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‘IN THIS INTERREGNUM’:

DIALECTICAL THEMES IN THE CRITIQUE OF CRIMINAL JUSTICE

Henrique Carvalho and Alan Norrie

Warwick Law School

*In this article, we offer a critical examination of the long and rich history of criminal justice scholarship in the pages of *Social & Legal Studies*. We do so by identifying and exploring a dialectical tension in such scholarship, between the recognition of the role of criminal justice as an instrument of violence, exclusion and control on the one hand, and the effort to seek, through or perhaps beyond the critique of criminal justice, an emancipatory project. We explore this tension by examining four areas in scholarship: popular justice, social control and governmentality, gender and sexuality, and transitional justice. Relating forms of critique to the historical development of a unipolar political world order from the time of the journal’s inception, we argue that the criminal justice scholarship in *Social & Legal Studies* positions it, like the world it describes, in a sort of ‘interregnum’. This is a place where the tension between the two poles of emancipation and control is evident, but shows few signs of resolution. Each of the four themes displays a different critical perspective, one that reflects a different response to living in a world where legal, social and political emancipation struggles against the weight and direction of history. Critique nonetheless reflects on criminal justice to reaffirm the need for emancipatory change and consider how it may be achieved.*

‘the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear’ (Gramsci, 1971/ 1999, 556).

Four critical themes

The area of crime, criminal law and criminal justice has been central to the scholarship of *Social & Legal Studies*. Over the course of the last 25 years, something like 185 articles related to criminal justice issues have been published in the journal, covering a wide range of topics. Over the period, one could list: the relationship between popular justice and legal justice; criminal justice and sexual politics (law and gender violence, homophobia, sexual abuse and sex offenders); crime and gender more generally (abortion, rape, domestic violence); criminal process (policing, prosecution, courts, sentencing, children and youth); law, punishment and control; the nature and problems of corporate crime; crime and governmentality (dangerousness); criminal law and the use and abuse of drugs; international criminal justice; criminal justice, race and racism; crime and the ‘war on terror’. In recent issues, problems such as human trafficking, ‘cimmigration’, cybercrime and issues concerning transitional justice reflect current concerns.

In general terms, one might say that the preoccupation of writers has been the social contextualisation of criminal justice problems through a variety of theoretical and critical methods. In line with contextualisation, papers often assume particularly historical and comparative methodologies, as well as detailed empirical work employing diverse and often innovative research methods. The reach of the journal towards historians and scholars working to compare criminal justice contexts, or to provide case studies of different national and cultural frameworks, has been noteworthy. Broadly, the journal’s critical perspectives are brought out within the range of topics, and the particular methods deployed. With regard to topics, emphasis is placed on how law operates as a mode of social control, often in ways that are hidden behind the stated goals and purposes of criminal justice systems. Law is seen broadly as a form of governmentality, and insofar as liberal

criminal justice officially presents itself as representing a sphere of liberties, the truth of law as a means of repression through the forms of freedom is an important theme.

In brief, the journal has deployed various ‘hermeneutics of suspicion’ to interrogate law’s claims and self-understanding. There is however often an underlying reflection on or implication of an emancipatory kind. If the critic can show how law works formally to express freedom and in practice or substance to repress it, *and* can show the mechanisms that produce these relations of form and substance, then we are closer to understanding how repression works, what might be the negative conditions for its possibility, and what might be the conditions that need to be removed for it to stop. Law may also contain a utopian promise of something better that might come into being. Forms of control that operate behind our backs, abstract universalisations of freedom which ignore and repress concrete freedom, wilful discriminations that ground violation, and all these set against the backdrop of historical and particular social contexts that generate these modes of control: all these point to different possibilities and different worlds in which lives could be lived differently. The very symbols of freedom expressed formally mark a space where substantive freedoms might emerge. This legal tension between repression and emancipation is particularly acute in criminal justice, where the liberal promise of individual freedom and responsibility is directly pitted against the coercive violence of political authority and the structural inequalities underpinning the problem of crime. The rich scholarship in *Social & Legal Studies* displays a tradition of critical and rigorous engagement with the resulting tensions.

No doubt, however, we glimpse the future ‘through a glass, darkly’ (1 Corinthians, 13:12). Taking our line from Antonio Gramsci, the discourse of authors in the criminal justice area might be seen as charting an interregnum between an old (the broken promise of the liberal Enlightenment) and a new (a world that is emancipated across a variety of social registers), generating a variety of morbid symptoms in the dystopic present. Some might view such a characterisation as overly critical of the role and forms of law, while others might see it as overly generous. Some might find it idealistic.

Nonetheless, we think that a view of criminal justice as placed in a confused and confusing historical world where things are not what they seem, where circumstances are bad and in need of emancipatory change, where such change is latent and potential but not easy to achieve, and indeed where things may be getting worse: such a view or set of views might be summarised as the overall position of criminal justice scholarship in *Social & Legal Studies*.

We have picked out four themes which elaborate this suggestion and indicate the direction of travel in the journal’s criminal justice scholarship. The first special issue published by the journal was on the theme of popular justice, and we see that as emblematic both of the period in which the journal appeared, and of the journal’s underlying commitment to a scholarship of emancipation. At the same time, we note the limits of the popular justice approach, and the failure of the debate to sustain itself over the period of the journal’s lifetime. In the 1980s, the negative counterpart of popular justice’s emancipatory promise was ‘authoritarian populism’ as a mechanism for re-securing social control under changing social and economic conditions. If the latter appears to be winning out today, it is all the more important to hold onto the significance of the earlier phenomenon at least as a reminder of how the socio-legal criminal justice problematic has been and can be different.

