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FEDERALISM, FEDERAL COURTS, AND VICTIMS' RIGHTS

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One of the most striking developments in American criminal law and procedure in the past four decades has been the widespread establishment of victims' rights at both the federal and state levels. For supporters of victims' rights, the story is one of almost universal success. Every state now has a statutory or constitutional provision requiring that many victims of crime receive notice of and the right to participate in any criminal proceedings against the alleged perpetrators in some fashion.[1] This is a tectonic shift compared with previous attitudes toward victim participation given the long-standing emphasis on prosecutors alone controlling the state's proceedings against an accused. Victims' rights came to be recognized by the federal government as well, with the passage of federal statutes providing for victim participation in federal court proceedings.[2] The U.S. Department of Justice

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1. *See* Steven J. Twist & Daniel Seiden, *The Proposed Victims' Rights Amendment: A Brief Point/Counterpoint*, 5 PHOENIX L. REV. 341, 344 (2012).

2. *See* 18 U.S.C. § 3771(a) (2012).

and all fifty states now have some form of victims' rights legislation, and many private organizations actively support the movement as well.[3]

A conspicuous exception to the success of the victims' rights movement has been the failure of Congress to pass a proposed amendment to the U.S. Constitution that would uniformly establish such rights in all federal and state courts. This has not been a fringe effort. Advanced by both private organizations and state officials, and with bipartisan support in Congress, bills establishing a Victims' Rights Amendment (VRA) have been introduced several times in the past three decades and twice passed the Senate Judiciary Committee.[4] Several proposals for a VRA have been introduced in recent years.[5] Despite the apparent strong support among members of Congress and the public, the bills have not progressed further; however, it seems likely that there will be additional future efforts to pass similar bills.[6]

Adoption of the VRA, or any federal legislation mandating recognition of victims' rights at both the federal and state levels, of course raises federalism concerns.[7] The now considerable scholarly literature on the proposed VRA is not oblivious to federalism issues, but has not fully engaged them, either.[8] Supporters of the VRA have not convincingly argued that an addition to the Bill of Rights is necessary given the widespread recognition of victims' rights at the state level.[9] Conversely, critics of the VRA have argued that nationalizing victims' rights is inappropriate, even though they support the imposition of federal standards in many other aspects of state criminal proceedings.[10] This Article undertakes a fresh and critical examination of the

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3. For overviews of these developments, see Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHOENIX L. REV. 301, 303–04 (2012); *see also infra* Part I. *See generally* DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE (3d ed. 2010).

4. *See, e.g.*, S.J. Res. 1, 108th Cong. (2003); S.J. Res. 52, 104th Cong. (1996).

5. *See* H.R.J. Res. 106, 112th Cong. (2012); H.R.J. Res. 40, 113th Cong. (2013); H.J. Res. 45, 114th Cong. (2015).

6. *See* Cassell, *supra* note 3, at 304–05; *infra* Part II.A.

7. *See* Cassell, *supra* note 3, at 316–17 (discussing the VRA and federalism). Short of a constitutional amendment, Congress could pass legislation that accomplishes essentially the same result, for instance by conditioning state receipt of federal funds on the adoption of certain minimum protections for crime victims. Congress has taken such a path with community notification laws for sex offenders and other measures that aid victims in various ways. *See* Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 52 (2008). Another recent example of such federal intervention is the Obama Administration's initiative to improve steps colleges take to protect students from sexual assault. *See* NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 2–4 (April 2014), https://www.notalone.gov/assets/report.pdf; *see also* Richard Pérez-Peña & Kate Taylor, *Fight Against Sex Assaults Holds Colleges to Account*, N.Y. TIMES, May 4, 2014, at A1.

8. *See, e.g.*, Cassell, *supra* note 3, at 301–02.

9. Andrew J. Karmen, *Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT. 157, 170 (1992).

10. *See* Twist & Seiden, *supra* note 1, at 360.

federalism implications of the VRA, and of the arguments by both its supporters and critics. Furthermore, this Article concludes that application of the functional arguments in favor of federalism, such as promoting state experimentation and permitting state law to govern in the absence of interstate externalities, suggests that the VRA should not be passed. More generally, this Article sets out criteria that will guide policymakers in deciding when, if ever, to require all states to follow a uniform victims' rights regime, by way of the VRA or some other means.

By the same token, this Article does not argue that the federal government does not have a role to play in the application or development of victims' rights under state law. One solution allows federal courts to account for certain aspects of victims' rights when considering petitions for writs of habeas corpus by state prisoners. To date, most federal courts have not been presented with this novel issue, but the courts that have encountered it have held that victims of state-prosecuted crimes have limited or no rights to participate in federal habeas proceedings.[11] This Article argues that, properly interpreted, federal statutes indeed permit interested victims to meaningfully participate in federal habeas proceedings, and it should be encouraged.

Part I of this Article begins by outlining the ascension of the victims' rights movement and its embodiment in state constitutional and statutory provisions. Part I then considers how states have implemented these provisions. Part II addresses the proposed VRA from a federalism perspective. It first outlines the history of congressional efforts to pass the VRA, and then considers and critically evaluates the federalism arguments made by both supporters and opponents of the VRA. Part III examines whether passage of the VRA would empower federal courts to enforce its provisions through injunctive actions, and whether, and to what extent, federal courts would be likely to do so. Part III also discusses whether, and to what extent, federal courts in habeas corpus actions should enforce victims' rights when reviewing the legality of convictions resulting from state prosecutions.

I. VICTIMS' RIGHTS IN THE STATES

A. The Victims' Rights Movement and Variability of Victims' Rights Among the States

Since the 1960s there has been support for victims' rights in criminal proceedings at both the state and federal levels. The victims' rights movement sought the enactment of legislation and public policy changes in order to offer victims ways to participate in and be heard during the criminal justice process concerning their victimization.[12] The movement also sought to provide protection, compensation, and services for victims of crime as well as affected

11. *See, e.g.*, Brandt v. Gooding, 636 F.3d 124, 136 (4th Cir. 2011).
12. *See* Cassell, *supra* note 3, at 303–07.

family members.[13] While it is widely assumed that the victims' rights movement began in the early 1970s, by then states had already begun to advance policies and programs aimed at victim advocacy.[14] For example, in 1965, California began to provide compensation to qualifying victims in order to lessen the financial impact of crime.[15] These policies may have grown out of President Lyndon Johnson's Commission on Law Enforcement and Administration of Justice.[16] The President's Commission was designed to "assess the extent of the crime problem" in response to the growing crime rate in the United States.[17] The Commission found that a significant proportion of victims did not report crimes, thus resulting in the creation of the Law Enforcement Assistance Administration (LEAA), which was established to help "fund and advise programs" involved in the prevention of victimization.[18] The LEAA hoped that crime-reporting rates would increase in response to its support of prevention and intervention efforts for victims of crime.[19]

Victims' rights advocates were especially active at the state level in the following decades. The emergence of the victims' rights movement at the state level was facilitated by Congress passing the Victims of Crime Act (VOCA) in 1984, which "provided funds for victim assistance programs, victim compensation, and discretionary funding for research on victim needs."[20] In 1986, victims' rights advocates formed the National Victims' Constitutional Amendment Network (NVCAN) to lobby for a federal constitutional amendment, though it initially devoted its efforts—quite successfully—in support of state constitutional or statutory provisions codifying victims' rights.[21] Following the passage of the VOCA and California's example, and due to the efforts of the NVCAN, states began to expand their own compensatory programs and protections for victims in their respective constitutions and statutory provisions.[22]

One of the most notable accomplishments of the victims' rights movement was giving victims the right to be heard. Prior to the 1970s, victims did not participate in the criminal process unless they were asked or required to

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13. *See* Mary L. Boland & Russell Butler, *Crime Victims' Rights: From Illusion to Reality*, 24 CRIM. JUST. 4, 5–6 (2009).

14. *See* Jeanne M. Mastrocinque, *An Overview of the Victims' Rights Movement: Historical, Legislative, and Research Developments*, 4 SOC. COMPASS 95, 95 (2010).

15. *Id.* at 96.

16. *Id.* at 95–96.

17. *Id.* at 96.

18. *Id.*

19. *Id.*

20. *Victims and Victimization: Rights of Victims*, NAT'L INST. JUST. (2008), http://www.nij.gov/topics/victims-victimization/rights.htm; *see infra* Part II.

21. Victoria Schwartz, Recent Development, *The Victims' Rights Amendment*, 42 HARV. J. ON LEGIS. 525, 525–30 (2005).

22. Mastrocinque, *supra* note 14, at 97–98.

testify.[23] Again, California led the way for victims' rights by requesting the first victim impact statement in 1976.[24] Generally, a victim impact statement is a written or oral statement provided by a crime victim, or the victim's family, that provides information about the physical, psychological, emotional, and financial harm that the crime had on the victim.[25] A victim impact statement is typically presented during pre-sentencing and parole hearings.[26] By 1992, at least thirteen states allowed victim impact evidence to be submitted at capital sentencing hearings.[27] Currently, all states allow victim impact statements during some phase of the sentencing process and at parole hearings.[28]

By 2003, all fifty states had victims' compensation programs and some form of victims' rights legislation.[29] To date, thirty-three states have constitutional provisions protecting victims' rights.[30] Moreover, all states have statutory provisions that protect victims' rights.[31] Most states' provisions offer victims

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23. *See* Cassell, *supra* note 3, at 303.

24. ELLEN K. ALEXANDER & JANICE HARRIS LORD, IMPACT STATEMENTS: A VICTIM'S RIGHT TO SPEAK, A NATION'S RESPONSIBILITY TO LISTEN, U.S. DEP'T OF JUSTICE (1994), https://www.ncjrs.gov/ovc_archives/reports/impact/welcome.html.

25. *Victim Impact Statements*, Nat'l Ctr. for Victims of Crime (2008), http://www.victimsofcrime.org/help-for-crime-victims/get.help-bulletins-for-crime-victims/victim-impact-statements.

26. *Id.*

27. Michael Ira Oberlander, *The Payne of Allowing Victim Impact Statements at Capital Sentencing Hearings*, 45 VAND. L. REV. 1621, 1647 (1992).

28. *Victim Impact Statements*, *supra* note 25.

29. *Victims and Victimization: Rights of Victims*, *supra* note 20.

30. ALA. CONST. art. I, § 6.01; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. II, §16a; CONN. CONST. art. XXIX, § b; FLA. CONST. art. I, § 16; IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. 1, § 13b; KAN. CONST. art. 15, § 15; LA. CONST. art. I, § 25; MD. CONST. art. IV; MICH. CONST. art. I, § 24; MISS. CONST. art. III, § 26A; MO. CONST. art. I, § 32; MONT. CONST. art. II, § 28; NEB. CONST. art. I, § 28; NEV. CONST. art. I, § 8; N.J. CONST. art. I, § 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST. art. I, § 42; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TENN. CONST. art. I, § 35; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8a; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m. For a comprehensive breakdown of victims' compensation by state, see *Summary of State Requirements and Maximum Benefits*, NAT'L ASS'N OF CRIME VICTIM COMPENSATION BDS. (2013), http://www.nacvcb.org/ [hereinafter NACVCB]; *see* Appendix.

