Criminal Justice and Social (In)Justice

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Abstract

The obstacles to achieving criminal justice in a society marked by structural injustice have long been recognised. Inequalities in social attitudes to certain groups and in the distribution of resources and opportunities in fields ranging from family life, education, health, shelter and employment are most obviously relevant, while the experience of abuse, prejudice or nutritional or emotional deprivation affects both life opportunities and psychological development. The threat to the legitimacy of punishment is particularly acute when the state itself bears responsibility for creating, or failing to alleviate, the relevant conditions. Doing criminal justice remains important, however, because disproportionalities in the impact of criminalisation and punishment on groups disadvantaged by injustice are matched by comparable disproportionalities in criminal victimisation. This challenge has been exacerbated by the growth and embedding of economic inequalities. This paper considers the implications for criminal justice systems, and for the re-emergence of new forms of criminal justice abolitionism.

Criminal Justice and Social (In)Justice

Nicola Lacey*

A recognition of the obstacles to achieving criminal justice in a society marked by structural injustice has been a longstanding feature of philosophical, legal and criminological literatures (Murphy 1973; Delgado 1985; Reiman 1996; Alexander 2010). Inequalities and injustices in social attitudes to certain groups and in the distribution of resources and opportunities in fields ranging from family life, education, health care, shelter and secure employment are perhaps the most obviously relevant features of a social order. Moreover the experience of abuse, prejudice, violence or nutritional or emotional deprivation is now understood to affect not simply economic and life opportunities but psychological development (Newburn 2013: 13-256). The consequent threat to the legitimacy of punishment is particularly acute when the state itself bears substantial responsibility for either creating, or failing to alleviate, the relevant conditions (Duff 2001: 175-201). Though the causal chains are complex (Lacey and Soskice 2020; Hagan and Peterson 1995; Muller and Wildeman 2013), it is no exaggeration – nor is it inconsistent with a recognition of the role of individual agency – to speak of many injustices as criminogenic.

Meeting the challenge of doing a measure of criminal justice in these circumstances remains important, however, because of a further consideration, and one that complicates the moral and political challenge. This is the fact that disproportionalities in the impact of criminalisation and punishment on groups disadvantaged by injustice are matched in many countries by comparable disproportionalities in criminal victimisation (Sampson and Wilson 1995; Peterson and Krivo 2010). Economically marginalised groups and those subject to racism and other forms of prejudice find themselves not only on the sharp end of the criminal justice system, but also disproportionately the victims of crime. They also, all too often, face poor provision of criminal justice services such as policing. It was of course this recognition

that gave the impetus to the re-emergence of a left of centre version of criminological 'realism' in the 1980s (Kinsey, Lea and Young 1986); and a recognition of its electoral implications underpinned Labour Party policy in Britain during the Blair era.

Over the last 50 years, however, this longstanding challenge has arguably been exacerbated by emerging features of political economy in the so-called advanced democracies: notably the growth and embedding of economic inequalities (Piketty 2013; Atkinson 2015; Savage 2021). The increase in poverty and the emergence in many relatively wealthy countries of a polarised demographic featuring a substantial minority excluded from many of the benefits of economic growth, and even of political association, has both complicated the political challenge facing democratic governments, and significantly exacerbated the injustices which had long been apparent. Conversely, the consolidation of a small, super-wealthy elite has arguably created a zone of impunity for certain crimes of the powerful, with corrosive implications for the legitimacy of the state's criminalising power. In this paper, I analyse these developments, and consider their normative upshot and practical implications for the criminal justice, and their role in the re-emergence of new forms of criminal justice abolitionism.

The paper proceeds as follows. In the first section, I analyse the forms and implications for social justice delineated by and arising from philosophical, legal and criminological literatures respectively. I set out a typology of three forms of injustice, distinguishing between material injustices, epistemic injustices and injustices of standing, and tracing their ramifications in different disciplinary and institutional contexts. I then move on, secondly, to consider how recent changes in political economy and society in wealthy democracies such as the UK have exacerbated both these injustices and the challenges which they pose for the effort to nonetheless realise some degree of criminal justice. And in the final section, I attempt to synthesise the upshot of these various analyses for criminal justice, its legitimacy and efficacy, today.

Criminal Justice and Social (In)justice in Philosophy, Law and Criminology

As I have already observed, considerations about injustice and its upshot for criminal justice have featured in philosophical/justificatory, legal/classificatory and criminological/explanatory scholarly literatures. Of course, the boundaries between these literatures are porous: much criminal law theory deploys philosophical concepts; and since the latter part of the 20th Century, the primary explanatory project of criminology in its more critical modes has often shaded into the terrain of political philosophy. Nonetheless, it is useful for our purposes to distinguish between the core contributions of each discipline, so as to tease out the various potential implications arising from their analyses for the legitimacy or possibility of criminal justice.

Philosophical perspectives: distinctive forms of injustice

It makes sense to begin with philosophy's contribution, not least because the concept of injustice itself has been a central object of philosophical analysis from philosophers of the ancient world such as Aristotle to the present day, and because the conceptions of justice elaborated in different philosophical traditions have informed, directly or indirectly, debates about criminal in/justice. In thinking about the bearing of social justice on criminal justice, perhaps the most obvious issues have to do with what we might call *material injustice*: the

ways in which the unjust distribution of access to public goods, opportunities, and material resources shapes potential offenders' substantive opportunity to conform their behaviour to the norms of criminal law, and places special barriers or difficulties in the path of their efforts to do. While some philosophers have been inclined to regard punishment in terms of retribution, and to ring-fence the concept of retributive justice so as to insulate it from the upshot of broader distributive justice (Moore 1997), most retributivists today would probably accept, following Murphy (1973), that background injustices in the distribution of resources and opportunities do potentially affect an individual's desert, for example in influencing the proportionality of a given penalty, posing a conundrum for the very project of criminal justice in an unjust society. But to say this is, of course, to beg the question of what counts as distributive injustice. Are all inequalities of resources, or of welfare outcomes, of or opportunities, presumptively unjust? Are ostensibly uneven opportunities and outcomes unjust only when not shaped by other qualifications such as 'merit', talent or 'natural desert'?

The literature on justice is vast, and even a brief overview is well beyond the scope of a single paper. Instead of attempting such a survey, I will focus on one example – that of John Rawls' famous *A Theory of Justice* (Rawls 1971), first published just over half a century ago. I do so not only because of the extraordinary influence which Rawls' theory of justice as fairness continues to exert across political philosophy, but also because it has recently been deployed to telling effect by philosopher Tommie Shelby in his searing work on the 'dark ghetto' in the United States (Shelby 2007, 2016).   The environment of the disadvantaged, segregated, disrespected ghetto produces, in Shelby's view, conditions which standardly undermine fair equality of opportunity in areas such as access to marketable skills, decent housing, adequate health care and other areas certain to affect the level of difficulty which ghetto residents face in confirming their behaviour to criminal law. These unfairnesses in the distribution of opportunity – along with inequalities far greater than those which Rawls would have seen as justifiable in terms of the difference principle[1] – reflect failures of justice in the basic structure of society. Indeed in some instances they even fall below the less demanding Rawlsian test of compliance with constitutional essentials. These systemic injustices in core social arrangements themselves amount to a form of 'extortion, even violence' (Shelby 2007: 126), which undermine the consent and reciprocity on which political obligation is based. In the absence of real efforts by the state to reverse them, crime may be seen as a form of resistance, of civil disobedience: those systemically excluded from the benefits of political association cannot justly be held to their civic obligations.

