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Enforcing Victim's Rights in Illinois: The Rationale for Victim "Standing" in Criminal Prosecutions

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Articles

ENFORCING VICTIMS' RIGHTS IN ILLINOIS: THE RATIONALE FOR VICTIM "STANDING" IN CRIMINAL PROSECUTIONS

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"It's moving from a two-ring circus to a three-ring circus that was never contemplated as part of the public justice system. . . ."[1]

* J.D., New York University. Professor of Law, Northern Illinois University College of Law. The author wishes to gratefully acknowledge the encouragement and helpful thoughts of my colleague, Professor Marc Falkoff, and to express appreciation for the invaluable research assistance of Noah Menold (J.D., NIU 2014), Daniel Kalina (J.D., NIU 2014), and Matthew Peterson (J.D., NIU 2015).

Sadly, this Article is appearing posthumously. Professor Lawrence Schlam passed away suddenly in March 2015. Larry was an expert in state and federal constitutional law, as well as a founding member of the law school at Northern Illinois University. Among his many virtues, he was a fierce advocate for the rights of victims of crime. In a landmark case, he represented a stalking victim who was denied an opportunity to make a statement prior to the court's acceptance of a plea bargain by the defendant. *See* People v. Johnson, 12 CF 76 (DeKalb Cnty., Ill. Oct. 5, 2012) (establishing that a crime victim has standing and may intervene in a criminal matter in order to vindicate statutory victim's rights). Not satisfied with winning his case, Larry used *People v. Johnson* as a vehicle for communicating to the legal community the inordinate difficulties that crime victims faced in having their voices heard in court. *See, e.g.*, Lawrence Schlam, *Victim Participation in Criminal Proceedings Makes Good Sense*, CHI. DAILY L. BULL., May 21, 2014, *available at* http://www.niu.edu/law/calendar/news_items/2014/Reprint%20NIU%20Schlam%20CDLB%2014%2005%2021a.pdf, *archived at* http://perma.cc/GJC5-FMDM (advocating for passage of a state constitutional amendment clarifying their right to standing). When the Illinois Crime Victims' Bill of Rights Amendment was passed by an overwhelming majority of voters on November 4, 2014, the new constitutional provision became a part of Professor Schlam's enduring legacy.

Memorial written by Marc Falkoff, Associate Professor, Northern Illinois University College of Law.

[1] Josh Weinhold, *Victims' Rights Amendment Resurfaces in Legislature*, CHI. DAILY L. BULL., Jan. 22, 2013, at 1 (quoting James R. Covington III, ISBA Director of Legislative Affairs). Put another way, the complaint about standing for victims is that "victims contesting violations of their rights could delay or complicate criminal cases and clash with defendants' rights to a speedy trial." *Id.* (quoting Matthew P. Jones, Office of The Appellate Prosecutor, Associate Director for Administration).

I. INTRODUCTION

In 1993, after growing pressure from victim's advocacy groups, the Illinois Constitution was amended to provide a substantial list of rights to which victims of crimes would thereafter be entitled.[2] This was followed by legislation executing the constitutional amendment, which added a requirement that the State notify victims of or facilitate their rights.[3] The enforcement of victims' rights, therefore, was delegated *solely* to prosecutors, who could potentially—and often actually did—fail in their statutory duty due to inadvertent nonfeasance or overly conservative use of prosecutorial discretion.[4] Thus, for more than twenty years, with at least one recorded exception, it has remained less than clear whether crime victims have "standing" to independently enforce their own rights should the statutorily mandated process fail.[5]

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[2] *See infra* Part II.B (discussing victims' rights in Illinois).

[3] *See* ILL. CONST. art. I, § 8.1 (noting Article I, Section 8.1 of the Illinois Constitution is not self-executing). The clause is, however, executed by the Rights of Crime Victims and Witnesses Act. 725 ILL. COMP. STAT. 120/4 (2010) [hereinafter "the Act"]. The Act affords victims of violent crime the same rights afforded by the Illinois Constitution and several additional rights. *Id.*; *see also* 725 ILL. COMP. STAT. 120/4.5(b)(9) (2010) ("[The prosecutor] shall inform the victim of the right to have present at all court proceedings, subject to the rules of evidence, an advocate or other support person of the victim's choice, and the right to retain an attorney, at the victim's own expense, who, upon written notice filed with the clerk of the court and State's Attorney, is to receive copies of all notices, motions and court orders filed thereafter in the case, in the same manner as if the victim were a named party in the case[.]"). "In Illinois, a proposed constitutional Crime Victim's Rights amendment was placed on the ballot . . . after approval by the House on a 1170 vote and after overwhelming approval by the Senate. . . . The Illinois amendment passed with over three-fourths voter approval." Jeffrey A. Parness, Laura Lee & Karen Blouin, *Monetary Remedies for Victims During Illinois Criminal Cases*, 44 VAL. U. L. REV. 69, 73–74 (2009) (citations omitted).

[4] 725 ILL. COMP. STAT. 102/4.5(b); *see* ROBERT C. DAVIS ET AL., SECURING RIGHTS FOR VICTIMS: A PROCESS EVALUATION OF THE NATIONAL CRIME VICTIM LAW INSTITUTE'S VICTIMS' RIGHTS CLINICS 12 (2009) (finding that victims' rights were infringed). Despite passage of crime victims' rights laws:

> [A]dvocates have been dismayed to see that, too often, victims' rights were violated with impunity. [A] survey of crime victims in 1998 found that, even within states with strong victims' rights legislation, many victims were not notified about key hearings and proceedings, many were not given the opportunity to be heard, and few received restitution. . . . [A]s many as one-third of victims in strong-protection states were not afforded the opportunity to exercise certain rights.

Id. (citations omitted).

[5] *See, e.g.*, People v. Johnson, 12 CF 76 (DeKalb Cnty., Ill. Oct. 5, 2012) (granting standing and intervention in a criminal case to a victim). In that litigation, a petitioner-intervener alleged that she had:

> [E]xpressed to the State's Attorney her desire to exercise her [victims' rights but] no one from the [State's] Attorney's Office spoke to [her]

They continue to be without clear recourse in Illinois to the traditional "check" on nonfeasance or malfeasance by public officials—standing to seek judicial review of perceived deprivations of expressed rights.[6]

Over the past two years, however, legislative and political efforts were made to again amend the Illinois Constitution, this time specifically to provide crime victims "standing"—a right to participate directly in criminal prosecutions to vindicate denied constitutional rights.[7] An

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> prior to the plea agreement . . . nor did the State inform her that the condition of electronic monitoring [was removed by a prior court order and, had the State] consulted with her prior to this date [of the prior court order,] she would have attended that hearing . . . and presented a victim impact statement that would have included, among other things, her desire to have the defendant continue to be placed on electronic monitoring. . . .

Id. She also alleged that "[i]ntervention is necessary because the [State's Attorney] informed [her] that he will not assert her rights or seek a remedy on her behalf." *Id.*; *see* Am. Crime Victim's Mot. to Intervene for the Ltd. Purposes of Asserting Constitutional and Statutory Rights of Crime Victims and Seeking Remedies for Violations of Those Rights, People v. Johnson, 12 CF 76 (DeKalb Cnty., Ill. Jun. 8, 2012) (on file with author).

[6] *See Proposals for a Constitutional Amendment to Provide Rights for Victims of Crime: Hearing Before the H. Comm. on the Judiciary*, 104th Cong. 242 (1996) (statement of Laurence H. Tribe, Professor, Harvard Law School) (noting that the problem with statutory rights for victims is that they "provide too little real protection whenever they come into conflict with *bureaucratic habit, traditional indifference, sheer inertia, or any mention of an accused's rights regardless of whether those rights are genuinely threatened*." (emphasis added)). "Properly understood, crime victims' rights are not barriers to an effectively functioning criminal justice system, but rather an important part of such a system. Crime victims' rights form part of the checks and balances that ensure a properly functioning criminal justice process." Paul G. Cassell & Steven Joffee, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U. L. REV. COLLOQUY 164, 181 (2011); *see also* Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331, 343 (1999) ("[T]he discretion given to prosecutors, thanks to a host of current doctrines, is virtually unlimited. [Thus there] is room for more judicial supervision without running the risk of stripping prosecutors of all their discretion." (footnotes omitted)); Mary Margaret Giannini, Note, *The Swinging Pendulum of Victims' Rights: The Enforceability of Indiana's Victims' Rights Laws*, 34 IND. L. REV. 1157, 1167 (2001) ("The strength of many states' victims' rights laws are immediately hampered by the absence of any direct method to remedy victims' rights violations, coupled with a lack of mandatory language to enforce those rights.").

[7] *See, e.g.*, H.R.J. Res. Constitutional Amendment 00001, 98th. Gen. Assemb. (Ill. 2014), *available at* http://www.ilga.gov/legislation/BillStatus_pf.asp?DocNum=1&DocTypeID=HJRCA&LegID=68225&GAID=12&SessionID=85&GA=98, *archived at* http://perma.cc/ZD74-HN6Y [hereinafter Amendment] (proposing to amend the Illinois Constitution regarding victims' rights). According to its synopsis, the bill:

> Proposes to amend the Bill of Rights Article of the Illinois Constitution concerning crime victim's rights. Provides that in addition to other rights provided in the Constitutional provision, a crime victim has the right to: (1) be free from harassment, intimidation, and abuse; (2) refuse to disclose information that is privileged or confidential by law; (3) timely notification of all court proceedings; (4) be heard at any

early bill, introduced in 2012, was opposed by several interested parties, including the Illinois State Bar Association.[8] For this, and perhaps other reasons, the bill did not move forward that session, but resurfaced again in the legislature early in 2013.[9] The same interests, again, resisted passage of the bill and it failed to reach the ballot.[10] However, a substantially similar bill was introduced again in March of 2014 and, having been overwhelmingly approved as a joint resolution on April 10, 2014, it was ratified by the citizens of Illinois on last November's ballot.[11]

Objections to bills introduced earlier—difficulties hypothetically anticipated—were misguided.[12] Allowing "victim standing" is already within the inherent power of the judiciary, and would simply be ratified or reaffirmed by any "victim standing" amendment.[13] Moreover, the experience with victim standing as a matter of positive law in other

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> proceeding involving a post-arraignment release decision, plea, sentencing, post-conviction or post-adjudication release decision, and any post-arraignment proceeding in which a right of the victim is at issue; (5) receive a report related to the defendant's sentence when available to the accused; and (6) have the safety of the victim and the victim's family considered in denying or fixing the amount of bail, determining whether to release the defendant, and setting conditions of release after arrest and conviction. *Provides that a victim, victim's lawyer, or the prosecuting attorney may assert the victim's constitutional rights in court*. Provides that nothing in this Constitutional provision creates any cause of action for compensation or damages against the State, any political subdivision of the State, any officer, employee, or agent of the State or of any of its political subdivisions, or any officer or employee of the court. Effective upon being declared adopted.

Id. (emphasis added).

8 *See* Chris Bonjean, *ISBA Position Paper on House Joint Resolution for Constitutional Amendment No. 29*, ILL. STATE B. ASS'N (Apr. 26, 2012), *available at* http://iln.isba.org/blog/2012/04/26/isba-position-paper-house-joint-resolution-constitutional-amendment-no-29, *archived at* http://perma.cc/84AK-DLVZ (objecting to the problems that might arise from adding another "party" to criminal prosecutions); *see also Illinois Victims' Rights Amendment Stalls After Sudden Turnaround in Legislative Support*, HUFF. POST (May 7, 2012), *available at* http://www.huffingtonpost.com/2012/05/07/illinois-victims-rights-a_n_1496118.html, *archived at* http://perma.cc/E52M-QTBL (noting that a bill amending the Illinois Constitution to allow victim standing has been "stalled").

9 *See* Weinhold, *supra* note 1, at 1.

10 *See id.* ("[The] Illinois State Bar Association (ISBA), the state's attorneys appellate prosecutor's office and Cook County State's Attorney Anita M. Alvarez raised concerns about offering victims a role in the traditional two-party criminal justice process. Their objections persuaded the House to hold off on sending the amendment to the November ballot.").

11 Amendment, *supra* note 7.

12 *See infra* Part V (discussing implied standing in states without any victim standing provisions in their constitution).

13 *See infra* Part V (providing the judicial balancing of interests in the victim standing provisions).

jurisdictions has by now revealed none of the difficulties anticipated by opponents.[14] Finally, if ratified, victim standing will improve the transparency of—and improve victims' faith in—the criminal justice system.[15] Thus, there was no legal or practical basis for the citizens of Illinois to have *not* ratified and approved this amendment.[16] It will simply assure the enforcement of existing statutory rights of victims and build greater public confidence in our criminal justice system.

Of course, a few knowledgeable attorneys—and some scholars—have suggested several potentially negative impacts of victim participation in criminal prosecutions.[17] As one commentator has noted:

> Part and parcel of prosecutorial discretion is the prosecutor's duty "to seek justice, not merely to convict." Ideally, a prosecutor pursues justice not only for the victims in an individual case, but also for the public and the defendant. *Treating the victim's concerns as paramount* elevates the private individual above the public—the very opposite of what our criminal justice system seeks to achieve. Washington Supreme Court Justice James M. Dolliver summed up this concept aptly: *"emphasizing the conflict between the victim and the accused and placing the victim in the role of a quasi-prosecutor or co-*

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14 *See infra* Part VI (presenting jurisdictions that allow victim standing in their constitutions).

15 *See infra* Part V.C (contributing the possibility of a renewed faith in the criminal justice system).

16 *See infra* Part VI (explaining the jurisdictions that allow victim standing in their constitutions).

17 Weinhold, *supra* note 1, at 1. *See e.g.*, Tyrone Kirchengast, *Victim Lawyers, Victim Advocates, and the Adversarial Criminal Trial*, 16 NEW CRIM. L. REV. 568, 582–83 (2013) ("Submissions made by private counsel acting for the best interest of victims may not accord with the views of the community as a whole. It is feasible that where victim lawyers [are] present, the decisions made by prosecutors on pretrial matters and on the evidence presented during trial may disproportionately take the victims' views on board in order to diminish any contestation between their own views and those of victims' counsel. Depending on the reasonableness of the submission made by victims' counsel, this may or may not be acceptable. [Victim] evidence may prejudice the objectivity of the prosecutor, given the highly emotive and at times unchallengeable testimony that such evidence may supply." (footnote omitted)). "This position may be challenged[, however,] out of recognition that victim interests may be raised alongside those of the state without compromising the integrity of the prosecution process, or the entire due process of the common law." *Id*. at 573.

> *counsel* . . . represents a dangerous return to the private blood feud mentality.[18]

The problem, though, is these criticisms seem to reflect a misperception of the impact or effect of "victim standing" as being equivalent to granting a victim "party" status.[19] To the contrary, the victim or her advocate will not, for example, be engaging in direct and cross-examination of witnesses, or routinely raising objections to evidence in open court. Critics, therefore, have presupposed a treatment of and role for victims not contemplated by the advocates of "victim standing."[20]

In fact, in none of the several jurisdictions in which crime victims have standing has it been used for purposes other than moving or petitioning to vindicate expressed victims' rights.[21] This limited

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[18] *See* Danielle Levine, Comment, *Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution*, 104 NW. U. L. REV. 335, 352–53 (2010) (emphasizing the particular assumptions about the effect and operation of victim standing that are simply not true) (emphasis added) (footnotes omitted); *see also* Kirchengast, *supra* note 17, at 582–83 (discussing victims' rights). Kirchengast states:

> [There has been] widespread criticism . . . that the victim will detract from processes directly aimed at affording defendants a due process through which to challenge accusations of wrongdoing, levelled by the state. The integration of victims [might also respond] to a political imperative to appease the interests of a sectarian, vocal, and special needs group in a way that defies the defendant's right to procedural fairness and due process of law. The [additional] fear is that victim participation will invite potentially subjective and thus prejudicial submissions on matters of state concern.

Id. at 569–70.

[19] Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 617 (2005) (contrasting participant and party). The victim's right to "standing" "is independent of the government and that the victim exercises [that right] not through the prosecutor or the courts but rather as an independent participant. While the role of a 'participant' may be legally distinguishable from that of a 'party,' participants are afforded the rights and the standing to assert them . . . even if they are not parties to a case." *Id.* (footnote omitted).

[20] Weinhold, *supra* note 1, at 1 (quoting Jennifer Bishop-Jenkins, victims' rights advocate). Jennifer Bishop-Jenkins states:

> "[V]ictims don't need lengthy court proceedings to address their concerns." If a right gets violated, . . . a victim could petition the judge to review the situation—a process similar to filings made by witnesses who don't want to testify. "All we're asking for is the same ability to make a motion request to the judge, with regards only to the very limited number of rights that we have."

Id.

[21] *See, e.g.*, State v. Lamberton, 899 P.2d 939, 941 (Ariz. 1995) (holding that a victim did not have standing to challenge a trial court's motion for post-conviction relief). In *Lamberton,* the court acknowledged that under Arizona law victims have the right to be

participation has, in practice, created no significant impediment to the efficient operation of the traditional criminal process. In fact, any potential conflicts with rights of defendants or prosecutorial discretion have been reasonably and expeditiously resolved by judges presiding in such proceedings. Finally, since victims *already* exercise existing rights to be present at all proceedings, object to potential violations of their privacy, and speak at sentencing, it is not clear what *additional* "prejudice" to defendants, if any, would result if victims may now directly motion or petition trial courts to remedy *denial* of victims' rights.

This Article argues that Illinois courts are already justified in *implying* victims' standing to enforce their expressed rights—in the absence of prosecutorial action or otherwise—though most courts apparently still feel the need for explicit legislative support.[22] Second, vindication of victims' rights is best accomplished through direct and immediate participation in criminal proceedings, rather than by filing separate "lawsuits" as suggested in the legislative debates.[23] Third, substantial, persuasive precedent in several other jurisdictions with victims' rights provisions reveal that courts that have adjudicated motions to enforce victims' rights have avoided any significant impediments to the criminal justice system.[24] Finally, this Article concludes that, given the apparently continuing dissatisfaction among victims with the criminal justice system, the Illinois legislature, as a matter of sound public policy, appropriately enacted and submitted for ratification the constitutional "standing amendment" and it was sensibly ratified on last November's ballot.[25] The amendment will simply allow victims to "intervene" not as "parties," but solely to vindicate their rights.[26]

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heard at criminal proceedings, but the court stated that "we cannot conclude that victims are 'parties' with the right to file their own petitions for review." *Id.* As a result, *in order for victims to have standing* to challenge the actions of the trial courts, victims must assert relief *for the rights denied them*. *Id.* at 942.

22 Implications of victim standing in criminal prosecutions, though often appropriate, are rare. *See, e.g.*, People v. Johnson, 12 CF 76 (Dekalb Cnty., Ill. Oct. 5, 2012) (illustrating one decision personally litigated by the author that granted standing and intervention to a victim in a criminal case); *see infra* Part III (implying victim standing to assert and vindicate their unenforced rights in Illinois as a matter of statutory interpretation).

23 *See infra* Part IV.C (implying victim standing in criminal prosecutions and the analogy of third party intervention in criminal prosecutions).

24 *See infra* Part VI (discussing jurisdictions that already have statutes and constitutional amendments similar to the Illinois proposed Victim's Rights Act).

25 *See* DAVIS ET AL., *supra* note 4, at 80 (explaining that the purpose of a victim's rights amendment would broker a relationship "with dissatisfied victims").

26 *See* Amendment, *supra* note 7 (proposing to amend the Illinois Constitution regarding victims' rights). The pending amendment read as follows:

Part II briefly discusses the history, motivations, and accomplishments of the "movement" for victim's rights; the political and legislative history leading to Article I, Section 8.1 of the Illinois Constitution; and the most recent successful effort to enact the constitutional "victims' standing" bill to protect victims' rights.[27] Part III focuses on how and why crime victim "standing" may be implied from existing law, even without the amendment, as a matter of Illinois statutory interpretation.[28] Part IV describes the arguments for moving from the existing reasonable implication of victim standing to request relief, at least in part from legislative history, to the justification for effective and efficient remedies, such as direct participation rather than independent litigation.[29] Part V discusses the experience with implying standing in states w*ithout* expressed victim standing while balancing the interests of the usual parties to the prosecution.[30] Part VI discusses the

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> "The victim has standing to assert the rights enumerated in subsection (a) in any court exercising jurisdiction over the case. The court shall promptly rule on a victim's request. The victim does not have party status. The accused does not have standing to assert the rights of a victim. The court shall not appoint an attorney for the victim under this Section. Nothing in this Section shall be construed to alter the powers, duties, and responsibilities of the prosecuting attorney.

