

Conceptions of Victimhood: Legal, Political, and Psychological Dimensions

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Defense Date: October 30th, 2023

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Dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of
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ABSTRACT

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Abstract

This dissertation focuses on conceptions of victimhood across legal, political, and psychological domains. Conceptions of victimhood, as they currently stand, delegitimize the claims of legitimate victims and impose undue burdens upon victims to respond in a socially correct way. My research can be divided into three subsections: 1) legal and political conceptions of victimhood and the delegitimization of legitimate claims to victim status, 2) societal burdens placed on victims unduly because of their victim status, and 3) psychological conceptions internal to victims that make self-identification of blamelessness and victim-status more difficult than current scholarship suggests.

I build an expanded definition of victimhood that recognizes victims of structural harms and a parallel conception of survivorhood that legitimizes the suffering of victims even if they are seen as complicit actors in the harm they suffer. After building up a more robust conception of who counts as a legitimate victim, I investigate the internal self-conception that victims construct in light of the societal conceptions that surround them. In particular, I show that many victims have psychological reactions to being harmed that are at odds with the social expectations for how a victim ought to feel and act in relation to themselves and their offenders. The trajectory of my project first deals with others' conceptions of victims, then addresses the ethical obligations imposed on victims as a condition of their legitimacy, and finally examines the psychological reactions of victims and internalization of legal and psychological conceptions.

Dedication

I dedicate this dissertation to my lovely partner, Stefan, and our five dogs: Flash, Kaia, Sassy, Noodle, and Pip.

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Acknowledgements

I'm extremely grateful to my co-chairs, Gopal Sreenivasan and Wayne Norman, for all of their time, feedback, and support throughout this process and to the rest of my committee members, Matthew Adler, Owen Flanagan, and David Wong, for their support and engagement with my work. This dissertation would not have been possible without all of the hours, expertise, and emotional support that you all provided for me. I would like to extend a special thank you to our wonderful DGSA, Janelle Hayes, for all of her help and support during my time at Duke. Completing multiple degree programs at once came with a lot of strange problems and issues, and Janelle was always willing to help and a fierce advocate for me. No matter what problems popped up, Janelle was always there to listen and help, and I truly appreciate all of her time, effort, and support. I would also like to extend my thanks to two of my fellow graduate students, Adrienne Duke and Ben Sarbey, who provided moral support and feedback throughout the project. I would like to recognize my partner, Stefan Waldschmidt, who was unrelentingly supportive and patient with me and served as my perpetual emotional support, tech support, and proof-reader. Finally, I would like to recognize all of the many dogs in my life for their emotional support and comfort in times of stress.

1. Introduction

This dissertation focuses on conceptions of victimhood and problems that arise when we talk about or think about victims in certain ways. The overarching problem this dissertation addresses is current legal and psychological conceptions that delegitimize the claims of legitimate victims without a coherent reason for doing so. I work towards building an expanded definition of victimhood that recognizes victims of structural harms and a parallel conception of survivorhood that legitimizes the suffering of victims even if they were seen as complicit actors in their harm. After building up a more robust conception of who counts as a legitimate victim, especially within formal systems, I turn my attention towards societal and interpersonal interactions with victims and our moral duties towards them.

My first chapter, *Complicit Victims and Strategic Human Rights Legislation*, addresses the problem of innocent victims within strategic human rights litigation. Advocates assert that human rights are universal and apply equally to all actors. But, in practice, advocates are often pressed to pursue the cases of innocent, sympathetic victims because they are more likely to garner the needed public support for success. The practice of predominantly pursuing cases of passive, innocent victims delegitimizes the causes and suffering of victims who are seen as complicit, bad actors, or perpetrators. When told that a former terrorist is a victim of torture, one may respond that the terrorist is clearly a perpetrator instead because they are active and complicit. However, the delineation of the world into neat categories—mutually exclusive “victims” and “perpetrators”—fails to capture the complexities of reality. I propose a change of language within strategic litigation towards a conception of “survivorhood,” which allows for the complexities of complicity and activity while still advocating that the person in question deserves help. Beyond the question of how to strategically deploy language in human rights advocacy, I argue that the utility of pursuing rights more broadly through strategic victim choice does not negate our ethical duty to advocate for complicit victims.

My second chapter, *The Moral Pressure to Report Crimes*, scrutinizes the ethical obligations that social norms and, in some circumstance the legal systems, impose on victims. In particular, after developing a conception of moral pressure, I focus on how victims of violent crimes are pressured to report their harm as a condition of their legitimacy as victims and their responsibility as citizens. When someone is victimized and they tell someone about it, one of the first responses is usually a variation on “Did you report this?” or “You need to report this.” The motivation behind this response is based in a desire to prevent future individuals from becoming victims at the hands of the offender through legal accountability measures. In a sense, this social norm requests that victims “rescue” future potential victims from their offender by altering the legal system. The situation parallels other cases where one might have a duty to rescue (e.g., Peter Singer’s child drowning in a pond) and parallels a series of legal cases surrounding Good Samaritan Laws. In this chapter, I look at two cases of potential duties to rescue--crime victims and Singer’s scenario--and examine our intuitions in each case. While the cases seem to have the same components, I argue that they should be treated differently because people frequently underestimate the hardship involved in reporting a crime and the likelihood of success for the rescue. Given the realities of the system, we should not morally pressure individuals to report crimes. Instead of relying on individual victims to heroically take on the heavy burdens of a flawed system, we should instead focus on institutional reforms that make the act of reporting less burdensome.

My third chapter, *Structural Victimhood: Expanding the Definition of “Victim”*, examines the role of language, especially the role of expanding definitions, for activism against certain forms of harm. Usually those who suffer some sort of violent incident are classified as victims. However, while the definition of violence has evolved to include structural and systemic violence, the definition of victimhood, especially in the United States legal context, remains limited to individuals who suffer harm at the hands of a clearly identifiable perpetrator. However, through advocacy and social movements, we have come to recognize that other actions and

structures with harmful effects are “violent” too. I argue that our definitions of victimhood should follow the trajectory of our definitions of violence by expanding to recognize actions, structures, and institutions that cause serious harm. One benefit of adding an analysis of systemic victimhood to the analysis of systemic violence is that such an analysis focuses on those who are actually harmed by the larger systems that structural analyses prioritize. This shift in focus legitimizes the claims of these victims and more fully captures the negative effects of violence. A further challenge in the analysis of systemic violence is that advocacy tends to focus on the removal of harmful systems; an analysis of systemic victimhood allows for the possibility of persuasive, personalized narratives that bring the harms of systems more clearly into view. Finally, an analysis of systemic victimhood shifts our focus away from a single moment of harm inflicted by a system and instead asks us to consider how the cumulative effects of violence impact victims over time.

My final chapter, *The Psychology of Victimhood: Reactive Attitudes, Gaslighting, and Self-Blame*, focuses on psychological reactions that victims have after being harmed, especially in the context of gender-based and racial harms. I argue that P.F. Strawson’s work on reactive attitudes assumes that, when an individual is harmed, they can easily identify both the harm and the offender such that they can develop attitudes like blame towards the offender. This ignores the complicated psychology of victimhood. A victim must first recognize the harm as a legitimate harm which is difficult given phenomena like gaslighting and societal resistance to recognizing some harms as legitimate. Once the harm is recognized, victims must then be able to identify an offender who is worthy of blame. Here, the psychology of victimhood again complicates the picture, with victims having to overcome their own self-blame and the blame that society places on them to direct their reactive attitude towards the offender. While Strawson only focuses on factors about the wrong doer that mitigate or modify our reactive attitudes towards them, I argue that we should equally consider factors about victim psychology that may, through no fault of the victim, mitigate or modify their reactive attitude as well.

1. COMPLICIT VICTIMS AND STRATEGIC HUMAN RIGHTS LEGISLATION

“When you say that you’re a victim, that’s sickening”

“What can I say? I lived a miserable life. I was imprisoned. I was tortured.

I lived in fear... It was my own fault for going, yeah, but I didn’t come out of it as a winner in any way.”¹

1.1 INTRODUCTION

In her recent book, Helen Duffy examines the current practice of strategic human rights litigation and its “role, impact, and limitations.”² By strategic human rights litigation, she is referring to the practice of using litigation to pursue goals or interests that go beyond those of the immediate parties alone.³ Her key focus in the book is to determine how and why strategic litigation makes a difference and to draw out the benefits and limitations of using the courts as an avenue for advancing human rights.⁴

One problem or limitation that any advocate must face is the problem of pure, sympathetic, or innocent victims.⁵ The use of sympathetic victims allows human rights advocates

¹ Quentin Sommerville, Interview with Yago Riedijk, BBC NEWS (March 3, 2019) <https://www.bbc.com/news/world-middle-east-47435039>.

² HELEN DUFFY, STRATEGIC HUMAN RIGHTS LITIGATION 4 (2018).

³ *Id.*

⁴ *Id.*

⁵ See *infra* PART III (discussing the different paradigms of victimhood).

to gain widespread support and success in their campaigns, but the use of only or mostly sympathetic victims undermines the ideal of universality of human rights. Research in social psychology has shed light on both the tendency to blame victims and on the decreased likelihood of aid from an observer after an attribution of blame has been made.⁶ To be labeled legitimate, victims must meet the high threshold for classification as innocent in a society with a predisposition to erroneously attribute blame to victims.⁷ Choosing a sympathetic victim can be a strategic choice that garners the necessary public support to push forward a particular human rights agenda.

However, there are harmful consequences to those choices that should be evaluated and mitigated to the extent possible. For instance, if human rights are established on the basis of public and institutional sympathy for an “ideal victim,” those rights might not then be extended to the wide array of actual victims whose pain is real but whose circumstances are less sympathetic. At a basic level, the need for public support for successful human rights campaigns creates a tension within the advocate between the desire that the campaign succeed in advancing human rights (which requires an “innocent” victim) and the commitment that human rights are for everyone.⁸

The tension we see in the context of strategic human rights litigation is one instance of the problematic logic of victimhood: one must be an innocent victim to be advocated for and recognized, but human biases make being an innocent victim an incredibly high bar that few can

⁶ See *infra* PART II (explaining briefly the psychological bases for victim-blaming and the desire for innocent victims).

⁷ *Id.*

⁸ The United Nations defines human rights as rights that are “inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status.” *Human Rights*, U.N.: GLOBAL ISSUES, <https://www.un.org/en/global-issues/human-rights> (last visited Oct. 8, 2023).

meet. In this chapter, I will use strategic litigation as a means of examining the logic of victimhood and putting forward a solution to relegitimize the claims of complicit victims more generally. I begin in Part I by examining the normative case and reasons behind why it is important to advocate for unsympathetic victims in the first place. In Part II, I will examine the case study of Shamima Begum, one of the schoolgirls from the United Kingdom who left home to become an Islamic State bride. I will place Begum's story within the victim-perpetrator dichotomy to explain why the dichotomy breaks down. In Part III, I will discuss several basic concepts in social psychology that underlie victim-blaming that are used to attribute complicity to those who experience harm. In Part IV, I will raise concerns that arise when we talk about people experiencing harms within the victim-perpetrator dichotomy, including the risk of undermining claims about the universality of human rights, the potential to compel victims to tell only ideologically correct forms of the narrative of their victimization, and the creation of a harmful, arbitrary hierarchy of victims which leads to the delegitimization of otherwise valid claims of victimization. In Part V, I examine proposals for how advocates can face the dilemma that comes with choosing a victim in strategic litigation. While we can only slowly chip away at the biases and connotations surrounding the word victim, we can instead shift our language to a term that allows room for agency and blameworthiness while still suggesting a need for sympathy and help—the term 'survivor.'

1.2 THE NORMATIVE CASE

This chapter has implications for our use of language, especially in strategic litigation and advocacy campaigns, but the use of only “innocent” victims is also normatively problematic and has negative ethical implications as well.

One could make the argument that, while it might be nice in an ideal world to advocate for every human rights violation, that it is impossible given the current state of affairs. Advocates have limited time and resources and should use those in the way to ensure the most human rights or the least violations for the most people. Put differently, the utilitarian calculus works out such that we should advocate for the causes that are most likely to succeed and create real change. Using innocent victims for advocacy makes it more likely that the advocates will garner support and win real life cases. The ideal of universality of human rights is just an ideal that cannot be met given current resource and time restraints. Furthermore, the hope is that cases using sympathetic victims will forward human rights in a broader sense, potentially even leading to more human rights for complicit victims indirectly.

Before diving into the specifics of the utilitarian calculus, it is important to remember the strong, Kantian language espoused in our commitments to human rights. Treaties like the ICCPR state that human rights “derive from the inherent dignity of the human person,”⁹ and to the “equal and inalienable rights of all members of the human family,” where these rights are grounded in humanity’s “endow[ment] with reason and conscience.”¹⁰ ¹¹ Human rights are grounded in our human dignity and equality which apply to all people universally, regardless of status or actions.¹²

⁹ This language appears at the beginning of most human rights treaties. *See, e.g.*, International Covenant on Civil and Political Rights (ICCPR) Preamble, Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹⁰ G.A. Res. 217 (III) A, art. 1, DHR, art. 1, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

¹¹ In the *Metaphysics of Morals*, Kant writes: “A human being regarded as a person, that is, as the subject of a morally practical reason, is exalted above any price; for as a person... he is not to be valued merely as a means to the ends of other or even to his own ends, but as an end in himself, that is he possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other beings in the world. He can measure himself with every other being of this kind and value himself on equal footing to them.” (1797)

See also, JEREMY WALDRON, ONE ANOTHER’S EQUALS.

¹² ICCPR, *supra* note 9, Preamble (“[recognizing] the inherent dignity and [] the equal and inalienable rights of all members of the human family”).

At the very least, advocates have a theoretical commitment to advocating for the rights of complicit victims because they are humans endowed with dignity.

Despite the strong language in our treaties, the utilitarian calculus is appealing to adopt, especially when considering matters of strategy. There is a resource problem. We cannot advocate for everyone, and in some sense we are always trying to pick cases and causes that will be successful. Having a successful case or cause pushes forward the human rights agenda and helps us progressively realize the most rights for the most people. Given that we cannot advocate for everyone, we ought to advocate in such a way as to secure the most rights for the largest number of people, and the way to accomplish that is through choosing predominantly sympathetic victims. The advocate's moral commitment to universality is outweighed by practical considerations and the imperative to advance the moral cause of human rights more generally.

On a strict utilitarian view, the calculus may land in favor of using sympathetic victims more often than not. If we incorporate a distributive consideration into our account though, our picture starts to change. Under a prioritarian view, greater weight is given to those who are worse-off, we should prioritize and give more weight to those who are worse-off.¹³ Insofar as complicit victims are among the worse-off, benefits to them in the form of advocacy should be given increased weight. Considering complicit victims may be subjected to torture, statelessness, cruel and inhumane treatment, rendition, and extrajudicial killings (among others), the case for complicit victims being-worse off is strong.

One could object that, in choosing sympathetic victims, we are still benefiting those who are worse-off indirectly. Using a sympathetic victim, we could win important legal victories pertaining to those same rights that strengthen protections for everyone, including complicit

¹³ Derek Parfit, *Equality or Priority*, 10 *RATIO* 202, 213 (1997).

victims. However, there are two things that are wrong with this reasoning. First, this reasoning assumes that for every specific rights violation there is an available and compelling innocent victim population that actually can forward the rights for the whole group. The conception of torture victims as being predominantly terrorists or criminals makes it harder to advocate for that right more generally, and allows states to “use national security as a pretext for torturing people”.¹⁴ Among those who are victimized for their participation in violations of national security and terrorism statutes, it is hard to imagine a sufficiently sympathetic victim.

Second, even if advocates can forward the rights generally *and* by doing so forward the specific rights relevant for complicit victims, states can create carve-outs from those hard won protections that exempt complicit victims from them. Using terrorism as a rationale or justification for a rights violation or derogation, for example, is not uncommon and seeks to explain away violations against complicit victims as no violation at all.¹⁵ The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism specifically noted the tendency of governments to seek these kinds of carve outs in national security contexts.¹⁶ Carve outs are not limited to national security or international contexts. For example, New York City creates a carve out for access to legal services in Immigration cases. If an individual has been convicted of one of over 150 different crimes, their

¹⁴*Torture*, AMNESTY INT’L: WHAT WE DO, <https://www.amnesty.org/en/what-we-do/torture> (last visited Oct. 8, 2023).

¹⁵ See generally, HUM. RTS. WATCH, *In the Name of Security: Counterterrorism Laws Worldwide since September 11* (June 29, 2012), <https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11> (describing instances of human rights violations justified through appeals to national security and terrorism).

¹⁶ Martin Scheinin, *Report of Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, A/HRC/4/26/Add.1 (March 15, 2007) <https://www.un.org/unispal/document/auto-insert-186517>, Martin Scheinin and Mathias Vermeulen, *Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight Against Terrorism*, EUI WORKING PAPERS (2010), <https://www.corteidh.or.cr/tablas/r29030.pdf>.

legal fees will not be covered by the city even if the defendant is indigent.¹⁷ The assumption that the rights for sympathetic victims will somehow eventually “trickle down” to complicit victims ignores the concrete barriers to such a transference of rights.

We should want to advocate for the rights of those who are worse-off, including rights for those who are complicit in their own suffering. General advocacy alone is insufficient because of the nature of the rights violated and the potential for carve-outs that limit the applicability of gains from general advocacy efforts. We should at least not *prima facie* exclude a subsection of victims without at least attempting to implement a strategy to make it possible to have success in these cases which advocate for victims who have a lot of suffering. The following chapter gives a potential framework for advocacy for those who wish to advocate for victims who are seen as heavily complicit in their suffering.

1.3 SHAMIMA BEGUM’S STORY

In February of 2015, at the age of fifteen, Shamima Begum and two of her schoolmates from Bethnal Green Academy in East London left England to join the Islamic State of Iraq and the Levant, or ISIL.¹⁸ After deceiving her parents about her plan, she travelled to Turkey using her older sister’s passport and then travelled to Syria. The three girls were welcomed by others already living in Raqqa, a stronghold city of the Islamic State.¹⁹ They were put up in a “house for

¹⁷ IMMIGR. AND NAT’Y LAW COMM., *Ending the Funding “Criminal Carve Out” for Immigration Legal Service Providers* (June 1, 2018) <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/ending-the-funding-criminal-carve-out-for-immigration-legal-service-providers>.

¹⁸ Robin De Peyer, *Families Fear Bethnal Schoolgirls who travelled to join ISIS are now dead*, THE EVENING STANDARD (Aug. 6, 2017), <https://www.standard.co.uk/news/world/families-fear-bethnal-green-schoolgirls-who-travelled-to-join-isis-are-now-dead-a3605096.html>.

¹⁹ Gregory Walton, *Isil Defector girls’ families go to Turkey to Probe Disappearance*, THE DAILY TEL. (March 23, 2015), <https://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11491142/Isil-defector-girls-families-go-to-Turkey-to-probe-disappearance.html>.

women” where newly arrived young girls waited to be married off as jihadist brides.²⁰ Within a few weeks, Begum was married to the much older Yago Riedijk, a Dutch-born IS fighter.

Shamima and her schoolmates had intermittent contact with their families until some time around May of 2016.²¹ Around that time one of her schoolmates, Kadiza Sultana, was likely killed in an airstrike in Raqqa.²² During this period of silence, Begum’s family feared that she was dead.²³

In February of 2019, Begum resurfaced in a refugee camp in Syria and was interviewed by Anthony Loyd.²⁴ At the time, she was nine-months pregnant with her third child and weak from her journey across the desert to the refugee camp after the Kurds began closing in on Islamic territory.²⁵ During the interview, Begum told of oppressions of people who she insisted were innocent, including her husband who was arrested and tortured as a suspected spy.²⁶ She also told the interviewer that she was not fazed by the sight of a severed head she saw in a bin because the man was an enemy of Islam.²⁷ She described videos of beheadings of Western journalists, stating that journalists who enter Syria illegally can be spies and may be a security threat to the caliphate.²⁸

While at times appearing to show continued support for the caliphate, Begum also stated that she did not think that the caliphate deserved victory because of its oppression and corruption.²⁹ At the time of this interview, she wanted only to return to Britain to raise her soon-

²⁰ Anthony Loyd, *Shamima Begum: Bring me home, says Bethnal Green girl who left to join ISIS*, THE TIMES (Feb. 13, 2019), <https://www.thetimes.co.uk/article/shamima-begum-bring-me-home-says-bethnal-green-girl-who-fled-to-join-isis-hgvqw765d>.

²¹ De Peyer, *supra* note 18.

²² *Id.*

²³ *Id.*

²⁴ Loyd, *supra* note 20.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Loyd, *supra* note 20.

to-be-born child in peace and safety.³⁰ In a later interview with the BBC, Begum stated that she did not regret her decision to travel to Syria even though she did not agree with everything the caliphate had done.³¹ She stated that she was shocked at the 2017 Manchester Arena attack that resulted in 22 deaths and sad that innocents were attacked but viewed it as justified retaliation for military attacks on Islamic State strongholds.³²

Her husband, Yago Riedijk, surrendered to a group of Syrian fighters during their flight from Baghuz.³³ He is currently being held prisoner in a Kurdish camp and has admitted to fighting for the Islamic State.³⁴ Riedijk was tried in absentia in the Netherlands and convicted to a six-year prison sentence if he were to ever return to the Netherlands, and the Netherlands has stated that it will not take any action to repatriate IS fighters.³⁵ Begum and her husband had three children, all of whom are now deceased as a result of malnutrition or illness. Her two oldest children both died before the age of two as Begum fled from bombings and atrocities across the desert.³⁶ Her youngest child was born in a Syrian refugee camp and died only a few weeks later from pneumonia.³⁷

³⁰ *Id.*

³¹ *Shamima Begum: IS teenager's family challenge citizenship move*, BBC NEWS (Feb. 22, 2019), <https://www.bbc.com/news/uk-47326496>.

³² *Id.*

³³ Loyd, *supra* note 20.

³⁴ *Dutch jihadi who married British school girl wants to return to the Netherlands*, DUTCH NEWS (March 3, 2019), <https://www.dutchnews.nl/news/2019/03/dutch-jihadi-who-married-british-school-girl-wants-to-return-to-the-netherlands>.

³⁵ *Jihadi Yago Riedijk 'will not be allowed to live with his family in Netherlands'*, DUTCH NEWS (March 4, 2019), <https://www.dutchnews.nl/news/2019/03/jihadi-yago-riedijk-will-not-be-allowed-to-live-with-his-family-in-netherlands>.

³⁶ Loyd, *supra* note 20.

³⁷ Martin Chulov, Nazia Parveen, and Mohammed Rasool, *Shamima Begum: baby son dies in Syrian refugee camp*, THE GUARDIAN (Mar. 9, 2019) <https://www.theguardian.com/uk-news/2019/mar/08/shamima-begum-confusion-after-reports-newborn-son-may-have-died>.

Begum, as a nineteen-year-old, has lost her three children, her husband is in prison, and she is indefinitely trapped in refugee camps. She has also been stripped of her U.K. citizenship and has little hope of ever returning home.³⁸ After losing her U.K. citizenship, Begum is arguably now stateless.³⁹ Britain claims that she potentially has Bangladeshi citizenship through her mother, but Bangladesh has repeatedly denied that she is a citizen because she has never sought citizenship or even visited the country.⁴⁰ Furthermore, if Begum were to attempt to enter Bangladesh, she would face the death penalty given to all those who violate the country's "zero tolerance" policy on terrorism.⁴¹

Begum's family has appealed the United Kingdom's decision to revoke her citizenship status.⁴² The Special Immigration Appeals Commission (SIAC) held hearings on the lawfulness of the revocation, including the question of whether the revocation has left Begum stateless in violation of international law,⁴³ and on whether Begum poses an ongoing threat to national security.⁴⁴ The Court of Appeals determined that Begum should be allowed to return to contest the revocation of her citizenship, but that decision was unanimously overruled by the Supreme Court,⁴⁵ the highest court in the United Kingdom, even though the court determined that she

³⁸ *Id.*

³⁹ *Shamima Begum: IS teenager to lose UK citizenship*, BBC NEWS (Feb. 20, 2019), <https://www.bbc.com/news/uk-47299907>.

⁴⁰ Lizzie Dearden, *Shamima Begum: Bangladesh says Isis bride not a citizen and has 'nothing to do with us'*, THE INDEP. (Feb. 20, 2019), <https://www.independent.co.uk/news/uk/home-news/shamima-begum-bangladesh-citizenship-isis-bride-british-uk-javid-stateless-a8788976.html>.

⁴¹ *Shamima Begum: IS Bride 'would face death penalty in Bangladesh'*, BBC NEWS (May 3, 2019), <https://www.bbc.com/news/world-asia-48154781>.

⁴² *Legal Challenge over removal of Shamima Begum's citizenship*, BBC NEWS (Oct. 22, 2019), <https://www.bbc.com/news/topics/c347vzp58nzt/shamima-begum-case>.

⁴³ *Shamima Begum: Stripping citizenship put her at risk of hanging, court hears*, BBC NEWS (Oct. 22, 2019), <https://www.bbc.com/news/uk-50137470>.

⁴⁴ *Id.*

⁴⁵ Holly Bancroft, *Shamima Begum: Timeline of Events since she fled to join Isis six years ago*, INDEP. (Sept. 15, 2021, 10:44), <https://www.independent.co.uk/news/uk/home-news/shamima-begum-timeline-isis-interview-b1920479.html>.

could not have a fair hearing while being detained in Syria.⁴⁶ Begum remains indefinitely confined in a Syrian refugee camp and de facto stateless.⁴⁷ She has asked for public forgiveness even after these decisions and offers to help the U.K. fight terrorism if she is allowed to return, but the government still refuses to allow her to enter the U.K.⁴⁸

Begum's case is one that it would be difficult for a human rights advocate to take on as a part of a strategic campaign. Even though she is someone who has suffered many intense harms, she is arguably at least complicit in terrorist activity. She does not express unremitting remorse, but she also does not express an unremitting commitment to continuing her life with the Islamic State. She lives in the unfortunate position between being a victim and being a perpetrator which leads many to delegitimize her claims of victimization altogether.

1.4 WHY IT'S HARD TO BE A SYMPATHETIC VICTIM

Humans often fall victim to the belief in a just world fallacy, which dictates that bad things only or usually happen to people who deserve them.⁴⁹ We do not want to admit the possibility that something bad would happen to us, so we form the motivated belief that if we are good people, we will only receive what we deserve—i.e. good things.⁵⁰ This belief in the justness

⁴⁶ Yasmine Ahmed, *The UK Supreme Court has failed Shamima Begum: Neither Justice nor Security is Served by Leaving Shamima Begum in a Legal Black Hole*, HUM. RTS. WATCH (March 2, 2021), <https://www.hrw.org/news/2021/03/02/uk-supreme-court-has-failed-shamima-begum>.

⁴⁷ *Id.*

⁴⁸ Jennifer Hassan, *Former Isis teenage bride who left Britain to join militant group in Syria tells the public: 'I'm sorry,'* WASH. POST (Sept. 16, 2021, 11:08 AM), <https://www.washingtonpost.com/world/2021/09/16/shamima-begum-gmb-interview-isis>.

⁴⁹ Rebecca M. Hayes, et al., *Victim Blaming Others: Rape Myth Acceptance and the Just World Belief*, 8 FEMINIST CRIMINOLOGY 202, 203 (2013).

⁵⁰ *Id.*

of the world is necessary to sustain one's belief that no harm will come to oneself,⁵¹ which is vital to one's sense of safety.

A natural consequence of a strong belief in a just world is the tendency to blame victims for their suffering.⁵² The world is just, therefore bad things should only happen to someone if they are a bad person deserving of those things.⁵³ The inferential leap is a simple one: (1) Something bad has happened to a victim, (2) Bad things only happen to bad people, (3) Therefore, the victim must be a bad person and worthy of blame.⁵⁴

Victim-blaming is ever-present in the media, especially when sexual assault is at issue.⁵⁵ This phenomenon is an extension of the belief in a just world fallacy.⁵⁶ Victim-blaming occurs when observers pick out certain behaviors of the victim which show some level of responsibility for the harm they are suffering.⁵⁷ In the case study above, the media and the courts in the United Kingdom frequently point to Begum's culpable actions and lack of remorse even in stories that chronicle her suffering. Her culpable behaviors are the focus and are picked out over and above her suffering as a victim.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Hayes, *supra* note 49 at 203.

⁵⁵ See, e.g., Neela Debnath, *Rape Victims are still being blamed for sexual violence in Somalia* (May 6, 2015) THE INDEP., <https://www.independent.co.uk/news/world/africa/rape-victims-still-blamed-for-sexual-violence-in-somalia-10229605.html>; Matthew Whitaker, *Don't blame women's drinking for rape*, (Nov. 6, 2013) CNN OP. <https://edition.cnn.com/2013/11/06/opinion/whitaker-women-drinking-rape/>; Gabrielle Fonrouge and Kenneth Garger, *NYPD Union Chief denies victim-blaming Tessa Majors, says critics 'twisted the words'* (Dec. 16, 2019) N.Y. POST <https://nypost.com/2019/12/16/nypd-union-chief-denies-victim-blaming-tessa-majors-says-critics-twisted-the-words/>; Heidi Stevens, *El Hefe puts blame on woman for her alleged sexual assault. Humanity's in short supply*. (Jan. 2, 2020) THE CHI. TRIB. <https://www.chicagotribune.com/columns/heidi-stevens/ct-heidi-stevens-el-hefe-sexual-assault-victim-blaming-0102-20200102-owhhef6fq5hdpcgdx26kua23u-story.html>.

⁵⁶ Hayes, *et al.*, *supra* note 49 at 203.

⁵⁷ *Id.*

Potential helpers of those who have been victimized are influenced by attributions about the origin of the victim's needs.⁵⁸ Helpers respond more favorably to needs when victims are perceived to be "innocent", or when their need is perceived to be due to circumstances outside the individual's control.⁵⁹ One example of a prototypical "innocent" victim is an elderly woman who is attacked by a stranger on her way home from visiting relatives.⁶⁰ The old woman did nothing wrong to contribute to her victimization and could not have fought off her offender, making her both blameless and helpless.⁶¹ In contrast, a need that is perceived to be caused by the actions of the victim, especially perceived wrongful actions, produces very little desire to help that victim.⁶² For example, someone who was tortured because of their participation in terrorist acts is unlikely to garner public support in their claim for reparations from the torturing government. In Begum's case, the United Kingdom is unwilling to offer aid at all, a decision justified by Begum's lack of innocence. The belief in a just world causes us to downplay the significance of external factors or circumstances outside the individual's control that led to the ultimate victimization.⁶³ Ultimately, because we view the need as coming from an illegitimate source for which the victim is to blame, our empathetic response is undermined and with it the desire to engage in prosocial behavior to aid the victim.⁶⁴

Victims are thus in an unfortunate position. Observers are more likely to search for culpable behaviors to blame the victim. Then the discovered blame undermines public support

⁵⁸ DeLamater, *et al.*, *Altruism and Prosocial Behavior*, in SOC. PSYCH. 352 (8th ed. 2018).

⁵⁹ *Id.*

⁶⁰ NILS CHRISTIE, THE IDEAL VICTIM 17–30 (1986).

⁶¹ *Id.*

⁶² J.H. Bryan and M. Davenport, *Donations to the Needy: Correlates of Financial Donations to the Destitute*, EDUC. TESTING SERV. Research Bulletin No. 68-1 (1968); Frey and Gaertner, *Helping and the Avoidance of inappropriate racial behavior: A Strategy that perpetuates a nonprejudiced self-image*. 50 J. OF PERSONALITY AND SOC. PSYCH., 1083, 1083–90 (1986).

⁶³ DeLamater, *et al.*, *supra* note 58 at 353.

⁶⁴ *Id.*

and aid for the victim. We blame Shamima Begum. We seek out her culpable actions and emphasize them, and then demand that she be more innocent to deserve aid. We insist that victims be innocent and at the same time search for blame in dispositional factors, discarding the situational factors. Being a truly “innocent” victim is thus a high bar that very few victims can actually meet.

1.5 CATEGORIZING VICTIMS AND QUESTIONING THOSE CATEGORIES

The question of strategic human rights, the problem of choosing the “right” kind of victim for the purpose of advancing a cause, presumes that there are certain types of victims, some of whom are more sympathetic than others. In this section I review some of the ways that scholars have mapped the public perception of victims, and then propose a more holistic model for these public perceptions. In drawing up this typology of victims, my ultimate goal is to show how that typology becomes internally incoherent and show that this incoherence is a problem for the kind of human rights advocacy that stakes its efforts on finding the “right” kind of sympathetic victim.

Because of the nature of international human rights law, one of the most effective ways to create change is through public campaigns which “name” and “shame” countries and groups that violate human rights. When engaging in naming and shaming, human rights groups are most effective when there is clarity around three core issues: the violation, the violator, and the appropriate remedy for the violation.⁶⁵ Philip Roth argues that when the responsibility for the violation is diffuse or questionable, the ability to effectively name and shame diminishes.⁶⁶ Roth’s claims bring to mind Makua Mutua’s critique of the “damning metaphor” of the human rights

⁶⁵ Phillip Roth, *Defending Economic, Social, and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 1 63, 67–68 (2004).

⁶⁶ *Id.* at 68.

movement.⁶⁷ The first dimension of the metaphor is the savage, portrayed as barbaric, cruel, and the negation of humanity.⁶⁸ The state being criticized is portrayed as the quintessential savage, violating the rights of its citizens by acting in illiberal, undemocratic, and authoritarian ways, redeemable only by the acceptance of the norms of human rights.⁶⁹ The second dimension of the metaphor is the victim who has suffered at the hands of the savage.⁷⁰ This individual is portrayed as helpless and powerless in the face of her offender, and thus in need of saving.⁷¹ Furthermore, the classic victim is the innocent one who is blameless and undeserving of her current suffering.⁷² The final dimension of the metaphor is the savior who rescues and frees the victim from the oppression of the savage.⁷³ The savior is usually seen as a redeemer who “protects, vindicates, civilizes and safeguards,” saving the helpless victim from oppression and tyranny.⁷⁴

In reality, however, there is rarely a clear delineation between these dimensions, including the line between victims and savages. The completely “innocent” victim is not representative of victims of human rights offenses and is nearly impossible to find. And yet, advocates and litigators frequently use the most “innocent” or “sympathetic” victims, especially when starting a string of litigation on a given topic. For example, one of the earliest cases on torture conducted during the war on terror concerned an innocent victim of mistaken identity rather than someone who was tortured but was also a terrorist.⁷⁵ Duffy writes that the choice to “[p]resent[] an

⁶⁷ See Makua Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L. J. 1 201, 201 (2001) (explaining the common subtext of human rights which depicts a battle between savages and saviors and victims).

⁶⁸ *Id.* at 202.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Mutua, *supra* note 67 at 202.

⁷³ *Id.* at 204.

⁷⁴ *Id.*

⁷⁵ Duffy, *supra* note 2 at 253–254.

innocent victim to a frightened American public may have proved critical to changing the discussion from one about the ‘rights of terrorists’ to one about the tragic consequences of abandoning the rule of law”.⁷⁶ Even though the campaign may have been successful, the campaign’s tactics were still in tension with the fundamental principle that human rights are for everyone, even terrorists.

Victims of atrocity can have a contradictory set of potential traits. Victimization portrays victims as powerless objects that are acted upon rather than agents themselves, potentially leading to degradation, disempowerment and lack of agency.⁷⁷ Victims also may feel a sense of power, however, because they have a type of moral high ground in comparison with the offender.⁷⁸ An idealized conception of victimhood claims that in order to be a true victim, one must be innocent or blameless to successfully occupy the moral high ground.⁷⁹ While this view of victims helps to heighten the moral rebuke towards the offender and restores faith in humanity through appeal to the virtuousness of victims, it also obstructs the claims of those victims who are not perfectly innocent.⁸⁰ Human rights advocates are torn between advancing the human rights of everyone, not just the innocent and likeable, and the need to have successful campaigns that further rights more generally.⁸¹ Moreover, the reality is that public opinion influences the success of a particular movement. Public opinion’s susceptibility to biases makes the choice of a sympathetic victim all the more important for garnering support.⁸² In ending her short section on sympathetic victims,

⁷⁶ *Id.* at 254.