Shelby's analysis of the 'dark ghetto' is a paradigm for the philosophical exploration of the upshot of distributive injustice for criminal justice. But I also mentioned his reference to the disrespect with which ghetto residents are not only treated, but viewed. And this brings us to a second form of injustice which also poses challenges to the project of criminal justice: what Miranda Fricker, in an influential book, has called *Epistemic Injustice* (Fricker 2007). The argument is relatively simple, but its upshot is profound. The distribution of power in society shapes how claims to knowledge are received and validated, rendering the truth claims of disrespected and marginalised groups less 'valid', less audible – and to ever more severe degrees, the greater the disparities of power and respect involved. The upshot for criminal justice is obvious: where the state accuses an individual, the individual – even with legal representation – is inevitably in a less powerful position: and if that individual is, in addition, a member of a culturally or materially marginalised group, a range of direct and indirect

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[1] Rawls' 'difference principle' specifies that inequalities can be justified only where they benefit the least advantaged over the longer term.

mechanisms is liable to undermine the credibility of their words and even the audibility of their voices. Sometimes this epistemic injustice will be a product in part of material injustice – as, for example, where an indigent defendant cannot afford high level legal representation and has to rely on poorly resourced public defence arrangements. But it may, more subtly, flow from factors such as implicit biases, for example in how veracity or credibility are assessed.[2] And these biases likely affect a groups marginalised in terms of a wide range of factors including age, gender, ethnicity, homelessness and insecure migration status (Franko 2019). There is now a very substantial literature, in sociology and economics as well as philosophy and psychology, on the operation of such implicit biases, as well as on the impact of cultural – particularly gendered and racialised - stereotypes (Dasgupta 2013; Devine 1989; Anderson 2012; Haslanger 2015; Holroyd 2012; Holroyd and Picinali 2017; Kelly and Roedder 2008; Lane et al 2007; O'Flaherty and Sethi 2019; Anderson 2022; Lackey 2020). While perhaps less obvious than the upshot of material injustices, the implications of epistemic injustice for criminal justice are no less radical. The recent overturning of the convictions of dozens of postmasters for a 'fraud' which was in fact caused by a software failure is a case in point.[3] Probably the most extensive miscarriage of justice case in English/Welsh legal history, it is horrifyingly eloquent testimony to the difficulty which members of social groups with lower social standing – in this case, many of them working class, and many of minority ethnicity – encounter in having their narratives accepted – indeed, even listened to – in criminal justice settings. In effect, these defendants' agency was effaced through the criminal justice authorities' grant of epistemic preference to an IT programme.[4]

Closely related to epistemic injustice – but also, arguably, underpinning the difficulty in motivating political action to tackle material injustice – are what we might call injustices of standing, or of concern and respect. To fully participate in a political community marked by reciprocity, individuals and groups have to be accorded a certain level of standing and respect: indeed, this standing is arguably definitional to political membership or inclusion. This basic form of standing or status is not, of course, the same as being approved of, admired, or liked; indeed in the case of serious offenders, those things are inevitably compromised. But within any broadly liberal schema, basic political standing needs to survive criminal conviction, and indeed underpins standards of due process in the administration of criminal justice. And, arguably, the development in some jurisdictions of penal mechanisms such as continuing (or even perpetual) civic disqualifications following a conviction (Jacobs 2015) both violates and represents an underlying failure of this basic precept of just standing. One might regard injustices of standing as a broad category of which epistemic injustice is one distinctive upshot.

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[2] I emphasise here the contemporary literature in psychology and philosophy; but historians, social theorists and critical race theorists too have tracked the longstanding impact of social status on the ability of individuals to have their truth claims affirmed, in areas as diverse as the natural sciences and commercial life as well as the criminal law: see for example Finn 2003; Lynch 1998; Shapin 1994; Hill Collins 1990.

[3] https://www.theguardian.com/business/2021/jul/19/appeal-court-quashes-more-convictions-post-office-it-scandal (accessed 18 August 2022)

[4] This case moreover illustrates both the intuitive plausibility, and the limits, of Jennifer Lackey's concept of agential testimonial injustice (Lackey 2020), which she argues explains as cases of genuine injustice the excessive credibility accorded to testimony such as confessions, even absent the social biases emphasized in Fricker's definition of epistemic injustice. The criminal justice officials in this case clearly gave excessive credibility to the IT system, but of course without doing that system – unlike the victims of a naively credited false confession - an injustice.

The philosophical debates, therefore, have provided us with three distinct but intersecting conceptions of injustice which pose difficult questions for criminal justice, potentially undermining the state's authority to enforce the criminal law – and, in practice, producing forms of injustice which are all too often mutually reinforcing. These forms of injustice provide critical tools for an analysis of all aspects of criminal justice – the scope and extent of criminal law; the practices of policing and prosecution; sentencing and the execution of punishment. Indeed some philosophers have gone so far as to claim that such injustices can be sufficient entirely to undermine the state's very standing to 'blame' or call offenders to account (Duff 2001; 2019; Edwards 2019; Tadros 2009; Watson 2012, 2015; for critical discussion see Lacey and Pickard 2021; Holroyd and Picinali 2021).

Note, moreover, two further features of even this parsimonious analysis of philosophical theories of justice and their upshot for criminal justice. First: each of these forms of injustice potentially affects the criminal justice system's construction and treatment of not only offenders but also victims. Just as a society's material injustices condition the scope and fairness of the opportunities which differently situated groups have to conform their behaviour to the law, the way in which their behaviour and testimony will be received and interpreted, and the standing which they enjoy, so they condition their likelihood of becoming a victim, particularly of certain forms of crime; the likelihood of having their complaint about criminal victimisation dealt with, attended to, and believed; and the respect and consideration with which they are likely to be treated by legal and criminal justice agents. Perhaps the most obvious example here would be the longstanding disbelief and deficits of respect encountered by victims (particularly female, and probably yet more so racially or class-marginalised female victims) of domestic abuse and sexual assault (Pickard 2021). But much the same applies to, for example, residents of poor areas who do not benefit from adequate policing; or young black men who find themselves presumptively criminalised when they are in fact victims or witnesses – a spectacular example being that of Dwayne Brooks following the racist murder of his friend Stephen Lawrence, documented in the subsequent Inquiry (MacPherson 1999).

Second, the normative resources provided by philosophical conceptions of justice and of the upshot of social injustice for criminal justice include – if less obviously – resources for the critical analysis of what we might see as the opposite end of the criminal justice spectrum to the 'dark ghetto': crimes of the powerful. A litmus test of the justice of a criminal justice system is its treatment of all on equal terms; and a failure to attend to the crimes of those who benefit from material advantages, as well as the advantages of credibility and of status, unjustified by the precepts of justice, pose just as sharp a challenge to the authority and legitimacy of criminal justice as do material, epistemic and standing injustices in relation to the disadvantaged or disrespected. In particular, these injustices of unfair advantage, as we might call them, also pose a subtle but dangerous threat to the overall legitimacy of the system. We know from extensive empirical research (Tyler 2003; 2006; Liebling and Tankebe (eds.) 2013)[5] that perceptions of procedural justice are important to trust in institutions – and hence, potentially, to their stability and potential efficacy. Unjust advantages in this terrain, particularly where so extensive that they may be regarded as creating a sphere of criminal justice impunity for the elite, are hence particularly toxic to perceived legitimacy. But they are also, crucially, corrosive of the state's normative claim to legitimate authority. And, as we shall see in the second section of this paper, recent political-

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[5] See more generally the ongoing work of theYale Justice Collaboratory https://law.yale.edu/justice-collaboratory/procedural-justice

economic developments in the rich democracies have created fertile conditions for just such a crisis of authority.

