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Victims, Right?

Anna Roberts

VICTIMS, RIGHT?

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In criminal contexts, a "victim" is typically defined as someone who has been harmed by a crime. Yet the word commonly appears in legal contexts that precede the adjudication of whether a crime has occurred. Each U.S. state guarantees "victims' rights," including many that apply pre-adjudication; ongoing "Marsy's Law" efforts seek to expand and constitutionalize them nationwide. At trial, advocates, judges, and jury instructions employ this word even though the existence or not of crime (and thus of a crime victim) is a central question to be decided. This usage matters in part because of its possible consequences: it risks obscuring and weakening the defense side of our two-sided system. Changing the language is thus a reasonable reform. But the usage matters also because of the underlying impulses, assumptions, and realities that it reveals. An exploration of those helps to illuminate broader concerns that require systemic, rather than merely linguistic, change.

† Professor of Law, St. John's University School of Law; J.D., New York University School of Law; B.A., University of Cambridge. For helpful feedback, my thanks to John Acevedo, Amna Akbar, Jill Anderson, John Barrett, Asli Bashir, Jeff Bellin, Kiel Brennan-Marquez, Michal Buchhandler-Raphael, Bennett Capers, Jenny Carroll, Ed Cheng, Erin Collins, Larry Cunningham, Caroline Davidson, Peggy Cooper Davis, Avlana Eisenberg, Sheldon Evans, Barbara Fedders, Todd Fernow, Brenner Fissell, Thomas Frampton, Cynthia Godsoe, Lauryn Gouldin, Eve Hanan, Daniel Harawa, Vida Johnson, Zachary Kaufman, Steven Koh, Anita Krishnakumar, Benjamin Levin, Kate Levine, Cortney Lollar, Sara Manaugh, Irina Manta, Sandy Mayson, Peggy McGuinness, Ion Meyn, Eric Miller, Kathryn Miller, Janet Moore, Jamelia Morgan, Justin Murray, Minor Myers, Alex Nunn, Ngozi Okidegbe, Shelly Page, Gustavo Ribeiro, Alice Ristroph, Jasmine Gonzales Rose, Andrea Roth, Felipe Serrano, Reggie Shuford, Laurent Sacharoff, Julia Simon-Kerr, Jocelyn Simonson, I. India Thusi, Kate Weisburd, Rebecca Wexler, Kayonia Whetstone, Maggie Wittlin, participants in the University of Connecticut School of Law and Brooklyn Law School faculty workshops, my workshop colleagues at the ABA/AALS Criminal Justice Section scholarly workshop, participants at CrimFest!, and colleagues at the St. John's University School of Law Scholarship Retreat. Thanks also to Jeremy Ashton, Chris Byrne, Elyssa Carr, Sarah Catterson, Sam Gagnon, Andres Gomez, and Nicholas Lynaugh for research assistance; to Mike Simons, Anita Krishnakumar, and Eva Subotnik for research support; to Courtney Selby for library assistance; to Karena and Sam Rahall for their support; and to the editors of the Cardozo Law Review.

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INTRODUCTION

Scholars argue that we are in a post-trial world,[1] and bemoan the circumstances under which the predominant form of criminal conviction—the guilty plea—is imposed:[2] too early in the process,[3] with

1 *See, e.g.*, Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014).

2 *See, e.g.*, Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2511–22 (2020).

3 *See* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 443, 454 (2001).

too much haste,[4] and with too little evidence,[5] contestation,[6] scrutiny,[7] and regulation.[8] But what if crime commission was being declared via another prevalent mechanism, which operates still earlier and quicker, and which garners even less attention, opposition, or restriction? This Article highlights an example of language use—the use of "victim" in pre-adjudication contexts[9]—and argues that it risks playing this role.[10] If we have a victim, then we had a crime; if we had a crime, then we have someone who committed a crime. If language is doing this kind of work, a burden is being lifted inappropriately from the prosecution.

The predominant legal definition of a "victim" in criminal contexts—found in cases, statutes, and constitutions, and endorsed by Black's Law Dictionary[11]—is a person who has been harmed by a crime, and yet legal uses of the word to refer to someone *alleged* to have been harmed by a crime are widespread. This issue has particular contemporary salience as the backers of state constitutional amendments, known collectively as "Marsy's Law," target state after state with provisions offering "victims' rights" (including pre-adjudication rights).[12] Kentucky passed a Marsy's Law amendment in 2020;[13] Wisconsin's 2020 vote and Pennsylvania's 2019 vote to do the same are the subject of ongoing litigation.[14] This issue emerges also in

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4 *See id.* at 484.

5 *See id.* at 450–51.

6 *See generally* Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150 (2012).

7 *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2475 (2004).

8 *See* Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1987–90 (2002).

9 This Article will use phrases such as "alleged victims," "complainants," and "complaining witnesses" in place of "victims," but will discuss, in Section III.A, some of the problems with these and other popular terms.

10 *See, e.g.*, Carr v. Haas, No. 17-2527, 2019 WL 2644732, at *1 (6th Cir. Jan. 8, 2019).

11 Black's Law Dictionary defines "victim" as "[a] person harmed by a crime, tort, or other wrong." *Victim*, BLACK'S LAW DICTIONARY (11th ed. 2019).

12 *See infra* Section I.A.

13 Kentucky Secretary of State, *Election Ballot*, http://web.sos.ky.gov/ballots/Allen%202020G.pdf [https://perma.cc/E8DG-P9RQ]; *Marsy's Law takes effect in Kentucky,* WHAS11 (Nov. 20, 2020, 2:08 PM), https://www.whas11.com/article/news/kentucky/marsys-law-takes-effect-kentucky-crime-victims-election-2020/417-dc3afcd6-9b66-4d29-acb0-509299b13647.

14 *See* Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n, No. 2019-CV-3485, 2020 Wisc. Cir. LEXIS 11 (Wis. Cir. Ct. Nov. 3, 2020) (finding Wisconsin ballot question "did not meet all constitutional and statutory requirements necessary to adequately inform the public on the purpose of the amendments upon which they were voting"); Brief for Petitioner, Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n, 2021 WL 640101 (Wis. Ct. App. Feb. 8, 2021) (No. 2020AP002003) (appealing decision), League of Women Voters of Pa. v. Boockvar, 219 A.3d 594 (Pa. 2019) (upholding preliminary injunction); *League of Women Voters of PA v. Boockvar*, ACLU PA., https://www.aclupa.org/en/cases/league-women-voters-pa-v-boockvar [https://perma.cc/XM2D-

trial practice, which reveals numerous instances of each of the relevant players—judges, prosecutors, defense attorneys, witnesses, and the drafters of jury instructions—referring, pre-adjudication, to the "victim" in the case.[15]

This tension between legal usage and legal definition—and indeed between legal usage and foundational premises relating to the presumption of innocence[16]—often goes unacknowledged.[17] Marsy's Law provisions typically define a "victim" as someone who has been harmed by a crime,[18] even while explicitly extending their protections to those who are pre-adjudication.[19] In litigation, powerful voices have challenged this usage—Kobe Bryant, Bill Cosby, and Jeffrey Epstein have all been embroiled in this[20]—but even when courts recognize the error their most frequent conclusion is that it was harmless.[21]

Analysis of this phenomenon is critically important, however. First, this needs to be understood as a language usage that is far from isolated. Throughout our legal language, and often unchallenged, are terms that appear to prejudge aspects of the adjudicative process. These include the widespread use of "offender" in place of "alleged offender,"[22] "offense" in place of "alleged offense,"[23] and "recidivism"

22Y5]; League of Women Voters of Pennsylvania v. Kathy Boockvar, 578 M.D. 2019, 2021 WL 62268 (Pa. Cmmw. Jan. 7, 2021) (finding Pennsylvania ballot measure unconstitutional); Anna Orso, *The Wolf Administration Won't Appeal a State Court Ruling that Tossed Victim-Rights Law Overwhelmingly Supported by Voters*, PHILA. INQUIRER (Feb. 9, 2021), https://www.inquirer.com/news/pennsylvania/marsys-law-pennsylvania-victim-rights-wolf-appeal-20210209 html [https://perma.cc/HV3N-FPB5] (confirming that an appeal is underway).

15 *See infra* Section I.B.

16 *See* People v. Solano, No. B222662, 2011 WL 1833375, at *11 (Cal. Ct. App. May 16, 2011) ("Solano argues characterizing the officers as victims prior to argument . . . undermines the presumption of innocence by sending a message to the jury [that] the People's version of events is the correct one.").

17 *See* Geoffrey Sant, *"Victimless Crime" Takes on a New Meaning: Did California's Victims' Rights Amendment Eliminate the Right to be Recognized as a Victim?*, 39 J. LEGIS. 43, 43 (2013) (noting that "to date there has been virtually no academic discussion of Marsy's Law").

18 *See A Model Constitutional Amendment to Afford Victims Equal* Rights, MARSY'S LAW, at 4, http://d3n8a8pro7vhmx.cloudfront.net/marsyslawforall/legacy_url/1090/Marsy-s-Law-Model-Constitutional-Amendment.pdf?1533058099 [https://perma.cc/K62T-4L92] [hereinafter MARSY'S LAW, *Model Constitutional Amendment*].

19 *See id.* at 1.

20 *See infra* Section I.B.; *infra* notes 323–25 and accompanying text.

21 *See infra* notes 177–91 and accompanying text.

22 *See* Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 1009–10 (2019) [hereinafter Roberts, *Arrests as Guilt*].

23 *See id*; U.S. CONST. amend. V ("the same offence"); U.S. CONST. Art. III, § 2, cl. 3 ("The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed . . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .").

to refer to re-arrest.[24] Second, it is important to study these language usages because of dangerous tendencies that their widespread use (and the acquiescence thereto) both exacerbates and reveals.

These kinds of usages and the acquiescence thereto both exacerbate and reveal dangerous tendencies such as the following: assumptions of guilt that bypass the evidentiary process; assumptions that claims by law enforcement or by complainants equate to crimes; the dominance of law enforcement narratives and vocabulary; and assumptions that law enforcement accounts are truthful, accurate, and neutral. These tendencies threaten the rights of defendants, the viability of defenses, and the role of defense counsel.

The role played by the word "victim" also highlights some of the inadequacies in our treatment of those who are harmed by crime. The use of the word "victim" (like the criminal system itself) has come to be seen as a way of bestowing dignity and respect.[25] Yet within our criminal system what is offered is, at best, a partial and instrumental form of dignity and respect, one that is tied to a willingness to cooperate,[26] and one that represents a paltry substitute for deeper forms of dignity and respect.[27]

This Article considers two possible ways to tackle these concerns, starting with a reformist approach. One might focus on the risks that this usage exacerbates, and recommend language change in response. The Article proposes reforms addressing the language use of judges, prosecutors, defense attorneys, the police, and those responsible for jury instructions. This reform is far from straightforward, however, given the widespread family of usages that reform of this type would have to counter, the lack of obvious alternative terms, and the risk that this kind of reform effort might entrench aspects of the existing system.[28]

A second option is to focus on the impulses that lie behind such usages.[29] This Article mentions a variety of possibilities, each of which connects this issue with broad areas of concern regarding the criminal

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24 *See* Roberts, *Arrests as Guilt, supra* note 22, at 1009–10.

25 *See infra* Section II.A.

26 Stacy Caplow, *What if There is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1, 12 (1998) (mentioning "the paradox that the prosecutor must forge a bond in order to motivate the victim, but may abandon the victim when his or her cooperation is no longer necessary").

27 *See id.*

28 To be consistent, one would have to tackle other usages that merge allegation with crime, such as pre-adjudication usages of "rape kit" and "crime scene." *See infra* Section III.A. Note also the concerns about ways in which "reformist reforms" can serve to entrench the criminal system. *See infra* Sections III.B–C.

29 *See* Roberts, *Arrests as Guilt, supra* note 22, at 1010–12 (making analogous point that common error regarding plea bargain prevalence occurs because incorrect figure fits with widespread assumptions).

system. First, the Article suggests that this word has come to bear the weight of signaling respect and dignity for those claiming crime—weight that the system more broadly has failed, and still fails, to bear. Second, like many common terms, it signals premature assumptions of criminal wrongdoing. Third, it hints at the pervasiveness, dominance, and perceived neutrality of law enforcement framing. Fourth, by deploying the language of crime even absent a crime as defined by law, it sheds light on a "rough and ready" or "I know it when I see it" concept of crime, which exists in fascinating and problematic tension with our legal definitions. And finally, it does something simpler: in suggesting that the line of adjudication is blurred, it reflects our reality. Lines are frequently drawn in our system that play a role more central than the supposedly central line of adjudication: lines drawn at arrest and charge, and bail setting, and indeed at birth.

While these potential impulses behind the word open up expansive areas of inquiry, it is important to start to unpack them. As calls for abolition enter the mainstream,[30] one fear that they may spark is the fear of giving up what we have. To evaluate the promise of abolition requires an accurate examination of what we actually have; requires shedding myths.[31] And if we find that our system is indeed one where in many ways that central line of adjudication is a blur, where we aren't ruled by definitions, or by other structures said to make the process fair and the punishment justified, where judgments of guilt do not await the point of adjudication, we may be more willing to explore other ways—less contingent ways—of according respect and dignity.

Part I examines two legal settings in which the pre-adjudication use of "victim" repeatedly appears: first, the various state constitutional amendments that bestow the language of "victim" and attendant rights on those who are pre-adjudication, and second the litigated uses of "victim" to refer to complaining witnesses during trial.[32] It highlights not just the dangers posed by this usage, but the troubling tendencies revealed by this usage and by instances of acquiescence thereto. Part II

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30 Abolition is understood in a variety of ways, but as described in one recent account, abolitionists "work toward eliminating prisons and police, and building an alternate and varied set of political, economic, and social arrangements or institutions to respond to many of the social ills to which prison and police now respond." Amna Akbar, *Teaching Penal Abolition*, L. & POL. ECON. PROJECT (July 15, 2019), https://lpeblog.org/2019/07/15/teaching-abolition [https://perma.cc/29L8-9TD2].

31 *See* Amna A. Akbar, *How Defund and Disband Became the Demands,* N.Y. REV. OF BOOKS (June 15, 2020), https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands/?lp_txn_id=992867 [https://perma.cc/CXG7-K67W] ("Abolitionists are often caricatured as having unattainable ends and an impractical agenda. But many organizations, like Survived and Punished and generationFIVE have demonstrated the failure of our system even on its own terms . . . .").

32 *See supra* note 9 for the terminology that this Article will use.

expands on the dangers, examining not just threats to defendants and defenses, and thus to our two-sided adversary system, but also the impoverished nature of this usage (and of criminal prosecution more broadly) as a means of bestowing dignity and respect. Part III discusses potential reform efforts aimed at tackling these dangers. Part IV posits that if reform is attempted, it ought to be paired with efforts to understand some of the assumptions, impulses, and forces that perpetuate this usage; it presents some possibilities, before considering their implications for current discussions of abolition.

I. PRE-ADJUDICATION USES OF "VICTIM"

This Part examines two contexts in which "victim" is used before there has been an adjudication of guilt: state constitutional amendments and trial litigation. First, a few notes about framing and scope. "Victim" is of course used in a variety of contexts—some legal, some not, and within legal contexts some criminal and some not. As one court has said, "[t]he term 'victim' is a "malleable term" the meaning of which depends on the context in which it is used.'"[33] To the extent possible, this Article attempts to focus on those contexts where one has reason to expect that a legal definition is in play. (Jury instructions are a particularly clear example). Given this focus, one can turn, as many courts do,[34] to Black's Law Dictionary for a working definition.[35] For the last twenty years, Black's has defined "victim" as "a person harmed by a crime, tort, or other wrong."[36] Even this may be a somewhat more capacious definition than is appropriate in many of the contexts discussed in this Article, where one might conclude that "a person harmed by a crime" is the relevant definition.

In addition to the dictionary definition of "victim," one has to acknowledge the variety of associations or overtones that accompany

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33 People v. Ruiz, No. B278461, 2018 WL 4292027, at *3 (Cal. Ct. App. Sept. 7, 2018) (quoting Santos v. Brown, 189 Cal. Rptr. 3d 234, 246 (Cal. Ct. App. 2015)).

34 *See, e.g.*, State v. Morock, No. 14AP–559, 2015 WL 4660026, at *7 (Ohio Ct. App. Aug. 6, 2015); State v. Skipintheday, 704 N.W.2d 177, 181 (Minn. Ct. App. 2005) ("Absent a statutory or caselaw definition of the word, we turn to a common lexical meaning; A victim is a person harmed by a crime, tort, or other wrong.") (quoting *Victim*, BLACK'S LAW DICTIONARY (7th ed. 1999)).

35 Other definitions exist, some of which courts invoke. *See, e.g.*, United States v. Terry, 142 F.3d 702, 710–11 (4th Cir. 1998) (noting that the definitions of "victim" provided in Black's Law Dictionary and Webster's Ninth New Collegiate Dictionary vary in scope).

36 *Victim*, BLACK'S LAW DICTIONARY, 7th ed. (1999). No definition was given in the first four editions. The 5th (1979) and 6th (1990) editions had "[t]he person who is the object of a crime or tort."

the word. To call someone a "victim" may be to trigger a variety of assumptions: if someone is a victim then they may seem to need sympathy,[37] protection and help,[38] and indeed "justice."[39] They are on the side of right.[40] They are not supposed to be blamed or shamed.[41] Even while focusing on the ways in which "victim" appears to pre-judge crime commission, this Article does not ignore these other aspects of the word's meaning. Indeed, they may help illustrate some of the significance of the prevalence of "victim" pre-adjudication: the more we become accustomed to thinking of complainants as victims,[42] the more natural it may seem to guarantee them rights.

Finally, there are all sorts of objections to the word "victim" other than the one that this Article addresses. It may be said to convey an unhelpful sense of weakness, damage, subordination, or lack of agency.[43] Those objections have received considerable scholarly treatment.[44] To the extent possible, this Article puts them to one side, to focus on one that has not: the implications of the usage—and of its

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37 *See* United States v. Edwards, No. CR 16-103-BLG-SPW-1, 2017 WL 4159365, at *1 (D. Mont. Sept. 19, 2017).

38 *See* Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 L. & SOC. INQUIRY 1111, 1112 (2000).

39 *See* Lynne Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 971–72 (1985) ("'Justice' in this context presumably means that the victim should be entitled to have the accused incarcerated without any formal adjudication of guilt.") [hereinafter Henderson, *The Wrongs*]; Lynne Henderson, *Whose Justice? Which Victims?*, 94 MICH. L. REV. 1596, 1607 (1996) (reviewing GEORGE FLETCHER, JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995)) (quoting George Fletcher as asserting that "[t]he purpose of the trial is to stand by the victim," and adding her view that "the (admittedly formal) presumption of innocence disappears under this theory, and trials become a distorted Durkheimesque ritual of condemnation and social cohesion rather than a determination of guilt.") (alteration in original).

40 *See* Henderson, *The Wrongs*, *supra* note 39, at 952 ("Unfortunately, the symbolic strength of the term 'victim's rights' overrides careful scrutiny: Who could be anti-victim? Thus, liberals find themselves caught in yet another apparent paradox: To be solicitous of a defendant's rights is to be antivictim."); Simon, *supra* note 38, at 1136 (quoting Janet Reno as saying that "I draw most of my strength from victims, for they represent America to me: people who will not be put down, people who will not be defeated, people who will rise again and stand again for what is right. . . . You are my heroes and heroines. You are but little lower than the angels.").

41 *See* Buszkiewic v. State, 424 P.3d 1272, 1280–81 (Wyo. 2018).

42 *See supra* note 9 for the terminology that this Article will use.

43 *See* Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1432 (1993) ("The victim is helpless, decimated, pathetic, weak, and ignorant."); Olivia Fleming, *Chanel Miller and Evan Rachel Wood Unearth the Aftermath of Sexual Assault*, HARPER'S BAZAAR (Nov. 6, 2019), https://www.harpersbazaar.com/culture/features/a29554899/chanel-miller-evan-rachel-wood-women-who-dare [https://perma.cc/K8XL-RYGX] ("We do not exist to be a side character in his story or his victim, we do not belong to the people who hurt us, and we continue to own and control our own narratives, and they get to be on the sidelines for once.") (quoting Chanel Miller).

44 *See, e.g.*, Sarah Buel, *Putting Forfeiture to Work*, 43 U.C. DAVIS L. REV. 1295, 1297 n.5 (2010).

widespread acceptance—for those claiming and accused of crime, and for our systems of adjudication.

A. *State Constitutional Amendments*

More than thirty states have amended their constitutions to add "victims' rights" provisions.[45] None of these amendments restricts its applicability to the post-conviction context,[46] and indeed the trend is toward pre-adjudication rights being spelled out with more force and more numerosity.[47]

These amendments have arrived in two waves, the second of which is still swelling. The first wave began in 1982, the year in which President Reagan's "Task Force on Victims of Crime" produced a lengthy report on "victims' rights."[48] The Report appended a proposed constitutional amendment, which was geared at the federal Constitution's Sixth Amendment,[49] but which acted as a catalyst for state constitutional amendments.[50] California passed one that same year,[51] and thirty-one states followed in the 1980s and 1990s.[52]

Of that first wave of amendments, while some do not make it explicit that they apply pre-adjudication,[53] others make clear that they

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45 Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. Litigation is pending in Pennsylvania and Wisconsin, in connection with the Marsy's Law provisions passed in those states.

46 *See infra*.

47 *See* sources cited *infra* notes 75–76.

48 PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982), https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/87299.pdf [https://perma.cc/FKE8-FLGH]

49 The proposal was to add the following sentence to the Sixth Amendment: "Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings." *Id.* at 114–15.

50 *See* Don Siegelman & Courtney W. Tarver, *Victims' Rights in State Constitutions*, 1 EMERGING ISSUES STATE CONST. L. 163, 164 (1988).

51 CAL. CONST. art. I, § 28(a) (1982).

52 ALA. CONST. art. I, § 6.01 (enacted 1994); Alaska (1994); Arizona (1990); Colorado (1992); Connecticut (1996); Florida (1988); Idaho (1994); Illinois (1992); Indiana (1996); Kansas (1992); Louisiana (1998); Maryland (1994); Michigan (1988), Mississippi (1998); Missouri (1992); Nebraska (1997); Nevada (1996); New Jersey (1991); New Mexico (1992); North Carolina (1996); OHIO CONST. art. I, § 10a (enacted 1994); OKLA. CONST. art. II, § 34 (enacted 1996); Oregon (1999); Rhode Island (1986); South Carolina (1996); Tennessee (1998); Texas (1989); Utah (1994); Virginia (1996); Washington (1989); Wisconsin (1993).

53 *See, e.g.*, OHIO CONST. art. I, § 10a (enacted 1994). All of them, however, are open to that interpretation, thanks to phrases such as "throughout the criminal justice process," "all phases,"

do.[54] As regards South Carolina, for example, "a person becomes a victim the instant the crime is committed or attempted and he or she suffers a harm."[55] That state's supreme court has listed several rights that "occur *prior* to indictment,"[56] and has specified that "[i]f the case proceeds through indictment, the victim gains more rights."

