

The Justice Trap: Law and the Disempowerment of Society

Peter Gelderloos

2010

Justice is a multifaceted concept, and thus perhaps a cumbersome one to negate with one stroke of the pen. One might say that justice has a discrete, defined institutional existence, in Euro/American states generally referred to as criminal justice, as well as a popular, informal existence in public opinion and the values claimed by social movements — social justice. These two aspects are subject to different forms of contestation, change, and formulation, but generally when they are not in agreement there is cause for social conflict, and social movements attempt to influence the forms of institutional justice as much as agents of institutional justice attempt to influence public opinion of what constitutes justice. I argue that justice as a concept unifying both its social and institutional aspects has certain common characteristics that can be identified through comparison to non-Western structures of restorative justice, and through contrast with systems of conflict resolution that do not qualify as justice systems. Furthermore I argue that the habit of social movements to claim social justice as a value and to enter into dialogue or the logic of demands with the institutions of criminal justice is a key element that allows the state to intervene in and control these social movements. Then I provide a personal anecdote that illustrates some of the contradictions and power relations in the practice of justice.

I make these arguments from the perspective of an anarchist, a university dropout, and an ex-prisoner. In other words, I am attempting to intervene in academic discourse from the outside, and speaking about justice not from the vantage of an elite social actor positioned to make policy suggestions, but from the vantage of someone who is policed by these justice policies on a daily basis. Though, given the audience, I defer as much as I can to the style vogue in academic circles, some readers may be perturbed

by a breach of etiquette within these pages. One is a matter of sources. I may or may not have disguised this fact well: in case I have not I will come out and admit that I have not comprehensively read the literature on justice, social or criminal. I personally question the validity of the tradition of literature, although I can see its advantages. I provide citation where I can, while elsewhere I simply express what I have puzzled out for myself, unsure whether that particular point has already been argued or refuted in the literature.

Too often the literature constitutes a closed circuit or feedback loop with only selective and highly managed input from people who have directly experienced imprisonment, probation, judgment, or whose friends and family have experienced the same. I have been to prison, several friends of mine are imprisoned or otherwise held hostage by the justice system, and I dedicate my life to fighting the state, with the express goal of razing all courthouses and prisons to the ground. In the course of this struggle I have accumulated experiences and information, and most of all a perspective or an affective reality, that is embarrassingly absent in the literature on justice. In this article I have dealt with the literature that has actually made itself relevant to the social movements with which I participate. The rest, I ignore. Not out of lack of interest, but lack of time. I know of no one who is able to live fully in both the world of literature and the world of action, however much those who belong to the former protest against this dichotomy. I have chosen to participate in social struggles rather than study them, and this participation frequently requires me to communicate with those outside as much as inside the struggle, hence the writing of this article.

Another possible breach is a matter of generalization. Perhaps some of the most obvious generalizations in these pages are expressed in the critique of academic discourse. Particularly when I have made past criticisms of that constellation of institutions called somewhat romantically “the academy,” members thereof have without fail demanded that I enter a logic of particularization and compartmentalization. Your critique, stated thus, is unfair. To what discipline are you referring? To which individuals? How do you define “recuperation”? On the one hand, this is a fair response. On the other hand, it is the discursive defense typical of all elite institutions engaged in the softer areas of counterinsurgency. The mass media, with their fair share of progressive, sympathetic, and humanitarian functionaries, operate with the exact same logic, especially in periods of social rebellion. Everything must be particularized, everything must be compartmentalized, everything must be defined. Segregated social actors must not be allowed to meet, the boundaries that separate them not allowed to blur. The parallels of this discursive framework to the alienation constantly reproduced by capitalism are obvious. In any case, with or without valid arguments, people in the street and people in prison know instinctively and from experience that academics are not their allies. Rather than demanding what precisely is meant by this or teasing out exceptions that challenge the rule, those academics who do not

see themselves as recuperators and vivisectors of social movements would better ask themselves why such a sweeping generalization is so commonly applied to them.

For my part, I am attempting in good faith to communicate with members of an institution I believe needs to be utterly destroyed, as much as the prisons do, because of all the good people I personally know who dedicate themselves to this institution.

* * *

In academic discourse and the literature of the social movements there is no shortage of critiques of the justice system. At the radical end of the spectrum we can find well reasoned, clear-headed calls for the abolition of its more obviously violent institutions — the police (e.g. Williams, 2004) and the prisons (e.g. Mathiesen, 1974, or Bissonette, 2008), and we also find plenty of analysis of the law itself as an elite tool (e.g. Thomson, 1975). Yet, just as the mass media may report individual cases of police and prison abuse but never spread a generalized critique of these institutions (which should be distinguished from the periodic calls to modernize them¹), social critics may target these institutions but rarely question the practice and the concept that lie behind them: that of justice. On the contrary, people who speak out and people who act out against the great social harm perpetrated by these institutions often do so in the name of justice. These advocates of justice include anarchist academics such as Noam Chomsky, who often calls for the enforcement of international law, to the annual masses of protestors whose signs and banners demand justice for Mumia, justice for Palestine. In these cases they are either calling for the existing judicial framework to change its mind — as Mumia has already gone to trial, and the UN has already deliberated and decided to partition Palestine; or they are imagining a new judicial framework that will be structurally better equipped to dispense desirable outcomes.

