Criminal Injustice

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Introduction

I have always loved the criminal law and I am frankly incredulous to hear that there are law students out there who don't enjoy studying it. The cases are mostly sensational, the doctrine is fascinating and ludicrous, and the stakes don't really get any higher. It is to the criminal law, after all, that one has to come to see the individual confront the full force of the state and its monopoly on punishment. In this chapter, I want to focus on the uneasy relationship between criminal law and what we call justice. I interrogate the key principles upon which our system of criminal law and justice proceeds and argue, with reference to the insights of queer, feminist and anti-racist scholars, that a critical approach to criminal law leads us inexorably to question much of what the criminal law tells us about justice, and that this is no bad thing.

What is Justice?

What do we mean when we talk about justice? In the first year of the law degree students will spend a lot of their time coming to terms with the notion of procedural justice; the idea that if the procedure is just or followed faithfully, the outcome will necessarily be just. This idea of procedural justice is very much at the heart of what we learn in criminal law, in evidence or in sentencing law. As we proceed through our degree we should, if we are being taught to think critically, become aware of the limits to procedural justice. Procedural justice only works if the procedure and those implementing it are completely free from bias. Because the exercise of discretion is often a key aspect of procedural justice, it is virtually impossible to guarantee that the law will be applied free from discrimination or prejudice. This is where justice as fairness or equality brushes up against procedural justice and students are forced to confront just one example of the conceptual messiness of law.

In the criminal law we often talk about criminal justice as both a concept (or set of principles) and a system. First year criminal law students will learn to reel off and explain criminal justice as deterrence, as retribution, as rehabilitation, incapacitation, restitution or denunciation. The system refers to the arms of the state from police, to prosecutors, to the judiciary, and prisons and probation, which are responsible for implementing the aims and goals of criminal justice. Those aims and goals include insuring and maintaining public order, social control and personal safety, vindicating individual autonomy and protecting property. What necessarily underpins the conceptual and institutional understandings of criminal justice are: first, an agreement that the goals of criminal justice are valid and accurately capture the notion of 'justice'; second, a societal acceptance that it is legitimate for the system to pursue and implement those goals on our behalf and; third, a faith in the capacity of the system to deliver these goals. Queer, feminist and anti-racist scholars and activists however, fundamentally challenge these presumptions.

The Validity of Criminal Justice Goals

Critical scholars challenge the very values upon which criminal justice goals are based and claim their validity. Criminal justice principles and goals reflect a hierarchy of values that are, more often than not, designed to protect existing structures of power and the status quo. The legal fiction of 'joint enterprise' is an oft-cited example of how criminal justice goals are selectively deployed in ways that entrench existing inequalities, often with discriminatory and unjust outcomes.

The doctrine of secondary (or accessory) liability is used in criminal law to deal with cases in which groups of people are involved in criminal activity and where responsibility for a particular criminal consequence is shared. Prior to 1985, the law in England and Wales operated on the basis of principles that had been law for at least 120 years,[1] in which secondary liability was based on proof that a defendant had 'aided, abetted, counselled or procured' the commission of the principal offence. The accompanying mens rea required proof of an accomplice's intent to do those acts of assistance or encouragement, with the awareness of their ability to assist or encourage the principal in committing a criminal offence.[2]

In 1985 the Privy Council heard a case that profoundly changed the law in respect of secondary liability in cases of joint enterprise.[3] These are cases in which two or more people agree to commit one crime (crime A) but during the commission of that crime, one of them goes on to commit another offence (crime B). What happens, for example, when two or more people agree to commit a burglary, but during the course of that burglary a murder is committed? The legal problem in these cases of joint enterprise is ascertaining the liability of those accomplices *to* crime A *for* crime B. In *Chan Wing-Siu* the Privy Council held that, in cases of joint enterprise, an accessory to crime B will be guilty of that crime if he had foreseen the possibility that the principal actor might act as he did. An accessory's foresight of that possibility, plus his continuation in the enterprise to commit crime A, were held sufficient in law to bring crime B within the scope of the conduct for which he was criminally liable. The law, therefore, no longer required proof of intent on the part of the accessory for liability for crime B.