Examples of pre-adjudication rights include a "right to be reasonably protected from the accused through the imposition of appropriate bail or conditions of release by the court,"[57] a "right to timely disposition of the case following the arrest of the accused,"[58] a right to "refuse an interview, deposition, or other discovery request by the defendant,"[59] a right to "confer with the prosecution . . . before trial or before any disposition of the case,"[60] and a right to "reasonable notice and to be present and heard during all critical stages of preconviction and postconviction proceedings."[61]

The second wave consists of amendments setting out state versions of "Marsy's Law." Marsalee ("Marsy") Nicholas was a twenty-one-year-old woman, who was killed by an ex-boyfriend, Kerry Conley, in 1983.[62] While Conley was out on $100,000 bail, Nicholas's mother apparently saw him at a grocery store; she had not previously known that he was at liberty.[63] This lack of notification spurred legal change. Nicholas's brother, Henry Nicholas III, is a billionaire who proceeded to found

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or "all crucial stages." *See, e.g.*, Bellamy v. State, 594 So. 2d 337, 338 (Fla. Dist. Ct. App. 1992) (rejecting defendant's argument that the presence of the complainant in the courtroom at trial pursuant to the "all crucial stages" presence guarantee of the state's "victims' rights" provision violated his due process rights, and noting that to adopt an interpretation of the provision that was limited to the post-conviction context "would undermine the purpose of the victim's rights constitutional amendment" and lead to an "absurd result").

54 *See, e.g.*, UTAH CONST. art. I, § 28 (mentioning rights that attach "once a criminal information or indictment charging a crime has been publicly filed in court").

55 *Ex parte* Littlefield, 540 S.E.2d 81, 85 (2000).

56 *Id.* ((1) [T]he right to be treated fairly; (2) the right to be informed when the accused is arrested, released from custody, or has escaped; (3) the right to be informed of any criminal proceedings which are dispositive of the charges against the accused; (4) the right to be informed of a hearing affecting bond or bail; and (5) the right to be protected from the accused or persons acting on his behalf.)

57 ALASKA CONST. art. I, § 24; *see* MO. CONST. art. I, § 32(2).

58 ALASKA CONST. art. I, § 24.

59 ARIZ. CONST. art. II, § 2.1.

60 *Id.*

61 LA. CONST. art. I, § 25.

62 Lyndon Stambler, *Point Dume Man Found Guilty of Murdering His Former Girlfriend*, L.A. TIMES (Apr. 18, 1985), https://www.latimes.com/archives/la-xpm-1985-04-18-we-23880-story.html [https://perma.cc/VU77-HVM5].

63 *See id.*

Marsy's Law for All LLC,[64] which aims to pass "victims' rights" amendments to state constitutions,[65] as well as federally. He reportedly spent a total of 99.3 million dollars to support Marsy's Law ballot measures between 2008 and 2018.[66] Marsy's Law provisions are on the books in twelve states,[67] and the rate at which they are arriving has intensified.[68] Marsy's Law provisions passed in all six states that had them on their 2018 ballots.[69] A Pennsylvania version was on the ballot in November 2019 (because of pending litigation,[70] votes have not been certified);[71] Wisconsin and Kentucky voters adopted Marsy's Law amendments in 2020, though litigation is ongoing in Wisconsin.[72] Other states are said to be considering similar steps.[73] These amendments adhere more or less closely to a model provision promulgated by the LLC.[74] They tend to offer a longer list of rights than the provisions passed during the first wave,[75] and (in contrast to the first wave) each of them makes explicit its applicability pre-adjudication.[76]

In addition to their considerable successes, the Marsy's Law backers have encountered several obstacles. Legislatures in New Hampshire, Alabama, and Idaho voted down Marsy's Law proposals.[77]

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64 *See* Beth Schwartzapfel, *The Billionaire's Crusade*, THE MARSHALL PROJECT (May 22, 2018, 10:00 PM), https://www.themarshallproject.org/2018/05/22/nicholas-law [https://perma.cc/SH5F-RYST].

65 These include notification provisions.

66 BALLOTPEDIA, *supra* note 13.

67 California (2008), Florida (2018), Georgia (2019), Illinois (2014), Kentucky (2020), Nevada (2018), North Carolina (2019), North Dakota (2018), Ohio (2018), Oklahoma (2018), South Dakota (2016 and then in an amended version in 2018), Wisconsin (2020).

68 *See* Jason Moon, *How One Group Is Pushing Victims' Rights Laws Across the Country*, NPR (Mar. 29, 2018, 2:24 PM), https://www.npr.org/2018/03/29/597684647/how-one-group-is-seeding-victims-rights-laws-across-the-country [https://perma.cc/YFF7-659T].

69 Florida, Georgia, Kentucky, Nevada, North Carolina, and Oklahoma.

70 *See* League of Women Voters of Pa. v. Boockvar, 219 A.3d 594 (Pa. 2019).

71 *See* Sheryl Delozier, *We Can Protect Victims and Reform Criminal Justice at the Same Time*, PA. CAP.-STAR (Apr. 7, 2019), https://www.penncapital-star.com/commentary/we-can-protect-victims-and-reform-criminal-justice-at-the-same-time-this-is-how-opinion [https://perma.cc/8H2V-NPR5].

72 BALLOTPEDIA, *supra* note 13; S.J. Res. 2., 2019 Leg. (Wis. 2019); *see also* sources cited *supra* note 16.

73 *See State Efforts,* MARSY'S LAW, https://www.marsyslaw.us/states [https:// perma.cc/2579-W8CT] (mentioning Mississippi, Idaho, Iowa, New Hampshire, Maine, and Kentucky).

74 *See* MARSY'S LAW, *Model Constitutional Amendment*, *supra* note 18.

75 *See, e.g.*, State v. Hughes, 134 N.E.3d 710 (Ohio Ct. App. 2019) (stating that the Marsy's Law amendment "expands the rights afforded to victims of crimes").

76 *See, e.g.*, N.D. CONST. art. I, § 25 (noting that "all victims shall be entitled to the following rights, beginning at the time of their victimization . . . ."); FLA. CONST. art. I, § 16 (same).

77 Jeanne Hruska, *'Victims' Rights' Proposals Like Marsy's Law Undermine Due Process*, ACLU (May 3, 2018, 10:00 AM), https://www.aclu.org/blog/criminal-law-reform/victims-rights-

In addition, state courts struck down proposed amendments in Kentucky and Montana,[78] and another has granted a preliminary injunction precluding the tabulation and certification of votes in Pennsylvania.[79] Whereas the rulings in Kentucky and Montana focused on procedural violations,[80] the Pennsylvania court emphasized the enormity of the implications of Marsy's Law for criminal defendants.[81] Indeed, the court concluded that "it is clear that the Proposed Amendment, by its plain language, will immediately, profoundly, and irreparably impact individuals who are accused of crimes, the criminal justice system as a whole, and most likely victims as well."[82] The court noted the amendment's assertion that the rights contained therein were to be "protected in a manner no less vigorous than the rights afforded to the accused,"[83] and listed some of the hazards for defendants' rights: the right to full and effective investigations would be harmed, as would the rights to confront witnesses and to enforce subpoenas compelling cooperation.[84] The proposed amendment would also alter the right to a speedy trial, the right against double jeopardy, the right to pretrial release, the right to post-conviction relief, and the right to appeal.[85] The Supreme Court of Pennsylvania affirmed the injunction, and litigation continues.[86]

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proposals-marsys-law-undermine-due-process [https://perma.cc/C6Z5-ZK65] (contrasting this with success in states that only require signatures in order to get on the ballot).

78 For Kentucky, see Westerfield v. Ward, 599 S.W.3d 738 (Ky. 2019); John Cheves, *Kentucky Supreme Court Strikes Down Marsy's Law, Says Ballot Wording was too Vague,* LEXINGTON HERALD LEADER (June 13, 2019, 1:45 PM), https://www.kentucky.com/news/politics-government/article231511858.html [https://perma.cc/7AKH-SNSF]. For Montana, see Mont. Ass'n of Ctys. v. State, 404 P.3d 733 (Mont. 2017).

79 League of Women Voters of Pa. v. Boockvar, No. 578 M.D. 2019, 2019 Pa. Commw. Unpub. LEXIS 623 (Pa. Commw. Ct. Oct. 30, 2019). Litigation is also ongoing in Wisconsin.

80 Kentucky's amendment was found to have violated the state constitution because the full text was not placed on the ballot and was not published. *See Westerfield*, 599 S.W.3d 738. Montana's amendment was struck down because it made changes to the constitution that were substantive and not closely related, and thus violated the separate vote requirement. *See Mont. Ass'n of Ctys.*, 404 P.3d 733.

81 *See Boockvar*, 2019 Pa. Commw. Unpub. LEXIS 623, at *19–21.

82 *Id.* at *19. Petitioners had called an experienced criminal defense attorney, who testified that the changes would "eviscerate his ability to effectively represent his clients," affecting his ability to get discovery, cross-examine, negotiate pleas, build a defense, and ensure that his clients were afforded their right to a speedy trial. *See id*. at *9–14.

83 *Id.* This language is also found in the model amendment and in several other state versions. *See* MARSY'S LAW, *supra* note 74.

84 *See Boockvar*, 2019 Pa. Commw. Unpub. LEXIS 623, at *19–21.

85 *See id*. at *37.

86 *See* League of Women Voters of Pa. v. Boockvar, 219 A.3d 594, 594 (Pa. 2019); *see also Boockvar*, 2019 Pa. Commw. Unpub. LEXIS 623, at *19–21; League of Women Voters of Pennsylvania v. Kathy Boockvar, 578 M.D. 2019, 2021 WL 62268 (Pa. Cmmw. Jan. 7, 2021)

The fact that both sets of constitutional provisions offer pre-adjudication rights to "victims" (sometimes implicitly in the first wave, but always explicitly in the second) presents a tension, given that the provisions might appear to assume commission of crime before adjudication has occurred. States address this in various ways, all problematic. Georgia does the most to avoid the problem of apparent prejudgment by defining "victim" to mean "alleged victim,"[87] though this willingness to define a term to mean something quite different from its legal dictionary definition is strange.[88] Oregon also does more than most states to reveal that "victimhood" rests on something less than an adjudication, and to gesture at the power of law enforcement to make an authoritative decision about who is a "victim." Oregon's constitution defines "victim" to mean "any person determined by the prosecuting attorney or the court to have suffered financial, psychological or physical harm as a result of a crime . . . ."[89] Many states instead simply define "victim" to mean someone who has been harmed by a crime;[90] the fact that they do that while guaranteeing pre-adjudication rights suggests a willingness to treat a claim of crime as the same as the occurrence of a crime. For example, the Arizona provision states that "'[v]ictim' means a person against whom the criminal offense has been committed."[91] At the same time, in Arizona, victims' rights "attach when a defendant is arrested or formally charged" (that is, *before*

(finding Pennsylvania ballot measure unconstitutional); Anna Orso, *The Wolf Administration Won't Appeal a State Court Ruling that Tossed Victim-Rights Law Overwhelmingly Supported by Voters*, PHILA. INQUIRER (Feb. 9, 2021), https://www.inquirer.com/news/pennsylvania/marsys-law-pennsylvania-victim-rights-wolf-appeal-20210209.html [https://perma.cc/HV3N-FPB5] (confirming that an appeal is underway).

87 *See* GA. CONST. art. I, § 1, ¶ XXX ("For the purpose of this Paragraph, a victim shall be considered an individual against whom a crime has allegedly been perpetrated . . .").

88 *Compare id.*, *with* FED. R. EVID. 412(d) ("In this rule, 'victim' includes an alleged victim.") The states are split on whether to follow the FRE drafters. *See* Ya'ara Barnoon & Elena Sytcheva, *Rape, Sexual Assault & Evidentiary Matters*, 13 GEO. J. GENDER & L. 459, 471 (2012).

89 OR. CONST. art. I, § 42; *id.* art. I, § 43. For a similar approach, see Rights of Crime Victims and Witnesses Act, 725 ILL. STAT. ch. 725, act 120/3(a)(1) (2019) (defining "victim," for purpose of constitutional amendment, as "any natural person determined by the prosecutor or the court to have suffered direct physical or psychological harm as a result of a violent crime perpetrated or attempted against that person . . ."); People v. Chatman, 66 N.E.3d 415, 429 (Ill. App. Ct. 2016) (explaining that this statutory definition is the relevant one as regards the Illinois constitutional amendment); Searcy v. Ada County, No. 34216, 2008 WL 9468621, at *9 (Idaho Ct. App. Aug. 11, 2008) (stating that under Idaho constitutional and statutory law, "a 'crime victim' is a person who has suffered harm as the result of crime which has been *charged*"); State v. Damato-Kushel, 173 A.3d 357, 362–63 (Conn. 2017) (arrest warrant suffices to establish status as "victim" for purpose of triggering constitutional rights).

90 *See, e.g.*, N.D. CONST. art. I, § 25; CAL. CONST. art. I, § 28; FLA. CONST. art. I, § 16.

91 ARIZ. CONST. art. II, § 2.1.

adjudication has occurred).[92] Others accord pre-adjudication rights to "victims" without defining the term.[93] Given that the core dictionary definition of "victim" in criminal contexts is someone against whom a criminal offense has been committed,[94] this again suggests a willingness to treat a claim of crime as the same as the occurrence of a crime.

In reviewing these constitutional provisions, one finds a core set of recurring rationales. Those rationales include a desire to offer "due process" to "victims,"[95] as well as things like dignity, respect, and fairness.[96] The theme of balance is also a prominent,[97] and problematic,[98] one. The Final Report of the President's Task Force on Victims of Crime (released in 1982) repeatedly invoked an interest in "balance,"[99] and stated that the Task Force's "sole desire [was] to restore

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92 Z.W. v. Foster, 422 P.3d 582, 583 (Ariz. Ct. App. 2018).

93 *See, e.g.*, N.M. CONST. art. II, § 24.

94 *See Victim*, BLACK'S LAW DICTIONARY (11th ed. 2019).

95 *See, e.g.*, S.C. CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1(A); FLA. CONST. art. I, § 16.

96 *See, e.g.*, ALASKA CONST. art I, § 24.

97 *See* Payton v. State, 266 So. 3d 630, 641 (Miss. 2019) ("Because our Constitution balances the rights of the accused with the rights of the victim, we—as guardians of the Constitution—can do no less."); MO. CONST. art. I, § 32(1)(1) (declaring "[t]he right to be present at all criminal justice proceedings at which the defendant has such right"); TENN. CONST. art. I, § 35 (same); OR. CONST. art. I, § 42(1) (granting rights for purposes that include "ensur[ing] that a fair balance is struck between the rights of crime victims and the rights of criminal defendants"); Ohio v. White, 709 N.E.2d 140, 153 (Ohio 1999) (proponents of Ohio's first-wave amendment "pointed out that while [Section] 10, Article I of the Ohio Constitution was adopted to protect the rights of persons accused of crime, there was no corresponding section in the Constitution to protect the rights of victims of crime, and adoption of this section was thus 'a question of balance'"); State v. Lane, 212 P.3d 529, 533 (Utah 2009) ("[T]he language of both the Victims' Rights Amendment and the Rights of Crime Victims Act does much to balance the treatment of victims in criminal cases with that afforded to defendants."); *California General Election Official Voter Information Guide*, CAL. SEC'Y OF STATE 62 (2008), https://vig.cdn.sos.ca.gov/2008/general/pdf-guide/vig-nov-2008-principal.pdf [https://perma.cc/N4L3-JNA3] (offering argument in favor of Marsy's Law amendment that "CALIFORNIA'S CONSTITUTION GUARANTEES RIGHTS FOR RAPISTS, MURDERERS, CHILD MOLESTERS, AND DANGEROUS CRIMINALS. PROPOSITION 9 LEVELS THE PLAYING FIELD, GUARANTEEING CRIME VICTIMS THE RIGHT TO JUSTICE AND DUE PROCESS").

98 *See* Hruska, *supra* note 77 ("This opening salvo [in the context of Marsy's Law] is a seductive appeal to one's sense of fairness. However, the notion that victims' rights can be equated to the rights of the accused is a fallacy. It ignores the very different purposes these two sets of rights serve."); State v. Bible, 858 P.2d 1152, 1205–06 (Ariz. 1993) (stating that the court must balance the victim's rights against those of the defendant if the victim's rights conflict with the defendant's right to a fair trial); Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503 (2015) (describing the deceptive allure of symmetry within the criminal system).

99 *See, e.g.*, PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 48, at 114 ("In applying and interpreting the vital guarantees that protect all citizens, the criminal justice system has lost an essential balance."); *id.* at vi (system "appallingly out of balance").

a balance to the scales of justice."[100] The Task Force was careful to say, however, that it did not intend to threaten the protections held by criminal defendants.[101] In the first wave of constitutional amendments one again finds explicit commitments that defendant protections should not be lessened.[102] Florida's 1988 amendment, for example, mentioned that it was not to interfere with the constitutional rights of the accused.[103] But in the second wave that kind of caveat is gone. Florida's 2018 amendment says nothing along those lines.[104] The same is true of the Marsy's Law model amendment.[105] Rather, in language adopted by Florida and North Dakota,[106] the model amendment declares an aim "to ensure that crime victims' rights and interests are respected and protected by law in a manner no less vigorous than the protections afforded to criminal defendants and juvenile delinquents . . . ."[107]

One can trace a shift not just in this kind of overall stance but in the specific rights that have been declared. As Professor Mosteller indicates, a shift has occurred within the "victims' rights movement," from calls for greater participation rights to initiatives that directly assist the prosecution, and conflict with defendants' rights and protections.[108] The Marsy's Law model amendment, for example, gives rights to "victims" to influence bail decisions and plea decisions, and to refuse to provide discovery:[109] all areas in which "victims' rights" may be invoked to the detriment of defendants. The Wisconsin amendment that was in place before that state's recent vote gave "victims" the

100 *Id.* at 119.

101 *See id.* at 114 ("It should be clearly understood that this Task Force wishes in no way to vitiate the safeguards that shelter anyone accused of crime; but it must be urged with equal vigor that the system has deprived the innocent, the honest, and the helpless of its protection.").

102 *See, e.g.*, ALA. CONST. art. I, § 6.01; FLA. CONST. art. I, § 16(b); CONN. CONST. art. I, § 8(b)(2) (1996) (stating that the "right to timely disposition of the case" must not abridge any right of the accused); IND. CONST. art. I, § 13(b) (ending with "to the extent that exercising these rights does not infringe upon the constitutional rights of the accused"); KAN. CONST. art. XV, § 15; MISS. CONST. art. III, § 26A(2) (stating that the section shall not "impair the constitutional rights of the accused"). *But see* MO. CONST. art. I, § 32(2).

103 *See* FLA. CONST. art. I, § 16 (amended 2018).

104 Matthew Harwood, *Can Victims' Rights Go Too Far?*, REASON (April 2019), https://reason.com/2019/03/16/can-victims-rights-go-too-far [https://perma.cc/A8W3-8UCG] (stating that the deletion "prompt[ed] the Florida League of Women Voters to oppose the effort").

105 MARSY'S LAW, *Model Constitutional Amendment*, *supra* note 18.

106 North Dakota, Ohio, and Oklahoma; *see also* Wisconsin proposed amendment.

107 MARSY'S LAW, *Model Constitutional Amendment*, *supra* note 18, at 1.

108 *See* Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1698–1704 (1997).

109 MARSY'S LAW, *Model Constitutional Amendment*, *supra* note 18.

"[o]pportunity to attend court proceedings unless the trial court [found] sequestration [was] necessary to a fair trial for the defendant;"[110] the Marsy's Law amendment gave them the right "to be present at all proceedings involving the case."[111] Perhaps the future appears in Missouri's legislative declaration that the state's policy is that "the victim's rights are paramount to the defendant's rights."[112]

B. *Litigation Concerning the Pre-Adjudication Use of "Victim"*

As regards courtroom uses of "victim" pre-adjudication, judges have been analyzing this issue since at least 1860,[113] when the Supreme Court of California reviewed a self-defense case, *People v. Williams*.[114] The trial judge, apparently seeking to guard against jury discrimination, had blundered into a different minefield. He charged the jury as follows:

> "The fact that the deceased was a Chinaman gave the defendant no more right to take his life than if he had been a white person; nor did the fact, if you so find, that the defendant was seeking to enforce the collection of taxes against another Chinaman, or even against *his victim* . . . ."[115]

Even while reversing on another issue, the court criticized the instruction in these terms:

> The word *victim,* in the connection in which it appears, is an unguarded expression, calculated, though doubtless unintentionally, to create prejudice against the accused. It seems to assume that the deceased was wrongfully killed, when the very issue was as to the character of the killing. . . . [I]t is apparent that in a case of conflicting proofs, even an equivocal expression coming from the Judge, may be fatal to the prisoner. When the deceased is referred to as "a victim," the impression is naturally created that some unlawful

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110 WIS. CONST. art. I, § 9(m) (amended 2020).

111 BALLOTPEDIA, *supra* note 13. The new amendment tucks away as its final provision the following: "This section is not intended and may not be interpreted to supersede a defendant's federal constitutional rights or to afford party status in a proceeding to any victim."; *see also* Wis. Justice Initiative v. Wis. Elections Comm'n, No. 2019-CV-3485 2020 Wisc. Cir. LEXIS 11 (Wis. Cir. Ct. Nov. 3, 2020) (finding Wisconsin ballot question "did not meet all constitutional and statutory requirements necessary to adequately inform the public on the purpose of the amendments upon which they were voting."); Brief for Petitioner, Wis. Justice Initiative v. Wis. Elections Comm'n, No. 2019-CV-3485 2020 Wisc. Cir. LEXIS 11 (Wis. Cir. Ct. Nov. 3, 2020) (No. 2020AP002003) 2021 WL 640101 (appealing decision)

112 MO. REV. STAT. § 595.209 (2016).

113 *See* Andrew Nash, Note, *Victims by Definition*, 85 WASH. U. L. REV. 1419, 1422 (2008).

114 People v. Williams, 17 Cal. 142, 147 (1860).

115 *Id.* at 146 (emphasis added).

> power or dominion had been exerted over his person. And it was nearly equivalent, in effect, to an expression characterizing the defendant as a criminal. The Court should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression. The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the Court, and the great deference which they pay to the opinions and suggestions of the presiding Judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the Court. A word, a look, or a tone may sometimes, in such cases, be of great or even controlling influence. A judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts; for of this matter, under our system, they are the exclusive judges.[116]

The pre-adjudication usage of "victim" is not just long-standing, but also pervasive. It appears in jury instructions (and the pattern instructions, indictments and statutes from which they often draw),[117] verdict forms,[118] judicial remarks,[119] prosecutorial comments and questions,[120] opening statements,[121] closing arguments,[122] voir dire,[123] defense questions and arguments,[124] and witness testimony.[125]

A review of this case law rebuts the assertion that there is nothing to worry about here. A wide variety of legal grounds for objection have

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116 *Id.* at 147.

117 *See* People v. Lovely, No. F071158, 2018, WL 1980960, at *23 (Cal. Ct. App. Apr. 27, 2018).

118 *See* Steinman v. Kerestes, No. 10-2398, 2011 WL 3862075 (E.D. Pa. July 29, 2011).

119 *See, e.g.*, Sanchez v. State, 253 P.3d 136, 144 (Wyo. 2011).

120 *See Lovely*, 2018 WL 1980960, at *23; Liska v. Anchorage, No. A-6351, 1998 WL 191166 (Alaska Ct. App. Apr. 22, 1998).

121 *See Liska*, 1998 WL 191166.

122 *See* People v. Allen, No. E065202, 2017, WL 4927712, at *8–9 (Cal. Ct. App. Oct. 31, 2017).

