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The Cruel Optimism of International Prison Regulation: Prison Ontologies and Carceral Harms

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This article examines the development of international human rights standards and oversight mechanisms directed at addressing the negative effects of imprisonment. We identify this as the rules-based prison-regulation project, widely endorsed by international organizations and legal scholars. However, with a focus on the United Nations Standard Minimum Rules for the Treatment of Prisoners, we argue that this project has inherent limitations, as it is based on (a) a reductive understanding of carceral harms and (b) a

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- BANWELL-MOORE, R. et al., 2022. "'The Human Toll': Highlighting the Unacknowledged Harms of Prison Suicide Which Radiate across Stakeholder Groups. *Incarceration: An International Journal of Imprisonment, Detention and Coercive Confinement*.
- TOMCZAK, P. 2021. "Reconceptualizing Multisectoral Prison Regulation: Voluntary Organisations and Bereaved Families as Regulators." *Theoretical Criminology*.
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rule-centric ontology of prisons. By challenging these foundations, we explore whether the project exemplifies "cruel optimism" (Berlant, 2011), where the pursuit of improved prison regulation could inadvertently hinder societal flourishing. We argue that the continuous search for new and better prison standards may perpetuate rather than alleviate the problems associated with imprisonment unless accompanied by explicit strategies for countering prison growth and dramatically reducing prisoner numbers, for building the democratic power of prisoners and communities targeted by imprisonment, and continual linkages between prison conditions and the wider political-economic institution of imprisonment. We conclude that engaging with prisons as sites of relational power in practice *must underlie any quest to reduce the harms of imprisonment.*

INTRODUCTION

The assumption that coherent international human rights standards and associated oversight mechanisms can make carceral institutions less harmful pervades scholarship and practice: according to Coyle (2003, 9), human rights should suffuse "all aspects of good prison management." Although prison regulation could refer to diverse activities concerned with "steering the flow of events and behaviour" (Braithwaite, Coglianese, and Levi-Faur 2007, 3), regulation typically centers on state-centric, legal or quasi-legal mechanisms (see van Zyl Smit 2010). The principal United Nations (UN) prison regulation instruments are the UN Standard Minimum Rules for the Treatment of Prisoners (SMRs; known as the Mandela Rules), the Convention Against Torture, and the Optional Protocol to the Convention Against Torture. These instruments place an expectation on states to reform prisons, focusing on prison conditions, management. and monitoring as apparent means of attaining greater human rights protection, safety, and transparency. These UN instruments have informed further regional instruments such as the European Prison Rules, produced by the European Council; the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, adopted by the Organization of American States; and an array of guidelines and declarations by the African Commission on Human and People's Rights.[1]

The most recent 2015 revision of the SMRs received largely positive analyses. Hailing (2019, 83) wrote that the Mandela Rules "inevitably have a huge impact on the establishment of human rights standards for prisoners in various countries and the actual improvement of the human rights situations of prisoners." This 2015 revision process achieved an international consensus that was held to overcome "the presumed opposition between prisoner and facility safety" (Peirce 2018, 268). The revised Rules expand the requirements for states to inspect and monitor prisons, a feature that Rogan (2021) argues should be replicated across European human rights instruments.

This international rules-based prison-regulation project is driven by well-resourced international nongovernmental and UN organizations including Penal Reform International; the UN Office of Drugs and Crime; and the UN Human Rights Council and UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or

1. Such as the Kampala Declaration on Prison Conditions in Africa and Plan of Action (1996), Robin Island Guidelines (2002), the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reform in Africa (2002).

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Degrading Treatment or Punishment and is broadly supported by sociolegal, law, and criminology academics. Rogan (2017, 3), for example, characterizes prisons as "eminently rule-bound institutions," in which rules laid down by (inter)national legal regimes structure the daily lives of both prisoners and staff. Infusing human rights considerations into these rules is advocated as a means of improving prison management and oversight, with incremental improvements to prison rules ostensibly critical to progress. Rogan (2021, 287) continues, "much more action is necessary to ensure that Europe has an optimal set of standards to direct the work of prison inspection and monitoring bodies."

A common implication of rules-based prison-regulation project is the establishment of inspection and monitoring bodies that process complaints and produce myriad reports on prisons. For Padfield (2018, 57), "the closed world of the prison needs both complex accountability mechanisms and clearer rules if high standards are to be effectively enforced." Yet, standard setting and establishing oversight structures form only the point of departure in the rules-based prison-regulation project. This point of departure needs to be followed by examining the actual regulation of prison conditions—for example, through research assessing which regulatory standards best preserve human rights in practice, a challenge that

> manifests itself differently in different parts of the world. In countries with developed national legal and bureaucratic structures, the question is how best to ensure that the existing structures conform to the wider norms. In less developed countries, national regulatory mechanisms need to be established and their compliance with international standards ensured at the same time. (van Zyl Smit 2010, 555)

Despite some recognition that human rights can be "hijacked' by risk discourse that supports punitive infrastructures (Whitty 2011) rather than considering whether the rules-based prison-regulation project is fit for purpose in efforts to reduce carceral harms, scholars identifying limitations usually focus on incremental refinements—for example, examining how to effect a more optimal form of human rights management in prisons (Karamalidou 2017) or training legal and correctional officers in international human rights law and the SMRs to improve prison conditions (Prais 2020). Too frequently, recognition that prisons across the world consistently fail to meet international legal and policy standards serves only to reaffirm belief in the rules-based prison-regulation project: strengthening human rights law and prison standards to better influence global practices of imprisonment (Tiroch 2016).

Thus, we insert caution into the largely optimistic discussion about the potential for international human rights standards to ameliorate the harms of imprisonment. This is a conceptual article that focuses on theory building through theory adaptation, revising extant knowledge by introducing alternative frames of reference to propose a novel perspective (Jaakkola 2020). Here, we problematize van Zyl Smit's 2010 call for empirical research about which regulatory standards best preserve human rights in practice instead highlighting fundamental limitations of the rules-based prison-regulation project both "on the books" and "in the cells." We analyzed a range of academic and gray literature on imprisonment with a focus on conceptualizations of

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carceral harms, prison ontology, transcarceration, and coloniality. Placing data from these diverse sources in dialogue adds breadth, depth, complexity, and richness to our analysis (Denzin and Lincoln, 2018).

A conventional approach to evaluating the SMRs could entail a sociolegal gap study, highlighting the (in)effectiveness of legal instruments by comparing the law in the books and its perceived objectives with the law in action (Feeley 2001), as suggested by van Zyl Smit (2010). Although Gould and Barclay (2012) distinguish between early gap studies, which assumed a gap was a failure of the law, and advanced gap studies, which try to understand the conditions in which laws have the consequences they intended, gap studies approach risk, accepting the existing goals and framings of the rules-based prison-regulation project, thus deflecting attention from our more fundamental questions. Our approach *begins* with perceived gaps between the minimum standards and prison realities and in the ways that the rules imagine carceral harms and regulatory processes. However, and significantly, our gaps are starting points for fundamentally reconceptualizing relationships between international prison regulation and the growing global prisoner population rather than merely conceiving them as implementation gaps. A focus only on identifying and closing gaps between (quasi-) legal standards and practice would obscure the ways that the regulatory mechanisms themselves shape both how prison space becomes known and understood as well as limit the range of responses to the harms of imprisonment that are being pursued. For example, as we will discuss, through prison regulation, the performance of prisons is not judged on their long-term social outcomes but rather on their adherence to rules and standards that have an assumed but unevidenced relationship to delivering better societies.

We argue that international standards—in particular the United Nations Standard Minimum Rules for the Treatment of Prisoners—are problematically based on(a) a reductive understanding of carceral harms and (b) a rule-centric ontology of the prison. Regarding carceral harms, we argue that artificial distinctions between the inherent and excessive harms of imprisonment in the rules-based prison-regulation project frame the prison as *fixable*, despite evidence that all prison systems create excessive harms, and that the inherent nature of imprisonment contributes to its much-publicized problems. This reductive conceptualization of carceral harms draws attention to the operation of *individual* institutions and the conditions they create for *individual* prisoners, deflecting attention from what are frequently systemic issues. In contrast, we draw on interdisciplinary literature supporting a transcarceral approach to understanding carceral harms, which addresses the geographic and temporal reach of imprisonment: people pass through chains of carceral institutions rather than sitting inside single institutions, prisons harm families and communities of prisoners, and prisons have social and economic structural consequences that disproportionately affect particular social groups. Failing to attend to these inherent and transcarceral harms of imprisonment has facilitated numerous instances in which SMR adoption or implementation has coincided with expansions in prison populations, as we will go on to demonstrate.

