PUNISHMENT WITHOUT PROCESS: "VICTIM IMPACT" PROCEEDINGS FOR DEAD DEFENDANTS

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INTRODUCTION

When women accuse powerful men of sexual assault, there is increasing public pressure to resolve any doubts in the accusers' favor before the criminal process is over, if not from the outset. Private individuals and institutions often do so without worrying about due process, but it is different for the trial court, where the presumption of innocence is supposed to apply. This is especially true where public shaming and the accompanying reputational consequences already constitute a kind of punishment. Although they may be sympathetic to accusers, especially those whose cause is championed by a strong and popular social movement, courts should not succumb to pressure to undermine the presumption of innocence.

This Essay analyzes two federal court decisions involving accused sex offender Jeffrey Epstein. In these cases, the district judges—seemingly in response to social pressure—undermined the presumption of innocence by offering Epstein's accusers the chance to make the equivalent of "victim impact statements" after Epstein's suicide in prison. The Essay argues that courts have an obligation to respect the presumption of innocence even after a criminal defendant's death. While the living accusers have valid and compelling interests, it is inappropriate for the trial court to recognize these interests by allowing victim impact proceedings when criminal charges have never been resolved—and especially, where, as here, no criminal trial had even begun. Epstein's accusers are sympathetic, and public opinion supports their struggle—often seemingly putting absolute faith in their allegations. But the public outcry and accompanying social movement should not have dictated how courts conduct courtroom proceedings. Judges must respect the presumption of innocence, including after a criminal defendant's death ends the possibility of a criminal prosecution.

After Epstein died while awaiting trial on criminal charges, the prosecution moved to dismiss the indictment in federal court in New York, and the district court judge ultimately granted the motion. But first, the judge ordered a hearing to enable Epstein's accusers to testify in court about the pain and

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suffering that the defendant's alleged crimes caused them. Before the hearing, we published a short op-ed pointing out that the law does not authorize trial courts to commence such hearings before a criminal defendant is convicted, but only after a criminal defendant is found guilty and awaits sentencing. "[N]ow that he is dead," we submitted, "the criminal justice system is not the place for Epstein to be called to account."[1]

The judge disagreed. Responding directly to our article, Judge Richard Berman asserted that the hearing had a legitimate purpose because he had discretion to continue the proceedings even in the dead defendant's absence. That being so, he maintained that the federal Crime Victims' Rights Act (CVRA)[2] required him "as a matter of law" to "consider the views of the victims in the case at the hearing . . . before deciding whether to grant the motion."[3] When he opened the hearing to Epstein's accusers and their lawyers, however, there was no dispute about the motion. The two sides recognized that the court had no choice but to dismiss the indictment, making the decision a ministerial task rather than a fact-finding mission. Nonetheless, before the judge so ruled, "[sixteen] women emotionally

1. Bruce A. Green & Rebecca Roiphe, *The Judge in Epstein's Case Should Not Turn the Dismissal into a Drama for the Victims*, NYLJ (Aug. 26, 2019, 11:00 AM), https://www.law.com/newyorklawjournal/2019/08/26/the-judge-in-epsteins-case-should-not-turn-the-dismissal-into-a-drama-for-the-victims/ [https://perma.cc/9G2Q-MY4X].

2. 18 U.S.C. § 3771 (2018).

3. United States v. Epstein, 19 CR 490 (RMB) (S.D.N.Y.), Aug. 27, 2019 Hearing tr., at 6–7*; see also id.* at 5 ("[P]ublic hearings are exactly what judges do. Hearings promote transparency and they provide the court with insights and information which the court might not otherwise be aware of. The victims have been included in the proceeding today both because of their relevant experiences and because they should always be involved before rather than after the fact."). Judge Berman also levelled a somewhat misinformed personal attack. At the hearing, the judge asserted, evidently based on an ex parte communication with an unidentified person, that Professor Green should have disclosed in the op-ed article that he "was counsel in one of the Epstein-related cases." *Id.* at 5. Afterwards, Professor Green wrote to Judge Berman to clarify the record, explaining that he had never been counsel to Epstein or his estate or to anyone in an Epstein-related case, but did serve as an expert witness, by way of expert declaration, in support of Professor Alan Dershowitz's motion to disqualify David Boies and his law firm in *Giuffre v. Dershowitz*, a pending defamation case that might be described as "Epstein-related." Letter from Bruce A. Green to Hon. Richard B. Berman (Aug. 30, 2019). He further explained: "[m]y work as an expert witness, which concluded in June, did not involve my representation of, or advocacy on behalf of, Professor Dershowitz. I did not serve as counsel or as an advocate on anyone's behalf in co-authoring the law journal article." *Id.* Judge Berman responded, in a letter provided to the *New York Post* on the same day it was mailed (and days before it was received), with the view that the prior expert work (which the judge characterized as "advocacy") should have been disclosed in the op-ed. Letter from Hon. Richard B. Berman to Bruce A. Green (Sept. 4, 2019), at 1; Emily Saul, *Judge Feuds with Fordham Professor over Epstein Accuser Hearing*, N.Y. POST (Sept. 4, 2019, 8:05 PM), https://nypost.com/2019/09/04/judge-feuds-with-fordham-professor-over-epstein-accuser-hearing/ [https://perma.cc/2DKG-2XJ4]. He also lamented that our "opinion piece may have been construed as an effort to chill Ms. Giuffre's and Mr. Boies' right to be heard under 18 U.S.C. § 3771 at the August 27, 2019 public hearing." Letter from Hon. Richard B. Berman, *supra*, at 2. The district court in *Giuffre v. Dershowitz* has since granted the disqualification motion. *Giuffre v.* Dershowitz, 19 Civ. 3317 (LAP), Opinion and Order, Oct. 16, 2019. We leave it to readers to form their own views on these collateral questions.

recounted their experiences being allegedly sexually abused" by Epstein, and lawyers read the statements of seven others.[4]

