

The Myth of Conflicting Interests: Guarding a Victim’s Right To Be Called the “Victim” During Trial

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I. INTRODUCTION

Since 1791, the Constitution of the United States has guarded the rights of the criminal defendant.¹ Those rights include the right to an attorney, the right to a speedy trial, the right to confront witnesses against him—and the list continues.² Perhaps most notably the Constitution provides that “no person shall be . . . deprived of life, liberty, or property, without due process of law.”³ The Supreme Court has interpreted “due process” to include several free-standing rights, among them the right to be presumed innocent until proven guilty,⁴ the right to an impartial tribunal,⁵ and the right to make the government prove its case beyond a reasonable doubt.⁶ Of course, all of these rights play a vital role in affording criminal defendants a fair trial and sustaining public confidence in the criminal justice system.⁷ Throughout these developments, however, courts lost sight of another person in dire need of her own legal protection: the victim.⁸

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1. See U.S. CONST. amend. IV–VI; see also ARIZ. CONST. art. II, § 24 (listing the rights of criminal defendants under the Arizona Constitution).

2. U.S. CONST. amend. IV–VI.

3. *Id.* amend. V; see also *id.* amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”); ARIZ. CONST. art. II, § 4 (“No person shall be deprived of life, liberty, or property without due process of law.”).

4. *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (“The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.”).

5. *In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”).

6. *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

7. See *id.* at 363–64.

8. Gessner H. Harrison, *The Good, the Bad, and the Ugly: Arizona’s Courts and the Crime Victims’ Bill of Rights*, 34 ARIZ. ST. L.J. 531, 533–34 (2002).

Through the 1970s, a victim could hardly participate in the prosecution of her own perpetrator, let alone exercise any rights during that process.⁹ The law's neglect of victims sparked a national movement amongst advocates determined to correct the systemic imbalance.¹⁰ In 1982, President Reagan's Task Force issued a public report in which it concluded that, although it "wish[ed] in no way to vitiate the safeguards that shelter anyone accused of [a] crime[,] . . . it must be urged with equal vigor that the system ha[d] deprived the innocent, the honest, and the helpless of its protection."¹¹ The Task Force thus proposed an amendment to the Constitution that would name victims a protected party, reasoning that the "government must be restrained from trampling the rights of . . . [t]he victims of crime [who] ha[d] been transformed into a group oppressively burdened by a system designed to protect them."¹²

Although no federal constitutional amendment has yet taken effect, Arizona voters met the call of the Task Force on November 6, 1990 when they passed their own amendment to the Arizona Constitution.¹³ With an underlying mission to "preserve and protect victims' rights to justice and due process," the Arizona Victims' Bill of Rights grants victims twelve rights.¹⁴ Chief among them is the right "to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process."¹⁵ This demand for fair, respectful, and dignified treatment may seem straightforward on its face, but courts have struggled to apply it in practice—especially when pitted against a defendant's due process rights.¹⁶

In *Z.W. v. Foster*, the Arizona Court of Appeals specifically noted tension between the rights of victims and defendants when deciding how to refer to

9. *Id.*; see also *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

10. Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 865 (2007).

11. Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 ARIZ. ST. L.J. 421, 421–22 (2015) (quoting PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114 (1982), <http://www.ovc.gov/publications/presdntstskforcrprt/87299.pdf> [https://perma.cc/49TV-GNRZ]).

12. *Id.* at 422.

13. *Id.* at 421.

14. ARIZ. CONST. art. II, § 2.1(A)(1–12).

15. *Id.* art. II, § 2.1(A)(1).

16. *State ex rel. Romley v. Superior Ct.*, 836 P.2d 445, 450 (Ariz. Ct. App. 1992) ("[C]ourts are now faced with extremely difficult questions arising from the inevitable tension between the rights of the accused, who is presumed to be innocent, and the rights of the victim.").

a victim during trial.¹⁷ Ultimately, the court erred by refusing to protect a victim’s right to be referred to as a “victim” during the proceedings. First, the court failed to uphold the ordinary meaning of the Arizona constitutional provision that grants victims a right to fair, respectful, and dignified treatment. Second, the court improperly upheld the trial court’s conclusion that accurate references to the victim’s legal status would preclude the defendant from receiving a fair trial. In order to advance the interests of both crime victims and the voters who sought to protect them, the Arizona Supreme Court and Arizona Legislature should override the unconstitutional holding in *Z.W. v. Foster*.

