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## Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends

HADAR AVIRAM†

### INTRODUCTION

Paul Manafort, one of the most reviled men connected with the Russian involvement in Donald Trump's ascent to power, was convicted of multiple white collar crimes related to his foreign activities.<sup>1</sup> Newspapers reported that Manafort was to serve his sentence at the notorious Rikers Island prison in New York, in conditions of "isolation."<sup>2</sup> This announcement caused an eruption of schadenfreude on social media, which was countered by sobering remarks from

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Much gratitude to Alessandro Corda, Johann Koehler, and Tobias Smith, for their excellent suggestions, as well as to Guy Hamilton Smith, Garrick Percival, Itay Ravid, Heather Schoenfeld, and others, for an excellent conversation on this topic that took place at the Law and Society Association Annual Meeting.

1. Judgment in a Criminal Case at 1, United States v. Manafort, No. 17-CR-00201-1 (D.D.C. Mar. 22, 2019) (judgment of guilty to conspiracy against the United States and Conspiracy to Obstruct Justice); Judgment in a Criminal Case at 1–2, United States v. Manafort, No. 1:18-cr-00083-TSE-1 (E.D. Va. Mar. 7, 2019) (judgment of guilty to subscribing to false United States Individual Income Tax Returns, failure to file reports of foreign bank and financial accounts and bank fraud).

2. William Rashbaum, *Paul Manafort to Be Sent to Rikers, Where He Will Be Held in Isolation*, N.Y. TIMES, (June 4, 2019), <https://www.nytimes.com/2019/06/04/nyregion/manafort-rikers-island-solidary-confinement.html>.

several progressive movement icons. Alexandria Ocasio-Cortez reminded her followers: “A prison sentence is not a license for gov torture and human rights violations. That’s what solitary confinement is. Manafort should be released, along with all people being held in solitary.”<sup>3</sup> Shaun King, architect of Real Justice, an organization dedicated to reforming criminal justice by funding progressive campaigns, remarked: “I see people excited to see Paul Manafort sent to Rikers Island and put in solitary confinement. 1. Rikers Island should be closed down 2. Solitary confinement should be ended. We must be so principled in our calls for reform that we want them even for our enemies.”<sup>4</sup>

That these reminders were needed, coming on the heels of a substantial legislative push to limit solitary confinement in New York State<sup>5</sup> is a testament to a conundrum in progressive criminal justice ideology: what shall we do with the powerful who transgress? “In its majestic equality,” said Anatole France, “the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread.”<sup>6</sup> This maxim has resonated deeply with critical criminologists, whose point of departure is deeply-seated structural inequalities. For critical criminologists, law plays

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3. Alexandria Ocasio-Cortez (@RepAOC), TWITTER (June 5, 2019, 7:09 AM), [https://twitter.com/AOC/status/1136273861715120129?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1136273861715120129&ref\\_url=http%3A%2F%2Fthehill.com%2Fhomenews%2Fhouse%2F447056-ocasio-cortez-says-manafort-other-prisoners-should-be-released-from-solitary](https://twitter.com/AOC/status/1136273861715120129?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1136273861715120129&ref_url=http%3A%2F%2Fthehill.com%2Fhomenews%2Fhouse%2F447056-ocasio-cortez-says-manafort-other-prisoners-should-be-released-from-solitary).

4. Shaun King (@shaunking), TWITTER (June 4, 2019, 7:50 AM), [https://twitter.com/shaunking/status/1135921664598917120?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1135921664598917120&ref\\_url=http%3A%2F%2Fcalforniacorrectionscrisis.blogspot.com%2F2019%2F06%2Fmore-progressive-punitivism-manafort.html](https://twitter.com/shaunking/status/1135921664598917120?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1135921664598917120&ref_url=http%3A%2F%2Fcalforniacorrectionscrisis.blogspot.com%2F2019%2F06%2Fmore-progressive-punitivism-manafort.html).

5. Erika Leigh, *More than 100 Lawmakers Sign on to Bill Limiting Solitary Confinement*, SPECTRUM NEWS (June 2, 2019), <https://spectrumlocalnews.com/nys/central-ny/news/2019/06/02/more-than-100-lawmakers-sign-on-to-bill-to-limit-solitary-confinement>.

6. ANATOLE FRANCE, LE LYS ROUGE 105–15 (Calmann-Lévy ed., 5th ed. 1894).

a crucial role in reflecting, and even deepening, the chasm between the powerful and the powerless. 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 “crimes in streets” committed by the powerless, which are visible, 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.

In “*The Question that Killed Critical Legal Studies*,” Michael Fischl recounted a conversation with a colleague who said, “The problem with critical legal studies is that it didn’t offer any alternative program. Now I’m no great defender of the rule of law, but what would you put in its place?”<sup>7</sup> This question, which Fischl opines “did us in,” could well be asked of critical, radical, and Marxist criminologies. If the problem is structural inequality, what is the solution? In his retrospective of critical criminology, Alessandro de Giorgi clarified the points of contention between liberal criminologists and their reform agenda on one hand, and radical criminologists who advocated revolution on the other.<sup>8</sup> But what kind of reform or revolution is necessary? Should the correctional apparatus remain in place? Should its focus change? If the problem is inequality, is the solution alleviating law’s hold on the poor, or strengthening its grasp on the rich?

This Essay examines the emergence of an academic and popular discourse that advocates turning the cannons of the punitive machine against the powerful. I identify this

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7. Richard Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 L. & SOC. INQUIRY 779, 780 (1992).

8. Alessandro de Giorgi, *Reform or Revolution: Thoughts on Liberal and Radical Criminologies*, 40 SOC. JUST. 24, 27 (2014).

discourse as “progressive punitivism.” Progressive punitivism is a logic that wields the classic weapons of punitive law—shaming, stigmatization, harsh punishment, and denial of rehabilitation—in the service of *promoting* social equality. This logic has permeated much of the political conversation on the progressive left in the United States, and while it has gained some hold in academic discourse, particularly in the legal field, its core lies in the leftist social media arena, where it has enjoyed considerable popular appeal in the last few years. Progressive ire before, and especially after, the election of Donald Trump to the presidency, has flared 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 operates within the criminal justice system in the context of a call to hold people perceived as belonging to powerful groups accountable for their actions. However, it also operates throughout the realm of social media and public opinion, often compensating for the perceived lack of formal consequences against the powerful with intense bursts of informal social control, such as online shaming and excoriation. These two realms—formal and informal social control—frequently cross paths in progressive punitivism in complex ways, often yielding informal, democratized punitive power to those perceived as powerless within the formal apparatus.

In the following pages, I attempt to sketch the main features, origins and consequences of the progressive punitive perspective. I start with an overview of the main characteristics of progressive punitivism: turning the existing punitive machine on the powerful, focusing on identity and group politics as an epistemological resource for identifying perpetrators, the concept of “leveling up”

punishment, the preoccupation with victim voices, and the idea of punishment as a catalyst for social change. I then review the three key areas in which ideas of progressive punitivism have gained visible popularity in recent times: police abuse of force; sexual assault, including carceral feminism and the #metoo movement; and hate crimes. I also engage in a brief discussion of the interplay between the call for formal consequences for lawbreaking and the engagement in intense punitive expressions of informal social control, particularly via shaming campaigns on social media. I then expand the theoretical framework by interrogating the intellectual and cultural sources of progressive punitivism, examining radical and critical criminology, second-wave feminism, and Communist China as a surprising intellectual parallel. I conclude that the most plausible source of progressive punitivism is conservative punitivism. Americans of all political stripes have been steeped for decades in a framework that sees criminal justice as the quintessential solution for moral problems and victims of crime as the premier moral interlocutors. American criminal justice in the late 20th and early 21st centuries has had a deep impact on the national psyche, and progressive punitivism is, upon reflection, an application of this mentality, rather than a deviation or revolutionary reinterpretation of it. The Essay ends with a discussion of the discontents of progressive punitivism and the dangers of cottoning to it as a viable strategy for social justice reform.

*A. What Is Progressive Punitivism?*

Progressive punitivism shares many overall laudable social goals with other projects of progressive reform, such as fostering equality and diversity, fighting oppression and enfranchising the powerless. What is unique about progressive punitivism, however, is its reliance on the traditional toolbox of the criminal process as an avenue for social change. Progressive punitive initiatives seek to identify the powerful people who have long been served by the oppressive legal apparatus, and subject them to formal or informal social control, seeking legal enforcement against them—arrests, criminal charges, criminal convictions, prison sentences—or recurring to alternative ways of punishment and stigma, typically through the arena of unforgiving reputational harm.

Because of these goals, progressive punitivism is as identity-driven as conservative punitivism. The pursuit of criminal or social accountability is focused on the holders of social or institutional advantage—law enforcement officers, celebrities, and members of privileged social groups—as targets. This orientation is understandable in that progressive punitivism is, by nature, corrective: enforcing the law against these powerful perpetrators is an effort to balance the harms typically visited on vulnerable and disenfranchised populations.

Relatedly, the comparison between the rebuke suffered by the powerful and the powerless is often made for the purpose of “leveling up.” Even as progressive advocates for criminal reform call for more leniency in the criminal justice system in the context of drawing comparisons across demographics, the argument is made in the context of a plea to treat the powerful comparator more harshly, rather than the powerless one more leniently.

As with its conservative counterpart, progressive punitivism is deeply preoccupied with victims, placing those most traumatized by the transgression at the forefront of the

demand for action and giving them a “voice.” But the different political orientation means that the focus is on categories of victims typically neglected by conservative punitivism— women and people of color. When victims speak up within the framework of progressive punitivism, therefore, they stand not only for themselves, but also for the disenfranchised groups that they represent. The symbolic confrontation between victim and accuser is microcosmic representation of a larger confrontation, in which the powerless speak up about their victimization and demand the accountability of the powerful.

A corollary of this systemic discourse is that the demand for retribution goes beyond the individual needs of the particular victim and is often perceived as a catalyst for change. When a privileged perpetrator is called upon to answer for crimes and wrongdoing, harsh retribution is not merely hailed as a just outcome in his or her particular case; it is also expected to have the trickle-down effect of promoting social justice overall. Public excoriation and the fall from grace of the powerful is not merely a just desert for bad behavior, but also, in the manner of a Greek tragedy, a “conversation starter,” the harbinger of reckoning, understanding, and important steps toward remedying structural inequalities.

### B. *Key Areas of Progressive Punitivism*

Because of the progressive commitment to the idea of fighting racism, sexism, and classism, among other harms of inequality and discriminations, the main areas of visible progressive punitivism concern people who are, whether justly or unjustly, perceived as perpetrating these harms.

