

TWENTY-FIVE YEARS OF VICTIMS' RIGHTS IN ARIZONA

Steven J. Twist & Keelah E.G. Williams*

I. INTRODUCTION

On November 6, 1990,¹ Arizona voters approved an amendment to the state constitution² granting specific procedural and substantive rights to victims of crime. Known as the “Victims’ Bill of Rights” (VBR), the amendment will celebrate its 25th anniversary on November 27, 2015.³

At the time of its passage, Arizona became one of only six states to afford crime victims’ rights protected by state constitutions.⁴ The VBR was enacted as part of a national movement that began with the publication of the Report of the President’s Task Force on Victims of Crime (“Final Report”).⁵

The Final Report proposed, *inter alia*, a federal constitutional amendment to protect the rights of crime victims:

In applying and interpreting the vital guarantees that protect all citizens, the criminal justice system has lost an essential balance. It should be clearly understood that this Task Force wishes in no way to vitiate the safeguards that shelter anyone accused of crime; but it must be urged with equal vigor that

* Twist is an Adjunct Professor, Sandra Day O’Connor College of Law. Williams is a J.D./Ph.D. candidate, Arizona State University. The authors wish to thank Jeremy Hamman, Michael Saks, and Steven Neuberger. The authors also extend thanks to the *Arizona State Law Journal* for assistance in preparing the article for publication.

1. Gessner H. Harrison, *The Good, the Bad, and the Ugly: Arizona’s Courts and the Crime Victims’ Bill of Rights*, 34 ARIZ. ST. L.J. 531, 531 n.2 (2002).

2. ARIZ. CONST. art. II, § 2.1.

3. Harrison, *supra* note 1, at 532.

4. *Id.* at 531–32. California is counted among the first five because of the enactment of article 1, section 28 of the California state Constitution, which at the time only established the right to restitution as a direct right of crime victims. CAL. CONST. art. 1, § 28 (amended 2008).

5. PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114 (1982), available at <http://www.ovc.gov/publications/presdntstskforcrprt/87299.pdf>. See also OFFICES OF THE U.S. ATTORNEYS, U.S. DEP’T OF JUSTICE, VICTIMS’ RIGHTS: CRIME VICTIMS’ RIGHTS ACT, available at <http://www.justice.gov/usao/priority-areas/victims-rights-services/victims-rights> (last visited Apr. 21, 2015).

the system has deprived the innocent, the honest, and the helpless of its protection.

The guiding principle that provides the focus for constitutional liberties is that government must be restrained from trampling the rights of the individual citizen. The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed. To that end it is the recommendation of this Task Force that the Sixth Amendment to the Constitution be augmented.⁶

Following issuance of the Final Report, proponents of crime victims' rights decided initially to focus their attention on passage of constitutional amendments in the states, before seeking a federal constitutional amendment.⁷ As Bob Preston, one of the movement's leaders, testified,

The 'states-first' approach drew the support of many victim advocates. Adopting state amendments for victim rights would make good use of the 'great laboratory of the states,' that is, it would test whether such constitutional provisions could truly reduce victims' alienation from their justice system while producing no negative, unintended consequences.⁸

The ensuing decades have seen remarkable advancement in crime victims' rights on a national scale. In 2004, Congress passed the Crime Victims' Rights Act⁹ protecting the rights of crime victims in federal courts, and the push for state victims' rights amendments continues to this day.¹⁰ Arizona's VBR is best understood within this historical context. After passage of the VBR, several states modeled their amendments after

6. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 5, at 114.

7. See Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1381–83 (recounting the history of crime victims' rights).

8. *Victims' Bill of Rights Amendment: Hearing on S.J. Res. 52 Before the S. Comm. on the Judiciary*, 104th Cong. 40 (1996) (statement of Robert E. Preston, Co-Chairman, National Victims' Constitutional Amendment Network).

9. Crime Victims' Rights Act, Pub. L. No. 108-405, 118 Stat. 2260, 2261–65 (2004) (codified as amended at 18 U.S.C. § 3771 (2012) and U.S.C. § 10603(d)–(e) (2006)).

10. As of this writing, 33 states have adopted victims' rights amendments. See *State Victims Rights Amendments*, NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, www.nvcap.org/states/stvras.html (last visited Apr. 2, 2015). In November 2014, the voters in Illinois strengthened what had been a weak state victims' rights amendment. *Id.* The text of the Illinois amendment and all other state amendments is available through the above website.

Arizona.¹¹ Despite the successes at textual law reform, experience teaches that texts can often be words on paper, without the power to change the culture of the legal system—unless there is the enervating presence of lawyers and court decisions that give the words life in real cases with real people.

Within Arizona, courts have grappled with the challenges of balancing traditional conceptualizations of defendants' rights and state interests with the rights of victims, as newly articulated by the VBR.¹² The resulting judicial decisions have given crime victims' advocates cause for celebration,¹³ as well as cause for concern.¹⁴ In honor of the VBR's anniversary, this Article considers twenty-five years of victims' rights law in Arizona. It begins with a brief substantive review of the VBR's purposes and protections, and an overview of how Arizona courts have approached interpreting the amendment. Next, it examines how Arizona courts have responded to major victims' rights issues, including defining who is a victim, victims' rights to be informed, present, and heard, as well as victims' rights to restitution. Finally, it concludes by considering the future of victims' rights in Arizona, including significant victims' rights issues yet to be decided, and the possibility of a Victims' Rights Amendment to the U.S. Constitution.

11. See, e.g., CAL. CONST. art I, § 28; OKLA. CONST. art. II, § 34; OR. CONST. art I, § 42; S.C. CONST. art. I, § 24; TENN. CONST. art. I, § 35; UTAH CONST. art I, § 28.

12. See, e.g., *P.M. v. Gould*, 136 P.3d 223, 227–28 (Ariz. Ct. App. 2006) (“[I]t is well-accepted that ‘if . . . the victim’s state constitutional rights conflict with a defendant’s federal constitutional rights to due process and effective cross-examination, the victim’s rights must yield.’”); *Arizona ex rel. Romley v. Superior Court*, 836 P.2d 445, 453–54 (Ariz. Ct. App. 1992) (“[t]he Victim’s Bill of Rights must yield to the federal and state constitutions’ mandates of due process of law so that the defendant is able to present her theory of self-defense . . .”).

13. See, e.g., *State v. Gonzales*, 892 P.2d 838, 848 (Ariz. 1995) (protecting victims’ right to attend all criminal proceedings); *State ex rel. Hance v. Ariz. Bd. of Pardons & Paroles*, 875 P.2d 824, 830 (Ariz. Ct. App. 1993) (upholding victims’ right to request notice of and to participate in post-conviction release proceedings).

14. See, e.g., *State ex rel. Napolitano v. Brown*, 982 P.2d 815, 817–19 (Ariz. 1999) (misconstruing the court’s rulemaking authority and restricting the legislature’s ability to enact rules furthering victims’ rights under the VBR); *Lindsay v. Cohen*, 343 P.3d 435, 435 (Ariz. Ct. App. 2015) (holding counsel for victim is “not entitled to offer evidence, examine witnesses, or present arguments as to substantive restitution claims”); see also Harrison, *supra* note 1, at 548–68.

II. THE VICTIMS' BILL OF RIGHTS: PURPOSE, CONTENT, AND INTERPRETATION

Each year, millions of Americans become victims of serious and often violent offenses.¹⁵ However, for much of the past century, crime victims were marginalized¹⁶ by the criminal justice system—viewed primarily as “unfortunate by-products”¹⁷ rather than active participants. After dutifully reporting a crime to the authorities, victims were firmly relegated to the sidelines.¹⁸ Beyond lending support to the prosecution as a witness, the victim’s role was one of passive observer.¹⁹ Police gathered evidence, prosecutors made determinations about pursuing cases, charges were filed in the name of “the state,” defense counsel protected the defendant’s interests, and guilt determinations were effected through plea bargain agreements, judges, and jurors.²⁰ Victims remained at the periphery, excluded from and “oppressively burdened by” a criminal justice system originally designed to protect them.²¹ Advocates of crime victims’ rights decried this injustice, arguing that compelling interests such as fairness to the victim, facilitating truth seeking, and preventing victim alienation demanded a reconceptualization of the victim’s place in the justice system.²²

Arizona’s voters agreed with these principles, resulting in an amendment to the state constitution. The Victims’ Bill of Rights (VBR) was intended to reestablish the important and central role of victims, to humanize and individualize the victims of crime, and to recognize that victims also have rights to fair treatment and due process in criminal proceedings.²³ The amendment enumerates specific rights to “justice and due process”²⁴ for crime victims, which can be grouped into four general categories: (1) rights that protect victims from harassment and abuse throughout the criminal justice process; (2) rights that allow a victim to participate in, contribute

15. DOUGLAS E. BELOOF ET AL., VICTIMS IN CRIMINAL PROCEDURE 3 (3d ed. 2010). See generally *Uniform Crime Reports*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/violent-crime-topic-page/violentcrimemain_final (last visited June 18, 2015).

