Article

Criminal Terms

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INTRODUCTION

Core items of vocabulary used by criminal legal academics to describe the criminal system,[1] those affected by it, and those overseeing it, convey implicit messages that bolster that system. While important scholarship in the last few years has identified the fact that criminal legal academics are implicated in the system and has argued that through the subtle messages that we send we have facilitated mass incarceration, it has not dwelt on the role played by our core vocabulary items. Adding this inquiry is timely and urgent, since if the push for new messages and new materials neglects the issue, we may be stuck even as we attempt to advance.

Organizations and entities other than academia are examining and adjusting the terms that they use to describe the criminal system and those affected by it. They are motivated by a concern that the common terms dehumanize, and that dehumanization has consequences. Now it is our turn to recognize a range of ways in which—even when our explicit message may be one

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1. *See infra* note 331 for the idea that "system" may be suboptimal phrasing.

that pushes for reform—our common terms bolster the system and ward off radical critique.

This Article identifies three overlapping types of messages that our common terms implicitly convey, whether in our classrooms, scholarship, or elsewhere. The first is that the system is by and large accurate, and indeed that accuracy is a meaningful concept within the criminal system. Examples include the use of "offender," "victim," and "recidivism," to refer, respectively, to an alleged offender, a complainant, and rearrest.[2] The second is that the system is necessary, because it has to deal with discrete, dangerous groups of people. Examples include the use of "sex offender," "violent offender," and "juvenile offender," as well as the ostensibly benign concepts of "redemption" and "rehabilitation."[3] The third is that the system, while undeniably flawed, is well-intentioned and moving in the right direction. Examples include the concepts of "progressive prosecution" and "lenience."

This Article will suggest that many of our common terms form a protective and opaque web around the system, distorting as they obscure. This is problematic regardless of its consequences. For a key part of academia is the debating of assertions, and scrutiny of the support given for those assertions. When our common terms convey implicit messages, they evade these academic norms of scrutiny and support. They also raise questions about our accuracy, honesty, and independence from the state, and, given the economically and racially disparate application of our system, they have regressive implications.

The consequences should concern us also, just as they concern entities beyond academia that have adjusted their terms. Our written and spoken terms influence a broad range of audiences, both within and outside academia. Those audiences include our students, who leave us each year and play a part in shaping the systems that we have helped to frame for them.

The prevalence and reach of these terms, and the breadth of our potential audiences, create an exciting opportunity to think about the effect that changing our terms might have. The system's treatment of those awaiting adjudication is widely decried and a global anomaly. It is worth contemplating whether lessening the extent to which we describe people awaiting adjudication as "offenders" and "flight risks," for example, might provoke or

2. Other terms examined include "crime," "pre-trial," and "factfinder." *See* discussion *infra* Part II.A.

3. Other terms examined include "felon," "flight," and "reentry." *See* discussion *infra* Part II.B.

reinvigorate debates. The system's treatment of people who are post-conviction is also widely decried and a global anomaly. It is worth contemplating whether more scrutiny of our use of "offender" terminology, including categorization of the "violent," "sex," or "juvenile" varieties, might facilitate change. It is possible that we fuel some of what we decry. It is possible that our language impedes even moderate reforms and renders radical possibilities unthinkable.

This is not a piece proposing that we change some words and otherwise press ahead. While vocabulary change is important, one also needs to recognize its limits. Academic roles are complex, and a variety of individual calculations—about goals, audience, and risk—may pull us in conflicting directions. In addition, it is not an accident that all these core terms convey messages that favor the state. The fact that we speak and write this way in contravention of a variety of academic norms helps reveal the power of the state to shape language, narrative, and thought, and it is important to investigate other manifestations of this power, including the enmeshment of our law school structure with the state.

Part I situates this Article at the intersection of two recent bodies of work. In the last three years, articles by Alice Ristroph and Shaun Ossei-Owusu have identified the fact that legal academics are implicated in the carceral state, and have pointed to implicit pro-carceral messages that we convey.[4] Focusing on pedagogy, they identify the need for new materials, though they do not focus on our core vocabulary items.[5] Meanwhile, outside academia, governmental and non-governmental entities have raised concerns about dehumanizing language in the criminal system context, and have initiated change.[6]

Part II identifies three types of bolstering messages embedded in our core academic lexicon—messages of accuracy, necessity, and redeemability—giving examples of each. Part III explores both the possibilities and limits of change. Part III.A thinks expansively about the conversations that might be inspired and invigorated were we to unsettle our common terms

4. Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631 (2020); Shaun Ossei-Owusu, *Criminal Legal Education*, 58 AM. CRIM. L. REV. 413 (2021).

5. This is not meant as a criticism. Numerous works by both authors, including some that address language, have influenced this author and informed this piece.

6. *See infra* Part I.B.

and uncover and debate our implicit premises. It explores this possibility in three contexts: the pre-adjudication landscape, the post-conviction landscape, and our openness to abolition or other radical change. Part III.B introduces a more measured note, urging consideration not just of individual priorities that may make change a complicated endeavor, but also of broader forces that sustain this linguistic status quo, including the influence of the state on our language and indeed on our law schools. Change must be attempted where it is possible but must be paired with efforts to investigate and address these phenomena.

I. CRIMINAL TERMS IN CONTEXT

The routine vocabulary of criminal legal academics lies at the intersection of two recent categories of writing. On the one hand, the years since the death of George Floyd have brought important scholarly publications suggesting that the legal academy has played a role in furthering mass incarceration.[7] And on the other hand, entities outside academia, including journalists, non-profits, and government entities, have declared the importance of altering standard criminal system terminology.[8] This Part will introduce some of these core texts before explaining the importance of bringing their concerns together.

A. ACADEMIC WRITING

Recent work by legal scholars has identified academia as an input into mass incarceration, and one that needs to be examined along with those that are better known.[9] This body of work has pointed to various relevant roles played by academics, including some within teaching, such as drafting of casebooks and

7. *See* Ristroph, *supra* note 4, at 1635 ("American law schools, through the required course on substantive criminal law, have contributed affirmatively to the collection of phenomena commonly labeled mass incarceration."); *see also* Ossei-Owusu, *supra* note 4, at 414 (arguing "that law schools are key sites for the reproduction of our penal status quo").

8. This focus on language builds on earlier writing, as is explained *infra* at notes 68–73 and accompanying text.

9. *See* Ristroph, *supra* note 4, at 1690 (mentioning other factors contributing to mass incarceration, such as "societal fear of crime," "racial mistrust and prejudice," and "economic inequality and the interests of the wealthier in managing the poor").

other materials,[10] curricular choices,[11] classroom discussions,[12] exclusion of voices,[13] omission of topics and questions,[14] and some beyond teaching, such as admissions,[15] hiring,[16] reform proposals that "invest in police and undercut movement demands,"[17] and so on.

This work has generally not focused on breaking things down to a still more fundamental level—the individual words with which we talk and write. Yet many of the themes explored

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10. *See* Shaun Ossei-Owusu, *For Minority Law Students, Learning the Law Can Be Intellectually Violent*, A.B.A. J. (Oct. 15, 2020), https://www.abajournal.com/voice/article/for_minority_law_students_learning_the_law_can_be_intellectually_violent [https://perma.cc/H7X2-YZ9E] (identifying that legal education materials fail to address the racial inequalities present in the criminal system).

11. *See* Ristroph, *supra* note 4, at 1635 (arguing that the pro-carceral messages within the substantive criminal law course contribute to mass incarceration).

12. *See* Shaun Ossei-Owusu, *Kangaroo Courts,* 134 HARV. L. REV. F. 200, 211 (2021) ("There are growing calls for a reimagination of how mass incarceration is discussed in law school.").

13. *See, e.g.*, *No. 2: Criminal Law*, GUERRILLA GUIDES TO L. TEACHING (Aug. 29, 2016), https://guerrillaguides.wordpress.com/2016/08/29/crimlaw [https://perma.cc/MZ5J-L434] (encouraging criminal law professors to bring into class "the voices and experiences of those directly impacted by the criminal justice system").

14. *See* Ossei-Owusu, *supra* note 12 ("[C]riminal legal education—particularly criminal law, criminal procedure, and evidence—fails to address questions of race, gender, and poverty that can be easily integrated into the curriculum."); Shaun Ossei-Owusu & Jocelyn Simonson, *The Academy and the (Undoing of) the Carceral State,* LAW & POL. ECON. PROJECT (Oct. 14, 2020), https://lpeproject.org/blog/the-academy-and-the-undoing-of-the-carceral-state [https://perma.cc/WUW3-YY6H] (mentioning academic silence in response to "life-or-death insurgency").

15. *See* Jennifer Chacón, *Law Schools and the Carceral State*, JOTWELL (June 25, 2021), https://crim.jotwell.com/law-schools-and-the-carceral-state [https://perma.cc/4VUV-SHQJ] (reviewing Ristroph, *supra* note 4). Chacón discusses how admissions policies that have disparate racial impacts affect how law schools consider race and criminal law, feeding into mass incarceration. *Id.*

16. *See id.* (noting that "hiring committees apply metrics of merit that are universally acknowledged to have disparate racial impacts . . . ."); *see also* Shaun Ossei-Owusu, *Making Penal Bureaucrats*, INQUEST (Aug. 23, 2021), https://inquest.org/making-penal-bureaucrats [https://perma.cc/3LA3-G9M4] (noting that following the killing of George Floyd, law schools are "scrambling for diversity" in their hiring plans).

17. #DefundthePolice Solidarity*, A Time for Solidarity: An Open Letter to Our Colleagues*, MEDIUM (Aug. 24, 2020), https://medium.com/@solidarityinthemoment/a-time-for-solidarity-8a1ce0e52210 [https://perma.cc/WN5C-LUKN].

in two recent pieces that have explored this issue fit neatly with consideration of core vocabulary items, and a brief examination of those themes follows.

In 2020, Alice Ristroph published *The Curriculum of the Carceral State*.[18] In the piece, she uncovers a pro-carceral portrayal of the criminal system in the leading criminal law casebooks and the teaching that they facilitate. She describes these texts as engaging in "criminal law exceptionalism,"[19] in that they convey the message that the criminal law is "uniquely necessary,"[20] constrained by legal protections and the most careful procedures,[21] able to guarantee accuracy,[22] and focused on the deepest (moral) wrongs, committed by flawed individuals.[23]

She identifies numerous means by which this portrayal is conveyed, many of them subtle and implicit.[24] For example, she points to the common curricular decision to "depict criminal law primarily through homicide and rape cases,"[25] and the emphasis, early and often, on protections that may be more theoretical than actual, such as the presumption of innocence, the legality principle, the Eighth Amendment, the due process requirement, and in particular the burden of proof beyond a reasonable doubt.[26] This emphasis on "proof," she tells us, forms part of a portrayal of the system as neutral and color-blind, and able to resolve even difficult questions like mens rea in an objective manner.[27] She identifies the frequent erasure of the government actors without whom nothing would happen in the criminal system,[28] demonstrating that the criminal law is presented as if it had freestanding substance, separate from enforcement choices.[29] And while of course criminal casebooks may have to acknowledge faults within the system, she identifies a common message: that things

18. Ristroph, *supra* note 4.
19. *Id.* at 1634 n.12.
20. *Id.* at 1667.
21. *Id.* at 1634 n.12.
22. *Id.* at 1643.
23. *Id.* at 1634, 1673–74.
24. *Id.* at 1639.
25. *Id.* at 1663.
26. *Id.* at 1653–54.
27. *Id.* at 1651; *id.* at 1653–54; *id.* at 1654 n.106; *id.* at 1702 ("Even when cases do go to a trial, mental states are attributed to defendants by ex post decisionmakers; they are not facts that prosecutors could or do prove with scientific certainty.").
28. *Id.* at 1671–72.
29. *Id.* at 1651.

that are faulty can be cured by the right innovation, whether that is an improved criminal code or the right kind of constitutional ruling.[30]

All of this, Ristroph shows us, involves inaccuracy,[31] dishonesty,[32] and distortion.[33] It is the presentation of an aspirational model as if it were descriptive[34]: a model that embodies the kinds of things that might need to be conveyed about the system in order for it to be palatable.[35] Thus, she points to the fact that the vast bulk of criminal cases are not resolved using the proof beyond a reasonable doubt standard,[36] and are not homicide or sexual assault cases.[37] She reminds us that the criminal system is a "tool of racial oppression,"[38] pervaded by human actors' discretion and bias.[39] She discusses numerous points at which bias is

30. *Id.* at 1682.

31. *Id.* at 1693.

32. *Id.* at 1701–02.

33. *Id.* at 1705.

34. *Id.* at 1652. Ristroph explains the origins of this aspirational model, showing that it was "designed to bring dignity and respectability to the field" of criminal law. *Id.* at 1690.

35. *Id.* at 1653.

36. *Id.* at 1656 n.117 ("For criminal convictions based upon guilty pleas—that is, almost all convictions—the prosecution does not have to prove anything. . . . [E]ven in the rare case that goes to a jury trial, prosecutors do not have to 'prove' guilt in the scientific or mathematical sense of the word proof; they merely have to convince a jury to vote for guilt.") (citation omitted).

37. *Id.* at 1667.

38. *Id.* at 1652.

39. *Id.* at 1635, 1671.

operative[40]: assessments of mens rea,[41] affirmative defenses,[42] and attempt standards,[43] for example.

All this, she argues, warrants the inclusion of criminal legal education in the list of possible factors contributing to mass incarceration,[44] and warrants change. This is in part because truth for its own sake is important.[45] But also because of the consequences.[46] Casebooks have influence on students and on the thinking and teaching of professors.[47] The messages that they send have served to ward off deep critiques of the system,[48] to limit the scope of reform proposals,[49] and to increase student trust in, and enthusiasm for, the criminal law and its sanctions.[50] The failure of these casebooks to explore the role of discretion and bias risks enforcing assumptions of Black criminality.[51] A better understanding of the reality of the system is likely at least to "produce a more chastened approach to the choice to use criminal sanctions,"[52] and may indeed "enable real change in American penal practices."[53]

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40. *Id.* at 1674.

41. *Id.* at 1657 n.120 (discussing how American legal education "obscures the ways in which mens rea determinations are likely to be shaped by racial bias" (citing Jody Armour, *Where Bias Lives in the Criminal Law and Its Processes: How Judges and Jurors Socially Construct Black Criminals*, 45 AM. J. CRIM. L. 203, 205 (2018))); *id.* at 1657 n.121 (critiquing the way in which criminal law "talk[s] about a criminal's mental state as though such a mental state were a real, let alone discoverable, condition" (quoting Francis X. Shen, Morris B. Hoffman, Owen D. Jones, Joshua D. Greene & René Marois, *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1317 n.37 (2011))); *id.* at 1688 n.271 (noting that "prosecutors attempt to prove *mens rea* through the use of circumstantial evidence and frequently must 'concoct' the defendant's level of intent to some degree" (quoting Deborah W. Denno, *Concocting Criminal Intent*, 105 GEO. L.J. 323, 377–78 (2017))).

42. *Id.* at 1674–75.

43. *Id.* at 1677.

44. *Id.* at 1635.

45. *Id.* at 1705.

46. *Id.* at 1686.

47. *Id.* at 1684.

48. *Id.* at 1662.

49. *Id.* at 1689.

50. *Id.* at 1636, 1679.

51. *Id.* at 1679.

52. *Id.* at 1704.

53. *Id.* at 1639.

In a subsequent piece, *Criminal Legal Education*,[54] Shaun Ossei-Owusu continues the conversation, with a focus on race, gender, and poverty,[55] looking not only at criminal law teaching, but also criminal procedure and evidence.[56] He points out that after George Floyd's death, academics used op-eds, policy proposals, and articles to raise awareness among the legal community and broader population of the need for change,[57] but that they now need to think more about ways in which their teaching impacts students, and through them influences the criminal system.[58] He shares Ristroph's optimism that while legal education has been largely unexplored as an input to the system, it provides potentially fruitful opportunities for reform.[59]

These pieces do not focus on academics' vocabulary, but they lay important groundwork for that inquiry. So too do recent efforts to study the impact of, and to change, vocabulary items used beyond the academic sphere.[60] This Part now turns to those.

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54. Ossei-Owusu, *supra* note 4.

55. *Id.* at 415.

56. *Id.* at 413.

57. *Id.* at 413; *id.* at 414 ("Law school deans, centers, and professors issued statements and penned op-eds decidedly denouncing white supremacy and police brutality.").

58. *Id.* at 413–14.

59. *Id.* at 414 ("[A]ttention to the oversights in the criminal justice curriculum provides an immediate, potentially fruitful, but rarely considered criminal justice reform strategy.").

60. *See* Erica Bryant, *Words Matter: Don't Call People Felons, Convicts, or Inmates*, VERA INST. OF JUST. (Mar. 31, 2021), https://www.vera.org/blog/words-matter-dont-call-people-felons-convicts-or-inmates [https://perma.cc/ZKT9-65V8] ("Many people and organizations are moving away from using terms that objectify and make people's involvement with these systems the defining feature of their identities. But many others—politicians, media outlets, and more—still use harmful and outdated language like 'convict,' 'inmate,' 'felon,' 'prisoner,' and 'illegal immigrant.'"). While this Article focuses on recent language change efforts, they build on an important history. *See infra* notes 68–73 and accompanying text.

B. BEYOND ACADEMIA

The Marshall Project, a prominent news organization focused on the United States criminal system,[61] recently announced an examination of, and change to, its routine terms.[62] The announcement acknowledged the importance of listening to those most directly impacted by these terms,[63] mentioning that through its "continued engagement with incarcerated and formerly incarcerated readers" it had come to understand that terms such as "inmate," "felon," and "offender" are "not neutral."[64] The Urban Institute, a "50-year-old mainstream liberal think tank,"[65] announced similar changes in 2016,[66] and governmental entities have also announced recent changes.[67] In addition, a recent report published by FWD.us, *People First: The Use*

61. *See* Carol S. Steiker, *Keeping Hope Alive: Criminal Justice Reform During Cycles of Political Retrenchment*, 71 FLA. L. REV. 1363, 1387 (2019) (describing the importance and success of the Marshall Project).

62. Akiba Solomon, *What Words We Use—and Avoid—When Covering People and Incarceration,* MARSHALL PROJECT (Apr. 12, 2021), https://www.themarshallproject.org/2021/04/12/what-words-we-use-and-avoid-when-covering-people-and-incarceration [https://perma.cc/984C-PUW3] (stating that they are adjusting their policy in accordance with "people-first" language).

63. *See* ALEX S. VITALE, THE END OF POLICING 249 (2021) ("The voices of those caught up in these systems are not always unified, and many of them could benefit from well-constructed research and the depth and breadth of experience many researchers have. But criminal justice research and policy must look to them as partners, not objects of study.").

64. Solomon, *supra* note 62.

65. Alexandra Cox, *The Language of Incarceration*, 1 INCARCERATION 1, 4 (2020), https://doi.org/10.1177/2632666320940859.

66. Nancy G. La Vigne, *People First: Changing the Way We Talk About Those Touched by the Criminal Justice System*, URB. INST. (Apr. 5, 2016), https://www.urban.org/urban-wire/people-first-changing-way-we-talk-about-those-touched-criminal-justice-system [https://perma.cc/EP64-JJN6].

67. *See* Karol Mason, *Guest Post: Justice Dept. Agency to Alter Its Terminology for Released Convicts, to Ease Reentry*, WASH. POST (May 4, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/05/04/guest-post-justice-dept-to-alter-its-terminology-for-released-convicts-to-ease-reentry [https://perma.cc/FZP5-BNZW] (announcing that the Office of Justice Programs would no longer use "felon" or "convict"); Phil Matier, *SF Board of Supervisors Sanitizes Language of Criminal Justice System*, S.F. CHRONICLE (Aug. 11, 2019), https://www.sfchronicle.com/bayarea/philmatier/article/SF-Board-of-Supervisors-sanitizes-language-of-14292255.php [https://perma.cc/3M4E-8B2L] (reporting that the San Francisco Board of Supervisors adopted new language guidelines rejecting use of the words "felon," "offender," "convict," "addict," and "juvenile delinquent"); John E. Wetzel, *Pennsylvania Dept. of Corrections to Discard Terms "Offender," "Felon" in Describing Ex-Prisoners*, WASH. POST (May 25, 2016), https://www.washingtonpost.com/news/true-crime/wp/

and Impact of Criminal Justice Labels in Media Coverage, seeks not only to decry dehumanizing terms and to urge their abandonment, but to speak to those who are skeptical about the point of language change absent some empirical showing of benefit.[68] This report is particularly useful not only because of its empirical component—investigating the impact, for example, of the word "defendants" as compared to "people accused of a crime"[69]—but because it includes a timeline revealing that these concerns (including those raised by directly impacted people[70]) are not

2016/05/25/pennsylvania-dept-of-corrections-to-discard-terms-offender-felon-in-describing-ex-prisoners [https://perma.cc/4UTC-W2H9] ("I'm embracing 'people first' language for everyone—including those who committed a crime."); Special Directive from George Gascón, L.A. Cnty. Dist. Att'y, to Deputy Dist. Att'ys (Dec. 7, 2020), https://www.georgegascon.org/wp-content/uploads/2020/12/SPECIAL-DIRECTIVE-20-14-.docx.pdf [https://perma.cc/ZB8P-UMBR] ("We will seek to avoid using dehumanizing language such as 'inmate,' 'prisoner,' 'criminal,' or 'offender' when referencing incarcerated people."); Act of Aug. 2, 2021, ch. 322, 2021 N.Y. Laws 972, 972 ("[I]n relation to replacing all instances of the words inmate or inmates with the words incarcerated individual or incarcerated individuals.").