⁷⁷ Catherine Lu, *Pathologies of Victimhood*, JUSTICE AND RECONCILIATION IN WORLD POLITICS 63, 68 (2017).

⁷⁸ *Id.*

⁷⁹ *Id.* at 69–70.

⁸⁰ *Id.* at 70.

⁸¹ Duffy, *supra* note 2 at 254.

⁸² *Id.* at 253.

Duffy asserts that one goal of strategic human rights litigation should be a reassertion of the universality of rights and education to that end.⁸³

Another scholar frames the issue slightly differently. Meyers begins by examining two victim paradigms derived from Amnesty International's conceptualization of victims: the pathetic victim paradigm and the heroic victim paradigm.⁸⁴ Pathetic victims are those who are innocent of any wrongs relevant to their current suffering, those who were helpless in the face of an insurmountable power, and those who experienced unspeakable, human-inflicted suffering.⁸⁵ Heroic victims are courageous, idealistic, and committed to ideals of justice and human rights.⁸⁶ They often bring about their victimization through activism but are not complicit in that victimization because of their moral character and just beliefs –their cause is just so the harms inflicted on them are unjust.⁸⁷ The problem with this conception of the heroic victim can be seen through Rorty's suggestion that even though these victims might participate in activism they are still seen through the prism of their suffering that can make them look like passive losers worthy of contempt, thus allowing a basis for rationalization of moral indifference to their plight.⁸⁸ Sometimes a given victim can slide between being seen as heroic or passive, a slippage that suggests that these two categories share some underlying assumptions.

Indeed, both paradigms share a common assumption that the victim must be an innocent one.⁸⁹ The innocence required by the pathetic paradigm is a passive innocence whereas the heroic

⁸³ *Id.* at 254.

⁸⁴ Diane Tietjens Meyers, *Two Victim Paradigms and the Problem of 'Impure' Victims*, 2 HUMANITY 255, 256 (2011).

⁸⁵ *Id.* at 257–58.

⁸⁶ *Id.* at 258–60.

⁸⁷ *Id.*

⁸⁸ Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES, 113 (ed. Stephen Shute and Susan Hurley, 1993).

⁸⁹ *Id.* at 260.

victim is an agentic victim.⁹⁰ Meyers gives two examples of groups of individuals who fail to fit into either paradigm but who should still be legitimately considered victims. Her first example is trafficked sex workers who have not been fooled about the reality of their employment prospects, but who nonetheless travel because there is no better avenue to economic advancement in their native land.⁹¹ These women suffer psychological and physical abuse similar to those who were trafficked against their will, but they do not fit the mold of innocence.⁹² Her second example is an inmate sitting on death row awaiting his execution.⁹³ If advocates focused only on pure victims, these trafficked sex workers and death row inmates would be precluded from being seen as people who—regardless of guilt—also has a right to life and to be free from cruel, inhumane, or degrading treatment or punishment.⁹⁴ For advocates of the universality of rights, this prisoner’s violation is just as legitimate as a violation against someone innocent.

The above paradigms of victimhood categorize victims across two main axes, innocence/complicity and activity/passivity. All of the categorizations mentioned can fit into the intersections of variations on these two properties. However, as we will see, the ways that we categorize people who suffer harms and the distinctions that we try to make between sufferers who are innocent and complicit, active and passive, quickly break down when we examine cases of actual victims. By first examining the paradigm that we use to categorize people who suffer harms, and then showing how it fails to capture the common situations that emerge in human rights courts, we can better understand how advocacy efforts might be adapted.

⁹⁰ *Id.*

⁹¹ *Id.* at 262.

⁹² *Id.* at 263.

⁹³ Rorty, *supra* note 88 at 264.

⁹⁴ *Id.* at 266.

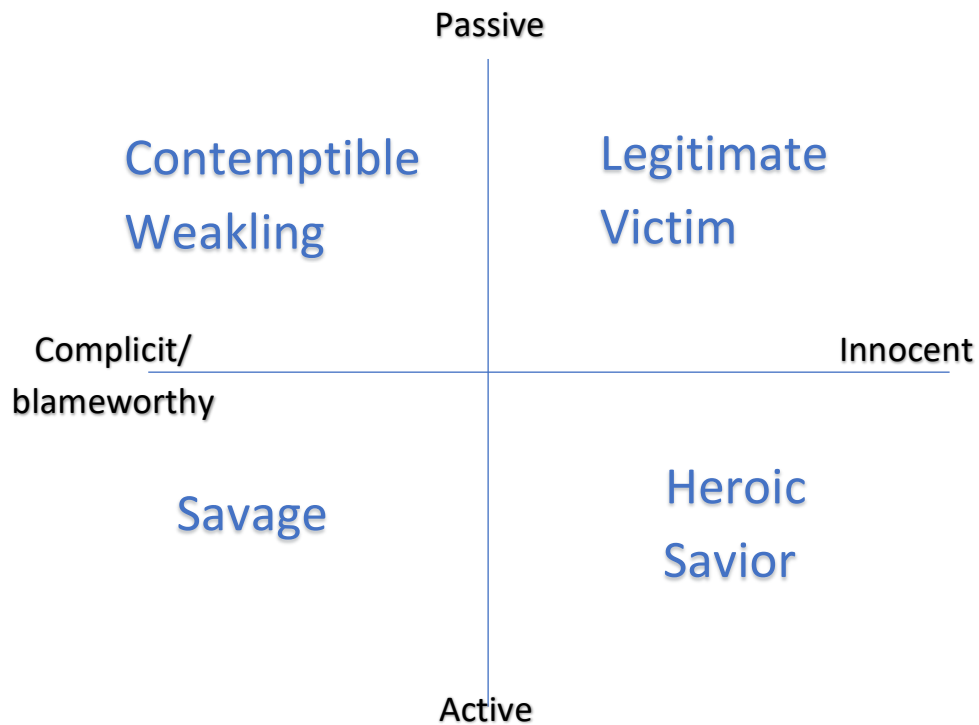


Figure 1: Victim Typology

The complicit-innocent axis is fairly straightforward. Because our categorizations are social identities rather than personal ones, one's innocence level is predominantly determined by the perceptions of others about a given victim. Innocence is not an on-off switch, but rather a continuum from, for example, an unrepentant terrorist who has murdered many people to an unoffensive elderly grandmother who volunteers at her local library.

The passive-active axis is less straightforward. The active portion of the coordinate plane consists of individuals who completed some action that has affected the perception of their status. It is a combination of the fact of if someone did act and of if they had the ability to act. One can be complicit and active in the sense that they committed some immoral or illegal act independent of their suffering. Begum, for example, allegedly committed immoral actions in taking part in the ISIS morality police. On the other hand, one who is active on the innocent side of the continuum

may have acted heroically in the face of the actual event of their victimization by fighting back or standing up to protest the unjust harms they suffer. Passivity is not just a function of a lack of action, but of that lack combined with the ability or inability to act. A contemptible weakling is someone who could have fought and is seen as culpable for their failure to fight, push back, or take some specific action. People speak with contempt about domestic violence victims who did not leave or sexual assault victims who did not fight back. In the latter case, the lack of fighting can even be used to claim that no sexual assault occurred despite the lack of consent. The truly innocent victim, then, is the one who was hopeless and powerless such that we could not expect them to fight back successfully against their own victimization. A prototypical case would be an elderly white woman who is attacked and robbed by a large, male perpetrator.

Starting with the Mutua conception of Savages, Victims, and Saviors, we can map each category onto the plane.

Savage Offender: Savage Offenders are those who are complicit and active. The savage could be a government infringing upon the human rights of its citizens as Mutua describes, but a similar category can be derived for individual bad actors, or what I will call “offenders.”

Someone who is in the Savage/Offender category has committed some bad action that is often independent of their current suffering. For example, a terrorist who is being tortured because they committed reprehensible actions prior to their own suffering. The terrorist is a victim of torture, and their past actions are used to justify harming them. The savage offender is often not allowed to claim the title of victim even though the harms that they suffer might otherwise make them legitimate victims. The past actions of the savage offender are used to delegitimize their claim to being victims of present suffering. Indeed, the category of the Savage Offender opens up the possibility that a person who suffers harm can always have their past history dredged for bad behavior that can be used to illegitimate their claim for legal redress.

Heroic Savior: Heroic saviors are those who are both innocent and active. Even though heroic saviors have acted and potentially even brought about their own suffering, they are not seen as complicit because of their strong moral character and commitment to justice. A hero is someone who has suffered but has taken actions for a just cause and who does not just “lie down” in the face of adversity. This category can be seen in both Mutua’s conception of “Saviors” who rescue the victim from the oppression and Meyer’s “heroic victims” who are in some sense overcome their own victimization through action. For example, an individual who shot an armed intruder who planned to hurt those inside has suffered and has committed an action that in the abstract seems immoral, namely shooting someone. But, through their strong moral character and will to protect innocents against an offender, the person becomes a heroic victim. Other heroic victims might be those who put their bodies on the line in front of a firehose during a peaceful protest. The heroic victim is selfless: acting in a way that others judge to be brave, and in a manner that is not solely for their personal benefit.

Legitimate Victims: Legitimate victims are passive and innocent. The hero who suffers and the offender who is harmed while being punished are both victims who appear to be “active”: they have agency and their current situation is the result of them asserting their will, for better or worse. However, as Mutua and Meyer’s categorizations of victimhood suggest, many victims are passive. The most common conception of a “true” victim is as one who is both passive and innocent. In this sense, Meyer suggests, the true and therefore legitimate victim is perceived as at least somewhat pathetic in that they are powerless against the victimizing force they face. Legitimate victims are those who are in need of saving or aid and who are also deserving of it because of their innocence. Given the human tendency to blame victims for their own suffering even when they are largely innocent, this category is a vexed one. The victim who is judged to be innocent (if somewhat pathetic) is the most likely to receive aid—but it is also the category that is

the most difficult to land in. The challenge of being a truly “innocent” victim often relies on appearing to have almost no agency: the person who was just walking down the street, who did not run, or yell, or fight back when assaulted by a wayward law enforcement officer. The legitimate victim can be perceived as heroic if they are seen as restraining themselves—avoiding lashing out or fighting back as a matter of principle rather than a matter of weakness. Here, the difference between being pitiable and being heroic turns on how much will or agency or spunk the victim is perceived as having—whether they exercise that agency or not. This suggests that the division between heroic and pathetic victims depends, not on the actions that others observe but rather on a judgment of the sufferer’s capacity to act—in other words, it depends on a projection that is prone to any number of biases and assumptions. Indeed, all these categories—heroic savior, savage offender, contemptible weakling, and legitimate victim—depend on social perceptions that are often made with little evidence.

Contemptible Weakling: Contemptible weaklings are passive and complicit. The scholarly literature mostly focuses on the first three types of sufferers: heroic saviors who are active and innocent, savage offenders who are active and complicit, and legitimate victims who are passive and innocent. However, if our designations depend on mapping people who suffer onto the axes of agency and degree of complicity, then we are missing a fourth category: those who are passive and complicit, the “contemptible weakling.” These sufferers are those who are culpable *because* they are passive. Contemptible weaklings are hard to conceptualize at first because, for someone to be complicit or a bad actor, we often assume that they must have actually acted. The label of contemptible weakling, by contrast, is given to people who are judged to be responsible for the lack of action that they took in response to the harm that they suffered. One example of the prototypical contemptible weakling could be a victim of domestic abuse who stays with her abuser. One could conceptualize that person in being complicit in that failing to fight

back, resist, or run away—they are judged to be blameworthy for not exercising their agency. It is worth noting that the contemptible weakling who is judged to be complicit in their own suffering is perilously close to the legitimate (and somewhat pathetic) victim who also shows little agency in the face of their suffering. The slippery justification that separates a contemptible weakling from an innocent victim is the idea that the contemptible weakling *could have* done something, but did nothing, while the pathetic victim *could not* have done anything to change their situation.

Taken together, these categories reveal two things. First, that the social narratives that categorize a person who is suffering as one kind of victim or another can have serious consequences for how a given sufferer is treated and how legitimate their claim to victim status might be. Second, despite the serious consequences of being judged to be one kind of a sufferer or another, the distinctions between these types of people are slippery at best. The savage offender seems to be both too active and too guilty to be able to claim the status of victim. But, in a sort of Goldilocks problem, one also cannot be too passive or else being labeled a contemptible weakling and having one's status to being a true "victim" questioned. It is almost impossible to get the level of agency "just right" in order to be judged an innocent victim.

Given the problems of and inconsistencies in categorization and the serious, detrimental effect of being placed in one category rather than another, we should fundamentally reconsider the established paradigms.⁹⁵ Being a victim should not depend on innocence in the form of passivity or in the form of political altruism.⁹⁶ Instead, it should be based on the nature of the treatment that the individual has been subjected to and the burdened agency of that individual in the face of such treatment.⁹⁷ Burdened agency functions as a type of middle ground that admits

⁹⁵ *Id.* at 267.

⁹⁶ *Id.*

⁹⁷ *Id.* at 268

that victims are subjected to powers that cause them to suffer while still granting them agentic complexity and resilience.⁹⁸ Under both the Mutua paradigm and the Meyers paradigm, however, it remains clear that those who are not “innocent” victims struggle to receive aid and struggle to have their claims of victimization legitimized because they do not fit neatly within the conception of victimhood held by the public at large. To see how these paradigms work in practice, it is worth considering how Begum’s case does (and does not) fit into the paradigms of legitimate victims and savage offenders.

Begum as an innocent (legitimate) victim: In order to gain public support, Begum’s advocates have operated under the pressure to make her appear to be as close to a perfectly innocent victim as possible. Advocates for Begum are attributing her victimization to circumstances that are outside of her control rather than dispositional features. Narratives of those who support Begum emphasize factors over which she had no control, especially her young age at the time she left the United Kingdom. They assert that Begum, through online videos and twitter accounts, was brainwashed and indoctrinated into Islamic extremism, entranced by the life that the propaganda promised. One such statement was given by an individual from Bethnal Green; she stated:

I was so shocked when I heard she went to Syria. She’s quite young and she’s a girl. I was so worried about her. She was a baby, she didn’t know what was going on there. People played a game with her and brainwashed her. She was a child... It wasn’t just her decision to go, they tricked her. It’s not her fault. No one can make such a decision when they’re 15.⁹⁹

⁹⁸ Rorty, *supra* note 88 at 268.

⁹⁹ Aamna Mohdin, *Let Shamima Begum Come Back, say Bethnal Green residents*, THE GUARDIAN (Feb. 14, 2019) https://www.theguardian.com/uk-news/2019/feb/14/let-shamima-begum-come-back-say-bethnal-green-residents?CMP=share_btn_tw.

Another resident echoed the same sentiments, stating “When she went to Syria, she was underage. She didn’t know what was right or what was wrong. The government should help her come back.”¹⁰⁰ A letter written by Begum’s lawyer describes her as being “groomed”, “radicalised”, and a victim of child trafficking.¹⁰¹ The letter further goes on to blame her radicalization, in large part, on the failings of the U.K. government to protect Begum or alert her parents of her suspected radicalization.¹⁰² At other times, Begum’s lawyer has stated that she was “damaged” and would need psychological support.¹⁰³ Both Begum and her husband claim that she is no danger to the United Kingdom because she was just a housewife during her time in ISIS.¹⁰⁴ Some blamed the death of Begum’s youngest child on the decision to strip Begum of her citizenship, with Shadow secretary Diane Abbott calling the decision “callous” and “inhumane”.¹⁰⁵ Former justice minister Philip Lee urged the country to reflect on its moral responsibility for the death of Begum’s child.¹⁰⁶

Begum as a savage offender: In contrast to the advocates who emphasize Shamima’s innocence, those who condemn Shamima focus on dispositional factors and behaviors that are within her control. Foreign Secretary Jeremy Hunt, among others, emphasized Begum’s agency rather than factors outside her control, stating that Begum “chose to leave a free country to join a

¹⁰⁰ *Id.*

¹⁰¹ Hanna Yusuf and Steve Swann, *Shamima Begum: Lawyer says teen was ‘groomed’*, BBC NEWS (May 31, 2019) <https://www.bbc.com/news/uk-48444604>.

¹⁰² *Id.*

¹⁰³ *Shamima Begum: ‘I didn’t want to be IS poster girl’*, BBC NEWS (Feb. 18, 2019), <https://www.bbc.com/news/uk-47276572>.

¹⁰⁴ Josie Ensor, *Shamima Begum was a cruel enforcer in ISIS’s morality police, say Syrian witnesses*, THE TEL. (April 13, 2019), https://www.telegraph.co.uk/news/2019/04/13/shamima-begum-cruel-enforcer-isils-morality-police-say-syrian/?WT.mc_id=tmng_share_em.

¹⁰⁵ *Shamima Begum: ‘Not safe’ to rescue IS bride’s baby, says Hunt*, BBC NEWS (March 10, 2019), <https://www.bbc.com/news/uk-47512659>.

¹⁰⁶ *Id.*

terrorist organization”.¹⁰⁷ He further elaborated that, "Shamima knew when she made the decision to join Daesh, she was going into a country where there was no embassy, there was no consular assistance, and I'm afraid those decisions, awful though it is, they do have consequences.”¹⁰⁸ Begum’s own father has come out in support of the U.K. government’s decision to revoke her citizenship, citing her lack of remorse for joining ISIS and stating that her own actions are the reason she is stranded in a Syrian refugee camp.¹⁰⁹ In contrast to Begum and her husband’s claims, members of an anti-Isil activist group living under jihadist rule have claimed that Begum served in the ‘morality police’, a group of women that ordered the imprisonment and lashing of women who did not follow Islamic rules regarding dress and travel.¹¹⁰

A false dichotomy: Begum’s story is a complex one with contradictory narratives abounding. As seen above, she displays elements that fall into legitimate victim and savage offender paradigms almost simultaneously. Media and advocates on either side of the debate seem to want to pin Begum into one category or the other, but the reality is that she is both. The desire for a completely innocent victim leads some to believe that Begum is not a victim at all, but rather a savage. Others, however, view Begum as a little too innocent to fit the prototypical savage category, leading them to classify her as a victim. The entrenchment of the savage and victim categories in Mutua’s metaphor obscure the truth about Begum’s story and lead to a failure on some to recognize her as, at least in part, a legitimate victim deserving of our aid.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Lizzie Dearden, *Shamima Begum’s father says he ‘doesn’t have a problem’ with daughter’s British citizenship being removed*, THE INDEP. (Feb. 24, 2019), <https://www.independent.co.uk/news/uk/home-news/shamima-begum-isis-bride-british-citizenship-removed-latest-father-sajid-javid-interview-uk-a8794141.html>.

¹¹⁰ Ensor, *supra* note 104.

Further Problems: Choosing only sympathetic victims has further negative consequences beyond undermining the claims of the universality of human rights. It may also force victims into telling only ideologically correct forms of their stories regarding their victimization, omitting or changing details that betray a shred of culpability.¹¹¹ If the receipt of aid or sympathy is contingent on being perceived as innocent, a victim will be more likely to tell the narrative of their victimization in whatever way makes them seem most innocent. This pressure causes victims to alter or omit details of the narrative, and, if discovered, these alterations become an additional damning indictment of the victim's character and trustworthiness.¹¹² The Department of Justice's Proposed Jury Instructions state that, "[t]he testimony of a witness may be discredited or, as we sometimes say, impeached by showing that he or she previously made statements which are different than or inconsistent with his or her testimony here in court."¹¹³ These instructions allow a victim or witness's statements to be completely discredited on omissions and differences between the ideologically correct narrative that the victim is originally pressured to give and the actual details of the incident.

¹¹¹ Lu, *supra* note 77 at 79.

¹¹² See generally, J McAvenia, *Getting Sex Crime Victims to Tell the Real Story*, L. ENF'T Q. 7 (1997) (stating that victims, especially those of sex crimes, will feel apprehension and embarrassment about their conduct and officers must take care to admonish victims to tell the complete story, keeping in mind the role of witness credibility in jury instructions.). For example, a woman petitioning for a five-year restraining order against Dodger's player Trevor Bauer was accused of "lies of omission" by Bauer's attorney for not mentioning texts suggesting consent on her way to Bauer's house where she was subsequently assaulted and for sleeping in bed next to Bauer after the assault. These "lies of omission" cast doubt on the woman's story and allowed Bauer's attorney to argue that "the woman gave Bauer every indication that she consented to the treatment she received during the nights they spent together in his home in Pasadena." The woman who omitted these details stated that she was afraid of the social consequences and being "paint[ed] as the slut." Andrew Dalton, *Trevor Bauer's Lawyer: 'Lies of Omission' in Woman's Sex Assault Story* (Aug. 17, 2021) NBC LOS ANGELES <https://www.nbctv.com/news/sports/trevor-bauers-lawyer-lies-of-omission-in-womans-sex-assault-story/2674147>.

¹¹³ DEPT. OF JUST., UNITED STATES' PROPOSED JURY INSTRUCTIONS (2015) <https://www.justice.gov/atr/case-document/united-states-proposed-jury-instructions>.

Keeping only innocent victims in the spotlight perpetuates potentially harmful stereotypes that only “real” victims who are powerless, helpless, and blameless are deserving of aid. Furthermore, the use of innocent victims creates an arbitrary hierarchy of victims that can be used to justify transgressions against less-than-innocent victims and to delegitimize valid claims of victimization.¹¹⁴ Victimhood is not based on amount or type of suffering, but rather on the perceived innocence of the victim. Take, for example, a man convicted of sexually assaulting a minor. Phrases like “you know what they do to people like you in prison” ring loudly, and stories of vigilante prisoners who murder child molesters are valorized.¹¹⁵ It’s difficult for us to even begin to conceptualize the child molester as a victim even though he was wrongfully murdered in a gruesome manner. A victim of an extrajudicial killing is not seen as a victim at all, and his suffering and his family’s suffering are delegitimized. Following a similar example, Lu observes that, “He does not seem to possess any redeeming skill or knowledge that would make his death a social loss. It is precisely because he lacks virtue and any other kind of excellence that it is difficult to acknowledge him as a victim.”¹¹⁶ On a larger scale, governments can use this hierarchy of victimhood to justify political violence as well. For example, the United States government uses the complicity of those affiliated with terrorist organizations as a justification for rendition and torture, even if that affiliation is loose or unproven, and even if the person involved has not perpetrated any crimes himself.

¹¹⁴ *Id.* at 71.

¹¹⁵ See, e.g. Caitlin O’Kane, *Inmate Confesses to beating two child molesters to death in prison* CBS News (Feb 21, 2020) <https://www.cbsnews.com/news/inmate-confesses-to-beating-two-child-molesters-to-death-in-prison-2020-02-21> (noting an instance where murders happened even though prison officials were warned before the attack).

¹¹⁶ Lu, *supra* note 77 at 71.

1.6 PROPOSALS AND APPLICATION

Given that legitimizing the claims of only certain types of victims is harmful, the logical next question is “What should we do instead?” Even if using innocent victims for strategic human rights litigation does have negative impact, it may be the case that rights are advanced further and faster through the use of victims who can successfully garner public support. Unfortunately, the belief in a just world fallacy prevents less-than-innocent victims from gaining widespread public support for their cause.

One potential option to get around this dilemma is through attempting to reframe the victim and their suffering as the product of situational factors. Highlighting some factors of a story while minimizing others or omitting them altogether can promote one interpretation over others.¹¹⁷ Content analyses of newspaper coverage of intimate partner violence, for example, have shown a tendency to display episodic frames which limit the issue to the victimizing event without placing it within a broader social context.¹¹⁸ The lack of contextual factors increases tendencies to blame victims and decreases the observer’s sense of responsibility for providing help to the victim.¹¹⁹ To increase perspective-taking and decrease the tendency to attribute blame, portrayals should focus on and emphasize the social explanations for the incident by providing context.¹²⁰ To that end, advocates should also emphasize the need for community support as well as the prevalence of the situation in question.¹²¹ This option is the one that Begum’s lawyer and

¹¹⁷ Kellie E. Carlyle, et al., *News Coverage of Intimate Partner: Impact on Prosocial Responses*, 17 MEDIA PSYCH. 451, 453 (2014).

¹¹⁸ *Id.* at 454.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 465.

¹²¹ *Id.*

family have employed in choosing to focus on her young age, lack of agency, and the negligence and indoctrination caused by others.

However, as Begum's story also illustrates, there will likely be a counter-narrative that surfaces, and no one can predict with complete accuracy which narrative will stick in the minds of the public. Reframing through the omission of details could, if discovered, create distrust and skepticism towards even the parts of the narrative that are true and complete. Furthermore, engaging in this strategy still has the potential to undermine the advocate's claim that human rights are for everyone. If they truly were for everyone, there would be no need to consciously emphasize one set of variables over the other. Finally, this method still requires the victim to conform to the ideologically correct form of the story in order to be successful. Begum, young and with no one to advise her, gave a damning interview that has been used against her to bolster claims that she is a dangerous perpetrator. Her interviews did not conform to the ideologically correct narrative of Begum as a young, helpless, penitent girl, undermining her efforts to reframe herself to fit the mold of the victim.

Instead of reframing, advocates could begin strategic litigation with prototypically innocent victims with the intent of setting helpful precedent to be used later for less innocent victims. For most, it is hard to imagine less sympathetic victims than the torture victims detained at Guantanamo Bay as prisoners in the 'war on terror'. One of the most beneficial outcomes of the habeas litigation in those cases was the "mere spectre of judicial review".¹²² Indirect oversight of lawyers with newly granted access to detainees forced reevaluation of some cases, including many cases of mistaken identity and entirely empty files.¹²³ Immediately after describing

¹²² Duffy, *supra* note 2 at 144.

¹²³ *Id.*

mistaken identities, Duffy discusses the slow changes that are beginning to take shape in outsiders' perceptions of Guantanamo Bay, making the link between "innocence" and public support even more salient.¹²⁴ Despite some victories in litigation, Guantanamo Bay is still open and victims still remain inside with no prospect of release and no charges filed.¹²⁵ The focus on an innocent victim of mistaken identity at least somewhat successfully began to shift the narrative away from the terrorist designations of the victims to problems with the rule of law.¹²⁶

A similar strategy could have been applied in Begum's case as well. Advocates likely could have found a jihadi bride that appeared significantly less culpable than Begum. Perhaps she was kidnapped rather than leaving by choice, was younger than Begum when she left, or repeatedly denounced extremism and tried to escape the Islamic state. Beginning with those cases, advocates could have established precedent that may have helped Begum's case and may have shifted public opinion, mitigating some of the blame that was placed on her.

This strategy may often be successful, but it still carries a heavy price. Less innocent victims will have to wait indefinite amounts of time while suffering continued violations of their rights. Even if she had waited to bring her claim and was successful, Begum's youngest child still would have remained in the refugee camp long enough to fall ill and die. Allowing some victims to suffer continued violations implicitly establishes a hierarchy among victims which places innocent victims at the top. Innocent victims are deemed more legitimate, easier to accept, and deserving of a remedy sooner than those who are less innocent.

Another potential solution, albeit an idealistic one, would be to address the underlying causes of victim-blaming and thus the need for "innocent" victims. Even though the existence of

¹²⁴ *Id.*

¹²⁵ *Id.* at 169.

¹²⁶ *Id.* at 254.

victim-blaming and its relationship to belief in a just world have been established, very few studies propose solutions or methods of reducing that bias. Rape myth acceptance, one form of victim-blaming, is heavily correlated with other societal problems like racism, sexism, and homophobia.¹²⁷ While we have literature on debiasing techniques for implicit biases,¹²⁸ one would need to get widespread commitment to debiasing techniques and to applying those techniques specifically to address bias against victims. Given that so far we have not even successfully gotten commitment to debiasing for racism or sexism alone, it is difficult to see this making a significant difference anytime soon. Multiculturalism and social competence, by contrast, were significant moderators of rape acceptance,¹²⁹ and are also moderators of implicit biases around race and gender more generally. Education and exposure to different cultures may lessen society's overall tendency to blame victims over time if resources were devoted to such an effort, but it does little to help advocates who are facing the dilemma of victim choice now.

How much an individual blames victims also correlates with future orientation and an intolerance of personal uncertainty.¹³⁰ Becoming more tolerant of uncertainty or less strongly future-oriented could reduce one's reliance on the belief in a just world fallacy and thus also reduce one's tendency to blame victims.¹³¹ Other studies of victim-blaming show correlations that seem to offer no practical guidance on mitigating victim-blaming. The tendency to blame the

¹²⁷ Eliana Suarez and Tahany M. Gadalla, *Stop Blaming the Victim: A Meta-analysis on Rape Myths*, 25 J. INTERPERSONAL VIOLENCE 2010, 2024 (2010).

¹²⁸ For general guidance on combatting various forms of implicit bias, *see generally*, Sarah E. Redfield, ENHANCING JUSTICE: REDUCING BIAS (2017); Adam Lueke and Bryan Gibson, *Mindfulness Meditation Reduces Implicit Race and Age Bias: The Role of Reduced Automaticity of Responding*, 6 SOC. PSYCH. AND PERSONALITY SCI. 284 (2014); PROJECT IMPLICIT, Education: Frequently Asked Questions, <https://implicit.harvard.edu/implicit/faqs.html#faq14> (2011).

¹²⁹ *Id.* at 2027.

¹³⁰ Michèle Bal and Kees van den Bos, *Blaming for a Better Future: Future Orientation and Associated Intolerance of Personal Uncertainty Lead to Harsher Reactions to Innocent Victims*, 38 PERSONALITY & SOC. PSYCH. BULL. 835, 841 (2012).

¹³¹ *Id.* at 842.

victim is higher for crimes like rape as opposed to robbery.¹³² One's tendency to blame victims also varies with temporary fluctuations in mood, and those with positive moods are less likely to attribute blame to victims.¹³³ When an individual is happy, they may have increased affective coping capacity, making future uncertainty less frightening and lessening one's need to believe the world is just.¹³⁴ One study even found a correlation between an individual's height and their tendency to blame victims.¹³⁵

The empirical literature does not offer much that could be of use to a human rights advocate or litigator, but it does contain some insights towards the beginning of a solution. A 2012 study examined the effects of mimicry on victim-blaming.¹³⁶ Participants in the study were shown a video and then told to either mimic the person's physical movements or to not mimic them.¹³⁷ Participants who mimicked later showed reduced tendencies to blame innocent victims, even when the victim was unrelated to the individual that the participant had mimicked.¹³⁸ Mimicry has been linked to one's ability to take the perspective of another and become more emotionally attuned and empathetic.¹³⁹

A later study examined the relationship between emotional disclosure and victim-blaming.¹⁴⁰ The study showed that emotional disclosure--or the release of negative emotions

¹³² Steffen Bieneck and Barbara Krahe, *Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is there a Double Standard?*, 26 J. INTERPERSONAL VIOLENCE 1785, (2011).

¹³³ Liz Goldenberg and Joseph P. Forgas, *Can happy mood reduce the just world bias? Affective Influences on Blaming the Victim*, 48 J. OF EXPERIMENTAL SOC. PSYCH. 239, 242 (2012).

¹³⁴ *Id.*

¹³⁵ Bai Bao-yu, et al., *Physical Shortness Lessens Victim-blaming: The mediating role of belief in a just world*, 2018 CURRENT PSYCHOLOGY: RESEARCH AND REVIEWS 1, 1 (2018).

¹³⁶ Mariëlle Stel, et al., *On Mimicry and the Psychology of the Belief in a Just World: Imitating the Behaviors of Others Reduces the Blaming of Innocent Victims*, 25 SOC. JUST. RES. 14, 14 (2012).

¹³⁷ *Id.* at 19.

¹³⁸ *Id.* at 21.

¹³⁹ *Id.* at 16.

¹⁴⁰ Kent D. Harber, et al. *Emotional Disclosure and Victim Blaming*, 15 EMOTION 603, 603 (2015).

through writing--after viewing a woman being victimized decreases the discussant's attributions of blame towards the victim.¹⁴¹ Victim-blaming is caused by a negative emotional reaction to future uncertainty, and emotional disclosure provides a method of alleviating negative emotions.¹⁴² Therefore, emotional disclosure can indirectly lessen one's tendency to blame victims.¹⁴³ Furthermore, the more a participant confronted negative emotions directly in their writing, the less they blamed the victim.¹⁴⁴

A related study examined the differences in reaction towards victims in self-focused individuals and other-focused individuals.¹⁴⁵ Researchers manipulated self-focus and other-focus by asking participants to recall a time when they were focused on others or to recall a time when they were focused on themselves prior to providing the participants with the victimization scenario.¹⁴⁶ One explanation for this phenomenon is that maintaining self-focus when hearing of a victimization brings about feelings of fear and distress at the thought of a similar fate.¹⁴⁷ By contrast, maintaining other-focus enhances the observer's empathetic response, leading to an increased likelihood of engaging in prosocial helping behaviors.¹⁴⁸

Taken together, these studies suggest that the way to overcome attributions of blame is to get observers to take the perspective of and empathize with the victim. Provoking that empathy involves portraying the incident as a whole rather than as one disconnected incident, which in

¹⁴¹ *Id.*

¹⁴² *Id.* at 611.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Michèle Bal and Kees van den Bos, *Putting the "I" and "US" in Justice: Derogatory and Benevolent Reactions Towards Innocent Victims in Self-Focused and Other-Focused Individuals*, 28 SOC. JUST. RES. 274, 274 (2015).

¹⁴⁶ *Id.* at 279–80.

¹⁴⁷ *Id.* at 277.

¹⁴⁸ *Id.*

turn increases the motivation to help the victim.¹⁴⁹ Attributions of blame can also be decreased through encouraging observers, witnesses, and the general public to engage in conversations and confront the negative emotions the incident has caused.¹⁵⁰ Some of these suggestions about framing the narrative and avoiding the creation of negative emotional reactions in the general public can be implemented into a strategic litigation plan, but it is unclear how successful they would be. One could attempt to reframe the narrative in an other-focused way and to allow the public a space to confront the negative emotions encountered. However, there will always be a potential counter-framing that does the opposite that less sympathetic individuals will be able to latch onto.

Additionally, these litigation moves still require an audience that is at least to some extent willing to engage with and listen to the narratives of victims that they believe deserve the harm that they have suffered. While using these dispositional reframing tactics might work on an already sympathetic audience, human rights advocates working to garner public support would still be asking the general public to sympathize with a terrorist or other bad actor and to metaphorically put themselves in the bad actor's shoes. Some might think that putting themselves in the mind of a terrorist is morally wrong in and of itself because, for example, it requires entertaining thoughts of violence. Some might claim that it is impossible for them, a moral person, to even occupy that mental space because it is so foreign.

The advocate is still unfortunately stuck in a dilemma. The rights claims of sympathetic victims are much more likely to garner public support and are therefore more likely to be successful. Successes, at least intermittent ones, are necessary in order to promote the human

¹⁴⁹ Carlyle, *supra* note 117 at 453.

¹⁵⁰ Harber, *supra* note 140 at 603.

rights agenda. However, choosing only sympathetic victims undermines the foundational claim that human rights are for everyone. Choosing a sympathetic victim is a move that one could make in the name of strategy, but advocates must realize the inherent trade-offs in such a strategy and continually remind the public that human rights are for everyone.

Instead, however, an advocate could move away from the loaded term ‘victim’ altogether. ‘Victim’ has deep connotations of passivity, blamelessness, helplessness, and moral superiority to an offender. The tension in question arises because we are forcing advocates to deal solely within the realm of *victims* of human rights violations. Each victim fits somewhere along the spectrum of innocence and passivity, and those who are the closest fit to what the public views as a legitimate victim are the ones whose claims and stories are put forwards. Culpable victims are just not seen as actual victims in the public eye, so there is pushback against their narrative of victimization. Maybe the problem of innocent victims is actually a problem with the term victim itself.

Instead, we need a term that doesn’t bring with it all of the troubling connotations and associations that exclude those who have legitimately been wronged. Advocates could label those who have suffered or been wronged as ‘survivors’ rather than victims. ‘Victim’ denotes passivity and helplessness. Complicit victims are usually those who have acted in some way, usually culpably, so a passive term like victim seems jarringly incorrect.