Perhaps persuaded by our article but nevertheless sympathetic to the accusers' wish for an opportunity to condemn Epstein in court, a federal district judge in Miami took a somewhat different approach. Judge Kenneth Marra had been presiding for around a decade over litigation brought by some of Epstein's accusers, who sought to set aside Epstein's 2008 non-prosecution agreement in the Southern District of Florida.[5] Unlike the New York judge, Judge Marra concluded unequivocally that Epstein's death ended the case. With it ended the court's possible authority to rescind the non-prosecution agreement: "[a]s a result of Mr. Epstein's death," Judge Marra wrote, "there can be no criminal prosecution against him and the Court cannot consider granting this relief to the victims."[6] Nor could the Court grant any other relief to the accusers under the CVRA: "[a]t this point," the judge explained, "as to Mr. Epstein, there are no present or future CVRA rights of victims to protect."[7] Among other things, this meant that the court could not convene "a public court proceeding in which [the accusers] can make a victim impact statement," even though the government had agreed to such a hearing.[8] However, the judge acknowledged that the accusers and the government could voluntarily hold a "forum" attended by the news media "where the victims may express how their interaction with Mr. Epstein and his alleged co-conspirators affected them."[9] And while the "forum"—not a hearing—"can be conducted anywhere the parties choose," the judge noted that the "forum [could] be before this Court."[10]

In both federal cases, the posthumous hearing or "forum" would serve as a form of court-authorized shaming for the deceased defendant (with the unproven idea that it would be therapeutic for his accusers) of the sort that ordinarily occurs in criminal proceedings, if at all, only after a criminal defendant has been convicted. If the criminal defendant, who had never been

4. Kat Tenbarge, *"I've Suffered and He Has Won": More Than 20 of Jeffrey Epstein's Accusers Gave Emotional Testimonies in Court as Prosecutors Moved to Shut Down His Case*, BUS. INSIDER (Aug. 27, 2019, 3:11 PM), https://www.businessinsider.com/victims-jeffrey-epstein-testimony-dismiss-indictment-court-hearing-federal-prosecutors-2019-8 [https://perma.cc/VTX7-BBQ5]. The next day, two of the accusers' lawyers defended the judge's assertion that he was legally required to give Epstein's accusers a public hearing before dismissing the indictment. Paul G. Cassell, & Bradley J. Edwards, *Hearing on Dismissing Epstein Charges Was Not 'Drama' but Proper Respect for Victims*, NYLJ (Aug. 28, 2019, 9:27 AM), https://www.law.com/newyorklawjournal/2019/08/28/hearing-on-dismissing-epstein-charges-was-not-drama-but-proper-respect-for-victims/ [https://perma.cc/NRK9-HT7Z] (maintaining that "crime victims' voices must be heard throughout the process.").

5. *See* Doe 1 v. United States, 359 F. Supp. 3d 1201 (S.D. Fla. 2019); Doe v. United States, 950 F. Supp. 2d 1262 (S.D. Fla. 2013); Doe v. Epstein, 2009 U.S. Dist. LEXIS 139535 (S.D. Fla. Aug. 4, 2009).

6. Jane Doe 1 and Jane Doe 2 v. United States, Case No. 08-80736-CIV-MARRA, Opinion and Order, Sept. 16, 2019, at 5.

7. *Id.* at 8.

8. *Id.* at 3–4, 8.

9. *Id.* at 8, n.4.

10. *Id.*

tried, were still alive, due process concerns would bar the judges from using their courtrooms in this fashion.[11] But the judges in Epstein's cases, and most especially the New York case, assumed that fair process concerns fade into the background once the accused is dead.

This Essay addresses the problem raised in these cases of how to reconcile due process concerns for deceased defendants with the interests of their accusers. It also engages the perennial question of how to protect the rights of unpopular—even reviled—criminal defendants in the face of public condemnation.[12] As others have recognized, the commitment to such rights is increasingly in jeopardy when social movements attempt to redress historic inequities toward less powerful and marginalized individuals and groups.[13] We argue, however, that courts cannot apply the presumption of innocence selectively. If we expect courts to protect the due process rights of poor and powerless defendants, then judges must protect all criminal defendants' procedural rights, even those of the rich and powerful.

I. BACKGROUND: THE POSTHUMOUS PROCEEDINGS IN THE EPSTEIN CASES

Federal victims' rights law allows victims to be heard at sentencing proceedings in criminal cases.[14] The Supreme Court has recognized that the impact of a crime on victims and their families is a relevant consideration for

11. Imagine for the moment that in a case involving a different defendant, the government concluded that there was insufficient evidence to justify a prosecution, and moved to dismiss the indictment. Suppose, for example, the court had suppressed essential evidence on constitutional grounds, and the appeals courts upheld the court's decision, with the result that, although the prosecution and public were convinced of the defendant's guilt, there was not enough admissible evidence to prove guilt beyond a reasonable doubt. And suppose that instead of granting the motion on the papers, as judges routinely do, a judge acknowledged that although he would ultimately dismiss the indictment, and that there was no conceivable basis to do otherwise, he would first hold a hearing in court for the benefit of the defendant's accusers in order to give them a chance to assert the defendant's guilt (without fear of a defamation action), to describe how the defendant harmed them, and to express their disappointment at the outcome. Such a hearing seems indefensible. The defendant would be entitled to a presumption of innocence. The court could not impose punishment until the presumption was overcome, either by a guilty plea or a guilty verdict. Ordering the hearing to give victims a forum would convey to the public the judge's belief that the defendant was guilty, even though there had never been a guilty plea or trial and never would be. And the hearing itself, while intended for the putative victims' wellbeing, would also function to inflict punishment of the accused, even if not formal punishment.

12. *See* Jed Rakoff, *How Can You Defend Those Crooks?*, NYLJ (Sept. 25, 1990); *see also* HOW CAN YOU REPRESENT THOSE PEOPLE? (Abbe Smith & Monroe Freedman, eds., 2013); Abbe Smith, *Defending Those People*, 10 OHIO ST. J. CRIM. L. 277 (2012).

13. *See, e.g.*, Lara Bazelon, *Put Away the Pitchforks Against Judge Persky*, POLITICO (Aug. 8, 2016), https://www.politico.com/magazine/story/2016/08/recall-judge-persky-stanford-rapist-brock-turner-courts-214145 [https://perma.cc/H7PR-PECC] (arguing that the campaign to punish a judge for a lenient sentence against a privileged white man accused of sexual assault undermines the criminal process); Jeannie Suk Gerson, *Unpopular Speech in a Cold Climate*, NEW YORKER (Mar. 14, 2019), https://www.newyorker.com/news/our-columnists/unpopular-speech-in-a-cold-climate [https://perma.cc/6LRD-AAE5] (arguing that Harvard's willingness to remove attorney and professor Ron Sullivan from his dean position for representing Harvey Weinstein undermines democratic values and the rights of defendants).

