ARTICLES

The Newly Informed Decency of Death: Hall v. Florida
Endorses the Marshall Hypothesis in Eighth Amendment
Review of the Death Penalty

Chance Meyer 153

The United States Supreme Court has long determined what criminal punishments violate the Eighth Amendment by asking whether they fall short of the American people’s standard of decency. It has relied mostly on state legislation to reflect what people think is decent. In 1972, Justice Marshall suggested the Court should factor expert knowledge of the actual workings of death penalty systems into its analysis. The Author refers to this approach as “informed decency.” Marshall believed doing so would make the death penalty unconstitutional because the American people would reject it if better informed. This has come to be known as “the Marshall Hypothesis.” Some forty years later, in Hall v. Florida, the Court finally did something akin to what Marshall suggested with regard to a particular feature of the death penalty. The Court relied on the knowledge of professional psychological organizations to find unconstitutional the manner in which Florida determined ineligibility for the death penalty based on intellectual disability. In this Article, the Author explains that if such an informed decency is adopted on a larger scale, and applied to the death penalty itself, current views of experts in science and law would provide strong evidence to find the death penalty violates the American standard of decency and, as a result, the Eighth Amendment.

Quarrelling About Public Safety: How a Reverse Miranda Warning Would Protect the Public and the Constitution

Matthew Specht 177

The public safety exception to the Miranda doctrine allows law enforcement officers to conduct interrogations without informing an individual of his or her Miranda rights and to use the individual’s responses as evidence against him or her in court. This exception allows officers to conduct un-Mirandized interrogations when the officer’s questions are reasonably prompted by a concern for public safety. Initially intended to avoid further danger to the public, the public safety exception has exceeded its intended bounds, resulting in an infringement upon the public’s Fifth Amendment rights.

This Article explains the reasoning behind the Miranda decision and tracks the various exceptions that have been created since that decision. The Author then discusses how these exceptions, particularly the public safety exception, have slowly eroded the constitutional protections of Miranda. The public safety exception, arising from the Supreme Court’s decision in New York v. Quarles, was intended to be a narrow exception distinguishing permissible “custodial questioning” from impermissible “investigatory questioning.” Since its creation, a number of circuits have expanded the public safety exception to include situations that involve no threat to public safety at all, representing a clear violation of the Fifth Amendment and a purposely narrow exception. The Author proposes a reverse Miranda warning that would allow officers to conduct custodial interrogation in the name of public safety, but would stop short of allowing the information obtained through these interrogations to be admissible at trial. By informing an individual that his or her answers to police questioning will not be admissible at trial, a reverse Miranda warning would still allow officers to perform public safety questioning while preserving the individual’s protection against self-incrimination, effectively balancing both the government’s and individual’s interests.
From Simple Statements to Heartbreaking Photographs and Videos: An Interdisciplinary Examination of Victim Impact Evidence in Criminal Cases

Mitchell J. Frank

This Article examines the use and effectiveness of victim impact statements—a type of victim impact evidence—in criminal cases. These statements may be written or oral and are authorized for use in both state and federal courts. Although impact statements are considered the most simple and frequently used form of victim impact evidence, other evidence used by prosecutors may include professionally produced, edited, narrated, and musically scored videos and photographs designed to incite emotional reactions. These alternative forms of victim impact evidence may carry great potential for subjecting defendants to substantial unfair prejudice. The Article analyzes selected cases in which courts in various jurisdictions, lacking guidance from the Supreme Court, have attempted to define the limits of what can be presented as victim impact evidence when it contains emotionally charged and perhaps inflammatory pictures or videos and may be substantially and unfairly prejudicial against defendants.

The Article analyzes the degree of correlation between perceived benefits and detriments of victim impact statements versus the empirical evidence supporting such conclusions based on studies from the United States and other countries. The Article then presents and discusses the Author’s detailed and comprehensive survey of judges, prosecutors, and public defenders in the Ninth Judicial Circuit of Florida regarding the use of victim impact statements in actual practice. The responses include a number of suggestions from judges and trial lawyers on how to improve the victim impact evidence process and enable those who use, or defend against, this type of evidence to do so more effectively.

The Author concludes that, under normal circumstances, victim impact statements give victims a voice in the criminal justice process and that any perceived detriment is not entirely founded. However, when victim impact evidence consists of videos and photographs that are designed to inflame the emotions of juries and judges, they may carry with them a potential to be unfairly prejudicial. Due to the fact that the Supreme Court has declined to provide guidance to the allowable limits of victim impact evidence, lower courts have been left to the task of setting their own limits, making uniformity across state and federal jurisdictions difficult, if not impossible, to achieve.

The Right to Marry and State Marriage Amendments: Implications for Future Families

Mark P. Strasser

In June 2015, the United States Supreme Court decided Obergefell v. Hodges, holding that it is unconstitutional for states to ban same-sex marriages. Because many states ban same-sex marriage by way of constitutional amendments, some state courts may eventually construe Obergefell as overturning these amendments in their entirety. However, this Article addresses the conceivable consequences of the Supreme Court’s holding by examining the possibility that some state courts may construe Obergefell as only partially invalidating state constitutional amendments banning same-sex marriage, leaving the door open to limitations on the benefits provided to same-sex couples.

This Article begins by evaluating the various state constitutional amendments that preclude same-sex marriages, analyzing the reach of the Supreme Court’s holding in light of the expansive constructions of the state amendments. To help rationalize the various interpretations of state constitutional amendments concerning marriage, the Author explores stepparent and second-parent adoption
statutes in regards to the legal benefits acquired by marriage. This Article continues by discussing the scope of state constitutional amendments in relation to current demographics of co-habitating, unmarried partners. The Author suggests two ways state legislatures may treat unmarried partners in accordance with evolving demographics: (1) state legislatures may choose not to provide any of the benefits or burdens of marriage upon a couple who chooses not to marry; or (2) state legislatures may offer different benefits and burdens to couples depending on their status (i.e. married or unmarried but cohabitating). The Author concludes by emphasizing the potential effects the Supreme Court’s holding may have on the institution of marriage, whether it be by restricting a state’s ability to provide benefits to non-marital couples, or allowing some burdens imposed on same-sex couples by state constitutional amendments to remain unabated by the vague language imposed in Obergefell.

STUDENT WORK

King Turned Commoner: The Effect of
Fernandez v. California

Jerry D. Clinch

In 2014, the Supreme Court decided Fernandez v. California, holding that an individual who objects to a warrantless search but is later lawfully removed from the premises can have his or her objection to the search superseded by a co-tenant. Such act of third-party consent, when a co-tenant who is not the suspect in the crime being investigated gives the police consent to search the home, is one of many setbacks in the long history of the erosion of the Fourth Amendment. This Article addresses Fernandez and its impact on Fourth Amendment rights. The Article begins by discussing the myth of true consent to searches and how police officers have the appearance of authority, which triggers an ingrained need to comply with search requests. The Author also explores the ability of police to lawfully arrest a co-tenant who is objecting to a search and take him or her off premises to acquire consent from another co-tenant. The Author then calls for the abolition of consent searches altogether, emphasizing the relative ease of obtaining a search warrant—the preferred method to lawfully search a home and a method that has become increasingly convenient due to evolving technology. In the alternative to abolishing consent searches altogether, the Author suggests either: 1) requiring officers to apprise an individual of his or her right to refuse a search; or 2) redefining the word “present” so a suspect who has objected but has been subsequently arrested is still present and, therefore, his or her objection still stands and cannot be overridden by a co-tenant. The Author concludes by warning that without consent search reform, the Fourth Amendment will become nothing but words on a page.
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The Stetson Law Review uses a soy-based ink throughout the publication.

The Stetson Law Review is indexed in the Index to Legal Periodicals, Current Law Index, and Shepard’s Florida Citator, and is available on Hein Online, Westlaw, and LexisNexis electronic databases.

The views expressed in published material are those of the authors and do not necessarily reflect the policies or opinions of the Stetson Law Review, its editors and staff, or Stetson University College of Law.
THE NEWLY INFORMED DECENCY OF DEATH: 

HALL V. FLORIDA ENDORSES THE MARSHALL HYPOTHESIS IN EIGHTH AMENDMENT REVIEW OF THE DEATH PENALTY

Chance Meyer*

I. INTRODUCTION

The farm animals overthrow Farmer Jones to secure their equality. Afterwards, the pigs, which led the revolt, form a new regime to rule the farm. They proclaim all animals to be equal. And, for a time, things are better. But the ideal of equality proves difficult to maintain in practice. The pigs become corrupt. They transmogrify into humanlike rulers of the very sort they had replaced. They begin walking upright, wearing clothes, dining with farmers, and reigning over the farm like dictators. Ultimately, as corrupt humans sometimes will, they rethink their proclamation of equality. While they still hold all animals to be equal, they now declare, “some animals are more equal than others.”

Nearly thirty years after the 1945 publication of George Orwell’s Animal Farm, the American death penalty underwent a regime change of its own. In Furman v. Georgia, the United States Supreme Court found that the manner in which states were imposing the death penalty was cruel and unusual, in violation of the Eighth Amendment. Each justice in the majority had different reasons, and each wrote separately. Among the five of them, they described the practice of the day as wanton,

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1. GEORGE ORWELL, ANIMAL FARM 134 (1945).
2. Id.
4. See id. at 239–40 (finding it unconstitutional to impose the death penalty under certain state statutes representative of the practice across the nation).
5. In fact, the Court “had not been so visibly fragmented since its earliest days,” agreeing only on “a terse per curiam statement announcing the result reached,” and issuing nine separate opinions, four in dissent. Robert A. Burt, Disorder in the Court: The Death Penalty and the Constitution, 85 MICH. L. REV. 1741, 1758 (1987).
freakish, discriminatory, pointless, arbitrary, and a result of ignorance. But it was the practice of capital punishment the Court found unconstitutional—the way the death penalty was being doled out at the time—not the death penalty itself. So the Court struck down the states’ death penalty regimes, but gave them another chance to get it right.

A few years later, in *Gregg v. Georgia*, the Court revealed why. It came down to state legislation. Because most states kept the death penalty on the books, the Court concluded that death met the American people’s then prevailing standard of decency and moral judgment. As such, it did not violate the Eighth Amendment. So it was public desire, as reflected by state legislation, that saved death from being found unconstitutional. Like the animals on the newly christened Animal Farm, the American people wanted to pursue a new regime that lived up to their ideals, despite the failings of the old. So, like the animals proclaimed their equality, the Court described new safeguards of fairness and reliability that, when put into practice, would cure the injustices of the past.

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6. *See Furman*, 408 U.S. at 257 (Douglas, J., concurring) (calling the states’ death penalty statutes “pregnant with discrimination”); *id.* at 305 (Brennan, J., concurring) (stating that “there is a strong probability that [the punishment of death] is inflicted arbitrarily”); *id.* at 310 (Stewart, J., concurring) (concluding that “the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed”); *id.* at 312 (White, J., concurring) (opining that the death penalty’s “imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purpose”); *id.* at 366 (Marshall, J., concurring) (stating that “[i]gnorance is perpetuated and apathy soon becomes its mate, and we have today’s situation” with capital punishment).

7. *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality) (recalling that “Furman did not hold that the infliction of the death penalty *per se* violates the Constitution’s ban on cruel and unusual punishments,” but only that death “could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner”).


10. *See id.* at 168–69 (explaining that death’s constitutionality “was presented and addressed in *Furman* but “not resolved by the Court,” and taking up that unresolved question).

11. *See id.* at 174 (discussing how the Eighth Amendment restricts legislative power).

12. *See id.* at 179–81 (explaining how legislation, elections, and juries have shown continued support of and insistence on capital punishment). While decency is only one of “four principles by which we may determine whether a particular punishment is ‘cruel and unusual,’” it is heavily relied upon by the Court in holding death to be constitutional, and the Eighth Amendment principle relevant to the instant inquiry. *Furman*, 408 U.S. at 281 (Brennan, J., concurring).

13. *See Gregg*, 428 U.S. at 175 (contemplating the Eighth Amendment inquiry as “intertwined with an assessment of contemporary standards” within which “legislative judgment weighs heavily”).

14. *Id.* at 175–76.

15. *See id.* at 195 (instructing that “the concerns expressed in *Furman* . . . can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance,” which is best achieved “by a system that provides for a bifurcated proceeding at which
But Justice Marshall saw things differently. In *Furman*, he observed that “American citizens know almost nothing about capital punishment.” They are not familiar with the myriad difficulties in its implementation. They may support an abstract and idealized death penalty—the prospect of taking life for life with utter fairness and reliability—but not the flawed reality of the actual practice. Rather than looking to state legislation and opinion polls, Marshall proposed that the Court should “attempt to discern the probable opinion of an informed electorate.” It should predict what the public’s moral judgment would be if informed with expert knowledge. That is, the Court should ask what people would think if they really knew death.

And Marshall had an answer to that question: the American people would find it morally unacceptable and reject it, making death itself unconstitutional. They would see the inevitable fallibility, corruption, and injustice in the administration of death. And they would not want to keep trying to get it right.

We might call this sort of inquiry “informed decency.” But it, along with Marshall’s conclusion, has come to be called “the Marshall Hypothesis.”

After *Furman*, the states redesigned death. They added new safeguards of fairness and reliability. But, in years since, the lesson

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the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information”.


17. Scholars have recognized the difference between the abstract ideal of the death penalty and its actual practice. See, e.g., C. Crystal Enekwa, *Comment, Capital Punishment and the Marshall Hypothesis: Reforming a Broken System of Punishment*, 80 TENN. L. REV. 411, 446 (2013) (arguing that, despite the idealized view of the death penalty, “[i]n reality, the only capital punishment system the United States can boast of today is permeated with arbitrariness, capriciousness, prejudice, and uncertainty”); Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1670 (1986) (“Death penalty proponents have assumed a system of capital punishment that simply does not exist. . . . But this idealized system is not the American system of capital punishment. . . . America simply does not have the kind of capital punishment system contemplated by death penalty partisans.”).


19. See id. at 363 (“I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance. Thus, I believe that the great mass of citizens would conclude . . . that the death penalty is immoral and therefore unconstitutional.”)

20. See id. at 362–66 (surveying the insufficient penological justifications, biases of administration, and injustices that weigh against death in an informed assessment of its morality and propriety).

21. See id. 314–71 (suggesting that expert knowledge should be considered in capital punishment sentencing); *infra* Part V (discussing informed decency of death).


23. See Gregg v. Georgia, 428 U.S. 153, 180 (1976) (observing that most states responded to *Furman* “by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence”).
learned on Animal Farm has proven relevant. From time to time, the Supreme Court has found itself gazing into the farmhouse window at post-\textit{Furman} death regimes that walk, talk, and look an awful lot like Farmer Jones. While \textit{Furman} did away with the old regimes, caprice and unfairness remained in old forms and new and, in some respects, came back stronger after the transition. On occasion, the Court has had to return to the Eighth Amendment to prevent states from imposing death cruelly and unusually.\textsuperscript{24}

But while the \textit{Furman} Court took up the Eighth Amendment as a scythe to level the entire field, the Court has since taken it up as a spade, to dig out only the tallest weeds of injustice that grow high over death. It has removed features, but kept the larger regimes intact.\textsuperscript{25} This happened once in \textit{Atkins v. Virginia},\textsuperscript{26} where the Court found that the execution of intellectually disabled people violates the decency underlying the Eighth Amendment.\textsuperscript{27} It happened again in 2014 in \textit{Hall v. Florida}.\textsuperscript{28}

In \textit{Hall}, Florida sought to take the life of a man who scored one point too high—on an IQ test only accurate within five points—to be found intellectually disabled and ineligible for execution under \textit{Atkins}.\textsuperscript{29} In other words, the measured score was not precise enough to ensure Hall’s actual IQ was not a point or five lower, in the constitutionally protected range. But Florida was going by that score, despite its uncertainty, and despite the lingering possibility that Hall was in fact intellectually disabled.\textsuperscript{30} For once, the arbitrariness of capital punishment was simple math.

Like it had in \textit{Furman} and \textit{Gregg}, the Court set out in \textit{Hall} to discern the current state of the evolving standard of decency. But this time the Court went in search of more informed views. The Court looked to experts, professional organizations, and the scientific community that

\begin{itemize}
\item \textsuperscript{24} See, e.g., \textit{Roper v. Simmons}, 543 U.S. 551, 578 (2005) (holding that the death penalty for minors is unconstitutional); \textit{Ford v. Wainwright}, 477 U.S. 399, 410 (1986) (holding that executing the insane is unconstitutional); \textit{Enmund v. Florida}, 458 U.S. 782, 801 (1982) (concluding that the death penalty for a minor participant in a felony is unconstitutional); \textit{Lockett v. Ohio}, 438 U.S. 586, 608 (1978) (holding that limiting mitigating evidence is unconstitutional); \textit{Coker v. Georgia}, 433 U.S. 584, 596–600 (1977) (finding that the death penalty for rape is unconstitutional); \textit{Woodson v. North Carolina}, 428 U.S. 280, 305 (1976) (holding that the mandatory death penalty is unconstitutional). There is quite a bit more to the story of why the practices in these cases were adopted by the states and later struck down, but, suffice it to say, Eighth Amendment defects still plagued the death penalty after the watershed of \textit{Furman} and \textit{Gregg}.
\item \textsuperscript{25} Justice Breyer has referred to this approach as “try[ing] to patch up the death penalty’s legal wounds one at a time.” \textit{Glossip v. Gross}, 135 S. Ct. 2726, 2755 (2015).
\item \textsuperscript{26} 536 U.S. 304 (2002).
\item \textsuperscript{27} \textit{Id.} at 321.
\item \textsuperscript{28} 134 S. Ct. 1986 (2014).
\item \textsuperscript{29} \textit{Id.} at 1990, 1992.
\item \textsuperscript{30} \textit{Id.} at 1992.
\end{itemize}
created and understood the test. After all, what does the average American citizen know of how the standard error of measurement in an IQ-testing instrument bears on the propriety of executing someone with diminished intellectual capacity? It is not an opinion-poll sort of thing. So the Court contemplated expert knowledge as informative of the legislative consensus on Atkins assessments, much the same way Marshall had envisioned informing the public’s sense of decency on the larger question of death’s constitutionality. Accordingly, the Court found Florida’s method unconstitutional and, more than ever before, seemed to embrace the Marshall Hypothesis, in form if not in name, for the limited purpose of Atkins assessments.

Looking forward, it is unclear whether the Court will employ an analysis akin to the Marshall Hypothesis in Eighth Amendment review of the death penalty beyond the particular issue of Hall. There are serious criticisms of the Marshall Hypothesis, as old as Furman and as recent as Justice Alito’s dissent in Hall. Heeding them, the Court may not pursue a more informed decency of death, but there is reason to believe it should.

Doing so makes good sense. Hall shows that expertise is needed to determine whether it is decent to take lives—that lay opinion alone is not sufficient. And because the greater machinery of death is every bit as arcane and technical as scoring IQ tests, the sort of expert knowledge required in Hall is also required to understand the decency of whole regimes. Certainly, there is nothing decent about making a life-or-death decision, of any sort, without relevant expertise, insight, and an appreciation for the full dimension of the issue. Perhaps it is time to let the death penalty be shaped by those who can see its shape.

If the Court were to subject death itself to a more informed decency, it would find strong evidence that death is cruel and unusual in violation of the Eighth Amendment. Numerous professional organizations, scholars, and experts in fields of science and law essential to the death penalty’s reliability and fairness have identified fundamental flaws in the American death penalty and have called for both moratoria and abolition. Decades after Furman, a fair and just death penalty regime

31. Id. at 1993.
32. Id. (considering “psychiatric and professional studies” as “lead[ing] to a better understanding of how the legislative policies of various [s]tates . . . implement the Atkins rule,” which “informs [the] determination whether there is a consensus” for purposes of the Eighth Amendment analysis).
33. Id. at 2001 (finding that “Florida’s rule is invalid under the Constitution’s Cruel and Unusual Punishments Clause,” in part because it “is in direct opposition to the views of those who design, administer, and interpret the IQ test”).
34. See infra Part V (discussing the potential outcomes should the Supreme Court extend the informed decency approach to the ultimate question of the constitutionality of death itself).
still has not been achieved. It appears more than ever to be unachievable in practice. As on Animal Farm, the pitfalls of implementation swallow the ideal. Death’s unconstitutionality is its impracticability.

In order to arrive at that conclusion, this Article proceeds in four parts. Part II describes the legislation-centric evaluation of decency undertaken by the Court in Furman and Gregg and later established firmly as the primary determinant of Eighth Amendment protection. Part III describes the Marshall Hypothesis: how Marshall would have the Court take the measure of decency by imagining the public’s moral judgment informed with expertise and specialized knowledge. Part IV describes the way Hall v. Florida endorses the Marshall Hypothesis in the limited context of Atkins IQ assessments, relying on the knowledge of professional organizations where the subject of Eighth Amendment scrutiny is too arcane and technical for the uninformed moral judgment of the public to provide a satisfactory measure of decency. And Part V considers the possible result of the Supreme Court extending that approach to the ultimate question of the constitutionality of death itself. In other words, Part V envisions a newly informed decency of death.

Decency is conformity with an accepted standard of behavior and morality. Inherent in the concept is a collective judgment—an agreement as to where to draw the line. So too the line of Eighth Amendment protection must be drawn somewhere, along a single, shared standard. We all create that standard. Decency is all of us. And in this sense, we are, all of us, equal in decency. But then, some are more equal than others.

II. HOW DECENCY IS EVALUATED UNDER FURMAN AND GREGG

At the time of Furman in 1972, the Supreme Court decided not to do away with death altogether.\textsuperscript{35} Even though the Court saw great injustice in its implementation, it gave the states another chance to get it right.\textsuperscript{36} In this way, the death penalty survived on the mere aspiration that it would


\textsuperscript{36} The Furman decision has been described as an experimental bid for better data, in which the Court concluded that a “legislative redrafting exercise might generate information the Court could use to improve its own constitutional decisionmaking.” James S. Liebman, Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006, 107 COLUM. L. REV. 1, 27 (2007). Indeed, “[i]f states wanted the death penalty, they could prove it by drafting and applying new, more careful, and more costly provisions. If most failed to reinstate, they thereby would bless the alleged abolitionist trend and enable the Court thereafter . . . to share responsibility with a majority of legislatures.” Id. (footnote omitted).
one day become fair and just in practice.\textsuperscript{37} Like in the early days of Animal Farm, all was promise.

One may wonder why that mere promise was enough for the \textit{Furman} Court. But one has to go far to find out. The answer lies four thousand miles across an ocean and over seventy years away, in the midst of the Second World War, during the very year George Orwell was putting the finishing touches on his allegorical response to the First.

In 1944, a young private in the United States Army named Albert Trop was under disciplinary detention in French Morocco when he escaped a stockade at Casablanca.\textsuperscript{38} He was later picked up, tried, and convicted of wartime desertion.\textsuperscript{39} As part of his sentence, he lost his United States citizenship.\textsuperscript{40} In 1958, the Supreme Court took up the question of whether that sentence violated the Eighth Amendment prohibition against cruel and unusual punishment.\textsuperscript{41} In finding that indeed it did, Chief Justice Warren insisted that constitutional provisions “are not time-worn adages or hollow shibboleths,” but “vital, living principles.”\textsuperscript{42} As such, the Warren Court found the American people’s “evolving standards of decency” to be the measure of what is cruel and unusual under the Eighth Amendment.\textsuperscript{43}

The line gets redrawn as we go along and become more enlightened.\textsuperscript{44} Denaturalization for desertion violated the then-prevailing standard, so it was unconstitutional.\textsuperscript{45} Albert Trop had brought with him from Northern Africa the story that would shape American criminal punishment for decades to come.

So, returning to 1972, the \textit{Furman} Court found itself asking what the still-evolving standard of decency had to say about the death penalty.\textsuperscript{46} Members of the Court looked to state legislatures for guidance as to what the public thought was decent, as reflected in the consensus of its elected

\textsuperscript{37} There was, however, a theoretical potential for \textit{Furman} to end the American death penalty. Since the sort of discretionary review statutes at issue in \textit{Furman} seemed the only form of capital punishment still constitutionally viable at the time of \textit{Furman}, “[a]ll that needed to be done to declare the penalty unconstitutional . . . was to draw a deductively obvious conclusion” from \textit{Furman}’s striking them down. \textit{Id.}


\textsuperscript{39} \textit{Id.} at 88.

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} \textit{Id.} at 99.

\textsuperscript{42} \textit{Id.} at 103.

\textsuperscript{43} \textit{Id.} at 101.

\textsuperscript{44} \textit{See} Weems v. United States, 217 U.S. 349, 378 (1910) (stating that the prohibition against cruel and unusual punishment “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice”).

\textsuperscript{45} \textit{See} \textit{Trop}, 356 U.S. at 103 (holding that “the Eighth Amendment forbids Congress to punish by taking away citizenship”).

\textsuperscript{46} \textit{Furman} v. Georgia, 408 U.S. 238, 269–70 (1972) (Brennan, J., concurring).
The Court found declining but still viable support for the death penalty.\footnote{See, e.g., id. at 385 (Burger, C.J., with Blackmun, Powell, and Rehnquist, JJ., dissenting) (finding that, “[i]n looking for reliable indicia of contemporary attitude,” there is “none more trustworthy” than how many states have a death penalty).} Indeed, forty states still had it on the books.\footnote{See id. at 299 (Brennan, J., concurring) (recognizing the “progressive decline in, and the current rarity of, the infliction of death”).}

A few years later, in 1976, the Court brought up Gregg to look at how the State of Georgia, like many others, had gone about fixing the problems identified in Furman.\footnote{See id. at 437 (Burger, C.J., with Blackmun, Powell, and Rehnquist, JJ., dissenting) (“Forty states, the District of Columbia, and the Federal Government still authorize the death penalty for a wide variety of crimes.” (footnote omitted)).} Along the way, it explicitly upheld the constitutionality of death itself.\footnote{Gregg v. Georgia, 428 U.S. 153, 187 (1976) (“We hold that the death penalty is not a form of punishment that may never be imposed . . . .”).} The Court found that “[t]he most marked indication of society’s endorsement of the death penalty for murder is the legislative response to Furman” in the at least thirty-five states that sought to repair their death penalty regimes, rather than abandon them, and that “the post-Furman statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.”\footnote{Id. (footnote omitted).}

After passing on death, the Court upheld Georgia’s new regime.\footnote{Id. at 207.} In doing so, it described how providing capital sentencers with “relevant information under fair procedural rules” and guidance as to how to weigh “particularly relevant” information constitutionalizes death, by ensuring sentencing discretion is “suitably directed and limited.”\footnote{Id. at 189, 192.} In short, death is decent as long as “the sentencing authority is given adequate information and guidance.”

A related criticism has been made of the Furman Court’s demand for more reliability from capital sentencing juries than it was able to achieve itself on the larger question of death’s constitutionality. Due to the fractionalized nature of the Court in Furman, it has been said that “Furman is virtually a caricature of the isolated jury in death cases . . . for which no attempt was
In later years, the Court became more entrenched in its reliance on state legislatures.\textsuperscript{56} It dubbed them the “clearest and most reliable objective evidence of contemporary values.”\textsuperscript{57} Decency became, more than anything, state legislation.

And this was the analysis on which the Court declined to strike down death when first faced with the question in \textit{Furman}. It held on to the mere promise that death might one day be fairly and justly implemented, because the American people seemed to consider death itself a decent punishment. Most states seemed to want it. So death deserved a second chance.

\textbf{III. DECENCY PURSUANT TO THE MARSHALL HYPOTHESIS}

But Marshall was done with second chances. He took an opposing view of the evolving standard of decency that sent his analysis on a course towards abolition and served as a powerful criticism of the Court’s approach in \textit{Furman} and \textit{Gregg}. The view that Marshall expressed in \textit{Furman} is simple: if people do not understand the intricacies of something, they can hardly determine whether it is decent.\textsuperscript{58} Has it not been said that the devil is in the details?

Marshall saw unfamiliarity, ignorance, and indifference as leading to the preservation of the death penalty as the \textit{status quo}, “whether or not that is desirable, or desired.”\textsuperscript{59} In effect, many states’ retention of the death penalty, to Marshall, was not the result of a continuous assessment of its propriety on the part of the American people, endlessly reaffirming the commitment to taking life. Rather, it was just the way things were, and thus the way things would tend to stay. Most people are busy going about their lives and do not take such an interest in the death penalty as to develop an appreciation for the vagaries of its workings and the weaknesses in its foundations. For most people, the question of whether the death penalty should be imposed is simply whether life should be taken for life, reductively excluding all the pitfalls and difficulties in made to formulate coherent standards by which individual [idiosyncrasies] might be tamed and the rule of law advanced.” Burt, supra note 5, at 1759. The Court could not follow its own advice, or achieve in \textit{Furman} the sort of sureness of collective judgment that it demanded states create in their juries.

\textsuperscript{56} See \textit{Atkins v. Virginia}, 536 U.S. 304, 312 (2002) (discussing cases where the Court relied on legislative evidence when determining the decency of the death penalty).

\textsuperscript{57} Id. (internal quotations omitted) (quoting \textit{Penry v. Lynaugh}, 492 U.S. 302, 331 (1989), \emph{abrogated by Atkins v. Virginia}, 536 U.S. 304 (2002)).

\textsuperscript{58} See \textit{Furman v. Georgia}, 408 U.S. 238, 362–63 (1972) (Marshall, J., concurring) (discussing the American people’s lack of knowledge with regard to capital punishment).

\textsuperscript{59} Id. at 361–62 n.145.
determining whether, when, and how to impose it. In this sense, the people offer their support for an idealized abstraction of the death penalty, not the imperfect reality of it. Thus, to meaningfully assess the decency of death, courts would have to view it through a dual lens, combining expert knowledge with public judgment. Marshall believed that doing so would lead to the death penalty being found unconstitutional because the people would not support death if they truly understood its many failings.60

The Marshall Hypothesis is often broken into “two testable propositions,” which are (1) that the American people know little about the death penalty, and (2) that if they did, they would not support it.61 Both have been hotly debated over the years.

While still contentious, the first testable proposition gains strong proof from Hall. Previously, the Court relied mostly on empirical studies such as a particularly comprehensive study in 1991 “[concluding] that the public lacks general knowledge about the death penalty and its administration.”62 But the experience in Hall provides a different sort of proof. There, the simple fact that the general public is not composed of specialized scientists was all it took to find the public’s moral judgment alone insufficient to evaluate the decency of a scientific component of death. Certainly, the general public does not have the psychological expertise to factor the intricacies of IQ testing into its assessment of the death penalty. Because the criminal justice system depends inescapably on many types of science, forensic and otherwise,63 there is much critical knowledge the public simply does not have, which is necessary to know death’s many details.

In this sense, Marshall’s view is, at bottom, difficult to impeach: people with expertise can better judge a thing than people without. If a sink in chambers springs a leak, the Supreme Court calls a plumber. If the lights go out, it calls an electrician. If computers crash, it calls information services. Some important and complicated matters require

60. Id. at 362–63.
61. Clarke et al., supra note 22, at 310.
63. See Donald E. Shelton, Twenty-First Century Forensic Science Challenges for Trial Judges in Criminal Cases: Where the “Polybutadiene” Meets the “Bitumen,” 18 WIDENER L.J. 309, 310 (2009) (“The seemingly rapid development of emerging scientific methods . . . has had, and will undoubtedly continue to have, an almost stunning impact on our justice system, particularly at the trial level.”). But see Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596–97 (1993) (“Yet there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly.”).
special knowledge and experience. So why then, when death is at stake, would the Court call solely a person without relevant specialization and expertise? The death penalty is widely regarded as the most complex and multifarious area of law. Why here, of all places, to turn away from informed opinion?

Even members of the Court have thrown up their hands, faced with death’s complexity. Having struggled for some twenty-five years on the Court to constitutionalize the death penalty, Justice Blackmun finally threw in the towel and professed, “From this day forward, I no longer shall tinker with the machinery of death.” Justice Scalia has recognized the Court’s failure to sort out death, challenging that “no one can be at ease with the stark reality that this Court’s vacillating pronouncements have produced grossly inequitable treatment of those on death row.” Justice Ginsberg has described her need, upon first joining the Court, to have clerks work to educate her on death penalty law, because the “jurisprudence is dense.” And, just last year, Justice Breyer, joined by Justice Ginsburg in his dissent in Glossip v. Gross, concluded that “changes that have occurred during the past four decades,” together with his “[twenty] years of experience” dealing with death on the Court, have led him to believe that “the death penalty, in and of itself, now likely constitutes a legally prohibited ‘cruel and unusual punishment’.”

To be sure, these justices knew a thing or two about critical analysis and criminal punishment when they made these statements and were better equipped than most of us to master both. How can the average American be expected to solve the jigsaw puzzle of policy, law, morality, and ethics that is the death penalty when it takes most of us a long career in the law toying with its many pieces to even begin to glimpse its full aspect? Marshall believed the American public should not be expected to

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master the death penalty any more than non-plumbers should be expected to replace valves, or non-electricians to diagnose power outages.

Thus, Marshall asked not whether the lay public supports the death penalty, but whether “people who were fully informed as to the purposes of the penalty and its liabilities” would support it.\(^69\) In posing this question, Marshall did not suggest that the public’s moral judgment should be ignored or replaced with more informed opinions. Rather, he maintained that “[w]ith respect to this judgment, a violation of the Eighth Amendment is totally dependent on the predictable subjective, emotional reactions of informed citizens” to information they did not happen to have.\(^70\) In Marshall’s view, the Eighth Amendment measure of decency should not be exclusive of the public’s gut impulses and instincts, but predictive of what its good judgment would be, given more complete and detailed information. Essentially, Marshall asked, what would happen if people knew the whole story?

Marshall’s answer to that question is the second proposition of his hypothesis. Based on the evidence available at the time, Marshall imagined that the public knew that death was not a better deterrent of murder than imprisonment, that the death penalty might actually promote violence and criminal activity, that convicted murderers are typically exemplary prisoners, that convicted murderers often become law-abiding citizens upon release, that the costs of execution exceed those of life imprisonment, that death is discriminatorily imposed against particular classes of people like the poor, and that “evidence [exists] that innocent people have been executed before their innocence can be proved.”\(^71\) Surveying this landscape of little-known but critical information, Marshall concluded that the average citizen would find the grim reality of the death penalty “shocking to his conscience and sense of justice.”\(^72\) The American people would not “knowingly support purposeless vengeance,” but rather, informed with all the information available, would hold the death penalty to be “immoral and therefore unconstitutional.”\(^73\) In Gregg, Marshall recalled noting in Furman that “the American people are largely unaware of the information critical to a judgment on the morality of the death penalty, and [concluding] that if

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70. Id. at 362.
71. Id. at 362–64.
72. Id. at 369.
73. Id. at 363.
they were better informed they would consider it shocking, unjust, and unacceptable.”\footnote{74}

Marshall did not believe that the American people, if well informed, would try to rehabilitate or repair their death penalty regimes. That would not be possible because “[n]o matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real.”\footnote{75} This and other inescapable realities would lead the American people to conclude that, fair, just, and decent killing of criminal defendants is an ideal impossible to attain. In other words, they would learn the lesson discovered on the Animal Farm. The American people would see that even if they got rid of Farmer Jones, the same old corruption, inequality, and injustice would return when they attempted to implement a new regime based on new proclamations of their ideals.

This second proposition of the Marshall Hypothesis remains heavily debated. One commentator has described it as “either naïve wishful thinking or antidemocratic paternalism.”\footnote{76} Another has shied from it, stating that “[i]t strikes me as arrogant to contend that those who disagree with me must be ignorant and that if they only knew the true facts, they would agree with me.”\footnote{77} Yet, there are studies demonstrating that lay proponents of the death penalty are indeed susceptible to being swayed by the sort of information Marshall had in mind. Various empirical research efforts have concluded that there is “qualified support for the proposition that information on sentencing innocent persons to death has a negative impact on support for the death penalty”;\footnote{78} that “[t]he more knowledgeable a person is about the death penalty before the study, the less likely it is that information on the operation of capital punishment will change that person’s views”;\footnote{79} and that “upon being informed about the operation of the death penalty, there is a decline in support for the penalty.”\footnote{80} While the results of such studies are indefinite and not without their detractors, it appears that there is at least some potential that America’s knowledge of problems with the death penalty could tug at its conscience. Whether it would tug hard enough to be death’s demise is a matter for the Court to decide at the end of an analysis like Marshall’s, not something that must be known in advance to justify the Court

\begin{footnotes}
\item[75] Furman, 408 U.S. at 367 (footnote omitted).
\item[78] Clarke et al., supra note 22, at 334.
\item[79] Aarons, supra note 62, at 393 (footnote omitted).
\item[80] Id. at 394.
\end{footnotes}
undertaking the analysis in the first place. In other words, criticisms of
the second proposition of the Marshall Hypothesis do not weigh against
the Court conducting a similar inquiry into whether, knowing all there is
to know, America would end its affair with death. Not knowing the
answer does not weigh against asking the question.

Beyond criticisms from scholars, there are several from the bench as
old as the Hypothesis itself.\textsuperscript{81} Chief Justice Burger wrote in
\textit{Furman} that he might have joined Justice Marshall if the Court was “possessed of [the]
legislative power.”\textsuperscript{82} But because the constitutional inquiry was supposed
to be “divorced from personal feelings as to the morality and efficacy of
the death penalty” and because the Court was obliged not to “seize upon
the enigmatic character of the [Eighth Amendment] guarantee as an
invitation to enact our personal predilections into law,” Burger could not
follow Marshall.\textsuperscript{83} Indeed, there is a danger in the Marshall Hypothesis
of a court substituting its knowledge of the death penalty for the moral
judgment of the American public that underlies Eighth Amendment
decency.\textsuperscript{84} Speculatively integrating expert knowledge into a lay moral
judgment is a difficult row to hoe.

Justice Rehnquist has also offered reasons to limit the evaluation of
decency to state legislation and imposition of death. In \textit{Atkins}, he warned
that reliance on international norms, professional organizations, and
religious organizations would open up the inquiry surrounding the death
penalty in an unmanageable way.\textsuperscript{85} Perhaps the Marshall Hypothesis
ushers in too many variable sources of information to be as sure as simply
taking stock of the number of states that keep death on the books and the
number that impose it.\textsuperscript{86} That measure is reliable. That measure is
consistent. Perhaps those qualities outweigh its dilettantism.

\begin{itemize}
\item\textsuperscript{81} The criticisms described here are responded to in Part V after reviewing empirical evidence
and studies that weigh in favor of adopting the Marshall Hypothesis more broadly in Eighth
Amendment jurisprudence.
\item\textsuperscript{82} \textit{Furman} v. Georgia, 408 U.S. 238, 375 (1972) (Burger, C.J., with Blackmun, Powell and
Rehnquist, J.J., dissenting).
\item\textsuperscript{83} \textit{Id. at} 375–76.
\item\textsuperscript{84} In fact, each of the dissenters in \textit{Furman} had a concern similar to this. As explained by one
commentator, “[i]t is commonplace in a dissenting judicial opinion to charge that the majority has
ignored canons of judicial restraint and wrongly relied on ‘personal’ or ‘policy’ views to invalidate
legislation,” and “[a]ll of the dissenters in \textit{Furman} invoked this formulation.” Burt, \textit{supra} note 5, at
1757 (footnote omitted).
\item\textsuperscript{85} \textit{Atkins} v. Virginia, 536 U.S. 304, 327 (2002) (Rehnquist, C.J., with Scalia and Thomas, J.J.,
dissenting).
\item\textsuperscript{86} Scholars too have expressed concerns as to whether Marshall’s approach, if adopted, would
be at all tenable. See, e.g., Clarke et al., \textit{supra} note 22, at 310 ("These simple propositions hide a world
of complexity. First, what would it mean for a person to be ‘fully informed’? What level of
information suffices?").
\end{itemize}
Justice Alito has offered a criticism based in *stare decisis*. In *Hall*, he complained that looking to professional organizations simply breaks from the Supreme Court’s long-established treatment of decency under the Eighth Amendment.87 And, in large part, it does. Despite Justice Rehnquist’s concerns in *Atkins* that the Court appeared to be flirting with professional organizations in its evaluation of decency,88 the hardline stance of the Court has been for decades that state legislatures are the ultimate word on what the American people think is decent.89

Such criticisms prevented the Hypothesis from ever taking hold in Marshall’s day. It failed to gain traction with the Court. The Court continued to look primarily to state legislatures for a measure of decency. And in time, its moment seemed to pass. But the law likes a comeback.

**IV. HOW HALL V. FLORIDA ENDORSES THE MARSHALL HYPOTHESIS**

The Supreme Court’s decision in *Hall v. Florida* breathes new life into the Marshall Hypothesis and presents good reasons for moving past the criticisms that have prevented its broad acceptance. It started with the Florida Supreme Court facing a critical question as to Florida’s compliance with *Atkins*. The Florida statute that defines intellectual disability for purposes of determining which defendants are categorically ineligible for the death penalty requires, among other things, an IQ of 70 or below.90 But the clinical tests used to measure IQ have a standard error of measurement (SEM) of, generally speaking, plus or minus five.91 The tests cannot identify actual IQ with exact precision, only a range within which each defendant’s actual IQ is somewhere secreted.92 In *Cherry v.*
the Florida Supreme Court faced the issue of whether the Florida statute excluded consideration of the SEM. The Court found that it did because “the statute does not use the word approximate, nor does it reference the SEM.” If a defendant scored a 71, he was eligible for death under the statute even if his actual IQ was 66. Diagnosing intellectual disability under Atkins was, in Florida, more a matter of statutory construction than the science of testing.

The Florida Supreme Court reached this conclusion because it was caught between two competing principles from Atkins. Atkins explicitly left to the states the task of enforcing its prohibition, which suggested to many that the states were free to define intellectual disability however they saw fit. On the other hand, the Atkins Court noted that “statutory definitions . . . are not identical, but generally conform to the clinical definitions.” There was the sense that intellectual disability still resided primarily in science. So Atkins threaded a needle between the sovereignty of state legislatures and the scientific, clinical nature of intellectual disability. The Florida Supreme Court was left to find the eye of that needle somewhere between honoring the Florida Legislature’s will and abiding by the clinical reality. And it ultimately decided that the Florida Legislature’s definition of IQ could rightly exclude consideration of the SEM.

Cherry was the law in Florida for seven years. Defendants could be executed if they scored a 71 or above. It did not matter if they could have presented evidence to support the conclusion that their actual IQ was lower than their measured IQ. It did not matter if they would have been clinically diagnosed as intellectually disabled.

And that is how Freddie Lee Hall came before the Florida Supreme Court—with an IQ score of 71. Applying its ruling in Cherry, the Florida

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93. 959 So. 2d 702 (Fla. 2007).
94. See id. at 712 (noting that the fundamental question raised in the appeal was “whether the rule and statute provide a strict cutoff of an IQ score of 70 in order to establish significantly subaverage intellectual functioning” or whether the Florida statute considers a range of scores under the SEM).
95. Id. at 713.
97. Id. at 317 n.22.
98. Hall v. Florida, 134 S. Ct. 1886, 1990 (2014) (explaining Florida’s rule that “[i]f, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed,” and holding that such a rigid rule “creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional”), abrogating Cherry v. State, 959 So. 2d 702 (Fla. 2007).
99. Id. at 1992 (noting that “Hall had received nine IQ evaluations in 40 years, with scores ranging from 60 to 80,” which included “an IQ test score of 71”).
Supreme Court found that Hall did not fall within the category of defendants ineligible for execution due to intellectual disability.\textsuperscript{100}

But the United States Supreme Court found otherwise. True to its treatment of Albert Trop, the Supreme Court in \textit{Hall} again set out to review the nation’s standard of decency. It asked whether the then prevailing standard would be violated by Hall’s execution given how Florida’s strict cutoff at 70 failed to account for the SEM.\textsuperscript{101} But, unlike the Court’s usual assessments of decency, it set out this time in search of more informed views. The Court found it “proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores” in assessing Florida’s strict cutoff at 70.\textsuperscript{102}

This came as a surprise to many. Commentators have recognized the Court’s disinclination to rely on empirical, scientific research in death penalty cases.\textsuperscript{103} Indeed, in \textit{Barefoot v. Estelle},\textsuperscript{104} where the Court considered the admissibility of psychiatrist testimony to the effect that a capital defendant poses a threat of future dangerousness,\textsuperscript{105} the Court “dismissed an American Medical Association study indicating a two-thirds error rate in the reliability of psychiatric predictions because the study only showed that the experts are wrong ‘most of the time,’ and failed to prove that experts are not ‘always wrong.’”\textsuperscript{106} The Court going so far out of its way to reject a study conducted by a prominent professional organization led many “to wonder whether empirical evidence plays any role at all in the Court’s decision making.”\textsuperscript{107} And with regard to Eighth Amendment review of the death penalty in particular, the Court had seemed to put a pin in the Marshall Hypothesis forty years ago and forgotten about it, instead wedding itself to state legislatures in drawing the parameters of Eighth Amendment protection.

The Court had something to say about this. It wrote, “[t]hat this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising,” since “[s]ociety relies upon medical and professional

\begin{footnotes}
\item[100] See \textit{Hall v. State}, 109 So. 3d 704, 709–10 (Fla. 2012) (“Hall asserts that the statutorily prescribed cutoff is arbitrary because it does not consider the range of scores mentioned in \textit{Atkins}. We have previously found this argument to be meritless.”).
\item[101] \textit{Hall}, 134 S. Ct. at 1994.
\item[102] \textit{Id.} at 1993.
\item[103] Clarke et al., supra note 22, at 309 (“Supreme Court Justices rarely take into account empirical research when making decisions, and they seem particularly opposed to incorporating social-scientific scrutiny of the death penalty.” (footnote omitted)).
\item[104] 463 U.S. 880 (1983).
\item[105] \textit{Id.} at 884–85.
\item[106] Clarke et al., supra note 22, at 309 (footnote omitted).
\item[107] \textit{Id.} (footnote omitted).
\end{footnotes}
expertise to define and explain how to diagnose the mental condition at issue.” Of course, the Court declaring that its analysis should not surprise anyone betrayed an awareness that the analysis was likely to do just that.109

Justice Alito perceived a deceit in the majority’s reasoning in Hall. He argued that reliance on the medical profession “marks a new and most unwise turn in our Eighth Amendment case law” and “sharply departs from the framework prescribed in prior Eighth Amendment cases.”110 He saw no reason to break from “societal norms” as the chief determiner of whether the death penalty, as applied to Hall, was decent.111

But whatever sleight of hand there was in the Court’s reaching for professional norms in Hall, Justice Marshall’s teachings resonated in the essential finding: “In determining who qualifies as intellectually disabled, it is proper to consult the medical community’s opinions.”112 As Marshall would imbue the public’s moral judgment about the death penalty with the teachings of experts, the Hall Court factored professional consensus into its accounting of state legislatures that have “passed legislation allowing defendants to present additional evidence of intellectual disability when their IQ test score is above 70.”113 The Court found that Florida’s rule violated the Eighth Amendment because it cut the Atkins inquiry off if there was an IQ score above 70, “tak[ing] an IQ score as final and conclusive evidence of a defendant’s intellectual capacity, when experts in the field would consider other evidence,” since the SEM is “a statistical fact, a reflection of the inherent imprecision of the test itself.”114 The strict cutoff at 70 fell short of the nation’s prevailing standard of decency, as reflected by the medical community’s understanding that IQ test results cannot support a strict cutoff.

The Court did not credit Marshall, or cite to his opinion in Furman, when it went in search of a more informed decency in Hall. But a different Eighth Amendment analysis arose with implications far beyond the narrow issue of Hall. The Marshall Hypothesis had finally won the day, even if not in name and even if limited to Atkins cases.

109. I once barked “I didn’t do it!” before my mother could ask if I knew anything about the unfortunately positioned Joseph in her porcelain nativity set being clumsily overturned and, as a result, beheaded.
111. Id.
112. Id. at 1993 (majority opinion).
113. Id. at 1997.
114. Id. at 1995.
V. IMPLICATIONS FOR THE CONSTITUTIONALITY OF DEATH ITSELF

Relying on the knowledge of professional organizations, the Hall Court made no less profound a finding than that “Florida’s law contravenes our Nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world.”\textsuperscript{115} Of course, that commitment and duty extend to the death penalty itself.

There is reason to believe that a broader adoption of informed decency—a robust application of the Marshall Hypothesis to capital punishment itself—would place death within the Eighth Amendment prohibition on cruel and unusual punishment. Professional organizations in science and law, death penalty experts, and researchers have made findings that, if fully appreciated by the public, could lead to an utter lack of faith in the reliability and fairness of the death penalty.\textsuperscript{116} Under these findings, a model of informed decency inclines towards abolition.

“In 2009, the National Academy of Sciences (NAS) published a landmark report on forensic science,” described as “one of the most important developments in forensic science since the establishment of the crime laboratory in the 1920s.”\textsuperscript{117} After spending years conducting a painstaking study of forensic techniques such as fingerprints, handwriting, and ballistics, the NAS concluded that “‘[t]he forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country.’”\textsuperscript{118} In the turbulent wake of the report, one commentator observed that “[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics,”\textsuperscript{119} and the Supreme Court recognized “[s]erious deficiencies . . . in the forensic evidence used in

\begin{footnotes}
\item[115] Id. at 2001.
\item[116] See infra Part V (discussing the flaws that the National Academy of Sciences, the American Psychological Association, the American Bar Association, the American Law Institution, and the Constitution Project have found with the death penalty).
\end{footnotes}
criminal trials." A pall of suspicion is cast over death in the wake of the pervasive failures of forensic sciences and the debunking of much of the basis for crime lab testimony used to support capital criminal convictions and sentences. In 2014, the NAS released another report, finding that at least 4.1 percent of defendants sentenced to death in the country are innocent.

The American Psychological Association has also weighed in on death. In 2001, it called for each state to put a moratorium on imposition of the death penalty “until the jurisdiction implements policies and procedures that can be shown through psychological and other social science research to ameliorate [certain] deficiencies.” In 2013, the president of that organization urged that it should go beyond the longstanding call for a moratorium and take an unqualified stance in favor of abolition.

Since 1997, the American Bar Association has called for a moratorium on death due to the lack of fairness and reliability in death penalty regimes across the nation. It now observes that “[d]ecades after Gregg v. Georgia . . . numerous concerns have arisen over states’ ability to fairly and accurately determine who should be sentenced to death” and “[l]awyers, courts, social scientists, law enforcement personnel, victims’ families and many, many others have weighed in on what problems they perceive to exist in the system.”

In 2009, the American Law Institute, which as part of its Model Penal Code had provided provisions for balancing aggravating and mitigating factors in capital sentencing, excised that section. The report that prompted the change stated that “[u]nless we are confident we can recommend procedures that would meet the most important of the concerns, the Institute should not play a further role in legitimating capital punishment, no matter how unintentionally, by retaining the section in the Model Penal Code.”

120. Melendez-Diaz, 557 U.S. at 319.
In 2001, the Constitution Project called for death penalty reform because it found that most death penalty regimes “pose almost as great a risk of arbitrary, capricious, and discriminatory application as three decades ago, when the Court called for reform in *Furman v. Georgia.*”126

These leading organizations, at the forefront of science and law, have called into question, and in some instances outright rejected, the legitimacy and propriety of the death penalty. Their findings are based on years of research by hundreds of scientists and legal experts. They are complex and dense. They represent the sort of specialized expertise that takes lifetimes to develop and cannot be achieved by lay people engaged in life’s other pursuits. They represent the sort of sophisticated analyses that Justice Marshall would utilize beyond lay opinion. And the findings show that the technical knowledge needed in *Hall* (to determine the decency of executing *Atkins* defendants without considering the SEM) is also necessary, on a larger scale, to fully appreciate the decency of death itself.