Id. The amendment would delete the portion that reads, "[t]he General Assembly may provide by law for the enforcement of this Section. *Id.* "When the [victims' rights constitutional] amendment passed, . . . [o]pponents protested that the amendment was a waste of time, as there could always be statutory protections [yet the] Illinois amendment passed with over three-fourths voter approval." Parness et al., *supra* note 3, at 74 (footnotes omitted). Perhaps this was because, according to the current Act's sponsor, Illinois State Rep. Louis I. Lang, D-Skokie, "[v]ictims of crimes have rights today, but under the law, many of those rights are unenforceable. Unless it's in the constitution, those rights will continue to be ignored in many courtrooms." Weinhold, *supra* note 1, at 1; *see also* DAVIS ET AL., *supra* note 4, at 11 ("A constitutional amendment . . . provides a level of permanency to the victims' rights, since they can be changed only by another cumbersome . . . amendment process[, and] *constitutional rights offer a level* of *implied enforceability*." (emphasis added)); David Schuman, *The Right to a Remedy*, 65 TEMPLE L. REV. 1197, 1208 (1992) (suggesting that one of the reasons victim standing requires constitutional status is that any "remedy guarantee applies only to those causes of action in existence at the time the guarantee became part of the constitution . . . but has no effect on *subsequently* created causes of action. Thus, a legislature cannot eliminate remedies for trespass or breach of contract. [*But it would have] a free hand . . . with respect to remedies for . . . modern inventions . . . .*" (emphasis added)). These "modern inventions" would presumably include victims' rights statutes.

[27] *See infra* Part II (explaining the movement of victims' rights from history to recent successes).

[28] *See infra* Part III (addressing victim standing and how it can be interpreted).

[29] *See infra* Part IV (describing a shift in victim standing relief from legislative history to direct participation).

[30] *See infra* Part V (balancing the interests of various parties in states without expressed victim standing).

precedent from jurisdictions that have *expressly* granted crime victims standing as a matter of positive law.[31] This Part demonstrates the successful resolution of a cross-section of actual conflicts between victims and defendants or prosecutors regarding claims of violation of victims' rights.[32] Part VII analyzes the preceding Parts and suggests, as indicated earlier, that victim standing may be judicially implied and, if courts presently appear to be hesitant about doing so, this inherent judicial power should be ratified by the voters.[33] It also suggests that any constitutional amendment articulating and ratifying that power would not, in practice, interfere with prosecutorial or judicial discretion, the rights of criminal defendants, or impede the administration of criminal justice.[34]

The Article concludes that, given this amendment, the Illinois judiciary will more frequently and justifiably exercise their inherent power to imply victim standing, in the absence of prosecutorial action or otherwise.[35] Further, that the judiciary is more than capable of guarding against possible "impediments" to criminal justice by *limiting* victim standing to situations where such impediments actually present themselves.[36] Additionally, and perhaps most important, is the ratification of the constitutional standing amendment which will benefit crime victims, and increase public confidence—and participation—in the system of criminal justice.[37] Finally, an additional needed legislative initiative should be to articulate, as a rule of court, forms that have been successfully used elsewhere to confirm that victims' rights have been respected, as well as template pleadings for use in requesting limited victim participation (intervention) to vindicate rights.[38]

II. THE CRIME VICTIMS' RIGHTS MOVEMENT

"The victim is no longer [merely] an unfortunate citizen who has been on the receiving end of a criminal harm, and whose

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31 *See infra* Part VI (explaining the precedent jurisdiction and their successes in resolving conflicts between victims and defendants).

32 *See infra* Part VI (discussing victims' rights).

33 *See infra* Part VII (analyzing parts I–VI).

34 *See infra* Part VII (analyzing the conflicts between victims' rights and defendants' due process rights).

35 *See infra* Part VIII (concluding the analysis and thesis of this Article).

36 *See infra* Part VIII (approving the legislature's abilities to protect victims' rights).

37 *See infra* Part VIII (concluding that the Victims' Standing Constitutional Amendment is beneficial).

38 *See infra* Part VIII (providing support to the Victims' Standing Constitutional Amendment).

concerns are subsumed within the 'public interest' that guides the prosecution and penal decisions of the state."[39]

A. Generally

In English common law, all crimes except treason were subject to private prosecution. Crimes against persons and property were identified as torts or "wrongs," with the victim having the primary responsibility to prosecute them since the harm was seen as a private, rather than a social harm.[40] However, by the time of the Revolutionary Era, there was an increasing recognition of the social harm caused by crime. This led to the establishment of public prosecutors in virtually every colony—and to a shift away from private involvement in the criminal justice system.[41] Still, even though the public justice system was established early in the colonies, it was not the only or even predominant means of maintaining law and order.[42] Indeed, private prosecution was the "dominant" form of criminal prosecution in colonial America.[43] This system of "private justice" was preferred, in part, because courts were generally in the capitals of the colonies, and it was difficult to travel to them long distances over poor roads.[44] For this reason, and because restitution, if any, went directly to the victim and not the state, private prosecution actually continued in the United States well into the second half of the nineteenth century.[45]

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[39] DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 11 (2001).

[40] *See* Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135, 1138 (2007) ("Even after identification and arrest, the victim carried the burden of prosecution. He retained an attorney and paid to have the indictment written and the offender prosecuted." (quoting William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 652 (1976))).

[41] *See generally*, Giannini, *supra* note 6, at 1159–60 (discussing the nature of early private prosecution and the transition to public prosecution).

[42] *See* Bruce L. Benson, Comment, *The Lost Victim and Other Failures of the Public Law Experiment*, 9 HARV. J.L. & PUB. POL'Y 399, 427 (1986) (explaining the justification of the public involvement in law and order).

[43] *See* Cassell & Joffee, *supra* note 6, at 178 (2011) ("[A]t the state level, private prosecution extended well into the nineteenth century.").

[44] *See* Benson, *supra* note 42, at 400 (explaining why private justice was used).

[45] *See* Cassell & Joffee, *supra* note 6, at 177–81 (providing a lengthy discussion of substantial evidence of private prosecution of crimes until at least 1875). See ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880 (1989), for a comprehensive review of nineteenth century criminal prosecution in Philadelphia, the only American city for which such a record has been compiled.

The public prosecutorial system became increasingly more significant, however, "for both philosophical and practical reasons."[46] The earlier "philosophical" thinking during the European "Age of Enlightenment" emphasized the larger societal interests of "deterrence, rehabilitation, and retribution," rather than the private interests of the victim.[47] Also, as a practical matter, the increasing development of professional, governmental systems of prosecution was accompanied by a redirection of prosecutorial focus—"the interests of the victim were [now] subsumed by the interests of society."[48]

The movement away from private to public prosecution, of course, had many positive effects for citizens. It meant greater egalitarian justice with increasing numbers of prosecutions and prosecutions that were "properly conducted."[49] However, "the pendulum [may have] swung too far."[50] By the late 1960s and early 1970s, it became clear that "victims had been relegated solely to the role of witnesses—mere evidence for the state—and . . . the only harm of crime was [more clearly and emphatically] seen as the harm to the public at large."[51] Increasingly, crime victims felt marginalized.[52] Academic studies showed that victim dissatisfaction with the criminal justice system directly impacted their willingness to report crimes and cooperate in their prosecution.[53] As a result, in the 1970s, a multi-pronged social movement began, one described as one of the most successful "civil liberties movements of recent times."[54] It focused on the status of crime victims in the criminal justice system.[55] Survivors of crime and their advocates began to

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46 Levine, *supra* note 18, at 338.

47 *Id.*

48 *Id.*

49 *See* Joanna Tucker Davis, *The Grassroots Beginnings of The Victims' Rights Movement*, NCVLI NEWS (2005), *available at* http://law.lclark.edu/live/files/6453-the-grassroots-beginnings-of-the-victims-rights, *archived at* http://perma.cc/8M8D-JRKP (discussing the beginnings of the victims' rights movement).

50 *Id.*

51 *Id.*; *see also* Mary L. Boland & Russell Butler, *Crime Victims' Rights: From Illusion to Reality*, 24 CRIM. JUST. 4, 5 (2009) (discussing the role of the civil rights work of the 1960s and 1970s).

52 *See e.g.*, 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, 1375 (stating that crime victims "have come to believe that the criminal justice system is out of balance, that their voices are not heard, and that the system is preoccupied with defendant's interests and rights").

53 *See* Davis, *supra* note 49 (giving examples of different organizations that crime victims established because of their unwillingness to cooperate with prosecution).

54 Boland & Butler, *supra* note 51, at 5 (citing John W. Gillis and Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victims Rights in the Courts*, 33 MCGEORGE L. REV. 689, 691 (2002)).

55 Davis, *supra* note 49.

establish "grassroots" crime victims' organizations.[56] Indeed, some of the country's most notable victims' advocacy organizations were established during that time as crime rates hit an all-time high.[57]

An additional impetus for advocating for victims' rights came from the fact that female victims, in particular, saw increasingly more negative outcomes when seeking to invoke the criminal justice system. For example, in *Linda R. S. v. Richard D.*, a district attorney had refused, on a mother's complaint, to institute an action against her out-of-wedlock child's father because, in the prosecutor's view, fathers of illegitimate children fell outside the scope of the non-support enforcement statute.[58] Regardless of the merits of any equal protection claim, the U.S. Supreme Court held that the mother had *no standing* to sue.[59] That is, she had failed to show that enforcement of the statute would actually result in support of her child, rather than merely the jailing of the child's father.[60] However, more portentous in "motivating" the movement was the *Linda R. S.* court's *dictum* that "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another."[61]

However, nearly two decades later the movement achieved one of its most important, early judicial victories—the Supreme Court's decision in *Payne v. Tennessee*.[62] There, the Court overruled its earlier decisions in *Booth v. Maryland* and *South Carolina v. Gathers*, holding that victim impact statements were admissible at capital sentencing hearings.[63] This

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56 *Id.*

57 *See* Marlene A. Young, Exec. Dir., Nat'l Org. for Victim Assistance, Address at the First National Symposium on Victims of Federal Crime: The Victims Movement: A Confluence of Forces (Feb. 10, 1997), *available at* http://www.trynova.org/wp-content/uploads/file/victimsmovement.pdf, *archived at* http://perma.cc/W4PS-GUPK (addressing the history of how crime victims movement has changed over the years); *see also* Boland & Butler, *supra* note 51, at 5 ("The first National Crime Survey in 1972 (now renamed the National Crime Victimization Survey) identified crime rates much higher than those reported to law enforcement in the FBI's Uniform Crime Reports. The tremendous toll of crime on its victims emerged into social consciousness.").

58 Linda R. S. v. Richard D., 410 U.S. 614, 615–16 (1973) (providing the prosecutor's reasoning). The district attorney had refused, on the mother's complaint, to institute an action against her child's father because, in the prosecutor's view, fathers of illegitimate children fell outside the scope of the statute. *Id.* The court held that the mother failed to show that enforcement of the statute would actually result in support of her child rather than merely in the jailing of the child's father, and that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.*

59 *Id.* at 619.

60 *Id.* at 618.

61 *Id.* at 619.

62 *See* Payne v. Tennessee, 501 U.S. 808, 808 (1991) (holding that the Eighth Amendment did not bar prohibiting a capital sentence jury from considering victim impact evidence).

63 Booth v. Maryland, 482 U.S. 496, 496 (1987) (holding that introducing victim impact statements at capital punishment sentencing violated the Eight Amendment); South

was, said the court, one of the "new procedures and new remedies" the state was free to "devise" to "meet felt needs."[64] As a result of *Payne*, many states now allow victim impact statements in capital cases, and they are allowed almost universally in non-capital cases.[65] *Payne* ameliorated the *dictum* in *Linda R. S.* by suggesting that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."[66]

This background provided much of the legal foundation and social impetus for victims' rights legislation in the states and, ultimately, for victim standing to participate in prosecutions. State and federal statutes—as well as constitutional amendments—have been enacted in at least thirty-three states providing victims' rights.[67] Many victims' advocates, however, felt that this legislation was largely ineffective due

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Carolina v. Gathers, 490 U.S. 805, 812 (1989) (finding that it was an improper argument to make when commenting on victim's religious tract and personal characteristics); *see Payne*, 501 U.S. at 827 (1991) (stating that "if the [s]tate chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar"). Victim impact statements provide victims the opportunity to testify about the harm they have experienced as a result of the crime. *Compare* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. LAW 611, 611–48 (2009) (discussing the justifications for victim impact statements), *with* Boland & Butler, *supra* note 51, at 6 **(**discussing case law indicating that the permissible scope of victim impact statements in capital cases continues to be an issue in the courts), *and* Kirchengast, *supra* note 17, at 575 ("Victim impact evidence has . . . been widely criticized both as being of limited evidential value to the sentencing court and as providing victims only the slightest measure of participation in the criminal trial process." (footnote omitted)), *and* Bryan Meyers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy*, 10 PSYCHOL. PUB. POL'Y & LAW 492, 492–515 (2004) (addressing the psychological issues of using victim impact statements).

64 *Payne*, 501 U.S. at 825.

65 *See Legal Issues: States That Allow Victim Impact Statements*, DEATH PENALTY INFO. CTR., *available at* http://www.deathpenaltyinfo.org/legal-issues-states-allow-victim-impact-statements (last visited Oct. 8, 2014), *archived at* http://perma.cc/VUS2-AX87 (displaying the states that allow victim impact statements). *But see* Kirchengast, *supra* note 17, at 570–71 (stating that on the other hand, "victim impact statements have been criticized as limited and ineffective, and as an adjunct to the criminal trial from which the victim continues to be excluded. The general criticism of impact evidence is that it affords a role for victims too late in the prosecution process, long after important decisions have been made regarding charge, indictment, plea, discovery of evidence, and potentially, mode of trial." (footnote omitted)).

66 *Linda R. S.*, 410 U.S. at 617 n.3 (citing Trafficante v. Metro Life Ins. Co., 409 U.S. 205, 212 (1972) (White, concurring) and Hardin v. Ky. Util. Co., 390 U.S. 1, 6 (1968)).

67 *See* Boland & Butler, *supra* note 51, at 5 (2009) (discussing state's actions in amending its rights to victims); *State Victim Rights Amendments*, NVCAP (2012), *available at* http://www.nvcap.org/states/stvras.html, *archived at* http://perma.cc/93LF-8N3Q (displaying states with victim's rights amendments).

to lack of enforcement.[68] Perhaps in response to this growing recognition, the federal Crime Victims' Rights Act ("CVRA") was enacted in 2004.[69] It guaranteed victims certain expressed rights in federal criminal proceedings, the most important of which may have been "standing" to directly enforce their rights at both the trial and appellate levels.[70] Several states followed suit, a few granting victim standing through constitutional amendments—Oregon in 2008, California in 2008, and New Jersey in 2012.[71] Constitutional "standing provisions," while they did not give victims status as a "party," were intended to allow crime victims to be "participants in the process," rather than merely to "[have] a 'voice' . . . in the criminal proceedings."[72]

B. Victims' Rights in Illinois: Article I, Section 8.1 of the Illinois Constitution and the Rights of Crime Victims and Witnesses Act

In 1993, as indicated earlier, the Illinois Constitution was amended to include a fairly comprehensive list of victims' rights.[73] This was

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[68] *See, e.g.*, Giannini, *supra* note 6, at 1167 ("The strength of many states' victims' rights laws are immediately hampered by the absence of any direct method to remedy victims' rights violations, coupled with a lack of mandatory language to enforce those rights.").

[69] *See* 18 U.S.C. § 3771 (2012) (enacting the Crime Victim's Rights Act).

[70] Boland & Butler, *supra* note 51, at 8. *See generally* Bandes, *supra* note 6, at 331–49 (1999) (discussing the meaning and implication of standing for victims).

[71] CA. CONST. art. I, § 28(b); OR. CONST. art. I, §§ 42–43; Crime Victims Bill of Rights, NJ DEP'T L. & PUB. SAFETY, *available at* http://www.state.nj.us/lps/dcj/victimwitness/cbor.htm (last visited Oct. 8, 2014), *archived at* http://perma.cc/KDK7-5M48.

[72] *See* United States v. Hunter, 2008 U.S. Dist. LEXIS 443 at 5 (D. Utah Jan. 3, 2008); Boland & Butler, *supra* note 51, at 6 (citing Amy Baron-Evans, National Federal Defender Sentencing Resource Counsel, *Crime Victims Rights Act* (Oct. 12, 2008), *available at* http://www.fd.org, *archived at* http://perma.cc/VX2G-UE2Q).

[73] ILL. CONST. art. I, § 8.1(a). The Amendment provides:

> Crime victims, as defined by law, shall have the following rights as provided by law: (1) The right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process. (2) The right to notification of court proceedings. (3) The right to communicate with the prosecution. (4) The right to make a statement to the court at sentencing. (5) The right to information about the conviction, sentence, imprisonment, and release of the accused. (6) The right to timely disposition of the case following the arrest of the accused. (7) The right to be reasonably protected from the accused throughout the criminal justice process. (8) 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. (9) The right to have present at all court proceedings, subject to the rules of evidence, an advocate or other support person of the victim's choice. (10) The right to restitution.

followed by an act of the legislature executing that constitutional provision and, additionally, placing enforcement and notice duties on prosecutors.[74] This legislation, called the Rights of Crime Victims and Witnesses Act ("RCVWA"), was intended to "implement, preserve[,] and protect the rights guaranteed to crime victims by Article I, Section 8.1 of the Illinois Constitution."[75] Although the Illinois General Assembly placed responsibility for facilitating victims' rights in county state's attorneys, the RCVWA failed to establish an enforcement mechanism in the event local prosecutors *failed* in their statutory duties, or should the victim wish to assert her rights independent of a prosecutor.[76] Making matters more difficult for victims, the new law expressly precluded any cause of action for damages or attorneys' fees against state actors for failure to facilitate victims' rights.[77] One "bright light," though, was the legislative debates, which clearly expressed the intent that a separate "lawsuit" could be filed in the event of non-enforcement of victims' rights, apparently by implication from the rights legislatively expressed.[78] Nevertheless, for reasons discussed below, separate lawsuits have been rare, at best, as they are impractical and inefficient.[79]

Id. This Amendment was adopted at the general election on November 3, 1992. *Id*.; *see also* Dave McKinney, *Constitutional Amendment on Victims' Rights Passes Ill. Senate*, CHI. SUN TIMES (Apr. 25, 2012), *available at* http://www.suntimes.com/news/metro/12133303-418/constitutional-amendment-guaranteeing-victims-rights-passes-ill-senate.html#.VDQqar5fHG4, *archived at* http://perma.cc/9G25-D6WB (discussing Illinois constitutional amendment in victims' rights).

74 725 ILL. COMP. STAT. 120/4 (2010).

75 *Id.* at 120/2.

76 *Id.* at 120/4.5(b).

77 *Id*. The statute reads:

> This Act does not limit any rights or responsibilities otherwise enjoyed by or imposed upon victims or witnesses of violent crime, nor does it grant any person a cause of action for damages or attorneys fees. Any act of omission or commission by any [person or entity] acting in good faith in rendering crime victim's assistance or otherwise enforcing this Act shall not impose civil liability upon the individual or entity or his or her supervisor or employer. Nothing in this Act shall create a basis for vacating a conviction or a ground for appellate relief in any criminal case. Failure of the crime victim to receive notice as required, however, shall not deprive the court of the power to act regarding the proceeding before it; nor shall any such failure grant the defendant the right to seek a continuance.

Id.

