

Toward the critique of punitive populism¹

Hacia una crítica del populismo punitivo

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Abstract: This paper presents the main theses of what in recent years I have analyzed under the concept of punitive populism, seen as a complex phenomenon that conflates penal policy with politics, criminology and even moralism in social media. Thus, in order to present my critical outlines, I offer in the second section a definition of punitive populism, while in the third section I explore its relationship with media criminology, in order to, in the fourth section, develop my ideas on punitive populism and moralism in social networks. In the fifth section I expose the legislative and penal consequences of punitive populism and, finally, in the sixth section, I present a normative proposal to reduce the effects of punitive populism. **Keywords:** populism; punitiveness; moralism; social media.

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Resumen: Este artículo presenta las tesis principales de lo que en años recientes he analizado bajo el concepto de populismo punitivo, visto como un fenómeno complejo que entrecruza a la política criminal con la política, la criminología y el moralismo en las redes sociales. Así, con el objetivo de presentar mi esbozo crítico ofrezco en la segunda sección una definición de populismo punitivo, mientras que en la tercera exploro su relación con la criminología mediática con el fin de desarrollar en la cuarta sección mis ideas sobre el punitivismo y el moralismo en las redes sociales. En la quinta sección expongo las consecuencias legislativas y penales del populismo punitivo y, en la sexta sección, presento una propuesta normativa para reducir los efectos del populismo punitivo.

Palabras clave: populismo; punitivismo; moralismo; redes sociales.

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To *Consuelo*, my beloved dog

I. Introduction

In 2021 *Punitive Populism (Populismo Punitivo)* was published. In this book I raised a critique of the current criminal law discourse. Provoking topics such as the definition of punitive populism, media criminology or lynchings in social media provoked interest in an audience beyond the boundaries of criminal law.² This led to the translation of my book into Italian (Nava, 2024). Four years have passed since its original publication and I claim that the main tenets of this

² For some reviews, see, por example, Lira, G., Populismo punitivo/Favela Chic, <https://www.lja.mx/2021/11/populismo-punitivo-favela-chic/>; Hernández, S. (2022). Nava Tovar, A. Populismo punitivo. Crítica del discurso penal moderno. *Revista Mexicana de Ciencias Penales*, 5(17), 163-170. <https://doi.org/10.57042/rmcp.v5i17.499>; Mesmoudi, M. (2023). Hacia una sociedad ejemplarmente punitiva. *Panorama. Revista de la Universidad Autónoma de Baja California Sur*, (67) 84-88. <https://www.uabcs.mx/documentos/revistaPanorama/Panorama%20digital%20revista%20No%209.pdf>; Contreras, R. E. (2023), Reseña: "Populismo punitivo o las caricaturas de la «justicia», *Enfoques jurídicos*, (8), 123-128, <https://doi.org/10.25009/ej.v0i08.2607>

book remain the same, although it is possible to explore ideas that reformulate and sustain its main assumptions. In this essay I intend to explain and restate the main and modest theses of my book in order to argue why punitive populism is today, more than ever, a threat to the rule of law. Thereby, I begin with the concept of punitive populism.

II. The definition of punitive populism

Although it is frequently used by judges, lawyers, legislators, political scientists and criminologists in the most varied debates, the concept of punitive populism does not have an univocal meaning. Rather, it is a nebulous concept that, just like the very concept of populism, is usually understood only when it is seen (Puhle, 2020, p. 72). The concept of populism is amorphous, elusive, specious. It is sometimes used mostly by politicians on both the left and the right to accuse the opposing party of political immorality. In the European and U.S. debate, the term populism is more often associated with the rise of extreme right-wing movements. But in Latin America the discussions around “left-wing populism” seem to positively vindicate the concept of populism.

Regardless of the positive and negative connotations that tend to be given in different regions, it is a concept that, since it refers to a multifaceted condition, “implies the redefinition of some of the essential characteristics of democracy, such as participation, representation and political conflict” (Blokker and Anselmi, 2020, p. 2). The concept of populism is usually associated with characteristics such as the rejection of representative democracy and its institutions, a response to a situation of crisis, an ideology lacking unique principles, the exaltation of a leader, and the expression of the sovereignty of the people. I have already developed these characteristics previously and it is not necessary to do it here (Nava, 2021, pp. 11-16; Nava, 2024, pp. 33-37). It suffices for me to point out that punitive populism does not coincide with all the typical characteris-

tics of populism in general (there is not always a leader), and, unlike other ideas about populism, it always has a negative charge (it is difficult to find any author who publicly stands up for it). This could lead to correctly consider punitive populism as a type of populism (Atzeni, 2023), although considering its specificities that I have previously stated.