The widespread doubt in the fairness and reliability of the death penalty held by those familiar with its inner workings—coupled with the likelihood that informing public judgment with expert knowledge would shake the public’s faith in the penalty—creates a greater pressure than ever before to desist in favoring uninformed views when shaping the Eighth Amendment contours of death.

After the initial drafting of this Article, the heated exchanges on the Supreme Court inspired by *Glossip v. Gross* perhaps gave a peek at the future (if indeed there is one) of what I have called informed decency. In *Glossip,* the Supreme Court undertook a post-*Hall* Eighth Amendment review of Oklahoma’s lethal injection protocol.127 This Author watched that case closely for indications of whether a more informed decency would find traction on the Court. On the one hand, Justice Breyer did a painstaking review of “[a]lmost [forty] years of studies, surveys, and experience” to conclude that the imposition of the death penalty itself likely violates the Eighth Amendment.128 Justice Breyer observed that the “circumstances and the evidence of the death penalty’s application have changed radically” since the Court concluded in *Gregg* that state statutes

128. See id. at 2755–56 (Breyer, J., with Ginsburg, J., dissenting) (stating that changes in the imposition of the death penalty over the past four decades, coupled with twenty years of experience on the Supreme Court, lead Justice Breyer to the conclusion that the death penalty violates the Eighth Amendment).
“contained safeguards sufficient to ensure that the penalty would be applied reliably and not arbitrarily.”

On the other hand, Justice Scalia, who wrote separately in order to “respond to Justice BREYER’s plea for judicial abolition of the death penalty,” dismissed the information relied on by Justice Breyer, calling it “a ream of the most recent abolitionist studies (a superabundant genre).” Justice Scalia then provided the fundamental counterargument to informed decency:

Justice BREYER’s dissent is the living refutation of Trop’s assumption that this Court has the capacity to recognize “evolving standards of decency.” Time and again, the People have voted to exact the death penalty as punishment for the most serious of crimes. Time and again, this Court has upheld that decision. And time and again, a vocal minority of this Court has insisted that things have “changed radically,” and has sought to replace the judgments of the People with their own standards of decency.

Perhaps the battle lines are drawn already. It seems that embracing empirical data and scientific study will lead some justices to find that death’s impracticability has finally revealed it to be unconstitutional. And those justices that reject empirical data and scientific study as unreliable, legally irrelevant (as the State of Florida once rejected the SEM), or an improper consideration in addition to the public’s moral judgment, will continue to find death itself constitutional because, after all, death is just what we do.

However, embracing informed decency would not require us to say that the moral judgment of the public should have no place in shaping Eighth Amendment protection. Of course, it does and must. The beating pulse of the Eighth Amendment will always be the American people’s sense of moral right and human dignity. But their judgments are only as reliable as the understanding on which they are based. Because the information necessary to really know death is highly technical and arcane, it can only be incorporated into the assessment of decency by embracing science, expertise, and specialization. As the general public should always be the Eighth Amendment’s heart—scientists, lawyers, and scholars must be part of its mind.

129. Id. at 2755.
130. Id. at 2746–47 (Scalia, J., with Thomas, J., concurring).
131. Id. at 2749 (citation omitted).
VI. CONCLUSION

The animals on Animal Farm learned that there is no getting rid of Farmer Jones. Regimes come and go. They change form and put a different face on things. But, in the end, unfairness and injustice abide, resurface, and grow strong once again in regimes implemented by fallible and corruptible administrators. We have learned the same lesson over the years in our experience with the American death penalty. After some forty years of post-*Furman* experimentation with various safeguards of reliability and fairness in capital punishment, professional organizations and experts in science and law have concluded that arbitrariness and injustice remain.

Justice Marshall would rely on those experts in determining whether death is decent. The Supreme Court did so in *Hall*, with regard to one particular aspect of the American death penalty—*Atkins* IQ assessments. It should do so with regard to death itself because that larger question also depends on technical and arcane knowledge. The full dimensions of death should be knowingly cast.

Death still walks, talks, dresses in fancy clothes, and sleeps in the farmhouse. But not everyone can see that it does. Not everyone knows where to look or cares to go looking. Those that do should be relied on to define a newly informed decency of death.
A suspect’s Fifth Amendment rights are among the most important—and fundamental—guarantees available to defendants in the criminal justice system.¹ Various caveats and exceptions to the *Miranda* requirement have been created in the decades since *Miranda* was decided. One of the most significant wrinkles in the *Miranda* doctrine allows the government to conduct an un-Mirandized interrogation pursuant to a public-safety exception articulated by the Supreme Court in 1984.² This Article argues that the public safety exception has grown inappropriately from its original form and that the public safety exception to *Miranda* should not exist at all. It argues that to balance law enforcement’s need for critical information in response to public safety emergencies with a defendant’s important constitutional rights, a suspect’s statements to police in a public emergency should be inadmissible at his or her trial. Further, to create incentives for the suspect to cooperate in the police investigation and deter police misconduct, the police should inform the suspect of this before questioning. This “reverse *Miranda* warning”³ would incentivize cooperation with law enforcement and, to be taken seriously by the public, would require changes to several law enforcement

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¹ See *Miranda v. Arizona*, 384 U.S. 436, 468 (1966) (stating that “[t]he Fifth Amendment privilege is so fundamental to our system of constitutional rule”).

² See *New York v. Quarles*, 467 U.S. 649, 655 (1984) (holding that there is a “‘public safety’ exception to the requirement that *Miranda* warnings be given before a suspect’s answers may be admitted into evidence”).

³ A reverse *Miranda* warning, which would not be constitutionally required, would inform suspects that because the police were trying to end an imminent threat to public safety, the suspect’s responses would only be used to end the crisis and not as evidence against the suspect at trial.
practices. These changes would help law enforcement respond to emergencies and protect suspects’ rights. Most importantly, this would restore balance to a criminal justice system that currently gives disproportionate power to prosecutors, results in the conviction of innocent people, and causes innocent people to plead guilty because of the prosecutor’s tremendous leverage. What is more, the “pressure of the situation may cause an innocent defendant to make a less-than-rational appraisal of his chances for acquittal and thus decide to plead guilty when he not only is actually innocent but also could be proven so.”

Miranda does not prevent the police from interrogating suspects without warning; it bars the government from introducing responses obtained by a defendant during the interrogation into evidence at his or her trial. Under Quarles, the police may question a suspect without a Miranda warning when necessary to ensure the public’s safety and may later use that un-Mirandized statement against the suspect in court. The theory of the reverse Miranda warning is that while police should be able to question un-Mirandized suspects to prevent immediate danger to the public, the statement should not be introduced at trial against the suspects because of the Fifth Amendment protections. Using such statements against a defendant in court strays too far from the government’s interest in ensuring public safety. Government use of exculpatory statements in court bears too attenuated a relationship to justify introducing the evidence of un-Mirandized questioning triggered by the initial crisis.

4. For example, to convince people that the reverse Miranda warning was not a police trick, law enforcement officers would have to stop tricking suspects into confessing in other circumstances. The Supreme Court has held that “Miranda forbids coercion, not mere strategic deception.” Illinois v. Perkins, 496 U.S. 292, 297 (1990).

5. See generally Jed S. Rakoff, Why Innocent People Plead Guilty, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty (describing circumstances when a defendant pleads guilty to avoid the possibility of facing a higher sentence and the Supreme Court’s acceptance of Alford pleas, which permit a defendant to plead guilty while maintaining his or her innocence).

6. Id.

7. Miranda v. Arizona, 384 U.S. 436, 444 (1966) (implicitly holding that the government could interrogate suspects without warning them of their right to an attorney, but the evidence gathered from such an interrogation would be inadmissible at trial).

II. THE MIRANDA DECISION

A. The General Rule

Historically, the Fifth Amendment offered only meager protections to criminal defendants. That changed under the Warren Court, where to safeguard the right to counsel and the right against self-incrimination, the 1966 *Miranda* decision mandated that suspects be given a set of warnings prior to custodial interrogation. As a result, suspects are informed that they do not need to respond to law enforcement interrogations and have the right to have counsel present during questioning.

The *Miranda* Court’s language is unambiguous: “Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” A waiver must be voluntary, knowing, and intelligent; the “mere fact that [the suspect] may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries.” The right against self-incrimination “is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, [the Court] will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.” After an interrogation without an attorney, the government bears a heavy burden; “a valid waiver will not be presumed

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9. See, e.g., Betts v. Brady, 316 U.S. 455, 466 (1942) (“[I]t is evident that the constitutional provisions to the effect that a defendant should be ‘allowed’ counsel . . . were intended to do away with the rules which denied representation, in whole or in part, by counsel in criminal prosecutions, but were not aimed to compel the state to provide counsel for a defendant.”). Also, the slow and halting process of reverse incorporation turned the state and federal systems into unequal systems of justice. Bradford Russell Clark, Note, Judicial Review of Congressional Section Five Action: The Fallacy of Reverse Incorporation, 84 Colum. L. Rev. 1969, 1971–72 (1984).
10. See Griffin v. California, 380 U.S. 609, 615 (1965) (reversing a state court conviction after the trial judge suggested that the jury could draw an adverse inference from the defendant’s failure to testify since “the Fifth Amendment . . . forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt” (footnote omitted)).
12. Id.
13. Id.
14. Id. at 445.
15. Id. at 468.
simply from . . . the fact that a confession was in fact eventually obtained.”

The Court also anticipated the argument that ultimately prevailed in Quarles, that “society’s need for interrogation outweighs the privilege.”17 In rejecting that objection, the Court stated that “an individual cannot be compelled to be a witness against himself” and that such a fundamental “right cannot be abridged.”18 If a suspect “desires to exercise his privilege, he has the right to do so.”19 The government ought not capitalize on a defendant’s ignorance of his rights: “The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel.”20 Similarly, the government should not exploit those who cannot afford an attorney simply because it would be easy to do so: “While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice.”21

The Miranda Court was deeply concerned about police coercion of suspects.22 The Court took account of the challenges that the new regime would present to law enforcement, though the majority believed them to be exaggerated.23 The Court’s holding was simultaneously prophylactic and constitutional.24

16. Id. at 475.
17. Id. at 479.
18. Id.
19. Id. at 480.
20. Id. at 470–71. The Court further noted that “[t]he defendant who does not ask for counsel is the very defendant who most needs counsel.” Id. at 471 (internal quotations omitted) (quoting People v. Dorado, 398 P.2d 361, 369–70 (Cal. 1965)).
21. Id. at 472 (footnote omitted).
22. Id. at 467 (stating “[the Court has] concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely”).
23. Id. at 474, 477–78. The majority’s skepticism that the newly created warnings would staunch police work was well founded as very few suspects apprised of their Miranda rights actually invoke them. See George C. Thomas III, The End of the Road for Miranda v. Arizona?: On the History and Future of Rules for Police Interrogation, 37 AM. CRIM. L. REV. 1, 3 (2000) (describing the theory that “most suspects still talk to police and still incriminate themselves”).
24. Dickerson v. United States, 530 U.S. 428, 432 (2000) (“Miranda, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule Miranda ourselves. We therefore hold that Miranda and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.”).
What the Court giveth, it can taketh away.25 Miranda’s compatibility with law enforcement has not stemmed the flow against the rights of the accused.26 Miranda required warnings for custodial interrogation,27 and in later years the Court has defined custodial interrogations rather narrowly. For example, a traffic stop that involves police questioning does not place the civilian “‘in custody’ for the purposes of Miranda.”28 A defendant who meets with his probation officer is also not in custody for Miranda purposes.29 And there is no interrogation unless law enforcement engages in “express questioning or its functional equivalent,” which is limited to “words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response.”30 The Court has required that the suspect affirmatively invokes his or her rights and has approved the use of un-Mirandized statements made to jailhouse informants.31 Further, Miranda does not require the exclusion of a suspect’s responses to basic biographical questions: such questions “fall outside the protections of Miranda and the answers thereto need not be suppressed.”32 While the Court held that a suspect is not required to answer such questions, it held that the introduction of the suspect’s answers need not require a waiver.33 And when the police violate a suspect’s Miranda rights, the resulting statement is not always subject to exclusion; however, the statement can be introduced at trial to impeach


27. Miranda, 384 U.S. at 444.


31. See Perkins, 496 U.S. at 297 (describing the lack of a coercive atmosphere and stating the purpose of Miranda was not to protect defendants who believe they are talking with cellmates).

32. Pennsylvania v. Muniz, 496 U.S. 582, 601–02 (1990) (holding a defendant’s responses to law enforcement’s biographical questions, which did not follow a Miranda warning, to be “admissible because the questions fall within a ‘routine booking question’ exception which exempts from Miranda’s coverage questions to secure the ‘biographical data necessary to complete booking or pretrial services’” (internal quotations omitted)).

33. Id.
a defendant’s testimony by showing the existence of a prior inconsistent statement. 34

These *Miranda* exceptions may not actually be exceptions. Each is at least arguably consistent with *Miranda* and its underlying rationale, which emphasized the importance of restricting coercive police practices. 35 *Miranda* was a response to police efforts that served “no purpose other than to subjugate the individual to the will of his examiner.” 36 But the exceptions still work to minimize deterrence by underscoring the fact that unwarned interrogations are not themselves barred, creating avenues for their introduction at a trial.

III. THE QUARLES DECISION

Since *Miranda*, a key exception has been carved out in emergency situations that allows officers to obtain potentially admissible testimony without providing the suspect an opportunity to hear his or her rights under *Miranda*. 37 The government may conduct an un-Mirandized custodial interrogation when “police officers ask questions reasonably prompted by a concern for the public safety.” 38 The *Quarles* Court reasoned that while the “enlarged protection for the Fifth Amendment privilege” was worth the “cost to society in terms of fewer convictions of guilty suspects,” it was not worth the cost of “further danger to the public.” 39

In *Quarles*, a rape victim approached a police car with two officers inside and described her assailant, who she claimed was carrying a gun. 40 After seeing a man matching the victim’s description, the police gave chase. 41 Upon apprehending the suspect, the police found his holster empty and asked where the gun was. 42 The suspect motioned in the

34. Harris v. New York, 401 U.S. 222, 226 (1971) (“The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner’s credibility was appropriately impeached by use of his earlier conflicting statements.”).
35. See, e.g., *Miranda* v. Arizona, 384 U.S. 436, 445–47 (1966) (describing various techniques police used to coerce and trick suspects into confession, even after the suspect had asked for an attorney or refused to discuss the matter with police).
36. *Id.* at 457.
38. *Id.* at 656.
39. *Id.* at 657.
40. *Id.* at 651–52.
41. *Id.* at 652.
42. *Id.* It appears that at the time the suspect was questioned, he was surrounded by at least four police officers and was handcuffed. *Id.* at 655.
direction of some empty cartons and stated that “the gun [was] over there.” The gun was found, and the defendant was arrested.

The Court sanctioned the un-Mirandized questioning in this case out of fear that the warnings might deter the suspect from responding to the police questions about the location of the missing gun. Such safeguards, Justice Rehnquist stated, were acceptable “when the primary social cost of those added protections is the possibility of fewer convictions,” but not when the cost is “something more than merely the failure to obtain evidence useful in convicting [the suspect].” The majority held that “the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.”

This departure from Miranda was not intended to be all-encompassing. The officer asked only one question immediately upon apprehending the suspect, which was aimed at resolving a dangerous situation. No further questions were asked of the suspect prior to securing the weapon and providing Miranda warnings. What’s more, the Court explicitly distinguished its holding from its decision fifteen years prior in Orozco v. Texas. In Orozco, the police questioned a man at his house without a Miranda warning, four hours after a shooting occurred outside a restaurant. The Quarles Court expressed approval of the decision made in Orozco to suppress the defendant’s statements because the questions were “clearly investigatory” and unrelated to “any immediate danger associated with the weapon.” Justice Rehnquist said, “[The Orozco holding] is in no sense inconsistent with our disposition of this case.”

43. Id. at 652 (internal quotations omitted).
44. Id.
45. Id. at 657.
46. Id.
47. Id.
48. See id. at 658 (describing the holding as “recognizing a narrow exception to the Miranda rule in this case”).
49. Id. at 659.
50. Id.
51. Id. at 659 n.8 (citing Orozco v. Texas, 394 U.S. 324 (1969)).
52. Id.
53. Id.
54. Id.
A. The Quarles Decision Wrongly Evaluates the Competing Interests

Justice Rehnquist incorrectly described the competing interests at stake when the police question a suspect in the midst of an ongoing threat. He implied that the police, absent the public safety exception, must choose between Mirandizing the suspect (and risking the defendant actually invoking his rights and stifling the investigation) and questioning the suspect without issuing a warning (increasing the likelihood that the dangerous situation is safely defused). The police face no such choice because they can engage in un-Mirandized questioning and later prosecute the suspect, though the un-Mirandized responses cannot be used in the case-in-chief. Where the police have sufficient evidence that a particular suspect has information to help resolve an ongoing threat, the police also have enough to make a conviction or favorable plea bargain reasonably likely. Stated another way, all of the evidence that led the police to ask Mr. Quarles about the location of the gun was also evidence admissible to show guilt at trial. Additionally, nontestimonial fruits of the investigation can be useful as well.

As an initial matter, the risk that a Mirandized suspect will stop talking is low. Indeed, one prominent study showed that “more than half of those who were given some warning incriminated themselves,” while less than one-third of unwarned suspects gave incriminating evidence. “About four out of five custodial suspects in the United States who are asked to submit to interrogation do so,” and the twenty percent who decline generally do so when first warned. Counterintuitively, warning suspects may “induce [them] to talk rather than to remain silent” because “[t]he warnings implicitly suggest to the suspect that the police are respectful of the suspect’s rights.” Importantly, it is likely that

55. See, e.g., United States v. Patane, 542 U.S. 630, 637 (2004) (stating “[t]he Miranda rule is not a code of police conduct, and police do not violate the Constitution (or even the Miranda rule, for that matter) by mere failures to warn”). Violations of a suspect’s rights can occur “only upon the admission of unwarned statements into evidence at trial.” Id. at 641.
56. Id. at 639.
57. Quarles, 467 U.S. at 687 (Marshall, J., with Brennan and Stevens, JJ., dissenting).
58. Id. at 660 (majority).
59. See Michael Wald et al., Interrogations in New Haven: The Impact of Miranda, 76 YALE L.J. 1519, 1565 (1967) (discussing the results of an empirical study where both warned suspects and unwarned suspects made incriminating statements). The concern that Miranda warnings would stifle investigations is as old as Miranda itself. See Miranda v. Arizona, 384 U.S. 436, 477 (1966) (discussing the potential impact Miranda warnings would have on interrogation procedures).
60. Wald et al., supra note 59, at 1565.
62. Id. at 558 (emphasis in original).
Miranda’s omnipresence means “the small number of suspects who are induced to remain silent by the administration of the warnings is getting even smaller while the number encouraged to talk is at least remaining stable.”63

Most importantly, the suppression of unwarned statements at trial does not interfere with law enforcement operations because the police do not violate the Constitution by engaging in un-Mirandized custodial interrogation. Miranda itself does not prevent “the police from asking questions to secure the public safety”; it merely holds that unwarned answers must “be presumed compelled and that they be excluded from evidence at trial.”64 Only the introduction of those statements at trial violates the Constitution.65 Justice Rehnquist ignores the fact that excluding the statement from a defendant’s trial does not disallow the police from relying on it to obtain information to solve a public emergency. The Self-Incrimination Clause is not violated “absent use of the compelled statements in a criminal case against the witness.”66 “[F]ailure to give a Miranda warning does not, without more, establish a completed violation when the unwarned interrogation ensues.”67 Even deliberate failures to warn a suspect create a constitutional violation only upon the admission of unwarned statements at trial, and at that point exclusion is a complete remedy.68 “Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial.”69

B. The Public Safety Exception Has Been Expanded

The Quarles exception originally allowed the police to ask a single question about a known threat to a suspect immediately after apprehending him.70 While lower courts infrequently encounter

63. Id. at 560.
65. There are, of course, separate ways for warned or unwarned interrogation to violate the Constitution, but those are not at issue here.
67. Id. at 789 (Kennedy, J., with Stevens, J., joining, and Ginsburg, J., joining as to Parts II and III, concurring in part and dissenting in part).
68. United States v. Patane, 542 U.S. 630, 641 (2004) (stating that “[o]ur cases also make clear the related point that a mere failure to give Miranda warnings does not, by itself, violate a suspect’s constitutional rights or even the Miranda rule”).
government attempts to invoke the exception,\textsuperscript{71} it has been expanded over time.

More recently, the United States Second Circuit Court of Appeals has provided a three-pronged test for use in evaluating \textit{Quarles}' applicability.\textsuperscript{72} First, questioning must relate to an objectively reasonable need to protect the police or public from an immediate danger.\textsuperscript{73} Second, the questions may not be investigatory or designed to elicit testimonial evidence.\textsuperscript{74} Third, such questioning is not to occur routinely and is allowable only when supported by the totality of the circumstances.\textsuperscript{75}

However, the same court has stated that the \textit{Quarles} Court's desire to narrow the public safety exception takes a back seat to the need to give police officers flexibility.\textsuperscript{76} The Ninth Circuit has applied the \textit{Quarles} exception to a suspected assault, allowing the introduction of a suspect's affirmative response to a police officer's inquiry into whether he had a gun in the car.\textsuperscript{77} The court did so to help the police officer "control a dangerous situation" where there may have been a gun present.\textsuperscript{78} The Seventh Circuit has applied the \textit{Quarles} exception to cases involving the sale of a kilogram of cocaine, reasoning that "drug dealers are known to arm themselves, particularly when making a sale, in order to protect themselves, their goods and the large quantities of cash often associated with such transactions."\textsuperscript{79} As a result, the investigating detective could properly inquire into whether a suspected drug dealer had a weapon that might pose a threat.\textsuperscript{80}

\textit{Quarles} has been applied to questions asked in the regular course of an arrest.\textsuperscript{81} For example, in the Ninth Circuit, a police officer asked a suspect whether "he had any drugs or needles on his person" prior to conducting a search.\textsuperscript{82} The suspect responded: "No, I don't use drugs, I sell them."\textsuperscript{83} Introduction of the suspect's incriminating statement was upheld.\textsuperscript{84} In another context, police officers executed a search warrant

\begin{itemize}
\item \textsuperscript{71} United States v. Reyes, 353 F.3d 148, 152 (2d Cir. 2003) (stating the court has "had few opportunities to address the public safety exception").
\item \textsuperscript{72} United States v. Estrada, 430 F.3d 606, 612 (2d Cir. 2005).
\item \textsuperscript{73} Id.
\item \textsuperscript{74} Id.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Reyes, 353 F.3d at 152.
\item \textsuperscript{77} United States v. Brady, 819 F.2d 884, 885 (9th Cir. 1987).
\item \textsuperscript{78} Id. at 888 (noting that if the suspect had a gun, there would be an immediate danger).
\item \textsuperscript{79} United States v. Edwards, 885 F.2d 377, 384 (7th Cir. 1989).
\item \textsuperscript{80} Id.
\item \textsuperscript{81} United States v. Carrillo, 16 F.3d 1046, 1049 (9th Cir. 1994).
\item \textsuperscript{82} Id.
\item \textsuperscript{83} Id. (internal quotations omitted).
\item \textsuperscript{84} Id. at 1050.
\end{itemize}
and handcuffed the lone resident of an apartment, leaving him on his bed.\textsuperscript{85} The Eighth Circuit sanctioned questioning of the suspect under \textit{Quarles}, reasoning that

\begin{quote}
[\text{a}l]though [the suspect's] hands were cuffed behind his back when the officers asked him if they needed to be aware of anything else, the officers could not have known if any armed individuals were present in the apartment or preparing to enter the apartment within a short period of time. Similarly, the officers could not have known whether other hazardous weapons were present in the apartment that could cause them harm if they happened upon them unexpectedly or mishandled them in some way.\textsuperscript{86}
\end{quote}

The expanded exception has turned nearly every criminal investigation into a public safety crisis. Under the current doctrine, the mere possibility of a weapon's presence is sufficient to justify a failure to Mirandize a suspect.\textsuperscript{87} The possible presence of a weapon need not even be particularized to the circumstances at hand; it is enough that the type of crime unfolding is one that, in the court's estimation, typically involves weapons.\textsuperscript{88} And the public safety exception allows the police to question a suspect after he has been read, and declined to waive, his \textit{Miranda} rights.\textsuperscript{89}

The judicial expansion of the public safety exception fails to fully capture the contours of its scope in other contexts. Not all suspects facing unwarned questions will have the government attempt to use their statements in court, and not all of those who do will seek to exclude them. The executive branch's interpretation of the public safety exception determines frequency of un-Mirandized interrogations.\textsuperscript{90}

A 2010 Federal Bureau of Investigation (FBI) memo shows that the agency viewed the public safety exception expansively.\textsuperscript{91} It advised its

\begin{footnotes}
\item[85.] United States v. Williams, 181 F.3d 945, 947–48 (8th Cir.1999).
\item[86.] \textit{Id}. at 953–54 (footnote omitted).
\item[87.] \textit{See, e.g.}, United States v. DeSantis, 870 F.2d 536, 539 (9th Cir.1989) (stating “[t]he fact that the inspectors had no reason to believe that DeSantis was armed and dangerous, as did the police in \textit{Quarles}, [was] of no consequence” because the search was reasonably necessary to ensure officer safety).
\item[88.] United States v. Lackey, 334 F.3d 1224, 1228 (10th Cir. 2003); \textit{DeSantis}, 870 F.2d at 539.
\item[89.] \textit{DeSantis}, 870 F.2d at 541 (noting that “[t]he same considerations that allow the police to dispense with providing \textit{Miranda} warnings in a public safety situation also would permit them to dispense with the prophylactic safeguard that forbids initiating further questioning of an accused who requests counsel”).
\end{footnotes}
agents that “the circumstances surrounding an arrest of an operational terrorist may warrant significantly more extensive public safety interrogation without *Miranda* warnings than would be permissible in an ordinary criminal case.” 92 It further stated that “agents should ask any and all questions that are reasonably prompted by an immediate concern for the safety of the public or the arresting agents without advising the arrestee of his *Miranda* rights.” 93 The FBI also decided that

[t]here may be exceptional cases in which, although all relevant public safety questions have been asked, agents nonetheless conclude that continued unwarned interrogation is necessary to collect valuable and timely intelligence not related to any immediate threat, and that the government’s interest in obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation. 94

A United States Justice Department spokesman claimed the memo and these procedures “clarified] existing flexibility in the rule.” 95

An example of the application of these procedures is seen in the investigation into the 2013 Boston Marathon bombing. Dzhokhar Tsarnaev, the surviving bomber, was questioned for over thirty-six hours approximately twenty hours after arriving at Beth Israel Deaconess Medical Center. 96 In that case, the “federal authorities invoked a public safety exemption . . . and questioned Dzhokhar Tsarnaev . . . without telling him that he had the right to remain silent.” 97 While “[l]ying grievously wounded in a hospital bed,” Mr. Tsarnaev made an admission to “specially trained [FBI] agents who had been waiting outside his hospital room for him to regain consciousness” immediately after waking up in the hospital. 98

92. Id.
93. Id.
94. Id (footnote omitted).
95. Savage, supra note 90.
C. The Expansion Is Unreasonable

The public safety exception’s expansion is bad law. *Quarles* represented a principled, limited departure from an important constitutional rule.\(^99\) *Quarles* involved limited questioning by law enforcement in response to a known threat that occurred immediately after law enforcement arrived.\(^100\)

By allowing the public safety exception to apply when there is a possibility of a threat, the judiciary has caused the exception to nearly swallow the rule. Almost every police investigation involves the possibility of a weapon or presence of an unknown confederate.\(^101\) This expanded version of *Quarles* allows the police to question suspects who are already in custody, may or may not possess a weapon, and unlikely pose an immediate risk to anybody.\(^102\) Applying *Quarles* to circumstances where there is a potential threat means applying it to every interaction between the police and civilians. Because many street crimes involve a weapon, does *Quarles* apply whenever the police are called to respond to reports of such crimes? Nearly every police call involves a conceivable threat to someone’s safety, either because of the underlying conduct that gave rise to the call for help or because a suspect might try to avoid capture.

Judicially sanctioned un-Mirandized questioning is also an unreasonable expansion of the exception. The *Quarles* exception’s exclusion of investigatory or testimonial questioning\(^103\) should be formalized. Rather than approving broad questions that ask suspects whether they have any information useful to the police, courts should require that law enforcement ask specific questions. Broad questions suggest the police are searching for general information rather than responding to an actual emergency. Further, minutes are precious in the chaos of an emergency, and open-ended questions\(^104\) are generally

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100. Id. at 652.
101. Courts even accept the threat of an unknown coconspirator to justify questioning after the police have swept the premises and found nothing. See, e.g., United States v. Williams, 181 F.3d 945, 953–54 (8th Cir. 1999) (holding the police officers acted reasonably in conducting the search of the suspect’s home following the detention of the suspect).
102. See supra text accompanying notes 70–89 (discussing the consequences of expanding the public safety exception).
103. See United States v. Estrada, 430 F.3d 606, 612 (2d Cir. 2005) (clarifying that the public safety exception does not allow questions that are “investigatory in nature or designed solely to elicit testimonial evidence”).
104. Here, I use “open-ended question” to mean a general inquiry such as “is there anything else we should know about?” I consider this line of questioning distinguishable from a situation where
insufficient to allow for a rapid response. The distinction between investigatory questions and an emergency response is elusive, but critical. The police make an end-run around that distinction when they ask broad questions (which appear responsive to emergency situations) that invite specific, testimonial answers that would be useful to a prosecutor, but not an investigator.

The public safety exception should, as a general rule, apply only to questioning that occurs immediately after a suspect is found in a dangerous situation. Questioning that occurs far later is likely unrelated to an ongoing threat; where serious public threats exist, the police do not wait around before questioning a suspect. The passage of time without further incident strongly suggests that no emergency poses an immediate threat to public safety. Where courts engage only in highly deferential review of law enforcement’s actions, police power is enhanced.105 If the police have the functional authority to decide when the public safety exception can be invoked, and what course of conduct they can take in response, they have nearly unchecked authority to ignore key constitutional rights. This structural problem needs a self-limiting mechanism in order to prevent law enforcement from expanding the exception.

The Quarles exception is a prudential deviation from otherwise-settled law. It is not a constitutional requirement, and therefore its ineffectiveness and underlying tension with the Constitution make rejecting it reasonable.

IV. THE PUBLIC SAFETY EXCEPTION SHOULD NOT EXIST AT ALL

The public safety exception does not meaningfully aid law enforcement investigations. The police are free to question any suspect without providing Miranda warnings if they need to do so to prevent an imminent terrorist attack, to determine whether there is an unsecured weapon in the vicinity, or for no reason at all.106 A Fifth Amendment violation occurs not upon unwarned police questioning, but upon the

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105. See Wayne A. Logan, Street Legal: The Court Affords Police Constitutional Carte Blanche, 77 IND. L.J. 419, 422, 436 (2002) (stating “as we enter the twenty-first century, American police enjoy unprecedented power to arrest, and hence search, individuals for any and all violations”).

106. United States v. Williams, 181 F.3d 945, 953–54 (8th Cir. 1999) (concluding that officers were permitted to ask about hazardous weapons); Seelye et al., supra note 98 (discussing the questioning of the Boston bombing suspect to determine if more attacks were planned).
introduction of a defendant’s responses at trial.\textsuperscript{107} The proper question to ask is whether the police should be able to use the information they obtain to secure the public’s safety in an emergency situation against a suspect at trial. They should not be allowed to do so.

Suspects generally have a right to decline to speak with the police or to speak only through their counsel.\textsuperscript{108} Waivers of these rights must be knowing and voluntary.\textsuperscript{109} It is no response to say that society should encourage suspects to talk to the police to help solve crimes. Clearly that is true in the abstract. But our Constitution protects people from forced self-incrimination.\textsuperscript{110} That constitutional mandate applies with particular force to protect people from the “cruel trilemma of self-accusation, perjury or contempt.”\textsuperscript{111} But the trilemma is particularly acute for guilty suspects because innocent suspects do not face similar pressures regarding the prospect of self-incrimination or perjury.\textsuperscript{112} That is not to say that innocent suspects do not also value their right to remain silent; for them, this right offers protection from potential misconduct at the hands of police officers who are incredulous with the suspects’ denial of wrongdoing. Further, innocent defendants may find that the story they tell police is likely to change, as they attempt to determine what the police want to hear and then provide an acceptable story.\textsuperscript{113} But the cruel trilemma is especially difficult for guilty suspects who cannot rely on the truth to set them free. What is more, the exclusion of statements made by a defendant in the heat of the moment is unlikely to impede investigations or prevent the government from obtaining convictions.\textsuperscript{114} Self-incriminating statements made at the crime scene are not needed to obtain convictions.\textsuperscript{115}

\begin{itemize}
  \item \textsuperscript{107} United States v. Patane, 542 U.S. 630, 641 (2004).
  \item \textsuperscript{108} Miranda v. Arizona, 384 U.S. 436, 467–69 (1966).
  \item \textsuperscript{109} North Carolina v. Butler, 441 U.S. 370, 373 (1979) (stating “[t]he question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case”).
  \item \textsuperscript{110} U.S. CONST. amend. V (providing that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself”).
  \item \textsuperscript{112} Daniel J. Seidmann & Alex Stein, The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege, 114 HARV. L. REV. 430, 452 (2000) (describing the desire for innocent suspects to speak out, while guilty suspects generally wish to remain silent). The Fifth Amendment obviously protects the innocent—especially those who have little corroborating evidence of their own. Id. at 452–53.
  \item \textsuperscript{113} Id. at 443.
  \item \textsuperscript{114} Daniel Brian Yeager, Note, The Public Safety Exception to Miranda Careening Through the Lower Courts, 40 U. FLA. L. REV. 989, 1034 (1988).
  \item \textsuperscript{115} Id. (stating “[t]he Quarles [C]ourt failed to consider whether the prosecution really needs self incriminating statements to preserve convictions” (footnote omitted)).
\end{itemize}
The tension Justice Rehnquist acknowledged in Quarles reflects an underlying assumption that suspects will be less willing to talk when informed of their rights.\textsuperscript{116} This assumption is appealing but overstated.\textsuperscript{117} When the government attempts to elicit information pursuant to the public safety exception, society’s need for such information is at its apex. If a suspect can help end a threat to public safety by talking to police, the law should facilitate the flow of information to law enforcement. Rendering such information inadmissible incentivizes suspect cooperation.\textsuperscript{118}

The costs of exclusion are easy to overstate. Exclusion matters most at trials, which are rare.\textsuperscript{119} Further, the exclusion of important evidence will not make defendants more likely to go to trial, since most decisions to plead guilty are motivated by a desire to avoid the most serious offense charged, to get credit for cooperation, and to avoid the expense and potential embarrassment that accompanies criminal litigation.\textsuperscript{120} While the admissibility of unwarned statements might in some cases be a factor in a defendant’s decision to plead guilty, it is unlikely the most important factor. The power imbalance between the prosecution and the defendant largely comes from the fact that the prosecutor “can effectively dictate the sentence by how he publicly describes the offense,” meaning, “it is the prosecutor, not the judge, who effectively exercises the sentencing power” which becomes “cloaked as a charging decision.”\textsuperscript{121}

The admissibility of evidence may be a factor both in a defendant’s decision on whether to plead guilty and the prosecutor’s decision on what plea bargain to offer, but because plea bargains tend to happen early in the adversarial process, neither party truly knows what evidence will be admitted at trial. But the prospect of a reverse \textit{Miranda} warning will have a beneficial effect on the plea bargaining process, which has caused, by an extremely conservative estimate, over twenty thousand false guilty pleas.\textsuperscript{122}

\textsuperscript{117} Duke, \textit{supra} note 61, at 557–58.
\textsuperscript{118} The police could, if they chose to, seriously strengthen these incentives by affirmatively notifying suspects that statements made at that time would not be introduced at trial and would only be used to resolve the existing crisis. Although suspects might hesitate to believe the police if this type of reverse \textit{Miranda} warning was offered, the police could improve their perceived integrity by not engaging in deception elsewhere.
\textsuperscript{120} \textit{Id.} at 2–3.
\textsuperscript{121} Rakoff, \textit{supra} note 5.
\textsuperscript{122} \textit{Id.}
To ensure public safety in known dangerous situations, the police should instead be able to immediately engage suspects by asking a limited number of questions about the crisis without obtaining a Miranda waiver. A suspect’s responses to such questions should not be admissible as exculpatory evidence.\(^{123}\)

Abolishing the public safety exception incentivizes law enforcement to limit un-Mirandized questioning by creating an unambiguous cost to such interrogations: exclusion from trial. Where the police know their questions will not yield admissible evidence, they will engage in unwarned questioning only when truly necessary.\(^{124}\) This outcome is good for society as well. Society wants (or ought to want) law enforcement to prevent harm when they are well-positioned to stop illegal activity before it happens, and also wants to preserve constitutional rights and the prophylaxis that protects them.

Why abolish the exception rather than limit it so that its application strays less from the circumstances presented in \textit{Quarles}? Examination of post-\textit{Quarles} doctrine shows the futility of efforts to limit the exception. The nature of the exception invites expansion because doctrinal application is inherently difficult and involves judicial judgment calls.\(^{125}\) Where courts must decide whether a particular set of facts involves a threat to public safety, some courts will inevitably find increasingly more facts that present a legitimate threat. Those cases, in turn, will invite courts not only to find a legitimate threat on similar facts but also to reason that the presence of prior expansions in the law justifies further

\(^{123}\) For purposes of this Article, I do not decide whether introduction of those statements would be appropriate for impeachment purposes. It is likely that the Court’s rationale for sanctioning the introduction of otherwise inadmissible statements for impeachment purposes would apply here as well. Because in such circumstances the statements are introduced not for their truth (and are thus not truly self-incriminating), but for their propensity to show the speaker’s untrustworthiness, this practice is slightly less objectionable. However, allowing the government to use un-Mirandized statements for impeachment would seem to incentivize such conduct. In \textit{Harris}, the Court stated that the privilege against self-incrimination “cannot be construed to include the right to commit perjury” and introduction of un-Mirandized statements to impeach the defendant “did no more than utilize the traditional truth-testing devices of the adversary process.” \textit{Harris v. New York}, 401 U.S. 222, 225 (1971). But in doing so, the government took advantage of information that should not have been in its possession.

\(^{124}\) See generally Arnold H. Loewy, \textit{Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence}, 87 Mich. L. Rev. 907, 911 (1989) (providing that “a police officer who knows that unconstitutionally obtained evidence will be admissible would have an incentive [to utilize certain interrogation techniques] that is absent in an officer who knows that such evidence is inadmissible”).

\(^{125}\) See generally Joanna Wright, \textit{Applying Miranda’s Public Safety Exception to Dzhokhar Tsarnaev: Restricting Criminal Procedure Rights by Expanding Judicial Exceptions}, 113 Colum. L. Rev. Sidebar 136 (2013) (discussing the expansion of the public safety exception to \textit{Miranda} warnings, and the likelihood that this expansion would be applied to the accused suspect in the 2013 Boston Marathon bombings, thereby limiting his rights).
expansions. Where the court is in for a penny, it is in for a pound. Commitment to a limited exception requires commitment to a more expansive exception.

Abolishing the public safety exception would not prevent law enforcement from questioning suspects in emergencies, but will limit the acceptable uses of those statements. The police have no reason to cease questioning just because the suspect’s responses are inadmissible.\(^{126}\) In the search and seizure context, the prospect of exclusion does little to limit police conduct, even when the police’s only incentive is to uncover evidence for the prosecution.\(^{127}\)

What would law enforcement’s response to an emergency situation look like post-\textit{Quarles}? Ideally, the structure of such interactions would maximize the likelihood that the questions lead to crisis-ending information. To accomplish this, police could offer a reverse \textit{Miranda} warning that informed the suspect that because the police were responding to a public emergency, any information the suspect provided would be inadmissible in court. Where the \textit{Miranda} warning incentivizes silence (which impedes ongoing investigations), the reverse \textit{Miranda} warning incentivizes cooperation with law enforcement.

Clearly there is no basis, constitutional or otherwise, to require a reverse \textit{Miranda} warning. But law enforcement agencies would be well-advised to utilize them, because such warnings would facilitate more effective investigations. For these warnings to be effective, however, the police would have to overcome a perception, present in the minds of at least some Americans, that interrogators will say anything in pursuit of a confession. In fact, only forty-eight percent of Americans view the honesty and ethical standards of the police as “very high” or “high,” and only twenty-three percent of nonwhites do.\(^{128}\) The police can, and sometimes do, lie or exaggerate to encourage suspect cooperation—though \textit{Miranda} does not allow the police to use trickery to obtain a waiver.\(^{129}\) But once a waiver is obtained, the police can make appeals to

\begin{subnotes}
\item[126] See Loewy, supra note 124, at 921–22 (arguing police can gain valuable information such as corroboration of the victim’s identity or identification of codefendants that may be useful in furthering the police investigation).
\item[127] Id. at 911–12.
\item[129] \textit{Miranda v. Arizona}, 384 U.S. 436, 476 (1966) (“[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.”).
\end{subnotes}
a defendant’s hopes or fears to encourage discussion. There are surely at least some individuals, likely racial minorities, who would view a reverse Miranda warning with skepticism. Law enforcement can most effectively combat this problem by altering their practices to make them less deceptive, so that the public—and, importantly, each suspect—is more likely to view the quasi-immunity of a reverse Miranda warning as a legitimate offer.

Opponents will likely argue that it would be unreasonable to upend traditional law enforcement practices in this manner. A little trickery (after obtaining a Miranda waiver) is essential to getting suspects to talk, they say. And maybe it is. But if these changes are unreasonable in light of their costs, then the benefits of having suspects make unwarned statements to the police must be quite small. If the government really obtains valuable crisis-ending information from such questioning, surely its benefits outweigh the marginal costs of reducing police attempts to mislead suspects after they have waived their Miranda rights.

But what happens after the emergency is resolved and the police make the transition from emergency response mode to criminal investigation mode? As always, the police must read the suspect his or her Miranda rights and obtain a waiver before beginning an interrogation. By brightening the lines between the reverse Miranda warning interrogation and the Miranda interrogation, the police diminish the chance that a suspect fails to appreciate the significance of his or her decision to waive Miranda and speak to law enforcement. This abrupt shift will clarify to the suspect that his or her statements will be treated differently from the initial part of the interrogation.

The reverse Miranda warning will deter police misconduct in other ways. For example, the police often give Miranda warnings and then

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130. In a 2010 opinion, the Court ruled that a suspect’s near-total silence for two hours and forty-five minutes was not an invocation of the right to silence. Berghuis v. Thompkins, 560 U.S. 370, 376, 386 (2010). The Court also described the continued course of police questioning, in which the suspect was asked questions such as “[d]o you believe in God?” and “[d]o you pray to God?” and “[d]o you pray to God to forgive you for shooting that boy down?” as dishonoring the suspect’s right to remain silent. Id. (internal quotations omitted).


132. See Duke, supra note 61, at 560 (describing how “[o]nce the police obtain a waiver, the trickery and psychological coercion that the Court noted in Miranda, together with any new interrogating tricks learned since then, can continue as before” (footnote omitted)).

133. If the benefits are so small, a departure from Miranda at all seems unreasonable.

134. Here, I assume that the police are engaging in a custodial interrogation.
proceed to question a suspect without first obtaining an unambiguous waiver.\textsuperscript{135} The presence of a reverse \textit{Miranda} waiver will require law enforcement to obtain from the suspect a clearer renunciation of his or her rights to show that the suspect understood the moment of transitioning to \textit{Miranda} interrogation.\textsuperscript{136}

The reverse \textit{Miranda} warning will force law enforcement officers to determine when to transition from the inadmissible to admissible interrogation. As a general guide, the police should only decide to make that transition once the specific emergency that prompted their questioning has been resolved. This might be when the missing gun is found or the kidnapped child is recovered. Though there might be temptation to engage in more robust questioning prior to the crisis’ resolution, the inadmissibility of the suspect’s responses ought to deter such additional questioning.

The decision about when to transition from one form of questioning to another is significant, and perhaps one that gives much discretion to law enforcement. It is also perhaps the sort of decision that should not generally lie in the hands of the police. But here there is little alternative. Most public emergencies evolve around situations involving a missing firearm or an at-large co-conspirator and will be resolved relatively quickly—without sufficient time to engage a magistrate. Protracting the process by requiring judicial involvement serves nobody’s interests.\textsuperscript{137}

And because the structure of the reverse \textit{Miranda} warning operates in part to protect suspects, the fact that the police may have some discretion should not mean that the entire process is abandoned. What is more, even though the police determine \textit{when} to transition from one type of interrogation to the other, the suspect remains adequately informed of his or her rights at all times. There will not be a situation where the suspect reasonably believes he or she is still in the stage of “inadmissible” interrogation but the police believe otherwise.

The logic of the reverse \textit{Miranda} warning is clear. The government regularly seeks information for use in an investigation and commits itself

\textsuperscript{135} See \textit{Davis v. United States}, 512 U.S. 452, 461 (1994) (holding that the Fifth Amendment right to counsel was not violated where the defendant made an ambiguous reference to counsel but questioning continued without an attorney); \textit{Michigan v. Mosley}, 423 U.S. 96, 106–07 (1975) (holding that a defendant’s right to silence was respected where he invoked his right with respect to one crime but was questioned two hours later about a different crime).

\textsuperscript{136} See \textit{Berghuis v. Thompkins}, 560 U.S. 370, 388 (2010) (discussing the importance of establishing an express or implied waiver during the interrogation before admitting a suspect’s responses into evidence at trial).

\textsuperscript{137} See \textit{Duke}, supra note 61, at 562 (describing how \textit{Miranda} warnings have rendered judicial decisions to grant or deny motions to suppress confessions much easier and quicker to make).
to not using such information in a prosecution.\textsuperscript{138} Indeed, the government sometimes grants use immunity for the purpose of defeating a witness’ invocation of his or her Fifth Amendment rights.\textsuperscript{139} If the government can commit itself to not using a witness’ statements at trial when investigating white-collar crime or examining the distribution of performance-enhancing drugs to Major League Baseball players,\textsuperscript{140} it can surely do so to ensure the public safety.

A witness’ information can be vitally important in the middle of a complex investigation,\textsuperscript{141} and witnesses regularly decline to testify without immunity.\textsuperscript{142} A witness’ cooperation is even more important when there is insufficient time to develop a complex investigation and the


\textsuperscript{140} Eder, supra note 139.


stakes are higher because the government risks not just a failed prosecution but an immediate threat to public safety. Government immunity, like the quasi-immunity that would exist under the reverse *Miranda* warning, is fundamentally about obtaining essential testimony without violating the witness’ constitutional rights. Prosecutors compel witness testimony when the prosecutors believe it is in their interest. In this sense, the reverse *Miranda* warning functions more like use immunity than transactional immunity because it merely protects the speaker from the in-court consequences of testifying.

The very existence of use immunity demonstrates the advantages of the reverse *Miranda* warning. The contrast between use immunity and transactional immunity indicates that the government can disavow reliance on a defendant’s particular statements but not forever abandon hope of prosecution. Indeed, a series of federal immunity statutes came into being after a number of decisions where the Court held witnesses could not be compelled to give potentially incriminating testimony unless the testimony would not be used against the witness.

### A. Allowing a Principled Exception

In the alternative, I argue that absent a reversal of *Quarles*, the public safety exception should be narrowly construed. It should only apply where there is a known threat to public safety, the police ask limited questions that prioritize resolving the dangerous situation (and not investigating the suspect’s involvement), and the interrogation happens immediately upon police arrival.

145. See Charles J. Walsh & Steven R. Rowland, *Immunized Testimony and the Inevitable Discovery Doctrine: An Appropriate Transplant of the Exclusionary Rule or an Excuse for a Broken Promise?*, 23 SETON HALL L. REV. 967, 977 (1993) (describing how “[t]he witness would no longer receive the windfall of transactional immunity, but instead would be protected from the consequences of his testimony, thereby leaving him in the same position as if he had remained silent”).
146. Russell Dean Covey, *Beating the Prisoner at Prisoner’s Dilemma: The Evidentiary Value of a Witness’s Refusal to Testify*, 47 AM. U. L. REV. 105, 108 n.8 (1997) (“Use immunity differs from transactional immunity in that a defendant granted transactional immunity can never be prosecuted for the events about which he or she testifies, whereas a defendant testifying under use immunity remains eligible for prosecution as long as the evidence is gathered from separate sources. The scope of immunity under the use immunity statute is coterminous with the scope of the Fifth Amendment privilege.” (citation omitted)).
The public safety exception should apply only where there is a known threat to public safety, not where there is simply the possibility of a threat. A known threat to the public safety exists where the police know there is a missing gun in a public place, an armed criminal accomplice who is still at large, or some other presently dangerous situation. The arrest of a single drug dealer without anything more does not indicate a presently dangerous situation because there is no known threat to public safety, and the potential existence of an armed accomplice is purely speculative. On the other hand, the arrest of a prospective buyer of illegal arms does indicate a presently dangerous situation, since the prospective seller is known to have weapons on hand (for the transaction) and is likely armed and willing to shoot to kill.

Quarles-sanctioned police questioning should be limited in duration and in substance. When the police ask broad questions or attempt to determine the suspect’s involvement in the alleged crime, they run the risk of undermining *Miranda* values. Lengthy questioning that meanders through a variety of topics suggests that it is not aimed at resolving a legal emergency. The contours of what constitutes an acceptable duration and scope of questioning will inevitably depend on the emergency being investigated: attempting to find a missing gun in rural Missouri, trying to locate a kidnapped child in downtown Nashville, and disarming a bomb in midtown Manhattan will all require different interrogation techniques. *Quarles* should not deny the police the benefits of their experience and reasoned judgment. But in all circumstances, the questioning should not take longer, or cover more topics, than reasonably necessary.

Finally, the questioning should occur immediately after the police arrive on scene and determine that an emergency exists. This too is a fact-dependent standard: in some situations, the police may want to call in a specialized task force, clear an area of civilians, or provide a suspect with basic medical treatment to ensure his or her survival. But an interrogation should occur at the first reasonable moment and not allow the police to

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148. *See supra* text accompanying notes 70–98 (describing the expansion of the public safety exception to *Miranda*).


wait around for the suspect to be particularly vulnerable. The public safety exception is premised on the notion that there is an immediate crisis; the police undermine that assumption when they fail to immediately take action.\textsuperscript{151} Failing to immediately respond suggests that the police are actually concerned with interrogating the suspect and not public safety.

These three limitations reflect an underlying skepticism of the public safety exception. The exception, which surely has a place in police practices, should not swallow the rule laid out in \textit{Miranda}.

\textbf{B. Once Bitten, Twice Shy?}

The suspect who cooperates with police after receiving a reverse \textit{Miranda} warning might decide that he has helped the police enough, and not make a Mirandized statement to the police. This may be particularly true after he then obtains an actual \textit{Miranda} warning and realizes that his statements might be read against him at trial. What happens when the Mirandized suspect stops talking?