‘Survivor’, by contrast, is consistent with and arguably requires an agent who has acted because surviving connotes and often is an action. Even on an intuitive level, the two terms have very different connotations. If, for example, I was to tell you that someone was a cancer survivor, you would likely call to mind words like “fighter” or think of them as someone who “beat” cancer. Both of these are terms that involve actively doing something. If instead I were to tell you that someone was a cancer victim, however, the associations would be quite different. You would likely think of someone who was not a fighter— someone who was more passive, helpless in the

face of the disease, and likely died from their illness. Both the victim and the survivor were harmed in this scenario and both are deserving of our sympathy because of the hardships that they encountered, regardless of if they did or did not act. Furthermore, both can be seen as needing and being worthy of help from outside parties. Both the cancer victim and the cancer survivor likely have medical expenses that the community can rally around to provide support.

‘Survivor’ is defined as “a person who survives,” where the action of surviving consists of “continuing to live or exist, especially in spite of danger or hardship.” Under this definition, someone like Shamima Begum would be a survivor, even if it seems wrong to call her a victim. Begum continues to live in a Syrian refugee camp despite frequent danger and the hardships of losing three children and having her citizenship revoked. A terrorist who was tortured in the CIA rendition program would also be a survivor on this account because they continued to live despite the danger to one’s life posed by torture and rendition and despite the hardships that come with surviving torture.

One possible difficulty with this terminology is that it seemingly requires the person who was harmed to actually survive. That would rule out as a survivor anyone who was killed by the harm in question. So, a terrorist who was tortured and died as a result would be excluded from survivorhood because of their death and also excluded from victimhood because of their culpability. Even if we accept the linguistic shift, the argument goes, we still have not come up with a term that applies to the experiences all of the legitimate victims we originally had hoped to capture.

In response, it is still an improvement to broaden the category even if we have not successfully broadened it all of the way. So even if this objection is entirely successful, it does not undermine the project as a whole but rather merely limits its scope. Additionally, while we may not technically be able to categorize the deceased as a survivor, we can shift the label to

those who would be receiving the reparations for the harm the deceased suffered. In losing a family member to a human rights violation, the family suffers a hardship that would categorize them as survivors. In that way, advocacy could still happen under the label of survivorship on behalf of the relatives of the deceased who could receive compensation in ways that the deceased would be unable to.

Switching to the term ‘survivor’ also helps us break the false dichotomy that we saw with Shamima Begum at the end of the case study. Victims are seen as diametrically opposed to perpetrators. Because of this conceptual opposition, it becomes impossible for a person to occupy both positions at the same time even if they have both harmed and been harmed. Even though that dichotomy is a false one, it is one that is commonly held both implicitly and explicitly. The response of the public is to insist on placing people into one category or the other even though it miscategorizes those like Shamima Begum and delegitimizes the harms they have suffered. By contrast, survivors do not have an intuitively opposing term, except perhaps deceased. Calling someone a survivor then does not put them in the middle of a problematic conceptual dichotomy and allows the public to clearly categorize anyone who has survived serious danger or hardship as a survivor regardless of their complicity or agency.

One might mistakenly be concerned that this is a purely linguistic shift that will likely have no practical effect even if it was taken up by human rights advocates. While there is not yet any empirical evidence to support this shift, there is evidence behind other movements that were originally denounced as purely linguistic. One early proponent of Person First Language, Beatrice Wright, wrote that studies in semantics, “show that language is not merely an instrument for voicing ideas but that it also plays a role in shaping ideas.”¹⁵¹ Person First Language advocates a

¹⁵¹ Beatrice Wright, *PHYSICAL DISABILITY: A PSYCHOLOGICAL APPROACH* 7 (1960).

shift away from using terms like “disabled person” towards using a person first phrase like “person with disabilities” under the rationale that the second centers the person rather than the condition, lowering the stigma that those with these conditions face. On its face, this is a purely linguistic change for advocacy efforts, and it has largely been a successful one that has been adopted across a wide range of different conditions and identities because it has been empirically shown to reduce stigma against these groups.

While Person First Language is not a perfect parallel to the shift that I am proposing here, I think that it at least provides hope for the project. Purely linguistic shifts can have psychological effects that lessen the stigma against groups that there is a psychological bias against. Complicit victims have a psychological bias against them that is deeply rooted in the fundamental attribution error and the belief in a just world fallacy. So, even though we do not currently have empirical support for the linguistic change from victim to survivor for complicit victims, we have enough reason to believe that it ought to be tried and studied.

AIDS advocates in the Denver Principles wrote, “We condemn attempts to label us as ‘victims,’ a term which implies defeat, and we are only occasionally ‘patients,’ a term which implies passivity, helplessness, and dependance upon the care of others. We are ‘People with AIDS.’”¹⁵² The connotations of victim are clear as scholars and advocates have shown, and it is hard to shift the biases and connotations embedded deep within us around certain terms. However, even though we may not be able to shift the connotations themselves, we can change the words that we are using in our advocacy efforts to mitigate those harmful biases.

¹⁵² Advisory Comm. of People with Aids, THE DENVER PRINCIPLES (1983)

1.7 CONCLUSION

Mutua and Meyers seem correct in their diagnosis that the delineation of the world into neat categories—mutually exclusive “victims” and “perpetrators”—fails to capture the complexities of reality. Victims are not entirely innocent, and savages are rarely entirely evil. In addition to being incorrect, the categories actively harm victims who are perceived to be not innocent enough. Victims are held to a high standard of innocence in a civilization that is prone to erroneous attributions of blame. However, scholars and advocates must be realistic and recognize the human tendency towards categorization will not vanish over-night. While we slowly chip away at the false dichotomy by resisting the urge to deny victim status to those who are both victims and perpetrators through debiasing and other efforts, we should make a linguistic shift towards calling complicit victims survivors instead. ‘Survivor’ is a term that is consistent with the agency and lack of helplessness and blameworthiness while still connotating a need for sympathy and help. This shift allows advocates to put forward the claims of less sympathetic victims with a higher chance of garnering public support. If advocates can successfully advocate for these survivors and gain public support, then they will no longer have to face the tension between successful advocacy practice and the belief that human rights are for everyone

2. THE MORAL PRESSURE TO REPORT CRIMES

2.1 INTRODUCTION

When someone tells you that they have been a victim of a crime, how do you intuitively react? There is likely some level of compassion. You might ask whether the person is ok (assuming you like them). Eventually though, the temptation arises to ask the victim whether they've reported the crime or plan to do so, and (again, if you're nice) potentially even offering to go with them and support them during the reporting process.

People generally assume that it's a good thing to report a crime for a variety of reasons. Usually those reasons boil down to two basic categories. First, reporting crimes deters future crime, including both specific deterrence and general deterrence. If the crime is reported and the offender is sent to prison, that offender can no longer harm the victim in question or other potential victims in the future. Additionally, the more offenders are sent to prison, the more future offenders might be deterred from committing crimes to avoid prison. So, by reporting the crime, the victim has in a sense rescued others from a future harm. Second, reporting the crime may be seen as a way for a victim to restore their dignity or reclaim their voice by asserting their moral standing over or relative to the offender. For now, we will focus on the first justification for reporting.

The first justification might be something like the duty to rescue—that is, the person reporting the crime is not just doing a nice thing: they are performing a socially necessary duty for their fellow citizens and doing their part to keep the criminal justice system functioning. If the victim accepts that they must report, they are accepting that they have a duty to rescue others from harm by the same offender or from other offenders who might be deterred by a well-

functioning criminal justice system. If the justification for reporting crimes is something like a duty to rescue, then it merits treatment like other duty to rescue cases. One such case is the case of the drowning child.¹ Suppose on your way home from work you see a small child drowning in a pond. You could wade into the water and rescue the child, saving them from near certain death at very little cost to you. In that case, most people think that we have a moral obligation to wade in and save the child. The parallel line of reasoning here might go something like this: the victim who should report the crime only has to go through the inconvenience of reporting—not a great harm in comparison to making sure that the dangerous perpetrator in question is caught and the larger criminal justice system continues to be effective. At first glance, the case of the child’s life weighed against some soggy shoes seems similar to the case of future victims and criminal justice system efficacy weighed against some bureaucratic inconvenience. If anything, it seems that the case is even stronger on the side of reporting the crime: the victim is not only saving others, they are potentially even saving themselves from harm at the hand of a perpetrator who may reoffend against them.

While you might not intuitively automatically lump the drowning child case and the crime reporting case together, they do share a common aspect in that both cases are concerned with an individuals who are in a position to rescue others, be it the drowning child or future victims. The action which saves the others seems like one that is not likely to have onerous costs associated with it, and the result is likely to be the prevention of harm against current or future individuals.

The question then becomes whether we should treat these two cases in the same way, and, if not, then why not, given they have certain features in common. As I will establish in this chapter, there are serious problems with the account above that links the moral imperative to

¹ The basic set-up of this case comes predominantly from Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFFAIRS 229, 231 (1972).

report a crime, implicitly or explicitly, to the moral imperative to rescue others. One problem with the comparison is that the imperative for victims to report crimes is not supported by the empirical evidence we have for what actually happens when victims do report crimes. First, reporting a crime is not akin to having soggy shoes. It is a difficult, drawn-out process that has strong potential to retraumatize the victim. Second, if the pressure to report hinges on the idea that reporting will—through the operations of the criminal justice system—avert future harms, then we would need to have some kind of evidence that future harms would actually be averted by said reports, which we do not have. As I will show in this chapter, the perceived ease of reporting and the idea that future harms will likely be averted are far from the case.

When talking about encouraging victims to report, it is tempting to use the language of giving moral reasons. When one says, “You should report that,” one explanation for what they are doing is that they are implicitly saying that there is a moral reason to report. You may or may not go further and explicitly state the reason you have in mind, but you are at least appealing to the existence of at least one such reason. Instead of using the language of moral reasons, we should instead frame this particular interaction as “moral pressure”. In cases of moral pressure, we say that person X tells or implies to person Y that they ought to do action A for a given moral reason R. A few things set moral pressure aside from merely giving moral reasons. First, in this specific scenario, the given R are not actually supported by solid empirical evidence. Without support for R being an actually existing, strong reason, it seems strange to refer to it as giving moral reasons. Although the talk that encourages victims to report crimes leans on the language of a moral duty to save others, that talk is not actually supported by solid empirical evidence that others would actually be saved. This moral pressure has the effect of artificially inflating the good effects that would follow from reporting crimes while almost entirely ignoring the costs that might come to the victims who report. Second, giving moral reasons does not completely capture what is

happening in the crime reporting case. One could give moral reasons for doing something supererogatory, implying that the action in question would merit praise. Those moral reasons, however, can be outweighed by other factors or countervailing moral reasons. In the case of reporting crimes, there is an added social pressure that is hard to articulate. As a victim, you are not being given some reasons to potentially do a supererogatory action that would be deserving of praise. If you do not report, there is an implication that there is something wrong about you. It's not just that the act of reporting is seen more as obligatory rather than supererogatory, there is an added layer. In not reporting, you are letting your offender "win" and failing to rise above the diminished state you've been put in, making you a sad, powerless, perpetual victim. It's not even that you won't deserve praise for failing to report, but that you will garner pity because there is a defect in your character: you fail to hold yourself with the esteem necessary for dignity. In what follows, I will be outlining a more detailed account of both the benefits that will likely come from reporting (which are minimal) and the costs of reporting (which can be significant).

To be clear, I am not arguing that we cannot talk to victims about their experience and that we cannot help them think about whether or not they ultimately want to report. I am also not arguing that victims should never report crimes. I am arguing that when we tell victims that they *should* report a crime, we are engaging in a kind of moral pressure that unfairly puts the burdens of the continued functioning of the criminal justice system on individual victims at a time when they are often most vulnerable. When we talk to victims about the harm that they suffer, what we should do is offer to support them in the path that they want to take without introjection. If a victim brings up the question of reporting or expresses a desire to do so, it is a good thing to help and support them through the process or to help them realistically weigh the costs and benefits of that action. It should, however, be entirely the victim's choice without the pressure or prompting of anyone else.

In what follows, I will begin by establishing that there is at least a moral pressure to report crimes stemming from different relationships and levels of societal pressures. Second, I will further explain the features in common between the crime report case and the drowning child case to show how exactly they are similar. Once we have established the similarities, I will then go on to discuss whether there is an obligation to report and to distinguish the two cases on two grounds: 1) the costs of rescue are higher and often underestimated for reporting crimes, and 2) the likelihood of successful rescue through crime reporting is much lower than typically assumed. Given that, I will argue that it is wrong to morally pressure individuals to report crimes, at least in most circumstances.

I will end by examining normative takeaways from this analysis and bring to light some of the societal pressures to be heroic that are unduly put on victims. My claim is that, because of the costs that come with reporting crimes, we should be working on ways to systematically reduce those burdens systemically rather than relying solely on heroism of individual victims.

2.2 THE MORAL PRESSURE TO REPORT

Through this section, I will be talking about victims being morally pressured to report crimes and the ethical status of engaging in the act of moral pressure. This discussion requires a definition of moral pressure. If a person X is morally pressuring a person Y to do an action A, X is telling Y that they have a moral reason, R, to do A, and therefore should A. Moral pressure differs from moral reasoning in two ways: First, there is a deployment of moral language without sufficient evidence to support the given moral reason why someone should R, and, second, the pressure implies not just that R *may* be a good thing to do all things considered, but that there is a moral defect in Y if they decide not to A.

To explain the concept further, let's look at another potential instance of moral pressure as a concept. Suppose that you are in a restaurant and hear a parent yell at their child, stating, "Sit up straight and stay still! Slouching and fidgeting are disrespectful to everyone here, so stop it! You don't want to be a loser, and only losers can't sit still."² Here, those in the restaurant may or may not actually care if the kid slouches or fidgets while eating their tacos. The parent is invoking the language of moral reasons, but something has too far. The reasons given are not supported by any kind of empirical evidence. Even if the child does sit still, it is not clear that the other diners will experience any change in the level of disrespect they felt. A large number of the diners likely did not even notice or care that the child was moving, let alone reading it as a sign of disrespect to them personally. Even if some of the diners had taken it as a sign of disrespect, the parent still went wrong in invoking that reason without any empirical support that the reason given was an accurate one. Similarly, the parent is not just attempting to give a moral reason that is disconnected from reality, the parent is stating that there is a defect in the child because of their failure to act in the way demanded. It's not just that sitting still is something good that should be praised when done, it's that the failure to do so means there is a defect in the child's character rather than just their current behavior. They are a "loser."

In the cases of moral pressure around reporting crimes that I will be discussing in this chapter, there is a large body of evidence that reporting crimes often does not lead to arrests or convictions, and so those who tell victims that they ought to report are only mustering the language of morality without paying attention to readily available evidence. Furthermore, they are failing to realize that, even if the reasons to report they invoke were accurate, there are a host of countervailing reasons and considerations surrounding the costs of that action for the victim. For

² While this example might seem strange and fantastical, it is real and comes from a recent experience at a local restaurant.

now, I am going to assume that it can still be moral pressure even if a person does not explicitly state the reasons following the ought statement. So, simply saying “you ought to report that” is sufficient to count as moral pressure because the “ought” implies at least some unstated moral reason to motivate the imperative statement.

I will be primarily dealing with questions of pressuring someone to report something that happened to them that was a crime. However, I think that some instances of third-party reporting fall under the scope of this project as well. I will take third-party reporting as an extreme form of moral pressure where the third-person literally takes away the victims’ choice as to whether report the crime. This view on third-party reporting has some obvious exceptions such as crimes currently occurring where reporting actually could stop an event in progress, crimes where the victim merits paternalism because of age or other status, and crimes in which the primary victim is deceased because the police necessarily become involved when there is a dead body. For right now, I will begin with the case of individuals who are pressured to report crimes of which they are the direct victim, namely where the crime or harm in question happened directly to them rather than someone else.

There are many different forms and varieties of pressure that one could assert over another across different scenarios. Moral pressure is unique in that it asserts that someone ought to do something because there are moral reasons to do so, even if those reasons are not explicitly stated or referred to. Moral pressure is pressure to do something that there is either a moral obligation to do or that there are at least some moral reasons to do that action. Pressure is not simply making a suggestion. Instead, it has at least some normative force or reason behind it that makes it feel more compelling than a mere suggestion. When you ask someone if they have reported a crime, you don’t usually shrug and say “maybe you should report it” in a way that would connote a suggest. We mean something more serious and more normative in nature.

Moral pressure could differ based on *relationship strength*. It would be different for a complete stranger to ask you to help them move than it would be for a friend to ask you to help them move. Both actions are arguably supererogatory acts, but one pressure has more umph to it because it is asserted by someone with a special relationship to you. In another case, your friend might kindly ask you to please stop texting during a movie at the theatre, or they may tell you that you must stop because you are being rude. The *amount* or *severity* of moral pressure being applied is different. We would also pressure someone to do something that they do not want to do or something that they do want to do, although the pressure seems to fade more into encouragement in the latter case rather than pressure. That would be a difference of if someone *consents* to the object of the moral pressure. The *source of the pressure* could also differ. One could be pressured to stop smoking interpersonally by a friend, through a social media advocacy campaign, or through a government agency mandated product label. In the sphere of reporting crimes, one could even be pressured to report *subconsciously* by seeing how well victims are treated and how often just is served on shows like *Law and Order* and *CSI*.

Moral pressure is important. The stronger the moral duty someone has, the stronger it seems the pressure we should apply for them to fulfill that obligation, and sometimes people should morally pressure us. It's part of what helps us to fulfill our moral obligations and live together in society, but we don't usually speak in terms of the pressure that we can and often do put on each other. While the legal system provides pressure itself, there are some norms and moral obligations that are enforced mostly or purely through moral or social pressure because of their nature or because of limitations of the criminal justice system. For example, we continue to see a rise in community-based policing efforts like neighborhood watches where, in a way, the police are outsourcing some of the investigating work to private citizens. You are pressured into

conforming with a moral norm say not to vandalize property because of pressure from individuals in your community rather than from legal pressures.

I think there is room for a more fleshed out theory of what is involved in moral pressuring and how much each of these factors influences when it is and is not permissible, but here I will stick with even the seemingly most innocuous case of a friend gently pressuring another friend to report a crime. If the victim is inclined to report the crime, or is undecided about reporting, or is disinclined to report the crime, they should have the freedom to consider what course they can take. Rather than engaging in moral talk about what a victim ought to do—regardless of their inclinations—the role of the friend is to offer consolation and an open ear, not offer moral reasons to engage in an action that, we will see, can have significant costs to the victim.

2.3 LEVELS OF MORAL PRESSURE

There are many sources of moral pressure that are often operating at different levels and in different ways. We'll start with the broadest levels of social pressure and then get down to interpersonal pressures like the one in the example above where one person tells another that they “ought to report” something. There are, after all, many ways that individuals can get the message that they need to report a crime that do not come in the form of a direct appeal from another individual.

2.3.1 Communal Safety

One reason that victims or bystanders may be pressured to report a crime is because reporting crimes is seen as a method of ensuring community safety. The Department of Homeland Security, for example, had an “If you see something, say something” campaign that released a series of Public Service Announcements in 2010 and 2011. One video launched a community safety approach to counter terrorism, beginning with the claim that “homeland

security begins with hometown security.”³ Another video portrays regular people engaging in what appears to be suspicious activity that supposedly merits hyper vigilance from good citizens who will then eagerly report the activity to the authorities. The suspicious activity in questions ranges from unattended backpacks to nervously talking on a phone.⁴ In this example, the virtue of reporting—regardless of how minor or major the observed action might be—is held up as a pillar of community safety. Within the cultures of the US at large, this slogan is widely known and invoked, including in individual communities. In the calculus of community safety advanced in this campaign, the more reporting we get, the safer we are. Rather than addressing victims who have already suffered a harm, this campaign asks citizens to imagine that they might, at any moment, become the victims of some horrible attack and that only a flurry of preemptive reporting can keep the whole community safe.⁵

The impetus to report for communal safety comes in the form of many different community safety-based initiatives. One flier for a local police department uses the “if you see something, say something line” in conjunction with the phrase “Protect your everyday.”⁶ One neighborhood-watch sign states that “We report crime to the police” followed immediately by

³ DEP’T OF HOMELAND SEC. (hereinafter “DHS”), *If You See Something Say Something: Campaign Partnership Guide* (July 15, 2010) https://www.dhs.gov/sites/default/files/publications/SeeSay-Overview508_1.pdf (describing the language of the original 2010 campaign video).

⁴ DHS, *The Drop-Off- If You See Something, Say Something*, YOUTUBE (Aug. 15, 2011) <https://www.youtube.com/watch?v=qml7obNdmgk>.

⁵ A newer version of the DHS Public Service Announcement states, “It’s not about paranoid, or about being afraid. It’s about standing up and protecting our communities,” seemingly to address the worry about the campaign causing general paranoia and fear in individuals. It’s not clear how effective this is, and it’s telling that the video specifically has to make those clarifications. Regardless, the emphasis is still on reporting as a means to protect one’s community. DHS, *If You See Something, Say Something* (Sept. 20, 2019) <https://www.dhs.gov/medialibrary/assets/video/21210>.

⁶ Michigan State Police, *Michigan Intelligence Operations Center (MIOC)*, <https://www.michigan.gov/msp/divisions/intel-ops/mioc> (last visited Oct. 8, 2023) (displaying the slogan “Protect Your Everyday” in conjunction with its imperative to report suspicious activity).

“Help us make our community a safe space.”⁷ These initiatives can even be traced back to the 1990s in public service announcements targeted towards children where the cartoon rabbits, Bert and Gert, urging them to “Stay alert... stay safe” in part through reporting suspicious activities.⁸ At least in communities with safety-based initiatives, there is a moral pressure being exerted to report crime to support communal well-being and safety. The morally pressuring message that more reporting creates more communal safety trickles down from national security to neighborhood security. As we will see in the next section, this moral pressure can also be present for individual victims.

2.3.2 Societal and Interpersonal Pressures

Moral pressure can also come in the form of pure interpersonal pressure as it did in the definitional example for moral pressure. Many people have had the experience of telling someone that something happened to them and having that friend then say that you ought to report it to someone for the sake of your own safety or dignity or for the sake of safety for others in the future, even if they don’t explicitly give the explanation as to why you should report. This interpersonal pressure has real effects. Studies show that victims are much more likely to report a

⁷ Sigo Signs, “*We Report Crime to the Police, Help Us Make Our Community a Safe Place*” Sign For Sale, AMAZON, <https://www.amazon.com/Report-Crime-Police-Community-Place/dp/B09NP9PGDS> (last visited Oct. 8, 2023).

⁸ There are a series of shorter videos which aim to teach kids “important lessons about safety.” IMDb, “Stay Alert... Stay Safe,” <https://www.imdb.com/title/tt20864088/> (last visited Oct. 8, 2023) (citing STAY ALERT... STAY SAFE, <https://www.youtube.com/watch?v=cgvv4wnVIFU> (Bear Spots 1994)). The campaign was started in Canada in response to the murder of an 11-year old girl, launched specifically by her family as a kind of “streetproofing” campaign aimed at teaching children to avoid dangerous situations. Her family saw the streetproofing and push for the legalization of the death penalty that occurred after the murder of their daughter and decided to launch a campaign of their own that rejected the fear-based approaches, leading to the creation of Bert and Gert. Rob Csernyik, *The Tragic Story Behind Canada’s Iconic “Stay Safe... Stay Alert” PSAs*, BUZZFEED (Aug. 25, 2016) <https://www.buzzfeed.com/robcsernyik/stay-alert-stay-safe>. Even though the aim of the new campaign was to reduce fear and empower children, it still reinforces in children that the way to make sure everyone is safe is to be hypervigilant (always listen to “your radar”) and to tell someone if they see something suspicious.

crime if they are told that they ought to do so, even if they are told that by a complete stranger.⁹ Furthermore, the increased rate of reporting occurs in roughly the same magnitude regardless of the type of argument the advisor presents in favor of reporting¹⁰ and even in cases where no argument in favor of reporting was given at all.¹¹ In this section, I will survey several different cultural narratives that attempt to portray and discuss how victims might experience this interpersonal pressure as they consider whether to report a crime or not.

The complex dynamics that can emerge when someone is urged to report a crime are represented with especial clarity in the popular Netflix show, *Sex Education*, where one character, Aimee, is assaulted on a bus while riding to school.¹² At school, she tells her friend Maeve what happened on the bus, and the first thing that Maeve says is “What?... You have to report it.”¹³ Despite Aimee insisting that she did not want to report it, Maeve says that what she wants for her birthday that day is for the two of them to go to the police together to report the crime. Aimee tries to back out multiple times over the next two scenes. A cop comes in and asks questions, including questions about how Aimee “had smiled at” her assaulter. Maeve rightfully calls out the officer on this comment, at which he notes that it’s notoriously hard to make these kinds of charges stick.¹⁴ Aimee and Maeve walk out, and we never hear of the perpetrator being caught, although we do live through some of Aimee’s later trauma surrounding riding the bus after the assault.

⁹ M. GREENBERG & R. BARRY RUBACK, *AFTER THE CRIME: VICTIM DECISION MAKING* 50 (1992).

¹⁰ *Id.* at 48–50. Three different types of arguments were examined: Arguments concerning the magnitude of the crime, arguments about police effectiveness, and arguments about punishing the offender. All three arguments were roughly equally persuasive, but it’s not clear that victims listened to the exact argument as they had difficulty picking out the exact type of argument given when presented with different argument types. *Id.* at 49–50.

¹¹ *Id.* at 49.

¹² *Sex Education*, Season 2, Episode 3. (NETFLIX Jan. 17, 2020).

¹³ *Id.*

¹⁴ *Id.*

Here we have a popular show that explicitly responds to a situation of victimization with moral pressure. Maeve's first point after being told was that Aimee *had* to report the crime, and Maeve went so far as to pressure her to the police station to file an actual report. The only thing that we ever see come of that report is a questioning, sexist police officer and the retraumatization of telling the story of the assault with the perpetrator never being caught. The show, rather unsettlingly, does not wrap up this narrative with the catching of the assaulter or an expelling of trauma. Aimee just feels bad, about her own violation and about the amount of trust she can put in her friends and in social institutions more generally.

Sex Education's depiction of the challenges that arise from interpersonal social pressure are a response to the narratives about how reporting crimes gives victims a voice and helps create social safety that percolate through other popular representations of the criminal justice system. In the United States, one of the most dominant folk narratives that we have about victimhood and the legal system come from the decades-long run of *Law and Order* (and especially its popular spin-off: *Law and Order: Special Victims Unit*). In an interview, Mariska Hargitay, who plays Detective Olivia Benson in the show, describes what she sees as some of the positive, real-world benefits of the show by saying, "I have so many times encountered people that have said because of the show, they knew what to do after their assault. Because of this show they had a rape kit done. Because of this show, they reported and had faith in that... When I started hearing those stories is when I knew it wasn't just a TV show anymore."¹⁵ Crime shows themselves, then, can serve as a real source of moral pressure for victims to report and avail themselves of the criminal justice system. Hargitay sees the moral pressure that comes from so many episodes of cases

¹⁵ Harmeet Kaur, "Law and Order actor Diane Neal weighs in on how the show can affect perceptions of police," CNN ENT. (September 15, 2022) <https://www.cnn.com/2022/09/15/entertainment/diane-neal-law-and-order-john-oliver-cec/index>.

successfully solved and victims receiving justice as actively helping to make the world more like the effective policing system that the show represents. This, in itself, is a telling train of logic, because it presupposes that the criminal justice system cannot function without the cooperation of victims and that victims need a fictional representation of criminal justice in order to be convinced to cooperate.

In a segment discussing *Law and Order*, media commentator John Oliver describes the many different misconceptions that those who watch crime dramas have about the criminal justice system, including that such viewers are “more likely to believe the police are successful at lowering crime,” and that “the police use force only when necessary” among other misconceptions.¹⁶ Indirectly then, we can see the suggestion that reporting crimes to the police is a successful way to prevent future crime from occurring. In order for social pressure to report crimes to appear, there needs to be a social belief that crime reporting is effective.

Oliver’s segment and the show *Sex Education* both respond to the narratives about the moral necessity of reporting crimes and the likely success that purportedly follows from that reporting. In both of these shows, we are introduced to a world in which people like Maeve and the actors that play detectives and police officers on TV believe that reporting crimes creates more safety and functions as a way to “stick up” for yourself and reclaim some of the agency that is violated in the criminal act. Both of these segments also suggest that things aren’t always that simple: police often don’t get the kinds of results that come from an episode of *Law and Order* and Aimee gets no justice, and no comfort, from the act of reporting itself.

These two recent media representations about the questionable effects of reporting crime come up against a larger social pressure that continues to assert that victims should report crimes.

¹⁶ *Last Week Tonight: Law and Order*, (MAX streaming service, Sept. 12, 2022).

In addition to pressure coming from media and popular television shows like *Law and Order*, we can also see pressure coming from celebrities and athletes. For example, the Time Person of the Year for 2017 was “The Silence Breakers,” a group of women including Taylor Swift, Ashley Judd, and Rose McGowan, among others, was recognized for their willingness to stand up and report their often powerful offenders, inspiring women from all walks of life to speak up against theirs.¹⁷ The silence breakers is meant to include more than those who are on the cover such that, “[t]he women and men who have broken their silence span all races, all income classes, all occupations, and virtually all corners of the globe.”¹⁸ In general, honoring people who have done heroic tasks is not objectionable. However, the TIME piece itself slips into moral pressure at times, asserting that “There’s something really empowering about standing up for what’s right” and that having a reputation as a whistle blower is “a badge of honor.”¹⁹ Even in a piece that is about the heroism and onerousness of the task of reporting crimes, we can still find pieces of language that promote moral pressure on other victims.

Pressure can also stem from social media campaigns, most notably the #MeToo movement where many people shared an original tweet by the actress Rose McGowan: “If all the women who have been sexually harassed or assaulted wrote ‘Me Too.’ as a status, we might give people a sense of the magnitude of the problem.”²⁰ The #MeToo movement did a lot of work and spawned an important social movement, and no one can deny its efficacy. However, this post in and of itself is a form of social pressure. It may not be directly asking individuals to go through

¹⁷ S. Zacharek, E. Dockterman, & H. Sweatband Edwards, *Time Person of the Year 2017: The Silence Breakers*, TIME MAG. (Dec. 18, 2017).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Stephanie Petit, *#Metoo: Sexual Harassment and Assault Movement Tweeted Over 500,000 Times as Celebs Share Stories*, PEOPLE MAG. (Oct. 16, 2017) <https://people.com/movies/me-too-alyssa-milano-heads-twitter-campaign-against-sexual-harassment-assault/#:~:text=%E2%80%9CIf%20all%20the%20women%20who,Weinstein%20of%20sexually%20harassing%20or.>

official channels of reporting, but it is asking victims to in a sense “out-themselves” as a victim and to share their suffering for the broader social good of educating the masses about the problems of sexual harassment and assault. The post says that it comes from the suggestion of a friend who is, perhaps, not unlike Maeve: imploring people to be brave, claim agency, and promote a larger social good by publicly stating that they had been harmed. In this framework, the magnitude of the problem can only be recognized if victims take on the individual responsibility to step up and be heroic.

It is true that the #MeToo case is different from the complete report that one would be asked to give in a police office. The #MeToo mode of reporting is minimal, only asking for two words and allowing the victim to keep the perpetrator anonymous to help prevent backlash. Individual posters maintained the ability to choose whether they wanted to share more. While it may be a lesser form of pressure that could in some circumstances be justified, it is still a form of moral pressure to report that victims have recently faced, and it reinforces the general idea that reporting for the good of the community is the morally correct thing to do.

2.4 THE DUTY TO RESCUE THAT LIES BEHIND THE MORAL PRESSURE TO REPORT

The social pressure that comes to individuals from friends, television shows, and social media campaigns does not always fully articulate the systematic ethical framework that underlies them. In the previous section, I stated the various forms of pressure that can be applied to victims in order to encourage them to report. In this section I will elaborate the moral reasoning that lies under the idea that victims ought to report crimes that they have suffered. At the core of the folk theories from the previous section about what victims ought to do is the presupposition that there is a duty to rescue others from harm, especially when the cost of acting to rescue others is low. In

reporting crimes, victims are acting as “good Samaritans” who are helping the criminal justice system save others from future harm.

The terms “good Samaritan” stem from a biblical parable in which a victim of a violent crime lies injured by the side of a road while a series of strangers walk past. However, instead of passing him by as others had, a Samaritan comes to the aid of the victim, bandaging his wounds and taking him to an inn to be cared for at his expense.²¹ The Samaritans were an outcast minority, generally despised by the anticipated audience of the original story, whereas, in the parable’s telling, those who passed the victim by were the elite (and self-congratulating) members of the majority. The main point of the original story was to be a subversive answer to the question, “who is your neighbor?” The person who provided the aid is known as the “Good Samaritan” in that parable. While those who passed by the injured man were not Samaritans, the label “Bad Samaritan” has come to be attributed to those who fail to prevent harm or rescue others in need of aid.

According to Feinberg, bad Samaritans must satisfy several conditions: First, there must exist a stranger or person with no special relationship to the person who is suffering or in need of aid. Second, that person (the bad Samaritan) must omit some action directed at the endangered or suffering person.²² Examples of such actions could include attempts to rescue, seeking aid, warning of danger, and others. Third, the bad Samaritan must have been able to perform the omitted action without “unreasonable cost or risk to himself or others.”²³ Fourth, because the bad Samaritan has omitted that action, the endangered or suffering person suffers new or increased

²¹ *Luke* 10:25 – 37.

²² JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 126 (1984).

²³ *Id.*

harm. For the reasons just given, the omission of the action of providing care under these circumstances makes the bad Samaritan morally blameworthy for their failure to aid or rescue.²⁴

Singer begins with an assumption that certain forms of suffering and death are bad. While his examples are food, shelter, and medical care, I will assume that suffering from being the victim of a crime is also bad in the same sense.²⁵ Singer's next assumption is that "if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it."²⁶ Following these two assumptions, Singer introduces what has come to be a paradigmatic case of a Good Samaritan problem. Assume that you are walking past a shallow pond and happen to see a child who is drowning in it. You have the capability to wade into the pool and pull the child out of the pond, successfully preventing said child from drowning while only suffering insignificant harms yourself like getting your clothing muddy.²⁷

For the purposes of this chapter, I will assume that most people share the basic intuition that we are morally obligated to save the drowning child if the cost to us is minimal. That ethical obligation, however, does not translate into a legal obligation, at least in the United States legal

²⁴ *Id.*

²⁵ Singer, *supra* note 1 at 231.

²⁶ *Id.* 229.

²⁷ *Id.* 230-231. Singer then goes on to generalize his principle beyond those who are suffering directly in our proximity to those who are suffering anywhere in the world whom we may never even know and even in cases where there are multiple such people who could aid those who are suffering such that diffusion of responsibility cannot override or lessen our moral obligations to those who suffer. That we ought not discriminate against those who are suffering far away can be drawn from the combination of a principle of impartiality and the increased ability to help those across the world. The existence of others who could also help not lessening our obligations is a harder argument to make, especially in cases involving giving monetary aid. However, Singer points out that the presence of others around the pond who could help but are not helping intuitively does not lessen your obligation to save the drowning child. If no one else is doing anything, you still morally ought to step in. If we accept the parallels between the case of the drowning child and saving children dying from famine through monetary donations, the line between moral obligation or duty and charity or supererogatory actions is erased. In both cases, we are saving someone who is suffering without sacrificing anything of comparable moral importance. To use Singer's example, sacrificing something minimal (buying new clothes) to save someone from death (through donation to famine relief) and saving the child drowning in the pond are, from a moral standpoint, the same.

system. Moreover, as I will show, making a parallel between the case of the drowning child and the case of the victim reporting a crime does not quite line up. In the example, it is assumed that the cost of rescue is minimal and the probability of the rescue succeeding is high. As we will see, those conditions do not hold for the victim reporting the crime.

