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Shielding Crime Victims from the Witness Exclusion Rule's Sword: Amending California's Constitution to Protect Crime Victim- Witnesses' Right to be Present

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Shielding Crime Victims from the Witness Exclusion Rule’s Sword: Amending California’s Constitution to Protect Crime Victim-Witnesses’ Right to be Present

*Kathryn Merrill**

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* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2024; B.A. English, University of Nevada, Reno. Foremost, I dedicate this Comment to Director Mariam El-menshawi. Her profound guidance, belief in my capabilities, and the inspiration she instilled have been the cornerstone of this piece. Without her, this Comment would remain unwritten. I extend my heartfelt gratitude to Meg Garvin, Executive Director of NCVLI, for her invaluable insights. My deepest thanks to my parents for their steadfast support. To my husband, your unwavering encouragement has been my anchor. Lastly, immense appreciation goes to the dedicated editorial staff and the Board of Editors for their meticulous assistance in refining this article.

I. INTRODUCTION

Locals in Aurora, Colorado eagerly anticipated the *Dark Knight Rises*' midnight premier at the Century Aurora theater.¹ Rebecca Wingo had never seen a Batman movie.² Her friend Marcus Weaver purchased tickets the day before the showing to ensure they could attend the midnight premiere.³ As Marcus and Rebecca took their seats, the buttery smell of popcorn permeated the air and an excited buzz hummed in theater 9.⁴ Theater 9 was one of Century Aurora's highest-capacity rooms, and patrons packed the midnight showing.⁵ The theater darkened, silencing the viewers' excited hum as the film began.⁶ But then, only ten minutes into the showing, chaos erupted.⁷ A gunman entered the theater, lighting multiple smoke bombs before unloading his weapon's ammunition into the crowd.⁸ Theater patrons' ears rang from the deafening gunfire and piercing screams as the shooter's acidic smoke bombs burned their lungs.⁹ Bullets sprayed through the theater while Marcus and Rebecca crawled behind the seats toward the exit.¹⁰ This was the last time Marcus saw Rebecca.¹¹

The mass shooting at the Aurora theater injured seventy people and killed twelve, including Rebecca.¹² As families mourned lost loved ones and survivors battled physical and emotional trauma, the shooter's defense counsel and the prosecution began crafting their strategies.¹³ The strategy included motioning the court to exclude the named victim-witnesses from the trial under Colorado's

¹ Micah Smith, *Ten Years Later: Aurora Theater Shooting Survivor Marcus Weaver Reflects on Tragedy*, DENVER 7 (July 20, 2022), <https://www.denver7.com/news/local-news/ten-years-later-aurora-theater-shooting-survivor-marcus-weaver-reflects-on-tragedy> (on file with the *University of the Pacific Law Review*).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Talya Cunningham, *Aurora Theater Shooting Survivor Training for Paralympics*, FOX 31 DENVER (July 19, 2022), <https://kdvr.com/news/local/aurora-theater-shooting-adan-avila-arredondo-powerlifting/> (on file with the *University of the Pacific Law Review*); TRIDATA DIVISION, SYSTEM PLANNING CORP., AURORA CENTURY 16 THEATER SHOOTING AFTER ACTION REPORT FOR THE CITY OF AURORA, COLO. 10 (2014).

⁶ See Julia Jacobo, *A Look Back at the Aurora, Colorado, Movie Theater Shooting 5 Years Later*, ABC NEWS (July 20, 2017), <https://abcnews.go.com/US/back-aurora-colorado-movie-theater-shooting-years/story?id=48730066> (on file with the *University of the Pacific Law Review*) (describing the excitement over the highly anticipated film).

⁷ Smith, *supra* note 1.

⁸ Jacobo, *supra* note 8.

⁹ See Smith, *supra* note 1 (describing the use of smoke bombs and booming of gunshots in the attack).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Lindsay H. Jones, *Aurora Theater Shooting: Rebecca Wingo Was Fearless, Lived Life with Abandon*, DENVER POST (JULY 24, 2012), <https://www.denverpost.com/2012/07/24/aurora-shooting-victim-rebecca-wingo-fearless-lived-life-with-abandon/> (on file with the *University of the Pacific Law Review*); Keith Coffman, *Accused Colorado Gunman to Seek Insanity Plea in Court*, REUTERS (May 13, 2013), <https://www.reuters.com/article/uk-usa-shooting-denver/accused-colorado-gunman-to-seek-insanity-plea-in-court-idUKBRE94C0CK20130513> (on file with the *University of the Pacific Law Review*); *People v. Holmes*, No. 12CR1522, 2013 Colo. Dist. LEXIS 1497, 1.

witness exclusion rule.¹⁴ The witness exclusion rule allows the defense or prosecution to ask the court to prohibit a witness's entry into the courtroom.¹⁵ In theory, excluding witnesses from the courtroom prevents the testimony of one witness from influencing the testimony of another witness.¹⁶

While state and federal law generally prohibit barring victims from the courtroom, defense attorneys and the prosecution may rely on the witness exclusion rule to do just that.¹⁷ Defense attorneys and prosecutors are successful at excluding victims when states do not provide explicit protections for victim-witnesses.¹⁸ Although the federal government, and every state, provide crime victims with the right to attend court proceedings, states differ on how they protect victims against exclusion.¹⁹ States utilize constitutional amendments or statutory provisions to provide victims the right to be present at court proceedings.²⁰ However, a tension arises between the victim's state constitutional right to attend court proceedings and the defendant's state statutory right to exclude a witness.²¹ States approach the issue in three ways: (1) providing an exception for victims in the evidence code; (2) having victims testify first; or (3) leaving the issue to the court's discretion.²²

¹⁴ Holmes, 2013 Colo. Dist. LEXIS 1497, at 1; COLO. REV. STAT. § 615 (2022) (stating that "at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion"); *Justice 101: Discovery*, OFF. OF THE U.S. ATT'YS., <https://www.justice.gov/usao/justice-101/discovery> (last visited Jan. 2, 2023) (on file with the *University of the Pacific Law Review*) (defining a witness as a "person who saw or heard the crime take place or may have important information about the crime or the defendant"); *The Victim as a Witness*, OFF. FOR VICTIMS OF CRIME, <https://www.ovcttac.gov/taskforceguide/eguide/5-building-strong-cases/54-landing-a-successful-prosecution/the-victim-as-a-witness/> (last visited Jan. 2, 2023) (on file with the *University of the Pacific Law Review*) (defining a "victim-witness" as a crime victim who testifies in a criminal proceeding); CHARLES DOYLE, CONG. RSCH. SERV., RL33679, CRIME VICTIMS' RIGHTS ACT: A SUMMARY AND LEGAL ANALYSIS OF 18 U.S.C. § 3771, at 23 (2021).

¹⁵ See DOYLE, *supra* note 14, at 23 (defining sequestration as "the practice of separating witnesses and holding outside the courtroom all but the witness on the stand"); see also *People v. Melendez*, 102 P.3d 315, 319 (Colo. 2004) ("[S]equestration orders are meant to prevent witnesses from tailoring their testimony to that of other witnesses and to aid the court in the detection of false testimony.").

¹⁶ *Melendez*, 102 P.3d at 319; DOYLE, *supra* note 14, at 23; Daniel J. Capra & Liesa L. Richter, "The" Rule: Modernizing the Potent, But Overlooked, Rule of Witness Sequestration, 63 WM. & MARY L. REV. 1, 10 (2021) ("Ensuring that witnesses are sequestered so they are unable to shape their testimony to accommodate that of other witnesses furthers meaningful cross-examination and effective truth-seeking.").

¹⁷ See Holmes, 2013 Colo. Dist. LEXIS 1497, at 1; *The Crime Victim's Right to Be Present*, OFF. FOR VICTIMS OF CRIME LEGAL SERIES BULL., Nov. 2001, at 1, https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin3/ncj189187.pdf (on file with the *University of the Pacific Law Review*) (explaining that "[i]n practice, defense counsel need only list victims and/or their family members as potential witnesses to have them excluded from the trial" and thus many states have enacted policies to prevent this).

¹⁸ *The Crime Victim's Right to Be Present*, *supra* note 17, at 1–2.

¹⁹ *About Victims' Rights*, OFF. FOR VICTIMS OF CRIME, <https://victimlaw.org/victimlaw/pages/victimsRight.jsp> (last visited Jan. 2, 2023) (on file with the *University of the Pacific Law Review*).

²⁰ *Id.*

²¹ See, e.g., *People v. Coney*, 98 P.3d 930, 935 (Colo. App. 2004) (reversing trial court's exclusion of victim's father, at defense's request, after testifying for the prosecution); *State v. Uriarte*, 981 P.2d 575, 578 (Ariz. Ct. App. 1998).

