“The Good, The Bad, And The Ugly:”
Arizona’s Courts and the Crime Victim’s Bill of Rights

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I. INTRODUCTION

Arizona has always enjoyed a reputation as a “pioneer” state. A little over ten years ago, a majority of Arizona’s voters reclaimed a little of Arizona’s pioneer spirit by approving a proposed amendment to the Arizona state constitution to provide Arizona’s crime victims with specific procedural and substantive rights. Arizona thus became one of only six states across the United States that, by 1990, had amended their state constitutions to provide crime victims with

1 Associate Mohr, Hackett, Pederson, Blakley & Randolph, P.C., Phoenix, Arizona; J.D. & M.B.A., Arizona State University 2001; B.A., University of Virginia 1992. I gratefully acknowledge Arizona Voice For Crime Victims, Inc., an Arizona not-for-profit organization dedicated to promoting and protecting the interests of crime victims, for its sponsorship of my work on this article. Special acknowledgment is also due to Mr. Steve Twist, a primary author of Arizona's Crime Victim's Bill of Rights and one of the authors of the soon-to-be-proposed Crime Victim's Rights Amendment to the U.S. Constitution, for his invaluable input. As always, I dedicate this article to my parents, Carrington and Louise Harrison; my grandparents, Franklin and Harriet Schwarzer; and to my wonderful wife, Beatrix Morgan Harrison. Their love and support make all things possible.

2 A similar view was apparently shared by former United States Supreme Court Associate Justice William O. Douglas in an address he delivered to the Pima County Bar Association on October 25, 1960. See William O. Douglas, “Arizona's New Judicial Article,” 2 Ariz. L.Rev. 159, 159 (1960) (explaining that Arizona, as a state, has often been an innovator).


4 See Editorial, “It Isn't All Bad,” Ariz. Republic, Nov. 13, 1990, at A12, available in 1990 WL 3736023 (explaining that Arizona has proven, with the passage of the Victims' Bill of Rights . . . that some election results are
such rights.\textsuperscript{5} Arizona’s “Victim’s Bill of Rights” became effective on November 27, 1990, and for the last ten years, the “VBR,” as it has come to be known, has given Arizona’s crime victims a much-needed participatory role in the criminal justice process.

Unfortunately for Arizona’s crime victims, Arizona’s upper-level courts have not always permitted the VBR to achieve all that its designers and supporters intended. In many respects, Arizona’s upper-level courts have both interpreted and applied the VBR consistent with the intent behind it, thus achieving important results for crime victims. For this, Arizona’s jurists rightly deserve praise. In other respects, however, Arizona’s jurists should expect some constructive criticism. Several of the results that the VBR was intended to achieve have not yet been fully achieved, and in some respects, Arizona’s upper-level courts have even taken steps to severely limit or eliminate the VBR’s ability to achieve results. Thus, the cases that have interpreted and applied the VBR to date can be generally grouped into three general categories: the “Good,” in which Arizona’s upper-level courts have permitted the VBR to achieve what it was intended to

\textsuperscript{5} This assertion was also shared by Mr. Justice Douglas, who commented that, in being an innovator, Arizona has often trod a lonely path. Douglas, 2 Ariz. L.Rev. at 159. The only other states trodding the lonely path of establishing rights for crime victims in the criminal justice process as of 1990 were: California (since 1982), Rhode Island (since 1986), Florida (since 1988), Michigan (also since 1988), and Washington (since 1989). See <http://www.nvcan.org/stvras.html> (Visited Sept. 24, 2000).
achieve for Arizona’s crime victims; the “Bad,” in which Arizona’s upper-level courts have been slow or reluctant to realize the full extent of the rights secured for crime victims by the VBR; and the “Ugly,” in which Arizona’s highest court relied upon a dubious interpretation of its own power as a basis for refusing to apply the VBR in a manner consistent with its underlying intent.

This Article is intended to inform Arizona’s citizens, legislators, and the members of the legal community about the current status of crime victim’s rights in Arizona jurisprudence. It begins by examining the VBR’s substantive provisions and explaining what they were intended to achieve for crime victims. Next, it categorizes and briefly examines several key cases that have interpreted and applied the VBR over the last ten years, and praises or critiques their holdings based upon their reasoning and whether or not the result achieved was consistent or inconsistent with the original goals of the VBR’s provisions. It concludes by providing Arizona’s citizens, legislators, and jurists with suggestions as to how they might improve the implementation and application of the provisions of the VBR in the years to come.

II. THE CRIME VICTIM’S BILL OF RIGHTS IN ARIZONA:
A BRIEF OVERVIEW OF THE RIGHTS IT GUARANTEES AND HOW IT SECURES THEM.

At its core the VBR acknowledges the deceptively simple proposition that when a crime is committed, it is committed not only to the detriment of the overall law-and-order of the “state” that protects and benefits every citizen, but also to the detriment of specific individual victims.
Historical tradition notwithstanding, the proposition that crime victims have a stake in criminal prosecutions has been acknowledged only recently in America’s and Arizona’s jurisprudence. Before the VBR became law in Arizona, victims were largely viewed by the criminal justice process as they had been for the past century and a half in other jurisdictions across the United States: as little more than the unfortunate by-products of criminal activity. Once a crime had been committed, a victim’s role in the typical criminal prosecution—if the victim would play any role at all—was to serve solely as a witness for the prosecution. Aside from this limited role, Arizona’s victims had no right of access to the criminal justice system. As one commentator put it, they were basically “pushed aside, forgotten, ignored, [and] diminished by a [criminal justice] system too skewed in favor of the accused.”

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6 See, e.g., Sue Anna Moss Cellini, “The Proposed Victims’ Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim,” 14 Ariz. J. Int’l & Comp. L. 839, 841-45 (1997) (explaining that before the American Revolution, crime victims played an integral role in criminal prosecutions, and that crime victims continue to play such a role in the criminal justice systems of other developed countries).


8 Of course, this meant that victims had to face interrogations by criminal defense attorneys interrogations which, too often, seemed to place the victim on trial instead of the accused in an unashamedly blatant effort to generate sympathy for the perpetrator. See Editorial, “It Isn’t All Bad,” Ariz. Republic, Nov. 13, 1990, at A12, available in 1990 WL 3736023.

9 See id. (asserting that before the VBR became law, Arizona victims were denied access to all court proceedings, including motions, jury selection, opening statements and testimony of all other witnesses).