II. *Z.W. v. FOSTER*: A FORGOTTEN PARTY’S STRUGGLE FOR EQUALITY

The *Z.W. v. Foster* decision reminded victims just how much work remains before they will achieve legal equality to defendants. The issue in that case stemmed from a child molestation victim’s petition for special action in which she asked the court to preclude references to her as the “alleged victim.”¹⁸ The victim argued that such references violated her right to be treated with fairness, respect, and dignity because they “call[ed] into question . . . whether [she] [wa]s in fact a victim.”¹⁹ The court, however, held that she did not have a right to be called a “victim” during trial.²⁰ It reasoned that the Victims’ Bill of Rights does not mandate use of any particular term to address victims.²¹ It also claimed that the title “alleged victim” did not undermine the victim’s credibility, but merely reflected the case’s procedural posture because the government had not yet proven the defendant’s guilt beyond a reasonable doubt.²²

Further, the court held that the defendant’s due process rights supported calling the victim the “alleged victim” because referring to her as a “victim” would “give[] [her] the right to say a crime ha[d] been committed as a matter of law” before the jury had even deliberated the issue.²³ The court added that trial courts have discretion on a “case-by-case basis” to decide how to address a victim during trial and, under these facts, because “the core issue in dispute

17. *Z.W. v. Foster*, 422 P.3d 582, 584, ¶ 7 (Ariz. Ct. App. 2018).

18. *Id.* at 583, ¶ 1.

19. *Id.* at 583, ¶ 5.

20. *Id.* at 583, ¶ 4.

21. *Id.*

22. *Id.* at 583, ¶ 5.

23. *Id.* at 584, ¶ 7.

[wa]s whether any crime [had] occurred,” the trial court did not abuse its discretion by disallowing the term “victim.”²⁴

The dissent countered that the plain language of Arizona’s constitutional and statutory law reflects the legislature’s intent for a victim to be referred to as a “victim” during trial.²⁵ It specifically noted that, under the Victims’ Rights Implementation Act, a victim accrues her rights at the arrest or formal charging of the defendant, so “logic dictates [that the victim] [wa]s a ‘victim’ and should [have] be[en] referred to as such.”²⁶ The dissent also argued that nothing in the record showed how referring to the victim as a “victim” would jeopardize the defendant’s due process rights, especially given the trial court’s explicit instructions to the jury regarding the defendant’s presumption of innocence.²⁷ Thus, not only did the dissent disagree with the majority’s belief that the victim had no right to be called a “victim,” but it disagreed as to whether enforcing such a right would interfere with the defendant’s right to a fair trial.

III. STEP ONE: DETERMINING WHETHER THE RIGHT EXISTS

To determine whether the Victims’ Bill of Rights grants victims the right to be referred to as such during trial, a court should seek to “effectuate the intent of those who framed [the Bill] and . . . the intent of the electorate that adopted it.”²⁸ To best effectuate that intent, a court should uphold the ordinary meaning of the Bill’s language at the time it was adopted.²⁹ Here, the relevant provision states, “To preserve and protect victims’ rights to justice and due process, a victim of crime has a right: 1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.”³⁰ The ordinary meaning of this provision, derived from its text and structure, refutes the *Z.W.* court’s

24. *Id.*

25. *Id.* at 585, ¶ 14 (Beene, J., dissenting).

26. *Id.*

27. *Id.* at 585–86, ¶¶ 15–16 (Beene, J., dissenting).

28. *See* *Heath v. Kiger*, 176 P.3d 690, 693, ¶ 9 (Ariz. 2008) (en banc) (quoting *Jett v. City of Tucson*, 882 P.2d 426, 430 (Ariz. 1994)).

29. *Bilke v. State*, 80 P.3d 269, 271–72, ¶ 11 (Ariz. 2003) (en banc) (“In giving effect to every word or phrase, the court must assign to the language its ‘usual and commonly understood meaning’” (quoting *State v. Korzep*, 799 P.2d 831, 834 (Ariz. 1990))); *Knapp v. Martone*, 823 P.2d 685, 687 (Ariz. 1992) (en banc); *State v. Lee*, 245 P.3d 919, 922, ¶ 9 (Ariz. Ct. App. 2011) (citing *Phelps Dodge Corp. v. Ariz. Elec. Power Coop.*, 83 P.3d 573, 587, ¶ 42 (Ariz. Ct. App. 2004)).

30. ARIZ. CONST. art. II, § 2.1(A)(1).

conclusion that a victim does not have a right to be referred to as a “victim” during trial.

