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#BelieveWomen and the Presumption of Innocence: Clarifying the Questions for Law and Life

Kimberly Kessler Ferzan *

In September 2018, Christine Blasey Ford accused Supreme Court nominee, Brett Kavanaugh, of sexually assaulting her when the two were teenagers. During the confirmation hearing, Donald Trump tweeted that if the facts were as Ford alleged, she would have reported the incident. In response, #WhyIDidn'tReport went viral with sexual assault victims coming forward on Twitter with their explanations for why they did not reveal the assault previously or for how when they did, such claims were not taken seriously. As social media swarmed with such stories, something else happened. In response to these tweets, men and women responded, "I believe you."

It is difficult to overstate the power of these three simple words. Victims of sexual violence were often speaking out for the first time, naming perpetrators that included friends, family, boyfriends, and strangers; and articulating the fear they had in retaliation, in reliving and acknowledging what had happened to them, in a degrading criminal process, and perhaps worst of all, in not being believed. And someone else in cyberspace reached out and *just believed them*. And though undoubtedly some of those who responded were friends of the victim, Twitter also contains many people who follow thousands of people and are reciprocally followed by thousands, so many of these responders may have been simply believing a complete stranger.

If #BelieveWomen was the battle cry for Ford's supporters, then the presumption of innocence was the banner for Kavanaugh's. Here is but a sampling: "Kavanaugh: Well-Deserved

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Victory for the Presumption of Innocence,”¹ “Losing the Presumption of Innocence,”² and “Kavanaugh Is Innocent Until Proven Guilty – Not the Other Way Around.”³ Ojel Rodriguez argued that, “The testimony by Ford was heart-throbbing, sincere, painful, and deeply compelling. . . . Nevertheless...[t]o any rational person, the standard of ‘proven without any reasonable doubt’ was not met.”⁴ Susan Collins explained her Senate vote noting,

But certain fundamental legal principles—about due process, the presumption of innocence, and fairness—do bear on my thinking, and I cannot abandon them.

In evaluating any given claim of misconduct, we will be ill served in the long run if we abandon the presumption of innocence, tempting though it may be. We must always remember that is when passions are most inflamed and fairness is most in jeopardy.⁵

The presumption of innocence and #BelieveWomen both embody compelling considerations, and we may wonder how to reconcile them. The Kavanaugh hearing presented the peculiar problem that no one knew who had to prove what and by what standard. On the one hand, the standard we should apply to a job applicant for the highest court in the land is hardly likely to be the same standard we apply to whether we should incarcerate him and deem him a criminal. On the other hand, even if the barest allegation might be sufficient to derail a candidate behind closed doors, certainly something more credible should be required once someone has been nominated by the president. But there is a wide range of positions between these two poles.

In this paper, I do not aim to reconcile these positions. My project is prior to it. My goal in this paper is to better explicate the claims that underlie both #BelieveWomen and the presumption

¹ Ojel L. Rodriguez, “Kavanaugh: Well-Deserved Victory for Presumption of Innocence,” *Globe Post*, October 15, 2018, <https://theglobepost.com/2018/10/15/kavanaugh-presumption-innocence/>.

² Thomas Jipping, “Losing the Presumption of Innocence,” *National Review*, September 25, 2018, <https://www.nationalreview.com/bench-memos/brett-kavanaugh-presumption-of-innocence/>.

³ Hans A. von Spakovsky, “Kavanaugh is Innocent Until Proven Guilty – Not the Other Way Around,” *Fox News*, October 3, 2018, <https://www.foxnews.com/opinion/kavanaugh-is-innocent-until-proven-guilty-not-the-other-way-around>.

⁴ Ojel L. Rodriguez, “Kavanaugh: Well-Deserved Victory for Presumption of Innocence,” *Globe Post*, October 15, 2018, <https://theglobepost.com/2018/10/15/kavanaugh-presumption-innocence/>.

⁵ Collins did not claim the presumption of innocence required proof beyond a reasonable doubt. “Read Susan Collins’s Speech Declaring Support for Brett Kavanaugh,” *New York Times*, October 5, 2018, <https://www.nytimes.com/2018/10/05/us/politics/susan-collins-speech-brett-kavanaugh.html>.

of innocence in law and life, as well as to identify instances in which cross-pollination, between our everyday evaluations and the legal system, is contaminating our thinking. First, I begin with #BelieveWomen. and sort through various ways to interpret this demand (though my survey is not exhaustive). I spend additional time on one particular interpretation, an understanding that ties a cry for trust to a non-reductionist position with respect to the justification for believing testimony—that is, the idea that we have reason to believe someone, and are justified in so doing, just on her say-so. Although it is not my contention that this view is superior to other understandings, I believe it has received less attention in the literature and thus warrants additional examination. Next, I demonstrate how complicated our calculations are in life. Then, I turn to law. Here, I show how the various interpretations of #BelieveWomen raise distinct legal questions, but also note that flat footed understandings of this demand have created confusions. I suggest the law may meet the demands of #BelieveWomen through a corrective of the kind proposed by Miranda Fricker, evidentiary instructions, and (potentially by) alterations of the burden of proof, but that full belief may be too much to ask in this context. That is, law may be unable to accommodate a demand that we believe women, though it may be able to treat them respectfully as epistemic agents. In making this claim, I reject that increasing one’s credences in light of testimony “counts” as believing someone.

Second, I look at the presumption of innocence, noting that under the Supreme Court’s jurisprudence it amounts to no more than the requirement that the prosecution must prove its case beyond a reasonable doubt. Additionally, following Larry Laudan, I endorse the view that the presumption in law is simply the claim that a juror has no evidence. But that is not what we want in life. The questions we want to ask in life are (1) what do we owe each other and (2) when there are contested factual situations, what is the default position. The presumption of innocence rhetoric assumes the answers to these questions.

Reconciling these claims will be difficult. And because the claims--#BelieveWomen and the presumption of innocence—encompass more than one demand or conception, we must be more precise as we try to analyze them. We will only find truth (or knowingly sacrifice it) when we are careful to attend to precisely the questions we are asking.

I. #BelieveWomen in Life and Law

A. #BelieveWomen and the Call to Be Believed

The first question is what does #BelieveWomen require? What is the nature of the demand?⁶ When Ford came forward with her allegation, what did #BelieveWomen direct the hearer to do?

To be sure, the obvious answer is *believe women*. But one might question whether that is more easily said than done. It is dubious that you can just will yourself to believe, and it seems that absent the right evidence, you'd be epistemically irrational to do so.

My aim in this section is not precision with respect to one type of descriptive content, nor is it to pin down one (or more) expressive functions for the slogan.⁷ My goal here is to be more ecumenical and to put on the table several distinct understandings. I want to capture what those who employ "BelieveWomen" in their tweets and on their signs may intend to express. And I also want us to grasp why we find the "I believe you's" in Twitter replies to be so valuable. My goal is not to select among these understandings.

1. Non-Epistemic Accounts

Maybe #BelieveWomen is not about epistemology at all. #BelieveWomen may be political rhetoric that stands for a call to arms and a call to action that is not truly about what you believe. Perhaps some hearers typed "I believe you" on an accuser's Twitter feed to stand in solidarity, not because they had actually taken the belief on board.

Beyond solidarity, #BelieveWomen may be about the good consequences that result from acting *as if* you believe women. We might think that if we treat all women as credible, this will encourage rape reporting, and more perpetrators of sexual violence will be brought to justice.⁸ The goal of more justice overall means potentially sacrificing truth in any individual case. As Bari Weiss reports, "[S]o many women are sharing [this view] with one another in private. Countless innocent women have been robbed of justice, friends of mine insist, so why are we agonizing about the possibility of a few good men going down?"⁹ Clearly, one would need to calculate the false positives against the false negatives (not to mention determine whether any deontological constraints are in play), but this

⁶ #BelieveWomen is under inclusive as a rallying cry as there are also male victims of sexual violence. For a critical inquiry into the differential treatment of male rape, see Bennett Capers, "Real Rape, Too," *California Law Review* 99 (2011): 1259-1308.

⁷ I thank Jason Stanley for prompting me to clarify the nature of my inquiry in this section.

⁸ This move was suggested to me by Debbie Hellman.

⁹ Bari Weiss, Opinion, "The Limits of 'Believe All Women,'" *New York Times*, November 28, 2017, <https://www.nytimes.com/2017/11/28/opinion/metoo-sexual-harassment-believe-women.html>

would be a distinct non-epistemic argument, one that has a significant role to play in calculating burdens of proof.¹⁰

2. Epistemic Accounts I

Alternatively, we might take the goal of #BelieveWomen to be epistemic—the aim is truly that women be believed. There are different epistemic accounts. We can understand #BelieveWomen as an epistemic overcorrection. Because women have been systematically disbelieved, we should believe them all, and then perhaps we will ultimately settle on the right amount of belief. Still, this directive sounds a bit odd—“Believe things that may be false so they can counteract the other false beliefs you have and eventually you will believe things that are true.”

Perhaps a more charitable way to view the demand is as an attempt to create a positive generic. Generics are often thought to be pernicious and many theorists argue against them because they essentialize their subjects,¹¹ and generics often don’t reflect anything like true probabilities. That is, often the problem with generics is that a few cases lead to the essentializing of the entire group.¹² This hashtag would be an effort at positive essentialization (though the creation of a positive generics requires far more empirical support than negative generics do).¹³ Nevertheless, Jennifer Saul has argued that generics might be deployed for positive impacts.¹⁴ To be sure, this way of shifting the generic may not be the most effective, but the idea is to shift the mindset to “women are

¹⁰ It is worth distinguishing two different types of arguments here. First, whenever we set the burden of proof, we are engaging in either a deontological question of what we owe someone before we visit negative consequences on him or a consequentialist question about trade-offs. There is a second view, suggested by Nancy Chi Cantalupo, that where we set the burden of proof expresses a view about who is likely lying. Nancy Chi Cantalupo, “For the Title IX Civil Rights Movement: Congratulations and Cautions,” *Yale Law Journal Forum* 125 (2016): 281-303. It is true that we can skew the burden of proof to take into account the ease with which false accusations are made. See Michael S. Pardo, “Second-Order Proof Rules,” *Florida Law Review* 61 (2009): 1083-1113. But we must first set the appropriate burden before we skew it. It is only because Cantalupo assumes the answer to the first question is that individuals should be treated equally with respect to burden of proof that she thinks that unequal treatment evinces distrust. My view is that the first question is where the action is and that there may be reasons for the balance to be something other than a preponderance, such that we cannot read distrust into where we set the balance. For instance, the University of Virginia’s honor code requires proof beyond a reasonable doubt for something like plagiarism, for which a student can be expelled. The idea is not that that burden expresses the view that professors are liars, but that that burden expresses a view about how much evidence the school should have before inflicting a potentially life-altering sanction.