10 Id.
The VBR was designed to change that by making the criminal justice process in Arizona inclusive for victims and responsive to their need to see justice done.\footnote{See \textit{Randy Kull, “House OK's a Victim's Rights Bill,” Ariz. Republic}, April 10, 1991, at B1, \textit{available in} 1991 WL 5987157.} It did this by empowering victims with their own due process rights in criminal prosecutions—rights which, if ignored or violated, would render certain stages constitutionally defective and subject to repetition.\footnote{See, \textit{e.g.}, \textit{State v. Arizona Bd. of Pardons \\& Paroles}, 875 P.2d 824, 830-832 (App. 1994) (fact that crime victim was never informed of her constitutional right under VBR to request notice of and to participate in post-conviction release proceedings violated her rights and rendered proceedings fatally defective).} It has thus been said that the VBR grants crime victims a mandatory participatory voice in Arizona’s criminal justice system.\footnote{See Wendy L. Marshall, “Justice In Arizona,” \textit{Ariz. Republic}, Dec. 6, 1992, at C1, \textit{available in} 1992 WL 8302455 (explaining that the VBR gives crime victims a constitutionally mandated voice in the justice system).}

Generally, the VBR consists of four classes of rights: (1) the right to for the victim to receive restitution from the person or persons who committed the crime;\footnote{See \textit{Ariz. Const. art. 2, } 2.1(A)(8).} (2) rights that allow a victim to participate in, contribute information to, and draw information from a criminal prosecution;\footnote{See \textit{Ariz. Const. art. 2, “2.1(A)(2), (A)(3), (A)(4), (A)(6), (A)(7), (A)(9), (A)(12).}} (3) rights that protect victims from harassment and abuse during or after a criminal prosecution; and (4) rights which ostensibly permit the legislature to act on behalf of crime victims
so that the rights secured by the VBR may be preserved. These rights, as generally described within the language of the VBR, have been supplemented with statutes in titles 8 and 13 of the Arizona Revised Statutes which were enacted as a part of the Victim’s Rights Implementation Act in 1991 and a similar 1995 act concerning crime victims’ rights for juveniles. These statutes enumerate specific requirements regarding how a victim’s rights are to be recognized within a criminal prosecution. Since the VBR became law in 1990, Arizona’s upper-level courts have further supplemented the VBR itself and its implementing statutes with decisions rendered in approximately thirty VBR cases. I will now discuss whether Arizona’s upper-level courts have helped or hindered the ability of the VBR to adequately preserve and promote the interests of crime victims by examining several of these cases.


The cases involving the VBR that have come before Arizona’s upper-level courts can be grouped into three general categories: the “Good,” in which Arizona’s upper-level courts have permitted the VBR to achieve what it was intended to achieve for Arizona’s crime victims.


without any significant delay; the “Bad,” in which Arizona’s upper-level courts have been slow or reluctant to realize the full extent of the rights secured by the VBR; and the “Ugly,” in which Arizona’s upper-level courts have flatly refused to interpret and apply the VBR in a manner consistent with the original intent behind its adoption.

A. The “Good”

Thankfully, Arizona’s courts have rendered numerous decisions that have either improved or enhanced the rights of crime victims in the criminal justice process. However, the most significant gains have been made in defining the substance and scope of the due process rights of crime victims as created by the VBR, preserving a crime victim’s right to receive restitution, and

19 See, e.g., State v. O’Neil, 836 P.2d 393, 395 (Ariz. App. 1991) (finding that appellate court could infer, from language of VBR granting victims the right to confer with prosecutors, that such conferences be conducted in an atmosphere that is unconstrained, certainly not intimidating, and one that encourages a victim to speak freely, and concluding that the trial court order that all such communications be recorded and made available to criminal defendants would substantially infringe upon this right and could not be sustained); State v. Riggs, 942 P.2d 1159, 1163 (1997) (where nothing in the record indicated that the reason for a victim's refusal to participate in pretrial proceedings or procedures was anything other than the fact that he or she had a constitutional right to so refuse, and the defendant failed to show that the victim refused the interviews for a reason or in a manner bearing on his or her credibility, a court will presume that he or she refused the interview solely because he or she had a constitutional right to do so; thus, because defendants failed to make any such showing, the trial courts' limitations on defendants' cross-examinations did not violate defendants' constitutional rights to confront adverse witnesses, to cross-examine, or to present a defense); Knapp v. Martone, 823 P.2d 685, 686 (1992) (Arizona courts must follow and apply the plain language of the VBR, and do not have authority to create ad-hoc exceptions to VBR provisions); State ex rel. Dean v. City of Tucson, 844 P.2d 1165, 1166 (Ariz. App. 1992); State ex rel. Romley v. Superior Court, 836 P.2d 445,451-52 (App. 1992) (If medical records have not been made available to the prosecution (or any agent of the state such as law enforcement officers), then victim has the right to refuse defendant's discovery request under the VBR); State ex rel. Romley v. Superior Court, 909 P.2d 476 (App. 1995) (where defendant only damaged an individual's car, rather than the individual personally, the crime of DUI was nonetheless committed against that individual, and, the definition of "criminal offense" as conduct giving rise to a felony or misdemeanor involving "the threat of physical injury" required court to conclude that defendant's actions constituted a criminal offense threatening individual with physical injury; thus, individual fell within the plain language defining "victim" as "a person against whom the criminal offense [was] committed," because he was the "victim" of
recognizing the victim’s right to introduce evidence to show how he or she has been impacted by
the criminal activity of a defendant.

1. Contreras: Making restitution a crime victim’s absolute right

Out of all of the VBR’s constitutional guarantees, Arizona’s jurists have expressed their
strongest support for the VBR’s requirement of restitution for crime victims. No case exemplifies
this strong support better than State v. Contreras,20 decided in 1994 by Division One of the
Arizona Court of Appeals.

In Contreras, the court took the opportunity to interpret the impact of the VBR on a
crime victim’s eligibility to receive restitution from the person or persons convicted of the criminal
conduct that caused the victims’ losses. Before the VBR became a part of Arizona’s constitution,
crime victims had a statutory right to receive restitution.21 However, it was not an absolute
right,22 in the sense that a victim could ask the trial court to impose a restitutionary component of
sentencing and be assured of getting relief even after the terms of sentence had been set. There


21 See, e.g., State v. French, 801 P.2d 482 (Ariz. App. 1990) (restitution of full economic loss to the victim of
a crime is mandatory under Arizona’s sentencing scheme); see also, Ariz. Rev. Stat. Ann. ‘’ 13-603(C), 13-804.

22 Here, I am using the term absolute right to mean a right which cannot be denied or ignored by a court, in
the same way that the term was used by the Arizona Supreme Court in State v. Roscoe, referring to a crime victim’s
was precedent which held that if the right to receive restitution was not exercised by the victim at sentencing, he or she could be prevented from seeking it afterwards unless certain changes in circumstances existed.\textsuperscript{23} This was true even though the Arizona Supreme Court had previously proclaimed that, with respect to a trial court's discretion to impose a restitutionary component as a part of sentencing, the court would “uphold any such conditions which \textit{on any reasonable theory tend to cause a defendant to make reparation for any crime which he may have committed}.”\textsuperscript{24}

\textit{Contreras} resolved this apparent conflict strongly in favor of crime victims. In \textit{Contreras}, the trial court imposed a two-year term of probation on the defendant as a result of his pleading guilty to a charge of criminal trespass, arising from an incident where he had gone into the victims’ house through an open window and removed several items of audiovisual equipment from their home.\textsuperscript{25} Contreras’ probation had certain conditions, but none required that restitution payments be made to the victim.\textsuperscript{26} Two months after the trial court entered the probation order, the defendant’s probation officer, at the request of the victims, petitioned to have the terms of

\begin{itemize}
  \item \textsuperscript{23} See Burton v. Superior Court, 558 P.2d 992, 995 (Ariz. App. 1977) (when additional conditions, such as the requirement to pay restitution to a crime victim, are to be imposed, the record must demonstrate that the defendant violated a term of the original probation or other changed circumstances warranting an adjustment of the original sentence).
  \item \textsuperscript{24} Redewill v. Superior Court of Maricopa County, 29 P.2d 475, 480 (Ariz. 1934) (emphasis added).
\end{itemize}
probation modified to include a restitution component. The defendant argued that, under

Burton v. Superior Court, the terms of probation could not be modified because he had not
violated them and there were no changed circumstances warranting modification. He also
contended that the victims had waived any right to receive restitution by failing to respond to a
letter from the County Attorney’s office which requested that they provide a list of expenses
covering the missing items prior to sentencing.