16. BELOOF ET AL., *supra* note 15, at 3.

17. Harrison, *supra* note 1, at 533.

18. BELOOF ET AL., *supra* note 15, at 3.

19. *Id.*

20. *Id.* at 3–4.

21. PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, *supra* note 5, at 114.

22. BELOOF ET AL., *supra* note 15, at 17–20.

23. See Harrison, *supra* note 1, at 534; Stellisa Scott, Note, *Beyond the Victims’ Bill of Rights: The Shield Becomes a Sword*, 36 ARIZ. L. REV. 249, 249 (1994).

24. ARIZ. CONST. art. II, § 2.1(A).

information to, and draw information from a criminal prosecution that will be resolved in a timely manner; (3) rights of victims to receive restitution from the person or persons who committed the crime; and (4) rights which permit the legislature to act on behalf of crime victims so that the rights secured by the VBR may be preserved.²⁵ In 1991, the Arizona legislature adopted the Victims' Rights Implementation Act²⁶ to assist in the realization of the rights established by the VBR, and in 1995, expanded crime victims' rights to victims of offenses committed by juveniles.²⁷ Victims were no longer mere bystanders in the quest for justice; the VBR had granted crime victims "a mandatory participatory voice in Arizona's criminal justice system."²⁸

In subsequent years, Arizona's courts have been tasked with interpreting and implementing victims' rights. Courts have had to reconcile victims' rights with the historically expansive protection of defendants' rights,²⁹ articulate the boundaries and scope of victims' rights,³⁰ and determine appropriate remedies when these rights are violated.³¹ Overall, a review of Arizona's Supreme Court and Court of Appeals decisions over the past twenty-five years³² suggests that many of the goals of the VBR have been realized. Arizona's jurists have frequently supported and protected victims' right to participate in the justice system and have given effect to victims' right to restitution. However, a handful of cases indicate that the courts are still grappling with balancing victim and defendant due process rights, and

25. See Harrison, *supra* note 1, at 534. The categories presented are a slight variation of those suggested by Harrison. Category 1 refers to ARIZ. CONST. art. II, §§ 2.1(A)(1), (A)(5); Category 2 refers to ARIZ. CONST. art. II, §§ 2.1(A)(2), (A)(3), (A)(4), (A)(6), (A)(7), (A)(9), (A)(10), A(12); Category 3 refers to ARIZ. CONST. art. II, § 2.1(A)(8); Category 4 refers to ARIZ. CONST. art. II, §§ 2.1(A)(1), (A)(11), (D).

26. Victims' Rights Implementation Act, ch. 229, 1991 Ariz. Sess. Laws 1137 (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. tits. 13, 41 (2014)).

27. Act of Apr. 20, 1995, ch. 197, 1995 Ariz. Sess. Laws 1500 (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. tits. 8, 13, 41 (2014)).

28. Harrison, *supra* note 1, at 534.

29. BELOOF ET AL., *supra* note 15, at 15.

30. See, e.g., Knapp v. Martone, 823 P.2d 685 (Ariz. 1992) (the first Arizona Supreme Court case to consider who qualifies as a victim under the VBR's definition).

31. See, e.g., Federal Deposit Ins. Corp. v. Colosi, 977 P.2d 836 (Ariz. Ct. App. 1998) (holding that victim can bring special action seeking relief if trial court refuses to enter judgment against defendant for failing to pay restitution, as victim has no other adequate avenue for remedy).

32. A Westlaw search for Arizona courts citing ARIZ. CONST. art. II, § 2.1 returned 146 reported cases.

suggest a reluctance to effectuate the VBR's intended scope within specific domains.³³

A significant portion of the praise due to Arizona jurists' dispensation of cases involving victims' rights stems from the first Arizona Supreme Court case to apply the VBR, *Knapp v. Martone*.³⁴ Crucially, *Knapp* established precedent for how to appropriately interpret the newly enacted amendment. In *Knapp*, a trial court ordered Ms. Knapp, the mother of two murdered children, to submit to a court-ordered deposition requested by her former husband (the defendant).³⁵ Although never charged with a crime, the state indicated during oral arguments that Ms. Knapp might be a co-conspirator to the crime. Against Ms. Knapp's objections, the trial court determined that she was not entitled to protection under the VBR because she did not fit the definition of a victim, based on the assumption that "it could not have been the intent of the draftspersons [of the VBR] to exclude a person, such as Ms. Knapp, who was, is, or could be a suspect in the case."³⁶ The Arizona Supreme Court reversed the trial court's orders, pointing to the definition of victim articulated by the VBR.³⁷ The court decisively emphasized the need for Arizona courts to "follow and apply the plain language of this new amendment to our constitution,"³⁸ and proscribed trial courts from making "ad hoc exceptions to the constitutional rule."³⁹

Although the courts have occasionally faltered in applying the VBR "in a manner consistent with its underlying intent,"⁴⁰ Arizona's jurists have remained largely faithful to the guidelines for interpretation demanded by *Knapp*. By attempting to close the door on creative semantic interpretations of the amendment's language, the court gave weight to the specific rights expressed by the VBR. Unfortunately, other case holdings⁴¹ suggest that ambiguities in interpreting victims' rights remain—and that this vagueness occasionally results in determinations inconsistent with the spirit of the

33. See discussion *infra* Part III(A). See also Harrison, *supra* note 1, at 532.

34. 823 P.2d 685 (Ariz. 1992).

35. *Id.* at 686–87.

36. *Id.* at 686.

37. *Id.* at 689. The VBR defines victim as "a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused." ARIZ. CONST. art. II, § 2.1(C).

38. *Knapp*, 823 P.2d at 687.

39. *Id.*

40. *Lindsay R. v. Cohen*, 343 P.3d 435, 437–38 (Ariz. Ct. App. 2015); Harrison, *supra* note 1, at 532.

41. See discussion *infra* Part III(A).

VBR.⁴² In the following section, this Article reviews notable Arizona cases addressing major victims' rights issues. Although the implications of these cases are predominantly positive for the state of victims' rights in Arizona, there is still work to be done before the goals of the VBR are fully realized.

III. NOTABLE VICTIMS' RIGHTS CASE LAW IN ARIZONA

Over the past twenty-five years, Arizona courts have addressed more than a hundred cases implicating the VBR.⁴³ Several of these decisions addressed fundamental principles of victims' rights—for example, carving the boundaries of who may be considered a victim and therefore entitled to protection under the VBR. Many others spoke to issues at the core of victims' rights, such as the right to be present and the right to be heard. This section provides a brief outline of notable Arizona cases addressing key victims' rights issues.

A. *Who is a Victim?*

The VBR defines a victim as “a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused.”⁴⁴ The Victims' Rights Implementation Act further clarifies that the “accused” refers to “a person who has been arrested for committing a criminal offense and who is held for an initial appearance or other proceeding before trial.”⁴⁵

Following the Arizona Supreme Court's decision in *Knapp*, Arizona's jurists have closely adhered to the definition provided by the VBR. For example, in *State v. Roscoe*,⁴⁶ the Arizona Supreme Court considered a conflict between the then existing provisions of A.R.S. § 13-4433(F) and the Arizona Rules of Criminal Procedure, and the VBR's definition of a victim.⁴⁷ The statute, which had been passed in 1992, and a conformed version of Rule 39(b)(11) provided that for purposes of pretrial interviews,

42. See, e.g., *Champlin v. Sargeant*, 965 P.2d 763, 764, 766 (Ariz. 1998) (failing to classify minor who observed defendant's molestation of another child as a “victim” when minor was not listed as victim in the specific offense count).

