# BEYOND THE VICTIMS' BILL OF RIGHTS: THE SHIELD BECOMES A SWORD

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## INTRODUCTION

In a noble effort to shield victims of crime from insensitive treatment and abuse by the criminal justice system, Arizona voters adopted Proposition 104, the Victims' Bill of Rights (the "Amendment"), as an amendment to the state constitution.[1] The Amendment became effective on November 16, 1990, and is now codified as Article II, 2.1 of the Arizona Constitution.[2] The Amendment enumerates twelve rights intended to safeguard crime victims' rights to fair treatment and due process.[3] Among such enumerated rights is subsection (A)(5), which provides that a victim has a right "[t]o refuse an interview, deposition, or

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1. *Election Results Across Arizona*, ARIZ. REPUBLIC, Nov. 8, 1990, at A14.
2. ARIZ. CONST. art. II, § 2.1. The Amendment provides that a victim of crime has a right:
   1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.
   2. To be informed, upon request, when the accused or convicted person is released from custody or has escaped.
   3. To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.
   4. To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.
   5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.
   6. To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.
   7. To read pre-sentence reports relating to the crime against the victim when they are available to the defendant.
   8. To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.
   9. To be heard at any proceeding when any post-conviction release from confinement is being considered.
   10. To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.
   11. To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.
   12. To be informed of victims' constitutional rights.
3. *Id.* at §2.1(A) (to "preserve and protect victims' rights to justice and due process").

other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant."[4]

To implement the twelve rights enumerated in the Amendment, the Arizona legislature adopted the Victims' Rights Implementation Act (the "Act").[5] The Act is codified as Chapter 40 Sections 13–4401 to 13–4437 of Title 13 of the Arizona Revised Statutes.[6] Section 13–4433 of the Act is the corresponding enabling legislation to subsection (A)(5) of the Amendment and, in accordance with the victims' right to refuse an interview, provides that "[t]he defendant, the defendant's attorney or another person acting on behalf of the defendant shall only initiate contact with the victim through the prosecutor's office."[7] Thus, the Amendment confers the right to refuse a defense interview, while the corresponding enabling legislation prohibits the defense from contacting the victim to inquire whether the victim wishes to exercise that right. By so doing, the Act goes too far and creates a sword in the hands of victims to thwart a defendant's ability to effectively present a legitimate defense and a fortress behind which prosecutors may isolate themselves from their constitutional duty to afford a criminal defendant a fair trial.[8]

This Note argues that although the Amendment provides victims the right to refuse a defense interview, it does not follow that the defense may be precluded from requesting one. Because Section 13–4433(B) of the Victims' Rights Implementation Act prohibits any member of the defense from contacting the victim to request an interview, it contravenes the First Amendment to the United States Constitution[9] and Article II Section 6 of the Arizona State Constitution.[10] Moreover, the requirement that defense counsel channel interview requests through the adversary creates innumerable difficulties that negatively impact the administration of justice.[11]

This Note begins with a survey of the controversy over the constitutionality of the Amendment, followed by a discussion of the current law relating to the Amendment. The next section advances the proposition that the Act will fail to pass Constitutional muster because it violates both the First Amendment Overbreadth Doctrine and the Doctrine of Prior Restraint. Next, this Note examines the impact of the Act on the criminal justice system. The final section proposes alternative enabling legislation whereby the defense attorney may contact the victim directly to request an interview. This Note concludes that such alternative legislation would function to preserve victims' rights as set forth in the Amendment without abrogating First Amendment guarantees.

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4. *Id.* at § 2.1(A)(5).
5. Ariz. Leg. Serv., ch. 229, § 13–4433 (West 1991), *amended by* ARIZ. REV. STAT. ANN. § 13–4401–37 (1992).
6. ARIZ. REV. STAT. ANN. §§ 13–4401 to 13–4437.
7. *Id.* at § 13–4433(B).
8. *See* State of Arizona v. Superior Court, 113 Ariz. Adv. Rep. 11, 16 (1992).
9. U.S. CONST. amend. I ("Congress shall make no law ... abridging the freedom of speech ....").
10. ARIZ. CONST. art. II, § 6 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.").
11. Interview with Christopher Johns, Training Director of the Maricopa County Public Defenders Office, in Phoenix, AZ (Sept. 17, 1992). *See also infra* text accompanying notes 90–117.

## I. BACKGROUND CONTROVERSY AND THE LAW TODAY

Arizona is one of few states to have elevated crime victims' rights to constitutional status.[12] The resulting tension between the constitutional rights of victims and those of criminal defendants are often at odds and difficult to balance.[13] The victims' right to refuse a defense interview pursuant to subsection (A)(5) of the Amendment has proved the most controversial provision of the Victims' Bill of Rights.[14] Arizona is the only state that imposes such limitations on a defendant's discovery rights as part of its constitutional scheme for protecting victims' rights.[15]

Critics of the Amendment argue that to preclude a defendant who's liberty rights may be at stake from interviewing the prosecution's most important witness deprives the defendant of due process guaranteed by the U.S. Constitution.[16] Supporters of the Amendment, however, maintain that no explicit right to a defense interview exists under the federal or Arizona constitutions.[17]

Addressing the constitutionality of denying a defendant the opportunity to interview the victim prior to trial, the United States Supreme Court in *Weatherford v. Bursey*[18] held that there is no federal constitutional right to discovery in a criminal case. Citing *Wardius v. Oregon,*[19] the Court noted that the Due Process Clause is silent regarding a defendant's discovery rights.[20] Likewise, the Arizona Court of Appeals held in *State v. Warner* that no such right exists under the Arizona Constitution.[21]