78 *See* Transcript of Ill. Gen. Assemb., S. Trans. 33-34, 88-53, Reg. Sess. (1993), *available at* http://www.ilga.gov/Senate/transcripts/Strans88/ST051793.pdf, *archived at* http://perma.cc/BJ6-WXL4 [hereinafter Trans. Ill. Gen. Assemb.] (showing the senate transcript of H.B. 1319 of the 88th Illinois General Assembly).

79 *See infra* notes 139–46 and accompanying text (discussing Myers v. Daley, 521 N.E.2d 98 (Ill. App. Ct. 1987).

Consequently, recent legislative efforts were made to amend the Illinois Constitution again, this time specifically to provide crime victims independent standing to participate directly in criminal prosecutions.[80] The constitutional amendatory bill was introduced in March of 2014, was passed by joint resolution on April 10, 2014, and was ratified on the November 2014 ballot.[81] As this Article suggests, there were no legitimate reasons for *not* ratifying the amendatory act; it will improve respect for and the transparency of the criminal justice system. Objections to similar, earlier amendatory bills were misguided. A judicially *implied* right of victim standing and direct participation in criminal proceedings already exists.[82] Ratification of the legitimacy of this inherent judicial power by positive law, constitutionally or otherwise, will make such participation more common. Finally, evidence from other states makes clear that no difficulties—but greater advantages—for the criminal justice system will now occur post-ratification.[83]

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[80] *See, e.g.*, Amendment, *supra* note 7 (introduced, by Rep. Lou Lang) (providing crime victims standing). The Amendment:

> Proposes to amend the Bill of Rights Article of the Illinois Constitution concerning crime victim's rights. Provides that in addition to other rights provided in the Constitutional provision, a crime victim has the right to: (1) be free from harassment, intimidation, and abuse; (2) refuse to disclose information that is privileged or confidential by law; (3) timely notification of all court proceedings; (4) be heard at any proceeding involving a post-arraignment release decision, plea, sentencing, post-conviction or post-adjudication release decision, and any post-arraignment proceeding in which a right of the victim is at issue; (5) receive a report related to the defendant's sentence when available to the accused; and (6) have the safety of the victim and the victim's family considered in denying or fixing the amount of bail, determining whether to release the defendant, and setting conditions of release after arrest and conviction. *Provides that a victim, victim's lawyer, or the prosecuting attorney may assert the victim's constitutional rights in court.* Provides that nothing in this Constitutional provision creates any cause of action for compensation or damages against the State, any political subdivision of the State, any officer, employee, or agent of the State or of any of its political subdivisions, or any officer or employee of the court. Effective upon being declared adopted.

Id. (emphasis added).

[81] *Id.*

[82] *See infra* Part III (discussing implied victim standing to assert and vindicate their unenforced rights as a matter of statutory interpretation).

[83] *See infra* Part V.A (describing the effects of denying implied standing for victims).

III. IMPLYING VICTIM STANDING TO ASSERT AND VINDICATE THEIR UNENFORCED RIGHTS IN ILLINOIS AS A MATTER OF STATUTORY INTERPRETATION

As pointed out earlier, there were no provisions in the RCVWA specifically allowing victims—as compared to prosecutors—standing to enforce allegedly denied victims' rights.[84] Nevertheless, victim standing to participate for this purpose can be implied as a matter of statutory construction supported by precedent from this and other jurisdictions.[85] The objective of statutory interpretation, of course, is to effectuate legislative intent.[86] Any interpretive effort must begin with reliance on the statutory language, which is to be given its "plain meaning," the most reliable indicator of intent.[87] Indeed, when statutory language is clear and unambiguous as to its intended meaning in the context of an attempted application, the text generally is the sole basis for interpretation.[88] Given ambiguity, however, the court may examine not just the text, but other relevant sources for determining legislative intent in that specific context.[89] For example, when two or more reasonable interpretations of the statute are possible, courts may examine both intrinsic and extrinsic evidence of intent to resolve the ambiguity.[90]

As for intrinsic evidence, every phrase or clause in a statute must be given its reasonable meaning in construing any other portion of that law,

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84 *See supra* Part II.B (explaining victims' rights in Illinois under the Illinois Constitution and the rights of Crime Victims and Witnesses Act).

85 *See generally infra* Part IV (illustrating arguments for moving from a reasonable implication of a separate injunctive remedy to effective and efficient direct remedies); Part V (discussing the judicial balancing of interests in states without expressed victim standing provisions).

86 Page v. Hibbard, 518 N.E.2d 69, 71 (Ill. 1987).

87 *See* Gaffney v. Bd. of Tr. of Orland Fire Prot. Dist., 969 N.E.2d 359, 372 (Ill. 2012) (noting the plain and ordinary meaning of language used in a statute is the best indicator for legislative intent); Metro. Life Ins. Co. v. Washburn, 493 N.E.2d 1071, 1074 (Ill. 1986) (stating that for a court to give effect to a statute the court must begin with the language used).

88 People *ex. rel.* Ill. Dep't of Corr. v. Hawkins, 952 N.E.2d 624, 631 (Ill. 2011).

89 *Id.* at 632; *see also* Solich v. George & Anna Portes Cancer Prevention Ctr. of Chicago, Inc., 630 N.E.2d 820, 822 (Ill. 1994) (stating a court can look beyond the language of a statute when ambiguous and consider the statute's purpose).

90 *See* People v. Purcell, 778 N.E.2d 695, 699–700 (Ill. 2002) (stating a statute is ambiguous if there are two or more reasonable interpretations). For an example of the effects of intrinsic evidence like looking at the statute as a "whole," see *People ex rel. Republican–Reporter Corp. v. Holmes*, 239 N.E.2d 682, 685 (Ill. App. Ct. 1968), which states that when dealing with multiple interpretations of a statute, one must look to the entire act rather than specific sections thereof in order to determine the intent of the legislature when creating said statute.

and no language shall be considered superfluous.[91] That is, legislation must be read "as a whole" in that the intended meaning of a particular clause or phrase is inherently dependent upon the language and intent of the entire statute.[92] Certainly, any reasonable construction of a law must take into account provisions that explicitly denote its purpose.[93] Thus, although the *express language* of the RCVWA speaks only of the state's attorney's obligation to inform victims of their rights and facilitate their exercise, this does not necessarily imply that all *other* actors falling within traditional notions of "standing"—such as those "injured in fact" by crime—are prohibited from participating in enforcing their rights if their participation is consistent with statutory intent.[94]

For example, one of the stated purposes of the RCVWA is "to *implement*, preserve and protect the *rights* guaranteed to crime victims by Article I, Section 8.1 of the Illinois Constitution."[95] With regard to this expressed "purpose," the legislative intent can be ascertained as a matter of "plain meaning." Courts often determine "plain meaning" by consulting a dictionary.[96] Merriam Webster's Dictionary, for instance, defines "implement" as "carry out, accomplish [or] to *give practical effect to* and ensure of actual fulfillment by concrete measures."[97] Among all these synonymous definitions of "implement," a court is required to choose the most comprehensive and dynamic understanding of this word.[98] To choose a less broad definition, one that would undermine the

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91 *See* Sylvester v. Indus. Comm'n, 756 N.E.2d 822, 827 (Ill. 2001) ("[E]ach word, clause and sentence [of the statute], if possible, must be given reasonable meaning and not rendered superfluous[.]").

92 Blum v. Koster, 919 N.E.2d 333, 338 (Ill. 2009). For example, the Act added enforcement rights to the original constitutionally enumerated protections, including requirements that the State inform the victim of her right, *inter alia*, "*to retain an attorney*, at the victim's own expense, who, upon written notice filed with the clerk of the court and State's Attorney, *is to receive copies of all notices, motions and court orders filed thereafter in the case, in the same manner as if the victim were a named party in the case*[.]" 725 ILL. COMP. STAT. 120/4(b)(9) (2010) (emphasis added). It would not be unreasonable to argue, reading the Act as a whole, that such a right expresses the intent that should the "*attorney*" discover that something in the prosecution regarding his client's rights was amiss, direct action on her part during proceedings should be allowed.

93 725 ILL. COMP. STAT. 120/2. (delineating the purpose of the RCVWA).

94 *See id*. at 120/4.5(a)–(b) (discussing the State's obligations).

95 *Id. at* 120/2 (emphasis added).

96 *See Gaffney*, 969 N.E.2d at 372–73 (referencing Merriam Webster's Dictionary); Kaider v. Hamos, 975 N.E.2d 667, 673 (Ill. App. Ct. 2012) (referencing Merriam Webster's Dictionary).

97 *Implement Definition,* MERRIAM-WEBSTER DICTIONARY, *available at* http://www.merriam-webster.com/dictionary/implement (last visited Oct. 7, 2014), *archived at* http://perma.cc/RHA5-FTRN.

98 *See* Mulligan v. Joliet Reg'l Port Dist., 527 N.E.2d 1264, 1269 (Ill. 1988) (stating that "[s]tatutes must be construed in the most beneficial way which their language will permit

effectuation of constitutional rights, would contradict the intent of the legislature.[99]

Thus, any interpretation of the RCVWA that would conclude that prosecutorial nonfeasance causing a denial of statutory rights should result in *not* allowing the victim to intercede for remedial purposes would be irrational.[100] Courts are not bound by the plain or literal meaning of statutory language if the consequences would be absurd, that is, if the plain meaning would produce a result inconsistent with clearly expressed legislative intent, or where an interpretation would yield unjust consequences not contemplated by the legislature.[101] Failing to

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so as to prevent hardship or injustice, and to oppose prejudice to public interests"). *See, e.g.*, *In re* Det. of Lieberman, 776 N.E.2d 218, 224 (Ill. 2002) (quoting *Mulligan*, 527 N.E.2d at 1269); People v. Botruff, 817 N.E.2d 463, 468 (Ill. 2004) (quoting *Mulligan*, 527 N.E.2d at 1269).

[99] *See* 725 ILL. COMP. STAT. 120/2 (providing that one purpose of the Rights of Crime Victims and Witnesses Act is to increase the criminal justice system).

[100] *Id.*

[101] *See In re* D.F., 802 N.E.2d 800, 805 (Ill. 2003) (noting a court does not have to follow a literal interpretation of a statute that produces unjust consequences). The court in *In re D.F.* stated:

> A plain language or literal reading of section 1(D)(m) supports respondent's position that the nine-month evaluation period applies only to a parent's reasonable *progress* and not a parent's reasonable *efforts*. A court, however, is not bound by the literal language of a statute that produces a result inconsistent with clearly expressed legislative intent, or that yields absurd or unjust consequences not contemplated by the legislature. A *literal* reading of section 1(D)(m) yields a result *inconsistent with* the legislature's statements of public policy and *purpose* contained in both the Juvenile Court Act and the Adoption Act.

Id. (citations omitted) (emphasis added); *see also* People v. Hanna, 800 N.E.2d 1201, 1207–08 (Ill. 2003) (stating statutes should be construed to avoid absurdity and listing cases supporting the court's ability to avoid construing a statute in a manner that would lead to an absurd result); *In re Det. of Lieberman*, 776 N.E.2d at 224, 226 (repeating that statutes should not be construed in a manner which produces injustice and expressing that courts are not bound to the literal language of a statute when it would defeat the intent of the legislature); Collins v. Bd. of Tr. of Firemen's Annuity & Ben. Fund of Chicago, 610 N.E.2d 1250, 1254 (Ill. 1993) ("[C]ourts are not bound by the literal language of a particular clause that might defeat such clearly expressed intent.") (citing Cont'l Ill. Nat'l Bank & Trust Co. v. Ill. State Toll Highway Comm'n, 251 N.E.2d 253, 259 (Ill. 1969)). In *Collins* the court indicated that:

> Therefore, when the spirit and intent of the legislature are clearly expressed and the objects and purposes of a statute are clearly set forth, the courts are not bound by the literal language of a particular clause that might defeat such clearly expressed intent. Ambiguity caused by a literal and confined construction may be modified, changed or rejected to conform to an otherwise clear legislative intent and the judiciary has the authority to read language into a statute that the legislature omitted through oversight. Existing circumstances at

allow standing for victims to rectify denial of their constitutional rights in the absence of any other convenient remedy would create an absurd or at least an irrational result.

Another expressed purpose of the RCVWA is "to ensure that crime victims are treated with *fairness* and *respect for their dignity and privacy* throughout the criminal justice system."[102] The reasonable implication from this language would be that the legislature has delegated to the judiciary the discretionary power to do whatever would be "fair" in a "flexible" and "broad" manner.[103] There are, of course, contexts in which a "flexible" and "broad" interpretation of amorphous language would be unwarranted. In *NAB Bank v. LaSalle,* for example, the use of the term "justice" in a statute was held *not* to provide the court with "untrammeled judicial discretion" in interpretation.[104] That statute concerned foreclosure sales, an aspect of property law with a centuries-old tradition of established equitable principles.[105] In *NAB Bank*, the court assumed that the legislature meant for the word "justice" in foreclosure matters to refer to this long tradition, as opposed to having the judiciary redefine notions of "justice" already developed over the course of the common law.[106] There is, on the other hand, no similar tradition of application of terms like "fairness," "respect," or "dignity" in the context of victim's rights legislation.[107] Thus, there is no preexisting meaning or tradition of "fairness" to which courts must defer in deciding

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> the time the statute was enacted, contemporaneous conditions, and the object sought to be achieved all may be considered.

Id. (citations omitted); *see also* People v. Hudson, 263 N.E.2d 473, 476 (Ill. 1970) (explaining that the rules of statutory construction must yield when intent of legislature is otherwise indicated); People v. Pohl, 969 N.E.2d 508, 513 (Ill. App. Ct. 2012) ("We may also consider the consequences that would result from construing the statute one way or the other, and, in doing so, we must presume that the legislature did not intend absurd, inconvenient, or unjust consequences."); Grams v. Autozone, Inc., 745 N.E.2d 687, 690 (Ill. App. Ct. 2001) (noting the court may consider the reasons for a law when determining legislative intent).

102 725 ILL. COMP. STAT. 120/2 (2010) (emphasis added).

103 *See Mulligan*, 527 N.E.2d at 1269 ("Statutes must be construed in the most beneficial way which their language will permit so as to prevent hardship or injustice, and to oppose prejudice to public interests."); *see also* Lake Cnty. Bd. of Review v. Prop. Tax Appeal Bd., 519 N.E.2d 459, 461 (Ill. 1988) (stating that terms must be given their ordinary meaning and interpreted to give the terms its full meaning); Ill. Nat'l Bank v. Chegin, 220 N.E.2d 226, 228 (Ill. 1966) (noting that courts have frequently held that absurd interpretations should be avoided).

104 984 N.E.2d 154, 160 (Ill. App. Ct. 2013) (citing Aurora Loan Servs., Inc. v. Craddieth, 442 F.3d 1018, 1028 (7th Cir. 2006)).

105 *Id.*

106 *Id.*

107 In the Interest of K.P., 709 A.2d 315, 321–22 (N.J. Super. Ct. Ch. Div. 1997) (discussing the application and definitions of fairness, respect, and dignity).

whether to imply and allow victim standing to enforce their constitutional rights.

This was the fundamental insight of the New Jersey Supreme Court in *In the Interest of K.P.* in interpreting the language of their state constitution.[108] As in the Illinois Constitution, New Jersey specifically required "fairness" for victims.[109] The court reasoned that the legislature intended for this word to be given some judicially ascertainable substance because there was *no preexisting legal context* that might provide interpretive content to the statutory "fairness" language.[110] As a result, the court held that the legislature had impliedly delegated power to the court to "creatively" effectuate the command of "fairness" in this new context—enforcing victims' rights laws—by implying victim standing to vindicate their own rights.[111] Illinois courts have an equally sound basis for construing the terms "fairness," "dignity," and "respect" under Illinois law to imply victim standing for the same purpose.

It is also important to note that the Act does *not* expressly or by implication *prohibit* victims' standing to request *injunctive relief* when their rights have been denied for reasons beyond their control.[112] It only prohibits to "any person a cause of action for *damages* or *attorneys fees*" for non- or misfeasance by public officials.[113] Therefore, standing to seek enforcement of denied statutory rights through *injunction* is not impermissible.[114] The expressed statutory prohibition applied only to *legal* claims; seeking standing to participate or "intervene" in an *existing*

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108 *See id*. at 323 (interpreting N.J. CONST. art I, pt. 22).

109 *Id.* at 321.

110 *Id.* at 322.

111 *Id.* at 323.

112 725 ILL. COMP. STAT. 120/9 (2010). The statute reads:

> This Act does not limit any rights or responsibilities otherwise enjoyed by or imposed upon victims or witnesses of violent crime, nor does it grant any person a cause of action for *damages or attorneys fees.* Any act of omission or commission by any [person or entity] acting in good faith in rendering crime victim's assistance or otherwise enforcing this Act *shall not impose civil liability* upon the individual or entity or his or her supervisor or employer. Nothing in this Act shall create a basis for vacating a conviction or a ground for appellate relief in any criminal case. Failure of the crime victim to receive notice as required, however, shall not deprive the court of the power to act regarding the proceeding before it; nor shall any such failure grant the defendant the right to seek a continuance.

Id. (emphasis added).

113 *Id.*

114 RUBEN E. AGPALO, STATUTORY CONSTRUCTION 227 (5th ed. 2003). This flows from the interpretive maxim "*expressio unius est exclusio alterius*[,]" "[w]here a [clause or provision] is expressly limited to certain matters, it may not, by interpretation or construction, be extended to [other matters]." *Id*. (internal quotation marks omitted).

criminal action to pursue judicial orders to enforce victims' constitutional rights as a matter of *equity* is a different matter.[115] Indeed, Section 9 of the Act might easily be read to have *intentionally excluded* equitable remedies so as to *preserve* those remedies for criminal victims in the event of official non- or misfeasance.[116]

As for extrinsic evidence, the legislative debates on the RCVWA indicate an intent that victims who are denied their rights should be able to bring "a lawsuit" to enforce those rights.[117] This "right to remedy"

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[115] *See generally* John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 1 (2013) ("If Congress has neither authorized nor prohibited a *suit to enforce the Constitution*, may the federal courts create one nonetheless? At present, the answer mostly turns on the form of relief sought: if the plaintiff seeks *damages*, the Supreme Court will normally refuse relief unless Congress has specifically authorized it; in contrast, if the plaintiff seeks an *injunction*, the Court will refuse relief only if Congress has specifically barred it. . . . [I]mplied injunctive relief does not contravene separation of powers principles because Congress and the federal courts have, since the Founding, viewed *implied injunctive relief* as permissible and even appropriate." (emphasis added)).

[116] *See* The Comm'n on Audit of the Province of CEBU v. Province of CEBU, G.R. No. 141386 (S.C., Nov. 29, 2001), *available at* http://sc.judiciary.gov.ph/jurisprudence/2001/nov2001/141386.htm, *archived at* http://perma.cc/D896-JKZQ (referencing that in accordance with the interpretive maxim "*casus omissus pro omisso habendus est*.[,] [a] person, object or thing omitted from an enumeration in a statute must be held to have been omitted intentionally").

[117] *See* Trans. Ill. gen. Assemb., *supra* note 78, at 33–39 (discussing H.B. 1319). During the Senate's discussion of the Rights of Crime Victims and Witnesses Act, Senator Klemm stated:

> It appears on the analysis, Senator, that the bill gives the victims of violent crime apparently twenty-four rights, but I see there appears to be no enforcement mechanism. And I was concerned about if a right was violated, then, of a victim, which we all support their rights, and there is no way for the victim, then , to gain redress—if, in fact, there's no penalty, I'm wondering, what does the victim gain? And it seems that they're no better off than they were without the constitutional amendment if there's no penalty for not giving them their just due.

Id. at 33 (quoting statement from Senator Klemm). In response Senator Cullerton replied:

> No, I disagree with you, Senator. This bill directs, for the most part, judges and the State's attorney as to what the procedures are with regard to victims in the criminal justice process. Now I certainly am not going to put a criminal penalty in here for, you know, the State's attorneys or for the judges. This is a constitutional right. This bill codifies that constitutional right. And of course, [if] there was some State's attorney around the State of Illinois that chose to intentionally violate the clear provisions of this Statute, ultimately someone would have to bring a lawsuit, but the fact that it's a constitutional amendment, and the fact that it's clearly stated in the law, does provide the enforcement provisions that are necessary to ensure the rights of these victims.

