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Operationalizing injustice. Criminal selectivity as a tool for understanding (and changing) criminalization in Argentina [1] [2]

Valeria Vegh Weis
Freie Universität Berlin, Germany
Buenos Aires University, Argentina
valeriaveghweis@derecho.uba.ar

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Abstract

This article proposes that the groundbreaking concept of "criminal selectivity" (Zaffaroni 2000, 2011, 2011b), not yet extensively used in the English literature, could benefit from a critical conceptualization and operationalization. The hope is that the resulting tools might facilitate the identification of the unfairness patterns and the subsequent transformation of the criminal justice system unequal functioning. To do so, this contribution will explore the framework of the notion of criminal selectivity to later describe how it displays at the two stages of the criminal justice process, i.e., primary and secondary criminalization. On the one hand, "primary criminalization" involves the enactment of statutes by legislators and the executive power. On the other hand, "secondary criminalization" encompasses the enforcement of the law by police officers; the court process by prosecutors, defense lawyers, judges, and juries; and the administration of punishment by correctional officers or parole boards. As none of these instances can possibly hold all the possible negative social behaviors accountable, an inquiry arises: what are the criteria to criminalize some behaviors and not others? Digging into this question, the article will provide some conceptual precision in relation to the mechanisms through

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which criminal selectivity operates. It will be argued that this filtering process works disregarding some behaviors and actors (under-criminalization) and focusing on others (over-criminalization) and that this different attitude responds to socio-economic grounds rather than to the involved social harm. Finally, building upon the described conceptual tools, the article analyzes the criminal justice system in Argentina.

Introduction

"Don't shoot again!". These are the words of a young man lying on the ground with a fresh gunshot wound in some random street in Buenos Aires, Argentina in 2017. The police officer, Luis Chocobar, shoots despite the plea. The young man dies. A video recording of this event goes viral when the police officer is publicly congratulated by the then Minister of Security, Patricia Bullrich, and received by the then President of the country, Mauricio Macri, in the government palace. This political support becomes known as the "Chocobar doctrine", meaning the overt legitimation for the police to shoot in case of doubt (Fava, 2018; Murano, 2018).[3] Meanwhile, the jobless young man is labelled as a criminal and becomes a representative of the 70% of the prison population who have committed only minor crimes against property (SNEEP, 2018).

The contrasting fates of the police officer and the young man are not isolated events, but are part of a systematic injustice that can be conceptualized as "criminal selectivity" (Zaffaroni, Alagia, Slokar 2000, Zaffaroni 2011a, 2011b). This notion, to be further developed throughout this article, describes the systematic unfairness in the creation and enforcement of criminal law that works to the detriment of the subsets of the population who are most vulnerable, in terms of their socio-economic status, gender, age, religion or ethnicity. This article proposes that this ground-breaking concept, which is not yet extensively used in the English literature, could benefit from a critical conceptualization and operationalization. The hope is that the resulting tools might facilitate the identification of the patterns of unfairness and the subsequent transformation of the unequal functioning of the criminal justice system.

To do this, this contribution will explore the framework of the notion of criminal selectivity and will later describe how it is manifest in two stages of the criminal justice process, that is, primary and secondary criminalization. On the one hand, "primary criminalization" involves the enactment of statutes by legislators and the executive power. On the other hand, "secondary criminalization" encompasses the enforcement of the law by police officers, the court processes carried out by prosecutors, defence lawyers, judges, and juries, and the administration of punishment by prison officers and parole boards. As none of these instances can possibly hold people to account for all the types of negative social behaviour that exist, the following question arises: what criteria are used to criminalize some types of behaviour and not others? Digging into this question, this article will provide some conceptual precision in relation to the mechanisms through which criminal selectivity operates. It will be argued that this filtering process works by disregarding some behaviour and some actors (under-

3 Following this case, the Ministry of Security issued a protocol entitled Reglamento General para el Empleo de las armas de fuego por parte de los miembros de las Fuerzas Federales de Seguridad [General Regulations for the Use of Firearms by Members of the Federal Security Forces]. The regulation authorizes law enforcement agencies to shoot when "the alleged offender is escaping after causing or trying to cause either the death of or severe injuries to another person" or when the suspects outnumber the police. This protocol was issued two issued it to avoid mass protests.

criminalization) and focusing on other behaviour and other actors (over-criminalization), and that these different attitudes respond to socio-economic grounds rather than to the social harm that is involved.

It is notable that even though these mechanisms are present in criminal justice systems all over the globe, their intensity is particularly striking in Latin America, and Argentina is no exception here. Relying on the principle of less eligibility that was elaborated by Rusche and Kirchheimer (1938/2004), it is not surprising that, as the most unequal region in the world (Lissardy, 2020), Latin America is also the territory that suffers from the most unequal deployment of criminalization. To demonstrate this trend, and by building upon the conceptual tools described above, the article will end by analysing how the criminal justice system works in Argentina. Although the examples deal with this country in particular, most of the reasoning can shed light on the general situation of the region. Overall, the article seeks to contribute to the analysis of the criminal justice system in Argentina (and, indirectly, in other Latin American countries) by proposing that the operationalization of the concept of criminal selectivity might form a suitable theoretical framework for making sense of the extent of the injustice and, hopefully, for changing it.

The conceptual framework: Criminal selectivity within the dynamics of conflict and control

Following Alessandro Baratta, criminology can be understood as the complex and dialectic interaction between *conflict* and *control* within a specific socio-economic framework (1986/2001: 227). This means that a comprehensive criminological perspective should include the study of both *conflict* and *control*.