Popular justice, in the journal’s beginning, is therefore our first theme.

Fast forwarding to the fourth theme, we identify transitional justice as an area that has featured in the journal in recent times. If popular justice reflected a world in which the power and domination associated with law was opposed to a popular counter-power, transitional justice often appears as the means whereby the problems of power and social conflict are resolved by law, either in terms of international criminal justice, or through other justice-related processes. There is indeed a transitional justice ‘industry’ out there, working to bring about change narrowly in the direction of liberal democracy, neo-liberal economy and the rule of law. Yet, the processes that produce these changes are often nuanced and difficult, for the transitions that must occur are ones which have to reflect the struggles of the past, the inherently violative nature of the previous social order, and the

social and political limits imposed on change. Transitional justice accordingly reflects both controlling and emancipatory impulses, and if it seeks to ‘restore’ something, it is not always clear what that should be. If it seeks to reconcile the past, the present and the future, the terms of that reconciliation need to be understood. Alternative futures may be present in the transitional process. In that regard, transitional justice as a recent discussion in the journal perhaps reflects something of the promise of popular justice in the beginning, albeit with a different formal setting and overall trajectory. Both popular and transitional justice reflect a broad need for social, political and legal change; perhaps the latter channels the ‘desire’ of the former, both reflecting and blocking it.

If popular justice represents a strong theoretical and practical impulse at the beginning of criminal justice scholarship in *Social & Legal Studies*, and transitional justice a later trend, by contrast the other two themes have been present throughout the period, as its two main streams. By the same token, these also most accurately reflect the state of criminal justice scholarship as an interregnum, as a place of ‘morbid symptoms’, of promises both squashed and unborn. Our second theme is that of social control and governmentality. Here, the idea of the criminal justice system as a system of *justice* is deconstructed as sustaining and (barely) concealing a *system* geared towards the maintenance of a specific, and rather problematic, social order. Although the ideas represented in this theme point directly to a Foucauldian tradition, and this much is reflected in the theoretical framework espoused by many of the papers representing it, the way in which this theme is explored by contributions in the journal makes use of a wide range of perspectives and approaches. At its heart, however, lies the intuition that criminal justice has to be understood through its relation to power and social order, and through its complicity with problems of social exclusion, structural inequality and political authoritarianism.

The intrinsic connection between criminal justice and oppression is also an essential element in our third theme, that of gender and sexuality. Here, the controlling and exclusionary aspects of criminal justice acquire an even more intimate and affective dimension, as they are revealed to regulate and

constrain the emotional subjectivities and lived experiences of individuals. Criminalization is inherently linked to processes and dynamics of ‘othering’, but looking at criminal justice through the optics of gender and sexuality magnifies the authoritarian nature of the link between law and morality, and the violence of the normalisation which occurs around the social construction of sexual identity in liberal societies. Another very interesting characteristic of this theme is that it highlights the ambivalent and contested role of criminal justice in contemporary societies, as a site of repression and violence which, perhaps paradoxically, may also offer a space for resistance. Being so central to the modern—and particularly the liberal—values around identity and autonomy, gender and sexuality present criminal justice scholarship with a particularly difficult challenge: that of trying to promote justice while also recognising how criminal justice practices directly harm some of the most fundamental aspects of concrete individuality.

In the next section, we trace and elaborate on the main elements of each of the four themes, and briefly discuss some of the contributions which exemplify them. Then, in the concluding section, we draw them together and reflect on what lessons can be learnt from the history of criminal justice in *Social & Legal Studies* so far, and then consider possible ways to build upon these in future contributions. The ordering of the four themes reflects their historical emergence and salience in the journal.

Criminal justice, social control and the search for emancipation

Popular Justice

In introducing the journal’s first special issue, Boaventura de Sousa Santos (1992) suggested that for a concept to be a core subject of debate, it must be sufficiently broad and plastic to include new dimensions as the debate develops. As importantly, it must have vague boundaries so that what is in

and outside the debate is never very clear. In such a debate, a discipline tests its edges and ultimately maintains its identity. Popular justice was precisely such an issue. De Sousa Santos referred to community justice and legal pluralism in his introductory essay, not popular justice. Others spoke of the contrast between legal formalism and informalism, but six out of the ten papers in this issue included the idea of ‘popular justice’ in their title.

The range of papers in this collection was impressive, with theoretical contributions balanced against case studies of popular or community justice in different parts of the world: Brazil, Chile, Mozambique, Nicaragua, India, the United States. The idea of popular justice was located historically in settings such as the Soviet Union, China, Cuba and Sri Lanka (Merry, 1992), and was then observed in contemporary settings, in a variety of roles. In Mozambique for example, Aase Gundersen (1992) depicted popular courts as sitting between the state and the community and reflecting both progressive and regressive social norms around issues of gender. MacDonald and Zatz (1992), in their essay on revolutionary Nicaragua, were alert to the ways in which the model of a mixed economy restricted popular involvement in agrarian decision-making. In Brazil (Paoli, 1992) and Chile (Parraguez, 1992), the focus was on the ways in which increased political involvement by the poor and repressed was opening up democratic spaces within the law as dictatorship gave way to democracy. In India and the United States, in contrast, the emphasis was on the popular dissatisfaction that existed with the Indian post-colonial state (Sethi, 1992), and the ways in which earlier more radical forms of popular engagement in the USA were giving way to conservative forms of ‘neo-populism’ (Harrington, 1992) – not an unfamiliar theme today of course.

