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I. INTRODUCTION AND BACKGROUND

A. Introduction: Crime Victims' State Constitutional Rights Are Often Illusory

In Maryland, a day care provider shook a young couple's baby to death, but the couple was unable to attend the trial, despite the fact that all other nonwitness members of the public could do so.[1] The young couple had state constitutional rights to attend the trial and address the court at sentencing, but the trial court denied their rights.[2] In Utah, a child was seriously sexually abused, and the perpetrator was charged with felony sex crimes. But a plea deal and hearing went forward with no opportunity for the victim to address the court in opposition to the plea,[3] even though the mother of the little boy who was sexually abused had a state constitutional right to address the court to oppose the plea bargain.[4]

1. Rippeon v. State, No. 2554, (Md. Ct. Spec. App. July 9, 2002), *cert. denied*, 810 A.2d 962 (Md. 2002) (copy of unreported opinion on file with author).

2. *Id.*

3. State v. Casey, 44 P.3d 756, 757–58 (Utah 2002).

4. UTAH CONST. art. I, § 28(1) ("To preserve and protect victims' rights to justice and due process, victims of crime have these rights, as defined by law: (a) To be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process . . . .").

The offender pled to a misdemeanor and was given a minimal sanction.[5] Similarly, in Florida, the victim of a multimillion dollar jewelry heist was not provided notice of, or the opportunity to speak at, the thief's plea and sentencing hearing. The owner of the stolen jewelry had a constitutional right to speak at sentencing, but did not get that opportunity.[6] Each court denied all of these victims their state constitutional rights. Their rights were illusory because the victims were unable to enforce them, as they lacked standing to enforce them, remedy for their violation, or review by a higher tribunal.[7]

The crime victims' rights movement worked to enact rights in two waves. The first wave provided victims with statutory rights.[8] Unsatisfied with the response of the legal culture to statutory rights, the crime victims' movement began to work to enact state constitutional rights.[9] The achievements of these victims' rights pioneers are nothing short of astonishing. The second wave resulted in thirty-three state constitutional amendments that contain some kind of victims' rights provision.[10] In the mid-1900s, before the advent of victims' rights, victims were lawfully exiled from criminal processes and rarely notified of important events.[11] Against an entrenched legal culture that

5. *Casey*, 44 P.3d at 757–58.

6. Ford v. State, 829 So. 2d 946, 947 (Fla. Dist. Ct. App. 2002).

7. Even illusory rights provide limited benefits. For instance, some government officials will probably ensure that many victims in their jurisdiction get rights. That some victims have rights is an improvement. Nevertheless, a study on the issue found that notice of a plea bargain was given to 63.4% of white victims and 42.5% of nonwhite victims in states deemed by that study to be strong victims' rights states. *See* NAT'L VICTIM CTR., COMPARISON OF WHITE AND NON-WHITE CRIME VICTIM RESPONSES REGARDING VICTIMS' RIGHTS (1997), *reprinted in* DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE 690–93 (1999). Thus, a remarkably high percentage of victims are not notified of their rights, much less given the opportunity to exercise them. Moreover, it appears that minority victims are less likely to have an opportunity to exercise their rights than other victims. This state of affairs is unacceptable. After all, the purpose of rights is to ensure that everyone has an equal opportunity to exercise them.

8. Don Siegleman & Courtney W. Tarver, *Victims Rights in State Constitutions*, *in* 1 EMERGING ISSUES STATE CONSTITUTIONAL LAW 163–73 (1988).

9. *See, e.g.*, PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114 (1982), *available at* http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/87299.pdf (recommending a federal constitutional amendment as necessary to change the legal culture).

10. See Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 app. A.

11. Former Federal Rule of Evidence 615, enacted in 1975, provided parties with the right to exclude all witnesses (including victims) from any criminal proceeding. Taking the lead of Rule 615, the states also typically gave parties the same right to exclude witnesses. For the history of victim attendance in criminal trials and Rule 615, see Douglas E. Beloof & Paul G. Cassell, *Victim Attendance at Trial: The Re-emerging National Consensus*, 9 LEWIS & CLARK L. REV. (forthcoming

completely excluded victims from the criminal process,[12] these pioneers established critical beachheads for the victims' rights movement. As impressive a feat as securing these beachheads was, the first and second wave of statutory and constitutional victims' rights have not been consistently successful in establishing real crime victims' rights. Present victim rights' laws (or courts' interpretation of those laws) often severely curtail victim standing, remedy, or review. Thus, it is time to move inland.

In this context, standing is the ability of victims to defend a denial of their rights in appellate courts. Differences in standing law appear among jurisdictions, but this Article does not examine various standing doctrines in all fifty-one jurisdictions. Right now, as illustrated by the stories in the introduction, victims are often without standing to vindicate the rights that the first and second waves of the victims' rights movement secured for them. The third wave of victims' standing, remedy, and review will transform these illusory rights into real rights.

There are three main obstacles in the way of turning victims' illusory rights into real rights: (1) government discretion to deny rights, (2) lack of a meaningful remedy to enforce rights, and (3) appellate court discretion to deny review.

The language in some state constitutions permits state governments to exercise their discretion to infringe severely on or completely eliminate victims' rights guaranteed by those state constitutions. Governments have the discretion to ignore constitutional rights that are not mandatory and, when constitutionally required, not reinforced with enabling legislation. Some victims' constitutional rights are cast in discretionary language, and, with limited exceptions, victims have no standing to obtain review of these discretionary rights when the government disregards them. Also, broad victims' constitutional rights provisions are vague. The vagueness of these provisions gives courts the discretion to narrowly apply them.

Victims' rights are also illusory when there is no adequate remedy. Without adequate remedy, victims cannot exercise their rights when prosecutors or trial courts deny them. In certain constitutions, voiding and reconsideration remedies for violations of victims' rights are prohibited or unduly restricted.[13] Because a prerequisite to standing is

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12. Except, of course, as witnesses.

13. See *infra* notes 287–322 and accompanying text for a discussion of these jurisdictions.

remedy, the absence of remedy precludes standing. Even in jurisdictions where such remedies are available, problems of mootness or lack of ripeness prevent remedy. Furthermore, some state constitutional victims' rights deny the courts any authority to stay proceedings while a rights violation is on review. The unavailability of stays aggravates the mootness problem.

Finally, victims' rights are illusory unless there is a nondiscretionary review mechanism. When remedy is available and the violation fits within the scope of the rights, review by writ is expressly or implicitly available under all state constitutional victims' rights provisions. But writ review is discretionary. Because review by writ is discretionary, it is improbable that courts will routinely review individual victims' rights violations.

Troubling too are appellate court deviations from conventional constitutional analyses that result in denials of victim standing. In states where courts should affirm victim standing, emerging judicial opinions deny standing. For example, constitutional rights must be mandatory before there can be standing, remedy, and review. Despite the existence of plain mandatory language in some states' respective bills of rights, however, courts label constitutional rights "directory," thus rendering them discretionary and eliminating potential enforcement.[14] Additionally, constitutional rights must be enabled before there can be standing and remedy. And, as Part II.B.1 explains, even when strong evidence exists that victims' rights are self-enabled, courts have sometimes held that victims' rights amendments are merely advisory and not binding. This reasoning is particularly unpersuasive when compared to courts' vigorous enforcement of defendants' constitutional rights.

There are three legal mechanisms for bringing about victims' standing, adequate remedy, and review. A federal constitutional amendment to the Bill of Rights providing victims' rights, accompanied by standing, meaningful remedy, and review is, from the perspective of providing consistent national rights, the best option. It is also the best option from the perspective of ensuring that courts will conclude that victims' rights are mandatory and enabled. Moreover, a federal constitutional amendment improves the chances that state courts will interpret and enforce the rights in a consistent manner, because the Supreme Court will be the ultimate arbiter of rights. But, as a practical

14. See *infra* notes 107–32 and accompanying text for a discussion of judicial disregard of mandatory rights.

matter, a federal constitutional amendment is the solution most difficult to attain. A second and considerably easier solution is to amend state constitutions to provide explicit protection of victims' rights. Ultimately, a vote of the people of the state is required to approve the amendment, and voters have been historically very receptive to such victim amendments.[15] Third and perhaps the most easily achieved solution is for states to enact legislation that would enable the victims' rights already provided in their state constitutions. Where victims' amendments presently permit, enabling legislation should be rapidly enacted to provide for or clarify victims' standing, meaningful remedy, and review. Unfortunately, some states' constitutional amendments will themselves need amendment before enabling legislation will succeed. In these circumstances legislatures could act to provide independent statutory victims' rights with standing, remedy, and review provisions completely independent of the state constitution. Such statutes would be an interim measure until the state constitution was amended.

Constitutional rights that do not grant people the standing to enforce them are so contrary to our legal traditions that they create a host of dysfunctions. These dysfunctions include: (1) turning judicial hierarchy upside down, (2) upsetting the hierarchy of laws, (3) corrupting the adversary process, (4) crippling rights enforcement, (5) constraining victims' ability to advocate for defendants, and (6) diluting constitutional rights. Providing victims with standing to enforce rights violations along with voiding and reconsideration remedies and appellate review as a matter of right will resolve all of these dysfunctions. Providing for standing, remedy, and review makes victims' rights directly enforceable by victims, brings victims' rights into conformance with the conventional model of individual rights, signals courts' intent to follow conventional constitutional analyses in interpreting victims' rights, and enhances government compliance with these rights. This Article also argues that these results are best achieved by amending or legislatively enabling state constitutions and by enacting a federal constitutional victims' rights amendment.

Part I of this Article provides some helpful background in victims' rights and the participant status of victims. Part II offers a comprehensive look at how states address victims' rights, and how many state courts have wrongfully denied victims' rights even when the rights are included in state constitutions. Part III explores the several dysfunctions of

15. See *infra* notes 19–23 and accompanying text for a discussion of these state amendments.

victims' constitutional rights bereft of standing or meaningful remedy or review. Finally, Part IV identifies the need for state legislation and constitutional amendments and a federal victims' rights constitutional amendment to allow victims to directly enforce their constitutional rights in appellate courts.[16]

B. Background

In order to fully appreciate the significance of the third wave of victims' rights, one should understand the scope of crime victims' rights. This background provides the content of broad and specific victims' rights, the personally held nature of these rights, and victims' status as participants rather than full, or third, parties. Ultimately, this review makes apparent that victims' rights, like other civil rights, are personally held civil liberties against the government.

Victims' rights sound in "fairness to the victim, respect for the victim, and dignity of the victim."[17] Including victims in the criminal justice system finally gives voice to a perspective that has for too long been ignored. As this Article will point out, victims' interests are often at odds with those of the two traditional parties to criminal proceedings, the

16. This Article argues for standing, remedy, and review to enforce currently existing rights. Professor Abraham Goldstein was the first academic to suggest victim standing for the limited purpose of representing a victim in a restitution hearing. *See* Abraham Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515 (1982). Scholars have written about new and expanded rights, and standing to accompany those rights, but that is beyond the scope of this Article. *See, e.g.*, GEORGE FLETCHER, WITH JUSTICE FOR SOME: PROTECTING VICTIMS RIGHTS IN CRIMINAL TRIALS 193–97 (1995) (suggesting, for example, that victims be able to ask questions of witnesses through the judge); Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331, 333 (stating that, while not a supporter of victim standing, "[m]y thesis is that the sorts of victim initiatives that have been successful have been those, and only those, that advance the prosecution's own agenda, while preserving the prosecution's complete freedom from third-party interference" (citations omitted)); Douglas E. Beloof, *Enabling Rape Shield Procedures Under Crime Victims' Constitutional Privacy Rights*, 38 SUFFOLK U. L. REV. (forthcoming Spring 2005) (urging that rape victims be allowed to directly enforce rape shield laws in trial courts and on pretrial review).

This Article also does not address the important relationship of crime victims to substantive criminal law. *See* MARCUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 154 (2002) (warning against the rapid growth of state control through criminalization of victimless harm). Professor Dubber writes: "[T]he point of the *entire* criminal law, and not merely its procedural aspect, is to vindicate the victim's right to autonomy." *Id.*; *see also* Paul H. Robinson, *Should the Victims' Rights Movement Have Influence over Criminal Law Formulation and Adjudication?*, 33 MCGEORGE L. REV. 749, 749 (2002) (arguing against victims' procedural role, but stating, "[the victims' rights movement] ought to have influence over criminal law formulation").

17. Beloof, *supra* note 10, at 293. This Article provides a thorough discussion of the reasons to include victims in the criminal justice process.

state and the defendant.[18] This Article does not offer a detailed defense of the need for victims' rights; it assumes that they are relevant and useful, but it argues that further action is required to fully vindicate the victims' rights that state codes and constitutions already describe. It is against this backdrop that this section outlines the history of the victims' rights movement.

Victims' state constitutional rights can be either broad or specific rights. Broad rights include the victims' rights to fairness, respect, dignity, privacy, freedom from abuse, due process, and reasonable protection.[19] Nineteen state constitutions provide for "fairness" and/or

18. *See infra* Part III.C.

19. ALASKA CONST. art. I, § 24 ("the right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process"); CONN. CONST. art. I, § 8(b)(1) ("the right to be treated with fairness and respect throughout the criminal justice process"); IDAHO CONST. art. I, § 22 ("the following rights: (1) to be treated with fairness, respect, dignity and privacy"); ILL. CONST. art. I, § 8.1(a)(1) ("[t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process"); IND. CONST. art. I, § 13(b) ("the right to be treated with fairness, dignity, and respect throughout the criminal justice process"); LA. CONST. art. I, § 25 ("shall be treated with fairness, dignity, and respect"); MD. CONST. art. 47(a) ("shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process."); MICH. CONST. art. I, § 24(1) ("the right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process."); MISS. CONST. art. III, § 26A ("shall have the right to be treated with fairness, dignity and respect throughout the criminal justice process"); N.J. CONST. art. I, ¶ 22 ("A victim of crime shall be treated with fairness, compassion and respect by the criminal justice system."); N.M. CONST. art. II, § 24(A)(1) ("the right to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process"); OHIO CONST. art. I, § 10a ("Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process . . . ."); OKLA. CONST. art. II, § 34 ("To preserve and protect the rights of victims to justice and due process, and ensure that victims are treated with fairness, respect and dignity, and are free from intimidation, harassment or abuse, throughout the criminal justice process, any victim or family member of a victim of a crime has the right to know . . . .") (listing information rights); OR. CONST. art. I, § 42(1) ("[T]o accord crime victims due dignity and respect . . . the following rights are hereby granted . . . .") (listing rights); R.I. CONST. art. I, § 23 ("A victim of crime shall, as a matter of right, be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process."); S.C. CONST. art. I, § 24(A) ("To preserve and protect victims' rights to justice and due process . . . , victims of crime have the right to: (1) be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal and juvenile justice process."); TENN. CONST. art. I, § 35 ("To preserve and protect the rights of victims of crime to justice and due process, victims shall be entitled to the following basic rights . . . . 2. the right to be free from intimidation, harassment and abuse."); TEX. CONST. art. I, § 30(a) ("A crime victim has the following rights: (1) the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process."); UTAH CONST. art. I, § 28(1) ("To preserve and protect victims' rights to justice and due process, victims of crime have these rights, as defined by law: (a) to be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process."); VA. CONST. art. I, § 8-A ("[I]n criminal prosecutions, the victim shall be accorded fairness, dignity and respect by the officers, employees and agents of the Commonwealth . . . .");

"due process" to victims.[20] One or more of the rights to "respect," "dignity," and "freedom from abuse" appear in twenty-one state constitutions.[21] Six constitutions include the express right to victim "privacy."[22] Eight constitutions provide for a victim's right to "reasonable protection."[23]

With only one exception,[24] state courts have interpreted these broad victims' rights to have substantive meaning. For example, in the New Jersey case *State v. Timmendequas*, the state prosecuted Timmendequas for kidnapping, sexually assaulting, and murdering Megan Kanga.[25] The New Jersey Constitution provides the broad guarantee that, "a victim of crime shall be treated with fairness, compassion and respect by the criminal justice system."[26] The New Jersey Supreme Court held this broad language, coupled with a victim's right to be present at public judicial proceedings, could be the lawful basis to deny a defendant's motion to change venue.[27] The court held that the victim possessed standing in the trial court to seek and obtain the empanelling of a foreign

WASH. CONST. art. I, § 35 ("To ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect, victims of crime are hereby granted the following basic and fundamental rights.") (listing rights); WIS. CONST. art. I, § 9m ("This state shall treat crime victims . . . with fairness, dignity and respect for their privacy.").

20. Beloof, *supra* note 10, at 328–29, app. A.

21. *Id.*

22. *Id.*

23. ALASKA CONST. art. I, § 24 ("the right to be reasonably protected from the accused through the imposition of appropriate bail or conditions of release by the court"); CONN. CONST. art. I, § 8(b)(3) ("the right to be reasonably protected from the accused throughout the criminal justice process"); ILL. CONST. art. I, § 8.1(a)(7) ("[t]he right to be reasonably protected from the accused throughout the criminal justice process"); MICH. CONST. art. I, § 24(1) ("[t]he right to be reasonably protected from the accused throughout the criminal justice process"); MO. CONST. art. I, § 32(1)(6) ("[t]he right to reasonable protection from the defendant or any person acting on behalf of the defendant"); N.M. CONST. art. II, § 24(A)(3) ("the right to be reasonably protected from the accused throughout the criminal justice process"); S.C. CONST. art. I, § 24(A)(6) ("[the right to] be reasonably protected from the accused or persons acting on his behalf throughout the criminal justice process"); WIS. CONST. art. I, § 9m ("[the right to] reasonable protection from the accused throughout the criminal justice process").

24. The sole exception is the ill-conceived opinion of the Rhode Island Supreme Court in *Bandoni v. State*, 715 A.2d 580, 587 (R.I. 1998). No opinion in any other state appellate court involving broad victims' constitutional rights has found such a provision to be merely directory to the legislature. For a comprehensive discussion of *Bandoni*, see *infra* notes 173–202.

25. 737 A.2d 55, 64 (N.J. 1999).

26. N.J. CONST. art. I, § 22.

27. *Timmendequas*, 737 A.2d at 76; *see also In re* K.P., 709 A.2d 315, 321 (NJ Super. Ct. Ch. Div. 1997) (holding under New Jersey's broad rights that a victim had standing and an unarticulated right to oppose a petition by the press to open a juvenile proceeding).

jury in preference to a change of venue.[28] In Arizona, intermediate appellate courts have held that victims' broad rights to fairness, respect, dignity, freedom from abuse, and due process, coupled with more particular rights, rendered unlawful orders requiring victims to submit to fingerprinting[29] or requiring state interviews of victims to be electronically recorded and made available to the defense.[30]

Several state courts have recognized victims' broad constitutional rights only to find that the scope of the rights did not extend to the factual context of the cases. The Illinois Supreme Court held broad language providing that "[c]rime victims . . . shall have the following rights as provided by law . . . [, including] the right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process"[31] did not alter the rule that a defendant's death before final appeal abated the judgment below.[32] The Maryland Supreme Court ruled that the broad language of the Maryland Constitution, which provides that "[a] victim of crime shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process,"[33] did not grant a trial court the discretion to admit into evidence in-life photographs of the homicide victim.[34] In a New Mexico case, the court refused to extend a crime victim's constitutional "right to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process" to alter a law concerning waiver of evidentiary privileges.[35] In Wisconsin, the court declined to rely on broad provisions to give the victim an interest in the change of venue proceeding.[36] The broad constitutional rights reviewed in these opinions plainly have substantive meaning or the courts would not have bothered to assess the scope of the right.[37]

28. *Timmendequas*, 737 A.2d at 76.

29. Romley v. Schneider, 45 P.3d 685, 688 (Ariz. Ct. App. 2002).

30. State v. O'Neil, 836 P.2d 393, 394 (Ariz. Ct. App. 1991).

31. ILL. CONST. art. I, § 8.1(a).

32. People v. Robinson, 719 N.E.2d 662, 663 (Ill. 1999).

33. MD. CONST. art. 47(a).

34. State v. Broberg, 677 A.2d 602, 612 (Md. 1996).

35. State v. Gonzales, 912 P.2d 297, 300 (N.M. Ct. App. 1996).

36. State v. Rymer, 2001 WI Ct. App. 31U, ¶ 16, 622 N.W.2d 770, *cert. denied*, 2001 WI 15, 626 N.W.2d 807.

37. Moreover, absent some explicit restriction in the plain language, these broad rights are substantive for another reason. The substantive meaning is revealed by comparing victims' explicit right of "privacy" in state constitutions with the federal Constitution's penumbral right of privacy. In nonvictim contexts, the U.S. Supreme Court has implied a federal constitutional right to privacy. The

In contrast to broad rights, specific victims' rights provide rights more focused than general "fairness." They can be parsed into the categories of due process and protection. Due process rights include rights to be notified, present, and heard at particular stages of the criminal process. Typically, a victim's right to be present is limited to critical stages of the criminal process or stages in which a defendant also has a right to be present.[38] Victims have rights to receive notice of their rights and notice of criminal proceedings. While the most common

term "privacy" is not expressly set out in the U.S. Constitution. Nevertheless, the U.S. Supreme Court has gleaned a right to privacy from the penumbras of the Constitution. In the 1965 case of *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (finding a right to privacy in the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments), the Court, in finding a right to privacy in a marital relationship, determined that some fundamental rights are not enumerated in the Constitution but nevertheless exist. Since *Griswold*, the Court has relied upon the penumbral right to privacy to protect "decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education." Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) (internal citations and quotations omitted). As recently as 2003, in *Lawrence v. Texas*, the Court expanded on the legitimacy of the penumbral right to privacy by holding that privacy protects the conduct between consenting homosexual adults in the home. 539 U.S. 558, 562 (2003). Accompanying this federal penumbral right to privacy is standing and remedy for the individual whose privacy rights are violated. If a constitutional right to privacy can be gleaned from constitutional penumbras, then an express right to "privacy" for crime victims clearly has substantive significance.

38. ALASKA CONST. art. I, § 24 ("allowed to be present to all . . . proceedings where accused has the right to be present"); ARIZ. CONST. art. II, § 2.1(A)(3) ("[t]o be present at, and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present"); CONN. CONST. art. I, § 8(b)(5) ("shall have . . . [t]he right to attend the trial and all other court proceedings the accused has the right to attend, unless such person is to testify and the court determines that such person's testimony would be materially affected if such person hears other testimony"); ILL. CONST. art. I, § 8.1(a)(8) ("shall have . . . the right to be present at the trial and all other court proceedings on the same basis as the accused, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial."); MICH. CONST. art. I, § 24(1) ("shall have . . . [t]he right to attend trial and all other court proceedings the accused has the right to attend"); MO. CONST. art. I, § 32(1)(1) ("shall have . . . the right to be present at all criminal justice proceedings at which the defendant has such right"); N.M. CONST. art. II, § 24(A)(5) ("shall have . . . the right to attend all public court proceedings the accused has the right to attend"); OKLA. CONST. art. II, § 34(A) ("right to be present at any proceeding where the defendant has a right to be present"); OR. CONST. art. I, § 42(1)(a) ("right to be present at and, upon specific request, to be informed in advanced of any critical stage of the proceedings held in open court when the defendant will be present"); S.C. CONST. art. I, § 24(A)(3) ("have the right to . . . be informed of and present at any criminal proceedings which are dispositive of the charges where the defendant has the right to be present"); TENN. CONST. art. I, § 35(3) ("[s]hall be entitled to . . . the right to be present at all proceedings where the defendant has the right to be present"); WA. CONST. art. I, § 35 ("[u]pon notifying the prosecuting attorney, . . . shall have the right to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend").

victims' right allows the victim to speak at the defendant's sentencing,[39] some constitutions provide for the right to speak at pretrial release or bail hearings and to be heard concerning a negotiated plea.[40] Constitutions in certain states give victims a right to confer with the prosecution concerning charging or disposition.[41] This is not a right to control the prosecution, but rather to gather information, to express concerns and preferences. Some constitutions grant victims the right to be heard at postconviction release hearings, such as parole hearings.[42] Victims have rights to a speedy trial or prompt disposition,[43] and the right to attend the

39. Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 299–305, app. I (2003) (collecting constitutional and statutory rights of victims to speak at sentencing).

40. A right to be heard at sentencing can sometimes allow for the victim to be heard by the court concerning a proposed plea bargain. *See, e.g.*, People v. Stringham, 253 Cal. Rptr. 484, 492 (Cal. Ct. App. 1988).

41. ALASKA CONST. art. I, § 24 ("to confer with the prosecution"); ARIZ. CONST. art. II, § 2.1(A)(6) ("[t]o confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition"); IDAHO CONST. art. I, § 22(5) ("[t]o communicate with the prosecution"); ILL. CONST. art. I, § 8.1(a)(3) ("shall have . . . the right to communicate with the prosecution"); IND. CONST. art. I, § 13(b) ("shall have the right . . . to confer with the prosecution, to the extent that exercising these rights does not infringe upon the constitutional rights of the accused"); LA. CONST. art. I, § 25 ("shall have . . . the right to confer with the prosecution prior to final disposition of the case"); MICH. CONST. art. I, § 24(i) ("shall have . . . right to confer with the prosecution"); N.M. CONST. art. II, § 24(A) ("shall have . . . the right to confer with prosecution"); N.C. CONST. art. I, § 37(i)(h) ("shall be entitled to . . . the right as prescribed by law to confer with the prosecution"); S.C. CONST. art. I, § 24(A)(7) ("have the right to . . . confer with the prosecution, after the crime against the victim has been charged, before the trial or before any disposition and informed of the disposition"); TENN. CONST. art. I, § 35(1) ("shall be entitled to . . . [t]he right to confer with the prosecution"); TEX. CONST. art. I, § 30(b)(1) ("on request . . . the right to confer with representative of the prosecutor's office"); VA. CONST. art. I, § 8-A(7) ("[t]he right to confer with the prosecution"); WIS. CONST. art. I, § 9m ("state shall ensure that crime victims have . . . the opportunity to confer with the prosecution").

42. ARIZ. CONST. art. II, § 2.1(A)(9) ("[t]o be heard at any proceeding when any post-conviction release from confinement is being considered"); MO. CONST. art. I, § 32(1)(2) ("[t]he right to be informed of and heard at . . . probation revocation hearings, and parole hearings, unless in the determination of the court the interests of justice require otherwise"); NEV. CONST. art. I, § 8(2)(c) ("[h]eard at all proceedings for the . . . release of a convicted person after trial"); S.C. CONST. art. I, § 24(A)(10) ("have the right to . . . be informed of any proceeding when any post-conviction action is being considered, and be present at any post-conviction hearing involving a post-conviction release decision").

43. ALASKA CONST. art. I, § 24 ("timely disposition . . . following the arrest of the accused"); ARIZ. CONST. art. II, § 2.1(A)(10) ("a speedy trial or disposition and prompt and final conclusion of the case after the conviction"); CONN. CONST. art. I, § 8(b)(2) ("timely disposition . . . following the arrest of the accused"); IDAHO CONST. art. I, § 22 ("timely disposition of the case"); ILL. CONST. art. I, § 8.1(A)(6) ("timely disposition . . . following arrest of the accused"); MICH. CONST. art. I, § 24 ("timely disposition . . . following the arrest of the accused"); MO. CONST. art. I, § 32 ("a speedy disposition and appellate review"); S.C. CONST. art. I, § 24(A) (11) ("prompt and final conclusion of

trial in many jurisdictions.[44] Finally, rights of protection include notice of pretrial release, imprisonment, and postsentence release or escape.[45]

the case"); TENN. CONST. art. I, § 35 ("to a speedy trial or disposition and a prompt and final conclusion of the case after the conviction."); WIS. CONST. art. I, § 9m ("timely disposition").

44. ALA. CONST. amend. 557 (victim can attend all crucial stages of proceedings, to the extent attendance does not interfere with constitutional rights of defendants); ALASKA CONST. art. I, § 24 (victim can attend all proceedings a defendant has the right to attend); ARIZ. CONST. art. II, § 2.1(A)(3) (victim can attend all proceedings in which defendant, prosecutor, and general public have a right to attend); COLO. CONST. art. II, § 16a (victim can attend critical procedures); FLA. CONST. art. I, § 16(b) (victim can attend critical proceeding, to extent attendance does not interfere with defendant's right); IDAHO CONST. art. I, § 22 (victim can attend criminal justice proceedings); ILL. CONST. art. I, § 8.1(a)(8) (victim can attend all court proceedings, unless victim's testimony will be materially affected); IND. CONST. art. I, § 13(b) (victim allowed to be present during public hearings); KAN. CONST. art. XV, § 15(a) (victim can attend to extent attendance does not interfere with rights of criminal defendants); LA. CONST. art. I, §25 (victim allowed to be present during all critical stages of preconviction and postconviction proceedings); MD. CONST. art. 47(b) (victim can attend criminal justice proceedings; victim must first testify); MICH. CONST. art. I, § 24(1) (victim can attend trial and other court proceedings); MISS. CONST. art. III, § 26(A) (victim allowed to be present at all public hearings when authorized by law); MO. CONST. art. I, § 32 (victim can attend criminal justice proceedings); NEB. CONST. art. I, § 28(1) (victim has the right to be present at trial unless the trial court finds sequestration necessary for a fair trial for the defendant); NEV. CONST. art. I, § 8 (victim has the right to be present at all public hearings involving the critical stages of a criminal proceeding); N.J. CONST. art. I, ¶ 22 (victim can attend judicial proceedings open to the public; court may sequester prior to testifying); N.M. CONST. art. I, § 24 (victim can attend all public court proceedings); N.C. CONST. art. I, § 37(1)(a) (victim can attend court proceedings of defendant); OKLA. CONST. art. II, § 34(A) (victim has the right to be present at any proceeding at which the defendant has the right to be present); OR. CONST. art. I, § 42(1)(a) (passed by referendum) (victim can attend all critical proceedings); S.C. CONST. art. I, § 24 (victim can be present at any criminal proceedings which are dispositive of the charges where the defendant has the right to be present); TENN. CONST. art. I, § 35(3) (victim has the right to be present at any criminal proceedings where the defendant has the right to be present); TEX. CONST. art. I, § 30(b)(2) (victim can attend all public proceedings, unless testimony materially affected); UTAH CONST. art. I, § 28(1)(b) (victim can attend trial and related proceedings); WASH. CONST. art. II, § 35 (victim can attend after victim testifies; victim has right to testify first); WIS. CONST. art. I, § 9m (victim can attend court proceedings; court can sequester to assure fair trial).