The first obvious arena, which directly relates to the topic of this article, is sexual harassment and assault. The overall commendable #metoo movement started a wave of admissions and sharing on the part of victims of sexual misconduct, but rather than inviting a dialogue about how to reimagine social spaces in which everyone is treated with

dignity and respect the movement has tended to focus on bringing down people in high-profile cases. The harbinger of the trend, admittedly the worst example of sexual offending with impunity, was Harvey Weinstein, yielding a string of confessions by actresses who were victimized by him.<sup>9</sup> This was followed by allegations of varying degrees of seriousness against public figures: politicians,<sup>10</sup> media personalities,<sup>11</sup> actors,<sup>12</sup> directors,<sup>13</sup> and comedians,<sup>14</sup> among others. In addition, in one 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, leading to a relentless, and ultimately successful recall campaign.<sup>15</sup> The Brock Turner

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9. Maria Puente, *Judge Rules Harvey Weinstein Sexual Assault Case Can Move Forward to Trial*, USA TODAY (Dec. 20, 2018), <https://www.usatoday.com/story/life/2018/12/20/harvey-weinstein-court-new-york-sex-crimes-charges-judge/2294182002/>.

10. Phil McCausland, *Sen. Al Franken ‘Embarrassed and Ashamed’ Following Sexual Harassment Allegations*, NBC NEWS (Nov. 26, 2017), <https://www.nbcnews.com/politics/congress/sen-al-franken-embarrassed-ashamed-following-sexual-harassment-allegations-n824026>. For a nuanced critique of the consequences Franken suffered, see Jane Mayer, *The Case of Al Franken*, THE NEW YORKER (July 29, 2019), <https://www.newyorker.com/magazine/2019/07/29/the-case-of-al-franken>.

11. Associated Press, *Garrison Keillor: Radio Station Reveals Broader Claims of Sexual Harassment*, THE GUARDIAN (Jan. 24, 2018), <https://www.theguardian.com/world/2018/jan/24/garrison-keillor-sexual-harassment-allegations>.

12. Victoria Bekiempis, *Kevin Spacey Faces Criminal Charge Over Alleged Sexual Assault of Teenager*, THE GUARDIAN (Dec. 24, 2018), <https://www.theguardian.com/culture/2018/dec/24/kevin-spacey-alleged-sexual-assault-teenager-allegations>.

13. Lisa France, *Dylan Farrow Details Alleged Abuse by Woody Allen in Her First Televised Interview*, CNN (Jan. 18, 2018), <https://www.cnn.com/2018/01/18/entertainment/dylan-farrow-woody-allen-interview/index.html>.

14. Melena Ryzik, Cara Buckley & Jodi Kantor, *Louis C.K. Accused by 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html>; Katie Way, *I Went on a Date with Aziz Ansari: It Turned Into the Worst Night of My Life*, BABE (Jan. 13, 2018), <https://babe.net/2018/01/13/aziz-ansari-28355>.

15. See Law Professors’ Statement for the Independence of the Judiciary and Against the Recall of Santa Clara County Superior Court Judge Aaron Persky, PALO ALTO ONLINE (Aug. 17, 2017), <https://www.paloaltonline.com/news/reports/>

example is one of special importance because the ire was directed not only at the person committing crime with perceived impunity, but also at the system for sentencing him. The message resulting from the successful recall campaign is that judges must be wary of public opinion and shame campaigns when they consider sentencing.<sup>16</sup> Unfortunately, those most likely to suffer from harsh judges operating out of fear of excoriation are those most often harmed by the criminal process: young, poor men of color, very much unlike Turner himself.

While progressive punitivism extends broader than the sexual misconduct issue, it is worthwhile to note that my arguments here dovetail the nascent literature on carceral feminism. Writers within the feminist movement, specifically writers of color, have pointed out the dangers of pursuing feminist goals through the carceral state. Carceral feminism logics have been linked to the Violence Against Women Act [VAWA],<sup>17</sup> the anti-trafficking movement<sup>18</sup> and violence against women in general.<sup>19</sup> Specifically, Nickie Phillips and Nicholas Chagnon have linked carceral feminism discourses to the Brock Turner outrage and Judge Persky's recall campaign.<sup>20</sup> However, as I show below, carceral feminism shares important characteristics with

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16. See Guy Hamilton Smith, *The Agony and Ecstasy of #MeToo: The Hidden Costs of Reliance on Carceral Politics*, Address at the Law and Society Association Annual Meeting in Washington, D.C. (2019).

17. Nancy Whittier, *Carceral and Intersectional Feminism in Congress: The Violence Against Women Act, Discourse, and Policy*, 30 GENDER & SOC'Y 791, 809 (2016).

18. Jennifer Musto, *Carceral Protectionism and Multi-Professional Anti-Trafficking Human Rights Work in the Netherlands*, 12 INT'L FEMINIST J. OF POL. 381, 384 (2010).

19. See generally David Gurnham, *A Critique of Carceral Feminist Arguments on Rape Myths and Sexual Scripts*, 19 NEW CRIM. L. REV. 141, 142 (2016).

20. Nickie Phillips & Nicholas Chagnon, "Six Months Is a Joke": *Carceral Feminism and Penal Populism in the Wake of the Stanford Sexual Assault Case*, FEMINIST CRIMINOLOGY 1, 13 (Aug. 1, 2018), <https://journals.sagepub.com/doi/abs/10.1177/1557085118789782>.

other progressive movements deploying criminal justice for progressive ends—including those that advance the interests of people of color.

Another area in which progressive activists seek criminal responsibility as an avenue of social justice is the problem of police violence, particularly the use of lethal force. The efforts to seek redress through the criminalization of individual police officers were evident in the public outrage over the shooting of Oscar Grant, an unarmed African-American man, by Johannes Mehserle, a white Bay Area Rapid Transit [BART] police officer, when protesters flooded the court and some threatened Mehserle's parents, as well as his defense attorney.<sup>21</sup> The public pressure was so intense that the defendant won a motion to change the trial venue.<sup>22</sup> Upon Mehserle's conviction of a lesser-included offense, public outrage broke again.<sup>23</sup> The latest wave of protests against the system's ineptitude in exacting retribution from officers occurred following the failure of the grand jury to indict Darren Wilson, a white police officer, for the shooting of Michael Brown, a young African American man.<sup>24</sup> Similar protests occurred when the grand jury did not indict the officer responsible for the killing of Eric Garner.<sup>25</sup> Legal reforms adopted to rectify the failures to hold police officers accountable have consisted, at least in the case of California, of the removal of procedural protections specifically in cases in which the defendants are police officers—a reform framed

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21. Order of the Court on Defendant's Motion to Change Venue at 15, *People v. Mehserle*, (No. 161210), 2010 WL 4374304 (Cal. Super. Ct. 2009).

22. *Id.*

23. Corey Moore, *Activists Protest Involuntary Manslaughter Verdict in Mehserle Shooting Case*, KPCC (July 9, 2010), <https://www.scpr.org/news/2010/07/09/17066/activists-protest-involuntary-manslaughter-verdict/>.

24. Colleen Shalby, *Protesters React to Ferguson Grand Jury Decision Not to Indict Darren Wilson*, PBS NEWS HOUR (Nov. 4, 2014), <https://www.pbs.org/newshour/nation/follow-reaction-ferguson-grand-jury-decision>.

25. Ashley Southall, *Protesters Fill Streets Across U.S. Over Decision in Garner Case*, N.Y. TIMES (Dec. 5, 2014), <https://www.nytimes.com/2014/12/05/nyregion/protests-continue-after-grand-jury-decision-in-eric-garner-case.html>.

not as a discrimination against a particular category of defendants but as an effort to correct a structural socio-political imbalance by creating a procedural imbalance.<sup>26</sup> While the animus behind initiatives like the recall campaign and the procedural amendment is understandable, there are grounds to believe it is misdirected. As Franklin Zimring explains, a systematic examination of lethal force incidents reveals some important avenues for change in police training, equipment, and culture, and the effort, energy, and outrage directed at the pursuit of justice against individual officers fails to address any of these more productive solutions.<sup>27</sup>

A third target of progressive punitivism has been bigotry and hate crimes. One of the most common progressive reactions to horrific instances of mass murder animated by white supremacy and misogyny (beyond the repeated calls for gun control) has been to demand that these mass murders be defined “terrorism.” This call, of course, has a symbolic import: the tendency to equate terrorism with militant Islam,<sup>28</sup> and the resulting cultural representations of Islam as terrorism,<sup>29</sup> have animated waves of Islamophobia in particular, and xenophobia in general, that have justified deeply disturbing rhetoric and policies. Erin Miller explains:

In contrast to the relatively mundane objectives of researchers and law enforcement, politicians, pundits, and the general public often use the term “terrorism” as a weapon, a political football loaded with a profoundly negative connotation and derisive judgment that far surpasses most, if not all, other labels for violence. Compared to other violent actors, perpetrators of terrorism tend to be viewed as especially inhuman and depraved. Authorities on whose watch terrorist attacks occur seem to be held to a far greater level of

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26. S.B. 227, 2015–16 Legis. Sess. (Cal. 2015).

27. See FRANKLIN ZIMRING, WHEN POLICE KILL 239–45 (2017).

28. MAHMOOD MAMDANI, GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR, AND THE ROOTS OF TERROR 15 (2004).

29. Rubina Ramji, *Representations of Islam in American Culture and Film: Becoming the ‘Other,’* in MEDIATING RELIGION: CONVERSATIONS IN MEDIA, RELIGION AND CULTURE 65 (Jolyon Mitchell & Sophia Marriage eds., 2003).

responsibility for not preventing these attacks. Perhaps this is because terrorist violence is linked to a broader cause or ideology, so observers view it as more predictable or preventable than random acts of violence. Where conventional violence is merely a matter of course; terrorism is a matter of national security.

As a result, invoking the label of terrorism or refraining from doing so is a powerful tool that leverages this symbolism and coded meaning. It is because of this power that the choice can be viewed from all sides of the political spectrum as subterfuge, political semantics, or racism. The question of whether or not authorities and observers uniformly afford perpetrators the same consideration regardless of their identity or their target is undoubtedly an important one. A hypothetical attack carried out by a middle-aged white male against a Planned Parenthood clinic could be an act of terrorism inspired by anti-abortion ideology; it could also be an act of domestic violence against his spouse who works at the clinic. Likewise, a hypothetical attack carried out by a young Muslim woman in an office building could be inspired by radical Islamism, or by personal retribution. Regardless, there is little value added by applying the label of terrorism sooner rather than later. We do not need this label as a crutch to tell us how horrified we should be if instead we can base this judgment on the details of the attack as they are known.<sup>30</sup>

Shirin Sinnar documents progressive efforts to define violent acts in the name of white nationalism as domestic terrorism.<sup>31</sup> She finds no legal or policy justifications for the distinctions between “domestic” and “international” terrorism; the magnitude of the threats and the civil liberties at stake are comparable in both cases, and federalism in itself is not a sufficient justification for a different approach. On the other hand, she criticizes efforts to “ratchet up” the criminalization of domestic terrorists in the name of equality, efforts drawn directly from the progressive punitivism playbook. As Sinnar explains, the existing laws and processes dealing with what is currently understood as terrorism are rife with civil liberty problems and due process violations, which should be remedied, rather than expanded

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30. Erin Miller, *Is It Terrorism? Why Does It Matter?*, START (Feb. 5, 2016), <https://www.start.umd.edu/news/terrorism-why-does-it-matter>.

