# GRANT THE PRESUMPTION OF INNOCENCE (ONLY) WHEN IT'S PERTINENT

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ABSTRACT

*Every term of art in the law that can harm human beings ought to be intelligible. Courts, legislatures as statute-writers, and scholars improve clarity when they explain and reassess high-stakes legal concepts. One such concept has escaped that attention. The United States Supreme Court wrote the presumption of innocence into constitutional criminal procedure; the phrase fills conversation around the world. But what is it for? Judicial decisions, statutes, scholarship, and lay discourse have left its meanings elusive.*

*Superficial benevolence in the term might explain this indifference to precision. Ascribing innocence seems gentle; "presumption" sounds logical. In application, however, purporting to presume innocence imposes plenty of harmful consequences, and rarely with any logic or rigor.*

*Time for clarity. The presumption of innocence is an instrument deployable toward desirable ends, rather than a desirable end in itself. It can have both good and bad effects. While harm derived from misapplication of this presumption has its fullest record in one setting, the reception of sexual misconduct accusations, the risk of epistemic injustice that it brings to factfinding is present anywhere individuals accuse and are accused. The presumption of innocence ought to be granted and withheld in proper measure.*

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## INTRODUCTION

When the president of France urged his countrymen not to take too seriously a cluster of accusations of sexual misconduct brought against the French celebrity Gérard Depardieu, he wrapped his support in a principle.[1] "I am unassailable on issues of the fight against violence against women," Emmanuel Macron said, "but things have to be done in the right order. Among our values there's the presumption of innocence."[2]

Making a similar claim about American values, Senator Susan Collins cited the presumption of innocence to support her vote to confirm Brett Kavanaugh to the Supreme Court after lengthy testimony in the Senate Judiciary Committee about sexual misconduct by Kavanaugh in decades past.[3] "[W]e will be ill served in the long run," Collins said, "if we abandon the presumption of innocence and fairness, tempting though it may be."[4] A chorus of commentary echoed Senator Collins by calling for the same shelter. "Well-Deserved Victory for the Presumption of Innocence," declared a blog headline.[5] "Losing the

1. Clea Caulcutt, *Macron Makes Enemies Defending Rape-Accused Star*, POLITICO (Jan. 3, 2024, at 4:00 ET), https://www.politico.eu/article/france-emmanuel-macron-gerard-depardieu-enemies-controversy-allegations-sexual-assault-violence [https://perma.cc/T8RC-4RSP].

2. *Id.*

3. *Hearing on the Nomination of Brett Kavanaugh Before the Committee on the Judiciary*, 115th Cong. (2018) (statement of Senator Susan Collins), https://www.collins.senate.gov/newsroom/senator-collins-announces-she-will-vote-confirm-judge-kavanaugh [https://perma.cc/MU5R-P95T].

4. *Id.*

5. Ojel L. Rodriguez, *Kavanaugh: Well-Deserved Victory for Presumption of Innocence*, THE GLOBE POST (Oct. 15, 2018), https://theglobepost.com/2018/10/15/kavanaugh-presumption-innocence/ [https://perma.cc/UFP4-DA3M].

Presumption of Innocence," from the National Review.[6] Fox News announced that Kavanaugh was Innocent until Proven Guilty.[7]

As the fame of an elderly actor and the notoriety of a 2018 judicial appointment recede, this shelter from accusations of sexual misconduct continues to thrive. Consider how the American public reacted to accounts about this type of misbehavior at a more recent time, November 2024. Calling these accounts accusations is accurate but something of an understatement, as ample evidence supported the truth of what the accusers said.

Before they elected one candidate to the presidency of the United States, voters had access to numerous accusations of him, one of which journalist E. Jean Carroll went on to prove in court.[8] Conduct by Donald Trump, a jury found, fulfilled the elements of a New York crime proscribing forcible sexual contact.[9] The trial judge who entered judgment this accuser confirmed that Trump as defendant "deliberately and forcibly penetrated Ms. Carroll's vagina with his fingers, causing immediate pain and long lasting emotional and psychological harm."[10] The accusation had filled news stories long before the verdict in early 2024 and the election later that year.[11]

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6. Thomas Jipping, *Losing the Presumption of Innocence*, NAT'L REV. (Sep. 25, 2018, at 14:11 ET), https://www.nationalreview.com/bench-memos/brett-kavanaugh-presumption-of-innocence/ [https://perma.cc/P4U5-SQJR].

7. *Quoted in* Kimberly Kessler Ferzan, *#BelieveWomen and the Presumption of Innocence: Clarifying the Questions for Law and Life*, 64 NOMOS: AM. SOC'Y POL. LEGAL PHIL. 65, 66 (2021).

8. Carroll v. Trump, 683 F. Supp. 3d 302, 305–06 (S.D.N.Y. 2023); *see* Jaclyn Diaz, Ryan Lucas & Ximena Bustillo, *See Where the Big Trump Cases Stand in the Months Leading to the Election*, NPR (Sep. 18, 2024, at 15:59 ET), https://www.npr.org/2023/07/20/1185762259/trump-criminal-civil-cases-lawsuits [https://perma.cc/8WBF-UNWC].

9. *See Carroll*, 683 F. Supp. 3d at 306–07.

10. Katie Herchenroeder, *New York State Passes Law That Could Have Counted Trump's Actions as Rape*, MOTHER JONES (Jan. 31, 2024), https://www.motherjones.com/politics/2024/01/new-york-state-rape-law-hochul-carroll/ [https://perma.cc/5BFT-LVCH].

11. Carroll is only the best-known, not the sole, such accuser. *See Sexual Misconduct Allegations Against Donald Trump–A Timeline*, GUARDIAN (Oct. 25, 2024), https://www.theguardian.com/us-news/2024/oct/25/trump-sexual-misconduct-allegations-timeline [https://perma.cc/F945-8VAQ]. Wikipedia maintains a page captioned "Donald Trump sexual misconduct allegations." *Donald Trump Sexual Misconduct Allegations*, WIKIPEDIA, https://en.wikipedia.org/wiki/Donald_Trump_sexual_misconduct_allegations [https://perma.cc/6YEM-8395] (last visited Nov. 30, 2025).

Soon after the November result landed, Trump chose several comrades in sexual-misconduct accusation-land for powerful positions. He picked for Attorney General a member of Congress who, according to a report by the House Ethics Committee, "regularly paid women for engaging in sexual activity, had sex with a 17-year-old girl, [and had] used or possessed illegal drugs."[12] For secretary of defense, Trump named a man who had responded to an accusation of sexual misconduct by paying his accuser and imposing a nondisclosure agreement as a condition of settlement.[13] Another of Trump's picks strayed from the denial playbook by responding to what an accuser said about his sexual misconduct with a text message to her that made apologetic noises while not quite admitting the truth of the accusation.[14] To lead a department he proposed to create, Trump chose a man whose company had reportedly paid an accuser $250,000 to settle her claim of sexual misconduct against him.[15] Another Trump pick for a Cabinet post looks benevolent in this assemblage: the sexual-misconduct complaint brought against her in court claimed she had enabled abuse by a predatory employee rather than perpetrated any on

12. Lisa Lambert, *Four Revelations from the House Report on Matt Gaetz*, BBC (Dec. 24, 2024), https://www.bbc.com/news/articles/c0mvpmnm9gno [perma.cc/U56-MHMH]; Kyle Cheney & Erica Orden, *Trump Selects Florida Rep. Matt Gaetz for Attorney General*, POLITICO (Nov. 14, 2024, at 16:18 ET), https://www.politico.com/news/2024/11/13/matt-gaetz-trump-attorney-general-pick-00189377 [https://perma.cc/PG2C-YHBJ].

13. Joseph Gedeon, *Pete Hegseth Will Lift NDA Related to Sexual Misconduct Allegations, Lindsey Graham Says*, THE GUARDIAN (Dec. 16, 2024), https://www.theguardian.com/us-news/2024/dec/16/pete-hegseth-nda-misconduct [perma.cc/62Y6-RPQ8].

14. *See* Rebecca Davis O'Brien, *Kennedy Sent Apologetic Text to Woman Who Accused Him of Sexual Assault*, N.Y. TIMES (Jul. 12, 2024), https://www.nytimes.com/2024/07/12/us/politics/kennedy-sexual-assault-accusation.html [https://perma.cc/D9GD-PP8V] ("I read your description of an episode in which I touched you in an unwanted manner. I have no memory of this incident but I apologize sincerely for anything I ever did that made you feel uncomfortable or anything I did or said that offended you or hurt your feelings.").

15. Jeet Herr, *Elon Musk's Creepy Workplace Is Techno-Feudalism in Action*, THE NATION (Jun. 14, 2024), https://www.thenation.com/article/society/elon-musk-sexual-harassment-techno-feudalism/ [https://perma.cc/32HD-VVX6] (reporting the news story of the $250,000 settlement, Musk's denial, and evidence that both the misconduct and the settlement occurred); *see also* Philip Wen, *Trump Selects Elon Musk to Lead Government Efficiency Department*, THE GUARDIAN (Nov. 13, 2024), https://www.theguardian.com/us-news/2024/nov/12/trump-appoints-elon-musk-government-efficiency-department [https://perma.cc/HE9K-RHXG] (discussing Elon Must's involvement in the Department of Government Efficiency).

her own.[16] These individuals, Trump very much included, enjoyed protection from a variation on presumed innocence.

Well-publicized instances of presumed innocence tend to have three inclusions in common—a female accuser, a male accused person, and an accusation of sexual misconduct, typically but not always rape—but the problem explored in this Article extends beyond the identity of claimants and respondents and one single category of wrongdoing. In telling deciders how to proceed in the absence of information or evidence, this presumption joins other gap-fillers that install material consequences. It shares commitments with jurisprudential mainstays that legal scholars continue to expound, including default rules,[17] the role of propositions and abstractions as guidance to judges,[18] the distinction between a rule and a standard,[19] the sociological construct of an unmarked category,[20] and the rule of law writ large.

Despite this proximity to concepts that occupy judicial exegesis and scholarship, the presumption of innocence has remained curiously under-explored. Judges mention it and at the same time appear to care little about what it means, where its impacts begin and end, which purposes it exists to serve, or how to measure it in operation.[21] Tendentious repetitions of the phrase keep it alive but do little to make it clearer.

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16. Kate Selig, *Judge Pauses Sexual Abuse Lawsuit Against Trump's Education Secretary Pick*, N.Y. TIMES (Dec. 8, 2024), https://www.nytimes.com/2024/12/08/us/linda-mcmahon-sexual-abuse-lawsuit.html [https://perma.cc/BU3P-H4FK].

17. *See* Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 729 (1992); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615, 616–17 (1990).

18. *See* Cass R. Sunstein, *General Propositions and Concrete Cases (With Special Reference to Affirmative Action and Free Speech)*, 31 WAKE FOREST L. REV. 369, 376 (1996).

19. *See* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–62 (1992).

20. *See* Wayne Brekhus, *A Sociology of the Unmarked: Redirecting Our Focus*, 16 SOCIO. THEORY 34, 34 (1998); Rebecca Bratspies, *"Underburdened" Communities*, 110 CALIF. L. REV. 1933, 1936–37 (2022) (drawing an analogy between unmarked category as a concept and the nonexistence of "underburdened" as a word).

21. "Whether the courts are discussing what the presumption of innocence is, what it does, or when it applies, confusion and contradiction are sure to be the hallmarks of those discussions." Davis Badger Anderson, Comment, *Walking with Shadows and Phantoms: The Presumption of Innocence and Bail Determinations*, 71 BUFF. L. REV. 883, 885 (2023); *see also* Carl-Friedrich

One might suppose that imprecision in legal doctrine matters only when someone can suffer from its lack of clarity.[22] Ascribing innocence seems gentle.[23] "Presumption" sounds like a well-controlled maneuver that resembles inductive reasoning.[24] Below this benevolence on the surface, however, presuming or purporting to presume innocence imposes bad consequences,[25] and rarely with any logic or rigor.

Fixing the problem starts with understanding the presumption of innocence in its only formal, official application: the criminal trial. Clarity here is foundational because judicial rulings on the presumption of innocence affect more than just the defendants and prosecutors who fight in court for the results they want and their successors who seek to cite or distinguish these decisions. What judges tell criminal-trial litigants about the presumption of innocence joins a durable record of contentions that partisans can assert. Engraved into published decisional law, this record travels to influence extralegal consequences. For these reasons the criminal trial holds central importance to the subject of this Article and sits at the top of its Part I to mark the core pertinence of the presumption of innocence in response to an accusation.[26] Core implying periphery,

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Stuckenberg, *Who Is Presumed Innocent of What by Whom?*, 8 CRIM. L. & PHIL. 301, 301 (2014) (stating that "all conceivable literal interpretations of the maxim make little or no sense, and . . . presumptions do not explain nor justify anything but are auxiliary norms which refer to the legal consequences spelled out in other norms").

22. *Cf.* Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 YALE L.J. 329, 348–49 (2024) (noting the Fourteenth Amendment's focus on threats to life, liberty, or property).

23. *See* Stuckenberg, *supra* note 21, at 304 n.16 and accompanying text (noting judicial and scholarly confusion on this point).

24. *See* DOUGLAS N. WALTON, ARGUMENTATION SCHEMES FOR PRESUMPTIVE REASONING 2–3 (1996).

25. *See* James Q. Whitman, *Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice*, 94 TEX. L. REV. 933, 934–35 (2016) (exploring, through the lens of comparative law, the presumption of innocence as a source of harshness rather than kindness).

26. An extensive literature about the presumption of innocence as it functions in real life complicates this preeminence. *See* CHARLES J. OGLETREE, JR., THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES JR. AND RACE, CLASS, AND CRIME IN AMERICA 9–10 (2010) (arguing that the true legal standard is a " presumption of guilt" that reveals itself "as events actually transpire" in the criminal justice system); Brandon L. Garrett, *The Myth of the Presumption of Innocence*, 94 TEX. L. REV. 178, 179 (2016) (calling the presumption "more of an ideal than real"); Elayne E. Greenberg, *Unshackling Plea Bargaining from Racial Bias*, 111 J. CRIM. L. & CRIMINOLOGY 93, 95 (2021) (identifying "a presumption of guilt for African American male defendants").

the presumption of innocence also holds force outside the sole context where American courts use it to undo judgments.

Accused persons other than criminal defendants at trial enjoy a claim to some variation on the presumption of innocence. Settings that qualify for some application of the presumption fall in what the latter half of Part I labels peripheral pertinence. This periphery occupies significant liminal space that covers what Kimberly Kessler Ferzan has separated as two venues where the presumption of innocence makes its impacts, "law" and "life."[27] In Ferzan's binary, "law" covers formal doctrine and "life" includes conversations, commentary, and judgments in the sense of lay opinion rather than anything a sheriff or court can enforce.[28] The two end points omit an important middle.

In the pertinence periphery that this Article stakes out, an accused person is not entitled to the same presumption of innocence recognized in constitutional criminal law, on one hand, but holds procedural entitlements that resemble the presumption of innocence on the other. Title IX safeguards that protect students accused of misconduct by higher-education institutions fall into the pertinence periphery.[29] When employers write human resources manuals that recite obligations and entitlements of themselves and their employees, they may choose to codify procedural rules;[30] these provisions can include modified versions of a presumption of innocence. Codes that govern clubs and associations provide other examples of middle-space formal or official contexts outside criminal law.[31] A distinguished federal judge has found another locus of the pertinence

Siting the criminal trial at the core of the presumption of innocence and ascribing "force" to it there, I do not claim that this doctrine offers protection in fact to persons accused of violating the criminal law.

27. Ferzan, *supra* note 7, at 66.

28. *See id*. at 77–81.

29. *See* discussion *infra* Section III.B.

30. *See* Rachel Leiser Levy, Comment, *Judicial Interpretation of Employee Handbooks: The Creation of a Common Law Information-Eliciting Penalty Default Rule*, 72 U. CHI. L. REV. 695, 696 (2005).

31. *See* Marilyn E. Phelan, *Expulsion of Members*, *in* 3 NONPROFIT ORGANIZATIONS: LAW AND TAXATION § 23:3 (2d ed. 2023) (noting courts' willingness to defer to club rules in determining the due process rights of club members who complain about expulsion).

periphery, an attenuated form of the presumption of innocence that benefits defendants in civil litigation.[32]

To see pertinence in this core-and-periphery perspective, envision concentric circles with the criminal trial at the center. Outer rings cover other loci of accusation that pose an arguable entitlement to the presumption of innocence as a safeguard for the accused person. This claim is relatively strong at the center of the outer rings, or what I've called the pertinence periphery. Because nobody is innocent of anything until proven guilty anywhere except at a criminal trial, to qualify for space near the core a setting must resemble the criminal trial in pertinent respects.[33] Some loci will qualify for the presumption of innocence; some won't. In this perspective, invoking the presumption of innocence to protect an accused person in a setting too far from the criminal trial becomes *impertinent*.[34]

Recall "among our values," the locus Emmanuel Macron mentioned when he invoked the presumption of innocence to benefit one individual accused by other individuals.[35] This characterization seems to regard the presumption as an unmitigated good like truth or beauty. Wrong about France, wrong everywhere. A presumption can aid adjudication or factfinding but it is not a value. Presumptions are instruments, or means to an end.[36] A value is an end in itself rather than an instrument. Like

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32. *See* J. Harvie Wilkinson III, *The Presumption of Civil Innocence*, 104 VA. L. REV. 589, 598, 612–32 (2018).

33. *Cf.* Herbert M. Kritzer, "*Data, Data, Data, Drowning in the Data*"*: Crafting the Hollow Core*, 21 L. & SOC. INQUIRY 761, 771, 785 n.70 (1996) (combining the metaphors of core-periphery and concentric circles).

34. For a more recent example of this impertinence than the 2018 defending of Brett Kavanaugh, consider what the astute journalist Josh Marshall wrote in early 2025 about the possibility that the governor of New York might deploy her power under the New York state constitution to remove the mayor of New York from office: "Before Monday I never agreed with . . . calls" that the governor do so, Marshall wrote. "Adams is a duly elected mayor and he is innocent of the crimes charged until proven guilty." Josh Marshall, *Monday Changed Everything: Gov Hochul Needs to Remove Eric Adams from Office*, TALKING POINTS MEMO (Feb. 13, 2025, at 19:22 ET), https:/talkingpointsmemo.com/edblog/monday-changed-everything-gov-hochul-needs-to-remove-eric-adams-from-office [https://perma.cc/6WHH-QFQR].

35. *See* Caulcutt, *supra* note 1 and accompanying text.

36. *See* Coffin v. United States, 156 U.S. 432, 459 (1895) ("[T]his *presumption is an instrument of proof* created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created.") (emphasis

every other instrument, the presumption of innocence exists to advance something other than itself.

That value, as defended in this Article, is *fairness understood with reference to asymmetry*. The state and the criminal defendant are uniquely unlike each other. Asymmetry that warrants the deployment of this tool amounts to one disputant's being able to harm its adversary without risking retaliation of the same nature. At both the criminal-law core and the nearby periphery, aggressive maneuvers available to the empowered side and unavailable to the other raise singular concerns about fairness. The other respect in which the state and the criminal defendant are different relates to their identity. The state is multiple and plural, the individual singular and solitary.

Fairness understood with reference to asymmetry is the end; we turn now to the means to that end. Because the presumption of innocence is an instrument that functions to mitigate a problem rather than a value in or of itself, it ought to be used when it's called for and not used when it can't help. That same generalization applies to every other tool. Instruments like a ladder, an awl with a sharp point, or a hammer weighted to be heavy at one end achieve excellent results and also do harm in action.

The instrument that occupies this Article achieves ends that vary. It is unambiguously well suited to one setting only—the criminal trial, its American home. The presumption of innocence can do good elsewhere too, but because it's a means in the mode of a hammer, rather than an end like fairness or truth, its impacts will not do good everywhere.

