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# Policy Paper: The Need to Enhance Victims' Rights in the Florida Constitution to Fully Protect Crime Victims' Rights

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# Policy Paper: The Need to Enhance Victims' Rights in the Florida Constitution to Fully Protect Crime Victims' Rights

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# INTRODUCTION

In 1988, Florida amended its constitution to add rights for crime victims.<sup>1</sup> 90 percent of the voters approved this amendment. Passage of the constitutional provision was a significant effort aimed at re-integrating victims into criminal justice processes. Much has been learned in the nearly three decades since adoption of Florida's constitutional victims' rights amendment. Lessons regarding the scope, structure, and articulation of rights necessary to make the rights meaningful are the subject of this Policy Paper, which explains why it is time for Florida to revisit its state constitutional protections for crime victims.

With regard to the scope of rights, consensus has developed around the country that certain rights are necessary to secure a meaningful place for victims in criminal justice. Included among these are the rights to notice, presence and a voice throughout the process; to proceedings free from unreasonable delay; to consideration of the victims' safety throughout the process; to respect for victims' privacy; to protection from the accused, including from discovery requests; and to restitution. With regard to the structure and articulation of rights, it has become clear that explicit standing and remedies are necessary to ensure full protection of crime victims' interests in criminal justice.

Crime victims have compelling concerns in the criminal justice system. No system of criminal justice can gain broad community acceptance if it fails to attend appropriately to these concerns. Over the last 40 years, acting on a bipartisan basis, the vast majority of states – including, as mentioned, Florida – have adopted significant statutory and even constitutional protections for crime victims. These enactments rest on the widely shared premise that “[w]hile defendants have strong interests in fair trials, victims likewise have strong personal interests in being listened to and taken seriously.”<sup>2</sup> This Policy Paper looks carefully at the federal and state crime victims' rights protections that have become an important—but often underappreciated—part of the current architecture in American criminal justice. While these protections differ in detail from jurisdiction to jurisdiction, when examined as a group, many common features emerge.

These common features were not fully apparent in 1998 when Florida enacted its victims' right amendment. When considering Article I, Section 16(b) of the Florida Constitution it is clear that many of the consensus rights are not included and effective structure and articulation of the rights is lacking.

The goal of this Policy Paper is to distill from the victims' rights enactments around the country a core set of shared values for criminal justice—shared values reflected in what is now commonly referred to as “Marsy's Law.”<sup>3</sup> This Policy Paper begins by briefly discussing the history of the crime victims' rights movement over the last several decades. It then reviews crime victims' enactments to identify the core set of values that have emerged. It finally offers some thoughts about what appears to be the most pressing current challenge for crime victims' rights: the need for effective enforcement. This Policy Paper concludes

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<sup>1</sup> See Fla. Const., art. I, section 16(b).

<sup>2</sup> STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 91 (2012).

<sup>3</sup> Similar shared values about the importance of victims' rights exist in foreign and international law as well. See, e.g., HUMAN RIGHTS WATCH, *MIXED RESULTS: U.S. POLICY AND INTERNATIONAL STANDARDS ON THE RIGHTS AND INTERESTS OF VICTIMS OF CRIME* (2008), <https://www.hrw.org/report/2008/09/23/mixed-results/us-policy-and-international-standards-rights-and-interests-victims> (discussing the many “international human rights instruments [that] address or touch on [crime] victims' rights”); cf. Marie Manikis, *Imagining the Future of Victims' Rights in Canada: A Comparative Perspective*, 13 OHIO ST. J. CRIM. L. 163 (2015); Michael K. Browne, *International Victims' Rights Law: What Can Be Gleaned from the Victims' Empowerment Procedures in Germany as the United States Prepares to Consider the Adoption of a “Victim's Rights Amendment” to its Constitution*, 27 HAMLINE L. REV. 15 (2004) (discussing German victims' law).

that a strengthened Florida state constitutional amendment offers the best path for ensuring that crime victims' interests are properly protected in Florida's criminal justice process.<sup>4</sup>

## I. THE CRIME VICTIMS' RIGHTS MOVEMENT

While a comprehensive history of the treatment of crime victims in the system remains to be written, the broad outlines can be quickly sketched. This backdrop is useful to understanding Florida's existing victims' rights amendment.

At our country's founding, crime victims played an important role in criminal prosecutions, often bringing their own "private" prosecutions.<sup>5</sup> Over time through the 19th century, a system of public prosecution steadily displaced victims.<sup>6</sup> Ultimately, well into the 20th century, the system had moved to the point where it seemed fair to describe the victim as "the forgotten [person]" of the system.<sup>7</sup>

The Crime Victims' Rights Movement developed in the 1970s because of this displacement of victims. The victim's absence from criminal processes conflicted with "a public sense of justice keen enough that it ... found voice in a nationwide 'victims' rights' movement."<sup>8</sup> Victims' advocates – who hailed from diverse movements including women's rights, civil rights and "law and order" – urged reforms to give more attention to victims' concerns, including protecting victims' rights to be notified of court hearings, to attend those hearings, and to be heard at appropriate points in the process.<sup>9</sup>

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<sup>4</sup> The issues discussed in this Policy Paper draw on some earlier articles by the authors also discussing victims' rights. See, e.g., Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHOENIX L. REV. 301 (2012); Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U.L. REV. 599 (2010); Paul G. Cassell & Steven Joffe, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U. L. REV. COLLOQUY 164 (2010); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861.

Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 Ohio St. J. Crim. L. 67 (2015); Meg Garvin & Megan McGill, *No Means No: The Need for Vigilance in Sexual Assault Law*, Nat'l Crime Victim L. Inst. News at Lewis & Clark L. Sch., Spring/Summer 2007.

<sup>5</sup> William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649 (1976).

<sup>6</sup> BIBAS, *supra* note 2, at 88; Abraham Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 1 (1982); Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U.L. REV. 1135, 1138-42 (2007).

<sup>7</sup> McDonald, *supra* note 5, at 650.

<sup>8</sup> *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (internal quotations omitted). See generally DOUGLAS EVAN BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE 3-35 (3d ed. 2010); Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289; Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373 [hereinafter Cassell, *Balancing the Scales*]; Goldstein, *supra* note 5; William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37 (1996); Collene Campbell et al., *Appendix: The Victims' Voice*, 5 PHOENIX L. REV. 379 (2012).

<sup>9</sup> See Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517. See generally BELOOF, CASSELL & TWIST, *supra* note 8, at 29-38; Douglas E. Beloof, *The Third Wave of Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255; Cassell, *Balancing the Scales of Justice*, *supra* note 8, at 1380-82.

The victims' rights movement received considerable impetus in 1982 when the President's Task Force on Victims of Crime reviewed the treatment of victims.<sup>10</sup> In a report issued that year, the task force concluded that the criminal justice system "has lost an essential balance. ... [T]he system has deprived the innocent, the honest, and the helpless of its protection. ... The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed."<sup>11</sup> The task force advocated multiple reforms, such as prosecutors assuming the responsibility for keeping victims notified of all court proceedings and bringing to the court's attention the victim's view on such subjects as bail, plea bargains, sentences and restitution.<sup>12</sup> The task force also urged that courts should receive victim-impact evidence at sentencing, order restitution, and allow victims and their families to attend trials even if they would be called as witnesses.<sup>13</sup> In its most sweeping recommendation, the task force proposed a federal constitutional amendment to protect crime victims' rights "to be present and to be heard at all critical stages of judicial proceedings."<sup>14</sup>

Realizing the difficulty of achieving the consensus required to amend the United States Constitution, advocates decided to try to initially enact state victims' amendments. They had considerable success with this "states first" strategy.<sup>15</sup> To date, about 35 states have adopted victims' rights amendments to their state constitutions protecting a wide range of victims' rights.

