

“VICTIMLESS CRIME” TAKES ON A NEW MEANING:
DID CALIFORNIA’S VICTIMS’ RIGHTS AMENDMENT ELIMINATE
THE RIGHT TO BE RECOGNIZED AS A VICTIM?

*Geoffrey Sant**

Introduction

In 2008, California voters passed Proposition 9, the Victim’s Bill of Rights Act of 2008 (“Marsy’s Law” or the “Act”), thereby amending the California Constitution.¹ Marsy’s Law has been described as “significantly reform[ing] California’s criminal justice system.”² Opponents consider the amendment “shocking.”³ Supporters see Marsy’s Law as a possible model for victims’ rights amendments elsewhere, including a potential amendment to the U.S. Constitution.⁴ Yet to date there has been virtually no academic discussion of Marsy’s Law.⁵ This

* Geoffrey Sant is Special Counsel at Dorsey & Whitney LLP. The author thanks Anthony Barkow, the former Executive Director of NYU School of Law’s Center on the Administration of Criminal Law and current partner at Jenner & Block LLP, for his thoughtful comments on this article. The author also thanks Will Wade-Gery, Attorney-Advisor at the Consumer Financial Protection Bureau and former partner at Morrison & Foerster LLP, for comments and discussions that helped refine the author’s analysis. Lastly, the author thanks Douglas E. Beloof, Professor of Law at Lewis & Clark Law School, and Paul G. Cassell, Ronald N. Boyce Presidential Professor of Criminal Law at the University of Utah, for their helpful comments on an earlier version of this article. This article builds on research initially conducted by the author on behalf of the National Crime Victim Law Institute (NCVLI), www.ncvli.org, a nonprofit organization committed to promoting balance and fairness in the justice system through the assertion and enforcement of crime victims’ rights through victim-centered advocacy, education, and resource sharing. NCVLI did not participate in the creation of this article, and the opinions, findings, and conclusions expressed herein are those of the author alone and do not necessarily represent those of NCVLI.

1. See DEBRA BOWEN, CAL. SEC’Y OF STATE, STATEMENT OF VOTE NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008), available at http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf (last visited October 11, 2012). Proposition 9 passed with 53.9% in favor and 46.1% against. *Id.* Some of the arguments developed fully in this article were published in summary form by the author and Will Wade-Gery in the Criminal Law Reporter on May 18, 2011. See Geoffrey Sant & Will Wade-Gery, *Does the California Victims’ Rights Law Narrow the Rights of Crime Victims?*, 89 CRIM. L. REP. 219 (May 18, 2011).

2. *2008 California Criminal Law Ballot Initiatives*, 14 BERKELEY J. CRIM. L. 173, 196 (2009).

3. *Id.* at 181-82 (citing Editorial, *No on Proposition 9*, L.A. TIMES, Sept. 26, 2008, at 28).

4. See, e.g., *About, MARSY’S LAW FOR ALL*, <http://www.marsyslawforall.org/about/> (last visited October 11, 2012) (“Dr. Henry T. Nicholas . . . was the key backer and proponent of Marsy’s Law. Dr. Nicholas is now lending his support to an effort to amend victims’ rights into the U.S. Constitution.”).

5. See Sant & Wade-Gery, *supra* note 1 (presenting an abbreviated version of some of the arguments in this article); *2008 California Criminal Law Ballot Initiative*, *supra* note 2, at 176-90 (summarizing Proposition 9 and discussing areas of particular impact or where the initiative’s constitutionality may be in dispute). Two other articles make note of Marsy’s Law in passing during discussions of the California parole system. See Steven Z. Perren, *Indeterminate Sentencing Redux: A Return to Rational Sentencing*, 22 FED. SENT’G REP. 165, 168 (2010); Blaire Russell, Note, *In re Lawrence and Hayward v. Marshall: Reexamining the Due Process Protections of California Lifers Seeking Parole*, 14 BERKELEY J. CRIM. L. 251, 252, 255

article aims to rectify this lack of attention, and focuses in particular upon one of the most contentious aspects of this amendment: the definition of “victim.”

The definition of “victim” within Marsy’s Law, arguably the most fundamental aspect of this constitutional amendment, has been criticized in passing in the *Berkeley Journal of Criminal Law* as “somewhat ambiguous” such that it “may therefore be difficult for courts to interpret.”⁶ The article foresaw litigation over the definitional section of Marsy’s law, but unfortunately it provided no detailed analysis of the purported ambiguities, and did not even identify the allegedly ambiguous terms.⁷ Meanwhile, at least one legal blogger has argued that the definitional section of Marsy’s Law created a “strange world” with perverse results, including that “some crime victims are no longer crime victims.”⁸ It has been stated that this victims’ rights law “[c]uriously . . . appears at first glance to narrow the scope of victims’ rights.”⁹

The remainder of this article provides the first in-depth academic analysis of the definitions section of Marsy’s Law. Based on the language of the text, the purpose of the amendment, public policy, and parallel language in other victims’ rights laws, this article argues that the definition of “victim” is both clear and without “perverse results.”¹⁰ Nevertheless, to avoid any potential ambiguity or difficulties in interpretation, this article also provides model language to be used in future victims’ rights amendments.¹¹ This proposed language accomplishes the same purposes as the Marsy’s Law definitions, while also avoiding any purported ambiguities.¹²

Overview of the Problem

Marsy’s Law specifically states that “[t]he term ‘victim’ does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim.”¹³ Based on a superficial reading of this language, one might conclude that all individuals “in custody” are excluded from “victim” status, and thus that “in custody” victims of sex trafficking and child prostitution (to take two examples) are excluded from the protections of Marsy’s Law.¹⁴ Thus, for example, one legal blogger argued:

(2009).

6. *2008 California Criminal Law Ballot Initiative*, *supra* note 2, at 179.

7. *See id.*

8. *See* Johnny California, *Not All Crime Victims Created Equal: Another Constitutional [sic] Problem With Prop. 9*, JOHNNY CALIFORNIA (Dec. 8, 2008), <http://johnnycalifornia.com/2008/12/08/not-all-crime-victims-created-equal-another-constitutional-problem-with-prop-9/>.

9. Sant & Wade-Gery, *supra* note 1, at 219.

10. *See infra* Parts I–V.

11. *See infra* Part VI.

12. *See infra* Part VI.

13. *Text of Proposed Laws, Proposition 9: Victims’ Bill of Rights Act of 2008: Marsy’s Law* § 4.1, in DEBRA BOWEN, CAL. SEC’Y OF STATE, CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 130 (2008), available at <http://vig.cdn.sos.ca.gov/2008/general/pdf-guide/vig-nov-2008-principal.pdf> (last visited October 11, 2012) (codified at CAL. CONST. art. I, § 28(e)) [hereinafter Marsy’s Law].

14. *See, e.g.*, California, *supra* note 8 (arguing that “[i]n the strange world of Prop. 9, some crime victims

In the strange world of Prop 9 [*i.e.*, Marsy's Law], some crime victims are no longer crime victims. . . .

. . . .

. . . By not extending Prop 9 rights to "a person in custody for the offense", [in the case of] someone who is assaulted or killed in jail or prison, neither he nor his next of kin have Prop 9 rights [*i.e.*, victims' rights]. And [w]hat happens if someone is a victim of police brutality while in custody . . . ?¹⁵

This seemingly straightforward reading of the definitional language in Marsy's Law creates a perverse result: a victims' rights law that strips certain victims of their legal rights – even their right to be recognized as victims.¹⁶

Further complicating the definition of "victim" within Marsy's Law is a recent Supreme Court decision that expands the meaning of the term "in custody" to also include certain instances in which a child is questioned by police.¹⁷ One may ask: Is a child prostitute being questioned by police no longer a "victim" under California law?