31. ALA. CODE §§ 15-23-1, 41-84 (2014); ALASKA STAT. § 18.66.100 (2014); ARIZ. REV. STAT. ANN. §§ 13-4401–4439 (2015); ARK. CODE ANN. §§ 16-90-1101–1115 (2014); CAL. PENAL CODE §§ 679–680 (West 2014); COLO. REV. STAT. §§ 24-4.1-100.1–304 (2015); DEL. CODE ANN. tit. 11, §§ 9401–9419 (2014); FLA. STAT. ANN. §§ 960.001–.298 (West 2014); GA. CODE ANN. § 17-10-1.1 (2014); IDAHO CODE ANN. § 19-5306 (2015); 725 ILL. COMP. STAT. ANN. 120/1-9 (West 2014); IND. CODE ANN. §§ 35-40-5-1 to 35-40-13-5 (West 2014); IOWA CODE §§ 915.10–.100 (2014); KAN. STAT. ANN. §§ 74-7301–7321 (2015); KY. REV. STAT. ANN. §§ 421.500–.576 (West 2014); LA. REV. STAT. ANN. §§ 46:1841–1845 (2014); ME. REV. STAT. tit. 15, § 6101 (2015); ME. REV. STAT. tit. 17-A, §§ 1171–1177 (2015); MASS. GEN. LAWS ANN. ch. 258B, §§ 1-3, 5-13 (West 2014); MICH. COMP. LAWS ANN. §§ 780.751–.911 (West 2014);

the following rights: to be present at criminal proceedings, to information and notification, to protection, to due process, to compensation, to be heard, and to a timely disposition of the case.[32] All of this information is compiled in the Appendix.

While virtually every state provides all of these rights via constitutional or statutory provisions, the zeal with which they are enforced, or the lack thereof, differs based on numerous factors, such as jurisdiction, judicial discretion, and budgetary limitations.[33] The inconsistency of enforcement among the states is used as a primary argument in favor of enacting a VRA.[34] While most states provide in their constitutions or statutes that victims have the right to the provisions discussed above, programs vary considerably across states. Some of these differences are grounded in basic definitions of who is a "victim,"[35] or how to determine what length of time satisfies the "speedy" trial guarantee.[36]

Other interstate differences depend on the scope of the right accorded the victim. One example is the victim compensation filing times and maximum payouts per state, found in the Appendix. For instance, Alabama and Ohio differ considerably in their filing time and maximum compensation for

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MINN. STAT. § 611A (2015); MISS. CODE ANN. §§ 99-43-1–49 (2014); MO. REV. STAT. §§ 595.010–.218 (2014); MONT. CODE ANN. §§ 53-9-101–133 (2015); NEB. REV. STAT. ANN. § 81-1848 (2015); NEV. REV. STAT. ANN. § 33.015 (West 2014); N.H. REV. STAT. ANN. § 21-M:8-k (2015); N.J. STAT. ANN. § 2A:12-14 (West 2015); N.M. STAT. ANN. §§ 31-26-4–10 (West 2014); OHIO REV. CODE ANN. § 109.42 (West 2015); OKLA. STAT. tit. 21, § 142A–B (2014); OR. REV. STAT. §§ 147.405–.421 (2014); 18 PA. CONS. STAT. ANN. § 11.201 (West 2014); R.I. GEN. LAWS ANN. §§ 12-28-1–13 (2015); S.C. CODE ANN. § 24-22-90 (2014); S.D. CODIFIED LAWS §§ 23A–28C-16 (2015); TEX. CODE CRIM. PROC. ANN. §§ 56.01–64 (West 2013); UTAH CODE ANN. § 77-38-1-7 (West 2014); UTAH CODE ANN. §§ 77-37-1–5 (West 2014); VT. STAT. ANN. tit. 13, §§ 5301–5322 (2015); WIS. STAT. §§ 950.01–.11 (2014); WYO. STAT. ANN. §§ 7-21-102–103 (2015); WYO. STAT. ANN. §§ 14-6-501–509 (2015). *See also* Schwartz, *supra* note 21, at 527–28.

32. *See supra* notes 30–31 and accompanying text.

33. Cassell, *supra* note 3, at 303–09; Schwartz, *supra* note 21, at 546–48.

34. Cassell, *supra* note 3, at 303; *infra* Part II. It is unclear whether any systematic factors account for the variance of victims' right among the states. Studies of interstate policy diffusion for criminal justice examine, among other variables, the geographic proximity, political ideology, crime rates, and public opinion of different jurisdictions. *See, e.g.*, Tiffany Bergin, *How and Why Do Criminal Justice Public Policies Spread Throughout U.S. States? A Critical Review of the Diffusion Literature*, 22 CRIM. JUST. POL'Y REV. 403, 405 (2011); Todd Makse & Craig Volden, *The Role of Policy Attributes in the Diffusion of Innovations*, 73 J. POL. 108, 108 (2011). However, these studies do not show a correlation between these variables and the rapidity or scope of the adoption of victims' rights. *E.g.*, Scott P. Hays, *Influences on Reinvention During the Diffusion of Innovations*, 49 POL. RES. Q. 631, 642 (1996) (studying diffusion of victims' compensation laws).

35. Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143, 153–55 (1999).

36. Mary Beth Ricke, Note, *Victims' Right to a Speedy Trial: Shortcomings, Improvements, and Alternatives to Legislative Protection*, 41 WASH. U. J.L. & POL'Y 181, 184–86 (2013).

victims.[37] Alabama has a one-year filing limit for victims' compensation; meaning that the victim has one year from the date the crime is reported to file for compensation from the state.[38] The maximum amount that a victim can receive from Alabama is $15,000.[39] In contrast, Ohio has no time limit on when a victim may file for compensation, and there is a maximum $50,000 payout.[40]

The Justice Fellowship recently commissioned a report showing the amount of compensation paid out to victims by states through their compensation programs.[41] The report examined the average amount each state's victim compensation fund directly paid to victims of violent crime in 2012.[42] Rates ranged from close to $1,300 to $25. In 2012, there were nearly seven million victims of violent crime aged twelve and older.[43] Meanwhile, victim compensation funds assist approximately 200,000 victims of crime annually and award nearly $500 million to them.[44] Thus, only a fraction of victims are receiving the funds they are entitled to, with varying levels of compensation among the states.[45]

B. Victim Impact Statements

One of the most notable changes in the criminal justice process, largely due to the victims' rights movement, was the inclusion of victim impact statements during both trials and parole hearings.[46] A victim impact statement gives the victim a voice during the criminal justice process, and all states recognize the right of victims to be heard.[47] While all states allow victim impact statements to be presented and considered some time before the sentencing process, when, where, and how they are delivered varies considerably depending on the jurisdiction and judge.[48] Most states allow the victim to present either an oral or written statement for a designated parole officer to include in the offender's pre-sentencing report, which is then considered by the judge.[49] Other times,

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37. ALA. CODE § 15-23-15(a)–(b) (2014); OHIO REV. CODE ANN. § 109.42 (West 2011).

38. ALA. CODE § 15-23-12(a)(1) (2014).

39. *Id.* § 15-23-12(b).

40. *See* Appendix; *see also* OHIO REV. CODE ANN. § 109.42.

41. DOUGLAS N. EVANS, COMPENSATING VICTIMS OF CRIME 1 (2014).

42. *Id.* at 6.

43. *Id.* at 1.

44. *Id.*

45. *Id.* Improvements that could and should be made to benefit victims of crime beyond the scope of this article. For proposals that could improve victims' awareness concerning the programs and funds available to crime victims, see *id.* at 15–19.

46. *See* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 611 (2009).

47. *Id.* at 614–15.

48. Damon Pitt, *No Payne, No Gain? Revisiting Victim Impact Statements After Twenty Years in Effect*, 16 CHAP. L. REV. 475, 485 (2013).

49. *Victim Impact Statements*, *supra* note 25.

the victim is allowed to present a statement in court during the sentencing hearing.[50] The presentation of the victim impact statement may take place in front of and be directed at the accused; however, this is not always the case.[51]

New York provides an illustrative example of one approach to the victim impact statement process during pre-sentencing. In New York, victims or their family members have the right to orally address the court on "any matter relevant" to sentencing.[52] The judge maintains discretion to decide whether or not to allow a family member to speak.[53] Judges can restrict the number of indirectly affected victims (i.e., family members) who may present statements during the pre-sentencing process.[54] One study concerning the regulation of victim impact statements in New York found that only one-third to one-half of the families interviewed were allowed to face the offender at sentencing in order to present their impact statements.[55]

Victim impact statements may also be presented to parole boards prior to or during parole hearings.[56] This process is very similar to a victim impact statement presentation at a pre-sentencing hearing; it can be done in-person or through a written statement.[57] As with pre-sentencing hearings, states vary on how and when they allow victims to present their statements.[58] In order to highlight the differences, the Appendix describes the different presentation formats that states allow for victim impact statements at parole hearings.[59] In some states, the victim may be present at the hearing, while in others victims may only submit written or oral statements to the board prior to the hearing.[60]

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50. *Id.*

51. Christine M. Englebrecht, *Where Do I Stand?: An Exploration of the Rules that Regulate Victim Participation in the Criminal Justice System*, 7 VICTIMS AND OFFENDERS 161, 167–79 (2012).

52. *Id.* at 167.

53. *Id.* at 167–68.

54. *Id.* at 167–69.

55. *Id.* at 174.

56. Kathryn Morgan & Brent L. Smith, *Victims, Punishment, and Parole: The Effect of Victim Participation on Parole Hearings*, 4 CRIM. & PUB. POL'Y 333, 334 (2005).

57. *Id.* at 336.

58. *See* Appendix. While using victim impact statements varies based on the jurisdiction, the use of victim impact statements has proven controversial regarding its potential impact on components of the criminal justice process, such as sentence length and parole decisions. Studies regarding the potential impact of victim impact statements have not found a definitive answer. *See, e.g.*, Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 447 (2003); Bryan Myers, Steven J. Lynn & Jack Arbuthnot, *Victim Impact Testimony and Juror Judgment: The Effects of Harm Information and Witness Demeanor*, 32 J. APPLIED SOC. PSYCHOL. 2393, 2396 (2002); Theodore Eisenberg, Stephen P. Gravey & Martin T. Wells, *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 318–19 (2003); Morgan & Smith, *supra* note 56, at 333–34; Pitt, *supra* note 48, at 488–93.

59. *See* Appendix.

60. Nadler & Rose, *supra* note 58, at 427.

C. The Future of Victims' Rights in the States

The expansion of victims' rights at the state level continues seemingly unabated.[61] For example, in 2013, Hawaii's State Senate unanimously passed a constitutional amendment for victims' rights, putting the state another step closer to a constitutional amendment in conjunction with its statutory provisions.[62] In 2011, the Ohio Attorney General expanded the state's compensation program by eliminating the ten year deadline for victims to file a claim.[63] Likewise, the cap for fees on individual attorneys or law firms was eliminated.[64] In 2013, Pennsylvania Governor Tom Corbett signed legislation allowing crime victims and their families to speak directly to members of the State Board of Probation and Parole.[65] Prior to this legislation, victims were only allowed to testify to the parole board through written statements and phone calls, but not in person.[66]

Oftentimes state provisions exceed those that have been proposed or implemented federally.[67] For instance, in 2013, the Supreme Court of New Jersey ruled that a criminal defendant does not have the absolute right to miss his sentencing hearing when the victim is prepared to make a statement.[68] This ruling was in response to a defendant who did not want to listen to the reading of the victim impact statement during sentencing.[69] The unanimous court held that "[t]here can be little doubt that from the standpoint of the victims, who are to be treated with fairness, compassion, respect, and dignity, their statements at sentencing will carry more meaning if they are heard not only by the judge but the defendant as well."[70]

Victims have not only state-funded programs, but also those of many non-governmental organizations at their disposal. These programs provide resources to victims of crime at the national, state, and local levels.[71] Non-

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61. This is not to say that victims' rights advocates lack concerns. Some advocates argue that both federal and state victims' rights provisions sometimes lack robust enforcement due to recalcitrance by some public authorities and attorneys, as well as a frequent lack of notice to victims. *See* Mary L. Boland & Russell Butler, *Crime Victims' Rights: From Illusion to Reality*, 24 CRIM. JUST. 4, 8–9 (2009); Elizabeth N. Jones, *The Ascending Role of Crime Victims in Plea-Bargaining and Beyond*, 117 W. VA. L. REV. 100, 129–36 (2014).