The position advanced by opponents that a victims' right to refuse a defense interview violates the defendant's due process rights is unsupported by the judiciary.[22] Accordingly, a crime victim in Arizona has the constitutional

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12. Seven states, including Arizona, have elevated victims' rights to constitutional status. *See* CAL. CONST. art. I, § 28; FLA. CONST. art. I, § 16(b); MICH. CONST. art. I, § 24; R.I. CONST. art. I, § 23; TEX. CONST. art. I, § 30; WASH. CONST. art. I, § 35; *see also* Patrick B. Calcutt, Comment, *The Victims' Rights Act of 1988, the Florida Constitution, and the New Struggle For Victims' Rights,* 16 FLA. ST. U. L. REV. 811, 811–12 (1988) (stating that Florida's amendment was "the first time any state has chosen to elevate the rights of victims to constitutional status").

13. *See* Thomas B. Dixon, Comment, *Arizona Criminal Procedure After The Victims' Bill Of Rights Amendment: Implications of a Victims' Absolute Right to Refuse a Defendant's Discovery Request,* 23 ARIZ. ST. L.J. 831, 833–834 (1991); *see also* Lynne N. Henderson, *The Wrongs of Victim's Rights,* 37 STAN. L. REV. 937, 956–64 (1985); Christopher Johns, *The Costs of Victim's Rights,* Arizona Attorney October 1992, 27; *see generally* John R. Anderson & Paul L. Woodward, *Victim and Witness Assistance: New State Laws and the System's Response,* 68 JUDICATURE 221, 226–27 (1985).

14. *See* Dixon, *supra* note 13, at 833–34; Johns, *supra* note 13, at 29.

15. *See supra* note 12 (the text of the victims' rights amendments in the other six states that have adopted them confirms that Arizona is the only state to include limitations on a defendant's discovery rights).

16. *See* ARIZONA PUBLICITY PAMPHLET, GENERAL ELECTION, Nov. 6, 1990, at 42–43.

17. *Id.* at 40 (position taken by Steve Twist, state Prosecuting Attorney and member of the Victims' Bill of Rights Task Force: pretrial interviews by the defense were never an absolute right, but rather a matter previously left to the court's discretion).

18. 429 U.S. 545 (1977).

19. 412 U.S. 470 (1973).

20. 429 U.S. 545, 559 ("the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded ....").

21. 168 Ariz. 261, 812 P.2d 1079 (1990).

22. *See supra* notes 18–21 and accompanying text.

right to refuse a defense interview.[23] It does not follow, however, that the defense may be precluded from requesting one.

The broad language of the Victims Rights Implementation Act exceeds the scope of the Victims' Bill of Rights and raises serious First Amendment issues. The Act not only prohibits the defense from initiating contact with a victim to request an interview, but also requires the prosecutor to be a conduit for all interview requests.[24] The Act thereby infringes on First Amendment guarantees of free speech[25] and adversely impacts the administration of justice.[26]

## II. THE VICTIMS' RIGHTS IMPLEMENTATION ACT IMPERMISSIBLY INFRINGES ON FREE SPEECH

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[27]

The history of First Amendment law is one of broad protection and free speech and is valued as among the most cherished policies of our civilization.[28] As Mr. Justice Brennan wrote in a 1964 concurring opinion, "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied government."[29]

The "freedom of speech" guaranteed under the First Amendment is not, however, absolute at all times and under all circumstances. Rather, the Supreme Court has distinguished between verbal conduct and verbal acts that are generally protected by the First Amendment and those that are not.[30] For example, the government may justifiably abridge speech which has the effect of inciting imminent lawless action.[31] Similarly, it is clear that so-called "fighting words" are not entitled to First Amendment protection.[32] The government may also

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23. *See* ARIZ. CONST. art. II, § 2.1(A)(5).
24. *See* ARIZ. REV. STAT. ANN. §13-4433(B).
25. *See* U.S. CONST. amend. I.
26. *See* interview with Christopher Johns, *supra* note 11.
27. U.S. CONST. amend. I.
28. Bridges v. California, 314 U.S. 252, 260 (1941).
29. Lamont v. Postmaster General of United States, 381 U.S. 301, 309 (1965).
30. *See* Schenck v. United States, 249 U.S. 47 (1919); Whitney v. California, 274 U.S. 357, 373 (Brandeis, J., concurring) (1927); Stromberg v. California, 283 U.S. 359 (1931); Near v. Minnesota, 283 U.S. 697 (1931); De Jonge v. Oregon, 299 U.S. 353 (1937); Herndon v. Lowry, 301 U.S. 242 (1937), *vacated by* Lowry v. Herndon, 192 S.E. 387 (1937); Cantwell v. Connecticut, 310 U.S. 296 (1940); Beauharnais v. Ilinois, 343 U.S. 250 (1952), *rehearing denied*, 343 U.S. 988.
31. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (advocacy of illegal conduct which is "directed to incit[e] or to produc[e such actions]" may be suppressed).
32. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942). "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572.

justifiably regulate certain kinds of libel, slander[33] and "vulgar" speech.[34] Moreover, "obscene" speech is unprotected by the First Amendment.[35]

Notwithstanding the aforementioned legitimate judicial restrictions on expression, any governmental restriction on First Amendment expression must be narrowly drawn to address only the specific evil at hand.[36] If a less restrictive alternative is available, the law is overbroad, and will be struck down if deemed "substantially" overbroad.[37] Moreover, unless there is a "clear and present" danger that speech will imminently produce a serious substantive evil,[38] governmental restriction impermissibly imposes a prior restraint[39] under the First Amendment.

