

*Studies in Critical Social Sciences*

Valeria Vegh Weis

# Marxism and Criminology

*A History of Criminal Selectivity*



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By

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LEIDEN | BOSTON

Cover art by Enzo Leone.

Library of Congress Cataloging-in-Publication Data

Names: Vegh Weis, Valeria, author.

Title: Marxism and criminology : a history of criminal selectivity / by Valeria Vegh Weis.

Description: Leiden ; Boston : Brill, [2017] | Series: Studies in critical social sciences, ISSN 1573-4234 ; VOLUME 104 | Includes bibliographical references and index.

Identifiers: LCCN 2016049409 (print) | LCCN 2017004128 (ebook) | ISBN 9789004319554 (hardback : alk. paper) | ISBN 9789004319561 (E-book)

Subjects: LCSH: Criminology--Economic aspects. | Criminology--Sociological aspects. | Marxian economics. | Criminal justice, Administration of. | Discrimination in criminal justice administration.

Classification: LCC HV6171 .V44 2017 (print) | LCC HV6171 (ebook) | DDC 364.01--dc23

LC record available at <https://lcn.loc.gov/2016049409>

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: [brill.com/brill-typeface](http://brill.com/brill-typeface).

ISSN 1573-4234

ISBN 978-90-04-31955-4 (hardback)

ISBN 978-90-04-31956-1 (e-book)

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This book is printed on acid-free paper and produced in a sustainable manner.

Printed by Printforce, the Netherlands

Marxism and Criminology

# Studies in Critical Social Sciences

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VOLUME 104

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*To Enzo, Dolly, Sammy, Diana and Carlos*



Bullets kill and bars constrain, but the practice of supervision inevitably involves the construction of a set of narratives which allows the kept, the keepers, and the public to believe in a capacity to control [crime] that cannot afford to be tested too frequently.

SIMON 1993



## Foreword

It is very rare these days to find a book that combines a critical, historical and structural account of crime, punishment, and social control. *Marxism and Criminology: A History of Criminal Selectivity* achieves those goals by doing for crime and crime control what Rusche and Kirchheimer – in their path breaking text *Punishment and Social Structure* – did for the analysis of punishment and incarceration. Valeria Vegh Weis offers a form of periodization that echoes *Punishment and Social Structure's* claims that the dominant forms of punishment in any period will correspond with the main form of production relations. However, Vegh Weis goes beyond that framework and does not limit the analysis to the category of 'labour market' – as Rusche and Kirchheimer did – but she analyses the complex socio-economic conditions underpinning crime and crime control.

To do so, Vegh Weis develops a typology aiming to identify three modalities of 'criminal selectivity' starting from the late 15th century to the present. Within each of these modalities, she analyses the process and discourses associated with the changing forms of selectivity and, in particular, those activities that were 'under-criminalized' and those that were 'over-criminalized.' In the first mode, *original criminal selectivity*, she argues that activities such as the expulsion of farmers and the appropriation of their land were considered legitimate, while vagrancy, begging and prostitution were considered to be serious crimes in need of strict regulation. The second mode, which is referred to as 'disciplinary,' involves the growth of the modern state that introduced new forms of control to discipline the poor and the working class. The third mode is identified as 'bulimic,' in which the poor are culturally included but economically expelled. Drawing on Marx's *Capital* and *Theories of Surplus Value*, it is suggested that the attempts of the previous period to incorporate the working class into the socio-economic structure is reversed.

By this logic, this book moves beyond the limited discourse of much conventional criminology and adopts a broader perspective firmly located within a Marxian tradition. Rather than adopting the classic conservative perspective of seeing crime as a function of the motivation of offenders or alternatively the liberal perspective that sees crime simply as a response to deprivation, Vegh Weis locates the social construction of crime in a historical context. Is in this way that she poses the question of selectivity and why certain groups have come to be conceived as 'criminals' while others are not. This, in turn, raises the question of social categories and their application. It is now commonplace in criminology to point out that the conception of crime and the criminal are structured by class, age, gender and race. Hundreds of studies have discussed



the interaction between these 'variables,' but they rarely ask questions about how crime and crime control became associated with the specific combination of these attributes. Understanding the historical development of social categories is a critical, if neglected task, as Vegh Weis suggests.