2.4.1 Duty to Rescue in the Law

Like many other moral rules or norms, we encounter a question about whether or not that moral norm should be codified into law, whether that be criminal or civil law. While some European nations have criminal statutes that codify the duty to attempt “easy rescues,” most English-speaking countries do not have criminal or even tort liability for a failure to rescue unless the bad Samaritan has a special relationship which creates that duty.²⁸ The going line in the American legal system is that there is no affirmative duty to rescue, even in cases where rescue would come at little to no cost and would very likely succeed.²⁹ An introductory torts casebook gives an illustrative example. Suppose a house catches on fire while the occupant isn’t at home, and a neighbor happens to see the fire starting while looking out their window. The neighbor does not call for help and just sits and watches the house burn without taking any action, even though he could easily call for help and mitigate the harm the occupant would suffer. In this case, “[t]he neighbor might be condemned as behaving unreasonably; and because he failed to act, the [occupant] suffered great harm. But the neighbor will not be held liable because he had no duty of care to the [occupant].”³⁰ In this example, not only does the neighbor not face criminal liability, he also does not face any civil liability either. Tort liability can only be incurred once a duty has been established, and strangers do not automatically have a legal duty to others. Said differently,

²⁸ Feinberg, *supra* note 22 at 127.

²⁹ *Id.*

³⁰ W. FARNSWORTH & M.F. GRADY, TORTS: CASES AND QUESTIONS 217–18 (3rd ed. 2019).

“a defendant ordinarily cannot be held liable for simply doing nothing, even if that failure to act causes harm to the plaintiff.”³¹

As seen above, reporting crimes can be seen as an instance of the duty to rescue on the basis of the components that Feinberg laid out. If one does not report a crime, we arguably have a person (usually a stranger) who omits an action (reporting the crime), which would not have significant costs, as a result of which someone will suffer harm (future victims, potentially including the person themselves).

While there is no general requirement that victims or bystanders report a crime in the U.S. legal system, there are requirements in particular cases through statutory law. The main class of laws in this category fall under the heading of “Mandatory Reporting Laws,” and generally deal with reporting in cases of special relationships. Nearly all states have some form of mandatory reporting statute. While the majority requires reporting only for those in certain occupations like teachers, social workers, law enforcement officers, clergy members, other states mandate reporting or suspected child abuse or neglect for all persons, regardless of their position or relationship to the child.³² For example, a North Carolina Statute requiring reporting by all individuals reads: “Any person 18 years of age or older who knows or should have reasonably known that a juvenile has been or is the victim of a violent offense, sexual offense, or misdemeanor child abuse under G.S. 14-318.2 shall immediately report the case of that juvenile to the appropriate local law enforcement agency in the county where the juvenile resides or is found.”³³ Individuals who are found guilty of failing to report or preventing someone else from reporting are subject to a class 1 misdemeanor under North Carolina law. Class 1 misdemeanors

³¹ *Id.* at 218.

³² U.S. DHSS CHILDREN’S BUREAU, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 2–3 (2019) <https://www.childwelfare.gov/pubpdfs/manda.pdf>.

³³ N.C. GEN. STAT. § 7B-301.

are punishable by up to 120 days imprisonment and a fine to be determined by the court. The 120 days is, however, a maximum, and the judge has the discretion to impose community punishment instead. With this statute in particular, an individual may even be bound to report a crime against someone who was a juvenile at the time of offense even though they are now an adult. While mandatory reporting statutes are largely paternalistic and aim to protect vulnerable populations, they can extend to mandated reporting of crimes against those who are adults and no longer considered part of a vulnerable population.

2.5 WHY REPORTING CRIMES IS DIFFERENT

As I have already argued, the moral pressure to report crimes is based on the ethical idea that reporting crimes is a way to rescue others: just as the passerby should wade into the water to save the drowning child, the victim should wade into the police office to report their crime and save future victims. In this section, after a brief discussion of the duty to report itself, I will outline three specific features that make reporting a crime significantly different from saving a drowning child. The three differences I will cover are (1) the costs of reporting a crime are much higher than *Law and Order* episodes or public safety campaigns generally assume; (2) the likelihood of a report actually leading to a successful rescue of the victim is much lower than is generally assumed; and (3) victims who report crimes might not correctly identify the perpetrator. My overarching argument is that there is no moral duty to report because the empirical evidence does not back up the justifications that we give for why one ought to fulfill that moral duty. If there is no moral duty to report, then it follows that we should not be telling victims that they ought to report crimes. While we can inform them of the possibility that one *could* report, we should not be telling victims that they *should* report.

2.5.1 The High Cost of Reporting

In the case of the drowning child, it is specifically stipulated that there is no morally significant or high cost to you in any way. The worst that may happen, for example, is that your clothing or shoes get wet or ruined during the rescue attempt. When we think of reporting a crime, it's tempting to think of just the reporting part. Something bad happens, you call the police and tell them what happened one time, and then the offender is hauled away and prosecuted by the legal system, resulting something at least resembling justice.

Unfortunately, that is not the reality of reporting a crime. Something bad happens to you, and you are somewhat likely to get extremely psychologically distressed about that bad thing. In that moment, you must then have the cognizance to call the police, and then you must recount everything that has happened to you in as much detail as possible to one or more officers. You will be asked to recall a story in “excruciating detail.”³⁴ There is no guarantee that the officer is going to be comforting or even believe your story. Even if they do believe you, they may be asking probing questions that could make it seem like they do not. You may be generally disbelieved or accused of lying or being hysterical, or you may be blamed for the crime itself even if you are believed.³⁵

If you are female or a member of some other minority, you may also suffer at the hands of testimonial injustice, making it less likely that you will be believed. Kate Manne, citing work by Miranda Fricker and others, describes testimonial injustice as “paradigmatically consist[ing] in subordinate group members tending to be regarded as less credible when they make claims about certain matters, or against certain people, hence being denied the epistemic status as knowers, in a

³⁴ KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* 202 (2017).

³⁵ *Id.* at 237–38.

way that is explained by their subordinate group membership.”³⁶ A person subject to testimonial injustice may be seen as less credible or less trustworthy, so their narrative is doubted and receives less uptake than the offenders.

For example, a woman who comes forward with an allegation against a powerful white man will have her credibility questioned in virtue of who she is and what subordinate groups she is a part of. Given how often minority members are subject to victimization, testimonial injustice, the fear of not being believed, and the questioning of one’s credibility are all costs associated with reporting, especially given that these forms of injustice are insidious and, “people can be unjustly dismissed as less credible than they are without any explicit thought, let alone mention, of the relevant social category.”³⁷

You are not guaranteed to be reporting to anyone who has any training in dealing with trauma or in trauma-informed interviewing. Many of police departments do have no specific funding or training for dealing with different types of victims, specifically with victims of sexual assault. A former executive producer on *Law and Order: Special Victims Unit*, for example, admitted in a podcast interview that a surprising number of police had come to him and admitted that they had no training on dealing with victims of sexual assault and learned everything they knew from the show.³⁸

That is step one of the process. Depending on the crime, you may also need to go to a hospital and recount everything to a nurse and then potentially again to a physician. They will then complete a full-body exam, document any physical findings and collect evidence.³⁹ While no

³⁶ *Id.* at 186.

³⁷ *Id.* at 187.

³⁸ *Last Week Tonight, supra* note 16.

³⁹ EMILY J. HANSON, CONGRESS. RSRCH. SERV. R44237, SEXUAL ASSAULT KITS (SAKS) AND THE BACKLOG OF UNTESTED SEXUAL ASSAULT EVIDENCE: IN BRIEF 2–3 (2022).

one can be required to undergo something like the rape kit process, the chances of identifying the perpetrator and holding the perpetrator accountable increase with the presence of additional evidence.⁴⁰ The verbal testimony of the victim is seen as “open to interpretation” in a way that DNA evidence is not.⁴¹ So, a victim may be urged to undergo more invasive questioning and procedures while it is simultaneously implied that their own narrative of the offense may be perceived as incorrect or unreliable.

If your case proceeds to trial, you will be forced to tell the narrative again, but in front of strangers while a defense attorney actively attempts to undermine your credibility and character. The Victim Impact Statement in the Brock Turner case describes the trial as:

Instead of taking time to heal, I was taking time to recall the night in excruciating detail, in order to prepare for the attorney’s questions that would be invasive, aggressive, and designed to steer me off course, to contradict myself, my sister, phrased in ways to manipulate my answers. ... I was pummeled with narrow, pointed questions that dissected my personal life, love life, past life, family life, inane questions, accumulating trivial details to try to find an excuse for [the offender]. After a physical assault, I was assaulted with questions designed to attack me, to say, see, her facts don’t line up, she’s out of her mind.⁴²

⁴⁰ It should be noted that, even if one goes through this process, the evidence generated may be lost, destroyed, or otherwise never tested. The number of backlogged rape kits is estimated to be in the hundreds of thousands nationally. *Id.* at 6.

⁴¹ RAINN, the largest American non-profit anti-sexual assault organization, states that “[m]any cases of sexual violence rely on first hand accounts and other evidence that leaves room for interpretation. DNA evidence helps build a stronger case against the perpetrator.” *The Importance of DNA in Sexual Assault Cases*, RAINN https://rainn.org/articles/importance-dna-sexual-assault-cases?_ga=2.154085051.2004888880.1696806944-1505921141.1696806944 (last visited Oct. 8, 2023).

⁴² Manne, *supra* note 34 at 202–03.

The trial process is brutal for victims in many ways, including retelling the narrative of the crime, but telling it to a hostile audience that demands a level of detail that is not possible to achieve. But every tiny error in detail gives your audience one more reason not to believe your story.⁴³

If we look at the National Crime Victimization study statistics behind why victims don't report, we see further costs. According to the 2022 National Crime Victimization survey, on average only 42% of violent crimes are reported to the police, and "[victims] may not report a crime for a variety of reasons, include fear of reprisal or getting the offender in trouble, believing that police would not or could not do anything to help, and believing the crime to be a personal issues or too trivial to report."⁴⁴ Many victims fear retaliation from their offender, with 20% explicitly stating that as a reason in the National Crime Victimization survey.⁴⁵ In the article "The Silence Breakers," women give voice to the fears associated with reporting. One woman stated that her offender told her that "If [she] ever wronged him, he would have [her] kidnapped, have [her] eyes gouged out with a big pen and throw [her] into the Hudson River." For that article, Times reported that "Nearly all of the people [they] interviewed about they experiences expressed a crushing fear of what would happen to them personally, to their families or to their job if they spoke up."⁴⁶ In that article, several of the women who did not ultimately report their abusers said

⁴³ As another example, I once sat it on a murder trial where a witness on the stand was grilled about what kind of pants the offender was wearing at the time of the murder. Her original witness statement claimed he was wearing khakis, but, in court, she stated that he was wearing jeans. The discrepancy was highlighted and used to call into doubt the witnesses entire account of the perpetrator's identity, and the witness was incredibly distraught about her mistake. The type of pants someone was wearing is a minor detail, and, especially in a memory surrounding a traumatic event, misremembering small details is fairly common and probably means little to nothing about the memory for the entire event. However, that one tiny detail was used as a reason to distrust and disbelieve the witness more generally.

⁴⁴ A. Thompson & S. Tapp, *Criminal Victimization, 2022*, U.S. DEP'T OF JUST. BULL., NCJ 307089, 6 (Sept. 14, 2023) <https://bjs.ojp.gov/document/cv22.pdf>.

⁴⁵ *Id.*

⁴⁶ Zacharek, et al., *supra* note 17.

that they could not do so for fear that they would lose a paycheck that their family depended on because they would be fired for making accusations against customers or employers themselves.⁴⁷

Fear of retaliation is not the only fear that one must contend with. Others fear that, with reporting, that crime becomes their identity, especially in high profile cases. In “The Silence Breakers,” the author states, “many of the people who have come forward also mentioned a different fear, one less visceral but not less real, as a reason for not speaking out: if you do, your complaint becomes your identity.”⁴⁸ After one lobbyist was groped in front of several colleagues, she created a petition with a large number of signatures only to be warned that she may not want to do this because she would become one of those famous victims like Anita Hill. A similar case could be the one of Christine Blasey Ford who accused Supreme Court Justice Brett Kavanaugh of sexual assault. Her name will always be synonymous with her allegations and the hearings that surrounded the Kavanaugh case. Blasey Ford, in addition to the identity problem, also received death threats for coming forward and expressed large amounts of fear of retaliation.⁴⁹

While this might seem like it is only a concern for high-profile cases clearly in the public eye, it also occurs in less public ways. One actor, Selma Blair, talks about the constant slander and “excruciating threats,” of coming forward after an assault. Her offender continually said sexual things about her to others over the course of years while threatening her against coming forward.⁵⁰ Being victimized can become your identity in a lot of ways, whether it be sexualization more generally or being seen as a whistle blower at your place of employment for betraying someone in power with a report.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Tim Mak, *Kavanaugh Accuser Christine Blasey Ford Continues Receiving Threats, Lawyers Say*, NPR. (Nov. 8, 2018) <https://www.npr.org/2018/11/08/665407589/kavanaugh-accuser-christine-blasey-ford-continues-receiving-threats-lawyers-say>.

⁵⁰ Zacharek, et al., *supra* note 17.

In some cases, victims may even face civil liability for their accusations if the offender is not proven guilty in the form of defamation suits for slander or libel. As the Chicago Alliance Against Sexual Exploitation explains, abusers can sue their victims for sharing their experiences, forcing them to prove their statements are the truth in court or pay damages.⁵¹ Suing in civil court does require resources, so the offender would need to have the financial ability to pay in court for this type of suit, but it is another real danger that victims face. Furthermore, it is a danger that can exacerbate even further power differentials between offenders who can pay and victims who could not afford an attorney for civil court or who could not pay damages, serving as another mechanism of threat to silence victims.

2.5.2 The Likelihood of Successful Rescue is Low

Reporting crimes is also different in that the likelihood that you successfully rescue yourself or a future victim is relatively low. In the drowning child case, it is stipulated that the pond is shallow and that you will very likely be able to rescue that child just by wading into the pond. Instead of a shallow pool, reporting a crime might be something along the lines of a several mile swim in deep water for a below average swimmer or not knowing that the child is surrounded by piranhas when attempting the rescue. Going into the rescue, depending on how much Law and Order you watch and how familiar you are with the legal system more generally, you likely think it's more like wading into a shallow pool than it is.

The FBI Uniform Crime Reporting Program reports statistics yearly about how likely certain crimes are to lead to an arrest, indictment, conviction, and imprisonment for different crimes, and the statistics are shockingly low.⁵² An analysis of this data from the Marshall Project

⁵¹ H. Forrestal & C. Sub, *What Sexual Assault Survivors Should Know About Defamation*, CAASE (June 7, 2022) <https://www.caase.org/sexual-assault-survivors-defamation/>.

⁵² Thompson, *supra* note 44.

found that the crime clearance rate, or the chance that someone is arrested and charged at all (even wrongly), for a murder is at around 50%.⁵³ So, if you were murdered tomorrow, there is a 50% that someone will be arrested. That does not mean that there will even be an indictment let alone a conviction of that person.

The crime clearance rates for other crimes are significantly lower. Violent crime as a general category has a clearance rate of just over 40% in 2019, with the subcategory of Rape having only around 30% clearance rate.⁵⁴ Property based crimes are lower still with burglary coming in at around 14% and motor vehicle theft coming in at just under 14%.⁵⁵ Taken together, the chances that someone is even arrested at all for a crime are lower than most generally think they are.

Once we get passed clearance rate and have an arrest, the percentages continue to go downhill from there until we reach the very small percentage of offenders who are incarcerated for the crime in question for any time at all. We'll start with the example of Sexual Assault. For every 1,000 sexual assaults that occur, approximately 310 are reported.⁵⁶ Of those that are reported, only 50 reports lead to some form of arrest.⁵⁷ Of the arrests, only 28 cases will lead to a

⁵³ W. Li & J. Lartey, *As Murders Spiked, Police Solved About Half in 2020*, THE MARSHALL PROJECT (Jan. 12, 2022). The FBI Uniform Crime Reporting (UCR) Program report for 2019 (the most recent year a formal report was released) put the clearance rate at 61.4%, but this figure also included nonnegligent manslaughter clearance rates, which are generally much higher than clearance rates for murder. The 50% figure given by The Marshall Project was calculated using UCR data from 2019-2020. *Id.*

⁵⁴ FBI UNIFORM CRIME REPORTING PROGRAM, *Crime in the United States, 2019: Clearances*, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/clearances> (last visited Oct. 8, 2023).

⁵⁵ *Id.*

⁵⁶ RAINN, *The Criminal Justice System: Statistics* <https://www.rainn.org/statistics/criminal-justice-system> (last visited Oct. 8, 2023). The statistics provided by RAINN are predominantly drawn from the Department of Justice's National Crime Victimization Study but also includes data from other Department of Justice Studies and from the Department of Health and Human Services. *Id.* For more information on their selection process for statistics, see RAINN, *About RAINN's Statistics* <https://www.rainn.org/about-rainns-statistics> (last visited Oct. 8, 2023)).

⁵⁷ RAINN, *The Criminal Justice System: Statistics* <https://www.rainn.org/statistics/criminal-justice-system> (last visited Oct. 8, 2023).

felony conviction, and only 25 perpetrators will be incarcerated.⁵⁸ That means that .025% of all sexual assaults will lead to any type of jail time for the perpetrator.⁵⁹ Even if we just count from the number of sexual assaults actually reported, there is still only a .08% chance of incarceration.⁶⁰

Sexual assault is not the only crime where these types of numbers can be seen. Out of 1,000 assault and battery crimes committed, a much higher number (627) are reported to the police. 255 of these reports will lead to an arrest, but only 105 of those cases will be referred to a prosecutor to be pursued further.⁶¹ 41 of those cases will lead to a conviction, and only 33 perpetrators will be incarcerated, or, on average, .033%.⁶² To look at one last example, take the case of robbery.⁶³ Out of every 1,000 robberies, on average, 619 are reported to the police.⁶⁴ 167 outhouse reports will even lead to an arrest, and only 37 of those reports will ever get referred to a prosecutor.⁶⁵ At the end of the day, 22 robberies will result in a felony conviction, and 20 perpetrators will be incarcerated for the robbery.⁶⁶ Overall, .02% of robberies will result in incarceration, and only .03% of those actually reported will result in incarceration.⁶⁷

If we are taking incarceration or even just conviction to be our measure of saving future victims, the chances that any individual crime report will save someone are shockingly low in the current U.S. system. It is not as though my report will more likely than not lead to taking

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² RAINN, *supra* note 57;

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

someone “dangerous” off the streets or preventing them from harming someone else or yourself again in the future.

Even in cases where we ultimately get a conviction, that does not mean that justice has been done or that all victims’ claims have been vindicated. For demonstration purposes, I will rely on a few high-profile cases to demonstrate the trend. First, in the case of Bill Cosby, 60 different victims came forward alleging abuse from the actor.⁶⁸ Of those 60, there was one successful prosecution that led to a brief incarceration. That incarceration was overturned on appeal, and Cosby went on to write a book about his time in prison, generating a substantial profit from it.⁶⁹ Second, in the case of Larry Nassar, 265 different victims came forward alleging abuse, but there were only 10 successful counts of abuse across an even smaller number of victims for which Nassar was actually convicted.⁷⁰ Finally, over a dozen women came forward to accuse Harvey Weinstein of abuse. He was tried for five felony counts, again across fewer than five victims, and was convicted on only two of those counts.⁷¹ Many women reported and subjected themselves to criticism for decades with little to no avail in some of these cases. This casts even further doubt on the idea that any one particular report of a crime will actually result in rescuing future victims from harm.

⁶⁸ P. Ryan, M. Puente, & C. Mallenbaum, *A complete list of the 60 Bill Cosby accusers and their reactions to his prison sentence*, USA TODAY (April 27, 2018).

⁶⁹ M. Dale, *Bill Cosby freed from prison, his sex conviction overturned*, ASSOCIATED PRESS (June 30, 2021).

⁷⁰ Rebecca Shabad, *We have been failed: Simone Biles breaks down in tears recounting Nassar’s sexual abuse*, NBC NEWS (Sept. 15, 2021) <https://www.nbcnews.com/politics/congress/we-have-been-failed-simone-biles-breaks-down-tears-recounting-n1279255>.

⁷¹ L. Rickwine & T. Reid, *Jury finds former Hollywood producer Harvey Weinstein guilty of rape*, REUTERS (Dec. 20, 2022).

2.5.3 You might get it wrong

One final reason that reporting crimes is different from the drowning child case is that there is a non-negligible chance that we will get it wrong. In the child's case, we know that the child is drowning and needs to be saved. In the case of reporting, we might be wrong about who an offender is or if there even is an offender at all, so we don't necessarily know who needs saving and what is actually threatening them.

There are many cases of Black Americans having the police called on them for no apparent reason other than being Black. The now-infamous story of police being called because a man was engaging in bird-watching activities in a park serves as a reminder that many people might not be the best reporters of incidents of harm.⁷² The racial bias in the United States should make everyone think twice about reporting things as crimes, especially when those "crimes" don't have a clear basis in criminal law. If someone says that they do not want to report a crime against someone because they do not believe a crime has occurred, there may be a good reason to listen to them. There is a solid chance that, unless you are trained in the law and are especially aware of your own implicit biases, you could get things very wrong and call the police on someone who has done absolutely nothing wrong in a morally problematic way.

At the far end of the spectrum, this can end in tragedy. In the case of Trayvon Martin was reported to the police as a "suspicious person" by a member of a neighborhood watch who subsequently shot and killed him even though he did nothing wrong.⁷³ In the case of Tamir Rice, someone called the police on a 12-year-old boy who was "a guy in here with a pistol" that was

⁷² Jason Bittel, *People called police on this black birdwatcher so many times that he made custom signs to explain his hobby*, WASH. POST (June 5, 2020).

⁷³ CNN Ed. Rsch., *Trayvon Martin Shooting Fast Facts*, CNN (Feb. 15, 2023) <https://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/index.html>.

“probably fake”. That report led to the fatal shooting of the 12-year-old boy. The pistol was fake.⁷⁴

To summarize the argument thus far: The supposed moral duty to report is based on the idea that if the victim reports the crime, that report will contribute meaningfully to a well-functioning criminal justice system that correctly identifies and prosecutes the perpetrators. The moral duty also assumes that the costs to the victim of reporting the crime are relatively low and that no good reason to refrain from reporting. However, both of those assumptions are incorrect. First, the costs of victims reporting crimes can actually be quite high: retraumatization can occur in the process of reporting, and reporting a crime can, in some cases, open the victim up to retaliation—especially if that crime involves implicating someone with power or social status. Second, even if a victim does decide to report, the odds of that report actually leading to an arrest and a conviction are low. If part of the reason that victims ought to report depends on actually preventing some kind of future harm, the criminal justice system that we currently have is not able to deliver on that possibility. Finally, even if a victim does report, there is the possibility that they might be contributing to an additional injustice as the criminal justice system that one could make a report to might actually end up apprehending the wrong person.

2.6 THE NORMATIVE TAKEAWAY

Before getting to the normative takeaway, one might be left with the question, “What can I say to a victim then? Suppose my friend has been victimized and tells me about it. If the

⁷⁴ Brad Bennett, *Remembering Tamir Rice: Police Shooting of 12-year-old Playing with Toy Gun Energized Criminal Justice Reforms*, S. POVERTY L. CTR. (Nov. 20, 2020) <https://www.splcenter.org/news/2020/11/20/remembering-tamir-rice-police-shooting-12-year-old-playing-toy-gun-energized-criminal>.

incorrect thing to do is to tell them to report it, what should I do instead? Can I not mention the police at all under this account?”

These are all good questions, and it is beyond the scope of this dissertation and likely more within the field of psychology to diagnose how best to console someone in a trauma informed manner. In short, I am suggesting that you should not mention the police unless the victim brings it up first. Reporting has moral connotations attached, so it’s hard to see a way for mentioning reporting to be a mere suggestion rather than moral pressure. If one were to insist that there must be a way to mention the police as a mere suggestion, I would suggest something like “If you would like to go to the police, I will support you in doing so. It is completely your choice whether to do so, and there is no wrong choice,” or something similar that removes that moral pressure or judgment from behind the phrase.

I take the difference between a mere suggestion and moral pressure to be one of degree rather than of kind, and I believe that it is possible to have a mere moral suggestion. When at the grocery store, the cashier may ask you if you would like to round up to the nearest dollar to support whatever charity the corporation has chosen to sponsor that month. In that encounter, there is a suggestion to donate to charity, a moral action with moral reasons to do so, but the act is so minimal and of so little consequence to everyone involved, that I would say that it would amount to a mere moral suggestion. Nothing will really happen to you if you say no. You probably won’t even encounter disappointment from the cashier. However, reporting a crime isn’t this kind of action. It comes with high stakes and high costs for a lot of different actors, making it fundamentally not the kind of thing that one could merely suggest. Even if you are explicit and claim to a victim that you are making a “mere suggestion” to report, you are asking for an act that is fundamentally too morally laden and costly to be merely suggested.

The normative takeaway is that we should not rely solely on the heroism of individual victims to make communities safer in a system in which that task of reporting is onerous and the likelihood that anyone is successfully rescued by that report is low. Instead of placing moral pressure on victims, we should look towards the system to create changes that either make the task less onerous or that make the likelihood of success higher.

So, the impetus for change needs to be on the system rather than the individual. This is true even when an individual victim reports inaccurately, leading to a false conviction. One could draw a strong conclusion from the fact that a victim might get the report wrong: not only should we not be compelling victims to report, but perhaps victims should instead *not* report crimes to a dysfunctional criminal justice system at all. My point, instead, is that individual victims should ultimately be able to make their own decisions about whether or not to report a crime, free from moral pressure. Even if victims might misidentify a perpetrator in the process of reporting a crime, that is a problem that needs to be addressed at the systemic level rather than it being the responsibility of individual victims. If a victim chooses to report, it is not their responsibility to engage in detailed strategizing about how their report might be used or misused by the criminal justice system or about the ways that police techniques may lead them to reconstruct their memory more or less accurately.

Throughout this chapter, one of the motivating ideas is that we should not be putting pressure on victims to be heroic and attempt to solve larger social problems when they have been harmed. This includes both those social pressures that come with encouraging victims to report crimes in order to help the criminal justice system AND the social pressures that might come with encouraging victims to NOT report crimes in order to keep an unjust criminal justice system from apprehending innocent people. The moral pressures that we exert should be focused on those with systematic power to change laws and procedures, not on individual victims. The final part of this

chapter will address this larger point and discuss some strategies and difficulties for this kind of reform.

Creating change that increases the likelihood of conviction, at least at first glance, seems much less likely than making the task less onerous because we quickly come up against due process concerns for the defendant. If, for example, we lowered the burden of proof in criminal cases from beyond a reasonable doubt to the clear and convincing evidence standard, we would successfully at least convict more of the offenders who end up in court. However, that increases our odds as well of wrongly depriving someone of their liberty through wrongful conviction and denies the criminal defendant due process.⁷⁵ ⁷⁶ We could similarly try (re)defining the burden of proof in some or all criminal cases to the defendant to prove that affirmatively that they did not commit the crime, but the same due process concerns may occur again.⁷⁷ I am not ruling out that there are changes that could be made, perhaps in reporting procedures or evidentiary protocol,

⁷⁵ The U.S. Supreme Court invokes Blackstone to justify the requirement of proof beyond a reasonable doubt as fundamental to due process under the Due Process Clause of the Fourteenth Amendment. *In re Winship*, 397 U.S. 358, 361–64 (1970). Due process is manifested in the Supreme Court through Blackstone’s emphasis on the importance of not convicting the innocent over the importance of convicting the guilty (“[w]ith reputation, liberty, and at times even life on the line, every legal and moral precept counsels caution in bringing down the hammer of justice on the criminal defendant.”) J. Harvie Wilkinson III, *The Presumption of Civil Innocence*, 104 VA. L. REV. 589, 597, 600–03 (2018).

⁷⁶ Even with the burden of proof of beyond a reasonable doubt, wrongful convictions are still a problem. As the Innocence Project states, “As of January 2020, the Innocence Project has documented over 375 DNA exonerations in the United States. Twenty-one of these exonerees had previously been sentenced to death. The vast majority (97%) of these people were wrongfully convicted of committing sexual assault and/or murder. Although these individuals were innocent of these crimes, approximately 25% had confessed and 11% had pleaded guilty. These exonerees spent an average of 14 years in prison—10% of whom spent 25 years or more in prison for crimes they didn’t commit.” THE INNOCENCE PROJECT, *Research Resources* <https://innocenceproject.org/research-resources> (last accessed Oct. 8, 2023).

⁷⁷ There is a large amount of scholarly literature, for example, on whether or not the court ought to define what “beyond a reasonable doubt” means for juries and, if so, how they ought to define it. See L.M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubts about Reasonable Doubt*, 78 TEX. L. REV. 105, 112–19 (1999) (giving an overview of approaches to the burden of proof in criminal cases, including both defining reasonable doubt for juries and leaving it undefined), Thomas V. Mulrine, *Reasonable Doubt: How in the World is it Defined?*, 12 AM. U. J. INT’L L. & POL’Y 195 (1997) (explaining various approaches to and definitions of reasonable doubt), Michael D. Cicchini, *Instructing Jurors on Reasonable Doubt: It’s All Relative*, 8 CALIF. L. REV. ONLINE 72 (2017) (identifying and discussing common definitions and jury instructions on the concept of reasonable doubt).

which could make the likelihood of successful rescue higher, but I do think that these measures will be harder to implement while still respecting due process and not unduly infringing upon the constitutional rights of the defendant.

Changes that make the task of reporting less onerous overall seem to not have the same problems. One may, as some jurisdictions have, streamline the process of reporting so that victims only have to tell the narrative 1-2 times rather than the potential dozens of times in the normal system.⁷⁸ One could also implement some form of educational program that explains the system as it actually functions to victims before they decide whether or not to make a formal report.⁷⁹ My goal here is not to solve the problem and show exactly how to create the systemic change, but rather to show that systemic change is where we should be looking rather than moral pressure and heroic victims.

The importance of systematic reforms that might take the social pressure to report off of victims can be seen by an analogy to the ways we ask (and don't ask) our students to discuss their personal experiences in a classroom. In most college classrooms these days, instructors and students alike know that it is inappropriate for a professor to tokenize a student with a minority identification. It would feel icky, for example, if in any classroom, a professor asked the only black student in a seminar to discuss their feelings on racism. It is completely different if the student feels comfortable voicing their experiences, and hopefully the instructor has created a

⁷⁸ One such proposal comes from a strategy guide presented to Parliament in the United Kingdom. Lord Chancellor and Secretary of State for Justice (U.K.), VICTIMS STRATEGY, Report to Parliament 23 (Sept. 2018) <https://assets.publishing.service.gov.uk/media/5bbca235ed915d23aa4c2e2d/victim-strategy.pdf>.

⁷⁹ Non-profits and advocacy groups try to provide something like this online. *See, e.g.*, RAINN, *Reporting to Law Enforcement* <https://www.rainn.org/articles/reporting-law-enforcement> (last visited Oct. 8, 2023) (walking individuals through the beginning stages of reporting sexual assault). Some State Offices of Victim Services have also written guides for victims. *See, e.g.* OFFICE OF VICTIM SERV. (CT Judicial Branch), *Crime Victims' Guide to the Adult Criminal Court* (2020) <https://www.jud.ct.gov/Publications/VS048.pdf> (outlining the judicial process from report through sentencing for victims). One could make the suggestion stronger, however, and state the agencies must inform victims about the process and its limitations before they are allowed to make an official report.

learning environment that makes such contributions feel safe and valued, but the instructor should not ask even though hearing the tokenized student’s perspective could result in a moral good, namely moral education of others in the classroom. The going principle is something like “The oppressed/marginalized should not have to explain their oppression or educate their oppressor.” I’m proposing an addendum that states that the victimized have no duty to explain or display their victimization for the benefit of others, and that it would be morally wrong to pressure them to do so.

One successful example of lowering the burdens associated with reporting crimes is the existence of Sanctuary Cities. Sanctuary Cities are cities which limit their interaction with national immigration officials, including through their criminal justice system.⁸⁰ In a non-sanctuary city, someone who enters the criminal justice system may or, in some cases, must be reported to immigration officials if they are non-citizens. This policy does not just apply to offenders, but also to victims who come into the system to report a crime. By reporting a crime, the undocumented victim in non-sanctuary cities is facing the additional fear of deportation.⁸¹

The fear of deportation that was introduced, especially for victims reporting crimes, was itself unjustified and should not have been introduced. However, sanctuary cities did implement a systemic change—namely, not cooperating with immigration officials—that made it systemically easier for victims to report crimes against them through reduction of deportations of undocumented persons who do not have criminal records. Some studies suggest that sanctuary

⁸⁰ Naomi Tsu, *What is a Sanctuary City Anyway?*, S. POVERTY L. CENTER <https://www.learningforjustice.org/classroom-resources/texts/what-is-a-sanctuary-city-anyway> (last accessed Oct. 8 2023)

⁸¹ Kenneth Roth, *Trump’s Cruel Deportations*, HUM. RTS. WATCH (Aug. 16, 2017) <https://www.hrw.org/news/2017/08/16/trumps-cruel-deportations> (documenting the Trump era policy of reporting victims and witnesses to immigration in addition to perpetrators).

cities may have lower crime rates more generally than non-sanctuary cities, lending more credence to the idea that systemic change ought to come first.⁸²

Another semi-successful legal intervention comes in the form of Anti-SLAPP (Strategic Lawsuit Against Public Participation) laws. These laws serve to protect victims from defamation suits by offenders that are meritless and meant to intimidate or silence their victims. These laws “generally give defendants the ability to ask the court to dismiss lawsuits arising from practicing their first amendment constitutional rights, including speech.”⁸³ While these laws do have some effect, their effect is still limited, the protection offered is minimal, and the laws only apply in some cases. At least in theory, however, this policy is aimed to reduce one of the costs associated with reporting, and, for that reason, can be looked at as a kind of model for the type of change I am suggesting.

In closing this chapter, I want to be clear: I am not arguing that no one should ever report crimes or that there aren’t moral reasons, some even with good weight, to report a crime. What I am arguing for here is a more careful weighing of the harms that come along with the often-quickly-assumed benefits of reporting a crime. My concern here also goes one step beyond calling for a more careful calculation of harms and benefits; it also concerns how we interact with each other and what we should say to each other when something awful happens. We shouldn’t pressure others to report crimes against themselves and require them to engage in moral heroism for a small chance of a future rescue in a brutal system. We need to realize the characteristics of the system that we are in, including the likelihood of success and the many challenges that

⁸² Some studies conclude that sanctuary cities “do not threaten public safety” while others find a correlation between sanctuary cities, lower crimes rates, and higher economic indicators. AM. IMMIGR. COUNCIL, *Sanctuary Policies: An Overview* (Oct. 21, 2020) <https://www.americanimmigrationcouncil.org/research/sanctuary-policies-overview>.

⁸³ Forrester, *supra* note 51.

victims may encounter. After educating ourselves about the nature of the system, we should focus on changing the system such that one does not need to be abnormally courageous or heroic to take on such a task. The awards that we give to victims for their bravery in speaking up is as much a plaudit for them as it is an indictment of the systems that we still need to change.

3. STRUCTURAL VICTIMHOOD: EXPANDING THE DEFINITION OF VICTIM

3.1 INTRODUCTION

In this dissertation, I have so far discussed how individual victims are often put in an impossible place where they need to be the “right” kind of victim in order to receive sympathy (chapter 1) and how those challenges are compounded when victims are told that they should report crimes (chapter 2). Running through both of these previous chapters is the theme that individual victims should not be charged with solving more systematic problems that make it hard for the harms that victims suffer to be recognized and addressed. In this chapter, I more directly turn to talk about some of these structural challenges by addressing the question of how we should think about victims who suffer harms that result from the operations of large and diffuse systems. Our existing concepts of victimhood—both colloquially, and especially in the United States legal system—focus on the victim as a person who is harmed in a single moment by a clearly identifiable perpetrator. In this chapter I reckon with those whose harms can best be understood by an analysis of larger and more diffuse systems.

