*Justifying the Crimes of the Powerful*

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The crimes of the powerful have been addressed from a variety of perspectives and interpreted through an array of analytical tools, as testified by the contributions included in this volume. Building on the solid foundations laid down by Edwin Sutherland (1983), corporations are often described as recidivist offenders compelled to undergo learning processes leading to crime (Pearce, 1976). Outside the economic sphere, some scholars have focused on state agents, highlighting how the formation, distribution and exercise of power produce harmful institutional conducts (Geis and Meier, 1977; Tilly, 1985; Whyte, 2009), while others have remarked that the core capitalist states remain the greatest source of state-supported harm, violence and injury (Rothe and Ross, 2009). Anomie and conflict theory have also been used, suggesting that powerful individuals and groups distance themselves from imputations of criminal conduct while attributing them to the powerless (Passas, 1990; Ruggiero, 1996; Slapper and Tombs, 1999; Ross, 2000). Finally, micro-sociological aspects have been examined, leading to the observation that the very dynamics and values guiding the behaviour of organizations and their members often pave the way for their criminality (Burns, 1963; Dalton, 1959; Mouzelis, 1967; Keane, 1995; Shover, 2007).

This chapter attempts to add to the available wide-ranging literature, focusing less on explanations of why, when and how the crimes of the powerful occur than on the ways in which such crimes can be justified through philosophical and political arguments. This theoretical investigation will be carried out while focusing on the following conceptual variables: equality, inclinations, needs, toleration, liberty and authority.

**On justification**

An important precedent to this approach in criminological theory is, of course, the ground-breaking work conducted by Sykes and Matza (1957), whose ‘techniques of neutralization’ reveal how offenders are able to deny the harm produced or the very criminal nature of their acts. Such techniques, however, seem to be precisely situated and pragmatically mobilised within contexts in which notions of morality and legality are negotiated. Ex-post rationalisations, they reflect an agonistic endeavour involving one party condemning and the other defending itself. The notion of justification adopted here, instead, implies the recourse to general principles and philosophies which are presented as non-negotiable, in that they are thought of as belonging to a collective patrimony of values. Such principles and philosophies, in brief, are not deemed reflections of a specific sub-culture, but core, constitutive elements of *our culture*.

Sociological analysis of justification proposes a specific reading of organisations and businesses, where resources and arrangements based on personal ties are said to play a crucial role in determining behaviour (Boltanski and Thévenot, 2006). The crimes of the powerful, following this line of analysis, can be seen as the result of proximity among actors, mutual trust, imitation, and the desire to perpetuate bonds, values and group interests. But such arguments do not appear to distance themselves from the criminological domain, where all of this can be expressed with the notions of sub-cultures and learning processes. Proper philosophical and political justification requires that partial concerns and factional gains be depicted as beneficial to the collectivity, hence it requires an agreed-upon definition of the common good and the identification of higher common principles. In this sense, justification is a form of compromise, and ‘a compromise, in order to be acceptable, must be based on the quest for a common good of a higher order than the ones the compromise attempts to reconcile’ (ibid: 20).

One strategy allowing for the configuration of a higher order consists of grounding such order on the alleged universal appreciation of individualism. By denying the reality of collective phenomena, for instance, the mere interest of individuals comes to be recognized. This strategy does not amount to deceit, but is inspired by a serious imperative to justify acts; it is not a pretext, but a genuine attempt to present actions as conducts which withstand the test of justification.

**Equality of souls and inclinations**

If we regard the crimes of the powerful as extensions of individual interests, justifications are to be found in the very history of liberalism. By linking liberalism with the Christian revolution and its legacy in the modern age, a sacred aura is conferred upon free enterprise and its social effects. Christianity, we are told, freed a world suffocated by hierarchy, where rank was deemed natural and reason belonged to born elites (Siedentop, 2013). It built a world of equal individuals ‘sharing a common fate and endowed with equal moral status’ (Collins, 2014: 7). Individual conscience developed, as did communities, as free associations of moral agents defined by St Paul as the ‘body of Christ’. Enemies of liberalism and individualism, therefore, are enemies of Christianity.