Impertinent applications of this presumption declare that an accusation of individual Tweedledum by individual Tweedledee must be received with skepticism. Right-thinking people should ignore or discount what Tweedledee said until a good enough reason for crediting this accusation emerges. Innocent until proven guilty, Tweedledum enjoys an entitlement not to suffer the consequences that crediting Tweedledee would

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added); Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 724 (2011) (demonstrating how the presumption historically functions as a procedural instrument).

warrant. Up goes Brett Kavanaugh onto his country's top court despite the careful expression, some of it under oath, of unrefuted accusations that included, and were not limited to, claims of sexual assault.[37] The president of France tells his countrymen to leave Gérard Depardieu alone.[38] Trump administration powerholders credibly accused of sexual misconduct escape the consequences that crediting these accusations would have generated.[39]

Away from the only setting where every defendant enjoys the presumption of innocence as an entitlement, listeners or onlookers or interlocutors may grant and withhold this favor at their election. The path of granting and the path of withholding are of equal valence in that neither is necessarily more just, generous, or valuable than the other. Onlookers outside the periphery who choose to deliver this benefit to accused persons are also free to render it in a weak or strong form as they please.

Recall the hammer, the awl, and the ladder as comparators. If what these things can accomplish does not aid the endeavor undertaken—if a blow, or a poke, or being able to climb is a bad means to an end—then these instruments ought to be left in the

37. *See* Nina Totenberg, *Federal Panel of Judges Dismisses All 83 Ethics Complaints Against Brett Kavanaugh*, NPR (Dec. 18, 2018, at 18:28 ET), https://www.npr.org/2018/12/18/678004085/federal-panel-of-judges-dismiss-all-83-ethics-complaints-against-brett-kavanaugh [https://perma.cc/6L5W-RBWT] (reporting that a judicial panel declined to investigate dozens of accusations on the ground that it had no disciplinary authority over a Supreme Court justice); *see also* Phil Mattingly, *How Brett Kavanaugh Explains His Baseball Card Debt*, CNN (Sep. 12, 2018, at 22:17 ET), https://www.cnn.com/2018/09/12/politics/brett-kavanaugh-baseball-ticket-debt-washington-nationals [https://perma.cc/ADS9-AAFX] (discussing the inquiry into Justice Kavanaugh's finances during his confirmation hearings).

38. He "is our *terroir*," meaning heritage, said a French casting director after the accusations emerged, "and in France, you don't touch the *terroir*." Caulcutt, *supra* note 1.

39. Only one of these picks withdrew, likely for a mix of reasons extending beyond his statutory rapes. *See* Mandy Taheri, *Matt Gaetz Mocked After House Applauds Fact He Won't Return to Congress*, NEWSWEEK (Jan. 7, 2025, at 15:11 ET), https://www.newsweek.com/matt-gaetz-mocked-after-house-applauds-fact-he-wont-return-congress-2009601 [https://perma.cc/RNN3-MC7X]. All who did not withdraw were confirmed by the Senate. *See also* Mariel Padilla, *The Growing List of Sexual Misconduct Allegations Against Trump's Picks*, THE 19TH (Nov. 21, 2024, at 15:40 ET), https://19thnews.org/2024/11/sexual-misconduct-allegations-trump-cabinet-picks/ [https://perma.cc/M88M-8LLP] (reporting that "[s]everal of the presidents-elect's top picks to lead his government have been accused of sexual misconduct. Matt Gaetz withdrew from consideration").

metaphoric hardware drawer or basement. Eschew them. A blow or a poke or a climb isn't always neutral. It can hurt.

Now comes the challenge of how and when to withhold this particular instrument when it ought to be withheld. Scholarly commentary with origins outside the United States has offered alternatives to the presumption of innocence that include "no presumption of guilt" and a "want of a presumption of guilt."[40] The neutrality of these phrases is attractive in principle, but negation in diction—"no" presumption, "want" used to mean absence or deprivation—might in practice demand too much from a listener who hears an accusation of one individual by another. The "view from nowhere" is hard to achieve.[41] Psychology, philosophy, and ordinary life experience show the impossibility of reaching a conclusion without some prior epistemic commitment.[42]

Just as Nowhere does not provide a point from which a view can emerge, pure neutrality is unavailable as a response to accusation. Inertia from a decider sides tacitly with the person accused. Other considerations might make refusal to consider the truth of an accusation acceptable, even desirable,[43] but as a stance it undermines the exercise of listening mindful to the possibility of truth in a statement. If an accusation could be true (and could also be false) and its truth or falsity matters, then listener-deciders need a heuristic to help sort false accusations from true ones and guide their judgment.

Enter, or re-enter, the application of pertinence and impertinence. "[W]hen there are contested factual situations," Kimberly Kessler Ferzan has asked rhetorically in her essay on the presumption of innocence, "what is the default position?"[44] A

40. Rinat Kinai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 273 (2002).

41. AMARTYA SEN, THE IDEA OF JUSTICE 160–61 (2009) (critiquing works of political philosophy that had found "the view from nowhere" attainable).

42. *See* Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1569–70 (1998) (exploring the necessity and explanatory power of "a point of view").

43. Here I am thinking about a rotten system that systematically imposes unjust punishments. *See* R.A. Duff, *Defending the Realm of Criminal Law*, 14 CRIM. L. & PHIL. 465, 498 (2020) (referencing the literature on criminal law abolition).

44. Ferzan, *supra* note 7, at 67.

default will always disfavor one side. To presume innocence of a person accused by an individual of misconduct is implicitly to presume a kind of guilt on the other side of the accusation.

What the impertinent presumption of innocence says the accuser must be guilty of is either insincerity (amenable to what this Article will label rudely as She's Lying) or incompetence (even ruder: She's Crazy),[45] maybe both.[46] A tacit presumption of guilt in this discounting of credibility has operated with particular force against persons who make accusations of sexual misconduct. Part II of this Article explores what writers call "the credibility discount" to argue that what this discount says about the presumption of innocence as a source of danger harms more than just girls or women as accusers and extends to more than rape, sexual harassment, or domestic violence as a subject of accusation.[47] This Part adds a novel claim that I call second-order epistemic injustice.

The credibility discount attacks the competence and sincerity of accusers but doesn't stop there: it also hides the ostensible basis for concluding that disbelief is deserved. Concealment worsens the injustice that accusers face. Being falsely accused of incompetence or insincerity is the first order of epistemic injustice they suffer; the second order arises from their inability to know which supposed deficiency of theirs underlies the tacit accusation. Because accusers are accused persons themselves, accused here of untrustworthiness, the peril they face is comparable to that of persons who in the United States have a Sixth Amendment right to know the charges against them.[48]

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45. *See* MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 45 (2007).

46. *See* discussion *infra* Section II.C.

47. *See* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3–4, 14–16 (2017) (introducing the term); Deborah Epstein, *Discounting Credibility: Doubting the Stories of Women Survivors of Sexual Harassment*, 51 SETON HALL L. REV. 289, 291–94 (2020); Katherine M. Cole, Note, *She's Crazy (to Think We'll Believe Her): Credibility Discounting of Women with Mental Illness in the Era of #MeToo*, 22 GEO. J. GENDER & L. 173, 178–84 (2020). *See also* Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 943–53 (2004) (applying the credibility discount thesis to campus sexual-assault proceedings).

48. U.S. CONST. amend. VI; Russell v. United States, 369 U.S. 749, 766 (1962) ("A cryptic form of indictment" forces "the defendant to go to trial with the chief issue undefined. It enables his

Entitlements provisioned in the U.S. Constitution inform what a person in the United States ought to receive even where courts do not enforce these entitlements as rights.[49]

Yet another condition harmful to accusers supports reassessment of the presumption of innocence to protect rather than impugn them. A venerable slur against accusers dating back to 1680 still holds force and calls for change. It occupies the last Part of this Article: When Matthew Hale, the English judge and scholar, wrote that a claim of sexual misconduct is "an accusation easily to be made and hard to be proved and harder to be defended by the party accused, tho[ugh] never so innocent,"[50] he turned the truth on its head. Very few accusations of any kind are "easily made."[51] Accusation has no existence until somebody puts it into words and shares it with a listener. Anything eligible for the label of accusation is at most a plan to accuse in the future until somebody hears it. A forum-by-forum review in Part III finds that every possible place to speak an accusation of sexual misconduct comes at a price that burdens the accuser.

Fair-minded observers who compare the burdens of accusation to the ease of a simple denial by an accused person will recognize that although not all accusations deserve belief, persons who have been accused of wrongdoing that makes them eligible for any kind of punishment including opprobrium have a motive to lie that accusers lack. Speaking false denial in response to accusation gives accused persons a gain at little cost. That cheapness and convenience isn't available to the accuser; every accusation this person might make, the false and the true alike, burdens her. That's asymmetry. When asymmetry in the accusation-relation harms one participant and advantages the other, fairness can support application of the presumption of

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conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand . . . to fill in the gaps of proof by surmise or conjecture.").

49. Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 388–89 (2003) ("The fact that private actors are not bound by constitutional rights in no way entails that such rights do not govern their legal relations with one another . . . .").

50. 1 MATTHEW HALE, THE HISTORY OF PLEAS OF THE CROWN 635 (Sollem Emlyn ed., 1736).

51. *See id.*

innocence to right the balance. Use of this presumption can benefit accusers by presuming *their* innocence. The granting and withholding described in this Article will, when justified, presume that an accuser is innocent of insincerity and incompetence.[52]

## I. THE PERTINENT PRESUMPTION OF INNOCENCE

Applications of the presumption of innocence deliver official protection to only a small fraction of accused persons. In the United States, that happy few are individuals whom the state has prosecuted and put on trial.[53] Everyone else who wishes this protection to protect a different set of persons must persuade listeners that what justifies the understanding of the presumption at its core justifies its application to where they want it applied.[54] Since this exercise of persuasion starts from the presumption of innocence as a constitutional right for criminal-trial defendants, so too does this Part.

### *A. Core Pertinence: Adjudication at a Criminal Trial*

#### *1. Unique Powers: The Supreme Court Names "Official Suspicion, Indictment," and "Continued Custody"*

The United States Supreme Court announced the presumption of innocence as a source of protection for defendants in an 1895 decision and only much later said anything specific about where this protection comes from and why it exists. *Coffin v.*

52. *See supra* note 40–41 and accompanying text. Like other usages of this word unmodified by an adjective, "presumption" here means the rebuttable kind. *See generally* Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974) (identifying incoherence in the idea of a presumption that cannot be rebutted).

53. *Cf.* WILLIAM SHAKESPEARE, HENRY IV, PART 2, act 5, sc. 3 (celebrating another "happy few" who suffered).

54. Examples of this argument by criminal procedure scholars include Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723 (2011) (extending the presumption of innocence to cover pretrial liberty) and Jelani Jefferson Exum, *Presumed Punishable: Sentencing on the Streets and the Need to Protect Black Lives Through a Reinvigoration of the Presumption of Innocence*, 64 HOW. L.J. 301 (2021) (connecting the presumption of innocence to law enforcement actions).

*United States* is recognized as the Supreme Court's first siting of the presumption in constitutional criminal procedure.[55] The Court wrapped its reversal of a conviction in a ringing present-tense sentence: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[56]

Force found present in this presumption—its power not only "undoubted" but also "unquestioned" and taken for granted "as a matter of course"[57]—spurred the Court to rule unanimously that a trial court's refusal to tell jurors about it was reversible error even though the judge had spoken to the jury at length (in 419 words, says my software) on the closely related issue of reasonable doubt.[58] *Coffin* deemed reasonable doubt sufficiently different from the presumption of innocence to make the two not fungible or synonymous. Why the failure of the court to give the defendants the presumption-instruction justified the undoing of a criminal conviction, *Coffin* seemed to think was too obvious to say.[59]

Eight or so decades later, the Supreme Court came closer to locating the presumption of innocence in the United States Constitution. Convicted of assault with intent to murder, Harry Lee Williams brought a habeas petition saying that he had been given only prison attire as clothing for his trial.[60] The Court reasoned that being forced to appear before jurors dressed in prison garb violated Williams' right to due process because among the entitlements of the Fourteenth Amendment is the right to a fair trial, and being compelled to dress in what a locked-up criminal would wear undermines the presumption

55. *See* Coffin v. United States, 156 U.S. 432, 453 (1895).

56. *Id.*

57. *Id.* at 453–54.

58. *See id.* at 452–53.

59. *Id.* at 432. Cases and treatises cited in *Coffin* do not provide reasoning either and the words "due process," "Fourteenth Amendment," and even "constitution" appear nowhere in the opinion. *See id.*

60. Estelle v. Williams, 425 U.S. 501, 502–03 (1976).

of innocence.[61] Williams went on to lose on the ground that neither he nor his lawyer had complained to the trial judge about being given prison clothes to wear in court, but the *Estelle v. Williams* majority implied that Williams would have prevailed if he had protested.[62]

A sentence in *Estelle v. Williams* introduced two themes about the presumption of innocence that occupy this Article: the idea of the presumption as a means or tool, and a commitment to fairness as a destination or end for that instrument. The presumption of innocence, wrote the Court, compels judges to "be alert to factors that may undermine the fairness of the fact-finding process."[63] This characterization envisions the presumption as resembling an alarm clock or, to fast-forward the analogy past 1976, software set to beep when a machine learns about a news story or social media post. Employ the presumption of innocence as an alert about unfairness, the Court instructed.

The Court put these two precedents together in 1978 to make the presumption of innocence an instrument with constitutional power to change results. Each of the prior decisions had contained one key inclusion while lacking another. *Coffin v. United States* reversed a conviction on the ground that the trial judge had refused to instruct a jury about this presumption but said nothing about the Constitution.[64] *Estelle v. Williams* left the defendant's conviction undisturbed but did link the presumption of innocence to the Fourteenth Amendment.[65] *Taylor v. Kentucky* marked the first time that the Supreme Court reversed a conviction on the ground that the failure of a trial judge to instruct the jury on the presumption of innocence violated the defendant's Fourteenth Amendment right to due process.[66]

61. *Id.* at 503–05.
62. *See id.* at 518–19.
63. *Id.* at 503.
64. 156 U.S. at 460–61.
65. *Estelle*, 425 U.S. at 503.
66. 436 U.S. 478, 490 (1978).

Significant growth of the doctrine in the Supreme Court stops with *Taylor v. Kentucky*. No decision by the Court ever took the presumption of innocence further, and just one year after issuing *Taylor* the Court quelled hopes for expansion.[67] As the last full-throated celebration by the Supreme Court of the presumption of innocence, *Taylor* marks an end but also a beginning. Its rationale for constitutionalizing the presumption can extend, *mutatis mutandis*, to contexts outside the criminal trial. Unlike *Coffin*, the Supreme Court's first embrace of the presumption of innocence, a decision long on citations and rhetoric but short on ratio decidendi, *Taylor v. Kentucky* engages with the question central to this Article: What is the presumption of innocence for?

As articulated in *Taylor*, the presumption of innocence instructs jurors to put out of their minds "official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial."[68] Postponing "other circumstances," an informative add-on I'll parse in a moment,[69] we see that *Taylor* characterizes powers held exclusively by the state as conditions against which the presumption of innocence pushes back. Official suspicion, indictment, and custody have asymmetrical impacts. They burden defendants and they advantage the state.

*Taylor v. Kentucky* rightly lists "official suspicion" foremost among the asymmetries that the presumption of innocence redresses.[70] For an individual, experiencing suspicion feels uncomfortable and unsettled; for state actors, the same experience generates opportunities to dominate over others. Subpoena power,[71] for example, enables law enforcers to gain information by asking for it in the name of government. Individuals can ask about what they wish to know without the subpoena that would add a stick to their inquiry, but people they question are

67. *See* Kentucky v. Whorton, 441 U.S. 786, 789–90 (1979) (ruling that "to hold that the Due Process Clause of the Fourteenth Amendment absolutely requires that an instruction on the presumption of innocence must be given in every criminal case" was reversible error).

68. *Taylor*, 436 U.S. at 485.

69. *Id.*; *see infra* Section I.A.2.

70. *Taylor*, 436 U.S. at 485–86.

71. FED. R. CIV. P. 45.

usually free to respond by ignoring them or stonewalling in a way that those who face questions from state actors cannot.

Resisters to unofficial investigations also can get away with more lying than can people who lie to state actors; dishonest answers spoken to nonstate actors rarely lead to punishment for perjury and are not covered by the crime of making false statements to an investigator.[72] Suspicion gives individuals no prerogatives comparable to what Fourth Amendment decisional law extends to state-actor enforcers whose suspicion is deemed reasonable.[73] Search warrants put curiosity about matters of fact on an official plane. They also furnish corroboration or confirmation, a benefit that people with suspicion often want and seldom can demand.[74]

Two other government-only conditions that *Taylor* included as reasons to honor a presumption of innocence also feature conspicuous asymmetry. The Court first identified indictment.[75] Only the government can indict people. Similar asymmetry occupies "continued custody."[76] When nonstate actors give continued custody a try by confining other people against their will, that maneuver will violate established prohibitions of crime and tort.[77] Courts sanction individuals who confine.

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72. *See* Daniel R. Alonso, *Tilted Scales: The Federal Edge in New York's Fight Against Corruption*, N.Y. ST. Bar Ass'n. J., Winter 2025, at 9, 12–13 (observing that federal-prosecutorial powers to leverage lying to investigators are especially broad).

73. Terry v. Ohio, 392 U.S. 1, 28 (1968) (imposing a reasonable suspicion standard on stop-and-frisk police searches); *see also* Devon W. Carbado, *Stop-and-Strip Violence: The Doctrinal Migrations of Reasonable Suspicion*, 55 HARV. C.R.-C.L. L. REV. 467, 472 (2020) (arguing, with support from an illustration, that reasonable suspicion is "a decidedly easy evidentiary standard for the government to meet").

74. *See, e.g.*, DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS 63 (2021) ("Subpoenas and search warrants can turn up valuable corroborative evidence that may never surface when an accuser comes forward in an informal setting.").

75. *Taylor*, 436 U.S. at 486–88.

76. *Id.* at 485.

77. When the state confines people, those who take action to protest this confinement must show it was unwarranted. *See generally* Salil Dudani, *Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences*, 129 YALE L.J. 2112, 2174–75 (2020) (reviewing the law of state-imposed civil and criminal confinement). When individuals confine other individuals, confinement itself is the wrong. *See* United States v. Lightfoot, 119 F.4th 353, 367 (4th Cir. 2024) (reviewing examples of criminalized confinement including the federal Hostage Taking Act, "unlawful restraint" as proscribed by Connecticut criminal law, "criminal confinement" in Indiana, and the Louisiana crime of false imprisonment while armed with a dangerous weapon);

### 2. *"Other Circumstances": Asymmetry as a Threat to Fairness in Accusation*

"[O]ther circumstances not adduced as proof at trial," the catchall phrase appended in *Taylor v. Kentucky* after "official suspicion, indictment, [and] continued custody,"[78] steers us to return to what the first three inclusions have in common and why the Court gathered them in its rationale for constitutionalizing the presumption of innocence. Asymmetry as a threat to fairness is the answer. Official suspicion burdens individuals but empowers the state. Same for indictment. Continued custody is a prerogative for state actors, a source of criminal and tort liability for an individual.[79] When one side of an accusation-relation holds advantages that match disadvantages held as counterparts by the other side, the accusation playing field tilts.[80]

Understanding the presumption of innocence calls for attention to quality of this tilt more than its quantity. Take money, for example. Only rarely will two nonstate disputants possess the same quantity of this variable. At least up to a point, however,[81] asymmetry between them in the amount of wealth they own will support no presumption of innocence to benefit the poorer person and harm the richer one. The state is almost certainly wealthier than any individual adversary, but this gap is not what justifies the presumption of innocence. Power to amass money through taxation and state-specific investment

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RESTATEMENT (THIRD) OF TORTS: INTEN. TORTS TO PERSONS § 7 (A.L.I., Tentative Draft No. 2, 2018) (reciting the elements of false imprisonment, a tort that proscribes the intentional confinement of another person).

78. *Taylor*, 436 U.S. at 485.

79. *See, e.g.*, F. Andrew Hessick & Sarah A. Benecky, *Standing and Criminal Law*, 49 BYU L. REV. 4, 969 (2024) (reviewing how Article III standing imposes limitations on the government, thus increasing its incentive to regulate through criminal law offering more predictable enforcement).