Id. at 33–34 (quoting statement from Senator Cullerton). Senator Klemm furthered his position by stating:

was apparently understood by the Illinois legislature to be implied from the existence of the original rights granted by the Constitution and the Act.[118] Regardless of the fact that the law disallows any claim for

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> Well, it seems to me, Senator, that the existing law already has that. And if—if a victim were denied any restitution, I mean, what recourse would they have? And as you know, I think, there's no right for suit now, and I don't think that when you said you could sue them, that that would be allowed, and I don't agree with that. Maybe you could clarify that for us.

Id. at 34 (quoting statement from Senator Klemm). Senator Cullerton agreed with some of Senator Klemm's statement by saying:

> Well, you're right. Because there's a constitutional amendment that's on the books, the way that someone can enforce it is to file a lawsuit citing the Constitution. That—that much I—I agree with you on. However, this bill gives specifics to that constitutional amendment. . . . So, the fact is, the bill flushes out the constitutional amendment. It makes it clear to the State's attorney, the judges and the victim what their rights are. If there's a question about them not being enforced, ultimately it would come down to a lawsuit, but hopefully, because we will pass this bill, that lawsuit will be unnecessary.

Id. at 34–35 (quoting statement from Senator Cullerton). Senator Butler joined the discussion stating, "I can't detect an enforcement procedure in here. It's voluntary; do you agree?" *Id.* at 36 (quoting statement from Senator Butler). Senator Cullerton responded:

> Now you asked about enforcement. If the State's attorneys want to violate this Statute, or the judges want to violate this Statute, my suggestion is, rather than put a criminal penalty in, or a fine—you're not going to fine the judge or the State's attorney—you put in the clearest status of the law and what the law is intended to mean. And if someone feels that their rights are being violated, *they have to file a lawsuit.* That's really the only practical way, in order to implement the provisions of the Statute.

Trans. Ill. Gen. Assemb., *supra* note 78, at 36–37 (quoting statement from Senator Cullerton) (emphasis added). Senator Cullerton went on to state:

> But I think that the provisions are clear, that the State's attorneys and the judges in this State will follow the law, and if there has to be—if there's one that does not want to, *a lawsuit can be provided—be brought forward to ensure the rights of the victims.* . . . Senator Butler, the amendment talks about not being able to impose civil liability upon the—the individual—that is, the State's attorney—for failure to provide—to follow one of the provisions of this Act. *But that doesn't mean that the victim can't bring a lawsuit to enforce the provisions of the Act.* And that's what this bill is all about."

Id. at 37–39 (quoting statement from Senator Cullerton) (emphasis added).

[118] *Id.* at 33–35. While responding to questions about how the RCVWA would be "enforced" if the rights granted to victims were denied, Senator John Cullerton explained that "the fact that it's a constitutional amendment, and the fact that it's clearly stated in the law, does provide the enforcement provisions that are necessary to ensure the rights of these victims." *Id.* at 34. "If there's a question about them not being enforced, ultimately it would come down to a lawsuit . . . ." *Id.* at 34–35; *see also In re* Scarlett Z.-D., 11 N.E.3d 360, 387 (Ill. App. Ct. 2014) (discussing the roots of Ill. Const. of 1970, art. I, § 12 in Marbury v.

damages for lack of prosecutorial enforcement, the debates make clear that victims should have standing to vindicate rights through a "lawsuit," which suggests an implication of an intended "right to remedy," even if through corollary proceedings such as requests for injunctive relief.

Finally, as for a "right to remedy," legislative intent regarding enforcement of victims' rights must be understood in a manner consistent with *other* constitutional provisions that speak to a citizen's right to a remedy for denied vested rights. All other provisions on the same topic—remedying denied rights—should be read *in pari materia* with the victims' rights provisions.[119] One such provision, the contemporary Illinois constitutional "remedies clause," might provide some guidance.[120] The clause can be said to originate from and reflect the promises extracted from King John, as reflected within the Magna Carta: "To no one will we sell, to no one will we refuse or delay, right or justice."[121] Centuries later, Blackstone famously reflected that: "it is a [settled] and invariable principle in the laws of England, that every right when withheld mu[s]t have a remedy, and every injury [its] proper redre[s]s."[122]

Although the federal Bill of Rights did not acknowledge this principle or reflect such a right, early in the history of the republic the U.S. Supreme Court—apparently without feeling obliged to cite precedent due to it being considered a self-evident truth by that time—recognized the vital link between a right and a remedy:

Madison, 5 U.S. 137, 163 (1803). "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property, or reputation. He shall obtain justice by law, freely, completely, and promptly." *Id*. at n.9 (quoting ILL. CONST. of 1970, art. I, § 12).

119 34 ILL. LAW AND PRAC. STATUTES § 72 (2001). Statutes *in pari materia* (laws relating to the same subject matter) must be interpreted in light of each other since they have a common purpose for comparable events or items. *Id*. As Lord Mansfield wrote in *Rex v. Loxdale,* "[w]here there are different *statutes in pari materia*, though made at different times, or even expired and not referring to each other, they shall be taken and construed together, as one system and as explanatory of each other." VINCENT CRABBE, UNDERSTANDING STATUTES 75 (1994) (quoting Rex v. Loxdale, 1 Burr. 445, 447 (1758)).

120 ILL. CONST. art. I, § 12 ("Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.").

121 Schuman, *supra* note 26, at 1199 (quoting WILLIAM MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 395 (2d ed. 1914) and SAMUEL E. THORNE ET AL., THE GREAT CHARTER 132 (1965)) (internal quotation marks omitted).

122 WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 109 (1800), *available at* https://archive.org/stream/lawsofengland03blaciala#page/n133/mode/2up, *archived at* http://perma.cc/8CLH-DLXT.

> 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 deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[123]

"Remedy amendments" were present in several early state constitutions which preceded the federal constitution.[124] They continue to exist in many modern state constitutions, including that of Illinois.[125] These provisions reflected the American experience, which differed from that in England, in that the evil to eradicate was not so much corrupt courts as it was wayward legislatures, bodies that might attempt to eliminate—or not provide—remedies for vested claims of right.[126] Remedy provisions, of course, result from different state histories and framers' intent and thus individual state interpretations will tend to differ.[127] In Illinois, for example, the legislature is free to revoke or repeal a remedy for a cause of action not allowed at common law at the time of the enactment of the constitutional "remedy provision," but that would not apply to claims already "vested" under current law.[128]

The Illinois Supreme Court, in other words, has limited the "right to remedy" to "vested rights," with the enforcement mechanism being the due process clause of the Illinois Constitution.[129] While there has been

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123 *Marbury*, 5 U.S. at 163; *see* BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 967–68 (1971) (providing no right to a remedy).

124 Schuman, *supra* note 26, at 1200 (indicating several state constitutions provided remedy amendments before the federal constitution).

125 ILL. CONST. art. I, § 12; *see* Schuman, *supra* note 26, at 1201 (listing state statutes that provide citizens a constitutional "right to a remedy").

126 *See* Schuman, *supra* note 26, at 1201 (stating that many American courts were concerned with "renegade legislatures that had for example deprived injured creditors of their judicial remedies against debtors by passing legislation impairing existing contractual obligations").

127 *See id.* (suggesting states differ in interpreting remedy provisions); *see also e.g.*, ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 9 (2009) (providing varying interpretations of state constitutions among the states).

128 *See* WILLIAMS, *supra* note 127, at 159–60 (suggesting the Illinois Supreme Court departed from longstanding United States Supreme Court precedent without relying on legislative history nor intent existing at the time of a law's enactment and showing the Illinois Supreme Court's reluctance to accept a law's expansion by the United States Supreme Court, where the expansion would conflict with well-established state law).

129 *See* First of America Trust Co. v. Armstead, 664 N.E.2d 36, 39 (Ill. 1996); *see also* ILL. CONST. art I, § 2 (providing the Due Process and Equal Protection clause of the Illinois constitution).

some reluctance to give a precise definition of a vested right, the Court has said that it is "an expectation that is *so far perfected* that it cannot be taken away by legislation[;] . . . a complete and unconditional demand or exemption that may be equated with a property interest."[130] This would appear to be the case with claims for violation of provisions expressing constitutional or statutory rights, especially where they include a *duty* on the part of state prosecutors to enforce those rights.[131] Once a prosecution is begun, victims' rights are vested—as are defendants' rights—and if the prosecutor *fails* to facilitate those rights in a pending prosecution, as required by law, the victim should have a practical and effective remedy.[132]

Thus, the Illinois due process clause, when read together with the remedies provision, guards against the denial of any remedy *at all* to a plaintiff with a vested claim, which would be the case were the county prosecutor to fail in her duty to enforce or facilitate a victim's right.[133]

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[130] *Armstead*, 664 N.E.2d at 40 (highlighting the Court's reluctance to define a vested right) (emphasis added). It is reasonable to assume that victims' rights provisions enforcing constitutional provisions provide victims with "an expectation that is so far perfected" that they can make "a complete and unconditional demand" to enjoin provision of those rights. *Id.*

[131] *See* 725 ILL. COMP. STAT. 120/4.5(b) (2010) (establishing enforcement of victims' rights in the Illinois Attorney General's office).

[132] *See, e.g.*, Allen Thomas O'Rourke, *Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law,* 61. S.C. L. REV. 141, 142–43, 160 (2009) (applying the Hohfeldian analysis to federal constitutional rights). Wesley Hohfeld (1879–1918) was an American legal theorist. *Id*. at 144. *He* argued that *right* and duty are correlative concepts, i.e., that one must always be matched by the other. *Id*. at 160. Hohfeldian analysis is now used in discussing constitutional issues. *Id*. at 143. This analysis provides another view of rights and when they vest. For example, the Supreme Court in *Blessing v. Freedstone,* 520 U.S. 329, 340 (1997) impliedly using Hohfeld's concept of a "right," held that to enforce a federal statute under 42 U.S.C. § 1983, "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Id*. at 340 (citing Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 106 (1989). The Court then identified three factors to determine whether a particular statutory provision creates a right:

> First, [a legislature] must have intended that the provision in question benefit the plaintiff. . . . Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence. . . . Third, the statute must unambiguously impose a binding obligation on the States.

Id. at 340–41 (citation omitted).

[133] Otherwise, a prosecutor could negate the legislative policy reflected in Section 8.1 of the Illinois Constitution and its enabling statute. In other words, withholding of an enforcement remedy for failing to provide statutory victims' rights would be treating such a deprivation as a non-injury, negating the positive law creating those rights. Schuman, *supra* note 26, at 1207–08. "A person acquires a vested right to a remedy for a cause of action when that cause of action 'accrues.'" *Id*. at 1207. To determine when the cause of action accrues, one must look to the applicable local law and if at the time the cause of

Further, although the crime victims' law makes no such distinction as to types of crime, an even stronger case for implied direct enforcement by domestic violence victims flows from the existence of the Illinois Domestic Violence Act of 1986, where the legislature had earlier—and now has twice—affirmed its intent to provide victims of that crime with remedies.[134] In any event, assuming that a right to remedy may be implied, and that *separate equitable* if not legal actions reasonably can be implied as that remedy, victims' standing to *directly participate* in criminal proceedings for vindication of her rights would seem to reasonably follow.

IV. VICTIM STANDING TO PARTICIPATE IN CRIMINAL PROSECUTIONS TO SEEK RELIEF FOR DENIED RIGHTS: FROM A REASONABLE IMPLICATION OF A *SEPARATE* INJUNCTIVE REMEDY TO EFFECTIVE AND EFFICIENT *DIRECT* REMEDIES

The 1993 legislative debates on the Victims' Rights Act indicate that, should a prosecutor fail to facilitate or enforce victims' rights, "a lawsuit" could be filed to seek relief.[135] Actually, this understanding—apparently shared by the General Assembly—of an *implied* right to remedy for victims in Illinois preceded those debates. Although not permitted under current law, in 1987 an Illinois court implied a separate suit for *damages* for denial of victims' rights.[136] In *Myers v. Daley*, a victim of a crime attempted to obtain information from the state's attorney as to whether the state was going to prosecute his case.[137] After several inquiries were ignored, the victim sued to enforce his rights under an earlier version of the Illinois Bill of Rights for Victims and Witnesses of Violent Crime Act.[138] In response, the state's attorney informed the

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action accrued, there was a viable remedy, no subsequent laws may take away that remedy. *Id.* at 1208.

134 750 ILL. COMP. STAT. 60/101-401 (2010); *see* 725 ILL. COMP. STAT. 120/1-9 (supplying legislative intent); 750 ILL. COMP. STAT. 60/102 (2), (6) (declaring that among the "purposes" of the law are to "facilitate accessibility of remedies under the Act to provide immediate and effective assistance and protection [to domestic violence victims]," and to "[e]xpand the civil and criminal remedies for victims of domestic violence . . . ."); *see also* Rebecca Goddard, Note, *When It's the First Time Every Time: Eliminating the "Clean Slate" of Pretrial Diversions in Domestic Violence Crimes*, 49 VAL. U. L. REV. 267, 302–04 (2014) (discussing the importance of appropriate remedies to victims of domestic violence).

135 *See infra* note 158 (providing example state legislation based on pertinent sections of the Act).

136 Myers v. Daley, 521 N.E.2d 98, 100 (Ill. App. Ct. 1987).

137 *See id.* at 99 (showing victims requested information on multiple occasions).

138 *See id.* (invoking the Act in a letter to the State's Attorney). The Illinois Bill of Rights for Victims and Witnesses of Violent Crime Act was originally codified in chapter 38,

victim of the status of the case and asked that he voluntarily drop his complaint.[139] The victim agreed, but only if the State would pay his court costs of ninety-two dollars and thirty cents.[140] The state's attorney refused, and the victim then filed a second action requesting an award of the court costs.[141] The appellate court ordered the State to pay the victim's costs, noting that to direct otherwise would run *counter to the purpose* of the Illinois victims' rights act, which required that "upon request by the victim of a violent crime, the State's Attorney must inform the victim of the status of the State's Attorney's investigation of the case."[142] According to the *Myers* court, "the purpose of the Act would be frustrated if a victim were forced to file suit to learn the status of his case, and were also burdened with the costs of that suit."[143] This decision, implying a cause of action from the Act so as not to frustrate legislative intent, presented the justification for the judicial implication of a claim for a separate remedy for denied rights apart from the criminal prosecution, and in addition to implied standing as a matter of statutory construction.

A. Victims' Standing to Sue Separately for Equitable Relief: The Analogy of Implying Causes of Action in Civil Practice

Since suits for *damages* against public officials for victims' rights violations are now expressly precluded, however, another remaining option would be a separate cause of action for equitable relief.[144] Yet, notwithstanding some discussion in the legislative debates suggesting

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paragraph 1401 *et seq*. of the Illinois Revised Statutes (1985). *See* 725 ILL. COMP. STAT. 120 (2010) (providing the current language).

139 725 ILL. COMP. STAT. 120.

140 *See Myers*, 521 N.E.2d at 99–100 (dismissing complaint and awarding court costs).

141 *See id*. at 100 (detailing the State's Attorney's appeal of the order assessing court costs following the dismissal of the complaint).

142 *Id*.; *see* 725 ILL. COMP. STAT. 120/4 (providing the language of the Act).

143 *Myers*, 521 N.E.2d at 100.

144 *See supra* notes 76–78, 112–16 (precluding the collection of damages and discussing the distinction between prohibition of legal and equitable remedies). It should be noted, however, that while statutorily prohibited in Illinois, damages suits under these circumstances exist in other jurisdictions. *See, e.g.*, ARIZ. REV. STAT. § 13-4437.B (2000) (demonstrating Arizona's victims' rights statute, for example, includes a provision which reads that "[a] victim has the right to recover damages from a governmental entity responsible for the intentional, knowing or grossly negligent violation of the victim's rights under the victims' bill of rights"). ARIZ. CONST. art. II, § 2.1. In Arizona, a "victim [also] 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, . . . any implementing legislation or court rules." ARIZ. REV. STAT. § 13-4437(A)–(B) (2000). Utah law also provides that victims may bring a variety of special actions, although not for damages, to enforce their rights. UTAH CODE § 77-38-11 (2010).

that a "lawsuit" could be filed, there is, of course, no *expressed* statutory right to file for injunctive relief. However, as in *Myers*, an Illinois court may *imply* an individual cause of action from a statute if:

> (1) plaintiff is a member of the class for whose benefit the Act was enacted; (2) it is consistent with the underlying purpose of the Act; (3) plaintiff's injury is one that the Act was designed to prevent; and (4) it is necessary to provide an adequate remedy for violations of the Act.[145]

Unlike federal courts, Illinois courts do not require potential plaintiffs to show that the legislature intended to *create* a private cause of action, only that the legislature did not expressly indicate any intent to *limit* the remedies available to those provided under the Act.[146] Consequently, in addition to the supportive comments in the legislative history, and although claims for damages are precluded, an implied equitable cause of action would be justified.[147]

There are four reasons Illinois courts could have found that victims have standing to join a criminal case via an equitable cause of action. First, crime victims, by definition, are within the class the victims' rights provisions were intended to benefit.[148] Second, an equitable cause of action is consistent with the statute's underlying purpose because the rights granted to victims are for their protection.[149] Third, the statute is

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[145] *See* Corgan v. Muehling, 574 N.E.2d 602, 609 (Ill. 1991) (holding that the Psychologist Registration Act implied a cause of action for a patient injured by an unregistered psychologist). Also, a separate cause of action may be implied where the statute would be practically ineffective without such an implication. *See also* Fisher v. Lexington Health Care, Inc., 722 N.E.2d 1115, 1119–20 (Ill. 1999) (establishing alternative means for implying a private right of action).

[146] *See* Sawyer Realty Group, Inc. v. Jarvis Corp., 432 N.E.2d 849, 852 (Ill. 1982) (recognizing a private right of action in the absence of an express remedy and limiting private rights of action only where the legislature expressly precludes it). To imply a private cause of action from a federal statute, a plaintiff must show that a specific legislative intent to create a private cause of action exists under the statute. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 284 (2001) (holding that there is no private cause of action to enforce Title VI disparate-impact regulations due to a lack of legislative intent).

[147] UTAH CODE ANN. § 77-38-11(1) (specifying Utah law allows for a separate equitable suit). "If a person acting under color of state law willfully or wantonly fails to perform duties so that the rights [of crime victims] are not provided, an action for injunctive relief, including prospective injunctive relief, may be brought against the individual and the governmental entity that employs the individual." *Id.*

[148] *See* 725 ILL. COMP. STAT. 120/3(a) (2010) (defining a crime victim subject to the Act).

[149] *See* ILL. CONST. art. I, § 8.1 (outlining rights guaranteed to crime victims); *see also* 725 ILL. COMP. STAT. 120/2 (establishing the purpose of the Act is to protect a victim's rights under ILL. CONST. art. I, § 8.1).

intended to prevent prosecutorial non- or misfeasance that causes crime victims further injury by losing their express rights.[150] Finally, rather than a private cause of action, direct victim intervention is necessary because, otherwise, victims will have no other means to enforce their rights.[151] No one has brought a separate lawsuit in Illinois, even though there is a growing sense that victims' rights have often been, and continue to be, ignored.[152] Perhaps this curious lack of separate litigation results from the reasonable assumption that although the legislature intended to enforce express rights, they intended *effective* and *efficient* enforcement of those rights, and a separate lawsuit is neither effective nor efficient.[153]

B. The Argument for Direct *Victims' Participation in Criminal Proceedings to Enforce Denied Rights in Lieu of Separate Equitable Actions*

"Statutes must be construed in the most beneficial way which their language will permit so as to *prevent hardship* or injustice, and to oppose prejudice to public interests."[154] A separate lawsuit would be just such a

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150 Although the Illinois General Assembly limited the remedies available under the RCVWA by expressly denying "cause[s] of action for damages or attorneys fees," the General Assembly did *not* indicate intent to exclude equitable relief. 725 ILL. COMP. STAT. 120/9. To the contrary, the sponsor of the Act, State Senator John Cullerton, stated that a victim could bring "a lawsuit" to vindicate her rights. *See* Trans. Ill. Gen. Assemb., *supra* note 78, at 34 (providing statements of State Sen. Cullerton).