123 *See* Ivon v. State, No. A-11817, 2017, WL 4334029, at *1–2 (Alaska Ct. App. Sept. 27, 2017).

124 *See, e.g.*, Grady v. Warden, No. CV144006185S, 2019 WL 1093301, at *6–7 (Conn. Super. Ct. Jan. 28, 2019).

125 *See Allen*, 2017 WL 4927712.

been raised,[126] in regard to usages by judges,[127] witnesses,[128] defense attorneys,[129] and prosecutors.[130] Courts have found this kind of objection to have merit in all sorts of cases,[131] including cases implicating the use of "victim" by defense attorneys,[132] prosecutors,[133] judges,[134] and witnesses.[135] Indeed, in some instances, defense attorneys

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126 For example, a violation of one's right to a fair trial, to an impartial trial, and to trial by jury; right to a complete defense; subversion of presumption of innocence; violation of Sixth and Fourteenth Amendment rights to a jury determination of the facts; reduction of prosecution's burden of proof; violation of due process right to present defenses such as self-defense and justifiable homicide; argumentativeness; improper comment on a complainant's credibility and a defendant's guilt; prejudicial effect that sufficiently exceeded probative value; suggesting to the jury that the court holds a favorable view of the accuser's credibility, which dilutes the presumption of innocence; due process protections such as a fair trial before an impartial judge and an unprejudiced jury; and prosecutorial impropriety.

127 For example, impropriety of judge's expressing a personal belief in the credibility of prosecution witnesses or in a criminal defendant's guilt; improper comment on the evidence; judicial nullification of self-defense claim.

128 *See* Tran v. Davis, No. 4:17-CV-330-Y, 2018 WL 2193925, at *7 (N.D. Tex. May 14, 2018).

129 *See, e.g.*, People v. Sanchez, 256 Cal Rptr. 446, 457 (Cal. Ct. App. 1989).

130 For example, expression of personal opinion by the prosecutor; impropriety of prosecutor expressing a personal belief in the credibility of prosecution witnesses or a personal belief in a criminal defendant's guilt; improper appeal to the jury's emotions; inflaming the passions or prejudices of the jury; improper comment on the weight of the evidence; shifting the burden of proof.

131 *See* Tolen v. State, No. A-10159, 2012 WL 104477 (Alaska Ct. App. Jan. 11, 2012); Alto v. State, No. A-10883, 2013 WL 1558157, at *2 (Alaska Ct. App. Apr. 10, 2013); Fritzinger v. State, 10 A.3d 603, 610–11 (Del. 2009); Jackson v. State, 600 A.2d 21, 24–25 (Del. 1991); State v. Nomura, 903 P.2d 718, 721–23 (Haw. Ct. App. 1995); State v. Wright, No. 02CA008179, 2003 WL 21509033, at *2 (Ohio Ct. App. July 2, 2003); State v. Almedom, No. 15AP-852, 2016 WL 1461839 (Ohio Ct. App. Apr. 14, 2016); Veteto v. State, 8 S.W.3d 805, 816–17 (Tex. App. 2000); Order Re Mr. Bryant's Motion to Preclude References to the Accuser as the "Victim," People v. Bryant, No. 03 CR 204 (Colo. Dist. Ct. May 28, 2004), https://www.courts.state.co.us/userfiles/File/Court_Probation/5th_Judicial_District/Cases_of_Interest/People_v_Bryant/05-04/ordr_re_victim_issue.pdf [https://perma.cc/4YVM-Q972] [hereinafter Order Re Motion to Preclude References to the Accuser as the "Victim," People v. Bryant].

132 *See, e.g.*, Grady v. Warden, No. CV144006185S, 2019 WL 1093301, at *6 (Conn. Super. Ct. Jan. 28, 2019).

133 *See* State v. Thompson, 76 A.3d 273, 283–85 (Conn. App. Ct. 2013); State v. Bales, No. 27687, 2007 WL 1087752, at *2 (Haw. Ct. App. Apr. 12, 2007); State v. Albino, 24 A.3d 602, 613–617 (Conn. App. Ct. 2011).

134 *See Bales*, 2007 WL 1087752; State v. Brewer, No. W2012-02282-CCA-R3-CD, 2014 WL 1669807, at *13–14 (Tenn. Crim. App. Apr. 24, 2014); Talkington v. State, 682 S.W.2d 674 (Tex. App. 1984); Bratcher v. State, No. 01-08-00610-CR, 2009 WL 1331344, at *9–11 (Tex. App. May 14, 2009); Hernandez v. State, 340 S.W.3d 55, 61–62 (Tex. App. 2011); Simpson v. State, No. 05-04-01039-CR, 2005 WL 2995081, at *3 (Tex. App. Nov. 9, 2005); Torres v. State, No. 04-98-00594-CR, 1999 WL 89934, at *4 (Tex. App. Feb. 24, 1999); People v. Williams, 17 Cal. 142, 146 (1860); State v. Cortes, 851 A.2d 1230, 1239–40 (Conn. App. Ct. 2004); People v. Davis, 423 N.Y.S.2d 229 (N.Y. App. Div. 1979); State v. Philbrick, 669 A.2d 152, 155–156 (Me. 1995).

135 *See* State v. Then, No. A-1790-06T4, 2009 WL 815453, at *17 (N.J. Super. Ct. App. Div. Mar. 31, 2009); State v. Sperou, 442 P.3d 581 (Or. 2019); State v. Wigg, 889 A.2d 233, 236 (Vt.

have been able to obtain preemptive relief in the form of judicial "language orders" prohibiting certain usages.[136] In pre-trial litigation regarding a sexual assault charge, Kobe Bryant was successful in obtaining an order excluding the word "victim" at trial, in favor of "alleged victim" and the woman's name.[137] The court noted that "the common understanding of the term 'victim' certainly implies that a person has been the subject of a particular wrong or crime and its use under these circumstances could improperly suggest that a crime had been committed such that the presumption of innocence might be jeopardized."[138]

However, the universe of published opinions—of course, a limited picture of what occurs in court and even of what happens at trial[139]—reveals many instances of apparent acquiescence to this usage. Defense arguments for a new trial are frequently denied, even when judicial orders to avoid this usage have been repeatedly violated,[140] whether by judges,[141] defense attorneys,[142] prosecutors,[143] witnesses,[144] or some combination thereof,[145] and even when, in the very act of defining the governing law by means of jury instructions, judges have identified the complainant as a "victim."[146] Courts may recognize that the potential for prejudice is "obvious,"[147] but they frequently find it to be unrealized.[148]

2005); State v. Devey, 138 P.3d 90, 95 (Utah Ct. App. 2006); State v. McFarland, No. 32873-2-III, 2016 WL 901088, at *4 (Wash. Ct. App. Mar. 8, 2016).

136 Note, however, that in several instances these have been violated. *See, e.g.*, *Thompson*, 76 A.3d at 283.

137 Order Re Motion to Preclude References to the Accuser as the "Victim," People v. Bryant, *supra* note 131.

138 *Id.* at 2.

139 Thank you to Jocelyn Simonson for highlighting this point. Note that the limitations involve not just the lack of published record corresponding to the majority of trials, but also the fact that these concerns exist outside of the trial context, as in bail hearings, for example.

140 *See* Ivon v. State, No. A-11817, 2017 WL 4334029 (Alaska Ct. App. Sept. 27, 2017) (violation by prosecutor and prosecution witness).

141 State v. Rodriguez, 946 A.2d 294, 302–03 (Conn. App. Ct. 2008).

142 *See, e.g.*, Grady v. Warden, No. CV144006185S, 2019 WL 1093301 (Conn. Super. Ct. Jan. 28, 2019).

143 *See, e.g.*, State v. Thompson, 76 A.3d 273, 283–85 (Conn. App. Ct. 2013) (prosecutor violated judicial order repeatedly, but new trial was denied).

144 *See* State v. Hills, No. 44496-4-I, 2000 WL 1873922 (Wash. Ct. App. Dec. 26, 2000); Tollefson v. Stephens, No. SA:14-CV-144-DAE, 2014 WL 7339119, at *18 (W.D. Tex. Dec. 23, 2014) ("[I]t is not error for the State, witnesses, or defense counsel to use the word 'victim' at trial.").

145 *See, e.g.*, *Grady*, 2019 WL 1093301 (defense counsel and prosecutor).

146 *See, e.g.*, United States v. Washburn, 444 F.3d 1007, 1013 (8th Cir. 2006).

147 *Grady*, 2019 WL 1093301, at *6.

148 *See, e.g.*, State v. Henderson, 574 S.E.2d 700, 703–04 (N.C. Ct. App. 2003).

Judges often rule against the defense by drawing distinctions, and making arguments, that are not just problematic means of resolving individual cases, but troubling indications of how they view our system. For example, perhaps the most common distinction drawn by judges ruling on this issue is a distinction between cases where the defense was contesting that any crime occurred (as in a self-defense scenario), and cases where the defense was "not contesting" that a crime occurred—but rather arguing that the defendant was wrongly accused.[149] Courts are frequently willing to find error in the first scenario,[150] but not in the second scenario.[151] After all, the courts reason, if no one is contesting that a crime occurred, then we *do* have a victim.[152] This justification appears frequently, with no indications that it is ever challenged. However, a challenge is due. When the defense argument is that the wrong person has been charged, it is not the job of the defense attorney (and it may well be distracting and unhelpful) to take a stance on whether a crime occurred. Her "failure to contest" the concept that a crime occurred should not be used as some sort of "concession" that a crime occurred. Her job is to develop a defense and pursue it. If the defense is that the wrong person has been charged it would be a waste of time and money, and perhaps in derogation of her responsibilities to her client, to spend time investigating all possible defenses that might possibly be pursued by some hypothetical other defendant so that she can say that none applied and that there was indeed a crime. The job of establishing that a crime occurred is that of the prosecution.

Courts' treatment of the word "victim" sometimes reveals a troubling inability fully to comprehend the justificatory nature of self-defense claims.[153] We see this when they conclude that there is no error

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149 *See, e.g.*, NAT'L CRIME VICTIM LAW INST., USE OF THE TERM "VICTIM" IN CRIMINAL PROCEEDINGS (11th ed. 2014), https://law.lclark.edu/live/files/21940-use-of-the-term-victim-in-crim-proc11th-edpdf [https://perma.cc/FDN5-FRLK] (endorsing this distinction); Washington v. State, No. 480, 2008 WL 697591 (Del. Mar. 17, 2008).

150 That error may, however, be found harmless; and indeed courts do not always find this to be error. *See* Mason v. State, No. 203, 1997 WL 90780, at *2 (Del. Feb. 25, 1997).

151 *See, e.g.*, Jackson v. State, 600 A.2d 21, 24 (Del. 1991) (stating that "'victim' is used appropriately during trial when there is no doubt that a crime was committed and simply the identity of the perpetrator is in issue. We agree with defendant that the word 'victim' should not be used in a case where the commission of a crime is in dispute."); State v. Cortes, 851 A.2d 1230, 1241 (Conn. App. Ct. 2004) ("In cases in which the fact that a crime has been committed against the complaining witness is not contested, but only the identity of the perpetrator is in dispute, a court's use of the term 'victim' is not inappropriate."); State v. Weber, 2017 WL 3638209, at *4 (Del. Super. Ct. Aug. 22, 2017); State v. Austin, 422 P.3d 18, 31 (Haw. 2018).

152 *See Jackson*, 600 A.2d at 25.

153 *See* Khalid Ghanayim & Mohammed Saif-Alden Wattad, *Reconsidering the Grounds and the Causing Conditions for the Necessity Defense: Between Justification and Excuse—A Comprehensive Study*, 86 UMKC L. REV. 111, 112 (2017) ("Justifications negate the wrongdoing

(or no prejudicial error) in calling the person who was wounded or killed by the defendant a "victim," given their injuries. It may be *understandable* that if someone was hurt or died a court might say of that person "of course we have a victim." That sort of thing happens all the time in common parlance: we talk of "homicide victims," even if all we know about the circumstances is that people were killed.[154] But in a legal context, where justificatory defenses such as self-defense may apply, it is problematic. So, for example, in cases involving self-defense claims, courts will sometimes quote the Black's Law Dictionary definition of "victim" (someone "harmed by a crime, tort, or other wrong") and even after doing so will conclude that the complainant certainly was a "victim."[155] Judges are missing something crucial about self-defense claims, however.[156] In such cases, there may be a dead body, but under the law there may be no crime, tort, or wrong.[157] This judicial approach raises questions about the role and value assigned to justificatory defenses, and to the attorneys tasked with raising them, within our criminal system.[158]

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that constitutes the criminality of a particular action, by treating the conduct in question as societally right and just, as well as consistent with the purposes of criminal law.").

154 *See* People v. Allen, No. E065202, 2017 WL 4927712, at *9 (Cal. Ct. App. Oct. 31, 2017) (finding no error).

155 *See, e.g.*, Tran v. Davis, No. 4:17-CV-330-Y, 2018 WL 2193925, at *8 (S.D. Tex. May 14, 2018) (citing *Victim,* BLACK'S LAW DICTIONARY (10th ed. 2014) ("A 'victim' is '[a] person harmed by a crime, tort, or other wrong.' Thus, reference to Nguyen as the 'victim' was accurate. Nguyen died as the result of gun shot wounds, and Petitioner admitted to shooting him. The only question was whether Petitioner shot him in self-defense."); Pridgen v. Director, TDCJ-CID, No. 6:17cv128, 2019 WL 2464769, at *10 (E.D. Tex. Mar. 21, 2019) (citing Black's definition, and concluding that the complainant "was in fact the victim of a fatal shooting," despite the fact that the claim was self-defense, in other words a claim that definitions such as that in Black's were not satisfied); Sanchez v. State, 253 P.3d 136, 144 (Wyo. 2011) (citing Black's Law Dictionary definition in support of assertion that "it was uncontested at trial that AI was the victim of a vicious beating. The only real dispute concerned whether Sanchez was her assailant and, if so, whether he was the first aggressor or acted in self-defense.").

156 *See Tran*, 2018 WL 2193925, at *8*; Pridgen*, 2019 WL 2464769, at *10; *Sanchez*, 253 P.3d at 144; State v. Rodebaugh, 655 S.W.2d 652, 654 (Mo. Ct. App. 1983) (despite self-defense claim, stating that "[w]e see no prejudice to defendant in the prosecutor's reference to the body of a man dead of a gunshot as a 'victim'").

157 *See* People v. Lovely, No. F071158, 2018 WL 1980960, at *22 (Cal. Ct. App. May 10, 2018) (quoting defense brief that stated that "[b]eing killed does not necessarily make someone a victim because [the defendant] could have acted in self-defense (i.e. justifiable homicide)"); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1764 (1999) (describing conception of crime as "a part of every human society, possibly a needed part, a functional mechanism that helps set and then illuminate the boundaries of acceptable behavior.").

158 *See* Roberts, *Arrests as Guilt, supra* note 22, at 1022–25 (suggesting that premature judgments of guilt help explain failures to provide and support defense counsel).

The case law also reveals judicial tendencies to defer to law enforcement. A common ground for rejecting defense arguments about the word "victim" is that when the word is used by police witnesses it is just the way that they talk—just "synonymous with the complaining witness"[159]—and that we should not ask police officers to do things differently.[160] This judicial assertion about synonymity was first made (without support) in a Delaware case,[161] and numerous cases in numerous jurisdictions have recycled it,[162] again without support other than that case, and without discussing the question of whether, even if it was accurate in one jurisdiction, it might not be accurate elsewhere.[163] Among other problems with this assertion, it appears to ignore the fact that police officers are trained and instructed on how to testify;[164] we do not just haul them into court fresh from the beat and then penalize them when they talk in the only way they know how.

In rejecting defendants' arguments, courts sometimes reveal a troubling view that the word "victim" is being used "in a neutral manner,"[165] as a straightforward way of referring to the complainant.[166] It is problematic if the government's stance has come to seem the

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159 *See, e.g.*, State v. Pierce, No. 0407019516, 2008 WL 282278, at *2 (Del. Sup. Ct. Feb. 4, 2008) ("Use of the word 'victim' in rape trial does not constitute reversible error because to law enforcement officers the word 'victim' is synonymous with the complaining witness.").

160 *See* James v. Nevada, No. 57178, 2012 WL 5378147, at *6 (Nev. Oct. 31, 2012) ("[W]e decline to require law enforcement officers to alter their commonly practiced terms of art.").

161 Jackson v. State, 600 A.2d 21 (Del. 1991).

162 *See, e.g.*, State v. Harvey 167 Wash. App. 1026 (Wash. Ct. App. 2012); State v. Wigg, 889 A.2d 233, 237 (Vt. 2005).

163 Note that in at least one Texas case the same justification was used for the word "complainant." Turro v. State, 950 S.W.2d 390, 405 (Tex. App. 1997) (witness "explained to the jury that he used the term 'complainant' simply out of habit because it was the term police officers commonly used to refer to all victims"); *id.* at 406 ("[I]t is not only the habit of police officers to refer to deceased victims as complainants, it is often used in that manner by courts."). Note also that the Hawaii Supreme Court has rejected the Delaware pronouncement. *See* State v. Mundon, 292 P.3d 205, 230 (Haw. 2012) ("Contrary to the conclusion of the Supreme Court of Delaware . . . it is not evident that police officers generally use the term 'victim' to refer to a complaining witnesses [sic] in police reports or when otherwise referring to a person making a complaint against another person.").

164 *See, e.g.*, David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 500 (1999).

165 *See, e.g.*, Davis v. State, No. 05-18-00398-CR, 2019 WL 2442883, at *2 (Tex. App. June 12, 2019) (stating that "the word 'victim' is mild, non-prejudicial, and is commonly used at trial in a neutral manner to describe the events in question"); Cueva v. Stephens, No. 2:14-CV-417, 2016 WL 4014088, at *9 (S.D. Tex. Feb. 19, 2016) (same).

166 *See* Buszkiewic v. State, 424 P.3d 1272, 1279 (Wyo. 2018) ("The prosecutor was simply referring to Ms. Oakland's role in the criminal proceedings—she was alleged to be the victim of two strangulations by Mr. Buszkiewic.").

neutral stance.[167] Since it really does not seem to be "neutral" here[168]—"victim," after all, is the word for someone who has suffered a crime—perhaps what is meant is something more like "normalized" or "usual." That is not really a salve; rather, it suggests still more reason for concern, if this presumption that a crime occurred has become so commonplace as to go largely unnoticed.[169]

While multiple courts including and since the *Williams* court in 1860 have been clear on the core risk for defendants—that the word "victim" could be seen as resolving a crucial jury question[170]—others seem unable to identify the threat correctly. In Texas, a line of precedent has developed that rejects defense arguments regarding the use of "victim" on the basis that "more inflammatory" words have failed to inspire judicial relief: "butcher," "killer," "slaughter," "sex slave," and so on.[171] These are not necessarily nice words, but the problem with "victim" in this context is less that it might inflame the jury, and more that it might eviscerate the jury's fact-finding function. This is a different problem, but not necessarily a "milder" usage than the other ones that Texas has upheld.[172] As further indication that the Texas courts sometimes struggle to see the core issue, one court supported its rejection of an ineffectiveness of counsel claim based on defense counsel's pre-adjudication use of the word by saying that "appellate courts in Texas have even used the word 'victim' in writing their

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167 *See* Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 254 (2019) ("To be 'neutral' is to side with the prosecution, not the defendant.").

168 *See* State v. Price, No. A18-1964, 2019 WL 4254834, at *4 (Minn. Ct. App. Sept. 9, 2019) (noting that the district court's pre-trial order stated that "[i]f there is an alleged victim, the attorney for the State shall instruct its witnesses to make all reasonable efforts to use neutral language and not refer to the alleged victim as 'victim'").

169 *See* State v. Wilson, No. 0012014953, 2006 WL 1064179, at *3 (Del. Super. Ct. Mar. 9, 2006) (mentioning a defense argument that defense counsel's failure to object could mean that "the jury became conditioned to thinking of the complaining witnesses as victims"); State v. Wigg, 889 A.2d 233, 236–37 (Vt. 2005) (recommending that witnesses use "a more neutral term" than "victim"); State v. Sperou, 442 P.3d 581, 590 (Or. 2019) (rejecting the State's argument that jurors will understand "that the word 'victim' really means 'alleged victim'").

170 *See* People v. Ruiz, No. B278461, 2018 WL 4292027, at *3 (Cal. Ct. App. Sept. 7, 2018) ("the ultimate issue"); State v. Thompson, 76 A.3d 273, 288 (Conn. App. Ct. 2013) ("the central issue"); Mahone v. Eden, No. 1:15-cv-01009-PJK-KBM, 2019 WL 2724054, at *1 (D.N.M. June 28, 2019) (rejecting "victim" usage in light of the "critical threshold finding" presupposed by the definition of *Victim,* BLACK'S LAW DICTIONARY (10th ed. 2014)).

171 *See, e.g.*, Anderson v. State, No. 03-00-00074-CR, 2001 WL 660931, at *4 (Tex. App. June 14, 2001) ("'Victim' is quite mild compared to other terms used by prosecutors in their comments to the jury, which the courts have found non-prejudicial.") (citing cases in which claims of prejudice were rejected as regards the following terms: "slaughter," "this killer," "sex slave," and "butcher"); Brown v. Director, TDCJ-CID, No. 6:07cv272, 2008 WL 1998691, at *6, *11 (E.D. Tex. May 2, 2008).

172 *See, e.g.*, *Anderson*, 2001 WL 660931, at *4.

opinions."[173] The court's citation was to a case upholding a conviction: in other words, a case in which the procedural posture did not implicate the relevant concern.[174]

No doubt some of these usages are more troubling than others, and on the more problematic end of the spectrum lie jury instructions. The use of the word "victim" in these instructions—distillations of the law that need to be constructed with care—is particularly concerning because of its potential consequences, because appellate courts often endorse it, and because it suggests how deeply embedded it is in legal thought. One might assume that courts would take these usages particularly seriously, since if one trusts the jury's common sense—as courts in this area urge us to do[175]—the jury must know that these are not casual or offhand references. But here, judges are frequently able to reject defense arguments precisely *because* judges are laying out considered bodies of law.[176] A number of courts have taken the position that if a judge's instructions parrot the language of a statute, that judge is likely to be in a safe harbor vis-à-vis reversal.[177] (Other cases take the same position with regard to judges who are using pattern instructions).[178] That justification is problematic. A criminal statute, of course, defines a crime. It may well be unobjectionable (at least as regards this Article's focus) to use "victim" in saying what a crime is, because if we have a crime under the statute in question we can say that we have a victim.[179] But to lift a statute into a jury instruction in a way that applies the language of "victim" to the complaining witness is to risk endorsing a premature determination of criminal victimhood, and potentially of guilt.

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173 Cueva v. State, 339 S.W.3d 839, 864 (Tex. App. 2011).

174 *But see infra* Section III.C.

175 *See, e.g.*, *Ruiz*, 2018 WL 4292027, at *3.

176 *See* State v. Walston, 766 S.E.2d 312, 319 (N.C. 2014) (stating that "we have often approved of jury instructions that are consistent with the pattern instructions" and that "[t]he term 'victim' appears frequently in our state's pattern jury instructions").