Discussing the merits of the defendant’s arguments, the court noted that not only was

Burton factually distinguishable, but that the precedential value of its holding had also been called
into question by the adoption of the VBR and subsequent cases on the subject of a crime victim’s
right to restitution. In a majority opinion, Judges Ehrlich and Toci echoed an earlier
proclamation of the court, stating that “restitution is not a claim which belongs to the victim, but

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26 See id.

27 See id.


29 See Contreras, 885 P.2d at 140.

30 See id.

31 See id. at 141.
[is] a remedial measure that the court is statutorily obligated to employ. Thus, the right to receive restitution was not one that was capable of being waived.

The opinion in Contreras also signaled a significant shift in the court’s view of restitution as a component of sentencing. The Burton court viewed the post-sentencing addition of restitution payments to victims as an enhancement of a defendant’s punishment, which could not be justified except by a showing that the defendant had done something since sentencing to warrant the enhancement of his punishment. However, the Contreras court espoused a different view, proclaiming that

[t]he modification of the terms of probation to increase restitution does not constitute an increase in punishment Abut rather an increase in a non-punitive aspect of probation directed towards a proper rehabilitative goal and to making the victim whole.

Thus, in Contreras, the court permitted the VBR to secure an absolute right to restitution for crime victims.

32 See id. at 142 (quoting State v. Iniguez, 821 P.2d 194, 197 (Ariz. App. 1991)).

33 See id. (quoting State v. Steffy, 839 P.2d 1135, 1138 (Ariz. App. 1992) (holding that even if a victim declines to request restitution, the trial court's obligation to order it is not excused)).

34 See Burton, 558 P.2d at 995.

35 Contreras, 885 P.2d at 142 (quoting State v. Foy, 859 P.2d 789, 792 (App. 1993)).
2. Mann: protecting and giving substance to
the crime victim's right to offer
victim impact evidence

In the death sentence appeal *State v. Mann*, Arizona’s jurists rendered an important decision which both protects and gives substance to a crime victim’s right to offer victim impact evidence under the VBR. In *Mann*, the defendant was convicted of first degree murder and sentenced to death for the killings of Richard Alberts and Ramon Bazurto during a drug deal.\(^{36}\) Alberts was a friend of the defendant’s and a fellow drug dealer.\(^{37}\) The evidence showed that the defendant had planned to defraud Alberts in a staged drug deal, to the tune of $20,000.\(^{38}\) When it came time for the deal to “go down,” Bazurto happened to be there.\(^{39}\) Although he had originally only planned to kill Alberts, the defendant decided then and there to kill both Alberts and Bazurto, and shot both of them after receiving his money from Alberts.\(^{40}\) Alberts died almost immediately, but Bazurto lingered on for between three and five minutes, according to the testimony of the defendant’s former girlfriend.\(^{41}\) During this time the defendant was standing on Bazurto’s hand

\(^{36}\) See *State v. Mann*, 934 P.2d 784, 787 (1997).

\(^{37}\) See id. at 788.

\(^{38}\) See id.

\(^{39}\) See id.

\(^{40}\) See id.

\(^{41}\) See id.
and describing to his girlfriend what was happening to Bazurto as he lost motor control and
died.\textsuperscript{42} The victims’ families were both outraged and saddened at this crime. During the
defendant’s trial, the families sent approximately 35 letters to the trial judge in which they
requested that the death penalty be imposed on the defendant.\textsuperscript{43} The trial judge ultimately
sentenced him to death.\textsuperscript{44} The defendant then argued, in his automatic appeal, that the victim
impact evidence received from the victims’ families had had an undue influence on the trial judge
at sentencing, and that as a result, his sentence had to be reversed.\textsuperscript{45}

Justice Feldman, writing for a unanimous court, rejected both of the defendant’s
arguments. The court acknowledged that the issue of victim impact evidence was not without
controversy, as reflected in the United States Supreme Court’s \textit{Payne v. Tennessee}\textsuperscript{46} opinion.\textsuperscript{47} However, the court explained that “[t]he United States Supreme Court has held that a State ‘may
legitimately conclude that evidence about the victim and about the impact of the murder on the

\begin{footnotes}
\footnotetext[42]{See State v. Mann, 934 P.2d 784, 788 (1997).}
\footnotetext[43]{See id. at 792.}
\footnotetext[44]{See id. at 787.}
\footnotetext[45]{See id. at 792.}
\footnotetext[47]{See Mann, 934 P.2d at 792.}
\end{footnotes}
victim’s family is relevant . . . as to whether or not the death penalty should be imposed.”

The court then noted that Arizona had so concluded by enacting the VBR. Ultimately, the court concluded, the victim impact evidence produced in Mann was admissible under the Arizona Constitution and “should be used to rebut the defendant’s mitigation evidence.”

It is this final conclusion in the Mann opinion that makes it such an important victim’s rights decision. Not only does the Mann holding protect a crime victim’s right to submit victim impact evidence to the court under the VBR, it also suggests that the court should use the evidence to counter a defendant’s mitigation evidence. By placing a judicial imprimatur on the use of victim impact evidence, Arizona’s crime victims can feel that the court is not only doing its job to preserve the general law-and-order and promote justice, but that it is also relying upon the input of specific, individual victims to determine how this should be done.

3. Gonzales and Hance: ensuring that a crime victim’s due process rights are satisfied

Arizona’s jurists have also expressed strong support for the due process rights of crime victims enumerated within the VBR and its implementing statutes, and have set important precedents regarding the scope of these rights and the remedies available to victims if they are

48 See id.

49 See id.
violated. In so doing, Arizona's jurists have cooperated fully with the intent behind the VBR and its implementing statutes and have made Arizona's criminal justice system more accessible and responsive to crime victims.

In *State v. Gonzales*, the Arizona Supreme Court addressed the issue of whether or not a victim’s presence in the courtroom during jury selection and possibly after giving testimony in the case violated a defendant’s due process rights. In *Gonzales*, the defendant was found guilty of felony murder, aggravated assault, theft, armed robbery, and two counts of burglary. The felony-murder charge arose out of the defendant’s stabbing of Darrel Wagner, whom the defendant brutally killed while stealing a VCR from the Wagner residence. Although Darrel had been stabbed several times, he was able to help his wife, Deborah, back into their apartment and call 911 before finally collapsing. Darrel died later that night, and Deborah had to spend five days in intensive care from the stab wounds that she had received trying to protect her husband.

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50 See id.