45. ALASKA CONST. art. I, § 24 ("[c]rime victims . . . have the following rights . . . to be reasonably protected from the accused through the imposition of appropriate bail or conditions of release by the court"); CAL. CONST. art. I, § 28(a) ("rights of victims . . . encompass[] . . . the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged"); CONN. CONST. art. I, § 8(b) ("shall have . . . the right to be reasonably protected from the accused throughout the criminal justice process"); ILL. CONST. art. I, § 8.1(a)(7) ("shall have . . . [t]he right to be reasonably protected from the accused throughout the criminal justice process"); MICH. CONST. art. I, § 24(i) ("shall have . . . the right to be reasonably protected from the accused throughout the criminal justice process"); MO. CONST. art. I, § 32(1)(6) ("[t]he right to reasonable protection from the defendant or any person acting on behalf of the defendant"); N.M. CONST. art. II, § 24(A)(3) ("shall have . . . the right to be reasonably protected from the accused throughout the criminal justice process"); S.C. CONST. art. I, § 24(A)(6) ("have the right to . . . be reasonably protected from the accused or persons acting on his behalf throughout the

While victims have these specific rights, some courts have been reluctant to give specific rights an expansive interpretation in certain contexts. For example, under the Texas Constitution, the specific right to confer with the prosecutor coupled with the broad right to "fairness" did not grant the victim the right to discover evidence in the prosecutor's file to facilitate a civil suit.[46] Additionally, the Illinois appellate court held that "the [victims' rights] Act and the [victims' rights] amendment" did not alter the "fundamental principle" that a conviction based on illegally obtained, inadmissible evidence could not stand.[47] In Arizona, a state constitutional right allows victims to refuse pretrial interviews, but does not implicitly include a right not to testify in a pretrial hearing[48] or refuse to testify at presentence hearings.[49] Concerning victims' rights to attend trial, a Florida appellate court ruled that a victim's right "to be present at all crucial stages of criminal proceedings"[50] did not create a right for victims to sit at counsel table.[51] Under California law, victims' right to speak at sentencing does not mean that a victim alone can alter the terms of the sentence.[52] In these jurisdictions, these specific rights have substantive meaning, although the scope of the rights did not encompass the facts of the cases.

On the other hand, some courts have held that specific constitutional provisions have enough substantive force to alter lesser laws in certain contexts. For example, in Michigan, a victim's constitutional right to

criminal justice process"); TEX. CONST. art. I, § 30(a)(2) ("has . . . the right to be reasonably protected from the accused throughout the criminal justice process"); VA. CONST. art. I, § 8-A(1) ("[t]he right to protection from further harm or reprisal through the imposition of appropriate bail and conditions of release"); WIS. CONST. art. I, § 9m ("state shall ensure that crime victims have . . . reasonable protection from the accused throughout the criminal justice process").

46. State *ex rel.* Hilbig v. McDonald, 839 S.W.2d 854, 855–56 (Tex. App. 1992).

47. People v. Nestrock, 735 N.E.2d 1101, 1109 (Ill. App. Ct. 2000), *appeal denied*, 742 N.E.2d 332 (Ill. 2000).

48. State *ex rel.* Dean v. City of Tucson, 844 P.2d 1165, 1167 (Ariz. Ct. App. 1992).

49. A.H. *ex rel.* Weiss v. Superior Court, 911 P.2d 633, 636 (Ariz. Ct. App. 1996).

50. FLA. CONST. art. I, § 16(b).

51. Hall v. State, 579 So. 2d 329, 331 (Fla. Dist. Ct. App. 1991). A victim's ability to sit at the counsel table can be achieved in most jurisdictions by demonstrating that the victim will be of assistance to the prosecution. Beloof & Cassell, *supra* note 11. The victims' presence at the counsel table allows the victim and the prosecution to confer, which may add an important aspect to the truth-finding process. *See* FED. R. EVID. 615. The old rule that a victim's presence had to be "essential" is rendered obsolete in those jurisdictions where the victim has the right to attend trial. Essentiality should no longer be necessary because the victim will attend anyway. A certification by the prosecutor that the victim's presence at the counsel table would be of assistance should now be sufficient.

52. Dix v. Superior Court, 807 P.2d 1063, 1067 (Cal. 1991).

restitution precludes abatement of a restitution order based on a criminal judgment. A Michigan constitutional amendment provides that "[c]rime victims . . . shall have . . . [t]he right to restitution."[53] The Michigan Supreme Court held that rules of abatement, which once voided defendants' conviction and judgment upon death if death occurs before appeals are exhausted, were now modified by the victims' constitutional rights.[54] In an Arizona case, it was held proper to balance a victim's right to a speedy trial with the defendant's due process right to prepare for trial. The result was denial of a defense continuance when the defendant had fired his lawyer and desired to represent himself.[55] As reviewed above, courts have coupled specific rights with broad rights and determined that these rights are powerful enough to alter procedural choices in favor of the victim.[56]

Specifically, victims' constitutional rights are superior to and, where a conflict exists, trump statutes[57] or court rules.[58] For example, under the Arizona Constitution, "'[v]ictim' means a person against whom the criminal offense has been committed."[59] In *State v. Roscoe*, the Arizona Supreme Court held that an enabling statute narrowly defining the term "crime victim" to exclude police officers was unconstitutional because it conflicted with the broader meaning of "victim" set forth in the Victims' Bill of Rights.[60]

When victims are exercising either their broad or specific rights, they are no longer merely witnesses or third parties in the criminal process. Rather, victims are "participants" in the criminal process. Being a participant means the "crime victim [has] rights of intermittent participation in the criminal [trial] process."[61] Victims are participants because they possess independent rights to participate at certain stages of the criminal process. For example, victims have an independent right to give impact statements at sentencing, typically including the right to give

53. MICH. CONST. art. I, § 24(1). For an opinion that says a victim's rights do not change abatement rules, see *People v. Robinson*, 719 N.E.2d 662, 663 (Ill. 1999).

54. People v. Peters, 537 N.W.2d 160, 164 (Mich. 1995).

55. State v. Lamar, 72 P.3d 831, 836–37 (Ariz. 2003); *see also* United States v. Broussard, 767 F. Supp. 1536 (D. Or. 1991) (balancing defendant's need for time to prepare for trial with statutory mandate to give docket priority to cases with child/victim witnesses).

56. *See supra* notes 19–55 and accompanying text.

57. *See* State v. Roscoe, 912 P.2d 1297, 1299–1302 (Ariz. 1996).

58. State v. O'Neil, 836 P.2d 393 (Ariz. Ct. App. 1991).

59. ARIZ. CONST. art. II, § 2.1(C).

60. 912 P.2d at 1302.

61. Beloof, *supra* note 39, at 286.

a sentencing recommendation.[62] Victims may address the court at sentencing regardless of whether they are called as witnesses by either party and despite the objection of either party.[63] Thus, victims at sentencing are not *witnesses* called by parties to give victim impact *testimony*, but rather are independent *participants* at sentencing hearings with a right to *present* impact information and sentencing recommendations.[64]

Although victims are participants when exercising their rights in trial level courts, they are not full parties to felony criminal cases. For example, victims do not have the right to independently prosecute felony criminal trials,[65] and their role at trial is generally limited to that of

62. *Id.*

63. *Id.*

64. *Id.*

65. Defendants' due process rights prevent the victim from being a private prosecutor in felony cases. *See* East v. Scott, 55 F.3d 996, 1001 (5th Cir. 1995) (holding that if a private prosecutor in a felony case controlled the criminal prosecution, defendants' due process rights would be violated); Person v. Miller, 854 F.2d 656, 662–64 (4th Cir. 1988); *see also* Forsythe v. Walters, No. 00-3352, 2002 WL 1283400, at *2 (3d Cir. May 3, 2002) (finding that a victim impact statement did not violate ex post facto laws because the victim's right to speak is not a right to punishment); Hall v. State, 579 So. 2d 329, 331 (Fla. Dist. Ct. App. 1991) (holding that a victim's right to be present at trial is not a right to actively participate in trial); Curry v. Commonwealth, No. 2001-SC-0530-MR, 2003 WL 1193799 (Ky. Jan. 23, 2003) (determining that because the right to consult with the prosecutor is not a duty to obey, the exercise of such right does not violate any constitutional right of the defendant); State v. Adkins, 97-0219 (La. App. 3 Cir. 10/29/97) (holding that a similar statute did not give right to determine who was in charge of the investigation or prosecution); State v. Harrison, 24 P.3d 936, 945 (Utah 2001) (limiting victims' attorney participation to the limits of permissible victim participation in a guardian ad litem situation).

The *East* and *Person* cases also held that a privately funded prosecutor could constitutionally assist in the prosecution as long as control of the prosecution remained with the public prosecutor. *East*, 55 F.3d at 1001; *Person*, 854 F.2d at 662–64. This is the law in most jurisdictions. *See* Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEG. HIST. 43, 49 (1995). Misdemeanor prosecutions are not subject to the due process limit. *See, e.g.*, Cronan *ex rel.* State v. Cronan, 774 A.2d 866, 867–68 (R.I. 2001). Professor George Fletcher has suggested a different kind of victim participation—that the victim should be able to pose questions to witnesses through the judge. *See* FLETCHER, *supra* note 16.

Victims also do not control decisions traditionally made by courts. In *State v. Barnett*, 980 S.W.2d 297, 308 (Mo. 1998), the Missouri Supreme Court held that victims' "right to be heard" did not give the victims control over the judge's sentencing decision. In *Barnett*, the defendant was sentenced to death against the victims' wishes. The court opined that the requirements of the crime victims' amendment were "fully satisfied by affording victims the opportunity for input at sentencing." *Id.* The Missouri Supreme Court also held that the specific language in the Missouri Constitution granting a victim the right to speak at sentencing did not give the victim control over the disposition of a case. State v. Jones, 979 S.W.2d 171, 179 (Mo. 1998), *cert. denied* 525 U.S. 1112 (1999). A South Carolina court held that a victim's right to be informed of and discuss a plea

observer and witness.[66] Victims do not need to be full parties or third parties, however, to exercise their participatory rights in trial courts. As a practical matter, independent participant status is limited to expressly legislated participation (with the exception of common law accommodations). Full parties, on the other hand, participate in the entire criminal process. Third parties, like nonvictim witnesses, are not victim participants. For purposes of determining victims' procedural status, victims are full parties for purposes of defending their rights, even though they are only participants in the criminal process when exercising their rights. Thus, victims defending against a rights violation in trial or appellate courts are full parties to the rights litigation, while victims exercising rights in trial court are participants in the criminal process.

The personal nature of victims' rights is revealed by the plain language of the various constitutional provisions, as well as relevant court opinions. The titles of the constitutional sections clearly delineate the rights as "Victims' Rights" or "Rights of Crime Victims."[67] The texts of the amendments also make apparent that the rights are personal to the

bargain with the prosecutor did not give the victim a right to veto the plea bargain. Reed v. Becka, 511 S.E.2d 396, 400 (S.C. App. 1999).

66. Victims in many jurisdictions have a right to attend the trial and other public criminal proceedings. *See supra* note 38. Additionally, victims may sit at the counsel table to assist the prosecution, either as a matter of right, *see* Crowe v. State, 485 So. 2d 351, 363 (Ala. Crim. App. 1984), *rev'd on other grounds*, *Ex parte* Crowe, 485 So. 2d 373 (Ala. 1985), or upon a showing by the prosecutor that the victim will be of material assistance, *see* FED. R. EVID. 615.

67. ALA. CONST. amend. 557 ("Basic Rights for Crime Victims"); ALASKA CONST. art. I, § 24 ("Rights of Crime Victims"); ARIZ. CONST. art. II, § 2.1 ("Victims' Bill of Rights"); CAL. CONST. art. I, § 28 ("Legislative findings and declaration; rights of victims; restitution; safe schools; truth-in-evidence; bail; prior convictions"); COLO. CONST. art. II, § 16a ("Rights of crime victims"); CONN. CONST. art. I, § 8(b) ("Rights of victims of crime"); FLA. CONST. art. I, § 16(b) ("Rights of accused and victims"); IDAHO CONST. art. I, § 22 ("Rights of crime victims"); ILL. CONST. art. I, § 8.1 ("Crime Victim's Rights"); KAN. CONST. art. XV, § 15 ("Victims' rights"); LA. CONST. ART. I, § 25 ("Rights of a Victim"); MD. CONST. art. 47 ("Crime Victims' Rights"); MICH. CONST. art. I, § 24 ("Rights of crime victims; enforcement; assessment against convicted defendants"); MISS. CONST. art. III, § 26A ("Victims' rights; construction of provisions; legislative authority"); MO. CONST. art. I, § 32 ("Crime victims' rights"); NEB. CONST. art. I, § 28 ("Crime victims; rights enumerated; effect; Legislature; duties"); NEV. CONST. art. I, § 8(2) ("rights of victims of crime"); N.J. CONST. art. I, §22 ("Rights of victims of crimes"); N.M. CONST. art. II, § 24 ("Rights of crime victims"); N.C. CONST. art. I, § 37 ("Rights of victims of crime"); OHIO CONST. art. I, § 10a ("Rights of victims of crimes"); OKLA. CONST. art. II, § 34 ("Rights of victims"); OR. CONST. art. I, § 42 ("Rights of victim in criminal prosecutions, juvenile court, and delinquency proceedings"); R.I. CONST. art. I, § 23 ("Rights of victims of crime"); S.C. CONST. art. I, § 24 ("Victims' Bill of Rights"); TENN. CONST. art. I, § 35 ("Rights of victims of crimes"); TEX. CONST. art. I, § 30 ("Rights of crime victims"); UTAH CONST. art. I, § 28 ("Declaration of the rights of crime victims"); VA. CONST. art. I, § 8A ("Rights of victims of crime"); WASH. CONST. art. I, § 35 ("Victims of Crimes—Rights"); WIS. CONST. art. I, § 9m ("Victims of crime").

victim by expressly stating that "victims have the right to" or "victims have the following rights," or similar language.[68] Moreover, the rights are lodged in states' bills of rights, revealing that the rights are individual rights against government.

State court opinions confirm that victims' rights are personal to the victim, and that only the victims may waive their own rights. For example, an Arizona appellate court held that a victim's failure to assert a right to restitution within a reasonable time constituted a waiver.[69] On the other hand, victims' rights are not susceptible to waiver by the prosecutor.[70] The state has no authority to waive victims' right to restitution,[71] and, additionally, prosecutors cannot waive victims' right to make a separate sentencing recommendation.[72] Thus, a victim did not waive the right to restitution when the probation officer failed in his statutory duty to contact the victim about monetary loss.[73]

Victims' rights are protected against waiver by the state even when the state has authority to enforce the rights. Most victims cannot readily afford counsel, do not have a right to appointed counsel, or may not be able to be present at every proceeding. As a result, some jurisdictions allow prosecutors to enforce victims' rights. But even when the state may enforce victims' rights, the state has no authority to waive victims' rights. In an action that consolidated three Arizona cases,[74] the defendants sought to interview the victim. In two of the cases, the prosecutor's paralegal made representations that an interview of the victim would occur.[75] In the third case, the victim appeared at the motion to compel hearing and invoked her right not to be interviewed.[76] In all three cases, the trial court ordered the victim interview.[77] The appellate

68. *See supra* notes 19–23, 38, 41–45 and accompanying text for a discussion of the rights guaranteed by state constitutions.

69. *In re* Alton D., 994 P.2d 402, 406 (Ariz. 2000).

70. *See, e.g.*, State v. Robinson, No. C1-02-1957, 2003 WL 21694412, at *3 (Minn. Ct. App. Jul. 22, 2003) (holding that rights are personal to the victim, the prosecutor cannot waive rights on behalf of the victim, and the victim has no obligation to remain silent if the state has agreed to remain silent pursuant to plea agreement).

71. People v. Valdez, 30 Cal. Rptr. 2d 4, 8 (Cal. Ct. App. 1994); *accord* People v. Licon, No. F037140, 2002 WL 1767570, at *2 n.3 (Cal. Ct. App. 2002).

72. *Robinson*, 2003 WL 21694412, at *3.

73. State v. Contreras, 885 P.2d 138, 142 (Ariz. Ct. App. 1994).

74. State v. Warner, 812 P.2d 1079, 1081–82 (Ariz. Ct. App. 1990).

75. *Id.* at 1081.

76. *Id.*

77. *Id.*

court overturned the orders, holding that the state did not have authority to waive victims' rights and the defendants did not have a right to rely on the paralegal's representations as to the effect of the amendment on the cases.[78] The personally held nature of victims' rights is further evidenced by the exclusion of defendants from the benefits of victims' rights amendments.[79]

In sum, the plain language and location of victims' constitutional rights amendments establish that victims' rights are personal to the victim. Furthermore, court opinions holding that victims can exercise or waive victims' rights and that the state or nonvictims cannot waive such rights confirm that the rights are personal to the victim. Victims' rights consist of broad rights to fairness, dignity, privacy, freedom from abuse, due process, and reasonable protection. Specific rights include rights of participation, privacy, and protection. Victims exercising their rights are participants in the criminal process, and victims enforcing rights violations are full parties to the rights enforcement action.

II. HOW VICTIMS ARE DENIED STANDING

This Part is divided into four sections. Section A undertakes an examination of how real rights require standing, adequate remedy, and review. It recognizes the fundamental constitutional principle that rights have remedies and uses the example of criminal defendants' constitutional rights to demonstrate how real rights might work.

Section B explores the problem that judicial discretion poses to victims' rights, noting that, as a general matter, discretionary rights are unenforceable. It addresses three distinct discretion problems: (1) discretion that exists when rights are not mandatory or are not enabled, (2) discretionary language accompanying particular victims' rights, and (3) judicial discretion in the interpretation of broad victims' rights.

Section C reveals that inferior remedies for victims' rights violations, including monetary damages, injunctions, and administrative regulation,

78. *Id.*

79. Defendants typically cannot avail themselves of victims' rights violations. *See, e.g.*, N.C. CONST. art. I, § 37(3) ("No ground for relief in criminal case. The failure or inability of any person to provide a right or service provided under this section may not be used by a defendant in a criminal case, an inmate, or any other accused as a ground for relief in any trial, appeal, postconviction litigation, habeas corpus, civil action, or any similar criminal or civil proceeding."); Herrera v. State, 24 S.W.3d 844, 846 (Tex. Crim. App. 2000) (holding that defendant charged with assaulting his wife did not have standing to assert victims' rights of his wife or give his wife standing to participate as a party in the criminal prosecution).

are insufficient to enforce victims' rights. To adequately vindicate victims' rights, the superior remedies of voiding and reconsideration are necessary. These remedies actually allow victims to exercise their constitutional rights. This section also argues that the constitutional protection against double jeopardy will not normally preclude a judge from voiding a criminal conviction for a violation of a victim's rights.

Finally, Section D reviews problems arising in appellate review, including the double bind of ripeness and mootness that hamper victims' rights enforcement. It also addresses express limits imposed on review in victims' constitutional provisions.

A. Real Rights Require Standing, Adequate Remedy, and Review

As John Marshall famously declared over 200 years ago, "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[80] Some victims' rights provisions deny remedy. Where remedy may exist, some courts have refused to follow Marshall's advice and have denied victims the ability to vindicate their rights. A comparison of victims' rights with criminal defendants' rights—criminal defendants being the only other individuals with constitutional rights in the criminal process—will illustrate how this denial of victims' rights is contrary to the American tradition described by Marshall.

Crime victims' state constitutional rights provisions equate victims' and defendants' rights in various ways. For example, victims' rights to attend proceedings are often linked to those proceedings a defendant also has the right to attend.[81] Victims' rights, like defendants' rights, can be

80. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

81. ALASKA CONST. art I, § 24 (victims are "allowed to be present at all . . . proceedings where the accused has a right to be present"); ARIZ. CONST. art. II, § 2.1(A)(3) (victim has the right "[t]o be present at . . . all criminal proceedings where the defendant has the right to be present"); CONN. CONST. art. I, § 8 (victim has "the right to attend the trial and all other court proceedings the accused has the right to attend"); ILL. CONST. art. I, § 8.1(8) (victim has the right "to be present at trial and all other proceedings on the same basis as the accused"); MICH. CONST. art. I, § 24(1) (victim has the right "to attend trial and all other court proceedings the accused has the right to attend"); MO. CONST. art. I, § 32 (victim has the right "to be present at all criminal justice proceedings at which the defendant has such right"); N.M. CONST. art. II, § 24 (victim may "attend all public court proceedings the accused has the right to attend"); N.C. CONST. art. I, § 37(1)(a) (victim has the right to "be present at court proceedings of the accused"); OR. CONST. art. I, § 42(1)(a) (victim has the right "to be present at . . . any critical stage of the proceedings held in open court when the defendant will be present"); S.C. CONST. art. I, § 24(A)(3) (victim has the right to be

found in state bills of rights. Moreover, only the courts can ultimately vindicate the constitutional rights of both defendants and victims.

Criminal defendants have real constitutional rights as well as standing and remedy to defend against violations of those rights. When a defendant's Fifth Amendment right against self- incrimination is violated, the defendant has standing to appeal from the final judgment. Thus, in *Miranda v. Arizona*,[82] the failure to adequately inform the defendant of his constitutional right to remain silent was the legitimate basis for appeal. Moreover, upon finding a violation had occurred, the Supreme Court did not hesitate to remedy it. The Court voided the judgment and remanded the case to the trial court for proceedings conforming to the defendant's constitutional rights. Similarly, when a defendant's right to privacy under the Fourth Amendment is violated, the defendant has the right to appeal and seek a remedy. For example, in *Katz v. United States*,[83] the defendant had standing to appeal a violation of his Fourth Amendment right to privacy when the government tapped and recorded his conversation in a public telephone booth. The Court remedied the violation by voiding the judgment. Likewise, when a defendant is denied his Sixth Amendment right to counsel, he has standing to enforce the right. Thus, in *Gideon v. Wainwright*,[84] the defendant had standing to enforce his Sixth Amendment right to counsel. The Court voided the conviction and sentence.

Defendants' due process rights are also inseparable from defendants' standing to obtain review of rights violations. If the right is violated, remedy is available. For example, defendants have standing to appeal a sentence and have the sentence voided when they are denied the opportunity to speak at sentencing. In *Green v. United States*, the Supreme Court held that criminal defendants must be given an opportunity to speak at sentencing.[85] A trial court's "failure to ask the defendant if he had anything to say before sentence" is imposed requires reversal.[86]

"present at any criminal proceedings which are dispositive of the charges where a defendant has the right to be present"); TENN. CONST. art. I, § 35(3) (victim has the right "to be present at all proceedings where the defendant has the right to be present"); WASH. CONST. art. I, § 35 (victim has the right "to . . . attend trial and all other court proceedings the defendant has the right to attend").

82. 384 U.S. 436 (1966).

83. 389 U.S. 347 (1967).

84. 372 U.S. 335 (1963).

85. 365 U.S. 301 (1961).

86. *Id.*

Defendants' rights are accompanied by standing and usually characterized by an absence of government discretion to comply with the right. Adequate remedies and appellate review mechanisms are typically available to enforce defendants' rights violations. One would expect something similar for victims' rights. In stark contrast, however, many crime victims' rights are unaccompanied by standing, remedy, or nondiscretionary review. Such deficient constitutional provisions cannot credibly be identified as anything other than illusory rights.

B. The Discretion Problem

Government discretion typically curtails victim standing to enforce constitutional rights. Ultimately, a discretionary right is an illusory right: if government compliance is optional, victims do not have standing to enforce rights. When the government opts to deny the right, problems of discretion in victims' rights can be reduced to three categories. First, there are the standing prerequisites of mandatory and enabled constitutional rights. A right that is not mandatory is called, interchangeably, an "advisory" or "directory" right. There is no standing, remedy, or review to enforce advisory rights. Second, certain particular victims' "rights" are written in discretionary language. This second type of discretionary right can be further divided into: (1) those in which government discretion is broad and largely unfettered, and (2) those that provide a test that must be met before the government can choose not to enforce the right. When the government has broad discretion, the right is illusory because the government may lawfully choose not to honor the right. Additionally, discretionary rights that require the government to meet certain conditions before it can ignore the right are illusory if the victim does not have standing to challenge the trial court determination that the government has met its burden. These rights can also become illusory if standards of review are so lax that there is no meaningful appellate court oversight. Third, a distinct discretion issue arises when vague, broadly worded victims' rights are interpreted in an unduly restrictive manner by courts in their otherwise proper role as final arbiters of constitutional meaning.

1. Discretion: mandated and enabled rights

Constitutional rights must be mandatory before the victim has standing in appellate court. Mandatory rights are rights the state is without discretion to disregard. The mandatory nature of a constitutional

right is typically made clear by use of the word "shall."[87] The vast majority of victims' rights are, plainly, mandatory rights. The phrase "shall have the following rights," or similar language, is present in the victims' constitutional rights provisions of seventeen states.[88] Other state constitutions have slightly different variations with the same effect. Five states provide that "victims have rights" (or that a victim "has a right").[89] Four states provide that victims "are entitled to rights."[90] Two states "grant" victims' rights.[91] Maryland has mandatory language with conditions on notice of the rights. The Maryland constitution states that victims "shall have the right to be informed . . . and if practicable, to be notified of [listing rights]."[92] Furthermore, the mandatory nature of constitutional rights is also established by placement in states' bills of rights.[93] Victims' state constitutional rights are likely to be mandatory

87. 16 AM. JUR. 2D *Constitutional Law* § 97 (1998) (collecting state cases).

88. ALASKA CONST. art. I, § 24 ("[s]hall have the following rights"); CAL. CONST. art. I, § 28(b) ("shall have the right"); COLO. CONST. art. II, § 16a ("shall have the right"); CONN. CONST. art. I, § 8b ("shall have the following rights"); ILL. CONST. art. I, § 8.1(a) ("[c]rime victims . . . shall have the following rights"); IND. CONST. art. I, § 13(b) ("[v]ictims of Crime . . . shall have the right"); KAN. CONST. art. XV, § 15 ("[v]ictims of crime . . . shall be entitled to certain basic rights"); LA. CONST. art. I, § 25 ("shall be treated with . . . shall be informed of the rights . . . shall have the right"); MICH. CONST. art. I, § 24(1) ("[c]rime victims . . . shall have the following rights"); MISS. CONST. art. III, § 26A(1) ("[v]ictims of crime . . . shall have the right"); MO. CONST. art. I, § 32(1) ("Crime Victims . . . shall have the following rights"); NEB. CONST. art. I, § 28(1) ("[a] victim of crime . . . shall have"); NEV. CONST. art. I, § 8(2) ("[t]he legislature shall provide by law for the rights of victims of crime"); N.M. CONST. art. II, § 24 ("[a] victim of [listing specific crimes] shall have the following rights"); OHIO CONST. art. I, § 10a ("shall be accorded rights"); R.I. CONST. art. I, § 23 ("[a] Victim of crime, as a matter of right . . . shall be entitled to receive . . . shall have the right"); WIS. CONST. art. I, § 9m ("[t]his state shall treat crime victims . . . [t]his state shall ensure that crime victims have all of the following privileges and protections").

89. ARIZ. CONST. art. II, § 2.1 ("a victim of crime has a right"); IDAHO CONST. art. I, § 22 ("[a] crime victim . . . has the following rights"); OKLA. CONST. art. II, § 34(A) ("The victim . . . has the right to"); S.C. CONST. art. I, § 24 ("victims of crime have the right to"); TEX. CONST. art. I, § 30 ("a crime victim has the following rights"); UTAH CONST. art. I, § 28(1) ("victims of crime have these rights").

90. ALA. CONST. amend. 557 ("[c]rime victims . . . are entitled to the right to"); FLA. CONST. art. I, § 16(b) ("are entitled to the right to"); N.C. CONST. art. I, § 37 ("[v]ictims of crime . . . shall be entitled to the following basic rights"); TENN. CONST. art. I, § 35 ("victims shall be entitled to the following basic rights").

91. OR. CONST. art. I, § 42(1) ("The following rights are hereby granted to victims . . . ."); WASH. CONST. art. I, § 35 ("[V]ictims of crime are hereby granted the following basic and fundamental rights . . . .").

92. MD. CONST. (Declaration of Rights) art. 47(b).

93. 16 AM. JUR. 2D *Constitutional Law* § 98 (1998) (collecting state cases).

because they are, in fact, present in the respective bill of rights of many states.[94]

Like other individual constitutional rights, most state constitutional rights of victims are silent about available review and remedies. The absence of specific remedies in a constitutional provision "is not necessarily an indication that it was not intended to be self-executing."[95] The idea that "where there is a right there is a remed[y] . . . is as old as the law itself . . . and 'would tend to tip the balance in favor of vindicating constitutional rights.'"[96] It is usual for express rights provisions to be silent about available remedies and to still be enforced as mandatory rights by the courts. For example, the rights in the United States Constitution's Bill of Rights typically have no express remedies. The absence of such express remedies has not prevented the Court from exercising its constitutional responsibility to grant standing and fashion remedies for rights violations.[97] Thus, silence about remedy should not lead to the conclusion that rights are not mandatory. Instead, the well-established convention of courts is to provide judicially created remedies for constitutional violations.

While the absence of remedial provisions is not a substantial indicium that rights are not mandatory, the presence of express review or standing provisions is strong evidence of mandatory rights. In rights provisions with express review and standing provisions, victims' rights are all but certainly mandatory rights.