What are *conflicts* about? *Social conflicts* describe the broad arenas of struggle, which include socio-economic, cultural, ethnic, gender, and religious aspects. As an example, immigration as a social conflict in Europe involves dimensions such as religion (e.g., the Catholic and Muslim worlds), ethnicity (e.g., Black, Brown and White subsets of the population), gender (e.g., the nexus with religion and the double burden attached to female migration) and class (e.g., Europeans with a guaranteed standard of living and immigrants fleeing from armed conflict, political persecution, or extreme poverty). Despite these multiple dimensions, most social conflicts, including immigration, are usually reduced to *criminal conflicts.* Immigration, for example, has been approached through the criminalization of unlawful entry, the dissemination of moral panics against terrorism, and the expansion of militarized policing, among other mechanisms (see Franko, 2019). The fact that criminal conflicts are, first and foremost, social conflicts also means that they are context-sensitive: they change according to the place and the time. Continuing with the example, immigration is not such a major social or criminal problem in Latin America as it is in western Europe, and it was not always such a problem in Europe either. To this we should add that what is regarded as a criminal conflict generally follows the dominant interests in a given society. Thus, it is more likely that, within a predominantly Caucasian and wealthy Europe, governments end up criminalizing the entry into the country without the necessary documentation yet do not criminalize the denial of food to a person in need.

Looking at *control,* there are also two dimensions: *social control* and *criminal control*. There is a great deal of discussion about the concept of *social control*. The first to use the term was Spencer in 1879, and it was later used by Ross in 1896 (Anitua, 2005). Decades after this, the structural-functionalist theory understood the law as the main instance of social control. The discussion expanded and, because of the multiple uses of the term, Cohen ultimately labelled it "a Mickey Mouse concept", saying that it has been used to characterize "all social processes that induce conformity, from childhood socialization until public execution" (1985: 5), or, in simple words, for almost everything to the point

that we no longer know what it is. Van Swaaningen followed this logic and explained that social control, as "an Orwellian conspiracy of the State and its accomplices is too negative and [...] does not reflect the currently fragmented and partly privatized forms of social control at the national level" (1997: 38). In contrast to the loose and undefined usage, Cohen understood social control as the organized ways in which society responds to the behaviour and the people considered deviant, problematic, worrying, threatening, conflictive, or undesirable in one way or another (1985: 1). Pavarini proposed the notion of "formal social control", which is the control applied by the agencies institutionally appointed to ensure social discipline through formalized procedures and forms of intervention (1980: 109). For the Italian thinker, everything that does not fit into this notion is informal social control (Pavarini, 1980). Lastly, Melossi (1990) distinguished between "social control of action", meaning the internalization of current values, and "social control of reaction", which represses those behaviours contrary to the established order. Social control of reaction is divided into "informal or diffuse social control" (family, religious groups, the media, work, school, and sports clubs) and "formal or institutionalized social control", which is made up of non-punitive and punitive state institutions (ministries, government, and criminal justice agencies).

It is notable that social and criminal control have increased, both qualitatively and quantitatively, since the events of 9.11 and the emergence of the so-called "war on terror", with its deployment of surveillance technologies and practices all over the globe (Wilson & Norris, 2006). In particular, a special focus of the global securitization agenda has been the expansion of counterterrorist legislation, even in Latin American countries where terrorism is not a major concern. Paradoxically, while terrorism remains an unclear notion in international law, it has been used by governments in the Latin American region as a concrete label to enforce social and criminal control, via militarized police, against social groups engaged in conflict. In Argentina, the neoliberal administration that was in power from 2015 to 2019 used semi-military police (the Gendarmerie) to confront social movements and indigenous peoples struggling for their rights, by labelling them as "terrorists" and using the global counterterrorism discourse and instruments as a legitimizing platform. Applying this logic, the terrorist label – which, as has been said, is unclear at the international legal level – was nevertheless used to describe those struggling for their rights as violent and anti-democratic in the domestic scene, raising social and criminal control to an even more striking level (Vegh Weis, 2020).

As can be seen, the discussion is complex. For the time being, *social control* can be conceptualized as comprising *criminal control* and the so-called "ideological apparatuses of the state" (Althusser, 1968), that is, the extra-punitive mechanisms that include the labour market, the media, the areas of the law apart from the criminal law, religion, social reactions, family, and the education system at the domestic and the global level. This means that social control is almost omnipresent and is exercised by both the criminal justice system (when it is crime control) and also by socio-economic institutions and even by our friends, who condition us to behave in one way or another, whether we are aware of this or not. In turn, *crime control* is the state exercise of coercion specifically oriented towards the treatment of criminal behaviour. Crime control is not blind, but is traversed by criminal selectivity through the mechanisms of under- and over-criminalization at the primary and secondary criminalization levels.

In particular, the understanding of criminology as the study of conflict/control must reject over-simplified statements such as the one that proposes that crime conflict is always functional to the capitalist system of production because it enables the crime control and social control that, in turn, ensure the docility of the workforce. As has been pointed out, nothing is valid for all places and all times. Thus, although crime conflict and crime control are necessary to sustain the capitalist system as a whole, dialectically, in their specific forms, they generate contradictions. If this were not the case, we would not waste time by trying to reduce crime at all. Indeed, crime also affects capital by demanding investments in safety measures and security services. Furthermore, there are conflicting interests be-

tween the dominant sectors themselves and between them and the subaltern classes. Therefore, in some situations, certain levels of crime may be deliberately allowed, while, in others, an almost absolute exercise of crime control is more functional to the socio-economic system.