These state constitutional amendments have passed in two waves, beginning with Rhode Island's enactment of a statement amendment in 1986.<sup>16</sup> Florida's amendment was one of the very first in the nation, and approved in the next election cycle in 1988.<sup>17</sup> The Florida provision is extremely brief and merely provides:



Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.<sup>18</sup>

In addition to these state constitutional amendments, during this first wave every state passed statutory protections for victims' rights. In many states these first wave rights lacked effective enforcement mechanisms to ensure that their rights were fully implemented. As Attorney General Janet Reno explained in 1997 after a Justice Department review of the landscape, these state efforts "failed to fully safeguard victims' rights."<sup>19</sup>

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<sup>10</sup> PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982), *available at* <https://www.ovc.gov/publications/presdntstskforcrprt/welcome.html>.

<sup>11</sup> *Id.* at 114.

<sup>12</sup> *Id.* at 63.

<sup>13</sup> *Id.* at 72-73.

<sup>14</sup> *Id.* at 114 (emphasis omitted).

<sup>15</sup> See S. REP. NO. 108-191 (2003).

<sup>16</sup> RHODE ISLAND CONST. art. I, § 23.

<sup>17</sup> FLA. CONST., art. I, § 16(b).

<sup>18</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. 64 (1997) (statement of Janet Reno, U.S. Att'y Gen.).

One way of improving enforcement of state crime victims' rights enactments is through strengthened state constitutional protections. In 2008, a second wave of state constitutional efforts began. In November 2008, California voters overwhelmingly approved Proposition 9 – Marsy's Law,<sup>20</sup> making California's amendment one of the strongest and most comprehensive in the country. Since then, similar Marsy's Law amendments have been added to the state constitutions of Illinois in 2014,<sup>21</sup> North Dakota, and South Dakota in 2016,<sup>22</sup> and Ohio in 2017.<sup>23</sup> Efforts are currently underway to add enhanced state constitutional protections for victims in not only Florida, but also Georgia, Idaho, Kentucky, Maine, Nevada, North Carolina, Oklahoma, and Wisconsin, among other states.<sup>24</sup>

The provisions in the more recently-enacted constitutional provisions are much more comprehensive than the Florida provision adopted nearly thirty years ago. Strong model language has been drafted as a guide to how to best implement crime victims' rights.<sup>25</sup> An example of how Marsy's Law might look if added specifically to the Florida Constitution is as follows:

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- (b) To preserve and protect the right of crime victims to achieve justice, to ensure a meaningful role throughout the criminal and juvenile justice systems for crime victims, and to ensure that crime victims' rights and interests are respected and protected by law in a manner no less vigorous than protections afforded to criminal defendants and juvenile delinquents, every victim is entitled to the following rights, beginning at the time of his or her victimization:
- (1) The right to **due process** and to be treated with **fairness and respect** for the victim's dignity.
  - (2) The right to be **free from intimidation, harassment, and abuse**.
  - (3) The right to be **reasonably protected** from the accused and any person acting on behalf of the accused.
  - (4) The right to have the safety and welfare of the victim and the victim's family considered when setting bail, including setting pre-trial release conditions **that protect the safety and welfare of the victim and the victim's family**.
  - (5) The right to **prevent the disclosure of information** or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information of the victim.
  - (6) The **right to privacy**, which includes the right to refuse an interview, deposition, or other discovery request by the defense or anyone acting on behalf of the defendant and to

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<sup>20</sup> CAL. CONST. art. I, § 28.

<sup>21</sup> ILL. CONST. art. I, § 8.1.

<sup>22</sup> Respectively, N.D. CONST. art. I, § 25; and S.D. CONST. art. VI, § 29.

<sup>23</sup> OHIO CONST., art. I, § 10(a).

<sup>24</sup> See *About Marsy's Law*, *supra* note 19.

<sup>25</sup> <https://marsyslaw.us/wp-content/uploads/2017/02/Marsys-Law-Short-Form-Model-Language.pdf>

set reasonable conditions on the conduct of any such interaction to which the victim consents.

(7) A victim shall have the following specific rights upon request:

- a. The right to **reasonable, accurate, and timely notice of, and to be present at, all public proceedings involving the criminal conduct**, including, but not limited to, trial, plea, sentencing, or adjudication, even if the victim will be a witness at the proceeding, notwithstanding any rule to the contrary. A victim shall also be provided reasonable, accurate, and timely notice of any release or escape of the defendant or delinquent, and any proceeding during which a right of the victim is implicated.
- b. The right to **be heard in any public proceeding** involving pretrial or other release from any form of legal constraint, plea, sentencing, adjudication, or parole, and any proceeding during which a right of the victim is implicated.
- c. The right to **confer with the state attorney** concerning any plea agreements, participation in pre-trial diversion programs, release, restitution, sentencing, or any other disposition of the case.
- d. The right to **provide information regarding the impact of the offender's conduct on the victim and the victim's family** to the individual responsible for conducting any pre-sentence investigation or compiling any pre-sentence investigation report, and to have any such information considered in any sentencing recommendations submitted to the court.
- e. The right to **receive a copy of any pre-sentence report, and any other report or record relevant to the exercise of a victim's right**, except for such portions made confidential or exempt by law.
- f. The right to **be informed of the conviction, sentence, adjudication, place and time of incarceration, or other disposition of the convicted offender**, any scheduled release date of the offender, and the release of or the escape of the offender from custody.
- g. The right to **be informed of all post-conviction processes and procedures**, to participate in such processes and procedures, to provide information to the release authority to be considered before any release decision is made, and to be notified of any release decision regarding the offender. The parole or early release authority shall extend the right to be heard to any person harmed by the offender.
- h. **The right to be informed of clemency and expungement procedures**, to provide information to the governor, the court, any clemency board, and other authority in these procedures, and to have that information considered before a clemency or

expungement decision is made; and to be notified of such decision in advance of any release of the offender.

(8) The rights of the victim, as provided in subparagraph (7)a., subparagraph (7)b., or subparagraph (7)c., that apply to any first appearance proceeding are **satisfied by a reasonable attempt** by the appropriate agency to notify the victim and convey the victim's views to the court.

(9) The right to the **prompt return of the victim's property** when no longer needed as evidence in the case.

(10) The right to **full and timely restitution** in every case and from each convicted offender for all losses suffered, both directly and indirectly, by the victim as a result of the criminal conduct. All monies and property collected from any person who has been ordered to make restitution shall be first applied to the restitution owed to the victim before paying any amounts owed to the government.

(11) The right to **proceedings free from unreasonable delay**, and to a prompt and final conclusion of the case and any related post-judgment proceedings.

a. The state attorney may file a **good faith demand for a speedy trial** and the trial court shall hold a hearing within five days to schedule a trial within fifteen days unless the trial judge enters an order with written findings of fact justifying a trial date more than fifteen days after the hearing.

b. All state-level appeals and collateral attacks on any judgment must be complete within two years from the date of appeal in non-capital cases and five years in capital cases. Each year, the Chief Judge of any district court of appeal or the Chief Justice of the Supreme Court shall report on a case-by-case basis to the Speaker of the House of Representatives and the President of the Senate all cases where the court was unable to comply with this subparagraph and the circumstances causing the delay. The legislature may adopt legislation to implement this subparagraph.

(12) The right to be informed of these rights, and to be informed that victims can seek the advice of an attorney with respect to their rights. This information shall be made available to the general public and **provided to all crime victims in the form of a card**.

(c) The victim, the retained attorney of the victim, a lawful representative of the victim, or the office of the state attorney upon request of the victim **may assert and seek enforcement of the rights enumerated in this section** and any other right afforded to a victim by law in any trial or appellate court, or before any other authority with jurisdiction over the case, as a matter of right. The court or other



authority with jurisdiction shall act promptly on such a request, affording a remedy by due course of law for the violation of any right. The reasons for any decision regarding the disposition of a victim's right shall be clearly stated on the record.

(d) The granting of these rights enumerated in this section to victims may not be construed to deny or impair any other rights possessed by victims. The provisions of this section apply throughout criminal and juvenile justice processes, are self-executing and do not require implementing legislation.