Part of the challenge of addressing the victims of unjust systems can be seen in the ways that our news media is most likely to address structural violence only when there is a spectacular moment of violence that can focus our attention. In the string of recent police shootings of unarmed black victims, one often hears a rallying cry like “Justice for Breonna Taylor.”¹ In this

¹ Richard A. Oppel, Jr., Derrick Bryston Taylor, & Nicholas Taylor, *What to know about Breonna Taylor’s Death*, N.Y. TIMES (March 9, 2023) <https://www.nytimes.com/article/breonna-taylor-police.html>.

case, protestors are signaling a desire to see Taylor’s killers put behind bars for their actions. This reflects a common focus in both philosophy and law of a particular conception of justice, namely retributive or punitive justice. However, even in the event that the officers involved were charged, tried, and sent to prison, it remains unclear if it would actually be justice *for* Breonna Taylor. A victim seeking justice in the form of compensation or other reparations is actually an incredibly small portion of what the criminal law is intended to do. But it seems like the people asking for justice are asking for something more than just a particular legal proceeding to take place and gain a particular outcome for a particular defendant.² It seems like many of these advocates are asking for a larger social reform—new forms of community safety, changes in housing policy, a more equitable distribution of funds in tremendously unequal cities where zip code can determine the kinds of opportunities you might have.

Indeed, the advocates who insist that we get justice for Breonna Taylor might be hesitant to go all-in on a program of victims’ rights reform. Victim-centric reforms to the criminal justice system are often seen as conservative and incompatible with the current constitutional protections afforded to criminal defendants.³ Inasmuch as the prototypical “victim” in the American legal system is a white woman and the prototypical defendant is a black man, some advocates might be hesitant to expand the powers granted to the forces aligned with mass incarceration. So, how can we account for the sense that there is some kind of justice that needs to be done, and that the legal

² Marc Schindler & Jeremy Kittredge, *A Crisis within a Crisis: Police Killings of Black Emerging Adults*, BROOKINGS INST. (Dec. 2, 2020) <https://www.brookings.edu/articles/a-crisis-within-a-crisis-police-killings-of-black-emerging-adults>.

³ See generally, MICHAEL VITIELLO, *THE VICTIMS’ RIGHTS MOVEMENT: WHAT IT GETS RIGHT, WHAT IT GETS WRONG* (2023). In Vitiello’s judgement, the Victim’s Rights movement did help expand resources to help victims deal with trauma, and contributed to a culture of greater sensitivity to sexual assault victims in many jurisdictions. However, Vitiello also points out that the movement has led to excessive punishment for many defendants and the destruction of the families of defendants. He further emphasizes that the Victims’ Rights movement has exacerbated racial inequality in the imposition of the death penalty and criminal sentencing generally while falsely promising “closure” to crime victims and their families.

system recognize the harms that are done to people, not just by individual bad actors but rather by whole systems? In this chapter I will build a concept of structural victimhood that allows us to more clearly understand some of the challenges that the legal system faces when it is trying to provide justice for the people that suffer from systemic harms.

Part of the challenge that comes when trying to create a legal theory that can account for structural harms is that the definition of “victim” is vague—what kinds of harms do you have to suffer to be deemed a victim? Are there things that you can do to have your victim status revoked? Who should have the power to decide who can and cannot lay claim to the title of victim? A vague conception of victimhood leads to something that is more than just an abstract conceptual uncertainty for the legal system; it creates a potentially painful experience for those who feel like they are victims but who also might worry that their status as a victim might be questioned or viewed as illegitimate. Those who suffer certain types of harms (e.g. structural harms, racism, poverty) are not seen as victims in the way that victims of more traditional, violent crimes are.⁴ The current focus of the legal system is on the harm or violent act rather than the one harmed, making it difficult to legitimize status and rights of those who suffer from structural harms.

Usually those who suffer some sort of harm are classified as victims, and for rhetorical reasons, victims sometimes claim that those harms are violent as way to underscore the severity

⁴ C.A.J. Coady, *The Idea of Violence*, 3 J. OF APPLIED PHIL. 8–9 (1986). See e.g., ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR (2013). Nixon lays out a concept of “slow violence” to describe the harms that accumulate over time from environmental degradation. These harms can cause extreme suffering, but their cause is not a single or spectacular violent act. In Nixon’s focus on environmentalism, he refers to the harms that come from the slow accretion of particulate matter in the air from a wide range of industrial activities—including the buildup of greenhouse gasses that contribute to global warming. The problem, for Nixon, is that because the cause of these harms is so diffuse and stretched out over time, it makes it hard to actually *see* the harm that happens over an extended timescale. In my framework, the victims of other kinds of structural harms—the accumulated biases and laws that accumulate over time to disadvantage particular populations—might also be said to be victims of a kind of slow violence.

of that harm. However, while the definition of violence has increasingly expanded and evolved, the definition of victimhood has remained stagnant and narrowly defined, especially in the United States legal context.⁵ Violence used to be defined as just the physical infliction of bodily pain. However advocates and social movements have argued that more kinds of harm should be grouped under the category of violence. The harms associated with poverty and racial injustice, for example, are now referred to as instances of structural or systemic violence because the harms inflicted are at least similar or greater in magnitude than the harms of a lot of physical traumas.⁶

Victimhood in most legislation specifically about victims is usually confined to victims of a crime, more specifically of violent crimes as defined narrowly within the legislation.⁷ Given that definitions of violence have expanded, it seems odd that the corresponding definition of victimhood has not expanded as well. Furthermore, the movements for expanding the definitions of the corresponding terms, violence and victims are associated with opposing political views.⁸ The push for expanding the definition of violence is largely seen as a progressive social justice movement, but the push for increased recognition of victims' rights in the U.S. has been seen as a conservative, hard-on-crime political agenda.

⁵ Coady, *supra* note 4 at 3 (discussing some of the more recent “fashionable” definitions of violence in comparison with older, more traditional definitions).

⁶ Barbara Rylko-Bauer and Paul Farmer, *Structural Violence, Poverty, and Social Suffering*, in THE OXFORD HANDBOOK OF THE SOCIAL SCIENCE OF POVERTY 47–48 (David Bradly & Linda Burton eds., 2016), John Galtung, *Violence, Peace, and Peace Research*, 6 J. OF PEACE RSCH. 167, 185 (1969).

⁷ For more on the prevalence of criminal justice focused models of legislation versus other, more civil justice focused reforms, see, L. SEBBA, THIRD PARTIES: VICTIMS AND THE CRIMINAL JUSTICE SYSTEM (1996), Ahmed White, *Victims' Rights, Rule of Law, and the Threat to Liberal Jurisprudence*, 87 KY L. J. 357, 386–87 (1998). For example, some state victims' rights provisions exclusively limited the grant of rights to only victims of violent crimes or victims of felonies. U.S. DEP'T OF JUST., OFFICE OF JUST. PROGRAMS, *Victim Law: About Victims' Rights* <https://www.victimlaw.org/victimlaw/pages/victimsRight.jsp> (last visited Oct. 8, 2023). The definition of “violent crime” is discussed more later. See, *infra* n. 78 & 79.

⁸ Jill Lapore, *The Rise of the Victims' Rights Movement: How a conservative agenda and a feminist cause came together to transform criminal justice*, THE NEW YORKER (May 14, 2018) <https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement>.

The Victims' Rights movement is often thought of as an inherently conservative movement that gives many progressive liberals pause. For those interested in criminal justice reform who feel that the legal system is stacked against people of color, Victim Impact Statements (one often touted victory of the Victims' Rights movement) seem to be one more tool in the arsenal of prosecutors who might use articulate white victims of crime as a means of swaying juries against defendants purely on the basis of an appeal to emotion.⁹ Being an advocate for the rights of the victim is often seen as butting up against maintaining the rights Constitutionally guaranteed to the defendant,¹⁰ making a more robust conception of victimhood fraught with difficulty.

For this reason, there has been much more discussion from liberals of questions of systematic violence where the possibility for wide-spread public policy reform might be possible. However, in this chapter I want to suggest that there might actually be something worth pursuing in the Victims' Rights movement for progressive liberals who have an interest in systematic legal reform. Part of the challenge of the Victims' Rights movement for reform-minded progressives is that victims' rights focus mainly on the rights of ideal individual victims. However, if we were to broaden the definition of victim to include, for example, victims of systematic violence like those unjustly prosecuted in a system that privileges the claims of white victims, that would also result in the need for legal reforms and new public policies. In this chapter, I am going to argue that if we expand the definition of victim, the legal framework that undergirds the Victims' Rights movement might also expand beyond traditionally conservative policy goals.

⁹ Susan Bandes argues that victim impact statements evoke emotions that have no place in the courtroom and skew court proceedings towards those victims whose emotions the jury is most likely to resonate with. Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHICAGO L. REV. 361 (1996). A similar argument is made by Jeffrie Murphy in his discussion of Supreme Court cases pertaining to Victim Impact Statements. JEFFRIE MURPHY, *GETTING EVEN: FORGIVENESS AND ITS LIMITS* 27–32 (2003).

¹⁰ *Id.*

While the historical and political points are interesting and will be a motivating force for this chapter, I will mainly develop a schema for the categorization of different forms of victimhood that roughly traces the current debates in the literature over the appropriate definition for violence. In doing so, my aim is to add and expand existing definitions of victimhood and the harms that victims suffer. While there are other aspects of the concept of victimhood that are interesting in their own right, here I want to focus predominantly on structural, wide definitions versus narrow definitions. Between these two different kinds of definitions, there is the additional wrinkle of legitimist definitions that hold that harms inflicted by legitimate governments or governments officials is not violence at all; only harms inflicted by non-legitimate actors counts as violence proper. What is at stake in this debate between narrow and wide definitions of violence is which forms of violence get to be considered legitimate forms of violence that can be recognized by governments and legal systems.

I will argue that the current way we speak about victims is a narrow approach where a victim is only created by a direct, criminal action against an individual. I will argue that, like in the context of violence, we should be trying to identify and recognize actions, structures, and institutions that cause serious harm, but with a focus on the people who are actually harmed rather than on the harmful act itself. This shift in focus will allow the claims of victims of structural harm to be recognized as legitimate claims of harm and more fully capture the negative effects of harmful acts. This shift will also allow for positive advocacy for those victims rather than merely negative advocacy aimed at eliminating policy through utilizing persuasive, personalized narratives of victims. Finally, this shift will switch from a focus on single instances of harm or violence to a focus on the experience of the victim, including harm inflicted outside of the single instance of a harmful act. This would more accurately reflect the cumulative effects of persistent systematic injustices that pile harms on victims.

In this chapter, when discussing harms, I will follow the existing literature by using the term “violence.” The scholarly literature on structural violence speaks in terms of violence rather than harm in order to better capture the level of harm that is above a threshold that makes that harm worth of being addressed by the legal system.¹¹ All instances of violence are instances of harm, but advocates use the term “violence” when talking about structural violence to convey the sense that the harms rise to a level that would require some kind of corresponding structural reform of the legal system. While scholars have already written at length about how harmful violent structures can be, I will show in this chapter that there needs to be a corresponding term that let us capture the experience of the specific people who are harmed by violent structures. This is where my concept of structural victimhood comes in.

While I doubt that mere definitional changes alone can solve the problem, I think we should more critically examine why our definitions of two closely linked terms—violence and victims—differ so much in both our everyday language and within the legal system. Expanding the definition of victimhood in the way that we have expanded the definition of violence will allow for us to more clearly register how those violent structures affect individual victims. The analysis of structural violence necessarily focuses on the structure: how those legal or social structures are set up. However, without a more developed concept of victimhood, it is harder to register what the experience of those structures looks like for the people who are harmed by them. It is especially important to give victims and their advocates more precise language to talk about how their experience intersects with violent systems. There is already a sizable discourse that dismisses the experience of victims who experience harm, from phenomena like victim-blaming

¹¹ Rylko-Bauer, *supra* note 6 at 59.

and gaslighting, and the concept of structural victimhood offers those victims a way to understand and communicate their experience within that challenging context.

In many of the definitions of violence, one could see a 1 to 1 comparison to the corresponding victim populations. For example, the term “domestic violence” implies that there is a person who is “a victim of domestic violence”; in every instance of “police brutality” there is an identifiable person who is a “victim of police brutality”— and, as I am arguing here, when we talk about “systemic violence” then there are people who are “victims of systemic violence.” This one-to-one correspondence naturally raises the question of why we need to flesh out a notion of systemic victimhood if there always seems to be a direct correspondence between a type of violence and a type of victim. In short: doesn’t the term “systemic violence” always contain and convey the same meaning that “systemic victimhood” does? However, while a form of violence often corresponds with an identifiable set of victims, it does not always. The reason for not-total-correspondence between forms of violence and forms of victimhood is that conceptions of systematic violence and conceptions of systematic victimhood do not actually cover the exact same ground. A focus on systematic victimhood brings our attention from the systematic action that creates a number of effects to a focus on the experience of those who suffer the harms associated with that action.

Even if we are able to satisfactorily identify the set of actions that create structural violence, there are often still arguments about who is and who is not a legitimate victim of the harms that follow from that structural violence. For example, even among people who agree that there is the structural anti-Black violence that was ingrained in the United States legal system during slavery and that has been passed down through Jim Crow, Mass Incarceration, and Red-

Lining, there is still debate about who can rightly claim to be a victim of that structural violence.¹²

A focus on systemic victimhood turns our attention to the people who are harmed by systemic violence and brings us directly to the painful debates about how we account for the harm that people experience as the result of systemic violence.

To be clear: my hope for this chapter is not to adjudicate who does and does not count as a “legitimate” victim. As I have shown in my first chapter, attempts to sort out what kinds of victims are the “right kind” of victim almost always creates a game where there are no winners among the people who have suffered a harm. What I hope to accomplish with this discussion of systemic victimhood is to turn our attention directly to the multitude of ways that systemic violence creates harm and how we can center the experience of that harm without falling into the trap of trying to sort out “legitimate” from “illegitimate” experience of harm.

The concept of the victim is becoming a bigger and bigger part of our discussions of justice, but we do not yet have a clear way of talking about what a victim is, who can claim to be a victim, and how victims ought to be treated. As we will see in the history section below, the victim has always had a somewhat ambiguous place in the Anglo-American legal tradition. But if we want to build a more just legal system, we will need to start with finding a responsible way to center the experience of the people for whom we are seeking justice.

3.2 BUILDING THE CONCEPT OF STRUCTURAL VIOLENCE

Progressive argumentation has attempted to further goals of social justice through the expansion of the definition of the term violence. For example, scholars like Catharine MacKinnon

¹² The Pew Research Center’s polling on reparations shows some differences within the community of black adults in terms of whether or not one’s ancestors needed to be enslaved in the United States in order to be eligible for reparations. Kiana Cox and Khadijah Edwards, *Reparations for Slavery*, PEW RSCH. CTR. (Aug. 30, 2022).

have focused conversations on structural violence like that of misogyny as a legitimate form of violence.¹³ The label of violence singles a problem out, as it does in the criminal context, as a uniquely bad one in need of remedying. While something like poverty may not be physical violence, the use of the term violence to describe it signals that the problem causes severe harm and has serious consequences for the corresponding victim population.

In order to better understand the concept of structural violence, I will return to a foundational piece that lays out a definition of structural violence in order to show how that definition will support the development of a concept of structural victimhood. Johan Galtung's seminal article "Violence, Peace, and Peace Research" states that "it is not so important to arrive at anything like *the* definition, or *the* typology- for there are obviously many types of violence."¹⁴ For Galtung, violence occurs any time physical and mental well-being in a society is lower than its potential because avoidable harms have occurred. For example, if someone dies from illness due to lack of medical care in a society with the capacity to grant that care to the victim, then violence has occurred because the actual realizations of well-being are below the potential one. Most notably, Galtung rejects a narrow conception of violence that only includes when someone intentionally physically harms or incapacitates someone.¹⁵ An act can still be violent even though it lacks an identifiable actor causing physical harm to an identifiable victim.

¹³ CATHERINE MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 7 (2006). MacKinnon in particular discusses the structural components of violence against women evident in the prevalence and treatment of rape in international armed conflict. *Id.* Structural violence has also played a role in the theorizing of other feminist scholars. *See, e.g.* Paul Farmer, *On Suffering and Structural Violence: A View from Below*, 125 DAEDALUS 261, 274–76 (1996) (discussing different axes that make groups more susceptible to structural violence and suffering more generally), J. ANN TICKNER, GENDER IN INTERNATIONAL POLITICS 48 (1992) (theorizing a feminist conception of security that involves the reduction or elimination of structural violence against women), Kristin Anderson, *Gendering Coercive Control*, 15 VIOLENCE AGAINST WOMEN 1444 (2009) (discussing the intersection of structural gender inequalities and vulnerability to coercive control).

¹⁴ Galtung, *supra* note 6 at 168.

¹⁵ *Id.* at 167.

Galtung points out several important dimensions of violence relevant to this discussion. First, Galtung distinguishes between physical and psychological violence.¹⁶ According to Galtung, a narrow conception of violence would only count an action against a physical body as violent while a broader view could also label diminishment in mental well-being as violent.¹⁷ Psychological harms could include threats of physical violence or harm or the mental toll of existing within a structurally violent system.¹⁸

Galtung also questions the common narrative of violence as requiring a “subject-action-object” pattern.¹⁹ Narrow conceptions of violence may require that there be a specific, identifiable subject that acts or perpetrates the violence in question. However, for Galtung, violence can still occur even with no direct perpetrator. Violence without a direct, identifiable perpetrator is indirect or structural violence, and frequently “shows up as unequal power and consequently as unequal life choices.”²⁰ Behind structural violence lies inequality, especially inequalities in who holds power. If there are people who are starving or dying from disease unnecessarily because of unequal distribution, Galtung argues that violence has occurred.

Galtung also draws a distinction between intended and unintended violence.²¹ The legal system focuses predominantly on harm that is intended because intention is strongly tied to conceptions of guilt and blame.²² However, the focus on intention causes us to miss structural harms that have no clear intent, even though those harms may be just as serious or worse than harms from intentional violent acts. If we care about the level of harm, then we should consider

¹⁶ *Id.* at 169.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 171.

²⁰ *Id.*

²¹ *Id.* at 171–72.

²² *Id.*

both intentional and unintentional harms as violent. As Galtung points out, “there is no reason to assume that structural violence amounts to less suffering than physical violence.”²³

Intentional physical violence has received more focus because it is more easily perceived and conceptualized. This form of violence shows up much more readily because it has clear objects who readily recognize the harm and can articulate it clearly as a complaint. By contrast, “[s]tructural violence is silent, it does not show”.²⁴ Structural violence lacks a clear “subject-action-object” structure, making it less easy to identify, even for those who are victims of it. There is no clear bad actor committing a single action against an identifiable victim.²⁵ So, even though structural violence may ultimately cause more harm, it is less readily identifiable and may be seen as just the status quo. While Galtung himself holds that it is possible for there to not be an object at all in structural violence, there are groups or individual people who are being harmed by the actions in question, they are just less clearly seen and potentially unable to recognize their own victimization.

Following our discussion of Galtung and his views on structural and physical violence, I will discuss several broad, non-exhaustive camps that definitions of violence can fall into. To think of new ways that we might expand the definition of victims, we should first look to the ways that different scholars have expanded the definition of violence, so that we can see how advocates might also reframe conversations about victims’ rights.

3.2.1 Wide and Restricted Theories of Violence

The definitions of violence that scholars offer tend to range between “wide” and “restricted” conceptions of violence. The political left has a tendency to employ “wide”

²³ *Id.* at 173

²⁴ *Id.*

²⁵ *Id.* at 171–73.

conceptions of violence while the political right tends to focus on “restricted” definitions. Between these two different conceptions of violence, there is a third group, “legitimists” that define violence in accordance with what kinds of harm a given legal system does or does not recognize.²⁶ The work of this chapter is to make an argument in favor of the kinds of legal reforms that would make wide definitions of victimhood acceptable to a legitimist framework.

“Wide” conceptions of violence see that the harms that individuals experience can be linked to institutional structures, and those who speak in terms of wide conceptions of violence say that the larger institutional structure itself can be violent. If a police officer shoots a Black person who is jogging through a primarily white suburban neighborhood, a wide conception of violence might look beyond the single instance of the shooting and see that moment of spectacular violence (which may or may not be captured by a body camera and replayed on YouTube) and ask about the history of redlining that created the predominantly white wealth in the suburb that makes a Black body look out of place to the officer who pulls the trigger.²⁷ This wide conception might also ask why the police officer charged with patrolling the area was carrying a gun or what forms of accountability might or might not exist for a police officer who misuses force in the discharge of their duty.

As this wide conception of violence stresses the particular rules and regulations that establish institutions, it places the cause for the spectacular instance of violence in institutions that might be changed or reformed with new public policy proposals and new sets of rules. These

²⁶ The typology of “wide” structuralist definitions of violence and legitimist definitions of violence is adapted from Coady, who is largely critical of the concept of structural violence. Coady, *supra* note 4 at 3.

²⁷ Mesic, et. al have found a statistical relationship between incidents of police shootings and socio-economic measures that are often associated with structural racism (degree of residential segregation, gaps in incarceration rates between different racial groups, gaps in educational attainment, gaps in employment status). Aldina Mesic, et.al, *The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level*, 110 J. OF THE NAT’L MED. ASS’N, 106, 106–18 (2018).

wide conceptions of violence include the ideas of “structural violence” that extend violence to encompass a wide range of social injustices and inequalities.²⁸ In the example of the police shooting, questions of wealth inequality and access to housing appear alongside the officer’s finger on the trigger as part of a larger causal chain that leads to spectacular moment of violence *and* leads to forms of deprivation like a lack of wealth and secure housing for minority populations that are harmful even if they are not as spectacular. Wide definitions of violence offer a lens that encourages us to see a wide range of harms as interrelated and consider harms that may not be easily visible alongside the supposedly more obvious moments of violence that can be captured in a few tense moments of heartbreaking video footage. This definitional approach focuses on the systems themselves that cause the harm and questions of why structures are set up the way that they are. It can also explain why those systems focus, at best, only on harms to victims indirectly.

In contrast to “wide” conceptions of violence, “restrictive” definitions of violence do not take as wide an aperture or consider as diverse of an array of harms. Restrictive definitions, according to Coady, “concentrate upon positive interpersonal acts of force usually involving the

²⁸ Galtung’s ultimate definition of violence is a clear example of a definition that falls under Coady’s “wide” definitions of violence. Galtung, *supra* note 6. For Coady, this wide conception of violence “not only allows reformers to say that they are working to eliminate violence when they oppose, say, a government measure to redistribute income in favour of the already rich, but allows revolutionaries to offer, in justification of their resort to violence, even where it is terrorist, the claim that they are merely meeting violence with violence.” Coady is largely critical of the framework that Galtung puts forward. When the more diffuse harms of lack of housing and lack of income--which can indeed be powerfully felt--are called violence, Coady believes that terms like “structural violence” gives advocates license to respond to diffuse structural harms with rioting. Coady, *supra* note 4 at 4. Another theorist classified under this label by Coady is Newton Garver. *See*, Newton Garver, *What Violence Is*, THE NATION 819, 822 (June 24, 1968) (“The institutional form of quiet violence operates when people are deprived of choices in a systematic way by the very manner in which transactions normally take place.”).

infliction of physical injury.”²⁹ These “restrictive” definitions of violence tend to be centrist in nature, by allowing that there does need to be some matter of reform but stopping short of addressing larger systematic issues. Restrictive definitions certainly open up the way to recognize a spectacular moment of violence like the police shooting mentioned above as being a form of violence.

In a legitimist definition of violence, the actions that police take that are within the bounds of legal uses of force are exempted from the category of violence by fiat.³⁰ But if a police officer uses force in excess of what is allowed, that action becomes violent, and the individual police officer might be sanctioned. The restrictive legitimist definition asks whether a given act that causes harm falls on the side of harm that is sanctioned by the law or not sanctioned by the law.³¹ But legitimists do not tend to question whether the legal system is itself drawing the right line between legitimate or illegitimate uses of force.³² Even if those using a restrictive definition of violence allow that the police officers acted in an unsanctioned way, those legitimist definitions do not extend to a discussion of housing policy and regulations on police accountability that the “wide definition” might consider as pieces of the larger puzzle that led to the instance of a person getting shot by a police officer in the first place.³³

²⁹ Coady, *supra* note 4 at 4. Coady believes that these definitions are intuitive and are supported by everyday usage and dictionary definitions of violence. Coady ultimately defends a conception under this heading. *Id.* Theorists who could be put in this category include Sidney Hook and Herbert Marcuse. *Id.* (citing Herbert Marcuse, *NEW YORK TIMES MAGAZINE* 90 (Oct. 27, 1968) (“Thanks to a kind of political linguistics, we never use the word violence to describe the actions of the police, we never use the word violence to describe the actions of the Special Forces in Vietnam. But the word is readily applied to the actions of students who defend themselves from the police, burn cars or chop down trees”).).

³⁰ *Id.* at 4–5.

³¹ *Id.*

³² Robert Paul Wolff, *On Violence*, 66 *THE J. OF PHIL.* 601, 606–09 (1969).

³³ *Id.* at 608–09.

One could have a less restrictive legitimist definition of violence. Legitimist definitions take their cue for what is properly violent and what is not from the legal system.³⁴ For example, a legitimist who lives in a society with a legal system that allowed for a wider array of things to be legally recognizable as violence would have a less restrictive definition. As a practical matter, the United States legal system has a fairly restricted view of what kinds of actions count as violence that can be recognized in court, so a legitimist view in the United States is usually aligned with a restrictive view. However, a committed legitimist would accept a wider definition if the normal process of legal reform were to widen the definition of violence within a particular society. In this case, someone who believes that restrictivist definitions of violence are morally or practically superior might part ways with the legitimist who accepts a shifting definition as the outcome of political reform through a legitimate political process.

Rather than an oversight, those who defend the “restrictive” definition of violence emphasize that the moment of spectacular violence is itself a unique form of harm that merits being singled out as “violent.”³⁵ For those who hold this position, bringing other more diffuse harms into a discussion of the spectacularly violent act would distract from the crucial attention due the spectacular act.³⁶ The spectacular act should be addressed with changes focused on individuals (changing the “hearts and minds” of a few recalcitrant people or removing the “bad apples” from the department) and specific policies rather than sweeping systemic reforms. While this approach does more to address the acute suffering of at least some victims, it still focuses on the violent act itself and erases victims of the less spectacular kinds of violence.

³⁴ Coady, *supra* note 4 at 4 (describing the position of Robert Wolff on violence).

³⁵ *Id.* at 10 (comparing a case of stabbing a beggar to death and refusing to assist a beggar).

³⁶ *Id.* at 11–12.

The legitimist definition of violence is usually aligned with the conservative viewpoint. This definition of violence is more narrow than the “wide” or even the “restrictive” because it attaches a question to every instance of harm: regardless of the extent of the harm done, was that harm an illegal or illegitimate use of force? This viewpoint certainly can conclude that the police officer shooting the black man was an instance of violence, but it would only do so after asking whether the officer in question was acting in accordance with the system of laws and responsibilities put in place. In this way, the legitimist definition, like the “wide” definition, looks away from the spectacular moment of violence in order to consider the larger social structure.

However, the legitimist conception of violence relies on descriptive criteria about the type of society that exists, whereas wide conceptions use normative criteria to assess whether the system is just. For the legitimist, force can be used and harm can be done, provided it meets some kind of legitimacy test. As the wide definition of violence and the legitimist definition of violence both share a tendency to look beyond the single spectacular moment of harm to ask after the implications of larger social systems, the legitimist definition of violence also shares a crucial aspect with the restrictive definition of violence: a focus on one individual (or a set group of individuals) as particular actors who can be blamed for harms.

Sidney Hook defines violence as “the illegal employment of methods of physical coercion for personal or group ends.”³⁷ Those advocating for a structural or “wide” understanding of violence would say that trying to identify as violent only those structures that serve to benefit one group and harm another ignores the way that the structural violence that doles out harm is not always easily traced back to the intentions of other currently living people. Still, the focus here is

³⁷ K.W. GRUNDY & M.A. WEINSTEIN, *THE IDEOLOGIES OF VIOLENCE* 12 (1974) (citing Sidney Hook, *Violence*, in *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* (ed. Edwin R. A. Seligman) 264–67 (1937)).

on legality and whether or not the harm itself was legitimate rather than centering the person who suffered the harm.

One could see a legitimist definition of violence, however, that aligns more with the views of the political left. While the right may focus on legitimate as being a function of legality, one could also create a version of legitimism that is based in morality rather than in legal structures. The right might say, for instance, that police violence against a Black man is legitimate because the law sanctions it. By contrast, the left may say that violence and looting occurring during protests is legitimate, where legitimacy refers not to legality but to the moral imperative of equality backing the movement or the necessity of the violence to further legitimate moral claims. Again though, even if this definition is more acceptable to progressives, the center is morality and harm rather than the person harmed.

In a way, the fact that none of these definitions of violence focus on the victim of the harm makes sense because they are theories of harm itself. The problem arises in the corresponding conceptions of victimhood, especially for wider definitions, even though there is always a harmed whenever there is a harm. While there often seems to be a one-to-one correspondence between a form of violence and a form of victimhood, that is not always the case. And when there is a lack of correspondence between a type of violence and a type of victimhood, we can see how a focus on systemic victimhood gets us to see the experiences of the individuals that follow from the act of violence.

For example, some political definitions of violence try to present a conception of violence for which there are no victims.³⁸ For example, when some political theorists talk in positive terms

³⁸ Galtung himself considers the question of whether a violent action has to have an “object” or a victim. Galtung is discussing cases where there is no physical violence, but there is a “*threat of physical violence* and indirect threat of mental violence” which could be considered a form of psychological violence. Galtung, *supra* note 6, at 38.

about “revolutionary violence,” they are often not intending to say that there will be “revolutionary victims”— perhaps because those who suffer in the ideal revolution are supposed to be corrupt or complicit elites who are not “legitimate victims” because they had a hand in bringing about the unequal social structure whose dialectical unfolding came crashing down on their heads.³⁹ These political definitions of violence tend to emphasize the effect of violence as being a form of social transformation that awakens and transforms the consciousness of individuals in a society—a transformation that may be experienced as a radical seeing of new possibility and that may be accompanied with some sadness for what has passed away.⁴⁰ But this transformation, at least in these political texts, is not a form of victimization because it emphasizes the new kinds of agency that individuals will be able to take in a transformed society.

Whether or not one finds this strand of political thinking plausible, the lack of correspondence between a form of violence and a form of victimization points to an important limit in the correspondence between the two terms and shows us what a focus on systemic victimhood could get at that a focus on systemic violence could not. Definitions of violence, whether they be “systematic” or “revolutionary,” tend to focus on the act that is done. That action

³⁹ Wolff, *supra* note 32 at 615 (“The fourth view of violence is the revolutionary counterdefinition... First, the connotation of the term 'violence' is accepted, but the application of the term is reversed: police are violent, not rioters; employers, not strikers; the American army, not the enemy. In this way, an attack is mounted on the government's claim to possess the right to rule. Secondly, the denotation of the term is held constant and the connotation reversed. Violence is good, not bad; legitimate, not illegitimate.... Since the outclass of rebels has scant access to the instruments of power used by established social classes—wealth, law, police power, legislation—it naturally seeks to legitimize the riots, harassments, and street crime which are its only weapons. Equally naturally, the rest of society labels such means “violent” and suppresses them.”).

⁴⁰ Fashina lays out the groundwork for this view in an analysis of Frantz Fanon’s psychoanalytically informed politics. As Fashina observes, Fanon was not just concerned with the practical utilitarian justification of anti-colonial violence (colonial occupation inflicted more harm than violent resistance would bring). Rather, the very act of deploying violent resistance changes the psychology of those who engage in it or support it. Colonization, for Fanon, is not just a legal and political arrangement; it is also a form of psychological domination. Oladipo Fashina, *Frantz Fanon and the Ethical Justification of Anti-Colonial Violence*, 15 SOC. THEORY AND PRAC. 179–212 (1989).

then has effects, and one of those effects is often to create harm. But even if we recognize that an action has effects that create harm, there is still a live question as to who gets to claim to be a legitimate victim of that harm and a still-larger set of questions about how people experience those harms and have that experience acknowledged.

3.3 BUILDING THE CONCEPT OF STRUCTURAL VICTIMHOOD

In this chapter, I work to expand the concept of victimhood from the victim as a person who is harmed by a spectacular act of physical violence to a person who can also suffer from the effects of larger and more diffuse systems that create harms. I call this structural victimhood. However, in trying to expand the definition of victimhood, this chapter must first account for the ways in which advocates have already been trying to bring the concept of the “victim” into the legal system since the emergence of the Victims’ Rights movement in the 1980’s.⁴¹ Most leftist critics of the Victims’ Rights movement—the kinds of critics and scholars who advanced ideas about structural violence from which I am drawing—are deeply skeptical of the Victims’ Rights movement.⁴² The Victims’ Rights movement is often accused of infringing on the rights of a defendant⁴³—especially in the context of a legal system where minorities are disproportionately in the position of being defendants. Some critics of the Victims’ Rights movement even say that the movement is itself part of the structural violence that ends up harming those who are caught

⁴¹ The Victims’ Rights movement predominantly came about as an attempt to rebalance a system that disproportionately protects the rights of defendants in the system at the expense of victims. The movement was pushed for even my officials at the highest levels in government. *See, e.g.*, PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT [hereinafter “Final Report”] at vi (1982) (“[victims] instead discover that they will be treated as appendages of a system appallingly out of balance”), President’s Remarks Announcing Support for a Constitutional Amendment on Victims’ Rights, 32 WEEKLY COMP. PRES. DOC. 1134 (July 1, 1996) (discussing the disproportionate interest given to those “who may be innocent” at the expense of victims).

⁴²White, *supra* note ## at 358–59.

⁴³ *Id.* at 410–12.

up in an inequitable criminal justice system.⁴⁴ The counterintuitive thrust of this section is to show that, while the critics of the Victims' Rights movement have a point about how that movement has historically amplified some inequities, there is still a strand of logic within the Victims' Rights movement that allows us to develop a more robust conception of structural victimhood. As I have shown in the previous section, an analysis of structural violence also needs an analysis of structural victimhood in order to clearly delineate the harms that individuals suffer when they are impacted by structural violence. In this section I show that we can work within the logic of the existing Victims' Rights movement in order to make that analysis possible. While the Victims' Rights movement often frames its interventions into the legal system in the restrictive legitimist terms discussed in the previous section, the seeds of a wider, more structural analysis of victimhood is nested inside the legal framework that the Victims' Rights movement has developed.

Inasmuch as the Victims' Rights movement has remained fixed inside these two definitional structures—narrow and legitimist—it has tended to be most conducive to conservative public policy proposals. In line with “narrow” definitions of victims, the Victims' Rights movement tends to mostly be talking about victims of violent crime,⁴⁵ and in line with the “legitimist” concerns, the appearance of tools like Victim Impact Statements in the courtroom

⁴⁴ Jill Lepore, *The Rise of the Victims' Rights Movement*, THE NEW YORKER (2018) <https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement>. (“In both capital and non-capital cases, victim-impact evidence has been shown to affect sentencing: that’s why prosecutors introduce it. Research also suggests that, though victims of violent crime are disproportionately poor and nonwhite, white victims are twice as likely as black victims to make victim-impact statements. Where jurors identify victims as “respectable,” they tend to identify with them (finding their lives to be similar to their own), while they rarely identify with defendants (whose lives tend to be very different from theirs). Jurors also report being less compelled by victim-impact statements made by black victims than by those made by white victims.”)

⁴⁵ For example, the Crime Victim Compensation Fund established by the 1984 Victims of Crime Act often only extends financial assistance to those who are victims of *violent* crime. *Victim Compensation: An Overview*, NAT'L ASSOC. OF CRIME VICTIM COMP. BOARDS, <http://www.nacvcb.org/index.asp?bid=14> (last visited Oct. 8, 2023).

often give voice to those victims who are most articulate and whose patterns of speech and rationality appeal to majority-white juries.⁴⁶ However, these Victim Impact Statements are only allowed into the legal system in instances where the victim can point to a specific offender as the person who victimized them.