Moreover, the book does not restrict the analysis to a narrow Marxist framework, but also incorporates a range of sources, including Michel Foucault's analysis of discipline. When describing the emergence of what it is referred as a 'legally-disciplining criminal selectivity' (late 18th century) – the first phase of the *disciplining criminal selectivity* –, Vegh Weis takes into account the lessons of *Discipline and Punish*. There, Foucault notes that, in the transformation from the *Ancien Régime* to industrial capitalism, the notion of crime was distorted, involving a shift from the attack of the body (murder, assault) to theft, and from 'mass cruelty' towards more marginalized forms of professional criminality. This, in turn, required for more efficient, continuous and dedicated forms of policing. Activities that were once considered rights, like the collection of wood were now to be seen as theft, as Marx pointed out in his early writings. As Vegh Weis clearly states, with the changing relations of production, a range of practices that were once tolerated became outlawed. At the same time, the bourgeoisie was careful to protect and play down its own transgressions, focusing regulation almost entirely on the activities of the poor. Thus, the aim was not so much to remove illegalities but rather to redistribute and redefine them. Criminal activity was held to be an infringement of the 'social contract' and the criminal becomes the enemy of society as a whole. Crime itself was re-categorized and reconstructed on a continuum of 'seriousness' and assesses, not only in terms of its immediate impact on the victim, but also in terms of its consequences for future disorder. Arriving to the 19th century, Vegh Weis, also following Foucault, refers to the emergence of a 'police-medically disciplining criminal selectivity' – the second phase of the *disciplining criminal selectivity* –, which traces the transition from crime as an 'act' to a situation in which the criminal becomes a specific type of person and the object of a new set of knowledges.

It is no accident that this book and the powerful works of Rusche and Kirchheimer, and Michel Foucault that inspire it, are drawn on the work of Marx and Engels, and are located in the Marxist tradition. Indeed, Marxism provides a critical examination of social phenomena that, unlike the traditional forms of positivism, is able to go beyond appearances and identify the underlying mechanisms in play. Marxism is a body of work that takes the nature of crime, justice and legality seriously, while providing the tools for understanding the mechanisms that sustain and perpetuate them. It is an historically informed approach that aims to understand the issues of our time as function of the

changing social relations of production. It aims to link theory to practice, agency and structure. Contrary to both liberal and orthodox interpretations of crime and punishment, Marxism allows us to develop a deeper understanding of these issues within an emancipatory framework.

It is true that some critics discourage a Marxist analysis of crime and punishment by expressing that Marx was critical of the advent of private property seeing it as a form of theft, and that he was at times scathing about the so called 'dangerous classes,' seeing them as parasitic and a potentially reactionary force. However, as Vegh Weis points out, it was also recognized by Marx that, in the dawn of capitalism, the enclosure movement and the forceful evictions from the land separated the worker from the means of production and that many had little option but to become thieves, beggars or bandits. Thus, Marx was sensitive to the conditions that produced criminality and which filled the ranks of the criminal classes with recruits. Marx and Engels demonstrated that it was the very capitalist system, which the bourgeoisie put forward as the model of a just and virtuous society, that produced these threats to its own sense of respectability and order. In this account, Marx and Engels' aim was not to romanticize the deviant or promulgate illusions about his or her 'freedom' or 'spontaneity,' but rather to point out that the deviants' existence, however authentic, does not transcend the limits of the larger social order. Concerning the analysis of the law, as Vegh Weis suggests, Marx and Engels were not averse to using it to promote or defend working class interests. On the contrary, their aim was to use the legal freedoms available in the bourgeois State to the full in order to develop the workers' movement and to maximize political freedom. Indeed, Marx and Engels constantly promoted demands for universal suffrage, a free press, freedom for trade unions and the abolition of arbitrary and repressive laws.

In sum, this book strives towards a theoretical perspective that connects with the liberative dimension of Marxism and utilizes the critique of crime and social control that allows us to better understand the past while encouraging us to work towards an alternative future.

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University of Kent  
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## Preface

"I can't breathe." These were the last words of Eric Gardner, an unarmed Black-American man who died while being arrested in July 2015. Mr. Gardner was committing a low-level offense: selling loose cigarettes in the streets of Staten Island, New York. A neighbor called 911 to complain about Mr. Gardner's familiar presence in front of a local store. Two police officers arrived and, during the arrest, put him in a chokehold – a technique that had been banned by the Police Department as a legal form of restraint. According to videotapes, Mr. Gardner did not resist the arrest. Despite pleading eleven times for help, he was left in the ground, handcuffed and motionless, without immediate aid. The practitioners and paramedics who arrived to attend to him did not follow expected protocol. Videos of Mr. Gardner's death quickly became viral. None of these documented facts were enough to convince the grand jury to bring charges against the police officers responsible for his death (Al Baker 2015).

