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Marsy's Law: Florida's Victim Classification Protections are Too Broad and Wrongfully Utilized by Florida Law Enforcement Agencies

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Marsy's Law: Florida's Victim Classification Protections are Too Broad and Wrongly Utilized by Florida Law Enforcement Agencies

Ashley Lee

ABSTRACT

While new trends in legislation may aim to reduce the use of excessive force by law enforcement, some Florida agencies interpreted their state's Marsy's Law to protect officers accused of using excessive force. This Comment examines the inappropriateness of Florida's law enforcement agencies' interpretation of Marsy's Law, particularly in the context of the law's original intentions. This Comment points to a potential solution to this problematic interpretation, advocating for an additional limiting clause that narrowly targets how law enforcement interpreted this statute in the context of excessive force reports.

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Marsy's Law refers to jurisdictional, statewide legislation that implements enumerated victim's rights provisions into a state's constitution.¹ First adopted in California, states further adopted varying versions of Marsy's Law.² In Florida, Marsy's Law passed with a provision that prohibits the disclosure of a victim's information.³ Consequently, various Florida police departments capitalized on this provision in order to conceal identifying officer information in excessive force reports.⁴ Although the Florida Supreme Court ruled that police officers responding to crime can be labeled as victims under Florida's Marsy's Law provisions, implications on due process rights⁵ and criticisms over the broad language within the statute rightfully suggests narrowing Marsy's Law's applicability.

This comment will argue that various Florida police agencies' application of Marsy's Law to their law enforcement in order to protect individual officers from potential subsequent litigation and prosecution is inappropriate given the Law's intentions. Part I discusses the background and original intent of Florida's Marsy's Law adaption. Part II describes the term "victim" and how a state's definition of "victim" impacts the application of Marsy's Law. Part III details how various Florida police agencies abused Florida's broad definition of "victim" as it

¹ *About Marsy's Law*, MARSY'S LAW, https://www.marsyslaw.us/about_marsys_law (last visited Sep. 24, 2021).

² *Id.*

³ Kenny Jacoby & Ryan Gabrielson, *Marsy's Law was Meant to Protect Crime Victims. It Now Hides the Identities of Cops Who Use Force*, USA TODAY (Oct. 29, 2020, 9:29 AM), [HTTPS://WWW.USATODAY.COM/IN-DEPTH/NEWS/INVESTIGATIONS/2020/10/29/POLICE-HIDE-THEIR-IDENTITIES-USING-VICTIMS-RIGHTS-BILL-MARSYS-LAW/3734042001/](https://www.usatoday.com/in-depth/news/investigations/2020/10/29/police-hide-their-identities-using-victims-rights-bill-marsys-law/3734042001/).

⁴ *Id.*

⁵ Jeanne Hruska, *'Victims' Rights' Proposals Like Marsy's Law Undermine Due Process*, ACLU (May 3, 2018), <https://www.aclu.org/blog/criminal-law-reform/victims-rights-proposals-marsys-law-undermine-due-process>.

relates to Florida's Marsy's Law Confidentiality Provision to shield individual officers from public scrutiny. Part IV analyzes the constitutional issues with broad "victim" designations and scenarios where law enforcement, acting within their duties, seem to fit the definition of "victim" which Marsy's Law originally intended to protect. Finally, Part V concludes that Florida's broad bright-line rule designating a victim with qualifying and automatic rights denies scrutiny to alleged wrongdoers who themselves may be victims of excessive, even deadly, police force. While disqualifying all law enforcement from Marsy's Law applicability is too narrow, there may be room for Florida to add an exclusionary clause restraining agencies from utilizing Marsy's Law to shield officer names within excessive force investigative reports.

I. THE ORIGINS OF MARSY'S LAW

Many states passed their own versions of Marsy's Law since California passed its version, and have had a big impact in establishing victims' rights.⁶ However, in Florida and some other states, Marsy's Law may be subject to interpretations that enable police departments to shield individual police officers who are being investigated for using unnecessary force.⁷ The clause causing controversy gives Florida's victims an enumerated "right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information of the victim."⁸ Victims are entitled to this right, "beginning at the time of his or her victimization."⁹ When a citizen acts on this privacy right, Florida's statutory language necessarily implies the police victimized the

⁶ *Id.*

⁷ Jacoby & Gabrielson, *supra* note 3.

⁸ FLA. CONST. art. I, § 16 (b)(5).

⁹ FLA. CONST. art. I, § 16 (b).

person.¹⁰ On the flip side, this presumption of victimization implies a perpetrator committed a delinquent act.¹¹

Marsy's Law stems from one family's tragedy.¹² In 1983, Marsalee (Marsy) Ann Nicholas' ex-boyfriend, Kerry Conley, lured her and then murdered her.¹³ The following week, Conley unexpectedly confronted Marsy's family around their neighborhood.¹⁴ According to her family, Marsy was a promising twenty-three-year-old University of California Santa Barbara student.¹⁵ Meanwhile, Conley worked as a carpenter while living with his parents in Malibu, California.¹⁶ Marsy and Conley dated for five years before Marsy called it quits around Thanksgiving of 1983.¹⁷ Five days later, Conley convinced Marsy to come over in the middle of the night and shot Marsy in the face.¹⁸ Marsy lived for four hours after the gunshot.¹⁹ Her brother Nicholas suffered nightmares for years from visiting Marsy in her dying moments at the hospital.²⁰

¹⁰ *Id.*

¹¹ *Id.*

¹² *About Marsy's Law, supra* note 1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *About Marsy's Law, supra* note 1; *see* Frank Mickadeit, *On Victims' Day, Henry Nicholas Recalls Sister*, THE ORANGE COUNTY REGISTER (Apr. 20, 2010, 8:35 PM), <https://www.ocregister.com/2010/04/20/on-victims-day-henry-nicholas-recalls-sister/>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

A jury convicted Conley of second-degree murder in 1985 and sentenced him to life with the possibility of parole.²¹ However, between Marsy's death and trial, Conley became a "free man" after posting a \$100,000 bail.²² Marsy's family did not become aware of Conley's temporary freedom until Marsy's mother Marcella Leach ran into Conley at a local grocery store just days after Marsy's murder.²³ According to Marsy's brother, Henry T. Nicholas III, Conley not only stared Henry Leach down at the grocery store but also showed off his freedom by driving around Marsy's neighborhood "in a convertible, flaunting."²⁴

Furthermore, even after Conley's conviction, Marsy's family saw Conley every two or three years to attend his parole hearing.²⁵ The family "would have to drive to Soledad for the parole hearing, and make their case to a parole board," right across the table from Marsy's murderer.²⁶ During their second trip to a parole hearing, Mrs. Leach broke down from the stress and consequently suffered a heart attack.²⁷ Marsy's family recognized their stress dealing with Marsy's murder was caused by "not being informed because the courts and law enforcement, though well-meaning, had no obligation to keep them informed. While those accused of crimes

²⁰ Mickadeit, *supra* note 15.

²¹ *About Marsy's Law*, *supra* note 1.

²² *See* Mickadeit, *supra* note 15.

²³ *About Marsy's Law*, *supra* note 1.