The Victims' Rights Implementation Act fails to pass Constitutional muster for two reasons. First, because the Act "sweeps within its ambit a substantial amount of protected speech along with that speech that may legitimately be regulated," it is facially overbroad.[40] Second, absent a clear and present danger that contact by defense counsel to request an interview will

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33. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Beauharnais v. Illinois, 343 U.S. 250.

34. Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986); FCC v. Pacifica Foundation, 438 U.S. 726 (1978), *rehearing denied,* 439 U.S. 883 (1978).

35. Roth v. United States, 354 U.S. 476 (1957), *rehearing denied,* 335 U.S. 852 (1957) (obscenity is held not to be entitled to First Amendment protection since such expression lacks social importance).

36. Broadrick v. Oklahoma, 413 U.S. 601 (1973), *superceded* by statute as stated in Bauers v. Cornett, 865 F.2d 1517 (1989). It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment Rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Id.* at 611–12. *See also* NAACP v. Button, 371 U.S. 415, 433 (1963) ("[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."); Herndon v. Lowry, 301 U.S. 242, 258 (1937), *vacated by* Lowry v. Herndon, 192 S.E. 387 (1937); Shelton v. Tucker, 364 U.S. 479, 488 (1960); *In Re* Primus, 436 U.S. 412, 438 (1978); De Jonge v. Oregon, 299 U.S. 353, 364–65 (1937).

37. *See* Broadrick, 413 U.S. at 615; Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987); City of Houston v. Hill, 482 U.S. 451, 458–459 (1987), *appeal dismissed, cert. denied,* 483 U.S. 1001 (1987); New York v. Ferber, 458 U.S. 747, 769 (1982).

38. *See* Schenck v. United States, 249 U.S. 47, 52 (1919); Abrams v. United States, 250 U.S. 616 (1919) (constitutionality of convictions under espionage acts); Whitney v. California, 274 U.S. 357 (Brandeis, J., concurring) (1927) (constitutionality of criminal syndicalism act); Herndon v. Lowry, 301 U.S. 242 (constitutionality of anti-insurrection act); Cantwell v. Connecticut, 310 U.S. 296 (1940) (breach of the peace); Thornhill v. Alabama, 310 U.S. 88, 105 (1940) (constitutionality of restrictions seeking to prevent destruction of life).

39. The doctrine of prior restraint is based on the theory that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) (emphasis in original). Prior restraints on speech are highly suspect and there is a heavy presumption against their constitutional validity. *See also* Carroll v. Princess Anne, 393 U.S. 175, 181 (1968); Near v. Minnesota, 283 U.S. 697, 716 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Organization for a Better Austin v. Keefe, 402 U.S 415, 419 (1971).

40. Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989); *see also* City of Houston v. Hill, 482 U.S. at 458–60 ; Kolender v. Lawson, 461 U.S. 352, 359 n.8 (1983); Gooding v. Wilson, 405 U.S. 518, 521–22 (1972).

imminently produce a serious substantive evil, the prohibition against such contact unconstitutionally imposes a prior restraint upon free speech.[41]

Mindful of the great importance freedom of expression holds in our constitutional scheme, the Supreme Court has developed a number of doctrines which seek to define the meaning and extent of protection accorded to free speech under the First Amendment. Of greatest concern for this Note are the Overbreadth Doctrine[42] and the Doctrine of Prior Restraint.[43]

### *A. The First Amendment Overbreadth Doctrine*

The First Amendment Overbreadth Doctrine is one method of statutory analysis employed by the Supreme Court to determine whether a statute impermissibly infringes on precious First Amendment guarantees. The Overbreadth Doctrine states that a law regulating speech is overbroad "if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate."[44]

A statutory analysis under the Overbreadth doctrine involves a two prong approach. First, no state action impinging on free speech will be sustained unless the government asserts a compelling interest to justify the impingement.[45] Second, the state may not prohibit broad classes of speech, if in so doing, a substantial amount of constitutionally protected speech is also prohibited.

The Victims' Rights Implementation Act satisfies the first prong of an overbreadth analysis. The primary purpose of the Amendment is to guarantee that crime victims be "treated with fairness, respect and dignity" and that they be "free from intimidation, harassment or abuse."[46] Accordingly, the Act was enacted to ameliorate the insensitive treatment of crime victims by the criminal justice system.[47] The state's interest in protecting victims of crime constitutes a compelling governmental interest sufficient to justify the impingement on free speech imposed by the Act.

In addition, however, to the requisite compelling governmental interest, the Supreme Court has consistently held that the state may not prohibit broad classes of speech, even when some of what is proscribed may indeed be legitimately regulated, if a substantial amount of constitutionally protected speech is likewise prohibited. The Victims' Rights Implementation Act fails to satisfy this second prong of the overbreadth analysis.

In conferring the right to refuse a defense interview, the Victims' Bill of Rights seeks to assure that a victim who has been traumatized by a violent crime

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41. *See supra* notes 38–39.
42. *See infra* notes 44–45 and accompanying text.
43. *See infra* notes 69–74 and accompanying text.
44. Broadrick v. Oklahoma, 413 U.S. 601, 612, *superceded by* statute as stated in Bauers v. Cornett, 865 F.2d 1517 (1989); *see also* City of Houston v. Hill, 482 U.S. 451, 458–60 (1985), *appeal dismissed, cert. denied,* 483 U.S. 1001 (1987); Kolender v. Lawson, 461 U.S. at 359 n.8; Gooding v. Wilson, 405 U.S. 518, 521–22 (1972).
45. *See* NAACP v. Alabama, 357 U.S. 449, 463 (1958); Sweezy v. New Hampshire, 354 U.S. 234, 265 (Frankfurter, J., concurring) (1957), *rehearing denied,* 355 U.S. 852 (1957); *see also* Bates v. City of Little Rock, 361 U.S. 516 (1960).
46. *See supra* notes 2–4 and accompanying text.
47. *See* Dixon, *supra* note 13; *see also* ARIZONA PUBLICITY PAMPHLET, *supra* note 16, at 34–40 (arguments "for" proposition).