62. S.B. 509, 27th Leg. (Haw. 2013).

63. *Victims: Apply for Victim's Compensation*, OHIO ATT'Y GEN. MIKE DEWINE, http://www.ohioattorneygeneral.gov/victimscompensation.aspx/?from=nav.

64. *Id.*

65. H.B. 492, 2013 Gen. Assemb., Reg. Sess. (Pa. 2013).

66. *Id.*

67. Schwartz, *supra* note 21, at 527–28.

68. State v. Tedesco, 69 A.3d 103, 110 (N.J. 2013).

69. *Id.* at 106.

70. *Id.* at 114.

71. For an overview of such organizations, see *Help for Crime Victims*, THE NAT'L CTR. FOR VICTIMS OF CRIME, http://www.victimsofcrime.org/help-for-crime-victims [hereinafter

governmental victim services include counseling, transportation, mediation, medical services, training and education, financial assistance, crisis intervention, legal advocacy, legal services, child care, safe houses, and support groups.[72] Well-known, nationwide interest groups, such as Mothers Against Drunk Driving (MADD) and the National Center for Victims of Crime, are just two of many organizations that help victims construct a victim impact statement, guide them through the criminal justice process, and provide free counseling services.[73] These groups often work in conjunction with the state to provide the fastest and most effective services for victims.[74]

Between non-governmental organizations and state provisions it is clear that victims' rights have expanded considerably since the 1960s and will continue to do so. While discrepancies exist among the states in how vigorously victims' rights are enforced, it is clear that they have led the way in creating a role for, and expanding the rights of, victims during the criminal justice process.

II. FEDERALISM AND THE PROPOSED VICTIMS' RIGHTS AMENDMENT

A. History of the Proposed Victims' Rights Amendment

Proposals to amend the U.S. Constitution to codify victims' rights for all federal and state judicial proceedings have a long pedigree.[75] These proposals originated from a report by the Task Force on Victims of Crime, which was convened by President Reagan in 1982.[76] In its Final Report, the Task Force noted that the Bill of Rights has fewer protections for victims than the accused, and argued that a sentence should be added to the Sixth Amendment providing rights for victims to be present and heard in criminal prosecutions.[77] As already noted, in 1986, victims' rights advocates formed NVCAN to lobby for such a change.[78]

NCVC]; NACVCB, *supra* note 30; *Victim Resources*, NAT'L CRIME VICTIM LAW INST. https://law.lclark.edu/centers/national_crime_victim_law_institute/for_victims/self_help/.

72. NCVC, *supra* note 71.

73. *Id.*

74. *See id.* For example, in July 2014, California passed SB 978, allowing medical providers, with a victim's permission, to contact counseling centers when he or she is transported to a hospital for a medical evidentiary exam. Prior to the bill, only law enforcement officers could contact counseling centers on behalf of victims.

75. For useful overviews of the proposed VRA's history, see Cassell, *supra* note 3, at 306–08; Schwartz, *supra* note 21, at 525.

76. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114–15 (1982) [hereinafter FINAL REPORT].

77. *Id.* at 114–15.

78. Schwartz, *supra* note 21, at 526. *See also Victims' Rights Amendment Introduced*, NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org (providing further information about the NVCAN and its support for the passage of a constitutional amendment).

By the mid-1990s, the advocates for a constitutional amendment approached the Clinton Administration and members of both parties in Congress, which resulted in several versions of the amendment being introduced in the latter part of the decade.[79] Those proposals had eight rights for victims of violent crime: notice of proceedings, to be present whenever the accused had a right to be present, to be heard at sentencing, notice of release or escape, a speedy trial, reasonable victim protection efforts, and notice of these rights.[80] The proposals had numerous co-sponsors, and hearings were held before the Senate Judiciary Committee, which approved the proposal in 1998.[81] However, the full Senate never voted on the proposal.[82]

A similar pattern occurred in the 2000s. Again, with bi-partisan support, numerous co-sponsors, and the Bush Administration's backing, VRAs similar to those from the 1990s were introduced in Congress.[83] Hearings were held, and again the Senate Judiciary Committee favorably reported out a proposed VRA in 2003.[84] Yet again, the full Senate took no action on the proposal, and no further significant activity on the VRA took place in that decade.[85] However, the attention bestowed on the VRA led to the passage of the Crime Victims' Rights Act (CVRA) in 2004,[86] which established a variety of rights in federal criminal proceedings that were similar to those in the proposed VRA. Indeed, the CVRA was the culmination of several earlier federal statutes, which in various ways established victims' rights in federal criminal proceedings.[87]

Several proposals for a VRA have been introduced in recent years.[88] They were very similar to previously-proposed VRAs, with the one notable difference being the coverage of *all* crime victims, not just victims of violent

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79. S.J. Res. 52, 104th Cong., § 1 (1996).

80. *Id.*

81. S. REP. NO. 105-409 (1998) [hereinafter 1998 Senate Report].

82. For further details on congressional activity on the proposed VRA in the 1990s, see Cassell, *supra* note 3, at 307; Schwartz, *supra* note 21, at 527–28.

83. S. REP. NO. 108-191, 195–96 (2003) [hereinafter 2003 Senate Report].

84. *Id.*

85. For further details on congressional activity on the proposed VRA in the 2000s, see Cassell, *supra* note 3, at 307–08.

86. Justice for All Act of 2004, Pub. L. No. 108-405, § 101-04, 118 Stat. 2260 (2004). For discussion of the passage and provisions of the CVRA, see Cassell, *supra* note 3, at 308–12.

87. Cassell, *supra* note 3, at 304–05 (referring to the Victims of Crime Act of 1984, the Victims' Rights and Restitution Act of 1990, the Violent Crime Control and Law Enforcement Act of 1994, the Antiterrorism and Effective Death Penalty Act of 1996, and the Victim Rights Clarification Act of 1997); 2003 Senate Report, *supra* note 83, at 61–65 (minority views of Sens. Leahy, Kennedy, Kohl, Feingold, Schumer & Durbin) (referring to other federal laws, such as the Victim and Witness Protection Act of 1982, the Victims' Rights and Restitution Act of 1990, the Violence Against Women Act of 1994, the Mandatory Victims Restitution Act of 1996, the Crime Victims With Disabilities Awareness Act of 1998, the Torture Victims Relief Act of 1998, and the Victims of Trafficking and Violence Protection Act of 2000).

88. *See supra* note 5 and accompanying text.

crimes.[89] However, the renewed proposal did not pass the 113th Congress.[90] Perhaps the successes of the victims' rights movement in the states and by congressional statute are a contributing factor in the decreased congressional interest in passing the VRA. The need for the VRA may seem diminished in light of these other laws.[91] Falling crime rates may also play a factor. Still, it seems unlikely that it will fall from the political agenda, or that there will be no further efforts to pass the VRA.[92]

Nonetheless, it is worth asking why, despite what one VRA critic called the "extraordinary political popularity of victims' rights,"[93] the formidable, bipartisan support for the VRA, and the considerable activity in Congress, the VRA has to date never received a full vote in (much less passage by) either chamber of Congress. No doubt, the sheer difficulty of passing any constitutional amendment explains much of the reason why. Consider the recent failure of repeated efforts to pass anti-flag burning amendments, to balance the budget, or to create term limits for members of Congress, all of which enjoyed public support like the VRA.[94] Another reason is that the VRA does indeed face formidable opposition. High-level interest groups like the National Governors' Association and many state attorneys general supported the various iterations of the VRA.[95] However, the VRA was opposed by an impressive array of well-known organizations, including the U.S. Judicial Conference, the lobbying arm of the federal courts, the Conference of Chief Justices, the National Association for the Advancement of Colored People, American Civil Liberties Union, and even a variety of victims' rights organizations.[96] Collectively, these groups advanced many reasons for their opposition, including that federal or state statutes were preferable to address

89. Cassell, *supra* note 3, at 313.

90. BELOOF, CASSELL & TWIST, *supra* note 3, at 731.

91. *Id. See also* Paul G. Cassell & Steven Joffee, *The Crime Victim's Expanding Role in the System of Public Prosecution: A Response to the Critics of the Crime Victims' Act*, 105 NW. U. L. REV. COLLOQUY 164, 166–67 (2010) (stating that victims' advocates set aside the proposed constitutional amendment "in the short term" and instead pressed for federal legislation).

92. For example, the 2012 Platform of the Republican Party favorably referred to the VRA while still not expressly endorsing its passage. *See id.* The 2012 Democratic Party Platform for 2012 made no reference to the VRA. *See The 2012 Democratic National Party Platform*, N.Y. TIMES (Sept. 4, 2012), http://www.nytimes.com/interactive/2012/09/04/us/politics/20120904-DNC-platform.html?_r=0.

93. Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443, 445. *See also* Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 742–43 (2013) (discussing the legislative success of crime victims groups, including their unique "ability to generate a wealth of public sympathy, an enormously powerful weapon in politics, particularly when used in conjunction with media coverage").

94. 2003 Senate Report, *supra* note 83, at 3–6.

95. *Id.* (summarizing the legislative history of efforts to pass the VRA in the 1990s and 2000s).

96. *Id.* at 59–61 (minority views of Sens. Leahy, Kennedy, Kohl, Feingold, Schumer, & Durbin) (listing these and other groups).

victims' rights, that state efforts could prove to be or were already adequate, and that it was an inappropriate distraction to devote the resources necessary to convince at least three-fourths of the states to ratify an amendment.[97] Presently, the latter rationales seem to have carried the day; however, that does not necessarily mean the debate has ended.

B. The VRA and the Values of Federalism

Many issues drove the debate over the VRA. The core substantive issue was the normative one of permitting a new party to participate in criminal proceedings, and whether that improperly impacted the ability of the accused to present a defense against the state.[98] Related practical issues concerned the precise language and interpretation of VRA provisions.[99] Further discussion of those arguments is beyond the scope of this Article, as this Article is principally concerned with the federalism implications of the VRA. This section of the Article first summarizes and critically evaluates the extant discussions of the federalism implications of the VRA. It then focuses on the related aspect of whether and to what extent federal courts would be expected to enforce state compliance with the VRA requirements.

1. Political Posturing on the VRA and a Functional Analysis of Federalism

Ratification of the VRA would nationalize victims' rights, which until now have been left to the vagaries of each state's law. VRA supporters have always acknowledged this point, but defended the imposition on the states on various grounds. The Task Force established by President Reagan argued, though not elaborately, that a constitutional amendment was necessary as a symbolic matter and to achieve efficacy, uniformity, and permanence for victims' rights.[100] Later, supporters renewed these arguments during the congressional debates over the VRA.[101] Their principal argument was that victims' rights were equally important to the rights of the accused in criminal proceedings—that is, those enumerated in the Bill of Rights.[102] Because most of those rights had been incorporated under the Due Process Clause of the Fourteenth

97. *Id.* (summarizing these views). For discussions of how prosecutors and other traditional participants in the criminal justice system may resent the perceived interference by victims, see Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 300–01, 301 n.43, 322; Andrew J. Karmen, *Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMM. 157, 159–60 (1992).