177 *See* Casey v. State, 215 S.W.3d 870, 887 (Tex. Crim. App. 2007) ("Because the jury charge tracked the language of the statute, the trial court did not abuse its discretion by including the word 'victim' in the charge."); Server v. Mizell, 902 F.2d 611, 615 (7th Cir. 1990) ("No logical argument can be made that the mere use of the term 'victim' somehow shifted the burden of proof. The word 'victim' was taken directly from the language of the statute, which used the term because it is gender neutral."); Hernandez v. State, 340 S.W.3d 55, 61 (Tex. Ct. App. 2011) ("As a general proposition, a jury charge that tracks the language of the relevant statute is sufficient and therefore not erroneous.").

178 *See, e.g.*, State v. Jackson, 688 S.E.2d 766, 769 (N.C. Ct. App. 2010); State v. Lopez, No. COA11-722, 2012 WL 2308555, at *7 (N.C. Ct. App. June 19, 2012); State v. Walker, No. 06-0259, 2007 WL 1828321, at *2–3 (Iowa Ct. App. June 27, 2007).

179 *But see infra* Section III.C.

Consider, for example, a recent North Carolina Supreme Court case involving jury instructions.[180] The defendant had requested that the words "alleged victim" instead of "victim" be used.[181] That request was denied, and the pattern jury instructions were read to the jury.[182] Those pattern jury instructions repeatedly required the jury to determine whether certain facts were true about "the victim,"[183] thus assigning to the complaining witness the term "victim" even in the context of asking the jurors to decide whether the alleged crimes had been committed. So, for example, the jurors were to assess whether the following things had been established beyond a reasonable doubt: "First, that the defendant engaged in a sexual act with the victim. . . . Second, that at the time of the acts alleged the victim was a child under the age of 13. And third, that at the time of the alleged offense the defendant was at least 12 years old and was at least four years older than the victim."[184] The Court of Appeals had found that the trial court erred in refusing the request to use "alleged victim"—it reasoned that whether the complaining witness was victimized "was "a disputed issue of fact for the jury to resolve"[185]—but the state Supreme Court reversed.[186] After all, it said, the trial court was sticking largely with the pattern jury instructions, and pattern jury instructions are surely a safe harbor against reversal.[187]

Even when courts are persuaded that the use of "victim" was error, the obstacles to relief frequently mean that nothing changes. It is common for courts in this area to find that the defendant has failed to meet his or her burden—each phrased in terms more forbidding than the last[188]—of showing that the error was prejudicial, and thus has failed

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180 *Walston*, 766 S.E.2d 312.

181 *See id.* at 314.

182 *See id.*

183 *See id.* at 317–18.

184 *Id.* at 317. The instructions have now been amended to refer to "alleged victim." *See infra* Part III.

185 *Walston*, 766 S.E.2d, at 314–15.

186 *Id.* at 314.

187 *Id.* at 319 (suggesting limited circumstances in which "alleged victim" would be preferable).

188 *See, e.g.*, State v. Ivey, No. COA17-1266, 2018 WL 3431870, at *3–4 (N.C. Ct. App. July 16, 2018) (harmless error because "victim" references "cannot be said to have substantially altered the way the jury viewed the evidence," the defendant cannot show that they "rendered it impossible for him to receive a fair and impartial verdict," and the defendant cannot "demonstrate substantial and irreparable prejudice"); People v. Broglin, No. 274342, 2008 WL 508108, at *1 (Mich. Ct. App. Feb. 26, 2008) ("[R]eversal is not required unless defendant meets his burden of establishing that the error was outcome-determinative and most likely resulted in a miscarriage of justice.").

to win a new trial.[189] And indeed, these cases make one wonder, as harmless error standards often do,[190] how one could ever meet such a standard:[191] how could one plausibly show that the word "victim," even when repeated multiple times by multiple parties, had the kind of influence that these standards demand?[192] Moreover, to defeat defense claims, judges have an almost fail-safe form of harmless error argument to deploy.[193] If jury instructions were given that laid out the correct standards as regards the phenomena that this usage implicates—the presumption of innocence,[194] the burden of proof,[195] the jury's role,[196] the judge's role,[197] the need for the jury to be unbiased,[198] the fact that opening statements and arguments are not evidence,[199] and so on—then, regardless of social science findings to the contrary,[200] courts are

189 *See* Tolen v. State, No. A-10159, 2012 WL 104477, at *4 (Alaska Ct. App. Jan. 11, 2012) ("In general, courts have only found reversible error where the term was used multiple times and/or was coupled with other prejudicial error or misconduct.").

190 *See* Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 HARV. L. REV. 1791, 1793 (2017).

191 *See, e.g.*, State v. Weber, No. 0408022175, 2017 WL 3638209, at *5 (Del. Super. Ct. Aug. 22, 2017) ("Defendant has not set forth a sufficient showing that but for the use of the term, the outcome of the proceedings would have been different.").

192 *See* State v. Harvey, No. 29513-3-III, 2012 WL 1071234, at *3 (Wash. Ct. App. Mar. 29, 2012) ("Ultimately, we do not know and cannot know what effect, if any, the reference by police or first responders to the deceased as 'victims' had.").

193 Note that *Cortes* is a rare exception (finding reversible error, despite state's argument that other instructions negated the prejudicial effect). *See* State v. Cortes, 851 A.2d 1230, 1239–41 (Conn. App. Ct. 2004).

194 *See Tolen*, 2012 WL 104477, at *4.

195 *See id.*

196 *See id.*; State v. Vilchel, 963 A.2d 658, 674 (Conn. App. Ct. 2009) (quoting the trial judge as having said to the jury, after self-defense instructions that referred to the complainant as the "victim," "If I used the word victim, and I think it's specifically like in reference to [the complainant], that doesn't mean I see him as a victim or anything like that. That's for you to decide, okay?"); *id.* at 675 ("The court unambiguously eliminated any improper connotation that the jury could infer from the court's use of the term by reminding the jury that it was the finder of fact and that the court did not view [the complainant] to be the victim of any crime.").

197 *See* State v. Brown, 984 A.2d 86, 96 (Conn. App. Ct. 2009).

198 *See* People v. Lovely, No. F071158, 2018 WL 1980960, at *25 (Cal. Ct. App. Apr. 27, 2018).

199 *See* People v. Cannon, No. H033457, 2009 WL 2416050, at *18 (Cal. Ct. App. Aug. 7, 2009); *Lovely*, 2018 WL 1980960, at *25.

200 *See, e.g.*, Vida B. Johnson, *Presumed Fair? Voir Dire on the Fundamentals of Our Criminal Justice System*, 45 SETON HALL L. REV. 545, 557 (2015) (discussing the misguided confidence in instructions that include those addressing the presumption of innocence and the prosecutor's burden of proof).

to presume that those instructions were followed,[201] and that they proved curative.[202]

The difficulty of persuading judges that defendants suffered prejudice presents a huge obstacle to ineffectiveness of counsel claims, whether the claims are based on defense counsel's failure to object to this usage, or defense counsel's adoption of this usage, or both. Many such claims fail at the first of the two steps required under Supreme Court case *Strickland* (that is, showing deficient representation);[203] almost all fail at the second step (that is, showing resultant prejudice).[204] A rare—perhaps unique—example of defense success came in the Ohio case *State v. Almedom*.[205] The appellate court found prejudicial error where defense counsel had remained silent in the face of repeated judicial descriptions of the complaining witnesses as "victims," some of which occurred before any testimony began.[206] This case, as do many presenting this issue, involved horrible alleged facts.[207] Whereas for some courts these alleged facts seem to act as a reason to reject defense claims,[208] for this court they highlighted the importance of a trial in which guilt was not, and did not appear to be, predetermined. The court explained its reasoning as follows:

> The average person is disgusted by the idea of anyone sexually abusing young children. Sefe Almedom was portrayed as such a disgusting person long before any evidence was presented. The trial court judge, who is viewed as the ultimate authority figure in the courtroom, in essence told the jury more than once that Almedom

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201 *See Lovely*, 2018 WL 1980960, at *26; State v. Holmes, No. COA12–1580, 2013 WL 5477371, at *3 (N.C. Ct. App. Oct. 1, 2013).

202 *See* Tolen v. State, No. A-10159, 2012 WL 104477, at *4 (Alaska Ct. App. Jan. 11, 2012); Alto v. State, No. A-10883, 2013 WL 1558157, at *2 (Alaska Ct. App. Apr. 10, 2013); State v. Rodriguez, 946 A.2d 294, 302–03 (Conn. App. Ct. 2008); State v. Nomura, 903 P.2d 718, 722–23 (Haw. Ct. App. 1995); State v. Mundon, No. CAAP-10-0000101, 2012 WL 1473433, at *4 (Haw. Ct. App. Apr. 27, 2012); State v. Branco, No. 24281, 2002 WL 31781118, at *1 (Haw. Ct. App. Dec. 12, 2002).

203 *See, e.g.*, Anderson v. State, No. 03-00-00074-CR, 2001 WL 660931, at *4 (Tex. Ct. App. June 14, 2001); People v. Sanchez, 256 Cal. Rptr. 446, 457 (Cal. Ct. App. 1989). A rare exception is Grady v. Warden, No. CV144006185S, 2019 WL 1093301, at *7 (Conn. Super. Ct. Jan. 28, 2019).

204 *See* State v. Wilson, No. 0012014953, 2006 WL 1064179, at *3 (Del. Super. Ct. Mar. 9, 2006); *Grady*, 2019 WL 1093301.

205 State v. Almedom, No. 15AP-852, 2016 WL 1461839 (Ohio Ct. App. Apr. 14, 2016).

206 *Id.* at *1 ("For reasons that are not clear, defense counsel never objected to the trial judge's comments even though the references began before any witnesses had testified. For instance, in describing the case before the testimony began, the judge stated, 'It is my understanding that in this case all victims are under the age of 13.'").

207 *See* Erin P. Davenport, *Idealized into Powerlessness*: *How a Judicial Order in* Nebraska v. Safi *Could Send Women's Rights Back to Colonial America*, 12 U. PA. J.L. & SOC. CHANGE 1, 15 (2008).

208 *See, e.g.*, State v. Phillips, 742 S.E.2d 338, 342 (N.C. Ct. App. 2013).

> had victimized three young girls. Almedom's claims that the accusations flowed from the hatred of the girls' mother toward him following the end of his emotional relationship with her could not be fairly and impartially evaluated by the jury after the jury had been told repeatedly by the trial court judge that the girls were victims. All the while, Almedom's defense counsel, who was supposed to be advocating for Almedom's well-being, stood idly by and made no objection to the trial judge's accusation that his client was a child abuser. The case was essentially decided before the first words were uttered by the witnesses for the State of Ohio and long before Almedom had a chance to deny the accusations and to submit a theory as to why the accusations were being made.
>
> We are not saying that the girls are not being truthful. We are not saying that Almedom was being truthful. We are saying that the conduct of the trial judge when linked with the deficient conduct of defense counsel denied Almedom of the opportunity for a fair trial—a trial in which his defense could be fairly considered.[209]

This intermediate court encapsulated in two short paragraphs many of the key concerns surrounding this issue: the risk of judgments or assumptions of guilt that precede and moot the evidence;[210] the pressing need for a fair trial even (or especially) in the face of awful alleged facts; the particular horror of a situation in which the judge (symbol of fairness) puts her imprimatur on a prosecution narrative; the particular horror of a situation in which defense counsel (symbol of protection) acquiesces thereto; the ever-present fear that to urge caution about the premature use of the word "victim" will be understood not as defending the constitutional system but as attacking the truthfulness of those alleging harm;[211] and the fragility of defenses in a regime that is inclined to endorse the prosecutorial account.[212]

Thus, one sees in this litigation just how firmly ground into our law and legal thinking the merger of "victim" and "alleged victim" is. It is there in many jury instructions.[213] It is there in the words of the

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209 *Almedom*, 2016 WL 1461839, at *2–3.

210 *See* Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867 (2018).

211 *See* Scott A. McDonald, *When a Victim's a Victim: Making Reference to Victims and Sex-Crime Prosecution*, 6 NEV. L.J. 248, 269 (2005).

212 For other aspects of this problem, see Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415, 1421 (2016) ("Judges may ask a defendant to provide an 'allocution' before pleading guilty, but the admission of guilt need not be under oath or very detailed, and it may just involve an in-court agreement that the defendant committed acts satisfying the legal elements of the crime."); *id.* at 1427 ("An admission to having satisfied the elements of the crime . . . does not reach the question of whether any defenses might defeat criminal liability.").

213 *See* People v. Lovely, No. F071158, 2018 WL 1980960, at *25 (Cal. Ct. App. May 10, 2018).

prosecutor, and the court, and defense counsel[214]—even when orders banning its use have been issued. Judges often say their use was inadvertent,[215] as do defense attorneys,[216] and in one instance, after violating judicial orders again and again, the prosecutor said she just could not help herself.[217] She could not understand her reflexive repetition of this word.[218]

II. WHERE MIGHT THIS USAGE LEAD?

Part I demonstrated that the use of "victim" in the pre-adjudication context, and thus an apparent willingness to treat an accusation as a crime, is widespread. It explained that in the litigation context courts often conclude that even if the pre-adjudication use of the word "victim" is error, the error is harmless; that this is just "semantics,"[219] as if the law was not created by language.[220] In this Part, I resist this acceptance, analyzing concerns that may be exacerbated by this widespread usage, and by the acquiescence with which it is often met.

A. *A Paltry Substitute*

"Victims' rights" provisions often cite the values of respect and dignity,[221] and since one needs to fall within the "victim" category to be

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214 *See* Grady v. Warden, No. CV144006185S, 2019 WL 1093301, at *7 (Conn. Super. Ct. Jan. 28, 2019).

215 *See, e.g.*, State v. Rodriguez, 946 A.2d 294, 302–03 (Conn. App. Ct. 2008).

216 *See, e.g.*, *Grady*, 2019 WL 1093301, at *7; Cano v. State, No. 14-06-00377-CR, 2007 WL 2872418, at *8 (Tex. App. Oct. 4, 2007) (stating that trial counsel's references to the complainant as the "victim" were "slips of the tongue" and "inconsistent with the defense that the complainant was untruthful and no crime occurred").

217 *See, e.g.*, State v. Thompson, 76 A.3d 273, 283–84 (Conn. App. Ct. 2013) (describing several judicial instructions to the prosecutor not to use "victim," and several violations of those instructions).

218 *Id.* at 284 (quoting prosecutor as saying "I don't know why I keep doing that. . . . I—it's inadvertent, I'm not doing it intentionally"); *id.* at 288 (describing the usage as "almost reflexive").

219 *See, e.g.*, Agee v. State, 544 N.E.2d 157, 159 (Ind. 1989) ("To say that the use of ['victim'] as opposed to ['decedent'] would conjure up prejudice against appellant in the minds of the jurors is indeed to stretch a point based upon semantics.").

220 *See* Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1696 ("As a human practice, law relies heavily upon human language.").

221 *See* Deborah M. Weissman, *The Community Politics of Domestic Violence*, 82 BROOK. L. REV. 1479, 1495 (2017); Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 261–63.

able to claim those rights, the word "victim" itself has been interpreted as having the potential to offer respect and dignity.[222] As mentioned above,[223] it is a multi-layered word that, in addition to its legal meaning, can all at one time express that a person needs help,[224] deserves protection,[225] is telling the truth (in contrast to a defendant who is not),[226] is accurate,[227] and is in the right (in contrast to the defendant "victimizer," who is in the wrong, and is indeed a bad person).[228] Some or all of these layers of meaning may make the word desirable,[229] particularly when seen in the context of the multiple people—particularly women,[230] particularly people of color[231]—whose accounts of harms and crimes have in many instances been devalued, distrusted, and challenged; whose champions have in many instances been absent.[232]

Thus in one recent Arizona case, a complaining witness sued the presiding judge after he denied her request to preclude reference to her as the "alleged victim."[233] She argued that "because the [state] Victims' Bill of Rights only uses the term 'victim' to refer to the crime victim, there is an implicit right to be referred to as such throughout the proceedings."[234] She noted that the Arizona State Constitution states that every victim in Arizona has the right to be treated throughout the criminal justice process with "fairness, respect, and dignity,"[235] and argued that "alleged victim" violates that right "because it calls into

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222 *See* Z.W. v. Foster, 422 P.3d 582, 583 (Ariz. Ct. App. 2018).

223 *See supra* Part I.

224 *See* Simon, *supra* note 38, at 1112.

225 *See id.*

226 *See* Aya Gruber, *Righting Victim Wrongs*, 52 BUFF. L. REV. 433, 437–38 (2004) ("The veracity of the victim, and by negative implication the dishonesty of the defendant, is . . . assumed *prima facie*."); *id.* at 437 n.18 (mentioning jury instructions to view defendant testimony with skepticism); Veteto v. State, 8 S.W.3d 805, 816 (Tex. Ct. App. 2000) ("Referring to A.L. as the victim instead of the alleged victim lends credence to her testimony that the assaults occurred and that she was, indeed, a victim.").

227 *See id.*

228 *See* Gruber, *supra* note 226, at 435; Minow, *supra* note 43, at 1433.

229 Though note that many reject the label "victim." *See infra* Section III.A.3.

230 *See* Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights*, 76 TEMP. L. REV. 645, 655 n.43 (2003).

231 *See, e.g.*, Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1271 (1991) (noting that "Black women are essentially prepackaged as bad women within cultural narratives about good women who can be raped and bad women who cannot").

232 *See id.*

233 *See* Z.W. v. Foster, 422 P.3d 582, 583 (Ariz. Ct. App. 2018).

234 *Id.* at 583.

235 *Id.* (quoting ARIZ. CONST. art 2, § 2.1).

question whether a crime was committed and whether someone is in fact a victim."[236] The court rejected her demand, finding that in the pre-adjudication setting "alleged victim" is accurate, given that "the case involves an alleged criminal act against an alleged victim."[237] (The court declined to comment on the tension between this accurate statement and the "victim" language used pre-adjudication by the state's constitution and statutes.[238]) However, the court went on to disclaim the notion that the term "alleged victim" is always appropriate, and to leave open the possibility that it might in certain cases "undermin[e] the victim's right to be treated with fairness, respect, and dignity."[239]

One may wonder whether the word "victim" and the associated legal entitlements are paltry substitutes for more meaningful sources of respect and dignity. Many scholars have noted that legal entitlements offered to "victims" ostensibly to aid them are limited in the extent to which they help, given that they may be motivated less by true understanding of, or interest in, the needs of those claiming harm,[240] and more by the interests of the state.[241] An examination, for example, of the type of "victim" who is eligible for state compensation reveals that it is frequently the "innocent" and compliant: bars to compensation for "victims" include the fact that they had a particular type of criminal record,[242] or were incarcerated or "engaged in an illegal act" at the time

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236 *Id.*

237 *Id.*

238 Note the Arizona definition of "victim" mentioned *supra* Section I.A ("'Victim' means a person against whom the criminal offense has been committed.").

239 *Foster*, 422 P.3d at 584.

240 *See* Meaghan Ybos, *The Media Frenzy Over Chanel Miller Boosts Mass Incarceration*, THE APPEAL (Sept. 30, 2019), https://theappeal.org/chanel-miller-brock-turner [https://perma.cc/CH3Q-WCB9] ("[V]ictims are often survivors of a criminal legal system that is just as cruel and punishing to them as it is to criminal defendants."); Allegra McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1638 (2019) (critiquing criminal prosecution as regards "the needs of survivors of harm"); Brittany Hailer, *Help or Hinderance: Is PA's Marsy's Law Too Ambiguous to Help All Victims?*, PITTSBURGH CURRENT (Oct. 29, 2019), https://www.pittsburghcurrent.com/pa-marsys-law-too-ambiguous-to-help-all-victims [https://perma.cc/N4R6-PE5B] (discussing possibility that provisions of Marsy's Law, such as repeated contact, notification, and requests to attend court, may re-traumatize).

241 *See* Weissman, *supra* note 221, at 1492; MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 77 (2006) ("Victims became a powerful weapon in the arsenal of proponents of the law-and-order agenda.").

242 *See* ALA. CODE § 15-23-23 (2020); ARK. CODE ANN. § 16-90-712(a)(5) (2020); MISS. CODE ANN. § 99-41-17(1)(j) (2020); WYO. STAT. ANN. § 1-40-106(c) (2020); MONT. CODE ANN. § 53-9-125(6) (2020); OHIO REV. CODE ANN. § 2743.60(E)(1) (2020); UTAH CODE ANN. § 63M-7-510 (2020); Alysia Santo, *The Victims Who Don't Count*, MARSHALL PROJECT (Sept. 13, 2018, 7:00 AM), https://www.themarshallproject.org/2018/09/13/the-victims-who-don-t-count [https://perma.cc/E6EW-69RD] (pointing out that seven states "bar people with a criminal record from receiving victim compensation," and drawing on records from two states to show

of the alleged crime,[243] or were not up to date with financial obligations,[244] or in compliance with vehicle insurance laws,[245] or that they did not report the alleged crime swiftly enough,[246] or did not cooperate with the authorities in its prosecution.[247] Respect and dignity, if in fact they are offered, are offered partially and with conditions.[248] Indeed, some states make their motivations plain, acknowledging that they are offering what they offer to "victims" in order to facilitate their

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that "the bans fall hardest on black victims and their families"); R.I. GEN. LAWS §§ 12-25-19(d)(1)(ii), (iii); WASH. REV. CODE § 7.68.060(4) (2020); *see also* CAL. CONST. art. I, § 28 (California's Marsy's Law definition of "victim" excludes those "in custody for an offense").

243 *See* S.C. CODE ANN. § 16-3-1510 (1976); ALA. CODE § 15-23-60(19) (1975); ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; N.D. CENT. CODE § 54-23.4-03; OR. REV. STAT. § 147.105(6); OHIO REV. CODE ANN. § 2743.60(E)(1) (2014); R.I. GEN. LAWS § 12-25-19(d)(2) (2020); TEX. art. § 56B.057(b)(6); UTAH CODE ANN. § 63M-7-510(1)(h) (2020); WASH. REV. CODE § 7.68.060(2)(b), (c) (2020); W.VA. CODE § 14-2A-14(e) (2020).

244 *See* OR. REV. STAT. § 147.105(6) (ordinarily no compensation for "a victim who owes a financial obligation ordered or imposed as a result of a previous criminal conviction"); WASH. REV. CODE § 7.68.060(4)(b) (2020).

245 *See* UTAH CODE ANN. § 63M-7-510 (2020) (no reparations for "the victim of a motor vehicle injury who was the owner or operator of the motor vehicle and was not at the time of the injury in compliance with the state motor vehicle insurance laws"); N.D. CENT. CODE § 54-23.4-01(8) (same).

246 *See* DEL. CODE ANN. tit. 11, § 9010(a)(5) (seventy-two hours); R.I. GEN. LAWS § 12-28-3 (1956); TEX. art. § 56B.053(a) (2021) ("not so late as to interfere with or hamper the investigation and prosecution"); WASH. REV. CODE § 7.68.060(b) (2020).

