

August 2019

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Recommended Citation

Hadar Aviram (2019) "The Master's Tools Will Never Dismantle The Master's House: Kavanaugh's Confirmation Hearing and The Perils of Progressive Punitivism," *Journal of Civil Rights and Economic Development*: Vol. 33 : Iss. 1 , Article 2.

Available at: <https://scholarship.law.stjohns.edu/jcred/vol33/iss1/2>

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THE MASTER'S TOOLS WILL NEVER DISMANTLE THE MASTER'S HOUSE: KAVANAUGH'S CONFIRMATION HEARING AND THE PERILS OF PROGRESSIVE PUNITIVISM

Hadar Aviram*

*To a surrounded enemy, you must leave a way of escape.*¹

INTRODUCTION

On October 3, 2018, more than 2,400 law professors, including many colleagues and friends, signed a letter addressed to the U.S. Senate, titled *The Senate Should Not Confirm Kavanaugh*.² In the letter, the signatories argued that Brett Kavanaugh's demeanor and tone during his confirmation hearing demonstrated a lack of judicial temperament and evinced his unfitness for high judicial office. Like many of my colleagues, I was deeply discomforted by the hearings. The reduction of what was supposed to a fact-finding hearing to a partisan contest was, perhaps, inevitable and unsurprising in a hopelessly polarized political atmosphere, the culmination of years of extremism and increased partisanship,³

*Thomas E. Miller '73 Professor of Law, University of California, Hastings College of the Law. I am grateful to Howard Erlanger, Samantha Godwin, Jonathan Korman, and Emily Murphy for offering me an attentive ear (their useful comments are not necessarily endorsements of my opinions), and to my colleagues and students at UC Hastings for discussing differences with an open mind and the assumption of good will.

¹ Sun Tzu, *The Art of War* (Lionel Giles, trans., Internet Classics Archive, MIT Classics).

² Law Professors, *Opinion: The Senate Should Not Confirm Kavanaugh*, N.Y. TIMES (Oct. 3, 2018), <https://www.nytimes.com/interactive/2018/10/03/opinion/kavanaugh-law-professors-letter.html>.

³ Alec Tyson, *America's polarized views of Trump follow years of growing political partisanship*, PEW RESEARCH (Nov. 14, 2018), <http://www.pewresearch.org/fact->

but deeply distressing nonetheless. Moreover, Ford's experience was far from idiosyncratic; it disturbingly echoed the cultural acceptability of disrespect of women's bodily autonomy—an obviously infuriating state of affairs. And yet, the reaction to the hearings by Kavanaugh's opponents left me wondering: What were we hoping to accomplish by mocking and reviling this man? By expecting him to apologize or take responsibility and then trumpeting the inadequacy of his response? Was this hearing, and our polarized reactions to it, making inroads for gender equality? Would this become a conversation starter, one that, as my progressive and feminist colleagues argued, would “spark a reckoning” with the system?⁴

This essay suggests that the strong sentiments against Kavanaugh, though understandable and keenly felt, might have been deployed in the wrong direction, and an example of a broader phenomenon that I refer to as **progressive punitivism**. Progressive punitivism is the reliance on weapons traditionally wielded by the conservative right—shaming, stigmatization, denial of rehabilitation, punitive approaches, and identity-driven divisions—in the service of social justice ideals. Progressive punitivism operates within the criminal justice system in the context of holding violent police officers, hate criminals, sexual abusers, and lenient judges accountable for their actions, but it also operates throughout the realm of social media and public opinion, and these two realms often cross paths in complex ways.

The marshaling of much progressive energy in the direction of punishing powerful individuals for their misdeeds leaves me deeply conflicted. On one hand, like so many of my friends and colleagues, I want to see a world in which policing is equitable, parsimonious, and nonviolent; people treat each other with positive curiosity and deep respect across demographics and identities; and violence and exploitation are so unacceptable that they go out of style. Because of this, I deeply understand the sentiment behind the desire for accountability on the part of

[tank/2018/11/14/americas-polarized-views-of-trump-follow-years-of-growing-political-partisanship/](https://www.tank/2018/11/14/americas-polarized-views-of-trump-follow-years-of-growing-political-partisanship/).

⁴ Alesha Durfee, *Kavanaugh confirmation could spark a reckoning with system that often fails survivors of sexual abuse and assault*, CONVERSATION (October 12, 2018), <https://theconversation.com/kavanaugh-confirmation-could-spark-a-reckoning-with-system-that-often-fails-survivors-of-sexual-abuse-and-assault-104564>.

people whose behavior flies in the face of these wishes and values, particularly when their powerful social advantage enables them to avoid consequences visited on others in less fortunate social positions. At the same time, I am deeply skeptical as to the potential of progressive punitivism to effectuate change and bring about mutual understanding, let alone a reckoning. My concern is that the recurrence to punitive methods sows divisiveness and rancor, discredits efforts at rapprochement or apology at the outset and thus discourages them, and directs the movement's energy in poisonous, and ultimately futile, directions. In short, I think that the effort to dismantle the master's house of misogyny and racial domination with the master's tools—a recurrence to punitivism, excoriation, and shaming—is doomed to fail.

A preliminary comment is warranted. The hearings polarized the American public to a considerable degree; unsurprisingly, Americans' assessment of the relative credibility of Ford and Kavanaugh strongly correlated with their opposition to, or support of, Kavanaugh as a Supreme Court candidate.⁵ I am not an outlier to this trend; Kavanaugh's nomination made me deeply concerned about the fate of civil rights litigation, as well as stoked the flames of my bitterness about the political machinations that sabotaged Merrick Garland's appointment during President Obama's last year in office.⁶ Relatedly or unrelatedly, I found Christine Blasey Ford's statement entirely credible, not only about her horrifying experience but also about the perpetrator's identity. My belief stemmed from a simple cost-benefit analysis: here was a person who was thrown into the center of a vicious and contentious public battle, with everything to lose and very little to gain. Trump's takedown of Ford at a Mississippi rally,⁷ in which he implied she was a publicity-seeking partisan, tells more about Trump and his milieu than about Ford and her milieu. I am deeply familiar with

⁵ Domenico Montanaro, *New Poll Finds Americans Deeply Divided by Gender On Kavanaugh Nomination*, NPR, (Sept. 26, 2018), <https://www.npr.org/2018/09/26/651647131/poll-nearly-6-in-10-to-closely-watch-kavanaugh-ford-hearing-many-undecided-on-tr>. For more on the partisan distribution of opinions on the parties' relative credibility, see Part III below.

⁶ Ariane de Vogue, *How McConnell won, and Obama lost, the Merrick Garland fight*, CNN (Nov. 9, 2016), <https://www.cnn.com/2016/11/09/politics/merrick-garland-supreme-court/index.html>.

⁷ Maggie Haberman & Peter Baker, *Trump Taunts Christine Blasey Ford at Rally*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/2018/10/02/us/politics/trump-me-too.html>.

this milieu, as Ford and I share a rung in the socioeconomic ladder: like me, Ford is a white, middle-class, well-educated academic, professionally attired and well spoken.⁸ Her vocabulary belies her professional identity: she uses words like “hippocampus” and “sequelae”.⁹ Ford and I do not know each other personally, and yet our shared location on the American socioeconomic map makes it plainly clear to me that she would not have placed herself in a humiliating, contentious, and potentially dangerous situation had she not been speaking the absolute truth.¹⁰ My strong belief in Ford’s truthfulness, and its embeddedness in our shared social locus, has led me to a profound understanding of the lack of belief that people like me—prosecutors, defense attorneys, judges, middle-class jurors—exhibit every day in American courtrooms toward the sexual victimization experiences of imperfect victims: women of color, people with fluid and challenging gender presentations and identities, sex workers, or people with substance abuse problems.¹¹ It has convinced me that we must strive to do better in that regard.

However, my ambivalence about the progressive left’s excoriation of Kavanaugh as untrustworthy, unworthy of judicial appointment, and, in general, an exemplar of personal pathology and viciousness, comes from another set of personal experiences: prior to my academic career, I was a public defense attorney in the Israeli army. In that capacity, I handled cases before the Special Military Court. By contrast to all other military courts of first instance, whose jurisdiction is regional, the Special Military

⁸ Julia Sharpe-Levin, *Why So Many White Women Don’t Believe Christine Blasey Ford*, REWIRE.NEWS (Oct. 4, 2018, 3:51 PM), <https://rewire.news/article/2018/10/04/why-so-many-white-women-dont-believe-christine-blasey-ford/>.

⁹ Jayne O’Donnell, *Peppering testimony with psychological terms, Ford appears as an alleged victim and an expert witness*, USA TODAY (Sept. 27, 2018), <https://www.usatoday.com/story/news/nation/2018/09/27/christine-blasey-ford-brett-kavanaugh-sequelae-hippocampus-norepinephrine-epinephrine/1442969002/>.

¹⁰ Ford and her family received threats in connection with the hearings, which led them to leave their home. Tim Mak, *Kavanaugh Accuser Christine Blasey Ford Continues Receiving Threats, Lawyers Say*, NPR (Nov. 8, 2018), <https://www.npr.org/2018/11/08/665407589/kavanaugh-accuser-christine-blasey-ford-continues-receiving-threats-lawyers-say>.

¹¹ For an empirical study of prosecutorial reluctance to pursue cases in which juries might construct complainants as sex workers or otherwise untrustworthy see Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC. REV. 531 (1997). For an overview of prosecutorial obligations to “imperfect victims” see Tamara Rice Lave, *The Prosecutor’s Duty to ‘Imperfect’ Rape Victims*, 49 TEX. TECH L. REV., 219, 223 (2016).

Court's jurisdiction is rank-based: it has exclusive first-instance jurisdictions in cases involving high-ranked officers, ranked Colonel and above.¹² As Yagil Levy explains, military hierarchy in Israel often reflects, crystalizes, and generates civic prestige, and reproduces existing social inequalities in Israeli society.¹³ Among those inequalities are gender hierarchy, and because of that, a considerable part of my caseload consisted of sexual harassment and abuse charges against high-ranked male officers, with lower-ranked women (often adolescent girls in mandatory service) on the receiving end.¹⁴ In short, for five years I defended dozens of men in situations that mirrored Kavanaugh's plight, who faced anything from the prospect of a delayed promotion to actual criminal charges. In addition, my recent academic work includes an in-depth study of parole hearings,¹⁵ as well as a study of the experiences of bar applicants with criminal records who navigate the moral character process.¹⁶ In both of these settings I have been exposed to people's reactions when faced with frightening and destructive challenges to their reputation.

The arguments presented in this piece by no means reflect the mainstream position among feminists or progressives, and my hope is that, rather than being perceived as undermining the feminist cause, they will be seen as a good-faith effort to inject more nuance and depth into our policy conversations. The #metoo movement should be rightly lauded for focusing on experiences of sexual harassment and abuse, ranging from the harrowing and traumatic to the burdensome and mundane, and share its vision for a world free of coercion, pressure, and fear.¹⁷ This should not

¹² *The IDF Military Justice System*, ISR. DEF. FORCES, (last accessed Jan. 24, 2019), <https://www.idf.il/en/minisites/military-advocate-generals-corps/the-idf-military-justice-system/>.

¹³ Yagil Levy, *Militarizing inequality: A conceptual framework*, 27 *THEORY & SOC'Y* 873 (1998), accessible at: <https://link.springer.com/article/10.1023%2FA%3A1006962331533>.

¹⁴ Anna Ahronheim, *Dramatic Rise in IDF Soldiers Reporting Sexual Assault*, JERUSALEM POST (Nov. 20, 2018), <https://www.jpost.com/Israel-News/Dramatic-rise-in-number-of-IDF-soldiers-reporting-sexual-assault-572369>.