But desirable to whom? The police unions are quite happy with Mumia's verdict, and world leaders and Judeo-Christian religious organizations are satisfied with the just outcomes west of the Jordan. This follows a general pattern: the definition of criminality, the structuration of justice, and the outcomes of the justice system in our society favor privileged and powerholding members of society over poor and disenfranchised members of society. This holds true for economic class as well as other axes of privilege and oppression such as race and gender. Because justice systems need to win consent, as will be argued below, justice systems also

¹ Modernization is impelled by a discourse full of specific criticisms, that take as their highest goal the good of the institution itself, its effective and continued functioning, whereas a real critique of an institution must lift it up by its very roots and include the possibility of discarding it wholesale, should it be found to conflict with the independent goals those formulating the critique have prioritized.

include limitations on the prerogatives of owners and rulers, and exceptional cases of punishment when such individuals are caught violating universal laws. The limitations generally protect privileged members of society from one another, for example prohibiting investors from defrauding other people with enough capital to invest, facilitating a consensus of the elite; meanwhile the exemplary and mediatic nature of the punishments, combined with their disproportionately meager numerical appearance, reveals their function to be legitimizing the universality and inviolability of a justice system that in its execution and in its breach preserves unequal distributions of wealth and power in society. In other words the present justice system does deliver what is considered to be justice for the privileged and powerful; what is perceived to be injustice is only systematic in the view of the poor and powerless. The existing judicial framework demonstrably operates on an elite mentality of social control, thus those justice-seekers who wish for the institutions to change their minds can be understood as naive, timidly pragmatic, or sympathetic to the elite mentality but holding a dissident opinion in some particular case.

The remaining viewpoints — that justice is served, or that it can only be served by changing the existing institutions — require one to declare their allegiances, given the opposing character, the contrasting relationship to a social hierarchy, of each viewpoint. One either adopts the perspective of the rulers or of the ruled, each of which conform to a high degree on whether they see justice or injustice in the functioning of the system. Yet the idea of taking sides is inimical to the concept of justice, which must be blindly impartial. This contradiction illuminates a necessary third way: the elimination of social classes through some revolutionary process. Couched in certain terms, this need not be such an extreme proposition, given that equality is generally seen as a prerequisite to justice, and the current definition of equality, limiting itself as it does to voting rights and civil liberties, has proven inadequate. Thus, the quest for justice reveals itself to be perfectly compatible with social movements that have revolutionary aims. I argue that this coexistence, this collaboration between social justice and revolution is one factor that frequently enables the recuperation of social movements within the dominant social order.

Before trying to understand how this is so, it would help us to examine just how far outside the concept of justice human societies have come. At the far end of the justice concept, we have multiple examples of *restorative justice*. Without any institutions of policing, imprisonment, or even anything properly characterized as punishment or a legal code, numerous human societies have arbitrated social conflict. In the system used traditionally by the Navajo, a system that survived a period of legal prohibition by the US government and is in official use today, elders seen as neutral act as specialized arbiters in trials that take place in the public eye. Non-specialized members of the society bring forth the conflict voluntarily, and

encouraged by the arbiter they tell their stories. The emphasis is on discovering the root of the discord and mobilizing social support to restore harmony (Tift and Sullivan, 2001). In comparison to Euro/ American justice systems, the Navajo practice is beautifully humane, but a number of elements are familiar. We will look at these, after examining a model of conflict resolution that cannot be characterized as a justice system, to help us create and understand a working definition of justice and imagine some of the possible alternatives.

This is the model of *diffuse sanctions* (Barclay, 1993) which is especially common in egalitarian societies that can be understood as post-state or as existing within a regional system that includes hierarchical societies – in other words anti-authoritarian societies that exist in tension with authoritarian neighbors or that may have even formed their present structures as part of a process of abandoning earlier state-organized societies to which they belonged (Scott, 2005). In such societies, conflict resolution is subjective, decentralized, diffuse, and carried out by what anarchists would refer to as direct action. On an economic level, incidentally, such societies are usually characterized by mutual aid or the gift economy.

In this model, conflict is subjectively defined. Ideally speaking, the individual identifies conflict for herself, in horizontal collaboration with her peers, through the personal interpretation of non-codified² cultural values of what is and is not acceptable behavior. Conflict resolution is decentralized: it does not take place within a singular, ritualized and formalized social space but within multiple ritualized and non-ritualized loci (thus it is impossible to speak of a single or official outcome). And within this model conflict resolution is diffuse and based on direct action: any and every individual has the prerogative to respond to a perceived conflict or breach of good behavior as she sees fit, and social peace is ensured through the sharing rather than the specialization of this duty. Social sanctions are meant to discourage rather than punish antisocial behavior and ideally everyone is empowered to carry out these sanctions.³ Common sanctions include ridicule, criticism, withholding esteemed social connections (e.g. sex or friendship), all the way up to ostracism and assassination (Boehm, 1993). The sanctions are aimed at the offending individual's social sensibilities and seem to be based on the assumption that the individual voluntarily wants to be an upstanding member of society. Only the most extreme sanction, assassination, falls outside this logic, but it does not seem to be universally present among societies that resolve conflicts through diverse sanctions, and seems to be reserved for the rare cases when the individual in ques-

² A code being distinct from a norm in how it is remembered, interpreted, and applied.

³ In many societies certain sanctions were the prerogative of one gender or age group although among anti-authoritarian societies such distinctions tended to be closer to generalizations or norms than to essential categories.

tion poses the danger of destroying the society itself — through repeat homicide or tyrannical behaviors.