43. See *supra* note 32, and accompanying text.

44. ARIZ. CONST. art. II, § 2.1(C).

45. ARIZ. REV. STAT. ANN. § 13-4401(1) (2014).

46. 912 P.2d 1297 (Ariz. 1996).

47. *Id.* at 1299.

peace officers were not considered victims if the offense conferring victim status occurred within the scope of official duties.⁴⁸ Applying the plain language interpretation set forth by *Knapp*, the court found the exclusion of peace officers to be an unconstitutional abrogation of the rights provided by the VBR.⁴⁹ Furthermore, the court acknowledged the impropriety of the legislature or courts attempting to restrict the class of ‘victim’ beyond that articulated in the VBR, noting, “[t]he Bill grants to the legislature the authority to define the rights created therein, not the power to redetermine who is entitled to them. . . . [N]either we [n]or the legislature can exclude from the Bill victims who have already been included by the people.”⁵⁰ In doing so, the court protected the VBR from judicial or legislative action expanding the number of exceptions to victim status beyond those explicitly enumerated in the VBR’s definition of victim.

Courts have interpreted these enumerated exceptions—individuals “in custody for an offense” or “the accused”—in a narrow manner, declining to restrict the class of victims protected by the VBR. In *State v. Nichols*,⁵¹ the petitioner, J.C., was a victim of kidnapping, robbery, and assault while living in Arizona.⁵² J.C. moved to Massachusetts, and was later arrested, convicted, and incarcerated for an unrelated weapons charge.⁵³ While in custody in Massachusetts, counsel for the defendant charged with J.C.’s kidnapping, robbery, and assault requested a pretrial interview with J.C., arguing that J.C. was not entitled to victim status because he was in custody on criminal charges.⁵⁴ In reviewing a judge’s order compelling J.C. to submit to pretrial interview, the Arizona Court of Appeals considered the definition of “in custody for an offense” in light of the VBR’s stated purpose: “to preserve and protect a victim’s rights to justice and due process.”⁵⁵ Noting “the victim’s right to decline an interview has been considered absolute,”⁵⁶ the court recognized that no previous Arizona case had held, implicitly or expressly, that individuals lose victim status or rights if taken into custody for an unrelated reason.⁵⁷ The court declined to suspend or forfeit constitutional rights “in the absence of clear language in

48. *Id.*

49. *Id.* at 1303.

50. *Id.* at 1302.

51. 233 P.3d 1148 (Ariz. Ct. App. 2010).

52. *Id.* at 1149.

53. *Id.*

54. *Id.*

55. *Id.* at 1150.

56. *Id.* at 1151.

57. *Id.*

the VBR expressly so providing,⁵⁸ and determined that for the purposes of the 'in custody' exception, victim status could only be denied to individuals already in custody when a criminal offense is committed against them.⁵⁹

Additional court decisions addressing the VBR's victim definition suggest a generous interpretation of victim status. For example, Arizona courts have upheld victims' rights asserted by parents of minor victims (regardless of whether the victim is alive or deceased),⁶⁰ and putative spouses.⁶¹ Courts have held that victims do not need to suffer personal injury to classify as victims,⁶² and that individuals not named in charging documents or complaints are still entitled to invoke constitutional rights as victims.⁶³ Such inclusive interpretations are consistent with the spirit and aims of the VBR.

However, Arizona's courts have limited individuals' entitlement to victim status in two notable domains. First, court opinions suggest a reluctance to fully confer victims' rights on victims who are also participating as witnesses. In *Champlin v. Sargeant*,⁶⁴ the Arizona Supreme Court held that witnesses to a defendant's criminal activity are not entitled to refuse defense interviews unless specifically named as victims in the charges filed against the defendant, even if the witnesses themselves are victimized by the criminal activity.⁶⁵ The defendant in *Champlin* was charged with multiple sexual offenses, including molestation of a child and public sexual indecency, stemming from three incidents involving two minors and an adult.⁶⁶ In two incidents, the defendant, Champlin, improperly touched one of the children while in the presence of the other child.⁶⁷ For both of these incidents, charges filed against Champlin named

58. *Id.* at 1152.

59. *Id.* at 1153.

60. *J.D. v. Hegyi*, 335 P.3d 1118, 1122 (Ariz. 2014) (holding that a parent who exercises rights on behalf of a minor victim is entitled to refuse a defense interview through final disposition of charges, even if the minor turns 18 before the case ends); *State ex rel. Smith v. Reeves*, 250 P.3d 196, 201 (Ariz. Ct. App. 2011); *see also Lincoln v. Holt*, 156 P.3d 438, 443 (Ariz. Ct. App. 2007) (holding that the parents or legal guardians of a minor victim are entitled to exercise all victims' rights on their own behalf, including the right to refuse a pretrial interview). When a minor victim's parent or guardian is either unwilling or unable to adequately represent the victim's interests, the trial court retains equitable power to appoint a representative. *See State ex rel. Romley v. Dairman*, 95 P.3d 548, 552 (Ariz. Ct. App. 2004).

61. *State v. Guadagni*, 178 P.3d 473, 478 (Ariz. Ct. App. 2008).

62. *State ex rel. Romley v. Super. Ct.*, 909 P.2d 476, 478 (Ariz. Ct. App. 1995).

63. *Id.*; *see also Douglass v. State*, 195 P.3d 189, 191 (Ariz. Ct. App. 2008).

64. 965 P.2d 763 (Ariz. 1998).

65. *Id.* at 767; *see also Harrison, supra* note 1, at 549.

66. 965 P.2d at 764.

67. *Id.*

only the molested child as a victim and did not identify the other child as a victim of any crime.⁶⁸ In the third incident, Champlin improperly touched one of the children while in the presence of the adult, and charges filed identified both the child and the adult as a victim.⁶⁹ Champlin filed a motion to compel depositions from both children and the adult, reasoning that interviews with unnamed victims would be “witness” interviews rather than “victim” interviews,⁷⁰ and that only witnesses against whom a defendant had committed an offense on the same occasion as the offense committed against the victim were entitled to victim protections under the VBR.⁷¹ The State argued that victims are not limited only to victims named in the offense count, and “implored the court to apply a broad definition to the term of victim to the facts of the case.”⁷²

Unfortunately, the court in *Champlin* held that witnesses to criminal conduct were only protected if also a victim of the specific criminal activity on that occasion.⁷³ Witnesses who were victims of criminal conduct by the same defendant on separate occasions could be compelled to submit to a pretrial interview, so long as the interview did not address their own victimization.⁷⁴ As a result, Champlin could interview one child with respect to the first crime, and the other child with respect to the second crime, even though both children were present for both crimes. However, Champlin was not entitled to a pretrial interview of the adult, as the adult had also been named as a victim in the specific offense count.

The court’s conclusion in *Champlin* indicates an unnecessarily restrictive interpretation of the VBR. Given that case law in Arizona establishes minors as victims of public sexual indecency if “in view or at hand” when indecent sexual conduct occurs,⁷⁵ both children in *Champlin* were victims of a crime regardless of whether or not they were explicitly named as such in the counts filed against Champlin.⁷⁶ The Arizona Court of Appeals had previously established that individuals do not need to be named as victims of any charged offense to be entitled to protection under the VBR.⁷⁷ A few

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 765.

72. Harrison, *supra* note 1, at 551 (internal quotation marks omitted).

73. *Champlin*, 965 P.2d at 767.

74. *Id.*

75. See Harrison, *supra* note 1, at 552 (citing the holding in *State v. Malott*, 821 P.2d 179, 181 (Ariz. Ct. App. 1991)).