For purposes of making this discussion more concrete, this article will primarily focus on child prostitutes as an example of individuals who may appear to fall in the "in custody" exclusion and yet had been recognized under previous law as "victims."¹⁸ Child prostitutes serve as a particularly compelling test case considering that the Official Voter Information Guide's argument in favor of Marsy's Law specifically cited (using all capital letters) the need to "level[] the playing field" between "child molesters," who have certain guaranteed rights under the California Constitution, and their "crime victims," who lacked any corresponding "right to justice and due process."¹⁹ Particularly in light of this language describing the intent and effects of the amendment, it would be a perverse result indeed if the amendment actually stripped child sex victims of their status as a "victim." Although this article focuses on child prostitutes as a test case, the analysis developed below can be applied equally well to the other direct victims of crime cited above as being purportedly excluded from receiving recognition (and rights) as victims, including individuals assaulted in jail or prison, and individuals who suffered police brutality while in custody.²⁰

are no longer crime victims"); Sant & Wade-Gery, *supra* note 1, at 219 (noting that "Marsy's Law's definition of 'victim' appears at first glance to narrow the scope of victims' rights").

15. California, *supra* note 8.

16. *See id.*

17. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2406 (2011) (expanding the definition of "in custody" when applied to juveniles). Note, however, that this case is likely limited to Miranda custody. *See also* discussion *infra* Part I.B (analyzing the impact of this decision upon Marsy's Law).

18. *See infra* Part IV.A (citing cases that specifically identified child prostitutes as "victims," including, *People v. Brandon*, 52 Cal. Rptr. 3d 427, 445-49 (Cal. Ct. App. 2006); *People v. Roberson*, 224 Cal. Rptr. 51, 55 (Cal. Ct. App. 1988)).

19. *See* BOWEN, *supra* note 13, at 62.

20. *See infra* Parts II.B, V.

This article argues for a different interpretation of the Marsy's Law definition of "victim" than the superficial analysis described above.²¹ In the author's view, courts are reasonably likely to accept that child prostitutes, victims of sex trafficking, in-custody victims of police brutality, and all other direct victims of crime remain included within the category of "victim."²² This is because the best interpretation of the exclusions is that they apply only to derivative victims of crime, not to direct victims.²³ Specifically, in the case of child prostitutes, these individuals would in almost all circumstances be direct, not derivative, victims of crime, thereby rendering the exclusions inapplicable to them.²⁴

This interpretation is consistent with the prevailing federal definitions of victim, which follow the same three-part framework: (i) direct victims; (ii) certain derivative victims; and (iii) exclusions that apply to narrow the scope of derivative victims.²⁵ It is also consistent with the undisputed intent of Marsy's Law, namely, to broaden the definition of "victim."²⁶

In addition, Marsy's Law states that to the extent its provisions conflict with prior law regarding victims' rights, the law providing the most expansive rights for victims shall prevail.²⁷ The definitional provision within Marsy's Law is arguably a substantive right – the right to be recognized as a victim – and so should be read to be as broad as the many state and federal laws that define child prostitutes as "victims."²⁸

As discussed above, the Marsy's Law definition of "victim" is technically open to a contrary interpretation, namely that the exclusions listed apply to direct *and* derivative victims.²⁹ Under this interpretation, a child prostitute "in custody for an offense" would not be a crime victim under Marsy's Law even though she or he otherwise qualifies as a direct victim of a crime such as trafficking.³⁰ This interpretation would be inconsistent with prevailing statutory norms, would be contrary to public policy, and would create the "strange world" and "perverse results" discussed above, in which a victims' rights amendment has the effect of stripping certain victims of their rights.³¹ Nevertheless, there cannot be complete assurance that some courts would not follow this alternative view. For this reason, the author has proposed slightly modified model language to be used in future victims' rights amendments, thereby accomplishing the same purpose while avoiding purported ambiguities.³²

21. See *supra* notes 16-18 and accompanying text.

22. See *infra* Part II.

23. See *infra* Part II.C.

24. See *infra* Part II.

25. See *infra* Parts II.D-E.

26. See *infra* Part III.

27. Marsy's Law § 7. See also discussion *infra* Part IV.

28. See discussion *infra* Part IV.

29. See *supra* notes 15-18 and accompanying text. See also Sant & Wade-Gery, *supra* note 1.

30. See Sant & Wade-Gery, *supra* note 1.

31. See *supra* notes 17-18 and accompanying text.

32. See *infra* Part VI.

Analysis

Marsy's Law defines a victim as follows:

[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. The term "victim" also includes the person's spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated. The term "victim" does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim.³³

I. Even broadly construed, the exclusions stated in Marsy's Law will rarely be applied to direct victims of crime.

The final sentence of the Marsy's Law definition of "victim" excludes "a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim."³⁴ As noted in Part II below, there is a strong argument that these exclusions apply only to the derivative victims defined in the second sentence of the definition, and not to the direct victims defined in the first sentence.³⁵ However, even assuming that these exclusions apply to direct victims as well, as a matter of law and practice, these exclusions are unlikely to apply to many direct victim child prostitutes.³⁶ Only the phrase "in custody" has legal potential to include direct victims of crime.³⁷ In order to make the discussion more concrete, the following analysis focuses on child prostitutes as a direct victim of crime who may nevertheless be "in custody."

A. A child prostitute is not "the accused" or "a person not acting in the interests of a minor victim."

The existence of a child prostitute presupposes an offense by an adult, whether that is solicitation or sex trafficking. Accordingly, with respect to those adult offenses, the child prostitute should not count as "the accused." This phrase specifically uses the definite article, in contrast to the indefinite article used elsewhere in the exclusion ("a person in custody for an offense, *the* accused, or a person. . .").³⁸ Unlike, for example, the phrase "a person in custody," which applies

33. Marsy's Law § 4.1.

34. *Id.*

35. *See infra* Part II.

36. *See infra* Part I.A.

37. *See infra* Part I.B.

38. Marsy's Law § 4.1.

to any individual in custody for a crime, the phrase “the accused” only applies to the specific individual(s) charged with that crime.³⁹ The exclusion of “the accused” does not exclude individuals who may be defendants in other actions or who may later be charged with other crimes.⁴⁰ Accordingly, even child prostitutes under threat of (and under actual) prosecution should not count as “the accused” for purposes of the associated adult crime. Moreover, there is little argument that a child prostitute can be identified as a person not acting in the interests of a minor victim. Even if a child prostitute were deemed to be acting against their own interests as a “minor victim,” that would presuppose their “victim” status.⁴¹

B. The phrase “in custody for an offense” means currently serving a sentence for a crime.

The only portion of the exclusion that may impact a child prostitute is the exclusion of individuals “in custody for an offense.” This is a very limited exclusion. In the case of adults,⁴² the exclusion only applies to persons *currently* in custody as a result of having been *sentenced* for a crime.⁴³ The language of the third sentence is in the present tense: “[t]he term ‘victim’ *does not include a person in custody* for an offense. . . .”⁴⁴ Thus, the exclusion only applies to individuals currently in custody.⁴⁵ Moreover, the phrase “in custody for an offense” limits the exclusion to individuals actually sentenced to custody for an offense.⁴⁶ Simply

39. *Cf. Shum v. Intel Corp.*, 629 F.3d 1360, 1367 (Fed. Cir. 2010) (“In our view, the word Congress did use, ‘the,’ is evidence that what follows . . . is specific and limited to a single party.”) (citing *Rumsfeld v. Padilla*, 542 U.S. 426, 434-35 (2004) (citation omitted) (emphasizing significance of definite article); *Freytag v. Comm’r*, 501 U.S. 868, 902 (1991) (emphasizing that definite article “the” narrows definition); *Otis v. Walter*, 24 U.S. (11 Wheat.) 192, 194 (1826) (“We consider the definite article as having been used for a definite purpose”); *Webster’s Third New International Dictionary* 2368 (1981) (for definitions of “custody” and “accused”)).

40. *Cf. Rumsfeld*, 542 U.S. at 434 (“The consistent use of the definite article . . . indicates that there is generally only one proper [individual identified]”); *Shum*, 629 F.3d at 1367; *Transamerica Ins. Co. v. South*, 125 F.3d 392, 399 (7th Cir. 1997) (discussing the significance of language that alternately uses the definite article ‘the’ and the indefinite article ‘an’).

41. *Cf. Granite Rock Co. v. International Brotherhood of Teamsters*, 130 S. Ct. 2847, 2860 (2010) (applying analogous logic: “[T]he CBA’s arbitration clause . . . pertains only to disputes ‘arising under’ the CBA and thus presupposes the CBA’s existence”).

42. The Supreme Court has held that “in custody” has a special, broader meaning when applied to juveniles. *See infra* notes 50-52 and accompanying text.