31. See Shirin Sinnar, *Separate and Unequal: The Law of ‘Domestic’ and ‘International’ Terrorism*, 117 MICH. L. REV. 1333, 1351 (2019).

and replicated in new contexts. She is especially concerned about creating punitive and oppressive enforcement mechanisms that might widen beyond what is desirable for the progressives who propose them, such as defining “black identity extremists” as terrorists. She also raises the problem of solving what are essentially political and structural problems primarily through the mechanism of the criminal law.<sup>32</sup>

The footprint of progressive punitivism against hate crimes extends beyond the official criminal process too, such as in the case of Aaron Schlossberg, an attorney filmed hurling racial epithets at restaurant workers.<sup>33</sup> Progressive activists, in retort, publicized Schlossberg’s name, brought about the loss of his office lease,<sup>34</sup> and held a mariachi party below his home after making his address public.<sup>35</sup> Recently, following the murder of Nia Wilson, an African American young woman, by a white man in a chilling, unprovoked attack, Oakland Mayor Libby Schaaf publicly argued for flipping the burden of proof in hate crime cases.<sup>36</sup>

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32. See Shirin Sinnar, *Confronting Domestic Terrorism Means Confronting White Nationalism*, SLATE (Mar. 15, 2019), <https://slate.com/news-and-politics/2019/03/domestic-terrorism-christchurch-white-nationalism-trump-muslim-ban.html>.

33. Eric Levenson, Paul Murphy & Gianluca Mezzofiore, *New York Attorney in Racist Rant Has History of Confrontations*, CNN (May 17, 2019), <https://www.cnn.com/2018/05/17/us/aaron-schlossberg-attorney-racist-rant/index.html>.

34. Deepti Hajela, *N.Y. Lawyer Who Ranted at Spanish Speakers Faces Eviction, Complaint—and a Mariachi Band*, USA TODAY (May 18, 2018), <https://www.usatoday.com/story/money/business/smallbusiness/2018/05/18/aaron-schlossberg-evicted-new-york-lawyer-loses-office-space-after-rant/62230002/>.

35. Sam Wolfson, *New Yorkers Respond to Lawyer’s Racist Rant with ‘Latin Party’ Outside His House*, THE GUARDIAN (May 18, 2018), <https://www.theguardian.com/us-news/2018/may/18/aaron-schlossberg-racist-lawyer-new-york-latin-party>.

36. “It raises the question about our legal system and how we apply the rules of evidence,’ said Mayor Libby Schaaf (D), who is white and was born in the city. ‘It may be time to recognize that if there is no explicit racial bias, but there is implicit racial bias, then maybe the burden of proof should shift to the defense.’” Scott Wilson, *As Stakes Rise in Nia Wilson Case, Simmering Racial Tensions Intensify in Oakland*, WASH. POST (Aug. 23, 2018), <https://www.washingtonpost.com>

C. *Progressive Punitivism Technologies: Formal and Informal Social Control*

As exemplified in the Sections above, progressive punitivism acts both in the formal criminal justice realm and in the realm of public opinion. In all three arenas discussed above—police-involved shootings, sexual harassment and abuse, and hate crimes—activists have pressed for a more effective criminal justice system, more prosecutions, more convictions, and harsher punishment.

Overall, the efforts to make the criminal justice system more responsive to the need to punish the powerful have not yielded considerable success, and largely because of these failures—especially juxtaposed with the efficiency and banality in which the process engulfs and oppresses the powerless—progressive activists largely perceive the criminal process as broken. The overall lack of trust in the ability of the criminal justice system to deliver results in the form of indictments and harsh sentences for privileged defendants is often directly linked to the pursuit of alternative means of social control. Opining about #metoo, Catharine MacKinnon writes:

This logjam [between official legal prohibition and lack of enforcement followup—H.A.], which has long paralyzed effective legal recourse for sexual harassment, is finally being broken. Structural misogyny, along with sexualized racism and class inequalities, is being publicly and pervasively challenged by women's voices. The difference is, power is paying attention.

Powerful individuals and entities are taking sexual abuse seriously for once and acting against it as never before. No longer liars, no longer worthless, today's survivors are initiating consequences none

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.com/national/as-stakes-rise-in-nia-wilson-case-simmering-racial-tensions-intensify-in-oakland/2018/08/23/8f89e5a2-9c05-11e8-8d5e-c6c594024954\_story.html?utm\_term=.0db948e7dbce. As in the case of the judicial recall campaign and changes in the laws for prosecuting police officers, there are two main dangers here. The worse is that removing constitutional and legal protections only for unlikeable criminals, while framed as an effort to correct a structural imbalance, could have an overall corrosive effect on due process. The lesser harm is the expenditure of precious activist energy on vindictiveness and schadenfreude rather than on structural reform. These harms and others are discussed below.

of them could have gotten through any lawsuit—in part because the laws do not permit relief against individual perpetrators, but more because they are being believed and valued as the law seldom has. Women have been saying these things forever. It is the response to them that has changed.<sup>37</sup>

MacKinnon's observations can be generalized to other aspects of progressive punitivism: an understandable, albeit controversial, corollary of the despair of activists from a responsive criminal process has been the recurrence to public, primarily online, methods of public excoriation and shaming. The failure to obtain a harsh sentence for Brock Turner led to an orchestrated online campaign to tarnish the reputation of Judge Persky, resulting in his recall. The public excoriation of public figures like Louis C.K. and Aziz Ansari has led to informal “moratoria” placed on their public appearances, and on public criticism and protest wherever they go. In the court of public opinion, particularly with the permanence of online notoriety, there is no sanctioned “end” to the proceedings. As journalist Jon Ronson argues, recovering one’s reputation from the shambles of informal social control and online mobbing can be an effort that takes long years and carries considerable monetary costs, which often exceed the consequences foreseen by those leading the mob on.<sup>38</sup> The availability of online platforms also implies that revealing a person’s address, or that of their relatives, can lead not only to inconvenience and anguish but also to placing people in real danger.<sup>39</sup> Naturally, the left did not invent the recurrence to informal but pernicious modes of public shaming, nor do these tactics by any means characterize only the left;<sup>40</sup> however, shaming, punitivism,

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37. Catharine MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>.

38. JON RONSON, *SO YOU’VE BEEN PUBLICLY SHAMED* 201–04 (2015).

39. See Jasmine McNealy, *What Is Doxxing, and Why Is It So Scary?*, CONVERSATION (May 16, 2018), <https://theconversation.com/what-is-doxxing-and-why-is-it-so-scary-95848>.

40. Andrew Quodling, *Doxxing, Swatting and the New Trends in*

and online endangerment raise particular difficulties when employed by a political constituency invested in criminal justice reform.

It is possible to examine the reliance of progressive punitivism on “disruptive” social control technologies, in lieu of the formal social control apparatus, as a particular example of a broader trend. In *The Submerged State*,<sup>41</sup> Suzanne Mettler argues that, in recent decades, federal policymakers have increasingly offered benefits in subtle and invisible ways—tax breaks and payments to private third parties in lieu of direct disbursement of benefits. This sublimation of the role of the state in providing services and social benefits has resulted not only in conservative hostility to governmental involvement (in healthcare and gun control, to name just two examples) but also in increasing progressive efforts to “hide” an agenda of governmental social benefits. The structural difficulties in enacting policy reforms—or even in obtaining recognition for positive policy changes—have probably influenced progressives, as well as conservatives, in a despair of the state’s role in correcting criminal justice imbalances, and may have contributed to the increasing reliance on “disruptive” technologies to even the criminal justice odds against the powerful.

A broader discussion of the interplay between progressive punitivism and the cultural logics underpinning these informal social control mechanisms exceeds the framework of this Essay. However, the centrality of online interactions to the informal aspects of progressive punitivism raises an important question: how much of this is new, and what, if any, are the ideological roots of this trend? We now turn to this question.

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*Online Harassment*, CONVERSATION (Apr. 21, 2015), <https://theconversation.com/doxxing-swatting-and-the-new-trends-in-online-harassment-40234>.

41. SUZANNE METTLER, THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY 9 (2011).

D. *The Intellectual-Criminological Roots of Progressive Punitivism*

Seen through the lens of late-20th-century American punitivism, progressive punitivism does not appear to have a particularly radical agenda. It does not call for divesting from the idea of punishment as a whole, nor does it provide a fresh, interesting alternative to criminal justice as the master framework for social improvement. Because its ideology seems to be merely a political redirection of the existing punitive framework, progressive punitivism does not have clearly identifiable intellectual precursors in radical thought. Indeed, searching for the roots of progressive punitivism, even in the realm of critical criminological perspectives, proves elusive, for several important reasons.

First, a dimension that holds immense importance for current activists—race—entered the radical criminology conversation at a surprisingly late stage. Radical criminologists of the 1970s adopted a largely, albeit not exclusively, Marxist standpoint,<sup>42</sup> which assumes a social structure in which the law interacts with largely two communities: the oppressors or the oppressed. Whether theoreticians assumed that the law worked as the handmaiden of the former, invariably at its behest<sup>43</sup> or as a relatively autonomous part of the superstructure that often works to the benefit of the powerful in that it preserves the status quo,<sup>44</sup> what is now referred to as “intersectionality,” was unrecognized in this literature, and the category suffering from the law’s oppressive arm conflated race with class. Some writings from this era do

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42. See Thomas J. Bernard, *Distinction Between Conflict and Radical Criminology*, 72 J. CRIM. L. & CRIMINOLOGY 362, 363 (1981); Elmer H. Johnson, *Radical Criminology and Marxism: A Fallible Relationship*, 3 CRIM. JUST. REV. 53, 58 (1978).