68. Brian Elderbroom, Felicity Rose, & Zoë Towns, *People First: The Use and Impact of Criminal Justice Labels in Media Coverage*, FWD.US 8–10, 19 (June 22, 2021), https://www.fwd.us/wp-content/uploads/2021/06/PF_PDF_report_final.pdf [https://perma.cc/P5EX-ELVT] (enhancing the conversation through, for example, quantitative and qualitative research into the impact of language choices on public opinion, as well as a helpful timeline of the People First Movement); *id.* at Executive Summary ("These new results show that even with improved coverage, journalists are still reinforcing the harmful language of the criminal justice system, even as they criticize it or lift up its failures."); *see also* Ravi Mangla & Erin George, *How Dehumanizing Language Fuels Mass Incarceration*, COMMON DREAMS (Oct. 1, 2019), https://www.commondreams.org/views/2019/10/01/how-dehumanizing-language-fuels-mass-incarceration [https://perma.cc/52L6-9T6R] (citing studies).

69. *See* Elderbroom et al., *supra* note 68, at 32 ("The response to a story about New York eliminating cash bail for most people was almost evenly split among people 50 and over when people first language was used, 52% negative and 48% positive (a 4 point gap). When the word 'defendants' replaced 'people accused of a crime' in the headline this group's reaction shifted by 12 points, to a 16 point negative lean (58% negative to 42% positive)."). While the practices of those other than legal academics are beyond the scope of this Article, this finding of course raises questions not only about academic uses of words like "defendant," but also those of prosecutors, defense attorneys, judges, and others. Other terms whose impact was investigated and highlighted by the researchers included "felon" versus "person with a felony conviction," "violent offenders" versus "people with violent convictions," and "sex offenders" versus "people convicted of sex offenses." *Id.* at 28–34.

70. *See, e.g.*, Eddie Ellis, *An Open Letter to Our Friends on the Question of Language*, CTR. FOR NULEADERSHIP ON URB. SOLS., https://cmjcenter.org/wp

new, even if the last few years have brought a flurry of activity.[71] Finally, in his recent book, *Usual Cruelty: The Complicity of Lawyers in the Criminal Injustice System*,[72] Alec Karakatsanis makes powerful points about the role of language, and the importance of language change, within criminal legal reform.[73]

This Article builds on these two strands of work, making the case that legal academic introspection should encompass vocabulary choices, and the implicit messages that they send, within its examination of our role in perpetuating the status quo. Progressive assertions frequently convey regressive messages through their vocabulary, thus suggesting that academic reform efforts—including current efforts to create new criminal law teaching materials[74]—will be incomplete if they neglect this component. This matters not just because of the importance of accuracy, honesty, and exposing our premises to scrutiny, but also because of the potential consequences of these usages. Nor does this Article limit itself to the messages of dehumanization on which the FWD.us report focuses.[75] Rather, it goes broader, looking at three types of implicit assertions that we reinforce daily in a broad range of our common terms.

-content/uploads/2017/07/CNUS-AppropriateLanguage.pdf [https://perma.cc/J398-977T] ("When we are not called mad dogs, animals, predators, offenders and other derogatory terms, we are referred to as inmates, convicts, prisoners and felons——all terms devoid of humanness which identify us as 'things' rather than as people . . . . [W]e are asking everyone to stop using these negative terms and to simply refer to us as PEOPLE. People currently or formerly incarcerated, PEOPLE on parole, PEOPLE recently released from prison, PEOPLE in prison, PEOPLE with criminal convictions, but PEOPLE.").

71. *See* Elderbroom et al., supra note 68, at 8–10.

72. ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM (2019).

73. *See, e.g.*, *id.* at 10 ("I write about . . . the language society uses to talk about the punishment system."). Karakatsanis also makes important points about legal education, some of which will be cited below.

74. *See, e.g.*, Ossei-Owusu, *supra* note 10 (mentioning open-access materials).

75. *See* Elderbroom et al., *supra* note 68. This Article also goes beyond a form of messaging highlighted in previous works by this author, namely messages prematurely conveying guilt. *See, e.g.*, Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 989 (2019) [hereinafter Roberts, *Arrests as Guilt*] (noting that arrests are often conflated with criminal guilt); Anna Roberts, *Victims, Right*?, 42 CARDOZO L. REV. 1449, 1451 (2021) [hereinafter Roberts, *Victims, Right?*] (arguing that the word "victim" inappropriately lessens the prosecutorial burden).

II. WHAT OUR COMMON TERMS CONVEY

This Part analyzes three categories of implied message that our common criminal terms convey. These three overlapping categories each serve to bolster the system and ward off radical critique. The first category conveys that accuracy is a quality that the system can, and generally does, achieve. The second communicates the otherness, badness, and dangerousness of groups of people whom the system must restrain. The third portrays the system as fundamentally well-intentioned and moving in the right direction. In discussing vocabulary items that fall within each category, this Part aims to expose premises that might be vulnerable to attack were they explicitly asserted but are able to thrive in the world of the implicit and routine.

A. ACCURACY AS ACHIEVABLE AND ACHIEVED

Our criminal system relies on a notion that there are things that happen called "crimes" and that the criminal system detects them and those who committed them with a decent amount of reliability. Our academic language reinforces these concepts in a variety of ways. It thus risks distortion.

Various components of the criminal system reveal that the bases for findings of "crime" are contestable. The typical criminal law syllabus indicates that crimes are defined through sets of elements and also require the absence of certain defenses. It then introduces students to materials that reveal that in large part these elements and defenses—if they are adjudicated—rely not on "findings of historical fact,"[76] but on normative judgments. This is true, for example, of mens rea standards that require deviations from reasonable standards of care,[77] or awareness of an unjustifiable risk;[78] it is true of attempt standards

76. Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 144 (1996) ("[C]riminal verdicts are not just findings of historical fact, but expressions of an inescapably subjective consensus reached among jurors who bring discrete viewpoints and perspectives to their deliberations."); Jody Armour, *Where Bias Lives in the Criminal Law and its Processes: How Judges and Jurors Socially Construct Black Criminals*, 45 AM. J. CRIM. L. 203, 219 (2018) ("[N]ormative [mens rea] requirements (rules, elements, and tests) direct factfinders to make moral judgements in reaching their verdict.").

77. *See* Armour, *supra* note 76, at 205 (stating that mens rea plays a central role "as a vehicle for factfinders to make frontal moral judgments of wrongdoers").

78. *See, e.g.*, MODEL PENAL CODE § 2.02 (AM. L. INST., Proposed Official Draft 1962) (defining recklessness).

such as "dangerous proximity;"[79] it is true of proximate cause standards that require reasonable foreseeability;[80] and it is true of defenses that require reasonable fear of imminent physical force,[81] or an emotional disturbance for which there is a reasonable explanation or excuse.[82] If cases go to trial, the jury is instructed to answer such questions—and to examine whether any doubts that they may have as to guilt are "reasonable."[83] While Jury instructions are supposed to provide crucial guidance, jurors may fail to obey or even understand them.[84] Also noteworthy is what happens to a criminal law pervaded by community judgment calls when the community is silent. If cases end in a guilty plea, these normative judgment calls are erased by an "admission of guilt."[85] This is an "admission" that falls short of a full confession, and indeed that may say nothing to rebut potential defenses.[86] The person alleged to have violated community norms becomes the one to speak as to their existence and their

79. *See* Ristroph, *supra* note 4, at 1677 (describing ways in which racial bias can enter into "unequivocality" determinations in attempt prosecutions).

80. *See, e.g.*, People v. Acosta, 284 Cal. Rptr. 117, 121 (Ct. App. 1991) (depublished) (explaining how proximate cause determinations are "sometimes more a matter of 'common sense' than pure logic").

81. *See* Jenny E. Carroll, *Graffiti, Speech, and Crime*, 103 MINN. L. REV. 1285, 1343 (2019) (mentioning the jury's role when assessing "the reasonableness of a response or the imminence of a threat in the context of an affirmative defense of self-defense"); Roberts, *Arrests as Guilt*, *supra* note 75, at 990–91 n.14 and accompanying text (describing how the trier of fact must make reasonable use of force determinations in self-defense cases).

82. *See, e.g.*, *Extreme Emotional Disturbance Defense*, N.Y. CTS. (Dec. 2019), https://nycourts.gov/judges/cji/2-PenalLaw/125/AC.125.EED.pdf [https://perma.cc/DJ6R-RHKS].

83. *See In re* Winship, 397 U.S. 358, 361 (1970).

84. *See* Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2512 (2020).

85. *See* Darryl K. Brown, *American Prosecutors' Powers and Obligations in the Era of Plea Bargaining, in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 200, 204 (Erik Luna & Marianne L. Wade eds., 2012) ("[W]hen pleas replace trials, most of the systemic components of public adjudication that serve the objectives of factual reliability and accurate normative judgment are missing—the jury, evidentiary disclosure, rules of evidence, formal adversarial challenges to state evidence, and so on.").

86. *See* Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415, 1427 (2016) ("[A]n admission to having engaged in acts that satisfy the formal elements of a criminal charge is not a full confession describing the facts of what was done or why. An admission to having satisfied the elements of the crime also does not reach the question of whether any defenses might defeat criminal liability.").

violation.[87] We never get an authoritative judgment as to guilt based on all the facts—no one ever knows all the facts. We rarely even get a community judgment as to the facts. Our sense of whether a "crime" occurred is based on an arrest, claim, charge, or plea,[88] or the judgment calls of a group of people presented with incomplete data.

Despite academia's unique opportunity to complicate the concept of "crime," and point out its constructed nature,[89] all too often our academic language takes it as a concrete, known thing, even if all we have to substantiate it is an arrest, claim, or charge. It is common for scholarly discussions to refer to "unreported" crimes,[90] or the rates at which police "solve" crimes or murders,[91] as if one could decide upfront that a crime (or murder) has occurred. In our use of "crime," as if it is a thing that exists in the world, we implicitly convey confidence that the task of the state is not to administer the process that constructs "crime" and "guilt,"[92] but rather to find those who did crimes and bring about the appropriate consequences. In other words, to identify and punish "criminals."[93] This bolsters the system in part because it suggests that the quality of one's adjudication need not depend

87. *See* Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 979–80 (1989) ("It seems paradoxical . . . to rely on someone charged with failing to recognize or observe the norms of reasonable conduct or belief to perform the task of factually assessing what those norms are. If we treat the question of reasonableness as more of a moral than a factual inquiry . . . it seems even more problematic to rely on a criminal defendant's moral judgment about reasonableness. It seems odd as well to expect the defendant to perform satisfactorily the difficult task of retrospectively and objectively comparing his own conduct or belief with the standard of reasonableness.").

88. *See infra* note 97 and accompanying text.

89. *See* Ristroph, *supra* note 4, at 1674.

90. *See, e.g.*, Andrew D. Leipold, *The Puzzle of Clearance Rates, and What They Can Tell Us About Crime, Police Reform, and Criminal Justice*, 56 WAKE FOREST L. REV. 47, 60 (2021).

91. *See, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1059 (1998).

92. *See* Erin Murphy, *Indigent Defense*, CHAMPION, Feb. 26, 2002, at 33 (describing how people who ask the "how can you" defend certain people question have already assumed these people are "in fact guilty criminals").

93. *See, e.g.*, Mirko Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less Is More When It Comes to Punishing Criminals*, 62 BUFF. L. REV. 1159 (2014) (providing examples of the modern uses of the terms "crime" and "criminal").

on one's wealth.[94] If one sees guilt and crime as things that can be constructed or deconstructed, and resources as helpful in those processes, this goal might well appear unachievable. Many of our core texts—those in which we introduce the criminal law to students—could usefully do more to question the meaning of "crime,"[95] and of "criminality."[96]

In addition, our common terms often treat an arrest, complaint, or charge as equivalent to a finding that a crime occurred and that the person suspected did in fact commit it.[97] This implicitly endorses the system's accuracy. Thus, scholars often use "offender" to refer to a person arrested or charged,[98] "crime" to refer to alleged crime,[99] "victim" to refer to someone alleged to have been harmed by crime,[100] "criminogenic" to refer to something that appears to lead to arrests,[101] "rehabilitation" to refer to pre-conviction efforts,[102] "recidivism" to describe rearrest,[103] and so on. When an arrest becomes "crime" or "recidivism," an

94. *See* Griffin v. Illinois, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.").

95. *See, e.g.*, SANFORD H. KADISH, STEPHEN J. SCHULHOFER, & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 651 (11th ed. 2022) ("When only one individual commits a crime, the analysis is relatively straightforward. We ask whether that person committed all of the elements of the offense with the required mens rea.").

96. *See id.* at vii (titling a chapter "Group Criminality").

97. *See* Roberts, *Arrests as Guilt*, *supra* note 75, at 989; *see also id.* at 1008; *id.* at 1027 n.282.

98. *See id.* at 1005; Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1380 (1994) ("[V]ictims of felonies had a right to initiate and prosecute a criminal case against their offenders.").

99. *See* Roberts, *Arrests as Guilt*, *supra* note 75, at 1009–10.

100. *See* Roberts, *Victims, Right*?, *supra* note 75, at 1495 (describing how some courts "regularly use 'victim' in their opinions to refer to those alleged to have been harmed by crime").

101. *See, e.g.,* Avinash Singh Bhati & Alex R. Piquero, *Estimating the Impact of Incarceration on Subsequent Offending Trajectories: Deterrent, Criminogenic, or Null Effect?*, 98 J. CRIM. L. & CRIMINOLOGY 207, 207 (2007) (using arrest histories of those released from prison to investigate whether prison has a "criminogenic" effect).

102. *See* Mary Fan, *Street Diversion and Decarceration*, 50 AM. CRIM. L. REV. 165, 168 (2013) ("Converging conditions have created an opportune time to develop a rehabilitative role for policing.").

103. *See* Anna Roberts, *LEAD Us Not into Temptation: A Response to Barbara Fedders's "Opioid Policing,"* 94 IND. L.J. SUPPLEMENT 91, 99–100 (2019).

act of the state is treated as the criminal act of an individual,[104] thus potentially dissolving concerns about, for example, unlawful arrests or racial disparity in arrest patterns,[105] and indeed potentially dissolving concerns about the fairness of the adjudicative process that may follow. Some scholars have identified similar problems with the routine use of the phrase "law enforcement," which could be said to contain an implied premise that what the state does, when it arrests or charges, is to enforce the law—that is, to bring about legal consequences for those (and perhaps only those) who have violated the law.[106]

Next, once a conviction is imposed, our core terms tend to treat crime conviction as equivalent to crime commission.[107] The word "offender" is frequently used without clarification of whether it refers to someone with a criminal conviction or someone who has committed a crime, or whether (as Black's Law Dictionary suggests) the first can be assumed to be a subset of the second.[108] This apparent willingness to merge the two concepts is striking given the many indications within legal scholarship, as elsewhere, of a system lacking in assurances that a conviction reliably denotes something that we can call criminal guilt.[109]

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104. *See* Ristroph, *supra* note 4, at 1671 ("When we obscure law's human agents, we may also obscure their flaws and limitations, or patterns of bias in their actual decisions.").

105. *See id.* at 1671 ("Racial bias is a property of humans—and an unmistakable property of the criminal law that humans have implemented and operated in the United States—but the curricular model of substantive criminal law is color-blind.").

106. *See* Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 10 n.37 (2022) ("The term law enforcement could be placed in scare quotes because when White college students are not policed for their drug use, but poor Black people are sentenced to life in prison for it, it is not the law that is being enforced, but rather existing race, class, and other social hierarchies."); KARAKATSANIS, *supra* note 72, at 69 (discussing the nature of the term "law enforcement").

107. *See* Roberts, *supra* note 84, at 2501 ("[S]cholars often discuss people who have criminal convictions in a way that appears to assume crime commission.").

108. *See id.* at 2535 (citing Black's Law Dictionary definition of "offender" as "[s]omeone who has committed a crime; esp., one who has been convicted of a crime").

109. *See* Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 619–22 (2013) [hereinafter Roberts, *Casual Ostracism*] (noting that the label of "criminal conviction" "fails with sufficient accuracy to sort those who have violated the law from those who have not"); Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV.

One might respond that this academic usage is just reflective of the fact, mentioned earlier, that whether a crime occurred is a question to which there may be no answer other than the proxy of a conviction.[110] This does not fit well, however, with academic acknowledgements that convictions of the "innocent" sometimes occur.[111] Rather, this dual meaning of "offender" seems to persist in largely unexamined fashion, facilitating discussions about when "offenders"—that is, people with convictions—can be said to have "aged out of crime," achieved "redemption," demonstrated "rehabilitation," and so on.[112] This not only sends potentially reassuring messages about the reliability of convictions, but may also send reassuring messages that those who have no convictions have not committed crimes,[113] thus adopting the kind of them/us stance that facilitates the imposition of punishment.

Finally, aspects of our core vocabulary implicitly endorse the reliability of the procedures through which convictions are imposed. "Pre-trial" is our standard term to describe phenomena

563, 580–81 (2014) [hereinafter Roberts, *Impeachment by Unreliable Conviction*] ("In the vast majority of convictions . . . there is no finding of proof beyond a reasonable doubt."); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2123 (1998) ("It is true that guilty pleas are often entered by frightened, powerless defendants on the advice of over-worked or under-qualified appointed defense lawyers, under the threat of lengthy prison sentences if convicted at trial, facing pre-trial detention that may itself—even if the defendant is ultimately acquitted—exceed the sentence being offered as part of the plea bargain, in cases that may have received as little attention from equally over-worked or under-qualified prosecutors. . . . The poor and ill-represented may also fare badly at trial, where the lack of preparation or empathy of their lawyers, the prejudices of jurors, and the great resources of the state may equally secure an unjust conviction . . . .").

110. *See supra* Part II.A.

111. *See, e.g.*, Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the* Brady *Safety Valve*, 2012 UTAH L. REV. 51, 56 (2012) (discussing how the modern plea bargaining system has become so powerful that it "induce[s] even innocent defendants to plead guilty").

112. *See* Roberts, *supra* note 84, at 2537–38.

113. *See* Jamie L. Small, *Classing Sex Offenders: How Prosecutors and Defense Attorneys Differentiate Men Accused of Sexual Assault*, 49 LAW & SOC'Y REV. 109, 115 (2015) (noting that "guilty men who are not formally accused in the first place escape the derogatory labels"); *see also id.* at 135–36 ("[T]he 'disease' of sexual offending has a remarkable ability to afflict only lower class men . . . . [C]lass privilege serves as a protective factor against sexual allegations, investigations, and convictions."); Roberts, *Casual Ostracism, supra* note 109, at 622 (quoting Doug Husak for the idea that "[it] is hard to believe that many of us have not committed countless state and federal offenses").

that occur before the moment at which a case ends, whether by dismissal, acquittal, or conviction. Yet, of course, trials are a relative rarity, with convictions coming far more frequently via guilty plea,[114] and all sorts of cases ending without conviction. Perhaps the term is just a vestige of the way things used to be, but if the trial is viewed as the "gold standard" in terms of scrutiny of the alleged facts,[115] our conventional language portrays our system as more golden than it is.[116] When trial does occur, our conventional way of referring to the role of the jury is as "factfinder," thus perhaps suggesting that the question of guilt or non-guilt is something ascertainable in yes-no fashion if the jury does its work with diligence. As mentioned earlier, finding "facts" is a partial view of what juries do;[117] one that amps up the notion that crimes either do or do not occur and that it is for the jury to figure out which it was, thus obscuring the centrality of the role of normative judgment (and potentially bias) at trial.

B. DISCRETE DANGEROUS GROUPS NEEDING CONTROL

Our common terms frequently serve to categorize, and indeed essentialize, those controlled by the criminal system. Quite often these usages appear in writing whose explicit message is a progressive one, decrying particular practices and pushing for reform.[118] Yet the use of these categories implicitly reasserts their validity, and helps to perform their work: not just of categorizing, but of otherizing, and thus helping to justify distinct, and distinctly harsh, treatment.[119]

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114. *See* Roberts, *Arrests as Guilt*, *supra* note 75, at 1011 ("In 2015, 88% of federal defendants ended their cases with a plea of either guilty or *nolo contendere*; the percentage of convictions that involved a guilty or *nolo contendere* plea was 97.5%.").

115. Lafler v. Cooper, 566 U.S. 156, 186 (2012) (Scalia, J., dissenting) (calling a criminal trial the "gold standard of American Justice").

116. We can compare the tendency of scholars to refer to "proof beyond a reasonable doubt"—the constitutionally-guaranteed standard *at trial*—as if it were the standard across the board in criminal cases. *See, e.g.*, Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2310 (1994) ("Any doubts that the witness committed the crime in question are negligible since a conviction rests on satisfaction of the most demanding burden of proof.").