While powerful offenders may justify their acts by claiming the saintly origin of their predatory instinct, they may at the same time claim that their rectitude is testified by the intimate, individual relationship they establish with the divinity they worship. Before Max Weber associated religious belief and self-discipline with the entrepreneurial spirit, philosophers formulated theories of morality revolving around individual rectitude, theories that ignored collective forms of life while encouraging solipsism. Individualism, in Plato, is characterized by *homo erectus*, namely a person who abandons the cave in which she is held and the uncomfortable position she is forced to assume, and walks in straight paces towards virtue. His theoretical model is ‘vertical’ and excludes deviations or inclinations. According to this model, therefore, leaning towards vice is a logical impossibility for those who have acquired independence in the form of erect posture. During the eighteenth century, the century of Immanuel Kant, depictions of individualism as independence abound, with Kant himself abhorring children for their ‘leaning’ on others and their passive attitude towards the mechanics of instincts. In his moral writings the others never appear, the only protagonist being the ego and her reason functioning in solitude (Arendt, 2006). Inclinations, on the other hand, are dangerous for autonomous individuals, because they allude not only to deviant conducts, but also to offers of care and solidarity to those in need (Cavarero, 2013). Rather than leaning towards others with acts of generosity, the ‘erect’ individual is allowed to act politically, that is to take initiatives, operate in new areas, be they economic or moral, in brief, to experiment with unique conducts. Acting is the faculty to initiate, the art of giving life to something new: the crimes of the powerful, from this perspective, are tantamount to novel discoveries, unprecedented forays into the static moral world made of continuity and habits.

Inclinations as care of the other entail solidarity and mutual responsibility, associated with reproduction and opposed to the total commodification of life. Against morbid individualism and infinite accumulation, groups may incline towards the defense of nature, ecological justice between generations, political participation and control of economic initiative. ‘Such claims, along with the counter-claims they inevitably incite, are the very stuff of social struggle in capitalist societies’ (Fraser, 2014: 68). The crimes of the powerful are indeed counter-claims, namely a forceful upsetting of rules, challenges to notions of legality, which aim at neutralizing the legitimacy of collective claims.

**Needs and tolerance**

Justifications of the crimes of the powerful may follow another trajectory, one based around the notion of need. The individuals described above, having achieved independence and rectitude, may advocate the crucial importance of needs defined by the *telos* to which they refer. To say that they need something is merely shorthand for the complete statement that they need something in order to acquire something else. The Marxist tradition distinguishes at least three different categories of needs: individual natural needs, or the means of biotic survival; social needs, or the means to an existence that is fulfilled in some ethical sense; and economic needs, the means required for the individual to serve the logic of capital (Heller, 1976). The crimes of the powerful adopt the third *telos*, that is a logic of appropriating resources before they are wasted. This echoes John Locke’s views around economic initiative, which is required to establish private ownership wherever fruits and game risk to rot and wherever rules allow such waste. Surprisingly, however, the crimes of the powerful also follow what can be termed a ‘Pareto logic’, in the sense that even wealth illegally appropriated can be regarded as loss if no one appropriates it. From this perspective, powerful individuals and groups who abstain from crime cause a ‘Pareto-inferior change’, which is referred to any change leading to at least one player experiences fall in utility. The crimes of the powerful, therefore, aim at causing ‘Pareto-superior change’, that is utility for all social players.

Tolerance for the crimes of the powerful may be generated by this very notion of ‘utility’, that we encounter when powerful actors pursuing their interest find resort to coercion unnecessary. Successful criminals may present themselves as philanthropists, in the sense that their deeds and their outcomes may appear as benefitting others rather than the perpetrators. These philanthropic powerful offenders, in brief, manage to repel the criminal label from their activity and to persuade others that their goals correspond to those of the collectivity. Criminal entrepreneurs, for instance, can often claim that their crimes (for example, producing or exporting prohibited or harmful goods) contribute to keeping and creating jobs (Ruggiero, 2007). It is in these cases that we are faced with what is deemed an ethical paradox of toleration.

The paradox lies in the fact that tolerating other people’s acts may be opposed to the imperatives of our ethical code. Believing that a certain kind of conduct is wrong can turn into the feeling that the conduct in question should be prevented. Such feeling, however, is avoided if toleration of that conduct is justified by adhering to higher principles which supersede our ethical code (Mendus, 1988). In the example given above the higher principles embedded in job creation may lead to condoning the crimes of the powerful and recognizing some moral value in them. Even crimes associated with tyrannical systems may find toleration, as in Xenophon’s dialogue between Hiero the tyrant and Simonides the poet that I will now discuss.

