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### Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law For Florida

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## PROTECTING CRIME VICTIMS IN STATE CONSTITUTIONS: THE EXAMPLE OF THE NEW MARSY'S LAW FOR FLORIDA

PAUL G. CASSELL & MARGARET GARVIN\*

*A majority of states have adopted state constitutional amendments protecting crime victims' rights. Most of those amendments were adopted long ago and many fail to comprehensively address crime victims' interests. In response to these shortcomings, the nation is seeing a new wave of state constitutional amendments protecting crime victims' rights. Among these states is Florida, where in November 2018 Florida voters approved significantly expanded protections for crime victims in Florida's Constitution—"Marsy's Law for Florida."*

*This Article explains in detail how Marsy's Law for Florida provides important new protections for crime victims in the Florida criminal justice process. The Article begins by providing a brief overview of the crime victims' rights movement in this country. It then turns to the specific crime victims' rights added by the new Florida Amendment, describing why each of these rights is an important addition to Florida's Constitution (and other similar constitutional amendments in other states). The Article concludes by reviewing broader lessons to be learned from Florida's new enactment, contending that Florida's recent experience may be useful for other states considering expanding their state constitutional protections and may ultimately set the stage for a federal constitutional debate about protecting crime victims' rights.*

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#### INTRODUCTION

Most states now recognize that crime victims have compelling interests at stake in criminal justice proceedings—interests so significant that they are protected in state constitutional amendments. But many of those state victims' rights amendments were adopted more than three decades ago and, in some respects, are beginning to show their age.<sup>1</sup> Many of these amendments contain only a short list of victims' rights and lack effective enforcement mechanisms.<sup>2</sup> As a result of these defects, most amendments fall short of their goal of ensuring that victims' interests are adequately protected throughout the criminal justice system.

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<sup>1</sup> See, e.g., Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135 (2007) (arguing that existing victims' rights provisions that lack victim standing, remedy, and review are flawed and calling for a third wave of victims' rights).

<sup>2</sup> Arizona is a notable standout. Passed in 1990, the Arizona victims' rights amendment, together with its statutory implementation, has resulted in robust enforcement of victims' rights. See AZ. CONST. art. II, § 2.1.

To address these concerns, a new wave of victims' rights amendments has been enacted over roughly the last decade, expanding the rights promised to victims and ensuring that those rights can be enforced, even by the victims. These new amendments draw on lessons learned over the last several decades regarding the scope, structure, and articulation of rights necessary to make crime victims' rights meaningful. Oregon modified its constitution in 2008 to remove express hurdles to rights enforcement.<sup>3</sup> That same year, California adopted the first Marsy's Law. Since then, similar Marsy's Law amendments were added to the state constitutions of Illinois in 2014,<sup>4</sup> North Dakota and South Dakota in 2016,<sup>5</sup> Ohio in 2017,<sup>6</sup> and Florida, Georgia, Nevada, North Carolina, and Oklahoma in November 2018.<sup>7</sup>

While these amendments have significant import for criminal cases, they have largely escaped serious scholarly attention. In this Article, we attempt to shed light on how these new amendments operate, focusing specifically on the recently adopted amendment in our nation's third most populous state, Florida. Florida approved one of the nation's first victims' rights amendments in 1988.<sup>8</sup> Drawing on what has been learned in the three decades since then, new provisions—known as “Marsy's Law for Florida”—were drafted by Florida's Constitutional Revision Commission (CRC) in early 2018 and approved by Florida's voters in November 2018.<sup>9</sup>

This Article provides one of the first academic assessments of a Marsy's Law amendment, using Marsy's Law for Florida as the springboard for discussion. Our analysis proceeds in several steps. Part I describes the history of crime victims' rights, tracing victims' involvement in the criminal justice process from the earliest days of the nation through today. Of particular importance are recent steps over the last several decades to add victim participatory rights into state constitutions. Florida has been in the vanguard of that effort, with both its original amendment and recent revisions.

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<sup>3</sup> OR CONST. art I, §§ 42, 43.

<sup>4</sup> ILL. CONST. art. I, § 8.1.

<sup>5</sup> N.D. CONST. art. I, § 25; S.D. CONST. art. VI, § 29.

<sup>6</sup> OHIO CONST. art. I, § 10(a).

<sup>7</sup> FLA CONST. art I, § 16(b); GA. CONST. art. I, § 1, ¶ XXX; NEV. CONST. art. I, § 8; N.C. CONST. art. I, § 37; OKLA. CONST. art. II, § 34. An iteration of Marsy's Law was adopted by Montana in 2016, but was held to violate the state constitutional separate-vote requirement. *Montana Ass'n of Cnts. v. State*, 404 P.3d 733, 748 (Mont. 2017). Similarly, Kentucky voters approved a Marsy's Law in 2018, but the vote was later held to be invalid because the entire text of the amendment was not on the ballot. *Westerfield v. Ward*, No. 2018-SC-000583-TG, 2019 WL 2463046, at \*10 (Ky. June 13, 2019).

<sup>8</sup> See FLA. CONST. art. I, § 16(b) (amended 1988).

<sup>9</sup> See FLA. CONST. art. I, § 16(b) (amended 2018).

Part II then turns to specific rights found in the new Florida provisions. Florida now has constitutional protections not only for victims' rights to notice of court hearings, to be present at those hearings, and to be heard, but also to a range of other protections such as preventing unreasonable delay in the process and providing reasonable protection from defendants, as well protection of victims' privacy and dignity and a right to due process. Florida also added important new enforcement mechanisms for its victims' rights amendment and language to make it entirely self-executing. These additions draw upon a core set of values that have emerged around the country.

Part III concludes by examining some of the lessons from Florida's new and strengthened state constitutional amendment. Four lessons are evident. First, victims' rights can be constitutionally protected without harming the criminal justice process or violating defendants' rights. Second, a consensus is emerging around the country regarding the kind of rights to which crime victims are entitled. Third, victims should have "standing" to assert and seek enforcement of the rights that they are promised. Finally, Florida's broad protections for such things as a victim's right to "due process" could serve to significantly expand the protections crime victims' interests receive throughout the criminal justice process and, more broadly, to invigorate a constitutional dialogue in this country about protecting crime victims' rights in the federal constitution.

#### I. A BRIEF HISTORY OF THE CRIME VICTIMS' RIGHTS MOVEMENT

To understand state crime victims' rights amendments in general—and Florida's new amendment in particular—it is useful to first understand some history about the crime victims' rights movement and state constitutional protections for victims. This section briefly describes how state amendments came to be enacted in many states and then turns specifically to Florida's new amendment.

##### A. RECOGNIZING CRIME VICTIMS' RIGHTS IN STATE CONSTITUTIONS

While a comprehensive history of crime victims' rights in the criminal justice process remains to be written, the broad outlines can be quickly sketched. At our country's founding, crime victims played an important role in criminal prosecutions, often bringing their own "private" prosecutions.<sup>10</sup>

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<sup>10</sup> See e.g., William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649 (1976) (describing colonial American landscape in which individual victims themselves primarily conducted key roles in the administration of justice including arrest, investigation, filing of charges, and prosecution).

Over time, for reasons not fully understood, a system of public prosecution steadily displaced the victims' former role.<sup>11</sup> Public prosecutors gradually assumed full control over prosecution decisions and any separate interest of victims came to lack legal weight. Ultimately, well into the twentieth century, the system evolved to the point where the victim was “the forgotten [person] of the system.”<sup>12</sup>

The Crime Victims' Rights Movement developed in the 1970s in response to 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>13</sup> Victims' advocates—who hailed from diverse movements, including those concerned with women's rights, civil rights, and “law and order”—urged the adoption of reforms giving 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>14</sup> Similar developments also occurred internationally.<sup>15</sup>

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<sup>11</sup> See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2015); Abraham Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 1 (1982); Beloof, *supra* note 1, at 1138–42.

<sup>12</sup> McDonald, *supra* note 10, at 650.

<sup>13</sup> Payne v. Tennessee, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (internal quotations omitted). See generally DOUGLAS E. BELOOF ET AL., *VICTIMS IN CRIMINAL PROCEDURE* 3–44 (4th ed. 2018); Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (1999); Collene Campbell et al., *Statement from the Author*, 5 PHOENIX L. REV. 379 (2012); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373 (1994) [hereinafter Cassell, *Balancing the Scales*]; Goldstein, *supra* note 11; William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37 (1996).

<sup>14</sup> See Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 543–47 (1985). See generally BELOOF ET AL., *supra* note 13, at 31–36; Douglas E. Beloof, *The Third Wave of Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255 (2005); Cassell, *Balancing the Scales*, *supra* note 13, at 1380–82.

<sup>15</sup> See, e.g., HUMAN RIGHTS WATCH, *MIXED RESULTS: U.S. POLICY AND INTERNATIONAL STANDARDS ON THE RIGHTS AND INTERESTS OF VICTIMS OF CRIME* 3–8 (2008), <https://www.hrw.org/report/2008/09/23/mixed-results/us-policy-and-international-standards-rights-and-interests-victims> [<https://perma.cc/8HFD-A8FY>] (discussing the many “international human rights instruments [that] address or touch on [crime] victims' rights”); cf. 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); Marie Manikis, *Imagining the Future of Victims' Rights in Canada: A Comparative Perspective*, 13 OHIO ST. J. CRIM. L. 163 (2015) (examining the evolution of Canadian victims' rights laws).

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>16</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>17</sup> The Task Force advocated multiple reforms, such as putting the responsibility on prosecutors to keep victims notified of all court proceedings and bringing to the court's attention the victim's view on subjects like bail, plea bargains, sentences and restitution.<sup>18</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>19</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>20</sup>

Realizing the difficulty of achieving the consensus required to amend the United States Constitution, advocates for crime victims' rights turned their efforts to state victims' rights amendments. The enactment of these state constitutional amendments began with California in 1982,<sup>21</sup> followed by Rhode Island's in 1986.<sup>22</sup> Florida's amendment was one of the first in the nation and was approved in the next election cycle in 1988.<sup>23</sup> The Florida provision adopted was extremely brief, simply providing that:

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>24</sup>

In the ensuing two decades, victims' rights advocates had considerable success with this "states first" strategy,<sup>25</sup> with about thirty-five states

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<sup>16</sup> PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982) [hereinafter PRESIDENT'S TASK FORCE], <https://www.ovc.gov/publications/presdntstskforcrprt/welcome.html> [<https://perma.cc/ZD25-CU9U>].

<sup>17</sup> *Id.* at 114.

<sup>18</sup> *Id.* at 63.

<sup>19</sup> *Id.* at 72–73.

<sup>20</sup> *Id.* at 114 (emphasis omitted).

<sup>21</sup> CA. CONST. art. I, § 28.

<sup>22</sup> R.I. CONST. art. I, § 23.