Although the uses of disproportionate punishment are well known in history, John Pratt claims that the concept of punitive populism has a short history (Pratt, 2007, p. 2). The concept of penal populism has its origins in the nineties, and can be traced back to an essay written by Anthony Bottoms, entitled "The Philosophy and Politics of Punishment and Sentencing" (Bottoms, 1995, pp. 17-49). In this essay, Bottoms referred to "populist punitiveness" to describe one of the four main influences on contemporary criminal justice and penal systems in modern society. Therefore, Bottoms used this concept to refer to those politicians who seek electoral gain through the defense of political-criminal theses, such as the thesis that increased penalties would necessarily lead to a reduction in crime rates (the punishment-as-crime-reduction thesis) and the thesis that penalties reinforce certain moral consensuses essential to life in society (the punishment-as-reinforcement-of-moral-consensus thesis). In fact, in his most recent book Ferrajoli considers penal populism to be one of the three factors of the crisis of penal guarantees, understood as "the demagogic and conjunctural use of criminal law, aimed at reflecting and feeding fear" and, thus, "promoting a criminal law that is maximal, unequal, classist and seriously prejudicial to fundamental rights" (Ferrajoli, 2024, pp. 141-142).

The seeking of electoral gains as the rhetoric of punitive populism is important. However, the modern concept of punitive populism goes beyond both the usual characteristics of populism and the mere search for electoral gain. Punitive populism also aims to maintain the legitimacy of an established government and, above all, has significant support from civil society. Manuel Anselmi rightly accounts for how punitive populism is an unusual typology that goes beyond political specificity:

It is not a purely political populism, although the social conditioning that it generates and its instrumental use are political to all intents and purposes. Penal populism primarily relates to the realm of justice and the rule of law, the proper application of laws and the social conditioning that arises from improper applications.

Unlike purely political populisms, penal populism is not necessarily anchored to a leader; rather, it constitutes a dynamic that some leaders or organizations, be they social or political, can exploit to generate consensus. Penal populism arises in the sphere of the reception of the rule of law by citizens. Distorted interpretation of the functioning of the justice system on the part of public opinion produces a delegitimization of the rule of law. (Anselmi, 2018, p. 73)

The strategy of using criminal law to obtain or maintain political legitimacy, based on the premise that society itself demands greater penalties for offenders, however, requires further development, as it would run the risk of understanding all criminal policy as populist criminal policy. Although all punitive populism makes use of criminal law, not all use of criminal law is punitive populism. By means of two theses I explain the core of what I understand by punitive populism. These theses are the thesis of the exclusion of alternative sanctions to imprisonment and the thesis of the disproportionality of penalties.

According to the thesis of the exclusion of alternative sanctions to imprisonment, alternative measures to imprisonment are a burden to justice enforcement. Although various penal systems have institutionalized alternative dispute resolution mechanisms in criminal proceedings, society not only rejects these alternatives to imprisonment for certain crimes, but also demands custodial sentences or the implementation of pretrial detention for the largest number of crimes. Despite the institutionalization of alternative mechanisms, society continues to consider that the appropriate and necessary punishment for the crimes suffered should be imprisonment.

According to the thesis of the disproportionality of penalties, a penalty that is not disproportionate is no penalty. Society must

be defended at all costs. The purpose of criminal law, rather than protecting those fundamental legal goods, adheres to the media and social judgments of the moment and to political correctness. Nor does it matter if the penalties are effective, since several penal systems are not very effective, since what matters is that the discourse of the disproportionality of penalties is to the satisfaction of society, which rarely questions the levels of effectiveness of public policies.

Thus, I define punitive populism as the discourse that seeks to put an end to criminality and the perception of impunity by increasing penalties and crimes that merit imprisonment, using fear towards insecurity, biased media reports and the resentment of certain social groups or citizens in general towards crime, with the aim of obtaining gains in electoral times or legitimacy in situations of social crisis, even when such measures are ineffective in combating crime. In a similar vein, in the context of Italian penal populism, Claudia Atzeni points out that, In the criminal justice context, “populism manifests itself through the use of rhetoric and policies designed to gain popular support by promising simplistic and punitive solutions to problems that are complex ones” (Atzeni, 2024, p. 336). This raises, however, problematic issues. If punitive populism always has a negative charge, how does it manage to persuade society and even progressive groups? This process can be summarized as follows: punitive populism requires the media to establish a politics of fear towards certain groups. Subsequently, social media and contemporary moralistic discourse will enhance the desire to punish those who are considered offenders. Then, political groups will try to gain electoral advantage from it and will therefore create disproportionate criminal legislation. Finally, the judges, under pressure from the media, social resentment and authoritarian legislative margins, will end up applying longer prison sentences. Therefore, the following section will describe the influence of mass media on punitive populism.

III. Media criminology and punitive populism

Whereas much has been written in various languages on the influence of the mass media on criminal law and criminology (Schwind, 2001, pp. 258-286; Clifford and White, 2017; Jewkes, 2015), in Latin America it has been the work of judge and criminologist Raúl Zaffaroni that has had the greatest influence on its concept and effects. Media criminology, or at least what is understood by it, is not new. Zaffaroni considers that it has always existed, "and always appeals to a creation of reality through information, subinformation and disinformation in convergence with prejudices and beliefs, according to a simplistic criminal etiology based on magical causality" (Zaffaroni, 2013, p. 216), and he locates the detection of the effects of media criminology by various sociologists at the beginning of the 20th century and later points out the main medium used at the end of the 20th century: television.

Based on the reading of Zaffaroni's extensive work and other critical readings of media criminology, I offer a preliminary definition. Media criminology refers to those media discourses that construct distorted images of the offender, the victim, the police forces, the judges, and even the anonymous avengers, in order to increase the rating of violent news, the perception of impunity and, therefore, it manages to spread a politics of resentment in civil society, thus allowing various politicians to propose punitive policies and to give judges no other measure than imprisonment.