²² ARIZ. R. EVID. 615 (stating a crime victim "who wishes to be present during proceedings against the defendant" shall not be excluded under the witness exclusion rule); WASH. REV. CODE § 7.69.030 (requiring courts to schedule victim-witness testimonies as early as practical so victims can be "physically present during trial after

California’s failure to explain how the constitutional right to be present interacts with a rule of exclusion creates space for confusion.²³ Consequently, without explicit language providing protections for victim-witnesses against exclusion, victims are at the mercy of the defense and prosecution’s game of strategy.²⁴ This strategy of wits retraumatizes victims and affords them with less rights than what the justice system provides to the disinterested general public.²⁵ Adding clear language could resolve this unnecessary uncertainty.²⁶ Thus, California should amend its Constitution to make explicit that a victim’s constitutional right to be present at court proceedings supersedes the California Evidence Code’s victim exclusion rule.²⁷ Part II provides an overview of the Crime Victims’ Rights Movement and legal background on how the federal government and California have addressed victim exclusion.²⁸ Part III analyzes California’s current legal protections in comparison to the federal and various states’ laws against victim-witness exclusion.²⁹ Part IV addresses arguments against expanding victims’ rights.³⁰ Part V proposes an amendment to the California Constitution, explicitly protecting victim-witnesses’ right to be present at all proceedings.³¹

II. CLEAR AS MUD: A BRIEF HISTORY OF CRIME VICTIMS’ RIGHTS

The United States has a complicated history with crime victims and their rights in the criminal justice system.³² Crime victims’ rights have changed over time—with American politics greatly influencing the Crime Victims’ Rights movements.³³ Section A discusses the Crime Victims’ Rights Movement and its

testifying and not be excluded solely because [the victims] have testified. . . .”); Coney, 98 P.3d at 935; *see also* WASH. CONST. art. I, § 35 (stating crime victims have the right to attend all court proceedings the defendants have the right to attend “subject to the discretion of the individual presiding over the trial or court proceedings”).

²³ CAL. CONST. art. I, § 28; CAL. EVID. CODE § 777 (West 2022); CAL. PENAL CODE § 1102.6 (West 2022).

²⁴ *The Crime Victim’s Right to Be Present*, *supra* note 17, at 1.

²⁵ *See* DOYLE, *supra* note 14, at 23 (“[V]ictims are even more likely to be barred from the courtroom during trial than members of the general public . . . [I]ronically, the victim’s status as a witness, the avenue of most likely access to pretrial proceedings, is the very attribute most likely to result in exclusion from the trial.”); *see also* Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 88–89 (2020) (on file with the *University of the Pacific Law Review*) (“[R]etraumatization refers to additional traumatization during a survivor’s interactions with . . . the justice system” and includes “dismissive or unresponsive actions, as well as statements that minimize what the survivor has experienced.”).

²⁶ CAL. CONST. art. I, § 28; CAL. EVID. CODE § 777 (West 2022); CAL. PENAL CODE § 1102.6 (West 2022).

²⁷ CAL. CONST. art. I, § 28; CAL. EVID. CODE § 777 (West 2022).

²⁸ *Infra* Part II.

²⁹ *Infra* Part III.

³⁰ *Infra* Part IV.

³¹ *Infra* Part V.

³² *Fundamentals of Victims’ Rights: A Brief History of Crime Victims’ Rights in the United States*, NAT’L CRIME VICTIM L. INST.: VICTIM L. BULL., Nov. 2011, at 1, <https://law.lclark.edu/live/files/11822-fundamentals-of-victims-rights-a-brief-history-of> (on file with the *University of the Pacific Law Review*) (describing the historical transition from private prosecution, in which victims played an active role in prosecuting their own cases—to the modern public prosecution, in which victims play a minor role).

³³ *Id.* at 1–2; *see* Melissa Hook & Anne Seymour, *A Retrospective of the 1982 President’s Task Force on Victims of Crime*, OFF. FOR VICTIMS OF CRIME, Dec. 2004, at 11, https://www.ncjrs.gov/ovc_archives/ncvrv/2005/pg4d.html (on file with the *University of the Pacific Law Review*) (explaining the political shifts of the Reagan administration, which established the Task Force on Victims of Crime to assess victims’ role in the criminal justice system and make recommendations from improvement).

influence on modern victims' rights laws.³⁴ Section B describes federal victims' rights protections.³⁵ Section C explains crime victims' rights in California.³⁶

A. Marching Towards Change: The Beginning of the Crime Victims' Rights Movement

The Crime Victims' Rights Movement began in the 1970s as a response to the American criminal justice system's exclusion of crime victims from the criminal justice process.³⁷ Before the Crime Victims' Rights Movement, the primary theory held that the crime only harmed the state and that crime victims were expendable after reporting the crime.³⁸ Specifically, states viewed victims as mere evidence and restricted their role to acting only as witnesses.³⁹ Accordingly, crime victims felt invisible and unsafe, and victims believed they were the only criminal justice system participants who lacked rights.⁴⁰ Then, in 1982, the movement received strong propulsion when President Reagan established the President's Task Force on Victims of Crime (Task Force).⁴¹ President Reagan created the Task Force because the administration concluded that the criminal justice system was treating crime victims poorly.⁴² One such victim was Roberta Roper.⁴³ Roper experienced the Maryland criminal justice system's automatic victim-witness exclusion in the 1980s.⁴⁴ The Court excluded Roper and her husband from the courtroom under the witness exclusion rule even though the couple had no knowledge of the events.⁴⁵ Instead, the court excluded the Ropers

³⁴ *Infra* Section II.A.

³⁵ *Infra* Section II.B.

³⁶ *Infra* Section II.C.

³⁷ PEGGY M. TOBOLOWSKY ET AL., CRIME VICTIM RIGHTS AND REMEDIES 8 (3d ed. 2016) (commenting that advocates for victims' rights originated as an offset of the coalitions advocating for civil rights, anti-war, and women's rights, as many victims of crimes were from marginalized groups); Marlene Young & John Stein, *The History of the Crime Victims' Movement in the United States*, OFF. FOR VICTIMS OF CRIME, Dec. 2004, at 2, https://www.ncjrs.gov/ovc_archives/ncvrvw/2005/pdf/historyofcrime.pdf (on file with the *University of the Pacific Law Review*) (stating that criminal justice system's inadequate responses to marital rape and domestic violence triggered advocacy); Joanna T. Davis, *The Grassroots Beginning of the Victims' Rights Movement*, NAT'L CRIME VICTIM L. INST. (2005), <https://law.lclark.edu/live/files/6453-the-grassroots-beginnings-of-the-victims-rights> (on file with the *University of the Pacific Law Review*) (commenting that the Civil Rights Movement's "call for equal justice for all victims of crime" strongly influenced the Crime Victims' Rights Movement).

³⁸ DOUGLAS E. BELOOF ET AL., VICTIMS IN CRIMINAL PROCEDURE 4 (4th ed. 2018).

³⁹ Davis, *supra* note 36.

⁴⁰ *Id.*

⁴¹ See Hook & Seymour, *supra* note 32, at 11 (explaining that the Task Force consisted of ten members with experience working with crime victims in either legal, educational, or spiritual capacities); see also John Kyl & Steven J. Twist, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 584 (2005) (noting the Task Force's proposals were "the origin of many of the reforms sought by the movement for securing crime victims' rights").

⁴² Hook & Seymour, *supra* note 32, at 11.

⁴³ Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 502 (2005).

⁴⁴ *Id.* (stating that in 1982, Stephanie Roper, Mrs. Roper's daughter, was kidnapped and brutally murdered).

⁴⁵ *Id.* (explaining that Mrs. Roper wished to attend the trial to learn about the state's case against the defendant and she wanted to see justice).

from “the most important event of [their] lives” and made them “feel like second-class citizens.”⁴⁶ The Ropers’ experience highlights the importance of protecting a victim’s right to be present at court proceedings.⁴⁷

A victim’s right to be present at public proceedings was at the forefront of the Task Force’s recommendations.⁴⁸ Prior to the Task Force’s recommendations, courts did not consider a crime victim’s presence at court proceedings essential to the judicial process.⁴⁹ Currently—at the state and federal levels—the government has enacted legislation providing crime victims the right to be present in the criminal justice process.⁵⁰ However, state and federal courts differ on how they address a victim’s right to attend court proceedings when the defense or prosecution names the victim as a witness.⁵¹

B. Crime Victims’ Rights at the Federal Level

The federal government addressed victim-witness exclusion with an amendment to the federal statutes.⁵² In 2004, Congress enacted the Crime Victims’ Rights Act (CVRA).⁵³ The CVRA provides broad rights for victims of federal crimes, such as the right to notification of court proceedings and the right to protections from the defendant.⁵⁴ The CVRA also specifies that neither the defendant, nor the state, cannot exclude victims of federal crimes from any public court proceeding.⁵⁵ However, the CVRA allows the district court to exclude the victim-witness only if the court finds clear and convincing evidence that circumstances would materially alter the victim’s testimony.⁵⁶

United States v. Baldwin (Baldwin) demonstrates how judges determine the CVRA’s clear and convincing standard for victim-witness exclusion motions.⁵⁷ In *Baldwin*, the court required the defendant to provide clear and convincing evidence proving the victim-witness’s presence during court proceedings would materially alter their testimony.⁵⁸ The defendant argued that the victim’s age, time

⁴⁶ *Id.*

⁴⁷ Hook & Seymour, *supra* note 32, at 11.