98. Cassell, *supra* note 3, at 304.

99. For examples of the scholarly debate over the VRA, see *id.* at 301 n.1 (listing scholarly sources both supporting and criticizing the VRA).

100. FINAL REPORT, *supra* note 76, at 114–15.

101. *See* McDonald v. City of Chi., 561 U.S. 742, 754, 764–75 (2010) (discussing the Incorporation Doctrine in the Supreme Court and the incorporated rights resulting therefrom).

102. See *id.* at 767–68.

Amendment and thus were binding on the states,[103] they argued that victims' rights should apply to the states in a parallel fashion.[104] Only in that way would victims' rights be uniformly guaranteed throughout the country, they argued.[105] Supporters also argued that the nationalization of victims' rights would not end state developments on the topic because the VRA would permit states "latitude to accommodate legitimate local interests."[106] Put another way, they argued, the VRA would establish a floor for victims' rights that states could supplement.[107]

Critics of the VRA countered all of these arguments. They contended that the quest for uniformity was elusive, as they predicted that implementation of some of the broad language of the VRA would lead to various interpretations by different states, and thus create a "patchwork" of protections for victims.[108] Critics further argued that there was considerable state activity establishing victims' rights, so a federal mandate was unnecessary and could stifle state innovation in this field.[109] Furthermore, they added that the VRA was similar to an unfunded mandate that could impose enormous implementation costs on the states.[110]

In surveying some of these arguments, the most prominent academic supporter of the VRA, Professor Paul Cassell, argued that the "inconsistency . . . is . . . breathtaking."[111] He supported this charge by observing that many of the critics of the VRA were staunch supporters of the Supreme Court's federalization of "a whole host of criminal justice issues ranging from the right to counsel, to *Miranda*, to death penalty procedures, [and] to search and

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103. *See id.* at 764–65.

104. Cassell, *supra* note 3, at 316–17.

105. *See, e.g.*, *id.* at 316–18; 1998 Senate Report, *supra* note 81, at 11–12; 2003 Senate Report, *supra* note 83, at 15–16. Even some supporters of the VRA nonetheless expressed concerns about the "federalization of crime and the nationalization of our criminal justice system." 1998 Senate Report, *supra* note 81, at 44 (views of Sen. Hatch).

106. Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 532.

107. Twist & Seiden, *supra* note 1, at 360–61.

108. Schwartz, *supra* note 21, at 546–47. *See also* 1998 Senate Report, *supra* note 81, at 68–71 (minority views of Sens. Leahy, Kennedy, & Kuhl); 2003 Senate Report, *supra* note 83, at 71 (minority views of Sens. Leahy, Kennedy, Kohl, Feingold, Schumer, & Durbin).

109. *See* Schwartz, *supra* note 21, at 547; Mosteller, *supra* note 93, at 444–45; 1998 Senate Report, *supra* note 81, at 69–71 (minority views of Sens. Leahy, Kennedy, & Kohl). It was argued that all of the state activity on behalf of victims differentiated the VRA from the nationalization of rights accomplished by the Fourteenth Amendment, because in the latter circumstance many states did not protect the rights of the newly freed slaves. 2003 Senate Report, *supra* note 83, at 71–72 (minority views of Sens. Leahy, Kennedy, Kohl, Feingold, Schumer, & Durbin).

110. 1998 Senate Report, *supra* note 81, at 62–64 (minority views of Sens. Leahy, Kennedy, & Kohl); 2003 Senate Report, *supra* note 83, at 79–82, 92 (minority views of Sens. Leahy, Kennedy, Kohl, Feingold, Schumer, & Durbin).

111. Cassell, *supra* note 106, at 531.

seizure rules, among many others[.]"[112] Cassell's critique can extend to other arguments made by the critics. For example, critics of the VRA typically have supported the nationalization of federal constitutional and statutory rights in a wide variety of contexts without lodging concerns similar to those they have about the VRA. Yet Cassell's critique is more powerful because it also applies to many of the arguments made by supporters. To his credit, Cassell acknowledges that many VRA supporters have typically been critics of the incorporation doctrine.[113] This time, though, he waves off the inconsistency, arguing that "it is unlikely that we will ever retreat from our national commitment to afford criminal defendants basic rights," and supporters of the VRA are now simply asking for "parallel treatment."[114]

Inconsistency in addressing federalism issues is not confined to the victims' rights arena. Generally, most conservatives support the VRA, but are typically skeptical of federal authority displacing state prerogatives or requiring states to follow federal mandates without good reasons. On the other hand, most liberals are critical of the VRA, yet typically support federal laws mandating national uniformity and state compliance to confront social and political problems.[115] Still, it remains easy to find exceptions to these generalizations in areas other than the debate over the VRA. For example, consider the incorporation of the Second Amendment. In *McDonald v. City of Chicago*,[116] the Supreme Court concluded that the right to bear arms under the Second Amendment applied to the states.[117] The interest groups urging the Court to render this holding, which limited the ability of states to enact gun control measures, created alliances between traditionally adversarial groups. Thirty-eight state attorneys general, who presumably would favor states' rights, filed an amicus curiae brief in favor of this result.[118]

Similarly, some interest groups that often oppose federal mandates favored the VRA despite the fact that it limits state innovation via a constitutional amendment. No less than forty-nine governors and forty-nine state attorneys

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112. *Id.*

113. *Id.* at 531 n.277 (citing Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 701–02 (1988); Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 63–70 (1996)).

114. *Id.* at 531.

115. *See* Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY, 37, 37 (2012) (discussing the skepticism progressives and liberals usually have for federalism).

116. 561 U.S. 742 (2010).

117. *Id.* at 791. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (holding that the District of Columbia's ban on handgun possession in the home violated the Second Amendment).

118. Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 359–60 (2012). The attorneys general of three states filed an amicus brief arguing for the opposite result. *Id.* at 401.

general at various times publicly supported VRA proposals in Congress.[119] But a lack of consistency in American law and politics is hardly limited to support or opposition to the VRA. Elected officials, interest groups, and the public at large are all often result-oriented toward federalism and other issues. They all may take seemingly counterintuitive positions on federalism issues due to an electoral advantage on a particular issue, the desire to place responsibility on the federal government, or the perception that the resolution of a problem, or lack thereof, in one state has a spillover effect.[120] In these circumstances, a federal, uniform position may provide a resolution.[121]

The now-standard arguments for or against the VRA are interesting and important; however, they are largely normative in nature. Specifically, if someone favors a robust conception of victims' rights, it would seem that he or she would support the VRA, with the reverse being true, as well. These arguments would benefit from a more sustained attention to a functional analysis of federalism. A rich academic literature in American law, politics, and economics has developed several rationales for federalism that can be utilized to measure arguments for or against a proposed federal resolution to a particular issue.[122] These rationales center on the idea that states are better equipped to fashion solutions that are amenable to their respective citizenries.[123] Citizens and businesses that disagree with particular policies in a state can vote by moving elsewhere if they disagree vehemently enough. In this way, states can serve as laboratories of experimentation, which other states, and indeed the federal government, may follow. On the other hand, state policies may have negative spillover effects in other states and spark races-to-the-bottom among states, which suggests that interstate collaboration is appropriate on an issue, or that a national resolution is beneficial.[124]

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119. 2003 Senate Report, *supra* note 83, at 3–4 (governors supported VRA by 49–1 vote in 1997); Twist & Seiden, *supra* note 1, at 365 (state attorneys general from forty-eight states, the U.S. Virgin Islands, and Washington, D.C., supported the VRA in 2004).

120. Solimine, *supra* note 118, at 381–89.

121. *Id.*

122. *See* sources cited *infra* note 124.

123. *See generally* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 389–405 (1997) (discussing factors for state authority in the federalism context).

124. For discussions and critiques of functionalist justifications for federalism, see DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 85–88 (1995); Jenna Bednar, *The Political Science of Federalism*, 7 ANN. REV. LAW & SOC. SCI. 269, 271–75 (2011); William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 217–19 (1997); Friedman, *supra* note 123, at 378–412; Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2213–28 (1998). *Cf.* Neil S. Siegel, *Collective Action Federalism and Its Discontents*, 91 TEX. L. REV. 1937, 1941 n.24 (2013) (explaining that interstate spillovers do not necessarily involve interstate competition, providing as examples pollution across state lines and cross-state economic effects of racial discrimination). It is difficult to precisely define and apply such terms as positive and negative externalities, or whether a particular aspect of interstate competition is a race to the top, a race to the bottom, or perhaps neither. *See, e.g.*, Michael W.

These factors can apply to analyzing the efficacy of federal or state regulation of criminal law and procedure.[125] On this account, crime negatively affects states and local communities, and states can respond by, among other solutions, pursuing policies that encourage criminals and criminal activity to shift to other states.[126] One way to accomplish this goal is by making criminal investigations and prosecutions easier, as well as increasing jail sentences, compared to neighboring states.[127] In turn, this inter-jurisdictional competition can be conceptualized as a race-to-the-bottom because negative effects are exported to other states, and thus states are encouraged to apply increasingly harsher sanctions or policies than they might otherwise to counter this result.[128] State cooperation or federal intervention are two potential paths to counter these issues.[129]

Consider how these criteria apply to the development of crime victims' rights among the states. Establishing and increasing such rights increases the sanction for criminal activity in several senses because a new actor—the victim—can enter the criminal justice process, almost always on the side of the prosecutor. Knowing this, potential criminals may be incentivized to relocate their illicit activities to other states. In turn, states might be encouraged to develop victims' rights to a degree that they might not otherwise. It would

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McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1500 (1987) (book review); Heather K. Gerken & Ari Holtzbatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 80 (2014). Nonetheless, useful insights can be gained by employing such an analysis, and it has thus far not been found in the extant analysis of the proposed VRA.

125. *See, e.g.*, Wayne A. Logan, *Crime, Criminals, and Competitive Crime Control*, 104 MICH. L. REV. 1733, 1737–45 (2006); Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1864–71 (2005). However, debate on the efficacy of federal or state control of criminal justice can occur in mainly consequential terms, giving less weight to the functional critique of federalism. *Compare* NICOLE LACEY, THE PRISONER'S DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY AMERICA (2008) (criticizing suboptimal criminal justice policies driven mainly by local concerns), *with* Stephanos Bibas, *Criminal (In)justice and Democracy in America*, 126 HARV. L. REV. F. 134, 137–38 (2013) (arguing that states and municipalities may have more incentives to weigh the costs and benefits of criminal justice policies, as compared to the federal government); Logan, *supra* note 7, at 88–103 (asserting that federal statutes, which since 1994 have heavily regulated state policy toward sex offenders, violate traditional norms of federalism, including state autonomy and experimentation); Janet Moore, *Democracy Enhancement in Criminal Law and Procedure*, 2014 UTAH L. REV. 543, 550 (arguing that reforms in criminal procedure should take place at the state level despite hostility or indifference by the courts).

126. Teichman, *supra* note 125, at 1838–39.

127. *Id.* at 1839–40.

128. *Id.* at 1862–63. Teichman provides examples of how states handle auto-theft rings, where stolen cars can easily be taken to other states, or "three-strikes laws," where some evidence seems to suggest that it displaces criminal activity to other states. *Id.* at 1843–48.

