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## New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004

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# New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004

David E. Aaronson\*

*The Crime Victims' Rights Act (CVRA) of 2004 is the most important legislation to advance crime victims' rights enacted in the United States in the last decade. While the CVRA strengthens existing federal crime victims' rights provisions, its most important contribution is the creation of a judicial enforcement regime, including standing for crime victims to transform often illusory crime victims' rights into meaningful, enforceable rights.*

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## I. Introduction

Until the crime victims' rights movement became a potent force for reform, official recognition and response to the special needs of crime victims typically was very limited. The coalition of groups and individuals most passionate about enacting a Federal constitutional amendment, or failing that, broad legislation with effective enforcement provisions was and continues to consist primarily of victims of serious, violent crimes and

their families.<sup>1</sup> Their experience with the criminal justice system failed to bring them closure or any sense of justice.<sup>2</sup>

The crime victims' rights movement has revealed legitimate and serious shortcomings within our criminal justice system. Crime victims have complained of insensitive treatment by police, prosecutors, and other criminal justice officials; inadequate protective measures, absence of meaningful restitution, compensation or other assistance; and have been mostly excluded from participating in the criminal justice process, except in their role as witnesses. Police and prosecutors often neglect to include victims in the various phases of investigation and prosecution, make decisions affecting the crime victims without informing or consulting them, and impose a "secondary harm"<sup>3</sup> on crime victims that adds to the injury already suffered.

Victims' rights advocates argue that the harm to which victims are exposed during the trial process, in addition to the original harm suffered from the crime, justifies giving crime victims rights independent from those of police and prosecutors. Criminal proceedings will ultimately be aided because crime victims are often the most important source of information available to police, prosecutors, judges, and juries. Thus, victims' cooperation is likely to be significantly improved if given meaningful and enforceable rights.

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1. See National Victims' Constitutional Amendment Passage, <http://www.nv-cap.org/> (last visited July 12, 2008) (listing supporters of victims' amendment project).

2. See Jon Kyl, Steven J. Twist, & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 583 (2005) ("The victims' rights movement seeks to end the unjust treatment of crime victims by reforming the culture of the criminal justice system in the federal government and the states.").

3. Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 293-96 (1999). Beloof states:

The fundamental justification for providing due-process-like rights of participation (and other types of rights) is to prevent the two kinds of harm to which the victim is exposed. The first harm is primary harm, which results from the crime itself. The other harm is secondary harm, which comes from governmental processes and governmental actors within those processes.

*Id.* at 294.

The Crime Victims' Rights Act ("CVRA") of 2004<sup>4</sup> is the most important legislation to advance crime victims' rights enacted in the United States in the last decade. The CVRA can be distinguished from earlier federal legislation and most state constitutional amendments and statutes in three areas: (1) extending rights and remedies to victims of all misdemeanors as well as felonies; (2) expanding participatory rights at critical stages of the criminal justice process; and, most significantly, (3) providing a judicial enforcement regime that grants standing to crime victims to appeal a violation of their rights immediately after the violation occurs to federal appellate courts, to be heard within seventy-two hours. In addition, the CVRA authorizes appellate courts to halt the trial proceedings for up to five days while an appeal is being heard and, if the relief sought is denied, requires appellate courts to clearly state the reasons for the denial in a written opinion.

This article discusses the CVRA—its rights, remedies, and likely impact on the priorities and roles of other criminal justice actors. Key issues are identified that will need to be resolved by the courts interpreting the CVRA or perhaps by Congressional amendment. In addition, because Congress intended the CVRA to serve as a model for reform of state victims' rights constitutions and statutes, illustrative state provisions are compared.<sup>5</sup>

## II. Evolution of Federal Victims' Rights Legislation

### A. *Pre-CVRA Federal Legislation*

The victims' rights movement in the United States has undergone three distinct stages. Throughout the first stage, occurring approximately from the early 1970s through the early 1980s, crime victims' rights advocates sought statutory recognition of new rights, including the right to restitution; more humane treatment by police, prosecutors and other criminal justice administrative officials; and participatory rights in the criminal justice process. During the second stage, starting with

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4. Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405 (codified as amended at 18 U.S.C. §3771 (2004)).

5. See Kyl et al., *supra* note 2, at 593 ("Congress intends the CVRA to transform the federal criminal justice system's treatment of crime victims and to serve as a model for reform of the criminal justice legal culture in the fifty states.").

the 1982 Report of the President's Task Force on Victims of Crime<sup>6</sup> that contained sixty-six recommendations including a proposed federal constitutional amendment, crime victims' rights advocates sought constitutional recognition of these rights, resulting in thirty-two state constitutional amendments.<sup>7</sup> The present day third stage seeks to give additional meaning to these rights by providing effective legal remedies.<sup>8</sup>

During the last twenty-five years, federal legislation has been enacted in response to demands to meet the basic needs of crime victims and to recognize their rights.<sup>9</sup> The first major federal victims' rights law was the Victim and Witness Protection

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6. OFFICE FOR VICTIMS OF CRIME, PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT (1982), [http://www.ojp.usdoj.gov/ovc/publications/presdnts\\_tskforcprpt/87299.pdf](http://www.ojp.usdoj.gov/ovc/publications/presdnts_tskforcprpt/87299.pdf). On April 23, 1982, President Ronald Reagan issued Executive Order 12360, establishing the President's Task Force on Victims of Crime. The Task Force conducted a nationwide study to assess the treatment of crime victims in the criminal justice system. Its members were unanimous in their findings that the criminal justice system regularly revictimized victims and that the system was out of balance in favor of offenders. Their final report included sixty-eight recommendations for action in five areas: (1) proposed executive and legislative action at the federal and state levels; (2) proposed federal action; (3) proposed action for criminal justice system agencies, including police, prosecutors, the judiciary, and parole boards; (4) proposed action for other organizations, including hospitals, the ministry, the Bar, schools, the mental health community, and the private sector; and (5) a proposed amendment to the Federal Constitution. Melissa Hook & Jane Seymour, *A Retrospective of the 1982 President's Task Force on Victims of Crime, Office for Victims of Crime*, December, 2004, <http://www.ojp.usdoj.gov/ovc/ncvrvw/2005/pg4d.html>.

7. See National Victims' Constitutional Amendment Passage, *supra* note 1 (citing AL, AK, AZ, CA, CO, CT, FL, ID, IL, IN, KS, LA, MD, MI, MS, MO, NE, NV, NJ, NM, NC, OH, OK, OR, RI, SC, TN, TX, UT, VA, WA, and WI as states that have adopted victims' rights amendments). See also Office for Victims of Crime, National Victim Assistance Academy, <http://www.ojp.usdoj.gov/ovc/assist/vaa.htm> (last visited July 12, 2008) (documenting dates and voter approval for state constitutional amendments for victims' rights until 1996). In addition, Montana does not have a victims' rights amendment to its constitution. However, in 1998, Montana voters approved a constitutional amendment broadening the purposes of the criminal justice system to include restitution to crime victims. If Montana were included, the total number of states enacting a victims' rights constitutional amendment is thirty-three. See National Victims' Constitutional Amendment Passage, *supra* note 1. For information about other state victims' rights constitutional amendments, see *id.*

8. Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 257, 342 [hereinafter Beloof, *The Third Wave*]. See also DOUGLAS E. BELOOF, PAUL G. CASSELL, & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE 769 (2d ed. 2006).

9. See Kyl, *supra* note 2, at 584-88 (2005), for a summary of legislation at the federal and state levels.

Act of 1982,<sup>10</sup> which provided restitution for crime victims, allowed the use of victim-impact statements at sentencing hearings and encouraged states to establish programs to serve crime victims. Congress expanded the provisions of this act through the Victims of Crime Act of 1984,<sup>11</sup> creating the Crime Victims Fund and the Office for Victims of Crimes in the Department of Justice. The Crime Control Act of 1990<sup>12</sup> mandated a variety of services for victims. Congress subsequently enacted the Mandatory Victims Restitution Act of 1996,<sup>13</sup> expanding the crime victims' right to restitution.

The Victims' Rights and Restitution Act of 1990<sup>14</sup> contributed the most to recognizing crime victims' rights prior to enactment of the CVRA. The Act's "Bill of Rights" guaranteed crime victims the following : (1) to be treated fairly and with respect for the victim's dignity and privacy; (2) to be reasonably protected from the accused offender; (3) to be notified of court proceedings; (4) to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victims would be materially affected if the victim heard other testimony at trial; (5) to confer with the attorney for the Government in the case; (6) to restitution; and (7) to information about the conviction, sentencing, imprisonment, and release of the offender.<sup>15</sup> The remedy provided in Section 502 of the Victims' Rights and Restitution Act of 1990 was that federal officials, "shall make their best efforts to see that victims of crime are accorded the rights described" in the Act.<sup>16</sup>

Four years later, Congress passed the Violent Crime Control and Law Enforcement Act of 1994,<sup>17</sup> which encompassed

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10. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C. §§ 1512-1514, 3679-3580) (1982)).

11. Victims of Crime Act of 1984, Pub. L. No. 98-473, 98 Stat. 2170 (codified as amended at 42 U.S.C. § 10601 (1984)).

12. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified as amended at 18 U.S.C. § 922(q) (1990)).

13. Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, tit. IIA, 110 Stat. 1227 (codified as amended at 18 U.S.C. § 3663(a) (1996)).

14. Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, 104 Stat. 4820 (codified as amended at 42 U.S.C. § 10606 (1990)).

15. 42 U.S.C. § 10606(b).

16. *Id.* § 10606(a).

17. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 42 U.S.C. §§ 13701-14223 (1994)).

several new provisions for victims, including the right of domestic violence victims to be heard at the defendants' pretrial release hearings and the right of violent crime and sexual abuse victims to allocute at sentencing.<sup>18</sup> The Act also mandated restitution for sexually exploited and abused children and victims of domestic violence and sexual assault.<sup>19</sup>

The trial of Timothy McVeigh, charged with responsibility for the April, 1995 bombing of the Murrah Building in Oklahoma City, Oklahoma, which resulted in the death of 168 persons, dramatically spotlighted a significant limitation of the Victims' Rights and Restitution Act of 1990—the lack of an effective enforcement mechanism. Surviving victims of the bombing, who were scheduled to testify at sentencing, sought to exercise their right to attend the trial. The victims were barred from attending the trial. The Government appealed to the Tenth Circuit, which held that the statute did not “grant standing to seek review of orders relating to matters covered by the Act.”<sup>20</sup> The Tenth Circuit noted that the statute “‘does not create a cause of action or defense in favor of any persons arising out of the failure to accord to a victim the rights enumerated.’”<sup>21</sup> However, the Tenth Circuit stated that it did not categorically rule out the possibility of mandamus relief for the government in the event of a patently unauthorized and pernicious ruling by the trial judge.<sup>22</sup>

In response to the public's dissatisfaction with the surviving victims' exclusion from the Oklahoma City bombing trial, the Victim Rights Clarifications Act of 1997<sup>23</sup> was enacted. It established the victim's right to attend trial even if the victim will also speak at sentencing. This right, however, is not absolute. The victim may only attend the trial assuming that no other statute, rule, or provision of law requires that the victim be excluded.<sup>24</sup>

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18. *Id.*

19. *Id.*

20. *United States v. McVeigh*, 106 F.3d 325, 335 (10th Cir. 1997).

21. *Id.* (quoting 42 U.S.C. § 10603(c)).

22. *Id.* at 333

23. Victim Rights Clarification Act of 1997, Pub. L. No 105-6, 111 Stat. 12 (codified as amended at 18 U.S.C. § 3510 (1997)).

24. *Id.*



### B. *Circumstances Leading to the Enactment of the CVRA*

A coalition of groups and individuals were passionate about enacting a Federal constitutional amendment, or, failing that, broad legislation with effective enforcement provisions. Among the various supporters, three groups of crime victim advocates with differing priorities played a prominent role: (1) family members and friends of homicide victims;<sup>25</sup> (2) sexual assault victims, their family, and friends and victims of domestic violence, including victims of spousal and child sexual abuse;<sup>26</sup> and (3) family members and friends of persons who were killed or seriously injured by drunk drivers.<sup>27</sup>

These groups and individuals have benefited from the scholarly contributions, organizing activities, strategic guidance, and political contacts of leaders of the contemporary victims' rights movement. In particular, three persons outside of the executive and legislative branches made important contributions in the battle to obtain Congressional support for a federal victims' rights constitutional amendment, which ultimately led to the legislative enactment of the CVRA: Professor Douglas E. Beloof;<sup>28</sup> Professor and former United States District Judge

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25. See, e.g., National Organization of Parents of Murdered Children, <http://www.pomc.org/> (last visited July 12, 2008).