⁴⁸ LOIS H. HARRINGTON ET AL., PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT 80 (1982) (explaining the Task Force recommended courts allow victims and their families to attend trials even as witnesses and further recommended abolishing the rule to exclude witnesses).

⁴⁹ TOBOLOWSKY ET AL., *supra* note 36, at 5.

⁵⁰ *Id.*

⁵¹ Beloof & Cassell, *supra* note 42, at 504.

⁵² 18 U.S.C. § 3771.

⁵³ *Id.*

⁵⁴ *Id.*; *A Brief Description of the Federal Criminal Justice Process*, U.S. DEP’T OF JUST., <https://www.fbi.gov/how-we-can-help-you/victim-services/a-brief-description-of-the-federal-criminal-justice-process> (last visited Jan 2, 2023) (on file with the *University of the Pacific Law Review*) (explaining that federal crimes are crimes that violate federal law; for example, robbery is outlawed in every state, but it is not a federal offense unless there is some connection with the federal government, such as the robbery of a federal bank).

⁵⁵ 18 U.S.C. § 3771 (“The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.”).

⁵⁶ *Id.*

⁵⁷ *United States v. Baldwin*, No. 19-CR-3579 MV, 2022 U.S. Dist. LEXIS 158874, at *6 (D.N.M. Sept. 2, 2022).

⁵⁸ *Id.*

elapsed since the incident, and interactions with law enforcement would influence the victim's testimony.⁵⁹ The court concluded that the defendant did not establish sufficient justification to exclude the victim after determining that focused cross-examination can adequately address the defendant's concerns.⁶⁰ *Bauldwin* emphasizes that the clear and convincing standard requires judges to find more than the mere possibility that the other witnesses' testimony would influence the victim's testimony.⁶¹

C. Crime Victims' Rights in California

The Crime Victims' Rights Movement gained the most ground at the state level.⁶² California was at the forefront of the state-level movement.⁶³ In 1982, that state-level support manifested in the passing of Proposition 8.⁶⁴ Proposition 8 amended the California Constitution to include a Victims' Bill of Rights.⁶⁵ The 1982 Victims' Bill of Rights established some protections, but did not protect victims' right to attend court proceedings.⁶⁶ Shortly after establishing the Victims' Bill of Rights, Marsy's Law Initiative spurred the next wave of the Crime Victims' Rights Movement.⁶⁷ After nearly twenty-five years of zealous advocacy, California enacted Marsy's Law under Article I, section 28(b) in 2008 providing crime victims with additional constitutional protections.⁶⁸ Crime victims' constitutional protections under Article I, section 28(b), also known as California's Victim Bill of Rights (VBR), provide crime victims with seventeen enumerated rights.⁶⁹ These rights include the victim's right to privacy and the victim's right to

⁵⁹ *Id.* at 7.

⁶⁰ *Id.* at 8.

⁶¹ *Id.* at 6.

⁶² Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 866 (2007) ("Realizing the difficulty of achieving the consensus required to amend the United States Constitution, advocates decided to go first to the states to enact state victims' rights amendments.").

⁶³ *Crime Victims' Rights in America: A Historical Overview*, OFF. FOR VICTIMS OF CRIME (2005), https://www.ncjrs.gov/ovc_archives/ncvrvw/2005/pg4b.html (on file with the *University of the Pacific Law Review*) (noting California is the first state in the nation to establish a crime victim compensation program); see also *About the Board: How CalVCB Helps Victims*, CAL. VICTIM COMP. BD., <https://victims.ca.gov/board/> (last visited Jan. 3, 2023) (on file with the *University of the Pacific Law Review*) (explaining that the victims' compensation program "provides reimbursement for crime-related expenses to victims who suffer physical injury or the threat of physical injury as a result of a violent crime").

⁶⁴ *California Ballot Pamphlet Primary Election for June 8, 1982*, OFF. OF THE SEC'Y OF STATE (1982) http://repository.uchastings.edu/ca_ballot_props/918 (on file with the *University of the Pacific Law Review*); *Crime Victims' Rights in America: A Historical Overview*, *supra* note 63.

⁶⁵ *Crime Victims' Rights in America: A Historical Overview*, *supra* note 63.

⁶⁶ *California Ballot Pamphlet Primary Election for June 8, 1982*, *supra* note 63.

⁶⁷ *About Marsy's Law*, MARSY'S LAW FOR ALL, https://www.marsyslaw.us/about_marsys_law (last visited Oct. 27, 2022) (on file with the *University of the Pacific Law Review*) (stating that Marsy Nicholas's murder traumatized her family, and the criminal justice system only exacerbated their anguish when they failed to provide the family notification of the defendant's release).

⁶⁸ CAL. CONST. art. I, § 28(b); *About Victims' Rights*, *supra* note 19 (highlighting that constitutional rights are more indefinite because "a constitutional amendment must be passed by each house of the legislature by a two-thirds majority," and requires voter ratification during a general election); see also *Commonwealth v. Barroso*, 122 S.W.3d 554, 558 (Ky. 2003) (holding that constitutional rights prevail over rights afforded in statutes).

⁶⁹ CAL. CONST. art. I, § 28(b) (providing a list of the seventeen enumerated rights for victims).

reasonable protections from the defendant.⁷⁰ Victims also have the right to receive public court proceedings notifications and attend all court proceedings that the defendant attends.⁷¹ California's VBR provides more expansive protections for crime victims than the 1982 Victims' Bill of Rights.⁷² However, California's VBR does not include explicit language to protect a victim's right to attend court proceedings when the defense or prosecution has named a victim as a witness.⁷³

III. ANALYZING CALIFORNIA'S SUBSTANDARD PROTECTIONS AGAINST THE WITNESS EXCLUSION RULE'S GRATUITOUS REACH

In practice, California's current laws on victim-witness exclusion are substandard.⁷⁴ California's legal framework allows for the court to incorrectly interpret the laws to conclude that the defendant's statutory right to exclude prevails over the victim's constitutional right to attend court proceedings.⁷⁵ The California Constitution creates unnecessary hurdles for victims wishing to participate in the criminal justice system.⁷⁶ Section A discusses why California's current laws on victim-witness exclusion are substandard compared to the federal CVRA.⁷⁷ Section B describes how the substandard protections outlined in California's VBR create an unnecessary tension with the California Evidence Code.⁷⁸ Section C seeks a solution to the victim-witness exclusion issue by comparing and contrasting other states' laws to California's VBR.⁷⁹

⁷⁰ *Id.* (stating that the victim's right to privacy and protection prevents the defendant from receiving confidential information about the victim, and forbids the defendant from harassing the victim or their family).

⁷¹ *Id.*

⁷² Compare *id.*, with *California Ballot Pamphlet Primary Election for June 8, 1982*, *supra* note 63 (showing that the current Victim Bill of Rights has 17 enumerated rights while the 1982 version did not protect a victim's right to attend a court hearing).

⁷³ See CAL. CONST. art. I, § 28(b)(7) (providing victims with the right to attend public proceedings but failing to ensure victims' right to attend trials when they are named as witnesses).

⁷⁴ CAL. CONST. art. I, § 28(b) (listing crime victims' constitutional rights but not providing protections for victim-witnesses).

⁷⁵ *Id.*; see also *People v. Hanson*, 197 Cal. App. 2d 658, 665 (1961) ("A motion to exclude witnesses during the trial is not a matter of right, but rests in the sound discretion of the trial court.").

⁷⁶ CAL. CONST. art. I, § 28(b); see also *The Crime Victim's Right to Be Present*, *supra* note 17, at 1 (explaining that defense counsel can name a victim as a witness and effectively exclude the victim from all court proceedings).

⁷⁷ *Infra* Section III.A.

⁷⁸ *Infra* Section III.B.

⁷⁹ *Infra* Section III.C.

A. Ignoring the Blueprint: Why California's Current Laws are Inadequate Compared to Federal Victim Protections

California's VBR has pitfalls that the federal CVRA avoids.⁸⁰ The federal CVRA explicitly states that courts may not exclude victims from the courtroom.⁸¹ The federal court can only exclude the victim if it determines by clear and convincing evidence that the other witnesses' testimony would influence the victim's testimony.⁸² The CVRA's strength is that it explicitly protects victims against exclusion.⁸³ The CVRA's clear language notifies victims that they have a right to be present, allowing victims to effectively advocate for themselves.⁸⁴ However, California's VBR does not provide the same explicit language protecting against victim-witness exclusion as the CVRA.⁸⁵ California's VBR is not only silent on excluding victim-witnesses but also combines the victim's right to be present with the right to notification.⁸⁶ California's VBR additionally requires the victim to request their right to attend the court proceedings.⁸⁷

The California VBR structure is confusing and detrimental to victims.⁸⁸ The structure is detrimental to victims because victims often lack legal advocacy, and they are thrust into a system that requires them to advocate for themselves.⁸⁹ The prosecution does not represent victims, which forces victims to either hire legal counsel or advocate for themselves if they cannot afford counsel.⁹⁰ Requiring victims to request the right to be present is confusing because the law does not explain how the victim is supposed to request the right.⁹¹ It is difficult for crime victims experiencing trauma to navigate a criminal justice system without representation.⁹² Requiring victims to request this right creates unnecessary barriers for victims wishing to participate in the criminal justice process.⁹³ These barriers contribute to victims feeling ignored and betrayed by a system that is supposed to protect them.⁹⁴ Negative experiences such as these can lead crime victims—and their communities—to not report crimes or participate in investigations and prosecutions.⁹⁵ These barriers are especially detrimental to

⁸⁰ 18 U.S.C. § 3771 (stating victims may not be excluded from any public proceeding unless clear and convincing evidence shows the victim's testimony "would be materially altered" by other witness testimony); CAL. CONST. art. I, § 28 (providing victims with the right to be present at court proceedings but the VBR does not refer to exclusion of victims specifically).