43. *See infra* note 46 (emphasis added).

44. *Marsy’s Law* § 4.1 (emphasis added).

45. *See Carr v. United States*, 130 S. Ct. 2229, 2236 (2010) (“[T]he present tense generally does not include the past.”); *United States v. Wilson*, 503 U.S. 329, 333 (1992) (“Congress’ use of a verb tense is significant in construing statutes”); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987) (“Congress could have phrased its requirement in language that looked to the past . . . but it did not choose this readily available option.”).

46. *Cf. Maleng v. Cook*, 490 U.S. 488, 490-91 (1989). In *Maleng*, the Supreme Court interpreted the statute regulating habeas corpus, 28 U.S.C. § 2254(a), which states “a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution” The Supreme Court interpreted this language (“a person in custody pursuant to the judgment of a State court”) as requiring “that the habeas petitioner be ‘in custody’ under the conviction or sentence under attack at the time his petition is filed.” *Id.* Thus, even under a broad reading of the exclusions in *Marsy’s Law*, the fact that the exclusions are

spending time in a detention facility awaiting bail or trial should be insufficient.⁴⁷ Thus, the scope of the exclusion is relatively narrow.

In the case of underage individuals, however, the language "in custody for an offense" may be affected by the Supreme Court's decision in *J.D.B. v. North Carolina*.⁴⁸ In *J.D.B.*, the Supreme Court held that "the age of a child subjected to police questioning is relevant to the custody analysis" and that a 13-year-old may be considered to be "in custody" when questioned at a school about a possible crime.⁴⁹ In the hypothetical case of a child victim of sex trafficking who is being questioned about acts of prostitution, it might be argued that the police questioning renders the child "in custody," and therefore not a "victim" due to the "in custody" exception within Marsy's Law.⁵⁰ (The most likely interpretation is that *J.D.B.*'s definition of "in custody" will be limited to *Miranda* cases, however.)

The majority in *J.D.B.* held that it was necessary to interpret the term "in custody" broadly in the case of juveniles being questioned by police because otherwise "some minors [would be] unprotected under *Miranda* in situations where they perceive themselves to be confined."⁵¹ It would be a perverse result if the Supreme Court's attempt to extend *Miranda* protections to "unprotected" juveniles had the effect of excluding juvenile victims of crime from other protections, namely, the protections of the Victim's Bill of Rights Act of 2008.

II. The exclusion clause is most reasonably interpreted to apply to derivative not direct victims of crime.

Although there are at least two possible interpretations of the scope of the exclusions within Marsy's Law, the most reasonable interpretation is to read the exclusions narrowly, as applying only to derivative victims such as family members. The alternative and broader interpretation is that the exclusions apply to both derivative and direct victims of crime. Under the narrow interpretation, there is no reason why child prostitutes should ever be excluded from the Marsy's Law definition of "victim."

Under the broad interpretation, the exclusions qualify not only under the second sentence of the definition, which describes derivative crime victims. . .

The term "victim" also includes the person's spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or

formulated in the present tense limits their scope to individuals presently in custody "under the conviction or sentence" at the time in which victimization occurred. *Id.*

47. *See id.* (requiring that the individual allegedly "in custody" be under a "conviction or sentence").

48. *J.D.B.*, 131 S. Ct. 2394 (2011).

49. *Id.* at 2398-99.

50. Even if such an argument succeeded, however, the child prostitute's exclusion from the category of victim would only last for the length of the police interview, after which the child would once again be included in the category of victims. *See supra* note 45.

51. *J.D.B.*, 131 S. Ct. at 2412, 13 (Alito, J., dissenting) (summarizing the majority's holding).

psychologically incapacitated.⁵²

. . .but also under the first sentence, which describes direct victims, as well:

[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.⁵³

Under this broad interpretation of the exclusions, therefore, direct victims of crime are excluded from the definition of “victim” if they are “the accused,” “in custody for an offense” or deemed not to act in the best interests of a minor victim.⁵⁴

Under the narrow interpretation, by contrast, the exclusions only qualify the second sentence definition of derivative victims, and do not qualify the first sentence definition of direct victims.⁵⁵ On this reading, the second sentence expands the traditional definition of victims to include individuals closely connected to a direct victim. The third sentence then establishes that certain derivative victims (such as persons “in custody”) are not to be considered “victims.” No direct victim of crime is excluded from recognition as a “victim.”

In this author’s assessment, the narrow interpretation is more reasonable for a number of reasons: (1) Marsy’s Law primarily expands protections for derivative victims, not direct victims, so the new exclusion language should also be understood to relate to derivative victims; (2) the contrary interpretation of the exclusions leads to several absurd results; (3) the grammar and structure of the exclusion better supports the narrow interpretation; (4) the broader interpretation of the exclusions is in tension with the prevailing norms for federal and state definitions of “victim,” none of which apply any exclusions to direct victims of crime; and (5) the structure of the definition of “victim” in Marsy’s Law mirrors federal statutes defining “victim,” which limit exclusions to derivative victims only.⁵⁶

A. *Marsy’s Law was created, in part, to extend protections to derivative victims, so the new exclusions are best read to apply to derivative victims alone.*

California traditionally distinguished between direct victims (who possessed certain victims’ rights), and derivative victims (who were excluded from those rights).⁵⁷ Under Marsy’s Law, a carefully selected list of derivative victims now

52. Marsy’s Law § 4.1.

53. *Id.*

54. *See, e.g.,* California, *supra* note 8 (interpreting Marsy’s Law in this way).

55. *See infra* Parts II.A-E.

56. *See id.*

57. *See, e.g.,* CAL. GOV’T. CODE § 13955(a)(2) (West 2008) (defining “derivative victims” in terms of their relationship to “victims”); *People v. Giordano*, 170 P.3d 623, 631 (Cal. 2007) (comparing direct victims and derivative victims under the law).

obtained full rights as "victims."⁵⁸ It is reasonable to interpret the list of exclusions, which appear immediately after the list of derivative victims, as acting to limit the range of derivative victims who are to receive "victim" status under Marsy's Law.

Prior to Marsy's Law, California law distinguished between "direct victims" and "derivative victims."⁵⁹ A "derivative victim" was generally defined as an "individual who sustains pecuniary loss as a result of injury or death to a victim."⁶⁰ Traditionally, derivative victims had fewer rights at law than a direct victim.⁶¹

Marsy's Law defined "victim" to broaden the group of individuals encompassed by victims' rights laws.⁶² It accomplished this, in part, by generally eliminating the legal distinction between direct victims and derivative victims. Thus, Marsy's Law carefully classified which derivative victims are now recognized as victims, namely: "the person's spouse, parents, children, siblings, or guardian" and other specific individuals.⁶³ Because Marsy's Law changed the treatment of derivative victims, it is reasonable to interpret the exclusions as being part of this same change, and as merely limiting the scope of derivative victims recognized as "victims."

B. The broad interpretation of the exclusions leads to absurd results. The narrow interpretation does not.

If one interprets the exclusions as applying to direct victims, then the definition of "victim" becomes absurd.⁶⁴ This interpretation would create situations where family members of a direct victim are "victims" even as the direct victim is excluded from recognition as a "victim."⁶⁵ It would also exclude certain direct victims from recognition as a "victim" if they were, for example, unable to act in the best interests of an additional minor victim.⁶⁶

Courts will not interpret language in a manner that leads to absurd results.⁶⁷ As noted, the third sentence of the definition states: "The term 'victim' does not include a person in custody for an offense, the accused, *or a person whom the court finds would not act in the best interests of a minor victim.*"⁶⁸ The italicized portion

58. Marsy's Law § 4.1.

59. *See supra* note 57.

60. CAL. GOV'T. CODE § 13955(a)(2).

61. *See, e.g., Giordano*, 170 P.3d at 631 (discussing the differing treatments of "direct victims" and "derivative victims" under various statutes); *People v. Birkett*, 980 P.2d 912, 919-20 (Cal. 1999) (discussing statutory schemes for "victim" restitution, and noting that courts had often excluded derivative victims from such schemes).

62. *See infra* Part III.A.

63. Marsy's Law § 4.1.

64. *See further discussion infra* Parts II.C.D, III.

65. *See further discussion infra* Parts II.C.D, III.

66. *See further discussion infra* Parts II.C.D, III.