Legislative history can also certainly inform whether rights are mandatory or self-enabling. As a general matter, courts refer to legislative history to interpret rights only when plain meaning is not discernable from the text of the Amendment.[98] Most amendments are self-enabled by their plain language.

On the other hand, laws that by their plain language are advisory are unenforceable. The term "victims' rights" is often generically used to

94. The sole exception is Alabama. Alabama appears to have a unique way of sequentially numbering constitutional amendments. It is nevertheless plainly intended to provide individual rights to crime victims. Indeed, in many states, victims' rights and criminal defendants' rights are placed in the same section of the state constitution but listed as separate subsections. *See* ALA. CONST. amend. 557.

95. 16 AM. JUR. 2D *Constitutional Law* § 104 (1998) (collecting state cases).

96. *Id.* (quoting Valenti v. Mitchell, 790 F. Supp. 555, 557 (E.D. Pa. 1992)).

97. *See supra* notes 81–86 and accompanying text.

98. *See, e.g.*, State v. Casey, 44 P.3d 756, 760 (Utah 2002) ("We need not inquire beyond the plain meaning of the amendment unless we find it ambiguous.").

describe all laws that accommodate victim participation, privacy, and protection in the criminal process. A good example of advisory rights, albeit statutory rather than constitutional, is found in the former federal victims' rights statute.[99] Under the former federal statute, executive branch agencies and officers "engaged in the detection, investigation or prosecution of crime shall make their *best efforts* to see that crime victims are given [their] rights."[100]

The Tenth Circuit Court of Appeals explored the limits that the "best effort" language impose on victim standing in an appeal and petition for mandamus brought by victims in the Oklahoma City bombing prosecution of Timothy McVeigh. In *United States v. McVeigh*,[101] victims attempted to enforce the federal victims' "right" to be "present at all public court proceedings related to the offense."[102] The district court judge denied the rights and ruled that the victims would be excluded from the trial.[103] The crime victims filed both an appeal and a mandamus action.[104] The mandamus sought to preserve an alternative method of review should the appeal be deemed procedurally improper.[105] The

99. 42 U.S.C. § 10606 (2004), *repealed by* Justice for All Act of 2004, Pub. L. No. 108–405, § 102, 118 Stat. 2260, 2264:

> (a) Best efforts to accord rights
>
> Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that victims of crime are accorded the rights described in subsection (b) of this section.
>
> (b) Rights of crime victims
>
> A crime victim has the following rights: (1) The right to be treated with fairness and with respect for the victim's dignity and privacy. (2) The right to be reasonably protected from the accused offender. (3) The right to be notified of court proceedings. (4) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial. (5) The right to confer with attorney for the Government in the case. (6) The right to restitution. (7) The right to information about the conviction, sentencing, imprisonment, and release of the offender.
>
> (c) No cause of action or defense
>
> This section does not create a cause of action or defense in favor of any person arising out of the failure to accord to a victim the rights enumerated in subsection (b) of this section.

100. *Id.* (emphasis added).

101. 106 F.3d 325 (10th Cir. 1997).

102. *Id.* at 334 (quoting 42 U.S.C. § 10606(b)(4)).

103. *Id.* at 328.

104. *Id.* at 328–29.

105. *Id.*

Tenth Circuit quickly determined that the rights were unenforceable by appeal or mandamus because the "statute charily pledges only the 'best efforts' of certain executive branch personnel to secure the rights listed."[106] Implicit in the court's analysis is that courts cannot enforce these rights because they are advisory, rather than mandatory. The consequence of advisory victims' rights is that victims do not have standing in appellate courts. Compared with concrete rights that are enforceable on review, federal statutory victims' rights were illusory.

Fortunately, no state constitutional victims' rights provision contains such advisory language. Nevertheless, contrary to the plain meaning of their constitutions, two state courts have declared that plainly mandatory rights are, instead, advisory rights. In the Kansas case of *State v. Holt*,[107] the trial judge refused to delay a judicial probation hearing of a misdemeanant to allow the victim to be heard.[108] Under the Kansas Constitution, victims are entitled to "certain basic rights . . . including the right to be informed of and to be present at public hearings, as defined by law . . . and to be heard at sentencing."[109] Because victims' rights under the Kansas Constitution apply only to public hearings, the case squarely presented the issue of whether a misdemeanor probation hearing is a "public hearing." Ultimately, the Kansas Supreme Court held that "[t]here is nothing in our . . . law which requires a public hearing" in misdemeanor probation hearings.[110]

Under Kansas' precedent, constitutional questions are only addressed when unavoidable.[111] In *Holt*, the constitution was not implicated because the hearing was not a "public hearing" and victims have no rights at nonpublic hearings. There was no legitimate reason for the court

106. *Id.* at 335.

107. 874 P.2d 1183 (Kan. 1994).

108. *Id.* at 1184.

109. *Id.* at 1185 (citing KAN. CONST. art. XV, § 15).

110. *Id.* at 1187.

111. The Kansas Supreme Court in *State v. Childs*, 64 P.3d 389 (Kan. 2003), an opinion authored after *Holt*, but citing to pre-*Holt* precedent, stated that

> it is a familiar rule that courts will not decide a constitutional question if there is some other ground upon which to decide or dispose of the case . . . . Only in cases where it is virtually impossible to decide the issue on the merits without considering the constitutionality will this court entertain the question of constitutionality . . . . We should address constitutional questions raised for the first time in this court only when '[w]e cannot intelligently dispose of this litigation without considering and discussing' those constitutional questions.

Id. at 392 (quoting McKay v. Rich, 874 P.2d 641, 641 (Kan. 1994) (quoting Van Sickle v. Shanahan, 511 P.2d 223, 225 (Kan. 1973) (quoting State v. Nelson, 502 P.2d 841, 845 (Kan. 1972)))).

to extend itself to address other constitutional issues because the constitution was not implicated.

Nevertheless, the *Holt* court went out of its way to render illusory what are transparently mandatory state constitutional victims' rights. In dicta, the court declared the entire victims' rights amendment to be advisory.[112] In Kansas, victims' rights are set forth in mandatory language. The Kansas Constitution provides that "[v]ictims of crime . . . shall be entitled to certain basic *rights*."[113] As discussed above, conventional interpretation is that mandated *language* means mandatory rights. Furthermore, the conventional interpretation of rights in bills of rights is that they are mandatory, and victims' rights are placed within the Kansas Bill of Rights.

There are other persuasive reasons why Kansas' constitutional rights are mandatory. The constitutional provision takes pains to assert that in the case of conflict between victims' rights and defendants' rights, defendants' rights prevail.[114] Absolutely no reason exists to include this language if it was not the clear intent that these were mandatory rights. The constitutional provision also states that the legislature "may" provide for other remedies.[115] This enforcement provision does not strip the rights of their mandatory nature, but rather allows the legislature, as well as the courts, to establish remedies for adequate enforcement. What is more informing about this language is that the Kansas amendment clearly anticipates rights enforcement. Such enforcement is not possible in an advisory rights scheme.

Additional evidence that these rights are mandatory is found in language limiting the civil liability of the state if rights are violated. The Kansas victims' rights provision reads: "Nothing in this section shall be construed as creating a cause of action for money damages against the state, a county, a municipality, or any of the agencies, instrumentalities, or employees thereof."[116] Clearly this provision is to limit state judicial

112. 874 P.2d at 1186 ("Although Art. 15, § 15 was adopted by the voters in 1992, it appears that the constitutional provision does not provide any greater rights than those already granted by statute. . . . Although K.S.A. 74-7333(a) states that 'victims of crime shall have the following rights,' there is nothing in the statute that actually creates any mandatory rights for crime victims, and the provisions are merely directive or permissive.").

113. KAN. CONST. art. XV, § 15(a) (emphasis added).

114. *Id.*

115. *Id.* § 15(b).

116. *Id.*

creation of *Bivens*[117] type actions—torts derived from violations of mandatory constitutional rights. It would be pointless to limit *Bivens* actions for advisory rights, as no mere advisory right could be the basis of such a suit.[118] This is because the government cannot be held liable for acting within lawful discretion that exists when rights are advisory. Moreover, other remedies are expressly precluded in the victims' rights provision of the Kansas Constitution. For example, the constitution prohibits reversal of a guilty finding as a remedy to comply with victims' rights.[119] Such a restriction is completely unnecessary unless remedial enforcement of mandatory rights was contemplated.

Furthermore, the *Holt* court implies that because the constitution and the statute share the same language, there is no legally significant distinction between the two: "Although [the victims' rights constitutional amendment] was adopted by the voters in 1992, it appears that the constitutional provision does not provide any greater rights than those already granted by statute."[120] To imply that a constitutional right is the equivalent of a statute is a fundamental constitutional error. Constitutional, rather than statutory, conventions become determinative of whether the right is mandatory and enabled because "[t]he rules distinguishing mandatory and directory statutes are of little value and are rarely applied in ruling upon the provisions of a constitution."[121] Only by defying important constitutional canons and ignoring a handful of others could the Kansas Supreme Court reach its ill-conceived result—that victims' rights are not mandatory. The unprincipled result in *Holt* strips Kansas victims of standing despite the overwhelming weight of constitutional canons to the contrary.

In California, intermediate appellate courts are split as to the mandatory or advisory nature of victims' state constitutional rights. In *People v. Superior Court (Thompson)*, the victim was assaulted.[122] A California appellate court ruled that victims' rights to notice of and to speak at sentencing under the California Constitution and statutes were merely advisory.[123] This ruling was made with little analysis, other than

117. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395–96 (1971).

118. Bandoni v. State, 715 A.2d 580, 586–87 (R.I. 1998).

119. KAN. CONST. art. XV, § 15(c).

120. State v. Holt, 874 P.2d 1183, 1186 (Kan. 1994).

121. 16 AM. JUR. 2D *Constitutional Law* § 95 (2003) (collecting state cases).

122. 202 Cal. Rptr. 585 (Cal. Ct. App. 1984).

123. *Id.* at 586–87.

the observation that neither the constitution nor the statute provided express remedy or implementing procedures.[124]

Under the same constitution and statute, however, another California intermediate appellate court reached the opposite result. In *Melissa J. v. Superior Court*, the defendant was convicted of sexually assaulting a small child.[125] His probation included a restitution order that he pay a monthly amount for the victim's therapy.[126] Later, the defendant moved to terminate the restitution requirement, and the court obliged without notifying the victim or providing an opportunity to object.[127] The appellate court allowed a petition for mandamus and issued a writ vacating the order terminating restitution.[128] The writ was based on a holding that the requirement for notice and an opportunity to be heard was a mandatory constitutional and statutory right.[129]

The *Thompson* and *Melissa J.* rulings are in conflict. While the *Melissa J.* court attempted to distinguish *Thompson*,[130] the fact that *Melissa J.* involved the vacating of an originally imposed restitution order without notice to the victim, and the *Thompson* court involved failure to notify the victim of sentencing, is of little import given the same mandatory language of the law framing both cases.[131] The California Supreme Court has yet to resolve the conflict between *Thompson* and *Melissa J*, thus leaving unresolved the ultimate

124. *Id.* at 586.

125. 237 Cal. Rptr. 5, 5–6 (Cal. Ct. App. 1987).

126. *Id.* at 6.

127. *Id*.

128. *Id.* The court noted that in the future, the victim would have to return to the trial court and ask for the order to be voided there before bringing a mandamus action. *Id.*

129. *Id.* at 6–7.

130. *Id.*

131. The California Penal Code provides:

> The victim of any crime, or the parents or guardians of the victim if the victim is a minor, or the next of kin of the victim if the victim has died, have the right to attend all sentencing proceedings under this chapter and shall be given adequate notice by the probation officer of all sentencing proceedings concerning the person who committed the crime. The victim, or up to two of the victim's parents or guardians if the victim is a minor, or the next of kin of the victim if the victim has died, have the right to appear, personally or by counsel, at the sentencing proceeding and to reasonably express his, her, or their views concerning the crime, the person responsible, and the need for restitution. The court in imposing sentence shall consider the statements of victims, parents or guardians, and next of kin made pursuant to this section and shall state on the record its conclusion concerning whether the person would pose a threat to public safety if granted probation.

CAL. PENAL CODE § 1191.1 (West 2004).

determination of whether the rights are mandatory or advisory.[132] In the meanwhile, the *Thompson* court opinion remains as precedent that is destructive to real victims' rights.

There is no bigger judicially created problem for victims' constitutional rights than a holding that the rights are "advisory." The tragedy of such radical judicial opinions is that they render victims' rights permanently impotent. Victims cannot enforce advisory rights. Advisory constitutional rights are illusory and cannot be resurrected by legislative action into real rights.[133]

Before a participant can have standing on review, the mandatory right must also be enabled. Constitutional rights that are not enabled do not have the force of law.[134] Enabled rights are either self-enabling (also called self-executing) or legislatively enabled by statute.[135] It is possible for a rights scheme to be partly self-enabling and partly left to the legislature to enable.[136]

Conventional constitutional analysis reveals that victims' state constitutional rights are self-enabled. Modern state constitutions "have been generally drafted upon the principle that all provisions of a constitution are self-enabling."[137] Because all victims' state constitutional rights amendments are "modern,"[138] the presumption is that they are self-enabling. Presumably, the legislatures of these states would have had to limit self-enabling in the language of the victims' rights provision to avoid enabling. Furthermore, state constitutional victims' rights are placed within bills of rights.[139] Individual rights

132. *See* Dix v. Superior Court, 807 P.2d 1063, 1067 (Cal. 1991) (determining that no victims' rights were actually violated in the case, noting that there were conflicting lower court opinions in California, neither foreclosing nor endorsing the possibility that standing may be present for violations of victims' rights).

133. To achieve mandatory rights, an entirely new constitutional amendment must be enacted. However, in these jurisdictions legislatures can create a separate set of statutory rights accompanied by standing, even when appellate courts have eviscerated the mandatory nature of constitutional rights.

134. 16 AM. JUR. 2D *Constitutional Law* § 98 (2004) (collecting state cases). Black's Law Dictionary defines enabled as "conferring new powers." BLACK'S LAW DICTIONARY 528 (7th ed. 1999).

135. *Id.*

136. 16 AM. JUR. 2D *Constitutional Law* § 108 (2004).

137. *Id.* § 100 (citing to relevant cases).

138. California passed the first victims' state constitutional amendment in 1982. *See* CAL. CONST. art. I, § 28.

139. The exception to this is Alabama, which has a peculiar way of incorporating Amendments by sequential number. However the title of the Alabama Amendment is "Basic Rights

provisions in bills of rights are generally self-enabling.[140] Most victims' rights amendments do not provide for specific remedies, but, as noted earlier, this is not determinative.

As a general proposition, the more a constitutional provision describes how it is to operate, the more likely it is to be self-enabling.[141] However, individual rights placed in bills of rights are an exception to the general rule that a less descriptive provision is less likely to be self-enabling.[142] Civil rights are usually written in general terms and are

for Crime Victims," which indicates that victims' rights are basic individual rights found in bills of rights. Specific victim rights sections appear in the following articles of their respective state constitutions: ALASKA CONST. art. I ("Declaration of Rights"); ARIZ. CONST. art. II ("Declaration of Rights"); COLO. CONST. art. II ("Bill of Rights"); CAL. CONST. art. I ("Declaration of Rights"); CONN. CONST. art. I ("Declaration of Rights"); FLA. CONST. art. I ("Declaration of Rights"); IDAHO CONST. art. I ("Declaration of Rights"); ILL. CONST. art. I ("Bill of Rights"); IND. CONST. art. I ("Bill of Rights"); KAN. CONST. art. XV ("Misc." within the Kansas "Bill of Rights"); LA. CONST. art. I ("Declaration of Rights"); MD. CONST. art. 47 (appears within a "Declaration of Rights"); MICH. CONST. art. I ("Declaration of Rights"); MISS. CONST. art. III ("Bill of Rights"); MO. CONST. art. I ("Bill of Rights"); NEB. CONST. art. I ("Bill of Rights"); NEV. CONST. art. I ("Declaration of Rights"); OHIO CONST. art. I ("Bill of Rights"); N.J. CONST. art. 1 ("Rights and Privileges"); N.M. CONST. art. II ("Bill of Rights"); N.C. CONST. art. I ("Declaration of Rights"); OKLA. CONST. art. II ("Bill of Rights"); OR. CONST. art. I ("Bill of Rights"); R.I. CONST. art. I ("Declaration of Certain Rights and Principles"); S.C. CONST. art. I ("Declaration of Rights"); TENN. CONST. art. I ("Declaration of Rights"); TEX. CONST. art. I ("Bill of Rights"); UTAH CONST. art. I ("Declaration of Rights"); VA. CONST. art. I ("Bill of Rights"); WASH. CONST. ("Declaration of Rights"); WIS. CONST. art. I ("Declaration of Rights").

140. In conventional constitutional analysis, rights placed in a Bill of Rights "are usually considered self-executing." 16 AM. JUR. 2D *Constitutional Law* § 98 (2003). *See* Medina v. People, 387 P.2d 733, 736 (Colo. 1964) ("The Bill of Rights is self-executing; the rights therein recognized or established by the Constitution do not depend upon legislative action to become operative."); State v. Christensen, 195 P.2d 592, 595 (Kan. 1948) ("the self-executing provisions of the bill of rights"); State v. Bachelder, 403 A.2d 758 (Mass. 1979) ("[P]rovisions of our constitutional Bill of Rights are self-executing and do not depend upon enabling legislation to be effective."); Quinn v. Buchanan, 298 S.W.2d 413, 418 (Mo. 1957) ("This provision is a declaration of a fundamental right of individuals. It is self-executing to the extent that all provisions of the Bill of Rights are self-executing."); *Ex parte* Berman, 87 N.E. 2d 716, 720 (Ohio Ct. App. 1949) ("The provisions contained in the Bill of Rights . . . are self-executing and require no legislative or statutory authority to support or implement them."); Coats v. State, 212 P.2d 141, 143 (Okla. Crim. App. 1949); Smith v. City of Philadelphia, 516 A.2d 306, 315 (Pa. 1986) (noting that a provision can "take effect without the aid of legislation, and being contained in the 'bill of rights' is by its very nature self-executing"); Lawrence v. State, 41 S.W.3d 349, 381 (Tex. App. 2001) ("[A]ny provision of the Bill of Rights is self-executing."), *rev'd on other grounds*, 539 U.S. 558 (2003); Robb v. Shockoe Slip Found., 324 S.E.2d 674, 676 (Va. 1985) ("A constitutional provision is self-executing when it expressly so declares . . . . Even without benefit of such a declaration, constitutional provisions in bills of rights . . . are usually considered self-executing.").

141. 16 AM. JUR. 2D *Constitutional Law* § 102 (2004) (collecting state cases).

142. *Id.* § 104 (collecting state cases).

typically self-enabling.[143] Analogously, as discussed in Part II.A, some criminal defendants' rights are specific, others are general, but all are self-enabled.

While victims' rights are typically self-enabling, not all of them are. For instance, when the legislature is mandated by the word "shall" to enable the rights, the rights are not self-enabling.[144] Similarly, if the legislature is given the *exclusive* authority to enact remedies, the rights are not self-enabling.[145] For example, the Nebraska Constitution provides that "there shall be no remedies other than as specifically provided by the Legislature for the enforcement of the rights granted in this section."[146] Correctly, the Nebraska Supreme Court refused to remedy a violation of a victim's constitutional rights when the legislature had not yet enacted remedies.[147]

Interestingly, only Idaho has a victims' rights amendment that expressly states, within the victims' constitutional rights provision, that it "shall be self-enacting."[148] However, in order for a constitutional amendment to be self-enabling it is not necessary that it contain enabling language. Indeed such language is rare.

On the other hand, several state constitutions do not provide for any legislative involvement.[149] In these states, absent other express limitations, mandatory rights provisions should be self-enabling because the legislature has not been given a role in enabling by the constitution.

143. For example, there is no case holding that any of the civil rights in the federal bill of rights require enabling legislation.

144. CAL. CONST. art. I, § 28(b) ("The Legislature shall adopt provisions to implement this section during the calendar year following adoption of this section."); NEB. CONST. art. I, § 28(2) ("The Legislature shall provide by law for the implementation of the rights granted in this section."); N.M. CONST. art. II, § 24(C) ("The provisions of this amendment shall not take effect until the legislature enacts laws to implement this amendment.").

145. CONN. CONST. art. I, § 8(b) (10) ("The General Assembly shall provide by law for enforcement of this subsection."); LA. CONST. art. I, § 25 ("Remedies to enforce this Section shall be provided by law."); NEB. CONST. art. I, § 28(2) ("There shall be no remedies other than as specifically provided by the Legislature for the enforcement of the rights . . . ."); WIS. CONST. art. I, § 9m ("The legislature shall provide remedies for the violation of this section.").

146. NEB. CONST. art. I, § 28.

147. State *ex rel.* Lamm v. Neb. Bd. of Pardons, 620 N.W.2d 763, 768 (Neb. 2001).

148. IDAHO CONST. art. I, § 22(10) ("This section shall be self-enacting. The legislature shall have the power to enact laws to define, implement, preserve, and expand the rights guaranteed to victims.").

149. This does not, however, prevent these legislatures from promulgating procedures to facilitate the rights or legislatively expand rights beyond the constitutional floor. *See* FLA. CONST. art. I, § 16; OR. CONST. art. I, § 42; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; WASH. CONST. art. I, § 35.

However, most crime victims' constitutional rights give the legislature certain kinds of authority concerning rights. These constitutions allow the legislature to facilitate the implementation of the amendment on a nonexclusive basis, leaving intact courts' traditional authority concerning constitutional rights. This means all, or some, of victims' rights are self-enabling. This shared enabling responsibility between courts and legislatures is achieved by permissive language that grants the legislature an option to exercise its enabling authority—that is, legislatures may enable core rights but cannot disable them.[150] Typically, provisions contain language to the effect that the legislature "may" create legislation to facilitate the rights.[151] The use of the word "may" is permissive and does not prevent a constitutional right from being self-enabled.[152] As a result, courts may enforce core provisions of the constitution, which do not require legislative action, because it is understood that they will be remedied by courts.

The Alaska Court of Appeals addressed this issue correctly in *Landon v. State* when it held that victims' constitutional right to attend trial was self-enabled.[153] The amendment was self-enabled even though

150. State v. Roscoe, 912 P.2d 1297 (Ariz. 1996) (finding unconstitutional enabling legislation excluding peace officers from definition of victim unconstitutional because it was narrower than the constitutional definition of victim).

151. ALA. CONST. amend. 557(b) ("Nothing in this amendment . . . shall be construed as creating a cause of action against the state . . . ."); ARIZ. CONST. art. II, § 2.1(D) ("The legislature, or the people by initiative or referendum, have the authority to enact substantive and procedural laws to define, implement, preserve and protect [victims' rights].") ILL. CONST. art. I, § 8.1(b) ("The general assembly may provide for enforcement of this section.); KAN. CONST. art. XV, sec. 15(b) ("The legislature may provide for other remedies to ensure adequate enforcement."); MD. CONST. art. 47(b) ("as these rights are implemented and the terms 'crime', 'criminal justice proceeding' and 'victim' are specified by law"); MICH. CONST. art. I, § 24(2) ("The legislature may provide by law for the enforcement of this section."); MO. CONST. art. I, § 32(1) ("Crime victims, as defined by law, have the following rights, as defined by law . . . ."); N.J. CONST. art. I, ¶ 22 ("A victim of crimes . . . shall be entitled to those . . . remedies as may be provided by the legislature"); N.C. CONST. art. I, § 37 ("as prescribed by law"); OKLA. CONST. art. II, § 34 ("The legislature, or the people by initiative or referendum, has the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights . . . ."); S.C. CONST. art. I, § 24(C)(3) ("The General Assembly has the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights . . . ."); TENN. CONST. art. I, § 35h ("The General Assembly has the authority to enact laws to define, implement, preserve, and protect the rights guaranteed to victims . . . ."); UTAH CONST. art. I, § 28 ("Nothing in this section shall be construed as creating a cause of action for money damages . . . ."); VA. CONST. art. I, § 8-A ("This section . . . does not . . . create a cause of action for money damages.").

152. Landon v. State, No. A-6479, 1999 WL 46543, at *2 (Alaska Ct. App. Feb. 3, 1999) (holding that a core right is enabled without legislative action).

153. *Id.*

it called upon the legislature to define the term "crime victim" and even though victims "shall have the following rights as provided by law,"[154] including "the right . . . to be present at all criminal or juvenile proceedings where the defendant has the right to be present."[155] The Alaska Constitution has a clause separate from the victims' rights provision that explicitly directs that provisions, if possible, should be construed as "self-executing."[156]

In *Landon*, the convict challenged the decision of the trial court to comply with the plain meaning of the constitution by allowing the victim to attend trial because the legislature had not yet statutorily defined the term "crime victim."[157] The Alaska Court of Appeals rejected the convict's argument, concluding that "it is possible—and thus constitutionally necessary—to construe the section as self-executing."[158] The court noted that the constitution gives victims the "right to be present at criminal proceedings when the defendant has a right to be present."[159] The court acknowledged that the constitution "allows the legislature to define 'crime victim' by 'law'—that is, by legislation . . . thus presumably authorizing the legislature to enact procedures to govern crime victims' exercise of the listed rights—and perhaps to define the scope of those rights in particular situations."[160] Despite the absence of legislation defining "victim" the court opined that "there can be no reasonable dispute that A.B. qualified as the 'victim' of Landon's crimes, and no reasonable dispute that Landon (and thus A.B.) had the right to be present."[161] Because a victim's right to be present is a core right under

154. *Id.*

155. *Id.* (quoting ALASKA CONST. art. I, § 24).

156. ALASKA CONST. art. XII, § 9 ("[P]rovisions of this constitution shall be construed to be self-executing."). In a few other states, the language is worded somewhat differently, but to the same permissive effect. For example, in Oklahoma the "[l]egislature, or the people by initiative or referendum, has the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims." OKLA. CONST. art. II, § 34(C). Such language should not prevent courts from finding that constitutional provisions are self-enabling because the language does not place all enabling authority exclusively in the legislature.

157. *Landon*, 1999 WL 46543, at *2.

158. *Id.*; *accord* State *ex. rel.* K.P, 709 A.2d 315, 321 (N.J. Super. Ch. Div. 1997) (implicitly determining a core provision of the New Jersey Victims' Rights Amendment did not require legislative enabling to be judicially enforceable). The New Jersey Constitution provides that "[a] victim of crime shall be entitled to those rights and remedies as may be provided by the legislature." N.J. CONST. art. I, § 22.

159. *Landon*, 1999 WL 46543, at *2.

160. *Id.*

161. *Id.*

the Alaska Constitution, the court concluded that the constitutional rights provided adequate legal authority for Judge Wanamaker's decision to allow a victim to attend the trial "even though the legislature had not yet enacted the Victims' Rights Act."[162]

On the other hand, when the legislature has complete authority to define a relevant term that is essential to enabling, this may translate into legislative control over all aspects of the amendment, making the victims' amendment not self-enabled. If not self-enabled, the legislature must enable the provision before victims can have standing. For example, the Colorado Constitution sets forth the right to "be heard when relevant, informed, and present at all critical stages of the criminal justice process," and that "[a]ll terminology, including the term 'critical stages,' shall be defined by the general assembly."[163] This provision was correctly interpreted in the Colorado case of *Gansz v. People*.[164] In *Gansz*, the criminal case was dismissed pretrial.[165] The court did not notify the victim of the dismissal hearing and the victim was not given an opportunity to be heard.[166] The victim claimed that his constitutional right to be present and be heard at the dismissal hearing was violated.[167] The court disagreed, noting that the legislature had express authority to define the critical stage and, in enabling legislation, had not included dismissal as a "critical stage."[168] Because the legislature had express authority to define "critical stage" and had not included dismissal in that definition, no right to speak at dismissal had been enabled.[169]

Landon and *Gansz* are readily reconciled. In *Landon*, the constitution had core provisions that the legislature could not disable through enabling legislation. Furthermore, the Alaska Constitution expressly provided for a right to be heard at sentencing. On the other hand, in *Gansz*, the constitution gave the legislature express control over defining the critical stage at which a victim had the right to be heard. In *Gansz*, because the legislature had not defined dismissal proceedings as critical

162. *Id.*
163. COLO. CONST. art. II, § 16a.
164. 888 P.2d 256 (Colo. 1995).
165. *Id.* at 257.
166. *Id.*
167. *Id.*
168. *Id.* at 258–59.
169. *Id.* at 257–58.

stages, the victim did not have an enabled right to object to dismissal.[170] In *Landon*, the legislature's failure to define the term "victim" did not prevent the court from interpreting the right as self-enabled because the person in the case at issue was a victim under the Alaska Constitution.[171] The cases also illustrate that unless the legislature is expressly delegated the exclusive authority to enable victims' rights, core rights are self-enabled.[172]

170. ALA. CONST. amend. 557(a) ("[c]rime victims, as defined by law"); ALASKA CONST. art. I, § 24. ("[c]rime victims, as defined by law, shall have the following rights as provided by law"); CONN. CONST. art. I, § 8(b) ("a victim, as the general assembly may define by law, shall have the following rights"); IND. CONST. art. I, § 13(b) ("Victims of crime, as defined by law, shall have the right to be treated with fairness, dignity, and respect throughout the criminal justice process; and, as defined by law, to be informed of and present during public hearings and to confer with the prosecution."); MD. CONST. art. 47(b) ("as these rights are implemented and the terms 'crime', 'criminal justice proceeding', and 'victim' are specified by law"); MO. CONST. art. 1, § 32 ("[a] Crime Victim, as defined by law."); MICH. CONST. art. 1, § 24 ("[c]rime victims, as defined by law"); NEB. CONST. art. I, § 28(1) ("[a] victim of crime, as shall be defined by law"); N.C. CONST. art. I, § 37(1) ("[v]ictims of crime, as prescribed by law"); TEX. CONST. art. I, § 30(c) ("The legislature may enact laws to define the term 'victim' and to enforce these and other rights of victims."); WIS. CONST. art. 1, § 9m ("[t]he state shall treat crime victims, as defined by law").