⁸¹ 18 U.S.C. § 3771.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ CAL. CONST. art. I, § 28(b); 18 U.S.C. § 3771.

⁸⁶ CAL. CONST. art. I, § 28(b)(7).

⁸⁷ *Id.*

⁸⁸ Interview with Mariam El-menshaw, Exec. Dir., Cal. Victims Res. Ctr. (Mar. 10, 2023) (notes on file with the *University of the Pacific Law Review*).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Interview with Mariam El-menshaw, *supra* note 87.

⁹⁴ *Id.*

⁹⁵ *Id.*

victims from underserved and marginalized communities.⁹⁶ These community members are less likely to be able to afford an attorney and are less likely to have access to critical agencies that can inform them of their rights.⁹⁷

Moreover, when victims do not have representation, the criminal case moves ahead without them, creating an automatic exclusion.⁹⁸ Automatic exclusion of victims from critical court proceedings mirrors the automatic exclusion practice the Ropers experienced in Maryland in the 1980s.⁹⁹ The Task Force and the Crime Victims' Movements fought against this exact practice because of the known outcomes exclusion has on victims.¹⁰⁰ Excluding underserved and marginalized victims reenforces the feeling that the system does not care about them and has revictimized them.¹⁰¹ The victims' negative experience in turn influences their friends', families', and neighbors' perception of the criminal justice system.¹⁰² Crime victims are then less likely to report crimes because they feel that the system does not recognize or care about them.¹⁰³ If crime victims do not report crimes, then they may not seek critical services such as victims' compensation or restitution.¹⁰⁴ Compensation and restitution provide necessary economic reimbursements to crime victims but require cooperation with law enforcement and the criminal justice process.¹⁰⁵ When victims do not report crimes, they lack access to critical victims' services that may lessen the financial burdens they experienced from the crime.¹⁰⁶ This lack of access is especially burdensome on victims with lower socio-economic standings, and these added expenses can result in crippling financial consequences.¹⁰⁷

Providing clear protections against victim-witness exclusion is critical, but California's VBR does not expressly provide this protection.¹⁰⁸ However, the state does provide statutory guidelines for courts to use when ruling on whether to exclude victims from court proceedings.¹⁰⁹ The California Penal Code (Penal Code) specifies exclusion criteria to guide the judge's victim-witness exclusion

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Interview with Mariam El-menshawi, *supra* note 87.

⁹⁹ Beloof & Cassell, *supra* note 42, at 502–03.

¹⁰⁰ HARRINGTON ET AL., *supra* note 47, at 80; *see* Beloof & Cassell, *supra* note 42, at 502–03.

¹⁰¹ Interview with Mariam El-menshawi, *supra* note 87.

¹⁰² *Id.*

¹⁰³ Danielle Sered, *Young Men of Color and the Other Side of Harm*, VERA INST. OF JUST., Dec. 2014, at 9 (on file with the *University of the Pacific Law Review*) <https://www.vera.org/downloads/publications/men-of-color-as-victims-of-violence-v3.pdf>; Interview with Mariam El-menshawi, *supra* note 87.

¹⁰⁴ *Id.*; *Restitution*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining restitution as “compensation paid by a criminal to a victim”).

¹⁰⁵ *About the Board: How CalVCB Helps Victims*, *supra* note 62 (explaining that the victim's compensation program “provides reimbursement for crime-related expenses to victims who suffer physical injury or the threat of physical injury as a result of a violent crime”); *see also* Sered, *supra* note 102, at 9.

¹⁰⁶ *See* Interview with Mariam El-menshawi, *supra* note 87 (discussing the cycle that causes victims not to seek support services).

¹⁰⁷ *See id.* (explaining that victims are often from lower socio-economic classes and that the criminal process can take a negative financial toll on victims).

¹⁰⁸ CAL. CONST. art. I, § 28.

¹⁰⁹ CAL. PENAL CODE § 1102.6 (West 2022) (including consideration of defendant's right to a fair trial, preventing disclosure of sensitive information, protecting minors and sexual victims from the trauma or psychological harm, and the court's interest in maintaining order).

rulings.¹¹⁰ In theory, the Penal Code creates a similar protection to the CVRA's clear and convincing standard.¹¹¹ The Penal Code is similar to the CVRA in this regard.¹¹² The Penal Code requires the party seeking to exclude the victim-witness to show a "substantial probability" that the victim's presence is prejudicial.¹¹³ *Baldwin* illustrates that, when used properly by courts, the clear and convincing standard in the CVRA provides strong protections against victim exclusion.¹¹⁴ But that is the issue that arises in practice in California: motions against exclusion, like the motion seen in *Baldwin*, are rare.¹¹⁵

One of the reasons why victim-witness exclusion motions are rare is because victims lack legal advocacy.¹¹⁶ Judges and prosecutors often do not advocate for victims.¹¹⁷ Prosecutors do not advocate for victims because prosecutors represent the state and the state's interest may differ from the victim's interests.¹¹⁸ An example of differing interests may be whether the prosecution accepts a plea bargain.¹¹⁹ In some cases, the conflicting interests may be as detrimental as the prosecution explicitly or implicitly discouraging victim presence, with the implicit aspect implying the victim does not need to be present.¹²⁰ The state may also move to exclude a victim in cases where the prosecution believes the presentation of the case against the defendant will be more successful without the victim.¹²¹ In this situation, the state's emphasis on achieving favorable case outcomes takes precedence over victims' rights and empowerment.¹²² This is problematic because it perpetuates a system focused on winning cases rather than ensuring fairness and affording rights.¹²³

Judges often do not advocate for victims' rights because the judge is focused on the defendant's right to a fair trial.¹²⁴ The focus on this right is incredibly important for a fair and just criminal justice process.¹²⁵ But the current California system ignores victims' rights when the victim cannot afford

¹¹⁰ *Id.* (requiring the party who excludes the victim to show a substantial probability that the victim's presence is prejudicial and requiring the court to consider reasonable alternatives to exclusion).

¹¹¹ *Compare id.*, with 18 U.S.C. § 3771.

¹¹² CAL. PENAL CODE § 1102.6 (West 2022); 18 U.S.C. § 3771.

¹¹³ CAL. PENAL CODE § 1102.6(b)(1) (West 2022).

¹¹⁴ *Baldwin*, 2022 U.S. Dist. LEXIS 158874, at 6 (explaining that clear and convincing evidence, which is required for exclusion of a witness, is a high standard).

¹¹⁵ See Interview with Meg Garvin, Exec. Dir., Nat'l Crime Victims Legal Inst. (Mar. 7, 2023) (notes on file with the *University of the Pacific Law Review*) (explaining the reasons that there is a lack of precedential case law on the issue); Interview with Mariam El-menshawi, *supra* note 87 (explaining that victim's rights often are not enforced because they are often not represented by legal counsel, who could make motions on their behalf).

¹¹⁶ Interview with Mariam El-menshawi, *supra* note 87; Interview with Meg Garvin, *supra* note 114.

¹¹⁷ *Id.*

¹¹⁸ Interview with Mariam El-menshawi, *supra* note 87.

¹¹⁹ BELOOF ET AL., *supra* note 37, at 792.

¹²⁰ Interview with Mariam El-menshawi, *supra* note 87 ("Victims' interests are often divergent from the prosecutor's interests. And in these situations, the prosecutor is clearly unable to assist the victims with their rights."); Interview with Meg Garvin, *supra* note 114 (explaining that the state often excludes victims to make a case look better to a jury, negatively impacting victims' abilities to participate).

¹²¹ Interview with Meg Garvin, *supra* note 114.

¹²² *Id.*

¹²³ Interview with Meg Garvin, *supra* note 114.

¹²⁴ Interview with Mariam El-menshawi, *supra* note 87.

