First, the UN Human Rights Commission moved to appoint an independent expert to recommend how to strengthen UN protection of human rights and fundamental freedoms while countering terrorism (Goldman 2004). The

independent expert subsequently recommended the creation of a "special procedure" with a multidimensional mandate to monitor states' counter-terrorism measures and their compatibility with international human rights law. This led to the appointment of the first UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (PPHRFFCT) in 2005.

The second development concerned the appointment, also in 2005, of a senior human rights officer to a new Counter-Terrorism Committee Executive Directorate (CTED), who was charged with supporting the work of the CTC, as well as a mandate to this body to liaise with the Office of the High Commissioner for Human Rights (OHCHR) (Flynn 2007). Currently, CTED employs two senior human rights officers and claims a more proactive approach to human rights through liaising with OHCHR and the creation of a working group on the human rights aspects of counter-terrorism in 2008 (CTED nd).

These initiatives represent the UN as "right-eous" (Sokhi-Bulley 2016)—a virtuous human rights actor in an internationally controversial domain—thereby providing it with important symbolic legitimacy (see Molnar and Warren 2020). Indeed, since 2006, "ensuring human rights and the rule of law" has formed one of the four core pillars of the UN's Global Counter-Terrorism Strategy. It is tempting to see incorporation of human rights-sensitive mechanisms as inevitable—especially given that the Security Council's decisions must accord with UN principles, one of which is to promote respect for human rights. Yet, as Flynn (2007) reminds us, initially, there was strong resistance to the notion that the CTC should consider matters of human rights in its day-to-day work program. Indeed, at the outset, the UN adopted a measured approach, suggesting that the CTC would "remain aware" of human rights concerns, but would avoid mentioning them in its dialogue with member states (Andreopoulos 2018). The fact that rights ultimately were incorporated into the counter-terrorism assemblage of the UN, however, should not blind us to their potential to become instruments of governance.

In the UN, the "making technical" of human rights has occurred through a number of tactics, among them (1) the complexity of the assemblage; and (2) the forms of knowledge privileged by the experts. First, the many resolutions passed by the UN since 2001 have created a complex set of structures to address terrorism/violent extremism, with almost forty different entities operating in silos and competing fiercely for resources and programme ownership. The International Federation for Human Rights (FIDH) (2017: 16) describes this as a "hydraheaded architecture of bodies" whose "overlapping mandates and never-ending acronyms" represent "an enigma for most, including for many member states and those who work in it." Within this structure, human rights experts are scattered across various mechanisms, also with overlapping mandates. In a scathing critique of UN counter-terrorism structures, the former UN Special Rapporteur for PPHRFFCT, Ben Emmerson (2017: 17), identified four bodies engaged in "critical human rights projects": OHCHR, Counter-Terrorism Implementation Task Force, CTED, and the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime (UNODC). He also found, however, that these entities (including the Special Rapporteur's office) lacked resources and coordination, preventing the mainstreaming of human rights within the organization or "the reorganization, improvement, development and evaluation of policy processes, so that a human rights perspective is incorporated… at all levels and at all stages, by the actors normally involved in policy-making" (McCrudden 2005: 9). This complexity, Emmerson (2017) argued, coupled with little publicly available information regarding UN counter-terrorism activities, not only dilutes the human rights effectiveness within the UN, but also adds to the technicality of the expertise, making it more impenetrable and resistant to challenge, including by member states (Sokhi-Bulley 2016).