Hiero has been a private man before becoming a tyrant and is asked by Simonides to explain how the pains and joys of the two conditions differ. Hiero claims that power brings fewer pleasures and greater grief than the condition of an ordinary person of moderate means. Those politically or economically powerful have to strive to maintain their status and their wealth, they are constantly fearful that they might be deprived of what they possess and, as a consequence, become powerless. Praise and respect do not balance this fear, because these are only bestowed upon them for the sake of flattery. Wealth itself ceases to generate pleasure, as growing amounts of it finds the powerful insensitive to what they are already inured. ‘So, in the duration of pleasure too, one who is served many dishes fares worse than those who live in a moderate way’ (Strauss, 2013: 5). It would be interesting to inquire whether Alfred Marshall took inspiration from Xenophon for the formulation of his celebrated theory of marginal utility: ‘the marginal utility of a thing to anyone diminishes with every increase in the amount of it he already has’ (Marshall, 1961: 79). Applying this principle to the accumulation of power, money and resources, we are led to conclude that there are natural limits to social privileges and that the abuse of one’s position is unlikely, due to spontaneous self-restraining mechanisms. ‘The richer a man becomes the less is the marginal utility of money to him’ (ibid: 81). Xenophon’s main focus, however, is fear rather than satiability: fear that the disadvantaged may challenge the unjust distribution of wealth or even plot tyrannicide, which will lead to the erection of statues honouring those who commit it. Fear is only tempered by the realization that inequality may constantly increase provided something is left for the needy, because ‘the one who lacks something takes his fill with delight whenever it comes to sight before him’ (Strauss, 2013: 6).

Another core concern of the powerful, however, is the existence of other powerful individuals and groups who may possess more, and this turns into bitter competition. For, as the ordinary individual desires a house or a field, the powerful desire cities, extensive territory, harbours or citadels, ‘which are things much harder and more dangerous to win than the objects desired by private men’ (ibid: 11). This is why, in Xenophon, crime is an option, as plundering temples ad human beings is the only guarantee that power is maintained and augmented. If crime, on the other hand, tarnishes the honourability of the powerful, this does not change the situation substantially, the powerful normally being less honoured than feared. Power, therefore, may well rule without or against the laws. Hiero in fact considers that, in order to become powerful, some unpopular or even criminal measures have to be taken, but he also admits that the conservation of power itself, once achieved, requires incessant ‘innovation’ in a cumulative, virtually infinite process. From the Hegelian perspective, such process corresponds to history, which offers a concrete social and political reality while providing an understanding of how to change it. The powerful are impelled to ‘go beyond’, to deny reality and overcome its restraining force: negation is realized ‘by action, struggle and work so that a new political reality is created’ (Kojève, 2013: 174). This exercise of ‘negation’ includes violating rules and decriminalizing conducts.

**Relative liberty?**

Tolerance towards the crimes of the powerful may also be granted when another key category of liberal thought is taken into account. Adam Smith strives to establish when the absolute liberty ideally enjoyed by all ends up injuring someone. He posits that violations may undermine our natural rights, for example the right of *liberi commercii*, namely the right to exchange goods and services with those who are willing to deal with us. Those who hamper such a right violate what Smith terms *iura perfecta*, that is to say ‘rights that we have a title to demand and, if refused, to compel another to perform’ (Smith, 1978a: 8). *Iura imperfecta*, conversely, pertain to expectations, to duties which might be performed by others for our benefit, but to which we have no entitlement nor can we compel others to perform. ‘Thus, a man of bright parts or remarkable learning is deserving of praise, but we have no power to compel any one to give it him’ (ibid: 9). Similarly, beggars may be the objects of our charity and may be assumed to have a right to demand it, but we are not compelled to share our wealth with them. In this initial classification, Smith argues that *perfect* rights relate to communicative justice, whereas *imperfect* rights refer to distributive justice.