is not further traumatized by contact with defense counsel or further exposure to the defendant.[48] Accordingly, any contact by defense counsel that serves to further traumatize crime victims constitutes constitutionally unprotected speech subject to restriction by the government.[49] Conversely, contact by defense counsel that does not further traumatize victims constitutes constitutionally protected speech for which government has no compelling interest to justify restriction.[50]

Section 13–4433 of the act is not narrowly tailored to further the state's interest in protecting victims of crime from further abuse. The Act prohibits defense counsel from initiating any contact with a victim to request an interview, without regard to whether such contact in fact functions to further traumatize the victim.[51] The Act, therefore, sweeps within its ambit a substantial amount of protected speech along with that speech that may legitimately be regulated.[52] Because the Act indiscriminately reaches both constitutionally protected and unprotected expression, it is constitutionally overbroad.

The state may not expansively prohibit classes of speech in so broad a manner as to include both constitutionally protected and unprotected speech. Legislation which does so is overbroad and, accordingly, the Victims' Rights Implementation Act is overbroad. Mere overbreadth, however, is not sufficient to overturn legislation on constitutional grounds. The legislation must be substantially overbroad.[53]

*1. The Act Is Substantially Overbroad*

Under the First Amendment Overbreadth Doctrine, statutes regulating protected speech must be narrowly drawn to preclude only such speech as is

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48. *See* Dixon, *supra* note 13, at 837.

49. *See supra* notes 30–35 and accompanying text.

50. *Cf.* Talley v. California, 362 U.S. 60 (1960). The Supreme Court held invalid an ordinance prohibiting the distribution of handbills because the breadth of its application went far beyond what was necessary to achieve a legitimate governmental purpose. The Court noted that it had been urged that the ordinance was aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance was in no manner so limited. The court held that the statute's comprehensive interference with first amendment freedoms goes far beyond what might be justified in the exercise of the States legitimate interest.

Moreover, the Supreme Court has consistently held that statutes restricting speech solely on the grounds that it is offensive or unseemly are unconstitutionally overbroad. For instance, in City of Houston v. Hill, 482 U.S. 451 (1987), *appeal dismissed, cert. denied*, 483 U.S. 1001 (1987), the Court struck down an ordinance making it unlawful for any person to "strike or in any manner oppose, molest, an abuse or interrupt any policemen in the execution of his duty." The Court reasoned that because the statute prohibited citizens from criticizing and insulting police officers which was constitutionally protected speech, the ordinance was overbroad. The fact that the statute also has a legitimate scope of application in prohibiting conduct which is unprotected by the First Amendment was not enough to save it.

Similarly, in Gooding v. Wilson, 405 U.S. 518 (1972), the Supreme Court struck down a Georgia statute which made it a misdemeanor for "[a]ny person [to], without provocation, use to or of another, and in his presence ... opprobrious words or abusive language, tending to cause a breach of the peace." *Id.* at 519. The Court found this statute overbroad as well, because it punished speech which did not rise to the level of "fighting words", as defined in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

51. *See* ARIZ. REV. STAT. ANN. § 13–4433(B).

52. *See* supra note 44.

53. *See infra* note 55 and accompanying text.

necessary to further a substantial and legitimate governmental interest.[54] A statute may be invalidated on its face, however, only if the overbreadth is substantial.[55] Because the Victims' Rights Implementation Act precludes the defense from initiating any contact whatsoever with the victim and is not restricted to regulating only that communication which violates victims' rights,[56] the overbreadth is substantial.

The Act reaches the universe of speech, both constitutionally protected and unprotected.[57] It does not merely regulate speech that might jeopardize a victims' right to be treated with fairness, respect and dignity and to be free from intimidation, harassment and abuse.[58] Instead, the Act expansively prohibits the defendant, the defense attorney or another person acting on behalf of the defendant from initiating contact with the victim to request an interview.[59] The Act, therefore, does not merely regulate abusive conduct by the defendant or defense counsel, but prohibits contact by any member of the defense regardless of whether such conduct threatens a victims' rights. The ban is so sweeping that any defense attorney is subject to legal action for constitutionally protected expression,[60] including that expression not posing a threat to the legitimate governmental interest in protecting victims of crime from further abuse.

*2. The Least Restrictive Alternative Test*

Closely related to the Overbreadth Doctrine is the least restrictive alternative test. "In a series of decisions [the Supreme] Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[61] Legislative abridgment of First Amendment rights must always be viewed in the light of less drastic means for achieving the same basic purpose.[62] If a legitimate governmental objective can be achieved by means which are less burdensome on First Amendment expression than the means selected, government must use the less burdensome means.[63]

The Victim's Rights Implementation Act legitimately seeks to assure that a victim traumatized by violent crime is not further traumatized by contact with defense counsel or unwanted contact with the defendant.[64] The Act, however, does not employ the least restrictive means for accomplishing these objectives. Section 13–4433(B) of the Act prohibits not only the defendant, but defense counsel or any other person acting on behalf of the defendant, from initiating

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54. *See supra* notes 44–45 and accompanying text.
55. Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987); City of Houston v. Hill, 482 U.S. 451, 458–459 (1987), *appeal dismissed, cert. denied,* 483 U.S. 1001 (1987); New York v. Ferber, 458 U.S. 747, 769 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973), *superseded by statute* as stated in Bauers v. Cornett, 865 F.2d 1517 (1989).
56. *See* ARIZ. REV. STAT. ANN. § 13–4433(B).
57. *See id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnote omitted).
62. *See id.*
63. *See id.*
64. *See supra* notes 2–4 and accompanying text.

contact with a victim to request an interview.[65] The state's legitimate interest in protecting victims from further traumatization by exposure to the defendant can be achieved by means less restrictive than an expansive prohibition on any member of the defense contacting the victim to request an interview. To protect against traumatic exposure to the defendant, it is necessary only to ban contact by the defendant. Because Section 13–4433 does not limit the proscription to the defendant, however, it fails to employ the least restrictive alternative.