(e) As used in this section, a "victim" is a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed. The term "victim" shall include their lawful representative, the parent or guardian of a minor, or the next of kin of a homicide victim, except upon a showing that the interest of such individual would be in actual or potential conflict with the interests of the victim. The term "victim" does not include the accused. The terms "crime" and "criminal" include delinquent acts and conduct. Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

Where does this extensive list of victims' rights come from? In the next section, we identify and analyze fundamental victims' rights that are being recognized around the country – rights that Florida should recognize in its Constitution.

## II. FUNDAMENTAL CRIME VICTIMS' RIGHTS

When viewed together, the enactment of state crime victims' rights amendments across the country reveal an emerging consensus that certain victims' rights should be protected. This section briefly reviews a number of these rights,<sup>26</sup> making the case for each of them and then explaining how protection has been operationalized in the current state constitutional (and, in some cases, statutory) enactments around the country. Florida should amend its state constitution to explicitly include these important rights.

### A. THE RIGHT TO NOTICE OF CASE PROCEEDINGS

A crime victim's right to notice about criminal proceedings is an important right that is now broadly recognized. Because victims and their families are directly and often irreparably harmed by crime, they

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<sup>26</sup> In this brief Policy Paper, not every right that might be considered fundamental or important to victims is discussed.

have a vital interest in knowing about any subsequent prosecution and any associated proceedings. Notice of proceedings is traditionally recognized as a core part of due process.<sup>27</sup> While victims may not suffer a loss of physical liberty through confinement as the result of a criminal proceeding, they certainly have strong claim to be kept fully informed about the progress of a criminal case. Knowing what is happening can, for example, greatly reduce a victim's anxiety about the process.<sup>28</sup> For reasons such as these, the President's Task Force on Victims of Crime urged that "[p]rosecutors should keep victims informed about the status of the case from the initial decision to charge or to decline prosecution."<sup>29</sup>

To guarantee that victims will be kept informed about the progress of court cases, many state constitutional and statutory provisions promise crime victims that they will be notified about proceedings. The California Constitution, for example, guarantees crime victims "reasonable notice" of all public proceedings.<sup>30</sup> And the Texas Constitution promises "the right to notification of court proceedings ... on the request of a crime victim."<sup>31</sup>

Some state provisions spell out notification rights in more detail. For example, Utah has enacted the Utah Rights of Crime Victims Act, which provides that "[w]ithin seven days of the filing of felony criminal charges against a defendant, the prosecuting agency shall provide an initial notice to reasonably identifiable and locatable victims of the crime contained in the charges."<sup>32</sup> The initial notice must contain information about "electing to receive notice of subsequent important criminal justice hearings."<sup>33</sup> In practice, Utah prosecuting agencies have provided these notices with a detachable postcard or, more recently, a computer-generated letter that victims simply return to the prosecutor's office to receive subsequent notices about proceedings. The return letter serves as the victims' request for further notices. In the absence of such a request, a prosecutor need not send any further notices.<sup>34</sup>

Fortunately, with developing new electronic technologies, keeping victims informed about court hearings is becoming easier.<sup>35</sup> Automated victim-notification systems abound, most prominently the so-called VINE (Victim Information Notification Everyday) system.<sup>36</sup> Under such a system, a victim registers for notification through e-mail or phone call. Then, when court hearings are scheduled, a computerized notification is made.

In some cases (e.g., terrorist bombings or massive financial frauds), the large number of victims may render individual notifications impractical. In such circumstances, notice by means of a press release to daily newspapers in the area has been regarded as a reasonable alternative to actual notice sent to each victim at his/her/their residential address.<sup>37</sup> New technologies may also provide a way of affording reasonable notice. For example, some federal courts have approved notice by publication, where the

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<sup>27</sup> See, e.g., *Dusenberg v. United States*, 534 U.S. 161, 167 (2002).

<sup>28</sup> PRESIDENT'S TASK FORCE, *supra* note 10, at 64 (quoting victim to this effect).

<sup>29</sup> *Id.*

<sup>30</sup> CAL. CONST., art. I, § 28(b)(7).

<sup>31</sup> TEX. CONST. art. I, § 30 (order rearranged).

<sup>32</sup> UTAH CODE ANN. § 77-38-3(1). See generally Cassell, *Balancing the Scales*, *supra* note 8.

<sup>33</sup> *Id.* § 77-38-3(2). The notice will also contain information about other rights under the victims' statute. *Id.*

<sup>34</sup> *Id.* § 77-38-3(8); see also Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 ARIZ. ST. L.J. 421, 434 (2015) (discussing victim notification in Arizona).

<sup>35</sup> See BIBAS, *supra* note 2, at 150 ("With the advent of email, notifying victims . . . is even easier").

<sup>36</sup> See, e.g., VINE, APPRISS SAFETY, <https://apprissafety.com/solutions/vinel>.

<sup>37</sup> *United States v. Peralta*, No. 3:08cr233, 2009 WL 2998050, at \*1-2 (W.D.N.C. Sept. 15, 2009).

publication directs crime victims to a website maintained by the government with hyperlinks to updates on the case.<sup>38</sup>

## B. THE RIGHT TO ATTEND COURT HEARINGS

Victims also deserve the right to attend all proceedings related to a crime, as is recognized across the country. The President's Task Force on Victims of Crime articulated the basis for this right: "The crime is often one of the most significant events in the lives of victims and their families. They, no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial."<sup>39</sup>

Several strong reasons support such a right. As Professor Doug Beloof and one of this paper's authors have argued at length elsewhere,<sup>40</sup> the right to attend the trial may be critical in allowing the victim to recover from the psychological damage of a crime. It is widely recognized that the "victim's presence during the trial may also facilitate healing of the debilitating psychological wounds suffered by a crime victim."<sup>41</sup>

Moreover, without a right to attend the trial, "the criminal justice system merely intensifies the loss of control that victims feel after the crime."<sup>42</sup> It should come as no surprise that "[v]ictims are often appalled to learn that they may not be allowed to sit in the courtroom during hearings or the trial. They are unable to understand why they cannot simply observe the proceedings in a supposedly public forum."<sup>43</sup> One crime victim put it more directly: "All we ask is that we be treated just like a criminal."<sup>44</sup> Defendants take full advantage of their right to be in the courtroom.<sup>45</sup>

To ensure that victims can attend court proceedings, many state amendments extend to a crime victim an unqualified right to attend trial,<sup>46</sup> while others extend a qualified right to attend unless the victim's testimony would be materially affected by attendance.<sup>47</sup> Often such provisions give victims a right not to be

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<sup>38</sup> See, e.g., *United States v. Skilling*, No. H-04-025-SS, 2009 WL 806757, at \*1-2 (S.D. Tex. Mar. 26, 2009); *United States v. Saltsman*, No. 07-CR-641 (NGG), 2007 WL 4232985, at \*1-2 (E.D.N.Y. Nov. 27, 2007); *United States v. Croteau*, No. 05-CR-30104-DRH, 2006 U.S. Dist. LEXIS 23684, at \*2-3 (S.D. Ill. 2006).

<sup>39</sup> PRESIDENT'S TASK FORCE, *supra* note 10, at 80.

<sup>40</sup> See Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005).

<sup>41</sup> Ken Eikenberry, *Victims of Crimes/Victims of Justice*, 34 WAYNE L. REV. 29, 41 (1987).

<sup>42</sup> Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 72 (1987).

<sup>43</sup> Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 58 (1987).

<sup>44</sup> *Id.* at 59 (quoting Edmund Newton, *Criminals Have All the Rights*, LADIES' HOME J., Sept. 1986).

<sup>45</sup> See LINDA E. LEDRAY, *RECOVERING FROM RAPE* 199 (2d ed. 1994) ("Even the most disheveled [rapist] will turn up in court clean-shaven, with a haircut, and often wearing a suit and tie. He will not appear to be the type of man who could rape.")