151 *See* Trans. Ill. Gen. Assemb., *supra* note 78, at 34 (articulating the necessity for a private right of action).

152 *See* DAVIS ET AL., *supra* note 4, at 12–13 ("Despite . . . remarkable progress in the passage of crime victims' rights, advocates have been dismayed to see that, too often, victims' rights were violated with impunity. An NIJ-funded survey of crime victims in 1998 found that, even within states with strong victims' rights legislation, many victims were not notified about key hearings and proceedings, many were not given the opportunity to be heard, and few received restitution. Although victims in these states generally fared better than those in states with weak victims' rights legislation, as many as one-third of victims in strong-protection states were not afforded the opportunity to exercise certain rights." (citations omitted)); *infra* notes 345–46 and accompanying text (stating that the prosecutor's and victim's goals do not always align).

153 Trans. Ill. Gen. Assemb., *supra* note 78, at 32. The transcript reads:

> Last year, as we're well aware, the Crime Victims' Rights Constitutional Amendment passed with the approval of our citizens in the State of Illinois, and this bill is an attempt to codify, by enacting legislation, that constitutional amendment, so as to *enforce* the rights of the crime victims of our State.

Id. at 32 (statement of State Sen. Cullerton) (emphasis added). The plain meaning of "enforce" is "to make active or effective." *Enforce Definition*, MERRIAM-WEBSTER.COM, *available at* http://www.merriam-webster.com/dictionary/enforce (last visited Oct. 26, 2014), *archived at* http://perma.cc/K8D-TPP5.

154 Mulligan v. Joliet Reg'l Port Dist., 527 N.E.2d 1264, 1269 (Ill. 1988) (emphasis added); *see also* Illinois Nat'l Bank v. Chegin, 220 N.E.2d 226, 228 (Ill. 1966) (stating that the law

"hardship"—time-consuming, resource-wasting, and far from a timely or meaningful remedy.[155] Most likely, by the time equitable relief could be granted in a separate suit the original criminal prosecution will be concluded. The victim would no longer have rights to enforce, which contradicts the statutory purpose to *implement* victims' rights.[156] Therefore, victims would not be provided with a meaningful remedy through a separate "lawsuit." Effective and efficient remedies are better accomplished through motions or petitions filed by victims *within* the criminal prosecution, demands for relief that could be heard directly and immediately.[157]

This better approach—direct victim participation—is suggested by analogy to other existing aspects of legal procedure. In civil actions, for example, those who are initially nonparties are afforded the opportunity, if necessary, to present claims or defenses through the statutory device of intervention.[158] Illinois' law provides for both interventions as of right and permissive intervention.[159] If obtained, intervention allows for the

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requires that a statute be given a reasonable interpretation according to the legislature's intent, by looking to the meaning of the statute and the reasons for its enactment). Further, "where the language of a statute admits of two constructions, one of which would make the enactment absurd, if not mischievous, while the other renders it reasonable and wholesome, the construction which leads to an absurd result will be avoided." *Id.*

155 *See, e.g.*, Myers v. Daley, 521 N.E.2d 98, 100 (Ill. App. Ct. 1987) (demonstrating a prohibitive burden is required of a victim).

156 *See In re* D.F., 802 N.E.2d 800, 805 (Ill. 2003) ("A court, however, is not bound by the literal language of a statute that produces a result inconsistent with clearly expressed legislative intent, or that yields absurd or unjust consequences not contemplated by the legislature.").

157 *See, e.g.*, *Myers*, 521 N.E.2d at 100 (indicating that relief under the Act would be "frustrated if victims were forced to file suit"); 725 ILL. COMP. STAT. 120/9 (2010) ("This Act *does not limit any rights* or responsibilities *otherwise enjoyed by* or imposed upon *victims* or witnesses of violent crime." (emphasis added)); *see also* Kyl et al., *supra* note 19, at 616 (arguing the importance of a victim's right to be heard "at the very moment when their rights are at stake" and thus be free from unreasonable delay as to the right to intervene).

158 735 ILL. COMP. STAT. 5/2–408 (2010). The state's judiciary has a substantial history of implying causes of action from state statutes. *See, e.g.*, Sawyer Realty Group, Inc. v. Jarvis Corp., 432 N.E.2d 849, 852 (Ill. 1982) (stating that courts can imply a private cause of action for violation of the statute that provides no express remedy); Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1978) (implying a cause of action from the Workmen's Compensation Act for retaliatory discharge); Boyer v. Atchison, Topeka and Santa Fe Ry. Co., 230 N.E.2d 173, 176–77 (Ill. 1967) (implying a cause of action from the Federal Safety Appliance Act); Witt v. Forest Hosp., 450 N.E.2d 811, 813 (Ill. App. Ct. 1983) (implying a cause of action from the Guardianship and Advocacy Act); Sherman v. Field Clinic, 392 N.E.2d 154, 161 (Ill. App. Ct. 1979) (implying a cause of action from the Illinois Collection Agency Act); Walinski v. Morrison & Morrison, 377 N.E.2d 242, 244 (Ill. App. Ct. 1978) (demonstrating a cause of action from Article I, Section 17 of the Illinois Constitution in situations where individuals are discriminated against during the employment process or in the sale or rental of real property on the basis of race, color, creed, national ancestry, or sex).

159 735 ILL. COMP. STAT. 5/2-408(a) (2010). Intervention as of right is available:

disposal of entire controversies in a single lawsuit, thus avoiding separate re-litigation of related issues.[160] Usually, intervention is allowed when necessary to protect the rights of the proposed intervenor; once allowed, the intervenor receives all the rights of an original party, *except* as justice and the avoidance of undue delay may require.[161] Under the recently passed constitutional amendment, however, the "intervention" or participation would be limited solely to seeking relief for denied rights. Therefore, this aspect of civil procedure—and its function—supports the notion of direct victim participation in criminal prosecutions to vindicate their rights as a matter of efficiency and judicial economy.

C. *Implying Victims' Standing in Criminal Prosecutions: The Analogy of "Third Party" Intervention in Criminal Prosecutions*

Crime victims, it would seem, also meet the traditional criteria for personal standing and participation or "intervention" in criminal prosecutions.[162] It would, therefore, be odd to conclude that victims

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> (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the [intervenor's] interest by existing parties is or may be inadequate and the [intervenor] will or may be bound by an order or judgment in the action; or (3) when the [intervenor] is so situated as to be adversely affected by a distribution or other disposition of property in the custody or subject to the control or disposition of the court or a court officer.

Id. Permissive intervention is available "(1) when a statute confers a conditional right to intervene; or (2) when an [intervenor's] claim or defense and the main action have a question of law or fact in common." *Id.* at 5/2-408(b). Intervention is within the discretion of the court. *Id.*

160 735 ILL. COMP. STAT. 5/2-408(a)–(b); *see infra* notes 171–72 and accompanying text (discussing how the presiding judge can address both criminal and civil suits involving related issues); People *ex rel.* Birkett v. City of Chicago, 779 N.E.2d 875, 887 (Ill. Ct. 2002) (discussing how the practice of intervention is liberalizing and avoids re-litigation of issues in a second suit).

161 735 ILL. COMP. STAT. 5/2-408(f) (2010) (emphasis added); City of Chicago v. Zik, 211 N.E.2d 545, 546 (Ill. App. Ct. 1965) (allowing an applicant to intervene after judgment because the intervenor was unaware of the original suit until after judgment was entered). Illinois courts, however, liberally construe the intervention statute in favor of intervenors. *See* Bredberg v. City of Wheaton, 182 N.E.2d 742, 747–48 (Ill. 1962) (pointing out that intervention is desirable to allow a person the opportunity to protect an interest which is in jeopardy due to the pending litigation).

162 *See generally* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 474–76 (1982) (discussing with some clarity the various criteria for individual standing). They would be making claims of direct injury in fact to the court which, though proximately caused by prosecutorial omission, could readily be redressed by the court; nor are they asserting a third party's claim or "generalized grievances," and they clearly fall within the "zone of interests" sought to be protected by the statute. *Id. But see* State v. Leingang, 763 N.W.2d 769, 774–75 (N.D. 2009) (holding that a victim cannot be

should in any way be denied the ability to directly enforce their statutory rights in this most effective manner. Actually, there is recent precedent in at least one Illinois circuit court implying victim standing under these circumstances.[163] There is also persuasive dictum from at least one other jurisdiction supporting such an implication; Connecticut, for example, has modeled its victims' rights statute on Illinois'.[164] In a fairly recent case construing Connecticut's statute, *State v. Gault*, a victim filed an affidavit under seal in a criminal prosecution.[165] The press wanted the redacted affidavit unsealed and the judge granted its motion.[166] The victim sought to *appeal* the order, arguing that the statute *implied* that the victim had such a right.[167] The Connecticut Supreme Court dismissed the appeal, holding that the victim had no standing to appeal because she was not legally a party:

> The state claims . . . that the victim's rights amendment does not provide victims with party status. It argues that the amendment, by its terms, delegates the authority for its enforcement to the General Assembly, and that body has not passed legislation providing for *party status* for crime victims or otherwise conveying a right to appeal. We agree with the state.[168]

However, in dicta, the court noted that the victim *had never moved to intervene* in the criminal case, thus suggesting that if she had initially sought to intervene, at least regarding her rights as a victim, she might have been a "party" eligible to file an appeal with regard to the unsealing of her affidavit.[169]

Whether or not crime victims are "parties" to a criminal prosecution, they are certainly interested "third parties" with regard to the enforcement of their rights. In Illinois, the procedural tool of intervention has been allowed in criminal proceedings if neither of the existing parties are protecting a third party's constitutional rights.[170] For

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given standing to challenge the district court's termination of the defendant's probation since this did *not* cause *injury* to the victim *directly or imminently*).

163 People v. Johnson, 12 CF 76 (Dekalb Cnty., Ill. June 8, 2012) (granting standing and intervention in a criminal case to a victim).

164 State v. Gault, 39 A.3d 1105, 1112 n.12 (Conn. 2012).

165 *Id.* at 1107.

166 *Id.* at 1109.

167 *Id.* at 1107.

168 *Id.* at 1110–11 (emphasis added).

169 *Id.* at 1110, nn.9–10.

170 *See* Klem v. Mann, 665 N.E.2d 514, 517 (Ill. App. Ct. 1996) (insurer sought to exercise a subrogation lien against a child's estate and did so with reasonable diligence in seeking

example, in *People v. Kelly*, the court held that a petition to intervene, rather than a separate equitable action, was the appropriate vehicle for media assertions of First Amendment rights to access the criminal court proceedings.[171] Public policy, the court noted, favors intervention over corollary litigation because the judge presiding over the criminal case is familiar with the facts and the defendant already has representation.[172] Illinois courts, therefore, already favor intervention over separate lawsuits as an appropriate vehicle to vindicate third parties as a matter of judicial economy.[173] Similarly, it would seem most efficient for crime victims to assert and remedy the denial of their statutory rights by moving for specific relief, as necessary, as part of the prosecution of a criminal case.

While a few states, such as Rhode Island, have held that permissive intervention "has no place in a criminal proceeding," Illinois courts have repeatedly granted permissive intervention to third parties whose rights or interests require protection.[174] News organizations, even in cases other than *Kelly*, have used intervention to vindicate violations of their constitutional right of access to judicial proceedings.[175] Although, both

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intervention); *see also In re* Interest of K.P., 709 A.2d 315, 322 (N.J. Super. Ct. Ch. Div. 1997) (holding that, under New Jersey's broad constitutional victims' rights provision, a victim had standing and an unarticulated right to oppose a petition by the press to open a juvenile proceeding).

171 People v. Kelly, 921 N.E.2d 333, 344, 349 (Ill. App. Ct. 2009); *see* People v. Pelo, 894 N.E.2d 415, 416 (Ill. App. Ct. 2008) (affirming trial court's grant of a newspaper's petition to intervene for purpose of seeking its First Amendment right to access to a transcript and other court records in a criminal case; indeed, the Illinois legislature had codified that right); People v. LaGrone, 838 N.E.2d 142, 146 (Ill. App. Ct. 2005) (holding that media were allowed to intervene in a criminal case for the purpose of asserting constitutional right to access to the courts); *In re Interest of K.P.*, 709 A.2d at 321 (finding that a victim has standing and an unarticulated right to oppose a petition by the press under New Jersey's broad constitutional victims' rights provision).

172 *Kelly*, 921 N.E.2d at 345–46. The judge presiding over the criminal case, being familiar with the facts, can retain the authority, and exercise due discretion, to make appropriate decisions regarding a victim's rights as well. The defendant already has criminal counsel and, from the point of view of all concerned, the matter is best kept out of civil courts. *Id.*

173 *Pelo*, 894 N.E.2d at 416.

174 State v. Cianci, 496 A.2d 139, 146 (R.I. 1985); *see* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 285–86 (2003) (discussing the opinion that intervention is inappropriate because it is a civil procedure mechanism not fit for criminal trials and it violates the right of the criminal defendant to have a fair trial because defendant's trial should not be interrupted by adjudication of third party interests that can later be brought as a civil matter). However, in Illinois, courts allow third parties to intervene in criminal cases at the court's discretion, and thus this precedent is inapposite.

175 *See, e.g.*, *Pelo*, 894 N.E.2d at 416 (affirming a trial court's grant of a newspaper's petition to intervene for purpose of seeking its First Amendment right to access to a transcript and other court records in a criminal case); *LaGrone*, 838 N.E.2d at 143–45

the First Amendment and Section 4 of Article I of the Illinois Constitution grant the press a right of access to court records and criminal proceedings—and the Illinois General Assembly codified the public's right of access—the right to intervene in criminal prosecutions is not unconditional.[176] News organizations must still petition for *permissive* intervention to assert their "right of access."[177] Thus, if the members of the press have, as a matter of judicial discretion, properly been granted intervention in criminal cases to vindicate their rights, crime victims should also have standing to "intervene" to vindicate their unprotected statutory rights.[178]

In conclusion, a reasonable interpretation of the Victims' Rights Act already implied an independent right to file a separate suit in equity to enforce constitutional and statutory rights denied to victims in a criminal prosecution. However, since such "lawsuits" would be inefficient and ineffective, few if any have been filed. Nevertheless, by analogy to the general criteria and reasons for implying a cause of action under existing law, and to the justifications for allowing permissive intervention in criminal and civil practice, victim standing to seek redress for denied rights directly in criminal proceedings—even absent the recent amendment—would appear warranted. This has been true in other states that, like Illinois, have not expressly authorized victim standing. Thus, passage of the "victims' standing" constitutional amendment simply clarified and guaranteed what already may be implied from current law. Indeed, other states without expressed victim standing have come to this conclusion, and *have* implied standing.

(finding that intervention is the appropriate method for news organizations to assert their constitutional right to present public access issues); *see also In re Interest of K.P.*, 709 A.2d at 321 (stating that under New Jersey's victims' rights provision, a victim has standing and an unarticulated right to oppose a petition by the press to open a juvenile proceeding).

176 705 ILL. COMP. STAT. 105/16(6) (2010); *Kelly*, 921 N.E.2d at 344. In addition, there is a common law presumption recognized by the Supreme Court that allows the public to inspect and copy public records and documents, such as judicial records and documents. *Kelly*, 921 N.E.2d at 344; *see* U.S. CONST. amend. I (the right of freedom of religion, speech, press, assembly, and petition); ILL. CONST. art. I, § 4 (describing freedom of speech under the Illinois State Constitution); 705 ILL. COMP. STAT. 105/16(6) (2010) (explaining how the records of the court are maintained by the clerks and required by law to be public with all individuals having free access to inspect and examine them).

177 *See* 735 ILL. COMP. STAT. 5/2-408(b) (2010) (providing permissive intervention in the state of Illinois); *Kelly*, 921 N.E.2d at 344–46 (holding that the media's use of a petition to intervene was the proper vehicle to seek access to sealed court proceedings and records in a criminal trial).

178 *See* People v. Johnson, 12 CF at 76 (Dekalb Cnty., Ill. June 8, 2012) (granting standing and intervention in a criminal case to a victim).

V. IMPLYING STANDING IN STATES *WITHOUT* EXPRESSED VICTIM STANDING PROVISIONS: JUDICIAL BALANCING OF INTERESTS

State courts generally hold that victims, not being "parties" to criminal prosecutions, do not automatically have standing to challenge denial of their statutory rights or interests.[179] This is even the case where states expressly provide for those rights in their constitution or laws. However, where victims assert implied standing in states with no express standing, the issue becomes the appropriate *scope* of the expressed right sought to be vindicated, and the reasonableness of the remedy sought. In other words, in practice, *denial* of implied victim standing in those states occurs where there is an alleged conflict between the *extent* of the right sought by the victim and what are adjudged to be more important exercises of prosecutorial discretion, or where claims of an *implied* remedy for a denial of rights are, on balance, found to significantly interfere with a defendant's due process rights.

A. Denying Implied Standing: Conflicts Between the Scope of the Victim's Right Asserted and the Superior Need to Protect Prosecutorial Discretion

Under existing victims' rights provisions, victims ordinarily cannot challenge prosecutorial or judicial decisions.[180] This is usually true where the relationship between the expressed right and the scope of the remedy sought is so attenuated as to be outweighed by a significant intrusion upon prosecutorial discretion. For example, a victim's "right to *speak* at sentencing" does not mean a victim may use the right in an effort to alter or dictate the terms of the sentence requested by the state.[181] In

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[179] *See, e.g.*, Cooper v. Dist. Ct., 133 P.3d 692, 695–714 (Alaska Ct. App. 2006) (rejecting various arguments that victim had standing to seek appellate review of sentencing error and her right to have part of a sentencing hearing sealed); Dix v. Superior Ct., 807 P.2d 1063, 1067 (Cal. 1991) (finding that individual victims do not have standing to intervene in ongoing criminal cases); People v. Parriera, 46 Cal. Rptr. 835, 840 (Cal. Dist. Ct. App. 1965) (reasoning that the victim of the crime is not a party); *see also* Lamb v. Kontgias, 901 A.2d 860, 864–69 (Md. Ct. Spec. App. 2006) (holding victim was not party to criminal prosecution and did not have standing to appeal lack of notice and opportunity to speak at hearing to reconsider sentence); *In re* State *ex rel*. Sistrunk, 142 S.W.3d 497, 502–03 (Tex. Ct. App. 2004) (holding victim's family had no standing to challenge defendant's sentence or procedures at sentencing hearing); Commonwealth v. Malloy, 450 A.2d 689, 693 (Pa. Super. Ct. 1982) (finding criminal victim was not a party to criminal prosecution and did not have standing to appeal decision dismissing complaint).

[180] *See, e.g.*, Gansz v. People, 888 P.2d 256, 257 (Colo. 1995) (holding that there is no victim statutory right to be heard at a hearing on a district attorney's motion to dismiss criminal charges).

[181] *See, e.g.*, *Dix*, 807 P.2d at 1067 (discussing how a crime victim sought to recall and resentence defendant for aggravated assault, the California Supreme Court reversed,

Cooper v. District Court, a victim sought to appeal her husband's suspended sentence entered under a plea agreement and seal portions of the sentencing hearing.[182] She was held not to have standing to do so under either the state constitutional amendment or the Victims' Rights Act; her only expressed right was to have a "timely disposition," which was satisfied.[183] Also, victims' demands for remedies for insufficient notice of hearings are usually rejected if the victim seeks to *reopen* pleas or sentences unless the trial court or the state has voluntarily chosen to do so, or important interests of the victim still have not been resolved.[184]

An example of this latter exception is *Ford v. State*.[185] The victim moved to declare a plea conference and agreement null and void because she only received four days' notice of the hearing on the plea, alleging it eliminated her right to speak at sentencing.[186] Insufficient notice to the victim, however, did not prevent the court from entering the plea agreement.[187] Nevertheless, the court granted the victim's petition to reopen the sentence *limited* to the question of *restitution* because the state conceded that, although restitution was a victim's right, in this case it had been denied.[188] There had, in fact, been an inappropriate distribution of funds among victims for which there would otherwise be no appellate remedy.[189] Rights—such as restitution in a criminal disposition—are personal to the victim, cannot be waived, and a victim has no obligation to remain silent on this issue even if the state has agreed to do so pursuant to a plea agreement.[190] Thus, given the cooperation of the state and the lack of interference with the defendant's

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holding that the victim had no standing in the defendant's criminal proceeding, that the victims' rights statute provided a victim with no "resentencing power").