53 See id.

54 See id.

55 See id.
When the defendant’s case came to trial, Deborah Wagner was present in the courtroom for jury selection and, after giving testimony, she possibly remained to observe the remainder of the trial.\textsuperscript{56} The defendant argued that the victim’s presence in the courtroom during jury selection and possible presence during trial had prejudiced him and denied him his constitutional right to a fair trial.\textsuperscript{57} The Arizona Supreme Court rejected this argument as being “without merit,” for two reasons.\textsuperscript{58} First, the defendant had failed to present any evidence that the victim’s presence in the courtroom had actually had or had tended to have a prejudicial effect upon either the jury or their verdict.\textsuperscript{59} The court noted that Deborah had attended jury selection on her own initiative and that she had been seated in the back row of the courtroom, going unnoticed by counsel and the court until several days later.\textsuperscript{60} Second, but most importantly, the court explained that under the Arizona Constitution, Deborah had a right to attend all of the proceedings that the defendant had the right to attend, so her attendance was constitutionally permissible.\textsuperscript{61} Under these conditions,

\begin{itemize}
  \item \textsuperscript{56} See id. at 848.
  \item \textsuperscript{57} See id.
  \item \textsuperscript{58} See id.
  \item \textsuperscript{59} See id.
  \item \textsuperscript{60} See id.
  \item \textsuperscript{61} See id. at 848.
\end{itemize}
the Justices explained that more than a bare allegation of prejudice would be required to convince the court that the defendant’s due process rights had been violated.\textsuperscript{62}

Taken with another case decided three years earlier by Division One of the Court of Appeals, the holding in \textit{Gonzales} takes on added importance with respect to a crime victim’s procedural and substantive due process rights. In \textit{State ex rel. Hance v. Arizona Board of Pardons and Paroles},\textsuperscript{63} the court had the opportunity to determine whether a state agency’s failure to notify a crime victim of her right to attend and be heard at post-conviction relief proceedings, as guaranteed by the VBR, rendered those proceedings constitutionally deficient. The victim in \textit{Hance} was raped by Eric Mageary, who was sentenced in 1974 to 25 years to life in prison for this crime.\textsuperscript{64} Mageary first became eligible for parole in 1982, but from then until 1989, the board continually denied his parole.\textsuperscript{65} In 1989, the Board finally granted Mageary parole, but this was revoked within a year because of Mageary’s inability to adhere to its terms.\textsuperscript{66} After being brought back to prison, the board continued to deny Mageary parole each time he became eligible

\textsuperscript{62} See id. (citing State v. Ethington, 592 P.2d 768, 770 (1979)).

\textsuperscript{63} 875 P.2d 824 (1993).

\textsuperscript{64} See id. at 826.

\textsuperscript{65} See id.

\textsuperscript{66} See id.
between 1989 and 1992.\textsuperscript{67} On May 5, 1993, the board held a hearing in which Mageary’s parole was again denied, but his request to be released on home arrest was granted.\textsuperscript{68}

The victim never received prior notice of the May 5, 1993 hearing date.\textsuperscript{69} In fact, neither the board nor the Coconino County Attorney’s office had made any attempt to notify the victim of Mageary’s parole hearings since 1984, when the last notice that was sent to the victim’s address of record was returned as undeliverable.\textsuperscript{70} Shortly after the 1993 hearing took place, however, both the Governor and the Coconino County Attorney requested that the board rescind its grant of Mageary’s request to be released on home arrest, based in part upon the fact that they had received letters from the victim requesting the rescission.\textsuperscript{71} The board determined that, despite the receipt of letters from the victim, no new information existed to justify holding a re-examination hearing to determine if there was probable cause to rescind Mageary’s upcoming release to home arrest.\textsuperscript{72} The Coconino County Attorney responded by filing a petition for special action directly to the Court of Appeals only a few hours before Mageary was scheduled to be

\textsuperscript{67} See id.

\textsuperscript{68} See id.

\textsuperscript{69} See id.

\textsuperscript{70} See Hance, 875 P.2d at 826.

\textsuperscript{71} See id. at 826-27.

\textsuperscript{72} See id. at 827.
released, asking for the release order to be set aside and for the court to order that the parole board hold the reexamination hearing.\textsuperscript{73} He based this request in part on the statutes implementing the VBR,\textsuperscript{74} which grant the victim the right “to be heard at any proceeding involving a post-arrest release decision.”\textsuperscript{75}

In a unanimous opinion, the Court of Appeals agreed that the May 1993 hearing was constitutionally deficient because the victim had not been notified of the hearing or her right to be heard at the hearing.\textsuperscript{76} In reaching this result, the court used some of the strongest language supporting victim’s rights that it has ever used. The court began by addressing the board’s argument that it could not be faulted for failing to notify the victim because the victim had not made a request to be notified.\textsuperscript{77} The court explained that this was incorrect because the VBR and the Victim's Rights Implementation Act placed an affirmative obligation on the state to inform the victim of her rights to request notice and be heard at post-conviction release proceedings.\textsuperscript{78} But,

\textsuperscript{73} See id.

\textsuperscript{74} See id.


\textsuperscript{76} See id. at 830.

\textsuperscript{77} See id.

\textsuperscript{78} The court explained that “The state cannot . . . use the victim's failure to request notice as a defense against the victim's right to appear at the release proceeding because the state failed to first fulfill its constitutional obligation to inform her of that right,” and that “[t]he constitutional mandate is clear: victims must be informed of their rights.” \textit{Id}. The court then stated, with particular clarity, that “[w]hile the statutory provisions do not specifically address how the
because "no agency of the state gave th[e] victim notice prior to the hearing, . . . the hearing violated her rights." Next, the court addressed what the proper remedy would be for such a violation. Explaining that "the Arizona Constitution protects a victim's rights to 'due process,'" the court felt that, under Arizona Revised Statutes section 13-4436, subsection (B), the victim was entitled to have the results of that hearing set aside.

The implications of Gonzales and Hance regarding a victim’s right to participate in a criminal prosecution are clear. First, under Hance, if a victim's due process rights, as secured by the VBR and its implementing legislation, are violated during any portion of a criminal prosecution, the victim will be entitled to have that portion vacated and repeated so that his or her rights will be vindicated. Furthermore, under Gonzales, defendants cannot successfully claim that they have been denied a fair trial when a victim simply exercises his or her rights under the VBR or its implementing legislation. Thus, Gonzales and Hance have arguably done more to make the

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79 See id. at 831.

80 See id. at 831-32.
day-to-day workings of Arizona's criminal justice system both accessible and responsive to crime victims than any others.

B. The “Bad” and the “Ugly”

While it is fortunate that Arizona’s jurists have rendered “Good” decisions like Contreras, Mann, Gulbrandson, and Hance, which have helped victims, it is just as unfortunate that they have rendered “Bad” and even “Ugly” decisions which have harmed victims’ interests and thwarted the legislature’s ability to promote their interests. These kinds of decisions are not only unfortunate in terms of their ultimate impact upon the rights of crime victims, but also unfortunate in that some are based on analyses of VBR and statutory provisions that, in the least, are questionable, and at the worst, directly conflict with the underlying intent and purpose of the VBR.