After expounding the very well know theory according to which the pursuit of self-interest, thanks to the laws governing markets, assure a beneficial outcome for society as a whole, he reiterates that the economic dynamic performs a crucial educational function, making anti-social behaviour counterproductive and transforming selfishness into its opposite: that is to say, regard and consideration for others. Private selfishness turns into public altruism. But anti-social behaviour returns in his *Theory of Moral Sentiments*, where Smith (1978b) examines what makes certain conducts praise-worthy and certain actions the spontaneous object of approbation and admiration. Utility, authority and wealth are his answers, with fortune playing a crucial role: in this way he separates a material status (being wealthy) from the way in which that status is acquired. Wealth is said to emanate power and elicit admiration in that the poor owe their subsistence to those who might be generous enough to share it. The hope that this may happen leads to the neglect of the ways in which ‘fortune’ is actually accumulated, leaving therefore the wealthy in the condition to negotiate the degree of virtuosity of their acts. Persons endowed with wealth, in other words, may constantly move the threshold beyond which their conduct is to be deemed immoral. Smith is well aware of this dynamic, for example, when he notes that wealth represents an important source of authority, but also an important object of dispute. In a situation where property can be acquired, he argues, there are advantages to be gained by committing acts of injustice, because ‘that situation tends to give full rein to avarice and ambition’. Hence the necessity to establish a ‘civil government’. But then he concedes that ‘civil government, so far as it is instituted for the security of property, is in reality instituted for the defence of the rich against the poor, or of those who have some property against those who have none at all’ (ibid: 12). One might conclude, in this respect, that even illicit or unorthodox economic practices, like conventional economic activity, will contribute to the dream that privileges will be extended and that power, the usual attendant of wealth, will be in some measure diffused among all the members of the community.

In the chapter ‘Delinquency’ of his *Lectures on Jurisprudence*, the author further clarifies his views on the subject matter. The initial distinction is made between damage produced by ‘willful injury’ or the *malice propense* of the offender, and damage caused by ‘faulty negligence, or *culpa*’ (Smith, 1978a: 103). In a list of what we would now describe as crimes of the powerful, he mentions ‘those injuries which may be done to one’s personal estate’, a variety of frauds, including the acts of ‘cheating another out of his property’ and offences like perjury and forgery. He then describes in some detail ‘fraud with regard to insurance’, where ‘the insurers, on the masters giving in an account of the value of the ship and cargo, insure her for that sum’. A ‘master’, we are told, may make mendacious claims, and ‘having insured his ship above the value, might take an opportunity of wrecking her on some place where he might easily save himself and crew; and by this means enrich himself to the great loss of the insurers’ (ibid: 132). We are also warned that the detection of such operations is very difficult, and that the large profits made in this way is the cause of the great temptation to commit this specific form of fraud. After briefly discussing some examples of ‘financial crime’, such as ‘forgery of bills, India bonds, banks bonds, bank notes and all other payables’, Smith moves his attention to ‘the crimes which the sovereign may be guilty of against the subjects’. Well, if ‘financial crimes’, again, are too difficult to detect, those committed by the sovereigns against their subjects do not produce ‘willful injury’, but are normally caused by pure ‘faulty negligence’. Does Smith, here, condone or encourage a variety of crimes of the powerful?

As we have seen, the virtuous circle translating self-love into public good may also turn into a vicious circle. But when this occurs it is likely that the damage caused cannot be attributed to specifically identifiable entities. The crimes committed by the powerful are hard to detect and responsibilities are difficult to apportion, also because often such crimes are the result of negligence rather than injurious intentions. We are faced, therefore, with *malice propense*, rather than with *culpa*. Such crimes, moreover, violate *imperfect*, rather than *perfect* rights. Authority emanates from wealth, whatever the modality in which it has been accumulated, and is aimed at protecting those who posses property against those who possess none. Smith could not have anticipated the future success of his formulations and the ways in which his views, wittingly or otherwise, provide an ideal justification for the crimes of the powerful.

**Absolute liberty**

Conquest brings the opening of new and inexhaustible markets even when carried out through illegal aggression. This typical crime of the powerful, which is condemned by Adam Smith, is condoned by John Stuart Mill, the philosopher of classical liberalism, a theorist of political economy and a proponent of women’s rights. Mill spent a large part of his adult working life drafting ‘dispatches’ or official documents on British policy in India (Lal, 1998). Between 1836 and 1856 he was responsible for the vast correspondence pertaining to the East India Company’s relations with the Native Indian States. He also represented the Company in negotiations with government and, during the rebellion of 1857, and defended its interests against plans to transfer the responsibility for India directly to the Crown. How could the apologist of ‘liberty’ support such a predatory enterprise?