Moreover, the state's interest in protecting victims from abuse by overzealous defense attorneys can be realized without prohibiting defense counsel from contacting the victim to request an interview. This objective can be attained by regulating what defense counsel may say by setting forth strict procedural guidelines by which defense counsel must conduct themselves during contact.[66]

The Amendment is aimed at assuring that victims of crime will be "treated with fairness, respect, and dignity", and that they be free from "harassment intimidation, or abuse."[67] The Act, however, is not so limited, and mandates that all contact by any member of the defense be suppressed in order to screen out that contact which may possibly traumatize a victim. In the absence of some showing that contact by defense counsel visits harm or abuse on the victim, such a generality is too remote to furnish constitutionally acceptable justification for this all-embracing infringement on free speech.

The Victims' Rights Implementation Act is not narrowly tailored to serve the state's interest in protecting victims' rights as enumerated in the Amendment, but encompass all classes of speech, including a substantial amount of constitutionally protected speech. Nor is the Act the least restrictive alternative for advancing such interests.[68] The objective of protecting crime victims from harassment or abuse by defense counsel does not justify prohibiting defense counsel from contacting the victim to request an interview without regard to whether such contact in fact constitutes harassment or abuse. Moreover, the objective of shielding victims from the trauma of further exposure to the defendant is insufficient to justify proscribing contact by defense counsel. The Act's sweeping prohibition is a substantially overbroad invasion of protected speech that cannot be justified by the governmental interest in protecting crime victims from harassment, abuse or intimidation. Thus, the Act fails under an overbreadth analysis.

### *B. The Doctrine of Prior Restraint*

The First Amendment provides that "Congress shall make no law abridging ... the freedom of speech", and "[i]t is no longer open to doubt that the liberty of the press and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."[69]

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65. *See* ARIZ. REV. STAT. ANN. § 13–4433(B).

66. The Amendment constitutionalizes the protections previously afforded crime victims under Rule 39 of the ARIZONA RULES OF CRIMINAL PROCEDURE. Rule 39 places numerous conditions on pretrial interviews and allows sanctions for violating the provisions therein.

67. ARIZ. REV. STAT. ANN. § 13–4433(C).

68. *See supra* notes 61–62 and accompanying text.

69. Near v. Minnesota *ex. rel.* Olson, 283 U.S. 697, 707 (1931).

The Supreme Court has interpreted these guarantees to afford special protection against orders that impose a "previous" or "prior" restraint on speech.[70]

Prior restraints on free speech are not, however, unconstitutional per se.[71] There are those constitutionally unprotected classes of speech which the state has justifiable interest in regulating.[72] Notwithstanding, "[a]ny system of prior restraints ... comes to [the] Court bearing a heavy presumption against its constitutional validity." [73]

Generally, the Supreme Court has employed the "clear and present danger" test in reviewing a variety of cases in which prior restraints and the scope of constitutional protections of freedom of expression were at issue.[74]

The Supreme Court first articulated the clear and present danger standard in *Schenck v. United States*.[75] In determining the extent to which government may constitutionally interfere with free speach, a unanimous Court declared, that

> [t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent. It is a question of proximity and degree. [76]

The Court held that to justify suppression of free speech there must be reasonable grounds to fear that serious evil will result if free speech is practiced and that the danger apprehended is imminent.[77]

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70. Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976).

71. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 n.10 (1963); Near v. Minnesota *ex rel.* Olson, 283 U.S. at 716; Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961).

72. *See supra* notes 30–35 and accompanying text.

73. Bantam Books, Inc. v. Sullivan, 372 U.S. at 70. *See also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975)("The presumption against prior restraints is heavier—and the degree of protection broader—even than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse the rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable."); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 181 (1968) (prior restraints on speech are highly suspect and there is a heavy presumption against their constitutionality); Near v. Minnesota *ex rel.* Olson, 283 U.S. at 716; New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Organization for a Better Austin v. Keefe, 402 U.S 415, 419 (1971).

74. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."). The "clear and present danger" standard has been utilized by either a majority or a minority of the Court in passing upon the constitutionality of convictions under espionage acts. *See* Schenck v. United States, 249 U.S. 47; Abrams v. United States, 250 U.S. 616 (1919). *See also* Whitney v. California, 274 U.S. 357 (1927) (under a criminal syndicalism act); Herndon v. Lowry, 301 U.S. 242 (1937) (under an "anti-insurrection" act); Cantwell v. Connecticut, 310 U.S. 296 (1940) (for breach of the peace at common law); Thornhill v. Alabama, 310 U.S. 88, 105 (1940) (constitutionality of restrictions to prevent the destruction of life or property, or invasion of the right of privacy).

75. 249 U.S. at 52.