In short, criminology can be conceptualized as the dynamic between conflict and control, but how do these dimensions relate to criminal selectivity, and how did this concept emerge?

Background to the concept of "criminal selectivity"

At the beginning of the twentieth century, William Bonger, coming from an orthodox Marxist perspective, developed certain elements that underlie the notion of "criminal selectivity". He focused his attention on *who* determines which activities constitute crimes, rejecting the universality of moral opinions. He analysed the criminalization of strikes, among other behaviours, asserting that "power is the necessary condition for those who want to classify certain conduct as a crime" (1905: 379). Bonger explained that European crime statistics for 1900 showed that 55% of criminalized people had been convicted of the crimes of vagrancy and begging, and that crimes against property were the next most common (1905: 546). Needless to say, these statistics demonstrated that the crimes of the poor were the only ones being counted, while the crimes of the powerful were ignored. As Bonger stated, the crimes shown in the statistics were not the only ones being committed, and they were definitely not the most grievous. In turn, he suggested, there were more harmful crimes committed by the wealthier classes that could be termed "crimes of greed" (1905: 572). By hiding these crimes, the statistics reflected a false association between crime and poverty, ignoring the fact that even in desperate situations alternative outlets may arise and that the crimes against property that existed were being committed in a context of absolute deprivation. Moreover, the statistics hid the fact that the dramatic increase in crime was not the direct result of a growth in the number of offences but was also a result of increasing criminalization: the recently created law enforcement agencies were persecuting the poor even more strongly than they had been persecuted before.

Another Dutch scholar, the criminologist Clara Wichmann was the first to analyse the class interests that underlie the process of criminalization (van Swaaningen, 1997: 96). She highlighted the fact that there was no causal relationship between crime and punishment, and she called attention to the fact that neither poverty nor repression were labelled as crimes, despite the social damage that they engendered.

Shortly after this, Evgeny Pashukanis (1924) went back to Chapter II of Marx's *Capital* to analyse the notion of fetishism as an outstanding feature of capitalism. Pashukanis used this concept to explain that fetishism permeates the entire law, assuming that men are equal and legal relationships are equitable transactions, even though in reality that is far from true. The Russian thinker stated that capitalist relations are secured and strengthened on the basis of these false legal considerations. Within criminal law in particular, Pashukanis explained, punishment is presented as a "fair transaction" between the state and the offender, in which the former imposes a sentence on the latter to compensate for the offence. This agreement is based on pre-established formalities, known as criminal procedure codes (1924: 156). This statement can only be regarded as fetishism because the state and the offender are not equal, not all offenders are treated equally by the state and the guarantees of the criminal procedure codes are not enforced when the offender is powerless.

Later on, Thorsten Sellin (1949) distinguished between "real" and "apparent" criminality, introducing more tools for understanding unfairness within the criminal justice system. A contemporary of Sellin, Edwin Sutherland (1940), warned about the existence of so-called "white-collar crimes" that were

mostly ignored by the criminal justice system. Indeed, he pointed out the existence of a "dark figure" in statistics, meaning that not all behaviours were effectively criminalized.

In the 1960s, the so-called "labelling approach theory" was developed. Frank Tannenbaum, Edwin Lemert, Erving Goffman, and, in particular, Howard Becker, were among the main scholars of this new school. Becker introduced the notion of "deviance" and stated that this concept goes beyond the notion of crime to include all kinds of socially condemned activities, such as speaking to oneself in the street, not complying with the rules of etiquette, or breaking the rules on a sports field (1962: 15/17). He pointed out that whether an act is considered to be deviant or not does not depend exclusively on the nature of the act (that is, on whether or not it violates the norm) but mostly depends on how other people consider it (1963: 14). Moreover, Becker clarified that there are some people with enough power to decide on what is to be considered deviant. In that regard, Becker coined the concept of "moral entrepreneurs" to refer to those individuals or groups who directly or indirectly help to build standards regarding what is considered as undesirable, deviant or criminal (1963: 182). Overall, Becker highlighted the need to shift the attention from the deviants to these moral entrepreneurs, who are the ones defining our values and our patterns of criminalization. He stated: "It is very interesting that most of the scientific research and speculation about diversion deal more with the people who break the rules than with those who produce or apply them" (1962: 182, translation is mine). Thanks to Becker and other scholars, the labelling approach theory emerged, and criminological thought finally stopped asking "who is the criminal?" and started asking "who is considered the target, and by whom?" (Anitua, 2005: 363).

During the 1970s, Michel Foucault (1975) referred to the "differential administration of illegalities" as an axiomatic element of modern criminal law, reinforcing the understanding that the law does not use the same parameters to treat all behaviours. The distinction between "tolerable" and "intolerable" illegalities, Foucault argued, responds to the interests and practices of the ruling classes. Therefore, the criminal justice system works as a thermometer of the bourgeois tolerance, either authorizing or banning certain practices according to class interests. To provide an example, in his lecture of March 14, 1973, published in the book *The Punitive Society* (2013), Foucault analysed how, in the nineteenth century, the criminal justice system regarded the act of depredation as an illegality because the workers' reluctance to work as hard as they were expected harmed the accumulation of wealth of the factory owners. Needless to say, the exploitation of the workers and the lack of sufficient rest were not considered illegalities.