182 *Cooper*, 133 P.3d at 694–95 (concluding that the constitutional right of victim of domestic violence to a timely disposition of defendant's case was satisfied notwithstanding victim's claim that trial court failed to properly sentence defendant by not requiring him to attend a batterer's intervention treatment program). The victim's rights were satisfied inasmuch as the sentencing took place in a timely manner, even if the appellate court were later to conclude that the proceedings were flawed. *Id.* at 694.

183 *Id.* at 700–01.

184 State v. Casey, 44 P.3d 756, 757–58 (Utah 2002) (explaining how a victim filed a motion to reject a plea bargain and the trial court informally reopened the plea hearing to accept the victim's testimony, that of his mother, permitted argument from the victim's counsel, and then reaffirmed the plea that any violation of the victim's rights was cured).

185 Ford v. State, 829 So.2d 946, 947–48 (Fla. Dist. Ct. App. 2002).

186 *Id.* at 947.

187 *Id.*

188 *Id.* at 948.

189 *Id.*

190 State v. Robinson, No. C1–02–1957, 2003 WL 21694412, at *3 (Minn. Ct. App. 2003). On the other hand, a victim's failure to assert a right to restitution within a reasonable time will constitute a waiver of that right. *In re* Alton D., 994 P.2d 402, 406 (Ariz. 2000).

expectations, the court allowed the victim standing limited to recovering losses resulting from an admittedly denied right that would otherwise not be remedied.[191]

On the other hand, courts have more difficulty providing remedies where the requested remedy interferes with prosecutorial discretion or a defendant's rights to a fair trial. Thus, a victim's right to "*confer* with the prosecutor"—even coupled with her broad right to "fairness" articulated in the same statute—does not grant her the right to discover evidence in a prosecutor's criminal file to facilitate her civil suit.[192] Nor does a victim's right to be present at all crucial stages of criminal proceedings imply standing to join the prosecutor at the counsel table.[193] Such allegedly implied "rights" are too tenuously related to—or are much broader than—the expressed rights and, perhaps more importantly, interfere with either prosecutorial discretion or defendants' rights. While a victim's presence at the counsel table may allow the victim and the prosecution to confer—perhaps adding to the truth-finding process—a certification by the prosecutor of this necessity rather than an assertion of an implied victim's right to do so is the only basis for such a privilege.[194] Thus, without express standing, it seems fair to assume courts will most likely *imply* victim standing only when it is essential to accomplish justice, or when the *scope* of the victim's asserted right is consistent with the rationale for the right.

B. Denying Implied Standing: Conflicts Between a Victim's View of the Scope of Her Rights and a Defendant's Due Process Rights

Under somewhat similar facts, in *State v. Harrison,* the court held that where a trial court permitted a victim's advocate to sit near the victim while she testified and allowed a guardian *ad litem* to sit at the state's counsel table and question witnesses, such a "team prosecution" was

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191 *Ford*, 829 So.2d at 948 n.1 (citing United States v. DiFrancesco, 449 U.S. 117, 139, 143 (1980)) (finding that "a federal statute allowing the government to appeal a sentence on the ground that it is too lenient does not violate federal double jeopardy . . . [as] a sentence is not accorded the same finality, under federal double jeopardy principles, as an acquittal").

192 State *ex rel*. Hilbig v. McDonald, 839 S.W.2d 854, 856 (Tex. Ct. App. 1992) (deciding that in promulgating the constitutional amendment and statute on crime victims' rights, the legislature did not intend for crime victims to have a right to discover material within the prosecutor's file in a pending criminal matter).

193 *See* State v. Harrison, 24 P.3d 936, 945–47 (Utah 2001) (concluding that allowing a "team prosecution" was plain error and inherently prejudicial by allowing the guardian *ad litem* to sit at the counsel table and question witnesses during trial).

194 *See* Crowe v. State, 485 So. 2d 351, 362–63 (Ala. Crim. App. 1984) (holding that victims may sit at the counsel table upon a showing by the prosecutor that the victim will be of material assistance); Hall v. State, 579 So. 2d 329, 330 (Fla. Dist. Ct. App. 1991) (determining that victims may sit at the counsel table to assist the prosecution).

plain error and inherently prejudicial to the defendant.[195] In other prosecutions as well, judicial failures to imply standing where it would unreasonably *expand* the scope of victim rights are frequently sustained where this would interfere with defendants' rights. In *State v. Gonzales*, for example, the court held that a victim's constitutional "right to be treated with fairness and respect for [her] dignity and privacy" did not negate a court order allowing the defense to inquire into the victim's use of alcohol for the purpose of impeachment.[196] Doing so would deprive the defendant of his right to confrontation.[197] The scope of the victim's right to "fairness" cannot be expanded to destroy the defendant's right to a "fair" trial.

Efforts in Illinois to "expand" the scope of expressed victims' rights and enforce those rights are largely given similar treatment. Courts will analyze whether claimed victim's rights—as enforced or sought to be enforced—s*ignificantly* interfere with a defendant's rights. In *People v. Richardson*, for instance, a defendant sentenced to consecutive prison terms sought a new sentencing hearing.[198] He claimed the state's presentation of *three* written "victim-impact statements" at sentencing, instead of the one permitted under the plain language of the Rights of Crime Victims and Witnesses Act, prejudiced his trial.[199] The Illinois Supreme Court held that while the circuit court erred in admitting and considering multiple statements, there was no evidence the statements unduly prejudiced the defendant's trial or the sentencing hearing was rendered fundamentally unfair.[200] Thus, even the technical "over-exercise" of a victim's right was sustained in the absence of any significant infringement of a defendant's rights.

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195 *Harrison*, 24 P.3d at 945, 947.

196 State v. Gonzales, 912 P.2d 297, 299–300 (N.M. Ct. App. 1996).

197 *Id.* at 299.

198 People v. Richardson, 751 N.E.2d 1104, 1106 (Ill. 2001).

199 *Id.*; 725 ILL. COMP. STAT. 120/1-9 (2010).

200 *Richardson*, 751 N.E.2d at 1109; *see* People v. Willis, 569 N.E.2d 113, 117 (Ill. App. Ct.) (holding any error in allowing manslaughter victim's cousin, who was outside of statutory definition of "victim," to address court regarding impact which defendant's criminal conduct had upon victim was harmless); People v. Gonzales, 673 N.E.2d 1181, 1183 (Ill. App. Ct. 1996) (discussing the trial court's alleged error in considering two victim impact statements in sentencing murder defendant, despite provision in Rights of Crime Victims and Witnesses Act defining victim as single representative of person killed, was waived where defense counsel failed to object to consideration of impact statements, as error did not rise to level of plain error).

C. *Jurisdictions That Have Implied Victims' Standing to Vindicate Denial of Expressed Rights Where There was no Interference with Defendants' Rights*

A few states imply victim standing to enforce expressed rights, but only where remedies would not conflict with prosecutorial discretion or the rights of defendants. At the time of the decision in *State v. Timmendequas*, for example, New Jersey had a "victims' rights" constitutional amendment and enabling statute quite similar to those in Illinois.[201] The New Jersey Constitution provided, *inter alia,* that "[a] victim of a crime shall be treated with fairness, compassion and respect by the criminal justice system."[202] The state Supreme Court held that the constitutional language, coupled with a victim's right to be present at public judicial proceedings without significant inconvenience, gave the victim standing to seek and obtain the empanelling of a *foreign jury* rather than allowing defendant a change of venue.[203] The victim's right to convenient participation was respected in the absence of any interference with the defendant's right to a fair trial.[204]

In *State of New Jersey in the Interest of K.P.,* the same court held that the right to make a statement during the dispositional phase of the trial would be useless and inconsistent with legislative intent without an implication of standing in the victim to vindicate the right.[205] After all, the courts have the power to prevent a miscarriage of justice, they are the guardian of rights, and requests for standing to obtain relief are "in *pari materia* with the fundamental [constitutional] right to be treated with fairness, compassion, and respect by the criminal justice system."[206] Those latter terms, said the court, make a victim "a constructive equivalent to a party in the case[,]" modifying the traditional state-defendant paradigm, at least to the extent necessary to enforce victims'

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201 State v. Timmendequas, 737 A.2d 55, 75–76 (N.J. 1999).

202 N.J. CONST. art. I, § 22.

203 *Id.*; *Timmendequas*, 737 A.2d at 76 (finding the decision not to change venue, but to empanel foreign jury, did not violate the defendant's constitutional rights since the Victim's Rights Amendment entitled the parents to fairness and respect, and a provision of the Crime Victim's Bill of Rights required a minimization of inconveniences). *But see* State v. Rymer, No. 99-1521-CR, 2000 WL 1855147, at *5 (Wis. Ct. App. 2000) (declining to rely on broad victims' rights provisions to give the victim an interest in change of venue proceeding) (cited in Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 264).

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

205 *In re* the Interest of K.P., 709 A.2d 315, 321 (N.J. Super. Ct. Ch. Div. 1997).

206 *Id.* at 321, 323.

rights.[207] To rule otherwise would change a victim's right into a nullity.[208]

The constitutions of Arizona and Utah also mandate that victims be treated with respect and dignity, including the right to refuse to allow intrusions into private matters.[209] In *State* ex rel. *Romley v. Hutt*, the Arizona court denied a defendant's motion to record the interactions between the victim and the prosecutor, holding that such an intrusion would create an atmosphere *hostile to the intent* of the constitutional provision with regard to victims' rights.[210] The victims' right to refuse to be interviewed by the defendant *implied* victim standing to move to preclude the requested "recording," especially where such a ruling did not implicate the defendant's right to a fair trial.[211] The Florida constitution, as well, contains similar "fairness" language and allows victims a right to be heard.[212] In *Ford v. State*, the court granted a victim's petition for a writ of *certiorari* based on the allegation that the state had not provided adequate notice, causing the victim to forgo restitution.[213] It held that those rights *implied* a right to standing to seek relief with respect to restitution.[214] But here again, allowing standing did not conflict with the rights of the defendant since double jeopardy is not violated where a trial court merely increases a sentence to include restitution.[215]

Finally, even before their relatively recent passage of a constitutional "standing amendment," California courts also interpreted their victims' rights provisions as implying victim standing.[216] In *Melissa J. v. Superior Court*, the court granted a victim's petition for a writ of mandamus because the trial court had ruled in favor of a defendant's *post-sentencing* motion to terminate restitution without affording the victim notice and

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207 *Id.* at 320–21.

208 *Id*. at 324. Specifically, if paragraph 22 of Article I of the New Jersey Constitution cannot be construed to grant standing to victims, then the constitutional amendment lacks meaning: "the people of New Jersey amended their constitution to grant the legislature power *it already* possessed." *Id.*

209 ARIZ. CONST. art. 2 § 2.1(1); UTAH CONST. art. I, § 28(a).

210 State *ex rel.* Romley v. Hutt, 987 P.2d 218, 223 (Ariz. App. Ct. 1999).

211 *Id*. at 223.

212 FLA. CONST. art. I, § 16(b).

213 Ford v. State, 829 So.2d 946, 948 (Fla. Dist. Ct. App. 2002); *see Interest of K.P.*, 709 A.2d at 320 (discussing decision in the context of an exception to the general rule of lack of standing where notice was not given prior to a hearing on distribution of restitution, restitution being a victim's right, and therefore the sentence should have been reopened in all fairness to correct a not otherwise remedial error).

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

215 *Id*.

216 CA. CONST. art. I, § 28(b).

opportunity to be heard.[217] The court distinguished *People v. Superior Court* (*Thompson*), holding that lack of notice at the *original* sentencing hearing did *not* deprive the trial court of the power to *proceed*, whereas in *Melissa,* the absence of notice occurred during a hearing on a *post-sentencing motion* to *terminate* restitution, which was invalid without prior notice to the victim and opportunity for her to be heard.[218]

In conclusion, fifteen states, including Illinois, have constitutional language granting victims' rights through language similar to what is discussed in this section.[219] Eight other states have similar statutory language executing the constitutional amendment.[220] The Illinois statute, like others, expressly grants victims "[t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process."[221] In several of these states, courts have implied victim's standing to vindicate denial of an expressed right, at least in the absence of interference with the rights of the state or the defendant.[222] The same reasoning would support a similar interpretation

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217 Melissa J. v. Superior Court, 237 Cal. Rptr. 5, 5–7 (Cal. Ct. App. 1987).

218 *Id.* at 6; *see* People v. Superior Court (Thompson), 202 Cal. Rptr. 585, 586–87 (Cal. Ct. App. 1984) (discussing that the People and victim of a battery that took place on a school campus separately petitioned for a writ of mandate and/or prohibition alleging that the order of the Superior Court sentencing the defendant, who had been convicted of committing the battery, to probation was unlawful in that victim was not notified of the sentencing date). The Court of Appeals held that the trial court had jurisdiction to proceed with the sentencing even though victim had not been notified of the date and, as a result, did not appear. *Id.*

219 ARIZ. CONST. art. II, § 2.1; IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); LA. CONST. art. I, § 25; MICH. CONST. art. I, § 24; MISS. CONST. art. III, § 26A; N.J. CONST. art. I, § 22; N.M. CONST. art. II, § 24; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; S.C. CONST. art. I, § 24; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art I, § 8-A.

220 IDAHO CODE ANN. § 19-5306 (2004); 725 ILL. COMP. STAT. 120/2 (2010); IND. CODE § 35-40-5-1 (2008); MISS. CODE ANN. § 99-43-1 (2000); N.M. STAT. ANN. § 31-26-2 (2009); S.C. CODE ANN. § 16-3-1505 (2003); UTAH CODE ANN. § 77-37-1 (LexisNexis 2012); VA. CODE ANN. § 19.2-11.01 (LexisNexis 2008).

221 725 ILL. COMP. STAT. 120/4(a)(1) (2010).

222 *See In re* Interest of K.P., 709 A.2d 315, 320 (N.J. 1997) (considering the legislature's intent). The court reasoned:

> It is difficult for the court to imagine that the Legislature intended to give victims these expansive rights, yet specifically intended that they should not be a factor for a court to consider when there is compelling evidence that a detrimental effect upon a victim will occur if the court ignored their request. The State contends that the Legislature specifically identified victims to be considered an interested party with standing to open a proceeding, and, therefore, the court should determine that the ability to open suggests standing to close. The court agrees. The court finds that the legislative intent is more in line with considering the victim's position as opposed to ignoring it. The court finds a victim is a constructive equivalent to a party in the case.

of the victims' rights laws in Illinois.[223] Indeed, it might be helpful to ask whether there has been any interference with the administration of criminal justice, or the rights of defendants, in jurisdictions that *have expressly* allowed for victim standing.

VI. THE EXPERIENCE IN JURISDICTIONS THAT EXPRESSLY ALLOW VICTIM STANDING IN THEIR CONSTITUTIONS OR STATUTES: SELECTED ASSERTIONS OF SELECTED VICTIM RIGHTS

Several jurisdictions have *expressly* provided victims standing to vindicate rights in their state constitutions and laws. New Jersey amended its state constitution to provide for victims' rights around the same time as did Illinois, and initially did not expressly provide for victim standing to enforce their rights.[224] Recently, however, New Jersey voters gave crime victims standing for this purpose, and for the same reasons as those leading to recent, successful legislative initiatives for similar changes in Illinois.[225] In addition, two states had earlier granted similar standing to victims through constitutional amendments—Oregon and California in 2008.[226] The Federal Crime Victim's Rights Act of 2004, which inspired this trend, explicitly allows a victim to bring motions in the district court for relief from denial of rights wherever the criminal proceedings are being held, and to seek mandamus from the appellate

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Id.

[223] 725 ILL. COMP. STAT. 120/4(a)(1) (2010) (providing "[t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process . . ."). As an aside, therefore, Section 8.1(d) of the Illinois constitution, stating that victims' rights do not create a basis for a *defendant* to vacate a conviction, need not be read as prohibiting the implication of standing and intervention of the *victim* to move to reopen and renegotiate a conviction to vindicate unfulfilled rights. ILL. CONST. art. I, § 8.1.

[224] *See supra* notes 202–03 (providing the language of New Jersey's Constitution and the state's leading case on the issue).

[225] N.J. STAT. ANN. § 52:4B-36 (2012) (declaring that a crime victim has the right "[t]o appear in any court before which a proceeding implicating the rights of the victim is being held, with standing to file a motion or present argument on a motion filed to enforce any right conferred herein or by Article I, paragraph 22 of the New Jersey Constitution, and to receive an adjudicative decision by the court on any such motion"); Angela Delli Santi, *NJ Gov. Christie Signs Law Aiding Crime Victims*, NORTH JERSEY.COM (Aug. 7, 2012, 6:54 P.M.), *available at* http://www.northjersey.com/news/crime-and-courts/nj-gov-christie-signs-law-aiding-crime-victims-1.479127, *archived at* http://perma.cc/83QC-P7MV. ("It literally addresses most of the issues victims have had problems with over the past [twenty] years and provides remedies in those areas . . . [f]or example, victims never had direct standing to come into criminal court and assert their rights. Now they do."); Press release, Illinois Attorney General, Senate Vote Puts Crime Victim's Rights Amendment on November Ballot (Apr. 10, 2014), *available at* http://www.ag.state.il.us/pressroom/2014_04/20140410.html, *archived at* http://perma.cc/D75G-Y3UZ.

[226] CA. CONST. art. I, § 28(b); OR. CONST. art. I, §§ 42, 43.

court to compel the district court to act should it refuse to provide relief.[227] Numerous states have allowed for victim standing by statute.[228]

Now that sufficient time has passed, and a significant number of victims' rights claims have been adjudicated, it would seem useful and illuminating to review the practical experience in those jurisdictions. This section discusses the application of a few of the common victims' rights provisions. Concerning each right, it examines how courts have resolved questions of defendants' due process rights arguably denied, or aspects of prosecutorial discretion allegedly impeded. Hopefully, this will provide some insight into the extent to which victim standing has in fact interfered with the due administration of criminal justice.

A. The Right to Restitution

The statutory right to restitution requires that a victim is entitled to be made whole as a result of a loss imposed by the defendant.[229] Yet, claims for restitution are occasionally alleged to conflict with a variety of defendant's rights, such as the rights to be free from double jeopardy, to be guaranteed due process of law, or to be free from *ex post facto* laws. In *People v. Harvest*, for example, a defendant was convicted of first and second-degree murder and was sentenced to a term of years.[230] However, the Court of Appeals reversed the second-degree murder conviction and ordered the prosecution to either retry that charge or reduce it to voluntary manslaughter.[231] The state elected not to retry the charge, but upon resentencing for voluntary manslaughter—and for the first time—the trial court ordered restitution.[232] The defendant argued on appeal that he had twice been placed in jeopardy, making the restitution award unconstitutional.[233]

The high court disagreed, holding that a victim restitution order was not *punishment* for double jeopardy purposes, and that nothing prevented the government from seeking restitution for the first time at

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227 18 U.S.C. § 3771(d)(3)–(4) (2006). In addition, a federal prosecutor can allege that the district court's erroneous deprivation of a victim's rights to notice and to be heard is reversible error. *Id.*

228 *See, e.g.*, CAL. GOV'T CODE § 6276.01 (West 2008); MICH. COMP. LAWS ANN. § 780.751 (West 2007).