An important portion of conflict resolution activities in societies that use diffuse sanctions can be characterized as *intentional levelling mechanisms*, actions that intentionally protect the society's horizontal characteristics and dissuade people in leadership positions who would attempt to dominate their peers (Boehm, 1993). The social dynamics in horizontal societies suggest that the democratic ideal of egalitarianism does not apply to so-called egalitarian societies in which justice systems are absent. In a society in which conflict resolution is, ideally speaking, a subjective process, an abstract equality strikes me as philosophically irrelevant. One might identify a notion of equal rights in many such societies, such as everyone's right to eat, but in a society in which this right is never under question, it seems more like a foregone conclusion than a discrete concept. Historically, rights come into question only with the existence of a central authority that has the power to grant or withhold those rights. In other words, not only in practice but also in terms of origins, might makes right.

Individuals can only ever be equal in an abstract sense. Equality is a mathematical concept and it might be useful to bureaucrats but it is inapplicable to human personalities and capabilities. An anarchist ontology should leave social democracy forever behind and insist that, in fact, no two humans are equal. If we accept that human needs and desires are different and furthermore are best defined by the individual himself, how can we continue to insist that one law can be applied to two different people, or two different circumstances, if our interest is fairness or the meeting of human needs and desires? Of course it's an act of projection but one can see this principle in the so-called egalitarian (more accurately 'anti-authoritarian') societies referenced by Boehm. In the course of their daily activities, these societies recognize the existence of leadership positions — leaders in the hunt, leaders in war, leaders in ritual, leaders in healing, leaders in oration. People are, after all, different in terms of their inclinations and abilities, so equality becomes a useless phrase when speaking of lived experiences in a horizontal society. What is relevant is the cultural determination, identified by Boehm, on the part of these anti-authoritarian societies to not let anyone use a leadership position to exercise power over others, and to respond with diffuse sanctions, with intentional levelling mechanisms, to knock someone's legs out from under her should she ever try to stand above the rest. The recognition of this prerogative in every individual is

⁴ As an anarchist I am using the concept of "state" in a different way from how it is usually understood by anthropologists. As we are interested in a unified critique of coercive and self-perpetuating hierarchies whereas they are interested in differentiating hierarchies, our usage is broader and finds its first appearances further back in history.

especially advantageous to preserving a horizontal structure, because specialized justice seekers are likely social actors to nourish the development of hierarchy.

States⁴ formed by a variety of means throughout the world, over the course of hundreds or thousands of years. Especially when considering the development of the first coercive, class- or caste-based hierarchical societies thousands of years ago, it is difficult to identify causes with any certainty. But one common element in the social processes that led to the eventual formation of states seems to be the concept of justice and the specialization of arbiters of social conflict. It is something of an idealization, and thus cannot be entirely true, but the historical likelihood that specialized arbiters preceded a specialized military class in the development of the state suggests that, while the state is certainly a military formation, it is even more the fruit of justice.⁵ Granting a specialized group the exclusive prerogative of sanctioning undesirable behavior, and thus defining undesirable behavior, and thus sculpting society's desires, seems to me to be a prerequisite (or perhaps a concomitant) to the creation of a class-based, hierarchical society. This is not to say that justice systems automatically lead to hierarchical societies: no social or cultural processes are automatic. The Navajo, for example, have specialized arbiters, and are a horizontal society, perhaps because in their case the same cultural determinations that legitimize the activity of neutral, elderly arbiters also legitimize certain ideas of fairness, harmony, and horizontality. Segmentary lineage systems that enable the existence of elderly arbiters as a nascent political class also contain many structural characteristics that could impede the development of a state. But because we do not have a mechanistic view of the development of societies, saying that the state is the fruit of justice is not the same as saying that justice is the seed of the state. Outcomes are always multiple, contested, and unpredictable.

Human societies have been diverse enough that one could imagine a society developing coercive hierarchical structures without a system of justice. In any case, examples abound of the correlation between justice systems and the development of the state, and in Western civilization, which has produced a world-dominant culture that has to a great extent authored the institutional bylaws of every government on the planet, justice played an indispensable role in the early development of the state and currently is a dominant concept in state interventions in mass psychology and public opinion, in popular conceptions of conflict resolution, in state counterinsurgency and repression of social movements, in surveillance and con-

⁵ David Graeber (2004) writes of democracy as a military formation, with reference to the ancient Greeks. At this stage, justice and warfare were not all that far removed. In Athens, next to the Acropolis stands Areopagus, the hill dedicated to Ares, the god of war and executions. Areopagus was used by a justice cult of elderly men who tried and punished criminals. Today, the criminal justice system has often been described as a military occupation or a domestic war against poor communities and communities of color (for just one example, see Gelderloos and Lincoln, 2006)

trol of lower classes, in the identity and activity of social movements, and in the disciplining of a broad host of human relationships in both the public and private spheres.

What are the common elements of justice systems? Because they seek to impose an official, singular outcome, the justice seekers must win social consensus. In stateless societies, this means that justice is largely a popular concept. The arbiters do not have structurally reinforced roles and thus they can lose followers if they are seen to mete out injustice. But even under the state, where justice is institutionalized and enforced, consensus, or its watered-down democratic version, consent, is a necessary element. All elites have had to work hard to win consent, and though the governed classes in Euro/American societies have to do much more than simply walk away in order to vacate our role as spectator/object, our rulers have needed no small amount of bread and circus to keep us in our seats.

The necessity of consent reveals the centralized character of justice. The justice ideal holds that conflicts must have a single, official outcome, not multiple, decentralized outcomes chosen by different social actors. In the extraordinary, to me humane, traditions of justice such as that practiced by the Navajo, legality and punishment are not key features, but centralization is a prerequisite for both legality — the codification of human behavior and morality that provides a potent set of tools for social control and reduces ethics to following orders; and for punishment — the prerogative of the state to cause harm and not be questioned for doing so, and another potent set of tools for social control.