²⁴ *See* Frank Mickadeit, *supra* note 15.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

have more than 20 individual rights spelled out in the U.S. Constitution, the surviving family members of murder victims have none.”²⁸

Marsy’s brother, Henry T. Nicholas III, led and sponsored the passage of the California Victims’ Bill of Rights Act of 2008 to advocate for victims’ rights statutes.²⁹ The California Victims’ Bill of Rights Act of 2008 is in the California Constitution under Article I §28(b) and provides victims seventeen enumerated rights.³⁰ The California Attorney General’s office captures these enumerated rights on a printable victim’s resources card.³¹ These rights include the right to: (1) reasonable protection from the defendant, (2) prevent the disclosure of confidential information to the accused, and (3) be heard at any hearing concerning post-arrest release.³²

A. MARSY’S LAW INTENT

According to the “Marsy’s Law For All” website, the overall mission of this law is “to give crime victims meaningful and enforceable constitutional rights equal to the rights of the accused.”³³ Some Marsy’s Law state constitutions require notice to a victim or a victim’s family when their offender is released, and the right for a victim to remain anonymous.³⁴ These

²⁸ *About Marsy’s Law, supra* note 1.

²⁹ Mickadeit, *supra* note 15.

³⁰ CAL. CONST., Art. I § 28(b); California Department of Justice, Victim Services, [oag.ca.gov, https://oag.ca.gov/victimservices/marsys_law](https://oag.ca.gov/victimservices/marsys_law) (last visited Sep. 27, 2021)

³¹ California Department of Justice, Marsy’s Card and Resources, [oag.ca.gov, https://oag.ca.gov/sites/all/files/agweb/pdfs/victimservices/marsy_pocket_en_res.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/victimservices/marsy_pocket_en_res.pdf) (last visited Oct. 27, 2021).

³² *Id.*

³³ *About Marsy’s Law supra* note 1.

³⁴ *Id.*

protections attempt to safeguard victims from continual harassment by their attackers when released.³⁵

The intent behind Marsy's Law, to ensure victims' accessibility to court proceedings, is evident in the success stories that Marsy's Law website features under the Victims' Voices tab. The site features the Baker Family, who realized victims' rights are important for keeping track of trial proceedings when they had to continually and manually check in with criminal justice employees to stay informed.³⁶ The paternal grandfather of Eva and Emily Baker sexually assaulted the women during their childhood.³⁷ A jury sentenced their grandfather to twenty-two years in prison for years of grooming, "by having them stay at his house for sleepovers, buying them gifts, and taking them on expensive trips," but he is now currently up for parole after serving just nine years.³⁸

The Baker family only became aware of a parole hearing coming up for Grandpa Baker because one of the daughters whom he assaulted, Eva Baker, diligently looked for updates.³⁹ Through their experiences advocating for their rights, the Bakers have come to believe that "[a] victim shouldn't have to track down this information, since the system can be difficult to navigate, especially for those who are still trying to recover from trauma. Information should be provided to victims in a timely manner so they can choose if and how they participate."⁴⁰ The

³⁵ *Id.*

³⁶ *The Baker Family*, MARSY'S LAW (Jun. 17, 2021), https://www.marsyslaw.us/the_baker_family.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

Baker family only had the opportunity to speak at Grandpa Baker’s parole hearing because of their own diligence.⁴¹

Similarly, the Marsy’s Law website features victim Kelvie Malia’s story. Malia’s then-husband assaulted and robbed her.⁴² Malia’s story, like the Baker family, highlights the importance of regularly updating victims with court proceedings and providing victims with opportunities to speak during “critical criminal justice proceedings that affect their interest.”⁴³ In her feature, Malia recounts having to “constantly call law enforcement and the courts to find out any information about [her] case.”⁴⁴ Through constant efforts to stay involved, Malia learned she “had no right to be informed directly of any of the legal proceedings nor a say in any of them.”⁴⁵ Malia even wrote a letter of support to Nevada’s legislature to adopt Marsy’s Law because she believed it would result in “reasonabl[e] protect[ion] from the defendant[s] and persons acting on behalf of the defendant.”⁴⁶ However, she explicitly noted she would not include “personal contact info for fear of further victimization.”⁴⁷ Stories featured on the Marsy’s Law website indicate crime victims desperately need and want some guaranteed rights as victims.

⁴¹ *Id.*

⁴² *Kelvie Malia*, MARSY’S LAW (Jan. 09, 2020), https://www.marsyslaw.us/kelvie_malia.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Senate Joint Resolution 17 Supporters*, C-12, <https://www.leg.state.nv.us/Session/79th2017/Exhibits/Assembly/LOE/ALOE1061C.pdf>

⁴⁷ *Id.*

One can deduce Marsy's Law's legislative intent from California's adoption of the law. Marsy's brother, Henry T. Nicholas III, led and sponsored the passage of the California Victims' Bill of Rights Act of 2008 after his family's experiences.⁴⁸ The statute includes multiple notice provisions and opportunities to "participate in the parole process, to provide information to the parole authority to be considered before the parole of the offender."⁴⁹ Central to Marsy's Law is the desire to shield victims from their abusers while increasing accessibility to relevant court proceedings.

B. MARSY'S LAW ADOPTIONS

Thus far, California, Florida, Georgia, Illinois, Kentucky, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, and Wisconsin have adopted Marsy's Law.⁵⁰ However, states have varying adaptations. In California, law enforcement agencies ideally notify victims of their Marsy's Law rights.⁵¹

However, states differ on the language of their Marsy's Law adaptations. An issue with varying adaptations appears in North Dakota, South Dakota, and Florida where police departments invoked Marsy's Law privacy protections to shield the identities of officers in excessive use of force reports.⁵² Police departments' and agencies' varied use of Marsy's Law comes from differences in statutory specificity. "Whereas California and the majority of other states with Marsy's Law provisions prohibit 'the disclosure of confidential information to the

⁴⁸ *About Marsy's Law*, *supra* note 1.

⁴⁹ *Victims' Rights Under Marsy's Law*, CAL. DEP'T OF JUSTICE, https://oag.ca.gov/victimservices/marsys_law (last visited Sep. 27, 2021).

⁵⁰ Jacoby & Gabrielson, *supra* note 3.

⁵¹ *Victim's Rights under Marsy's Law*, *supra* note 49.

⁵² Jacoby & Gabrielson, *supra* note 3.

defendant,’ North Dakota’s version, passed in November 2016, deleted the words ‘confidential’ and ‘to the defendant.’”⁵³ Rather, North Dakota’s version broadly reads a crime victim has the right to “prevent disclosure of information or records that reasonably could be used to locate or harass you or your family.”⁵⁴

On October 15, 2017, Donald Miller attacked a responding police officer from the North Dakota Bismarck Police Department.⁵⁵ Miller punched the officer in the head and gouged the officer’s eyes.⁵⁶ In response, the unnamed officer shot Miller in the stomach and wounded him.⁵⁷ However, even after the North Dakota Bureau of Criminal Investigation reviewed the officer shooting, the police department refused to identify the involved officer citing Marsy’s Law.⁵⁸ Bismarck Police Chief Dan Donlin explained Marsy’s Law protections applied because officers “are human beings and get protections under the law just as every citizen does.”⁵⁹ The key difference in statute wording between California and North Dakota’s confidentiality provision is the latter broadened statutory interpretation to “prohibit the disclosure of victim ‘information’ to anyone.”⁶⁰

⁵³ *Id.*

⁵⁴ *Victim’s Rights–Marsy’s Law*, N.D ATT’Y GEN., <https://attorneygeneral.nd.gov/public-safety/victims-rights-marsys-law> (last visited Feb. 20, 2022).

⁵⁵ James Macpherson, *Officer in Shooting Invokes Victim’s law to Withhold name*, AP NEWS (Nov. 2, 2017), <https://apnews.com/article/861bf1e42dbf473e9029e77a36932685>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *See* Jacoby & Gabrielson, *supra* note 3.