¹¹ Sarah-Jane Leslie, “The Original Sin of Cognition: Fear, Prejudice, and Generalization,” *Journal of Philosophy* (2017): 393-421; Sally Haslanger, “Ideology, Generics, and Common Ground,” in Charlotte Witt, ed., *Feminist Metaphysics: Explorations in the Ontology of Sex, Gender and Self* (Dordrecht: Springer 2011).

¹² Leslie, at 395.

¹³ Leslie at 296.

¹⁴ Jennifer Saul, “Are Generics Especially Pernicious?” *Inquiry* DOI: [10.1080/0020174X.2017.1285995](https://doi.org/10.1080/0020174X.2017.1285995)

believable.” This interpretation of #BelieveWomen takes its aim to be to reset the public’s typical associations of women with false/truthful claims of sexual violence.¹⁵

Another view would be that #BelieveWomen is best understood through the prism of standpoint epistemology.¹⁶ This might cover two different sorts of ideas. One is that women are experts in the range of misogynistic behaviors.¹⁷ A second idea would be that women claim particular expertise in whether any individual case is an assault. This conception is not that women are men’s epistemic equals, but that women know better than men.

But something still seems amiss. As we reflect on Ford’s situation, she didn’t want you to act “as if” you believed her, to type her notes on Twitter in solidarity, or to think of her case as a “corrective.” She wanted you to really and truly believe her. Whatever might bring about valuable consequences, there is a different value to being believed. Moreover, although #BelieveWomen might be an assertion of expertise, for some victims of sexual violence, the desire is not to assert that one is an expert, but simply to be taken on one’s own terms. Ford was vulnerable and exposed; she had put her story forward; and she wanted you to believe *her*.

How might we understand the import of #BelieveWomen as an epistemic directive? First, #BelieveWomen may be thought to stand for the proposition that women rarely falsely report sexual assault. This directive is as simple as attending to baseline probabilities. Moreover, not only is such a directive useful in the individual case, but it may be that a rule “believe women” is also justified. Fred Schauer argues that just as rule-consequentialism may yield more right action overall than act-consequentialism, evidentiary rules create more truth overall.¹⁸ Thus, we might think that following a rule of “believe women” will yield more correct epistemic judgments about when to believe women than assessments individual cases. This understanding is both empirical and epistemic. It is empirical in that its justification relies on whether it is in fact true that women rarely falsely report (such that if it turned out that our numbers were wrong, we ought to

¹⁵ #BelieveWomen does not exhaust the possible epistemic correctives out there. See, e.g., Georgi Gardiner, “Doubt and Disagreement in the #MeToo Era,” manuscript on file with author.

¹⁶ I thank Jason Stanley for this suggestion.

¹⁷ See generally Kate Manne, *Down Girl*

¹⁸ Frederick Schauer, “In Defense of Rule-Based Evidence Law – and Epistemology Too,” *Episteme* 5 (2008): 295-305. Cf. Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (2006), 19 (“every rule that leads to the exclusion of *relevant* evidence is epistemically suspect”).

#DisbelieveWomen).¹⁹ It is epistemic in that it is aimed at epistemic goals—that is, getting to the truth, as opposed to serving some other value.

An alternative epistemic interpretation is that #BelieveWomen may be thought to be a corrective. As Miranda Fricker notes, women have suffered epistemic injustice. “Testimonial injustice occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker’s word.” This can be an attack on either competence or sincerity grounds.²⁰ Fricker argues:

When the hearer suspects prejudice in her credibility judgement—whether through sensing cognitive dissonance between her perception, beliefs, and emotional responses, or whether through self-conscious reflection—she should shift intellectual gear out of spontaneous, unreflective mode, and into active critical reflection in order to identify how far the suspected prejudice has influence her judgement.

...

If she finds the low credibility judgement she has made of a speaker is due in part to prejudice, then she can correct this by revising the credibility upwards to compensate. There can be no algorithm for her to use in determining how much it should be revised upwards, but there is a clear guiding ideal. The guiding ideal is to neutralize any negative impact.²¹

A Frickerian approach then grounds #BelieveWomen in injustice, but also offers an epistemic corrective. Fricker, too, wants to get to the truth of the matter, and her claim is that we need to re-evaluate our approach to speakers in order to achieve that.

3. Epistemic Accounts II: Trust, Testimony, and Non-Reductionism

The Frickerian corrective is responsive to a systematic discounting of women’s testimony. One response to this discounting is *stop discounting*. Fricker’s view, like positions within standpoint epistemology and claims that we should shift burdens of proof, has received significant attention. I’d like to draw a different connection here. Although I do not argue that this is the best way to understand #BelieveWomen, I do contend that this perspective resonates with the directive and is far less explored in the literature. We should thus spend some time unpacking this approach—the

¹⁹ Statistics do indeed support the view that few women lie. But I don’t want my exposition to turn on this empirically contested question.

²⁰ Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (2007, Oxford University Press).

²¹ M Fricker 1183-84

interpretation of #BelieveWomen as a call to trust and as a call to non-reductionism. That is, not only do we owe it to women to start with a baseline of trust but this trust will justify our believing them.

As a minimum stance, we owe each other “basic epistemic respect,” which Michael Lynch defines as “to treat them in some or all of the following ways: as a possible knower, as someone who can engage in the give and take of the game of giving and asking for reasons, and as someone who has the potential to make up their own minds.”²² We owe everyone this baseline of respect.

Do we owe more? Alongside the “Believe Women” signs are the “Trust Women” signs. This may be a signal for the standpoint epistemology discussed earlier, or it could be a view that we should trust them after decades of distrust. As Karen Jones explicates the concept, “to trust someone is to have an attitude of optimism about her goodwill and to have the confident expectation that, when the need arises, the one trusted will be directly and favorably moved by the thought that you are counting on her.”²³ Like belief, trust cannot be willed.²⁴ Jones takes reasonable trust to be a permissive norm, where it is not irrational to distrust someone, and notes the difficulties in signaling that one is trustworthy.²⁵

It may be difficult to make the claim that we *owe* women trust. Yet, it remains the case that we ought not to distrust them. And, we owe them, at the very least, basic epistemic respect.²⁶ Notably, the demand of respect or trust is not just about what we owe them, but it also generates an epistemic permission to form a belief. This is important because the desire to be respected or trusted is not sufficient to grant an epistemic permission to believe that testimony,²⁷ but this linkage

²² Michael Lynch, “Truth as a Democratic Value,” this volume; see also Stephen L. Darwall, “Two Kinds of Respect,” *Ethics* 88 (1977): 36-49, 3-41 (discussing recognition respect).

²³ Karen Jones, Trust as an Effective Attitude, *Ethics* 107 (1996): 4-25, 5-6.

²⁴ Jones at 16.

²⁵ Karen Jones, book, ch. 5. As Renee Bolinger noted in her comment to my paper, the push for trust may be at the level of social epistemology. We can only indirectly cultivate trust in women who claim to have been victims of sexual violence.

²⁶ Neil Manson’s commentary at the UCL workshop helpfully unpacked an entire range of interests that women may have. (On file with author). He suggested: an interest in being recognized as epistemically competent, an interest in being recognized as epistemically virtuous, an interest in being recognized as truthful, an interest in social inclusion/participation, an interest in justice and fairness, an interest in social power and authority, the instrumental interest in the practical importance of being believed, and an interest in others believing what we say *because* they believe us. Pursuing these suggestions would make this already wide-ranging paper too unwieldy, but I think he is quite right to think that the strength of the linkage in the text may turn on which of his suggested interests we endorse and how strong those interests are.

²⁷ Some readers have objected that non-reductionism is unnecessary to this project—as the question is just whether we owe women trust. But this can generate a “wrong-kind-of-reasons” problem—that “having a

can be created – the cry for trust or respect can be conjoined with a non-reductionist approach to testimony.²⁸ Let me explain.

Lawyers might be surprised to find that one way that philosophers take people to gain beliefs (and knowledge) is through the philosophical notion of “testimony.” To lawyers, testimony involves a witness stand, an oath, and a penalty of perjury. To the philosopher, the idea is that someone tells you stuff, and then, through some process (subject to debate), you believe it. When you ask your mom what she did last night, and she tells you she went to the movies, ta-da, you now believe your mom went to the movies. In life, beliefs based on testimony seem to come quite readily.

Reliance on testimony is unavoidable. Without testimony, we would have to give up on science and history, as we would lack empirical access to the claims inherent in these fields.²⁹ Testimony is a central way in which we go about learning about, and thereby navigating, our world.

Now, let’s take a cursory glance at what the “some process (subject to debate)” is that gets us from what the speaker said to what you, the hearer, come to believe. The question is partly whether you have good reason—are justified—in believing something. Your belief that you are holding an apple comes from your perception. You need no further reason to believe it beyond touch and sight. No one would fault you for believing something because you saw it! But what about when people tell you things? Non-reductionists argue that “so long as there are not any relevant defeaters, hearers can justifiably accept the assertion of speakers *merely* on the basis of the a speaker’s testimony.”³⁰ The justification for believing testimony is then on a par with the justification for believing one’s senses, as “the fact that my belief is based on how my perceptual system represents the world to me imbues it with a kind of justification that, at least under normal circumstances,

moral obligation . . . to believe *p* does not appear to be the right kind of thing to provide a reason . . . to believe *p*.” Marusic and White at 98. Hence, non-reductionism provides a link between the moral and epistemic components.

²⁸ I thank Alex Guerrero for this helpful intervention at the NOMOS conference.

²⁹ C.A.J. Coady, *Testimony: A Philosophical Study* (Oxford University Press 1992), 8-13.