What struck many social justice advocates about the case was its unfairness. Does the unfairness that plagued Garner's case (social inequality, police brutality, lack of accountability) represent an isolated incident or is it part of a systematic bias in criminal justice systems? Is this punitive and biased legal response to a social conflict a local phenomenon, exclusive to urban areas like New York City, or a national one? Could it even be global? To what extent does the heartbreaking experience of Mr. Gardner describe the current function of criminal justice? Can we track this legal path along modern history? This book thinks through these complex questions lurking beneath Gardner's case as a striking sample of how criminal justice systems have been resting on a complex paradox: a promise of justice mixed with practical unfairness. As a result, it seems that entire communities 'can't breathe' when facing the criminal justice system.<sup>1</sup>

Consider the United States: as of the writing of this book, more than 2 million people are currently in prison serving an average sentence of 1.5 to 2.5 years; more than 7 million are on probation; and more than 3 million are on parole (Garland 2016). This means that 12 million people are part of the U.S.

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1 'I can't breathe' is now a song written by Mr. Gardner's siblings (Sacks 2016) and a t-shirt worn by famous basketball players (The Washington Times 2014; Scott 2014).

system of mass penal control. Most of them are unemployed<sup>2</sup> under-educated<sup>3</sup> young<sup>4</sup> Black-American and Latino males.<sup>5</sup> The ethnic composition of the U.S. prison population has *reversed* over the past 50 years, turning over from 70% white at the mid-century point to nearly 70% Black and Latino today. As a result, more Black-Americans are under correctional control today than were enslaved in 1850, a decade before the civil war started (Alexander 2010, 175). However, ethnic patterns of criminal activity have not been fundamentally altered during the last half of the century (Wacquant 2001, 97).

These biases are present from the start, during the creation of the statutes and during the enforcement of laws. In the first eight months of 2014, for example, Black-American and Latino communities accounted for 86% of those arrested for marijuana possession in New York City (Goldstein 2014). On a national level, 1,100 people are killed by police officers each year: 95% of the victims are male, 50% are 34-years-old or younger, and Black-Americans are heavily over-represented in these numbers, accounting for one in four of these deaths (The Counted 2016). Bias also seems to be an intrinsic aspect of the judicial system. Few of these arrests go to trial: 97% of such cases are closed through plea bargain, where the stigmatized minority population faces a lack of adequate legal defense, as well as implicit and explicit bias from public

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- 2 The unemployment rate for Black-Americans averaged 11.6% between 1963 and 2012, more than double the white jobless rate over that time (Fletcher 2013). Black and Latinos families headed by single mothers are likely to live below the poverty line (McKernan et al., 2009).
  - 3 A quarter of Black-American students attend 'drop out factories,' high schools where close to half (or more) of the students aren't graduating in four years. And numerous studies document how even high-achieving poor students rarely apply to top colleges (Building a Grad Nation Report 2016).
  - 4 Black-Americans are not significantly more likely than whites to be stopped for clear traffic safety law violations. But in investigatory stops, a Black-American man age twenty-five or younger has a 28% chance of being stopped for an investigatory reason over the course of a year; a similar young white man has a 12.5% chance. As people grow older they are less likely to be stopped in this way, but a Black-American man must reach fifty – well into the graying years – before his risk of an investigatory stop drops below that of a white man under age twenty-five (Epp and Maynard-Moody 2014).
  - 5 A white woman has only a 7% chance of being stopped by police officers for an investigatory reason over the course of a year (Epp and Maynard-Moody 2014). When discussing sentencing, the average sentence for males is 278.4% greater than that of females (51.5 versus 18.5 months) (Mustard 2001, 296). Females receive even shorter sentences relative to men than White-Americans relative to Black-Americans (302). On the other hand, when combining gender with class and race, studies show that women of color and low income women are disproportionately affected by mandatory arrest policies for domestic violence (INCITE-NATIONAL 2016, 38).

servants (Gleeson 2016). Even when the accused are granted a trial, they confront mostly white juries. Overall, Latinos and Black-Americans are incarcerated at a much higher rate than whites: in a sample of 100,000 U.S. residents, more than 4,000 would be people of color, in comparison with less than 700 White-Americans.<sup>6</sup> Unfairness does not end when people are released from prison. After serving time, they can lose the franchise to vote, face removal from public housing, have their parental rights withdrawn, be prohibited against becoming foster or adoptive parents, confront restrictions to holding public office, and be rejected from welfare assistance. These are only a few of several collateral consequences of convictions (Jacobs 2015).