¹⁵ Hadar Aviram, *Yesterday's Monsters: The Manson Family Cases and the Illusion of Parole* (forthcoming 2020) (Univ. Cal. Press).

¹⁶ Hadar Aviram, *Moral Character: Making Sense of the Experiences of California Bar Applicants with Criminal Records*, presented in Washington D.C. (2019).

¹⁷ *Understanding the Me Too Movement: A Sexual Harassment Awareness Guide*, MARYVILLE C. (last visited July 26, 2019, 1:01 PM), <https://online.maryville.edu/blog/understanding-the-me-too-movement-a-sexual-harassment-awareness-guide/>.

absolve us from self-inquiry on whether some of the movement's tools—criminal accountability, harsh sentencing, public shaming and excoriation, mob trials via social media—push us farther away from that goal in ways that may not seem obvious to many well-intended activists and advocates. Kavanaugh's confirmation hearing, and the reactions to it on both sides of the political aisle, are but one example of the ways in which progressive punitivism can seriously backfire, and an important opportunity to reflect on policymaking in this context and others.

This essay proceeds in four parts. In Part I, I problematize the idea of the accused's demeanor as evidence of guilt, remorse, or entitlement, arguing that we tend to overestimate our ability to deduce internal states of mind from people's behavior and expressions. Part II assesses the potential (or lack thereof) of public performances of reckoning to produce a valuable expression of remorse, discussing the value of contingent apologies. Part III expands the framework to examine the way our politically fractured field responds to partisan efforts to excoriate culprits, arguing that "starting a national conversation" on the basis of excoriation and stigmatization is not a realistic expectation. In Part IV, I situate the Kavanaugh incident in the overall context of progressive punitivism, offering an initial and generative sketch of the ideology and its mixed effects. The conclusion offers a modest proposal for a better way to start a bipartisan conversation about gender-based inequities and iniquities, as well as a future agenda for research on progressive punitivism in its other manifestations.

I. "HE DID NOT DISPLAY THE IMPARTIALITY AND JUDICIAL TEMPERAMENT REQUISITE"¹⁸: ON DEDUCING GUILT, REMORSE, AND ENTITLEMENT FROM DEMEANOR

The law professors' letter criticized Kavanaugh for "exhibiting a lack of commitment to judicial inquiry."¹⁹ The signatories found evidence of this lack of commitment in Kavanaugh's demeanor:

Instead of being open to the necessary search for accuracy, Judge Kavanaugh was repeatedly

¹⁸ Law Professors, *supra* note 2.

¹⁹ *Id.*

aggressive with questioners. Even in his prepared remarks, Judge Kavanaugh described the hearing as partisan, referring to it as “a calculated and orchestrated political hit,” rather than acknowledging the need for the Senate, faced with new information, to try to understand what had transpired. Instead of trying to sort out with reason and care the allegations that were raised, Judge Kavanaugh responded in an intemperate, inflammatory and partial manner, as he interrupted and, at times, was discourteous to senators.²⁰

Other commentators suggested that Kavanaugh’s demeanor reflected callousness,²¹ ambition,²² indifference to Ford’s suffering,²³ a lifetime of entitlement,²⁴ and his own guilt.²⁵

The assumption that we can deduce guilt, remorse, or both, from a person’s demeanor is so powerful that Kavanaugh himself felt the need to write a *Wall Street Journal* op-ed to acquit himself from the character deficiencies he felt were revealed by his demeanor.²⁶ This assumption is certainly not limited to Supreme Court judicial hearings; it is part and parcel of the factfinding method of our criminal process. Police officers try to deduce guilt

²⁰ *Id.*

²¹ JoAnn Wypijewski, *What Brett Kavanaugh Really Learned in High School: Make the Rules, Break the Rules and Prosper*, VERSO (Sept. 28, 2018), <https://www.versobooks.com/blogs/4055-what-brett-kavanaugh-really-learned-in-high-school-make-the-rules-break-the-rules-and-prosper>.

²² Matt Thompson, *This Was Never About Finding Out the Truth*, ATLANTIC (Sept. 30, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/kavanaugh-ford-hearing-was-never-about-truth/571729/>.

²³ Ezra Klein, *The Ford-Kavanaugh sexual assault hearings, explained*, VOX (Sept. 28, 2018, 7:56 AM), <https://www.vox.com/explainers/2018/9/27/17909782/brett-kavanaugh-christine-ford-supreme-court-senate-sexual-assault-testimony>.

²⁴ Meagan Day, *The Banality of Brett Kavanaugh*, JACOBIN MAGAZINE (Sept. 28, 2018), <https://jacobinmag.com/2018/09/brett-kavanaugh-banality-elites-meritocracy>.

²⁵ Marlow Stern, *John Oliver Exposes Brett Kavanaugh’s ‘Horrible’ Testimony*, DAILY BEAST (Oct. 1, 2018, 12:04 AM), <https://www.thedailybeast.com/john-oliver-exposes-brett-kavanaugh-horrifying-testimony>.

²⁶ Brett Kavanaugh, *I am an Independent, Impartial Judge*, WALL STREET J. (Oct. 4, 2018, 7:30 PM), <https://www.wsj.com/articles/i-am-an-independent-impartial-judge-1538695822>.

from suspects' demeanor in interrogation rooms.²⁷ Jurors²⁸ and judges²⁹ draw credibility conclusions about the defendant, the victim, and other witnesses. Parole Board commissioners assess inmates' insight and remorse at parole hearings.³⁰ Some of these deductions are made by professionals and some by laypeople; some are guided by special instructions and manuals and some by unfettered discretion; but they are all characterized by a considerable amount of confidence in our ability to learn deeper things from a person's demeanor.³¹

A. *Guilt*

Much of the conversation surrounding the hearing revolved around the relative credibility of the parties.³² Echoing many Kavanaugh detractors' sentiments, Roger Cohen of the New York Times wrote:

The words that resonate for me are the very words Kavanaugh used about his mother, Martha, the Maryland prosecutor and trial judge, whose trademark line was: "Use your common sense. What rings true? What rings false?"

For my common sense, Mr. Kavanaugh "doth protest too much, methinks." Christine Blasey Ford rang true. I'll take her "100 percent" over his. She felt no need to yell. Nor did she hide behind a shield

²⁷ Saul M. Kassir et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, L. & HUM. BEHAV. (2007), available at <https://web.williams.edu/Psychology/Faculty/Kassin/files/Police%20survey%20ms%2007.pdf>.

²⁸ Cynthia R. Cohen, *Demeanor, Deception and Credibility in Witnesses*, Address to the ABA Section of Litigation Annual Conference in Chicago (April 24-26, 2013).

²⁹ Stephen Porter & Leanne ten Brinke, *Dangerous Decisions: A Theoretical Framework for Understanding How Judges Assess Credibility in the Courtroom*, 14 LEGAL & CRIMINOLOGICAL PSYCHOL. 119 (2009).

³⁰ Beth Schwartzappel, *The Secret Hints for Winning Parole*, MARSHALL PROJECT (Jan. 25, 2016, 7:15 AM), <https://www.themarshallproject.org/2016/01/25/the-secret-hints-for-winning-parole>.

³¹ See generally Melissa Healy, *Must Reads: Here's what experts who study sexual violence say about the credibility of Christine Blasey Ford's testimony*, L.A. TIMES (Sept. 28, 2018, 2:00 AM), <https://www.latimes.com/science/sciencenow/la-sci-sn-ford-testimony-credibility-memory-20180928-story.html>.

³² *Id.*

of repetition. She did not succumb to pathos (“I may never be able to coach again”). She spoke with a deliberation, balance and humanity missing in the judge.³³

But is it possible to deduce guilt from the manner in which people speak; the loudness of their voice, the repetitions, the pathos or its absence? Some law enforcement professionals and behavioral scientists argue that it is possible to methodically deduce truthfulness from demeanor.³⁴ Psychologist Paul Ekman’s method for lie detection consists of reading micro expressions—facial expressions that occur within 1/25th of a second.³⁵ Ekman argues that micro expressions are involuntary, the outcome of either conscious suppression or unconscious repression, and are universally recognizable independent of culture.³⁶ Reading these swift facial expressions as they flash across a person’s face can offer clues as to the person’s truthfulness.³⁷

However, the mainstream psychological science is far less encouraging regarding our ability to detect deception. In a meta-research project, Charles Bond and Bella dePaulo relied on 206 documents, reflecting judgments made by an aggregate of 24,483 people.³⁸ Bond and dePaulo found considerable consistency across relevant studies, showing a consistent rate of 54 percent correct lie-truth judgment; people correctly classify 47 percent of lies as deceptive and 61 percent of truths as nondeceptive.³⁹ They also find that people are more accurate in judging audible than visible lies, that people appear deceptive when motivated to be believed,

³³ Roger Cohen, *An Injudicious Man Unfit for Office*, N.Y. TIMES (Sept. 28, 2018), <https://www.nytimes.com/2018/09/28/opinion/kavanaugh-supreme-court-temperament.html>.

³⁴ Candice Jalili, *How to Tell If Someone Is Lying to You, According to Body Language Experts*, TIME (Dec. 3, 2018, 4:17 PM), <https://time.com/5443204/signs-lying-body-language-experts/>.

³⁵ *Micro Expressions*, PAUL EKMAN GROUP, (last visited July 14, 2019), <https://www.paulekman.com/resources/micro-expressions/>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Charles F. Bond & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. R. (2006).

³⁹ *Id.*

and that individuals tend regard their interaction partners as honest.⁴⁰

It is especially disappointing to see the inability to detect lies among professionals, whose pride and confidence in their gut instinct is bolstered by their supposed professional experience in detecting lies. Saul Kassin et al. surveyed 574 investigators from 16 police departments in five American states and 57 customs officials from two Canadian provinces.⁴¹ The subjects were asked to rate their own deception detection skills and estimated a 77 percent level of accuracy.⁴² This high level of confidence far surpasses experimental findings.⁴³ Elsewhere, Meissner and Kassin reviewed literature on police officers' accuracy in detection and found it to be no different than that of laypeople.⁴⁴ In another study, Kassin et al. played ten taped confessions of inmates to college students and police investigators, half of which were true and half false.⁴⁵ The study found students were generally more accurate than police, and accuracy rates were higher among those presented with audiotaped than videotaped confessions.⁴⁶ In addition, investigators were significantly more confident in their judgments and also prone to judge confessors guilty.⁴⁷ To determine if police accuracy would increase if this guilty response bias were neutralized, participants in a second experiment were specifically informed that half the confessions were true and half were false.⁴⁸ This manipulation eliminated the investigator response bias, but it did not increase accuracy or lower confidence.⁴⁹

As Ekman himself explains in his book *Telling Lies*, lie detection rates among other professionals—lawyers, trained law enforcement professionals, psychotherapists, trial attorneys, and

⁴⁰ *Id.*

⁴¹ Kassin et al., *supra* note 27.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Christian Meissner & Saul Kassin, "He's guilty!": Investigator Bias in Judgments of Truth and Deception, 5 L. & HUM. BEHAV. 469 (2002).