247 *See, e.g.,* R.I. GEN. LAWS § 12-25-19(d)(1)(i) (1956); R.I. GEN. LAWS § 12-28-3 (2020); ALA. CODE § 15-23-12(c) (1975); CAL. GOV'T CODE § 13956 (2019); CONN. GEN. STAT. § 54-208(c); DEL. CODE. ANN. tit. 11 § 9010(a)(3) (2011); FLA. STAT. § 960.13(1)(b) (2019); IND. CODE § 5-2-6.1-18; KAN. STAT. ANN. § 74-7305 (2019); KY. REV. STAT. ANN. § 49.370(2) (2020); LA. STAT. ANN. § 46:1809(3)(a)(ii) (2019); MASS. GEN. LAWS ch. 258C, § 2(c) (2018); MICH. COMP. LAWS § 18.356(2) (2020); MINN. STAT. § 611A.53(2)(2); MISS. CODE ANN. § 99-41-17(3); MO. REV. STAT. § 595.020(4) (2018); MONT. CODE ANN. § 53-9-125(4); NEV. REV. STAT. § 217.220(1)(e) (2017); N.M. STAT. ANN. § 31-22-7(D)(3); N.C. GEN. STAT. § 15B-11(c) (2011); N.D. CENT. CODE § 54-23.4-06(5); OHIO REV. CODE ANN. § 2743.60(C) (2014); OR. REV. STAT. § 147.015(1)(d); 18 PA. CONS. STAT. § 11.707(a)(4) (2002); S.C. CODE ANN. § 16-3-1170(4) (2017); S.D. CODIFIED LAWS § 23A-28B-25(c) (2018); TENN. CODE ANN. § 29-13-109(f) (2012) ("fully cooperates"); TEX. CODE CRIM. PROC. art. § 56B.107(a)(1); UTAH CODE ANN. § 63M-7-509(e); W.VA. CODE § 14-2A-14(d) (2020); Santo, *supra* note 242 (adding that most funds "deny reimbursement to victims who refuse to cooperate with law enforcement or who were committing a crime that contributed to their injury or death"); WASH. REV. CODE § 7.68.060(3) (2020); WIS. STAT. § 949.08(2)(d) (2016); WYO. STAT. § 1-40-106(a)(iv).

248 *See* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 623 (2009).

assistance with prosecution,[249] and sometimes even asserting a "duty" on the part of "victims" to provide that assistance.[250]

Thus, the expansion of this kind of "victim" usage and of the rights attached thereto brings troubling consequences for both those charged with crime and those who have suffered from crime. Defendants are in danger, not only because of all the ways in which this language usage might further condition us to assume criminal wrongdoing,[251] but also because many of the new rights offered to complainants—to resist discovery,[252] to be present at all proceedings,[253] to weigh in on bail and on pleas,[254] and so on—have the potential to detract from the protections offered to defendants pre-adjudication.[255] At the same time, more and more weight may be placed on the term and the associated rights as sources and indications of "respect" and "dignity," even

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249 *See, e.g.*, TEX. STAT. art. § 56B.002(b) (2020) ("It is the legislature's intent that the compensation of innocent victims of violent crime encourage greater public cooperation in the successful apprehension and prosecution of criminals."); State v. Blake, 63 P.3d 56, 60 (Utah 2002) (stating that the Utah "victims' rights" amendment was enacted in response to an increasing recognition that "[w]ithout the cooperation of victims and witnesses in reporting and testifying about crime, it is impossible in a free society to hold criminals accountable"); WASH. CONST. art. II, § 35 ("Effective law enforcement depends on cooperation from victims of crime."); HAW. REV. STAT. § 801D-1 (mentioning "the continuing importance of . . . citizen cooperation to state and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system"); N.J. STAT. ANN. § 52:4B-35 ("improved treatment" of "victims" is to be achieved through "the establishment of specific rights" with the aim of "enhanc[ing] and protect[ing] the necessary role of crime victims").

250 *See, e.g.,* S.C. CODE ANN. § 16-3-1505; UTAH CODE ANN. § 77-37-1; WASH. REV. CODE § 7.69.010; HAW. REV. STAT. § 801D-1; LA. STAT. ANN. § 46:1841; 18 PA. CONS. STAT. § 11.102(1); WIS. STAT. § 950.01 (2020).

251 *See* State v. Wilson, No. 0012014953, 2006 WL 1064179, at *3 (Del. Super. Ct. 2006) ("Wilson contends that prejudice occurred as the jury became conditioned to thinking of the complaining witnesses as victims.").

252 *See* ARIZ. CONST. art. II, § 2.1(5) (offering the right "[t]o refuse an interview, deposition, or other discovery request by the defendant"); Arizona ex rel Romley v. Superior Court, 836 P.2d 445 (Ariz. Ct. App. 1996) (in pre-adjudication context, owner of car allegedly struck by defendant was a "victim" under state constitutional and statutory law, and thus was entitled to refuse a pre-trial defense interview); Romley v. Hutt, 987 P.2d 218 (Ariz. Ct. App. 1999) (vacating trial court's ordering of a "pretrial victim interview," which had been based on a sense that "[w]here the two rights are in conflict the defendant's right to due process must be paramount").

253 State v. Gertsch, 49 P.3d 392, 400 (Idaho 2002) (stating that Gertsch's argument that witnesses should have been excluded "runs contrary to those victims' constitutional right to be present at Gertsch's trial").

254 *See, e.g.,* S.C. CONST. art. I, § 24.

255 *See* Gruber, *supra* note 230, at 666 ("Critics contend that the victims' rights movement in fact focuses more on increasing punishment than on empowering victims. . . Under this view, the victims' rights movement is more of an anti-crime, even anti-defendant movement, than a movement intended solely to give victims of crime more participation in the criminal process. As a result, the calls for the granting of party or near-party status are a means to empowering the victim only when the victim's interests are adverse to the defendant's.").

though those who have suffered from crime might be better supported by other means of honoring those values.

B. *Claims Being Treated like Crimes*

One way of understanding many of these usages is that they treat claims as equivalent to crimes.[256] This Subpart will analyze some of the dangers attending this kind of treatment, starting with law enforcement claims, then looking at complaining witness claims, and then considering dangers that exist in both contexts.

1. Law Enforcement Claims

One thing that appears to be happening in many of these usages is that law enforcement claims that we have a crime, and thus that we have a "victim," are being treated as sufficient to establish that there was a crime, and thus a "victim."[257] Some states, for example, are explicit that a "victim" is someone whom the government says is a "victim."[258] Oregon voters recently approved a constitutional amendment that defines "victim" as anyone "determined by the prosecuting attorney or the court to have suffered direct financial, psychological or physical harm as a result of a crime."[259] This is a definition that risks erasing the defense side of our two-sided adversary system,[260] and that seems to have inspired a little embarrassment among the state's judiciary. In a recent opinion, one appellate judge airbrushed away the problematic part of that definition (willing even to sacrifice syntax to do it), stating that "'[v]ictim' means any person . . . to have suffered direct financial, psychological or physical harm as a result of a crime . . . ."[261]

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256 *See id.* at 648 n.14 (reproducing Arizona's "victims' rights" constitutional provision, and noting that "[a]lthough the 'rights' listed above are all conferred at the pre-trial or trial stage, the Arizona Constitution's treatment of the victim assumes occurrence of a criminal offense and proper identification of the victim").

257 *See* People v. Solano, No. B222622, 2011 WL 1833375, at *11 (Cal. Ct. App. May 16, 2011).

258 *See* OHIO REV. CODE ANN. § 2930.01(H) (for purpose of statutory "victims' rights," "victim" is "[a] person who is identified as the victim of a crime . . . in a police report or in a complaint, indictment, or information"); DEL. CODE ANN. tit. 11, § 9401(7) (2020).

259 OR. CONST. art. I, § 42(6)(c) (providing, among other things, pre-adjudication rights to "victims").

260 *See* Davenport, *supra* note 207, at 24.

261 State v. Horton, 418 P.3d 31, 36 n.3 (Or. Ct. App. 2018) (Allen, J., dissenting) (second and third alterations in original) (quoting, selectively, OR. CONST. art. I, § 42(6)(c)).

Some might say that the treatment of law enforcement claims as constituting crimes is realistic,[262] but it is problematic.[263] First, it can contribute to the dominance of law enforcement vocabulary in legal and other contexts,[264] and thus, as will be discussed below,[265] can contribute to the dominance of law enforcement framing. Second, it contributes to an assumption of law enforcement truthfulness and accuracy.[266] This assumption is fueled by the common presentation of law enforcement accounts as definitive,[267] but conflicts with both our adversary system and documented instances of law enforcement dishonesty.[268]

2. Complaining Witness Claims

These usages also reveal examples of the treatment of claims by complaining witnesses as sufficient to establish crimes. Every state has "victim compensation" funds,[269] and they frequently allow claims even

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262 *See infra* Section IV.D.

263 *See* Roberts*, supra* note 22, at 997–1012 (identifying tendencies in the language of judges and legal scholars, among others, to merge law enforcement accounts with crime commission).

264 See *supra* Section I.B for instances of prosecutors using the word "victim" in their indictments and in the courtroom, and courts claiming that "victim" is cop-speak for "complaining witness."; *see also* Adam H. Johnson, *Media Frame: Stoking Panic Over "Flood" of "Juveniles" in Baltimore's Inner Harbor*, THE APPEAL (June 7, 2019), https://theappeal.org/media-frame-baltimore-inner-harbor-stoking-panic-flood-of-juveniles [https://perma.cc/FF45-5MJM] ("Baltimore media repeatedly ran headlines . . . referring to children as 'juveniles,' a loaded police term, or 'Copspeak' designed to dehumanize those we would normally call teenagers or kids."); Donna Coker, sujatha baliga, Alisa Bierria & Mimi Kim, *Harms of Criminalization and Promising Alternatives*, 5 U. MIA. RACE & SOC. JUST. L. REV. 369, 381 (2015) (noting choice not to use "language of law enforcement," including words like "perps, perpetrators, [and] offenders").

265 *See infra* Section IV.C.

266 *See* Helen A. Anderson, *Police Stories*, 111 NW. U. L. REV. ONLINE 19, 29 (2016) (describing how law enforcement accounts are often presented as if they can be assumed to be truthful and accurate).

267 *See, e.g.*, Andrew McCormick, *Shifting How Journalists Talk About People in Prison*, COLUM. JOURNALISM REV. (Jan. 22, 2019), https://www.cjr.org/analysis/language-prisoners-holiday-meal-incarceration.php [https://perma.cc/8XCY-9SAZ] (describing this phenomenon).

268 *See* Roberts, *supra* note 22, at 997–1012 (identifying tendencies to merge law enforcement accounts with crime commission in the language of judges and legal scholars, among others); *id.* at 993 (mentioning examples of prosecutor and police dishonesty); Paul Farhi & Elahe Izadi, *Journalists Are Reexamining Their Reliance on a Longtime Source: The Police*, WASH. POST (June 30, 2020, 11:49 AM), https://www.washingtonpost.com/lifestyle/media/journalists-are-reexamining-their-reliance-on-a-longtime-source-the-police/2020/06/30/303c929c-b63a-11ea-a510-55bf26485c93_story.html [https://perma.cc/5N6L-WGPT].

269 Vida B. Johnson, *When the Government Holds the Purse Strings but Not the Purse:* Brady, Giglio*, and Crime Victim Compensation Funds*, 38 N.Y.U. REV. L. & SOC. CHANGE 491, 492 (2014).

in the absence of any arrest or prosecution.[270] "Victims" can declare themselves to be such,[271] even when "victim" is defined to mean someone who has suffered a crime.[272] In some "victims' rights" provisions, the rights become available "at the time of [the] victimization,"[273] as opposed to the point at which law enforcement has intervened to assert the claim itself.[274]

As mentioned above,[275] one needs of course to understand the context that helped to permit the development of "victims' rights," a context that included—and still includes—a tendency to disbelieve certain kinds of claims from certain groups of people.[276] The call to #BelieveWomen, for example, stands in contrast to historical and current tendencies to do the opposite.[277]

It is problematic, however, to move from acknowledging our history of discrediting of claims by women and other subordinated groups to a stance that a complaining witness's claim establishes a crime.[278] To analyze this further, it may be helpful to isolate the particular component parts of such a stance. To identify a claim with a

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270 *See* ALA. CODE § 15-23-13 (2020); MICH. COMP. LAWS § 18.356(2) (2020); NEB. REV. STAT. § 81-1816(2) (2020); N.H. REV. STAT. ANN. § 21-M:8-h(III) (2020); N.J. STAT. ANN. § 52:4B-10 (2020); N.M. STAT. ANN. § 31-22-7(D) (2020); N.C. GEN. STAT. § 15B-14(a) (2020); OHIO REV. CODE ANN. § 2743.59(A) (2020); OKLA. STAT. ANN. tit. 21, § 142.11 (2020); OR. REV. STAT. § 147.125(1)(a) (2019); 18 PA. STAT. AND CONS. STAT. § 11.704(b)(2) (2020); 12 R.I. GEN. LAWS § 12-25-19(f) (2020); S.D. CODIFIED LAWS § 23A-28B-23 (2020); TENN. CODE ANN. § 29-13-109(f) (2020); UTAH CODE ANN. § 63M-7-509(2) (2020); VA. CODE ANN. § 19.2-368.6(C) (2020); WYO. STAT. ANN. § 1-40-110(c) (2020).

271 *See* LA. STAT. ANN. § 46:1804 (2020) ("A person who believes he is a victim of a crime enumerated in R.S. 46:1805 . . . shall be eligible for an award of reparations . . . .").

272 *See, e.g.*, LA. STAT. ANN. § 46:1802 (2020). When these statutes mention a burden of proof, it is typically a mere "preponderance." *See* N.D. CENT. CODE, § 54-23.4-02 (2019); 18 PA. CONS. STAT. § 11.707(a) (2020); S.D. CODIFIED LAWS § 23A-28B-9 (2020); TENN. CODE ANN. § 29-13-109(a); TEX. CODE ANN. 56B.103(a) (2021); 13 VT. STAT. ANN. tit. 13, § 5355(a) (2019).

273 *See* N.D. CONST. art. I, § 25 (noting that "all victims shall be entitled to the following rights, beginning at the time of their victimization . . . ."); FLA. CONST. art. I, § 16 (same).

274 McDonald, *supra* note 211, at 256 ("[G]enerally, a crime victim's rights accrue independent of the facts of the alleged crime, including any defense asserted, or the conviction of the defendant.").

275 *See supra* Section II.A.

276 *See* Kimberly Kessler Ferzan, *#BelieveWomen and the Presumption of Innocence*, *in* LXIV NOMOS: TRUTH AND EVIDENCE (forthcoming Fall 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3592545.

277 *See id*. (discussing various ways to interpret this demand).

278 Note that this is not necessarily the view of all who endorse the #BelieveWomen stance. *See, e.g.*, Sherry Colb, *What Does #BelieveWomen Mean?*, VERDICT (Nov. 7, 2018), https://verdict.justia.com/2018/11/07/what-does-believewomen-mean [https://perma.cc/5LP6-BFCR] ("#BelieveWomen tells us that we can . . . drop the skepticism that we have brought to rape accusations for centuries."); *id.* ("No one with any sense would deny that women have sometimes lied about rape.").

crime is a) to assume the claim's truthfulness;[279] b) to assume its accuracy; and c) to assume that the law and facts align in such a way that a crime, as defined by the law, can be said to have occurred. Much of the debate in this area focuses on a).[280] Those who support the broad use of the term "victim," and oppose attempts to restrict it, often argue in terms of credibility: they want the term as an affirmation of truthfulness, and they characterize resistance to the term as an attack on truthfulness.[281] Presumably people of all sorts sometimes lie,[282] and are sometimes inaccurate, but let us assume the opposite: let us assume that all complaining witnesses are truthful and accurately describe their experience. The much bigger issue—one that goes largely unacknowledged in this context, and whose disregard threatens core structures of criminal law—is c). The accounts of complaining witnesses, even if assumed to be truthful and accurate, may not track the relevant elements, and defeat any relevant defenses, in a way that corresponds to a crime as defined by law.[283] This will be discussed further below.[284]

3. Claims of Either Sort

To treat pre-adjudication claims of crime, whether made by law enforcement or by complainants, as equivalent to crime, is—among other issues—to permit one side's account to become the full story. To assume the truthfulness of a claim may well translate into assumptions of untruthfulness of the person facing criminal accusations.[285] But, as

279 *See* Gruber, *supra* note 230, at 649–50 (stating that the problem with the trend toward the "privatization" of the criminal law is that it "assumes the victim . . . is an incontrovertibly truthful, moral, and irreproachable entity").

280 *See* People v. Cannon, No. H033457, 2009 WL 2416050, at *16 (Cal. Ct. App. Aug. 7, 2009) ("Defendant asserted that whether F. was a victim in the case against Allen depended on whether her testimony at Allen's trial was truthful."); McDonald, *supra* note 211, at 270 (stating that the word "victim" "preserves the victim-witness's presumption of veracity").

281 *See* McDonald, *supra* note 211, at 250.

282 *See* Colb, *supra* note 278 (discussing those who claim to have been raped).

283 *See* Minow, *supra* note 43, at 1434 ("There is a strong tendency for people to couple a claim of victimhood with a claim of incorrigibility—that the victim knows better than anyone else about the victimization, and indeed, the victim cannot be wrong about it."); *id.* at 1439 ("Systematically disregarding the stories of particular kinds of victims has been so longstanding a problem that it may seem premature to criticize those occasions when victims do gain an uncritical hearing. But uncritical deference to the victim's perspective simply supplants one faulty view of knowledge and persuasion with another . . . .").

284 *See infra* Section II.B.3.

285 *See* State v. Almedom, No. 15AP-852, 2016 WL 1461839, at *1 (Ohio Ct. App. Apr. 14, 2016) ("[T]he trial court judge consistently referred to the girls as 'victims,'" which the appellate court said was, "in essence . . . telling the members of the jury that the girls were truthful when

suggested above, even if we assume truth and accuracy as regards the claim, there is a far more concerning issue—more concerning in part because it is rarely discussed. This issue is that identifying a claim (whether by law enforcement or by a complainant) with crime threatens the viability of core components of the criminal law, such as defenses and mens rea. Complainants or law enforcement may speak with absolute honesty and accuracy, but we rely on a two-sided adversary system because those qualities are not enough:[286] our criminal law encompasses defenses whose assessment may require hearing from the defense; our criminal law encompasses elements such as mens rea, whose assessment again may require hearing from the defense.[287] With every endorsement of a regime in which law enforcement's (or a complaining witness's) claims, no matter how truthful and accurate, are taken as establishing a crime, we threaten further to erode these core definitional components of crime. As a result, we threaten to reduce interest in providing adequate defense resources and protections.[288] We are at risk of adhering more to lay senses of what "crime" is than to formally defined (and often narrower) notions of what "crime" is.[289] As one example, the case law again and again reveals judges who are unable to appreciate that in a self-defense case there may be no crime, no wrong, and no tort, however grievous the injuries caused by the defendant may have been.[290]

To treat pre-adjudication claims of crime, whether they are made by law enforcement or by complainants, as equivalent to crime is often to assume prematurely the guilt of the person alleged to have committed

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they claimed that sexual abuse occurred, as opposed to telling the jury Almedom was truthful in his denial, or refusing to comment on the credibility of any potential witnesses."); Gruber, *supra* note 230, at 661–62 ("By giving these complainants rights as 'victims,' the law presupposes that the complainants' version of events is true (and by implication the defendants' is not true.) From the beginning, then, the designated victim—most likely designated by the prosecution—is innocent beyond doubt, absolutely truthful, and even deserving of reverence.").

286 *See* Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 701–02 (1999) ("There are some significant similarities between the crime control model and punitive forms of victims' rights. They both focus on factual as opposed to legal guilt. It is the commission of the criminal act as reported by victims to researchers or the police, not the state's ability to prove guilt beyond a reasonable doubt or compliance with legal rights, which defines victimization.").

287 *See* Gruber, *supra* note 230, at 661 ("Victims' Bills of Rights and other reforms confer pre-trial rights to 'victims' even in cases where the defense contests that any crime has occurred (i.e., non-injurious assault cases or rapes).").

288 *See* Roberts, *Arrests as Guilt, supra* note 22, at 1022–24.

289 *See id.* at 1017 ("[O]nly some homicides are crimes, and only some criminal homicides are murders. It is not unusual, however, for reporting of homicide rates to betray the assumption that they are crime rates and indeed to refer to them as 'murder rates.'"); *infra* Section IV.E.

290 *See supra* Section I.B.

a crime,[291] and to do so via means other than the formal systems and tools set up for adjudication.[292] Again, tendencies toward such premature judgments appear all over the law and legal scholarship—note, for example, the frequency with which judges, legislatures, and legal scholars use the word "offender" to refer to someone who has merely been arrested or charged[293]—and need to be resisted.[294]

III. POSSIBLE REFORMS

Part I examined a range of legal contexts in which uses of "victim" are in tension with a key definitional component of the word and key components of the criminal system. It revealed three methods commonly used to address that tension: first, ignoring it; second, defining "victim" in a way that lacks semantic support (i.e. as "alleged victim"); or third, defining "victim" in a way that lacks adjudicative support (i.e. as "person who has been harmed by a crime"). If, as Part II suggests, this tension remains problematic despite these unconvincing efforts at resolution, then the first thing that one might turn to is reform. This Part will recognize reform efforts that have been made in order to adjust language to fit better with the fundamental precepts of the system, and will discuss other ones that could be tried.

Trying to reform these language usages would involve using alternative terms in contexts that are squarely legal, criminal, and pre-adjudication. Such efforts could target a variety of groups that have contributed to the prevalence of the word "victim" in this kind of context, such as prosecutors, defense attorneys, judges, witnesses, and drafters of jury instructions.

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291 *See* State v. Sperou, 442 P.3d 581, 591 (Or. 2019) ("[J]ust as it would be improper for defendant to be called a 'criminal' or 'guilty person' throughout trial, giving a complaining witness a title that assumes a defendant's guilt tends to undermine the principle that the state has the burden to prove guilt beyond a reasonable doubt.").

292 *See* Capers, *supra* note 210 (detailing the use of "evidence" beyond the conception of the evidence rules drafters); Jason Wool, *Maintaining the Presumption of Innocence in Date Rape Trials Through the Use of Language Orders:* State v. Safi *and the Banning of the Word "Rape"*, 15 WM. & MARY J. WOMEN & L. 193, 201–02 (2008) ("[F]or Safi, the [language] order signified an attempt to prevent the prosecution from labeling him as guilty of a very serious crime before the jury had heard all of the facts."); JoAnne Young, *Banned Words at Rape Trial Resonate Years After*, LINCOLN J. STAR (July 6, 2015), https://journalstar.com/news/local/banned-words-at-rape-trial-resonate-years-after/article_54ab3019-6838-54d2-a982-f8712d171b88.html [https://perma.cc/J33V-X8NQ] (quoting defense attorney's statement that terms such as "victim" allow the prosecutor "to suggest through language that the accused is guilty of a crime, when they wouldn't be able to say it directly under the rules of evidence.").

293 *See* Roberts, *Arrests as Guilt, supra* note 22.

294 *See id.* at 1022–29 (discussing some of the risks of equating charges with guilt).

One can imagine a series of training programs that could be instituted to help bring about this kind of reform. So, for example, those who draft, apply, and revise jury instructions could be encouraged to screen them for the use of the word "victim," and to consider substituting less problematic alternatives.[295] Reform efforts in Vermont and Connecticut offer two potential models.[296]

Prosecutorial trainings could use various dimensions of this issue as a means of exploring what it might mean to "do justice" in trial litigation.[297] While it is clear that this prosecutorial mandate means something other than the single-minded pursuit of convictions,[298] scholars have highlighted the lack of more detailed guidance.[299] One potential facet of such a duty is taking an active role in shaping police behavior,[300] and this could include instructing police witnesses to avoid the word "victim" in their testimony.[301] Prosecutors could also consider the possibility of avoiding the word "victim" in indictments, given that the indictments may be read to the jury;[302] judges may import the word from the indictments into jury instructions;[303] and the word's appearance in indictments may be invoked to support a finding that its appearance elsewhere was harmless.[304] Prosecutors could also consider

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295 *See* People v. Allen, No. E065202, 2017 WL 4927712, at *8 (Cal. Ct. App. Oct. 31, 2017).