Another common element is the idea of neutrality. The person who is hurt, the person who for whatever reason hurt another person — the lived realities of these characters become secondary within the logic of neutrality. They are recharacterized as biased, and their viewpoints cast as untrustworthy for arriving at just outcomes. Neutrality removes fairness to a bird's eye view, protagonizing nobody in theory. But in practice, the protagonist is the personification of neutrality — it is the arbiter himself. (This primitive epistemology should in no way be seen as distant from the proliferation of TV series protagonizing judges, prosecutors, and police in current day American society). Thus, the person who is most important to the justice process, the person who inhabits the center of the damaged community's affective attentions is the person judged to be most distant from the act of damage itself. Understood thusly, the neutrality of justice appears less like a noble principle and more like a pathological avoidance of the trauma which the community has been presumably convened to address. At the end of the spectrum most distant from the Western practice, in the framework of restorative justice, the arbiter is more of a narrator who uses her power to protagonize the people directly involved in the conflict, presumably for the benefit of all society. But in all forms of justice familiar to Euro/American society and to all forms present in hierarchical

societies, the chief interest of justice must be the imposition of justice itself, given that the crimes of the lower classes always contain some element of negation of the ruling class's legitimacy in criminalizing certain behaviors.

The portrayal of emotions and affective ties as impediments to the execution of justice must also be examined. An arbiter's neutrality is based to a large part on his psychological, emotional distance from the act of social harm which must be resolved. Such distance is represented as an advantage. Yet without empathy, without consciousness of the pain that surrounds and gives meaning to each particular story of social harm, just what kind of resolution is society able to facilitate? Turning instances of social harm into cases of facts and technicalities is to set down codes of conduct that ignore the causes and consequences of harm but allow society to get on with business as usual. Justice is an avoidance mechanism that leaves the so-called perpetrator in denial or guilt, the so-called victim in ashamed trauma, and lets society off the hook: the crime was a breach of code that concerned one or two or several people, those responsible have been punished, and the rest of the community has no obligation to help those who hurt and those who got hurt to become healthy and whole again, nor to examine what in the social environment may have allowed this harm to take place. In this aspect justice is a patriarchal concept. Its appointed symbol is a goddess,⁶ blindfolded and made to hold a sword and a scale, tokens of the military and the market.

Justice requires us to view human conflicts in inhuman terms. Those of us involved in an incident of social harm must remove ourselves from the space of its resolution, we must vacate our personal emotional needs to make room for the imposition of an objective solution we have no part in crafting and no choice but to consent to. We must sympathize against our own interests. Justice is self-betrayal. Given the common elements of justice as a unifying concept and given that the contestations of social justice generally seek to change the forms or spirit of institutional justice, social contestations regarding justice are thus an invitation to betrayal.

Beyond single incidents of social harm — that which in our society is disciplined as crime — what does justice mean for social movements? When a social movement demands justice, even if it is demanding a restructuring of the existing institutions, it preserves the alienation of people from the resolution of their own problems. The demanding of justice imposes the logic of demands within the movement, a negotiation with power rather than a negation of power. Negotiation preserves the central role of the state, the institutional hierarchy which is often the cause

⁶ Note that male priest classes in patriarchal societies of the era to which we owe this statue-personification of justice frequently co-opted feminine fertility symbols. Their ability to harness these symbols came to symbolize the new male power.

and beneficiary of what we identify as injustice; meanwhile the ritual of entreaty — protests, petitions, letters — focuses the energies of justice-seekers towards communication with the state rather than direct resolution of the problem itself, thus preserving the alienation between what we want and what we do. Conversely, the social movements' voluntary adoption of the justice etiquette imposes on those movements what Scott (1998) might refer to as legibility, a social ordering that on the one hand facilitates state intervention in locales distant from the seat of power and on the other hand loses local knowledge and obstructs resolution of problems at the local level. Historically the process by which legibility is imposed has often provoked popular opposition to authority but tragically the social movements of democratic societies have been trained to abandon their protective incoherence-to-authority and explain themselves, to translate their multiple desires into demands that fit within authority's parameters, and lay down the red carpet for state intervention. The language of justice reinforces in people's minds the idea of the state's role in conflict resolution, because it is a call for a fair arbiter, a call for compromise among all parties rather than the negation of the elite. The language of justice also clarifies to the state paths of intervention into the popular conflicts with the potential to birth rebellion. It informs the state of the very worst grievances, which masks need to be changed, which institutions need to be reformed. When a social movement demands justice it is naming the price for which it can be bought off.

An example close at hand is that of the squatting movement in Barcelona. Barcelona is a city with a long tradition of resistance to the state and to capital, relatively strong social movements, a stupefying amount of tourism and real estate investment, and tens of thousands of empty buildings. Squatting is as old as property, but squatting as a social movement arose in Barcelona in the '80s, identifying more with the autonomous movements of northern Europe than with the city's legacy of anarcho-syndicalism, though it was nonetheless influenced by the latter. In years past, squatters defended their houses and social centers with physical resistance to a greater extent than they do today. A popular slogan spraypainted across the walls of the city succinctly declared: "Desalojos — Disturbios," *Evictions — Riots*. In the first decade of the 21st century, the Spanish and particularly Catalan police modernized and increased their capacity for repression, also developing the anti-terror politics formulated in the suppression of the Basque struggle to a point where it could be utilized against anarchists and squatters, no doubt inspired by the agile American usage of terrorism after September 11th. In the same years that a number of anarchists and squatters in Barcelona were arrested and dispersed to high security prisons across the country under creative or sometimes just insubstantial terrorism charges; the same years that the age-old beatings on the street and torture in the jails combined with an increase in conviction and imprisonment of people identified and particularized by the media as *antisistema*; that the

city passed its Rudy Giuliani-style *civisme* laws to increase state control over public space and create a more tourism-friendly environment, the criminal justice system became the exclusive arena of resolution for the problem of squatting.