A. Textual Analysis

Although the Victims’ Bill of Rights does not designate any particular term for addressing a victim during trial, its broader command to treat victims with “fairness, respect, and dignity” sets the bar for *all* interactions with a victim—including when addressing her in court.³¹ Based on the ordinary meaning of the words “fairness,” “respect,” and “dignity” in 1990 (the year the Bill was adopted), the Bill confers to victims a right to be referred to as a “victim” throughout trial.

First, the ordinary meaning of the word “fairness” in 1990 supports giving victims the right to be called a “victim” during trial. The 1990 edition of the Merriam-Webster Dictionary defines “fair” as “conforming with the established rules” or “just.”³² Certainly, addressing a victim as a “victim” during trial conforms with the legal status conferred to her at the arrest or charging of the defendant per the Victims’ Rights Implementation Act.³³ Moreover, a court’s recognition of her legal status fosters more just proceedings by asserting her equality to the defendant as a protected party in the criminal justice process.³⁴ By barring use of the title “alleged victim”—a title that would brand a victim as “dubious” and “suspect”—a court further promotes justice by helping ensure that the victim, just like the defendant, receives an unbiased opportunity to be heard.³⁵ These textual implications especially make sense within the context of the broader Victims’ Rights Movement and its goal to create and protect due process rights for victims.³⁶ Thus, to achieve “fairness” as understood by Arizona legislators and voters in 1990, a victim should have a right to be called a “victim” during trial.

Additionally, the ordinary meaning of the word “respect” in 1990 reinforces a victim’s right to be addressed as a “victim” during trial. The 1990

31. See *City of Phoenix v. Glenayre Elecs., Inc.*, 375 P.3d 1189, 1196 (Ariz. Ct. App. 2016), *vacated in part*, 393 P.3d 919 (Ariz. 2017) (finding that a statute’s broad language encompassed other more specific implications).

32. *Fair*, MERRIAM-WEBSTER DICTIONARY 258 (9th ed. 1990).

33. See ARIZ. REV. STAT. § 13-4402(A) (2019) (“[T]he rights and duties that are established by this chapter arise on the arrest or formal charging of the person or persons who are alleged to be responsible for a criminal offense against a victim.”); *Z.W. v. Foster*, 422 P.3d 582, 585, ¶¶ 13–14 (Ariz. Ct. App. 2018) (Beene, J., dissenting).

34. See Terry Campos, *Use of the Term “Victim” in Criminal Proceedings*, 11 NCVLI NEWS 2009, at 1, 19; Twist & Williams, *supra* note 11, at 424–25.

35. See Campos, *supra* note 34, at 3.

36. See Twist & Williams, *supra* note 11, at 421–22, 424.

edition of the Merriam-Webster Dictionary states that “respect” means “high regard” or “esteem.”³⁷ When a court calls a victim a “victim,” it pays high regard or esteem to her role in the criminal justice process by affirming her status (and rights) under Arizona law.³⁸ This affirmation reminds the victim that her story is worth sharing and that she deserves a full and fair opportunity to be heard.³⁹ In turn, she will feel emboldened to participate in the proceedings, fulfilling a primary aim of the broader Victims’ Rights Movement.⁴⁰ In contrast, when a court refers to a victim as the “alleged victim,” it diminishes her story, credibility, and legal status, all of which will deter her from engaging in the prosecution—an outcome diametrically opposed to the objectives of the Victims’ Rights Movement.⁴¹ Therefore, in order to give a victim “respect” as understood by Arizona legislators and voters in 1990, she should have a right to be called a “victim” during trial.

Finally, the ordinary meaning of the word “dignity” in 1990 justifies giving victims the right to be called a “victim” during trial. The 1990 edition of the Merriam-Webster Dictionary defines “dignity” as “the quality or state of being worthy, honored, or esteemed.”⁴² For a court to treat a victim with “dignity,” it must thus recognize the intrinsic value of her unique experiences and point of view.⁴³ By respecting a victim’s wish to be referred to as a “victim,” a court does exactly that. It specifically shows regard for her pain, her perception of injustice, and her desire for legal reparation.⁴⁴ In contrast, when a court refuses to call her a “victim,” it caters entirely to the defendant’s preferences and, as a result, flouts the aims of the Victims’ Rights Movement by alienating the victim from her own case and subjecting her to what may feel like a second victimization.⁴⁵ Using the term “alleged victim” only

37. *Respect*, MERRIAM-WEBSTER DICTIONARY, *supra* note 32, at 596.