80. For a discussion on the legitimacy of the criminal justice system in the context of "gamesmanship," see John D. King, *Gamesmanship and Criminal Process*, 58 AM. CRIM. L. REV. 47, 48–49 (2020) (defining "gamesmanship" as "a strategy designed for winning regardless of the factual and legal merits of the case").

81. *See supra* notes 87–90 and accompanying text.

instruments does separate government from a merely rich litigant at a *quality*-of-advantage plane.

Seen through a lens of fairness related to this asymmetry, the meaning of "other circumstances not adduced as proof at trial" in *Taylor*'s rationale for the presumption of innocence emerges into view.[82] The term adds particulars. Like official suspicion, indictment, and continued custody, this phrase tells readers to think about advantages held uniquely by the state and correlative disadvantages that burden an accused individual. Followers of this reasoning can build on the three specifics that *Taylor* mentioned.

Each weakness of the individual that pertains to the presumption of innocence has a parallel government-held strength. We've noted how official suspicion and continued custody, two government powers noted in *Taylor*,[83] are experienced by individuals and what would happen to these people should they try to claim these prerogatives. The same pattern—power and opportunity for state actors, injury and anxiety and distress for individuals—continues when we take up the invitation of "other circumstances" and add to the three-item *Taylor* list.[84] The state monopoly of force,[85] for example, has a complement in criminal and tort rules that punish and deter defiance of that monopoly by an individual.[86] Applying physical force empowers state actors and gets individuals in trouble.

The wealth gap between the state and an individual takes form in a qualitative gap, too. Taxpayers foot the bill for evidence-gathering work by entire occupations on the government payroll—among them auditors, inspectors, police forces, subject-specific investigators who cover particulars like drugs or

82. *Taylor*, 436 U.S. at 485.

83. *Id.* at 484–85.

84. *Id.* at 485.

85. *See* Max Weber, *Politics as a Vocation*, *in* FROM MAX WEBER: ARTICLES IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1946) (calling a state "a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory") (emphasis in original).

86. *See, e.g.*, Stephanos Bibas, Forum, *Victims Versus the State's Monopoly on Punishment?*,130 YALE L.J. 857, 858 (2021) (describing the criminal justice system as an "impersonal punishment machine").

smuggling, and child protective services staffers—that support the investigation and prosecution of individuals.[87] Rich individuals purchase quite a lot in the labor market,[88] but what they can buy generates less occupational or professional identity for their provider-workers than the more prosaic stability of working for the state. Paths to government service are more established, abler to provide and improve job training, and better at delivering longer-horizon employment benefits like pensions and sometimes even union membership.[89] Nonstate actors routinely run out of purchasing power when they run out of money; governments tend to stay open and solvent. Maneuvers that wealthy spenders might value as creative disruption or the chance to "break things" weaken the solidity of an entity.[90]

Just as governments possess a more powerful hold on wealth than what even very rich individuals have, they also enjoy an extra-strong version of the entity identity that individual human beings can form from the ground up or join as constituents. Individuals create businesses separate from themselves with little effort or investment and can put their solitary human

87. *See* CTR. ON BUDGET AND POL'Y PRIORITIES, POLICY BASICS: WHERE DO OUR FEDERAL TAX DOLLARS GO? (2025), https://www.cbpp.org/sites/default/files/4-14-08tax.pdf [https://perma.cc/N85L-XCXS] (noting that taxpayer dollars support the "basic duties of the federal government" such as "enforcing the nation's laws to promote justice"); U.S. DEP'T OF JUST., *Criminal Resource Manual § 273: Cost of Obtaining Evidence*, https://www.justice.gov/archives/jm/criminal-resource-manual-273-cost-obtaining-evidence [https://perma.cc/VQK3-VYWP] (last visited Dec. 1, 2025) (discussing the varying expenses for discovery).

88. Jeff Bercovici, *Peter Thiel Is Very, Very Interested in Young People's Blood*, INC. (Aug. 1, 2016), https://www.inc.com/jeff-bercovici/peter-thiel-young-blood.html [https://perma.cc/DBE4-45VX] (reporting on "parabiosis," a blood transfusion that young donors work to provide older recipients); Guthrie Scrimgeour, *Inside Mark Zuckerberg's Top-Secret Hawaii Compound*, WIRED (Dec. 14, 2023, at 11:55 ET), https://www.wired.com/story/mark-zuckerberg-inside-hawaii-compound/ [https://perma.cc/C84S-GTR4] (describing the construction of "a 5,000-square-foot underground shelter" that will "have its own energy and food supplies, and, when coupled with land purchase prices, will cost in excess of $270 million").

89. *See, e.g.*, Karla Walter & Sachin Shiva, *Good Jobs for Government Workers Improve Public Services*, CTR. FOR AM. PROGRESS (Sep. 15, 2025), https://www.americanprogress.org/article/good-jobs-for-government-workers-improve-public-services/ [https://perma.cc/ZZ9K-E57C] (discussing the benefits of government jobs in the wake of massive funding cuts and layoffs).

90. *See generally* JONATHAN TAPLIN, MOVE FAST AND BREAK THINGS: HOW GOOGLE, FACEBOOK AND AMAZON CORNERED CULTURE AND UNDERMINED DEMOCRACY (2017) (so arguing).

condition into a limited liability company.[91] As social animals, they also affiliate and associate.[92] Yet individuals never achieve the degree of *e pluribus unum* strength that government can leverage to overpower them.[93] *Unum*, the condition of being one or unified, is the more powerful word of the old national motto. An individual member of *pluribus* can be picked off and isolated.[94]

Accusation in a criminal charge by the state comes from a collective comprised of multiple deciders.[95] No individual state actor can accuse alone.[96] Discrete contributions from investigators, prosecutors, and grand juries widen inputs into the accusation.[97] These inclusions also diffuse vulnerability and responsibility.

Identity in the form of one side's being the people with a capital P,[98] or State with a capital S, exemplifies the asymmetry of *unum* being stronger than *pluribus* but it's not the only example. Public-discourse grievance labels that denounce an enemy with reference to its collective identity—"woke mob," "cancel culture," "DEI hire"—ask listeners to think about a gap in power between a lone brave individual and an entity comprised of multiple persons.[99] Uttered as protest, these epithets seek a

91. Samantha J. Prince & Joshua P. Fershée, *An LLC by Any Other Name Is Still Not a Corporation*, 54 SETON HALL L. REV. 1105, 1110 (2024).

92. The observation dates back to sixteenth-century theology. *See* JOHN CALVIN, COMMENTARY ON THE BOOK OF GENESIS 145 (John King ed. & trans., 1965) (1554) (stating that "man is a social animal").

93. *See* Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 912 (1998) (explaining the "original meaning of E pluribus unum" as the "original meaning of 'diversity'") (citing ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY (1991)).

94. *Id.*

95. *See* Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 250 (2019) ("The customary case caption in criminal court, 'The People v. Defendant,' pits the local community against one lone person in an act of collective condemnation.").

96. *Id.* at 251.

97. *See id.*; *see also* Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2336–37 (2008) (discussing tensions between prosecutorial control and the grand jury's independent investigative role).

98. Washburn, *supra* note 97, at 2336–37; Simonson, *supra* note 95, at 253.

99. Josh Hawley, writing as the senior U.S. senator from his state, added "the Epicureans" to the list of grievance labels that attribute sinister power to dangerous disembodied aggregations. *See* Leah M. Litman, Melissa Murray & Katherine Shaw, *Of Might and Men*, 122 MICH. L.

favor that parallels the presumption of innocence: they champion the One against a mighty *e pluribus unum*. Any mob, entire "culture," or abstraction powerful enough to decree a hire contains multitudes.[100] The speaker who dons this term dresses up as an underdog. His foe, possessed of strength in numbers, throws punches no beleaguered little guy can return. Speakers who characterize what they resent as coming from an amorphous assemblage claim for themselves what the presumption of innocence protects.

Individual accusers lack the combination of multiplicity and unity that characterizes their state-like counterparts. They necessarily speak with frail human voices. Being singular means vulnerability at multiple levels.[101] Unlike governments and incorporated entities, we natural persons are certain to die and can do so at any time. Our human bodies can collapse. So too can the dwellings we live in and the vehicles we use for travel. Some of us—a minority—possess wealth,[102] but all of us can reach our money only when mechanics of storage and retrieval are functioning.

Among the many vulnerabilities that derive from existence as a human individual rather than a nation-state or corporation or community, the one that relates most closely to the presumption of innocence is vulnerable credibility. We humans navigate life with relative ease, safety, and happiness when we are regarded as trustworthy; we are harmed when we're characterized as dishonest. Defamation as a remedy for this

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REV. 1081, 1088 (2024) (reviewing JOSH HAWLEY, MANHOOD: THE MASCULINE VIRTUES AMERICA NEEDS (2023)).

100. *See* Simonson, *supra* note 95, at 258 (noting how the "cultures that produce everyday criminal law and its processes[] . . . often reproduce existing hierarchies and pathologies").

101. Paul H. Robinson, Jeffrey Seaman & Muhammad Sarahne, *Rethinking the Balance of Interests in Non-Exculpatory Defenses*, 114 J. CRIM. L. & CRIMINOLOGY 1, 7–8, 10 (2024) (discussing outcome of violent crimes for victims).

102. See Arloc Sherma, Danilo Trisi & Josephine Cureton, *A Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET & POL'Y PRIORITIES (Dec. 11, 2024), https://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality [perma.cc/TW5C-8TU8] (reporting that a minority of the American population, 10%, holds more than two-thirds of the nation's wealth).

characterization exists because reputation for credibility is uniquely valuable and fragile.[103]

Stances and stories become intelligible only when individuals communicate them and achieve believability only when the human narrator, exponent, or witness who relays information comes across as worthy of belief. When we possess credibility, that possession is vulnerable because the goodwill, reputation, and trust we may have accreted can erode. We can also fail to attain credibility, for reasons never fully in our control.

Individual prosecutors, all of them human beings, are sheltered from this human weakness because when they accuse they deploy a penal code rather than recite a declarative sentence whose power to persuade rests on their personal credibility. They are empowered to assert in the name of the state that actions by those they accuse fulfilled the elements of at least one codified crime.[104] Should a judge or jury reject their contention at trial, they've lost, but that result almost never stirs anyone to say that they made a false accusation or are unworthy of belief.

Listeners who reject what a human accuser says, by contrast, do conclude that the accusation was false. The state can be called a speaker of falsehood only colloquially; the defense facing criminal prosecution doesn't call the government a liar but confines its attacks on credibility to constituents of the prosecution's case, such as witness testimony. Similarly, groups and businesses can suffer reputational harms that defamation law will remedy but entities don't get called dishonest or unworthy of belief with any seriousness. Attacks on their integrity that have teeth focus on their actions, products, or policies rather than who they are.

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103. DAVID ELDER, DEFAMATION: A LAWYER'S GUIDE § 9:1, Westlaw DEFAMATION § 9:1 (database updated Dec. 2025) (stating that "the state's strong interest in vindicating reputation and its separate and distinct interest in protecting the public against false and or deceptive matter collectively justify" a remedy for this wrong).

104. *See generally* NAT'L DIST. ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS THIRD EDITION, at 3 (2009), https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf [https://perma.cc/GY7F-AM3X] (stating that "[a] prosecutor is the only one in a criminal action who is responsible for the presentation of the truth").

An individual accuser might believe that actions by the person she accuses fulfilled the elements of some criminal prohibition, but she has no authority to equate her contention with liability for a codified crime.[105] She cannot present her contention as coming from the capital-P people or the capital-S state.[106] Subject followed by transitive verb followed by object must be the sequence of her accusation. Unlike an indictment, her accusation about harm she experienced necessarily contains a one first-person pronoun: either *I*, denouncer of the accused person, or *me*, the object of wrongdoing. Accusation by an individual is always personal. Vulnerability follows.

### *B. Peripheral Pertinence: Asymmetry That Supports a Degree of Presumption to Favor an Accused Person Outside a Criminal Trial*

#### *1. Unique Strength on One Side and Vulnerability on the Other*

To qualify for protection by the presumption of innocence away from the core, one side of the fight—in judicial proceedings, that's the defendant; elsewhere, the accused person—must be up against an entity comprised of multiple human contributors who work together as a team. Here the presumption of innocence functions to ameliorate advantages of *e pluribus unum* solidarity in a binary conflict. When one participant in a dispute can be attacked as an individual human being and the other cannot, some version of a presumption of innocence to benefit the individual and burden the disputant made up of many people becomes justified. Individuals *qua* individuals are just as central to the presumption of innocence as the government that opposes a defendant in court.

Peripheral pertinence rests in a zone between core pertinence and impertinence. Recall the two central advantages held by the state in a criminal trial that justify a presumption in favor

105. Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 371–72 (1986).

106. *See* Simonson, *supra* note 95, at 256.

of an accused person: first, prerogatives unavailable to individuals; second, identity as a collective or aggregation facing against an individual.[107] Conditions that include this asymmetry qualify accused persons for a counterpart to the criminal-adjudication presumption of innocence.

*2. Peripheral Pertinence Illustrated*

Whenever an institution chooses to act on a complaint and presents its message in a formal proceeding, the zone of peripheral pertinence will feature separate participants sharing the role of accuser. Both the entity and a human person have accused. Entitlement to a presumption of innocence extends, and should extend, to aggressions from an accuser that holds types of power the accused person lacks. That accuser is the entity.

Individuals whose initial accusations occupy the institutional effort stand in a different relation to the accused person. They too are accusers, but their identity and status contain no asymmetry that needs balancing. The presumption of innocence thus properly applies *to the proceeding* and not to the accuser's testimony. Again, fairness under conditions of asymmetry guides the use of this instrument. Institutions that initiate disciplinary proceedings against individuals offer a clear example of pertinent similarity to the state as initiator of criminal prosecution.

Of these institutions, the college or university as accuser of an individual student sits especially near the core of the presumption of innocence. The institutional accuser chooses to act on what it hears from an individual accuser before it institutes proceedings.[108] This institution can lose the fight, but it does not lose because it suffers from asymmetrical detriment. A higher-ed entity always can inflict harm on an accused person that an

107. *See supra* notes 98–102 and accompanying text.

108. That generalization includes its own presumption of innocence: this Article attributes good faith to the entity. At a show trial, or another unjust proceeding, an institution could have decided to target an individual first and arrayed complainants as witnesses second.

accused person cannot inflict on it, and it always contains multitudes.

The presumption of innocence as a legal obligation currently imposed by the government on higher education illustrates this partial resemblance to core pertinence. Ordering all institutions under its aegis to maintain grievance procedures that "[t]reat complainants and respondents equitably," the federal Department of Education goes on to state what this requirement demands.[109] Its version of the presumption of innocence demands "a presumption that the respondent is not responsible" for misconduct until the grievance procedures conclude.[110]

This variation on the presumption of innocence gives accused persons less protection than what criminal defendants receive. "[N]ot responsible" is a weaker ascribed condition than "innocence" and the regulation installs a shorter half-life for its presumption.[111] Partial resemblance is the signature characteristic of the peripheral presumption of innocence. To belong in this geography between core pertinence and impertinence, the presumption will furnish accused persons with shelter and specify that this shelter is less than what accused persons at the core receive.

Sexual-misconduct investigations in higher education illustrate the peripheral presumption of innocence by giving accused persons a thinner-than-constitutional-criminal but still meaningful degree of presumption.[112] In contrast to their counterparts at the core, accused persons at this locus enjoy a version of the presumption that is subject to variation. To observe this flexibility applied to the presumption as an entitlement, consider two perspectives manifested by two universities: the Board of Regents of Louisiana, the agency in charge of all public

109. 34 C.F.R. § 106.45(b)(1) (2025).

110. *Id.* §§ 106.45(b)(1), (b)(3) (2025).

111. *Id.* § 106.45(b)(3).

112. For an illustration of the peripheral presumption in effect, see Blair A. Baker, *When Campus Sexual Misconduct Policies Violate Due Process Rights*, 26 CORN. J.L. & PUB. POL'Y 433, 534–36 (2017).

higher education in its state,[113] and Brown University, a private institution.[114]

Both schools comply with the Department of Education requirement that protects respondents with a presumption that they are not responsible for sexual misconduct; at the same time, the two rulebooks each modify the presumption in different directions. Louisiana mentions the presumption of non-responsibility for respondents twice in its rules and adds a requirement that "known parties" receive written notice of this presumption.[115] Its modification stretches presumed non-responsibility to give accused persons a little more. Brown University expresses contrary priorities.

At Brown, the presumption of non-responsibility falls under a heading captioned "Presumption of Non-Responsibility and Good Faith Reporting" that includes two sub-rules below that banner, the first announcing a presumption that favors respondents and the second, captioned "False Allegations and Statements," stating that "[a] determination that a Respondent was not responsible for a Policy violation does not, without more, establish that the Complainant or any other Party or witness has made a false allegation or statement in bad faith."[116] Good faith in the Brown University rulebook extends the presumption of innocence to accusers too.

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113. *About Regents*, LA. BD. OF REGENTS, https://www.laregents.edu/regents/#about [https://perma.cc/7RSY-4MSJ] (last visited Dec. 2, 2025) ("The Board of Regents, a state agency created by the 1974 Louisiana Constitution, coordinates all public higher education in Louisiana.").

114. *About Brown*, BROWN UNIV., https://www.brown.edu/about [https://perma.cc/Q3JR-B4XN] (last visited Dec. 2, 2025) ("As a private, nonprofit institution, the University advances its mission through support from a community invested in Brown's commitment to advance knowledge and make a positive difference locally and globally.").

115. LA. BD. OF REGENTS, TITLE IX GRIEVANCE PROCEDURES 3, 7 (2020), https://regents.la.gov/wp-content/uploads/2021/08/BOR-TITLE-IX-GRIEVANCE-PROCEDURE.pdf [https://perma.cc/Y636-YXYW].

116. *Sexual Misconduct Grievance Procedure*, BROWN UNIV. [hereinafter *Grievance Procedure § 2.3*], https://campus-life.brown.edu/equity-compliance-reporting/gender-discrimination-sexual-violence/sexual-misconduct-grievance [https://perma.cc/2ZS4-JR6B] (last visited Jan. 5, 2026). This procedure is part of Brown University's "Sexual Misconduct Policy," effective on February 20, 2025. *Id.*; *see Sexual Misconduct Policy, No. 01.45.01*, BROWN UNIV. (2021), https://policy.brown.edu/policy/sexual-and-gender-based-misconduct [https://perma.cc/YR8S-MUSS].

Each of these two institutions articulates and follows the same presumption of non-responsibility for respondents that it must accept as a condition of receiving federal funds,[117] and each expands it in a separate direction. Louisiana underscores and repeats a presumption that protects accused persons;[118] Brown University cites that presumption only once and matches it with a presumption of good faith to protect accusers.[119] Here at the peripheral presumption of innocence, this combination of the familiar and a modification—"the same and not the same"[120]—partakes of some but not all of what characterizes the core.

## II. WHERE THE PRESUMPTION OF INNOCENCE TURNS IMPERTINENT

Vulnerability of an accused individual up against the asymmetrical strength of an accuser can, as we've seen, justify protecting that individual with a pertinent presumption of innocence beyond our core of the criminal trial.[121] This vulnerability extends to individual accusers too—and the binary nature of individual-on-individual accusation means that the presumption of innocence can favor only one side, not both. Zero-sum impacts mean that this instrument delivers disadvantage as well as advantage, harm along with benefit.

The harm of the impertinent presumption of innocence is that it presumes that accusations are untrue.[122] In its pertinent application, this impediment for an accuser generates good results. These reasons are absent in individual-rendered accusations. Because it impugns the narrative or testimony of an accuser as unworthy of belief without identifying a good reason

117. 34 C.F.R. § 106.45 (2025).

118. *See* La. BD. OF REGENTS, *supra* note 115, at 7.

119. *See Grievance Procedure § 2.3*, *supra* note 116.

120. I borrow this phrase from a book title. ROALD HOFFMANN, THE SAME AND NOT THE SAME (1995).

121. *See, e.g.*, Coffin v. United States, 156 U.S. 432, 453 (1895) (recognizing the presumption of innocence as a fundamental principle rooted in fairness and due process).