Criminal law's framing of social injustice

Criminal law, it goes without saying, operates with its own, internal conception of justice: doing (legal)/criminal justice is, definitionally, what criminal law aspires to do. But what it means to do criminal justice in legal terms is, first, foremost and – for some legal theorists and lawyers – exclusively defined by the law itself. Beyond complying with core precepts of due process and procedural fairness such as the right to trial before an impartial tribunal, the presumption of innocence and the right to have the case against one proven to a distinctively high standard, which are now strongly associated with the perhaps somewhat broader-than-strictly-legal figure of 'human rights', this simply means having the existing criminal law (including, where applicable, sentencing norms) applied to each defendant accurately, even-handedly and fairly. From the legal point of view, the proposition that background social injustice can generally be brought into the courtroom to argue for the defendant's exoneration would be regarded as threatening to both the law's authority and its core focus on individual responsibility, founded in the notion of agency consisting in adequately engaged cognitive and volitional capacities at the time of the crime. The requirement of proof of responsibility or *mens* rea is itself, of course relevant to distributive justice: underpinning Hart's conception (Hart 1968) of responsibility as engaged cognitive and volitional capacities is the thought that this is what is necessary to provide a 'fair opportunity' to comply with the law. In this sense, the responsibility requirement arguably also reduces the chances of the criminogenic conditions of background injustice entrapping offenders into norm infractions to as great an extent as would a system of stricter liability. But the idea that criminal law's standards might be regarded as not applying, or not applying with their full force, to defendants simply because of their experience of injustice would be regarded as straightforwardly counter to the functions and distinctive *modus operandi* of criminal law (Lacey 1988; 2011; 2016), and this marks limits – albeit fluid and contested – to criminal law's potential accommodation of questions of background injustice. And while, as we shall see below, criminal law and procedure has indeed found some ways in which to mitigate the degree to which it reflects and compounds background injustice, criminal law's orientation to binary decision-making – guilty or not guilty – limits its flexibility, at least in relation to decisions about liability.

Of course, this normative insulation of legal discourse is not beyond critique: both critical and socio-legal traditions in criminal law scholarship have done much work to expose the ideological assumptions and power relations underlying, the practical upshot of, and the contradictions implicit in this form of supposed legal autonomy (Lacey, Wells and Quick 1998; Norrie 2014). In particular, the recent 'preventive turn' in criminal law, alongside the emergence of hybrid risk/character-based practices of responsibility attribution in areas as diverse as terrorism, low level public disorder and joint enterprise killings are testimony to just such porosity between law and power (Ashworth and Zedner 2014; Carvalho 2017; 2022; Lacey 2016a). As Carvalho has argued, the cultural task of criminal law in upholding hegemonic hold of civil order is a complex one, given the many gaps between criminal law's claim to be doing justice and the social realities of criminalisation, which must be glossed over: 'The apparent unity and coherence of civil order, the sense of civic identity and belonging it fosters, are largely the product of the dominant ideological apparatus preserved by the state, by its effort to maintain its hold on common sense'(Carvalho 2022: 6). There

are limits, accordingly, to the extent to which criminal law can put its coding logic in question without compromising its own legitimacy and authority.

This, however, does not mean that the content, interpretation and enforcement of criminal law is entirely insulated from broader concerns about justice. For example, in many systems featuring a jury as the trier of fact in some criminal cases, the possibility of 'jury nullification' operates as a safety valve: a jury can simply refuse to convict in circumstances where it regards conviction as unjust. Apart from such 'perverse' jury verdicts, systems of criminal law such as that of England and Wales have three main ways of making adjustments or framing their approach so as to respond to issues of injustice, and to mitigate, resolve or even pre-empt their impact on criminalisation. These accommodations can happen at various stages of the process. First, they may be taken into account in the legislative process, either in framing the law or in deciding whether or not to criminalise an activity in the first place. The framing of statutory criminal defences – for example, the recent partial defence of loss of control in English criminal law; or indeed of new or amended forms of criminalisation - illustrates the ways which concerns about the upshot of social injustice for criminal justice can filter into the law-making process. Another good example would be the opposition to legislation which would require citizens or residents to carry identity cards on the basis that criminalisation of the failure to carry a card would almost certainly lead to unevenness in enforcement which would reflect background social injustices.[6] In addition, recent reforms of criminal procedure including special provision for vulnerable witnesses, protocols governing cross-examination, and other such legislative and policy initiatives might also be seen as measures geared to enhancing epistemic justice in the criminal process.[7]

The second mechanism by which English criminal law fine tunes its rules in ways which speak directly or indirectly to issue of background injustice is the realm of common law defences (Gardner 2007; Horder 2003). Defences such as self-defence or duress recognise that some defendants encounter special barriers to conformity to an extent which either justifies their commission of an act otherwise defined as criminal or (more often), attenuates the link between act and offender, undermining or mitigating individual responsibility by reason of cognitive or volitional deficits, some of them arising from social context. Criminal law's preference for defences which speak to deficits of responsibility rather than justifications of actions reflects the importance attached to not diluting the force of criminal law's prohibitions, in recognising a justificatory defence, by in effect allowing the offender to redraw the boundaries of criminal law. The case of necessity – tellingly reframed by English courts in terms of the concept of 'duress of circumstances', hence narrowing the law's view of the defence's grounding to those situations which can be analogiesd to human-imposed duress – is a case in point. Courts across many jurisdictions have exhibited concern that a capacious justificatory defence of necessity would, in effect, invite defendants to redefine the scope of criminal law as it applies to them (Norrie 2014: Part IV; Lacey Wells and Quick 1998: 49-53; 313-26). A yet more complex case is that of so-called 'cultural defences'; claims that the defendant's distinctive life experience and values might shape their perceptions or capacities in such a way as to undermine their capacity or opportunity to conform to the law. (Note, of course, the resonance here with philosophical debates about the normative upshot of implicit bias…).

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[6] See for example the pressure group Liberty's evidence to the Home Affairs Committee on the Government's proposal to introduce national identity cards in 2003 (Liberty 2003):
https://www.dematerialisedid.com/PDFs/id-card-evidence-to-home-affairs-committee-dec.pdf
[7] I am grateful to Federico Picinali for alerting me to this point.