This concern is overstated. The suspect-friendly substance of a reverse \textit{Miranda} warning, followed by a \textit{Miranda} warning, very much suggests “to the suspect that the police are respectful of the suspect’s rights.”\textsuperscript{152} Additionally, nearly all suspects are aware of their \textit{Miranda} rights prior to interrogation, and it is not clear that the reverse \textit{Miranda} warning would change their perception of what it would mean to speak to law enforcement.\textsuperscript{153} Further, a jury will likely believe a suspect who receives both warnings and makes statements in both instances has not been coerced, meaning that “the suspect’s incriminating statements acquire more cogency.”\textsuperscript{154} Indeed, concerns that utilizing two warnings will cause suspects to immediately clam up and not respond to the reverse \textit{Miranda} warning are overstated. But of course, this might play out differently in practice. Perhaps the reverse \textit{Miranda} warning will cause suspects to truly ponder the future consequences of their actions and choose to render no assistance to the government, thereby impeding efforts to resolve the public emergency and the future prosecution. While experience with \textit{Miranda} suggests that this is unlikely to happen, if this

\begin{flushleft}\textsuperscript{151}. See New York v. Quarles, 467 U.S. 649, 668–70 (1984) (O’Connor, J., concurring in the judgment in part and dissenting in part) (describing the immediate threat to public safety that triggered this narrow exception to the \textit{Miranda} rule). \\
\textsuperscript{152}. Duke, supra note 61, at 558. \\
\textsuperscript{153}. Id. at 555, 557–58. \\
\textsuperscript{154}. Id. at 561.\end{flushleft}
were to happen it might be grounds for abandoning the reverse *Miranda* warning.

Additionally, the confession is not the government’s only evidence against the suspect. For example, in *Quarles* the victim described her rapist to the police as

a black male, approximately six feet tall, who was wearing a black jacket with the name “Big Ben” printed in yellow letters on the back. She told the officers that the man had just entered an A & P supermarket located nearby and that the man was carrying a gun.155

The officers then drove to the supermarket and found a suspect matching the victim’s description.156 Exclusion of the suspect’s gun and statement about the gun would not impede the rape prosecution, and there could be little question about the suspect’s identity (beyond general concerns about the reliability of eyewitness statements). There is also little reason to doubt the persuasiveness of the evidence on the gun possession charge. Not all cases, to be sure, will have such sufficient evidence. But combined with the likelihood that the suspect will talk with law enforcement, the chances of a subsequent *Miranda* warning impeding the investigation are slim.

Why, then, do police departments not already utilize this practice (at least with various forms of un-Mirandized interrogations)? The most likely answer is that law enforcement is reluctant to engage in conduct that *might* reduce a suspect’s willingness to participate in an interrogation.157 And even though warnings do not appear likely to reduce participation,158 this reality is counterintuitive.159

V. CONCLUSION

Judicially created tools designed to allow law enforcement officers to ensure the safety of the public are essential. Without the ability to

156. Id. at 652.
158. Id. at 555–56.
159. Additionally, the Court’s decision in *Missouri v. Seibert*, 542 U.S. 600 (2004) might make law enforcement skittish about this tactic, even though the case involves a different sort of police conduct. *Seibert* addressed a similar but distinguishable set of circumstances: the police, as a matter of course, conducted an un-Mirandized interrogation and obtained a confession, then Mirandized the suspect and repeated the process. Id. at 604–06. Perhaps the Court would have approved of law enforcement’s actions had there been some reason for their initial un-Mirandized questioning or if they had not only later provided a *Miranda* warning but also explicitly stated that the prior confession was inadmissible.
investigate disturbances and follow up on tips, the police would find the job nearly impossible to perform. But the tension between effective police work and a suspect’s constitutional rights need not be so problematic. By more fully acknowledging the fact that constitutional violations occur not through un-Mirandized questioning but by the introduction of a suspect’s response at trial, courts can encourage effective community policing and the protection of a suspect’s rights.
FROM SIMPLE STATEMENTS TO HEARTBREAKING PHOTOGRAPHS AND VIDEOS: AN INTERDISCIPLINARY EXAMINATION OF VICTIM IMPACT EVIDENCE IN CRIMINAL CASES

Mitchell J. Frank*

I. INTRODUCTION

The robbery victim still had nightmares from the defendant having pointed his gun at her face as he demanded that the victim turn over her purse, her watch, and her diamond engagement ring. She had no choice but to comply. Immediately following the attack, she started having tremors, night sweats, nightmares, and lost the ability to concentrate at work. Counseling did not help; neither did the medication her doctor prescribed for her. Notwithstanding the trauma the robbery victim had experienced, she was determined, if given the opportunity, to help put her attacker in prison. That opportunity came at trial, and she was more than equal to the task. Her testimony was firm and clear. Cross-examination proved fruitless. The jury deliberated for only eighty-five minutes. Her attacker was convicted.

The robbery victim then turned to the second opportunity she was offered—to provide the court and the defendant with a victim impact statement, which the victim could choose to provide live or in writing. To help take back the power that the defendant also robbed her of that day, and to explain to the court as persuasively as possible how much damage he had done to her, she decided upon the former. The victim both intended and expected that her statement would result in a more severe sentence for the defendant than the court would otherwise give.

The above scenario may be hypothetical, albeit almost certainly representative of the feelings of numerous victims every year, but its “victim impact statement” (VIS) is decidedly not. It is today, instead, a universally established part of both the state and federal American criminal judicial systems, and a key part of “victim impact evidence”
In its origin, however, it is both quite recent and humble, starting only in 1976, and not with legislation or a court decision but with one man—James Rowland, the Chief Probation Officer in Fresno County, California—and his experiences with victims of crime:

[M]y career started as a [d]eputy [s]heriff for San Bernardino County and for some reason after a year, I ended up in the detective division and was involved in several cases [involving] . . . domestic violence, rape, murder, [and] child abuse . . . . I was amazed to learn . . . , and I didn't have the term immediately, the impact that crime had on so many people, serious impact. I saw a woman killed by a drunk driver, a head-on collision. The child came through the windshield[,] and as I ran up to the door, she was taking her last breath. And I was very young, fresh out of college and just had a lot of influence on me. And I reflected. I said, “Neither my department nor my four years of college ever dealt with victim issues.” And I didn't understand that [because] it was so devastating at times. And the term “impact” was not the original term that I had, but my dad was a builder and he was frequently complaining about environmental impact. And years later I guess I reflected on that and when I was, at that time with being a

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1. Although universal in their adoption, VISs are not universal in application. See generally Nat’l Ctr. for Victims of Crime, Victim Impact Statements, https://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victim-impact-statements (last visited Mar. 21, 2016) (discussing the types of cases in which VISs may be used, the individuals who may give such a statement, the form in which it may be presented, and the defendants’ rights to challenge the information contained within the statement).

2. Ellen K. Alexander & Janice Harris Lord, Impact Statements: A Victim’s Right to Speak, A Nation’s Responsibility to Listen, NAT'L CRIM. JUST. REFERENCE SERVICE (July 15, 1994), https://www.ncjrs.gov/ovc_archives/reports/impact/welcome.html. This Article will focus on how VISs and VIE are working in practice; the evolution of these statements, or the victim’s rights movement, generally is not within the purview of this Article. For sources on these subjects, see, e.g., Paul G. Cassell, In Defense of Victim Impact Statements, 6 OHIO ST. J. CRIM. L. 611 (2009); Vik Kanwar, Capital Punishment as “Closure”: The Limits of a Victim-Centered Jurisprudence, 27 N.Y.U. REV. L. & SOC. CHANGE 215 (2002); Alice Koskela, Victim’s Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System, 34 IDAHO L. REV. 157 (1997).
[d]eputy [s]heriff[,] I said, “[i]f I’m ever in a position to focus more on what crime really does to people[,] . . . I’ll do something about it.”

Years later I ended up as a [p]robation [o]fficer in Fresno[,] and the term “victim impact statement” was born there, going back to my early years as a law enforcement officer and my dad complaining about an environmental impact statement.

I met a [judge] when I went to Fresno as chief probation officer, Judge Kenneth Andrene[.] [W]e became very close[,] and he was talking about how the victim is neglected and the justice system is doing nothing for victims. So the victim impact statement discussion came a little earlier, but basically most of the discussion in Fresno was about both victim impact and probation-based victim services to assist them. We were able to hire some staff that worked exclusively with victims. And the victim impact statement was simply . . . two or three paragraphs in the pre-sentence report. That’s before the victim actually came to court and could testify. So it was in our pre-sentence report. ³

From this single pre-sentence report in 1976, VISs and VIE are today authorized, and in many cases constitutionally so, in all fifty states. ⁴ In federal cases, Federal Rule of Criminal Procedure 32 requires that:

- All pre-sentence reports contain “information that assesses any financial, social, psychological, and medical impact on any victim”; ⁵ and
- “Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.” ⁶

Although victim impact statements may be universally authorized, the more important questions are whether and how well they are working in actual practice. This Article will analyze two types of evidence to answer these questions regarding victim impact statements: (1) empirical studies from the United States and other countries that use VISs; and (2) the survey performed by the Author, which contains a number of

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⁴. See Nat’l Ctr. for Victims of Crime, supra note 1.
suggestions—from judges who preside over court proceedings and trial lawyers who use victim impact statements—that if implemented, would improve the VISs process and enable those who use or defend against VIS to do so more effectively.

VISs—oral or written—are the simplest, most cost-effective (they are free), and easily available types of VIE. For these reasons, they almost certainly are the most often used forms of VIE. Additionally, because they are not “visual” (in the manner of cinematic movies) or “musical” (e.g., scored for maximum emotional impact), they lack characteristics that would easily incite potent emotional reactions capable of creating unfair prejudice to the defendant.

Such oral or written VISs are not the only forms, however. At the other end of the spectrum of VIE lie professionally produced and edited, narrated, and musically scored videos, and types of photographs that by their very nature are designed to incite potent emotional reactions. Part IV of this Article will analyze selected cases in which courts have attempted to define the limits of VISs and which illustrate the dangers of evidence that are, at least, highly emotionally charged and, at most, inflammatory, carrying with them a great potential for subjecting defendants to substantial unfair prejudice. In both Parts I and IV, this Article will analyze how a vacuum created by the United States Supreme Court has left it to lower courts to rein in the use of this particularly potent form of VIE.

Therefore, this Article will analyze how VIE is actually working in its simplest and most common, as well as its most sophisticated and prejudicial, forms. The Author hopes that trial lawyers and judges will benefit from both.

In Part II, this Article will examine empirical evidence of VISs, largely focusing on non-capital cases. VISs in capital cases are fundamentally different because the statements conveying victim information are not directed to the court post-plea or post-conviction. Rather, the statements are directed to jurors in the sentencing phase of the trial. Thus, the operation, as well as the impact of these statements in these two types of cases, is fundamentally different.7

7. Compare statistical evidence that statements have a lack of effect on sentencing severity in general, infra Part II(A), with findings that victim impact statements cause a greater likelihood that jurors will recommend the death penalty in capital cases. See, e.g., Jeremy A. Blumenthal, Affective Forecasting and Capital Sentencing: Reducing the Effect of Victim Impact Statements, 46 AM. CRIM. L. REV. 107, 116, 119 (2009) (finding that study participants, acting as mock jurors who heard VISs, were more likely to hand the defendant a death penalty sentence than mock jurors who had not heard VISs, whereas mock jurors who heard both VISs and expert testimony on affective forecasting were less likely to give the defendant a death penalty); Jerome Deise & Raymond Paternoster, More Than
Capital case jurisprudence on VIE, however, does warrant discussion at this point. One decision in particular from the United States Supreme Court has created a legal vacuum on an issue critical to criminal defendants nationwide in both non-capital and capital cases: what will either be permitted or barred in the use of such evidence. For this reason, Part IV will examine both types of cases.

In 1991, in Payne v. Tennessee, the Court abandoned its recent decisions in Booth v. Maryland and South Carolina v. Gathers, and held that the Eighth Amendment and its bar of cruel and unusual punishment would not render VIE (there, live testimony) per se inadmissible in capital cases. Rather, the Court deferred:

“Within the constitutional limitations defined by our cases, the [s]tates enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished.” The [s]tates remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. [VIE] is simply

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another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.\textsuperscript{12}

Thus, with the same decision, the Court both “uncapped the bottle” containing such evidence, at least in capital cases, and at the same time refused to provide guidance to lower federal or state courts as to how or when it could be used.

Seventeen years later, the Court again had the opportunity, with both \textit{Kelly v. California}\textsuperscript{13} and \textit{Zamudio v. California},\textsuperscript{14} to provide this guidance. In addition to the logic of the Court doing so and the judicial efficiency that would result if it did, rulings were \textit{particularly} needed in both cases—for in both, the VIE at issue was \textit{far} more potent than the live testimony presented in \textit{Payne}.\textsuperscript{15} Prosecutors had played videos for both penalty phase juries as part of their VIE.\textsuperscript{16} Among other highly emotionally powerful portions, these videos showed grave markers of the deceased.\textsuperscript{17} The Court’s opinion does not adequately reflect, nor could it, the highly emotional impact of the videos themselves.\textsuperscript{18} Not unexpectedly, both juries recommended death.\textsuperscript{19} Yet, in both cases, the Supreme Court denied certiorari.\textsuperscript{20}

Justice John P. Stevens would have granted the petitions.\textsuperscript{21} Accordingly, in his statement in response to the denials, he criticized the Court for having failed to address an important need in regard to VIE:

Given \textit{Payne}’s sharp retreat from prior precedent, it is surprising that neither the opinion of the Court nor any of the concurring opinions made a serious attempt to define or otherwise constrain the category of admissible [VIE]. Instead, the Court merely gestured toward a standard, noting that, “[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.” That statement

\begin{itemize}
\item \textsuperscript{12} \textit{Id.} at 824–25 (citations omitted) (quoting Blystone v. Pennsylvania, 494 U.S. 299, 309 (1990)).
\item \textsuperscript{13} 555 U.S. 1020 (2008) (mem.).
\item \textsuperscript{14} \textit{Id.}
\item \textsuperscript{15} \textit{Id.} at 1020, 1025.
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{18} \textit{Video Resources}, U. S. SUPREME CT. (Nov. 10, 2008), http://www.supremecourtus.gov/opinions/video/kelly_v_california.html.
\item \textsuperscript{19} People v. Zamudio, 181 P.3d 105, 114 (Cal. 2008); People v. Kelly, 171 P.3d 548, 552 (Cal. 2008).
\item \textsuperscript{20} \textit{Kelly}, 555 U.S. at 1020.
\item \textsuperscript{21} \textit{Id.} at 1026.
\end{itemize}
represents the beginning and end of the guidance we have given to lower courts considering the admissibility of [VIE] in the first instance.

In the years since Payne was decided, this Court has left state and federal courts unguided in their efforts to police the hazy boundaries between permissible [VIE] and its impermissible, “unduly prejudicial” forms. Following Payne’s model, lower courts throughout the country have largely failed to place clear limits on the scope, quantity, or kind of [VIE] capital juries are permitted to consider.22

Justice Stevens went on to state his concerns as to both the variety of such evidence, including “poems, photographs, hand-crafted items, and—as occurred in these cases—multimedia video presentations,”23 and its “especially prejudicial” nature:24

Equally troubling is the form in which the evidence was presented. As these cases demonstrate, when [VIE] is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming. While the video tributes at issue in these cases contained moving portrayals of the lives of the victims, their primary, if not sole, effect was to rouse jurors’ sympathy for the victims and increase jurors’ antipathy for the capital defendants. The videos added nothing relevant to the jury’s deliberations and invited a verdict based on sentiment, rather than reasoned judgment.25

It has been twenty-three years since the Court in Payne uncapped what many have since argued is a wellspring of highly prejudicial, constitutionally infirm and irrelevant evidence, all directed toward criminal defendants facing death.26 Moreover, it has been six years since the Court again failed to take the lead (by denying certiorari in Kelly and Zamudio) to provide guidance to either the states or lower federal courts as to the use of this critical evidence.27

As will be shown in Part IV of this Article, two things are clear. First, Justice Stevens’ concerns have proved prescient. Lower courts are faced

[22. Id. at 1024 (citations omitted).]
[23. Id.]
[24. Id. at 1025.]
[25. Id.]
[26. See supra note 8 (discussing literature critical of Payne). To this point, one scholar notes that “[a] flood of critics have alleged that by allowing the admission of victim-impact evidence at capital sentencing, Payne permits ‘arbitrary and capricious’ sentencing in violation of the Eighth Amendment.” Greenberg, supra note 8, at 1349.
[27. Kelly, 555 U.S. at 1020.]
with the task of having to fill the vacuum in the absence of the Court's guidance. Second, the need for this guidance is significant because each time a court renders a decision of the type analyzed in this Article, the potential for lack of uniformity grows.

Following this introduction, Part II of this Article will review empirical evidence, including studies from Canada, England, and Australia, and will analyze the degree of correlation between perceived benefits and detriments of victim impact statements on the one hand, and the empirical evidence on the other. Part III will present and discuss a detailed and comprehensive survey, performed by the Author in 2013, of judges, prosecutors, and public defenders in the Ninth Judicial Circuit of Florida, as to how VISs are actually working. In Part IV, the Article will examine selected nationwide caselaw at the outer end of the spectrum of VIE, even to the point of it arguably being termed “beyond the pale”—and how courts have coped with such evidence. The Article will conclude in Part V, followed by Appendices I, II, and III, which will detail results of the Ninth Judicial Circuit survey.

II. SUGGESTED DETRIMENTS OR BENEFITS OF VICTIM IMPACT STATEMENTS VS. THE EMPIRICAL EVIDENCE—TOO OFTEN, THE EMPEROR HAS NO CLOTHES

There has been no shortage of commentary either criticizing or touting the use of VISs. However, in analyzing their detriments or benefits as part of the focus in this Article on how such statements are actually working, beliefs and opinions should defer to evidence. Fortunately, a substantial amount of research, empirical in nature, does exist to help determine the validity—or lack thereof—of many of them.

A. Victim Impact Statements Result in More Severe Sentences

Research suggests that “the overwhelming majority of the victims want their VIS to be used in sentencing, and many of them seek to influence the sentence imposed on the offender via the input.” One study has shown that “almost three-quarters of victims who stated they provided VIS material expected the VIS to have an impact on the sentence.” It does seem logical to believe that often-emotional victims,

28. See, e.g., supra note 8 and all sources cited infra in Part II.
appearing before the court and describing in painful detail how the defendant’s act has hurt them or their families, would correctly expect to influence courts to sentence more severely than the court otherwise would. Moreover, as described at the start of this Article, our hypothetical victim had both this intention and expectation. Though the intention may exist, however, the evidence refutes the likelihood of such expectations coming to pass:

Research suggests that the concerns expressed by opponents of the VIS concerning possible erosion of adversarial criminal justice principles, rights of defendants and imposition of harsher sentences have not [materialized]. Studies conducted in the USA and in Australia comparing sentencing outcomes of cases with and without VIS, and research in Australia on sentencing trends and comparison of sentence outcomes before and after the VIS reform, suggest that sentence severity has not increased following the passage of VIS legislation. Nor has the VIS affected sentencing patterns or outcomes in the majority of the cases.31

And, equally or more surprising:

In [the] minority of cases in which VIS made a difference, the data revealed that the sentence was as likely to be more lenient as it was to be more severe than initially thought. For example, if the [offense] was perpetrated in an unusually cruel manner, or with disregard to special vulnerability of the victim, then the sentence was likely to be higher. The practitioners likewise provided instances of cases they tried where the VIS led to the imposition of a more lenient sentence than would have been indicated. For example, cases in which the victim’s statement disclosed that the victim had made a complete recovery or in circumstances where certain injury had been mistakenly attributed to the crime . . . . In other words, contrary [to suggestions of other authors in this field], it seems that VIS make an important contribution to proportionality rather than to severity of sentencing.32

Additional studies also refute the existence of a causal relationship between VISs and more severe sentencing:

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32. Id. at 548 (footnotes omitted).
• A California study concluded that “[t]he right to allocution at sentencing has had little net effect . . . on sentences in general.”

• A New York study concluded that there was “no support for those who argue against [VISs] on the grounds that their use places defendants in jeopardy.”

• “A multivariate statistical study of Assault Occasioning Actual Bodily Harm (AOABH) cases was undertaken to examine in closer detail possible effects on sentencing patterns resulting from the introduction of VIS. The multivariate analysis of the factors related to sentences for [such cases] identified as predictors of prison sentences: a previous record of imprisonment, the presence of aggravating factors, an absence of mitigating circumstances[,] and the defendant’s age. However, the presence of a VIS in the court file, the [judge’s] remarks about the VIS[,] or whether the case was [finalized] before or after the introduction of VIS[,] were not found to be related to sentencing disposition.”

• An American study of the effects of victim rights legislation found evidence in two different respects that also refutes any connection between VISs and more severe sentencing. Its survey of prosecutors nationwide, with 378 responding, reported that 57% found that victim rights legislation (including VISs) had “[n]o [i]mpact” on length of sentence; 30% said that sentences were increased “less than 10%”; 11% said they were increased “10 to 20%”; and only 2% said that they were increased “more than 20%.” Additionally, the authors examined criminal case files in two counties in Wisconsin and North Carolina both before and after the passage of victim rights legislation in these states—and uncovered no evidence that the change increased sentence lengths.

33. Cassell, supra note 2, at 635.
34. Id. (quotations omitted).
35. Erez et al., supra note 30, at 215.
37. Id. at 11 tbl.6.
38. Id. at 29.
In regard to VISs, one author has stated: “The purpose of instituting VIS was to provide victims a voice, not to restructure sentencing priorities. The legislation concerning victim input was not intended to substitute harm for culpability, nor to consider harm as the overriding criterion in sentencing.”\footnote{Erez, supra note 29, at 555.} This seems accurate. No constitutional, statutory, or rules-based authority has been found that requires victims’ statements, vis-à-vis sentencing, to be, “considered persuasive,” “given great weight,” or “primary” so as to supersede or outweigh other factors used in sentencing. Instead, and consistent with the “seriousness of the offense”\footnote{18 U.S.C. § 3553(a)(2)(A) (2012).} being but one of the factors found in the federal sentencing guidelines, statements are one among many considerations that sentencing judges should take into account. As empirical evidence shows, VISs do not support an undesirable policy that would “consider harm as the overriding criterion in sentencing”\footnote{Erez, supra note 29, at 555.} because they do not appear to affect sentencing \textit{ab initio}.

B. Victim Impact Statements Subject Defendants to Unfounded Accusations

This belief has also been tested—and found to be without substance:

The concern that victims would use the VIS as an opportunity to subject offenders to unfounded accusations has also not [materialized]. In most jurisdictions currently [practicing] VIS, victims do not prepare their own statement[,] but it is filtered or “edited” by the specific agency responsible for the preparation of VIS. Moreover, “retelling” victims’ stories often “sterilizes” them to such an extent that judges noted that the VIS was mild compared to what would have been expected in the light of the [offense] involved. VIS therefore turns out to be an understatement rather than an overstatement of the harm sustained in the particular [offense]. The recent pilot project in England confirms that victim statements tend to understate the impact of [offenses], and that the VIS scheme does not encourage exaggeration, inflammatory input or vindictiveness.\footnote{Id. at 548–49 (footnotes omitted).}
C. Defendants Will Subject Victims Giving Statements to Unpleasant Cross-Examination and Thereby Further Harm or Traumatize Them

As one researcher has noted, “one of the commonly raised arguments against the VIS [is] that because of the likelihood of VIS to affect the sentence, victims will be subjected to unpleasant questioning and challenges to their input.” 43 Although this may be a common argument, research involving legal professionals (generally judges, lawyers, and victim advocates) shows there is little, if any, validity to it: 44

Concern that defendants would challenge the content of VIS thereby subjecting victims to unpleasant cross-examination on their statements has . . . not [materialized]. Legal professionals have stated that challenges to VIS in court are quite rare. According to these professionals, there are strategic disincentives militating against calling victims to the witness stand and cross-examining them on the content of their statements . . . because of the adverse effects it may have on the sentence. Decision makers who hear and observe victims testifying about the impact of the crime on them may be affected by the testimony and therefore more inclined, according to the legal professionals, to impose a harsher sentence. In this respect, the concern about protecting victims from unnecessary and possibly degrading questioning regarding the content of their VIS (as distinguished from cross-examining victims about their testimony in the trial) seems to be unwarranted. 45

One 2006 Canadian survey specifically asked judges how often crime victims were cross-examined on their statements. 46 Ninety-seven percent of the ninety-six judges who responded from the three jurisdictions (British Columbia, Alberta, and Manitoba) said “that it never or almost never took place.” 47

Trial lawyers who do not cross-examine victims almost certainly are prudent. Victims giving impact statements as to how they or their families (or both) were hurt fall in the same class of witnesses as grieving parents, widows or widowers, or plaintiffs who have been seriously injured by the defendant. Any competent trial lawyer knows that one cross-examines

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43. Id. at 549 n.20.
44. Id. at 549.
45. Id. (footnotes omitted).
47. Id. at 10.
such witnesses only when necessary, and even then, only with the greatest of care.

D. Victim Impact Statements Have Harmful Effects on Those Who Give Them

One cannot rule out that some victims will be emotionally hurt or impacted by, among other things, going into court (which is stressful for many witnesses and seasoned trial lawyers alike), speaking publicly (when public speaking is renowned as being one of the most common fears), and directly confronting the defendant(s) who hurt them. This does not mean, however, that victims do not benefit from this process. They have been shown to benefit substantially.48

Another argument against the use of [VISs] in sentencing is that it has harmful effects on victims. Some argued that [VISs] subject victims to pressures, and that victims may feel burdened by the responsibility for deciding the penalty.

This argument is empirically inaccurate, and does not represent the majority of victims who get involved in criminal justice proceedings. The cumulative knowledge acquired from research in various jurisdictions, in countries with different legal systems, suggests that victims often benefit from participation and input. With proper safeguards, the overall experience of providing input can be positive and empowering.49

One author has summarized a number of research studies, which have shown the following results for victims who engage in the VIS process. All of them either benefit the victims or encourage in their own right:50

- “[V]ictims are interested in having a voice.”
- “[B]y and large victims do not feel burdened by being heard . . . .”
- Victims do not “feel pressured by knowing that their input has been conveyed to decision makers.”
- “[T]he majority of victims of personal crimes wished to participate and provide input, even when they thought their input was ignored or did not affect the outcome of their case.”

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49. Id. at 550–51 (footnotes omitted).
50. Id. at 551.
“For some, input restores the unequal balance between themselves and the offender, particularly in cases in which the victim did not have an opportunity to testify or be heard because they were resolved by a plea.”

Other victims “wanted ‘to communicate the impact of the offense to the offender.’”

“For the majority of the victims, filling out a VIS was a forum to formally express the crime impact on them, a civil duty they considered important for reaching a just sentence.”

“Providing input for [VISs] also helps victims to cope with the [victimization] and the criminal justice experience. Many victims who filled out [VISs] claimed that they felt relieved or satisfied after providing the information.”

“The recent English pilot project found that for the majority of the victims filing the statement was a worthwhile therapeutic experience, and the cathartic effect of recording the impact of the [offense] had been an end in itself.”

In-depth interviews of rape victims in the United States elicited the following reasons for their participation in the VIS process: “[O]ver half of the victims felt that input will assist with achieving substantive justice, and almost three quarters sought procedural justice”; they “wanted to engage the criminal justice process and . . . assert ‘ownership of the conflict’ which they felt was misappropriated from them in the name of the state”; “[o]thers wanted to reduce the power imbalance they felt with the defendant, resolve the emotional aspects of the rape, achieve emotional recovery, or achieve formal closure”; and “[m]any victims also wanted to remind judges of the fact that behind the crime is a real person who is a victim.”

“The literature in the growing field of therapeutic jurisprudence provides support to the proposition that having a voice may improve victims’ mental condition and welfare. Scholars in this area have discussed [at] length the therapeutic advantages of having a voice, and the harmful effects that feeling silenced and external to the process may have on victims.”

51. Id. at 551–52 (footnotes omitted).
The empirical evidence on this issue may fairly be described as having settled the matter—victims benefit from engaging in the VIS process and by giving statements, and they do so in varying and important ways.

E. Judges and Legal Professionals Learn a Great Deal About Victimizations from Victim Impact Statements

While the substantial empirical evidence infra operates to disprove the perceived detriments of VISs, it may also operate to prove perceived benefits—here, the belief that VISs serve to educate judges and legal professionals:

Research also confirms that judges are sometimes unaware of victim suffering and injuries resulting from crime, because the information did not find its way into the file, either intentionally . . . or accidentally . . . . In the past, judges and other legal professionals had little opportunity to receive direct detailed input from victims and become acquainted with short and long term effects of various crimes. Research shows that legal professionals who have been exposed to [VISs] have commented on how uninformed they were about the extent, variety and longevity of various [victimizations], and how much they have learned from [VISs] about the impact of crime on victims from properly prepared [VISs].

As to whether judges learn case-specific victim details not otherwise available, the authors of the Canadian judges’ survey noted that “[i]t has been argued that the information contained in the [VIS] is useful, but redundant in the sense that it will emerge from Crown submissions or evidence adduced at trial.” In response, the judges were asked: “How often do [VISs] contain information relevant to sentencing that did not emerge during the trial or in the Crown’s sentencing submissions?” The results were equivocal—47% said that VISs “often” or “sometimes” contain useful information not obtainable from these sources, while 53% said “seldom” or “almost never.”

52. Id. at 553–54 (footnotes omitted).
53. Roberts & Edgar, supra note 46, at 13. At the outset, however, such an argument based on the evidence being adduced at trial is highly questionable. How the victim has been affected by the crime is not often an element of a crime—and would therefore render such evidence immaterial, unfairly prejudicial (with little if any probative value) under Federal Rule of Evidence 403, and therefore inadmissible. One exception, however, is where an element of the crime was “great bodily injury” to the victim, for example.
54. Id. at 14.
55. Id.
Consistent with these findings, the same survey found judges evenly on the question of whether, in general, VISs are useful—50% said they were in “all” or “most” cases, while the other half said they were in “some” or “just a few” cases.\(^{56}\)

Both survey responses may (happily) be explained by thoroughness in the Crown’s sentencing submissions, thereby leaving little relevant sentencing information to be found elsewhere by the court.

Generally, to the extent judges and legal professionals become more educated as to the ways in which victims are affected by crime, the criminal justice system (and society as well) will only benefit. Judges will make more informed sentencing decisions, and, along with lawyers and victim advocates, will help make the victim’s journey through the VIS process both smoother and, at least indirectly and possibly directly, a more therapeutic experience.

F. Suggested Detriments or Benefits Aside—How Do Victim Impact Statements Operate (in Four Important Respects)?

1. How Often Are Victim Impact Statements Given?

There is not a significant breadth of research with which to answer this question. However, one study in particular does examine how VISs are given—and it appears to be the most extensive research study performed in the entire VIE arena.

The Witness and Victim Experience Survey (WAVES) was performed from 2007 to 2010 in England and Wales.\(^ {57}\) “WAVES was a national quarterly survey of victims and witnesses [where] respondents were individuals involved in cases which resulted in a criminal charge[,] and which have been closed through . . . verdict or discontinued prosecution.”\(^ {58}\) The surveys always asked for responses to the same three questions:\(^ {59}\) (1) whether respondents were offered the opportunity to make a Victim Personal Statement (VPS);\(^ {60}\) (2) if they were so offered, whether they made one; and (3) if they made one, whether they felt their

\(^{56}\) Id.


\(^{58}\) Id. at 15 n.26.

\(^{59}\) Id. at 15.

\(^{60}\) Id. The authors use the acronyms VIS and VPS interchangeably, although they acknowledge that “VIS more accurately conveys the purpose of the statement[—]to document the impact of the crime and not the personal views of the victim about the offender or the appropriate sentence to be imposed.” Id. at 8–9 (emphasis in original).
“views as set out in the Victim Personal Statement were taken into account during the Criminal Justice System.”\textsuperscript{61} The most significant results were as follows:

- A total of 57,072 responded to the first question, with 42\% saying they had been offered an opportunity to make a VPS, 45\% saying they had not been, and 13\% saying they did not know.\textsuperscript{62} Clearly, better efforts were needed to offer these statements to victims.
- Of those who recalled being offered an opportunity to make a VPS (24,108), 55\% did make a VPS, 40\% did not, and 5\% did not know.\textsuperscript{63} This appears to be the empirical evidence that best answers the question: How often are statements given? And, the answer is very encouraging—55\% is a robust response.
- Of those who made a VPS (13,355), 67\% said his or her VPS was taken into account “fully” or “to some extent,” only 18\% said no, and 15\% did not know.\textsuperscript{64} This is compelling evidence that in at least one key respect, VPS was fulfilling its main goal of providing victims the opportunity and the satisfaction, with all its attendant benefits,\textsuperscript{65} of feeling they were involved in sentencing in a meaningful way.

Such encouraging results are tempered by those from the survey of Canadian judges, who reported that they only saw VISs in 11\% of cases.\textsuperscript{66} To answer this question, “[j]udges were asked, ‘In approximately what percentage of all sentencing hearings was a VIS submitted[?]’”\textsuperscript{67} However, this question was at the least ambiguous, in that it did not differentiate between written and verbal statements, and at the most implied that only written statements—those that were “submitted”—would generate a “yes” response. As the authors cautioned:

It seems likely that these statistics underestimate, to an unknown extent, the degree of victim participation in sentencing since VIS is not the only avenue by which victims can provide information to the court. In some locations victims appear to provide the information orally without having submitted a formal statement. As one judge

\textsuperscript{61.} Id. at 15 (emphasis omitted).
\textsuperscript{62.} Id. at 18 tbl.1.
\textsuperscript{63.} Id. at 17, 18 tbl.1.
\textsuperscript{64.} Id. at 18 tbl.1.
\textsuperscript{65.} See supra text accompanying notes 50–51 (discussing the benefits of victims engaging in the VIS process).
\textsuperscript{66.} Roberts & Edgar, supra note 46, at 1.
\textsuperscript{67.} Id.
noted on his or her survey, “I conducted [forty-three] sentencing hearings [and] formal VIS[s] were only received and filed once or twice[,] but many victims, especially in circuit locations[,] address the court directly.”

Finally, on a much smaller scale, albeit without detailing sampling methods or totals, the authors who studied six sites in North Carolina and Wisconsin estimated that between 50% and 90% of victims did not respond to mail invitations to exercise their right to give statements. Additional studies would be welcome to help determine the extent of VIS participation.

2. In Which Types of Cases Did Judges Feel Victim Impact Statements Were a Particularly Useful Source of Information?

Seventy-nine percent of the judges in the Canadian survey said there were certain offenses for which a VIS was a “particularly useful source of information.” Crimes of violence and sexual offenses were identified most often by judges in all three Canadian jurisdictions that were surveyed. This is consistent with what one would expect, as these crimes cause, more than others, both physical and emotional harm to their victims.

3. How Often Do Judges Refer to the Victim Impact Statement or Its Contents in Their Reasons for Sentence?

The Canadian survey's authors first explained, “The most important consideration for the victim . . . would appear to be judicial recognition. For this reason we asked judges in the survey how often they referred to the [VIS] or its contents in their reasons for sentencing.” If they did so, these judges would be fulfilling one of the goals that research has shown both is important to victims and results in therapeutic benefits for them—

68. Id. (emphasis added).
69. Davis et al., supra note 36, at 31.
70. Id. The authors suggest, based on their own experience, and again without providing any details, that these high percentages were caused by incorrect contact information. Id.
71. This survey is referred to several times in this Article because it is both extensive and multifaceted and thereby lends itself to empirically answering a number of the questions posed herein.
72. Roberts & Edgar, supra note 46, at 15.
73. Id. No tables or numerical responses could be found that further detail these findings.
74. Id. at 18.
“remind[ing] judges of the fact that behind the crime is a real person who is a victim.”

These judges did their part in supporting victims in this respect. Thirty-nine percent “almost always” referred to the VIS; 23% “often” did so; 33% sometimes did so; and only 5% “never” or “almost never” did so. One certainly can say that the victims appearing in these cases benefitted from their judges’ reference to the VIS. These victims were not the only ones, however.

4. **What Are the Judicial Perceptions of the Purpose of Victim Impact Statements?**

This was the subject of the final question posed to the Canadian judges. The judges were asked to rate the importance of five principal purposes served by VISs as identified in the leading Canadian case regarding the use of the VISs. With “1=not at all important” and “10=very important,” the average results were as follows:

- “Provide the victim with an opportunity to participate in the sentencing process”—7.9;
- “[P]rovide the offender with an idea of the harm inflicted on the victim”—7.8;
- “Provide court with information about the impact of the crime”—7.4;
- “Provide the victim with an opportunity to communicate a message to the offender”—7.0; and
- “Provide Crown with information about the seriousness of the crime”—4.5.

By ranking the first four purposes the highest in importance, and each high in its own right, these judges were consistent in recognizing benefits to victims as shown by other empirical evidence. Additionally, by ranking the last purpose much lower in importance, the judges were also consistent with other research, albeit in the negative—no other research appears to have determined that victims consider providing

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75. Erez, *supra* note 29, at 552; see also *supra* notes 50–51 and accompanying text (examining the therapeutic benefits of giving victims a voice through VISs).
76. Roberts & Edgar, *supra* note 46, at 18 tbl.22.
77. *Id.* at 25.
78. *Id.* (footnotes omitted).
79. *Id.* at 25 tbl.30 (emphasis omitted).
80. *Id.* (emphasis omitted).
81. See *supra* text accompanying notes 50–51 (listing various benefits to victims found by other empirical evidence).
information to prosecutors “about the seriousness of the crime” 82 to be a benefit.

G. Conclusion

The empirical evidence examined herein 83 shows that victims are likely to receive substantial therapeutic benefits when they provide impact statements and have their voices heard. Given that this may be considered the primary purpose of a VIS, 84 which is being fulfilled, 85 it is fair to say that this empirical evidence alone is sufficient to indicate that the VISs are operating successfully. Further support for this conclusion is found in the studies that refute perceived detriments of the VIS and greatly support its perceived benefits. 86 Alternatively, in the case where the evidence disputes victims’ expectations that their statements will lead to more severe sentencing, this is an encouraging finding. If the evidence were to the contrary, it would mean that VISs were running afoul of their primary purpose—“to provide victims a voice, not to restructure sentencing priorities.” 87

This assessment of successful operation should be qualified for the American judicial system, however, by the fact that the evidence currently does not show the extent to which VISs are being used. Besides, no matter the importance of the benefits in providing impact statements, victims cannot receive any benefits if they do not participate. Hopefully, more expansive research will be done that would show excellent VIS participation in the United States consistent with that found in England and Wales, 88 but until then, this qualification seems appropriate.

III. THE 2013 NINTH JUDICIAL CIRCUIT SURVEY ON VICTIM IMPACT STATEMENTS

In 2013, the Author conducted a survey in the Ninth Judicial Circuit in and for Orange and Osceola Counties, Florida to discover how VISs

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82. Roberts & Edgar, supra note 46, at 25.
83. See supra Part II(D) and accompanying notes (discussing various studies that support the assertion that victims do benefit from appearing in court, despite any victim apprehension regarding the judicial process).
84. See supra text accompanying note 39 (explaining that the primary purpose of VISs is to give victims a voice).
85. See supra text accompanying notes 50–51 (noting the benefits that victims receive from VISs).
86. For a discussion of these studies, see supra Part II(A)–(F).
87. Erez, supra note 29, at 555; see supra text accompanying notes 39–41 (noting that victim harm is only one of several factors to consider in sentencing).
88. See Roberts & Manikis, supra note 57, at 3 (reviewing empirical research on the impact of VISs in England and Wales).
were actually operating in the hands of judges, prosecutors, and public defenders. Responses were received from thirty judges, twenty-four prosecutors, and three public defenders. The results showed that: (1) VISs were being used with reasonable frequency; (2) they appeared to be operating in a manner reasonably consistent with their purpose; and (3) these courtroom participants could offer thoughtful suggestions regarding the “best practices” of preparing and delivering victim impact statements, including advice on what makes these statements most persuasive. The most material and illustrative findings were as follows:

THE JUDGES

- Twelve of the thirty judges had experience with VISs. All allowed them, and none barred them in any specific cases where there was a victim.
- The judges reported that statements were presented in the following ways: orally, without a statement; if in writing, the victim read from it to the court or provided it ahead of time; victims in foreign jurisdictions had the proceeding streamed live over the internet, and were allowed to then interact by mail or phone; read by the prosecutor, a victim advocate, or other representative; and with the assistance of visual aids.
- Defense attorneys rarely presented a VIS. Eight out of twelve said “no” or “never”; two said “rare” or “sometimes”; and two said “yes” or “[y]es, in mitigation on occasion.” When used, they were in “[v]iolent crimes, mostly,” or usually in domestic violence cases where the “[v]ictim decline[d] prosecution but [the] state proceeded anyway.”
- Of twelve judges responding as to what benefits they have observed in the use of VISs, seven focused mainly on those held by victims. Several mentioned that victims were able to address and express their feelings. Four mentioned victims having the benefit of “closure” or “finality.” One stated that there are “many [benefits because] . . . having a voice is important to a victim who has no ‘standing’ to pursue a case and does not often have control on the outcome.”

89. For the survey’s questions and responses, including the textual responses, see infra Appendices I, II, and III.
90. See supra text accompanying note 39 (explaining that the primary purpose of VISs is to give victims a voice).
91. See infra Appendix I (providing the questions and answers from the judges’ survey).
92. Infra Appendix I, at Questions 1, (a)–(b).
93. Infra Appendix I, at Question (c).
94. Infra Appendix I, at Questions (d)–(e).
focused on the benefits to themselves, including: “[h]elps to understand the personal impact of the crime and helps me to fashion an appropriate sentence”; “[a]llows judges to see how crimes have affected victims”; and “[t]hey present a more complete picture of the impact of the crime.” One noted a benefit for the defendant, saying that “[t]he perpetrators get to see the results of their behavior[—]very helpful in juvenile cases[,] and the principles [of] restorative justice are supported by these impact statements.”

If the reader compares these responses to the previously discussed and empirically shown benefits of VISs, he or she will see a significant correlation. To put it another way, these judges understand.

- Regarding negatives of VISs, of eleven judges, two found none; three mentioned matters related to emotion, including statements getting “out of hand if not controlled” and “[h]ostility from the victim or [the] victim’s family directed to the defendant.” But one who did find negatives of VISs also said that “[e]motional breakdowns have been few and far between,” and another said that “[e]motions and anger sometimes [require] more security, but that is not a huge problem.” Other negatives mentioned included: witness confusion with a negotiated sentence; statements being “time consuming—but I don’t really consider that a negative”; lack of relevancy; and times where the victim’s “lack of knowledge of the judicial system leads [him or her] to ask the court for more incarceration on a plea[,] then the court declines to take a negotiated plea between the State and defense. In that case, the victim has now pushed a case to trial that really has a poor chance of a positive outcome.”

What is striking here, and also a strong vote of confidence for the use of VISs, is what is not found—not one responding judge pointed in a strong way to any negatives in using VISs.

- What has made for more effective statements? The following specifics were offered: appearing live; “[f]acts rather than emotion”; “[p]reparation, a good victim advocate who

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95. Infra Appendix I, at Question (j).
96. See supra Part II(D) (discussing the benefits of the VIS).
97. Infra Appendix I, at Question (k). This last comment is confusing, for it is always in the judge’s power, regardless of what the victim says or wants, to not abandon a negotiated plea or let the case be “pushed . . . to trial.” This is especially, but not exclusively, true where the court already knows after negotiating the plea that the case is weak.
understands the process, and generally the educational level of the person making the statement”; “[m]ore descriptive statements, or any statements that are written properly”; “[i]f they write it and try to keep to it”; and “simply speaking from the heart about how the crime has affected them.”

- In an expansive “tell us how it is working” question, these judges were asked: “What concerns, if any, have you had regarding the use of such statements as part of the sentencing process?”

Out of eleven responding judges, seven said “none” or “[n]o concerns.” Only three expressed specific concerns. None were substantial. Verbatim, they were:

1. “My concern would be that the sentencing [would] be unduly influenced by the emotionalism of the statement. That is somewhat mitigated by written impact statements, reviewing the facts of the case in advance, and outlining a range of sentencing options [that] I think would be appropriate prior to the hearing. I then move up or down from the middle of that range based on everything presented. Rarely have I gone outside of that range.”

This judge does not note that he or she has ever actually “gone outside of that range” due to being “unduly influenced by . . . emotionalism.” This concern is better categorized as a cautionary note, and not a concern based on negative experience(s).

2. “I believe they are appropriate and important, however with more and more mandatory minimums, the disparity between the wishes of the victim and the leeway of the court could become a problem.”

This judge appears to think it is possible that in the future he or she will not be able to give the more lenient sentences that victims want because they will conflict with mandatory minimum sentences. In this, the judge may prove prescient, but at this point this is not a “concern” of what is happening today.

3. “I do not think the prosecution makes it clear what the purpose is of impact statements. Sometimes victims come in and want to come up with the sentence.”

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98. *Infra* Appendix I, at Question I.
99. *Infra* Appendix I, at Question (n).
100. *Infra* Appendix I, at Question (n).
101. *Infra* Appendix I, at Question (n).
102. *Infra* Appendix I, at Question (n).
103. *Infra* Appendix I, at Question (n).
104. *Infra* Appendix I, at Question (n).
And, when that occurs, it is likely that victims will be disappointed. Having victims “sometimes” being disappointed, when the prosecution does not make it clear in advance that it is not the victims’ role to determine the sentence, is a concern. One wants as many victims as possible to benefit from the VIS process, not to be disappointed by it. However, this unmet expectation must be rated as relatively minor when one considers that victims are disappointed only “sometimes,” and, more importantly, when weighed against the overall benefits for the victims in giving the statement to begin with.

- These judges had specific suggestions for defense attorneys when confronted by VISs, including, affirmatively: “[s]ay nothing[,] . . . [h]ave the defendant apologize to the families[,] . . . [a]cknowledge the pain of the victim while reminding the court that the defendant may also be a victim and is a person with family in the gallery”; “[e]xpress sympathy for the victim’s plight and quickly return focus on the better qualities of the defendant”; be “respectful and generally just remind the court sympathy is not to be taken into consideration”; “[k]now when to cross[-]examine and when to sit down”; and present testimony from other witnesses.

As to what not to do: do “[n]ot ask questions of victims that would make the situation worse”; do not seek to cross-examine the victim about the statement—one judge noted that he rarely allows victims to be crossed; and, impliedly, do not object to either written or oral statements as hearsay.

Defense attorneys sitting at counsel table hearing these statements, without question, are in a difficult position. Heeding some of these suggestions may make it less so.

- Defense attorneys had suggestions for prosecutors as well, including that prosecutors should “[k]now the facts of their case[,] . . . limit their venom[,] . . . [and stay] [c]ool, calm, [and] collected”; “[m]ake sure they know what the victim is going to say”; “[i]t would be helpful not to have repetitive victim impact statements from the same type of source[—]e.g. friends. They should plan the statements for maximum

105. See supra Part II(A) (discussing the impact of VISs on sentences).
106. Infra Appendix I, at Question (p).
107. Infra Appendix I, at Question (p).
108. See supra Part II(C) (explaining that defense attorneys rarely cross-examine victims’ impact statements).
use[—]a friend, a family member, a teacher, a religious leader, etc.”; “[p]repare the victim to be concise and let [him or her] know the defendant will be close by when the statement is given”; and “the state needs to make the victim [aware] of limitations in sentencing.”

The thrust of these suggestions was that more contact and better preparation between prosecutors and victims is needed. Given the caseloads prosecutors carry, this is likely a difficult goal. One judge, in regard to what suggestions he or she had to prosecutors, said: “That’s tough[;] . . . they need more funding. They need more victim advocates. They need fewer cases to be able to focus on the victims. But overall they do a great job on the resources they have.”

- In the survey, those Ninth Circuit judges responded to two important questions: “How have you used [VIs] in determining sentencing?” and “How much weight do you give them?”

The responses to the first question were mainly both very judicial and very appropriate—e.g., “I have listened to or read the statements [and] then apply them to the facts of the case.” But a closer examination of the responses reveals that VIs did help determine sentencing with some judges, as three out of ten responding judges answered “yes” without qualification. Five more impliedly said “yes,” but qualified their responses—“[t]o increase a possible sentence”; “[i]t has very limited use, but some use”; “[v]aries case by case”; “[o]ne small factor among many”; and “[o]ften the sentencing is already set, but when not, the impact of the victim or family helps me as one of many factors to determine a consequence.”

As for the second question, the responses ranged from “[a] lot of weight” (1) to, e.g., “[v]aries in each case” (4) to “[s]ome weight” (4). As one judge thoughtfully explained,

It all depends[,] . . . sometimes it can carry significant weight depending on what other factors I am considering. Other times it’s one of many factors, and sometimes the crime itself presents an appropriate sentence[,] and the impact statement has really no
relevance to sentencing; but [its] relevance again goes to the closure for the victim and [him or her] gaining some control in the process.  

Pursuant to their self-reports, these judges are not “substitut[ing] harm for culpability, nor . . . consider[ing] harm as the overriding criterion in sentencing.” Neither are they excluding VISs from their sentencing considerations. Rather, it appears that they have hit center-mass—they are in “the sweet spot”—with how they are using these statements and how much weight they are giving them. VISs appear to be in good hands with these judges.

- Finally, when asked what “could be done to improve the process of [VISs],” the judges’ responses were encouraging. Five out of ten judges said “nothing,” “I believe they are fine as-is,” or “no opinion.” Two said that prosecutors should have earlier and better contact with victims. Each one of them said that victims should have “the full benefits of technology,” and that more funding and a deadline for submission of impact statements, which, if not met, will waive the statements, were needed. In sum, there was little the judges felt that could be done to improve the VIS process.

THE PROSECUTORS

- A review of the answers from the twenty-four prosecutors responding to the survey indicate that prosecutors have used VIS in a wide spectrum of cases—mainly, but not exclusively, including crimes of violence (felonies and misdemeanors) and even “down to” criminal mischief, or in any crime in which there is a victim. Violent crimes were listed quite often, with sex crimes and domestic violence specifically named by many prosecutors.

- Six out of the twenty-four prosecutors sought to present VISs either 100% of the time or any time there was a victim or one who was willing to participate. Six prosecutors did so from 50% to 80% of the time; five from 20% to 35% of the time;

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114. *Infra* Appendix I, at Question (r).
115. Erez, *supra* note 29, at 555; *see supra* text accompanying note 39 (describing the use of VISs as informative to the court and therapeutic to victims).
116. *Infra* Appendix I, at Question (u).
117. *See infra* Appendix II (providing the questions and answers from the prosecutors’ survey).
118. *Infra* Appendix II, at Overview, Question 1. Drug cases would not, except in rare instances, be a forum for VISs because there are no “victims.”
and seven from 3% to 15% of the time. The median was either 50% or 35%.

- All twenty-four presented VISs through “live testimony,” while twenty-two also used written affidavits. Additional presentation formats included: “[o]ral statements from the [prosecutor] to the [court] based on conversations with the victim”; “a child[’s] recorded statement on an [iPhone] played in court”; an email; and an unsworn letter.

- Twenty-one of the twenty-four prosecutors said that defense attorneys had not objected to VISs. When there was an objection, it was because the statement was “[n]ot sworn to,” was irrelevant, there was “a negotiated plea, or it [was] not the victim [himself or herself] but a family member.” Courts almost never sustained defense objections—seven of eleven responding prosecutors said they objected “zero” times or “none”; while others responded “never” (2), “very rarely,” or “seldom.”