26. See, e.g., Illinois Coalition Against Sexual Assault, <http://www.icasa.org/home.aspx?PageID=500&> (last visited July 12, 2008); Pennsylvania Coalition Against Rape, <http://www.pcar.org/> (last visited July 12, 2008); The Justice League of Ohio, <http://www.thejusticeleagueohio.org/> (last visited July 12, 2008); National Sexual Violence Resource Center, <http://www.nsvrc.org/> (last visited July 12, 2008); Iowa Coalition Against Sexual Assault, <http://www.iowacasa.org/> (last visited July 12, 2008). Additional information on the activities and programs of other organizations and the federal government can be obtained from: (1) the Office on Violence Against Women, U.S. Department of Justice, 800 K Street, N.W., Suite 920, Washington, D.C. 20530; (2) the National Crime Victim Law Institute, 10015 SW Terwilliger Boulevard, Portland, Oregon 97219-7799.

27. See, e.g., Mothers Against Drunk Driving, <http://www.madd.org/> (last visited July 12, 2008).

28. Professor of Law, Lewis & Clark Law School and former Executive Director, National Crime Victim Law Institute. Representatives of victims' rights groups, state and local prosecutor offices, victims' rights offices, crime victim resource and service centers, law professors, the ABA Victims Committee, and the U.S. Department of Justice have met annually for the last seven years at the National Crime Victim Law Institute Law and Litigation Conference at Lewis & Clark Law School for educational sessions and to explore constitutional, legislative, and litigation strategies.

Paul Cassell;<sup>29</sup> and legal activist and strategist, Steven J. Twist.<sup>30</sup>

The enactment of the CVRA in its present form is largely a result of the leadership and advocacy both of crime victims' rights groups and the strong bipartisan support of United States Senators Jon Kyl (R-Arizona), Dianne Feinstein (D-California), and other congressional supporters. In addition, the CVRA received White House support; however, input from the professional staff of the U.S. Department of Justice was limited. Because legislation can be amended and funding can be restricted, legislators and others with reservations about certain provisions of the CVRA viewed the CVRA as preferable to the proposed, and more permanent, amendment to the United States Constitution, which had strong support in Congress.<sup>31</sup> Senate sponsors of the federal constitutional amendment settled for a statutory alternative after realizing that a constitutional amendment did not have the votes necessary to pass.<sup>32</sup>

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29. Professor of Law, University of Utah, and, formerly, United States District Court Judge for the District of Utah (Mar. 13, 2002–Nov. 5, 2007).

30. Adjunct Professor, Arizona State University College of Law and General Counsel for the National Victims Constitutional Amendment Project. Professor Twist participated in the crafting of the final version of the Federal Victim Rights Bill. See National Organization for Victim Assistance, *"Breathtaking" Statute Adopted in Near Silence - Federal Victim Rights Bill Enacted 1*, available at [http://humanright.go.kr/03/sub/%B9%CC%B1%B9%20%BF%AC%B9%E6%20%C7%C7%C7%D8%C0%DA%BA%B8%C8%A3%B9%FD\(2004.%2010.%2030.%20%C5%EB%B0%FA\).pdf](http://humanright.go.kr/03/sub/%B9%CC%B1%B9%20%BF%AC%B9%E6%20%C7%C7%C7%D8%C0%DA%BA%B8%C8%A3%B9%FD(2004.%2010.%2030.%20%C5%EB%B0%FA).pdf) (last visited July 12, 2008).

31. See 150 CONG. REC. S4260, 4271 (2004) (statement of Sen. Leahy) ("I did not think the proposed constitutional amendment was the best way forward. We all agree . . . that every right provided by the victims' rights amendment can be, or already is, protected by State or Federal statutory law."). See also *id.* at 4275 (statement of Sen. Durbin) ("I agree with James Madison, who wrote that the United States Constitution should be amended only on 'great and extraordinary occasions,' and I am reluctant to amend our Constitution for only the 18th time since the adoption of the Bill of Rights.").

32. See 150 CONG. REC. S4260 (2004) (statement of Sen. Feinstein) ("Essentially, bottom line, what we have found after numerous Judiciary Committee subcommittee hearings, committee hearings, markups, putting the victims' rights constitutional amendment out on the Senate floor in a prior session, taking it down because we didn't have the votes, beginning anew in this session, going through the processes in committee, and recognizing that we didn't have the 67 votes necessary for a constitutional amendment—both Senator Kyl and I, as well as the victims and their advocates decided that we should compromise.").

Supporters of an amendment to the United States Constitution reluctantly viewed this legislation as a practical step forward.<sup>33</sup>

Whether it was merely the exigencies of time or a carefully planned strategy, the CVRA was passed with very little legislative debate, input from the judiciary, and without national publicity or visibility.<sup>34</sup> With Senators Feinstein and Kyl leading the way, the Senate passed the bill by a vote of 96 to 1 and the House passed the bill by a vote of 393 to 14.<sup>35</sup> The Senate version integrated a few provisions that were more pro-victim than the House version, such as requiring a "clear and convincing" standard of proof that a victim's testimony would be materially altered before a victim can be excluded from the courtroom.<sup>36</sup> The final compromise bill was passed in a basket of legislation, titled the "Justice for All Act," which contained two well-publicized, pro-defendant statutes authorizing funding for the use of DNA evidence to prove innocence and training to improve defense representation in capital cases.<sup>37</sup> Despite having implica-

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33. See 150 CONG. REC. S4260, 4263 (2004) (statement of Sen. Feinstein) ("[W]e will follow this bill carefully and we will see whether the enforcement rights contained in this bill are adequate. If not, you can be sure as the sun will rise tomorrow, we will be back with a constitutional amendment."). See also Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, Nila Lynn Crime Victims Rights Act: Hearing on HR. 4342 Before the H.R. Comm. on the Judiciary, 109th Cong. (June 21, 2006) (statement of Margaret A. Garvin, then-Director of Programs, National Crime Victim Law Institute).

34. See *United States v. Marcello*, 370 F. Supp. 2d 745, 749 (N.D. Ill. 2005) ("First, little legislative history exists. Nowhere in the legislative history provided by the Government (nor found independently) does one find the debate or exchange of ideas that more frequently accompanies the art of law-crafting."). See also 150 CONG. REC. S4260, 4272 (2004) (statement of Sen. Leahy) (Senator Leahy, while supporting passage of the CVRA, noted that "we had so little opportunity to work on crafting the crime victims' statute. I would have liked to have gotten the views of the Office for Victims of Crime and other components of the Department of Justice, for example. . . . [We had] no time to hold hearings on it or improve the bill in Committee.").

35. National Organization for Victim Assistance, *supra* note 30, at 1; Pamela Blume Leonard, *All But Death, Can Be Adjusted*, CHAMPION MAGAZINE, December 2006, at 40, available at [http://www.nacdl.org/\\_852566CF0070A126.nsf/0/A5E2F90FCEE059FF8525727A0078CA03?Open](http://www.nacdl.org/_852566CF0070A126.nsf/0/A5E2F90FCEE059FF8525727A0078CA03?Open).

36. See Kyl et al., *supra* note 2, at 592-93, 599-601.

37. See Justice For All Act, Pub. L. No. 108-405, Preamble (codified as amended in several sections of 18 U.S.C. and 42 U.S.C. (2004)) ("To protect victims' rights, to eliminate the substantial backlog of DNA samples collected from crime scenes and convicted offenders, to improve and expand the DNA testing capacity of Federal, State, and local crime laboratories, to increase research and development of new DNA testing technologies, to develop new training programs regarding the

tions for the workload of the federal judiciary, no representatives of the judicial branch testified or submitted statements at the hearing. The Act was adopted on Saturday, October 9, 2004, during the end-of-session rush to adjourn, passing in the Senate and the House by unanimous consent without debate or comment.<sup>38</sup> President Bush signed the bill into law on October 30, 2004.

Congressional sponsors of the CVRA intended that the CVRA serve as a model for amending state constitutional and statutory provisions, since most criminal cases are litigated in state courts. Sen. Feinstein stated:

This act, of course, binds only the federal system, but is designed to affect the states also. First it is hoped that states will look to this law as a model and incorporate it into their own systems. This law encourages that by allowing both types of grants—legal assistance and victim notification—to be provided to state entities, and for use in state systems where the state has in place “laws substantially equivalent” to this act.<sup>39</sup>

Without state adoption of these recently created rights and remedies, the CVRA would have a negligible impact on the overall treatment of victims within the criminal system and would likely prompt victims’ rights advocates to resume their crusade for a federal constitutional amendment.<sup>40</sup>

The CVRA authorizes six categories of appropriations to benefit crime victims and to facilitate the implementation of its provisions at the federal and state levels.<sup>41</sup> One provision au-

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collection and use of DNA evidence, to provide post-conviction testing of DNA evidence to exonerate the innocent, to improve the performance of counsel in State capital cases, and for other purposes.”).

38. National Organization for Victim Assistance, *supra* note 30, at 1.

39. 150 CONG. REC. S4260, 4262 (2004) (statement of Sen. Feinstein).

40. *See id.*

41. Justice For All Act, Pub. L. No. 108-405 (codified as amended in 42 U.S.C. § 10603d (2004)) includes the following five categories of authorized appropriations: (1) \$2,000,000 for fiscal year 2005 and \$5,000,000 for the fiscal years 2006-2009 to the United States Attorneys Offices for Victim’s Witnesses Assistance Programs; (2) similar amounts to the Office of Victims of Crime of the Department of Justice for enhancement of the Victim Notification System; (3) \$300,000 in fiscal year 2005 and \$500,000 for each of the fiscal years 2006-2009, to the Office for Victims of Crime of the Department of Justice for staff to administer the appropriation for the support of organizations designed under item four; (4) \$7,000,000 for fiscal years 2005 and \$11,000,000 for each of the fiscal years 2006-2009, to the Office for Victims of Crime of the Department of Justice for the support of organi-

thorizes \$7,000,000 for fiscal year 2005 and \$11,000,000 for each of the fiscal years 2006-2009 to the Office for Victims of Crime of the Department of Justice for enforcement of crime victims' rights in Federal jurisdictions and to States and tribal governments that have laws "*substantially equivalent* to the provisions" of the CVRA.<sup>42</sup> The Department of Justice has not issued regulations or guidelines on the meaning of the phrase "substantially equivalent."<sup>43</sup> Only a small portion of the funds authorized by the CVRA have actually been appropriated.<sup>44</sup>

Fully implementing the CVRA requires a significant allocation of scarce criminal justice resources. Resource needs include improving crime-victim notification systems, hiring and training victim/witness coordinators, and funding *pro bono* organizations for legal counsel and support services for indigent crime victims. Other costs include the likely increase in the federal appellate court's workload as more crime victims and their representatives exercise their CVRA rights.

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zations that provide legal counsel and support services for victims in criminal cases for the enforcement of crime victims' rights in Federal jurisdictions, and in States and tribal governments that have laws "substantially equivalent" to the provisions of the CVRA; (5) \$5,000,000 for fiscal year 2005 and \$7,000,000 for fiscal years 2006-2009, to the Office for Victims of Crime of the Department of Justice for the support of: (A) training and technical assistance to States and tribal jurisdictions to craft state-of-the-art victims' rights laws and (B) training and technical assistance to States and tribal jurisdictions to design a variety of compliance systems, which shall include an evaluation component. In addition, 42 U.S.C. § 10603e (2004) amends the Victims of Crime Act of 1984 to authorize \$5,000,000 for each of the fiscal years 2005-2009 for grants to State, tribal, and local prosecutors' offices, law enforcement agencies, courts, jails, and correctional institutions and to qualified public or private entities to develop and implement state-of-the-art systems for notifying victims of crime of important dates and developments, provided that the jurisdiction has laws "substantially equivalent" to the CVRA.

42. *Id.* (emphasis added).

43. Cf. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (2005), <http://www.usdoj.gov/olp/final.pdf>. Margaret A. Garvin, Executor Director, National Crime Victim Law Institute, stated: "What is necessary for a law to be 'substantially similar' to the CVRA is that it afford a victim the ability to independently assert and seek enforcement of his or her rights at both the trial and appellate levels." E-mail from Margaret A. Garvin dated September 5, 2008 (on file with author).

44. Telephone interview with Margaret A. Garvin, then-Director of Programs, National Crime Victim Law Institute (April 28, 2008). See also *Hearing on HR. 4342*, statement of Margaret A. Garvin, *supra* note 33.

### III. Crime Victims' Rights Act of 2004

#### A. *Rights Provided by the CVRA*

The CVRA, section 3771(a) amends the federal criminal code to grant crime victims specified rights, including:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.<sup>45</sup>

These rights may be asserted by the crime victim or the crime victim's lawful representative and the attorney for the Government.<sup>46</sup> In addition, "[t]he prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney . . . ."<sup>47</sup>

Although the CVRA does not provide grounds for a new trial if rights are denied, it allows victims to file motions to re-open a plea or sentence in certain circumstances.<sup>48</sup> The CVRA also adds new victims' rights and modifies some of the existing

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45. 18 U.S.C. § 3771(a) (2004).

46. *Id.* § 3771(d)(1).

47. *Id.* § 3771(c)(2).