1. The “Bad”—Champlin v. Sargeant:

Unnecessarily restricting the meaning of “victim”

Jurists in Arizona’s upper-level courts have claimed on many occasions that if the meaning and implications of a statute can be gleaned unambiguously from the plain meaning of the statutory language, there is no need to resort to external interpretive aids when applying its provisions. The only task remaining, in these instances, is for the court to apply the meaning of

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the terms to the facts, along with relevant case precedents, and render a decision accordingly.\textsuperscript{82} However, in the Arizona Supreme Court’s 1998 \textit{Champlin v. Sargeant}\textsuperscript{83} decision, the court unnecessarily frustrated the plain language meaning of Arizona Revised Statutes section 13-4433, subsection (A) and the protections that it attempts to provide to crime victims by holding that witnesses to a defendant’s criminal activity do not have the right to refuse to submit to defense interviews under the statute as VBR-protected “victims,” despite the fact that they were also victimized by the criminal activity, unless they were named as victims in counts filed against the victimizing defendant.\textsuperscript{84}

In \textit{Champlin}, the defendant was charged with six counts of what the court called “serious criminal misconduct:” sexual contact with a minor, molestation of a child, and public sexual indecency.\textsuperscript{85} All of the charges stemmed from three incidents involving Champlin, two minors named Alejandro and Jonathan, and one adult named Shelley. The first such incident was alleged to have occurred on a day between June 1 and July 28, 1996, when Champlin was alleged to have touched Jonathan improperly in a movie theater in Alejandro’s presence.\textsuperscript{86} Regarding this

\textsuperscript{82} See, e.g., \textit{Board of Education v. Leslie}, 543 P.2d 775, 777 (Ariz. 1975).


\textsuperscript{84} See \textit{Champlin}, 965 P.2d at 766-767.

\textsuperscript{85} 965 P.2d at 764.

\textsuperscript{86} See id.
incident, Jonathan was named as the victim of the crime of sexual conduct with a minor (count II against the defendant), but Alejandro was not identified as a victim of any crime. The second incident was alleged to have occurred on August 4, 1996, when Champlin was alleged to have touched Alejandro improperly in a movie theater in Shelley’s presence. Regarding this incident, Alejandro was named as the victim of the crime of sexual conduct with a minor (count I against the defendant), and Shelley, unlike Alejandro had been in the first incident, was identified as a victim of the crime of public sexual indecency (count VI against the defendant). Finally, the third incident was alleged to have occurred on September 15, 1996, when the defendant allegedly touched Alejandro improperly in a movie theater in Jonathan’s presence. Similar to the first incident, Alejandro was named as the victim of the crime of sexual conduct with a minor (count V against the defendant), but Jonathan was not identified as a victim of any crime.

After learning that Alejandro, Jonathan, and Shelley would not submit to pretrial defense interviews, as they believed they were entitled to do under the VBR and its implementing statutes,

87 See id.
88 See id.
89 See id.
90 See id.
91 See id.
Champlin filed a motion with the trial court to compel their depositions.\textsuperscript{92} He wanted to interview Alejandro as a witness to the first alleged incident, Shelley as a witness to the second alleged incident, and then Jonathan as a witness to the third alleged incident. Champlin claimed that these would not be “victim” interviews; rather, that they would purely be “witness” interviews and that “no question posed will touch upon alleged criminal conduct of which the particular interviewee is also a named victim.”\textsuperscript{93} According to Champlin’s interpretation of Arizona Revised Statutes section 13-4433, subsection (A), “victim” protection extended only to witnesses against whom a defendant had committed an offense on the same occasion that he or she had also committed an offense against the victim. Since Alejandro witnessed the alleged incident giving rise to count II but had not been named as a victim thereof, Champlin argued that Alejandro had no right under the statute to refuse his request for a pretrial interview concerning that incident.\textsuperscript{94} Similarly, Champlin argued that Jonathan had no right to refuse, since he had witnessed the alleged incident giving rise to count V but had not been named as a victim of that incident.\textsuperscript{95}

The state disputed the defendant’s interpretation of the statute, explaining that the language of the statute clearly prevented courts from compelling victims to testify on “any matter,\textsuperscript{96}

\textsuperscript{92} See Champlin, 965 P.2d at 764.

\textsuperscript{93} See id.

\textsuperscript{94} See id.

\textsuperscript{95} See id.

\textsuperscript{96} See id.
including a charged criminal offense witnessed by the victim that occurred on the same occasion as the offense against the victim.” The State argued that the clause beginning with the comma following “any” and the word “including” (referred to by the Champlin court as the “‘same occasion’ clause”) was “merely a category included within the broad sweep of ‘any matter,’” and that it did not restrict the victim’s right to refuse to submit to an interview in any way. In fact, as the State argued, the words “shall not be compelled to testify on any matter” would, on their face, plainly seem to include testimony regarding any of a defendant’s prior criminal activity that they might have witnessed.

Using reasoning that defies the common sense grammatical interpretation of the statute, the Arizona Supreme Court unfortunately sided with Champlin’s interpretation of Arizona Revised Statutes section 13-4433, subsection (A). The court opined that the state’s reading of

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97 Id. at 765-66.

98 See Champlin, 965 P.2d at 766.

99 Applying the principles found in a leading treatise on English grammar, the same occasion clause is a subordinate adjective clause which modifies the words any matter. See John E. Warriner, Warriner’s English and Composition: Complete Course 55, at 4b (Harcourt, Brace, Jovanovich, 1973). Grammatically speaking, the clause does not actually modify these words rather, it merely relates back to them to supply an additional concept within the sentence for emphasis: that the phrase any matter is supposed to include within its broad scope, in addition to any other kinds of matters, those matters that are described within the clause. It is thus a nonrestrictive clause because it does not limit the words any matter, and the elimination of the clause from the sentence would not change the sentence's basic meaning. See Warriner at 630, 34i (referring to nonessential clauses as nonrestrictive clauses because they do not limit the words that they modify or affect the basic meaning of the sentence of which they are a part). Yet, the court reads the clause as restricting the term any matter. The reason that this makes no grammatic sense is that any matter cannot be
the statute was “unsound” because “it would render the ‘same occasion’ clause superfluous and would . . . violate the established rule of [statutory] construction, expressio unius est exclusio alterius[: . . .the expression of one or more items of a class indicates an intent to exclude omitted items of the same class.” ¹⁰⁰ It concluded that a witness to criminal activity on a given occasion was only protected by the statute if the witness was also a victim of that criminal activity on that occasion; otherwise, the witness could claim no protection. Thus, the court held that Alejandro and Jonathan could not refuse to testify pursuant to Arizona Revised Statutes section 13-4433, subsection (A), because they were not named as “victims” of the first and third incidents, respectively.

The court’s conclusion in Champlin is troubling because the ultimate holding is entirely inconsistent with prior decisions regarding who is considered to be a victim of the crime of public sexual indecency and what the definition of a “victim” is under the VBR and its implementing statutes. In Champlin, the State had argued that “the definition of ‘victim’ is not limited to named victims of a specified [offense] count” and implored the court to “apply a broad definition of ‘victim’” to the facts of the case. Had the Arizona Supreme Court reviewed the applicable caselaw regarding the crime of public sexual indecency and the definitions of “victim” in the VBR and Arizona Revised Statutes section 13-4401, subsection (14) before rendering its ultimate

limited by the term including, and so the court’s interpretation of the clause as a restrictive one is manifestly incorrect.
holding, the State would have gotten its wish because the court would have achieved a much different result.