14. 18 U.S.C. § 3771(a)(4).

the sentencing judge.[15] Indeed, in capital cases, the Court has held that the prosecution may call victims' family members to give testimony relevant to the jury's decision whether to impose a death sentence.[16] Although the aim is to inform the judge's or jury's sentencing decision,[17] a victim's "impact statement" can be emotionally satisfying, and perhaps even somewhat healing, regardless of whether it influences the sentence imposed.[18]

At times, victims' presentations at sentencing appear to be intended less to assist the sentencing judge than to fulfill the victims' need for public self-expression. For example, at the sentencing of Dr. Larry Nassar for sexually abusing Olympic gymnasts, more than 160 victims spoke before the sentence was pronounced, and the district judge praised their courage while condemning Nassar.[19] As we noted in an earlier article, the judge's "[c]ritics argued that she abandoned the proper role of neutral arbiter, took sides, and inappropriately broadcast her views." But even if the judge's conduct and statements in the sentencing hearing raised concerns, this was certainly an appropriate setting in which to hear from victims. The judge no longer "had to maintain a neutral stance. The defendant ha[d] been convicted and the purpose [was] to draw on all sorts of information," including victim statements, "to find the right punishment and justify the sentence imposed."[20]

In Epstein's case in New York, the posthumous hearing closely resembled Nassar's sentencing hearing and was almost certainly inspired by it. In a federal courtroom filled with reporters, women recounted being sexually assaulted by Epstein and how their lives suffered as a result.[21] The important differences between the Nassar and Epstein hearings were contextual and

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15. *See* Payne v. Tennessee, 501 U.S. 808, 825 (1991) ("Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.").

16. *Id.*

17. *Id.*

18. *See, e.g.*, United States v. Blake, 89 F. Supp. 2d 328 (E.D.N.Y. 2000) (Weinstein, J.):

> Victim impact statements may also serve as a catharsis for victims, helping to assuage the bitterness at the fates that they have suffered. By participating in the criminal proceeding, victims realize that they are recognized as important by the court. The proceeding is not merely about the criminal, but it also accounts for the person most affected by the crime. Simply giving this person a chance to speak and be heard can have a beneficial effect. Instead of the victim feeling depersonalized and forgotten by the legal processes, she can feel that her situation was properly understood and considered.

Id. at 251; Jamie Balson, *Therapeutic Jurisprudence: Facilitating Healing in Crime Victims*, 6 PHOENIX L. REV. 1017, 1031 (2013) ("Historically and at present, the primary function of a victim impact statement has been expressive or therapeutic; to provide crime victims with a voice regardless of the impact it may have on the sentence itself."). *But see* Walls v. State, 986 S.W.2d 397 (Ark. 1999) (reversing sentence and remanding for resentencing where trial judge, observing that "part of the reason for a victim impact statement is for healing and therapy," allowed the victim's family to testify at sentencing regarding uncharged crimes).

19. Bruce A. Green & Rebecca Roiphe, *Judicial Activism in Trial Courts*, 74 NYU ANN. SURV. AM. L. 365, 383 (2019).

20. *Id.*

21. United States v. Epstein, 19 CR 490 (RMB) (S.D.N.Y.), Aug. 27, 2019 Hearing tr., at 34–85.

perhaps not evident to observers. One key difference was that Epstein had not first been convicted on the federal charges—indeed, he had pled not guilty and the trial had not begun.[22] Another key difference was that Epstein was dead and therefore could not respond to what was said about him. A third difference was that in Epstein's case, there was no contested question on which the judge plausibly needed to hear argument or take testimony: none of the speakers opposed the prosecution's motion to dismiss Epstein's indictment nor could they credibly do so.

The court's decision to allow Epstein's accusers to speak in a New York federal courtroom may have been informed by their shabby treatment more than a decade earlier. As a *Miami Herald* reporter revealed in a later series of stories, federal prosecutors in Miami drafted a lengthy indictment against Epstein for sex trafficking but were then persuaded not to charge him.[23] Instead, they entered a deal in which he pled guilty to two state felony charges (solicitation of prostitution and procurement of minors for prostitution) in state court, where he received a short jail sentence followed by favorable treatment by his jailors.[24] The non-prosecution agreement also provided immunity in Florida to others with whom Epstein worked. Although the federal prosecutors had previously led Epstein's accusers to believe that they would get the chance to weigh in on how the prosecutors would proceed in Epstein's case, they did not follow through. To the contrary, the prosecutors never gave the accusers notice of their decision or of the guilty plea proceeding in state court, with the result that the accusers and their counsel could not object either in the federal prosecutors' office or in state court.[25]

In 2019, Judge Marra in Miami wrote a long and critical opinion holding that the prosecutors should have notified Epstein's accusers before concluding a deal to forego federal charges.[26] The matter of the appropriate remedy was still undecided when Epstein, who was a party to the proceeding, died. But even after Epstein's death, his Florida accusers continued to press for remedies under the CVRA, and particularly for rescission of Epstein's non-prosecution agreement. Epstein's accusers argued that Epstein could no longer assert his rights,[27] but they still could. But the Florida district judge concluded that the accusers had it backwards, because Epstein's death ended

22. United States v. Epstein, 19 CR 490 (RMB) (S.D.N.Y.), Criminal Docket (indicating not guilty pleas entered on July 8, 2019).

23. Doe v. United States, 359 F. Supp. 3d 1201, 1205-08 (S.D.N.Y. 2019).

24. *Id.* at 1207, 1213–14; Doe v. United States, 817 F. Supp. 2d 1337, 1338–40 (S.D. Fla. 2011); Julie K. Brown, *How a Future Trump Cabinet Member Gave a Serial Sex Abuser the Deal of a Lifetime*, MIAMI HERALD (Nov. 28, 2018), https://www.miamiherald.com/news/local/article220097825.html [https://perma.cc/8YTZ-LXS7].

25. Doe v. United States, 359 F. Supp. 3d at 1208–16.

26. *Id.* at 1218–21.