76. *Id.*

77. Whitney v. California, 274 U.S. at 376.

For instance, in *Nebraska Press Assn. v. Stuart*,[78] the Supreme Court held that judicial orders restraining criminal pretrial news publications, even though intended to preserve Sixth Amendment rights to a fair trial, involve prior restraints and are therefore unconstitutional.[79] Only a showing by government that there is a clear and present danger to the administration of justice could justify such a prior restraint. More recently, the Court suggested that "clear and present danger" is an appropriate guide in determining the constitutionality of restrictions upon expression when the substantive evil sought to be prevented is destruction of life or property, or invasion of the right of privacy.[80]

A mere likelihood, however great, that a substantive evil will result cannot alone justify restriction upon free speech. An "undifferentiated fear or apprehension of disturbance" is not enough to overcome the right to free expression.[81] There must be a clear and present danger that the the conduct itself will bring about the substantive evil, and the substantive evil likely to result must be extremely serious and the degree of imminence extremely high before government may abridge free speech.[82] Thus, the rule emanating from the "clear and present danger" cases is that the substantive evil sought to be avoided must be extremely serious and the degree of imminence high before government action limiting speech will be sanctioned.[83]

The evils that the Amendment seeks to obviate are not sufficiently exigent to warrant supression of free speech. The requirement that a defense attorney's request for an interview be channeled through the prosecutor presupposes that a victim is harmed by direct contact with the defense attorney.[84] However, it has never been established empirically that direct contact by the defense attorney further traumatizes, or in any other manner, causes harm to the victim.[85] Accordingly, the state is imposing prior restraints based merely upon an "undifferentiated fear or apprehension of disturbance."[86] Assuming that the substantive evil of further traumatization to crime victims be deemed extremely serious, mere apprehension of such evil lacks the requisite imminence to overcome the right of freedom of expression.[87] Because it has not been demonstrated that substantial numbers of victims will be further traumatized by a request for an interview by defense counsel, the imposition of such prior restraints on the free speech of defense counsel constitutes an impermissible infringement on First Amendment guarantees.

In addition to infringing on free speech as protected by the U.S. Constitution, the Victims' Rights Implementation Act violates Article II, Section

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78. 427 U.S. 539 (1976).
79. *Id.* at 559 ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.").
80. Thornhill v. Alabama, 310 U.S. 88 (1940).
81. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969).
82. *See* Whitney v. California, 274 U.S. 357, 374–376 (1927) (Brandeis, J., concurring).
83. *See* Bridges v. California, 314 U.S. 252, 263 (1941).
84. Christopher Johns, *Can We Talk*, The Defender, January, 1992. at 22.
85. *See id.*
86. *See supra* note 81 and accompanying text.
87. *Id.*

6 of the Arizona Constitution.[88] Arizona's free speech provision is generally interpreted to guarantee even broader free speech rights than those conferred by the United States Constitution.[89] Thus, because the Victims' Rights Implementation Act contravenes the First Amendment of the United States Constitution, it necessarily violates Art. II, § 6 of the Arizona State Constitution.

## III. IMPACT OF THE VICTIMS' RIGHTS IMPLEMENTATION ACT; PRACTICAL IMPLICATIONS AND CONCERNS

By requiring the prosecutor to be a conduit for defense interview requests, the Victims' Rights Implementation Act in effect requires the defense to rely on the adversary for access to critical information. Accordingly, strong policy considerations counsel against precluding the defense from contacting a victim to request an interview. The following examples demonstrate the impact the Act is having on the criminal justice system and the administration of justice.

One difficulty created by the requirement that contact with the victim be channeled through the prosecutor stems from the fact that the prosecutor neither represents the victim nor is the victim's lawyer.[90] Consequently, the prosecutor and the victim do not always have the same interests. [91] Indeed, it is not uncommon for the victim's interests to be antithetical to those of the prosecutor.[92]

For instance, in domestic violence cases, the victimized spouse may decide not to press charges against the abuser.[93] Instead, the victim may want only for the abuser to return home to resume life as if nothing had happened. In such cases, the prosecutor's interests in punishing the abuser are indeed antithetical to the victim's. Similarly, in cases wherein a juvenile has perpetrated a crime against his parents, such as stealing the family car, the parents may have had the child arrested only to teach the child a lesson. However, if the child is a repeat offender, the prosecutor may have an interest in pursuing the case contrary to the interests of the victimized parents.

Another difficulty created by requiring the prosecutor to serve as a conduit for defense requests stems from the obvious fact that the interests of the prosecution and defense are at odds. Within this context, the potential for abuse by the prosecution is substantial.[94] For example, there is a concern that the prosecutor will utilize the exclusive dominion over the victim conferred by Section 13–4433(B) to improperly influence the victim.[95] Specifically, the fear is

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88. *See* Ariz. Const. art. II, § 6. Arizona's free speech provision provides that "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

89. Mountain States Tel. v. Ariz. Corp. Comm'n, 160 Ariz. 350, 773 P.2d 455 (Ariz. 1989)(Corporation Commission order blocking access to all "ScoopLines" impinged on free speech guarantees that are broader under Arizona Constitution).

90. Interview with Christopher John, *see supra* note 11.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id. See also* Amicus Curiae Memorandum of Points and Authorities from the Arizona Attorneys for Criminal Justice (May 13, 1992)(on file with author).

95. Because the statute provides that "[t]he prosecutor's office shall promptly inform the victim of the defendant's request for an interview and shall advise the victim of his right to refuse the interview," the concern is that prosecutors will exploit the opportunity to inform the

that prosecutors will improperly advise victims to refuse requests for defense interviews.