Caselaw clearly shows that Arizona courts have considered minors to be “victims” of the crime of public sexual indecency whenever a defendant has engaged in indecent sexual conduct and “is reckless about whether a minor is ‘in view or at hand’ regardless of whether the minor actually witnesses the act.” In those cases where more than one minor was “present” when the indecent sexual conduct has taken place, Arizona’s courts have held that multiple counts against the defendant may arise from one instance of the conduct. This holds true even though the minor or minors did not actually see the indecent sexual conduct—it is sufficient that they may have been merely “cognizant of [the defendant’s physical] closeness” to their location at the time the conduct took place. Clearly, under these cases, Jonathan and Alejandro should have been

100 Champlin, 965 P.2d at 766.

101 See, e.g., State v. Malott, 821 P.2d 179, 181 (Ariz. App. 1991) (offense of public sexual indecency with a minor is committed regardless of whether a minor actually witnesses the act, and so defendant was guilty of the offense even though minors were asleep in room where defendant committed the indecent act); State v. Jannamon, 819 P.2d 1021, 1024 (Ariz. App. 1991) (citing to Malott, supra). See also, State v. Whitaker, 793 P.2d 116 (Ariz. App. 1990) (explaining that the term "public," within the meaning of public sexual indecency in Ariz. Rev. Stat. 13-1403, refers simply to the presence of another person and not place where act occurred; "public" is thus a descriptive term of offense and not element of the same; a "public place" means a place where the actor might reasonably expect his conduct to be viewed by another).

102 See Jannamon, 819 P.2d at 1025 (discussing propriety of multiple counts).

103 See Malott, 821 P.2d at 181.

104 See Jannamon, 819 P.2d at 1024 (court explaining that [w]e are not persuaded that because [two of the girls] . . . were not cognizant of what truly was happening until after the defendant [had committed the indecent act and]
considered by the court to be victims of Champlin’s indecent sexual conduct as long as they were “present” when the conduct took place, irrespective of whether or not they were named as victims in the counts filed against Champlin. Therefore, the court should have afforded them the protections guaranteed to victims in the VBR and its implementing legislation, which define a victim straightforwardly as “a person against whom [a] criminal offense has been committed.”

Because the Arizona Supreme Court chose otherwise, the Champlin decision represents an unduly restrictive interpretation of the term “victim” that should be cause for alarm among those who support victim’s rights.

2. The “Ugly:” State ex rel Napolitano v. Brown: Decimating the legislature’s ability to promote victim’s interests

If there is one decision that stands out as being the “ugliest” decision of Arizona’s jurists regarding Arizona’s Victim’s Bill of Rights (“VBR”) and the interests of crime victims it advances, it has to be the Arizona Supreme Court’s 1999 opinion in State ex rel. Napolitano v. Brown. This is an “ugly” decision for two reasons. Not only does the decision reinforce a questionable line of cases in which the court self-servingly defeats the raison d’être of the checks-


\[106\] 982 P.2d 815 (Ariz. 1999).
and-balances protections of the separation of powers, it pours salt into that wound by unnecessarily decimating the legislature’s potential for limiting the harsh impact of the court’s despotism on the fledgling role of crime victims in Arizona’s criminal justice process.

In this section of the article, I will examine the basis of the Arizona Supreme Court’s Brown decision in light of its claim that Arizona’s judicial branch has the “exclusive” authority to set rules of procedure without those rules being subject to any form of “check” from the legislative branch. I will begin by arguing that the court’s self-serving interpretation of its rulemaking authority under the Arizona Constitution is excessive, given the history and motives behind the constitutional amendment that supposedly conferred this authority upon the court. I will then argue that even if one assumes that the judicial branch has the exclusive authority to set rules that are procedural in nature, the scope of that authority extends only to rules that are purely procedural in nature, and that this authority does not permit the court to grant or destroy substantive rights, including those of crime victims, under the guise of procedural rulemaking. Ultimately, I will conclude that legislative checks on the power of the judicial branch, such as the one at issue in Brown, are vital tools needed to correct the judiciary’s apparent insensitivity to the interests of crime victims in having criminal cases brought to a reasonably prompt and final resolution.

a. Background -- The Brown Decision.

In Brown, the central issue was whether certain amendments made by the Arizona
legislature in 1998 to Arizona Revised Statutes section 13-4234, subsections (D) and (F), were unconstitutional because they provided less time for a capital defendant to file for post-conviction relief than he or she would have under Rule 32.4, subsection (c) of the Arizona Rules of Criminal Procedure. The court determined that the legislature’s amendments were unconstitutional because they “violated the separation of powers requirement” in Arizona’s constitution by usurping the court’s “exclusive” rulemaking authority granted by article VI, section 5.5 of the same, and because the state could not produce evidence sufficient to convince the court that it had actually made the amendments guided by a desire to implement a provision of the VBR that is “unique and peculiar to crime victims.”

In holding the amendments unconstitutional, the Brown court imposed serious restrictions upon the legislature’s ability to use the VBR to reform Arizona’s criminal justice system and make it more responsive to victim’s needs and interests. First, any legislative act that would purport to


108 The court explained that Rule 32.4c allows a defendant in a capital case 120 days after appointment of counsel to file a petition for post-conviction relief. It also provides that he can obtain one sixty-day extension upon a showing of good cause, and additional thirty-day extensions upon further showings of good cause. The amendments to A.R.S. ’ 13-4234, in contrast, would have allowed a capital defendant sixty days to file a petition for post-conviction relief, and permit the court to grant only one thirty-day extension. See id. at 816.

109 See id. at 817.

110 See id.

111 See id. at 817-19.
change a court-promulgated rule would have to avoid “engulfing the rule” or, in layman’s terms, not directly conflict with it.\(^{112}\) Second, assuming that a legislative act did not directly conflict a court rule, one would have to demonstrate that the legislature’s act was explicitly taken pursuant to the VBR.\(^{113}\) Under Brown, a purpose that is merely consistent with the VBR’s letter and spirit is not sufficient—the explicit purpose would have to be to implement or protect a right granted by the VBR and the amendment would have to show sufficient potential for achieving the policy advanced by that right.\(^{114}\) Third, assuming that the first two conditions were met, the legislative act would have to be done to implement or protect a right described by the VBR that is “unique and peculiar to crime victims”\(^{115}\)—if not, then the defendant’s interests would always outweigh the victim’s competing interests and the court would give effect to the defendant’s interests at the expense of the victim’s. In the Brown case, the right at issue was the right to a prompt and final resolution of the case—in other words, the right to a speedy trial. The court concluded that victims and defendants both have interests in this right, but also opined that their interests are at odds with one another. Victims want to see justice done in a reasonably short period of time, while defendants want justice to be done in a slower, deliberate fashion, such that the criminal justice

\(^{112}\) See id. at 817 (quoting State v. Robinson, 735 P.2d 801, 807 (Ariz. 1987)).

\(^{113}\) See Brown, 982 P.2d at 818-19.

\(^{114}\) See id. at 817-18.

\(^{115}\) See id. at 818.
system will not run roughshod over their rights. \(^{116}\) Accordingly, the *Brown* court ultimately held that a defendant’s interest in the opportunity to secure a potentially unlimited number of extensions of the deadline for filing post-conviction relief under Rule 32.4, subsection (c) of the Arizona Rules of Criminal Procedure outweighs a victim’s interest in having cases brought to a prompt and final resolution by having the defendant’s sentence become final if not successfully appealed within ninety days.