For media criminology the perception of insecurity or impunity of criminals plays a central role. Without the perception of certain crimes, media criminology fails. Therefore, the use of cruel images in newspapers and newscasts will be a daily routine. The crueller the images, the greater their dissemination. But not all images refer to the cruelty and violence of criminals. The spectacle of media criminology is also plagued by images rooted in the misogynist, classist, xenophobic and racist imagination of society. The essential thing for media criminology is to create moral panic in society and not what can potentially affect society. This is a kind of "cog-

nitive demagoguery" (Bronner, 2016, p. 93). which will then impact on the punitive demands of civil society. Therefore, I am interested in pointing out how media criminology portrays the stereotypes of some characters. These are the stereotypes regarding the criminal, the victim, the police and the vigilante.

1. The Criminal. Perhaps the latinamerican stereotype of the criminal is the most negative in our society. It is easy to see how the middle class has created criminal stereotypes regarding young men, poor, migrants, dark-skinned, of low economic condition and many of them have names of American series of the nineties ("Kevin", "Brandon", "Brayan"), representatives of certain subcultures and coming from certain spaces. One only needs to look at media reports in which the poor young man is associated with being a possible criminal. Media criminology tends to reinforce in society's imagination the perception that poor young people are dangerous. It matters little if society realizes the harmful effect of excluding them and turning them into a sort of self-fulfilling criminal prophecy. The simple fact of seeing poor young people in traditional neighborhoods or in gentrified areas is reason enough for moral panic to be activated.

This is not to say that the crimes of other groups are not relevant to public opinion. If a politician is accused of corruption and there is evidence of this, he or she will be the subject of special attention by media criminology, until the politician, as in almost every case, is released by virtue of due process violations. If at some other time the moral panic is based on sexual harassment or sex panic (Lancaster, 2011), media criminology will create the perception that all men are sexual harassers, thus taking advantage of feminist causes to introduce punitivist ideas into their discourses. Rather, the media overexploits the news about crime, whether it be morbid crimes or crimes committed by poor youths. However, since most crimes are committed by poor people, then these crimes will have greater visibility in the media.

2. The Victim. The image of the victim occupies the front and center of media criminology. The word of the victim in the pub-

lic sphere arouses social fury. With regard to certain crimes, “*A vítima tem sempre razão*”, that is, “the victim is always right” (Bosco, 2022, p. 17). The victim, as Daniele Giglioli puts it in a fearless essay,

[i]s the hero of our time. Being a victim grants prestige, demands to be listened to, promises and fosters recognition, activates a powerful generator of identity, of right, of self-esteem. It immunizes against any criticism, it guarantees innocence beyond reasonable doubt. How could the victim be guilty or responsible for anything? (Giglioli, 2017, p. 11)

Talking about the victim is complicated. In the age of the victim any discussion that casts doubt on the victim’s testimony must be rejected and immoralized. The victim should not be confronted. For media criminology, the victim of a violent crime represents the best way to institutionalize moral panic in society. There is an overexposure of the dead victims’s bodies or the survivor’s testimonies. At first glance, it might be tempting to think that the media cares a great deal about the victims. But this is far from correct. The body of the dead victims, the testimony with rage, the pain of the surviving victim, is used to increase the rating of the news, not to seek justice. Media criminology knows how to use the victims, or to take advantage of visually shocking crimes such as sexual crimes against women, to infuriate society and demand disproportionate penalties from the legislature that judges need to observe.

3. The police. If criminals are labeled as dangerous beings, then police officers must be labeled in almost the same way. Any information that proves state agents’s crimes is maximized by the media to create moral panic towards state police agencies. It is clear that not all police officers are honest, but it is also not true that all police officers are corrupt and violent. Ironically, the mass media as well as the hasty reading of philosophers such as Benjamin (Benjamin, 1999), Foucault (Foucault, 1975) and Agamben (Agamben, 2003),³

³ I am by no means opposed to reading such philosophers. Indeed, they are very important philosophers. However, they deserve to be read systematically and critically, beyond the superfluous readings made by legal theorists.

coincide in presenting the police as an arbitrary and irrational power. However, the social labeling of the police is also accompanied by an aesthetic valuation. The physical appearance of police officers is seen as an expression of their work ethic. The lack of discipline over the body is a lack of moral rigor. An excess of body fat is an absence of moral virtue. A confusion of an ethical judgement with an aesthetic judgement. After all, according to Álvarez, for “the society of exposure, fatness is a moral disease” (Álvarez, 2021, p. 293). The Latin American policeman is often the object of crude comparisons with the elite police of the United States and even with policemen in entertainment series by virtue of their different physiques.

If police officers are corrupt, the same can be said of public defenders, prosecutors and judges. All of them are perceived as negligent and corrupt bureaucrats who, for merely procedural reasons, end up freeing criminals who will then go on to commit the most atrocious crimes. The mass media knows how to exploit the procedural errors and corruption of some judges and public attorneys. According to Zaffaroni, the media “set up a show that presupposes an omnipotent State that if it did not prevent the misfortune was due to negligence or inefficiency, which sets in the collective imagination the dangerous idea that the State must be omnipotent” (Zaffaroni, 2011, p. 385). This will increase the resentment and distrust of the people towards any institutional authority.