48. *Id.* § 3771(d)(5) ("Limitation on Relief. In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if: (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied, (B) the victim petitions the court of appeals for a writ of mandamus within 10 days, and (C) in the case of a plea, the accused has not pled to the highest offense charged."). See also The Justice for All Act, April, 2006, <http://ojp.usdoj.gov/ovc/publications/factshts/justforall/content.html>.

rights. Most notable is the new right of victims to be reasonably heard at any public proceeding involving release, plea, or sentencing.<sup>49</sup>

Further, the CVRA provides that crime victims have the right to "proceedings free from unreasonable delay."<sup>50</sup> Kyl, Twist, and Higgins observe that "delays in criminal proceedings are among the most chronic problems faced by victims. Whatever peace of mind a victim might achieve after a crime is too often inexcusably postponed by unreasonable delays in the criminal case."<sup>51</sup> The victim may assert this right when the defendant or the Government seeks delay and the defense does not object. Kyl, Twist, and Higgins argue that this right "should be interpreted so that any decision to schedule, reschedule, or continue criminal cases should include victim input through the victim's assertion of the right to be free from unreasonable delay."<sup>52</sup>

There are also concerns with this right. The victim's right to proceedings free from unreasonable delay may conflict with exceptions to the Speedy Trial Act,<sup>53</sup> and, possibly, the defendant's due process right to prepare a defense. Further, the gov-

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49. 18 U.S.C. § 3771(a)(4).

50. *Id.* § 3771(a)(7).

51. Kyl et al., *supra* note 2, at 611.

52. *Id.*

53. 18 U.S.C. §§ 3161-3179 (1975). There are several exceptions in the Speedy Trial Act that might authorize a delay that may seem unreasonable to a victim. Courts will need to decide whether such delays are presumptively reasonable or a violation of 18 U.S.C. § 3771(a)(7). See *Henderson v. United States*, 476 U.S. 321, 326-33 (1986). The U.S. ATTORNEYS CRIMINAL RESOURCE MANUAL 628, SPEEDY TRIAL ACT OF 1974 (2006), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00628.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00628.htm), states:

Certain pretrial delays are automatically excluded from the Act's time limits, such as delays caused by pretrial motions. In *Henderson*, the Supreme Court held that § 3161(h)(1)(F) excludes "all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is 'reasonably necessary.'" The Act also excludes a reasonable period (up to 30 days) during which a motion is actually 'under advisement' by the court. Other delays excluded from the Act's time limits include delays caused by the unavailability of the defendant or an essential witness, delays attributable to a co-defendant, and delays attributable to the defendant's involvement in other proceedings, including delay resulting from an interlocutory appeal.

*Id.* (citing 18 U.S.C. § 3161(h)(1)(E) (1975); 18 U.S.C. § 3161(h)(1)(F); 18 U.S.C. § 3161(h)(1)(J); *Henderson*, 476 U.S. at 330) (citations omitted).

ernment needs time to prepare and organize its case, limiting the speed with which a trial may commence.

## B. *Scope of the CVRA*

### 1. What crimes qualify?

Under the CVRA, victims' rights are applicable to *any* Federal offense or an offense committed in the District of Columbia, Federal territories, or Indian Reservations.<sup>54</sup> Therefore, victims may assert their rights both in felony and misdemeanor cases involving both violent and non-violent crimes.<sup>55</sup> During the negotiations for a federal constitutional amendment, victims' rights advocates agreed on a definition of victim as a "victim of violent crime," which is far more limited in scope than the CVRA's definition.<sup>56</sup>

Similarly, the definition of "victim" in many state constitutions and statutes is more limited than that in the CVRA. In some states, an eligible victim is limited to a person who has suffered actual or threatened physical, psychological, or financial injury as the result of a crime. For example, Florida, Maryland, and South Carolina all recognize victim status based on a showing of direct injury.<sup>57</sup> Similarly, Illinois restricts victim status to victims suffering actual injuries as a result of violent

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54. See 18 U.S.C. § 3771(e).

55. *Id.* See also 150 CONG. REC. S4260, 4275-76 (2004) (statement of Sen. Kennedy) ("This legislation will protect all victims of crime, including victims of identity theft, personal property theft, fraud, embezzlement, vandalism, and other non-violent offenses.").

56. See National Victims Constitutional Amendment Passage, *supra* note 1. The proposed victims' rights amendment defined victim as follows: "The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them are hereby established and shall not be denied by any State or the United States and may be restricted only as provided in this article." *Id.* (emphasis added).

57. See FLA. STAT. § 960.03(13) (1985) ("Victim' means: (a) A person who suffers personal physical injury or death as a direct result of a crime; . . . (c) A person against whom a forcible felony was committed and who suffers a psychiatric or psychological injury as a direct result of that crime but who does not otherwise sustain a personal physical injury of death."); MD. CODE ANN., CRIM. PROC. § 11-104(2) (West 2004) ("Victim' means a person who suffers actual or threatened physical, emotional, or financial harm as a direct result of a crime or delinquent act."); S.C. CODE ANN. § 16-3-1510 (1984) ("Victim' means any individual who suffers direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a criminal offense.").



crime.<sup>58</sup> Other states are even more limited, focusing not on actual injury, but on the nature of the crime committed. For example, Louisiana limits the definition of victim to those victims of felonies, sexual offenses, and domestic violence.<sup>59</sup> The adoption of the CVRA by the states would result in greatly expanded eligibility for "victim" status.

Victims' rights advocates argue that serious harm may be inflicted on victims of non-violent felonies and misdemeanors, including identify theft, personal property theft, fraud, embezzlement, serious vandalism, and other non-violent offenses. On the other hand, non-violent misdemeanors also include large numbers of cases of minor conflicts among neighbors and others, including dog-at-large, noise disturbances, minor acts of trespass, and drunk and disorderly persons.

States considering adoption of the CVRA's broad definition of "victim" face a different environment than prosecution of crime at the federal level.<sup>60</sup> Millions of misdemeanor cases are processed nationwide by the states. States will need to consider how best to allocate their scarce criminal justice resources and take into consideration the administrative demands, unfunded financial costs, and the likelihood of increased appellate litigation. In addition, states will also need to consider the serious harm inflicted on victims by non-violent misdemeanor crimes, the benefits of recognizing their rights, and avoiding creating two classes of crime victims.

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58. 725 ILL. COMP. STAT. 120/3(a) (1993) ("Crime victim' means (1) a person physically injured . . . as a result of a violent crime . . . or (2) a person who suffers injury to or loss of property as a result of a violent crime perpetrated or attempted.").

59. LA. REV. STAT. ANN. § 46:1842(9) (1985) ("Victim' means a person against whom any of the following offenses have been committed: (a) Any homicide, or any felony offense . . . (b) Any sexual offense. (c) The offenses of vehicular negligent injuring and first degree vehicular negligent injuring. (d) Any offense . . . committed against a family or household member . . . or dating partner . . .").

60. However, the CVRA applies to offenses committed in the District of Columbia. 18 U.S.C. §3771(e) (2004). Since the District of Columbia processes a large number of misdemeanor cases similar to that of other states, a study of the degree to which the CVRA is being implemented and the problems encountered in the District of Columbia might be of assistance to other states considering the adoption of the CVRA's broad definition of crime victims. Also, it might be of assistance to the Department of Justice's Office of Victims of Crime in formulating policy, making grants, and planning program initiatives.

2. Who can claim status as a “victim” of a federal offense under the CVRA, assert its rights, and seek to obtain its benefits?

Eligibility to claim victim status under the CVRA establishes not only trial participation rights, such as the right to be reasonably heard at sentencing, but other rights as well, such as the right to full and timely restitution.<sup>61</sup>

The CVRA broadly defines “crime victim”:

[T]he term crime victim means *a person directly and proximately harmed* as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representative of the crime victim’s estate, family members, or any other persons appointed as suitable by the court, may assume crime victim’s rights under this chapter, but in no event shall the defendant be named as such guardian or representative.<sup>62</sup>

In addition, the CVRA provides that a person accused of an offense is not a “victim” and may not assert any of its rights.<sup>63</sup>

This definition, requiring only that persons be “directly and proximately harmed,” conflicts with and is broader than the definition of “victim” in Rule 32(a)(2) of the Federal Rules of Criminal Procedure. Under Rule 32(a)(2), a victim is defined as “an individual against whom the defendant committed an offense for which the court will impose sentence.”<sup>64</sup> As a result of this conflict, the Judicial Conference of the United States recommended that the U.S. Supreme Court propose amendments to Rules 1 and 32 of the Federal Rules of Criminal Procedure to conform to the CVRA’s definition of “crime victim.”<sup>65</sup> On April 23, 2008, the U.S. Supreme Court submitted to Congress crime victims’ rights amendments to the Federal Rules of Criminal

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61. 18 U.S.C. §3771(a)(6) (2004). *See, e.g.*, *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008).

62. 18 U.S.C. § 3771(e) (emphasis added).

63. *Id.* § 3771(d)(1) (“A person accused of the crime may not obtain any form of relief under this chapter.”).

64. FED. R. CRIM. P. 32(a)(2).

65. *See* JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, MEETING OF JUNE 11-12, 2007 24-29, <http://www.uscourts.gov/rules/Minutes/ST06-2007-min.pdf> (approving the amendments of Rules 1, 12.1, 17, 18, 32, 60, and 61 for final approval by the Judicial Conference).

Procedure, effective December 1, 2008. The proposed Rule 1(b)(11) states: “‘victim’ means a ‘crime victim’ as defined in 18 U.S.C. § 3771(e).”<sup>66</sup>

Senator Jon Kyl, a sponsor of the CVRA, stated that the definition of “victim” was intentionally broad “because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged.”<sup>67</sup> Thus, the CVRA applies to situations in which no prosecution is underway.<sup>68</sup>

To illustrate the confusion this application may yield, suppose that a person is charged with five criminal separate but related offenses in a five-count indictment, each with different victims. A plea agreement to one count of the indictment is reached and accepted and the other four counts are dismissed. May persons who are allegedly harmed by the crimes in the four counts that were dismissed and remain unproven assert rights under the CVRA? Should persons who are “victims of related but uncharged, dismissed, or acquitted criminal conduct” be recognized as “victims” under the CVRA?<sup>69</sup>

Use of the phrase “a person directly and proximately harmed” is intended to have a broad application. Referring to this phrase, Kyl, Twist, and Higgins state: “These terms necessarily invoke the concept of ‘foreseeability,’ which has been liberally interpreted in other victims’ statutes. Simply put, crime foreseeability has far-reaching consequences.”<sup>70</sup>

Applying a “foreseeability” standard or another similar causation test will no doubt result in differences of interpretation and, not surprisingly, litigation. For example, in a recent case the defendant pled guilty to conspiracy to possess marijuana

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66. 66. Amendments to the Federal Rules of Criminal Procedure, April 23, 2008, available at <http://www.supremecourtus.gov/orders/courtorders/frcr08p.pdf>.

67. See 150 CONG. REC. S4260, 4270 (2004) (statement of Sen. Kyl) (“This is an intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged.”).

68. See 18 U.S.C. § 3771(d)(3) (“The rights described . . . shall be asserted in the district court in which a defendant is being prosecuted for the crime or if no prosecution is underway, in the district court in the district in which the crime occurred.”).

69. Jefri Wood, *The Crime Victims’ Rights Act of 2004 and the Federal Courts*, FEDERAL JUDICIAL CENTER, June 2, 2008, at 8, [http://www.fjc.gov/public/pdf.nsf/lookup/cvra0806.pdf/\\$file/cvra0806.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cvra0806.pdf/$file/cvra0806.pdf).

70. See Kyl et al., *supra* note 2, at 594.

with intent to distribute.<sup>71</sup> The former girlfriend of one of the defendant's customers claimed that her former boyfriend abused her at least in part because of his use of the marijuana sold by the defendant and was, therefore, a "victim" under the CVRA and should have the right to give a victim impact statement at the defendant's sentencing hearing. After an extensive discussion of the meaning of "directly and proximately" harmed, the District Court rejected her claim, holding that linking the defendant's criminal act to the alleged abuse was too attenuated, either temporally or factually, to demonstrate the required nexus between the defendant's act of selling drugs and her former boyfriend's subsequent act of abusing her.<sup>72</sup>

In relation to the above case, suppose the accused is on trial for possession of illegal narcotics with intent to sell or distribute. One of the alleged victims is a customer of the defendant whose addiction resulted from purchasing drugs from the defendant for more than two years. If the customer is given immunity against prosecution and agrees to testify against the alleged seller, is the customer a "victim"? In relation to the defendant's alleged customer, who else might qualify as a "a person directly and proximately harmed" and thus be entitled to victim status: (1) the customer's spouse? (2) minor or adult children? (3) parents? (4) other relatives? (5) another person in a serious relationship with the customer? (6) the customer's employer? What showing is required for each of these persons to intervene to request recognition as a "victim"?<sup>73</sup>

Moreover, do companies or other organizations have rights under the CVRA? The definition of crime victim refers only to "a *person* directly and proximately harmed . . . ." <sup>74</sup> "A related statute, 42 U.S.C. §10607(e), includes 'an institutional entity' in its definition of victim."<sup>75</sup> Also, the legal rights of a crime victim

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71. *United States v. Sharp*, 463 F. Supp. 2d 556, 558 (E.D. Va. 2006).