<sup>23</sup> FLA. CONST. art. I, § 16(b) (amended 1988).

<sup>24</sup> *Id.*

<sup>25</sup> See S. REP. NO. 108–191, at 3 (2003).

adopting victims' rights amendments to their state constitutions, protecting a wide range of victims' rights.<sup>26</sup> In addition to these state constitutional amendments, all fifty states passed statutory victims' rights.<sup>27</sup>

#### B. FLORIDA'S STATE CONSTITUTIONAL PROTECTION OF CRIME VICTIMS' RIGHTS

How well did the "first wave" of state constitutional enactments succeed in securing the legal protection of victims' interests in criminal justice? While the amendments helped increase recognition of victims in criminal justice processes, their effects fell short of full protection for victims' independent interests. Many of the amendments (such as Florida's) contained only a short list of victims' rights.<sup>28</sup> Many amendments also lacked effective enforcement mechanisms to ensure that victims' rights were fully implemented.<sup>29</sup>

Victims' rights advocates have been concerned that such enactments "frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia."<sup>30</sup> As the U.S. Justice Department reported in 1997:

[E]fforts to secure victims' rights . . . 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>31</sup>

While more recent assessments are infrequent, they generally conclude that victims' rights "enforcement is wildly uneven."<sup>32</sup>

The failure to consistently enforce state victims' rights has similarly held true for federal victims' rights. Consider, for example, one of the seemingly simplest rights to provide: the right to notice of court hearings. In the federal system, despite the Crime Victims' Rights Act (CVRA) extending

<sup>26</sup> See Paul G. Cassell, *Introduction: The Maturing Victims' Rights Movement*, 13 OHIO ST. J. CRIM. L. 1, 2 (2015).

<sup>27</sup> See Beloof, *supra* note 14, at 257–58.

<sup>28</sup> See, e.g., CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16A; FLA. CONST. art. I, § 16(b); N.J. CONST. art. I, § 22; WA. CONST. art. I, § 35.

<sup>29</sup> See, e.g., Beloof, *supra* note 14, at 256–60, 300–23 (discussing state amendments without clear and specific enforcement provisions).

<sup>30</sup> Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.

<sup>31</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. 41 (1997) (statement of Janet Reno, U.S. Att'y Gen.).

<sup>32</sup> BIBAS, *supra* note 11, at 90.

to crime victims a specific right to notice<sup>33</sup> (and the availability of significant federal resources to implement that right), many federal crime victims continue to be unaware of their rights. A 2008 General Accounting Office report found that approximately 25% of the responding federal crime victims were unaware of their right to notice of court hearings.<sup>34</sup> Even higher percentages of uninformed victims were found in a survey of state criminal justice systems.<sup>35</sup> Compounding the problem, the same survey of state victims found that racial minorities were less likely to be notified than their white counterparts.<sup>36</sup>

In 2017, Jay Howell, a prominent Florida victims' attorney with significant experience representing victims throughout the state, testified before the Florida Constitutional Revision Commission about these difficulties in enforcing victims' rights in Florida:

The issue is enforcement. Under our current system, with our broadly stated constitutional amendment and our statutes, are victims seeing those rights unfold in their cases? And, the sad reality is that they are not. We don't have, despite almost thirty years under our constitutional amendment and our statutes, a comprehensive, consistent or authoritative system for enforcing the rights in practice . . .<sup>37</sup>

One way of improving enforcement of state crime victims' rights enactments is by strengthening state constitutional protections. A second wave of state constitutional efforts began in 2008. Oregon adopted amendments to Article 1, Sections 42 and 43 to enhance enforceability and California voters overwhelmingly approved Proposition 9—Marsy's Law, for California.<sup>38</sup> Since then, similar Marsy's Law amendments were added to

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<sup>33</sup> 18 U.S.C. § 3771(a)(2) (2019).

<sup>34</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-54, CRIME VICTIMS' RIGHTS ACT: INCREASING AWARENESS, MODIFYING THE COMPLAINT PROCESS, AND ENHANCING COMPLIANCE MONITORING WILL IMPROVE IMPLEMENTATION OF THE ACT 82 (2008).

<sup>35</sup> National Victim Center, *Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights*, in VICTIMS IN CRIMINAL PROCEDURE, *supra* note 13, at 701–03 (4th ed. 2018).

<sup>36</sup> *Id.* at 703.

<sup>37</sup> *Constitution Revision Commission Declaration of Rights Committee*, December 12, 2017 (statement of Jay Howell, made at 1:14:00), <https://thefloridachannel.org/videos/12-12-17-constitution-revision-commission-declaration-rights-committee/>. [<https://perma.cc/F7P3-AGMW>]

<sup>38</sup> CAL. CONST. art. I, § 28. The namesake for the California enactment is Marsy Nicholas, who was the sister of Dr. Henry Nicholas, the co-founder of Broadcom Corporation. In 1983, Marsy was stalked and murdered in California by her ex-boyfriend. Marsy's Law, in its California iteration and elsewhere, attempts to prevent recurrence of the poor treatment the Nicholas family received during the criminal justice process by affording to victims a robust set of rights, as well as explicit mechanisms to assert and seek enforcement of those rights.

the state constitutions of Illinois in 2014,<sup>39</sup> North Dakota<sup>40</sup> and South Dakota in 2016,<sup>41</sup> Ohio in 2017,<sup>42</sup> and (along with Florida) Georgia,<sup>43</sup> Nevada,<sup>44</sup> North Carolina,<sup>45</sup> and Oklahoma<sup>46</sup> in November 2018.

The provisions in the recently enacted victims' rights amendments are more comprehensive than the Florida provision adopted nearly thirty years ago. Typically, these newer amendments contain fifteen or more specific rights for crime victims, along with detailed provisions concerning the enforcement of rights and a definition of the "victims" who can avail themselves of the rights.<sup>47</sup> The combination of a robust set of rights and explicit standing and enforcement provisions is the common thread in this new wave of state-constitutional amendments known as "Marsy's Laws."

The recently adopted Marsy's Law for Florida follows the path of these other recent state-level constitutional amendments. Florida's constitution is one of the most amendable in the country,<sup>48</sup> and the amendment moved through Florida's unique mechanism for evaluating changes to the Florida Constitution: the Constitutional Revision Commission (CRC).<sup>49</sup> Florida's CRC dates to 1968, when Florida's voters ratified three separate constitutional amendments—including one requiring a Constitutional Revision Commission to convene and examine the Florida Constitution once every twenty years, beginning in 1977.<sup>50</sup> A CRC met in 1977–78, 1997–98, and, most recently, 2017–18.<sup>51</sup>

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<sup>39</sup> ILL. CONST. art. I, § 8.1.

<sup>40</sup> N.D. CONST. art. I, § 25.

<sup>41</sup> S.D. CONST. art. VI, § 29.

<sup>42</sup> OHIO CONST. art. I, § 10(a).

<sup>43</sup> GA. CONST. art. I, § I, ¶ XXX.

<sup>44</sup> NEV. CONST. art. I, § 8.

<sup>45</sup> N.C. CONST. art. I, § 37.

<sup>46</sup> OKLA. CONST. art. II, § 34.

<sup>47</sup> See, e.g., N.D. CONST. art. I, § 2; 25 S.D. CONST. art. VI, § 29.

<sup>48</sup> TALBOT D'ALEMBERTE, *THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE* 11–13 (1991).

<sup>49</sup> See generally Robert F. Williams, *Foreword: Is Constitutional Revision Success Worth Its Popular Sovereignty Price*, 52 FLA. L. REV. 249 (2000) (describing the Constitution Revision Commission's suggested changes to the Florida Constitution).

<sup>50</sup> See CONSTITUTION REVISION COMMISSION 2017-2018, HISTORY (2018), <https://flcrc.gov/about/history> [<https://perma.cc/ESZ6-FHSW>] (archived website that describes the history of Florida's Constitutional Review Commission).

<sup>51</sup> *Id.*

On November 7, 2017, five members of the CRC filed the Marsy's Law for Florida proposal.<sup>52</sup> On January 19, 2018, following a hearing before the Declaration of Rights Subcommittee, the proposal was approved by a 6-1 vote.<sup>53</sup> The CRC held further hearings on the proposal around the State and, on April 18, 2018, the full CRC approved the proposal and sent it to the voters for their consideration.<sup>54</sup>

On November 6, 2018, the necessary supermajority of Florida voters approved the amendment, with 61.6% of Florida voters voting to pass the measure.<sup>55</sup>

## II. SPECIFIC RIGHTS IN FLORIDA'S NEW VICTIMS' RIGHTS AMENDMENT

Crime victims in Florida now have a more comprehensive and enforceable set of state constitutional rights.<sup>56</sup> But some critics of these new state constitutional protections have raised concerns, suggesting (often without any specific support) that protections for criminal defendants will be eroded or other unintended problems may emerge.<sup>57</sup> Other critics take the opposite tack, arguing that these measures are mere "feel good" gestures that will make no substantive difference for crime victims.<sup>58</sup>

We believe both of these objections are misplaced. In this part of this Article, we respond to these concerns, using Florida's language as a springboard. Careful analysis of Florida's new provisions, as well as parallel language found in other state constitutions, shows that victims' rights do not harm the administration of criminal justice or violate defendants' rights. In the sections that follow, we trace the source of Florida's extensive list of victims' rights. We describe and analyze the most significant rights provided in the new Florida Amendment, explaining how each of these rights would operate against the backdrop of other similar provisions that exist around the

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<sup>52</sup> See CONSTITUTION REVISION COMMISSION 2017-2018, DECLARATION OF RIGHTS: RIGHTS OF ACCUSED AND OF VICTIMS; ADDITIONAL RIGHTS OF VICTIMS (2018), <https://flerc.gov/Proposals/Commissioner/2017/0096> [<https://perma.cc/4JTZ-SYJQ>].

<sup>53</sup> *Id.*

<sup>54</sup> Transcript, Fla. Const. Revision Comm'n Meeting, April 16, 2018 Session, vol. I, at 131 (Apr. 16, 2018) <https://crc.law.fsu.edu/publishedcontent/administrativepublications/meetings/transcripts/transcript04-16-2018vol1.pdf> [<https://perma.cc/CW32-BV66>].

<sup>55</sup> See Florida Division of Elections, *Rights of Crime Victims*, (Nov. 6, 2018), <https://floridaelectionwatch.gov/Amendments> [<https://perma.cc/HX2R-8TY7>] (maintained by the Fla. Dep't of State).

<sup>56</sup> See FLA. CONST. art. I, § 16(b)(1)(a).

<sup>57</sup> See, e.g., Andrew Pantazi, *Will Marsy's Law Help Victims or Create New Problems?*, JACKSONVILLE FLA. TIMES-UNION, Sept. 28, 2018, <https://www.jacksonville.com/news/20180928/will-marsys-law-help-victims-or-create-new-problems> [<https://perma.cc/A2RR-F3TS>].