⁴⁵ Saul Kassin, Christian Meissner & R.J. Norwick, "Td Know a False Confession If I Saw One": a Comparative Study of College Students and Police Investigators, 29 L. & HUM. BEHAV. 211 (2005).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

judges—were also no better than chance.⁵⁰ Ekman marshals this information to bolster confidence in his own lie detection system based on micro expressions: he states that Secret Service agents and discrete groups of federal officers, police officers, and clinical psychologists who had received lie detection trainings did better than average.⁵¹

In a law review article about juror lie detection, Renée Hutchins offers evidence that deducing guilt from demeanor is endorsed, as a matter of routine, in jury instructions,⁵² but no guidance is offered as to how juries should make such deductions.⁵³ Hutchins expresses less confidence than Ekman in the micro expression method for lie detection, arguing that evidence of any one of the “lying” emotions is not necessarily conclusive proof of guilt.⁵⁴ First, as Hutchins explains, innocent people might lie—and be correctly perceived as lying—for reasons unrelated to guilt. And second, expressions denoting shifts in the automatic nervous system can reflect stress, shame, alarm, or other form of heightened emotion that is not necessarily deception.⁵⁵ This is as true for human detection as it is for polygraph detection; nonetheless, the latter is regarded unreliable by the legal system and inadmissible in court, whereas the former is relied upon as the default method for credibility deductions in the legal process.

But if demeanor cannot offer proof of guilt or dishonesty, can it offer proof of remorse?

B. Remorse

Before discussing the challenges in displaying remorse, it is important to keep in mind that it is not always an appropriate measure of virtue. The general perception of what constitutes a complete apology, as explained in Nick Smith’s *I Was Wrong*, is that a precursor to self-accountability is an accurate recitation of

⁵⁰ Paul Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics and Marriage* 341-43 (2009).

⁵¹ *Id.*

⁵² Renée McDonald Hutchins, *You Can’t Handle the Truth! Trial Juries and Credibility*, 44 SETON HALL L. REV. 505, 521 (2014).

⁵³ *Id.* at 524.

⁵⁴ *Id.*

⁵⁵ *Id.*

the facts—and that is without even analyzing the nonverbal presentation accompanying the apology.⁵⁶ Without a complete acknowledgment of the factual basis for the apology, it will seem lacking or “minimized.”⁵⁷ And this, of course, is a considerable challenge when one disputes the facts for which one is offering an apology. In his book *Showing Remorse*, Richard Weisman discusses two kinds of people who could face such challenges: the innocent defendant and the defendant who believes that his actions were right.⁵⁸ Neither of these people can genuinely express remorse in a satisfying way, because the building blocks of the apology will be perceived as lacking.

In the context of parole (and a criminal trial), convicted defendants are regarded as factually as well as legally guilty. Nonetheless, some of them profess their innocence. Formally, sentencing judges and parole commissioners are not supposed to hold the lack of expressed remorse against people who contest their guilt; practically, however, the extent to which the person is seen as stubbornly avoiding accountability and exhibiting lack of insight, as opposed to courageously fighting to prove their innocence, largely depends on whether the person is perceived as guilty or as innocent.⁵⁹ This argument is even stronger for people facing proceedings and hearings in which they have not been determined to be guilty; since their guilt is still in question, their lack of remorse can be seen as part and parcel of their profession of their innocence.⁶⁰ Naturally, our interpretation of the lack of remorse is highly contingent of our interpretation of the factual question of guilt.

Although the assessment of remorse as genuine is regarded as an important task in the criminal justice system, as Susan Bandes argues, there is currently no credible empirical evidence that remorse can be accurately evaluated in a courtroom (or, for that matter, anywhere else where virtual strangers’ credibility is

⁵⁶ See generally Nick Smith, *I Was Wrong: The Meanings of Apologies* (2008) (hereinafter, “I Was Wrong”).

⁵⁷ *Id.*

⁵⁸ See generally Richard Weisman, *Showing Remorse: Law and the Social Control of Emotion* (2014).

⁵⁹ See generally Daniel S. Medwed, *Under Pressure: The Hazards of Maintaining Innocence after Conviction*, NE. SCH. L. FAC. PUBLICATIONS, 46 (2014).

⁶⁰ *Id.*

assessed).⁶¹ By contrast, the evidence suggests that race and other impermissible factors can confound the ability to evaluate remorse.⁶² Similarly, in *The Cultural Defense*, Alison Renteln reminds us that not everyone displays remorse in the same way.⁶³ Among her examples is the criminal trial of a young Hmong man, in which on appeal the defense argued that the jury drew the wrong conclusions from the defendant's defiant and unemotional demeanor.⁶⁴

In conducting interviews for my forthcoming book *Yesterday's Monsters*, which examines parole hearings as performative spaces, I found that correctional personnel strongly believe in the Parole Board's ability to discern genuine remorse. In one instance that I relate in the book, I was conversing at a social event with a seasoned official of the California Department of Corrections and Rehabilitation (CDCR) as well as a journalist who was formerly incarcerated for a long period of time. When I asked my interlocutors how the parole board knew which of the inmates it interviewed was expressing genuine remorse, the CDCR official told me that the Board was able to use its experience to read nonverbal cues of contrition. The journalist chuckled. When I asked him about it, he replied that, over the years, men who were serving lengthy incarceration periods got to know each other very well and were amused to see no correlation between their own assessments of real contrition, which were based on many years' worth of acquaintance, and the Board's perceptions of who was contrite and who was not. In another interview, attorney Keith Wattley, who represents inmates on parole, related that he frequently had to interject when the Board misread his clients' demeanor as anger and lack of contrition and provide "cultural translation" of these reactions.

While these misreadings of remorse often disadvantage people regarded as "other" due to their disadvantaged racial and class backgrounds, they can also confound our understanding of reactions of people from socially advantaged backgrounds, as I turn to explain now.

⁶¹ Susan Bandes, *Remorse and Criminal Justice*, 8 EMOTION R. 14 (2016).

⁶² See generally M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301 (2018).

⁶³ See generally Alison Dundes Renteln, *The Cultural Defense* (2004).

⁶⁴ *Id.*

C. Entitlement

Of all the claims pertaining to Kavanaugh's performance at the hearings, perhaps the most modest deduction was that his remarks evinced a lifetime of entitlement and privilege. Deeply embedded in his milieu, Kavanaugh focused on the wrongs visited upon him and his family, appearing insensitive to the plight of others and to the setting, which, as many commentators reminded us, was nothing more than a job interview for an exalted position.⁶⁵

As a defense attorney experienced in cases of sexual misbehavior by highly-ranked officers, what I saw at the hearings was no different than what I saw when interviewing my clients—guilty and innocent alike. Colonels and Brigadier Generals arrived at our office, almost always accompanied by their wives, expressing rage and indignation at the accusations laid at their door. The context—a trial, an effort to block a promotion, a negotiation of retirement terms—did not matter, and neither did the amount and weight of the evidence against our client. Men who calmly led companies and regiments to combat sat shaking and waving their fists, tears in their eyes, expressing defiance and vowing revenge. This reaction was universal, and my somewhat cynical interpretation of it, after my client left the room, was “he is upset that the rules of engagement have changed and he didn't get the memo.”

What I learned later was that my clients—like all humans—were reacting in accordance with the entitlement effect. The work of behavioral scientists Amos Tversky and Daniel Kahneman exposed many ways in which mental “shortcuts” rely on a variety of biases and heuristics that can distort the truth. One example is the attribution bias: we tend to attribute our successes to our own internal resources and hard work, and our failures to external and

⁶⁵ For examples of this position see Laura McGann, *The Brett Kavanaugh hearing isn't a trial. It's a job interview*, VOX (Sept. 27, 2018, 9:30 AM), <https://www.vox.com/policy-and-politics/2018/9/27/17906230/brett-kavanaugh-hearing-accusers-sexual-assault-confirmation>; *Today's Hearing: Trial or Job Interview?*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/podcasts/the-daily/kavanaugh-christine-blasey-ford-republicans-democrats.html>.

situational factors.⁶⁶ As Keith Campbell and Constantine Sedikides found in an experiment, when people perceive themselves threatened, the effect of the self-serving attribution bias increases.⁶⁷ Kavanaugh's testimony was a textbook example of this heuristic, but he is far from alone in this: living an examined life that requires attributing much of one's achievements to moral luck and social stance is an endeavor that calls for plenty of effort, and while it would be admirable to see more self-awareness in the judicial profession, exhibiting common biases is far from an indicator of significant personal pathology.

It is also important to keep in mind that interpreting defiance, remorse, or appropriateness of behavior depends not only the cultural background and worldview of the speaker, but also that of the observer. A particularly telling example is in a *Washington Post* opinion by Jonathan Capehart.⁶⁸ Note how Capehart unfavorably compares Kavanaugh's confirmation testimony with that of Clarence Thomas:

Kavanaugh's words of rage in his opening statement were very similar to those uttered by Justice Clarence Thomas when he sat in the hot seat in 1991 over allegations of sexual harassment from Anita Hill. But the situations weren't the same. Back then, I couldn't help but feel a pang of empathy for Thomas. As an African American, I understood Thomas's controlled fury. He was a living example of the admonition relatives gave me about successful black folks: There's only so far "they" will let a black man rise. Keep your nose clean, lest you give "them" an excuse to tear you down. I didn't want Thomas to ascend to the Supreme Court, but his humanity came through when he sternly said, "From my standpoint, as a

⁶⁶ D.T. Miller & M. Ross, *Self-serving biases in the attribution of causality: Fact or fiction?* 82 *PSYCHOL. BULL.* 213 (1975).

⁶⁷ W. Keith Campbell & Constantine Sedikides, *Self-threat magnifies the self-serving bias: A meta-analytic integration*, 3 *REV. GEN. PSYCHOL.* 23 (1999).

⁶⁸ Jonathan Capehart, *Hell Hath No Fury Like an Entitled White Man Denied*, *WASH. POST: Blogs* (Sept. 28, 2018), https://www.washingtonpost.com/blogs/post-partisan/wp/2018/09/28/im-not-here-for-the-entitlement-of-kavanaugh-and-graham/?utm_term=.ddaaf19ec7ba.

black American, as far as I'm concerned, it is a high-tech lynching for uppity blacks who in any way deign to think for themselves."

To be sure, Thomas was defiant. But what we got from Kavanaugh was sputtering, tearful grievance. Even worse was his audience-of-one belligerence, his talking over senators, his smug, rude and petulant behavior overall, not to mention his bald partisanship. The entire spectacle was one long "but you promised" tantrum of a grown man denied what he seems to believe is his.⁶⁹

Since much of the commentary about Kavanaugh's entitlement made arguments related to race, not just gender, it is important to critically examine this assessment as well.⁷⁰ Capehart, an African American man, found Kavanaugh's statement more infuriating than Thomas' because he read it as a classic example of white entitlement.⁷¹ But it is entirely possible to come, in good faith, to the opposite conclusion. While Kavanaugh's reactions reflected an unexamined conscience resting squarely in his socio-economic comfort zone, commentators on the Thomas and Hill testimonies were incensed, and with good reason, by Thomas' cynical exploitation of his identity as an African American man, marshaling the concept of intersectionality to discredit Anita Hill in the eyes of progressives, particularly people of color, for whom the battle for racial representation might have felt more urgent than the battle for gender equity.⁷²

II. WHAT HE SHOULD HAVE SAID: ON THE INHERENT IMPERFECTION OF CONTINGENT APOLOGIES

Much of the critique of Kavanaugh's demeanor suggested that other, acceptable courses of action were available to him. The law professors' letter critiqued Kavanaugh for not "being open to the necessary search for accuracy" and for not "trying to sort out with

⁶⁹ *Id.*

⁷⁰ Paul Krugman, *The Angry White Man Caucus*, N.Y. TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/opinion/kavanaugh-white-male-privilege.html>.

⁷¹ Capehart, *supra* note 69.

⁷² See generally Randall Kennedy, *Sellout: The Politics of Racial Betrayal* (2008).

reason and care the allegations that were raised.”⁷³ Others criticized him for not offering a more empathetic reply, or for not saying that he did not remember what had happened and offering an apology in the eventuality that Ford’s recollections were accurate.⁷⁴

Keeping in mind my aforementioned comments on the unreliability of demeanor as a source of remorse, I argue here that remorse offered in the context of a proceeding in which there is either an outcome favorable or not favorable to the accused is not likely to offer an apology of value.