After discovering North Dakota’s unique application of Marsy’s Law’s privacy statute to a responding officer, attorney Jack McDaniels, who often represents media outlets in North Dakota, commented that it was “a perversion of that Marsy’s Law thing.”⁶¹ However, Florida and South Dakota incorporated the language of North Dakota’s confidentiality provision in 2018.⁶²

C. MARSY’S LAW IN FLORIDA’S CONSTITUTION

On November 6, 2018, Florida codified its version of Marsy’s Law through its constitution.⁶³ Article 1, Section 6, broadly defines “victim” as someone who suffers “direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed.”⁶⁴ In Florida, a “victim by extension” also includes a “victim’s lawful representative, the parent or guardian of a minor, or the next of kin of a homicide victim.”⁶⁵ The only exclusionary clause in Florida’s “victim” definition is when the victim by extension’s interest actually or potentially conflicts with that of a direct victim.⁶⁶ For better or worse, Florida’s exclusionary clause prioritizes the direct victim when their interests potentially conflict with the victim by extension.⁶⁷

⁶¹ Macpherson, *supra* note 55.

⁶² See Jacoby & Gabrielson, *supra* note 3.

⁶³ States Attorney’s Office 5th Judicial Circuit, *Victim’s Rights and Marsy’s Law*, SA05.ORG, <https://www.sao5.org/victim-and-witness-resources/marsys-law/index> (last visited Nov. 17, 2021).

⁶⁴ FLA. CONST. art. I, § 16 (e).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

All victims under Florida’s broad definition are automatically entitled to the enumerated rights codified in the state’s constitution.⁶⁸ These rights include: (1) protection from the accused; (2) security of potentially identifying personal information; and (3) freedom from intimidation, harassment, or abuse.⁶⁹ Additionally, upon request, a victim has the rights to: (1) timely notification of any public proceedings involving the criminal conduct; (2) speak at any public proceeding involving pretrial release; (3) confer with district attorneys about plea arrangements; and (4) receive a copy of a presentencing report.⁷⁰ These rights align with Marsy’s Law’s original purpose of protecting victims from continual harassment and increasing victim’s accessibility to court proceedings.

Particularly at issue here, is Florida’s victims’ “right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim’s family, or which could disclose confidential or privileged information of the victim.”⁷¹ Victims are entitled to this right, “beginning at the time of his or her victimization.”⁷² When victims act on this privacy right, statutory language necessarily implies the person claiming to be a victim was victimized by someone else. However, this presumption of victimization also necessarily implies that a delinquent act occurred at the hands of a perpetrator.

There is a mismatch between public policy intentions when police departments use this privacy provision of Florida’s Marsy’s Law to shield identifying information of officers

⁶⁸ FLA. CONST. art. I, § 16.

⁶⁹ *Id.*

⁷⁰ *Id.* § 16 (b)(6).

⁷¹ *Id.* § 16 (b)(5).

⁷² *Id.* § 16 (b).

undergoing review within police excessive force reports. While police excessive force reports analyze a police officer's conduct for wrongfully applied force, the mismatch occurs because implementing the victim's privacy right on the police officer's name necessarily implies the police officer is the victim in the situation, even though it is the officer's conduct at issue. By design, excessive force investigations scrutinize the officer's conduct, the potential perpetrator. As it currently stands, Florida agencies' excessive force investigations consider officers both victims and potential perpetrators. Thus, there may be a need to create additional exclusionary clauses for Florida's victim definition.

II. SCOPE OF VICTIM CLASSIFICATION UNDER MARSY'S LAW

While Marsy's Law seeks to protect victims, several state Marsy's Law statutes provide vague definitions of who classifies as such victims.⁷³ When determining whether someone or something can be a "victim" for Marsy's Law protections, some courts study the plain language of the state statute and interpret legislative intent.⁷⁴

A. IN OHIO, VICTIM CLASSIFICATION UNDER MARSY'S LAW DOES NOT INCLUDE MUNICIPAL CORPORATIONS

In November 2020, the Ohio Supreme Court considered in *City of Centerville v. Knab* "whether a municipal corporation is a 'victim' as that word is used in Article I, Section 10(a) of the Ohio Constitution, a provision known as Marsy's Law."⁷⁵ In *Knab*, the city of Centerville

⁷³ See, e.g., N.M. CONST. art. II, § 24 (b) ("A person accused or convicted of a crime against a victim. . ."); GA. CONST. art. I, § 1, para. 30 ("For the purpose of this Paragraph, a victim shall be considered an individual against whom a crime has allegedly been perpetrated . . .").

⁷⁴ See *City of Centerville v. Knab*, 162 Ohio St. 3d 623, 2020-Ohio-5219, 166 N.E.3d 1167 (2020).

⁷⁵ *Id.*

sought to recover payroll losses caused by a false active shooter alarm. Michael P. Knab called emergency services to report an active shooter.⁷⁶ When the emergency dispatcher followed up, he claimed a shooting occurred in his home.⁷⁷ When officers arrived to Knab’s home, they learned from his friend and parents that no shooting occurred, but Knab told them someone attempted to shoot him.⁷⁸ Knab exited the home peacefully and officers found no evidence of firearm use.⁷⁹ Ultimately, Knab was charged and convicted of two misdemeanors for “making a false report to law enforcement . . . and improper use of the 911 emergency system.”⁸⁰

If the municipality corporation is considered a “victim,” then the municipality would have a right to restitution under Marsy’s Law.⁸¹ Essentially, Centerville wanted false alarm caller “Knab to pay restitution to Centerville for the costs it had incurred responding to Knab’s 9-1-1 call.”⁸² However, the court refused to give Centerville victim status as a public municipality, reasoning the language of Marsy’s Law and likely legislative intent did “not include corporate entities or governmental bodies in its definition of ‘victim’ and does not define the term

⁷⁶ *Id.*

⁷⁷ Dan Trevas, *City Does Not Qualify as ‘Victim’ under Voter-Approved Victim’s Rights Law*, HIGHLAND COUNTY PRESS (Nov. 19, 2020), <https://highlandcountypress.com/Content/In-The-News/Headlines/Article/City-does-not-qualify-as-victim-under-voter-approved-victim-s-rights-law/2/73/61720>.

⁷⁸ *Id.*

⁷⁹ *Id.* However, police did find drug paraphernalia.

⁸⁰ *Id.*

⁸¹ *See Knab*, 166 N.E.3d at 1167–68.

⁸² *Id.* at 1169.

‘person.’”⁸³ Thus, Centerville could not collect restitution from Knab under the theory that it is a victim for Marsy’s Law purposes.⁸⁴

To reconcile the court’s prior decision giving victim status to a bank that was robbed with its contrasting decision on Centerville, the court analyzed the differences between a municipal corporation and a private corporation. The Ohio Supreme Court explained the following differences:

With this understanding of a municipal corporation, none of the various dictionary definitions above suggest that the common, ordinary meaning of the word “person” includes a political subdivision or municipal corporation. In its narrowest form, the term encompasses only natural persons. But even an understanding that allows the term to include a corporation appears to contemplate that the corporation is private, not public. The type of corporation that could fairly be described as a “person” is one that has most of the rights and duties of a human being.⁸⁵

Furthermore, when considering the voters’ intent when passing Marsy’s Law, the court held “nothing in the text of Marsy’s Law suggests that the voters intended that a municipal corporation could qualify as a victim under that section These enumerated rights are incongruent with an understanding of ‘victim’ that includes a public corporation.”⁸⁶ The court reasons Centerville, as a municipal corporation, acts more like an arm of the State⁸⁷ than a private corporation when carrying out services such as sending law enforcement responders out

⁸³ *Id.* at 1173.

⁸⁴ *Id.* at 1167, 1174. However, the court pointed out there may be other ways for a municipality to collect restitution. *Id.*

⁸⁵ *Id.* at 1174.

