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**Criminal Law:**  
*Progressive Punitivism*

Hadar Aviram<sup>1</sup>

Anatole France's famous maxim, that "in its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread,"<sup>2</sup> has resonated deeply with critical criminologists, in whose view law plays a crucial role in reflecting, and even deepening, the chasm between the powerful and the powerless. According to progressive and radical criminologists, criminal legislation is crafted to encompass behaviors of the powerless while ignoring the harms perpetrated by the powerful—all under the guise of universal, impersonal language. Law enforcement unfairly targets visible "crimes in streets" committed by the powerless and ignores "crimes in suites" committed by the powerful. Charging decisions discriminate against the powerless, trials disadvantage the powerless while offering advantages to the powerful, and these differences are reinforced through sentencing disparities between the powerful and the powerless. But if the problem is inequality, is the solution alleviating law's hold on the poor or strengthening its grasp on the rich?

In this Chapter, I examine the emergence of a discourse that advocates the latter—that is, turning the cannons of the punitive machine against the powerful in order to *promote* social equality. This academic and popular discourse, which I call "progressive punitivism," reflects progressive concerns around issues such as police accountability for use of excessive force, especially against people of color; the proliferation of sexual harassment, assault, and abuse, by the powerful, with too little accountability; and the too-lenient legal response to expressions of racism, xenophobia, and other forms of social hatred and exclusion.

Progressive-punitivism initiatives seek to identify the powerful people who have long been served by the oppressive legal apparatus and to correct the inequality benefitting them by subjecting them to formal or informal social control, such as seeking legal enforcement against them—arrests, criminal charges, criminal convictions, prison sentences—or alternative forms of punishment and stigma, typically through the arena of

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1. Summarized and excerpted from Hadar Aviram, *Progressive Punitivism: Notes on the Use of Social Control to Advance Social Justice Ends*, 68 *BUFF. L. REV.* (2019).

2. ANATOLE FRANCE, *LE LYS ROUGE* (1894).

unforgiving reputational harm. Comparisons are often made to defendants belonging to disenfranchised demographics, with the purpose to “level up” by treating the powerful more harshly. An important part of this logic is the quest for justice for victims through harsh punishment, with a focus on categories of victims typically neglected by conservative punitivism, namely, women and people of color. Relatedly, the goal is not just to punish the individual wrongdoer but also to spark a “reckoning” or a “public conversation” that will remedy social wrongs toward these underserved victim groups.

A salient arena for progressive punitivism is sexual harassment and assault, where the #MeToo movement (or a portion of it, often referred to as “carceral feminism”<sup>3</sup>) has focused on supporting allegations against, and raining harsh consequences on, politicians, media personalities, actors, directors, and comedians, among others. In one such case, the lenient sentencing of Stanford student Brock Turner for the sexual assault of an unconscious woman behind a dumpster drew national ire not only at him but also at the judge, who became the target of a recall campaign and subsequent retaliation. Similar arguments and efforts are often made in the context of police violence, with protesters<sup>4</sup> and lawmakers<sup>5</sup> alike calling for harsh punishment and removal of due-process protections in criminal prosecutions of police officers, particularly in cases involving lethal force used against people of color. A third arena in which progressive punitivism is prominent is bigotry and hate crimes. Some activists advocate expanding the definition of “terrorism” to highlight the equivalency of white domestic terrorism and militant Islam<sup>6</sup> through the availability of harsh punishment and the removal of due-process protections,<sup>7</sup> whereas

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3. AYA GRUBER, *THE FEMINIST WAR ON CRIME* (2020).

4. Corey Moore, *Activists protest involuntary manslaughter verdict in Mehserle shooting case*, KPCC (July 9, 2010); Colleen Shalby, *Protesters react to Ferguson grand jury decision not to indict Darren Wilson*, PBS NEWS HOUR (Nov. 4, 2014); Ashley Southall, *Protesters Fill Streets Across U.S. Over Decision in Garner Case Protests*, N.Y. TIMES (Dec. 4, 2014).

5. SB 227 (2015).

6. MAHMOOD MAMDANI, *GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR, AND THE ROOTS OF TERROR* (2004).

7. Erin Miller, *Is It Terrorism? Why Does It Matter?* NATIONAL CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM (Feb. 5, 2016); Shirin Sinnar, *Separate and Unequal: The Law of ‘Domestic’ and ‘International’ Terrorism*, 117 MICH. L. REV. 1333 (2019).

others engage in heightened punitive reactions to hateful, bigoted behavior in general<sup>8</sup> or advocate flipping the burden of proof in hate crime cases.<sup>9</sup>

While in all of these instances activists press for a more effective criminal-justice system, these efforts are accompanied by a mistrust in the system's ability to deliver satisfactory results. Progressive activism thus has relied strongly on public—primarily online—methods of public excoriation and shaming. These are characterized by demands for apologies, rejections of any apologies offered as imperfect, and resistance to any sanctioned “end” to the proceedings.<sup>10</sup>

Identifying the intellectual genealogy for progressive punitivism can be challenging, but the emergence of this logic is less surprising given that the political left and right do not operate in separate universes. The American public (as well as the American academic scene) has experienced decades of exposure to punitive ideologies and policies, and these, as well as their legacies, are bound to leave imprints on social movements of all stripes.