Second, the rules-based prison-regulation project is based on a rule-centric ontology—in which state-determined rules and policies determine prison life. Therefore, this project fails to engage with contested ontologies of the prison (Bornstein 2010). In other words, what a prison is—what ought to happen, who should

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have control, what is just, what subjects populate prisons—is contested within the prison itself. In turn, we argue that prisons are constituted relationally by *power in practice*, meaning that structural and interpersonal power relations drive both the imperative to imprison and the constitution of imprisonment. Power relations often operate along diverse and context-specific vectors of colonial, capitalist control, along with hierarchical orderings of gender, religion and race. State-determined rules and policies do not exist in a vacuum; rather, power relations between groups of prisoners, communities targeted by criminal justice systems, prison-centered charity and mutual aid groups (Carlton 2016), and wider cultural norms are significant in producing imprisonment. We argue that engaging with prisons as rule-determined institutions is reductionist and risks reaffirming the state's vision and power. Although prisons everywhere are constituted by power in practice, Western prisons are often assumed to successfully produce the docile bodies of Foucault's writing (1977; cf. Crewe, Liebling, and Hulley 2015). Where the bureaucratic state is less powerful—for example, in Latin America (Biondi and Collins 2016; Darke 2018; Whitfield 2018), Africa (Martin and Jefferson 2019), Israel (Bornstein 2010), and India (Arnold 1994), prisons are more readily seen by scholars as being processually constituted by power relations between different groups—primarily prisoners and prison staff. By failing to attend to these relations, increasing prison bureaucracy consistently empowers the state over those who are imprisoned (Armstrong 2018; Jefferson 2022). Our understanding of power in practice aligns with processual notions of emergence, which presume that everything in the social world is continually being made, remade, and unmade (Abbott 2016; Renault 2016) rather than being determined through replicable applications of legal schema in different contexts.

Throughout this analysis, we argue that (a) reductive understandings of carceral harms and (b) a rule-centric ontology of the prison risks the current prison-regulation project exemplifying "cruel optimism." Cruel optimism, as Lauren Berlant (2011, 1) articulates, occurs "when something you desire is actually an obstacle to your flourishing." We demonstrate how the quest for more and better rules-based prison regulation risks forming an obstacle to rather than a route toward a flourishing society. Arguments for better regulation and accounts of prisons' failures to meet standards provide important starting points. However, an endless search for new and better prison standards risks expanding and embedding flawed institutions rather than reducing harms. This is especially the case in the absence of explicit strategies for countering prison growth and dramatically reducing prisoner numbers, for building the democratic power of prisoners and communities targeted by imprisonment, and for making continual linkages being made between prison conditions and the wider political-economic institution of imprisonment. Moreover, rules-based prison regulation risks deflecting attention from these central issues. We do not question the commitment, passion, and expertise of the international community. However, in bringing Berlant's work to bear on international rules-based prison regulation, we highlight that the need to do *something* about conditions in prisons sustains many compromised efforts for reform. The attachment to a particular mode of law, regulation, and reform is productive of fraught subjects and institutions: we as, for example, academics, nongovernmental organizations, and UN departments are constituted by a "cluster of promises" (Berlant 2011, 16) of a better future that are phantasmic to the extent that

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they betray the promise of a better society. Increasingly, our attachment to prison reform requires that we adopt "a position that seeks repair of what may be constitutively broken" (Berlant 2011, 227). Thus, the concept of cruel optimism requires us to question the most common sense of reform strategies and to connect them with an examination of the ontology and role of social institutions "outside the realms of ideal theory" (Meer 2022, 2).

The concept of cruel optimism has been developed within critiques of multiple social movement projects, from the postwar social democratic state in Berlant's own work, to the project of racial justice (Meer 2022), to movements that centre on sexual consent as sufficient to preventing sexual violence (Kessel 2020). There is an ambivalence within this literature about whether identifying cruel optimism is something to admire and retain because progress and harm reduction can only be made through attempting the impossible (Meer 2022; Ray 2023). However, we suggest that the difficulties that we identify in this paper require changing approach, and toward the conclusion of this paper, we identify ways to reconceive prison regulation such that we can move beyond cruel optimism.

THE DEVELOPMENT AND CONSEQUENCES OF INTERNATIONAL PRISON REGULATION

The SMRs originated in the European enlightenment ideals of scientific criminology, legal standardization and civilization. They were initially drafted in 1929 by the International Penal and Penitentiary Commission, which began life as the International Penitentiary Congress, a collection of European and colonial state delegates, prison reform societies, lawyers and philanthropists in Middle Temple, London, in 1872 (Wines 1873). After a brief life in the League of Nations, the Rules were resurrected by the UN Economic and Social Council in 1957 and were last updated and termed the Mandela Rules in 2015. In 2013, in anticipation of a review of the 1957 SMRs, UN Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment Juan E. Mendez identified solitary confinement as comprising torture when used for punishment and called for the Rules to be updated in response (Méndez 2013). This pressure led to the 2015 revision, which left the structure broadly the same but targeted particular areas for update and modernized the language used. The updated areas were respect for prisoners' inherent dignity, medical and health services, disciplinary measures and sanctions, investigations of deaths and torture in custody, protection of vulnerable groups, access to legal representation, complaints and independent inspection, and training of staff (Office for Democratic Institutions and Human Rights and Penal Reform International 2018).

In this section, we demonstrate that, despite this long history and role in internationally significant institutions, the influence of the SMRs on prison regimes around the world is difficult to determine. We argue that their most identifiable outcome is the stimulation of further regional and national rules and monitoring practices that comprise the slow, incremental improvement in minimum standards that are internationally expected of prison systems.

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The SMRs are a soft law instrument that do not legally bind states. As there is no direct court-imposed sanction on states that do not adhere to their precepts, the Rules' influence relies on being an "expressive statement that may shape legislation, policy, and legal decisions" (Peirce 2018, 272). Although the general ideas and rationalities contained in the rules have become part of prison management discourses and textbooks, it is surprisingly difficult to point to examples of successful implementation in particular jurisdictions. For example, van Zyl Smit's (2019) argument for the existence of a "transnational legal ordering" that encompasses prison conditions identifies its influence by pointing to relatively obscure and sporadically occurring features of criminal justice—such as the transfer of prisoners between territories—as evidence.

The SMRs are sometimes directly adopted by national governments and legal systems. In some countries, particularly those which previously had no domestic legal provisions in this area, the SMRs have been granted a legal status that is enforceable by courts. For example, in 2005, the Argentinian supreme court incorporated the SMRs into the national constitution. In others, governments and prison management have adopted the SMRs to reshape how prisons are run. Nordic prison reforms have included "detailed descriptions of both the UN- and European prison rules" (Lappi-Seppälä and Koskenniemi 2018, 136). The Dominican Republic has undertaken extensive prison reforms with the objective of implementing international standards (Peirce 2021). In Thailand, the SMRs were implemented and tested in one prison in 2016: the Thonburi Remand Centre (Thailand Criminology and Corrections 2016). We will return to these examples in the discussion below.

Where the SMRs are not incorporated into an enforceable legal framework or implemented in practice, they sometimes have a mediated legal influence through courts that interpret human rights instruments in line with internationally agreed standards. The tightening of restrictions on solitary confinement in the 2015 Rules has been influential in Canadian Supreme Court cases to determine that the regime of solitary confinement was contrary to the Canadian Charter for Rights and Freedoms.[2] Peirce (2018) argues this was because the Mandela Rules are seen to carry the internationally agreed expertise of penologists and prison managers.