The criminal law finds itself in a bind here. Should, for example, a young man brought up in a highly sexist, macho environment in which women are represented as likely to lie about their desire for sex be for this reason held to a different standard in his assessment of a sexual partner's consent to sex (Lacey 2011; Pickard 2021)? Equally controversially – and speaking rather to issues of material injustice: given what we know about the association between background injustice and patterns of criminal behaviour, should criminal law entertain a defence of 'rotten social background', acknowledging that systemic injustice materially affects the fairness of a defendant's opportunity to conform to the law (Bazelon 1976; Delgado, 1985; see Lacey 2016b)? To advocates of such a defence, its enactment would be an apt and common-sensical recognition of the fact that systemic injustices affect the scope of opportunity to remain law-abiding and the scale of temptations and pressured to offend: a necessary corrective to structurally produced inequality before the law (Kelly 2018; see more generally Green 2014). To its critics, it is a mechanism that – variously - fundamentally undermines criminal law's integrity and universality; fails, in the light of the fact that many highly disadvantaged people do not commit offences, to establish adequate causal linkages between 'rotten' background and a particular criminal offence; and disrespects the agency of the disadvantaged (Moore 1985, 1997; Morse, 1979, 2000; 2011; Robinson 2011). [8]

Before leaving the terrain of the defences, it is important to note that the boundaries between acceptance and refusal to see background injustices as relevant to criminal liability are more blurred than the previous discussion has implied. In a number of areas, the judicial interpretation and statutory development of defences in recent years has made efforts to accommodate, within certain limits, questions of background material injustice, epistemic injustice and injustice of standing. One example serves to illustrate all three considerations. In various jurisdictions, the boundaries around defences have come under pressure as a result of the growing recognition that the experience of long-term violence and abuse, often within the family or a sexual relationship, can affect defendants' capacities of self-control and even their perceptions. Given that the opportunity to avoid being subjected to these pressures or threats is itself undermined by material injustice such as poverty or lack of access to alternative housing; and that victims' voices need to be given standing, this has generated a great deal of criticism, and, in several jurisdictions, has led to important (if still insufficient[9]) changes in the scope of defences such as self-defence and the partial defence of provocation – since abolished in England and Wales. In both cases, the requirement of immediacy of reaction has been modified in the light of a greater sensitivity to the context of the long-term victim of abuse; and provocation has been replaced with a more capaciously defined loss of control defence with a particular aspiration to render the defence potentially more gender-neutral in its application (McColgan 1993; Kinports 2004). It is also the case that expanding psychological and psychiatric understanding of the way in which early experiences of deprivation or abuse can shape development has fed increasingly into expert testimony in mental incapacity defences. But it remains true that criminal law operates – and sees itself as having to operate – with a robust presumption of sanity, and a parsimonious accommodation in particular of volitional defects (Norrie 2014: 237-73).

Thirdly, criminal law, broadly defined, may make its most direct accommodation of background injustices at the pre- and post-conviction stages – perhaps most obviously in

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[8] One might even argue that a statutory defence encompassing the upshot of structural injustices which the state could have tackled is a contradiction: the state in a sense acknowledging its own lack of authority. I am grateful to Valeria Ruiz Perez for discussion on this point.

[9] Indeed recent research suggests that the impact of the changes in English law has been limited: Centre for Women's Justice (https://www.centreforwomensjustice.org.uk/women-who-kill)

sentencing decisions. At this stage, pre-sentence reports detailing relevant social and psychological background serve in many jurisdictions more fully to contextualise the offence within the offender's psychological and material conditions and opportunities, and it is accepted that the severity of the sentence, usually within a more or less strictly defined range, should be adjusted according to broad mitigating (and, perhaps, aggravating) conditions. The scope for background injustices to shape criteria of mitigation or aggravation are, however, defined to a greater or lesser extent in different legal systems, and are defined moreover in relation to varying sentencing principles.[10] Where desert is regarded as the primary distributive sentencing principle, the argument rehearsed above – does 'rotten social background' truly undermine individual desert – may simply be reiterated; while consequence-oriented sentencing principles such as reform or deterrence may afford a different scope for injustice-based adjustment. Note that this sort of adjustment is also open to police officers and prosecutors, who usually work within very broad parameters of discretion in how the carry out their enforcement, recording and prosecution decisions. To take a particular example, the public interest criterion for prosecutions in England and Wales could certainly be interpreted so as to afford scope for a social injustice-sensitive policy; while the 'reasonable prospect of conviction' test might be regarded as risking exacerbating background injustices, particularly of the epistemic kind. Unfortunately, notwithstanding these possibilities for adjustment, it seems likely however that background epistemic injustices and injustices of standing serve to intensify the unjust patterns of discretionary criminal enforcement.

Criminological conceptions of social injustice

Criminology, broadly understood as the effort to produce systematic accounts of the nature, causes and implications of crime, has its origins in the classical theories of Beccaria (1764) among others. With the development of proto-medical and psychiatric sciences in the 19th Century, a supposedly scientific 'positivist' school of criminology emerged in the work of Lombroso and others (Lombroso 1876). In their earliest forms, neither classicism nor positivism showed much interest in the broad environment in which crimes occurred. For the classicists, crime was simply the product of rational choices under prevailing social conditions, with the penal project the establishment of deterrent sanctions apt to shape incentives and to optimise the balance of outcomes (Newburn 2013: 123-9. For the positivist, crime was the product of criminal character or atavism (Newburn 2013: 130-40). But even at this early stage, Lombroso himself acknowledged that in the case of the less serious offenders, social causes might intersect with criminal propensity to produce crime. And through the 20th and into the 21st Centuries, virtually every criminological paradigm – not only the dominant, sociological theories of crime, but even the refined versions of positivism and of rational choice theory which continue to feature in this increasingly diverse discipline - recognise the key importance of social, cultural and spatial context in constraining choice, shaping cognitive and emotional development, and influencing life opportunities at every level (Newburn 2013: 181-261). Modern day socio-biological, neurophysiological and other forms of positivism largely acknowledge and explore the interaction between social and personal/psychological characteristics, while sociological

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[10] For a recent example of judicial efforts to address this issue, see the Italian Constitutional Court's decision in Judgement 251/2012, which addressed the Constitutional legitimacy of article 69(4) of the penal code, as modified by the *ex-Cirielli*, where it 'prohibited the prevalence of the mitigating factors in article 73(5)' of Italian Drugs law (d.P.R 309/1990). I am grateful to Zelia Gallo for this reference.

criminologists remain convinced that the primary explanation of crime lies in the shape of the social world (Newburn 2013:143-180; Pratt et al 2004). Increasingly, criminologists acknowledge that the diversity of their subject matter – ranging as it potentially does from violent offences through property offences, drug offences, street crime to highly planned cyber-crime and fraud – is unlikely to be susceptible of a unitary explanation; rather, each of the main paradigms in the history of the discipline is accepted as having some contribution to make to our understanding of the phenomenon, or perhaps phenomena, of crime.