<sup>58</sup> *Id.*

country.<sup>59</sup> We also look at provisions defining who is a crime “victim” entitled to rights as well as the enforcement mechanisms available to victims to assert their rights. This review demonstrates that the new Florida Amendment is a measure that properly draws on an emerging consensus around the country on how state constitutional victims’ rights amendments should be drafted.

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

A crime victim’s right to notice of 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 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>60</sup> Knowing what is happening cannot only greatly reduce a victim’s anxiety about the process,<sup>61</sup> but it can allow them to take necessary safety measures and prepare for subsequent aspects of the case when they may have more participatory rights at stake. For these reasons, 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>62</sup>

Building on this recommendation, the Marsy’s Law for Florida Amendment provides that a victim will receive notice of case proceedings. Specifically, the proposal extends to victims, “upon request,” the right to “reasonable, accurate, and timely notice of . . . all public proceedings involving the criminal conduct, including, but not limited to, trial, plea, sentencing, or adjudication . . . .”<sup>63</sup> This provision is similar to those found in many other states’ constitutional and statutory provisions, which promise crime victims that they will be notified about criminal justice events related to the crimes committed against them.<sup>64</sup> The California Constitution, for

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<sup>59</sup> In this brief article, we do not discuss every right that might be considered fundamental or important to victims.

<sup>60</sup> See *Dusenbery v. United States*, 534 U.S. 161, 167 (2002).

<sup>61</sup> PRESIDENT’S TASK FORCE, *supra* note 16, at 64 (quoting victim to this effect).

<sup>62</sup> *Id.*

<sup>63</sup> FLA. CONST. art. I, § 16(b)(6)(a). The new amendment extends to victims a specific right to “due process,” as discussed *infra* note 114 and accompanying text.

<sup>64</sup> Notice and other rights provisions across the country vary with regard to inclusion of the “upon request” language. Notably, even when a right includes opt-in language such as “upon request” there are system obligations to ensure the right has meaning. See *e.g.*, *Ariz. ex rel. Hance v. Ariz. Bd. of Pardons & Paroles*, 875 P.2d 824, 832 (Ariz. Ct. App. 1993) (determining in the context of parole that the state may not use a victim’s failure to request

example, guarantees crime victims “reasonable notice” of all public proceedings.<sup>65</sup> And the Texas Constitution promises “the right to notification of court proceedings” on the “request of a crime victim.”<sup>66</sup>

The new notice provision in the Florida Amendment mirrors these constitutional rights in other states and extends an unqualified right to “reasonable notice” of all public court proceedings to Florida’s crime victims. The provision expands on the earlier version, which provided a right to notice only for “all crucial stages of criminal proceedings,”<sup>67</sup> a phrase that was not precisely defined and in its ambiguity did not provide clear protections for victims. The new Florida notice provision provides constitutional foundation for victim notification, ensuring that the existing state statutory scheme directing state agencies to provide “guidelines” for notification cannot undercut the notification to victims.<sup>68</sup>

Fortunately, with emerging electronic technologies, keeping victims informed about court hearings is becoming easier.<sup>69</sup> Automated victim-notification systems abound; most prominently used in many states is the so-called VINE (Victim Information Notification Everyday) system.<sup>70</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 (for example, terrorist bombings or massive financial fraud), 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>71</sup> New technologies may also provide a way of affording reasonable notice, with more direct notification. For example, some federal courts have approved notice by publication, where the publication directs crime victims to a

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notice as an excuse for denying rights when the state failed to use reasonable efforts to inform the victim she was constitutional entitled to request notice).

<sup>65</sup> CAL. CONST. art. I, § 28(b)(7).

<sup>66</sup> TEX. CONST. art. I, § 30(2)(b)(1).

<sup>67</sup> FLA. CONST. art. I, § 16(b) (1988).

<sup>68</sup> See FLA. STAT. § 960.001 (providing “guidelines” for fair treatment of victims and witnesses in the criminal justice and juvenile justice systems).

<sup>69</sup> See BIBAS, *supra* note 11, at 150 (“With the advent of email, notifying victims . . . is even easier”).

<sup>70</sup> See, e.g., VINE, APPRISS SAFETY (2020), <https://apprissafety.com/solutions/vine/> [<https://perma.cc/9HAK-RLBE>].

<sup>71</sup> United States v. Peralta, No. 3:08-cr-233, 2009 WL 2998050, at \*1–2 (W.D.N.C. Sept. 15, 2009).

website maintained by the government with hyperlinks to updates on cases.<sup>72</sup> The Florida notice provision comfortably embraces such possibilities by requiring that victims receive “reasonable” notice of court proceedings.

#### B. THE RIGHT TO ATTEND COURT HEARINGS

The new Florida Amendment also guarantees crime victims, “upon request,” an unqualified right “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.”<sup>73</sup> This right builds on a reascendant national consensus that victims deserve the right to attend all proceedings related to their case.<sup>74</sup>

In 1982, the President’s Task Force on Victims of Crime articulated the rationale and need for a right to attend criminal trials:

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>75</sup>

Several strong reasons support such a right. As Professor Doug Beloof and one of this Article’s authors have argued at length,<sup>76</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>77</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>78</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

<sup>72</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. Apr. 27, 2006).

<sup>73</sup> FLA. CONST. art. I, § 16(b)(7)(a).

<sup>74</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, 504–14 (2005).

<sup>75</sup> PRESIDENT’S TASK FORCE, *supra* note 16, at 80.

<sup>76</sup> See Beloof & Cassell, *supra* note 74.

<sup>77</sup> Ken Eikenberry, *Victims of Crime/Victims of Justice*, 34 WAYNE L. REV. 29, 41 (1987).

<sup>78</sup> Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 72 (1987).

proceedings in a supposedly public forum.”<sup>79</sup> One crime victim put it more directly: “All we ask is that we be treated just like a criminal.”<sup>80</sup> Defendants take full advantage of their right to be in the courtroom.<sup>81</sup>

To ensure that victims can attend court proceedings, many state amendments extend to a crime victim an unqualified right to attend the trial,<sup>82</sup> while others extend only a qualified right to attend, limiting the right if the victim’s testimony would be materially affected by attendance.<sup>83</sup> The 1988 Florida Victims’ Right Amendment only extended to Florida victims a qualified right to attend court hearings—specifically, a right to be present “to the extent that these rights do not interfere with the constitutional rights of the accused.”<sup>84</sup> This qualifying phrase is ambiguous, because it is unclear how a victim attending a trial could interfere with the rights of the accused.<sup>85</sup> A related implementing statute was similarly unhelpful. It provided that “[i]n 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” cannot be sequestered from a trial “unless, upon motion, the court determines

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<sup>79</sup> Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims’ Perspective*, 34 WAYNE L. REV. 51, 58 (1987).

<sup>80</sup> *Id.* at 59 (quoting Edmund Newton, *Criminals Have All the Rights*, LADIES’ HOME J., Sept. 1986).

<sup>81</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>82</sup> See, e.g., AK. 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 74, at 504–19 (providing a comprehensive discussion of state law on this subject).

<sup>83</sup> See, e.g., NEB. CONST. art. I, § 28(1) (victim has “the right to be present at trial unless the trial court finds sequestration necessary for a fair trial for the defendant”).

<sup>84</sup> FLA. CONST. art. I, § 16(b) (amended 1988) (“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. § 960.001(1)(e) (“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 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. § 90.616(2)(d) (“A witness may not be excluded if the witness is . . . [i]n 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>85</sup> See generally Beloof & Cassell, *supra* note 74, at 527–34 (collecting case law on this issue).

such person's presence to be prejudicial."<sup>86</sup> Here again, what is "prejudicial" is left undefined.

The new Florida Amendment resolves such ambiguities by clearly establishing an unqualified right for a victim to attend a trial—even where the victim might be called as a witness. Such a provision is constitutional, as the relevant case law demonstrates. While the United States Supreme Court has not spoken at any length on witness sequestration rules,<sup>87</sup> many lower courts have. For example, the Eleventh Circuit—the federal Court of Appeals with jurisdiction over Florida—found no violation of a defendant's constitutional rights when a murdered police officer's young son attended a capital sentencing proceeding.<sup>88</sup> The Court could

see no error, much less a constitutional deprivation, in the trial court's ruling. Petitioner cites no authority for the proposition that due process requires that in a capital sentencing proceeding, the defendant has a constitutional right to have removed from the courtroom spectators whose presence may remind the jury of the victim. A criminal proceeding is a public hearing; all citizens, including the victim's family, have a right to attend.<sup>89</sup>

Other courts have explained that the issue of witness sequestration simply presents no federal constitutional question. The reasons were well-stated by Judge Posner, who explained that the Constitution does not embody every procedural device that might protect a defendant: "A refusal to exclude . . . witnesses until they testify is not a denial of due process . . . . [T]he due process clause does not incorporate every refinement of legal procedure designed to make trials fairer or more accurate—not even one hallowed by time."<sup>90</sup> Following this same analysis, the Maryland Court of

<sup>86</sup> FLA. STAT. § 90.616.

<sup>87</sup> The Supreme Court has indicated that exclusion of a witness who disobeys a sequestration order is a matter vested in the sound discretion of the trial court, *Holder v. United States*, 150 U.S. 91, 92 (1893), a ruling that hardly suggests constitutional underpinnings for sequestration. The Supreme Court has also held that a defendant cannot be sequestered because of his right to confront witnesses against him, *Perry v. Leeke*, 488 U.S. 272, 282 (1989), and that sequestration does not permit a trial judge to prevent a defendant from communicating with his lawyer during an overnight break. *Geders v. United States*, 425 U.S. 80, 88 (1976).

<sup>88</sup> *Willis v. Kemp*, 838 F.2d 1510, 1523 (11th Cir. 1988).

<sup>89</sup> *Id.* at 1523; *see also* *United States v. Edwards*, 526 F.3d 747, 758 (11th Cir. 2008) (finding that "[a] criminal defendant has no constitutional right to exclude witnesses from the courtroom"); *State v. Williams*, 960 A.2d 805, 815 (N.J. Super. Ct. App. Div. 2008) (finding that "defendant had no constitutional right to exclude [victim] from the courtroom while [victim] had a constitutional right to remain after concluding his testimony").

<sup>90</sup> *Bell v. Duckworth*, 861 F.2d 169, 170 (7th Cir. 1988) (citations omitted); *see also* *State v. Beltran-Felix*, 922 P.2d 30, 38 (Utah Ct. App. 1996) (holding that a victim's right to attend and remain in the courtroom during the entire trial of a defendant did not facially, or as applied, violate the defendant's right to a fair trial).