More often, regional and national adoption of the minimum standards is through a further set of rules and standards in the translation from general principles of human rights to more finely grained rules for particular regimes (Armstrong 2018). In Europe, the SMRs influenced the writing of the European Standard Minimum Rules in 1973, which attempted to incorporate the SMRs into the European framework. However, the European Court of Human Rights decided that failing to meet these standards did not necessarily constitute a breach of the prohibition of degrading treatment.[3] The European Standard Minimum Rules were replaced by the European Prison Rules in 1987, which were updated in 2006 and 2020 and are used by the Council of Europe to promote prison reform across Europe, in particular in post-soviet states (Cliquennois and Champetier 2016; Walmsley 1995).

2. Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen, (2017) ONSC 7491, 43 CR (7th) 153; British Columbia Civil Liberties Association v. Canada (Attorney General), (2018) BCSC 62, 43 CR (7th) 1.

3. See Eggs v. Switzerland, application no. 7341/76, October 19, 1979; X v. Germany, application no. 235/56, June 10, 1958.

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Since the 1970s, the European Court of Human Rights has been gradually but significantly increasing its supervision of imprisonment and the last 20 years have seen more evidence that the European Prison Rules are influencing the Court's decisions. Initially, complaints based on prison conditions failed because the court accepted that imprisonment inherently led to the loss of other rights and freedoms (van Zyl Smit and Snacken 2011).[4] However, in *Golder v UK* (1975), the Court found that rights infringements against prisoners had to be accompanied by a condition of proportionality and legality. The European Court of Human Rights has traditionally been stronger in protecting procedural rights of prisoners that are explicitly protected under the European Convention on Human Rights than in intervening in prison administration and finding violations of Article 3 (the prohibition of torture, inhuman and degrading treatment) based on poor prison conditions (van Zyl Smit and Snacken 2011). However, *Peers v. Greece*[5] determined that Article 3 could be applied to prison conditions even where the harmful conditions were not deliberately inflicted. In *Ivan Karpenko v. Ukraine*,[6] the court took note of the fact that the SMRs had not been followed in finding a violation of Article 3 and Article 8 regarding being deprived of social contact with other prisoners.

Similar moves have been made at the continental level in Africa and Latin America. In 1996, the African Commission appointed a Special Rapporteur on Prisons and Conditions of Detention, who has referenced the SMRs in reporting on African prisons and adjudicating prisoners' rights cases before the Commission. The Rapporteur has also published further guidelines on the conditions of imprisonment: Resolution on the Adoption of the Ouagadougou Declaration and Plan of Action on Accelerating Penal and Prison Reform in Africa 2002 and the Robben Island Guidelines 2002. The Organization of American states adopted the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas in 2008 and this set of soft-law prison regulations has, notably, been far more willingly incorporated into the Inter-American Court of Human Rights' case law than has been the case in Europe (Seatzu and Fanni 2015; Gronowska 2017).

The SMRs also provide a significant basis for UN and civil society reports that may grant legal bases for reform efforts. The United Nations Human Rights Committee has referred to them when interpreting the International Covenant on Civil and Political Rights—for example, that placing someone in a cell with no light constitutes degrading treatment contrary to Article 7 (van Zyl Smit 2010).[7] International and national monitoring organisations also draw on the SMRs to frame criticisms of prison systems. It remains true that "the practical effect of the Rules depends to a great extent upon the way they eventually permeate national and local law making, administrative regulations or correctional practice" (United Nations Secretariat 1970, 32).

4. In areas of prison conditions "Strasbourg has done little more than legitimate the existing practice of most States" (Livingstone 2000).

5. ECHR 279 (2001); Peers v. Greece, application no. 28524/95, April 19, 2001.

6. ECHR 392 Karpenko v. Ukraine, application no. 45397/13, December 16, 2021.

7. For example, see Suleimenov vs. Kazakhstan (CCPR/C/119/D/2146/2012); Barkovsky vs. Belarus (CCPR/C/123/D/2247/2013) on the Human Rights Committee's use of the SMRs in finding breaches of article 10 and article 7 of the International Covenant on Civil and Political Rights.

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The relatively successful processes of encouraging regional and national legal regimes to recognize and replicate the SMRs has occurred in a time when the problems of prisons have escalated globally. Significantly, global prisoner numbers are increasing: in 2003, there were over nine million people in prison, 19 years later we have over 11 million people in prisons, which are said to be in ever more crisis (Penal Reform International 2022). In the following sections, we provide an analysis of this prison-regulation project that attempts to explain why advancing rules-based prison regulation is consistent with such increasing prisoner numbers and crisis.

CONCEPTUALIZING CARCERAL HARMS

The Reductive Conceptualization of Carceral Harms

The Mandela Rules have a narrow and reductionist conception of the harms of imprisonment such that they prevent an adequate understanding of prison and its effects. In this section, we outline how the Rules problematically construct two categories of carceral harm. The harms in the first category result from excessively punitive prison conditions—such as lack of health care, absence of windows, torturous disciplinary regimes—that are said to be both illegitimate and reformable (nonessential to institution of imprisonment). In prisons that conform to the minimum standards, these avoidable harms would not occur. The second category of harms, implicitly referred to in the SMRs, includes those harms that are inherent to imprisonment. Research has found that imprisonment in all its forms imposes significant harms that are not contingent on prison conditions. For example, imprisonment is a stressor that can induce psychological disturbance among those with no prior disorder (Liebling 2007, 433). Drake (2018) draws comparisons between prison ethnographies in Zambia (Egelund 2016) and Norway (Shammas 2014) to show that, despite vast differences in prison conditions, similar existential fears and personal deprivations were foundational to the prisoner experience—psychological consequences of the loss of autonomy, relationships, heterosexual sex, for example.

The Rules attempt to address the first form of excessive harms, making them visible and rendering them unnecessary, illegitimate and addressable aspects of imprisonment. The SMRs explicitly seek to reduce harm that exceeds that which is "incidental to the justifiable separation or the maintenance of discipline" (Rule 3). They acknowledge the inherent suffering of prison, but the rules focus attention on the adverse prison conditions and the practices of prison management that govern the conditions of prisoners, foregrounding harms that occur locally—in time and space—to individual prisoners and the setting they are in. The archetypal form of harm is torture and inhuman and degrading treatment, as outlined in Rule 1. Attention is also given to less severe but important aspects of prison life such as the cleanliness of living spaces (Rule 17), the size of windows (Rule 14), access to health care (Rule 24), and sanitary equipment (Rule 15, 16, 18). It also incorporates aspects of prison bureaucracy, in so far as these might reduce harm, by separating prisoners into categories (for example, by gender, age, conviction) and limiting contact between them (Rule 11); keeping detailed records of prisoners (Rules 6–10); placing restrictions on the processes and

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forms of punishment, discipline, and restraint that are available to prison guards (Rules 36–49); ensuring there are complaints mechanisms (Rules 56–57); and ensuring there are prison inspections (Rules 83–85). The harms of failing to implement these measures are made visible by the Rules and, in being named, are presented as unnecessary aspects of imprisonment.

Of course, the differences between the conditions faced by prisoners are important: places with less disease and fewer deaths are of benefit. However, the inherent harms of imprisonment are concealed and implicitly accepted within this paradigm. This distinction problematically minimizes and invisibilizes significant harms that scholarship has identified as inherent to imprisonment and presents harms that are endemic to imprisonment globally as exceptional and reformable. This problematic conception of carceral harm allows rules-based regulation to function as a form cruel optimism by sustaining a fantasy that all prison systems could emulate an idealized vision of "acceptable" northern European prisons (Drake, 2018).

Although the SMRs refer briefly to the "suffering inherent" to imprisonment (Rule 3), this is underresearched and underacknowledged in human rights and regulatory scholarship, which focuses on, for example, evaluating discrete prison programs or monitoring programs (Carver and Handley 2020; Rogan 2021), paying close and perhaps disproportionate attention to small variations in carceral practice but relatively little to the inherent effects of imprisonment itself.