171. Other constitutions provide the legislature with permissive definitional authority of varied scope. Absent violations of an enabled right, there is no injury in fact. Among other state constitutions, legislative authority to define terms varies. Some constitutions allow the legislature to define the term "victim." *See* ALASKA CONST. art. I, § 24. ("Crime victims, as defined by law, shall have the following rights as provided by law . . . ."); ARIZ. CONST. art. II, § 2.1(D) ("The legislature, or the people by initiative or referendum, have the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section."); IND. CONST. art. I, § 13(b) ("Victims of crime, as defined by law, shall have the right to be treated with fairness, dignity, and respect throughout the criminal justice process; and, as defined by law, to be informed of and present during public hearings and to confer with the prosecution . . . ."); LA. CONST. art. I, § 25 ("[a]s defined by law, a victim of crime shall have the right to"); MD. CONST. art. 47(b) ("as these rights are implemented and the terms 'crime', 'criminal justice proceeding', and 'victim' are specified by law"); MICH. CONST. art. I, § 24(1) ("shall have the following rights, as provided by law"); MISS. CONST. art. III, § 26A(3) ("The Legislature shall have the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section."); OHIO CONST. art. I, § 10a ("as the general assembly shall define and provide by law, shall be accorded the rights to"); OKLA. CONST. art. II, § 34 ("The Legislature, or the people by initiative or referendum, has the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section."); S.C. CONST. art. I, § 24(C)(3) ("The General Assembly has the authority to enact substantive and procedural laws to define, implement, preserve, and protect the rights guaranteed to victims by this section."); TENN. CONST. art. I, § 35 ("The general assembly has the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section."); UTAH CONST. art. I, § 28(4) ("The Legislature shall have the power to enforce and define this section by statute."); VA. CONST. art. I, § 8-A ("The General Assembly may define and provide by law . . . .").

172. Also, when the plain language is ambiguous, legislative history may be referenced to assist the interpretation. *See* State v. Casey, 44 P.3d 756, 761 (Utah 2002). In the context of victims'

The Rhode Island Supreme Court opinion in *Bandoni v. State*[173] abandoned constitutional canons to declare that victims' rights were not self-enabled.[174] The *Bandoni* court opined that the specific constitutional right of a victim to speak at sentencing was not accompanied by a "sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed be enforced."[175] One plausible interpretation is that the court found that victims' constitutional rights were not self-enabled in order to preserve governmental immunity from civil suit.

In *Bandoni*, the victims were a husband and wife injured by a drunk driver.[176] The wife requested and was given assurance that they would be informed of criminal proceedings.[177] Instead, the criminal case proceeded quickly to disposition without the victims' knowledge and in violation of the victims' constitutional right to speak at sentencing.[178] The Bandonis sued under both negligence and constitutional rights deprivation theories, but both theories were rejected by the court.[179] For the constitutional claim to be valid, the rights had to be self-enabling.[180] Relevant here is that the court found that no civil rights tort could lie because this remedy was not expressly spelled out in the constitution.[181] Without remedy, the court held that the right was not self-enabled.[182] The court did not discuss conventional constitutional analysis, which does not require express remedies to be provided in order for mandatory rights placed in bills of rights to be self-enabled.[183] For example, violations of criminal defendants' constitutional rights under the Rhode Island Constitution are self-enabled, despite the lack of an express remedy.[184]

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rights, the Utah Supreme Court has determined that "we need not inquire beyond the plain meaning of the [victims' rights] amendment unless we find it ambiguous." *Id.* at 761.

173. 715 A.2d 580 (R.I. 1998).

174. *Id.* at 587.

175. *Id.* at 586.

176. *Id.* at 582–83.

177. *Id.* at 583.

178. *Id.*

179. *Id.* at 582.

180. *Id.*

181. *Id.* at 587–96.

182. *Id.*

183. Landon v. State, No. A-6479, 1999 WL 46543, at *2 (Alaska Ct. App. Feb. 3, 1999).

184. *See, e.g.*, State v. Jeremiah, 696 A.2d 1220, 1220–21 (R.I. 1997) (noting that suppression is the proper remedy for evidence obtained in violation of the Rhode Island Constitution).

The court used ambiguous legislative history and the absence of an express remedy[185] in the constitution to trump canons of constitutional analysis. These canons, discussed below, plainly establish that this constitutional provision allowing victims to speak at sentencing is self-enabled. This disregard of constitutional canons led Justice Flanders, in dissent, to aptly characterize the nature of the majority opinion: "This is a dark day for state constitutional law and judicial independence in Rhode Island. For crime victims in particular, this day will doubtless live in legal infamy."[186]

In darkening the hope of victims' rights, the *Bandoni* majority abandoned several canons of constitutional interpretation. The *Bandoni* majority initially decided that the broad rights of the amendment providing that "[a] victim of crime shall, as a matter of right, be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process" were merely general principles and therefore not self-enabled.[187] The denigration of these rights began when the court relied upon the victims' attorney's concession that these broad rights were not substantive rights.[188] The *Bandoni* decision is somewhat based on an idiosyncratic concession of the victim litigant.[189] Such a concession has no support in the opinions of other state courts. Victims' broad constitutional rights are typically rights with substantive content.[190] Indeed, no other state appellate court opinion involving broad victims' rights has held that the rights have no substantive meaning.

In relying on the generalization that the less specific a constitutional provision is, the less likely it is to be self-enabling, the *Bandoni* court implicitly rejected the more particularized constitutional convention that civil rights placed in bills of rights are self-enabling.[191] Such a holding was particularly ill-advised in the *Bandoni* case when the broad rights were not even directly litigated by the parties, but rather, only the specific right to speak at sentencing was at issue.

The *Bandoni* opinion spurned other fundamental conventions of constitutional analysis. The majority rejected the plain meaning of the

185. *Bandoni*, 715 A.2d at 583.

186. *Id.* at 601 (Flanders, J., dissenting).

187. *Id.* at 587.

188. *Id.* at 584.

189. *Id.* at 587.

190. *See supra* notes 19–37 and accompanying text for a discussion of broad rights.

191. *See supra* note 136 and accompanying text for a discussion of this principle.

amendment.[192] Later in the opinion, the court conveniently performed a complete about face and twisted a clause in the amendment beyond reason to implicitly find that the victim's rights amendment mandated legislative enabling.[193] In a final bit of cynicism, the majority used the fact that the legislature has not yet enabled the amendment as proof that the amendment is not self-enabling, despite the fact that such legislative inaction in the absence of any directive to the legislature instead leads to the opposite conclusion.[194]

The Bandonis sought monetary damages under the constitution for the prosecutor's failure to notify them of sentencing. Ultimately, the *Bandoni* majority preserved the traditional sovereign immunity of prosecutors and judges over remedying victims' rights violations:

> We are mindful of the difficulty in attempting to impose tort liability on judges and prosecution officers who enjoy immunity, as well as the difficulty in defining the scope of liability for state officials who are responsible for complying with the victim's rights statute. Notwithstanding the departure from blind adherence to the concept of sovereign immunity, which has been accomplished through both legislation and judicial decisions, the concept of judicial and prosecutorial immunity remains alive and well . . . .[195]

The *Bandoni* majority opinion sits on slender reeds. In contrast, the dissent uses time-honored constitutional canons and finds the rights both mandatory and self-enabling. Rebutting the majority's use of the absence of an express remedy as the reason for holding victims' rights unenforceable, Justice Flanders aptly observed that, "one searches the Federal and State constitutions in vain to find specific causes of action and remedies provided therein for any violations of the bill-of-rights provisions . . . ."[196] Disturbed by the constitutionally unprincipled opinion of the majority, Justice Flanders avers the following: "What vexes me is the majority's remarkable refusal to enforce the plain language of the victims' rights amendment to our state constitution."[197] And, furthermore,

192. *Bandoni*, 715 A.2d at 605 (Flanders, J., dissenting).
193. *Id.* at 604 (Flanders, J., dissenting).
194. *Id.* at 605 (Flanders, J., dissenting).
195. *Id.* at 595.
196. *Id.* at 604 (Flanders, J., dissenting).
197. *Id.* at 601 (Flanders, J., dissenting).

> [b]y means of the Court's decision in this case the constitutional right of crime victims to address the court before sentencing of the criminal who injured them "regarding the impact which the perpetrator's conduct has had upon the victim," has been judicially emasculated. As a result, a right that our Constitution declares to be "essential and unquestionable," has been rendered nonessential and questionable; a right that our Constitution decrees is to be "established, maintained, and preserved," has been disestablished, dismembered, and disserved; and a right that our Constitution proclaims to be "of paramount obligation in all . . . judicial . . . proceedings," has been judicially subordinated to a vision of legislative hegemony over the protection of constitutional rights. And I especially regret that Rhode Island's Supreme Court, charged by the Constitution to say what that law is, to be the guardian of our constitutional rights, and to uphold these paramount provisions in all judicial proceedings, has relegated itself to the sidelines in this case when it comes to enforcing the State's Constitution. Instead of functioning as a key player in the protection of constitutional rights, the Court has withdrawn from the field to cower in the shadows of its intended constitutional role. Instead of serving as "an impenetrable bulwark against every assumption of power in the Legislative or Executive . . . [and] resist[ing] every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights," the Court has allowed itself to become a penetrable bullseye for those who would shoot down crime victims' constitutional right. Instead of independently enforcing and protecting these constitutional rights against all violations (whether they come from within or without the government), the Court has consigned the Judiciary in this constitutional case to serving as the liveried footservants of the General Assembly, waiting for some sign on high that it is permissible for this Court to enforce the constitutional rights that are so dear to the People of this State but which, says the majority, this Court is powerless to uphold without express legislative authorization to do so. I emphatically disagree with this shrunken and withered vision of judicial power, responsibility, and independence.[198]

Justice Flanders goes on to urge that "just because . . . 'the form and extent of [legal remedies] is necessarily subject to the legislative power,' this does not mean that legal remedies cannot be awarded by the courts for the violation of constitutional rights" until the legislature acts.[199] He identifies the absurd consequences of ruling the opposite way, which

198. *Id.* at 602 (internal citations omitted) (Flanders, J., dissenting).

199. *Id.* at 604 (Flanders, J., dissenting).

would "turn Rhode Island into a topsy-turvy jurisdiction where people who trip on municipal sidewalks may sue their government for damages but individuals whose fundamental constitutional rights have been violated by the government are powerless to do so."[200]

Ultimately, the vast majority of state constitutional victims' rights amendments are drafted as mandatory rights. Nevertheless, in the three states where appellate courts have expressly ruled on whether victim standing is implicit in victims' constitutional rights, two state supreme courts have refused to imply standing; in a third state, the intermediate appellate courts are split. The Kansas Supreme Court defied constitutional conventions to conclude that victims' rights are not mandatory rights.[201] The Rhode Island Supreme Court abandoned constitutional conventions to rule that victims' rights were not enabled rights.[202] Intermediate appellate courts in different appellate districts in California have come to opposite conclusions.[203] As the *Holt*, *Thompson*, and *Bandoni* opinions demonstrate, courts are abandoning their constitutional role in favor of denigrating victims' constitutional rights. The unfortunate judicial precedent of these cases undermines the legal protections that assure the vitality of other civil liberties. If courts establish precedent that compromises canons in one context, such bad precedent may be extended to other civil liberties. Finally, these opinions erode public and victim confidence in the constitutional system. For victims, the bottom line is that their rights are held to be advisory or not enabled.

2. Discretion and particular victims' rights

There are both discretionary and mandatory victims' rights. Victims do not have standing when rights are discretionary. In a few state constitutions, particular victims' rights are written in discretionary language. There are two types of particular discretionary rights. First, there are provisions in which government discretion is broad and largely unfettered. For example, under the Kansas Constitution, the victims'

200. *Id.*

201. State v. Holt, 874 P.2d 1183 (Kan. 1994).

202. *Bandoni*, 715 A.2d at 580.

203. Melissa J. v. Superior Court, 237 Cal. Rptr. 5 (Cal. Ct. App. 1987); People v. Superior Court (Thompson), 202 Cal. Rptr. 585 (Cal. Ct. App. 1984) (holding that absent legislative discretion on how to implement the victims' rights amendment, "the court has no authority to afford any relief").

right to speak at sentencing is not discretionary, but at all other proceedings the victim may speak "at any other time deemed appropriate by the court."[204] The language, "deemed appropriate," almost certainly gives the court unfettered discretion. The Missouri Constitution provides victims the mandatory right to information and the right to be heard "unless in the determination of the court the interests of justice require otherwise."[205] The interests of justice standard is not readily bounded. As a result, the Missouri exceptions are close to unfettered discretion. As another example, in Idaho, victims have the right to be heard "unless manifest injustice would result."[206] Victims' rights are illusory when accompanied by unfettered government discretion to deny rights.

Second, there are mandatory rights that provide a more precisely defined legal standard to be met before rights can be lawfully denied. Essentially, these are mandatory rights accompanied by a narrowly defined exception. With these rights, the court has the authority to deny a right, upon proof, only in specified circumstances. For example, in the Connecticut Constitution, a victim has the right to attend "unless such person is to testify and the court determines that the person's testimony would be materially affected if such person hears other testimony."[207] Because a court must determine that testimony would be "materially affected" before the victim can be excluded, the sequestration of victims from trial is an exception to the otherwise mandatory right of attendance.[208]

204. KAN. CONST. art. XV, § 15(a).

205. MO. CONST. art. I, § 32(2).

206. IDAHO CONST. art. I, § 22(6).

207. CONN. CONST. art. I, § 8(b)(5).

208. In Illinois, New Jersey, Texas, and Wisconsin, the right to be present is also discretionary. *See* ILL. CONST. art. I, § 8.1(a)(8) ("unless the victim is to testify and the court determines the victim's testimony would be materially affected if the victim hears other testimony at trial"); N.J. CONST. art. I, ¶ 22 ("A victim of crime shall not be denied the right to be present . . . except when . . . the victim is properly sequestered."); TEX. CONST. art. I, § 30(2)(b)(2) ("unless . . . the court determines the testimony would be materially affected if the victim hears other testimony at the trial"); WIS. CONST. art. I, § 9m ("unless the trial court finds sequestration is necessary to a fair trial for the defendant"). Because credible evidence must be presented establishing that testimony would be materially affected, victims will rarely be excluded from the trial. The possibility of exclusion is made rarer still by the ability to call the victim as the first witness, thus allowing them to be present for the rest of the trial. *See* Gabriel v. State, 925 P.2d 234, 236 (Wyo. 1996) (upholding the decision of the trial court to allow the victim to observe the trial after the victim testified first and had a lengthy pretrial statement). There are other examples. In California, the right to restitution is required unless "compelling and extraordinary reasons exist to the contrary." CAL. CONST. art. I, § 28(b). In Idaho, a victim's constitutional right to refuse an interview is subject to existing law. *See* IDAHO CONST. art. I, § 22. In New Mexico, a victim's right to have her

Even these mandatory rights become illusory rights when victims are denied standing to challenge erroneous trial court rulings. Even if victims can challenge such rulings, standing is of little use if the review standard is too lax. If, for instance, such determinations are overturned only when the court abuses its discretion, victims' rights are left without meaningful appellate court oversight.[209] Instead, a standard like clear and convincing proof that testimony would "be materially affected" provides a concrete basis for appellate review.

3. Discretion and broad victims' rights

Fundamentally, courts have the authority to interpret constitutions, including victims' broad constitutional rights.[210] Broad victims' rights are vague rights. To the extent that the original intent is unclear, courts may interpret these broad rights either narrowly or expansively. Judicial discretion is a problem for victims when broad constitutional rights are interpreted to provide no additional, or unduly restricted, constitutional accommodations beyond those provided for in more specific victims' rights.

The courts of New Jersey have been the most expansive in addressing broad rights. The New Jersey Constitution provides that "a victim of crime shall be treated with fairness, compassion and respect by the criminal justice system."[211] As noted in Part I.B, in *State v. Timmendequas*,[212] the New Jersey Supreme Court held this broad language, coupled with the victims' right to be present at public judicial proceedings, could be a lawful basis to deny a defendant's motion to change venue. Further, the court held that the victim possessed trial court access to seek and obtain the empanelling of a foreign jury in preference to a change of venue.[213]

Outside of New Jersey, state courts have used broad rights to inform more specific rights.[214] It is probable that some state courts will follow the New Jersey courts' example of applying broad rights in expansive

property returned promptly is subject to "compelling evidentiary reasons for retention." N.M. CONST. art. II, § 24(11).

209. *See infra* Part II.D.2 for a discussion of how victims can be left without meaningful appellate court oversight.

210. *See* notes 19–37 and accompanying text for examples of victims' broad rights.

211. N.J. CONST. art. I, ¶ 22.

212. 737 A.2d 55, 76 (N.J. 1999).

213. *Id.* at 74–75.

214. *See supra* notes 25–28.

ways, while some states courts will not. For example, in Wisconsin, a court declined to rely on broad provisions to give the victim an interest in the change of venue proceeding.[215]

C. The Remedies Problem

Remedies for victims' rights violations consist of superior and inferior remedies. Superior remedies allow for victims to exercise their rights. For example, a victim who was precluded from testifying at sentencing can have the sentence voided and the defendant would then be resentenced with the benefit of the victims' testimony. An inferior right, however, attempts to compensate victims for the loss of their rights in place of directly enforcing the rights. In the context of victims' rights, inferior remedies are essentially dysfunctional because they do not leave victims in the position to exercise their rights. The more specific dysfunctions of inferior remedies are reviewed below. On the other hand, the superior remedies of voiding and reconsideration, which are also available for violations of criminal defendants' constitutional rights, ultimately do allow victims to exercise their rights. If victims' rights are to be real rights, like defendants' rights, then the remedies of voiding and reconsideration must be available to victims.

1. The inferior remedies

Inferior remedies do not put victims in a position to exercise their rights. Instead, inferior remedies attempt to give victims something in place of their rights, to compensate them for the loss of use of the rights and to generally deter government violations of their rights. But inferior rights do not satisfy even these limited goals because they are available only to certain victims in certain limited circumstances.

One potential inferior remedy is to make constitutional torts available to compensate victims for rights violations. Citizens have this monetary damages remedy available in other contexts, for example, when their Fourth Amendment right to privacy is violated by the police.[216] While many states ban money damages for victims' rights violations, constitutions could be amended to allow for this remedy.

215. State v. Rymer, 2001 WI Ct. App. 31U, 622 N.W.2d 770, *cert. denied*, 2001 WI 15, 626 N.W.2d 807.

216. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

Nevertheless, there are at least two significant obstacles to money damages as a satisfactory remedy. First, victims' rights are typically violated by prosecutors and judges who are shielded by sovereign immunity and, therefore, cannot be sued for most types of rights violations. "It is always agreed that an immunity protects . . . judges . . . so long as their acts are 'judicial' in nature and within the very general scope of their jurisdiction,"[217] even "in civil rights cases."[218] Judges are even immune from actions when they act maliciously.[219] Judicial immunity also extends to prosecutors,[220] although prosecutors may be liable for civil rights violations done maliciously.[221] Moreover, these immunities are unlikely to be modified. *Bandoni* provides a good example of how highly courts can value judicial and prosecutorial immunity. The majority of the Rhode Island Supreme Court cast aside many conventions of constitutional analysis to rule that victims' rights were not self-enabled in large part to protect these immunities.[222]

Second, even if monetary damages were available, it is unlikely victims would collect sufficient damages to satisfy them or deter government misconduct. Substantial damages are intuitively appropriate when a home is wrongfully invaded and searched, a suspect is beaten, or a person falsely arrested. On the other hand, damages for the violation of a victims' right to speak at sentencing are far harder to quantify. Moreover, a judge who violated a plaintiff's rights could readily testify in the civil trial that exactly the same sentence would have been imposed if the victim's right had been honored. This likely would eliminate damages, or at least reduce the damages award to relative insignificance. Even if the measure of damages did not rest on whether there was a different sentence, but on the lost opportunity to be heard, it is unlikely substantial damages would be awarded for such a loss. In addition to failing to adequately compensate the victim, these small damages would be unlikely to deter future rights violations.

217. W. PAGE KEETON ET AL., PROSSER AND KEATON ON TORTS § 132, at 1056–69 (5th ed. 1984).

218. *Id.*

219. *Id.* at 1060.

220. *Id.* at 1058.

221. *Id.* at 1060–61.

222. *See supra* notes 173–202 and accompanying text for a discussion of *Bandoni*.

State constitutional civil rights injunctions are another possibility for victims whose rights have been violated by prosecutors.[223] As a general rule, however, such injunctions are only available when the prosecutor acts maliciously, and to achieve an injunction, the victim would need to demonstrate an ongoing pattern of rights violations.[224] This is a substantial undertaking. Such an effort would require access to the names of large numbers of crime victims to gather sufficient evidence to demonstrate the pattern. Even if such an investigation were practically feasible or lawful, such intrusions on the privacy of crime victims run completely counter to ensuring the values of dignity and privacy of victims that underlie victims' rights. Moreover, a victim must establish that his rights will again be violated in the future.[225] Outside the context of whether there is a pattern, it is difficult, if not impossible, to predict when in the future an individual victim's right will be violated. Because "[a]n injunction may not be issued to halt that conduct absent a great and immediate threat that the named plaintiff will suffer irreparable injury" and because it is so difficult to establish an immediate threat, injunctions will rarely, if ever, be available to enforce victims' rights violations.[226]

Administrative review of victims' rights violations might also provide victims with an avenue of recourse. But, like all inferior remedies, this does nothing to ensure that aggrieved victims actually have the opportunity to exercise their rights in the case involving their victimization. Furthermore, there are severe limits on what administrative bodies can accomplish. For example, it is unlikely that the judicial branch, attorneys general, and county prosecutors will support the creation of a separate agency that exercises actual authority over them. Moreover, separation of powers problems would hamper executive branch administrative authority over judges. Finally, any hope that such a body could discipline ethical violators of victims' rights is unrealistic. Because transgressors are lawyers and judges, only state supreme courts and their authorized processes can lawfully discipline bar members for improper conduct falling within the purview of prosecutorial and judicial ethics. Left without any real authority over judicial and prosecutorial agencies, administrative bodies could not insist on any systemic

223. 42 AM. JUR. 2D *Injunctions* § 73 (2003) ("A plaintiff may seek injunctive relief to guard against continuing (or future) governmental misconduct.") (collecting state cases).

224. *Id.* (noting injunction cases involving a "pattern" of constitutional violations).

225. *Id.*

226. *Id.* § 74.

improvements to ensure rights compliance. Such an agency might add value by bringing prosecutors and judges together to cure systemic violations,[227] but the agency would likely face too many hurdles to provide even an effective inferior remedy.

Ethical discipline itself is plainly an insufficient remedy. No reported opinion has disciplined prosecutors; one opinion for judges; and one opinion for defense counsels.[228] Two cases in twenty-three years since the first victim constitutional amendment came into being reflects the inadequacy of ethics as a remedy for victims' rights violations.

Internal administrative remedies in prosecutors' offices could help curb rights violations in future cases. However, Congress correctly structured this as supplementary to victims' direct enforcement of their rights.[229] Internal discipline is not a remedy that allows victims whose rights have been violated to actually exercise their rights in the case involving their victimization. Moreover, such internal discipline for violation of victims' rights is only as good as each local jurisdiction's commitment to it. At best, internal discipline sets up unequal enforcement depending upon the county in which the violation occurs and each district attorney's commitment to compliance. Moreover, internal discipline in prosecutors' offices does not address the problem of judicial disobedience of victims' rights.

In sum, a review of inferior remedies for victims' rights reveals them to be sorely wanting. In order for victims to have real rights, the superior remedies of voiding and reconsideration must be available for victims' rights violations.

2. The superior remedy of voiding

The superior remedy for failure to comply with victims' rights is voiding. An entire court proceeding and its result can be voided, and once voided, the hearing can be repeated in compliance with victims' rights. Analogously, criminal convictions are voided when defendants' rights are violated.[230] In fact, state appellate courts have vacated results and ordered judges and parole boards to comply with victims' rights. In

227. *See generally* U.S. DEP'T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, VICTIMS' RIGHTS COMPLIANCE EFFORTS: EXPERIENCES IN THREE STATES (Nat'l Criminal Justice Ass'n ed., 1998).

228. Disciplinary Counsel v. O'Neill, 815 N.E.2d 286 (Ohio 2004) (disciplining judge for this and other ethical violations); *In re* Thompson, 98 P.3d 366 (Or. 2004).

229. *See* Appendix I.

230. *See supra* notes 82–84 and accompanying text.

Melissa J., for example, the trial court modified a restitution order in violation of the victim's constitutional and statutory right to notice and to be heard.[231] On appeal, the California intermediate appellate court voided the trial court's order.[232] Similarly, the Supreme Court of Arizona vacated a parole board order when a victim had failed to request notice of hearings because the state had failed to comply with its lawful obligation to inform the victim of the hearing.[233] In the Florida case of *Ford v. State*,[234] victims petitioned for certiorari challenging a restitution order entered in violation of the victims' constitutional right to address the court at sentencing. The Florida intermediate appellate court voided the restitution portion of the judgment and remanded the case for a resentencing.[235] The appellate court granted the writ, ordering that restitution be divided in proportion to the victims' loss rather than in equal shares.[236] As these cases reveal, courts are correctly beginning to utilize the voiding remedy to enforce victims' rights.

Voiding an entire proceeding is typically accompanied by rejection of all evidence gathered in that proceeding—a relatively inefficient measure. A more limited remedy than voiding the proceeding is voiding the result. Voiding the result alone, without voiding the original proceeding, may be available to enforce victims' rights in some circumstances. For example, voiding the result is permissible after a motion and hearing on reconsideration. This reconsideration of the result is possible in the context of some victims' rights violations because victims do not have the right to cross-examine witnesses. Because victims do not lose any right to cross-examination, courts can reconsider decisions without throwing out all the evidence gathered at prior hearings and still be in compliance with victims' rights to notice and to be heard. Where reconsideration is available, the main threat to efficiency—a complete rejection of the previously vetted evidence—is unnecessary. Of course, the victim needs a second hearing to accommodate the victim's right. At a reconsideration hearing, a victim can exercise her right to address the court, and the court will affirm or void the prior ruling or order. The full parties would be present and have the opportunity to

231. Melissa J. v. Superior Court, 237 Cal. Rptr. 5, 6 (Cal. Ct. App. 1987).

232. *Id.* at 6–7.

233. State *ex rel.* Hance v. Ariz. Bd. of Pardons and Paroles, 875 P.2d 824, 830 (Ariz. Ct. App. 1993).

234. 829 So. 2d 946 (Fla. Dist. Ct. App. 2002).

235. *Id.* at 948.

236. *Id.*

participate as well. Courts would reconsider the result in light of the victim's information.

Some state courts have already reconsidered rulings when victims' rights have been violated. In the Utah case of *State v. Casey*,[237] a state appellate court upheld reconsideration but declined to order voiding of the proceeding when the court had initially denied the victim his rights.[238] In *Casey*, the court violated a victim's rights to receive notification of a plea hearing and to address the court in opposition.[239] The victim argued that the plea and sentence were in error because the plea and sentence resulted in a violation of the victim's rights.[240] The trial court treated the objection as a motion to reconsider, heard the victim's opposition to the plea bargain, and decided to leave undisturbed the original plea and sentence.[241] On review, the Utah Supreme Court determined that the procedure of reconsideration undertaken by the trial court was sufficient to remedy the rights violation.[242]

While reconsideration is efficient, it is easy for courts to engage improperly in reconsideration as merely a pro forma matter, with no genuine intention of changing the earlier decision regardless of what information the victim provided. Nonetheless, when done with integrity, reconsideration is a useful procedure for remedying some victims' rights violations.

a. Double jeopardy limits on voiding and reconsideration. Voiding or reconsideration remedies are not available to a prosecutor or victim when barred by federal or state double jeopardy. The Double Jeopardy Clause, incorporated against the states by the Supreme Court in 1969,[243] provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[244] Double jeopardy prevents the state from undertaking multiple prosecutions against a defendant for the

237. 44 P.3d 756 (Utah 2002).

238. *Id.* at 758.

239. *Id.* at 760.

240. *Id.* at 759.

241. *Id.* at 766.

242. *Id.* at 760. A troubling aspect of the *Casey* majority opinion was its approval of the trial court's "informal" procedure to allow victim input. *See id.* at 756. The concurrence correctly chastised the sanctioning of such informal procedures. *Id.* at 766 (Wilkins, J., concurring). Had the trial court voided the plea, it is doubtful that such an informal procedure would have been tolerated by the court.

243. Benton v. Maryland, 395 U.S. 784, 794 (1969).

244. U.S. CONST. amend. V.

same offense, thus "subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[245]

The impact of double jeopardy is largely limited to preventing the voiding of trials. In other procedural contexts, double jeopardy poses little threat to voiding and reconsideration remedies for victims' rights violations. Double jeopardy protects defendants in certain procedural stages and not others. Jeopardy attaches when "a defendant is 'put to trial before the trier of facts, whether the trier be a jury or a judge.'"[246] Furthermore, double jeopardy does not attach to pretrial procedures of motions to quash and demurrers to indictments,[247] refiling of affidavits in support of arrest warrants,[248] or grand jury proceedings.[249]

As participants, crime victims have procedural rights in certain pretrial settings. For example, in some jurisdictions, participants are entitled to the rights to notice and to address the court at pretrial release hearings and the right to prompt disposition.[250] Double jeopardy presents no bar to voiding and reconsideration of pretrial hearings or rulings for failure to afford victims their due rights. Thus, for example, the Double Jeopardy Clause does not prohibit reconsideration of a release order where a victim's right to receive notice of, or the opportunity to speak at, a release hearing is violated. The trial court can readily remedy the violation by convening a reconsideration hearing to present the victim's information and opinion. The court can then consider whether to modify the earlier decision. As another example, if trials are unduly delayed, victims can assert their rights to a prompt disposition without running afoul of double jeopardy.