The predominance of entirely or partially sociological theories of crime from the early 20th Century on has created a disciplinary context highly open to the analysis of the impact of structural and systemic injustice on the incidence of crime, and indeed embeds criminological theory within the bread range of explanatory social sciences (see Braithwaite 2022). The early Chicago 'Social Ecology' School (Newburn 2013: 202-8) focused on the spatial concentration of crime in Chicago's 'zone of transition; an area of the city marked by high levels of mobility, with successive waves of migrants moving in and, sometimes, on; by poor housing; by poor infrastructure; and by social disorganisation. Robert K. Merton's (Merton 1938) 'strain theory' explained crime as a reaction to the frustrations of life for many in a society in which they share the approved goals of material success, yet are unable to reach those goals by approved means. Resituating Emile Durkheim's influential conception of 'anomie' (Durkheim 2013 (1893)), Merton mapped the different possible reactions to these strains. In a world in which legitimate goals cannot be reached by certain groups by legitimate means, one might say, it is only rational for those groups to find creative strategies to avoid the force of social norms about means, and indeed to find ways of rationalising their behaviour within alternative networks and frames of meaning (Matza and Sykes 1961). Edwin Sutherland's theory of differential association (Sutherland 1939) explored the impact of networks and peer groups in shaping social behaviour and attachment to norms, in a hugely influential precursor to the burgeoning criminological studies of delinquency, the formation of criminal or alternative subcultures, and the social conditions conducing to their development. Life cycle research, including that using the rich databases accumulated in Chicago from the early 20th Century on, has shed light on the links between crime and the life course; and urban sociology has been influential in exploring the links between the urban context, deprivation, social disorganisation, migration, racism, and deindustrialisation from the 1970s on (Sampson and Wilson 1995; Wilson 1987; 1996; Sampson 1987, 2013). Cultural and phenomenological criminology have explored the ways in which cultural attachments and the experience of crime underpin its production, and criminologists have also explored the cultural influence of media constructions of crime (Cohen 1972; Hall et al 1978).

Each of these paradigms is, evidently, apt to produce interpretations which invite analysis of how far social injustice is involved in shaping patterns of crime. But, until the 1970s, criminologists did not tend to ponder the political or normative questions arising from their analyses. For example, Merton's strain theory might well be thought to invite a critique of American capitalism and consumerism as criminogenic (Messner and Rosenfeld 2013), while the social ecology school and its successors, alongside urban sociology, invite a critical analysis of the emergence of urban poverty, race and class prejudices, and lack of opportunity. One partial exception to the criminological tendency to restrict itself to explanatory terrain was labelling theory: the proposition that deviance, understood as the (inevitably selective) social application of a label, is amplified by a process of primary, secondary, tertiary… labelling. In other words, anyone labelled, or associated with those labelled as deviant, is thereby more likely to attract further labelling: a case of 'give a dog a

bad name…' (Becker 1963). The upshot was the troubling thought that society's response to crime – 'criminal justice' - is itself criminogenic. Labelling theory encouraged and informed the 'sociology of deviance' and 'critical criminologies' of the 1970s on (Newburn 2013: 263-91). The latter were also influenced by a more general revival of interest in Marxist thought, symbolised in the criminal justice sphere by the re-issuing of Rusche and Kircheimer's 1930s classic, *Punishment and Social Structure*, in 1969.

In the view of these criminologies, it was not enough to expose and explore the social causes of crime. Where the relevant explanation was grounded in part or in whole in social phenomena such as poverty, inequality, racism, economic or cultural exclusion - or, conversely, impunity for crimes of the powerful - it was the job of the criminologist to expose, criticise and, if possible, counter these injustices. In short: if the social causes of crime include key elements of social injustice, criminology could not be neutral; it should be morally and politically engaged. These critical criminologies in turn invited a partial reaction in the form of so-called 'Left Realist' criminologies which drew attention to the fact that the impact of crime was itself marked by patterns of material disadvantage – a development which, with important consequences, established victims of crime as a central concern of the discipline and its policy upshot (Kinsey, Lea and Young 1986; Newburn 2013: 281-96).

Both critical and primarily explanatory criminologies, as well as a burgeoning tradition of scholarship engaging specifically with the social origins, role and upshot of penality, epitomised by the journal *Punishment and Society* established under David Garland's editorship in 1999, flourish today. How do they assess the impact or explain the origins of the different forms of social injustice delineated in the philosophical debates? Probably the most obvious way in which they do so has to do with the very clear correlation between being subject to unjust material deprivation and an increased probability of committing/being labelled as committing crime. Across the world, statistical analysis, surveys, and qualitative research show that crime clusters among the less advantaged social groups: those enduring poor housing, subject to various forms of prejudice, lacking educational or employment opportunities, in disorganised urban and family contexts. Conversely, criminal justice responses tend to single out these groups, and the forms of crime stereotypically associated with them – drug use, street crime, burglary, robbery – for particular control and penal attention (Reiman 1996). In addition, we now know that the experience of childhood deprivation, abuse, or malnourishment affect psychological development, including the inculcation of the power of self-control, with decisive implications for life chances and the capacity to avoid crime (Sampson 2013). To the extent that we see material inequalities as unjust, most criminologists would conclude, notwithstanding the fact that many 'truly disadvantaged' (Wilson 1987) individuals manage to avoid it, that social injustice is a key cause of crime; and moreover that the impact of labelling and punishment serves to entrench and exacerbate that injustice. For some radical criminologists this implies that the only way forward is abolition in one of its various guises (Mathiesen 1974, 2014; Carrier and Piché 2015); or that crime should be regarded as a form of resistance; or that the exposure of injustice is criminology's core task, while the questions of how to tackle and of how to analyse it more deeply are for the politician, social policy scholar or moral/political philosopher. And while there is a long tradition of so-called 'administrative criminology', which sees its core task as shaping social policy (Zedner and Ashworth (eds). 2003), its engagement with broad questions of structural or social aetiology have been relatively few, with a focus instead on producing effective forms of crime control or prevention.

Epistemic injustices, too, have often been exposed by criminological research and featured in explanations of crime, and in particular of the actions and reactions of law enforcement officials (as well as members of the public in reporting crime) which do much to shape the conception and image of crime. It is a challenge, of course, to research the ways in which epistemic injustices such as implicit biases, stereotypes and other filters shape the social construction of crime; but both ethnographic research (for example, Fassin 2021) and statistical patterns of practices such as stop and search (Lammy 2017) suggest that prejudices about the veracity and credibility of certain groups – notably, young black urban men, other racialised minorities – are decisive in shaping policing practices. Conversely, epistemic injustices shape the reception of victim testimony, from the police station to the courtroom and beyond; as the example of sexual offences, where survivors have often told researchers about the experience of being silenced (indeed further assaulted) in court, shows all too clearly. It seems inevitable that these factors also affect jury decision-making (Thomas 2020, though on evidence from Scotland, see Chalmers et al 2021a, 2021b); and while in many countries there is now an effort to educate judicial decision-makers about implicit bias, it would be optimistic to think that these have been successful, even where they have been substantial. More broadly, the experience of being on the receiving end of racism, sexism or other forms of prejudice over the life course seem highly likely to shape not only attitudes and psychological/emotional development but also life chances. To take just one example, recent autobiographical accounts in the wake of the Black Lives Matter movement have testified to the sense of exclusion felt by racialised minorities as children in an education system in which forms of knowledge of particular relevance to their lives – black, global south or working class history for example – have been marginalised in the curriculum, and where any effort to voice a distinctive experience or to question the parameters of accredited knowledge is either ignored or met with hostility (see e.g. Akala 2018).