- Prosecutors identified what they believed made VISs “persuasive,” which included: victims testifying live (6); victims expressing “emotion” to the court regarding how they have been impacted (8) (although one respondent qualified this with: “When the victim is emotional yet reasonable”); victims telling the court what they would like to see from the case (2); and victims explaining how the crime continues to impact them.

- Prosecutors were also asked about the times when they believed VISs were not persuasive. Responses included: when victims “seemed vengeful”; were “angry or seeming like they just want[ed] to retaliate”; “berat[ed] the defendant”; “want[ed] outrageously high sentences”; were “unreasonable or [overreacted]”; were “only asking for money”; had “known the [d]efendant on a personal level”; made statements saying they wanted the defendant to go to jail or prison; talked about irrelevant history; and when “the

119. *Infra* Appendix II, at Question 2.
120. *Infra* Appendix II, at Question 3.
121. *Infra* Appendix II, at Question 4.
122. *Infra* Appendix II, at Question 5.
123. *Infra* Appendix II, at Question 6.
124. *Infra* Appendix II, at Question 8.
judge [had] already made up [his or her] mind” or there was a plea agreement (3).  

Two points warrant emphasis here. First, victims who, rather than being emotional—an often-cited reason for why a VIS will be persuasive—are being too emotional, thus appearing vengeful or angry, will “turn off” judges. Thus, it appears there is an “emotional threshold” that should not be crossed. Second, the fact that only three out of twenty-four prosecutors believed that their judges had already made up their minds and “tuned out” the victims before them is evidence that their judges remained open-minded. It is, of course, possible that the judges were staying attentive to be courteous to the victims and not because they had not made up their minds, but it seems if this were the case, more than three prosecutors would have formed such an opinion.

- The survey asked prosecutors in what percentage of the cases had there already been a sentencing agreement in place at the time the statements were given. The highest category of responses was 75% to 90% of the time (6). The median response, however, was 50%.

- A significant finding is that one-third of the prosecutors (eight out of twenty-four) said they had “known a judge, after agreeing to or determining a sentence, to change his or her mind (and the sentence) AFTER hearing the statement(s).” This is roughly consistent, or at least not inconsistent, with the judges’ responses regarding how they have used VISs in determining sentencing.

- Only one-third of the prosecutors (eight out of twenty-four) reported that they had seen defense attorneys present VISs on behalf of their clients. Reasons for doing so included seeking leniency and mitigation of sentence. One respondent noted that defense attorneys present VISs “[w]hen the victim has forgiven the defendant and wants leniency.”

Logically, one might initially think that defense attorneys would use VISs more often, but logistical hurdles stand in the way. How is defense counsel supposed to learn about

\[\text{Infra Appendix II, at Question 9.}\]
\[\text{Infra Appendix II, at Question 8.}\]
\[\text{Infra Appendix II, at Question 10.}\]
\[\text{Infra Appendix II, at Question 11.}\]
\[\text{See supra text accompanying notes 111–114 (discussing responses of how judges use VISs in sentencing).}\]
\[\text{Infra Appendix II, at Question 13.}\]
\[\text{Infra Appendix II, at Question 14.}\]
witnesses who will say the impact on the victim is less than the victim will say it is? And, how often will such witnesses even exist, or be willing to cooperate with defense counsel if they do exist?

- Prosecutors’ responses regarding benefits of VISs were highly consistent with responses from the surveyed judges and the empirical evidence. Benefits of VISs to victims included: victims receive closure (8); victims’ voices are heard (3); and victims feel “empowered” (2). Noted benefits of VISs to the judges were also quite similar, including: a VIS “[h]elps the judge understand the gravity of the case better,” and “[t]he [c]ourt gets to see how personal this crime is to someone[,] and [that it is] not just another case.” Similarly, prosecutors noted that VISs had an impact on defendants, as observed: “It is good for the . . . defendant to hear what his or her actions caused.” Although one prosecutor responded, “I also think, or perhaps I just hope, that the impact of a victim statement has an effect on the defendant. [I]n only a handful of cases I am confident that it [does].”

- Consistent with the judges’ responses, prosecutors reported almost no concerns with the use of statements as part of the sentencing process. Eleven of the twenty responding prosecutors said that they had “none” or “no” concerns regarding the use of VIS as part of sentencing. The specific concerns noted are also fairly described as minor and include: “Sometimes it will be [when] the victim is asking for less punishment [that] I disagree”; “[S]ometimes the victim says irrelevant things”; “Whether [the] victim is going to recommend to the court something less than what I am asking for”; “[The] victim is unreasonable and can tank a plea to [the] bench by asking for max without justification”; and “That it will make the defendant angry and he’ll back out of the plea” (this respondent gave no indication as to any frequency with which this occurred).

132. Compare infra Appendix II, at Question 16 (reporting prosecutors’ responses as to the benefits of VISs), with supra text accompanying note 95 (discussing judges’ responses as to the benefits of VISs), and supra Part II(D) (discussing the benefits of VISs shown through empirical research).
133. Infra Appendix II, at Question 16.
134. Compare infra Appendix I, at Question (n) (reporting judges’ responses regarding concerns with VISs) and supra text accompanying note 99–104 (discussing same), with infra Appendix II, at Question 17 (reporting prosecutors’ responses regarding concerns with VIS).
135. Infra Appendix II, at Question 17.
Prosecutors—when asked “What have you done particularly well in regard to the process of [VISs]?”—offered a number of specific actions that other prosecutors could emulate, both in terms of preparation and delivery, including: “[M]ake sure he/she addresses the court[,] . . . not the defendan[t]”; “Tell them other things other victims have included as a reference”; “Prepare[] the victim and ha[ve] her write out her statement beforehand” (2); “Encourage victims to make [a VIS]” (2); “Mak[e] sure I advocate for the victim if [he or she is] too afraid to speak for [himself or herself]”; “Mak[e] the suggestion that the child audio-record [his or her] statement”; “Logistically [set] cases off for sentencing post the defendant [pleading] to allow for people to come into court and be heard”; and “[I]f it [is] hard for them to do, provid[e] encouragement that they were brave to do it.”

When asked what they have seen “defense counsel do particularly well,” five of the seventeen responding prosecutors said “nothing,” “none,” or “I do not recall.” Prosecutors did note several actions, however, including: “work around [the statements]” (although this respondent did not say how that should be done); show respect, including when questioning the victim (3); “argue to the judge, not the victim”; “help the defendant understand [the] purpose [of a VIS]”; keep the defendant “quiet”; “have evidence/testimony to counter-balance [the prosecutor’s]”; and “[n]ot cross-examin[e] the victim.”

Prosecutors had much less to offer regarding what defendants did particularly well than they did for what they, the prosecutors, did well. This result was expected, however, and is not due to any lack of competence of the defense attorneys. Rather, it is because of the nature


137. *infra* Appendix II, at Question 20. However, see *supra* text accompanying notes 130–131 for a discussion regarding difficulties in defense counsels’ ability to discover and present evidence to counter-balance a prosecutor’s evidence. The prosecutor responding with “[h]ave evidence/testimony to counter-balance mine” offered no suggestions for defense counsel. *infra* Appendix II, at Question 20.

138. Compare *infra* Appendix II, at Question 19 (reporting what prosecutors believe they have done well) and *supra* text accompanying note 136 (discussing same), with *infra* Appendix II, at Question 20 (reporting what prosecutors believe defendants did well), and *supra* text accompanying note 137 (discussing same).
of the process and the limits of defense attorneys' ability to discover and then present witnesses or other VISs in court.\textsuperscript{139} Defense attorneys have much less to work with.

- The survey examined this significant issue: “In what approximate percentage of the times that such statements were presented by the prosecution, do you feel that they affected sentences by making them longer or tougher?”\textsuperscript{140} Nineteen prosecutors gave percentages. Responses ranged from 0% to 75%, with a median of 25% and a mean of 28.5%.\textsuperscript{141} This appears roughly consistent with the tone of the responses given by judges.\textsuperscript{142}

This may initially appear to contradict studies that statements do not materially affect sentencing,\textsuperscript{143} but this is likely, at best, an indicator that would not seem to empirically contradict them both because the prosecutors’ “feelings” may be incorrect and the surveyed judges did not provide percentages.\textsuperscript{144}

- Prosecutors next were asked the companion question: “In what approximate percentage of the times that such statements were presented by you, do you feel that they did not affect sentencing in any material way?”\textsuperscript{145} Nineteen provided percentages. Responses ranged from 1% to 100%, with a median of 75% and a mean of 64.7%.\textsuperscript{146} This is highly consistent with their responses to the previous question—how often do statements increase sentences. The combined medians equal 100%, and the combined means come close at 93.2%. In short, prosecutors reported that statements either had no effect on sentences or increased them. If the median or mean totals had been in excess of 100%, and to the degree

\begin{itemize}
  \item \textsuperscript{139} Supra text accompanying notes 130–131.
  \item \textsuperscript{140} Infra Appendix II, at Question 21.
  \item \textsuperscript{141} Infra Appendix II, at Question 21. Percentages reported were: 0% (2), 1%, 5%, 10% (2), 15%, 20%, 25% (3), 30%, 40%, 50% (4), 60%, and 75%. Other responses were: “sometimes”; “can’t answer”; “low %”; “[i]t’s impossible to say because it has no effect on the sentence if there is an agreement[,] and you don’t know if it really affects the sentence after trial”; and “[s]mall minority.” Infra Appendix II, at Question 21.
  \item \textsuperscript{142} See infra Appendix I, at Questions (q)–(r) (reporting surveyed judges’ responses regarding VISs’ effect on sentencing); see also supra text accompanying notes 111–114 (discussing same). The survey did not directly ask the judges the question posed here to prosecutors because of the expectation that judges would feel uncomfortable going on record in a survey, even anonymously, with such information. Rather, this information was elicited more subtly by asking if these judges had used VISs and how much weight they had given such statements. Infra Appendix I, at Questions (q)–(r).
  \item \textsuperscript{143} See supra Part II(A), particularly supra text accompanying notes 36 and 37 (describing a study that provides evidence that impact statements do not affect sentencing).
  \item \textsuperscript{144} Supra note 142.
  \item \textsuperscript{145} Infra Appendix II, at Question 22.
  \item \textsuperscript{146} Infra Appendix II, at Question 22. Percentages reported were: 1%, 10% (2), 25% (2), 40%, 50% (2), 75% (6), 90% (3), 99%, and 100%. Id.
either was, it would have been an indication that these prosecutors' respective percentages were in conflict.\textsuperscript{147} They were not.

- The survey asked, ”[H]ow much weight do you think judges have given [statements] in determining sentencing?”\textsuperscript{148} This was the same question asked of the judges.\textsuperscript{149} And, these sets of results, again spanning a scattered range of responses, were highly consistent. They included: “significant weight,” “depends on the [type of] case,” and “[s]ome weight.”\textsuperscript{150}

As for the types of cases in which prosecutors believed give VIS the most weight, nineteen of the twenty-four prosecutors cited, as may be expected, one or more of crimes of violence generally, domestic violence, or sex crimes.\textsuperscript{151} However, these were not the only types of cases.

One respondent said: “A [j]udge wanted to give a burglary [d]efendant the minimum sentence. The [v]ictim appeared and was an [elderly] woman with heart issues. She described how she can’t sleep, stay[s] in her house[,] and [cannot] function out of fear [the offender] will come back. The [j]udge realized how much damage this defendant did to her as a person, not just her belongings being taken.”\textsuperscript{152} Unfortunately, although he or she implied the result of the statement—a more severe sentence—this respondent did not provide further detail.

- When VISs are implicated, prosecutors are even more “in the trenches” than judges, because prosecutors have greater interaction with victims through preparation and pre-sentencing consultations. Therefore, they are uniquely qualified and well-positioned to detail how VISs are actually working, by answering the question: “What problems have you observed in the process of [VISs]?”\textsuperscript{153}

Prosecutors’ responses were almost laudatory in nature. Seven of the twenty who responded with clarity said “none” or “nothing.” Four noted that, at times, the victims’ statements might stray from how the victims had been impacted. (Although not stated by the respondents, the court

\textsuperscript{147} Not accounted for in these percentages are the cases where victim impact statements led to reduced sentences. This question was not posed due to the already-substantial length of the survey. Additionally, reduced sentences were expected to be a much less common result of VISs than enhanced sentences, due almost certainly to considerably fewer victims requesting the former.

\textsuperscript{148} \textit{Infra} Appendix II, at Question 24.

\textsuperscript{149} \textit{See infra} Appendix I, at Question (r) (asking judges how much weight they give to VISs); \textit{see also supra} text accompanying note 112 (discussing the same question).

\textsuperscript{150} \textit{Infra} Appendix II, at Question 24.

\textsuperscript{151} \textit{Infra} Appendix II, at Question 25.

\textsuperscript{152} \textit{Infra} Appendix II, at Question 26.

\textsuperscript{153} \textit{Infra} Appendix II, at Question 27.
and prosecutors should be capable of quickly bringing victims or those speaking on their behalf back to the issue at hand.) One said that victims were not sufficiently prepared, while another said that victims’ statements were poorly done.  

Remaining problems, which at most appeared to be relatively minor or isolated in nature, were the following:

(1) “Victims sometimes feel re-victimized when the sentence is low after presenting a VIS.”  

This would be at least significantly mitigated if prosecutors or victim advocates explained in advance that increasing sentences is not the purpose of VISs.  

(2) “Sometimes the victims are scared to present statements.” If so, they can present them in writing, through their victim advocate, or through the prosecutor.  

(3) “Sometimes the judge doesn’t [give] victims enough time to speak or say what they need to in order to feel whole or move forward with their [lives].”  

(4) “Not affording [v]ictims the right to make the statement when they are victims of burglaries.”  

When asked what could be done to improve the process, eight of the eighteen prosecutors said “nothing,” “none,” “no idea,” “not sure,” or “no opinion.” Remaining specific suggestions included:

(1) “Let the victim share the statement via closed circuit television so that he/she does not have to actually see defendant in court.” However, this would eliminate several of the therapeutic benefits of VISs.  

(2) “Bring them into the process sooner, have them at plea negotiations.”  

(3) “Create a form that [allows] the victim to write it out at the beginning of the case and add more information or details to it during the

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154. *Infra Appendix II,* at Question 27.  
155. *Infra Appendix II,* at Question 27.  
156. *See supra* note 39 and accompanying text (stating that the purpose of VISs is to provide victims with a voice).  
157. *Infra Appendix II,* at Question 27.  
158. *Infra Appendix II,* at Question 27.  
159. *Infra Appendix II,* at Question 27.  
160. *Infra Appendix II,* at Question 29.  
161. *Infra Appendix II,* at Question 29.  
162. *See supra* notes 50 and 51 and accompanying text (discussing the therapeutic benefits of VISs).  
163. *Infra Appendix II,* at Question 29.
process, if needed.” This appears to be a simple, cost-free, and excellent suggestion.

(4) “I don’t care for judges asking defense attorneys if they’d like to question the victim. . . . It’s the victim’s time to be heard[,] . . . not a time to be cross-examined. . . . I think it’s disrespectful to people who at a time where confrontation rights aren’t the issue and the adversarial nature of process shouldn’t be at play.” Such rights may not be “the issue,” but under any concept of due process cross-examination does and should remain “the right” of the defendant. (Interestingly, this respondent acknowledged that “most of the time, defense counsel doesn’t ask questions.”)

- Finally, some prosecutors had suggestions for how they and defense attorneys could “do better in preparing for, handling, or reacting to [VISs].” Specific ideas included:
  1. “Educate the victims on when these statements are most effective.”
  2. “Early involvement of the [victim], multiple drafts of written statements, practice statements with [the prosecutor] (to reduce length/detail).”
  3. “Try to get them as early as possible and use them in negotiating prior to agreeing on a sentence.” This seems to be a particularly excellent suggestion from the prosecutors’ point of view. Defendants may see what lies at “the end of the road” for them in sentencing, and thereby be motivated to plead out—and do so much earlier in the process.

THE PUBLIC DEFENDERS

The results of this survey are limited because the Author only received responses from three public defenders out of approximately 120 public defenders who were included in the survey—a rate of 2.5%. Such few responses, however, by themselves, may be informative.

164. *Infra* Appendix II, at Question 29.
165. *Infra* Appendix II, at Question 29.
166. *Infra* Appendix II, at Question 29.
171. See *infra* Appendix III (providing the questions and answers of the public defenders’ survey).
172. Email from Melissa Vickers to Mitchell J. Frank, Assoc. Professor of Law, Barry Univ. Sch. of Law, Question from Prof. Frank re Surveys (July 26, 2013, 5:04 PM EDT) (on file with Author).
Both the judges’ and prosecutors’ surveys, especially the latter, show that public defenders, mostly out of necessity and prudence, have little role to play regarding VISs that mainly are used against their clients. Therefore, not surprisingly, one possible explanation for public defenders’ lack of response to the Author’s survey is that they had little desire to take the time, with heavy caseloads, to comment on a process which they may feel is “stacked against them” and against which they have little ability to defend. However, if this were the case, it would be an indication that they were focusing on how the VIS process operates vis-à-vis their clients—or even themselves—rather than how it operates vis-à-vis the victims of crime. Put another way, public defenders may have forgotten or failed to focus on the fact that the main purpose of VISs is to benefit victims. If true, and had they realized they had an opportunity to give meaningful suggestions and input to help improve the VIS process for these victims, the response rate may have been higher. Prosecutors, who showed no signs of feeling the process was “stacked against them,” had a response rate of 16%, between six to seven times that of the public defenders.

Pertinent, albeit limited, findings from the public defenders’ survey include the following:

- Prosecutors infrequently tried to present VISs—10% and 25% of the time.
- “Emotion” or “raw emotion,” or when the victim explains how the crime is still affecting him or her, makes VISs persuasive.
- When public defenders have presented VISs, they have done so: where “the victim would rather [have the defendant] work to pay restitution than go to [prison]”; in cases of “[s]tatutory rape, or [where] family member victims . . . have forgiven the [defendant],” but prosecution was forced; and “[w]hen the guidelines are so out of skew with logic and

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173. See infra Appendix II, at Question 13, 14, and 20; see supra text accompanying notes 130 and 131 (explaining why most public defenders never present victim impact statements).
174. See supra Part II(C) (recognizing public defenders act prudently when they choose not to cross-examine grieving victims).
175. Infra Appendix II, at Question 13.
176. The survey was sent to approximately 150 state attorneys. Email from Samantha Garcia to Mitchell J. Frank, Assoc. Professor of Law, Barry Univ. Sch. of Law, Question from Prof. Frank re Surveys (July 26, 2013, 11:24 AM EDT) (on file with Author). Twenty-four state attorneys responded, infra Appendix II, at Overview, whereas only three public defenders responded out of the 120 who received the survey, supra text accompanying note 172.
177. Infra Appendix III, at Question 2.
178. Infra Appendix III, at Question 8.
the alleged victim [does not want] to completely ruin the [defendant's] life.”

- In relating what benefits they have observed in the use of VISs, one respondent stated: “In some cases I would imagine it is cathartic to someone who has suffered at the hands of [the defendant] to let [him or her] know the human cost.”

It seems this public defender may not have been sufficiently focused on victims when he or she responded.

- Concerns of VISs expressed by public defenders included: “Sometimes [a VIS] can turn into an attack on my client as a human being”; “[e]motion can often take over”; and “sometimes logic is overruled by emotion. Sometimes witnesses play up (usually[,] police officers fall in this category)[,] or if the media is [a] part[,] then everyone is making a show rather than trying to get a true restorative[-]style sentence.”

Public defenders have tried to ameliorate these concerns by objecting to the use of VISs—“so my client at least thinks I am fighting for [him or her]”—and by “[working] hard to take the emotion out of it.”

- When asked what they had done “particularly well” in regard to VISs, public defenders responded: “[n]othing”; “[used] them in cases where the victim was forced to prosecute”; and “[h]ard to say.”

- Respondents felt VISs helped make sentences longer or tougher from 5%, to 10%, to 75% of the time. In 95%, 90%, and 25% of the time, they felt a VIS did not affect sentencing in any material way.

- Respondents felt judges gave VISs “[v]ery little” weight, “[m]uch weight,” or “[p]robably more [weight] than they should.”

- Problems with the VIS process included: “[w]hen the victim starts talking about other non-charged crimes [he or she]

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180. *infra* Appendix III, at Question 16 (emphasis added).
181. *infra* Appendix III, at Question 17.
182. *infra* Appendix III, at Question 18.
185. *infra* Appendix III, at Question 22.
suspect[s] my client of doing,” and “[t]he amount of emotion which clouds rational and reasonable sentences.”

- What can “prosecutors and defense attorneys do better in preparing for, handling, or reacting to [VISs]?” To better prepare, respondents suggested: “[a]lways read [VISs] ahead of time before they are presented [in] court”; “[t]alk to people first”; and “[t]alk [to] the victims ahead of time and get them on board with the agreements.”

- Finally, they reported that the following “could be done to improve the process of [VISs]”: “[t]hey could be limited in scope and duration—ten minutes to say how this crime is still [affecting] you today”; “[m]ore stringent rules regarding the scope of testimony and disallowing narration”; and “[i]nstuct judges about how to handle the emotional aspects of the statements but still be able to give rational[,] reasonable sentences.”

### IV. VICTIM IMPACT EVIDENCE IN ITS MOST EMOTIONAL, POTENT, AND PREJUDICIAL FORMS—THE STRUGGLE TO ENSURE FAIRNESS

As this Part will show, since Payne, lower courts, without the Supreme Court’s guidance, have been faced with highly emotional VIE. Generally, the Court in Payne stated that the overall purpose of VIE was “to show instead each victim’s ‘uniqueness as an individual human being,’ whatever the jury might think the loss to the community resulting from his death might be.” The Court also revived the right of the state to offer “‘a quick glimpse of the life’ which a defendant ‘chose to extinguish’ [and demonstrate] the loss to the victim’s family and to society which has resulted from the defendant’s homicide.”

The purpose of victim impact evidence aside, the Court provided lower courts with no particular tests or requirements, other than the descriptor that the “glimpse of the life” be “brief,” to help determine admissibility of such evidence and do so in a reasonably consistent

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187. Infra Appendix III, at Question 27.
188. Infra Appendix III, at Question 28.
189. Infra Appendix III, at Question 29.
190. Infra Appendix III, at Question 29.
191. See supra note 8 and discussion in Part I (discussing literature critical of the holding in Payne).
193. Id. at 822 (citations omitted) (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).
fashion, thereby promoting uniformity. Rather, as Justice Stevens noted, the Court left lower courts with a single statement to guide them. In reality, it was a single sentence.

As the reader will see in the particular cases discussed in this Part, and as may be generally expected in these types of cases, determinations as to admissibility involve weighing the “probative value” of the VIE against the “danger of unfair prejudice” it poses.

A. Photographs of a Slain Mother’s Unborn Child, Who, Although Viable, Died in Utero from Lack of Oxygen Minutes After the Mother Did, Dressed in Clothes He Would Have Worn Home from the Hospital After Being Born

In 1998, seven years after the United States Supreme Court rendered its decision in Payne, the South Carolina Supreme Court, in State v. Ard, a capital case, ruled that two photographs of a slain mother’s unborn but viable child were admissible as VIE.

In Ard, the child–victim lived only six to eight minutes after his mother was shot, suffocating in the womb from lack of oxygen. The defendant was convicted of murdering the mother and, because the child was viable, the child as well. In the sentencing phase, the State offered two photographs that showed the child dressed in the clothes that his mother wanted him to wear home from the hospital after his birth. The defendant objected that the photographs gave “the impression that it was a born existing person” and the “prejudice from [them] outweighed any potential probative value.” The trial court admitted the photographs, notwithstanding the fact that the viability of the child was not at issue during the sentencing phase.

194. Id. at 822, 829–30 (citations omitted).
195. See supra text accompanying note 22 (referencing the language “unduly prejudicial” used by the Supreme Court).
197. If in federal court, see Federal Rule of Evidence 403: although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. If in state court, the court is likely using a statutory version of Federal Rule of Evidence 403 that is identical, or not materially different. See, e.g., N.M. R. EVID. 11-403; TEX. EVID. R. 403.
199. Id. at 330–32.
200. Id. at 330.
201. Id.
202. Id. at 331.
203. Id. (internal quotations omitted).
204. Id. at 331–32.
The South Carolina Supreme Court held that it was within the discretion of the trial court to admit the photographs and affirmed the death sentence. The court gave four specific reasons: (1) “[t]he two photographs were properly admitted to portray the individuality of the unborn child. Since the child was murdered before he was born, there was no other way to vividly present his uniqueness to the jury”; (2) “the photographs aided the jury in determining the vulnerability of the infant victim and, therefore, were relevant in assessing the circumstances of the crime and the character of the defendant”; (3) the photographs of the child, dressed as he was, “[revealed the mother’s] aspirations about the birth of her child and were relevant to the sentence for her murder”; and (4) “the photographs support[ed] the statutory aggravating circumstances that two persons were murdered by appellant during one course of conduct and one of the victims was a child under the age of eleven.”

It would be difficult to imagine more heartrending, prejudicial, and inflammatory evidence than the not one but two photographs presented in this case. The sentencing jury knew this was an unborn child, wearing the clothes his mother had picked out for him to wear when she brought him home from the hospital, and who had suffocated to death within her womb—after she had died.

As to the four reasons for the evidence admission asserted by the court, the first one took “uniqueness” to the extreme. There was no dispute about the facts—the jury had already decided the child was viable. Any manner of obstetric testimony or medical records could have shown the state of the child at the time of his death. The second, third, and fourth reasons could also have easily been accomplished—and without the substantial prejudice that accompanied the photographs—through obstetric testimony of lay witnesses.

The court cited Payne for the proposition that “evidence about the victim is relevant to the jury’s consideration of the sentence which should be imposed.” Yet, although the court discussed the relevancy of these photographs in detail, it never specifically addressed the defendant’s objection that the prejudice caused by the photographs outweighed any potential probative value, save only noting that it did not agree, as
defendant claimed, that the photographs showed the child lying in a casket.\textsuperscript{211}

B. Photographs Showing a Slain Police Officer’s Two Young Sons and Widow Looking Down into the Grave as His Casket Was Lowered, and His Sons Sitting on a Bench by the Gravesite

These photographs were admitted by the trial court in the penalty phase of the capital case \textit{State v. Rose}.\textsuperscript{212} On appeal, the Arizona Supreme Court struggled to affirm.

Quoting \textit{Payne}, the court recognized that VIE “is generally admissible at sentencing unless it is ‘so unduly prejudicial that it renders the trial fundamentally unfair.’”\textsuperscript{213} At trial, defendant objected to admission of the photographs under Arizona Rule of Evidence 403\textsuperscript{214} on the basis that their probative value was substantially outweighed by the danger of unfair prejudice.\textsuperscript{215} The trial court overruled this objection.\textsuperscript{216}

The Arizona Supreme Court found this to be a case of first impression, in that “no Arizona case [had] addressed the admissibility of photographs of the victim’s survivors, ostensibly to depict their response to the victim’s death and its effect on them.”\textsuperscript{217} The court then cited two California Supreme Court decisions that allowed admission—in the penalty phase of a capital case—of photographs of the victim’s gravesite:

- \textit{People v. Zamudio}, which permitted three photographs of the victims’ grave markers;\textsuperscript{218} and
- \textit{People v. Kelly}, which permitted a video montage that ended with a close-up of the victim’s grave.\textsuperscript{219}

The court relied on these decisions in affirming the trial court’s admission of the graveside photographs on the basis that the trial court had not abused its discretion in ruling as it did under Rule 403: “After all, the jury was well aware, without the photographs, that the murder caused the two boys to suffer a devastating loss of their father’s love, affection, and support for the rest of their lives.”\textsuperscript{220}

\textsuperscript{211} Id. at 331 n.3.
\textsuperscript{212} 297 P.3d 906, 917 (Ariz. 2013).
\textsuperscript{213} Id. at 916 (quoting \textit{Payne}, 501 U.S. at 825).
\textsuperscript{214} Ariz. R. Evid. 403 is materially indistinguishable from Fed. R. Evid. 403.
\textsuperscript{215} \textit{Rose}, 297 P.3d at 917–18.
\textsuperscript{216} Id.
\textsuperscript{217} Id. at 917.
\textsuperscript{218} 181 P.3d 105, 137 (Cal. 2008).
\textsuperscript{219} 171 P.3d 548, 570 (Cal. 2008).
\textsuperscript{220} \textit{Rose}, 297 P.3d at 918.
In doing so, the court relied on decisions involving far less prejudicial photographs than were involved in the instant case. Consider the difference: photographs of grave markers and the victim’s grave on the one hand, versus photographs of a slain police officer’s two young sons and his widow looking down into the grave as his casket was lowered, and then his sons sitting on a bench, albeit with their backs to the camera, by the gravesite, on the other. The former photographs were only of objects. The latter were not. They added heartbreaking visual evidence of a personal dimension. No further discussion should be necessary to impress the point that the court’s reliance was factually, and significantly, misplaced.

Most significantly, the court’s reliance on Zamudio and Kelly showed that the Supreme Court’s denial of certiorari in both cases had come home to roost. Justice Stevens’s great concern that the “especially prejudicial” nature of the VIE in those cases, including video and photographs merely of the graves, would invite “a verdict based on sentiment, rather than reasoned judgment” had taken concrete form in Arizona.

And, the Arizona Supreme Court did not by any means heartily affirm the trial court’s admission of these photographs, regardless of any abuse of discretion standard: “The trial court, however, would have acted well within its discretion had it excluded those photographs, given their marginal relevance, the danger of unfair prejudice their admission posed, and the extensive, clearly permissible [VIE] already presented.” Edward James Rose, the defendant, was sentenced to death in Rose.

The reader may be asking two questions at this point:

- Who likely would not have been sentenced to death by this penalty phase jury, where defendant was charged with murdering a police officer, after the jurors took these photographs into the jury room?
- Would Rose have not been sentenced to death, or his death sentence upheld, if the United States Supreme Court had either accepted certiorari in Zamudio and Kelly and reversed, or at the very least provided guidance or parameters as to

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221. Supra notes 13–18 and accompanying text.
222. Supra notes 23–25 and accompanying text.
223. Rose, 297 P.3d at 918.
224. Id. at 909.
what type of “graveside” evidence— if any— was permissible? 225

C. A Seventeen-Minute Video Tribute to a Slain Police Officer, Including a Photo Montage from Childhood to Adulthood, Poems, and a Television Segment That Covered His Funeral, All Accompanied by a Medley of Music from the Beatles to a Religious Hymn

The defendant in State v. Hess226 was convicted of aggravated manslaughter in the death of her husband, a police officer.227 The defendant challenged her thirty-year sentence in the New Jersey Supreme Court based on ineffective assistance of counsel in various respects.228 The most striking instance of ineffective assistance, which drew the focus of the court, was counsel’s lack of objection to the “day-in-the-life” video—one of several pieces of VIE introduced by the state at sentencing.229

The court first dispelled the idea that judges were completely immune to the effects of prejudicial VIE:

Undoubtedly, concerns over prejudicial victim-impact statements, including photographs and videos, are less pronounced when a judge rather than a jury is imposing sentence. Nevertheless, judges, no less than jurors, are susceptible to the wide range of human emotions that may be affected by irrelevant and unduly prejudicial materials. We are fully aware that judges, who are the gatekeepers of what is admissible at sentencing, will have viewed materials that they may deem non-probative or unduly prejudicial. We have faith that our judges have the ability to put aside that which is ruled inadmissible. However, both the bar and bench should know the general contours of what falls within the realm of an appropriate video of a victim’s life for sentencing purposes.230

The video that counsel failed to object to:

- was seventeen minutes long.231

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225. It is difficult to envision the Court finding the photographs in this case as being within any parameters it might have provided for the guidance of lower courts, had it accepted certiorari in these two cases and rendered a decision.
226. 23 A.3d 373 (N.J. 2011).
227. Id. at 376.
228. Id.
229. Id. at 381.
230. Id. at 392 (citation omitted).
231. Id. at 393.
was professionally produced;\textsuperscript{232} contained a montage of approximately sixty photographs of the officer’s life from childhood to adulthood, including one of his tombstone;\textsuperscript{233} contained four separate home-video clips of him graduating from the police academy, coaching a baseball game, and appearing on fishing trips;\textsuperscript{234} contained a television segment that covered his funeral;\textsuperscript{235} had three poems displayed over some of the photographs and video clips;\textsuperscript{236} and was, in its entirety, accompanied by a medley of music: “Here Comes the Sun” by the Beatles, “I’ll Be Home for Christmas,” two country songs—“I’m From the Country” and “Live, Laugh, Love,” one religious hymn—“Here I Am, Lord,” and military cadences.\textsuperscript{237}

It took the court little time to perform its analysis and render its decision:

In this case, defense counsel should have objected to the video, and his failure to do so cannot be considered strategic or reasonable. The music and the photographs of the victim’s childhood and of his tombstone, and the television segment about his funeral do not project anything meaningful about the victim’s life as it related to his family and others at the time of his death. They should have been redacted from the video because they contain little to no probative value, but instead have the great capacity to unduly arouse or inflame emotions. Although we do not believe that the introduction of the video, alone, had the capacity to alter the outcome of the sentence, on remand the video should accord with the prescriptions in this opinion.

We cannot set forth an exhaustive catalogue of what is and is not permissible in a video, other than to say how this video exceeded permissible bounds. We in no way intend to limit the right of family members to present photographs and videos within a reasonable period before the death of the victim, or to express themselves in the

\begin{itemize}
  \item \textsuperscript{232} Id.
  \item \textsuperscript{233} Id.
  \item \textsuperscript{234} Id. at 381.
  \item \textsuperscript{235} Id. at 393.
  \item \textsuperscript{236} Id. at 381.
  \item \textsuperscript{237} Id.
\end{itemize}
ways they see fit. For example, we do not suggest that a family member could not read a poem in court.  

The *Hess* decision partially filled for New Jersey trial courts the vacuum left by the United States Supreme Court after *Payne*.  

Notwithstanding that it did not “set forth an exhaustive catalogue,” it did start providing specific guidance: poems and reasonably recent photographs and videos of the victim would be admissible; music, photographs of an adult victim’s childhood, photographs of his tombstone, and television segments of funerals, would not.

**D. A Professional Quality Video of a Twenty-Year-Old Murder Victim That Was “Entirely Appropriate for a Memorial Service”**

In *Salazar v. State*, the Texas Court of Criminal Appeals handed down what can be fairly described as a highly detailed and well-reasoned primer on how courts should analyze video VIE specifically and VIE generally.

In *Salazar*, the defendant was charged with capital murder but was convicted of the lesser-included offense. The jury assessed punishment at thirty-five years in prison and fined the defendant $10,000. An important part of the VIE that was admitted for the jury to consider was a professional quality video regarding Jonathon Bishop, the twenty-year-old deceased.

Presenting the court’s full, although lengthy, description is warranted to help the reader experience, at least partially, what the jury must have felt when the video was played for them:

This video is an extraordinarily moving tribute to Jonathon Bishop’s life. It consists of approximately 140 still photographs, arranged in a chronological montage. Music accompanies the entire seventeen-minute video and includes such selections as “Storms in Africa” and “River” by Enya, and concludes with Celine Dion singing, “My Heart Will Go On,” from the movie *Titanic*.

Almost half of the approximately 140 photographs depict the victim’s infancy and early childhood. The pictures show an angelic baby, surrounded by loving parents, grandparents, unidentified relatives,

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238. *Id.* at 393–94.
241. *Id.* at 332.
242. *Id.* at 334.
243. *Id.* at 333.
and other small children. Later photographs show Jonathon as a toddler, playing the piano, frolicking at the beach with other friends, happily riding on a carousel, laughing in a field of bluebonnets, and cuddling with a puppy. The video also includes numerous annual school pictures showing Jonathon’s progression from a cheerful child to an equally cheerful young man. It catalogs his evident and early prowess as a young soccer player and eventually as a football player. There is a picture of him and his date, presumably going to their prom, and more candid shots of the victim and his teen-age buddies. The video includes many family reunion portraits showing Jonathon’s entire extended family. Understandably, this professional and polished production portrays Jonathon in a very positive light and it is entirely appropriate for a memorial service. The music, too, is appropriately keyed to the various visuals, sometimes soft and soothing, then swelling to a crescendo chorus. In sum, it is a masterful portrait of a baby becoming a young man. It is also extraordinarily emotional.244

Defense counsel objected on various grounds, including on the basis that “[the] exhibit is highly prejudicial and outweighs any probative value. . . . After the admission of that exhibit, . . . [there is] absolutely no way this Defendant can get a fair trial, absolutely no way.”245

The court began its analysis of this VIE by referring to Payne:

As the Supreme Court stated in Payne v. Tennessee, such evidence is “designed to show . . . each victim’s ‘uniqueness as an individual human being,’” and is a way to inform “the sentencing authority about the specific harm caused by the crime in question.” . . . Defendants are not nameless, faceless ciphers in the courtroom. . . . Every homicide victim is an individual, whose uniqueness the defendant did or should have considered, regardless of whether the murderer actually knew any specific details of the victim’s life or characteristics.

On the other hand, the punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial.246

244. Id. at 333–34 (emphasis added).
245. Id. at 334.
246. Id. at 335–36 (quoting Payne v. Tennessee, 501 U.S. 808, 823–25 (1991)) (first emphasis in original, second emphasis added) (footnotes omitted). The court also noted the distinction between victim character evidence and victim impact evidence. Id. at 335.
The court, as evidenced by its use of italics at length, was concerned:

At the same time, we caution that victim impact and character evidence may become unfairly prejudicial through sheer volume. Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice under Rule 403. Hence, we encourage trial courts to place appropriate limits upon the amount, kind, and source of victim impact and character evidence. 247

And, it further cautioned:

As we noted in [Mosley v. State], 248 there is no legal “bright and easy line” for deciding precisely what evidence is and is not admissible as either victim character or [VIE]. The inability to craft a bright-line rule, therefore, requires heightened judicial supervision and careful selection of such evidence to maximize probative value and minimize the risk of unfair prejudice. Courts must guard against the potential prejudice of “sheer volume,” barely relevant evidence, and overly emotional evidence. A “glimpse” into the victim’s life and background is not an invitation to an instant replay. 249

The court then conducted a thoughtful and thorough Rule 403 analysis of the video, 250 including considering the following factors as stated in its prior decision in Solomon v. State, 251 as follows in its entirety: 252

- The probative value of the evidence:
  The court assessed the value as “minimal.” 253 “Nearly half of the photographs showed Jonathon Bishop as an infant, toddler or small child, but appellant murdered an adult, not a child. He extinguished Jonathon Bishop’s future, not his past. The probative value of the vast

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247. Id. at 335 (footnotes omitted).
248. 983 S.W.2d 249.
249. Salazar, 90 S.W.3d at 336 (footnotes omitted) (quoting Mosley, 983 S.W.2d at 262–63).
250. Id. at 336–39.
251. 49 S.W.3d 356 (Tex. Crim. App. 2001). In its Rule 403 analysis, the Salazar court applied rules that were “simply the normal evidentiary rules that courts apply in any Rule 403 admissibility determination.” 90 S.W.3d at 336.
252. Because of the clarity and thoroughness of this analysis, and in the hope that judges and trial lawyers may refer to this as an exemplar, the court’s analysis is presented in its entirety.
253. Salazar, 90 S.W.3d at 337.
majority of these ‘infant-growing-into-youth’ photographs is *de minimis."

- Its potential for unfair prejudice:

  [The] prejudicial effect [of these photographs] is enormous because the implicit suggestion is that appellant murdered this angelic infant; he killed this laughing, light-hearted child; he snuffed out the life of the first-grade soccer player and of the young boy hugging his blond puppy dog. The danger of unconsciously misleading the jury is high. While the probative value of one or two photographs of an adult murder victim’s childhood might not be substantially outweighed by the risk of unfair prejudice, what the State accurately characterizes as a “seventeen-minute montage” of the victim’s entire life is very prejudicial both because of its “sheer volume,” and because of its undue emphasis upon the adult victim’s halcyon childhood. Because the probative value of much of the video montage is low and the potential for unfair prejudice high, these two factors weigh against admissibility.

- The time needed to put on the evidence:

  [This] also weighs against admissibility. Here, both parents testified in person and spoke briefly, but eloquently, of their love for Jonathon, his individuality, his childhood and youth, his love of life, and of their personal loss and grief. Mrs. Bishop’s testimony was three record pages long, while Mr. Bishop’s was two pages. Their testimony was fully admissible. Mrs. Bishop had also testified as the State’s first witness during the guilt stage and authenticated a photograph of Jonathon as he looked around the time of his death. This photograph was clearly relevant and admissible. The memorial video, on the other hand, was very lengthy, highly emotional, and barely probative of the victim’s life at the time of his death.

- The proponent’s need for the evidence:

  The State’s need for this evidence was also minimal. Both parents were available to testify and both did so. Their testimony was eloquent and brief. Because Mr. Bishop compiled the photographs for the memorial videotape, the State could have offered a small number of those photographs through him.

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254. *Id.*
255. *Id.*
256. *Id.* at 337–38.
257. *Id.* at 338 (footnotes omitted).
The court concluded its analysis by finding that although in “close cases, courts should favor the admission of relevant evidence[,] [t]his is not a close case”;\textsuperscript{258} that all of the Rule 403 factors “weigh[ed] against admissibility”;\textsuperscript{259} and that “[t]he video itself was not admissible and the Enya and Celine Dion background music greatly amplifie[d] the prejudicial effect of the original error.”\textsuperscript{260}

The court therefore reversed the defendant’s sentence and remanded the case to the court of appeals “to apply its harmful error analysis to both the visual and audio portions” of the video, instead of only the former as it had done originally.\textsuperscript{261} As may be expected, the court of appeals reviewed its decision based on the higher court’s instructions and ultimately determined that it could not “conclude the error had no influence or only a slight influence on the verdict.”\textsuperscript{262} Accordingly, it in turn reversed and remanded this case to the trial court for a new hearing on punishment.\textsuperscript{263}

As the New Jersey Supreme Court did in Hess,\textsuperscript{264} the Texas Court of Criminal Appeals did here. Both courts contributed to setting parameters for the admissibility of VIE, in these cases videos, where the United States Supreme Court would not.\textsuperscript{265} Judges and trial attorneys in these states, and hopefully those in other states as well, can only benefit from their having done so.

E. A Victim Impact Video Made for a Memorial Service

Whereas the victim impact video in Salazar was “entirely appropriate for a memorial service,”\textsuperscript{266} the video in United States v. Sampson\textsuperscript{267} was actually created for one.\textsuperscript{268}

Gary Sampson pleaded guilty to two counts of carjacking resulting in death, and in a sentencing trial under the Federal Death Penalty Act

\textsuperscript{258} Id. (footnotes omitted).
\textsuperscript{259} Id.
\textsuperscript{260} Id. at 339.
\textsuperscript{261} Id.
\textsuperscript{263} Id.
\textsuperscript{264} See State v. Hess, 23 A.3d 373, 392–94 (N.J. 2011) (defining parameters for admissibility of VISs); supra Part IV(C) (discussing how the court in Hess defined parameters for admissibility of VISs).
\textsuperscript{265} See supra notes 8–27 and accompanying text (describing the cases and decisions that helped define the parameters of admissible VIE).
\textsuperscript{266} 90 S.W.3d at 334 (emphasis added); supra discussion in Part IV(D).
\textsuperscript{267} 335 F. Supp. 2d 166 (D. Mass. 2004).
\textsuperscript{268} Id. at 191.
the jury returned its verdicts requiring the death penalty on both counts. VIE was presented at the trial because:

[It] may be considered by the jury in federal capital cases, as a non-statutory aggravating factor, if the jury unanimously finds that the prosecution has proven at least one statutory aggravating factor. The FDPA explicitly permits the government to present evidence “concerning the effect of the offense on the victim and the victim’s family.” Such evidence “may include oral testimony, a [VIS] that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim’s family, and any other relevant information.”

Along with other VIE, the government sought to introduce a memorial video of Jonathan Rizzo, who was a college student and one of the defendant’s victims:

The video, made for a memorial service, was about twenty-seven minutes in length and featured over [two hundred] still photographs of the victim, in roughly chronological order, from the time he was born until the time just before his death. The pictures were set to evocative contemporary music, including that of the Beatles and James Taylor.

Because the “probative value was outweighed by the danger of unfair prejudice, and created a danger of provoking undue sympathy and a verdict based on passion as opposed to reason,” the court excluded the video. In doing so it relied primarily on the holding in Salazar, from which it cited at length. In comparing the videos in both cases, the court stated:

Even longer than the videotape analyzed in Salazar, the Rizzo video was close to [thirty] minutes long and featured many pictures of the victim from birth to college, posing with family, friends and religious figures. In addition, it was set to poignant music. Even without the music, admission of the video would have been unfairly prejudicial in light of the fact that the jury heard powerful, poignant testimony about Jonathan Rizzo’s full life and the impact of his loss on his family, and

270. Sampson, 335 F. Supp. 2d at 175.
271. Id. at 186 (citations omitted).
272. Id. at 191.
273. Id.
274. See id. at 191–93 (comparing Sampson to Salazar).
saw photographs of him in conjunction with this testimony. The video, given its length and the number of photos displayed, would have constituted an extended emotional appeal to the jury and would have provided much more than a “quick glimpse” of the victim’s life. Together with the evocative accompanying music, the videotape’s images would have inflamed the passion and sympathy of the jury. 275

Although not explaining its analysis in nearly as great detail as the court did in Salazar, 276 the District Court of Massachusetts clearly was applying a Rule 403 analysis. 277 Its decision in this federal case, as well as the extent to which it relied upon and cited from Salazar, is further indication that (1) courts have started to curtail the use of these highly prejudicial types of VIE, and (2) the first steps are being taken on the road to uniformity in ruling on such evidence. Both are worthy goals.

V. CONCLUSION

If the primary purpose of a VIS is to “provide victims a voice,” and this seems to be an accurate statement, 278 then it is being fulfilled. The empirical evidence strongly shows that victims are being given a voice, along with other benefits. Additionally, perceived detriments of VISs have, with equal strength, been empirically shown to be only that—perceptions. Both results were confirmed by respondents in the Ninth Judicial Survey analyzed herein. For victims of future crime, who will need and deserve the best that any part of the criminal justice system can deliver, this should be excellent news.

The question remains, however, to what extent these victims will be likely to avail themselves of the VIS process—and receive its benefits. Responses from Ninth Judicial Circuit prosecutors suggest that VISs are given in from 35% to 50% of the cases. 279 However, while there is strong evidence of extensive VIS use internationally, 280 there is a dearth of studies specifically targeted to this issue in the United States. Such research is vital to encouraging the use of VISs in the United States.

At the other end of the VIE spectrum lie the videos and photographs, such as those analyzed in Part IV, that both are designed to inflame emotions of juries and judges and carry with them such great potential to

275. Id. at 192–93 (footnotes omitted).
277. See Sampson, 335 F. Supp. 2d at 178–83 (applying Rule 403 analysis to the facts).
278. Erez, supra note 39 at 555.
279. Supra notes 118–19 and accompanying text.
280. Supra notes 57–65 and accompanying text.
be unfairly prejudicial. Such potential could, in one stroke, have been at least significantly curtailed, and conceivably eliminated, had the Supreme Court offered guidance in *Payne*\(^{281}\) as to permissible parameters for this evidence or seized later opportunities to do so.\(^{282}\) It repeatedly declined. Lower courts, as this Article has shown,\(^{283}\) have been left to the task of providing those parameters. As well as the lower courts may do, uniformity across state and federal jurisdictions will be difficult, if not impossible, to achieve. Although ordinarily such uniformity is neither necessary nor in many instances even desirable, such should not be the case with *this* evidence—which Justice Stevens accurately termed “especially prejudicial.”\(^{284}\) Remembering that this evidence is used in penalty phases of capital cases where death may be the sentence, as well as in other cases where life imprisonment or long prison terms may result, there is no compelling reason why a defendant in one jurisdiction, but not one in another, should be subject to it.


\(^{282}\) See *supra* notes 13–25 and accompanying text (examining how the Supreme Court has given no guidance to the lower courts on the boundaries of permissible VIE).

\(^{283}\) See *supra* Part IV (discussing how lower courts have decided various cases involving VIE).

APPENDIX I

FLORIDA NINTH JUDICIAL CIRCUIT
JUDGES SURVEY
30 TOTAL SURVEYS RECEIVED

OVERVIEW

Of the thirty judges who responded to the survey, twelve (40%) have presided over criminal jury trials where VIE was introduced.

Of the twelve judges who presided over criminal jury trials where VIE was introduced, only four (33.3%) have seen defense attorneys introduce victim impact statements. However, three (25%) judges stated they would have allowed VIE from the defense, but have never been asked while presiding over a case.

None of the twelve judges who presided over criminal jury trials have ever refused to allow victim impact statements.

Of the twelve judges who presided over criminal jury trials where VIE was introduced, only one (8.3%) required the written victim impact statement to be read out loud.

*Judges’ responses are reproduced exactly as they appear on survey response forms.*
<table>
<thead>
<tr>
<th>Question 1</th>
<th>Have you presided over criminal jury trials since victim impact statements have been allowed?</th>
</tr>
</thead>
<tbody>
<tr>
<td>12 out of 30 Respondents (40%)</td>
<td>YES</td>
</tr>
<tr>
<td>18 out of 30 Respondents (60%)</td>
<td>NO</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question a</th>
<th>In what types of cases have you allowed such statements?</th>
</tr>
</thead>
<tbody>
<tr>
<td>All criminal cases: misdemeanors, felonies, juvenile.</td>
<td></td>
</tr>
<tr>
<td>Battery, Criminal Mischief</td>
<td></td>
</tr>
<tr>
<td>Whenever the state indicates the victim wants to make a statement.</td>
<td></td>
</tr>
<tr>
<td>Simple Battery, Sexual Battery, Domestic Violence, Burglary</td>
<td></td>
</tr>
<tr>
<td>Felony, Misdemeanor and Juvenile cases.</td>
<td></td>
</tr>
<tr>
<td>All criminal cases if the victim wants to be heard at sentencing.</td>
<td></td>
</tr>
<tr>
<td>Criminal cases</td>
<td></td>
</tr>
<tr>
<td>At sentencing in any case</td>
<td></td>
</tr>
<tr>
<td>To the jury, in death penalty cases only. In other types, to me when requested.</td>
<td></td>
</tr>
<tr>
<td>Criminal charges with a death, battery, other personal crimes</td>
<td></td>
</tr>
<tr>
<td>Prior to any criminal sentence that has a victim</td>
<td></td>
</tr>
<tr>
<td>All in which they were offered</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Question b</th>
<th>In what types of cases have you not, and why not?</th>
</tr>
</thead>
<tbody>
<tr>
<td>I always allow the victims to address the court.</td>
<td></td>
</tr>
<tr>
<td>Not asked other than these</td>
<td></td>
</tr>
<tr>
<td>I always allow it.</td>
<td></td>
</tr>
</tbody>
</table>
Cases that do not involve a victim, or the victim chooses not to do an impact statement

None

I have allowed them when asked.