117. *See supra* Part II.A.

118. *See* Marina Bell, *Abolition: A New Paradigm for Reform*, 46 LAW & SOC. INQUIRY 32, 52 (2021) ("A major characteristic of reformist approaches, criminal punishment interventions, and programs is their unreflective use of terms like 'offender.'").

119. *See* Alice Ristroph, *The Definitive Article*, 68 U. TORONTO L.J. 140, 158

The word "offender," for example, does more than merge crime conviction and crime commission, in the way mentioned above.[120] It also transmutes whatever prompted it—an arrest, charge, or conviction, for example—into someone's permanent identity as a wrongdoer,[121] and thus as someone who poses an ongoing threat. It also frequently becomes an *all-consuming* identity,[122] particularly when presented in opposition to "victim."[123] The "offender" is someone who does and threatens harm and is contrasted with someone who has suffered harms.[124] The word establishes not just one's individual identity, but one's membership in a group, and membership in the "offender" group conveys one's separateness, one's defective nature, and one's need for special treatment. Legal academia's common terms also include several subsets of the "offender" category, including "violent offender," "sex offender," and "juvenile offender." These are often used in progressive contexts, such as arguments that reform initiatives should include "violent offenders,"[125] or arguments against the permanent exile of "sex offenders,"[126] or of "juvenile offenders."[127] As will be explained, however, to endorse

(2018) (stating that "the scholarly analysis of criminal law is . . . by and large a justificatory project").

120. *See supra* Part II.A.

121. *See* LINDSEY POINTER, THE RESTORATIVE JUSTICE RITUAL 28, 48–49 (1st ed. 2021), https://doi.org/10.4324/9781003096344.

122. *See* Monica Ramsy, *Heroizing Restorative Justice:* Steven Universe *and Rewriting Justice Narratives Through Superhero Cartoons*, 11 CALIF. L. REV. ONLINE 417, 427 n.70 (2020) (describing "victim" and "offender" as examples of "criminalizing, totalizing language").

123. *See* POINTER, *supra* note 121, at 10 (noting that adherence to these labels suggests "that 'offender' or 'victim' is who the person is in broader terms rather than a description of their role in a specific, limited incident").

124. *See id.* (mentioning "ways in which 'offenders' are oppressed and victimized by a variety of social structures in complex ways").

125. *See, e.g.*, Josh Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 WIS. L. REV. 699, 702 ("Reforms like South Carolina's are positive initial steps, but they will not on their own end mass incarceration; for that task we need to incarcerate fewer violent offenders and for less long.").

126. *See, e.g.*, Asmara Tekle-Johnson, In the Zone: Sex Offenders and the Ten-Percent Solutions, 94 IOWA L. REV. 607, 614 (2009) (asserting "a need for rational discourse that truly focuses on protecting children and the larger public from dangerous sex offenders without trampling on the Constitution and common sense in the process").

127. *See, e.g.*, Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 56 (2017) ("If *Graham* and *Miller* are

and attribute meaning to these terms and these categories—even if one's aim is reform—is to aid the system's work of demarcating, categorizing, and exposing to uniquely bad treatment.

Regarding "violent offender," some scholars have noted that the category of "violent" offenses has a reach that may not be intuitive,[128] and may not be consistent.[129] Things classed as "violent offenses" can include burglary and larceny, for example.[130] Even if one were to conclude that the category of "violent offenses" has enough integrity to be meaningful, it is a different thing to categorize those convicted (or accused) as "violent offenders." This phrase speaks not just to the status of having been convicted; it also contains a judgment to the effect that this is your lasting character. And in grouping you with others in this category the terminology asserts implicitly that the group shares this essence. Once you are described using your presumed group

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to be taken seriously, courts and policymakers may not deliver juvenile offenders into permanent exile without considering the social context in which they committed their crimes.").

128. *See* Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 621 (2011) ("[W]e are not always sure what counts as violence, and the criminal law doesn't always punish what seems to be violence, and in fact, the greatest source of violence might be the criminal law itself."); *see also* Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 830 (2000) ("[M]ost 'violent crimes' are simple batteries which involve no physical injury, most injuries sustained in such cases do not require medical treatment, and most cases requiring medical treatment do not require hospitalization."); Ruth Wilson Gilmore, *The Worrying State of the Anti-Prison Movement*, SOC. JUST. (Feb. 23, 2015), http://www.socialjusticejournal.org/the-worrying-state-of-the-anti-prison-movement [https://perma.cc/44JV-AL5U] (mentioning the "fact that categories such as 'serious' or 'violent' felonies are not natural or self-evident" and the role played by police and district attorneys in "produc[ing] serious or violent felony charges, indictments, and convictions").

129. Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017, 1024 (2014) ("[I]n formal law [the term 'violent crime'] . . . is inconsistently defined and strategically redefined."); Ristroph, *supra* note 128, at 611 (noting that the parameters of the category of "violence" are "manipulable and contested.").

130. *See* Ben Grunwald, *Toward an Optimal Decarceration Strategy*, 33 STAN. L. & POL'Y REV. 1, 54 (2022) ("A starting point is to emphasize that 'violence is a much more capacious legal category than most people assume.' Many jurisdictions count burglary as a violent crime even though less than 4% involve a physical attack. Even broader, some jurisdictions count larceny, driving under the influence, certain forms of drug trafficking, and mere threats of physical harm as violence." (quoting Leon Neyfakh, *OK, So Who Gets to Go Free?*, SLATE (Mar. 4, 2015), https://slate.com/news-and-politics/2015/03/prison-reform-releasing-only-nonviolent-offenders-wont-get-you-very-far.html [https://perma.cc/A95W-FVAT]))).

identity, we have gone a long way toward permitting your separate and harsher treatment.[131] Thus, even as progressive statements may urge rethinking of some of this harsh treatment, the use of the state's terms strengthens its foundations. Uncomplicated references to "violent" offenses and offenders are common in criminal academia.[132]

Turning to "sex offenders," some scholars have pointed out that the category of "sex offenses" (like "violent offenses") has a reach that may not be intuitive.[133] Public urination,[134]

131. *See id.* at 53–54 (stating that "the public debate about criminal justice—which typically only grants sympathy and mercy to people convicted of non-violent offenses—has entrenched in the public consciousness a monolithic image of the 'violent offender' as dangerous and irredeemable").

132. *See* Ristroph, *supra* note 128, at 573 ("A surprising feature of the phrase 'violent crime' is how un-self-consciously it is used. Relatively few jurisdictions—and even fewer scholars, perhaps—have offered a clear account of what makes a crime *violent*.").

133. *See* Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1566 (2014); *see also* Mona Lynch, *Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529, 558 (2002) (describing ways in which federal "lawmakers (at least verbally) imagined the most vile example and generalized from that by legislating punitive responses that affect huge classes of criminal actors"); Joseph L. Lester, *Brandishing the Mark of Cain: Defects in the Adam Walsh Act*, 21 FED. SENT'G REP. 107, 107 (2008) ("[T]he new federal guidelines expand who gets the sex offender label and for how long."); Laura Marie Crylen, *Badgering "Sex Offenders": Problems with Wisconsin's Sex Offender Registry and the Mandatory Registration for Non-Sexual Crimes*, 36 J. LEGIS. 375, 376 (2010) ("Like many other states receiving federal crime grant funding, the Wisconsin statute includes kidnapping and false imprisonment within the list of enumerated sex offenses, and mandates they be registered as sex offenders, despite the fact that those crimes contain no sexual element."); Ed Pilkington, *"There Was a Lot of Shame": Meet the Sex Offender "Who Is Not a Sex Offender,"* GUARDIAN (Oct. 1, 2018), https://www.theguardian.com/us-news/2018/oct/01/there-was-a-lot-of-shame-meet-the-sex-offender-who-is-not-a-sex-offender [https://perma.cc/TS6Z-MV6L]; *see also* Aya Gruber, *Sex Exceptionalism in Criminal Law*, 75 STAN. L. REV. (forthcoming 2023) (analyzing sex exceptionalism in criminal law and the nuances of regulating sex).

134. *See* Elizabeth B. Megale, *From Innocent Boys to Dirty Old Men: Why the Sex Offender Registry Fails*, 47 CRIM. L. BULL. 1067, 1070 (2011) (mentioning how public urination can be included in the broad reading of "sex offenses"); Kiley Eichelberger, *Marking Juveniles as Unfit to Parent: Terminating the Rights of Parents Registered as Predatory Offenders in Minnesota*, 43 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 152, 167 (2021) ("Children as young as eight years old can be registered alongside adults for acts such as sexting, public urination, and indecent exposure.").

sexting,[135] sex work,[136] teenagers having sex,[137] and, in some states, gay people having sex,[138] can be included in this category. Even if one were to put that concern aside, feeling sufficiently comfortable that the category of "sex offenses" has enough integrity to be meaningful and does something other than "perpetuate hate and fear,"[139] it is a different thing to categorize as "sex offenders" those who have been convicted.[140] This phrase speaks to the status of having been convicted, and to the presumed sta-

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135. *See* Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035, 1037 (2010) (discussing sexting prosecution).

136. Roger Lancaster, *Sex Offenders: The Last Pariahs*, N.Y. TIMES (Aug. 20, 2011), https://www.nytimes.com/2011/08/21/opinion/sunday/sex-offenders-the-last-pariahs.html [https://perma.cc/U83R-C2TU] ("Some states require exhibitionists and 'peeping Toms' to register; Louisiana compelled some prostitutes to [register as sex offenders]."); Catherine Wagner, Note, *The Good Left Undone: How to Stop Sex Offender Laws from Causing Unnecessary Harm at the Expense of Effectiveness*, 38 AM. J. CRIM. L. 263, 277 (2011) ("At least five states require registration for visiting a prostitute.").

137. *See Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US*, HUM. RTS. WATCH (May 1, 2013), https://www.hrw.org/report/2013/05/01/raised-registry/irreparable-harm-placing-children-sex-offender-registries-us [https://perma.cc/WH33-G8CX]; *see also* Lester, *supra* note 133, at 108 ("Any sex-related crime, even those committed by children fourteen years old, will beget the label."); Amy E. Halbrook, *Juvenile Pariahs*, 65 HASTINGS L.J. 1, 48 (2013) (discussing the *Dipiazza* case where teenagers having consensual sex led to the boy being on a sex-offender registry); Dara Lind, *Why the Sex Offender Registry Isn't the Right Way to Punish Rapists*, VOX (July 5, 2016), https://www.vox.com/2016/7/5/11883784/sex-offender-registry [https://perma.cc/RDT3-AV63] ("Some of the activists who inspired registry laws to begin with . . . have since turned against them. Those advocates say they never intended for the registry to expand so far beyond child molesters—and that they certainly didn't intend for so many people to be registered for having consensual sex as teenagers, or for pulling down their siblings' pants as children.").

138. *See* Lynch, *supra* note 133, at 556 (mentioning Kansas, Louisiana, Mississippi, and South Carolina).

139. Megale, *supra* note 134, at 1099 ("[T]o . . . classify crimes as sex-related serves only to perpetuate hate and fear rather than resolve a criminal problem.").

140. *See id.* ("[T]he act of classifying the offender as a *sex offender* creates a lifelong label that stigmatizes the individual and segregates the person from society. This separation of the sex offender from mainstream society is an act of violence . . . ."); McLeod, *supra* note 133, at 1574 ("Persons classified as sex offenders constitute a diverse group; apart from their legal status, these men and women have little else in common.").

tus of having committed the offense, and it also contains a judgment that this is who you are[141]—this is your lasting character.[142] It is one of the more damning characterizations that modern society offers,[143] and it is widely used in academia. And in grouping you with others in this category, the terminology asserts, implicitly, that you all share this character trait, this essence.[144] Once you are in a group like this, we have gone a long way to permitting your separate, and harsher, treatment.[145] In addition, once we recycle a term that conveys permanence we are smoothing the way to long-term or life-long "registration" and surveillance,[146] or other ways "to confine, manage, and monitor."[147] Thus, even as progressive statements may urge rethinking of some of this treatment by the state, the use of the state's

141. *See* Lester, *supra* note 133, at 108 ("There is nothing that a defendant can do to avoid receiving the label. It is automatic. There is no process. It is merely a foregone conclusion that all people convicted of a sex crime be labeled as sex offenders.").

142. *See* Megale, *supra* note 134, at 1099 (stating that with this classification "the person is punished for *being* bad; the individual is redefined and *becomes* the bad act rather than just a person who has *done* a bad act. Once redefined, the individual cannot remove this characteristic; it becomes as intrinsic as the person's sex or ethnicity. The redefinition encourages the dehumanization of individuals who commit sex offenses. Society can too easily jump to judgment considering these individuals to be bad or dangerous rather than objectively evaluating whatever individualized risk a person may present").

143. *See* Lester, *supra* note 133, at 107 ("Branding a person a sex offender is the most damning label available in modern society. No other term evokes such universal disgust.").

144. *See* Gwenda M. Willis, *Why Call Someone by What We Don't Want Them to Be? The Ethics of Labeling in Forensic/Correctional Psychology*, 24 PSYCH., CRIME & L. 727, 728 (2018) ("Beyond the stigma, disempowerment and distress that labels such as 'offender' and 'sex offender' may evoke, these labels also communicate that individuals with similar criminal convictions represent homogenous groups."); *see also* Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 456 (2010) (mentioning that "the sex offender population is far from homogenous").

145. *See* Ira Mark Ellman, *When Animus Matters and Sex Crime Underreporting Does Not: The Problematic Sex Offender Registry*, 7 U. PA. J.L. & PUB. AFFS. 1, 1 (2021) ("An astonishingly broad array of burdens are imposed today on anyone ever convicted of almost any sexual offense of any kind or seriousness, including but extending far beyond inclusion in publicized websites listing 'sex offenders.' No similar regime has ever been imposed on any other group of law-abiding former felons who have fully served the sentence for the crime they committed years earlier.").

146. *See* McLeod, *supra* note 133, at 1574 ("In seventeen states, registration is for life.").

147. Lynch, *supra* note 133, at 557; *id.* at 554 ("I think that what people have

term strengthens the foundations of that treatment. Once we categorize people as a subset of humanity, demarcated because of what is assumed to be a violative act and a violative essence, we are halfway to dehumanization. Indeed, reading the titles of recent academic publications on this topic suggests that we are more than halfway. The themes of dehumanization and disgust are evident in these examples:[148]

- *Slipping Through the Cracks and Into Schools: The Need for a Uniform Sexual-Predator Tracking System*[149]
- *The Evil That Men Do: Perverting Justice to Punish Perverts*[150]
- *Caging the Beast: Formulating Effective Evidentiary Rules to Deal with Sexual Offenders*[151]
- *"Whoever Fights Monsters Should See to It that in the Process He Does Not Become a Monster": Hunting the Sexual Predator with Silver Bullets—Federal Rules of Evidence*

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to understand is . . . that sexual offenders are different. . . . Long prison terms do not deter them. All too often, special rehabilitation programs do not cure them. No matter what we do, the minute they get back on the street, many of them resume their hunt for victims, beginning a restless and unrelenting prowl for children, innocent children to molest, abuse, and in the worst cases, to kill. So we need to do all we can to stop these predators." (quoting 142 CONG. REC. 10,312 (1996) (statement of Rep. Charles Schumer))); State v. Hilton, 862 S.E.2d 806 (N.C. 2021) (finding no constitutional violation in life-long satellite-based monitoring of Mr. Hilton); Lester, *supra* note 133, at 108 n.12 ("A sex offender typically will be subject to registration requirements, as well as employment and residence restrictions, for at least ten to fifteen years, while a second- or third-tier designation increases the registration period to twenty-five years or life.").

148. I omitted student publications, but some of their titles—which are often particularly arresting—merit reflection too. After all, it was legal academia that formed the environment in which those publications were inspired and nurtured (and presumably, in many instances, supervised). I note also that while I think it is important to give specific examples, I approach the act of doing so with hesitation and humility. I have made choices within academia—and outside it too—that I deeply regret, and I will no doubt continue to do so.

149. Shelly George, *Slipping Through the Cracks and into Schools: The Need for a Universal Sexual-Predator Tracking System*, 10 SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 117 (2008).

150. Grant H. Morris, *The Evil that Men Do: Perverting Justice to Punish Perverts*, 2000 U. ILL. L. REV. 1199 (2000).

151. Charles H. Rose, III, *Caging the Beast: Formulating Effective Evidentiary Rules to Deal with Sexual Offenders*, 34 AM. J. CRIM. L. 1 (2006).

413–415—And a Stake Through the Heart—Kansas v. Hendricks[152]

- *Juvenile Sex Offenders: Should They Go to School with Your Children or Should We Create a Pedophile Academy*[153]

"Juvenile offender" is another term that is widely used in academia, sometimes in the context of pushes for progressive reform, and that merits scrutiny. As with the other "offender" uses it suggests a coherent group, united by wrongdoing; it also suggests a category quite distinct from those whom we might think of as "children." The sense of coherence and wrongdoing is misguided: apart from anything else, in some states "juvenile offender" is the term of art for young people *accused of* certain offenses.[154] More broadly, there is room for more investigation of whether the widespread academic use of "juvenile" in place of "child" or "young person" is always warranted.[155] After all, "juvenile" is a term consciously pushed out into the world by state actors,[156] with the aim of dehumanizing,[157] and one that has been imbued with racialized meaning;[158] it is one that was recently dropped from the name of a national non-profit, on the grounds that it is subtly and wholly negative, is dehumanizing,

152. Joëlle Anne Moreno, *"Whoever Fights Monsters Should See to It that in the Process He Does Not Become a Monster": Hunting the Sexual Predator with Silver Bullets—Federal Rules of Evidence 413-415—And a Stake Through the Heart*—Kansas v. Hendricks, 49 FLA. L. REV. 505 (1997).

153. Lydia D. Johnson, *Juvenile Sex Offenders: Should They Go to School with Your Children or Should We Create a Pedophile Academy*, 50 U. TOL. L. REV. 39 (2018).

154. *See, e.g.*, *Crimes Committed by Children Between 7–18*, N.Y. CTS. (DEC. 2019), https://www.nycourts.gov/courthelp/Criminal/crimesByChildren.shtml [https://perma.cc/BP9N-CPPB] ("A child who is 13, 14, or 15-years-old and is charged with committing a serious or violent felony offense listed in Penal Law 10.00 (18), is considered a Juvenile Offender.").

155. Note that "juvenile" is not always the term of art for children in the legal system. See, for example, "child abuse," "child custody," "child labor," "child pornography," "child protective services," "child support," "child welfare," and "children's rights."

156. *See infra* notes 333–339 and accompanying text.

157. *See infra* notes 333–339 and accompanying text.

158. *See generally* Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379 (2017) (examining racialization in the juvenile justice system).

and "can be used as a racist dog whistle."[159] As will be discussed below,[160] conceptualizing young people who are facing charges as belonging to a category called "juveniles" may help facilitate their uniquely harsh treatment by lessening the concern that we might have were we talking about "children."

"Felon" is a word that, despite its powerfully stigmatizing nature, is a popular one in legal academic conversations. Like "offender," it merges conviction with commission; merges assumed commission with lasting character;[161] and essentializes in such a way that the group is presented as if it were distinct from the rest of us, had coherence as a category, and shared certain damning qualities other than the conviction.[162] For this kind of reason, Alice Ristroph urged us to say "Farewell to the Felonry,"[163] but it refuses to go away. Ristroph has described legal academic discussions endorsing the word "felon" as a meaningful label that denotes people who need to be shunned from (for example) the halls of legal academe.[164] The word appears in more

159. The National Juvenile Defender Center recently became The Gault Center: Defenders of Youth Rights. *See The Gault Center*, LINKEDIN, https://www.linkedin.com/posts/gault-center_we-are-delighted-to-announce-that-the-national-activity-6895081042806411264-DHtP [https://perma.cc/U2PY-2X4J] ("Why the name change? While not explicitly negative, the word 'juvenile' carries only negative connotations. It is used almost exclusively by the legal system, it is dehumanizing, and because of the vast racial disparities in the juvenile legal system, it can be used as a racist dog whistle. For years, we have worked to remove 'juvenile' from our vocabulary when we speak of young people and the lawyers who defend them. The language we use matters. The children involved in the juvenile legal system matter, and our language must reflect that. It was time our organization's name reflect this important change in language.").

160. *See infra* Part III.

161. *See, e.g.*, Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563, 595 (2018) ("[T]he very label 'felon' reveals a concern with the *person*, not simply a specific act, and the permanence of that label is consistent with the goal of regulation over an extended time.").

162. *See* Roberts, *Casual Ostracism*, *supra* note 109, at 622–24 (attempting to illustrate the falsity of this purported meaning and coherence).

163. Ristroph, *supra* note 161, at 565 (noting that "[i]n American law, the designations *felon* and *felony* carry great significance, and authorize substantially disparate treatment").