129. *Id.* at 1866.

seem that these effects are relatively weak. Even if potential criminals engage in a rigorous ex ante cost-benefit analysis with regard to criminal activity, it is unlikely that they give much weight to whether or not victims are engaged in the formal criminal process. The applicable sanctions and the likelihood of a successful prosecution are likely to be more important. The role of victims is not irrelevant; however, it likely plays a secondary role regarding the possibility of criminals relocating to other states.[130] States are typically concerned with victims who live or are victimized in their own state. Regarding victims' rights, then, "[g]iven all the other pressures that bear on criminal justice policy, interjurisdictional competition to displace crime does not appear to be a major force that shapes the system."[131]

The application of functional justifications for federalism shows that the proposed VRA is not appropriate. As developed in Part I, all states have established victims' rights, but the kinds of rights and the level of their enforcement differs among the states. Uniformity does not exist, and it can be argued that some states enforce victims' rights more effectively than others. The Appendix highlights some of these important and varying differences between states.

However, it does not follow that the VRA is the appropriate solution for these inconsistencies. The level of protection of victims' rights appears to have relatively minimal interstate effects, and in particular few, if any, interstate externalities. The benefits and costs of victims' rights seem largely internalized within each state. Thus, to the extent states compete to increase victims' rights, it appears to be a race-to-the-top. States may have a variety of reasons, from mundane budgetary concerns to apprehensions about changing traditional criminal procedure, to not adopt or enforce a panoply of victims' rights. Conversely, other states might consider it good policy and politics to adopt and vigorously enforce victims' rights. This experimentation should play out on a state-by-state basis, and as the state laws and practices survey in Part I demonstrates, states have continued to experiment. Consequently, federal intervention through the VRA or in other ways, at least at present, is unnecessary.

2. Federal Court Enforcement of the VRA

Another way federalism concerns arose during the debates over the proposed VRA was how federal courts may enforce its provisions against the states.[132] Some states allow crime victims to file civil suits for money damages,[133] but no proposed version of the VRA has ever contained such a provision. The

130. Perhaps this conclusion would change as victims' rights become more established in state criminal procedure and victims come to exercise their rights more vigorously.

131. Samuel R. Gross, *Jurisdictional Competition in Criminal Justice: How Much Does It Really Happen?*, 104 MICH. L. REV. 1725, 1732 (2006).

132. *See* Mosteller, *supra* note 93, at 451.

133. Cassell, *supra* note 3, at 333–34, 334 n.219; *supra* Part I.A.

reasons for this omission were avowedly pragmatic because such suits raise potentially complex issues, including how such an action might affect plea-bargaining, as well as other aspects of the criminal process.[134] The language of the VRA did not mandate a damages remedy, and its availability, supporters said, was for Congress and the states to decide.[135]

However, that left unresolved the issue of how VRA requirements might be enforced against states by actions for declaratory or injunctive relief in federal court.[136] The silence of the VRA on this issue, and the express exception for only damages actions, would seem to leave open the possibility of such relief.[137] Supporters of the VRA seem to acknowledge this point, but were untroubled by any federalism implications because, as they observed, other provisions of the Bill of Rights are routinely enforced by criminal defendants as defenses to state prosecutions.[138]

In contrast, critics of the VRA expressed great concern regarding possible federal court supervision of state criminal procedures in order to enforce the requirements of the VRA.[139] They emphasized that, not unlike the long history of prison reform litigation, injunctive suits in federal court, especially those brought as class actions, would impose potentially enormous monetary costs on a state and intrude on the daily operations of its criminal justice system.[140] Indeed, they further observed, the conference of state chief justices opposed the adoption of the VRA for this reason.[141]

These respective arguments contain inconsistencies, some of which could be described as breathtaking.[142] Typically, most conservative supporters of the

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134. *See* Cassell, *supra* note 3, at 333–34.

135. *Id.* at 333; 2003 Senate Report, *supra* note 83, at 84. According to VRA supporters, a victim could not file a damages action under 42 U.S.C. § 1983 to enforce rights guaranteed under the VRA. Cassell, *supra* note 3, at 334. Under existing law, courts have also rejected § 1983 damage actions by victims against public officials for alleged failures to protect existing rights. *See, e.g.*, Pusey v. Youngstown, 11 F.3d 652, 657–58 (6th Cir. 1993).

136. Schwartz, *supra* note 21, at 536. Such actions could also be brought in state court, but they would not present the federalism issues addressed in this article.

137. *Id.*

138. Cassell, *supra* note 3, at 335; Twist & Seiden, *supra* note 1, at 362.

139. 1998 Senate Report, *supra* note 81, at 71–72 (minority views of Sens. Leahy, Kennedy, & Kohl); 2003 Senate Report, *supra* note 83, at 92–93 (minority views of Sens. Leahy, Kennedy, Kohl, Feingold, Schumer, & Durbin).

140. 1998 Senate Report, *supra* note 81, at 71–72 (minority views of Sens. Leahy, Kennedy, & Kohl); 2003 Senate Report, *supra* note 83, at 93 (minority views of Sens. Leahy, Kennedy, Kohl, Feingold, Schumer, & Durbin).

141. 2003 Senate Report, *supra* note 83, at 92–93 (minority views of Sens. Leahy, Kennedy, Kohl, Feingold, Schumer, & Durbin).

142. However, not all of the arguments are inconsistent. For example, Republican Senator Fred Thompson opposed the VRA because of its intrusion on state prerogatives, including the likelihood of federal court supervision of state criminal proceedings. 1998 Senate Report, *supra* note 81, at 47–49. Likewise, Professor Robert Mosteller, a critic of the VRA, did not seem troubled by the prospect of federal court intervention, and indeed conceded that it would increase

VRA would otherwise be critical of federal court injunctive actions that monitor state institutions such as schools, prisons, or mental health facilities, often at great cost to the state, to enforce compliance with federal constitutional rights.[143] Critics charge that such actions effectively vest executive and legislative power in federal judges, far beyond the scope of power traditionally held by courts.[144] Conversely, most liberal critics of the VRA have embraced such federal court actions in other contexts as necessary to compel recalcitrant states to follow federal constitutional norms.[145]

If the VRA were adopted, and declaratory or injunctive relief actions were permitted and inevitably filed, it is likely that such actions would neither be as uncontroversial as the VRA's supporters suggest, nor as disruptive as its critics argue. The history of similar institutional reform litigation in federal courts indicates the likelihood of this conclusion.[146] Injunctive actions in federal court against state action in general, and institutional reform litigation in particular, have long been controversial.[147] While such actions were especially and successfully utilized in the Civil Rights Movement, not all federal judges embraced them, and Congress has passed legislation limiting the ability of litigants to seek injunctive relief.[148] Depending on various factors, including local conditions, the state institution involved, and the scope of the injunctive relief sought, such actions have sometimes not been especially controversial.[149] Instead, structural reform litigation has, on occasion, "stabilized as a form of litigation with a range of generally accepted remedies in a few leading cases and imitated elsewhere."[150]

A similar pattern may follow if federal courts were called upon to enforce the VRA. All states have constitutional or statutory protections for victims' rights, so being required to follow the broad language of rights enumerated in the VRA would not present a monumental shift. States would argue that they are already complying with the VRA. No doubt, some victims would disagree

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the "effectiveness of victims' rights," while still ultimately opposing it. Mosteller, *supra* note 93, at 451.

143. *See supra* notes 139–42 and accompanying text.

144. *See, e.g.*, ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN THE GOVERNMENT 150–61 (2003).

145. *See, e.g.*, Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

146. For an excellent overview, see John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387 (2007).

147. S. Gene Fendler, *Federal Injunctive Relief Against State Court Criminal Proceedings: From* Young *to* Younger, 32 LA. L. REV. 601, 601 (1972).

148. Jeffries & Rutherglen, *supra* note 146, at 1395–97, 1408–12 (discussing Congressional restrictions and federal judicial behavior).

149. *Id.* at 1411–12.

150. *Id.* at 1412. For similar conclusions, see Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 565 (2006).

and argue that the state law provisions, either facially or as-applied, are deficient. In turn, they might file a lawsuit in federal court seeking an order to force full state compliance with the mandates of the VRA. The outcome of these lawsuits would inevitably vary from state to state, but it is difficult to believe that there would be endless and massive intrusions by federal courts. Most federal judges and state officials would not have the appetite for such litigation. Rather, such litigation would probably lead to some reforms in states as needed, and sooner or later recede into the background.[151]

C. The Fate of the Victims' Rights Amendment

Calling for an amendment to the U.S. Constitution is no small task. The adoption of the VRA is unjustified based on the values of federalism. While federal courts would likely adopt a modest, incremental approach in enforcing the VRA, should it be enacted, the VRA should not be implemented at all. The benefits and burdens of expanding or diminishing victims' rights are largely confined to the states, and a uniform federal law is unnecessary. Nonetheless, support for the VRA will likely continue. Many supporters will disagree with the assessments of this article on federalism grounds and conclude that the VRA's apparent uniformity is necessary. Others may support the VRA as a matter of symbolic politics. Consequently, the proposed adoption of the VRA is unlikely to fade from the policy agenda.

III. VICTIMS' RIGHTS AND FEDERAL HABEAS CORPUS

Absent the VRA, federal courts would still have a significant role in adjudicating and enforcing victims' rights established by federal statutes with regard to federal criminal actions in those courts. Victims' rights established by state law would be resolved primarily in state courts. Each sovereign would operate on its own terms. An exception to this strict dichotomy occurs in the adjudication of federal habeas corpus actions in federal court.[152] In those actions, federal courts review claims by prisoners that their state criminal convictions violated their federal constitutional rights.[153] This section outlines the, at times, complicated and contentious history of federal habeas actions,

151. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 828–30 (2006) (suggesting that structural reform litigation regarding "criminal justice institutions" could be effected through institutional injunctions).

152. Fay v. Noia, 372 U.S. 391, 410 (1963). Another exception would be the infrequent instances when the U.S. Supreme Court directly reviews state court adjudications of victims' rights. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 827 (1991) (holding that the state did not violate the Eighth Amendment in permitting a victim impact statement in the sentencing phase of a capital case).

153. 28 U.S.C. § 2254 (2012). This article does not address the other type of habeas actions that can be brought in federal court under 28 U.S.C. § 2255 regarding claims of prisoners in federal custody.

and then examines the curious history of the enforcement of victims' rights in federal habeas litigation.

Shortly after the Civil War, Congress statutorily granted federal judges the authority to hear constitutional claims from persons convicted in state court seeking a writ of habeas corpus.[154] That authority was narrowly construed for decades because it was often limited to circumstances where the state court lacked personal jurisdiction, thus resulting in few writs being granted.[155] This narrow application ceased during the Warren Court for two reasons. First, the Court incorporated many of the provisions of the Bill of Rights concerning criminal proceedings to the states, thus expanding the list of potential constitutional violations in state courts.[156] Second, the Court expanded the procedural ambit of the federal habeas statutes by permitting writs to be issued even when claims had not been fully presented to state courts.[157] The conventional wisdom for the change is that the Court was driven by the perception that state judges and institutions were incapable of vigorously protecting the constitutional rights of the accused.[158]

These developments, permitting federal judges to superintend state criminal procedures, were very controversial on and off the Court. On the Court, more conservative decisions from the Burger and Rehnquist Courts curtailed the Warren Court's expansive decisions by highlighting the costs of habeas, such as the value of finality in state court convictions, the quality of state court judging, and the balance of federalism.[159] Off the Court, the National Association of Attorneys General (NAAG) and other groups lobbied the Court in favor of those results and Congress to amend the habeas statutes to codify and extend these more restrictive interpretations.[160] Those efforts culminated in 1996 with the passage of the Antiterrorism and Effective Death Penalty Act

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154. Katy J. Harriger, *The Federalism Debate in the Transformation of Federal Habeas Corpus*, 27 PUBLIUS: J. FEDERALISM 1, 3 (1997).