72. *Id.* at 561-67.

73. *Cf. United States v. Guevara-Toloso*, No. 04-1455, 2005 U.S. Dist. LEXIS 9762 (E.D.N.Y. May 23, 2005). The court held that proximate harm does not include victims of former state crimes involving the same defendant. However, the court also noted that the CVRA may be ambiguous regarding previous federal crimes, because it is not clear at what point a victim's right is extinguished post-conviction. *Id.* at \*2-6.

74. 18 U.S.C. § 3771(e) (emphasis added).

75. Wood, *supra* note 69, at 10.

may be asserted by the legal representatives and guardians of crime victims under age eighteen and of persons who are "incompetent, incapacitated, or deceased."<sup>76</sup>

The definition of "victim" in many state constitutions and statutes is more limited. For example, in Arizona, a crime victim is defined as "a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative . . . ." <sup>77</sup> If the person is in custody for an offense or is the accused, victim status is denied.<sup>78</sup>

By specifying the necessary relationship to a deceased victim, Arizona and other states provide a clearer, but narrower, definition than the "proximately harmed" language of the CVRA. The more restricted definitions of victims in most states' victims' rights provisions reduce the likelihood of large numbers of persons asserting rights as "victims," except in those situations where a large scale crime occurs, such as the Oklahoma City bombing or an Enron-type debacle.

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76. 18 U.S.C. § 3771(e).

77. ARIZ. CONST. art. II, § 2.1.

78. *Id.* Colorado and Florida also limit the definition of crime victim in their constitutions by permitting "immediate family" or "next of kin" to assert victims' rights if the primary victim is deceased. See COL. CONST. art. II, § 16(a) ("Any person who is a victim of a criminal act, or such person's designee, legal guardian, or surviving immediate family members if such person is deceased, shall have the right to be heard when relevant, informed, and present at all critical stages of the criminal justice process. All terminology, including the term 'critical stages', shall be defined by the General Assembly."); FLA. CONST. art. I, § 16(b) ("Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused."). Some state constitutions define victim based on definitions found in statutes. In Connecticut, in order for someone to assume the rights of a deceased victim, the deceased is required to formally designate that person beforehand. See CONN. GEN. STAT. § 54-126a (2004) ("For the purposes of this section, 'victim' means a person who is a victim of a crime, the legal representative of such person, a member of a deceased victim's immediate family or a person designated by a deceased victim in accordance with section 1-56r."); CONN. GEN. STAT. § 1-56r (2001) ("Any person eighteen years of age or older may execute a document that designates another person eighteen years of age or older to make certain decisions on behalf of the maker of such document and have certain rights and obligations with respect to the maker of such document.").

### 3. What happens when there are multiple crime victims?

The CVRA includes a provision addressing multiple crime victims, providing the courts with discretion to determine a reasonable method of affording crime victims their rights without unduly delaying the proceedings:

In a case where the court finds that the number of crime victims makes it impractical to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.<sup>79</sup>

Some recent cases addressing the “right to be heard” provision of the CVRA reveal judicial concern over the practical issues that may arise when numerous victims assert their rights. Judge Friedman’s concurrence in *Kenna v. United States* illustrates the point:

Although only Kenna filed a petition for mandamus, the “Conclusion” of the opinion gives not only Kenna but the “other victims” of the fraud the right to speak at Zvi’s sentencing. Suppose a case with five defendants and 20 victims. Does each victim have the right to speak at the sentencing of each defendant? Although the court notes that “Kenna concedes that the district court may place reasonable constraints on the duration and content of victims’ speech, such as avoiding undue delay, repetition or the use of profanity,” it is difficult to believe that the Act requires the court to listen to 100 victim statements.<sup>80</sup>

Other judges, however, have concluded that the possibility of multiple crime victims will not overburden the courts, and the legislative safeguards for such situations provide sufficient discretion for the court to fashion a reasonable alternative procedure.<sup>81</sup>

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79. 18 U.S.C. § 3771(d)(2).

80. *Kenna v. United States*, 435 F.3d 1011, 1019 (9th Cir. 2006) (Friedman, J., concurring).

81. See *United States v. Degenhardt*, 405 F. Supp. 2d 1341, 1350 (D. Utah 2006) (“[I]t might be argued that courts must have discretion on whether to hear from victims because some cases (particularly financial fraud cases) may involve hundreds or thousands of victims. If a court is required to hear from all these victims, the argument runs, then courts will be overwhelmed. This hypothesis, however, is not borne out by the actual experience in the many state courts that give victims a right to speak at sentencing. Many states give victims of financial crimes a right to be heard at sentencing. The reports from these states indicate

Although the Attorney General Guidelines apply only to executive branch officers, it is likely that judges would employ the guidelines' suggestions to provide large numbers of victims their rights. For instance, the guidelines suggest using the Automated Victim Notification System, official websites, print media, and toll free numbers to identify and notify large groups of victims.<sup>82</sup> Concerning participation, the guidelines suggest that victims use e-mail to communicate victim impact statements and video feeds to view the proceedings when attendance is impracticable.<sup>83</sup> The rights afforded victims under the statute, however, require repeated notification and accommodation by the court for victims to attend various pretrial, trial, and post-trial proceedings, especially if rescheduling is necessary to accommodate the needs of the judge, prosecutor, or defense attorney.<sup>84</sup> Thus, even utilizing the latest technology, delays in the criminal proceedings would likely result if large numbers of victims desired to exercise their participatory rights.<sup>85</sup>

#### 4. The Nature of Rights Afforded: Mandatory or Discretionary?

Mandatory rights have been described as "rights the state is without discretion to disregard."<sup>86</sup> Discretionary rights may range from those conferring broad and largely unbounded discretion to those with narrow discretion limited by ascertainable legal standards. Victims' rights statutes with broad, unfettered discretion or without meaningful remedies may confer largely illusory or advisory rights. A court's interpretation of victims'

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that proceedings there have not been significantly prolonged. . . . And finally, if there were ever a case with many victims that truly threatened to interfere with a court's ability to function, the CVRA itself solves the problem. In cases involving an overwhelming number of victims, the CVRA allows courts to fashion a reasonable alternative procedure.") (footnotes omitted).

82. See U.S. DEPT OF JUSTICE, *supra* note 43, at 13-14. See, e.g., *United States v. Croteau*, No. 05-CR-30104, 2006 U.S. Dist. LEXIS 23684, at \*3 (S.D. Ill. April 27, 2006) (unpublished) (granting the Government permission to publish details about a change of plea hearing on a public website in a multiple victim case, and finding that the court's obligation under the CVRA to ensure that victims are afforded their rights outweighed possible disclosure concerns).

83. See U.S. DEPT OF JUSTICE, *supra* note 43, at 63-64.

84. See 18 U.S.C. § 3771(a).

85. See *Kenna*, 435 F.3d at 1018-19.

86. *Beloof*, *The Third Wave*, *supra* note 8, at 278.

rights constitutional amendments and statutes may largely determine the ultimate nature of the rights provided. For example, the Kansas Supreme Court found that victims' rights were discretionary regardless of mandatory language, but encouraged judges to afford victims their rights when "the court deems it advisable and when it can be accomplished without undue burden on the judicial system."<sup>87</sup>

Five of the eight enumerated rights in the CVRA—numbers 1, 2, 4, 5, and 7—are qualified by use of the word "reasonable" or "reasonably." These five rights are to: (1) "be reasonably protected from the accused"; (2) "reasonable, accurate, and timely notice of any public court proceeding, or parole proceeding, involving the crime, or any release or escape of the accused"; (4) "be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding"; (5) "confer with the attorney for the Government in the case"; and (7) "proceedings free from unreasonable delay."<sup>88</sup> The three rights not so qualified—numbers 3, 6, and 8—are to: (3) "not be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding"; (6) "full and timely restitution as provided in law"; and (8) "be treated with fairness and with respect for the victim's dignity and privacy."<sup>89</sup>

Thus, police officers, prosecutors, and judges have some discretionary authority, but the discretion is limited by a vague but arguably ascertainable legal standard in applying five of the eight rights. An additional qualification specifically applies to the prosecutor and to police officers and victims' rights coordinators to the extent that they are under the prosecutor's direction: "Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any other officer under his direction."<sup>90</sup> Another qualification is that the CVRA only requires that federal law enforcement officials engaged in the detection, investigation, or prosecution of

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87. *State v. Holt*, 874 P.2d 1183, 1188 (Kan. 1994).

88. 18 U.S.C. § 3771(a).

89. *Id.*

90. 18 U.S.C. § 3771(d)(6).



crime shall make their “best efforts to see that crime victims are notified of, and accorded, the rights described . . . .”<sup>91</sup> The phrase, “best efforts,” is a vague standard echoing language in Section 502 of the Victims’ Rights and Restitution Act of 1990.<sup>92</sup> However, the CVRA imposes a duty upon the trial judge to ensure that the CVRA’s rights are meaningfully applied, stating: “In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described . . . .”<sup>93</sup>

#### IV. Victims’ Rights at Different Stages of the Criminal Process

The rights provided by the CVRA vary according to the nature of the right and the stage of the proceeding. The rights to reasonable notice and not to be excluded are expansive, applying to “any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.”<sup>94</sup> The right to be reasonably heard, however, only applies at public proceedings involving release, plea, sentencing, or parole and not at the actual trial. The other five rights afforded to victims under the Act make no mention of the different stages of criminal proceedings.<sup>95</sup> In determining what is “reasonable” in relation to five of the eight crime victims’ rights set forth in the CVRA, courts are likely to take into consideration the different stages of the criminal process in balancing the needs and interests of the prosecutors, defendants, and crime victims. Defend-

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91. *Id.* § 3771(c) (emphasis added).

92. *Cf.* 42 U.S.C. §10606(a) (1990). The statute provides language describing the only remedy available in the Victims’ Rights and Restitution Act of 1990: officials “shall make their best efforts to see that victims of crime are accorded the rights described” in the Act. *Id.* (emphasis added). This remedy has been superseded by the remedies provided by the CRVA. *See supra* notes 14-15.

93. 18 U.S.C. § 3771(b).

94. *Id.* § 3771(a).

95. *See* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims’ Rights Act*, 2005 BYU L. REV. 835, 855 (2005) [hereinafter Cassell, *Recognizing Victims*] (arguing that the legislative history of the CVRA indicates Congress intended it as a remedial statute, and therefore any general provision should be interpreted “generously so as to effectuate the important congressional goals.”); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861 (2007) [hereinafter Cassell, *Treating Crime Victims Fairly*].

ants' interest in pretrial and trial proceedings are greater than in post-trial proceedings. The presumption of innocence and the right to prepare a defense are protected by the due process clause prior to adjudication of guilt. At sentencing and post-trial proceedings, such as parole hearings, defendants have a diminished liberty interest.

A. *Pretrial Rights: Right to be Reasonably Protected from the Accused and to be Present and Reasonably Heard at Pretrial Release Hearings*

The crime victim's right to notice of, to be present at, and to be heard at the pretrial release hearing or the defendant's initial appearance<sup>96</sup> potentially juxtaposes a crime victim's rights against a jailed suspect's liberty interest in a prompt judicial determination of pretrial release. The first right of crime victims set forth in the CVRA is "[t]he right to be reasonably protected from the accused."<sup>97</sup> A crime victim may have relevant information to provide the judge, for example, facts unknown to the prosecutor that relate to the future dangerousness of the defendant.

There is a potential conflict between the defendant's statutory rights under Rule 5(a) and the victim's rights under the CVRA, section 3771(a)(2). Under Rule 5(a) of the Federal Rules of Criminal Procedure,<sup>98</sup> a person making an arrest within the United States must take the defendant without *unnecessary delay* before a judicial officer. Is it "necessary" within the meaning of Rule 5(a) to delay the defendant's initial appearance to ensure that crime victims receive reasonable, accurate, and timely notice of this proceeding? Also, section 3771(a)(2) of the CVRA only requires "reasonable" notice.<sup>99</sup> Is it reasonable for the judge to delay the initial appearance if the accused is in jail in order to allow time for all alleged victims to be notified?

There may be little time to notify alleged crime victims and inquire whether they wish to be present and heard. The judge's duty to insure that the crime victim's rights are protected may impose an obligation to ask the prosecutor if victims of the al-

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96. See 18 U.S.C. § 3771(a)(2)-(4).

97. *Id.* § 3771(a)(1).