Popular justice was thus a moving concept. Christine Harrington (1992) wrote of the experience in the United States of Community Boards which were shifting from what she called ‘authentic’ or ‘genuine’ populism, by which she meant forms of popular justice that could underpin governance strategies and direct action. The resulting liberal and radical visions of ‘community’ and ‘law’ were placed under attack by these conservative moves. The example is local in comparison with the

deeper historical roots of popular justice, which lay in the twentieth century’s experience of socialism and communism, in the struggles against fascist dictatorships of the 1970s and 80s, and in the liberation struggles being promoted in Africa and Central America. Yet, Harrington’s point about a radical understanding of community that could provide the basis for popular forms of agency, resist state authoritarianism and radically shape social demands and forms of government is to the point. That said, popular justice was an often inchoate idea that flourished in the 1980s on the back of the struggles of third world countries for liberation and emancipation. It then hit the pages of *Social & Legal Studies* just at the point in global politics when the world was turning again, and when, with the collapse of the Soviet bloc and a new unipolar world order, the social conditions for articulating popular justice were in retreat. In their place would emerge a world where the popular could be equated with authoritarianism and consumer choice. In such a world, emancipation would come to be regarded in both realpolitik *and* social theory as just the way and the language in which governance would occur.

Governmentality was Foucault’s word for anticipating and understanding this new world order, and it was to become an idea whose time had come. Ironically, there is an early interview between Foucault and some supporters of Chinese communism from 1972 in which he could be said to ‘out-Mao the Maoists’ in terms of popular justice. Where his interviewers suggest that a state apparatus and controls are necessary to promote third world communist revolution, Foucault responded that in the case of popular justice, ‘you do not have three elements, you have the masses and their enemies’ and the former ‘rely only on their own experience [and] purely and simply carry [their decisions] out’ (Foucault 1980: 8-9). Such an argument might be seen as an early, radical account of the relationship between power and law, wherein social power overcomes law in a rather different, indeed inverted, way to that depicted in his *Discipline and Punish* (Foucault, 1979). In terms of popular justice, though, what it indicates is something of the roots of the conceptual dilemmas that made the topic vague and contestable in the manner described by de Sousa Santos. What did popular justice really mean?

Peter Fitzpatrick (1992) neatly pinned down the underlying problematic thought, that popular or community justice was essentially informal in comparison to state law’s formalism, when he prefaced his contribution to the Special Issue with a line from William Blake: ‘Unorganised innocence: an impossibility.’ Norrie, in his later essay in the journal (1996), followed this line of thought to argue that the suggestion that popular justice involved a ‘dialectics of formal and informal control’ itself involved a strong and misleading dose of Weberian antinomianism (the abstraction and opposition of form to substance, of the formal to the informal) alongside the more obvious links to Marxian and Hegelian dialectics. His argument, that a structural conception of ‘legal architectonics’ combining form and substance differentially in different contexts, including those in so-called popular justice settings, reflected the experience of writers in the field such as Gundersen and MacDonald and Zatz, who found the rhetoric of popular justice to be at odds with the realities of progressive or regressive state governance and economic strategies in countries where a genuine commitment to emancipation struggled to win out.

A coda to this debate appears in a later essay by John Hund (2008) in which he criticises Rick Abel’s influential account of South African popular justice. Abel is well-known for his two-volume edited work on the politics of informal justice, and he later wrote an extended study on law and justice in the struggle against Apartheid in South Africa. Hund’s complaint is against Abel’s understanding of the Alexandra Treason Trial in which five defendants were charged with offences implying that grassroots community governance was in effect an attempt to overthrow the state. In reality it was an effort to *give form* to township justice in a situation where the state could no longer govern. Hund writes that the lesson of the Treason Trial for students of popular justice is that “self-help’ popular justice can create social capital which teaches people habits of cooperation’ and he adds that witnessing ‘non-state sources of social ordering, justice and living law is not a minor insight’ (2008:488). Whether extra-state law and popular justice ‘can create and sustain social life in a fair and decentralized way must be one of the most interesting and pertinent sociological questions legal scholars can ask’ (Hund 2008:488), but he suggests that a method of understanding popular justice

that fails to give credence to its particular *formal* qualities will end up misrepresenting and discounting its true historical and emancipatory significance. While popular justice may represent a debate that has been eclipsed for a significant period of our recent history, it points to issues of self-governance and emancipation that may find themselves back on the agenda in the years to come. If scholars find the ground shifting in new directions, they would do well to heed Hund’s recommendation that such justice is differently formed, rather than unformed.

Social Control and Governmentality

In the very first issue of *Social & Legal Studies*, an article by Suzanne Hatty and Stuart Burke (1992: 88) discussed the extent to which the stigma associated with the medicalisation of diseases such as AIDS/HIV and its link to ‘discourses on pollution’ contributed to ‘the construction of dangerousness’ in the context of crime and punishment. This paper effectively inaugurates what became perhaps one of the longest, richest and most pervasive traditions of scholarship within the journal: the critical analysis of criminal justice as a means of social control and an instrument of governmentality. Papers within this broadly conceived theme have largely explored the extent to and ways in which diverse aspects of criminal law and justice are intrinsically connected to a particular form of social, or civil (Farmer, 2016), order. And, just as in Hatty and Burke’s article, these papers have shown an active concern with exposing the extent to which the construction of values, ideas and institutions within criminal justice has served a specific social, political and economic agenda. This will often, if not always, produce, promote, or at least manage, conditions of exclusion and domination.

