

Huaming Li | 2021 | Law | 2<sup>nd</sup> place

Should ‘innocent until proven guilty’ apply not only to courts of law, but also to public censure?

## Introduction

In almost all civilized criminal justice systems, few maxims have received more widespread adoption and acknowledgment than the principle that the accused are presumed innocent until proven guilty at courts of law.<sup>1</sup> The principal justification for the presumption of innocence is to minimize the possibility of wrongful convictions. As Sir William Blackstone posits, “it is better that ten guilty persons escape, than that one innocent suffer.” Wrongful convictions lead to irreversible unjust consequences—allowing the real perpetrator to escape justice and remain free to harm another and creating a new, innocent victim.<sup>2</sup> Such two-fold tragedies would be a travesty of justice and would gravely undermine the legitimacy of the judiciary.

While the principle of presumption of innocence has a sound and long-established relationship with courts of law, some have proposed extending it into public censure to protect the censured from extra-legal punishments. Public censure is herein means the expression of the public’s disapproval of the behavior of public figures in “the court of public opinion,”: that is, in social media, newspapers, and demonstrations.<sup>3</sup> Public figures, the target of public censure, are those who occupy positions of persuasive power and influence in society<sup>4</sup> —politicians, celebrities, and officers of corporate entities—or who thrust themselves to the forefront of particular public controversies that concern them in order to influence the resolution of the issues involved.<sup>5</sup>

In this essay, I argue that the presumption of innocence principle (“PIP”) should not apply to public censure for the following three reasons. Firstly, courts of law and public censure differ markedly in their functions and consequences. Secondly, the application of PIP to public

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<sup>1</sup> See, e.g., United Nations, Universal Declaration of Human Rights (1948), art. 11; United Nations, International Covenant on Civil and Political Rights (“ICCPR”), 999 U.N.T.S. 171 (1966), art. 14.

<sup>2</sup> Jeanne Bishop & Mark Osler, Prosecutors and Victims: Why Wrongful Convictions Matter, 105 J. CRIM. L. & CRIMINOLOGY 1031, 1044 (2015).

<sup>3</sup> See Wallace F. Campbell, The Court of Public Opinion, 145 N. AM. REV. 103, 103 (1887)

<sup>4</sup> This definition derives from a series of landmark decisions by the United States Supreme Court, namely *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Rosenblatt v. Baer*, 383 U.S. 75 (1966), *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), *Associated Press v. Walker*, 388 U.S. 130 (1967), and *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

censure unjustifiably restricts the fundamental right to freedom of expression. Thirdly, enforcing PIP in public forums is impractical.

## 1. Disparate Functions and Consequences

A major goal of the criminal justice system is retributive. To effectively punish offenses, powers unavailable to ordinary citizens are conferred upon law enforcement and the judiciary, and the consequences of a guilty verdict involve fines, imprisonment, or even death. In contrast, the court of public opinion, in which public censure occurs, is a place where (a) the censurer and the censured hold commensurate powers; (b) the consequences fall far short of deprivation of life, liberty, or property; and (c) mistaken and wrongful judgments are relatively easily reversible and remediable.

PIP is designed to prevent power abuse at courts of law, where powers over the accused are granted to government officials to maintain the authority of law, while no such power imbalance exists in the court of public opinion. Those legal powers include apprehending, prosecuting, sentencing, and punishing those who are suspected or convicted of crimes, which, if left unfettered, would generate great likelihood of abuse. Such a power imbalance between the government and the accused necessitates PIP, an essential procedural safeguard to restrain the powers of law enforcement and the courts. PIP discourages prosecutors from prosecuting without sufficient evidence and imposes a high burden of proof on them, effectively reducing the likelihood of wrongful convictions.<sup>5</sup>

In the court of public opinion, public figures are in no a weaker position than the censurer. The censured either hold authoritative positions as influential characters, or have thrust themselves into public controversies on their own initiative. The censors do not have any prosecutorial or judicial powers or other prerogatives over the censured, and hence there is no threat of an abuse of powers.