43. ISAAC D. BALBUS, MARXISM AND DOMINATION 201 (1982).

44. Alan Stone, *The Place of Law in the Marxian Structure-Superstructure Archetype*, 19 L. & SOC’Y REV. 39, 48 (1985).

not mention race at all.<sup>45</sup> Those that do mention racial injustices as a private example of class oppression.<sup>46</sup>

Critical discussions of the flaws of Marxist criminology tended to address other aspects of the Marxian structure that were unfalsifiable, difficult to substantiate empirically, or futile in accounting for overcriminalization and oppression in Socialist societies.<sup>47</sup> A comprehensive critique of the omission of race would have to wait until 1987, when Darnell Hawkins argued that the class-based rhetoric of radical or Marxist criminology needed to be heavily modified to account for racial discrimination.<sup>48</sup> Hawkins lobbed his critique not at pure Marxist criminology, whose lack of subtlety and nimbleness would prove useless for his purposes, but toward the “bigger tent” of conflict criminology. Hawkins argued that certain aspects of racial disparities in sentencing, which would appear anomalous from a class-based conflict criminology perspective, made sense considering how racism operated on the ground. Relying on the seminal capital punishment study by David Baldus et al.,<sup>49</sup> Hawkins stressed that racial critiques of criminal justice must pay attention to the race of the victim, not only that of the offender; indeed, leniency toward Black perpetrators, especially in the

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45. See generally WILLIAM CHAMBLISS, CRIME AND THE LEGAL PROCESS 2 (1968); AUSTIN TURK, POLITICAL CRIMINALITY: THE DEFIANCE AND DEFENSE OF AUTHORITY 11 (1982).

46. MICHAEL LYNCH & W. BYRON GROVES, A PRIMER IN RADICAL CRIMINOLOGY (1986).

47. JAMES INCIARDI, RADICAL CRIMINOLOGY: THE COMING CRISES 27–33 (1980).

48. See Darnell Hawkins, *Beyond Anomalies: Rethinking the Conflict Perspective on Race and Criminal Punishment*, 65 SOC. FORCES 719, 721 (1987).

49. See David Baldus, Charles Pulaski & George Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133 (1986); David Baldus, Charles Pulaski, & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); David Baldus, George Woodworth & Charles Pulaski, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia* 18 U.C. DAVIS L. REV. 1375 (1984–85).

American South, which at first glance was at odds with the critical criminology prediction of severity, could be explained as state indifference toward Black lives.

Granted, in 1987 Hawkins would have seen in his rearview mirror not only conflict, radical, and Marxist criminologists, who were either oblivious to race or conflated it with class, but also a rich sociological heritage examining racial discrimination in criminal justice, starting with W.E.B. DuBois, himself an enthusiastic communist and fighter for class equality.<sup>50</sup> In the American context, the 1980s and 1990s brought about a wealth of literature specifically about racial discrimination. These included quantitative sociological and econometric studies,<sup>51</sup> including studies specifically focused on the race and class intersection,<sup>52</sup> as well as articles summarizing research findings and concluding that discrimination occurs broadly<sup>53</sup> and normative and doctrinal commentaries on the need to level the playing

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50. Dan S. Green & Earl Smith, *W.E.B. DuBois and the Concepts of Race and Class*, 44 PHYLON 262, 262 (1983).

51. See Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 743 (1993); George Briges, Robert Crutchfield & Edith Simpson, *Crime, Social Structure and Criminal Punishment: White and Nonwhite Rates of Imprisonment*, 34 SOC. PROBS. 345, 345 (1987).

52. See David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction,"* 83 GEO. L. J. 2547, 2547 (1995); Miles Harer & Darrell Steffensmeier, *The Differing Racial Effects of Economic Inequality on Black and White Rates of Violence*, 70 SOC. FORCES 1035, 1035–36 (1992); Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1255 (1994).

53. See Darnell F. Hawkins, John H. Laub, Janet L. Lauritsen & Lyn Cothorn, *Race, Ethnicity, and Serious and Violent Juvenile Offending*, JUV. JUST. BULL., June 2000, at 1, <https://www.ncjrs.gov/pdffiles1/ojjdp/181202.pdf>; Carl E. Pope & William Feyerherm, *Minorities and the Juvenile Justice System*, OFF. JUV. JUST. & DELINQ. PREVENTION, July 1995, at 1, 15; Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 CRIM. JUST. 427 (2000); Michael Tonry, *Racial Disproportion in US Prisons*, 34 BRIT. J. CRIMINOLOGY 97 (1994); Marjorie S. Zatz, *The Convergence of Race, Ethnicity, Gender, and Class on Court Decisionmaking: Looking Towards the 21st Century*, 2 CRIM. JUST. 503 (2000).

field.<sup>54</sup> Overall, this literature does not evince a call to “level up,” that is, sentence white offenders more severely. The leading normative commentators, such as Angela Davis and Paul Butler, call for the opposite—a focus on decriminalizing, or nullifying verdicts of, black offenders.

Second, even within the conversation about class, until fairly recently most scholarship has focused on the injustices of a seemingly class-blind system that focused its oppressive power on the poor, rather than on the impunity of the rich. For one thing, the nature of crimes of the powerful has changed, and would have been more difficult to detect. Since the 18th century, financial crashes were typically failures of monetary policy, not banking practice.<sup>55</sup>

An important piece of the puzzle involves political framing. Criminologist John Hagan argues that the “age of Reagan” in American criminal justice, which he dates between 1974 and 2008, was characterized by a retreat from the “age of Roosevelt’s” focus on rehabilitation, corporate regulation, and positivist criminology toward an aggressive focus on crimes of the poor, particularly through the vehicle of the War on Drugs.<sup>56</sup> Simultaneously, the later era saw large-scale deregulation of businesses, which opened up “opportunities, incentives, and even rationalizations of white-collar crime.” Thus, for Hagan, the focus on harsh treatment of street crimes happened in tandem with the unleashing of corporate crime.

There were also epistemological and methodological

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54. See Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 841 (1997); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998); Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95 (2000).

55. Benedikt Koehler, *History of Financial Disasters, 1763–1995* (2006).

56. JOHN HAGAN, WHO ARE THE CRIMINALS? THE POLITICS OF CRIME POLICY FROM THE AGE OF ROOSEVELT TO THE AGE OF REAGAN 2, 8–9, 19 (2010).

difficulties in identifying the culprits. As Daniel Hirschman explains, the now popular concept of the “top-one-percenters” was obscured from public discourse until the 2000s, even though at that point the data revealed that top income earners in the 1990s received a larger share of income than at any point since the Great Depression, and that their incomes had begun a dramatic upward climb in the early 1980s.<sup>57</sup> Hirschman argues that shifts in top incomes remained under the radar, because the relevant economic disciplines that produced knowledge about income inequality had “blind spots” in important places: Macroeconomists focused on labor’s share of national income, but did not examine the distribution of income between individuals; labor economists, on the other hand, drew on newly available survey data to explain wage disparities in terms of education, age, work experience, race, and gender. These surveys failed to capture movements among top income earners, and so this group, which figured, and were reviled, prominently in the discourse produced by Occupy Wall Street and other international movements for economic equality.<sup>58</sup>

This is not to say that early criminologists ignored the crimes of the powerful. One area of scholarship that has always paid attention to these is, of course, white-collar crime. As early as 1945, Edwin Sutherland saw the analysis of white-collar crime as an important theoretical challenge, wondering whether it was appropriate to expand the traditionally understood concept of “crime” to include it,<sup>59</sup> and eventually make the study of it as one of the lynchpins of his career.<sup>60</sup> Donald Cressey certainly thought so upon interviewing incarcerated embezzlers

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57. Daniel Hirschman, *Inventing the Economy* 158 (2016) (unpublished dissertation, University of Michigan) (on file with the University of Michigan).

58. Craig Calhoun, *Occupy Wall Street in Perspective*, 64 BRIT. J. SOC. 26, 26–27 (2013).

59. Edwin H. Sutherland, *Is “White Collar Crime” Crime?*, 10 AM. SOC. REV. 132 (1945).

60. EDWIN SUTHERLAND, *WHITE COLLAR CRIME: THE UNCUT VERSION 1* (1983).

about their rationalizations for their crimes,<sup>61</sup> yielding responses astonishingly similar to those that juvenile delinquents gave Gresham Sykes and David Matza in their own study.<sup>62</sup>

Some white-collar crime literature does have a punitive focus, or more accurately, a critique of the trivialization of white-collar crime. This literature, for the most part, sees the impunity of white-collar criminals as a consequence of the overpowering neoliberal ethos.<sup>63</sup> Snider and others<sup>64</sup> discuss the partial impact of social movements opposing white-collar crime, which argue for stiffer punishments for these criminals. The success of these movements in procuring more severe punishment for corporate criminals is confirmed in a study by Van Slyke and Bales.<sup>65</sup> The study examined sentencing levels before and after the 2001–2002 white-collar crime scandals epitomized by the fall of Enron, and found that, while overall sentencing levels evince leniency toward white-collar criminals compared to street criminals, sentences did become more severe in the aftermath of Enron. Importantly, some scholars have not found white-collar crime sentences to be lighter than street-crime sentences; however, the increased pressure for prosecution of these crimes yields lighter sentences.<sup>66</sup>

Third, the call for punitivism in the context of feminist

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61. See Donald Cressey, OTHER PEOPLE'S MONEY: A STUDY IN THE SOCIAL PSYCHOLOGY OF EMBEZZLEMENT 136-37 (1973).

62. See Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOC. REV. 664, 666-68 (1957).

63. Laureen Snider, *The Sociology of Corporate Crime: An Obituary*, 4 THEORETICAL CRIMINOLOGY 169 (2000).

64. Jack Katz, *The Social Movement Against White-Collar Crime*, 2 CRIMINOLOGY REV. Y.B. 161, 162-65 (1980).

65. Shanna Van Slyke & William D. Bales, *A Contemporary Study of the Decision to Incarcerate White-Collar and Street Property Offenders*, 14 PUNISHMENT & SOC'Y 217, 217-19 (2012).

66. Ilene H. Nagel & John L. Hagan, *The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity*, 80 MICH. L. REV. 1427, 1428 (1982).

criminology, linked with the “carceral feminism” movement, heavily contrasts with the race and class materials in that feminist criminology has tended to focus on male criminality much more saliently than critical race scholarship has focused on white criminality, or Marxist scholarship on crimes of the wealthy. Even though much of feminist criminological scholarship raises questions about the constant use of a male lens—including the historical focus on male criminality and the paucity of research on female criminality<sup>67</sup>—a substantial subset of feminist studies focus on women as victims or on the gender ratio between male and female offenders. While this scholarship often assumes that criminality has always been a male phenomenon—a point disputed by both sociologists and historians<sup>68</sup>—it has had the power to focus the conversation on male aggression, an important point for many second-wave feminists concerned about violence against, and exploitation of, women.

Indeed, some second-wave and radical feminism writings seem to be harbingers of carceral feminism in particular and progressive punitivism in general. Catharine MacKinnon’s early writings about sexual harassment in the workplace foreshadowed the logics and techniques of the #metoo movement.<sup>69</sup> As mentioned above, writing in the aftermath

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67. FRANCES HEIDENSOHN, WOMEN AND CRIME 145–47 (2d ed. 1995); Kimberly J. Cook, *Has Criminology Awakened from Its “Androcentric Slumber”?*, 11 FEMINIST CRIMINOLOGY 334, 335 (2016).