4. The Vigilante (The Punisher). Faced with the corruption and ineffectiveness of the rule of law, the figure of the vigilante becomes the restoration of justice in its purest—and most retributive—sense. No matter how much the vigilantes are criticized, in some societies they will always have more legitimacy than authority. They are the ultimate reconciliation between legality and legitimacy. The neighborhood vigilante reconciles the ideal dimension of law with the real dimension better than Robert Alexy would think. The force of law of the vigilante, located outside the law, is experienced by society as a genuine act of justice and the basis of authority, because it goes beyond formal law and its guarantees in favor of criminals. Ferrajoli’s garantism, in the face of the vigilante’s re-

volver, has little chance of survival. In the face of society, the vigilante is a man of justice; garantism, a supporter of criminals.

Therefore, media criminology will provoke a moral panic that will open the Pandora's box of punitive populism. Ratings benefit media criminology over a critical-academic discourse. Moral panic or fear affects the whole society. However, there is something more to say about fear; it can turn into hatred, rage, resentment, feelings that will engender punitive populism from within society itself. Fury, in Nussbaum words, is the daughter of fear (Nussbaum, 2018, p. 84). And fury will now be enhanced in the digital age through social media. Therefore, the focus of the next section will be centered in social media and punitive populism.

IV. Punitive populism and social media

Perhaps the most noteworthy subject of my book revolves around the relation between social media and punitive populism. This topic deserves some remarks. Much has been written about the relation between the mass media and media criminology, but not much has been written about the relation between social media, public moralism and punitive discourse. This is a novel topic in the field of criminal law and criminology for several reasons. Reflections on the digital age have given rise to suggestive reflections on the manipulation of our brain in the face of the cognitive market of information (Bronner, 2022) or the display of moral virtues as a status symbol (Hübl, 2024). In my reflections on punitive populism, however, I did not address these issues in as much depth as I would have liked, but I can point to the consequences of influencers and moralism for the criminal justice system.

Apparently, our digital age have fulfilled the dream of a faster and horizontal communication. The official news are contrasted and questioned by people who now gain visibility in the digital age. Knowledge is no longer spread by elite people and experts, but by anyone who may even have more followers. But this dream also

generates issues that impact the criminal justice system. Our digital era is no stranger to society's emotions of fear or anger. Rather, the digital era amplifies these emotions and take them to a new level. In social media, people reflect an image to others. By being exposed to the gaze of others, the moralistic representation impacts on the punitive culture.

Social media favor those who exalt their moral virtues. Being a digital warrior and not an analytical philosopher generates greater interest in the digital community. The emergence of woke thinking and cancel culture account for this exaltation. By virtue of the moralistic outbreak in social media, many people will show that they possess certain moral virtues and awareness of social, sexual and racial injustices in order to identify with other people and gain legitimacy. Moralism, however, should not be identified with morality. John Kekes correctly states what is meant by moralism:

Moralism is the misguided tendency to exaggerate the moral importance of what has little or none. Led by this misplaced emphasis, moralists arrogate to themselves a spurious authority to judge others. They cultivate a hyperactive sensitivity that finds serious moral problems behind ordinary, customary practices, and condemn those who resist their bullying for colluding in immorality. (Kekes, 2014, p. 101)

There has been talk of cultural, human, social and erotic capital, but little has been written about that capital that is eagerly sought after in social networks: moral capital, a precious good (Hübl, 2024, p. 125-126). This form of public moralism, correctly seen by Hübl as a moral spectacle (*Moralspektakel*), however, claims an active stance against social problems and enemies, a stance that is usually both emotional and punitive. Hence I can sustain the following thesis: there is no moralism without punitivism and there is no punitivism without moralism.

Social media extend the exposure of crime news that belong to the traditional media field and amplify social resentment. Social networking sites like Facebook or X become the preferred

way for citizens to express social rage regarding crime. This leads to the fact that accusations of corruption of politicians, sexual harassment of academics or cruel crimes are the object of social demands for justice. On the one hand, this seems to bring people closer to justice. On the other hand, this can produce severe effects on the legitimacy of the criminal law system. This is where problems concerning due process and social lynchings start.

In theory, accusations on social media could give rise to reasonable debates about the reasoning of the authorities. But nothing could be further from the truth. Once news of an accusation or crime spreads, superfluous and emotionally charged comments emerge on social media, harmful to the legitimacy and effectiveness of the criminal justice system. Criminal justice is an issue that concerns society and it is no longer enough for some experts to express comments that few people will understand. But this does not have to result in opinionators and influencers on X and Facebook, lacking the necessary expertise, being the ones to direct the investigations and judicial decisions of the criminal justice system. This kind of opinions will divide society and bring out the worst in it. In Bronner's words, "the most trivial and unremarkable event becomes a moral issue on which everyone must imperatively take a position. Every such event is an occasion for people to exhibit their moral intransigence and the beauty of their soul" (Bronner, 2022, p. 110). Do Bronner's words sound familiar?