Contemporaneously, the emerging critical criminology school helped to identify some of the macrosocial effects of the unfair functioning of the criminal justice system. Kevin Bales (1984) studied the intersection between legal and illegal businesses in the capitalist system, and how this intersection was not targeted by crime control. William Chambliss (1994) focused his attention on the application of penal control in US ghettos, in contrast with the lack of monitoring of the crimes committed by influential individuals. Steven Spitzer (1975) proposed the development of a Marxist criminological theory to distinguish the categories of people on whom crime control rests. Roberto Bergalli (1982) called for a reflection on those socially harmful acts that are not criminalized, despite being the most damaging and numerous, because they are functional to the economy.

Between the 1970s and the 1980s, abolitionist scholars distinguished between "criminalization" and "decriminalization", in a counterpoint to the concept of criminal selectivity. This school argued for the decriminalization of behaviours that do not harm others, particularly so-called victimless crimes such as drug-related offences. One of its exponents, Nils Christie (1993), warned about the link between increasing criminalization and crime control as an "industry". In turn, Louk Hulsman argued that the fact that most crimes do not appear in the statistics (because they never reach the criminal justice

system) might be seen as a positive phenomenon: they are social problems that are effectively treated through informal mechanisms outside the criminal law (1993: 185). Lastly, scholars who have argued for a criminal justice system strictly based on penal guarantees, such as Luigi Ferrajoli (1999) and Zaffaroni (1998), have also helped to reveal the unfairness of the everyday outcomes of the criminal justice system.

As a result of these twentieth century contributions, the unfairness of crime control has become clear, and relevant conceptual tools have emerged, including what we regard today as primary and secondary criminalization.

What are the stages of criminal selectivity? Primary and secondary criminalization

The notion of "primary criminalization" was coined by scholars from conflict theory and is defined as "the process in which powerful groups manage to influence legislation, using penal institutions as a weapon to combat and neutralize behaviors of opposing groups" (Vold, 1958, quoted by Baratta, 1986: 133-4). Later, the scholar who has already been mentioned as a representative of the labelling approach theory, Becker, noted that "the rules that these labels [referring to the process of labelling by penal agencies] generate and sustain are not aligned with everyone's opinion. On the contrary, they are subjected to conflicts and disagreements, they are part of the political process of society" (1962: 37). He added that, before an act is seen as deviant and before any type of person is labelled and treated as marginal, someone must have created the norm stating that the specific behaviour was deviant. The deviation is, therefore, the product of an initiative and, without this initiative, deviation, understood as a consequence of the violation of a norm, would not exist (1962: 181). Baratta argued that "primary criminalization" refers to the rules that define the processes of criminalization and decriminalization (1986: 95); in other words, it describes the production of rules against antisocial actions (1986: 168). These rules, Baratta clarified, are made by those belonging to the hegemonic social class and are functional to the demands of capitalist accumulation (1986: 185). He added that "immunity zones are created for behaviors whose harm is particularly directed towards the lower classes" (1986: 185).

Within the Latin American literature, Zaffaroni, Alagia, and Slokar defined "primary criminalization" as "the act and the effect of a criminal law sanction that materially incriminates or permits the punishment of certain persons [by the] political agencies (parliament and executive branch)" (2000: 7). They elaborated on this by stating that primary criminalization is a formal act that is fundamentally programmatic. When the law states that an action must be punished, a programme is only enunciated, but the programme must be carried out by agencies that are different from those that initially formulated the programme. The essential characteristic of primary criminalization, they argued, is that it is such an immense programme that it would be impossible for the law enforcement agencies to carry it out to its full extent. The disparity between the number of crimes that take place in society and those that come to the attention of the enforcement agencies is enormous and inevitable (Zaffaroni et al., 2000).

"Primary criminalization" can therefore be defined as the primary filtering process through which only a small proportion of the negative social behaviour or social harms that take place in society are covered by the law. In other words, "primary criminalization" describes the filtering system in place that labels only some harmful conduct as criminal behaviour. This filtering process is twofold. On the one hand, only certain harmful behaviours are subjected to criminal sanctions. Generally, these are the offences that are perpetrated with simple or primitive resources, that demand easier gathering of evidence, that produce low social–political conflict, and that are typically committed by those in the most vulnerable subsets of society. In contrast, those behaviours that are more complex, that demand

higher levels of know-how when they are investigated, that do not produce social unrest, and that are usually committed by individuals of higher social status, are not at the core of the legislative process. On the other hand, among the behaviours addressed by legislation, different punitive consequences are attached, which respond not only to the social harm involved but also to class and racial interests. The result of the process of primary criminalization might be described as "unequal legal treatment of negative social behaviours" or, in brief, "inequality under the law".

The notion of "secondary criminalization" was outlined by Becker when he explained that deviation is caused by the response of people to certain types of conduct that are labelled as deviant (1962: 37). He added that, once the rule exists, it is applied to certain people of the underclass to increase the population that the norm has created (181-2). In turn, Baratta defined the process of "secondary criminalization" as "the criminal process involving the action of the bodies of inquiry and culminating in the judgment" (1986: 168). Zaffaroni, Alagia, and Slokar argued that "secondary criminalization" consists of a punitive action exerted on specific individuals, which occurs when law enforcement agencies detect a person whose behaviour is attributed to some primarily criminalized act, investigate him/her (in some cases depriving him/her of his/her freedom of movement) and subject him/her to the judicial and correctional agencies (2000: 7). Therefore, "secondary criminalization" is the result of the limited operational capacity of law enforcement agencies in the face of the vast programme installed by "primary criminalization". In particular, the police are responsible for "choosing" those individuals who are made subject to secondary criminalization. Generally, these individuals are those who perpetrate simple, easily detectable, criminal acts, and who cause fewer problems because of their inability to access political, judicial, economic and media authorities (Zaffaroni et al., 2000: 7-9). In turn, the courts only decide on a few cases that have already been selected by the police. Finally, the prison system collects a fraction of those selected by the previous agencies (Zaffaroni et al., 2000: 13). It should be noted that some scholars refer to the prison agencies as "tertiary criminalization". Baratta, in particular, presented this third moment of the criminalization process as a separate one, and defined it as the mechanism through which the prison sentence or the security measures are enforced (1986: 168).

