



Niki Lacey

March 27th, 2024

Horizon, Windrush and Grenfell tell us clearly – Criminal Justice requires Epistemic Justice

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Niki Lacey explains the concept of “epistemic injustice”, where the voices of marginalised groups are either unheard or dismissed as less valid than those of more powerful members of society. Drawing on several examples (Post Office, Windrush, Grenfell and more), she considers: what are the ramifications of these grave injustices for the legitimacy of the criminal justice system?

It has long been recognised that societies with glaring inequalities will face obstacles to achieving criminal justice. Perhaps the most obvious of these have to do with what we might call *material injustice*: those

with more limited access to public services and other resources – and more generally with fewer opportunities with regards to education, health, social care, shelter and so on – are more likely to encounter obstacles in the path to trying to conform their behaviour to the norms of criminal law.

Over the last 30 years, this longstanding challenge has been exacerbated by ever-greater levels of inequalities in so-called advanced economies. A substantial minority have been excluded from the benefits of economic growth, while the consolidation of a small, super-wealthy elite has arguably created a **zone of impunity** for certain “crimes of the powerful”.

But alongside material injustice, there is a second form of injustice which also poses challenges to the project of criminal justice: what Miranda Fricker, in an influential **book**, has called *Epistemic Injustice*...

Epistemic justice and recent miscarriages of justice

The argument is relatively simple, but its upshot is profound. The distribution of power in society shapes how claims to knowledge are received and validated, rendering the truth claims of disrespected and marginalised groups less audible and less “valid”. The greater the disparities of power and respect involved, the more acutely this happens.

The upshot for criminal justice is obvious. It is already known that where the state accuses someone, that individual – even with legal representation – is inevitably in a less powerful position. But if that individual is, in addition, a member of a culturally or materially marginalised group, then a number of direct and indirect mechanisms

serve to undermine the credibility of their words and even the audibility of their voices.

Sometimes this epistemic injustice is related to material injustice – as, for example, where an indigent defendant cannot afford adequate legal representation and has to rely on poorly-resourced public defence arrangements. But it may, more subtly, flow from factors such as implicit biases, for example in how veracity or credibility are assessed. And these biases likely affect groups that are marginalised in terms of a wide range of factors including age, gender, ethnicity, homelessness and insecure migration status.

There is now a very substantial literature, in sociology and economics as well as philosophy and psychology, on the operation of such **implicit biases**, and particularly on the impact of gender and racial stereotypes. While perhaps less obvious than the upshot of material injustices, the implications of epistemic injustice for criminal justice are no less radical. The recent overturning of the convictions of **dozens of postmasters and postmistresses** for a “fraud” which was in fact caused by a software failure is a case in point. Probably the most extensive miscarriage of justice case in UK legal history, it is a horrifyingly eloquent testimony to the difficulty which members of groups with lower social standing – in this case, many of them working class, and many of minority ethnicity – encounter in having their narratives accepted (or even listened to) in criminal justice settings.

In effect, it is a story of the defendants’ agency being effaced through the criminal justice authorities’ grant of *epistemic preference* to an establishment organisation – and one that relies on evidence generated by an IT programme. (It is also a story replete with lessons about the difficulty of challenging evidence produced in closed-box digital systems).

Looking beyond the Horizon/Post Office scandal, epistemic injustice and status inequalities more generally seem likely to have sat at the core of several recent large-scale miscarriages of justice. Think, for example, of the **deportation** of so many of the **Windrush generation**; the inability of **Grenfell residents** to get safety concerns taken seriously; and the recent scandal about overseas students **falsely accused** of faking the results of English language tests. Striking, here, is not only each miscarriage of justice in itself, but the way in which each was preceded by a lengthy period of ignoring, discounting, disbelieving and denying on the part of state authorities. The **Hillsborough football stadium disaster** is another case in point, as is the **patterned enforcement** of the infamous joint enterprise law, with prosecutions all too often featuring evidence whose supposed relevance is based on **prejudicial stereotypes**.



People protesting in London on 5 May 2018 against the 'hostile environment' targeted at the Windrush generation. Photo © David Mbiyu via Shutterstock.

Both material and epistemic injustices affect the criminal justice system's identification and treatment not only of offenders, but also of

victims. Just as a society's material and epistemic injustices condition the opportunities which differently situated groups have to conform their behaviour to the law, and the way in which their behaviour and testimony will be received and interpreted, so they condition their likelihood of becoming a victim, particularly of certain forms of crime; the likelihood of having their complaint about criminal victimisation dealt with, attended to, and believed; and the respect and consideration with which they are likely to be treated by legal and criminal justice agents.

Perhaps the most obvious example would be the disbelief and disrespect encountered by victims (particularly female, and probably yet more so racially or class-marginalised female victims) of domestic abuse and sexual assault. But we could also consider, for instance, residents of poor areas who do not benefit from adequate policing; or young black men who find themselves presumptively criminalised when they are in fact victims or witnesses – a spectacular example being that of Duwayne Brooks following the racist murder of his friend Stephen Lawrence, documented in a subsequent [Inquiry](#).

Criminal justice implications for the marginalised – and for the powerful

This brief analysis of the upshot of social injustice for criminal justice also has implications for what we might see as the opposite end of the criminal justice spectrum: crimes of the powerful. In general, a litmus test of the justice of a criminal justice system is its treatment (or not) of all people on equal terms. A failure to attend to the crimes of those who benefit from material advantages (as well as the advantages of credibility and of status) poses just as sharp a challenge to the authority of the criminal justice system as do material and epistemic injustices relating to the disadvantaged or disrespected.

What's more, these injustices of unfair advantage, as we might call them, also pose a subtle but real threat to the overall legitimacy of the system. We know from extensive empirical research that perceptions of procedural justice are important to **trust** in institutions – with consequences for the stability and efficacy of those institutions. Unjust advantages in this terrain, particularly if they are so extensive as to be regarded as creating a sphere of impunity for the elite, therefore may not just be toxic to the perceived *legitimacy* of the criminal justice system. Crucially, they are also corrosive of the state's claim to legitimate *authority*. This gives us yet more reason to worry about growing inequalities: their impact falls on not just criminal and social justice, but the integrity of our political institutions at the most fundamental level.

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