38. *See* Campos, *supra* note 34, at 19.

39. *See* Scott A. McDonald, *When a Victim’s a Victim: Making Reference to Victims and Sex-Crime Prosecution*, 6 NEV. L.J. 248, 257 (2005).

40. *See id.*; Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President’s Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 21–22 (1999).

41. *See* McDonald, *supra* note 39, at 257; Courtney Fisher, *An Analysis of Victim Satisfaction with the Criminal Justice System in a Procedural Justice Framework* (2014) (Ph.D. dissertation, University of Maryland), <https://www.courts.ca.gov/documents/BTB24-Precon1F-1.pdf> [<https://perma.cc/HS99-ZUKH>].

42. *Dignity*, MERRIAM-WEBSTER DICTIONARY 206 (9th ed. 1990).

43. *See* Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity’s Evolution in the Victims’ Rights Movement*, 9 DREXEL L. REV. 43, 46–47 (2016).

44. *See* Valerie M. Meredith, *Victim Identity and Respect for Human Dignity: A Terminological Analysis*, 91 INT’L REV. RED CROSS 259, 261 (2009).

45. *See* DOUGLAS E. BELOOF ET AL., *VICTIMS IN CRIMINAL PROCEDURE* 27 (Carolina Acad. Press, 4th ed. 2018); Twist & Williams, *supra* note 11, at 421–22, 424.

makes matters worse by casting doubt on the victim’s authenticity despite her sincere belief in her claims.⁴⁶ Thus, to uphold a victim’s “dignity” as understood by Arizona legislators and voters in 1990, a victim should have a right to be called a “victim” during trial.

The ordinary meaning of the words “fairness,” “respect,” and “dignity” at the time Arizona voters adopted the Victims’ Bill of Rights⁴⁷ thus defies the court’s decision in *Z.W. v. Foster* to reject a victim’s right to be called the “victim” during trial.

B. Structural Analysis

To discern the meaning of a constitutional provision, a court should not only analyze its relevant language, but it should assess the provision’s fit in the broader constitutional scheme.⁴⁸ Here, the structure of the Victims’ Bill of Rights demands that courts actively enforce a victim’s right to be called a “victim” during trial.

The Bill opens with an introductory sentence stating its general purpose “[t]o preserve and protect victims’ rights to justice and due process.”⁴⁹ Below that, it lists the specific rights granted to victims—the first one being the right “[t]o be treated with fairness, respect, and dignity.”⁵⁰ Notably, the Bill’s drafters did not include that language in the introductory section, but they set it off as its own separate provision in a list of just twelve enumerated rights.⁵¹ Such placement suggests that neither the drafters of the provision nor the voters who adopted it intended it to serve as a mere “exhortation” to treat victims kindly or a “background norm” for interpreting the rest of the Bill.⁵² Rather, they sought to create a “tangible and enforceable right[.]”⁵³ Controversial or not, the distinctive location of the provision shows that the drafters intended it to carry a force equal to every other right listed under the

46. See Campos, *supra* note 34, at 3.

47. Notably, the ordinary meaning of these words remains the same in the present day. See *Dignity*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/dignity> [https://perma.cc/443L-Q5H8]; *Fairness*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/fairness> [https://perma.cc/HC82-G9YJ]; *Respect*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/respect> [https://perma.cc/HZ6R-5MYV].

48. See *Meyer v. State*, 436 P.3d 511, 515, ¶ 10 (Ariz. Ct. App. 2019) (using both the “text and structure” of a statute to construe its meaning).

49. ARIZ. CONST. art. II, § 2.1(A).

50. *Id.* art. II, § 2.1(A)(1)–(12).

51. *Id.*

52. See Giannini, *supra* note 43, at 72, 93.

53. *Id.* at 72.

Bill: the force of a constitutional command.⁵⁴ For this reason, a court should guard a victim's right to fair, respectful, and dignified treatment just as it would guard a defendant's own constitutional rights.

In sum, not only does the relevant language of the first provision of the Victims' Bill of Rights establish a victim's right to be called a "victim" during trial, but the structure of the Bill affirms a court's authority to enforce that right. The court in *Z.W. v. Foster* thus erred by failing to recognize a victim's constitutional right.