Whereas in the past a squatter might pick up a brick to defend her house, now the only option is to hire a lawyer, even if that method is doomed to failure: fighting back physically is too heavily persecuted and penalized. The courts remain benignly inefficient, however, so that by fighting eviction through legal channels, one may win a year or even two in the squatted building before a judge finally signs an eviction order. And although the squatters are still in a way fighting for their expropriation of abandoned property, the courts do not allow the laws regarding private property to be questioned, nor do they deign to substantiate the Spanish Constitution's guarantee for the right to housing nor its prohibition on real estate speculation. The legal resolution of squatting dodges the important social questions that squatting as direct action against speculation, against property, and against the social relationships of capitalism poses. It pacifies the movement tactically and disciplines squatters to think in terms of dialogue and argumentation with the authorities, or appealing to one elite institution (the courts) for protection against other elite institutions (real estate companies or the police, who often evict without a court order). It is no surprise that this change in the squatters movement coincides with an increase in rhetoric that values rights, citizenship, civil society, civil disobedience, and demands for affordable housing (i.e. demands that are compatible with, rather than a rejection of, the state and capitalism), at the expense of the anticapitalist and anarchist values of the movement in earlier years.

Even if the call for justice is a call against the state, it still contains a subtext of pleading that idealizes a benevolent authority (a neutral, centralized arbiter able to mete out singular outcomes and win social consent) and inscribes the typical ending: the return of the state, hands washed, sins forgiven, legitimacy renewed. The state has no qualms about intervening against itself. One ministry or bureaucracy that has kept clear of the present scandal and retains the legitimacy to act with a mandate will mercilessly announce a "crusade" against their colleagues in another office. An opposition party that has not yet had the opportunity to stain its reputation will adopt the revolutionary rhetoric, recklessly so according to some commentators, and ride the old guard out of office. The office itself will remain, unquestioned and often more functional after a little spring cleaning. In a classic example, segments of the Civil Rights movement in the US in the '50s and '60s called for the federal government to intervene against several more reactionary state governments to end segregation. In this process, the federal government won itself leverage within the movement which it used to isolate and silence black organizations and individuals who were critical of the legislative solutions the federal government was proposing. Today, with these laws on the books and a black presi-

dent in the White House, legal segregation is a thing of the distant past but de facto segregation (in terms of access to food, housing, education, and medical care) is worse than before. By creating a role for the federal government as a dispenser of social justice rather than focusing on creating the desired changes through direct action,⁷ the Civil Rights movement aided the state in dividing and conquering it, in defining the movement's demands, and improving its image in the process.

One might worry that if the resolution of social conflicts were up to subjective direct action rather than a structurally reinforced neutral arbiter, we would have the justice of the lynch mob. A long tradition of Western thought has sought to design fairer social structures of conflict resolution to mediate this dilemma: that both the social hero (in this example, black freedom fighters) and the social villain (the racist lynch mob) think they are in the right, and allowing one to act freely also means allowing the other to act freely. In other words, equality before the law requires that the social villain must have the same rights as the social hero, thus both must be equally restricted in their actions, in order to protect the primacy and prerogative of an institutional framework that is entrusted with the resolution of social conflicts. But evading this problematic by limiting the freedom of all social actors and bequeathing that freedom as privilege to an institutional framework powerful enough to guarantee outcomes creates a far more dangerous situation. Firstly, neutrality does not exist, if it is to mean a position from which one can act without self-interest and without a personal perspective. The arbiters have a marked self-interest, and given that their identity and their ability to act exist at odds with the rest of society, from whom the freedom to act has been stolen, their intervention in social conflict will be characterized by their ulterior motive of competitive self-preservation.

The democratic structuration of justice prevents antisocial elements from acting freely, but it also prevents any individuals or groups we might identify as justice-seekers, freedom fighters, or social innovators from acting freely; in fact it de-protagonizes them, and in turn it creates a configuration of institutions peopled by individuals who are equally fallible in terms of judging fairness or right, yet who enjoy the sole power to resolve conflicts, mandate social changes, and foster among themselves and in the rest of society a belief in their legitimacy to do so.⁸ Furthermore, all checks and balances are executed by people ensconced within this institutional configuration. It is a classic case of the fox being put in charge

⁷ Of course there are countless examples of direct action and direct action victories throughout the course of the Civil Rights movement; however the movement leadership continuously subordinated these actions, which were often spontaneous, to their strategy of negotiation.

⁸ I would also argue that these are people who operate at the very bottom of Kohlberg's stages of moral development, those who make decisions on the basis of reward or punishment, those who do what they do because it is their job, the banal bureaucrats described by Hannah Arendt.

of the hen house, and the irony only deepens when we reexamine the myth used to justify this structuration of conflict resolution, the one steeped in fear of lynch mob-justice; historically, haven't lynch mobs been instigated by the ruling class?

In the era of the War on Terrorism, it is interesting to note that our fears of conflict resolution in a horizontal society, one without any overarching arbiter, actually reflect the archetype of asymmetrical warfare. *Taking things into their own hands*, rather than being seen as an assumption of responsibility, calls up images of anarchy and terrorism. People are conditioned to expect violence and mayhem will arise in the absence of a powerful social arbiter. But that which we understand to be terrorism is a characteristic of society under the state. Dissidents whose demands are too far outside the parameters imposed by the state, deprived of any power to determine their own outcomes, attack the weak underbelly of society as a whole. This is an activity that is only rational within a justice-oriented society.