\(b. \textit{The Dubious Basis of Brown:}\n\textit{An Incorrect Interpretation of the Court’s Constitutional Powers and its Role in Rulemaking.}\)

The court’s pronouncement that Arizona Revised Statutes section 13-4234 was unconstitutional prompts one to inquire whether the *Brown* court properly interpreted the extent of the Arizona Supreme Court’s constitutional rulemaking authority when it made this determination. After careful examination, one thing seems painfully clear: had the court engaged in a more extensive analysis of prior interpretations of its constitutional powers and followed the traditional model of the separation of powers doctrine, the *Brown* court might have arrived at an entirely different result. This appears so for two reasons. First, the *Brown* court would have discovered that post-1960 interpretations of the Arizona Supreme Court’s constitutional rulemaking authority were at best overly generous, given the history and motives behind the constitutional amendment that supposedly conferred this authority upon the court in 1960.

\(^{116}\) See *id.* at 818.
Second, the Brown court would have recognized that in order to remain faithful to the balance of power distributed under the separation of powers model of constitutional government, the scope of its procedural rulemaking authority could extend only to purely procedural rules—rules to aid the court in conducting its day-to-day business—and not result in the creation or destruction of substantive rights, including those of crime victims, under the guise of its rulemaking power.

For the proposition that Arizona’s judicial branch has the “exclusive” authority to set all rules of procedure, the Brown court relied heavily upon the constitutional language describing the rulemaking power granted to the Arizona Supreme Court by article VI, section 5.5 of the Arizona Constitution. This section of Article VI states that “[t]he Supreme Court shall have . . .power to make rules relative to all procedural matters in any court.” Beginning with the Arizona Supreme Court’s 1966 decision in Arizona Podiatry Association v. Director of Insurance, the

117 The specific cases relied upon by the Brown court are Pompa v. Superior Court (Maricopa County), 931 P.2d 431 (Ariz. App. 1997), Slayton v. Shumway, 800 P.2d 590 (Ariz. 1990), State v. Fowler, 752 P.2d 497 (Ariz. App. 1987), as approved by the Arizona Supreme Court in State v. Bejarano, 762 P.2d 540 (Ariz. 1988), and State v. Robinson, 735 P.2d 801 (Ariz. 1987). The Pompa, Shumway, Fowler, Bejarano, and Robinson cases, in turn, rely upon a line of cases, beginning with the court's decision in Arizona Podiatry Assn v. Director of Ins., 422 P.2d 108 (Ariz. 1966), for the proposition that the Arizona Supreme Court has the exclusive authority to set rules of procedure without being subject to any sort of check by the legislative branch.

118 Ariz. Const. art VI, sec. 5.5.

119 422 P.2d 108 (Ariz. 1966). An earlier case, Heat Pump Equip. Co. v. Glen Alden Corp., 380 P.2d 1016 (Ariz. 1963) was technically the first case to comment upon the judiciary's rulemaking power after passage of the Modern Courts Amendment in 1960, but it did so without describing the scope of that power. As such, I refer the reader instead to the Arizona Podiatry case, which did discuss the supposed scope of the court's rulemaking power.
court has consistently interpreted this clause to mean that the court enjoys the “exclusive”\textsuperscript{120} constitutional authority “to make (all) rules relative to all procedural matters in any court,”\textsuperscript{121} and that the power “may not . . . be reduced . . . by the legislature.”\textsuperscript{122}

The problems with this pronouncement, that the Brown court failed to realize, are twofold. First, the court should have recognized that the interpretations of the court’s constitutional rulemaking authority based upon the Arizona Podiatry case seem overly generous, given the language of and history and motives behind the constitutional amendment that supposedly conferred the rulemaking authority upon the court. The amendment in question is the Modern Courts Amendment of 1960\textsuperscript{123} (the “MCA”). Historically speaking, the MCA was designed to give the Arizona Supreme Court the power to administratively supervise all lower Arizona courts in an effort to combat serious delays in achieving prompt case resolutions which existed at the time in Arizona’s court system.\textsuperscript{124} The language of the MCA supposedly granting the court

\begin{enumerate}
\item\textsuperscript{120} Arizona Podiatry Ass'n, 422 P.2d at 110.
\item Id.
\item Id.
\item Initiative Petition 101, otherwise known as the Modern Courts Amendment, was placed on the ballot for the general election of 1960, which was held on November 8, 1960. The Modern Courts Amendment was approved at the November 8 general election and became effective on December 9, 1960. It repealed the former Article VI of the Arizona Constitution and replaced it with the current version. See Heinz R. Hink, Judicial Reform in Arizona, 6 Ariz. L.Rev. 13, 17 (1964).
\item This goal was actively promoted by the authors and proponents of the Modern Courts Amendment as the purpose of the amendment. See, e.g., Arizona Secretary of State, Initiative and Referendum Publicity Pamphlet 1960,
\end{enumerate}
exclusive authority to set rules of procedure may be found in section 5, paragraph 5, which states that “[t]he Supreme Court shall have . . . power to make rules relative to all procedural matters in any court.” One will no doubt note that this language differs slightly—but ever so importantly—from the court’s Arizona Podiatry interpretation: the latter asserts that the court has the power to make all rules relative to procedural matters, while the former states that the court merely has the power to make such rules without suggesting that this power belongs to the court exclusively. Although from a purely textual standpoint, the Arizona Podiatry interpretation seems colorable, external interpretive aids suggest that it is overly generous. None of the MCA’s proponents suggested or otherwise indicated at the time that a cornerstone of the MCA would be to grant the Supreme Court the exclusive authority to set all rules of procedure, without any possibility of limitation by the legislature as a co-ordinate branch of government. Indeed, in the initiative and referendum publicity pamphlet for the 1960 election year, there is no mention of this

Proponent’s Argument for Publicity Pamphlets Proposition 101 at 14 (1960) (hereafter Year 1960 Publicity Pamphlet) (explaining that the Modern Courts Amendment is a proposal to . . . provide for improved efficiency in the administration of justice and elimination of congestion in the state courts); Henry R. Kiel, State Bar Fact Sheet Explains Objectives of Court Movement, Ariz. Wkly. Gazzette 1 (Apr. 26, 1960) (explaining that the Modern Courts Amendment went to the people of Arizona for approval because it is the people who are being hurt by [a] two and three year backlog of cases pending before superior and supreme courts and reprinting the text of the Proponent’s Argument that would appear in the Year 1960 Publicity Pamphlet); Bisbee Club Told Plan Hits Delay: Bar’s Modern Court Proposal Praised by Judge Porter Murry, Ariz. Wkly. Gazzette 1 (Oct. 4, 1960) (statement by Judge Murry opining that the Modern Courts Amendment should attack successfully the problem of delays in the state’s courts and improve efficiency in the administration of justice).

125 See Year 1960 Publicity Pamphlet at 8.

126 Besides looking for relevant articles in the Arizona Law Review and other legally oriented Arizona periodicals, my research included a search for any articles or editorials concerning the proposed effect of the Modern
as being the effect of a “yes” vote on the proposal. Thus, there is no evidence to suggest that either the authors or the proponents of the MCA had intended to make the Arizona Supreme Court’s rulemaking authority exclusive via section 5, paragraph 5 of the amendment. Similarly, there is no evidence to suggest that voters were persuaded to vote in favor of the proposal because it would so change the scope of the Arizona Supreme Court’s rulemaking authority.

Second, the court should have recognized that principles inherent in the separation of powers model of constitutional government strongly suggest that interpreting the MCA consistent with Arizona Podiatry would defeat the raison d’être of the checks-and-balances protections provided by the separation of powers. As Montesquieu explained, “there is no liberty, if the power of judging be not separated from the legislative . . . power. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator.” Scholars have interpreted Montesquieu’s observation to mean that “separation of powers is a functional concept; separation is a necessary, if not a sufficient, condition of liberty . . . [and its] absence promotes tyranny.”