¹²⁵ *Id.*

representation, and the prosecutor and the judge often do not protect the victims' right to attend trials.¹²⁶ This results in motions not being filed against victim exclusion, and the Penal Code's guidelines are thus never considered.¹²⁷ In comparison, the CVRA's clear language notifies the victim of their rights and puts the prosecutor and the judge on notice to uphold the victim's rights.¹²⁸ The CVRA's clear notice may result in more motions against exclusion and the opportunity for judges to consider the victim's interests.¹²⁹ The CVRA provides clear language preventing victim exclusion, which ultimately results in victims understanding their protections and asserting their right to be present at all critical court proceedings.¹³⁰

B. California's Protections Result in an Unnecessary Tension

California provides victims with a constitutional right to be present at all court proceedings the defendant may attend.¹³¹ California also provides statutory guidelines for the court to follow when determining if the court should exclude the victim-witness.¹³² However, California's legislation inadequately protects victims against the witness exclusion rule because the law does not address the confusion that arises between the rights of the defendant and the victim.¹³³ Failing to protect victims from the witness exclusion rule undermines the victim's constitutional right to be present at court proceedings.¹³⁴ For instance, the witness exclusion rule can be used as a tactic to exclude the victim from critical court proceedings.¹³⁵ The current California law allows for unnecessary confusion about whether the victim's constitutional right or the evidentiary code prevail.¹³⁶ The defense and prosecution use the incertitude created by these laws as a strategy.¹³⁷ This strategy has three purposes: to craft the story they want to tell the judge and jury, to intimidate victims, or based on a legitimate belief that the victim's presence will implicate a fair trial.¹³⁸ However, victim exclusion negatively impacts victims' ability to exercise their rights and ability to be independent participants in the

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ 18 U.S.C. § 3771.

¹²⁹ *Id.*; see also Interview with Mariam El-menshawi, *supra* note 87 (explaining that lack of notice and knowledge of rights is one reason victim's rights are often not enforced).

¹³⁰ 18 U.S.C. § 3771.

¹³¹ CAL. CONST. art. I, § 28(b)(7).

¹³² CAL. PENAL CODE § 1102.6 (West 2022).

¹³³ CAL. CONST. art. I, § 28(b); CAL. EVID. CODE § 777 (West 2022).

¹³⁴ Interview with Meg Garvin, *supra* note 114; see also *The Crime Victim's Right to Be Present*, *supra* note 17, at 1, ("[D]efense counsel need only list victims and/or their family members as potential witnesses to have them excluded from the trial [and] [a]s a result, this rule often allows victims and family members to be excluded even when they have little, or no, relevant testimony to offer.").

¹³⁵ *The Crime Victim's Right to Be Present*, *supra* note 17, at 1.

¹³⁶ CAL. CONST. art. I, § 28(b); CAL. EVID. CODE § 777 (West 2022); *Id.* at 1, ("In practice, defense counsel need only list victims and/or their family members as potential witnesses to have them excluded from the trial.").

¹³⁷ Interview with Meg Garvin, *supra* note 114.

¹³⁸ *Id.*

criminal justice systems.¹³⁹ Attending court trials is imperative to many crime victims because court proceedings are often cathartic and informative for victims.¹⁴⁰ Therefore, excluding victims from this process mirrors the issues crime victims' rights movements aimed to rectify: the state ignoring and retraumatizing victims.¹⁴¹

States jeopardize a victim's right to be present at court proceedings by failing to limit the witness exclusion rule.¹⁴² The California Constitution provides victims with the right to attend proceedings, while the California Evidence Code allows a defendant to exclude victim-witnesses from court proceedings.¹⁴³ The failure of California's Evidence Code and Constitution to explicitly explain how the constitutional right to be present interacts with the rule of exclusion creates unnecessary confusion.¹⁴⁴ As a result, California's existing legal construct leaves the issue to the court's interpretation of which law prevails—even though the hierarchy of law says that constitutional rights prevail.¹⁴⁵ Leaving the issue to the court's interpretation results in different jurisdictions reaching different conclusions.¹⁴⁶ This creates different standards for victim protections across state counties—depending on which judge is presiding over the case.¹⁴⁷ In addition, a victim without representation does not have the opportunity to raise a rights violation by opposing the victim-witness exclusion, so the violation goes without review.¹⁴⁸ Victims rarely have access to a victims' rights attorney and the court only upholds their rights upon either the victim's, the prosecution's, or the

¹³⁹ *Id.*

¹⁴⁰ See *The Crime Victim's Right to Be Present*, *supra* note 17, at 1 (“[Victim’s] want to hear counsel’s arguments and view the reactions of the judge, jury, and defendant.”); see also Lucy N. Friedman, *The Crime Victim Movement at Its First Decade*, 45 PUB. ADMIN. REV. 790, 793 (1985) (“The court process can also be therapeutic for the victim because of its public acknowledgment that the victim was not to blame and that the offender committed a wrong.”).

¹⁴¹ *The Crime Victim's Right to Be Present*, *supra* note 17, at 1; see also Katirai, *supra* note 25, at 88–89 (2020) (discussing victim retraumatization when the judicial system is “dismissive or unresponsive” towards victims).

¹⁴² See *The Crime Victim's Right to Be Present*, *supra* note 17, at 1 (noting that states without victim-witness protections allow for the defense counsel to simply “list victims and/or their family members as potential witnesses to have them excluded from the trial”).

¹⁴³ CAL. CONST. art. I, § 28(b)(7); CAL. EVID. CODE § 777 (West 2022).

¹⁴⁴ CAL. CONST. art. I, § 28; CAL. EVID. CODE § 777 (West 2022); see also *People v. Young*, 175 Cal. App. 3d at 541 (“At trial, the court retains discretion to decide whether prior to his testimony a witness should be precluded from hearing the testimony of another witness.”).

¹⁴⁵ CAL. CONST. art. I, § 28; CAL. EVID. CODE § 777 (West 2022) (stating that the court “may” exclude certain witnesses upon a party’s motion); James Tyger & Sarah K. Cunningham, *What is Hierarchy of Law*, THE PROPER ROLE OF HIGHER EDUCATION IN A DEMOCRATIC SOCIETY, 26 (2021) (ebook) <https://www.igi-global.com/dictionary/hierarchy-of-law/101142> (on file with the University of Pacific Law Review); see also *Young*, 175 Cal. App. 3d at 541 (“At trial, the court retains discretion to decide whether prior to his testimony a witness should be precluded from hearing the testimony of another witness.”).

¹⁴⁶ See *Young*, 175 Cal. App. 3d at 541 (“At trial, the court retains discretion to decide whether prior to his testimony a witness should be precluded from hearing the testimony of another witness.”);

BELOOF ET AL., *supra* note 37, at 79 (“Each trial court can arrive at unique conclusions about the meaning and scope of victim’s rights.”).

¹⁴⁷ BELOOF ET AL., *supra* note 37, at 791.

¹⁴⁸ See Interview with Mariam El-menshaw, *supra* note 87 (implying that one obstacle to enforcement of victim’s rights is the lack of representation and advocacy for victims).

judge's assertion.¹⁴⁹ As explained above, the state is not a consistent advocate for victims' rights and the state itself often violates victims' rights.¹⁵⁰

Judicial bias toward the defendant's rights over victim rights also affects the outcomes of victim-witness exclusion motions.¹⁵¹ Judges are heedful of ensuring the defendant's rights are honored.¹⁵² This is critical and necessary for a fair criminal justice process.¹⁵³ However, judges may overlook a victim's right to be present because they are concerned that decisions may be overturned for violating a defendant's rights.¹⁵⁴ Defendants' rights are at the forefront of the judge's mind because defendants have lawyers who advocate for them and will push back against any rights violations.¹⁵⁵ Victims often do not have an advocate pushing back against victims' rights violations.¹⁵⁶ This lack of advocacy results in very defendant-focused trials, in which where victims are no longer independent participants—which is the purpose of victims' rights.¹⁵⁷ Leaving the determination of victim-exclusion strictly to the court's interpretation of which law prevails creates legal complexities that retraumatize victims and undermine the intended purpose of California's VBR.¹⁵⁸

C. Seeking a Solution: Comparing California's VBR to Other States' Laws Against Victim-Witness Exclusion

States approach the victim-witness exclusion protections in three ways.¹⁵⁹ First, some states provide an exception for victims in the state evidence code by clearly stating that the court cannot exclude victim-witnesses from critical trial proceedings.¹⁶⁰ At the same time, one state requires victim-witnesses to testify

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*; Interview with Meg Garvin, *supra* note 114.

¹⁵¹ Interview with Mariam El-menshawi, *supra* note 87

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*; Interview with Meg Garvin, *supra* note 114.

¹⁵⁶ *Id.*

¹⁵⁷ Interview with Meg Garvin, *supra* note 114.

¹⁵⁸ See DOYLE, *supra* note 14, at 23 (“[V]ictims are even more likely to be barred from the courtroom during trial than members of the general public. . . [I]ronically, the victim’s status as a witness, the avenue of most likely access to pretrial proceedings, is the very attribute most likely to result in exclusion from the trial.”); see also Katirai, *supra* note 25, at 88–89 (“Retraumatization refers to additional traumatization during a survivor’s interactions with. . . the justice system” and includes “dismissive or unresponsive actions, as well as statements that minimize what the survivor has experienced.”).