Appeals has rejected a constitutional attack on Maryland's victims' attendance provision, holding:

Nothing in the constitution touches on the exclusion of witnesses during criminal trials. The Sixth Amendment to the United States Constitution and Article 2, Section 10 of our own guarantee to an accused a speedy and public trial and to be confronted with the witnesses against him. Otherwise neither document contains anything that might be seen as a right to limit those who may want to attend the trial.<sup>91</sup>

Based on such well-developed case law,<sup>92</sup> the unqualified right to attend the entire trial that Florida's amendment provides victims is constitutional.<sup>93</sup> And Florida's victims are now unequivocally guaranteed the ability to attend all other public proceedings involving the crimes committed against them.

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

In addition to creating an unqualified right for victims to attend an offender's trial, Florida's new amendment also grants victims the right to be heard at various points throughout the criminal justice process. Specifically, the amendment enumerates victims' right to be heard, "upon request," in "public proceeding[s] involving pretrial or other release from any form of legal constraint, plea, sentencing, adjudication, or parole" and, more generally, in "any proceeding during which a right of the victim is implicated."<sup>94</sup>

This new version of the right to be heard expands the former right-to-be-heard provision. The previous version limited the right to be heard to unspecified "crucial stages" of criminal cases.<sup>95</sup> In contrast, Florida's new, expanded right-to-be-heard provision specifically enumerates various stages of a criminal proceeding where a victim is guaranteed the right to be heard, and adds a final catch-all for any other proceeding where a victim's right might be implicated.

This expansion follows the trend in many other states. Many states now recognize that crime victims deserve the right to be heard at numerous points in the criminal justice process, thus allowing victims to participate directly

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<sup>91</sup> *Wheeler v. State*, 596 A.2d 78, 88 (Md. Ct. Spec. App. 1991).

<sup>92</sup> *See* Beloof & Cassell, *supra* note 74, at 527–29 (collecting cases rejecting defendant's arguments that victim/witness exclusion is constitutionally required).

<sup>93</sup> *Martinez v. State*, 664 So.2d 1034, 1036 (Fla. Dist. Ct. App. 1995), suggested, in what seems to have been dicta, that a defendant had some sort of right to exclude a victim from opening statements in trial. In light of the authorities collected above, none of which appear to have been considered by *Martinez*, the dicta in the case should not be regarded as persuasive. *See also* Beloof & Cassell, *supra* note 74, at 533–34 (arguing *Martinez* is "singularly unpersuasive").

<sup>94</sup> FLA. CONST. art. I, § 16(b)(6)(b).

<sup>95</sup> *See* FLA. CONST. art. I, § 16(b) (amended 1988).

in the administration of criminal justice.<sup>96</sup> Direct victim participation can provide important information to judges. For example, allowing an individual victim to speak at sentencing is useful because “gauging the harm to a unique human being, not a faceless abstraction, requires evidence of how that particular victim suffered.”<sup>97</sup> Victim participation can also lead to important therapeutic benefits for victims and legitimizing benefits for the system. As then-Professor (now-Judge) Stephanos Bibas has explained at length in *The Machinery of Criminal Justice*, “it is simple participation that helps to empower and heal victims. Participants see the law as more fair and more legitimate when they have some control over the process and [] they have been heard, whether or not they control ultimate outcomes.”<sup>98</sup>

Recognizing such benefits, many states have extended a right to victims to participate directly in some criminal justice proceedings. For example, the recently enacted constitutional provision in South Dakota promises crime victims “[t]he 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>99</sup> Other states have similar provisions in their state constitutions guaranteeing victims the opportunity to participate.<sup>100</sup>

Like other states, the Florida Amendment identifies specific stages at which a victim has the right to be heard. The first is the right to be heard “in any public proceeding involving pretrial or other release from any form of legal constraint . . . .”<sup>101</sup> This broad provision covers any decision to release

<sup>96</sup> See, e.g., CAL. CONST. art I, § 28(b)(8) (providing victims the right “[t]o be heard, upon request, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue”).

<sup>97</sup> BIBAS, *supra* note 11, at 91; see also Laurence H. Tribe, *McVeigh’s Victims Had a Right to Speak*, N.Y. TIMES, June 9, 1997, at A25.

<sup>98</sup> BIBAS, *supra* note 11, at 151.

<sup>99</sup> S.D. CONST. art VI, § 29.

<sup>100</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(a)(5) (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); UTAH CONST. art. I, § 28(1)(b) (right to be heard at important proceedings); 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).

<sup>101</sup> FLA. CONST. art. I, § 16(b)(6)(b).

a defendant on bail or other form of pre-trial release.<sup>102</sup> This right ensures that a victim can address the court directly regarding whether a judge should release a defendant before trial. The victim is not given the ability to command or veto the release or detention of any defendant; the ultimate decision remains with the judge. Similarly, when considering later release such as parole, a victim statement “can enable the board to appreciate fully the nature of the offense and the degree to which the particular inmate may [present risks to the victim or community] upon release.”<sup>103</sup> The board, of course, makes the final parole decision.

The new Florida Amendment also extends to victims a right to be heard regarding any “plea,”<sup>104</sup> consistent with provisions in many other states.<sup>105</sup> A victim’s right to be heard concerning a plea is important, because under Florida’s current rules of procedure, the judge is not bound to approve a plea agreement negotiated by the parties.<sup>106</sup> This is consistent with the rule in most states that a plea bargain between the prosecution and a defendant must be submitted to the trial judge for approval.<sup>107</sup> If the judge believes that the bargain is not in the interests of justice, she may reject it.<sup>108</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>109</sup> or to present to the judge information about whether the plea is in the interests of justice. Yet

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<sup>102</sup> See FLA. R. CRIM. P. 3.131(b) (setting out possible conditions of pre-trial release); FLA. STAT. § 903.046(2) (setting out bail determination criteria); see also *Byrd v. Mascara*, 197 So.3d 1211, 1213 (Fla. Dist. Ct. App. 2016) (discussing circumstances in which bail might be excessive). See generally SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* (2018).

<sup>103</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 generally 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) (discussing victim participation in parole hearings).

<sup>104</sup> FLA. CONST. art. I, § 16(b)(6)(b).

<sup>105</sup> See BELOOF ET AL., *supra* note 13, at 419–21.

<sup>106</sup> *Goins v. State*, 672 So. 2d 30, 31 (Fla. 1996) (the judge “is never bound to honor the [plea] agreement”).

<sup>107</sup> See *id.* at 419–22 (discussing this issue).

<sup>108</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>109</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).

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>110</sup>

The Florida Amendment not only gives victims a right to be heard before a judge agrees to accept any plea, but also gives victims, upon request, a specific right to “confer with the prosecuting attorney concerning any plea agreements . . . .”<sup>111</sup> Similar rights are found in other state constitutions and the federal CVRA.<sup>112</sup> A right to confer with the prosecutor gives a crime victim the ability to potentially influence the prosecutor's decision about what kind of plea arrangement to offer. This means that the right to confer must be provided “at a time that will enable the victims to exercise those rights meaningfully.”<sup>113</sup> As with the right to be heard regarding any release, victims have a voice in the plea-bargaining process, not a veto or a mandate. The judge is not required to follow the victim's suggested course of action regarding the plea, but gains more information on which to base a determination on how best to proceed.

The new Florida Amendment also specifically gives victims a right to be heard at “any public proceeding involving . . . sentencing, adjudication, or

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<sup>110</sup> BELOOF ET AL., *supra* note 13, 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); 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); Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U.L. REV. 301 (1987) (advancing reasons for victim participation in plea discussions).

<sup>111</sup> FLA. CONST. art. I, § 16(b)(6)(c). The provision also extends rights to confer regarding “release, restitution, sentencing, or any other disposition of the case.” *Id.* The principles discussed above in text about conferring on plea decisions apply equally to these other situations.

<sup>112</sup> *See, e.g.*, S.D. CONST. art. I, § 29(10) (giving victims the right “to confer with the attorney for the government”); 18 U.S.C. § 3771(a)(5) (“the reasonable right to confer with the attorney for the Government in the case”).

<sup>113</sup> *Doe v. United States*, 950 F. Supp. 2d 1262, 1268 (S.D. Fla. 2013) (explaining important of victim conferral right) (citing *United States v. BP Products North America*, 2008 WL 501321 (S.D. Tex. 2008)); *see also* Opinion and Order, *Jane Does v. United States*, No. 9:08-cv-80736-KAM (S.D. Fla. Feb. 21, 2019) (finding that victims of Jeffrey Epstein sex trafficking crimes should have been informed before prosecutors entered into a non-prosecution agreement).

parole . . . .”<sup>114</sup> Here again, this provision is consistent with those of many other state amendments, which typically extend to victims the right to be heard at proceedings for determining a sentence<sup>115</sup> or parole.<sup>116</sup> Defendants, of course, have the right to directly address the sentencing authority before a sentence is imposed.<sup>117</sup> The Florida provision extends the same basic right to victims.<sup>118</sup>

The reasons for a victim’s right to be heard at sentencing are manifold, including providing information to the sentencing judge, creating therapeutic and other benefits for victims, explaining the crime’s harm to the defendant, and improving the perceived fairness of sentencing.<sup>119</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>120</sup> Nor does the claim that victims’ impact statements might be

<sup>114</sup> FLA. CONST. art. I, § 16(b)(1)(b).

<sup>115</sup> See BELOOF ET AL., *supra* note 13, at 599–600.

<sup>116</sup> See *id.* at 645.

<sup>117</sup> See, e.g., *Hill v. State*, 246 So.3d 392, 395 (Fla. Dist. Ct. App. 2018) (discussing defendant’s right of allocution); see also FED. R. CRIM. P. 32(i)(4)(A) (recognizing defendant’s right to allocute in federal cases).

<sup>118</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 victim’s state constitutional right to be heard at crucial stages supports the admission of victim impact evidence at sentencing).

<sup>119</sup> See generally Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009).

<sup>120</sup> Bibas, *supra* note 11, at 91; see also 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”); EDWIN VILMOARE & 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”); Cassell, *supra* note 119, at 634–37 (“good evidence that victim impact statements generally lead to harsher sentences is lacking”); 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”); 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”); 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 (1999) (“sentence severity has not increased following the passage of [victim impact] legislation”); cf. Stephanos Bibas & Richard A. Bierschbach,

somehow “emotional” carry much weight, given that many other parts of the law recognize the propriety of emotional arguments.<sup>121</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.<sup>122</sup> Defendants can likewise respond to the information that victims provide in appropriate ways, such as providing counter-information.<sup>123</sup> To assist victims in making statements that may be useful to the sentencing judge, the Florida Amendment gives victims the “right to receive a copy of any presentence 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.”<sup>124</sup> This provision ensures that Florida victims will know the salient facts that a judge is considering when imposing a sentence, unlike the shot-in-the-dark approach that some other jurisdictions follow by not providing victims access to the report.<sup>125</sup>

The Florida Amendment also extends a right to be heard to “any proceeding during which a right of the victim is implicated.”<sup>126</sup> This catch-all is consistent with language in many other state amendments.<sup>127</sup> This makes explicit that victims can present information in support of a claim of

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*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 & 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); 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).