Perhaps yet more obvious from the findings of sociological criminology over the decades is, however, that of inequalities of standing, status or respect. This is not only a matter of the disrespect involved in criminal justice enforcement practices shaped by prejudice or implicit bias; it is a factor in how those who are labelled as criminal are treated, and even of how we think of the very concept of crime. If certain groups are, de facto or even, as in the case of long-lasting post-sentence disqualifications, formally marginalised within the political system or excluded from the franchise (Lerman and Weaver 2014; Western 2006), can we say that the conditions of reciprocity underlying a just social order are truly met? And can we believe that, for example, prison conditions in this country or the United States would be as they are if a greater proportion of those sent to prison were of high social status (Whitman 2003)? Prison research over the decades evidences widespread disrespect reaching well beyond the specific disapproval of crime (Carlen 1983; Liebling and Arnold 2004). Conversely, ethnographic and other qualitative research on marginalised communities in which crime is frequent show how important the search for respect remains for those involved in offending (Bourgois 2002; Watson 2020). Indeed, within differential association and subcultural theory it is precisely this search for a meaningful peer group and mutual respect which underpins certain forms of offending. Criminology and urban sociology, are capable, in short, of illuminating the role of all three forms of injustice at an empirical level through a range of quantitative and qualitative methodologies; though criminologists take different positions on whether it is part of their scholarly role to engage in the explicit identification or critique of those injustices.

The Evolving Political Economy of Criminal Justice and Social Injustice

To understand the implications of structural injustice for criminal justice, it is also important to look at broad political-economic and associated cultural developments over time.   Many forms of sociological criminology are sympathetic to this proposition, and changing cultural norms in particular have attracted a great deal of attention. But, other than in Marxist criminological approaches (Rusche and Kircheimer 1969, Quinney 1970), with a few honourable exceptions (Box 1987; Young 1999; Garland 2001), the impact of macro-economic change on crime has featured relatively little in criminological analysis. This is an important lacuna, not least because there is strong reason to think that some decisive changes in the political economy of many countries, including but not only the wealthiest democracies who claim to espouse liberal principles of justice, have been of great importance to both the social phenomena of crime and attitudes towards it (Lacey and Pickard 2015). A comprehensive survey, which would require rigorous comparative treatment, is well beyond the scope of this paper; but two key aspects require mention.

Changes in the economy and labour market: economic exclusion and increasing inequalities

The economic changes which swept the industrial world in the 1970s are well documented, and equally well known. The oil crisis of that decade provided one significant economic shock; while increasing globalisation undercut the economic basis for industrial production in the richer countries. The upshot was the disappearance, over a remarkably short period of time, of secure, often unionised, and reasonably well-paid jobs for those with basic but not advanced levels of education, underpinning what are recognised in the labour market as 'skills'. While the upshot of these changes was exacerbated, in many countries, and perhaps most spectacularly the United States, by the impact of the accumulating effects of long-term racism as well as by class-based disrespect – the latter fatefully reflected in Hillary Clinton's infamous 'deplorables' comment during the 2016 election campaign – there is good reason to think that these structural changes in the labour market produced criminogenic conditions. We know that the economic insecurity occasioned for many brought distress, loss of self-esteem and respect among those whose place in the economy, and their social status with it, disappeared within just a few years (Wilson 1987, 1996, 2009). These conditions of economic precarity, social marginalisation, as well as the bleak housing conditions, poor quality education, and inadequate public infrastructure of the urban centres hollowed out by deindustrialiation, are precisely those which criminological theories have associated with an elevated incidence of crime. And indeed, crime rates – including violent crime rates- soared in the United States, and rose significantly in many other western societies, adding to the conditions fostering social disorganisation, counter-cultural attachments and incentives to flout criminal law's constraints or to retreat into illegal drug (or, more recently, opioid) addiction (Gottschalk 2015; Reiner 2007; Gallo, Lacey and Soskice 2018; Miller 2016).

Political economists, like primarily explanatory/empirical criminologists, do not tend to dwell on whether these changes – some of them, like deindustrialisation, hard for governments to avoid; others, like the erosion of welfare benefits, otherwise - should be accounted structural social injustices. But there has been an increasing focus in sociology and, to some extent, political science on the normative upshot of these broad changes. One particular focus has been a marked emphasis on the links between inequality and crime. Increasing inequality between the middle classes and those in the 'precariat' (Savage 2015, 2021) has been prompted both by the diminishing opportunities of the portion of the population with fewest skills, social capital and employment options – a situation which they encounter stubborn barriers to escaping given that the new, often service sector or professional jobs emerging out

of the gradual transition to a 'knowledge economy' generally require a much higher level of formal qualifications than did the old industrial jobs, which for many are replaced by insecure forms of employment such as 'zero hour contracts'. The resulting economic and psychological precarity arguably has the further consequence of engendering resentment which has decisive impacts on levels of participation and trust in the political system, with further ramifications in terms of that system's capacity to build consensus for penal reform or moderation. On the other hand, and particularly in the most recent iterations of financialised capitalism, we have the emergence of a super-rich 0.1 percent. This implies the risk of financially and otherwise exploitative crime among those whose wealth can buy, or may lead them to think they can buy, political or other influence affording impunity from usual social, including criminal justice, constraints. Perhaps yet more important, the risk that perceptions of such impunity, along with diminishing levels of trust in politicians and criminal justice institutions, pose important threats to the perceived legitimacy of criminal justice – as well as, from a normative point of view, undermining that legitimacy.

There has, accordingly, developed an extensive literature which tries to assess the links between (putatively unjust) inequalities and both crime and criminal justice responses to crime (Hagan and Peterson (eds.) 1995; Moller and Wildeman 2013; Lacey et al (eds.) 2020). Precise causal links – as opposed to correlations - are difficult to pin down (Lacey and Soskice 2020); but historical (Garland 1985 1990, 2001; Lacey 2016a), comparative (Lacey 2008; Lacey and Soskice 2019; Cavadino and Dignan 2006; Sutton 2004; Lazarus 2004) and life course research (Sampson 1987, 2013) gives us some purchase on the broad macro-conditions at issue here. To take a recent and compelling example, Robert Sampson and Ash Smith (2021) have identified, on the basis of the extensive Chicago life course study,[11] a spectacular difference in the chances of committing crime and of avoiding criminality as between the research cohort growing up in the 1970s and that growing up just fifteen or so years later. The scale of the change is perhaps most tellingly evoked by the fact that the *most* criminally active of the second cohort was involved in crime at about the same level as the *least* criminally involved of the first cohort - producing what Sampson and Smith call a 'birth lottery'. Sampson is still working on various hypotheses about the range of macro and micro changes which underpin this remarkable finding; but one factor stands out. The first cohort went through their education, training and search for employment at the height of the economic, social and psychological disruptions of deindustrialisation and urban decline; while the second cohort did so during a period of renewed growth and the beginnings of urban revival in Chicago, at a time when the upswing in crime was giving way to the extended crime decline seen from the mid-1990s.