122. *See* Tuerkheimer, *supra* note 47, at 1–2 (discussing how institutional disbelief of accusers rests on systemic assumptions of falsity, particularly in sexual misconduct contexts).

to discredit her, the impertinent presumption risks epistemic injustice.[123] As expounded and delivered in decisional law and scholarly commentary, the impertinent presumption not only attacks individual accusers but conceals what it is doing; its epistemic injustice is stealthy and evasive rather than transparent.[124]

### *A. Epistemic Injustice, in Concept: Unjustified Attack on the Competence and Sincerity of an Accuser*

In an influential book about the crediting and discrediting of testimony as true and not true, Miranda Fricker addressed epistemic injustice, a phrase that means "a wrong done to someone specifically in their capacity as a knower."[125] Too much skepticism about the truth of an accusation generates what Fricker calls testimonial injustice when it originates in a groundless mistrust of what an accuser knows and says.[126] Examples of testimonial-epistemic injustice that Fricker and other scholars have gathered focus on accusations of the type I've adverted to, a claim of sexual misconduct articulated by one individual against another.[127]

Focusing on characteristics that pertain to accusers as individuals, Fricker found two variables or "distinct components: competence and sincerity."[128] To deserve belief, an accuser must be competent, that is to say able to perceive and describe reality accurately, and also sincere. An individual is sincere if she believes while testifying that what she says is true.

Because testimony warrants belief when it comes from a witness who is both competent and sincere, disbelief in response to what she says that has no other justification is an attack on

123. *See generally* FRICKER, *supra* note 45, at 1–2 (developing the concept of testimonial injustice, where a speaker is wrongfully discredited due to prejudice).

124. *See id.*

125. *Id.* at 1.

126. *See id.* at 17–21.

127. *See id.* at 1, 49–52.

128. *Id.* at 45.

either competence or sincerity grounds.[129] Fricker concludes that when prejudice causes a hearer to give a deflated level of credibility to the speaker's word—put another way, when this speaker is actually competent and sincere yet due to prejudice isn't believed—this outcome constitutes testimonial injustice.[130]

The presumption of innocence turns impertinent here because it contains a tacit complementary presumption harmful to the individual accuser. An antonym for innocence is guilt.[131] When one individual accuses another, a presumption that protects the accused person with the ascription of innocence withholds the ascription of innocence from the person who accuses. "You are at a minimum insincere or incompetent, and maybe both" is more than an insult: this characterization accuses the accuser of having harmed another person with either blameworthy conduct or subpar human functionality. Because false accusation is either a culpable act or a manifestation of inferior capacity, the impertinent presumption of innocence harms the individual accuser by unjustly ascribing a kind of guilt to her.

Listeners who hear an accusation of an individual by an individual might squirm at the discomfort that this stark binary seems to impose on them and seek middle-ground neutrality in response.[132] No such safe space for them exists, because every accusation calls for a change to some status quo. To do nothing in response is to take the side of the person at the receiving end of the accusation.

In other words, once leveled and received every accusation either gets credited enough to remain alive and eligible to achieve change or it doesn't. When the accusation doesn't get

129. FRICKER, *supra* note 45, at 45 ("[T]here might be cases in which the [hearer's] prejudice attacks only one of the distinct components, and in such cases the experience of the injustice may have one or another rather different character, depending on whether it is one's competence or one's sincerity that is undermined.").

130. *See id.* at 32, 42.

131. *Cf.* Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547, 549 (2008) (favoring "innocent," in addition to "not guilty," as a plea that defendants could enter).

132. *See, e.g.*, FRICKER, *supra* note 45, at 99 (describing the enduring aim for listeners to "neutraliz[e] the impact of prejudice in one's credibility judgements" by their critical awareness of prejudice).

credited, it has been rejected. Rejection of an accusation says that what the accuser said is untrue. This rejection stays in place as long as the presumption of innocence remains. It might be undone later. But preserving the status quo is not neutral.

The impertinent-presumption dialogue, reduced to its fundamentals, contains two participants, an individual accuser and a skeptical interlocutor.

> "I accuse," says the individual, filling in particulars that if credited would support a conclusion that the person accused deserves blame.
>
> "The person you've accused is entitled to the presumption of innocence," replies the interlocutor.
>
> "Do you believe me or disbelieve me?"

The impertinent presumption steers the interlocutor to take umbrage at this binary and its demand for a single choice.

> "Neither. I neither disbelieve nor believe you."
>
> "What do you think about my story?"
>
> "I think it raises troubling questions. I also think the person you've accused is entitled to the presumption of innocence."
>
> "Do you think I'm telling the truth?"
>
> "I don't know."
>
> "Do you think what I've said is false?"
>
> "I don't know."
>
> "Your mind is empty? You think nothing?"
>
> "I think it's too soon to judge what you've said."

> "Well, I'll contend that you should believe me, unless you have reason to think what I'm saying is false."
>
> "That's not how the presumption of innocence works. It's the other way around. You're saying the accused person is not innocent."
>
> "Yes. And when I say that, I'm wrong?"
>
> "I don't know."
>
> "The presumption of innocence says I must be wrong, at least provisionally, right?"
>
> "The presumption isn't about you. It's about innocence ascribed to an accused person until the conclusion of due process."
>
> "I recited facts that are inconsistent with innocence. I said they happened. Is my story true or false?"
>
> "The answer to that question isn't something I can give you now. Right now, as I tried to say, we can't know."
>
> "Any statement of fact might be false," the speaker might say to conclude the dialogue. "If I'm not credited, then my testimony has been deemed false. Where did the falsity come from? What does refusal to accept the truth of my testimony say about me as an accuser?"

Miranda Fricker has supplied an answer from philosophy: disbelief says that the accuser lacks at least sincerity or competence and perhaps both.[133] That disbelief may pretend to be neutral, but it leaps to favor one side and disfavor the other.

Adding another layer of wrong to this injustice, the discredited speaker does not receive a clearly articulated reason for this

133. *See* FRICKER, *supra* note 45, at 42, 45.

rejection. People seeking to defend their credibility are entitled to a modicum of clarity about what doubters of their credibility are contending. To return to the ascribed dialogue: "You want to insult me, insult me," an accuser might say. "But whatever you're saying, own it. My competence and my sincerity are two different things. Which of them are you impugning?"

All accused persons, says the United States Constitution, have a right "to be informed of the nature and cause of the accusation."[134] One study of the Sixth Amendment has remarked that "[t]he need for this fundamental right is obvious: if a defendant doesn't even know what he is charged with having done, how can he show he didn't do it?"[135] Accusers written off as lacking credibility for no reason who want to demonstrate they didn't deserve this condemnation face the same impossibility.[136]

These accusers are better off than a criminal defendant deprived of his Sixth Amendment right to be informed in a few respects. First, they probably won't be sent to prison. Second, they can try to tune out the epistemic injustice that harms them, unlike criminal defendants forced to show up in court and listen to the accusation. They can also ruminate about whether She's Crazy or alternatively She's Lying better explains the rejection and reach something resembling an answer in their own minds, an option less available to a criminal defendant accused of a crime with no specifics.[137] In other respects, however, the second-order epistemic injustice examined here is worse than an opaque accusation by the government.

Our unindicted accuser has no Sixth Amendment right to a remedy.[138] Mulling over the difference between Crazy and

134. U.S. CONST. amend. VI.

135. Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 688 (1996).

136. *See id.*; *see also* FRICKER, *supra* note 45, at 47–48 (explaining that victims of testimonial injustice often do not know why they have been discredited, making it impossible to defend their credibility).

137. *See* Amar, *supra* note 135, at 688 (observing that an accusation might say nothing about the defendant's actual conduct, leaving him unaware that he might, for example, be able to show mistaken identity).

138. *See* U.S. CONST. amend. VI ("the accused shall enjoy a right to a speedy and public trial"); FRICKER, *supra* note 45, at 44–46.

Lying applied to oneself might yield an answer or another insight, but will also hurt. Because evasion in the rendering of this slur isn't recognized, it isn't discouraged. Evaders have little incentive to ask themselves what exactly they have said about the credibility of a sexual-misconduct accuser.

The law cares about forthrightness in a wide sense that extends beyond attention to overtly false statements. Concepts including "material omission" and "misleading" as an adjective paired with "false" recognize that dishonesty can exist and cause harm even when a speaker refrains from saying anything untrue in a declarative sentence.[139] Rules of evidence lay down how the forensic exercise of impeachment, which implies that a witness may have lied, can proceed.[140] Criminalization of false statements[141] goes out of its way to proscribe a bigger set of untruths than those covered by perjury, which addresses statements under oath.[142] Deceit is actionable in tort.[143] Lawyers have professional duties of candor that oblige them to reveal what they might prefer to hide.[144] Obstruction of justice functions to thwart truth-finding.[145] Stances and doctrines like these show that concealment can be understood as an independent wrong of itself.

Because concealment of the ostensible reason to distrust a speaker inflicts a layer of extra harm, a problem instilled and buttressed by law generates a second-order epistemic injustice.[146] The first order of this wrong notes the injustice of

139. The Securities Act of 1934, for example, puts "omit to state any material fact" in the same prohibition that includes "make any untrue statement of a material fact." 15 U.S.C. § 78n(e). The Lanham Act proscribes misleading descriptions and representations that undermine trademarks. 15 U.S.C. § 1125(a)(1). *See also* Macquarie Infrastructure Corp. v. Moab Partners, L.P., 601 U.S. 257, 263–65 (2024) (recognizing "half-truths" as among the prohibitions of securities law).

140. *See* FED. R. EVID. 607–09.

141. *See* 18 U.S.C. § 1001(a).

142. *See* 18 U.S.C. § 1621.

143. *See* Kousisis v. United States, 145 S. Ct. 1382, 1394 (2025) (citing PROSSER AND KEETON ON THE LAW OF TORTS § 110, 765 (5th ed. 1984)) (holding that a common-law deceit claim requires the plaintiff to show that they "suffered substantial damage," or economic losses).

144. *See* MODEL RULES OF PRO. CONDUCT r. 3.3 (A.B.A. 2002).

145. *See* 18 U.S.C. § 2J1.2.

146. *See* FRICKER, *supra* note 45, at 44–46.

attacking the sincerity and competence of a speaker without good cause. Obscurity over whether sincerity or competence or a combination of the two is being questioned adds a second order of wrong. Experience, to which I now turn, puts this injustice into practice.

### *B. Epistemic Injustice in Action: The Credibility Discount Applied to One Set of Accusers*

#### *1. Impugning Accusers' Competence Without Justification*

She's Crazy can serve as shorthand for the characterization that calls an accuser incompetent. Its crudity here isn't gratuitous: I intend to include what that word in its everyday usage includes.[147] To say that an accuser was incapable of perceiving reality accurately deserves to be placed first in the recitation of slurs expressed by the impertinent presumption of innocence.

One United States Senator wrote forthrightly about She's Crazy as the "delusion theory" strategy he put together with the help of psychiatrists to discredit a prominent accuser, Anita Hill.[148] As the chief advocate inside the Senate for Supreme Court nominee Clarence Thomas, this strategist, Senator John Danforth, had to counter testimony from Hill that had credibly cast Thomas as a workplace sexual harasser.[149] It fell to Danforth to support Thomas's denial by finding a reason for the Judiciary Committee and the public to doubt the testimony.

While impugning competence challenges everything a speaker says, the other epistemic attack, impugning sincerity, challenges only what she has chosen to lie about. The broader reach may have encouraged Danforth to choose Crazy rather than Lying as his characterization of Hill as an accuser.[150] The

147. On these inclusions, see Cole, *supra* note 47 , at 185 (offering examples from American popular culture).

148. Deirdre M. Smith, *The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation*, 31 CARDOZO L. REV. 749, 751 n.4 (2010).

149. *See id.* at 750, 751 n.4.

150. *Id.* at 751 n.4 (citing JOHN C. DANFORTH, RESURRECTION: THE CONFIRMATION OF CLARENCE THOMAS 155, 160–61, 168–70 (1994)).

closeness of Clarence Thomas's win, 52-48,[151] was rare at the time; these days closely decided partisan fights in the Senate are routine, but prevailing against that much opposition shows the force of what Danforth blew at Anita Hill.

Followers repeated the Crazy slur both crudely and fancily. Journalist David Brock spread the crude version when he wrote that Hill was "a little bit nutty and a little bit slutty."[152] Colleagues of John Danforth in the Senate applied to Hill the more arcane "erotomania," a rare disorder whose sufferers mistakenly believe that they are in a sexual or romantic relationship with somebody of higher status.[153] This use of psychiatric jargon dressed up Crazy in a term of art that includes the Greek word for madness. Advocates for Thomas prepared psychiatrists to testify in the Senate about the possibility that erotomania accounted for the falsity of Hill's accusation.[154]

The soi-disant 'dean' of American evidence law, John Wigmore,[155] bestowed upon She's Crazy its most enduring respectability when he wrote it into an esteemed and still-cited magnum opus. "No judge should ever let a sex-offence charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician" is the most infamous sentence in Wigmore's

151. *Roll Call Vote 102nd Congress*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1021/vote_102_1_00220.htm [https://perma.cc/7DFK-K33U] (last visited Jan. 5, 2026).

152. David Brock, *The Real Anita Hill*, AM. SPECTATOR, Mar. 1992, at 18. Brock went on to repeat this slur in a book also called The Real Anita Hill, then recanted it in a later book. *See* DAVID BROCK, BLINDED BY THE RIGHT: THE CONSCIENCE OF AN EX-CONSERVATIVE 106–07 (2002) ("Not even the *Spectator* had ever seen the likes of the sexist imagery and sexual innuendo I confected to discredit Anita Hill. These were but two ingredients in a witches' brew of fact, allegation, hearsay, speculation, opinion, and invective labeled by my editors as 'investigative journalism.'").

153. Smith, *supra* note 148, at 751 n.3.

154. JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS 306–07 (1994).

155. *See, e.g.*, ELIZABETH LUTES HILLMAN, DEFENDING AMERICA: MILITARY CULTURE AND THE COLD WAR COURT-MARTIAL 7 (2005) (calling Wigmore "the dean of American evidence law"); Brian H. Bornstein & Steven D. Penrod, *Hugo Who? G. F. Arnold's Alternative Early Approach to Psychology and Law*, 22 APPLIED COGNITIVE PSYCH. 759, 762 (2008) ("Wigmore [],the noted dean of American evidence law.").

rumination,[156] but *A Treatise on the Anglo-American System of Evidence in Trial at Common Law*[157] went further on the odds of Crazy being true. Wigmore wrote that rape complainants' psychic complexes are multifarious, "distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions."[158] What Wigmore called the unchaste mentality "finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim."[159]

Judges today appear to disagree with Wigmore about the need to examine a sexual-assault accuser for signs of Crazy before admitting testimony from her in criminal cases,[160] but they enable and encourage looser variations on the slur. Let's regard as superseded judicial musings that are almost a hundred years old, such as the suggestion by the Wisconsin Supreme Court that a "not normal" child complainant had probably "imagined things entirely beyond facts and conditions. She was approaching the age of puberty, when her mind might be disturbed by her physical condition."[161] The court, announcing that it would take a "charitable view," said this child "was not responsible for her improbable stories; rather that they were figments of her abnormal condition."[162] She's Crazy sounded kinder to this court than She's Lying.

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156. JOHN WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIAL AT COMMON LAW § 924a, at 379–80 (2d ed. Supp. 1923–33).

157. *Id.* at 380. For a discussion of the book's impact, see Fleming James. Jr., *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 50 YALE L.J. 955, 956 (1941).

158. WIGMORE, *supra* note 156, at 379; *see also* Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509, 518 (1992) (quoting a later edition of the Wigmore treatise).

159. WIGMORE, *supra* note 156, at 379. Estrich, *supra* note 176, at 518 n.27. On "unchaste," see *infra* Section II.C.2.

160. Kent D. Streseman, Note, *Headshrinkers, Manmunchers, Moneygrubbers, Nuts & Sluts: Reexamining Compelled Mental Examinations in Sexual Harassment Actions Under the Civil Rights Act of 1991*, 80 CORN. L. REV. 1268, 1300 n.164 (1995) (reviewing decisional law and American Law Reports to identify a current consensus that courts require "compelling reasons" before they will order examination of rape complainants).

161. Rice v. State, 217 N.W. 697, 699 (Wis. 1928).

162. *Id.* at 699.

The leading late-twentieth century decision that approved impugning the competence of accusers, *Ballard v. Superior Court of San Diego County*,[163] also suggested that complainants might be Crazy. Not always, of course; and so most of the time a defendant cannot demand a psychiatric evaluation of a complainant. But "sex violations" are different,[164] said the California Supreme Court, and here the defendant could seek that order.

Although the California legislature undid this holding decades ago,[165] support for an entitlement of rape defendants to call their accusers Crazy in court survives in other states. North Carolina, for example, enacted an exception to its rape shield law that invites defendants to put the mental health of the complainant into the dispute: its rape shield statute includes an exception for expert testimony that the complainant "fantasized or invented" the story in her accusation.[166] Undisturbed decisional law in Kentucky and Colorado permits defendants to introduce evidence of a complainant's sexual fantasies to impugn her credibility.[167]

A late twentieth-century variation on She's Crazy permitted expert testimony from an optometrist that a rape complainant, the defendant's daughter, suffered from a pathology called "hysterical amblyopia."[168] Vision testing shows persons with this condition to be severely impaired, sometimes "legally blind," while lacking any physical deficiency in their eyes.[169] The optometrist witness had given the girl placebo eyeglasses to confirm his suspicion.[170] Wearing them, she scored as sharp-

163. Ballard v. Superior Ct. of San Diego Cnty., 410 P.2d 838 (Cal. 1966), *superseded by statute*, CAL. PENAL CODE § 1112 (West 2025).

164. *Id.* at 846–47.

165. CAL. PENAL CODE § 1112 (West 2025).

166. Tess Wilkinson-Ryan, Comment, *Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant*, 153 U. PA. L. REV. 1373, 1386–87 (2005). The exception remains in the North Carolina rules of evidence twenty years later. *See* N.C. GEN. STAT. § 8C-1-412(b)(4) (1983).

167. Ramona C. Albin, *Appropriating Women's Thoughts: The Admissibility of Sexual Fantasies and Dreams Under the Consent Exception to Rape Shield Laws*, 68 U. KAN. L. REV. 617, 635–37 (2020) (citations omitted).

168. Clinebell v. Commonwealth, 368 S.E.2d 263, 266 (Va. 1988).

169. *Id.*

170. *Id.*

sighted immediately on a vision test and then even better, "essentially perfect," a week later.[171] Hysterical blindness, said the expert. So far, no harm done. The effect of placebo glasses on the complainant's eyesight supported what this witness said on the stand.

Where the Virginia Supreme Court veered into the She's Crazy slur was in allowing the optometrist to testify not only about the complainant's hysterical amblyopia but to tell the jury that people with this condition become phony-blind because they have "a need for attention."[172] How an optometrist could have known about that supposed need in the population, the court did not say. It overruled both the trial judge and the intermediate appellate court to approve testimony from an eye doctor that called a rape complainant delusional by nature.[173]

### 2. *Impugning Accusers' Sincerity Without Justification*

"Women's credibility is questioned in the workplace, in courts, in legislatures, by law enforcement, in doctors' offices and in our political system," said an essay called *People Think Women Lie Because That's What We Teach Our Children*.[174] The author supplied hyperlinks about disbelief in all six of those venues.[175] "People don't trust women . . . not to be bosses, pilots, employees. Last year, a survey of managers in the United States revealed that they overwhelmingly don't believe women who request flextime," Soraya Chemaly continued, with four more hyperlinks to support She's Lying.[176]

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171. *Id.*

172. *Id.* at 267. Saying that female speakers want attention and should for that reason be ignored or silenced is familiar. *See* Mona Eltahawy, *A Vindication of the Demands of Attention Whores*, FEMINIST GIANT (Apr. 11, 2021), https://www.feministgiant.com/p/a-vindication-of-the-demands-of-attention [https://perma.cc/9X9K-CN5P].