The divergent consequences also mean the application of PIP to public censure is unwarranted. Standard punishments at courts of law encompass “restrictions, confinements, and deprivation of property and life.”<sup>6</sup> Public censure, however, rarely results in any profound consequences. In fact, any harm resulting from censure would usually be *de minimis*. By way of illustration, consider presidential censure by the United States Congress – one of the formal mechanisms for public censure that have potentially more significant effects than other forms of censure. Congressional censure has no formal legal effect – it merely expresses the congress’s disapproval of the president’s conduct.<sup>7</sup> Censure by the general public would at most damage the reputation of the censured concerning the issues

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<sup>5</sup> Extending the doctrine of public figures in the context of free speech, the United States Supreme Court has categorized such persons as “limited-purpose public figures.” See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

<sup>6</sup> Warren Quinn, *The Right to Threaten and the Right to Punish*, 14 PHIL. & PUB. AFF. 327, 327 (1985).

<sup>7</sup> Brian C. Kalt, *Impeachment vs. Censure: Constitutional Law, Politics, and the Art of the Possible*, CONSTITUTIONALIST (Jan. 19, 2021), <https://theconstitutionalist.org/2021/01/19/impeachment-vs-censure-constitutional-law-politics-an-d-the-art-of-the-possible/> (last visited June 20, 2021).

involved instead of any formal or authoritative condemnation on the record, much less any legal punishment.

In addition to being *de minimis*, the harm caused by public censure is also easily remediable as public opinion changes frequently. At courts of law, in light of all the safeguards and rigid procedures, it would be difficult for the convicted to overturn their convictions once the judgment becomes final. They have limited access to resources that may help locate otherwise available exculpatory evidence. As for public censure, the censured have the same, if not better, access to resources as the censors, and they are in a strong position to influence public opinions and vindicate themselves. Take Brett Kavanaugh, Associate Justice of the U.S. Supreme Court as an example. Despite the accusations of sexual misconduct during high school after being nominated in 2018, he was nevertheless confirmed by the Senate and successfully assumed the judicial office.<sup>8</sup> He suffered damage to his reputation but the allegations have never substantially affected Kavanaugh's service on the bench. Not only did he himself assertively deny the allegations, but the conservative camp also took pains to help him minimize the repercussions of the accusation, going as far as to suggest that the allegations were false and dismissing them as "the talk of campus".<sup>9</sup> Given the insignificance and remediability of the harm from public, PIP will overprotect the powerful or influential public figures if applied to public censure.

## 2. Unjustifiable Restriction on Free Speech

Applying PIP to public censure would impose an illegitimate limit on freedom of expression and have a chilling effect on public oversight on matters of public concern. Freedom of expression is recognized as a fundamental human right: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."<sup>10</sup> This right would be jeopardized if PIP were to apply to public censure.<sup>11</sup>

Any protection is meaningless without attaching corresponding penalties to its violation. Thus, to enforce the PIP on public censure should entail penal consequences for non-compliance. But setting down penalties such as court-ordered public apologies, fines, and short-term imprisonment, or even liability for defamation to deter violation of PIP in public forums is equivalent to punishing people for expressing their views. People would be too afraid to express their opinions without sufficient evidence, and every comment directed at

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<sup>8</sup> Wikipedia Contributors, Brett Kavanaugh Supreme Court Nomination, WIKIPEDIA, [https://en.wikipedia.org/wiki/Brett\\_Kavanaugh\\_Supreme\\_Court\\_nomination](https://en.wikipedia.org/wiki/Brett_Kavanaugh_Supreme_Court_nomination) (last visited June 20, 2021)

<sup>9</sup> See Robin Pogrebin & Kate Kelly, Brett Kavanaugh Fit in with the Privileged Kids. She Did Not., N.Y. TIMES (Sept. 14, 2019), <https://www.nytimes.com/2019/09/14/sunday-review/brett-kavanaugh-deborah-ramirez-yale.html> (last visited June 20, 2021).

<sup>10</sup> ICCPR, 999 U.N.T.S. 171 (1966), art. 19

<sup>11</sup> See Charles Tobin, Freedom of Speech: Inglorious Bastards and Patriotic Americans, 28 COMMS. LAWS. 2, 2 (2011).

public figures would potentially be subject to litigation. The law would threaten rather than protect people's right to free speech.