This problem is not exclusive to the United States. In Europe, criminal justice is not quite as demographically homogenous as in the United States, but it still disproportionately targets immigrants and minorities (Antunes 2003). Currently, Europe is rethinking the operation of its criminal justice systems in face of mass, often forced, migrations and their unknown impact on European cultural identity. These debates have been intensified by backlashes of local populations against immigrants. Recently, immigration policies have been cited as a key factor in Great Britain's decision to leave the European Union. Similarly, the United States is in a critical moment of national rethinking about class and racial inequality. Data increasingly provides evidence that those targeted by a system of mass penal control are often racial minorities and the poor. These discussions have been exacerbated by high tensions between law enforcement and communities of color,<sup>7</sup> and by the emergence, in the United States, of the Black Lives Matter movement. The relevance of these debates in the public arena is so important that the last U.S. presidential candidates, from both conservative and liberal sides, have offered radical agendas for rethinking the criminal justice system.

The unfairness of criminal justice systems is currently in the spotlight. This illumination is already a victory if we acknowledge that such unfairness has

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6 Latinos and Black-Americans are incarcerated at a rate of 4,347 people per 100,000 U.S. residents of the same race and gender, while white men were imprisoned at a rate of 678 prisoners per 100,000 inhabitants (Bureau of Justice Statistics 2010).

7 One of the outcomes was the recent resign of Bratton, who was the leader of the broken windows policing model. This happened after communities of color' organizations protested against him in City Hall. The New York-based Communities United for Police Reform asserted that Bratton "was no reformer to communities impacted by abusive and discriminatory policing." Civil Rights Attorney Darius Charney, who sued the N.Y.P.D. over its stop-and-frisk practices, expressed his concern about Bratton's legacy (Weichselbaum 2016).

been hidden under the name of idealized justice. This idealization proclaims that if a subset of the population had been targeted more intensively by the criminal justice system, it is just the reasonable and unbiased response to the fact that the real offenders were among those people. Historically, criminal justice systems often punish people as a mode of social control and not just as a response to their crimes. This distortion is the core of legal unfairness. The manipulation of crime control as a tool to intervene in social unrest neglects the corollary that punishment ought to be used as a last resort and only for those behaviors that cause real social harm.

We must then look at how this unfairness is not only a clear feature in the operation of criminal justice systems, but that it is also not a recent event. In fact, this unfairness has been with us since the 15th century at least. It is not an accident, but a mandated feature of a criminal justice system. This book is committed to challenging existing narratives that analyze crime and punishment purely from a normative-legal perspective. Instead, it conceives of them as part of the socio-economic environment, plagued by legal discretion and bias. The book discusses the persistence of unfairness in crime control through a critical, holistic and historical analysis. This focus is not just a personal and impassioned response to bias. Instead, this book sutures the idea of unfairness to a critical and theoretical perspective. Such unfairness in all the spheres of a criminal justice system, plagued by stigmatizing patterns of class, race, ethnicity, gender, and religious bias, will be referred to as 'criminal selectivity.'

Criminal selectivity is much more pervasive in society rather than being limited to criminal justice systems. It begins in the context of unequal economic distribution. As Thomas Piketty (2013) notes in his widely read and discussed book, 10% of the most economically advantaged people in the world own between 80% and 90% of global wealth, while 50% of the poorest population combined own less than 5% of the world's wealth. 921 million people worldwide live in slums, well below the poverty line (Davis 2006). In the United States alone, 1.5 million families (with three million children overall) live on less than \$2.00 per person per day (Kathryn and Luke 2015). The situation is even more striking for the racial minorities. Young Black-American men are more likely to go to prison than to college. Just to give an example, while 992 Black-American men received a bachelor's degree from the Illinois State Universities in 1999, roughly 7,000 Black-American men were released from Illinois state prison system in 2000 for low-level drug offenses (Alexander 2010, 184–185). Criminal selectivity seems to be working as a means to fulfill social control functions over racial minorities and impoverished populations, and not as an exclusive means of crime control.

The scope of this book is the criminal justice system, and it will comprehensively analyze criminal selectivity from looking at how it operates throughout the penal process. The first stage takes place through the drafting of statutes, when selectivity generates 'inequality under the law.' The second stage in this process may be called 'law enforcement profiling,' which can be defined as the biased discretionary and selective activity of law enforcement agents (including border patrol and special teams).<sup>8</sup> This is not just 'racial profiling' – as it is commonly referred to – but also includes class, ethnicity, gender, and religion bias. The third stage involves judicial and prosecutorial activity. We might call the third stage 'courts' discretion,' to make it clear that it does not only refer to the so-called 'prosecutorial discretion,' but also includes judges', defense attorneys', and juries' biased performance. The fourth stage, which we will call 'differential penalization,' relates to imbalanced punishments and, in particular, to prison management. It includes the administration of the collateral consequences of convictions that help re-start the cycle of economic and social exclusion.