67. *See, e.g., Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510-511 (1989) (if the plain text would induce an absurd result, the Court will interpret the law in a manner that reaches the most likely intended result); *Birkett*, 980 P.2d at 915 ("We must follow the statute's plain meaning, if such appears, unless doing so would lead to absurd results.").

68. Marsy's Law § 4.1 (emphasis added).

only makes sense when it is interpreted as modifying the second sentence (derivative victims), and leads to absurdity when it is interpreted as modifying the first sentence (direct victims).

If the third sentence modifies the first sentence, then the definition of “victim” would exclude persons who suffered direct harm and who are for some reason unable to act in the best interests of a minor victim. Consider the following scenario: A court has decided that a medically incapacitated mother is incapable of acting in the best interests of her daughter. If the mother and daughter are joint victims of a violent assault, the mother would be excluded from the class of “direct victims” simply because she is “a person whom the court finds would not act in the best interests of a minor victim.”⁶⁹

A “person whom the court finds would not act in the best interests of a minor victim” was presumably meant to refer to a guardian or some other derivative victim, such as a parent. And, in fact, the second sentence lists “parents,” a “guardian,” and “a lawful representative of a crime victim” among the derivative victims now included in the definition of “victim.”⁷⁰ Hence, the third sentence should be understood only to modify the second sentence.

Other absurd results appear if the third sentence is interpreted as modifying the first sentence. Consider the following hypothetical: a minor is a victim of sexual assault. The assault victim subsequently commits an unrelated offense leading to custody. With respect to the assault, this direct victim would no longer count as a “victim.” However, her legal representative would count as a “victim” because the second sentence of the definition includes the legal representative of a minor.⁷¹ On its face, it appears absurd to read a victims’ rights amendment to grant “victim” status to representatives of a child victim while denying that status to the child victim herself.

Likewise, it would be absurd if family members of a direct victim had the right to participate in proceedings, while the actual direct victim was barred from participation. Consider the following situation: a prisoner is assaulted in custody. If the “in custody” exclusion applies to direct victims of crime, then the prisoner would have no guaranteed right to attend proceedings related to the assault or to give information to an official “concerning the impact of the offense on the victim” even though his or her siblings and other family members would have the absolute right to attend those same proceedings and to provide information “concerning the impact of the offense on. . . the victim’s family.”⁷²

69. *Id.*

70. *Id.*

71. *Id.*

72. CAL. CONST. art. I, § 28(b)(10). See also California, *supra* note 8 (raising a similar scenario and describing it as a “strange world” and “nothing rational”).

C. *The grammar and structure of the definition support the narrow interpretation of the exclusions.*

1. The verbs used in the provision provide further evidence that the third sentence is intended to restrict the class of derivative victims only.

Although each of the three sentences serves to define the term "victim," the first sentence uses a different verb from the final two sentences.⁷³ In contrast, the second and third sentences use the same verb and a parallel structure.⁷⁴ This further supports the notion that the third sentence's exclusions only apply to the second sentence of the definition.

It is a general rule of the English language that the same verb may be repeated when referring to a series of similar concepts, but that differing verbs are used when dealing with a sequence of different concepts. Justice Breyer has commented upon this rule as follows: "That is why we cannot, without comic effect, yoke radically different nouns to a single verb, e.g., 'He caught three salmon, two trout, and a cold.'"⁷⁵

The first sentence, defining a direct victim, uses the verb "to be," thereby *equating* the term "victim" with those directly impacted by crime ("[a] 'victim' is a person who suffers direct or threatened physical, psychological, or financial harm").⁷⁶ On the other hand, the second and third sentences use the verb "include," thereby expressing that the traditional meaning of "victim" is being *expanded* to encompass certain derivative victims as well: "The term 'victim' *also includes*. . . and *includes*. . . The term 'victim' *does not include*. . ."⁷⁷

2. The phrase "a person in custody for an offense" appears within a series of other exceptions which apply only to derivative victims.

When a word with an ambiguous scope of meaning appears within a list, courts will look to the scope of the other words on the list in order to interpret the scope of the ambiguous word.⁷⁸ In this case, the phrase "a person in custody for an offense" appears at the beginning of a list. Each of the other terms on the list ("the accused" and "a person whom the court finds would not act in the best interests of a minor victim") can only refer to derivative victims.⁷⁹ For this reason, a court should conclude that the phrase "a person in custody for an offense" likewise applies to derivative victims only.

73. Marsy's Law § 4.1.

74. *Id.*

75. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 245 (2007) (Breyer, J., dissenting).

76. Marsy's Law § 4.1 (emphasis added).

77. *Id.*

78. See discussion *infra* Part II.D.

79. See discussion *infra* Part II.D.

When interpreting the scope of a word or phrase, courts look for guidance to the surrounding context. The “meaning of a word, and, consequently, the intention of the legislature,” should be “ascertained by reference to the context, and by considering whether the word in question and the surrounding words are . . . referable to the same subject-matter.”⁸⁰ According to the principle of *noscitur a sociis*, words in a series should be interpreted in relation to one another.⁸¹ The Supreme Court has called *noscitur a sociis* “an interpretive rule as familiar outside the law as it is within, for words and people are known by their companions.”⁸² Elsewhere, the Supreme Court has commented that, “[t]he maxim *noscitur a sociis*, . . . while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.”⁸³

In *Gutierrez v. Ada*, the Supreme Court had to interpret the breadth of the phrase “any election.”⁸⁴ Despite the seemingly broad scope of the words “any election,” the Court limited the scope of these words to gubernatorial elections because the statute within which these words appeared contained many references to gubernatorial elections, and none to other elections.⁸⁵ The Court interpreted the words “any election” in accordance with the surrounding language so as to avoid giving this phrase a far broader scope than intended.⁸⁶

Here, a court should apply the principle of *noscitur a sociis* and understand the phrase “a person in custody” to be limited to derivative victims so as to avoid giving the exception an “unintended breadth.”⁸⁷ Much like the example of the phrase “any election” discussed by the Supreme Court in *Gutierrez*, the phrase “a person in custody” seems at first glance to have a potentially broad scope. Just as the phrase “any election” in *Gutierrez* was surrounded by references to gubernatorial elections, the phrase “a person in custody” appears first in a list of exceptions – “the accused” and “a person whom the court finds would not act in the best interests of a minor victim” – which can only apply to *derivative* victims of crime.⁸⁸

It is axiomatic that the perpetrator of a crime (“the accused”) is not a victim of the crime committed.⁸⁹ And, as noted above, it would be absurd to exclude a direct victim on the basis that the direct victim is incapable of acting in the best interests

80. *Neal v. Clark*, 95 U.S. 704, 709 (1878).

81. *See, e.g., Washington State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (stating that words are “known by their companions”); *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (same language).

82. *Gutierrez*, 528 U.S. at 255.

83. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

84. *Gutierrez*, 528 U.S. at 254-255.

85. *Id.*

86. *Id.*

87. *Compare Gutierrez*, 528 U.S. at 254-255, with *Jarecki*, 367 U.S. at 307 (describing the principle of *noscitur a sociis* as having the purpose of avoiding “unintended breadth”).

88. *Compare Marsy’s Law* § 4.1, with *Gutierrez*, 528 U.S. at 255.

89. *Cf. People v. Tackett*, 50 Cal. Rptr. 3d 449, 455 (Cal. Ct. App. 2006) (rejecting defendant’s “new and novel theory” that he should be considered the victim of a drunk driving offense).

of an additional minor victim.⁹⁰ It would be equally absurd to find that a direct "minor victim" is to be excluded from the category of "victims" because she was unable to act in her own best interests.

Therefore, the phrase "a person in custody" should, like the other exceptions, be interpreted as applying to derivative victims only. This is because, in construing a provision of law, courts "must, to the extent possible, ensure that the statutory scheme is coherent and consistent."⁹¹

D. Federal and state statutes defining "victim" exclude certain individuals from the category of derivative victims recognized as "victims" but never exclude anyone from the category of direct victims.