There are at least two important insights that can be gained from looking at issues of crime and punishment from the perspective of governmentality, which have been helpfully explored by one of Barbara Hudson’s (1998) contributions to the journal. One such insight is the intuition that power is shaped and exercised in different ways, which effect different forms of control—and that law plays an important and complex role in these mechanics. Hudson has highlighted how scholarship on

governmentality has turned our attention to the idea of ‘the juridical’ as a specific form of power directed at controlling acts, which can ground an expanded understanding of the political role of the legal system. Another important notion within this framework is that of normalization as a ‘project of governance’ (Hudson, 1998: 555) which is intimately related to the nature of social control in and since modernity. In broad strokes, then, the theme of governmentality in criminal justice can be said to be primarily represented by efforts to understand criminal justice as a form of juridical power, which is exercised through and in order to produce images of normality and deviance which are then respectively promoted and repressed in social reality and experience.

One of the main ways in which these insights are explored within this theme is through analyses of the interrelation between knowledge and power, as exemplified by Melossi’s (1993: 259) discussion of how ‘conditions of punishment are dependent on the social structure’, and how they are conditioned by the social perceptions of power elites. Similarly, the ideological dimension of criminal justice policy and practice, as well as the extent to which these are enabled and legitimated through specific discourses and symbolic apparatuses, constitute a common and invaluable line of enquiry. Many of the notable interventions in this area make use of historical critique in order to uncover the implication of criminal justice in the project of social control. For instance, John Pratt’s article on the social construction of dangerousness (1996) examines how the notion of the dangerous offender shifted significantly in the end of the twentieth-century, from an inherently welfarist conception to an approach based on actuarial risk, which was more attuned to the needs of neo-liberal society. This way, the framework of dangerousness laws legitimated a new form of governance which was devoid of the original aspirational aims once attributed to that form of regulation. Lindsay Farmer’s (1996) paper, in turn, highlights how the doctrinal definition of crime contained within legal knowledge, while circular and therefore seemingly imprecise, in reality serves a very specific purpose in the constitution of the modern criminal law, which is central to its role as an instrument of social order.

Looking at criminal justice through the lens of social control and governmentality almost inevitably means highlighting its violent, oppressive side. Indeed, in its relation to power, criminal justice defines and reinforces an image of order and community primarily by excluding, both physically and symbolically, certain individuals and groups from full participation or membership in society. It does so, for instance, by reproducing a problematic link between race and drugs in the criminalisation and enforcement of drug crimes, as suggested by Desmond Manderson (1997). Likewise, Barry Vaughan (2000) has also investigated how the law can construct young people as a social category in need of enhanced regulation, deploying the notion of active citizenship as a device targeted at controlling and repressing disorder. Throughout its history, scholarship in *Social & Legal Studies* has covered a wide variety of instances in which criminal justice contributes to the oppression of specific groups and populations, from youth, the insane and the intoxicated, to colonial, racialized and indigenous populations, including problems such as drug laws, poverty laws, anti-social behaviour, human trafficking, hate crime laws, and the criminalisation of migration.

Generally, attention to the relationship between criminal justice and control emphasises the ‘positive’ and ‘productive’ nature of legal power. However, in doing so, this perspective highlights how the social role of criminal justice institutions appears mostly negative, in the sense that it maintains, and even actively produces, problems of structural inequality and socio-political violence. Nonetheless, arguably the main picture that emerges from such a study is actually one which reveals and magnifies the tensions contained within criminal justice, particularly as a liberal project. For example, Mark Brown’s (2004) paper examining the criminalisation of certain tribes in nineteenth-century India exposes the complexity of such historical settings, where a predominantly repressive and authoritarian discourse around the criminal tribes legislation and its implementation by administrators is contrasted with a much more ambivalent historical record in relation to the government of tribes such as the Minas, evidenced by underexamined military records which displayed a more classic liberal approach that privileged recruitment and assimilation over repression. Likewise, there is an intrinsic paradox contained within the idea of criminal justice, one

which uneasily conjoins violence with emancipation. The instrumentality of criminal justice as an apparatus of governmentality and social control is an important aspect of this paradox, but it is not the whole story. Interventions such as Brown’s have recognised and explored this complexity, applying a post- or de-colonial perspective which contextualises criminal justice within a contradictory imperial project and process, which conditions and underpins its structural and ideological violence.

Furthermore, although looking at criminal justice from the perspective of social control undoubtedly implies to look at it in a negative and critical vein, some contributions have sought to use these critical analyses as pathways toward thinking of forms of improvement, resistance, and perhaps change. In a rich exchange, Neil Hutton (1999) and Barbara Hudson (1999) have debated, in their respective articles, the possibility of advancing Hudson’s idea of a ‘social theory of culpability’ in criminal justice, and thus allowing the notion of criminal responsibility to address, or at least accommodate for, social problems such as poverty. More recently, Awol Allo (2017) examined the possibility of using the criminal trial as a space of resistance, by tapping into the political essence of the criminal trial through re-signification, from the perspective of the trial of Marwan Barghouti in Tel-Aviv. Therefore, although looking at criminal justice as a means of social control primarily evokes the limits of pursuing justice through the legal disposition of crime and punishment, this approach also inevitably explores the promise of emancipation embedded within this pursuit, echoing Foucault’s intuition that the productive character of power includes the production of the very means of resistance against it (Foucault, 1980). Ultimately, however, the extent to which the project of criminal justice reveals itself as perpetuating many forms of injustice and aimed at producing power, exclusion and control evidences how any promise of emancipation contained within it is, at the very least, hard to articulate and yet to be actualized.