While there are many critiques of the Victims' Rights movement from the left, there is also a parallel interest on the left in supporting victims. Recent movements, most notably the #MeToo movement, have been raising awareness of the prevalence of victimization and of the harms that it can cause. #MeToo is not the first movement for the recognition of victims. The word 'victim' arose in the late fifteenth century, derived from the Latin *victima* which denoted a person or live animal to be sacrificed to the gods in a religious ceremony.⁴⁷ The word has largely lost its original meaning and today denotes someone who has suffered an offense against them or their property through the agency of a different individual. It can be used to denote someone who has suffered an injury or hardship more generally or, more specifically, a person who has been duped or tricked by another.⁴⁸

However, even if we no longer think of victims as being sacrificed, modern legal theory still preserves a sense of the victim's status as being intertwined with larger organizational and societal priorities. We may no longer sacrifice victims to the gods, but states see their legitimacy as attached to the treatment of victims: prosecutors and elected officials often state that they are endeavoring to find "justice for" any number of harmed individuals and groups. Those officials who, for example, join protesters in seeking "justice for Breonna Taylor" do not justify their actions in solely terms of the harms that the perpetrators have done against the rule of law, but

⁴⁶ JEFFRIE MURPHY, *GETTING EVEN: FORGIVENESS AND ITS LIMITS*, 27–33 (2003) (discussing different Supreme Court case decisions and their rationales pertaining to Victim Impact Statements).

⁴⁷ JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 117–18 (1984).

⁴⁸ *Victim*, Oxford English Dictionary, https://www.oxfordlearnersdictionaries.com/us/definition/american_english/victim (last visited Oct. 8, 2023).

rather focus on the harm done to the particular person, Breonna Taylor.⁴⁹ The category of “victim” can increasingly be seen as expanding beyond individuals who have been harmed to encompass groups, states, and potentially even ecosystems. This section traces the challenges and possibilities that come with trying to define the concept of the victim in a world where harms and the people and groups suffering from them are manifold.

3.3.1 Legal History: Taking the Victim out of the Legal System

The restrictive framework of the Victims’ Rights movement and the wider framework of social justice movements are both working to put the concept of victimhood back into the legal system. This is a response to a long legal history that has de-emphasized and sidelined the role of the victim. In order to understand how the Victims’ Rights movement and social justice movements are approaching our legal system, we first need to understand how the victim was removed from a legal system that, at least on an intuitive level, seems like it should be concerned with the harms that victims suffer.

Victims have not always been, and arguably are still not, a central part of the legal tradition that forms the basis of United States law. It is precisely because “the victim” has more recently emerged (or, re-emerged) as central figure in our legal deliberations that many of the contradictions and paradoxes that this chapter addresses appear. The foundations of United States law in English common law shows how our legal system has evolved to focus on the perpetrator rather than the victim. In English common law, long before the American Revolution, prosecution was ‘private’ or brought forward by the victim—this would seem to set the system up to have a

⁴⁹ Opper, *supra* note 1.

set of robust protections for the victim, but things did not quite work out that way.⁵⁰ Well before the system of English Common Law transitioned to the American colonies, this system of having the legal process initiated by the victims further shifted with the political theory of Hobbes's *Leviathan*: rather than a system of private proceedings brought forth by individual victims, any crime was first conceived of as a crime against the king's peace rather than a harm committed by a perpetrator against a victim.⁵¹ Because the victim became the king—or later, in the American system, the state—the rights of the person harmed by the perpetrator were crowded out while the individual perpetrator still held an identifiable place in the rights and protections of the modern legal system.

Against this backdrop where the individual person as the victim is replaced by the king or state, protections in the Constitution were built in to protect the accused who might be subject to mistreatment or abuse when an action is initiated against them by a disproportionately powerful state. This is the legal tradition that evolved to give perpetrators the right to trial by a jury of their peers,⁵² the ability to plead the fifth amendment,⁵³ and eventually even the right to legal

⁵⁰ R. Barajas & S. Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Towards a Proper Balance*, 49 *Baylor L. Rev.* 1, 8–11 (1997), Lynne Henderson, *The Wrongs of Victim's Rights*, 37 *STAN. L. REV.* 937, 940–41 (1985), John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 *AM. J. LEGAL HIST.* 313, 317–22 (1973), Harold J. Berman, *The Background of the Western Legal Tradition in the Folklaw of the Peoples of Europe*, 45 *U. CHI. L. REV.* 553, 559 (1978).

⁵¹ This transition predates Hobbes, but a full discussion of the history is beyond the scope of the current chapter. For more information, *see generally*, F.A. Inderwick, *THE KING'S PEACE: A HISTORICAL SKETCH OF THE ENGLISH LAW COURTS* (1895) (sketching the history of the legal concept of the king's peace). For a more recent discussion of the concepts origins and legacies, *see* Lisa Ford, *THE KINGS PEACE: LAW AND ORDER IN THE BRITISH EMPIRE* (2021) (discussing the corrosion of the rights of British subjects and the relationships between peacekeeping, sovereignty, and political subjectivity).

⁵² U.S. CONST. amend. VI.

⁵³ U.S. CONST. amend. V. The right against self-incrimination is only one of the recognized sub-parts of the protections provided by the Fifth Amendment. It includes the right to not have to testify at trial and protections against incrimination after police arrest. Legal Information Institute, *Fifth Amendment*, CORNELL L. SCHOOL, https://www.law.cornell.edu/wex/fifth_amendment#:~:text=strengthen%20its%20case.-,Self%2DIncrimination,In%20the%20landmark%20Miranda%20v. (last visited Oct. 8, 2023).

representation by a public defender.⁵⁴ A parallel evolution of increasing rights for victims has not been as consistent or widespread, in part because the authors of the Constitution did not deem it necessary to delineate specific rights for individual victims of crime because the real victim of crime was not an individual person but rather the state. As such, defendants may be subject to the maltreatment of the state and must be protected against infringement on their rights, but the victim is not subject to such infringements.

This transition from criminal proceedings as initiated by victims to criminal proceedings initiated by states is reflected in the naming convention that we use that describe criminal cases in terms of alleged perpetrators and state entities rather than alleged perpetrators and victims. Even people who are not lawyers will recognize the naming formula for criminal cases: “The State”, or “The People” versus “The Accused.”⁵⁵ Though the victim may have been an important party to the event that lead to the court proceeding, the victim’s identity is nowhere to be found in the title of the case. The shift from private to public prosecution did not give rise to a corresponding evolution of rights for the victim, who lost much of the agency that earlier came with the power to initiate a legal proceeding. The victim does not have a role in deciding what crimes to charge the defendant with or whether to bring a case at all—that power is reserved for the state’s prosecutor.⁵⁶ Moreover, the victim typically has no role in either a criminal investigation or trial, except as a possible witness to the crime against them.⁵⁷ This is because when a perpetrator is

⁵⁴ U.S. CONST. amend. VI. The Sixth Amendment guarantees the right to “assistance of counsel.” Originally, this guarantee only applied in federal cases, but it was extended to state cases in 1963. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵⁵ Andrew J. Karmen, *Who’s Against Victims’ Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN’S J. LEGAL. COMMENT. 157, 158 (1992) (crime was “prosecuted by the state on behalf of an abstraction (“the People”), the real flesh-and-blood victim was treated just like another piece of evidence”). *See also*, ROBERT REIFF, *THE INVISIBLE VICTIM* 134–35 (1979) (describing how crimes became perceived as against the government rather than against the individual victim).

⁵⁶ David L. Roland, *Progress in the Victim Reform Movement: No Longer the “Forgotten Victim,”* 17 PEPP L. REV. 35, 35 (1989) (explaining problems victims encounter in the criminal justice system generally).

⁵⁷ *Id.*, Karmen, *supra* note 55 at 158.

accused of committing a crime, modern legal theory conceives of that harm as being a violation of the social contract rather than as a harm that is directed at a particular victim.

The victim also drops out of the discussion about the punishment that the perpetrator should serve: in criminal proceedings, when someone is assigned prison term or community service, the idea is that the perpetrator must pay “debt to society” as a whole rather than give restitution to a particular victim.⁵⁸ Yet, even as the role of the victim has been historically curtailed in our legal system, the re-emergence of the victim as a central party in legal deliberations creates the need for a deeper conceptual understanding what a victim is and how our legal system might change to accommodate that which it has historically excluded.

As we will see, the accumulative nature of case law, in which one precedent is stacked on top of another over time, makes it difficult to reorient the structure of United States law as it currently exists. But case law also presents a wide range of materials in which ideas about victimhood and potential precedents for recognizing different kinds of victims are plentiful. Analytic philosophy is particularly well-suited to the task of articulating the role of the victim in our legal system because it offers the means to assemble this diverse body of precedent into a structure that might both identify the contradictions that have accumulated in case law as well as find possibilities for a more just legal system that exist within the precedents that we already have.

⁵⁸ Jean Hardisty, *Crime and Political Ideology*, POL. RSCH. ASSOCIATES (Dec. 1, 2004) <https://politicalresearch.org/2004/12/01/crime-and-political-ideology>. Restitution for victims does exist in criminal settings to some extent, but it does have limitations and is not the main function of the criminal system by any means.

3.3.2 The 20th century Victims' Rights Movement: Putting the Victim back into the Legal System

The prevalence of the term 'victim' has increased over the last 50 years, perhaps partly due to the Victims' Rights movement. In this section, I will show how even the restrictive framework that is used by the Victims' Rights movement can be used by social justice advocates to expand the definition of victimhood to encompass the victims of structural harms.

The first thing to realize about the Victims' Rights movement is that it did not simply take the pre-existing category of "victim" and then advocate for rights for those in that category. The Victims' Rights movement also had to engage in its own expansion of the term "victim" to meet its own ends. In order to understand how the Victims' Rights movement has expanded the term "victim," we have to understand the history of the actual changes that the movement has brought about. Then we can analyze how those legal reforms actually expanded the concept of victim.

The Victims' Rights movement began in the 1970's, partially in response to *Linda R.S. v. Richard D. et al* which held that "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another."⁵⁹ A private citizen, in this case, refers to the victim of the crime. Crime victims lacked legal standing and rights and could serve no role other than that of witness.⁶⁰ The movement was further supported by other movements that were challenging tenets of the criminal justice system, such as the Civil Rights movement and the feminist movement.⁶¹

A string of different protections emerged for victims in the 1980's. In 1982, the Task Force on Victims of Crime established by President Ronald Reagan issued a Final Report that proposed an amendment to the federal Constitution that would grant victims of crime with

⁵⁹ *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973).

⁶⁰ Karmen, *supra* note 55 at 158.

⁶¹ *Id.* at 158-59.

federally protected rights. The Task Force recommended an addition to the Sixth Amendment that would guarantee rights of the victim alongside the listed rights of the accused. While the federal amendment was a failure, the Victims' Rights movement did make substantial federal legislative progress in the form of statutory law providing rights to victims of crimes and also included provisions for protection of victims and witnesses from intimidation and for ordering restitution for the victim under certain circumstances.⁶² In 1984, the Victims of Crime Act (VOCA) was passed, establishing victim notification systems and the Crime Victims Fund to provide compensation to victims of crime.⁶³

3.4 HOW THE VICTIMS' RIGHTS MOVEMENT HAS EXPANDED THE CONCEPT OF VICTIMHOOD

Now that we have understood the background of where the Victims' Rights movement has come from, we can better understand how that movement has gone beyond just bringing "the victim" into legal proceedings. The Victims' Rights movement has actually expanded the definition of what it means to be a victim under the law.

As the Victims' Rights movement expanded what it meant to be a victim in the legal system, it worked first to accommodate victims (and in doing so redefined the victim as an entity whose experience the legal system needed to accommodate) and then started to welcome the victim's active participation (and in doing so expanded the role of the victim from merely being a witness to being someone with real power within the legal system).⁶⁴ This sequence of

⁶² Final Report, *supra* note 35.

⁶³ Victims of Crime Act of 1984 (VOCA), §§ 42 U.S.C. 10601-10604 (1984), D.B. Gewurz & M.A. Mercurio, Note, *Are Victims All Dressed Up with Nowhere to Go?* 8 ST. JOHN'S LEGAL CMMT 251, 267-68 (1992).

⁶⁴ Joseph B. Sandborn, Jr., *Victims' Rights in Juvenile Court- Has the Pendulum Swung Too Far*, 85 JUDICATURE 140, 141-42 (2001).

movements amounts to an expansion of the category of victim. While this expansion does not yet allow for the concept of structural victimhood that I am developing in this chapter, each moment of expansion lets us see how the concept of victimhood has been expanded in the past and might be further modified in the future.

The first form of expansion that the Victims' Rights movement took on, accommodation, began from the claim that the criminal justice system was contributing to the alienation of victims. This first move was an attempt to expand the category of victim from someone whose level of harm was being deliberated about by the legal system to someone who actually had a stake in how those deliberations happened (rather than simply the outcome) and who could acutely feel the harm of being alienated from those deliberations. Victims had always been witnesses, but in a system where perpetrators are innocent until proven guilty, the witness's testimony is only a piece of information for the court to consider. The person who was the victim was not given consideration beyond the court considering the information that could be extracted from the victim's testimony. The Victims' Rights movement claimed that this treating of victims as only witnesses was a form of alienation that separated them from a legal process that was deeply entwined with the victim's life. To address this form of alienation, the Victims' Rights movement created a public policy response that formed victim and witness assistance programs to provide services for victims. This move to provide additional services acknowledged that victims were more than just people who could await whatever redress the legal system arrives at. Victims were institutionally acknowledged and accommodated. In the 1980's, Victims' Rights movement went further by moving from simply accommodating victims to actually advocating that victims should be active participants in the criminal justice processes beyond the limited role as witness.⁶⁵

⁶⁵ *Id.*

A Constitutional amendment protecting the rights of victims of crimes was proposed in 1997.⁶⁶ The amendment would have granted the victim “standing” in the criminal trial and a limited participatory role in the proceedings,⁶⁷ but the amendment was ultimately rejected due to concerns about efficiency,⁶⁸ general disdain for victim participation, undermining of court neutrality and the adversarial system,⁶⁹ infringement on the rights of the accused,⁷⁰ and difficulties in defining the term “victim”.⁷¹ While many states have adopted victims’ rights statutes and amendments to their state constitutions,⁷² the federal constitutional rights of the accused will trump any state legislation if rights come into conflict.⁷³

This progression shows some of the tension inherent in the movement to expand victims’ rights: while a just court system might find a place for victims, it should also somehow balance the victim’s power with the defendant’s right to a fair and unbiased trial. Giving institutional power to the victim assumes that the victim is not just seeking redress from the court, but rather suggests that the victim’s role has been expanded to play a pivotal role in determining what form that legal redress might take. Critics of the Victims’ Rights movement often point out that this kind of expansion is precisely the kind of dangerous expansion that should be avoided: the

⁶⁶ OFFICE OF VICTIMS OF CRIME, *History of Law: The Evolution of Victims’ Rights*, https://www.ncjrs.gov/ovc_archives/nvaa/supp/c-ch4.htm#:~:text=Its%20authors%20proposed%20augmenting%20the,critical%20stages%20of%20judicial%20proceedings.%22 (last visited Oct. 8, 2023) (“The issue of federal constitutional protection of victims’ rights was first raised in the landmark President’s Task Force on Victims of Crime *Final Report* published in 1982. Its authors proposed augmenting the Sixth Amendment of the U.S. Constitution to provide that ‘. . . the victim, in every criminal prosecution, shall have the right to be present and to be heard at all critical stages of judicial proceedings.’”)

⁶⁷ Sue Anna Moss Cellini, *The Proposed Victims’ Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 42 ARIZ. J. INT’L & COMP. L. 525, 528 (1996) (citing S.J. Res. 52, 104 Cong. 104 §1(1996)).

⁶⁸ *Id.* at 534–37.

⁶⁹ Erin Blondel, *Victims’ Rights in an Adversary System*, 58 DUKE L. J. 237, 253–54 (2008).

⁷⁰ *Id.* at 247–48, 261–62.

⁷¹ *Id.* at 258–59 (citing *U.S. v. Sharp*, 463 F. Supp. 2d 556, 561–67 (E.D. Va. 2006) (mem.)).

⁷² Cellini, *supra* note 67 at 526–27.

⁷³ *Id.* at 544, Barajas & Nelson, *supra* note 50 at 24.

passions and hurt that the victim feels might make them unable to rationally evaluate what kinds of cases should be pursued and what kinds of cases should not be pursued.⁷⁴ However, for better or worse, what we see here is that as the Victims' Rights movement has sought to bring the victim into the legal system, the powers and capacities of the victim have grown and changed. The victim of the Victims' Rights movement is a more developed being with more capacities and a greater degree of agency, an entity who is not just a witness to the crime but rather also someone whose experience of the courtroom must be considered and someone who might even have some say on how the prosecution proceeds.

In the paragraphs above, we have talked about victims' rights advocates have expanded the powers and considerations that the victim has under the legal system. Critics who worry about that expansion fear that the power of individual victims might overturn the impartiality of the judicial process. However, there are other kinds of expansion that the Victims' Rights movement has also pioneered that go further to recognizing the quality of diffuse harms that social justice advocates are hoping to bring into focus—the harms that I am arguing are necessary parts of the concept of structural victimhood. This second, different kind of expansion comes from a somewhat arcane, but institutionally important, source: the Crime Victim Compensation Fund.⁷⁵ As I will show in these next paragraphs, whenever the question of money as a form of redress is posed, the ability of money to transfer and circulate between different people raises the question of how the harms that are done to an individual might reverberate out to affect multiple people and how the nature of a particular harm cannot always be pinned to a single source.

⁷⁴ *Id.* at 533–35.

⁷⁵ Office for Victims of Crime, *Crime Victims Fund*, [https://ovc.ojp.gov/about/crime-victims-fund#:~:text=The%20Crime%20Victims%20Fund%20\(the,cases%2C%20not%20from%20tax%20dollars](https://ovc.ojp.gov/about/crime-victims-fund#:~:text=The%20Crime%20Victims%20Fund%20(the,cases%2C%20not%20from%20tax%20dollars) (last visited Oct. 8, 2023).

The Crime Victim’s Compensation Fund is overseen by the Office for Victims of Crime and “provides financial assistance to victims of crime through state-based compensation programs, as well indirectly through state grants that help finance victim service organizations.”⁷⁶ Following the mandates of VOCA, each state has a victim compensation office to which victims can submit claims for expenses directly related to the crime such as medical bills or lost wages. These expenses can be already incurred or expenses that will be incurred in the future (e.g. costs of therapy). These funds are often available only to victims of *violent* crime rather than crime more generally.

Here, we can already see how the legal system’s attempt to give some rights to victims kicks off a series of questions about who might rightly claim the status as the kind of victim that the legal system can recognize as worthy of compensation. Violent crime, in this particular legal definition, includes “rape, assault, child sexual abuse, drunk driving, domestic violence, and homicide.”⁷⁷ Yet this list (or almost any other list of particular kinds of violence) can hardly be counted on to articulate the whole range of violations that one might reasonably consider to be “violent.”⁷⁸ The fact that there is compensation for harm, and the lack of clarity around exactly what kinds of harm merit compensation, puts the focus of the question on the extent of the harm done. Even if the legal system intends for that compensation to only be for the harms that arise from a clearly identifiable perpetrator, it is natural for an advocate of social justice reform to raise

⁷⁶ Office for Victims of Crime, *Types of Funding*, <https://ovc.ojp.gov/funding/types-of-funding> (last visited Oct. 8, 2023).

⁷⁷ JOSHUA DRESSLER AND STEPHEN P. GARVEY, *CRIMINAL LAW: CASES AND MATERIALS* (7 ed. 2016), NAT’L ASSOC. OF CRIME VICTIM COMP. BOARDS, *supra* note 45, Michael O’Hear, *Third-Class Citizenship: The Escalating Legal Consequences of Committing a “Violent Crime,”* 109 J. OF CRIM. L. & CRIMINOLOGY 165, 170–79 (2019).

⁷⁸ For example, one version of the proposed Constitutional Amendment discussed earlier did not define what kinds of victims would be included under the phrase “victims of violent crime.” S.J. Res. 1, 108th Cong. § 1 (2003).

the question of whether harms of an equal extent that arise from more diffuse circumstances shouldn't also be worthy of compensation.

An additional edge case within the Crime Victim's Compensation Fund—cases where funds are due to the victim's family if the victim is dead—sheds further light on how the question of compensation raises the prospect of expanding the definition of victimhood to include a wider set of structural concerns. In cases where direct victim is deceased, family members can apply for funds instead to help with funeral and other expenses.⁷⁹ This peculiar manner of extending compensation implicitly recognizes that the harm done to a single victim might reverberate through other people connected to that victim (the family members)—and yet, in only allowing the family members to claim compensation in the case of the victim's death, it suggests that only so many people who might be victimized by a given action can be recognized by the legal system. The fund is financed primarily through fees charged to offenders such as bail bonds that were forfeited and penalties or fines that make up part of an offender's sentence.⁸⁰ Unlike reparations awarded during sentencing to the victim, conviction or apprehension of the offender for that individual victim is not a necessary precondition of receiving these funds. Here, we can see the role that the state plays as an intermediary between offender and victim, collecting funds from the perpetrator through a series of fees attached to a variety of bureaucratic processes rather than directly connecting the funds collected from a particular perpetrator to the restitution that is paid to a particular victim.

Taken together, the various expansions of the victim's role throughout the reforms sought by the Victims' Rights movement create a situation where victim appears as a more multifaceted entity than simply a witness whose testimony offers evidence. Victims themselves are seen as

⁷⁹ NAT'L ASSOC. OF CRIME VICTIM COMP. BOARDS, *supra* note 45.

⁸⁰ *Id.*

having additional qualities that the court needs to address, from the capacity to feel alienated from the court's proceedings to the agency to play a role in determining those proceedings (like giving the victim a degree of prosecutorial discretion). As the Victims' Rights movement has sought to secure compensation for victims, the concept of victimhood has expanded even more as compensation raises the question of what kinds of harms fall within the bounds of consideration and what kinds of harms fall outside the bounds of consideration.

Entering the 21st century, the Victims' Rights movement has gathered together its more fully realized concept of victimhood in a piece of federal legislation called the Crime Victims' Rights Act passed in 2004.⁸¹ When the Crime Victims' Rights Act was written, it was unclear at what point in the process rights attach to victims and to which kinds of victims. The Department of Justice's Office of Legal Counsel (OLC) issued a statement saying that rights do not attach to victims prior to formal charging against the accused.⁸² If this were the case, many victims would never receive any rights at all. Based on the plain language of the act, its legislative history, and its purposes, one could argue that these rights should attach during the initial investigation.

This Act is one of the most comprehensive attempts that the United States has made to create a series of protections for victims that approaches the level of detail and attention paid to crafting the protections for perpetrators. In doing so, this legislation emphasizes and further pushes out some of the forms of expansion that we have already discussed in this chapter. Under this act, victims of federal offenses were granted the following rights:⁸³

- 1 The right to protection from the accused

81 Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn, Crime Victims' Rights Act, Pub. L. No. 108-405, tit. 1, 118 Stat. 2260, 2261-65 (2004), U.S. Courts, *The Crime Victims' Rights Act of 2004 and the Federal Courts Federal Judicial Center* (Oct. 24, 2005) [https://www.uscourts.gov/sites/default/files/cvra0001.pdf#:~:text=The%20CVRA%20gives%20victims%20the,3771\(a\)\(4\)](https://www.uscourts.gov/sites/default/files/cvra0001.pdf#:~:text=The%20CVRA%20gives%20victims%20the,3771(a)(4)).

82 OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST., ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 9 (2005) <http://www.usdoj.gov/olp/final.pdf>.

- 2 The right to timely notification of proceedings
- 3 The right not to be excluded from proceedings
- 4 The right to speak at critical proceedings in the case
- 5 The right to confer with the prosecuting attorney
- 6 The right to an order of restitution
- 7 The right to proceedings without an unreasonable delay
- 8 The right to be treated with fairness and dignity⁸⁴

Prior to the passing of the Crime Victims' Rights Act, it was not uncommon for one or more of these rights to be violated in most cases. For example, Rodney King, a victim of police brutality, was excluded from the state proceedings in his case.⁸⁵ The prosecution did not want to call him as a witness, so his only access to proceedings was through television reports.⁸⁶

This list of rights only applies to victims of violent federal crimes, but similar laws have been passed in every state with varying levels of protection. While this list offers a starting place for granting someone like Rodney King a foothold in the legal system, many of the rights in both the state and federal lists are formulated quite vaguely. This vagueness can, on the one hand, be seen as a lack of clarity that fails to give victims the rights that they should have. However, this vagueness is the product of the fact that it is hard to fix exactly what the rights of victims ought to be given the concern with balancing, on one hand, the consideration that ought to be given to victims in light of the harm that they have suffered with, on the other hand, the danger that a victim's power might unbalance the fairness of the justice system. But this vagueness also opens up the potential for expanding the definition of victim in ways that both follow from what the

⁸⁴ The Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771 (2004).

⁸⁵ GEORGE P. FLETCHER, WITH JUSTICE FOR SOME (1995), Steven Clymer, *Reflections on the Rodney King Case*, 48 LITIGATION (2022).

⁸⁶ Fletcher, *supra* note 85.

Victims' Rights movement had previously proposed and help chart the way for a new definition of structural victimhood.

To look back at that list from the previous paragraph again, manifold lines are unclear and non-specific. It is unclear what it means, for example, to treat a victim with "fairness and dignity" within the criminal system. According to the Model Rules of Professional Conduct (which lays out the guidelines for decorum in the United States Legal System), victims are not mentioned at all, and the only requirement of treatment for witnesses is that they should be *unnecessarily* embarrassed or mistreated.⁸⁷ It is also unclear from this list what constitutes a "critical proceeding" at which a victim has the right to be heard. Due to potential conflicts with the defendant's Constitutional rights, most victims are only allowed to speak in their capacity as victim prior to sentencing. They have no right to speak during plea bargaining or during the trial phase.⁸⁸ Even some of the rights that seem clear-cut are often difficult to realize. Victims very rarely ever speak with the prosecutor unless they are preparing to serve as a witness during the trial.⁸⁹ Even then, prosecutors have no requirement to undergo any education in trauma-informed interviewing or dealing with victims' issues. Additionally, even in cases where restitution is ordered, restitution is never actually paid to the victim because the defendant is indigent.⁹⁰ Even

⁸⁷ MODEL RULES OF PROF. CONDUCT, r. 4.4 (AM. BAR. ASS'N 1983).

⁸⁸ The CVRA gives victims the right to be "reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771(a)(4). While they can be heard in court while a plea is being made, they do not have the any involvement in the negotiation or acceptance of a plea. Cassell, Mitchell & Edwards, *Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges are Filed*, 104 J. CRIM. L & CRIMINOLOGY 59, 61 (2014).

⁸⁹ *Id.*

⁹⁰ The question of restitution from indigent defendants is complicated. The court can still order an indigent defendant to pay discretionary restitution because indigence is one factor among several. *See, e.g., U.S. v. Trigg*, 119 F.3d 493 (7th Cir. 1999). Restitution may still be ordered on the basis of a defendant's perceived future ability to pay. *See, e.g., U.S. v. Stoddard*, 150 F.3d 1140, 1147 (9th Cr. 1998). For a general discussion of the practice of determining restitution and enforcing it, including cases where the defendant is indigent, *see*

granting solutions to all of the problems in these lists, many victims' rights provisions do not have any enforcement mechanism attached to them.⁹¹ Therefore, even if a victims' rights have been violated, there is no way to file a complaint or rectify that violation.

Within all of these vague distinctions that are laid out, the parts that contain the most potential for building an expanded notion of structural victimhood are (3) The right not to be excluded from proceedings and (8) The right to be treated with fairness and dignity.⁹² First, the right to not be excluded from proceedings begins with the recognition that victims have a right to see how the legal system is dealing with a case that is a matter of personal importance to the victim. But even if it is only the individual victim who is allowed to be present, that victim may see themselves as the representative of the harms that are structural and extend beyond the individual perpetrator of the crime to the victim of larger social circumstances.

One of the reasons why courts have historically wanted to keep victims outside of legal proceedings—interacting with them only when they serve their duty as witnesses—is precisely that when you have the physical body of the victim present, the court cedes some level of rhetorical control over what the legal case is about for the public that is watching and interpreting

Catharine M. Goodwin, *Imposition and Enforcement of Restitution*, U.S. SENTENCING COMM'N (June 2000) <https://www.ussc.gov/sites/default/files/pdf/training/online-learning-center/supporting-materials/Imposition-and-Enforcement-of-Restitution.pdf>.

⁹¹ One example of a statute that was unsuccessful because of very limited enforcement rights is the Victims' Rights and Restitution Act of 1990. Pub. L. No. 101-647, 104 Stat. 4820. For a discussion of the problem with this statute in particular, see Paul G. Cassell, *Barbarians at the Gates?: A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 443, 515–22. For a discussion of the problem with the enforcement mechanisms with the CVRA itself, see Blondel, *supra* note 69 at 259–72. At the state level, state constitutional amendments suffer from a similar lack of enforcement mechanisms. David L. *Progress in the Victim Reform Movement: No Longer the "Forgotten Victim,"* 17 PEPP. L. REV. 35, 41, 183–84 (1989) (claiming that a right without an enforcement mechanism is “no right at all” and calling the state amendments “mere guidelines that patronize victims with rhetoric and illusory promises.”).

⁹² 18 U.S.C. § 3771 (2012). The Senate sponsors of the CVRA explained the rationale for these provisions: “In case after case we found victims and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by prosecutors to [*sic*] busy to care enough, by judges [focused] on defendants' rights, and by a court system that simply did not have a place for them.” 150 CONG. REC. 7297. For further descriptions of victim participation, see BELOOF, CASSELL, & TWIST, *VICTIMS IN CRIMINAL PROCEDURE* 728–33 (3d ed. 2010).

the actions of the court. This issue becomes even more loaded when we contemplate what it might mean for an individual victim to be treated with fairness and dignity. Because the guidelines do not specify or define those concepts, that leaves the provenance of “fairness and dignity” up to a matter of legal and political contestation. As we have already seen, the Victims’ Rights movement has made a number of inroads to giving the victim a say, not just in terms of giving their narrative in the form of Victim Impact Statements, but also in advocating to give victims some control over what cases do and do not get tried in the first place. If part of what it means to treat a victim with dignity is left up for the victim to decide what a “dignified” treatment of their legal case might look like, that introduces some space for the possibility that the victim might claim that their status as a sufferer of structural harm be considered alongside the kinds of harms with identifiable offenders.

Instead of victim-centric reforms to the criminal system, civil law offers an alternative path for reform. In the civil system, the argument goes, an individual victim can seek damages from an offender for harms resulting from the offense. These can be physical harms, psychic harms, or property harms. It seems plausible to think that there might also be an allowance for victims of structural harm to seek redress as structural victims in civil court if the consideration of structural claims cannot yet be made in criminal court. However, the civil system is not the brilliant solution it first appears to be and cannot be the answer for the majority of victims. The civil system is inaccessible to many victims of crime, especially poorer and minority victims who cannot afford counsel. Unlike in the criminal system, no party to the offense has the right to an attorney.⁹³ Individuals can apply for “indigent” counsel, but the requirements for this service do

⁹³ See generally, Tonya L. Brito, *The Right to a Civil Attorney*, 148 DAEDALUS 56 (2019) (discussing the case law surrounding the rejection of the right to an attorney in civil law cases including a 2011 case by the Supreme Court).

not correlate with who can and cannot afford an attorney.⁹⁴ Furthermore, those who work for indigent defendants often have absurdly large caseloads and lack the resources to serve effectively as counsel.⁹⁵ The victim, therefore, has no right to counsel in any proceeding regarding their crime. While the burden of proof in the civil system is easier to satisfy, defendants can bring retaliatory counterclaims to intimidate victims into dropping even meritorious suits. All of these challenges, in part speak to the kinds of structural harms that are inflicted on victims by the legal system itself.

3.5 THE NOT-SO-PASSIVE VICTIM

It is one thing for victims to try to bring an understanding of structural harms into the cases that appear in the legal system; it is quite another to use the legal system to address the structural harms that it inflicts on victims itself. As I have shown, however, within the process of legal reform it is possible to slowly shift norms—as the Victims’ Rights movement has, to some extent, done—and work within the structures of the legal system to change what it might be possible for that legal system to do. When we look only at the structural harms, it can be hard to see what any kind of possible solution might look like. However, when we turn our attention to the role that victims play, and the ways that they can leverage their rights to advocate for a larger say (for better and for worse) in the systems that govern their lives, the challenge that structural harms pose seem a little bit less intractable. Turning our attention to structural victimhood not only lets us analyze the effects that systemic violence has on individual people, it also brings a vantage point that suggests we might be able to do something about it.

⁹⁴ *Id.* at 61.

⁹⁵ *Id.*

Though the Crime Victims' Rights Act is a relatively recent evolution, the concept of "the victim" has spread rapidly throughout the United States legal system. Every state has passed some form of legislation providing for the protection of victims' rights in state offenses. Most have passed amendments to the state constitution or enacted statutory provisions providing varying rights to the victims.⁹⁶ These rights do vary by state, with some states only providing rights to victims of felony offenses.⁹⁷ Furthermore, since rights of offenders are federally guaranteed, they will always trump the rights of victims in the case of conflict. This stance is animated by the sense that if the victim is given more rights and more control over the proceedings of a legal case, their bias or sense of aggrievement might skew or hamper a fair or impartial trial. In this sense, the victim, who is sometimes conceptualized as the passive recipient of a harm also contains the potential to be an overly active and disruptive force within the court itself. The figure of the victim occupies a paradoxical place in our imagination as having both too little and too much agency. As I've worked to show in this chapter, the potential agency that victims might exercise within the criminal justice system opens up the possibility that victims and their allies might be able to advocate to put an understanding of structural victimhood into the legal system.

In victims' rights, conservatives are pro rights with the sense that it's the individual victim and the incident of direct, illegitimate violence against them that matters. But they won't grant that someone who is suffering from racism is also a victim to whom they should extend rights. By contrast, the left has kind of given up on victims' rights because it is seen as taking the side of the

⁹⁶ Barajas & Nelson, *supra* note 50 at 5.

⁹⁷ The CVRA does not draw a distinction between misdemeanors and felonies and extends rights to victims of both types of *federal* offenses. 18 U.S.C. § 3771(e) (2012). However, many state provisions do draw this distinction and extend rights only to victims of felony offenses. U.S. DEP'T OF JUST., OFFICE OF JUST. Programs, *Victim Law: About Victims' Rights* <https://www.victimlaw.org/victimlaw/pages/victimsRight.jsp> (last visited Oct. 8, 2023).

criminal justice system against defendants and embodying the racial injustices of the system. But, I don't think that the rejection of the Victims' Rights movement as it currently stands means that the left should give up on victims' rights. Rather, I think that there is a way to view current popular movements as victims' movements in themselves that seek to extend who counts as a legitimate victim. Just as expanding the term violence has opened new doors for thinking about systemic injustices, expanding the definition of victimhood could create new opportunities to see victim populations that are seen as more culpable or victims that are more indirect (like in the case of reparations for slavery) as legitimate victims as well.

4. THE PSYCHOLOGY OF VICTIMHOOD: REACTIVE ATTITUDES, GASLIGHTING, AND SELF-BLAME

4.1 INTRODUCTION

In this chapter, I focus on the psychology of victimhood. One of the fundamental problems with the concept of victimhood is that, apart from whatever harms the victim might suffer and whether or not the legal system will recognize that harm, there is the separate question of whether or not victims themselves can recognize the harms that are done to them. On one level, it might seem self-evident that victims should be able to recognize their harms; they, after all, were the people that experienced the harm. How could they fail to recognize something that they have directly experienced? However, a wide swath of research in the psychological and social sciences suggests that there are many reasons people fail to articulate, recognize, and correctly categorize their direct experiences. On a simple level, for example, a victim might not articulate a harm because they fear retaliation from a more powerful offender. A victim's memory of the intensity of a harm might unconsciously shift to accommodate the narratives of people in their social group who constantly say that what the victim experienced "isn't so bad" or that they are being "too emotional." A victim might even come to doubt their ability to correctly categorize their experience at a deeper level by succumbing to social pressure and thinking of themselves as

an unreliable narrator of their own experience that is unable to properly assign blame. This chapter explores the psychological and social dynamics that might make a victim doubt their capacity to understand what they have experienced and properly label it.