¹⁵⁹ ARIZ. R. EVID. 615 (providing that “a victim of crime, as defined by applicable law, who wishes to be present during proceedings against the defendant” shall not be excluded under the witness exclusion rule); WASH. REV. CODE § 7.69.030 (West 2022) (requiring courts to schedule victim-witness testimonies as early as practical so victims can be “physically present during trial after testifying and not to be excluded solely because [the victims] have testified. . .”); see also Coney, 98 P.3d at 935 (determining whether the Victim’s Rights Act enacted under Colorado’s constitution takes precedence over the state evidence code’s witness exclusion rule because Colorado’s laws leave the question to the courts’ discretion); WASH. CONST. art. 1, § 35 (stating that a crime victim has the right to attend all court proceedings the defendant has the right to attend “subject to the discretion of the individual presiding over the trial or court proceedings”).

¹⁶⁰ ARIZ. R. EVID. 615 (providing that “a victim of crime, as defined by applicable law, who wishes to be present during proceedings against the defendant” shall not be excluded under the witness exclusion rule); ALASKA R. EVID. 615.

before other witnesses.¹⁶¹ Second, other states, like California, leave space for confusion regarding victim-witness exclusion.¹⁶² Last, a few states' evidence codes protect victim-witnesses from courtroom exclusion with explicit exemptions from the rule on witnesses.¹⁶³ Alaska, Arizona, Wisconsin, Oregon, and Louisiana all provide victims with the right to be present during the same proceedings that the defendant has a right to attend.¹⁶⁴

Alaska and Wisconsin explicitly state that victim-witnesses cannot be excluded in their evidence codes, but other states are less clear.¹⁶⁵ Colorado and California are two such states.¹⁶⁶ However, unlike California, Colorado's courts have examined the confusion that arises between the victim's constitutional right to be present and the defendant's right to exclude witnesses under the evidence code.¹⁶⁷ A Colorado court analyzed victim-witness exclusion in an unpublished case regarding the Aurora Colorado theater shooting.¹⁶⁸ The Colorado court concluded that the victim's constitutional right to attend proceedings supersedes the defendant's statutory right to exclude a witness because constitutional rights have historically superseded statutory rights.¹⁶⁹ California courts have not provided a similar solution to this tension between the California Constitution and the Evidence Code.¹⁷⁰ Thus, when the defense or prosecution names a victim as a witness in California, the victim is often automatically excluded unless they have representation advocating for their right to be present.¹⁷¹

Washington similarly leaves space for unnecessary confusion on which right prevails.¹⁷² However, Washington has created a compromise for victims and

¹⁶¹ WASH. REV. CODE § 7.69.030 (West 2022) (requiring courts to schedule victim-witness testimonies as early as practical so victims can be “physically present during trial after testifying and not to be excluded solely because [the victim] have testified”).

¹⁶² WASH. CONST. art. 1, § 35 (stating that a crime victim has the right to attend all court proceedings the defendant has the right to attend “subject to the discretion of the individual presiding over the trial or court proceedings”); *see also* Hanson, 197 Cal. App. 2d at 665 (“A motion to exclude witnesses during the trial is not a matter of right, but rests in the sound discretion of the trial court.”).

¹⁶³ ALASKA R. EVID. 615; ARIZ. R. EVID. 615; WIS. STAT. § 906.15 (West 2022); OR. REV. STAT. § 40.385 (West 2022).

¹⁶⁴ *Id.*

¹⁶⁵ ALASKA R. EVID. 615; WIS. STAT. § 906.15 (West 2022); *see also* WASH. CONST. art. 1, § 35 (stating that a crime victim has the right to attend all court proceedings the defendant has the right to attend “subject to the discretion of the individual presiding over the trial or court proceedings”); Hanson, 197 Cal. App. 2d at 665 (“A motion to exclude witnesses during the trial is not a matter of right, but rests in the sound discretion of the trial court.”).

¹⁶⁶ CAL. CONST. art. I, § 28(b); CAL. EVID. CODE § 777 (West 2022); COLO. REV. STAT. § 615 (2022); COLO. CONST. art. II, § 16a.

¹⁶⁷ Holmes, 2013 Colo. Dist. LEXIS 1497, at 13–23.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 24.

¹⁷⁰ Interview with Meg Garvin, *supra* note 114 (explaining that the reason there is not much case law on victim-witness exclusion is because victims often lack attorneys to help them assert and enforce their rights); *see also* CAL. CONST. art. I, § 28; CAL. EVID. CODE § 777 (West 2022); CAL. PENAL CODE § 1102.6 (West 2022).

¹⁷¹ Interview with Mariam El-menshawi, *supra* note 87; *see also The Crime Victim's Right to Be Present, supra* note 17, at 1 (“In practice, defense counsel need only list victims and/or their family members as potential witnesses to have them excluded from the trial.”).

¹⁷² WASH. CONST. art. 1, § 35 (stating that a crime victim has the right to attend all court proceedings the defendant has the right to attend “subject to the discretion of the individual presiding over the trial or court

defendants that may solve the confusion that occurs in California.¹⁷³ Washington requires victim-witnesses to testify as early as possible to allow victims to be present during critical trial stages.¹⁷⁴ Washington's rule safeguards against the possibility that other witnesses' testimony may influence the victim's testimony by having the victim testify first.¹⁷⁵ Washington's rule also ensures that the court does not exclude the victim-witness from court proceedings "solely because [the victim has] testified."¹⁷⁶ California's Penal Code guidelines against exclusion do not include this provision.¹⁷⁷ However, Washington's rule is not a constitutional right and the statute does not require notification of this right.¹⁷⁸ California's Constitution provides more protections for victims because it requires law enforcement to provide victims with a list of their rights under California's VBR.¹⁷⁹ Washington does not provide a similar victims' rights notification requirement.¹⁸⁰ Washington also provides this rule as a statutory right rather than a constitutional right.¹⁸¹ Constitutional rights are considered more indefinite and are historically a higher order of law.¹⁸² Although Washington requires victims to testify first, this rule provides inadequate protections against victim-witness exclusion because it does not require victims' rights notifications and is not a constitutional amendment.¹⁸³

proceedings"); *State v. Sexsmith*, 157 P.3d 901, 908 (Wash. App. Div. 3 2007) ("It is within the discretionary power of the court to exclude potential witnesses from the courtroom.").

¹⁷³ WASH. REV. CODE § 7.69.030 (West 2022) (requiring victim-witnesses to testify first so victims are not excluded from court proceedings "solely because they have testified").

¹⁷⁴ *Id.* ("With respect to victims and survivors of victims, to be physically present in court during trial, or if subpoenaed to testify, to be scheduled as early as practical in the proceedings in order to be physically present during trial after testifying and not to be excluded solely because they have testified.").

¹⁷⁵ *See id.* (requiring victim's to testify as early as possible so they can be in the courtroom after testifying); *see also* DOYLE, *supra* note 14, at 23 (2021) (explaining that victim-witnesses are often excluded to prevent them from being influenced by other witness' testimony).

¹⁷⁶ WASH. REV. CODE § 7.69.030 (West 2022).

¹⁷⁷ CAL. PENAL CODE § 1102.6 (West 2022).

¹⁷⁸ WASH. REV. CODE § 7.69.030 (West 2022).

¹⁷⁹ CAL. CONST. art. I, § 28(b)(17).

¹⁸⁰ WASH. REV. CODE § 7.69.030 (West 2022).

¹⁸¹ *Id.*

¹⁸² *About Victims' Rights*, *supra* note 19 (highlighting that constitutional rights are more indefinite because "a constitutional amendment must be passed by each house of the legislature by a two-thirds majority," and requires voter ratification during a general election).

¹⁸³ *Compare* WASH. REV. CODE § 7.69.030 (West 2022), *with* CAL. CONST. art. I, § 28(b)(17).