The consequences of this change in law were significant. Because secondary parties are convicted of the same offence as the principal offender, one glaring implication of *Chan Wing-Siu* was that a lower threshold of mens rea was now required to convict a secondary party (who may not have even been at the scene of a crime) of an offence like murder, than the principal who actually committed the actus reus. The House of Lords adopted the reasoning in *Chan Wing-Siu* in *Powell and English* in 1999,[4] endorsing and developing the policy basis for the Privy Council's departure from settled doctrine. In the words of Lord Steyn: "The criminal justice system exists to control crime. The prime function of that system must be to deal justly but effectively with those who join with others in criminal enterprises… In order to deal with this important social problem the accessory principle is needed and cannot be abolished or relaxed."[5]

The cases of *Chan Wing-Siu* and *Powell and English* met immediately with robust scholarly criticism and as the effects of the law became more widely publicly known, popular dissent followed.[6] It was not until 2016 in *Jogee* that the Supreme Court overturned its own precedent, stating that the Court had taken a 'wrong turn' in *Chan Wing-Siu,* and the law of joint enterprise should revert to its previous doctrinal status as a species of secondary liability proper, in which foresight was not equivalent to intent but was instead only relevant as evidence of that intent.[7]

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[1] Accessories and Abettors Act 1861, section 8.
[2] See *Johnson v Youden* [1950] 1 KB 544; *Bainbridge* [1960] 1 QB 129; *Maxwell v DPP for Northern Ireland* [1978] 3 All ER 1140.
[3] *Chan Wing-Siu v The Queen* [1985] AC 168.
[4] [1999] 1 AC 1.
[5] per Lord Steyn in *Powell and English* [1999] 1 AC 1, 14.
[6] See, for example, 'Jengba', formed in 2010 to campaign against the law of joint enterprise. 'Joint Enterprise,' accessed 16 June 2021, https://jointenterprise.co.
[7] *R v Jogee* [2016] UKSC 8; *Ruddock v The Queen* [2016] UKPC 7.

It is important for us to think about the political and policy context in which this 'wrong turn' took place, among the consequences of which were the mass imprisonment of, disproportionately, young men of colour, many of whom were subject to life sentences.[8] In 1997, the New Labour Government of Tony Blair swept into power with a flagship policy called 'Tough on Crime, Tough on the Causes of Crime', which was designed to rival the Conservative's monopoly as the party of law and order.[9] That policy relied on bullish crime control rhetoric and gave way to the Crime and Disorder Act 1998, which ushered in a new agenda of "authoritarianism, communitarianism, remoralization [and] managerialism" in criminal justice administration in the UK, much of which was explicitly targeted at young people.[10] The moral panic of the time was heavily focused on the spectre of marauding gangs of youths, wantonly committing crime with no accountability, parental or otherwise.[11]

As a number of criminal justice scholars have pointed out, the rhetoric that supported this shift took a highly racialised tone that bled through to its implementation.[12] There is a documented link between the criminalisation of young Black men in particular with the 'gangs discourse' that accompanied these broad legal and policy changes.[13] The Met Police's 'Trident Matrix', for example, includes a database of those subject to surveillance pursuant to 'gangs' policing, 86% of which were revealed in 2019 to be Black, Asian or minority ethnicities.[14] These changes occurred too at a time when crime rates were declining and there existed no credible data to suggest gang violence was a growing or especially acute problem in the UK.[15] Indeed, and as the Supreme Court pointed out in *Jogee*, there was no "objective evidence" that the law prior to *Chan Wing-Siu* or *Powell and English* failed to provide adequate protection from 'gang' crime.[16] Instead, the departure from precedent was justified

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[8] A survey of prisoners in 2014 suggested that up to half of those imprisoned pursuant to joint enterprise laws identified as 'BAME'. Patrick Williams and Becky Clarke, *Dangerous Associations: Joint Enterprise, Gangs and Racism* (Centre for Crime and Justice Studies, 2016), accessed 16 June 2021, https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/Dangerous%20assocations%20Joint%20Enterprise%20gangs%20and%20racism.pdf.