³⁰ Jennifer Lackey, “Introduction,” in Jennifer Lackey and Ernest Sosa, eds., *The Epistemology of Testimony* (2006): 1-21, 4. Lackey expounds elsewhere:

For every speaker A and hearer B, B knows that p on the basis of A’s testimony that p if and only if: (1) B believes that p on the basis of the content of A’s testimony that p, (2) A’s testimony that p is appropriately connected with the fact that p, (3) B has no undefeated defeaters for A’s testimony that p, (4) B is a reliable and properly functioning recipient of testimony, and (5) the environment in which B receives A’s testimony is suitable for the reception of reliable testimony.

Jennifer Lackey, “A Minimal Expression of Non-Reductionism in the Epistemology of Testimony,” *Noûs* 37 (2003): 706-23, 712.

requires no additional argument or independent corroboration from other sources.”³¹ Notably, a non-reductionist does not take testimony to be infallible. To be sure, it may be defeated, just as the discovery that you had been given a hallucinogen would defeat your belief that there really was an apple in your hand. But the idea is that you don’t need anything beyond someone’s testimony for you to be justified in your believing what he says.³² So, you can believe there is an apple on the table either because you saw it or because I told you. In contrast, for reductionists, “the justification of testimony is *reduced* to the justification we have for sense perception, memory, and inductive inference.”³³ The reductionist wants more for justified belief than simply someone’s say-so. She will look to the speaker’s credibility, demeanor, and the general circumstances.³⁴

Both sides of this debate face formidable objections.³⁵ I certainly cannot do justice to this debate here; indeed, Axel Gelfert notes that “developing a theory of testimonial justification is often seen as an especially vexed task.”³⁶ What I can do, however, is to show #BelieveWomen can be understood through a prism that uses the respect that is owed as both a moral claim about what we

³¹ Axel Gelfert, *A Critical Introduction to Testimony* (Bloomsbury 2014), 99.

³² Gelfert at 100.

³³ Lackey at 5.

³⁴ Gelfert 102-03.

³⁵ For a theory to be thoroughly reductionist, it must eliminate testimony and reduce the reliability of testimony to the reliability of perception and so forth. Gelfert 104. One worry about global reductionism is that it implies that children, who gain most of their knowledge through taking adults at their word, actually don’t *know* anything, as their beliefs are not justified. Angus Ross, “Why Do We Believe What We Are Told?” *Ratio* XXVIII (1986):69-88, 70. Elizabeth Fricker attempts to give an account of why children may accept testimony. Elizabeth Fricker, Critical Notice, Telling and Trusting: Reductionism and Anti-Reductionism in the Epistemology of Testimony, *Mind* 104 (1995):393-411, 403, but there are objections to this approach. See Matthew Weiner, “Accepting Testimony,” *The Philosophical Quarterly*, 53 (2003): 256-64, 261. In addition, there is an impossibility to reductionism to the extent that one is truly supposed to confirm everything one knows. Coady, *Testimony*, at 82, 144. Another concern is that we cannot even begin to reduce testimony to other things without being able to identify a report and to what it refers, and once we attempt such an endeavor, we cannot get language and the practice of reporting off the ground without reliance on testimony. Leslie Stevenson, “Why Believe What People Say?” *Synthese* 94 (1993): 429-451; Coady, *Testimony*, 85-93. Another potential reductionist move, inference to the best explanation, leads to reference class problems, as we need to know what to compare to what to determine whether it is reliable.

On the other hand, non-reductionism seems to be a recipe for, in Elizabeth Fricker’s term, “gullibility.” Elizabeth Fricker, “Against Gullibility,” in Bimal Krishna Matilal and Arindam Chakrabarti, *Knowing from Words: Western and Indian Philosophical Analysis of Understanding and Testimony* (1994): 125-161. Phenomenologically, Fricker believes that we are always unconsciously monitoring speakers; we are not taking their say-so. E Fricker, AG, 150. Not only do we do this, but we are required to do this: “any fully competent participant in a social institution of a natural language simply knows too much about the characteristic role of the speaker, and the possible gaps which may open up between a speaker’s making an assertion, and what she asserts being so, to want to form beliefs in accordance [with non-reductionism].” E Fricker, AG, 126.

³⁶ Gelfert at 95.

owe women and an epistemic claim that given what we owe them we are also justified in believing them.

Only to non-reductionists is believing women about *believing speakers*. As C.A.J. Coady notes, “When we believe testimony we believe what is said because we trust the witness.”³⁷ Richard Moran argues that the reductionist (or what he calls Evidentialist) view misses something important. Even if hearers can take assertions to be evidence, that is not what speakers see themselves as doing. Speakers are intentionally conferring a reason for the hearer to believe something; they are offering an assurance. Moran juxtaposes this with a photographer who offers a photograph.³⁸ Both photographer and viewer take the photograph to be offering evidence of some fact. But speakers don’t see themselves as photographs. They see themselves as intentionally conveying information such that it is their utterances as assurances that are providing reasons. In either case, the photographer and speaker may be giving reasons to “believe *that*” but only the speaker is also saying “believe *me*.” “The ‘directive’ aspect of telling, attesting to a specific proposition, is thus related to the speaker’s presentation of herself as accountable for the hearer’s believing what she says.”³⁹ In other words, speakers are sticking their necks out, as they are asking you to believe them. And, because of this, the speaker is subject to criticism if she is wrong.⁴⁰ Indeed, Katherine Hawley, in her recent study on trustworthiness, maintains that asserting something is a promise to speak truthfully.⁴¹

In addition, because the speaker has stuck her neck out, there is some attendant embarrassment if one opts not to believe her. As Jonathan Adler notes, if a stranger gave you directions and then you asked another person for directions, you would be embarrassed if the first stranger saw you do this. You’d feel sheepish about not taking his word. It is a sign of *distrust*. This example seems to

³⁷ Coady, *Testimony*, at 46.

³⁸ Yes, it is true that nowadays the photographer is offering an assurance that the photo is not doctored and so forth. But one can imagine the photographer seeing something for the first time in her photograph in the same way that any other viewer does.

³⁹ Richard Moran, *The Exchange of Words: Speech, Testimony, and Intersubjectivity* (OUP 2018).

⁴⁰ Moran, bk, 140.

⁴¹ Hawley, *How To Be Trustworthy* 50-52. Hawley is not advocating the nonreductionist view, and notes that a promising view is ill-suited to deal with any epistemic warrant created in eavesdroppers to whom the promise to speak truthfully is not made. *Id.* at 58-59.

demonstrate a “believe unless defeated” stance to testimony as opposed to a “examine fully before you believe” approach.⁴²

The non-reductionist view is tied to two ideas, one conceptual and the other normative. The conceptual idea is that we need to understand testimony as an interpersonal exercise; it is fundamentally different from perception. The normative idea is that we need to value the speaker as the informant, and not simply as a bearer of information that may be read off of her external state or the sounds that come out of her mouth. To value her is to understand that testimony is bound up in her intention that you take her testimony as a reason to believe the fact that she tells you. Importantly, the idea is not that valuing her gives you a normative reason that you should believe, but that this is an epistemically defensible way to get to truth. It merely involves recognizing “that we are rationally entitled to encounter others—the possessors of rational powers—in a fundamentally different way than mere objects.”⁴³

The non-reductionist, then, rejects that what is said to her can be reduced to other means by which we gather knowledge (such as perception, inference, and memory). And, this rejection can partially be understood as respect of persons. As Gelfert explains, “On this view, withholding trust until sufficient independent evidence is available would, in a sense, amount to not trusting our interlocutor at all: instead of treating our interlocutor as a person, capable of vouching for the truth of the matter, we would effectively be reducing them to the status of being a mere instrument for gathering evidence – much like, say, a measurement instrument in science.”⁴⁴ And G.E.M. Anscombe remarked, “It is an insult and an injury not to be believed.”⁴⁵

⁴² Adler, Jonathan, "Epistemological Problems of Testimony", *The Stanford Encyclopedia of Philosophy* (Winter 2017 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/win2017/entries/testimony-episprob/>>.

⁴³ Berislav Marušić and Stephen White, “How Can Beliefs Wrong?—A Strawsonian Epistemology,” *Philosophical Topics* 46 (2018): 97-114, 113. See also Ross 79-80 “The suggestion is that our response to language reflects a *sensitivity* to the entitlements and obligations generated by its use.” “There can, of course, be no general objection to introducing concepts like entitlement and obligation into a discussion of reasons for believing. In speaking of the possession of certain evidence as justifying us in drawing a certain conclusion, or as ‘forced’ it upon us, we are already invoking entitlements and obligations to believe. That is the language of reason.” 81: “We have seen that a measure of respect for the authority of others as judges of the correct and incorrect use of language is a condition of the existence of shared standards of correct use. It must equally be seen as a condition of reason in so far as that implies a respect for objective standards of truth or fitness to be believed.”

⁴⁴ Gelfert 91.

⁴⁵ G.E.M. Anscombe, “What Is It to Believe Someone?” in C.F. Delaney, ed., *Rationality and Religious Belief* (Univ. Notre Dame 1979):141-151, 150.

Indeed, Miranda Fricker’s corrective may be ill-suited to her articulation of the wrong hearers commit when they fail to accord a woman with the epistemic respect to which she is entitled. Fricker argues that the problem with epistemic injustice is that one uses the speaker as a means. The idea is this: if you take what she is saying as true, then you treat her as an informant; when you dismiss the speaker as a knower, you treat her as a piece of information.⁴⁶ The former respects a person; the latter treats her as a means.⁴⁷

This distinction resonates with the contrast between the reductive and non-reductive views. But if this is the nature of the objection, then Fricker’s solution may be slightly misguided, as she is providing a reductionist answer to a non-reductionist problem, as Marušić and White note.⁴⁸ Her account of how one is used as a means is that one is taken merely as a source of evidence as opposed as a knower. But her corrective relies on better evaluation of the evidence, which is the very same sort of reductive evidential stance toward testimony, as opposed to a denial that testimony ought to be evaluated in the same sort of way.⁴⁹

Let us return to #BelieveWomen within this non-reductionist epistemological stance. #BelieveWomen gains a rhetorical robustness that its other framings lack. We believe things all the time because we believe people. Women making sexual assault claims should not be treated any differently. Valuing women as people is simply to take their testimony with the same respect and regard as we take anyone else’s. If one way to understand “Black Lives Matter” is that black lives matter just as white lives do—but we have taken the latter for granted and ignored the former—similarly, one way to understand #BelieveWomen is as a claim that you should believe women in cases of sexual violence just as you believe men when they claim to be victims of other crimes.