In his book, *I Was Wrong*, philosopher Nick Smith offers an analysis of the landscape of apologies. Examining a wide range of public apologies made in various settings, ranging from press conferences by corporate CEOs to criminal sentencing hearings, Smith finds that a complete apology, one deemed universally acceptable, consists of no less than thirteen components.⁷⁵ In his adaptation of the framework for the criminal justice field, he categorizes them as follows:

1. Corroborated factual record—full and transparent admission to the facts;
2. Acceptance of blame—recognition of the causal moral responsibility for those facts;
3. Possession of appropriate standing: the apologizer is personally responsible, and therefore can and does accept the blame;
4. Identification of each harm (rather than conflating them or admitting to a lesser harm);
5. Identification of the moral principles underlying each harm, making explicit the values that are at stake;
6. Shared commitment to the moral principles underlying each harm—vindicating those values and validating the victim’s offense as justified;

⁷³ Law Professors, *supra* note 2.

⁷⁴ Paul Waldman, *What Brett Kavanaugh should have said*, WASH. POST: Opinion (Sept. 25, 2018), https://www.washingtonpost.com/blogs/plum-line/wp/2018/09/25/what-brett-kavanaugh-should-have-said/?noredirect=on&utm_term=.6e9a35e58d2d.

⁷⁵ See generally Smith, *I Was Wrong*, *supra* note 57.

7. Recognition of the victim as moral interlocutor, possessing humanity and dignity and worthy of engaging in moral discourse;

8. Categorical regret—belief that the apologizer made a mistake that he or she wishes could be undone;

9. Performance of the apology—expressing an apology to the victim rather than keeping it to oneself;

10. Reform—refraining from reoffending from now on;

11. Redress—taking practical responsibility for the harm and offering commensurate remedies;

12. Intentions for apologizing—rather than self-serving the apologizer, the intent is to enhance the well-being of the victim and affirm the breached value; and

13. Emotions—experiencing an appropriate amount of sorrow and guilt, as well as empathy and sympathy for the victim.⁷⁶

If Smith's list of factors seems like a theoretical tall order, it is useful to reflect on the public commentary on a variety of apologies offered in recent years. Much of the conversation, particularly online, revolves around whether apologies offered are "complete," with the classic case of the "non-apology-apology" being excoriated and rejected.

One close example is the apology offered by comedian Louis C.K., formerly lauded as an insightful analyst of the human condition and an astute commentator on gender relations, among other topics, who fell from grace due to revelations that he had masturbated in front of women without their consent.⁷⁷ C.K.'s apology was as follows:

⁷⁶ Nick Smith, *Justice Through Apologies: Remorse, Reform, and Punishment* 17-19 (2014) (hereinafter "JUSTICE").

⁷⁷ Caroline Famke, *The sexual harassment allegations against Louis C.K., explained*, VOX (Nov. 10, 2017, 4:51 PM), <https://www.vox.com/culture/2017/11/9/16629400/louis-ck-allegations-masturbation>.

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I want to address the stories told to The New York Times by five women named Abby, Rebecca, Dana, Julia who felt able to name themselves and one who did not.

These stories are true. At the time, I said to myself that what I did was O.K. because I never showed a woman my dick without asking first, which is also true. But what I learned later in life, too late, is that when you have power over another person, asking them to look at your dick isn't a question. It's a predicament for them. The power I had over these women is that they admired me. And I wielded that power irresponsibly. I have been remorseful of my actions. And I've tried to learn from them. And run from them. Now I'm aware of the extent of the impact of my actions. I learned yesterday the extent to which I left these women who admired me feeling badly about themselves and cautious around other men who would never have put them in that position. I also took advantage of the fact that I was widely admired in my and their community, which disabled them from sharing their story and brought hardship to them when they tried because people who look up to me didn't want to hear it. I didn't think that I was doing any of that because my position allowed me not to think about it. There is nothing about this that I forgive myself for. And I have to reconcile it with who I am. Which is nothing compared to the task I left them with. I wish I had reacted to their admiration of me by being a good example to them as a man and given them some guidance as a comedian, including because I admired their work.

The hardest regret to live with is what you've done to hurt someone else. And I can hardly wrap my head around the scope of hurt I brought on them. I'd be remiss to exclude the hurt that I've brought on people who I work with and have worked with who's professional and personal lives have been impacted by all of this, including projects currently

in production: the cast and crew of *Better Things*, *Baskets*, *The Cops*, *One Mississippi*, and *I Love You, Daddy*. I deeply regret that this has brought negative attention to my manager Dave Becky who only tried to mediate a situation that I caused. I've brought anguish and hardship to the people at FX who have given me so much *The Orchard* who took a chance on my movie. and every other entity that has bet on me through the years. I've brought pain to my family, my friends, my children and their mother.

I have spent my long and lucky career talking and saying anything I want. I will now step back and take a long time to listen. Thank you for reading.⁷⁸

C.K.'s apology, which hits most if not all of Smith's components, was hotly debated on social media.⁷⁹ While some commentators found it laudable, most expressed their dismay at its incompleteness.⁸⁰ Moreover, many commentators have found that the apology must contain a component of self-sanction, and that some time must pass—always more than what had passed—before C.K. “gets to” reappear in public.⁸¹ His return to the comedy stage provoked ire specifically because his new act includes bitter commentary over how he was treated on social media.⁸² This ire

⁷⁸ Joanna Walters & Molly Redden, *Louis CK Responds to Allegations of Sexual Misconduct: 'These Stories Are True'*, *GUARDIAN* (Nov. 11, 2017), <https://www.theguardian.com/tv-and-radio/2017/nov/10/louis-ck-statement-sexual-misconduct-allegations-these-stories-are-true>.

⁷⁹ See e.g. Lisa Respers France, *Was that Louis C.K. apology really one at all?*, *CNN: Entertainment* (Nov. 11, 2017, 7:08 PM), <https://www.cnn.com/2017/11/10/entertainment/louis-ck-apology-reaction/index.html>.

⁸⁰ Jess Joho, *Please Stop Applauding Louis C.K. for Doing the Bare Minimum*, *MASHABLE* (Nov. 11, 2017), <https://mashable.com/2017/11/10/louis-ck-sexual-misconduct-apology-reaction-awful/#aLHkK8nnLqqm>; Nancy D. Wadsworth, *Louis C.K.'s apology is imperfect. But it is still important.*, *WASH. POST* (Nov. 14, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/14/louis-c-k-s-apology-was-imperfect-but-it-was-still-important/>.

⁸¹ Marina Fang, *Female Comedians Are Not Interested In Louis C.K.'s Redemption Attempt*, *HUFFINGTON POST* (Aug. 28, 2018), https://www.huffingtonpost.com/entry/louis-ck-comeback-female-comedians-respond_us_5b85892be4b0cf7b002f9391.

⁸² Matthew Dessem, *Audio of a New Louis C.K. Set Has Leaked, and It's Sickening*, *SLATE* (Dec. 31, 2018), <https://slate.com/culture/2018/12/louis-ck-leaked-set-governors-parkland-pronouns.html>; Megan Garber, *The Leaked Louis C.K. Set Is Tragedy Masked as*

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reflects a disbelief in C.K.'s contrition: he must have apologized merely so that he can go on with his career.

If C.K.'s apology rings hollow to critics because of the seriousness of his original wrongdoing and the notion that his penitence should have lasted longer, a muddier situation involved comedian Aziz Ansari. In 2017, an anonymous woman referred to as "Grace" approached the online platform *Babe* to tell the story of a harrowing date she had with the comedian,⁸³ a self-professed and outspoken supporter of women's rights and bodily autonomy. According to this account, Ansari had pressured her into sex, and relented only when she cried, at which point she left in a car he had called for her. Ansari's apology was as follows:

In September of last year, I met a woman at a party. We exchanged numbers. We texted back and forth and eventually went on a date. We went out to dinner, and afterwards we ended up engaging in sexual activity, which by all indications was completely consensual.

The next day, I got a text from her saying that although it may have seemed okay, upon further reflection, she felt uncomfortable. It was true that everything did seem okay to me, so when I heard that it was not the case for her, I was surprised and concerned. I took her words to heart and responded privately after taking the time to process what she had said.

I continue to support the movement that is happening in our culture. It is necessary and long overdue.⁸⁴

By contrast to more serious behavior, Ansari's behavior, while perhaps not commendable, awoke more controversy amidst

Comedy, ATLANTIC (Dec. 31, 2018), <https://www.theatlantic.com/entertainment/archive/2018/12/louis-ck-leaked-tape/579220/>.

⁸³ 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>.

⁸⁴ Meg Swertlow, *Aziz Ansari Releases Statement After Being Accused of Sexual Misconduct*, *E! NEWS* (Jan. 13, 2018, 7:32 AM), <https://www.eonline.com/news/906326/aziz-ansari-releases-statement-after-being-accused-of-sexual-misconduct>.

commentators.⁸⁵ Some placed the word “apology” between quotation marks to signal its incompleteness, observing that Ansari didn’t “seem to own up that he had done anything wrong”⁸⁶ while others would find that no apology would suffice, because “[i]f Ansari was aware of her discomfort, the situation was unforgivable.”⁸⁷ Other commentators thought the backlash against Ansari had gone too far, observing that Ansari “was the first exposure many young Americans had to a Muslim man who was aspirational, funny, immersed in the same culture that they are. Now he has been—in a professional sense—assassinated, on the basis of one woman’s anonymous account.”⁸⁸ Like C.K., Ansari’s return to the comedy stage also evinces that the experience of public excoriation did not yield the effects that his critics were perhaps hoping for; his new set featured critique of what he refers to as “progressive candy crush” and the excesses of the progressive left in criticizing strangers online for minutiae.⁸⁹

The cynical disbelief in the genuine contrition of these men, and many others, often stems from the impression that the apology itself was offered to save the apologizer’s reputation and career, rather than to support the victim. One possible conclusion is that, when significant negative repercussions (be they criminal, professional, or reputational) are on the table, it is rather pointless to expect genuine apologies or to dissect them for their flaws, as they will always be found wanting. In Nick Smith’s *Justice Through Apologies* he criticizes the reliance on “court-ordered apologies”—that is, apologies offered as part of a plea for judicial leniency in sentencing—as inherently unreliable and useless,

⁸⁵ Caroline Framke, *The controversy around Babe.net’s Aziz Ansari story, explained*, VOX (Jan. 18, 2018, 10:09 AM), <https://www.vox.com/culture/2018/1/17/16897440/aziz-ansari-allegations-babe-me-too>.

⁸⁶ Teresa Jusino, *What Aziz Ansari’s “Apology” Says About How Men View Their Encounters With Women*, MARY SUE (Jan 15, 2018, 2:02 PM), <https://www.themarysue.com/aziz-ansari-apology/>.

⁸⁷ *The Problem with Aziz Ansari’s Apology*, GUESTLIST (Jan. 16, 2018), <https://guestlist.net/article/92669/the-problem-with-aziz-ansari-s-apology>.

⁸⁸ Caitlin Flanagan, *The Humiliation of Aziz Ansari*, ATLANTIC (Jan. 14, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/>.