Moreover, widely recognized problems—including elevated mortality rates, disease, mental ill-health, drug dependency, and sexual violence that are endemic to prisoner populations globally (Wolff et al. 2006; OHCHR 2019)—persist in all prisons systems, yet they are consistently represented as fixable by addressing aspects of prison management (Aon, Larson, and Brasholt 2018). Imprisonment is consistently directed at those from the most disenfranchised groups in any country: those who are poorest (Wacquant 2009), least educated, those with mental health conditions and learning difficulties (Blagg, Tulich, and Bush 2017), and those from populations that do not comply with social norms and who threaten political and economic elites. Prisons create and compound dispossession and social exclusion by enforcing harmful gender norms (Pemberton 2013) and targeting oppressed racialized and indigenous groups (Razack 2015; Stanley and Mihaere 2019; George et al. 2020). Prisoners have consistently been significantly more likely to die at a younger age than people in the community due to long-standing factors including elevated rates of self-inflicted death among prisoners relative to the community (Zhong et al. 2021), prison violence, the prevalence of communicable diseases, and inadequate health care (Liu et al. 2021). Indeed, Nordic countries that are often considered to have exceptional prisons were found to have the highest prisoner suicide rate in a study of 24 high-income countries (Fazel et al. 2017; see also Morthorst et al. 2021).

In addition, the SMRs function to render harms that are present in all prison systems as exceptional. The fact that there are significant gaps between the expectations of the SMRs and the realities of prison conditions is, of course, accepted by proponents of international penal regulation: it serves to justify the rules-based prison-regulation project and provides impetus for the development of monitoring institutions and procedures. However, the fact that no prison system systematically meets international standards is too rarely acknowledged. In the rules-based prison-regulation project, the

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problem is generally seen to occur in developing states that have low resources. However, even in Europe, where prison conditions are considered to be informed by human rights concerns (van Zyl Smit 2006), the Rules are systematically broken. Prisons in the UK, for example, routinely hold people in bleak cell conditions in which people shared unsuitable rooms with uncovered toilets, some of which were described as "cramped, squalid and unsuitable for habitation" and some "infested with vermin" (HMIP 2017, 3, 13). Slopping out—formally abolished in 1996 and contrary to Rule 15 of the SMRs—was still evident in UK prisons in 2019 (Bulman 2019; Casciani 2010).

Furthermore, solitary confinement was a flagship change to the 2015 SMRs revision. Rule 44 now recognizes that "solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days." The Rules now prohibit indefinite and prolonged use of solitary confinement generally and its use on prisoners who have mental and physical disabilities that would be exacerbated by such conditions. Solitary confinement should now only be used in exceptional cases and for as short a time as possible and be subject to review. However, solitary confinement remains part of the ordinary running of prisons: in 2017, HMIP in England and Wales found that "in local prisons 31% of prisoners report being locked in their cells for at least 22 hours a day" (HMIP 2017, 3). Solitary confinement became the de facto condition of almost all prisoners in the UK during the COVID-19 pandemic. Her Majesty's Inspectorate of prisons stated in July 2020 that "for the last 12 weeks, most prisoners had spent at least 23 hours locked up each day" (Robins, 2020). In prisons and other detention settings, solitary confinement has been systematically imposed to deal with mental health crises and resistance. As UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Nils Melzer noted in 2021, Closed Supervision Centres (CSC) that have been a part of UK prisons since 1998 are akin to solitary confinement. He noted that prisons are granted £100,000 annually for every inmate in CSCs and that decision making on who should be held in these centres may not be exclusively based on individual assessment (OHCHR, 2021). One prisoner, Kevin Thakrar, has been held in a CSC for over 11 years (Siddique, 2021). There is widespread use of segregation and cell confinement in UK immigration-detention settings to deal with mental health issues, to manage those at risk of self-harm, and as a tool to aid removal (Medical Justice 2015; Medical Justice and Bail for Immigration Detainees 2021).[8] In summary, the human rights focus on solitary confinement as an issue of human rights concern effaces the reality of imprisonment by rendering the systematic isolation of prisoners as a "bug" of imprisonment rather than a "feature" of it.

Even the well-regarded Nordic prison systems place people under stress that causes profound harm. Empirical studies have shown that Nordic prisons produce suffering through the deprivation of autonomy similar to that of prisons in harsher systems (Reiter, Sexton, and Sumner 2018). Nordic exceptionalism—the idea of a really-existing prison system that is small, well-resourced, causes little harm, and is characterized by openness—overlooks both the experiences of people imprisoned in

8. These reports point to the limits of the definition of solitary confinement which seem to rule that cell confinement with another prisoner does not count as a harmful form of practice.

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supposedly humane prisons, which are marked by suffering (Drake 2018), and the ways in which Nordic prisons continue to use harsh practices—for example, the widespread use of pretrial solitary confinement in prisons in Sweden, Denmark, and Norway (Smith 2011). Ultimately, the notion of Nordic exceptionalism feeds the fantasy that it would be possible to transform all prison systems, from the more technologically advanced but overly punitive systems in the US and UK, to places where prisons are poorly resourced and more overcrowded and where there is a high level of poverty and unemployment in the general population (Sarkin 2008), to prison systems that, to use Penal Reform International's mission statement, "uphold human rights for all and do no harm" (Penal Reform International 2023).

To summarize, the SMRs construct an artificial distinction between carceral harms that are exceptional and those that are inherent and enduring. This section has argued that this delineation is problematic because prison standards are breached systematically and the inherent and enduring harms of imprisonment are rendered invisible. The labeling and treatment of Rules as minimum standards when these are in practice only aspirational serves to diminish abilities to properly appreciate and respond to the harms of imprisonment, contributing to what Jefferson (2022, 8) calls "structural blindness." Thus, the presentation of carceral harm in the SMRs allows regulation to function as a form of cruel optimism by obscuring the inherent harms of imprisonment and problematically presenting the excessive harms as fixable.

Reconceiving Carceral Harms: A Transcarceral Approach

The conception of carceral harm in the SMRs has a further deficiency: by misrepresenting prisons as bounded, isolated institutions they preclude analysis of the prison as part of a transcarceral chain of institutions that marginalize, surveille, supervise, and imprison. Here, we argue that it is necessary to shift toward an understanding of the prison as an institution with substantial (yet rarely acknowledged) geographical and temporal reach to reckon with carceral harms that occur at a distance from the prison space and time as well as those that are collectively rather than individually felt. These radiating harms are systematically produced consequences of imprisonment but are too commonly conceptually distanced from the direct treatment of an individual prisoner contained in a single institution at a single point. The SMR's focus on the contemporaneous effects of carceral institutions on an individual prisoner is challenged by ethnographic and sociolegal approaches that "take[s] issue with the most commonly attributed feature of 'the' prison [in the human rights literature]: its presumed closed, walled-off, separateness from society" (Martin and Jefferson 2019, 137).

In their focus on producing rules for implementation by prison management, the SMRs conceive the treatment of prisoners largely in terms of a static prisoner that remains in one institution long term. However, the prison is "structurally connected to other penal institutions" (Ellis 2021, 180). Flows into prisons are influenced by experience of both the school system (Mallett 2016) and the care system (Day, Bateman, and Pitts 2020). Once under the supervision of the criminal justice system, people are transferred through distinct carceral institutions—for example, to and from

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police custody—and frequently secure mental health facilities (Leonard, Sanders, and Shaw 2021) and immigration detention (BiD 2013). Each new environment requires the detainee to familiarize themselves with a different set of expectations, challenges, rules, personnel, and oversight bodies. As sets of Rules and oversight bodies are attached to discrete institutions, systemic issues that travel between distinct institutions are often missed.

The Rules' focus on the contemporary experience of prison itself overlooks the longitudinal harms to which prison contributes. The harms of imprisonment can be felt after a prison sentence. Evidence of the criminogenic character of imprisonment (Cid 2009; Gaes and Camp 2009) means that prisons are likely to exacerbate harm. This is to say little of the prison's effects on employment (Holzer 2009), housing (Greenberg and Rosenheck 2008; Madoc-Jones et al. 2018), and health, along with elevated mortality rates among prisoners after release—especially among women prisoners (Carlton and Segrave 2011). These long-term effects of imprisonment compound histories of dispossession and exclusion faced by the communities targeted by imprisonment. This longitudinal view of carceral harm is expressed by Carlton and Segrave (2011, 556):

> The accounts offered by women and caseworkers consistently challenged the notion of incarceration as an isolated traumatic event. Rather, we found that state intervention and institutionalization often featured throughout these women's lives. In this regard, the focus on the "pains' of imprisonment and the impacts of incarceration is replaced by a broader conceptualization of traumatic experiences and an examination of the interaction between these experiences of structural disadvantage and institutional harms inflicted across a lifetime.