98. FED. R. CRIM. P. 5(a).

99. See 18 U.S.C. § 3771(a)(2).

leged offenses have been properly informed of their right to be present and heard at a pretrial release hearing. In addition, initial appearances may be conducted by video conferencing, with the defendants' consent.<sup>100</sup> Procedures need to be developed to clarify how to provide accurate and timely notice of the initial appearance to crime victims, including who should notify them, which persons should be notified, whether these persons desire to be present and heard, and where they should go.<sup>101</sup>

In *United States v. Turner*, the judge discovered, at the defendant's bail hearing, that the victims in the case had not received adequate notice of either the initial hearing or the bail hearing. The judge, *sua sponte*, ordered the prosecutor to provide all alleged victims with a written summary of the proceedings to that point and notification of their rights under the CVRA to attend and be heard at future proceedings.<sup>102</sup> The judge determined, however, that under the Bail Reform Act, no conditions of release would reasonably assure the defendant's appearance and entered an order of detention pending trial, with defendant's consent, subject to reconsideration.<sup>103</sup> In a carefully crafted opinion Judge Orenstein observed that the defendant is entitled to a presumption of innocence and suggested that an accused should not be subjected to further incarceration without a substantive ruling on whether conditions of release exist that satisfy the requirements of the Bail Reform Act.<sup>104</sup>

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100. FED. R. CRIM. P. 5(f).

101. See *United States v. Turner*, 367 F. Supp. 2d 319, 323-38 (E.D.N.Y. 2005), for a thorough discussion by Judge Orenstein of the problems and some possible solutions to provide alleged crime victims with reasonable, accurate, and timely notice of their right to attend the initial appearance.

102. *Id.* at 324.

103. *Id.* at 321 (citing 18 U.S.C. § 3142 (e) (1984)).

104. In 1984 Congress enacted the Bail Reform Act, 18 U.S.C. §§ 3141-50. 18 U.S.C. § 3142(f) provides for preventive detention for persons charged with a crime of violence or other specified offenses. See *United States v. Salerno*, 481 U.S. 739, 750 (1987) ("The Bail Reform Act . . . narrowly focuses on a particularly acute problem in which the Government interests are overwhelming. The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses. Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest. . . . In a full blown adversary hearing, the Government must convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. While the Government's general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee, already indicted

Other courts have interpreted the right to be present inconsistently. In *United States v. Marcello*, the court held that the victim's right to be heard at a pretrial release hearing could be accommodated through written statements, and the victim was not entitled to appear in person before the court.<sup>105</sup> On the other hand, in *United States v. Degenhardt*, the court held that a crime victim's right to "be reasonably heard" at sentencing gives the victim the right to speak directly to the judge at sentencing.<sup>106</sup>

B. *Rights during Trial Proceedings: Right not to be Excluded, Emotional Displays, and Victims' Seating*

1. Right not to be excluded from the courtroom

Suppose there is a case involving several eyewitness victims, and the defendant is concerned that the testimony of some victim-witnesses will be influenced by their presence in the courtroom during the testimony of other victim-witnesses. Should each of these witnesses have the right to be present in the courtroom during the testimony of the other witnesses?<sup>107</sup> More generally, what should the legal standard be when the victim is scheduled to testify and his or her testimony would be susceptible to alteration if he or she observed the proceedings?

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or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at its greatest. . . . On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right. But . . . this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society.").

105. *United States v. Marcello*, 370 F. Supp. 2d 745, 746-50 (N.D. Ill. 2005). Cf. *United States v. Blumhagen*, No. 03-CR-56S, 2006 U.S. Dist. LEXIS 15380, at \*4-5 (W.D.N.Y. 2006) (ordering government to provide notice allowing a reasonable time for victims to attend a hearing for dismissal of the indictment).

106. *United States v. Degenhardt*, 405 F. Supp. 2d 1341, 1345 (D. Utah 2005). See also *Kenna v. United States Dist. Court (In re Kenna)*, 435 F.3d 1011, 1016 (9th Cir. 2006) ("The statements of the sponsors of the CVRA and the committee report for the proposed constitutional amendment disclose a clear congressional intent to give crime victims the right to speak at proceedings covered by the CVRA. Our interpretation advances the purposes of the CVRA. The statute was enacted to make crime victims full participants in the criminal justice system. Prosecutors and defendants already have the right to speak at sentencing . . .").

107. See Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1699 (1997).

The CVRA states that a crime victim has “the right not to be excluded from any . . . public court proceedings, unless the court, after receiving *clear and convincing evidence*, determines that testimony by the victim would be *materially altered* if the victim heard other testimony at that proceeding.”<sup>108</sup>

The above provision effectively amends Rule 615 of the Federal Rules of Evidence to allow victims to attend trial proceedings prior to their testimony when they are serving as witnesses, unless the stringent standard of proof set forth above is met by the defendant.<sup>109</sup> In the Ninth Circuit, the trial judge must find by clear and convincing evidence that it is *highly likely*, and not merely possible, that the victim’s testimony would be materially altered if allowed to observe the proceedings prior to testifying.<sup>110</sup> The provision also applies to the right to attend other public court proceedings, such as pretrial release hearings and preliminary hearings to determine probable cause.

Recent amendments to the Federal Rules of Criminal Procedure to implement the CVRA, effective December 1, 2008, include a new Rule 60(a)2, “Attending the Proceeding,” which states:

The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim’s testimony would be materially altered if the victim heard other testimony at that proceeding. In determining whether to exclude a victim, the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.<sup>111</sup>

The presence of a victim during a criminal trial prior to the victim testifying has not been held to be a violation of the Fifth

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108. 18 U.S.C. § 3771(a)(3) (2004) (emphasis added).

109. *See In re Mikhel*, 453 F.3d 1137, 1139-40 (9th Cir. 2006) (ordering trial court to make specific findings of whether there was “clear and convincing evidence” of material alteration of the victim’s prospective testimony to support exclusion of victim from trial).

110. *Id.*

111. Amendments to the Federal Rules of Criminal Procedure, April 23, 2008, available at <http://www.supremecourtus.gov/orders/courtorders/frcr08p.pdf>.

Amendment right to due process.<sup>112</sup> However, as the Utah Court of Appeals noted in *State v. Beltran-Felix*,<sup>113</sup> victim attendance may violate the Fifth Amendment, as applied, in cases where the defendant manages to successfully prove both that the victim's attendance allowed the victim to conform his or her testimony, and that the tainted testimony affected the outcome of the trial.<sup>114</sup>

Traditionally, courts considered it presumptively prejudicial to the defendant if a witness were permitted to remain in the courtroom prior to testifying after a formal removal request. State victims' rights constitutional amendments, legislation, and witness sequestration rules have altered that presumption.<sup>115</sup>

The CVRA requires a showing of "clear and convincing evidence" that the victim's testimony will be materially altered and places this burden on the defendant.<sup>116</sup> The Act imposes a higher burden of proof than most state constitutions and statutes require in order to exclude a victim-witness from the courtroom.<sup>117</sup> In Delaware, Nevada, and Wyoming, the victim is permitted to attend trial unless "good cause" can be shown to exclude the victim.<sup>118</sup> The Nevada statute exempts victims from

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112. See Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 527-34 (2005) (discussing the broad rejection of any constitutional right to victim exclusion). See also *State v. Beltran-Felix*, 922 P.2d 30, 33-34 (Utah Ct. App. 1996) (quoting various federal and state cases in which it was determined that permitting a witness to remain in the courtroom was not a facial violation of a defendant's Fifth Amendment Rights). Thus, victims' rights legislation that permits victim attendance during all public proceedings appears to be inferentially constitutional. See *id.* at 33.

113. 922 P.2d 30 (Utah Ct. App. 1996).

114. *Id.* at 33-35.

115. See *State v. Fulimante*, 975 P.2d 75, 92 (Ariz. 1999); see also Beloof & Cassell, *supra* note 112, at 524-27.

116. See BLACK'S LAW DICTIONARY 256 (8th ed. 2004) (defining clear and convincing evidence as "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.").

117. See *United States v. Johnson*, 362 F. Supp. 2d 1043, 1055-56 (N.D. Iowa 2005).

118. See DEL. CODE ANN. tit. 11 § 9407 (1993) ("A victim or an individual designated by the victim may be present whenever a defendant has a right to be present during a court proceeding concerning the crime charged other than a grand jury proceeding, unless good cause can be shown by the defendant to exclude the

exclusion based on "good cause" only if victims have completed both direct and cross-examination testimony.<sup>119</sup> Other states such as Arkansas, North Carolina, Virginia, and Wisconsin qualify the victim's right to attend public proceedings based on possible interference with the operation of a fair trial.<sup>120</sup> The California statute provides several situations—the defendant's right to a fair trial among them—in which it is appropriate to exclude the victim from the proceedings.<sup>121</sup>

The CVRA's focus is to preserve and strengthen the victim's right to attend trials, as opposed to emphasizing the policies underlying a defendant's right to a fair trial.<sup>122</sup> Some prosecutors prefer, when the order of witnesses permits, to have the victim

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victim."); NEV. REV. STAT. § 171.204 (1997) ("[T]he magistrate may, if good cause is shown and upon the request of any party or on his own motion, exclude from the examination every person except: . . . [t]he victim, after he has testified as a prosecuting witness and his cross-examination has been completed."); WYO. STAT. ANN. § 1-40-206 (1991) ("Unless the court for good cause shown shall find to the contrary, the victim, the victim's designee or both shall have the right to be present at all trial proceedings which may be attended by the defendant.").

119. NEV. REV. STAT. § 171.204.

120. See ARK. CODE. ANN. § 16-90-1103 (1997) ("The victim or a representative of the victim may be present whenever the defendant has a right to be present during a court proceeding concerning the crime charged, other than a grand jury proceeding, unless the court determines that exclusion of the victim or the victim's representative is necessary to protect the defendant's right to a fair trial or the confidentiality or fairness of a juvenile proceeding."); N.C. GEN. STAT. § 15A-832 (1998) ("When the victim is to be called as a witness in a court proceeding, the court shall make every effort to permit the fullest attendance possible by the victim in the proceedings. This subsection shall not be construed to interfere with the defendant's right to a fair trial."); VA. CODE. ANN. § 19.2-265.01 (1995) ("[A]ny victim . . . may remain in the courtroom and shall not be excluded unless the court determines, in its discretion, the presence of the victim would impair the conduct of a fair trial."); WIS. STAT. § 906.15 (1997) ("[U]nless the judge or circuit court commissioner finds that exclusion of the victim is necessary to provide a fair trial for the defendant or a fair fact-finding hearing for the juvenile.").

121. See CAL. PENAL CODE § 1102.6 (1995) ("A victim may be excluded from a criminal proceeding only if each of the following criteria are met: [a]ny movant, including the defendant, who seeks to exclude the victim from any criminal proceeding demonstrates that there is a substantial probability that overriding interests will be prejudiced by the presence of the victim. 'Overriding interests' may include, but are not limited to, the following: . . . [t]he defendant's right to a fair trial . . .").

122. See, e.g., *United States v. Grace*, 408 F. Supp. 2d 998, 1020, 1021 (D. Mont. 2006) (denying defendant's motions for a change of venue based on prejudicial pretrial publicity, noting that the CVRA required courts to make "every effort" to afford victims' full attendance, and this requirement was integrated into the consideration of the interest of the community as a whole in a local trial).

testify first or early in the trial to minimize the possibility of altered testimony. This also prevents defense counsel from impeaching the victim on cross-examination by attempting to show that the victim's testimony may have been influenced by observing other witnesses. Another remedy might be to require formal pretrial statements or depositions designed to freeze victim testimony before the trial begins.

## 2. Emotional displays in the courtroom

The CVRA does not provide guidance when a victim's behavior in the courtroom involves overt displays of emotion, unless such emotional displays are somehow connected to the material alteration of the victim's testimony.<sup>123</sup> It may be argued, however, that courts have the inherent power to exclude disruptive victims.<sup>124</sup> Because courts have exercised their power to exclude disruptive defendants, although defendants have a constitutional right under the Confrontation and Due Process Clauses to be present during court proceedings, they may have the same power to exclude disruptive victims.

How emotionally disruptive would a victim's conduct have to be before a court would hold that the victim's conduct interfered enough to deny a defendant a fair trial? Suppose in a murder trial members of the victim's family sat in the front row of the spectators' gallery throughout the trial wearing large buttons with a picture of the deceased victim. Is this conduct so inherently prejudicial that it deprives a defendant of a fair trial? In *Musladin v. Lamarque*,<sup>125</sup> the Ninth Circuit reversed the defendant's conviction on the above facts, concluding that the spectators' courtroom conduct was inherently prejudicial to the defendant. Yet, the next year in *Carey v. Musladin*,<sup>126</sup> the

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123. See Mosteller, *supra* note 107, at 1699-1700. See, e.g., *Lanham v. Commonwealth*, 171 S.W.3d 14, 32 (Ky. 2005) (upholding trial court decision refusing to move victims attending the trial out of the sight of the jury when they began to cry during a photo presentation).