⁴⁶ Cite Craig for informant/information distinction.

⁴⁷ Notably, I don’t think that even as she frames it, the means principle is implicated. If A asks B if B is alive, B’s answer of “yes” is a piece of information that he is alive, irrespective of the truth of his answer (and thus is not hearsay!). It seems odd to say that we are disrespecting B though. Indeed, as any evidence professor can tell you, there are myriad ways that we take what people say into evidence, even when they intend to make assertions, because their relevance to our adjudicative questions is not the truth of their assertions. Are we disrespecting them?

⁴⁸ Accord Berislav Marušić and Stephen White, “How Can Beliefs Wrong?—A Strawsonian Epistemology,” *Philosophical Topics* 46 (2018): 97-114.

⁴⁹ Ibid. at 105 (“What this tension in Fricker’s view reveals is that, to make good on any distinction between ‘informant’ and ‘source of information’ that has the kind of ethical significance Fricker assigns it, we need to abandon the kind of evidentialism she presupposes for determining the proper response to an interlocutor.”).

One clarification will deepen this demand. Again, the non-reductionist will look to defeaters. Defeaters may simply be contrary evidence.⁵⁰ Or, these defeaters may be about the speaker herself and whether she seems trustworthy.⁵¹ Alternatively, the defeaters may deal with the context.⁵² The speaker who appears highly intoxicated defeats one's warrant to go to belief. And the speaker who says something radically outlandish also does not entitle one to say, "But Aunt Susie said she saw aliens and so I believe it!" Hence, non-reductionists can take on board the fact that there is a difference between someone you ask for directions and the stranger who announces she was assaulted on the street, and it can accommodate the concern that the content of what is being claimed as true is certainly relevant.

But, as we see these clarifications taken on board, we should also note that #BelieveWomen may be precisely aimed at our inclination to find defeaters when there are instances of sexual violence. And so, #BelieveWomen becomes a reminder that the speaker's credibility is not undermined because she is a woman, nor should her claim be undermined because it is about sexual violence.⁵³ Hence, a non-reductionist could take #BelieveWomen as a claim that being a woman who claims to have been victimized is not a defeater, and thus, as a claim that women are entitled to the same sort of testimonial respect as men, a respect in which we believe someone simply on her say-so.

B. #BelieveWomen in Life

Those who heard the Ford allegations were ultimately trying to decide what to believe. I have suggested that there are different ways that the call to #BelieveWomen might be interpreted as these hearers deliberated. Some of these interpretations do not depend upon epistemic values, but instead are external demands toward goals of increased justice and social change. Some seek to influence our methods of belief formation indirectly. I suspect that different speakers mean different things.

⁵⁰ Felix Bräuer, "Looking Beyond Reductionism and Anti-Reductionism," *Episteme* (2018):1-19, 4.

⁵¹ Michel Croce and Paul Poenicke, "Testing What's At Stake: Defending Stakes Effects for Testimony," *teorema* XXXVI (2017): 163-183, 168.

⁵² *Ibid.*

⁵³ Cf. Karen Jones, "The Politics of Credibility," in Louise Antony & Charlotte Witt (eds.), *A Mind of One's Own: Feminist Essays on Reason and Objectivity*. Westview Press (2002).

Undoubtedly, one problem that we confront in life is that we may have myriad practical and epistemic claims on the table at once. Let's start with a hard case in life. When actress Lena Dunham's friend was accused of sexual assault, Dunham tweeted in support of her friend. In response, *bustle.com* included a posting by Jenny Hollander entitled, "Why 'Believe Women' Means Believing Women Without Exception."⁵⁴ Hollander's claim was that if you #BelieveWomen then you believe women even when the accused is your spouse, your father, your son, or your friend.⁵⁵

That seems to be a lot to ask. But there are many different ways to think about it. Consider just a taste of how the previous interpretations bear on this demand. First, wholly on epistemic turf, hearers know quite a bit about the subject so we might wonder whether spouses really should defer to strangers about what their husbands did.⁵⁶ A demand of #BelieveWomen that goes against the bulk of the hearer's evidence will simply have to meet a high bar.

Second, when #BelieveWomen is not aimed at truth in the individual case, but about increasing justice overall, the hearer may have other objections. The hearer might question (1) why she should sacrifice truth in this case, (2) even if her loved one is guilty, as a matter of agent-relative morality, isn't applying the demand to her to ask too much of her, and/or (3) even if her loved one is guilty, as a matter of agent-relative morality, shouldn't all subjects be entitled to an exception such that they have the support of their loved ones?

Third, conflicting values are even more difficult once we consider the partiality literature. Some theorists argue that as part of being a good friend, one is committed to a degree of epistemic partiality.⁵⁷ Then, even if #BelieveWomen is purely an epistemic construct and is aimed at truth, arguments on the *other* side may not be truth arguments. The hearer may have non-epistemic values to contend with.

⁵⁴ Jenny Hollander, "Why 'Believe Women' Means Believing Women Without Exception," November 21, 2017 <https://www.bustle.com/p/why-believe-women-means-believing-women-without-exception-5532903>

⁵⁵ It is difficult to sort out Hollander's claim because it is not clear exactly what she takes to undergird #BelieveWomen. At times, it seems to be an argument that you are likely wrong if you believe your loved one is not guilty. At other times, it seems to be that if everyone believes their loved one is the exception, that it undermines the goals of #BelieveWomen. She asserts that "when you believe all women on principle, you *believe all women*" (emphasis hers).

⁵⁶ Sarah Stroud, "Epistemic Partiality in Friendship," *Ethics* (2006): 498-524, 514 ("Our extra knowledge sometimes allows us to draw a more accurate conclusion.").

⁵⁷ See Simon Keller, "Friendship and Belief," *Philosophical Papers* 33 (2004): 329-351. Cf. Nomy Arpaly and Anna Brinkeroff, "Why Epistemic Partiality is Overrated," *Philosophical Topics* 46: 37-51 (arguing that partiality is not constitutive of a good friendship but that friends may have duties to double check evidence because the cost of a false positive is very high).

Fourth, the hearer may have significant stakes in her attachment to the accused. Imagine having to take on board that someone you love deeply: your father, your husband, your son, is a rapist. That's not a belief that you form like finding out the year the Wizard of Oz was produced (1939). It is a belief that shapes (and rocks) your world, demands revision of countless beliefs and qualification of endless memories, calls for reactive attitudes, and requires action. To form that belief is life changing for the believer.⁵⁸ And in higher stakes situations, we should expect that pragmatic encroachment will require more evidence before you feel comfortable knowing something.⁵⁹

Each of these issues is worthy of an article in its own right, as there are myriad considerations that yield no easy resolution. This brief discussion demonstrates how complicated this calculation can be, particularly in high stakes scenarios. But we should also be wary of too quickly using high stakes scenarios as our model in more ordinary cases. First, we might ask what turns on believing that the sexual assault has occurred. If while watching the hearings, I think Kavanaugh assaulted Ford, *my belief* is not going to make or break whether he is appointed to the Supreme Court, so the consequences of my belief are different than those for Susan Collins. Hence, it is a mistake to think that the consequences (whether not receiving a Senate appointment or going to prison) that bear on the decisionmaker ought to apply in the same way to the ordinary hearer.⁶⁰ Second, in these more ordinary cases, we have to examine the costs of both sides.⁶¹ That is, pragmatic encroachment might counsel in favor of lower, not higher, standards.

That said, in instances in which we only know the victim, we seamlessly take beliefs on board. For instance, imagine a student comes to me and asks that during our class on the law of sexual assault, that I not call on her⁶² to answer a question in class because she has been a victim of sexual violence.⁶³ Surely, I just believe her.⁶⁴ I am not going to ask her whether she reported it, whether I

⁵⁸ Cf. Stroud at 511 (“friendship *is* importantly contingent on continued esteem for one’s friend’s merits and character, then it is not surprising that we would massage our beliefs about our friend’s character in a favorable direction and downplay any information which might threaten that esteem”). See also Rachel McKinnon, “Lotteries, Knowledge and Irrelevant Alternatives,” *Dialogue* 52 (2013): 523-549. There are negative views of this epistemic stickiness as it may perpetuate injustice. Jason Stanley, *How Propaganda Works* (Princeton 2015), 193-99.

⁵⁹ Jason Stanley, *Knowledge and Practical Interests* (Oxford 2005).

⁶⁰ I thank Georgi Gardiner for raising this issue.

⁶¹ Bianca Crewe and Jonathan Jenkins Ichikawa, “Rape Culture and Epistemology.” In Jennifer Lackey, ed., *Applied Epistemology* (forthcoming OUP).

⁶² This is hypothetical. I only use volunteers for classes on sexual assault to avoid putting a student in a situation in which she would have to make the sort of request that appears in the text.

⁶³ I thank Victor Tadros for suggesting this type of case to me.

⁶⁴ I have (sadly) been in this situation many a time. Each time, I just believe.

can see her medical records, or whether she can supply me with witnesses. (Instead, I'd offer her the sort of support that comes from believing her—asking whether she is alright, whether she wants to talk about it, whether she is receiving counseling, or whatever might be appropriate in the moment.)

Notably, it is this case of uncontroversial and freely given belief that resonates with us. Our view of the easy case, where one unhesitatingly wholeheartedly believes, has become the battle cry for the law. The easy case resonates with us because we recognize that there are times that we appear to be straightforwardly non-reductionist full believers. But life and law are not always so easy. I have tried to demonstrate in this section that taking a belief on board may not be quite as easily justified, epistemically or normatively, in hard cases in ordinary life.