Though in many ways related to the main critical concerns discussed in relation to the previous theme, looking at these concerns from the perspective of gender and sexuality renders particular insights, and such is the breadth and depth of *Social & Legal Studies*’ scholarship on such matters in criminal justice, that this area deserves to be acknowledged on its own right. In the journal’s history so far, something between one third and one half of all the papers published discussing criminal justice have issues of gender and sexuality as one of their main foci. This is not only a clear acknowledgement of the general relevance of gender and sexuality to social and legal studies in general, but also a specific reflection of the journal’s commitment ‘to feminist [...] perspectives to the study of law’, as expressed in its mission statement. Furthermore, although—as suggested by contributions such as Tamar Pitch’s (1992)—feminist scholarship is particularly apt to shed light on issues of social control and oppression, the way in which it does so is by seeking a deeper, more substantial understanding of the subjectivities of the oppressed, thus maintaining a much closer dialectical connection between oppression and emancipation.

It should be said that, although—as just mentioned—the body of work involved in this theme owes a significant debt to feminist scholarship, the purpose of this section is not to delve in detail into the nature and quality of feminist contributions to the journal in the twenty-five years since its inception (such is the specific aim of another contribution to this issue). Instead, the focus here is on how discussions of gender and sexuality have informed an understanding of problems and debates in criminal justice. However, it should also be mentioned that the articles in *Social & Legal Studies* which have dealt with gender and sexuality in criminal justice have displayed an exceptionally inquisitive and creative approach to the theme, constantly dealing with matters that go beyond what could be considered more well-established discussions in the area—although the journal figures many important contributions to those discussions as well. For instance, one of the earliest papers published in the journal was Leslie Moran’s (1995) discussion of ‘the juridification of the male body and its desires’ in relation to the case of sadomasochism. In the following year, Sarah Payne’s article (1996) looked at changes in the history of psychiatric admissions and its link to criminalization

and incarceration, to analyse the notion of masculinity in relation to the increasing ‘redundancy’ of the domestic role of young males. Then, later in that same year, Christine Bell and Marie Fox (1996) provided a fresh perspective to the study of the criminalization of women who kill, by moving beyond the traditional scenario of women who kill their partners in response to domestic abuse. Throughout its history, scholarship in the journal has discussed issues as diverse as homophobic violence and the criminalization of homosexuality; sexual violence against children and the criminalization of paedophilia; sexual and gender violence in an international and global perspective; human trafficking for sexual purposes; the criminalization of abortion and of pregnant women who take drugs; the problem of forced marriages; prostitution; incest; sexually-transmissible diseases; among others.

In terms of the particular insights which this theme brings to criminal justice studies, as mentioned above, it exposes the gendered character of legal domination and of the civil order engendered through it, as well as the intimate and affective dimensions of its many forms of subjectification and social control. Within the scholarship in the journal, these issues have been explored through a variety of different methods and perspectives. Some contributions have directly offered rewarding reflections on the choice and the limits of methods, such as Carol Smart’s (1999) notes about the value of historical work to our understanding of sexuality, highlighting how such work ‘challenges our modern complacencies and arrogance, and brings us back in touch with the prolonged difficulties of bringing about social and legal change’, thus also ‘locat[ing] us ... in an important tradition of endeavour and struggle’ (1999: 392). There have also been examples of work that have explicitly enquired on the need for intersectional analyses of issues of gender and sexuality in criminal justice; for instance, Anny Cossins’ (2003) paper on the cultural legal construction of different female subjectivities deployed the notion of ‘convergence’ to approach the interrelation between sex and race with regards to the vulnerabilities of certain populations. Some papers were based on literary and cultural analysis, like Jenni Millbank’s (2004) exploration of the representation of lesbians in a prison setting. Others employed creative empirical methodologies to circumvent the

limitations of access to aspects of the criminal justice system, such as Louise Ellison and Vanessa Munro’s papers (2009, 2014), which were based on the use of mock jury trials to understand the many factors affecting jury deliberation in rape trials.

Another aspect that should be highlighted about this area of criminal justice scholarship, that further differentiates it from the other themes, is the higher degree of ‘positive engagement’ with criminal justice practices and institutions—that is, a more consistent and active attempt to use the law, and the criminal justice system more broadly, as a space for struggle, instead of a solely problematic aspect of society to be abandoned or transcended. Many papers in the journal examine how to pursue a more substantial kind of justice through law, either through re-deployment or through reform, echoing Carol Smart’s suggestion that ‘law, understood in its widest meaning, is still one of the most important sites of engagement and counter-discourse’ (1999: 392).