In order to explore how victims can come to doubt their ability to correctly label their experiences and even themselves, this chapter brings together two core concepts from psychology and philosophy: gaslighting and the reactive attitudes. The concept of reactive attitudes comes from P.F. Strawson's work, and these attitudes, broadly, are attitudes that you develop towards another person as a result of your perception of the other person's actions towards you. For example, I might develop an attitude of love towards my partner for staying up late and helping me edit my dissertation because that action indicates his good will towards me. On the other hand, I might develop an attitude of resentment towards a stranger who shoved ahead of me in the line to get dinner.

Forming reactive attitudes relies on recognizing a harm as such, correctly identifying the person to blame, and evaluating the relationship between the wrong doer's actions and their intentions towards you, the victim. In that calculation, there are several things that can affect the end-result evaluation of the harm. When evaluating who is to blame, for example, a victim might take account of if that person intended to harm them. If the wrong doer is responsible, then we will be more likely to generate a negative reactive attitude towards them. While the most obvious factors influencing the evaluation may have to do with the offender, the victim's capacity to form reactive attitudes is also influenced by factors internal to their own psychology and, indirectly, by societal pressure and stigma that becomes internalized. As this chapter traces the different kinds of reactive attitudes that victims might form, I will be pairing those analyses of reactive attitudes with an analysis of the different kinds of gaslighting that can interfere with a victim's capacity to form appropriate reactive attitudes.

In this chapter, I begin with talking about the reactive attitudes generally. Next, I discuss Strawson's first special consideration for mitigation or modification of reactive attitudes: the case where the person who does a harm is in some sense not responsible for their action. Even if their actions harmed you, it is not seen as a manifestation of ill intent. However, in addition to the question of if the wrong doer actually intended the harm, there is an additional question of if the victim can correctly perceive that intention in light of phenomena like epistemic gaslighting. The second part of this chapter moves on to a more extreme form of gaslighting that goes beyond just attacking a victim's ability to know their own experience. In the second part of this chapter, I examine the case where gaslighting and social pressure undermines the victim's capacity to see themselves as a moral agent capable of even making a judgement of blame. This second form of gaslighting draws on the second special consideration that Strawson gives for the reactive attitudes: when someone is not a rational agent—is psychotic or is not a morally agentive being—Strawson posits that it is not appropriate to target these kinds of people with negative reactive attitudes like blame. However, in a parallel case, victims may come think of themselves as crazy or without sufficient moral agency to make any kind of judgment at all about who is responsible for the harms that they suffer.

4.2 REACTIVE ATTITUDES GENERALLY

In "Freedom and Resentment," Strawson predominantly deals with what he calls the reactive attitudes, meaning "[n]on-detached attitudes and reactions of people directly involved in transactions with each other."⁹⁸ The attitudes are ones that come about as a result of certain interactions between individuals that indicate "the quality of others' wills towards [them], as

⁹⁸ P.F. STRAWSON, *FREEDOM AND RESENTMENT AND OTHER ESSAYS* 4 (1974).

manifested in their behavior.”⁹⁹ These attitudes matter for a discussion of victim psychology because the degree to which a victim sees herself as someone who was legitimately harmed or as someone who thinks “What he did wasn’t so bad” or “Maybe it’s just all in my head” largely depends on the kinds of reactive attitudes that victims form about those that harm them. As we will see, there are a lot of ways that a victim’s capacity to form appropriate reactive attitudes can be warped by social and cultural messages and by direct attacks on the victim’s own capacity as someone who can truly know their own experience. However, before we can examine how the reactive attitudes of victims can be torqued and twisted, we need to better understand Strawson’s concepts.

Reactive attitudes are at the core of how we evaluate the actions that others do. For example, as a result of another person’s positive action towards us (e.g. giving assistance in a difficult task, saying encouraging things, etc.), we will develop an attitude towards that person that reflects the positive qualities of that person’s will towards us. Since the behavior exhibited indicates a positive will, we will likely have a positive reactive attitude towards them such as gratitude or love. Similarly, to use Strawson’s example, if someone were to step on our hand in a way indicating a negative will towards us, we would likely have a negative reactive attitude towards that person like resentment.¹⁰⁰

Strawson claims that we attach a lot of importance to the attitudes, intentions, and will that others have towards us, and our reactions to others’ behaviors are affected by our beliefs about the attitudes or intentions that the behavior exhibits. We are concerned with how the actions of others “reflect attitudes towards us of goodwill, affection, or esteem on the one hand, or

⁹⁹ *Id.* at 14.

¹⁰⁰ *Id.* at 5.

contempt, indifference, or malevolence on the other.”¹⁰¹ To return to the example of someone treading on your hand, the action of treading is itself a harm, but our reaction to that harm is importantly guided by how we perceive the will or intention of the person who harmed us. If the action is perceived to be the result of a bad intention or malevolence, we may have a reactive attitude of resentment towards the treader. If instead, however, the treading was the result of an accident or a byproduct of an intent to help us, a reactive attitude of resentment is significantly less likely to occur. Depending on the circumstances, our perception of the benefit or harm towards us may come mainly or even entirely from the perceived attitude itself.

4.3 STRAWSON’S FIRST SPECIAL CONSIDERATION

In addition to laying out a conception of the reactive attitudes, Strawson also examines the conditions under which certain reactive attitudes are natural or appropriate towards others. For our discussion of reactive attitudes and victim psychology, it is important to understand the conditions under which reactive attitudes can change because this chapter is getting at the different ways that a victim’s ability to form appropriate reactive attitudes can get twisted around. He does so through the consideration of the negative reactive attitude of resentment, or “situations in which one person is offended or injured by the action of another in which- in the absence of special considerations- the offended person might naturally or normally be expected to feel resentment.”¹⁰² In particular, he lays out two kinds of special considerations that might modify or mitigate our resentment towards another. In this section, we will consider his first special consideration alone.

¹⁰¹ *Id.*

¹⁰² *Id.* at 7.

The first category of special considerations concerns situations in which the offense in question was one for which offender was not fully or at all responsible.¹⁰³ The offender is still seen as fully agential, and reactive attitudes in general towards that person are still appropriate. The agent is still an appropriate target for the general demand for goodwill and for the reactive attitudes. Instead, our reactive attitude is mitigated or modified because the offender was, for example, ignorant of the injury or caused it reluctantly for reasons outside their control. Even though the offending agent is seen as fully agential, the injury or harm is not seen as incompatible with the offender having good will or positive intentions towards us. Since our reactive attitudes are responsive to others' intentions towards us, the lack of negative intention towards us modifies our resentment by lessening it. Example excuses in this category may take the form of "he didn't mean to" or "he couldn't help it."¹⁰⁴

4.4 EPISTEMIC GASLIGHTING

Strawson's first condition concerns itself with the lessening or destruction of a negative reactive attitude based off of a perception that the wrong doer, though fully agential, was not fully responsible for the harm in question such that their action was not inconsistent with that person having good will towards you. The fact of the offender's lack of bad intention changes the appropriate reactive attitude towards that person. In Strawson, however, there is not a clear discussion of the difference between the wrong doer's *actual* intention towards a victim and the victim's *perception* of the wrong doer's intention. Perception and reality come apart, and there are factors in a victim's psychology that make it likely that the perceived intention, especially as it changes over time, might not adequately reflect the wrong doer's actual intention. Indeed, the

¹⁰³ *Id.*

¹⁰⁴ *Id.*

wrong doer may even play on these psychological features as a way of lessening the blame and resentment that are due them. Even if the wrong doer themselves does not engage in those actions, societal stigma and interpersonal interactions can have the same effect, even when not done consciously.

One way that a reactive attitude may become lessened is when the victim in question is being gaslit. In general, gaslighting is the process of manipulating someone, intentionally or unintentionally, into doubting their own experience and perceptions and/or their ability to reason and make moral judgments more generally. Gaslighting has recently received more philosophical attention, and several different types of gaslighting have been delineated. For our purposes, we will focus on psychological gaslighting and epistemic gaslighting. While psychological gaslighting was theorized prior to epistemic gaslighting, epistemic gaslighting, while still harmful, is aimed more at someone's ability to perceive and to know rather than some deeper assessment of their own character and moral status. Strawson's two special considerations track these two types of gaslighting, one dealing with perceptions of ill-intent and responsibility and the other concern with agency full stop. Since we are dealing with Strawson's less extreme special consideration first, we will begin with epistemic gaslighting.

4.4.1 Epistemic Gaslighting and Reactive Attitudes

Rachel McKinnon puts forward epistemic gaslighting as a form of epistemic injustice, or, more specifically, an instance of testimonial injustice.¹⁰⁵ This kind of gaslighting can be subtle, unintentional, and done by anyone, including friends, allies, and other good-intentioned individuals. It takes the form of suspicion, expressions of doubt, or a lack of belief of a victim's

¹⁰⁵ Rachel McKinnon, *Allies Behaving Badly: Gaslighting as Epistemic Injustice*, in ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE, 167, 167–74 (Kidd, Medina, & Pohlhaus, eds., 2019).

account of a harm against them. On this view, “gaslighting involves expressing doubts that the harm or injustice that the speaker is testifying to really happened as the speaker claims.”¹⁰⁶

Testimonial injustice is a specific type of ethical wrong done to someone in “their capacity as a knower.”¹⁰⁷ In an instance of testimonial injustice, a person suffers from a credibility deficit based on a negative identity prejudice, or a prejudice “against people owing to some feature of their social identity.”¹⁰⁸ Fricker points specifically to some historically powerless groups, including women, whose social identity is based on stereotypes that suggest a lack of credibility in and of themselves by being inversely related to the speaker’s competence, sincerity, or both. For example, women may stereotypically be seen as intuitive or overly emotional, both of which undermine their rationality and therefore their *competence* to give rational testimony.¹⁰⁹ Similarly, an agent’s *sincerity* may also be undercut by stereotypical associations with immorality or a tendency to lie or exaggerate.¹¹⁰ As a result of this credibility deficit, the person is morally wronged because being a knower is a central feature of human beings.¹¹¹ As I want to emphasize, testimonial injustice does not just diminish the individual’s capacity as a knower to others, it can also undermine the individual’s own sense of themselves as a knower who can develop the proper reactive attitudes.

In terms of Strawsonian reactive attitudes, this form of gaslighting can lead to an inaccurate appraisal of the offender’s intent towards us and the level of blame that they deserve. What objectively may have been a harm perpetrated against us that is the result of ill-intent may be perceived as not based on ill-intent because the victim comes to question their own perception

¹⁰⁶ *Id.* at 168.

¹⁰⁷ MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* 20 (2007).

¹⁰⁸ *Id.* at 27–28.

¹⁰⁹ *Id.* at 14–15, 45.

¹¹⁰ *Id.* at 45.

¹¹¹ *Id.* at 44 (“To be wronged in one’s capacity as a knower is to be wronged in a capacity essential to human value.”)

and knowledge of the event because of the gaslighting they are subjected to. Undermining one's sense of themselves as a knower or at least an accurate perceiver of situations means that they may not form a negative reactive attitude against someone who harmed them even though they would be correct to form that attitude based on the actual facts. Through interactions with others and internalization of general societal stigma against victims, individual victims may be less able to form negative reactive attitudes at all or to form reactive attitudes that properly reflect the severity of the harm.

If one comes to understand oneself as a "victim" then someone is at least part way towards forming reactive attitudes that identify a legitimate harm with a source outside of themselves. However, being classified as a victim creates a whole apparatus of narratives and dismissals that can be marshaled against and within a victim. Just as external stigma from any type of prejudice may be internalized, external victim-blaming may be internalized to make a person think that they are "just playing the victim" or that their status as being an "emotional victim" makes their own account of the harms that they have suffered overblown or unreliable.¹¹²

¹¹² Internalization of external stigma is a well-documented phenomenon both among victims in particular and among those who experience external stigma more generally. Internalization among victims in particular will be discussed in more detail later on, but some different examples include internalized self-stigma among sexual minorities (J.A. Puckett & H. Levitt, *Internalized Stigma within Sexual and Gender Minorities: Change Strategies and Clinical Implications*, 2 J. OF LGBT ISSUES IN COUNSELING 426 (2015), Szymanski, Kashubeck-West, & Meyer, *Internalized heterosexism: A Historical and Theoretical Overview*, 36 THE COUNSELING PSYCH. 510 (2008)), internalization of body shape ideals and negative evaluation of one's own body (A. Paterna, et. al., *Internalization of Body Shape Ideals and Body Dissatisfaction: A Systematic Review and Meta-Analysis*, 54 INT'L J. OF EATING DISORDERS 1575 (2021)), internalized self-stigma around mental illness (P.W. Corrigan & A.C. Watson, *The Paradox of Self-Stigma and Mental-Illness*, 9 CLINICAL PSYCH. 35 (2002), A.C. Watson, et. al, *Self-Stigma in People with Mental Illness*, 33 SCHIZOPHRENIA BULL. 1312 (2007)), and internalized stigma around addiction (C. Lloyd, *The Stigmatization Problem of Drug-Users: A Narrative Literature Review*, 20 DRUGS: EDUC., PREVENTION, AND POL'Y 85 (2013), J.B. Luoma, et al., *An Investigation of Stigma in Individuals Receiving Treatment for Substance Abuse*, 32 ADDICTIVE BEHAVIORS 1331 (2007)). However, not all stigma is internalized, and some may react to stigmatization with anger and empowerment or remain relatively indifferent. See generally, P.W. Corrigan & A.C. Watson, *The Paradox of Self-Stigma and Mental-Illness*, 9 CLINICAL PSYCH. 35 (2002) (describing studies where internalization occurs less often and the three different responses to stigmatization, and discussing factors that may influence which response governs in different cases).

In other words, the credibility deficit that others put on a victim may be internalized by the victim, interfering with their ability to form negative reactive attitudes and to identify the appropriate target for those attitudes.

4.4.2 Victim as social identity

In describing victim as an identity, I am building on Fricker's idea that the wrong of testimonial injustice is predicated on the credibility deficit occurring because of an identity prejudice.¹¹³ For Fricker, for something to count as an instance of testimonial injustice, it has to be based on an identity prejudice, or "prejudices against people *qua* social type."¹¹⁴ The social type in question is one that Fricker argues is "directly dependent upon shared social-imaginative conceptions of the social identities of those in the particular operation of power."¹¹⁵ Testimonial injustice is inherently tied to conceptions of social identities, and epistemic gaslighting is defined as a form of testimonial Injustice. Therefore, for gaslighting of victims *qua* victim (as opposed to gaslighting of women *qua* women where the gaslighting is concerned with properties specific to women rather than those specific to victims) to be testimonial injustice, we must establish that victim itself is a social identity capable of grounding an identity prejudice.

Though Fricker does not describe "victim" as a category in and of itself, the category "victim" itself could count as an identity sufficient to generate the credibility difference in question. A category being a social identity means that there are "conceptions alive in the social imagination that govern, for instance, what it is or means to be a woman or a man, or what it means to be gay or straight."¹¹⁶ So, it is a socially constructed category that individuals are placed

¹¹³ *Id.* at 28 ("The speaker sustains testimonial injustice if and only if she receives a credibility deficit owing to an identity prejudice in the hearer").

¹¹⁴ *Id.* at 4.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 14.

in that is both associated with and defined by societal conceptions and stereotypes. While “victim” doesn’t look exactly like traditionally recognized identities like woman or man, it has identity weight because something changes in our perception when the word someone is labelled a “victim”. “Victim” comes with many different conceptions and stereotypes attached, including helplessness, weakness, a lack of power, or emotionality but also culpability and untrustworthiness, many of which could bear on a speaker’s perceived credibility. Just as woman is a social identity because of the conceptions associated with it, victim is also a social identity in and of itself because it has conceptions attach that transcend and add to the existing conceptions of that individual based on the social identities that they had prior to becoming a victim.

“Victim” is, as I am arguing, not just a descriptor but rather a category itself that can intersect with other social categories and add additional content to those identities. The specific ways in which someone who is a victim might suffer a credibility deficit might differ depending on the other intersecting identities. Being a white, female victim is different from being a white female. The former makes you think of the person as emotional, in distress, or helpless on one hand but also a potential target for blame for her suffering. If our white, female victim is a victim of sexual assault, it isn’t uncommon for her to be seen as broken or damaged, but also impure or unchaste (based on dress, prior sexual history, etc.). Similar changes in perception occur when you add the category of victim to any other intersecting set of identities that one could imagine. If, by contrast, we have a male victim of sexual assault, we may see stereotypes of wimpiness, a lack of masculinity, or just the perception that one cannot be male and a victim of sexual assault. The content of the intersectional identity changes, but victim adds on different instantiations of the same narratives of weak or emotional personal characteristics and suspicion and blame. Inasmuch as people with these interacting identities internalize these narratives about their

characteristics *qua* victim, they can start to discount their own stories and their own sense of themselves as people possessing knowledge of their own harm.

4.5 CREDIBILITY JUDGMENTS LESSEN OR DESTROY REACTIVE ATTITUDES

I have argued that victim is a type of identity prejudice like Fricker has in mind in instances of testimonial injustice. On Fricker's view, the credibility deficit that arises comes from stereotypes that carry some characteristics that call into question the competence or sincerity of the agent giving testimony, or both. There are many different characteristics that can be used to support a credibility deficit in regards to victims, but, for the sake of brevity, I will focus on two types of traits here: those that undermine competence through its perceived tension with rationality (being emotional), those that undermine sincerity through attributions of culpability (victim-blaming), and those that undermine sincerity through suspicion (lying or attention seeking). For both of these types of traits there is a way in which the second a victim internalizes their sense of being an "emotional", "culpable", or "suspicious" victim, they can lose purchase on their sense of themselves as being wrongfully harmed by another.

These credibility deficits, once internalized, affect how a victim sees the harm that occurred and the wrong doer who caused the harm. Originally a victim may think that there was actually a harm that occurred, that the wrong doer committed that harm, and that the harm was indicative of the ill-will of the wrong doer towards them. In that moment, a negative reactive attitude of resentment will likely develop targeted at the wrong doer. However, that negative reactive attitude may shift or even disappear over time as the victim comes to doubt that there actually was a harm at all, that the person responsible for the harm was (at least) predominantly responsible for the harm, and/or that the harm was the result of ill-will.

Competency deficits on the basis of emotionality are those that call into question whether or not what occurred was actually a harm. The victim may be accused of being emotional or misperceiving the situation. They may also call into question the ill-will of the wrongdoer through suggestions that the wrongdoer did not mean it or intend to cause harm. The victim comes to see themselves the way others see them: as unable to perceive the situation accurately to come to rational conclusions about the event and the wrongdoer.

Sincerity deficits on the basis of victim-blaming or victim suspicion call the true nature of the harm and the role of the wrongdoer into question. Instead of being prompted to believe that what happened was not a harm, the victim is prompted to reevaluate whether or not the wrongdoer was responsible for the harm in question. If the wrongdoer was not responsible for their action, then, *a la* Strawson, it does not make sense to develop a negative reactive attitude towards them. The victim's negative attitude should instead be directed towards the person who was actually responsible for the harm, which, given the internalization of blame and suspicion, is likely to be perceived as the victim themselves. In what follows, I will more thoroughly lay out the types of credibility deficits that victims incur and the probable effects of those deficits on the victim's ability to form proper negative reactive attitudes.

4.5.1 Competency Deficits based on Emotionality

Emotionality has long been seen as opposed to, or at least capable of undermining, reason and has been invoked as a way discrediting or dismissing victims' testimony. Both Fricker and MacKinnon invoke a scene from *The Talented Mr. Ripley* where Marge Sherwood is dismissed by her gaslighter as an emotionally distraught woman who is not conforming with the dictates of reason, but one doesn't have to look beyond everyday life for examples. For example, imagine trying to tell someone about an instance of sexism perpetrated by someone that you both know. Unless that person is a strong ally sensitive to the kinds of harms in question, you're likely to hear

that “You’re being overly sensitive,” “You’re overreacting (too angry, frustrated, etc.),” “You’re being paranoid, insecure, or dramatic,” “I’m sure they didn’t mean it that way,” or other variations on those themes. The response doesn’t necessarily come from a place of ill-will, but it is one that is incredibly commonplace for most people who express victimization, even to friends and family.

Victim emotionality being contraposed to rationality is not just an interpersonal phenomenon. It is quite literally written into law and upheld by the Supreme Court. In a Supreme Court case about the constitutionality of Victim Impact Statements in capital cases, Justice Powell concluded that allowing victim statements and the emotions they contain could influence the jury to give the death penalty for reasons “irrelevant to the decision to kill.” The Court specifically did not want to allow the “emotionally-charged opinions” of victims to undermine the “reasoned decision making” in capital cases.¹¹⁷ Even in subsequent cases, the law continues to contrast

¹¹⁷ *Booth v. Maryland* was overruled by the Supreme Court in *Payne v. Tennessee*, 501 U.S. 808 (1991), but the strong claims about the emotionality of victims went largely untouched. Victims were still seen as emotional, and emotionality was enshrined as antithetical to reason even though some emotion was allowed in because of victim impact statements. That emotion was allowed in because it was indicative of the actual harm experienced and was only meant to be evidence of harm. The Court overruled the decision on the basis that the information provided by the victim was relevant to the blameworthiness of the defendant because it demonstrated the actual harm done by the crime, even if the actual harm could not be foreseen by the defendant ahead of time. A decent portion of the opinion is dedicated to a comparison between what the defense can submit during the sentencing phase as mitigating evidence and what the prosecution can submit. The defense can submit mitigating evidence about general character completely unrelated to the circumstances of the crime. The Court argues that the State, on behalf of the victim, should be able to submit evidence about the character of the victim or the harms imposed upon them. At the end of the opinion, the Court explicitly acknowledges that their opinion does not extend to “characterizations and opinions about the crime, the defendant, and the appropriate sentence.” This last point was explicitly reaffirmed by the Supreme Court in *Bosse v. Oklahoma* (2016).

The concurrences (and to a lesser extent the majority opinion) also state that if the evidence presented by the victim was “unduly inflammatory,” the evidence could be excluded from trial or subject to review by an appellate court. The statement in question was noted as a brief one that “did not inflame the passions [of the jury] more than did the facts of the crime.” So, evidence that is so emotional as to be “unduly inflammatory” can still be excluded at the judge’s discretion.

In Souter and Kennedy’s concurrence specifically, the Court reaffirms its commitment to rationality. They note that “Evidence about the victim and survivors, and any jury argument predicated on

reason and emotion and to proclaim that reason is the correct way of forming opinions and making judgments with emotionality as a mere potential source of evidence of the presence of emotional harm. Emotionality is only allowed as evidence that you are emotionally distressed by the crime. Victims have a competency deficit in determining the actual blameworthiness of the offender and the appropriate sentence for them because they are perceived as emotional. Therefore, we regularly categorically disallow their opinions on those issues in criminal cases. This legal disavowal parallels and enshrines the dismissive interpersonal responses to emotional victim narratives.

Credibility deficits on the basis of emotionality are especially nefarious for at least two reasons. MacKinnon calls the first reason “epistemic injustice circle (of hell).” Suppose that you tell someone that you have been sexually harassed, and they dismiss your claim by saying that you’re being too emotional (or some variation on that theme). Being emotional casts doubt on your ability to assess the situation rationally because emotion is seen as antithetical to reason. In response to their dismissal, you become even more frustrated, angry, and generally emotional.

it, can, of course, be so inflammatory as to risk impermissibility based on passion, not deliberation” before also noting that this kind of evidence can already be limited by judicial discretion. However, they go further, citing additional caselaw stating that “capital sentence should be imposed as a ‘reasoned moral response,’” and that “if a person is to be executed, it should be the result of a decision based on reason and reliable evidence.” The dissent accuses the majority of violating a similar principle that “any decision to impose the death-sentence be, and appear to be, based on reason rather than caprice or emotion.”

So, even though the *Payne* Court overruled the decision, it doesn’t do much in regards to the emotionality of victims. Emotion is still seen as the opposite of reason, and emotionally charged persons are not reliable beyond giving an account of their (emotional) harms. They are still not seen as reliable to give opinions about the proper sentence, for example, because their opinion may be driven by emotion rather than reason. At best, the emotionality is seen as evidence of the actual harm done that can be inputted to the rational decision-making process of the jury. And, if the emotionality rises above a certain threshold so as to prejudice the jury’s decision beyond its minor role in the reasoning process, it will be excluded or reviewed by an appellate court. Even this level of inclusion of emotion was controversial, as the Dissent argued that allowing the prosecutor to introduce such evidence “serves no purpose other than to encourage jurors to decide in favor of death, rather than life, on the basis of their emotions rather than their reason.” and that, “[e]vidence that serves no purpose other than to appeal to the emotions or sympathies of the jurors has never been considered admissible.”

Now that you are even more emotional, the person who dismissed you has even more reason to do so. The circle of hell is “a positive feedback loop,” whereby a victim’s “subsequent emotionality is treated as a *further* reason to discount the speaker’s testimony” (MacKinnon 169).

The second reason lies at the intersection of Fricker’s two ways of incurring a deficit, lacking competency or sincerity. As we’ve seen, emotionality can be used as a reason for dismissing someone’s claims because they are not appropriately rational and therefore lack competency. Their expressions of harm are overblown at best, and there is doubt about if there actually was a harm rather than a wrongful perception of one. However, if someone is a victim and lacks emotionality, then they will likely not be perceived as sincere.¹¹⁸ Someone coming to you and explaining something awful that happened to them with completely flat affect would be an anomaly, and, at the very least, it’d be normal to assume that what happened to them couldn’t have been *that* bad because they aren’t emotionally affected.

It’s a fine line between being emotional enough to be believable but not so emotional that you lack competency, if such a line even exists. Victims who express emotion are seen as more believable than those who do not express emotion or act in a calm or numbed manner,¹¹⁹ but even

¹¹⁸ Studies show that victims are more likely to report to different people or agencies if there is emotional distress, especially to the police. *See, e.g.,* Golding et al., *Social Support Following Sexual Assault*, 17 J. OF CMTY. PSYCH. 92 (1989). There is a general intuition behind this that “real” crimes are the ones that emotionally distressing and are reported officially because of that level of distress. *See, e.g.,* Bohner and Schapansky, *Law Students’ Judgments of a Rape Victim’s Statement: The Role of Displays of Emotion and Acceptance of Sexual Aggression Myths*, 12 INT’L J. OF CONFLICT AND VIOLENCE 1, 2 (2018) (showing the role of appropriate expressions of emotionality by victims in establishing their credibility among law students). Judgments of rape victims are biased by an expectation that the victim will report immediately to the authorities while in a distressed state after physically resisting their attacker. Carroll and Clark, *Men’s Acquaintance Rape Scripts: A Comparison Between a Regional University and a Military Academy*, 55 SEX ROLES 469 (2006).

¹¹⁹ Bell and Loftus, *Vivid Persuasion in the Courtroom*, 49 J. OF PERSONALITY ASSESSMENT 659 (1985), Wrede and Ask, *More than a Feeling: Public Expectations About Emotional Responses to Criminal Victimization*, 30 VIOLENCE AND VICTIMS 902 (2015), Nitschke, McKimmie, and Vanman, *A Meta-Analysis of the Emotional Victim Effect for Female Adult Rape Complaints: Does Complaint Distress Influence Credibility?*, 145 PSYCH. BULL. 953, 973 (2019).

the level and type of emotion expressed gain different levels of believability. Victims who display the emotion of sadness or distress are seen as more believable than victims who display anger.¹²⁰ Victims who express emotions of shame, at least within the context of rape cases, are seen as even more credible still than those who express emotions of sadness.¹²¹ To be seen as sincere, victims must be seen not only as having the appropriate level of emotion, but also the correct type of emotion, but that same emotionality can be used as a tool against them to discount their judgments as irrational. Even worse still, having a high level of emotionality may also be perceived as a sign of manipulateness, with one author claiming that some university assault victims “love to turn the campus into hysterical psycho-dramas of sexual transgression.”¹²²

It's clear that victims can suffer a credibility deficit In the eyes of others they are not experiencing the appropriate amount and kind of emotion consistent with rationality. The more a victim hears expressions about their response being “overblown” or something similar, the more likely they are to doubt their experience of the harm. If others continually tell you that the way that you remember an experience is incorrect, you will likely start to doubt your own perception. If everyone believes that you are being too emotional, it's likely that you will start to believe that yourself. The reasoning is a fallacious appeal to the people, but most errors of reasoning that become named do so because they are so pervasive. Believing that your emotionality is irrational will likely make you question whether the reactive attitude that you have towards the wrongdoer is irrational as well. Most people want to be rational, and the way for the victim to become

¹²⁰ Vrij and Fisher, *The Roles of Displays of Emotions and Ethnicity in Judgments of Rape Victims*, 4 INT'L REV. OF VICTIMOLOGY 655 (1997).

¹²¹ Keskin et al., *On Shame and the Perceived Credibility of Sexual Assault Allegations*, 37 APPLIED COG. PSYCH. 212, 216 (2022).

¹²² Paglia, *SEX, ART, AND AMERICAN CULTURE: ESSAYS* 51–56 (1992).

rational here is for them to lessen or get rid of the negative reactive attitude that is now perceived as originally being formed irrationally.

4.5.2 Sincerity Deficits from Victim-Blaming and Suspicion

Victims may also experience a credibility deficit because of a lack of sincerity based on suspicion of their claims or on culpability in their own victimization. In general, one of the main reasons that victims, especially victims of sexual assault, are discouraged from reporting is that they are likely to receive non-supportive reactions from those to whom they disclose the assault, including friends, family, the police, medical professionals, clergy, and others.¹²³ Furthermore, these negative reactions can come even from well-intentioned efforts to support victims.¹²⁴ Some non-supportive reactions are suspicions: maybe the victim misinterpreted the event, maybe it

¹²³ For experiments and discussion on non-supportive responses to rape victims, including victim-blaming and suspicion, see Yamawaki, Darby, & Queiroz, *The Moderating Role of Ambivalent Sexism: The influence of Power Status on Perception of Rape Victim and Rapist*, 147 J. OF SOC. PSYCH. 4 (2007) (general discussion and relation to post rape trauma), Ullman, *Social Reactions, Coping Strategies, and Self-Blame Attributions in Adjustment to Sexual Assault*, 20 PSYCH. OF WOMEN Q. 505 (1996) (reactions from the victims social network), Comack and Peter, *How the Criminal Justice System Responds to Sexual Assault Survivors: The Slippage between "Responsibilization" and "Blaming the Victim,"* 17 CANADIAN J. OF GENDER AND THE L. 283 (2005), Campbell and Johnson, *Police Officers' Perceptions of Rape: Is there a Consistency Between State Laws and Individuals Beliefs?*, 12 J. OF INTERPERSONAL VIOLENCE 255 (2007), and Du Mont, Miller, and Myhr, *The Role of "Real Rape" and "Real Victim" Stereotypes in the Police Reporting Practices of Sexually Assaulted Victims*, 9 VIOLENCE AGAINST WOMEN 466 (2003) (police and other legal services reactions), Ullman and Townsend, *Barriers to Working with Sexual Assault Survivors: A Qualitative Study of Rape Crisis Center Workers*, 13 VIOLENCE AGAINST WOMEN 412 (2007) (reactions of medical professionals), Campbell, et. al, *Community Services for Rape Survivors: Enhancing Psychological Well-Being or Increasing Trauma?*, 67 J. OF CLINICAL AND CONSULTING PSYCH. 847 (1999), Golding et al., *Social Support Services Following Sexual Assault*, 17 J. OF CMTY. PSYCH. 92 (1989), Filipas and Ullman, *Social Reactions to Sexual Assault Victims from Various Support Sources*, 16 Violence and Victims 673 (2001) (community and social services generally), and Sheldon and Parent, *Clergy's Attitudes and Attributions of Blame Towards Female Rape Victims*, 8 VIOLENCE AGAINST WOMEN 191 (2003) (reactions of members of the clergy), Purohoit, et al., *Gender Based Violence in 140 Characters or Fewer: A #BigData Case Study of Twitter*, 21 FIRST MONDAY (2016) (victim blaming for all types of gender violence on social media).

¹²⁴ Herbert and Dunkel-Schetter, *Negative Social Reactions to Victims: An Overview of their Reponses and their Determinants*, in LIFE CRISES AND EXPERIENCES OF LOSS IN ADULTHOOD 497-518 (1992), Sudderth, *"It'll Come Right Back at Me": The Interactional Context of Discussing Rape with Others*, 4 VIOLENCE AGAINST WOMEN 572 (1998), Madigan and Gamble, *THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM* (1991). A similar experience of negative reactions from allies is described in MacKinnon (2017).

wasn't nearly as bad as they are making it out to be, or maybe they are making it up to get attention. Other non-supportive reactions include blaming the victim explicitly (e.g. You shouldn't have been drinking, dressed that way, in that part of town, etc.) or asking questions that imply blame (e.g. How much had you had to drink?, Did you say no or try to resist?, Did you have all the doors and windows locked?, etc.).¹²⁵

In what follows, I will briefly lay out the concepts of victim suspicion and victim-blaming separately. After discussing both, I will turn to the problems that these types of sincerity deficits create for victims once internalized in terms of generating proper negative reactive attitudes. The negative reactive attitude is supposed to be directed towards the individual who was responsible for the harm that indicated ill-intent from the wrongdoer. However, victim-blaming and victim suspicion turn that outwardly directed reaction inwards as the victim internalizes blame and comes to see themselves as increasingly more responsible for their own harm.

4.5.3 Victim-Blaming

Victim-blaming is a common phenomenon whereby we assume that the victim is somehow culpable in their own harm. Our sense of safety is underwritten with a strong need to see the world as just such that bad things only happen to bad people. That way, as long as we are good people, we can rest assured that we are safe. Conversely, that means that if something bad happened to a person, then they must have done something bad to deserve what happened to

¹²⁵ Davis, Brickman, & Baker, *Supportive and Unsupportive Responses of Others to Rape Victims: Effects of Concurrent Victim Adjustment*, 19 AM. J. OF CMTY. PSYCH. 443 (1991), Golding et al., *Social Support Services Following Sexual Assault*, 17 J. OF CMTY PSYCH. 92 (1989), Ullman, *Psychometric Characteristics of the Social Reactions Questionnaire: A Measure of Reactions Towards Sexual Assault Victims*, 24 PSYCH. OF WOMEN Q. 257 (2000).

them.¹²⁶ So, if something bad has happened to you and you are a victim, it is a normal, intuitive psychological response for others to look for reasons to blame you for your own misfortune. A classic example is the “She asked for It” rape myth.¹²⁷ On this line of thinking, the victim of a sexual assault is culpable for her assault because she engaged in behaviors that implied to her rapist that she wanted to have sex with him, even if she explicitly said no. Some of said behaviors could include her dress, how much she had been drinking, prior flirtation or sexual history, or a failure to fully resist, among others.¹²⁸ All of these narratives that people create to dismiss or mitigate the harms that a victim suffers are also narratives that victims can take on for themselves.

While a large amount of victim-blaming research has focused on victims of sexual assault, victims of other forms of crime also experience victim-blaming. There is no general bias towards blaming victims of sexual assault more than other victims.¹²⁹ For example, someone who was

¹²⁶ A ton of research has been done on victim-blaming and the belief in a just world, predominantly stemming from the work of Melvin J. Lerner in his book *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* (1980) and in his pioneering experiments like those in his paper *Observer's Reaction to the 'Innocent Victim': Compassion or Rejection?*, 4 *J. OF PERSONALITY AND SOC. PSYCH.* 203 (1966). Especially post #MeToo, there has also been an explosion of stories and media around victim blaming as well. I am only skimming the surface of a deep area of research to make the basic point that victim-blaming is common-place.

¹²⁷ For a meta-analysis of common rape myths and general definitions, see Suarez and Gadalla, *Stop Blaming the Victim: A Meta-Analysis on Rape Myths*, 25 *J. OF INTERPERSONAL VIOLENCE* 2010 (2010).