⁸⁶ *Knab*, 166 N.E.3d at 1174.

⁸⁷ *Id.* at 1174, 1179.

to emergencies.⁸⁸ Specifically, the court notes a municipal corporation carries out government acts *per se* through the “establishment and maintenance of a police department.”⁸⁹

Additionally, the court distinguishes between the private rights victims expect, such as dignity and privacy, and “the rights of a government body.”⁹⁰ This distinction is important and carries through the court’s analysis of what Ohio voters likely believed the statute meant by “victims” and who qualified as one. Ohio voters likely did not vote for the passage of Marsy’s Law to expand victim’s rights to municipal corporations because they “were told that Marsy’s Law would ensure that victims and their families receive due process, respect, fairness, and justice.”⁹¹ Specifically, the court noted “[t]he ballot language for Marsy’s Law includes a list of [enumerated] rights that are primarily private and individual in nature.”⁹²

Although there may be room to consider private corporations as victims under Marsy’s Law in certain contexts, Ohio highlights that the intent of citizens voting on the law to protect their private rights can partially define what and who is a victim.⁹³ Ohio’s *Knab* decision is relevant to how Florida law enforcement agencies capitalize on Marsy’s Law victims’ rights because when used in an excessive force inquiry context, the agency is arguably acting on its powers as an arm of the State. Shielding an officer’s identifying information on an excessive

⁸⁸ Trevas, *supra* note 77.

⁸⁹ See *Knab*, 166 N.E.3d at 1174. (citing *Aldrich v. Youngstown*, 106 Ohio St. 342, 140 N.E. 164 (1922)).

⁹⁰ Trevas, *supra* note 77.

⁹¹ See *Knab*, 166 N.E.3d at 1175–76.

⁹² *Id.* at 1175.

⁹³ *Id.* at 1175–76.

force investigation only protects the private interests of the person whose very conduct is being questioned, rather than the interests of the person more naturally thought of as a victim.

B. IN FLORIDA, VICTIM CLASSIFICATION UNDER MARSY’S LAW EXTENDS TO
INDIVIDUAL POLICE OFFICERS

In *Fla. Police Benevolent Ass’n v. City of Tallahassee*, the Florida Supreme Court reversed the court of appeal’s decision, finding “nothing in [Marsy’s Law] ‘excludes law enforcement officers—or other government employees—from the protections granted crime victims.’”⁹⁴

This case arose from two separate Tallahassee police encounters where officers, met with deadly force responded, with deadly force, resulting in casualties.⁹⁵ During the first incident, an officer responded to a potential aggravated battery where the victim alleged the suspect threatened to kill him and brandished a knife during the attack.⁹⁶ On the scene, the officer first found the suspect hiding in bushes ten to fifteen feet away.⁹⁷ However, the suspect “threatened to kill the officer, waved a large hunting-style knife at the officer, and then rushed toward him,” and the officer, while running away, responded by fatally shooting the suspect.⁹⁸ In the second relevant encounter, a different police officer responded to a stabbing call and found the suspect leaning into a car window as the car’s passenger pleaded to the officer for help.⁹⁹ The suspect

⁹⁴ See Jim Saunders, *Marsy’s Law Dispute Goes to Florida Supreme Court*, NEWS 4 JAX (May 4, 2021), <https://www.news4jax.com/news/local/2021/05/04/marsys-law-dispute-goes-to-florida-supreme-court/>.

⁹⁵ *Fla. Police Benevolent Ass’n, Inc. v. City of Tallahassee*, 314 So. 3d 796, 802 (Fla. Dist. Ct. App. 2021).

⁹⁶ *Id.* at 798.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

then approached the officer's vehicle, got into a shooting stance, and pointed a gun at the responding officer.¹⁰⁰ Fearing for his life, the officer exited his vehicle and shot the suspect, who later died from his wounds.¹⁰¹

When the City of Tallahassee revealed it intended to disclose the identities of both the involved police officers, the Florida Police Benevolent Association, which serves as the Tallahassee officers' bargaining representative, asked the trial court to apply "protections granted crime victims under article I, section 16 of the Florida Constitution" and prevent Tallahassee "from disclosing any personal information that could be used to identify or locate the officers."¹⁰² The appellant appealed the trial court's determination that victim protections afforded in article I, section 16 of the Florida Constitution are "unavailable to law enforcement officers even when a crime suspect threatened an officer with deadly force," as well as the trial court's assertion that, "even if the officers were crime victims, their names were not entitled to confidential treatment."¹⁰³

First, the court considered appellee's argument that allowing such use of Marsy's Law for police officer identification protection would undermine and conflict with Florida's open-records laws codified in article I, section 24(a) of the Florida Constitution.¹⁰⁴ However, the court found "no language in either article I, section 16 or article I, section 24(a) suggests that public records related to government employees ordinarily subject to disclosure are not entitled to confidential

¹⁰⁰ *Id.*

¹⁰¹ *Fla. Police Benevolent Ass'n, Inc.*, 314 So. 3d at 798.

¹⁰² *Id.* at 797.

¹⁰³ *Id.* at 798.

¹⁰⁴ *Id.* at 798–99.

treatment under article I, section 16 when a government employee becomes a crime victim.”¹⁰⁵

The Florida Supreme Court acknowledged the potential importance of the open-records law but refused to alter its plain-language reading of Marsy’s Law because it would surpass its power as a judiciary. The court stressed:

[H]owever compelling the public policy considerations may be in favoring broad public records disclosure and the ability of the public to access records of the machinery of government, it is not the province of the judiciary to read into the language of the constitutional text anything not included or to limit the text in a manner not supported by its plain language.¹⁰⁶

Furthermore, unlike the trial court’s conclusion that a victim’s right to confidential treatment does not extend to “protecting a victim’s name from disclosure,” the Florida Supreme Court concluded “information . . . that could be used to locate or harass the victim or the victim’s family includes records that could reveal the victim’s name or identity.”¹⁰⁷

In both *Knab* and *Fla. Police Benevolent Ass’n, Inc.*, courts looked to the statutes’ language to infer and interpret the legislative intent.¹⁰⁸ Applying the decisions of both cases to facts centering around police departments using Marsy’s Law protections, in my mind, spurs some argument that the “victim” label should not necessarily apply to responding officers because police are an arm of government. Some scholars have even called state police agencies the “punitive arm” of state governments.¹⁰⁹ However, individual police officers are humans and

¹⁰⁵ *Id.* at 802.

¹⁰⁶ *Id.*

¹⁰⁷ *Fla. Police Benevolent Ass’n, Inc.*, 314 So. 3d at 804.

¹⁰⁸ *Knab*, 166 N.E.3d 1167, 1175–76 (Ohio 2020); *Fla. Police Benevolent Ass’n, Inc.*, 314 So. 3d at 802.

¹⁰⁹ Joe Soss & Vesla Weaver, *Police Are Our Government: Politics, Political Science, and the Policing of Race–Class Subjugated Communities*, ANNUAL REVIEWS (Mar. 15, 2017), <https://doi.org/10.1146/annurev-polisci-060415-093825>.

do hold private interests to be treated with dignity and privacy, as contemplated in the *Knab* decision.¹¹⁰

The police officers undisputedly hold private interests as stated in *Fla. Police Benevolent Ass'n, Inc.*. However, the overly broad finding that police officers can become victims when responding to calls in their line of duty has affirmed an unfettered and wrongful use by multiple Florida police agencies to classify their officers as victims whenever they respond to calls, even when they are not met with deadly or even minimal force.¹¹¹

C. PROTESTERS VICTIMIZED LAW ENFORCEMENT DURING CAPITOL RIOTS

Undoubtedly, some law enforcement officers became victims in their line of duty when responding to the January 6, 2021, Capitol riot committed by Donald Trump supporters attempting to stop the presidential election certification.¹¹² At a Congressional committee meeting, United States Army veteran and Officer Aquillo Gonnell recalled the trauma he faced while defending the Capitol.¹¹³ Gonnell's memories included hearing fellow officers scream while the mob crushed them, helping other officers from being dragged by the crowd, and getting soaked by rioters with chemical irritants.¹¹⁴ Perhaps most vividly, Gonnell recalled

¹¹⁰ Trevas, *supra* note 77.