164. Ass'n of Am. L. Schs., *Webinar Replay: Rethinking Criminal Law Language*, YOUTUBE (Jan. 19, 2022), https://www.youtube.com/watch?v=aaJQehrueDs (describing hiring discussions at an unnamed law school, during which "we cannot have a *felon* on our faculty" was used as a conversation-ender regarding a candidate); *id.* (describing "a strong kind of insurmountable sense that to be a 'felon' said something about the character of the person who had that label and disqualified them from the law school faculty").

benevolent contexts also: all sorts of progressive scholarly discussions about the need to lessen "felon disenfranchisement" or "the exclusion of felons" from the jury risk reinforcing this category as a meaningful one and this word as an apt one,[165] even while pushing for change.

"Flight" is a word that commonly appears in academic discussions of "flight risk" and of how that risk should be handled. Lauryn Gouldin has dissected its implicit messaging.[166] She explains that academics often use "flight" to refer to non-appearance in court[167] and points out the possibility that missed court

165. *See* Margaret Colgate Love, *What's in a Name? A Lot, When the Name is "Felon,"* CRIME REP., https://thecrimereport.org/2012/03/13/2012-03-whats-in-a-name-a-lot-when-the-name-is-felon [https://perma.cc/4K78-WJUB] ("[L]abeling people as 'felons' is . . . fundamentally at war with efforts to reduce the number of people in prison [and] to facilitate reentry. . . ."); *see also id.* ("Social liberals and fiscal conservatives alike pay lip service to the supposed American ideal of second chances. But our language, like our law, points in the opposite direction."); Elderbroom et al., *supra* note 68, at 36 ("[R]eporters and journalists who aim to shine a light on injustice or expose abuses of power minimize the impact of their critiques when they describe the subjects of their stories using the same harmful language as the system that is oppressing them. Their language choices are in effect reinforcing false and dangerous stereotypes, and validating the very system that seeks to strip away freedom and humanity.").

166. Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677 (2018) [hereinafter Gouldin, *Defining Flight Risk*] (discussing the nuances behind "flight risk" and how it can be better understood); Lauryn P. Gouldin, *The Language of Criminal Justice Reform: Reflections on Karakatsanis's* Usual Cruelty, 55 NEW ENG. L. REV. 1, 10 (2020) [hereinafter Gouldin, *The Language*] ("As Alice Ristroph explains, however, the term 'felon' still suggests serious wrongdoing to listeners, in ways that lead listeners to overestimate a person's culpability for past misconduct or risk of future harm. The same can be said of common references to 'flight risk' or to 'dangerousness.'") (citing Ristroph, *supra* note 161, at 567–69)).

167. Gouldin, *Defining Flight Risk*, *supra* note 166, at 682–83 ("Scholars, judges, and legislative drafters often use flight and nonappearance interchangeably. But these terms are not coextensive. Flight risk is properly assigned to defendants who are expected to flee a jurisdiction. This is a small, and arguably shrinking, subcategory of a much larger group of defendants who pose risks of nonappearance."); *id.* at 687–88 ("Empirical studies of nonappearance introduce still more inconsistent terminologies, including, for example, frequent references to 'fugitives.' Sometimes, the term 'fugitive' is used, in keeping perhaps with more colloquial understandings, to identify an individual who has left the jurisdiction. At other times, being a fugitive is not contingent on any spatial or geographical movement. Instead, it turns on the passage of time: for instance, a fugitive may be someone who has failed to appear for more than one year.").

dates may be the product of, for example, inadvertence, or financial or other obstacles to getting to court.[168] This kind of phenomenon is erased by a term that risks conveying deviousness, defiance, and guilt.

Finally, there are a variety of ostensibly benevolent terms whose implicit messaging may serve to reinforce the status quo and ward off radical reform. "Redemption," for example, has become a popular way of describing a good, or perhaps even a right, that should be available to some or all of those coming back from a crime, conviction, or prison sentence.[169] To be redeemed, however, means that one has sinned,[170] and thus the word risks reinforcing sin-based notions of the meaning of conviction and obscuring questions about whether a conviction (even if it is assumed to correspond to guilt) corresponds to sin.[171] "Rehabilitation" is introduced to first-year law students as one of the theories justifying punishment and may well seem to be the most benign of the group.[172] For sure, many professors teach and write about these theories from a critical perspective,[173] but if voiced in an uncomplicated way, calls for rehabilitation reinforce the notion that conviction conveys not just guilt, but a defect that the state is justified in trying to fix.[174] Michael Pinard has raised

168. *See id.* at 691–92 ("Without more information about the front-end processes for generating bench warrants or the back-end processes for resolving them, warrant backlog data provide little in the way of illumination about whether nonappearance is the problem or the product of other problems, such as overcriminalization, the poverty of arrestees, or the difficulty of navigating the cumbersome pretrial process. The problems with existing data reinforce this Article's central claim: putting all types of nonappearance and all bench warrants in the same bucket muddies these waters, making solutions harder to find and potentially obscuring the government's contribution to the problem.").

169. *See, e.g.*, Terrell Carter, Rachel López, & Kempis Songster, *Redeeming Justice*, 116 NW. U. L. REV. 315, 318 (2021) (arguing for a "right to redemption").

170. *See* Michael Pinard, *Race Decriminalization and Criminal Legal System Reform*, 95 N.Y.U. L. REV. ONLINE 119, 132 (2020).

171. *See* Roberts, *supra* note 84, at 2538 (discussing the many layers of power, injustice, and vulnerability that precede punishment).

172. *See* Ristroph, *supra* note 4, at 1660 ("In most casebooks, four broad justificatory theories—retribution, deterrence, incapacitation, and rehabilitation—are duly presented as possible rationales for all the doctrines that will follow.").

173. *See, e.g.*, *No. 2: Criminal Law*, *supra* note 13 (recommending, for example, that one should put the idea that "criminal law is a tool of social control" in conversation with the theories of punishment "as a way to complicate the narrative around the possible purposes of criminal law").

174. *See* Roberts, *supra* note 84, at 2538.

interesting related questions about the word "reentry," which is commonly invoked in progressive arguments that more should be done to help those leaving prison to "reenter society."[175] He suggests that this reinforcement of the notion that prison is *not* society helps convey that those in prison are separate from "us" and are not circulating in the realm of the fully social or indeed fully human[176]—a notion that one can detect elsewhere,[177] in the erasure of people confined in jails and prisons from maps,[178] from hurricane evacuation plans,[179] and from vaccination schedules.[180]

C. BENDING TOWARD JUSTICE

Where an entity (like our criminal system) has inspired widespread, vociferous, and well-supported excoriation, one important form of bolstering is terminology that points to good intentions and better futures. Some of our common vocabulary items portray a system that is generally well-meaning and that, despite its struggles, is redeemable.

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175. *See* Ass'n of Am. L. Schs.*, supra* note 164 (including a conversation with Michael Pinard regarding his thoughts on re-entry).

176. *See id.* ("[W]e live in the same society as individuals who are incarcerated. They're removed from their communities, but they're not removed from society. I think that's a phrase that's used in ways that separate us from individuals who are caged . . . that banishes them in every conceivable way and, similarly, that again absolves systems, institutions, and us . . . .").

177. *See* Sharon Dolovich, *Teaching Prison Law*, 62 J. LEGAL EDUC. 218, 230 (2012) (explaining that, through curricular gaps, "most law schools only reinforce the invisibility of the vast shadow system of carceral institutions in which millions of Americans are currently locked away").

178. *See* Liz Ševčenko, *Remembering the Age of Mass Incarceration*, 12 MUSEUMS & SOC. ISSUES 3, 4 (2017) ("The carceral state was sustained by widespread societal denial of the scope and implications of mass incarceration. In New York City, Rikers Island Jail is part of a daily commute for thousands of visiting families and corrections workers; yet as students at The New School found, for much of the city's history the jail is unmarked on subway maps . . . ."); KARAKATSANIS, *supra* note 72, at 10 ("[T]he success of the punishment system depends on erasing people and their stories . . . .").

179. *See* Alyssa Rinaldi, *Why Was Rikers Island Left Out of the Evacuation Plan for Hurricane Sandy?*, N.Y.U. LOCAL (Nov. 5, 2012), https://nyulocal.com/why-was-rikers-island-left-out-of-the-evacuation-plan-for-hurricane-sandy-146a9e162c4b [https://perma.cc/VM72-CGUL].

180. *See* Troy Closson, *The High-Risk Group Left Out of New York's Vaccine Rollout*, N.Y. TIMES (Jan. 26, 2021), https://www.nytimes.com/2021/01/26/nyregion/new-york-vaccine-prisons.html [https://perma.cc/R373-7L4V] (referring to the 50,000 people incarcerated in the state's prisons and jails).

A striking example is the rapid spread of the phrases "progressive prosecution" and "progressive prosecutor." The prospect of using these phrases to refer to types of prosecution and prosecutors in this country implicates big questions, such as whether "progressive" is being used in a relative sense (that is, more progressive than usual) or in an absolute sense (intrinsically progressive), and, if the latter, what the threshold is, and whether any conceivable threshold could be cleared in the system as currently configured. After all, among other problems, the criminal apparatus has "historical ties to slavery and . . . continue[s to] perpetuat[e] . . . race- and class-based oppression."[181]

Some scholars have asked these and other important questions. Some, for example, have objected to the implied premise that progressive prosecution exists as a practice,[182] or is even possible.[183] One or two have identified the uncertainty about

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181. Clair & Woog, *supra* note 106, at 26; *see also* Note, *The Paradox of "Progressive Prosecution*,*"* 132 HARV. L. REV. 748, 759 (2018) ("Reforms should disrupt the power imbalance between the prosecutors and the prosecuted because a criminal legal system that operates as a racial caste system is illegitimate."); Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7, 33 (2021) (voicing concern about professors hoping that their students will become criminal law practitioners, given that "the criminal system over-incarcerates such that 1 in 3 Americans now has an arrest record, criminalizes poverty, and polices along lines of race and fosters unequal citizenship rather than equal citizenship").

182. *See* KARAKATSANIS, *supra* note 72, at 87 ("None of them have stopped prosecuting children as adults. None of them have sought to eliminate fines and fees for the indigent. None of them have opened a systemic civil rights investigation into the brutality, neglect, and crimes against confined people that are rampant in their local jails . . . ."); *see also id.* at 88 ("[T]hey inflict brutal punishment under torturous conditions on a cohort that is disproportionately poor, black, and brown.").

183. *See* Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. L. 411, 412 (2019) (noting that prosecutors are "still implicated in the caging of America"); *see also* Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 817 (2020) ("Given the inherent power imbalances, racial biases, and other inequities intentionally established as part of the criminal legal system, I believe it to be impossible to be a progressive prosecutor."); PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 115 (2009) ("Progressives who become prosecutors have signed up with the wrong team."); KARAKATSANIS, *supra* note 72, at 92 ("Prosecutors are political actors responding to incentives and, like most of the country, they have been socialized in mass human caging. If left on their own, they will largely preserve mass human caging, if only because none of them have the power to dismantle such a mammoth system if they wanted to . . . .").

whether it is to be understood in a relative sense.[184] A couple have noted that it is far from clear what the category would encompass.[185] Some have pointed out that those to whom the label is attached are doing or promising things that, far from sounding progressive,[186] are at best long overdue and kind of basic.[187] And thus some persist in keeping the phrase firmly in quotation marks, a notion to be studied (or rejected) rather than a practice being embodied.[188]

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184. *See, e.g.*, Andrew Crespo (@AndrewMCrespo), TWITTER (Aug. 11, 2020), https://twitter.com/AndrewMCrespo/status/1293382896829554689?s=20 [https://perma.cc/NU7E-RBPP] ("I agree that there is a comparative way to use the term 'progressive prosecutor.' (Although I think the phrase is typically deployed as a binary, as in 'X *is* a PP' rather than 'X is a *more* PP than Y.')").

185. *See, e.g.,* Steven Zeidman, *Public Defenders as Prosecutors: Unanswered Questions*, GOTHAM GAZETTE (June 20, 2019), https://www.gothamgazette.com/letters/130-opinion/8607-public-defenders-as-prosecutors-unanswered-questions [https://perma.cc/BLS3-6NMB] (stating that "exactly what it means to be a progressive prosecutor is far from clear").

186. *See id.* ("[P]rosecution will be kinder, gentler, and more attuned to race and poverty, but thousands and thousands of people will still be prosecuted, and many of them will end up enduring the brutality, despair, and violence of years lived in prison cells. The progressive prosecutor won't ask for money bail very often, or maybe not at all, but will ask that any number of people be held without bail or subject to all kinds of surveillance and restraints on their liberty. The progressive prosecutor won't seek incarceration except as necessary, or even only as a last resort, but will find that last resort with respect to thousands of people. The progressive prosecutor won't ask for the maximum sentence all the time, and maybe only in some cases, but will still often ask for jail or prison sentences."); *see also* Rachel E. Barkow, *Can Prosecutors End Mass Incarceration*?, 119 MICH. L. REV. 1365, 1372–73 (2021) (reviewing EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019)) (noting that "the label progressive can be misleading").

187. *See* Francesca Laguardia, *From the Legal Literature: Is Progressive Prosecution Possible?*, 57 CRIM. L. BULL. 632, 633–34 (2021) ("[P]rogressive prosecutors should be attentive to racial disparities in the system, including in charging, sentencing recommendations, jury selection, and office culture."); *see also* Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1427 (2021) (mentioning, for example, "constitutional compliance").

188. *See, e.g.*, Rachel Foran, Mariame Kaba, & Katy Naples-Mitchell, *Abolitionist Principles for Prosecutor Organizing: Origins and Next Steps*, 16 STAN. J. C.R. & C.L. 496, 498–99 (2021) (laying out the authors' three reasons for maintaining the quotation marks around "progressive prosecution": that there is "no generally accepted definition," that the mantle may be claimed "without consistent adherence to any specific set of policies, practices, or goals," and that prosecution is a "systemic component of the criminal punishment system, a death-making system of racialized social control").

Generally, however, the quotation marks dropped quickly, and the concept became an entity.[189] In a two-year period, several law schools hosted events discussing not whether "progressive prosecution" is possible, but who is doing it, how it is being done, and how to do it better.[190] Scholarly articles engage with this as a meaningful concept, and they sometimes go further, mentioning a "wave of progressive prosecutors,"[191] and the dawning of "the age of progressive prosecution."[192]

While these various reasons exist for concern about the term's viral spread,[193] one can also understand some of the allure. If the system is indeed a misguided and destructive one, and if prosecutors have perhaps the greatest role in perpetuating

189. *See* Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 739–40 (2020) (offering details on the recent rise of the term).

190. *See Progressive Prosecution and the Carceral State*, AM. CONST. SOC'Y (Feb. 7, 2020), https://www.acslaw.org/event/progressive-prosecution-and-the-carceral-state [https://perma.cc/Y8BA-ZSTJ] (notifying members that U.C. Hastings Law School hosted a symposium on "progressive prosecutors"); *see also 21st Century Prosecutors: What Does It Mean for Prosecutors to Be Progressive?,* AM. CONST. SOC'Y (Oct. 17, 2019), https://www.acslaw.org/event/21st-century-prosecutors-what-does-it-mean-for-prosecutors-to-be-progressive [https://perma.cc/4KDP-Q4G3] (announcing an informational panel on "progressive prosecutors" at Northwestern University Law School); *2020 Symposium*, J. CRIM. L. & CRIMINOLOGY, https://jclc.law.northwestern.edu/progressive-prosecution-legal-empirical-and-theoretical-perspectives [https://perma.cc/Y49U-Q3QZ] (announcing the symposium titled "Progressive Prosecution: Legal, Empirical, and Theoretical Perspectives"); *21st Century Prosecutors: What Does It Mean for Prosecutors to Be Progressive?*, YALE L. SCH. (Oct. 24, 2019), https://law.yale.edu/yls-today/yale-law-school-events/21st-century-prosecutors-what-does-it-mean-prosecutors-be-progressive [https://perma.cc/WC6B-2C8B] (announcing a panel featuring four elected "progressive" District Attorneys and a representative from Fair and Just Prosecution at Yale Law School).

191. *See, e.g.,* Judith L. Ritter, *Making a Case for No Case: Judicial Oversight of Prosecutorial Choices—From* In Re *Michael Flynn to Progressive Prosecutors*, 26 BERKELEY J. CRIM. L. 31, 39 (2021) ("The recent wave of progressive prosecutors does not present identical ideologies or implementation strategies.").

192. *See, e.g.*, Elizabeth Webster, *Postconviction Innocence Review in the Age of Progressive Prosecution*, 83 ALB. L. REV. 989, 989 (2019).

193. *See, e.g.*, Gouldin, *The Language*, *supra* note 166, at 13 ("Lawyers' failures to investigate, challenge, and correct the defects in conventional rule-of-law narratives are, perhaps, especially surprising because lawyers are trained to be language experts. The study of the law is, in many ways, a study of words and how to parse key passages.").

it,[194] and if prosecutors were, are, and will be trained at our institutions *by us*, perhaps the most seductive form of bolstering is terminology that communicates the message that prosecution can move and is moving in a redemptive direction.[195]

"Lenient" is another common term in academia that bolsters the criminal apparatus by suggesting the state's benevolence.[196] It is commonly found as a description of a state act—whether during policing, bail determinations, plea bargaining, sentencing, or elsewhere—that is less harsh than it could be. One could argue—as with "progressive"—that it is to be understood in a relative sense.[197] But unless that understanding is made explicit, there is no reason to favor it over an absolutist interpretation.[198] Moreover, academics adept in linguistic precision could make that meaning explicit by using the word "relative(ly)," as is sometimes done.[199] Absent such clarification, the word hints at a benevolent state, contemplating a (guilty) offender, and allowing its core tenderness to extend an act of grace.[200] In a nation with exceptionally harsh sentencing, grave racial and economic disparities, vile jail and prison conditions, and an overwhelmed system infused by arbitrariness, bias, and bargaining, slapped

194. *See* Laguardia, *supra* note 187, at 635 ("Progressive prosecutors appeared in response to popular and academic criticism of mass incarceration and the criminal justice system . . . . The standard argument is that the power of the prosecutor is virtually limitless, and singularly responsible for mass incarceration in the United States.") (footnotes omitted).

195. *See* Amanda Jack (@brooklynPD), TWITTER (Jan. 2, 2022), https://twitter.com/brooklynPD/status/1477803546984816641 [https://perma.cc/7SM6-GFE6] ("Progressive prosecutors are nothing more than a term of art we have created to make ourselves feel better about locking away our neighbors in cages.").

196. *See, e.g.*, Fan, *supra* note 102, at 168–69 ("The policing literature is filled with concerns and cautions regarding police discretion, including the discretion to be lenient."); *see also* KADISH ET AL., *supra* note 95, at 82 ("In some courts, there are no explicit negotiations at all, but most defendants plead guilty nonetheless, usually in the expectation that their plea will win them some leniency from the sentencing judge.").

197. *See supra* note 184 and accompanying text (discussing possibility of interpreting "progressive prosecutor" in a relative sense).

198. One can also respond with the need to keep an eye on one's baseline. *See* Roberts, *supra* note 103, at 102 ("Care should be taken to make sure that an embrace of developments that improve upon the baseline doesn't spill over into acceptance—or even endorsement—of the baseline.").

199. *See, e.g.*, Stephanie Holmes Didwania, *Gender Favoritism Among Criminal Prosecutors*, 65 J.L. & ECON. 77, 78 (2022) (referring to "relative leniency").

200. *See* M. Eve Hanan, Terror and Tenderness (unpublished manuscript on file with the author).

on top of widespread state failures to ensure adequate safety, housing, education, mental and physical health services, addiction services, and so on, there is at least a question about whether it is supportable to point to a state act other than the harshest one and call it "lenience."

This bolstering of the system has all sorts of problematic dimensions. One involves concerns about a lack of academic independence. Another is the risk that this kind of vocabulary plays a role in obscuring the reality of the system. This happens in other ways too: glimpses of what happens behind the prison walls are tightly regulated,[201] and stereotypes, assumptions, myths, and jokes swirl around them to confuse and placate us.[202] Vocabulary also distracts us from, or distorts, the potential that other approaches offer,[203] whether abolitionism or other forms of societal change.[204] Thus, each of these types of messaging may serve to silence radical responses. They raise specters of there being too much to lose—both the system's current procedures and its future potential—and too many risks and threats currently held at bay.

III. HOW TO PROCEED?

Part II laid out three categories of terms that implicitly bolster the criminal system by portraying it as one that deals with guilty people (not just legally guilty, but morally, and found so

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201. *See* Nicole B. Godfrey, *Creating Cautionary Tales: Institutional, Judicial, and Societal Indifference to the Lives of Incarcerated Individuals*, 74 ARK. L. REV. 365, 417 (2021) ("Mainstream American society has little understanding of what goes on inside American prison walls due to the prison system's lack of transparency. While the United States incarcerates nearly 2.2 million people, 'the indignities suffered each day by the human beings living in American prisons and jails occur largely out of sight from the general public.'") (footnotes omitted).

202. *See* M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185, 1187 (2020) ("[P]opular culture demonstrates an obsession with prison stories. Whether fancifully, such as television shows set in prison, or seriously, such as journalistic reports of prison conditions, impressions of what prison is like are available at our digital fingertips.") (footnotes omitted).