68. Much of this discussion suffers from serious ahistoricism. See NICOLA LACEY, WOMEN, CRIME, AND CHARACTER: FROM MOLL FLANDERS TO TESS OF THE D’URBERVILLES 2–7 (2008); LUCIA ZEDNER, WOMEN, CRIME, AND CUSTODY IN VICTORIAN ENGLAND 1–2 (1991); Malcolm M. Feeley & Hadar Aviram, *Social Historical Studies of Women, Crime and Courts*, 6 ANN. REV. L. & SOC. SCI. 151 (2010); Malcolm M. Feeley & Deborah L. Little, *The Vanishing Female: The Decline of Women in the Criminal Process, 1687–1912*, 25 LAW & SOC’Y REV. 719 (1981).

69. Ginia Bellafante, *Before #MeToo, There Was Catharine A. MacKinnon and Her Book ‘Sexual Harassment of Working Women’*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/books/review/metoo-workplace-sexual-harassment-catharine-mackinnon.html>.

of #metoo, MacKinnon embraced the movement's ethos, opining that the online outrage and excoriation campaigns that, in part, characterized the movement are an outcome of the incompetence of formal criminal law in addressing sexual harassment.<sup>70</sup> For an even more extreme example of the antecedents of carceral feminism, it is interesting to consider Valerie Solanas' SCUM manifesto, in which the ultimate solution for the exploitation and oppression of women lies in the annihilation of men:

SCUM will kill all men who are not in the Men's Auxiliary of SCUM. Men in the Men's Auxiliary are those men who are working diligently to eliminate themselves, men who, regardless of their motives, do good, men who are playing ball with SCUM. A few examples of the men in the Men's Auxiliary are: men who kill men; biological scientists who are working on constructive programs, as opposed to biological warfare; journalists, writers, editors, publishers and producers who disseminate and promote ideas that will lead to the achievement of SCUM's goals; faggots who, by their shimmering, flaming example, encourage other men to de-man themselves and thereby make themselves relatively inoffensive; men who consistently give things away—money, things, services; men who tell it like it is (so far not one ever has), who put women straight, who reveal the truth about themselves, who give the mindless male females correct sentences to parrot, who tell them a woman's primary goal in life should be to squash the male sex (to aid men in this endeavor SCUM will conduct Turd Sessions, at which every male present will give a speech beginning with the sentence: "I am a turd, a lowly abject turd," then proceed to list all the ways in which he is. His reward for doing so will be the opportunity to fraternize after the session for a whole, solid hour with the SCUM who will be present. Nice, clean-living male women will be invited to the sessions to help clarify any doubts and misunderstandings they may have about the male sex); makers and promoters of sex books and movies, etc., who are hastening the day when all that will be shown on the screen will be Suck and Fuck (males, like the rats following the Pied Piper, will be lured by Pussy to their doom, will be overcome and submerged by and will eventually drown in the passive flesh that they are); drug pushers and advocates, who are hastening the dropping out of men.<sup>71</sup>

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70. Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>.

71. VALERIE SOLANAS, SCUM MANIFESTO (Matriarchy Study Group 1983)

Arguably, it was easier for feminism to make the leap from protecting the oppressed to punishing the oppressors because its focus has, for the most part, not been on female *criminality* but on female *victimization*. Moreover, feminists who wrote about the former, just like nonfeminist writers about gender and crime, have faced a picture of official statistics in which women are *underrepresented* in the criminal population. By contrast, critical writers in the area of class and race have had to first tackle the hurdle of the overcriminalization of the oppressed population and pull the official statistics' wool off their audience's eyes in pointing out the crimes of the powerful. But even in these other areas, some writers have finally turned the focus onto the crimes that remained obscured in enforcement statistics. Indeed, in recent years, criminological theory has come to see all of these categories—white criminals, male criminals, wealthy criminals, corporate criminals—as part of an overarching category of “crimes of the powerful.” A recent anthology, edited by Gregg Barak,<sup>72</sup> begins with a complaint about the paucity of evidence about the existence and harms of these crimes, even though they victimize far more people than street crimes:

In part . . . the crimes and victims of the powerful remain relatively invisible thanks to the concerted efforts of lawyers, governments, and corporations to censor or suppress these disreputable pursuits from going viral when they succeed. This absence of knowledge also continues, in part, because the discipline of criminology spends only 5 percent of its time researching, teaching, and writing about “white-collar” crime while devoting 95 percent of its time to “blue-collar” crime . . . even this 5 percent may be inflated because much of what passes for researching and teaching about “white-collar” crime (i.e., embezzlement, identity theft, insurance fraud) not only has little in common with the crimes of the powerful, but also are actually crimes against the powerful.

The categories reviewed in the book include crimes of

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(1967), <https://www.ccs.neu.edu/home/shivers/rants/scum.html>.

72. THE ROUTLEDGE INTERNATIONAL HANDBOOK OF THE CRIMES OF THE POWERFUL 1 (Gregg Barak ed. 2015).

globalization, corporate crimes, environmental crimes, financial crimes, state crimes, state-corporate crimes and state-routinized crimes.

Several important themes stand out. First, the analysis of crimes of the powerful is, by necessity, global; many such crimes happen across borders and their perpetrators benefit from the ability to hide behind borders and hop across jurisdictions. Second, a conversation about the crimes of the powerful requires expanding the definition of “crime” because the problem often runs deeper than merely lax enforcement—many of these crimes are simply not socially understood as crimes or legally coded as such. This is especially salient in the context of environmental crime: the field of green criminology explicitly utilizes the concept of “harm” rather than “crime” to define the behaviors of concern.<sup>73</sup> This moniker encompasses harms that are not recognized as crimes either because the victims—nonhuman animals or the environment—are not imbued with rights or legal personhood, or because they tend to disproportionately harm disenfranchised people who have less power to claim their legal rights.<sup>74</sup>

Third, the common theme running through these criminal and harmful behaviors is the avoidance of sanctions, but “sanctions” are broadly defined: they are certainly not limited to the incarceration of individuals. The consequences advocated by scholars of crimes of the powerful address, first and foremost, the needs of the

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73. See MICHAEL LYNCH, MICHAEL A. LONG, PAUL B. STRETESKY & KIMBERLY L. BARRETT, GREEN CRIMINOLOGY: CRIME, JUSTICE, AND THE ENVIRONMENT 1–20 (2017); Nigel South, Avi Brisman, and Piers Beirne, *A Guide to a Green Criminology*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK OF GREEN CRIMINOLOGY 27–42 (Nigel South & Avi Brisman eds., 2012); ROB WHITE, TRANSNATIONAL ENVIRONMENTAL CRIME: TOWARD AN ECO-GLOBAL CRIMINOLOGY 4 (2011); ROB WHITE & DIANE HECKENBERG, GREEN CRIMINOLOGY: AN INTRODUCTION TO THE STUDY OF ENVIRONMENTAL HARM (2014).

74. AVI BRISMAN & NIGEL SOUTH, GREEN CULTURAL CRIMINOLOGY: CONSTRUCTIONS OF ENVIRONMENTAL HARM, CONSUMERISM, AND RESISTANCE TO ECOCIDE 2–6, 51–53 (2014).

victims. In the case of environmental crime, this might require extensive cleaning of polluted areas, deforestation or biodiversity offsetting,<sup>75</sup> rewilding<sup>76</sup> and regulating industries like trophy hunting for the benefit of biodiversity and native populations.<sup>77</sup> Thus, the tools of remedy and enforcement are as diverse and creative as the range of crimes they address, not necessarily limited to the conventional tools of law enforcement and criminal prosecution.

Save for some feminist criminology sources, it is difficult to situate the progressive punitivism trend in legacies of radical and critical criminological discourses. But in searching for more obvious parallels, I encountered a disturbing analogy between progressive punitivism and the criminological logics underpinning the Communist Chinese criminal law.

While criminalization, tribunals, and harsh punishment were part and parcel of the Cultural Revolution, China didn't actually have an official criminal code until 1979. The Maoist authorities had drafted one, but Mao believed it unwise to codify a criminal law that later might restrain the party. Nonetheless, in one of his classic works he explicitly states that whether a particular behavior is to be handled through punishment or with compassion depends on the locus of the perpetrator in the class structure:<sup>78</sup>

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75. David Takacs, *Are Koalas Fungible? Biodiversity Offsetting and the Law*, 26 N.Y.U. ENVT'L L.J. 161, 161 (2018).

76. John Hintz, *Some Political Problems of Rewilding Nature*, 10 ETHICS, PLACE & ENV'T 177 (2007).

77. *Informing Decisions on Trophy Hunting*, INT'L UNION FOR CONSERVATION OF NATURE, Sept. 2016, at 2, [https://www.iucn.org/downloads/iucn\\_informing\\_decisionsontrophyhuntingv1.pdf](https://www.iucn.org/downloads/iucn_informing_decisionsontrophyhuntingv1.pdf).

78. MAO TSE-TUNG, *On the Correct Handling of Contradictions Among the People*, in SELECTED WORKS OF MAO TSE-TUNG (last visited Nov. 7, 2019), [https://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv\\_5\\_58.htm](https://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv_5_58.htm).

The people's democratic dictatorship uses two methods. Towards the enemy, it uses the method of dictatorship, that is, for as long a period of time as is necessary it does not permit them to take part in political activity and compels them to obey the law of the People's Government, to engage in labour and, through such labour, be transformed into new men. Towards the people; on the contrary, it uses the method of democracy and not of compulsion, that is, it must necessarily let them take part in political activity and does not compel them to do this or that but uses the method of democracy to educate and persuade. Such education is self-education for the people, and its basic method is criticism and self-criticism.

This deliberate focus of the criminal apparatus on some and not on others came to characterize the eventual 1979 code. As Donald Clarke and James Feinerman argue,<sup>79</sup> the question of what constitutes a crime is deliberately nebulous in the criminal code, and highly dependent on the perpetrator's location on the class food chain:

The Criminal Law (CL) does not so much define which acts are punishable as prescribe what the sanctions shall be when relatively severe punishments are deemed in order. The definition of crime is accomplished outside the Criminal Law by reference to political exigencies or generally accepted standards of morality. There is little perceived danger in allowing government officials to impose their own standards of morality, since Chinese state ideology does not accept the legitimacy of multiple standards of morality.