296 *See* CONNECTICUT JUDICIAL BRANCH CRIMINAL JURY INSTRUCTIONS, CRIM. JURY INSTRUCTION COMM. (2019), https://jud.ct.gov/JI/Criminal/Criminal.pdf [https://perma.cc/D2FW-B7A9] (mentioning decision to replace "victim" with "decedent" or "complainant" in statutory language used in jury instructions); VERMONT TRIAL COURT JURY INSTRUCTION PROJECT (2010), http://www.vtbar.org/UserFiles/Files/WebPages/Attorney%20Resources/juryinstructions/criminaljuryinstructions/notes.htm [https://perma.cc/5DKM-67GR] (instructions drafted in accord with recommendation that "judges, lawyers and witnesses (especially police) should avoid the word 'victim'").

297 *See* State v. Rodriguez, 946 A.2d 294, 301 (Conn. App. Ct. 2008) ("Referring to Castaneda as the victim, the state asserted, is consistent with the role of a prosecutor seeking justice for the citizens of the state.").

298 *See* Berger v. United States, 295 U.S. 78, 88 (1935).

299 *See* Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203 (2020).

300 *See* Roberts, *Arrests as Guilt*, *supra* note 22, at 1029 n.294.

301 *See* Gomez v. Director, TDCJ-CID, No 6:18cv89, 2019 WL 2521675, at *8 (E.D. Tex. Apr. 1, 2019) (Mr. Gomez "states that the prosecutor '[elicited] and/or coached witnesses they called to the stand to refer to the complainant as a "victim" during their testimony.'"); State v. Lott, No. A16-0969, 2017 WL 2226701, at *5 (Minn. Ct. App. May 22, 2017) ("The state has a duty to prepare its witnesses, prior to testifying, to avoid inadmissible or prejudicial statements.").

302 *See* State v. Albino, 24 A.3d 602, 616 (Conn. App. Ct. 2011) ("[T]he term 'victim' is also used in the indictment . . . as it is routinely in criminal charges which are read to the jury.").

303 *See* Casey v. State, 215 S.W.3d 870, 886 (Ct. Crim. Apps. Tex. 2007) (quoting trial judge rejecting defense objection to charge by saying that "I can't change the wording of the Indictment . . . [and] the application paragraph has got to track the Indictment").

304 *See* Jackson v. State, 600 A.2d 21, 25 (1991).

avoiding the word in their own utterances at trial,[305] given the risk that use of the term "may cause the jury to draw an improper inference that the defendant committed a crime against the complainant."[306] They should be particularly vigilant in those instances where language orders have been issued forbidding the word's use,[307] despite the fact that harmless error rules create an incentive for prosecutors to be (at least) careless as regards the risk of error.[308] Indeed, prosecutors could consider joining motions for language orders banning the use of the word "victim."[309]

Prosecutorial trainings could also use this issue as a means of exploring what it might mean to "do justice" beyond trial litigation. In analyzing how this goal might be applied to appellate litigation, prosecutors could consider whether it might include approaches that are something other than maximally aggressive.[310] They might, for example, refrain from arguing at the appellate level that certain errors were harmless.[311] Prosecutors could also examine the many ways in

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305 Mahone v. Eden, No. 1:15-cv-01009-PJK-KBM, 2019 WL 2724054, at *1 (D.N.M. June 28, 2019) ("[T]he case should be decided on the evidence, not labels."); Clarence Mabin, *Banned Words Debated in Sex Assault Case*, LINCOLN J. STAR (June 16, 2007), https://journalstar.com/news/local/banned-words-debated-in-sex-assault-case/article_172ad305-2315-58a0-8109-310661de8d1c.html [https://perma.cc/BDN6-5QH8] ("A prosecutor who has the facts does not have to rely on words like 'victim' or 'rape.'").

306 State v. Warholic, 897 A.2d 569, 584 n.7 (2006) (cautioning the state "against making excessive use of the term 'victim' to describe a complainant when the commission of a crime is at issue," for that reason).

307 *See* State v. Thompson, 76 A.3d 273, 286 (Conn. App. Ct. 2013).

308 *See* Darryl Brown, *Does it Matter Who Objects? Rethinking the Burden to Prevent Errors in Criminal Process*, 98 TEX. L. REV. 101, 118 (2020); Gabe Newland, *Harmless Error Explained*, THE APPEAL (Nov. 11, 2019), https://theappeal.org/harmless-error-explained [https://perma.cc/PGK7-APB9].

309 *See, e.g.*, Grady v. Warden, No. CV144006185S, 2019 WL 1093301, at *6 (Sup. Ct. Conn. Jan. 28, 2019) ("The prosecutor did not have an objection to the motion in limine and acknowledged that the state of the law supported the defense's motion . . . .").

310 *See* Jackson v. State, 600 A.2d 21, 25 (1991) (prosecution described as engaging in an "overreactive misreading" of the court's ruling on the word "victim" after they filed a "motion for clarification of opinion and/or rehearing en banc" due to concerns that the court's dicta resulted in "banning" of the use of the word "victim"); Anna Roberts, Foster v. Chatman: *An Egregious Batson Violation (and a SCOTUS Reversal)*, CASETEXT (May 24, 2016), https://casetext.com/analysis/foster-v-chatman-an-egregious-batson-violation-and-a-scotus-reversal [https://perma.cc/T7HT-TM42] (discussing the meaning of "doing justice" in the appellate context).

311 Newland, *supra* note 308; State v. Cortes, 885 A.2d 153, 158 n.4 ("Although the state concedes that the trial court's seventy-six references to the complainant as the "victim" in its jury charge were improper, it argues that such references constituted harmless error because the entire charge adequately conveyed that the complainant was merely alleged to be the victim of a crime. The state's contention is, at best, dubious. The trial court's seventy-six references to the complainant as the "victim" were neither isolated nor sporadic, but pervasive. . . . In the context

which they might fulfill their duty to seek to reform the criminal system.[312] Where they operate in a jurisdiction whose pattern instructions contain problematic uses of the word "victim," for example, they might take an active role in pushing for those instructions to be amended.

Judicial trainings could emphasize the importance of modifying statutory language and pattern instructions when crafting jury instructions,[313] where they contain problematic references to "victims," even if they might provide a safe harbor from reversal. Judges should also think about other ways to play a preemptive role on this issue, particularly given the multitude of obstacles that prevent defendants from getting relief after error occurs.[314] They could discuss, for example, whether the Supreme Court of Hawaii is right that "unless there are good reasons found by the court for permitting otherwise, the court should instruct all counsel that they and their witnesses must refrain from using the term ['victim.']"[315] Judges could usefully review the 1860 case *People v. Williams*, including the salutary warnings that "in a case of conflicting proof, even an equivocal expression coming from the Judge, may be fatal to the prisoner,"[316] and that "[a] judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts . . . ."[317]

Defense training in this area could provide useful opportunities to think about ways in which the defense might either combat or compound injustice. Defense attorneys could start by examining the importance of avoiding this usage themselves (unless sound strategic reasons support it), including in stipulations,[318] and proposed jury

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of the present case, the jury could have drawn only one inference from ['victim's'] repeated use, namely, that the defendant had committed a crime against the complainant.").

312 *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-1.2(f) (4th ed., AM. BAR. ASS'N) ("The prosecutor should seek to reform and improve the administration of criminal justice.") Part of that work might be resisting proposed reforms, such as Marsy's Law. *See, e.g.*, Shane Young, Heather Gatnarek, Scott Hofstra, Jan Skavdahl, & Sen. John Schickel, *OpEd: We All Agree, Marsy's Law Offers Only Empty Promises*, FORWARD KY. (Mar 2, 2020), https://forwardky.com/oped-we-all-agree-marsys-law-offers-only-empty-promises [https://perma. cc/3AUJ-5CY2] (prosecutor and others opposing Kentucky's Marsy Law).

313 *See* State v. Walston, 766 S.E.2d 312, 319 (N.C. 2014); State v. McKinney, No. A-1946-13T1, 2017 WL 370918, at *14 n.12 (N.J. Super. Ct. App. Div.) (noting that the word "victim" appears in some Model Jury Charges, but adding that "Model Jury Charges are not binding but merely helpful guides to trial judges").

314 *See supra* Section I.B.

315 State v. Mundon, 292 P.3d 205, 230 (Haw. 2012).

316 People v. Williams, 17 Cal. 142, 147 (1860).

317 *Id.*

318 *See* State v. Alger, 640 P.2d 44, 46–47 (Wash. Ct. App. 1982).

instructions.[319] Defense attorneys should also consider making greater use of in limine motions for language orders, particularly in light of the difficulty of "un-ringing the bell," and of getting relief, once an objectionable usage has occurred.[320] In one recent case, the federal defender moved for such an order but with no supporting case law or argument,[321] so dissemination of relevant precedent and potential arguments would be helpful, particularly given the relative novelty of such tools.[322] Examples of successful motions for language orders could persuade defense attorneys that you do not need to be Bill Cosby's attorney,[323] or Kobe Bryant's,[324] to try this (though their legal memoranda might provide useful templates). You do not have to be Jeffrey Epstein's counsel to contest declarations of "victim" status that occur before adjudication has occurred.[325] More generally, trainings could emphasize the importance of considering objections to the use of this word,[326] particularly given the obstacles to appellate review,[327] not to mention the risk of an ineffectiveness claim,[328] that silence creates. A useful cautionary tale would be a recent Vermont case, *State v. Burke*, in which, when a detective violated the pre-trial order, the only person

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319 *See* State v. Santiago, 917 A.2d 1051, 1060 (Conn. App. Ct. 2007) ("In his requested instruction concerning the crime of manslaughter in the first degree, the defendant used the term 'victim' eleven times.").

320 *See* State v. Sperou, 442 P.3d 581 (Or. 2019).

321 *See* United States v. Lussier, No. 18-CR-281, 2019 WL 2489906, at *5 (D. Minn. 2019); Liska v. Anchorage, No. A-6351 1998 WL 191166, at *2 (Alaska Ct. App. Apr. 22, 1998) (mentioning defense's failure to cite any authority).

322 *See* Wool, *supra* note 292, at 217–18.

323 Defendant's Motion In Limine to Exclude All References to Ms. Constand and the 404(b) Witness as "Victims," Pennsylvania v. Cosby, No. CP-46-0003932 (2017), https://www.montcopa.org/ArchiveCenter/ViewFile/Item/3818 [https://perma.cc/AFG6-EWYW].

324 *See* Wool, *supra* note 292, at 216 (citing Kobe Bryant's defense attorney for the proposition that "defense attorneys pretty routinely get orders precluding use of the term [victim] in cases where consent is the defense"); Dahlia Lithwick, *Gag Order*, SLATE (June 20, 2007, 7:27 PM), https://slate.com/news-and-politics/2007/06/a-nebraska-judge-bans-the-word-rape-from-his-courtroom.html [https://perma.cc/3AY6-V652] (noting a growing trend, and one that has expanded from the language of prosecutors to that of witnesses).

325 *See* Doe 1 v. United States, 359 F. Supp.3d 1201, 1211–12 (S.D. Fla. 2019).

326 *See* State v. Jorge P., 4 A.3d 314, 321 (Conn. App. Ct. 2014) ("The defendant acknowledges that although the court used the word 'victim' fourteen times during the trial, he did not object and that this claim is raised for the first time on appeal."); State v. Almedom, No. 15AP-852, 2016 WL 1461839, at *1 (Ohio Ct. App. Apr. 14, 2016) ("For reasons that are not clear, defense counsel [in a case that "involved allegations which in all likelihood would cause Almedom to be incarcerated for the rest of his life if found to be true"] never objected to the trial judge's comments even though the references began before any witnesses had testified."); *id.* ("Defense counsel sat mum during the repeated references [by the court to 'the victims.']").

327 Of course, there are claims that in at least some instances silence is strategic.

328 *See, e.g.*, *Almedom*, 2016 WL 1461839.

in the courtroom to object was Mr. Burke himself, who spoke up, saying "You're not supposed to be saying the victim. That's been barred."[329]

Defense training in this area could also provide illustrations of the importance of persistence, and of defense attorneys' ability to bring about change. Defense attorneys at both the trial and appellate level could study the example of North Carolina, where repeated defense challenges to the use of pattern jury instructions strewn with the word "victim" went nowhere,[330] until eventually the instructions were amended, at least as to one offense.[331] That a trial court practice—this or any other—is "deeply engrained" need not preclude efforts to change it.[332] Defense attorneys could also be trained on affirmative litigation prospects: members of the defense bar were key to litigation efforts aimed at blocking Marsy's Law in various states.[333]

Police trainings could be useful too. The topic of how to refer to complaining witnesses could be included in police officers' training on how to testify; if the topic is already included,[334] then the prescription could be changed. And if it is true that part of why one hears police witnesses use the word "victim" for complaining witness so often is that

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329 Burke v. Pallito, No. 2:12 CV 197, 2013 WL 6145810, at *20 (D. Vt. Nov. 21, 2013) (adding that the judge's response was "Oh, let Mr. Maguire [the defense attorney] handle it," and that in response to two further violations of the order "there was no objection").

330 *See, e.g.,* State v. Carrigan, 589 S.E.2d 134, 139 (N.C. Ct. App. 2003) (rejecting defendant's argument that trial court's use of "victim" forty times in jury instructions was plain error, and mentioning in support of its finding the fact that "the word 'victim' is used in North Carolina pattern jury instructions for first degree rape and first degree sexual offense charges"); State v. Tarleton, No. COA12-916, 2013 WL 1901843, at *5 (N.C. Ct. App. May 7, 2013) ("Our courts typically do not find plain error when the trial court referred to the witness as 'the victim' in the jury charge, particularly when the instructions follow the pattern instructions."); State v. Kirk, No. COA10-566, 2010 WL 5421434, at *3 (N.C. App., Dec. 21, 2010) ("[T]he relevant pattern jury instructions use the phrase 'the victim' throughout.").

331 *See* N.C.P.I.—CRIM. 207.45.1 (amended 2016), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/pji-master-2019/criminal/r207.45.1%20[2016].pdf [https://perma.cc/XG62-FP6F] (amended post-*Walston*, so that "victim" is replaced throughout by "alleged victim"); *see also id. at* 207.45.1A (amended 2016) (for later alleged offenses).

332 Kirk Johnson, *Judge Rules [Kobe] Bryant Accuser May Not Be Called 'Victim,'* N.Y. TIMES, June 2, 2004, at A13 ("Legal experts said the judge's decision was highly unusual, mostly because lawyers so rarely question the deeply engrained terms of trial court.").

333 *See* Westerfield v. Ward, 599 S.W.3d 738 (Ky. 2019) (association of criminal defense lawyers among those getting Kentucky Marsy's Law amendment declared unconstitutional); Montana Ass'n of Ctys. v. State, 404 P.3d 733 (Mont. 2017) (same in Montana).

334 *See* Adam Johnson & Jim Naureckas, *Copspeak: When Black Children Suddenly Become 'Juveniles*,' FAIR (Mar. 19, 2018), https://fair.org/home/copspeak-when-black-children-suddenly-become-juveniles [https://perma.cc/PTF3-NDEQ] (saying, as regards the word "juvenile" being used by the police in place of "child," that it is part of "an institutional lexicon developed over decades of public relations fine-tuning").

"victim" is the term of art among police for complaining witnesses,[335] the term of art should perhaps be changed, given that it is in tension with fundamental aspects of the criminal law.

There is certainly potential for positive change here. Since language has the ability either to reinforce or to challenge assumptions,[336] the hope might be that as language shifts, the attitudes expressed and reinforced by the language might shift as a result.[337] Efforts to change language use are strengthening as regards words like "felon,"[338] "inmate,"[339] "convict,"[340] "prisoner,"[341] "perpetrator,"[342] "offender,"[343] "ex-con,"[344] ex-offender,[345] "rapist,"[346] "criminal,"[347] and so on;[348] perhaps the same could happen with "victim." One can see positive language change in adjustments made to some jury instructions that were challenged on the basis that they referred to the complainant

335 *See* People v. Johnson, No. C047560, 2005 WL 3476530, at *6 (Cal. Ct. App. Dec. 20, 2005) (police witness "indicated people are commonly either suspects, victims, or witnesses").

336 Victoria Law & Rachel Roth, *Names Do Hurt: The Case Against Using Derogatory Language to Describe People in Prison*, REWIRE NEWS GRP. (Apr. 20, 2015, 1:53 PM), https://rewire.news/article/2015/04/20/case-using-derogatory-language-describe-person-prison [https://perma.cc/7NB2-3VA2] ("The way we write and speak helps shape people's perceptions about the world.").

337 *See* A. Rachel Camp, *Pursuing Accountability for Perpetrators of Intimate Partner Violence: The Peril (and Utility?) of Shame*, 98 B.U. L. REV. 1677 (2018) (describing how society's perceptions about individuals change based on labels assigned).

338 *See* Law & Roth, *supra* note 336.

339 *See Words Matter: Using Humanizing Language*, THE FORTUNE SOC'Y, https://fortunesociety.org/wordsmatter [https://perma.cc/65A5-VY8G] (listing "words to avoid" such as "offender, inmate, felon, criminal, convict, prisoner, delinquent," and "sex offender").

340 *See id.*

341 *See id.*

342 *See* Erin George & Ravi Mangla, *How Dehumanizing Language Fuels Mass Incarceration*, COMMON DREAMS (Oct. 1, 2019), https://www.commondreams.org/views/2019/10/01/how-dehumanizing-language-fuels-mass-incarceration [https://perma.cc/84P6-CT5V] ("Decarceration advocates must hold policymakers, media outlets, and public figures accountable for promoting a language that allows for shifts in the broader consciousness.").

343 Law & Roth, *supra* note 336; Lynn S. Branham, *Eradicating the Label "Offender" From the Lexicon of Restorative Practices and Criminal Justice*, 9 WAKE FOREST L. REV. ONLINE 53 (2020).

344 Law & Roth, *supra* note 336.

345 *See id.*

346 McCormick, *supra* note 267.

347 Nancy G. La Vigne, *People First: Changing the Way We Talk About Those Touched by the Criminal Justice System*, URBAN WIRE (Apr. 4, 2016), https://www.urban.org/urban-wire/people-first-changing-way-we-talk-about-those-touched-criminal-justice-system [https://perma.cc/22BF-44Q5].

348 *See* Deanna R. Hoskins, *Language Matters for Justice Reform*, THE HILL (June 30, 2019, 5:55PM), https://thehill.com/blogs/congress-blog/politics/451099-language-matters-for-justice-reform [https://perma.cc/M9T6-L8WW].

as "the victim;"[349] in the increasing use of language orders;[350] and in some shifts in the language used in statutes and rules.[351]

Several complexities need to be addressed by those attempting this kind of reform, and a discussion of four of them follows: the scale of the project; the scale of related projects; the risk of entrenching the system; and the question of which alternative term to use.

A. *Scale of this Task*

Attempting to end usages of this kind would be a significant undertaking. Every state's law now contains at least one provision that refers to complainants as "victims;"[352] one finds the same in federal statutes.[353] In addition, "victim" appears in pre-adjudication legal contexts not just on its own but in all sorts of combinations, such as "victim support,"[354] "victim advocate,"[355] "crime victim assistance board,"[356] "counselor-victim privilege,"[357] and so on.

In addition, while this Article is focused on those pre-adjudication legal contexts where one would expect legal definitions to hold sway, those pushing for reform may have to confront the question of where the line should be drawn. What should one say, for example, about media reports? What should one say about legal scholarship?[358] What

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349 Thus, for example, in a 2018 California case, the defense complained that the California jury instruction on homicide and self-defense referred to "the victim." People v. Lovely No. F071158, 2018 WL 1980960 (Cal. Ct. App. May 10, 2018). The instruction now indicates that judges should use the name of the "decedent/victim" instead. *505 Justifiable Homicide: Self-Defense or Defense of Another*, JUD. COUNCIL OF CAL. CRIM. JURY INSTRUCTION (Nov. 2020 ed.)

350 *See* Lithwick, *supra* note 324.

351 For example, West Virginia's new version of 61-8B-11 uses "alleged victim" several times, in contrast to the previous version's exclusive reliance on "victim." W. VA. CODE § 61-8B-11 (2020).

352 Compilation of state provisions on file with author.

353 *See, e.g.*, United States v. Turner, 367 F. Supp. 2d 319, 325–26 (E.D.N.Y. 2005) (discussing the Crime Victims' Rights Act, 18 U.S.C. § 3771); Victim Rights Clarification Act of 1997, Pub. L. No. 105-6, 111 Stat. 12 ("[S]hall not order any victim of an offense excluded from the trial of a defendant accused of that offense . . . .").

354 *See, e.g.*, OKLA. STAT. ANN. tit. 22, § 60.2 (2019).

355 *See* WASH. REV. CODE § 7.69.030(10) (2009); State v. Gault, 39 A.3d 1105, 1114 (Conn. 2012); KY. REV. STAT. ANN. § 421.575 (2020).

356 *See* IOWA CODE § 915.82 (2013).

357 *See, e.g.*, People v. Stanaway, 521 N.W.2d 557, 564 (Mich. 1994).

358 *See, e.g.*, Paul H. Robinson, *Should the Victims' Rights Movement Have Influence over Criminal Law Formulation and Adjudication?*, 33 MCGEORGE L. REV. 749, 755 (2002) ("There are a variety of proposals for victim involvement in the criminal justice process. Many are unobjectionable, even important. For example, a recent U.S. Department of Justice report urges that victims have a right to notification of bail . . . .").

about courts—including our Supreme Court—that regularly use "victim" in their opinions to refer to those alleged to have been harmed by crime?[359] The further one gets from contexts such as jury instructions and "victims' rights" amendments, where one would expect legal definitions to hold sway, the harder it becomes to draw a clear line between "victim" as legal term and "victim" as lay concept, and the harder it becomes to lay down prescriptions, particularly given the power of arguments that those who claim harm should be able to choose their own terms.[360]

Finally, if the use of the word has indeed come to be seen by some as a means of bestowing things like fairness, respect, and dignity,[361] its retraction is likely to provoke resistance.[362] This may be particularly true

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359 This is quite common in the Supreme Court's Confrontation Clause cases, for example. *See, e.g.*, Michigan v. Bryant, 562 U.S. 344, 366 (2011) ("Another factor the Michigan Supreme Court did not sufficiently account for is the importance of informality in an encounter between a victim and police."); *id.* at 368 ("Victims are also likely to have mixed motives when they make statements to the police."); Ohio v. Clark, 576 U.S. 237, 242 (2015) ("[U]nder Ohio Rule of Evidence 807, which allows the admission of reliable hearsay by child abuse victims, the court ruled that L.P.'s statements to his teachers bore sufficient guarantees of trustworthiness to be admitted as evidence."); Maryland v. Craig, 497 U.S. 836, 853 (1990) ("We . . . conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."). *But see* Idaho v. Wright, 497 U.S. 805, 808 (1990) ("The alleged victims were respondent's two daughters, one of whom was 5 1/2 and the other 2 1/2 years old at the time the crimes were charged."). Here the Supreme Court is just used as an example. This usage abounds in lower courts too. *See, e.g.*, United States v. Jones, No. 15-174, 2016 WL 10704518, at *5 (E.D. La. Jan. 28, 2016) ("By its second motion, the government seeks to preclude the defendant from offering evidence or eliciting testimony concerning the victims' prior sexual history."); Stoot v. City of Everett, 582 F.3d 910, 919 (9th Cir. 2009) ("Law enforcement officers may obviously rely on statements made by the victims of a crime to identify potential suspects."); United States v. Patane, 304 F.3d 1013, 1016 (10th Cir. 2002) ("We reject any suggestion that victims of domestic violence are unreliable witnesses whose testimony cannot establish probable cause absent independent corroboration."). Some courts, however, are careful to note the complications involved in using the term pre-adjudication. *See, e.g.*, United States v. Thompson, 178 F. Supp. 3d 86, 89 n.1 (W.D.N.Y. 2016) ("The 'victims' are, of course, 'alleged victims.' For the sake of brevity, however, the Court refers to them as 'victims.'") (citing FED. R. EVID. 412(d) ("In this rule, 'victim' includes an alleged victim.")); United States v. Underwood, 47 M.J. 805, 809 (A.F. Ct. Crim. App. 1997) ("I use the term alleged victim, not victims because they're not victims until someone decides they're victims.").