⁸⁹ Eren Orbey, *Aziz Ansari’s New Standup Tour Is a Cry Against Extreme Wokeness*, NEW YORKER (Oct. 4, 2018), <https://www.newyorker.com/culture/culture-desk/aziz-ansaris-new-standup-tour-is-a-cry-against-extreme-wokeness>.

regardless of whether they were voluntary or not.⁹⁰ Relying on both retributive and consequential theories of punishment, Smith argues that the distinction between voluntary and involuntary apologies loses much of its meaning when the impetus for the apology is to obtain leniency from the court.⁹¹

Our judicial and administrative structures and institutions offer plenty of settings that are the functional equivalent of Smith's court-ordered apology. A classic example is the parole hearing. My own work, and that of others, show that the parole board's decision to grant or deny parole depends, to a great degree, on the extent to which the inmate reflects "insight," which is a combination of remorse and a reframing of the crime of commitment that highlights personal accountability and dismisses environmental or contextual aspects.⁹²

Regardless of the extent to which inmates express their remorse before the Board, prosecutors and victims present at the hearings rarely, if ever, find their performance convincing.⁹³ For example, members of the Tate family, who consistently appear and speak up at all parole hearings related to the Manson Family members—including people convicted of murders that preceded, and were unrelated to, Sharon Tate's murder—have spoken publicly about their mistrust.⁹⁴ Indeed, the very fact that the apology is offered for the purpose of being granted parole is automatically discounted. A typical example is of Anthony DiMaria, a relative of Leno and Rosemary LaBianca, who testified at Charles Watson's parole hearing: "In my opinion, if Charles Watson has true contrition for the crimes that he has committed, I don't see how he can walk into this room and ask for parole."⁹⁵ Such expressions strengthen Nick Smith's argument against demanding and expecting court-ordered apologies. The cases of Louis C.K. and

⁹⁰ Smith, *Justice*, *supra* note 77, at 65.

⁹¹ *Id.*

⁹² Aviram, *supra* note 14; Victor L. Shammass, *Pains of Imprisonment*, ENCYCLOPEDIA OF CORRECTIONS 14-15, (2007); Kathyne Young, et. al., *Predicting Parole Grants: An Analysis of Suitability Hearings for California's Lifer Inmates*, 28 FED. SENT'G REP. 268 (2016).

⁹³ German Lopez, *Prisoners rarely get released on parole, even when they're no longer a threat. Here's why.*, VOX (Jul. 13, 2015, 1:00 PM), <https://www.vox.com/2015/7/13/8938061/parole-boards-politics>.

⁹⁴ See generally Brie Tate & Aliaa Statman, *Restless Souls: The Sharon Tate Family's Account of Stardom, the Manson Murders, and a Crusade for Justice* (2012).

⁹⁵ Charles Watson's parole hearing transcript, 2011, p. 131 (on file with author.).

Aziz Ansari, among many others, suggest that the reluctance to expect, dissect, and criticize apologies where serious negative repercussions are present extend beyond the ambit of the formal criminal justice system.

Extending Smith's argument beyond the criminal realm is particularly important in Kavanaugh's case, because much of the progressive critique of his demeanor stressed that he was not being criminally tried for his actions, but merely attending a "job interview" and thus not facing serious consequences.⁹⁶ But such claims disingenuously ignore how much was at stake for Kavanaugh. First, his entire life's work—most specifically, his judgments on others' guilt and contrition—would be undermined by an overall perception that he lacked insight into, and contrition regarding, his own behavior. Second, the mortification faced by his family and friends would also be on his mind. And third, while commentators might dismiss the consequences because of the obvious entitlement and privilege embedded in the setting (a potential appointment to the Supreme Court), it is important to keep in mind that the worth and reward available to Kavanaugh himself had subjective weight and value, if not an objective threat. Adam Kolber argues that, when fashioning sanctions and repercussions, it is important to take into account the subjective experience of offenders, as more "sensitive" offenders, for whom the experience of punishment is far removed from their everyday reality, will be experiencing, *de facto*, harsher punishment than less "sensitive" offenders.⁹⁷ Kolber's position presents, of course, serious ethical issues—should we be lenient with wealthy defendants, who suffer from "affluenza,"⁹⁸ and harsher on poorer defendants, who suffer from "povertenza,"⁹⁹ because the latter have harder lives and will thus be relatively less discomfited by punishment? But this article does not call for leniency for a

⁹⁶ See sources *supra* note 71.

⁹⁷ Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009).

⁹⁸ Alex Horton, 'Affluenza' Drunk Driver Who Killed Four Now Free After Serving Two Years, WASH. POST (Apr. 2, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/04/02/affluenza-drunk-driver-who-killed-four-now-free-after-serving-two-years/?utm_term=.65d0e7332840.

⁹⁹ Jessica Mitchell, *Please Excuse Davontaye, He Suffers from Povertenza*, HUFFINGTON POST (Dec. 31, 2015), https://www.huffingtonpost.com/jessica-ann-mitchell/affluenza-privilege_b_4445349.html.

criminal defendant on account for his privilege—merely for understanding that, for someone in his social milieu, confronting serious accusations in the most public forum possible is, subjectively, an experience far more fraught than “a job interview.”¹⁰⁰

Examining the hearings through Kavanaugh’s perspective is also important because his choice of remarks strongly contradicts the received wisdom on defense strategy in sex offense hearings. As a defense attorney in sexual misbehavior cases, my main concern in crafting a defense strategy was to narrow the range of dispute between the accuser and the accused: the more my client’s version corresponded to the victim’s, the better off we were, defense-wise. The reason for this is obvious. Evidence in such cases, as in many others, falls into two main groups: physical and testimonial. The former can offer empirical confirmation or refutation of the prosecution and defense stories; the latter tend to be assessed on the basis of the parties’ relative credibility. Because of that, it is important to scan the defendant’s version for details that will be easily contradicted by forensic and physical evidence. The quintessential example would be a claim that no intercourse or physical altercation took place, which could be easily refuted by medical examination evidence in a manner devastating to the defense. The implication is that the dispute in sexual assault cases is often relegated to the question of consent, which requires the jury to assess the parties’ credibility with little objective evidence to assist them. This principle was as true in judicial hearings as it was for administrative purposes, such as determining the terms of my clients’ retirement from military service as career officials.

Against this backdrop of best practices, Kavanaugh’s choice to offer a blanket denial of the accusations against him appears a risky strategy. Much has been made of his journal, both its entries and what was missing from it, in an effort to strengthen or undermine his broad denials.¹⁰¹ Moreover, Kavanaugh’s denial covered not merely Ford’s accusations, but any possibility of sexual misconduct in any other time and place, any admission of

¹⁰⁰ See sources *supra* note 66.

¹⁰¹ Li Shou, *Brett Kavanaugh’s July 1 calendar entry that could help Ford’s case, explained*, VOX (Sept. 28, 2018, 1:40 PM), <https://www.vox.com/policy-and-politics/2018/9/28/17914174/brett-kavanaugh-calendar-christine-blasey-ford>.

excessive drinking (and the possibility of misbehavior while drunk) and even sexual experience (which he limited to “many years” after high school).¹⁰² The best explanation for this strategy is that, risky as it was, it offered less risk than offering an apology that, by nature of the settings, would never be charitably received. Any perception on Kavanaugh’s part that it is better to deny than to apologize would be validated by the partisan discourse that characterized the hearings and intensified after them, to which we now turn.

III. “STARTING A NATIONAL CONVERSATION:”¹⁰³ ON THE PROSPECTS OF SHAME-BASED RAPPROCHEMENT IN A PARTISAN ENVIRONMENT

In December 2018, Christine Blasey-Ford presented the Sports Illustrated Inspiration award to Rachel Denhollander, who spoke up about her sexual abuse in the hands of Larry Nassar and enabled many more athletes to come forward with their own accusations.¹⁰⁴ At the ceremony, Blasey Ford commended Denhollander: “In stepping forward, you took a huge risk and you galvanized future generations to come forward even when the odds are seemingly stacked against them. . . The lasting lesson is that we all have the power to create real change and we cannot allow ourselves to be defined by the acts of others.”¹⁰⁵ These words, of course, apply to the courage and determination of Ford herself; as she knows all too well, publicly denouncing sexual abusers is a risk as well as a personal sacrifice, and can be a horrific experience, as it often exposes the accuser to critique, ridicule and shame, not to mention serious risks of retaliation.

By right, we should reward the courage of complainants by “creating real change.” Unfortunately, in this far-from-perfect

¹⁰² Joe Tacopino, *Brett Kavanaugh says he was a virgin in high school*, N.Y. POST (Sept. 24, 2018, 7:11 PM), <https://nypost.com/2018/09/24/brett-kavanaugh-says-he-was-a-virgin-in-high-school/>.

¹⁰³ Chen, *Perspective: Kavanaugh, Langbert, and #MeToo*, CAMPUS (Oct. 11, 2018), <http://www.cnycampus.org/2018/10/perspective-kavanaugh-langbert-and-metoo/>.

¹⁰⁴ Cindy Boren, *Christine Blasey Ford Presents SI ‘Inspiration of the Year’ Award to Rachael Denhollander*, WASHINGTON POST (December 12, 2018), https://www.washingtonpost.com/sports/2018/12/12/brett-kavanaughs-accuser-presents-si-inspiration-year-award-larry-nassar-victim/?utm_term=.a9f2e97c72ef

¹⁰⁵ *Id.*

political moment, the promise of change through punitive consequences remains unfulfilled—largely because, in a partisan environment, a “national conversation” is not conducive to change.

Public polls about the Kavanaugh confirmation hearings are a case in point. Prior to the hearings, more Americans than not opposed Brett Kavanaugh’s nomination (37 percent to 32 percent), and more Americans than not had unfavorable views of him (37 percent to 31 percent).¹⁰⁶ The two camps were predictably divided along party lines: 67 percent of Republicans supported Kavanaugh nomination and 67 percent of Democrats opposed it.¹⁰⁷ After the hearing, the respondents’ estimations of truth strongly correlated both with their political affiliation and their gender: 80 percent of Democratic men believed Ford, as did 74 percent of Democratic women, while 77 percent of Republican men believed Kavanaugh, as did 73 percent of Republican women.¹⁰⁸

There are two ways to interpret these data. The first is that, overall, people who tended to support Kavanaugh also tended to believe him and vice versa. This correlation dovetails with research findings from the Cultural Cognition Project, which consistently found people’s assessment of facts and credibility strongly correlate with their life experiences and worldviews.¹⁰⁹ This correlation, robustly demonstrated again and again by social science, yields some serious unease in the criminal justice system. The classic example is jury selection. The tendency to disqualify jurors’ whose appearance, demographics, and demeanor suggests social and political affiliations that will be inhospitable to one’s side in the adversarial process is nowadays exploited not just by the common sense and gut-instincts of seasoned prosecutors and defense attorneys, but by a well-oiled industry of trial

¹⁰⁶ NPR/PBS News Hour/Marist Poll of 997 National Adults, MARIST POLL (last visited on July 14, 2019), http://maristpoll.marist.edu/wp-content/uploads/2018/09/NPR_PBS-NewsHour_Marist-Poll_USA-NOS-and-Tables_1809251359.pdf.

¹⁰⁷ *Id.*

¹⁰⁸ Domenico Montanaro, *Poll: More Believe Ford Than Kavanaugh, A Cultural Shift From 1991*, NPR (Oct. 3, 2018, 3:08 PM), <https://www.npr.org/2018/10/03/654054108/poll-more-believe-ford-than-kavanaugh-a-cultural-shift-from-1991>.

¹⁰⁹ See e.g. Dan Kahan, David Hoffman and Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

consultants.¹¹⁰ What we allow and disallow in the jury selection process is an indication of our deep ambivalence. Supreme Court precedent has required that distinctive groups, such as women or members of racial groups, not be excluded from the venire.¹¹¹ It has also placed some limitations on the ability to exclude people from the jury on the basis of race and gender.¹¹² On the other hand, it has not allowed for-cause challenges that depend on similar deductions, such as exclusion of members of the NRA from cases involving guns.¹¹³ The erratic caselaw on jury selection suggests that courts attempt to make a distinction between “good biases” and “bad biases” that has no basis in empirical studies, and that it is unclear on the value and effects of deliberation on established worldviews.