76. *Id.*

77. See, e.g., *State ex rel. Romley v. Super. Ct.*, 909 P.2d 476, 478 (Ariz. Ct. App. 1995).

years after *Champlin*, the Arizona Court of Appeals again considered the rights of witnesses alleging victimization by the defendant. In *State v. Stauffer*,⁷⁸ defendant Proto was charged with committing sexual abuse against V.M.⁷⁹ The State intended to call three witnesses, N.T., T.G., and D.M., each of whom would testify that Proto had committed similar acts of sexual misconduct against them.⁸⁰ Proto had been convicted of sexual abuse against N.T., with an appeal pending.⁸¹ In contrast, the alleged crimes against T.G. and D.M. had not resulted in arrests or criminal charges.⁸² Proto sought pretrial interviews of all three witnesses, each of whom invoked rights under the VBR to refuse to be interviewed about the offenses committed against them.⁸³

In addressing the trial judge's order to compel all three interviews, the court of appeals first considered whether N.T.'s rights as a victim established by her own case against Proto extended to a separate prosecution involving a third party's charge against the same defendant.⁸⁴ The court interpreted *Champlin* to stand for "the principle that a victim's right to refuse to be interviewed about the offense committed against that victim is inviolate, even as to other offenses allegedly committed on the same occasion by the defendant,"⁸⁵ and extended this principle to separate prosecutions involving other charges brought by third parties. Because N.T.'s testimony as a witness for V.M. comprised of recounting the criminal offense Proto committed against N.T., N.T. was entitled to retain her victim status and the protections afforded by the VBR.⁸⁶

However, in turning to the two remaining witnesses, the court concluded that the arrest or formal charging upon which victims' rights arise is "victim-specific."⁸⁷ Rather than activating victims' rights "for all persons [the defendant] has victimized," victims are limited to the constitutionally defined class of victims against whom the specific offense(s) charged was committed.⁸⁸ Because Proto had not been arrested or charged for any criminal acts committed against T.G. and D.M., these individuals' "rights to

78. 58 P.3d 33 (Ariz. Ct. App. 2002).

79. *Id.* at 34.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 35.

85. *Id.*

86. *Id.* at 35–36.

87. *Id.* at 36.

88. *Id.*

refuse to be interviewed simply [had] not . . . arisen,”⁸⁹ and they could be compelled to submit to pretrial interview.⁹⁰

Taken together, *Champlin* and *Stauffer* suggest that witnesses are not protected as victims from pretrial interviews if their victimization arises from incidents other than the specific offense for which they will testify. Even if victimized by the same defendant, for the same or similar type of offense, victim status is limited to victims of the specific occasion of criminal activity for which the defendant is charged. However, victims who are named as victims in the specific offense count, or who are testifying in a separate prosecution about an offense for which the victims’ rights had attached, remain entitled to refuse pretrial interview. The decisions in these two cases suggest that when tasked with delineating victim status, Arizona’s jurists continue to grapple with balancing witness-victims’ rights to refuse pretrial interviews with defendants’ rights under the criminal discovery rules.

The second domain in which Arizona courts have narrowly interpreted victim status is with regards to individuals who commit suicide. In *State v. Superior Court*,⁹¹ the defendant, Jafet, was accused of sexually assaulting a woman who committed suicide shortly after the indictment.⁹² The State listed the deceased’s parents as witnesses, and Jafet sought a court order requiring the parents of the deceased sexual assault victim to submit to an interview.⁹³ The State objected, contending that the parents were protected under the VBR and entitled to refuse the interviews.⁹⁴ A trial court granted the order, and the State appealed.⁹⁵ In evaluating the petition, the Arizona Court of Appeals considered the VBR’s definition of crime victim as “a person against whom the criminal offense has been committed or, *if the person is killed or incapacitated*, the person’s spouse, parent, child or other lawful representative”⁹⁶ Relying partly on a definition of victim in the Arizona Rules of Criminal Procedure, the court determined that a deceased victim “must have been killed *by the alleged criminal offense*” for the parents of the deceased victim to qualify as victims under the VBR.⁹⁷

89. *Id.* at 37.

90. *Id.* at 38.

91. 922 P.2d 927 (Ariz. Ct. App. 1996).

92. *Id.* at 929.

93. *Id.*

94. *Id.*

95. *Id.* at 928.

96. *Id.* (emphasis added) (quoting ARIZ. CONST. art. II, § 2.1(C)).

97. *Id.* at 930.

The State argued that the defendant's conduct "started a chain of events . . . ultimately result[ing] in the deceased's suicide,"⁹⁸ therefore creating a "nexus between the death of the victim and the alleged offense."⁹⁹ The court rejected this argument, stating that "the standard for demonstrating that the alleged criminal offense killed the victim . . . requires a showing of causation, which is something more than just any nexus."¹⁰⁰ Given the speculative nature of the connection between Jafet's conduct and the deceased suicide, the court declined to find a causal relationship, and affirmed the trial court's order compelling the parents to submit to interviews.¹⁰¹

The Arizona Court of Appeals' finding has potentially interesting implications for family members of suicide victims in future cases. Although *State v. Superior Court* requires a causal link between the criminal offense and the victim's death, it is unclear what fact patterns might satisfy this standard. Perhaps less time intervening between the offense and the suicide,¹⁰² or stronger evidence suggesting the suicide occurred as a direct result of the offense, could confer victim status for surviving family members under the VBR.

In sum, Arizona's courts have generally remained faithful to the definition of victim articulated by the VBR. In several instances courts have broadly interpreted this definition, favoring a generous and relatively comprehensive construction of victim status that is consistent with the spirit and goals of the VBR. However, a handful of cases suggest that courts are hesitant to be overly inclusive in defining victims—particularly when such labeling might unduly interfere with defendants' rule-based rights to interview witnesses, and when bestowing victims' rights on third parties if the connection between the victim's death and the charged offense is tenuous.¹⁰³ Each of these narrowing constructions could and should be addressed by the legislature.¹⁰⁴

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. In *State v. Superior Court*, the deceased committed suicide more than seven months after the alleged sexual assault. *Id.* at 929.

103. A third potential domain may be with respect to stepsiblings. In *Allen v. Sanders*, the Arizona Court of Appeals granted relief to a defendant seeking to interview the stepsister of the murder victim. 346 P.3d 30, 30 (Ariz. Ct. App. 2015).

104. For an example of how the legislature might address court rulings unfavorable to victims, consider *Montgomery v. Chavez*, 321 P.3d 420 (Ariz. 2014). In *Chavez*, the Arizona Supreme Court held that the prosecutor could not redact victims' birth dates from discovery materials without a court order. *Id.* at 420. After the Arizona Supreme Court's opinion, the

B. Right to be Informed & Present

The right to be informed is the “linchpin”¹⁰⁵ of the VBR, and refers to both an affirmative obligation of the state to inform a victim of his or her constitutional rights,¹⁰⁶ and—upon request—to be notified of certain events and legal proceedings.¹⁰⁷ It is through this right to be informed that victims gain knowledge and empowerment to exercise further rights, such as the right to be present and the right to be heard.

The Arizona Supreme Court first considered the victims’ right to be heard under the VBR in *State ex rel Hance v. Arizona Board of Pardons and Paroles*.¹⁰⁸ In *Hance*, the Arizona Board of Pardon and Paroles ordered release of a convicted rapist, Eric Mageary, to home arrest.¹⁰⁹ Mageary had been considered and denied for parole multiple times between 1982 and 1993, before being granted home release at a parole hearing in May of 1993.¹¹⁰ The Board had attempted to contact the victim in 1984 by mailing a letter to her last known address.¹¹¹ After the letter had been returned as undeliverable, no further attempts were made to notify the victim of future proceedings.¹¹² Following a request for rescission by the Governor of Arizona and the Coconino County Attorney, the Arizona Supreme Court vacated the Board’s order releasing Mageary and ordered a reexamination hearing.¹¹³ However, the court emphasized that the decision was the result of neither the Governor’s nor County Attorney’s request, but instead was the result of the failure to notify the victim of her rights under the VBR.¹¹⁴

Contrary to the Board’s claim that it had no duty to notify in the absence of the victim’s request, the court determined that the VBR and Victims’ Rights Implementation Act impose a “corollary duty on the state”¹¹⁵ to provide information to the victim about their rights “at various stages of criminal proceedings.”¹¹⁶ Because the victim was never informed of her

statute addressing victims’ right to privacy was amended to define “identifying information” as including a victim’s date of birth. ARIZ. REV. STAT. ANN. § 13-4434(D)(1) (2014).