Double jeopardy protects defendants most strongly at the trial stage. Double jeopardy attaches at trial when the jury is selected and sworn, or, if a bench trial, when first witness is sworn in.[251] The victim's right at

245. Green v. United States, 355 U.S. 184, 187–88 (1957).

246. Serfass v. United States, 420 U.S. 377, 388 (1975) (quoting United States v. Jorn, 400 U.S. 470, 479 (1971)).

247. Kepner v. United States, 195 U.S. 100, 130–31 (1904).

248. Collins v. Loisel, 262 U.S. 426, 429–30 (1923).

249. United States v. Williams, 504 U.S. 36, 49 (1992); Respublica v. Shaffer, 1 U.S. (1 Dall.) 236, 237 (1788).

250. *See supra* notes 42–44 and accompanying text for a list of states that guarantee the right to be heard at pretrial release hearings and the right to a speedy disposition.

251. Crist v. Bretz, 437 U.S. 28, 35 (1978); *Serfass*, 420 U.S. at 388.

trial is the right to attend. Should victims fail to get adequate notice of the right or of the trial date, or if the court refuses attendance, double jeopardy will nevertheless attach as trial begins. The verdict, be it conviction or acquittal, cannot be altered, absent limited exceptions. Because the verdict cannot be altered, victims will not be able to exercise their constitutional right to attend the trial. Federal double jeopardy in all likelihood prohibits victims from voiding the trial or verdict in the hope of attending a retrial. However, as the right to attend trial is an ongoing right, the victim could seek expedited review until the trial is over. Nevertheless, because most criminal trials are fairly brief, it is unlikely that even an expedited writ procedure would conclude before the trial was finished.

There are a few exceptions to the double jeopardy limitations on reconsidering a verdict. For example, the defendant may appeal a conviction, which, if reversed, may result in retrial. If the court excluded the victim in the last trial, she can seek a writ of prohibition to prevent a similar order in the second trial. If the victim misses the new trial because she is not notified of the trial date, jeopardy attaches and the victim is again without remedy.

Assuming the defendant himself does not eliminate double jeopardy by successfully securing a mistrial in the trial court[252] or retrial after appeal,[253] the only way for the state to get a retrial after a mistrial is for manifest necessity,[254] and this exception is available only during the course of the trial. Manifest necessity exists where "prejudice to either the defendant or the state may be found."[255] Standing alone, the denial of a trial attendance right does not necessarily result in prejudice to victims or the state in the crucial sense that the absence of a victim is likely to alter the result of the trial. However, it is possible that a victim's presence might actually change the outcome of the trial. For example, if the victim hears something she knows to be false in the trial and is able

252. United States v. Scott, 437 U.S. 82, 98–99 (1978) (explaining that there is no double jeopardy if mistrial is declared on defendant's own motion). This is not true in all cases. If a defendant is goaded into moving for a mistrial because of prosecutorial misconduct, double jeopardy bars retrial. *See* Oregon v. Kennedy, 456 U.S. 667, 676 (1982).

253. Defense appeals, which successfully secure an overturn of the conviction, are considered "waivers" of double jeopardy or, alternately, "the same jeopardy which attached at the first trial [that] did not come to an end" because there was no acquittal or conviction. Green v. United States, 355 U.S. 184, 189 (1957). *Accord* Scott, 437 U.S. at 88–89; Ball v. United States, 163 U.S. 662 (1896).

254. Illinois v. Somerville, 410 U.S. 458, 462–63 (1973).

255. 21 AM. JUR. 2D *Criminal Law* § 383 (2003).

to reveal the truth. If the parties are unaware of the falsehood, a victim may be the only one capable of revealing it.[256] In this context, the victim's presence improves the truth finding function of the trial. Nevertheless, as victims have no other rights at trial relative to the truth-finding function, presently it is unlikely that manifest necessity can be the basis for voiding a trial when a victim's right to attend is violated.[257]

Victims have the right to speak at entry of plea hearings. The right to speak at sentencing expressly or implicitly provides for this.[258] In a plea bargain, double jeopardy generally attaches when a court unconditionally accepts the plea.[259] However, the procedural manner in which a plea is given is critical to the legality of the plea. Pleas of guilty may be voided in certain circumstances. First, a guilty plea is void if the plea is a sham or if a court is without jurisdiction to take the plea.[260] Pleas of guilty are shams when the state is not present or is uninvolved in the disposition.[261] The theme running through these cases is that the defendant should not become his own prosecutor and confess guilt without the state's involvement, thus avoiding proper prosecution. Victims denied their right to oppose the plea could allege that the plea was a sham. For example, it would be a sham if the prosecutor and the defense attorney proceeded in knowing violation of constitutional sentencing procedure.

The second basis for overturning a plea is that courts lack jurisdiction to take a plea when the in-court proceedings lack fundamental prerequisites to validity.[262] The central distinction between a sham proceeding and lack of jurisdiction is that the sham proceedings reflect fraud. The similarities between the denial of state participation

253. Beloof & Cassell, *supra* note 11.

257. While victims have no voiding remedy because of double jeopardy, this does not necessarily preclude appellate review of the rights violations. While double jeopardy may render victims' objection to exclusion moot once the trial is over, victims can seek review for rights violations because the violations are capable of repetition, yet evade review. However, review is far from assured as both writs and mootness exceptions are in the reviewing court's discretion. *See, e.g.*, Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976) ("[I]ssuance of the writ is in large part a matter of discretion with the court to which the petition is addressed.").

258. People v. Stringham, 253 Cal. Rptr. 484, 492 (Cal. Ct. App. 1988).

259. Morris v. Reynolds, 264 F.3d 38, 51 (2d Cir. 2001).

260. *See, e.g.*, United States v. Combs, 634 F.2d 1295, 1300 (10th Cir. 1980) (McKay, J., concurring) ("Where there is no plenary trial because the defendant pleads guilty, the case law clearly indicates that jeopardy attaches upon the court's acceptance of the guilty plea, unless the plea is made in a sham proceeding or the court lacks jurisdiction.").

261. F.M. English, Annotation, *Plea of Guilty as Basis of Claim of Double Jeopardy in Attempted Subsequent Prosecution for Same Offense*, 75 A.L.R.2D 683, §§ 4–5 (2004).

262. *Id.* § 5.

and victim participation are significant. Victims, like the state, have an independent right to notice of, and to address the court at, a plea hearing. The violation of victims' constitutional right to speak means the plea is given in a constitutionally improper manner. Similar to cases in which the state has no notice of defendants' guilty pleas—absent compliance with the victims' right to speak—the plea lacks a fundamental prerequisite to validity and could be voided by the court without running afoul of double jeopardy.

In the Florida intermediate appellate court case of *Ford v. State*,[263] the victims sought to vacate pleas and a restitution order. The victims had losses ranging from $63 to $3.4 million.[264] The plea and restitution order were accepted and entered in violation of the victim's right under the Florida Constitution to "be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent these rights do not interfere with the constitutional rights of the accused."[265] Florida statutes enable the constitutional mandate requiring state agencies to provide notification to the victim.[266] The court, unaware of the lack of notice and of the victim's objection to both the plea arrangement and restitution conditions, entered the defendant's guilty plea into the record and imposed sentence.[267] The victim filed a petition for writ of certiorari, which the court issued as to the restitution condition of sentencing but denied as to the request to vacate the plea.[268]

The *Ford* opinion contains little analysis to illuminate either the result or the distinction between restitution and the rest of the sentence. While the court does not explicitly state that double jeopardy prevented the court from vacating the plea, this is the most likely explanation because the only state argument cited by the court was that vacating the plea would violate double jeopardy.[269] If, indeed, double jeopardy bars voiding a plea when victims' rights are violated, it would at first blush seem to apply to restitution as well. The answer might be that in Florida restitution is not considered criminal punishment but, rather, is civil in

263. 829 So. 2d 946 (Fla. Dist. Ct. App. 2002).

264. *Id.* at 947.

265. FLA. CONST. art. I, § 16(b); *Ford*, 829 So. 2d at 948.

266. FLA. STAT. ANN. § 960.001(1)(e)(3), (j) (West 2004).

267. *Ford*, 829 So. 2d at 948.

268. *Id*.

269. *Id.*

nature.[270] Because, in Florida, restitution is not punishment, double jeopardy principles are inapplicable to restitution.

However, the *Ford* court implied that double jeopardy prevented a rehearing and, therefore, that a sentence taken in violation of a victim's rights did not deny the court of jurisdiction to accept the plea. Inherent in such a conclusion might be the assumption that a remedy is available only to full parties because victims as third parties have no interest in punishment. However, this reflects faulty logic. The state has an interest in punishment, revealed in its statutory right to address the court at sentencing. Double jeopardy is no barrier to resentencing when the state has been denied the opportunity to speak at sentencing. Likewise, victims clearly have an interest in punishment rooted in their harm, an interest implicit in, and inseparable from, victims' rights to address the court at disposition. Victims' interest in punishment is reflected in victims' rights to speak at plea and sentencing hearings. In most jurisdictions, victims, as participants and like full parties, have a completely independent right to address the court at sentencing.[271] Victims do not need the permission of the parties or the court to exercise this right. The right itself is the essential proof that victims have an interest in punishment. It makes no sense to provide a right to speak at sentencing if there is no interest in punishment. Moreover, the contents of victims' sentencing remarks are not limited to information about the crime or its impact upon the victim. Just like the state, victims may give sentencing recommendations, essentially prayers for relief, concerning what the ultimate sentence should be.[272] There is no coherent way to reconcile this right with the view that victims have no interest in punishment.

The California case *People v. Stringham* explains that victims have a real interest in punishment.[273] In *Stringham*, pursuant to a victim's right to be heard at sentencing, the victim objected to the trial court's acceptance of a plea agreement to a reduced charge in a homicide

270. Bunch v. Florida, 745 So. 2d 400, 401 (Fla. Dist. Ct. App. 1999) (citing cases and explaining that the purpose of restitution "is to make victims of crime whole by restoring them to the value of that which they have lost as a result of the crime, rather than to punish the wrongdoer"); *see also* FLA. STAT. ANN. § 775.089(1)(a) (West 2004) ("In addition to any punishment, the court shall order the defendant to make restitution to the victim.").

271. *See* Beloof, *supra* note 39, at app. I (listing the states that give victims the right to address the court at sentencing).

272. Beloof, *supra* note 39, at 299.

273. People v. Stringham, 253 Cal. Rptr. 484 (Cal. Ct. App. 1988).

case.[274] The trial court was persuaded by the victim's opinion that the plea agreement was inappropriately lenient and scheduled the case for trial.[275] The appellate court understood that the purposes behind the victim's right to address the court "are to acquaint the court with the victim's unique perspective of the case, and require consideration of the victim's statement by the court."[276] The *Stringham* court averred:

> Our obligation . . . is to adopt a construction . . . that will effectuate the voters' intent . . . and avoid absurd results. It would be difficult to conceive of a more absurd result than to . . . [deny] a victim . . . a meaningful opportunity to protest a plea bargain that will allow a defendant to escape the punishment which the victim . . . feels is appropriate to the crime.[277]

The *Stringham* court eloquently affirmed that victims have an interest in punishment founded in their right to speak at sentencing. This interest in punishment is part and parcel of the right to oppose (or support) a plea or sentence. Because of the victims' right to speak at sentencing, and their interest in punishment that is inseparable from this right, pleas and sentences taken in violation of victims' rights are taken in excess of trial courts' jurisdiction. Voiding sentences under these circumstances does not violate double jeopardy any more than voiding the sentence where the state's interest in punishment and opportunity to speak at sentencing is denied. Victims, like the state, have an interest in punishment and a right to be heard at sentencing.

The United States Supreme Court has recognized a victim's interest in a criminal's punishment even when there was no express victims' right at issue. In *Calderon v. Thompson*,[278] the Court addressed substantial delay in the postconviction process, explaining that for delay to unsettle expectations in the execution of moral judgment "is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' *an interest shared by the state and victims of crime alike*."[279] The Court's language supports victims' interest in punishment.

274. *Id.* at 486.

275. *Id.* at 487.

276. *Id.* at 491.

277. *Id.* (citations omitted).

278. 523 U.S. 538 (1998).

279. *Id.* at 556 (quoting Herrera v. Collins, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring)) (emphasis added) (citation omitted).

It cannot be credibly argued that defendants' federal constitutional protection against double jeopardy forbids any contemplation of victims' interest in punishment. Indeed, victims' interest in punishment is more firmly rooted in American legal history than the states' interest.[280] At common law, victims were private prosecutors, and only by enacting statutes authorizing public prosecution was the states' interest in punishment newly legitimized.[281] Victims' state constitutional rights relegitimize what has always been crime victims' constitutionally permitted interest in punishment. Put another way, there was no "original intent" that double jeopardy exceptions should not apply to violations of crime victims' rights.

In light of victims' interest in punishment, when victims' right to speak at sentencing is denied, trial courts *do* lose jurisdiction to sentence. The contrary view in *Ford*[282] puts formalism over substance by implicitly assuming that victims, as third parties, cannot seek the voiding remedy. Yet even the *Ford* formalism is no longer relevant and its implied premise is wrong. While victims may still not be full parties in felony criminal prosecutions, victims are also no longer merely third-party outsiders in relation to exercising state constitutional rights. Victims' rights grant them participant status for pleas and sentencing. Thus, the formalism of third-party status in contexts other than victims' rights can no longer credibly be used to deny victims the remedy of voiding pleas and sentences because, like the state, the victims have an interest in punishment and a right to speak at sentencing.

The *Ford* court's implicit holding that double jeopardy bars voiding when victims' rights are violated is fundamentally flawed. Moreover, the *Ford* opinion is troubling because the same court reached the opposite result in the same case in an earlier, and later withdrawn, unpublished opinion. In the earlier opinion, the court held: "We cannot agree with the state that only the order of restitution should be revisited, however, and accordingly quash the pleas and remand for further proceedings with adequate notice to the petitioner and remaining victims."[283] Of course, appellate courts engaged in ongoing deliberation are free to reformulate

280. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 127–28 (1998) (Stevens, J., concurring); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 96 (J.P. Mayer ed., Doubleday & Co. 1969) (1838).

281. *See* Beloof, *supra* note 10, at 291 n.16.

282. *See supra* notes 263–72 and accompanying text for a discussion of the *Ford* holding.

283. Ford v. State, No. 4D01-4165, 2002 Fla. App. LEXIS 10815, at *4 (Fla. Dist. Ct. App. July 31, 2002).

their views. But certainly such a significant shift in a constitutional rights case of first impression resulting in the denial of the voiding remedy should be accompanied by explanation. Instead, the lack of analysis in *Ford* is representative of judicial denigration of victims' rights. The critical remedial issue concerning victims' constitutional rights was, perhaps, too insignificant to the court for the court to undertake a comprehensive analysis of its dubious demise. At bottom, *Ford*, in both its result and the short shrift given the issue, stubbornly affirms the very criminal justice culture that victims' rights were meant to change—a culture that suppresses victims' interests.

Most state constitutions also expressly grant victims the right to speak at sentencing. Double jeopardy, however, does not prohibit voiding a sentence when victims are denied their right to address the court at sentencing. The two exceptions to double jeopardy include, first, illegal sentences and, second, sentences conducted in an illegal manner. Illegal sentences are those that fail to comply with a substantive statutory requirement of the sentence itself, rather than violating a procedural prerequisite to imposing sentence. For example, a sentence that flies in the face of a statutorily mandated sentence is an illegal sentence because it conflicts with the statutory sentencing requirements. The failure to impose mandatory restitution is an example of such an illegal sentence.

Likewise, sentences taken in violation of either the defendants' right or the states' statutory authority to speak at sentencing are plainly sentences taken in an illegal manner. Again, comparison to defendants' rights highlights how courts should treat victims' rights. The Supreme Court, despite the absence of express language granting the right, has held that criminal defendants must be given an opportunity to speak at sentencing.[284] A trial court's "failure to ask the defendant if he had anything to say before sentenc[ing]" requires reversal.[285] Absent explicit limitations, sentencing in violation of the victims' right to speak occurs in a similarly illegal manner.

Denial of prosecutors' right to speak at sentencing is also a denial of a necessary prerequisite to sentencing and double jeopardy that does not prevent resentencing. In *United States v. Crawford*,[286] for example, the sentencing court stopped the government from attempting to speak and

284. Green v. United States, 365 U.S. 301, 304 (1961).

285. *Id.*

286. 769 F.2d 253, 256 (5th Cir. 1985) (superseded in part by statute as stated in *United States v. Lopez*, 26 F.3d 512, 522 (5th Cir. 1994)).

proceeded to sentence without informing government counsel of the right to be heard. The government had a right to speak under Federal Rule of Criminal Procedure 32(a)(1)(C), which provided, "[t]he attorney for the government shall have an equivalent opportunity [to the defendant] to speak to the court."[287] Defendants, or at least their counsel, knew that a sentence taken in an improper manner is unlawful, and they knew that the sentence is subject to reversal and can have no legitimate expectation of finality in the sentence.[288]

Victims' rights to speak at sentencing are similar to defendants' rights and the governments' statutory authority. For example, the Arizona Constitution provides, "[t]o protect and preserve victims' rights to justice and due process, a victim of crime has a right . . . [t]o be heard at any proceeding involving . . . a negotiated plea[] and sentencing."[289] Because the state and defendant know that a sentence taken in an improper manner is unlawful, they have no legitimate expectation of finality in sentences where the constitutional rights of crime victims are violated. Furthermore, the victims' interest in punishment, discussed above, and the victims' interest in exercising their rights, makes the voiding remedy available and appropriate for violation of their rights. Double jeopardy should rarely bar courts from vindicating victims' rights by implementing the voiding remedy.

b. Express state, constitutional, and court-placed limits on voiding and reconsideration. While voiding and reconsideration remedies are the only superior remedies available to crime victims, these remedies are sometimes denied to victims in the very constitutional provisions that give victims rights. In particular, some victims' rights provisions establish very restrictive limits on voiding and reconsideration remedies. These restrictions eliminate standing because remedy is a prerequisite to standing. This section summarizes the different state constitutional limitations on victims' rights and also examines how some state courts illegitimately use these limitations to infringe further upon victims' rights.

In Oregon and Virginia, for example, there is no victim standing to ensure that rights can be exercised in criminal cases because there is no voiding or reconsideration remedy available. The Oregon Constitution

287. *Id.* at 255 (quoting FED. R. CIV. P. 32(a)(1)(c)).

288. *Id.* at 255–56.

289. ARIZ. CONST. art. II, § 2.1(A)(4).

provides that the section may not "be used to invalidate . . . [a] ruling of a court, conviction or adjudication."[290] The Virginia Constitution similarly provides, "[t]his section does not confer upon any person a right to appeal or modify any decision in a criminal proceeding."[291] These constitutional provisions do not provide for real rights because the rights can be violated egregiously and even intentionally, without meaningful redress.[292] In these two states, the only hope to achieve the remedies of voiding and reconsideration is amendment of the state constitutions or redress to current and completely independent statutory rights and remedies.

Kansas,[293] Missouri,[294] and Idaho[295] prohibit setting aside a "finding of guilty or not guilty." However, to the extent that federal double jeopardy limits already prohibit voiding a verdict, these state provisions have little additional practical effect on victims' standing. To the extent these limitations exceed double jeopardy, they have an additional effect of preventing voiding and reconsideration remedies. Nevada,[296]

290. OR. CONST. art. I, § 42(2).

291. VA. CONST. art. I, § 8-A.

292. In these jurisdictions, until and unless the victims amendments are changed, only inferior remedies can be established by the legislature for rights violations. Inferior remedies are discussed in Part II.C.1.

293. KAN. CONST. art. XV, § 15(c) ("Nothing in this section shall be construed to authorize a court to set aside or to void a finding of guilty or not guilty or an acceptance of a plea of guilty or to set aside any sentence imposed or any other final disposition in any criminal case.").

294. MO. CONST. art. I, § 32(4) ("Nothing in this section shall be construed to authorize a court to set aside or to void a finding of guilt, or an acceptance of a plea of guilty in any criminal case.").

295. The Idaho Constitution provides:

> Nothing in this section shall be construed to authorize a court to dismiss a case, to set aside or void a finding of guilt or an acceptance of a plea of guilty, or to obtain appellate, habeas corpus, or other relief from any criminal judgment, for a violation of the provisions of this section; nor be construed as creating a cause of action for money damages, costs or attorneys fees against the state, a county, a municipality, any agency, instrumentality or person; nor be construed as limiting any rights for victims previously conferred by statute.

IDAHO CONST. art. I, § 22.

296. The Nevada Constitution provides:

> 3. Except as otherwise provided for in subsection 4, no person may maintain an action against the state or any public official or employee for damages or injunctive, declaratory or other legal or equitable relief on behalf of a victim of crime as a result of a violation of any statute enacted by the legislature pursuant to subsection 2. No such violation authorizes setting aside a conviction or sentence or continuing or postponing a criminal proceeding.
>
> 4. A person may maintain an action to compel a public officer or employee to carry out any duty required by the legislature pursuant to subsection 2.

Illinois,[297] and Oregon[298] prohibit "setting aside the conviction," and Idaho,[299] Kansas,[300] and Missouri[301] prohibit setting aside a "plea of guilty." Idaho,[302] Utah,[303] and Oregon[304] prohibit challenging a "criminal judgment." Nevada and Connecticut prohibit setting aside a "sentence."[305] In these eight states, once the judgment is entered, neither a conviction nor a sentence can be voided because the remedy is foreclosed by the victims' rights provisions themselves. Courts cannot order a plea or sentence undone if there are express limitations on such a remedy in the constitutional rights provisions.

On the other hand, Arizona, South Carolina, Nebraska, and Texas do not prevent a victim from contesting a violation of victims' rights. The Arizona Constitution provides that "[a] victim's *exercise* of any right granted by this section shall not be grounds for dismissing any criminal proceeding or setting aside any conviction or sentence."[306] South

NEV. CONST. art. I, § (8)(3)–(4).

297. ILL. CONST. art. I, § 8.1(d) ("Nothing in this Section or in any law enacted under this Section shall be construed as creating a basis for vacating a conviction or a ground for appellate relief in any criminal case.").

298. The Oregon Constitution provides:

> Nothing in this section reduces a criminal defendant's rights under the Constitution of the United States. Except as otherwise specifically provided this section supercedes any conflicting section of this Constitution. Nothing in this section is intended to create any cause of action for compensation or damages nor may this section be used to invalidate an accusatory instrument, ruling of a court, conviction or adjudication or otherwise suspend or terminate any criminal or juvenile delinquency proceedings at any point after the case is commenced or on appeal.

OR. CONST. art. I, § 42(2).

299. *See supra* note 295.

300. *See supra* note 293.

301. *See supra* note 294.

302. IDAHO CONST. art. I, § 22 (prohibiting victims' rights from creating appellate relief "from any criminal judgment").

303. UTAH CONST. art. I, § 28(2) ("Nothing in this section shall be construed as creating a cause of action for money damages, costs, or attorney's fees, or for dismissing any criminal charge, or relief from any criminal judgment.").

304. *See supra* note 298.

305. *See supra* note 296; CONN. CONST. art. I, § 8b(10) ("Nothing in this subsection or in any law enacted pursuant to this subsection shall be construed as creating a basis for vacating a conviction or ground for appellate relief in any criminal case."). On the other hand, ARIZ. CONST. art. II, § 2.1(B) provides that "[a] victim's exercise of any right granted by this section shall not be grounds for dismissing any criminal proceeding or setting aside any conviction or sentence." By its language, this provision would appear to allow victims in Arizona, however, to seek to void a plea or sentence if victims were denied the opportunity to exercise their rights. Taken in context, the limitation was plainly aimed at preventing the defendant's use of the right to void.

306. ARIZ. CONST. art. II, § 2.1(B) (emphasis added).

Carolina has a similar provision that states that "[a] victim's exercise of any right granted by this section is not grounds for dismissing any criminal proceeding or setting aside any conviction or sentence."[307] By the plain language of these provisions, victims in Arizona and South Carolina can seek to void a plea or sentence if they were denied the ability to exercise their rights.

Nevertheless, in refusing to void a plea bargain, the South Carolina Supreme Court held that state victims' rights expire as a matter of law after the defendant is sentenced:

> Once a criminal case has been resolved and the defendant is sentenced, the alleged victim loses his status under the Victims' Bill of Rights. The trial court cannot use the Victims' Bill of Rights to re-open a completed criminal proceeding. Further, even if the solicitor fails to honor the Victims' Bill of Rights during a criminal proceeding, this Court cannot issue a writ of mandamus to reopen a criminal proceeding once it is resolved.[308]

Such a harsh opinion, imposing a judicial barrier to review and remedy well beyond double jeopardy or the plain language of the South Carolina Constitution, reveals the judicial commitment to keeping victims' rights illusory.[309] In fact, the South Carolina Constitution provides that "[a] victim's *exercise* of any right granted by this section is not grounds for dismissing any criminal proceeding or setting aside any conviction or sentence."[310] This constitutional language does not limit voiding of pleas and sentences as a remedy when victims are prevented from exercising their rights. Plainly the provision means a victim cannot challenge a sentence imposed after the victim had an opportunity to exercise his rights. Faced with this reality, the court created its own roadblock to remedy through the artifice of eliminating victim status upon disposition. Of course, unless waived, criminal defendants do not lose their ability to contest rights violations upon sentencing. The court posited no reason, much less a credible reason, in creating this double standard for victims' rights. A victim should retain victim status and standing at least until the litigation concerning a rights violation is final on review. To rule otherwise creates an "Alice in Wonderland" process

307. S.C. CONST. art. I, § 24(C)(1).

308. *Ex parte* Littlefield, 540 S.E.2d 81 (2000).

309. For an enumerated list of the rights rendered illusory, see S.C. CONST. art. I, § 24.

310. *Id.* § 24(C)(1) (emphasis added).

in which the rights violation itself is concurrent with the termination of victims' status and rights, thus eliminating any hope of redress.

As in Arizona and South Carolina, in Nebraska and Texas, victims cannot contest sentences taken in a lawful manner that complied with victims' rights. Nebraska and Texas prohibit "contest[ing] the disposition of any charge."[311] This language does not, however, appear to prohibit victims from contesting a violation of their rights.[312] In *State ex rel. Sistrunk*, the victim appealed a violation of a right to speak at sentencing.[313] The case should have been readily disposed of since the Texas Constitution prohibits appeals for violations of victims' rights—because appeal was barred for victims' rights violations, the proper review mechanism was writ.[314] Instead, the Texas intermediate appellate court went out of its way to reach constitutional issues to deny the victim standing entirely. Specifically, the court focused on the provision of the Texas Constitution providing that a victim cannot "challenge a disposition."[315] Thus, in its rush to deny standing, the court failed to differentiate between lawful and unlawful disposition. The constitution does not prevent victims from contesting *a rights violation*. Indeed, the constitution expressly permits it, providing that a "victim has standing to enforce the rights enumerated in this section but does not have standing to participate as a party."[316] Read together, a better interpretation of the standing language and the prohibition on challenging a disposition is that victims cannot contest a lawful disposition. When victims have been granted their rights to speak at sentencing, the compliance renders the sentence lawful, at least relative to the victim. The constitutional

311. NEB. CONST. art. I, §28(3); TEX. CONST. art. I, § 30(e).

312. NEB. CONST. art. I, § 28(3) ("Nothing in this section shall constitute a basis for error in favor of a defendant in any criminal proceeding, a basis for providing standing to participate as a party to any criminal proceeding, or a basis to contest the disposition of any charge."); TEX. CONST. art. I, § 30(e) ("The legislature may enact laws to provide that a judge, attorney for the state, peace officer, or law enforcement agency is not liable for a failure or inability to provide a right enumerated in this section. The failure or inability of any person to provide a right or service enumerated in this section may not be used by a defendant in a criminal case as a ground for appeal or post-conviction writ of habeas corpus. A victim or guardian or legal representative of a victim has standing to enforce the rights enumerated in this section but does not have standing to participate as a party in a criminal proceeding or to contest the disposition of any charge.").

313. 142 S.W.3d 497, 499–500 (Tex. App. 2004).

314. For example, the Connecticut Supreme Court properly dismissed a victim appeal because appeals are prohibited under the Connecticut Constitution. State v. McCahill, 811 A.2d 667, 672–73 (Conn. 2002).

315. *Sistrunk*, 142 S.W.3d at 502.

316. *Id.*

proscription makes more sense under this interpretation. In Texas, victims should not be able to challenge conditions of sentence, but may challenge an unlawful disposition that has been rendered unlawful by the denial of victims' rights.

In addition to judicially inserting unlawful sentences into the term "disposition," the *Sistrunk* court also demonstrated its complete misunderstanding of the nature of crime victims' rights. As one of its rationales for refusing to void the sentence, the court opined "if noncompliance with victim impact statements does not provide a ground for a defendant to set aside his sentence, such noncompliance surely provides no ground for the victims to challenge the sentence."[317] The only explanation for this dramatically erroneous analysis is that the court was simply unaware that victims' rights are personal to the victim, not the defendant.

Unfortunately, this is yet another case in which the victim's lawyer made an ill-considered concession. The victim's lawyer conceded that "the law does not provide a remedy for victims when their rights are violated."[318] To the contrary, nothing in the Texas Constitution prohibits voiding unlawful dispositions.[319]

Another limitation on reconsideration and voiding occurs when the constitutional rights leave exclusive remedial authority to the legislature and the legislature fails to enact remedies. For example, the Nebraska Constitution provides that "there shall be no remedies other than as specifically provided by the Legislature for the enforcement of the rights granted by this section."[320] Correctly, the Nebraska Supreme Court refused to remedy a violation of a victim's constitutional rights when the legislature had not yet enacted remedies.[321] Without legislative action in Nebraska, victims in Nebraska can only enforce their rights through another constitutional amendment. Fortunately, this dilemma does not exist in most other state constitutions, because unlike Nebraska, most other state constitutions state that the legislature "may" provide for remedies. In these states, legislatures and courts share remedial

317. *Id*.