Perhaps this is a reflection of the ‘utopianism’ (Lacey, 1998) inherent in aspects of gender critique, the belief that things can and should be different which can stem from the keen awareness that the values and normative categories upheld by the law lie in sharp contrast with concrete lived experiences. ‘Another law and justice’ should be pursued. As Lacey (1998) has suggested, critique, reformism and utopianism are often interrelated projects, so that attempts to reform and strategically deploy the law are not necessarily in tension with the recognition that the criminal justice system is predominantly an instrument of domination and oppression. The scholarly engagement with issues of gender and sexuality in the pages of the journal has therefore acutely expressed the complex and ambivalent dynamics of criminal justice, and shown how the deeper and nuanced understanding of subjectivity and relationality promoted by such engagement has the potential to ground resistance.

Transitional Justice

Like ‘popular justice’, the idea of transitional justice probably thrives because its meaning is vague and plastic. It is associated with the transition from violent authoritarian regimes to more liberal (and neo-liberal) regimes that are judged politically and legally more progressive. Empirically, transitional justice studies analyse the legal forms that accompany such transitions and which seek to judge and resolve past violations in order to establish a better present and future. As Bell, Campbell and Ni Aolain put it, ‘Transitional justice analyses provide important tools in understanding how societies emerge from violent conflict. As generally understood, ‘transitional justice’ encompasses the legal, moral and political dilemmas that arise in holding human rights abusers accountable at the end of conflict’ (2004: 305). This is a descriptive and thin, though still important, account of transitional justice, trimming the concept to political objects. If a stronger understanding were sought, it might be helpful to distinguish the justice that accompanies social and political transitions from ‘transitional justice’ in a deeper sense, meaning a justice that is specific to, or immanent within, a dynamic social setting where there is a desire to question the past and find different and new ways of proceeding. It would emphasise the different trajectories and promises immanent within transitions. Comparison might be drawn with the socially liberative qualities of transition envisioned in psychodynamic theory and therapy by writers such as Jonathan Lear (1998) and Jessica Benjamin (2018). Writing in the same issue of *Social & Legal Studies*, for example, Kirsten Campbell proposes with regard to humanitarian law that ‘we should ... begin with ... the institution of justice [which] requires a radical rethinking of the existing positive legal order of international humanitarian law [and] the development of a new positive legal order, from a new symbolization of the wrong – such as a new category of humanitarian crime of sexual violence – to a new symbolization of justice – such as a new conception of legal remedies’ (2004: 346).

Precisely what this entails may be unclear, but the argument latches onto a critical method that looks beyond the already known, leans on the concept of transition, and reflects the sense of an open historical future: one in which the world might be reorganised in the interests of the many. Many of the papers on transitional justice imply that there is some such deeper quality to the idea of

transitional justice. They do not define it analytically in, say, the way that legal theorists might define ‘retributive justice’, but they recognise a range of social and critical methods which are deemed appropriate in addressing the phenomenon in a variety of social and historical contexts, and so doing they imply an immanent if inchoate understanding of what transitional justice in the social world might *become*. Here, an important role is played by feminism, for example in Julietta Lemaitre’s (2016) account of women living in a Colombian conflict zone as they organise their lives to guard and sustain themselves, their families, each other, the land and the environment in ways that are emotionally grounded and sustainable.

Since the turn of the century, *Social & Legal Studies* has published about 30 essays on transitional justice. The scholarship is rich and diverse, so general conclusions are hard to achieve.

Geographically, it has discussed the phenomenon in a variety of settings: Northern Ireland, South Africa, the former Yugoslavia, Sierra Leone, New Zealand, Rwanda, Argentina, Japan, Sri Lanka.

Papers have discussed the Holocaust and the overall effect of Empire and the need for restitution.

Within these different settings, authors have focused on a variety of issues including reconciliation, the role of the trial, the relationship between the trial and other goals of transition such as truth,

fact finding and healing, the creation of new representative institutions, the treatment of girl

soldiers, of gender more generally, reconciliation with regard to historical wrongs, former

combatants, the place of social and economic rights in settlement, legacies of prejudice, alternative

tribunals, apology, the role of forensic science, the court as archive, gendered crime. A general focus

has been on victims, the translation and subsumption of violation and trauma into a political setting,

the resulting hierarchy between ‘good’, ‘less good’ and ‘bad’ victims, the ability of victims to reject

transitional processes conducted in their name, the sometimes progressive recognition of gender in

victimhood, and then the unforeseen political effects of so doing.

Theoretically, a range of approaches have been used to highlight the connection between a process of supposed transition and the underlying social, political, ethical and emotional relations that are

partially or otherwise engaged or denied by, or that are deflected, changed, and controlled in, the process. To achieve these rich and subtle understandings of the relationship between forms of power and how they address deep-seated kinds of trauma and violation, a variety of theories are deployed including feminism, psychoanalysis, critical discourse analysis, Derrida’s theory of ‘spectrality’ and Agamben’s of ‘bare life’. In all cases, the question might be: as liberal legal power reaches out in a variety of purportedly enlightened, humanitarian ways to resolve historically severe violation and to allow communities to move on, what is nonetheless missed or repressed, what returns and repeats, what bites back at the proposed resolution?