[9] Fran Abrams, 'Election '97: Blair Promises Bill to Tackle Youth Crime,' *The Independent*, 25 April 1997, accessed 16 June 2021, https://www.independent.co.uk/news/election-97-blair-promises-bill-to-tackle-youth-crime-1269277.html.

[10] John Muncie, 'Institutionalized intolerance: Youth Justice and the 1998 Crime and Disorder Act,' *Critical Social Policy* 19/2 (1999), 147.

[11] See the comments of Jack Straw, former Home Secretary, cited in *Guardian*, 28 November 1997, cited in Muncie, 'Institutionalized Intolerance', 148.

[12] Claire Alexander, '(Re)thinking "Gangs."', *Runnymede*, 2008, accessed 16 June 2021, https://www.runnymedetrust.org/uploads/publications/pdfs/RethinkingGangs-2008.pdf; Patrick Williams, 'Criminalising the Other: Challenging the Race-Gang Nexus.' *Race & Class* 56/3 (2015), 18–35.

[13] Williams and Clarke, *Dangerous Associations;* Amnesty International. *Trapped in the Matrix: Secrecy, Stigma, and bias in the Met's Gangs Database* (London: Amnesty International UK, 2018). Accessed 16 June 2021, https://www.amnesty.org.uk/files/reports/Trapped%20in%20the%20Matrix%20Amnesty%20report.pdf

[14] Met Police, 'Current list of people listed on the Gang Matrix,' March 2019, accessed 16 June 2021 https://www.met.police.uk/foi-ai/metropolitan-police/disclosure-2019/march/current-list-people-gang-matrix/

[15] Juanjo Medina and Jon Shute, '"Utterly Appalling": Why Official Review of UK Gang Policy is Barely Credible,' Manchester Policy Blogs, 16 December 2013, accessed 16 June 2021, http://blog.policy.manchester.ac.uk/featured/2013/12/utterly-appalling-why-official-review-of-uk-gang-policy-is-barely-credible/; Hannah Smithson, Rob Ralphs and Patrick Williams, 'Used and abused: the problematic usage of gang terminology in the United Kingdom and its implications for ethnic minority youth,' *British Journal of Criminology*, 53/1 (2013) 113−28.

[16] *Jogee,* 75.

with reference to "weighty and important" practical policy considerations, which "prevailed over strict logic."[17]

It is in contexts like these then that critical scholars call the validity of criminal justice goals into question, and where it can seem that criminal justice rhetoric and infrastructure is being used as a shroud to control and discipline specific populations. Or where the principle of public order is relied upon to trump that of individual autonomy, though it is the autonomy of a few that is most heavily impacted.

As critical criminal lawyers we should be clear that decisions like those taken by the Courts in rewriting the doctrine of joint enterprise involve value judgments that can't be artificially extricated from the political context in which they sit by a veneer of legal positivism. Thus, although the principles and goals of criminal justice are supposed to vindicate our shared values critical scholars argue that in practice, criminal justice is often mobilized to perpetuate class, race and other inequalities.[18]

The Legitimacy of the System

Closely related to our discussion of the validity of criminal justice goals, above, is a critical concern with the legitimacy of the criminal justice system in its pursuit and implementation of criminal justice principles and goals. Our recognition of the state's right to determine and implement criminal justice policies on our behalf is grounded fundamentally in the social contract, or the idea that we cede some of our freedom to the state in exchange for its protection. However, some argue that not everyone is included in this contract, or that the contractual benefits do not accrue equally.[19]

One way in which the system lacks legitimacy is because the use of state force is disproportionately applied. Above I discussed the troubled doctrinal history of joint enterprise as an example of criminal law and policy that has more severely impacted some communities over others, calling us to question the validity of the criminal justice goals upon which such laws are based. In fact, there is evidence of the disproportionate application of state force to racialized and minoritized communities at every point of the criminal justice system. This is true of police use of stop and search powers, arrest and prosecution rates, conviction and imprisonment rates and disproportionate rates of deaths in custody or following police contact.[20] Between the years 1991 – 2014, 509 people from BAME, refugee and migrant communities died in suspicious circumstances after coming into contact with the police, prison authorities or immigration detention officers.[21] There has never been a successful prosecution of a criminal justice actor for the unlawful killing or otherwise of a person of colour while in state custody in the United Kingdom.