In absence of hard evidence supporting the Arizona Podiatry interpretation of the court’s
rulemaking power, and to avoid imputing to the MCA’s proponents an intent to eliminate a fundamental check on the judiciary’s power, a more plausible interpretation of the intended effect of section 5, paragraph 5 would seem to be that the MCA’s authors and proponents merely intended the MCA to reflect the balance of power between the legislature and the supreme court with respect to the rulemaking power prevailing before adoption of the MCA in 1960. Prior to the adoption of the MCA, Arizona’s Supreme Court and legislature had shared the rulemaking power, but the legislature had the ultimate authority in the event of a conflict. The court enjoyed the “inherent power to prescribe rules of practice and rules to regulate their own proceedings in order to facilitate the determination of justice, without any express permission from the legislative branch.” In 1939, the balance of power shifted when the Arizona legislature enacted Arizona Code (1939) section 19-202, in which it unilaterally curtailed its exercise of the rulemaking power by authorizing the Arizona Supreme Court to “regulate pleading, practice, and procedure in all courts of the state.” However, this statute also placed a limitation upon the

Mary L. Rev. 211, 214 (1989).


131 See De Camp v. Central Arizona Light & Power Co., 57 P.2d 311, 313 (Ariz. 1936) (explaining that The Legislature . . . has the supreme authority, except in so far as any rules made by it may unreasonably limit or hamper the courts in the performance of the duties imposed on them by the Constitution.)


supreme court’s exercise of the rulemaking power. In consideration of the legislature’s largesse, the court was to use the rulemaking power to promulgate rules “promoting [the] speedy determination of litigation upon its merits,”\textsuperscript{134} and yet, at the same time, its rules could not “abridge, enlarge, or modify the substantive rights of any litigant.”\textsuperscript{135} Thus, prior to the adoption of the MCA, the supreme court recognized that its rulemaking power was “not absolute but subject to limitations based on reasonableness and conformity to constitutional and statutory provisions.”\textsuperscript{136}

Unfortunately, this position is diametrically opposed to that adopted by the court in Arizona Podiatry and its progeny, to the effect that the court enjoys the “exclusive”\textsuperscript{137} constitutional authority “‘to make (all) rules relative to all procedural matters in any court,’ which authority may not be reduced by the legislature.”\textsuperscript{138} The restrictions imposed on the legislature in the Brown opinion—all of which are based on Arizona Podiatry and its progeny—reflect a hostility on the part of Arizona’s jurists towards certain aspects of the VBR and its implementing legislation. Those aspects concern instances where the VBR would require the

\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} De Camp v. Central Arizona Light & Power Co., 57 P.2d 311, 313 (Ariz. 1936)
\textsuperscript{137} Arizona Podiatry Assn., 422 P.2d at 110.
\textsuperscript{138} Id.
court, which has traditionally had a single-minded obsession with advancing the interests of criminal defendants, to simultaneously advance the interests of crime victims that stand in opposition to those interests, thus striking a balance between victims and defendants that would satisfy the interests of both without necessarily producing the optimal result for either. Rather than appear to be anything less than meticulous regarding its perceived duty to advance the interests of defendants in the criminal justice process at all costs, however, the court resorted to a strained and dubious interpretation of its constitutional authority to avoid the VBR’s constitutional mandate, which would require it to strike such a balance.

There is evidence that some degree of animosity has existed between Arizona’s jurists and proponents of the VBR since it was nothing more than a proposed amendment to Arizona’s constitution.\textsuperscript{140} Whatever animosity existed had largely been kept in check—until the unanimous Brown decision came out in 1999. Although no other decision involving the legislature’s attempt to implement the guarantees set out in the VBR has come before the court since Brown, proponents of victim’s rights in Arizona should be alarmed at the potential damage that Brown could do. After all, as Brown clearly illustrates, the legislature may not take simply any action

\begin{footnotesize}
\begin{enumerate}
\item Id.\textsuperscript{139}
\item See, e.g., Slayton v. Shumway, 800 P.2d 590, 595-97 (Ariz. 1990) (Cameron, J., dissenting) (opining that Proposition 104 was a two-headed calf in so far as it attempts to grant the legislature the power to amend, enact, or repeal rules that impact victim’s rights, and stating that [t]he judiciary should not share its rule-making power with the legislature or with anyone else. The making of the rules of court is a function to be guarded jealously).
\end{enumerate}
\end{footnotesize}
that it feels would improve the criminal justice system, even if it would help victims. Rather, the legislature may only take certain acts in order to promote the interests of victim’s rights under the VBR, and even then, it must be able to substantiate these acts with hard evidence that they are strictly related to a victim’s “unique and peculiar” interests in the criminal justice process. Yet, by imposing these requirements, it seems that the courts are trying to do exactly what they complained that the legislature was doing: usurping the authority and discretion of a (supposedly) co-equal branch of state government.

IV. CONCLUSION

Clearly, the VBR and its implementing legislation have had a mixed reception in Arizona’s upper-level courts. In some areas, most notably, defining the substance and scope of the due process rights of crime victims as created by the VBR, preserving a crime victim’s right to receive restitution, and recognizing the victim’s right to introduce evidence to show how he or she has been impacted by the criminal activity of a defendant, the courts have fully cooperated with the spirit and intent that spawned the VBR.

However, in two key respects, Arizona’s upper-level courts have refused to allow the VBR to achieve all that its designers and supporters intended. First, with respect to the idea of who may be considered to be a “victim,” the court unnecessarily restricted the scope of the term by not consulting prior decisions involving the crime of public sexual indecency—a crime which, unfortunately, is most frequently committed against society’s most impressionable and vulnerable
members: minors. To correct this situation, the legislature should consider modifying the
definition of “victim” under the VBR and its implementing legislation so that it will clearly
encompass persons who can be considered as victims of the so-called “public indecency” crimes.

By far, the most troubling act which Arizona’s upper-level courts have taken with respect
to the VBR and its implementing legislation has been to severely restrict the legislature’s ability to
correct or change procedural rules that, frankly, ignore the concerns of victims altogether. The
court was correct when it opined that the authority of the judicial branch to make procedural rules
in Arizona courts is absolute: by not permitting the legislature to make changes to these rules, the
judiciary has set itself up as the sole branch of government which is not subject to a “check” or
“balance” from another branch. This, despite the fact that the checks-and-balances system is the
cornerstone of the separation of powers doctrine. Although Arizona’s crime victims have yet to
learn what the full effect of the Brown decision might be, one thing appears to be painfully clear:
the only way to wrest control over procedural rules away from the court will be to pass a
constitutional amendment to that effect.141

Arizona’s jurists have much to be proud of respecting the VBR and the achievements that
they have helped to make in the area of crime victim’s rights. However, as can be seen from the

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141 As one Arizona jurist has said, I do not mean to infer that the people may never take away the rule-making
power of the courts. To do so, however, the constitutional amendment must be fairly, clearly, and directly presented and
not under the blanket of victim's rights. Slayton v. Shumway, 800 P.2d 590, 97 (Ariz. 1990) (Cameron, J.,
dissenting).
preceding analysis of its decisions during the first ten years of the VBR’s existence, there is still significant and important work remaining to be done.