C. #BelieveWomen in Law

Enter law. Law must answer questions about #BelieveWomen. Some of these are familiar to law, and even if we do not know what the answer is, we know what the terms of the debate are. But there are some claims that are made in the context of sexual violence that seem spurious, or even silly. My aim is to map central #BelieveWomen interpretations onto our legal debates, to reveal mistakes in flatfooted epistemic approaches, and to offer preliminary remarks about how law can (and cannot) meet the demands of BelieveWomen.

Before doing so, however, it is worth spending a moment on the historical background for rape law and the evidentiary challenges that women who claimed to have been victims of sexual violence faced.

Currently subject to revision, the American Law Institute's Model Penal Code, renowned in numerous ways for its innovative approach to the criminal law, includes these two provisions with respect to sexual assault:

Section 213.6(4): *Prompt Complaint*. No prosecution may be instituted or maintained under this Article unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence [or special provisions for minors].⁶⁵

⁶⁵ MPC § 213.6(4).

Section 213.6(5). *Testimony of Complainants*. No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. . . . In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.⁶⁶

If this sort of institutionalized epistemic injustice strikes you as profoundly troubling, consider John Henry Wigmore (whom I shall quote at length):

There is, however, at least one situation in which chastity may have a direct connection with veracity, viz, when a woman or young girl testifies as a complainant against a man charged with a sexual crime. . . . Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their 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. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. The real victim, however, too often in such cases is the innocent man for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.⁶⁷

There are myriad other challenges that victims of sexual violence faced when seeking justice for wrongs done to them. Even though rape shields statutes have removed the ability to infer incredulity (and consent) from lack of chastity, and states have removed prompt complaint⁶⁸ and

⁶⁶ MPC § 213.6(5).

⁶⁷ 3A Wigmore Evidence § 924a at 736 (Chadbourn rev. 1970).

⁶⁸ The exhaustive survey done by the American Law Institute's Model Penal Code sexual assault provision reform project reveals that only South Carolina and Texas have vestiges of these provisions. *Model Penal Code-Revision of Article 213, Commentary*, B.2a.

corroboration requirements,⁶⁹ scholars continue to document the difficulties that women confront in having their cases prosecuted, much less securing guilty verdicts.⁷⁰ It is in the shadow of the criminal law's long-standing disbelief, that #BelieveWomen now intersects the law.

1. Trust, Credences, and Believing Women

Legal adjudications don't operate on beliefs. Jurors are not asked which witnesses they believe. They don't believe the plaintiff or the defendant. Belief has very little to do with it.⁷¹ Rather, they are asked about whether their confidence levels meet whatever the legal standard is.

The courtroom setting is reductionist. We evaluate all evidence. Far from taking people at their word, we do require oaths and penalties of perjury. We assess demeanor. We question each piece of evidence for whether it is what it purports to be and whether it is reliable. We reject that you can offer beliefs based on what others have told you, and we instead require those with personal knowledge testify.⁷² We look under the hood at everything.

As #BelieveWomen morphs into the courtroom, we might then ask about whether the non-reductionist full belief account has any purchase. One question is whether one may simply abandon non-reductionism solely for this forum without being a reductionist generally. Notably, I believe a thoroughgoing non-reductionist can account for this reductionist shift in approach without abandoning non-reductionist commitments.⁷³

⁶⁹ Although some states continue to have a corroboration requirement, in practice, it is limited in its applicability to testimony that is problematic on its own terms (contradictory, incredible, and so forth). *Ibid.* B.2b.

⁷⁰ Deborah Tuerkheimer, "Incredible Women: Sexual Violence and the Credibility Discount" *University of Pennsylvania Law Review* 166 (2017): 1-58; Michelle J. Anderson, "The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault," *Boston University Law Review* 84 (2004): 945-1022.

⁷¹ Some philosophers may quibble (or more than quibble) with this characterization. For recent efforts to introduce belief and knowledge into legal proof, see Lara Buchak, "Belief, Credence, and Norms," *Philosophical Studies* 169 (2014): 285-311; Sarah Moss, "A Knowledge Account of Legal Proof," (manuscript on file with author).

⁷² Federal Rule of Evidence 602.

⁷³ That is, there are various ways to stay a non-reductionist but become a reductionist in the legal setting. First, counter-evidence may be a defeater. Second, one might recognize that even in life, non-reductionism about belief gives way when the stakes get high. Croce and Poenicke argue that just as pragmatic encroachment may impact when we make knowledge claims, so, too, the stakes may impact when we look for additional evidence. Croce and Poenicke, "Testing What's At Stake: Defending Stakes Effects for Testimony." They claim that this can be accommodated within non-reductionism by including *pragmatic*

But there is a more pressing worry—if #BelieveWomen is a claim that respecting women will generate a belief, we may find that the law falls short. Jurors may increase their credences without fully believing the witness. Does #BelieveWomen, understood as advocating for non-reductionism and full belief, ask too much?

I want to suggest that we can accord women with the respect they are due, that in according that respect we can still be non-reductionist, and that we very well may not arrive at belief. To make this point, I should sever the reductionism/non-reductionism debate from the distinction between belief and credence.⁷⁴ The link between credence-increasing and reductionism is clear. If you are taking someone as more or less reliable as an epistemic source, then you will have more or less trust in her word and will adjust your credences accordingly. To be sure, you could arrive at full belief through this process, but you need not do so. Evaluating our epistemic sources just is to operate in a world of shades of gray.

Now consider non-reductionism. It may be that, although the debate has focused on whether non-reductionism justifies beliefs, that one could be a non-reductionist about credence increases. For instance, I offer you my word and you take that offer as a reason for you to have increased confidence in a proposition simply based on my testimony. So long as you don't look beyond my testimony, you are being non-reductionist. What I think is interesting about this result is that it leads to the possibility that there may be a kind of robust trust or assurance that grounds full belief and a lesser epistemic respect that grounds credence increasing. Basic epistemic respect may not ground full belief even for the non-reductionist. Hence, to be clear, I take it that both reductionism and non-reductionism are compatible with arriving at either an increase in one's credence or the adoption of full belief.

But here's the rub for when #BelieveWomen meets law. What I reject is that when you increase your credence based on someone's testimony, you can always be said to be believing her. Here's the view I wish to offer: to believe someone is to take the claim on board at the same level of credence as the speaker offers it. If my husband says, "That might have been a bear," then I believe him if I think, "There might have been a bear." If my husband says, "A bear was in our backyard," then I believe him if I think, "There was a bear in our backyard." I reject, however, that you believe

defeaters within the account. When the stakes are high, we scrutinize more. This means that we effectively become reductionists in high stakes situations.

⁷⁴ Many thanks to Renee Bolinger for prompting me to sever these questions and consider the issues in this section.

someone if you attribute less credence to the proposition than the level of credence on offer. If my husband says, “A bear was in our backyard,” and I think, “There *might have been* a bear in our backyard,” then I have not believed him. Increasing your credence in phi in response to someone’s testimony of full belief that phi is not believing her testimony.⁷⁵ One might still be a non-reductionist, but one is not a non-reductionist believer.

Beyond the fact that credence increasing does not seem to accord with our typical assumptions of what it means to believe someone, it also has a counterintuitive implication. Assume I thought that a fox was in my backyard to a 95% probability. My husband tells me it was a bear, and I then reduce my credence to 55% (that’s giving his testimony real weight). On the credence-increase-is-belief view, I will say, “There was probably a fox in my backyard, and I believed my husband when he said it was a bear.” It seems bizarre to say that you can believe someone and yet conclude the opposite. Indeed, the complaint that on pain of irrationality, a senator could not say that she believed Ford but still did not have enough evidence to fail to confirm Kavanaugh, is a claim that believing someone demands more than credence increase.

Unfortunately for a conception of the #BelieveWomen demands full belief, this may mean that we can accord women epistemic respect, or even trust, be non-reductionists, and yet still not believe them. That is, it may be that respecting someone *just is* increasing your credence, as opposed to forming a full belief. If I take you seriously as an epistemic agent, if I take your assurance as a reason for me to believe something, and I then increase my credence because of you, I have respected you, even if I have not believed you. If there is only a tiny increase in credence, one might question whether I have respected you as an epistemic agent, but surely, in a high stakes situation, one might take another’s words seriously without arriving at full belief. The law’s draw to credences, then, does not run afoul of what we may owe to women and what we are justified in believing, even though it does not lead to the sort of robust belief sought.

2. Legal Confusions Based on Bad Epistemology

Unfortunately, legal commentators don’t know how to think about testimony. In our current debates, it seems that flat-footed approaches can generate odd claims. Things are getting lost in the

⁷⁵ Accord Anscombe (one cannot believe both people when they are giving opposite testimony).

translation from life to law. Consider two examples. The first error is the robust skepticism that we can know anything or believe anything in these cases. I have never been a fan of seeing these cases as “he said/she said” or “word-on-word” because they give the impression of even odds, as though each side is as likely as a coin flip. Just because there are two sides doesn’t mean each is equally likely to be correct. As Lois Shepherd describes its meaning: “‘He said, she said’ implies that we throw up our hands in capitulation — the truth simply cannot be known. It’s one person’s word against another person’s word and that’s all there is to it.”⁷⁶

Why would anyone think this? Here’s a diagnosis. If I am justified in believing *A* because of her testimony and I am justified in believing *B* because of his testimony, and *A* and *B* testify to opposite facts, then I have a problem. If #BelieveWomen tells us that women have as much claim to be believed as men, that their testimony gives sufficient warrant for belief, then there is no nuance, no credences, and no probabilities. It is a question of which side you believe. Even on the feminist side of the he said/she said is the worry that this word on word comes down to a battle of equal entitlements to belief and that where the burden is set then will decide who counts as telling the truth.

Yet, we know in life that you can hear both sides to a story and be completely convinced that one person is telling the truth and the other is lying. Again, he said/she said isn’t fifty-fifty; it is not a close call. It is not even “even evidence.” Parents, teachers, and principals adjudicate disputes between children by determining credibility on a daily basis. Credibility disputes do not reduce to “cannot know.”⁷⁷ As Georgi Gardiner notes, “[W]e mistake the linguistic balance of the expression...for epistemic balance,”⁷⁸ and by doing so, we ignore the range of ways that different people’s testimony is evaluated against a range of background beliefs, probability baselines, and so forth.