<sup>121</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.”); *cf.* 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>122</sup> See Paul G. Cassell & Edna Erez, *Victim Impact Statements and Ancillary Harm: The American Perspective*, 15 CAN. CRIM. L. REV. 149, 163–67 (2011) (discussing victims’ rights to present impact statements orally and in other ways).

<sup>123</sup> See generally *id.* at 175–96 (providing a fifty-state survey on procedures concerning victim impact statements).

<sup>124</sup> FLA. CONST. art. I, § 16(b)(6)(e).

<sup>125</sup> See Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, UTAH L. REV. 861, 928–936 (2007) (discussing conflicting federal law on whether victims can receive access to the presentence report in federal cases).

<sup>126</sup> FLA. CONST. art. I, § 16(b)(6)(b).

<sup>127</sup> See, e.g., S.D. CONST. art. VI, § 29(9).

right under the amendments, consistent with ordinary due-process principles.<sup>128</sup>

Indeed, fortifying the new right to be heard in Florida is based on ensuring an overarching and general right to “due process.”<sup>129</sup> This right has the potential to be a sweeping protection for crime victims in Florida, just as the federal Due Process Clause has provided significant protections for criminal defendants in criminal justice proceedings throughout the country. The exact reach of Florida’s new due process provision will depend on case-specific development in future years, but it should ensure that victims’ interests are broadly considered whenever judges and other actors make procedural decisions affecting victims.

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

Florida’s amendment also guarantees victims the right “to proceedings free from unreasonable delay, and to prompt and final conclusion of the case and any related postjudgment proceedings.”<sup>130</sup> This provision parallels language found in many other state provisions that have extended to crime victims the right to “a speedy trial and a prompt and final conclusion of the case”<sup>131</sup> or to proceedings “free from unreasonable delay.”<sup>132</sup> Such provisions are designed to be the victim’s analogue to a defendant’s Sixth Amendment right to a speedy trial.<sup>133</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>134</sup> The interests underlying a speedy trial, however, are not confined to defendants. The Supreme Court has

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<sup>128</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).

<sup>129</sup> FLA. CONST. art. I, § 16(b)(1).

<sup>130</sup> FLA. CONST. art. I, § 16(b)(10).

<sup>131</sup> *See, e.g.*, ARIZ. CONST. art. II, § 2.1(A)(10); CAL. CONST. art. I, § 28(b)(9).

<sup>132</sup> *See, e.g.*, 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. § 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>133</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . .”).

<sup>134</sup> *Smith v. Hoey*, 393 U.S. 374, 378 (1969) (citing *United States v. Ewell*, 383 U.S. 116, 120 (1966)).

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>135</sup>

Victims often suffer significantly from delays in the criminal justice system.<sup>136</sup> 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>137</sup> And victims suffer as a consequence of these delays. For example, victims of violent crime frequently suffer from post-traumatic stress disorder (PTSD).<sup>138</sup> A connection between initial victimization and later depression, substance abuse, panic disorder, agoraphobia, social phobia, obsessive-compulsive disorder, and even suicide have also been reported in the academic literature.<sup>139</sup> Delays in the criminal process can exacerbate these initial injuries. 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>140</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>141</sup>

Academic literature confirms the ways in which delays in the criminal justice system can compound the crime’s initial harmful effects on a victim.<sup>142</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>143</sup> Delays in proceedings can also be particularly difficult for child

<sup>135</sup> *Barker v. Wingo*, 407 U.S. 514, 519 (1972).

<sup>136</sup> See Brief of Arizona Voice for Crime Victims et al. as Amici Curiae Supporting Petitioner at 6–9, *Ryan v. Washington*, 137 S. Ct. 1581 (2017) (No. 16-840) (collecting research on delays). This section draws on the research collected in the AVCV brief.

<sup>137</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>138</sup> See Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. TRAUMATIC STRESS 119, 125–26 (2003); Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims’ Mental Health*, 23 J. TRAUMATIC STRESS 182, 182 (2010).

<sup>139</sup> Parsons & Bergin, *supra* note 138, at 182.

<sup>140</sup> Ricke, *supra* note 137, at 193.

<sup>141</sup> Ulrich Orth & Andreas Maercker, *Do Trials of Perpetrators Retraumatize Victims?*, 19 J. INTERPERSONAL VIOLENCE 212, 215 (2004).

<sup>142</sup> Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 159 (2003).

<sup>143</sup> Parsons & Bergin, *supra* note 138, 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 (2006).

victims, who may have difficulty healing until the anxiety of legal proceedings can be brought to an end.<sup>144</sup>

The new Florida provisions do not require a judge to follow a victim's call for scheduling trial or for ending all delay; rather, a judge must prevent "unreasonable" delay<sup>145</sup> and, ultimately, provide a victim with "a prompt and final conclusion of the case."<sup>146</sup> Because of language and intent similarities, when interpreting these provisions, Florida courts can look to the traditional body of case law that already exists for resolving defendants' speedy-trial claims.<sup>147</sup>

The new Florida provisions also set specific deadlines for the scheduling of a trial. Specifically, the provisions call for a trial judge to hold a calendar call within fifteen days of a state attorney's filing of a demand for a speedy trial.<sup>148</sup> The provisions then require that the judge schedule a trial within sixty days of the conference, unless the court enters an order "with specific findings of fact" that justify a later trial date.<sup>149</sup>

In addition to creating time requirements that ensure that victims do not have to suffer unreasonable delays in scheduling trials, the Florida Amendment also creates timeliness requirements for concluding any state-level appeal and collateral attack on a criminal judgment. Specifically, the amendment requires that any such attacks "must be complete within two years from the date of appeal in non-capital cases and within five years from the date of appeal in capital cases."<sup>150</sup>

Like trial court timelines, exceptions to these deadlines exist if a court "enters an order with specific findings as to why the court was unable to comply . . . and the circumstances causing delay."<sup>151</sup> In addition, the Amendment requires that on a yearly basis "the chief judge of any district court of appeal or the chief justice of the supreme court shall report on a case-

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<sup>144</sup> Cassell, *Balancing the Scales*, *supra* note 13, at 1402–07.

<sup>145</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>146</sup> *See* FLA. CONST. art. I, § 16(b)(10).

<sup>147</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. LAFAYE, CRIMINAL PROCEDURE § 18.2 (5th ed. 2009 & Supp. 2018).

<sup>148</sup> FLA. CONST. art. I, § 16(b)(10)(a).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at § 16(b)(10)(b).

<sup>151</sup> *Id.*

by-case basis to the speaker of the house of representatives and the president of the senate all cases where the court entered” such an order “regarding inability to comply” with the appellate level deadline.<sup>152</sup>

These provisions raise no separation of powers questions. While the Amendment sets out standard timelines for criminal cases—implicitly giving priority to their resolution—a Florida court remains free to depart from the timelines in a particular case if there is a good, case-specific reason requiring a departure. If there is such a reason, the court must explain its specific reasons for departing. This is consistent with long-standing provisions in the federal Speedy Trial Act, which also permit departure from a trial timeline (70 days) if the court sets forth “in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.”<sup>153</sup>

#### E. THE RIGHT TO REASONABLE PROTECTION AND OTHER SAFETY-RELATED PROVISIONS

In addition to providing victims with rights that relate to proceedings, the Amendment also extends certain protections designed to keep victims safe throughout the entire criminal justice process. One overarching right is the right to be “reasonably protected from the accused and any person acting on behalf of the accused.”<sup>154</sup> More than a dozen other states extend to victims a similar constitutional right to be reasonably protected from the accused.<sup>155</sup> For example, a California constitutional provision extends a right to victims to “be reasonably protected from the defendant and persons acting on behalf of the defendant.”<sup>156</sup> Federal law, too, gives victims “[t]he right to be reasonably protected from the accused.”<sup>157</sup>

These kinds of provisions are designed to require that a crime victim’s safety be considered by courts, parole boards, and other government actors

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<sup>152</sup> *Id.* at § .§ 16(b)(10)(b).

<sup>153</sup> 18 U.S.C. § 3161(d)(7)(A) (2008).

<sup>154</sup> FLA. CONST. art. I, § 16(b)(3).

<sup>155</sup> *See, e.g.*, S.D. CONST. art. VI, § 29(3). *See generally* BELOOF ET AL., *supra* note 13, at 257–58.

<sup>156</sup> CAL. CONST. art. I, § 28(b)(2).

<sup>157</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, 69–73 (2010) (critiquing this provision).

in making discretionary decisions that could lead to harm to a crime victim.<sup>158</sup> An illustration of this is the provision of a separate waiting area in a courthouse, where a victim might be kept separate from the defendant or the defendant's family.<sup>159</sup>

In extending a right to reasonable protection, the Amendment clarifies that the new right is not "intended to create a special relationship between the crime victim and any law enforcement agency or office."<sup>160</sup> The CRC's drafting history underlying this clause reveals that the drafters' intention was to ensure that the provision was not interpreted as requiring "around-the-clock protection when . . . it is not warranted for victims."<sup>161</sup>

The Florida Amendment contains an additional provision promising victims the "right to have the safety and welfare of the victim and the victim's family considered when setting bail, including setting pretrial release conditions that protect the safety and welfare of the victim and the victim's family."<sup>162</sup> Defendants and convicted offenders who are released may pose a danger to their victims. These dangers can be particularly pronounced for victims of domestic and sexual violence. For instance, in November 2017 Jason McGuire chased his estranged wife Madonna with a hammer in Cape Coral, Florida.<sup>163</sup> Fearful for her safety, she filed of aggravated battery charges against her husband. McGuire was released on December 2, and one week later he killed Madonna.<sup>164</sup>

Sadly, Madonna's case is hardly unique.<sup>165</sup> In an effort to prevent such travesties, Florida has now joined a number of other states in enacting constitutional provisions requiring notice to crime victims whenever an

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<sup>158</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), no such discretionary consideration needs to be made regarding a victim's safety, although a victim will receive notice of the release.

<sup>159</sup> Transcript, Fla. Const. Revision Comm'n Meeting, Mar. 20, 2018 Session, vol. II at 259–60 (Mar. 20, 2018), <http://flcrc.gov/Meetings/Transcripts.html> [<https://perma.cc/44DG-V7CB>]. This illustration was offered as part of the provisions' drafting history. *Id.*

<sup>160</sup> FLA. CONST. art. I, § 16(b)(3).