The main idea handed down to us by John Stuart Mill is that individuals are free and sovereign, an that happiness is not the direct and conscious objective of conducts, rather, it is the unintended outcome of other objectives: ‘the happiness of others, the improvement of mankind, art, beauty, the contemplation of nature, any activity pursued for its own sake’ (Himmelfarb, 1982: 15). This philosophy of anti-self-consciousness echoes Adam Smith’s notion of individual interest as public good. Mill, however, shifts the emphasis from the outcomes of individual choice onto individual choice itself. The opening lines of *On Liberty* offer a concise summary of his whole enterprise. The book is said to assert one very simple principle, namely that no authority should govern by means of compulsion and control the dealings of individuals, whether the means be physical force in the form of legal penalties, or the moral coercion exerted by public opinion. Interference of government on any member of a community is only justified when it is intended to prevent harm to others. Conversely, there is no justification for the authority to intervene to ensure the ‘physical or moral good’ of those who, by making choices, may cause harm to themselves. The individual

cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right (Mill, 1982: 47).

Liberty not truth is the mark of individuality, he asserts, meaning that dissenters from conventional truth express their individual independence more than proponents of that truth. The invective against tradition and dull conformity is expressed in a tone which is as combative as it is persuasive. We need protection, Mill says, not only from the tyranny of the magistracy, but also from that of the prevailing opinions and feelings, and our fight should be against ‘the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them’ (Mill, 1982: 63). This fight against customs is the only exercise that guarantees the liveliness of our mental and moral powers. Feelings and character must be active and energetic, not inert and torpid. Finally,

An intelligent deviation from custom is better than a blind and simply mechanical adhesion to it… Energy may be turned to bad uses; but more good may always be made of the energetic nature than of an indolent and impassive one (ibid: 124).

An ‘intelligent deviation’ is what in economic thought is known as innovation, and in the sociology of deviance is one of Merton’s ‘adaptations’, which allows individuals to pursue legitimate ends (money and success) while using illegitimate means. Intelligent deviation, therefore, immediately brings to mnd crimes committed by powerful people. Mill, however, advocates the cultivation of individuality ‘within the limits imposed by the rights and interests of others’. Deviance, therefore, must not hurt others, their life, health or interests, and should be confined within the boundaries of victimless behaviour.

‘If anyone does an act hurtful to others, there is a prima facie case for punishing him by law or, where legal penalties are not safely applicable, by general disapprobation’ (ibid: 70). Conducts causing harm to others, therefore, may escape formal punishment where statutory penalties are difficult to apply or are nonexistent. Using our contemporary vocabulary, we may suggest that conducts for which penalties can be ‘safely applicable’ correspond to conventional criminal conducts, while those for which legal intervention is problematic are the preserve of powerful individuals and groups. Mill appears to suggest, therefore, that the crimes of the powerful are punishable through mere general disapprobation.

A range of conducts examined in *On Liberty* fall in this grey area where liberty encounters crime, and Mill’s attempt to classify them mirrors our own contemporary endeavour to formulate a taxonomy of offences and the harm these produce. Even in situations where liberty and crime, in a sense, almost coincide, he considers freedom as a priority by unequivocally stating that ‘leaving people to themselves is always better than controlling them’ (ibid: 165). We are faced here with two familiar concepts regularly recurring in debates around white collar and corporate crime. ‘General disapprobation’ and ‘punishment by opinion’ echo analyses of the crimes of the powerful as conduct whose definition should be elaborated, and whose criminal nature perceived, within the occupational context in which it occurs. Punishment or persuasion? Mill’s argument reminds us of this dilemma, although his belief that ‘leaving people to themselves is always better than controlling them’ would suggest that persuasion, accompanied by disapprobation, would de preferable.

Intervention against malpractice, in many cases, ‘would produce other evils, greater than those which it would prevent’ (Mill, 1982: 70). We are therefore left with two main solutions: either the conduct affecting others is met with free, voluntary, consent by those affected, or those affected somehow ‘disappear’. We are yet in another crucial part of Mill’s argument, where the author discusses the variable liberty within a highly controversial commercial activity, namely the marketing of poisons. Here, he notes that authority control should not infringe on the liberty of producers or sellers, nor on that of buyers. Persons should simply be warned of the dangerousness of the good they buy. In a clarifying example, Mill describes a person attempting to cross a bridge which has been ascertained to be unsafe. There is no time to warn the person of the danger, but she might be seized and turned back without any real infringement of her liberty, ‘for liberty consists in doing what one desires’, and she does not desire to fall into the river (ibid: 166). In other cases, the person may desire just that, and once warned of the danger, should be left free to make her choice. The conclusion stemming from this example might be that those in charge of the building of the bridge should be granted the freedom to make it unsafe. Potential victims, on the other hand, should be granted the freedom to voluntarily become victims, thus ‘participating’ in the free entrepreneurial process. The crimes of the powerful, in this sense, are justified through the disappearance of the victims, on the one hand, and through their consent to being victimized, on the other.