How expert knowledge is created and marshaled to assess compliance also renders human rights technical. These tactics allow governing through rights to happen, with governmental power being exercised through measurement and relevant knowledge. As noted above, the key bodies monitoring compliance with UN special resolutions in this space are CTC and its executive directorate (CTED). As with many EU and UN agencies, quantitative methods are preferred to gauge compliance, thus allowing less open-ended and vague responses and overall clearer assessment. Most questions in the CTED's Detailed Implementation Assessment (DIA) used to measure states' implementation of resolutions are therefore devoid of narrative, requiring only a "Yes, Largely, Partially, Marginally, or No" response. Approximately fifteen percent of these questions relate to human rights, such as whether the rule of law is respected in terrorism cases and whether member states' definitions of terrorism are clear and precise. These are complex and highly contested issues that, by virtue of these DIA questions, "disguise issues of accountability and judgment as technical problems of measurement and data availability" (Rosga and Satterthwaite 2012: 2). Unlike other global indicators, this DIA-generated information is not made public and concerns about human rights are referred to only in general terms (without country and situation details) in CTC's Global Implementation Surveys. There is thus little room for external scrutiny of this quantitative knowledge; flowing with its own authority and sheltered from doubt, it closes down spaces for democratic contestation by civil society actors (Nelken 2015) and, indeed, the "suspect community" itself (Pantazis and Pemberton 2009). Limitations can also be discerned in relation to the sources on which this knowledge is based and its impact. Regarding the former, the knowledge upon which these conclusions are based is drawn solely from official sources as the CTC and CTED's guiding documents do not explicitly allow for evaluations from alternative sources and state visits (as knowledge production exercises) are conducted only upon invitation. On the latter point, CTED is bereft of tools or capacity to follow up its recommendations following a country visit to assess impact comprehensively (FIDH 2017). There is a sense in which this official expert knowledge brings human rights into being—the numbers rather than the narratives rendering rights compliance and violations measurable and calculable— as they simultaneously grease the gears of the complex UN counter-terrorism machinery. The cumulative effect is to privilege narrow forms of expert and state knowledge, *displacing* rather than addressing the key tensions that led to rights creation.

Moreover, far from merely marginalizing human rights in practice, as we suggest above, the inclusion of human rights in the counter-terrorism assemblage can produce conditions for authoritarian practices to occur and expand. Human rights, for example, form a central plank of the UN Plan of Action to Prevent Violent Extremism (A/70/674 2015), with the phrase, "human rights," mentioned almost fifty times. The plan emerged from a Preventing Violent Extremism (PVE) agenda—itself stemming from the UN Human Rights Council in 2015—and ultimately resulting in a resolution titled: "Human rights and preventing and countering violent extremism." This "softer" approach recognized that law enforcement and security measures were insufficient to address terrorism, grounding counter-terrorism efforts in rights-based approaches developed in partnership with communities. Organizations, such as FIDH (2017), however, have criticized how human rights have become securitized in this domain. For them, there is a danger of human rights being used "as a legitimizing force for states to criminalize undefined violent extremism and pursue draconian policies that securitize social programming in the name of national security" (FIDH 2017: 121). The prosecution of human rights defenders and political opponents in nations, such as China and Russia, on charges of "extremism" (as evidenced in FIDH's report) thus

illustrates how an ostensibly rights-based approach to counter-terrorism can comfortably articulate with authoritarian but nonetheless liberal rationalities.

Case Study II: The UK, Terrorist Prevention and Investigation Measures (TPIMs) and Human Rights

The tactics identified above are vital, we argue, to understanding how the UN human rights assemblage may act to simultaneously contain governmental interference and entrench securitization. Mirroring developments at the international level regarding the UN, national counter-terrorism measures adopted in the post 9/11 period have been accommodated *within*, rather than *in conflict with*, the human rights infrastructure. This domestic dialectic forms our second case study. The example considered here is legislation relating to Terrorist Prevention and Investigation Measures (TPIMs) in the UK—a form of hybrid civil–criminal order imposing onerous restrictions short of house arrest and much maligned for its role in the erection of a parallel or "shadow" system of justice outside the ordinary (trial-based) criminal justice system (Zedner 2007: 186–187).

The story of TPIMs stems directly from the problematization of its forerunner—the control order—a similar non-trial-based measure designed to respond to a government defeat on December 16, 2004, in the House of Lords decision of *A. and others v. Secretary of State for the Home Department* ([2005] 2 AC 68). In *A.*, the House of Lords held that the indefinite detention of foreign prisoners without trial under Section 23 of the Anti-terrorism, Crime and Security Act 2001 (ATCSA)[3] was incompatible with the Human Rights Act 1998 (HRA)—the act incorporating into British law the European Convention on Human Rights (ECHR). It is difficult to overstate the ground-breaking nature of this decision and the challenges it presented for the UK government at the time. The decision in *A.* remains the only national security case in which (by a majority of 8:1) the House of Lords has issued a declaration of incompatibility with ECHR law since the passage of the Human Rights Act 1998. With the relevant sections of the ATCSA due to expire (unless renewed by statutory order) in a few months, a sense of crisis pervaded debates over the new legislation, hardly aided by the resignation of Home Secretary, David Blunkett, on unrelated grounds (Horne and Walker 2014). The new Home Secretary, Charles Clark, was faced with the unenviable task of, as Dyer and colleagues (2004) put it, "devis[ing] a solution" or risking "more embarrassing court defeats in the run-up to the general election."