<sup>161</sup> Transcript, Fla. Const. Revision Comm'n Meeting, Mar. 20, 2018 Session, vol. II at 259–60 (March 20, 2018), <http://flcrc.gov/Meetings/Transcripts.html> [<https://perma.cc/44DG-V7CB>].

<sup>162</sup> FLA. CONST. art. I, § 16(b)(4).

<sup>163</sup> Adam Pinsker, *Murder Victim Had Restraining Order Against Husband*, FOX 4 NEWS, Dec. 18, 2017, <https://www.fox4now.com/news/local-news/murder-victim-had-restraining-order-against-husband> [<https://perma.cc/BJ59-J7QH>].

<sup>164</sup> *Id.*

<sup>165</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).

offender will no longer in custody.<sup>166</sup> During criminal proceedings, before a sentence is imposed, the new Florida Amendment promises victims the right to “reasonable, accurate, and timely notice of any release or escape of the defendant or delinquent . . . .”<sup>167</sup> After a sentence is imposed, the Amendment promises victims a right to notice of “any scheduled release date of the offender, and the release of or the escape of the offender from custody.”<sup>168</sup> These provisions track provisions in, for example, the California Victims’ Rights Amendment, which gives victims the right to request to be informed of “the scheduled release date of the defendant, and the release of or the escape by the defendant from custody.”<sup>169</sup> Other states have comparable notice requirements.<sup>170</sup> These provisions ensure that victims are not surprised to discover that an offender is no longer in custody.

The Florida Amendment requires notice to be provided in either of two circumstances: either a *release*, which could include a post-arrest release, the post-conviction paroling of a defendant, or a pardon,<sup>171</sup> or an *escape*. The administrative burdens associated with such notification requirements have been minimized by technological advances. As with many other states, Florida already has in place a computer-operated program that can place a telephone call to a programmed number when a prisoner is moved from one prison to another or released.<sup>172</sup>

The new Florida Amendment also provides a victim a right to protection from more than just the threat of physical violence. For many of the same reasons that victims may become targets of violence because of their

<sup>166</sup> See, e.g., CAL. CONST. art. I, § 28(b)(12); S.C. CONST. art. I, § 24(A)(1).

<sup>167</sup> FLA. CONST. art. I, § 16(b)(6)(a). While Florida did not have a previous constitutional provision regarding these rights, statutory protections did exist regarding notice of release. See, e.g., FLA. STAT. ANN. § 960.001(1)(e) (West 2019) (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.* § 960.001(1)(p) (requiring notice to victims of any escape from a state facility).

<sup>168</sup> FLA. CONST. art. I, § 16(b)(6)(f).

<sup>169</sup> CAL. CONST. art. I, § 28(b)(12).

<sup>170</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.”); MICH. CONST. art. I, § 24(1) (Crime victims have the right “to information about the conviction, sentence, imprisonment, and release of the accused.”); S.C. CONST. art. I, § 24(A)(2) (“[V]ictims of a crime have the right to . . . be reasonably informed when the accused or convicted person is arrested, released from custody, or has escaped . . .”).

<sup>171</sup> See generally 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>172</sup> See Fla. Dep’t of Corr., *Victim Services*, <http://www.dc.state.fl.us/vict/index.html> [<https://perma.cc/9XDY-MET3>].

participation in the criminal justice system, they are also often the targets of harassment and verbal abuse. Taking these additional forms of potential harm into account, the Amendment guarantees a victim the “right to be free from intimidation, harassment, and abuse.”<sup>173</sup> Here again, other states have similar provisions.<sup>174</sup>

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

Frequently victims have substantial privacy and dignity interests at stake in criminal proceedings.<sup>175</sup> Sexual-assault victims, for example, suffer the ultimate invasion of privacy and run the risk of continued loss of privacy during the resulting criminal justice process.<sup>176</sup> A criminal justice system should be structured so that it avoids unnecessary invasions of privacy and insults to a victim’s dignity.<sup>177</sup>

Recognizing the legitimacy of protecting such victims’ interests, a number of states extend specific protections to crime victims’ 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>178</sup> Arizona promises crime victims the right “[t]o be treated with fairness, respect, and dignity . . . throughout the criminal justice process.”<sup>179</sup> Indiana extends to victims “the right to be treated with fairness, dignity and respect throughout the criminal justice process.”<sup>180</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>181</sup>

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<sup>173</sup> FLA. CONST. art. I, § 16(b)(2).

<sup>174</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.”); ILL. CONST. art. I, § 8.1(a)(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.”); TENN. CONST. art. I, § 35(b) (Victims shall be entitled to the “right to be free from intimidation, harassment and abuse throughout the criminal justice system.”).

<sup>175</sup> See generally Mary Graw Leary, *The Third Dimension of Victimization*, 13 OHIO ST. J. CRIM. L. 139 (2015) (discussing digital victimization).

<sup>176</sup> See Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims’ Identities*, 64 S. CAL. L. REV. 1019, 1020–21 (1991).

<sup>177</sup> Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity’s Evolution in the Victims’ Rights Movement*, 9 DREXEL L. REV. 43, 44–45 (2016).

<sup>178</sup> CAL. CONST. art. I, § 28(b)(1).

<sup>179</sup> ARIZ. CONST. art. II, § 2.1.

<sup>180</sup> IND. CONST. art. I, § 13(b).

<sup>181</sup> 18 U.S.C. § 3771(a)(8) (2018).

The Florida Amendment takes a slightly different approach to protecting the privacy rights of victims. Rather than enumerating any general right to privacy as some states do, the Amendment provides that victims have rights to “fairness,” “respect for the victim’s dignity,” and “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.”<sup>182</sup> The precise scope of these rights remains to be fully defined,<sup>183</sup> but existing principles and caselaw provide general guidance.

With respect to a right to “fairness,” such provisions are usually understood as being analogous to a defendant’s right to due process.<sup>184</sup> For example, Senator Kyl explained with regard to the federal CVRA’s fairness provision that “[o]f course, fairness includes the notion of due process.”<sup>185</sup> In Florida, interestingly, victims are promised both a right to “fairness” as well as a right to “due process,”<sup>186</sup> implying that fairness must be broadly construed to extend beyond due process.

A right to “dignity” has also been applied in other crime victims’ cases and can be applied in Florida in a case-by-case approach. To take one example, a federal district court in Kansas considered whether to admit into the courtroom cameras and sketch artists, who might have depicted likenesses of mentally-ill crime victims.<sup>187</sup> In restricting such depictions under the federal CVRA’s right to be treated with “dignity,” the court explained that “there is a compelling government interest in protecting the dignity, as well as the physical and psychological well-being, of mentally-ill alleged crime victims who have been potentially exploited through extensive video recording of themselves engaged in bizarre sexual behavior under the tutelage of their social worker.”<sup>188</sup> Florida’s new dignity provision invites courts to make similar case-specific applications of the right when a victim’s dignity is unnecessarily threatened.

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<sup>182</sup> FLA. CONST. art. I, § 16(b)(5).

<sup>183</sup> Presumably shared societal understanding of expected privacy interests will be central to this development. Cf. Matthew Tokson, *Knowledge and Fourth Amendment Privacy*, 111 NW. U. L. REV. 141, 149–63 (2016) (discussing expectation of privacy in Fourth Amendment case law).

<sup>184</sup> See Cassell, *Balancing the Scales*, *supra* note 13, at 1387 (discussing right to “fairness” under Utah’s victims’ rights amendment).

<sup>185</sup> 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

<sup>186</sup> FLA. CONST. art. I, § 16(b)(1).

<sup>187</sup> *United States v. Kaufman*, No. CRIM.A. 04-40141-01, 2005 WL 2648070 (D. Kan. Oct. 17, 2005).

<sup>188</sup> *Id.* at \*4.

With regard to Florida's provision restricting disclosure of information that could be used to harass the victim, Florida's police agencies have already begun implementing these provisions. Because of the new Florida Amendment, police agencies are no longer making automatic disclosures of sensitive information about victims.<sup>189</sup> And with regard to restrictions on releasing information that is confidential or privileged, the new Amendment may increase the effectiveness of protections for certain materials. For example, Florida and other states have enacted sexual assault-counseling privilege laws, which enable sexual assault counselors to maintain the confidentiality of information revealed to them by crime victims.<sup>190</sup> Constitutional protection for victims' privacy may help to ensure that such statutes operate as intended.<sup>191</sup>

#### G. THE RIGHT TO RESTITUTION

Finally, the Florida Amendment provides a right to restitution. All states have recognized, at least to some degree, a crime victim's right to restitution through statute,<sup>192</sup> and about twenty states have added a state constitutional right to restitution.<sup>193</sup> For example, Illinois promises to a crime victim "[t]he right to restitution" in its constitution.<sup>194</sup> North Carolina extends to a crime

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<sup>189</sup> See Paul Cassell & Meg Garvin, *Marsy's Law is Working as Intended, Protecting Victims' and the Public Interest*, TAMPA BAY TIMES, Jan. 30, 2019, <https://www.tampabay.com/opinion/columns/marsys-law-is-working-as-intended-protecting-victims-and-the-public-interest-20190130/> [<https://perma.cc/WM7J-UCA9>].

<sup>190</sup> See FLA. STAT. § 90.5035 (2002); see also 735 ILL. COMPILED STAT. ANN. 5/8-802.1 (2013) (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) (describing state sexual assault-counseling privilege laws).

<sup>191</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>192</sup> See PEGGY M. TOBOLOWSKY ET AL., CRIME VICTIM RIGHTS AND REMEDIES 171 (3d ed. 2016). Florida did not previously afford a constitutional right to restitution, but it did have a statutory provision. See FLA. STAT. § 775.089(1)(a) (2015) ("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>193</sup> See TOBOLOWSKY ET AL., *supra* note 192, at 171.

<sup>194</sup> ILL. CONST. art. I, § 8.1(a)(10). For discussion of the Illinois provision, see Jeffrey A. Parness, *The New Illinois Constitutional Crime Victim Restitution Right: A Revolutionary Amendment?*, 27 DCBA BR. 26 (2015).

victim “[t]he right [as prescribed by law] to receive restitution.”<sup>195</sup> The California Constitution provides that “[r]estitution 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.”<sup>196</sup> Congress has also enacted broad restitution provisions in the federal system.<sup>197</sup>

The new Florida Amendment gives victims a sweeping constitutional 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.”<sup>198</sup> The drafting history of the provision makes clear that the intention was “to be certain that victims who have suffered an economic loss are made whole.”<sup>199</sup> Against that backdrop, the far-reaching language in the provision promising restitution in “every case” makes clear that victims are always entitled to financial recovery from their offenders for any financial loss resulting from the crime. Similarly, the broad language guaranteeing “full” restitution for “all losses suffered, both directly and indirectly” makes clear that victims are entitled to restitution for all aspects of any loss. For example, not only are victims entitled to recover the fair market value of any property they may have lost, but if incremental value existed—such as sentimental value—then restitution is required for that value as well.<sup>200</sup> Finally, the inclusion of a timeliness requirement provides an opportunity for victims to demand restitution as soon as it becomes reasonably available.