**Authority**

‘Authority is the possibility for an agent to act upon others without others reacting despite being able to do so’ (Kojève, 2004: 26). This is an elegant formulation that echoes Mill’s notion of consent. We have seen that Mill’s concern is not to prevent perceptible damage to others, but rather to prevent harm being inflicted on them without their consent (McKinnon, 2008). Authority examined from the perspective of consent can be seen as an entity that does not change itself in relation to the action it performs, as change would signal its failure. If I want to get someone out of my room and I have to use force to do so, I show lack of authority. Naturally recognized by its subjects, all human authority must have a cause, a reason or a justification of its existence. The four ‘pure’ forms of authority identified by Kojève are linked with four different philosophical schools: Hegel (master and father) Aristotle (leader or chef), Plato (judge or the pretense of impartiality, objectivity, disinterest). These pure forms are not the result of a social contract: their genesis is spontaneous. More precisely, there is a theological or theocratic theory, whereby the prime and absolute authority belongs to God and all others derive from Him. Elaborated by the scholastics, this theory is then appropriated by partisans of hereditary monarchies. Plato’s theory, on the other hand, is based on the assumption that authority derives from justice and equity, and when based on more or less brute force it is a sheer pseudo-authority. Aristotle’s theory indicates that real authorities occupy the position they do by showing wisdom, knowledge, the capacity to predict and transcend the present. In Hegel, the whole notion is reduced to the relationship between the master and the slave, the victors and the vanquished, ‘the former having risked his life in order to gain recognition, the latter having preferred subjugation rather than death’ (Kojève, 2004: 50).

The crimes of the powerful can find justification in all the theories listed above, for example, they may be seen as the result of the divine right to freedom, individualism and hereditary wealth, as expressions of justice and equity supported by consent, or as the inevitable outcome of the master-slave relationship accepted by those who are subjugated. It is in Aristotle’s conceptualization, however, that we find a compelling aspect, namely that authority possesses the capacity to predict the future and transcend the present. Authority, in the form of crimes of the powerful, surpasses the natural time which prioritizes the present and the past: the time of the crimes of the powerful is the future. It is in the future that powerful offenders will enjoy the advantages acquired and transmit them to their progeny and peers, where the augmented inequality will become increasingly difficult to challenge, and where the foundational nature of their acts will be weighed. The crimes of the powerful, in brief, inhabit a grey area in which conducts await the outcome of the criminalization-decriminalization conflict, in the sense that they may be subject to regulation or may become accepted routine. Some of these crimes, in fact, possess a decriminalization impetus, while others implicitly invoke legal pragmatism, in that they challenge legal reasoning and request departure from precedents. These foundational crimes are inspired by an ‘experimental’ logic and driven by a consequentialist philosophy. Powerful actors so driven adopt illicit practices with the awareness that they are, indeed, illicit, but justify them through their founding force, namely their capacity to transform the previous jurisprudence and establish new laws and new types of legitimacy. The crimes of the powerful, in sum, restructure the legal and political spheres while playing a legislative role.

**Negative and positive liberty**

Consent and authority return under different guises in the influential distinction between two purely descriptive concepts, respectively termed negative liberty and positive liberty (Berlin, 1969). The former is freedom from coercive interference by others in relation to certain areas of personal conduct. Within certain relevant domains, nobody is entitled to deny others, either directly creating obstacles or calling on institutions to do so, opportunities to choose the behavior to adopt. Positive liberty, on the other hand, is freedom to be one’s own master. It involves a ‘wish to be the instrument of my own, not of other men’s acts of will’ (ibid: 131). In brief, individuals have a right to exercise their own will in the private domain as well as in the public arena, where participation amounts to self-government, namely decision-making opportunities (McKinnon, 2008). We shall discuss in a moment the ambiguity of this formulation.