In their survey of the travails of transitional justice in Northern Ireland, Bell, Campbell and Ni Aolain (2004) examine the salience of the concept of the rule of law in a violent and conflicted setting. They consider the need to reshape legal institutions to face new realities, the need to deal with the past, the accommodation of minorities and the establishment of minority rights, and unmet transitional needs such as those existing around the treatment of gender. The claim for a new understanding of gender relations emerges as a need for a future that would not be the exact same as the past, in which work needed to be done to remodel and live social relations differently. Such a claim for a different future taking off from the present is generally immanent to transitional justice. As Vikki Bell explains in the same issue of the journal, the new institutional idea of a Civic Forum in Northern Ireland cannot be seen as simply a technology for peace, but must rather be understood as a way of thinking about the future differently from the present or past. Peace requires, she says, ‘a call to the future, a call for a new spirit. This new spirit is one that cannot be conjured, marketed and distributed like an easy sentimentality’. Rather, ‘the pursuit of Peace has to be sought in the messiness of the present, and ... the heterogeneity of the past’. The ghosts of the past cannot be simply banished but must rather be acknowledged leading to ‘a conjoining of ... divergent paths as a condition of that future’s very possibility’ (Bell, 2004: 423).

Bell’s comments, aligned with Campbell’s demand for a new humanitarian law, Lemaitre’s account of women in a Colombian war zone, and juxtaposed with Bell, Campbell and Ni Aolain’s sober evaluation of the problems of actually existing transition, highlight the nature of transitional justice. On the one hand, it is a discourse rooted in an historical period and directed at an existing empirical phenomenon, one that has developed far beyond its early roots in the trials of the post-Second World War period. It is the form of justice that in different ways has accompanied the advent of a unipolar world order, where some (but by no means all) regional disruptions could be smoothed over in more confident times through legal and quasi-legal means. It deals in the currency of that order – the rule of law, the transition to democracy, individual human and minority rights, the neo-liberal economy. From that standpoint, it engages with the difficulties of getting the social world to behave according to the liberal imaginary’s prescribed legal standards. (What happens when the violence doesn’t stop?) But transitional justice is then a process with clear limits, for the currency in which it deals is itself able to provide the basis for only a limited transition. Private property rights, but not social and economic obligations or the upholding of peasant land rights. Formal democratic rights but no substantive equalisation of access to wealth. Gender recognition in terms of violations, but no change in terms of roles. On the other hand, the term ‘transitional’ signifies something more than a legally and politically trimmed and tailed change that leaves the broader issues undisturbed. Here the concept aligns with the real experience of those who have undergone violation and trauma, and who do not want themselves or their families to repeat it. ‘Never again!’ is the oft-repeated claim, and it has to be repeated precisely to the extent that the underlying situation remains unchanged, to the extent that the looking to the future does not entail an ambitious rethinking of and engagement with the past. In this deeper sense, transitional justice adds moral and political heft to the idea of transition, and draws on emancipatory demands immanent in the social world.

Four dialectical tropes, critique and social history

We should reassert the diversity and multiplicity of topics and method in criminal justice discussion in *Social & Legal Studies*. In picking out four areas, we have inevitably selected and interpreted in one way when others would have been possible. The areas we have selected nonetheless reveal something about the field as a whole, in terms of what they tell us about both theoretical method and the journal’s historical location in a particular time and place. We wish to connect these two aspects. In reviewing the development of criminal justice scholarship, we were struck by the bold critical starting point represented by popular justice, while noting its inability to sustain its theoretical and practical significance beyond the early days. We then noted the role that the governance and gender and sexuality literatures have played in establishing a central and staple critical diet in the field. Then finally, we looked at the issue of transitional justice as an emergent topic, and one that in some way recapitulates the popular justice debate, albeit while remaining quite distinct in its form, function and context.

We regard these four themes as worthy of identification first of all because they represent four important ways in which criminal justice occurs in the world. Popular justice reflected important developments in societies in the 1970s and 80s, and had its roots in socialist organisation throughout the twentieth century. Historically, the 1990s saw these developments on the wane, and with them went the sense of the possibility of emancipatory change through new forms of law and democracy. A world which had lost that sense of possibility was one in which emancipatory promise might *itself* be seen as a part of the problem, as the new tool of the masters to make government possible. The new world order was one in which a theory of governmentality would find its perfect complement. At the same time, issues of sex and gender remained a crucial and fruitful location for thinking through how structural inequalities were systematically maintained while law could nonetheless be the source of important change. Law could also be linked to ideas of emancipatory freedom at least in a utopian sense, so that it was viewed overall as a complex phenomenon with

different negative and positive facets. Finally, the idea of transitional justice reflected the ongoing historical trajectory of a unipolar world order, which it would seek to fashion, but in ways that brought out the promise of something else. In these last two forms, the broken promises of modern emancipation linger in difficult relations and in complicated ways.

Two brief comments about the dialectical relation between form and history recommend themselves to us in thinking about this. The first is Gramsci’s remark about the old and the new and the ‘great variety of morbid symptoms’ that occupy us in the meantime. Indications of morbidity pervade the discussion of governmentality. Yet, even there the search for a sense of a freedom against power in the later Foucault reveals that the ways in which emancipation has become distorted do not tell us everything we need to know about the subject. Even as the world becomes contorted into ways of denying the human spirit, it seems at the same time to honour it in the distortion. The discussions of sex and gender and transitional justice reveal a similar understanding of how the world engages a dialectic of emancipation at the same time as powerful forces seek to roll it back, with law caught conceptually between impulses that are both ideal and liberatory, and authoritarian. Popular justice represents no simple solution to these issues, yet it indicates that power can rest with the many and not the few, and can be used in the pursuit of what E.P.