IV. STEP TWO: DETERMINING WHETHER THE RIGHTS CONFLICT

The words and structure of the Victims' Bill of Rights make clear that victims have a constitutional right to be referred to as a "victim" during trial—but that right may have limits. Specifically, if it conflicts with a defendant's due process rights under the Federal Constitution, the latter must prevail.⁵⁵ A court should not, however, fall into the trap of assuming that the rights of the victim and defendant necessarily conflict when, in reality, they can co-exist in harmony.⁵⁶ In this case, contrary to the majority's conclusion in *Z.W. v. Foster*, a victim can employ her right to be called a "victim" during the proceedings without disturbing a defendant's right to a fair trial.

For a defendant to receive a fair trial, the jury must appreciate his presumption of innocence and resort to conviction only when the government proves its case "beyond a reasonable doubt."⁵⁷ The majority in *Z.W. v. Foster* claimed that references during trial to the victim as a "victim" would endanger the defendant's presumption of innocence.⁵⁸ It reasoned that such references could impede the jury's ability to objectively weigh the evidence by insinuating that the crime in question had in fact occurred.⁵⁹ But the actual meaning of the term "victim" rebuts that argument.

54. *Id.*; Cassell, *supra* note 10, at 874.

55. *State v. Bible*, 858 P.2d 1152, 1205 (Ariz. 1993) (explaining that victims' rights "cannot conflict with a defendant's right to a fair trial"); *State ex rel. Romley v. Superior Ct.*, 836 P.2d 445, 449 (Ariz. Ct. App. 1992).

56. *See State ex rel. Romley v. Dairman*, 95 P.3d 548, 554, ¶ 22 (Ariz. Ct. App. 2004); *Twist & Williams*, *supra* note 11, at 445.

57. *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *In re Winship*, 397 U.S. 358, 363–64 (1970).

58. *See Z.W. v. Foster*, 422 P.3d 582, 584, ¶¶ 7–8 (Ariz. Ct. App. 2018).

59. *See id.* at 583, ¶ 6. *See also* Order Re Mr. Bryant's Motion to Preclude References to the Accuser as "Victim," *People v. Bryant*, No. 03-CR-204, 2004 WL 869618, at *2 (Colo. Dist. Ct. May 28, 2004).

The term “victim”—just like the term “defendant”—rightly denotes a party’s status under Arizona law.⁶⁰ It does not guarantee the victim’s credibility or the validity of the state’s charges.⁶¹ It does not mischaracterize the evidence.⁶² And it says nothing at all about the defendant.⁶³ Using the term “victim” merely heeds the instruction of the Victims’ Rights Implementation Act to recognize a party as a “victim” (so that she may accrue victims’ rights) at the arrest or charging of the defendant.⁶⁴ The Arizona Court of Appeals has further emphasized that *before* a defendant is convicted, “[a] victim . . . is presumed to have been violated for purposes of obtaining victims’ rights and is entitled to those rights as provided under our constitution and laws.”⁶⁵ Therefore, references in trial to the victim as such do not prejudice the defendant because they do not imply his guilt; rather, they accurately identify another party’s legal status.

Regardless, a court neutralizes even the possibility of prejudice through its instructions to the jury.⁶⁶ In Arizona, standard jury instructions, which the judge relays at both the beginning and end of trial, direct the jury to “start with the presumption that the defendant is innocent” and remember that “[t]he State has the burden of proving the defendant guilty beyond a reasonable doubt.”⁶⁷ Further, standard instructions require the jury to determine a case’s facts based on only the “evidence produced in court”—not on comments from the attorneys or trial judge.⁶⁸ Any jury who understands the gravity of their role in the criminal justice process will strive

60. Campos, *supra* note 34, at 19; McDonald, *supra* note 39, at 262.

61. McDonald, *supra* note 39, at 250, 265.

62. *Id.* at 262. *See also* Darden v. Wainwright, 477 U.S. 168, 169 (1986) (holding that remarks that “did not manipulate or misstate the evidence” did not deprive the defendant of a fair trial).

63. *See* McDonald, *supra* note 39, at 262.

64. *See* ARIZ. REV. STAT. ANN. § 13-4402(A) (2019).

65. State *ex rel.* Romley v. Dairman, 95 P.3d 548, 554, ¶ 22 (Ariz. Ct. App. 2004).

66. *See, e.g.,* State v. Bolivar, 477 P.3d 672, 679, ¶ 17 (Ariz. Ct. App. 2020) (finding that instructions on the state’s burden of proof and the defendant’s presumption of innocence prevented any “error” from using the term “victim”); State v. Mason, No. 2 CA-CR 2018-0202, 2019 WL 5294951, at *13, ¶ 50 (Ariz. Ct. App. Oct. 17, 2019) (finding that instructions on the jury’s duty and the state’s burden of proof made any misuse of the term “victim” during trial “harmless”); State v. Nomura, 903 P.2d 718, 722 (Haw. Ct. App. 1995) (holding that instructions that informed the jury of the burden of proof on the prosecution “dissipate[ed] whatever effect the term ‘victim’ might have had on the jury”).