I have not declined any cases, the state and defense always agreed or it wasn’t an issue

<table>
<thead>
<tr>
<th>Question c</th>
<th>Please describe the mechanics of how victim impact statements have been arranged for and actually presented in court.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The prosecutor advises the Court that there is a victim or a victim’s representative who wishes to address the Court. Then, just before sentencing is pronounced, the victim is brought to the lectern to read or make his/her statement. Where victims were in foreign jurisdictions we have streamed the proceeding “live” via secure internet connection and allowed the victims to interact by email or phone.</td>
</tr>
<tr>
<td></td>
<td>The victims were allowed to read directly from the statement.</td>
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<td></td>
<td>The state sets it up. For plea agreements, the state will either have the victim present or ask to set off sentencing so they can determine if the victim wants to present a statement. For trials, sentencing is usually set off for some period of time as well.</td>
</tr>
<tr>
<td></td>
<td>If it is a plea or a trial, right before sentencing the court will hear the victim’s impact statement either read to the court or verbalized by the victim in open court</td>
</tr>
<tr>
<td></td>
<td>They have usually been submitted ahead of time directly to me.</td>
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</tbody>
</table>
Usually orally by the victim appearing and making a statement.

Either the victim gives the statement live or in some cases an advocate or representative of the victim reads a statement into the record.

Usually the victim makes a statement or the prosecutor reads a statement to the court.

Some are read and others are simply statements made by the victim/family.

The victim advocate was present to provide support, the victims all proceeded with verbal statements, some used visual aids that they brought themselves.

I allow the victim, or victim’s representatives, to speak freely in court. Oftentimes, he or she reads off a prepared letter. I have also allowed the victims presence to be waived but a written statement to be read on the record.

Written statement, read by either victim or victim advocate.

<table>
<thead>
<tr>
<th>Question d</th>
<th>Have defense attorneys attempted to present victim impact statements?</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td></td>
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<tr>
<td>No</td>
<td></td>
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<tr>
<td>No - usually only mitigation testimony.</td>
<td></td>
</tr>
<tr>
<td>Never</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td></td>
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<tr>
<td>Sometimes</td>
<td></td>
</tr>
<tr>
<td>No</td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>They have presented mitigation from defendant’s family and friends, not victim impact. On rare occasion, a defense attorney will call a victim whose</td>
</tr>
</tbody>
</table>
testimony is favorable to defendant in mitigation.

| No |
| No |
| Yes, in mitigation on occasion |

**Question e**  In what types of cases?

| Never, in my experience. |
| Same as above |
| Variable |
| None |
| Violent crimes, mostly |
| None |
| No |
| Cases where Victim decline prosecution but state proceeded anyway, usually DV |

**Question f**  Have you allowed victim impact statements by the defense?

| I would if asked. |
| No |
| Yes |
| No - has never been requested. |
| No one has ever asked |
| Yes, when requested. |
| No |
| I allow a defendant to present any mitigation or witnesses as to mitigation |
| Yes. Victim’s rights statute does not pick sides |

**Question g**  How and in what format have they done so?

| Impact statements have been done by written submissions, in person |
statements, family representative spokesperson, via the internet.

Either the victim appears or the defense has a written statement.

Either written statements or live statements from the victim.

Defense or defense witness makes a statement. Clearly this is not an impact statement per se.

Written statement or sworn testimony

<table>
<thead>
<tr>
<th>Question h</th>
<th>Whether presented by the prosecution or the defense, have you allowed such statements to be presented to the court in writing as opposed to live in court?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
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<tr>
<td></td>
<td>Both</td>
</tr>
<tr>
<td></td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>I have done it both way[s].</td>
</tr>
<tr>
<td></td>
<td>Yes</td>
</tr>
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<td></td>
<td>Yes</td>
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<td></td>
<td>Yes</td>
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<tr>
<td></td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>All victim impact statements I received were all in person, although several victims read from a prepared statement</td>
</tr>
<tr>
<td></td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Only if read aloud in court</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question i</th>
<th>If not, why not?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Not ever asked</td>
</tr>
<tr>
<td></td>
<td>Allowed</td>
</tr>
<tr>
<td></td>
<td>Must be of record.</td>
</tr>
<tr>
<td>Question j</td>
<td>What benefits have you observed in the use of victim impact statements?</td>
</tr>
<tr>
<td>------------</td>
<td>---------------------------------------------------------------------</td>
</tr>
<tr>
<td></td>
<td>Psychologically the victim feels better because they got to express their feelings and someone listened to them. Also, the opportunity provides closure. The system and the actual judge appear to be responsive, even if the court cannot grant all of the victims' requests because the law does not allow the requests. The perpetrators get to see the results of their behavior - very helpful in juvenile cases and the principles restorative justice are supported by these impact statements.</td>
</tr>
<tr>
<td></td>
<td>Allows the victim to have their say in court with a set time period and parameters.</td>
</tr>
<tr>
<td></td>
<td>It brings some closure to the victims - particularly in death cases. It allows the victim an opportunity to tell a defendant how their lives have been affected - often in ways the defendant never imagined.</td>
</tr>
<tr>
<td></td>
<td>The benefit is really not for anyone other than the victim, and in very serious sexual battery cases the victim feels a sense of finality that really cannot be achieved by simply telling them it is over he took a plea.</td>
</tr>
<tr>
<td></td>
<td>Allows judges to see how crimes have affected victims.</td>
</tr>
<tr>
<td></td>
<td>Helps to understand the personal impact of the crime and helps me to fashion an appropriate sentence.</td>
</tr>
<tr>
<td></td>
<td>It gives the victim an opportunity to address their feelings and thoughts about the matter under consideration and more input from all sides is beneficial to the court when deciding an issue.</td>
</tr>
<tr>
<td></td>
<td>Not a lot</td>
</tr>
</tbody>
</table>
They present a more complete picture of the impact of the crime.

Many . . . having a voice is important to a victim who has no “standing” to pursue a case and does not often have control on the outcome. The statement provides a small sense of closure to the victim or victim’s family. Increasingly, the victim impact statement can also help the victim’s family portray the victim in a light different/better than media portrayal.

The effect on the defendant being sentenced and it gives a victim their right to be heard

Have not observed any, but then, I am not a psychiatrist.

<table>
<thead>
<tr>
<th>Question k</th>
<th>What negatives have you observed?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Emotional breakdowns have been few and far between. Other that taking court time, I have seen no negatives. The time spent on these statements is necessary and serves a positive societal purpose that places the court in a compassionate role.</td>
</tr>
<tr>
<td></td>
<td>If they get off track and just start talking.</td>
</tr>
<tr>
<td></td>
<td>They get out of hand if not controlled. They can be exceedingly emotional.</td>
</tr>
<tr>
<td></td>
<td>Sometimes victims’ lack of knowledge of the judicial system leads them to ask the court for more incarceration on a plea, then the court declines to take a negotiated plea between the State and defense. In that case, the victim has now pushed a case to trial that really has a poor chance of a positive outcome.</td>
</tr>
<tr>
<td></td>
<td>None.</td>
</tr>
<tr>
<td></td>
<td>Hostility from the victim or victim’s family directed to the defendant.</td>
</tr>
</tbody>
</table>
None so far.

Emotions and anger sometimes requires more security, but that is not a huge problem

On occasions, victims focus on matters that are not relevant under the law.

They can be time consuming, but I don’t really consider that a negative

If there is a negotiated sentence sometimes it seems confusing to the victim

<table>
<thead>
<tr>
<th>Question 1</th>
<th>What has made for more effective statements?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>This question pre-supposes that the terms “effective statements” register an identical cognitive response between the person taking the survey and the person writing the question. This questions fails to detail whether “effective” statement is a measure of how the victim feel after the statement is given or whether it “affected” the judge outcome towards a more punitive or lenient result.</td>
</tr>
<tr>
<td></td>
<td>If they write it and try to keep to it.</td>
</tr>
<tr>
<td></td>
<td>I swear in the person making the statement, which may give them pause about what they say. I also have them stand at the podium facing me, unless they ask to face the defendant, which I do allow. I ensure my deputies are properly positioned to avoid confrontation. I also monitor the time and emotionalism of the speaker, steering them to a safer place if need be.</td>
</tr>
<tr>
<td></td>
<td>Just simply speaking from the heart about how the crime has affected them.</td>
</tr>
<tr>
<td></td>
<td>More descriptive statements, or any statements that are written properly.</td>
</tr>
</tbody>
</table>
Oral presentations by the victim in court at sentencing.

It all depends on the case under consideration. Sometimes written statements work best and other times live testimony works best. I’ve seen both work very effectively.

That the victims are here live

The effectiveness of the statement is dependent upon the facts of the case.

Preparation, a good victim advocate who understands the process, and generally the educational level of the person making the statement

Facts rather than emotion

Question m What approximate percentage of the time has anyone other than the IMMEDIATE victims presented victim impact statements that you have considered in determining sentencing? (“Immediate victims” includes, in cases of death, close family survivors; but otherwise, “immediate victims” does not include those not DIRECTLY subject to the defendants’ actions).

I cannot reliably or accurately approximate the percentage requested.

0%

Very few. This would have to be scheduled - If a sentencing will have a number of statements, I schedule it for an hour, and let each side know they may have 30 minutes. If they want additional statements to be considered, they must be put in writing and sent to me in chambers at least 3 business days in advance, and I review them all.
On Victim cases about 15-20% of the time has family members given an impact statement. Usually because the victim is too young or scared to do it on their own.

<table>
<thead>
<tr>
<th>Question n</th>
<th>What concerns, if any, have you had regarding the use of such statements as part of the sentencing process?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No concerns, if taken in the light they are offered and the judicial officer is not swayed by emotional pleas.</td>
</tr>
<tr>
<td></td>
<td>My concern would be that the sentencing be unduly influenced by the emotionalism of the statement. That is somewhat mitigated by written impact statements, reviewing the facts of the case in advance, and outlining a range of sentencing options I think would be appropriate prior to the hearing. I then move up or down from the middle of that range based on everything presented. Rarely have I gone outside of that range.</td>
</tr>
<tr>
<td></td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>No, except in capital cases.</td>
</tr>
<tr>
<td></td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>No concerns.</td>
</tr>
</tbody>
</table>
I believe they are appropriate and important, however with more and more mandatory minimums, the disparity between the wishes of the victim and the leeway of the court could become a problem.

I do not think the prosecution makes it clear what the purpose is of impact statements. Sometimes victims come in and want to come up with the sentence

No concerns

<table>
<thead>
<tr>
<th>Question o</th>
<th>If you have had concerns, what have you been able to do to ameliorate them?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Follow the agreed plea negotiations.</td>
</tr>
<tr>
<td></td>
<td>Explain to Victims the whole process and purpose behind the impact statements.</td>
</tr>
<tr>
<td></td>
<td>Use written impact statements in capital cases.</td>
</tr>
<tr>
<td></td>
<td>My concerns would be at a level where there is little I feel I can do.</td>
</tr>
<tr>
<td></td>
<td>Explain to everyone the purpose of the hearing.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question p</th>
<th>What, if anything, have you observed defense attorneys do to try and ameliorate the effects of such statements?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Not ask questions of victims that would make the situation worse.</td>
</tr>
<tr>
<td></td>
<td>Nothing out of the norm.</td>
</tr>
<tr>
<td></td>
<td>Say nothing - which at times is appropriate. Have the defendant apologize to the families for his/her actions. Acknowledge the pain of the victim while reminding the court that the defendant may also be a victim, and is a person with family in the gallery. Basically, humanize the defendant.</td>
</tr>
</tbody>
</table>
They generally state things such as “we understand and appreciate the victim’s feelings, which is why we have reached this resolution (plea)”

Presented testimony from other witnesses.

Express sympathy for the victim’s plight and quickly return focus on the better qualities of the defendant.

The attorneys are very respectful and generally just remind the court sympathy is not to be taken into consideration.

They sometimes try to cross the victim about the statement-I rarely allow that

Knowing when to cross examine and when to sit down.

Most defense attorneys are respectful, however some will try to minimize the impact

One particular attorney objected based on hearsay to a written impact statement. The same attorney would also object at the live impact statement

Present their own witnesses in mitigation, they have also brought in evidence to impeach victim

<table>
<thead>
<tr>
<th>Question</th>
<th>How have you used victim impact statements in determining sentencing?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>I have listened to or read the statements then apply them to the facts of the case.</td>
</tr>
<tr>
<td></td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>To increase a possible sentence.</td>
</tr>
<tr>
<td></td>
<td>Gives me a better understanding of the severity of the offense or lack thereof.</td>
</tr>
<tr>
<td></td>
<td>Yes.</td>
</tr>
<tr>
<td></td>
<td>It has very limited use, but some use</td>
</tr>
<tr>
<td></td>
<td>One small factor among many.</td>
</tr>
</tbody>
</table>
Often the sentencing is already set, but when not, the impact of the victim or family helps me as one of many factors to determine a consequence.

<table>
<thead>
<tr>
<th>Question r</th>
<th>How much weight do you give them?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>These are case-by-case decisions. It also depends on whether the plea has been negotiated.</td>
</tr>
<tr>
<td></td>
<td>Varies in each case.</td>
</tr>
<tr>
<td></td>
<td>Some weight.</td>
</tr>
<tr>
<td></td>
<td>A lot of weight</td>
</tr>
<tr>
<td></td>
<td>Some weight.</td>
</tr>
<tr>
<td></td>
<td>That depends on the case before the court. Sometimes it is very important and other times it is not. Its a case by case determination.</td>
</tr>
<tr>
<td></td>
<td>Some weight</td>
</tr>
<tr>
<td></td>
<td>The statements of victim and defendant and their families is only one small factor in many.</td>
</tr>
<tr>
<td></td>
<td>It all depends . . . sometimes it can carry significant weight depending on what other factors I am considering. Other times it’s one of many factors, and sometimes the crime itself presents an appropriate sentence and the impact statement has really no relevance to sentencing; but it’s relevance again goes to the closure for the victim and their gaining some control in the process.</td>
</tr>
<tr>
<td></td>
<td>Some</td>
</tr>
<tr>
<td></td>
<td>Varies case by case</td>
</tr>
<tr>
<td>Question(s)</td>
<td>Response</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>What, in your opinion, can prosecutors do better in preparing for, handling, or reacting to victim impact statements?</td>
<td>Know the facts of their case and limit their venom. Cool, calm, collected. Make sure they know what the victim is going to say. Do a better job in preparing the victim to present the statement. It is clear that some have no idea what the victim is going to say. It would be helpful not to have repetitive victim impact statements from the same type of source - e.g. friends. They should plan the statements for maximum use - a friend, a family member, a teacher, a religious leader, etc. Nothing. Prepare the victim to be concise and to let them know the defendant will be close by when the statement is given. Speak often with victims and be available to guide victims through the process. I am not sure Prosecutors should actually try to have contact with the victim before final disposition. This is something that is not always done. That’s tough . . . they need more funding. They need more victim advocates. They need fewer cases to be able to focus on the victims. But overall they do a great job on the resources they have. The state needs to be more prepared in letting the court know that a victim has been given notice of the hearing. Also, the state needs to make the victim away of limitations in sentencing Not my position to say. Judges are supposed to be NEUTRAL</td>
</tr>
</tbody>
</table>
**Question t**  What, in your opinion, can defense attorneys do better in preparing for, handling, or reacting to victim impact statements?

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Know the facts of their case and limit their venom. Cool, calm, collected.</td>
</tr>
<tr>
<td></td>
<td>Not have them or their clients react to them verbally or physically.</td>
</tr>
<tr>
<td></td>
<td>Humanize the defendant, while acknowledging the victim's pain.</td>
</tr>
<tr>
<td></td>
<td>Nothing.</td>
</tr>
<tr>
<td></td>
<td>No opinion.</td>
</tr>
<tr>
<td></td>
<td>I don’t know if there is much more they can do than what I have observed them doing so far.</td>
</tr>
<tr>
<td></td>
<td>I am not sure about this either</td>
</tr>
<tr>
<td></td>
<td>They need to know when to question the witness and when to simply sit down.</td>
</tr>
<tr>
<td></td>
<td>Be prepared for them and be cognizant of the victims’ fragility at times.</td>
</tr>
<tr>
<td></td>
<td>Be respectful.</td>
</tr>
</tbody>
</table>

**Question u**  What, in your opinion, could be done to improve the process of victim impact statements?

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Make available to victims the full benefits of technology.</td>
</tr>
<tr>
<td></td>
<td>Nothing.</td>
</tr>
</tbody>
</table>
|   | A big procedural issue in my courtroom is that the prosecutor never seems to know if the victim wants to make a victim impact statement. When the state meets with the victim, in preparation for a plea or trial, there should be some type of question asking whether the victim will want to make a statement in the event of a plea before trial. More notice should be given to the JA when setting hearings as
<p>| |</p>
<table>
<thead>
<tr>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>to whether or not there will be live victim impact statements or not.</td>
</tr>
<tr>
<td>I believe they are fine as is.</td>
</tr>
<tr>
<td>Nothing</td>
</tr>
<tr>
<td>Have the prosecutor contact the victim early in the process to get the victim’s input regarding the case and possible resolutions and when possible get the victim to write a statement for the prosecutor to read in court. In very serious case involving bodily injury, it would be better for the victim to appear in person and make a statement.</td>
</tr>
<tr>
<td>See responses above.</td>
</tr>
<tr>
<td>I don’t know</td>
</tr>
<tr>
<td>No opinion.</td>
</tr>
<tr>
<td>Funding would be a great start, education for victims and availability of support groups for victims, resources for them, education on a broader scale of the court system that does not come from fictionalized television shows.</td>
</tr>
<tr>
<td>Require a time frame for submission. If deadline is not met, it is waived . . . .</td>
</tr>
</tbody>
</table>
APPENDIX II

FLORIDA NINTH JUDICIAL CIRCUIT STATE ATTORNEYS SURVEY
24 TOTAL SURVEYS RECEIVED

OVERVIEW

Of the twenty-four state attorneys who responded to the survey, all twenty-four (100%) reported using VIE during the sentencing phase of a trial. However, the range of using VIE by case ranged from 3% of cases to 100% of cases.

Of the twenty-four, all (100%) sought to present VIE by live testimony, and twenty-two of the twenty-four (91.7%) sought to present written affidavits. Additionally, state attorneys offered victim impact statements in the forms of conversations with the victim, a child-recorded statement on an iPhone played in court, an email, an unsworn letter to the court, and a written unsworn letter, respectively.

Three of the twenty-four (12.5%) reported that the defense had objected to a victim impact statement presented.

Eight of the twenty-four (33.3%) reported that they knew of a judge who, after agreeing to or determining a sentence, changed his or her mind after hearing a victim impact statement.
Seven of the twenty-four (29.2%) reported that the defense had sought to introduce victim impact statements.

*State attorneys’ responses are reproduced exactly as they appear on survey response forms.*

<table>
<thead>
<tr>
<th>Question 1</th>
<th>In what types of cases have you sought to present victim impact statements?</th>
</tr>
</thead>
<tbody>
<tr>
<td>All kinds that have personal victims, (i.e. not drug cases)</td>
<td></td>
</tr>
<tr>
<td>All cases where the victim wishes to present one</td>
<td></td>
</tr>
<tr>
<td>Felony Battery, Agg Battery, Burglary, Home Invasion Robbery, etc</td>
<td></td>
</tr>
<tr>
<td>Theft cases, robbery, battery, violent cases.</td>
<td></td>
</tr>
<tr>
<td>Domestic violence cases</td>
<td></td>
</tr>
<tr>
<td>Battery, sex cases, burglary</td>
<td></td>
</tr>
<tr>
<td>Domestic Violence; DUI Manslaughter</td>
<td></td>
</tr>
<tr>
<td>All VT crimes, including Battery, DUI, Thefts, Burglary</td>
<td></td>
</tr>
<tr>
<td>Domestic Violence, Robbery, Battery, Sex Crimes and Child abuse</td>
<td></td>
</tr>
<tr>
<td>Murder, attempted murder, aggravated battery, robberies, aggravated assault and home burglaries, traffic homicides</td>
<td></td>
</tr>
<tr>
<td>Burglaries, batteries, crimes involving violence</td>
<td></td>
</tr>
<tr>
<td>any case where there is a victim</td>
<td></td>
</tr>
<tr>
<td>Battery, Battery on Law Enforcement Officer, Criminal Mischief, Grand Theft, Exposure of Sexual Organs</td>
<td></td>
</tr>
<tr>
<td>Sex crimes, domestic violence, serious felony (attempted murder, aggravated battery, etc.)</td>
<td></td>
</tr>
<tr>
<td>All victim cases</td>
<td></td>
</tr>
<tr>
<td>Any Victim crime</td>
<td></td>
</tr>
</tbody>
</table>
I tell all victims they have the right to address the court at sentencing if they desire. There was a DWLS with death case in which the victim's family submitted them, I also have an animal cruelty case where a bunch of citizen's have submitted letters. Murder cases and any cases where the victims want to do so.

Domestic violence, sex crimes

Sex crimes, domestic violence, violent crime

Murder, battery, theft, assault, any with victim

Any case with a victim; I deal mostly with sex crimes, armed robberies and homicides

All types - from DUIs with personal injury to aggravated batteries to robberies with firearms

**Question 2**

In what approximate percentage of overall cases have you sought to present such statements?

- 50%
- 100%
- 35%
- 20%
- 75%
- 30%
- 100% if the victim was willing in the DV case.
- 10%
- 80%
- 50%
- All of them
- All where there is a victim
3%
Any time the victim is willing to give a statement

25%  
All cases that I can get them.
Less than 10%, but most of my cases are traffic violations, rwov, or drug cases so I only have victims in about 25% of my cases

5%

20-30%
Less than 10%; victims rarely want to speak.

15% roughly

50% at least

10%

Question 3  
In what format(s) have you sought to present them? You can select more than one choice below.

<table>
<thead>
<tr>
<th>Format</th>
<th>Responses (Percentage)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Live Testimony</td>
<td>24 Responses (100%)</td>
</tr>
<tr>
<td>Written Affidavits</td>
<td>22 Responses (91.7%)</td>
</tr>
<tr>
<td>Testimony</td>
<td>5 Responses (20.8%)</td>
</tr>
<tr>
<td>Other</td>
<td>5 Responses (20.8%)</td>
</tr>
<tr>
<td></td>
<td>(Oral statements from the State Attorney to the judge based on conversations with the victim, a child recorded statement on an IPhone played in court, an email, an unsworn letter to the court, and a written unsworn letter)</td>
</tr>
</tbody>
</table>

Question 4  
Has the defense objected to such statements being presented?

<table>
<thead>
<tr>
<th>Response</th>
<th>Responses (Percentage)</th>
</tr>
</thead>
<tbody>
<tr>
<td>YES</td>
<td>3 Responses (12.5%)</td>
</tr>
<tr>
<td>NO</td>
<td>21 Responses (87.5%)</td>
</tr>
<tr>
<td>Question 5</td>
<td>If so, on what bases?</td>
</tr>
<tr>
<td>------------</td>
<td>----------------------</td>
</tr>
<tr>
<td>Relevancy</td>
<td>If there's a negotiated plea, or it's not the victim themselves but a family member.</td>
</tr>
<tr>
<td></td>
<td>I allow the defense to review written statements ahead of time and if the State and the Defense cannot agree, then the Court makes a ruling.</td>
</tr>
<tr>
<td></td>
<td>Not sworn to</td>
</tr>
<tr>
<td></td>
<td>Sometimes defense has objected to some of the substance of the victim impact statement.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 6</th>
<th>What approximate percentage of the time have courts sustained defense objections, and for what reasons?</th>
</tr>
</thead>
<tbody>
<tr>
<td>0%</td>
<td>Never</td>
</tr>
<tr>
<td>0%</td>
<td>0</td>
</tr>
<tr>
<td>1%</td>
<td>Because the family member (parent of a juvenile VT) was to present instead of the VT</td>
</tr>
<tr>
<td>Zero</td>
<td>None</td>
</tr>
<tr>
<td>Seldom</td>
<td>That happened one time and it was properly sustained</td>
</tr>
<tr>
<td>0%</td>
<td>Never have</td>
</tr>
<tr>
<td>Very rarely</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 7</th>
<th>What approximate percentage of the time have courts overruled defense objections, and for what reasons?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always - its statutory</td>
<td>0</td>
</tr>
</tbody>
</table>
99% Victim’s right’s statute

None

0

Never have

Very often. I’d imagine that judges don’t want to limit a victim on what they wish to express, and the judge, unlike the jury, has the necessary skill to ignore something that the court knows it shouldn’t consider.

<table>
<thead>
<tr>
<th>Question 8</th>
<th>When victim impact statements have been presented, what, in your opinion, has made them persuasive, when you felt they were?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Details, credibility, etc.</td>
<td>The victim explaining what they would like to see from the case.</td>
</tr>
<tr>
<td>Words coming from the victim seem to impact the Court moreso than an attorney making arguments- its the live body/person that seems to make the crime and its impact real</td>
<td>That the victim is interested and the court should consider their position.</td>
</tr>
<tr>
<td>When there is live testimony from victim</td>
<td>Actual victim present in court</td>
</tr>
<tr>
<td>The testimony of the victim personalizes the case and puts a face to the crime rather than a case number.</td>
<td>Victim emotion and sufficient (but not exhausting) detail have motivated courts</td>
</tr>
<tr>
<td>Honesty</td>
<td>They are generally persuasive because they are emotional and they cause the judge to actually realize that the crime</td>
</tr>
</tbody>
</table>
affected someone tremendously and the defendant needs to be punished for it.
The statements aren’t used to impact a plea they are there for the victim to have their say so I don’t believe them to be persuasive
The impact to their lives of the case itself
The sincereness and emotion filled nature of them whether written or live.
When the victim really talked about the impact the crime had on them (e.g. created low self-esteem, etc)
The most compelling statements are emotional statements about the how the crime effected the victims life.
The Court hearing from the Victim what this crime has caused in their life
The victim conveying to the court how the crime has impacted them and continues to impact them.
Seeing the person who was affected by the defendant’s actions.
Seeing the person who was affected.
Emotion
When the victim is emotional yet reasonable
When victim calm, rational, and had an articulate reason for what they believed should happen to the defendant
Sincere emotion
The emotion the victim is able to express to the judge
<table>
<thead>
<tr>
<th>Question 9</th>
<th>When victim impact statements have been presented, what, in your opinion, has made them not persuasive, when you felt they were not?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>When one is angry or seeming like they just want to retaliate or maybe the person giving the statement seems like they have a mental health issue.</td>
</tr>
<tr>
<td></td>
<td>The victim not asking anything of the court.</td>
</tr>
<tr>
<td></td>
<td>Sometimes not much substance is actually conveyed, so the impact is little if anything.</td>
</tr>
<tr>
<td></td>
<td>That they showed indifference to the case.</td>
</tr>
<tr>
<td></td>
<td>When the Victim doesn’t read them.</td>
</tr>
<tr>
<td></td>
<td>Lack of feeling of victim.</td>
</tr>
<tr>
<td></td>
<td>The judges seem to already have a sentence in mind.</td>
</tr>
<tr>
<td></td>
<td>Overly emotional, detailed ‘belly-aching’ statements reek of revenge rather than justice to both court and counsel.</td>
</tr>
<tr>
<td></td>
<td>When the court’s decision on sentencing has been already made or there is an agreed to plea.</td>
</tr>
<tr>
<td></td>
<td>Ones lacking in details or personal comments are less effective.</td>
</tr>
<tr>
<td></td>
<td>When the judge has already made up their mind and kinda of halfway listen to them.</td>
</tr>
<tr>
<td></td>
<td>When the victim talked about irrelevant history or other family they felt was to blame.</td>
</tr>
<tr>
<td></td>
<td>Statements about I want them to go to jail/prison.</td>
</tr>
<tr>
<td></td>
<td>They have not been effective when the Victim has known the Defendant on a personal level.</td>
</tr>
<tr>
<td></td>
<td>Victim only asking for money.</td>
</tr>
</tbody>
</table>
When written, a lot of times the spelling and grammar detracts from the impact because you have to figure what the person was trying to say.

I don’t present them if they will not be useful, unless the victim insists, which hasn’t happened.

I have not seen one that is not persuasive.

When the victims are unreasonable or overreacting.

Vindictive statements, wanting outrageously high sentences, not being able to effectively articulate the impact on their life.

When victims just berate the defendant.

If the victim seemed vengeful and not a sympathetic victim.

Question 10

In approximately what percentage of the time, when victim impact statements were given, had the Court, prosecution and defense ALREADY agreed on the sentence to be imposed.

75%
50%
10%
Lower than 50%
50%
45%
2%
75%
90%
15%
100%
Very few
75%
| 10% | very few |
| 25% | Not sure. However, in this circumstance victims are always told there is an agreement in place, whether they agree with it or not, but they still have the right to address the court. |
| 70% | |
| 60% | |

| 75% | |
| 50% | |
| 40% | more than half |
| 40% | |

| Question 11 | Have you ever known a judge, after agreeing to or determining a sentence, to change his or her mind (and the sentence) AFTER hearing the statement(s)? |
| YES | 8 Responses (33.3%) |
| NO | 0 |

| EXPLANATORY ANSWERS TO QUESTION 11 | No, if it is an agreed upon plea no. However, some Judges if it is a plea to the bench do not state the exact terms they would give but would give a range and sometimes after hearing from the victim give the top of the range.

| | If they do, it's only for a particular condition they will not reconsider the whole agreement.
| | No it's reversible if the Judge does so they don't
<p>| | No, most of the time there is a cap out there on the sentence, but no formal agreement. |</p>
<table>
<thead>
<tr>
<th>Question 12</th>
<th>If so, can you please provide some examples of how this occurred, and why you think it did.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>I do not recall.</td>
</tr>
<tr>
<td></td>
<td>After he heard from the victim</td>
</tr>
<tr>
<td></td>
<td>0%</td>
</tr>
<tr>
<td></td>
<td>Maybe when the victim is asking for something the lawyers did not contemplate like community service or substance abuse issues.</td>
</tr>
<tr>
<td></td>
<td>It's been so long, I can't give you the specifics</td>
</tr>
<tr>
<td></td>
<td>It was employee theft of &gt;$20,000 and the prosecutor was giving a probationary sentence. Victim wanted jail time. Judge rejected probationary sentence.</td>
</tr>
<tr>
<td></td>
<td>I can't remember details.</td>
</tr>
<tr>
<td></td>
<td>The victim did not approve of the plea offer. after describing how the event affected her daughter, the court would not take the plea agreement</td>
</tr>
<tr>
<td></td>
<td>Can't recall a specific example.</td>
</tr>
<tr>
<td></td>
<td>Again, I think a judge doesn't want to be in a position to contradict his or herself, so I think they rarely commit to a sentence if they know a victim plans on giving an impact sentence, if the judge thinks the statement may affect the sentence</td>
</tr>
<tr>
<td>Question 13</td>
<td>Has the defense ever sought to present victim impact statements to the Court on behalf of a defendant(s)?</td>
</tr>
<tr>
<td>-------------</td>
<td>--------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>YES</td>
<td>8 Responses (33.3%)</td>
</tr>
<tr>
<td>NO</td>
<td>16 Responses (66.6%)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 14</th>
<th>If so, for what reason(s) could you discern the defense did so?</th>
</tr>
</thead>
<tbody>
<tr>
<td>For mitigation.</td>
<td>They were usually in the form of recantations or minimalizing the offense.</td>
</tr>
<tr>
<td>They want leniency</td>
<td>They hoped the judge would be sympathetic if it was a plea to the bench.</td>
</tr>
<tr>
<td>Mitigation of sentence, downward departure, etc.</td>
<td>To mitigate the emotional pull of our statements.</td>
</tr>
<tr>
<td>When the victim has forgiven the defendant and wants leniency</td>
<td>No</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 15</th>
<th>Please describe the mechanics of how you have seen victim impact statements arranged for and actually presented in court.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Testimony and written statements read by the prosecutor on behalf of the victim</td>
<td></td>
</tr>
<tr>
<td>Under Florida Statutes the victim can either come to court and present live testimony/sworn, written statement, or just submit the sworn, written statement</td>
<td></td>
</tr>
<tr>
<td>Through sworn statements and live testimony</td>
<td></td>
</tr>
</tbody>
</table>
The victim is called to testify at sentencing or the notarized letter is submitted.

We meet with the victim beforehand and she reads her statement to the court.

Call victim personally to prepare statement

The victim either speaks freely, reads statement, or submits affidavit.

Either written and read by the ASA or live testimony that is controlled by the court

I don't quite understand this question.

We request them during plea negotiations or before a plea to the bench. They submit them to us or sometimes to the PSI writer. We either read them out loud or the V appears and reads them.

The court takes the plea and then asks the state for anything else and the State asks the court for the victim to provide their statement.

Huh? same answer as the top - testimony and written statements

Scheduling with the judge on the exact sentencing date.

Live victim testimony or prosecutor reading written statement sent by the victim or (one time) had child audio-record their statement because she was too nervous to speak in court.

Live testimony of the victim, victim reading a pre-written letter, ASA reading vt's letter

We have the Victim come in for the sentencing hearing and tell the Court whatever they want about how this crime has impacted their life.
Witnesses called to testify about how the crime has impacted them, what they believe the court should do.

Testimony from defense witnesses (usually right after the trial).

No

Generally prior to sentencing after trial, or after a plea has been accepted and prior to sentencing

The victim is advised of the sentencing and told they can make a statement. If there is a victim advocate, they go over what is acceptable to say. The defendant enters a plea, the victim makes a statement, and then the defendant is sentenced. Sometimes I read a written statement instead if the victim doesn’t want to talk.

Usually in the form of a letter to judge

I don’t understand this question

Victim and advocate are sitting in courtroom. before def enters plea, I let judge know that victim is present and wishes to make impact statement. Def enters plea. before judge imposes sentence, judge tells state that victim may make statement. after, judge sentences def.

**Question 16**  
What benefits to anyone, if any, have you observed in the use of victim impact statements?

Helps the judge understand the gravity of the case better, sobers the defendant a little, helps the victim find closure.

It is helpful to the victim

It sometimes give the victim closure
<table>
<thead>
<tr>
<th>Shows to the court that the victim is interested and can tell the judge what their position is.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Victims feel empowered</td>
</tr>
<tr>
<td>Personal satisfaction to the victim</td>
</tr>
<tr>
<td>It gives the victim closure and they feel part of the process.</td>
</tr>
<tr>
<td>Victims always feel better about a resolution if they get to tell the court and the defendant what effect the crime had on them. ASAs benefit because VTs feel better and are more accepting of resolutions when the are involved. Courts are put in a tough position of acknowledging VT concerns, but following the law or agreements.</td>
</tr>
<tr>
<td>It benefits the victim and or their family</td>
</tr>
<tr>
<td>Victims like them.</td>
</tr>
<tr>
<td>It helps the victims mostly it bring some type of closure to their cases</td>
</tr>
<tr>
<td>All parties know what teh impact on victim was</td>
</tr>
<tr>
<td>It gives the judge an idea of how this has affected the victim and what the sentence will actually do for the victim.</td>
</tr>
<tr>
<td>It sometimes seems to make the victim feel empowered and gives some amount of closure</td>
</tr>
<tr>
<td>Victims feel like they at least got a fair shake.</td>
</tr>
<tr>
<td>It benefits the Victim and the Court. The Victim gets to express their feelings and possibly get closure. The Court gets to see how personal this crime is to someone and not just another case</td>
</tr>
<tr>
<td>It allows the victim to directly address the court, and through the court the defendant and let the court and defendant know how the crime has impacted them.</td>
</tr>
</tbody>
</table>
It lets everyone be heard and feel like they are a part of the legal process.

It helps the court understand the dynamics of the crime. It allows the victims to vent.

It is good for the state, the court to understand the impact serious crimes have on victims, and the defendant to hear what his or her actions caused, and it can be good for a victim to confront his or her perpetrator and finally have the upper hand.

The victims feel like they were heard.

Gives victim sense of being a part of process and that they can stand up to defendant for what he did.

It gives closure to most victims.

Two benefits - first and foremost for victim to have a chance to be heard, I think can be very powerful for the victim and provide a sense of closure. And to be heard and make the defendant a captive audience to what the victim is saying, I think also is cathartic. I also think, or perhaps I just hope, that the impact of a victim statement has an effect on the defendant. in only a handful of cases I am confident that it has.

<table>
<thead>
<tr>
<th>Question 17</th>
<th>What concerns, if any, have you had regarding the use of such statements as part of the sentencing process?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Sometimes it will be the victim asking for less punishment when I disagree.</td>
</tr>
<tr>
<td></td>
<td>Many times the victims come before the court and present heartfelt, emotional testimony and it does alter the way the judge handles the sentencing.</td>
</tr>
</tbody>
</table>
That sometimes the victim says irrelevant things.

No concerns

None

None.

As an ASA, I fear that family of, friends of or the defendant themselves will retaliate.

No concerns

None

None

None

Retaliation by the defendant

Just when victim wants to bring up irrelevant things

Whether victim is going to recommend to the court something less than what I am asking for.

None.

None

That it will make the defendant angry and he'll back out of the plea.

That victim is unreasonable and can tank a plea to bench by asking for max without justification.

None -- I think it's a valid part of sentencing

None

Question 18

If you have had concerns, what have you been able to do to ameliorate them?

No, the victim has the right to share the impact statement how she truly feels

I try to explain to victims how victim impacts statements work, and that the main purpose is to provide them with closure

Prepared the witness
<table>
<thead>
<tr>
<th>No concerns</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
</tr>
<tr>
<td>Written statements save the face-to-face, or waiving them altogether</td>
</tr>
<tr>
<td>Have the judge instruct the defendant that the impact is not the sole basis of the sentence and is only merely one of many things taken into consideration.</td>
</tr>
<tr>
<td>Tried to steer victim back on track</td>
</tr>
<tr>
<td>Explain to the victim that while you may think Defendant only deserves probation, and you have the right to tell the court that, the State ultimately brings the charges and it is up to me to recommend a sentence taking into account a number of factors including criminal history, the crime, etc.</td>
</tr>
<tr>
<td>Try to advise the victim to be direct, on point, and direct her statement to the judge.</td>
</tr>
<tr>
<td>I speak with victims in that regard, tell them how I think they can maximize what the judge will do</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 19</th>
<th>What have you done particularly well in regard to the process of victim impact statements?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Let the victim say them and make sure he/she addresses the court . . . not the defendant.</td>
<td></td>
</tr>
<tr>
<td>I try to allow every victim the opportunity to present some form of statement</td>
<td></td>
</tr>
<tr>
<td>Tell them other things other victims have included as a reference.</td>
<td></td>
</tr>
<tr>
<td>Prepared the victim and had her write out her statement beforehand</td>
<td></td>
</tr>
<tr>
<td>Call victims, met with them and review statements</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Getting victims to write the statement early crystalizes their own goals for prosecution and involves them in what can be a frustrating process of delays for (from the lay perspective) no reason at all.</td>
<td></td>
</tr>
<tr>
<td>Encourage victims to make them</td>
<td></td>
</tr>
<tr>
<td>I always try to be proactive in pushing the Vs to do them. that's half the battle.</td>
<td></td>
</tr>
<tr>
<td>I always ask my victims before plea if they want to give a statement written or live.</td>
<td></td>
</tr>
<tr>
<td>Making sure I advocate for the victim if they are too afraid to speak for themselves.</td>
<td></td>
</tr>
<tr>
<td>Making the suggestion that the child audio-record their statement</td>
<td></td>
</tr>
<tr>
<td>Live testimony is more beneficial than a statement</td>
<td></td>
</tr>
<tr>
<td>Informing victims of right to address court if they desire, or do it through me.</td>
<td></td>
</tr>
<tr>
<td>Logistically setting cases off for sentencing post the defendant pleading to allow for people to come into court and be heard.</td>
<td></td>
</tr>
<tr>
<td>Always giving the victim an opportunity to give a victim impact statement</td>
<td></td>
</tr>
<tr>
<td>Making sure they happen when the victim wants to make one.</td>
<td></td>
</tr>
<tr>
<td>Have victim write it ahead of time and review it with them</td>
<td></td>
</tr>
<tr>
<td>Encouraged victims to have their voice heard</td>
<td></td>
</tr>
<tr>
<td>Victim advocates do the most regarding preparation with the victim of their statement. just being respectful of them and if it was hard for them to do,</td>
<td></td>
</tr>
</tbody>
</table>
providing encouragement that they were brave to do it

<table>
<thead>
<tr>
<th>Question 20</th>
<th>What have you seen defense counsel do particularly well in regard to the process of victim impact statements?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Show respect</td>
</tr>
<tr>
<td></td>
<td>Work around them</td>
</tr>
<tr>
<td></td>
<td>I do not recall</td>
</tr>
<tr>
<td></td>
<td>Nothing</td>
</tr>
<tr>
<td></td>
<td>Nothing</td>
</tr>
<tr>
<td></td>
<td>When defense counsel are allowed to ask questions of a VT, the best do it with respect and then argue to the judge, not the victim</td>
</tr>
<tr>
<td></td>
<td>Being kind to victims when the statements are made</td>
</tr>
<tr>
<td></td>
<td>Nothing</td>
</tr>
<tr>
<td></td>
<td>Help the defendant understand its purpose</td>
</tr>
<tr>
<td></td>
<td>Keeping the Defendant quiet</td>
</tr>
<tr>
<td></td>
<td>I think it is harder from a defense standpoint. They can present relatives, but victim versus mom of defendant are very different types of statements.</td>
</tr>
<tr>
<td></td>
<td>Have evidence/testimony to counter balance mine.</td>
</tr>
<tr>
<td></td>
<td>Not cross examining the victim</td>
</tr>
<tr>
<td></td>
<td>Act respectful toward the victim</td>
</tr>
<tr>
<td></td>
<td>Not ask any follow up questions or push victim button to make that person lose it</td>
</tr>
<tr>
<td></td>
<td>Listen respectfully</td>
</tr>
<tr>
<td></td>
<td>Nothing</td>
</tr>
<tr>
<td>Question 21</td>
<td>In what approximate percentage of the times that such statements were presented by the prosecution, do you feel that they affected sentences by making them longer or tougher?</td>
</tr>
<tr>
<td>-------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>40%</td>
<td></td>
</tr>
<tr>
<td>1%</td>
<td></td>
</tr>
<tr>
<td>50%</td>
<td></td>
</tr>
<tr>
<td>20%</td>
<td></td>
</tr>
<tr>
<td>Sometimes</td>
<td></td>
</tr>
<tr>
<td>30%</td>
<td></td>
</tr>
<tr>
<td>0%</td>
<td></td>
</tr>
<tr>
<td>15%</td>
<td></td>
</tr>
<tr>
<td>10%</td>
<td></td>
</tr>
<tr>
<td>25%</td>
<td></td>
</tr>
<tr>
<td>Half and half</td>
<td></td>
</tr>
<tr>
<td>Can’t answer</td>
<td></td>
</tr>
<tr>
<td>None</td>
<td></td>
</tr>
<tr>
<td>50% if after trial or plea to the bench</td>
<td></td>
</tr>
<tr>
<td>5%</td>
<td></td>
</tr>
<tr>
<td>60%</td>
<td></td>
</tr>
<tr>
<td>50%</td>
<td></td>
</tr>
<tr>
<td>75%</td>
<td></td>
</tr>
<tr>
<td>Low %</td>
<td>It’s impossible to say because it has no effect on the sentence if there is an agreement and you don’t know if it really affects the sentence after trial</td>
</tr>
<tr>
<td>25%</td>
<td></td>
</tr>
<tr>
<td>10%</td>
<td></td>
</tr>
<tr>
<td>25% and this is just a guess</td>
<td></td>
</tr>
<tr>
<td>Small minority</td>
<td></td>
</tr>
</tbody>
</table>

<p>| Question 22 | In what approximate percentage of the times that such statements were presented by you, do you feel that they |</p>
<table>
<thead>
<tr>
<th>Question 23</th>
<th>Please describe your opinion on how judges have, overall, used victim impact statements in determining sentencing.</th>
</tr>
</thead>
<tbody>
<tr>
<td>It may show how serious the victim is about the case and may help them understand the facts better</td>
<td></td>
</tr>
<tr>
<td>It really depends on the type of case, for less serious cases it has little to no impact</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>did not affect sentencing in any material way?</th>
</tr>
</thead>
<tbody>
<tr>
<td>75%</td>
</tr>
<tr>
<td>99%</td>
</tr>
<tr>
<td>10%</td>
</tr>
<tr>
<td>75%</td>
</tr>
<tr>
<td>75%</td>
</tr>
<tr>
<td>10%</td>
</tr>
<tr>
<td>100%</td>
</tr>
<tr>
<td>75%</td>
</tr>
<tr>
<td>75%</td>
</tr>
<tr>
<td>90%</td>
</tr>
<tr>
<td>25%</td>
</tr>
<tr>
<td>1%</td>
</tr>
<tr>
<td>50%</td>
</tr>
<tr>
<td>90%</td>
</tr>
<tr>
<td>40%</td>
</tr>
<tr>
<td>50%</td>
</tr>
<tr>
<td>25%</td>
</tr>
<tr>
<td>Most</td>
</tr>
<tr>
<td>Only if there was already a negotiated agreement</td>
</tr>
<tr>
<td>75%</td>
</tr>
<tr>
<td>90%</td>
</tr>
<tr>
<td>75%</td>
</tr>
<tr>
<td>Majority</td>
</tr>
<tr>
<td>I think it depends on the crime charged and how it affects the judge</td>
</tr>
<tr>
<td>---------------------------------------------------------------------</td>
</tr>
<tr>
<td>They do weigh them unless there is a stipulated agreement.</td>
</tr>
<tr>
<td>It's highly important.</td>
</tr>
<tr>
<td>Type of a crime at bar</td>
</tr>
<tr>
<td>They repeat statements made by the victim in justifying their sentence.</td>
</tr>
<tr>
<td>Well, if done correctly. The wisest judges include the victim's statement in their ruling, but still give a fair sentence.</td>
</tr>
<tr>
<td>I don't think they use them very much. The law and/or the plea agreement determines the sentence.</td>
</tr>
<tr>
<td>Terms of the sentence, restitution, length of the incarceration time or probation time—all these things are factored in when judges hear and read the VI stmts.</td>
</tr>
<tr>
<td>Unsure</td>
</tr>
<tr>
<td>Can't answer</td>
</tr>
<tr>
<td>They just consider them with whatever sentence they have already thought about prior.</td>
</tr>
<tr>
<td>Gives them a reason to go over the bottom of the guidelines</td>
</tr>
<tr>
<td>Judges don't seem to take into account the victims input.</td>
</tr>
<tr>
<td>I believe it helps the Court realize that &quot;real&quot; people were affected by this crime.</td>
</tr>
<tr>
<td>In most cases, unless the facts and what happened to the victim are very bad (sex cases, crimes of violence with life altering injuries, etc.) judges are looking at a defendant's history and likelihood to reoffend.</td>
</tr>
<tr>
<td>I think it lets them attach the sentence they want to see to what someone else said.</td>
</tr>
</tbody>
</table>
This is a dumb question.  
Most judges seem genuinely interested in victim impact statements so I believe they use them to determine length of sentences  
I don’t know.  
Very little except to justify what they already planned to do  
I hope they use them to fashion a just sentence

<table>
<thead>
<tr>
<th>Question 24</th>
<th>In your opinion, overall, how much weight do you think judges have given them in determining sentencing?</th>
</tr>
</thead>
</table>
| 40%         | Depends on the type of case  
I think it depends on the crime and their particular beliefs on the issue  
A good amount.  
Some weight  
Most definite  
0%  
Not much.  
I think they give them sufficient weight  
Not sure how to measure weight. I’d say the judges give them a small to moderate amount of weight.  
Unsure  
Can’t answer  
I think they give it moderate to minimal weight.  
Depends on the judge  
2%  
50%  
10% |
Some weight, but more as a confirmation of what they were already going to do or considering doing.

<table>
<thead>
<tr>
<th>Percentage</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>15-25%</td>
<td>Significant weight</td>
</tr>
<tr>
<td>Some</td>
<td>Very little unless victim can offer a unique story</td>
</tr>
<tr>
<td>15%</td>
<td>Not very much</td>
</tr>
</tbody>
</table>

### Question 25

In what type(s) of cases have judges, in your opinion, given victim impact statements the most weight?

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sex crimes</td>
<td></td>
</tr>
<tr>
<td>Very serious, violent cases</td>
<td></td>
</tr>
<tr>
<td>Person crimes - batteries, violent crimes</td>
<td></td>
</tr>
<tr>
<td>Crimes of violence.</td>
<td></td>
</tr>
<tr>
<td>Domestic violence</td>
<td></td>
</tr>
<tr>
<td>Personal injury to victims, domestic and sexual assaults</td>
<td>0%</td>
</tr>
<tr>
<td>Theft cases, including burglaries</td>
<td></td>
</tr>
<tr>
<td>Battery cases - any kind</td>
<td></td>
</tr>
<tr>
<td>Violent personal crimes by strangers: robberies, agg batteries traffic homicides</td>
<td></td>
</tr>
<tr>
<td>Probably very violent cases, murders, rape etc.</td>
<td></td>
</tr>
<tr>
<td>Can’t answer</td>
<td></td>
</tr>
<tr>
<td>The more serious cases with fact specific instances of impact on the victim in the judge’s opinion</td>
<td></td>
</tr>
<tr>
<td>Sex crimes</td>
<td></td>
</tr>
<tr>
<td>DV and Sex cases</td>
<td></td>
</tr>
<tr>
<td>Victim crimes such as sex crimes, burglary cases, robbery</td>
<td></td>
</tr>
</tbody>
</table>
Sex crimes, violent crimes, property cases where the items taken are irreplaceable.

The DWLS with death case.

Where the victims are most sympathetic.

Sex crimes, child abuse, domestic violence, homicide

Domestic violence

Child sex victims

Any violent, personal crime

Violent cases/sex crimes cases with sympathetic victims

<table>
<thead>
<tr>
<th>Question 26</th>
<th>Can you give any examples of where you feel judges have given victim impact statements the most weight?</th>
</tr>
</thead>
<tbody>
<tr>
<td>A minor victim or a family member</td>
<td></td>
</tr>
<tr>
<td>Cases where the victim is present at the time of the offense</td>
<td></td>
</tr>
<tr>
<td>Violent crimes</td>
<td></td>
</tr>
<tr>
<td>Crimes of violence.</td>
<td></td>
</tr>
<tr>
<td>Where there has been a history of abuse</td>
<td></td>
</tr>
<tr>
<td>No</td>
<td></td>
</tr>
<tr>
<td>When a minor VT testified to how the theft affected her performance at school, I felt the judge used in going above the recommendation.</td>
<td></td>
</tr>
<tr>
<td>Not specifically</td>
<td></td>
</tr>
<tr>
<td>If the V wants the Def treated lightly or given probation with counselling-- the Judges really seem to weigh those kinds of comments more heavily than the comments where the V says they want the book thrown at the def. or the def. maxed out.</td>
<td></td>
</tr>
<tr>
<td>Unsure</td>
<td></td>
</tr>
<tr>
<td>No</td>
<td></td>
</tr>
</tbody>
</table>
One judge heard live testimony from the victim at a violation of probation hearing. She was articulate and told the judge exactly what happened as well as how it made her feel without any questions from the state.

<table>
<thead>
<tr>
<th>Hearing that the defendant’s molestation of a child has fundamentally changed that child’s life and view of the world</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
</tr>
</tbody>
</table>

A Judge wanted to give a burglary Defendant the minimum sentence. The Victim appeared and was an older woman with heart issues. She described how she can’t sleep, stay in her house and function out of fear they will come back. The Judge realized how much damage this Defendant did to her as a person, not just her belongings being taken.