Think, for example, of a politically incorrect comment or one that calls into question an anonymous accusation. If someone demands that the accused party defend himself against a victim's accusation as a basic rule of argumentation, he or she will run the risk of being lynched on social media for his alleged lack of sensitivity. One party must be morally destroyed and another is shielded against all confrontation. The status of victim confers "a form of adamic innocence; to others, a moral responsibility from birth" (Bronner, 2022, p. 113). As Giglioli has already noted with regard to the quarrelsome style of discussions, "the longer an Internet debate goes on, the closer one gets to a comparison with Hitler or the

Nazis” (Giglioli, 2017, p. 35-36). The epidemics of sensitivity in universities are a clear example of this. Questioning a group considered a minority carries the risk of being cancelled. Thus, epidemics of sensitivity, “which express the will not to expose oneself to contradiction, are often transformed into a reflection of censorship” (Bronner, 2022, p. 114).

The same counts for the impossibility of criticizing the punitive tendencies in social media. If a person questions punitive trends regarding a criminal reform or sanction, then he or she will be attacked with fallacious arguments or cancelled out by the opinion of influencers and their followers. 240 characters, written in an emotive tone, are worth more than a critical inquiry into the presumption of innocence beyond a reasonable doubt. Rather, the presumption of guilt must be categorically assumed in order not to be out of fashion. The effects of the so-called echo chambers of social media and their preference for bad news and media lynching override critical thinking.

The machinery of social lynching is very difficult to oppose because many media lynchings are based on a claim to correctness or justice, namely, the claim according to which the cause is just, objective, desirable, in moral terms.⁴ After all, in times of virtual moralism, who does not want crimes against the environment, women or animals to be sanctioned? Who could openly defend racism, classism, homophobia or misogyny? Even the most racist and classist teacher will adhere to the public punitiveness if someone is discovered with his or her same private prejudices, just as the most misogynist and homophobic teacher will upload on X or Facebook a profile picture with badges supporting feminism, and will not hesi-

⁴ In a recent paper I have further developed the idea of the claim of correctness (Nava, 2023a, p. 149-153), as Alexy puts it in his non-positivist account (Alexy, 2021, p. 36-40). In my view, the claim to correctness or to justice is raised not only by law, but by any authority or institution that aspires to be legitimate or morally justified. Even the critics of this claim will shield themselves under arguments that aspire to justify themselves to others. But this rational justification makes it more difficult to oppose the current moralism which, in the name of morally acceptable causes such as feminism and the fight against racism, introduces punitivist ideas into society.

tate to join the social lynching or cancellation of whoever is labeled as homophobic or misogynist.

Thus, punitive discourses are camouflaged with moral correctness, just what punitive populism requires to be incorporated into various progressive causes. Naturally, there will be people who will doubt the rationality of these punitive and lynching practices made by society. But in the face of the onslaught of virtual publications and popularity of those who begin the disqualifications towards certain subjects, they will have no other way but to join the defamation campaigns, because not even silence in the face of defamation is an option (“if you keep silent, you are on the side of the crime”, “you do not speak because surely you do not understand sisterhood”).

But no one is safe from these lynchings. To preach moralism and punitivism is easy and enjoyable. To suffer the excesses of moralism and punitivism is not. This is a lesson that people who have fallen into moralistic positions have had to feel in their own flesh to realize the disproportionality of punishment. We have seen how famous academics (renowned portuguese sociologist Boaventura de Sousa Santos) or progressist groups (“Poder Prieto” in Mexico), who have previously made moral judgments about injustices, when accused of sensitive issues, such as sexual harassment or cultural appropriation of the political agenda of excluded social groups, have been lynched. And the same goes for the application of cancel culture, hateful speech or penalties imposed on people who have preached moralism and punitivism through movies, music or opinions in social media and then were found to have made politically incorrect comments or illegal acts in some social network or video. The recent case of the rise and fall of the film Emilia Perez is quite illustrative in this regard.

I fully understand the anger in these cases. To abuse academic power and claim to represent disadvantaged groups in order to commit the same attitudes of privileged groups is something that deserves to be criticised. But caution must be exercised. Ilse Torres is right to point out that emotions play a determining role in the aspiration for just societies. But just as there would be emotions

with the potential to motivate behaviours that correspond to such relevant principles in our communities, there would also be emotions that are risky for their realisation (Torres, 2024, p. 26). Anger at unfounded accusations can be self-defeating for good causes.

We see the same thing when high punishments in social media are requested. One never knows when disproportionate punishments will be applied to innocent people. But it matters little or nothing. Modern societies have fallen into sustaining authoritarian penal sanctions, even knowing that these sanctions are ineffective against crime. The important thing here is to highlight the punitive characteristics that social media enhance with the public display of moral virtues. Various progressive, environmentalist, feminist, and animal rights positions have found on social media the ideal place to express their demands, but they have also succumbed to the idea of thinking that punitivism will solve the problems they fight against. This is perhaps a paradox that punitive populism can create through its expansion on social media. This will pave the way for authoritarian legislation to be developed with the support of a good part of these groups. The following section will explain the institutional problems of moralistic punitivism.