<sup>46</sup> See, e.g., ALASKA CONST. art. I, § 24 (right "to be present at all criminal ... proceedings where the accused has the right to be present"); MICH. CONST., art. I, § 24(1) (right "to attend the trial and all other court proceedings the accused has the right to attend"); OR. R. EVID. 615 (witness exclusion rule does not apply to "victim in a criminal case"); see also Beloof & Cassell, *supra* note 40, at 504-19 (providing a comprehensive discussion of state law on this subject).

<sup>47</sup> See, e.g., FLA. CONST. art. I, § 16(b) ("Victims of crime or their lawful representatives ... are entitled to the right ... to be present ... at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused"). See also Fla. Stat. Ann. § 960.001(1)(e) (re "guidelines") ("A victim, a victim's parent or guardian if the victim is a minor, a lawful representative of the victim or of the victim's parent or guardian if the victim is a minor, or a victim's next of kin

excluded from public proceedings. When the right is phrased in the negative—a right *not* to be excluded—it avoids the possible suggestion that a right “to attend” carried with it a victim’s right to demand payment from the government for travel to court.<sup>48</sup> Such an unqualified right does not interfere with a defendant’s right for the simple reason that defendants have no constitutional right to exclude victims from the courtroom.<sup>49</sup>

### C. THE RIGHT TO BE HEARD AT RELEVANT PROCEEDINGS

Many states have also recognized that crime victims deserve the right to be heard at points in the criminal justice process, thus allowing victims to participate directly in criminal justice. Allowing such victim participation can provide important information to judges. Having the actual victim speak is useful because “gauging the harm to a unique human being, not a faceless abstraction, requires evidence of how that particular victim suffered.”<sup>50</sup> And victim participation can lead to important therapeutic benefits. As Professor Bibas has explained at length in his important book *The Machinery of Criminal Justice*, “it is simple participation that helps to empower and heal victims. Participants see the law as more fair and legitimate when they have some control over the process and they have been heard, whether or not they control ultimate outcomes.”<sup>51</sup> Hearing victim voices can be important regardless of any formal effect on criminal penalties, as recent experience with “reconciliation commissions” in other countries attests.<sup>52</sup>

Recognizing such benefits, states have extended a right to participate in various ways. For example, the recently enacted constitutional provision in South Dakota promises crime victims the “the right to be heard in any proceeding involving release, plea, sentencing, adjudication, disposition or parole, and any proceeding during which a right of the victim is implicated.”<sup>53</sup> A number of states have similar provisions to their state constitutions guaranteeing victim participation.<sup>54</sup>

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may not be excluded from any portion of any hearing, trial, or proceeding pertaining to the offense based solely on the fact that such person is subpoenaed to testify, unless, upon motion, the court determines such person’s presence to be prejudicial.”); Fla. Stat. Ann. § 90.616(2)(d) (re evidentiary rule on exclusion of witnesses) (“A witness may not be excluded if the witness is . . . . In a criminal case, the victim of the crime, the victim’s next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, unless, upon motion, the court determines such person’s presence to be prejudicial.”).

<sup>48</sup> Cf. ALA. CODE § 15-14-54 (right “not [to] be excluded from court . . . during the trial or hearing or any portion thereof . . . which in any way pertains to such offense”). This negative formulation may be excessive caution, because no right-to-be-present provision has been interpreted to require the State to pay for victims to travel.

<sup>49</sup> See *Beloof & Cassell*, *supra* note 40, at 520-34; see, e.g., *United States v. Edwards*, 526 F.3d 747, 757-58 (11th Cir. 2008).

<sup>50</sup> BIBAS, *supra* note 2, at 91; see also Laurence H. Tribe, *McVeigh’s Victims Had a Right to Speak*, N.Y. TIMES, June 9, 1997, at A25.

<sup>51</sup> BIBAS, *supra* note 2, at 151.

<sup>52</sup> See, e.g., Mary Burton, *Custodians of Memory: South Africa’s Truth and Reconciliation Commission* 32 INT’L J. LEGAL INFO. 417 (2004).

<sup>53</sup> S.D. CONST. art VI, § 29.

<sup>54</sup> See, e.g., ARIZ. CONST. art II, § 2.1(A)(4) (right to be heard at proceedings involving post-arrest release, negotiated pleas, and sentencing); COLO. CONST. art. II, § 16a (right to be heard at critical stages); ILL. CONST. art. I, § 8.1(4) (right to make statement at sentencing); KAN. CONST. art. 15, § 15(a) (right to be heard at sentencing or any other appropriate time); MICH. CONST. art. I, § 24(1) (right to make statement at sentencing); MO. CONST. art. I, § 32(1)(2) (right to be heard at guilty pleas, bail hearings, sentencings, probation revocation hearings, and parole hearings, unless interests of justice require otherwise); N.M. CONST. art. II, § 24(A)(7) (right to make statement at sentencing and post-sentencing hearings); R.I. CONST. art. I, § 23 (right to address court at sentencing); WASH. CONST. art. I, § 35 (right to make statement at sentencing or release proceeding); WIS. CONST. art. I, § 9m (opportunity to make statement to court at disposition); UTAH CONST. art. I, § 28(1)(b) (right to be heard at important proceedings).

The existing state amendments frequently recognize several points in the process as appropriate times for crime victims to be heard. First, the amendments commonly extend the right to be heard regarding any *release* proceeding—e.g., bail hearings. This right ensures the court can hear directly from the victim but nothing in these rights gives victims the ability to veto the release or detention of any defendant; the ultimate decision to hold or release a defendant remains with the judge. Similarly, when considering later release such as parole, victim statements to parole boards “can enable the board to fully appreciate the nature of the offense and the degree to which the particular inmate may present risks to the victim or community upon release.”<sup>55</sup>

The right to be heard also typically extends to any proceeding involving a plea bargain. Under the present rules of procedure in most states, a plea bargain between the prosecution and a defendant must be submitted to the trial judge for approval.<sup>56</sup> If the judge believes that the bargain is not in the interests of justice, she may reject it.<sup>57</sup> Unfortunately in some states, a victim does not always have the opportunity to discuss a plea with the prosecution while it is being negotiated<sup>58</sup> or to present to the judge information about whether the plea is in the interests of justice. Indeed, it may be that in some cases, “keeping the victim away from the judge ... is one of the prime motivations for plea bargaining.”<sup>59</sup> Yet there are compelling reasons to afford victims a role in the plea bargaining process:



The victim's interests in participating in the plea bargaining process are many. The fact that they are consulted and listened to provide them with respect and an acknowledgment that they are the harmed individual. This in turn may contribute to the psychological healing of the victim. The victim may have financial interests in the form of restitution or compensatory fine. ... [B]ecause judges act in the public interest when they decide to accept or reject a plea bargain, the victim is an additional source of information for the court.<sup>60</sup>

As with the right to be heard regarding release, victims have a voice in the plea bargaining process, not a veto. The judge is not required to follow the victim's suggested course of action on the plea, but simply has more information on which to base such a determination.

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<sup>55</sup> Frances P. Bernat et al., *Victim Impact Laws and the Parole Process in the United States: Balancing Victim and Inmate Rights and Interests*, 3 INT'L REV. VICTIMOLOGY 121, 134 (1994); see also Laura L. Richardson, *The Impact of Marsy's Law on Parole in California*, 49 CRIM. L. BULL. 1091 (2013) (discussing changes in parole hearings after Marsy's law enactment); Kathryn M. Young, *Parole Hearings and Victims' Rights: Implementation, Ambiguity, and Reform*, 49 CONN. L. REV. 431 (2016).

<sup>56</sup> See generally BELOOF, CASSELL & TWIST, *supra* note 8, at 422 (discussing this issue).

<sup>57</sup> See, e.g., UTAH R. CRIM. P. 11(e) (“The court may refuse to accept a plea of guilty ....”); *State v. Mane*, 783 P.2d 61, 66 (Utah Ct. App. 1989) (following Rule 11(e) and holding “[n]othing in the statute requires a court to accept a guilty plea”).