<table>
<thead>
<tr>
<th>My Judge was trying not to cry in open court while the victim’s mom was talking about losing her child.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases involving long term abuse as in sex crimes or domestic violence</td>
</tr>
<tr>
<td>Sometimes DV victims ask for leniency and the judge has obliged.</td>
</tr>
<tr>
<td>No</td>
</tr>
</tbody>
</table>

| Not in this space |

<table>
<thead>
<tr>
<th>Question 27</th>
<th>What problems have you observed in the process of victim impact statements?</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td></td>
</tr>
<tr>
<td>Victims sometimes feel re-victimized when the sentence is low after presenting a victim impact statement</td>
<td></td>
</tr>
<tr>
<td>Victims sometimes do not stay on task.</td>
<td></td>
</tr>
</tbody>
</table>
Sometimes the victims are scared to present statements

None

It can negatively affect the court’s view of the “Victim”, but that does not usually run counter to considerations of justice.

None

Not affording Victims the right to make the statement when they are victims of burglaries

None that i have seen

Sometimes the judge doesn’t victims enough time to speak or say what they need to in order to feel whole or move forward with their life.

None

Getting victims to focus on “impact” rather than everything about the history/crime

Sometimes the Victim sometimes get caught up on a matter and veer from how the crime impacted them

Willingness of victim to do a statement or come into court on less serious cases.

Timing, sometimes a victim can’t come in, so they just send a letter or we talk on the phone and I share what they had to say with the court.

Some victims want to vent their anger at the defendant.

None

Sometimes the victims aren’t properly prepared to make one

Most are poorly done and of no real value

None
<table>
<thead>
<tr>
<th>Question 28</th>
<th>What, in your opinion, can prosecutors and defense attorneys do better in preparing for, handling, or reacting to victim impact statements?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Not much. Defense may want to let their client know about them</td>
</tr>
<tr>
<td></td>
<td>Educate the victims on when these statements are most effective</td>
</tr>
<tr>
<td></td>
<td>Have them read their statement.</td>
</tr>
<tr>
<td></td>
<td>Just being prepared</td>
</tr>
<tr>
<td></td>
<td>Meet and talk to victims and advocates.</td>
</tr>
<tr>
<td></td>
<td>Talking to the victim about the purpose of the statement.</td>
</tr>
<tr>
<td></td>
<td>Early involvement of the VT, multiple drafts of written statements, practice statements with ASA (to reduce length/detail)</td>
</tr>
<tr>
<td></td>
<td>Not really. They do a fine job now.</td>
</tr>
<tr>
<td></td>
<td>Nothing</td>
</tr>
<tr>
<td></td>
<td>Ensuring they are talking to the victims because it is their right</td>
</tr>
<tr>
<td></td>
<td>Nothing</td>
</tr>
<tr>
<td></td>
<td>Try to get them as early as possible and use them in negotiating prior to agreeing on a sentence.</td>
</tr>
<tr>
<td></td>
<td>Prepare the victim</td>
</tr>
<tr>
<td></td>
<td>Try to get more Victims to do live testimony</td>
</tr>
<tr>
<td></td>
<td>Not much. We can only explain the process and answer questions, it is ultimately up to the victim if they want to give input in the multiple ways possible (in-person, by having me read something, or give something to the judge)</td>
</tr>
<tr>
<td></td>
<td>Having a better idea of what is going to happen to the case (or when it will resolve) so that the victim’s aren’t coming to court 4 times to get the case</td>
</tr>
</tbody>
</table>
resolved only to not want to come back another time.

Making sure the victim has a real opportunity to be present and be heard.

In general, prosecutors can talk to the victim more about making a statement and encourage them to do it. They aren’t really encouraged.

Take time to talk with victim and coach them on how to effectively speak.

Close the courtroom so people aren’t going in and out during a statement.

<table>
<thead>
<tr>
<th>Question 29</th>
<th>What, in your opinion, could be done to improve the process of victim impact statements?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Let the victim share the statement via closed circuit television so that he/she does not have to actually see defendant in court. Especially if they do not want to write a statement.</td>
</tr>
<tr>
<td></td>
<td>Bring them into the process sooner, have them at plea negotiations</td>
</tr>
<tr>
<td></td>
<td>No opinion</td>
</tr>
<tr>
<td></td>
<td>Not sure</td>
</tr>
<tr>
<td></td>
<td>Pay more attention to victims needs</td>
</tr>
<tr>
<td></td>
<td>Preparing the victim</td>
</tr>
<tr>
<td></td>
<td>Not much, because the effectiveness depends on the VT, not the process. As long as the court has heard from the victim (if they so chose) I think the process has worked</td>
</tr>
<tr>
<td></td>
<td>Not rush sentencings to clear a docket and afford people the right to make the statements</td>
</tr>
<tr>
<td></td>
<td>Nothing</td>
</tr>
<tr>
<td></td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>Nothing</td>
</tr>
</tbody>
</table>
Create a form that always the victim to write it out at the beginning of the case and add more information or details to it during the process, if needed.

More examples to help victim see how to focus the statement

Nothing.

No idea.

Nothing

Training of attys and victim advocates in how to write or speak for these statements

I don’t care for judges asking defense attorneys if they’d like to question the victim. From my perspective it’s the victim’s time to be heard only as to what the victim wishes to say, not a time to be cross-examined. Most of the time, defense counsel doesn’t ask questions. The same way I typically don’t ask questions of defense witnesses, like family offering mitigation at sentencing. I think it’s disrespectful to people who at a time where confrontation rights aren’t the issue and the adversarial nature of process shouldn’t be at play.
APPENDIX III

FLORIDA NINTH JUDICIAL CIRCUIT PUBLIC DEFENDERS SURVEY

3 TOTAL SURVEYS RECEIVED

OVERVIEW

Two of the three responding public defenders reported that they objected to the introduction of VIE.

One of the three responding public defenders reported knowing a judge who, after already agreeing to or determining a sentence, changed his or her mind after hearing the victim impact statement.

*Public defenders’ responses are reproduced exactly as they appear on survey response forms.

<table>
<thead>
<tr>
<th>Question 1</th>
<th>In what types of cases has the prosecution sought to present victim impact statements?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>robbery, burglary, battery, assault, false imprisonment</td>
</tr>
<tr>
<td></td>
<td>Theft cases, sex cases, violent cases</td>
</tr>
<tr>
<td></td>
<td>Sexual battery</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 2</th>
<th>In what approximate percentage of overall cases has the prosecution sought to present such statements?</th>
</tr>
</thead>
<tbody>
<tr>
<td>25%</td>
<td></td>
</tr>
<tr>
<td>25%</td>
<td></td>
</tr>
<tr>
<td>10%</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 3</th>
<th>In what format(s) has the prosecution sought to present them? You can select more than one choice below.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Live Testimony</td>
<td>3 of 3 (100%) Responses</td>
</tr>
<tr>
<td>Written Affidavits</td>
<td>3 of 3 (100%) Responses</td>
</tr>
<tr>
<td>-------------------</td>
<td>-------------------------</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 4</th>
<th>Have you objected to such statements being presented?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 5</th>
<th>If so, on what bases?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Relevance</td>
<td>Objected to the content of the statement, not the statement itself</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 6</th>
<th>In what approximate percentage of the time have courts sustained your objections, and for what reasons?</th>
</tr>
</thead>
<tbody>
<tr>
<td>0, the courts have consistently said even in negotiated pleas the victim has a right to be heard</td>
<td>50% legal grounds</td>
</tr>
<tr>
<td>N/A</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 7</th>
<th>In what approximate percentage of the time have courts overruled your objections, and for what reasons?</th>
</tr>
</thead>
<tbody>
<tr>
<td>100, the courts have consistently said even in negotiated pleas the victim has a right to be heard</td>
<td>50% relevance</td>
</tr>
<tr>
<td>N/A</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 8</th>
<th>When victim impact statements have been presented, what, in your opinion, has made them persuasive, when you felt they were?</th>
</tr>
</thead>
<tbody>
<tr>
<td>When the victim explains how the crime is still effecting them</td>
<td>Emotion</td>
</tr>
<tr>
<td>The raw emotion</td>
<td></td>
</tr>
<tr>
<td>Question 9</td>
<td>When victim impact statements have been presented, what, in your opinion, has made them not persuasive, when you felt they were not?</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td></td>
<td>When the victim complains about the character of my client</td>
</tr>
<tr>
<td></td>
<td>When they do not related to the facts of the case at hand</td>
</tr>
<tr>
<td></td>
<td>When it appears they are trying to do more than just relate the actual injury.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 10</th>
<th>In approximately what percentage of the time, when victim impact statements were given, had the Court, prosecution and defense ALREADY agreed on the sentence to be imposed?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>75%</td>
</tr>
<tr>
<td></td>
<td>3%</td>
</tr>
<tr>
<td></td>
<td>95%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 11</th>
<th>Have you ever known a judge, after agreeing to or determining a sentence, to change his or her mind (and the sentence) AFTER hearing the statement(s)?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Not personally</td>
</tr>
<tr>
<td></td>
<td>No</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 12</th>
<th>If so, can you please provide some examples of how this occurred, and why you think that it did?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n/a</td>
</tr>
<tr>
<td></td>
<td>n/a</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 13</th>
<th>Have you ever sought to present victim impact statements to the Court on behalf of your clients?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>3 of 3 (100%) Responses</td>
</tr>
<tr>
<td>No</td>
<td>0 of 3 (0%) Responses</td>
</tr>
<tr>
<td>Question 14</td>
<td>If so, why have you done so?</td>
</tr>
<tr>
<td>-------------</td>
<td>----------------------------</td>
</tr>
<tr>
<td></td>
<td>When the victim would rather my client work to pay restitution than go to Department of Corrections</td>
</tr>
<tr>
<td></td>
<td>Statutory rape, or family member victims that have forgiven the family member but were forced to prosecute</td>
</tr>
<tr>
<td></td>
<td>When the guidelines are so out of skew with logic and the alleged victim is not wanting to completely ruin the client's life.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 15</th>
<th>Please describe the mechanics of how you have seen victim impact statements arranged for and actually presented in court.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Either the prosecutor reads the letter or calls them to the stand and they read their letter</td>
</tr>
<tr>
<td></td>
<td>They walk into court and give a narration</td>
</tr>
<tr>
<td></td>
<td>State attorney or I will call them present the information to the court.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 16</th>
<th>What benefits to anyone, if any, have you observed in the use of victim impact statements?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The victims feel better</td>
</tr>
<tr>
<td></td>
<td>Sometimes, they can make the victim look less creditable</td>
</tr>
<tr>
<td></td>
<td>In some cases I would imagine it is cathartic to someone who has suffered at the hands of their person to let them know the human cost.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 17</th>
<th>What concerns, if any, have you had regarding the use of such statements as part of the sentencing process?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Sometimes they can turn into an attack on my client as a human being</td>
</tr>
<tr>
<td></td>
<td>Emotion can often take over</td>
</tr>
<tr>
<td></td>
<td>That sometimes logic is overruled by emotion. Sometimes witnesses play up (usually police officers fall in this category) or if the media is part then everyone is making a show rather than trying to get a true restorative style sentence.</td>
</tr>
<tr>
<td>Question 18</td>
<td>If you have had concerns, what have you been able to do to ameliorate them?</td>
</tr>
<tr>
<td>-------------</td>
<td>--------------------------------------------------------------------------------</td>
</tr>
<tr>
<td></td>
<td>Object so my client at least thinks I am fighting for them</td>
</tr>
<tr>
<td></td>
<td>Little to none</td>
</tr>
<tr>
<td></td>
<td>Work hard to take the emotion out of it.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 19</th>
<th>When objections were made to specific jurors’ questions, what were the most common types of objections?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Bringing the victims in instead of just reading the letters</td>
</tr>
<tr>
<td></td>
<td>Use them when appropriate</td>
</tr>
<tr>
<td></td>
<td>When they don't overplay it, have believable witnesses</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 20</th>
<th>What have you done particularly well in regard to the process of victim impact statements?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Nothing</td>
</tr>
<tr>
<td></td>
<td>Use them in cases where the victim was forced to prosecute</td>
</tr>
<tr>
<td></td>
<td>Hard to say</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 21</th>
<th>In what approximate percentage of the times that such statements were presented by the prosecution, do you feel that they affected sentences by making them longer or tougher?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>10%</td>
</tr>
<tr>
<td></td>
<td>75%</td>
</tr>
<tr>
<td></td>
<td>5%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 22</th>
<th>In what approximate percentage of the times that such statements were presented by the prosecution, do you feel that they did not affect sentencing in any material way?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>90%</td>
</tr>
</tbody>
</table>
25%
95%

Question 23
Please describe your opinion on how judges have, overall, used victim impact statements in determining sentencing.

I think judges pretty much have in their mind what their sentence will be before arguments or statements even begin.

They use them to give victims a voice and inform them on the proper sentence to be imposed. . . . sometimes it seems as though its used as the Judge’s P.R. for re-election.

Depends if they are running for office again.

Question 24
In your opinion, overall, how much weight do you think judges have given victim impact statements in determining sentencing?

Very little
Much weight
Probably more than they should.

Question 25
In what type(s) of cases have judges, in your opinion, given victim impact statements the most weight?

Maybe burglary of dwellings or batteries
Sex and violent crimes . . . Burg. Dwelling too
Child sexual battery cases.

Question 26
Can you give any examples of where you feel judges have given victim impact statements the most weight?

no
No.
Again child sexual battery cases where it has been years of abuse.
<table>
<thead>
<tr>
<th>Question 27</th>
<th>What problems have you observed in the process of victim impact statements?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>When the victim starts talking about other non-charged crimes they suspect my client of doing</td>
</tr>
<tr>
<td></td>
<td>The amount of emotion which clouds rational and reasonable sentences.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 28</th>
<th>What, in your opinion, can prosecutors and defense attorneys do better in preparing for, handling, or reacting to victim impact statements?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Always read them ahead of time before they are presented to the court</td>
</tr>
<tr>
<td></td>
<td>Talk to people first</td>
</tr>
<tr>
<td></td>
<td>Talk the victims ahead of time and get them on board with the agreements.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 29</th>
<th>What, in your opinion, could be done to improve the process of victim impact statements?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>They could be limited in scope and duration - 10 minutes to say how this crime is still effecting you today</td>
</tr>
<tr>
<td></td>
<td>More stringent rules regarding the scope of testimony and disallowing narration</td>
</tr>
<tr>
<td></td>
<td>Instruct judges about how to handle the emotional aspects of the statements but still be able to give rational reasonable sentences.</td>
</tr>
</tbody>
</table>
THE RIGHT TO MARRY AND STATE MARRIAGE AMENDMENTS: IMPLICATIONS FOR FUTURE FAMILIES

Mark P. Strasser

I. INTRODUCTION

The United States Supreme Court struck down state same-sex marriage bans in Obergefell v. Hodges, thereby invalidating state marriage amendments precluding such unions. However, precisely because the marriage amendments differ in wording and have been construed in different ways by the courts, Obergefell is unlikely to completely invalidate all of them. Thus, while all of the states will recognize same-sex marriage, some marriage amendments will likely be viewed as limiting the benefits that are permissibly accorded to non-marital couples (whether composed of individuals of the same sex or of different sexes) and their families (whether or not including children).

Part II of this Article discusses the wording and interpretation of various state marriage amendments, exploring some of the limitations imposed by the amendments in addition to the restrictions on who may marry whom. Part III discusses the implications of some of the more robust amendments in light of current marriage demographics, noting how these limitations enshrined in the state constitutions may be very difficult to remove. The Article concludes by discussing some negative effects that these state constitutional amendments will likely have.

II. THE DIFFERING MARRIAGE AMENDMENTS AND THEIR INTERPRETATIONS

State marriage amendments vary significantly. Some are narrowly tailored to prevent the recognition of same-sex marriage, while others

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2. See, e.g., ALASKA CONST. art. I, § 25 (“To be valid or recognized in this State, a marriage may exist only between one man and one woman.”); ARIZ. CONST. art. XXX, § 1 (“Only a union of one man and one woman shall be valid or recognized as a marriage in this state.”); ARK. CONST. amend. LXXXIII, § 1 (“Marriage consists only of the union of one man and one woman.”).
are worded more broadly to prevent the state from according benefits traditionally associated with marriage to non-marital couples. Now that the United States Supreme Court has held that the federal Constitution precludes states from refusing to recognize same-sex marriages, the highest courts in several states may have to construe their respective states’ marriage amendments in light of the federal Constitution’s protections for same-sex unions. While some courts will likely hold the state’s marriage amendment unenforceable in toto, others will likely hold that federal guarantees require only the partial invalidation of that state’s marriage amendment. The latter holdings will leave a variety of limitations enshrined within the respective state constitutions, adversely impacting many families in unforeseen and undesirable ways.

A. The Variation in State Law

Several states have constitutional amendments precluding the recognition of same-sex marriages. The wording in those bans sometimes narrowly focuses on prohibiting same-sex couples from marrying within a particular state or preventing state recognition of those same-sex marriages celebrated elsewhere. At other times, the wording more

3. See, e.g., FLA. CONST. art. I, § 27 (“Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.”); MICH. CONST. art. I, § 25 (“To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”); S.C. CONST. art. XVII, § 15 (“A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State. This State and its political subdivisions shall not create a legal status, right, or claim respecting any other domestic union, however denominated.”).

4. See Obergefell, 135 S. Ct. at 2604 (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same[] sex may not be deprived of that right and that liberty.”).

5. See ALA. CONST. amend. DCCLXXIV(e) (“The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.”); ALASKA CONST. art. 1, § 25 (“To be valid or recognized in this State, a marriage may exist only between one man and one woman.”); ARIZ. CONST. art. XXX, § 1 (“Only a union of one man and one woman shall be valid or recognized as a marriage in this state.”); ARK. CONST. amend. LXXXIII, § 1 (“Marriage consists only of the union of one man and one woman.”); COLO. CONST. art. II, § 31 (“Only a union of one man and one woman shall be valid or recognized as a marriage in this state.”); GA. CONST. art. I, § 4, ¶ I(a) (“This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.”); IDAHO CONST. art. III, § 28 (“A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.”); MISS. CONST. art. XIV, § 263-A (“Marriage may take place and may be valid under the laws of this State only between a man and a woman. A marriage in another State or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this State and is void and unenforceable under the laws of this State.”); MO. CONST. art. I, § 33 (“That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.”); MONT. CONST. art. XIII, § 7 ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this
broadly focuses on preventing state recognition of both same-sex marriages and also “marriage-like” relationships. Sometimes, the amendment specifically prohibits state recognition of “marriage-like” relationships involving same-sex couples, whereas at other times state...
law precludes the recognition of any marriage-like relationships regardless of their composition. It is likely underappreciated that the United States Supreme Court's striking down same-sex marriage bans on federal grounds will leave in place many restrictions on the benefits that can be accorded to non-marital couples.

B. Narrowly Focused Amendments

Several states have constitutional amendments whose language is narrowly focused on preventing the celebration or recognition of same-sex marriages. Now that the United States Supreme Court has held that the federal Constitution protects the right to marry a same-sex partner, these amendments are unenforceable insofar as they preclude the

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or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

8. See ARK. CONST. amend. LXXXIII, § 2 (“Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize a common law marriage from another state between a man and a woman.”); FLA. CONST. art. I, § 27 (“Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.”); KAN. CONST. art. XV, § 16(b) (“No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.”); KY. CONST. § 233A (“Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”); MICH. CONST. art. I, § 25 (“To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”); OHIO CONST. art. XV, § 11 (“Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.”); S.C. CONST. art. XVII, § 15 (“A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State. This State and its political subdivisions shall not create a legal status, right, or claim respecting any other domestic union, however denominated. This State and its political subdivisions shall not recognize or give effect to a legal status, right, or claim created by another jurisdiction respecting any other domestic union, however denominated.”); S.D. CONST. art. XXI, § 9 (“The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota.”); TEX. CONST. art. I, § 32(b) (“This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.”); UTAH CONST. art. I, § 29(2) (“No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.”); VA. CONST. art. I, § 15A (“This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.”); WIS. CONST. art. XIII, § 13 (“Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.”).

9. See supra note 5 (highlighting state constitutional amendments that narrowly focus on the prohibition of same-sex marriage).
yet, a separate question involves how those amendments will be construed by the courts, and the amendments may well be construed as doing more than merely preventing same-sex couples from marrying. If so construed, the amendments will continue to limit the benefits that state legislatures can award to non-marital couples and their families, even though the amendments can no longer justify a refusal to recognize a same-sex marriage.

Consider Montana’s amendment, defining marriage: “Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.”

On its face, the amendment has a fairly limited reach because it only speaks to which marriages will be recognized or considered valid within the state. However, a different question involves how that amendment has been or might be interpreted by the courts.

In Donaldson v. State, several couples challenged Montana’s refusal to grant same-sex couples any of the rights or benefits of marriage. The couples made clear that they were not challenging Montana’s refusal to recognize same-sex marriage per se. They instead claimed that the state was constitutionally required to set up an alternate system, so that same-sex couples could enjoy some of the benefits of marriage even if they were not permitted to participate in the institution of marriage. The district court noted that the plaintiffs had not claimed that particular laws were unconstitutional, but instead wanted the court to direct the legislature

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10. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) (“[T]he Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”); see U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); Obergefell, 135 S. Ct. at 2604–05 (“The Court now holds that same-sex couples may exercise the fundamental right to marry.”).

11. MONT. CONST. art. XIII, § 7.


13. Id. at 365 (“Plaintiffs expressly do not challenge Montana law’s restriction of marriage to heterosexual couples, do not seek the opportunity to marry, and do not seek the designation of marriage for their relationships.”).

14. Id. (“[P]laintiffs contend however that there is a ‘statutory structure’ in Montana law that prohibits them from enjoying ‘significant relationship and family protections and obligations automatically provided to similarly-situated different-sex couples who marry[,] . . . [and that] this statutory structure interferes with their rights under Article II of the Montana Constitution, including their rights to equal protection, due process, and the rights to privacy, dignity and the pursuit of life’s necessities.”).

15. Id. (“The District Court noted that Plaintiffs do not seek a declaration that any specific statutes are unconstitutional.”).
to enact a statutory scheme to correct this perceived inequity. 16 Basically, the plaintiffs were asking the court to order the legislature to create a civil union status following the example set by the Vermont Supreme Court in Baker v. State. 17

The trial court in Donaldson held that “ordering the Legislature to enact a statutory scheme to address Plaintiffs’ goals of achieving equal treatment . . . would be an inappropriate exercise of judicial power.” 18 When upholding the trial court’s refusal to grant the desired remedy, 19 the Montana Supreme Court suggested that the plaintiffs should be afforded the opportunity not only to amend their complaint but to specify which statutes were constitutionally offensive and which level of scrutiny to employ in the constitutional analysis. 20

Justice Rice’s concurrence offers an example of how the Montana amendment might be interpreted in the future. He interpreted the amendment to afford special protection to marriage, which he described as “a unique relationship, dissimilar to all other relationships and alone essential to the nation’s foundation and survival.” 21 Because of the unique status of marriage, he reasoned that “the State errs neither by recognizing it as such nor by giving it exclusive treatment.” 22 Justice Rice feared that according non-marital couples the benefits of marriage “would strip from the law the exclusive treatment of marriage as a basis for providing any concrete legal benefit.” 23

Now that the United States Supreme Court has held that same-sex marriage is protected by the federal Constitution, the Montana amendment could be interpreted to be nullified in its entirety. 24 But if the amendment is given the interpretation suggested by Justice Rice’s

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16. Id. at 366 (“The District Court concluded, however[,] that ‘what plaintiffs want here is not a declaration of the unconstitutionality of a specific statute or set of statutes but rather a direction to the legislature to enact a statutory arrangement.’”).
17. 744 A.2d 864, 867 (Vt. 1999) (holding that precluding same-sex couples from having access to the benefits of marriage violated state constitutional guarantees).
19. Id. at 366 (“We agree with the District Court that Plaintiffs’ requested relief exceeds the bounds of a justiciable controversy, and decline to provide the declaratory relief requested.” (citation omitted) (citing Gryczan v. State, 942 P.2d 112, 117 (Mont. 1997))).
20. Id. at 367 (“The Plaintiffs should be afforded the opportunity to amend their complaint and to develop an argument as to the nature of the State’s interest in advancing specific laws as well as the level of constitutional scrutiny that should be applied to those laws by the courts.”).
21. Id. at 368 (Rice, J., concurring).
22. Id.
23. Id.
24. An Oregon court followed Montana’s lead and narrowly construed that state’s marriage amendment, rejecting that it precluded the state from affording marital benefits to non-marital couples. See Shineovich and Kemp, 214 P.3d 29, 38 (Or. Ct. App. 2009) (“The state takes the position that Measure 36 restricts only the right of same-sex couples to marry and does not alter any existing rights of such couples to obtain legal benefits presently granted on the basis of marital status.”).
concurrence, Montana would still be precluded by the state constitution from affording marital benefits to non-marital couples,\textsuperscript{25} state recognition of same-sex marriage notwithstanding. The Obergefell Court’s emphasis on the unique status of marriage\textsuperscript{26} might be used to justify the refusal to accord non-marital relationships some of the benefits of marriage.

C. More Broadly Focused Amendments

A number of states adopted amendments that not only prohibited same-sex marriage, but also precluded the states from according benefits to marriage-like relationships like domestic partnerships or civil unions.\textsuperscript{27} A majority of the electorate in those states presumably wanted to reserve not only the name “marriage” for certain different-sex couples but also many of the material benefits associated with marriage.\textsuperscript{28}

Consider the Nebraska Constitution, defining marriage: “Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.”\textsuperscript{29}

A question not addressed by Obergefell is whether a state can recognize different-sex, but not same-sex, civil unions or domestic partnerships.\textsuperscript{30} That would depend in part on the justification offered by

\textsuperscript{25} See Donaldson, 292 P.3d at 374 (“Marriage has always been much more—a concrete legal status which the law recognized and favored with exclusive treatment, including benefits and obligations. In adopting the Marriage Amendment, Montana voters determined to permanently preserve this exclusive treatment for marriage by placing it in the Constitution.”).

\textsuperscript{26} See Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015) (“Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. . . . The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations.”).

\textsuperscript{27} See, e.g., FLA. CONST. art. I, § 27 (“Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.”); KAN. CONST. art. XV, § 16(b) (“No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.”); KY. CONST. § 233A (“A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”).

\textsuperscript{28} See Appling v. Doyle, 826 N.W.2d 666, 673 (Wis. Ct. App. 2012) (“[T]he only reasonable conclusion based on the language of the amendment is that voters thought about the ‘legal status’ of marriages and domestic partnerships as a whole picture, including eligibility, formation, and termination requirements, along with the rights and obligations that attend marriage.”).

\textsuperscript{29} Neb. Const. art. I, § 29.

\textsuperscript{30} A state might permit both same-sex and different-sex couples to enter into a civil union or domestic partnership. See, e.g., CAL. FAM. CODE § 297(b)(4)(B) (“Notwithstanding any other provision of this section, persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over [sixty-two] years of age.”). See also id. § 297(a) (“Domestic partners are two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.”).
the state, although it seems unlikely that the state could justify such a limitation on civil unions or domestic partnerships.\textsuperscript{31}

Suppose that the state could not justify its recognition of different-sex, but not same-sex, civil unions or domestic partnerships. In that event, it would still be necessary for the Nebraska amendment to be authoritatively construed. A court might say that the amendment is simply unenforceable as a general matter, and thus it precludes neither the recognition nor celebration of same-sex marriages nor the creation or recognition of civil unions or domestic partnerships. In the alternative, a court might delete the constitutionally offensive language and read the amendment as precluding the recognition of civil unions, domestic partnerships, or other non-marital relationships more generally. Thus, a court might read that amendment as if it had been written: “Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.”\textsuperscript{32}

Would a court delete the constitutionally offensive language or instead simply strike down the amendment \textit{in toto} because it is offensive to federal constitutional guarantees? That is unclear, although different courts might reasonably be expected to take different approaches.

Consider for purposes of illustration how different state supreme courts have interpreted their respective states’ doctrines of necessaries. In \textit{Richland Memorial Hospital v. Burton},\textsuperscript{33} the South Carolina Supreme Court explained that the “common law doctrine as modified by statute . . . provides that, in the absence of contract, a husband is liable for his wife’s necessaries supplied to her by a third person.”\textsuperscript{34} However, such a statute does not pass muster—“the necessaries doctrine, as codified in \textit{[Section] 20-5-60} [of the South Carolina 1976 Code of Laws], denies husbands equal protection of the laws by failing to impose a reciprocal obligation on wives.”\textsuperscript{35} Given that constitutional infirmity, the South Carolina court had two choices: strike down the statute or make it gender-neutral. The court chose the latter, holding that “the necessaries doctrine

\textsuperscript{31}. Cf. Elizabeth M. Glazer, \textit{Civil Union Equality}, 2012 \textit{CARDozo L. REV. de NOVO} 125, 142 (2012) (“If civil unions are unavailable to different-sex couples, then only same-sex couples have the right to exercise the liberty of choosing among alternative relationship recognition vehicles. And if only same-sex couples are offered such a choice, the law treats similarly situated individuals differently and therefore unequally.” (footnote omitted)).

\textsuperscript{32}. NEB. CONST. art. I, § 29 (alterations added).

\textsuperscript{33}. 318 S.E.2d 12 (S.C. 1984).

\textsuperscript{34}. \textit{Id.} at 13 (citing O’Hagan v. Fraternal Aid Union, 141 S.E. 893 (S.C. 1928)).

\textsuperscript{35}. \textit{Id.}
allows third parties providing necessaries to a husband or wife to bring an action against the individual’s spouse.”

The Virginia Supreme Court took a different tack. In *Schilling v. Bedford County Memorial Hospital, Inc.*, the court held that the necessaries doctrine “creates a gender-based classification not substantially related to serving important governmental interests and is unconstitutional.” However, instead of adopting the appellee’s suggestion “to extend the doctrine so it applies to wives as well as husbands,” the court simply struck it down, leaving to the legislature the task of re-crafting the doctrine so it would pass muster.

Suppose that a Nebraska court considering whether to strike or instead modify the Nebraska amendment took the latter approach by deleting the language that would have imposed a burden solely on same-sex couples. A separate issue would involve how narrowly the amendment should be construed. Possible approaches are illustrated in an Eighth Circuit decision involving the Nebraska amendment’s constitutionality.

In *Citizens for Equal Protection v. Bruning (Bruning II)*, the Eighth Circuit Court of Appeals reviewed a district court’s decision striking down the Nebraska marriage amendment. The appellate court accepted the claims that “the many laws . . . extending a variety of benefits to married couples are rationally related to the government interest in ‘steering procreation into marriage,’” and that “[b]y affording legal recognition and a basket of rights and benefits to married . . . couples, such laws ‘encourage procreation to take place within the socially recognized unit that is best situated for raising children.’” The court justified the refusal to recognize civil unions because “the expressed intent of traditional marriage laws [is] to encourage . . . couples to bear and raise children in committed marriage relationships.”

The *Bruning II* court upheld the Nebraska amendment, notwithstanding the denial to same-sex couples of the right to marry or

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36. *Id.*
37. 303 S.E.2d 905 (Va. 1983).
38. *Id.* at 908.
39. *Id.*
40. *Id.* (“It . . . is unconstitutional.”).
41. *Id.* (“[T]his task, if advisable, is better left to the General Assembly.”).
42. 455 F.3d 859 (8th Cir. 2006), *abrogated by Obergefell v. Hodges, 135 S. Ct. 2584 (2015).*
44. *Bruning II*, 455 F.3d at 867.
45. *Id.*
46. *Id.* at 868.
enter into civil unions.\textsuperscript{47} Now that the United States Supreme Court has held that same-sex marriage is constitutionally protected, the \textit{Bruning II} analysis must be modified.\textsuperscript{48} The unresolved issues include whether any of the Nebraska amendments survive and, if so, the degree to which it precludes the state from awarding marriage-type benefits to individuals in non-marital relationships.

The \textit{Bruning II} court held both that the amendment reserves a number of rights for married couples and that doing so was constitutionally permissible. A court considering the amendment now might interpret it as privileging marriage over other types of relationships and thus as reserving some or all of the benefits of marriage for those who have married. Or, a different court might look at the state amendment and note that it does not on its face preclude different-sex, non-marital couples from receiving benefits traditionally associated with marriage. The court might then interpret the amendment as only imposing burdens on same-sex couples. If so, and if targeting in that way violates constitutional guarantees, the amendment might be struck in its entirety and understood not to impose any limitations as a state constitutional matter.

Suppose an amendment targets individuals on the basis of orientation by reserving marriage for different-sex couples and, in addition, privileges marriage over other types of relationships, regardless of whether those non-privileged relationships involved individuals of the same sex or of different sexes. Consider the South Dakota constitutional provision: “Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota.”\textsuperscript{49} While the state is clearly targeting same-sex marriage,\textsuperscript{50} it is also privileging marriage as a general matter over any other “quasi-marital relationship.”\textsuperscript{51} By framing the issue more generally and precluding the recognition of any quasi-marital relationship however composed, the second sentence, unlike the first,

\begin{itemize}
\item \textsuperscript{47}Id. at 871 (“We hold that [Section] 29 [of the Nebraska Constitution, article 1] and other laws limiting the state-recognized institution of marriage to heterosexual couples are rationally related to legitimate state interests and therefore do not violate the Constitution of the United States.”).
\item \textsuperscript{48}Cf. Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015) (stating that besides \textit{Bruning II} and \textit{Obergefell}, “the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution”).
\item \textsuperscript{49}S.D. \textsc{Const.} art. XXI, § 9.
\item \textsuperscript{50}Id. (“Only marriage between a man and a woman shall be valid or recognized in South Dakota.”).
\item \textsuperscript{51}Id.
\end{itemize}
seems much less vulnerable to the charge that it is targeting on the basis of orientation. A court considering the constitutionality of the South Dakota state constitutional amendment would invalidate the first sentence, but might not invalidate the second, in which case it would be necessary to decide what counts as a “quasi-marital relationship” in South Dakota.

Marital status confers a host of rights upon marital couples,52 and many would suggest that conferring a few of the rights that married couples enjoy upon a non-marital couple53 would not make the latter relationship marital or even quasi-marital.54 However, such a view assumes that the number of accorded benefits plays an important role in determining what is “marriage-like.” For example, a Kansas appellate court suggested that non-marital relationships would not be deemed “marriage-like” unless they were accorded all of the benefits of marriage.55

One commentator has suggested that the relevant criterion should focus on how the relationship is defined rather than on how many benefits are accorded.56 Using this approach, a relationship is marriage-like if the criteria for entering into the relationship either mirror or are

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52. Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003) (“The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that ‘hundreds of statutes’ are related to marriage and to marital benefits.”).


54. See Appling v. Doyle, 826 N.W.2d 666, 673 (Wis. Ct. App. 2012) (“[V]oters would have understood that, regardless of differences in rights and obligations, the ‘legal status’ of marriage is a phrase that includes reference to the substantial rights and obligations that go with marriage and that, if the legislature conferred those same rights and obligations on same-sex couples, however such couples are identified, the resulting legally recognized relationship would be substantially similar to marriage.”); Mark Strasser, The Future of Marriage, 21 J. AM. ACADEMY OF MATRIMONIAL LAWYERS 87, 105–06 (2008) (“Other amendments not only reserve marriage for different-sex couples but also preclude the state from recognizing a status for same-sex couples that is identical or substantially similar to marriage. Presumably, this prohibition would preclude recognition of civil unions or robust domestic partnerships, but might permit a status that affords a more limited range of benefits, such as health benefits through a state employer.”) (footnotes omitted)).

55. State v. Curreri, 213 P.3d 1084, 1090 (Kan. Ct. App. 2009) (“It is noteworthy that the constitutional amendment does not refer to ‘a right or an incident of marriage.’ Its reference to ‘the rights or incidents of marriage’ obviously refers not to an isolated right that a married person may share in common with nonmarried persons, but rather the ‘bundle of rights’ that identifies marriage as a distinct and separate institution. This provision in the amendment seeks to cut off attempts to circumvent the amendment’s definition of marriage by those seeking recognition of a relationship, other than between one man and one woman, which otherwise purports to bear all the hallmarks of a conventional marriage.”) (first and second emphasis in original, third emphasis added)).

close to those that are used for marriage. But that would mean that a marriage-like relationship entitling the parties to only one of the benefits to which marital couples are entitled would offend state constitutional limitations. It would also mean that a relationship defined in terms of different criteria would not qualify as marriage-like, even if the relationship were accorded all of the benefits and obligations of marriage.

One need not adopt a single criterion to determine which relationships are “marriage-like.” One might instead adopt an approach that looks at both the criteria for entering into (or exiting) the relationship and the benefits and obligations acquired by virtue of being in that relationship. However, it would then be helpful to have guidance both with respect to which criteria would militate in favor of calling something “marriage-like” and with respect to how many benefits would militate in favor of a finding that a relationship was being treated as a marriage.

A state might wish to avoid the difficulties associated with determining which relationships are marriage-like and might instead follow Idaho’s example: “A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.” Presumably, this means that the only domestic status that can be given legal recognition is marriage and that other domestic relationships will not be recognized or considered valid.

Consider a cohabiting non-marital couple, Brett and Morgan. Each has a job and is insured through that job. Each owns a car that is titled in his or her own name. Each is named on the apartment lease. They do not have a special status and for legal purposes might be treated as if they were roommates who shared an apartment as a way of reducing expenses.

Suppose in addition that Brett has a child whom Morgan wishes to adopt via second-parent adoption, which involves an adoption of a child by an adult who might be partnered with, but is not married to, the child’s

57. *Id.* at 26 (“So long as the same-sex couple (or unmarried heterosexual couple) is required to satisfy marriage-like criteria to receive the legal right or benefit, and so long as the right or benefit is one that typically is reserved for married persons, the state has created a legal status that recognizes or validates a ‘domestic legal union’ other than heterosexual marriage.”).

58. *Id.*

59. *See* *Appling*, 826 N.W.2d at 672 (“[T]hat would mean that voters thought the marriage amendment would permit legally recognized same-sex-couple relationships that are formed with criteria different than marriage criteria but carry with them all the rights and obligations that attend marriage—in other words, marriage by another name.”).

60. *See id.* at 674 (“‘Legal status’ refers not only to eligibility and formation requirements, but also to rights and obligations and, for that matter, termination requirements.”).

legal parent. As a general matter, a second-parent adoption is only possible if no person other than the would-be adopter’s adult partner has parental rights and thus would not be permissible if an ex-partner retained parental rights by virtue of a biological connection to the child. Where a second-parent adoption takes place, the parental rights of the legal parent are not terminated in order for the second parent to adopt.

Some states do not permit second-parent adoptions, reasoning that the only time an adult can adopt a child with the existing parent retaining parental rights is when the would-be adoptive parent is the child’s stepparent. The rationale behind permitting an exception for stepparents is that because the child is living in the home with the parent and the parent’s spouse, it would make no sense to require the legal parent to surrender his or her parental rights in order for the other parent to adopt since each parent will continue to be in the home and play an important role in the child’s life.

The same rationale permitting a stepparent to adopt without terminating the parental rights of the stepparent’s spouse might be used

62. In re Adoption of I.M., 288 P.3d 864, 869 (Kan. Ct. App. 2012) (“A second-parent adoption is when an unmarried partner is permitted to adopt the biological or legal child of the parent without requiring the parent to relinquish any parental rights, so long as the parent consents to the adoption.”).


64. Peter Wendel, Inheritance Rights and the Step-Partner Adoption Paradigm: Shades of the Discrimination Against Illegitimate Children, 34 HOFSTRA L. REV. 351, 376 (2006) (“The second-parent adoption rule provides that, where a child who is being adopted has only one legally recognized parent, adoption by that parent’s unmarried partner does not legally displace the natural parent but rather establishes a ‘second’ parent-child relationship which complements the existing parent-child relationship.” (emphasis added) (footnote omitted)).

65. See Sharon S. v. Superior Court, 73 P.3d 554, 558 n.2 (Cal. 2003) (“The phrase ‘second-parent adoption’ refers to an independent adoption whereby a child born to [or legally adopted by] one partner is adopted by his or her non-biological or nonlegal second parent, with the consent of the legal parent, and without changing the latter’s rights and responsibilities.” (internal quotations omitted) (quoting Emily Doskow, The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World, 20 J. JUV. L. 1, 5 (1999))).


67. See Wendel, supra note 64, at 395 n.232 (“[T]he stepparent adoption exception is appropriate because it recognizes that, unlike the classic adoption paradigm, in the stepparent adoption scenario the non-custodial natural parent does not necessarily step out of the child’s life.”).
to justify permitting a cohabiting partner to adopt without terminating the legal parent’s rights because the child will continue to be raised by both parents in the home, whether or not the adoption is formalized. 68 States permitting second-parent adoptions have often recognized that these differing scenarios are analogous in this respect. 69 Yet, one of the issues for a state with an amendment like Idaho’s might be whether second-parent adoption is precluded precisely because it is likening a domestic, non-marital, cohabiting relationship to a marital one.

The Idaho Supreme Court addressed whether Idaho permitted second-parent adoption in In re Adoption of Doe. 70 The trial court reasoned that local law precluded an unmarried partner from adopting a partner’s child. 71 On appeal, the plaintiff argued that “Idaho’s adoption statutes unambiguously allow her to adopt, that she meets all of the statutory requirements to adopt, that a second, prospective parent may adopt without terminating the rights of the existing legal parent, and that it is immaterial that she is considered unmarried under state law.” 72 The Idaho Supreme Court agreed, noting “the unambiguous language in [Idaho Code Section] 16–1501 that allows for ‘any adult person residing in and having residence in Idaho’ to adopt ‘any minor child’” 73 and explaining that the relevant law “contains no provisions that limit adoption to those who are married.” 74 The court reasoned that “[t]he Legislature has imposed no restrictions that would disqualify Jane Doe from seeking to adopt Jane Doe I’s children, and the [c]ourt will not imply any such restrictions based upon Idaho’s marital statutes.” 75 Because the Idaho Supreme Court was unwilling to impose additional limitations that were not expressly included within the law, 76 the court

68. Id. (“To the extent that this is the justification, however, there is no basis for distinguishing the stepparent adoption scenario from the step-partner adoption scenario.”).
69. Jason C. Beekman, Same-Sex Marriage: Strengthening the Legal Shield or Sharpening the Sword? The Impact of Legalizing Marriage on Child Custody/Visitation and Child Support for Same-Sex Couples, 18 WASH. & LEE J. C.R. & SOC. JUST. 215, 226 (2012) (“Second-parent adoption is modeled on stepparent adoption, a statutory scheme that allows a biological (or adoptive) parent’s spouse to adopt a child without terminating the biological parent’s legal rights.” (footnote omitted)).
70. 326 P.3d 347 (Idaho 2014).
71. Id. at 351 (“[T]his court [i.e., the magistrate court] concludes that the legislature’s intent in relation to adoptions is that the petitioner must be in a lawfully recognized union, i.e. married to the prospective adoptee’s parent, to have legal standing to file a petition to adopt that person’s biological or adopted child.”).
72. Id.
73. Id. at 353.
74. Id.
75. Id.
76. Id. at 351.
did not interpret the statute as requiring the termination of all parental rights before a non-spouse could adopt a child.\footnote{Id. at 353.}

Other courts have been unwilling to permit non-spouses to adopt while at the same time permitting the already recognized parent to retain her parental rights. In \textit{In re Adoption of I.M.},\footnote{288 P.3d 864 (Kan. Ct. App. 2012).} a former stepfather sought to adopt his ex-wife’s child.\footnote{Id. at 866.} The child viewed him as her father.\footnote{Id. (“I.M. considers J.M. to be her father and she calls him her father.”).} The ex-wife consented to the adoption\footnote{Id. at 867.} as long as she did not have to surrender her own parental rights for the adoption to be approved.\footnote{Id. (“I.M.’s mother agrees that the adoption would be in I.M.’s best interest, but does not want to give up her own parental rights to I.M.”).} The rights of the child’s biological father were not at issue—allegedly, he was unfit and had never played any role in the child’s life.\footnote{Id. at 867 (“The petition also set forth that consent from E.B. was unnecessary because he was an unfit parent who made no effort to support or communicate with I.M. before or after her birth.”).}

The Kansas appellate court refused to grant the adoption, even though there would have been no bar had the ex-stepparent still been married to the child’s mother.\footnote{See id. at 867, 868 (“J.M. is no longer I.M.’s stepparent, so we must treat this as an independent adoption under the statute. . . . [J.M.] has no statutory authority to consent to his own adoption of I.M.”).} The court agreed with those courts “that have strictly interpreted similar statutory language to require the relinquishment of all parental rights of the biological parents, except in the case of a traditional stepparent adoption.”\footnote{Id. at 869.}

Two different points might be made about \textit{In re Adoption of I.M.} First, there is a question of statutory construction—different state courts have taken very different approaches when deciding whether local law permits second-parent adoptions when the issue has not been expressly addressed by the legislature.\footnote{See Mark Strasser, \textit{Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child}, 66 TENN. L. REV. 1019, 1047 (1999) (“Courts have been divided about whether to permit second-parent adoptions, even when the relevant legislature has failed to speak to the issue directly and even when that legislature has made clear that the relevant statutes should be construed to benefit the child.”).} But the point here is not about the best way to interpret the statutes regarding adoption. Rather, it is that if a non-marital partner’s ability to adopt without requiring the termination of the custodial parent’s rights is thought to be a right normally associated with

\begin{footnotes}
\item[77.] Id. at 353.
\item[79.] Id. at 866.
\item[80.] Id. (“I.M. considers J.M. to be her father and she calls him her father.”).
\item[81.] Id. at 867.
\item[82.] Id. at 866 (“I.M.’s mother agrees that the adoption would be in I.M.’s best interest, but does not want to give up her own parental rights to I.M.”).
\item[83.] Id. at 867 (“The petition also set forth that consent from E.B. was unnecessary because he was an unfit parent who made no effort to support or communicate with I.M. before or after her birth.”).
\item[84.] See id. at 867, 868 (“J.M. is no longer I.M.’s stepparent, so we must treat this as an independent adoption under the statute. . . . [J.M.] has no statutory authority to consent to his own adoption of I.M.”).
\item[85.] Id. at 869.
\item[86.] See Mark Strasser, \textit{Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child}, 66 TENN. L. REV. 1019, 1047 (1999) (“Courts have been divided about whether to permit second-parent adoptions, even when the relevant legislature has failed to speak to the issue directly and even when that legislature has made clear that the relevant statutes should be construed to benefit the child.”).
\end{footnotes}
marriage, then some of the state marriage amendments may be construed as precluding the legislature from permitting second-parent adoptions.\textsuperscript{87}

Consider the Kentucky constitutional amendment, which reads: “A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”\textsuperscript{88} At issue in \textit{S.J.L.S. v. T.L.S.}\textsuperscript{89} was whether the statutory provisions governing stepparent adoption could be applied to a non-marital couple, especially in light of state constitutional constraints.\textsuperscript{90} The Kentucky appellate court addressing that issue wrote:

\begin{quote}
The overwhelmingly obvious answer is no. Without question, it is inappropriate to use a legal fiction [by saying that a non-marital partner is equivalent to a legal spouse]\textsuperscript{91} to sidestep a public policy so clearly expressed by the Legislature in statute and by the People of the Commonwealth in its ratification of a Constitutional provision.\textsuperscript{92}
\end{quote}

Suppose, however, that the Kentucky legislature were to change its mind about the wisdom of prohibiting second-parent adoptions. That would not matter. If the Kentucky Supreme Court were to adopt the reading of the relevant state constitutional provision offered in \textit{S.J.L.S.}, namely, that the state constitution prohibits treating a non-marital relationship as marital and that second-parent adoptions do so,\textsuperscript{93} the Kentucky Constitution would have to be changed before the legislature could authorize second-parent adoptions.

When the marriage amendments are read broadly, they can have substantial consequences for families, even bracketing some of the direct effects of being unable to marry a life partner.\textsuperscript{94} Consider the reading of

\begin{itemize}
\item \textsuperscript{87}. In \textit{D.M.T. v. T.M.H.}, the Florida Supreme Court implied that had the legislature reserved a particular benefit for married couples, the state marriage amendment might have precluded non-marital couples from receiving that benefit. 129 So. 3d 320, 342–43 (Fla. 2013) (discussing how the marriage amendment had not reserved one particular benefit for marital couples and thus same-sex couples could also receive that benefit, whereas a different benefit had been reserved for marital couples and thus same-sex couples could not receive that latter benefit).
\item \textsuperscript{88}. KY. CONST. § 233A.
\item \textsuperscript{89}. 265 S.W.3d 804 (Ky. Ct. App. 2008).
\item \textsuperscript{90}. Id. at 815–16.
\item \textsuperscript{91}. See id. at 816 (discussing the “family court . . . adopt[ing] the ‘legal fiction’ that the relationship between T and S is equivalent to marriage”).
\item \textsuperscript{92}. Id. at 818.
\item \textsuperscript{93}. See id. (holding, inter alia, that a person who was not the legal spouse of the child’s parent could not be considered a stepparent).
\item \textsuperscript{94}. See Courtney Thomas-Dusing, Note, \textit{The Marriage Alternative: Civil Unions, Domestic Partnerships, or Designated Beneficiary Agreements}, 17 J. GENDER RACE & JUST. 163, 166 (2014) (discussing “traditional marriage rights such as property division, insurance and employment benefits, hospital visitation, inheritance rights, and tort claims”).
\end{itemize}
the Michigan marriage amendment offered in *Stankevich v. Milliron*\(^{95}\) (*Stankevich I*). At issue in *Stankevich I* was the parental status of Jennifer Stankevich, who married Leanne Milliron in Canada.\(^{96}\) Subsequent to the marriage, Milliron delivered a child.\(^{97}\) The Michigan Constitution precludes the recognition of same-sex marriage,\(^{98}\) so the Michigan appellate court held that the marriage validly celebrated in Canada could not be recognized.\(^{99}\)

Yet, Stankevich was not asking the state to recognize her relationship with Milliron because the couple had already separated.\(^{100}\) Instead, Stankevich sought recognition as the child’s equitable parent under Michigan law.\(^{101}\) But the Michigan Supreme Court has confined equitable parent doctrine to those in legal marriages,\(^{102}\) so the state bar on the recognition of same-sex marriage meant that Stankevich could not be recognized as an equitable parent,\(^{103}\) regardless of how such a ruling would affect the interests of the child whom Stankevich had helped to raise.

The Michigan marriage amendment has been construed rather broadly. In *National Pride at Work, Inc. v. Governor of Michigan*,\(^{104}\) the Michigan Supreme Court considered whether the amendment precluded domestic partner benefits.\(^{105}\) The amendment read: “‘To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be

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97. The couple married while Milliron was pregnant. See id. (“Before that date, defendant had been artificially inseminated, and later gave birth to a child.”).
98. MICH. CONST. art. 1, § 25 (“To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”).
99. *Stankevich I*, 2013 WL 5663227, at *3 (“Thus, to recognize plaintiff’s same-sex union as a marriage . . . would directly violate the constitutional provision that, ‘the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.’” (quoting MICH. CONST. art I, § 25)).
100. Id. at *1.
101. Id. at *2.
102. See Van v. Zahorik, 597 N.W.2d 15, 20 (Mich. 1999) (“The present custody dispute is not in the context of a divorce, and the children at issue were not born or conceived during marriage. Accordingly, the doctrine of equitable parenthood would not apply to the present case.”).
103. *Stankevich I*, 2013 WL 5663227, at *4 (“[P]laintiff is not a parent as defined under the [Child Custody Act] or the equitable parent doctrine . . . .”).
104. 748 N.W.2d 524 (Mich. 2008).
105. Id. at 529 (addressing “whether the marriage amendment . . . prohibits public employers from providing health-insurance benefits to their employees’ qualified same-sex domestic partners”).
the only agreement recognized as a marriage or similar union for any purpose.”