Thus, as it is pragmatically impossible to prosecute every criminal offence that is perpetrated every day in a given jurisdiction, "secondary criminalization" is needed. This process consists of a second instance of filtering that is responsible for selecting which of the countless behaviours are going to be effectively criminalized. This filter has also been conceptualized as "selective enforcement", and is carried out by three processes that could be referred to as "law enforcement profiling", "courts' discretion", and "differential penalization" (Vegh Weis, 2017a, 2017b). These processes are not bias-free but are, in turn, conditioned by class, race, gender, ethnicity, age and religion. The targeted individuals are those who represent "the aesthetic public image of the offender, with classist, racist, age and gender components" (Zaffaroni et al., 2000: 9). At the other extreme of the selective process, the authors of state crimes, white-collar crimes, organized crime, or war crimes, who do not match the threatening image of an offender, are rarely targeted by the enforcement agencies.

In particular, these criminalizing processes are supported by special representatives of each of the interest groups – who can be called "moral entrepreneurs" (Becker, 1962) – who have promoted "moral panics" (Cohen, 1974). The notion of "moral entrepreneurs" describes those individuals with the power to define and label others, who are likely to promote and build the sanction and the implementation of standards in the proposed sense (Becker, 1962: 19). Moral panics are condensed political struggles to "control the means of cultural reproduction" (Cohen, 1974: 8). These notions can be traced back to Marx's work, *Digression: (On Productive Labor)* (1861-1863/1989: 360-361), where he warns that "[t]he criminal produces an impression, partly moral and partly tragic, as the case may be, and in this way renders a 'service' by arousing the moral and aesthetic feelings of the public". Regard-

less of the ironic tone of the passage, Marx states that there are social processes during which an event is identified as threatening and as arousing "moral and aesthetic feelings" in the whole population.

Indeed, Marx, one of the most critical scholars of the unfairness within the capitalist system of production, himself suffered from criminalizing "moral and aesthetic sentiments". The anecdote recalls that, when miserable circumstances had completely absorbed the family's resources, Marx went to sell the silver tableware belonging to his wife's family. As soon as he entered the premises of a pawnshop with the dishes on a Saturday night, the manager called the police and described Marx as a "foreign Jew". The father of materialism did indeed belong to a religious minority, did not dress very well, and did not speak English. This incident led to him being held by the British police for two days. Only on the Monday was the founder of scientific socialism able to demonstrate conclusively, with the help of "respectable" friends who lived in London, that he was not a thief, and that the silver was, in fact, his legal property (Enzensberger, 1974: 390).

At this point, we have made it clear that analyses of the unfairness of the criminal justice system have been evolving since the beginning of the twentieth century, although the term "criminal selectivity" was coined only recently. We have also learned that criminal selectivity operates through two filters, at the level of "primary criminalization" and "secondary criminalization". However, one key question remains unanswered. What are the mechanisms that define what is allowed through these two filters?

How does criminal selectivity operate? Over-criminalization and under-criminalization

This section introduces the concepts of *under-criminalization* and *over-criminalization* to clarify what is left within the boundaries of crime control at both the primary and the secondary levels. *Under-criminalization* refers to the restrictive criminal treatment of behaviours perpetrated by privileged sectors of the population – defined in relation not only to their class but also to their gender, sexual orientation, and religious and ethnic belonging – regardless of the social harm involved in those behaviours. Under-criminalization takes place as a result of the limited legislative treatment of those behaviours usually perpetrated by members of these privileged sectors (*primary under-criminalization*) and their limited prosecution by law enforcement agencies including the police, courts and prisons (*secondary under-criminalization*).

Over-criminalization refers to the emphatic prioritization of the criminal treatment of those behaviours that are perpetrated by especially vulnerable sectors of the population – defined in relation not only to their class, but also to their gender, sexual orientation, and religious and ethnic belonging – regardless of the minor social harm that their behaviours entail. *Over-criminalization* takes place as a result of the increasing legislative treatment of those behaviours that are usually perpetrated by members of these underprivileged sectors (*primary over-criminalization*) and their excessive prosecution by law enforcement agencies (*secondary over-criminalization*).

In short, the notion of *under-criminalization* explains *how* certain types of conduct are minimally addressed by the law (*primary under-criminalization*) and minimally enforced (*secondary under-criminalization*) despite the social harm involved. *Under-criminalization* is therefore not connected to the harmfulness of the behaviour but relates to the demographic features of the subset of the population associated with that behaviour. On the other hand, *over-criminalization* explains how other types of ordinary activities are subjected to over-inclusive legislation (*primary over-criminalization*) and over-targeting (*secondary over-criminalization*), even when they do not produce social harm. This means that what is left outside or inside the scope of the criminal justice system does not respond to a more harmful stand toward vital assets. The wellbeing of individuals and societies is not what is at stake at

the moment of define the target of the criminalization processes. Instead, these are defined by the socio-demographic caractheristics of victims and victimizers. The reasoning is that more criminalization tends to focus on those victims and victimizers who are less functional to the socio-economic system. That is why we can refer then to cases of over-criminalization (in relation to the actual social harms perpetrated).