<sup>58</sup> See Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 377 (2016) (discussing diversity in practice about victim involvement in plea negotiations).

<sup>59</sup> HERBERT S. MILLER ET AL., *PLEA BARGAINING IN THE UNITED STATES* 70 (1978).

<sup>60</sup> BELOOF, CASSELL & TWIST, *supra* note 2, at 423. See generally Elizabeth N. Jones, *The Ascending Role of Crime Victims in Plea-Bargaining and Beyond*, 117 W. VA. L. REV. 97 (2014) (discussing victims' rights during plea); Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301 (1987) (advancing reasons for victim participation in plea discussions); Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 330-32 (2007) (victim involvement in plea bargains improves perception of fair treatment and increases public confidence in the process).

State amendments also typically extend to victims the right to be heard at proceedings for determining a sentence. Defendants, of course, have the right to directly address the sentencing authority before sentence is imposed.<sup>61</sup> Victims' enactments typically extend the same basic right to victims.<sup>62</sup> The reasons for this right are many.<sup>63</sup> It is important to emphasize that victims "are not reflexively punitive" and a number of "[e]mpirical studies find that participation by victims does not lead to harsher sentences."<sup>64</sup> Nor does the claim that victims' impact statements might be somehow "emotional" carry much weight, given that many other parts of the law recognize that it is proper to have such arguments.<sup>65</sup>

Victims can exercise their right to be heard in any appropriate fashion, including making an oral statement at court proceedings or submitting written information for the court's consideration. Defendants can respond to the information that victims provide in appropriate ways, such as providing counter-information.<sup>66</sup>

Finally, many state amendments extend to a victim a general right to be heard at any proceeding involving any right established by the amendment. This allows victims to present information in support of a claim of right under the amendments, consistent with ordinary due-process principles.<sup>67</sup>

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<sup>61</sup> See, e.g., FED. R. EVID. 32(i)(4)(A); UTAH R. CRIM. P. 22(a).

<sup>62</sup> See generally NORMA DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 349-58 (3d ed. 2013) (discussing victim impact statements). See also *Cozzie v. State*, No. SC13-2393, 2017 WL 1954976, at \*9 (Fla. May 11, 2017) (recognizing that crime victims' state constitutional right to be heard at crucial stages supports the admission of victim impact evidence at sentencing).

<sup>63</sup> Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009) (collecting rationales for the right including that victim-impact statements provide information to the sentencer, have therapeutic and other benefits for victims, explain the crime's harm to the defendant, and improve the perceived fairness of sentencing, and noting that all 50 states provide victims the opportunity for a victim impact statement).

<sup>64</sup> BIBAS, *supra* note 2, at 91; see also Cassell, *supra* note 64, at 634-37 ("good evidence that victim impact statements generally lead to harsher sentences is lacking"); Edna Erez, *Who's Afraid of the Big Bad Victims? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 CRIM. L. REV. 545, 548 ("sentence severity has not increased following the passage of [victim impact] legislation"); Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 308 (2003) ("We find [no] significant relation between the introduction of [victim impact evidence] and sentencing outcomes."); EDWIN VILLMOARE & VIRGINIA N. NETO, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EXECUTIVE SUMMARY, VICTIM APPEARANCES AT SENTENCING HEARINGS UNDER THE CALIFORNIA VICTIMS' BILL OF RIGHTS 61 (1987) ("[t]he right to allocution at sentencing has had little net effect ... on sentences in general"); Robert C. Davis & Barbara E. Smith, *The Effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting*, 11 JUST. Q. 453, 466 (1994) (finding "no support for those who argue against [victim impact] statements on the grounds that their use places defendants in jeopardy"); ROBERT C. DAVIS ET AL., VICTIM IMPACT STATEMENTS: THEIR EFFECTS ON COURT OUTCOMES AND VICTIM SATISFACTION 68 (1990) (concluding that the result of the study "lend[s] support to advocates of victim impact statements" since no evidence indicates that these statements "put[] defendants in jeopardy [or] result in harsher sentences"); cf. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 137 (2004) ("Victims do not want vengeance so much as additional rights to participate."); but cf. Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1050 (2014) (discussing limitations of the current studies and making suggestions for future research); Susan A. Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANN. REV. L. & SOC. SCI. 161, 166-67 (2012) (arguing that mock jury research shows victim impact evidence leads to punitiveness).

<sup>65</sup> Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U.L. REV. COLLOQUY 355, 356 (2008) ("Rather than bemoaning emotional reactions, reformers should acknowledge emotion as the legitimate battlefield of criminal justice."); Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims Rights Amendment*, 1999 UTAH L. REV. 479, 486-96 (victim impact statements convey information, not emotion).

<sup>66</sup> See generally Paul G. Cassell & Edna Erez, *Victim Impact Statements and Ancillary Harm: The American Perspective*, 15 CAN. CRIM. L. REV. 149, 175-96 (2011) (providing a fifty state survey on procedures concerning victim impact statements).

<sup>67</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) ("For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard." (internal quotation omitted)).

## D. THE RIGHT TO PROCEEDINGS FREE FROM UNREASONABLE DELAY

Many state provisions also extend to crime victims the right to “a speedy trial and a prompt and final conclusion of the case”<sup>68</sup> or to proceedings “free from unreasonable delay.”<sup>69</sup> Such provisions are designed to be the victim’s analogue to a defendant’s Sixth Amendment right to a speedy trial.<sup>70</sup> The defendant’s right is designed, among other things, “to minimize anxiety and concern accompanying public accusation” and “to limit the possibilities that long delay will impair the ability of an accused to defend himself.”<sup>71</sup> The interests underlying a speedy trial, however, are not confined to defendants. The Supreme Court has acknowledged that “there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.”<sup>72</sup>

Victims often suffer significantly from delays in the criminal justice system.<sup>73</sup> For example, victims of violent crime frequently suffer from post-traumatic stress disorder (PTSD).<sup>74</sup> A connection between initial victimization and later depression, substance abuse, panic disorder, agoraphobia, social phobia, obsessive-compulsive disorder, and even suicide has also been reported in the academic literature.<sup>75</sup> Delays in the criminal process can then exacerbate these initial injuries. Indeed, a “common problem in the prosecution of crimes against victims is that the trial is typically delayed through scheduling conflicts, continuances, and other unexpected delays throughout the course of the trial.”<sup>76</sup> It thus is not surprising that multiple studies suggest “the negative effect on a victim’s healing process when there is a prolonged trial of the alleged attacker because the actual judicial process is a burden on the victim.”<sup>77</sup> And “[t]he long delay between reporting a crime to the police and the beginning of the trial represents [a] source of psychological stress for crime victims.”<sup>78</sup>

Academic literature confirms the ways in which delays in the criminal justice system can compound the crime’s initial effects on a victim.<sup>79</sup> A victim’s experience with the justice system often “means the difference between a healing experience and one that exacerbates the initial trauma.”<sup>80</sup>

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<sup>68</sup> See, e.g., CAL. CONST., art. I, § 28(b)(9).

<sup>69</sup> See ARIZ. CONST. art. II, § 2.1(A)(10); CAL. CONST. art. I, § 29; ILL. CONST. art. I, § 8.1(a)(6); MICH. CONST. art. I, § 24(1); MO. CONST. art. I, § 32(1)(5); WIS. CONST. art. I, § 9m. The right may also exist in statute. See, e.g., Fla. Stat. Ann. § 960.001(1)(a)(7) (requiring law enforcement to inform victims of “[t]he right of a victim to a prompt and timely disposition of the case in order to minimize the period during which the victim must endure the responsibilities and stress involved to the extent that this right does not interfere with the constitutional rights of the accused”).

<sup>70</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial ....”).