As innovations in carceral geography and criminology have illuminated, more work is needed to understand how the prison space is inscribed into individuals and groups, who carries the burden of incarceration with them in ways that index further harm (Moran 2014; Chamberlen 2016; Keenan 2019). The geography of prison harm is not limited to the life paths of the prisoner; rather, the range of people who are harmed by imprisonment exceeds the prisoner. Families, dependents, friends, and communities of the imprisoned are harmed by imprisonment. Kincaid, Roberts, and Kane (2019) found that 312,000 children are affected by parental imprisonment in the UK each year, with 54% of prisoners having children under 18. Partners of prisoners deal with loss of income, increased expenditure, social isolation, and extra burdens of childcare (Murray 2005). Because particular communities within each jurisdiction are overpoliced, imprisonment results in significant community-based social disruption (Clear, Rose, and Ryder 2001). These combine to create an intergenerational effect of prison on future adults' mental health and interaction with the prison system—65% of prisoners' sons are later subject to criminalization (Kincaid, Roberts, and Kane 2019). Prison staff are themselves harmed by working in the stressful prison environments, in particular because of the proximity to the inevitable and distressing events of prisoner suicides (Banwell-Moore et al., 2022).

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Finally, moments of harm and grief are often starting points for addressing root causes (Brown 2021). The prison perpetuates cycles of violence through dispossession, inequality, and stress on mental and physical health by channeling responses to harm into a punitive rather than reparatory and transformative mode (GenerationFIVE 2017). We should count these *opportunity harms*—the failure to take paths that will prevent similar harms happening in future—as part of the harms of growing imprisonment.

As a document that is used to direct prison reform discourse across sectors and to legitimize prison policy by nation states, the Rules' narrow institutional focus fails to account for significant carceral harms. The SMRs are agreed by states that want to maintain sovereignty over their criminal justice systems (Peirce 2018), illuminating why the SMRs exclude these features of the prison. Yet, the effect is to create, in Owers's (2007, 17) words, a "virtual prison" not just in the heads of prison administrators (as in Owers's work) but in the prison monitoring community and wider project of rules-based prison regulation (See also Carlen 2008).

Thus, prison regulation must contend with the transcarceral nature of punitive states rather than limiting the understanding of prison to contemporaneous analysis of the dyadic relation between the individual prisoner and the prison state (Palacios 2016). This requires recognizing and responding to harms that result from the flows of people—staff, prisoners, visitors—in and out of the prison; through chains of carceral institutions—for example, the care–prison pathway; the longitudinal harms of imprisonment for individuals, families, and communities; and the adverse social, environmental, and economic consequences of prisons. Adopting such a perspective reveals the limited and narrow imaginary of carceral harm that underlies international rules-based prison regulation while valuably extending attention throughout an individual's journey through criminal justice institutions and to the effects of imprisonment on a wider group of people than the imprisoned.

Rates of Imprisonment: The Elephant in the Room

By failing to reckon with the broad array of harms of imprisonment, rules-based prison regulation risks enabling the expansion of carceral harms. It is striking that the Mandela Rules fail to mention, let alone express, targets regarding prisoner numbers or rates. Although there are frequent gestures toward reducing the numbers of remand prisoners and using alternative sentences in UN reports and in the Tokyo Rules for noncustodial sentences, there is a problematic and long-running assumption that improvements in prison conditions and the development of alternatives to imprisonment will inevitably reduce prison populations.

In 1970, the UN Secretariat acknowledged that "the movement to keep as many offenders as possible out of the institutions had already gathered momentum when the Rules were established. The Rules acknowledge this *in tone if not in terminology*" (United Nations Secretariat 1970, 4, emphasis added). Notwithstanding whether this assumption was fair in 1970, over the subsequent 50 years continued belief that human rights, prison standards, and the development of alternatives to imprisonment will result in overall reductions in imprisonment has been demonstrably complacent.

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Yet, the assumption that human rights and penal regulation have inherently decarceral effects is still frequently defended (van Zyl Smit and Snacken 2011). Consequently, efforts to reform imprisonment subsume decarceral strategies: for example, in 2020 Penal Reform International had a total expenditure of £4 million, with £1.8 million going toward prison reform and just £17,000 allocated to reducing the use of imprisonment (Penal Reform International 2021).

It is notable that efforts to incorporate the SMRs into national law and practice consistently coincide with expansions of the inherently harmful prison system. Implementation of the SMRs into Argentinian law, for example, coincided with an increase in the rate of imprisonment (rates given per 100,000 population) from 174 in 2015 to 230 in 2018, representing around 28,000 more prisoners.[9] In Thailand, experimenting with a "full implementation' of the SMRs in one prison occurred alongside an increase in the imprisonment rate from 437 in 2016 to 516 in 2020, an increase of 58,000 prisoners.[10] Uganda's imprisonment rate expanded from 87 in 2002 to 133 in 2014, which entailed almost tripling its prison estate to hold 40,000 additional prisoners, with the Ugandan Prison Service attracting substantial external funding through seeking to "be a center of excellence in providing human rights–based correctional service in Africa" (Martin 2014, 71).[11] After the Dominican Republic implemented prison reforms in 2003, the prison population increased significantly from 14,000 to 26,000 (Peirce 2021). The coincidences of SMR implementation and expansions in prison populations must be a central consideration for all nongovernmental organizations (NGOs), academics, and practitioners concerned with ameliorating the harms of imprisonment. In the remainder of this section, we explore the central analytical distortions that produce the idea that addressing prison conditions will have a decarceral effect, paying particular attention to overcrowding and alternatives to detention.

Despite decades of SMRs and moves toward a transnational legal ordering of imprisonment, overcrowding still affects the majority of prison systems, "with more than 50 UN Member States operating prison services at more than 150 per cent of their official capacity" (United Nations 2021, 5). Calls to reduce overcrowding are not a straightforward good and must be problematized. Increasing imprisonment results in overcrowding, which exposes more people to the inherent harms of imprisonment, but commentators very frequently focus on overcrowding primarily as a barrier to the achievement of adequate prison conditions (Council of Europe 2022). The discourse around overcrowding produces ostensibly convincing demands that can unfortunately easily be routed toward reforms facilitating prison expansion and potentially increased privatization (Carlton 2016). For example, the UN's rhetoric in the 2021 Common Position on Incarceration sounds positive. It espouses the need for "effective and sustainable reform efforts [that] require a holistic reform approach aimed at addressing the root causes of overincarceration and overcrowding, and shifting policies towards prevention and alternatives to imprisonment" (United Nations 2021, 15). However, the specifics of which root causes of overincarceration are to be addressed and a clear

9. https://www.prisonstudies.org/country/argentina.
10. https://www.prisonstudies.org/country/thailand.
11. https://www.prisonstudies.org/country/uganda.

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idea of what exactly the community is trying to prevent are lacking. For example, decriminalization programs would be one effective way to address the root causes of overincarceration (Robinson 2020), but the UN's statement could just as easily be read as supporting an increase in criminalization and preventative detention under the guise of crime prevention. This vague discourse creates unfocused efforts to address overcrowding, which gesture at reduction while risking the expansion of carceral systems and the proliferation of all their enduring harms.

Similarly, the development of alternatives to incarceration is well recognized to be insufficient to reduce imprisonment rates. In fact, there is an association in some countries (such as France, Portugal, Greece, and Spain) between the introduction of alternatives and increases in prison populations (Tabar, Miravalle, and Torrente 2016). The promotion of alternatives also masks net-widening effects of many alternatives to incarceration (Cohen 1985). The promotion of alternatives tends to be oriented toward punishment (curfews, tagging, unpaid work) that are promoted within an increasingly privatized criminal justice market (Worrall 2019) rather than being founded on principles of minimal intervention and transformative-justice approaches to preventing and resolving harm (GenerationFIVE 2017; Ben-Moshe 2022).