173. *Clinebell*, 368 S.E.2d at 267.

174. Soraya Chemaly, *People Think Women Lie Because That's What We Teach Our Children*, HUFFPOST (Nov. 11, 2014), https://www.huffpost.com/entry/people-think-women-lie-because-thats-what-we-teach-children_b_5805532 [https://perma.cc/NR3V-3PYN].

175. *Id.*

176. *Id.*

Sincerity-based attacks on testimony that otherwise deserves belief challenge the intentions of the accuser. In contrast to her incompetent sister who does not understand what she is talking about, the insincere accuser knows her accusation is false and makes it intending to harm the accused. We've noted how Anita Hill was slurred as lacking competence; attackers also said she lacked sincerity.[177] One senator accused Hill of "flat-out perjury," and another engaged in an extended attack on her story, insinuating that she fabricated her accusations out of stereotypes of Black men, a 1971 novel by William Peter Blatty, and a Kansas sexual harassment case that made reference to a porn film actor named Long Dong Silver.[178]

She's Lying as epistemic injustice worked to put Clarence Thomas on the Supreme Court and endures in rape prosecutions. In the same year that truth-telling Anita Hill was successfully discredited as insincere, the Massachusetts Supreme Judicial Court decided that a complainant had a cliché-motive to lie about rape.[179] A trial judge had refused to let the defendant's lawyer ask the complainant about her supposed fear of how her parents "would react to the knowledge that she was sexually active."[180] Reversible error, said the state supreme court: the defendant was entitled to suggest that "the complainant had reason to lie."[181] When another rape defendant wanted to present evidence that he said would show the complainant's motive to lie, a New Mexico appellate court agreed. It approved the same trope about parental disapproval, announcing that "a teenage girl's fear of punishment from her parents for engaging in premarital sex tends to prove her motivation to fabricate a claim of rape to cover up consensual sex."[182]

The trope supposes that female speakers lie not out of ambition, the way a man might, but because they deeply care about

177. *See* Streseman, *supra* note 160, at 1270; BROCK, *supra* note 152, at 106–07.

178. Streseman, *supra* note 160, at 1270 n.5 (citations omitted).

179. *See id.*; Commonwealth v. Stockhammer, 570 N.E.2d 992, 998 (Mass. 1991).

180. 570 N.E.2d at 998.

181. *Id.* at 998, 1003.

182. State v. Stephen F., 152 P.3d 842, 848 (N.M. Ct. App. 2007).

disapproval from others—and only in one respect, their identity as sexual receptacles.[183] The people they strive to avoid offending are first their parents and then a gentleman friend. An appellate court in New York sided with a defendant who said that exclusion of evidence he'd wanted to offer at trial precluded him "from presenting the viable defense that the complainant had reason to fabricate . . . a forcible, violent assault."[184] What might that reason be? Lying would fend off consequences "resulting from her voluntary participation in sadomasochism with another man."[185]

Another judicial stroll down She's Lying Lane seemed similarly sure that what fills the female mind is not desire to know and speak the truth but a chronic worry about possible condemnation on the only axis that matters to girls and women. A trial judge in Pennsylvania speculated that a complainant lied about having consented to sex because she fretted belatedly that the truth about consent might "have jeopardized her relationship with her boyfriend."[186] A few assertions of She's Lying do call female accusers ambitious. For example, one legal-medical treatise quoted in a judicial opinion said women bring "deliberate false accusations" against "physicians and dentists" for the sake of "blackmail or collecting money by suit or by settlement."[187] The treatise dates back to 1931 and the citation to a 1957 dissent; this slur seems to be in decline. Modern rounds of She's Lying emphasize weakness rather than villainy.[188]

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183. Full-fledged human beings would care about speaking the truth, or at least about appearing truthful. *Cf.* Louise Antony, *Finding the Truth*, 56 DUQ. L. REV. 7, 7 (2018) (contending, with reference to philosophy, that "[p]eople *do* care about the truth").

184. People v. Jovanovic, 263 A.D.2d 182, 199 (N.Y. App. Div. 1999).

185. *Id.*

186. Commonwealth v. Berkowitz, 609 A.2d 1338, 1350 (Pa. Super. Ct. 1992).

187. Wedmore v. State, 143 N.E.2d 649, 659 (Ind. 1957) (Emmert, J., dissenting) (quoting ALFRED W. HERZOG, MEDICAL JURISPRUDENCE 827, 845–46 (1931)).

188. *See, e.g.*, Dowdy v. Grayson, No. 2023-CA-00985-COA, 2025 WL 1741585, at *5 (Miss. Ct. App. June 24, 2025) (noting judicial bafflement about why a daughter falsely accused her father of sexual misconduct); Brett Erin Applegate, Comment, *Prior (False?) Accusations: Reforming Rape Shields to Reflect the Dynamics of Sexual Assault*, 17 LEWIS & CLARK L. REV. 899, 904–05 (2013) (reviewing late-twentieth century case law on recantation of sexual-assault accusations, which recantations can themselves be false).

Scholars have gathered evidence showing that Black women draw She's Lying as a response to their accusations more often than white female accusers, and the reason for this extra-hostile response is not that accusations by Black women are less likely to be true.[189] Black women also experience three types of gendered harm that befall women more than men—rape, sexual harassment, and domestic violence—at more severe levels than what white women experience.[190] If impertinent applications of the presumption of innocence unjustly protect accused persons at the expense of accusers, as this Article has maintained, then these applications are inflicting an extra round of harm on the basis of race.

### *C. Second-Order Epistemic Injustice: Calling Accusers Unworthy of Belief While Refusing to Say Why*

Listeners who want to presume that accusers are guilty of unreliability hide that presumption of guilt by obscuring their ostensible reason for this belief.

#### *1. Piling On as Evasion*

Decisional law, scholarly writing, and lay commentary practice evasion by answering the sincerity-or-competence question by reciting a string of possibilities that all suggest an accuser deserves mistrust but are otherwise inconsistent or incomprehensible. Commentary in the Model Penal Code almost cops to

189. Epstein, *supra* note 47, at 314–15; *see also* Elizabeth Langston Isaacs, *The Mythology of the Three Liars and the Criminalization of Survival*, 42 YALE L. & POL'Y REV. 427, 439 (2024) (arguing that post-conviction relief for incarcerated victims of domestic violence is applied harshly because legislators and judges have in mind "three liars," or dishonesty they attribute to "[1] women, [2] people of color, and [3] imprisoned people").

190. *See* Elizabeth A. Mosley, Jessica R. Prince, Grace B. McKee, Sierra E. Carter, Ruschelle M. Leone, Kathy Gill-Hopple & Amanda K. Gilmore, *Racial Disparities in Sexual Assault Characteristics and Mental Health Care After Sexual Assault Medical Forensic Exams*, 30 J. WOMEN'S HEALTH 1448, 1448–49 (2021) (reviewing data on a race gap and also reporting more hostility in response to rape complaints by Black women) (2021); Epstein, *supra* note 47, at 315 (reporting higher rates of sexual harassment suffered by Black women, and also more disbelief of their complaints); BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION 26-27 (2012) (reporting domestic violence statistics).

this maneuver when it muses about "a tangled mesh."[191] The tangled mesh blends "psychological complexity, ambiguous communication, and unconscious restructuring of the event by the participants."[192] Here the Model Penal Code piles more on top of its pile-on by not acknowledging that it says anything about the accuser. Instead it disparages only mess inside "the participants," ambiguity in their "communication," and the "unconscious restructuring," whatever that means, of a vaguely noted "event."[193] Only the bottom line—that listeners should respond with disbelief when a woman accuses a man of rape—is clear here. The reason to disbelieve her consists only of opaque musk.

Another allegation of falsity in sexual-assault claims gathers eight supposed "motives" that swirl in the unruly mind of an accuser: "material gain, alibi, revenge, sympathy, attention, a disturbed mental state, relabeling, [and] regret."[194] What "alibi" might mean here goes unsaid. Isn't "relabeling" an act rather than a motive? A "disturbed mental state" isn't a motive either. And if false accusation yields material gain to an accuser, someone ought to say how.[195]

In an allegory-like "case study" of an accusation later recanted by an accuser who said she'd lied, French researchers said they found explanatory power in "cognitive dissonance," "psychological stress," and a notion on the part of the accuser labeled "religious" that the extramarital sexual intercourse she had engaged in—had initiated, actually—was wrong.[196] Stress and religion and cognitive dissonance are much more widespread than false accusations; they cannot suffice to explain this one. Disgust, shame, sorrow, the authors continue. Add

191. MODEL PENAL CODE § 213.1 cmt. at 303 (A.L.I., 1980).

192. *Id.*

193. *Id.*

194. André W. E. A. De Zutter, Robert Horselenberg & Peter J. van Koppen, *Motives for Filing a False Accusation of Rape*, 47 ARCHIVES SEXUAL BEHAV. 457, 459–60 (2018).

195. *See infra* Part III (reviewing costs and punishments that accusers experience).

196. S. Demarchi, F. Tomas, A. Franchi & L. Fanton, *Cognitive Dissonance and False Rape Allegations: A Case Study*, 11 LA REVUE DE MÉDECINE LÉGALE 122, 123–24 (2020).

"trivialization."[197] Each addition to the list of supposed motives makes the authors' explanation less clear.

Writing in 1967, student authors applied the same throw-it-all-at-the-wall-and-see-what-sticks approach by gathering possibilities: "False accusations of sex crimes in general, and rape in particular, are generally believed to be much more frequent than untrue charges of other crimes."[198] Who "generally" believes that? Never mind; onward: "A woman may accuse an innocent man of raping her because she is mentally sick and given to delusions; or because, having consented to intercourse, she is ashamed of herself and bitter at her partner; or because she is pregnant, and prefers a false explanation to the true one; or simply because she hates the man whom she accuses."[199] She might be this: she might be that; possibly she is something else. These attacks simultaneously disparage the accuser as hyperfocused on her own advantage and also irrational, adrift, "given to delusions."[200] She contains multitudes, none of them trustworthy.

One early contribution to the false-accusation legal literature, expressing sympathy for accusers, included the familiar "revenge" and added "blackmail, jealousy, guilt, or embarrassment."[201] Maybe "regret" and "embarrassment" mean the same thing; maybe "blackmail" is what the motive list had in mind when it said "material gain."[202] As for revenge, no one has explained why the vengeful seem to confine their lying to sexual misconduct. One would assume these liars would vary the menu now and then.

An op-ed published during the Brett Kavanaugh confirmation hearings whose headline said accuser Christine Blasey Ford was "no poster child for women's rights" limited its conjecture to two possible sources of unreliability in this accuser:

197. *Id.*

198. Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1138 (1967).

199. *Id.*

200. *Id.*

201. Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1025 (1991).

202. *See* De Zutter et al., *supra* note 194, at 460.

one, her "mental health;" two, her "past sexual conduct."[203] The author elaborates with a rhetorical question: "Do any of us know the first thing about Ford's mental health or sexual history? Of course not, but it doesn't seem to matter for those forging ahead with her as their champion."[204] Hard to know what knowing "the first thing" about these two conjoined slurs would reveal about untrustworthiness. "Mental health" impugns competence, but what exactly does "past sexual conduct" or "sexual history" say about credibility?[205] How does this reason to mistrust an accusation align with the incompetence that this skeptic used "mental health" to identify? This reason-free attack on credibility takes us now to the sexual-history slur expressed more compactly in a single word.

### *2. Condemnation by Evasion in the Adjective "Unchaste"*

As an antonym, "unchaste" may sound extra quaint or passé now but it was always vague on what exactly it negates.[206] It's the opposite of "chaste," from the Latin "castus."[207] The standard definition of *castus* as "clean and pure" glosses over the hierarchical nature of this status, an aspect that's easier to see in kin-words like "caste" and "castle."[208] To be unchaste is to fall out of line.[209]

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203. Catherine Cherkasky, *Christine Blasey Ford Is No Poster Child For Women's Rights: A Female Attorney's Perspective*, USA TODAY (Oct. 5, 2018, at 08:55 ET), https://www.usatoday.com/story/opinion/voices/2018/10/04/false-accusations-kavanaugh-ford-innocent-column/1488329002/ [https://perma.cc/U8GZ-FVCT].

204. *Id.*

205. *See* Applegate, *supra* note 188, at 911 (discussing how sexual assault victims were extensively questioned about their "sexual history" in trials on the theory that "promiscuity reflected negatively on the victim's credibility as a witness").

206. *Cf.* HANNE BLANK, VIRGIN: THE UNTOUCHED HISTORY 3 (2007) ("By any material reckoning, virginity does not exist.").

207. *Chaste*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/chaste#word-history [https://perma.cc/6JVS-P8LG] (last visited Sep. 19, 2025) (describing the Latin castus as "untouched" and "free of vice").

208. *See* Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 67–69 (2002).

209. *See id.* at 69–70; Dailey v. Reynolds, 4 Greene 354, 355 (Iowa 1854) ("A female against whom the want of chastity is established is at once driven beyond the reach of every courtesy and charity of life, and almost beyond the portals of humanity.").

Until the enactment of rape shield laws in the mid-1970s, American courts permitted defendants to introduce evidence of the complainant's unchaste reputation and unchaste conduct.[210] Some courts insisted on a distinction between the two types of unchastity that put higher evidentiary value on "unchaste reputation."[211] Which past actions render a complainant unchaste, along with why the unchastity of a speaker should steer listeners to doubt what she says, has always remained conveniently open.

Persons who wanted to call an accuser "unchaste" back in the day did not need to provide specifics related to her sexual experience.[212] "Evidence that a woman consumed alcohol or drugs, enjoyed tobacco products, traveled alone late at night, befriended women of ill repute, possessed condoms, uttered profane language in public or in the company of men, or even, as a white woman, associated with people of color," as Michelle Anderson reports, functioned "to prove a woman's unchaste character."[213] Condoms in one's possession bespeak a plan or desire to engage in sexual intercourse, maybe, and given the low repute of the condom in the era before rape shield laws, associating this thing with reprehensibility might have had some claim to the truth.[214] Other inclusions in this review do not even allege that the complainant herself engaged in any sexual acts, proper or improper.

Readers of "unchaste" as rendered in decisional law have searched for any meaning of this word that might plausibly speak to credibility, particularly the connection between a record of compliance with norms about sexual behavior and an entitlement to be presumed credible when one testifies in court. Leon Letwin, working in the 1970s to codify rape shield legislation in California, speculated that "a moral flaw" in one part of

210. *See* Applegate, *supra* note 188, at 911; Luke Saunders, *Rape Shield Laws: Protecting Sex-Crime Victims*, NOLO, https://www.nolo.com/legal-encyclopedia/rape-shield-laws-protecting-sex-crime-victims.html [https://perma.cc/DHJ9-MTN7] (last visited Jan. 5, 2026).

211. Anderson, *supra* note 208, at 69–70.

212. *See id.*

213. *Id.* at 74 (citations omitted).

214. *See id.* at 74 n.118.

the complainant's ostensible character, which Letwin called "sexual laxity," might reflect "on other aspects of her character (e.g., honesty) as well."[215] That inference defies not only reason but also numerous legal rules and stances, among them evidence law's longstanding disapproval of so-called character evidence to impugn anyone.[216]

Those aforementioned readers of "unchaste" as rendered in decisional law have not seen this word published there recently, of course, but the impact of this impugning remains alive and harmful. Only one of the exceptions included today in most rape shield laws, the opportunity to introduce evidence showing that another person "was the source of semen, injury, or other physical evidence,"[217] refrains from slurring the complainant on the ground that she is or was what used to be called unchaste;[218] other exceptions allow defenders of persons accused of rape to introduce previous sexual activity by a complainant to undermine credibility.[219] Condemnation as unchaste harms some groups of accusers more than others.[220]

Calling a rape complainant unchaste flourishes even more in lay discourse than in court, especially from people who have almost certainly never heard that word.[221] These impugners do

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215. Leon Letwin, *"Unchaste Character," Ideology, and the California Rape Evidence Laws*, 54 S. CALIF. L. REV. 35, 46 (1980), quoted in *id.* at 74 n.123.

216. *See* FED. R. EVID. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").

217. FED. R. EVID. 412(b)(1)(A).

218. *See* Anderson, *supra* note 208, at 56.

219. In a relatively recent decision, New York's high court reversed the exclusion of evidence and granted a defendant a new trial, finding that "a broader 'interest of justice' provision vesting discretion in the trial court" supported protecting him with the rape shield exception. People v. Cerda, 223 N.E.3d 308, 313 (N.Y. 2023) (quoting People v. Williams, 614 N.E.2d 730, 733 (N.Y. 1993)).

220. For example, a 2019 report found that in U.S. states that do not specifically prohibit this impugning of accusers—that's the large majority—judges use the history of complainants as sex workers "to invalidate assault charges." Danielle A. Sawicki, Brienna N. Meffert, Kate Read & Adrienne J. Heinz, *Culturally Competent Health Care for Sex Workers: An Examination of Myths That Stigmatize Sex-Work and Hinder Access to Care*, 34 SEXUAL & RELATIONSHIP THERAPY 355, 357 (2019).

221. *See* Francine Banner, *Honest Victim Scripting in the Twitterverse*, 22 WM. & MARY J. WOMEN & L. 495, 495 (2016) (calling one popular social media site "a micro-courtroom in which victims' veracity and perpetrators' responses are evaluated, interrogated, and assessed").

know a few other words. "Slut" is among their preferred fresher ways to call a complaint unchaste.[222] Identity as a slut means that, unlike her good-girl counterparts who, in principle, should be safe from rape,[223] this complainant deserved what happened to her.[224] Impugners have no apparent problem believing that rape is what sluts experience and ought to suffer while believing at the same time that a claim of having been raped should be disbelieved if the claimant is a slut.[225]

*3. Factitious Disorder as Evasion*

A third variation on second-order epistemic injustice can follow from misuse in court of a psychological diagnosis. Four points direct clinicians toward a label that impugns the competence and sincerity of an accuser without clarifying a line between the two slurs. The leading professional manual recites four ostensible diagnostic criteria for factitious disorder:

A. Falsification of physical or psychological signs or symptoms, or induction of injury or disease, associated with identified deception.

B. The individual presents himself or herself to others as ill, impaired, or injured.

222. *See* Goodwin v. Pennridge Sch. Dist., 389 F. Supp. 3d 304, 309 (E.D. Pa. 2019) (reporting a claim that a high school classmate of the plaintiff raped her and then, along with his peers, called her a slut); James W. Hendrix & Daniel Simon, *Ethical Advocacy: A View from Chambers*, 55 TEX. TECH L. REV. 437, 455 (2023) (quoting a statement by a judge in court that "a girl who was raped off campus endured daily verbal harassment for five weeks following the rape, including being called a slut, a liar, a bitch, and a whore").

223. *See* Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 829 (2013).

224. Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47, 48 (1992) (contending that rape complainants navigate "a legal system which puts the same issue in the form of a question: was she in fact a 'slut' who deserved it, as the perpetrator claims, or not-a-slut, deserving of some redress?").

225. LEORA TANENBAUM, SLUT! GROWING UP FEMALE WITH A BAD REPUTATION 9 (1999); *see also* Wendy N. Hess, *Workplace Rumors About Women's Sexual Promiscuity as Gender-Based Insults Under Title VII*, 31 ABA J. LAB. & EMP. L. 447, 450 (2016) (noting impacts of rumored promiscuity on credibility and dignity as reported by male and female study subjects).

C. The deceptive behavior is evident even in the absence of obvious external rewards.

D. The behavior is not better explained by another mental disorder, such as delusional disorder or another psychotic disorder.[226]

Readers attuned to the language of epistemic injustice will spot what Miranda Fricker labeled the impugning of "sincerity" in Criterion A, which speaks about willful deception, while Criterion C, which notes the lack of a rational-looking motive to explain deceptive behavior by the patient, can be read to stand for "competence."[227] Although the *Diagnostic and Statistical Manual* calls these sentences "diagnostic criteria," one study reported that in practice clinicians do not actually apply them to diagnose factitious disorder.[228] They find the presentation-focused Criteria B and C too difficult to implement and rely on Criterion A alone, reaching a diagnosis first by gathering "circumstantial evidence to develop an index of suspicion" and only afterwards finding evidence of deception.[229]

Notwithstanding years of robust discussion about overreliance on Criterion A and alternatives proffered to guide clinical practice, when it revised the *Diagnostic and Statistical Manual* into its current iteration as the DSM-5 in 2013 the American Psychiatry Association reaffirmed its commitment to criteria that clinicians do not observe.[230] Again, separate claims about (in)sincerity and (in)competence merge to form an amalgam without boundaries. The diagnosis of factitious disorder can

226. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 324 (5th ed. 2013) [hereinafter DSM-5].