<sup>71</sup> *Smith v. Hoey*, 393 U.S. 374, 378 (1969) (citing *United States v. Ewell*, 383 U.S. 116, 120 (1966)).

<sup>72</sup> *Barker v. Wingo*, 407 U.S. 514, 519 (1972).

<sup>73</sup> See Brief of Amicus Curiae Arizona Voice for Crime Victims (AVCV) at 6-9, *Ryan v. Washington*, 137 S. Ct. 1581 (Feb. 2017) (No. 16-840) (collecting research). This section draws heavily on the research collected in the AVCV brief.

<sup>74</sup> See Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims’ Mental Health*, 23 J. TRAUM. STRESS 182, 182 (2010); Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. TRAUM. STRESS 119, 119 (2003).

<sup>75</sup> Parsons & Bergin, *supra* note 74, at 182.

<sup>76</sup> Mary Beth Ricke, *Victims’ Right to a Speedy Trial: Shortcomings, Improvements, and Alternatives to Legislative Protection*, 41 WASH. U. J. L. & POL’Y 181, 183 (2013).

<sup>77</sup> *Id.* at 193.

<sup>78</sup> Ulrich Orth & Andreas Maercker, *Do Trials of Perpetrators Retraumatize Victims?*, 19 J. INTERPERSONAL VIOLENCE 212, 215 (2004).

<sup>79</sup> Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUM. STRESS 159, 159 (2003).

<sup>80</sup> Parsons & Bergin, *supra* note 74, at 182; see also *Hill v. McDonough*, 547 U.S. 573, 585 (2006) (“Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.”); Douglas A. Berman, *Finding Bickel Gold in a Hill of Beans*, 2006 CATO SUP. CT. REV. 311, 322.

Delays in proceedings can also be particularly hard on child victims, who have difficulty healing until the anxiety of legal proceedings can be brought to an end.<sup>81</sup>

State provisions affording victims the right to proceedings free from unreasonable delay do not require courts to follow victims' demands for scheduling trial or for ending all delay, but rather insure against "unreasonable" delay.<sup>82</sup> In interpreting these provisions, courts can look to the body of case law that already exists for resolving defendants' speedy-trial claims.<sup>83</sup>

## E. THE RIGHT TO PROTECTION FROM THE ACCUSED

The criminal justice system is intended, in part, to protect victims. Victims are usually in the best position to know what protections will and will not be effective, which means considering the victim's input regarding protection is absolutely critical as is timely communication regarding such protections to allow for execution of safety plans when necessary.

Defendants and convicted offenders who are released may pose a special danger to their victims. An unconvicted defendant may threaten or carry out violence to permanently silence the victim and prevent subsequent testimony. Or a convicted offender may later attack the victim in a quest for revenge. These dangers are particularly pronounced for victims of domestic violence and rape. For instance, Colleen McHugh obtained a restraining order against her former boyfriend Eric Boettcher on January 12, 1994.<sup>84</sup> Authorities soon placed him in jail for violating that order.<sup>85</sup> He later posted bail and tracked McHugh to a relative's apartment, where on January 20, 1994, he fatally shot both Colleen McHugh and himself.<sup>86</sup> No one had notified McHugh of Boettcher's release from custody.<sup>87</sup>

In an attempt to prevent such travesties, in addition to the rights to be heard regarding release and to protection, a number of states have enacted constitutional provisions requiring notice to crime victims whenever an offender will no longer be in custody.<sup>88</sup> California's amendment, for example, gives victims, upon request, the right to be informed of "the scheduled release date of the defendant, and the release of or the

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<sup>81</sup> Cassell, *Balancing the Scales of Justice*, *supra* note 8, at 1402-07.

<sup>82</sup> See, e.g., *United States v. Wilson*, 350 F. Supp. 2d 910, 931 (D. Utah 2005) (interpreting CVRA's right to proceedings free from unreasonable delay to preclude delay in sentencing).

<sup>83</sup> For example, in *Barker v. Wingo*, the United States Supreme Court set forth various factors that could be used to evaluate a defendant's speedy-trial challenge in the wake of a delay. 407 U.S. 514, 530-33 (1972) (describing factors such as: (1) the length of the delay; (2) the reason for the delay; (3) whether and when the defendant asserted his speedy-trial right; and (4) whether the defendant was prejudiced by the delay). See generally WAYNE R. LAFAVE, *CRIMINAL PROCEDURE* § 18.2 (4th ed. 2009 & 2017 Supp.).

<sup>84</sup> Jeffrey A. Cross, *The Repeated Sufferings of Domestic Violence Victims Not Notified of Their Assailant's Pre-Trial Release from Custody: A Call for Mandatory Domestic Violence Victim Notification Legislation*, 34 U. LOUISVILLE J. FAM. L. 915, 915-16 (1996).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See *id.* (providing this and other examples).

<sup>88</sup> While Florida does not have a constitutional provision regarding these rights there are statutory protections regarding notice of release. See, e.g., Fla. Stat. Ann. § 960.001(1)(e) (requiring notice to victims of "[t]he release of the accused pending judicial proceedings" and "when a term of imprisonment, detention, or residential commitment is imposed, the release of the defendant or juvenile offender from such imprisonment, detention, or residential commitment"); *id.* at § 960.001(1)(e) (requiring notice to victims of any escape from a state facility).

escape by the defendant from custody.<sup>89</sup> Other states have comparable requirements.<sup>90</sup> These provisions ensure that victims are not surprised to discover that an offender is back on the streets. Generally, notice is provided in either of two circumstances: either a *release*, which could include a post-arrest release or the post-conviction paroling of a defendant or a pardon,<sup>91</sup> or an *escape*. The administrative burdens associated with such notification requirements have recently been minimized by technological advances. As noted earlier in this paper, many states have developed computer-operated programs that can place a telephone call to a programmed number when a prisoner is moved from one prison to another or released.<sup>92</sup>

## F. THE RIGHT TO PROTECTION AND CONSIDERATION OF THE VICTIM'S SAFETY

Given the safety concerns of a crime victim in a criminal case, a number of states have also recognized a specific right for crime victims to have their safety considered during court proceedings. For example, about 15 states extend to victims the constitutional right to be reasonably protected from the accused—such as the California constitutional provision extending a right to victims to “be reasonably protected from the defendant and persons acting on behalf of the defendant” and to “have the safety of the victim and the victim’s family considered in fixing the amount of bail and release conditions for the defendant.”<sup>93</sup> Virginia extends to victims “[t]he right to protection from further harm or reprisal through the imposition of appropriate bail and conditions of release.”<sup>94</sup> Sometimes such enactments are supplemented by giving victims the right to be free from harassment.<sup>95</sup> Federal law, too, gives victims “[t]he right to be reasonably protected from the accused.”<sup>96</sup>

These provisions are designed to require that a crime victim’s safety be considered by courts, parole boards, and other government actors in making discretionary decisions that could harm a crime victim.<sup>97</sup> For example, in considering whether to release a suspect on bail, a court following such a provision is required to consider the victim’s safety. This dovetails with the earlier-discussed provisions giving victims a right to speak at proceedings involving bail.<sup>98</sup> Once again, it is important to emphasize that nothing in these

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<sup>89</sup> CAL. CONST. art. I, section 28(b)(12).

<sup>90</sup> See, e.g., ARIZ. CONST. art. II, § 2.1 (victim’s right to “be informed, upon request, when the accused or convicted person is released from custody or has escaped”); S.C. CONST. art. I, § 24 (“victims of a crime have a right to ... be reasonably informed when the accused or convicted is arrested, released from custody, or has escaped”); MICH. CONST. art I, § 24 (crime victims have the right to information about the conviction, sentence, imprisonment, and release of the accused”).

<sup>91</sup> Mary Margaret Giannini, *Measured Mercy: Managing the Intersection of Executive Pardon Power and Victims’ Rights with Procedural Justice Principles*, 13 OHIO ST. J. CRIM. L. 89 (2015).

<sup>92</sup> See, e.g., VINELINK, <https://www.vinelink.com>.