IV. CHALLENGING THE CRITICS OF THE WITNESS EXCLUSION RULE AND VICTIMS' RIGHTS

Victims' rights critics argue that victims' rights undermine defendants' right to due process and exacerbate inequalities in the criminal justice system.¹⁸⁴ Critics argue that giving a victim the right to attend all proceedings interferes with the defendant's right to a fair trial.¹⁸⁵ Critics state that the victim's presence in the courtroom may unduly influence the court and interfere with the defendant's rights.¹⁸⁶ Critics argue that giving a victim the right to attend all proceedings interferes with the defendant's right to a fair trial, as a victim's presence may create undue influence.¹⁸⁷ Critics say that the victim's presence may cause undue influence, as their presence might make the jury assume the defendant is guilty, whether or not before the prosecution offers sufficient proof.¹⁸⁸ However, allowing the victim to be present may instead facilitate more accurate direct and cross-examination questions because the victim is most aware of the crime.¹⁸⁹ Therefore, the victim's presence may result in a more fair trial for the defendant because the jury may receive more accurate information.¹⁹⁰

Another argument against a victim's right to attend trials is that the victim's emotions during court proceedings will unduly influence the court.¹⁹¹ Critics worry that permitting a victim-witness to attend all court proceedings may make it difficult for the court to exclude an emotionally affected victim.¹⁹² The presence of highly emotional victims could disrupt court proceedings and potentially bias the judge and jury.¹⁹³ However, trial judges have considerable leeway when it comes to managing participant's emotional displays in the

¹⁸⁴ Laurie Schipper & Beth Barnhill, *We're Victims' Rights Advocates, and We Opposed Marsy's Law*, ACLU, <https://www.aclu.org/news/criminal-law-reform/were-victims-rights-advocates-and-we-opposed-marsys-law> (last visited Jan. 4, 2023) (on file with the *University of the Pacific Law Review*) (arguing that victims' rights "threatens due process and diminishes fundamental principles of American justice"); Sophie Quintin, *'Marsy's Law' Protections for Crime Victims Sound Great, but Could Cause Problems*, PEW TRUSTS (Oct. 12, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/12/marsys-law-protections-for-crime-victims-sound-great-but-could-cause-problems> (on file with the *University of the Pacific Law Review*) (noting that victim's rights "interfere with a defendant's due process rights . . . by giving people harmed by a crime the right to be present and heard before the alleged perpetrator has pleaded innocent or guilty"); *Due Process*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining due process as "the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case").

¹⁸⁵ Quintin, *supra* note 183.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *See id.* (highlighting potential due process concerns caused by Marsy's Law).

¹⁸⁹ Beloof & Cassell, *supra* note 42, at 544.

¹⁹⁰ *Id.*

¹⁹¹ Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1702 (1997).

¹⁹² *Id.* ("The wording of the right 'not to be excluded' gives no indication that disruption, excessive display of emotion, or other misconduct would override the right.")

¹⁹³ *Id.* ("Moreover, by making the right of victims to be present very difficult, if not impossible, to forfeit, the Amendment may encourage emotional displays by victims.")

courtroom, which includes calling for a brief recess.¹⁹⁴ Further scholarship on the role of emotions in court proceedings has stated that “emotion leads to truer perception” and more accurate decisions.¹⁹⁵ Thus, the victim’s emotions may not negatively affect the jury as much as the defense or prosecution fears.¹⁹⁶

Critics also raise concerns over multiple victim-witnesses testifying at the same time.¹⁹⁷ Allowing multiple victims to attend the entire court proceedings may result in victims tailoring their testimonies after hearing another victim testify.¹⁹⁸ Critics explain that failure to exclude victim-witnesses in this situation violates a defendant’s right to a fair trial.¹⁹⁹ However, the more promising perspective comes from victims’ rights advocates who argue that cases with multiple victims are rare.²⁰⁰ Because of this rarity, it is unlikely the scenario critics are concerned about will occur.²⁰¹ Additionally, victims typically give their statements to law enforcement before testifying.²⁰² This procedure protects against false testimony by limiting victims’ statements to the statements already on the record.²⁰³ Also, the victims’ recorded statement limits the victims’ ability to change their story while testifying.²⁰⁴ Thus, the rarity of such cases and the presence of procedural safeguards extinguish concerns over the presence of multiple victim-witnesses.²⁰⁵

V. PROPOSED AMENDMENT TO THE CALIFORNIA CONSTITUTION PROTECTING VICTIM-WITNESSES AGAINST EXCLUSION

California should amend its constitution to explicitly state that a court may not exclude a victim under the witness exclusion rule.²⁰⁶ California’s constitution currently provides a crime victim with the right to be present at all proceedings the defendant attends.²⁰⁷ However, California’s failure to explain how the constitutional right to be present interacts with a rule of exclusion creates

¹⁹⁴ BELOOF ET AL., *supra* note 37, at 550; *People v. Ramer*, 21 Cal. Rptr. 2d 480 (Ct. App. 1993) (unpublished court opinion citing and analyzing Penal Code § 1102.6, which allows the victim to be removed, at the court’s discretion, for the same reasons as a defendant).

¹⁹⁵ Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 368 (1996).

¹⁹⁶ *See id.* (describing the positive role that emotion plays in the legal reasoning process).

¹⁹⁷ *See* Mosteller, *supra* note 190, at 1700 (arguing that multiple victims-witness present “a substantial danger” that victim-witnesses will be influenced during testimony of others).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* (“[A] blanket rule prohibiting exclusion of victims from any public judicial proceeding would violate a defendant’s constitutional right-in this case, the right to effective cross-examination under the Sixth Amendment.”).

²⁰⁰ Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment*, 2 UTAH L. REV. 479, 500 (1999).

²⁰¹ *Id.*

²⁰² *Id.* (“For example, the victims typically have given pretrial statements to police, grand juries, prosecutors, or defense investigators that would eliminate their ability to change their stories effectively.”).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Beloof & Cassell, *supra* note 42, at 518 (noting that a constitutional amendment affording victims with an absolute right to attend trials provides victims with the most protection against victim-witness exclusion).

²⁰⁷ CAL. CONST. art. I, § 28(b)(7).

unnecessary space for confusion.²⁰⁸ This uncertainty often results in courts removing victims from the courtroom even when they have a right to attend court proceedings.²⁰⁹ Excluding victims from the courtroom retraumatizes victims, lowers victims' status in the criminal justice system below the general public, and frustrates the purpose of victims' rights protections.²¹⁰ Adding a provision to the California Constitution protecting a victim-witness's right to attend court proceedings provides a necessary clarity.²¹¹ Clarifying a victim-witness's right to attend trials also limits defense counsel and prosecution from listing victims as witnesses to exclude victims from proceedings.²¹² Although other states have provided statutory protections in their evidence codes, California should propose a constitutional amendment.²¹³ The Legislature should enact a constitutional amendment over a statute because constitutional rights supersede statutory rights, and constitutional rights are more permanent.²¹⁴

The California Legislature should amend California's Constitution to include the following language:

Cal. Const. art. I, section 28(b)(7)

(7) To reasonable notice of all public proceedings, including delinquency proceedings at which the defendant and the prosecutor are entitled to be present and of all parole or other post-conviction release proceedings, and the right not to be excluded from such proceedings. A victim of crime, as defined by applicable law, who wishes to be present during proceedings against the defendant, shall not be excluded under Cal. Evid. Code section 777. Additionally, when victims and survivors of victims are subpoenaed to testify, they are to be scheduled to testify first before subsequent witnesses in the proceedings in order for the victims and survivors of victims to be present during trial after testifying and not to be excluded solely because they have testified.

This amendment would provide stronger protections against excluding victim-witnesses from court proceedings because it specifically states that the Evidence Code's witness exclusion does not apply to victims.²¹⁵ The specific language would solve the current tension between the defendant's right to exclude witnesses and a victim's right to be present at all court proceedings.²¹⁶ The specific language

²⁰⁸ CAL. CONST. art. I, § 28(b); CAL. EVID. CODE § 777 (West 2022).

²⁰⁹ CAL. CONST. art. I, § 28.

²¹⁰ See *The Crime Victim's Right to Be Present*, *supra* note 17, at 1; DOYLE, *supra* note 14, at 23; Katirai, *supra* note 25, at 88–89 (2020).

²¹¹ Beloof & Cassell, *supra* note 42, at 518.

²¹² *The Crime Victim's Right to Be Present*, *supra* note 17, at 1; see, e.g., *id.* at 518 (giving an example of a victim's rights provision "designed to give victims an absolute right to Attend trials").

²¹³ Beloof & Cassell, *supra* note 42, at 518; see also *Proctor v. State*, 236 P.3d 375, 380 (Alaska Ct. App. 2010) (holding that the victim could remain in the courtroom while other witnesses were testifying because the victim has a state constitutional right to be present during the court proceedings); Barroso, 122 S.W.3d at 558 (concluding that constitutional rights prevail over rights afforded in statutes and rules).

²¹⁴ *Proctor*, 236 P.3d at 380; Barroso, 122 S.W.3d at 558; *About Victims' Rights*, *supra* note 19.

²¹⁵ See *Proctor*, 236 P.3d at 380 (holding that the victim could remain in the courtroom while other witnesses were testifying because the Alaska evidence code exempts victim-witnesses from exclusion when the victim has a state constitutional right to be present during the court proceedings).