227. *See* FRICKER, *supra* note 45, at 44–46.

228. Aideen Lawlor & Jurek Kirakowski, *When the Lie Is the Truth: Grounded Theory Analysis of an Online Support Group for Factitious Disorder*, 218 PSYCHIATRY RSCH. 209, 209 (2014) (referencing the predecessor DSM-4, which omits Criterion D but is otherwise substantially similar to the DSM-5).

229. *Id.*

230. *See id.*

signify either insincerity or incompetence or both.[231] The DSM-5 is capable of keeping sincerity and competence distinct—it has a word to mean deceit toward a rational-looking end like money or time off from work, "malingering"[232]—but it does not observe that boundary in its description of factitious disorder.[233] Factitious disorder in this perspective presents an opportunity for evasion and eliding of the sort we've seen in other instances of second-order epistemic injustice.[234]

As a respected autonomous profession with its own goals and commitments, psychiatry doubtless has good reasons to unite incompetence and insincerity into a unitary judgment of psychopathology without emphasizing where each begins and ends. Law, however, insists on a distinction between the two. Labels central to criminal and tort law—among them fraud, deceit, conspiracy, theft, conversion, even negligence—all address mental state in the sense of knowledge on the part of the actor that the actor is doing something harmful. Defendants are deemed guilty or not guilty of a crime, and liable or not liable for some torts, based on assessment of whether the state or the plaintiff has proved that they acted with intent.[235]

The gap between factitious disorder as provisioned in psychiatry's official manual, which puts insincerity together with incompetence under one rubric, and the insistence of law on a distinction between the two suggests that a court ought to proceed with caution in response to a partisan contention that an accusation lacks credibility because the accuser suffers from factitious disorder. That contention might be correct, but because it's vague on a point central to a legal conclusion—that is, the

231. *See id.*

232. *See* DSM-5, *supra* note 226, at 326 (defining malingering as "differentiated from factitious disorder by the intentional reporting of symptoms for personal gain"); *id.* at 403 (adding that malingering is "voluntary behavior").

233. *See id.* at 326.

234. *See* FRICKER, *supra* note 45, at 44–46.

235. *See* Jay Sterling Silver, *Intent Reconceived*, 101 IOWA L. REV. 371, 392 nn.99–100 (2015) (citing the Restatement of Torts and the Model Penal Code to note the centrality of intent to tort and criminal law).

presence or absence of intent to deceive—"factitious disorder" as a label blurs a boundary of importance to the law.

Coining the phrase "factitious sexual harassment" gave one forensic psychiatrist an occasion to unite She's Lying and She's Crazy. Sara Feldman-Schorrig put the two together by adverting to *pseudologia fantastica*, a term that Feldman-Schorrig defined as "pathological lying."[236] A better definition might be "mythomania" or "fantastical lying," because those phrases make reference to delusion.[237] When Feldman-Schorrig added that persons who make false claims of sexual harassment could be motivated by "the wish to acquire victim status," she ascribed another combination of insincerity and incompetence to the accuser.[238] Feldman-Schorrig united the two also by saying that "factitious disorders are characterized by the intentional production or feigning of signs or symptoms solely in order to assume the sick role."[239] That explanation uses "disorders" to signify Crazy and "intentional production or feigning of signs or symptoms" to supply Lying.[240]

In another paper coauthored with a lawyer who represents defendants in sexual harassment litigation,[241] Feldman-Schorrig recommended the exploration of factitious disorder as a litigation tactic to impugn complainants' credibility.[242] "[S]exual harassment claims are highly prone to exaggeration and embellishment, if not outright fabrication," the coauthors wrote.[243] Once again She's Crazy joined She's Lying, this time muddying the second-order epistemic injustice waters with a claim that a plaintiff might "falsely impute to 'harassment' in the workplace emotional trauma that she is suffering due to stressors outside

236. Sara Feldman-Schorrig, *Factitious Sexual Harassment*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 387, 391 (1996).

237. *See id.*

238. *Id.*

239. *Id.* at 387.

240. *See id.*

241. Sara P. Feldman-Schorrig & James J. McDonald, Jr., *The Role of Forensic Psychiatry in the Defense of Sexual Harassment Cases*, 20 J. PSYCHIATRY & L. 5 (1992).

242. *Id.* at 23.

243. *Id.* at 6.

of the workplace, such as spousal abuse, marital discord, financial problems and the like."[244] Those stressors, especially spousal abuse, make this hypothetical plaintiff seem more incompetent than insincere: but as with all instances of evasion in attacks on credibility the line wriggles. Weaponizing factitious disorder as a partisan label carries second-order epistemic injustice into a realm of high professional authority.[245]

## III. CONDITIONS THAT BURDEN ONE SET OF ACCUSERS ENOUGH TO JUSTIFY EXTENDING THE PRESUMPTION OF INNOCENCE TO PROTECT THEM

The pertinence-impertinence line offered in this Article guides observers to use the presumption of innocence to mitigate advantages of procedure and institutional power that an accuser can hold over an accused person. Advantages of procedure and power that favor the state are absent when one individual accuses another, and accusers who allege sexual misconduct face particular burdens and detriments.[246] We have explored one such condition, the credibility discount.[247] This Part continues that reassessment, finding reasons to ascribe credibility to accusers.

### *A. False Accusation Is Not, Pace Matthew Hale, "Easily to Be Made" in Any of the Three Fora Available to Sexual-Misconduct Accusers*

Time to unpack "easily to be made and hard to be proved and harder to be defended by the party accused, tho[ugh] never so innocent" as a characterization of sexual-misconduct

244. *Id.*

245. *See generally* JONAS ROBITSCHER, THE POWER OF PSYCHIATRY (1980) (offering an analysis of this occupational prestige from an author writing as both a lawyer and a board-certified psychiatrist); Alison L. Weitzer, *The Revitalization of Battered Woman Syndrome as Scientific Evidence with the Enforcement of the DSM-5*, 18 MICH. ST. U. J. MED. & L. 89, 120–21 (2014) (noting that the DSM has been dubbed "the bible").

246. *See supra* Part II.

247. *See supra* Section II.B; Tuerkheimer, *supra* note 47, at 20–21 (explaining how legal doctrines have been shaped by "entrenched disbelief of women [complainants]").

accusations.[248] Any claim that makes reference to actions witnessed only by partisan participants is indeed "hard to be proved," but that difficulty is a reason to favor acceptance of factual information on point, not reject it. As for "harder . . . to be defended by the party accused," defending oneself when accused takes effort only when listeners have been willing to credit the accuser. If an accusation presumptively lacks merit because people who make it are presumed deficient in sincerity or competence, blowing off whatever these people said is easy rather than hard. It's denial, not accusation, that's "easily to be made." Impugn your accuser, wrap yourself in the impertinent presumption of innocence, and you're good to go.

You don't have to do even that much until your accuser finds a place to be heard. An accuser can't just open her mouth and howl.[249] Her story has a home in only three locations at most. First, accusers can complain to police or prosecutors. Anyone can reach that forum if the accusation includes a crime. Some accusers can reach the second forum, a department or office that enforces rules to protect members of the community to which the accuser or accused person belongs. Lastly, some accusers are able to publish their accounts in a medium that audiences read or otherwise consume as members of the public. All fora impose costs on accusation.

### *1. Denunciation to Police or Prosecutors*

Useful light on how sexual-misconduct accusations reach state actors with authority to investigate appears in *Sexual Assault Incident Reports*,[250] a publication credited to an international association of chiefs of police but written with American practices in mind. An editorial note that credits funding from

248. *See* HALE, *supra* note 50, at 635 (alterations added). For further discussion of the quote, see *supra* note 50 and accompanying text.

249. The familiar pejorative reference to this possibility is "cry rape." For further discussion on how this trope is perpetuated by popular culture, see Eva Wiseman, *The Truth About Women 'Crying Rape'*, THE GUARDIAN (Mar. 31, 2013), https://www.theguardian.com/lifeandstyle/2013/mar/31/truth-about-women-crying-rape [https://perma.cc/NL8R-NM96].

250. INT'L ASS'N OF CHIEFS OF POLICE, SEXUAL ASSAULT INCIDENT REPORTS: INVESTIGATIVE STRATEGIES (2018) [hereinafter INCIDENT REPORTS].

the Office of Violence Against Women of the U.S. Department of Justice and announces the authors' efforts to include "the most current thinking" about this crime tells readers that this publication sets out to state best practices.[251] But *Incident Reports* offers description along with prescription. Its recommendations to investigators, made available here to the larger public, lay out experiences that prospective complainants can expect to face when they choose this forum for accusation.

Start with intake, which marks a beginning from the perspective of investigators.[252] When our accuser speaks to these officers, she can expect to generate a tracking number along with a file that will remain open until someone closes it.[253] *Incident Reports* notes that this recordkeeping may go on to generate an array of judgments by adjective when an office closes the case, including "unfounded," "unsubstantial," "baseless," "false," and the ambiguous "cleared."[254] Accusations that repose in police records do not speak for themselves or for the person who provided them; they exist in a state of third-hand characterization. Any accusation that takes form by means that the accuser does not control cannot, from her point of view, be easily made.

*Incident Reports* provides more information about the path of denunciation to police and prosecutors in a boxed-off paragraph captioned "Report Writing Considerations and Potential Suspect Defenses."[255] This passage continues the theme of prescription as description. By telling investigators how to write a report so as to preserve prosecutability in the face of "common sexual assault defenses," *Incident Reports* identifies perils for accusers.[256]

For example, the report-writing consideration called "Identity" urges investigators to "[c]ollect and preserve DNA

251. *Id.* at 8.
252. *See id.* at 3.
253. *Id.* at 2.
254. *Id.*
255. *Id.* at 3.
256. INCIDENT REPORTS, *supra* note 250, at 3.

samples from the victim and suspect, and other physical evidence."[257] This exercise in collection points up two broad categories of burden for an accuser. First, she can expect to have her body examined and touched by strangers doing a forensic job.[258] Second, she is forewarned by the "defenses" label of this boxed paragraph that an adversary will try to use this material to challenge and undercut what she says.[259] *Incident Reports*, with apparently benign intentions, tells investigators to "[d]ocument fear, force, threat, coercion and/or inability to consent," once again combining benevolence toward the accuser with a recommendation that investigators put her through burdensome paces.[260] The accuser must endure what police officers do to extract evidence of her recently reported suffering.[261]

A paradox of reporting threads through *Incident Reports*. On one hand, words from the accuser are necessary. An accusation is words: it can take no other form. On the other hand, words from the accuser function to undermine, erase, and contradict her accusation. *Incident Reports* labels this undoing "impeachment by contradiction," the near certainty that whoever defends the accused person will go over written-down verbiage in search of divergences that this defender can exploit.

From the perspective of an accuser, both speaking and not speaking to police investigators are dangerous paths. This individual can make every effort to tell the exact same story every time but only rarely will her rendering always emerge in that pristine-looking state. Even if the accuser's words never change, her vulnerability to what note-takers write down remains. Listeners might mishear or misreport what she says. They could decide to omit a detail she reported on the ground that it seems peripheral but that later becomes necessary for credibility-evaluators to know. It's even possible for her to be called too prepared, too consistent in her delivery to be

257. *Id.*
258. *Id.* at 5.
259. *Id.* at 3.
260. *Id.*
261. *See id.*

trusted.[262] "Victims attempting to report rape or sexual assault to law enforcement must walk a tightrope," writes Maybell Romero.[263] They should appear "shattered" on one hand, but not quite so shattered on the other hand "that they are unable to relate minute details about the assault or events surrounding the assault."[264] Verbalization is at the same time necessary and potentially fatal to accusation.

"Do not polygraph victims," says *Incident Reports*,[265] telling accusers indirectly that police investigators might do exactly that to them. Congress set out to discourage this maneuver in 2005 by taking grant funds away from jurisdictions who by policy or practice require, or even ask, sexual assault victims to submit to a polygraph examination.[266] This instrument has been infamous in evidence law for more than a century;[267] its days of law enforcement respectability may have come to an end. But it can land on an accuser.

Accusers who report harmful impacts on their bodies have other levels of reporting to think about. *Incident Reports* tells investigators to give accusers "information on how to obtain medical treatment and undergo a forensic exam."[268] The "forensic" in "forensic exam," a term that announces investigation into whether the accusation meets standards of both science and law, signals more questioning to come. The best-practices perspective of *Incident Reports* encourages the rendering of more information to the accuser.[269] Facts about HIV, other

262. *Cf.* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 297–99 (10th ed. 2015) (recounting the successful impugning of a truthful witness by a lawyer at trial who showed that the witness had practiced speaking her testimony); Danielle Paquette, *What We Mean When We Say Hillary Clinton 'Overprepared' for the Debate*, WASH. POST. (Sep. 27, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/09/27/what-we-mean-when-we-say-hillary-clinton-overprepared-for-the-debate/ [https://perma.cc/D8A7-RLUP] (reviewing a slur of a presidential candidate).

263. Maybell Romero, *Shamed*, 111 VA. L. REV. 325, 364 (2025).

264. *Id.*

265. INCIDENT REPORTS, *supra* note 250, at 5.

266. 34 U.S.C. § 10451(a).

267. Jeremy Ben Merkelson, Wendy Kearns, David Rice & Elyse Sparks, *Neurotechnology Works Its Way Forward*, 48 SEATTLE U. L. REV. ONLINE 1, 11 (2025).

268. INCIDENT REPORTS, *supra* note 250, at 5.

269. *See id.* at 6.

sexually transmitted infections, and locations to which the accuser can return should she later change her mind after saying no to a sexual assault forensic examination are among the recitations that an accuser can expect to hear.[270] Useful and welcome, perhaps, but potentially burdensome.

*Incident Reports* provides more reasons to doubt Matthew Hale's assertion that sexual assault accusations are "easily made" by warning police investigators about recurring difficulties for people who consider making a report. For example, it adverts to the appearance of informants as "reluctant to actively participate with case proceedings."[271] This reluctance does not stem from the unimportance of what these informants have to say: narration from a reluctant witness "may aid in the identification and apprehension of a serial offender."[272] *Incident Reports* also reminds investigators about statutes of limitation, a cutoff that can cause them to put pressure on an accuser.[273]

Another unwelcome possibility for accusers, *Incident Reports* continues, is that police investigators will "[p]ressur[e] a reluctant victim to sign a form stating that they are not interested in prosecution and will not hold the agency accountable for stopping the investigation."[274] The accuser might feel ambivalent about going forward. She might already know, from prior observation of or experience with sexual assault, about the credibility discount that accusers face.[275] Although *Incident Reports* says this pressure is "poor practice" that can jeopardize investigation,[276] the move must occur at least sometimes if it warrants space in a short guidance.

The aversion to pressuring accusers expressed in *Incident Reports'* disapproval of pushing them to sign waivers does not appear in its treatment of another police strategy: *Incident Reports*

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270. *Id.* at 5.

271. *Id.*

272. *Id.*

273. Her testimony might be needed immediately if it is crucial to "another case involving the same suspect." *Id.* at 6.

274. INCIDENT REPORTS, *supra* note 250, at 6.

275. *See supra* Section II.B.

276. INCIDENT REPORTS, *supra* note 250, at 6.

urges investigators to consider asking, or perhaps telling, accusers to initiate a phone call to the suspect they name and record the conversation.[277] This "strong tool" can generate a transcript useful for eliciting admissions and impleading the suspect at a later time.[278] Production of this transcript comes at the price of stress for the accuser, as will the choice she may make to veto the idea.

"Keep in mind the co-occurring nature of violence against women crimes," says *Incident Reports* before formulating a list of possibilities that names domestic violence, stalking, drugging to facilitate sexual assault, theft, property damage, false imprisonment, human trafficking, kidnapping, abduction, administering an illegal substance, poisoning, and witness tampering.[279] To keep in mind this catalogue is to remember that accusations made to police and prosecutors come from a human being who may well have suffered harm from more criminal conduct than the rape she reports. Victims of one of these thirteen other crimes—in addition to the one that drew scorn from Matthew Hale—reach the police in a state of vulnerability likely to make the task of accusation harder.

### 2. *Denunciation to Compliance Offices*

In contrast to the police-and-prosecutors forum for an accusation, which is open to the public at large, compliance offices receive a limited set of complainants. Compliance as used here means hewing to statutes and regulations written to protect individuals in two settings: education (especially "higher" post-secondary education) and employment. What I mean by "a limited set of complainants" is that individuals with access to this compliance are different from the United States average in pertinent respects.

Differences here amount to advantages. College students are both less likely to experience sexual assault than their non-

277. *See id.*
278. *Id.*
279. *Id.* at 7.

college peers and more catered-to when this risk ripens; their status as 'customers' pressures schools to demonstrate commitment to student safety.[280] Workers whose employers maintain human resources departments might roll their eyes at the idea of Human Resources as a protector,[281] but they enjoy access to support for their safety on the job that unemployed and less formally employed persons lack. Because compliance offices investigate and sanction misbehaviors that violate the criminal law and also those that do not constitute crimes, their power is wider in this sense than what police and prosecutors can hear while touching fewer people. Accusations of sexual harassment, in contrast to criminal sexual assault, occupy a large share of authority that does not overlap with that of the last forum.

Similar in this function to *Incident Reports*, the step-by-step guide for police investigators, a document called the *Title IX Model Intake Form: Title IX Report Information* sheds light on the receipt of accusations by administrators in higher education.[282] In my home state, the college official who meets with a student is instructed to tell her about her rights.[283] The first Miranda-sounding warning: "You have the right to make a report to university police or campus security, local law enforcement, and/or state police or choose not to report; to report the incident to your institution; to be protected by the institution from retaliation for reporting an incident; and to receive assistance and resources from your institution."[284] Other recitations follow as scripts.

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280. SOFI SINOZICH & LYNN LANGTON, U.S. DEP'T OF JUST., RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995-2013, at 1 (2014), https://bjs.ojp.gov/content/pub/pdf/rsavcaf9513.pdf [https://perma.cc/89Y2-ZHPA]; *see Campus Safety: What Are Students (and Parents) Looking for to Make Sure University Is Safe?*, 22MILES (Oct. 25, 2024), https://www.22miles.com/blog/campus-safety-what-are-students-and-parents-looking-for-to-make-sure-university-is-safe/ [https://perma.cc/J53F-SYSQ] ("With 82% of college students reporting concerns about their personal safety on campus, universities are now under pressure to provide comprehensive safety solutions.").

281. Chris Westfall, *The Credibility Crisis in HR: How to Rebuild Trust with Employees*, FORBES (Nov. 28, 2024, at 11:09 ET), https://www.forbes.com/sites/chriswestfall/2024/11/27/the-credibility-crisis-in-hr-how-to-rebuild-trust-with-employees/ [https://perma.cc/5SEK-KMRH].

282. *See* ST. UNIV. OF N.Y. STUDENT CONDUCT INST., TITLE IX TOOLKIT 1–3 (2024) (model intake form for internal use) (on file with author).

283. *Id.* at 1.

284. *Id.*

Justifiably enough, the recitation strives to safeguard two interests distinct from what the accuser needs: due process for accused persons and what's good for the college or university.[285]

*Incident Reports* has another counterpart for human resources departments that receive complaints about sexual misconduct. *Conducting Sexual Harassment Investigations (with Sample Procedures)* speaks to business managers and the lawyers who advise them.[286] Its "sample procedures" inform prospective accusers about the Human Resources road ahead.