V. To legislate and to sanction

To cancel, to lynch, to incarcerate. Although these are differentiated forms of punishment, they are social and institutional expressions of disapproval of actions and crimes. In the face of serious crimes such as femicide, rape, kidnapping, robbery or extortion, society demands a response from the State. Doing nothing is not an option. However, criminal policy must be guided by specific parameters, guidelines or normative principles. Sanchez-Ostiz, based on principles theory, has developed a characterization of the principles of criminal policy (Sánchez-Ostiz, 2012). It is not necessary to present a development and critique of these principles here. It suffices to mention the three general principles and point out how punitive

populism gives priority to one of them over the other two competing principles.

These principles are the *Principle of Security*, the *Principle of Legality* and the *Principle of Respect for Dignity*. According to Sanchez-Ostiz, we have, "in the first place, the obligation to assure the foundations of social life (security in social life); followed, second, by the obligation to respect human freedom, therefore the ideal means to achieve the protection of social life will be norms and not factual instruments (legality as legal security), with all that entails; and third, that the dignity of the human being must be respected as such (respect for dignity in the means of protection)" (Sánchez-Ostiz, 2014, p. 528).

It can be seen that these principles, while not absolute, are in conflict. Incarceration, after a trial that complied with legal requirements, affects human dignity. But human dignity also imposes limits on criminal punishment. I am thinking for example of the prohibition of torture, the death penalty or disproportionate custodial sentences or the use of mandatory pretrial detention. Notwithstanding that these principles seek to limit legislative discretion, with punitive populism the notion of proportionality between the offence and the sentence is at risk. Thus, the legislature requires punitive populism to persuade society that there is a dangerous enemy or them against whom disproportionate measures must be taken.

Carl Schmitt, in *Der Begriff des politischen*, points out correctly that all politics involves a distinction between friend (*Freund*) and enemy (*Feind*) (Schmitt, 2009, p. 25). In the same way, punitive populism appeals to the right causes to create enemies within society. Whether it is the urban outcast (Wacquant, 2008), the indigent, the migrant, the young person living in the peripheral suburbs, punitive populism requires the creation of a common enemy to impose an authoritarian penal policy. In Latin America the poor youth will be labeled as delinquent, while in Europe migrants will be the target of attack of penal populism. Enzo Traverso has pointed out how Marine Le Pen in referring to migrants does not appeal

to racist issues, but appeals to human rights to defend French women against Islamic obscurantism (Traverso, 2023, p. 30).

Experts will obviously be quick to criticise a criminal policy that prioritises the principle of security. But it should be noted that it is now up to the influencers the *editorialization of the world* (Bronner, 2022, p. 158). The crime policy that will sell and convince the most will be the one that promises to end insecurity at any cost. Hence, the principle of security of social life will have greater weight with respect to the principle of legality and respect for dignity. And such punitive policies will have in some countries democratic support. The best example of this is El Salvador's President Nayib Bukele. In March 2022, Nayib Bukele, self-proclaimed as "world's coolest dictator", introduced an state of exception that suspended certain fundamental rights, including due process, with the claim of restoring security to citizens that suffered extreme violence by street gangs. As a part of Bukele's public security strategy, he opened the *Terrorism Confinement Center (Cecot)*, El Salvador's maximum security prison. Despite criticism from academic and human rights groups, Bukele's popularity did not decline, but even allowed him to have admirable democratic legitimacy. Not only did he obtain a supermajority in Congress, but in 2024 his popularity is around 87 percent.

Bukele has such confidence in his democratic support that he even invited Luis Arturo Villar Sudek, a Mexican influencer ("Luisito Comunica"), to do a report on this maximum security prison. This influencer, far from criticizing human rights violations, left this prison with "a certain sense of relief and empowerment", and later took some photos with the "world's coolest dictator". So far the video has more than 4100000 views on Youtube.⁵ This confirms the social support of punitive populism. And the same can be seen with respect to authoritarian policies such as mandatory pre-trial detention or even extrajudicial executions: society usually supports these

⁵ <https://www.youtube.com/watch?v=69qKUoGhoQo>. Last revised on September 4, 2024.

illegal policies or actions. The arrival of Javier Milei to the Argentine presidency also announces the introduction of “iron fist” (“*mano dura*”) policies against crime. With notable exceptions such as Pablo Stefanoni’s ingenious reflections concerning how to read the right and some early warnings about phenomena that may still be embryonic or marginal but with expansive potential (Stefanoni, 2022, p. 197), various democracy theorists did not take Milei’s candidacy seriously, and now that he is in charge punitive policies have been announced. Milei has even said recently that Argentina “is a blood-bath because of Zaffaroni’s ideas”.⁶

But not only countries with right-wing governments regard punitive populism as a primary policy. In Latin America, left-wing governments have also succumbed to punitive populism. In Chile, the National Congress has passed laws that emphasise the punitive nature of law enforcement. Of the 54 bills passed up to May this year, 60% are dedicated to increasing penalties, establishing prison sentences or limiting parole options (Fuentes, 2024). The same can be said of Mexico. Currently, the Mexican legal system continues to apply mandatory pre-trial detention, despite the fact that it is not compatible with international obligations under the American Convention on Human Rights, as pointed out by Arnulfo Daniel Mateos (Mateos, 2023). Mandatory pre-trial detention, as a precautionary measure, clearly needs to be subjected to a proportionality analysis (Mateos, 2024, pp. 253-254): But, still, it continues to be applied for reasons based on giving greater weight to the principle of security. Regardless of the assumed conceptions of punishment (Torres, 2025), which, as I have pointed out in my last book, were a matter for classical philosophers such as Hobbes, Feuerbach, Kant, Fichte or Hegel, all of whom saw that in order to understand the basis of punishment one must delve into the nature of the human being and society (Nava, 2023b, p. 169), punitive populism aims at making prison sentences the preferred punishment of choice. Judges will have to punish with imprisonment in order