27. In response to Epstein's attorneys' argument that the accusers' request was now moot, the accusers retorted that since Epstein is dead, "he should no longer have a voice in [the] proceeding." Jane Doe 1 and Jane Doe 2 v. United States, Case No. 08-80736-CIV-MARRA, Opinion and Order, Sept. 16, 2019, at 4.

the case, and with it the court's ability to grant them relief.[28] Nonetheless, he consented to the use of his court for a voluntary "forum" in which Epstein's accusers could make "victim impact statements" for the benefit of prosecutors and the press.[29]

Given how federal prosecutors had been pilloried for mishandling the Florida case, that Epstein had become a focal point of the #MeToo movement,[30] the extraordinary media attention to Epstein's New York prosecution, and Epstein's evasion of prosecution by taking his own life, one can understand federal judges' desire to give Epstein's accusers "their Larry Nassar moment."[31] Neither the federal prosecutors nor Epstein's lawyers objected.[32] Each judge found a different, clever way to oblige the accusers. Judge Berman convened a hearing, purportedly focusing on whether to dismiss the indictment, at which, rather than speaking to that question, the accusers could discuss Epstein's criminal behavior and its impact on them. Judge Marra recognized that no hearing was needed on whether the litigation was over, and rejected the premise that the accusers still had rights under the CVRA. But he adopted a different stratagem, inviting the accusers and the prosecution to hold a "forum" in his courtroom. Neither judge addressed whether the hearing or forum, while of undoubted benefit to Epstein's accusers, impinged on the fair process rights of the dead criminal defendant. Likewise, neither judge considered how future criminal defendants might perceive these judicial proceedings.

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28. *Id.* at 5.

29. *Id.* at 8, n.4.

30. See, e.g., Ellis Kashmore, *What the Jeffrey Epstein Case Means for #MeToo*, FAIR OBSERVER (Aug. 10, 2019); Katie Reilly, *How the #MeToo Movement Helped Make New Charges Against Jeffrey Epstein Possible*, TIME (July 9, 2019).

31. *See* Liz Spikol, *Jeffrey Epstein's Victims Will Never Have Their Larry Nassar Moment Now | Perspective*, PHIL. INQUIRER (Aug. 12, 2019, 10:47 AM), https://www.inquirer.com/opinion/commentary/jeffrey-epstein-suicide-larry-nassar-sexual-abuse-20190812.html [https://perma.cc/H39S-DFSK].

32. Although the prosecutors surely sympathized with Epstein's accusers and took their interests to heart, the prosecutors may still have thought the hearing was a bad idea. For one, the prosecutors may have regarded the hearing as a bad precedent in future cases where the accusers want to weigh in on a question or otherwise to express themselves but the law does not accord them a right to do so. The prosecutors may also have worried that accusers' decision to speak or their statements at the hearing might undermine their credibility at a future trial of Epstein's co-conspirators. But it would have been a public relations nightmare for the prosecutors to express a dissenting view.

Nor, as a practical matter, could Epstein's former lawyers object. At that point, they no longer had a client from whom to take direction. Under conventional professional understandings, their role as counsel had ended with Epstein's death. See Restatement (Third) of the Law Governing Lawyers § 31(2)(b) (2000) ("[A] lawyer's actual authority to represent a client ends when . . . the client dies"). Any expression of concern about the hearing would be poorly received and have no influence on the judge. And, at that point, it hardly mattered: Epstein's reputation could not get worse. Although many villains had previously been prosecuted in Manhattan's federal court, including spies, murderers, mob bosses and drug kingpins, few criminal defendants have been more vilified in the popular press before a trial in that court had even begun.

II. FAIR PROCESS FOR DEAD CRIMINAL DEFENDANTS

There is a body of federal court decisions on what courts should do when a criminal defendant dies before the case is over.[33] The understanding running through all the decisions is that the case may not continue, and the defendant may not be punished posthumously, if the criminal proceedings have not run their course, including not just through the conclusion of the trial but also through the decision of any appeal that has been filed. If the proceeding is still ongoing when the defendant dies, the indictment must be dismissed, restoring the dead defendant to the position of one against whom charges had never been filed—which is to say, presumed innocent in the eyes of the law.[34]

For example, in a 2017 decision of the Second Circuit, the court reaffirmed the "well-established doctrine" that "when a criminal defendant dies pending an appeal as of right, his conviction abates, the underlying indictment is dismissed, and his estate is relieved of any obligation to pay a criminal fine imposed at sentence."[35] Even if the defendant had been tried and found guilty, that result would not be conclusive if the appeal remained unresolved: despite the guilty verdict, the court would still have to put the deceased defendant back in the position of one who had never been charged. Quoting from an earlier opinion, the court stated emphatically: "'the appeal does not just disappear, and the case is not merely dismissed. Instead, everything associated with the case is extinguished, leaving the defendant as if he had never been indicted or convicted.'"[36]

The Second Circuit identified two considerations animating this doctrine, but observed that the one that "more readily supports the far-reaching consequences of" the abatement doctrine is the one "'grounded in procedural due process concerns.'"[37] That is, in the case of a criminal defendant who

33. *See e.g.*, Durham v. United States, 401 U.S. 481, 483 (1971) (stating that lower federal courts have been correct in unanimously applying the rule that "death pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception"); United States v. Libous, 858 F.3d 64 (2d Cir. 2017); United States v. Pogue, 19 F.3d 663, 665 (D.C. Cir. 1994) (per curiam).

34. *See, e.g.*, *Libous*, 858 F.3d at 68–69 (when defendant died pending appeal, in addition to vacating the conviction and dismissing the indictment, court must order the return of any fines paid); United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977) ("[E]ven though death has effected an abatement of further proceedings against [the deceased defendant] as a matter of law, fairness requires more than simply dismissing his appeal as moot . . . . [W]e believe it just and appropriate to follow our established practice by dismissing [his] appeal as moot, vacating the conviction entered against him, and remanding the case to the district court for dismissal of the outstanding indictment as to him."); United States v. Pogue, 19 F.3d 663, 666–67 (explaining that when the defendant died pending appeal—even though the defendant pled guilty and may only have intended to challenge his sentence on appeal—the trial court must vacate the conviction and the order of restitution and dismiss the indictment).

35. *Libous*, 858 F.3d at 66.

36. *Id.* (quoting United States v. Estate of Parsons, 367 F.3d 409, 413 (5th Cir. 2004) (en banc)).

37. *Id.* (quoting United States v. DeMichael, 461 F.3d 414, 416 (3d Cir. 2006)). The other rationale is that once the defendant dies, the purpose of punishment can no longer be served. *Id.*

appeals from a conviction, "'the interests of justice ordinarily require that a defendant not stand convicted without resolution of the merits of an appeal.'"[38]

One might view this doctrine as unnecessarily protective of the procedural interests of a dead person. From the popular perspective, even assuming one is disposed to give a defendant the benefit of the doubt before the trial begins, one's attitude is likely to shift once the jury returns its verdict and the trial judge imposes a sentence. But from the law's perspective, the commitment to fair process commands a different attitude. In the eyes of the criminal law, the deceased defendant must be regarded as innocent, and conclusively so, unless the appellate process is complete. And the trial court must give expression to the criminal law by dismissing the indictment rather than allowing its allegations to remain in place unanswered. Otherwise, the court might be perceived as giving credence to the indictment's premise that the accused committed the crimes alleged there.