¹¹¹ Kenny Jacoby, *Cops Who Use Force and Even Kill Can Hide Their Names From the Public*, PRO PUBLICA (Oct. 29, 2020, 6 AM), <https://www.propublica.org/article/how-cops-who-use-force-and-even-kill-can-hide-their-names-from-the-public>.

¹¹² See Kevin Breuninger & Dan Mangan, *Two More Police Officers Die by Suicide After Defending Capitol during Riot by Pro-Trump Mob, Tally Now 4.*, CNBC (Aug. 2, 2021, 3:38 PM), <https://www.cnbc.com/2021/08/02/3rd-police-officer-gunther-hashida-kills-himself-after-capitol-riot-by-trump-mob.html/>.

¹¹³ Barbara Sprunt, *'This Is How I'm Going To Die': Police Sergeant Recalls The Terror Of Jan. 6.*, NPR (Jul. 27, 2021, 12:51 PM), <https://www.npr.org/2021/07/27/1021161550/this-is-how-im-going-to-die-police-sergeant-recalls-the-terror-of-jan-6>.

¹¹⁴ *Id.*

thinking, “[t]his is how I’m going to die, trampled defending this entrance.”¹¹⁵ Capitol Police Officer Harry Dunn recalled rioters called him “nigger,” and emphasized it was the first time he had ever been called that slur while in uniform.¹¹⁶ After work, Gonnell’s wife could not even hug him because of the chemical irritants on his uniform; in fact, Gonnell could not even sleep that night because the chemicals reactivated and burned his skin.¹¹⁷ More than six months after the riots, Gonnell was still recovering from injuries after already undergoing foot surgery.¹¹⁸ Similarly, Dunn sought out counseling to recover from the emotional turmoil.¹¹⁹

Consequently, four officers committed suicide within months of responding to the capitol riot.¹²⁰ Officer Jeffrey Smith, a twelve-year veteran, died by suicide just days after responding to the capitol riot.¹²¹ Smith’s widow recalled Smith was hit in the head while in the line of duty at the capitol riot and seemed like a “completely different person” from then on.¹²² Undoubtedly, officers can qualify as *per se* victims when, like those who responded to the

¹¹⁵ *Id.*

¹¹⁶ *Police Officers Deliver Emotional Testimony at Jan. 6 Committee Hearings*, NBC NIGHTLY NEWS (Jul. 27, 2021), <https://www.nbcnews.com/news/embedded-video/mmvo117484101786>.

¹¹⁷ Sprunt, *supra* note 113.

¹¹⁸ *Id.*

¹¹⁹ Tim Fitzsimons, Geoff Bennett & Phil Hessel, *Four officers who responded to Capitol riot have died by suicide*, NBC NEWS (Aug. 2, 2021, 2:54 PM), <https://www.nbcnews.com/news/us-news/third-d-c-officer-who-responded-capitol-riot-dies-suicide-n1275740>.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

capitol riot, they are targeted by mobs of people and intentionally trampled,¹²³ berated with racial slurs,¹²⁴ sprayed with chemicals,¹²⁵ and physically assaulted¹²⁶.

When an angry mob intentionally tramples and beats an officer while on the line of duty, it is hard to say the officer are not victims worthy of Marsy's Law rights. Capitol riot officers seeking to voice their experiences to our government's legislature aligns with Marsy's Law's intent to uplift victims' voices.¹²⁷

Recent events, such as the Capitol riot support formidable arguments that banning all law enforcement officers from invoking Marsy's Law privacy protections is too narrow of a bright-line rule. However, there may be a middle ground if the rule can be refined to confine victim status for law enforcement when certain factors are triggered. A better application would be to examine the different backdrops and circumstances where Marsy's Law protections are being invoked. A narrowly-tailored solution that would by default recognize officers as victims could include an exclusionary clause prohibiting agencies from utilizing Marsy's Law privacy protections to protect individual officers within excessive force investigative reports.

III. FLORIDA POLICE AGENCIES' APPLICATIONS OF MARSY'S LAW CONFIDENTIALITY PROVISION

¹²³ Sprunt, *supra* note 113.

¹²⁴ Fitzsimons, *supra* note 119.

¹²⁵ Sprunt, *supra* note 113.

¹²⁶ Fitzsimons, *supra* note 119.

¹²⁷ *About Marsy's Law*, *supra* note 1.

Although *Fla. Police Benevolent Ass'n*.¹²⁸ arose from police officers who faced potential deadly force, various Florida police agencies applied Marsy's Law victim protections to officers who experience a broad range of force.

A. MULTIPLE FLORIDA LAW ENFORCEMENT AGENCIES UTILIZE MARSY'S LAW TO SHIELD OFFICERS FROM PUBLIC SCRUTINY

Some officers are internally designated by their agencies as victims when met with imminent deadly force,¹²⁹ but at other times they can be classified as victims from facing minor force.¹³⁰ According to an article featured in USA Today, “[f]ar more often, police are withholding the names of officers involved in violent altercations with juveniles, intoxicated people or people experiencing mental health episodes.”¹³¹

In Hillsborough, Florida, Tampa police officers invoked Marsy's Law protections for officers in at least three incidents in 2021.¹³² The first encounter on July 4, 2021, ended in the death of forty-year-old John Reuben Turbe, Jr.¹³³ While the law enforcement “office withheld the officer's name, citing Marsy's Law, an amendment to Florida's constitution designed to protect crime victims. Tampa police previously identified him as Bryan Velazquez.”¹³⁴ Officer

¹²⁸ See *Fla. Police Benevolent Ass'n*, 314 So.3d at 797.

¹²⁹ See Tony Marrero, *State Attorney's Office Clears Tampa Officers in Three Separate Shootings*, TAMPA BAY TIMES (Sep. 24, 2021), <https://www.tampabay.com/news/hillsborough/2021/09/24/state-attorneys-office-clears-tampa-officers-in-three-separate-shootings/>.

¹³⁰ See Jacoby & Gabrielson, *supra* note 3.

¹³¹ *Id.*

¹³² Marrero, *supra* note 129.

¹³³ *Id.*

¹³⁴ *Id.*

Velasquez responded to a gas station clerk alleging Turbe had a firearm, approached people, and shot into the air.¹³⁵ As captured on body camera, when Velasquez confronted Turbe, the suspect ran, “took five steps toward the Velazquez and pointed the gun at [sic] him.”¹³⁶ Velasquez opened fire and Turbe died from his injuries.¹³⁷

The second incident on August 16, 2021 did not end in death, but shots were fired at Samario Lee Austin, a civilian, who a jury later charged with multiple crimes.¹³⁸ While Austin possessed a rifle and a handgun in his apartment complex, an officer fired without announcing himself because the officer thought Austin had “tactical and firepower advantage” over him.¹³⁹ Austin did not physically injure the officer in any way.¹⁴⁰ The third incident on August 19, 2021 involved an officer who shot multiple times through his windshield at a teenager who raised his gun toward officers.¹⁴¹ Neither the teen nor the officers were injured, and the teen remains anonymous due to his minor status.¹⁴²

Additionally, in Hernando County, Florida, in January 2019, a homeless man whom police officers had already arrested and handcuffed to a hospital bed started swinging his right

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* (quoting Hillsborough State Attorney Andrew Warren’s office’s September 17, 2021 news release).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

arm around “wildly.”¹⁴³ To gain control of the man, the responding officer pepper sprayed him.¹⁴⁴ According to the Hernando County Sheriff’s Office, the officer deserved Marsy’s Law privacy protections as a victim of battery because the flailing, but handcuffed, suspect hit a wire “near the deputy’s shoulder.”¹⁴⁵ Even though excessive force reports are meant to further investigate potential wrongful conduct of an officer, these Florida officers are essentially presumed to be the victims by their own employers, the police agencies.