The idea that we can escape the dangers of antisocial actors through recourse to fairness-ensuring structures is an institutionalization of ethical immaturity. Implicit in its justification is the recognition that right and wrong do in fact exist; if not, there could be nothing *wrong* with letting the lynch mob act freely. The fact that both the lynch mob and the freedom fighters think they are right is immaterial. Parallel to an unfettered ability to act in order to better society exists our ability to communicate with our peers to approach some sort of shared social ethos. In fact, challenging attitudes we see as harmful or antisocial, and receiving criticisms of our own attitudes, is necessary to our personal ethical development. Democratic pluralism prevents any such growth, which is very useful, because an ethical system in which we surrender the resolution of all conflicts to an unquestionable, powerfully God-like arbiter requires citizens of the basest ethical qualities. Democratic government negates the possibility of resolving social contradictions. There is after all an imperative that in a hierarchical, class-based, white supremacist, patriarchal, ecocidal, and rampantly abusive society, certain contradictions must not be resolved (Jensen, 2004).

The frequency with which the present system produces injustice, as evaluated by almost any standards (e.g. a person who is innocent by strictly legal standards being sent to prison) is a tragedy of immense proportions. But looking beyond that, to recognize that the successful production of justice is also an abusive violation of human needs, clarifies that our task is not to fix the justice system but to abandon it in favor of something else entirely. To demonstrate that justice is a violation of human needs, I'm going to tell a story about myself. It is a story about me being arrested on false grounds, and of justice being served. As a story it is not as dramatic as that of, say, Mumia abu-Jamal, and it certainly lacks the social importance. But perhaps its mundaneness brings it closer to the millions of other processes of the justice system occurring all around us.

On 23 April 2007, I was arrested in Barcelona after a small squatters' protest. The protest took place on one of the busiest pedestrian streets of the city, Las Ramblas, on an especially busy holiday, St. Jordi. The purpose of the protest was to communicate with the public about squatting. To this end a festive banner was made, and flyers were distributed. Someone in the protest had fabricated a homemade firework. The idea was to grab people's attention and to shoot flyers into the air (and such fireworks are a Catalan anarchist tradition). It was poorly made, and produced much too loud a noise. With a tragicomic grace, the flyers that had been stuffed down the tube floated down as confetti, having been shredded by the force of the blast. I was already leaving the protest and the noise of the firework took me by surprise. At the time I had only been in Catalunya three weeks, and did not understand Catalan or Spanish. I returned to see the police chasing one of the protestors, and, thinking myself safe since I had not been on the scene when the firework went off, followed at a distance to see if anyone had gotten arrested, so we could begin legal support. I forgot that I was wearing a t-shirt with an anarchist symbol on it (it was a gift – I usually don't dress so explicitly), and when the police saw me watching the arrest, they arrested me as well. The two of us were charged with public disorder with explosives, which carries a minimum sentence of three years in prison, and a maximum of six years.

The institutional narrative is very simple: justice was won. The police alleged that the firework was a mortar, and that it shot out stones that caused damages and injuries. A forensic analysis proved it was just a firework, and witnesses clarified that there were no injuries, no damages, and no panic or disorder. We were acquitted. End of story.

But in human terms, the most important feature is not the outcome. It is the experience of living under a system powerful enough to submit an individual to a process for reasons that it alone deems valid.⁹ In my case, this meant going to jail in a foreign country (and, this seems a triviality until you imagine having to do it yourself, going to jail practically blind, because I was arrested while wearing contact lenses, which I had to take out after a couple days) for one week, until the movement could raise the unprecedentedly high 30,000 euro bail the judge had set, believing police allegations that we had just carried out some quasi-terrorist act. It meant being forced to live for the two years until trial in a strange place where previously I had no social roots nor friends, and for the first year having to sign in at court every fortnight; not being allowed to work or renew my visa but required to remain there, under the constant threat of being kidnapped and locked

⁹ For the elaboration of this theme, a friend of mine who studies criminal justice in the academy recommends Malcolm Feeley, 1979. *The Process is the Punishment*, New York: Russell Sage Foundation.

in an unpleasant building watched over by violent thugs for three to six years of my life. And having to raise several thousand euros to pay for a lawyer to defend me (because, within this system, we cannot defend ourselves, in every sense). And now that it's all over, knowing that the same thing could happen all over again, that even, to add insult to injury, the very same cops who accused me the first time, who it is tacitly admitted were lying, could invent another story about me.

On an ethical dimension this story has interesting implications. Technically I was innocent; I neither constructed, set off, nor knew about the firework, and the firework was not really an explosive and did not constitute a felony disorder. However the justice process proved completely maladapted as a truth-seeking mechanism, which is ironic considering that criminal justice prioritizes facts and definitions over affective causes and results. I was compelled to misrepresent my political affinity to the anarchist squatters, to deny that I would have been more involved could I communicate with them better, and that I was more than just a passerby. I declined to mention that earlier that day I had helped make the banner used in the protest, and that in fact I had been staying at the squat from which the protest began its route, because no matter what legal principles they adhere to, guilt by association and collective guilt are indeed active categories in the minds of judges, especially when dealing with such distinct Others as squatters. My attorney as much as the prosecutor acknowledged this unwritten fact with the questions they did and did not ask me. For their part the organizers of the protest were compelled to downplay, at least in outward discourse, that the use of the firework had been irresponsible: it was poorly made, had not been tested, and the plan was not well communicated to other people in and around the protest.