Concerning the crimes that are usually over-criminalized, it is worth proposing a final distinction between *coarse crimes* and *criminalized survival strategies*. *Coarse crimes* refer to those behaviours that are perpetrated in a rudimentary manner, without much planning, and that usually affect property. These conducts are disproportionately over-criminalized in relation to the social harm that they produce (a repairable effect on property). *Criminalized survival strategies* refer to activities designed to ensure revenue when formal employment is not accessible. Although they do not directly affect other individuals, they are strongly over-criminalized (e.g. begging and vagrancy). To dig into the concept of *over-criminalization*, it is interesting to revisit the notion of "less eligibility" to account for the modification in the conditions of punishment in each historical period. Karl Marx outlined the notion of less eligibility in *Capital* (1867/1998: 896-904). He stated that the general situation of the marginal classes tends to improve when a stable dynamic of capitalist valorization ensures long periods of economic growth and social stability. In turn, the general situation of the marginal classes tends to deteriorate when the crisis of a specific mode of capitalist social formation urges a revolution in the production system and causes the development of a new regime of accumulation. The concept was further developed in an article by George Rusche (1933/1980) and disseminated in the work *Punishment and Social Structure* (1938/2004), co-written with Otto Kirchheimer. The authors suggested that, to serve as a deterrent, punishment must offer worse conditions than those offered by the labour market to the lowest stratum of the working class (1938/2004: 4). This interesting notion of "less eligibility" could be even further expanded to demonstrate the links between social and criminal policies. Social policies are considered in relation to crime control, suggesting that the lowest stratum of the employed working class marks the limit of social assistance. That is, social policies must offer worse conditions and remain "less eligible" than the conditions of the occupied working class to ensure that workers accept the conditions of the market. Meanwhile, crime control must offer worse conditions than social policies to serve as deterrence.

Thus, in Argentina, current social plans such as the Universal Child Allowance (roughly 37 US$ per month in December 2020) offer less money and greater bureaucratic requirements than the worst jobs available in the labour market (which paid roughly 160 US$ per month in December 2020) in order to force people to get those jobs, despite the miserable income and the oppressive labour conditions[4] (CELIV, 2020). At the same time, prisons tend to offer worse conditions than social assistance, even when this entails human rights violations and poor living conditions (CELS, 2020). Thus, Argentinian prisons offer worse food and poorer accommodation than what people can afford with the Universal Child Allowance, and the Universal Child Allowance offers fewer chances than the lowest paid jobs available in the market.

In short, the notion of "criminal selectivity" constitutes a key element when analysing the criminal justice system. The concepts of *under- criminalization* and *over-criminalization*, in dialogue with the lesser eligibility principle, help clarify the mechanisms through which criminal selectivity operates at the primary and secondary criminalization levels. Overall, "criminal selectivity" may be described as

4 See more at https://elsalario.com.ar/Salario/salario-minimo

the mode according to which the criminal justice system operates in its different instances of criminalization (primary and secondary), based on the overly-punitive treatment of those acts committed by individuals who are in a vulnerable position because of their class, gender, age, ethnicity or religious membership (*over-criminalization*) and on the absence or minimization of the punitive treatment of acts committed by those individuals who have a socially advantageous position in relation to their class, gender, age, ethnicity or religious membership (*under-criminalization*).

Criminal selectivity in the Argentinian criminal justice system

So far, this paper has offered theoretical tools to enable a better analysis of the functioning of the criminal justice system (i.e., criminal selectivity, primary and secondary criminalization, over-criminalization and under-criminalization), but how do all these notions operate? To explore this dimension, the following section focuses on the Argentinian context.

As mentioned above, Argentina follows the same trend as other countries of the Latin American region in terms of inequality: most resources are concentrated in a few hands, while structural poverty encompasses almost half of the population. The neoliberal government that ruled from 2015 to 2019 enhanced this dramatic situation with a political agenda that prioritized the production of commodities rather than industrialization, weakened labour regulations, reduced investment in health, education and welfare, and exponentially increased the external debt (Fidel, 2021). Today, Argentina has a population of 45 million people, 40.9% of whom live below the poverty line. While the monthly average income in a poor household is roughly 320 US$, an amount of 545 US$ is needed to purchase the minimum amount of food and services to avoid destitution. Annual inflation is running at over 40% and, from 2019 to 2020, social inequality increased from 20 to 21, which means that the richest 10% now have 21 times more than the poorest 10%. Concerning gender, men earn an average of 23% more than women (INDEC, 2020).[5]

At the level of "primary criminalization", a paradigmatic example of criminal selectivity arises from the topic of abortion, which is still a criminal offence under the penal code of all Latin American countries except Uruguay (BBC, 2018) and Argentina[6]. In Argentina, until December 2020, the penal code provided penalties of between one and four years in prison for the practice of abortion. This punitive approach worked for decades as a material obstacle that prevented pregnant people from accessing abortion in safe conditions. As a result, clandestine abortion has, until today, been the leading cause of maternal death. According to the latest official data from the Argentinian Ministry of Health, 17.6% of a total of 245 deaths of pregnant people in 2016 were caused by abortion (ANCCOM, 2019). The inclusion of abortion in the penal code until December 2020 might be regarded as *over-criminalization*. This is because abortion is an action that does not affect anyone besides the pregnant person who decides to carry it out (i.e., there is no social harm involved in this behaviour), and, despite this, the state decided to continue to use crime control to respond to it. The punishment did not respond to social harm, but rather to religious and moral values that should not play a role in public law.