360 *See* Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 83 n.1 (2020) (stating that in choosing between "victim" and "survivor," the best practice "may be to follow the lead of the person who has experienced the violence").

361 *See, e.g.*, NAT'L CRIME VICTIM L. INST., *supra* note 149, at 2 (stating that the use of "alleged victim" or "complainant" violates "a victim's right to be treated with fairness, dignity, and respect").

362 *See* Gruber, *supra* note 230, at 655 n.43 ("[T]he victims' rights movement was intimately tied to the outcry against unfair treatment of battered women by the legal process.").

in light of past and present failings—public and private—to accord fairness, respect, and dignity to members of subordinated groups.

B. *Size of Related Tasks*

The reform project in question would be an ambitious one not just because of the pervasiveness of this usage but also because a consistent approach would mean that multiple other terms would have to be uprooted. Throughout legal scholarship, statutes, constitutional provisions, and courtroom terminology one finds other phrases that appear to take a pre-adjudication allegation and treat it like a fact, and specifically like a crime. These include "crime scene,"[363] "rape kit,"[364] "rape crisis counselor,"[365] "rape shield,"[366] "fleeing felon,"[367] "juvenile offender"[368] "youthful offender,"[369] "adolescent offender,"[370] "murder weapon,"[371] "perp walk,"[372] "sexual assault kit,"[373] "sexual assault nurse

363 *See* Ridling v. State, 203 S.W.3d 63, 75–76 (Ark. 2005); Pierce v. State, No. 111, 2009 WL 189150, at *1 (Del. Jan. 16, 2009) (mentioning the defendant's argument that his counsel "should have objected to the terms 'victim,' 'sexual assault,' and 'crime scene'").

364 *See* Order to Show Cause Plaintiff's Response at 4, Bowen v. Cheuvront, No. 4:07CV3221, 516 F. Supp. 2d 1021 (D. Neb. 2007), http://www.onpointnews.com/docs/cheuvront2.pdf [https://perma.cc/8CHR-CP4Z] (stating that the court "ordered that the 'rape kit' or 'sexual assault kit' be referred to as the 'sexual examination kit' and the SANE (Sexual Assault Nurse Examiner) Nurse be referred to as the 'sexual examiner'").

365 *See, e.g.*, People v. Albarran, 2018 IL App (1st) 151508, ¶ 68.

366 *See* John Leubsdorf, *Fringes: Evidence Law Beyond the Federal Rules*, 51 IND. L. REV. 613, 628 (2018) ("[R]ape shield provisions . . . limit cross-examination of complaining witnesses about their sexual history.").

367 *See* Tennessee v. Garner, 471 U.S. 1, 12 (1985).

368 *See Crimes Committed by Children Between 7–18*, N.Y. COURTS, https://www.nycourts.gov/courthelp/Criminal/crimesByChildren.shtml [https://perma.cc/BYU4-QH8V].

369 *See id.*

370 *See Adolescent Offenders*, N.Y. COURTS, https:/www.nycourts.gov/courthelp/Criminal/adolescentOffender.shtml [https://web.archive.org/web/20191220053848] ("Due to the Raise the Age law, all 16 years olds [sic] charged with felony offenses on or after October 1, 2018, are treated as adolescent offenders (AO).").

371 *See* State v. Kurrus, 49 A.3d 260, 271 (Conn. App. Ct. 2012) (stating that "the repeated use of the words 'victim,' 'murder' and 'murder weapon' throughout trial by the prosecutor is improper").

372 *See* Roberts, *Arrests as Guilt, supra* note 22, at 999 (pointing out that at the arrest stage there is no "perp[etrator]").

373 *See* Bowen v. Cheuvront, 516 F. Supp.2d 1021, 1023 (D. Neb. 2007) (mentioning that the court issued an order "forbidding all witnesses [from using] the words: 'rape,' 'victim,' 'assailant,' 'sexual assault kit' and 'sexual assault nurse examiner.'").

examiner,"[374] and "sexual assault response team."[375] The use of words that could be said to contain embedded assumptions of crime and guilt is pervasive and so engrained as to go largely unmentioned.[376]

C. *Risk of Entrenching the System*

Those pushing for reform in this area run two related risks: first, that by attempting to ameliorate an aspect of the criminal system they might appear to, or might actually, reinforce that system.[377] Abolitionists have made a persuasive case that so-called "reformist reforms"[378]—those that fail to shrink the criminal system—may have the undesirable effect of entrenching that system.[379]

The second and related risk is that by objecting to the use of the word "victim" pre-conviction, reformers might appear to, or might actually, endorse its use post-conviction. I have written elsewhere about elements of our criminal system—the overwhelming pressure to plead guilty, for example, and the inadequate provision of defense resources—that ought to unsettle the apparent willingness of some academics to treat crime conviction as synonymous with crime commission.[380] That same analysis cautions against comfort with the word "victim"—if one takes it to mean someone who has suffered crime—even in the post-conviction context.

D. *Choice of Alternative Terms*

None of the obvious alternative terms is without its critics. "Victim" is a fraught term for reasons other than those on which this piece centers;[381] sticking an "alleged" in front fails to remove those

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374 *See id.*

375 *See, e.g.*, People v. Lemma, No. D073689, 2019 WL 2520692, at *2 (Cal. Ct. App. June 19, 2019).

376 *See* Tollefson v. Stephens, No. SA:14-CV-144-DAE, 2014 WL 7339119, at *6 (W.D. Tex. Dec. 23, 2014) ("Terms like 'victim,' 'murder,' 'crime,' and 'crime scene' are frequently used in homicide trials . . . .").

377 *See, e.g.*, McLeod, *supra* note 240, at 1643 (stating that "efforts to reform criminal legal processes in order to attempt to realize idealized visions of justice are doomed to simply further entrench existing injustices if they are not accompanied by more transformative demands").

378 *See, e.g.*, *id.* at 1616 n.21.

379 *See id.* at 1643.

380 *See* Roberts, *Convictions as Guilt, supra* note 2.

381 *See, e.g.*, Weissman, *supra* note 221, at 1492 n.61 (noting that the term "victim" is a "'passive notion' derived from the Latin word for a sacrificial animal").

concerns and may add new ones.[382] "Complaining witness" may be ambiguous.[383] And terms such as "complaining witness," "complainant," or "prosecuting witness"[384] may fail accurately to convey the fact that prosecution in our system is generally led by the prosecutor,[385] rather than by the individual whose injury is alleged;[386] a similar problem attaches to "accuser."[387] "Prosecutrix" has unwelcome gendered overtones.[388] And one could go on. One defense attorney objected to "complainant" in a homicide case on the grounds that it appeared to imply that the deceased was "not an accident victim,"[389] and that it "raised a prejudicial inference that she was 'crying for vengeance from her grave.'"[390] Terms like "survivor" and "harmed party,"[391] even

382 Note that the word may dissatisfy opposite camps, being taken on the one hand as a meaningless technicality and understood to be so, and on the other hand a slur on a complainant's credibility. For the latter, see NAT'L CRIME VICTIM L. INST., *supra* note 149, at 2 ("Synonyms for 'alleged' include 'dubious,' 'questionable,' 'suspect,' 'suspicious,' and 'so-called.' Referring to a victim in such a manner implies that the victim is not truly a victim, but is instead fabricating the charges."); McDonald, *supra* note 211, at 269 ("Use of the modifier—'alleged'—casts aspersions on the credibility of the accuser . . . ."); Z.W. v. Foster, 422 P.3d 582, 583 (Ariz. Ct. App. 2018) ("Z.W. challenges the superior court's ruling denying her request to preclude reference to her as the 'alleged victim.' She argues [unsuccessfully] that allowing defense counsel to refer to her in that manner, rather than simply as the 'victim,' necessarily violates her statutory and constitutional rights under Arizona's Victims' Bill of Rights.").

383 For other concerns, see McDonald, *supra* note 211, at 269 ("The prosecution in People v. Bryant argued that use of any word other than victim would carry with it potential confusion and inaccuracy. The rationale was that the use of the terms 'accuser' or 'complaining witness' violated the victim's constitutional and statutory right to be treated with fairness, respect, and dignity. 'Accuser,' the government argued, is confusing, misleading, and legally inaccurate, while 'complaining witness' can refer to the victim, the outcry witness, or the police officer who submitted reports.").

384 *See* Holloway v. United States, 526 U.S. 1, 10 n.8 (1999).

385 *See* I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561 (2020); Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331.

386 *See* McDonald, *supra* note 211, at 270.

387 *See id*. For other concerns, see Michele Sharpe, *Who's a Victim? Who's an 'Accuser'? The Loaded Language of Sexual Assault*, WASH. POST (Sept. 27, 2018, 5:29 PM), https://www.washingtonpost.com/outlook/2018/09/27/whos-victim-whos-an-accuser-loaded-language-sexual-assault [https://perma.cc/W9TB-ANXW] ("A superficially neutral term such as 'accuser' comes freighted with an entire patriarchal history."); Johnson, *supra* note 332 ("Some women's advocacy groups say that 'accuser' is prejudicial and should not be used.").

388 *See* Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765 n.4 (1986) ("The designation 'prosecutrix' is fast becoming obsolete because of feminist assertions that it evokes the image of a vindictive woman whose testimony is suspect.").

389 Turro v. State, 950 S.W.2d 390, 405 (Tex. App. 1997).

390 *Id.*

391 *See* Katirai, *supra* note 360, at 83 n.1 ("The word 'victim' is typically used by members of law enforcement and within the context of courtroom proceedings, but for many, 'survivor' speaks to a sense of empowerment."); Danielle Sered, *A New Approach to Victim Services: The*

while they steer clear of appearing to assume crime commission, encapsulate related factual conclusions—that something bad happened, that it caused harm—that still are problematic in pre-adjudication criminal contexts, when that remains to be proven.

Maybe it's not strange that the perfect word does not present itself. There is a tension within a system that purports to champion the individual even while emphasizing that the prosecution runs the show:[392] even as "victims' rights" become more numerous, the process is still not led by those who have them.[393]

However, while the criminal system persists, if we take seriously the objection to a term that appears to answer one of the questions that is to be answered by other means, then options such as "alleged victim" or "complainant," or (where death has occurred) "decedent," are preferable to "victim." In some contexts, using the person's name is also a possible option.

IV. WHERE MIGHT THIS USAGE COME FROM?

The previous Part laid out some complications with taking a reformist approach to this issue. This Part expands on one such complication, suggesting that a necessary part of assessing the likely value of reform efforts is attempting to understand what is fueling the problematic phenomenon.

The previous Part offered reasons to be concerned about the potential effects of this usage. This Part suggests that there are also reasons to be concerned about what might potentially *contribute* to this usage. It suggests that it is hard for language usages to gain and maintain such prevalence—particularly where they are usages that clash with legal definitions—unless something powerful fuels them.[394] What might it be that leads even those who trade in words, definitions, precision,

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Common Justice Demonstration Project, 24 FED. SENT'G. R. 50, 50 (2011) (describing choice to refer to "harmed party" and "responsible party").

392 *See* State v. McKinley, No. 8-05-14, 2006 WL 1381635 (Ohio Ct. App. May 22, 2006); Julia O'Donoghue, *DAs Oppose Bill to Stop Jailing Rape, Abuse Victims*, TIMES-PICAYUNE: NOLA.COM (July 22, 2019, 3:12 PM), https://www.nola.com/news/article_8ef63206-0a0a-5717-bf06-fb9868f07414.html [https://perma.cc/XVV6-LX9B]; Caplow, *supra* note 26, at 12 ("Most prosecutors are chary of victim participation, fearing undue interference with their case processing, resulting in at best begrudging, minimal inclusion in, but more often virtual exclusion from, all decision making.").

393 *See* Weissman, *supra* note 221, at 1494.

394 *See* Roberts, *Arrests as Guilt, supra* note 22, at 1012 (hypothesizing that a common error about plea bargaining rates would not persist so widely were it not in tune with common assumptions).

and accuracy, to adopt this word that appears to elide the most central distinction within criminal procedure and criminal law theory, often without acknowledging the issue?[395] And what can we learn about our criminal system and alternatives to our system through consideration of such forces? This investigation opens up vast areas of inquiry, and thus the aim here is merely to touch on several possibilities, leaving further exploration for future scholarship.

A. *Desire to Dignify*

As mentioned earlier, one way in which the term "victim" has been understood is as a way of according respect and dignity,[396] and of acknowledging harm.[397] There is a scholarly consensus that this nation has often failed those who have come forward to allege crimes, particularly those from marginalized groups. Those failures have included disbelief that the alleged act occurred,[398] or, even if it occurred, that it inflicted a harm that mattered.[399] "Victim" is a term that can be deployed to combat all those tendencies, because it can potentially convey the existence of harm, crime, and impact on a life that matters. It can assert that invasions of bodily integrity and property rights are harms that are taken seriously. So it may be that pre-adjudication use of this term is fueled at least in part by a desire to display, as quickly as possible, trust, acknowledgement of harm, and acknowledgement of worth.

There are irreconcilable tensions in using this word for these purposes in these contexts, however. First, in the kind of context on which this Article focuses, to use the word "victim" risks resolving a

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395 *See* United States v. Turner, 367 F. Supp.2d 319, 325–26 (2005) (acknowledging the issue).

396 *See supra* Section II.A. Note that the backers of Marsy's Law chose to invoke respect and dignity on the ballot in Kentucky and Pennsylvania. *See, e.g., Election Ballot*, *supra* note 13 ("Are you in favor of providing constitutional rights to victims of crime, including the right to be treated fairly, with dignity and respect, and the right to be informed and to have a voice in the judicial process?"); *see also* League of Woman Voters of Pa. v. Boockvar, No. 578 M.D. 2019, 2019 Pa. Commw. Unpub. LEXIS 623 (Pa. Commw. Ct. Oct. 30, 2019) (noting that the Pennsylvania ballot question, which invokes "fairness, respect and dignity" for "crime victims," "omits all of the many changes to existing constitutional provisions affording rights to the accused"); *see also Ohio Issue 1, Marsy's Law Crime Victim Rights Initiative (2017)*, BALLOTPEDIA, https://ballotpedia.org/Ohio_Issue_1,_Marsy%27s_Law_Crime_Victim_Rights_Initiative_(2017) [https://perma.cc/2EWP-KGXE] (Ohio ballot question invoking "due process, respect, fairness, and justice").

397 *See supra* Section I.B.

398 *See, e.g.*, Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 1–2 (2017).

399 *See id.* at 27–28.

question—whether a crime occurred—that is meant to be resolved via evidentiary and criminal processes, and may pose a threat to criminal defendants and to the system that prosecutes them. But second, if part of what fuels the call for victimhood to be proclaimed from the earliest moment is a sense of the need to respect those who have been disrespected, to value those who have been devalued, and to honor the bodily integrity and property rights of those for whom they have been always uncertain, our criminal system is an inapt place to turn. Historically and still, this system disproportionately targets people of color, and particularly African-Americans; historically and still, it devalues time, lives, life goals, and family ties;[400] historically and still, it tramples on bodily integrity and exacerbates racialized wealth disparities.

Scholars have made the case that a system that is "built upon the dehumanization of the Black body,"[401] and other forms of racial subordination,[402] lacks the credibility to say that it can protect Black "victims."[403] That more broadly, a system that has wrought such harm on vulnerable groups cannot credibly champion them.[404] That a system that imposes such harm, pain, damage, death, and exposure to sexual

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400 *See* Roberts, *Convictions as Guilt, supra* note 2, at 2517–18.

401 Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 989 (2019) (stating that "the dehumanization and denigration of the Black body" is inherent to "the modern-day criminal justice system").

402 *See* Darren Lenard Hutchinson, *Who Locked Us Up? Examining the Social Meaning of Black Punitiveness*, 127 YALE L.J. 2388, 2393–94 (2018) (reviewing JAMES FORMAN, JR., LOCKING P OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017)); Elisabeth Epps, *Amber Guyger Should Not Go To Prison*, THE APPEAL (Oct. 7, 2019), https://theappeal.org/amber-guyger-botham-jean [https://perma.cc/N28P-JJYM] ("If we are ever to dismantle white supremacy, we must be willing to consider that its chief foot servant, the criminal legal system, must be abolished . . . ."); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1604 (2017) ("[T]hese institutions enforce an undemocratic racial caste system originating in slavery.").

403 *See* Micah Herskind, *Some Reflections on Prison Abolition*, MEDIUM (Dec. 7, 2019), https://medium.com/@micahherskind/some-reflections-on-prison-abolition-after-mumi-5197a4c3cf98 [https://perma.cc/L3Y2-QWE2] ("The history of mass incarceration unequivocally teaches us that embracing criminalization in any form means embracing anti-Blackness. It teaches us that if we want to combat harm, we must attack and dismantle, rather than put any faith in, all systems of criminalization.").

404 *See* I. India Thusi, *Harm, Sex, and Consequences*, 2019 UTAH L. REV. 159, 193 ("The criminal legal system has subordinated and controlled people of color from Johannesburg to Los Angeles. Attempts to use it to vindicate people of color from social 'harm,' even the presumed harms of patriarchy, must be viewed suspiciously."); Laurie Schipper & Beth Barnhill, *We're Victims' Rights Advocates, and We Opposed Marsy's Law*, ACLU (May 16, 2018), https://www.aclu.org/blog/criminal-law-reform/were-victims-rights-advocates-and-we-opposed-marsys-law [https://perma.cc/72SU-37CX] ("[R]outinely, biases based on race, gender, or immigration status result in the arrest of victims seeking assistance.").

and other violence cannot credibly be called upon to address claims of harm, pain, damage, death, or sexual and other violence.[405]

Even if respect and dignity are accorded to the complainant, they are contingent in nature; as described above, her worth inflates or deflates according to her usefulness to the project of prosecution and conviction.[406] And if she were one day to be the accused—indeed, potentially the same day[407]—that respect and dignity would dissolve.

B. *Tendency to Assume Guilt*

One might also read this usage as simply a manifestation of a tendency to assume crime (and thus a component of guilt) prematurely.[408] If we tend to see an accusation of crime as tantamount to a crime, then perhaps it is unsurprising that it is common to see "victim" even before the existence or not of a crime has been adjudicated. In support of this proposition, one can point to a whole range of other usages that could be read as conveying similar premature assumptions: "offender" in place of "arrestee,"[409] "offense" in place of "alleged offense,"[410] and "recidivism" referring to re-arrest,[411] as well as pre-adjudication uses of "crime scene,"[412] "murder weapon,"[413] "fleeing felon,"[414] and so on. If one holds the view that such premature assumptions are common—whether because of media, or as a result of how people are treated pre-adjudication, or because of race- and class-

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405 *See, e.g.*, Victoria Law, *Against Carceral Feminism*, JACOBIN (Oct. 17, 2014), https://www.jacobinmag.com/2014/10/against-carceral-feminism [https://perma.cc/Z56U-CPAH] ("[P]olice are often purveyors of violence and . . . prisons are always sites of violence.").

406 *See* Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement*, 9 DREXEL L. REV. 43, 64 (2016) (discussing Kantian and other sources for the notion that dignity is incompatible with the treatment of people as a means to an end, and the tension between that notion and the treatment of complainants in the criminal system, in which they "are very much objects that may enhance and aid the government in reaching its goals, but otherwise are not honored participants in the process"); Symposium, *Domestic Violence in Legal Education and Legal Practice: A Dialogue Between Professors and Practitioners*, 11 J.L. & POL'Y 409 (2003).

407 See, for example, the practice of issuing "cross-complaints," i.e., charging both of those involved in an alleged assault.

408 Note that while I certainly see the charge or arrest stage as premature, in other work I have remarked upon the tendency of legal scholars to put excessive faith in the meaning and reliability of *convictions*. *See supra* Section III.C.

409 *See* Roberts, *Arrests as Guilt, supra* note 22, at 1008–09.

410 *See id.*

411 *See id.*

412 *See supra* Section III.B.

413 *See supra* Section III.B.

414 *See supra* Section III.B.

bias,[415] or because we long for certainty, or a combination of the above—then steering people away from "victim" may do little or nothing to tackle these underlying problems.

C. *Influence of Law Enforcement Framing*

This usage presents a useful opportunity to consider some of the dimensions and dominance of law enforcement framing.[416] Courts often explain the pre-adjudication use of "victim" by saying that it is the term that law enforcement uses, sometimes adding that it is a "neutral" and "concise" term.[417] Courts tend not to mention the possibility that it is selected and maintained because of its usefulness to law enforcement, because it helps to frame a situation in a certain way. Certainly, there may be instances where the usage is so ingrained that a prosecutor truly could not stop herself from blurting it out,[418] but there is a reason that these usages are so common as to have become ingrained. Scholars have identified the tendency of "victims' rights" initiatives to aid law enforcement;[419] there are thus good reasons why law enforcement might choose to reinforce the language of "victims" in the pre-adjudication context.

There is room for deeper scholarly consideration of the impact of various types of law enforcement framing,[420] whether that framing involves shaping the statements or alleged statements of suspects,[421]

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415 *See* Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, SENTENCING PROJECT 13 (Sep. 3, 2014), https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies [https://perma.cc/7FY3-K4UK] ("A number of studies have shown that Americans, and whites in particular, strongly associate crime with racial minorities, and racial minorities with crime.").

416 *See supra* Section II.B.1 (for examples of courts attributing the appearance of "victim" in the courtroom to prosecutorial indictments or police usage).

417 *See, e.g.*, Davis v. State, No. 05-18-00398-CR, 2019 WL 2442883, at *2 (Tex. App. June 12, 2019) (stating that "the word 'victim' is mild, non-prejudicial, and is commonly used at trial in a neutral manner to describe the events in question"); Noguera v. LeGrand, No. 3:11-cv-00428-LRH-WGC, 2017 WL 2190062, at *5 (D. Nev. May 18, 2017) ("Perhaps, the phrase 'alleged victim' would have been preferable, but, in each of the instructions Noguera challenges, the word 'victim' was a clear and concise way to refer to the person who was object of the defendant's alleged acts.").

418 *See supra* notes 217–18 and accompanying text.

419 *See, e.g.*, Mosteller, *supra* note 108, at 1698–1704.

420 *See* Steven Chermak, *Image Control: How the Police Affect the Presentation of Crime News*, 14 AM. J. POLICE, no. 2, 1995, at 21, 21 [https://perma.cc/6F5Y-GVYB] (referring to a "significant limitation of the literature").