<sup>93</sup> CAL. CONST. art. I, § 28(b)(2)-(3).

<sup>94</sup> VA. CONST. art. I, § 8-A.

<sup>95</sup> See, e.g., CAL. CONST. art. I, § 28(b)(1) (victims have a right to “be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process”); TENN. CONST. art. I, § 35 (victims shall be entitled to the “right to be free from intimidation, harassment and abuse throughout the criminal justice system”); ILL. CONST. art. 1, § 8.1 (crime victims have the right to “right to be treated with fairness and respect for their dignity and privacy and to be free from harassment, intimidation, and abuse throughout the criminal justice process”).

<sup>96</sup> 18 U.S.C. § 3771(a)(1) (2006). See generally Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims’ Rights Act, and the Victim’s Right to be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 85-96 (2010).

<sup>97</sup> In the case of a mandatory release of an offender (e.g., releasing a defendant who has served the statutory maximum term of imprisonment), there is no such discretionary consideration to be made of a victim’s safety.

<sup>98</sup> See *supra* note 55 and accompanying text.

provisions binds a court. Rather, the provisions merely establish a requirement that due consideration be given to such concerns in the process of determining release.

## G. THE RIGHT TO PROTECTION OF PRIVACY AND DIGNITY

Victims also have considerable privacy and dignity interests at stake in criminal proceedings.<sup>99</sup> Sexual-assault victims, for example, suffer the ultimate invasion of privacy from the crime, and run the risk of continued loss of privacy during the criminal justice process.<sup>100</sup> A criminal justice system should be structured so that it avoids unnecessary invasions of privacy and insults to dignity.<sup>101</sup>

Recognizing the legitimacy of protecting such victims' interests, about 20 states extend specific protections to crime victims for protection of their privacy and dignity interests. For example, California promises a victim a right "[t]o be treated with fairness and respect for his or her privacy and dignity."<sup>102</sup> Arizona promises crime victims the right "[t]o be treated with fairness, respect, and dignity ... throughout the criminal justice process."<sup>103</sup> And Indiana extends to victims "the right to be treated with fairness, dignity and respect throughout the criminal justice process."<sup>104</sup> Federal law, too, guarantees crime victims "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy."<sup>105</sup>

The precise scope of these general rights remains to be fully defined. At a minimum, such provisions provide constitutional dignity to various other enactments that help protect victim privacy. For example, some states have enacted so-called victim-counselor privilege laws, which enable victim counselors to maintain the confidentiality of information revealed to them by crime victims, subject of course to constitutional disclosure obligations.<sup>106</sup> Constitutional protection for victims' privacy may help to ensure that such statutes operate as intended.<sup>107</sup>

As a way of developing the right of privacy, the proposed Florida amendment would specifically provide that the right of privacy "includes the right to refuse an interview, deposition, or other discovery request by the defense or anyone acting on behalf of the defendant and to set reasonable conditions on the conduct of any such interaction to which the victim consents." Other states have adopted virtually identical provisions.<sup>108</sup>

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<sup>99</sup> See generally Mary Graw Leary, *The Third Dimension of Victimization*, 13 OHIO ST. J. CRIM. L. 139 (2015).

<sup>100</sup> See Paul Marcus & Tora McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. CAL. L. REV. 1019 (1991).

<sup>101</sup> Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement*, 9 DREXEL L. REV. 43 (2016).

<sup>102</sup> CAL. CONST. art. I, § 28(b)(1).

<sup>103</sup> ARIZ. CONST. art. II, § 2.1.

<sup>104</sup> IND. CONST. art. I, § 13(b).

<sup>105</sup> 18 U.S.C. § 3771(a)(8).

<sup>106</sup> See, e.g., 735 ILL. COMPILED STAT. ANN. 5/8-802.1 (protecting confidentiality of statements made to rape crisis personnel). See generally Bonnie J. Campbell, *Preface* to U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS: THE CONFIDENTIALITY OF COMMUNICATIONS BETWEEN SEXUAL ASSAULT OR DOMESTIC VIOLENCE VICTIMS AND THEIR COUNSELORS: FINDINGS AND MODEL LEGISLATION (1995).

<sup>107</sup> See *People v. Turner*, 109 P.3d 639, 643 (Colo. 2005) (noting justifications for victim-counselor privilege); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 907 (discussing victims' privacy interests).

<sup>108</sup> See, e.g., ARIZ. CONST., art. II, § 2.1(a)(5) (giving victims the right "[t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant"); CAL. CONST., art. I, § 28(b)(5) (giving victims the right "[t]o refuse an interview, deposition, or discovery request by the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, and to set reasonable conditions on the conduct of any such

Florida law currently has an unusual procedure, in which victims in criminal cases can be deposed before trial.<sup>109</sup> Less than a dozen states allow victims to be deposed as a basic discovery procedure.<sup>110</sup> In the vast majority of the states and in the federal system, the deposition is available in criminal cases primarily for the purpose of preserving the testimony of a witness likely to be unavailable at trial.<sup>111</sup> The proposed changes are a compromise approach, moving Florida law in the direction of the vast majority of other states. Under the proposed changes, a defendant would continue to be allowed to seek to depose a victim, but the victim would have the right to refuse that request or impose reasonable conditions on it.

## H. THE RIGHT TO RESTITUTION

Finally, all states have recognized, to some degree, a crime victim's right to restitution,<sup>112</sup> and about 20 states have added a state constitutional right to restitution. For example, Illinois promises to a crime victim simply "[t]he right to restitution."<sup>113</sup> North Carolina extends to a crime victim "[t]he right as prescribed by law to receive restitution."<sup>114</sup> The California Constitution contains perhaps the most elaborate provision:

(A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.

(B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.

(C) All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim.<sup>115</sup>

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interview to which the victim consents."); S.D. CONST., art. I, § 29(6) (giving victims "[t]he right to privacy, which includes the right to refuse an interview, deposition or other discovery request, and to set reasonable conditions on the conduct of any such interaction to which the victim consents").

<sup>109</sup> Fla. R. Crim.P. 3.220(h).

<sup>110</sup> See generally 5 WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 20.2(e) (4<sup>th</sup> ed. 2009 & 2017 Supp.).

<sup>111</sup> See *id.*; see, e.g., *Tharp v. State*, 362 Md. 77, 763 A.2d 151 (2000) (court has no authority to order deposition in criminal case except as authorized by statute or court rule, and rule here does not authorize discovery deposition); *McDole v. State*, 339 Ark. 391, 6 S.W.3d 74 (1999) (the ability to question adverse witnesses as mandated by the confrontation clause "does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony"; neither is there a denial of equal protection because depositions are available as to all witnesses in civil cases, as the procedural distinctions between the two classifications are "real and not feigned" and have a grounding relevant to the purpose for which classification is made).

<sup>112</sup> PEGGY M. TOBOLOWSKY ET AL., CRIME VICTIM RIGHTS AND REMEDIES 171 (3d ed. 2016). Notably, Florida does not afford a constitutional right to restitution but it does have a statutory provision. See Fla. Stat. Ann. § 775.089(1)(a) ("In addition to any punishment, the court shall order the defendant to make restitution to the victim for: 1. Damage or loss caused directly or indirectly by the defendant's offense; and 2. Damage or loss related to the defendant's criminal episode, unless it finds clear and compelling reasons not to order such restitution.").

<sup>113</sup> MICH. CONST. art. I, §(a)(12). For discussion of Illinois' provision, see Jeffrey A. Parness, *The New Illinois Constitutional Crime Victim Restitution Right: A Revolutionary Amendment?*, 27 DCBA BR. 26 (2015).

<sup>114</sup> N.C. CONST. art. I, § 37(1)(c).

<sup>115</sup> CAL. CONST. art. I, § 28(b)(13).