318. *Id.*

319. TEX. CONST. art. I, § 30.

320. NEB. CONST. art. I, § 28.

321. State *ex rel.* Lamm v. Neb. Bd. of Pardons, 620 N.W.2d 763, 769 (Neb. 2001).

responsibility, and courts can enforce core provisions of their constitutions, including voiding and reconsideration remedies.[322]

The Alabama Constitution contains another type of limitation by expressly limiting "causes of action" and prohibiting the legislature from establishing causes of action under the victims' rights amendment.[323] This causes a problem for victims' rights, because as the Tenth Circuit pointed out in the *McVeigh* case, if all causes of action by any person are prohibited, then victims may not even resort to writs to enforce their rights.[324] However, the prevalence of restrictions against monetary causes of action in many other state constitutions[325] may indicate that the

322. *See supra* notes 151–52 and accompanying text for a discussion of constitutions with language that allows legislatures to take part in enabling victims' rights.

323. The Alabama Constitution provides that "[n]othing in this amendment or in any enabling statute adopted pursuant to this amendment shall be construed as creating a cause of action against the state or any of its agencies, officials, employees, or political subdivisions." ALA. CONST. art. I, § 6.01(b). Of course, the Alabama Legislature could create a statutory scheme independent of the constitution that provided rights, standing, and remedies. Otherwise, it would take a constitutional amendment to provide judicial remedies.

324. United States v. McVeigh, 106 F.3d 325, 335 (10th Cir. 1997). The court stated:

> Finally, and in any event, Congress explicitly instructed that the Act "does not create a cause of action or defense in favor of any person arising out of the failure to accord to a victim the rights enumerated in subsection (b)." The excluded witnesses argue this provision relates only to independent enforcement actions and does not bar appeal or mandamus challenges within the criminal proceeding itself, but this facially uncompelling contention is undercut further by a decision of this court in an analogous standing context. In *United States v. Kelley*, 997 F.2d 806, 807–08 (10th Cir. 1993), we joined a line of authority holding that crime victims do not have standing under the Victim and Witness Protection Act (VWPA), 18 U.S.C. § 3663, to appeal unfavorable restitution orders. Significantly, this case law rejects victims' arguments for standing under the VWPA because the history and plain language of the VWPA "do not indicate that Congress, either explicitly or implicitly, intended to provide a private cause of action to victims." A fortiori, the Victims' Rights Act, which explicitly denies any private cause of action, does not grant standing to seek review of orders relating to matters covered by the Act.

Id. (internal citations omitted).

325. ALA. CONST. art. I, § 6.01(b) ("The Legislature may from time to time enact enabling legislation to carry out and implement this amendment."); ALASKA CONST. art. I, § 24 ("Crime victims, as defined by law, shall have the following rights as provided by law . . . ."); IDAHO CONST. art. I, § 22(10) ("Nothing in this section shall be construed . . . as creating a cause of action [against the state]."); KAN. CONST. art. XV, § 15(b) ("Nothing in this section shall be construed as creating a cause of action for money damages against the state . . . ."); LA. CONST. art. I, § 25 ("Nothing in this section shall be the basis of . . . any cause of action for compensation or damages against the state . . . ."); MD. CONST. art. 47(C) ("Nothing in this Article permits any civil cause of action for monetary damages for violation of any of its provisions . . . ."); MISS. CONST. art. III, § 26A ("Nothing in this section . . . shall be construed as creating a cause of action for damages against the state . . . ."); MO. CONST. art I, § 32(3) ("Nothing in this section shall be construed as creating a cause of action for money damages [against the state]."); NEV. CONST. art. I, § 8(3) ("[N]o

Alabama "no cause of action" clause was included to prohibit civil suits for monetary damages, rather than victims' standing to enforce their rights. If this is not the case, Alabama victims have no standing in appellate courts to enforce their constitutional rights. If there are no causes of action available, it would require an amendment to the Alabama Constitution to provide any cause of action.

Thus, victims faced with express constitutional elimination of a remedy have no standing to defend their rights. In the words of Justice Wilkins of the Utah Supreme Court, "we cannot impose any corrective action on the failure of the prosecutor to inform the court of the request to speak . . . with all due formality, thereby according [the victim] his constitutional right to actually be heard."[326] In fact, Justice Wilkins goes on to recognize that victims' rights "may be made illusory by the intentional or unintentional mishandling of the situation by the prosecutor or the trial court, all without meaningful remedy."[327] To become real rights, victims' rights must be accompanied by the voiding remedy.

D. The Review Problem

There are three types of review problems concerning victims' rights. First, the jurisdictional barriers of mootness and ripeness curtail review of rights violations. Furthermore, a problem arises from the prohibition of stays on review that renders many victims' rights cases moot. Second, some constitutions have express limits on review. Third, while rights violations can be redressed by writ, writ review is merely discretionary, rather than granted as a matter of right, and thus courts may ignore violations of victims' rights.

1. Ripeness and mootness problems and the problem of prohibiting stays

Problems of ripeness and mootness plague victims' rights. Specifically, constitutional victims' rights provisions that prohibit

person may maintain an action against the state . . . for damages . . . .); N.C. CONST. art. 1, § 37(2) (Nothing in this section shall be construed as creating a claim of money damages against the state . . . ."); OHIO CONST. art I, § 10a ("This section . . . does not create any cause of action for compensation or damages against the state."); S.C. CONST. art I, § 24(B) ("Nothing in this section creates a civil cause of action on behalf of any person against . . . the State . . . ."); TEX. CONST. art. I, § 30(e) ("The legislature may enact laws to provide that a judge [or] attorney for the state . . . is not liable for a failure or inability to provide a right enumerated in this section.").

326. State v. Casey, 44 P.3d 756, 767 (Utah 2002) (Wilkins, J., concurring).

327. *Id.*

voiding eliminate the potential for remedy and render the rights violation moot. Because cases are not ripe when they are not yet ready for adjudication or review,[328] victims are often limited in their ability to obtain a pretrial appellate review of rights violations. For example, victims might seek to have a court determine well in advance of trial that the victims can exercise their right to attend the trial, but courts are presently free to put off any decision regarding victims' rights until trial—a delay that makes it difficult to challenge any ruling because double jeopardy proscriptions render the issue moot. The issue is mooted if the trial is over before the victim can engage an appellate court to review the violation and the jurisdiction does not allow for a voiding remedy. This double bind of ripeness and mootness works to eliminate victim standing to enforce violations of victims' rights.

An express restriction on review that promotes mootness is manifested in three constitutions, those of Maryland, Nevada, and Oregon, which deny stays for review of denial of victims' rights. While allowing for appeal, the Maryland Constitution provides, "[n]othing in this article . . . authorizes a victim of crime to take any action to stay a criminal justice proceeding."[329] Similarly, the Nevada Constitution, while allowing for an action to compel, provides that violations of victims' rights cannot be the basis of "continuing or postponing a criminal proceeding."[330] Finally, the Oregon Constitution provides that victims' rights may not be used to "suspend . . . any criminal or juvenile delinquency proceedings."[331] These types of "no stay" provisions do not expressly prevent review—but they do encourage mootness.[332] Mootness is encouraged because, absent the ability to stay, the criminal case may conclude before the victim issue is resolved on review. As Justice Wilkins remarked about the no stay provision in Utah enabling statues,[333] when a no-stay provision is "juxtaposed with the rights of the criminal defendant to a speedy trial and the necessity to move forward

328. *See, e.g.*, Abbott Lab. v. Gardner, 387 U.S. 136, 148 (1967), *overruled on other grounds* ("[I]t is fair to say that its [ripeness'] basic rationale is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . .").

329. MD. CONST. art. 47(c).

330. NEV. CONST. art. I, § 8(3).

331. OR. CONST. art. I, § 42(2).

332. *State v. Casey*, 44 P.3d 756, 767 (Utah 2002) (Wilkins, J. concurring).

333. UTAH CODE ANN. § 77-38-11(2)(b) (1999).

with the criminal process . . . appellate relief for [the victim] is a practical impossibility."[334]

2. Express limits on review

Victims can generally obtain review of rights violations through writs. Only the Idaho Constitution arguably denies writ relief for unlawfully obtained criminal judgments: "Nothing in this section shall be construed to authorize a court to dismiss a case, to set aside or void a finding of guilt or acceptance of a plea of guilty, or to obtain appellate, habeas corpus *or other relief* from any criminal judgment . . . ."[335]

Though some states' constitutional amendments do foreclose the opportunity for appellate review, this does not foreclose the use of writs to vindicate victims' rights. For example, the Connecticut Constitution precludes appeal of victims' constitutional rights violations.[336] The state constitutional amendment provides that nothing in the enabling legislation "shall be construed as creating a . . . ground for appellate relief in any criminal case."[337] Likewise, the Illinois Constitution states: "[n]othing in this Section or in any law enacted under this Section shall be construed as creating a ground for appellate relief in any criminal case."[338] However, these and other similar provisions do not foreclose enforcement of the right via writ, because writs are not appeals and actions on writs are not criminal matters. The Connecticut Supreme Court explained that: "It is well established law that appellate rights are

334. *Casey*, 44 P.3d at 767 (Wilkins, J. concurring). An exception to the rule prohibiting review of cases that are moot is cases that are "capable of repetition yet evading review." Sosna v. Iowa, 419 U.S. 393, 399–400 (1975). For example, when courts deny the victim the right to attend the trial, and the trial commences without the victim, double jeopardy prohibits retrial. Because the trial cannot be voided, there is no remedy and the case is moot. However, a court has discretion to review the case even though it cannot remedy the violation, by applying the "capable of repetition yet evading review" exception. Opinions issued under this exception create binding precedent directing future actions of lower courts. *See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1981) (ruling that a criminal conviction rendered a newspaper's suit to gain access to the courtroom moot but reviewing as capable of repetition yet evading review and establishing binding precedent on First Amendment issues and public trial issues). However, this exception cannot accurately be described as a solution. The exception is used sparingly and is applied only at the discretion of the court. Thus, victims cannot rely on the exception as a consistent way to achieve review.

335. IDAHO CONST. art. I, § 22 (emphasis added).

336. CONN. CONST. art. 1, § 8(b) ("Nothing in this subsection . . . shall be construed as creating a basis for vacating a conviction or ground for appellate relief in any criminal case.").

337. *Id.*

338. ILL. CONST. art. I, § 8.1(d).

established by statute . . . . [Thus, a] victim seeking appellate vindication of [their constitutional rights under the victims' rights amendment] must[, therefore,] proceed, if at all, by writ of error."[339]

Other states do not constitutionally mandate appellate review, but also do not foreclose legislative action that would allow for appellate review. For example, the Louisiana Constitution states, "[n]othing in this Section shall be construed to . . . confer upon any person the right to appeal or seek supervisory review of any judicial decision made in a criminal proceeding."[340] The Virginia Constitution also expressly denies that the constitutional amendment provides for appellate review, stating that "[t]his section does not confer upon any person a right to appeal . . . [in] any decision in a criminal proceeding."[341] So, as in Illinois and Connecticut, writs are not foreclosed even absent enabling legislation; but, unlike the situations in Illinois and Connecticut, the Louisiana and Virginia legislatures remain free to legislatively enable appeal procedures for victims.

Presently, only Maryland and Utah expressly provide for appellate review of a trial court's violation of victims' rights.[342] To date, other state courts ruling on this issue have denied victim appeals from final judgment in the absence of an express authorizing statute. For example, in Colorado and California, courts have ruled that appeals are unavailable to victims because they are not considered parties.[343] Of course, absent constitutional prohibitions, these legislatures could readily grant victims the statutory right to appeal.

On the other hand, writs of certiorari, mandamus, and prohibition are available to victims when there is a voiding remedy, whether or not the constitutional provisions expressly make writs available. A petition for a writ is the method of seeking writ review. The writ remedy is the issuance of a writ, accompanied by a command to prosecutors or judges

339. State v. McCahill, 811 A.2d 667, 672–73 (Conn. 2002).

340. LA. CONST. art. I, § 25.

341. VA. CONST. art. I, § 8-A.

342. UTAH CODE ANN. § 77-38-11 (2004); MD. CODE ANN., CTS. & JUD. PROC. § 11-103(b) (2004) ("A victim of violent crime . . . may file an application for leave to appeal . . . from an interlocutory or final order . . . .").

343. *See* Dix v. Superior Court, 807 P.2d 1063, 1067 (Cal. 1991); People v. Gansz, 888 P.2d 256, 257 (Colo. 1995) (holding that the victim had no right to appeal because the victim was not a party and hence had no standing).

to comply with the law.[344] Such an order is frequently accompanied by the voiding of a hearing or result. Petitions are accepted and writs issued in the discretion of reviewing courts.[345] If the petition is based on government conduct outside the scope of the victim's right, however, the writ will not lie. For example, when a victim's right to speak at sentencing was honored, mandamus did not lie for the victim to challenge the lawful sentence ultimately imposed by the court.[346] Furthermore, if the petition seeks a remedy that is barred in the victims' rights provisions or is otherwise beyond the court's authority to impose, a writ will not lie. For example, when a constitution provided that a conviction could not be voided despite violation of the victim's right to speak at sentencing, a writ of mandamus did not lie.[347]

Neither full party status nor standing to appeal is required for victims to obtain review by writ. The Tenth Circuit, in *United States v. McVeigh*, denied the victim mandamus because former federal victim procedures are discretionary, rather than mandatory.[348] However, in dicta, the court acknowledged that mandamus is available to victims to compel a government official to comply with mandatory law despite nonparty status and no right to appeal:

> We do *not* hold that the lack of what is often called "appellate standing" necessarily precludes mandamus review. Standing encompasses "constitutional considerations related to the 'case or controversy' limitation of Article III and also prudential concerns 'that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes.'" Article III authority is a

344. *See, e.g.*, Cantu v. Longoria, 878 S.W.2d 131, 132 (Tex. 1991) ("Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no adequate remedy by appeal.").

345. *See, e.g.*, Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976) ("[I]ssuance of the writ is in large part a matter of discretion with the court to which the petition is addressed.").

346. *Dix*, 807 P.2d at 1063; *see also* Schroering v. McKinney, 906 S.W.2d 349 (Ky. 1995). In *Schroering*, the defendant was convicted of reckless homicide and ultimately granted shock probation. *Id*. at 350. On appeal by the defendant to the Kentucky Supreme Court, the court held that although the widow had a personal interest in the outcome, she did not have standing to seek mandamus because she was not a party to the case. *Id.* The Kentucky court is mistaken that only parties can bring mandamus in a criminal case. However, the court accurately found that the victim had no standing to bring a mandamus action because no right of the victim had been violated. *Id.* at 351. Instead, the trial court fully complied with the victim's right to give an impact statement. *Id.* at 350. Because victims have the right of control over a lawful sentence rendered after their rights have been complied with, mandamus did not lie. *Id.* at 351.

347. *Ex parte* Littlefield, 540 S.E.2d 81 (2000).

348. 106 F.3d 325, 336 (10th Cir. 1997).

> prerequisite to judicial review, however sought. In contrast, a prudential concern, such as nonparty status, counseling uniquely or primarily against the propriety of appeal, need not bar a petition for mandamus review. We emphasize that our standing analysis turns on constitutional considerations, not the excluded witnesses' nonparty status.[349]

Mandamus review has taken place in several situations. For example, it has taken place when a victim was not given notice or an opportunity to be heard at a hearing in which a California trial court vacated a previously entered order of restitution.[350] It has taken place when the petitioner sought to be classified as a "victim" under federal law[351] and when a victim challenged an Oregon trial court's jurisdiction to order defendant's counsel into the victims' homes.[352] Also, it has taken place when a Texas trial court had ordered a psychological evaluation of a child sexual assault victim by the defendant's expert.[353]

The writ of certiorari is available when other means of review are not. Appellate courts retain their inherent authority to consider petitions for, and issue writs of, certiorari directing lower courts to obey the law. Certiorari is also available for violations of victims' rights.

In *Ford v. State*,[354] the trial court sentenced the defendants pursuant to a plea agreement even though the victims were not notified of the hearing as required by the Florida Constitution. The trial court granted certiorari review of the victims' right to restitution.[355] The intermediate appellate court noted that "this is a violation of a constitutional right for which there is no appellate remedy, [and] we agree that the petitioner has

349. *Id.* at 334 n.7 (internal citations omitted). If anything, the enhanced status of crime victims as participants, rather than witnesses or third parties, at least in the context of victims' rights, should operate to ensure the availability of writs, particularly because writs are available to victims in their lesser, non-constitutional status of witnesses or third parties.

350. Melissa J. v. Superior Court, 237 Cal. Rptr. 5 (Cal. Ct. App. 1987).

351. Saum v. Windall, 912 F. Supp. 1384, 1397 (D. Colo. 1996) (issuing a peremptory writ because "'crime victim' status [under Victim's Rights and Restitution Act] is reviewable, states a valid claim and is not subject to dismissal").

352. State *ex rel.* Beach v. Norblad, 781 P.2d 349, 350 (Or. 1989) (issuing a peremptory writ because the court had no jurisdiction over victim as to order widow to allow search of home in which husband was murdered).

353. State *ex rel.* Holmes v. Lanford, 764 S.W.2d 593, 594 (Tex. App. 1989) (issuing writ because neither the prosecution nor the court had "authority to force a complaining witness to submit to such an invasion of her right to privacy").

354. 829 So. 2d 946, 948 (Fla. Dist. Ct. App. 2002).

355. *Id.* at 947.

demonstrated certiorari jurisdiction."[356] On review, petitioners sought to void the restitution order and have it changed to divide payments in proportion to each victim's loss, rather than to be evenly split among the victims.[357] The court issued a writ so ordering.[358] Similarly, in the Iowa case of *State v. West*,[359] victims petitioned for a writ of certiorari alleging that the trial court erroneously denied their claims to share in a restitution fund.[360] The court reviewed the petition because the victims did not have standing to appeal and they were injured financially in a way different from the public generally.[361] Ultimately, the court denied the writ only because the petitioner was not a victim under the state's legal definition.[362]

Like other forms of writ, writs of prohibition prevent trial courts and—when they are acting in a quasi-judicial capacity—prosecutors from acting without jurisdiction. For example, in *State ex rel. Miller v. Smith*,[363] the West Virginia Supreme Court issued a writ of prohibition, petitioned for by the crime victim to prevent the prosecutor from interfering with the victim's access to a state grand jury.[364] The prosecutor had violated the constitutional rights of the people, in this case the victim, to report crimes to the grand jury.[365] The court issued the writ under its inherent authority to uphold constitutional rights.[366] In Missouri, a trial court sought to close the courtroom to the press and public.[367] The victim, however, applying a state constitutional provision allowing the victim to attend trial, sought a writ of prohibition to prevent the court from excluding the victim from the courtroom.[368] The appellate court accepted review on the writ but ultimately determined that the

356. *Id.* at 948.

357. *Id.* at 947.

358. Petitioners also asked the court to void the plea and reinstate the charges. The court denied the writ based upon particular language in the victims' constitutional rights providing that victims' rights must "not interfere with the constitutional rights of the accused." *Id.*; FLA. CONST. art. I, § 16(b).

359. 320 N.W. 2d 570 (Iowa 1982).

360. *Id.* at 571.

361. *Id.* at 573.

362. *Id.* at 574–75.

363. 285 S.E.2d 500 (W. Va. 1981).

364. *Id.* at 506–07.

365. *Id.* at 501–02.

366. *Id.* at 506–07.

367. State *ex rel.* Pulitzer Inc. v. Autry, 19 S.W.3d 710 (Mo. App. 2000).

368. *Id.* at 711.

victim was not a subject of the trial court's order excluding the press and the public.[369] Other modern victims' constitutional rights should also be enforceable by writ of prohibition.[370]

Thus, even in jurisdictions where there is no express provision for review, writs are available to crime victims. Writs of certiorari, mandamus, and prohibition have been properly utilized by victims to challenge unlawful government action in criminal cases. It is unnecessary for constitutional provisions or statutes to expressly provide victims with review via writ in order for such writs to be available to victims. Writs are available for victims' rights violations only when the rights are not discretionary, the violation is within the scope of the rights, and voiding or reconsideration remedies properly accompany the issuance of writs.

However, writs are issued only at the discretion of the reviewing court.[371] Mandamus is an extraordinary remedy available only in rare cases,[372] and courts will proceed with great caution before granting relief in the nature of mandamus.[373] This means that in jurisdictions without review as a matter of right, courts are never forced to review victims' rights violations, and, in all likelihood, courts rarely will. Moreover, courts are not required to provide any reason for declining to review writ petitions. Even if victims' rights have successfully jumped all other hurdles in the race towards enforcement, the odds are that unlimited appellate court discretion will prevent them from ever reaching the finish line. Thus, discretionary writs are not reliably available review mechanisms for victims seeking to enforce their rights.

Part II has revealed the challenges faced in achieving real victims' rights. In sum, there are three general problems: (1) discretion, (2) inadequate remedies, and (3) review problems. Discretion issues include: the problems discretion poses to achieving mandatory and enabled rights which are necessary to standing; the inability to achieve standing where a particular right is accompanied by government discretion to ignore the right; and the problem of judicial discretion to interpret rights narrowly.

369. *Id.* at 717.

370. *See also* Burdette v. Lobban, 323 S.E.2d 601, 603 (W. Va. 1984) (issuing a writ of prohibition to overturn order requiring child victim to be interviewed by defense outside the presence of the victim's attorney).

371. LaBuy v. Howes Leather Co., 352 U.S. 249 (1957).

372. *Ex parte* Collett, 337 U.S. 55 (1949).

373. Laughlin v. Reynolds, 196 F.2d 863 (D.C. Cir. 1952).

Next, inadequate remedies, remedies other than voiding and reconsideration, were revealed to be inferior because they do not provide victims the opportunity to exercise their rights in cases involving their own victimization. Furthermore, these inferior remedies are unlikely to have sufficient force to deter government rights violations. Voiding and reconsideration remedies are superior remedies to ensure compliance with victims' rights.

Finally, the discretionary nature of writ review, the most commonly available method of review, means that enforcement of victims' rights violations will be rare.

These ways in which victims are denied standing do not only create challenges for victims, but impose significant dysfunctions in law and undermine conventional canons of civil rights.

III. THE MANY DYSFUNCTIONS OF ILLUSORY RIGHTS

Without standing, the remedy of voiding, and nondiscretionary review, crime victims' rights are illusory rights. The most significant problem with illusory rights is that crime victims cannot enforce their rights in a way that ensures they will be able to exercise those rights. Instead, the very governments against whom the rights are meant to be exercised remain free to ignore, and even intentionally violate, victims' rights. Many significant problems stem from victims' rights without standing. Without victim standing to enforce victims' rights, judicial hierarchy is turned upside down because the trial courts are allowed to usurp appellate courts' traditional authority, hierarchy of laws is upset, adversity is corrupted, rights enforcement is crippled, victim advocacy in favor of defendants is constrained, and constitutional rights are degraded.

A. No Standing Turns Judicial Hierarchy Upside Down

Given that victims' rights are routinely exercised at the trial court level, significant dysfunctions arise when victims are denied appellate standing. No state appellate court has ever denied access at the trial court level to victims exercising their rights. In *People v. Stringham*, the court held that a victim had trial court access to make a statement regarding a plea bargain.[374] Trial-level access was based upon the state statutory right to speak at sentencing and also upon the proposition that a plea

374. 253 Cal. Rptr. 484, 492 (Cal. Ct. App. 1988).

bargain necessarily involves sentencing issues.[375] In rejecting the argument that the victim did not have access to the trial court, the appellate court held that "[i]t would be difficult to conceive of a more absurd result than to . . . prevent a victim . . . from having a meaningful opportunity to protest a plea bargain [in the trial court] that will allow a defendant to escape the punishment which the victim . . . feels is appropriate to the crime."[376] For the *Stringham* court, the cost of denying trial-level access is unacceptable because it denies victims an opportunity to exercise their rights.

Even a state court taking an excessively restrictive view of appellate court access has required trial court access. The Massachusetts Supreme Court held that a statutory provision providing a victim with a right to "prompt disposition" did not extend beyond the initial sentencing hearing.[377] Nevertheless, the court went on: "We conclude . . . that a victim asserting the right . . . should be provided with an opportunity to address the [trial] court when that right is jeopardized."[378] For this court, the cost of denying the victim trial court access to defend rights was unacceptable.

A thorough treatment of victim trial-level standing under a state constitution is found in the New Jersey case of *In re K.P.*[379] The decision was based on victims' broad constitutional right to "fairness" and "respect" in conjunction with victims' specific right to be present at trial.[380] In *K.P.*, the trial court faced the issue of whether a crime victim has standing to oppose a newspaper's motion to open to the public a closed juvenile proceeding.[381] The court thoroughly reviewed United States Supreme Court law on standing, as well as New Jersey's constitutional and statutory crime victim law.[382] The court held that "a victim has standing [in trial court], and an unarticulated right to oppose a petition by the press to open a juvenile proceeding."[383] These cases make clear that victims have access to trial courts in order to exercise their rights.

375. *Id.*
376. *Id.* at 491.
377. Hagen v. Commonwealth, 772 N.E.2d 32, 34 (Mass. 2002).
378. *Id.*
379. 709 A.2d 315 (N.J. Super. Ct. Ch. Div. 1997).
380. *Id.* at 319–22.
381. *Id.* at 319.
382. *Id.* at 319–22.
383. *Id.* at 322.

With real rights, like defendants' rights, appellate courts are the ultimate arbiters of the meaning of constitutional rights. On the other hand, illusory victims' rights—with trial-level standing and no appellate court standing—turn judicial hierarchy upside down. In this upside down process, trial courts are the ultimate arbiters of victims' constitutional rights. Each trial court can arrive at unique conclusions about the meaning and scope of victims' rights. Moreover, these trial courts can apply their disparate interpretations of constitutional rights without fear of reversal. The result is different rights for different victims based on which trial judge presides over the case. Such a process erodes the meaning of victims' rights, confidence in the judicial system, and time honored judicial hierarchies of constitutional authority. This would never be tolerated for criminal defendants' rights. It should not be tolerated for victims' rights.

B. No Standing Upsets the Hierarchy of Laws

In our hierarchy of laws, statutes are lesser laws than constitutions. Providing victims' standing to enforce statutes, but not constitutional rights, contradicts this hierarchy of laws. In a variety of statutory contexts, victims have standing, remedy, and review. First, crime victims have standing to seek review of the denial of a personally held evidentiary privilege. For example, crime victims have evidentiary privileges to keep their crisis counseling records confidential.[384] With personally held privileges, victims can seek appellate court review of a denial of these statutory privileges.[385]

Standing has been granted to victims in other contexts as well. Thus, mandamus was allowed when a victim challenged an Oregon trial court's jurisdiction to order defendant's counsel into the victim's home[386] and when a Texas trial court ordered a psychological evaluation of a child sexual assault victim by defendant's expert.[387]

384. *See* Euphemia L. Warren, *She's Gotta Have It Now: A Qualified Rape Crisis Counselor-Victim Privilege*, 17 CARDOZO L. REV. 141, 146 (1995) (listing sixteen states with crisis counselor privileges).

385. *See infra* notes 385–402 and accompanying text.

386. State *ex rel.* Beach v. Norblad, 781 P.2d 349, 350 (Or. 1989) (issuing a peremptory writ since the trial court had no jurisdiction over the victim as to order a widow to allow search of home where husband was murdered).

387. State *ex. rel.* Holmes v. Blanford, 764 S.W.2d 593, 594 (Tex. Crim. App. 1989) (issuing writ because neither the prosecution nor the court had "authority to force a complaining witness to submit to such an invasion of her right to privacy").

Victims have been granted standing in the statutory rape shield context. In a Fourth Circuit decision, *Doe v. United States*, the court granted an interlocutory appeal to a rape victim from a district court's pretrial denial of the protections of the federal rape shield law.[388] In *Doe*, the defendant asserted that the court did not have jurisdiction to hear the appeal.[389] First, the court observed that "[t]he text, purpose, and legislative history of [the rape shield law] clearly indicate that Congress enacted the rule for the special benefit of the victims of rape."[390] The court observed that the rule made no reference to appeal.[391] Regardless, the circuit held that the "remedy [was] implicit as a necessary corollary of the [rape shield] rule's explicit protection of the privacy interests Congress sought to safeguard."[392] The court found significant the fact that "[n]o other party in the evidentiary proceeding shares these interests to the extent that they might be viewed as a champion of the victim's rights."[393] The court found that "congressional intent . . . will be frustrated if rape victims are not allowed to appeal an erroneous evidentiary ruling."[394]

The court then turned to the law governing review of final decisions from trial courts, a prerequisite to appeal,[395] and reviewed United States Supreme Court precedent holding that the requirement of finality in the statute be "given a 'practical rather than a technical construction.'"[396] Furthermore, "[t]he [Supreme] Court . . . instructed that the most important considerations for determining whether an order is final are 'the inconvenience and costs of piecemeal review on the one hand and

388. 666 F.2d 43, 45 (4th Cir. 1981).

389. *Id.*

390. *Id.* at 46.

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.*

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Id. (quoting 28 U.S.C. § 1291 (2004)).