Large prison populations subject more people, families, and communities to harmful, expensive, and largely dysfunctional institutions; this problem cannot be reduced to the inhumane and dangerous conditions that overcrowding gives rise to. Since the 1970s, the number of people imprisoned globally has increased, reaching 11.5 million in 2022 (Prison Reform International 2022). The idea that UN documents and reports can effectively communicate disapproval of increasing numbers of people being imprisoned through the tone of their writing and allusions to root causes is misguided. Part of the problem is that the project of prison regulation separates the external governance of the prison (who is incarcerated) from the internal governance (the requirements for prison management). In the next section, we argue that this separation of is premised on an inadequate ontology of the prison itself. Shifting to a view of imprisonment as part of a chain of transcarceral institutions that is shaped by power in practice rather than shaped only by institutionally specific rules is the focus of the next sections.

CONTESTED PRISON ONTOLOGIES

Prisons Are (Un)Ruly Institutions

The rules-based prison-regulation project has stimulated the proliferation of rules used in prison management and mechanisms to monitor prisons. However, this focus on establishing and improving the rules by which prisons run frequently fails to bolster the power of prisoners to challenge conditions (See Hughett 2019). On the contrary, the evidence we discuss in this section shows that international penal regulation processes frequently exclude prisoners from decision making, strengthen prison bureaucracy, and increase the responsibilities of prisoners (Armstrong 2018). This section argues that regulation efforts based on conceptualizations of the prison as a rule-defined institution are likely to consolidate state power over communities that are targeted by

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imprisonment, highlighting that this implication can no longer be overlooked by the rule-making communities.

Advocates of a more unified system of incrementally improving legal standards for prisons conceptualize prisons as rule-bound institutions (Rogan 2017). Consequently, improving the framework of rules through which prisons operate and prisons' adherence to that framework appears the best, or perhaps the only, way to improve prison conditions. This apparently rule-bound nature allows prisons to be seen as core elements of democracy. Creating a rule-compliant prison helps to fulfil the prison's role in state building through producing institutions that are seen to hold rule of law and liberal democratic values (Drake 2018). Indeed, in 2010, the UN Department of Peacekeeping Operations wrote that "prisons are an essential link in the rule of law chain" (cited in Drake 2018, 6). The reality that punitive institutions are run essentially through the discretionary powers of prison staff is anathema to the pervasive republican-democratic notion that legitimate state power cannot be arbitrary in the sense that it does not follow "effective, common-knowledge" procedural rules (Lovett 2012).

However, as Lazar (2019) argues, the fact that carceral institutions can apparently adhere to a consistent set of rules does not preclude the prisoner's experience of domination. The growing number of rules that prisons are expected to comply with does not necessarily result in more power for those in prison to challenge conditions they perceive as unjust (Hughett 2019) nor in fewer people being exposed to dominating conditions. Even if we accept that prisons do adhere to rules imposed on them, making a dominating institution more predictable does not make it less dominating.

Prisons and their current forms of rule-based regulation are profoundly undemocratic. Throughout the history of the SMRs, the existing practice and knowledge of correctional managers and officers have been influential. In 1978, Rubin Kraiem, writing in support of implementation of the SMRs, said that to incorporate human rights standards in prisons "requires that we assume the positions both of the philosopher and of the correctional officer" (1978, 159). The clear and consistent omission is prisoners themselves. Kraiem's sentiment of moderation was echoed in Penal Reform International's attempts to moderate the demands of other civil society actors in the Mandela Rules revision and in the influential contributions of corrections officers in that process (Peirce 2018). The SMRs have been created through engagement with the criminological expertise of informants, prison governors, NGOs, and governments. Prisoners' views were excluded from the Mandela Rules redesign (Peirce 2018), as were the voices of organizations who were more critical of imprisonment. This mirrors the exclusion of prisoners' views from the recommendations of other international oversight bodies such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (O'Connell and Rogan 2022).

Moreover, extensive scholarship has identified how extending human rights regimes into prisons can bolster bureaucracy and the power of the prison system over those it confines and can lead to increased funding that enlarges prisons. For example, Armstrong (2018) details how human rights approaches to prison rules can produce myriad capillary rules and a vast bureaucracy surrounding the prison, along with renewed legitimacy. Examples of this tendency can be gleaned from around the world. In Argentina and Chile, "rehabilitation programmes ended up combined with managerial standards and priorities that facilitated privatization of prisons and

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eventually got displaced for security priorities" (Hathazy 2016, 165). In Uganda, the implementation of human rights in prisons became a form of governance that "invigorates bureaucratic power and enables institutional reproduction" (Martin 2017, 247). Hannah-Moffat (2004), in reference to Canadian prisons, argues that the legalisation of rights and the managerial conception of rights as risk mean that rights are increasingly hard to claim. In Scotland, Armstrong (2018) notes how the success of a legal challenge to a slopping-out regime in 2005 and subsequent (unrealized) fear of large compensation pay-outs led to the Scottish Prison Service being granted in excess of half a billion pounds in prison infrastructure investment, which would likely enable an increase in the prison population.

Furthermore, tendencies within rules-based prison regulation encourage surveillance and security processes being conducted on prisoners. In the commentary on Rule 54 of the European Prison Rules, the Council of Europe writes that "individual prisoners, particularly those subject to medium or maximum security restrictions, will also have to be personally searched on a regular basis to make sure that they are not carrying items which can be used in escape attempts, or to injure other people or themselves, or which are not allowed, such as illegal drugs." This guide for managing prisons accepts and even promotes potentially invasive body searches "on a regular basis" based upon broad collective categorizations. The imprecise wording of SMRs also works to justify breaches in, for example, the name of security. For example, Rule 1 of the Mandela Principles asserts,

> All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.

As Armstrong (2018) notes, while purporting to be a blanket rule against degrading treatment, this rule reincorporates the language of safety and security as a justification for prison conditions that may interfere with a prelegal sense of human dignity. The result is a system in which degrading treatment—strip searching, isolation, etc.—can come to be understood as part of a rights-respecting practice or even one operating within a rubric of care (See Kemp 2019).

More widely, human rights discourse risks reshaping fundamental penal logics as part of human rights practice. The history of poorly remunerated work and training programs in prisons—which in many places were the prison's economic objective—is reconceived as something for the benefit of prisoners themselves (Browne 2007; Mantouvalou 2021). Human rights can even serve as justification for imprisonment itself by presenting crime as a human rights violation for which imprisonment is the cure (Karamalidou 2017). Nondiscrimination and equality laws in the Scottish prison system were applied equally to staff and prisoners—with no regard to the power differentials between them—meaning that prisoners complaining about their treatment might be held to have "breached rights to respect and dignity of staff if they complain

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about their confinement conditions while uttering a race- or gender-based epithet" (Armstrong 2018, 20).

Human rights law may even allow the imposition of degrading treatment for prison management reasons. The weak protection of degrading treatment in prisons is not limited to soft-law human rights mechanisms. Where rules are found in legally enforceable human rights standards—for example, as part of the prohibition on torture—this can be considered a *de jure* defence against degrading treatment, obfuscating conditions which, in any other setting, would be seen to be "degrading treatment." These mechanisms purporting to protect against degrading treatment in fact require evidence of improper intent to find breaches of Article 3. In A v UK (2009), the court found that "in order for a punishment or treatment associated with it to be 'inhuman' or 'degrading', the suffering or humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment." In deciding whether prison conditions contravene Article 3, the court will look at the justificatory reasoning for the condition—in turn undermining Article 3's status as an absolute right (See, for example, *Ocalan v. Turkey* in relation to solitary confinement, Yankov in relation to forced head shaving).[12]

To summarize, it is problematic that increasing the rule-boundedness of prisons is seen as the primary tool of progress, not least because the effects of increasing human rights and rule-based regulation are far from clear. The making of rules is based on penological expertise that elevates state, academic, and prison management discourses above more critical voices and those of prisoners. And, once in place, rules are difficult for those in prison to use to their advantage. The idea that the prisons, places that operate through the discretionary power of staff, can be subject to rule-based regulation that ameliorates the significant harms they produce is central to our claim of cruel optimism. This ontological understanding of the prison as definable by rules is also a part of the affective draw—comforting, hopeful—to the project. The next section offers a starting point for alternative prison ontologies which could better inform strategies to combat prison harms.