The system faces a crisis of legitimacy, then, among those communities who bear the brunt of its surveillance and application of force and for whom the dissonance between the promise of

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[17] *Jogee,* 55-56.
[18] For an approach to criminology that centres class and gender see: James W. Messerschmidt, *Capitalism, Patriarchy, and Crime: Toward a Socialist Feminist Criminology* (Totowa, NJ: Rowman & Littlefield, 1986).
[19] Charles Mills, *The Racial Contract* (Ithaca: Cornell University Press, 1997). See also Carol Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988).
[20] See: David Lammy, *The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System* (London: Lammy Review, 2017), accessed 16 June 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf.
[21] Harmit Athwal and Jenny Bourne, eds, *Dying for Justice* (London: Institute of Race Relations, 2015), accessed 16 June 2021, https://irr.org.uk/app/uploads/2015/03/Dying_for_Justice_web.pdf

criminal law and justice and the lived reality is most stark. A wave of Black Lives Matter protests across Britain over the summer of 2016 and again in 2020 saw thousands of young people on the street protesting racist policing, and police violence. There is little evidence today of any change in the conditions in which that unrest germinated. Black people continue to be stopped and searched by police at a rate nines times greater than that of white people.[22] The onset of the COVID-19 pandemic saw lockdown regulations imposed in racially discriminatory ways[23] as well as exposing, again, the ways that the consequences of crises are disproportionately borne by poor people and people of colour.[24] An investigation of the policing of the Black Lives Matter protests found that police disproportionately used excessive force at Black-led protests, and against Black protesters in particular.[25] It also found that police regularly neglected their duty of care to anti-racist protestors, both in terms of welfare support and in failing to facilitate the right to peaceful protest and assembly.[26]

The consistent dissonance then between what the criminal law and justice system says it will do for us, and the hard reality, leads to a crisis of legitimacy, which is only added to by its lack of capacity.

The Capacity of the System

As to the third presumption underpinning the logic of criminal justice, our faith in the capacity of the criminal justice system to deliver on its stated goals, critical scholars are skeptical. Even if we did accept the validity of criminal justice goals and the legitimacy of the system, that system often fails to deliver on what it says it is trying to do. There is an immediate tension, for example, between criminal justice principles like retribution and rehabilitation. There is a substantial body of literature attesting to the brutalizing effects of imprisonment, even for those who serve short sentences,[27] and an eye-wateringly high rate of reoffending among those who have previously been sentenced to imprisonment.[28] Surveys of

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[22] Home Office, 'Police Powers and Procedures, England and Wales, Year Ending 31 March 2020 Second Edition,' *Gov.UK*, 16 November 2020, accessed 16 June 2021, https://www.gov.uk/government/statistics/police-powers-and-procedures-england-and-wales-year-ending-31-march-2020. Searches of all 'BAME' groups were four times higher than those of white people.

[23] Adam Elliot-Cooper, *'Britain Is Not Innocent' A Netpol report on the policing of Black Lives Matter protests in Britain's towns and cities in 2020* (London: Netpol, 2020), 12-13, accessed 16 June 2021, https://secureservercdn.net/50.62.198.70/561.6fe.myftpupload.com/wp-content/uploads/2020/11/Britain-is-not-innocent-web-version.pdf.

[24] Public Health England, 'Disparities in the Risk and Outcomes of COVID-19,' *Gov.uk*, 2 June 2020, accessed 16 June 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/908434/Disparities_in_the_risk_and_outcomes_of_COVID_August_2020_update.pdf.