203. *See* Foran et al., *supra* note 188, at 519 ("Prosecution is a systemic and structural component of the criminal punishment system. Discussions of 'good,' 'bad,' 'progressive,' or 'regressive' prosecutors keep the focus on individuals and are a distraction that impedes the need for structural and systemic change.").

204. *See* Susan A. Bandes, *What Are Victim Impact Statements For?*, 87 BROOK. L. REV. 1253, 1275 (2022) ("[O]ne of the functions of naming and ostracizing a monster is to avoid examining the conditions that allow monstrous behavior to flourish.").

through factfinding in court); that deals with inherently bad and dangerous people, separate and different from the rest of us, separate from society, and in need of state intervention and constraint; and that is well-intentioned and tending toward justice with progressive leaders at its helm.

Perhaps these terms help make the apparatus palatable, at least for some.[205] But in doing so, they sacrifice honesty and accuracy, evade conventions relating to sourcing and support, silently answer important questions, and ward off needed critiques. Thus, this final Part will start by considering the possibilities that language change might bring, both possibilities within academia and those that ripple out into the broader world. These terms cover so many core components of the existing system and are so widely used that it is intriguing to explore possibilities that might be unlocked were we to disrupt these terms. On the other hand, this contravention of norms and this pervasiveness hint at motivating forces and structures that might outlast and outpace language change alone. Thus, this Part ends by considering the potential limits of language change and some of its needed corollaries.

A. CONSIDERING CHANGE

Even if we think only about our impact in academic and classroom conversations, there are reasons to consider change. In describing the benefits of adjusting the criminal law curriculum, Ristroph has highlighted the values of accuracy and honesty,[206] and those apply here. Ristroph's warnings about the risk of law professors silently reinforcing highly problematic racialized assumptions also have a corollary here. Her focus is the lack of explanation of mass incarceration found in the typical criminal law casebook and the risk that this reinforces assumptions of Black criminality.[207] One can find analogous risks here, namely implicit messages that convictions (and indeed arrests) correspond to guilt, and guilt to badness and danger, to lack of humanity, and to the appropriateness of exile. (So too, implicit messages that overseeing this kind of system can be done in a

205. *See supra* note 35 and accompanying text (stating what makes the system "palatable" for some).

206. *See supra* notes 31–32 (highlighting inaccuracy and dishonesty of the pedagogical status quo).

207. *See supra* note 51 and accompanying text ("The failure of these casebooks to explore the role of discretion and bias risks enforcing assumptions of Black criminality.").

progressive fashion.) In a criminal system where governmental acts, and indeed jury decision-making, commonly involve racial disparity, this messaging is problematic.[208]

We also need to think about the variety of ways in which our language choices might affect lives beyond the classroom. As Ristroph points out, academics affect each other's thinking about the system, and frame for each other the points of contention.[209] In addition, we enter the public forum in a variety of ways, in our litigation, policy advocacy, training, public engagement, and so on. An abundant literature explores the potential of language choices to affect thought and attitudes;[210] as mentioned above, FWD.us has produced data relating to such effects in the domain of criminal system vocabulary.[211] And as Ristroph and Ossei-Owusu point out, we should not forget that every day we are framing the system and shaping the terms of debate for our students and that every year those students are leaving us and constituting core components of the criminal system, as judges, prosecutors, defense attorneys, legislators, policy analysts, and so on.[212]

This Section thus engages in broad imaginings of the potential of a shift in terms to enliven debates in the scholarly realm, and, through our various forms of public influence, to provoke

208. *See* Roberts, *supra* note 103, at 98 (pointing out the racialized risk of equating arrests to guilt); *see also* Roberts, *supra* note 84, at 2509 ("[A]ssumptions that convictions connote crime commission—and that a lack of convictions bespeaks innocence—are neither race-neutral nor class-neutral.").

209. *See supra* note 47 and accompanying text ("Casebooks have influence on students and on the thinking and teaching of professors.").

210. *See* Gouldin, *The Language*, *supra* note 166, at 8 ("The words we use to frame criminal justice reform conversations are important and impactful. Those labels shape how community members, voters, or system actors perceive the way that our system works, the victimization it is supposed to remedy or prevent, and the harms it inflicts.") (footnote omitted); *see also id.* at 14 ("[T]he words we use to describe legal systems drive our collective perceptions of the fairness of those systems.").

211. *See supra* note 68 and accompanying text.

212. *See* Ristroph, *supra* note 4, at 1705 n.356 ("[W]e must make our contribution, if any, in the preparation of new criminal law mentalities." (quoting Jonathan Simon, *Teaching Criminal Law in an Era of Governing Through Crime*, 48 ST. LOUIS U. L.J. 1313, 1335 (2004))); *see also* Ossei-Owusu, *supra* note 4, at 414 (arguing "that law schools are key sites for the reproduction of our penal status quo, yet are relatively ignored in criminal justice scholarship").

new questions, attitudes, and perhaps practices.[213] It revisits the three kinds of message described in Part II and explores some of the ways in which challenging them might have effects in three contexts: the pre-adjudication landscape, the post-conviction landscape, and the envisioning of radical new possibilities.

1. Changing the Pre-Adjudication Landscape

Legally, the portion of a criminal case that precedes conviction is crucially distinct from the portion that follows conviction. Pre-conviction, one has the status of legal innocence, and, even while subject to the consequences of arrest or charge,[214] one still holds the possibility of being able to ward off conviction and the slew of consequences that follow therefrom.[215]

Yet, as described above, many of our common terms collapse this distinction, implicitly assigning to the person facing charges qualities such as guilt, badness, threat, deviousness, and lack of full humanity.[216] Conditions that might potentially inspire our empathy—childhood, innocence, and economic precarity—are frequently obscured.[217]

So too, many of our common practices collapse this distinction.[218] Our systems of bail and pre-trial detention lead to the jailing of hundreds of thousands of people based on criminal charges.[219] Money frequently makes the difference between freedom and jail, and the imposition of bail has been identified as

213. *See* Rafi Reznik, *Taking a Break from Self-Defense*, 32 S. CAL. INTERDISC. L.J. 19, 31 (mentioning the possibility that avoiding the term "criminal justice system" might "provoke questions and catalyze change").

214. *See* Roberts, *Arrests as Guilt*, *supra* note 75, at 997–98 (discussing consequences of arrest).

215. *See* Mason, *supra* note 67 ("The American Bar Association has documented more than 46,000 collateral consequences of criminal convictions, penalties such as disenfranchisement and employment prohibitions that follow individuals long after their release.").

216. *See supra* Part II.

217. *See supra* Part II.

218. *See* Clair & Woog, *supra* note 106, at 19 ("While awaiting trial, various restrictions on liberty can be attached to a defendant through their bail conditions. Pretrial incarceration, GPS monitoring, mandatory drug testing, and stay-away orders severely constrain the freedom of people charged with crimes despite their formal designation as presumed innocent under the law.").

219. *See Pretrial Detention*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/research/pretrial_detention [https://perma.cc/9TUW-YL7P] ("More than 400,000 people in the U.S. are currently being detained pretrial . . . .").

the relevant adjudicative moment for many.[220] Jail poses irremediable harm, intensified by the horror of our jail conditions. The prospect of further confinement and all that it destroys helps bring about guilty pleas,[221] often without the participation of defense attorneys and thus without even the façade of an adversarial process.[222] Even absent jailing, in advance of adjudication, routine judicial orders may lead to separation from one's children and other family members and exclusion from one's home.[223] Reforms are proposed and attempted, but are often incomplete and subject to reversal.[224]

One form of resistance to these practices is rigor in choosing terms that reject rather than indulge this collapse. If as academics we decry these bail and pre-detention practices, and this pressure absent adjudication to confess one's guilt, if we decry jail conditions and the pre-adjudication blindness to humanity and human bonds, we have an opportunity to examine our language to make sure its message is not inconsistent or even facilitative.

Thus, we can review our use of legal terms that may, as described in Part II.A, implicitly convey guilt pre-conviction: "offender" and "victim," for example. Avoiding terms such as "offender" might help facilitate debate about all the ways in which

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

221. *See* Roberts, *supra* note 84, at 2517 ("A guilty plea can often shorten the duration of one's confinement and thus can offer the prospect of not just liberty but all that liberty can permit: life with loved ones and other potential ingredients of a sustainable life.") (footnotes omitted).

222. *See id.*

223. *See, e.g.*, *In a Legal First, NY State Appeals Court Mandates Review of Problematic Orders of Protection,* THE BRONX DEFS. (June 24, 2021), https://www.bronxdefenders.org/in-a-legal-first-ny-state-appeals-court-mandates-review-of-problematic-orders-of-protection [https://perma.cc/94QQ-TVQ2] (discussing the story of Shamika Crawford, who was homeless and separated from her children for three months because of an order of protection for a case that was later dismissed).

224. *See, e.g.*, Jamiles Lartey, *New York Rolled Back Bail Reform. What Will the Rest of the Country Do?*, MARSHALL PROJECT (Apr. 23, 2020), https://www.themarshallproject.org/2020/04/23/in-new-york-s-bail-reform-backlash-a-cautionary-tale-for-other-states [https://perma.cc/2FW3-2KHZ] ("In 2019, the New York legislature passed one of the most progressive bail-reform packages in the United States, abolishing bail for many misdemeanors and nonviolent crimes. . . . Prominent politicians, including Gov. Andrew Cuomo and Mayor Bill de Blasio, backed a new bill to roll back many of the changes, which passed April 3.").

our practices appear inconsistent with legal innocence[225]: the jailing,[226] shackling,[227] trauma,[228] danger,[229] pressure to plead guilty,[230] and resource starvation or total deprivation of defense counsel,[231] for example.[232] Shifting away from terms like this,

225. *See* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 973 (1985) ("Preventive detention denies free will or choice and rests on a deterministic, wicked person theory of crime. The accused become 'criminals,' and as such, they may be removed from society for society's protection. The transformation of human beings into criminals justifies incarcerating them whether or not they have been formally found guilty of an offense.") (footnotes omitted); *see also id.* at 973 n.184 ("For example, the President's Task Force characterizes the [E]ighth [A]mendment right to bail as a mere 'interest' in remaining free. The transformation of a constitutional right into an interest may be justified because constitutional rights only attach to 'us.' Since the accused is seen as a 'criminal,' not as a human being, it is relatively easy to treat him differently. Negative labels have long served the purpose of justifying atrocities against each other.") (citation omitted); Bryant, *supra* note 60 ("Throughout history and across the world, dehumanizing language has facilitated the systemic, inhumane treatment of groups of people. This is certainly the case for people impacted by the U.S. criminal legal and immigration systems, and that's why it's so important to use language that actively asserts humanity.").

226. *See The Civil Rights Implications of Cash Bail*, U.S. COMM'N ON C.R. 2 (Jan. 2022), https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf [https://perma.cc/M9GW-KYHC] (reporting that the number of people held in pretrial detention "is particularly striking considering our criminal system is founded on a presumption of innocence").

227. *See* Amber Baylor, *Beyond the Visiting Room: A Defense Counsel Challenge to Conditions in Pretrial Confinement*, 14 CARDOZO PUB. L., POL'Y & ETHICS J. 1, 28 (2015) ("If lawyers resorted to calling clients to court to speak with them, individuals were required to get up and be transported predawn to the courthouse where they would spend the day in handcuffs just to meet with their attorney.").

228. *See id.* at 15–17 (discussing the trauma of spending time in jail).

229. *See id.* at 15 ("Potential abuse is a perpetual threat during the duration of one's time in jail.").

230. *See* Roberts, *Arrests as Guilt*, *supra* note 75, at 1014 n.191 (noting conditions contributing to the pressure to plead guilty).

231. *See id.* at 1023–24 ("[I]f factual guilt is viewed as something established by arrest, then many or all of the functions of defense counsel may be seen as a waste of money. Who wants to support those who are trying to get people off on a technicality? Who wants to fund smoke and mirrors?") (footnotes omitted).

232. *See* Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1997 n.189 (2019) ("[C]riminal law exceptionalism sees guilt as prior to process, both temporally and normatively. It tells us that there is a truth of the matter about a defendant's guilt before any investigative or adjudicative procedures have taken place, and it envisions the function of procedure as simply the sorting of the already-guilty from the innocent. One implication of this view is that seeming violations of procedural protections may be recharacterized as non-violations if they do not disturb this sorting function.").

that make of a criminal charge a civilian's act, might enable more scrutiny of arrest and charge as governmental acts, carried out in racially and economically disparate ways.[233] Depending on context, one could refer to, for example, people who have been arrested or charged. Avoiding terms such as "victim," when referring to those who hold the legal status of complainant, might help raise new questions about the appropriateness of "victims'" rights and protections that derogate from the rights and protections of the person accused.[234] And indeed, examination of those questions might lead to the conclusion that the conflicting demands within the criminal system—protection for those claiming harm and protection for those alleged to have harmed—reveal the defunctness of the criminal system as a forum for adjudicating claims of harm.[235]

We can also review our use of terms that may, as described in Part II.B, implicitly strip away humanity pre-conviction: "juvenile" and "flight," for example. "Juvenile" tends to refer either to a young animal or to a young person exposed to allegations of law breaking.[236] There is little semantic room in there for the human child as child, and it might be that in our discussions we want to create such room.[237] Being reminded of childhood might

233. *See* Ristroph, *supra* note 4, at 1671 ("When we obscure law's human agents, we may also obscure their flaws and limitations, or patterns of bias in their actual decisions."); *see also* Alice Ristroph, *The Second Amendment in a Carceral State*, 116 NW. U. L. REV. 203, 213 (2021) ("The naturalized conception of criminality has long been racialized.").

234. *See, e.g.*, Roberts, *Victims, Right?*, *supra* note 75, at 1457–64 (describing the rapid spread of "Marsy's Law" constitutional amendments, each guaranteeing "victims' rights" both pre- and post-adjudication); *see also id.* at 1456 ("[T]he more we become accustomed to thinking of complainants as victims, the more natural it may seem to guarantee them rights.") (footnote omitted); MO. REV. STAT. § 595.209 (2016) (declaring that the state's policy is that "the victim's rights are paramount to the defendant's rights"); Small, *supra* note 113, at 137 ("[P]opulation management in the postindustrial state occurs through criminal rhetoric—people are either victims, perpetrators, or protectors . . . .").

235. *See infra* note 323 and accompanying text (stating how use of the term "victim" "help[s] to illustrate the defunct nature of our system").

236. *See, e.g.*, *Juvenile Justice Glossary*, THE COAL. FOR JUV. JUST., https://www.juvjustice.org/sites/default/files/ckfinder/files/juvenile-justice-glossary.pdf [https://perma.cc/LG66-VL2B] (defining "juvenile" as "[y]outh at or below the upper age of original juvenile court jurisdiction").

237. *See* Ass'n of Am. L. Schs., *supra* note 164 ("For a DA transition team, we changed the name of a subcommittee from 'juvenile justice' to 'youth and emerging adults' both to get rid of the word justice but even more to open the door to increasing different treatment of young people beyond age eighteen, more consonant with the brain science.").

reinvigorate debates about the things done to young people in this country: the shackling,[238] jailing,[239] trauma,[240] danger,[241] registration,[242] invasions of bodily integrity,[243] and racially disparate treatment.[244] So too, we might want to ensure that our language describing absence from court leaves room for eventualities other than "flight," such as poverty and other forms of precarity. Doing so might inspire useful conversations about the ways in which courtroom process—and indeed much of the criminal system—ignores poverty and other realities of precarious lives.[245] Finally, language that reminds us of the humanity of those facing charges might spur more interest in their participation in the fundamentally human act of communication. Scholars have described the multi-faceted silencing of those charged with crimes[246] and the failure to make courtroom procedures

238. *See* KARAKATSANIS, *supra* note 72, at 7–8 (mentioning the shackling of eight-year-old children in D.C. courtrooms).

239. *See* Sara S. Hildebrand, *Reviving the Presumption of Youth Innocence Through a Presumption of Release: A Legislative Framework for Abolition of Juvenile Pretrial Detention*, 125 PENN ST. L. REV. 695, 709 (2021) ("The harms caused by jailing youth pretrial are not circumscribed to the duration of detention—they are far-reaching and touch nearly every aspect of life.").

240. *See id.* at 724 ("Worse, though . . . subjecting youth to pretrial detention puts them in danger of physical and emotional trauma and undermines the likelihood that they will attain normal, healthy development.").

241. *See id*. at 699 (noting the "dangers of detention").

242. *See* McLeod, *supra* note 133, at 1577 ("Many states require lengthy periods of registration with periodical registration, even for offenses committed by juveniles.").

243. *See, e.g.*, Kevin Lapp, *As Though They Were Not Children: DNA Collection from Juveniles*, 89 TUL. L. REV. 435, 439 (2014) ("The few courts that have addressed DNA collection from juveniles have not considered age to be a factor that matters. Even in the context of compulsory collection following a delinquency adjudication in juvenile court, courts find compulsory DNA collection reasonable. Indeed, courts have asserted that DNA databasing of juveniles advances the goals of the juvenile court . . . .").

244. *See* Hildebrand, *supra* note 239, at 698–99 (explaining how juvenile risk assessment instruments contribute to racially disparate outcomes because "the risk scores of youth of color are inflated in relation to their actual risk level").

245. *See, e.g.*, Roberts*, Casual Ostracism, supra* note 109, at 639 (mentioning lack of dependent care, financial assistance, and employment protection, for those summoned to court); *see also* Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 6–9 (2018) (discussing the way that economic sanctions such as fines, fees, and surcharges result from and reproduce poverty).

246. *See, e.g.*, Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1452 (2005) ("Silenced defendants are also excluded from the larger institutional and social discourses that control their

comprehensible to them.[247] This exclusion from one of our core capacities—communication—might become less tolerable were their humanity less obscured.[248]

2. Changing the Post-Conviction Landscape

Our system of mass criminalization and mass incarceration imposes convictions and punishment at the end of processes whose reliability academics have questioned.[249] Those punishments dehumanize in ways that academics have decried.[250] Our vocabulary risks endorsing what our writing challenges.

Alec Karakatsanis provides a powerful summary of many of the aspects of imprisonment that scholars and others have criticized:

> Putting a human being in a cage is brutal business—one that every lawyer should study in meticulous detail for herself. Lawyers must understand and communicate what it does to a person to strip from the person almost every form of humanity that we take for granted every day: to prevent him for years from eating at a restaurant, going on a date, making love, visiting a museum, traveling to a new place, having walls between his bed and his toilet, hugging his mother, seeing his grandfather before he dies. And the consequences of the policing-to-incarceration pipeline go well beyond the things that come with physical

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fates within the justice system. Since defendants speak for themselves so infrequently, judges, prosecutors, and lawmakers almost never hear from them, and the democratic processes that generate out justice system proceed without those voices.").

247. *See, e.g.*, Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1094 (2004) ("Courts are burdened with too many cases, so proceedings often take place in a chaotic and confusing atmosphere. Defendants often receive inadequate and inattentive representation; even in court, no one assures that the defendant understands the proceeding and is participating effectively.").

248. *See* Derek W. Logue, *Rethinking the "Sex Offender" Label*, CRIME REP. (Nov. 23, 2021), https://thecrimereport.org/2021/11/23/rethinking-the-sex-offender-label [https://perma.cc/VRL9-KH4P] ("Society would rather dehumanize people with sexual deviancy than learn from them to help prevent future abuse," demonstrating that "Americans appear to think that individuals labeled as 'sex offenders' label [sic] cannot be rehabilitated, and are irredeemable monsters.").

249. *See, e.g.*, Roberts, *supra* note 84, at 2503 ("Legal scholars have . . . generated an expansive literature exploring factors that can jeopardize the reliability of convictions as markers of factual guilt. These factors include those that are identified by innocence scholars as the primary contributing causes of 'false convictions.' But they extend further . . ." as well.).

250. *See, e.g.*, Ossei-Owusu, *supra* note 4, at 427 ("[A] global pandemic is making already squalid correctional facilities more dangerous.").

> banishment. They include what we do to people in our cages: scandalous medical and mental health care, beatings and stabbings, rampant sexual trauma, extended periods of confinement alone with no one to interact with and no natural light, and coerced labor; obliteration of parental and other friendship and family relationships through unaffordable for-profit prison phone contracts; revocation of the right to vote; unemployment and homelessness for dependent families; deportation; and crushing cycles of debt, despair, and alienation.[251]

And while there is power in this one-paragraph cataloging of many of the dimensions of prison's dehumanization, one could take any item on this list and uncover untold depths of degradation. It is not just, for example, that those in prison cannot eat at a restaurant, but that they are vulnerable to inescapable abuse and deprivation through what passes for prison food.[252] What you give someone to eat can be an expression of love,[253] but it can also be the opposite.[254] One can express through the food that one gives to another a view of them as less than human—as so rotten that rot is of no consequence,[255] as so polluted that pollution would do no harm.[256]

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251. KARAKATSANIS, *supra* note 72, at 149.