The other important takeaway from the data is that even people who tended to disbelieve Kavanaugh at the hearings still supported his nomination.¹¹⁴ An important demographic category in this respect is Republican women. As the data above demonstrates, if a case for feminism and #metoo was made, it failed to impress Republican women, 73 percent of whom found Kavanaugh credible—and even those who did not still supported his candidacy.¹¹⁵

The conclusion from this is that the extent to which the Kavanaugh hearing “sparked a national conversation” largely depends on what you mean by “conversation.”¹¹⁶ The hearings received a wide coverage, many op-eds were written, much ado took place on social media; but, the conversation was mostly had

¹¹⁰ See *Trial Consultants Industry in the US: Industry Market Research Report*, IBISWORLD (Sept. 2018), <https://www.ibisworld.com/industry-trends/specialized-market-research-reports/advisory-financial-services/legal/trial-consultants.html>.

¹¹¹ See *Taylor v. Louisiana*, 419 U.S. 522, 528, 531 (1975).

¹¹² See *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).

¹¹³ See *U.S. v. Salamone*, 800 F.2d 1216, 1226 - 1227 (3d Cir. 1986), *cert. denied*, 498 U.S. 1030 (1991).

¹¹⁴ Jeffrey M. Jones, *Americans Still Closely Divided on Kavanaugh Confirmation*, GALLUP: Politics (Oct. 2, 2018), <https://news.gallup.com/poll/243377/americans-closely-divided-kavanaugh-confirmation.aspx>.

¹¹⁵ Jason Sattler, *Don't reward Republicans for Brett Kavanaugh and the politics of personal annihilation*, USA TODAY: Opinion (Oct. 7, 2018, 5:00 AM), <https://www.usatoday.com/story/opinion/2018/10/07/brett-kavanaugh-help-supreme-court-shrink-womens-rights-column/1551654002/>.

¹¹⁶ *Kavanaugh Allegations Reveal Lack Of Comprehensive Sex Ed, Consent Educator Says*, WBUR (Sept. 26, 2018), <https://www.wbur.org/hereandnow/2018/09/26/kavanaugh-allegations-sex-ed>.

between camps, without making any inroads for gender equality in the camp that supported Kavanaugh.¹¹⁷

There could be many explanations for the lack of rapprochement. Naturally, the increased polarization of the American public, highlighted by the acrimonious partisanship of the legislature, is a significant hurdle to any conversation.¹¹⁸ The decline in civility across political lines is also a detriment.¹¹⁹ And, I believe, the choice to tackle the question of sexual assault via the pursuance of accountability among specific individual wrongdoers yields strong retrenchment of existent positions. This is not surprising; studies on confirmation bias robustly and consistently show that, when provided information, people tend to absorb the parts that confirm their existing opinion or interpret the facts to conform to their existing opinion, particularly in partisan environments.¹²⁰

So, should we refrain from pursuing justice for sexual victims through the punishment of their assailants? An important counterargument is that the failure to pursue criminal justice consequences, or more broadly, to hold individuals accountable for their behavior, keeps the system in its imperfect state. In her article about imperfect rape victims, Lisa Frohmann marshals empirical evidence to show that prosecutors hesitate to pursue, and often choose to dismiss, sexual assault cases involving victims who they predict will not appear credible to a middle-class jury.¹²¹ Frohmann warns that this approach has a constitutive effect: while the prosecutors might be motivated by a good-faith effort to protect the victims from the unpleasant experiences of being

¹¹⁷ Ronald Brownstein, *The Battle Over Kavanaugh Is Just Getting Started*, ATLANTIC (Sept. 26, 2018), <https://www.theatlantic.com/politics/archive/2018/09/kavanaugh-hearing-confirmation-vote-supreme-court/571369/>.

¹¹⁸ Carroll Doherty, *Key takeaways on Americans' growing partisan divide over political values*, PEW RESEARCH CENTER: Fact Tank (Oct. 5, 2017), <https://www.pewresearch.org/fact-tank/2017/10/05/takeaways-on-americans-growing-partisan-divide-over-political-values/>.

¹¹⁹ Glenn Walker, *The decline in civility in America*, SAN DIEGO READER (Sept. 30, 2015), <https://www.sandiegoreader.com/news/2015/sep/30/blog-diego-decline-civility-america/#>.

¹²⁰ See Jennifer Jerit and Jason Barabas, *Partisan Perceptual Bias and the Information Environment*, 74 J. POL., 672, 672 (2012); see also Wendy Rahn, *The Role of Partisan Stereotypes in Information Processing about Political Candidates*, 37 AM. J. POL. SCI., 472 (1993). See also Elizabeth Kolbert, *Why Facts Won't Change Our Mind*, NEW YORKER (Feb. 27, 2017) (a journalistic compilation of the scientific evidence).

¹²¹ See Frohmann, *supra* note 11, at 553.

humiliated, contested, and disbelieved in court, the functional outcome of their failure to pursue cases with imperfect victims is that such cases do not rise to the public consciousness.¹²²

This critique is well taken. However, it is also important to look at the limited resources of #metoo and the feminist movement as a whole. Directing the movement's energy toward the pursuance of justice against individual wrongdoers places the locus of the problem upon these individuals' personal pathologies, undermining any efforts devoted to reform the systemic structures that enable gender inequities and iniquities to take place. Rather than seeing Kavanaugh as uniquely flawed, it is important to keep in perspective that, as many commentators highlighted, he is a man of his time and place.¹²³ Efforts toward changing such cultures from within are likely to be more successful in gathering a critical mass of support across political lines than the vilification of one person in an exhausting high-profile case, which predictably leads to retrenched views and shuts down the possibility of conversation without stigma or blame. True, in the aftermath of the Kavanaugh hearings, some men chimed in with confessions of their own inappropriate adolescent behavior.¹²⁴ Doug Newberry of *The Enquirer* confessed:

As a young adult, my alcohol intake increased as I set out on my own. I lost inhibitions and became arrogant when I drank. I was not a "loose cannon," in my opinion, but during this time there were three distinct incidents when I made unwanted advances toward female acquaintances.

At three different times and separated by years, I groped a woman's breasts, I forcibly kissed another at a party and I attempted to remove a woman's clothing.

¹²² *Id.*

¹²³ Anna North, *Guilty until proven innocent: Trump's Kavanaugh defense shows how we treat people who report assault*, VOX (Oct. 4, 2018, 5:30 PM), <https://www.vox.com/2018/10/4/17936878/trump-mississippi-rally-brett-kavanaugh-bret-stephens>.

¹²⁴ See Doug Newberry, *Opinion: I am Brett Kavanaugh*, CINCINNATI OBSERVER (Oct. 4, 2018), <https://www.cincinnati.com/story/opinion/2018/10/04/opinion-am-brett-kavanaugh/1519204002/>.

. . . Ford's testimony again filled me with guilt of the pain and suffering I now believe I caused these women. I'm a man of Kavanaugh's era. I was a party boy in my youth. I believe Ford's story because it is entirely possible. I listened to Kavanaugh's testimony and I heard the fear of someone who was afraid to confess his sins. I imagine this would be my – or any guilty man's – reaction if caught off-guard or not ready to open up about it.¹²⁵

But Newberry was not personally and publicly facing the consequences of his adolescent behavior, and his public contrition hardly made any waves, especially when compared to the vast scope of the problem of sexual misbehavior.

The failure of such "projects of reckoning" to start a real national conversation is much wider than Kavanaugh's case, and even wider than the #metoo movement. In the last part of this essay, I argue that it is merely an example of a family of similar political technologies, which have overall been met with very limited success.

IV. THE KAVANAUGH HEARINGS IN CONTEXT: PROGRESSIVE PUNITIVISM

The hollow hope that Kavanaugh's confirmation hearing would bring about a conversation about sexual assault beyond partisan lines is not endemic to this case. Rather, it represents a broader project, which consists of the pursuit of social justice ends through means more traditionally associated with the conservative right—namely, employing formal and informal social control to punish and shame individuals. I refer to this project as progressive punitivism.

An article devoted to the Kavanaugh hearing is too narrow a framework to deeply examine progressive punitivism. Therefore, Part IV offers a mere sketch of the basic features of the project, its origins, some examples of the main areas of its operation, and the concerns it raises.

¹²⁵ *Id.*

A. Origins of Progressive Punitivism

It is first important to point out that the political left and the right do not operate in separate universes; decades of exposure to punitive ideologies and policies, as well as their legacies, are bound to leave imprints on social movements of all stripes. Nonetheless, commentators who ascribe our overall punitive society—mass incarceration, mass supervision, and the demonizing of “others”—exclusively to conservatives might be surprised at the progressive turn to similar means for their own ends.

This surprise is largely unwarranted. Early accounts of the punitive turn typically blamed Nixon and Reagan for the policies that increased mass incarceration.¹²⁶ 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.¹²⁷ Beckett, as well as Elizabeth Hinton in *From the War on Poverty to the War on Crime*, also identify Ronald Reagan and his war on drugs as a central culprit in the criminalization and demonization of Americans.¹²⁸ 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 *The New Jim Crow*.¹²⁹ However, other 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

¹²⁶ Josie Duffy Rice and Clint Smith, *Justice in America Episode 9: How Democrats and Republicans Created Mass Incarceration*, THE APPEAL (Sept. 19, 2018), <https://theappeal.org/justice-in-america-episode-9-how-democrats-and-republicans-created-mass-incarceration/>.

¹²⁷ See Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics* 14 (Oxford Univ. Press, 1st ed. 1979).

¹²⁸ See *id.*; see also Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* 308-09 (Harv. Univ. Press, 1st ed. 2016).

¹²⁹ See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 44-45 (The New Press, 2012).

delinquency.¹³⁰ Similarly, Marie Gottschalk in *The Prison and the Gallows* and Naomi Murakawa in *The First Civil Right* have highlighted the role of mainstream Democrats, as well as civil rights activists, in bringing about punitive consequences.¹³¹ And James Forman's *Locking Up Our Own* 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.¹³²

These books show us that conservative lawmakers and criminal justice 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 in *Governing Through Crime*, 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."¹³³ In other words, institutions and actors across the political spectrum regularly approach society with a criminal justice hammer in hand, so it is no surprise that every problem we see looks like a nail.

The tendency to recur to criminal justice methods to solve systemic problems is exacerbated by two 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*, 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.¹³⁴ Indeed, a very particular kind of victims'-rights discourse has come to dominate criminal justice

¹³⁰ Hinton, *supra* note 129, at 308-09.

¹³¹ See Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* 26 (Cambridge Univ. Press, 2006); see generally Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America* 9 (Oxford Univ. Press, 2014).

¹³² See generally James Forman, *Locking Up Our Own: Crime and Punishment in Black America* 12 (Farrar, Straus & Giroux, 1st ed. 2017).

¹³³ See generally Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* 10-11 (Oxford Univ. Press, 1st ed. 2007).

¹³⁴ See *id.* at 78.

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.¹³⁵ 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 deeply embedded structural inequalities and its effects are unevenly distributed across class, gender, and race. It is now widely acknowledged that, while 1 in 100 Americans is behind bars, that figure is much higher for particular segments of the American population: 1 in 9 young black men is incarcerated, and 1 in 3 is under some form of correctional supervision.¹³⁶ Racial and class inequalities are found at every turn; in policing,¹³⁷ in criminal courtrooms,¹³⁸ and in sentencing,¹³⁹ 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.¹⁴⁰

¹³⁵ 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, 672-673 (1999) (explaining a theoretical critique of this victim model, and the suggestions of others); see also Josh Page, *The Toughest Beat: Politics, Punishment, and the Prison Officers Union in California* 7 (Oxford Univ. Press, 2011) (analyzing the political power of victims in the incarceration arena); Aviram, *supra* note 14 (analyzing the rise of victims dominating the moral conversation at parole hearings). 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* 7 (Oxford Univ. Press, 2011). For an analysis of the rise of victims to dominate the moral conversation at parole hearings, see Aviram, *supra* note 14.