Here’s a second odd claim. It is the claim that testimony somehow isn’t evidence. Here’s a sample of that position: “The truth is that I don’t know whether Kavanaugh is innocent or guilty, and—as I wrote on Friday—I found Dr. Ford’s testimony to be compelling and credible. Having

⁷⁶ Lois Shepherd, “The Danger of the ‘He Said, She Said’ Expression,” <https://thehill.com/opinion/judiciary/411157-the-danger-of-the-he-said-she-said-expression>

⁷⁷ Accord Shepherd.

⁷⁸ Gardiner, She Said/He Said.

said that, (so far) we have seen *zero* evidence to prove Brett Kavanaugh attempted to rape her 36 years ago.”(emphases in original)⁷⁹

Here we seem to be confusing what counts as evidence from corroboration of that evidence. It’s as if if one isn’t a non-reductionist, then testimony does not count at all. Once upon a time, a claim of rape was not sufficient—one needed prompt complaints and the like. The question now is that if the stakes warrant a second look at the testimony then mustn’t they likewise require more evidence than just the testimony? But there is a distinction between reductionism and corroboration. For example, some reductionists maintain that testimony may be justified by an inference to the best explanation. But if so, reductionism does not require something or someone else. Hence, there seems to be a confusion between thinking we cannot take a belief on board just because someone said it and thinking the fact that someone said it is of no evidentiary import.

Notably, it is true that corroboration requirements can seem to *devalue* testimony.⁸⁰ The Constitution provides that no person shall be convicted of treason without the testimony of two witnesses.⁸¹ But notice that that is not the view that testimony is not evidence. If that were true, then two witnesses would be no better than one.

It is preposterous to think that a burden, be it preponderance or beyond a reasonable doubt, cannot be met with someone’s testimony. You are highly confident in many, many things in your life simply because someone told you those things. To be sure, one can go the skeptical route. You could be brain in a vat; your thoughts could come from an evil demon. But if one is going to maintain that one knows about Lincoln and Napoleon, that one understands scientific principles that one has never discovered for oneself, that one can get the accurate time of day by asking someone on the street, then one is going to have to abandon the outright silly view that one cannot know that there was a sexual assault when someone says there was.

Although some may be inclined to see these arguments as just bad faith, I believe that we have a problem of cross pollination. The language of belief that makes sense in everyday discourse (though

⁷⁹ Matt Lewis, “It’s ‘Believe the Woman vs. the Presumption of Innocence—and Kavanaugh is Caught in the Middle,” <https://www.thedailybeast.com/its-believe-the-woman-vs-the-presumption-of-innocenceand-kavanaugh-is-caught-in-the-middle>

⁸⁰ Barzun 1964.

⁸¹ US Constitution art III, § 3. There are some interesting questions here I cannot pursue. We might think that this provision tells us that testimony is lesser evidence. But it might simply be that we want *more* evidence for such a serious crime. The problem with sexual assault is that there are rarely witnesses to the offense, and so a corroboration rule of this sort would effectively prevent the prosecution of the vast majority of cases.

some folks will quickly defend credences there too) has no role to play in our adjudicative practices that are far more reductionist and credence-based. When we ask “do you believe Christine Blasey Ford?”, we have given up the nuance of probabilistic claims. In life we may speak in black and white, but law recognizes an abundant number of shades of gray. Hence, law requires us to abandon a flat footed non-reductionism of equal entitlements or a view that when non-reductionism gives way, testimony has no evidentiary import. Law has more nuance than the everyday reliance on full belief.

3. Epistemic Correctives, Standpoint Epistemology, and Burden Shifts

While the understanding of #BelieveWomen as a call for non-reductionism and full belief may get lost in translation to law, other concepts make the transition more easily. To be sure, signs of solidarity or efforts to change baseline assumptions of truth or generics, are not themselves arguments for within the courtroom, but three of our conceptions do seem to be within the realm of the trial—epistemic correctives, standpoint epistemology, and setting the burden of proof.

a. Epistemic Correctives

Legal theorists have been sensitive to the interpretation that gives #BelieveWomen a Frickerian spin. Sherry Colb’s nuanced account of “What Does #BelieveWomen Mean?” takes up primarily the Frickerian corrective approach.⁸² Colb’s argument is eminently reasonable. She claims, “The #BelieveWomen hashtag responds to a very old and longstanding prejudice,” such as Lord Chief Justice Matthew Hale saying that “[rape] is an accusation easily made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.”⁸³ Colb also notes the prevalence of jury instructions and evidentiary requirements that made it more difficult to prove rape.

⁸² Sherry Colb, “What Does #BelieveWomen Mean?” Verdict: Legal Analysis and Commentary from Justia, November 7, 2018. <https://verdict.justia.com/2018/11/07/what-does-believewomen-mean>

⁸³ Ibid.; see 1 Hale, *History of the Pleas of the Crown* (1847), 635.

Colb claims that #BelieveWomen does *not* mean that women never lie. Instead, she notes the incentive structure is such that men are the ones more likely lying.⁸⁴ After all, the accuser could simply stay out of the entire matter; it is the accused who has a motive to proclaim his innocence. Colb's proposal is rather modest ultimately, as she merely counsels for police to act *as if* they believe a complainant. Colb wants the police officer to take the complainant seriously and be fair minded, but she is also skeptical of getting police officers to actually commit to a belief without further investigation. To Colb, then, #BelieveWomen is just "respect women as you would any other victim of any other crime."

Deborah Tuerkheimer has a more aggressive approach to #BelieveWomen, but one that is ultimately about a Frickerian corrective.⁸⁵ Tuerkheimer notes that legal scholarship has failed to take notice of Fricker's work, and Tuerkheimer deploys Fricker's insights to argue that epistemic injustice results in a "credibility discount."⁸⁶ Tuerkheimer notes this discounting is pervasive in sexual assault cases, ranging from policing, to prosecuting, to adjudicating.⁸⁷ Where Tuerkheimer goes bold is that her solution is to allow for Equal Protection litigation because women are receiving credibility discounting based on group membership.⁸⁸ But this sort of litigation is the means to reach Tuerkheimer's ideal end which is simply for individuals to apply the Frickerian corrective and to assess the evidence correctly.

Admittedly, operationalizing a Frickerian corrective is far easier said than done. In some ways, the #BelieveWomen campaign is working indirectly to do just this—to make individuals stop and think about women's testimony. Are there more direct evidentiary remedies? Charles Barzun suggests that our system of evidence ought to employ rules of weight, wherein we can instruct the fact finder as to how to weight evidence.⁸⁹ Then, instead of excluding hearsay, for example, we could simply say it was "an *inferior grade* of evidence."⁹⁰ Barzun notes that corroboration

⁸⁴ Another way to put this point is that it is a costly signal. In these sorts of cases, costly signals can be assimilated with a broad expressive view of #Believe Women (as truly standing for #BelieveCostlySignals) or it can be absorbed within reductionism as it gives a reason to believe testimony. I thank Bob Goodin for suggesting the costly signal view.

⁸⁵ Her paper is not framed as a discussion of the hashtag, but I think it is a fair reading of her sentiments. Deborah Tuerkheimer, "Incredible Women: Sexual Violence and the Credibility Discount," *University of Pennsylvania Law Review* 166 (2017): 1-58.

⁸⁶ *Ibid.* at 3.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ Charles L. Barzun, "Rules of Weight," *Notre Dame Law Review* 83 (2008): 1957-2017.

⁹⁰ Barzun 1958.

requirements, like those previously used for rape, are rules of weight because they deem the evidence itself insufficiently weighty to sustain the conviction.⁹¹ Barzun does not counsel that such rules should be used to tell juries how to value evidence positively or increase its weight, as that would come close to be an irrebuttable presumption and would be of dubious constitutionality (e.g., “I hereby instruct you to believe women.”).⁹² Still, one might wonder whether there is a way to construct a clever instruction along the lines of what we tell jurors with respect to direct and circumstantial evidence: “Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other.”⁹³

b. Standpoint Epistemology

There are other extensions of the myriad interpretations of #BelieveWomen that are possible in the legal domain. The Frickerian interpretation opens up the prospect of a robust standpoint epistemology. The idea is not that women are equal to men, but that women are superior interpreters of the facts. How standpoint epistemology can or should be taken into account in law is tricky. We might think that there isn't room for specialized knowledge with respect to some legal questions. The idea of whether the defendant believed there was consent, for example, is wholly subjective and determined from the defendant's standpoint. And, jurisdictions that take consent to be subjective willingness allow the victim to be the final arbiter of consent, irrespective of any expertise. Yet, perhaps standpoint epistemology comes into play with questions of reasonableness: whether it is the question of whether the defendant was negligent (thereby unreasonably believing he had consent), whether affirmative consent was present (thereby relying on objective interpretations of conduct), or whether the defendant's behavior was coercive (would a reasonable person take the defendant's actions as well as the situation to be threatening). These questions might open up space for a claim along the lines that a woman is better equipped to understand what sorts of conduct would feel coercive and undermine consent. It is unlikely, however, that the law would qualify

⁹¹ Barzun 1959

⁹² Barzun 2014.

⁹³ California Criminal Jury Instruction 223.

either the defendant or the victim as an expert with greater knowledge. Rather, any “expertise” is more likely to rely on specific past acts between the victim and the defendant that, for example, would lead the victim to take some conduct as a threat that an ordinary juror would not.⁹⁴ Though I cannot explore it here, the idea that women are experts raises questions about jury composition—it pits the idea that one may rightly worry about having a doctor on a medical malpractice case because the doctor really does know better against the view that gender-stereotypes are pernicious such that peremptory strikes based on gender and that gender’s likely life experiences are unconstitutional.⁹⁵ That is, standpoint epistemology and the Constitution don’t currently mix.

c. Reconsidering the Burden of Proof (Explicitly and Covertly)

Finally, an interpretation of #BelieveWomen as arguing for rebalancing our tradeoffs plays a role in formulating the burden of proof. There is a rich literature about burdens. To some, this is only about how we allocate error between false positives and false negatives. This leads to the criminal maxim of “better to let ten guilty men go free than to convict one innocent man.” However, as theorists have pointed out that some false negatives may be extremely detrimental, thus leading to a far lower burden than proof beyond a reasonable doubt,⁹⁶ other theorists have sought to give a deontological interpretation of the burden. For instance, Alec Walen has argued that the proof beyond a reasonable doubt standard is a deontological restriction, and that only certain sorts of tradeoffs (those dealing with retributive justice) may be made—other harms that come from the false negative do not count within the calculus.⁹⁷ Ultimately, we need to determine what we are trading off (is it only the costs of error and which ones?) and how the balance should be set.