¹²⁸ The paradigmatic case of rape is usually a variation on a white woman who is attacked by a stranger, usually in a deserted but public space, where the woman is physically injured in her attempts to fight off her attacker. Any departure from that paradigm usually results in the victim not being seen as genuine. The “real victim” ascription usually applies, at least is sexual assault, usually applies to younger, single sexual assault victims who are sexually inexperienced, resist their offender, and show signs of emotional trauma. Du Mont, Miller, and Myhr, *The Role of “Real Rape” and “Real Victim” Stereotypes in the Police Reporting Practices of Sexually Assaulted Victims*, 9 *VIOLENCE AGAINST WOMEN* 466 (2003), Steketee and Austin, *Rape Victims and the Justice System: Utilization and Impact*, 63 *SOCIAL SERVICE REVIEW* 285 (1989), Williams, *The Classic Rape: When Do Victims Report?* 31 *SOC. PROBS.* 459 (1984)

¹²⁹ Brems and Wagner, *Blame of Victim and Perpetrator in Rape Versus Theft*, 134 *J. OF SOC. PSYCH.* 363 (1994), Felson and Palmore, *Biases in Blaming Victims of Rape and of Other Crimes* 8 *PSYCH. OF VIOLENCE* 390 (2018), Reich, Pegel, and Johnson, *Are Survivors of Sexual Assault Blamed More than Victims of Other Crimes?*, 37 *J. OF INTERPERSONAL VIOLENCE* (2022). Sexual assault victims do seem to experience increased stigmatization, egocentricity, and silencing in Felson and Palmore’s study, but the level of blame assigned was not significantly different across crimes.

robbed may also be blamed for their harm if they were intoxicated while robbed or were in a “bad part” of town and should have known better.

4.5.4 Victim Suspicion

The sincerity and motivations of victims have been cast under suspicion on both the political and individual level. Anti-victim sentiment and the politicization of the term “victim” have been on the rise since the late 1980’s, with terms and phrases like “victim mentality,” “a nation of victims,” “victim(hood) culture,” “victim-speak,”¹³⁰ “playing the victim,” and more specific phrases like “pulling the gender card” being coined.¹³¹ One series of essays in the early 90’s specifically pointed towards the prevalence of “victim mentality” among different groups including racial minorities, LGBTQ+ individuals, and even some inner-city politicians and the need to overcome “victim mentality” to become “more responsible for ourselves” and therefore less likely to become victims.¹³² The label “victim” became a political term used derisively by conservatives to dismiss pushes for social justice for minority groups because those groups were wrongly and manipulatively invoking the term “victim” to garner public sympathy and gain

¹³⁰ ALYSON M. COLE THE CULT OF TRUE VICTIMHOOD: FROM THE WAR ON WELFARE TO THE WAR ON TERROR 4, 17 (2007).

¹³¹ KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY 231 (2017).

¹³² Errol Smith, *It's Values, Stupid*, 12 NEW DEMOCRAT (1993).

undue benefits.¹³³ Overall, victim is depicted as a term invoked, at least in some circumstances,¹³⁴ as a political tool to gain sympathy, public attention, and special privileges or to attack conservative or powerful individuals to forward a liberal political agenda.¹³⁵

As we've seen, some victims are seen as suspicious because some sense or imply that there is an improper political motive behind the accusation given. One might think that this applies largely or exclusively to highly publicized claims made against individuals in positions of power to garner public support and create change. However, suspicion goes beyond just the high-profile cases that originally come to mind. The conception of victims as individuals trying to push a broad political agenda in society has effects on individual cases that do not have political connotations.

¹³³ Conservatives continue to depict victims, especially those of minority status, in incredibly extreme terms. They are described, on one hand, as “manipulative, aggressive, and even criminals, as actual or potential victimizers.” Cole, *supra* note 33 at 3. On the other hand, however, they are also labelled “weak...self-indulgent, helpless, hopeless dependents.” *Id.* at 22. While these conceptions don't immediately look like they go together given that one implies a large amount of agency and the other no agency, the common threat is that victims evoke their status as weak or needy manipulatively to try to gain undeserved special privileges like welfare programs or affirmative action policies. *Id.* at 23. Victims in this sense are seen as trying to blame their poor circumstances on society, self-anointing themselves as a “victim” and then exaggerating their claims to avoid accepting individual responsibility for their circumstances. *Id.* at 3, 21.

¹³⁴ I want to largely rule out the category of victims of legally recognized crimes from consideration here. Conservatives are often pro crime victim and push for victim protections even at the expense of the rights of a criminal defendant. I don't mean to imply that they depict those specific types of victims politically. However, even within the group of recognized legal crimes, conservatives may still say a victim is using their plight politically, especially in cases involving rape by a public official or someone in a place of power. Women “crying rape” for example, are accused of doing so “as some sort of revenge or leisure activity,” leading to prison [being] full of men who are innocent of crimes against women or girls.” Some male commentators even claim that government agencies that believe a victim's claim of rape are engaging in “political correctness.” Bindel, *Yes, There's a Major Problem with Rape Prosecutions. But it's Not that Women are Lying*, THE GUARDIAN <https://www.theguardian.com/commentisfree/2017/dec/20/problem-rape-prosecution-women-lying-collapse-liam-allan-victims> (Dec. 20, 2017).

¹³⁵ As an example of the political invocation of suspicion of victim claims, consider the case of Donald Trump. Trump described allegations against him of sexual harassment and assault as “false smears” and a “horror show of lies, deceptions and malicious attacks” that were used as political tactics by media to condemn anyone who challenged their control as “a sexist, a rapist, a xenophobe, and morally deformed,” and that the politicized media “will attempt to destroy everything about you, including your reputation. They will lie, lie, lie, and then again, they will do worse than that. They will do whatever's necessary.” Healey and Rappaport, *Donald Trump Calls Allegations by Women 'False Smears'*, NY TIMES <https://www.nytimes.com/2016/10/14/us/politics/donald-trump-women.html> (Oct. 13, 2016).

This innate suspicion of individuals' claims to victim status can be seen clearly in the cultural fascination with false rape accusations, despite empirical evidence that false accusations are rare¹³⁶ and no more common than false accusations for other crimes.¹³⁷ In cases of rape, even those that are not highly publicized, do not involve in political or notable figure, and express no underlying feminist crusade, people are still suspicious of victims. In any context where a victim is attempting to gain the support, sympathy, or intervention of third-parties, even if that support is just from local police, they can be accused of going beyond documenting offenses to magnifying, exaggerating, or completely making up offenses.¹³⁸ For example, some claim that if an interpersonal dispute arises, a victim might not be content to merely publicly state the harm that

¹³⁶ The exact prevalence of false accusations is difficult to determine because of a lack of distinction between cases of "false" accusation versus those that are "unfounded" or "unproved" largely because most of the data comes from within criminal investigations. Spohn, White, and Tellis, *Unfounding Sexual Assault: Examining the Decisions to Unfound and Identifying False Reports*, 48 L. AND SOC'Y REV. 161, 163-66 (2014). The same study examined false accusations to the LAPD in 2008 and found that false reports were around 4.5% of all reports. A 2010 study of rapes reported to an American University over a ten-year period (1998-2007) found 5.9% of the reports to be false. After examining their results and the results of other studies, they concluded that the false accusation rate was likely somewhere between 2% and 10%. Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1329-30 (2010). A study false reports of rape of several countries in Europe similarly estimated the prevalence rate to be somewhere between 4% and 9%. Lovett and Kelly, *Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe*, CHILD AND WOMAN ABUSE STUD. UNIT, Country Briefing: England (2009). Studies have varied in reporting false allegation rates between 1.5% and 90%, but the credibility of sources with high percentages has been called into question. Rumney, *False Allegations of Rape*, 65 CAMBRIDGE L. J. 128 (2006).

¹³⁷ Edwards, et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 767 (2011), Gunby, Carline, and Beynon, *Regretting it After? Focus Group Perspectives on Alcohol Consumption, Non-Consensual Sex and False Allegations of Rape*, 22 SOC. AND LEGAL STUD. 87, 90 (2013), Lisak, et al., *False Accusations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318 (2010), Rumney, *False Allegations of Rape*, 65 THE CAMBRIDGE LAW JOURNAL 128 (2006), Ferguson and Malouff, *Assessing Police Classifications of Sexual Assault Reports: A Meta-Analysis of False Reporting Rates*, 45 ARCHIVES OF SEXUAL BEHAV. 1185 (2016).

¹³⁸ Campbell and Manning, *Microaggression and Moral Cultures*, 13 COMPAR. SOCIO. 692, 704 (2014).

occurred. Instead, “the aggrieved might exaggerate [the harms] extent or make it up whole cloth,”¹³⁹ even if there is no political motive.¹⁴⁰

Victim suspicion on an interpersonal level can be most clearly seen through the lens of false rape accusations. The idea that women lie about rape is pervasive in law, religion, and stereotypes on social media.¹⁴¹ This fascination dates pre-dates Blackstone’s commentaries,¹⁴² and is entrenched not only in culture, but in the law itself. Seventeenth Century judge Matthew Hale noted that “rape is an accusation that is easily to be made, hard to prove, and harder to be defended by the party accused, tho’ never so innocent.”¹⁴³ Hale’s statement became known as the “Hale Warning” and was read aloud in rape cases until the late twentieth century.¹⁴⁴ One scholar in the sixties argued that “[p]rosecuting attorney[sic] must continually be on guard for the charge of sex offense brought by the spurned female that has as its underlying basis a desire for revenge, or a blackmail or a shakedown scheme” and that psychologists would “find that complaints are too often made of sexual misbehaviour that has occurred only in the overripe fantasies of the so-called victims.”¹⁴⁵ A review of medical literature from the 1880’s to the 1980’s also pointed to

¹³⁹ *Id.*

¹⁴⁰ In the article containing this quote, the others then go on to give two examples of such behavior, one where a “spurned” woman falsely accuses a man of rape and one where an individual makes false accusations of child-abuse against a former spouse. Neither case contains any mention of politics or a political agenda. It is just one person making a claim against another in the context of a local legal community or legal system. *Id.*

¹⁴¹ Edwards, et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 *SEX ROLES* 767 (2011).

¹⁴² J. Taylor, *Rape and Women’s Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson*, 10 *HARV. WOMEN’S L.J.* 59, 74 (1987) (citing *Wedmore v. State*, 237 *Ind.* 212, 227, 143 *N.E.2d* 649, 656 (1957) (Emmert, J., dissenting)).

¹⁴³ M. HALE, *HISTORIA PLACITORUM CORNAE: THE HISTORY OF THE PLEAS OF THE Crown* 635 (1736)

¹⁴⁴ F. Ferguson, *Rape and the Rise of the Novel*, 20 *REPRESENTATIONS* 88 (1987).

¹⁴⁵ Plowscoe, *Sex Offenses: The American Legal Context*, 25 *L. AND CONTEMP. PROBS.*, 217, 222-23 (1960).

accusations of rape as largely *unfounded*, even suggesting that for every true accusation, there could be as many as twelve false ones.¹⁴⁶

False accusations were explained by suspecting victims of revenge, blackmail, hallucinatory or delusional ideas, desires to inflict punishment or suffering, attempts to preserve a “chaste” reputation, and attempts to force marriage.”¹⁴⁷ Victims were viewed as at least lacking credibility, but also of being potentially deliberately deceitful and manipulative. Suspicion of false accusations presents a view of victims as: casting blame on someone else to hide their own (pregnancy and chaste reputation, political stuff), making claims to garner sympathy, making claims to victimize someone else, being deluded into thinking a harm was greater than it was or existed at all.

False accusations of rape are, unfortunately, not just an occurrence of the past that no longer occur. Following the #MeToo movement, there was a revival of concerns about false allegations and assigning blame to alleged perpetrators without due process.¹⁴⁸ While the #MeToo movement itself was a broader political campaign, the suspicion that it generated trickled down to individual cases where the victim had not political motive or involvement in the #MeToo movement at large. Rather than merely generating support for victims of sexual harassment and assault, the movement has triggered a defensive reaction in men, making many men even more skeptical of claims and more likely to believe an accusation of rape or sexual harassment is

¹⁴⁶ Mills, *One Hundred Years of Fear: Rape and the Medical Profession*, in JUDGE, LAWYER, VICTIM, THIEF: WOMEN, GENDER ROLES, AND CRIMINAL JUSTICE 30 (1982).

¹⁴⁷ *Id.* at 33.

¹⁴⁸ M. Cromwell, *#MeToo Movement Goes Too Far*, BALTIMORE SUN, <https://www.baltimoresun.com/news/opinion/oped/bs-ed-op-1220-metoo-toofar-20171219-story.html> (Dec. 20, 2017), B. Stephens, *When #MeToo Goes Too Far*, NY TIMES, <https://www.nytimes.com/2017/12/20/opinion/metoo-damon-too-far.html> (Dec. 20, 2017)

false.¹⁴⁹ One study of police officers shows that they believe the false allegation rate to be somewhere between 5% and 90%, with a mean of 53%.¹⁵⁰ Those in the study who refused to give an exact percentage reported that, “I would say that a small percentage would be the genuine ones,” and, “we get quite a number of false allegations... I would say a significant percentage.”¹⁵¹ In 2018, DeVos went so far as to say that “she didn’t know which was greater- the number of false accusations of sexual assault on campus or the number of campus rapes.”¹⁵² These statistics did not apply to cases of high-profile assault where the accused was powerful or politically involved. They largely applied to individual cases of rape reported in individual communities.

The perception of victims as being either culpable or suspicious creates a credibility deficit because it leads us to doubt that the victim’s claims are sincere. In response to giving testimony about an instance of victimization, victims are met with accusations and replies stating that their testimony is wrong and that they have attributed too much blame to the wrongdoer. Instead, it is suggested that they should reevaluate their own motivations and tendency to exaggerate claims as well as their amount of responsibility for the harm itself. The insistence on this reevaluation can, as I will show below, lead to unfounded changes in the strength or existence of the victim’s reactive attitudes towards the offender.

¹⁴⁹ Men even explicitly reported feeling attacked or persecuted by the movement. Roos and Jones, *Empowerment or Threat: Perceptions of Childhood Sexual Abuse in the #MeToo Era*, 37 J. OF INTERPERSONAL VIOLENCE (2020). Despite the goal of the #MeToo movement to garner awareness around sexual assault and harassment, “disbelief of its victims” was listed one of the primary obstacles to ending sexual harassment and abuse even post #MeToo. C. MacKinnon (2018), *#MeToo Has Done What Law Could Not*, NY TIMES <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> (Feb. 4, 2018).

¹⁵⁰ L. McMillan, *‘Police Officers’ Perceptions of False Allegations of Rape*, 27 J. OF GENDER STUD. 9, 12 (2016).

¹⁵¹ *Id.*

¹⁵² Bauer-Wolf, *Education Dept. Clarifies DeVos Comments on Sexual Assault*, INSIDE HIGHER ED., <https://www.insidehighered.com/news/2018/03/14/education-department-devos-says-false-reports-sexual-assault-are-rare> (March 13, 2018).

Taken together, the credibility deficits sustained by victims on the basis of both competence and sincerity can become internalized by the victim. That internalization can then affect the reactive attitude that the individual has towards the wrong doer, causing them to readjust the existence or strength of that attitude on the basis of external stigma rather than on the actual circumstances of the harm. This points towards the psychological difficulties that come with being a victim who is trying to form appropriate Strawsonian reactive attitudes. As a victim, you are surrounded by stigma, blame, and suspicion which can make you doubt your own experience, knowledge, and ability to form rational attitudes.

4.5 MODELING BLAME AND INTERNALIZATION

We have now established that the deficits in question are attributed to victims by society and have stated that these deficits can then become internalized, leading to problems in developing accurate Strawsonian reactive attitudes. In this section, I will say more about internalization of stigma generally and about internalization by victims in particular in response to attributions of the deficits already discussed. I will argue that these deficits lead to a phenomenon called behavioral self-blame in victims and explain how that self-blame interacts with conceptions of reactive attitudes.

Originally identifying oneself as a victim is the first step towards forming appropriate reactive attitudes. If someone can see I as a victim, then they have at least identified a source of harm that is external to them.¹⁵³ However, that reactive attitude can be compromised if they start to see I as an “emotional”, “culpable”, or “suspicious” victim. What once was seen as a harm committed by someone with ill will towards you may no longer seem to be a harm at all or at

¹⁵³ For the sake of simplicity, I am not going to discuss individuals who are only victims of their own actions as in “victimless crimes”. I will only be considering those who were harmed by someone else.

least may be seen as no longer an indicator of ill will, thus mitigating or destroying the negative reactive attitude towards the wrongdoer.

When faced with recurring suspicion or doubt, including by those you take to be credible or to be generally on your side, it makes sense that you would come to doubt your own sense of what happened and your reaction to it. If your close friend thinks that the reactive attitude that you've developed is too strong or mistaken and you find your close friend to be a credible source of information that cares about your well-being, you may come to believe that your reactive attitude is too strong as well and thus alter or remove it as much as possible. Even if the person in question is not a friend, a victim could still come to believe that their reactive attitude was wrong or mistaken. Formal support providers like legal and medical professionals could be seen as "experts" because they have interfaced with a wide variety of the types of harm in question. If someone who is an "expert" that has seen dozens of cases of the harm in question doubts or blames you, then your claim must be worthy of that treatment as compared with the other incidents the expert has seen. Since they have more experience, the expert's perspective may be seen as more correct, and the victim may lessen their reactive attitude to correspond to the expert's supposedly correct appraisal rather than the victim's own experience.

One study on rape disclosure found that victims who were subjected to negative reactions not only questioned whether disclosing in the future would be effective; they also came to doubt whether their experiences were rape at all and had their already existing feelings of self-doubt reinforced, even from friends and family.¹⁵⁴ If you come to believe that what you experienced was not actually a harm, you will view your negative reactive attitude as overblown and attempt to mitigate it accordingly, even if the harm actually was a rape.

¹⁵⁴ C. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. CMTY. PSYCH. 263 (2006).

Victim culpability and internalized self-blame may also lead to mitigation of one's negative reactive attitudes. Reactive attitudes are directed at the individual who is culpable for the harm, so the internalization of culpability may affect who is seen as the appropriate target for resentment.¹⁵⁵ ¹⁵⁶ Victims internalize negative messaging that they hear from external sources. Victims reported that they had not only internalized recent comments about blame, but rather “negative messages that they received from others throughout their lives” about victims.¹⁵⁷ If one internalizes narratives about emotionality or suspicion, then the basis for forming their reactive attitude (the harm) is called into question. In literature on victim self-blame¹⁵⁸, scholars draw a

¹⁵⁵ Even if the victim can retain some amount of offender-directed reactive attitude, that attitude may still be directed inward as well. In some studies, even when victims did blame their offender and believed the offender was responsible, the victim still simultaneously blamed themselves. M. Test & J.A. Livingston, *Qualitative Analysis of Women's Experiences of Sexual Aggression: Focus on the Role of Alcohol*, 23 PSYCH. OF WOMEN Q. 573 (1999).

¹⁵⁶ Internalization of external messaging about victim culpability not uncommon and increases risk factors for negative psychological outcomes. N.J. Strickland, et al., *Fostering Resilience and Countering Stigma: A Qualitative Exploration of Risk and Protective Factors for Negative Psychological Consequences Among Alcohol-Involved Sexual Assault Survivors*, 15 PSYCH. TRAUMA: THEORY, RSCH., PRAC., AND POL'Y 1012, 1012 (2023). The phenomenon goes beyond just an assessment of the actions that occurred and how those actions relate to proper blame-attributions. Victims can even start to question how stable traits or characteristics of themselves as agents caused the harm. R. Janoff-Bulman, *Characterological Versus Behavioral Self-Blame: Inquiries into Depression and Rape*, 37 J. OF PERSONALITY & SOC. PSYCH. 1798, 1799 (1979). While characterological self-blame is associated with more negative psychological outcomes than behavioral self-blame generally, the distinction between the two categories is itself questionable, and behavioral self-blame messaging (e.g. a victim allowed their assault to happen by engaging in the behavior of excessive drinking) can be perceived as a reflection on their character (e.g. a victim is a careless or reckless person). Strickland, et. al, *supra* note 59, at 1013 (citing Brown, et al., *The Impact of Victim Alcohol Consumption and Perpetrator Use of Force on Perceptions in Acquaintance Rape Vignettes*, 33 VIOLENCE AND VICTIMS 40 (2018), and Ungar, *Resilience, Trauma, Context, and Culture*, 14 TRAUMA, VIOLENCE, & ABUSE 255 (2013).

¹⁵⁷ L. McClean, M. Bambling, and S. Steindl, *Perspectives on Self-Compassion from Female Survivors of Sexual Abuse and Counselors Who Work with Them*, 36 J. OF INTERPERSONAL VIOLENCE NP4564, NP4571 (2021).

¹⁵⁸ Even before the distinction between characterological and behavioral self-blame was drawn, it was a well-documented phenomenon among victims, especially victims of rape. Some studies suggest that, while fear is the primary reaction to being raped, self-blame comes in at a close second and is even more common than an angry reaction. A.W. Burgess & L.L. Holstrom, *Rape Trauma Syndrome*, 131 AM. J. OF PSYCHIATRY 351, (1974), A.W. BURGESS & L.L.HOLSTROM, RAPE: VICTIMS OF CRISIS (1974), S. Griffin, *Rape: The All-American Crime* 10 RAMPARTS MAG. 26 (1971), C.H. HURSCH, THE TROUBLE WITH RAPE (1977), 5 K. Weis and S. Weis, *Victimology and the Justification of Rape*, in EXPLOITERS AND EXPLOITED, VICTIMOLOGY: A NEW FOCUS (1975).

distinction between two different types of blame: behavioral and characterological.

Characterological self-blame involves an invocation of a character trait (being too trusting, careless, etc.) as the basis for self-blame, whereas behavioral self-blame invokes specific behaviors (drinking alcohol, walking down a dark street alone, etc.) as the basis for self-blame.¹⁵⁹

¹⁶⁰ We will turn to characterological self-blame later in this chapter, but for now we shall focus on behavioral self-blame.

One way of thinking about the process outlined above of adjusting blame attributions is through an analogy with the legal conception of comparative negligence. On a comparative negligence view, there is a total of 100% of blame for the harm in question to be doled out amongst the parties in question. There are a finite number of different behaviors of different parties that lead to the harm, and each person is responsible for some percentage of those actions. So, if there are two parties, and one is 30% responsible, then the other must be 70% responsible. The two parties are in a reciprocal relationship with one another where if the blame of one person increases, the blame of the other party must decrease because there is a finite amount of blame being distributed.¹⁶¹ If, as a victim, you have your feelings of self-blame reinforced, then there will be a corresponding reduction in blame for the offender. In terms of negative reactive attitudes, we would also expect to see a mitigation of the attitude because the offender is seen as less blameworthy than they originally were thought to be, even though nothing about the offender or the act itself have changed. Prior to exposure to victim-blaming, a victim may judge

¹⁵⁹ Janoff-Bulman, *supra* note 59, at 1799.

¹⁶⁰ Lerner and Miller argue that, in cases where a victim cannot be characterologically blamed because they are deemed “innocent” because of their good reputation, they will instead be behaviorally blamed for some action they took that seemed to contribute to the occurrence of the harm. M.J. Lerner and D.T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCH. BULL. 1030, 1035 (1978).

¹⁶¹ This relies on the idea that there is a finite amount of blame to be shared or at least that an increase in blame for one party results in a decrease in blame for other parties to the harm, but I think this is a fairly intuitive point of view that reflective of how most states in the U.S. conceive of civil harms.

themselves to be minimally or not at all responsible. For example, the victim may believe at the beginning that they were only 10% at fault for the harm in question and that the offender was 90% at fault. The victim is then exposed to stigma and internalizes that stigma, making them believe that they are more at fault than they originally believed, perhaps 60% responsible now. Victims come to see more and more of their own behaviors as casually related to the harm through internalization of behavioral self-blame. Since the victim's judgment of their own guilt has increased, their judgment of the offender's guilt has decreased from 90% to 40%, leading to a mitigated reactive attitude towards the offender.

Strawson himself recognizes that not all reactive attitudes are directed outwards towards someone else. Some reactive attitudes may also be self-reactive attitudes, reflecting demands on oneself towards others like obligation, guilt, or shame. Self-reactive attitudes are generally associated with a willingness to accept suffering or punishment in return without developing reactive attitudes in response because the infliction is seen as just or due.¹⁶² In a similar way, one could see the relationship between self-reactive attitudes and offender-directed attitudes as inversely related in these circumstances where internalized stigma can turn an other-directed reactive attitude into a self-directed one. The more resentment and guilt that is directed inward, the less resentment is available to be directed towards the offender. While we can have self-reactive attitudes that accurately reflect our failures, it's also possible that we could have self-reactive attitudes that are based on an incorrect, stigma-induced conception of who actually deserves resentment in this case.

¹⁶² Strawson, *supra* note 1 at 22.

4.6 STRAWSON'S SECOND SPECIAL CONSIDERATION

So far, this chapter has considered the case of Strawson's first special consideration on reactive attitudes and related it to a form of epistemic gaslighting where a victim can start to doubt their own knowledge and discount their own experience by ingesting any of the ample messages about victim emotionality, suspicion, and culpability. In this next part of the chapter, I move to an even more extreme form of gaslighting called psychological gaslighting.

Psychological gaslighting is more closely related to Strawson's second special consideration, namely cases where the offender cannot be seen as a moral agent at all and is, therefore, not a proper target for reactive attitudes. While Strawson only considers cases where the moral agency of the offender is called into doubt, I will consider a parallel situation where the victims own sense of I as a moral agent is undermined by the effects of psychological gaslighting. I will start with a discussion of Strawson's second consideration, move into a description of psychological gaslighting, and then combine the two to explain how psychological gaslighting can, in an even more fundamental way, inhibit the forming of negative reactive attitudes.

In Strawson, the second category of special considerations concerns situations in which the agent is either viewed as not being himself for some reason or as not being fully agential at the time of the offense. In explaining the former, Strawson remarks that "[w]e shall not feel resentment against the man he is for the action done by the man he is not; or at least we shall feel less."¹⁶³ In these cases, circumstances like abnormal levels of stress, coercion, or distress, in some relevant way make the agent not himself such that he is no longer the agent the injury or attitude is attributable to. In this line of thinking, the circumstances were significantly abnormal and therefore the offense is not seen as indicative of a general attitude towards us. In the latter type of

¹⁶³ Strawson, *supra* note 1 at 8.

cases, the agent is not seen as an agent at all because they are psychologically abnormal or morally undeveloped. The agent was himself here, but “he is warped or deranged, neurotic, or just a child.”¹⁶⁴

In response to the second category of cases, Strawson draws a distinction between “the attitude (or range of attitudes) of involvement or participation in a human relationship, on the one hand, and what might be called the objective attitude (or range of attitudes to another human being), on the other.”¹⁶⁵ Because these individuals are not fully morally agential, they are not an appropriate target for the normal reactive attitudes that result from participation in human relationships. In these cases, we can step back from the behavior of the individual, at least to a degree, and adopt an objective attitude that is opposed to the reactive attitudes, viewing the actor as someone to be treated or managed rather than as someone who is an appropriate target for interpersonal reactive attitudes. Inasmuch as we see someone as non-agential, we are predisposed towards the promotion of objective attitudes rather than reactive ones.

4.7 PSYCHOLOGICAL GASLIGHTING

As Strawson’s second special consideration shows, a crucial part of being able to form correct reactive attitudes is the ability to see that the person who does the harm is a full moral agent. What I want to argue is that, similarly, being able to see yourself as a full moral agent is also a necessary condition for forming correct reactive attitudes. Just as the person who caused the harm might fail to be seen as a moral agent, the victim of the harm can fail to see themselves as a full moral agent, and moral agents are the only proper generators of the reactive attitudes Strawson discusses. Since psychological gaslighting can fully undermine one’s sense of self, this

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 9.

form of gaslighting can lead to an even deeper problem with the development of reactive attitudes. While epistemic gaslighting dealt with the attitude itself and whether or not that attitude was proper, psychological gaslighting deals with the victim's deeply held views of their self and their character, undermining them in an even more fundamental way.

Kate Abramson first defines gaslighting as roughly “the phenomenon [of]... emotional manipulation in which the gaslighter tries (consciously or not) to induce in someone the sense that her reactions, perceptions, memories and/or beliefs are not just mistaken, but utterly without grounds- paradigmatically, so unfounded as to qualify as crazy.”¹⁶⁶ Gaslighting amounts to more than a mere dismissal by the gaslighter and seeks further to get the victim to dismiss herself, to “not take herself seriously as an interlocutor,”¹⁶⁷ or to “undermine [her] sense of standing to protest bad conduct.”¹⁶⁸

Abramson focuses on gaslighting as instantiating, among other things, the obvious moral wrong of “aiming at the obliteration of another person's independent perspective and moral standing.”¹⁶⁹ The aims of gaslighting are interpersonal in nature and reflect an other-directed need for the victim to see the situation and herself in a particular way, namely a way that makes the victim's challenge to the gaslighter's behavior “completely disappear *as* a challenge” rather than merely dismissing the challenge.¹⁷⁰ The moral wrong of gaslighting goes beyond this aim and is inseparable from the means used to satisfy the aims. Gaslighters frame their targets as having certain qualities (e.g. “crazy”, “paranoid”, etc.) so that they do not have the moral standing to issue a proper challenge to the gaslighter's harm. The challenge of the victim only disappears as a

¹⁶⁶ Kate Abramson, *Turning Up the Lights on Gaslighting*, 28 PHIL. PERSPECTIVES 1, 2 (2014).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 6.

¹⁶⁹ *Id.* at 12.

¹⁷⁰ *Id.* at 10.

challenge is when the victim both lacks the standing to issue a challenge and sees herself as lacking that standing as well. In Abramson's words, "he aims to destroy the possibility of disagreement by so radically undermining the other person that she has nowhere left to stand from which to disagree, no standpoint from which her words might constitute genuine disagreement."¹⁷¹

Abramson's account of gaslighting is one of psychological manipulation that goes beyond just the questioning of the victim's credibility. If, after the initial gaslighting exchange, there isn't immediate uptake of the dismissing action, the gaslighter will make use of manipulate leverage to get the victim's assent. This manipulative leverage might take the form of threats like the loss of a job or a withdrawal of affection or emotional goading. This manipulative demand reflects the intolerance of the gaslighter for challenges to their behavior and a need to make such a challenge impossible through the destruction of the victim's agential capacities. Even worse, the victim in a sense becomes complicit in the destruction of her own standing as a moral agent. Abramson asserts that, "gaslighted women have not only their wills, but their affective dispositions and even sometimes their character turned against them for their own destruction."¹⁷²

4.8 BLAME AND DESTRUCTION OF PERCEIVED MORAL AGENCY

Gaslighting works through undermining the sense of the agency of the victim. In a way, this situation parallels Strawson's modification of the reactive attitudes on the basis of the non-agency of the perpetrator. Both one's standing to experience attitudes and the subsequent attitudes themselves are called into question and that questioning itself may alter the intensity or existence of the attitude, especially if the victim's affective dispositions have been turned inward against

¹⁷¹ *Id.*

¹⁷² *Id.* at 16.

herself for interrogation and destruction. Inasmuch as we see someone's lack of agency as a reason that they are not a proper target for the reactive attitudes, one's seeming lack of agency might make them view themselves as not a proper agent for them. The reactive attitudes are interpersonal between moral agents, so, if the lack of moral agency on one side of the equation (the perpetrator) modifies the reactive attitude, the lack of moral agency on the other side of the equation (the victim) may also modify it. Just as one can see the target of the attitude as non-agential and therefore not a proper target, one can see oneself as non-agential and therefore not a proper bearer of attitudes.

Abramson makes a similar point in her piece through reference to Darwall's second and third person standpoints and (briefly) to Strawson. When we are angry or have been harmed, we generally take ourselves to have the standing to make a demand for something (an apology, for example). If the person who caused the harm is seen as deeply mentally disabled, then we cannot presuppose an authority to make any kind of demand of that person because they aren't the type of person of whom such demands could be made. As Abramson notes, the person who is seen as crazy should be regarded "in Strawsonian terms as the object of treatment and management, rather than a member of the moral community of whom demands may be made."¹⁷³ Gaslighters prey upon these distinctions to make victims feel as though they have no right to make challenges or demands because they are crazy and paranoid. Those who are crazy or paranoid, according to Strawson, are not the proper target of the reactive attitudes, and if the victim views herself as having these attributes like the gaslighter claims, she will likely not see herself as a proper generator of reasonable reactive attitudes either. If a victim actually comes to view herself in this light, then demands in the form of reactive attitudes are no longer seen as something that she can

¹⁷³ *Id.* at 13.

accurately make, thus mitigating or negating any reactive attitude that she might initially feel even if the initial attitude was an appropriate one. The accusations of the gaslighter target and undermine “her basic evaluative competencies and ability to react appropriately.”¹⁷⁴ Questioning one’s ability to react appropriately or one’s status of as a moral agent entirely calls into question the reaction itself and likely changes that reaction by lessening it or precluding it altogether.

As previously discussed, characterological self-blame goes deeper than behavioral self-blame and attributes blame to the victim on the basis of a lasting character trait. Some character traits listed in the literature are being reckless, being too trusting, etc. It may be the case that the victim, because they have been completely undermined, does not generate reactive attitudes at all because they think of themselves as unable to do so properly. Alternatively, what is happening in psychological gaslighting could also be seen as an invocation of characterological self-blame. One of the features of psychological gaslighting is that the victim becomes complicit in the destruction of their own moral agency.¹⁷⁵ Abramson states that victims of gaslighting can “even sometimes their character turned against them for their own destruction.”¹⁷⁶ A victim becomes characterologically powerless and incapable, making them unfit to be considered as a moral agent. A victim may view themselves as to blame for having these characteristics, turning any semblance of a reactive attitude that may form inwards rather than outwards towards the gaslighter. Not only are they completely undermined and unable to form reactive attitudes because they no longer perceive themselves as rational agents, but they also may view themselves as to blame for being unable to do so. Victims can be induced to victim-blame themselves for not having the characteristics necessary for moral agency that can be directed towards others.

¹⁷⁴ *Id.* at 8.

¹⁷⁵ *Id.* at 16.

¹⁷⁶ *Id.*

4.9 REFRAMING VICTIMHOOD

In this chapter, I have discussed how reactive attitudes can be compromised by different forms of psychological duress, in particular through forms of gaslighting that undermine a victim's knowledge of their own experience, and, in more extreme cases, even undermine the victim's capacity to see themselves as rational and moral agents. But these two undermining dynamics need not be mutually exclusive. Though the dynamics of these forms of undermining may be different, they can emerge within the unfolding psychological duress within a single case. A wrongdoer, for example, might refer to incidents of epistemic gaslighting perpetrated by others as support for their psychological manipulation and undermining of the victims' agency. Behavioral self-blame can become characterological self-blame when victims attribute their behavior to characterological traits through psychological manipulation. In considering what kinds of reactions victims may have towards others, it's important to not focus solely on characteristics of the wrong doer that may make them a less appropriate target for resentment, we should also focus on the reality that those reactions are also a product of societally produced biases in victim psychology.

5. Conclusion

To conclude, this dissertation has provided a deeper look into our conceptions of victimhood, showing the underlying assumptions and problematic nature of those conceptions, and analyzes some of the ethical, societal, and psychological pressures that are often wrongly placed on victims. For our normal conceptions of victimhood, I have suggested both that we expand our definitions of victimhood so that we focus not just on the perpetrator or the harm, but also on how that harm is experienced by real people. I've also proposed that expanding the definition is necessary to legitimize the claims of different kinds of victims who have wrongfully had their claims delegitimized and given a framework for advocating for such victims in light of the realities of social perceptions of those victims. In addition to addressing conceptions and problems with those conceptions, I also analyze some of the societal pressures put on victims and have argued that we should put those pressures on institutions rather than forcing victims to be heroic and take on daunting, traumatizing responsibilities in a system that is unlikely to successfully accomplish its own goals. Finally, in light of all of the following arguments and empirical evidence about how victims are conceived, I consider how victims conceive of themselves after a harm has occurred. In particular, I look at how victims may come to mentally delegitimize their own claims through the internalization of external stigma and both psychological and epistemic gaslighting. Being a victim is already really hard. You cannot be a victim unless something bad has happened to you. We don't need to make it even harder by not recognizing our own biases and misconceptions and how those further harm victims.

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