Under "Responsibilities of Human Resources," this guidance starts by telling HR to investigate sexual misconduct complaints "immediately, if practical," and "in all cases as soon as practical."[287] So far so good. Consistent with the higher-ed pattern, everything that follows emphasizes the divergent interests of the employer and the accuser. That divergence also merits a conclusion of "so far so good"—separation between an adjudicator and a disputant is central to procedural justice[288]—but it also refutes Matthew Hale's "easily to be made."

The next instruction to Human Resources is to "have another management person present" when interviewing the complainant or another employee.[289] After that: Interview the complainant's supervisor to learn about what the complainant said.[290] If the complainant went directly to HR rather than tell her story to the supervisor, then HR should "determine what is known and why it was not reported."[291] If the complaint involves pictures or graffiti, review them.[292] Review everyone's

285. *See generally* WILLIAM A. KAPLIN, BARBARA A. LEE, NEAL H. HUTCHENS & JACOB H. ROOKSBY, *Student Disciplinary Issues*, *in* THE LAW OF HIGHER EDUCATION: ESSENTIALS FOR LEGAL AND ADMINISTRATIVE PRACTICE §§ 9.1–9.3 (7th ed. 2024) (providing this perspective in an overview of disciplinary procedures).

286. Glenn A. Duhl, *Conducting Sexual Harassment Investigations (with Sample Procedures)*, PRAC. LITIGATOR, Nov. 1999, at 11.

287. *Id.* at 20.

288. *See id.* at 20–22.

289. *Id.* at 20.

290. *Id.*

291. *Id.*

292. *Duhl*, *supra* note 286, at 20.

personnel file.[293] Request the names of all potential witnesses, "then interview all the witnesses and accused harassers in detail."[294]

In the next section, "Deciding the Complaint," the guidance makes recommendations about factfinding and the imposition of discipline.[295] Like the section on the responsibilities of Human Resources, this part of *Conducting Sexual Harassment Investigations* stakes out an admirable commitment to fairness and procedure. It tells managers to review written materials on point, assess "the credibility of the accused and the complainant," and administer discipline, if "discipline is in order," consistent with "established practices" and any labor agreement in place.[296]

Like *Title IX Model Intake Form* as an overview of what to expect when reporting one's accusation to a university compliance office, *Conducting Sexual Harassment Investigations* shows how very not "easily made" these communications are. Guidance to managers in both the higher-ed and employment settings rightly emphasizes procedural justice as an entitlement for accused persons.[297] These settings exemplify peripheral pertinence for the presumption of innocence, a locus where institutions extend a version of this presumption to individuals they accuse and ought to do so.[298] Accusers in turn ought to value due process as an entitlement for the people they accuse.[299]

This commitment to principle noted, the 'oughts' and 'shoulds' continue. Safeguards for the interests of accused

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293. *Id.*

294. *Id.* at 21.

295. *Id.* at 22–23.

296. *Id.* at 22.

297. The two manuals, along with INCIDENT REPORTS as guidance to police investigators, represent ideal-type models. *See* INCIDENT REPORTS, *supra* note 251. Accusers in the real world might well find less fidelity to due process in the organizations tasked with intake of what they say. No one who tells an accusation to the police, a Title IX office, or Human Resources can expect to benefit from whatever real-world lapses in due process ensue, however.

298. *See supra* Section II.B.2.

299. *See* JOHN RAWLS, A THEORY OF JUSTICE 11–12 (Harv. Univ. Press Rev. ed., 1999) (1971) (arguing that an individual will best identify "principles of justice" from "behind a veil of ignorance" about which position in society that individual will occupy).

persons and the institutions that manage accusation come at the expense of accusers. Accusers should not resent this burden because procedural justice demands it. Observers of the compliance-office forum for accusation, in turn, ought to acknowledge that the burden exists and that it refutes what Matthew Hale said about "easily made."

*3. Publication in One's Own Words*

Denunciation that an accuser can compose and distribute away from police, prosecutors, and compliance personnel who work for a school or employer seems to qualify for "easily made." Such a message need not clear any threshold set up by another person or institution before it reaches the world. Type. Click. Done.

Matthew Hale, who died centuries before the launch of the information revolution, thought accusations were much too "easily made" back when most women couldn't read or write and almost no one had access to what would later be called print or broadcast media. If our "pious misogynist" could sample a few tweets, retweets, TwitLongers, feeds, direct messages, or even basic home pages that millions of ordinary people maintain and update today at little or no marginal cost,[300] he would probably think that the problem of too-easy denunciation grew alarmingly worse after 1680. Unfiltered, rarely censored, cheap, accessible around the clock and from every geographic location, and shared to some degree by almost one hundred percent of the population, publication by electronic technology can overcome almost every mechanical barrier to being heard.

The platform known at the moment as both Twitter and X provides an exceptionally convenient forum for denunciation. Anyone can join: it relies on advertising more than

300. Michael D.A. Freeman, *"But If You Can't Rape Your Wife, Who[m] Can You Rape?": The Marital Rape Exemption Re-Examined*, 15 FAM. L.Q. 1, 10 (1981) (characterizing Hale); Robert J. Kolansky, *Can We Really Ascribe a Dollar Amount to Interpersonal Communication? How* Phonedog v. Kravitz *May Decide Who Owns a Twitter Account*, 20 JEFFREY S. MOORAD SPORTS L.J. 133, 138–39 (2013) (reviewing social media terminology).

subscriptions for its revenue, which means posting and consuming content is "free."[301] The @ and # keys on every keyboard connect participants. Even if @Celebrity or #I'mAngry isn't paying attention to a post, widely shared software directs content of interest to audiences within click-range. Access to this forum is indeed "easily made," then, but the costs of accusing there start promptly to mount after the accuser has published what she says.

Two particular usages of Twitter/X used to denounce sexual misconduct, recounted below from the vantage point of the accuser, illustrate predictable adversity. In taking that vantage point, I refrain from comment on the truth *vel non* of what these accusers said. As individuals they might lack sincerity or competence.[302] The men they accused might have done nothing wrong. Whether true or false, an accusation published on social media imposes some pain on its target too, not just the accuser. These reservations about accusation by tweet noted, let's take a look.

Denunciation of the singer and actor Ansel Elgort by someone identified only as Gabby must have seemed too "easily made" to the star's big fan base. In 2020, "Gabby" wrote on Twitter that she had managed to find Elgort "when it was two days before my 17th birthday," in 2014; "I got his private Snapchat."[303] The post went on to say that soon after her seventeenth birthday, Gabby met Elgort in person.[304] "So when it happened instead of asking me if I wanted to stop having sex knowing it was my first time and I was sobbing in pain and I didn't want

301. *See* Emily E. Burton, Comment, *American Star Chamber: Online Misinformation, Government Intervention, and the Intellectual Matrix of the First Amendment*, 32 CATH. U. J.L. & TECH. 79, 98 (2024) (describing this business model with reference to Facebook (Meta) as well as X Corp (Twitter)).

302. *See supra* Section II.C. and accompanying text.

303. *Id.*; Jennifer Zhan, *A Timeline of Allegations Against Ansel Elgort*, N.Y. MAG.: VULTURE (Apr. 19, 2022), https://www.vulture.com/2022/04/ansel-elgort-sexual-assault-allegations-timeline.html [https://perma.cc/E3KB-2WXX].

304. *See* Mike Vulpo, *Ansel Elgort Breaks His Silence After Being Accused of Sexually Assaulting 17-Year-Old Girl*, ENEWS (June 21, 2020, at 20:09 ET), https://www.eonline.com/news/1162931/ansel-elgort-breaks-his-silence-after-being-accused-of-sexually-assaulting-17-year-old-girl. [https://perma.cc/H2BH-GWXN].

to do it the only words that came out of his mouth were 'we need to break you in.'"[305] Gabby reported post-traumatic stress disorder and panic attacks.[306] Listed as having 59,000 followers, the Twitter account where this story appeared left the internet soon after this post. The accusation may have been "easily made," but publishing it apparently took @itsGabby off social media.[307]

Another accuser used Twitter's successor, X, to publish claims of sexual misconduct including and not limited to rape.[308] This denunciation named Rich Campbell, co-founder of a media company.[309] Campbell initially responded by announcing his resignation from the company and promising a statement to come.[310] His accuser, an influencer writing under the name Azalia Lexi, later tweeted that accusation had not proceeded "easily" for her after it went viral: "I am getting death threats," she wrote, "and people emailing me my live location and saying they can see me."[311] Lexi filed a personal injury action against Campbell one year after her post; nine days later Campbell counterclaimed for $3.6 million in damages for defamation and emotional distress.[312]

These two accusations posted on one particular site are here for the limited purpose of questioning the characterization of them as "easily made." Had these tweets languished unseen

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305. *Id.*

306. Zhan, *supra* note 303.

307. *See id.*

308. *One Year Ago Today (December 26, 2023)…One True King Co-Founder Sues Fellow Influencer Over Rape Claim*, MYNEWSLA.COM (Dec. 26, 2024) https://mynewsla.com/crime/2024/12/26/one-year-ago-today-december-26-2023-one-true-king-co-founder-sues-fellow-influencer-over-rape-claim/ [https://perma.cc/CT7S-TNYP].

309. Jackie Arias, *Rich Campbell Leaves OTK After Sexual Assault Accusations*, GAMERANT (Dec. 17, 2022), https://gamerant.com/rich-campbell-twitch-otk-leave-why/ [https://perma.cc/7PD8-89UQ].

310. *Id.*

311. Azalia Lexi (@AzaliaLexi), X (Dec. 19, 2022, at 14:45 ET), https://x.com/Azalialexi/status/1604925919381975040?mx=2 [https://perma.cc/2TVE-DRRZ].

312. Dylan Horetski, *Rich Campbell Files $3.6M Defamation Lawsuit Over Sexual Assault Allegations*, DEXERTO (Jan. 4, 2024, at 18:21 ET), https://www.dexerto.com/entertainment/rich-campbell-files-3-6m-defamation-lawsuit-over-sexual-assault-allegations-2458787/ [https://perma.cc/3SE2-NYK6].

and un-retweeted, calling them easy and cheap could be correct: but whenever a Twitter/X accusation reaches anyone, the accuser will experience adverse consequences.[313] Either she or the person she accuses might deserve distress; either might deserve a medal for valor. We don't know the merits. We do know that accusation comes at a price. Matthew Hale worried about harm to only one person in the accusation dyad; both of them suffer.

A short-lived phenomenon called Shitty Media Men shows the persistence of vulnerability for persons who choose accusation by self-publication even when they share in the aggregation and multiplicity that we've seen protect participants in the accusation struggle.[314] In October 2017 Moira Donegan, a journalist working for The New Republic, created what she called an "anonymous, crowdsourced document"—a Google spreadsheet onto which recipients could enter denunciations of sexual misconduct.[315] The spreadsheet invited contributors to name offenders' names and omit their own.[316] Donegan sent a link to the attachment by email to "a handful" of fellow female journalists.[317]

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313. Accusations made elsewhere online have had the same consequence for accusers. *See, e.g.*, Laura Gianino, *I Went Public with My Sexual Assault. And Then the Trolls Came for Me*, WASH. POST (Oct. 18, 2017, at 6:00 ET), https://www.washingtonpost.com/news/posteverything/wp/2017/10/18/i-went-public-with-my-sexual-assault-and-then-the-trolls-came-for-me/ [https://perma.cc/M3DA-ZHZD] (recalling an essay published on Bustle.com that drew "the trolls" on Twitter and Facebook); Julia Carrie Wong & Maria L. La Ganga, *'My Own Form of Justice': Rape Survivors and the Risk of Social Media 'Vigilantism'*, THE GUARDIAN (Sep. 13, 2016, at 7:00 ET), https://www.theguardian.com/society/2016/sep/13/social-media-rape-survivors-justice-legal-system [https://perma.cc/85P6-UKXR] (providing quotes from two informants who recalled their experiences after posting about being raped: "I'm constantly being bombarded with dozens and dozens of messages telling me that it was all my fault" and "First you get raped by a person, then you get raped by the media, then you get raped by the commenters") (internal quotations omitted)

314. *See supra* Section II.A.

315. Moira Donegan, *I Started the Media Men List My Name Is Moira Donegan*, N.Y. MAG.: THE CUT (Jan. 10, 2018), https://www.thecut.com/2018/01/moira-donegan-i-started-the-media-men-list.html [https://perma.cc/KZ6E-2KQ2]; Lila Shapiro, *Moira Donegan Created the "Shitty Media Men" List to Address a Moral Injustice. Stephen Elliott Says He's Suing Her for the Same Reason*, N.Y. MAG.: INTELLIGENCER (Oct. 25, 2022), https://nymag.com/intelligencer/article/shitty-media-men-lawsuit-moira-donegan-stephen-elliott.html [https://perma.cc/H4AN-LV8F].

316. Shapiro, *supra* note 315.

317. *Id.*

Donegan later defended Shitty Media Men as necessary, arguing that women were entitled to protect themselves from sexual harassment and assault and that protection for them required more than what their "long-standing partial remedy" of "the whisper network" had to offer.[318] The whisper network, or "informal alliances that pass on open secrets and warn women away from serial assaulters," had deficiencies that Donegan said an anonymous crowdsourced Google Doc could ameliorate.[319] Social alliances could be "elitist, or just insular," and "they are also prone to exclude women of color."[320] In Donegan's design, anonymity and crowdsourcing were to retain the private-conversation intimacy that drew revelations to the old whisper network and made them believable.[321] Donegan said she intended Shitty Media Men "to be private as well."[322]

In response, along came a variation on the presumption of innocence that Donegan seemed to concede had a degree of merit. "Many called the document irresponsible, emphasizing that since it was anonymous, false accusations could be added without consequence," Donegan wrote in her retrospective on Shitty Media Men.[323] "Others said that it ignored established channels in favor of what they thought was vigilantism and that they felt uncomfortable that it contained allegations both of violent assaults and inappropriate messages."[324] Some critics "expressed sympathy with the aims of the document—women warning women, trying to help one another—but thought that its technique was too radical. They objected to the anonymity, or to the digital format, or to writing these allegations down at all."[325] Shitty Media Men drew a defamation claim that

318. Donegan, *supra* note 315.
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.*
325. *Id.*

Donegan had to settle.[326] Denunciation by this means has not returned on any discernible scale.

We turn now to the tiny minority of accusers who have access to media of the non-social kind and can make accusations there in their own words. Amber Heard, who published an oped in the Washington Post open to interpretation as an accusation of Johnny Depp, a fellow actor and her ex-husband—even though Depp's name or former marital status did not appear in it and Heard included no specifics particular to Depp—and E. Jean Carroll, who denounced Donald Trump in a magazine article, a book, and two federal-court trials, were famous for other achievements before they accused.[327] Their experiences also attest to difficulties that refute Matthew Hale's "easily."[328]

Johnny Depp protested what Amber Heard published in a defamation action that sought $50 million in damages.[329] Of interest to "easily made" was the publication that Depp objected to; it led to harm for Heard even though it barely accused any individual. In 2018, the Washington Post headlined Heard's oped as "I spoke up against sexual violence—and faced our culture's wrath. That has to change."[330] Heard wrote her editorial carefully, not "easily." A Virginia jury priced Heard's liability

326. Jessica Testa, *'Media Men' Lawsuit Ends in a Settlement*, N.Y. TIMES (Mar. 6, 2023, at 18:58 ET) https://www.nytimes.com/2023/03/06/style/media-men-list-settlement-moira-donegan.html [https://perma.cc/7RZV-MVJC].

327. Amber Heard, *Amber Heard: I Spoke Up Against Sexual Violence — and Faced Our Culture's Wrath. That Has to Change*, WASH. POST (Dec. 18, 2018), https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36_story.html [https://perma.cc/R3KC-AEC6]; Nicole Briese, *Johnny Depp and Amber Heard's Relationship Timeline*, PEOPLE (July 6, 2023, at 18:06 ET), https://people.com/movies/johnny-depp-amber-heard-relationship-timeline/ [https://perma.cc/8EEW-RS2Z/]; Larry Neumeister, *Jennifer Peltz & Michael R. Sisak, Jury Finds Trump Liable for Sexual Abuse, Awards Accuser $5M*, AP NEWS (May 9, 2023, at 20:00 ET), https://apnews.com/article/trump-rape-carroll-trial-fe68259a4b98bb3947d42af9ec83d7db [https://perma.cc/J7JN-H7M6].

328. *See supra* note 50 and accompanying text.

329. Julia Jacobs & Adam Bednar, *The Johnny Depp vs. Amber Heard Libel Case Is in the Jury's Hands*, N.Y. TIMES (May 27, 2022), https://www.nytimes.com/2022/05/27/arts/depp-heard-closing-arguments-libel.html [https://perma.cc/ZM7W-7RDC].

330. Heard, *supra* note 327.

to Depp at $10 million, offset by a smaller amount owed by Depp to Heard.[331]

During and after this loss in court, for which she paid Depp $1 million,[332] Heard drew a memorable degree of vilification. One reporter wrote that researchers traced online calumny about Heard to "an army of bots" joined by "men's rights activists" who'd "decided discrediting Amber Heard [was] the key to destroying every woman who accuses men of abuse or domestic violence."[333] Memes on popular social media sites including TikTok, Twitch, and Etsy mocked Heard.[334] Death threats and what she called "chaos" moved Heard to take refuge in Spain with her two-year-old daughter.[335] Heard's agent said publicity surrounding the trial cost her work in films.[336]

The Depp-Heard conflict shows not only that accusation is not easily made for an accuser but that it needn't even say much to generate punishment for her. Depp read the editorial as an attack on him and a jury found that its content fulfilled the elements of defamation,[337] but that interpretation of what Heard wrote can be reached only with concern for the feelings and pride of the accused. Coming to the piece myself with little knowledge about Depp (I'd seen only two films of his) and less about Heard, I understood it to speak about a social problem rather than a person. The editorial deserved legal sanction only if it signified more than it said. In benefiting an accused person and harassing the person who used publication as a forum, the

331. Julia Jacobs & Adam Bednar, *Johnny Depp Jury Finds That Amber Heard Defamed Him in Op-Ed*, N.Y. TIMES (June 1, 2022), https://www.nytimes.com/2022/06/01/arts/depp-heard-trial.html [https://perma.cc/V2VB-MTS6].

332. Eric Andersson, *Why Amber Heard 'Had to Get Out of the U.S.' Last Year After Johnny Depp Trial*, PEOPLE (July 7, 2023, at 10:56 ET), https://people.com/why-amber-head-had-to-get-out-of-the-u-s-after-johnny-depp-trial-7557577 [https://perma.cc/6E9B-FETX].

333. Aja Romano, *Why the Depp-Heard Trial Is So Much Worse Than You Realize*, VOX (May 20, 2022, at 13:00 ET), https://www.vox.com/culture/23131538/johnny-depp-amber-heard-tiktok-snl-extremism [https://perma.cc/4KK4-6TR9].

334. *Id.*

335. Andersson, *supra* note 332.

336. JoAnne Sweeny, *Social Media Vigilantism*, 88 BROOK. L. REV. 1175, 1216–17 (2023). Depp lost work too. *Id.* at 1216.

337. Jacobs & Bednar, supra note 329.

tendentious reception of what Amber Heard wrote extended to Depp an impertinent presumption of innocence.

Two judgments that added up to more than $88 million might suggest that E. Jean Carroll was a winner on the accusation playing field.[338] Differing from Amber Heard in this respect, Carroll also won approval in the publicity marketplace.[339] As of this writing, however, Carroll hasn't collected a penny from the man she accused, and for her too accusation was not easily made. Donald Trump assaulted her in 1995 or 1996; Carroll did not publish her account of the attack until 2019.[340] Two decades plus of unremedied trauma do not go by "easily." Carroll needed statutory change in New York before she could bring a claim for battery;[341] her defamation claim was actionable before then, but rape—or "sexual abuse," the term for what Trump did to her until New York revised its definition of rape[342]—is not defamation: and only defamation, which required other harmful misconduct by Trump to exist, was available for Carroll until the New York legislature revived her time-barred claim for sexual assault.