Changes in attitudes to crime and in the conditions under which criminal justice policy is formed in the political sphere

In addition to the large macro-economic and accompanying social developments of the 1970s, this period saw, in many countries, but most carefully documented in relation to the United States, changing attitudes to crime (Enns 2016). On the one hand, particularly in individualistic liberal market economies (Hall and Soskice 1999; Lacey 2008), amid a context in which states' perceived capacity to control the economy was in decline, criminal justice policy became a tempting focus for electoral competition. There is a lively debate about how far this had to do with changing social attitudes attendant on rising crime (Lacey

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[11] The data in this study allows for analysis over a substantial period, controlling for a wide range of differences including education and employment status, capacity for self-control, family background and so on, mental and physical health.

and Soskice; 2015, 2020; Gallo, Lacey and Soskice 2018; Enns 2016); and how far with the manipulations of politicians, particularly in the context of countries such as the United States with a history of racist associations of crime with African Americans, and a resort to crime policy as a facially neutral but widely racially decoded response (Beckett 1997). It has also been argued that the widespread sense of lived injustice paradoxically contributed to increasingly punitive attitudes and an orientation to the 'pleasure' of punishment, in a psychological dynamic in which offenders become the object of an ostensibly satisfying hostility which seems to offer relief from suffering (Chamberlen and Carvalho 2021). What is incontrovertible is that the competitive, first past the post political systems featured in most liberal market countries tended to produce an 'arms race' between the two main political parties as to which could prove itself 'tougher' on crime; while the coordinated market economies of the Nordic region and of northern Europe managed better, through their consensus and compromise-oriented political systems, to sustain the stability and moderation of their crime policy even amid rising crime, as well as the relative generosity of their welfare provision.[12] The liberal market economies which feature higher levels of inequality as measured by the gini co-efficient; higher rates of illiteracy and child poverty; and higher levels of residential segregation conversely struggle to moderate the temper of criminal policy (Lacey 2008; Lacey and Soskice 2015). While this would be hard to establish comparatively, it seems likely that these sorts of socio-economic conditions are also conducive to higher levels of epistemic injustice.[13]

Intractable inequalities at both ends of the distribution, alongside the lifeworlds these inequalities produce, have become a key focus across the social sciences: in economics - (Piketty 2013; Milanovic 2018; Stiglitz 2013; Case and Deaton 2021[14]); in politics (Hopkin 2014; Phillips 2021; Jensen and van Kerbergen 2016); in anthropology (Koch 2018; Bourgois 2002; Goffmann 2014) and in sociology (Savage 2015; 2021; Sennett 2003). Not all of these literatures assume inequality to imply structural injustice; nor do they necessarily prescribe solutions (for an example of one that does, see Atkinson 2015). But their very interest in inequality is premised on its salience, and a sense that at a minimum we need to understand its origins as a precursor to debating what, if anything, can be done about it. And in some iterations, this social science literature implies a radical critique of criminal justice as it exists, within structurally unjust societies, today (Fassin 2018; 2021, both in its upshot for the disadvantaged and in the opportunities it affords for elite impunity.

Social Injustice and the Legitimacy of Criminal Justice Today

So far, this paper has set out a conceptual framework within which to explore the links between social and criminal justice; mapped the place and upshot of those links within a number of disciplines; and considered some recent developments in political economy and society which might be thought to pose new or exacerbated challenges to the project of pursuing criminal justice in increasingly unequal democracies. But, of course, the interest and significance of these links does not lie in intellectual or analytic reasons alone. Rather, such scholarship is generally motivated by a range of other concerns: with the upshot of the

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[12] Though even in these jurisdictions, recent developments have begun to put pressure on the longstanding consensus: Barker 2019.

[13] While my argument here is restricted to the so-called advanced capitalist democracies, the links between polarization, inequality and the quality of criminal justice almost certainly characterize a wider range of countries, including for example those of Latin America.

[14] We should also mention the ongoing IFS Deaton Review on Inequalities in the 21st Century https://dera.ioe.ac.uk/33419/1/The-IFS-Deaton-Review-launch.pdf : (Joyce and Xu 2019).

analysis for public policy and the potential for change and reform, implying the need for a clear understanding of the conditions of existence of both the links themselves and any prospect of weakening or breaking them; with its upshot for the stability, effectiveness and perceived legitimacy of criminal justice; and with its upshot for the political or even moral legitimacy of the exercise of the state's criminal justice power. In my discussion so far, I have moved between the second and third of these considerations, without addressing them directly. In this section, mainly leaving aside the question of the potential for reform, which would require a much more textured discussion relative to particular systems, I will conclude by considering the second and third considerations: How far does social injustice affect the stability and efficacy of criminal justice? And to what extent, if at all, does it undermine the state's authority to punish?

As far as the stability and efficacy of criminal justice is concerned, notwithstanding considerable research evidence about the importance of perceptions of procedural fairness to the perceived legitimacy of criminal justice (Tyler 2003, 2006), as well as of the impact of perceptions of social injustice and of the impunity of the powerful in underpinning acts of disobedience or protest (Lewis et al 2011), the overwhelming evidence is that criminal justice systems can maintain a remarkable degree of stability even where a significant number of the populace believe that they are scarred in substance and/or enforcement by background social injustice. Of course, such situations produce resistance, some of it violent: in recent UK history, think of the case of the miners' strike of the 1980s or the various urban riots over the last 30 years; widespread criticism of racial disproportionalities across the criminal justice system, most spectacularly in the exercise of police powers of stop and search (Lammy 2017); protests at the policing of anti-racist or climate change demonstrations; instances of apparent jury nullification in the attempted enforcement of public order charges in such cases. Across the Atlantic, the brutal murder of George Floyd by a police officer and the ensuing Black Lives Matters protests across the country and indeed beyond, came close to undermining the viability of the Minneapolis police department and called forth, in a significant emerging form of modified abolitionism, the call to 'defund the police' and to reallocate the funds dedicated to policing to other forms of local service more likely to produce safety and respect across social groups. But a call for full blown abolition remains marginal; and even this egregious instance which promised the institutionalisation of a more moderate abolitionism seems to have lost some momentum. Meanwhile the entry of social media onto the scene of public debate has both provided new resources for broadcasting evidence of egregious forms of substantive and epistemic injustice in the exercise of criminal justice power, while also providing a new platform for the diffusion of forms of hate and prejudice which underpin those very injustices and the toleration they have been accorded. The ensuing dynamics are still working themselves out in our increasingly polarised societies.

At the other end of the inequality spectrum, the occasional prosecution of elite offenders like Bernie Madoff, Jeffrey Epstein, Jonathan Aitken, perhaps, serve to keep the lid on perceptions, potentially corrosive to the perceived legitimacy of criminal justice, that the rich are above the law. At the level of *realpolitik*, we would have to conclude that criminal justice systems within relatively affluent and stable democracies have a remarkable ability to legitimate themselves with an adequate portion of the population to sustain their stability, even in the face of widespread acknowledgement that their enforcement bears the marks of the whole panoply of background injustices. Most people seem to think, in other words, that the justice of conviction and punishment is insulated from that of the background conditions: conditions which mean that the opportunities of avoiding offending are radically unequal;

and that those on the receiving ends of various kinds of prejudice or marginalisation are more likely to be prosecuted, less likely to be believed when they speak in their own defence, and more likely to be on the receiving end of the most intrusive and degrading aspects of punishment. Even in an unjust society, it seems, many believe that it still makes sense to 'do criminal justice'.

This may be because they hold a strictly retributivist view underpinned by a narrow conception of factors which affect moral desert: if one regards criminal law in moral terms, and punishment as the just response to blameworthy wrongdoing – as western penal discourse and indeed theory have increasingly invited us to do over the last 50 years – it is intuitively plausible to think that even if offenders have themselves suffered unfair treatment, this does not undermine their guilt in committing offences (Moore 1985). Whether because a persisting faith in the formal justice of the legal system or because of a substantive attachment to the core norms of the criminal law, criminal justice remains largely taken for granted as a core and legitimate state institution. And the stability of the criminal justice systems of a wide range of societies over a long period in which the public and popular philosophy of punishment has changed markedly suggests that many believe they would be worse off living under a system without criminal justice. In other words, even where we regard the state's authority as compromised, we find it hard to contemplate living in a world in which there exists no police force, or at least publicly funded institution, to call on in the event of, say, burglary or an assault; or where serious offences such as sexual and non-sexual violent crimes are not met with any decisive state response. The supposed overall effects of criminal justice are largely seen to be, on balance, positive: or, perhaps, the least-worst solution available.