105. *State ex rel. Hance v. Ariz. Bd. of Pardons & Paroles*, 875 P.2d 824, 380 (Ariz. Ct. App. 1993).

106. ARIZ. CONST. art. II, § 2.1(12).

107. *Id.* § 2.1(2)–(3).

108. *See Hance*, 875 P.2d at 593.

109. *Id.* at 826.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 827.

114. *Id.* at 828–29.

115. *Id.* at 831.

116. *Id.*

right to request notice of the hearings, her failure to request notice did not release the Board from their obligation to notify her of the proceedings.¹¹⁷

Importantly, *Hance* also held that the remedy for the violation of a victim's right to be informed can include setting aside the results of the constitutionally defective hearing, and the ordering of a new hearing.¹¹⁸ With this determination, the court established a clear and effective deterrent for lackluster attempts to notify victims. Furthermore, the court articulated a "reasonable efforts"¹¹⁹ standard for notification, and laid the burden firmly with the state.¹²⁰

Once informed, victims may choose to exercise their right to be present at "all criminal proceedings where the defendant has the right to be present."¹²¹ In *State v. Gonzales*,¹²² the Arizona Supreme Court firmly upheld this fundamental right by holding that a victim's presence in the courtroom during jury selection did not violate the defendant's due process rights.¹²³ The defendant, Ernest Gonzales, was sentenced to death for the murder of Darrel Wagner.¹²⁴ During jury selection, Wagner's wife, Deborah, sat in the back row of the courtroom—unnoticed by either the court or counsel for several days.¹²⁵ Gonzales claimed that Deborah's presence during jury selection was prejudicial, and infringed upon his right to a fair trial.¹²⁶ The Arizona Supreme Court decisively rejected this argument in a single paragraph of the opinion, noting that under the VBR, the victim had a constitutional right to attend all proceedings that Gonzales had the right to attend.¹²⁷

The holding of *Gonzales* established that more than mere allegations of prejudice are required to impinge on a victims' constitutional right to be present.¹²⁸ In *State v. Uriarte*,¹²⁹ Arizona's courts further established that a

117. *Id.*

118. *Id.* at 831–32.

119. *Id.* at 831.

120. *Id.* ("Notifying the County Attorney of the upcoming release proceeding was not sufficient under the facts of this record The issue is whether the victim received that which the constitution guarantees: reasonable efforts by the state to notify her of her constitutional rights").

121. ARIZ. CONST. art. II, § 2.1(3).

122. 892 P.2d 838 (Ariz. 1995).

123. *Id.* at 848.

124. *Id.* at 842–43.

125. *Id.* at 848.

126. *Id.*

127. *Id.* Furthermore, the court suggested that there was no evidence that the jurors had noticed Deborah's presence, and if they had noticed, no evidence that her presence was prejudicial. *Id.*

128. See Harrison, *supra* note 1, at 536.

victim's right to be present might supersede certain procedural rules, such as court-ordered exclusion of prospective witnesses.¹³⁰ The defendant in *Uriarte* was accused of child molestation.¹³¹ At commencement of the trial, the judge invoked a rule excluding prospective witnesses from the proceedings.¹³² The victim's mother, R.A., attended court proceedings on behalf of the child victim, and was called to testify on the last day of trial.¹³³ The defendant objected, arguing that R.A.'s presence during previous testimony violated the court order excluding witnesses.¹³⁴ The trial court judge overruled this objection on the grounds that a minor victim's parents may exercise all of the minor victim's rights, including the right to be present at trial.¹³⁵

The Arizona Court of Appeals upheld the trial court's decision, holding that the Victim's Rights Implementation Act authorizes a minor victim's parent to exercise all of the victim's rights on behalf of the victim.¹³⁶ Additionally, the court clarified that "on behalf of" does not limit the parent to exercise rights only when the minor victim is unable to exercise those rights—rather, the parent of a minor victim may exercise victims' rights in addition to the minor, for the purpose of lending parental support.¹³⁷ Noting a conflict between the Victims' Rights Implementation Act and the Arizona Rules of Court governing exclusion of witnesses from trial proceedings, the court concluded that the procedural rules must yield to the constitutional rights granted by the VBR.¹³⁸ By doing so, the court reestablished the hierarchical import of the VBR, and upheld the purpose and spirit of crime victims' rights in the face of incompatible procedural rules.

However, Arizona's jurists have also placed limitations on the scope of a victim's right to be present. For example, a victim's right to attend does not extend to "all criminal proceedings,"¹³⁹ but is instead limited to hearings that the defendant also has the right to attend.¹⁴⁰ Thus, a victim may not be

129. 981 P.2d 575 (Ariz. Ct. App. 1998).

130. *Id.* at 579.

131. *Id.* at 576.

132. *Id.* at 577.

133. *Id.*

134. *Id.*

135. *Id.* at 577–78.

136. *Id.* at 578.

137. *Id.*

138. *Id.* at 579.

139. *See, e.g.,* *Morehart v. Barton*, 250 P.3d 1139, 1144–45 (Ariz. 2011) (holding that the victim has no right to attend a mitigation-related hearing which the defendant had no right to attend).

140. *Id.*

entitled to attend purely procedural hearings.¹⁴¹ Furthermore, the right to be present does not confer upon victims standing as “parties,”¹⁴² nor “aggrieved”¹⁴³ status, nor the right to file their own petitions for review.¹⁴⁴

Overall, Arizona’s courts have dependably protected crime victims’ right to be informed, and once so informed, exercise their right to be present. The right to be informed remains an affirmative obligation of the state, and a violation of this right can result in deficient hearings being set aside and held anew. A victim’s right to be present at trial proceedings does not automatically result in prejudice to the defendant, and procedural rules may be displaced so as to give effect to this constitutional right. However, victims are not considered parties to criminal proceedings, and the right to be present extends only to those proceedings that defendants themselves have a right to attend. Once again, these limitations could be removed by legislation.

C. *Right to be Heard—Victim Impact Statements*

Under the VBR, crime victims have the right to be heard at “any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing,”¹⁴⁵ and “at any proceeding when post-conviction release from confinement is being considered.”¹⁴⁶ The most controversial application of this right has been with respect to Victim Impact Statements (VIS).

The content and function of VIS is constrained by a standard articulated by the Supreme Court in *Payne v. Tennessee*.¹⁴⁷ There, the Court established that victim statements violate due process if they are “so unduly prejudicial that it renders the trial fundamentally unfair.”¹⁴⁸ In Arizona capital cases, A.R.S. § 13-703.01(R)¹⁴⁹ authorizes victims to “present information about the murdered person and the impact of the murder on the victim and other

141. *Id.* at 1145.

142. *See, e.g.,* *State v. Lamberton*, 899 P.2d 939, 941 (Ariz. 1995) (“[T]he VBR and the VRIA give victims the right to participate and be notified of certain criminal proceedings. This is not the same as making victims ‘parties.’”).

143. *Id.* (“[T]he [v]ictim here is not ‘aggrieved’ within the legal meaning of the term because the judgment of the trial court does not operate to deny her some personal or property right, nor does it impose a substantial burden upon her.”).

144. *Id.* at 942.

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

146. *Id.* § 2.1(A)(9).

147. 501 U.S. 808 (1991).

148. *Id.* at 825.

149. Current version at ARIZ. REV. STAT. ANN. § 13-752(R) (2014).

family members.”¹⁵⁰ In response to challenges that the statute is unconstitutional, Arizona’s Supreme Court has held that the statute reflects a valid exercise of the legislature’s rulemaking authority under the VBR.¹⁵¹ Victim statements in Arizona’s courts serve two related purposes: assisting in the determination of a defendant’s blameworthiness,¹⁵² and as rebuttal to mitigating evidence.¹⁵³ VIS may include discussion of personal characteristics of the murdered person and the impact the murder has had on the family and the community, but, in capital cases, victims are not permitted to recommend a sentence.¹⁵⁴

The Arizona Supreme Court’s rationale for proscribing victims from offering sentence recommendations in capital cases¹⁵⁵ is surely subject to continuing discussion. Roots of the rationale run to the Eighth Amendment’s prohibition against cruel and unusual punishment, but it is hard to reconcile this right of the defendant with prohibiting the victim from asking for life imprisonment and *not* the death penalty in a capital case. Moreover, the victim’s constitutional rights to justice and due process, and to be treated with fairness, suggest that the victim should be afforded the same rights of allocution as the defendant. There remains uncertainty on this point in other jurisdictions. For example, in Oklahoma, the court of criminal appeals has concluded that victims in capital cases may make sentencing recommendations,¹⁵⁶ while the U.S. Court of Appeals for the 10th Circuit has concluded to the contrary.¹⁵⁷ Ultimately, the Supreme Court of the United States will have to resolve the conflict.