⁶ <https://www.youtube.com/shorts/vhT3Bmbgu9Q>. Last revised on September 4, 2024.

to have the legitimacy of the punitive society. An interesting paradox arises here, highlighted by Massimo Donini: “Penal populism therefore is an expression of *criminal demagoguery* (*demagogia penalistica*) equally divided between legislation, politics and the judiciary, where the judiciary, which initiated it, also takes on the paradoxical task of containing it” (Donini, 2020, p. 13).

Against this scenario, judges who do not punish people considered criminals will be subject to social criticism or even be suspended. Precisely, in the context of political polarization (Flores, 2014, pp. 103-117), the judicial branch will be criticized for being unresponsive to popular demands for justice claimed by civil society⁷ As Alejandro Sahui points out, Schmitt’s ghost appears in the configuration of institutions that encourage the participation of the people without deliberative instances of mediation (Sahui, 2024, p. 97). In this sense, measures such as mandatory preventive imprisonment or disproportionate penalties will be in line with the fury of a society that is tired of crime and impunity. The greater the degree of media coverage of the crime, the greater the penalty imposed. The greater the degree of social resentment, the greater the penalty imposed. In this scenario, the proper interpretation of the law or the rational analysis of the evidence will be of little importance. The judge thus either becomes a representative of social irrationality by reaffirming media trials, or he becomes an enemy of the people’s affections by following rules such as due process. Seen in this light, punitive populism is preparing its triumphal march.

⁷ The judicial branch, labeled as conservative, is usually one of the preferred targets of punitive populism. In this regard, Jan-Werner Müller rightly points out that “the populist ideal became reality in the form of strengthening the executive while diminishing the power of the judiciary and/or staffing judicial offices with partisan actors. Thus the new constitutions helped decisively in the populist project of «occupying the state,» as the shift to a new constitution justified the replacement of existing office holders” (Müller, 2016, p. 66).

VI. Is there a way to resist punitive populism?

So far it might seem that there is nothing to do against punitive populism. As I write these lines a number of progressist groups, citizens and legislators still consider disproportionate punishments as more important than any other policy to fight against crime. The persuasive effects of punitive populism require direct confrontation, and not a mere contemplation of reality. I believe that one of critical criminology's merits was to put criminal policy and current criminal biases under scrutiny. But critical criminology's discourse was unable to come up with a proposal to criticize and change populist criminal policies. I am aware that crime prevention necessarily involves minimal criminal law and non-criminal policy. Hence, I fully adhere to Ferrajoli's latest reflections in order to refound penal garantism and to advocate for "*un diritto penale minimo e un diritto social massimo*" or "a minimum criminal law and maximum social law" (Ferrajoli, 2024, p. 278). This is a formula that should be universally valid in any state under the rule of law.⁸

I believe, however, that more can be added regarding the influence of punitive populism on civil society. This is where I think my ideas can contribute further. For this reason, I present a normative proposal to contain punitive populism. The starting point consists in recognizing the dual dimension of criminal law. In the field of the philosophy of law, Alexy presents the thesis of the dual nature of law. According to this thesis, the "factual dimension is represented by the elements of authoritative issuance and social efficacy, whereas the ideal dimension finds its expression in the element of moral correctness" (Alexy, 2021, p. 36). Thus, coercion and correctness are presented as two sides of the same dimension. For-

⁸ When I refer to the idea of rule of law, I want to emphasize the normative idea of a system of government in which its authorities are constrained by law. In order to accomplish that idea, States divide the government powers in different branches and entrench civil liberties in constitutional walls (like due process and equal protection under the law). Of course, I am aware that, strictly speaking, different notions used to refer to the rule of law are not equivalent (i.e., "Rechtsstaat", "Estado de Derecho" or "Regle de Droit"). In this regard, see: Mora-Sfuentes (2021, p. 103 ff).

unately, it is not necessary to develop this topic here. Suffice it to say that in general terms criminal law shows the extremes of the separation between the two dimensions. On the one hand, coercion “is necessary if law is to be a social practice that fulfils its basic formal purposes as defined by the values of legal certainty and efficiency” (Alexy, 2021, p. 30), while on the other hand, law, as a social practice, claims to be legitimate in a moral sense.

Any explanation of institutional authority requires, in my view, to understand both dimensions of law. Criminal law without critical criteria or correctness is authoritarian law; without coercion, ineffective law. Authoritarian criminal law and ineffective law are often pathologies of legal systems. Punitive populism seeks to make criminal norms and institutions effective by increasing the coercive dimension, without taking into consideration the moral and legal validity of the measures, since it only seeks to gain or maintain political legitimacy at any cost. Thus, the critical or ideal dimension of law should require criminal law to take the human rights of the victim, the accused and the sentenced person seriously, in accordance with respect for the human dignity of all these parts and not to base its decisions on media or/and political criteria. Likewise, the factual or real dimension of law must demand from criminal law that judicial decisions respect the principle of legality, and, at the same time, be effective to a high degree. Both dimensions need each other for the penal system to acquire legitimacy in the face of a society that lost its confidence in criminal justice system and its institutional responses to crime. The critique of punitive populism must attack the fallacious and perverse representations of media criminology and social media. Some past reflections may be of interest here.