396. *Doe*, 666 F.2d at 46 (quoting Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964)).

the danger of denying justice by delay on the other.'"[397] The *Doe* court balanced these factors, noting that "[t]he inconvenience and costs associated with permitting the victim to appeal are minimal . . . [and] no greater than those resulting from government appeals of suppression orders."[398] Furthermore, "[b]ecause the [rape shield] rule provides for pre-trial evidentiary hearings, appeals are unlikely to involve significant postponements of criminal trials."[399] The court noted that in the instant case, the appeal was heard with no delay of the criminal trial.[400] The court observed that on the other side of the balance was the manifest "injustice to rape victims in delaying an appeal until" final judgment.[401] Absent "immediate appeal, victims aggrieved by the court's order will have no opportunity to protect their privacy from invasions forbidden by the [rape shield] rule."[402] The court observed that "[a]ppeal following [judgment] is no remedy, for the harm that the rule seeks to prevent already will have occurred."[403] Having concluded that appeal was in keeping with congressional intent to safeguard rape victims' privacy interests, that no other party could "champion . . . the victim's rights,"[404] and that the test of practical finality was met, the court granted the victim standing to bring an interlocutory appeal, ultimately reversing the trial court order allowing disclosure of prior sexual conduct at trial.[405]

A central function of constitutionalizing rights is to ensure their enforcement. In our hierarchy of laws, constitutional rights possess a greater status than statutes. It makes little sense to deny standing, remedy, and review for constitutional rights violations when they are available to victims for violations of statutory victim laws.

397. *Id.* (quoting Dickinson v. Petroleum Corp., 338 U.S. 507, 511 (1950)).

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*; *see also* State v. Johnson, 944 P.2d 869, 871 (N.M. 1997). The court granted the state's petition for writ of certiorari to examine the trial court's order disclosing information allegedly protected by the rape shield law. The court found the evidence inadmissible and issued the writ.

C. No Standing Corrupts Adversity

Without victim standing, victims' rights can only be contested on review by parties that have no personal stake in the right.[406] Yet, only victims can predictably be truly adverse to those infringing upon their rights. In *Doe*, a context analogous to victims' rights, the Fourth Circuit Court granted a rape victim an appeal from an adverse ruling under federal rape shield laws and opined that "[n]o other party in the evidentiary proceeding shares these interests to the extent that they might be viewed as a champion of the victim's rights."[407] Victims are the only ones personally interested in their rights. As a result, the adversarial system will never work properly unless victims are granted standing, remedy, and review to enforce their rights.

406. Victims' rights have been contested between defendants and prosecutors in a variety of contexts. Burden of Proof: The defendant has the burden to prove that his rights are violated when victims' rights are exercised. *See* State v. Beltran-Felix, 922 P.2d 30, 33 (Utah Ct. App. 1996) (noting that the defendant has the burden of proof to demonstrate that rights are violated). Due Process: In allowing defendants access to the victim's medical records, an Arizona appellate court ruled that the state victim's rights amendment must give way to the requirements of the federal constitution. Landon v. State, No. A-6479, 1999 WL 46543, *2 (Alaska Ct. App. Feb. 3, 1999) (holding that federal due process is not violated by a victim's attendance at trial because there is no constitutional right to exclude witnesses); State v. Fulminante, 975 P.2d 75, 92 (Ariz. 1999) (holding that due process rights were not violated when victim's mother was allowed to attend trial and that there could be no violation absent prejudice of constitutional magnitude); State *ex rel.* Romley v. Superior Court, 836 P.2d 445, 449 (Ariz. Ct. App. 1992); Wheeler v. State, 596 A.2d 78, 88–89 (Md. Ct. Spec. App. 1991) (ruling that a victim could only be excluded upon a showing of good cause and that because the victim testified first, the court had no good cause to exclude). In California, allowing the victim to attend the trial did not violate defendant's fair trial or confrontation rights. Rules of sequestration are legislative, not constitutional. People v. Huber, 227 Cal. Rptr. 113, 132–33 (Cal. Ct. App. 1986), *aff'd on other grounds*, 5 F.3d 537 (9th Cir. 1993). Presumption of Innocence: There was no violation of the presumption of a defendant's innocence when the victim was allowed to attend proceedings prior to conviction. Bellamy v. State, 594 So. 2d 337, 338 (Fla. Dist. Ct. App. 1992). Speedy Trial for Victim: A trial court could properly balance the victim's right to a speedy trial and the court's prerogative to control its own docket to deny a continuance to facilitate the defendant's preparation when the defendant had fired his lawyer and chosen to represent himself. State v. Lamar, 72 P.3d 831, 836 (Ariz. 2003). Pretrial Interviews: The Arizona Constitution gives the crime victim a right to decline a pretrial interview. The court of appeals held that the defendant has no constitutional right to a pretrial interview under the Confrontation Clause because a defendant has no general constitutional right to pretrial discovery. State *ex rel.* Romley v. Hutt, 987 P.2d 218, 222 (Ariz. Ct. App. 1999). Ex Post Facto: The restriction against ex post facto laws is not violated when the law granting victims the right to speak at sentencing or at parole hearings was passed after the defendant committed the crime. *Huber*, 227 Cal. Rptr. at 133. When a crime is committed, and then the victim's right to speak at sentencing is created, a victim impact statement does not violate ex post facto laws. Forsythe v. Walters, No. 00-3352, 2002 WL 1283400, *2 (3d Cir. May 3, 2002) (finding that because a victim's right to speak is not a right to punishment, there was no ex post facto violation).

407. *Doe*, 666 F.2d at 46.

Absent standing for victims, the defendant and prosecutor are vested with control over the existence and the scope of the victims' rights controversy. The parties may not be interested in defending victims' rights or may take a position that denies the rights their full potential. For example, if the parties agree that victims' rights violations do not concern them, the rights issue will die regardless of whether appellate courts would ultimately agree with victims' concerns. Furthermore, there are circumstances in which the state and defendants are both adverse to victims' interests, like a victim's right to speak in opposition to plea agreements. The parties may act to prevent or circumscribe the exercise of victims' rights by refusing to provide notice of a right or of a hearing date.

Furthermore, prosecutorial control of victims' rights provides fertile ground for ethical conflicts of interest. It is a mistake to define the state and victims as nonadversaries simply because both are harmed by the criminal act and share an interest in punishment. Adversariness exists when prosecutors violate victims' rights. Moreover, the public prosecutor is obligated to the public interest. When the public interest and victims' rights coincide, perhaps no conflict exists. However, when there is conflict, the prosecution cannot reasonably be expected to defend victims' rights. Absent provisions for victim standing when there is a conflict, a rights violation will go unredressed. In recognition of this reality, Arizona law provides that "[i]n any event of any conflict of interest . . . the prosecutor shall have the responsibility to direct the victim to the appropriate legal referral, legal assistance, or legal aid agency."[408] When in conflict, the prosecutor cannot serve two masters, and the victim necessarily becomes the odd man out. Without standing and remedy, victims are powerless to enforce their rights to oppose the plea bargain, and such powerlessness eliminates the potential for true adversity.

D. No Standing Cripples Rights Enforcement

Denying victims standing to enforce their rights means that only the state can litigate rights violations. However, the state is far from a consistent advocate for crime victims' rights.[409] First, the state itself may

408. ARIZ. R. CRIM. P. 39(c)(3) (2004).

409. See, for example, *supra* notes 263–72 and accompanying text for a discussion of *Ford v. State*, and the discussion in the previous section, Part III.C, about how the state's and victim's interests are often in opposition. Indeed, state courts would benefit by soliciting amicus briefs from

be the violator. Thus, in state after state where the prosecution has violated victims' rights to be heard at a disposition, prosecutors have taken the position that victims cannot seek to void the plea or sentence.[410] On the other hand, if the state is not the violator, it will typically defend victims' rights against defendants' attempts to reverse convictions because the state has an interest in upholding convictions.[411]

In any other context, the state cannot consistently be relied on to defend victims' rights because the state's decisions to defend victims' rights are frequently based on other priorities. Whether the state will choose to defend the right is only predictable when the other priorities of the state are known. Changing priorities may lead the state to take diametrically opposed positions concerning the same victims' rights issue. Thus, the state will support the right if convictions are thereby defended and oppose victims' rights if judicial denial of the rights is of minimal consequence to the prosecution.[412]

Whether there is conflict or not, the state is under no legal obligation to defend victims' rights and can decline to defend the rights simply out of indifference. In the context of defendants' rights, the state could not be such an exclusive gatekeeper over review of rights violations. The state should not have such authority over victims' rights. Instead, victims should be able to enforce their rights independently of the state. This is the only way to obtain enforcement of rights when the state faces a conflict, has other priorities, or is simply disinterested.

local and national victim organizations, such as the National Crime Victim Law Institute at Lewis and Clark Law School.

410. *Cf. Ex parte* Littlefield, 540 S.E.2d 81, 84–85 (S.C. 2000); State v. Sistrunk, 142 S.W.3d 497, 502 (Tex. App. 2004); State v. Casey, 44 P.3d 756, 760 (Utah 2002).

411. *E.g.*, State v. Landon, No. A-6479, 1999 WL 46543, *2 (Alaska Ct. App. Feb. 3, 1999).

412. Ironically, victims in general may be better off by choosing only to defend their rights when the state is defending a conviction (and thus certain to defend victims' rights) than victims who attempt to assert their rights when the state is the violator. While this may be a sound tactical choice given present reality, any need for such a tactic is completely contrary to constitutional conventions. Individuals should be able to defend their constitutional rights regardless of the government's position. This routine state emphasis on preserving a ruling or conviction made sense in a two party criminal process. Without victim participants, rulings not adverse to the state were usually adverse to the defendant. Now, rulings can be made that are adverse to the victim, and may or may not be adverse to the state or defendant. Certainly, the state should be more circumspect than to reflexively defend trial court denials of victims' rights when the chances of conviction are unaffected by the denial. Exercising its discretion, the state can weigh public policy. The state might consciously recognize that victims' rights across all prosecutions are more advantageous to the state than opposing the right in a particular case.

E. Victims' Advocacy in Favor of Defendants Is Constrained

Absent victim standing and with the state in control of rights enforcement, victims' rights are artificially framed as rights conflicting with defendants' rights, even though victims' rights are centrally rights against the government.[413]

Though they have rights against the government, victims cannot look to defendants to make up for the victims' standing deficit, even if the victim intends to exercise his right for the benefit of the defendant. Defendants do not have standing to contest denials of victims' rights because victims' rights are not personal to defendants. For example, in the Illinois case of *People v. Richardson*,[414] the defendant was denied review under the victims' rights language of the Illinois Constitution because the provisions serve "as a shield to protect the rights of victims [not to be] used as a sword by criminal defendants seeking appellate relief."[415] As a result, defendants can only challenge the granting of victims' rights when it conflicts with their rights. Even if defendants could defend victims' rights, defendants as a whole could not be relied upon to advocate for victims' rights. To be sure, in many cases, victims speak against defendants' positions. Nevertheless, a victims' rights process that precludes appellate court scrutiny when victims intend to speak for defendants and are denied the right is fundamentally corrupt and exemplifies why the government should never be so exclusively in charge of individual constitutional rights.

F. No Standing Degrades Constitutional Rights

Legal rights without standing are destructive to the conventional model of constitutional civil liberties. Standing accompanying legal rights is a tradition as old as the constitution itself. The seminal case of *Marbury v. Madison* reasoned:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury . . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to

413. Beloof, *supra* note 10, at 295 n.32 (citing authorities).

414. 751 N.E.2d 1104 (Ill. 2001).

415. *Id.* at 1108 (quoting People v. Benford, 692 N.E.2d 1285, 1289 (Ill. App. Ct. 1998)); *see also* Herrera v. State, 24 S.W.3d 844, 846 (Tex. App. 2000) (holding that a defendant who assaulted his wife could not assert his wife's rights as a victim).

> deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[416]

Since that time "[t]he law is clear that injuries to . . . constitutional . . . rights are sufficient for standing."[417] The interest of the state in preserving its control over victims' rights through denial of standing, remedy, and review should live in the shadow of the dominating value enshrined in constitutional rights—preservation of "a government of laws, and not of men."

Of course, arguments can be made that denying victims standing to defend victims' rights has its benefits. For example, denying appellate court standing to victims may be efficient. Absent such standing, trial court denial of victims' rights cannot be challenged by the victim on review, and leaving the decisions in trial courts alone is more efficient because there is no chance that a trial-level proceeding will be delayed while an appellate court determines whether to correct the rights violation. Moreover, appellate courts benefit because they do not expend resources reviewing victims' rights violations. Furthermore, the prosecutor and defendant benefit by maintaining complete control over the review of victims' rights. This control increases the parties' influence over the development of victims' rights law in appellate courts. Without victims defending their rights on review, parties who are not victims are the exclusive litigants of the meaning and scope of victims' rights. Moreover, denying victims standing prevents conflicts with defendants' rights. For example, delay on review could potentially conflict with a defendant's speedy trial rights.[418] In addition, ordering a resentencing would unsettle defendants' interest in certainty and finality. However, these arguments, and arguments like them, are more appropriately reasons for not constitutionalizing victims' rights in the first place, not against allowing standing for already granted constitutional rights.

Rights in constitutional bills of rights are important enough to be accompanied by standing, the remedy of voiding, and nondiscretionary review. The very reason to constitutionalize rights is to enforce the rights against government.[419] The two sound alternatives remaining are either

416. 5 U.S. (1 Cranch) 137, 163 (1803).

417. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 69 (2d ed. 2002) (citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152–53 (1951)).

418. U.S. CONST. amend. VI; Speedy Trial Act, 18 U.S.C. § 3161 (2004).

419. Beloof, *supra* note 10, at 295 n.32 (citing sources for the proposition that victims' rights are rights against government).

to remove illusory victims' rights from constitutions altogether or to make victims' rights real by providing standing, remedy, and review. In state after state, the people have already decided in favor of victims' constitutional rights.[420] Victims' rights are the most recent state constitutional rights and have been approved at the polls by overwhelming margins.[421] Victims' rights will likely remain in state constitutions. As Professor Tobolowsky has accurately observed:

> The relevant inquiry is no longer whether victims should have participatory rights in the criminal justice process . . . . The relevant current focus [is] to ensure that these victim participatory rights are appropriate and meaningful in the context of the varied and societal interests involved in criminal prosecutions.[422]

As a practical matter, there is no way to proceed but to change victims' illusory rights into real rights.

IV. THE THIRD WAVE OF VICTIMS' RIGHTS

Following the very successful first two waves of victims' rights work—first enacting victims' rights statutes and then enacting victims' rights amendments—a third wave is necessary to give real meaning to these rights. To become real, rights must be accompanied by victim standing, meaningful remedy, and review as a matter of right. Changing the legal culture is difficult and movements do not overcome obstacles all at once. The victims' rights movement is no exception. As victim participation has become more familiar and accepted, greater achievements are now possible. Victim standing, remedy, and review are

420. *See supra* notes 19–23 and accompanying text for a list of states with Victims' Rights Amendments and for a discussion of the victims' rights movement.

421. Alabama (70%); Alaska (87%); Arizona (58%); Colorado (86%); Connecticut (79%); Florida (90%); Idaho (79%); Illinois (77%); Indiana (89%); Kansas (84%); Louisiana(68%); Maryland (92%); Michigan (80%); Mississippi (93%); Missouri (84%); Nebraska (78%); Nevada (74%); New Jersey (85%); New Mexico (68%); North Carolina (78%); Ohio (77%); Oklahoma (91%); Oregon (58%); Rhode Island (N/A); South Carolina (90%); Tennessee (89%); Utah (68%); Virginia (84%); Wisconsin (84%). National Victims' Constitutional Amendment Passage, *State Victim Rights Amendments*, *at* http://nvcap.org (last visited Apr. 4, 2005).

422. Peggy Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 103 (1999). To be sure, the argument could be made that including standing to assert rights could alter the public opinion concerning the wisdom of victims' rights. This argument is unlikely to carry the day. The idea that victims have been denied needed "real rights" in a present constitution is more likely to resonate with the electorate than the idea that no real victims' constitutional rights are needed.

now within reach. To achieve victim standing, the problems of discretionary rights, lack of remedy, and discretionary review must be solved.

Congressional action provides a solution to the problem of victim standing. In 2004, the United States Senate moved a bill[423] to the House that provides for real, albeit statutory, victims' rights in the federal criminal process. The Senate vote was 96 to 1 in favor of the bill. Ultimately, the bill became H.R. 5107 and has since, with a 393 to 14 margin in the House, the unanimous consent of the Senate, and the President's signature, become law.[424] The broad rights guaranteed by the legislation include "the right to be treated with fairness and with respect for the victims' dignity and privacy" and the right to "reasonable protection."[425] Specific rights include the rights: (1) to notice; (2) not to be excluded from public proceedings; (3) to be reasonably heard at public proceedings involving release, plea, or sentencing; (4) to confer with the government's attorney; (5) to restitution; and (6) to proceedings free from unreasonable delay.[426]

This new law repeals the preexisting federal discretionary victims' rights characterized by the "best efforts" language, which the court found to be unenforceable in *McVeigh*.[427] The law provides that "[t]he crime victim, the crime victim's lawful representative, and the attorney for the Government may assert the rights established in this chapter."[428] The victim clearly has ultimate enforcement authority because, in cases of conflict, the Government attorney must yield defense of the rights to the victim.[429] The bill expressly allows for a writ of mandamus that is nondiscretionary in nature: "The court of appeals shall take up and decide such application forthwith and shall order such relief as may be necessary to protect the crime victim's ability to exercise the rights."[430] The only restriction on voiding is prohibiting a retrial: "In no case shall a failure to afford a right under this chapter provide grounds for a new

423. S. 2329, 108th Cong. (2d Sess. 2004) (enacted).

424. Justice for All Act of 2004, Pub. L. No. 108-405 (codified as amended in scattered sections of 42 U.S.C.).

425. S. 2329, 108th Cong. (2d Sess. 2004) (enacted).

426. *Id.*

427. *See supra* notes 101–06 and accompanying text for a discussion of *McVeigh*.

428. S. 2329, 108th Cong. (2d Sess., 2004).

429. *Id.*

430. *Id.*

trial."[431] The new federal law represents the cutting edge of the third wave of victims' rights. The unanimous consent of the Senate and the 393 to 14 favorable House vote reveal that the relevant question is not *whether* there will be a third wave of real victims' rights adopted by states or imposed on the states, but *when*.

A. Establishing Standing in the States

1. Solving the discretion problem

As discussed in Part II.B, courts have often held that victims' rights are discretionary, ignoring and sometimes foreclosing victims' assertions of their rights. In Kansas, for example, the court in *Holt* dubiously concluded that the rights are discretionary and thus illusory.[432] Unless the court reverses itself, for there to be real victims' rights, Kansas will need to pass an entirely new amendment that plainly declares that victim's rights are mandatory. In other states, enabling legislation could provide for victim standing.[433] Legislatures should enact comprehensive procedural schemes to implement victims' rights to avoid any chance that a court will hold that a victims' rights amendment is not self-enabling. Moreover, the creation of trial-level and appellate court procedures will help signal to courts that the rights are believed by the legislature to be mandatory.

Victims' rights are meaningless when they depend on judicial findings that the exercise of rights is "in the interest of justice" or similarly vague tests. Constitutions should be amended to eliminate judicial discretion in rights. Victim standing is better assured if the rights are not compromised by these discretionary loopholes. If there must be an exception to a right, three things must accompany the right. First, authority to limit the right must be narrowly circumscribed in order for victims to have standing. Second, victims must have standing on review to challenge adverse rulings. And third, on review there must be a standard that gives appellate courts meaningful oversight of trial court decisions that deny victims the exercise of their rights.

Victims' broad constitutional rights are vague rights. Even where narrowly interpreted by courts, these rights provide a tremendous

431. *Id.*

432. *See supra* notes 107–21 and accompanying text for a discussion of *Holt*.

433. *See supra* notes 144–52 and accompanying text for a list and discussion of these states.

opportunity to serve as foundations upon which legislatures may enact more specific rights for victims. For example, victims' broad right to privacy could result in procedures that allow victims to be formally notified of, and to move to quash, subpoenas *duces tecum* that seek victims' private records kept by third parties. Victims' right to be treated with dignity could be the basis, for example, of statutes allowing a support person for the victim in the courtroom. Victims' right to due process could support notice and the right to be heard in contexts, such as dismissal hearings, which may not expressly be provided for in constitutional provisions.

Solving the discretion problem alone is not enough to secure real victims' rights. The remedy of voiding and reconsideration procedures must also be available to victims.

2. Solving the remedies problem

Unfortunately, some states have expressly limited voiding remedies when victims' rights have been violated. Even more troubling, some victims' rights amendments foreclose any remedy. For example, the Oregon Constitution provides that the "section [may not] be used to invalidate . . . [a] ruling of a court, conviction or adjudication."[434] The Virginia Constitution provides, "[t]his section does not confer upon any person a right to appeal or modify any decision in a criminal proceeding."[435] These constitutions provide for illusory, unenforceable rights. Victims in Oregon and Virginia will not be able to achieve the superior remedies of voiding and reconsideration under their state constitutions until these constitutions are amended.

In some state constitutions, the remedy of voiding has been severely curtailed, particularly with regard to pleas and sentences.[436] Until these provisions are amended to allow the voiding of pleas and sentences that have been taken in violation of victims' rights, victims will be without remedy and, as a result, without standing to obtain review. In other states, it is advisable to expressly provide for remedy in enabling legislation. Providing for a remedy is, theoretically, at least, not necessary because courts have the inherent authority to void proceedings and reconsider results when constitutional rights are violated. In practice, however, the unprincipled judicial resistance towards remedying victims'

434. OR. CONST. art. I, § 42(2).

435. VA. CONST. art. 1, § 8-A.

436. *See supra* Part II.C.2.b and accompanying notes.

rights violations demonstrated in this article argues for expressly legislated voiding remedy and reconsideration procedures.

3. Solving the review problem

Finally, establishing a review mechanism available to victims as a matter of right is essential to consistent enforcement of victims' rights violations. An effective means of securing appellate review—assuming a constitution does not preclude it—is expressly to provide a means of review in constitutions or enabling statutes. There are some state laws that expressly provide for review mechanisms.[437] Two state constitutions explicitly provide for actions to compel government officials to obey victims' rights. The Constitution of South Carolina provides that the mechanism for enforcing victims' rights is mandamus.[438] The Nevada Constitution provides that an action to compel the government to comply with a victim's right is available.[439] Utah law specifically provides that victims may use mandamus to enforce their rights.[440] Arizona has abolished the old form of writs and in its place created "special actions," which crime victims may bring to enforce their rights.[441] In Maryland, a victim has the right to appeal from an interlocutory or final order that denies or fails to consider the victim's right.[442] Utah statutes also provide

437. *See supra* Part II.D.2 and accompanying notes for a discussion of states' review mechanisms.

438. South Carolina's Constitution provides, "The rights created in this section may be subject to a writ of mandamus, to be issued by any justice of the Supreme Court or circuit court judge to require compliance of government officials." S.C. CONST. art. I, § 24(B). "A victim, as defined in S.C. CODE ANN. § 16-3-1510 (supp. 1997), possesses no rights in the appellate process. . . . Additionally, the rights granted by the South Carolina Constitution and statutes are enforceable by a writ of mandamus, rather than direct participation at the trial level." Reed v. Becka, 511 S.E.2d 396, 399 (S.C. Ct. App. 1999).

439. NEV. CONST. art. I, § 8(4).

440. UTAH CODE ANN. § 77-38-11(1)–(2)(a)(i) (1999); *see* State v. Casey, 44 P.3d 756, 766 n.14 (Utah 2002).

441. ARIZ. REV. STAT. § 13-4437(A) (2004) provides, "The victim has standing to seek an order or to bring a special action mandating that the victim be afforded any right or to challenge an order denying any right guaranteed to victims under the victims' bill of rights, article II, § 2.1, Constitution of Arizona, any implementing legislation or court rules."

442. *See* MD. CODE ANN, CRIM. PROC. § 11-103(b) (2004) ("[A] victim of the violent crime for which the defendant is charged may file an application for leave to appeal to the Court of Special Appeals from an interlocutory or final order that denies or fails to consider a right secured to the victim."); *see also* Cianos v. State, 659 A.2d 291, 293 (Md. 1995) (quoting MD. CODE ANN CTS. & JUD. PROC. § 12-303.1(c) (1994)) ("Although not a party to a criminal proceeding, the victim of the violent crime for which the defendant is charged has a right to file an application for leave to appeal

for declaratory judgment actions, mandamus, and appeal.[443] Michigan statutes allow a victim to appeal to a circuit court judge the parole board's granting of parole.[444] By granting victims standing to enforce their rights, the Texas constitution implicitly provides for a review procedure.[445] Florida and Indiana statutes grant victims "standing."[446] In these eight jurisdictions review of some sort is expressly available.[447] Such provisions facilitate courts' understanding of their authority. The state courts of at least two of these states, Arizona and Utah,[448] are vigorously engaged in enforcing victims' rights. Absent other restrictions in victims' state constitutional rights, writs are implicitly available. Even in the states that have expressly banned appeals, writs are available.[449]

Thus, when victims' rights are constitutionally protected, the problem in review of victims' rights is not the unavailability of writ review, but rather the discretionary nature of writs. The solution to the review problem is to provide for nondiscretionary review of victims' rights violations. When victims were merely third parties defending

to the Court of Special Appeals *from an interlocutory or final order* that denies or fails to consider a right secured to that victim . . . ." (alteration in original)) .

443. UTAH CODE ANN. § 77-38-11(2)(a)(i) provides that the victim may "bring an action for declaratory relief or for a writ of mandamus defining or enforcing the rights of victims and the obligations of government entities under [the Rights of Crime Victims Act]."

444. MICH. COMP. LAWS § 791.234(9) ("The action of the parole board in granting a parole is appealable by . . . the victim of the crime for which the prisoner was convicted. The appeal shall be to the circuit court in the county from which the prisoner was committed, by leave of the court.").

445. TEX. CONST. art. I, § 30(e).

446. FLA. STAT. ANN. § 960.001(7) (West 2004) ("The victim of a crime . . . ha[s] standing to assert the rights of a crime victim which are provided by law . . . ."); IND. CODE § 35-40-2-1 (2004) ("A victim has standing to assert the rights established by this article.").

447. There is, perhaps, a down side to expressly providing for a particular review mechanism. When a review method is expressly authorized by statute, other review mechanisms may be foreclosed. For example, Arizona courts have interpreted a provision for "special action" to exclude review on appeal. *See* State v. Lamberton, 899 P.2d 939, 942 (Ariz. 1995). South Carolina courts have reached a similar conclusion: "A victim . . . possesses *no* rights in the appellate process. Nothing in our Constitution or statutes provides the 'victim' standing to appeal the trial court's order. Additionally, the rights granted by the South Carolina Constitution and statutes are enforceable by a writ of mandamus . . . ." Reed v. Becka, 511 S.E.2d 396, 399 (S.C. Ct. App. 1999).

448. *See, e.g.*, Romley v. Schneider, 45 P.3d 685, 688 (Ariz. Ct. App. 2002); State v. Casey, 44 P.3d 756 (Utah 2002).

449. The use of writs also solves the potential problem of open-ended time limits on challenging pleas and sentences. Writs are limited by the doctrine of laches. If victims sleep on their rights, mandamus will not be available. In *United States v. Carter*, 270 F.2d 521 (9th Cir. 1959), the court held that even when mandamus is available to the federal prosecutor, a delay of four months in challenging a court's order suspending the sentence and putting the defendant on probation meant the action was barred by laches. *See also* Phillip E. Hassman, Annotation, *Propriety of Issuing Writ of Mandamus in Federal Criminal Proceedings*, 29 A.L.R. FED. 218 (2004).

evidentiary privileges or moving to quash subpoenas, the argument that discretionary review was sufficient was perhaps stronger. Today crime victims are participants with constitutional rights. Unlike third parties, victims have due process rights in the criminal process. Unlike third parties, victim harm and victims' rights legitimize victims' interest in punishment. Procedures should be established to grant victims the right to nondiscretionary review of rights violations. One could not credibly suggest that criminal defendants' constitutional rights are to be reviewed only in the discretion of the court. Crime victims' rights should be similarly respected. The solution of Congress in H.R. 5107 is excellent, providing for a nondiscretionary writ of mandamus.[450] Writs of mandamus can remedy a broad range of victims' rights violations, from the undue delay that violates the right to prompt disposition, to voiding pleas and sentences when victims' rights to notice and to be heard are violated. Moreover, H.R. 5107 does not prohibit stays pending review of the writ.

However, the new federal law does not solve the double bind of ripeness and mootness.[451] Prosecutors and defendants should be required to bring any objection to victims' exercise of their rights well before trial. Courts should also be mandated to rule on these objections sufficiently before trial for the victim to achieve pretrial review. For example, victims' rights to attend trial, which if violated are presently unredressable because of double jeopardy, should be the subject of pretrial rulings and pretrial writ review.

A model for such pretrial proceedings can be found in rape shield laws. For example, the federal rape shield procedure requires a party to "file a written motion at least 14 days before trial" if the party intends to offer evidence of the victim's prior sexual behavior or sexual predisposition.[452] In similar fashion, parties objecting to the victim's exercise of victim rights could be required to make their objection well in advance of trial to allow time for review. Such a procedure worked well in the Fourth Circuit Court of Appeals case of *United States v. Doe*.[453]

450. *See supra* notes 423–31 and accompanying text for a discussion of H.R. 5107.

451. *See supra* Part II.D.1 for a discussion of the problems that ripeness and mootness pose to victims.