Consider, for example, the case of *Mayer v. Superior Court.*[96] Mayer was a defendant in Maricopa County pending trial on charges of armed robbery and kidnapping.[97] Defense counsel requested an interview with the victim through the prosecutor pursuant to Arizona Revised Statute, Section 13–4433 (B).[98] The victim, Malcom Hernandez, agreed to be interviewed by defense counsel.[99] The prosecutor advised defense counsel that the interview would be held January 23, 1992.[100] At the stipulated time and place, the victim was present and ready for the interview, but before the interview commenced, the victim conferred once more with the prosecutor.[101] Defense counsel was then informed that no interview would take place because the victim had changed his mind.[102] In conferring with the victim just prior to the interview, the prosecutor allegedly gave the victim additional information with which to make "an informed decision."[103]

A Petition for Special Action was filed by defense counsel alleging violations of Rule 39, the Victims' Rights Implementation Act and ethical violations.[104] In response to the Petition for Special Action, the state argued that the victim was exercising his constitutional rights by conferring with the prosecutor before the scheduled interview and that the claim that the prosecutor discouraged or intimidated the victim to refuse the interview was unsubstantiated.[105]

The issue presented in the *Mayer* Petition for Special Action was whether the Victims' Bill of Rights or Arizona Revised Statute, Section 13–4433 prohibits trial courts from subpoenaing victims for evidentiary hearings to determine if a prosecutor has committed misconduct by dissuading or intimidating a previously cooperative victim from giving a pretrial interview with defense counsel.[106] The *Mayer* Special Action demonstrates the problems

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victim of his right to refuse the interview to improperly influence victims to refuse the interview request. ARIZ. REV. STAT. ANN. § 13–4433(B).

96. See Petition for Special Action and Application for Interlocutory Stay of Proceedings (April 6, 1992)(on file with author).

97. Id. The indictment charged Mayer with the armed robbery of an electronics department in a Dillards Department store. Mayer restrained the victim, a sales clerk, in a storeroom at gun point while he stole electronic equipment. This information is obtained from Phoenix Police Department Reports.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. The prosecutor forewarned the victim about the "defense attorney's demeanor and [the uses of] interview transcripts and impeachment". *See* Petition for Special Action and Application for Interlocutory Stay of Proceedings (April 6, 1992)(on file with author).

104. *Id.*

105. *See* Amicus Curiae Memorandum *supra* note 94.

106. See Petition for Special Action and Application for Interlocutory Stay of Proceedings (April 6, 1992)(On file with author).

Numerous state and federal courts have held that the defense in a criminal case has the right to interview witnesses prior to trial without interference by the prosecution. *See* United States v. Pinto, 755 F.2d 150 (10th Cir. 1985)(prosecution may not interfere with free choice of witness to speak with defense absent justification by the clearest and most compelling considerations); Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966), *cert. denied*, 396 U.S. 865 (1969) (defendant's conviction reversed on grounds that the prosecutor violated due process by advising witnesses not to talk to anyone in his absence); State v. Barncord, 726

generated by granting the prosecution exclusive dominion over crime victims. However, because the State Supreme Court declined to accept jurisdiction over the Petition,[107] the issue remains unresolved. Accordingly, the concerns that prosecutors are utilizing the exclusive access provided by Section 13–4433 to improperly interfere with a victim's decision to grant a defense interview remain viable.[108]

Yet another difficulty presented by the Victims' Rights Implementation Act is the absence of a prescribed time frame within which the prosecutor must transmit the request for an interview or the corresponding response to such request. Section 13–4433(B) provides that "[t]he prosecutor's office shall promptly inform the victim of the defendant's request for an interview and shall advise the victim of his right to refuse the interview."[109] The term "promptly" is not defined, however. This ambiguity in the provision creates a tremendous potential for improper delay by prosecutors.[110] Moreover, because the statute is silent as to the time within which the prosecutor must relay the victims' response to such requests, the potential for abuse is even greater.

Specifically, the concern is that prosecutors may not convey a request for an interview and the response thereto in a timely manner so as to allow the defense attorney to effectively prepare a defense.[111] As an officer of the court, the defense attorney has a duty to investigate the case and to properly counsel the defendant.[112] Defense attorneys rely on pretrial interviews to effectively

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P.2d 1322 (Kan. 1986)(a defendant is entitled to have access to any prospective witness even if it does not lead to an actual interview); *accord* Mota v. Buchanan, 26 Ariz. App. 246, 547 P.2d 517 (1976); State v. Hanshe, 105 Ariz. 396, 466 P.2d 1, supp. op. 105 Ariz. 529, 468 P.2d 382 (1970)(proper procedure for an accused to follow in protecting his right to interview the prosecution's witness is to demand that the prosecutor rescind his instructions, and, if necessary apply to trial court); State v. Chaney, 5 Ariz. App. 530, 428 P.2d 1004 (1967) (improper to discourage police officers from discussing case with defendant's counsel just prior to testifying); Rosser v. State, 45 Ariz. 264, 42 P.2d 613 (1935)(counsel for the adversary has every legal and ethical right to call upon any potential witness, prior to trial and interrogate him informally about his knowledge); *cf.* State v. Warner, 168 Ariz. 261, 812 P.2d 1079 (1990); *see generally* Robert N. Clinton,*The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials,* 9 IND. L. REV. 711 (1976)(prosecutor engages in misconduct if he instructs witnesses not to speak to defense counsel).