Needless to say, if a district court has no choice but to dismiss an indictment when the convicted defendant dies before his appeal is decided, the district court has no choice but to dismiss the indictment when, as in Epstein's case, the defendant dies before a trial has even begun: the court must treat the accused as innocent for all legal or judicial purposes, regardless of popular sentiment or assumptions to the contrary.

Further, if a court cannot allow a guilty verdict to remain in place for the defendant whose appeal was undecided, and cannot allow an indictment to remain in place when the defendant dies before proceedings conclude, the court cannot initiate further proceedings for purposes of imposing punishment on a dead defendant. Punishment, of course, comes in many forms. It may include loss of liberty or monetary sanctions. But punishment can also consist of public shaming, including the opprobrium that accompanies a judicial declaration that one is guilty of a crime.[39] The due process concerns for a dead defendant that require the trial judge to dismiss the decedent's indictment should also preclude that judge from publicly conveying that the decedent was guilty as charged and from inflicting public disgrace and humiliation. But that is precisely what the two federal judges did in Epstein's case. The judges repeatedly acknowledged Epstein's accusers to be his "victims," not "putative victims" or "alleged victims." This conveyed the courts' conclusion that Epstein had in fact victimized the women, notwithstanding that the sex trafficking charges against him in New York, to which he pled "not guilty," had to be dismissed, and he was never charged with sex trafficking in federal court in Florida. The judicial

38. *Id.* (quoting United States v. Wright, 160 F.3d 905, 908 (2d Cir. 1998)).

39. *See* Smith v. Doe, 538 U.S. 84, 97–98 (2003) ("Some colonial punishments indeed were meant to inflict public disgrace. Humiliated offenders were required 'to stand in public with signs cataloguing their offenses.' . . . At times the labeling would be permanent: [a] murderer might be branded with an 'M,' and a thief with a 'T.' . . . The aim was to make these offenders suffer 'permanent stigmas, which in effect cast the person out of the community.'") (citations omitted).

proceedings for the accusers' benefit were calculated to reinforce the popular view that Epstein was guilty and deserving of public condemnation.

To say that due process *concerns* foreclosed the district court from continuing the pretrial proceedings against Epstein in absentia for purposes of public shaming is not necessarily to contend that deceased defendants have due process *rights*. The Fifth and Fourteenth Amendments provide that *no person* shall be deprived of "life, liberty, or property, without due process of law."[40] While other laws or procedures may benefit deceased criminal defendants—for example, some convicted defendants have been pardoned posthumously when it was later established that they were wrongly convicted[41]—one might argue that a deceased person is not a "person" within the meaning of these constitutional provisions.

But regardless of whether the dead have constitutional rights, the law still has concern for dead defendants' procedural interests. The attorney-client privilege illustrates this point. One might suppose that because the privilege belongs to the client, the privilege evaporates upon the client's death because the client is no longer around to assert it. But just the opposite is true, as the Supreme Court recognized in *Swidler & Berlin v. United States*.[42] The Court identified "weighty reasons that counsel in favor of posthumous application" of the privilege, even though the client could no longer complain personally if the court required counsel to breach the dead client's confidences. The Court justified this broad interpretation of the privilege not only out of respect for the interests of the deceased but in order to reassure living clients that the courts will continue to protect the confidentiality of their communications with counsel even after they are dead.[43]

Just as living clients are reassured by courts' abiding commitment to protecting clients' privileged communications even after the clients' death, defendants (and the public generally) are more likely to have confidence in judges' fairness if, even after a defendant's death, judges maintain their commitment to procedural fairness to the accused, including the presumption of innocence. Conversely, if judges feel free, after an untried defendant's death, to express their belief in the defendant's guilt, future defendants may understandably worry about the strength of judges' commitment in general to this rule-of-law principle. Defendants (and the public) may conclude (as

40. U.S. CONST., amends. V, XIV.

41. *See, e.g.*, *Texas: Dead Inmate Exonerated*, N.Y. TIMES (Feb. 6, 2009), https://www.nytimes.com/2009/02/07/us/07brfs-DEADINMATEIS_BRF.html [https://perma.cc/Q69G-M8AZ] (describing the posthumous pardon of Timothy Cole).

42. 524 U.S. 399 (1998).

43. *See id.* at 407:

> Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.

some undoubtedly suspect already) that judges merely pay lip service to the presumption of innocence but, having made up their minds well in advance of a jury verdict, judges secretly favor the prosecution throughout the trial.

III. JUDICIAL SUBTERFUGE IN THE EPSTEIN CASES

In Epstein's cases, the federal judges in New York and Florida could conceivably have been more straightforward and candid following his death. One can imagine them saying essentially:

> now that Epstein is dead, we can say what we have thought all along because we read the same periodicals and social media accounts as everyone else. We assume that Epstein was guilty of horrible sexual offenses and ruined many young women's lives. By taking his own life, he deprived those women of the satisfaction of seeing him found guilty, of speaking at his sentencing hearing, and of then seeing him sentenced and kept behind bars for the rest of his life. But as a judge, I can give those women some small measure of comfort by allowing them to speak in court at a proceeding that looks just like a sentencing hearing—a proceeding in which our judicial presence lends credence to the women's accounts and implicitly conveys our own belief that Epstein is guilty.

If the judges had acknowledged that this is what they were doing, the public would have cheered. No doubt, the judges did not proceed so boldly because, even if there were no opportunity for appellate review, such blatant defiance of fair process values would open them more widely to criticism and perhaps even to complaints of judicial misconduct. They may have assumed that more subtle approaches would escape notice or even be applauded. But, in our view, their approaches were no better and, in some ways, worse.