The solution to this new "problem" in governmentality terms came in the form of the Prevention of Terrorism Act (PTA)—the legislation authorizing control orders. The PTA achieved the difficult balancing act of allowing the government to appear "tough on terrorism" in the public eye, with a nod towards human rights to avoid any declarations of incompatibility. The PTA, which clearly mandated significant interferences with liberty, met with initial fierce opposition in the House of Lords and was criticized by the Joint Committee of Human Rights (2005-06: 38), who foresaw problems with Article 5 of the European Convention on Human Rights (ECHR). Despite this, the legislation was presented by the government as compliant with the Human Rights Act (HRA) 1998/ECHR, arguably derogating from the HRA/ECHR "by stealth" (Fenwick 2013: 892). This process

[3] ATSCA is the UK's post-9/11 legislation that is mirrored in other liberal democracies. On the UK's influence on counter-terrorism laws in other countries, see, e.g., Roach (2015).

was aided by court decisions scrutinizing the new regime in 2007—decisions that were largely progressive, but which, as Ewing (2005: 47) observes, also contained "the seeds of further restriction." Thus, when decisions of the House of Lords sought to impose limits on the orders, these judicial modifications were welcomed by the government as "giving the impression that the judges had, in human rights terms, supported the control orders scheme" (Fenwick 2010: 163).

Efforts to portray the government as "right-eous" (Sokhi-Bulley 2016) in this area were further intensified with the replacement of control orders by TPIMs—part of a much-trumpeted "correction in favour of liberty" announced by the government in 2010 (Syrett 2015). While TPIMs are deemed a form of "light" control order (Zedner 2014), omitting some of their predecessor's egregious features, the government relied on the early House of Lords' decisions on control orders to resist calls for the abolition of non-trial-based measures in parliament and thus to entrench liberty-invading practices. This is arguably what transpired in the years following this "correction," with the introduction in 2012 of Enhanced Terrorism Prevention and Investigation Measures (ETPIMs)[4] and the enactment, in 2015, of legislation reinstating a controversial feature (forced relocation) of the old control order regime[5] (Fenwick 2013, 2015, 2016). Indeed, for some commentators, the fact that the 2011 TPIM legislation, unlike its predecessor, is not required to be renewed annually represents a worrying normalization of emergency measures (Galli 2015; Roach 2011). Viewed through a governmentality lens—namely, as a methodology for understanding how government constantly reforms itself (Miller and Rose 1990)—we see a pattern of problematization–failure–and–solution, culminating in the consolidation and extension of governance *through* freedom and rights since 2010 (Rose 1999). Central to this process are decisions of the British superior courts on control orders since 2005. The courts have declared that some restrictions, such as forced relocation, are sometimes incompatible with liberty rights, thereby assuming their traditional human rights-based tempering role.[6] To reprise the arguments advanced above, however, concerning how rights are rendered *technical* and governmental (Sokhi-Bulley 2016: 16), we must underscore what they appeared to *permit* as well as *prohibit* (Ewing and Tham 2008: 669). Their permissive nature, coupled with the interpretation placed on them by the government, can thus be linked directly to "technical" judicial/executive determinations on "the right way to do rights" (Sokhi-Bulley 2016: 16). Two "techniques" are relevant here: (1) the (implied) application of a proportionality/balancing test in the control order litigation to take account of the counter-terrorism context; and (2) the presentation by the government to parliament of ECHR memos and compatibility statements under Section 19 of the HRA. It is to these that we now turn.