229 CAL. PENAL CODE § 1202.4 (West 2004).

230 People v. Harvest, 101 Cal. Rptr. 2d 135, 137 (Cal. Ct. App. 2000).

231 *Id.*

232 *Id.*

233 *Id.*

resentencing.[234] Restitution is compensation, which does not involve an affirmative disability or restraint, and thus historically has not been regarded as punishment.[235] While victim restitution in the context of a criminal sentencing, of course, follows from a finding of "a criminal mind," this would not preclude a victim from obtaining essentially the same relief—a civil judgment for money—outside of the criminal process.[236]

Similarly, in another California case, a defendant pled guilty to auto theft.[237] He received a suspended sentence and probation, which included a condition of victim restitution.[238] The trial court ultimately revoked probation, ordered service of a previously imposed sentence of incarceration, and modified the sentencing order to require payment of restitution not paid during the term of the now revoked probation.[239] On appeal, the defendant argued that by modifying his sentence the court increased his punishment in violation of double jeopardy provisions.[240] The appellate court held that a sentencing court could modify a suspended sentence to impose restitution—even if that was not part of the original sentence—and that such an order did not "increase punishment" in violation of double jeopardy.[241] The clear legislative intent was that restitution be imposed in all cases unless "compelling and extraordinary reasons exist to the contrary."[242] No such reasons existed in this prosecution.[243]

At issue in *People v. Lyon* was an alleged conflict between a victim's right to restitution and a defendant's due process right to effective counsel.[244] In that case, a defendant found guilty of embezzlement was sentenced to five years in prison and was ordered to make victim restitution, including the victim's attorney fees.[245] The defendant appealed, arguing that paying attorney's fees as restitution would interfere with his right to prepare and present a defense; it would place an undue burden on counsel's efforts and obligation to provide effective

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234 *Id.* at 141. Doctrines of waiver, estoppel, and laches were irrelevant. *Id.* While estoppel may be invoked against the government, it will not defeat a strong public policy such as the constitutional mandate for victim restitution. *Harvest*, 101 Cal. Rptr. 2d at 142.

235 *Id.* at 140.

236 *Id.* at 138.

237 People v. Young, 45 Cal. Rptr. 2d 177, 178 (1995).

238 *Id.*

239 *Id.* at 178–79.

240 *Id.* at 179.

241 *Id.* at 182.

242 *Id.* at 179.

243 *Young*, 45 Cal. Rptr. 2d at 182.

244 People v. Lyon, 57 Cal. Rptr. 2d 415, 417 (1996).

245 *Id.* at 416.

representation.[246] Balancing interests, the court held that the order providing for payment of victims' legal expenses must be set aside.[247] Knowledge by defense counsel that the client, if convicted, could be charged with these costs would adversely affect the manner, extent, and degree of counsel's preparation, and thus "have a chilling effect on the exercise of [the defendant's] constitutional right[s]."[248]

The defendant's constitutional right to be free from *ex post facto* laws was at issue in *State v. Clark*.[249] *Clark* involved a victim's appeal from a criminal restitution order, an appeal in which neither the defendant nor the prosecution participated.[250] The trial court required payment for the therapy of a minor victim who had been sexually abused.[251] Since the defendant was also sentenced to prison, he had no means to pay those costs.[252] However, since the defendant—who was also a minor—had been adopted through DCFS, the minor victim requested that DCFS be ordered to pay the treatment costs.[253] The trial court declined to issue such an order, holding, *inter alia*, that allowing the appeal would be an *ex post facto* law punishing the *State*.[254]

B. The Right to be Notified of all Stages of the Judicial Process

The defendant's right to have the state honor a plea bargain was at issue in *State v. Means*.[255] A plea agreement was set aside after the prosecutor notified the court that he had not informed the victim before the hearing on the plea.[256] The defendant then entered into a second plea agreement with the State, but it was less favorable to him.[257] On appeal, the defendant argued that once an agreement is reached and the defendant pleads guilty "due process concerns . . . inhibit the ability of the prosecutor to withdraw from a guilty plea."[258] Prosecutors, he claimed, should not be able to circumvent a plea agreement where a defendant has voluntarily and knowingly waived his jury right, the right to counsel, and the right to cross-examine witnesses.[259] The court agreed,

246 *Id.* at 416–17.
247 *Id.* at 418.
248 *Id.* at 417.
249 State v. Clark, 251 P.3d 829, 833 (Utah 2011).
250 *Id.* at 831.
251 *Id.*
252 *Id.*
253 *Id.*
254 *See id.* (refusing to issue the order absent exceptions).
255 State v. Means, 926 A.2d 328, 333 (N.J. 2007).
256 *Id.* at 329.
257 *Id.* at 329, 331 (illustrating the first and second plea agreements).
258 *Id.* at 333.
259 *Id.*

concluding that while a trial court is obliged to protect a victims' right to notice, that right may not be used to impinge on a defendant's constitutional rights.[260] The lower court should have heard from the victims on the second plea agreement.[261] Had it done so, it would have been in a better position to decide whether to accept or reject the second agreement, and the second plea would have been sustained.[262]

Another interesting case, again presenting arguments of violations of double jeopardy but suggesting a superior judicial approach to accepting plea agreements, was *State v. Casey*, where a defendant charged with felony aggravated sexual abuse of a child had pled not guilty.[263] The prosecution offered to reduce the charges to a misdemeanor in exchange for a guilty plea.[264] The victim had previously told the prosecutor she did not want the charges reduced, but the prosecution never informed the court of her statement.[265] At the "change of plea hearing" the plea to the misdemeanor was accepted and the finding of guilty was entered.[266] After the victim asked to speak at sentencing on the misdemeanor the trial court briefly re-opened the plea, considered what the victim had said, and then re-affirmed and entered the prior plea agreement.[267] The appellate court held that a victim may deliver a request to be heard at a change of plea hearing, and that request must be conveyed to the court; nevertheless, here the trial court had remedied the violation by allowing the victim to speak at re-sentencing.[268] There was little if any delay or impediment in this prosecution.[269]

Double jeopardy claims were at issue again in *State v. Barrett*, where a defendant pled guilty to stalking.[270] He was sentenced without the

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260 *Id.* at 334.

261 *Means*, 926 A.2d at 335.

262 *Id.* at 335. *But see* Reed v. Becka, 511 S.E.2d 396, 400 (S.C. Ct. App. 1999) (disregarding victims input). The state moved to withdraw a plea *offer* made to a defendant. *Id*. at 398. The trial court denied the motion and both the state and the victim's parents appealed. *Id.* The defendant claimed he detrimentally relied on the proposed plea agreement but the victim argued that she was entitled to consult with the prosecutor and "be *informed* of any offers to plea bargain" *before* a plea is entered. *Id.* at 400 (emphasis added). The court held that victims do not have a right to *veto* a plea agreement and, in any event, that the state may withdraw a plea *offer* without victim consent. *Id*. That is, although victims must be *notified* of plea offers, that right does not extend to allowing them to reject a proposed offer or, for that matter, force a prosecutor to trial or back into negotiations. *Id.*

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

264 *Id.*

265 *Id.* at 758.

266 *Id.* at 758–59.

267 *Id.* at 758.

268 *Id.* at 767.

269 *Casey*, 44 P.3d at 762.

270 State v. Barrett, 255 P.3d 472, 476 (Or. 2011).

victim being notified of the hearing date.[271] The victim petitioned for re-sentencing because the Oregon Constitutional requirement that she be notified of and be present at sentencing hearings was not met.[272] However, the defendant claimed that resentencing would violate his double jeopardy rights.[273] The trial court recognized that the victim's constitutional rights had been violated, but found there was no remedy.[274] The Oregon Supreme Court ruled that the trial court *could* resentence as a remedy for the violation of victims' constitutional rights because criminal sentencing is "a ruling of a court" as opposed to a "conviction" or "adjudication."[275] Thus, vacating defendant's sentence and ordering a resentencing would not be inconsistent with the right to be free from double jeopardy.[276]

Similarly, in *Hoile v. State*, a victim was not notified of a hearing to reconsider the sentence of her assailant.[277] She sought to vacate the altered sentence on these grounds.[278] The trial court granted her request and the defendant appealed.[279] In Maryland, a victim may file an application for leave to appeal in criminal litigation, but she does not have a right to appeal unless the decision appealed from *substantially* affected her *direct* interests.[280] Here, the assault victim was held entitled to participate fully in briefing and oral argument because resolution of the appeal on the merits *would* affect her direct and substantial constitutional interests—her statutory rights to be notified, attend, and be heard at reconsideration hearings.[281] There was no impediment to the defendant's rights.[282]

In *Ex parte Littlefield*, the state's interest in preserving prosecutorial discretion was at stake.[283] Victims of white collar crimes petitioned for a *writ of mandamus* setting aside the guilty plea of a perpetrator with respect to offenses he committed against several victims because the

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271 *Id.*
272 *Id.*
273 *Id.*
274 *Id.* at 474.
275 *Id.* at 479.
276 *Barrett*, 255 P.3d at 481.
277 948 A.2d 30, 35 (Md. 2008).
278 *Id.* at 36.
279 *Id.*
280 *See id.* at 39 (interpreting Maryland's declaration of rights and State statutes).
281 *Id.* at 42. However, the victim was not entitled to relief in the case because the legislature had not permitted a victim to seek invalidation of an otherwise legal sentence merely because the victim's rights concerning imposition of that sentence had been violated. *Id.* at 52.
282 *Hoile*, 948 A.2d at 44–45.
283 *Ex parte* Littlefield, 540 S.E.2d 81, 84 (S.C. 2000).

petitioning victims, who were not involved in the instant plea, were not *heard* on the plea bargain that included only some of the victims.[284] The state argued that if the statutory rights of victims were interpreted to include every victim of a perpetrator—even those victims' cases not prosecuted or part of a plea agreement—prosecutors would suffer an enormous burden of notification.[285] Since the offenses against the petitioning victims were not included within the guilty plea agreement, the court held, they were not "victims" with rights to notice and attendance at the plea bargain hearing.[286] Prosecutorial discretion was sustained against an overly expansive view of the right to be heard.[287]

C. The Right to be Present at all Stages of the Judicial Process

The defendant's right to sequester or exclude witnesses before trial was at issue in *State v. Beltran-Felix*.[288] The prosecutor informed the court that the victim, who was to testify, wished to be present during the entire trial.[289] The defendant objected, but the court overruled the objection.[290] The victim remained in the courtroom throughout the trial and the jury returned a guilty verdict.[291] On appeal, the court held that a rape victim may remain in the courtroom throughout the trial, and that a defendant has no constitutional right to the exclusion or sequestration of witnesses unless, under particular circumstances—such as with a disruptive witness—the court finds that the victim's presence may deprive a defendant of a fair trial.[292]

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284 *Id.* at 84–85.

285 *Id.* at 85.

286 *Id.* at 86. *But see In re* Dean, 527 F.3d 391, 392 (5th Cir. 2008) (recognizing victims have the right to be a part of the plea agreement). The government told the court in an *ex parte* proceeding that it was going to sign a plea agreement with the defendant, and asserted that due to the number of victims, it would not be practicable to consult with them. *Id.* The government argued that notifying the victims would result in extensive media coverage, which would impair the plea negotiation process and possibly prejudice the case if no plea was reached. *Id.* Some of the victims objected to the plea agreement, but the court agreed with the government's argument, and directed the government to notify all the victims *after* the plea agreement had been finalized. *Id.* at 393. However, on appeal, the court reversed, and held that the CVRA gave victims the right to confer with prosecutors during the plea negotiation process, *before* a plea agreement was reached, and the number of victims did not render notice to, or conferring with, the victims to be impracticable. *Id.* at 394–95 (citations omitted).

287 *Ex parte* Littlefield, 540 S.E.2d 81, 87 (S.C. 2000).

288 State v. Beltran-Felix, 922 P.2d 30, 32 (Utah Ct. App. 1996).

289 *Id.*

290 *Id.*

291 *Id.*

292 *Id.* at 34.

In another case concerning the right to be present, *Morehart v. Barton*, a trial court granted the defendant's motion for an *ex parte* hearing, but excluded the prosecution and victim under a state procedural rule that authorizes their exclusion for certain matters.[293] The intent of the *ex parte* motion was to address the lack of return of summonses issued as part of defense counsel's pretrial investigation of mitigation evidence, a motion opposed by the victim who claimed a right to confidentiality.[294] The murdered victim's family argued that they were entitled to attend the hearing because defendant's counsel would be present.[295] The Arizona Supreme Court held that although victims may have "various rights to participate in court proceedings that are independent of the defendant's right to be present[,]" the family had no constitutional right to attend *ex parte* hearings concerning purely procedural matters—whether or not defense counsel will appear.[296] Thus, the court refused to expand the alleged scope of the victim's right under these circumstances.[297]

D. The Right to Offer Victim Impact Statements

In *State v. Muhammad*, a defendant argued that the "victim impact statute" violated the provision of the New Jersey Constitution that prohibited the infliction of cruel and unusual punishment.[298] Defendant argued that the admission of such statements in a capital case, would likely confuse and "impassion" the jury during sentencing, and thus the penalty decision would be made in an arbitrary and capricious manner, rather than on the basis of relevant evidence.[299] However, the State contended that this evidence was relevant because it illustrates each victim's uniqueness and the nature of the harm caused, and that deference should be given to the legislative judgment that victim impact evidence plays a proper role in sentencing.[300] The court agreed, finding that any such statement was not likely to be sufficiently overwhelming and confusing as to raise cruel and unusual punishment concerns.[301] Thus, the victim's right prevailed over a defendant's overly broad interpretation of the scope of his rights.[302]

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293 Morehart v. Barton, 250 P.3d 1139, 1140 (Ariz. 2011).
294 *Id.* at 1144.
295 *Id.*
296 *Id.* at 1145.
297 *Id.*
298 State v. Muhamad, 678 A.2d 164, 170 (N.J. 1996).
299 *Id.* at 171.
300 *Id.*
301 *Id.* at 175.
302 *Id.* at 182.

In another case concerning impact statements, *Kenna v. U.S. District Court for C.D. California*, two defendants plead guilty.[303] At the first defendant's sentencing more than sixty victims submitted *written* statements—and several spoke in open court—about the effects of the crimes.[304] At the second defendant's sentencing hearing, the district judge refused to hear the victims speak in person because he claimed that he heard them at the other defendant's sentencing and had re-reviewed all their statements.[305] Kenna, one of the victims, petitioned to reopen the sentence because he had not been heard, but the Defendant argued that a victim's right to be heard during sentencing was limited to *written* impact statements.[306]

The court concluded that "[v]ictims now have an indefeasible right to speak, similar to that of the defendant," which was violated when the victim was not allowed to speak at sentencing.[307] The district court contended that the *scope* of "[t]he right to be reasonably heard" lay within judicial discretion.[308] The Court of Appeals, however, interpreted the CVRA's right to be "reasonably heard" as the victims' *right to speak in open court*.[309] Thus, it would appear, some victims' rights are sufficiently important that, on rare occasion, their vindication may involve an impediment to an expeditious trial, but a reasonable extension of the sentencing phase after a fair trial.

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303 Kenna v. U.S. Dist. Ct. for C.D. Cal., 435 F.3d 1011, 1013 (9th Cir. 2006). On the other hand, the right of allocution exists only for those who may be defined as *proximate* "victims." *See, e.g.*, *In re* Antrobus, 519 F.3d 1123, 1125 (10th Cir. 2008) (determining whether plaintiffs' daughter is a "victim"). In that case, the accused pleaded guilty to the transfer of a handgun to a juvenile, who, after reaching the age of eighteen, shot several people at a shopping center. *Id.* at 1124. The parents of one of the shooting victims petitioned the court hearing *the transfer of the handgun offense* to recognize their daughter as a victim, enabling the parents of the deceased to be heard at the defendant's sentencing hearing following conviction of the transfer of handgun offense. *Id*. The Tenth Circuit Court of Appeals ruled that the *transfer of a handgun* was not *directly connected* to the death of their daughter. *Id.* at 1125.

304 *Kenna*, 435 F.3d at 1013.

305 *Id.*

306 *Id.*

307 *Id.* at 1016.

308 *Id.* at 1013. This judicial discretion is broad. *See, e.g.*, Sharp v. State, 908 S.W.2d 752, 757 (Mo. Ct. App. 1995) (holding that the more narrow language of the victims' rights statute did not bar a victim from testifying as to a specific sentencing recommendation because the trial court retained broad discretion under common law to receive any information it deemed relevant to the sentencing process).

309 *Kenna,* 435 F.3d at 1016.

E. The Right to Privacy and "Fair" Treatment

The victim's right to privacy was alleged to conflict with a defendant's right to Due Process in, among other cases, *State v. Gomez*.[310] In *Gomez,* the victim suffered eye damage after being attacked by the defendant and was evaluated by his own doctor, who made a diagnosis.[311] The trial court ordered that he also be examined non-invasively by a doctor chosen by the defense before trial would proceed.[312] The victim appealed, alleging that the order violated his right to be "treated with fairness, compassion and respect by the criminal justice system."[313] The appellate court held that "a trial court may exercise its inherent authority" in this way.[314] However, in an effort to effectively balance the victim's right to privacy with the defendant's right to a fair trial, the appellate court ruled that there must first be a showing of a compelling need for the examination—that, for example, comparable evidence is not available through another source—and that the benefit to the defendant "*clearly outweighs*" the hardship or inconvenience to the victim.[315]

In a similar situation, also evincing judicial readiness to "fairly" balance competing interests, a victim with cerebral palsy and developmental delays was molested by her father.[316] He was convicted of "sexual conduct with a minor."[317] During the sentencing phase, the

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[310] State v. Gomez, 62 A.3d 933, 935 (N.J. Super. Ct. App. Div. 2013). *See e.g.*, Day v. Superior Court, 823 P.2d 82, 83–84 (Ariz. Ct. App. 1991) (sustaining the denial of a theft defendant's motion for deposition of the victim, based on the Arizona Constitution's Victim's Bill of Rights, which precludes the trial court from ordering the deposition of a victim who has indicated an unwillingness to be interviewed by the defense, despite the rule of criminal procedure that permits a trial judge to exercise discretion to order the deposition of a material witness in certain circumstances); State v. O'Neil, 836 P.2d 393, 394–95 (Ariz. Ct. App. 1991) (concluding that the lower court's order for the state to record all statements made by the victims to the prosecutor and provide defense counsel with copies of the transcripts would enable the defendant to make an end run around the constitutional right conferred on victims to refuse any discovery requests by, in essence, permitting the defendant to obtain an interview of the victims). *But see* State v. Blackmon, 908 P.2d 10, 12 (Ariz. Ct. App. 1995) (finding that the defendant had the right to cross-examine the victim at her "victim impact statement" because the Victim's Bill of Rights did not abolish the pre-existing rule that the defendant had a due process right to question victims who testified at pre-sentence hearings).

[311] *Gomez*, 62 A.3d at 934–35.

[312] *Id.* at 935.

[313] *Id.* at 939.

[314] *Id.* at 940.

[315] *Id.* at 939 (emphasis added).

[316] *See* P.M. v. Gould, 136 P.3d 223, 225, 231 (Ariz. Ct. App. 2006) (demonstrating that the trial court has the best opportunity to balance the interests of the parties).

[317] *Id.* at 225.

state informed the court that it intended to call the victim's counselor as a witness to prove the aggravating factor of emotional harm.[318] The defendant subpoenaed the counseling records to prepare for cross-examination of the counselor, and the trial court ordered an *in camera* review of the records.[319] The victim appealed, seeking to protect her privacy by preventing production of those records.[320] The appellate court held that the defendant had a right to information "essential to the preparation of a defense," and that where the victim's counselor-patient privilege is at odds with the defendant's due process right, "the defendant's due process right is the 'superior right.'"[321] As suggested in *Gomez*, however, the lower court should first determine whether the records were *essential* to the state's efforts. The appellate court found that they were not.[322] The state already had proof of *six* aggravating factors, yet only *one* was needed for an "aggravated" sentence.[323] Therefore, the victim's privacy was preserved without interference with defendant's due process rights or prosecutorial discretion.