Applying negative liberty to powerful offenders we are led to argue that such offenders may claim a degree of immunity in relation to their choices, particularly within certain protected domains of conduct. No coercive interference by others is allowed in such domains, where choices, Berlin omits to note, are rendered possible due to the political power of those making them. Here is where his distinction reveals its ambiguity, in that negative liberty needs a substantial degree of positive liberty, without which no immunities in relation to choice of conduct could be gained. In sum, negative and positive liberty can amalgamate in a perfectly homogenous whole making choices possible and interference by external forces difficult. Berlin’s distinction, therefore, seems to originate in ethical concerns pertaining to the individual and their ‘informal’ life, but unwittingly leads us to the ‘formal’ sphere in which individuals interact, namely the political arena.

‘Real power to determine the future of democratic societies rests in the hands of a remarkably small number of people’ (Miller, 2003: 40). This statement is a good starting point for a discussion of contemporary political issues, which here inevitably can only be cursory. Politics has become the exclusive preserve of a caste, an elite who claims its right to govern due to incompetence of ordinary people, including those who designate them as representatives. Voters have to limit their role to the choice of their qualified leaders, being unqualified to decide on issues directly. The ‘democratic’ process itself generates this form of political deskilling among citizens, whereby people lose touch with those making choices which affect their life. A political decision, in effect, requires judgment with respect to available options, factual information relating to the likely outcome of those options, and sensitivity with regards to their ethical fairness.

‘It would be risky to ask the general public to make major policy decisions unless they have the skills and information to make good judgments, but they have no incentive to acquire these unless they are given significant decisions to make’ (ibid: 47).

The crimes of the powerful, in this case, find justification in the fact that the general public is incapable of identifying options, assessing their likely outcome, let alone establishing the ethical value of the acts it is called to judge. The minority monopolizing the realm of politics is therefore able to also monopolize the decision whether acts are to be deemed criminal or not.

**Conclusion**

Justification puts the crimes of the powerful in a peculiar light, as I hope I have shown in this contribution. It is a strategy that may or may not incorporate deceit, but mainly aims to present conducts as being beyond good and evil, to allow them to escape any sort of judgment. Of course, it implies a high degree of hegemonic power, but even when hegemony is weak it makes claims, it establishes a right to forcefully upset rules and challenge notions of legality. Perfectly consistent with Hegelian interpretations of history, the crimes of the powerful occur in specific social and political contexts which offer opportunities for change. The powerful are compelled to ‘go beyond’ and ‘negate’ those contexts, and in doing so they find justification for their actions, whose illegality is perceived as a form of innovation, within a process of inevitable historical evolution. Justifications provided by Adam Smith pinpoint how the crimes committed by the powerful are hard to detect and responsibilities are difficult to apportion. Such crimes, moreover, are the result of negligence rather than injurious intentions, they fall in the category of *malice propense*, rather than in that of *culpa*. Ultimately, they only violate *imperfect*, not *perfect* rights. In his turn, John Stuart Mill is not concerned with the harm caused by powerful actors, but only with establishing whether that harm is inflicted with or without the consent of those suffering it.

The crimes of the powerful are ‘experimental’ and experiments may lead to the foundation a new ethics, new rules and new socio-political arrangements. In this sense, these types of crimes have been described above as capable of

restructuring the legal and political spheres and playing a legislative role. The distinction between negative and positive liberty, finally, has given an unexpected opportunity to clarify that both types of liberty coalesce in specific minorities who can find justification for their actions through a careful amalgam of the two.

The imperative of justification does not rule out that individuals and groups attempt to exempt themselves from it and opt for the use of deception or violence. Hegemony is never perfect: however, the justification model allows us to identify the shifts into deception and violence, and ‘to discriminate between situations oriented toward justification and situations of domination and contingency’ (Boltanski and Thévemot, 2006: 346). On the other hand, distinguishing acceptable justification from unacceptable associations (in our case, the crimes of the powerful) becomes increasingly hard, as the skills required to make such a distinction are proportionate to the power held by actors in the extremely skewed, polarized, elitist political systems of today.

In Greek the term *idiotes* was used to describe someone who lived an entirely private existence and took no part in the public life of the city. *Idiotes* today are those who believe that the pursuit of private gains, whether enacted legally or illegally, turns into beneficial achievements for all. The evolution of the political sphere, sadly, seems to be set to produce increasing numbers of unskilled political actors, as exemplified in the statement: ‘You, the people, have the right to air your views; and we, the ruling class, reserve the right to disregard them’ (Badiou, 2005: xvi). *Idiotes*, in this case, will proliferate, and with them the justifications of the crimes of the powerful.

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