B. CONTEMPORANEOUSLY, FLORIDA’S LEGISLATURE ATTEMPTS TO INCREASE POLICE ACCOUNTABILITY

Furthermore, Florida’s acceptance of this Marsy’s Law interpretation goes against the state’s other measures to bolster police accountability. In April 2021, the Florida House unanimously approved of HB 7051: Law Enforcement and Correctional Officer Practices,¹⁴⁶ which mandates officers to intervene if they witness another officer use excessive force.¹⁴⁷ In June 2021, Florida Governor Ron DeSantis signed it into law after just twenty-four hours of review.¹⁴⁸

¹⁴³ Jacoby & Gabrielson, *supra* note 3.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Amanda Castro, *Florida House OKs Bill on Excessive Use of Force by Police*, CLICK ORLANDO (Jun. 30, 2021, 7:37 PM), <https://www.clickorlando.com/news/2021/06/29/police-use-of-force-bill-goes-to-florida-governor/>.

¹⁴⁷ Brendan Farrington, *Florida House OKs Bill on Excessive Use of Force by Police*, U.S. NEWS (Apr. 26, 2021, 5:19 PM), <https://www.usnews.com/news/best-states/florida/articles/2021-04-26/florida-house-oks-bill-on-excessive-use-of-force-by-police>.

¹⁴⁸ Castro, *supra* note 146.

Included in HB 7051 is an agency mandate to “track and report use of force incidents, prohibiting officers who are under investigation or who were fired for use of force from getting hired at another agency.”¹⁴⁹ By passing bills such as HB 7051, the Florida legislature understands the need to bolster police accountability. According to the Orlando Police Department, they also recognize the need to do so to “ensure the fair and equitable treatment of all of its members.”¹⁵⁰

However, capitalizing on Marsy’s Law to protect the identities of police officers reviewed in excessive force reports directly contradict the idea of accountability by shielding officers from any potential public scrutiny or pressure. While it may be too narrow to say officers acting in the line of duty should never qualify as “victim” worthy of Marsy’s Law protections, internally-investigated excessive force reports may be an inappropriate context to apply Marsy’s Law protections. While Florida’s state legislature’s elected members attempt to bolster police accountability in the state, law enforcement utilizes broadly-worded victims’ rights statutes to stretch the meaning of the word “victim,” effectively undermining the private interests motivating voters in passing Florida’s Marsy’s Law.

IV. AUTOMATIC VICTIM CLASSIFICATION MAY IMPERMISSIBLY IMPACT CONSTITUTIONAL RIGHTS

Some groups previously argued against implementation of Marsy’s Law legislation on grounds that it may impact a defendant’s constitutional rights.¹⁵¹ According to the political

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Hruska, *supra* note 5. ACLU Kentucky, *VOTE NO ON AMENDMENT 1: MARSY’S LAW IS BAD FOR VICTIMS AND WRONG FOR KENTUCKY*, ACLU KENTUCKY (Oct. 12, 2020, 11:15 AM), <https://www.aclu-ky.org/en/news/vote-no-amendment-1-marsys-law-bad-victims-and-wrong-kentucky>.

director of American Civil Liberties Union (“ACLU”) of New Hampshire, implementing Marsy’s Law can wrongfully “strengthen the state’s hand against a defendant, undermining a bedrock principle of our legal system—the presumption of innocence.”¹⁵²

While victims’ rights are important and thus codified in many state constitutions,¹⁵³ they should not undermine constitutional rights. Ultimately, while advocates for Marsy’s Law argue how powerful a victims’ rights can be when facing some of the hardest experiences of life,¹⁵⁴ others argue victims’ rights cannot be bolstered by impairing a defendant’s presumption of innocence.¹⁵⁵

Narrowing the definition of “victim” in Florida’s Marsy’s Law privacy protections provision may help reduce the unduly prejudicial impact victim-labeling has on a defendant’s constitutional rights. Police agencies designating their officers as victims in use-of-force reports creates an improper presumption that the officers acted justly, and the accuser provoked the force used. More narrowly, restraining law enforcement agencies from utilizing Marsy’s Law in excessive force reports may increase transparency and further promote procedural integrity, positively impacting Florida’s efforts to address police accountability.

A. JUDGE BARRED USING “VICTIM” TO DESCRIBE INDIVIDUALS SHOT IN KYLE RITTENHOUSE TRIAL

¹⁵² Hruska, *supra* note 5.

¹⁵³ Jacoby & Gabrielson, *supra* note 3.

¹⁵⁴ *See The Baker Family*, *supra* note 36.

¹⁵⁵ Hruska, *supra* note 5.

Kyle Rittenhouse’s high-profile criminal trial began in November 2021.¹⁵⁶ Rittenhouse faced several charges related to his conduct during a protest in Kenosha, Wisconsin where he shot Jacob Blake.¹⁵⁷ Photographs from the protest showed Rittenhouse illegally armed with a rifle.¹⁵⁸

Before trial, both parties stipulated that Rittenhouse shot and killed two men and injured another.¹⁵⁹ The trial focused on whether Rittenhouse acted in self-defense.¹⁶⁰ According to Defendant Rittenhouse, he shot three people in fear for his life because he was followed by a “mob,”¹⁶¹ jump-kicked to the ground,¹⁶² struck with a skateboard, and lunged at.¹⁶³

However, even before trial started, Judge Schroeder made headlines by deciding to bar both sides from labeling individuals who Rittenhouse shot and killed, or wounded as “victims.”¹⁶⁴ Rather than calling them “victims,” the judge approved alternative references such

¹⁵⁶ Dennis Romero & Samira Puskar, *Men shot by Rittenhouse can't be called 'victims' during trial, but 'rioters,' 'looters' are OK, judge rules*, U.S. NEWS (Oct. 26, 2021, 8:31 PM PDT), <https://www.nbcnews.com/news/us-news/men-shot-rittenhouse-can-t-be-called-victims-during-trial-n1282466>.

¹⁵⁷ *Id.*

¹⁵⁸ Christina Maxouris, *Here's what legal experts say helped acquit Kyle Rittenhouse*, CNN (Nov. 20, 2021, 6:43 AM ET), <https://www.cnn.com/2021/11/19/us/legal-experts-what-helped-rittenhouse-acquittal/index.html>.

¹⁵⁹ Romero & Puskar, *supra* note 156.

¹⁶⁰ Maxouris, *supra* note 158.

¹⁶¹ *Id.*

¹⁶² Jessica McBride, *Kyle Rittenhouse Shooting Video & Photos [GRAPHIC]*, HEAVY. (Nov. 19, 2021, 9:31 PM), <https://heavy.com/news/kyle-rittenhouse-shooting-video-photos-graphic/>.

¹⁶³ Maxouris, *supra* note 158.