155. History of the Federal Judiciary: Habeas Corpus Jurisdiction in the Federal Courts, FED. JUD. CTR., www.fjc.gov/history/home.nsf/page/jurisdiction_habeas.html (last visited July 25, 2015).

156. Harriger, *supra* note 154, at 3.

157. *See Fay*, 372 U.S. at 438 (holding that habeas petitions could be heard in cases where the petition had not been presented in state court, unless the prisoner deliberately bypassed state procedures).

158. For overviews of these developments, see NANCY J. KING & JOSEPH L. HOFFMAN, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT 6–11, 48–60 (2011); Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 798–805 (2009).

159. KING & HOFFMAN, *supra* note 158, at 61–66; MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM 120–21 (1999).

160. SOLIMINE & WALKER, *supra* note 159, at 121. For further discussion of the post-Warren Court debate over habeas corpus, see Harriger, *supra* note 154, at 9–20; Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2349–73 (1993).

(AEDPA).[161] This law creates a one-year statute of limitations to bring habeas petitions after exhausting state remedies, speeds up the protracted litigation of habeas suits in capital cases; and provides that habeas relief can only be awarded when a state court acts contrary to "clearly established federal law," as determined by the Supreme Court.[162]

The lengthy and contentious debate over the scope and application of federal habeas can obscure how difficult it is for a state prisoner to convince a federal judge to issue a writ. The changes in law effectuated by the Warren Court likely encouraged prisoners to file petitions in U.S. District Courts. Petitions rose from 560 filed in 1950, to 5,000 annually in the 1960s, to 9,000 by 1970, and to about 15,000 today.[163] However, this spike in the number of habeas applications was not correlative with the number granted. Even at the zenith of the Warren Court, federal judges granted only three to four percent of the petitions filed.[164] Only one to two percent of petitions were granted in subsequent decades.[165] The subset of petitions filed in cases where the death penalty was available presents a different picture, with up to forty percent being granted.[166] The grant rate for the noncapital subset of petitions thus falls below one percent.[167] The latter figure is due to the more complicated substantive and procedural law that governs capital cases, coupled with their higher stakes and generally being more vigorously argued.[168] There is a robust debate over what accounts for the low rate of petitioner success, especially in non-capital cases[169] and what can be done to change it, if anything.[170]

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161. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996), codified in scattered sections of the U.S. Code.

162. For discussion of the provisions of AEDPA, see Hoffman & King, *supra* note 158, at 805–06.

163. KING & HOFFMAN, *supra* note 158, at 60; SOLIMINE & WALKER, *supra* note 159, at 122. *See also* McQuiggin v. Perkins, 133 S. Ct. 1924, 1943 (2013) (Scalia, J., dissenting) (providing similar statistics).

164. SOLIMINE & WALKER, *supra* note 159, at 122.

165. *Id.* at 122–23.

166. *Id.* at 123.

167. *Id.* at 122–24.

168. Hoffman & King, *supra* note 158, at 821–22 (discussing differences between capital and noncapital habeas cases).

169. *Cf.* SOLIMINE & WALKER, *supra* note 159, at 124 (arguing that the low rate indicates that state criminal trials do not systematically undermine the full and fair adjudication of the federal constitutional rights of the accused); KING & HOFFMAN, *supra* note 158, at 87–101 (stating that the low rate of petitions is due to most noncapital prisoners not being in state custody long enough to exhaust remedies and subsequently file a petition).

170. For a variety of perspectives, see SOLIMINE & WALKER, *supra* note 159, at 126–27 (arguing that habeas corpus should still exist, but generally be limited to a focus on the process due to the accused to raise their rights); HOFFMAN & KING, *supra* note 158, at 796–98 (arguing that habeas corpus should be abandoned for noncapital cases, except for claims of actual innocence, and for capital cases, coupled with a federal initiative to improve state defense services); John H. Blume, Sheri Lynn Johnson & Keir M. Weyble, *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 CORNELL L. REV. 435 (2011) (taking issue with

Still, this narrative lacks any reference to the victims' rights movement. One explanation for this absence may be because the leaders of that movement were not particularly concerned with federal habeas litigation.[171] Likewise, it appears that most victims were primarily interested in the resolution of the original criminal trials and less so in post-trial proceedings, including habeas litigation.[172] Indeed, both supporters and critics of the VRA, at least in the 2003 iteration, took pains to emphasize that victims' rights laws would not apply in federal habeas proceedings.[173] Perhaps this reticence is due to the fact that victims were rarely involved in habeas cases. Alternatively, it might be because almost all federal habeas litigation is resolved on a paper record and evidentiary hearings are rarely held.[174] Thus, there is no forum for victims to speak their mind on any issue in open court, though they could presumably still submit a brief or some other written statement.

Perhaps reflecting this reticence, the CVRA, passed in 2004 in the wake of the abandonment of the effort to pass the VRA in 2003, made no reference to victims' rights in habeas cases.[175] However, that changed two years later with the passage of the Adam Walsh Child Protection and Safety Act (AWCPSA).[176] One minor provision of that wide-ranging law expressly establishes victims' rights in federal habeas litigation.[177] It is similar, but not identical, to the list of victims' rights in federal criminal trials established by

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Hoffman & King's arguments); Aziz Z. Hug, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519 (2014) (arguing that the Supreme Court's habeas jurisprudence is more coherent than often thought, and, as properly understood, is an instrument for sorting out cases warranting either less or more judicial attention).

171. 2003 Senate Report, *supra* note 83, at 41.

172. *Id.*

173. *Cf.* 2003 Senate Report, *supra* note 83, at 41 (observing that "the administration of criminal justice exception [found in the 2003 proposal] covers habeas corpus filings and proceedings, including those pursuant to 28 U.S.C. § 2254"); *id.* at 107 (minority views of Sens. Leahy, Kennedy, Kohl, Feingold, Schumer, & Durbin) (arguing that "the exercise of [victims'] rights would be terribly disruptive of a proceeding in a habeas corpus" case).

174. KING & HOFFMAN, *supra* note 158, at 79–80. *See also* Cullen v. Pinholster, 131 S. Ct. 1388, 1413 (2011) (Sotomayor, J., dissenting) (noting that evidentiary hearings are held in only 4 of every 1,000 noncapital cases, and 9.5 of every 100 capital cases). It appears that the low rate of hearings in federal court might become even lower after the *Cullen* decision, which held that relief under AEDPA would usually be based solely upon the state court record, as opposed to examining new evidence that might arise in a later evidentiary hearing. For further discussion, see Hug, *supra* note 170 at 536–38.

175. *Victims' Rights: Crime Victims' Rights Act*, U.S. DEP'T OF JUST., http://www.justice.gov/usao/briefing_room/vw/rights.html (last updated July 8, 2015).

176. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, 120 Stat. 616 (2006). The habeas provision is in Title II, § 212. For an overview of the AWCPSA, see Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present and Future*, 34 NEW ENG. J. CRIM. & CIVIL CONFINEMENT 3 (2008).

177. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, 120 Stat. 616 (2006).

the CVRA. The AWCPSA states that victims have "right[s] not to be excluded from any such public court proceeding," "to be reasonably heard at any public proceeding in the district court," "to proceedings free from unreasonable delay," and "to be treated with fairness and with respect for the victim's dignity and privacy."[178] Notably, the AWCPSA does not include a right of notification to the victim, though state law might still require victim notification of federal proceedings.[179]

The rationale for including the provisions on victim participation in habeas proceedings in the AWCPSA is unclear from the legislative history, which makes only passing reference to these habeas provisions.[180] Presumably they are related to concerns with those convicted of crimes against juveniles eventually seeking habeas relief in an attempt to set aside state trial results.[181]

The habeas provisions of the CVRA have been subject to relatively little adjudication. The most prominent discussion is the decision of the Fourth Circuit in *Brandt v. Gooding*,[182] a habeas case with a relatively unusual set of facts.[183] The habeas petitioner had previously sued his former lawyer for legal malpractice in state court.[184] The court found the plaintiff guilty of criminal contempt for introducing a fraudulent letter into those proceedings.[185] The conviction was affirmed and the former plaintiff, now a state prisoner, filed a writ of habeas corpus in U.S. District Court.[186] The petitioner moved to intervene in that proceeding under Federal Rule of Civil Procedure 24 to file a memorandum to correct what she saw as misstatements of fact made by the habeas petitioner when the latter moved for summary judgment.[187] She sought to utilize the CVRA provisions permitting victims in state proceedings to

178. 18 U.S.C. § 3771(b)(2)(A) (2012) (referencing rights found in section 3771(a)(3)–(4), (7)–(8)).

179. CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE: ADAM WALSH CHILD PROTECTION AND SAFETY ACT: A LEGAL ANALYSIS 20 (2007).

180. AWCPSA was enacted without committee hearings or other parts of the typical legislative process, as part of its fast-tracking through Congress, thus leaving minimal legislative history. *See* Logan, *supra* note 7, at 52, 112–13.

181. DOYLE, *supra* note 179, at 21. Earlier proposed legislation that culminated in the AWCPSA placed severe restrictions on the ability of state prisoners convicted of killing a child to pursue federal habeas relief, and also permitted victims to participate in those habeas proceedings. *E.g.*, Children's Safety Act, H.R. 3132, 109th Cong. § 303 (2005). The former provisions proved controversial and are not in the AWCPSA. The legislative history of the earlier proposals only briefly refers to victims' rights in the habeas provisions. *See* H.R. Rep. No. 109-218, pt.1, (2005).

182. 636 F.3d 124 (4th Cir. 2011).

183. *Id.* at 127.

184. *Id.*

185. *Id.* at 130.

186. *Id.*

187. *Id.* at 131–32.

intervene in federal habeas proceedings.[188] The district judge denied the motion to intervene, and the Fourth Circuit affirmed.[189]

Petitioner argued that the CVRA permitted her to intervene, thus granting her intervention under Rule 24(a)(1).[190] Alternatively, she contended that the CVRA independently granted a right to intervene to vindicate her "right to be reasonably heard at any public proceeding . . . involving release . . . ."[191] The court dismissed the first argument because the CVRA does not guarantee a right to intervene.[192] Rejecting the petitioner's second argument, however, proved more challenging for the court.[193] The court agreed that a habeas petition initiated a "public proceeding" under the CVRA.[194] Because most habeas cases are resolved on the pleadings and a paper record, the court continued, a crime victim could submit documents to be "heard" at the public proceeding.[195]

However, the court concluded that a formal intervention did not need to be granted to vindicate that right.[196] The legislative history of the CVRA, the court stated, does not demand that "reasonably heard" be the equivalent of an "in-person right to be heard."[197] The court continued that in circumstances such as here, where the district judge ruled on the petition based on a paper record, the right to be "reasonably heard" was vindicated when the district judge construed her motion to intervene as an amicus curiae brief.[198] Such a brief, the court concluded, provided petitioner with "a full and fair opportunity, under the CVRA, to provide information and communicate her views to the court."[199]

Other courts have followed *Brandt*,[200] as it reached the correct result. Most habeas cases are decided on a paper record, and it would be unnecessary in almost all other circumstances to schedule a hearing solely for the victim to speak in court. Because habeas cases are akin to appellate litigation, in that habeas courts do not hold trials de novo, the interests of the victim to be heard

188. *Id.* at 131.

189. *Id.* at 132.

190. *Id.* at 136. *See also* Fed. R. Civ. P. 24(a)(1) (providing for the "unconditional right to intervene").

191. *Brandt*, 636 F.3d at 136. *See also* 18 U.S.C. § 3771(a)(4) (2012).

192. *Brandt*, 636 F.3d at 136.