252. *See* Alysia Santo & Lisa Iaboni, *What's in a Prison Meal?*, MARSHALL PROJECT (July 7, 2015), https://www.themarshallproject.org/2015/07/07/what-s-in-a-prison-meal [https://perma.cc/4JT8-M34C] (describing prison meals at various facilities and facilities being sued based on complaints that the meals are inadequate and inhumane); *see also* Kanav Kathuria, *The Invisible Violence of Carceral Food*, INQUEST (Jan. 4, 2022), https://inquest.org/the-invisible-violence-of-carceral-food [https://perma.cc/R4CK-35CQ] (describing the deteriorating quality of prison food in Maryland).

253. *See* Julie R. Thomson, *The Very Real Psychological Benefits of Cooking for Other People*, HUFFPOST (July 17, 2017), https://www.huffpost.com/entry/benefits-of-cooking-for-others_n_5967858ae4b0a0c6f1e67a15 [https://perma.cc/26QS-479G] ("If you're cooking for someone, even if they're not present during the act, it can absolutely bring a sense of closeness in that you're expressing your love and care . . . .").

254. *See, e.g.*, Jerry Metcalf, *A Day in the Life of a Prisoner,* MARSHALL PROJECT (July 12, 2018), https://www.themarshallproject.org/2018/07/12/a-day-in-the-life-of-a-prisoner [https://perma.cc/V3CL-3CNB] ("We eventually arrive at the filthy, food-splattered serving counters, where Trinity (our privatized food-service contractor) ladles us a tray of gray plop they call 'Turkey Ala King,' a rock-like biscuit, and canned green beans overcooked into a tasteless, scentless mush.").

255. *See* Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385, 1401 (2022) ("The food-safety problems to which prisons and jails routinely subject incarcerated people would cause the closure of a free-world restaurant or the recall of contaminated food.").

256. *See, e.g.*, Secrets from a Prison Cell (@cellsecrets), TWITTER (Nov. 12, 2021), https://twitter.com/cellsecrets/status/1459299680953815043 [https://perma.cc/3P9L-Z3RR] ("The guard finally brought our lunch trays at 3pm. He

For all the valuable scholarly work done to expose these and other forms of dehumanization, it may be that with our core scholarly terms we indulge them, or at least that we could do more to resist.[257] As laid out in Part II.A, we commonly use terms that merge conviction with guilt. And as laid out in Part II.B, we commonly use terms that merge guilt with sin,[258] badness, defect,[259] and otherness, and in categorizing various types of "offender" we demarcate groups as not just distinct from each other, but different from us. When we speak of those in jail or prison we often speak of them as distinct from society, and distinct from the public.[260]

So, for example, it is worth scrutinizing our embrace of the state's category of "sex offender." Scholars decry much of the attendant treatment,[261] but through our use we continue to endorse the category. As mentioned above, it creates an all-embracing, permanent identity out of an arrest, charge, or conviction;[262]

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stood in front of my cell door, opened the styrofoam tray & said, 'You want any of this shit?' Disgusted with him & the food, I replied, 'I wouldn't feed it to my dog, so you go ahead & eat it.' I'm sure retaliation is coming.").

257. *See* Carter et al., *supra* note 169, at 328 ("We realized that the commoditization, dehumanization, and even warehousing of human beings were characteristics of a world where individual stories were hidden under blanket indictments."); Ristroph, *supra* note 128, at 575 ("In the criminal law, violent crime seems to verify the need for, and justice of, the state's own violence in policing and punishment.").

258. *See* discussion of "redemption," *supra* note 169 and accompanying text; *see also* Roberts, *Impeachment by Unreliable Conviction, supra* note 109, at 591 ("[T]hey may assume that a conviction evinces readiness or willingness to do evil, or to sin, without examining the extent to which the particular conviction before the court required a showing of any such depravity.").

259. *See* discussion of "rehabilitation" *supra* notes 172–174 and accompanying text.

260. *See supra* note 176 and accompanying text.

261. *See, e.g.*, Lester, *supra* note 133, at 107 ("The label *sex offender* carries a significant burden. All states require those deemed sex offenders to register on a regular basis with local law enforcement so that the community where they live and work can be notified of their presence. They may have to put signs in their yard announcing their new status as outcasts or even have special license plates on their vehicles to further distinguish them from the rest of society. Failure to comply with any of these requirements is a crime, often a felony.").

262. *See* Ristroph, *supra* note 161, at 610 (mentioning, in addition to "felon," other classifications that "label persons rather than acts, offenders rather than offenses: the outlaw, the habitual offender, the sex offender, or even just the criminal.").

it shrinks a person down to nothing but this;[263] shrinks their relationship to sexuality down to nothing but this; takes that force within us all and makes of it something wholly monstrous. It facilitates exile and the severing of ties.[264] Were we to seek terminology that reduces what has become an identity back into an arrest, charge, or conviction, and leaves room for the person to emerge, it might be that reform would be more imaginable. It might be that room could emerge for a person to be a person, and to have contact with their children and their grandchildren, for example.[265] Homelessness,[266] joblessness,[267] harassment,[268]

263. *See* Small, *supra* note 113, at 113 ("The behavior of the new sex offender is largely the same as the historical rapist, but his actions are now solidified for life in a social identity that trumps all other statuses.").

264. *See* McLeod, *supra* note 133, at 1559 ("The extraordinarily punitive character of post-conviction sex offense regulations . . . makes survivors who have close personal or familial ties to their assailants reluctant to report not only out of fear and shame but because criminal conviction consequences that amount to permanent banishment are often undesirable between intimates . . . .").

265. *See* Alexis Karteron, *Family Separation Conditions*, 122 COLUM. L. REV. 649, 653 (2022) ("[N]umerous states bar sex offenders from contact with minors, regardless of whether the underlying crime involved a minor or whether there is any reason to believe the supervisee is a threat to children. When such a restriction is unjustified, it can have unfair and devastating impacts. Critically, it also violates the rights of parents to maintain contact with and direct the upbringing of their children.").

266. *See* McLeod, *supra* note 133, at 1583 ("Residential restrictions have come under criticism, both for their inhumanity and their inefficacy. The restrictions routinely cause those subject to them to become homeless because individuals cannot find a place where they can live in compliance with the restrictions, particularly in urban environments.").

267. *See id.* at 1557 ("[R]ather than prevent repeat criminal conduct, post-conviction sex offense regulation may actually be criminogenic. Residency restrictions often render those subject to them unemployable, homeless, and at risk of harassment or even lethal violence.").

268. *See id.*

humiliation,[269] castration,[270] invasive testing,[271] and indefinite post-sentence detention[272] might come to seem intolerable. Rejecting terms that assume permanence might undermine baseless statistics and senseless regimes.[273]

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269. *See id.* at 1580 (arguing that U.S. sex offender registration databases "become . . . a vehicle for humiliating a large class of citizens, including young people, in some instances for the entirety of their lives"); *see also id.* at 1582 (giving examples of humiliating requirements, especially those that result from community notification requirements); Kenya A. Jenkins, *"Shaming" Probation Penalties and the Sexual Offender: A Dangerous Combination*, 23 N. ILL. U. L. REV. 81, 82 (2002) ("Probation conditions that require offenders to post signs and bumper stickers announcing their crimes are called 'shaming' conditions. In various states, trial courts have begun ordering sex offenders to follow such probation conditions.").

270. *See* Lynch, *supra* note 133, at 536 ("California was the first state to enact, in 1996, a nonvoluntary chemical castration punishment for child molesters, required after the second conviction, and by judicial discretion for a first offense if it meets certain risk/seriousness criteria.").

271. *See* McLeod, *supra* note 133, at 1594 ("In order to monitor convicted sex offenders, the paraprofessionals deploy tests that include invasive technologies of questionable reliability, including but not limited to penile plethysmographs and polygraphs.").

272. *See id.* at 1597 ("By 2007, twenty states and the federal government had enacted new civil commitment provisions that permit indefinite detention of convicted sex offenders after they have completed their sentence if they are deemed dangerous."); *see also id.* at 1600 ("[M]ost committed individuals never leave."); Allison Frankel, *Pushed Out and Locked In: The Catch-22 for New York's Disabled, Homeless Sex-Offender Registrants*, 129 YALE L.J.F. 279 (2019) (describing the post-sentence confinement of "sex offenders" on the basis that they have no approved address to which to be released); Ortiz v. Breslin, 142 S. Ct. 914, 914 (2022) (Sotomayor, J., statement respecting the denial of certiorari) ("Because petitioner Angel Ortiz was unable to identify any release address that satisfied the State's requirement, he spent over two additional years incarcerated when he should have been at liberty. Although Ortiz's petition does not satisfy this Court's criteria for granting certiorari, I write to emphasize that New York's residential prohibition, as applied to New York City, raises serious constitutional concerns.").

273. *See, e.g.*, Daniel Conviser, *After 25 Years, It Is Past Time to Reform New York's Sex Offender Risk Assessment System: Part II*, N.Y. L. J. (Feb. 9, 2021), https://www.law.com/newyorklawjournal/2021/02/09/after-25-years-it-is-past-time-to-reform-new-yorks-sex-offender-risk-assessment-system-part-ii [https://perma.cc/G3WP-37KK] ("A professional sex offender evaluator would never use an actuarial risk assessment instrument . . . to set a presumptive risk level. Sex offenders are as varied and complex as other human beings. Accurate predictions about future behaviors cannot be made simply by consulting a statistical table."); *see also* David Feige, *When Junk Science About Sex Offenders Infects the Supreme Court*, N.Y. TIMES (Sept. 12, 2017), https://www.nytimes.com/2017/09/12/opinion/when-junk-science-about-sex-offenders-infects-the

More broadly, rejecting terms like "offender" and "felon" that dehumanize as they categorize, in favor of some of the available alternatives,[274] might aid the changes for which we often explicitly push.[275] It is not uncommon for scholars to decry the broad array of consequences of conviction (sometimes termed "collateral consequences"[276]) that the state imposes. "Civil death" is the analogy sometimes used,[277] given the numerous and severe restrictions on intimate and public life.[278] Yet our terms often obscure the human life that makes this kind of "death" so problematic. When we analyze, for example, parole or probation conditions that prohibit people with felony convictions from spending time with other people with felony convictions,[279]

-supreme-court.html [https://perma.cc/7ZPZ-XPFZ] (describing the judicial influence of an "entirely invented number" associated, in Supreme Court doctrine, with a purported recidivism rate for people convicted of sex offenses).

274. Language guides exist for those who want to consider alternatives. *See* Bryant, *supra* note 60.

275. *See* Lynn S. Branham, *Eradicating the Label "Offender" from the Lexicon of Restorative Practices and Criminal Justice*, 9 WAKE FOREST L. REV. ONLINE 53, 53 (2019) ("[T]he language we use when referring to people can thwart systemic and cultural change"); Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 302 (2011) (asking, in regard to the people labeled by the Supreme Court as, among other things, "habitual offenders," how anyone could "doubt the appropriateness of extended prison terms for these malefactors[.]").

276. Valuable work has been done by Angélica Cházaro and others to identify and reject the inaccurate and minimizing qualities of this phrase. *See, e.g.*, Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 609 (2016) (with a focus on immigration consequences, stating that "cumulative consequences may be a more apt descriptor than collateral consequences").

277. *See* Ristroph, *supra* note 161, at 605 ("Whether or not a person convicted of a felony is imprisoned, that person faces legal and social disabilities so extensive that his condition is compared often to infamy, exile, or civil death.").

278. *See* Mason, *supra* note 67 ("The American Bar Association has documented more than 46,000 collateral consequences of criminal convictions, penalties such as disenfranchisement and employment prohibitions that follow individuals long after their release. These legal and regulatory barriers are formidable, but many of the formerly incarcerated men, women, and young people I talk with say that no punishment is harsher than being permanently branded a 'felon' or 'offender.'").

279. *See* Donna Coker & Ahjané D. Macquoid, *Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement*, 5 U. MIA. RACE & SOC. JUST. L. REV. 585, 600 (2015) ("Parole and probation requirements that require no contact with other ex-felons may limit the reach of support systems of friends and families as do public housing rules that make families risk eviction if they allow an ex-offender relative to visit.").

or the vulnerability of those in prison to the loss of their parental rights,[280] the severing of human connection might lose its profundity if we refer to "felons" and "offenders."[281] When we analyze the deprivation of basic human needs or human rights inflicted on those in prison,[282] and the damage this can cause,[283] the implications are dulled if we use terms that obscure humanity and that convey intrinsic permanent defect. When we expose the manifestations of propensity reasoning within an evidentiary system that purports to be wary of it,[284] we may blunt our work if we ourselves use terms that convey propensity.[285]

Recent history provided an answer to the question of whether if a life-saving vaccine was available during a pandemic

280. *See* Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1494–95 (2012) ("Moreover, federal law governing child welfare practice encourages the termination of incarcerated mothers' parental rights, and local policies do too little to keep incarcerated mothers in contact with their children or to support their families after they are released from prison.").

281. *See* Ristroph, *supra* note 161, at 603–04 ("[F]elon legitimizes, by naturalizing, the extraordinarily severe criminal justice system we have constructed.").

282. *See* Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 437 (2004) ("[C]onsider, in light of the state's obligation to avoid gratuitous inhumane punishments, the conditions of confinement facing inmates at prisons and jails across the country, which strongly suggest that this requirement is routinely being violated. The widespread incidence of rape and sexual assault in prisons and jails and the ongoing threat of such abuse, which is a permanent aspect of incarceration at many prisons, would alone serve to prove the point."); *see also id.* at 439 (describing prison overcrowding that not only exacerbates the risk of sexual and other violence and coercion, but also "depriv[es] inmates of the minimum physical space humans need to preserve a sense of self").

283. *See, e.g.*, Craig Haney, *Counting Casualties in the War on Prisoners*, 43 U. S.F. L. REV. 87, 107 (2008) ("[P]eople who are subjected to extreme forms of imprisonment can be psychologically harmed—sometimes irreparably so—by the experience.").

284. *See* Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 2015–16 (2016) (suggesting that prior conviction impeachment persists "in part because while this particular type of propensity reasoning is ostensibly rejected, the consigning of those with convictions to criminal status is a part of the criminal justice system, is at some level endorsed by those who administer it, and is a part of our societal belief system").

285. *See* Ristroph, *supra* note 161, at 615 ("The idea that felony begins on the inside, in one's own internal character or with one's own choices, operates as an enticing and effective distraction from the role of state actors in enacting and enforcing criminal laws.").

and the only way for people in prison to get it was for the government to give it to them we would have become so blinded to their humanity, and their existence as part of society,[286] that the efforts to provide it would be shaky and controversial, and sometimes absent—even when the threat existed not just to them but to those at liberty.[287] COVID-19 vaccines for those imprisoned and jailed were initially not even part of some states' plans.[288] Scholars decried the slowness to vaccinate[289] and, more broadly,

286. *See* Kimberlee Kruisi & Jonathan Mattise, *Tennessee Panel Deemed Vaccinating Inmates a "PR Nightmare*," AP NEWS (Mar. 6, 2021), https://apnews.com/article/pandemics-prisons-nashville-coronavirus-pandemic-tennessee-35d7e4fb8335fb52f6a5a8520658bad1 [https://perma.cc/XT4R-P2AG] (detailing how, as of March 2021, Tennessee had "inoculated an unknown number of corrections staff . . . but no prisoners," and had placed those in prison in the last group due to be vaccinated. "The Tennessee debate reflects an issue facing states nationwide as they roll out life-saving vaccines: whether to prioritize a population seen by many at best as an afterthought, separate from the public, and at worst as non-deserving. The resistance comes even though medical experts have argued since the beginning of the pandemic that prisoners were at extremely high risk for infection given that they live in extremely close contact with each other and have little ability to social distance."); *see also id.* ("Documents from the meetings of the Pandemic Vaccine Planning Stakeholder group, did, in fact, stress the importance of the general public seeing that inmates 'are people' who should be treated as 'part of the community' and 'if untreated they will be a vector of general population transmission.' Yet the documents concede that providing the vaccine to inmates would result in 'lots of media inquiries.'").

287. *See* Godfrey, *supra* note 201 (describing the indifferent approach taken by prison systems across the country in the context of the COVID-19 pandemic and in the face of risk, even to individuals who were not incarcerated, like those working in the facilities).

288. *See* Katie Rose Quandt, *Incarcerated People and Corrections Staff Should Be Prioritized in COVID-19 Vaccination Plans*, PRISON POL'Y INITIATIVE (Dec. 8, 2020), https://www.prisonpolicy.org/blog/2020/12/08/covid-vaccination-plans [https://perma.cc/PXJ8-P626] (mentioning that as of that date, incarcerated people were omitted from the vaccine allotment plans of Alaska, Arkansas, Florida, Kansas, Michigan, Oregon, South Carolina, South Dakota, Texas, and Wisconsin). Note that Governor Cuomo had to be sued in order to make a vaccine provision plan for those incarcerated. *See* Troy Closson, *New York Must Offer Vaccine to All Prisoners Immediately, Judge Rules,* N.Y. TIMES (Apr. 5, 2021), https://www.nytimes.com/2021/03/29/nyregion/covid-vaccine-new-york-prisons.html [https://perma.cc/FW3M-Z3H2] (describing a ruling that found incarcerated individuals in New York had been arbitrarily excluded from the state's vaccine rollout plan).

289. *See* Laura I. Appleman, *Pandemic Eugenics: Discrimination, Disability, & Detention During COVID-19*, 67 LOY. L. REV. 329, 355 (2021) ("The failure to prioritize inmates seemed shortsighted given that prison outbreaks frequently spur community spread.").

the failure to protect the safety of those incarcerated.[290] And yet we daily use vocabulary that sends out messages consistent with this treatment: language of otherness, inhumanity, guilt, sin, and defect.

3. Openness to More Radical Landscapes

Another intriguing possibility that might flow from language reexamination and reform is a more nuanced set of responses to the possibility of abolition or other radical change. This Subsection will explore three forms that such a development might take: awareness that we don't have the kind of system that we tell ourselves we do; complication of some of the common objections to abolitionist ideas; and facilitation of attention to societal structures as opposed to just individuals deemed threatening.

While abolition in the criminal context is defined in a variety of different ways, whichever version one pursues would mean letting go of a lot of structures and precepts that are commonly endorsed.[291] That might be alarming. After all, from the first weeks of law school we may have been exposed to a variety of potentially comforting premises about the system, several of which are bolstered by the kinds of vocabulary uses highlighted in this Article. These include the notion that the criminal system demands that the state meet the highest burden of proof within United States law[292] and applies that burden at the trial of criminal charges.[293] That in declaring this regime, part of what motivated the Supreme Court was the notion that "it is far worse to

290. *See id.* at 343–48 (describing COVID-19 trends and the lack of interventions implemented in prisons across the country).

291. *See, e.g.*, Amna Akbar, *Teaching Penal Abolition,* LAW & POL. ECON. PROJECT (July 15, 2019), https://lpeblog.org/blog/teaching-abolition [https://perma.cc/WK3U-GZHV] ("Abolitionists work toward eliminating prisons and police, and building an alternate and varied set of political, economic, and social arrangements or institutions to respond to many of the social ills to which prison and police now respond.").

292. *See In re* Winship, 397 U.S. 358, 361 (1970) ("The requirement that guilt of a criminal charge by established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times . . . . It is now accepted in common law jurisdiction as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.'") (internal citations omitted).

293. *Id.*

convict an innocent man than to let a guilty man go free."[294] That the criminal system imposes the presumption of innocence until the moment at trial when that highest burden of proof must be applied,[295] and that that will happen only once the community has passed its judgment on the basis of evidence zealously presented by two competing sides, with the accused protected by the right to counsel.[296] That in settling upon conviction, the jury will not only be finding this burden met but also passing moral judgment, since the concept of criminal guilt presupposes a voluntary choice to do wrong.[297] In our language of "pre-trial" we endorse this sense that trial includes a watershed moment, before which innocence is presumed, and at which this highest burden of proof is applied by the community. Our language also often endorses the notion that these terms—guilt and innocence—correspond to a tidy binary[298] and can be assessed by some sort of objective criteria. And our language of "offender" carries with it, among other things, the notion that by the time of conviction (at the latest) what has been uncovered is guilt, and indeed wrongdoing.

Scrutinizing and changing our language may make us realize that what we thought we had and what we may fear losing is not necessarily there. Not (in the vast bulk of instances) the exercise of the right to trial, and thus not the highest burden of proof and not the exercise of community judgment; not the basis to assume moral wrongdoing. Not the objective clarity to "guilty" and "innocent" that our pedagogical mainstays suggest. And if

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294. *Id.* at 372 (Harlan, J. concurring).

295. *Id.* ("It is only because of the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal trials that the Court has not before today had to hold explicitly that due process, as an expression of fundamental procedural fairness, requires a more stringent standard for criminal trials than for ordinary civil litigation.").

296. *See* Gideon v. Wainwright, 372 U.S. 335, 343–44 (1963) (establishing that appointment of counsel is a fundamental right and an essential element to a fair trial).

297. *See* Morissette v. United States, 342 U.S. 246, 250 n.4 (1952) (noting that "[h]istorically, our substantive criminal law is based upon a theory of punishing the vicious will," and that "[i]t postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong" (quoting Roscoe Pound, *Introduction to* FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW, at xxxvii (1927))).