Another technique for interpreting ambiguous language is to look at parallel statutes which have the same purpose but which have been framed in a slightly different manner.⁹² These parallel authorities can provide insight into the interpretation of a word or phrase. In this case, many federal victims' rights statutes exclude certain individuals from the category of derivative victims recognized as "victims."⁹³ However, *no* federal or California statute excludes anybody from the category of direct victims recognized as "victims."⁹⁴ For this reason, a court should conclude that the exclusions within Marsy's Law were also intended to apply to derivative victims only.

1. Federal statutes

Federal statutes define "victim" in a two-step process: first, a "victim" is "a person directly and proximately harmed,"⁹⁵ second, some derivative victims (e.g., certain legal guardians and other representatives) are also included within the "victim" category,⁹⁶ "but in no event shall the defendant be named as such representative or guardian."⁹⁷ Thus, the Crime Victims' Rights Act, the Mandatory Victims Restitution Act of 1996, and the Victim and Witness Protection Act each defined the "victim" as a person directly and proximately harmed, and each exclude

90. See discussion *supra* Part II.B.

91. *Ali*, 552 U.S. at 222.

92. See, e.g., *Bragdon v. Abbot*, 524 U.S. 624, 631 (1998) (interpreting statutes by looking to parallel language in previous statutes).

93. See *infra* Part II.D.1.

94. See *infra* Part II.D.1-2.

95. Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663(a)(2) (2006); Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A(2) (2006); Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, 18 U.S.C. § 3771(e) (2006).

96. Victim and Witness Protection Act of 1982 § 3663(a)(2); Mandatory Victims Restitution Act of 1996 § 3663A(2); Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act § 3771(e).

97. Victim and Witness Protection Act of 1982 § 3663(a)(2); Mandatory Victims Restitution Act of 1996 § 3663A(2); Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act § 3771(e).

“the defendant” from being named as the guardian or representative.⁹⁸ As can be seen, the definitions in these federal statutes exclude “the defendant” solely from the class of derivative victims (*i.e.*, legal guardians and representatives) potentially recognized as “victims.” These federal statutes do not specifically exclude “the defendant” or “the accused” from the class of direct victims recognized as “victims” because doing so would be both unnecessary and absurd.⁹⁹

2. California

Prior to Marsy’s Law, California statutes defining victim limited the definition to direct victims of crime.¹⁰⁰ Apparently because these statutes did not recognize any derivative victims within the definition of “victim,” there was no need to specifically exclude “the accused” from this definition. For example, California Penal Code Section 679.01 defines “victim” as “a person against whom a crime has been committed.”¹⁰¹ This definition limits the term “victim” to direct victims only and contains no exclusion for “the defendant” or “the accused.”¹⁰² California Penal Code Section 136(3) also defines “victim” in such a way that restricts the category to direct victims only, and likewise contains no exclusions for “the accused” or “the defendant.”¹⁰³ Other California statutes that define “victim” do so in such a way as to exclude all derivative victims, and thus apparently had no need to exclude “the accused” or “the defendant.”¹⁰⁴

Thus, California statutes recognized that all direct victims of crime were “victims.” It is reasonable to conclude that Marsy’s Law also recognized all direct victims as “victims.”

E. The definitional structure of Marsy’s Law mirrors that contained in various federal statutes.

Federal and California statutes can be used to interpret the overall structure of the definition of “victim” within Marsy’s Law.¹⁰⁵ Specifically, Marsy’s Law

98. Victim and Witness Protection Act of 1982 § 3663(a)(2); Mandatory Victims Restitution Act of 1996 § 3663A(2); Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act § 3771(e).

99. For a discussion of “absurd,” see *supra* Part II.B.

100. See, *e.g.*, CAL. PENAL CODE § 679.01 (West 2008) (“victim” is defined as “a person against whom a crime has been committed”); CAL. PENAL CODE § 136(3) (West 2008) (definition of “victim” does not include derivative victims and contains no exclusions); CAL. GOV’T CODE § 13951(g) (West 2008) (definition of “victim” contains no derivative victims and no exclusions).

101. CAL. PENAL CODE § 679.01.

102. See *id.*

103. CAL. PENAL CODE § 136(3).

104. See, *e.g.*, CAL. GOV’T CODE § 13951(g).

105. This is a similar but distinct argument from that discussed in Part II.D. See *supra* Part II.D. Part II.D states that the exclusions in Marsy’s Law likely apply only to derivative victims because in federal and state statutes, exclusions apply only to derivative victims and not to direct victims of crime. Part II.E states that Marsy’s Law can be interpreted as having a similar structure to federal statutes, which first state that all direct victims are recognized as “victims,” then add that certain derivative victims are also recognized as victims,

closely resembles many federal statutes containing a three-part definition of victim: (1) direct victims are "victims"; (2) certain derivative victims are included in the definition of "victim"; and (3) certain other derivative victims are excluded from the definition of "victim."¹⁰⁶ Because Marsy's Law appears to share this same structure, it is reasonable to conclude that the exceptions in the third sentence of Marsy's Law were intended to apply to derivative victims only.

When a court construes a statute, it is "informed by interpretations of parallel definitions in previous statutes."¹⁰⁷ Marsy's Law was a referendum placed directly on the ballot, and so lacks a legislative history.¹⁰⁸ However, it appears to have been modeled upon federal victims' rights laws, all of which share the three-part structure identified above.

Thus, the Crime Victims' Rights Act ("CVRA") establishes the following definition of "victim":

For the purposes of this chapter [this section], the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter [this section], but in no event shall the defendant be named as such guardian or representative.¹⁰⁹

As can be seen, the CVRA first recognizes direct victims ("a person directly and proximately harmed") as "victims." Then, the CVRA expands the definition of "victim" to include certain derivative victims ("legal guardians"; "family members"; "other persons appointed as suitable by the court"). Lastly, the CVRA excludes certain individuals from the list of derivative victims who are recognized as "victims" ("in no event shall the defendant be named as such guardian"). The CVRA's definition of "victim" exactly copies the definition appearing in other federal statutes.¹¹⁰ Each of these statutes follows the same three-step process.¹¹¹

and finally list certain individuals who are excluded from the category of "victims" even if they would otherwise fall into the category of derivative victims. *See supra* Part II.D.3. Thus, Part II.D is an argument based on the purpose of Marsy's Law (discernible through a comparison with similar statutes), and Part II.E is an argument based on the structure of Marsy's Law (also discernible through a comparison with similar statutes).

106. *See, e.g.*, Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act § 3771(e); Mandatory Victims Restitution Act of 1996 § 3663A(a)(2); Victim and Witness Protection Act of 1982 § 3663(a)(2).

107. *Bragdon*, 524 U.S. at 631.

108. *See supra* note 1 and accompanying text.

109. Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act § 3771(e).

110. *See, e.g.*, Mandatory Victims Restitution Act of 1996 § 3663A; Victim and Witness Protection Act of 1982 § 3663.

To the extent that Marsy's Law departed from these prior statutes, it did so by greatly expanding the class of derivative victims recognized as "victims." Federal law limited derivative "victim" status to certain selected representatives of underage, incompetent, incapacitated, and deceased victims.¹¹² In contrast, Marsy's Law added a long list of family members of direct victims to the category of recognized "victims."¹¹³ In order to maintain the exclusion for defendants and other bad actors, Marsy's Law changed the language of the CVRA and the other federal statutes from "in no event shall the defendant be named as such guardian" to a broader exclusion of such individuals generally (thus excluding "a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim").¹¹⁴ Moreover, because Marsy's Law expanded both the class of derivative victims recognized as "victims" under the law, and also expanded the corresponding exclusion of certain individuals from that group, it was necessary to break what had originally been a single sentence in the federal statutes into two separate sentences.¹¹⁵ Faced with a similar situation, the Supreme Court concluded that "the most apparent effect of the amendment was to divide what was once a lengthy principal sentence into separate subparagraphs."¹¹⁶

Marsy's Law changed what had originally been a subordinate clause into an independent sentence. Nevertheless, it appears to have the same basic structure and scheme as other victims' rights laws, all of which exclude defendants and bad actors solely from the class of derivative victims recognized by law as "victims."

F. The narrow interpretation of the exclusions is most consistent with the intent of the amendment.

There is no dispute that Marsy's Law was intended to expand the definition of "victim" and to provide victims and their families with greater access to the justice system.¹¹⁷ If there is any ambiguity as to the meaning of the plain text of Marsy's Law, the court should look to the amendment's intent for guidance.¹¹⁸ Because the undisputed intent of Marsy's Law was to expand access to the justice system, the

111. *See id.*

112. *Id.*; Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act § 3771(e).