Different legal questions will strike the balance differently. Within the Title IX context, one can make arguments for higher and lower standards based on the costs of error on either side, and one could maintain that lower standards better protect victims. A university that requires only a preponderance for expulsion for cheating would have difficulty articulating why a higher standard is

⁹⁴ State v. Kelly on battered women.

⁹⁵ JEB v. Alabama.

⁹⁶ Larry Laudan, “The Rules of Trial, Political Morality, and the Costs of Error: Or, is Proof Beyond a Reasonable Doubt Doing More Harm than Good?,” in 1 *Oxford Studies in the Philosophy of Law* (Leslie Green & Brian Leiter eds., 2011).

⁹⁷ Alec Walen, “Proof Beyond a Reasonable Doubt: A Balanced Retributive Account,” *Louisiana Law Review* 76 (2015): 355-446.

required for expulsion for sexual misconduct (particularly if there were no collateral impacts). And, with Kavanaugh, we might think the costs of error are significantly different: not giving him a job on the highest court in the land or appointing an attempted rapist to the court.⁹⁸

Of course, how errors are allocated depends not just on the burden of proof. As Michael Pardo notes, it also depends on the quality of the evidence, whether it is systematically skewed, and whether it is likely to be misinterpreted by the factfinder.⁹⁹ All of these impact what the true distribution of false positives and negatives will be.

#BelieveWomen as an argument for changing the balance of false positives and false negatives affects other aspects of law as well, albeit covertly. Rape shield statutes exclude evidence of the victim's prior sexual conduct as minimally relevant and thus outweighed by the policies of encouraging rape reporting. If rape shield statutes prevent the admission of a prior act, then even in a case in which it might create reasonable doubt, the evidence is excluded to pursue the goal of more justice overall, as opposed to more truth in the individual case.

Moreover, the creation of different sorts of crimes may change the risk of error. As Bill Stuntz famously demonstrated, legislators can circumvent burdens of proof by removing elements. So, if the moral wrong is ABC, but the statute only requires AB, then the legislature has removed the possibility of reasonable doubt on C, an element which may be hard to prove. (Stuntz then argued that it is within prosecutorial discretion to determine whether C exists and she should prosecute, a result Stuntz found problematic.¹⁰⁰) Hence, the way that substantive law is constructed also determines who bears what risks.

The understanding of #BelieveWomen that advocates for believing women at the expense of a few innocent men is precisely the embodiment of these trade-off questions. This is a debate that we need to have, and #BelieveWomen puts that debate front and center in stark form. There

⁹⁸ We can give this more nuance. Is the president's nomination entitled to some sort of deference? Irrespective of that deference does it matter that the nominee is already in the public eye? Certainly, the allegations, however spurious, that could keep someone from being a nominee are distinct from the reasons not to go forward with someone who is already subject to public awareness. I thank John Oberdiek for discussion on this point.

⁹⁹ Michael S. Pardo, "Second-Order Proof Rules," *Florida Law Review* 61 (2009): 1083-1113, 1088; [See also Laudan at 73].

¹⁰⁰ William J. Stuntz, "The Pathological Politics of the Criminal Law," *Michigan Law Review* 100 (2001): 505-600; see also Richard McAdams in *Criminal Law Conversations*.

are difficult questions here, including what to do about the potential distributional effects of different standards,¹⁰¹ but we need to be clear about what our goals are and how we reconcile them.

II. The Presumption of Innocence

Our difficulties in sorting out claims of sexual violence are not solely the result of not knowing what we mean by believing women. The presumption of innocence is likewise on display in law and life in ways that continue to confuse our debates.

A. The Presumption in Law

Recall that both the news media and Susan Collins invoked the presumption of innocence during the Kavanaugh hearings. And there are those who invoke this presumption completely outside the adjudicative context.

Here's the problem. To quote Inigo Montoya, "I do not think it means what you think it means." Well, the real problem is that it appears to mean many things.¹⁰² There are questions as to the fora in which it applies and as to the standard required. And, there is the distinct question of what it means to presume someone innocent.

1. The Forum and the Standard

Doctrinally, within the United States, the Supreme Court's interpretation of the presumption is extraordinarily narrow. *Kentucky v. Wharton* held that failure to give an instruction on the presumption of innocence does not in and of itself violate the Constitution.¹⁰³ *US v. Salerno* upheld the constitutionality of the Bail Reform Act, allowing a court to prejudge the defendant's case and to use the fact of indictment as evidence that the defendant will commit another offense.¹⁰⁴ The fact that someone was acquitted of an offense prevents neither civil charges nor use of the evidence as a

¹⁰¹ Many #BelieveWomen debates seem to invoke the image of a drunk fraternity boy. But college women are less at risk for sexual assault. Sofi Sinozich and Lynn Langton, *U.S. Department of Justice Special Report: Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013* (December 2014). There are also significant concerns (1) that criminalization changes will disproportionately impact poor people of color but (2) that women of color (as well as immigrants and transgender people) are least likely to have their rights vindicated. See generally Aya Gruber, *The Feminist War on Crime* ch. 5 (Univ. of California Press 2020).

¹⁰² The discussion of these interpretations draws from Kimberly Kessler Ferzan, "Preventive Justice and the Presumption of Innocence," *Criminal Law and Philosophy* 8 (2014): 505-525.

¹⁰³ 441 U.S. 786 (1979).

¹⁰⁴ 481 U.S. 739 (1987).

prior bad act in a future case. Generally, the presumption is thought just to be the reasonable doubt requirement for criminal convictions.¹⁰⁵

In contrast, in adjudicating alleged violations of the presumption as codified by the European Convention on Human Rights, the European Court of Human Rights has given the presumption more substance. Two cases should suffice to draw the stark contrast in jurisprudential approach. In *Alenet de Ribemont v. France*, the court held that the presumption was infringed when prior to trial, high ranking French police officers commented to the press that the defendant was an accomplice to murder.¹⁰⁶ In *Geerings v. Netherlands*, a judge determined by a balance of probabilities that the defendant did commit thefts and ordered forfeiture of his assets. However, because the defendant had been acquitted of these charges, the European Court of Human Rights held that this violated the presumption.¹⁰⁷

Theoretically within and without the United States, there is broad disagreement about the meaning of the presumption.¹⁰⁸ To some, in line with current doctrine, the presumption *just is* the beyond a reasonable doubt rule. In contrast, others argue for broader extensions. Shima Baradaran argues that the presumption of innocence should preclude certain factors, including the indicted offense and future dangerousness, in determining whether to release a defendant on bail.¹⁰⁹ These factors, Baradaran argues, conflict with the view that the defendant ought to be presumed innocent until conviction.¹¹⁰ Unlike the beyond a reasonable doubt view of the presumption, which gives the presumption substantive content, this position claims that the presumption protects the criminal process, noting that only it can adjudicate guilt. It is, as Carl-Friedrich Stuckenberg calls it, a view of the presumption as a “flank defense” that protects the primacy of the criminal process.¹¹¹

The presumption is also thought to animate or closely relate to other procedural rights, including those related to self-incrimination and search and seizure.¹¹² Of course, as one seeks to extend the

¹⁰⁵ Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives*. (Oxford and Portland: Hart 2010), xxxviii; Laudan 40.

¹⁰⁶ (1995) 20 EHRR 557, [1995] ECHR 15175/89.

¹⁰⁷ [2007] ECHR 30810/03.

¹⁰⁸ Laudan 91.

¹⁰⁹ Shima Baradaran, “Restoring the Presumption of Innocence,” *Ohio State Law Journal* 72 (2011): 723-776.

¹¹⁰ See also R.A. Duff, “Pre-trial Detention and the Presumption of Innocence,” in A.J. Ashworth et al. (eds.) *Preventive Justice* (Oxford University Press 2014).

¹¹¹ Carl-Friedrich Stuckenberg, “Who Is Presumed Innocent of What by Whom?” *Criminal Law and Philosophy* 8 (2014): 301-316 (this issue) (presumption protects against anticipating the outcome of the criminal trial, circumventing the outcome, and undermining the outcome).

¹¹² William S. Laufer, “The Rhetoric of Innocence,” *Washington Law Review* 70 (1995); Stumer xxxix.

presumption beyond trial, the question of what the presumption means becomes even more difficult. If police are to believe the defendant innocent, how do they justify searching him?¹¹³ And if the standard for overcoming the presumption is met for the search, why is the defendant entitled to the presumption anew when it comes to bail or even trial?¹¹⁴ What about the relationship between citizen and state entitles the defendant to de novo review of the very same issue at every stage of criminal inquiry? Notably, if the presumption is applicable here, it reveals that not only do we not have one addressee, the jury, but we do not even have one standard. After all, no one thinks that the police need proof beyond a reasonable doubt before they conduct a search. And, that means that there is something of a sliding scale that must balance the state's need to investigate crime against the individual's liberty. It would mean that the presumption does not entail proof beyond a reasonable doubt.

Despite the disparate demands on the presumption, it is important to note that all of these constructions of the presumption are within *criminal proceedings* and the person bound by the presumption is *the state*. Even from broad European Court of Human Rights holdings, Liz Campbell extracted the general principle that, "What the ECtHR has found to be problematic are court expressions of suspicion after acquittal, and also state declarations of guilt that encourage the community to view her as guilty and arrogate the appropriate judicial role."¹¹⁵

Kavanaugh's hearing was hardly a criminal proceeding. And, whoever held what burden (a question to which I will return), it was hardly a beyond a reasonable doubt standard. And, once we are out of the criminal process, we don't tend to invoke the presumption. If the question is whether I slipped on your steps because you negligently maintained them, it would be odd for you to run around talking about the presumption of innocence. All of this seems to be the wrong forum for the presumption.