Thompson once referred to, in a different context and with due reservation, as a ‘rough music’, that is a form of law that ‘belongs to the people, and is not alienated, or delegated’ (Thompson 1991: 530). Morbidity is definitely a possibility there too, but at least in the contemporaneous debate, the old and the new were both on show, and the sense of an interregnum could be grasped and spoken of.

The second comment is from Marx, writing about right and law in his ‘Critique of the Gotha Programme’. There he wrote that ‘Right can never be higher than the economic structure of the society and its cultural development conditioned thereby’ (Marx, 1968: 320). There is a way in which a valid critique tracks the object it critiques since, in order to be valid, it must remain true to its

object and look immanently at the thing itself. Our four forms of critique, of popular and transitional justice, of governmentality and the critique of sex and gender in law, reflect the nature and the limits of the legal and social world they analyse, and they produce valid yet partial visions of that world. We see this in that we identify broadly what we call four dialectical tropes at play within the critical field.

In the field of popular and alternative justice, the key dialectical theme is that of negation. *Social & Legal Studies* opened its theoretical account with a special issue that played with the hypothesis that the problem of emancipation should be dealt with by ‘not-law’, by informalism-as-negation. It is really interesting to think that criminal justice scholarship was inaugurated in the journal by highlighting what criminal justice is not: that is, by highlighting the negation of criminal justice, and thinking of alternative forms of justice. To be sure, this was an abstract form of negation, which ultimately gave way to a sense of the place of law and differential legal forms in a complex historical totality, but the key dialectical trope was that of *dialectical negation*.

In the area of control and governmentality, the key dialectical figure is that of reversal, something that we can perhaps relate to the role of law in supporting a ‘master-slave relation’ under modern social conditions. We are reminded of Roland Barthes’s observation that the ‘universal language (law) comes just at the right time to lend a new strength to the psychology of the masters: it allows it always to take other men as objects, to describe and condemn at one stroke’ (Barthes, 1973: 45). This highlights the illusory, ideological, formal character of criminal justice, and the way that the form (of liberty) is turned against itself. In the struggle for recognition, a supposed tool for establishing freedom is turned into a weapon in denying it. Yet that was never supposed to be law’s purpose, quite the reverse, and the reversal is somehow immanent in the form itself as it moves through history: a *dialectical reversal*.

Gender and sexuality debates about law reflect something of these existing forms of negation and reversal, but add a sense of dialectical complexity. Law exists as exclusion, repression and

marginalisation, but the false universalism of abstract law and the contradiction between abstract universalism and concrete cultural and social realities establishes a complex setting in which outcomes and tendencies are potentially in conflict. If liberal theory establishes a basic ideal/ actual trope, in which liberative law (the ideal) faces a recalcitrant world not yet ready for it (the actual), gender and sexuality debates portray the legal ideal as a mode of repression not only subsumed in but also to a large extent reproducing the oppressive actuality. Yet it might also in a difficult setting provide means to negotiate alternatives. At the same time as criminal justice can be represented as criminal injustice, the ambivalence and complication at work in issues of gender and sexuality, which suggest the possibility of a different world, may also be explored as a site of struggle. This indicates *law's dialectical complexity in a whole*.

Finally, there is transitional justice. In dialectical terms, we see the appropriate trope as being that of reconciliation, albeit of a systematically *broken* character. The language of retributive and restorative justice, the search for truth, the desire for ‘transition’ all point in the direction of reconciliation. No doubt a conservative, Hegelian, reading of dialectical reconciliation is possible here, but that is not what we mean. This is a ‘transitional’ justice, but transitional to what? In Kazuo Ishiguro’s novel *Never Let Me Go* (2010), the characters are in transition, but it is a transition to their own death. Such a negative change is not envisioned by the makers of transitional justice, but what positive goal do they have in mind? A better world, but in what ways better, and with what outcomes? The articles in *Social & Legal Studies* are in general suspicious of what transition offers, and what is being reconciled with what. They point to negative continuities in the world that are suppressed through transition, while indicating how transition presupposes qualitative changes in social relations. So a reconciliation perhaps, but one that remains as a promise that is systematically undelivered: *law's (broken) dialectical relation*.

Conclusion

Perhaps, in the end, all that we are left with is still something of an ‘interregnum’, a condition of morbid symptoms and broken, unborn promises. Maybe legal theory, echoing Marx’s comment about right, can be no higher than the society of which it is a part. On the other hand, perhaps critical thought must start from the place which we inhabit, and in this regard, there is no doubt that the criminal justice scholarship in *Social & Legal Studies* has made an invaluable contribution to our understanding of past and contemporary social realities. One possible way forward is to continue to critically examine criminal justice as just one dimension of a larger social whole, which is inherently related to social and historical changes and underlying anthropological and ethical issues. If the backdrop to the first twenty-five years has been the advent of the unipolar world order, with what changes in criminal justice practices will we have to deal as that idealised order breaks down or becomes reformed in different geo-historical ways? In striving to develop our understanding of the intrinsic relations between criminal justice and power, order, history and change on the one hand and on emotions, subjectivity, and the struggle for emancipation on the other, we can hope to continue to challenge the limits and violence inherent in our contemporary practices of justice, and in so doing move beyond them, towards an increasingly real—and realisable—sense of what these practices could be. This could provide us with a fifth trope, to set alongside our four, and already foreshadowed in the positive, emancipatory aspect of critical scholarship: *the dialectical emergence of the new*.

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