113. Marsy's Law § 4.1.

114. *Id.*

115. Compare Marsy's Law § 4.1, with *United States v. O'Brien*, 130 S. Ct. 2169, 2174 (2010) (affirming a First Circuit decision which interpreted a new version of a statute as merely "break[ing] what was a single run-on sentence into subparagraphs" for stylistic reasons).

116. *O'Brien*, 130 S. Ct. at 2176.

117. *See 2008 California Criminal Law Ballot Initiatives*, *supra* note 2, at 179, 196 ("It is apparent that Proposition 9's drafters intended its protections to cover a group well beyond a narrow category of 'technical' victims of realized crimes."). *See also infra* Part III.A.

118. *People v. Broussard*, 856 P.2d 1134, 1135 (Cal. 1993) (declaring that the language of statutory provisions enacted in response to the 1982 version of Marsy's Law must be "interpreted reasonably in light of [Marsy's Law's] evident purpose"). *See also Dolan v. Postal Service*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, *considering the purpose and context of the statute*, and consulting any precedents or authorities that inform the analysis.") (emphasis added).

court should interpret the language of the definition in that light, and accordingly conclude that the exclusions apply only to derivative victims and not to the direct victims of crime.

G. The purpose of Marsy's Law was to expand victims' rights and broaden the definition of "victim."

All available sources indicate that the intent of Marsy's Law was to expand victim's rights. These sources are reviewed below.

1. Interpretations of intent with respect to earlier amendments

In 1995, the California appellate courts considered the 1982 version of Marsy's Law, and concluded that any interpretation which had the effect of limiting victim's rights "would be in derogation of the expressed intent and purposes" of the 1982 victim's rights amendment which originally established those rights.¹¹⁹

2. Other indicia of intent

According to the California appellate courts, "When an initiative measure's language is ambiguous, we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet."¹²⁰

An examination of the contemporary arguments demonstrates unequivocally that the 2008 Marsy's Law amendment was intended to *expand* access to the justice system for both direct and derivative crime victims.¹²¹ The Office of the Attorney General of California officially describes the purpose and intent of Marsy's Law to be "[p]rovid[ing] victims with rights to justice and due process."¹²²

Opponents of Marsy's Law agreed that the amendment would expand access to the justice system to additional individuals: "It makes changes to the rights of victims of crime, primarily by requiring some additional notice of and participation in legal proceedings, and places these changes in the state Constitution."¹²³ Likewise, an editorial in the L.A. Times opposing the amendment stated, "[i]f the concern is protection of families from further victimization, as proponents claim, that goal can be met without granting families a new and inappropriate role in

119. *People v. Carbajal*, 899 P.2d 67, 71 (Cal. 1995).

120. *Birkett*, 980 P.2d at 915 (interpreting the 1982 version of Marsy's Law by examining arguments made by proponents and opponents of the measure, including arguments on the ballot pamphlet). *See also* *Strauss v. Horton*, 207 P.2d 48, 52 (Cal. 2009) (looking to the ballot arguments to determine the intent of a California constitutional amendment).

121. BOWEN, *supra* note 13, at 62 (2008) (derivative victims who felt shut out of the justice system describing these experiences). *See also supra* notes 118-120.

122. State of California Department of Justice – Office of the Attorney General, "Statement of Purpose and Intent," available at <http://oag.ca.gov/victimservices/content/statement> (last visited on Nov. 29, 2012).

123. *See* "NO ON PROP 9: QUESTION AND ANSWER," available at http://digital.library.ucla.edu/websites/2008_993_112/facts_QA.html (last visited on Nov. 29, 2012).

prosecutions.”¹²⁴

In addition, because federal victims’ rights legislation provided victims with expanded rights and access to court hearings, it is reasonable to assume that California’s victims’ rights amendment was intended to produce the same result.¹²⁵ Other statutes and policies both domestically and internationally reflect an ongoing expansion of victims’ rights to participate within the criminal justice process.¹²⁶ As one example, the European Union’s Framework Decision on the standing of crime victims insists that crime victims play “a real and appropriate role” in European criminal trials.¹²⁷ It would be anomalous for a victims’ rights amendment, such as Marsy’s Law, to act in contradiction of this global trend.¹²⁸

3. Textual indicia of intent

The text of the Marsy’s Law amendment shows that it was created with the intention of *expanding* access to the justice system to derivative victims of crime. The amendment states: “The statutory provisions of this Act shall not be amended by the Legislature [except by three-fourths vote or by a statute approved by the voters]. However, the Legislature may amend the statutory provisions of this Act *to expand the scope of their application*, to recognize additional rights of victims of crime, or to further the rights of victims of crime by a statute passed by a majority vote of the membership of each house.”¹²⁹

Likewise, the amendment’s opening declaration states that crime victims have “the right to notice and to be heard during critical stages of the justice system.”¹³⁰ The amendment states that “the ‘Victims’ Bill of Rights Act of 2008: Marsy’s Law’ is needed to remedy a justice system that fails to fully recognize and adequately enforce the rights of victims of crime.”¹³¹ “Marsy’s Law is written on behalf of [murder victim Marsy’s] mother, father, and brother, who were often treated as though they had no rights.”¹³² As the quoted language demonstrates, Marsy’s Law had the purpose of expanding access to the justice system both on behalf of the direct victim and also on behalf of derivative victims (such as the “mother, father, and brother”), so as to “fully recognize” rights that were not recognized previously (“as though they had no rights”).¹³³

The 2008 amendment specifically revised many provisions of California law in

124. Editorial, *No on Proposition 9*, L.A. TIMES, Sept. 26, 2008, at 28.

125. See Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 Ohio St. J. Crim. L. 611, 616 (2009); see also Douglas E. Beloff & Paul G. Cassell, *The Crime Victim’s Right to Attend the Trial: The Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481 (2005) (the current trend is to permit greater participation in court hearings by crime victims through participation, including allocation).

126. See *infra* notes 126–127 and accompanying text.

127. 2001 O.J. L 82/2 JHA.

128. See, e.g., Edna Erez, *Victim Impact Statements*, 33 Austl. Inst. Criminology, (1991) (Austl.) (noting that “[a]s the process has continued, concern for victims’ rights expanded into areas beyond its initial focus”).

129. Marsy’s Law, § 9 (emphasis added).

130. *Id.* at § 2(1).

131. *Id.* at § 2(2).

132. *Id.*

133. *Id.* at § 2(1)-(2).

order to expand access to the justice system. For example, the amendment expands access to parole hearings, from "[t]he victim, next of kin, two members of the immediate family, or two representatives" to "[t]he victim, next of kin, members of the victim's family, and two representatives."¹³⁴ This change allows an unlimited number of family members of the victim to attend the parole hearing, removes the former limitation of "immediate family," and allows two representatives to attend in *addition* to the victim and family members. The 2008 amendment specifically states that "the [parole] board shall allow. . . spouse, children, parents, siblings, grandchildren, and grandparents [of victims to attend parole hearings]."¹³⁵

H. Given the stated purpose of the amendment, the exclusions should be understood to limit only derivative victim protections.

Given the stated intent of Marsy's Law, it would be hypertechnical to interpret the definitional exclusions to apply to direct victims as well as derivative victims. It is well established in California that courts must not subvert the intent of a constitutional amendment through excessively technical interpretations of the amendment's language: "[A] constitution is . . . not to be interpreted according to narrow or supertechnical principles, but liberally and on broad general lines, so that it may accomplish in full measure the objects of its establishment."¹³⁶

There is no reason to believe that Marsy's Law "constituted a retrenchment from then-existing rights, rather than the expansion that [was] so obviously envisioned."¹³⁷

III. Marsy's Law has a conflicts provision that arguably supports the narrow interpretation of the exclusions.

Marsy's Law states that, in case of a conflict of law between Marsy's Law and other laws that provide rights to victims of crime, the law that provides greater rights shall prevail.