Proportionality/Balancing Test

The privileging of security over human rights since 9/11 has led to renewed scrutiny of legal devices, such as the "balancing metaphor" used to justify rights incursions

[4] The provisions set forth in the ETPIMs legislation could be enacted at any time as emergency legislation following a terrorist attack.

[5] The Counter-Terrorism and Security Act 2015 bolsters the legal framework underpinning TPIMs by (1) reintroducing the requirement to impose relocation; and (2) introducing further non-trial-based executive measures, namely a new "temporary exclusion order" (TEO) that draws on the TPIM model.

[6] Successful challenges also have been based on violations of Article 6 of the ECHR, so that "controlled" individuals must now be informed of allegations against them.

(McDonald 2009; Waldron 2003). Zedner (2005: 510), for example, writes how this device serves to obscure and simplify the highly complex relationship between security and liberty, with the result that "the metaphor of balance is used as often to justify and defend changes as to challenge them." Similarly, McDonald (2009) criticizes the balancing test for assuming a shared understanding of the values of liberty and security. Proposed "solutions," such as a "culture of justification" (Dynzenhaus 2007), which place the onus of justification on the relevant political body to show that fundamental rights requirements are met, appear elusive, given that, as Krasmann (2012: 381) writes, they presume "what has yet to arise, namely a common concern about governmental encroachment in the name of security and a willingness of all parties to join in that discourse."

Despite the unqualified nature of Article 5 (the right to liberty) under the HRA and ECHR, arguments to create a new balance between the right to liberty and security interests in the counter-terrorism context were repeatedly, but unsuccessfully, pressed upon the House of Lords by counsel for the state in the control order litigation. While rejected by the House of Lords, the principle established in the earlier case of *Austin v Commissioner of Police for the Metropolis* ([2009] UKHL 5)—requiring that a measure's societal benefit should be allowed to minimize the ambit of Article 5 due to a need to combat terrorism (the "re-balancing" argument)—has, according to Fenwick (2010: 197), had some "unacknowledged influence" on decision-making in the three leading cases of *Secretary of State for the Home Department v. JJ* ([2007] 3 WLR 642); *Secretary of State for the Home Department v. AF* ([2007] 3 WLR 681); and *Secretary of State for the Home Department v. AP* ([2010] 3 WLR 51). Fenwick (2010: 197) contends that the judges' narrow focus on the confinement period (rather than other restrictions) "appears to have become transmuted into an implied proportionality analysis to determine and restrict the ambit of Article 5." This implicit, rather than overt, application of the balancing test effectively recalibrates Article 5 protections by raising the point at which the right to liberty becomes engaged with national security interests, and places UK case law in tension with the more holistic approach to the issue of deprivation of liberty adopted by the European Court of Human Rights (ECtHR) (Ewing and Tham 2008). The net effect has been the de facto transformation of Article 5 into a qualified right (similar to Articles 8–11 of the ECHR), resulting in deferential decisions that only nibble around the edges of coercive measures in question (for example, by prohibiting forced relocation only where it was "unusually destructive of normal life" (*AP* [2010] 3 WLR 51)).

Understood in governmentality terms, the *legal* technique of "proportionality/balance" can thus be interpreted as subjugating other knowledges and voices on rights (Sokhi-Bulley 2016). One such voice is that of the controlee, who is forced to undergo long periods of detention and restrictive conditions (such as forced relocation/"internal exile") and is never free from severe restraint. Another is that of the Joint Committee of Human Rights (2005-06: 38) who, as noted, claimed it would be difficult to operate the legislation consistent with Article 5 of the ECHR. There is a sense in which these legal mechanisms, as key constitutive techniques, bring complex relations of rights into the realm of thought based on assumptions of "equilibrium" and "order" (Moosavian 2015), but, as in the UN example, *displace* rather than address the key tensions that led to their creation (Sokhi-Bulley 2016). Thus, as Ewing and Tham (2008) have written, the control orders regime (continued through TPIMs), despite a number of "successful" challenges, survives largely unscathed, with TPIM notices remaining, as per the October 2016 review of the legislation, "a crucial component of the Government's national security response" (Home Office 2016).