¹⁶⁴ Romero & Puskar, *supra* note 156.

as “decedents” or “complaining witnesses.”¹⁶⁵ Alternatively, Judge Schroeder decided the defense could label those Rittenhouse shot as “looters,” “rioters,” or “arsonists,” if the defense laid sufficient foundation.¹⁶⁶ Judge Schroeder explained his rule against using the word “victim” as longstanding policy within his courtroom because the word is loaded with improper pretrial judgment.¹⁶⁷ According to legal analysts, Judge Schroeder’s decision is based on trying to maintain the presumption of innocence that defendants are entitled to under the Constitution.¹⁶⁸ Judge Schroeder’s reasoning mirrors the ACLU of New Hampshire’s concern over Marsy’s Law impeding a defendant’s presumption of innocence.¹⁶⁹

Similarly, in Kobe Bryant’s sexual assault prosecution, Colorado’s Chief District Court Judge Terry Ruckeriegle, concluded the parties could not refer to Bryant’s accuser as a “victim.”¹⁷⁰ In Bryant’s matter, the court acknowledged the argument that the label “victim” improperly refutes the presumption of innocence defendants are afforded.¹⁷¹ Because Bryant’s defense potentially relied on consent, the court reasoned whether a crime occurred “remain[ed] in dispute,” and victim-labeling thus impermissibly “assum[ed] the commission of a crime prior

¹⁶⁵ Erik Ortiz, *Rittenhouse judge in spotlight after disallowing word 'victims' in courtroom*, U.S. NEWS (Oct. 27, 2021, 2:53 PM PDT), <https://www.nbcnews.com/news/us-news/rittenhouse-judge-spotlight-after-disallowing-word-victims-courtroom-n1282559>.

¹⁶⁶ Romero & Puskar, *supra* note 156.

¹⁶⁷ Ortiz, *supra* note 165.

¹⁶⁸ *Id.*

¹⁶⁹ *See* Hruska, *supra* note 5; *see also* Ortiz, *supra* note 165.

¹⁷⁰ *See* Order Re Mr. Bryant’s Motion to Preclude References to the Accuser as the “Victim,” *People v. Bryant*, No. 03 CR 204 (Colo. Dist. Ct. 2004), https://www.courts.state.co.us/userfiles/File/Court_Probation/5th_Judicial_District/Cases_of_Interest/People_v_Bryant/05-04/ordr_re_victim_issue.pdf. [hereinafter Bryant’s Motion]

¹⁷¹ *Id.*

to any such determination by a jury and is accordingly inconsistent with the presumption of innocence.”¹⁷² Analogously, in excessive force investigations, the report itself implies whether an officer used undue force and whether it is still in dispute.¹⁷³ Yet, in its current interpretation Florida’s officers are presumed victims worthy of confidentiality protections afforded through Marsy’s Law, even though it is their conduct at issue in the investigation.¹⁷⁴

Pre-trial findings in both Rittenhouse and Bryant’s prosecutions show that the judiciary recognizes the potential risk labels carry for due process.¹⁷⁵ Thus, there may be an argument that classifying police officers within excessive force reports as victims, deserving of victims’ protection rights, also improperly impedes upon a defendant’s constitutional due process rights. Even in the narrow context of an internal excessive force report, by granting officers Marsy’s Law protections, the implied presumption is that the officer did no wrong and acted accordingly in response to the accuser’s actions. This implied presumption is backwards because excessive force reports are meant to analyze the officer’s conduct for wrongdoing, and the officer is not typically seen as a victim within that context.¹⁷⁶

Approving victim classification for police officers within an excessive force report seems to contradict the constitutional promise of presumed innocence. Even if an officer is innocent and did not use excessive force, the report labels the officer as a victim, which implies the officer

¹⁷² *Id.*

¹⁷³ See Ryan Mills, Devan Patel, & Melanie Payne, *Analysis: Most Florida officers disciplined for excessive force kept their jobs*, THE FLORIDA TIMES-UNION (Jul. 26, 2020, 3:35 PM ET), <https://www.jacksonville.com/story/news/crime/2020/06/06/analysis-most-florida-officers-disciplined-for-excessive-force-kept-their-jobs/41740219>.

¹⁷⁴ *Id.*

¹⁷⁵ See Bryant’s Motion, *supra* note 170; see also Ortiz, *supra* note 165.

¹⁷⁶ Mills, Patel, & Payne, *supra* note 173.

suffered at the hands of the perpetrator. Arguably, using victims' rights to remain anonymous and avoid public scrutiny in an excessive force report automatically and impermissibly indicates the other person is to blame for the level of force used. A victim's rights provision in police excessive force reports clearly and maliciously goes against the intent of Marsy's Law, especially considering the connotation behind 'victim,' which is too loaded for some judges to use in pre-adjudication.

While prosecutions and civil lawsuits give attorneys and judges the opportunity to limit the effects of pre-adjudication victim labeling through pre-trial motions,¹⁷⁷ Marsy's Law protections in excessive force reports leave similar discretion to the law enforcement agencies officers are employed by.¹⁷⁸ Like a pre-trial motion, an excessive force report hints that more investigative measures may come. Yet, the presumptions brought by victim labeling seem too contradictory to uphold because their implications go against the entire purpose of an excessive force report—assess an officer's actions in the line of duty.

Accordingly, some states with victims' rights laws share similar reservations as Judge Schroeder in labeling people as "victims" pre-adjudication.¹⁷⁹ In Georgia, victims' rights laws give pre-trial protections to "alleged" victims.¹⁸⁰ Florida law enforcement interprets its Marsy's Law in such a way where the police officer becomes a victim worthy of protections, even

¹⁷⁷ See Order Re Mr. Bryant's Motion to Preclude References to the Accuser as the "Victim," Bryant's Motion, *supra* note 169; Ortiz, *supra* note 165.

¹⁷⁸ See James MacPherson, *Officer in Shooting Invokes Victim's Law to Withhold Name*, AP NEWS (Nov. 2, 2017), <https://apnews.com/article/861bf1e42dbf473e9029e77a36932685>. The Bismarck Police Department wanted to air on the side of caution when it came to upholding a victim's state given constitutional rights. *Id.*

¹⁷⁹ Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449, 1461 (2021).

¹⁸⁰ *Id.* at 1461; See GA. CONST. art. I, § 1, ¶ XXX ("For the purpose of this Paragraph, a victim shall be considered an individual against whom a crime has allegedly been perpetrated . . .").

though the investigation centers around the officer’s potential wrongdoing. Unlike pre-trial motions, where attorneys advocate to a judge who assesses and makes decisions based on the legal validity and implications of a specific motion, Florida law enforcement agencies play the judge, jury, and executioner when protecting individual officers from public scrutiny in excessive force investigations.

B. FLORIDA’S EXCESSIVE FORCE REPORTS ALREADY GIVE AGENCIES HIGH LEVELS
OF DISCRETION

Marsy’s Law should not be applicable to police officers investigated in excessive force reports because these reports are an important mechanism for public awareness and for everyday citizens to apply public scrutiny and encourage police accountability. Excessive force reports are not an appropriate backdrop for officers to presumably be considered victims, especially because these reports scrutinize police conduct.

The Criminal Justice Standards and Training Commission (“CJSTC”), part of Florida’s Department of Law Enforcement, helps determine whether an officer is morally fit to serve as part of law enforcement.¹⁸¹ The CJSTC is separate from local Florida police departments and can decertify an officer for committing a felony, a misdemeanor involving dishonesty, or for failing to maintain good moral character.¹⁸² The CJSTC investigates officer conduct after it receives information from agencies that an officer left employment and whenever local agencies “conduct an internal investigation when they have cause to suspect that an officer has committed a disqualifying crime or moral character violation.”¹⁸³ In both these information mediums to the

¹⁸¹ Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676, 1694 (2020).