IV. Conflicts with existing law

It is the intent of the People of the State of California in enacting this Act that if any provision in this Act conflicts with an existing provision of law which provides for greater rights of victims of crime, the latter provision shall apply.¹³⁸

Arguably, one of the rights, which Marsy's Law provides to victims of crime, is the right to be recognized as such. Thus, Marsy's Law expands the universe of

134. Cal. Pen. Code 8.1 § 3043(b)(1) (West 2012).

135. Cal. Pen. Code 8.1 § 3043(e) (West 2012).

136. *People v. Giordano*, 42 Cal. 4th 644, 655 (2007) (citing *Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization* 22 Cal. 3d 208, 244-245 (1978) and quoting *Stephens v. Chambers*, 34 Cal. App. 660, 663-664 (1917)).

137. *United States v. Degenhardt*, 405 F. Supp. 2d 1341, 1347 (D. Utah 2005).

138. Marsy's Law § 7.

victims permitted to testify at parole hearings to “any person harmed by the offender”¹³⁹ and states that “the term ‘victim’ also includes the person’s spouse, parents, children, siblings,” and others.¹⁴⁰ To the extent that Marsy’s Law provides a more restrictive interpretation of “victim” than earlier victims’ rights laws, there is a reasonable argument that the conflicts of laws provision should broaden the scope of the Marsy’s Law definition of victim.

Before Marsy’s Law, California defined “victim” so as to encompass child victims of prostitution. In fact, numerous federal and California statutes explicitly state that child victims of prostitution are “victims,” and both federal and California case law is to the same effect.¹⁴¹ In addition, neither federal nor state law definitions of “victim” in existence prior to Marsy’s Law carved out any exceptions for direct victims of crime who are “in custody.”¹⁴² Therefore, even if one interprets the Marsy’s Law definition of “victim” as excluding direct victims who are “in custody,” this definition does not supplant the broader preexisting definition of “victim” that includes all direct victims of crime. Victims each have a substantive right to be recognized as a “victim,” and Marsy’s Law does not abridge this right.

While the foregoing is an arguable interpretation of the conflicts of laws provision of Marsy’s Law, it should be noted that there are two potential weaknesses to this argument. First, it is not clear that the right to be recognized as a “victim” is indeed a substantive right. Second, it is not clear if the conflicts of laws provision actually requires that the definition of “victim” within Marsy’s Law to be expanded so as to encompass all who would have been recognized as victims under former law. It could be read solely to require that individuals who would have been granted rights as “victims” under former laws continue to receive those rights, but that they do not also receive the rights granted under Marsy’s Law.

A. California law

Before Marsy’s Law, California defined a “victim” as “any person alleged or found, upon the record, to have sustained physical or financial injury. . . as a direct result of the crime charged.”¹⁴³ This definition of victim does not exclude individuals in custody. Because a child victim of prostitution is the object of the crime of sex trafficking, a child prostitute would be recognized as a “victim” under former California law and would arguably continue to be recognized as a “victim” under the conflict of laws provision of Marsy’s Law.

California case law consistently described child victims of prostitution as

139. *Id.* at § 4(d).

140. *Id.* at § 4(e).

141. *See infra* Section IV.A-B.

142. *Id.*

143. Cal. Pen. Code § 11158 (2008); *see also* *People v. Tackett*, 144 Cal. App. 4th Supp. 445, 454 (Cal. App. 3d Dist. 2006) (“The basic notion of a victim of a crime is the person who was the object of the crime – the person against whom the crime was committed.”).

"victims."¹⁴⁴ California appellate courts have referred to current and former child prostitutes as "victims," and compared them to victims of other crimes.¹⁴⁵ Thus, for instance, one appellate court stated that "many of the victims in this case were much like the victims of child abuse, rape, and domestic violence. . . The testimony of each victim served to corroborate the experience related by all of the victims."¹⁴⁶ Likewise, a California appellate court repeatedly described a fourteen-year-old prostitute as a "victim": "the victim's acts of prostitution. . . the victim's testimony. . . the victim submitted. . ."¹⁴⁷

B. Federal law

Federal statutes and federal case law consistently recognize child victims of prostitution as "victims." Thus, the Crime Victims' Rights Act establishes that all direct victims are "victims."¹⁴⁸ Direct victims who are in custody are not excluded from this definition.¹⁴⁹ Courts considering the Crime Victims' Rights Act have explicitly labeled child victims of prostitution as "victims."¹⁵⁰

Other federal statutes are even more explicit in declaring that child victims of prostitution are to be considered victims. Thus, the Trafficking Victims Protection Act uses the word "Victims" in its title, and states that its purpose is to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims."¹⁵¹ The statute further states: "[V]ictims are often forced through physical violence to engage in sex acts Such force includes rape and other forms of sexual abuse, torture, starvation, imprisonment, threats, psychological abuse, and coercion."¹⁵² "Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked"¹⁵³

Case law connected to the Trafficking Victims Protection Act supports the interpretation of child victims of prostitution as victims. Thus, the Ninth Circuit repeatedly used the word "victim" to describe a 17-year-old who came to Guam to

144. See, e.g., *Brandon*, 145 Cal. App. 4th at 1018-1024.

145. *Id.*

146. *Id.* at 129, 131.

147. See *Roberson*, 198 Cal.App.3d at 866-867.

148. 18 U.S.C. § 3771(e) (defining "victim" as one who is "directly and proximately harmed as a result of the...offense").

149. *Id.*

150. See, e.g., *U.S. v. Vaughn*, CR. No. S-08-0052 LKK (GGH), 2008 U.S. Dist. LEXIS 86954, at *1 (E.D. Cal. Oct. 17, 2008) ("Defendant Vaughn has been indicted for sex trafficking offenses involving minors.... All of the alleged victims were stated to be under the age of eighteen at the time of the charged offense, and there are a total of six victims."); cf., *New York v. Ferber*, 458 U.S. 747, 758-60, nn.9-10 (1982) (comparing child prostitution to child sexual pornography, and classifying the children in each case as "child victim[s]").

151. Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101(a) (2006).

152. *Id.* at (b)(6).

153. *Id.* at (b)(19).

work as a prostitute.¹⁵⁴ The Court concluded its discussion with the remark: “[A]s to the age of the victim. . . [the defendant] in fact imported a minor for purposes of prostitution.”¹⁵⁵ Likewise, in the case of other statutes directed at the sex trafficking of children, courts have consistently described the child prostitutes as “victims.”¹⁵⁶ This is true even in cases where the child prostitutes allegedly acted of their own volition in accepting payment for sexual acts. Thus, the Ninth Circuit has described child prostitutes as victims, stating that the sex offender “hired the boys to engage in sex acts with the promise of monetary payment” and describing the sex acts engaged in by the boys for approximately two dollars as “commercial sex acts.”¹⁵⁷ Despite the ostensibly commercial nature of the acts, the Court labeled the boys as victims.¹⁵⁸

The principle that child victims of prostitution are victims has remained true even when the child prostitute was held in detention (in custody).¹⁵⁹ Thus, for example, a district court ordered that the custodian of juvenile records provide “certified copies of any and all information pertaining to a victim in a child sex trafficking case.”¹⁶⁰ Likewise, victims of child prostitution who later continue to work in the sex industry are labeled as victims. For example, the Ninth Circuit repeatedly used the term “victims” to describe a group of women who had been tricked into coming to a United States territory for the purposes of prostitution, notwithstanding the fact that the women later continued to work as prostitutes.¹⁶¹

Furthermore, the Federal Rules of Criminal Procedure refer to “any victim of a crime of violence or sexual abuse.”¹⁶² Prior to being superseded by the Crime Victims Rights Act, the Federal Rules of Criminal Procedure stated that a court “must address any victim of a crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence.”¹⁶³ Thus, federal law has long recognized individuals who have suffered sexual abuse are “victims.”

C. *Potential weakness in the conflicts argument.*

The above argument is certainly worth making, but it is subject to two potentially significant lines of attack. First, if the right to be recognized as a victim is not itself a right covered under the Conflicts provision (which instead only covers those substantive rights that accrue to parties recognized as victims), then the

154. *United States v. Mi Kyung Byun*, 539 F.3d 982 (9th Cir. 2008).

155. *Id.* at 993-994.

156. *See, e.g.*, 18 U.S.C. § 1591 (2008) (“Sex trafficking of children or by force, fraud, or coercion”); *United States v. Clark*, 435 F.3d 1100 (9th Cir. 2006) (interpreting this statute).