421 *See* Mitchell P. Schwartz, *Compensating Victims of Police-Fabricated Confessions*, 70 U. CHI. L. REV. 1119, 1127–30 (2003).

coordinating with the media,[422] or other types of public relations work,[423] of which careful vocabulary choice is one example.[424] There is room for introspection by scholars and others regarding the extent to which law enforcement framing has come to be our framing,[425] has come to seem natural or neutral.[426] The police may label "perpetrators," "offenders," "victims," and "recidivists," before an adjudicative process has played out, but then so may scholars and judges.[427] This framing

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422 *See* Chermak, *supra* note 420 ("Police departments actively construct public images of themselves so that news presentation benefits the organization rather than harms it. Existing research on police behavior has focused on how police fight crime, provide services, and maintain order, ignoring how police behave to control their presentation in the news media.").

423 *See* Maya Lau, *Police PR Machine Under Scrutiny for Inaccurate Reporting, Alleged Pro-Cop Bias*, L.A. TIMES, (Aug. 30, 2020, 6:00 AM), https://www.latimes.com/california/story/2020-08-30/police-public-relations [https://web.archive.org/web/20210104131828/https://www.latimes.com/california/story/2020-08-30/police-public-relations]; Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 901 (2020) (describing the "common public relations 'spin'" after "police-involved shootings").

424 *See* Johnson & Naureckas, *supra* note 334 (saying, as regards the word "juvenile," being used by the police in place of "child," that it is part of "an institutional lexicon developed over decades of public relations fine-tuning").

425 *See, e.g.*, Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants,* 71 L. & CONTEMP. PROBS. 93, 95-96 (2008) ("In covering crime stories, journalists typically rely on law-enforcement officials' views, downplaying the defense perspective while minimally acknowledging the innocence presumption. Thus, news of crime generally exhibits a pro-prosecution bias, rooted most importantly in this dependence of reporters on official and, therefore, purportedly credible sources." (internal citation omitted)); Adam H. Johnson (@adamjohnsonNYC), TWITTER (Apr. 5, 2018, 11:33 AM), https://twitter.com/adamjohnsonNYC/status/981917661515960322 (appending comment "[I] see the New York Times has mind-readers on staff" to New York Times story headlined "Police Fatally Shoot a Brooklyn Man After Falsely Believing He Had a Gun"); Benjamin Mueller & Nate Schweber, *Police Fatally Shoot a Brooklyn Man, Saying They Thought He Had a Gun*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/nyregion/police-shooting-brooklyn-crown-heights.html [https://perma.cc/W9Z3-AYLF] (subsequent version of headline).

426 *See, e.g.,* Davis v. State, No. 05-18-00398-CR, 2019 WL 2442883, at *2 (Tex. App. June 12, 2019) (stating that "the word 'victim' is mild, non-prejudicial, and is commonly used at trial in a neutral manner to describe the events in question"); Cueva v. Stephens, No. 2:14-CV-417, 2016 WL 4014088, at *9 (S.D. Tex. Feb. 19, 2016) (same).

427 *See, e.g.,* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1379 ("The first colonists imported the English common law tradition of private prosecutions. Under this system, victims of felonies had a right to initiate and prosecute a criminal case against their offenders."); Roberts, *Convictions as Guilt, supra* note 2, at 2537–39 (2020) (citing Alice Ristroph on risk of propaganda in the criminal academy); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2061 (2017) ("Deploying legitimacy theory and procedural justice as a diagnosis and solution to the current policing crisis might even imply, at some level, that the problem of policing is better understood as a result of African American criminality than as a badge and incident of race-and class-based subjugation.").

risks shaping thought; risks making law enforcement in effect the last word on whether a crime occurred.

An increased awareness of the spread and influence of law enforcement terminology may expand awareness of a broader phenomenon of which this often forms a part: the use of terms that tend to prop up the criminal system by making it seem at worst redeemable, and at best essential. Even in the words of reform-minded scholars, it is common to see the use of "lenience" to characterize sentences or bail amounts;[428] "mercy" to describe acts of executive discretion; and "progressive prosecutor" to describe those who are, or who proclaim themselves to be, at the less punitive end of the prosecutorial spectrum. It is important to examine all these terms and interrogate the notions that they appear to be furthering. Can sentences be said to be lenient, merely because they are shorter than others in our prison-hungry system? Can bail—requiring the legally innocent to attempt to buy their freedom—ever be lenient? Is it mercy at the end of the system's workings to turn back from some worst-case outcome? Can one wielding the tools of this system be said to be progressive?[429] Certainly one could respond that "relative(ly)" is to be read into this kind of expression, but this is at best a feeble and fluctuating understanding.[430]

It is important to note these terms, what they imply and whom they benefit, and how it is that they start to seem neutral. Understanding them, and moving away from them, may help us to see with clearer eyes both the criminal system and those who are caught up in it.

D. *Reflection of Reality*

Another possibility is that this usage—which blurs the supposedly central line between accusation of crime and finding of crime, and thus in at least some instances the supposedly central line between accusation of guilt and finding of guilt[431]—persists because it matches our blurry reality. In other words, while this usage might be in irreconcilable tension with our criminal system's core tenets, and with

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428 *See* Roberts, *Convictions as Guilt, supra* note 2, at 2537–49 (critiquing this usage).

429 *See, e.g.*, Note, *The Paradox of "Progressive Prosecution,"* 132 HARV. L. REV. 748 (2018); Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 YALE L.J. F. 848, 924–29 (2019).

430 *See* Andrew Crespo (@andrewmcrespo), TWITTER (Aug. 11, 2020, 11:04 PM), https://twitter.com/AndrewMCrespo/status/1293382896829554689?s=20 ("I agree that there is a comparative way to use the term 'progressive prosecutor.' (Although I think the phrase is typically deployed as a binary, as in 'X *is* a PP' rather than 'X is a *more* PP than Y.'")).

431 For example, where a defendant agrees that a sexual encounter occurred but claims that it was consensual, or agrees that a homicide occurred but denies that it was criminal.

what we tell ourselves about the system, it might be reflective of the system as it actually exists.

We tell ourselves of a system where we apply the most rigorous procedural protections because the stigma is the greatest, and the exposure to punishment unique.[432] We tell ourselves of a system where every component of guilt has to be proven beyond a reasonable doubt at trial,[433] based on admissible evidence, and with neutral fact-finders who not only apply the relevant legal standards to the admissible evidence but also apply community standards of culpability.[434] And we tell ourselves that it is not until that highest burden of proof has been applied—and the defendant has had a chance to tell her story, aided by a vigorous advocate who had the chance to proffer evidence and arguments and defenses to rebut the government's account—that we permit punishment to occur. Up until that point of course we apply the presumption of innocence.[435]

But it's perhaps in words like "victim" that reminders of the reality peep through. Perhaps that supposedly central line of adjudication, said to be so carefully policed by the rules of procedure, the rules of evidence, and our constitutional guarantees, is frequently just a blur, with the most vital dividing lines lying elsewhere. Perhaps, for some, it's the moment when you are born, for example.[436] Or perhaps, as Jocelyn Simonson has argued, the setting of bail may serve as the true adjudicative moment.[437] Certainly the idea that the true dividing line occurs pre-adjudication is supported by not only bail and pre-adjudication detention, but by pre-adjudication billing of defendants

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432 *See, e.g.*, *In re* Winship, 397 U.S. 358 (1970).

433 Note, for example, the prevalence of "pre-trial" as a descriptor of adjudicative stages or processes or detention, despite the fact that far more often the relevant stage is "pre-plea."

434 After all, some crime definitions *require* normative judgment. *See, e.g.,* Jody Armour, *Where Bias Lives in the Criminal Law and its Processes: How Judges and Jurors Socially Construct Black Criminals*, 45 AM. J. CRIM. L. 203, 219–21 (2018).

435 *See, e.g.,* Carissa Byrne Hessick, *DNA Exonerations and the Elusive Promise of Criminal Justice Reform*, *Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent*, 15 OHIO ST. J. CRIM. L. 271, 277 (2017) ("[O]ur criminal justice system exists in order to sort the guilty from the innocent.").

436 *See* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 413 (1996) (mentioning the "oft-unstated assumption that blacks are still on probation" and "are not necessarily granted a presumption of innocence") (quoting ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS: WHY ARE MIDDLE-CLASS BLACKS ANGRY? WHY SHOULD AMERICA CARE? 72 (1993)); Michael Pinard, *Race Decriminalization and Criminal Legal System Reform*, 95 N.Y.U.L. REV. ONLINE 119, 119 (2020) (describing "the reality that simply being Black has been and will continue to be criminalized").

437 *See* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 585 (2017) ("[F]or indigent defendants [bail] often serves the function that a real trial might, producing guilty pleas and longer sentences when an individual cannot afford to pay their bail.").

for attorneys,[438] ankle monitors,[439] global positioning systems,[440] and jail,[441] and by a variety of other consequences of arrest and charge.[442] More than one scholar and judge has referred to pre-adjudication hardships as a form of punishment,[443] thus challenging the constitutional mandate that punishment be imposed only post-conviction.[444]

Key aspects of the guilty plea process support this notion of a blur where one might assume a sharp dividing line. David Shapiro pointed out that probable cause—the standard of proof required for an arrest—typically suffices for the acceptance of a guilty plea, the means by which the vast bulk of convictions are imposed.[445] Arrests may rely entirely on a law enforcement account,[446] and a guilty plea has the same core evidentiary requirement.[447] Potential defenses may end up being barely more salient at the guilty plea stage than at the arrest stage,[448] and the give-and-take nature of repeat players' plea bargaining may deter aggressive defense litigation.[449] Finally, the judgment of the community

438 *See* John D. King, *Privatizing Criminal Procedure*, 107 GEO. L.J. 561, 568 (2019).

439 *See* Ava Kofman, Digital Jail: How Electronic Monitoring Drives Defendants Into Debt, ProPublica (July, 3 2019, 5 A.M.), https://www.propublica.org/article/digital-jail-how-electronic-monitoring-drives-defendants-into-debt [https://perma.cc/LD66-LYXQ].

440 *See* Aaron Cantú, *When Innocent Until Proven Guilty Costs $400 a Month—and Your Freedom*, VICE (May 28, 2020, 1:09 PM), https://www.vice.com/en_us/article/4ayv4d/when-innocent-until-proven-guilty-costs-dollar400-a-monthand-your-freedom?utm_campaign=sharebutton [https://perma.cc/B76L-T446].

441 *See* Steven Hale, *Pretrial Detainees are Being Billed for their Stay in Jail*, THE APPEAL (July 20, 2018), https://theappeal.org/pretrial-detainees-are-being-billed-for-their-stay-in-jail [https://perma.cc/NMS7-9U8E].

442 *See, e.g.*, Judith G. McMullen, *Invisible Stripes: The Problem of Youth Criminal Records*, 27 S. CAL. REV. L. & SOC. JUST. 1, 23–24, 34–35 (2018).

443 *See* Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327 (2017).

444 *See* Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1303 (2012) (describing pretrial detention as involving "conditions tantamount to punishment").

445 *See* David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 43–44 (1984).

446 *See* Roberts, *Arrests as Guilt, supra* note 22, at 991.

447 *See* Shapiro, *supra* note 445, at 42–44 (stating that a summary by law enforcement of evidence providing a "factual basis" for a plea is probably sufficient where it establishes probable cause).

448 *See id.*

449 Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 582 (2014).

is absent from guilty pleas,[450] as is the requirement of a neutral fact-finder, or indeed any fact-finder.[451]

Even when trials do occur, their reality in our under-resourced system challenges the stories we tell of how the dividing line is honored and policed, of how it acts to distinguish adjudication from charge. Numerous restrictions exist on the ability of defendants to mount defenses or tell their stories,[452] on jurors' ability to focus solely on the admissible evidence,[453] to honor the presumption of innocence,[454] and to apply the correct burden of proof,[455] and on the extent to which the jury represents the community.[456] Exceptions of course are possible, when the appropriate line is faithfully and rigorously policed. But in the vast bulk of cases, perhaps the crucial moment is indeed the issuing of a charge; perhaps the use of "victim" regardless of whether adjudication has occurred reflects the difficulty of getting beyond—of challenging or countering—governmental assertions that a crime occurred and that someone was victimized.

E. *Rough and Ready Sense of Crime*

A final phenomenon that this usage helps to illustrate is the widespread presence of a kind of "shadow criminal law:" a concept of crime (including a concept of "victims") that does not rely on formal criminal concepts, elements, or definitions. A kind of "I know it when I see it" concept.[457] This is understandable—we need a way to refer to the

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450 *See* W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. (forthcoming) (manuscript at 14), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542575 ("Rhetorically, at least, it seems the jury's desuetude has left a populist gap in need of filling"); *id.* at 40 (suggesting that "the modern-day demise of jury trials opened a distinctly *democratic* hole in our institutions").

451 *See* Roberts, *Convictions as Guilt, supra* note 2, at 2520–21.

452 *See generally id.* (discussing, for example, failures to provide defense counsel, or defense counsel with adequate resources); Richard Delgado, "*Rotten Social Background:" Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation*, 3 L. & INEQ. 9 (1985) (describing insanity as the "rich man's defense") (internal citation omitted).

453 *See id.*

454 *See id.* at 2512; Justin D. Levinson, Huajian Cai, & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 207 (2010) (discussing study designed by the authors that found, "[First,] that participants held implicit associations between Black and Guilty. Second, we found that these implicit associations were meaningful—they predicted judgments of the probative value of evidence").

455 *See* Roberts, *Convictions as Guilt, supra* note 2.

456 *See id.*

457 See, for example, statutes criminalizing a failure to report in circumstances where one "knows" that a crime has been/ is being committed. *See, e.g.*, OHIO REV. CODE ANN. § 21921.22(A) (2013).

kind of thing whose legal version is litigated in court: rapes, murders, crimes, victims, and so on. But this phenomenon can jeopardize the protections that the law sets up, such as mens rea requirements and defenses.[458]

Thus, for some of the judges mentioned above it is unproblematic—natural and appropriate even—for the person whose death is the focus of a homicide trial to be referred to as a "victim." And of course that seems right if we are focused on common parlance, in which the word "victim" does not necessarily imply crime or guilt: we speak of "victims of circumstance," for example. But when we enter criminal legal fora in which definitions are in play, and in which the existence of a "victim" suggests the existence of a crime, this rough-and-ready usage becomes more problematic. As described above,[459] it risks obscuring the role that justificatory defenses (such as self-defense) are supposed to play: where a justificatory defense is satisfied, after all, there is no crime. It risks obscuring the role of the defense attorney, which is not to "get someone off," but to play a part in the process that leads to a decision as to whether a crime appears to have occurred.[460] It risks obscuring the nuanced components of crimes, such as mens rea, and in general expanding the cloud of criminality beyond its already vast spread.

We see this shadow criminal law again in the equating of claim and crime.[461] As mentioned above,[462] even a truthful claim of a crime does not necessarily translate to a crime. This concept needs to be reinforced because it is frequently obscured in criminal legal discussions that rely on reports or claims or arrests to denote crimes. When we speak of pre-adjudication "victims" and express concern about the rates at which "crimes," or "murders," or "rapes" are committed, reported, enforced, or solved, and when all of this rests on pre-adjudication data—whether arrests, claims, or charges—our language is in tension with a system that defines crime, murder, and rape legally, in part to ensure that the label of crime is cabined and in part to ensure that defenses can be proffered and things like mens rea can be contested.

There may be a hopeful coda here, however. While the concern at issue centers on a risk that we deemphasize crucial aspects of the law's structure and protections—defenses and elements such as mens rea—it

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458 *See* Roberts, *Arrests as Guilt, supra* note 22, at 1016–17 (stating that "in the assumptions of the police and the public and sometimes of legal scholars, establishment of an act (or even an assertion thereof) frequently seems to be taken as establishment of a crime").

459 *See supra* Section I.B.

460 *See* Erin Murphy, *Indigent Defense*, CHAMPION, Jan/Feb. 2002, at 33.

461 *See, e.g.*, *supra* Section II.B.2.

462 *See supra* Section II.B.3.

is worth considering where the emphasis tends to lie instead. As mentioned above, when judges insist that we have a "victim," even when the defendant is arguing self-defense, it seems that the judges are influenced by the fact that, legal arguments as to crime notwithstanding, we do indubitably have a *harm*.[463] And it seems that to those judges a word like "victim" that can be taken as acknowledging the harm is acceptable—desirable even. And so, if one starts to feel that a system infused by law enforcement rhetoric, deeply hampered in its ability to guarantee accurate adjudication, in tension with the community's sense of crime, unable to offer dignity and respect in any consistent way, and inclined to blur its core dividing line needs to be abandoned, one can see a kernel of hope right at the law's center: judges who lean away from definitions of crime in favor of an alternative centering principle, namely harm. To do this is threatening to a system that purports to criminalize only when a crime in all its nuance has been established. But it is hopeful, perhaps, in that it points to a different regime, one invoked by abolitionists, who identify harm as a more desirable focus than crime,[464] whose theories and practice are built around that focus, and who strive toward respect, dignity, and bodily integrity for all.[465] It undermines the argument that a focus on harm is alien or unattainable.

A consideration of the pre-adjudication use of "victim" thus affords an opportunity to reflect on ways in which the criminal system's operation diverts from its official portrayal. That reflection might prompt a sense that those things that we're commonly said to have aren't guaranteed—not the protection of our highest burden of proof, not the precise definitions of an area of law governed by statutes and attentive to defenses, not the fierce protection of the presumption of innocence, not a central and carefully policed dividing-line between accusation and finding of guilt, not conviction as the key moment, not really evidence as the basis for adjudication, and not really even crime

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463 *See supra* Section I.B.

464 *See* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1825 (2020) ("Abolitionists are working for a world without police—and so they are making demands and running experiments that decrease the power, footprint, and legitimacy of police while building alternative modes of responding to collective needs and interpersonal harm."); Herskind, *supra* note 403 (mentioning Mariame Kaba's reflection that "for abolitionists, the unit of analysis is *harm*, whether that harm is labeled criminal or not. And it is precisely because of abolitionists' focus on *harm* that they are against prisons—because prisons, as a rule, harm people").

465 *See, e.g.,* Camp, *supra* note 337, at 1723 ("Accountability interventions that protect the dignity of wrongdoers are more likely to have a positive impact on behavior change than are shame-driven ones."); Reina Gossett & Dean Spade, *Prison Abolition and Prefiguring the World You Want to Live In*, YOUTUBE (Jan. 7, 2014), https://www.youtube.com/watch?v=XDQlW1uJ8uQ [https://perma.cc/7TWK-J8GL] (mentioning "the belief that we are all indisposable").

as the guiding principle. Rather, we have a system that doles out the criminal system's unique harshness without its justificatory precision and protections. And at the same time, we don't have a system that provides what the word "victim" and the attendant rights are said to be striving toward: respect and dignity.

The advance of abolition into mainstream discussions of criminal law makes this kind of consideration particularly timely. An appropriate part of evaluating arguments for abolition is to consider what it is that we have now: not the idealized version, to which one might be inclined to cling,[466] but the actual version, out beyond the labeling and unsupported precepts. This consideration might make abolitionist ideas appealing in that they involve a rejection of our system. But it might also make them appealing—or at least less daunting—by unsettling the supposedly stark divide between our existing criminal system and stepping away from it; and by unsettling the sense of impracticality, of fantasy.[467] Suppose that what's said above is right: that we already have a somewhat loose grip on the centrality of crime as a governing principle; that harm is what moves us, more than crime as tightly defined; that the structural and definitional integrity that we may have thought was there isn't;[468] that we already seem motivated by the community's sense of when it is that action is needed and accountability to be demanded;[469] and that we indeed yearn for

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466 *See* Daniel Epps on how our account of the system's erring on the side of "freeing the innocent" might assuage potential concerns. Daniel Epps, *The Consequences of Error in Criminal* Justice, 128 HARV. L. REV. 1065, 1150 (2015). Who wouldn't be nervous about what would happen to "victims," and about "violent offenders" and "violent recidivists," given current "crime rates," were we to reframe our society without criminal enforcement? Who wouldn't be loath to let go of a system that sorts carefully and errs on the side of the innocent? If you see the criminal system as a reliable and fair one in which both sides are heard and community judgment and the highest standard of proof applied and the finding is that we have someone who made a free choice to do evil, and to violate the law and norms of the community, then of course you might get nervous about that being taken away.

467 *See* Roger Lancaster, *How to End Mass Incarceration*, JACOBIN (Aug. 18, 2017), https://www.jacobinmag.com/2017/08/mass-incarceration-prison-abolition-policing [https://perma.cc/8RR9-DT7J] (mentioning "pie-in-the-sky imaginings"); *see also* Jasmine Sankofa, *Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform*, 59 HOW. L.J. 651, 689 (2016) (suggesting that the absence of scholarly engagement with abolition is often due to the "conceptualization of abolition as impractical and 'foolish'").

468 *See* Akbar, *supra* note 31 ("Abolitionists are often caricatured as having unattainable ends and an impractical agenda. But many organizations, like Survived and Punished and generationFIVE have demonstrated the failure of our system even on its own terms . . . .").

469 *See* Bill Keller, *What do Abolitionists Really Want?*, THE MARSHALL PROJECT (June 13, 2019), https://www.themarshallproject.org/2019/06/13/what-do-abolitionists-really-want [https://perma.cc/FW6C-2XEA] (mentioning the abolitionist objective of devolving responsibility for public safety to local communities).

ways to embody respect and dignity. Acknowledging that might make less alarming the exploration of abolitionist goals and practices, in which the guiding principles do indeed center harm rather than crime, and respect and dignity that are universal.[470]

CONCLUSION

Written into the law throughout this country—in every state's statutes and most states' constitutions, in jury instructions, and in the words of judges, defense attorneys, prosecutors, and witnesses—is a merger of accuser and victimized, of alleged crime and crime, of the processes pre-adjudication and post, and thus potentially a challenge to the presumption of innocence and our processes of adjudication. And all often without attention or discussion; all so normalized as to appear to many to be "neutral," to be just how people talk, to be just a bit of shorthand.[471] But we need to be careful, both about what these usages may reveal and about what they may exacerbate.[472] "Victims' rights" are growing in number and in reach; they attach to these language choices; they derogate from defendants' rights and protections; and they do little to serve the deepest needs of those harmed by crime and of a society harmed by punitivism.

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470 *See, e.g.,* Camp, *supra* note 337, at 1723 ("Accountability interventions that protect the dignity of wrongdoers are more likely to have a positive impact on behavior change than are shame-driven ones."); Gossett & Spade, *supra* note 465 (mentioning "the belief that we are all indisposable").

471 *See, e.g.,* State v. Harvey, No. 29513-3-III, 2012 WL 1071234, at *3 (Wash. Ct. App. Mar. 29, 2012) ("[V]ictim" may be "as the State suggests, a shorthand reference to the recipient of a bullet."); State v. Thompson, 76 A.3d 273, 288 (Conn. App. Ct. 2013) (calling the prosecutor's repeatedly violative usages "mostly ill-chosen short-form references to the complainant").

472 *See* MO. REV. STAT. 595.209 ("The rights of the victims granted in this section are absolute and the policy of this state is that the victim's rights are paramount to the defendant's rights."); Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment,* 10 ST. THOMAS L. REV. 579, 582 (1998) ("'Victims' rights' were—and are—used to counter 'defendants' rights' and to trump those rights if possible.").