This brings us to the social dimension of this incident: the firework was certainly loud enough to bother or upset people in the immediate area. Yet the intervention of the police prevented any resolution and transformed everyone into spectators or perpetrators, subsequently segregating these two categories. Whatever disturbances the firework may have caused were turned into legal tools, as the police pressured two people into signing a form saying they were injured ("You never know, that ringing in your ears, tomorrow you may be deaf. We won't take you to the hospital to get it checked out unless you sign this form.") Fortunately those people took the trouble to later go to the police commissary to retract their denunciations and say they had been pressured. Still, this favorable outcome obscures the fact that because of police intervention they never got the chance to yell at the people who set off the firework, and the people who set it off never got the chance to hear that criticism.

This prophylactic approach to social control reveals the political dimension. The police personally view themselves as opponents of the anticapitalist squatters, and the squatters certainly return the favor. Most squatters have friends who have

been beaten, jailed, or tortured by the cops, all have been insulted, degraded, and threatened by them, and the cops exist in part to counteract the squatters' forceful subversion of the social order and the property laws. Thus the police understand it as their responsibility to prevent or punish squatter interventions in public, and to them public fear of terrorism is simply a tool to achieve this. Significantly, this particular protest was organized as part of a response to a wave of evictions and repression carried out against anticapitalist squatters over the previous year. Actions on other days included interrupting a meeting of property owners and holding a major march. This action was to be the most tranquil, the most focused on meeting the public and communicating. The justice system repressed it and cast it as a "paramilitary" attack by squatters who wanted to vent their rage "against people who disagreed with them."¹⁰ In practice we can see a blurred distinction between democratic pluralism's ideal function to protect people with different opinions from attacking one another and its bad habit of preventing people with different opinions from communicating with one another. In a spectacular society, the only mediator of opinions is to be the spectacle itself.

My tawdry little story illustrates how the justice system can meet its political objectives, which are, to speak honestly, oppressive, even while meting out justice. The movement was repressed, my codefendant and I received a just outcome, and there is no contradiction between these two facts. Without ever having to falsely imprison anyone, the justice system was able to strike a number of blows against a movement that is the declared enemy of capitalism and the state. Two people were briefly locked up and for a longer period submitted to a regime of psychological harassment. Dozens of people had to scramble to raise money, organize support, communication, and solidarity events, taking a great deal of time away from their other projects and from their initial effort to communicate and create connections with the public, further distancing them from public reality (since the public does not consciously exist in a state of war, as much as the state consciously employs methods of warfare against them); additionally these people had to live through a psychological hardship, having a friend of theirs and another person with whom they felt affinity being kidnapped and threatened with imprisonment. In other words, two people are arrested and their entire community is punished over a period of two years even though the court pretends to have absolved them.

If we had been seeking justice, if we imagined that we would find victory within the courts, this would be the end of the story. Fortunately, we recognize that we live under a domestic state of war. This declaration may seem dogmatic, or hot-headed, or self-important, except that criminologists and police theorists are quick to acknowledge this point as well: policing is counterinsurgency (Williams, 2004).

¹⁰ Quotes are from the initial accusation submitted by the prosecutor.

Current military doctrine on “fourth generation warfare” is even more explicit in describing the war as both domestic and permanent. Our ability to survive the frequent attacks of the justice system lies in our negations of that system: creating relationships of solidarity; developing means to resolve our own conflicts without recourse to the justice system; abandoning the morality of innocence and guilt, of codified, objective law; revealing the class interests of the institutions and agents of the justice system; engaging in direct, nonmediated communication with people from whom we are meant to be isolated; surviving in illegality; and continuing to take action without permission. I would say that on balance, we won this particular contest. There was a great deal of psychological stress, but in the end strong personal relationships were formed, the justice system was shown to more people for what it truly is, and the squatters’ movement proved itself capable yet again of surviving repression. Personally, I was forced to live in a situation of illegality, and I did it triumphantly, stealing what I needed for survival since I wasn’t allowed to work for it.

This is the point in the essay where I am to argue that society would be safer, more empowered, and much freer to develop ethically and to repair social harm, to right wrongs, if it were organized horizontally and individuals were allowed to use direct action and diffuse sanctions, if there were no justice system, no government — democratic or otherwise — and no hierarchy of social classes. Yet I have no intention to write a pamphlet, stating the obvious, for some, and spouting dogma, for others. And I have no intention to elaborate in convincing detail, because social planning is inimical to horizontal forms of organization. One cannot produce a policy paper against societies guided by policy papers. And if one doubts the clear acts of negation, the millions of people *taking things into their own hands* every day, one has already chosen sides.

Arguing objectively against justice can only bring one so far, precisely because of the importance within justice systems of denying subjective realities. The millions of people who violate the law out of need or on a whim, especially when these violations challenge social control or existing hierarchies, are negating the very basis of the justice concept, yet most of the objective criticisms of the justice system that appear in academic discourse do not seem to recognize the full implications of these frequent negations. I feel it necessary to point out that the academy as a whole shares in the responsibility for the ongoing disempowerment of society constituted by the practice of justice, because the academy, through objectivity, avails itself to institutions rather than to lives. The academy *produces discourse* rather than *enabling action*, and discourse is fodder and fuel for institutions that already exist. It is the vital force that animates and adapts the bureaucracies that govern; it is useless to the governed except as palliative.