ECHR Memos and Section 19 (HRA) Compatibility Statements

A crucial next step in the process of rights being rendered "technical," and thus governmental, is through ECHR memos and Section 19 (HRA) compatibility statements. These methods were used by the UK government as key "inscription devices" (Law 2004) to convey the impression that the ground rules had been established by the judiciary through the control order litigation and that control orders, albeit within certain limits, were consistent with human rights requirements. As Kennedy (2004: 348) argues, "to say what is, is also to govern" so that the government's interpretation placed on the control order litigation, though ambiguous,[7] rapidly became the dominant discourse. This first became apparent in the renewal debates relating to the PTA (control orders) legislation, where a declaration of compatibility with the ECHR from the Home Secretary under section 19(1)(a) of the HRA (1998) was accompanied by strong claims that the judges had, through their decisions in *JJ* and *AF*, supported the scheme:

> The judgment [in *AF*] should also finally put to bed the argument of some noble Lords that control orders are in some way an affront to human rights. That is clearly not the case. The protection of human rights is a key principle in all our counterterrorism work, including the use of control orders.[8]

As observed above, however, whether the protection of human rights is, indeed, a key principle is doubtful given the very narrow reading of Article 5 of ECHR adopted by the domestic courts in tension with the ECHR case law and statements by the Joint Committee of Human Rights to the opposite effect (Ewing and Tham 2008). The courts' position was again put to parliament in relation to the TPIM and ETPIM legislation, where section 19 compatibility statements were this time accompanied with ECHR memos, asserting compatibility with ECHR rights and pressing home (in line with the court decisions) a focus on "actual confinement" (Home Office 2011: 18, 22, 2013: 5, 21). In this manner, ECHR memos, "in general supportive of dialogue, but in this instance… partially misused" came to assume a "ratification" rather than a "checking" role (Fenwick 2013: 881). Similarly, Section 19 statements of compatibility to parliament, mandated under the HRA (1998) before the second reading of a bill—and used ordinarily as a key mechanism for ensuring compliance with fundamental rights—here acted to "shield the recalibrating process [carried out by the courts] from scrutiny" (Fenwick 2010: 231).

As with the first case study, it behooves criminologists, particularly those interested in a governmental approach to human rights, to interrogate the knowledge sources upon which these respective inscription devices draw, as it is often these sources that become inscribed into dominant interpretations of law. In the control orders/TPIM saga, forms of (legal) power/knowledge can be traced to sources internal, rather than external, to the government, such as the Joint Committee on Human Rights (JCHR). As both ministers and members of the JCHR have acknowledged, despite the JCHR and other human rights

[7] This ambiguity is evident in the differing responses of major newspapers to the *JJ* and *AF* cases. Compare, for example, the article, entitled "Judges Back Control Orders," in the *Morning Star* on November 1, 2007, with the following articles on the same day: "Law lords rule that terror suspects curfews are 'virtual imprisonment'" (in *The Independent*), "Lords back terror law orders on suspects, but give them new rights" (in *The Guardian*) and "Curfews for terror suspects should not exceed 12 h, law lords rule" (in *The Times*). For a discussion of these responses, see Ewing and Tham (2008: 693).

[8] Lord West, HL Deb, 3 March 2010, col 1519.

proofing mechanisms, the government acts on the advice of its own (legal) experts (Ewing and Tham 2008). For example, following the consideration of the Draft Detention of Terrorist Suspects (Temporary Extension) Bills, former Home Office Minister Paul Goggins cautioned Members of Parliament about the value of pre-legislative scrutiny, noting that though the JCHR had reached a unanimous view, "apart from one concession, I do not think that it found a listening ear among Ministers" (Hansard, HC Vol. 532, col. 138 (September 5, 2011) (cited in Horne and Walker 2014: 286)). Here, the ambiguity that can be said to define the judicial response to the control orders scheme was interpreted by government legal advisors as licensing the control order model with devices such as memos serving to shield it from scrutiny (Fenwick 2010).