A victim's right to privacy was alleged to interfere with a defendant's right to appellate review in *State v. Bray*.[324] After his conviction for rape and other related offenses, the defendant filed a motion seeking to preserve the victim's computer hard drive in the record under seal for purposes of appellate review.[325] The victim claimed that this would violate her statutory right to "refuse . . . [a] discovery request by the criminal defendant."[326] The trial court granted the defendant's motion, however, and the victim filed an interlocutory appeal.[327] The appellate court maintained the defendant's due process rights by holding, *inter alia*, that the order to place the victim's hard drive under seal to protect defendant's appellate rights did *not* constitute "compelled discovery" in violation of the victim's right to refuse discovery because:

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318 *Id.*

319 *Id.* at 225–26.

320 *Id.* at 225.

321 *Id.* at 226.

322 *Gould*, 136 P.3d at 231.

323 *Id.* at 230. Further, even if the trial court found that the state's interest in calling the *counselor* was compelling, it should have then considered whether the *records* were really necessary for cross-examination. *Id.* at 232.

324 *See* State v. Bray, 291 P.3d 727, 730 (Or. 2012) (discussing how the victim's right to privacy conflicted with the defendant's right to appellate review).

325 *Id.*

326 *Id.* at 733.

327 *Id.* at 731.

> [T]he issue at this stage of the case . . . is not whether defendant was entitled to have the cloned hard drive produced before or during trial. The victim has already won that point: The trial court refused to give defendant access to the hard drive. . . . [T]he trial court ordered only that the victim deliver an existing hard drive clone so that it could be placed under seal in the trial court file. . . . [T]he trial court order does not require the disclosure of any information relating to the litigation to anyone. Regardless of what the exact boundaries of "discovery" may be . . . defendant's request . . . for purposes of appellate review, and the trial court's order allowing that request, [does] not qualify.[328]

There is also a decision in which a victim's right to privacy has been alleged to interfere with a defendant's right to confront witnesses under the Sixth Amendment. A defendant filed a motion in *State v. Gilchrist* "for an order directing the prosecutor to provide the defense with a photograph" of the victim to allow him to cross-examine her.[329] The victim argued that this would violate her right to be "treated with fairness, compassion[,] and respect by the criminal justice system."[330] The court held that the victim did not have to provide the photograph because the defendant failed to show how it was relevant to his claim of innocence, and that any possible benefit to the defendant was outweighed by the victim's right to privacy, fairness, and respect.[331]

F. The Right to be Heard on Appeal

Exercise of this right, may conflict with prosecutorial discretion regarding such decisions. In *State v. Bradley,* for example, a victim filed criminal complaints against two individuals.[332] The prosecutor filed a complaint against one, but refused to pursue the other for lack of probable cause.[333] The victim moved to reverse this decision.[334] The court found that the victim had no standing to do so because he was not a "prosecuting attorney" as required by the appellate court rules.[335] The victim argued on appeal that New Jersey law does not prevent a private

328 *Id.*
329 State v. Gilchrist, 885 A.2d 29, 31 (N.J. Super. Ct. App. Div. 2005).
330 *Id.* at 34–35.
331 *Id.* at 35.
332 State v. Bradley, 19 A.3d 479, 480 (N.J. Super. Ct. App. Div. 2011).
333 *Id.*
334 *Id.*
335 *Id.*

litigant from *initiating* proceedings by filing complaints and, at that stage, there is no need for a "prosecuting attorney."[336] The State countered that the sound "public policy behind the limitation on who may act as a 'prosecuting attorney' is well-established."[337] In addition, "[u]nlike private citizens, prosecutors are . . . governed by the Rules of Professional Conduct[,] and their decisions are calculated] to ensure fairness in the process."[338] The appellate court agreed, ruling that it is a matter of prosecutorial discretion as to whether it's in the public's interest to appeal, and a victim cannot appeal an exercise of prosecutorial discretion.[339] This is a typical situation in which prosecutors have not been "swayed,"—did not deviate from their ethical duty—as a result of a victim's participation in the process.

In conclusion, given the decisions reviewed in this section—involving as they do the resolution of actual disputes or conflicts between victims seeking enforcement of rights, and assertions of defendants' rights or claims of prosecutorial discretion—it is fair to conclude that state courts have no difficulty in fairly and expeditiously balancing the interests of all participants in resolving these disputes over the extent of victims' rights. There is no indication in this precedent that efforts to enforce victims' rights have interfered in any significant way with the expeditious and fair administration of criminal justice.

VII. ANALYSIS

The 1970s witnessed a social movement focused on the status of crime victims in the criminal justice system. It was described as "one of the most successful civil liberties movements of recent times."[340] The "movement" flowed in part from academic studies indicating the negative effects of crime on victims and their dissatisfaction with the criminal justice system, both of which directly impacted the willingness

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336 *Id.* at 481.

337 *Id.*

338 *Bradley*, 19 A.3d at 481. *See, e.g.*, Taliaferro v. Locke, 6 Cal. Rptr. 813, 816 (1960) (noting that the prosecutor is bound by the law and professional ethics controlling all counsel). These decisions go beyond safety and redress for an individual victim; they involve "the complex considerations necessary for the effective and efficient administration of law enforcement." People v. Keenan, 758 P.2d 1081, 1098 (Cal. 1988) (quoting People v. Heskett, 30 Cal. 3d 841, 860 (1982)).

339 *Bradley*, 19 A.3d at 482. *See, e.g.*, Reed v. Becka, 511 S.E.2d 396, 400 (S.C. Ct. App. 1999) (holding that a victim did not have the right to veto a plea agreement and force a prosecutor to trial or back into negotiations; the prosecutor has unfettered discretion in this regard).

340 Boland & Butler, *supra* note 51, at 5 (quoting John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victims Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 691 (2002)).

of victims to report crimes and cooperate in their prosecution.[341] As a result, after overwhelming public and legislative support, the Illinois Constitution was amended in 1993 to provide a substantial list of victims' rights.[342] This was followed by legislation executing that constitutional provision.[343]

However, the *enforcement* of victims' rights in most states, including Illinois, was delegated solely to prosecutors, who have often failed—or at least are thought by victims to have failed—in their statutory duty of enforcement due to inadvertent nonfeasance or, occasionally, "erroneous" exercises of prosecutorial discretion.[344] Yet, regardless of

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[341] *See* Davis, *supra* note 49 (analyzing the history of the criminal justice system).

[342] *See* ILL. CONST. art. 1, § 8.1(a) (enumerating the rights for crime victims). Article I, Section 8.1(a) of the Illinois Constitution guarantees crime victims ten basic rights "as provided by law":

> (1) The right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process. (2) The right to notification of court proceedings. (3) The right to communicate with the prosecution. (4) The right to make a statement to the court at sentencing. (5) The right to information about the conviction, sentence, imprisonment, and release of the accused. (6) The right to timely disposition of the case following the arrest of the accused. (7) The right to be reasonably protected from the accused throughout the criminal justice process. (8) 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. (9) The right to have present at all court proceedings, subject to the rules of evidence, an advocate or other support person of the victim's choice. (10) The right to restitution.

Id. The Illinois Constitution also provides that "[t]he General Assembly may provide by law for the enforcement of this section." *Id*.; *see* Parness et al., *supra* note 3, at 73–74 (stating the House approved a unanimous vote, and the public passed the amendment with a three-fourths vote).

[343] *See supra* note 6 (describing the enacted legislation).

[344] *See supra* note 17 (describing the failure of the prosecutors in fulfilling their duty of enforcement); 725 ILL. COMP. STAT. 120/4.5(a)–(b) (2010) (delegating the rights to the state's attorney); *see also* 725 ILL. COMP. STAT. 120/9 (setting out the scope of the Act). The Act states:

> This Act does not limit any rights or responsibilities otherwise enjoyed by or imposed upon victims or witnesses of violent crime, nor does it grant any person a cause of action for damages or attorneys fees. Any act of omission or commission by any [person or entity] acting in good faith in rendering crime victim's assistance or otherwise enforcing this Act shall not impose civil liability upon the individual or entity or his or her supervisor or employer. Nothing in this Act shall create a basis for vacating a conviction or a ground for appellate relief in any criminal case. Failure of the crime victim to receive notice as required, however, shall not deprive the court of the power to act regarding the

whether or not prosecutors conform to their statutory duty, many issues will inevitably arise during a criminal prosecution where a victim will have important concerns regarding the way her statutory rights have been implemented or protected.[345] Victims' interests may or may not coincide with those of prosecutors or defendants.[346] In these situations, victims should at least have standing to request judicial assistance in resolving these perceived conflicts.

The legal justification for allowing victim standing can be found, first, through reasonable statutory interpretation of existing victims' rights provisions.[347] Second, by analogy to the persuasive jurisprudence

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> proceeding before it; nor shall any such failure grant the defendant the right to seek a continuance.

Id.

[345] *See, e.g.*, Gina Warren, *Due Process – Prosecutorial Implications of a Victim's Right to be Heard: Court Upholds Victim's Right to be Heard at Important Justice Hearings:* State v. Casey, 44 P.3d 756 (Utah 2002), 34 RUTGERS L.J. 1173, 1184–85 (noting the importance in protecting the defendant's due process and liberty rights).

[346] *See, e.g.*, William T. Pizzi, *Victims' Rights: Rethinking our "Adversary System,"* 1999 UTAH L. REV. 349, 349 (1999) ("The Victims' Rights Amendment carries with it formal acknowledgment that victims of violent crime have a stake in the trial that is different from that of the general public or even the prosecutor."). Even where the interests of the state and the victim *are* consistent in a given case, the legislature should still consider enacting a requirement that prosecutors file forms in court files evidencing compliance with their statutory duties and verifying that victims' rights have been noticed or respected. *See, e.g.*, UNIF. TRIAL CT. RULES 31–40 (2010), *available at* http://courts.oregon.gov/OJD/docs/programs/utcr/2010_UTCR.pdf, *archived at* http://perma.cc/C4CY-WBRC (describing the prosecuting attorney's notification of compliance with crime victims' constitutional rights for adults and delinquents). In addition, it might be fruitful to enact by legislation proof of notice forms, template pleadings and orders for use in requesting and granting victim intervention.

[347] This is the case due to the rules of statutory construction in Illinois. *See supra* Part III (implying victim standing to assert and vindicate their unenforced rights as a matter of statutory interpretation). For example, the Illinois statute, like others, expressly requires that victims have "[t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process." 725 ILL. COMP. STAT. 120/4(a)(1) (2010). In New Jersey, the court found that this same overarching right in its constitution implied standing to vindicate denial of other individually expressed rights, at least in the absence of interference with the rights of the state or the defendant. *See, e.g.*, *In re* the Interest of K.P., 709 A.2d 315, 320 (N.J. Super. Ct. Ch. Div. 1997) (discussing the legislative intent regarding victim's rights). The court stated:

> It is difficult for the court to imagine that the Legislature intended to give victims these expansive rights, yet specifically intended that they should not be a factor for a court to consider when there is compelling evidence that a detrimental effect upon a victim will occur if the court ignored their request. The State contends that the Legislature specifically identified victims to be considered an interested party with standing to open a proceeding, and, therefore, the court should determine that the ability to open suggests standing to close. The court agrees. The court finds that the legislative intent is more in line with

in other jurisdictions that have *not* expressly granted victim standing as a matter of law, but where standing has been implied.[348] Finally, victim standing seems unproblematic given positive judicial experience with *existing* "victim standing" provisions in a significant number of other states and under federal law.[349] While arguments have been advanced about the potential negative impact of victim intervention—or, more accurately, victim "participation"—on both defendants' constitutional rights and prosecutorial discretion, most of these arguments flow from a misguided sense of the effect of "victim standing" provisions.[350] There had been a misperception that these provisions would create an additional "party" in criminal proceedings, one capable of impeding the criminal process by making it more complex or time-consuming, or of interfering with defendants' constitutional rights.

In fact, victims' standing to vindicate or protect their own rights—or at least their conception of those rights—has been shown in *practice* to be closely *limited* to that purpose, and there is generally no significant interference with or impediment to prosecutorial discretion or the defendant's due process rights.[351] The victim's standing is often based on the implied or expressed purposes of victims' rights laws and practically all potential conflicts over assertions of these rights—either in those states with or without victim standing as a matter of positive law—and has been rationally and expeditiously resolved by criminal trial courts.[352] There is no reason to believe this will not also be the case in Illinois.

Consequently, legislative and political efforts were made to amend the Illinois Constitution specifically to provide crime victims with

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> considering the victim's position as opposed to ignoring it. The court finds a victim is a constructive equivalent to a party in the case.

Id. The same reasoning would support a similar interpretation of the victims' rights laws of Illinois.

348 *See supra* Part V (interpreting the implied standing in states without express victim standing provisions).

349 *See supra* Part V (discussing the complication with the defendants' right to a speedy trial and victims contesting violations of their rights).

350 *See supra* notes 5, 17–21 and accompanying text (analyzing the arguments over victim intervention). It should also be noted that the important principle of prosecutorial discretion should not be extended to include discretion regarding a statutory *duty* to enforce a victim's statutory rights, especially where a victim continues to be vulnerable to further violence. *See* Kathryn E. Litchman, *Punishing the Protectors: The Illinois Domestic Violence Act Remedy for Victims of Domestic Violence Against Police Misconduct*, 38 LOY. U. CHI. L.J. 765, 772–74 (2007) (noting that the recidivism rate of domestic abuse is particularly high but quantifying the prevalence is difficult).

351 *See supra* Parts V–VI (contrasting between states that allow and disallow victim standing provisions).

352 *See supra* Part IV (providing the jurisprudence on victim standing).

standing to participate in criminal prosecutions for the limited purpose of protecting their statutory rights.[353] Fortunately, although passage of such a constitutional amendatory act was thwarted in the last Illinois legislative session, the legislature was committed to enacting victim standing.[354] The amendatory bill was again introduced in March of 2014, and passed as a joint resolution on May 30, 2014.[355] It seeks to allow crime victims to be participants in the process, rather than merely to have a voice in the criminal proceedings.[356] This action was thought necessary, of course, because state courts generally hold that victims, not being "parties" to criminal prosecutions, do not automatically have standing to intervene to challenge denied rights or interests.[357] Yet, inevitably, there continue to be perceived conflicts between the asserted scopes of statutory rights asserted by victims and exercises of prosecutorial discretion or demands for protection of a defendant's due process rights.

Separate causes of action for injunctive relief under these circumstances, a legislatively suggested alternative, would be an inefficient and ineffective remedy for violations of crime victims' rights.

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353 *See, e.g.*, Amendment, *supra* note 7 (describing the house resolution proposing an amendment to the Illinois Constitution to give more rights to crime victims).

354 *See supra* notes 17–21 and accompanying text (raising concerns about offering victims a role in the traditional two-party criminal justice process); Weinhold, *supra* note 1, at 1. The pending amendment would, *inter alia,* add the following section to the original constitutional list of rights: "(b) *A victim, the victim's lawyer, or* the prosecuting attorney may assert the rights enumerated in subsection (a) in any court with jurisdiction over the case as a matter of right. The court shall act promptly on the request." Amendment, *supra* note 7 (emphasis added); *see also Illinois Victims' Rights Amendment Stalls after Sudden Turnaround in Legislative Support*, *supra* note 8 (noting that the committee killed the bill before the deadline).

355 *See* H.R.J. Res. No. 103, 98th Gen. Assemb., Reg. Sess. (Ill. 2014), *available at* http://www.ilga.gov/legislation/BillStatus.asp?DocNum=103&GAID=12&DocTypeID=HJR&LegId=82477&SessionID=85&GA=98, *archived at* http://perma.cc/WP2D-QX24 (describing that the bill was adopted by both houses on May 30, 2014).

356 *See* Boland & Butler, *supra* note 51, at 9 (addressing the victim's role in the criminal justice process).

357 *See, e.g.*, Dix v. Superior Court, 807 P.2d 1063, 1067 (Cal. 1991) (holding that crime victims do not have the right to appeal the sentence imposed); Cooper v. District Court, 133 P.3d 692, 696 (Alaska Ct. App. 2006) (rejecting various arguments that victim had standing to seek appellate review of sentencing error and her right to have part of a sentencing hearing sealed); Lamb v. Kontgias, 901 A.2d 860, 869 (Md. Ct. Spec. App. 2006) (holding victim was not party to criminal prosecution and did not have standing to appeal lack of notice and opportunity to speak at hearing to reconsider sentence); *In re* State *ex rel.* Sistrunk, 142 S.W.3d 497, 502 (Tex. Ct. App. 2004) (holding victim's family had no standing to challenge defendant's sentence or procedures at sentencing hearing); Commonwealth v. Malloy, 450 A.2d 689, 694 (Pa. Super. Ct. 1982) (holding that the criminal victim was not a party to the criminal prosecution and did not have standing to appeal the decision dismissing complaint).

This is, no doubt, why few, if any, independent or separate actions of this sort have been filed since the effective date of the victims' rights provisions in Illinois. The most *effective* remedy for denied victims' rights—and for resolving such conflicts—is direct, limited victim participation. That is, crime victims, when necessary, should be able to assert their statutory rights by moving directly and immediately for specific relief as part of and during the criminal prosecution. It would be odd to conclude that victims should in any way be denied this ability to seek such relief in this most efficient and effective manner. The courts, after all, have the power to prevent a miscarriage of justice, they are the guardian of rights, and thus requests for standing to obtain relief are "in *pari materia* with the fundamental right [victims' constitutional right in most states,] to be treated with fairness, compassion, and respect by the criminal justice system."[358]

Those latter phrases have been held to make a victim a *constructive* equivalent to a party in the case, and may seem to modify the traditional state-defendant paradigm, but they "participate" only for the *limited purposes* of vindicating victims' statutory rights.[359] To administer criminal justice otherwise would change victims' constitutional and statutory rights into a nullity.[360] Thus, it was quite appropriate for the Illinois voters to ratify the recent constitutional amendatory bill granting victims standing for the purpose of enforcing their rights.

VIII. CONCLUSION

Illinois courts are already free to use their inherent equitable power to enforce the rights of victims by allowing victims standing to directly petition for vindication of denied rights during prosecutions. In the alternative—perhaps because the judiciary has been reluctant to make such implications in the absence of legislative support, and because

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358 *In re* Interest of K.P., 709 A.2d 315, 321 (N.J. Super. Ct. Ch. Div. 1997).

359 *See* 725 ILL. COMP. STAT. 120/4.5(b)(9) (2010) (implicating the requirements of the prosecutor). The statute provides that the prosecutor:

> [S]hall inform the victim of the right to have present at all court proceedings, subject to the rules of evidence, an advocate or other support person of the victim's choice, and *the right to retain an attorney,* at the victim's own expense, who, upon written notice filed with the clerk of the court and State's Attorney, is to receive copies of all notices, motions and court orders filed thereafter in the case, in the same *manner as if the victim were a named party in the case*[.]

Id. (emphasis added).

360 *See id* (enumerating the victims' constitutional rights). Specifically, if the New Jersey Constitution cannot be construed to grant standing to victims then the constitutional amendment lacks meaning: "the people of New Jersey amended their constitution to grant the Legislature power *it already* possessed." *In re Interest of K.P.*, 709 A.2d at 324.

authority in other states supports the efficacy of such an amendment—the Illinois voters wisely ratified a constitutional "victims' standing amendment" accomplishing the same goal as judicial implication. The legislature has indicated its inclination to do so in the past, and, given the continuing dissatisfaction on the part of crime victims with the extent of their current participation in the criminal process, it was wise to finally enact and have ratified such an amendment.[361] The Illinois judiciary, as has been shown through precedent in other states with victim standing, should be more than capable of guarding against any possible "impediments" to defendant's rights or prosecutorial discretion. Further, given the ongoing possibility of prosecutorial nonfeasance—especially given expanding caseloads—independent victim standing is necessary to guarantee victims' rights.[362] The Illinois legislature and voters exercised good judgment in passing the Victims' Standing Constitutional Amendment.

[361] *See supra* notes 40–62 with accompanying text (describing the dissatisfaction of the crime victims).

[362] *See supra* notes 17–21, 42 with accompanying text (describing the crime victims' participation in the criminal process).