A clear example, from a social question less complicated than conflict resolution, is that of climate change. On the one end, the academy produces the engineers and public relations specialists who are, apart from the politicians and business executives, most directly responsible for destroying the planet.¹¹ On the other end, the academy produces the scientists who are studying this destruction. Climate scientists know very well that our society is engaged in an act of mass suicide. However, they continue to produce studies which, it is overwhelmingly obvious, only corporations, governments, and other elite institutions are positioned to act upon; these studies are not even written in language accessible to a general audience. It is left up to the mass media, financially inseparable from the corporations responsible for climate change, to choose just how and to what extent this disaster should be communicated to the public. On the whole climate scientists do not sabotage the work of their colleagues in the disciplines that produce the technicians whose job it is to destroy the planet, they do not hijack media broadcasts to tell the real story, they do not stand at the local grocery store handing out flyers informing people that they only have a few years left to save the planet, they do not avail themselves, their institutional resources, and their cultural legitimacy to the anarchists who are going to prison for using sabotage to stop deforestation, and they are not themselves setting car lots full of SUVs on fire (or developing other means to render large numbers of these fuel-inefficient vehicles unsalable while releasing less carbon into the atmosphere). They have chosen institutional loyalty over loyalty to the planet and to what they themselves know to be true.

Certain things I have written in this essay are similar to arguments that have been made by scholars with an abolitionist perspective. The difference is that these scholars have presented their arguments as suggestions for social design. But the justifiable argument that the police, the courts, and the prisons constitute part of a counterinsurgency war waged against oppressed members of society require one to take sides. Faced with an asymmetrical war of aggression, one cannot choose neutrality. You cross a critical boundary when those who are processed, those who are jailed, those who are tortured, those who are killed, are your friends or fam-

¹¹ Responsibility is judged by how much one profits from the harmful action, how much power one exercises in the realization of the harmful action, and how much access to information about the harm one has. The problem of climate change is not the product of the personalities of certain individuals, it is the product of the capitalist logic of production and Western values regarding human relationships with the environment, all reproduced in the actions and decisions of everyone within society. Participation in the destruction of the planet is spread out, but responsibility is concentrated. A common person must risk her liberty and with luck and good planning might shut down a coal-burning power plant for one day. The executive of a power company need only risk her ludicrous financial privileges and she could shut down a great many power plants and create a much larger ripple in public consciousness.

ily members, when they are not simply “informants”¹² or members of a sample. Criticizing justice through the production of discourse rather than the enabling of action is unforgivably cynical. It is useful to recall that the prison system developed in large part as a humanitarian reform (Foucault, 1977), guided by scholars, many of them well meaning, drafting papers and formulating better means of social management.

In today’s bureaucratic system of control, one need not be ridiculously wealthy to be part of the ruling class. One need only view society from above, see human problems in inhuman terms, alienate desires from actions, and contribute one’s two cents.

There are already many acts of resistance against the justice system, and millions of people who understand themselves to be at war with the police or with at least some aspects of the state. What is needed is not that their enemy be advised of more humane ways to treat them, nor even that these millions be studied by some progressive academic bold enough to acknowledge their existence — the study will probably not be of any use to them, but it will be useful for government agencies tasked with analyzing and undermining these uncontrollable social elements. What is needed is solidarity: rather than particularizing, joining together to create a collective force capable of changing this reality from below.

My goal in writing this article is to enable action, not to produce discourse. Seeing through our own eyes rather than dehumanizing social conflicts can help us to act more effectively and more honestly. Realizing that it is our responsibility to take things into our own hands rather than calling for a more powerful actor to solve a problem allows us to confront the institutional configuration that causes or exacerbates many of society’s worst problems. Believing that we can survive the repression that this path will incur can give us the courage to do what must be done.

¹² I think there is no small significance in the difference of usage this word has for us and for academics. What is most significant is that the meaning is the same: “those who talk with the authorities.”

Harold Barclay, 1982. *People Without Government: An Anthropology of Anarchy*, London: Kahn and Averill.

Jamie Bissonette, 2008. *When the Prisoners Ran Walpole: A True Story in the Movement for Prison Abolition*, Cambridge: South End Press.

Christopher Boehm, 1993. "Egalitarian Behavior and Reverse Dominance Hierarchy," *Current Anthropology*, Vol. 34, No. 3, June 1993.

Michel Foucault, 1977. *Discipline and Punish: the Birth of the Prison*. New York: Pantheon Books.

Peter Gelderloos and Patrick Lincoln, 2006. *World Behind Bars: The Expansion of the American Prison Sell*, Harrisonburg, Virginia: Signalfire Press.

David Graeber, 2004. *Fragments of an Anarchist Anthropology*, Chicago: Prickly Paradigm Press.

Derrick Jensen, 2004. *A Culture of Make Believe*, White River Junction, Vermont: Chelsea Green.

Thomas Mathiesen, 1974. *The Politics of Abolition*, London: Martin Robertson.

James C. Scott, 1998. *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*, New Haven: Yale University Press.

James C. Scott, 2005. "Civilizations Can't Climb Hills: A Political History of Statelessness in Southeast Asia," lecture at Brown University, Providence, Rhode Island, February 2, 2005.

Dennis Sullivan and Larry Tift, 2001. *Restorative Justice: Healing the Foundations of Our Everyday Lives*, Monsey, NY: Willow Tree Press.

E.P. Thompson, 1975. *Whigs and Hunters: the origin of the Black Act*, London: Allen Lane.

Kristian Williams, 2004. *Our Enemies in Blue*, Brooklyn: Soft Skull Press.

Library.Anarhija.Net



Peter Gelderloos

The Justice Trap: Law and the Disempowerment of Society
2010

This paper was presented at the conference Hierarchy and Power in the History of Civilizations at the Russian Academy of Sciences in Moscow, June 2009, and published in *Social Anarchism* summer 2010.

lib.anarhija.net