2. What Does It Mean to Presume Someone Innocent?

¹¹³ See Rinat Kitai, "Presuming Innocence," *Oklahoma Law Review* 55 (2002): 257-296 (discussing how some scholars claim that the presumption raises a logical contraction because if "the innocence of the person is assumed...it is impossible to explain logically why an investigation is being conducted and charges filed without reaching an absurd conclusion that all accused persons are prosecuted by law enforcement agencies without basis").

¹¹⁴ Laudan 93-94.

¹¹⁵ Liz Campbell, "Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence," *Modern Law Review* 76 (2013): 681-707, 694.

The other difficulty here is that there is a question of what it means to be presumed innocent. Even in the context of criminal adjudications, our faith in the clarity of the presumption can unravel. What exactly does it mean to tell the jury they need to presume the defendant is innocent? Following Laudan, we should first distinguish between probatory (court-decided, legal) innocence and material (factual, actual) innocence (or guilt). A probatory presumption of innocence means that the jury (or other state actor) starts with the presumption that it simply has no evidence of the defendant's guilt.¹¹⁶ A material presumption of innocence would mean that the jury is asked to presume that the defendant is not in fact guilty. In other words, to believe that an individual is materially innocent is to believe that *he did not in fact commit the offense* whereas to believe an individual is probatory innocent is to believe that one *has no proof that the defendant committed the offense*.¹¹⁷

Laudan raises a range of concerns with viewing the presumption of innocence in criminal cases as one of material innocence: How can jurors simply adopt beliefs contrary to facts (such as that the defendant was arrested and charged, and thus likely isn't innocent¹¹⁸) and how do individual jurors hold the belief that the defendant is materially innocent until the very moment when the jury collectively reaches the conclusion that the beyond a reasonable doubt standard is satisfied? Laudan argues instead for probatory innocence: "What is important is that the juror concedes that she has no proof now about guilt and that, therefore, she lacks any clue about which side will eventually prevail. This is a patently true description of her situation and any juror should accede to its truth."

The presumption of innocence, then, is that the jury has no evidence yet as to whether the defendant committed the crime beyond a reasonable doubt. The reason we put the burden on the state is because given the stakes, locking someone up and branding him a criminal, we believe that the state ought to have this high burden. This is Constitutional bedrock for criminal cases, but in other areas, we might evaluate the tradeoffs and come to a different conclusion. Importantly, in American law, the presumption has no role outside of being the corollary of proof beyond a reasonable doubt—an extraordinarily high burden before action is warranted.

Ultimately, for the Kavanaugh hearing, the *prior* question was who held what burden. If Kavanaugh had to show that he was worthy of the post, then not just the evidentiary baseline but

¹¹⁶ Importantly, no evidence is not the same as even odds. Richard D. Friedman, "A Presumption of Innocence, Not of Even Odds," *Stanford Law Review* 52 (2000): 873-87.

¹¹⁷ Laudan 12.

¹¹⁸ Accord Friedman at 879 ("most criminal defendants who are brought to trial in America are in fact guilty")(citations omitted).

the evidentiary question would look entirely different.¹¹⁹ Consider the concerns that Harriet Miers was simply unqualified to be a Supreme Court justice. If she had to meet some standard, no one would contend that she was entitled to a presumption of innocence (or competence). It is a legitimate question whether a president's decision to nominate, or the fact that the nominee was in the public eye, counted toward the standard and created some sort of deference. However, because the allegation against Kavanaugh was one of a criminal nature, the presumption of innocence was invoked. That should not have been the question.¹²⁰

B. The Presumption in Life

The lack of fit between the presumption and the Kavanaugh hearing pales in comparison to the way we ought to think about these questions in life. We think we know what we mean when we invoke the presumption—the intention is to invoke a deep, inalienable entitlement to someone's belief in our material innocence. The Constitution contains no such guarantee. We then see individuals sniping at each other when one asserts that someone is not entitled to the presumption. They seem to be making a category mistake.

Still, there is something right about invoking the presumption. If the legal presumption is about how the state ought to treat us until a particular burden is met, then the rhetorical presumption has to do with how we should treat each other. If speakers have claims on us to be taken seriously as knowers, subjects have claims on us that we should not rush to judgments against them. Perhaps we ought not to start by thinking ill of someone. Unless and until you become convinced by some (to be determined) standard that I have done something wrong, shouldn't you think the best (or at least not the worst) of me?

Unquestioningly, for centuries, white men have received the benefit of the doubt when claims of sexual assault have been made against them. Still, the fact that we have given too much weight to their testimony does not mean that they are entitled to no weight or to no consideration. In the same way that we worry about the use of statistical evidence in other contexts, men are entitled to

¹¹⁹ Compare Youngjae Lee, "Op-Ed: It's Better To Pass over 10 Innocent Nominees than to Risk Having a Justice Guilty of assault on the Supreme Court." *L.A. Times*, October 5, 2018.

¹²⁰ In her comment at the NOMOS conference, Renee Bolinger also raised the question of whether it was appropriate to reassert the presumption of innocence after the victim presented evidence. As Bolinger views this, it is to inappropriate claim there is no evidence after evidence has been presented. However, I think the problem is an ambiguity between the two questions above. If the presumption of innocence is asserted as a reminder that there is a standard, as opposed to a commentary on whether the standard is potentially met, then it makes perfect sense to reassert the presumption later. Indeed, juries are instructed about the presumption of innocence, and this is not a commentary on the quality of the state's evidence.

claim that just because other men are sexual assaulters doesn't mean that they are. If women are owed due respect and consideration, then so are men. The entitlement to be heard and to be valued is an entitlement on both sides. But as the banner of #BelieveWomen is waved in the court of public opinion, men have sought to clothe their account in the presumption of innocence. Both sides are clearly employing this rhetoric to sway public opinion, but for this reason, our discourse becomes contaminated with concepts that simply do not apply. We thus avoid having the real debates.

Again, the court of public opinion is quite different from a court of law. Forming a belief that a random celebrity is a rapist is quite different from expelling or incarcerating him. Moreover, in life, one may simply reserve judgment in a way that is not possible in law. But instead of thinking about this within the context of sexual assault and the criminal law, we ought to think about how we otherwise adjudicate negative allegations. How do we understand someone's claim that he was robbed? How do we understand the competing accounts of a bar fight? What is the fair minded and respectful way to go about sorting individuals' testimony?

I think the question of what we owe someone as a starting assumption is difficult. Recently, theorists have brought our attention to how *beeding* (not ignoring) baseline probabilities may result in biased views.¹²¹ And, as mentioned earlier, there is the further question of whether we can wrong someone by what we believe about them. As we struggle with how to confront statistical evidence, we will struggle here with how to approach sexual assault allegations. Unlike just about every other debate in this area in which women or people of color are potentially wronged by the employment of statistical evidence,¹²² in these cases, we are at a crossroads as to whether white men will also be the recipients of negative statistical assumptions.¹²³ Although some will (rightly) bemoan that it is only when the majority group is impacted that we have important normative discussions,¹²⁴ the silver lining is that these important normative discussions can inhere to the benefit of everyone.

¹²¹ Deborah Hellman, *The Epistemic Commitments of Nondiscrimination* (October 26, 2018). Virginia Public Law and Legal Theory Research Paper No. 2018-60. Available at SSRN: <https://ssrn.com/abstract=3273582>

¹²² For exploration, see Renée Jorgensen Bolinger, "The Rational Impermissibility of Accepting (Some) Racial Generalizations," *Synthese* (2018):doi: [10.1007/s11229-018-1809-5](https://doi.org/10.1007/s11229-018-1809-5)

¹²³ Although it is undoubtedly true that black men will still be disproportionately impacted by this statistical assumption.

¹²⁴ Cf. Ekow Yankah, "Op-Ed: When Addiction Has a White Face," *The New York Times* (Feb. 9, 2016), <https://www.nytimes.com/2016/02/09/opinion/when-addiction-has-a-white-face.html>.

At the moment, the invocation of the presumption of innocence covertly skews the question. The true critical question is always who has to prove what and by what standard. The presumption of innocence answers: the accuser and beyond a reasonable doubt. *Indeed, that is what commentators said with respect to Kavanaugh—that they were not convinced beyond a reasonable doubt.*

But the fact that we owe men consideration does not fix the terms of the inquiry. As a final illustration, consider the following case from Crewe and Ichikawa.¹²⁵ A conference was held to celebrate the work of an esteemed philosopher, but that philosopher had recently been accused of sexual misconduct. For this reason, some philosophers urged the boycotting of this conference. Now, one response is that professor has been neither charged nor convicted. But it is a mistake to think that if we do not *know* the person committed the offense, then we ought to participate. We may want a lower threshold, and one that takes into account the stakes for the complainants if the profession continues to celebrate someone who actually has committed sexual misconduct. As Crewe and Ichikawa note, “there is no clear reason why submitting to the workshop is the choice of default.”¹²⁶ Certainly, one does not sign onto a conference without considering the topic, the quality of the participants, and so forth. The idea here is that the consideration “is this person worth honoring” is on the table. The presumption of innocence is just empty rhetoric that obscures the foundational question of to whom we owe what when.

III. Conclusion

Claims of sexual violence require us to seek truth while doing right by speakers and subjects. The myriad epistemic and non-epistemic interests pull us in different directions. The different approaches to testimony, the ability to work in credences or beliefs, and the encroachment of pragmatic concerns makes even the epistemological questions difficult.

These questions are debated in different fora—though I have dealt primarily with the criminal law, Title IX, and public opinion—journalists, prosecutors, police officers all have their roles to play, and they all have different roles to play. Undoubtedly, the interconnections between these questions can bring us a sense of deeper understanding as we can deploy tools for one sphere in another.

¹²⁵ Bianca Crewe and Jonathan Jenkins Ichikawa, “Rape Culture and Epistemology.” In Jennifer Lackey, ed., *Applied Epistemology* (forthcoming OUP).

¹²⁶ [need final page when book out]

But we ought to be careful of the shadows we are casting. There are some tools that are appropriate for one forum but not for another. As we seek rhetoric that applies across the board, we risk running roughshod over our deepest commitments and making errors about what issues are and are not at stake. We thereby risk talking past each other. Finding the right answer will be hard enough even when we are asking the right questions.