67. STATE BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS (CRIMINAL) 15–16 (5th ed. 2019).

68. *Id.* at 18–19.

to faithfully adhere to these orders.⁶⁹ Frankly, it insults both their intelligence and integrity to assume that appropriate use of a legal term will cause them to discount the court's charge to them.⁷⁰ Under mild facts like these, one can assume the opposite: that the members of the jury—decent, competent people who have been painstakingly screened through *voir dire*—will make good on their promise to assess the evidence with diligence and impartiality.⁷¹

For all of these reasons, a victim's right to be referred to as a "victim" during trial does not conflict with a defendant's due process rights. The *Z.W.* court found tension where none existed and, consequently, stole from the victim a right owed to her under the Arizona Constitution.

V. THE PROPOSED SOLUTION (AND ALTERNATIVES)

Although a victim could argue that *Z.W. v. Foster* leaves room for trial judges to allow use of the term "victim" in their discretion—an argument that victims *have* successfully made since the *Z.W.* decision⁷²—a victim should not have to depend on the success of such an argument to attain her rights. Rather, the Arizona Supreme Court should set new precedent that corrects the errors in *Z.W. v. Foster*. Even better, for a more enduring solution, the Arizona Legislature should invoke its authority under the Victims' Bill of Rights to enact law that defines the scope of a victim's right to fair, respectful, and dignified treatment.⁷³ Judges and lawmakers alike should specify that the Victims' Bill of Rights *does* grant victims a right to be called a "victim" during trial, and that enforcing that right *does not* disturb a defendant's due process rights.

69. See *Mason*, 2019 WL 5294951, at *13 ("We presume the jury followed its instructions."); see also *Sparf v. United States*, 156 U.S. 51, 78 (1895) ("It is [the jury's] duty to take the law from the court, and apply it to the facts of the case."); *State v. Bible*, 858 P.2d 1152, 1206 (Ariz. 1993) ("[T]he preliminary and final jury instructions focused the relevant inquiry and helped ensure that Defendant received a fair trial.").

70. See *McDonald*, *supra* note 39, at 263–64.

71. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974) ("[A] court should not lightly infer that . . . a jury, sitting through lengthy exhortation, will draw [the most prejudicial] meaning from the plethora of less damaging interpretations."); *id.*

72. See, e.g., *State v. Bolivar*, 477 P.3d 672, 677, ¶ 10 (Ariz. Ct. App. 2020) (finding that "*Z.W.* d[id] not establish that the term 'victim' is inappropriate when the defendant disputes whether a crime occurred" but that "trial courts should have flexibility in determining how to refer to crime victims during criminal proceedings") (citing *Z.W. v. Foster*, 422 P.3d 582, 584, ¶ 8 (Ariz. Ct. App. 2018)).

73. See ARIZ. CONST. art. II, § 2.1(D) ("The legislature, or the people by initiative or referendum, have the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section . . .").

Under existing precedent, however, a victim might explore a couple of other avenues for obtaining—to the fullest extent possible—fair, respectful, and dignified treatment. First, she could propose jury instructions that explain the legal reasons for her victim status, which, if adopted, might ease a court’s concerns regarding the prejudicial effects of the label “victim.” Alternatively, if a court still refuses to allow references to her as the “victim” during trial, she could request that she be addressed by name rather than as the “alleged victim.” Although neither option would fully advance her rights, both could provide at least some relief in a defendant-oriented criminal justice system.

A. Additional Jury Instructions?

Assuming that neither the Arizona Supreme Court nor Arizona Legislature reverse *Z.W. v. Foster*, a victim could try to work around the *Z.W.* holding by proposing additional jury instructions that obviate a court’s fear of prejudicing the defendant.⁷⁴ Those instructions might read:

In this trial, you will hear the complaining witness referred to as the “victim.” The term “victim” denotes the independent legal status of the complaining witness under Arizona law. It should not be taken as evidence of the credibility of the complaining witness or as evidence of the guilt of the defendant. Whether the defendant is guilty in this case is a matter for you alone to decide based on only the evidence presented in court.