[25] Elliot-Cooper, *'Britain is Not Innocent'*, 18-25.

[26] Elliot-Cooper, *'Britain is Not Innocent'*, 25-28.

[27] Seena Fazel et al., 'Mental Health of Prisoners: Prevalence, Adverse Outcomes, and Interventions.' *Lancet Psychiatry* 3/9 (2016), 871-881; Zoe Cutcher et al. 'Poor Health and Social Outcomes for Ex-Prisoners with a History of Mental Disorder: A Longitudinal Study,' *Australian and New Zealand Journal of Public Health* 38/5 (2014), 424-429; Tyson Whitten et al., 'Parental Offending and Child Physical Health, Mental Health, and Drug Use Outcomes: A Systematic Literature Review,' *Journal of Child and Family Studies 28*/5 (2019), 1155–1168; Lucius Couloute, 'Nowhere To Go: Homelessness Among Formerly Incarcerated People,' *Prison Policy Initiative* (2018).

[28] A large-scale study in the United States, for example, showed that around two-thirds of ex-detainees were rearrested within three years, and three-quarters within five years. Matthew Durose, Alexia D. Cooper, and Howard N. Snyder, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* (Washington, DC: Bureau of Justice Statistics, 2014). For recent data showing rates of recidivism year-to-year in the UK see: Gov.uk, 'Reoffending', *Gov.uk*, 19 April 2021, accessed 16 June 2021, https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/crime-and-reoffending/proven-reoffending/latest#full-page-history.

public opinion towards punishment shows that people see rehabilitation as a key goal of imprisonment, however, few people seem to have faith that rehabilitation is ultimately possible in prison.[29] The literature on the effectiveness of rehabilitative initiatives in prison environments, coupled with reoffending data, would seem to bear out that skepticism.[30] It's important, therefore, for critical scholars and students to have an honest discussion in the classroom about the limits of the criminal justice system and its bluntness as a tool for social engineering. It is unlikely, for example, that the criminal justice system is going to be capable of fixing legal and policy failure in the areas of employment, health care, and education where this leads to criminality, particularly in retrospect.

Alongside conceptual tensions like those between retribution and rehabilitation lie very real material concerns about the capacity of criminal justice to deliver on its goals. The Chair of the Criminal Bar Association in the UK recently described the criminal justice system as "on its knees" due to a crisis in funding.[31] Cuts to funding over the last 10 years have impacted at almost every point in the system. The under resourcing of the police, prosecution services and courts have meant that, against the system's own measures of success in rates of prosecutions and convictions, many seriously offences are accurately described as having been decriminalized.[32] Cuts to legal aid for those who can't afford representation when charged with a criminal offence have had serious implications for equality of access to justice.[33] A lack of support for those being released from prison and on probation only adds to high recidivism rates among ex-detainees.[34]

Reflecting on the foregoing discussion calling into question the validity, legitimacy and capacity of the system and its underlying rationale then, there is an immediate conundrum for the critical scholar teaching the criminal law: How do we navigate the contradictions that the criminal law presents for us in the classroom and in our work? What does it mean to teach the doctrine of the criminal law, which is underpinned by and proceeds on the basis of these presumptions above, when all the while we believe them to be almost entirely fictitious? In a final reflection below I want to suggest that while a critical lens on the criminal law might lead us to question the foundations of the criminal law and the criminal justice system this doesn't need to end in nihilism (if we don't want it to!)