5 See more at https://www.argentina.gob.ar/sites/default/files/resumen_indicadores_sociales.pdf

6 Abortion was decriminalized and legalized in December 2020 after decades of feminist struggle. The legal situation is still precarious as new legal challenges arise, including the declaration by a judge in the Province of Chaco that the law is unconstitutional. Legal and practical obstacles to the enforcement of the law are likely to continue (DW, 2021).

In contrast, also at the level of "primary criminalization", there are no criminal consequences in Argentinian legislation for the manipulation of the prices of medication, not even in respect of life-saving drugs. To provide an example, Laboratorio Beta S.A. is the only lab in the country producing misoprostol. This is the drug recommended by the World Health Organization for carrying out abortions under safe conditions. Beta S.A. increased the price of misoprostol by 460% over three years, without any relation to production or marketing costs (Bing Bang, 2018). This unjustified price increase harms many pregnant people who cannot afford to buy the medicine and must rely on unsafe methods to carry out an abortion, which might lead to death or cause them serious psychological or physical harm.

Criminal selectivity, then, shows that the manipulation of pharmaceutical drug prices with no justification in the form of a change in production or marketing costs by laboratories is *under-criminalized*, meaning that it is not addressed by the criminal law regardless of the significant social harm caused by this behaviour. The reasons for this *under-criminalization* are not the lack of social damage, but rather the fact that the activity benefits the economic interests of powerful corporations in the pharmaceutical industry. Moreover, *under-criminalization* also corresponds to the fact that those who are victimized by the manipulation of the price of misoprostol belong to the most vulnerable sectors of society in terms of gender and class. In terms of gender, the victims are women and trans men. In contrast, it should not come as a surprise that Argentine laboratories are managed by men of a good social status, and that fewer than 30% of hierarchical positions are held by women. In terms of class, the price of misoprostol particularly harms those who belong to the most vulnerable socio-economic sector, meaning that women who cannot afford to have an illegal abortion in a private clinic that meets minimum sanitary conditions will also be unable to afford the necessary pharmaceutical drug for the procedure. Thus, a simple example shows how, at the level of primary criminalization, the *over-criminalization* of abortion and the *under-criminalization* of the manipulation of the price of an essential medicine do not respond to the social harm involved in either of these behaviours. The price manipulation of misoprostol produces more social harm than an abortion for which consent is given. The reasons behind criminal selectivity are, therefore, beyond the law. Their formation is tainted by religious conflicts, gender inequality, and the economic power of corporations.

At the level of "secondary criminalization" and, specifically, when dealing with law enforcement, criminal selectivity is equally intense. Police investigations are almost always carried out against poor young men who are usually accused of coarse crimes against property or activities related to drug trafficking (for statistics in the City of Buenos Aires, see Infobae, 2020). In particular, as regards the possession of drugs solely for personal use, the Supreme Court has made it clear in the leading case of *Arriola* that if the act takes place within the private sphere, crime control should not intervene because there is no social harm involved (CSJN 332: 1963). However, law enforcement agencies seem to be ignoring this ruling, as 40% of drug-related criminal cases in the city of Buenos Aires are in relation to drugs possessed for personal consumption (Aldrovandi, 2019).

In turn, at the level of *under-criminalization*, there have been no investigations and there are no specialized units for investigating harmful acts committed by state agents or businesspeople involved in the speculative and exchange-rate manoeuvres that plagued many of our countries in every episode of capital flight and financial destabilization of the economy. In Argentina, the most recent contracts for external debt will affect the national economy for the next 200 years, and yet these behaviours have been *under-criminalized* at the law enforcement level. This means that the security forces are not investigating these events and there are not even any specialized units dedicated to this matter. Of course, this decision is not due to the undeniable social harm caused by these behaviours, but rather to the fact that the perpetrators are corporations and powerful individuals that are traditionally outside the reach of police power.

Is it then social harm that determines what the police investigate? The answer is negative. In the cases referred to above, class and age appear more clearly to define what lies within and what lies without the gates of punitive power. If you are a poor and young person, *over-criminalization* will result in the police lurking and searching for information even if this violates your privacy. If you are an adult businessman or public official, *under-criminalization* within the operating procedures of law enforcement will serve you well, even when your actions involve a series of currency flights that will have a negative impact on the country and its citizens for generations to come.

In another paradigmatic example of criminal selectivity at the police level, if you have a restaurant business and occupy the pavement with tables and chairs, you will have no problem with the police, but if you are a street vendor selling products to guarantee a minimum subsistence, you will be considered to be hindering a public thoroughfare and are likely to be brutally detained (see CELS, 2019a).

Criminal selectivity persists at the level of the courts. In Argentina, no court cases have been brought against the government staff or corporations that manage the metro, even though asbestos, a carcinogenic substance that can affect people's life and health, has been found in the trains (Romero, 2019). Affecting the health of workers and users of the metro does not seem to be a sufficient criterion for opening the gates to punitive power. However, criminal cases have been initiated against union leaders for obstructing the metro lines in support of their demand for decent wages (Notitrans, 2018). In other words, crime control over-criminalizes actions that do not harm anyone's lives or physical integrity but just disrupt the normal transport routine. Ironically, these very actions are exercised as trade union rights and, therefore, are constitutionally protected. The question arises once again: is decreasing social harm the goal behind this punitive response to the union protest and the absence of response to the asbestos contamination of the trains? This does not seem to be the case. Getting cancer from driving on public transport is more damaging than being delayed by a union strike exercised as part of the right to protest. The factor that determines which actions are criminalized and which are not is not social harm but social class: workers are *over-criminalized*, while corporations that run the metro and government staff in charge of controlling them benefit from *under-criminalization*.