Consider, for example, the provision for analogy (Article 79 of the CL): a "crime" not stipulated in the CL (or elsewhere) may be punished according to the most nearly applicable article. This shows that if rules defining crime are "law," then the very notion of "crime" is not a "legal" concept; the determination of whether a particular act constitutes a crime is something that must take place outside the CL. Thus, while the CL tells you what punishment to apply for a particular crime, it is often unhelpful in determining whether a crime has been committed. In this respect, the CL resembles the rules for punishment of Imperial China, which stipulated any number of punishable acts in great detail, but also contained provisions allowing for analogy and

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79. Donald C. Clarke and James V. Feinerman, *Antagonistic Contradictions: Criminal Law and Human Rights in China*, 141 CHINA Q. 135, 137–39 (1995).

punishing “doing what ought not to be done.”

The Special Part lists various crimes and their punishments. Pride of place goes to counter-revolutionary crimes, which are defined as “all acts endangering the People’s Republic of China committed with the goal of overthrowing the political power of the dictatorship of the proletariat and the socialist system” [but are very rare despite their textual prominence . . . . The other chapters in the Special Part cover crimes of endangering public security, undermining the socialist economic order, infringement of personal and democratic rights, property violation, disruption of the order of social administration, disruption of marriage and the family, and dereliction of duty and corruption.

The Special Part is a relatively skimpy 103 articles . . . . One reason for the relative simplicity of the Chinese CL is that the provision on analogy offers an escape hatch in case of imperfect or careless drafting. Another reason is that the CL is supplemented by numerous other pieces of special legislation either specifically criminalizing a certain act or prohibiting an act and providing vaguely that “where it constitutes a crime, criminal responsibility shall be affixed,” without providing any guidance as to under what circumstances the performance of a prohibited act would constitute a crime. Finally, it must be remembered that the CL is as much a political text as a legal one; its drafters were concerned with providing a legal basis for state action, not with worries about due process, and it was designed to be used by judicial and public security cadres with a low educational level. Although the late 1980s and early 1990s have seen a movement among the Chinese legal community to revise the wording of the Criminal Law in an attempt to make it technically more elegant, no revision has yet taken place.

Essentially, what Clarke and Feinerman are describing is a punishment system that relies on the sentiments of the communist order toward the offender to even make the decision whether a crime has been committed. But a possible—and reasonable—counterargument could be that all criminal codes are, covertly, Maoist “little red books” by virtue of differential enforcement. After all, isn’t a city ordinance that prohibits any person from sitting or lying on a city sidewalk, but yields fines only against poor, homeless people, exactly the same as “political texts” that “impose [their] own standard

of morality?"<sup>80</sup> Is there an operative distinction between laws that explicitly target the poor and laws that do so under the cover of neutral language?

It is possible, for example, to argue that the latter legislative style—a law that purports to criminalize in a neutral, universal way, but is enforced in a way that targets members of a particular class—is abhorrent in a way that its explicitly classist, racist, or sexist counterpart is not: it is dishonest and generates false consciousness about the supposedly fair operation of the legal system.<sup>81</sup> In that respect, openly saying, “severely punish the rich” is a statement of integrity. However, this rationale does not neatly address what happens in the context of progressive punitivism for two main reasons.

First, the days in which the mainstream public was in the dark about differential enforcement in the United States are long gone. The disparities that critical criminologists have been studying for decades—racialized police activity, ideological bias in charging decisions and sentencing disparities for members of different races and classes—are all out in the open and available far beyond insular academic circles. Progressive activists have been widely exposed to Michelle Alexander’s *The New Jim Crow*,<sup>82</sup> which succeeded in popularizing arguments about structural racism in criminal justice as few texts by professionals had before. Moreover, many of today’s

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80. See Don Mitchell, *The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States*, 29 ANTIPODE 303, 305–06 (1997); Justin Olson & Scott MacDonald, *Washington’s War on the Visibly Poor: A Survey of Criminalizing Ordinances & Their Enforcement*, in SEATTLE U. SCH. L. HOMELESS RTS. ADVOC. PROJECT 1–4 (Sara K. Rankin ed., 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2602318](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2602318); TamiIwamoto, *Adding Insult to Injury: Criminalization of Homelessness in Los Angeles*, 29 WHITTIER L. REV. 515, 515–19 (2007).

81. See Alan Stone, *The Place of Law in the Marxian Structure-Superstructure Archetype*, 19 LAW & SOC’Y REV. 40, 41, 65 (1985).

82. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* ix-xi (2d ed. 2012).

activists came to support criminal justice in the aftermath of the Ferguson riots: they have been reading excellent journalistic coverage of the criminal justice system<sup>83</sup> and listening to podcasts about miscarriages of justice<sup>84</sup> for years. Activists can easily see through laws that are facially egalitarian but differentially enforced. This should be good news for critical criminologists, who for decades struggled to gain influence in the progressive mainstream and is largely to the credit of academics willing to engage in public outreach and journalists who simplified and popularized the academic arguments.

Second, laws employing a universal language at least open the possibility of enforcement reform and reinforce, albeit superficially, the shared value of equality before the law. By contrast, laws that openly target particular populations cement partisan animosity toward these populations, which then legitimizes overt denial of their civil rights.

In any case, it would be farfetched to assume, with no evidence, that current trends in progressive activism borrow from Maoism with full awareness of the consequences. An Occam's Razor approach toward the intellectual roots question leads to a much simpler answer: progressive punitivism is simultaneously more and less imaginative than the scholarly conversation about these themes. It is more imaginative in the sense that it steps beyond showing comparisons and focusing on the oppressed to direct popular focus toward the oppressors and their behavior, and less so in the sense that it relies on limited, conventional rhetorical tropes, which could

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83. Cf. German Lopez, *Why You Can't Blame Mass Incarceration on the War on Drugs*, Vox (May 30, 2017, 9:00 AM), <https://www.vox.com/policy-and-politics/2017/5/30/15591700/mass-incarceration-john-pfaff-locked-in>; Matt Thompson, *Imagining the Presence of Justice*, THE ATLANTIC (May 3, 2017), <https://www.theatlantic.com/national/archive/2017/05/criminal-justice-across-america-reporting-project/524985/>.

84. Cf. *Serial: Season One*, WBEZ (2014) (downloaded using iTunes).

benefit from the refreshing diversity of recourses and remedies offered by creative scholars with a deep understanding of the market, public-private intersection, and the dynamics of incentives. As I explain in the next Section, this is not surprising given how steeped Americans of all stripes are in punitive logics.

#### E. *Progressive Punitivism and the American Psyche: A Natural Extension of the Punitive State Logic*

The emergence of a progressive punitive logic in the United States is not particularly surprising if one keeps in mind 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. Criminal justice and punishment scholarship in the United States is steeped in this punitive legacy. Early accounts of the punitive turn typically blamed Nixon and Reagan for the policies that increased mass incarceration; in *Making Crime Pay*, Katherine Beckett shows how Richard Nixon's racialized fears of the civil rights movement fueled his campaign, and how the moral panic he generated about rising crime rates—rather than the actual rise in crime rates—led to his election and the execution of his policies.<sup>85</sup> Elizabeth Hinton, as well as Beckett, also identified Ronald Reagan and his war on drugs as a central culprit in the criminalization and demonization of Americans.<sup>86</sup> The centrality of race for this campaign of criminal labeling is not lost on either commentator and is also front and center in Michelle Alexander's book.<sup>87</sup>

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85. KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 39 (1997).

86. ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 307 (2016).

87. See ALEXANDER, *supra* note 81, at 1.

But recently, academic commentators have tended to view the Nixon and Reagan presidencies not as a break from what preceded them, but rather as the continuation of policies espoused by liberal presidents that already targeted and stigmatized poor people of color. Hinton's book is a case in point: her narrative emphasizes the reliance of the Kennedy and Johnson administrations on the idea of the pathologies of the black family and its connection to delinquency. Similarly, Marie Gottschalk in *The Prison and the Gallows*<sup>88</sup> and Naomi Murakawa in *The First Civil Right*<sup>89</sup> have highlighted the role of mainstream Democrats, as well as civil rights activists, in bringing about punitive consequences. James Forman's *Locking Up Our Own*<sup>90</sup> examines how well-meaning African American lawmakers and law enforcement officials marshaled the tools they were familiar with—criminalization, harsh policing, tough sentencing—to solve problems for crime-ridden communities, and how these tools backfired and worsened the situation for those communities.

These newer works expand the field of responsibility by arguing that conservative actors did not corner the market on relying on the criminal justice apparatus as the quintessential solution to society's ills. As Jonathan Simon argues, the pressure to address social malaise through the metaphor of crime is a feature of late modernity, exercising pressure on Republican and Democrat politicians alike to appear "tough on crime."<sup>91</sup> In other words, institutions and actors across the political spectrum have regularly approached social problems with a criminal justice hammer

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88. MARIE GOTTSCHALK, *THE PRISON AND THE GALLows: THE POLITICS OF MASS INCARCERATION IN AMERICA* 2 (2006).

89. NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 143–47 (2014).

90. JAMES FORMAN, *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 217 (2017).

91. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 5 (2009).

in hand, and it is therefore no surprise that all these problems looked like criminal justice nails.

The tendency to recur to criminal justice methods to solve systemic problems has been exacerbated by three additional features of the punitive turn. The first is the rising importance of victims as the leading constituency in shaping values and priorities. In *Governing Through Crime*, Jonathan Simon argues that the quintessential defining metaphor of the American citizen has come to be the potential victim, replacing the yeoman farmer and small businessman of yesteryear.<sup>92</sup> Indeed, a very particular kind of victims-rights discourse has come to dominate criminal justice conversations—a discourse portraying the criminal justice system as a zero-sum game between the opposing categories of offenders and victims, in which harsher punishment for the former is an unqualified good for the latter.<sup>93</sup> This perspective narrows the American imagination to punitive perspectives as the only available method for expressing care for victims' experiences, and marginalizes alternative important avenues to honor victims, such as restorative justice, victim-offender mediation, and coalitions to end violence.

The second important feature of the punitive turn is, of course, that it is deeply embedded structural inequalities and its effects are unevenly distributed across class, gender, and race. It is now widely acknowledged that, while one in one hundred Americans is behind bars, that figure is much higher for particular segments of the American population: one in nine young black men is incarcerated, and one in three

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92. *Id.* at 77.

93. 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, 706 (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 52–54 (forthcoming 2020).

is under some form of correctional supervision.<sup>94</sup> Racial and class inequalities are found at every turn: in policing,<sup>95</sup> in criminal courtrooms,<sup>96</sup> and in sentencing,<sup>97</sup> to name just a few. Many criminal justice critics, in academia and in the activist realm, treat this overrepresentation not as a coincidence, but rather as part of a systemic project of crystallizing and enhancing inequalities.<sup>98</sup>

The third feature shared by conservative and progressive punitivism relates to the role of high-profile individual cases—“redball crimes”—as powerful rhetorical devices for systemic reform. Conservative punitivism has succeeded in transforming public opinion and public policy through the visibility and symbolism of Willie Horton, whose crimes were prominent in George H.W. Bush’s presidential campaign.<sup>99</sup> Each of these cautionary tales served the conservative punitive agenda by progressive punitivism; Richard Allen Davis, murderer of Polly Klaas, was the trigger for the Three Strikes Law;<sup>100</sup> and the Manson family murders figured prominently in the creation of California’s “extreme

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94. *One in 100: Behind Bars in America 2008*, PEW CTR. ON STATES 3-6 (2008), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2008/one20in2010pdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2008/one20in2010pdf.pdf).

95. CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP xv–xvii (2014).

96. NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT 15 (2016).

97. Michael Tonry, *Fifty Years of American Sentencing Reform—Nine Lessons*, 48 CRIME & JUST. 1 (2019).

98. See ALEXANDER, *supra* note 81, at 1; PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 184–85 (2009); ANGELA DAVIS, POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT xiv–xvi (2017); EPP ET AL., *supra* note 94, at 148–50; VAN CLEVE, *supra* note 95, at 181.

99. David C. Anderson & Catherine Enberg, *Crime and Politics of Hysteria: How the Willie Horton Story Changed American Justice*, 11 J. CONTEMP. CRIM. JUST. 298 (1995); Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, MARSHALL PROJ. (May 13, 2015, 6:37 PM), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited>.

100. FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT, *passim* (2003).

punishment trifecta": the return of the death penalty, the birth of life in prison without parole, and the punitive turn in parole policies.<sup>101</sup> Progressive punitivism seeks to make individual cases into "conversation starters" as well: the Kavanaugh hearing<sup>102</sup> and Brock Turner's sentencing<sup>103</sup> are just two examples. But while this rhetorical device—relying on a case with high emotional valence to make a systemic argument—works well in service of conservative goals, it backfires when used in service of progressive goals, for reasons I explain in the next Section.

These characteristics of the punitive turn are now firmly seared into the American psyche. Not only is criminal justice perceived as the default avenue for addressing social problems, but it is also inexorably linked to the idea of group identity for both accusers and accused, and victims.

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

#### F. Challenges and Problems

Highlighting the discontents of progressive punitivism should not imply that its targets are blameless, or that they ordinarily suffer a harsher fate than the usual people on the receiving end of the legal process. These criticisms are best understood, therefore, as implying that progressive activism expends unnecessary energy on pursuing the accountability of individuals, some more deserving than others, that would be better spent elsewhere. I offer here some preliminary

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101. AVIRAM, *supra* note 93.

102. 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.C.R. & ECON. DEV. (forthcoming 2019).

103. Hamilton-Smith, *supra* note 16.

thoughts about the problems of viewing the progressive reform project through a punitive prism.

First, the emphasis on punishment of individual wrongdoers as an educational lesson confounds personal pathology with situational evil. The lessons of Stanley Milgram's renown obedience to authority experiment,<sup>104</sup> as well as Philip Zimbardo's Stanford prison experiment,<sup>105</sup> are well taken: bad behavior, including serious displays of cruelty and sadism, is largely situational. 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. One of the best examples of this mismatch is the progressive outrage about the confirmation hearings of Brett Kavanaugh to the Supreme Court. As I argue elsewhere, the focus on Kavanaugh's personal pathology, dishonesty, and misogyny has weakened the broader takeaway from the hearings: that Kavanaugh, lamentably, is a man of his time and place, and the effort to individually pathologize men like Kavanaugh creates a risk of normalizing the cultural Petri dish in which he and others operate.<sup>106</sup>

Second, criminal justice is limited as a paradigm of reform by its very nature: waiting for an incident to occur so that the social reaction to it will trigger reform hangs the success of reform on the happenstance of particular occurrence. The dependence "case and controversy" to seek an opportunity of reform means that the lightning rod for public ire is largely left to chance, or to a movement's preferences and idiosyncrasies. Sometimes, instances of poor

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104. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW viii (First Harper Perennial Modern Thought 2009) (1974).

105. Technical Report from Craig Haney, Curtis Banks & Philip Zimbardo, Stanford University, to Office of Naval Research, *Interpersonal Dynamics in a Simulated Prison*, 1 (Oct. 1972), <https://apps.dtic.mil/dtic/tr/fulltext/u2/751041.pdf>.

106. Aviram, *supra* note 102.

behavior—racism, sexual assault, police brutality—that come to light in the context of an individual lawsuit are less egregious than the ones that remain in darkness. But 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. Again, while the Kavanaugh hearings yielded a “national conversation” of questionable quality, they did not teach us much about the scope of the problem or how to address it.

Third, even if individual instances of public outrage are laudable in the aggregate, they can drain the movement of energy and resources. The emphasis on criminalization and harsh sentencing draws efforts away from other laudable, systemic reforms that are less attractive to the public and thus less visible. Movements to reform social ills must spend their limited energy and resources in directions that might prove most productive. To focus a movement on mobbing and stigmatizing one particular person is to spend finite capital—money, time, and verve—on a particular case under the unproven assumption that the case will produce systemic change.

Fourth, some difficult questions must be asked of the American tendency of both progressives and conservatives to place victims at the forefront of policy and reform. The validation and empowerment of victims is deeply compromised by the way in which victim-centered punitive processes 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. The empirical debate on the percentage of false complaints of sexual abuse,

which was reignited by the Kavanaugh hearings,<sup>107</sup> does not have an easy resolution precisely because it is difficult to know the correct answer.<sup>108</sup> Progressives and conservatives disagree not only on the rate of false accusations, but also on the existence or absence of incentives to falsely accuse.<sup>109</sup> Some progressive commentators openly accept the possibility of false accusations, but claim that such miscarriages of justice are “acceptable casualties” in the broader war against sexual misconduct.<sup>110</sup> This argument may be persuasive to some in the progressive left, but it is understandable why it would leave many moderates and progressives unimpressed. More importantly, making victimization the centerpiece of reform is dangerous in that it 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

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107. See Peter Baker, ‘*It Was All Fake,’ Trump Misleadingly Says of Kavanaugh Accusations*, N.Y. TIMES (Nov. 6, 2018, 3:55 PM), <https://www.nytimes.com/2018/11/06/us/politics/brett-kavanaugh-christine-blasey-ford.html>; Margery Egan, *The Myth of False Accusations of Sexual Assault*, BOSTON GLOBE (Oct. 15, 2018), <https://www.bostonglobe.com/opinion/2018/10/14/the-myth-false-accusations-sexual-assault/Qsy2s4MgJ0k0CXyVjSZcKM/story.html>.

108. A recent meta-analysis of seven studies found that “confirmed false allegations of sexual assault made to police occur at a significant rate. The total false reporting rate, including both confirmed and equivocal cases, would be greater than the 5% rate found.” Claire Ferguson & John Malouff, *Assessing Police Classifications of Sexual Assault Reports: A Meta-Analysis of False Reporting Rates*, 45 ARCHIVES SEXUAL BEHAV. 1185, 1185 (2016).

109. André W. E. A. de Zutter, Robert Horselenberg & Peter van Koppen, *Motives for Filing a False Allegation of Rape*, 47 ARCHIVES SEXUAL BEHAV. 457, 458–59 (2018) (recognizing some motivations for false allegations of sexual misconduct).

110. 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), <https://www.newyorker.com/culture/culture-desk/the-rising-pressure-of-the-metoo-backlash>. 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, 10:30 AM), <https://www.vox.com/2014/10/13/6966847/yes-means-yes-is-a-terrible-bill-and-i-completely-support-it?fbclid=IwAR0jmDw9p5o705Xiqyt5wvIX0AQLF4DR0eaCqK1dFHXCeTw6VHNaJ9YTGN8>.

requires.<sup>111</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 for whom there is no clear dichotomy between victim and offender, and whose take on their predicament does not take an accusatory tone.<sup>112</sup>

A poignant example of the above point was the cultural dissection of Amber Guyger's trial for the murder of her next-door neighbor, Botham Jean.<sup>113</sup> Guyger, a white woman and an off-duty Dallas police officer, argued that she shot her African American neighbor because she mistook Jean's apartment for her own. At her sentencing hearing, the victim's brother, Brandt Jean, asked the judge's permission to hug Guyger, and offered her his forgiveness: "If you truly are sorry, I know . . . I can speak for myself, I forgive you . . . I'm not going to say I hope you rot and die just like my brother did, but I, personally, want the best for you."<sup>114</sup> This offer of forgiveness by Brandt, a devout Christian, "spark[ed] a debate over forgiving,"<sup>115</sup> in which some commentators opined that Brandt's gesture of mourning his brother according to his faith and character should not be "cheapened" by white Christians, who have historically

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111. See Kathryne M. Young, *Parole Hearings and Victims' Rights: Implementation, Ambiguity, and Reform*, 49 CONN. L. REV. 431, 434 (2016).

112. For alternative models sensitive to victim perspectives, see Roach, *supra* note 93, at 672–73, 699.

113. Elliott McLaughlin & Steve Almasy, *Amber Guyger gets 10-year murder sentence for fatally shooting Botham Jean*, CNN (Oct. 3, 2019, 4:05am), <https://www.cnn.com/2019/10/02/us/amber-guyger-trial-sentencing/index.html>.

114. Jonathan Culver, "*I Want the Best for You*": Botham Jean's Brother Hugs Amber Guyger in Emotional Courtroom Scene, USA TODAY (Oct. 3, 2019, 6:01 AM), <https://www.usatoday.com/story/news/nation/2019/10/02/amber-guyger-sentencing-botham-jeans-brother-embraces-guyger/3847967002/>.

115. Bill Chappell & Richard Gonzales, *Brandt Jean's Act Of Grace Toward His Brother's Killer Sparks A Debate Over Forgiving*, NPR (Oct. 3, 2019, 4:21 PM), <https://www.npr.org/2019/10/03/766866875/brandt-jeans-act-of-grace-toward-his-brother-s-killer-sparks-a-debate-over-forgi>.

benefitted from “Black forgiveness,”<sup>116</sup> and even opining on whether it is “wrong to forgive” where “injustice still exists.”<sup>117</sup> While this commentary more explicitly criticized the conduct of Guyger’s judge (who also hugged her and gave her a bible), the attributes of progressive punitivism were on full display: critique of the system for not “ratcheting up” Guyger’s treatment to the level experienced by African American defendants, contextual critique of an instance in which a victim did not follow a punitive script, and the assertion that forgiveness and redeemability would be the wrong approach in a case characterized by racial undertones.

Fifth, the reliance on identity as the logic underpinning targets for criminal enforcement poses problems of consistency, believability, and plausibility. Because progressive punitivism is characterized by drawing attention particularly to the plight of particular groups of victims associated with underprivileged status, calls for reforming the criminal process in a punitive direction often carry a mandate to categorically believe, or disbelieve, not just individuals but collectives of people. But in a universe of intersectional identities, the consequences of this mandate are unclear. Consider the case of “Cornerstore Caroline,” a woman who complained about being harassed by an 8-year-old boy, which was ultimately determined unfounded.<sup>118</sup> In a world in which categorical alliances are inexorably linked to identities, what is the appropriate resolution of such a case?