In the case of the New York judge, the pretense that there was a legal obligation to conduct a public hearing on the prosecution's motion to dismiss Epstein's indictment, and an attendant legal obligation to let the victims speak at such a hearing, simply heaped deception upon lawlessness. To begin with, the idea was predicated on the assumption that the judge had discretion not to dismiss the indictment and therefore would benefit from views on the question. But as we have shown, it was a foregone conclusion that the judge would dismiss the indictment and the accusers' views were irrelevant to that determination. As a matter of law, the prosecution could not continue against Epstein after his death, which was an uncontested fact. Unsurprisingly, no party argued to keep the prosecution open, and neither the judge nor the accusers' counsel could cite a prior federal case where, after a criminal defendant's death, the judge held a hearing to decide whether or not to dismiss the indictment.[44]

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44. The judge cited one painfully inapposite decision, *United States v. Heaton*, 458 F. Supp.2d 1271 (D. Utah 2006), to justify the hearing. United States v. Epstein, 19 CR 490 (RMB) (S.D.N.Y.), Aug. 27, 2019 Hearing tr., at 7–8. In *Heaton*, the prosecution moved "in the interest of justice" to dismiss an indictment charging the defendant with unlawful sexual activity with a minor. 458 F. Supp.2d at 1271–72. Before deciding the motion, the court

Further, even if there had genuinely been some question about how to proceed after Epstein's death, and the judge might have benefitted from the parties' views, there was no obligation to hold a hearing in court. Federal judges do not hold public hearings on every question that comes their way in a criminal case and they have no obligation to do so. Of course, a guilty plea, trial, or sentencing must be public, and the parties must have a chance to speak. But motions in which the facts are not in dispute are generally decided without a hearing. Motions hearings are designed to address contested issues of fact or law. In this case, there was neither. When the relevant facts are undisputed and there is no legal question on which the judge would benefit from argument, judges conventionally decide motions on the papers.[45]

Moreover, even assuming there was a legitimate reason for a hearing, the accusers had no right to speak at it. As a general matter, only the prosecution and defense have the right to be heard in a public proceeding in a federal criminal case. Third parties who might be moved to speak have no general right to do so.[46]

The district judge claimed that the CVRA[47] required giving Epstein's accusers a chance to speak. That finding, though, was not based on a plausible reading of the federal victims' rights law. Like analogous state laws, the CVRA establishes victims' right to be heard at specified proceedings in the course of a criminal case. In federal criminal cases, a crime victim has "[t]he right to be reasonably heard at any public proceeding

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directed the prosecutor to confer with the alleged victim and then to communicate her views regarding the motion to the court. Of course, this decision was different from Epstein's case, as Judge Berman essentially conceded. *United States v. Epstein* at 7. To begin with, *Heaton* involved a living defendant against whom the prosecution could continue, which placed a burden on the prosecution to justify its decision to end the prosecution. The prosecution had not offered such a justification, and, therefore, the district court was not legally compelled to grant the prosecution's motion to dismiss the indictment as it was in Epstein's case, and may have benefitted from a hearing. Second, the court in *Heaton* did not order a hearing at which the alleged victim would speak, but ordered that the motion would be decided on the papers. 458 F. Supp.2d at 1273. Third, the court did not solicit the equivalent of a "victim impact statement" but sought the alleged victim's view (to be transmitted by the prosecutor in writing) on a question legitimately before the court, namely, whether the indictment should be dismissed in the interest of justice. Fourth, the CVRA contemplates the procedure that was employed, insofar as it provides victims a "right to confer with" the prosecutor before a prosecution is abandoned. 18 U.S.C. § 3771(a)(5) (2018). While the court in *Heaton* explained its decision as an application of the victim's statutory right to be treated fairly, the case provides no conceivable support for the proposition that fair treatment of victims means that before dismissing an indictment against a dead defendant as a matter of law, the court may or must convene a judicial hearing to allow accusers to denounce the defendant. Finally, insofar as it relied on victims' statutory right to fair treatment, *Heaton* itself reflected an expansive, and debatable, application of the CVRA.

45. *See, e.g.*, FED. R. CRIM. P. 12(b); Henderson v. United States, 476 U.S. 321, 329 (1986) ("'[I]f motions are so simple or routine that they do not require a hearing, necessary advisement time should be considerably less than 30 days.'" (quoting S. Rep. No. 96-212, at 34)).

46. Third parties who come to have a legal stake in the criminal proceeding—for example, witnesses who are threatened with a contempt citation for refusing to produce documents or to testify—have a right to be heard before their rights are adjudicated. But they are the exception.

47. 18 U.S.C. § 3771 (2018).

in the district court involving release, plea, sentencing, or any parole proceeding."[48] This excludes the overwhelming majority of proceedings that may take place in a criminal case—including the anomalous proceedings at issue here. The law identifies particular proceedings where crime victims, although not formally parties to the criminal case, have significant interests at stake. With the exception of "release" decisions, which implicate putative victims' safety, the proceedings all follow a guilty plea or an adjudication of guilt. The specified proceedings are those where an accuser's statement might influence a contested judicial decision as to which the judge has discretion. In Epstein's case, the accusers had no comparable interests at stake or contributions to make, the facts were not contested, and the judge had no discretion. The only option was, as both parties agreed, to dismiss the case.

The federal victims' rights law reflects a balancing of the interests of crime victims (or putative victims), criminal defendants, and the prosecution. It may be in crime victims' or accusers' interest to have a voice at every phase of a criminal proceeding, but victims' rights laws carefully limit the extent to which victims may participate.[49] Here, on its face, federal law accorded victims no right to be heard at a proceeding on a motion to dismiss an indictment on account of the defendant's death. Unlike, say, a proceeding on whether to dismiss an indictment against a living defendant as part of a bargain, this could not be analogized to a "plea" proceeding or to any other proceeding covered by the statute. There was no discretionary decision to make. As Judge Marra found, Epstein's death ended the victims' rights under the CVRA in general. And even if the law applied, it certainly did not afford accusers the right to make pretrial victim impact statements.

IV. WHY JUDGES' UNFAIRNESS TO DEAD DEFENDANTS MATTERS TO THE LIVING

If one assumes, as the district court evidently did, that Epstein's accusers were in fact victims of sexual offenses, the public had a strong interest in offering therapeutic assistance. Much attention has been given to how criminal proceedings can re-victimize or re-traumatize victims of a crime. Procedures have been adopted to minimize the extent to which the criminal process harms victims. Although Susan Herman has argued convincingly that most of the state's work in helping victims heal must take place outside the criminal process,[50] others believe the criminal process can play a positive role in promoting healing. In particular, they believe victims experience a healing process when judges award restitution or impose retributive sentences as well as when victims speak voluntarily at sentencing hearings. In Epstein's case, the district judges evidently believed that a posthumous

48. *Id.* § 3771(a)(4).

49. *See generally* Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229 (2005).

50. SUSAN HERMAN, PARALLEL JUSTICE FOR VICTIMS OF CRIME (2010).

opportunity for Epstein's accusers to have their say would serve a similar role.[51] But the opportunity came at a cost.