157. *Clark*, 435 F.3d at 1103-1110.

158. *Id.*

159. *See, e.g.*, *United States v. McClure*, No. 08-cr-100 (WBS), No. 08-cr- 270 (WBS), 2009 U.S. Dist. LEXIS 29247, at *10 (E.D. Cal. April 7, 2009)

160. *Id.* (internal citation omitted).

161. *United States v. Chang Da Liu*, No. 06-10758, 538 F.3d 1078, 1089 (9th Cir. 2008).

162. Fed. R. Crim. P. 32(i)(4)(B).

163. *Id.*

argument fails from the outset. There would be no conflict with any prior law. Second, even if that issue is overcome, it is far from clear that there would be a conflict *requiring the application of Marsy's Law*. If a prior law recognizes an in-custody minor as a victim and Marsy's Law does not, the Conflicts provision can simply be read to state that nothing in Marsy's Law is intended to undo the protections of the existing law for those minor victims. That would do nothing to secure them protection directly under Marsy's Law itself.

V. The narrow interpretation is sound from a policy perspective.

In interpreting ambiguous statutes, courts will consider principles of public policy.¹⁶⁴ The narrow interpretation of the exclusion sentence makes sense for two policy reasons. First, it limits the burden on the state prison system.¹⁶⁵ Second, it prevents perpetrators of family crimes from attending hearings as "victims."¹⁶⁶

A. Burden on state prison system

The 2008 version of Marsy's Law expands the definition of "victim" to include family members of direct victims.¹⁶⁷ Furthermore, the 2008 version grants "victims" the right to be present and to participate in a wide variety of legal proceedings, including: the right to be present at "all public proceedings. . .at which the defendant and the prosecutor are entitled to be present" and "all parole or other post-conviction release proceedings;"¹⁶⁸ the right to be heard "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;"¹⁶⁹ the right to "provide information to a probation department official conducting a pre-sentence investigation;"¹⁷⁰ and the right to "participate in the parole process."¹⁷¹ If all incarcerated derivative victims were granted these additional rights, it would create an enormous burden upon the California prison system.¹⁷² It is reasonable to restrict the scope of derivative victims so that the prison system is not overwhelmed by prisoners attending innumerable proceedings at government expense. The amendment reasonably excludes persons "in custody" from being defined as "victims" merely as a result of their family relationship to a direct victim.

164. . See *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 583 (2008) (citing public policy arguments in support of interpretation of statute); *U.S. v. Montalvo-Murillo*, 495 U.S. 711, 718 (1990) (interpreting statute in manner that conforms with the "great principle of public policy").

165. See *infra* Part V.A.

166. See *infra* Part V.B.

167. Marsy's Law, *supra* note 14, § 4.1.

168. Cal. Const. art. I, § 28(b)(7).

169. Cal. Const. art. I, § 28(b)(8).

170. Cal. Const. art. I, § 28(b)(10).

171. Cal. Const. art. I, § 28(b)(15).

172. See *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011) (finding that, in California, "[o]vercrowding has overtaken the limited resources of prison staff").

There is a legitimate public policy concern that extending “victim” status to all incarcerated derivative victims of crime could overburden the prison system by requiring the state to transport these individuals to proceedings on behalf of a victim.¹⁷³ However, this public policy rationale does not apply in the case of direct victims, because in a typical case the direct victim would be expected to attend trial proceedings as a witness anyway.

This interpretation is supported by the legislative history of the federal Crime Victims Rights Act, which granted crime victims the right to be “reasonably heard at any public proceeding.”¹⁷⁴ Jon Kyl, a sponsor of the Crime Victims Rights Act, explained that “the term ‘reasonably’ is meant to allow for alternative methods of communicating a victim’s views to the court when the victim is unable to attend the proceedings. Such circumstances might arise, for example, if the victim is incarcerated on unrelated matters at the time of the proceedings”¹⁷⁵ As this statement demonstrates, federal legislators made the public policy choice of not transporting incarcerated victims to hearings for purposes of making a victim’s impact statement; it would hardly be surprising if state legislators made the same choice.

B. *Perpetrators of family violence*

Similarly, if there were no exclusion of persons “in custody for a crime” from the category of derivative victims, then certain incarcerated perpetrators of family violence would transform into “victims” due to their family relationship to the direct victim. Consider the following hypothetical: A father is convicted and incarcerated for sexually assaulting his 18-year-old daughter. Later, the daughter becomes the victim of a separate, unrelated crime. The father would not be considered “the accused” for purposes of the new crime. Likewise, the father would not be a person incapable of acting in the best interests of a *minor* victim, because the victim is not a minor. Thus, without the additional exception of “a person in custody for an offense,” the father would be transformed into a “victim” solely due to his family relationship to the daughter. As a “victim,” the father would have the right to attend all proceedings involving his daughter – the victim of his own sexual abuse. Perpetrators of other acts of family violence, such as domestic violence, incest, or molestation, would each become transformed into “victims” solely by virtue of their victim becoming victimized a second time while an adult. A narrow interpretation of the “in custody for an offense” exclusion would avoid this result.

However, this public policy exclusion does not make sense when applied to the direct victim. The direct victim of family crimes is not the perpetrator, and she does not need to be protected from herself.

173. *See id.*

174. 18 U.S.C. § 3771(a)(4) (2006).

175. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Jon Kyl).

VI. Proposed model language for future victims' rights amendments.

As discussed above, in the author's view the definitional section of Marsy's Law is clear, and the alternative interpretation would create perverse results. Nevertheless, to entirely avoid any potential ambiguities, the author recommends that, to the extent that proponents of future victims' rights amendments wish to build upon this language, those proponents improve the language so as to remove any alleged ambiguities.

To be certain, many victims' rights amendments have been proposed, and Marsy's Law is just one in a crowd.¹⁷⁶ The earliest proposed amendment would have simply added the following language to the Sixth Amendment: "Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings."¹⁷⁷ In the current Congress, a very different (and far lengthier) constitutional amendment is under consideration.¹⁷⁸ Nevertheless, should future victims' rights proponents wish to emulate the California state constitutional amendment, with its relatively broad recognition of derivative victims as "victims," the following slightly modified language would eliminate the alleged ambiguities of Marsy's Law:

The term "victim" shall include both direct and indirect victims. A direct 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. The term "victim" shall include all direct victims. An indirect victim is a person who suffers derivatively from the commission

176. See Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 612-16 (2009) (outlining history of proposed national and state constitutional amendments).

177. *Id.* at 614.

178. H.R.J. Res. 106, 112th Cong. (2012). The text of the currently proposed constitutional amendment is available at: Nat'l Victims' Const. Amendment Passage, <http://www.nvcap.org/> (last visited Aug. 29, 2012):

Section 1. The rights of a crime victim to fairness, respect, and dignity, being capable of protection without denying the constitutional rights of the accused, shall not be denied or abridged by the United States or any State. The crime victim shall, moreover, have the rights to reasonable notice of, and shall not be excluded from, public proceedings relating to the offense, to be heard at any release, plea, sentencing, or other such proceeding involving any right established by this article, to proceedings free from unreasonable delay, to reasonable notice of the release or escape of the accused, to due consideration of the crime victim's safety, and to restitution. The crime victim or the crime victim's lawful representative has standing to fully assert and enforce these rights in any court. Nothing in this article provides grounds for a new trial or any claim for damages and no person accused of the conduct described in section 2 of this article may obtain any form of relief.

Section 2. For purposes of this article, a crime victim includes any person against whom the criminal offense is committed or who is directly harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime.

Section 3. This article shall be inoperative unless it has been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within 14 years after the date of its submission to the States by the Congress. This article shall take effect on the 180th day after the date of its ratification.

or attempted commission of a crime or delinquent act, including the direct victim's spouse, parents, children, siblings, and guardian. In the case of a direct victim who is deceased, a minor, or physically or psychologically incapacitated, the category of indirect victim shall also include a lawful representative. The term "victim" shall include all indirect victims, except that the term "victim" shall not include any indirect victim who is in custody for an offense, who is accused of a crime, or a person whom the court finds would not act in the best interests of a minor victim.

In the author's view, explicitly breaking down the concept of "victim" into its component parts – "direct" victims and "derivative" or "indirect" victims – will avoid both the purported ambiguities and perverse results described above.