Classic accounts tend to blame mostly conservative politicians, such as Nixon and Reagan, for the punitive turn in American criminal justice,<sup>11</sup> emphasizing its racial underpinnings.<sup>12</sup> But recently, academic commentators have tended to view the Nixon and Reagan presidencies as the continuation of policies espoused by liberal presidents that already targeted and stigmatized poor people of color.<sup>13</sup> Some of these accounts also point the finger at the complicity of civil-rights activists and African-American lawmakers and police officers in advancing the punitive turn.<sup>14</sup>

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8. Sam Wolfson, *New Yorkers Respond to Lawyer's Racist Rant with 'Latin Party' Outside His House*, GUARDIAN (May 18, 2018).

9. Scott Wilson, *As stakes rise in Nia Wilson case, simmering racial tensions intensify in Oakland*, WASH. POST (Aug. 23, 2018) (quoting Oakland Mayor Libby Schaaf).

10. JON RONSON, *SO YOU'VE BEEN PUBLICLY SHAMED* (2015).

11. KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (1999) ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016).

12. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

13. MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014).

14. JAMES FORMAN, *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017).

In other words, for many years, no one—conservative or progressive—could afford to be viewed as “soft on crime.”<sup>15</sup> Institutions and actors across the political spectrum have regularly approached social problems with a criminal-justice hammer in hand, and it is therefore no surprise that all these problems looked like criminal-justice nails. This tendency is exacerbated by three characteristics of the punitive turn: the increase in punitive victims-rights discourse (while silencing any restorative, nonpunitive victim perspectives),<sup>16</sup> the racial and class implications of mass incarceration,<sup>17</sup> and the disproportionate impact of high-profile individual cases of high emotional valence, known as “redball crimes,”<sup>18</sup> on shaping popular fear and public policy.

As a conservative program, punitivism has had destructive effects on people and communities that have been widely documented in the literature. But progressive punitivism also poses disturbing questions about values, priorities, and alliances, which raise a set of objections about its promise as a problem-solving paradigm.

First, the emphasis on punishment of individual wrongdoers as an educational lesson conflates personal pathology with situational evil.<sup>19</sup> It is perhaps ironic that movements that set out to highlight the systemic power imbalances that enable evils like abuse of power to prevail have focused their efforts on a method of redress that is best suited for adjudicating personal pathologies.<sup>20</sup>

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15. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2009).

16. For a theoretical critique of this victim model, and the suggestions of others, see Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671 (1999); for an analysis of the political power of victims in the incarceration arena, see JOSH PAGE, *THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA* (2011); for an analysis of the rise of victims to dominate the moral conversation at parole hearings, see HADAR AVIRAM, *YESTERDAY’S MONSTERS: THE MANSON FAMILY CASES AND THE ILLUSION OF PAROLE* (2020).

17. Pew Center on the States, *One in 100: Behind Bars in America 2008*.

18. AVIRAM, *supra* note 16.

19. STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (2009).

20. Hadar Aviram, *The Master’s Tools Shall Never Dismantle the Master’s House: Kavanaugh’s Confirmation Hearings and the Perils of Progressive Punitivism*, 33 J. CIV. RTS. & ECON. DEV. 1 (2019).

Second, punitive responses meted out in individual cases can sometimes misrepresent the realities on a systemic level. Because grand juries, courts, and legislative hearings approach reality on a case-by-case basis; the individual incidents that become the focal point of discussion offer little knowledge of the scope and breadth of a particular problem.

Third, even if individual instances of public outrage are laudable, they can, in the aggregate, drain the movement of energy and resources. To focus on mobbing and stigmatizing one particular person is to spend finite capital—money, time, verve—on a particular case under the unproven assumption that the case will produce systemic change.

Fourth, placing victims at the forefront of policy and reform can reify victimization to a point that is unhealthy not only to offenders but also to the victims themselves, and sets up “victimization competitions.” The conservative victims’ rights movement brought about many of the excesses of the 1990s and the 2000s, and its progressive counterpart, albeit considerably less destructive overall, can wreak havoc in cases that do not merit punitivism, merely because of the strength and power of the interlocutor-victims. For example, the idea that allegation is tantamount to truth, and that false accusations are “acceptable casualties” in the broader war against sexual misconduct,<sup>21</sup> can leave many moderates and progressives unimpressed. More importantly, centering victimization strengthens the already unhealthy premise that a necessary condition to having a stake in social reform is claiming a status of oppression and victimization, which requires people to marinate in their victimization experience longer than their healing requires.<sup>22</sup> And finally, emphasizing retribution as a central tool in the reform arsenal places the onus on victims to complain and to position themselves against offenders, marginalizing the voices of many victims whose attitudes are not punitive.<sup>23</sup>

Fifth, the overreliance on identity as the logic underpinning targets for criminal enforcement poses problems of consistency, believability, and plausibility. In a universe of intersectional identities, the consequences of

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21. For a comprehensive exposition about the overreach of #MeToo accusations, see Jia Tolentino, *The Rising Pressure of the #MeToo Backlash*, NEW YORKER (Jan. 24, 2018). For an example of support for due-process restrictions for the benefit of the movement, see Ezra Klein, “*Yes Means Yes*” is a terrible law, and I completely support it, VOX (Oct. 13, 2014).