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116. Jemar Tisby, *White Christians, Do Not Cheapen the Hug and Message of Forgiveness from Botham Jean’s Brother*, WASH. POST (Oct. 3, 2019, 12:36 PM) <https://www.washingtonpost.com/religion/2019/10/03/white-christians-do-not-cheapen-hug-message-forgiveness-botham-jeans-brother/>.

117. Heather Sells, “Weaponizing” Forgiveness in the Botham Jean Case: Is It Wrong to Forgive When Injustice Still Exists?, CBN NEWS (Apr. 4, 2019), <https://www1.cbn.com/cbnnews/us/2019/october/weaponizing-forgiveness-in-the-botham-jean-case-is-it-wrong-to-forgive-when-injustice-still-exists>.

118. Kristine Phillips, A Black Child’s Backpack Brushed Up Against a Woman. She Called 911 to Report a Sexual Assault, WASH. POST (Oct. 16, 2018, 8:07 AM), [https://www.washingtonpost.com/nation/2018/10/13/black-childs-backpack-brushed-up-against-woman-she-called-report-sexual-assault/?utm\\_term=.cb3c1cf74266](https://www.washingtonpost.com/nation/2018/10/13/black-childs-backpack-brushed-up-against-woman-she-called-report-sexual-assault/?utm_term=.cb3c1cf74266).

If we want women to be categorically believed, where does that leave the boy who was falsely accused? Moreover, 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>119</sup> and the Scottsboro Boys?<sup>120</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 intra-racially?<sup>121</sup> Confounding the personal with the political, 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>122</sup>

But worse, the rhetorical device of using high-profile cases to prove an individual point, which has so effectively galvanized politicians and voters alike for conservative causes, backfires when used for progressive causes—for the very reasons that progressives so often decry. When conservatives warn of the dangers of another Willie Horton and propose to address them by increasing punishment across the board, their individual case matches their general policy, resulting in overall “total incapacitation” for all

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119. Elliott McLaughlin & Emanuella Grinberg, *Justice Department Reopens Investigation Into 63-Year-Old Murder of Emmett Till*, CNN (July 13, 2018, 12:23 AM), <https://www.cnn.com/2018/07/12/us/emmett-till-murder-case-reopen-ed-doj/index.html>.

120. JAMES GOODMAN, STORIES OF SCOTTSBORO xi (First Vintage Books 1995) (1994).

121. See William Wilbanks, *Is Violent Crime Intraracial?*, 31 CRIME & DELINQ. 117, 117–26 (1985).

122. 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*, DEADSPIN (Jan. 21, 2019, 8:08 PM), [https://theconcourse.deadspin.com/dont-doubt-what-you-saw-with-your-own-eye-s-1831931203?fbclid=IwAR2JD1ZGjOazF-woL1Ptq8cnWR-iRBsEuEahbjxUWXZVkJEN\\_hQodbEgH1Cg](https://theconcourse.deadspin.com/dont-doubt-what-you-saw-with-your-own-eye-s-1831931203?fbclid=IwAR2JD1ZGjOazF-woL1Ptq8cnWR-iRBsEuEahbjxUWXZVkJEN_hQodbEgH1Cg).

prisoners.<sup>123</sup> By contrast, when progressives call for harsh punishment and highlight a case in which the defendant is powerful, the first people in line to suffer from an overall harsh punishment policy will be the much more frequent sufferers in the criminal justice web: poor defendants of color who look nothing like the individuals showcased in the progressive punitive campaign. Judge Persky's recall campaign is a classic example: sending a message to judges that leniency can result in mob retaliation is likely to make judges harsher across the board, and since the criminal defendant population is disproportionately poor, black, or brown, the effects of the campaign will be felt far more acutely by the people that very same progressive campaign seeks to protect.<sup>124</sup>

Sixth, engaging in a framework that feeds on outrage takes an emotional toll. Progressive punitivism builds largely on a platform of understandable, and often justifiable, rage. Efforts to criticize the underlying angry animus of the movement are often categorized as "tone policing," and rejected.<sup>125</sup> But what we know about rage suggests that it has an ambiguous contribution to social change. On one hand, anger can drive one to action when channeled in a useful direction.<sup>126</sup> What animates much of the logic behind campaigns of revelation and reckoning is the notion that expressing anger has a cathartic function, the evidence for which, unfortunately, is mixed at best. What experiments and studies of online behavior have shown is that anger is often a generative emotion; feeling and

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123. JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA (2014).

124. Robert Salonga, *DA Report Scrutinizes Ongoing Racial Disparities in Santa Clara County Prosecutions*, SAN JOSE MERCURY NEWS (Feb. 19, 2019, 6:00 AM), <https://www.mercurynews.com/2019/02/19/da-report-scrutinizes-ongoing-racial-disparities-in-prosecutions/>.

125. For a good introduction for the use and abuse of the term, see Laura Portwood-Stacer & Susan Berridge, *Introduction: Privilege and Difference in (Online) Feminist Activism*, 14 FEMINIST MEDIA STUD. 519, 519 (2014).

126. See Albert Rothenberg, *On Anger*, 128 AM. J. PSYCHIATRY 454, 460 (1971).

expressing rage leads to feeling and expressing more rage, and can sometimes backfire spectacularly when the anger is marshaled at effecting change.<sup>127</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 lead to potential spillovers in which rage can be directed at undeserving targets.

Finally, punitivism is countereffective in coalition building. As progressives know all too well from decades of being on the receiving end of shaming and excoriation, these are not particularly 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. Unfortunately, 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. Unfortunately, being on the receiving end of a shaming experience without appropriate opportunities for reintegration merely fosters a sense of enmity and rancor,<sup>128</sup> and therefore an unsatisfying platform for building alliances.

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127. See Russell G. Geen, David Stonner & Gary L. Shope, *The Facilitation of Aggression by Aggression: Evidence Against the Catharsis Hypothesis*, J. PERSONALITY & SOC. PSYCHOL. 721, 725 (1975); Jennifer Parlamis, Keith G. Allred & Caryn Block, *Letting Off Steam or Just Steaming?*, 21 INT'L J. CONFLICT MGMT. 260, 260 (2000); Carol Tavris, *On the Wisdom of Counting to Ten: Personal and Social Dangers of Anger Expression*, 5 REV. PERSONALITY & SOC. PSYCHOL. 170, 170 (1984); João Vieira da Cunha & Wanda J. Orlikowski, *Performing Catharsis: The Use of Online Discussion Forums in Organizational Change*, 18 INFO. & ORG. 132, 132 (2008).

128. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 54–55 (1989).

## CONCLUSION

The concept of progressive punitivism allows us to examine a disturbing cultural trend through a lens that is simultaneously more general and more specific than the existing critiques. Recent contributions to the criminal justice literature have highlighted specific manifestations of the disconcerting aspects of progressive punitivism<sup>129</sup>, but have regarded them as unique to the particular movements in which they arise; noticing common, more general punitive trends across the progressive milieu is crucial. At the same time, progressive punitivism highlights the specific criminal justice aspects of broader discontents with progressive discourse and activism. Commentators have focused on the alienating nature of identity politics and on the difficulty building coalitions across fragmented and hostile identity-based interest groups,<sup>130</sup> particularly when identities are inconsistently portrayed as immutable or changeable;<sup>131</sup> on the inability to tolerate, and engage with, alternative perspectives in the guise of protection of the vulnerable;<sup>132</sup> on the culture of a “left that eats its own” and is deeply critical of its own allies, to the point of ostracizing people for minutiae and semantics;<sup>133</sup> and on the weakening effect the echo chamber of the left has had on its persuasive power and ability to reach change.<sup>134</sup> Progressive punitivism can be

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129. See generally JUSTIN MERCEAU, BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT (2019) (regarding animal cruelty); AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION (2020) (regarding sexual harassment and assault).

130. MARK LILLA, THE ONCE AND FUTURE LIBERAL: AFTER IDENTITY POLITICS 14–15 (2017).

131. See Adolph Reed Jr., *Antiracism: A Neoliberal Alternative to a Left*, 42 DIALECTICAL ANTHROPOLOGY 105 *passim* (2018).

132. E.g., JON RONSON, SO YOU’VE BEEN PUBLICLY SHAMED 4 (2015).

133. See generally DIANNA ANDERSON, PROBLEMATIC: HOW TOXIC CALLOUT CULTURE IS DESTROYING FEMINISM (2018).

134. See generally GREGG LUKIANOFF & JONATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE (2018).

seen as the criminological extension of these disconcerting trends.

The general observations mentioned above are particularly important because they map out possible pushback against the critique of progressive punitivism. 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 productively channel that rage.

Some promising avenues include the recent trend toward progressive prosecution. Since some scholars have identified county prosecutors as a dominant driving force in mass incarceration,<sup>135</sup> several elections have seen the triumph of prosecutors committed to ratcheting down the penal apparatus.<sup>136</sup> Real Justice, a PAC focused on the struggle for racial equality, focuses on supporting the campaigns of progressive prosecutors.<sup>137</sup>

Similarly, the welcome tendency to listen to affected and traumatized communities can, and should, be expanded beyond the appetite for punishment. For example, legislative fixes that ostensibly protect sex workers as victims of abuse, such as the Stop Enabling Sex Traffickers Act (SESTA) and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), turn out to be ineffective and counterproductive,

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135. See JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* vii (2017).

136. Such recent campaigns resulted in Larry Krasner’s victory in Philadelphia and Marilyn Mosby’s appointment in Baltimore; in San Francisco, public defender Chesa Boudin is running for District Attorney.

137. REAL JUSTICE, <https://realjusticepac.org/> (last visited Sept. 30, 2019).

and important voices of sex workers are heard in the debate on what to do; the classic tendency to direct the penal machine toward pimps or clients does not necessarily advance the interests of sex workers, and there is an increasing understanding that people living the realities of sex work are an important source of knowledge and policy suggestions beyond the deployment of penal techniques.<sup>138</sup>

Because of the proliferation of progressive punitivism on social media, it is important to bring these nonpunitive perspectives into public discourse and encourage progressive activists, as well as progressive voters, to expand their imagination beyond punishment. Shaun King and Alexandria Ocasio-Cortez's willingness to stand with reform and against divisive paradigms, even in the defense of someone like Paul Manafort, is an admirable step in the right direction. 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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138. KATIE HALL-JARES, COREY SHDEIMAH & CHRYSANTHI LEON, CHALLENGING PERSPECTIVES ON STREET-BASED SEX WORK 3 (2017).