Discussion: Implications for Governmental Criminology and Governing through Rights

The two cases reveal the tactics, techniques and knowledge that makes governing through rights possible, as well as how the corresponding assemblages responded to previous problematizations in each instance. Like Sokhi-Bulley (2016: 15), we must ask more about that process, particularly the "mundane, tedious, and unremarkable" aspects of rights governance. A finer set of tools is required to understand how governing through rights operates, whether through "tactics," as the way in which human rights "proofing" mechanisms are arranged, and/or "techniques," as the micropractices and devices which translate thought into the "domain of reality" (Miller and Rose 2008: 33). Closer scrutiny of both processes necessarily involves careful examination of the forms of expert knowledge privileged in human rights proofing regimes and the subjugation (of other knowledges/voices) that may flow from that. Where we seek to support and advance this work, however, is (1) through a greater focus on how problems and potential solutions are defined and institutionalized, and (2) through greater attention to the *legal* as well as *political* rights proofing mechanisms.

Thus, in both cases above, we witness patterns of problematization and solution, culminating in the consolidation and extension of governance *through* freedom and rights, whether through the rapidly expanding PVE agenda or the normalization of exceptional measures. At various points since 9/11, the absence of sufficient human rights protections at both national (UK) and international level (UN) went from being, in Foucault's (1998) words, a "given" to a "question." While currently under strain in certain liberal democracies (Gearty 2017; Mehozay 2018), human rights remain the global embodiment of a contemporary "ethics of progress" and therefore an important framing with which governmental criminology needs to engage. Given the tethering of any new solution to the previous problematization, it remains vital to examine carefully the conditions that made these rights solutions (legal or parliamentary proofing mechanisms) possible. "Doing history" regarding human rights and criminology, as Whitty and Murphy (2013) argue, harnesses the ability of historical knowledge to inform current and future criminological choices, better preparing us for the challenges of the present.

This effort includes shifting attention to more prosaic features of legal rights governance. As noted above, Sokhi-Bulley's (2016) critique of human rights governance at a global and European level represents a significant and important contribution to the literature. Several of her key arguments regarding the EU Fundamental Rights Agency (FRA), for example, are reflected in our discussion about the UN rights assemblage. Yet, such institutions form only part of the complicated patchwork of human rights proofing

mechanisms currently stitched into countries' policy and legislative development, including oversight by the courts. Declarations of compatibility and ECHR memoranda could not be more mundane and seemingly unimportant compared to the high-minded principles enshrined in grand declarations of human rights and their enactment. But memoranda are only one key inscription device by which an abstract notion of rights becomes represented in a specific way. The legal concepts of "proportionality" and "balance," while looming much larger on the legal imaginary, are nevertheless similarly humdrum parts of administering and dispensing justice. While balance has been deemed a juridical "metaphor" (Moosavian 2015), we see it as more than symbolic, instead serving as a practical, even material, means that bring complex relations of rights into the realm of thought. As our analysis above has shown, the notion that a balance is possible—that there is a two-dimensional fulcrum working within the governance of rights—is ingrained so deeply in legal culture as to ostensibly qualify unqualified rights under the ECHR. It is notable how the UK Government argued before the ECtHR in *A v. UK* (Application no. 3455/05, 19 February 2009) that the principle of fair *balance* underlies the whole ECHR and that therefore the exception to the right to liberty should be broadened in the counter-terrorism context by *balancing* society's interest in combating terrorism against the individual's interest in a reasonably prompt release from detention pending deportation. As in many other legal contexts, balance is here put forward "as if it were self-evidently a worthy and respectable goal" (Ashworth 1998: 30), without full articulation of the values and principles at stake. In line with many other mundane and taken-for-granted legal "techniques of truth" identified by Valverde (2017), it would therefore benefit from more historical and sociological investigation.

In seeking to draw a line preventing arbitrary state intrusion and coercion in civil society and in citizens' lives, including international civil society and citizenship, human rights are strongly associated with liberal modes of government. Yet, in some current domains, such as our cases above, rights are comfortably articulating with non-liberal rationalities that some have taken as authoritarian (see Dean 2007). There is a sense in which our exploration of governing through rights is a key piece of a broader puzzle about how illiberal and liberal modes of governance coexist in practice (see Dean 2002, 2007; Lippert 2006; Valverde 1996). This is true whether examining subnational, national or international domains and practices (see Dean 2007). The notion that authoritarian modes articulate with a rights-based approach characteristic of liberal rationality is consistent with Dean's (2002, 2007) concept of "authoritarian liberalism." We elaborate this briefly by quoting Dean (2007: 111), who argued that