In *State v. Mann*,¹⁵⁸ the Arizona Supreme Court protected crime victims’ right to proffer victim impact information by reaffirming that the ability to introduce such information is protected under the VBR’s right to be heard.¹⁵⁹ Additionally, the court held that even if victim information inspires a judge to make empathic remarks, this is not in itself evidence of prejudice.¹⁶⁰ The defendant in *Mann* was convicted of first-degree murder

150. See, e.g., *State v. Armstrong*, 189 P.3d 378, 388 (Ariz. 2008).

151. *Id.* at 389.

152. E.g., *State v. Gulbrandson*, 906 P.2d 579, 599 (Ariz. 1995); see also *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

153. E.g., *Armstrong*, 189 P.3d at 389; see also *State v. Carreon*, 107 P.3d 900, 918 (Ariz. 2005).

154. E.g., *Lynn v. Reinstein*, 68 P.3d 412, 417 (Ariz. 2003).

155. *Id.* at 414–18.

156. *Dodd v. State*, 100 P.3d 1017, 1046 (Okla. Crim. App. 2004).

157. *Dodd v. Trammell*, 753 F.3d 971, 994–96 (10th Cir. 2013).

158. 934 P.2d 784 (Ariz. 1997).

159. *Id.* at 792; see *Harrison*, *supra* note 1, at 547.

160. *Mann*, 934 P.2d at 793.

and sentenced to death.¹⁶¹ During the trial, the victims' family sent a "barrage" of letters to the judge requesting that the defendant receive the death penalty.¹⁶² In reference to the letters, the judge stated that he "understood their feelings."¹⁶³ On appeal, the defendant claimed that the letters improperly influenced the judge's sentencing determination.¹⁶⁴ The court disagreed, finding that the judge's comments were "merely expressions of empathy, not evidence of prejudice."¹⁶⁵ The court presumed that the trial judge was capable of ignoring irrelevant sentencing factors, particularly in light of the judge's statement that only evidence presented at trial was used to establish the necessary aggravating factors.¹⁶⁶ Thus, neither the letters themselves nor the judge's comments suggested that the victim information was unduly prejudicial or improperly considered.

Despite historical controversy regarding the consideration of Victim Impact Statements, Arizona's courts have generally provided strong protections to the rights of crime victims to offer victim impact information. Although victims' recommendations for sentencing are considered immaterial and improper, statements discussing characteristics of the murdered individual and the impact of the crime are relevant for establishing the defendant's blameworthiness and rebutting mitigation. By safeguarding victims' right to be heard in this domain, Arizona's jurists aid the realization of an equally fundamental goal of the VBR: the acknowledgement of each victim as a unique individual.

D. *Right to Restitution*

Crime victims in Arizona have a constitutional right to restitution under the VBR.¹⁶⁷ Since the VBR's inception, the right to restitution has been one of the most well-protected crime victims' rights in Arizona courts. To determine whether restitution is merited, courts consider a three-part test: (1) the loss must be economic; (2) the loss must be one that the victim would not have incurred but for the defendant's criminal offense; and (3)

161. *Id.* at 787.

162. *Id.* at 792.

163. *Id.*

164. *Id.*

165. *Id.* at 793.

166. *Id.* at 792–93.

167. ARIZ. CONST. art. II, § 2.1(8) (A victim of crime has the right to "receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.").

the criminal conduct must directly cause the economic loss.¹⁶⁸ Rather than serving a punitive purpose, restitution “forces [the defendant] to recognize the specific consequences of his criminal activity and accept responsibility for those consequences”¹⁶⁹ with the aim of making the victim whole.¹⁷⁰ Upon conviction, the court has an affirmative duty to require the defendant to make restitution.¹⁷¹ Because restitution is not a penalty or disability,¹⁷² nor part of the adjudication of guilt,¹⁷³ it does not require proof beyond a reasonable doubt.¹⁷⁴

This evidentiary distinction was illustrated in the case *In re Stephanie B.*,¹⁷⁵ wherein the juvenile defendant, Stephanie, was charged with two counts of aggravated assault after an altercation with the victim, Shandra.¹⁷⁶ Stephanie was accused of punching and kicking Shandra in the face, resulting in chipped and broken teeth.¹⁷⁷ The trial court found Stephanie not delinquent with respect to the first count, “assault causing the fracture of any body part,” but delinquent with respect to the second count, “assault while the victim was impaired.”¹⁷⁸ At the restitution hearing, Stephanie was ordered to pay \$2,936 to reimburse the cost of repairing Shandra’s broken teeth.¹⁷⁹ On appeal, Stephanie argued that the restitution order was improper because she had not been found delinquent on the aggravated assault count containing fracture of a body part.¹⁸⁰ The Arizona Court of Appeals disagreed, noting that, as part of the sentencing function, restitution is bound by a different evidentiary burden than determinations of criminal culpability—specifically, preponderance of the evidence rather than proof beyond a reasonable doubt.¹⁸¹ Thus, the trial court judge could have appropriately determined that Stephanie was responsible for restitution

168. *State v. Wilkinson*, 39 P.3d 1131, 1133 (Ariz. 2002).

169. *State v. Zaputil*, 207 P.3d 678, 681 (Ariz. Ct. App. 2008).

170. *Id.*

171. *Id.* (“[R]estitution is mandatory under our sentencing scheme.”). The court may conduct a hearing if it lacks sufficient information to order restitution. *Id.*

172. *Id.*

173. *In re Stephanie B.*, 65 P.3d 114, 118 (Ariz. Ct. App. 2003).

174. *Id.* (“The burden of proof applicable to restitution is proof by a preponderance of the evidence.”).

175. *Id.* at 118.

176. *Id.* at 115.

177. *Id.*

178. *Id.* at 116.

179. *Id.*

180. *Id.*

181. *Id.* at 118.

based on the adjudication of the first assault count, irrespective of the delinquency determination of the second assault count.¹⁸²

Even prior to the implementation of the VBR, crime victims in Arizona were statutorily entitled to restitution.¹⁸³ However, victims who did not exercise the right at sentencing could be barred from later attempts to receive restitution, absent certain changes in circumstances.¹⁸⁴ The court in *State v. Contreras*¹⁸⁵ amended these restrictions, holding that restitution is mandatory—even if the victim declines to request it.¹⁸⁶ In *Contreras*, the defendant pled guilty to first-degree criminal trespass, and was ordered to serve two years of probation.¹⁸⁷ The plea agreement included an acknowledgment that economic restitution was required.¹⁸⁸ However, the victim failed to respond to inquiries from the County Attorney's office regarding the value of the stolen property, resulting in no restitution amount recommended to the court and no restitution payments ordered as a condition of probation.¹⁸⁹ Two months later, the defendant's probation officer submitted a petition to modify the conditions of probation so as to include terms ordering restitution.¹⁹⁰ The defendant argued that by failing to respond to inquiries about economic losses at the time of sentencing, the victim had effectively waived her right to restitution.¹⁹¹ The Arizona Court of Appeals disagreed, finding that the victim's lack of reply to the letter requesting information about her losses did not constitute a waiver of her right to restitution.¹⁹² Further, the court determined that even if a victim fails to request restitution, the trial court is not excused of its obligation to impose restitution.¹⁹³ This is because the objective of restitution is not only to serve the victim, but also to rehabilitate the defendant.¹⁹⁴ Importantly, the court emphasized that restitution serves a remedial, rather than punitive,

182. *Id.* The court noted how this logic similarly applies to individuals found not guilty of a particular criminal offense, but liable in a related civil matter due to the lower burden of proof. *Id.*

183. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-603(C), 13-804 (2014).