¹⁸² *Id.*

¹⁸³ *Id.*

CJSTC, the local agency completely controls the facts and circumstances reported to the CJSTC.¹⁸⁴ Similarly here, local Florida law enforcement agencies utilize Marsy's Law to gatekeep identifying information that would normally be available for public access.

A local law enforcement agency's control over the facts considered in excessive force investigations can have a monumental impact on uncovering the truth of whether the police officer used undue force. Public scrutiny and pressure on agencies to bolster police accountability measures can be invaluable for uncovering facts and witnesses necessary to complete the picture of everything that happened surrounding an excessive force report. For example, in Volusia County, Florida, then-officer Andrew Jenkins, who had previously been awarded a medal of valor, was originally cleared of wrongdoing from an excessive force complaint when the police department reviewed Jenkins' body camera footage.¹⁸⁵ However, video footage from a bystander witness forced the department to reopen its investigation.¹⁸⁶ The witness's video revealed Jenkins violated several sheriff's department policies, "lost his temper," and consequently broke complainant's leg.¹⁸⁷

Before Florida law enforcement agencies utilized Marsy's Law's confidentiality provision, "anyone could request a copy of the police report with the officer's name. From there, you could find that officer's disciplinary history, civilian complaints, if they've shot anyone in the

¹⁸⁴ *Id.*

¹⁸⁵ See Claire Metz, *Volusia County deputy fired after excessive force investigation*, WESH (Apr. 17, 2018, 9:25 PM EDT), <https://www.wesh.com/article/volusia-county-deputy-fired-after-excessive-force-investigation/19845835#>.

¹⁸⁶ See Mills, Patel, & Payne, *supra* note 173.

¹⁸⁷ See Metz, *supra* note 185.

past and other information.”¹⁸⁸ One solution to bring back transparency could be to amend Marsy’s Law, or to add a supplementary bill to further bolster police accountability by clarifying to law enforcement agencies that they cannot utilize the victim information clause to shield officers in excessive force investigation reports.

While Marsy’s Law intended to uplift victims’ voices by improving accessibility to the justice system,¹⁸⁹ Florida’s law enforcement agencies are arguably destroying the public’s accessibility to police procedural transparency. Possessing the ability to redact officer names unfairly gives law enforcement agencies power to shield their own and keep public scrutiny at bay, which is a backwards practice compared to Florida’s legislature’s attempts to increase police accountability.¹⁹⁰ The irony is that local law enforcement agencies already hold vast and exclusive power in controlling what facts to consider when investigating an officer’s conduct.¹⁹¹

V. CONCLUSION

Florida’s current broad, but bright-line rule for designating someone a “victim” automatically entitled to Marsy’s Law protections¹⁹² has been interpreted and capitalized by its state law enforcement agencies to shield individual officers from public scrutiny, even when those officers’ conduct is the focal point of excessive force allegations. While Florida law

¹⁸⁸ Daniel Rivero, *To Conceal Identities in Use-of-force Cases, Police Argue They are Victims*, NPR (Feb. 17, 2022, 4:47 PM ET), <https://www.npr.org/2022/02/17/1081569491/to-conceal-identities-in-use-of-force-cases-florida-police-argue-they-are-victim>.

¹⁸⁹ *See About Marsy’s Law*, *supra* note 1.

¹⁹⁰ *See Castro*, *supra* note 146.

¹⁹¹ Grunwald & Rappaport, *supra* note 181.

¹⁹² Fla. CONST. art. I, § 16 (b).

enforcement is quick to label its officers as victims, in some courts, judges stray from referring to people as victims pre-adjudication¹⁹³ because of the possible effects on a defendant's unadjudicated disposition and constitutional due process rights. Deeming an officer a "victim" worthy of Florida's Marsy's Law rights, particularly in excessive force reports, wrongfully implies the person alleging excessive force is the perpetrator. Florida's current practice—allowing state law enforcement agencies to abuse and stretch broad statutory language to shield officers—goes against the original intent of Marsy's Law and the integral purpose of excessive force investigations.

However, recent events such as the capitol riot¹⁹⁴ exemplifies circumstances whereby officers clearly become victims in the line of duty. Those officers arguably became per se victims which Marsy's Law originally intended to empower. Thus, a broad, fact-triggering exclusionary clause that disqualifies all officers from Marsy's Law victim rights, such as the one in Florida where a direct victim's interest conflicts with a secondary victim,¹⁹⁵ may be too overreaching for the reality of police work that may actually make some officers victims.

A way to narrow Marsy's Law protections and address public policy concerns is if Florida legislators or voters can restrain local agencies from utilizing the confidential provision within excessive force reports. Limiting Marsy's Law in this way would align with the Florida Legislature's recent attempts to bolster police accountability through HB 7051: Law Enforcement and Correctional Officer Practices.¹⁹⁶ HB 7051 specifically requires an inter-

¹⁹³ See Romero & Puskar, *supra* note 156.

¹⁹⁴ See Sprunt, *supra* note 113.

¹⁹⁵ See Fla. CONST. art. I, § 16 (e).

¹⁹⁶ See Amanda Castro, *Florida Governor Signs Police Use of Force Bill*, CLICK ORLANDO (Jun. 30, 2021), <https://www.clickorlando.com/news/2021/06/29/police-use-of-force-bill-goes-to-florida-governor/>.

agency reporting system that prevents officers actively being investigated for excessive force to move to a different agency while still under investigation.¹⁹⁷ To further bolster police accountability, Florida legislators can amend this bill or add a supplementary bill to clarify that local Florida law enforcement agencies cannot utilize Marsy's Law in excessive force investigation reports.

Another method to narrow the scope of Florida's Marsy's Law is to add another exclusionary clause to this portion of Florida's constitution,¹⁹⁸ which would trigger based on specified facts under Florida's broad victim definition. Currently, Florida only has one exclusionary clause that removes a secondary victim, such as a family member, from invoking Marsy's Law protections if the facts show the secondary victim's interest conflicts with the interests of a direct victim.¹⁹⁹ Carving out an additional but very specific exception to Florida's "victim" definition for state agents investigated for potential wrongdoing would still allow the state's definition to remain inclusive. Perhaps triggering facts could clarify that confidentiality can still apply to officers in the public records context where the officer's conduct is not being investigated for wrongdoing. Narrowing Marsy's Law in this way acknowledges that law enforcement officers should still be considered victims in the broad range of circumstances where it makes sense to presume that they are victims.²⁰⁰

¹⁹⁷ *Id.*

¹⁹⁸ Fla. CONST. art. I, § 16 (b).

¹⁹⁹ *Id.*

²⁰⁰ Breuninger & Mangan, *supra* note 112.

Ultimately, Florida law enforcement agencies' current interpretation of Marsy's Law grossly manipulates the law's well-intended purpose—protecting victims from continual harassment—to stall police practice transparency and police accountability. Shielding an officer's name within an excessive force report creates a gross information imbalance between an arm of the state²⁰¹ and the public. How police agencies presently utilize Marsy's Law is likely far from the vision Florida's voters imagined when they were told the legislation would bolster victim's rights.²⁰² Rather, the law is used to stifle efficient public inquiry into the potential violent wrongdoings of those meant to protect the community. In its current state, Florida's Marsy's Law is used to give police agencies an information imbalance, and discourages police accountability rather than empowering victims with a voice in the legal system.

²⁰¹ See *Knab*, 166 N.E.3d 1167, 1174 (2020).

²⁰² See *Rivero*, *supra* note 188.

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