Plaintiffs argued that an employer’s conferring domestic partnership benefits does not amount to the employer recognizing a marriage between the parties. The Michigan Supreme Court disagreed, noting that the failure to call something a marriage does not establish that the relationship is not being treated as a marriage. The court explained that the question before it was not the name given to the relationship, but whether that relationship was being treated as a marriage or something similar to a marriage.

The court reasoned that a domestic partnership is a kind of union and then addressed whether a domestic partnership is sufficiently similar to a marriage to run afoul of the amendment’s limitations. The court explained that the amendment might still be triggered by a relationship that was not the equivalent of marriage because “[a] union does not have to possess all the same legal rights and responsibilities that result from a marriage in order to constitute a union ‘similar’ to that of marriage.”

That two relationships might be similar even if not accorded identical benefits does not establish how many or which benefits must be awarded for the relationship to be classified as similar for purposes of the marriage amendment. Rather than address which or how many benefits would trigger the amendment’s limitations, the Michigan Supreme Court took a different approach.

The court noted two respects in which marriages and domestic partnerships are similar, namely, “marriages and domestic partnerships are the only relationships in Michigan defined in terms of both gender and lack of a close blood connection.” Because domestic partnerships and marriages “have these core ‘qualities in common,’” the court...

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106. Id. at 532 (quoting Mich. Const. art. 1, § 25).
107. Id. at 533.
108. Id. (“[J]ust because a public employer does not refer to, or otherwise characterize, a domestic partnership as a marriage or a union similar to a marriage does not mean that the employer is not recognizing a domestic partnership as a marriage or a union similar to a marriage.”).
109. Id. (“The pertinent question is not whether public employers are recognizing a domestic partnership as a marriage or whether they have declared a domestic partnership to be a marriage or something similar to marriage; rather, it is whether the public employers are recognizing a domestic partnership as a union similar to a marriage.”).
110. Id. at 534 (“When two people enter a domestic partnership, they join or associate together for a common purpose, and, under the domestic-partnership policies at issue here, legal consequences arise from that relationship in the form of health-insurance benefits. Therefore, a domestic partnership is most certainly a union.”).
111. Id. (“The next question is whether a domestic partnership is similar to a marriage.”).
112. Id.
113. Id. at 537.
concluded that “domestic partnerships are unions similar to marriage.” 114 Once it was established that domestic partnerships and marriages were sufficiently similar, no benefits could be accorded to the former than were normally accorded to the latter. 115

Yet, the court’s observation that both relationships were defined in terms of sex was accurate only if understood in a particular way because the “sex” requirement for the two was not the same—the partners had to be of different sexes for marriage and of the same sex for domestic partnerships. 116 While each relationship was defined in part based on the category of sex, the criteria differed with respect to whether the sexes of the partners had to match.

Suppose domestic partnerships had not been defined in terms of gender—individuals of the same sex or of different sexes could qualify as domestic partners. It is simply unclear whether the court would have held that the amendment barred the recognition of domestic partnerships when no gender limitation had been imposed. 117 One suspects so, however, because the individuals would still be entering into the union to secure a particular benefit. 118 The Michigan court explained that “the

114. Id. (footnote omitted). See also Kristofer A. Scarpa, Comment, State Constitutional Law—Marriage—Michigan Marriage Amendment Bars Public Employers from Providing Health Benefits to Same-Sex Partners of Employees. National Pride at Work, Inc. v. Governor of Michigan, 748 N.W.2d 524 (Mich. 2008), 40 RUTGERS L.J. 995, 1000 (2009) (“The majority reasoned that because these two characteristics are unique to both marriages and domestic partnerships, and the combination of the two elements are unique only to marriages and domestic partnerships, the two types of relationships resemble each other to such an extent that they should be classified as ‘similar’ for purposes of the marriage amendment.” (footnote omitted)).

115. Nat’l Pride at Work, 748 N.W.2d at 538 (“[I]f there were any residual doubt regarding whether the marriage amendment prohibits the recognition of a domestic partnership for the purpose at issue here, this language makes it clear that such a recognition is indeed prohibited ‘for any purpose,’ which obviously includes for the purpose of providing health-insurance benefits.”).

116. Id. at 535 (“All the domestic-partnership policies at issue here require the partners to be of a certain sex, i.e., the same sex as the other partner. Similarly, Michigan law requires married persons to be of a certain sex, i.e., a different sex from the other.” (footnote omitted)).

117. Different-sex couples might prefer a kind of domestic partnership status to marriage. See Scott Titshaw, The Reactionary Road to Free Love: How DOMA, State Marriage Amendments, and Social Conservatives Undermine Traditional Marriage, 115 W. VA. L. REV. 205, 276 (2013) (“Today, different-sex couples in D.C., Hawaii, Illinois, and Nevada can choose between marriage and a quasi-marriage civil union or domestic partnership. These alternatives may be attractive for symbolic reasons, but they may also offer substantive advantages such as federal law invisibility.” (footnote omitted)).

118. See Nat’l Pride at Work, 748 N.W.2d at 541 (noting the following statement by the Michigan Civil Rights Commission: “If passed, Proposal 2 would result in fewer rights and benefits for unmarried couples, both same-sex and heterosexual, by banning civil unions and overturning existing domestic partnerships. Banning domestic partnerships would cause many Michigan families to lose benefits such as life insurance, pensions and hospital visitation rights.” (footnote omitted)).

119. See id. at 534 (“When two people enter a domestic partnership, they join or associate together for a common purpose, and, under the domestic-partnership policies at issue here, legal consequences arise from that relationship in the form of health-insurance benefits.”).
pertinent question is not whether these unions give rise to all the same legal effects; rather, it is whether these unions are being recognized as unions similar to marriage “for any purpose.”” 120 Yet, that might be taken to mean that even if domestic partnerships were not defined in terms of sex and those closely related by blood were not barred from entering into domestic partnerships, the court still might say that the amendment precluded the state from recognizing such relationships because the union would be recognized for the purpose of securing benefits.

Some public employers in Michigan modified their domestic partnership policies after *National Pride at Work* to enable employees to secure coverage for a non-family member with whom the employee lived. 121 But by making one of the criteria whether the individual was a family member, those employers might have made their policies vulnerable to challenge. Using the *National Pride at Work* approach as a model, a Michigan court might suggest that awarding such benefits on the basis of “family” was also precluded by the amendment, 122 even though domestic partner status could only be accorded to a non-family member.

An alternative interpretation of the Michigan amendment was that it precluded the state from awarding certain benefits specifically related to marriage to non-marital couples, 123 like the presumption of parenthood when a child is born into a marriage. 124 But the court rejected that narrowing interpretation, instead construing the amendment broadly so

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120. Id. (footnote omitted).
121. Sarah Abramowicz, *The Legal Regulation of Gay and Lesbian Families as Interstate Immigration Law*, 65 *VAND. L. REV. EN BANC* 11, 28 n.97 (2012) (“A number of Michigan’s public employers responded to the ruling by replacing domestic-partner benefits with benefits provided to a broader category termed ‘other qualified adults,’ which typically consists of nonrelatives and non-tenants who have lived with an employee for more than six months.”).
122. Using the category of “sex,” rather than asking whether the partner was of the same or different sex, was one of the factors making the domestic partner benefits impermissible. *See Nat’l Pride at Work*, 748 N.W.2d at 537 (finding that public employers that provided health insurance benefits to eligible same-sex partners violated article 1 of the Michigan Constitution). Just as the court found that the amendment reached domestic partner benefits even though those benefits were accorded to same-sex partners and marital benefits were restricted to different-sex partners, a court might hold that the amendment precluded awarding benefits to adult non-family members. The court might reason that using the category of family or “close blood relative” as a factor (even if the idea was to exclude blood relatives, *see id.*) would itself be a factor making domestic partner benefits impermissible.
123. Id. at 538 (“Plaintiffs argue that the marriage amendment does not prohibit public employers from providing health-insurance benefits to their employees’ qualified same-sex domestic partners because health-insurance benefits do not constitute a benefit of marriage.” (footnote omitted)).
124. *See Pecoraro v. Rostagno-Wallat*, 805 N.W.2d 226, 228 (Mich. Ct. App. 2011) (“In Michigan, a child conceived and born during a marriage is legally presumed the legitimate child of that marriage, and the mother’s husband is the child’s father as a matter of law.”).
that no benefits associated with marriage could be accorded to a marriage-like union.\textsuperscript{125}

The Michigan Supreme Court could overrule \textit{National Pride at Work}, perhaps emphasizing that by limiting marriage to “the union of one man and one woman,”\textsuperscript{126} the amendment was targeting on the basis of orientation. However, a reversal of that decision without some important change in the intervening jurisprudence might be taken to impugn the \textit{National Pride at Work} court’s methods or motivations.\textsuperscript{127} The amendment could be repealed via referendum, although state initiative campaigns can be very expensive, which might deter individuals from mounting such a campaign.\textsuperscript{128} In short, it does not seem likely that the Michigan marriage amendment will be construed narrowly in the near term. But that means that the Michigan marriage amendment will likely preclude the Michigan legislature from affording a variety of benefits to non-marital couples, even if doing so would promote the public interest. Ironically, the limitations that the Michigan electorate may not have supported in the first place seem firmly in place in the Michigan Constitution and will be relatively difficult to remove.\textsuperscript{129}

Not all of the state high courts interpret their state marriage amendments to impose robust restrictions. In \textit{State v. Carswell},\textsuperscript{130} the Ohio

\textsuperscript{125.} \textit{Nat’l Pride at Work}, 748 N.W.2d at 539 (“The people of this state have already spoken on this issue by adopting this amendment. They have decided to ‘secure and preserve the benefits of marriage’ by ensuring that unions similar to marriage are not recognized in the same way as a marriage for any purpose.” (footnotes omitted)).


\textsuperscript{127.} Cf. William B. Turner, \textit{The Perils of Marriage as Transcendent Ontology}: National Pride at Work v. Governor of Michigan, 9 GEO. J. GENDER & L. 279, 284 (2008) (discussing \textit{National Pride at Work} and then noting that “[t]he debate over same-sex marriage is primarily about the desire in certain quarters to perpetuate hierarchies by specifying one category of persons who will occupy the bottom half of the binary” (footnote omitted)).

\textsuperscript{128.} Cf. Schuette v. BAMN, 134 S. Ct. 1623, 1662 (2014) (Sotomayor, J., dissenting) (“In 2008, for instance, over $800 million was spent nationally on state-level initiative and referendum campaigns, nearly $300 million more than was spent in the 2006 cycle. . . . ‘In several states, more money [is] spent on ballot initiative campaigns than for all other races for political office combined.’” (quoting T. DONOVAN, C. MOONEY & D. SMITH, \textit{STATE AND LOCAL POLITICS: INSTITUTIONS AND REFORM} 132 (2012))); James N. G. Cauthen, \textit{Referenda, Initiatives, and State Constitutional No-Aid Clauses}, 76 ALB. L. REV. 2141, 2158 (2013) (discussing “an expensive initiative proposal and approval campaign”).

\textsuperscript{129.} See \textit{Nat’l Pride at Work}, 748 N.W.2d at 548–49 (Kelly, J., dissenting) (“[Citizens for the Protection of Marriage Committee] told voters that the ‘marriage amendment’ would bar same-sex marriage but would not prohibit public employers from providing the benefits at issue. It is reasonable to conclude that these statements led the ratifiers to understand that the amendment’s purpose was limited to preserving the traditional definition of marriage. And it seems that a majority of likely voters favored an amendment that would bar same-sex marriage but would go no further.” (footnote omitted)).

\textsuperscript{130.} 871 N.E.2d 547 (Ohio 2007).
Supreme Court construed the Ohio marriage amendment narrowly.\textsuperscript{131} That amendment reads: “This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.”\textsuperscript{132} The court offered the following explanation of the amendment’s meaning:

The definition of “status,” our understanding of the legal responsibilities of marriage, and the rights and duties created by the status of being married, combined with the first sentence of the amendment’s prohibition against recognizing any union that is between persons other than one man and one woman causes us to conclude that the second sentence of the amendment means that the state cannot create or recognize a legal status for unmarried persons that bears all of the attributes of marriage—a marriage substitute.\textsuperscript{133}

The Ohio Supreme Court explained that the amendment precluded the state from recognizing civil unions.\textsuperscript{134} However, if the state recognized a status that accorded some, but not all, of the benefits of marriage, then the amendment’s restrictions would not be triggered.\textsuperscript{135}

Consider a domestic partners registry that accords same-sex partners a legal status affording them very few, if any, benefits. One issue is whether the state is precluded by the marriage amendment from recognizing such a status for unmarried couples. An Ohio appellate court reasoned that “Cleveland’s domestic partner registry is, in essence, simply a label that confers little or no legal benefits on the domestic partners and thus does not ‘approximate the design, qualities, significance or effect of marriage.’”\textsuperscript{136} Because it did not approximate marriage in those ways, the court upheld the constitutionality of the registry.\textsuperscript{137}

\textsuperscript{131. See id. at 551 (interpreting the meaning of the amendment as prohibiting the state from “creating or recognizing a legal status deemed to be the equivalent of a marriage of a man and a woman”).}
\textsuperscript{132. OHIO CONST. art. XV, § 11.}
\textsuperscript{133. Carswell, 871 N.E.2d at 551.}
\textsuperscript{134. Id. (“The second sentence of the amendment prohibits the state and its political subdivisions from circumventing the mandate of the first sentence by recognizing a legal status similar to marriage (for example, a civil union).” (footnote omitted)).}
\textsuperscript{135. See id. (interpreting the marriage amendment to mean that “the state cannot create or recognize a legal status for unmarried persons that bears all of the attributes of marriage” (emphasis added)).}
\textsuperscript{137. Id.}
It might be argued that affording one or a few benefits to a domestic partner would not trigger the amendment only if the accorded benefit was not normally associated with marriage. But the interpretation of the amendment as precluding the award of benefits or obligations associated with marriage to a non-marital couple has been rejected in Ohio as well.\textsuperscript{138}

Consider spousal support. Traditionally, spousal support is awarded as part of a divorce decree ended upon the death of either party or the remarriage of the party receiving support.\textsuperscript{139} The rationale behind ending it upon the remarriage of the spouse receiving support is that the support will no longer be needed because the new spouse will take on that obligation.\textsuperscript{140}

One effect of terminating support upon remarriage is that the ex-spouse has an incentive to cohabit with but not marry a partner so that the spousal support will continue.\textsuperscript{141} That incentive could be removed by specifying that support will be terminated upon the remarriage or cohabitation of the ex-spouse receiving support.\textsuperscript{142}

New spouses and cohabiting partners are distinguishable in that the former, but not the latter, have acquired a status that imposes legal

\textsuperscript{138} See \textit{id.} at *3–4 (explaining that even though the domestic partners registry imposes some marital duties as well as “the legal right of being registered and recognized as a domestic unit,” it did not violate the constitution because the Ohio Supreme Court held that “any legally established relationship bearing less than all the attributes of marriage is constitutional”).

\textsuperscript{139} See, e.g., Amber N. Csaszar, \textit{Statutory Interpretation}, 63 MD. L. REV. 949, 952 (2004) (“In Maryland, the right to receive alimony traditionally terminates upon remarriage.” (footnote omitted)); Odette Marie Bendek, \textit{Florida’s “Cohabitation” Statute: The Revolution That Wasn’t}, 82 FLA. B.J., June 2008, at 95, 95 (“Prior to the new statutory language, the only bright-line basis upon which to terminate alimony was the death of either party or the remarriage of the receiving spouse.”).

\textsuperscript{140} Note, \textit{The Void and Voidable Marriage: A Study in Judicial Method}, 7 STAN. L. REV. 529, 542 (1955) (“The obligation ceases upon remarriage since the ex-wife has acquired another source of support . . . .”).

\textsuperscript{141} DAVID M. BILODEAU, \textit{Divorce Demystified, in 1 MASS. BASIC PRAC. MANUAL § 6-9-333 (5th ed. 2015) (“[H]istorically, alimony recipients have frequently cohabited with a third party with whom they shared an intimate relationship without any plans of remarriage in order to continue receiving alimony payments from an ex-spouse.”); Jennifer L. McCoy, \textit{Spousal Support Disorder: An Overview of Problems in Current Alimony Law}, 33 FLA. ST. U. L. REV. 501, 519 (2006) (“In most states, spousal support ends automatically upon the recipient’s remarriage, but in many states, it does not automatically end upon the recipient’s cohabitation.” (footnotes omitted)).

\textsuperscript{142} See, e.g., Salvato v. Salvato, 2 N.E.3d 974, 975 (Ohio Ct. App. 2013) (“[Lawrence’s] spousal support obligation shall terminate in the event of the death of either party, [Windy’s] remarriage or [her] cohabitation with an unrelated male in a relationship similar to marriage.” (alterations in original) (quoting the divorce decree from the trial court)). Cf. McCoy, supra note 141, at 519 (“[W]hen two romantically involved partners choose to live together, they constructively assume mutual duties of support and service toward each other. Due to these constructive duties of support, it makes little sense for courts to continue requiring people to support former spouses who are now being supported by others.” (emphasis added)).
obligations towards the other partner. Because of that difference, a state might not choose to treat cohabitants and new spouses as equivalent for cessation of spousal support purposes. The focus here, however, is not on what approach is best as a matter of public policy. Rather, it is on whether a state marriage amendment would preclude a state from terminating spousal support upon the continuing cohabitation of the support-receiving spouse. Arguably, doing so would treat a marital relationship (remarriage) and a non-marital relationship (cohabitation) as equivalent.

In Fitz v. Fitz, an Ohio appellate court addressed whether the state’s marriage amendment precluded treating cohabitation, like remarriage, as a basis for terminating support. The trial court had held that doing so “would be tantamount to finding cohabitation to be the equivalent of marriage.” The appellate court reversed because a holding that spousal support need no longer be paid to the cohabiting ex-spouse “does not, in and of itself, confer a legal status tantamount to marriage.”

The appellate court reasoned that “[t]he act of terminating or modifying spousal support on the grounds of cohabitation does not create or recognize a legal status for individuals who cohabitate.” Even if it had, that status would involve only one rather than “all of the attributes of marriage” and thus could hardly be construed as “a marriage substitute.” Precisely because the Ohio Supreme Court has construed the Ohio marriage amendment as only precluding the state from “creat[ing] or recogniz[ing] a legal status for unmarried persons that bears

143. See McCoy, supra note 141, at 519 (“[A] major difference between spouses and cohabitants is that cohabitants do not assume legal duties of support and service toward each other . . . .” (emphasis added)).

144. Id. (“In most states, spousal support ends automatically upon the recipient’s remarriage, but in many states, it does not automatically end upon the recipient’s cohabitation.” (footnotes omitted)).


146. See S.C. CODE ANN. § 20-3-130(B)(1) (2014) (“Alimony and separate maintenance and support awards may be granted pendente lite and permanently in such amounts and for periods of time subject to conditions as the court considers just including, but not limited to: (1) Periodic alimony to be paid but terminating on the remarriage or continued cohabitation of the supported spouse . . . .”).


148. Id. at *1.

149. Id. at *3.

150. Id.

151. Id. at *2.

152. Id. at *3.


154. Id.
all of the attributes of marriage—a marriage substitute,”¹⁵⁵ the state’s treating cohabitation and remarriage alike for purposes of terminating spousal support does not make cohabitation and remarriage equivalent.

A broad interpretation of the Ohio marriage amendment might have yielded a different result. If it were interpreted to preclude the recognition of a union or status that in any way “‘intends to approximate the design, qualities, significance or effect of marriage’ for unmarried relationships”¹⁵⁶ and if a cohabiting relationship were treated as a status similar to (re)marriage for spousal support purposes, then the state’s marriage amendment would bar using cohabitation as a basis for stopping spousal support. The Ohio marriage amendment would have had the paradoxical effect of inducing a class of people to choose cohabitation over (re)marriage.

III. MARRIAGE AMENDMENTS AND CURRENT DEMOGRAPHICS

Any analysis of the impact of state marriage amendments must be made in light of current demographic trends. An increasing number of people live together without the benefit of marriage,¹⁵⁷ and the way that state marriage amendments are interpreted can have profound effects upon the lives of those people. A marriage amendment interpreted to impose robust limitations on the state may preclude members of a growing number of families from receiving a variety of benefits to the detriment of the individuals themselves and society as a whole.

A. Non-Marital Cohabitation

More and more unmarried couples are living together,¹⁵⁸ and many of those couples are raising children.¹⁵⁹ Some of those couples cannot

¹⁵⁵.  Id. (emphasis added).
¹⁵⁶.  Id. at 556 (Lanzinger, J., dissenting).
¹⁵⁹.  Kaaryn Gustafson, Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism, 5 STAN. J. C.R. & C.L. 269, 277 (2009) (“While it is true that an increasing proportion of children born in the United States are born to unmarried parents, a large proportion of these births are to couples who are unmarried and cohabiting.” (footnote omitted)).
marry, whereas others are permitted to marry but for whatever reason choose not to do so.

One possible reaction to the differing marriage choices that individuals make is to say that they are free to choose as they will, although they must accept the benefits and burdens of their choices. Yet, one of the questions at hand involves determining the appropriate allocation of benefits and burdens based upon marital status, and it is by no means obvious that the traditional array is the optimistic mix. Thus, even if it were true that an individual choosing not to marry would not have a right to complain in the sense that he or she consciously decided not to accept either the benefits or the burdens of marriage, that would not establish the wisdom of reserving a great array of benefits for married couples. It might be that both the unmarried individuals themselves and society as a whole would be better off if some benefits (and, perhaps, burdens) traditionally associated with marriage were also accorded to non-marital couples.

A different possible approach is to offer an array of benefit–burden combinations that are associated with differing relationships.

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160. Now that the Court has held that same-sex marriage is protected under the federal Constitution, some of the individuals living together without the benefit of marriage may be choosing to do so rather than being precluded from marrying regardless of whether or not they wish to do so.

161. See, e.g., Deborah A. Widiss, Changing the Marriage Equation, 89 WASH. U. L. REV. 721, 755 (2012) (“[D]ifferent-sex couples who choose long-term cohabitation rather than marriage may have a predilection for greater individual autonomy.” (footnote omitted)); Emily E. Diederich, Note, ‘Cause Breaking Up Is Hard to Do: The Need for Uniform Enforcement of Cohabitation Agreements in West Virginia, 113 W. VA. L. REV. 1073, 1077 (2011) (“Some couples choose to cohabitate because, in light of today’s divorce rates, they are fearful of the commitments attendant to marriage.” (footnote added)). Other commentators suggest that non-marital cohabitation rates may have risen, at least in part, because of the decriminalization of sexual relations outside of marriage. See William N. Eskridge Jr., Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules, 100 GEO. L.J. 1881, 1956 (2012) (“The most plausible legal reason for declining marriage rates, therefore, is not the repeal of mandatory rules against interracial marriage, but is instead the repeal of mandatory rules penalizing sexual cohabitation and nonmarital children and the creation of a menu of legal options for romantic couples.” (footnote omitted)).

162. See Eskridge, supra note 161, at 1956 (“Offered a choice of cohabitation with fewer legal benefits than marriage, many couples have chosen not to marry. There is every reason to believe that many of these couples have made choices that are optimal for them.”); Jana B. Singer, The Privatization of Family Law, 1992 WIS. L. REV. 1443, 1446 (1992) (“Traditionally, . . . the law distinguished sharply between marriage and other intimate relationships and used marriage or marital status as a [sic] criteria for allocating a wide variety of public benefits and burdens.”).

163. Cf. James Herbie DiFonzo, Unbundling Marriage, 32 HOFSTRA L. REV. 31, 65 (2004) (“Focusing on marriage’s functions rather than on its inherent natural or secular meanings may ultimately shift the public debate away from whether any particular type of couple fits within the definition of marriage, and toward a more pragmatic inquiry into whether particular types of entitlements and obligations should be available to all our domestic households.” (footnote omitted)).

164. Cf. Eskridge, supra note 161, at 1890–91 (“[T]he utilitarian perspective supports rules that open up choices for American adults, not only as to whom they want to partner with but also as to the rules of their partnership. The utilitarian perspective does not necessarily favor unlimited choice;
might permit couples in effect to design their own relationship rights and responsibilities via contract.\textsuperscript{165}

Which options should be offered would seem to be a matter of public policy (assuming that the choices were not in violation of constitutional guarantees).\textsuperscript{166} Different states might offer differing schemes.\textsuperscript{167} Further, states might decide to change their own benefit–burden options in light of the changing needs of society.\textsuperscript{168} But the focus here is not on which benefits or burdens in particular should be accorded to non-marital couples, but simply on whether the marriage amendments are tying the hands of legislatures in ways that were neither anticipated nor desired.

B. The Pernicious Effect of the Marriage Amendments

States currently disagree about which benefits should be reserved for marital couples, e.g., whether a parent must surrender his or her parental rights before a non-marital partner can adopt that child.\textsuperscript{169} There may be other differences, such as how property might be distributed when a relationship ends.\textsuperscript{170} Further, states may differ about whether support can be ordered when non-marital relationships end.\textsuperscript{171}

\textsuperscript{165} See Erez Aloni, \textit{Registering Relationships}, 87 TUL. L. REV. 573, 576 (2013) (recommending “a registration-based marriage alternative . . . [which] would offer couples the option to sign—and deposit with the state—a contract defining the partners’ obligations and rights vis-à-vis each other and changing their status to that of ‘registered partners’”).

\textsuperscript{166} The State of Virginia argued that deference should be given to its public policy decision to prohibit interracial marriage. \textit{See Loving v. Virginia}, 388 U.S. 1, 8 (1967) (“[T]he State argues . . . [that] this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.”). The State’s contention was rejected. \textit{See id. at 12} (“There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”).

\textsuperscript{167} See Aloni, supra note 165, at 575 (“[A] few states have enacted covenant marriage in an attempt to reduce divorce rates . . . .” (footnote omitted)).

\textsuperscript{168} Cf. Kyle Thomson, \textit{Note, State-Run Insurance Exchanges in Federal Healthcare Reform: A Case Study in Dysfunctional Federalism}, 38 AM. J.L. & MED. 548, 550 (2012) (discussing the theory that “policies are often best run by states in order to conform to the peculiarities of their own populace and the particular needs and desires of the citizens in any given state” (footnote omitted)).

\textsuperscript{169} Shannon Price Minter, \textit{Interstate Recognition of LGBT Families}, 36 HUM. RTS. 10, 10 (2009) (“[M]any states either automatically recognize both partners in a same-sex couple as legal parents of a child born to one of them or permit the couple to obtain a second-parent adoption. But in a number of states, there is no way for both partners to become legal parents to their children.”).

\textsuperscript{170} See Kristin Bullock, \textit{Comment, Applying Marvin v. Marvin to Same-Sex Couples: A Proposal for a Sex-Preference Neutral Cohabitation Contract Statute}, 25 U.C. DAVIS L. REV. 1029, 1031 (1992) (“Forced into a nonmarital status, same-sex cohabitants are left without the legal distribution of property upon separation or death that comes automatically with marriage.” (footnote omitted)).

\textsuperscript{171} See J. Thomas Oldham, \textit{Lessons from Jerry Hall v. Mick Jagger Regarding U.S. Regulation of Heterosexual Cohabitants or, Can’t Get No Satisfaction}, 76 NOTRE DAME L. REV. 1409, 1411 (2001) (“[I]n most states cohabitants have no ‘status’-like rights, regardless of the duration of the cohabitation or whether the relationship was childless or minor children were in the household, an
That states differ about the best approaches to these issues is unsurprising. Not only might some states consider factors that other states do not when deciding whether to pass particular legislation, but states will also differ about how heavily to weigh certain factors compared to others. The difficulty pointed to here is not that states might vary (within constitutionally prescribed limitations), but that the marriage amendments may well be construed in ways that were not understood at the time they were passed and now may preclude state legislatures from acting in ways that would promote local public policy.

It is fair to suggest that there is always a danger that state constitutional amendments will be interpreted in unforeseen ways, which is simply the chance that electorates take when voting for such amendments. Yet, at least in some cases, the marriage amendments were advertised as not doing exactly what the state supreme courts have construed them to do.172 But that may mean that in the frenzy to prevent same-sex couples from marrying,173 the state constitutions will have been amended in ways that not only have failed to achieve the primary task of precluding same-sex marriage (because of federal constitutional guarantees), but will now prevent the legislatures from responding to changing demographics and serving the needs of both same-sex and different-sex non-marital couples and their families.

IV. CONCLUSION

Various states have marriage amendments in their constitutions. As a general matter, they were designed to prevent the states from recognizing or giving effect to same-sex marriages wherever celebrated. Many amendments did not solely focus on marriage, but in addition privileged marriage over non-marital relationships (defined in sex-neutral terms).

Obergefell renders some state constitutional amendments void and of no effect. However, others will likely be viewed as having no legal effect only insofar as they preclude the celebration or recognition of same-sex marriages, but will still be operative with respect to privileging marriage over other types of relationships.

172. See supra note 129 and accompanying text (discussing how the construction of the Michigan amendment has conflicts with what the voters were told it would do).

173. See supra notes 5–8 and accompanying text (outlining those states with constitutions that prohibit recognition of same-sex marriage and marriage-like relationships). Each of these state constitutional amendments precluded the celebration or recognition of same-sex marriages.
Perhaps marriage should be privileged over other kinds of relationships as a matter of public policy. Perhaps not. But even so, it is not at all clear that marriage should be privileged in exactly the ways that it has been privileged historically. Several state legislatures are or will be constrained by their state marriage amendments and precluded from according various benefits and burdens to non-marital couples, even if doing so would help the couples, their families, and society as a whole. Obergefell has removed one of the pernicious effects of the state marriage amendments. Regrettably, in various states, other pernicious effects will likely continue unabated with no end in sight.
I. INTRODUCTION

Over the years, third-party consent has evolved into a disconcerting doctrine. To elucidate this contention, consider the following hypothetical situation, which provides a glimpse into the current state of third-party consent in the United States. John lives in Florida with his live-in girlfriend, Mary, and their five-year-old daughter. An armed robbery takes place at a convenience store near John’s home. Police respond and question the only witness to the event, who provides a description that matches John. The responding officers then proceed to search for the shooter.

The police officers notice John running toward his house, and, as he matches the shooter’s description, they follow him. John had recently stopped at his drug dealer’s home to purchase one ounce of marijuana that was given to John in multiple glassine baggies, which he had placed in his backpack. The police arrive at John’s home and witness him walking inside, with his girlfriend sitting outside on the porch. The police officers walk up to the home as John walks back outside. The officers explain that they are investigating a robbery that recently took place, and they ask for permission to search John and Mary’s home. John refuses. The officers return to their cruiser to run a search on John in the police database, discovering that John has a warrant out for his arrest. John is subsequently arrested. As the officers walk John to their vehicle, John yells to Mary: “No matter what happens, do not let them search the house.”

After John is placed inside of the police cruiser, the officers ask Mary if she would consent to a search of her home. Mary replies, “No.” The police then threaten that they will get a search warrant and take her daughter away if Mary does not cooperate. Mary acquiesces and consents to a search of her home. Following the search, the officers have in their possession John’s backpack with one ounce of marijuana in multiple small baggies. The police charge John with possession of a controlled
substance with intent to sell, a third-degree felony,¹ which carries a potential five-year prison sentence.² The search conducted by the officers will almost certainly be considered a lawful search based on Mary’s voluntary consent, and John’s attempt to suppress the discovered evidence will likely be futile.

Since the country’s inception, the American citizen’s right to be free from warrantless searches and seizures has deteriorated over time, especially in the last century.³ In the beginning, the Framers of the Constitution crafted the Fourth Amendment in an effort to prevent our newly formed government from possessing the ability to utilize two legal devices employed by the British: “the general warrant and the writ of assistance.”⁴ It has been observed that the liberties ostensibly inherent in the Fourth Amendment have been weathered away in favor of police convenience, and our country’s Fourth Amendment jurisprudence seems to be slowly morphing into exactly what the Framers were trying to prevent.⁵ As an illustration, after the Court decided to provide criminal defendants with greater Fourth Amendment protection by allowing an

* © 2016, Jerry D. Clinch. All rights reserved. J.D., Stetson University College of Law, 2014; B.S., Bellevue University, 2011. I would like to express my gratitude for the help and guidance provided by Professor Ellen S. Podgor and Stetson Law Review editor Sunai Edwards—without your help this Note would not have been possible. I would also like to thank my loving family—Amber and MaKenna—for your patience, support, and advice during the writing process.

2. Id. § 775.082(3)(e).
3. See United States v. Matlock, 415 U.S. 164, 171, 177 (1974) (holding that justification of a warrantless search based on voluntary consent did not require that the consent was given by the defendant, but that permission obtained via a third party with common authority over the premises was sufficient); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (stating that an exception to the requirements of a warrant and probable cause necessary to conduct lawful searches under the Fourth Amendment is a search conducted after obtaining voluntary consent); Katz v. United States, 389 U.S. 347, 357 (1967) (describing warrantless searches as “per se unreasonable” unless approved as a judicially sanctioned exception to the warrant requirement); Johnson v. United States, 333 U.S. 10, 14, 14 n.4 (1948) (discussing the necessity of obtaining a warrant, based upon probable cause, from a neutral magistrate, as opposed to allowing warrantless searches by police officers which “would reduce the [Fourth] Amendment to a nullity and leave the people’s homes secure only in the discretion of police officers”); Agnello v. United States, 269 U.S. 20, 32 (1925) (stating that “[t]he search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws”).
4. Potter Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1369 (1983) (citing Nelson Lasson, The History and Development of the Fourth Amendment to the United States Constitution 51–105 (1970)). General warrants were issued without probable cause and often without any evidence of criminal wrongdoing. Id. Writs of assistance were a form of a general warrant that involved taxation and import regulations imposed by the British. Id. at 1370.
5. See Nancy J. Kloster, Note, An Analysis of the Gradual Erosion of the Fourth Amendment Regarding Voluntary Third Party Consent Searches: The Defendant’s Perspective, 72 N.D. L. Rev. 99, 123 (1996) (concluding that the discretionary authority granted to law enforcement by judicial interpretations of the Fourth Amendment is starting to resemble the authority accorded to British colonial officials under general warrants).
objecting individual to override a consenting co-tenant—in contrast to its historical erosion of the Fourth Amendment’s protections against unreasonable searches—the Court then stripped the new protection away within a few short years by declaring that the individual’s objection loses its force if that individual leaves his or her home. Further, there exists a good-faith exception for law enforcement officers. Under the good-faith exception, the actual act of drafting a warrant by police officers followed by locating a judge to sign the warrant constitutes good faith on the part of the police, which may result in a court excusing a warrant’s lack of probable cause or other defects. Such an exception is a slippery slope, as evidenced by one judge who went so far as to pre-sign warrants for the police to use as they pleased.

This Article argues that our nation’s consent-based search jurisprudence is in dire need of reform and that the consent exception to a search warrant should be eliminated. In arguing for the abolition of consent searches, the Article considers the psychological aspects of consent coupled with police officers’ status as authority figures. The Article then explains how it is human nature to do what one is told by an authority figure.

Part II of this Article provides a glimpse into the history of our country’s Fourth Amendment jurisprudence. It begins by highlighting the birth of the consent-search doctrine, and discussing a series of cases in which it appeared as though the Supreme Court was going to provide American citizens with more Fourth Amendment power, after having stripped so much away in the preceding years. Part III focuses on the most recent Supreme Court decision at the time of this Article’s composition regarding the consent-search doctrine: Fernandez v.
This Part provides the facts and circumstances surrounding \textit{Fernandez} and the rationale behind the Court’s conclusion. Part IV presents arguments both for and against the Court’s decision in \textit{Fernandez}.

Part V analyzes the effects of \textit{Fernandez} and current consent-based search law. In this Part, the Author argues for the abolition of consent-based searches, asserting that voluntary consent—whether from a defendant or a third party—is a myth. This Part delves into the psychology of providing voluntary consent and the effect that an authority figure has upon an individual when obedience is requested. Further, the Author advocates for the increased use of search warrants as opposed to voluntary consent. In the alternative, the Author suggests using \textit{Miranda}-like warnings\footnote{\textit{Miranda} v. Arizona, 384 U.S. 436 (1966).} to apprise a defendant or third-party individual of his or her right to refuse a search without suffering any negative repercussions. Finally, the Author advocates, at a minimum, for redefining the term “present” as it applies to third-party consent searches. Part VI provides a brief conclusion, proclaiming that now is the time to reinstate the power to the Kings, lest we desire to lose what little power we Kings now hold.

\textbf{II. THE BIRTH AND EVOLUTION OF CONSENT}

The United States Supreme Court opened the door for warrantless, consent-based searches in \textit{Amos v. United States}.\footnote{255 U.S. 313 (1921).} In \textit{Amos}, federal agents arrived at the defendant’s home without a search warrant and informed the defendant’s wife that the agents were there to conduct a search of the premises, to which the wife ultimately acquiesced.\footnote{Id. at 315.} The Court determined that this search violated the Fourth Amendment based on the lack of a warrant.\footnote{Id. at 315–17.} Though the Court did not actually use the word “consent” in its opinion, the Court rejected the government’s argument that acquiescence by the defendant’s wife was an adequate waiver of the defendant’s Fourth Amendment rights based on coercive tactics used by the agents involved.\footnote{Id. at 317.} Left open for debate, however, was the question of whether one co-tenant may waive another co-tenant’s rights.\footnote{Id.}
Almost a quarter of a century later, the Supreme Court decided Davis v. United States,\textsuperscript{17} holding that federal agents involved in the ostensibly voluntary search of a locked room in a gas station owned by the defendant did not violate the defendant's Fourth Amendment rights.\textsuperscript{18} The Court's decision in Davis was a clear departure from precedent stating that warrantless searches were unreasonable.\textsuperscript{19}

In the years following Davis, a number of cases emerged involving third-party consent searches, which yielded the short-lived rule that consent given by a third party to conduct a search of another individual's residence violates the Fourth Amendment.\textsuperscript{20} Only fifteen years later, the Court decided Frazier v. Cupp,\textsuperscript{21} in which it recognized an "assumption of risk" exception, thereby allowing a third party to consent to the search of a duffel bag owned by the defendant.\textsuperscript{22} The assumption-of-risk logic used in Frazier resulted in the Court's decision in United States v. Matlock,\textsuperscript{23} which paved the way for our current consent jurisprudence.

In Matlock, at issue was whether the consent obtained to conduct a warrantless search of a shared residence from the defendant's common-law wife was valid.\textsuperscript{24} Matlock was suspected of a bank robbery, arrested at his home, and placed in a squad car.\textsuperscript{25} Police then met with Mrs. Graff who stated that she shared a room with the defendant and consented to a search of the residence that yielded evidence of the bank robbery.\textsuperscript{26} Matlock argued that such third-party consent was insufficient to support the search and moved to suppress the discovered evidence.\textsuperscript{27} The Court determined that the consent from Matlock's common-law wife was sufficient, holding that consent may be acquired by a third-party

\begin{itemize}
\item \textsuperscript{17} 328 U.S. 582 (1946).
\item \textsuperscript{18} Id. at 593–94. Pertinent to the Court's ruling, the items sought by the searching officers, government-owned gas coupons, did not belong to the defendant, and the property searched was the defendant's "public" business, not his residence. Id. at 593. These two considerations appeared to be the primary reason behind the Court's decision that the search was voluntary. Id.
\item \textsuperscript{19} See, e.g., Weeks v. United States, 232 U.S. 383, 391–92 (1914) (claiming that the Fourth Amendment was intended to keep government officials in check, to limit their power, and to prevent the seizure by unlawful means).
\item \textsuperscript{20} Stoner v. California, 376 U.S. 483, 489 (1964) (finding consent by hotel clerk was invalid); Chapman v. United States, 365 U.S. 610, 616–17 (1961) (finding consent by landlord was invalid).
\item \textsuperscript{21} 394 U.S. 731 (1969).
\item \textsuperscript{22} Id. at 740. The defendant, Frazier, owned the duffel bag in question and jointly used it with his cousin who ultimately consented to its search. Id. The Court determined that by allowing for the joint use of the duffel bag, Frazier had "assumed the risk" that his cousin may let police search it. Id.
\item \textsuperscript{23} 415 U.S. 164 (1974).
\item \textsuperscript{24} Id. at 166.
\item \textsuperscript{25} Id. at 166, 179.
\item \textsuperscript{26} Id. at 166.
\item \textsuperscript{27} Id.
individual who has “common authority over or other sufficient relationship to the premises or effects sought to be inspected.”

Following its decision in *Matlock*, the Supreme Court went one step further in *Illinois v. Rodriguez*, holding that the third-party consent exception to a warrantless search of a residence extended to instances when consent is obtained from a third-party individual who police reasonably believed had common authority over the residence, regardless of whether such belief was in error. Years later, the Supreme Court leveled the playing field by providing an objecting third party with a little more power through its decision in *Georgia v. Randolph*.

In *Randolph*, police were called to a residence where they were met by the defendant’s estranged wife who informed them that the defendant used drugs and the evidence of such drug use could be found inside of the couple’s residence. Police asked the defendant for consent to search the premises, which he refused. Police then asked the defendant’s wife for consent, which she gave. The subsequent search revealed evidence of drug use, resulting in the defendant’s arrest. The defendant moved to suppress the evidence, arguing that his wife’s consent had been invalidated as a result of his refusal; the trial court denied the defendant’s motion. The Supreme Court granted certiorari and held that when one physically present co-tenant refuses to consent to a search of a dwelling occupied by multiple individuals, police are precluded from obtaining consent to search the premises from another co-tenant.

Shortly following its decision in *Randolph*, the Supreme Court was presented with another case involving co-tenant consent in *Fernandez v. California*. The Court’s decision in *Fernandez* is the most recent Supreme Court decision regarding co-tenant consent searches, and its holding has left a great impact on our country’s Fourth Amendment jurisprudence.

28. *Id.* at 171.
30. *Id.* at 186.
32. *Id.* at 107.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 107–08.
37. *Id.* at 122–23.
III. FERNANDEZ V. CALIFORNIA—WHILE THE KING IS AWAY, THE POLICE MAY COME PLAY

In Fernandez, police officers witnessed a man, who was suspected of involvement in a recent robbery, flee into an apartment building. Police entered the apartment building, heard loud screaming that came from an apartment, and proceeded to knock upon the door of that apartment. Roxanne Rojas, the defendant’s girlfriend, answered the door, and the officers noticed what appeared to be fresh blood on her shirt and hand. Ms. Rojas was asked to step outside so the officers could perform a protective sweep of the apartment; however, the officers were immediately confronted by the defendant who verbally objected to the police coming into his domicile. The defendant, suspected of inflicting harm upon Ms. Rojas, was detained and arrested following his objection. The police officers returned to the defendant’s apartment approximately one hour after his arrest and requested permission to conduct a search. Ms. Rojas consented to the search, both orally and in writing, which resulted in the police finding evidence incriminating the defendant in the earlier robbery. The defendant unsuccessfully moved to suppress the evidence discovered after his objection to the search, and he was subsequently found guilty, receiving a fourteen-year term of imprisonment. The defendant appealed the trial court’s decision, which was affirmed by the California Court of Appeal. The California Supreme Court denied the defendant’s petition for review, and the United States Supreme Court granted certiorari.

The Supreme Court was presented with the question of whether the Randolph decision applied to a defendant who was not present to object to a search after he was lawfully detained. The Court determined the defendant’s physical presence to be dispositive as to whether an objection was to hold any power. The Court ultimately held in Fernandez that a physically present individual who objects to a warrantless search can be

39. Id. at 1130.
40. Id.
41. Id.
42. Id.
43. Id.
44. Id.
45. Id. at 1130–31.
46. Id. at 1131.
47. Id.
48. Id.
49. Id. at 1134.
50. Id.
overridden by another co-tenant if the objecting co-tenant is involuntarily made absent from the home due to a lawful detention, or, in other words: one's physical presence is a prerequisite for a Randolph objection to have an effect.\textsuperscript{51} The Court's decision in Fernandez has subsequently been utilized by courts in determining the validity of consent-based searches involving consenting and non-consenting co-tenants.\textsuperscript{52}

\textbf{IV. TWO SIDES OF THE COIN—EVALUATING FERNANDEZ}

A. Heads—If the King Is Not There, Then a Search Is Most Fair

It would appear that the government, whether federal or state employees, support the Court's decision in Fernandez, as it provides law enforcement officials with another tool to procure evidence of a crime. As such, this Part will focus on the various arguments brought forth by the government in support of Fernandez.

First and foremost, a consent search is a favorable means of protecting an individual's privacy from the arbitrary intrusion by police officers—with voluntary consent, there is "no arbitrary invasion of privacy."\textsuperscript{53} Further, obtaining consent to conduct a warrantless search may be the only means of gathering crucial evidence of a crime.\textsuperscript{54} Placing restrictions on consent searches can serve to "jeopardize their basic validity."\textsuperscript{55} Given that consent searches are deemed favorable, co-tenant consent searches can be viewed as equally favorable.

Objectively, the Fourth Amendment's protection against unreasonable searches does not favor the criminal defendant over any other individual.\textsuperscript{56} In a scenario involving co-tenant consent, a consenting co-tenant acts of his or her own volition, not as a defendant/co-tenant's agent, when exercising the right to consent or to deny consent to conduct
a search of a residence.\textsuperscript{57} Justification for co-tenant consent rests on the notion that persons with common control over the premises to be searched have “the right to permit the inspection \textit{in his own right and that the others have assumed the risk} that one of their number might permit the common area to be searched.”\textsuperscript{58} Further, while the Fourth Amendment generally prohibits warrantless searches, a search based on an individual’s voluntary consent is a “reasonable” search—regardless of whether consent is given by an individual who is suspected of wrongdoing or an innocent co-tenant.\textsuperscript{59} The Fourth Amendment itself requires only that no government search will occur if it is “unreasonable.”\textsuperscript{60}

Further, the Randolph decision was meant to apply only in certain, specific situations; Randolph was only intended to apply where co-tenants have equal authority to consent, all co-tenants are present when consent is requested, and a dispute between co-tenants regarding consent to search the shared premises arises.\textsuperscript{61} Social norms\textsuperscript{62} require such an exception given the circumstances. Animosity created by the co-tenants’ differing decisions regarding consent may lead to verbal or physical violence between the present co-tenants.\textsuperscript{63} Further, social norms do not require such an exception when only a single co-tenant is present because there would be no risk of animosity and, thus, of violence resulting from the conflicting views of multiple co-tenants.\textsuperscript{64} With its decision in Randolph, the Court strove to preserve Matlock’s central holding regarding co-tenants, that “the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.”\textsuperscript{65} In Randolph, the Court endorsed the Matlock Court’s view that co-tenants assume the risk that another co-tenant may provide consent to enter a shared residence.\textsuperscript{66}

\textsuperscript{57} Brief for Respondent, \textit{supra} note 53, at 17 (citing United States v. Matlock, 415 U.S. 164 (1974)).

\textsuperscript{58} \textit{Id.} at 18–19 (emphasis in original) (internal quotation marks omitted) (quoting \textit{Matlock}, 415 U.S. at 171–72 n.7).


\textsuperscript{60} Rodriguez, 497 U.S. at 183 (citing U.S. CONST. amend. IV).

\textsuperscript{61} Brief for Respondent, \textit{supra} note 53, at 21.

\textsuperscript{62} A norm is defined as “[a] model or standard accepted (voluntarily or involuntarily) by society or other large group, against which society judges someone or something.” \textit{BLACK’S LAW DICTIONARY} 519 (Bryan A. Garner ed., 4th pocketed. 2011).

\textsuperscript{63} Brief for Respondent, \textit{supra} note 53, at 21–22.

\textsuperscript{64} \textit{Id.} at 22.


\textsuperscript{66} \textit{Id.} at 22–23.
The actual, physical presence of an additional occupant refusing permission to search distinguished *Randolph* from earlier co-tenant consent cases.\(^{67}\) Property rights provide no guidance regarding a situation involving multiple co-tenants with conflicting wishes on providing consent to search the shared residence.\(^{68}\) Thus, *Randolph* drew a line—a line that required physical presence. “[I]f a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant’s permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.”\(^{69}\)

Justice Breyer explained in his concurring opinion that “[i]f Fourth Amendment law forced [the Court] to choose between two bright-line rules, (1) a rule that always found one tenant’s consent sufficient to justify a search without a warrant and (2) a rule that never did, [he] believe[d] [the Court] should choose the first.”\(^{70}\) Justice Breyer decided to make this choice because “a rule permitting such searches can serve important law enforcement needs (for example, in domestic abuse cases), and the consenting party’s joint tenancy diminishes the objecting party’s reasonable expectation of privacy.”\(^{71}\)

Additionally, an argument can be made that social expectations do not dictate a wider construction of *Randolph*. *Randolph* was decided based on the notion that a visitor would be hesitant to enter a residence when a conflict arises between two or more present residents regarding the visitor’s admittance; however, this reticence to enter dissipates once the objector is no longer present.\(^{72}\) As stated by the court in *United States v. Henderson*,\(^{73}\) “[a] prior objection by an occupant who is no longer present would not be enough to deter a sensible third party from accepting an invitation to enter by a co-occupant who is present with authority to extend the invitation.”\(^{74}\)

Nor does property law require a wider construction of *Randolph*. *Randolph* recognized that “[e]ach [co-tenant] . . . has the right to use and enjoy the entire property as if he or she were the sole owner, limited only

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70. U.S. Brief, *supra* note 59, at 16 (internal quotation marks omitted) (quoting *Randolph*, 547 U.S. at 125 (Breyer, J., concurring)).
71. Id. (internal quotation marks omitted) (quoting *Randolph*, 547 U.S. at 125 (Breyer, J., concurring)).
73. 536 F.3d 776 (7th Cir. 2008).
74. Id. at 784.
by the same right in the other [co-tenants]." Further, it has been previously stated:

[A] tenant in common may properly license a third person to enter on the common property. The licensee, in making an entry in the exercise of his or her license, is not liable in trespass to nonconsenting [co-tenants], particularly in the absence of excessive or negligent use of the right granted and in the absence of fraud in procuring the license.

While “prejudicing” another co-tenant’s property is not allowed, inviting someone who is disliked by a separate co-tenant into a shared residence does not rise to the level of prejudice that would preclude one from offering admittance; a co-tenant “must do something to the prejudice of the other, in reference to the property so situated.”

Additionally, allowing a Randolph objection to maintain its force beyond the moment when an objector is physically present would create, rather than cure, problems. Allowing a once-present individual to object and have that objection continue on indefinitely in his or her absence would be unreasonable. For example, cold-case officers would not be able to return to a residence decades after an objection in an effort to obtain consent from a separate co-tenant. Further, there exists no Fourth Amendment principle that would allow for an imposition of a time period to govern the length of time an objection would last. While the Court has previously “set forth precise time limits governing police action,” it is “certainly unusual” for the Court to do so. Thus, a time limit for consent searches is unreasonable and unrealistic.