184. *See, e.g.*, *Burton v. Superior Court*, 558 P.2d 992, 995 (Ariz. Ct. App. 1977); *see also* *Harrison, supra* note 1, at 553.

185. 885 P.2d 138, 139 (Ariz. Ct. App. 1994).

186. *Id.* at 142.

187. *Id.* at 140.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 142.

193. *Id.*

194. *Id.*

purpose.¹⁹⁵ Thus, modifying the probation terms to include restitution payments did not result in an increase in punishment, but rather was directed toward “a proper rehabilitative goal and to making the victim whole.”¹⁹⁶

Arizona cases following *Contreras* continued to both broaden and strengthen the scope of victims’ right to restitution. With respect to paying restitution, Arizona case law has established that restitution payments are not stayed during the appeals process,¹⁹⁷ and that consenting to restitution in a plea agreement obligates payment—even if the charges are later dismissed.¹⁹⁸ With respect to who may receive restitution, Arizona’s courts have determined that parents of minor victims are also entitled to restitution for economic losses,¹⁹⁹ including losses incurred as a result of attending trial (e.g., lost wages),²⁰⁰ even if those losses are voluntary.²⁰¹ Additionally, victims remain eligible for restitution even if determined to be partly at fault for the losses suffered. For example, in *State v. Clinton*,²⁰² Renee Ortiz was a passenger in a van driven by the defendant, and was gravely injured when the driver lost control of the vehicle.²⁰³ The driver had been drinking alcoholic beverages provided by Ortiz.²⁰⁴ The defendant pled guilty to aggravated assault, and Ortiz requested restitution for medical bills.²⁰⁵ The trial court denied Ortiz restitution because her injuries were partly caused by her own reckless conduct.²⁰⁶ The Arizona Court of Appeals reversed, concluding that “restitution laws do not benefit only *innocent* victims, they

195. *Id.*

196. *Id.* (quoting *State v. Foy*, 859 P.2d 789, 792 (Ariz. Ct. App. 1993)).

197. *State v. Hansen*, 160 P.3d 166, 166 (Ariz. 2007). Importantly, the court in *Hansen* was forced to make a decision between a statute enacted pursuant to the VBR and a directly conflicting Arizona Rule of Criminal Procedure. The court found in favor of victims’ rights, determining that the statute governed as a valid exercise of the legislature’s rulemaking authority under the VBR. *Id.* at 167.

198. *State v. Zaputil*, 207 P.3d 678, 682 (Ariz. Ct. App. 2008).

199. *See, e.g., In re Ryan A.*, 39 P.3d 543, 548 (Ariz. Ct. App. 2002).

200. *See id.* at 549–50; *see also In re Erika V.*, 983 P.2d 768, 769 (Ariz. Ct. App. 1999) (noting that “the legislative requirement of full restitution and the policies underlying mandatory restitution are best fulfilled if ‘victim’ includes the entity suffering the economic loss resulting from the [defendant’s] criminal activity”) (citation omitted).

201. *In re Ryan A.*, 39 P.3d at 548.

202. 890 P.2d 74 (Ariz. Ct. App. 1995).

203. *Id.* at 75.

204. *Id.*

205. *Id.*

206. *Id.*

benefit *all* victims—except those who are in custody or are ‘the accused.’”²⁰⁷

However, the right to restitution is not without boundaries.²⁰⁸ Victims are not entitled to restitution against defendants found “guilty except insane,” as such a determination is not considered a “conviction” for purposes of restitution.²⁰⁹ Additionally, only crimes “committed *against* someone” will yield victims entitled to restitution,²¹⁰ and not all persons who suffer financially as a result of an offense are considered victims.²¹¹ And, in the most concerning opinion to date, the Arizona Court of Appeals held that counsel for the victim is not entitled to offer evidence, examine witnesses, or present arguments as to substantive restitution claims.²¹² Asserting that “restitution is not a claim that belongs to victims,”²¹³ the court seemingly ignored or denied the very personal nature of the restitution right established by the Arizona Constitution. It is a matter of “justice” for a crime victim, and a matter of “due process” that the victim be allowed to act through private counsel to assert the right. The assertion of this personal right is not—and should not be—dependent on the prosecutor deciding whether to seek restitution, and if so, how much.

Overall, however, crime victims’ right to restitution has been well defended by Arizona’s jurists. Restitution is considered an automatic, affirmative right for victims, encompassing both mandatory and voluntary losses. The majority of cases contemplating the right to restitution have resulted in holdings favorable to crime victims, in no small part due to restitution’s categorization as remedial, rather than punitive, action.

E. Balancing Victims’ and Defendants’ Rights

In general, the past twenty-five years of crime victims’ rights cases in Arizona reveals a heartening adherence to the language and spirit of the VBR. However, a number of cases suggest that Arizona’s jurists continue to

207. *Id.*

208. Harrison, *supra* note 1, at 557.

209. State v. Heartfield, 998 P.2d 1080, 1081 (Ariz. Ct. App. 2000). The court noted, however, that its decision was guided by the lack of clear statutory language authorizing restitution for victims of defendants found guilty except insane. *Id.*

210. State v. Guadagni, 178 P.3d 473, 477 (Ariz. Ct. App. 2008).

211. *Id.* at 478. *See, e.g.*, State v. French, 801 P.2d 482, 483–84 (Ariz. Ct. App. 1990) (holding that a motel owner was not a “victim” entitled to restitution for costs incurred as the result of sexual assault on the premises).

212. Lindsay R. v. Cohen, 343 P.3d 435, 438 (Ariz. Ct. App. 2015).

213. *Id.*

grapple with supposed conflict in balancing victims' and defendants' rights. This misperception is unfortunate. The rights afforded to victims are not incompatible with defendants' rights.

Contrary to this notion, several cases improperly weigh defendants' and victims' rights against one another. For example, in *State ex rel. Romley v. Superior Court*,²¹⁴ the Arizona Court of Appeals noted, "courts are now faced with extremely difficult questions arising from the inevitable tension between the rights of the accused, who is presumed to be innocent, and the rights of the victim."²¹⁵ The defendant in *Romley*, Ann Roper, was charged with aggravated assault.²¹⁶ Roper filed a motion requesting that the judge compel the victim to make medical records available to the defense to assist in her self-defense claim.²¹⁷ Roper alleged that the victim had "manifest[ed] one of his violent personalities" at the time of the assault, and that medical records would prove that the victim had received treatment for a multiple personality disorder.²¹⁸ The trial court granted the disclosure and the State appealed, arguing that the VBR precluded disclosure of the victim's medical records.²¹⁹

In affirming the motion to compel disclosure, the Arizona Court of Appeals opined that "when the defendant's constitutional right to due process conflicts with the Victim's Bill of Rights in a direct manner, such as the facts of this case present, then due process is the superior right."²²⁰ The court explained that "due process is the foundation of our system of laws, having been first provided to the people in the Magna Carta and given to us by our founders in the United States Constitution."²²¹ The court concluded by stating that the VBR "should not be a sword in the hands of victims to thwart a defendant's ability to effectively present a legitimate defense. Nor . . . a fortress behind which prosecutors may isolate themselves from their constitutional duty to afford a criminal defendant a fair trial."²²² Such language is at once obviously true—the defendant's due process and fair trial rights in the U.S. Constitution are the supreme law of the land and indeed do trump the rights of the victim if there is a direct conflict—but is

214. 836 P.2d 445 (Ariz. Ct. App. 1992).

215. *Id.* at 450.

216. *Id.* at 447.

217. *Id.*

218. *Id.*

219. *Id.* at 447–48.

220. *Id.* at 449.

221. *Id.*

222. *Id.* at 454.

also obviously subject to over-reach by inviting unfounded assertions of conflict between defendants' and victims' rights.