124. See 150 CONG. REC. S4260, 4264 (Statement of Sen. Kyl) ("Obviously, everyone in the courtroom has to behave. The judge can throw anybody out if they do not behave or if they express emotions or try to communicate w/ the jury. That is not the issue.").

125. 427 F.3d 653, 656-58 (2005).

126. 549 U.S. 70 (2006).



Supreme Court reversed the Ninth Circuit's decision.<sup>127</sup> In a concurring opinion, Justice Kennedy stated that there was insufficient showing that the defendant's conviction was obtained in a trial tainted by an atmosphere of coercion or intimidation.<sup>128</sup>

### 3. Where should victims sit in the courtroom?

Where the victim sits in the courtroom requires a consideration of whether crime victims should be treated more like witnesses or parties. Should a crime victim sit in the spectator gallery unless called to testify, at the prosecutor's table, or should a third table be added in the courtroom along with prosecution and defense tables? If crime victims were treated more like parties, would that be more likely to influence the jury prejudicially in violation of the defendant's right to a fair trial? The CVRA is silent concerning the preferred or appropriate location for the victim to sit during those proceedings in which the victim is permitted to attend. Of the eight rights provided in the CVRA, the victim's right to be reasonably heard and to confer with the government's attorney is central to the question of where the victim should sit in the courtroom. As discussed earlier, the victim's right to be heard in the district court is limited to proceedings involving release, plea, sentencing, or parole.<sup>129</sup> The answers to these questions probably will vary depending on the proceeding.

While the majority of states do not permit the victim to sit at counsel table, a few states have determined that it is permissible. An Alabama statute provides victims the right to sit at counsel table with the prosecutor.<sup>130</sup> In an Alabama case, a vic-

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127. Justice Thomas, writing for the Court, held that the Ninth Circuit improperly concluded that the California Court of Appeals unreasonably applied clearly established Federal Law. *Id.* (citing 28 U.S.C. 2254(d)(1) (1948)).

128. *Id.* See also *Ducote v. State*, 873 A.2d 1099 (Del. 2005) (victim hugging victim support counselor after her testimony in view of the jury was inappropriate, but cured by the judge's cautionary instruction); *State v. Boone*, 820 P.2d 930 (Utah Ct. App. 1991) (victim's wife making exclamations such as "that's not true!" in the courtroom did not interfere enough to deny defendant a fair trial).

129. See 18 U.S.C. § 3771(a)(4) (2004).

130. See ALA. CODE § 15-14-53 (1983) ("The victim of a criminal offense shall be entitled to be present in any court exercising any jurisdiction over such offense and therein to be seated at counsel table of any prosecutor prosecuting such offense . . . .").

tim was permitted to sit at counsel table where she began to cry during testimony describing the autopsy of her murdered husband.<sup>131</sup> The court found that the victim's crying did not constitute behavior that would violate the defendant's constitutional right to a fair trial.<sup>132</sup> In a California case, the California Court of Appeals permitted a victim to sit at counsel table, but qualified its decision in order to retain a clear dividing line between witness and party status and to prevent prejudicial trial practices.<sup>133</sup> On the other hand, Louisiana expressly prohibits victims from sitting at counsel table.<sup>134</sup>

Other practical issues might arise when there are multiple victims. How should the court determine which victims deserve a seat in the well of the court? With multiple victims, there is also a risk of creating dissention among victims who might feel excluded or neglected if one victim or group of victims is given special treatment.

### C. *Plea Agreements, Guilty Pleas, and Sentencing Proceedings*

Plea agreements have been a source of victim dissatisfaction, complaint, and litigation. Victims' rights advocates believe that plea agreements reached between prosecutors and defendants are sometimes inappropriate and that an injustice occurs when cases are resolved without the victims' knowledge or participation. Defense attorneys complain that plea agreements are violated when victims recommend a sentence greater than the one the prosecutor has agreed to recommend to the court,

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131. *Crowe v. State*, 485 So. 2d 351, 362-63 (Ala. Crim. App. 1984).

132. *Id.* at 363.

133. *State v. Ramer*, 21 Cal. Rptr. 2d 480, 484 (Ct. App. 1993) ("[W]e do not wish this opinion to be viewed as approving of the practice of permitting a victim to sit with a prosecutor at the counsel table. At a criminal trial at which the victim testifies, the victim is a witness and not a party to the case. . . . The court should not, in our view, allow a seating arrangement which treats a witness, even a key witness, as if the witness were a party to the case. . . . We do recognize, that the presence of the victim at the counsel table does increase the possibility of both emotional and jury focus on factors which may not be consistent with the jury trial process involved in assessing criminal guilt.").

134. See LA. CODE EVID. ANN. art. 615 (2000) ("The court shall also enter such other order as may appear reasonably necessary to preserve decorum and insure a fair trial, provided that the victim shall not be allowed to sit at the counsel table.").

sometimes with the prosecutor's full knowledge and encouragement.

Under the CVRA, victims have the right to reasonably confer with the prosecutor concerning plea agreements.<sup>135</sup> A limitation of this right is the CVRA's provision that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction."<sup>136</sup> In *In re W.R. Huff Asset Management Co.*, a group of crime victims petitioned for a writ of mandamus, seeking to vacate a settlement agreement in a forfeiture action.<sup>137</sup> One of the victims' arguments was that the government did not adequately consult with them before entering into the settlement agreement as required by the CVRA, section 3771(a)(5).<sup>138</sup> In rejecting this claim, the Second Circuit stated: "Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement."<sup>139</sup>

The CVRA also provides that victims have a right to be heard at any public proceeding involving pleas and sentencing. The CVRA does not address the question of *when* the victim must be heard. However, Kyl, Twist, and Higgins argue that, to be effective, the right to be heard must allow the victim to address the judge before the judge exercises discretion to accept or reject a plea.<sup>140</sup>

When there are multiple defendants sentenced at the same trial, does the crime victim have a right to be heard at the sentencing of each defendant? *Kenna v. U.S. Dist. Court (In re Kenna)* arose out of a dispute over the right of a victim to be heard when the judge had already heard from that victim regarding a different defendant.<sup>141</sup> The defendants, a father and

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135. See 18 U.S.C. § 3771(a)(5) (2004). The source of this right is in the Victims' Rights and Restitution Act of 1990. One of its "Bill of Rights" is "to confer with the attorney for the Government in the case." 42 U.S.C. § 10606(b)(5).

136. 18 U.S.C. § 3771(d)(6).

137. 409 F.3d 555, 560-61 (2d Cir. 2005).

138. *Id.* at 561.

139. *Id.* at 564.

140. See Kyl et al., *supra* note 2, at 603.

141. 435 F.3d 1011, 1013. (9th Cir. 2006). In *Kenna v. United States Dist. Court (In re Kenna)*, 453 F.3d 1136, 1136-37 (9th Cir. 2006), the Ninth Circuit rejected this argument and denied mandamus relief to the victim who claimed that

son, defrauded numerous victims in an investment scheme and several victims spoke at the father's sentencing.<sup>142</sup> When the son was sentenced three months later, the court denied the victims the opportunity to speak, ruling that the victims had been heard at the previous sentencing, and there was nothing the victims could say that would impact the court's sentence.<sup>143</sup> The Ninth Circuit granted the petition for mandamus filed by one of the victims.<sup>144</sup> Determining that the statute "is ambiguous as to what it means for crime victims to be heard," the Ninth Circuit, after reviewing the legislative history and finding a congressional intent to give crime victims the right to speak at proceedings covered by the CVRA, held that the right to be heard at any public proceeding involving sentencing "means that the district court must hear from the victims, if they choose to speak, at more than one criminal sentencing."<sup>145</sup> The Ninth Circuit left it to the district court to decide whether it should conduct a new sentencing hearing.<sup>146</sup>

Under what circumstances is the crime victims' right to be heard at plea and sentencing hearings satisfied by submission of written statements rather than being heard in person?<sup>147</sup> Cassell argues that the term "reasonably" should be narrowly interpreted to allow for alternative methods of communicating a victim's views to the court when the victim is unable to attend the proceedings.<sup>148</sup> Other situations, however, may justify the receipt of written statements. For example, in cases involving a very large number of crime victims, courts have leeway to fashion reasonable procedures in a way that does not unduly complicate or prolong the proceedings.<sup>149</sup>

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the prosecution's unwillingness to disclose the defendant's presentence report violated his rights under the CVRA.

142. *In re Kenna*, 435 F.3d at 1012-13.

143. *Id.* at 1012-13.

144. *Id.* at 1018.

145. *Id.* at 1015, 1016.

146. *See id.* at 1017-18.

147. *Cf. United States v. Marcello*, 370 F. Supp. 2d 745, 746-50 (N.D. Ill. 2005) (holding that the victim's right to be heard at a pretrial release hearing could be accommodated through written statements, and the victim was not entitled to appear in person before the court).

148. *See Cassell, Recognizing Victims*, *supra* note 95, at 890.

149. *See* 18 U.S.C. §3771(d)(2) (2004).

In *United States v. Degenhardt*, the court concluded that while the phrase “to be reasonably heard” is ambiguous, the legislative history “makes it clear that the CVRA created a right to be heard in person.”<sup>150</sup> The court also stated that the victim’s right to speak is mandatory and not subject to the discretion of the court, unless such a large number of victims are involved that the effective functioning of the court would be impaired.<sup>151</sup>

A controversial issue is whether crime victims are entitled to have access to the presentence report, including statements in the report made by the defendant. Crime victims’ rights advocates argue that because the CVRA provides for the right of crime victims to make sentencing impact statements, there is a need for victims to view the defendants’ pre-sentencing report statements in order to be adequately prepared. The crime victim may be the only person with first-hand knowledge of the circumstances of the crime who may be able to refute the defendant’s allegations. Also, victim rights’ advocates may argue that the overarching right to be treated with “fairness” and with respect for the victim’s “dignity” justify victim access to the presentence report.<sup>152</sup>

Defense advocates may argue that defendants have a right under the Sixth Amendment’s Confrontation Clause,<sup>153</sup> and as a matter of fundamental fairness under the Due Process Clause, to view and challenge crime victims’ written or oral sentencing statements. If defendants have a Confrontation Clause right, this may also include the right of cross-examination.<sup>154</sup> In response, similar to a defendant’s right to allocute at sentencing, crime victims’ advocates may argue that crime victims are not functioning as “witnesses” testifying against defendants, and therefore defendants have no confrontation rights in this context. If a crime victim is provided access to a defendant’s presentence report statements, defense counsel could argue that a defendant is entitled to similar access to the crime victim’s statements, absent compelling privacy interests.

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150. 405 F. Supp. 2d 1341, 1346 (D. Utah 2005).

151. *Id.* at 1343-45.

152. *See* 18 U.S.C. § 3771(a)(8).

153. *See Crawford v. Washington*, 541 U.S. 36 (2004).

154. *See Wood, supra* note 69, at 8.

In *In re Kenna*, the Ninth Circuit found that the victim in a fraud case did not demonstrate that his reasons for requesting the presentence report outweighed the confidentiality that should be given to the report.<sup>155</sup> The victim filed a petition for writ of mandamus under the CVRA seeking an order requiring the district court to release to the victim the entire presentence report.<sup>156</sup> The Ninth Circuit held that there is no support “in either the language of the statute or the legislative history” for the proposition that the CVRA conferred a general right for crime victims to have access to presentence reports.<sup>157</sup>

The CVRA provides that crime victims have “(t)he right to full and timely restitution as provided in law.”<sup>158</sup> This provision interacts with existing restitution statutes. Does the CVRA provide an additional right that restitution be “full” and “timely”? In *United States v. Sacane*, the victims, a group of investment funds, moved for an order requiring more detailed financial disclosures from the defendant in advance of a restitution hearing.<sup>159</sup> They claimed that they needed to inspect the presentence report in order to enforce their CVRA right to full and timely restitution.<sup>160</sup> The district court denied the request, holding that the CVRA does not provide a right to disclosure of the presentence report.<sup>161</sup> The Court stated that if the victims believed that additional financial disclosure was necessary, they may pursue their CVRA right to enlist the assistance of the government.<sup>162</sup>

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155. 453 F.3d 1136, 1137 (9th Cir. 2006) (per curiam).

156. *Id.*

157. *Id.* See also *In re Brock*, No. 08-1086, 2008 U.S. App. LEXIS 2104 (4th Cir. Jan 31, 2008) (per curiam); *United States v. Citgo Petroleum Corp.*, No. C-06-563, 2007 U.S. Dist. LEXIS 57686 (S.D. Tex. Aug. 8, 2007); *United States v. Sacane*, No. 3:05-cr-325, 2007 U.S. Dist LEXIS 22178 (D. Conn. March 28, 2007).

158. 18 U.S.C. § 3771(a)(6) (2004).

159. 2007 U.S. Dist LEXIS 22178, at \*2.

160. *Id.* at \*2-3.

161. *Id.* at \*4, 8.

162. *Id.* at \*6. 18 U.S.C. §3771(c)(1) states: “Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).”