298. Note the centrality of this supposed binary to criminal law thinking. *See, e.g.*, Carissa Byrne Hessick, *DNA Exonerations and the Elusive Promise of Criminal Justice Reform*, 15 OHIO ST. J. CRIM. L. 271, 277 (2017) (mentioning the "foundational premise" that "the system exists to sort the innocent from the guilty").

we scrutinize the pervasive use of words like "victim" and "offender" in pre-trial legal contexts we may wonder (as other things should make us wonder[299]) about the vibrancy of the presumption of innocence.[300] Careful attention to the role played by language may reveal the vulnerability of these precepts, and may make us more interested in radically new possibilities.[301] Indeed, they may seem less radically new if we discover the detachment of our system from its purported bases and justifications.

Second, a heightened awareness of the categorization in which our language frequently engages may complicate some of the most common objections to abolitionist work. Amna Akbar tells us that abolitionists "work toward eliminating prisons and police, and building an alternate and varied set of political, economic, and social arrangements or institutions to respond to many of the social ills to which prison and police now respond."[302] A frequent response to descriptions of such work takes the form

299. *See* William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 361 (1995) (commenting that the "sweeping rhetoric" of the presumption of innocence "continues in the face of practices that are inconsistent with its premises and promises").

300. *See, e.g.*, Erik Ortiz, *Rittenhouse Judge in Spotlight After Disallowing Word "Victims" in Courtroom*, NBC NEWS (Oct. 27, 2021), https://www.nbcnews.com/news/us-news/rittenhouse-judge-spotlight-after-disallowing-word-victims-courtroom-n1282559 [https://perma.cc/CV4E-KMBH] ("That's pretty standard in his courtroom to not allow 'victim,' said Ted Kmiec, a local criminal defense lawyer who has had cases before Schroeder. 'He believes you're presumed innocent, and with that presumption of innocence, nobody is a victim unless it's proven.'"); *see also* Alice Ristroph, *Criminal Law as Public Ordering*, 70 U. TORONTO L.J. 64, 72 (2020) ("One can easily identify seemingly exceptional attributes of criminal law in operation, such as the presumption of innocence and the requirement of proof beyond a reasonable doubt, and just as easily identify reasons to think that these distinctive procedural requirements play little role in the actual operation of criminal law.").

301. *See* Bell, *supra* note 118, at 51 ("Some abolitionists and abolitionist organizations have zeroed in on the effects of oppressive language where the criminal punishment system is concerned because certain words and terms carry with them certain assumptions about the people and the concepts they describe. Critical Resistance notes in their Abolitionist Toolkit: '[T]hese . . . assumptions make the [prison industrial complex] seem logical and necessary. They redefine people and actions in terms of the category or idea represented by the word. In this way a person becomes a criminal, and the act of the State putting someone in a cage becomes justice.'").

302. Akbar, *supra* note 291.

of questions like "What about the rapists? What about the murderers"?[303] These questions are sometimes thought of as "gotchas,"[304] designed to expose the absurdity of a non-carceral response to certain categories of people. If academics could contribute more vigorously to efforts to demonstrate the complexities in such words, the "gotcha" effect might be lessened. For even while acknowledging the profundity of the trauma—sexual, violent, and sometimes fatal—that humans can and do inflict on each other, one can wonder about the concepts conjured and blurred by these words, and by analogous words found within more common academic parlance. For even while academic usage of "rapist" and "murderer" may not be not mainstream, we make heavy use of the phrase "sex offender," a phrase that does similar work, and that itself has been invoked in questions for abolitionists.[305] Just like that phrase, "rapist" and "murderer" are invoked as resonant categories, but contain a variety of ambiguities, such as whether they refer to crime conviction, or crime commission, or a single act or multiple, or an intrinsic permanent identity. By failing to limit, the words suggest an all-embracing permanent identity and that probing into the number of instances would be pointless and offensive. What complicates this is that, as mentioned earlier, we have no universally-accepted, objective way of determining whether a "rape" or "murder" occurred,[306] so one may wonder what these words are referring to: they are used sometimes in the absence of any criminal

303. *See, e.g.*, Angel Parker, *What About the Rapists and Murderers?* (June 24, 2020), https://medium.com/@amparker/what-about-the-rapists-and-murderers-7a81955b772c [https://perma.cc/6FED-GXJ9] ("The most common question posed to abolitionists is 'what about the rapists and murderers?'").

304. *See* Fabiola Cineas, *What the Public Is Getting Right—and Wrong—About Police Abolition,* VOX (Oct. 30, 2020), https://www.vox.com/21529335/abolish-the-police-movement [https://perma.cc/87MF-N6S7] ("People seemed eager to get to what they've framed as this sort of 'gotcha' moment in the abolitionist imagination.").

305. *See* Adina Ilea, *What About "The Sex Offenders"? Addressing Sexual Harm from an Abolitionist Perspective*, 26 CRITICAL CRIMINOLOGY 357, 358–59 (2018).

306. *See supra* Part II.A (noting a variety of components of crimes and defenses that rely on the exercise of judgment, if they are assessed by juries).

proceeding,[307] sometimes in connection with police or prosecutorial investigation,[308] and of course often in connection with a conviction,[309] and the variety of uses hints at the fact that each of these is an incomplete metric. To some extent, then, one can see our failure to complicate the widespread use of phrases like "sex offender" and other types of "offender" as analogous to the endorsement of "rapist" or "murderer" as terms with clear referents and as such potent concepts that they ought to stop abolitionist work in its tracks.

Finally, increased scrutiny of our core terms might facilitate the kind of focus on societal structures that abolitionist work includes. For example, the more our categories demarcate groups of people as distinctly bad and dangerous, and thus in need of distinct responsive containment, the less attention is given to societal bars to safety and thriving.[310] Allegra McLeod has made this kind of point in connection with allegations of sexual harm, showing how the stigmatization and social ostracism of those deemed "sex offenders" can serve as a distraction from, and facilitator of, utter failure to address societal structures that enable or encourage sexual harm, and indeed utter failure to address the harm.[311] To exile people, both literally and

307. See, for example, uses of the phrase "unreported rape."

308. *See, e.g.*, U.S. DEP'T OF JUST., FBI, 2019 CRIME IN THE UNITED STATES, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/murder [https://perma.cc/TCW5-X37V] ("The FBI's Uniform Crime Reporting (UCR) Program defines murder and nonnegligent manslaughter as the willful (nonnegligent) killing of one human being by another. The classification of this offense is based solely on police investigation as opposed to the determination of a court, medical examiner, coroner, jury, or other judicial body.").

309. *See supra* Part II.A for concerns about the meaning that ought to be attached to a guilty plea and about the judgment calls involved in jury adjudication.

310. *See* Mangla & George, *supra* note 68 ("These labels ignore the social, economic, and political drivers of mass incarceration and deprive people of their complex identities."); *see also* Bell, *supra* note 118, at 51 (noting that terms such as "criminal" and "offender" "assume criminality, which legitimates the often unjust laws that lead these individuals to be labeled as such and legitimates the circumstances that have led them to be saddled with that label, while placing the blame entirely upon them.").

311. *See* McLeod, *supra* note 133, at 1560–65; *see also* Small, *supra* note 113, at 122 ("The practice of prosecuting sexual assault then . . . becomes as much about distinguishing between good and bad men as about eliminating violence against women."); Megale, *supra* note 134, at 35 ("[C]oncentrating hate toward the individual for the bad act distracts society from real issues that should be resolved. For example, in committing a sex act, an individual typically is perpetuating an abuse suffered by that same individual."); Lynch, *supra* note 133,

conceptually, is to push away the need for change to, and responsibility for, the society in which we all live. So too, another category of terms—those that point to the progressive potential of agents within the system, most notably "progressive prosecutors"—can serve an analogous function, by pinning hopes for safety and thriving on individuals working within the system, rather than the kinds of non-carceral work espoused and carried out by abolitionists.

Thus, two broad types of work called for by abolitionists[312]—the divesting from our current carceral systems and the investing in societal mechanisms that offer possibilities of safety, freedom, and thriving[313]—may be warded off by messages that are reinforced by our core terms. Our terms emphasizing the necessity, accuracy, and progressive potential of the system may make divesting an alarming prospect. And our terms emphasizing its necessity and progressive potential may overshadow the urgent need for investing. Questioning these terms might thus facilitate an openness toward—and perhaps even an eagerness for—abolitionist possibilities of both sorts.

B. LIMITS OF CHANGE

While the previous Section engaged in wide-ranging consideration of the kinds of changes that might be facilitated by scrutiny and abandonment of our core terms, this Section explores

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at 555 n.21 ("As the measures to deal with sex offenders have become more punitive, comprehensive sex offender treatment/therapy programs within the criminal justice system have been dismantled, and little to no resources are allocated for the true protection and remediation of the child victims . . . ."); *id.* at 560 (in the federal system, "those who are identified as needing protection from social harm are left behind, since the resources and efforts are singularly aimed at eradication rather than remediation, and constitutional rights are chipped away in the process").

312. *See* Foran et al., *supra* note 188, at 529–30.

313. *See, e.g.*, *Divest/Invest: Criminalization*, FUNDERS FOR JUST., https://divest-ffj.org/#what-is [https://perma.cc/3XN3-48UN] ("[I]nvest/divest is the idea that as we're making reforms, as we're pushing policy changes, as we're overseeing shifts in practice, that we pay special attention to how money is being spent, and we demand a divestment from the systems that harm our communities, like the criminal legal system, like policing regimes, like the court system and demand that that money that's currently being spent, that's being poured into those systems with no accountability, be moved instead to community-based alternative systems that support ou[r] people, that feed our people, that ensure we have jobs, and housing—the things we need to take care of ourselves and our communities.").

some of the factors that might restrict efforts to change language. First, the priorities balanced by individual academics may impose limits. Second, and not entirely distinct, broader structural forces have helped to preserve our linguistic status quo. While efforts at language change are desirable,[314] they must be paired with efforts to comprehend and respond to these other pressures.

1. Individual Priorities Limiting Change

Academics speak and write with a keen appreciation of the risks and benefits that may result.[315] Depending on who we are and what we strive for, funders, students, the media, our bosses, our institutions, the state, our colleagues, the public, judges, prosecutors, alumni, legislators, and others may care rather deeply about what we say. A variety of priorities may deter individuals from diverting from the kinds of terms highlighted above.

First is the fact that some of these terms have come to seem neutral,[316] and to divert from them might well provoke pushback on the grounds that one is politicizing. Pushback is likely to

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314. *See* KARAKATSANIS, *supra* note 72, at 98 ("Only by having an honest conversation about what the punishment bureaucracy is can an informed movement dismantle it.").

315. *See* UCLA School of Law, *UCLA Law Review Symposium: Toward an Abolitionist Future (1/28/2022)*, YOUTUBE, at 1:09:14 (Jan. 28, 2022), https://www.youtube.com/watch?v=Lv09Yrv6iT8 (depicting Alec Karakatsanis saying of academics that "there is a certain set of sort of off limits topics. I can't touch, I can't say those things. If I start saying and doing those things, I will not get tenure, I will not get invited to the fancy club—right. I can't stress for you enough how powerfully that is in the mind of every single person who stands up in front of you and calls themself a teacher. It is in their minds at every single moment they're telling you what—they're giving you a lecture; they're deciding what their next Article is going to be. They're all thinking, subconsciously or consciously, how will taking this intellectual position affect my career path?"); *see also* Smith, *supra* note 183, at 414 ("I don't much care for prosecutors. I have gotten in trouble for saying this in the past. It is apparently not the kind of thing an academic is supposed to say.").

316. *See, e.g.*, Davis v. State, No. 05-18-00398-CR, 2019 WL 2442883, at *2 (Tex. App. June 12, 2019) (stating that "the word 'victim' is mild, non-prejudicial, and is commonly used at trial in a neutral manner to describe the events in question"); *see also* Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 254 (2019) ("To be 'neutral' is to side with the prosecution, not the defendant.").

strike with particular force at those already marginalized within and beyond the academy through demographics and "status."[317]

A variety of concerns relating to student wellbeing and pedagogical goals may also deter efforts to change language. Harmful acts that track gender-based or race-based subordination historically and still tend to be ignored or devalued.[318] The criminal system may offer the only public recognition of harm and may offer that in part through designating "perpetrators," "victims," and "crimes". The closest thing it offers to dignity may be the designation of a "victim."[319] Thus to pontificate from the podium about "alleged victims" or the illusory nature of "crime," or the problems with merging crime with wrong or conviction with guilt is hard at the best of times and may be profoundly hard when one's students are traumatized by, and wanting to see recognition of, racist and sexist violence.[320] To attempt to disentangle the various layers of meaning wrapped up in "rapist," "murderer," "sex offender," or "predator," or to start challenging the imposition of this kind of label in our system,[321] may cause offense and pain where those labels are keenly desired.[322] These

317. *See, e.g.*, Nw. Pritzker Sch. of L., *Validity and Equity Problems in Law School Teaching Evaluations*, YOUTUBE (Jan. 23, 2022), https://www.youtube.com/watch?v=paoeE5D2UiU.

318. *See* Roberts, *Victims, Right?*, *supra* note 75, at 1500–01.

319. *See* Z.W. v. Foster, 422 P.3d 582, 583 (Ariz. Ct. App. 2018) (lawsuit by complaining witness against presiding judge, arguing that for her to be referred to as the "alleged victim" and not "victim" violated her state constitutional right to "fairness, respect, and dignity").

320. Note, for example, the widespread pushback to the decisions by the judge in Kyle Rittenhouse's trial to preclude the prosecution from referring to "victims" in the case. *See* Ortiz, *supra* note 300; *see also* Ristroph, *supra* note 232, at 1996 (noting that criminal law exceptionalism "cultivates the conviction that a failure to criminalize is an expression of indifference or even approval").

321. *See* Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not "Transformative Justice." Here's Why.*, APPEAL (Feb. 5, 2018), https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645 [https://perma.cc/5PLN-XMV4] (saying of the sentencing of Larry Nassar that "[a]mid our society's current cultural upheaval around sexual violence, [Judge] Aquilina struck a chord with many survivors who want and need to believe that justice under this system is possible.").

322. *See* Wilbert L. Cooper, *People-First Language Matters. So Does the Rest of the Story.*, MARSHALL PROJECT (Apr. 13, 2021), https://www.themarshallproject.org/2021/04/13/people-first-language-matters-so-does-the-rest-of-the-story [https://perma.cc/V4DP-L8M7] ("Of course, challenging registries and sexual offense terminology is controversial. When you talk about a term like 'rapist,' naming that violence is important to many people.").

are not easily reconcilable pressures, and indeed the irreconcilable pressures revealed by debates about the legal use of the word "victim"—pressures to protect those charged with crimes and to dignify those alleging crimes—help to illustrate the defunct nature of our system.[323]

Professors may also be keenly aware of economic pressures and other influences affecting our students. As Ristroph has pointed out, when you have required students already deep in debt to fork out hundreds of dollars on a criminal casebook it is not uncomplicated to launch into a critique of it:[324] to point out, for example, all the ways in which its editors reveal the defunct nature of the law and their view of it through inopportune vocabulary choices. It is complicated to adopt a new vocabulary aimed at exposing the state's wrongs in a classroom that may include students motivated to pursue prosecutorial work, perhaps because a family member has been an inspiration. We play, in other words, a variety of roles: not just intellectual and provocateur, but champion, cheerleader, counselor, employee, and so on. These roles may pull us in different directions.[325]

In our teaching and writing, a variety of other concerns about audience may complicate an interest in changing our terms. First, many of the terms that convey the kinds of messages highlighted above are terms of art, in which one might conclude that one's students need to become fluent, if they are to be practice-ready by the time that they leave us. To work within criminal law may require the ability to argue that your client is eligible for "compassionate release,"[326] or should not have been

323. *See* Roberts, *Victims, Right?*, *supra* note 75, at 1500; *see also* Anna Roberts, *Defense Counsel's Cross Purposes: Prior Conviction Impeachment of Prosecution Witnesses*, 87 BROOK. L. REV. 1225, 1247 (2022) (noting the inherent tension in decrying the weaponization of criminal history to ostracize those with convictions, while also recognizing the use of a prior conviction as a witness impeachment tool that can benefit those facing criminal charges).

324. *See* Ristroph, *supra* note 4, at 1684 ("[I]t is difficult to explain to students why they are being asked to read several hundred pages of a seemingly authoritative text (perhaps after having spent a couple hundred dollars on said text) when it is not, in fact, trustworthy.").

325. *See* Bruce A. Green, *Foreword: Can a Good Person Be a Good Prosecutor?*, 87 FORDHAM L. REV. ONLINE, https://ir.lawnet.fordham.edu/flro/vol87/iss1/1 [https://perma.cc/6G6B-KN4U] (explaining that an online symposium was organized, seventeen years after Abbe Smith concluded that you cannot be a good person and a good prosecutor, in order to investigate whether, even if correct then, that judgment was still correct).

326. *See* Hanan, *supra* note 200 (describing the origins of the term).

targeted for a "consent search,"[327] or is not a good candidate for a "sentencing enhancement,"[328] or ought to have her case reviewed by the prosecution's "conviction integrity unit,"[329] even if in doing so you feel that you're wandering dazed through a fantasy land of euphemisms. It may require the ability to argue that your clients should be eligible for dispensations given to "juvenile offenders" or "youthful offenders," even though you are keenly aware that they are children awaiting adjudication; it may require you to argue that the elements of your client's "felon in possession" charges haven't been established, or that certain things should happen in the "guilt phase" of an upcoming trial.[330]

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327. *See* Christopher M. Peterson, *Irrevocable Implied Consent: The "Roach Motel" in Consent Search Jurisprudence*, 51 AM. CRIM. L. REV. 773, 774 (2014) (stating that *Morgan v. United States* and similar cases "expose the consent search doctrine's drift from a foundation based on actual consent by the searched party to focusing on the needs of law enforcement. This drift has made 'consent search' a misnomer—law enforcement officials can conduct a search under the auspices of the consent search when clearly no consent has been granted"); *see also* Tracey Meares & Gwen Prowse, *Policing as Public Good: Reflecting on the Term "To Protect and Serve" as Dialogues of Abolition*, 73 FLA. L. REV. 1, 15 n.70 (2021) ("The term 'consent search' is a misnomer in that it is extraordinarily difficult to determine whether a person has truly consented to a search voluntarily.").

328. *See* Nazgol Ghandnoosh (@NazgolG), TWITTER (Nov. 23, 2021), https://twitter.com/NazgolG/status/1463115855462608901?s=20&t=o_GtYp1szMVAnKKHLsQFPA [https://perma.cc/X59G-DTA2] ("So many lost linguistic battles serve as a foundation for mass incarceration. For example, how have we not renamed 'sentencing enhancements'?").

329. Anthony C. Thompson, *Retooling and Coordinating the Approach to Prosecutorial Misconduct*, 69 RUTGERS U. L. REV. 623, 676 (2017) ("[Brooklyn District Attorney] Thompson . . . changed the name to the Conviction Review Unit, believing that the District Attorney's program lacked the integrity it purported to bear."); Josie Duffy Rice, *Do Conviction Integrity Units Work?*, APPEAL (Mar. 22, 2018), https://theappeal.org/do-conviction-integrity-units-work-a718bbc75bc7 [https://perma.cc/BCL4-WW3H] ("For many prosecutors, establishing a unit allows them to appear as if they are making strides towards justice. But an actual dedication to integrity is a different matter altogether.").

330. Though note that they can also fight these terms. *See* United States v. Ray, 803 F.3d 244, 253 (6th Cir. 2015) (describing defense opposition to "felon-in-possession" terminology); *see also* United States v. Fell, No. 5:01-cr-12-01, 2018 WL 7247414, at *2 (D. Vt. Apr. 4, 2018) (granting motion to preclude reference to the "guilt phase," and stating that "[o]ver time the use of words matters and jury perception of the presumption of innocence should not be colored or weakened by the use of the phrase 'guilt phase.' When the jury is present, we will call the initial phase 'the guilty/not guilty phase' or 'the guilt/innocence phase' or 'the first phase of the trial' or some other expression which does not suggest the outcome.").

For sure, one can use one's platform to raise questions about the ways in which these terms euphemize, label, and pre-judge. One noticeable shift in academic language is the increasing tendency to avoid the phrase "criminal justice system," because it sends the kinds of euphemistic messages discussed earlier.[331] It remains the standard term, however, and with this and other terms you may have to pick your battles, as both professor and advocate. Spending time interrogating and altering standard terms will lessen the time available to achieve other pedagogical goals. Innovative vocabulary uses in one's advocacy might alienate, distract, or confuse, and one might well choose the conventional terms so that one's argument comes through clearly and concisely and is not attacked on anything other than its central point.[332] After all, often there is no obvious or easy alternative to these terms: such is the extent to which state language has captured our conceptions.

2. Broader Pressures Limiting Change

Investigating broader pressures that facilitate our common terms is also important. It reveals that linguistic change will not suffice and it sheds light on other phenomena that need attention.