193. *Id.* at 137.

194. *Id.*

195. *Id.* The court earlier assumed, without deciding, that the attorney was a "crime victim within the meaning of the [CVRA]." *Id.* at 136.

196. *Id.* at 137.

197. *Id.* (internal quotation marks omitted).

198. *Id.*

199. *Id.* (footnote omitted).

200. *E.g.*, United States v. Alcatel-Lucent France, SA, 688 F.3d 1301, 1306 (11th Cir. 2012) (per curiam).

would usually be satisfied by the opportunity to file an amicus brief.[201] Of course, the distinction between an intervener and an amicus is readily apparent. The former assumes all of the powers and responsibilities of a party, and can engage in discovery, file motions, formally participate in all hearings, and in some form have a veto over some decisions made by other parties.[202] In contrast, the filer's power is exhausted when the amicus brief is filed.[203] That brief may be eloquent and persuasive, but it cannot be buttressed by further legal involvement of the victim.[204] Nonetheless, the right to be heard under the CVRA is conditional, as it must be "reasonable," and, therefore, in most habeas cases the opportunity to file an amicus brief encompasses that right.[205]

Brandt tailored its holding to the circumstances of that case, implying that a different view might be appropriate in other habeas cases.[206] For example, if there was an evidentiary hearing, the victim may be afforded an opportunity to speak in person. It is unlikely that the victim would be a formal party in such a scenario, as Gooding sought in *Brandt*,[207] but rather an interested witness. This would supplement or replace the opportunity to file an amicus brief. Whether in-person or by amicus brief, the victim could address legal issues and also, if desired, the impact of the crime on his or her life. It might seem odd initially to permit a victims' impact statement in a federal habeas

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201. *Cf.* United States v. Laraneta, 700 F.3d 983, 985–86 (7th Cir. 2012) (discussing complications caused by intervention of crime victims at either trial or appellate stages).

202. Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237, 254–55 (2008).

203. *Id.*

204. *Id.* (comparing participating as an amicus curiae or an intervener).

205. *See* Cassell, *supra* note 3, at 323–26 (discussing what the "right to be heard" encompasses); Blondel, *supra* note 202, at 270–72 (skeptical of increasing victims' rights, arguing that the right to be "reasonably heard" under the CVRA should be read narrowly, but also include the ability to file an amicus brief).

206. Another way for victims to participate in habeas cases would be if more of those cases settled out of court. While the vast majority of criminal cases settle before trial, mostly via plea-bargaining, a settlement at the habeas stage almost never takes place. Nonetheless, de facto settlements can occur when a U.S. Magistrate Judge recommends the grant of a habeas petition to a U.S. District Judge. At that point, the habeas petitioner may plead guilty to a lesser charge and withdraw the habeas petition. Email from J. Michael R. Merz, U.S. Magistrate Judge, S.D. Ohio, to author (August 26, 2013, 8:21 EST) (on file with authors) [hereinafter Merz email]. There are likely several reasons for the dearth of formal settlements, including the lack of counsel for the petitioner in most noncapital habeas cases, the lack of incentives to compromise given the costs already incurred, and the difficulty associated with determining what court has authority to revise a sentence. KING & HOFFMAN, *supra* note 158, at 82–83. *See also* Anup Malani, *Habeas Settlements*, 92 VA. L. REV. 1, 31–38 (2006). Despite these obstacles, Professor Malani has argued that there can and should be more attempts to settle habeas cases. *Id.* at 39–51. Professor Malani makes no specific reference to victims being involved in the settlement regime he advocates. However, should such a culture of settlement in habeas cases arise, victims can and should be consulted by appropriate counsel regarding the propriety of a settlement.

207. Brandt v. Gooding, 636 F.3d 124, 136 (4th Cir. 2011).

proceeding.[208] This might be so because at the habeas stage the court is not pondering the appropriate sentence after a conviction,[209] but instead only the presence of constitutional errors in previous proceedings. Yet such a statement should be permitted, even if it is not directly applicable to the factual and legal issues present in the proceeding.[210]

There are several reasons supporting this assertion. First, the habeas jurisdiction of the federal courts presents an acute problem of federalism. It is a conspicuous exception to the usual steps of civil or criminal litigation where, with rare exceptions, parties get only one chance to fully litigate their case. Thus, federal habeas jurisdiction is an exception to res judicata, so a convicted state prisoner has the opportunity to litigate his conviction again, at least regarding federal constitutional issues, even after his trial has ended and appeals have been exhausted.[211] This intrusion into the finality of state criminal procedures has resulted in considerable controversy and driven much of the change in habeas procedures since the end of the Warren Court.[212]

However, an all-or-nothing response to this intrusion is unnecessary. A middle ground between a total repeal of habeas and a robust revival of Warren Court principles would be to acknowledge the careful balancing act of federal judges adjudicating state criminal procedures and to show a willingness to weigh the unique factors of each case.[213] One way to accomplish this goal is to be open-minded to the participation of victims in habeas proceedings, not only through amicus briefs on legal issues, but also through oral or written victim impact statements.[214] A victim impact statement in a habeas proceeding may

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208. *See* DOYLE, *supra* note 179, at 20 (footnote omitted) ("[T]he usual form of a victim's being heard, the victim impact statement, has no real place in a habeas proceeding.").

209. *See* BELOOF, CASSELL & TWIST, *supra* note 3, at 567 (explaining that a VIS in state or federal court is typically made at the sentencing stage).

210. It is not entirely uncommon for victims to be present during hearings in federal habeas cases, though they may not make statements, even when invited. There are also other instances, besides *Brandt v. Gooding*, of victims being permitted to participate in limited ways in federal habeas proceedings. For example, in *Gillispie v. Timmerman-Cooper*, No. 3:09-cv-471, 2013 WL 526481 (S.D. Ohio Feb. 11, 2013), the court denied the State's Motion for Stay Pending Appeal after it had granted a writ of habeas corpus. *Id.* at *6. The state government filed a notice of appeal, and the court subsequently scheduled a bond hearing, at which the victims were set to testify. Merz email, *supra* note 206. Reportedly the victims would have contested the court's holding, which was based in part on questioning of their eyewitness testimony. *Id.* The hearing was later cancelled and the victims' testimony was not taken. *Id.*

211. *See* Harriger, *supra* note 154, at 3.

212. SOLIMINE & WALKER, *supra* note 159, at 125 (explaining the symbolic costs of habeas, despite the fact that states tend to win the vast majority of habeas cases).

213. For arguments to modify federal habeas corpus based on changing institutional needs, see KING & HOFFMAN, *supra* note 158, at 167–71; SOLIMINE & WALKER, *supra* note 159, at 124–27.

214. This article does not argue that federal law should formally incorporate state victims' rights law on this matter, or that federal courts should be bound by state law. Rather, it only asserts that federal courts should acknowledge the universal adoption of victims' rights in all states when considering the appropriate scope of victim involvement in habeas cases. *Cf.* Wayne

be largely, if not wholly, of symbolic value. However, most proponents of the victims' rights movement would likely support this as a tool to empower a traditionally ignored party to criminal proceedings. Permitting a victim to appear in federal habeas proceedings in these ways would acknowledge that federal decision makers are not oblivious to the interests and sovereignty of the state.[215]

IV. CONCLUSION

Many discussions of rights in the United States proceed on the assumption that the Constitution and the branches of government have the lead roles in developing rights, often in the face of passive or recalcitrant states. Still, over the years developments of victims' rights in criminal procedure turns that assumption on its head. For several decades, states have taken the lead in the victims' rights revolution, and the federal government has followed that lead by passing legislation that supports victims' rights. All of these developments raise implications for federalism. Victims' rights have received extended and continued, if varied, attention in the fifty states. For that reason, and because it would on balance not serve the values of federalism, Congress should not pass the VRA. States can continue to serve as laboratories on victims' rights, but nationalization of those rights through the VRA is unnecessary and inappropriate. Nonetheless, whether or not the VRA is passed, federalism concerns argue in favor of federal courts recognizing a robust version of victims' rights when considering habeas corpus petitions from prisoners challenging their state court convictions. The development of victims' rights at the federal and state levels thus does not occur in completely separate spheres, and would benefit by accounting for its implications to federalism principles.

A. Logan, Erie *and Federal Criminal Courts*, 63 VAND. L. REV. 1243 (2010) (discussing the application of state law in federal criminal proceedings).

215. *Cf.* Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2317–18 (2014) (arguing that federal criminal proceedings will be more legitimate if the federal system pays more deference to local practices in criminal justice).

APPENDIX[216]

STATE	STATE CONS'T AMEND.	VICTIM ALLOWED TO BE PRESENT AT PAROLE HEARING	VIS PRESENTATION FORMAT AT PAROLE	FILING LIMIT	STATE COMPENSATION MAX LIMIT (IN USD)
Ala.	✓	✓	Oral or written statement	1 year	15,000

216. For statues that specifically apply to rules governing victim input and presence at parole hearings, see ALA. CODE §§ 15-22-36(3)(i), 15-23-79 (2015); ARIZ. REV. STAT. ANN. § 31-4411(H) (2015); ARK. CODE ANN. § 16-90-1113(a) (2014); CAL. PENAL CODE § 3043 (West 2015); COLO. REV. STAT. § 24-4.1-302.5 (2015); DEL. CODE ANN. tit. 11, § 9416 (2014); FLA. STAT. § 960.001(e) (2015); FLA. CONST. ART. I, § 16; GA. CODE ANN. § 17-17-13 (2014); 730 ILL. COMP. STAT. § 105/10 (West 2015); IND. CODE ANN. §§ 35-40-5-1 to 35-40-13-5 (West 2015); IND. CODE ANN. § 11-13-3-3 (West 2015); IOWA CODE § 915.18 (2014); KAN. STAT. ANN. § 22-3717(K)(h) (2015); KY. REV. STAT. ANN. § 421.530 (West 2015); MD. CODE ANN., CRIM. PRO. § 11-403 (West 2014); MASS. GEN. LAWS ANN. ch. 258B § 3(b), (p) (West 2015); MICH. COMP. LAWS ANN. § 780.771 (West 2015); MISS. CODE ANN. § 99-43-43 (2014); MO. ANN. STAT. § 595.209(1)(6) (West 2015); MONT. CODE ANN. §§ 46-23-202, 46-24-212 (West 2015); NEB. CONST. art. I, § 28; N.H. REV. STAT. ANN. § 21-M:8-k(II)(t) (2015); N.J. STAT. ANN. § 52:4B-44 (West 2015); N.M. STAT. ANN. § 31-21-25(E) (West 2015); N.D. CENT. CODE §12.1-34-02(18) (2015); OHIO REV. CODE ANN. § 2967.12 (West 2015); OKLA. CONST. art. II, § 34(a); 18 PA. CONS. STAT. ANN. § 11-201 (West 2015); R.I. GEN. LAWS § 12-28-6 (2015); S.C. CODE ANN. § 16-3-1560 (2014); S.D. CODIFIED LAWS §§ 23A-28C-1(10), 24-15-3 (2015); TENN. CODE ANN. § 40-38-103(2) (2014); TEX. CRIM. PROC. CODE ANN. §56.02(7) (West 2015); UTAH CODE ANN. § 77-38-4 (West 2015); VT. STAT. ANN. tit. 13, § 5305(c)(1) (2015); WASH. REV. CODE § 7.69.032(2)(a) (2015); WIS. STAT. § 304.06(1) (2014). *See also* SUSAN C. KINNEVY & JOEL M. CAPLAN, NATIONAL SURVEYS OF STATE PAROLE BOARDS: MODELS OF SERVICE DELIVERY (2008); Crime Victims Rights Act, 18 U.S.C. § 3771 (2015); IDAHO ADMIN. CODE § 50.01.01.300 (2014); *Parole/Pardon Board Hearings*, LA. DEP'T OF PUB. SAFETY & CORR., http://www.doc.la.gov/pages/victim-services/parolepardon-board-hearings/ (last visited Aug. 17, 2015); *State of Alaska Department of Corrections Policies and Procedures, Chapter: Victim's Right, Subject: Victim Notification*, STATE OF ALASKA (2012), http://www.correct.state.ak.us/pnp/pdf/1000.01.pdf; *Maryland Parole Commission FAQ Index, Victims Rights Related to Parole Hearings*, DEP'T OF PUB. SAFETY & CORR. SERV., http://www.dpscs.state.md.us/aboutdpscs/FAQmpc.shtml#answ26 (last visited Aug. 17, 2015); *Information for Crime Victims*, STATE OF N.J., STATE PAROLE BD., http://www.state.nj.us/parole/victim.html (last visited Aug. 17, 2015); *Frequently Asked Questions*, N.Y. DEP'T OF CORR. & CMTY. SUPERVISION, https://www.parole.ny.gov/faq.html (last visited Aug. 17, 2015); *Attendance at Hearings*, OKLA. PARDONS & PAROLE BD., http://www.ok.gov/ppb/Parole_Process/Hearing_Process/Hearing_Attendance/index.html (last visited Aug. 17, 2015); *Victim Information Guide*, OR. BD. OF PAROLE & POST-PRISON SUPERVISION, http://www.oregon.gov/BOPPPS/pages/victims_guide.aspx (last visited Aug. 17, 2015); *Victims Services*, VA. DEP'T OF CORR., http://vadoc.virginia.gov/victim/ (last visited Aug. 17, 2015); *What You Need to Know About Open Parole Bd. Hearings*, W.V. PAROLE BD., http://www.paroleboard.wv.gov/SiteCollectionDocuments/Victim%27s%20Rights.pdf (last visited Sept. 21, 2015); *Victim Input*, WYO. BD. OF PAROLE, http://boardofparole.wy.gov/victimservices/victimappearances.htm (last visited Aug. 17, 2015).