D. *Right to be Present and Heard at Parole Hearings*

The CVRA specifically provides crime victims the right to reasonable, accurate, and timely notice of any parole proceeding.<sup>163</sup> Additionally, they have the right to attend and be reasonably heard at any parole proceeding.<sup>164</sup> In a recent federal case applying Michigan's version of the CVRA, the district court denied the defendant's due process claim that the parole board's reliance on victim statements violated the defendant's constitutional rights.<sup>165</sup> Because Michigan's provision protects victim privacy, the victim's statements were kept confidential, and the defendant had no knowledge of what was asserted and consequently had no opportunity to rebut the claims in front of the parole board.<sup>166</sup> The court reasoned that because the defendant had no liberty interest in parole, the defendant's rights had not been violated.<sup>167</sup> If this case had been decided under the CVRA, the result likely would have been the same, since the basis of the decision was the defendant's diminished rights after conviction.

E. *Overarching Rights: Right to be Treated with Fairness and Respect for Dignity and Privacy*

The CVRA provides crime victims with "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy."<sup>168</sup> This right is not easily classified into discrete stages of the criminal proceeding, and to a greater extent than the other enumerated rights in the CVRA, the applicability of this general right will likely be defined by courts as they interpret the statute in specific situations. However, this right has already influenced the Rules Committee responsible for proposing amendments to the United States Supreme Court.

In a recent set of proposed amendments to the Federal Rules, crime victims' right to fairness, dignity, and privacy was, in part, a basis for recommendations that victims' personal in-

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163. 18 U.S.C. § 3771(a)(2).

164. *Id.* § 3771(a)(4).

165. *Palmer v. Granholm*, No. 1:06-cv-301, 2006 U.S. Dist. LEXIS 45333, at \*29 (W.D. Mich. July 5, 2006).

166. *Id.* at \*4.

167. *Id.* at \*10-13.

168. 18 U.S.C. § 3771(a)(8).

formation not be disclosed in the case of an alibi defense, victims be notified and given an opportunity to quash subpoenas issued on third parties seeking information about crime victims, and the convenience of victims be considered in determining the place of the trial.<sup>169</sup> In proposing these changes, the Committee stated that it “sought to incorporate, but not go beyond, the rights created by the statute.”<sup>170</sup> These changes were adopted by the Supreme Court and submitted to Congress on April 23, 2008, effective December 1, 2008.<sup>171</sup>

Proponents of these broad rights for victims equate them with due process rights and seek to import the due process framework of fundamental fairness.<sup>172</sup> Senator Kyl, one of the primary legislative sponsors of the CVRA, stated: “The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process.”<sup>173</sup>

It remains unclear if courts will accept this characterization. While defendants’ due process rights are predicated on potential deprivation of life, liberty, or property, victims have none of these at stake in the criminal process.<sup>174</sup> There is no

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169. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CRIMINAL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE 349-75 (2006); Cassell, *Treating Crime Victims Fairly*, *supra* note 95; Federal Rulemaking: Rules Published for Comment, 1998, <http://www.uscourts.gov/rules/newrules1.html>. Other provisions of the CVRA are also applicable. For example, the crime victim’s right to attend public proceedings may be substantially impacted by the court’s determination of the place of the trial. See 18 U.S.C. § 3771 (a)(3).

170. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 169, at 350.

171. See Amendments to the Federal Rules of Criminal Procedure, April 23, 2008, available at <http://www.supremecourtus.gov/orders/courtorders/frcr08p.pdf>.

172. See Cassell, *Recognizing Victims*, *supra* note 95, at 858-59.

173. *Id.* at 859 (quoting 150 Cong. Rec. S4269 (statement of Sen. Kyl)).

174. There is some debate about whether the victim’s right to restitution represents a property interest and, therefore, should afford the victim due process in determining restitution. For example, in *United States v. Lay*, 456 F. Supp. 2d 869 (S.D. Tex. 2006), when Ken Lay’s estate moved to have his conviction vacated *ab initio* following his death, a victim moved the court to deny the motion, because his statutory right to restitution constituted a property interest, and vacating the conviction would result in a loss of that property. *Id.* at 871-72. The court denied the motion and vacated the conviction, noting that abatement is the equivalent of never having been convicted. *Id.* at 873.



obvious limit to the circumstances that could trigger a victim's right to be treated with fairness and dignity and, likewise, little limit on the interpretations different courts may embrace.

In *United States v. Heaton*, the prosecutor charged the defendant with attempting to entice a minor into unlawful sexual activity. The prosecutor then sought leave to dismiss the charge without prejudice.<sup>175</sup> The district judge stated that it would make its own determination whether dismissal is warranted, that the victim's right to be treated with fairness and dignity extends to the court's decision of whether to dismiss an indictment, and that, unlike other rights in the CVRA, this right is not limited to "public proceedings."<sup>176</sup> The judge then ordered the government to consult with the victim and inform the court "that the victim has been consulted on the dismissal and what the victim's views were on the matter."<sup>177</sup>

## V. Enforcement of Victims' Rights

### A. CVRA's Enforcement Remedies: Standing, Fast-Track Appeal, Mandatory Appellate Review, Authorized Stay of Proceedings, and Written Record, if Relief Denied

A principal goal of the victims' rights movement, reflected in the drafting of the CVRA, is to develop an effective judicial enforcement regime so that victims' rights can be meaningfully exercised. The enactment of the CVRA's remedies granting crime victims standing along with an expedited right of appeal and the resulting nascent development of appellate case law are the CVRA's most important contributions to the advancement of crime victims' rights.

What has been most lacking in state constitutional amendments and federal and state legislation are meaningful enforcement mechanisms.<sup>178</sup> Without adequate remedies, victims cannot exercise their rights when prosecutors or trial judges

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175. *United States v. Heaton*, 458 F. Supp. 2d 1271, 1271 (D. Utah 2006). See also *United States v. Patkar*, No. 06-00250, 2008 U.S. Dist. LEXIS 6055 (D. Haw. Jan. 28, 2008); *United States v. Kaufman*, No. 04-40141-01, 2005 U.S. Dist. LEXIS 21006 (D. Kan. Oct. 17, 2005).

176. *Heaton*, 458 F. Supp. 2d at 1272.

177. *Id.* at 1272-73.

178. See sources cited *supra* note 8.

deny them. In the legislative history of the CVRA, Senators Feinstein and Kyl make clear that providing victims with an enforcement mechanism to initiate review of alleged violations of victims' rights is an essential component of the legislation.<sup>179</sup>

According to Professor Beloof, there are three main obstacles to turning victims' illusory rights into real rights: "(1) government discretion to deny rights, (2) lack of a meaningful remedy to enforce rights, and (3) appellate court discretion to deny review."<sup>180</sup> Only eight states provide standing to crime victims to seek legal redress for a violation of their rights.<sup>181</sup>

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179. See 150 Cong. Rec. S4270 (Apr. 22, 2004) (statement of Sen. Feinstein) ("This provision is critical for a couple of reasons. First, it gives the victim standing to appear before the appellate courts of this country and ask for review of a possible error below. Second, while mandamus is generally discretionary, this provision means that courts must review these cases. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures review and encourages courts to broadly defend the victims' rights."). See also *id.* (statement of Sen. Kyl) ("For a victim's right to truly be honored, a victim must be able to assert the rights in trial courts, to then be able to have denials of those rights reviewed at the appellate level, and to have the appellate court take the appeal and order relief. By providing for all of this, this bill ensures that victims' rights will have meaning.").

180. See Beloof, *The Third Wave*, *supra* note 8, at 258. See also discussion *supra* part III.B.4.

181. Eight states provide crime victims with standing to appeal: Arizona, Indiana, Maryland, Michigan, Nevada, South Carolina, Texas, and Utah. Maryland specifically gives victims standing by statute to file an application for leave to appeal interlocutory or final orders when their legal rights are violated at trial, but prohibits the ability to stay a criminal proceeding. Maryland Rule 8-111(c), effective January 1, 2008, provides: "Although not a party to a criminal or juvenile proceeding, a victim of a crime or a delinquent act or a victim's representative may: (1) file an application for leave to appeal to the Court of Special Appeals from an interlocutory or a final order under Code, Criminal Procedure Article, § 11-103 and Rule 8-204; or (2) participate in the same manner as a party regarding the rights of the victim or victim's representative." In *Maryland v. Hoile*, 948 A.2d 30 (2008), the Court of Appeals held that an assault victim, who successfully filed and argued a motion to vacate reconsideration of defendant's sentence based on an asserted denial of her statutory rights to be notified, attend, and be heard at sentence reconsideration hearings, was entitled to participate in briefing and oral argument before the Court of Appeals. The court reasoned, however, that since the application for appeal does not stay other proceedings in a criminal case, unless all parties consent, there is no effective tangible remedy for a victim to seek to "un-do" what already has been done in a criminal case, including the right to seek invalidation of an otherwise legal sentence. *Id.* at 52. Indiana and Utah also prohibit the ability of a victim to stay a criminal proceeding. See IND. CODE ANN. § 35-40-2-1 (West 2004); UTAH CODE ANN. § 77-38-11 (West 1994). South Carolina's Constitution and Utah law provide the closest enforcement provisions to the CVRA. In South Carolina, the state constitution allows victims to seek review through a writ of

Review by traditional writ of mandamus is discretionary with federal and state appellate courts<sup>182</sup> and is an unlikely avenue for routine review of violations of crime victims' rights.

The CVRA establishes a new statutory review mechanism—although the CVRA uses the traditional label of a writ of mandamus—that includes: (1) standing for crime victims to appeal a violation of their rights immediately after the violation occurs to federal appellate courts; (2) a mandatory review by an appellate court; (3) a fast track time schedule, requiring that the appellate court *take up and decide* the case within seventy-two hours after a petition has been filed; (4) a stay or continu-

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mandamus. See S.C. CONST. art. I, § 24 (“The rights created in this section may be subject to a writ of mandamus, to be issued by any justice of the Supreme Court or circuit court judge to require compliance by any public employee, public agency, the State, or any agency responsible for the enforcement of the rights and provisions of these services contained in this section, and a willful failure to comply with a writ of mandamus is punishable as contempt.”). Utah also allows victims to bring actions for declaratory relief or for mandamus. See UTAH CODE ANN. § 77-38-11 (“Adverse rulings on these actions or on a motion or request brought by a victim of a crime or a representative of a victim of a crime may be appealed under the rules governing appellate actions, provided that no appeal shall constitute grounds for delaying any criminal or juvenile proceeding.”). Utah also allows victims to file amicus briefs in cases affecting their interests. *Id.* The Texas Constitution provides that a “victim . . . has standing to enforce the rights enumerated in this section but does not have standing to participate as a party in a criminal proceeding or to contest the disposition of any charge.” TEX. CONST. art. I, § 30. The remedy described in the Arizona statute resembles mandamus by allowing victims to bring a special action to mandate enforcement of their enumerated rights. See ARIZ. REV. STAT. ANN. § 13-4437 (1992) (“The victim has standing to seek an order to bring a special action mandating that the victim be afforded any right or to challenge an order denying any right guaranteed to victims under the victims’ bill of rights . . .”). Similarly, the Nevada Constitution permits a victim to initiate an action to compel public officials to comply with victims’ rights. See NEV. CONST. art. 1, § 8(4) (“A person may maintain an action to compel a public officer or employee to carry out any duty required by the legislature pursuant to subsection 2.”). Subsection 2 outlines the rights afforded to crime victims in Nevada. See NEV. CONST. art. 1, § 8(2). A Michigan statute limits victim appeals to cases involving parole board decisions granting parole to prisoners. See MICH. COMP. LAWS § 791.234(11) (1982) (“The action of the parole board in granting a parole is appealable by the prosecutor of the county from which the prisoner was committed or the victim of the crime for which the prisoner was convicted. The appeal shall be to the circuit court in the county from which the prisoner was committed, by leave of court.”).

182. A writ of mandamus is typically discretionary and usually reserved for extraordinary situations when a “superior court must compel a lower court or government officer to perform mandatory or purely ministerial duties correctly.” BLACK’S LAW DICTIONARY 712 (8th ed. 2004); see also FED. R. APP. P. 21.

ance of the proceedings below for up to five days while the appeal is being heard; and (5) a written opinion clearly stating the reasons for denial, if the court of appeals denies the relief sought.<sup>183</sup>

The CVRA states:

Motion for Relief and Writ of Mandamus. The rights described . . . shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court *shall* take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule of the Federal Rules of Appellate Procedure. The court of appeals *shall take up and decide such application within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.*<sup>184</sup>

Thus, the CVRA authorizes crime victims to independently assert their rights granted by the CVRA and to be represented by an attorney.<sup>185</sup> The Government may also independently assert these rights on behalf of the crime victims.<sup>186</sup> In addition, the federal district judges are directed to ensure that crime victims are afforded these rights "[i]n any court proceeding involving an offense against a crime victim."<sup>187</sup>

There are some instances when staying proceedings for up to five days may infringe upon the defendant's constitutional or statutory rights. For example, suppose a crime victim believes that his or her rights were violated by a trial judge's denial of

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183. 18 U.S.C. § 3771(d)(3) (2004).