The Courts have found numerous bases for this right. The right to effective assistance of counsel is one. *See, e.g,* United States v. Calzada, 579 F.2d 1358 (1978). The due process clause of the fifth amendment is another. *See* Mota v. Buchanan, 26 Ariz. App. 246, 547 P.2d 517 (1976). Decisions condemning prosecutorial interference with defense interviews have also been based upon ABA Standards. *See* ABA Stds., Discovery and Procedure Before Trial, Std. 11–4.1: "Neither the counsel for the parties nor the prosecution or defense personnel shall advise persons (other than the accused) who have relevant material or information from discussing the case with opposing counsel or showing opposing counsel any relevant materials, nor shall they otherwise impede opposing counsel's investigation of the case." *See also* Ariz. S.Ct. Rule 42, Rules of Professional Conduct, ER 3.4 (fairness to opposing counsel). Similarly, interference or intimidation of defense witnesses has been condemned by the United States Supreme Court in Webb v. Texas, 409 U.S. 95 (1972), and the Arizona Supreme Court in State v. Dumaine, 162 Ariz. 392, 783 P.2d 1184 (1989) (finding no misconduct).

107. Order refusing jurisdiction (May 20, 1992)(on file with author).

108. *See* letter from Christopher Johns, Training Director of the Maricopa County Public Defenders Office (Oct. 10, 1992)(on file with author). Johns writes that "[e]ven though jurisdiction was not expected [for the Mayer Special Action, *supra*] this issue is happening over and over."

109. ARIZ. REV. STAT. ANN. § 13–4433(B).

110. Interview with Christopher Johns, *supra* note 11.

111. *Id.*

112. *Id.*

investigate the case, and the interview is often a critical part of effective trial preparation.[113] In many instances, defense counsel can properly evaluate the state's case and advise the defendant accordingly as to plea agreements only after a victim interview.[114] In fact, in the vast majority of cases, plea agreements are only possible after an interview with the victim.[115] Consequently, a defense attorney cannot adequately counsel a defendant without timely information concerning the possibility of a pretrial interview. Under these circumstances, the potential for delay afforded by the ambiguity in the Act impedes the administration of justice.

The recent decision by the Court of Appeals in *State v. Roper*[116] reflects these concerns. The Court wrote, "the amendment should not be a sword in the hands of victims to thwart a defendant's ability to effectively present a legitimate defense. Nor should the amendment be a fortress behind which prosecutors may isolate themselves from their constitutional duty to afford a criminal defendant a fair trial."[117] However, because Section 13–4433 is ambiguous and fails to mandate specific time limits within which the prosecution is required to transmit a critical interview request and the corresponding response, the Act does in fact provide a fortress behind which prosecutors may hide as they effectively deny a defendant the opportunity to present a legitimate defense.

## IV. THE SOLUTION

The Victims' Rights Implementation Act must be narrowly tailored to serve the state's legitimate interest in protecting the rights of crime victims as set forth in the Victims' Bill of Rights.[118] Accordingly, the Act should be amended to employ the least restrictive means of advancing the state's interests without impermissibly infringing upon constitutionally protected speech.

To address the concern that crime victims may be further traumatized by contact with the defendant, Section 13–4433 of the Act should be amended to ban contact by the defendant, or any other person acting on behalf of the defendant, *other than defense counsel.* This would be the least restrictive means of achieving the state's objective of protecting victims from traumatic contact with the defendant without extending beyond the interests it serves.

To address the concern that crime victims may be traumatized by contact with defense counsel, the Act should be amended to allow defense requests for victim interviews to be made directly by defense counsel to the victim, *requiring that such requests must be made in strict compliance with a narrowly drawn set*

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113. Johns, *supra* note 11.

114. Christopher Johns, *The Unintended Consequences of Victims' Rights,* THE MARICOPA LAWYER, August 1991, at 5.

115. *Id.* Determining beforehand what and how the victim will testify provides defense counsel with the crucial information upon which to advise his or her client whether to proceed to trial. Ironically, a victim's refusing to agree to an interview by defense counsel may result in greater trauma to the victim. Without an interview, a plea is less likely and a trial, during which a victim will be further traumatized by exposure to the defendant and cross examination by defense counsel, will be more likely.

116. 113 Ariz. Adv. Rep. 11 (1992). The court held that, in certain circumstances, the Victims' Bill of Rights must yield to the accused's need to effectively cross-examine witnesses and present a defense to insure federal and state constitutional mandates of due process.

117. *Id.* at 16.

118. *Supra* note 2.

*of guidelines.*[119] In those cases where a victim is in fact abused or harassed by defense counsel, the state may sanction the offending attorney.[120] State sanction is an effective and less restrictive deterrent against abusive conduct than complete prohibition. The Act, so amended, would permissibly regulate unprotected First Amendment speech without sweeping in constitutionally protected speech. The statute would thereby be narrowly drawn to further the state's legitimate interest in protecting crime victims from abuse or harassment by defense counsel, without abrogating precious First Amendment guarantees.

## CONCLUSION

The Victims' Bill of Rights grants crime victims the right to refuse a defense interview. It does not follow, however, that defense counsel may be precluded from requesting one. The Amendment was not intended as a strategic coup for prosecutors. It was intended to prevent the insensitive abuse of crime victims by the judicial system. However, requiring that interview requests be channeled through the prosecutor's office affords overzealous or unscrupulous prosecutors the opportunity to harbor critical pretrial information from the defense, even when a victim would be willing to submit to an interview. Because the Act broadly restricts speech that may not violate a victim's rights, the Act is constitutionally overbroad and unconstitutionally imposes prior restraints on free speech. A workable and constitutional solution for reconciling the state's interest in safeguarding the rights of crime victims with First Amendment guarantees would allow defense counsel to contact crime victims directly, subjecting offending attorneys to sanctions for abusive conduct.

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119. *See supra* note 66. Under this paradigm, Rule 39 would still be available to serve the victims' interests against invasions of privacy by defense counsel.

120. *Id.*