STATE	STATE CONS'T AMEND.	VICTIM ALLOWED TO BE PRESENT AT PAROLE HEARING	VIS PRESENTATION FORMAT AT PAROLE	FILING LIMIT	STATE COMPENSATION MAX LIMIT (IN USD)
Alaska	✓	✓	Written statement	2 years	40,000; 80,000 in homicides with multiple victims
Ariz.	✓	✓	Oral or written statement	2 years	25,000
Ark.	-	-	Can meet with the parole board prior to the hearing at a victim impact meeting; written statement	1 year	10,000; 25,000 for catastrophic injuries
Cal.	✓	✓	Oral or written statement; through legal counsel, videocassette, or audiocassette recording	3 years	63,000
Colo.	✓	-	Written statement	1 year	20,000 (each district may set a lower minimum)
Conn.	✓	✓	Oral or written statement	2 years	15,000; 20,000 in cases of homicide
Del.	-	✓	Oral or written statement	1 year	25,000; 50,000 when injuries are total and permanent.
Fla.	✓	✓	Oral or written statement	1 year	15,000; 30,000 for catastrophic injuries

STATE	STATE CONS'T AMEND.	VICTIM ALLOWED TO BE PRESENT AT PAROLE HEARING	VIS PRESENTATION FORMAT AT PAROLE	FILING LIMIT	STATE COMPENSATION MAX LIMIT (IN USD)
Ga.	-	-	Written statement	1 year	25,000
Haw.	-	-	Written or oral statement	18 months	10,000; 20,000 if only medical expenses claimed
Idaho	✓	✓	Written or oral statement	1 year	25,000
Ill.	✓	-	Written statement; videotape; recording	2 years	27,000
Ind.	✓	✓	Oral or written statement; videotape or audio recording	180 days	15,000
Iowa	-	✓	Oral statement given by victim or counsel	2 years	No overall limit; maximum for each expense
Kan.	✓	-	Can speak to the parole board at a "Public Comment Session" scheduled once a month in one of three cities; written statement; via telephone for a verbal comment	2 years	25,000
Ky.	-	✓	Written statement	5 years	25,000

STATE	STATE CONS'T AMEND.	VICTIM ALLOWED TO BE PRESENT AT PAROLE HEARING	VIS PRESENTATION FORMAT AT PAROLE	FILING LIMIT	STATE COMPENSATION MAX LIMIT (IN USD)
La.	✓	- [217]	Via telephone from the office of the local district attorney, prior to the hearing	1 year	10,000; 25,000 when injuries are total and permanent
Me.	-	No parole board	No parole board	3 years	15,000
Md.	✓	Only in the case of an open hearing	Written statement; may meet with the parole commissioner prior to the hearing	3 years	45,000
Mass.	-	Only allowed in certain cases	Written statement	3 years	25,000
Mich.	✓	-	Written or oral statement (in person or over the telephone) given to a member of the board prior to the hearing	1 year	25,000
Minn.	-	No parole board	No parole board	3 years	50,000

217. Louisiana does not have a physical parole board hearing. In other words, even the offender does not meet in-person with the board—all communication is done via teleconference. The board members are at the headquarters in Baton Rouge while the offender testifies on the phone from the closest state prison or parish facility. Victims can testify, but they must go to either Baton Rouge, where the parole Board is meeting, or to the institution where the offender will testify. *Parole/Pardon Board Hearings*, LA. DEP'T OF PUB. SAFETY & CORR., http://www.doc.la.gov/pages/victim-services/parolepardon-board-hearings/ (last visited Sept. 21, 2015).

STATE	STATE CONS'T AMEND.	VICTIM ALLOWED TO BE PRESENT AT PAROLE HEARING	VIS PRESENTATION FORMAT AT PAROLE	FILING LIMIT	STATE COMPENSATION MAX LIMIT (IN USD)
Miss.	✓	-	Written or recorded statement	3 years	20,000
Mo.	✓	✓	Oral statement; written statement; telephone call to the board member convening the hearing, prior to the hearing; audiotape; videotape; personal meeting with a board member prior to the hearing	2 years	25,000
Mont.	✓	✓	Written statement	1 year	25,000
Neb.	✓	✓	Written or oral statement	2 years	10,000
Nev.	✓	✓	Oral or written statement; interview with a commissioner of the board prior to the hearing	1 year	35,000
N.H.	-	✓	Written or oral statement	1 year	25,000

STATE	STATE CONS'T AMEND.	VICTIM ALLOWED TO BE PRESENT AT PAROLE HEARING	VIS PRESENTATION FORMAT AT PAROLE	FILING LIMIT	STATE COMPENSATION MAX LIMIT (IN USD)
N.J.	✓	-	May present an oral or written statement to the Senior Hearing Officer of the Board prior to the hearing	3 years	25,000; 60,000 for catastrophic injuries
N.M.	✓	✓	Written or oral statement	2 years	20,000; 60,000 for catastrophic injuries
N.Y.	-	-	Written statement; interview with or submission of audiotape or videotape to the parole board prior to the hearing	1 year	No medical maximum; limits on other expenses
N.C.	✓	✓	Written statement[218]	2 years	30,000; additional 5,000 for funeral expenses

218. Victims of violent or assaultive crimes whose offenders are in medium or minimum custody have the opportunity to appear before the Commission in Raleigh to present information they feel is important for the Parole Commissioners to hear. The meetings are held once a week, are 30 minutes each and are limited to five persons per scheduled appointment. There is a limited number of appointments available and they are scheduled on a first-come first-serve basis.

Victim Information, N.C. DEP'T OF PUB. SAFETY, https://www.ncdps.gov/Index2.cfm?a=000003,002210,002214 (last visited Sept. 15, 2015).

STATE	STATE CONS'T AMEND.	VICTIM ALLOWED TO BE PRESENT AT PAROLE HEARING	VIS PRESENTATION FORMAT AT PAROLE	FILING LIMIT	STATE COMPENSATION MAX LIMIT (IN USD)
N.D.	-	Dependent on crime type	Written statement; however, victims of violent crime may personally appear to give an oral statement	1 year	25,000
Ohio	✓	✓	Written statement; presentation of the written statement allowed at the hearing; meet or teleconference with parole board member prior to the hearing	No limit	50,000
Okla.	✓	✓	Written statement; petition; oral statement	1 year	20,000; 40,000 in catastrophic cases and homicides
Or.	✓	✓	Written statement; oral statement by victim or appointed counsel	6 months	47,000
Pa.	-	✓	Written or oral statement; videotaped statement	2 years	46,500

STATE	STATE CONS'T AMEND.	VICTIM ALLOWED TO BE PRESENT AT PAROLE HEARING	VIS PRESENTATION FORMAT AT PAROLE	FILING LIMIT	STATE COMPENSATION MAX LIMIT (IN USD)
R.I.	✓	-	Meeting prior to the hearing with the board, or written statement	3 years	25,000
S.C.	✓	✓	Written or oral statement; video or tele-conferencing into the hearing	180 days	15,000; 25,000 in catastrophic cases
S.D.	-	✓	Written or oral statement	1 year	15,000
Tenn.	✓	✓	Written or oral statement	1 year	30,000
Tex.	✓	_	Oral statement presented to the board prior to the hearing; written statement	3 years	50,000; 125,000 when injuries are permanent and total
Utah	✓	✓	Written or oral statement	No limit	25,000; additional 25,000 medical is base amount exceeded
Vt.	-	✓	Written or oral statement; audio or visual recording	No limit	10,000

STATE	STATE CONS'T AMEND.	VICTIM ALLOWED TO BE PRESENT AT PAROLE HEARING	VIS PRESENTATION FORMAT AT PAROLE	FILING LIMIT	STATE COMPENSATION MAX LIMIT (IN USD)
Va.	✓	-	Written statement; meeting with the parole board in person or via teleconference prior to the hearing	1 year	25,000
Wash.	✓	-[219]	Written or oral statements; recorded statements- audio tape, videotapes, CD's or other electronic means; video or tele-conference	2 years	50,000
D.C.[220]	-	✓[221]	Written or oral statement; statement via audio or video during the hearing	1 year	25,000

219. Washington state has an Indeterminate Sentence Review Board (ISRB), which only reviews two types of cases; in all other instances there is no parole. *Indeterminate Sentence Review Board*, DEP'T OF CORR. WASH. STATE, http://www.doc.wa.gov/isrb/ (last visited Sept. 15, 2015).

220. Washington D.C. does not have a sovereign constitution, but still provides for victims' rights under its statutes. D.C. CODE § 23-1901 (2015).

221. In 1997, the District of Columbia Board of Parole was abolished resulting in the transfer of authority for parole matters to the U.S. Parole Commission. *Id.* at § 14-131.

STATE	STATE CONS'T AMEND.	VICTIM ALLOWED TO BE PRESENT AT PAROLE HEARING	VIS PRESENTATION FORMAT AT PAROLE	FILING LIMIT	STATE COMPENSATION MAX LIMIT (IN USD)
W. Va.	-	✓	Oral statement; written statement; or a meeting with a parole board member prior to the hearing	2 years	35,000; 50,000 in homicides; 100,000 in catastrophic cases
Wis.	✓	✓	Written statement or oral statement	1 year	40,000; additional 2,000 for funerals
Wyo.	-	-	Prior to the hearing victims can submit a statement to the board either orally, written, via teleconference, video, or through a DVD or audio recording	1 year	15,000; 25,000 for catastrophic cases