“Curative” instructions like these would eliminate doubt as to whether calling a victim a “victim” might deprive the defendant of a fair trial.⁷⁵ They would correct juror misconceptions about the term “victim,” and they would remind the jury, once again, to objectively consider the evidence.⁷⁶ If the criminal justice system existed solely to advance defendants’ due process rights, requiring such instructions would surely serve that aim. As evidenced

74. See *Taylor v. Kentucky*, 436 U.S. 478, 486 (1978) (identifying the “purging effect” of an instruction to be one way of protecting a defendant’s right to a fair trial); *BELOOF ET AL.*, *supra* note 45, at 81.

75. See, e.g., *State v. Thompson*, 76 A.3d 273, 285, 289 (Conn. App. Ct. 2013) (holding that the trial court’s instructions reminding the jury that the term “victim” had no bearing on the defendant’s guilt successfully “neutralize[d] the potential prejudice” against the defendant); *State v. Robinson*, 838 A.2d 243, 247 (Conn. App. Ct. 2004) (“[A]ny impermissible effect of the use of th[e] term [“victim”] was ameliorated by the court’s twice stated instruction to the jurors that it was up to them to decide if the complaining witness was a victim . . .”).

76. See, e.g., *Thompson*, 76 A.3d at 285; *Robinson*, 838 A.2d at 247.

by the Victims' Rights Movement, however, the criminal justice system must account for the interests of another party: the victim.⁷⁷

When a court allows use of the term “victim” during trial, even if it predicates that allowance on the introduction of curative jury instructions, it accommodates the victim’s right “[t]o be treated with fairness, respect, and dignity.”⁷⁸ So long as those instructions do not discredit the victim but, instead, explain the court’s obligation under Arizona law to honor her independent rights and legal status, they will not diminish her role in the criminal justice process.⁷⁹ Nor will they compound the pain she has already experienced or belittle her perception of injustice.⁸⁰ Such instructions would simply direct the jury not to construe the court’s allowance of the term “victim” as a verification of her allegations. In this way, curative jury instructions provide a path for a victim to exercise her constitutional right while also ensuring the defendant receives a fair trial.

Still, although requiring an instruction on the victim’s legal status does not preclude her right to fair, respectful, and dignified treatment, it tells her that she will not receive that right apart from extra action by herself or the court. Of course, on a pragmatic level, the requirement to obtain more jury instructions would hardly, if at all, burden the victim.⁸¹ But nothing in the Constitution—state or federal—actually prescribes that condition.⁸² As discussed above, the Victims’ Bill of Rights grants victims the right to be called a “victim” during trial, and defendants’ constitutional rights do not limit that right because they do not conflict with it.⁸³ By imposing its own restrictions, a court thus exceeds its constitutional authority.⁸⁴ In the process, it sets dangerous precedent, opening the floodgates for courts to make other extra-constitutional exceptions to a victim’s right to fair, respectful, and dignified treatment.⁸⁵ Although such a compromise might provide short-term

77. Twist & Williams, *supra* note 11, at 421–22.

78. *See supra* Part III.

79. *See* Campos, *supra* note 34, at 19.

80. *See* Fisher, *supra* note 41.

81. Theresa A. McNamara, *Act 10: Remediating Problems of Pennsylvania’s Rape Laws or Revisiting Them?*, 101 DICK. L. REV. 203, 227 (1996) (explaining that a court could “easily” issue jury instructions “to cure any confusion or prejudice”).

82. *See* U.S. CONST.; ARIZ. CONST.

83. *See supra* Parts III–IV.

84. *See* ARIZ. CONST. art. XXI, § 1 (describing the only way to amend the Arizona Constitution, which includes a vote by a majority of the Arizona Senate, Arizona House of Representatives, and Arizona voters).

85. *See* Compassion in Dying v. Washington, 85 F.3d 1440, 1449 (9th Cir. 1996) (Trott, J., dissenting) (“[T]he first decision is distilled from the language of the Constitution, but the next

resolution for the victim, in the long run it would only weaken the foundation of her constitutional rights.