²¹⁶ CAL. CONST. art. I, § 28(b); CAL. EVID. CODE § 777 (West 2022).

solves the confusion by providing that a victim's right to be present at court proceedings supersedes the Evidence Code's right to exclude victim-witnesses.²¹⁷ Thus, the court will be on notice that the victim cannot be excluded from court proceedings when the defense counsel or prosecution names a victim as a witness.²¹⁸ The court may refer to specific language stating that the victim has a right to attend all court proceedings, even if the victim will be testifying as a witness.²¹⁹

The express constitutional language would also provide notice to victims of their right to attend court proceedings if the defense or prosecution names them as a victim-witness.²²⁰ The constitutional amendment ensures all parties are aware that the court cannot exclude a victim from court proceedings simply by the defense or prosecution naming the victim as a witness.²²¹ The proposed amendment would shift the judge's focus from solely considering defendant's rights to also being more mindful of victims' rights.²²² The proposed constitutional amendment also eliminates the current law's requested rights requirement.²²³ Requiring victims to request the right to be present is burdensome and confusing.²²⁴ The current law does not explain how victims should request the right, and the language is vague and difficult to understand.²²⁵ Victims think they have requested their right to be present when they tell the prosecutor they want to attend the trial; however, they need to request the right in writing.²²⁶ Verbally telling the prosecutor they want to be present is inadequate because busy prosecutors may forget to inform the victim of upcoming proceedings.²²⁷ A written request ensures that the prosecutor knows the victim wants to attend court proceedings.²²⁸ But the current law does not explain that the victim's request to be present at court proceedings should be in writing and sent to the prosecutor.²²⁹ Thus, victims may believe they have requested their right to be present, but the prosecution may fail to notify them of upcoming court proceedings.²³⁰ This is frustrating for victims and creates an

²¹⁷ See Holmes, 2013 Colo. Dist. LEXIS 1497, at 23 (holding that the victim's constitutional right to attend proceedings supersedes the defendant's evidentiary right to exclude a witness because constitutional rights have historically superseded statutory rights).

²¹⁸ Proctor, 236 P.3d at 380 (illustrating how the Alaska evidence code's victim-witness exclusion exemption protects victim-witnesses from being excluded from the court proceedings).

²¹⁹ *Id.*

²²⁰ See Interview with Mariam El-menshawi, *supra* note 87 (describing how a lack of notification of victims' rights results in victims not being able to effectively advocate for their inclusion).

²²¹ CAL. CONST. art. I, § 28(b)(17); see also Proctor, 236 P.3d at 380 (illustrating how the Alaska Evidence Code put the prosecution and judge on notice regarding the victim's right to be present at the court proceeding).

²²² See Interview with Mariam El-menshawi, *supra* note 87 (describing how judges are often focused on the defendant's rights to a fair trial rather than being mindful of the victim's rights).

²²³ See *id.* (explaining how requested rights are a barrier to victims asserting their rights because requested rights are difficult for victims to understand and are vague).

²²⁴ *Id.*

²²⁵ *Id.*; CAL. CONST. art. I, § 28(b).

²²⁶ Interview with Mariam El-menshawi, *supra* note 87.

²²⁷ See *id.* (discussing the conflict between the victim's interests and the prosecutor's responsibilities).

²²⁸ *Id.*

²²⁹ CAL. CONST. art. I, § 28(b).

²³⁰ Interview with Mariam El-menshawi, *supra* note 87.

unnecessary barrier against their participation.²³¹ Eliminating the current law's requirement that victims must request the right to attend court proceedings would solve this issue.²³² Prosecutors would be required to notify victims of all criminal proceedings if attendance was an automatic right, rather than a requested right.²³³

Lastly, the proposed constitutional amendment postulates a compromise similar to Washington's rule requiring victim-witnesses to testify before other witnesses.²³⁴ Requiring the victim-witness to testify first ensures that other witnesses' testimony does not influence the victim's testimony.²³⁵ However, the proposed constitutional amendment would provide stronger protections than the Washington rule.²³⁶ This constitutional amendment would provide more protections for victims because California's VBR currently requires law enforcement to provide victims with a list of their rights when they report the crime.²³⁷ Washington does not provide a similar requirement for notification, which may result in victims not knowing they have this right.²³⁸ Washington also provides this compromise as a statutory right rather than a constitutional right.²³⁹ This proposal would amend California's constitution, making the rule more concrete than Washington's statutory protections.²⁴⁰

A constitutional amendment would also align with the recommendations of the President's Task Force, the crime victims' rights movements, and Marsy's law initiative.²⁴¹ These movements recognized the importance of allowing crime victims to attend critical court proceedings.²⁴² All of these critical moments in crime victims' rights history have emphasized the need to change laws to better reflect the grievances and injustices faced by victims.²⁴³ California should continue to protect victims' rights against an indifferent justice system and pass a constitutional amendment against victim-witness exclusion.²⁴⁴

²³¹ See *id.* (explaining that requested rights are difficult for victims to understand and create a barrier against effective self-advocacy).

²³² See *id.* (discussing the barrier created by requested rights).

²³³ See CAL. CONST. art. I, § 28(b) (stating some victim's rights must be requested, while others are automatic); Interview with Mariam El-menshawi, *supra* note 87 (discussing notification issues arising from requested rights); see, e.g., Beloof & Cassell, *supra* note 42, at 518 (giving an example of a victim's rights provision "designed to give victims an absolute right to attend trials").

²³⁴ WASH. REV. CODE § 7.69.030 (West 2022).

²³⁵ DOYLE, *supra* note 14, at 23.

²³⁶ *About Victims' Rights*, *supra* note 19; compare WASH. REV. CODE § 7.69.030 (West 2022), with CAL. CONST. art. I, § 28.

²³⁷ CAL. CONST. art. I, § 28(b)(17).

²³⁸ WASH. REV. CODE § 7.69.030 (West 2022); see also Interview with Mariam El-menshawi, *supra* note 87 (stating that when victims are not given notice of their rights, they are unable to enforce their rights and advocate for themselves).

²³⁹ WASH. REV. CODE § 7.69.030 (West 2022).

²⁴⁰ *About Victims' Rights*, *supra* note 19.

²⁴¹ *Crime Victims' Rights in America: A Historical Overview*, *supra* note 63; HARRINGTON ET AL., *supra* note 47, at 80; *About Marsy's Law*, *supra* note 66.

²⁴² HARRINGTON ET AL., *supra* note 47, at 80.

²⁴³ See *Crime Victims' Rights in America: A Historical Overview*, *supra* note 63.

²⁴⁴ CAL. CONST. art. I, § 28(b).

VI. CONCLUSION

Stephanie Roper, Marsy Nicholas, Rebecca Wingo, and Marcus Weaver.²⁴⁵ Four victims of nightmarish crimes spanning over four decades.²⁴⁶ Four grieving families retraumatized, ignored, and excluded by a criminal justice system indifferent to their experiences.²⁴⁷ Today, a new indifference pervades the criminal justice system in the form of victim-witness exclusion.²⁴⁸ This indifference is problematic due to California's substandard legal protections for victim-witnesses.²⁴⁹ California does not provide an express protection against victim-witness exclusion.²⁵⁰ This silence retraumatizes victims and ultimately undermines the purpose of California's VBR.²⁵¹ California's VBR provides victims with the right to be present at court proceedings.²⁵² However, defense counsels or the prosecution need only to list a victim as a possible witness to exclude the victim from court proceedings.²⁵³ Defense counsels and prosecutors can conduct this practice because California does not have explicit provisions protecting victim-witnesses under the witness exclusion rule.²⁵⁴

California's constitution should be amended to make explicit that a victim-witness cannot be excluded from court proceedings under the evidence code.²⁵⁵ This amendment solves the tension between a victim's state constitutional right to attend trials and the defendant's state evidentiary right to exclude witnesses.²⁵⁶ The constitutional amendment also upholds the objectives of over half a century of rights movements fighting for victims' right to fair treatment.²⁵⁷ California has historically been at the forefront of victims' rights movements, and it is time once again for California to remedy a prevalent issue.²⁵⁸ California should provide victims with explicit constitutional protection against the witness exclusion rule to uphold the purpose of the California VBR.²⁵⁹

²⁴⁵ Kyl & Twist, *supra* note 36, at 582; Smith, *supra* note 1; *About Marsy's Law*, *supra* note 66.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *The Crime Victim's Right to Be Present*, *supra* note 17, at 1.

²⁴⁹ CAL. CONST. art. I, § 28(b); CAL. EVID. CODE § 777 (West 2022).

²⁵⁰ CAL. CONST. art. I, § 28(b).

²⁵¹ *See id.* (providing that the goal of the VBR is to "preserve and protect a victim's rights to justice and due process").

²⁵² CAL. CONST. art. I, § 28(b)(7).

²⁵³ *See The Crime Victim's Right to Be Present*, *supra* note 17, at 1, (noting that states without victim-witness protections allow for the defense counsel to simply "list victims and/or their family members as potential witnesses to have them excluded from the trial").

²⁵⁴ CAL. CONST. art. I, § 28(b); CAL. EVID. CODE § 777 (West 2022); *The Crime Victim's Right to Be Present*, *supra* note 17, at 1.

²⁵⁵ CAL. CONST. art. I, § 28(b)(7).

²⁵⁶ *Id.*; CAL. EVID. CODE § 777 (West 2022).

²⁵⁷ *See Young & Stein*, *supra* note 36, at 4 (explaining that the victim's rights movement began with the early women's movement, grew especially strong in the 1970s, and continued through today).

²⁵⁸ *Crime Victims' Rights in America: A Historical Overview*, *supra* note 63.

²⁵⁹ *See* CAL. CONST. art. I, § 28(b) (lacking any mention of witness exclusion rule); *see also* HARRINGTON ET AL., *supra* note 47, at 80 (describing the objectives for safeguarding victims' right to be present).