The Power-in-Practice Ontology of Prisons

The international prison-regulation project is based on a rule-centric ontology of prison. This ontological approach positions rules as the primary determinant of prison conditions and generates an imaginary of a benign, nondominating institution that upholds and conforms to rules (Carlen 2008). Thus, this approach conceals the ways that prisons are relational and constituted by power in practice: determined not only by statist legal regimes but also by social, cultural, and economic dynamics. Prison

12. Ocalan v Turkey, application no. 46221/99, May 12, 2005; Yankov v Bulgaria, application no. 39084/97, December 11, 2003. Similarly, Mavronicola (2015, 135–366) writes, "Attributing the adjective 'inhuman' or 'degrading' to punishment or treatment associated with it is dependent on a complex assessment to which the crime committed by the individual or the particular risk of harm he or she poses at a given time to self or others may be relevant. This is in line with human dignity, which requires a minimum level of respect for our mutual humanity, including as regards our exercise of agency. Punishment which 'matches' the offence committed by the individual can be viewed as respectful of the individual's dignity in reflecting an appropriate response to conceptions of individual responsibility, and the limits of individual autonomy embodied in the criminal law and criminal justice system more broadly."

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ethnographers Martin and Jefferson (2019, 138) sum this up: prison life is poorly represented in "the formal functions of the prison as established by law, implemented by organizational reform and assessed by universal standards." In opposition, they argue that prisons are fundamentally relational: "defined by the contingent intersubjective relations among the people who populate these institutions, and not simply by the formal functions that prison actors fulfil or fail at" (2019, 137). In practice, imprisonment is shaped by context-specific imperatives of elite, colonial and capitalist control along with hierarchical orderings of gender, religion, and race (Stanley and Smith 2015). This section argues that these dynamics drive the imperative to imprison, the constitution of imprisonment and, currently, its rules-based regulation.

The rules-based prison-regulation project exists within a historical imaginary in which the modern prison system and efforts to reform it are both positioned as context-neutral legal instruments that replicate European advancements in criminal justice in other parts of the world. For Coyle (2005, 3), the modern prison system "has its roots in the north-east of the United States and in Western Europe and has subsequently spread around the world, often in the wake of colonial expansion." Prison reform has also always been a project with an international vision.[13] Indeed, the original motivation for the SMRs was the desire to spread the "enlightened' British prison system around the world. For example, the 1929 Minimum Standards were driven by "British initiative and the propagandist activities of interested persons in Great Britain, following the revelation of distressing barbarities in the penal systems of a great many foreign countries" (Candler 1930, 109). This echoes broader neocolonial development narratives which seek to correct the deficiencies of institutions in the Global South that were initially imposed on colonized countries with expertise from international NGOs. The SMRs are part of the colonial-development nexus, in which international institutions financed and largely influenced by wealthy colonial states exert influence over states in the Global South (Hearn 2007). As Whitfield (2018, 4) writes regarding the Latin American context, "examination of the uneven social distribution of punishment in post-colonial Latin America reveals the ways in which it reproduces colonial hierarchies, not least because the ability to punish effectively is also a sign of modernity and progress." Indeed, Europe is singled out as particularly successful at institutionalizing regulation: van Zyl Smit (2010, 509) writes that in Africa and the Americas "there are treaties and enforcement mechanisms that are similar to those in Europe, but they are apparently not as effective as their European counterparts."

This view of prison reform obscures the ways that transplanting an institution into different contexts changes its purpose and character. Colonial prisons were built as modes of colonial domination and control, having different functions to prisons in the metropole in relation to discipline and class formation (Arnold 1994; Branch 2005). For example, prisons were systematically used in India from 1790 by the East India Company (Anderson, 2007). Their place in upholding British power is evidenced by the 1857 Indian uprisings against British rule, during which mutineers conducted 41 jail

13. Early prison reformers Jonas Hanway, John Howard travelled across Europe in the late 1790s. Allexis de Tocqueville was sent by the French to US to gather information on prison management in 1830s. Elizabeth Fry produced reports on Danish prisons to the Danish royal family that changed how Danish prisons were run. Latter day reforming British prison commissioner, Alexander Paterson, traveled widely including notable trips to colonial Burma to inspect prisons (Brown 2007).

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breaks, releasing over 23,000 prisoners (Anderson 2007). In contrast, British and European prisons emerged along with an expansion of all forms of punishment during a period in which the disciplining of a recently urbanized factory labor force was the main economic goal (Melossi and Pavarini 2018; Moore 2019). Therefore, the prison has fulfilled diverse purposes that furthered the ends of the powerful. Prisons were used in colonial and metropolitan contexts to further context-specific ends rather than emerging, fully conceived, during the European Enlightenment and being reproduced under colonial rule (See Moore 2014, 2015).

Local differences in the drive to establish prisons coincide with differences in the power composition of established prisons. For example, Arnold (1994) found that contest and protest were significantly more visible in India's colonial prisons than in Foucault's (1977) understanding of French prisons filled with docile, disciplined prisoner bodies. Regarding Israeli prisons holding Palestinians, Bornstein (2010, 462) highlights "struggles over what kind of agency is possible, who has power to act, and who must submit as obedient object." Following rule-centric conceptualizations of imprisonment and its regulation obfuscates how prisons are shaped also by the actions, views, and resources of prisoners and communities around the prisons. Even in England and Wales, where prisons are typically understood in bureaucratic terms, emerging scholarship illustrates the influence of prisoner actions in determining regulatory changes through campaign, protest, and riot (Kemp 2022). Our contention is that these relational, power-in-practice features of prison ontology are critical to understanding the divergent ways that human rights are put into effect in prisons and orienting toward alternative routes toward challenging prison harms.

The connections between the social function of prisons and their relational constitution are seen across contemporary systems. The overrepresentation of marginalized groups—shaped through relations of indigeneity, religion, class, race, sexuality, and disability—is a common feature of all prison regimes (Ben-Moshe and Magaña 2014). Moreover, the technology of detention is adapted to new political imperatives over time. In the UK in the 2000s, the increase in the use of immigration detention, followed by the establishment of specific prisons for foreign national offenders, coincided with increased suspicion of Muslim communities and in the politicization of migration. Between 2002 and 2015, UK imprisonment rose 20%, whereas the Muslim prisoner population rose more than doubled from 5,502 to 12,225 (Shaw, 2015). Again, the changing purpose of imprisonment shifted the constitution of these carceral institutions, generating different sorts of subjectivity, resistance, and changes in the likelihood of neglect, abuse, and poor conditions (Bosworth 2011, 2012).

In summary, the differences in purpose and make-up of prisons and the roles of power in practice in shaping the institutional lives of prisons are effaced by regulatory frameworks that prioritize rule application and managerial practice. Consequently, a primary effect of rules-based international prison regulation is to connect and subsume globally diverse carceral institutions under the same apparently benign, justificatory logic. As Piacentini and Katz (2017, 222) write, "it is through the diffusion of human rights law into international human rights obligations, trickling down to domestic laws, national prison service policies outlining fair and transparent decision-making, where legal links and obligations between penal systems are made." The current naivety to power in practice means that regulation fails to displace social inequalities that prisons

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often entrench (see Razack 2012) and, thus, is always incorporable into and risks enabling a new generation of punitive institutions by offering—for example, directions on how to build legitimized "human rights compliant" prisons.[14]

BEYOND CRUEL OPTIMISM?