In subsequent years, Arizona courts followed the language of *Romley* and continued to evaluate victims' rights and defendants' rights as competing interests.²²³ In 1996, the Arizona Court of Appeals concluded, "[u]nder certain circumstances, a defendant's right to gather exculpatory information can take precedence over the victim's constitutional right to be left alone."²²⁴ A year later, the Arizona Supreme Court echoed *Romley* when holding that victims have no blanket constitutional right to be free from questioning at trial regarding refusal of pretrial interviews.²²⁵ Similar sentiments were repeated in 2006, when the Arizona Court of Appeals once again perceived a struggle of "how to properly reconcile the sometimes conflicting interests of the State, defendant and victim in the sentencing portion of a criminal prosecution."²²⁶ While acknowledging that victims' rights are constitutionally protected, the court determined that "[o]n occasion . . . the rights of a victim have been forced to yield to the duties of the State in prosecuting wrongdoers and the rights of the criminal defendant to defend against such prosecutions" lest "society's interest in justice . . . be jeopardized."²²⁷

The language from these opinions suggests that Arizona courts continue to grapple with balancing defendants' and victims' rights. Weighing these rights against one another, however, seems an inappropriate task if the two spheres of rights are acknowledged to exist in equipoise. Furthermore, such comparisons wrongfully suggest that victims' and defendants' rights are mutually exclusive. Currently, crime victims' advocates are working towards resolving this perceived conflict through a proposed amendment to the U.S. Constitution.²²⁸

223. *But see* State *ex rel.* Romley v. Dairman, 95 P.3d 548, 554 (Ariz. Ct. App. 2004) ("[V]ictims' rights neither trump, nor are trumped by, a defendant's presumption of innocence. Each set of rights is independent.").

224. State v. Superior Court, 922 P.2d 927, 930 n.1 (Ariz. Ct. App. 1996) (holding that the parents of a victim who had committed suicide must submit to interview).

225. State v. Riggs, 942 P.2d 1159, 1162 (Ariz. 1997) ("[I]f, in a given case, the victim's state constitutional rights conflict with a defendant's federal constitutional rights to due process and effective cross-examination, the victim's rights must yield.").

226. P.M. v. Gould, 136 P.3d 223, 227 (Ariz. Ct. App. 2006).

227. *Id.*

228. See discussion *infra* Part IV(B).

IV. THE FUTURE OF VICTIMS' RIGHTS IN ARIZONA

A. *Big Issues Still Unresolved*

Despite a rich and growing body of jurisprudence that is largely faithful to the text and original intent of the VBR, significant gaps remain in the ability of the VBR to change the culture of the criminal justice system. For example, for the last twenty-five years, it has been the constitutional right of the victim to be informed of, present for, and heard at the first post-arrest release proceeding—the Initial Appearance (IA).²²⁹ And yet, this right is rarely preserved and protected. Understandably, it can be difficult. When a municipal police officer arrests a suspect and takes him to a county jail, and then the county sheriff holds the suspect subject to an independent judicial decision regarding the scheduling of an IA (of which the prosecutor may or may not get notice of), properly notifying the victim and thereby affording the victim the rights to be present and heard can be challenging. But surely not insurmountable. One dares speculate at how the system would rally if a defendant's rights had been overlooked in the same manner for a quarter of a century.

Another challenge is presented by the victim's rights to both a speedy trial and to a prompt and final conclusion of the case after conviction and sentence.²³⁰ These are two separate rights, which the Arizona Supreme Court erroneously conflated in the *Napolitano* decision.²³¹ In capital cases, these rights are regularly ignored without consequence. The courts have not been faithful to these constitutional rights, and the challenges this failure poses for victims is significant. During a rally for the VBR at the State Capitol in 1990, Candy Lightner stated, "Victims don't want vengeance, they want healing; but there can be no healing until justice is done."²³² A speedy trial and a prompt and final conclusion to the case after conviction are essential for victim healing. Delay itself causes trauma. But in capital cases, delays of years to trial are too often the rule, and delays of decades occur through the post-conviction process. All the while the victims must continue to relive the most traumatic events of their lives. The Sixth Circuit concluded that unexplained delay in ruling on a crime victim's motion for

229. ARIZ. CONST. art. II, § 2.1(A)(1–4); ARIZ. R. CRIM. P. 4.1, 4.2.

230. ARIZ. CONST. art. II, § 2.1(A)(10).

231. See State *ex rel.* *Napolitano v. Brown*, 982 P.2d 815, 816 (Ariz. 1999).

232. Candy Lightner, Founder, Mothers Against Drunk Driving, Remarks at the Rally in Support of the Passage of Arizona's Victims' Bill of Rights (Sept. 1990) (spoken in the presence of one of the authors).

three months raised fairness issues.²³³ The Supreme Court itself has observed:

[T]here is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system.²³⁴

Finally, the Arizona Supreme Court has yet to fully take up the issue of the scope of the victim's rights to "justice and due process."²³⁵ Despite opportunities in each case presented, these words remain largely undiscussed in the case law. Yet, they are the fundamental basis for each of the rights that follow in article II, section 2.1(A) of the VBR.

B. A Victims' Rights Amendment to the U.S. Constitution?

The victims' rights movement has been divided into two waves. The first wave brought about statutory protections for crime victims' rights, typically in the form of state statutes.²³⁶ The second wave resulted in constitutional protections, typically in the form of crime victims' bill of rights.²³⁷ Although tremendous progress has been achieved, some crime victims' advocates, such as Douglas Beloof, contend that a third wave is needed to fully realize, effectuate, and enforce victims' rights.²³⁸ Beloof argues that—while representing important advancements in the recognition of crime victims—the rights afforded to crime victims by state constitutions remain illusory.²³⁹ Victims' rights have not been fully effected because in many jurisdictions the government retains discretion to deny rights, there is no meaningful remedy to enforce victims' rights, and review by writ remains discretionary.²⁴⁰ While Arizona has not suffered from these ills, as rights

233. *In re Simons*, 567 F.3d 800, 801 (6th Cir. 2009).

234. *Barker v. Wingo*, 407 U.S. 514, 519 (1972).

235. ARIZ. CONST. art. II, § 2.1(A).

236. BELOOF ET AL., *supra* note 15, at 707.

237. *Id.*

238. Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing Remedy and Review*, 2005 BYU. L. REV. 255, 257 (2005) as reprinted in BELOOF ET AL., *supra* note 15, at 707–08.

239. *Id.*

240. *Id.*

here are enforceable, there remains a lingering failure to fully embrace the ethic of a more victim-centered justice system.²⁴¹

True changes in the underlying culture of the criminal justice system are likely to come about only through the adoption of a federal constitutional amendment. This is consistent with the history of the Bill of Rights. James Madison argued that the Bill of Rights needed to be in the Constitution because over time the rights would take on “the character of fundamental maxims . . . [and be] incorporated with the national sentiment.”²⁴² If the rights of crime victims are to be “incorporated with the national sentiment,” they will have to become a part of the U.S. Constitution.²⁴³

V. CONCLUSION

Victims’ rights in Arizona have undergone dramatic changes since the enactment of the Victims’ Bill of Rights. For victims of crime in Arizona, greater protections exist now than ever before. Decisions by Arizona courts, in conjunction with decisions by the 9th Circuit and the United States Supreme Court, continue to shape the meaning and scope of victims’ rights. No longer pushed aside and forgotten by the system designed to protect them, crime victims have reclaimed their place and their voice in the criminal justice system. In the years to come, Arizona courts may be called upon to decide some of the remaining important unresolved victims’ rights issues. The Arizona legislature may be called upon to enact additional rules defining and preserving the specific rights of crime victims. And, perhaps most critically, the people of Arizona may be called upon to lend their support to a Victims’ Rights Amendment to the United States Constitution.

A review of twenty-five years of Victims’ Bill of Rights case law demonstrates that Arizona courts largely uphold the underlying spirit and intent of the Victims’ Bill of Rights, recognizing the interests and rights of crime victims. Now acknowledged, the challenge remains how best to protect them.

241. See *supra* Part IV(A).

242. James Madison, *James Madison to Thomas Jefferson, Oct. 17, 1788*, in 1 THE FOUNDERS’ CONSTITUTION: MAJOR THEMES 477 (Philip B. Kurland & Ralph Lerner eds., 1987), available at http://press-pubs.uchicago.edu/founders/print_documents/v1ch14s47.html.

243. Arguments and history are marshalled on the National Victims’ Constitutional Amendment Passage website. See NVCAP, www.nvcap.org (last visited June 18, 2015).