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338. *See* Lola Fadulu, *Trump Loses Appeal of Carroll's $5 Million Award in Sex-Abuse Case*, N.Y. TIMES (Dec. 30, 2024), https://www.nytimes.com/2024/12/30/nyregion/trump-carroll-appeal-denied.html [https://perma.cc/LPR2-NFKC].

339. Time magazine celebrated Carroll as one of the 100 most influential people of 2024: "a woman freeing herself," wrote Tarana Burke, the activist credited as the founder of #MeToo. "And in E. Jean's case, it just so happens, freeing millions more alongside her." Tarana Burke, *E. Jean Carroll*, TIME (Apr. 17, 2024, at 7:01 ET), https://time.com/6965208/e-jean-carroll-2024 [https://perma.cc/TH89-CJXB].

340. E. Jean Carroll, *Hideous Men*, THE CUT (Jan. 26, 2024), https://www.thecut.com/article/donald-trump-assault-e-jean-carroll-other-hideous-men.html [https://perma.cc/87UM-H2PF].

341. *See* Benjamin Weiser, *Writer Who Says Trump Raped Her Plans to Use New Law to Prove It*, N.Y. TIMES (Sep. 20, 2022), https://www.nytimes.com/2022/09/20/nyregion/carroll-trump-suit.html [https://perma.cc/3DJN-AA7Y]. In May 2022, New York's state government passed a bill that would give sexual assault victims a year to bring expired claims against their abusers; Carroll used the opportunity to bring a second claim against Trump for raping her in the mid-1990s. *Id.*

342. *See* Associated Press, *New York to Expand Definition of Rape After E Jean Carroll's Case Against Trump*, THE GUARDIAN (Jan. 30, 2024, at 19:52 ET), https://www.theguardian.com/us-news/2024/jan/30/new-york-rape-definition-expanded-bill-kathy-hochul-e-jean-carroll-donald-trump [https://perma.cc/76JT-UYMJ]. Following the verdict in Carroll's case against Trump, New York revised its legal definition of rape to include any "nonconsensual anal, oral and vaginal sexual contact," recognizing that the previous, more narrow definition led to the jury finding that Trump was guilty of sexual abuse rather than rape. *Id.*

Other adversity that Carroll experienced in consequence of accusing included the almost predictable suggestions from online strangers that she ought to die,[343] a second helping of defamation from Trump,[344] and, as Carroll wrote, "whether it's my age, the fact that I haven't met anyone fascinating enough over the past couple of decades to feel 'the sap rising,' as Tom Wolfe put it, or if it's the blot of the real-estate tycoon, I can't say. But I have never had sex with anybody ever again."[345] All that said, no publication of a sexual-misconduct accusation in the accuser's own words ever succeeded as much as this one.

### *B. Silencing Through Defamation Liability in Concept and in Action*

In 2018, the United Nations General Assembly examined a potent counter-weapon available to accused persons all over the world. Dubravka Šimonović, writing in the role of Special Rapporteur, concluded that the opportunity for malefactors to bring an action for defamation has "frequently and increasingly" discouraged women from reporting sexual misconduct.[346] Defamation actions are harder for plaintiffs to win in the United States than in the countries covered in this report,[347] but the counter-weapon holds force against American accusers too.

Defamation plaintiffs in the United States can prevail if they establish four elements in court. First, they need a "false and defamatory statement;" second, "an unprivileged publication to a third party;" third, "fault amounting . . . to negligence on the part of the publisher;" and fourth, "harm caused by the

343. *See* Kayla Epstein & Sam Cabral, *E Jean Carroll Trial: Judge Threatens to Remove Trump from Court*, BBC, (Jan. 17, 2024), https://www.bbc.com/news/world-us-canada-68009461 [https://perma.cc/6PJQ-LPVE].

344. *See* Fadulu, *supra* note 338.

345. Carroll, *supra* note 340.

346. Dubravka Šimonović (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *Report on Online Violence Against Women and Girls from a Human Rights Perspective*, ¶¶ 1, 31, U.N. Doc. A/HRC/38/47 (June 18, 2018).

347. *See* Eric J. McCarthy, Comment, *Networking in Cyberspace: Electronic Defamation and the Potential for International Forum Shopping*, 16 U. PA. J. INT'L BUS. L. 527, 531 (1995) (adverting to "the rather pro-defendant U.S. libel laws").

publication."[348] Accusers who choose the forum of publication in their own words become eligible for the "publisher" role named in the third element.[349] A person holding that role can be liable for defamation.[350]

In our review of publication in one's own words as one of the three fora available to accusers,[351] we've seen the counter-weapon in action. Johnny Depp won at trial after claiming that three sentences Amber Heard wrote in an editorial—(1) "I spoke up against sexual violence—and faced our culture's wrath. That has to change." (2) "Then two years ago, I became a public figure representing domestic abuse, and I felt the full force of our culture's wrath for women who speak out." (3) "I had the rare vantage point of seeing, in real time, how institutions protect men accused of abuse"—were false and defamatory statements.[352]

Amber Heard paid a high price, more than the literal one of a million dollars to settle the action after losing in court, for publishing those three sentences,[353] and accusers who stated more explicitly that an individual had committed sexual misconduct also faced accusations of defamation.[354] The action brought against Azalia Lexi was a more literal counter-weapon in that Rich Campbell made his accusation in the form of a counter-claim.[355] Another instance of this response to a sexual misconduct accusation gained attention in 2020 when the actor and musician known as 50 Cent brought a defamation action against the mother of one of his children after she accused him on social

348. RESTATEMENT (SECOND) OF TORTS § 558 (A.L.I. 1977).

349. *See id.* § 577.

350. *Id.* § 574.

351. *See supra* Section III.A.3.

352. Heard, *supra* note 357 (referring to the jury's findings by providing these sentences at the top of Heard's op-ed online).

353. *See* Andersson, *supra* note 332.

354. *See, e.g.*, Aaron Katersky, *Jay-Z Files Defamation Lawsuit Against Former Accuser, Her Attorneys*, ABC NEWS (Mar. 3, 2025, at 22:03 ET), https://abcnews.go.com/US/jay-sues-accuser-defamation/story?id=119410629 [https://perma.cc/T4G4-Y3GJ]; Associated Press, *Kesha and Dr. Luke Reach a Settlement Over Rape and Defamation Claims*, NPR (June 22, 2023, at 18:01 ET), https://www.npr.org/2023/06/22/1183894048/kesha-dr-luke-settlement [https://perma.cc/PB29-AWFE].

355. Horetski, *supra* note 312.

media of rape and sexual abuse.[356] His complaint sought more than a million dollars in damages along with a court order to remove the post and "refrain from making other defamatory comments."[357] When 50 Cent withdrew the action later that year, his casting the motion to withdraw as 'without prejudice' kept open the possibility that this accuser would continue to face an accusation of defamation.[358]

A different outcome ended the defamation action that Marilyn Manson brought against Evan Rachel Wood after Wood accused him of sexual assault and "horrific" psychological abuse.[359] After losing preliminarily in court, Manson dropped his defamation claim and agreed to pay Wood's attorneys' fees.[360] This much surrender by an accused person suggests that the accusation had merit.[361] It also shows that even groundless invoking of the counter-weapon harms an accuser. Wood had to spend years in litigation defense.[362]

The defamation counter-weapon harms even those accusers whose publications refrained from naming the person accused. Amber Heard's experience illustrates that result, as does a counterpart to adult-level defamation liability: A Maine high school suspended a sixteen-year-old student for the offense of posting a sticky note for peers to read that said "There's a rapist in our school, and you know who it is."[363] School punishers

356. Malia Mendez & Nardine Saad, *50 Cent Files Motion to Drop His Defamation Lawsuit Against Ex-Girlfriend Daphne Joy*, L.A. TIMES (Sep. 11, 2024, at 13:25 PT), https://www.latimes.com/entertainment-arts/music/story/2024-09-11/50-cent-daphne-joy-defamation-lawsuit-dismissed#:~:text=Curtis%20Jackson%2C%20a.k.a.%2050%20Cent,of%20rape%20and%20physical%20abuse. [https://perma.cc/XSX8-QPF3].

357. *Id.*

358. *Id.*

359. Marina Dunbar, *Marilyn Manson Drops Defamation Lawsuit Against Evan Rachel Wood*, THE GUARDIAN (Nov. 26, 2024, at 17:05 ET), https://www.theguardian.com/music/2024/nov/26/marilyn-manson-defamation-lawsuit-evan-rachel-wood [https://perma.cc/48FB-X89H].

360. *Id.*

361. *See id.*

362. *See id.*

363. Norris *ex rel.* A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12, 14 (1st Cir. 2020); David Charns & Phil Hirschkorn, *Student Sues Cape Elizabeth Schools Over Suspension After Posting Sticky Note Saying, 'There's a Rapist in our School'*, WMTW (Oct. 16, 2019, at 6:14 ET),

defended this penalty as a merited response to what it called "bullying."[364]

Defamation as a counter-weapon that accused persons can deploy against accusers falls near the banner acronymized as SLAPP, strategic lawsuits against public participation.[365] According to the scholars who coined this term, aggression against speakers in litigation—both actions filed in court and threats of doing so in the future—imposes the punishment of being "sued into silence" on vulnerable citizens who communicate on matters of public concern.[366] I say the counter-weapon lands "near" rather than "under" the SLAPP banner because the term's coiners apply their designation only to "lawsuits that implicate the First Amendment right to petition the government for the redress of grievances,"[367] and defamation actions against accusers who publish accusations in their own words will rarely fit that description.

Similar concerns pertain, however. Aggressors who bring what the SLAPP acronym calls "strategic lawsuits" choose defamation more than any other cause of action,[368] and the impact of this aggression takes form more often in burdening speakers than court judgments.[369] How much silencing of accusers who would otherwise use the publication forum for their accusations cannot be known, but one prominent lawyer adverted to the scope of this silencing problem when she told a reporter that while on his first campaign trail, Donald Trump brandished the

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https://www.wmtw.com/article/student-sues-cape-elizabeth-maine-schools-over-suspension-after-posting-sticky-note-saying-theres-a-rapist-in-our-school-update/29471913 [https://perma.cc/3QCK-NUEP] (internal quotations omitted).

364. Charns & Hirschkorn, *supra* note 363.

365. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENV'T L. REV. 3, 3 (1989).

366. *Id.*

367. Joseph W. Beatty, Note, *The Legal Literature on SLAPPs: A Look Behind the Smoke Nine Years After Pring and Canan First Yelled "Fire!"*, 9 U. FLA. J.L. & PUB. POL'Y 85, 95 (1997) (citation omitted).

368. *See* John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPS*, 26 LOY. L.A. L. REV. 395, 402 (1993).

369. Beatty, *supra* note 367, at 94–95.

counter-weapon of a defamation action in response to accusations of sexual assault.[370]

## CONCLUSION: PUTTING A GOOD INSTRUMENT TO GOOD USE

Variations on the presumption of innocence have enjoyed esteem across the centuries and around the world. Both the common law and civil law have long embraced it,[371] as did China and the Soviet Union back when they thought of themselves as socialist nation-states.[372] Most national legal systems share the tradition.[373] Even passages in the Bible offer variations on the theme.[374] Breadth makes the construct of interest to a range of disciplines—sociology, social psychology, anthropology, political science and political theory, comparative religion, criminal justice—but the versions of it that include an explicit reference to "presumption" show the particular salience of law.

Influence that stretches into extralegal settings is part of the law's power—and great power, as the United States Supreme Court and other authorities have noted, imposes correlatively great responsibility.[375] Every term of art in the law that can harm

370. *See* Chelsey N. Whynot, *Retaliatory Defamation Suits: The Legal Silencing of the #MeToo Movement*, 94 TUL. L. REV. ONLINE 1, 2 (2020). The lawyer said she "actually had clients who were considering coming out publicly and after he said that, they were afraid and they didn't want to because they said, '[h]e's going to sue us." *Id.*

371. *See* R.G. Bloemberg, *The Development of the 'Modern' Criminal Law of Evidence in English Law and in France, Germany and the Netherlands: 1750-1900*, 59 AM. J. LEGAL HIST. 358, 399 (2019).

372. BARTON L. INGRAHAM, THE STRUCTURE OF CRIMINAL PROCEDURE 6 (1987) (noting, at the time of the Cold War, that the law of both countries assigns the burden of proof to the government).

373. Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 260 (2002). For an overview of differences between the presumption of innocence in two national settings, see generally François Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. COMP. L. 107, 108–09 (2010) (describing an overview of differences between the presumption of innocence in two national settings).

374. For example, the God of Genesis though omniscient conspicuously refrained from punishing Adam and Eve until he heard their side of the apple story, and Deuteronomy says adverse testimony by a single witness is not enough to support the imposition of harm on an individual. Finding the presumption of innocence in Exodus requires exegesis: the medieval scholar-rabbi Maimonides did that work when he identified it as present in a rule that "the innocent and righteous" must not be slain. Wilkinson, *supra* note 32, at 598–99.

375. *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 464 (2015) (Kagan, J.) (quoting Amazing Fantasy No. 15: Spider–Man); *see also Luke* 12:48 (King James) ("[U]nto whomsoever much is

human beings ought to be intelligible. The presumption of innocence has the power to strengthen the liberty of individuals and check misconduct by state actors; it also does harm when it's misapplied.

Taking on a share of the responsibility for law and lawyers generated by the influence of this concept, this Article has constructed a description of the presumption of innocence that makes new descriptive and normative claims. Rather than stay in a binary that declares the presumption of innocence either present or absent, the Article posited a core surrounded by concentric rings of periphery. Outside its core of the criminal trial, the presumption of innocence reaches, and should reach, other settings that qualify for a peripheral application of this presumption. The characteristic that fills the core and becomes thinner in the surrounding periphery is what this Article has called pertinence. To find pertinence, the Article reviewed what the United States Supreme Court has said justifies the entitlement to this presumption and phrased its answer as "fairness under conditions of asymmetry."

When a setting of accusation raises problems of fairness under conditions of asymmetry that resemble the criminal trial in pertinent respects, vulnerable individuals accused there ought to receive some rendering of the presumption of innocence. The version of the presumption they receive is—and should be—thinner and less forceful than that provided by constitutional criminal procedure. The presumption of innocence is a good safeguard at both the core and the nearby periphery, provided that the accusation-setting includes asymmetry that disadvantages an individual. This safeguard becomes harmful when misapplied away from asymmetry at the core.

Misapplication of something beyond its boundary invites multiple adjectives by way of condemnation. Using this presumption might be misplaced, for starters. Inapposite. Confused, perhaps. One might take the opprobrium further with

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given, of him shall much be required; and to whom men have committed much, of him they will ask the more.").

"pernicious" or "enabling." But the most accurate adjective for dangerous misapplication of the presumption of innocence is "impertinent," the only English word that connotes both out-of-boundness and insolence.[376] The presumption of innocence inflicts harm when observers apply it in favor of accused individuals and against individual accusers in settings that present no threat to the accused individual that implicates fairness under conditions of asymmetry.

Unjustified impugning of individual accusers pervades official sources in American law—including judicial decisions and the Model Penal Code, whose rearguard understandings of rape accusation have been under revision in the American Law Institute for many years,[377] but still not superseded—and also in public reaction after women accuse men of this wrong. An abstruse-sounding academic claim turns out to have real-life consequences. In practice, not only in philosophy and theory, the unjustified mistrust of accusers' sincerity and competence flourishes.

Evidence gathered in this Article found two senses in which the problem of impertinence in this application of the presumption of innocence is worse than what the literature about it has reported. The first is epistemic injustice, the wrong of disbelief as a response to a statement that does not deserve this discredit. Scholars have documented two instances of epistemic injustice, wrongful impugning of competence and wrongful impugning of sincerity. As it's used by courts and also in statutory law and commentary, this disbelief also contains a third wrong that this Article labeled second-order epistemic injustice.[378] Disbelievers have called some rape accusers delusional and others dishonest, but more often these skeptics don't say whether they are

376. *Impertinent*, OXFORD ENGLISH DICTIONARY (3d ed. 2019).

377. Michelle J. Anderson, *Backwards: The ALI on Consent and Mens Rea for Rape*, 76 N.Y.U. ANN. SURV. AM. L. 695, 695 (2021) (noting that the ALI approved this revision project in 2012 and that its Reporter, Stephen Schulhofer, published his ideas about rape law reform in a 1998 book).

378. *See generally supra* Section II.C (explaining the forms in which second-order epistemic injustice can take in practice).

pointing to incompetence or insincerity or both.[379] They tell the accuser that they doubt the truth of what she asserted but omit saying why. Accused persons have a claim in justice to know the charge against them. The Fifth and Sixth Amendments support this claim even when these guarantees of rights do not apply formally to the wrong they suffer. Deprivation of this entitlement is a discrete wrong for any accused person.

The second under-described sense in which the impertinent presumption of innocence harms accusers is insufficient recognition of the difficulty that accusation imposes. Catalogues of the harms and burdens of rape accusation have, until now, focused only on the detriments of being accused. To this incomplete reckoning this Article has added the detriments or cost of making an accusation anywhere one can be made.

Police intake processes burden complainants. Compliance offices hear accusations arising in education and employment with attention to the interests of accused persons. Accusation in the third available location, denunciation by publishing one's own words, will reliably generate attack on the accuser when it's heard. Every forum in action refutes the seventeenth-century contention that an accusation of sexual misconduct is "easily to be made."[380] Credibility discount, check. Presumption of guilt, check. Hurdles that make accusation costly to the accuser, check. The potent counter-weapon of a defamation action by the person she accuses adds another concern for an injured person as she considers whether to speak.

The pertinence criterion of asymmetry with respect to power and prerogative provides a reasoned basis to redress this pattern of injustice. Asymmetry features extra detriment juxtaposed against extra advantage, the latter condition exemplified by what the state enjoys at a criminal trial. Informed by an inquiry into pertinence, the last third of this Article gathered

379. *See* Benjamin Weiser, Lola Fadulu & Kate Christobek, *In Rape Trial Deposition Video Trump Says Vulgar Tape Simply Reflects Truth*, NY TIMES (May 5, 2023), https://www.nytimes.com/2023/05/04/nyregion/e-jean-carroll-trump-rape-trial.html [https://perma.cc/69H7-ZW3C] (quoting Donald Trump speaking on E. Jean Carroll, "It's the most ridiculous, disgusting story. It was just made up.") (internal quotations omitted).

380. *See supra* Section III.A.

reasons to reallocate the presumption of innocence. Sexual-misconduct accusers have a claim to this benefit.

In describing the presumption of innocence as an instrument, this Article has insisted that the impertinence problem matters beyond the sexual-misconduct context that offers the fullest record of its existence. Unjust advantages and disadvantages align with more traits and identities than the gender or sex of people who receive or fail to receive this bounty. The three-word sentence Black Lives Matter, for example, understood as directive, speaks about the need for parity in presumptions of innocence that state actors have withheld and extended, sometimes at their whim rather than with fidelity to principle.[381] The impertinent presumption of innocence aided a judge now sitting on the highest United States court when he was accused of more varied misconduct than the sexual kind.[382] Comparable impertinence in the presumption of innocence benefited nominees to the current presidential administration.

What the impertinent presumption of innocence has done and still does to individuals who make accusations about rape, sexual harassment, and domestic violence can be done to anyone of any gender whose narrative about any wrongdoing might displease listeners who have the power to exploit a strong default and call it a principle. Accusations of sexual misconduct flutter canary-like in the coal mine of public reception,[383] where impertinence in the presumption of innocence warns us observers about a broad threat to reason, justice, and the rule of law.

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381. Kindness and deference bestowed by police officers on armed and dangerous white suspects might seem benign in isolation but generosity of this sort becomes impertinent, to put it mildly, when seen through a lens of how law enforcement has treated much less threatening Black counterparts. *See* Exum, *supra* note 54, at 339–43 (arguing that the killing by police of an unarmed Black woman in her Louisville home sheds light on what the American presumption of innocence means).

382. *See supra* note 37 and accompanying text.

383. For another application of this metaphor that includes a gendered reference to peril, see Bryant v. Woodall, 1 F.4th 280, 286 (4th Cir. 2021) ("Establishing standing does not require that a litigant fly as a canary into a coal mine before she may enforce her rights.").