The Cost of Criminal Justice or an Alternative Horizon

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[29] Julian V. Roberts and Mike Hough, 'The State of the Prisons: Exploring Public Knowledge and Opinion,' *The Howard Journal of Criminal Justice* 44/3 (2005), 286, 296-298.
[30] M. Keith Chen and Jesse M. Shapiro, 'Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach,' *American Law and Economics Review* 9/1 (2007), 1-29; Patrick Bayer, Randi Hjalmarsson and David Pozen, 'Building Criminal Capital Behind Bars: Peer Effects in Juvenile Corrections,' *The Quarterly Journal of Economics* 124/1 (2009), 105-147.
[31] Owen Bowcott, 'Criminal Justice System is 'On Its Knees', Says Top English Lawyer,' The Guardian, 19 November 2020, accessed 16 June 2021, https://www.theguardian.com/law/2020/nov/19/criminal-justice-system-is-on-its-knees-says-top-english-lawyer.
[32] A stark example of this kind of failure can be seen in sexual offences. See: Centre for Women's Justice, End Violence Against Women Coalition, Imkaan and Rape Crisis England and Wales, 'The Decriminalisation of Rape: Why the Justice System is Failing Rape Survivors and What needs to Change,' *indd*, November 2020, accessed 16 June 2021, https://indd.adobe.com/view/4453b960-41a2-4eff-8aea-1839ec0aa2a5.
[33] Dominic Gilbert, 'Legal Aid Advice Network 'Decimated' by Funding Cuts', *BBC*, 10 December 2018, accessed 21 June 2021, https://www.bbc.com/news/uk-46357169.
[34] Robert Wright, 'England's probation service at risk from cash squeeze, watchdog warns', *Financial Times*, 28 September 2020, accessed 21 June 2021. https://www.ft.com/content/526fec7a-6537-4979-a45c-606d1f168372; 'London Prisons Mission' accessed 16 June 2021, https://www.londonprisonsmission.org/safe-homes-for-women-leaving-prison

It is a familiar criticism of the critical perspective that it can lead us to a dead end, in which a productive escape from real and material inequality and injustice are all but impossible. There is a paradox at the heart of our study of the criminal law for the critical scholar or student that might not necessarily be readily apparent through a liberal or 'mainstream' account of criminal law, and that appears when we consider what we must give up to accept the coherence of the criminal justice system in its totality. In other words, some of the aims we might have as queer, feminist and anti-racist scholars and activists are simply at odds with what criminal law offers us as justice. How do we reconcile our support, for example, for calls to defund the police or to abolish prisons with a concept of justice that has carceral responses at its apex?[35] We want the state to take crime seriously and to protect us, but we don't want to be used as a cover for increasing the power of the state, knowing what we know about how that power is unevenly distributed and applied.[36]

Our wariness about the validity, legitimacy and capacity of criminal law and justice means that we are also concerned with the way in which criminal justice goals are used to justify other forms of state violence like deportations,[37] or unequal access to state services like healthcare,[38] or just the everyday violence of being constantly subjected to humiliating harassment by state agents who seem to face little accountability for their actions.[39] In many ways, the cost of entry into the realm of criminal justice may just be too high to pay, both personally and politically.[40] Alternatively, our awareness of the paradox at the heart of criminal law may lead us to get to work rethinking the basis upon which we demand criminal justice and the animating principles and concepts upon which the system is based.

There is a long history in queer, feminist and anti-racist communities of mutual support and protection, and in some cases, of generating alternatives to current systems of criminal law and justice.[41] These groups emphasize the need to transform the meaning of justice as we

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[35] see further: 'Abolitionist Futures', accessed 21 June 2021, https://abolitionistfutures.com; Adam Elliot-Cooper, 'Defund the Police' is not Nonsense. Here's What It Really Means', *The Guardian*, 2 July 2020, accesed xxx, https://www.theguardian.com/commentisfree/2020/jul/02/britain-defund-the-police-black-lives-matter.

[36] See further on this point: Sarah Lamble, 'Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment,' *Law and Critique* 24/3 (2013), 229-253; Yvette Russell, 'Criminal Law to the Rescue? 'Wolf-Whistling' as Hate Crime,' *Critical Legal Thinking*, 20 July 2016, accessed 21 June 2021, https://criticallegalthinking.com/2016/07/20/wolf-whistling-as-hate-crime/

[37] Luke de Noronha, *Deporting Black Britons: Portraits of Deportation to Jamaica* (Manchester: Manchester University Press, 2020).