The Florida Amendment’s language also is clearer than some other restitution laws on how restitution is to be paid in situations where a victim suffers a loss caused by multiple criminals. The right to restitution “from each convicted offender for *all* losses suffered” means that a victim need not apportion her restitution among multiple defendants.<sup>201</sup> Some other restitution regimes have had difficulty providing full restitution to victims in these situations, such as child-pornography possession crimes, when many widely distributed offenders are together responsible for the victim’s

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<sup>195</sup> N.C. CONST. art. I, § 37(1)(c).

<sup>196</sup> CAL. CONST. art. I, § 28(b)(13)(B).

<sup>197</sup> *See, e.g.*, 18 U.S.C. § 3663 (2018); 18 U.S.C. § 3663A (2018).

<sup>198</sup> FLA. CONST. art. I, § 16(b)(9).

<sup>199</sup> *See* Transcript, Fla. Const. Revision Comm’n, Mar. 20, 2018 Session, vol. II at 260–61 (Mar. 20, 2018), <http://flcrc.gov/Meetings/Transcripts.html> [<https://perma.cc/44DG-V7CB>].

<sup>200</sup> *See* *Davis v. State*, 244 So.3d 374, 378 (Fla. 4th Dist. Ct. App. 2018) (noting that restitution can go beyond fair market value to include such things as “sentimental value” or the value of “recent repairs”).

<sup>201</sup> *Cf.* 18 U.S.C. § 3664(i) (2018) (allowing apportionment of restitution among multiple defendants).

losses.<sup>202</sup> The Florida Amendment, however, takes the simple step of clearly making any convicted defendant jointly and severally liable for all of a victim's losses—a standard approach in tort law that applies equally well to criminal restitution awards.<sup>203</sup>

Even though this restitution provision is broad, offenders may often lack the means to make full restitution. Accordingly, even in the face of a full restitution requirement, a sentencing judge can establish an appropriate repayment schedule and enforce it during the period in which the offender is under the court's jurisdiction.<sup>204</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 imprisonment or perhaps even no imprisonment at all so that he can continue to work and make restitution payments to victims.<sup>205</sup> Notably, a defendant who cannot pay the full amount of restitution ordered is put on a payment plan to pay only as much as they can reasonably afford.<sup>206</sup> As with many other issues, the trial court can exercise its sound discretion in implementing restitution, provided that the victim's right to full restitution is protected.

#### H. THE "VICTIM" DEFINITION PROVISION

In addition to extending rights to crime victims, the new Florida Amendment provides a definition of a "victim" to whom the rights are extended.<sup>207</sup> This definition is important, as otherwise victims' rights would

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<sup>202</sup> See, e.g., *Paroline v. United States*, 572 U.S. 434 (2014) (reversing order for full restitution to child pornography victim and ordering only proportional restitution).

<sup>203</sup> See generally Paul G. Cassell et al., *The Case for Full Restitution for Child Pornography Victims*, 82 GEO. WASH. L. REV. 61, 97–109 (2013) (arguing child pornography victims are entitled to restitution for the full amount of their losses from defendants who have stolen their images).

<sup>204</sup> Cf. 18 U.S.C. § 3664(f) (2018) (establishing restitution procedures for payment schedules).

<sup>205</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 Focus at Sentencing*, 19 FED. SENT'G REP. 125 (2006). But cf. Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trial 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>206</sup> See, e.g., *Bourget v. State*, 634 So.2d 1109, 1110 (Fla. 2d Dist. Ct. App. 1994) ("[T]he trial court cannot revoke [a defendant's] probation for an inability to pay if she makes a bona fide effort to obtain the necessary resources.").

<sup>207</sup> FLA. CONST. art. I, § 16(e).

be remitted to the discretion of either the courts or the legislature in deciding who would be afforded rights.

The Amendment provides that “[a]s 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.”<sup>208</sup> This “victim” definition is a standard one, having been used elsewhere, such as California’s constitutional provisions.<sup>209</sup> Its application in most cases should be straightforward, since for many crimes Florida prosecutors must identify a specific victim.<sup>210</sup> In situations where “victim” status is in doubt, the trial court can inquire into the circumstances of the case and see where a person claiming victims status has suffered “direct or threatened physical, psychological, or financial harm.”

In some cases, the victim will be unable to personally exercise their rights. In such cases, the Florida Amendment provides that the “term ‘victim’ includes the victim’s 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.”<sup>211</sup> Thus, in situations where the victim is a minor, is incapacitated, or deceased (as in a homicide case), the victim’s “representative” can step into the victim’s shoes to assert the victim’s rights.

The Amendment makes clear that “[t]he term ‘victim’ does not include the accused.”<sup>212</sup> This provision ensures that someone who is criminally culpable cannot attempt to take advantage of victims’ enactments, as has occasionally been attempted in other states.<sup>213</sup> Also, to ensure that crime victims who are harmed by juveniles are covered by the Amendment’s provisions, the Amendment specifies that its protections extend not just to crimes by adults but also “delinquent acts and conduct.”<sup>214</sup>

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<sup>208</sup> *Id.*

<sup>209</sup> See CAL. CONST. art. I, § 28(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.”).

<sup>210</sup> See generally BELOOF ET AL., *supra* note 13, at 45–108 (discussing issues relating to “victim” definition).

<sup>211</sup> FLA. CONST. art. I, § 16(e).

<sup>212</sup> *Id.*

<sup>213</sup> Cf. *Knapp v. Martone*, 83 P.2d 685 (Ariz. 1992) (en banc) (discussing this issue under Arizona law).

<sup>214</sup> FLA. CONST. art. I, § 16(e).

## I. IMPLEMENTATION AND ENFORCEMENT PROVISIONS

In addition to extending the substantive rights discussed above, the Amendment also contains various enforcement provisions designed to guarantee that the rights will work effectively. In addition to enumerating rights, Florida's Amendment clarifies that the rights included "may not be construed to deny or impair any other rights possessed by victims."<sup>215</sup> Further, that provision also declares that the Amendment is self-executing and does not "require implementing legislation."<sup>216</sup> This provision gives the Amendment's new rights automatic legal effect without the need for any subsequent action by the Florida Legislature. Of course, the fact that accompanying legislation is not required does not mean it is not permitted. Legislation has been proposed in Florida to aid in the implementation of the victims' rights enumerated in the new constitutional language—although such legislation has yet to be enacted.<sup>217</sup>

The Amendment also guarantees that victims will receive information about their rights. The Amendment extends to victims the "right to be informed of these rights . . . . This information shall be made available to the general public and provided to all crime victims in the form of a card or by other means intended to effectively advise the victim of their rights under this section."<sup>218</sup> This provision already exists in many other states that have adopted Marsy's Laws, including California.<sup>219</sup> Presumably, the information will be provided through a Marsy's Law card, which law enforcement officers can provide to victims when they contact them after the crime.<sup>220</sup>

Once victims receive information about their rights under the Amendment, the Amendment also ensures that they are empowered to assert and seek enforcement of their rights. Responding to enforcement problems with earlier victims' protections,<sup>221</sup> the new Amendment specifically authorizes victims, attorneys retained by victims, lawful representatives of victims, and prosecutors acting upon the request of victims to "assert and

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<sup>215</sup> FLA. CONST. art. I, § 16(d).

<sup>216</sup> *Id.*

<sup>217</sup> See S.B. 1426, 2019 Sen., Reg. Sess. (Fla. 2019).

<sup>218</sup> FLA. CONST. art. I, § 16(b)(11).

<sup>219</sup> See CAL. CONST. art. I, § 28(b)(17) (extending the right "to be informed of the rights enumerated in paragraphs (1) through (16); S.D. CONST. art. VI, § 29, cl. 19 (victims have "[t]he right to be informed of these rights, and to be informed that a victim can seek the advice of an attorney with respect to the victim's rights. This information shall be made available to the general public and provided to each crime victim in what is referred to as a Marsy's Card").

<sup>220</sup> See Transcript, Fla. Const. Revision Comm'n Meeting, Mar. 20, 2018 Session, vol. II at 249–50 (Mar. 20, 2018) (sponsoring Commissioner Cerio discusses a "Marsy's Law card").

<sup>221</sup> See *supra* notes 29–37 and accompanying text.

seek enforcement of the rights enumerated in th[e] section . . . as a matter of right.”<sup>222</sup> This provision guarantees victims—and those representing a victim’s interests—“standing”<sup>223</sup> to assert victims’ rights in any case where those rights are implicated.

The Amendment further requires that courts and other authorities with jurisdiction over a case to enforce the rights of victims whenever victims assert them. Specifically, the Amendment requires that authorities “shall act promptly on such a request [for enforcement of a victim’s right], affording a remedy by due course of law . . . .”<sup>224</sup> Further, the Amendment requires victims receive an adequate explanation for the authority’s decision by mandating the authority “clearly stat[e] on the record” the reasons for its disposition of the victim’s asserted right.<sup>225</sup> These provisions, similar to those found in other victims’ enactments,<sup>226</sup> should provide victims the power to directly and quickly secure enforcement of their rights in the circumstances where government authorities fail to provide them.<sup>227</sup>

### III. LESSONS FROM FLORIDA’S NEW CONSTITUTIONAL PROTECTIONS FOR VICTIMS

Having reviewed how Florida’s new constitutional provisions were designed to operate, can we learn any broader lessons about protecting crime victims’ rights in state constitutions and, more broadly, about state constitutions in general? Four lessons seem particularly important.

A first lesson to be drawn from the new Florida amendment is that a consensus is emerging regarding the kind of rights to which crime victims are entitled. Marsy’s Law supporters were proud to report after the November 2018 election that an additional 52 million Americans were covered by Marsy’s Law provisions<sup>228</sup>—and that figure did not account for the population of other states, including California, which had previously approved strong state constitutional victims’ rights amendments.

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<sup>222</sup> FLA. CONST. art. I, § 16(c).

<sup>223</sup> See Lawrence Schlam, *Enforcing Victims’ Rights in Illinois: The Rationale for Victim “Standing” in Criminal Prosecutions*, 49 VAL. U.L. REV. 597, 638 (2015).

<sup>224</sup> FLA. CONST. art. I, § 16(c).

<sup>225</sup> *Id.*

<sup>226</sup> See, e.g., 18 U.S.C.A. § 3771(b)–(d) (West 2015).

<sup>227</sup> See *State v. Barrett*, 255 P.3d 472, 481–82 (Or. 2011) (providing resentencing of defendant as a remedy for violation of state constitutional provision giving victim a right to notice and to be present at a sentencing hearing).