The task of a critique of punitive populism can be summarized as that of expounding its relation to moralism and social media. Since punitive populism can be assumed by any political party or government, one must be critical even of personal political preferences. This is not easy, since one can agree with the general idea of a liberal or distributive policy and still criticize the criminal legislation of the government or opposition. In the same way, a frontal

critique must be made of the media's cognitive biases towards subjects considered criminals, since they are mostly biases linked to social inequality and xenophobia.

In the same way, society also needs to understand that empathy toward victims should not be reduced to encouraging media or physical lynching and calling for disproportionate penalties. Nussbaum is right when she reminds us that we should not support victims in satiating their desire for revenge, but rather subsidize some kind of therapy to help them face what happened to them (Nussbaum, 2016, p. 196). In this sense, it is essential to seek that the damage, as far as possible, be repaired, and, above all, the authorities should not resort to public apologies to the victims as a form of political ritual (Lübbe, 2003), but rather be concerned with preventing people from becoming victims of other crimes, either by criminal actions or by the actions and/or omissions of State's authorities.

I should also recall something fundamental regarding the communication of the authority with society. There will be media cases linked to criminal justice that might divide public opinion. In some cases due process and the presumption of innocence will even be considered legal formalisms in favor of criminality. In these cases, it is necessary that the prosecutors of the criminal law system offer society the clearest and most precise explanation of its institutional reasonings. This will minimize the resentment of society, derived from an understandable discomfort with certain controversial decisions. Torres states correctly that "the most significant challenge in the criminal law field is how to configure a system that allows us to avoid or limit the harm we do to ourselves [...] without the need to add more pain" (Torres, 2024, p. 195). However, I would add that disagreement about such polemic cases is inevitable, but the reduction of procedural injustices and impunity is essential to resist punitive populism. Due process is not corruption or ineffective formalism, but a basic guarantee of the rule of law.

Finally, the critique of punitive populism must also be made in social media, since the flow of information in the digital age cannot

yet be regulated (Barberis, 2020).⁹ Even if pain and anger at crime lead citizens to demand higher penalties, caution must be exercised. This implies not giving any public opinion, accusation or denunciation the character of a definitive truth. Notwithstanding the fact that social media ecochambers and influencers begin to promote resentment, it is a priority to assume a critical and analytical position to convince society that punitivism, without respect for the presumption of innocence, judicial impartiality or the verification of facts, is a merely emotive response that encourages authoritarian legislations. In Bronner's words:

The use of analytical thinking, critical thinking, and what we generally call our rationality requires a slower, more energizing, and therefore more painful mental pathway that cannot always compete with instant cognitive pleasures. [...]

Let us repeat it firmly: there is a very steep slope that leads us to cognitive demagoguery, to fascination with the negative and that, in general, allows the dark side of the cognitive apocalypse to prevail; however, that slope is not irresistible. (Bronner, 2022, p. 262)

In this sense, whoever assumes to be a critic of punitive populism will be an uncomfortable person, because, as Zaffaroni says, "[H]is permanent dysfunctionality for punitive power -which constantly drives for its expansion and decontrol- will make him eternally uncomfortable" (Zaffaroni, 2011, p. 622). This choice implies being, at times, an uncomfortable person for a good part of the media, civil society, the political power and the judiciary. Any person who expresses a dissident voice on social media runs the risk of being vulnerable to identitarian and dogmatic attacks. I say it again: in populist times, no one is immune. This is the price to pay in a pu-

⁹ In *Populismo digitale. Come internet sta uccidendo la democrazia*, Mauro Barberis presents a proposal for dealing with media populism: public and international regulation of the Internet. However, the technical and political problems involved in this remedy are very difficult to implement, as Barberis acknowledges (Barberis, 2020). This book has been recently translated into Spanish (Barberis, 2024).

nitive society. But it is also the value to be gained in a society that, despite everything, still appreciates the rule of law and its virtue.

VII. Conclusion

What I have sketched here shows that punitive populism today is a much more complex phenomenon than the mere pursuit of electoral gain. The various social expressions of moralism in social networks, the culture of cancellation and physical lynchings are yet another manifestation of punitive populism that increases penalties and increases criminal standards. Not paying attention to these expressions is a categorical mistake. Therefore, my work presents not only a description of punitive populism, but also a strategy to confront this form of populism from the very manifestations that engender it, whether from an authoritarian government or from progressive groups that somehow think that criminal law is their ally in fighting against any kind of injustice. Our political imagination needs to defend the legacy of humanist ideas with equal rigor and sensitivity. If punitive power, which derives from political authority, aspires to social legitimacy, then it should not forget to protect individuals from savage powers and authoritarian state measures. Perhaps it is time to take society's punitive claims seriously. Explaining how all these punitive manifestations hang together, and seeking to neutralize them, even at the cost of being censored or canceled, is a good place to start.

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