Finally, a co-tenant’s permission to search a residence is acceptable “[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection.” Removal from a residence pursuant to a lawful

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75. Brief for Respondent, supra note 53, at 29–30 (internal quotation marks omitted) (citing Randolph, 547 U.S. at 114 (quoting 7 Richard Powell, Powell on Real Property § 50.03[1], at 50-14 (M. Wolf gen. ed. 2005))).
76. 86 C.J.S. Tenancy in Common § 144 (1997) (footnotes omitted).
77. Brief for Respondent, supra note 53, at 31 (internal quotation marks omitted) (quoting Rothwell v. Dewees, 67 U.S. 613, 619 (1863)).
78. U.S. Brief, supra note 59, at 25.
79. Id.
80. Id.
81. Id. (internal quotation marks omitted) (quoting Maryland v. Shatzer, 559 U.S. 98, 110 (2010)).
82. Brief for Respondent, supra note 53, at 34–35 (internal quotation marks omitted) (quoting Georgia v. Randolph, 547 U.S. 103, 121 (2006)).
arrest does not render a search illegal under *Randolph*—even though removal may deprive an individual of the opportunity to object to a subsequent search—because a Fourth Amendment violation occurs when police actions are unreasonable.\(^8^3\) Thus, a lawful arrest based upon probable cause is not unreasonable, nor is returning to the scene of the arrest in an attempt to procure evidence of the crime.

Imposing consent restrictions upon remaining co-tenants following a lawful arrest may hinder crime prevention. While law enforcement officers have a variety of ways to procure evidence, there is no requirement that law enforcement officials seek a search warrant to conduct a residential search in an effort to minimally affect an individual’s privacy.\(^8^4\) Even with advances in technology resulting in faster procurement of a warrant, no guarantee exists that circumstances will always allow police officers to obtain a warrant in a quick and effective manner.\(^8^5\) Even with the introduction of telephonic and electronic warrants, such “warrants may still require officers to follow time-consuming formalities designed to create an adequate record,” and there is no “guarantee that a magistrate judge will be available when an officer needs a warrant.”\(^8^6\)

B. Tails—When the King Is Away, His Objection Must Stay

While some have lauded the Court’s decision in *Fernandez*,\(^8^7\) many are less enthusiastic given the potential implications on citizens of the United States. As such, this Part focuses on some of the various arguments brought forth by advocates in opposition to the *Fernandez* ruling.

First, privacy interests support a continuing objection. Per *Randolph*, an individual’s objection should maintain force even if he or she is removed.\(^8^8\) This is so because one’s privacy interest does not diminish even when the individual is taken into custody.\(^8^9\) The Court decided *Randolph* with social expectations in mind.\(^9^0\) These social expectations are “influenced by the law of property,” though they are not “controlled

\(^{83}\) Id. at 35.
\(^{84}\) Id. at 39.
\(^{85}\) Id. at 41.
\(^{87}\) Supra Part IV(A) (noting that governmental employees support the Court’s decision in *Fernandez* because it provides law enforcement officers greater means of procuring evidence).
\(^{89}\) Id. at 16.
\(^{90}\) See *Georgia v. Randolph*, 547 U.S. 103, 111 (2006) (recognizing “the great significance given to widely shared social expectations” when determining whether a putative search is reasonable).
by its rules.”91 To provide an example, it is very unlikely that a visitor would feel that his or her admittance into a residence was consensual if he or she was just refused entry and, even more so if he or she was the cause of the refusing individual’s absence from the residence.92

In terms of property law, co-tenants who share a residence also share the right to exclude.93 “Each [co-tenant] . . . has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in the other [co-tenant].”94 Without obtaining a license from an individual to enter into his or her residence, any such subsequent entry is a trespass.95 The Court has previously stated that “[o]ur law holds the property of every man so sacred, that no man can set his foot upon his [neighbor’s] close without his leave.”96 Thus, when police, clearly informed to stay out of an individual’s domicile, arrange for that individual’s absence from his or her home and then seek another resident’s permission to enter, they commit a common-law trespass.97

Further, police should not be able to return to a residence to obtain consent after having just removed and detained the individual.98 In such circumstances, the rule of law is undermined when an individual expresses his or her desire that police not enter into his or her domicile, only to have the police override the individual’s wishes without utilizing the proper legal methods to do so, such as obtaining a search warrant.99 Police arresting an objecting individual are responsible for the individual’s inability to remain physically present. Social norms would not allow an officer to obtain permission to enter the premises after the officer just removed the individual.100

An individual’s right to exclude is at its pinnacle when at one’s own home. “At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable

91. Brief of the National Ass’n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 8, Fernandez v. California, 134 S. Ct. 1126 (2014) (No. 12-7822) (internal quotation marks omitted) (quoting Randolph, 547 U.S. at 121) [hereinafter NACDL Brief].

92. Brief for Petitioner, supra note 88, at 17.

93. NACDL Brief, supra note 91, at 17. “Because each joint tenant is entitled to possession of the whole, each is enabled to defend the estate against strangers. Title may be vindicated and trespassers removed from any part by an action of ejectment brought by any joint tenant.” 4 GEORGE W. THOMPSON, THOMPSON ON REAL PROPERTY § 31.07(d) (D. Thomas ed., 2004).

94. POWELL, supra note 75, at § 50.3[1].

95. NACDL Brief, supra note 91, at 19.


97. NACDL Brief, supra note 91, at 19.

98. Brief for Petitioner, supra note 88, at 17–18.


100. Brief for Petitioner, supra note 88, at 19.
government intrusion.” Thus, society shows great respect for an individual's right to maintain the privacy of his or her home. While one's decision to share a residence with another results in surrendering a portion of his or her privacy interest, doing so does not hinder his or her ability “to stand at the door of his castle and bid defiance to all the forces of the Crown.” Our society's perspective regarding the sanctity of one's home is such that “when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority.”

Second, law enforcement officers have other means of gaining entry absent consent. Should an individual refuse to allow police officers consent to search the individual's domicile, the officers have the option of attempting to procure a search warrant. The Court has previously stated that “[i]t is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.” In the event that an individual is arrested, the arrest normally provides the “probable cause” necessary to procure a search warrant, which could be obtained with relative ease. While it is true that it may take longer to obtain a search warrant than to waltz into a domicile with the owner's consent, in the event of a subsequent arrest the extra wait is immaterial given that the possibility of the destruction of evidence by any remaining resident is minimal under such circumstances. In such an event, it is more likely that any remaining residents will fly the straight-and-narrow “to deflect suspicion raised by sharing quarters with a criminal.”

The time required preparing a few papers and presenting evidence to a magistrate may be an inconvenience to officers, but this minor delay is not enough to justify circumventing the constitutional requirement to obtain a search warrant. If time is of the essence for fear of destruction of evidence, assuming that said potential destruction does not rise to the level of exigent circumstances, warrants are now available through various avenues and can be obtained relatively quickly. For example,

102. NACDL Brief, supra note 91, at 11.
103. Id. at 11 (internal quotation marks omitted) (quoting Miller v. United States, 357 U.S. 301, 307 (1958)).
104. Id. at 12–13 (emphasis in the original) (internal quotation marks omitted) (quoting Georgia v. Randolph, 547 U.S. 103, 113–14 (2006)).
106. Brief for Petitioner, supra note 88, at 20–21.
107. Id. at 21 (internal quotation marks omitted) (quoting Randolph, 547 U.S. at 116).
warrants may be obtained via telephone or radio communications, as well as by email or video conferencing, which allows officers to remain on the premises while attempting to procure a warrant so that they might monitor what is taking place. As early as 1973, it was estimated by a district attorney’s office in California that “[n]inety-five] percent of telephonic warrants take less than [forty-five] minutes.” Further, there are several instances of new technological advances to curtail the warranting process. In 2008, a Utah program utilized electronic warrants in circumstances where an officer “requested an e-warrant for a forced blood draw on a man arrested for DUI. The warrant was approved in about five minutes.” A similar story out of Kansas states that “[f]rom the time the officer begins completing the search warrant affidavit form to the time the judge returns the signed search warrant is now about [fifteen] minutes.”

“[W]ith current computer and electronic telecommunications technology, police officers can now swiftly obtain a warrant without leaving the area of investigation.” Additionally, police officers may seal off the premises, removing the individuals from inside, while awaiting a warrant, which would virtually eliminate all possibility that evidence would be destroyed. Moreover, as stated earlier, the exigent circumstance doctrine allows for entry without seeking a warrant or consent “to prevent the imminent destruction of evidence” or to render emergency assistance to an individual inside a residence. Further, requiring the procurement of a warrant imposes no real burden upon law enforcement given that “the overwhelming majority of warrant

110. NACDL Brief, supra note 91, at 28 (internal quotation marks omitted) (citing People v. Blackwell, 195 Cal. Rptr. 298, 302 n.2 (Cal. Ct. App. 1983)). More recently, an Arizona court stated that “the Mesa Police Department is able to obtain a [telephonic] warrant within as little as fifteen minutes and that delays of only fifteen to forty-five minutes are commonplace.” State v. Flannigan, 978 P.2d 127, 131 (Ariz. Ct. App. 1998).
111. Jason Bergreen, Utah Cops Praise Electronic Warrant System, POSITIVE LEO, http://positiveleo.wordpress.com/2008/12/26/utah-cops-praise-electronic-warrant-system/ (last visited Mar. 17, 2016). Going even further, the article states that, in one instance involving an e-warrant concerning a theft, “[i]t took the judge about two minutes to review the e-warrant,” which supports the fact that obtaining an electronic warrant may only take a miniscule amount of time. Id.
applications submitted to judges are approved,” coupled with the fact that “[t]he rate of outright rejection [of warrant applications] is extremely low.”

Law enforcement officers have a variety of different avenues available to gain entry into a residence. Consequently, if officers lack probable cause and there are no safety or medical concerns, nor reason from any remaining co-tenants that the residence contains evidence of criminal activity, then an objecting individual should have the ability to prevent police from entering his or her premises and the individual’s right to privacy should prevail. Allowing involuntary removal to negate objections to police entry is contrary to Randolph.

Randolph is meant to distinguish situations where there is, and where there is not, an “absence of reason to doubt” whether one tenant is able to speak for another; or rather, whether police should reasonably be aware that their presence is, in fact, welcome. Requiring continued presence of an objecting individual opens the door for the possibility that police, instead of attempting to procure a warrant, will wait until an objecting individual leaves the premises and then attempt to obtain valid consent from another resident. Taking circumstances one step further, allowing officers to purposefully negate an objection by lawfully detaining an individual eliminates the need for officers to even leave the objecting individual’s doorstep. This allows police officers the ability “to render the objector’s prior assertion of his Randolph rights meaningless.”

Third, Randolph objections do not result in administrative difficulties or in a complete bar from obtaining consent from a co-tenant. It would be relatively simple for officers wishing to perform a warrantless search, following an express refusal, to attempt to obtain consent again from the objector, or to speak to a different resident who could be reasonably relied on to provide such assurance that there no longer exists an objection.

116. NACDL Brief, supra note 91, at 27 (internal quotation marks omitted) (quoting M. Hirsch, Fourth Amendment Forum, Featured Column, 30 CHAMPION 50, 51 (Apr. 2006)).
117. Id. at 27–28 (internal quotation marks omitted) (quoting Richard Van Duizend et al., The Search Warrant Process: Preconceptions, Perceptions, Practices 27 (Nat’l Ctr. for State Courts 1985)). Outright rejection happens so infrequently that “[m]ost of the police officers interviewed could not remember having a search warrant application turned down.” Id. at 28 (internal quotation marks omitted) (quoting Van Duizend et al., supra, at 27).
118. Brief for Petitioner, supra note 88, at 22–23.
119. Id. at 24 (internal quotation marks omitted) (quoting Georgia v. Randolph, 547 U.S. 103, 112 (2006)).
120. Id.
121. Id. at 25.
122. Id. at 27.
The Court has stated that the determination of consent to enter a residence must be judged utilizing an objective standard, which considers whether the facts and circumstances surrounding a given situation would provide a reasonably cautious individual to believe that the consenting party had authority over the premises. In other words, if it is reasonable for an officer to believe that a co-tenant could rightly attest to the fact that the objecting tenant withdraws his or her objection to a search, then police may rely on such an attestation and validly obtain consent from the co-tenant to conduct a search.

Regarding obtaining consent from an individual who has previously objected and is subsequently detained, said arrested individual may well provide consent after a cooling down and reflection period. In the alternative, police may attempt to enlist the help of the cooperative co-tenant. For example, a cooperative co-tenant may help in trying to persuade the objector to provide consent. If obtaining consent proves to be impossible, a cooperative co-tenant may provide police with useful information that would allow for easier procurement of a search warrant.

Further, the imposition of a continuous presence rule is problematic. The term “present” itself presents difficulty as no guidance is provided regarding what exactly constitutes being “present.” For example, is someone present when he or she moves to his or her front lawn? What happens if he or she goes to the restroom? Is one present if he or she steps away and takes a phone call in another room? If literal presence at his or her doorway were required to maintain one’s “presence,” then police would be able to surreptitiously evade the legal effect of a potential or present objection.

V. REINSTATING THE KING’S POWER

Both the government and advocates for the defense provide compelling arguments for and against the Court’s decision in Fernandez. It is difficult to attempt to concoct a solution that will be agreed upon by both sides, provide citizens with much needed protection, and allow police officers to do their jobs without being needlessly impeded in their duties. The following Part suggests some resolutions to the current third-party consent problem with a focus on the intent of our nation’s Founders.
in crafting the Fourth Amendment—their disdain for general warrants.

A. God Save the King—Exposing the Myth of Voluntary Consent

“[E]very man’s house is his castle” is a maxim that was once used to describe the nation’s view toward the Fourth Amendment of our Constitution. As the Fourth Amendment has evolved to the point where a man’s castle can be easily invaded, a much-needed change is in order. The Author fully realizes that, given how the nation’s Fourth Amendment jurisprudence has evolved over the years, a complete ban on consent searches may seem far-fetched. Many will argue that such a ban needlessly impedes upon a police officer’s duties, and that hardened criminals will be acquitted of their crimes, or that they will not be prosecuted in the first place, for lack of sufficient evidence to prosecute effectively. Further, it may be argued that consent searches are completely voluntary, and thus, any individual who wishes to refuse consent to a search of his or her domicile may do so freely without the fear of any repercussions. Unfortunately, this line of thought is misguided as voluntary consent is a myth, especially where an authority figure is involved.

Consent searches are mythical for the simple fact that most people do not willingly consent to searches. In a scenario where an individual is confronted with a police officer requesting consent to search his or her domicile—as well as his or her car, purse, person, etc.—most people would not feel that they really have the power to deny a request by a police officer. Many individuals are taught from an early age to respect authority figures and to do as they are told. Realistically, as Professor Maclin has previously stated, “[c]ommon sense teaches that most of us do not have the [chutzpah] or stupidity to tell a police officer to ‘get lost’”, this line of thinking likely stems directly from our upbringing.

131. Id. at 236.
Further, human psychology supports the contention that most individuals will obey authority figures “even when it is not in their own best interests to do so.” One would logically think that if a person were in possession of illegal drugs on his or her person, that he or she would be foolish to willingly consent to a search of his or her person; however, this is not the case.

In *United States v. Drayton*, police boarded a bus stopped in Tallahassee, Florida “as part of a routine drug and weapons interdiction effort.” While aboard the bus, an officer ultimately made his way to two individuals, both of whom were wearing baggy clothing. The officer asked one individual if he would consent to a search of his person, to which the individual responded, “Sure.” Upon searching the individual, the officer discovered packages of cocaine. Mr. Drayton, who was seated next to the man with the cocaine, was then asked if he would consent to a search; Mr. Drayton lifted his arms, was searched, and cocaine was discovered.

The defendants moved to suppress the evidence based on a lack of valid consent, but the motion was denied; the defendants were subsequently convicted in district court. The District Court’s decision was reversed and remanded by the Court of Appeals for the Eleventh Circuit, which based its decision on the idea that the defendants would not have felt “free to disregard police officers’ requests to search absent some positive indication that consent could have been refused.” The Supreme Court subsequently reversed after concluding that the consent to the search was voluntary because a reasonable person would have felt free to refuse.

Anomalies like that in *Drayton* occur because people are, in a sense, programed to acquiesce to the requests of authority figures. The fact that people are programed to respond in certain ways, especially if not cognitively aware of this fact, serves to hinder the ability to be objective and reasonable in terms of coming up with a solution for the problem revolving around mythical consent searches. Thus, awareness becomes

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134. *Id.*
136. *Id.* at 197.
137. *Id.* at 198–99.
138. *Id.* at 199.
139. *Id.*
140. *Id.*
141. *Id.* at 199–200.
142. *Id.* at 200 (internal quotation marks omitted) (quoting United States v. Washington, 151 F.3d 1354, 1357 (1998)).
143. *Id.* at 206, 208.
key in crafting a solution to a problem that plagues unwilling consenters each and every day.

1. **Dr. Milgram and His Progeny**

Stanley Milgram conducted an experiment, in part, to help determine whether there was any credibility to the concept that those involved in the mass killings during the Holocaust performed their duties as the result of strict obedience to authority.¹⁴⁴ Dr. Milgram’s experiment consisted of an experimenter instructing an unknowing subject to shock a victim, utilizing a shock generator, which had thirty different voltage levels ranging from fifteen to 450 volts.¹⁴⁵ Unknown to the subject, however, was the fact that the shock generator was fake and that the other individuals involved in the experiment—the experimenter and the victim—were actors.¹⁴⁶ The goal of the experiment was to see “how far people would go in obeying an instruction if it involved harming another person.”¹⁴⁷ Every subject administered every shock up through the 300-volt shock, at which point five individuals refused to continue.¹⁴⁸ Out of all forty subjects, twenty-six of them, or sixty-five percent, proceeded to administer all thirty shocks.¹⁴⁹ This is rather significant given that the researchers originally thought that few, if any, of the subjects would make it much further than the halfway point, much less all the way until the

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¹⁴⁴. McLeod, supra note 132.
¹⁴⁵. STANLEY MILGRAM, Behavioral Study of Obedience, in READINGS ABOUT THE SOCIAL ANIMAL 27, 28 (Joshua Aronson & Elliot Aronson eds., 11th ed. 2011). In addition to having thirty different settings, all of which were clearly marked, the shock generator contained designations ranging “from Slight Shock to Danger: Severe Shock.” Id.
¹⁴⁶. Id.
¹⁴⁷. McLeod, supra note 132. In Dr. Milgram’s experiment, forty individuals, all male, were selected to take part in the experiment. MILGRAM, supra note 145, at 29. The individuals were obtained under the guise of helping to conduct an experiment that would measure the correlation between punishment and learning. Id. at 30. The subject was paired with another individual, an actor, each of whom would play the role of either the “teacher” or the “learner.” Id. at 31. Through manipulation, the subject always played the role of the “teacher.” Id. Following the assignment of the roles for the experiment, both individuals were placed in separate rooms and the “teacher” was told to administer a shock to the “learner” each time he responded incorrectly, moving up one level after each wrong answer. Id. at 31–32. The “teacher” read a list of paired words to the “learner” and then read the first word in the pair again, which the “learner” was supposed to match up with the second word of the pair. Id. at 31. During the course of the experiment, the “learner,” as the voltage approached the top end, acted as though he was in a great deal of pain. Id. at 33. As the “teacher” hit the 150-volt mark, the “learner” protested and “demand[ed] to be released from the study.” Jerry M. Burger, Replicating Milgram, Would People Still Obey Today?, 64 AM. PSYCHOLOGIST 1, Jan. 2009, at 2. Should the “teacher” want to stop the experiment, the “experimenter” would then attempt to prod the “teacher” into continuing with the experiment; this continued until either the “teacher” administered the highest level of shock or refused to continue. Id. at 1–2.
¹⁴⁸. MILGRAM, supra note 145, at 35. Most of the individuals who refused to continue administering shocks stopped between 300 and 375 volts. Id. at 36.
¹⁴⁹. Id.
The results of Dr. Milgram’s experiment are such that “[o]rdinary people are likely to follow orders given by an authority figure. . . . Obedience to authority is ingrained in us all from the way we are brought up.”

Dr. Milgram’s research into obedience toward authority has inspired a number of other scholars to conduct similar studies in an effort to confirm just how obedient individuals are. In Dr. Milgram’s obedience experiment, one arguable flaw was that only male participants were used. Thus, many subsequent experiments have observed both male and female subjects in tandem. Most studies have indicated results similar to Dr. Milgram’s experiment, demonstrating that many individuals are susceptible to influence from an authority figure.

In a slightly different study regarding obedience toward authority figures, in 1995, Wim Meeus and Quinten Raaijmakers studied what they called “administrative violence,” involving an experimenter, a subject, and a confederate who was described to the subject as a job applicant. The subjects were instructed to disturb the applicant during a test with the knowledge that if the applicant failed the test, he would be denied the job for which he was applying and end up unemployed. Subjects were instructed to make fifteen negative remarks regarding the applicant’s performance and personality; if they refused, much like the Milgram

150. Id. at 34.
151. McLeod, supra note 132.
152. See Sharon Presley, The Present and Future of Obedience to Unjust Authority, RESOURCES FOR INDEP. THINKING (2010), http://www.rit.org/authority/futureobedience.php (discussing the Kilham & Mann study out of Australia, the Dutch study, and the Burger study); Thomas Blass, The Milgram Paradigm After 35 Years: Some Things We Now Know About Obedience to Authority, 29 J. APPLIED SOC. PSYCHOL., May 1999, at 955, 966 (discussing a variety of Milgram-like experiments subsequent to Dr. Milgram’s).
153. MILGRAM, supra note 145, at 29. However, Dr. Milgram performed one condition in which the participants were women, resulting in the same obedience level as obtained from men. Blass, supra note 152, at 968.
154. Id. at 966.
155. Id. Sixty-five percent of the participants in Dr. Milgram’s study were fully obedient, taking part in the study until the very end as opposed to refusing to continue. Id. In 1969, D. M. Edwards conducted a study out of South Africa utilizing ten male and six female participants, and the study yielded a fully obedient level of eighty-seven and a half percent. Id. In 1974, W. Kilham and L. Mann conducted a study out of Australia utilizing twenty-five male and female participants, yielding a fully obedient level of twenty-eight percent, which is rather inapposite of Dr. Milgram’s study. Id. Of note, however, male participants in the Kilham & Mann study were fully obedient forty percent of the time, versus sixteen percent in women. Id. at 968. In 1977, M. E. Shanab and K. A. Yahya out of Jordan conducted an experiment involving forty-eight male and female participants, yielding a result of seventy-three percent of participants who were fully obedient. Id. at 966. In 1985, G. Schurz conducted an experiment with twenty-four males and thirty-two females resulting in an eighty percent fully obedient level. Id.
156. Presley, supra note 152.
157. Id.
experiment, the experimenter would attempt to prod the subject into continuing.\textsuperscript{158} The results were such that ninety percent of participants obeyed and continued their task to fruition.\textsuperscript{159}

The most recent study, conducted by Jerry Burger in 2009, was a partial replication of Dr. Milgram’s experiment wherein participants would, like in the Milgram experiment, ask a “learner” to recall a word previously read and pair it with its partner word.\textsuperscript{160} In this partial replication, conducted almost identically to Dr. Milgram’s earlier experiment and designed to avoid ethical problems, the study would end when either the “teacher” refused to continue, or when the “teacher” decided to move past the 150-volt mark.\textsuperscript{161} The results of this experiment were that seventy percent of participants were fully obedient.\textsuperscript{162}

It is clear that individuals are highly susceptible to the influence of authority figures, so much so that the average individual, at the behest of a perceived authority figure, is willing to cause great bodily harm to another person if instructed to do so. Thus, in the context of consent searches, when a criminal suspect is confronted by a law enforcement official—a well-known authority figure—and asked for consent to conduct a warrantless search, the suspect is psychologically predisposed to acquiesce to the official’s request, even when doing so is clearly not in his or her best interest. In the context of third-party consent searches, the lack of repercussions associated with acquiescing to a warrantless search of a shared residence, coupled with the desire to avoid any connection with the criminal activity, increases the probability that a non-suspect joint tenant will consent to the search, and provide law enforcement officers with the incentive to orchestrate the removal of any individual who objects, or who would object, to a warrantless search.

2. The Key to the Castle—A Search Warrant

In the event that a law enforcement officer is unequivocally refused consent, whether by a suspect or a third party, what options does he or she have to obtain evidence of a crime? The most obvious answer is that they may attempt to obtain a search warrant. The Fourth Amendment of the U.S. Constitution states:

\begin{itemize}
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Burger, supra note 147, at 6–7.
\item \textsuperscript{161} Id. at 7. The 150-volt mark is significant as, in Dr. Milgram’s experiment, this was the level at which the “learner” would protest and demand to be let go, which is the same procedure that took place in Burger’s experiment. Id. at 2, 7.
\item \textsuperscript{162} Id. at 8.
\end{itemize}
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.\textsuperscript{163}

Thus, for a law enforcement officer to obtain a search warrant, he or she must demonstrate that a search is justified by reason of probable cause, support the probable cause with sworn affidavits, as well as describe, in sufficient detail, the location of the search and what is to be searched.\textsuperscript{164}

In circumstances such as those involved in \textit{Fernandez}, where probable cause exists to justify an arrest, the arrest normally provides the probable cause necessary to procure a search warrant.\textsuperscript{165}

Further, due to the evolution of search warrant jurisprudence and advancements in technology, search warrants may be obtained within minutes through telephonic, fax-based, or other electronic means, and without requiring officers to leave the scene of an alleged crime.\textsuperscript{166}

Additionally, police officers generally do not have to worry about being denied a search warrant given the fact that the vast majority of search warrants submitted to the judiciary are approved,\textsuperscript{167} and that the rejection of a warrant application rarely takes place.\textsuperscript{168}

Further, while police officers have the ability to procure evidence of a crime by way of a search warrant, in the event of a third-party consent dispute, there still exists the possibility that a disputing third party will deliver any incriminating evidence to the police upon his or her own initiative; or, in the alternative, the third party may divulge any information he or she has that may ultimately help police officers obtain a warrant.\textsuperscript{169}

Finally, requiring law enforcement officials to procure a search warrant in place of obtaining an individual’s consent helps protect the

\textsuperscript{163} U.S. CONST. amend. IV.
\textsuperscript{164} Id.
\textsuperscript{165} Brief for Petitioner, supra note 88, at 20–21.
\textsuperscript{166} See State v. Flannigan, 978 P.2d 127, 131 (Ariz. Ct. App. 1998) (stating that a telephonic warrant may be obtained by officers “within as little as fifteen minutes”); Beci, supra note 113, at 295 (stating that “with current computer and electronic telecommunications technology, police officers can now swiftly obtain a warrant without leaving the area of investigation”); Benefiel, supra note 112, at 18 (stating that, from start to finish, a warrant may be obtained electronically within fifteen minutes); Bergreen, supra note 111 (stating an e-warrant was reviewed by the judge in about two minutes).
\textsuperscript{167} NACDL Brief, supra note 91, at 27 (citing M. Hirsch, supra note 116, 1t 51).
\textsuperscript{168} Id. at 27–28 (citing VAN DUZEND ET AL., supra note 117, at 27). In fact, so few warrants are denied that the majority of interviewed officers could not recall ever being denied a requested warrant. Id.
private individual, while also serving to place a reasonable limit on police power. Existing law regarding consent searches allows police officers to attempt to persuade an individual to consent to a search. Current law “does not preclude the police from ‘wearing down’ the suspect to obtain consent.” Indeed, courts have upheld consent searches where an individual initially refuses to allow consent but is then informed that a warrant would be obtained. To further elucidate this point, following the Court’s decision in Schneckloth, Justice Marshall, in his dissent, expressed his dismay stating that the Court has approved “a game of blindman’s [bluff], in which the police always have the upper hand, for the sake of nothing more than the convenience of the police.” Justice Marshall’s concerns rang true when researchers were informed by a police detective how obtaining one’s consent to search worked in the real world. According to the detective, a request for consent to conduct a search takes place similar to this scenario:

[You] tell the guy, “Let me come in and take a look at your house.” And he says, “No, I don’t want to.” And then you tell him, “Then, I’m going to leave Sam here, and he’s going to live with you until we come back [with a search warrant]. Now we can do it either way.” And very rarely do the people say, “Go get your search warrant, then.”

The detective’s example illustrates the fiction involved in our current voluntary consent doctrine.

Further, the Court’s decision in Fernandez serves to bolster the power of law enforcement officers in terms of allowing for the circumvention of obtaining a search warrant when involved with a consent-search scenario. In United States v. Groves, the Seventh Circuit ruled that a particular search was valid after the defendant in question clearly refused to provide the officer consent to search his domicile, prompting the

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171. Strauss, supra note 130, at 251.
172. Maclin, supra note 170, at 80. See, e.g., State v. Livingston, 897 A.2d 977, 984 (N.H. 2006) (finding a defendant’s consent to a car search was voluntary after the defendant, who had initially refused consent, was informed that his refusal would be circumvented via a canine drug sniff); State v. Watkins, 610 S.E.2d 746, 751 (N.C. Ct. App. 2005) (finding a defendant’s girlfriend’s consent to a search voluntary after police informed the girlfriend, who had initially refused consent, that they would procure a warrant).
174. Id.
175. Id. (citing Van Duizend Et Al., supra note 117, at 69).
176. 530 F.3d 506 (7th Cir. 2008).
officers to attempt to procure a search warrant, which was denied.\textsuperscript{177} Following the denial, the officers, after waiting several weeks for the defendant to leave, returned to his home and asked his girlfriend for consent to search the premises.\textsuperscript{178} The defendant’s girlfriend testified that the officers threatened to involve Child Protective Services to remove her child if she refused to consent; she acquiesced resulting in the police officer’s procurement of evidence that was used against the defendant.\textsuperscript{179}

While \textit{Groves} took place years before the Court’s decision in \textit{Fernandez}, the very idea that such practice was allowed is abhorrent. Clearly, this is exactly the type of unscrupulous practice that the Court’s decision in \textit{Fernandez} allows for by requiring a continually present and objecting individual. Additionally, shortly after the Court’s decision in \textit{Fernandez}, other courts issued rulings that only serve to prove that requiring a present and objecting individual to override a third-party consenter allows law enforcement officers to circumvent the Fourth Amendment’s warrant requirement.\textsuperscript{180} Thus, it is clear that the Court’s decision in \textit{Fernandez} is contrary to the spirit of the Fourth Amendment as drafted by the Founders of our nation and that radical change is necessary to rectify this wrong. It is hard to imagine that, when drafting the Fourth Amendment, the drafters could have possibly intended for an American citizen to be free from a warrantless search only so long as he or she is present in his or her home to object. Such unscrupulous practices—lying in wait for a pristine opportunity—cannot be tolerated. To allow such a blatant disregard for the principles of the Fourth Amendment demonstrates an intolerable lack of respect for our Founding Fathers.

3. \textit{The Arbitrary Determination of Voluntary Consent}

In the event that a criminal defendant claims his or her consent was not voluntary, it is the government’s job to show that consent was “freely and voluntarily given, a burden that is not satisfied by showing a mere

\textsuperscript{177} \textit{Id.} at 508.
\textsuperscript{178} \textit{Id.}
\textsuperscript{179} \textit{Id.} at 508–09.
\textsuperscript{180} \textit{See} United States v. Peyton, 745 F.3d 546, 549 (D.C. Cir. 2014) (demonstrating the willingness of law enforcement officers to return to a residence with the knowledge that a defendant will not be present to object in an effort to procure consent to search a domicile from a third party); State v. Coles, 95 A.3d 136, 151 (N.J. 2014) (demonstrating that an unlawful detention of an objector will result in the suppression of evidence); State v. Lamb, 95 A.3d 123, 125–26 (N.J. 2014) (providing an example of law enforcement’s ability to convince an objector and a defendant to vacate a domicile in order to obtain consent from a willing third party).
submission to a claim of lawful authority.”¹⁸¹ In determining whether consent was voluntary or brought about by way of duress or coercion, such determination must be made by giving consideration to the totality of the circumstances.¹⁸² In assessing the totality of the circumstances, some factors that the Court has considered include: the accused’s age, education, and intelligence; lack of advice regarding the accused’s constitutional rights; the length of detention; the nature of the questioning; and the use of physical punishment. None of these factors is controlling standing alone.¹⁸³ Thus, there may be an argument that there is already in place a proper check in power—the court system—that may be sufficient to ensure that an individual’s voluntary consent was truly given of his or her own volition. Unfortunately for the individual, it would appear that, when considering the totality of the circumstances, a court will likely find that voluntary consent was given,¹⁸⁴ unless police misconduct had clearly taken place.¹⁸⁵ In fact, it has been suggested that a court will almost certainly find that consent was given voluntarily in the absence of police misconduct, regardless of any alternate surrounding circumstances.¹⁸⁶ Thus, relying on the court system as a buffer to make a

¹⁸³ Id. at 226.
¹⁸⁴ See United States v. Perea, 374 F. Supp. 2d 961, 978 (D.N.M. 2005) (consent was voluntary where a defendant was held at gunpoint, handcuffed, placed in police cruiser, and then asked for consent to search his vehicle); State v. Weisler, 35 A.3d 970, 973 (Vt. 2011) (consent to search of a vehicle was voluntary where a motorist had witnessed two passengers being forced to the ground at gunpoint, handcuffed, and patted down and after he was warned that refusal would result in the officer attempting to secure a search warrant when said conversation took place in the officer’s vehicle); State v. Stover, 685 S.E.2d 127, 133 (N.C. Ct. App. 2009) (consent was voluntary after a warrantless entry by an officer who kicked down the defendant’s apartment door and aimed his gun at the defendant, where the officer subsequently lowered his gun and helped the defendant find someone to care for his child).
¹⁸⁵ See United States v. Calhoun, 542 F.2d 1094, 1101–02 (9th Cir. 1976) (consent to search an apartment was involuntary where eight agents entered into a defendant’s apartment unannounced with guns drawn, arrested and handcuffed him in the middle of the night, and handcuffed the defendant’s wife); United States v. Whitlock, 418 F. Supp. 138, 142 (E.D. Mich. 1976) (consent to search a vehicle was involuntary where an agent, with a warrant to search the defendant’s apartment, held defendant at gunpoint outside of his vehicle, handcuffed the defendant, removed the defendant to his apartment with a total of five agents, and failed to advise the defendant that he could refuse consent to search anything outside of the warrant); Thomas v. State, 127 So. 3d 658, 666–67 (Fla. Dist. Ct. App. 2013) (absent exigent circumstances, consent to search a residence was involuntary where police entered the residence without a warrant, after being verbally denied entry and removing the objector); State v. Cunningham, 4 N.E.3d 800, 806–07 (Ind. Ct. App. 2014) (consent to a pat-down search was involuntary where an officer gave the defendant an ultimatum as opposed to a request to conduct a search).
¹⁸⁶ See Strauss, supra note 130, at 227 (stating that “consent searches are upheld except in extreme cases that almost always focus not on subjective factors of the suspect, but on the behavior of the police”); Brian A. Sutherland, Note, Whether Consent to Search Was Given Voluntarily: A Statistical Analysis of Factors That Predict the Suppression Rulings of the Federal District Courts, 81 N.Y.U. L. REV. 2192, 2225 (2006) (concluding, after analyzing a plethora of cases involving consent, that courts, in rendering evidence suppression decisions, really make their determinations based on
reasonable determination based on the totality of the surrounding circumstances as to whether an individual’s consent is voluntary, as opposed to a product of duress or coercion, provides little comfort to any individual in a situation where it is not abundantly clear that police officers have engaged in some form of illegal or egregious conduct. Further, while it is seemingly true that a court will be inclined to conclude that consent is involuntary should police misconduct be alleged, there still exists the tremendous hurdle that an individual alleging misconduct must overcome—undertaking the difficult task of actually convincing the court that such misconduct has taken place.

4. Off with Its Head—Eliminate Voluntary Consent

Based on the aforementioned psychological studies, it is clear that human decisions are highly susceptible to influence by authority figures. Relevant to consent doctrine is the consideration of the private citizen versus the law enforcement official. The average individual is almost certainly unwilling to provide a law enforcement officer with the consent to perform a search in the event that such a search will yield evidence of any illegal activity, but he or she is programmed to obey authority figures, and thus, may provide consent to a search even though doing so will incriminate himself or herself.187 Further, in the event of a third-party consent search, the likelihood that officers are given consent to search increases dramatically, given the similarity between such a situation and those situations in the aforementioned experiments.188 Stated differently, a third party providing consent to search a domicile is much more likely to do so when no negative consequences will befall him or her. Thus, it is imperative that a solution is discovered with regard to third-party consent doctrine.

In addition to the myth of voluntary consent, law enforcement officers have at their disposal means other than consent to procure evidence of a crime—most notably, the search warrant. Requiring law enforcement officers to obtain a constitutionally prescribed warrant serves to keep police power in check. As has been previously stated by whether police misconduct occurred, as opposed to whether the individual provided consent voluntarily).

187. See United States v. Drayton, 536 U.S. 194, 207 (2002) (indicating that a defendant, when presented with a request to perform a search of his person, is inclined to acquiesce to an authority figure).

188. See Presley, supra note 152 (stating that in Meeus and Raaijmaker’s study, as well as in Dr. Milgram’s, “participants were more likely to attribute responsibility to the experimenter for what happened,” and that the results of the study were that people are to “[d]o what [they] are told and [to] . . . not question why”).
the Court, “[s]ecurity against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.”189 This quote by Justice Butler serves to illustrate that police officers, likely intending no ill will, may act in a surreptitious and abrasive manner, doing whatever they can to make an arrest based on the thrill of the catch. While it is certainly comforting for law-abiding citizens to know that they have zealous law enforcement officers watching over them, such comfort cannot outweigh the need to preserve constitutionally prescribed protections—lest citizens desire to set aside what the Founding Fathers worked so hard to achieve.

Finally, it is true that an individual may rely on the court to make a determination based on the totality of the circumstances that the consent given was invalidated by reason of coercion or duress.190 However, given that a court will almost certainly find that any consent given was voluntary, absent clearly observable misconduct on the part of the police, an individual relying on the court for help will find little solace with such a safeguard.191

For these reasons, even though doing away with consent searches is a drastic measure, consent searches should be abolished given that voluntary consent is a mythical creature, coupled with the irrefutable fact that law enforcement officials have at their disposal the constitutionally powerful search warrant as a means of collecting evidence, and that the court system is currently inadequate in determining whether consent is voluntary. In the alternative, at the very least, third-party consent searches should be abolished as the potential for injustice increases dramatically where a third-party co-tenant is faced with a request to conduct a warrantless search of a shared residence where there will be no ill effect resulting from the search on the co-tenant. This is especially unjust given that police officers may be inclined to act in a disreputable manner in obtaining such consent by means of removing an objecting suspect from the premises or lying in wait until he or she leaves.

B. An Ignorant King Is No King at All—Fernandez Warnings

In 1966, the Supreme Court decided *Miranda v. Arizona*,192 holding that statements stemming from custodial interrogation may not be used

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191. Sutherland, *supra* note 186, at 2225.
against a defendant unless procedural safeguards protecting the privilege against self-incrimination are demonstrated. In deciding *Miranda*, the Court’s concern revolved around the interrogation atmosphere and the “evils it can bring.” When an individual is subjected to a custodial interrogation, the individual must be apprised of his or her right to remain silent, that anything said can and will be used against him or her in court, that he or she has a right to confer with an attorney, and that, if indigent, he or she will be appointed an attorney to represent him or her.

While providing individuals in a consent-based search scenario with *Miranda*-like warnings—that consent to a search may be refused without resulting in any negative consequences upon the refusing individual—may be considered a somewhat radical measure, the line of thinking that resulted in the now-well-known *Miranda* warnings applies equally in consent-search scenarios. Thus, providing *Fernandez* warnings seems quite reasonable. Just as the Court noted in *Miranda* that in-custody interrogations by law enforcement officials trade on one’s weaknesses, the same can be said in both consent-search scenarios and third-party consent-search scenarios. However, the Court in *Schneckloth* attempted to distance itself from the Court’s decision in *Miranda*, claiming that consent searches are not coercive in nature and that the totality of the circumstances criteria will serve to protect individuals. Further, the Court in *Schneckloth* stated that requiring law enforcement to make the conclusion that an individual knowingly and voluntarily waived his or her right to consent would be impractical as such determinations were designed for the judiciary. The Court also made clear that, even if law enforcement could determine whether a waiver was made knowingly and voluntarily, “there is no universal standard that must be applied in every situation where a person foregoes a constitutional right,” asserting that

193. *Id.* at 444. A custodial interrogation takes place when questioning is initiated by law enforcement after an individual has been taken into custody or deprived of liberty in a significant way. *Id.*

194. *Id.* at 456. The Court notes that interrogation takes a heavy toll on one’s liberty and trades on one's weaknesses. *Id.* at 455. Further, the interrogation may well lead to false confessions. *Id.* at 455 n.24.

195. *Id.* at 467–68.

196. *Id.* at 469. This warning is necessary to make the individual aware of the consequences of forgoing the right to remain silent. *Id.*

197. *Id.* at 469–70.

198. *Id.* at 473.

199. *Id.* at 455.


201. *Id.* at 244.

202. *Id.* at 245.
a knowing waiver is not necessary regarding consent searches, as *Miranda* warnings serve to protect an individual at the pretrial stage, preserving the fairness of his or her trial.\(^{203}\)

As should be clear by this point, given one’s disposition to adhere to authority figures, said authority figures hold all the cards in scenarios where they are seeking to obtain consent from the average American citizen, who is not likely appraised of what a police officer can actually do. Additionally, just as the Court in *Miranda* was concerned with the possibility that interrogation may lead to false confessions,\(^{204}\) so too may a police officer extract consent from a suspect or third party when the individual in question is posed with a threat by a police officer. Thus, it is in the interest of justice to reject the holding in *Schneckloth*,\(^ {205}\) and to require police officers to expressly inform individuals that they have the unequivocal right to refuse to consent to a search, and that doing so will not be to their detriment,\(^ {206}\) especially because such a procedure will not unduly hinder law enforcement.\(^ {207}\) Indeed, providing an individual who is requested to consent to a search with *Fernandez* warnings that such consent may be refused “would not lead to the end of consent.”\(^ {208}\) Past experience shows that many individuals, even after being informed of their *Miranda* rights, will still waive them.\(^ {209}\) Additionally, a number of police departments encourage employees to provide warnings in an effort to “bolster the voluntariness of a consent to search.”\(^ {210}\)

Further, the Court in *Schneckloth* identified impracticability as a reason for disallowing consent warnings\(^ {211}\) because there exists an “acknowledged need for police questioning as a tool for the effective enforcement of criminal laws.”\(^ {212}\) However, a requirement that law enforcement provide individuals with *Fernandez* warnings would result in little detriment to law enforcement practices, having “little effect on the

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203. *Id.* at 237–39.
205. Holding that “while [a] subject’s knowledge of a right to refuse is a factor to be taken into account [regarding whether consent is voluntary], the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.” 412 U.S. at 249.
206. *Id.* at 252–53.
207. *Id.* at 253.
208. *Id.* at 253.
209. *Id.* One explanation as to why an informed individual would decide to waive his or her *Miranda* rights is because of “the inherent psychological vulnerability of facing the state as a criminal suspect.” Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79, 82 (1998).
210. Strauss, *supra* note 130, at 254 (internal quotation marks omitted) (quoting State v. Robinnette, 685 N.E.2d 762, 771 n.6 (Ohio 1997)).
212. *Id.* at 225.
rate of consent.” The states of Ohio and New Jersey have proven that there exists only a miniscule effect in requiring law enforcement to provide individuals with Fernandez warnings. Previously, both Ohio and New Jersey required law enforcement officials to give consent warnings. The imposition of a consent-warning requirement in both states had little effect on the consent rate. Thus, requiring Fernandez warnings will have little, if any, effect on law enforcement.

Additionally, while the Court has stated that the preservation of fairness in a criminal trial as a consideration differentiating Miranda situations and consent-search situations, the similarities between Miranda and Schneckloth, even absent trial considerations, necessitate a greater degree of protection in consent-search scenarios. The Court’s decision in Miranda was based on fear that a coercive interrogation may lead to false confessions—a fear that is shared equally in consent-search scenarios. Additionally, it is well established that the Court in Miranda also made its decision, in part, based on how difficult it was to apply a “totality of the circumstances” analysis in determining whether a confession was voluntary—the same test that the Court in Schneckloth has demanded be used in consent-search scenarios. Determining voluntariness based on a court’s application of the totality of the circumstances was not pragmatic prior to Miranda, nor is it any more practical when used to determine voluntariness when consent is at issue, especially since courts rarely give consideration to all of the surrounding circumstances.

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214. Id. at 1204–05.
215. State v. Robinette, 653 N.E.2d 695, 697 (Ohio 1995) (deciding to create “a bright-line test, requiring police officers to inform motorists that their legal detention has concluded before the police officer may engage in any consensual interrogation”), rev’d, 519 U.S. 33, 40 (1996); New Jersey v. Johnson, 346 A.2d 66, 68 (N.J. 1975) (holding that individuals must be aware of their right to refuse consent before a subsequent search may constitutionally take place).
216. Phillips, supra note 213, at 1205. Ohio maintained a consent rate of 94.9% and New Jersey, imposing a stricter requirement, maintained a consent rate of 88.3%. Id.
221. See Kamisar, supra note 219, at 163–64 (indicating that the totality of the circumstances approach was unclear and fickle).
222. See supra note 186 and accompanying text (noting that courts, when deciding whether to suppress evidence obtained during a search, often focus on the behavior of law enforcement officers at the time of the search, rather than whether consent to the search was given voluntarily).
It is certainly correct to say that *Miranda* warnings work to preserve the fairness in a given trial on the basis that such warnings are required once trial proceedings are initiated by way of placing an individual in custody, thereby kick-starting the judicial process; however, is the same process not also started upon the finding of any evidence of a crime following consent to search? Obviously, there is a clear difference between when the judicial process actually commences and a situation in which the judicial process may start, depending upon a resulting search, but the difference is not so great as to justify the prohibition of *Fernandez* warnings to help ensure that an individual is protected—as is required by our Constitution\(^\text{223}\)—from a warrantless and unreasonable search and seizure, especially given how similar *Miranda* and *Schneckloth* happen to be.

Indeed, *Fernandez* warnings would prove to be of paramount importance in the case of third-party consent scenarios, wherein the third party, who ultimately has nothing to lose by allowing law enforcement officers to conduct a search of his or her shared domicile, would be inclined to provide consent in an effort to steer clear of being considered a suspect.\(^\text{224}\) In a scenario similar to that in *Fernandez*, where the individual suspected of committing a crime has been lawfully removed from his or her domicile—either by police officers or of his or her own volition—an uninformed third party, when confronted with a uniformed police officer asking for consent to search the residence, will likely feel that he or she has no other option but to provide consent, lest he or she wishes to end up the subject of the current investigation.\(^\text{225}\) This is not to say that apprising a third party of the right to refuse to consent to a search will preclude him or her from helping law enforcement officials—this is an imperfect solution to a greater problem—but providing such warnings may serve to protect the Fourth Amendment rights of some criminal suspects, while still allowing police officers to make use of the consent search.

\(^{223}\) U.S. Const. amend. IV.

\(^{224}\) See Adrian J. Barrio, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court’s Conception of Voluntary Consent*, 1997 U. Ill. L. Rev. 215, 244 (1997) (stating that innocent individuals may be inclined to provide consent to a search to both prove their innocence and avoid further surveillance by police).

\(^{225}\) See id. at 241 (stating that a police officer’s uniform, badge, and gun are not only indicators of a police officer’s authority, but that they may also psychologically influence an individual to believe that noncompliance with the officer’s requests may result in his or her punishment).
C. An Absent King Rules His Kingdom—Redefining “Present”

One of the most disturbing revelations resulting from the Court’s decision in Fernandez is that an individual, recently detained by police officers, sitting in a police cruiser while in plain view of his or her domicile, is not considered to be “present” for the purpose of expressing his or her Randolph objection.\(^\text{226}\) Per Randolph, this individual, moments prior to being detained, held the complete and unequivocal power to deny police officers without a warrant the consent necessary to search his or her home.\(^\text{227}\) Once detained, however, this same individual is transformed into a powerless being after he or she is removed from the home, whether by lawful detention, or simply because he or she needed to make a trip to the grocery store to buy some milk.\(^\text{228}\) In the event that a suspect makes the determination to waive his or her Fourth Amendment rights and provide consent to police officers to conduct a warrantless search, it is his or her prerogative to do so; however, in the event that a third party provides consent to police officers, especially following the detention of a suspect co-tenant, such actions are tantamount to a third-party waiver of the suspect co-tenant’s Fourth Amendment rights.\(^\text{229}\) Such disregard for one’s Fourth Amendment rights cannot stand.

The simplest solution for this obvious problem would be to allow an individual to be considered “present” when he or she is in police custody.\(^\text{230}\) While the Randolph Court was concerned about burdening police by requiring them to locate a non-present defendant in order to ask for his or her consent,\(^\text{231}\) requiring officers to secure consent from a detained individual does not involve this concern as officers would know exactly where the defendant is located.\(^\text{232}\) Thus, defining “present” to include circumstances wherein a suspect is lawfully detained by law enforcement officers imposes no real burden upon them. Additionally, any third party involved is not placed in the awkward predicament of having to choose between his or her co-tenant—potentially his or her

\(^\text{227}\) See id. (stating that the defendant was not present when consent was provided by a third party); Georgia v. Randolph, 547 U.S. 103, 114 (2006) (stating that a third party has no power to consent to a search in the event of a “present and objecting co-tenant”).
\(^\text{228}\) Id.
\(^\text{230}\) Id. at 501.
\(^\text{231}\) Id. (citing Randolph, 547 U.S. at 122).
\(^\text{232}\) Id.
spouse—and the police. This serves, at least in part, to help even the playing field on which both the American citizen and the law enforcement officer are required to do battle.

VI. REGAINING THE KING’S THRONE

Today’s Fourth Amendment jurisprudence has transformed so much from the point of its inception that it is almost unrecognizable. Where all searches and seizures absent a valid warrant were once considered to be inherently unreasonable, our nation’s Fourth Amendment jurisprudence has evolved to the point where the only thing that police officers are required to do to conduct a warrantless search of a residence shared by multiple individuals is wait for the criminal suspect to leave his or her residence and then secure consent from a co-tenant, whether by means of empty threats or one’s stark obedience to authority. This effectively amounts to a third-party co-tenant waiving the suspect’s Fourth Amendment right to be free from warrantless searches. Thus, it would seem that the nation’s Fourth Amendment jurisprudence has morphed into something that would prompt the Founding Fathers to roll over in their graves.

Some scholars suggest that abolishing the consent exception to the Fourth Amendment’s warrant requirement is a radical and unrealistic option. However, given that voluntary consent is nothing more than a myth, eliminating consent searches is the most logical and realistic way to get Fourth Amendment jurisprudence back in-line with the intentions of the Founding Fathers, who detested the general warrants of the Crown, so as not to revert back into the very form of government from which the Founding Fathers fought so valiantly to break free. At times, radical action is the most prudent action—this is so in the case of the current consent doctrine. As the nation’s Fourth Amendment jurisprudence now stands, each King who resides with another adult individual no longer rules his land, allowing for any of his subjects to usurp and overthrow him as soon as he departs his kingdom. In the beginning, the King was so powerful that only with a warrant could an intruder make his or her way into the King’s castle. Next, an intruder could enter the castle with the King’s permission. Now, an intruder need

234. See United States v. Groves, 530 F.3d 506, 508 (7th Cir. 2008) (describing an almost identical scenario involving the lengths some officers will resort to in order to obtain evidence of a crime).
235. Gan, supra note 169, at 346.
only ask permission of the King’s jester to gain entry into the castle. How long will it be before it becomes an intruder’s prerogative to lawfully enter into a King’s castle based on nothing more than a whim? It is for these reasons that radical change is necessary in order to honor and uphold the values upon which this country was constructed.