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331. *See, e.g.*, Benjamin Levin, *Rethinking the Boundaries of "Criminal Justice,"* 15 OHIO ST. J. CRIM. L. 619, 620 (2018) ("In fact, not only have scholars critiqued the characterization of the criminal justice system as a system, but some scholars and activists have begun to challenge the use of the term 'criminal justice' at all. Given the widely articulated concerns about structural inequality and the massive U.S. prison population, is 'criminal justice' an accurate or appropriate description of the nation's model of criminalization, policing, prosecution, and punishment? Framed as deep structural critiques, a new cluster of critical accounts refers simply to the 'criminal system' or the 'criminal legal system,' omitting any reference to justice."); *see also* Ristroph*, supra* note 232, at 209; Sara Mayeux, *The Idea of "The Criminal Justice System*," 45 AM. J. CRIM. L. 55, 60 (2018) (arguing that "'the criminal justice system' is not particularly systemic at all, in the sense that it has been produced by specific and local histories and individuals"); Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUDS. 419, 421 (2018)) (arguing that the criminal justice system is not framed neutrally; it is framed as a means of crime prevention while it operates in fact to undermine racial equality); John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1104 (2013) (asserting that the "criminal justice 'system' in the United States is not a single system but a mélange of feuding institutions with differing constituencies and incentives").

332. Thanks to Jeffrey Bellin for bringing to my attention concerns of this sort.

First, it is important to recognize that in at least some instances these vocabulary items are intentionally put out into the world by the state[333] and that this is just one form of the state's efforts to control thought and narrative.[334] These efforts include police practices in deriving statements from suspects and arrestees[335] and police accounts of alleged events,[336] which are of-

333. *See, e.g.*, Adam H. Johnson, *Media Frame: Stoking Panic Over "Flood" of "Juveniles" in Baltimore's Inner Harbor*, APPEAL (June 7, 2019), https://theappeal.org/media-frame-baltimore-inner-harbor-stoking-panic-flood-of-juveniles [https://perma.cc/8MUQ-AKM9] ("Baltimore media repeatedly ran headlines . . . referring to children as 'juveniles,' a loaded police term, or 'Copspeak' designed to dehumanize those we would normally call teenagers or kids."); Adam Johnson & Jim Naureckas, *Copspeak: When Black Children Suddenly Become 'Juveniles*,' FAIR (Mar. 19, 2018), https://fair.org/home/copspeak-when-black-children-suddenly-become-juveniles [https://perma.cc/W8NM-3YPY] (saying, as regards the word "juvenile" being used by the police in place of "child," that it is part of "an institutional lexicon developed over decades of public relations fine-tuning"); DeAnna Hoskins & Zoë Towns, *Opinion: How the Language of Criminal Justice Inflicts Lasting Harm*, WASH. POST (Aug. 25, 2021), https://www.washingtonpost.com/opinions/2021/08/25/criminal-justice-language-bias-lasting-harm [https://perma.cc/9W72-CHAQ] ("For too long, too many of us have accepted and reproduced the 'official' jargon of the U.S. criminal justice system. Designed to desensitize, terms such as 'felon,' 'convict,' 'offender' and 'criminal' replace names and other descriptions such as 'woman,' 'daughter,' 'father,' 'child' or 'person.'"); Alexandra L. Cox & Camila Gripp, *The Legitimation Strategies of "Progressive" Prosecutors*, 31 SOC. & LEGAL STUD. 657, 658–59 (2022) (demonstrating how prosecutors use the label "progressive" to self-legitimate and differentiate themselves from other actors in the criminal system).

334. *See, e.g.*, Maya Lau, *Police PR Machine Under Scrutiny for Inaccurate Reporting, Alleged Pro-Cop Bias*, L.A. TIMES, (Aug. 30, 2020), https://www.latimes.com/california/story/2020-08-30/police-public-relations [https://perma.cc/9MGN-SGAS]; Elliot Hannon, *Philadelphia Cops Attack and Beat Woman, Steal Her 2-Year-Old, and Post Photo of Themselves "Protecting" the Child*, SLATE (Oct. 30, 2020), https://slate.com/news-and-politics/2020/10/police-union-posts-propaganda-photo-white-officer-comforting-black-child-during-philadelphia-wallace-protests.html [https://perma.cc/T4LK-G75M]; *Minneapolis to Hire Influencers to Spread Messaging During Trial over George Floyd's Death*, CBS NEWS (Feb. 27, 2021), https://www.cbsnews.com/news/minneapolis-hiring-influencers-to-spread-messaging-trial-derek-chauvin-george-floyd-death [https://perma.cc/C233-ESXV].

335. *See* Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1603 (2009) ("Confessions emerge from a collaboration between investigator and criminal, in which the interrogator usually plays the role of lead author.").

336. *See, e.g.*, Nicholas Bogel-Burroughs & Frances Robles, *When Police Lie, the Innocent Pay. Some Are Fighting Back*, N.Y. TIMES (Aug. 28, 2021), https://www.nytimes.com/2021/08/28/us/false-police-statements.html [https://perma.cc/8NEQ-HY88]; Patrick Smith, *Mayor Lori Lightfoot Blamed Gun Violence on Judges, but Emails Show Her Staff Knew It Wasn't True*, WBEZ

ten bolstered by the media.[337] More broadly, they include state attempts to deter or drown out unwelcome messages within or about the criminal system.[338] While linguistic change might do something to resist these kind of efforts, their breadth and effects require independent investigation and resistance.[339]

Second, our tendency to engage in premature assumptions of guilt appears in some of the core terms mentioned above, but sometimes surfaces even when those terms are replaced. For ex-

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CHI. (May 26, 2021), https://www.wbez.org/stories/mayor-lori-lightfoot-blamed-gun-violence-on-judges-but-emails-show-her-staff-knew-it-wasnt-true/f3b89c13-f72b-497d-8074-603e8bb9cc7e [https://perma.cc/B8BE-Y63A].

337. *See* Nazgol Ghandnoosh, *Media Guide: 10 Crime Coverage Dos and Don'ts*, THE SENT'G PROJECT, https://www.sentencingproject.org/app/uploads/2022/08/10-Crime-Coverage-Dos-and-Donts.pdf [https://perma.cc/HU7M-H9TV] (May 2022) (recommending reporting claims as claims and facts as facts); *see also* Will Bunch, *SEPTA Rape Fiasco Is Latest in a U.S. Pandemic of Police Lying. There Must Be Consequences.*, PHILA. INQUIRER (Oct. 24, 2021), https://www.inquirer.com/opinion/commentary/philadelphia-septa-rape-police-lying-20211024.html [https://perma.cc/UVY3-8PAJ] ("There needs to be a lot more accountability from the news media, which . . . far too readily accepts police news releases as undisputed fact, despite law enforcement's dismal track record on truthfulness."); Jerry Iannelli, APPEAL, *Why the Media Won't Stop Using "Officer-Involved Shootings*," (Oct. 12, 2021), https://theappeal.org/officer-involved-shooting-media-bias [https://perma.cc/ZZW6-66AP] (showing that obfuscating language serves to protect police and dehumanize disproportionately Black victims of police violence); Scott Hechinger, *A Massive Fail on Crime Reporting by The New York Times, NPR*, NATION (Oct. 6, 2021), https://www.thenation.com/article/society/crime-reporting-failure [https://perma.cc/CP36-YGLM] ("Media outlets, editors, and reporters need to improve their practices by turning to sources beyond just police and prosecutors, critically analyzing police sources when used, conveying genuine nuance in their reporting and headlines, and stopping the use of dehumanizing language."); Mark Anthony Neal, *Copaganda: How Pop Culture Helped Turn Police Officers into Rock Stars—and Black Folk into Criminals*, INQUEST (Nov. 13, 2021), https://inquest.org/copaganda [https://perma.cc/C5RK-TNPU] (asserting that pro-law-enforcement media "has long been a tool to disrupt legitimate claims of anti-Black violence").

338. See, for example, jury exclusion or disqualification of those with criminal records or an (assumedly) unfavorable view of the system; arrests of those distributing information about jury nullification; the deterrence of defendant and defense witness testimony through the threat of impeachment with criminal convictions or arrests; and indeed the pervasive silencing of those charged with crimes throughout their criminal system processing. *See, e.g.*, Natapoff, *supra* note 246.

339. *See, e.g.*, Stuart Schrader, *The Lies Cops Tell and the Lies We Tell About Cops*, NEW REPUBLIC (May 27, 2021), https://newrepublic.com/article/162510/cops-lie-public-safety-defund-the-police [https://perma.cc/U7R3-TZLA].

ample, some restorative justice proponents reject the terms "offender" and "victim" but have adopted alternatives in which assumptions of guilt may resurface.[340] "Responsible party" and "harmed party" have gained some traction, but these terms bring with them an assumption of, at the least, the commission of harm by the person against whom allegations have been brought.[341] Depending on the context, that may be problematic. The nature of these assumptions—and the extent to which they are fueled by the state and the media—merits investigation, since language change may unsettle them but is unlikely to destroy them.

Finally, there is room for careful investigation of the structure of the law school and its embeddedness with the state.[342] The extent to which even private law schools are embedded with the state is significant. Law schools are locked in partnerships with judges, prosecutors, and others, cultivating mutually beneficial relationships with them, relying on them for jobs and training,[343] bringing them in to teach and participate in events, honoring them, subsidizing students to work for them, and in some instances allowing our students to prosecute people in the name of the state and with our resources, letterhead, and support;[344] indeed, allowing our students to wield the resources of both the state and the law school against those who may have very few.[345]

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340. *See* POINTER, *supra* note 121, at 10–11. Thank you to Eve Hanan for related discussions.

341. *See id.* On this issue, one can compare "survivor."

342. Ossei-Owusu & Simonson, *supra* note 14 ("We must interrogate our own institutions' roles in creating our current conditions, and we must work to repair the harm that we and our institutions have done.").

343. *See* Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" if You're Trying to Put That Lawyer's Client in Jail?*, 69 FORDHAM L. REV. 997, 1042 (2000) (describing Merton's experience supervising a prosecution clinic).

344. *See* Olwyn Conway, *"How Can I Reconcile with You When Your Foot Is on My Neck?": The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 MICH. ST. L. REV. 1349, 1395 n.216 (2018) ("As of 2018, out of 203 ABA-approved law schools, thirty-six have prosecution clinics, but only nineteen appear to have an 'in-house' clinic, as opposed to an externship agreement with a District Attorney Office supplemented by a seminar class.").

345. *See* Stephen Ellmann, *The Clinical Year Begins*, 21 CLINICAL L. REV. 337, 342 (2015) ("Students who work in prosecution clinics . . . will very likely be prosecuting men and women of limited means, and students in these roles should come to grips with the responsibilities that come with wielding the power of the state."). In a student publication—Jarrod T. Green, *A Play on Legal Education*, 4 PHX. L. REV. 331, 359 (2010)—the student author attempts to "come to

Broadly speaking, law school clinics were conceived of as ways to provide representation to those who could not afford it.[346] But prosecutorial clinics offered benefits so attractive that many law schools were willing to launch them, despite the tension with such a mission.[347]

This embeddedness may have the kind of conscious effect mentioned earlier, namely prompting academics to hold back from dramatic linguistic change so as not to provoke those whom the law school wishes to please.[348] It may also help propel this language through less conscious mechanisms. There might be

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grips" with this conundrum, with a fictionalized dialog that includes the following:

J.T.: Tony, how is the hybrid prosecution clinic?

TONY: I completed my fourth trial; I am 4 and 0, a perfect record. Salud!

J.T.: How many poor souls did you throw in jail?

TONY: Come on now J.T. It is an important civic duty.

346. Peter A. Joy, *Prosecution Clinics: Dealing with Professional Role*, 74 MISS. L.J. 955, 960 (2005) ("Clinical legal education has its earliest roots in providing needed legal services to the poor, and prosecution clinical experiences do not directly fit this template.").

347. *See* Karen Knight, *To Prosecute Is Human*, 75 NEB. L. REV. 847, 865 (1996) (noting that "an argument can be made that it is inappropriate for a law school to contribute resources to the effort to 'imprison the poor'" and that "Nebraska's prosecution clinic has been likened by some members of the faculty to providing free legal services to IBM"); *see also id.* at n.39 (quoting a student journal entry: "According to Prof. X, the Criminal Clinic does nothing more than 'prosecute people who don't need to be prosecuted in the first place'"); Conway, *supra* note 344, at 1395 n.216 (noting "that there is an argument to be made . . . that most law schools frame their clinic programs as services provided to the indigent community in order to increase access to justice, and perhaps prosecution clinics do not fit this model"); Joy, *supra* note 346, at 961–62 ("Clinical legal education has developed and expanded in the last several decades, and not every law school tailors all of its clinical courses to fit into the historical access to legal services model underpinning the clinical legal education movement . . . .").

348. *See, e.g.*, Merton, *supra* note 343, at 1042 ("The Pace Prosecution Clinic is a guest of the Manhattan D.A.'s office; like any guest, we do not want to abuse our welcome, or become more trouble than we are worth"); *see also* Stacy Caplow, *"Tacking Too Close to the Wind": The Challenge to Prosecution Clinics to Set Our Students on a Straight Course*, 74 MISS. L.J. 919, 922 (2005) ("There are extensive examples of the misbehavior of prosecutors in cases involving trial misconduct, suppression of evidence, use of false testimony, abuse of power and, in some highly publicized instances, reluctance to reassess evidence of innocence. Clinicians surely have to honestly and openly discuss this behavior. The challenge for clinicians who work with prosecution offices, either directly or by monitoring student interns, is to raise these issues with sufficient diplomacy to avoid alienating the host office and jeopardizing the clinic.").

cognitive dissonance were we fully to confront the system's nature, whether through language choice or otherwise, while employed by institutions that cultivate and support its agents.

So too, the fact that we send students out into the world each year to do the system's work—through internships, clerkships, and other post-graduation jobs—might affect our conscious language choices, since our schools and students depend on those employer relationships. But our role in shaping and graduating those who have created and continue to perpetuate this system—whether as judges, prosecutors, or legislators, or in a range of other justificatory and enforcement roles[349]—may at a less conscious level also help propel this language. It might be uncomfortable to confront the system's nature fully, whether through language choice or otherwise, given that through people whose thinking we helped to shape we have played a role in getting and keeping it where it is. For sure we are not producers of students as a factory is of widgets: our students exercise independent judgment and their views are not dictated by things that we say or write. But we play a potentially formative role in shaping their early conceptions of what within our legal systems is ethical, contestable, and possible, and what is not.[350] If it is true that the system is and has throughout our careers been a monstrosity, if it is true that this is the moral crisis and civil rights issue

349. *See* Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 305 (2017) ("It is the prosecutor who exercises virtually unreviewable discretion in seeking charges, determining bail, negotiating a resolution, and ultimately, fixing a sentence. What is the prosecutor's role in creating mass incarceration? Or, as some scholars have asked, where were the lawyers when our criminal justice system was evolving into a fast track to mass incarceration? Where were the prosecutors when we became a mass incarceration state?"); *see also* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 173–74 (2019) (arguing that an academic focus on the power of prosecutors has diverted attention from more promising sources of reform, namely legislators, judges, and police).

350. *See* Ristroph, *supra* note 4, at 1692 ("Reflecting on the half century of mass incarceration, substantive criminal law teachers are left with two unpleasant positions: What I teach doesn't matter, or what I teach does matter—and look what it hath wrought."); *see also* Ossei-Owusu, *supra* note 4, at 427–28 ("Law professors have the potential to shape the future entrants of the legal profession."); Chacón, *supra* note 15 ("About ten years ago, I was teaching substantive criminal law, and I had a mini-revelation. When it comes to mass incarceration, I was part of the problem. Literally hundreds of lawyers had passed through my criminal law class by then. Some of them were prosecutors, and they were (and are) participating in the project of mass incarceration, adding bodies to the prisons and jails of this country, one person at a time.").

of our time,[351] and if it is the very opposite of an anti-racist system,[352] then we are implicated in what has been done, and how it has been done.[353] From this perspective, one can see how it might be tempting to speak of "progressive prosecution,"[354] for example, and troubling to say that it is a nullity. We need a way to square what we know and what we do.[355]

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351. *See, e.g.*, Alec Karakatsanis, *Why Crime Isn't the Question and Police Aren't the Answer*, CURRENT AFFS. (Aug. 10, 2020), https://www.currentaffairs.org/2020/08/why-crime-isnt-the-question-and-police-arent-the-answer [https://perma.cc/K9A2-X57L] ("It is hard to overstate the urgency of this moment for the people whose bodies and minds are on the line. Police surveil, harass, brutalize, and kill Black people. The things happening to human beings in our jails and prisons are unspeakable.").

352. *See* Renee Nicole Allen, *From Academic Freedom to Cancel Culture*, 68 UCLA L. REV. 364, 405 (2021) ("In the wake of George Floyd's killing at the hands of the police, law schools are exploring antiracist practices including antiracist hiring. While this offers an opportunity to serve as an important turning point, it is imperative that institutions proceed in a manner that avoids perpetuating the existing problems.").

353. Ossei-Owusu, *supra* note 4, at 415 (mentioning "legal education's reluctance to take full account of its role in our criminal justice crisis."); *see also* #DefundthePolice Solidarity, *supra* note 17 ("We and our peers have trained many lawyers, policy-makers, law-makers, and judges who have designed and effectuated key instruments of systemic inequality—incarceration, policing, and deportation among them, but also broader structures of inequality created and sustained by law and policy."); Ossei-Owusu & Simonson, *supra* note 14 ("Scholars and teachers must confront their role in perpetuating the status quo and facilitating mass incarceration.").

354. *See* Hanan, *supra* note 200 ("[T]he promise of a progressive prosecutor charging with restraint increases our optimistic attachment to prosecutorial power."); *see also* Levin, *supra* note 187, at 1417 ("Generally speaking, the progressive prosecutor is presumed to be one powerful antidote to mass incarceration or the problematic institutions of the penal state.").

355. *See* Franklin L. Runge, *Keeping Up with New Legal Titles*, 112 LAW LIBR. J. 345, 357 (2020) ("If you hear that a scholar is writing about the criminal justice system, your head and your gut tell you that there is but one conclusion: the criminal justice system in the United States of America is irretrievably broken. What does it mean that this knowledge is deeply embedded in your thought process, yet every hour government agents commit brutal acts in American communities in the name of justice?"); *see also* Robert Costello, Book Review, 35 CRIM. JUST. 41, 42 (2020) (reviewing ALEC KARAKATSANIS, UNUSUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM (2019)) (mentioning "ways in which legal education and legal practice can normalize cruelty" and "processes by which lawyers can become desensitized to things that should shock human beings to the core"); Ristroph, *supra* note 161, at 618 ("Felon is one of the devices by which we construct the targets of the criminal justice system as guilty, the better to construct ourselves as innocent.").

CONCLUSION

This Article has described an expansive web of common academic terms that convey implicit messages about the criminal system, those who control it, and those who are controlled by it. They do so in a way that sometimes diverges from accuracy and honesty and that risks silently resolving fundamental debates about the sustainability of the system, and thus helping to perpetuate the status quo.[356] Certainly none of these usages is unique to academia—there are implications for the language of all sorts of people who speak about the criminal system[357]—but we have a unique opportunity for change. The possibility of challenging or replacing these terms can inspire bold imaginings about the questions that this could provoke or reenergize, and the pushes for reform or abolition that this could fuel.[358] But these terms didn't come from nowhere. These bold imaginings, and the attendant pushes for change, need to be paired with attention to the kinds of forces that impel this and other aspects of the status quo.

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356. *See* Ossei-Owusu, *supra* note 4, at 414 (arguing that "law schools are key sites for the reproduction of our penal status quo, yet are relatively ignored in criminal justice scholarship").

357. *See, e.g.*, Lauren Johnson, Cinnamon Pelly, Ebony L. Ruhland, Simone Bess, Jacinda K. Dariotis & Janet Moore, *Reclaiming Safety: Participatory Research, Community, Perspectives, and Possibilities for Transformation*, 18 STAN. J. C.R. & C.L. 191, 203 (2022) (describing a study exploring "the complexity of public safety from perspectives of 12 community member roundtable participants"); *see also* Elderbroom et al., *supra* note 68 (raising questions about a mainstay of criminal court language—"the Defendant"); Margaret Love, *A Plea to Stop Labeling People Who Have a Criminal Record*, COLLATERAL CONSEQUENCES RES. CTR. (Apr. 25, 2016), https://ccresourcecenter.org/2016/04/25/a-plea-to-stop-labeling-people-who-have-a-criminal-record [https://perma.cc/S68V-L28G] (noting how often media accounts used the word "felon" in describing Virginia Governor McAuliffe's restoration of civil rights to people with felony convictions).

358. *See* Bell, *supra* note 118, at 46 ("In line with pursuing a positive project as well as a negative one, another goal of the vision of abolition that I put forward here (which has been suggested by other abolitionist scholars and activists) is the creation of a new vocabulary, including the elimination and substitution of certain terms, such as offender, inmate, and criminal justice system. . . . Language has tremendous power to construct our thinking and worldviews and, in turn, construct the world and the ways we interact with it.").