<sup>228</sup> See Valerie Richardson, *Marsy’s Law for Crime Victims Wins Big with Ballot Victories in all Six States*, WASH. TIMES, Nov. 7, 2018, <https://www.washingtontimes.com/news/2018/nov/7/marsys-law-crime-victims-wins-big-six-states/> [perma.cc/NB3E-G7ZE].

Very little language in the Florida Amendment is unprecedented or untested.<sup>229</sup> To the contrary, almost all the provisions parallel other state constitutional provisions (or the federal CVRA). This conjunction of language may provide support for Professor Paul Kahn's suggestion that the interpretation of state constitutions ultimately reflects common principles leading to an "American constitutionalism."<sup>230</sup> While the extent of such state constitutional convergence has been disputed,<sup>231</sup> the developing convergence on crime victims' rights should reassure legislators, courts, and others involved in the criminal justice system that victims' rights can be successfully grafted on to existing processes. And, more broadly, perhaps the emerging consensus and convergence of these victims' rights enactments will demarcate a set of widely shared values around the country.<sup>232</sup>

The second lesson that emerges is that extensive rights can be crafted to provide rights to victims that do not undercut other interests. Comparing Florida's original 1988 victims' rights amendment to the 2018 version reveals a dramatic difference. In 1988, Florida moved quite cautiously, promising crime victims just three rights—the rights to be informed, present, and heard (when relevant)—at "crucial" proceedings.<sup>233</sup>

The country now knows much more about the kinds of victims' rights that need to be protected—and can be protected—than it did several decades ago. Florida's new Amendment promises victims a lengthy set of rights, including both specific and general rights. The new Amendment attempts to cover the full extent of potential issues confronting crime victims during the criminal justice process, addressing everything from victims' rights during initial bail hearings, plea discussions and plea hearing, to trials, sentencing, and parole and commutation proceedings. The new Amendment addresses all aspects of the criminal process.

Victims are becoming part of the day-to-day landscape of criminal cases. Too often in the past, crime victims were viewed as the "barbarians at

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<sup>229</sup> Cf. G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 53 (1998) (discussing "interstate borrowing" among state constitutions, including borrowing of language for state victims' rights amendments).

<sup>230</sup> Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1162–63 (1993).

<sup>231</sup> See, e.g., TARR, *supra* note 229, at 188 (arguing that state constitutions show a "considerable range of opinion" on important values).

<sup>232</sup> See Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 190–92 (1985); Peter Harris, *Structural Change in the Communication of Precedent Among State Supreme Courts, 1870–1970*, 4 SOC. NETWORKS 201, 209–11 (1982).

<sup>233</sup> FLA. CONST. art. I, § 16(b) (amended 2018).

the gate”<sup>234</sup>—an unworthy group seeking to destroy the criminal justice system rather than improve it. But the idea that crime victims’ rights should not be a part of a conventional criminal justice system is becoming increasingly difficult to maintain, as Florida and many other states enact expansive victims’ rights amendments responsive to community needs.

Florida’s experience in expanding constitutional protections for victims may set an example for other states. About a dozen states lack any state constitutional protections for crime victims.<sup>235</sup> Florida’s decision to enlarge previously existing victims’ rights might signal to these states the importance of adding state constitutional rights for victims.

For the more than two-thirds of states that have already enacted victims’ rights amendments, Florida’s recent amendment might also serve as a model—particularly for those states with antiquated provisions. Just as Florida’s amendment required updating, other states might consider whether their amendments need modernization. For any state lacking comprehensive constitutional protection of victims’ interests, Florida’s new progressive provisions can provide guidance.

A third lesson evident from the new Florida Amendment is the importance of providing “standing” and other enforcement mechanisms in crime victims protections. In 1988, Florida adopted a few baseline rights for crime victims.<sup>236</sup> But as noted earlier,<sup>237</sup> an inability to enforce those basic provisions led to an incomplete implementation of the rights. If states are going to promise crime victims rights in the criminal justice process, victims need “standing” to assert their rights, as otherwise the victims’ rights are rendered meaningless.

Using language found in constitutional amendments in other states, Florida now provides victims standing through a specific constitutional right to assert their rights,<sup>238</sup> ensuring that courts and other institutions cannot simply ignore victims’ interests. Perhaps even more important, the Florida Amendment also requires that the courts “shall act promptly on such a request, affording a remedy by due course of law for the violation of any right.”<sup>239</sup> These specific enforcement measures should make victims’ rights

<sup>234</sup> Cassell, *supra* note 121, at 533–36.

<sup>235</sup> See State Victim Right Amendments, Nat’l Victims’ Const. Amend. Passage, (2012), <http://www.nvcap.org/states/stvras.html> [perma.cc/FQ93-XT53] (collecting states with and without victims’ rights amendments).

<sup>236</sup> See FLA. CONST. art. I, § 16(b) (1988); *supra* note 23 and accompanying text.

<sup>237</sup> See *supra* note 37 and accompanying text.

<sup>238</sup> FLA. CONST. art. I, § 16(c) (the victim “may assert and seek enforcement of the rights enumerated in this section . . . in any trial or appellate court . . .”).

<sup>239</sup> *Id.*

in Florida not just a set of paper promises, but realities in the criminal justice system.

Clear and simple directions to enforce crime victims' rights are especially necessary because of the unfortunate reality that victims often need to assert their rights without the assistance of legal counsel.<sup>240</sup> The procedural mechanisms for enforcing victims' rights should be laid out as clearly and simply as possible so that even victims without legal counsel know how to proceed.

By providing specific enforcement mechanisms, Florida's Amendment fits within a broader pattern of recent "self-executing" state constitutional amendments. Self-executing constitutional provisions are those that take full effect without the need for any further legislative action.<sup>241</sup> As discussed above,<sup>242</sup> the new Florida Amendment directly provides that its provisions "are self-executing, and do not require implementing legislation."<sup>243</sup> Florida's specific language may signal that crime victims' rights protections are, like some other recently enacted state constitutional protections, "a modern fundamental right deserving of constitutional stature and insulation from the whims of courts and the legislature."<sup>244</sup>

Fourth and finally, Florida crime victims now have broad and overarching rights to "due process," "fairness," and "respect for the victim's dignity."<sup>245</sup> These capacious rights should significantly advance the attention that courts and other institutions pay to victims' interests in the criminal justice process. Just as the United States Supreme Court in the 1960s used

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<sup>240</sup> See John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victims Rights Movement: Enforcing Crime Victims' Rights in Court*, 33 MCGEORGE L. REV. 689, 696 (2002) (arguing "[i]t's time to bring in the lawyers"). Interestingly, in one case involving a police shooting of a victim, a Florida trial court relied on the Florida's 1988 victims' rights amendment to make a discretionary appointment of a lawyer for a crime victim. *State v. Lozano*, 616 So.2d 73 (Fla. Dist. Ct. App. 1993); cf. Margaret Garvin & Douglas E. Beloof, *Crime Victims Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67, 88 (2015) (calling for expansion of legal services for crime victims).

<sup>241</sup> See, e.g., *Plante v. Smathers*, 372 So.2d 933, 937–38 (Fla. 1979) (deciding whether provision was self-executing). See generally ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 343–45 (2009) (discussing when state constitutional provisions are self-executing); Jeremy M. Christiansen, *State Search and Seizure: The Original Meaning*, 38 U. HAW. L. REV. 63, 84–87 (2016) (discussing self-executing state constitutional provisions regarding search and seizure).

<sup>242</sup> See FLA. CONST. art. I, § 16(d), *supra* note 216 and accompanying text.

<sup>243</sup> FLA. CONST. art. I, § 16(d).

<sup>244</sup> Richard A. Goldberg & Robert F. Williams, *Farmworkers' Organizational and Collective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights*, 18 RUTGERS L.J. 729, 741 (1987).

<sup>245</sup> FLA. CONST. art. I, § 16(b)(1).

“due process” language in the Fourteenth Amendment to significantly expand criminal defendants’ rights,<sup>246</sup> it is possible that Florida (and other states) courts will use similarly broad language in crime victims’ amendments to ensure that crime victims’ concerns are not overlooked.

Many commentators have urged state courts to begin paying renewed attention to state constitutional provisions, including exploring the full reach of state due process clauses and other similarly broadly worded rights. For example, U.S. Court of Appeals Judge Jeffrey S. Sutton recently published an excellent book, *51 Imperfect Solutions: States and the Making of American Constitutional Law*, explaining how state constitutions are designed to be “change incubators,” developing new ways to protect individual rights in an increasingly complex world.<sup>247</sup> By interpreting their state constitutional provisions, state courts can develop innovative rights, perhaps ultimately exporting ideas that work in one state to other states and federal government.<sup>248</sup> Judge Sutton is hardly alone in calling attention to the role of state constitutions in protecting important rights in this country. At least since Justice William J. Brennan’s influential 1986 article on how state constitutions can serve as guardians of individual rights,<sup>249</sup> many state courts and legal commentators have echoed this position.<sup>250</sup> The protections for crime victims now found in Florida and other states’ constitutions provide the perfect opportunity for such development.

As Florida and other states move on to the next chapter in their efforts to protect crime victims’ rights, this incubation of rights may result in further

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<sup>246</sup> See generally FRED P. GRAHAM, *THE DUE PROCESS REVOLUTION: THE WARREN COURT’S IMPACT ON CRIMINAL LAW* (1970).

<sup>247</sup> JEFFREY S. SUTTON, *51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* 213 (2018).

<sup>248</sup> *Id.* at 212.

<sup>249</sup> See, e.g., William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individuals Rights*, 61 N.Y.U. L. REV. 535 (1986).

<sup>250</sup> See, e.g., *State v. Kennedy*, 666 P.2d 1316 (Or. 1983); *R. Communications, Inc. v. Sharp*, 875 S.W.2d 314 (Tex. 1999); *State v. Tiedemann*, 162 P.2d 1106, 1113 (Utah 2007); Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individuals Rights Are Really Deeply Rooted in American History and Tradition*, 85 S. CAL. L. REV. 1451 (2012); Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695 (2010); Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989 (1996); Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law As Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727 (1992); Sanford Levinson, *Courts as Participants in “Dialogue”: A View from American States*, 59 U. KAN. L. REV. 791 (2011); Richard S. Price, *Linde’s Legacy: The Triumph of Oregon State Constitutional Law, 1970–2000*, 80 ALB. L. REV. 1541 (2017); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015 (1997).

attention to how best to protect crime victims in the criminal justice process. Florida's experience with its clear and comprehensive victims' rights Amendment may well inform a national conversation recognizing crime victims' rights as worthy of protection in our nation's fundamental charter—perhaps leading to a federal constitutional amendment providing the highest level of constitutional protection for all crime victims across the country.