> authoritarian measures follow…from the liberal understanding of liberal government itself…. Liberal reliance on authoritarian techniques [such as arrest, imprisonment, torture, banishment, surveillance] is a consequence of the understanding of government as a limited sphere that must operate through the forms of regulation that exist…within what has conventionally been called 'civil society'

Furthermore, while

> liberalism is facilitative of realms of freedom in civil society, there is a counter-side of the liberal conception of government… its authoritarian dimension… [Liberalism]… turn[s] the injunction to govern through freedom into a set of binding obligations… enforceable through coercive or sovereign instruments. [Dean 2007: 110]

We think "governing through rights" is one instance of this broader "counter-side" and "turn" that is inherent in liberal modes of government according to Dean but which is not

obvious. Its empirical exploration helps to show how "authoritarian liberalism" becomes possible and is a link that should be underscored. Authoritarian liberalism is a response to a problematization regarding security that has assembled rationalities (liberalism) and technologies (rights) available at this moment.

Exploring such seemingly mundane mechanisms also begins to show not only how governing through rights becomes possible, but more broadly how authoritarian liberalism becomes so. They are among the conditions of possibility of its formation, and previous work, including that of Sokhi-Bulley (2016) and Dean (2007), whom we draw upon appreciatively, has not explicitly situated governing through rights as being intimately tethered to the qualities of liberal government. We think connecting them this way begins to lend more insight into both.

Conclusion

In these two cases of "governing through rights," rights have served simultaneously to contain and entrench securitization and, indeed, extend it. Yet, while invoking rights can sometimes be ineffectual, we are not suggesting this is inevitable in all instances, nor are we suggesting rights are necessarily or merely camouflage or legitimation. In the UN human rights assemblage, rights represent a powerful language for claims-makers, such as the UN Special Rapporteur for PPHRFFCT, while also lying comfortably alongside coercive state practices. Similarly, in the UK, while the courts largely accommodated the control order/TPIMs scheme, the TPIM regime nonetheless became, in various respects, less repressive as a result of the litigation. Given the ambivalence inherent in the very concept of "human rights" (Posner 2014)—a *universal* claim that could acquire the quality of enforceable rights only within a particular *political* community—it is perhaps unsurprising that rights have shown themselves susceptible to redeployment and co-optation to post-9/11 securitization. Our intention here has been therefore to act as a "critical friend" and, as one of us has written elsewhere, to render rights more "amenable to progressive intervention and reform…while avoiding ill-conceived totalizing endeavours doomed to fail" (Lippert 2016: 88).

To begin this process of reform and revival of rights will require two fundamental shifts in our view. First, if rights are not to be rendered "technical" in both the political and judicial fora devoted to their enforcement—or worse, still, if rights are to be "governed through"— we must return to the *political* content of human rights—the goal of justice for the individual against the power of the state. A less disingenuous rights discourse would see a shift away from ritualized *compliance* towards *substance*—from *formalism* to the *actual protection* of individual citizens' human rights (Hamilton 2018).

Second, our analysis suggests the need for meaningful acknowledgement of the role that liberalism has played in the oppression of vulnerable groups. Recognizing liberalism's role is all the more necessary in an age of "security populism" and a revival of human rights discourse cannot occur without, as Lazarus and Goold (2019: 21) argue, "lay[ing] bare flaws in the individualistic liberal vision of rights and the disconnect between abstract claims of universality and lived experiences on the ground."

In line with this, then, the next step for governmental criminology is to explore more closely *how* tactics and techniques at once help create and satiate the appetite for security in a climate where we see the paradoxical rise of human rights in tandem with securitizing and criminalizing discourses (Hamilton 2018, 2019). This should include empirical work

that builds on existing literature and that examines the rise of human rights "solutions" to problematizations, as well as probes further how rights are "rendered technical" and, more broadly, how they align and comprise "authoritarian liberalism" or indeed other emergent rationalities. As suggested by the analysis above, critical criminologists also need to explore the relatively untilled field of law's knowledge production in relation to technologies, problematizations and rationalities. We leave this task to another day.

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