¹³⁶ See Jenifer Warren, *1 in 100 Adults Behind Bars*, in *One in 100: Behind Bars in America 2008* 5-6, (PEW CTR. ST., Feb. 2008).

¹³⁷ See generally Charles Epp, Steven Maynard-Moody & Donald Haider-Markel, *Pulled Over: How Police Stops Define Race and Citizenship* 159 (Univ. Chi. Press, 2014).

¹³⁸ See generally Nicole Gonzalez Van Cleve, *Crook County: Racism and Injustice in America's Largest Criminal Court* xii (Stan. Univ. Press, 2016).

¹³⁹ See generally Michael Tonry, *Fifty Years of American Sentencing Reform — Nine Lessons*, 48 CRIME & JUST.—REV. RES. 1, 1 (2018).

¹⁴⁰ See generally Alexander, *supra* note 130, at 2; see also Epp et al., *supra* note 138, at 159; see also Van Cleve, *supra* note 139, at xii; see also Paul Butler, *Let's Get Free: A Hip-Hop Theory of Justice* 37 (New Press, 2010); see also Angela Davis, *Policing the Black Man: Arrest, Prosecution, and Imprisonment* xiv (Pantheon Books, 1st ed. 2017).

B. Defining Features of Progressive Punitivism

Progressive punitivism shares many of those features, albeit through a different political lens, which somewhat alters its framework. While sharing overall laudable social goals with other projects of progressive reform—fostering equality and diversity, fighting oppression and disenfranchisement—progressive punitivism relies on the toolbox of the criminal process as an avenue for reform. Progressive punitive initiatives seek to identify people whose actions are detrimental to reform 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 online.

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 power—law enforcement officers, celebrities, and members of privileged social groups—as targets. This orientation is understandable in that progressive punitivism is, by nature, corrective, in that it seeks to balance the harms typically visited on vulnerable and disenfranchised populations by harms visited on the powerful.

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 demographic, 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 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 other categories of victims: women and people of color. When victims speak up for 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 an individual 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 exceeds the 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, a just outcome in his or her particular case—one that would provide appropriate, harsh retribution—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 dessert for bad behavior, but, in the manner of a Greek tragedy, a “conversation starter,” the harbinger of reckoning, understanding, and important steps toward remedying structural inequalities.

C. Key Areas

Because of the progressive commitment to the idea of fighting racism, sexism, and classism, among other harms of inequality and discriminations, the main areas in which progressive punitivism has been visible concern people who are (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.¹⁴¹ 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.¹⁴² This was followed by allegations of varying

¹⁴¹ Haley Britzky, *The big picture: #MeToo has exposed hundreds of high-profile people*, AXIOS (July 7, 2018), <https://www.axios.com/metoo-movement-exposed-417-high-profile-people-6fd3fab0-cfe6-4e8c-b47a-db15dbea68e3.html>.

¹⁴² See Maria Puente, *Judge rules Harvey Weinstein sexual assault case can move forward to trial*, USA TODAY (Dec. 20, 2018),

degrees of seriousness against public figures: politicians,¹⁴³ media personalities,¹⁴⁴ actors,¹⁴⁵ directors,¹⁴⁶ and comedians,¹⁴⁷ 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, Judge Persky, leading to a relentless, and ultimately successful recall campaign.¹⁴⁸ The last example is one of special importance, because the ire was directed not only at the person committing the crime with perceived impunity, but also at the system for sentencing him; and the message resulting from the successful campaign is that judges must be wary of public opinion and shame campaigns when they consider sentencing.¹⁴⁹ 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.¹⁵⁰

While progressive punitivism extends broader than the sexual misconduct issue, as I explain below, it is worthwhile to note that

<https://www.usatoday.com/story/life/2018/12/20/harvey-weinstein-court-new-york-sex-crimes-charges-judge/2294182002/>.

¹⁴³ See 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>.

¹⁴⁴ See Associated Press, *Garrison Keillor: radio station reveals broader claims of sexual harassment*, GUARDIAN (Jan. 24, 2018), <https://www.theguardian.com/world/2018/jan/24/garrison-keillor-sexual-harassment-allegations>.

¹⁴⁵ See Victoria Bekiempis, *Kevin Spacey faces criminal charge over alleged sexual assault of teenager*, GUARDIAN (Dec. 24, 2018), <https://www.theguardian.com/culture/2018/dec/24/kevin-spacey-alleged-sexual-assault-teenager-allegations>.

¹⁴⁶ See Lisa Respers 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>.

¹⁴⁷ See Joanna Walters and Molly Redden, *Louis CK responds to allegations of sexual misconduct: 'These stories are true'*, GUARDIAN (Nov. 11, 2017); see also Way, *supra* note 84.

¹⁴⁸ See Abel et al., *Law Professors' Statement for the Independence of the Judiciary and Against the Recall of Santa Clara County Superior Court* (Aug. 17, 2017), <https://www.paloaltoonline.com/news/reports/1503112952.pdf>.

¹⁴⁹ See Maura Dolan, *Vandalism, threats, broken friendships: The heated campaign to recall judge in Brock Turner case*, L.A. TIMES (Jun. 3, 2018), <https://www.latimes.com/local/lanow/la-me-ln-recall-judge-20180601-story.html>.

¹⁵⁰ See generally Clarence M. Dunnville, Jr., *Unequal Justice Under the Law—Racial Inequities in the Justice System*, VA. LAW. (Dec. 2000), <https://www.vsb.org/docs/valawyer magazine/dec00dunnville.pdf>.

my arguments here dovetail the nascent literature on carceral feminism.¹⁵¹ 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),¹⁵² the anti-trafficking movement,¹⁵³ and violence against women in general.¹⁵⁴ Specifically, Nickie Phillips and Nicholas Chagnon have linked carceral feminism discourses to the Brock Turner outrage and Judge Persky's recall campaign.¹⁵⁵ However, as I show below, carceral feminism shares important characteristics with 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 BART police officer, when protesters flooded the court and some threatened Mehserle's parents, as well as his defense attorney.¹⁵⁶ The public pressure was so intense that the defendant won a motion to change the trial venue.¹⁵⁷ Upon Mehserle's conviction of a lesser-included offense, and not second-degree murder, public outrage broke again.¹⁵⁸ A more recent wave

¹⁵¹ "Carceral Feminism describes an approach that sees increased policing, prosecution, and imprisonment as the primary solution to violence against women." *Carceral Feminism*, TRANSFORMHARM.ORG (last visited July 28, 2019), <https://transformharm.org/carceral-feminism/>.

¹⁵² See Nancy Whittier, *Carceral and Intersectional Feminism in Congress: The Violence Against Women Act, Discourse, and Policy*, 30 GENDER & SOC'Y 791, 792 (2016).

¹⁵³ See Jennifer Musto, *Carceral Protectionism and Multi-Professional Anti-Trafficking Human Rights Work in the Netherlands*, 12 INT'L FEMINIST J. POL. 381, 382 (2010).

¹⁵⁴ See David Gurnham, *Critique of Carceral Feminist Arguments on Rape Myths and Sexual Scripts*, 19 NEW CRIM. L. REV. 141, 142 (2016).

¹⁵⁵ See Nickie D. Phillips & Nicholas Chagnon, "Six Months Is a Joke": *Carceral Feminism and Penal Populism in the Wake of the Stanford Sexual Assault Case*, 1-23 FEMINIST CRIMINOLOGY 1, 12, 14 (2018).

¹⁵⁶ See Order of the Ct. on Def.'s Mot. to Change Venue, *People v. Mehserle*, No. 161210 (Cal. Super Ct. Oct. 16, 2009).

¹⁵⁷ See *id.*

¹⁵⁸ See Corey Moore, *Activists protest involuntary manslaughter verdict in Mehserle shooting case*, KPCC S. CAL. PUB. RADIO (July 9, 2010),

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.¹⁵⁹ Similar protests occurred when the grand jury did not indict the officer responsible for the killing of Eric Garner.¹⁶⁰ 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 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.¹⁶¹ 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 in *When Police Kill*, 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.¹⁶²

A third target of progressive punitivism has been bigotry and hate crimes. Most of the activity in this arena has been outside of the official criminal process, such as in the case of Aaron Schlossberg, an attorney filmed hurling racial epithets at restaurant workers.¹⁶³ Progressive activists, in retort, publicized

<https://www.scpr.org/news/2010/07/09/17066/activists-protest-involuntary-manslaughter-verdict/>.

¹⁵⁹ See Colleen Shalby, *Protesters react to Ferguson grand jury decision not to indict Darren Wilson*, PBS NEWS HOUR (Nov. 4, 2014, 10:30 PM), <https://www.pbs.org/newshour/nation/follow-reaction-ferguson-grand-jury-decision>.

¹⁶⁰ See Ashley Southall, *Protesters Fill Streets Across U.S. Over Decision in Garner Case*, N.Y. TIMES (Dec. 4, 2014), <https://www.nytimes.com/2014/12/05/nyregion/protests-continue-after-grand-jury-decision-in-eric-garner-case.html>.

¹⁶¹ See S.B. 227, 2015-2016, Reg. Sess. (Cal. 2015), An Act to Amend Sections 917 and 919 of the Penal Code, Relating to Grand Juries (Apr. 27, 2015), available at http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0201-0250/sb_227_bill_20150427_amended_sen_v97.pdf.

¹⁶² See Franklin Zimring, *When Police Kill* x-xii (Harv. Univ. Press, 2017).

¹⁶³ Eric Levenson, Paul Murphy & Gianluca Mezzofiore, *New York attorney in racist rant has history of confrontations*, CNN (May 17, 2019, 8:17 PM), <https://www.cnn.com/2018/05/17/us/aaron-schlossberg-attorney-racist-rant/index.html>.

Schlossberg's name, brought about the loss of his office lease,¹⁶⁴ and held a mariachi party below his home after making his address public.¹⁶⁵ Recently, following the murder of Nia Wilson, a young African American 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.¹⁶⁶ 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.

D. 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.¹⁶⁷

¹⁶⁴ Deepti Hajela, *N.Y. lawyer who ranted at Spanish speakers faces eviction, complaint — and a mariachi band*, USA TODAY (May 18, 2018, 9:58 AM), <https://www.usatoday.com/story/money/business/smallbusiness/2018/05/18/aaron-schlossberg-evicted-new-york-lawyer-loses-office-space-after-rant/622300002/>.

¹⁶⁵ Sam Wolfson, *New Yorkers respond to lawyer's racist rant with 'Latin party' outside his house*, GUARDIAN (May 18, 2018), <https://www.theguardian.com/us-news/2018/may/18/aaron-schlossberg-racist-lawyer-new-york-latin-party>.

¹⁶⁶ Scott Wilson, *As stakes rise in Nia Wilson case, simmering racial tensions intensify in Oakland*, WASH. POST (Aug. 23, 2018), https://www.washingtonpost.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 (“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.”).

¹⁶⁷ See e.g. J. David Goodman & Al Baker, *Wave of Protests After Grant Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014),

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.¹⁶⁸ 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.

One understandable, but troubling, 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.¹⁶⁹ 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.¹⁷⁰ 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 in his book *So You’ve Been Publicly Shamed*, 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.¹⁷¹ The availability of online platforms also implies that revealing a person’s address, or that of their relatives, can lead not

<https://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html>.