[38] Medact, Migrants Organise, New Economics Foundation, 'Patients Not Passports: Migrants' Access to Healthcare During the Coronavirus Crisis,' *New Economics*, June 2020, accessed 21 June 2021, https://neweconomics.org/uploads/files/Patients-Not-Passports-Migrants-Access-to-Healthcare-During-the-Coronavirus-Crisis.pdf ; Mattha Busby, Rhi Storer and Eric Allison, 'They're Going Grey in The Face': How Covid-19 Restrictions Are Affecting UK Inmates,' *The Guardian*, 20 October 2020, accessed 21 June 2021, https://www.theguardian.com/society/2020/oct/20/covid-19-prison-staff-say-restrictions-creating-a-mental-health-timebomb.

[39] Lewis, Paul et al. *Reading the Riots: Investigating England's Summer of Disorder* (London: London School of Economics and Political Science and The Guardian, 2011). Accessed 21 June 2021. http://eprints.lse.ac.uk/46297/1/Reading%20the%20riots%28published%29.pdf, 19.

[40] See further on this point: Yvette Russell, 'The Cost of "Justice": Sexual Offence Complainants and Access to Personal Data,' *Critical Legal Thinking*, 7 May 2019, accessed 21 June 2021, https://criticallegalthinking.com/2019/05/07/the-cost-of-justice-sexual-offence-complainants-and-access-to-personal-data/.

[41] For example, see the long history of Black and Asian grass roots organising in Britain, much of which promoted its own progressive political and social vision: Jasbinder S. Nijjar, 'Building From the Base, Starting From The Streets,' *Institute of Race Relations*, 22 October 2020, accessed 21 June 2021, https://irr.org.uk/article/building-from-the-base-starting-from-the-streets/; Anandi Ramamurthy,

currently understand it through the narrow lens of criminal law controlled by the state, and to build towards a future by harnessing the power of collective solidarity. Dean Spade calls this type of survival work "mutual aid", when it is done in collaboration with social movements demanding transformative change.[42] Mutual aid is a good way of describing a move towards social justice and away from criminal justice.[43] Social justice seeks individual accountability alongside a conscious politics of building and mobilizing collective action to address harm and foster wellbeing, while resisting neoliberal cooption.[44]

A key aspect of this work is about an acknowledgement that the systems that are in place do not meet many peoples' needs and an unwillingness to rely on the law or the various arms of the state to act as saviour. Mutual aid focuses on building capacity within communities to enable them to respond to the needs of their members with their own resources, as well as building a shared understanding of why it is that people don't have what they need.[45] Part of this work might involve, for example, generating discussion about alternatives to imprisonment, or promoting contextual understandings of crime and what is owed to each person as 'fairness' "tak[ing] into account someone's upbringing, health and social background in thinking about how the justice system should deal with them".[46] There may well still be a place for criminal law in such an alternative, but that place is likely to be strategic or tactical rather than central.[47]

Many mutual aid and community groups organizing an alternative to criminal justice emphasize the need for 'care not cops'.[48] That invocation of care as a central organizing concept for this type of work attempts to shift the focus away from punitiveness as the animating rationale for so much of what passes currently for criminal justice, and towards holistic responses focused on harm reduction, safety, health and well-being. Activists who work together toward a future without prisons, police and punishment urge their members and supporters to "practice everyday abolition"[49] by drawing on shared resources to "[build] the future from the present".[50] This involves working to address the conditions under which prison and police are considered to be the best option for us to deal with social problems, and by undoing the naturalness of carceral logic. Abolitionist practice can mean, for example,

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'Racism, Self Defence and the Asian Youth Movements,' *Discover Society*, 3 April 2019, accessed 21 June 2021, https://discoversociety.org/2019/04/03/racism-self-defence-and-the-asian-youth-movements/; Our Migration Story, 'Resisting Racism: the Bradford 12 Defence Campaign,' *Our Migration Story*, accessed 21 June 2021, https://www.ourmigrationstory.org.uk/oms/resisting-racism-the-bradford-12-defence-campaign.