The decision by the U.S. Supreme Court in *New York Times Co. v. Sullivan*<sup>12</sup> best illustrates the undesirability of such a limit on the public's free expression. A democratically elected government official sued the *New York Times* for defamation. While some relevant stories published in the newspaper were fabricated, Justice William J. Brennan Jr., speaking for the majority of the Court, opined that defamatory falsehood relating to an official conduct is illegal only if "actual malice" is proven.<sup>13</sup> The Court justified the holding by reasoning that it was in accordance with the protection of free expression and would not cause "would-be critics of official conduct to be deterred from voicing their criticism," which is critical to the functioning of any democratic institution.<sup>14</sup> This holding sets an example to prevent "prior restraints," such as restriction of publications, and "the law against seditious libel" that makes it an offense to engage in speech that criticizes the government.<sup>15</sup> It has also been justifiably extended to all public figures because having political, cultural, or social influence naturally exposes them to criticism, disapproval, and condemnation by the public, even mistakenly, for their conduct.<sup>16</sup> The risk of undeserved reputational damage is nevertheless outweighed by the significant public interest in holding those involved in public matters accountable.

### **3. Impracticable Enforcement**

Even if penalizing non-compliance with PIP for public censure were-theoretically justified, the characteristics of public forums make its enforcement impractical. Unlike courts of law where rules and procedures are clearly defined and must be followed by interested parties in all phases of judicial proceedings, public censure is conducted on public forums where the identities of censors are difficult to determine. In the court of public opinion, it is almost impossible to set a standard that is not vagueness. These disadvantages would in turn lead to waste of resources.

In the digital era, public censure often occurs in places where the censors are either unknown or insufficiently identifiable. It would be hard to find out who had violated a public censure PIP. Current practices of tracking crimes in cyberspace involve checking relevant IP address, network activity records, internet terminal ownership, relevant witness testimony, and other statements for a comprehensive judgment.<sup>17</sup> The complexity of such activities calls for substantial resources and the number of the censors would make it prohibitively expensive. On the other hand, the practicability of PIP at courts of law is maintained partly because of the written guidelines of procedure that can be strictly followed, including

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<sup>12</sup> 376 U.S. 254 (1964).

<sup>13</sup> *Id.* at 283

<sup>14</sup> *Id.* at 279

<sup>15</sup> Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 *LAW & CONTEMP. PROBS.* 648, 651 (1955)

<sup>16</sup> See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

<sup>17</sup> See generally Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 *U. PENN. L. REV.* 1003 (2001).

evidentiary hurdles for prosecution, presentation of the case in front of the juries, and the burden to prove the accused guilty beyond any reasonable doubt.<sup>18</sup> However, the court of public opinion is an open place where determining what exactly counts as violating PIP is extremely difficult due to the numerous ways of expressing one's views.

To deter violations of PIP, a set of standards for punishment must be formulated. However, people's expressions of views, judgments, and attitudes vary greatly in their languages, intensity, and cultural backgrounds. Any standards would be inherently vague: does simply expressing one's belief in the sexual assault allegations of Kavanaugh amount to a violation or does one need to explicitly state that Kavanaugh must not be confirmed because of his sexual misconduct in order to be punished?

Additionally, with PIP being a legal principle, the general public does not have the same awareness or professional training as a lawyer would have to exercise caution in accusing other people of an infraction. Mass punishment caused by vague criteria for imposing burdens on people who are not competent to follow the rule is something society should strive to avoid.

## **Conclusion**

A democratic and free society ceases to exist the moment its citizens are "restrained in any manner from speaking, writing, or publishing their opinions upon any public measure, or upon the conduct of those who may advise or execute it."<sup>19</sup> Public censure embodies the ideal of people's ability to speak about public figures and engage in matters of public concern. Introducing the presumption of innocence would foist such an unnecessary and unreasonable restriction given the mere reputational harm that can be easily remedied by those involved and the difficulty and inefficiency of enforcing PIP in the court of public opinions. The implication is not that anyone in the public spotlight should be deprived of any interest in their reputation. They could resort to defamation law when their reputation is harmed by malicious false accusations. But in the absence of those extraordinary circumstances, applying "innocent until proven guilty" to public censure is illogical, unjustifiable, and impractical.

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<sup>18</sup> Innocent Until Proven Guilty?: The Presentation of Suspects in Criminal Proceedings, FAIR TRIALS (June 3, 2019), <https://www.fairtrials.org/publication/innocent-until-proven-guilty-0> (last visited June 24, 2021).

<sup>19</sup> N.Y. Times Co. v. Sullivan, 376 U.S. 254, 297 (1964) (Black, J., concurring)