While Epstein's accusers wanted to speak in these proceedings, the hearing sent a demoralizing and misleading message to victims in general: what they have to say does not really matter to the outcome of a proceeding. Victims' statutory right to speak at sentencing and other post-conviction proceedings should not be meant, as it was here, simply to promote self-expression or therapy. Victims should perceive that they have, and should actually have, an opportunity to appropriately influence judges' decisions. But the Epstein proceedings sent the opposite message. In New York, there was no possibility that Judge Berman's decision whether to dismiss the charges, or any other judicial decision, would be affected by anything Epstein's accusers said in court. And in Miami, there is not even a pretense that an in-court, post-litigation "forum" will make a difference to the litigation, which is now over. Future victims may come away from this with the impression that judges have no intention of considering what they have to say but are only going through statutorily prescribed motions, condescendingly affording a right to therapeutic self-expression rather than a true role in the proceedings. That would be unfortunate, both because victims' statements deserve to be considered when the law deems it appropriate, and because victims may be discouraged from speaking if they perceive the opportunity to be just for show.

Further, the proceedings were calculated to influence pending and future proceedings against Epstein's estate and Epstein's co-conspirators, which was almost certainly one of the objectives of the accusers' counsel. Everyone recognized that more proceedings would follow. The prosecutors were explicit that their investigation of possible co-conspirators was ongoing, and it was likewise no secret that the accusers would seek civil damages against the estate. The accusers' lawyers have an interest in maintaining public sympathy for their clients and cause. But professional conduct rules limit the accusers' lawyers' ability to discuss the cases in the press, on television, or elsewhere in public media knowing that what they said is substantially likely to materially prejudice pending or future civil or criminal proceedings.[52] Further, their clients' statements in court would likely gain more coverage, reach a larger audience, and ultimately be more influential than whatever the accusers and their lawyers might say outside court. The concern for protecting the fairness of future proceedings should have discouraged the federal judges from providing Epstein's accusers a judicial hearing or forum

51. In Epstein's case, the district judge assumed that, at the very least, he had discretion to afford Epstein's accusers a hearing before dismissing the indictment and concluding the proceedings. The judge cited Federal Rule of Criminal Procedure 57, which allows federal district judges to regulate their practice in any manner that is not inconsistent with the district court rules and other law. We leave to another day whether the federal statute implicitly denied the court discretion to allow accusers to speak in court proceedings different from, and not analogous to, the ones identified in the law—that is, not involving release, plea, sentencing, or parole.

52. *See, e.g.*, N.Y. RULES OF PROF'L CONDUCT r. 3.6.

that would lead to extensive media coverage of statements scripted by lawyers.

The proceedings also undermine respect for judicial integrity because of their transparently pretextual nature. Judges, who often call parties, lawyers, and witnesses to account when they are deceptive about their motivations, should be honest about their own. In Epstein's cases, both federal judges sought to pass off their proceedings as if they were unexceptional and unremarkable. Acting as if the hearing was a routine one under the CVRA, Judge Berman pretended to need the accusers' views on an uncertain procedural question. And one might have supposed from Judge Marra's nonchalance in offering his courtroom for the media to cover the accusers' public statements that courtrooms are routinely used for public fora of this nature. They are not.

But, in our view, the largest cost is to confidence in fair process. Although most criminal cases are tried in state court, federal judges preside over high profile cases that shape how the public understands the criminal process. Many publicly vilified individuals, including alleged spies, murderers, mob bosses, and drug kingpins, are brought to federal court with the promise that they will receive a fair trial. In many of these cases, the public widely assumes from the start, based on media accounts, that the defendants are guilty as charged. Certainly, the prosecution will see the accused as guilty and otherwise would not bring charges. The one public official most responsible for giving effect to the presumption of innocence, and to due process rights in general, is the judge. Proceedings such as in the Epstein cases that employ stratagems to circumvent procedural conventions for a sympathetic cause erode confidence in the judiciary's commitment to procedural fairness.

V. CONTEMPORARY SOCIAL MOVEMENTS AND THE PRESUMPTION OF INNOCENCE

The Epstein cases in New York and Miami illustrate how courts may respond to the pressure of popular social and cultural movements by eroding fair process values. In endorsing women's unproven accusations of sexual misconduct by opening their courts to "victim impact" proceedings against an alleged sex offender, now deceased, two federal judges appeared to succumb to the popular pressure of the #MeToo movement and its slogan, "believe women."[53]

53. *See, e.g.*, Marie Solis, *When Believing Women Isn't Enough to Help Them*, VICE (Oct. 9, 2018, 4:46 PM), https://www.vice.com/en_us/article/gyemm3/when-believing-women-isnt-enough-to-help-them [https://perma.cc/R735-ZAGD] (observing that the "#MeToo movement . . . took off in 2017 . . . [and] made 'believe women' its rallying cry"). The #MeToo movement has spawned an analogous slogan, "believe survivors." This too has the potential to substitute blind faith for a respectful willingness to hear and investigate accusers' allegations. *See* Emly Yoffe, *The Problem with #BelieveSurvivors*, ATLANTIC (Oct. 3, 2018), https://www.theatlantic.com/ideas/archive/2018/10/brett-kavanaugh-and-problem-believesurvivors/572083/ [https://perma.cc/LX7C-3GX6].

The concept of "believe women" is ambiguous. Its proponents may be seeking to eliminate the perceived practice of reflexively disbelieving women's accusations of sexual misconduct. The slogan can be read as a rebuke to these biased assumptions that may have led the public and media to discount women's accusations.[54] In the context of the criminal process, "believe women" responds to the perception that law enforcement officers historically dismissed rape victims, which further traumatized them and left a whole class of crimes unpunished. Accordingly, some reformers correctly urge investigators to be no more skeptical of accounts of women who report sexual violence than they would be with other complaints. They should treat these accusers with dignity, as they should all complainants, and follow up by investigating credible sexual assault reports, rather than dismissing them out of hand.[55]

On the other hand, "believe women" often seems directed at everyone in and out of the criminal process, instructing them to believe women accusers at all stages rather than accumulating and analyzing all the available evidence and making independent judgments of credibility. As one writer has put it, "'believe women' means believing women without exception."[56] The theory underlying this strong, and perhaps conclusive, presumption is that women are not motivated to lie about sexual misconduct, especially given the strong disincentive to make even truthful accusations, and that, as an empirical matter, women almost never do make false accusations.