452. FED. R. EVID. § 412.

453. 666 F.2d 43 (4th Cir. 1981). *Doe* involved an interlocutory appeal by the rape victim from an erroneous trial court denial of rape shield protections. *Id.* at 45. Interlocutory appeals are creatures of statute and generally provide for pretrial review. *See, e.g.*, Bayless v. Bayless, 580 N.E.2d 962, 964 (Ind. Ct. App. 1991) ("An appeal from an interlocutory order is not allowed unless

Operating within the procedure that required two weeks advance notice, the court found the pretrial review process quite workable:

> The inconvenience and costs associated with permitting the victim to appeal are minimal. Certainly, they are no greater than those resulting from government appeals of suppression orders that are authorized by 18 U.S.C. § 3731. Because the rule provides for pre-trial evidentiary hearings, appeals are unlikely to involve significant postponements of criminal trials. Indeed, in this case, we heard the appeal and filed an order resolving the issues without any delay of the criminal trial.
>
> On the other hand, the injustice to rape victims in delaying an appeal until after the conclusion of the criminal trial is manifest. Without the right to immediate appeal, victims aggrieved by the court's

specific authority is granted by the Indiana Constitution, statutes or rules of the court."). These appeals are also typically discretionary. *See, e.g.*, Cheney v. United States Dist. Court, 124 S. Ct. 2576, 2601 n.9 (2004) (Ginsberg, J., dissenting) ("I note that the decision whether to allow such an [interlocutory] appeal lies in the first instance in the District Court's sound discretion."). Because interlocutory appeal is not available to obtain review from final judgment, and assuming writs were unavailable, the right to appeal would also be necessary to obtain review from final judgments. Only one state has expressly provided for interlocutory appeals of denials of victims' rights. Maryland law gives victims the right to appeal from an interlocutory or final order. MD. CODE ANN., CRIM. PROC. § 11-103 (2004). Statutes expressly providing for nondiscretionary interlocutory appeal are a promising way to expand review of victims' rights violations. New Hampshire law provides for nondiscretionary interlocutory appeal in a different context: "The victim shall have a right to interlocutory appeal to the supreme court from any decision by a court to require the disclosure of records or testimony of a rape crisis or domestic violence center or sexual assault or domestic violence counselor." N.H. REV. STAT. ANN. § 173-C:9 (2003). Some states and federal courts allow for appeal under the collateral order doctrine. To be appealable, the order "must determine claims of right separate from, and collateral to, rights asserted in the action." 4 AM. JUR. 2D *Appellate Review* § 113 (2003). The order "must be the final disposition of the collateral issue." *Id.* Finally, the order will "immediately affect the rights of the parties, and if review is deferred," rights will probably be irreparably lost. *Id.* Relying on the collateral order doctrine, an intermediate appellate court in Pennsylvania held that an order requiring a rape crisis center to produce privileged communications is a final and appealable order. *See* Commonwealth v. Miller, 593 A.2d 1308 (Pa. Super. Ct. 1991). Citing United States Supreme Court and Pennsylvania Supreme Court precedent, the *Miller* court ruled that an order which appears to be interlocutory can be final and appealable "if: 1) it is separate from and collateral to the main cause of action; 2) the right involved is too important to be denied review; and 3) the question presented is such that if review is postponed until final judgment in the case, the claimed right will be irreparably lost." *Id*. at 1309. Applying these factors, the court held that the order involving the records was "separate from and collateral to the underlying criminal action." *Id.* at 1310. The court stated that the "victim's right to privacy and confidentiality in her relationship with the rape center were too important to be denied review" on appeal. *Id*. Moreover, if the appeal was denied, confidentiality would be lost irreparably since "once the information is divulged, the privilege is lost." *Id*. While the Miller case involved a third party record holder, there is little doubt that appeal under the collateral order doctrine would extend to the victim in Pennsylvania if she possessed her own privileged records.

> order will have no opportunity to protect their privacy from invasions forbidden by the rule. Appeal following the defendant's acquittal or conviction is no remedy, for the harm that the rule seeks to prevent already will have occurred.[454]

The inconvenience and costs of pretrial review of victims' constitutional rights violations would also be minimal. Should pretrial hearings be required on objections to victims' rights, as rape shield objections are now, review of rights denials is unlikely to involve significant delays of criminal trials. Moreover, the injustice to victims in delaying review of many of their constitutional rights is apparent because review after final judgment is no remedy. States provide constitutional rights that are, borrowing from the language of the *Doe* opinion, "for the special benefit of . . . victims."[455] Requiring pretrial rulings solves mootness problems because a remedy can still be achieved on review before it is forever precluded by attachment of double jeopardy at trial. The appellate court can order the trial court to comply with the right before the opportunity is foreclosed. The ripeness problem is also cured by the timing deadlines that force trial courts to rule pretrial. Finally, putting the burden on the parties to object pretrial is appropriate because victims typically have fewer legal advocacy resources than parties.

While some courts have been principled in their interpretation of victims' rights, others have not. In some jurisdictions, where rights schemes have the potential of real rights, court opinions interpret any vagueness or ambiguity against victims' standing. Even worse, these courts neglect constitutional canons to achieve results adverse to victims' rights. The solutions set forth above should go a long way to eliminating aberrant judicial opinions because they bring rights into conformity with constitutional rights canons. Nevertheless, experience shows that the assumption should not be made that the same analytical rules that apply to other rights will be applied to victims' rights. Enabling language providing remedy and review should be as explicit as possible to overcome the real problem of double standards.

B. Establishing Standing by Federal Constitutional Amendment

An effort is underway to refer the Crime Victims' Rights Amendment to the United States Constitution to the states for ratification

454. *Doe*, 666 F.2d at 46.

455. *Id.*

and, ultimately, incorporation into the Bill of Rights.[456] A recurrent argument against the amendment is that it is not needed because the states already have adequate constitutional and statutory laws.[457] But this argument is refuted by the states' consistent denial of victim standing. Ultimately, if state constitutional rights remain illusory, the most effective solution is a federal constitutional amendment, applicable to the states.

Professor Laurence Tribe, a noted liberal constitutional law scholar, wrote to Senators in support of the federal amendment: "despite the [statutory] Massachusetts Victims' Bill of Rights," which explicitly contained a right to prompt disposition,[458] "the Massachusetts Attorney General . . . took the position that the victim of the rape did not even

456. S.J. Res. 1, 108th Cong. (2003) (proposing an amendment to the Constitution of the United States to protect the rights of crime victims). The proposed amendment reads:

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States:
>
> SECTION 1. The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established and shall not be denied by any State or the United States and may be restricted only as provided in this article.
>
> SECTION 2. A victim of violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused; the rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and the right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender. These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity.
>
> SECTION 3. Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages. Only the victim or the victim's lawful representative may assert the rights established by this article, and no person accused of the crime may obtain any form of relief hereunder.
>
> SECTION 4. Congress shall have power to enforce by appropriate legislation the provisions of this article. Nothing in this article shall affect the President's authority to grant reprieves or pardons.
>
> SECTION 5. This article shall be inoperative unless it has been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within 7 years from the date of its submission to the States by the Congress. This article shall take effect on the 180th day after the date of its ratification.

Id.

457. But see Parts II and III for an explanation of why a third wave of victims' rights is necessary.

458. MASS. GEN. LAWS ANN. ch. 258B, § 3 (West 2003).

have legal standing to appear in the courts of this state."[459] Tribe observed that Massachusetts' denial of standing "left the victim a quintessential outsider to the State's system of criminal prevention and punishment."[460] It is just this kind of ill-advised state judicial ruling that argues strongly for a federal amendment.

In congressional testimony on an earlier version of the amendment, Tribe was persuaded "that attempts to protect the rights of victims at the state level . . . have proved insufficient."[461] A conservative former law professor, now federal judge, Paul Cassell, agreed with Tribe that a federal amendment is necessary.[462] Even candid testimony in opposition to the amendment is in accord with the professors' views. Ellen Greenlee, when she was the President of the National Legal Aid and Defender Association, recognized that the state victims' amendments "so far have been treated as mere statements of principle that victims ought to be included and consulted more by prosecutors and courts. A state constitution is far . . . easier to ignor[e] than the federal one."[463] These observations are supported by a study that reveals that in states with strong victim laws only 63.3% of white victims, and merely 42.5% of nonwhite victims, received mandatory notice of plea bargains.[464]

Should the Amendment be enacted, the United States Supreme Court would likely provide victims with standing in federal and state appellate courts. The Supreme Court, attuned to the concept of victim harm originating in the criminal act, the potential for further harm from the criminal process, and the inclusion of victim participation in the states' criminal proceedings, has shown increasing respect for the legitimate interests of crime victims. The Court recognizes that a criminal defendant's rights should not be applied in a manner that unnecessarily harms the crime victim.[465] Furthermore, in *Payne v. Tennessee*, the Court

459. Letter from Laurence Tribe to Senators Diane Feinstein and Jon Kyl (Apr. 8, 2003) (on file with author).

460. *Id.*

461. Laurence H. Tribe, *Statement on Victims' Rights* (1997), *reprinted in* DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE 722 (1999).

462. See Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH. L. REV. 479.

463. *The Proposed Victims' Rights Constitutional Amendment: Hearing on H.R.J. Res. 173 and H.J. Res. 174 Before the House Comm. on the Judiciary*, 104th Cong. 147 (1996).

464. *See supra* note 7.

465. Morris v. Slappy, 461 U.S. 1, 14–15 (1983).

recognized a murder victim's "uniqueness as an individual human being" for sentencing purposes.[466]

Recently, the Supreme Court noted the legitimacy of victim harm in the capital case of *Calderon v. Thompson*.[467] In *Calderon*, the Court addressed the seemingly endless delay in the postconviction process, explaining that to unsettle expectations in the execution of moral judgment "is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and the victims of crime alike."[468] Moreover, it is far less likely that the Supreme Court would abandon canons of constitutional analysis that it has created to deny standing to crime victims, as some state appellate courts have done. The prospect of victim standing in both state and federal courts under the proposed federal amendment, contrasted with state denial of victim standing, lends considerable credibility to the amendment effort.

C. Congressional Strategies for the Third Wave

A federal constitutional amendment to the Bill of Rights providing victims rights, accompanied by standing, meaningful remedy, and review is the best option from the perspective of providing consistent national rights. It is also the best option from the perspective of ensuring that courts interpret victims' rights as mandatory and enabled. Moreover, it improves the chances that state courts will interpret and enforce the rights in a consistent manner, because the Supreme Court will be the ultimate arbiter of rights. As a practical matter, however, an amendment is the most difficult solution to attain.

A federal constitutional amendment has been debated on the floor of the Senate. Nevertheless, some Senators wanted to see if the states could be encouraged to provide meaningful standing, remedy, and review before turning to the passage of a federal amendment that would impose such enforcement devises upon the states. Ultimately, the result of this experiment of Congress is H.R. 5107.[469] This bill creates incentives for states to provide meaningful enforcement provisions and funds these incentives over a five year period.[470] Essentially the bill has three

466. 501 U.S. 808, 823 (1991).

467. 523 U.S. 538, 556 (1998).

468. *Id.* (quoting Herrera v. Collins, 506 U.S. 390, 421 (1993)) (citation omitted).

469. Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, H.R. 5107, 108th Cong. (2004). For a copy of this Act, see Appendix I.

470. *Id.*

different projects to positively impact state victims' rights. First, the bill establishes programs such as those run by the National Crime Victim Law Institute (NCVLI), which manages legal clinics in states across the country, presently under grants from the U.S. Department of Justice's Office for Victims of Crime.[471] Second, the law provides expert legal consultation to the states concerning legal changes necessary to bring the state law into substantial similarity with the federal statute's rights and enforcement provisions. And third, the law provides funds for compliance initiatives.

Should this experiment fail to achieve adequate progress in the states, the victims' rights amendment will most certainly be resurrected in the Senate. In agreeing to this plan, the sponsors of the amendment, Senator Diane Feinstein of California (D) and Senator Jon Kyl of Arizona (R), were clear that the amendment would be reintroduced in Congress absent significant progress in the states.[472] But at least for the next five years, assuming the projects are funded, it is safe to say that the federal constitutional amendment has been placed on the back burner. Moving to the front burner are efforts like H.R. 5107 to help the states ride the third wave of victims' rights. In the next five years, focused victim law reform efforts should be on state enabling legislation and on amending state constitutions to provide standing, meaningful remedy, and review. Equally significant is the need for impact litigation to determine state judicial commitment to constitutional canons in the victims' rights context. Should the state effort fail, the federal amendment effort will have dramatically increased chances of success because it will be the only remaining legal mechanism with which to practically achieve real victims' rights across the states.

V. CONCLUSION

The absence of victim standing, remedy, and review corrupts victims' rights in important ways, including de-personalization of the right, corruption of the adversary process in victims' rights litigation, limitation of the procedural context of rights litigation, creation of a rights context in which the government can essentially ignore the rights, and the establishment of precedent corrosive to constitutional

471. 150 CONG. REC. S10,910-13 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). See Appendix II for a copy of Senator Kyl's statement.

472. *See id.*; S. REP. No. 108-191 (2003).

conventions. Most importantly, however, victims simply cannot defend their rights.

The victims' rights movement has made great efforts to change the legal culture of the criminal justice system. The movement has worked hard to enact laws that are, by modern measure, new and innovative. The new laws challenge the modern paradigm that only the state and the defendant have an interest in the criminal process and punishment. The first wave brought statutory victims' rights, the second wave brought constitutional rights, but neither wave has ensured that victims have real rights.

State crime victims' constitutional rights remain illusory. Victims will achieve real rights in the third wave when they get standing to directly defend their rights, when appellate courts can void results reached in violation of victims' rights, and when review of violations is a matter of right.

APPENDIX I

H.R. 5107, 108th Cong. (2004)

TITLE I—SCOTT CAMPBELL, STEPHANIE ROPER, WENDY PRESTON, LOUARNA GILLIS, AND NILA LYNN CRIME VICTIMS' RIGHTS ACT

SEC. 101. SHORT TITLE.

This title may be cited as the "Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act."

SEC. 102. CRIME VICTIMS' RIGHTS.

(a) Amendment to Title 18—Part II of title 18, United States Code, is amended by adding at the end the following:

CHAPTER 237—CRIME VICTIMS' RIGHTS

Sec. 3771. Crime victims' rights.

(a) Rights of Crime Victims—A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) 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.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) Rights Afforded—In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(c) Best Efforts to Accord Rights—

(1) GOVERNMENT—Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) ADVICE OF ATTORNEY—The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) NOTICE—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d) Enforcement and Limitations—

(1) RIGHTS—The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) MULTIPLE CRIME VICTIMS—In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) MOTION FOR RELIEF AND WRIT OF MANDAMUS—The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) ERROR—In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) LIMITATION ON RELIEF—In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

> This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.
>
> (6) NO CAUSE OF ACTION—Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

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

(f) Procedures To Promote Compliance—

> (1) REGULATIONS—Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.
>
> (2) CONTENTS—The regulations promulgated under paragraph (1) shall—
>
> > (A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;
> >
> > (B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist

such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.'.

(b) Table of Chapters—The table of chapters for part II of title 18, United States Code, is amended by inserting at the end the following: 3771.

(c) Repeal—Section 502 of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10606) is repealed.

SEC.103. INCREASED RESOURCES FOR ENFORCEMENT OF CRIME VICTIMS' RIGHTS.

(a) Crime Victims Legal Assistance Grants—The Victims of Crime Act of 1984 (42 U.S.C. 10601 et seq.) is amended by inserting after section 1404C the following:

SEC. 1404D. CRIME VICTIMS LEGAL ASSISTANCE GRANTS.

(a) In General—The Director may make grants as provided in section 1404(c)(1)(A) to State, tribal, and local prosecutors' offices, law enforcement agencies, courts, jails, and correctional institutions, and to qualified public and private entities, to develop, establish, and maintain programs for the enforcement of crime victims' rights as provided in law.

(b) Prohibition—Grant amounts under this section may not be used to bring a cause of action for damages.

> (c) False Claims Act—Notwithstanding any other provision of law, amounts collected pursuant to sections 3729 through 3731 of title 31, United States Code (commonly known as the "False Claims Act"), may be used for grants under this section, subject to appropriation.

(b) Authorization of Appropriations—In addition to funds made available under section 1402(d) of the Victims of Crime Act of 1984, there are authorized to be appropriated to carry out this title—

> (1) $2,000,000 for fiscal year 2005 and $5,000,000 for each of fiscal years 2006, 2007, 2008, and 2009 to United States Attorneys Offices for Victim/Witnesses Assistance Programs;
>
> (2) $2,000,000 for fiscal year 2005 and $5,000,000 in each of the fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice for enhancement of the Victim Notification System;
>
> (3) $300,000 in fiscal year 2005 and $500,000 for each of the fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice for staff to administer the appropriation for the support of organizations as designated under paragraph (4);
>
> (4) $7,000,000 for fiscal year 2005 and $11,000,000 for each of the fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice, for the support of organizations that provide legal counsel and support services for victims in criminal cases for the enforcement of crime victims' rights in Federal jurisdictions, and in States and tribal governments that have laws substantially equivalent to the provisions of chapter 237 of title 18, United States Code; and (5) $5,000,000 for fiscal year 2005 and $7,000,000 for each of fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice, for the support of—
>
> > (A) training and technical assistance to States and tribal jurisdictions to craft state-of-the-art victims' rights laws; and
> >
> > (B) training and technical assistance to States and tribal jurisdictions to design a variety of compliance systems, which shall include an evaluation component.

(c) Increased Resources To Develop State-of-the-Art Systems for Notifying Crime Victims of Important Dates and Developments—The Victims of Crime Act of 1984 (42 U.S.C. 10601 et seq.) is amended by inserting after section 1404D the following:

> SEC. 1404E. CRIME VICTIMS NOTIFICATION GRANTS.
>
> (a) In General—The Director may make grants as provided in section 1404(c)(1)(A) to State, tribal, and local prosecutors' offices, law enforcement agencies, courts, jails, and correctional institutions, and to qualified public or private entities, to develop and implement state-of-the-art systems for notifying victims of crime of important dates and developments relating to the criminal proceedings at issue in a timely and efficient manner, provided that the jurisdiction has laws substantially equivalent to the provisions of chapter 237 of title 18, United States Code.
>
> (b) Integration of Systems—Systems developed and implemented under this section may be integrated with existing case management systems operated by the recipient of the grant.
>
> (c) Authorization of Appropriations—In addition to funds made available under section 1402(d), there are authorized to be appropriated to carry out this section—
>
> (1) $5,000,000 for fiscal year 2005; and
>
> (2) $5,000,000 for each of the fiscal years 2006, 2007, 2008, and 2009.
>
> (d) False Claims Act—Notwithstanding any other provision of law, amounts collected pursuant to sections 3729 through 3731 of title 31, United States Code (commonly known as the "False Claims Act"), may be used for grants under this section, subject to appropriation.

SEC. 104. REPORTS.

(a) Administrative Office of the United States Courts—Not later than 1 year after the date of enactment of this Act and annually thereafter, the Administrative Office of the United States Courts, for each Federal court, shall report to Congress the number of times that a right established in

chapter 237 of title 18, United States Code, is asserted in a criminal case and the relief requested is denied and, with respect to each such denial, the reason for such denial, as well as the number of times a mandamus action is brought pursuant to chapter 237 of title 18, and the result reached.

(b) Government Accountability Office—

> (1) STUDY—The Comptroller General shall conduct a study that evaluates the effect and efficacy of the implementation of the amendments made by this title on the treatment of crime victims in the Federal system.
>
> (2) REPORT—Not later than 4 years after the date of enactment of this Act, the Comptroller General shall prepare and submit to the appropriate committees a report containing the results of the study conducted under subsection (a).

APPENDIX II

Statement of Senator Jon Kyl

150 CONG. REC. S10,910-13 (daily ed. Oct. 9, 2004)

Mr. KYL. Mr. President, as the primary drafter of Title I of H.R. 5107, I would like to make a few comments. After extensive consultation with my colleagues, broad bipartisan consensus was reached and the language in Title I was agreed to.

I would like to make it clear that it is not the intent of this bill to limit any laws in favor of crime victims that may currently exist, whether these laws are statutory, regulatory, or found in case law. I would like to turn to the bill itself and address the first section, (a)(1), the right of the crime victim to be reasonably protected. Of course the government cannot protect the crime victim in all circumstances. However, where reasonable, the crime victim should be provided accommodations such as a secure waiting area, away from the defendant before and after and during breaks in the proceedings. The right to protection also extends to require reasonable conditions of pretrial and postconviction relief that include protections for the victim's safety.

I would like to address the notice provisions of (a)(2). The notice provisions are important because if a victim fails to receive notice of a public proceeding in the criminal case at which the victim's right could otherwise have been exercised, that right has effectively been denied. Public court proceedings include both trial level and appellate level court proceedings. It does not make sense to enact victims' rights that are rendered useless because the victim never knew of the proceeding at which the right had to be asserted. Simply put, a failure to provide notice of proceedings at which a right can be asserted is equivalent to a violation of the right itself.

Equally important to this right to notice of public proceedings is the right to notice of the escape or release of the accused. This provision helps to protect crime victims by notifying them that the accused is out on the streets.

For these rights to notice to be effective, notice must be sufficiently given in advance of a proceeding to give the crime victim the opportunity to arrange his or her affairs in order to be able to attend that proceeding and any scheduling of proceedings should take into account the victim's schedule to facilitate effective notice.

Restrictions on public proceedings are in 28 CFR Sec. 50.9 and it is not the intent here today to alter the meaning of that provision.

Too often crime victims have been unable to exercise their rights because they were not informed of the proceedings. Pleas and sentencings have all too frequently occurred without the victim ever knowing that they were taking place. Victims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm. Their lives are significantly altered by the crime and they have to live with the consequences for the rest of their lives. To deny them the opportunity to know of and be present at proceedings is counter to the fundamental principles of this country. It is simply wrong. Moreover, victim safety requires that notice of the release or escape of an accused from custody be made in a timely manner to allow the victim to make informed choices about his or her own safety. This provision ensures that takes place.

I would like to turn to (a)(3), which provides that the crime victim has the right not to be excluded from any public proceedings. This language was drafted in a way to ensure that the government would not be responsible for paying for the victim's travel and lodging to a place where they could attend the proceedings.

In all other respects, this section is intended to grant victims the right to attend and be present throughout all public proceedings.

This right is limited in two respects. First, the right is limited to public proceedings, thus grand jury proceedings are excluded from the right. Second, the government or the defendant can request, and the court can order, judicial proceedings to be closed under existing laws. This provision is not intended to alter those laws or their procedures in any way. There may be organized crime cases or cases involving national security that require procedures that necessarily deny a crime victim the right not to be excluded that would otherwise be provided under this section. This is as it should be. National security matters and organized crime cases are especially challenging and there are times when there is a vital need for closed proceedings. In such cases, the proceedings are not intended to be interpreted as "public proceedings" under this bill. In this regard, it is not our intent to alter 28 CFR Sec. 50.9 in any respect.

Despite these limitations, this bill allows crime victims, in the vast majority of cases, to attend the hearings and trial of the case involving their victimization. This is so important because crime victims share an interest with the government in seeing that justice is done in a criminal case and this interest supports the idea that victims should not be

excluded from public criminal proceedings, whether these are pretrial, trial, or posttrial proceedings.

When "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," a victim may be excluded. The standards of "clear and convincing evidence" and "materially altered" are extremely high and intended to make exclusion of the victim quite rare, especially since (b) says that "before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding." It should be stressed that (b) requires that "the reasons for any decision denying relief under this chapter shall be clearly stated on the record." A judge should explain in detail the precise reasons why relief is being denied.

This right of crime victims not to be excluded from the proceedings provides a foundation for (a)(4), which provides victims the right to reasonably be heard at any public proceeding involving release, plea, or sentencing. This provision is intended to allow crime victims to directly address the court in person. It is not necessary for the victim to obtain the permission of either party to do so. This right is a right independent of the government or the defendant that allows the victim to address the court. To the extent the victim has the right to independently address the court, the victim acts as an independent participant in the proceedings. When a victim invokes this right during plea and sentencing proceedings, it is intended that the he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victims' family and the community, and sentencing recommendations. Of course, the victim may use a lawyer, at the victim's own expense, to assist in the exercise of this right. This bill does not provide victims with a right to counsel but recognizes that a victim may enlist a counsel on their own.

It is not the intent of the term "reasonably" in the phrase "to be reasonably heard" to provide any excuse for denying a victim the right to appear in person and directly address the court. Indeed, the very purpose of this section is to allow the victim to appear personally and directly address the court. This section would fail in its intent if courts determined that written, rather than oral communication, could generally satisfy this right. On the other hand, the term "reasonably" is meant to allow for alternative methods of communicating a victim's views to the

court when the victim is unable to attend the proceedings. Such circumstances might arise, for example, if the victim is incarcerated on unrelated matters at the time of the proceedings or if a victim cannot afford to travel to a courthouse. In such cases, communication by the victim to the court is permitted by other reasonable means. In short, the victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the release, plea, or sentencing of the accused. This bill intends for this right to be heard to be an independent right of the victim.

It is important that the "reasonably be heard" language not be an excuse for minimizing the victim's opportunity to be heard. Only if it is not practical for the victim to speak in person or if the victim wishes to be heard by the court in a different fashion should this provision mean anything other than an in-person right to be heard.

Of course, in providing victim information or opinion it is important that the victim be able to confer with the prosecutor concerning a variety of matters and proceedings. Under (a)(5), the victim has a reasonable right to confer with the attorney for the government in the case. This right is intended to be expansive. For example, the victim has the right to confer with the government concerning any critical stage or disposition of the case. The right, however, it is not limited to these examples. This right to confer does not give the crime victim any right to direct the prosecution. Prosecutors should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions. Under this provision, victims are able to confer with the government's attorney about proceedings after charging. I would note that the right to confer does impair the prosecutiorial discretion of the Attorney General or any officer under his direction, as provided (d)(6).

I would like to turn now to restitution in (a)(6). This section provides the right to full and timely restitution as provided in law. We specifically intend to endorse the expansive definition of restitution given by Judge Cassell in U.S. v. Bedonie and U.S. v. Serawop in May 2004. This right, together with the other rights in the act to be heard and confer with the government's attorney in this act, means that existing restitution laws will be more effective.

I would like to move on to (a)(7), which provides crime victims with a right to proceedings free from unreasonable delay. This provision does not curtail the government's need for reasonable time to organize and prosecute its case. Nor is the provision intended to infringe on the

defendant's due process right to prepare a defense. Too often, however, delays in criminal proceedings occur for the mere convenience of the parties and those delays reach beyond the time needed for defendant's due process or the government's need to prepare. The result of such delays is that victims cannot begin to put the criminal justice system behind them and they continue to be victimized. It is not right to hold crime victims under the stress and pressure of future court proceedings merely because it is convenient for the parties or the court.

This provision should be interpreted so that any decision to schedule, reschedule, or continue criminal cases should include victim input through the victim's assertion of the right to be free from unreasonable delay.

I would add that the delays in criminal proceedings are among the most chronic problems faced by victims. Whatever peace of mind a victim might achieve after a crime is too often inexcusably postponed by unreasonable delays in the criminal case. A central reason for these rights is to force a change in a criminal justice culture which has failed to focus on the legitimate interests of crime victims, a new focus on limiting unreasonable delays in the criminal process to accommodate the victim is a positive start.

I would like to turn to (a)(8). The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process. Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process.

It is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process. This legislation is meant to ensure that cases like the McVeigh case, where victims of the Oklahoma City bombing were effectively denied the right to attend the trial and to avoid federal appeals courts from determining, as the Tenth Circuit Court of Appeals did, that victims had no standing to seek review of their right to attend the trial under the former victims' law that this bill replaces.

I would also like to comment on (b), which directs courts to ensure that the rights in this law be afforded and to record, on the record, any

reason for denying relief of an assertion of a crime victim. This provision is critical because it is in the courts of this country that these rights will be asserted and it is the courts that will be responsible for enforcing them. Further, requiring a court to provide the reasons for denial of relief is necessary for effective appeal of such denial.

Turning briefly to (c), there are several important things to point out. First, this provision requires that the government inform the victim that the victim can seek the advice of the attorney, such as from the legal clinics for crime victims contemplated under this law, such as the law clinics at Arizona State University and those supported by the National Crime Victim Law Institute at the Law School at Lewis and Clark College in Portland, Oregon. This is an important protection for crime victims because it ensures the independent and individual nature of their rights. Second, the notice section immediately following limits the right to notice of release where such notice may endanger the safety of the person being released. There are cases, particularly in domestic violence cases, where there is danger posed by an intimate partner if the intimate partner is released. Such circumstances are not the norm, even in domestic violence cases as a category of cases. This exception should not be relied upon as an excuse to avoid notifying most victims.

I would now like to address the enforcement provisions of the bill in (d). This provision allows a crime victim to enter the criminal trial court during proceedings involving the crime against the victim, to stand with other counsel in the well of the court, and assert the rights provided by this bill. This provision ensures that crime victims have standing to be heard in trial courts so that they are heard at the very moment when their rights are at stake and this, in turn, forces the criminal justice system to be responsive to a victim's rights in a timely way. Importantly, however, the bill does not allow the defendant in the case to assert any of the victim's rights to obtain relief. This prohibition prevents the individual accused of the crime from distorting a right intended for the benefit of the individual victim into a weapon against justice.

The provision allows the crime victim's representative and the attorney for the government to go into a criminal trial court and assert the crime victim's rights. The inclusions of representatives and the government's attorney in the provision are important for a number of reasons. First, allowing a representative to assert a crime victim's rights ensures that where a crime victim is unable to assert the rights on his or her own for any reason, including incapacity, incompetence, minority, or death, those rights are not lost. The representative for the crime victim

can assert the rights. Second, a crime victim may choose to enlist a private attorney to represent him or her in the criminal case--this provision allows that attorney to enter an appearance on behalf of the victim in the criminal trial court and assert the victim's rights. The provision also recognizes that, at times, the government's attorney may be best situated to assert a crime victim's rights either because the crime victim is not available at a particular point in the trial or because, at times, the crime victim's interests coincide with those of the government and it makes sense for a single person to express those joined interests. Importantly, however, the provision does not mean that the government's attorney has the authority to compromise or co-opt a victim's right. Nor does the provision mean that by not asserting a victim's right the government's attorney has waived that right. The rights provided in this bill are personal to the individual crime victim and it is that crime victim that has the final word regarding which of the specific rights to assert and when. Waiver of any of the individual rights provided can only happen by the victim's affirmative waiver of that specific right.

In sum, without the ability to enforce the rights in the criminal trial and appellate courts of this country any rights afforded are, at best, rhetoric. We are far past the point where lip service to victims' rights is acceptable. The enforcement provisions of this bill ensure that never again are victim's rights provided in word but not in reality.