Moreover, even when criminal cases are initiated, *over-criminalization* and *under-criminalization* continue at the moment of sentencing. Most convictions are applied to poor young people charged with petty offences (what a surprise…). In Argentina, more than 50% of people aged 16 or 17 years old who are accused of committing crimes are punished with a prison sentence of 30 months or more, although the majority of these cases are for robbery and theft (Subsecretaría de Política Criminal, 2017: 18-19). In contrast, *under-criminalization* at the level of sentencing becomes evident in the fact that more than 70% of the 13,000 criminal cases initiated between 2014 and 2017 against governmental staff for crimes committed while performing their official functions were dismissed without further investigation, fewer than 3% went to trial and, of that 3%, the majority of the cases ended up with the defendant on probation. As regards criminal cases for the use of deadly force by police officers between 2014 and 2016, only 10% resulted in convictions (CELS, 2018). In short, cases of white-collar crimes with tremendous economic consequences for the country and deaths at the hands of those who should ensure citizens' physical integrity are abandoned halfway through the court process or the defendants receive such light sentences that they qualify for probation.

Criminal selectivity continues inside the prison system. According to the last available statistics from the Argentine Federal Penitentiary Service, 70% of those who are behind bars today were either unemployed or only had part-time jobs before being arrested. Moreover, more than 50% of them had no trade or profession, and 84% had not completed secondary education (SNEEP, 2017). The presumption of innocence does not seem to apply to this vulnerable population, which becomes clear in the fact that 57% of those imprisoned are being held in pre-trial detention, meaning that they are still

legally innocent (SNEEP, 2017). In the prisons, conditions are so dire that the National Ministry of Justice has declared a "prison emergency" from 2019 to 2021 as overcrowding affects sanitation and increases violence (CELS, 2019b).

These poor conditions are not those enjoyed by the individuals imprisoned for crimes against humanity. These individuals are in Prison 34, which is located in Campo de Mayo, and in which there are no cameras and only a few prison officers to monitor the inmates in their "rooms", which is the word they use rather than "cells". The place also has volleyball and soccer fields, and a barbecue area (Política Argentina, 2016).

The tension between *over-criminalization* and *under-criminalization* does not end there. It continues to affect civil rights. It was only in 2007 that people in pre-trial detention were authorized to exercise a right to which they should have always had access because of their legally innocent condition: the right to vote whilst being held in prison (ACE, 2020). However, a person convicted for crimes against humanity, Antonio Bussi, who was found guilty of kidnapping, murder, and embezzlement, exercised his civil and political rights to participate in elections much earlier and in 1995 even became the governor of the province of Tucumán after having benefited from impunity laws (Ginzberg, 2011).

Final thoughts

The systematic unfairness that characterizes criminal justice systems worldwide, which has been referred to as criminal selectivity, is not an isolated phenomenon. It takes place within a world that is unequal in terms of class, gender, sexual orientation, age, religion, and ethnicity. This means that systematic injustice by the criminal law, law enforcement agencies, courts, and prisons comes on top of a series of previous injustices already present in our communities. The grounds of what we have described as primary and secondary over-criminalization and under-criminalization, which are present at all levels of the criminal justice system, were laid down much earlier when social inequalities were already in place. Those who are targeted by the criminal justice system have already been harmed at the level of wealth distribution. For this reason, a democratic and egalitarian criminal justice system requires a democratic and egalitarian world to precede it, as the principle of less eligibility demonstrates. Argentina, along with the whole of the region of Latin America, manifests high levels of inequality and poverty (Lissardy, 2020) that make this process more complex.

However, this does not mean that, as criminologists, we cannot make any contribution towards undoing this regime of unfairness. The exposure of the persistence of criminal selectivity as an inherent mechanism in our penal systems needs data, examples, and explanations. We need to reach out to those who still believe that the prisons are full of people who deserve to have been punished and that the courts operate with the sole intention of doing justice. This claim is particularly urgent in Latin America, where data are still not fully accessible, resources for scholarly work are scarce, and "media criminology" spreads moral panics against the most disadvantaged sectors (Cohen, 1985; Zaffaroni, 2011a). With this goal in mind, this article offers conceptual tools that can be used to operationalize injustice and to perform a better analysis of the functioning of our battered criminal justice systems, leading towards the much-needed transformation.

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Valeria Vegh Weis, LL.M, PhD., is Argentinean/German and teaches Criminology and Transitional Justice at Buenos Aires University and National Quilmes University (Argentina). She is currently an Alexander von Humboldt Post-Doctoral Researcher at Freie Universität Berlin, where she teaches and researches the role of human rights and victims' organizations in transitional justice. She is also an Associate Researcher at the Max Planck Institute for European Legal History in Germany where she co-directs the research group on Transnational Criminal Law in Transatlantic Perspective (1870¬-1945). Her book Marxism and Criminology: A History of Criminal Selectivity (BRILL 2017, Haymarket Books 2018) was awarded the Choice Award by the American Library Association and the Outstanding Book Award by the Academy of Criminal Justice Sciences. She is also the co-author of Bienvenidos al Lawfare with Raúl Zaffaroni anc Cristina Caamaño (Capital Intelectual 2020) and Criminalization of Activism (Routledge 2021).

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