[42] Dean Spade, *Mutual Aid: Building Solidarity during this Crisis (and the Next)* (London & New York: Verso Books, 2020).

[43] 'Abolitionist Futures.'

[44] Rickke Mananzala and Dean Spade, 'The Nonprofit Industrial Complex and Trans Resistance,' *Sexuality Research & Social Policy* 5/1 (2008), 53.

[45] Spade, *Mutual Aid.*

[46] 'Reframing,' *Transform Justice*, accessed 21 June 2021, https://www.transformjustice.org.uk/reframing/.

[47] Dean Spade, 'Laws as Tactics,' *Columbia Journal of Gender and Law* 21/2 (2011), 40-71.

[48] See, for example, this community group organizing in Portland, Oregon: 'Care Not Cops,' https://www.carenotcops.org.

[49] Sarah Lamble, 'Practising Everyday Abolition,' in *Abolishing the Police*, Koshka Duff ed. (London: Dog Section Press, 2021) 147-160.

[50] Ruth Wilson Gilmore, 'Making Abolition Geography in California's Central Valley,' *The Funambulist*, 20 December 2018, accessed 21 June 2021, https://thefunambulist.net/making-abolition-geography-in-californias-central-valley-with-ruth-wilson-gilmore.

demanding police out of schools,[51] campaigning against educational exclusion,[52] or advocating for universal health care and housing. Working towards abolition is an ongoing process of everyday practice, both personal and political, and one that decentres criminal justice and asks different questions of and about the law.

Conclusion

What does it mean to demand accountability for criminal behaviour, while also being profoundly wary of the state's approach to criminal justice? These are difficult questions but ones that we need to ask ourselves from the beginning of our study of the law. In this chapter I've offered a critical perspective on some of the key elements that scaffold what we learn in criminal law early on in our degrees. Those elements include the concepts and principles that underlie criminal law, and some of the key aims and goals of the criminal justice system. The critical perspective requires us to think about the doctrine in context and to maintain, perhaps, a healthy skepticism towards what the criminal law says about itself.

Our critical skepticism of the cohering logic behind our study of criminal law and criminal justice doesn't need to lead us to abandon the social contract all together. It might instead direct us to more creative thinking about what social solidarity means and what accountability and responsibility requires under conditions of profound social, economic and political inequality. We might take to seeing the criminal law as 'tactics' to both deconstruct and deploy as necessary,[53] rather than as a coherent whole the rules of which we need to internalize and memorize to pass our law degree successfully. However we perceive it, learning the tools to think critically for ourselves remains crucial.

Recommended further reading:

- Kaba, Mariame. *We Do This 'til We Free Us: Abolitionist Organizing and Transforming Justice.* Chicago: Haymarket Books, 2021.
- Lamble, Sarah. 'Queer investments in punitiveness.' In, *Queer Necropolitics*. Jin Haritaworn, Adi Kuntsman and Silvia Posocco eds. London: Routledge, 2014.
- Naffine, Ngaire. *Criminal Law and the Man Problem*. Oxford: Hart Publishing, 2019.
- Norrie, Alan. *Crime, Reason and History: A Critical Introduction to Criminal Law* Cambridge: Cambridge University Press, 2014.
- Shankley, William and Patrick Williams. 'Minority ethnic groups, policing and the criminal justice system in Britain.' In *Ethnicity and Race in the UK: State of the Nation*. Bridget Byrne, Claire Alexander, Omar Khan, James Nazro, William Shankley eds. Bristol: Policy Press, 2020.

[51] Vik Chechi-Ribeiro, 'Why the Police Have No Place in Schools,' *The Guardian*, 5 September 2020, accessed 21 June 2021, https://www.theguardian.com/commentisfree/2020/sep/05/police-schools-manchester.
[52] Berni Graham et al., *School Exclusion: A Literature Review on the Continued Disproportionate Exclusion of Certain Children* (UK Department of Education, 2019).
[53] Spade, 'Laws as Tactics.'