Some reject the theory and its underlying empirical assumptions.[57] But even if one accepts both, "believe women" is incompatible with the criminal process. In making their charging decision, prosecutors should not presumptively believe or disbelieve women or anyone else. They should resist biased assumptions about accusers and accusations and should instead

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54. *See, e.g.*, Emily Crockett, *Rape and Sexual Assault Are Common. So Why Don't We Believe Victims?*, VOX (Oct. 17, 2016, 5:23 PM), https://www.vox.com/2016/5/1/11538748/believe-rape-victims [https://perma.cc/F5DQ-89ZM].

55. *See* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 (2017). Even the idea that criminal investigators should initially believe accusers has been questioned. *See* Dan Subotnik, *Why Not Believe Women in Sexual Assault Cases?: An Engagement with Professors Tuerkheimer, Colb, and Many Others*, 34 TOURO L. REV. 995, 1022 (2018) ("In sum, while sexual assault claims must be investigated, we cannot create a strong presumption of guilt within a larger system of presumed innocence. Accepting women's testimony at face value, ignores the role of jealousy, shame, regret, and unfulfilled needs. Consideration of these factors should satisfy any standard of scrutiny required under Equal Protection.").

56. Jenny Hollander, *Why "Believe Women" Means Believing Women Without Exception*, BUSTLE (Nov. 21, 2017), https://www.bustle.com/p/why-believe-women-means-believing-women-without-exception-5532903 [https://perma.cc/94ZS-7YWY]. At its extreme, "believe women" is chillingly reminiscent of the earlier slogan, "believe the children," which was popularized in the 1980s in support of the McMartin child abuse prosecution, which was eventually recognized as disastrously unfair. *See* David P. Elder, Comment, *Investigation and Prosecution of Child Sexual Abuse Cases*, 19 W. ST. U. L. REV. 249, 257–87 (1991).

57. *See, e.g.*, Christine Rosen, *Don't Believe All Women, Because Some Are Terrible*, COMMENTARY, Sept. 19, 2019, https://www.commentarymagazine.com/politics-ideas/dont-believe-all-women-because-some-are-terrible/ [https://perma.cc/WHH6-WJWH].

make credibility determinations as objectively as possible. If left without probable cause, police should not make arrests, and if left with reasonable doubts, prosecutors should not pursue charges.

More importantly, whatever one might conclude about the professional responsibilities of investigators and prosecutors, trial judges must stand for fair process. Presuming women accusers' truthfulness is antithetical to the presumption of innocence. It would be reversible error, for example, if a judge were to instruct the jury to presume that women who were complaining witnesses testified truthfully.[58] Such an instruction would be tantamount to telling jurors that the defendant should be presumed guilty of alleged offenses. That would stand due process on its head. Of course, once they retire to deliberate, jurors are free to draw upon their experience, which may lead them to assume that accusers have no reason to lie and should therefore be believed. But judges cannot tell jurors that, as a matter of law, they may or must start out with such an understanding. It would be especially problematic to give such an instruction based on the group identity of the accuser.[59]

The New York and Miami judges were not so blatant as to instruct trial jurors to "believe women." But their unorthodox conduct of the proceedings following Epstein's death, against the background of the #MeToo movement, looked to all the world like an affirmation and adoption of the movement along with one of its central premises. We have previously written in praise of trial court activism,[60] but the Epstein cases call for considering the limits. By ordering or endorsing the equivalent of a sentencing hearing in the case of a deceased defendant who had never been tried, the judges capitulated to a powerful social moment. The judge in Nassar's case did the same, but she did not compromise the presumption of innocence in doing so. The judges in Epstein's case did damage to the judiciary as an institution by applying her approach outside the sentencing context. Their departure from traditional procedure and process encroaches on important fair process values.

The judges took the wrong lesson from the #MeToo movement. To the extent that victims of sexual offenses were traditionally treated poorly by police, prosecutors, and judges, it is important to correct the historic imbalance. Insofar as it advocates more rigorous enforcement and severe punishment of credible sexual assault claims against powerful white men, the #MeToo movement may be in tension with progressive criminal justice reform,[61] but it does not necessarily conflict with fair criminal process. The tenet "believe women" when applied in the courtroom certainly does.

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58. United States v. Verner, 748 F.2d 925, 926–27 (4th Cir. 1986).

59. *See* MODEL CODE OF JUD. CONDUCT r. 2.3(A) cmts. 1, 2 (AM. BAR ASS'N 2011).

60. Green & Roiphe, *supra* note 19, at 382–85.

61. *See* Guy HamiltonSmith, *The Agony & the Ecstasy of #MeToo: The Hidden Cost of Reliance on Carceral Politics*, SW. U.L. REV. (forthcoming 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3427857 [https://perma.cc/DA5W-FMXS]. Smith argues that the focus of the #MeToo movement on punishing rape or sexual abuse more severely is at odds with the goal of reducing mass incarceration and will end up affecting others accused of sex crimes, the majority of whom are poor and people of color.

The goal of equal treatment for all in the criminal justice system is essential, but it should exist side-by-side with, and not supplant, the procedural protections that courts must afford all defendants. Courts should address inequality in law enforcement and the disparate treatment of different classes of accused and accusers by eliminating bias and treating all with equal dignity rather than dispensing with fundamental procedural protections for certain criminal defendants. If we expect the presumption of innocence to protect poor and minority defendants who make up the vast majority of those accused of a crime, then we have to promote that same principle when the accused is rich and powerful. In the end, the best guarantee of equal treatment is fair processes applied in all cases.[62]

When we think of despised criminal defendants, we used to think of an individual accused of terrorism or mass murder. But in the current climate, rich and powerful men accused of sexual assault have assumed this status. That presents a challenge for the judiciary, which is charged with providing a fair process for all accused, even the most reviled such as Jeffrey Epstein. The best way to ensure fair treatment of women and other marginalized groups is not by treating the powerful unfairly but by providing an equally fair process to all individuals. Judges, especially, should stand up for this ideal.

We are similarly arguing that the erosion of procedural protections and accompanying loss of faith in judicial process will affect other criminal defendants who tend to be disadvantaged.

62. Kate Levine has made a similar argument in the context of the BlackLivesMatter movement. *See generally* Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745 (2016). In addition to seeking to redress the disproportionately harsh treatment of racial minorities by police, prosecutors and judges, the movement targets police abuse and emphasizes the need to punish (mostly white and male) police officers who violate the criminal law. Recognizing that prosecutors have been more protective of police officers than of others who come under investigation, as illustrated by the St. Louis prosecutor's investigation of police officer Darren Wilson for the shooting of Michael Brown, many call for prosecutors to treat the police as they treat others. Levine argues, in contrast, that the more protective procedures adopted in cases involving the police ought to be a model for how all suspects are treated. *Id.*