Congress has also enacted broad restitution provisions in the federal system. In the Mandatory Victims Restitution Act,<sup>116</sup> Congress required federal courts to enter a restitution order in favor of victims for crimes of violence. The law provides that “[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [a crime of violence as defined elsewhere,] the court *shall* order ... that the defendant make restitution to the victim of the offense.”<sup>117</sup> In justifying this approach, the Judiciary Committee explained that “the principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time.”<sup>118</sup> While restitution is critically important, the committee also found that restitution orders were only sometimes entered and, in general, “much progress remains to be made in the area of victim restitution.”<sup>119</sup> Accordingly, restitution was made mandatory for crimes of violence in federal cases.

The exact contours of these restitution provisions are yet to be defined. While some decisions interpret restitution provisions broadly to ensure that victims have been made whole,<sup>120</sup> other courts appear to be unwilling to give any real content to constitutional protections for a victim’s right to restitution.<sup>121</sup> And new crimes have posed particularly vexing challenges, such as the issues surrounding how to provide full restitution for victims of child-pornography crimes when many widely distributed offenders are responsible for the victims’ losses.<sup>122</sup>

Under restitution provisions, courts are often required to enter an order of restitution against the convicted offender. However, frequently offenders lack the means to make full restitution payments immediately. Accordingly, even in the face of full restitution orders, the courts can establish an appropriate repayment schedule and enforce it during the period of time in which the offender is under the court’s jurisdiction.<sup>123</sup>

In determining the contours of the victims’ restitution right, well-established bodies of law can be examined.<sup>124</sup> Moreover, details are often explicated in implementing legislation accompanying state amendments. For instance, in determining the compensable losses, an implementing statute might rely on the current federal statute, which includes among the compensable losses medical and psychiatric services, physical and occupational therapy and rehabilitation, lost income, the costs of attending the trial, and in the case of homicide, funeral expenses.<sup>125</sup> It is important to understand that victims’ interests and defendants’ interests can sometimes align on restitution. A defendant who pays restitution may be able to raise a well-deserved claim for mitigation of other penalties, perhaps gaining a shorter term of

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<sup>116</sup> 18 U.S.C. §§ 3663A, 3664.

<sup>117</sup> 18 U.S.C. § 3663A(a)(1) (emphasis added).

<sup>118</sup> S. REP. NO. 104-179, at 12-13 (1995) (quoting S. REP. NO. 97-532, at 30 (1982)). This report was later adopted as the legislative history of the MVRA. See H.R. CONF. REP. NO. 104-518, at 111-12 (1996).

<sup>119</sup> S. REP. NO. 104-179, at 13.

<sup>120</sup> See, e.g., *United States v. Kaplan*, 839 F.3d 795, 800-03 (9th Cir. 2016) (allowing restitution to capture “sentimental value” of destroyed property).

<sup>121</sup> See, e.g., *A.B. v. Lynch*, No. CV-16-0192-PR (Ariz. 2017) (petition for review granted, and then later dismissed, regarding review of trial court decision upholding an artificial \$10,000 cap on restitution in certain traffic-related criminal cases despite Arizona constitutional provision guaranteeing right to “receive prompt restitution” from a convicted defendant).

<sup>122</sup> See, e.g., *Paroline v. United States*, 134 S Ct. 1710 (2014) (reversing order for full restitution to child pornography victim and ordering only proportional restitution).

<sup>123</sup> Cf. 18 U.S.C. § 3664 (establishing restitution procedures).

<sup>124</sup> See generally Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of Criminal Courts*, 30 UCLA L. REV. 52 (1982). Cf. RESTATEMENT (FIRST) OF RESTITUTION (2011) (setting forth established restitution principles in civil cases).

<sup>125</sup> See 18 U.S.C. § 3663A.

imprisonment or perhaps even no imprisonment at all so that he can continue to work and make restitution payments to victims.<sup>126</sup>

### III. THE FUTURE OF CRIME VICTIMS' RIGHTS IN FLORIDA

Given the emerging consensus concerning victims' rights as reflected in many state constitutions as well as in federal law, Florida should not simply rest on the nearly thirty-year-old provision currently in its constitution.<sup>127</sup> Instead, Florida should, through its established and recognized procedures, expand the protections contained in its provision to cover the rights reflected in provisions enacted across the country and reflected in Marsy's Law.

Looking at the roughly 35 states where victims' rights amendments currently exist, Florida's amendment is among the most limited. This is unsurprising since, as noted earlier, Florida was one of the very first states to adopt constitutional protections for crime victims in 1988. In the nearly three decades since, we have learned a great deal about protecting crime victims' rights – knowledge that should be imported into the Florida Constitution.

Related to these coverage limitations are implementation problems. Victims' rights advocates have long been concerned that current enactments “frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia.”<sup>128</sup> As the Justice Department reported in 1997:

[E]fforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims[] rights advocates have sought reforms at the State level for the past 20 years and many States have responded with State statutes and constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights. These significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.<sup>129</sup>

While more recent and comprehensive statistics are lacking, the general consensus appears to be that victims' rights “enforcement is wildly uneven.”<sup>130</sup> The limited statistics that are available present cause for concern. Consider, for example, one of the seemingly simplest rights to extend: the right to notice of court hearings. In the federal system, despite the CVRA extending a right to notice to crime victims (and the availability of federal resources), many victims continue to be unaware of that right. A GAO report, for

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<sup>126</sup> Carissa Byrne Hessick & Douglas A. Berman, *Towards A Theory of Mitigation*, 96 B.U. L. REV. 161, 194 (2016) (reporting survey finding “strong agreement among judges that victim compensation could be mitigating”); see also Benji McMurray, *The Mitigating Power of a Victim Focused Sentencing*, 19 FED. SENT'G REP. 125 (2006); but cf. Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. REV. 649, 673 (2003) (arguing that “the victim's rights movement further imperils the traditional goals of sentencing in that it tends, by its nature, to serve only the goal of retribution”).

<sup>127</sup> See generally Paul G. Cassell, *The Maturing Victims' Rights Movement*, 13 OHIO ST. J. CRIM. L. 1 (2015).

<sup>128</sup> Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.

<sup>129</sup> *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. 64 (1997) (statement of Janet Reno, U.S. Att'y Gen.).

<sup>130</sup> BIBAS, *supra* note 2, at 90.

example, found that approximately 25 percent of the responding federal crime victims were unaware of their right to notice of court hearings.<sup>131</sup> Even larger percentages of failure to provide required notices were found in a survey of (presumably less well-funded) state criminal justice systems.<sup>132</sup> Distressingly, the same survey found that racial minorities were less likely to be notified than their white counterparts.<sup>133</sup>

Against this backdrop, it would make sense to push for strengthening of prominence and enforcement of the crime victims' provision in the Florida Constitution. The Marsy's Law formulation adopted recently in other states contains clear enforcement mechanisms for crime victims, by directly providing standing to pursue judicial enforcement<sup>134</sup> as well as the right to a prompt trial-court decision and, if necessary, appellate review. Such clear provisions—lodged in state constitutions—offer the mechanism for fully vindicating crime victims' important interests.

## RECOMMENDATION

To ensure appropriate protection for crime victims in the criminal justice process, Florida should amend its existing crime victims rights provision by adopting a more comprehensive "Marsy's Law" provision as soon as possible.

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<sup>131</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, CRIME VICTIMS' RIGHTS ACT: INCREASING AWARENESS, MODIFYING THE COMPLAINT PROCESS, AND ENHANCING COMPLIANCE MONITORING WILL IMPROVE IMPLEMENTATION OF THE ACT 82 (Dec. 2008).

<sup>132</sup> National Victim Center, *Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights*, in BELOOF, CASSELL & TWIST, *supra* note 8, at 631-34.

<sup>133</sup> *Id.*

<sup>134</sup> See Lawrence Schlam, *Enforcing Victims' Rights in Illinois: The Rationale for Victim "Standing" in Criminal Prosecutions*, 49 VAL. U.L. REV. 597 (2015).