But this is not, of course, a zero-sum matter. Social movements for the reform of criminal justice to mitigate the upshot of what are understood to be background material, epistemic and status injustices, are frequent and sometimes successful – as in the case of the long struggle for homosexual law reform in many western countries from the 1950s on. Nor is it to say that there is no point at which the perceived illegitimacy of the criminal justice system would be such as to prompt such widespread resistance that the system is undermined or destroyed. But this seems unlikely to happen other than in the context of a radical collapse in perceptions of the state's legitimacy and authority overall (Matravers 2006). And that sort of collapse/withdrawal of civic consent, likewise, seems likely to be inhibited by people's pragmatic assessment of the balance of advantage. To misquote Hilaire Belloc, it is a case of keeping hold of states for fear of yet a grimmer fate. But this should not be a recipe for complacency: we have enough evidence of the upshot of a corrosion of trust among a substantial minority of the populace to know that efforts at mitigating the upshot of social injustice for criminal justice are urgently required, and that a failure to attend to these gaps between criminal justice's avowed aspiration and the realities of criminalisation may undermine political trust and participation in ways which threaten the capacity of political systems to deliver reform.

If this analysis of the upshot of perceived injustice for the stability and viability of criminal justice leads to an unsatisfyingly muddy conclusion, perhaps we can say something more decisive at the normative level. For on anything approaching Shelby's Rawlsian approach (Shelby 2007, 2016) – and as widely acknowledged by philosophers and criminal law theorists (Duff 2001; Tadros 2009; Watson 2015; Lacey 1988) – even many countries proud of their liberal democratic conventions exhibit and, on one view, are complicit (through their failure to address) not only those injustices but their bearing on the fairness of criminalisation

and punishment. But does any injustice undermine the normative legitimacy of the system, as a whole or in relation to particular groups such as the poor or victims of racism and other forms of exclusion, as Shelby suggests?

This question of course relates to the broader issue of what we regard criminal law as punishment justified by or as 'being for' (Chiao 2016, 2019; Lacey and Pickard 2021). And at the risk of leading us towards another unsatisfyingly muddy conclusion, I would suggest that any normative theory of criminal justice which contains – as the vast majority do – some element of consequence-sensitivity - in other words, which sees the normative test of criminal justice as resting in whole or in part in its contribution to human welfare and the protection of autonomy or dominion (Braithwaite and Pettit 1990; Lacey 1988) - will have to accept the need to make a balancing assessment, and one without a very clear normative threshold. It is a question, in other words, of whether we regard the consequences of injustice for offenders to be such as to outweigh the other social costs, including to victims who are frequently themselves subject to background injustice, which would proceed from a judgment that criminal justice entirely lacks legitimacy: a tension in some senses between a collective good and individual injustices. Shelby argues, persuasively, that the state has lost its authority to hold those in the ghetto accountable for their offences, they have nonetheless a moral duty to their fellow residents, to whom they are doing wrong. But this says nothing about how those victims should go about enforcing those duties in the absence of a state mechanism geared to doing so. For even the mildest and most qualified consequentialist, then, the normative question about the legitimacy yields no clearer an answer than the positive questions explored above. Yet this is to pose the issue in unduly stark terms: as presenting a binary between legitimacy and illegitimacy. Perhaps the solution here, as suggested by Chamberlen and Carvalho, is to discard the idea of justice as an absolute goal to be reached, and rather to conceive it as an 'ongoing practice… [and] … a collective, intersubjective endeavour' (Chamberlen and Carvalho 2021: 97) which - like legitimation itself (Beetham 1990) - is always a work in progress, and one to which a range of abolitionist endeavours and reformist programmes - therapeutic and restorative justice, alternative mechanisms of dispute resolution based in communities, among many others – can contribute something of value. If we think about the different ways in which social injustice echoes through the practice of criminal 'justice', as the analysis I have offered aspires to help us do, we can correspondingly think of the criminal process in more disaggregated terms as a set of arrangements, protocols and institutions each of which may be subject to incremental reform. Again responding to the consequence-sensitive normative intuition, this implies that our political responsibility here is to work constantly towards reducing criminal injustices, thereby strengthening the state's claim to authority, rather than to bemoan the impossibility of perfect justice.   In this sense, the diversification of the broad category of abolitionist thought is a hugely welcome development.[15]

What, finally, of the argument that the state loses its moral standing to call to account where its own actions amount to complicity or hypocrisy (Duff 2019; Edwards 2019; Watson 2012)?   If we regard the criminal law in moral terms as a system of ascribing not only responsibility but blame, that argument is persuasive.[16] But if we regard criminal law in

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[15] And one to which Shelby's forthcoming monograph (2022) will doubtless make a key contribution.
[16] Yet it is worth noting that even authors like Duff and Watson, who make a powerful case for the state's complicity in criminal injustice, in effect embrace the 'muddy' conclusion: rather than seeing this injustice as undermining the state's overall authority to criminalise and punish or making the case for abolition, they envisage modifying the degree of injustice through concessions at the sentencing state and other institutional modifications aimed at longer term change.

political terms as, rather, a regulatory system geared to certain valued social ends, or as a system which underpins the authority of public institutions (Chiao 2016, 2019; Lacey and Pickard 2021), it follows that our assessment of its overall legitimacy must take into account not merely the legitimacy of state authority but also the overall balance of likely outcomes for human welfare under different reform scenarios, as well as the overarching question of social justice in relation to each discrete aspect of the institutions of criminal justice.

Is this a counsel for despair, or for a woolly relativism? In my view, not at all. Exposing the upshot of social injustices for criminal (in)justice is a hugely important contribution to political discourse – as indeed social movements such as Black Lives Matter show very clearly. Ideally, it invites not merely criminal justice reform but also a reassessment of the scope of criminal law's regulatory reach and the potential for finding resources for preventing and responding to crime through a wide range of non-criminal justice means: in the organisation of the economy, of the welfare system, of social provision, and of access to the sort of education which gives real opportunities under prevailing economic conditions (Braithwaite 2022; Wilmot-Smith 2019). The larger challenge here is, of course, to tackle the background injustices which inevitably echo through criminal justice, and build up the social institutions – public services and community infrastructures providing education, health care, welfare – which can mitigate social injustice. But none of these valuable things can come about other than through political action and persuasion – as well, particularly in the case of epistemic injustice and injustices of standing and respect – as engaging each other and those with whom we associate in discussion, as well as reflecting honestly and critically on our own implicit biases and prejudices. In the final analysis, then, the recent decline in political participation (Siaroff 2009) in many countries – itself shaped by the perceptions of elite impunity and state illegitimacy – is probably the greatest contemporary threat to the important project of combatting social injustice and, in doing so, attenuating the links between social and criminal injustice. The effort to rebuild the cultural and institutional bases for effective democratic participation in our fragmented societies presents itself, accordingly, as one of the most important contemporary challenges facing the pursuit of social justice.

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