B. Addressing the Victim by Name?

If, even after the proposal of curative jury instructions, a court refuses to allow references to the victim as a “victim,” the victim could request that she be addressed by name during trial.⁸⁶ In doing so, she might point to the *Z.W.* court’s assertion that trial judges “should have flexibility in determining how to refer to crime victims during criminal proceedings” and should give “great deference” to a victim’s request that “a particular name or part of a name be used or not be used.”⁸⁷ A victim might also remind the trial judge that although the *Z.W.* court barred use of the term “victim” under the case’s unique facts, it did not—as the Arizona Court of Appeals has explained—confine courts to use of the title “alleged victim” in all cases.⁸⁸

Unlike when a court uses the title “alleged victim,” when a court addresses a victim by name before the jury, it does not disparage her credibility, intentions, or allegations. In fact, using the victim’s name personalizes her to the jury, underscoring the reality that real people on both sides of the matter—not just the defendant—have real interests at stake.⁸⁹ This neutral yet personal mode of addressing the victim may help her feel comfortable enough to participate in the proceedings, free from the fear of baseless, premature scrutiny from the jury.⁹⁰ At the same time, it does raise privacy concerns for victims, and especially young ones, who do not want their name shared on public record.⁹¹ Nonetheless, assuming a victim consents to using her name,

expansion begins from the reasoning of the last decision, and so on down the line until we reach a point where the words of the Constitution are so far in the background that they are virtually ignored.” (quoting Erwin N. Griswold, *The Judicial Process*, 31 FED. B.J. 309, 317 (1972))).

86. See Order Re Mr. Bryant’s Motion to Preclude References to the Accuser as “Victim,” *supra* note 59 (holding that “use of the term ‘victim’ at trial would be inappropriate” and resolving to refer to the victim by name).

87. See *Z.W. v. Foster*, 422 P.3d 582, 584, ¶ 8–9 (Ariz. Ct. App. 2018).

88. See *State v. Mason*, No. 2 CA-CR 2018-0202, 2019 WL 5294951, at *12, ¶ 47 (Ariz. Ct. App. Oct. 17, 2019) (finding that the defendant “ha[d] pointed [the court] to no binding authority—and [it] [was] aware of none—that requires use of the title ‘alleged victim’ in criminal proceedings”).

89. See *BELOOF ET AL.*, *supra* note 45, at 24 (“Modern criminal procedure tends to view the party injured by the crime as merely the state.”).

90. Campos, *supra* note 34, at 3.

91. See ARIZ. REV. STAT. § 13-4434 (2015); *People v. Ramirez*, 64 Cal. Rptr. 2d 9, 13 (Cal. Ct. App. 1997) (finding that a statute that allowed victims to conceal their identity during trial protected their privacy, encouraged them to report offenses, and protected them from harassment, threats, and physical harm); *BELOOF ET AL.*, *supra* note 45, at 293.

it offers a far more dignified alternative to addressing her as the “alleged victim.”

Still, when a court has given the victim no choice but to ask to be addressed by name or otherwise be branded the “alleged victim,” it falls short of treating her with “fairness, respect, and dignity.” To be sure, a court’s use of her name does not in itself violate her rights; the problem lies in its deliberate use of her name as a substitute for acknowledging her victim status, which signals to the victim that she lacks equal value to the defendant as an independent, protected party.⁹² Further, it discounts the pain she has experienced, her perception of a wrong against her, and her desire to be identified as the “victim” as she seeks legal reparation.⁹³ Put simply, a victim has a right under the Arizona Constitution to be addressed according to her legal status.⁹⁴ Although referring to her by name beats stigmatizing her as the “alleged victim,” if a court has forced her to give up her wish to be called the “victim,” it rejects her constitutional right.

VI. CONCLUSION

Arizona voters affirmed victims’ place in the criminal justice process upon passing the Victims’ Bill of Rights in 1990. Since then, courts have struggled to balance victims’ rights with the rights of defendants. But there is no need to balance when determining how to address a victim during trial. The Victims’ Bill of Rights grants victims the right to be called a “victim” during trial, and that right does not conflict with defendants’ due process rights. Both parties may thus simultaneously exercise their respective rights. Because the *Z.W. v. Foster* court concluded the opposite, the Arizona Supreme Court and Arizona Legislature should reject its holding. Under current precedent, a victim might still request to give the jury “curative” instructions on the term “victim” or to simply be referred to by name during trial—but neither of these options would fully advance her interests. In the end, perhaps only an amendment to the Federal Constitution will finally equalize victims with their legal counterparts.⁹⁵ Until then, victims must continue to fight for the fair, respectful, and dignified treatment they deserve.

92. See *supra* Part III.

93. See *supra* Part III.

94. See *supra* Part III.

95. Twist & Williams, *supra* note 11, at 448 (“[T]here remains a lingering failure to fully embrace the ethic of a more victim-centered justice system. True changes in the underlying culture of the criminal justice system are likely to come about only through the adoption of a federal constitutional amendment.”).