The book will also be analyzing this holistic analysis of the selective operation of the criminal justice system from a historical perspective to show that unfairness has been a standard pattern of the capitalist system of production. Examining the continuities and discontinuities of this long historical process may help us understand criminal selectivity as it relates to the complex socio-economic structure, with its cultural, political, religious, ethnic and gender-specific features. The book takes its readers on a path through the capitalist system of production, focusing on those behaviors that have been systematically criminalized and those that have been consistently ignored by crime control agencies since the 15th century to today. The book also proposes who were the social actors that perform both kinds of behaviors. Finally, the book points out which were the discourses that have made this unfair operation of the criminal justice system possible, as well as the underlying material goals of punishment within those ideological discourses.

In order to understand how unfairness have been plaguing each stage of the criminal justice system through capitalism it was necessary to go beyond legal analyses. This history of criminal selectivity is inextricably tied to the socio-economicspheres in which it takes place. Marx and Engels are called to bring to the table the methodology of historical materialism while their theoretical contributions are used as sources for reflection. This double approach is the one that allows us to situate crime and punishment in the development of the

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8 While writing this lines, a S.W.A.T. team – a special group designed to confront particularly complex crimes- entered in the house of a black mother to enforce a traffic ticket. While doing so, they killed her, while also injuring her five-years old son (Lowery 2016).

capitalist system of production, and to analyze in-depth the interaction of the legal sphere with its economic, political, social, cultural, religious, ethnic and gender implications. This materialistic perspective is the one that helps prove that, far from being a circumstantial phenomenon, the selective functioning of the criminal justice system has been present since the origins of capitalism because it has been a necessary tool for the foundation and reproduction of this mode of production.

Although this book does not suggest concrete public policies, it is hoped that the analysis provided here would serve as an impetus to ask deeper questions in more comprehensive ways to frame the discussion of how to deal with and overcome unfairness in criminal justice systems. When analyzing the history of modern crime and punishment, evidence suggests that the most outrageous crime is the drastic inequality within the operation of criminal justice. The contemporary system that has been born in the name of 'justice' has been operating in a biased manner in terms of class, race, ethnicity, religion, gender, and age. After more than half a millennium of unfairness, the time is very ripe to think radically about how to overturn this feature. The proposed concept of criminal selectivity is meant to illuminate the intrinsic unfairness in the application of and punishment that thrives alongside capitalism. My desire is that this clarification might make the all too distant idea of 'change' become a much more feasible goal.



## Acknowledgements

I write these lines with deep gratitude because I have a lot for which to be thankful. This book would not have been possible without the academic and emotional collaboration, support, and inspiration of a great number of people.

Martin O'Reagan and Brittany Magnin undertook the copyediting process. They have enthusiastically helped me in nourishing the book with a bright tone, polishing lines that I have thought in a non-native language. Martin has been the principal responsible for the editing process and has accompanied me during long days of reviewing and editing. Brittany has played the role of a magician in helping to assure that my voice comes through clearly and powerfully. I want to express my profound gratitude to Hanna Zemichael who helped me to polish and improve the final version of the manuscript.

The cover of the book is the result of countless days and nights of effort put forth by my partner, Enzo Leone. Enzo did not leave my side for even one single minute; he was always here to read each and every line, give comments and express his support and encouragement which are responsible for making this book come to light. Many thanks to my amazing friend Noelia Langle who kindly offered her artistic support.

I would also like to extend my thanks to all the great friends and colleagues I have encountered at New York University School of Law who accompanied me on this journey. I am particularly grateful to Gabe Chipkin who helped me prepare the first draft, and to Samantha Wayne and Giuseppe Bianco who gave me critical inputs in key sections of the book. A very special thanks to Christopher Stahl, a star consultant from the NYU Writing Center, who helped me to think and write better in our inspiring weekly meetings. Thanks to Professors Anthony Thompson, Kim Taylor-Thompson, Thane Rosenbaum, and Peggy Cooper Davis for their invaluable support and encouragement.

My sincere gratitude crosses the equator all the way back to Argentina, my homeland. I remember going to visit Atilio Boron, with this project in hand and a deep admiration, at the very beginning of this process. I was greeted warmly with his human quality that comes to overshadow his theoretical grandeur. He introduced me to the person that would be my Ph.D. director, Fernando Lizárraga, a privileged guide through the process of creating and writing, and the most detailed and keen critic of my work. Fernando has accompanied me since this book was just an idea, throughout the process of thinking, writing and revising it. Atilio also introduced me to Mariano Ciafardini, a prominent