This article has critiqued the content and form of international prison regulation. Regarding content, we have illustrated how the SMRs misrepresent the nature of carceral harms, addressing imprisonment primarily as a rule-based institution, problematically obscuring the contested constitution and emergence of prisons. We have drawn on scholarship to argue that prisons are constituted primarily by relational sociopolitical power in practice and that prisons produce a range of harms beyond the immediate effect on individuals from unacceptable prison conditions. As a result, rules-based prison regulation is inherently assimilable into existing criminal justice systems. In so far as it is claimed to stem the tide of harm that prison systems create, rules-based prison regulation is an example of what Berlant calls cruel optimism—being a project that shores up rather than destabilizing the powerful imaginary of the prison as a rule bound entity. Consequently, scholars and the international community must move away from the problematic yet pervasive idea that "new knowledge, better rules and more professionalism" are all that is needed to respond to the failures of prisons (Jefferson 2022, 2).

Pessimistic readings of the benefits of rules-based prison regulation are not new. Proponents of rules usually reply that these readings play into the hands of punitive policy makers because if it is thought that nothing can be done to improve prisons, then they need not try to make conditions better (Sparks and Bottoms 1995). Furthermore, advocates of the current regulatory approach also suggest that although everyone knows that prisoner numbers are important, in the absence of success in limiting numbers and a collapse in the global system of imprisonment, something needs to be done about prison conditions. As noted in the introduction, there is a reading of cruel optimism that instills a nobility to the "compulsion to repeat" the optimistic act, which risks again and again having to survive disappointment in in pursuit of success (Meer 2022, 4). In this section, we contest this pessimistic reading by suggesting useful positions that international prison reform and monitoring communities could adopt. We contend that the harms of prisons globally can be tackled in ways that do not further enable mass incarceration, without purporting to provide a step-by-step guide toward fixing the prison system.

Our argument highlights the need to engage with the political-economic nature of imprisonment rather than pursuing strategies that are blind to prisons' roles in social structures of control and dispossession. Doing this means learning from and bolstering the power of communities targeted by imprisonment to challenge imprisonment, prevent harms, and resolve conflicts outside the criminal justice system. It means going beyond the bureaucratic state as the object and subject of strategy. It opens possibilities for realizing the ways that prisoners, communities, activists, and NGOs can influence the power in practice within the prison by witnessing, amplifying, and creating

14. https://www.penalreform.org/blog/how-to-build-a-prison-compliant-with-human/.

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communities of opposition within and across the prison walls (Kemp, 2019, 2022; Tomczak, 2021). Consistently, it is local mutual aid groups that sound the alarm over failings because they are responsive to the needs of prisoners (Spade 2020). Funding, amplifying, and supporting—for example, prisoner unions and prisoner-led mutual aid groups—can be one way to do this, but care must be taken not to co-opt or direct them. However, this is undermined by the rules-based prison regulation-project, as the Mandela Rules and other instruments create their own materiality and authority by creating domains of knowledge about which one has to display expertise to participate in policy discourse.

In so far as pushes for change focus on state reforms, international prison regulation must be founded on reductionist strategies. International prison rules should explicitly and consistently acknowledge and exemplify the inherent harms of imprisonment and have the reduction in imprisonment rates as their explicit goal. Without doing so, all rules will play into a well-worn reformist trap that provides justification for prison building and harmful, excessive means of control and punishment. The concept of nonreformist reforms is vital here. Kaba et al. (2017) define nonreformist reforms as "measures that reduce the power of an oppressive system while illuminating the system's inability to solve the crises it creates" (see also Mathiesen 2014). In arguing that nonreformist reforms could form a basis for international prison oversight bodies, Lamble (2022, 1) writes, "[a] key question to consider is not only whether a proposed reform will reduce harm and suffering, but whether it simultaneously works to reduce the size, scope, and power of the system?" Examples of nonreformist reforms include advocating a moratorium on prison building; responding to overcrowding through releasing certain categories of prisoners; and repealing laws that target oppressed groups such as those that criminalize drugs, sex work, immigration, protest, and property offences. Refocusing on nonreformist reforms will require making tough decisions not to work in collaboration with reform programs that involve building new prisons. And in places where existing prisons are not fit for human habitation, it means insisting on developing strategies that respond to harms and conflicts using nonpunitive methods (GenerationFIVE 2017).

Implementing these changes requires a shift in how we conceptualize penal regulation. Despite holding radical potential, regulation efforts tend to locate forms of monitoring which seek to stabilize systems and make them persist. Thus, international prison regulation often proposes monitoring systems that coexist with the systems they regulate, rather than working to fundamentally change them. Resisting tendencies to simply (re)design regulatory systems, we should think of how regulatory interventions could destabilize problematic systems—exposing their failures while reducing their scope. Simultaneously, these regulatory interventions must adopt a system-centric as opposed to institution-centric model of analysis and evaluation. Carving up criminal justice institutions has the effect of narrowing responsibility, curtailing accountability, and allowing people to fall through gaps (Borakove et al. 2015). This requires focusing on systemic failures in outcomes—for example, in safety, equality, and survival—as well as failures to attain standards for individual institutions.

This discussion should not be taken to criticize uses of prisoners' human rights to discursively challenge the legitimacy of incarceration (Simon 2019). Using the rhetorical power of rights and their associated depoliticized, neutral, and fact-finding

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face to persuade the public and prison officials to change may be a necessary starting point for such interventions. However, to counter uses of human rights that are complicit in upholding existing systems that advance dispossession, advocates need to rethink human rights, beyond their ossification in institutionalized, state-centric forms (Goodale 2022). Ultimately, allowing human rights to justify the building of additional prisons that will widen the use of incarceration is self-defeating.

CONCLUSION

The article has critiqued the international rule-based prison-regulation project, which proposes that adherence to incrementally improving networks of rules is the optimal means of limiting the harmful effects of prisons. This project has had some positive effects on conditions faced by prisoners and itemizes some of the ways prisons routinely fail to meet standards. However, we have argued that the Mandela Rules and international prison regulation efforts based on them currently adopt a reductive conception of carceral harms and a flawed ontology of the prison. We have argued for a transcarceral approach to prison harms, illustrating that prisons have geographic and temporal reach; are linked to other carceral institutions; produce collective harms on families and communities of prisoners; and have adverse structural, social, and economic consequences for particular social groups. Furthermore, we have illustrated an ontology that conceptualizes the prison as constituted by power in practice. Understanding the prison as a political technology that is shaped by the local socioeconomic functions it serves is critical to understanding and developing means to challenge prison expansion. Without this, the project of rules-based international prison regulation constitutes cruel optimism.

What, then, are the consequences of understanding prison reform as a cruel optimism? Taking Berlant's cue, the international penal reform community needs to build objects that can facilitate rather than undermining flourishing, democratic, nonpunitive societies. Along the way, we need to unlearn the ways of seeing and responding to the world that play into regulatory efforts coinciding with global prison expansion. In particular, our analysis suggests that unlearning the moves that isolate prison conditions as a humanitarian issue from the recognition that imprisonment is a political and economic technology is a central starting point. We have suggested redirecting resources to bolster groups challenging imprisonment and ensuring efforts are founded on the concept of nonreformist reforms to facilitate a reductionist trajectory.

In international reform discourse, Mandela's remark that "no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones" is ubiquitous (For example, United Nations 2021, 1). It is frequently mobilized to highlight the humanitarian import of the project of reform and to emphasize that there is a continuity between Mandela's struggle against lawful racial violence and segregation, and the rules-based prison-regulation project. To the extent that Mandela's decontextualized remark takes us away from thinking about the scale and scope of prison power and its role in embedding structural injustices and leads us to imagine an abstract individual prisoner in a generic jail, our analysis suggests that it may be an unhelpful starting point for thinking about reducing the

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harms of imprisonment. During Mandela's imprisonment, the South African apartheid state offered him release on the condition that he publicly renounced the violence of the antiapartheid movement. In response, he said, "Only free men can negotiate; prisoners cannot enter into contracts" (*The Guardian*, 2013). This quotation, drawing attention to the inherently repressive power relations that sustain carceral spaces and the side-lining of prisoners and their communities from organized reform efforts would be a better starting point for understanding what prisons do and how to respond to their harms.

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CONFLICTS OF INTEREST

None.

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