22. Kathryn M. Young, *Parole Hearings and Victims’ Rights: Implementation, Ambiguity, and Reform*, 49 CONN. L. REV. 431 (2016).

23. For alternative models sensitive to victim perspectives, see Roach, *supra* note 16.

a mandate to “believe women” or “believe people of color” are unclear. If we want women to be categorically believed, where does that leave all the men and boys of color who, throughout America’s fraught history with hypersexualized black masculinity, have been falsely accused of sexually inappropriate behavior with white women, such as Emmett Till<sup>24</sup> and the Scottsboro Boys?<sup>25</sup> By contrast, if our primary allegiance is to people of color, where do we leave victims of color, given the robust empirical evidence that most crime is committed intraracially?<sup>26</sup> Confounding the personal with the political, and the individual facts with the interest of protecting groups and identities, leave these dilemmas unanswered, particularly if moderate voices calling for case-by-case assessments of truth are vilified.<sup>27</sup>

But worse, calling for harsh punishment of a privileged perpetrator (particularly if lenient judges become targets of ire) risks skewing the entire system toward punitiveness, and the first people in line to suffer would invariably be the very poor defendants of color that progressives seek to protect.

Sixth, engaging in a framework that feeds on outrage takes an emotional toll. The perception that expressing and exercising anger is cathartic is largely unsupported by psychological research, which suggests that anger is often a generative emotion; feeling and expressing rage leads to feeling and expressing more rage, and can sometimes backfire spectacularly when the anger is marshaled at effecting change.<sup>28</sup> Pursuing justice through punitive means, particularly in the frequent cases in which the system falls short of delivering it, can intensify anger and rage, and

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24. Elliott McLaughlin & Emanuella Grinberg, *Justice Department reopens investigation into 63-year-old murder of Emmett Till*, CNN (July 13, 2018).

25. JAMES GOODMAN, *STORIES OF SCOTTSBORO* (2013).

26. William Wilbanks, *Is Violent Crime Intraracial?* 31 *CRIME & DELINQUENCY* 117 (1985).

27. One example in which those invoking new facts and a broader context were excoriated for racism was the video of an altercation between Catholic schoolboys mocking a Native American elder. *See, e.g.,* Laura Wagner, *Don’t Doubt What You Saw with Your Own Eyes*, *CONCOURSE* (Jan. 21, 2019).

28. Jennifer D. Parlamis et al., *Letting Off Steam or Just Steaming?* 21 *INT’L J. CONFLICT MGMT.*, 260 (2000); Carol Tavris, *On the Wisdom of Counting to Ten: Personal and Social Dangers of Anger Expression*, 5 *REV. PERSONALITY & SOC. PSYCH.* 170 (1984); João Vieira da Cunha & Wanda J. Orlikowski *Performing Catharsis: The Use of Online Discussion Forums in Organizational Change*, 18 *INFO. & ORG.* 132 (2008).

lead to potential spillovers in which rage can be directed at undeserving targets.

Finally, punitivism is countereffective in coalition building. Shaming and excoriation are not effective techniques for garnering cooperation and building coalitions. If the ultimate goal of the movement is to bring about social change, a considerable aspect of the reform effort should be directed at building bridges and opening opportunities for cooperative, inclusive discussion. When the weapons of choice are stigma and calls for indictments, incarceration, and shaming, political opponents are more likely to leap to the defense of the target than to come to the table in the spirit of cooperation.

The last few years have seen several critiques of the alienating nature of identity politics and of the difficulty building coalitions across fragmented and hostile identity-based interest groups.<sup>29</sup>

I see progressive punitivism as the criminological extension of these disconcerting trends. My concern is that critiques of the intolerance, intellectual fragility, and scorched-earth mentality at the bottom of the efforts to “level up” the punitive apparatus to include targets that the left dislikes are going to be dismissed as “tone policing” and dampening righteous rage. There is no doubt, given the realities of the last few decades, that powerless and disenfranchised sectors in American society have every reason to feel rage at the institutions that failed them. But there should be room for a good-faith conversation on how best to channel that rage. Indeed, some promising avenues include the recent trend toward progressive prosecution, the emphasis on restorative justice, and overall efforts to shrink the carceral apparatus. If holding the criminal justice hammer in hand has led to seeing various social problems as nails, it is time to hand the public a few new hammers and see the project of equality in America not as a fight to destroy, but as a fight to build.

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29. DIANNA ANDERSON, *PROBLEMATIC: HOW TOXIC CALLOUT CULTURE IS DESTROYING FEMINISM* (2018); MARK LILLA, *THE ONCE AND FUTURE LIBERAL: AFTER IDENTITY POLITICS* (2018); GREGG LUKIANOFF & JONATHAN HAITT, *THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE* (2018).



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