¹⁶⁸ *Majority of Americans Think U.S. Criminal Justice System is Broken, Ineffective; See Need for Change*, OPEN SOC’Y FOUNDS. (Feb. 13, 2002), <https://www.opensocietyfoundations.org/newsroom/majority-americans-think-us-criminal-justice-system-broken-ineffective-see-need>.

¹⁶⁹ Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html>.

¹⁷⁰ Jason Green & Martha Ross, *Two dozen gather to protest Louis C.K. shows in San Jose*, MERCURY NEWS (Jan. 17, 2019, 8:58 AM), <https://www.mercurynews.com/2019/01/16/dozens-gather-to-protest-louis-c-k-s-appearance-in-san-jose/>.

¹⁷¹ See generally Jon Ronson, *So You’ve Been Publicly Shamed* (2015).

only to inconvenience and anguish but also to placing people in real danger.¹⁷² Naturally, the recurrence to informal but pernicious modes of public shaming is not endemic to the progressive left, nor is it necessarily its original invention;¹⁷³ but the problems with this aspect of progressive punitivism, as well as with the phenomenon overall, do not lie with its originality or uniqueness, but rather in the fact that it is employed by a political constituency whose interest in criminal reform should lead it to know better.

E. Challenges and Problems

Pointing out the problems with progressive punitivism should not imply that its targets are blameless, or that they suffer a harsher fate than the usual people on the receiving end of the legal process. It is merely an argument that the progressive left expends an inordinate amount of energy on pursuing the accountability of individuals, some more deserving than others, that would be better spent elsewhere. Here are some of the challenges of viewing the progressive reform project through a punitive prism:

1. 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, as well as Philip Zimbardo's Stanford prison experiment, are well taken: bad behavior, including serious displays of cruelty and sadism, is largely situational.¹⁷⁴ It is perhaps ironic that movements that set out to highlight the systemic power imbalances that enable evils like

¹⁷² 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>.

¹⁷³ See Andrew Quodling, *Doxxing, swatting and the new trends in online harassment*, CONVERSATION (Apr. 21, 2015), <https://theconversation.com/doxxing-swatting-and-the-new-trends-in-online-harassment-40234>.

¹⁷⁴ See generally Craig Haney & Philip Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, STAN. DEPT PSYCHOL., REP. PREPARED FOR OFF. NAVAL RES. INT'L J. CRIM. & PENOLOGY (Oct. 1972), <https://apps.dtic.mil/dtic/tr/fulltext/u2/751041.pdf>; see generally Stanley Milgram, *Obedience to Authority: An Experimental View* (Harper & Row, 2009).

abuse of power to prevail are focusing their efforts on a method of redress that is best suited for adjudicating personal pathologies. In the specific context of the Kavanaugh hearings, precious energy was spent on a particular—albeit serious—allegation of misconduct, portraying Kavanaugh as uniquely and personally pathological and the righteous focal point of anger and scorn, rather than seeing him as what he is: a man of his time, place, and social standing, guilty of doing what many others do as well on a daily basis.

2. Inherently, waiting for an incident to occur as an opportunity to trigger reform, depends 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 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.

3. The emphasis on criminalization 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, verve—on a

particular case under the unproven assumption that the case will produce systemic change.

4. As with conservative punitivism, progressive punitivism pursues justice largely through the voices of victims. The validation of these voices 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 victims’ rights movement from the right brought about many of the excesses of the 1990s and the 2000s, and the current victim’s rights movement from the left, 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,¹⁷⁵ does not have an easy resolution precisely because it is difficult to know, empirically, the correct answer.¹⁷⁶ Progressives and conservatives disagree not only on the rate of false accusations, but also on the existence or absence of incentives to falsely accuse.¹⁷⁷ Some progressive commentators openly accept the possibility of false accusations, but claim that such miscarriages of justice are “acceptable casualties” in the broader

¹⁷⁵ See Peter Baker, ‘*It Was All Fake, Trump Misleadingly Says of Kavanaugh Accusations*,’ N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/us/politics/brett-kavanaugh-christine-blasey-ford.html>; see also Margery Egan, *Myths about false accusations*, STANFORD MEN AGAINST ABUSE NOW (last visited Apr. 18, 2019), https://web.stanford.edu/group/maan/cgi-bin/?page_id=297.

¹⁷⁶ 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” by the researchers. See Claire Ferguson and John Malouff, *Assessing Police Classifications of Sexual Assault Reports: A Meta-Analysis of False Reporting Rates*, 45 ARCHIVES SEXUAL BEHAV. 1185, 1185 (2016).

¹⁷⁷ The literature does recognize some motivations for false allegations of sexual misconduct. See André de Zutter, Robert Horselenberg & Peter van Koppen, *Motives for Filing a False Allegation of Rape*, 47 ARCHIVES SEXUAL BEHAV. 457, 457 (2018).

war against sexual misconduct.¹⁷⁸ 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 requires.¹⁷⁹ 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.¹⁸⁰

5. 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

¹⁷⁸ For a comprehensive exposition about the overreach of #metoo accusations see Ezra Klein, “*Yes Means Yes*” is a terrible law, and I completely support it, VOX (Oct. 13, 2014), <https://www.vox.com/2014/10/13/6966847/yes-means-yes-is-a-terrible-bill-and-i-completely-support-it?fbclid=IwAR0jmDw9p5o705Xiqt5wv1X0AQLF4DR0eaCqK1dFHXCeTw6VHNaJ9YTG N8> (writing about supporting due process restrictions for the benefit of the movement); 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> (detailing a comprehensive exposition about the overreach of #metoo accusations). 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), <https://www.vox.com/2014/10/13/6966847/yes-means-yes-is-a-terrible-bill-and-i-completely-support-it?fbclid=IwAR0jmDw9p5o705Xiqt5wv1X0AQLF4DR0eaCqK1dFHXCeTw6VHNaJ9YTG N8>.

¹⁷⁹ See Kathryn M. Young, *Parole Hearings and Victims’ Rights: Implementation, Ambiguity, and Reform*, 49 CONN. L. REV. 49, 431, 476 (2016).

¹⁸⁰ For alternative models sensitive to victim perspectives, see generally Roach, *supra* note 136 (describing alternative models sensitive to victim perspectives).

just individuals but collectives of people. But in a universe of intersectional identities, it is unclear where such a mandate leaves us. Consider the case of “Cornerstore Caroline,” a woman who complained about being harassed by an 8-year-old boy (the complaint was ultimately unfounded).¹⁸¹ In a world in which our categorical alliances are ruled by identities, what is the appropriate resolution of such a case? 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 were falsely accused of sexually inappropriate behavior with white women—the legacy of Emmett Till¹⁸² and the Scottsboro case?¹⁸³ 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?¹⁸⁴ 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.¹⁸⁵

6. Progressive punitivism builds largely on a platform of understandable, and often justifiable, rage. Efforts to criticize the underlying angry

¹⁸¹ See 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), https://www.washingtonpost.com/nation/2018/10/13/black-childs-backpack-brushed-up-against-woman-she-called-report-sexual-assault/?utm_term=.cb3c1cf74266.

¹⁸² See Elliott McLaughlin & Emanuella Grinberg, *Justice Department reopens investigation into 63-year-old murder of Emmett Till*, CNN (Jul. 13, 2018), <https://www.cnn.com/2018/07/12/us/emmett-till-murder-case-reopened-doj/index.html> (last updated Jul. 13, 2018).

¹⁸³ See James Goodman, *Stories of Scottsboro* 1 (Vintage Books, 1995).

¹⁸⁴ See W. Wilbanks, *Is Violent Crime Intra-racial?*, 31 CRIME & DELINQ. 117, 117 (1985).

¹⁸⁵ See Laura Wagner, *Don't Doubt What You Saw With Your Own Eyes*, CONCOURSE (Jan. 21, 2019), https://theconcourse.deadspin.com/dont-doubt-what-you-saw-with-your-own-eyes-1831931203?fbclid=IwAR2JD1ZGjOazF-woL1Ptq8cnWR-iRBsEuEahbjxUWXZVken_hQodbEgH1Cg (noting that 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).

animus of the movement are often categorized as “tone policing” and rejected.¹⁸⁶ 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.¹⁸⁷ On the other hand, anger is a generative emotion; feeling and expressing rage leads to feeling and expressing more rage.¹⁸⁸ 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.

7. 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. One might hope that Kavanaugh’s experience of being publicly accused of serious misconduct would make him keenly sensitive to the plight of suspects and defendants. Unfortunately, being on the receiving end of a shaming experience without appropriate opportunities for reintegration merely fosters a sense of enmity and rancor.¹⁸⁹

¹⁸⁶ See Laura Portwood-Stacer & Susan Berridge, *Introduction: Privilege and Difference in (Online) Feminist Activism*, 14 FEMINIST MEDIA STUD. 519, 519-520 (2014) (introducing the use and abuse of the term).

¹⁸⁷ See Albert Rothenberg, *On Anger*, 128 AM. J. PSYCHIATRY. 454, 454, 457 (1971).

¹⁸⁸ See Tavis, Carol, *On the wisdom of counting to ten: Personal and social dangers of anger expression.*, 5 REV. PERSONALITY & SOC. PSYCHOL., 170, 170 (1984).

¹⁸⁹ See John Braithwaite, *Crime, Shame and Reintegration* 12-13 (Cambridge Univ. Press, 1989).

CONCLUSION

The destructive nature of the Kavanaugh confirmation hearings exposed us to the inspiring courage of Christine Blasey Ford, but ultimately ended up with a deeply conservative court. Moreover, the “national conversation” that resulted was predictably partisan and rancorous. If pursuing accountability against individuals is, overall, not where the critical mass of reform energy should be spent, what should we do instead?

The hopes pinned on individual cases, and the energies spent on denouncing individual wrongdoers, are better spent focusing on systemic solutions. One important avenue is early age education. If Kavanaugh’s alleged behavior is not an indication of personal pathology, but rather of a broad social malaise—a premise on which Kavanaugh’s detractors largely agree—young people should be socialized to befriend people of all genders, races and colors, as a regular occurrence, through egalitarian policies in educational placements and through careful pedagogy. There is some evidence that gender-based segregation begins in early age¹⁹⁰—a problem more easily corrected than later, when it is more difficult to instill the sense that others (in this case, women) possess humanity and dignity.

In general, it seems that #metoo activists—victims and perpetrators alike—would benefit from an environment that fosters genuine apologies, genuine declarations of harm, and genuine offers of redress. As I argued in this paper, the criminal process, the toxic online arena of shaming, and highly public allegations (which are not merely “job interviews”¹⁹¹) are the wrong venues for this sort of sincerity and rapprochement. In the absence of truth and reconciliation commissions for sexual misconduct (and those might not be a bad idea), progressives might want to recur to ADR methods such as restorative justice—either via victim-offender mediation (VOM) or restorative circles. Apologies genuinely offered with the victim’s well-being in mind, rather than for the purpose of restoring the offender’s reputation

¹⁹⁰ Laura D. Hanish & Richard A. Fabes, *Peer socialization of gender in young boys and girls*, *ENCYCLOPEDIA ON EARLY CHILDHOOD DEV.* (Aug. 2014), <http://www.child-encyclopedia.com/gender-early-socialization/according-experts/peer-socialization-gender-young-boys-and-girls>.

¹⁹¹ See sources *supra* note 66.

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or save him from negative consequences, are far more likely to be received as genuine and provide the healing and conversation that is so important to all parties.

Finally, this piece offered merely an abbreviated discussion of progressive punitivism, using the Kavanaugh hearing as an example. It is offered here as an opportunity to deepen the conversation about the goals, methods, and impacts of progressive reform. We may have deep disagreements about the methods, but I venture to guess that the goal—a safer and more equitable society—is one many of us share beyond partisan lines.