184. *Id.* (emphasis added). The "Writ of Mandamus" under the CVRA differs markedly from the discretionary common law Writ of Mandamus.

185. *See* 18 U.S.C. § 3771(d)(1) ("Rights: The crime victim or the crime victim's lawful representative and the attorney for the Government may assert the rights described in subsection (a).").

186. *See id.*

187. *Id.* § 3771(b).

the right to be reasonably heard at a pretrial release hearing.<sup>188</sup> The victim files an appeal to the appellate court, which grants a stay of a few days. If the defendant can show that this stay affected his or her liberty interests or ability to prepare a defense, there may be a basis for a due process claim. Also, a delay may violate the defendant's right, under Rule 5(a) of the Federal Rules of Criminal Procedure, to be taken before a judicial officer without unnecessary delay and may also affect the computation of the defendant's rights under the Speedy Trial Act.<sup>189</sup>

### B. *Limitations of CVRA's Enforcement Remedies*

The CVRA prohibits the award of damages. The CVRA states:

No Cause of Action. Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages.<sup>190</sup>

However, during the floor debate on the CVRA, Senator Leahy expressed a preference for a damages remedy over the use of a mandamus mechanism, fearing that victims' assertions of a denial of fairness or respect in the criminal process could "be difficult claims to adjudicate."<sup>191</sup>

Another limitation of the CVRA enforcement mechanism is the statutory language limiting remedies that may affect the independent role of the public prosecutor: "Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction."<sup>192</sup>

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188. See discussion of *United States v. Turner*, 367 F. Supp. 2d 319 (E.D.N.Y. 2005) *supra* notes 101-03 and accompanying text.

189. The Speedy Trial Act, 18 U.S.C. §§ 3161-3174 sets time limits for completing the various stages of a federal criminal prosecution.

190. 18 U.S.C. § 3771(d)(6).

191. 150 CONG. REC. S4260, 4271 (2004) (statement of Senator Leahy) ("I note with some regret that S. 2329 [CVRA] picks up language from S.J. Res. 1 [proposed constitutional amendment] denying victims any cause of action for damages in the event that their rights are violated. Allowing victims to vindicate their rights through separate proceedings for damages instead of through mandamus actions in the criminal case could well be a more efficient as well as a more effective way of ensuring that victims' rights are honored.").

192. 18 U.S.C. § 3771(d)(6).

In addition, there are limitations on voiding or vacating certain hearings or procedures and redoing or reopening them.<sup>193</sup> The CVRA states:

Limitation on Relief. In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied; (B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and (C) in the case of a plea, the accused has not pled to the highest offense charged.<sup>194</sup>

The CVRA's limitation that crime victims and prosecutors may not seek a new trial as a remedy for a violation of victims' rights is buttressed by federal—and state—constitutional protections for defendants under the Double Jeopardy Clause.<sup>195</sup> The Double Jeopardy Clause insures that the Federal government and the states may not undertake multiple prosecutions against a defendant for the same offense. Double jeopardy attaches at trial when the jury is selected and sworn or when the first witness is sworn in a non-jury trial. Thus, the Double Jeopardy Clause prevents the voiding of trials and re-prosecution.

There are limited exceptions when the Double Jeopardy Clause does *not* bar a retrial or a reconsideration of the verdict, such as when the defendant seeks and obtains a mistrial or when the defendant appeals and the court orders a retrial. The only way for the state to get a retrial after a mistrial is "manifest necessity."<sup>196</sup> Beloof observes that "the denial of a trial attendance right does not necessarily result in prejudice to victims or the state in the crucial sense that the absence of a

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193. The right to reopen or redo a particular proceeding has been referred to as "the superior remedy." Beloof, *The Third Wave*, *supra* note 8, at 304.

194. 18 U.S.C. § 3771(d)(5).

195. The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution states: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. In *Benton v. Maryland*, 395 U.S. 784, 794 (1969), the Supreme Court held that the Double Jeopardy Clause applies to the states as a result of its incorporation into the due process clause of the Fourteenth Amendment.

196. *Illinois v. Somerville*, 410 U.S. 458, 462-463 (1973) (manifest necessity requires prejudice either to the defendant or the state).

victim is likely to alter the result of the trial.”<sup>197</sup> He concludes that “presently it is unlikely that manifest necessity can be the basis for voiding a trial when a victim’s right to attend is violated.”<sup>198</sup> While a retrial is unlikely, a victim does have the right to pursue an expedited interlocutory appeal—included in the CVRA’s definition of a “writ of mandamus”—until the trial is over.<sup>199</sup>

Double jeopardy does *not* bar voiding and reconsidering certain pretrial and post-trial proceedings as a remedy for a violation of victims’ rights. For example, the Double Jeopardy Clause does not bar reconsideration of the victims’ rights to notice and to be heard at pretrial release hearings, or of a release order as a remedy for failure to notify a crime victim of the scheduling of a parole or release hearing.

What are the consequences when a motion to reconsider a plea or sentence is granted? The procedure is unclear. Does the defendant have a right to withdraw the plea and seek to renegotiate a plea agreement? Does the prosecutor have a right to renegotiate a plea agreement? Voiding an entire proceeding may result in rejecting all evidence presented in that proceeding and starting anew. An alternative is to vacate the result without voiding the original proceeding. At the reconsideration hearing, a crime victim can exercise his or her right to be heard and the judge will then void, modify, or affirm the prior ruling or order.<sup>200</sup> After the victim(s) is given the opportunity to be heard, the defendant and government arguably should be allowed to respond.

### C. *Conflict among the Federal Circuits of the Standard for Review to Issue a Writ of Mandamus*

Although a crime victim has standing to immediately appeal an alleged violation of the crime victim’s CVRA rights

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197. Beloof, *The Third Wave*, *supra* note 8, at 308.

198. *Id.* at 309. However, Beloof suggests it is possible that a victim’s presence might actually change the outcome of the trial when a victim hears something that she knows to be false in the trial and is able to reveal the truth. If the parties are unaware of the falsehood, a victim may be the only one capable of revealing it. *Id.*

199. See *Kenna v. United States (In re Kenna)*, 435 F.3d 1011, 1015-16 (9th Cir. 2006).

200. See Beloof, *The Third Wave*, *supra* note 8, at 305.

along with the mandatory right to have the appeal heard on an expedited basis by a federal appellate court, a conflict exists among the appellate courts as to whether the applicable legal standard for granting a requested writ of mandamus should be discretionary or mandatory when the trial court's order reflects an abuse of discretion or legal error. Congress may have created the uncertainty by naming the appellate remedy a "writ of mandamus," the name of a common law, discretionary judicial remedy.<sup>201</sup>

In a Fifth Circuit case, *In re Dean*,<sup>202</sup> an explosion at a refinery operated by the defendant, BP Products North America Inc., killed fifteen and injured more than 170 persons.<sup>203</sup> The Department of Justice filed a sealed *ex parte* motion, prior to bringing any criminal charges, seeking an order from the district court excusing the government from the requirement of notifying crime victims until after a plea agreement had been signed.<sup>204</sup> The government argued that: (1) notification to victims in advance of the public announcement of a plea was impractical because of the large number of victims, and (2) media coverage of a potential criminal disposition could impair the plea negotiation process and might prejudice the case if no plea were reached.<sup>205</sup> The district court, on the same day, signed an *ex parte* order granting the government's motion.<sup>206</sup> After the defendant signed the plea agreement and pled guilty, all vic-

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201. See *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008) (discussing the appellate standard of review under the CVRA). The court stated:

Congress could have drafted the CVRA to provide for "immediate appellate review" or "interlocutory appellate review," something it has done many times. Instead, it authorized and made use of the term "mandamus." "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopted the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meanings its use will convey to the judicial mind unless other instructed."

*Id.* at 1124 (citations omitted) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

202. 527 F.3d 391 (5th Cir. 2008) (per curiam).

203. *United States v. BP Prods. N. Am. Inc.*, No. H-07-434, 2008 U.S. Dist. LEXIS 12893, at \*3 (S.D. Tex. Feb. 21, 2008).

204. *In re Dean*, 527 F.3d at 392.

205. *Id.*

206. *Id.* at 395.



tims who wished to be heard, either personally or through counsel, were permitted to speak at a plea hearing.<sup>207</sup>

Twelve of the victims asked the district court to reject the plea agreement, alleging, *inter alia*, that the *ex parte* proceedings violated the CVRA and that they were denied the “reasonable right to confer with the attorney for the Government in the case.”<sup>208</sup> While the district court acknowledged that CVRA rights may apply before any prosecution is underway, it denied the request.<sup>209</sup> The victims then petitioned the Fifth Circuit for a writ of mandamus, seeking a reversal and a remand with “instructions that the plea agreement not be accepted and the parties are permitted to proceed as they determine — so long as it is in a way that respects crime victims’ rights.”<sup>210</sup> Within seventy-two hours, a Fifth Circuit panel granted the mandamus petition in part, directing the district court to “take no further action to effect the plea agreement, pending further order and awaiting additional briefing.”<sup>211</sup>

On appeal, the parties disputed the standard of review. The victims argued that ordinary appeal standards apply rather than the stricter standards for obtaining a writ of mandamus.<sup>212</sup> The Fifth Circuit recognized that decisions of the Second and Ninth Circuits supported the victims’ position.<sup>213</sup> In *Kenna*, Judge Kozinski observed: “The CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute. . . . [W]e must issue the writ whenever we find that the district court’s order reflects an abuse of discretion or legal error.”<sup>214</sup> The Third Circuit, in an unpublished decision, also agreed with the Second and Ninth Circuits.<sup>215</sup>

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207. *Id.* at 393.

208. *Id.* at 392. See Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act, *supra* note 4.

209. *In re Dean*, 527 F.3d at 393.

210. *Id.* at 392.

211. *Id.* at 393.

212. *Id.* at 393-94.

213. *Id.* at 394 (citing *Kenna v. United States Dist. Court (In re Kenna)*, 435 F.3d 1011, 1017 (9th Cir. 2006); *In re W.R. Huff Asset Mgmt.*, 409 F.3d 555, 563 (2d Cir. 2005)).

214. *In re Kenna*, 435 F.3d at 1017.

215. See *In re Walsh*, No. 06-4792, 2007 U.S. App. LEXIS 9071 (3rd Cir. Apr. 19, 2007).

The Fifth Circuit, however, disagreed with this standard, holding that a writ of mandamus may issue only if: “(1) the petitioner has ‘no other adequate means’ to attain the desired relief; (2) the petitioner has demonstrated a right to the issuance of the writ that is ‘clear and indisputable;’ and (3) the issuing court, in the exercise of its discretion, is satisfied that the writ is ‘appropriate under the circumstances.’”<sup>216</sup> The court found support from the Tenth Circuit, which recently held that the discretionary standard for mandamus applied: “[M]andamus is a well worn term of art in our common law tradition.”<sup>217</sup>

Applying this three-prong standard, the Fifth Circuit held that the third-prong—a writ of mandamus must be “appropriate under the circumstances”—was not met, despite finding that the district court, with the best of intentions, misapplied the law.<sup>218</sup> The district court’s use of *ex parte* proceedings had no precedent and was contrary to the provisions of the CVRA.<sup>219</sup> Yet, the court found that, despite the trial judge’s error, the victims were notified, although much too late in the process, and were allowed “substantial and meaningful participation” at the plea hearing.<sup>220</sup> The court concluded:

We are confident, however, that the conscientious district court will fully consider the victims’ objections and concerns in deciding whether the plea agreement should be accepted. The decision whether to grant mandamus is largely prudential. We conclude that the better course is to deny relief, confident that the district court will take heed that the victims have not been accorded their full rights under the CVRA and will carefully consider their objections and briefs as this matter proceeds.<sup>221</sup>

Subsequently, the U.S. Supreme Court denied an application for stay of enforcement of the judgment of the Fifth Circuit.<sup>222</sup>

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216. *In re Dean*, 527 F.3d at 394 (quoting *In re United States*, 397 F.3d 274, 282 (5th Cir. 2005)).

217. *Id.* at 394 (quoting *In re Antrobus*, 519 F.3d 1123, 1127 (10th Cir. 2008)).

218. *Id.* at 394-95.

219. *Id.* Since the third-prong of the mandamus standard was not met, the court stated that it was unnecessary to decide whether the first two prongs of the mandamus standard were met. *Id.* at 394.

220. *Id.* at 395.

221. *Id.*

222. *Dean v. U.S. Dist. Court*, 128 S. Ct. 2996 (2008).

Accordingly, the Second, Third, and Ninth Circuits have adopted a pro-victim standard of review to determine when a writ of mandamus should be issued. Their view is that the CVRA contemplates routine review of trial court decisions denying victims' rights when a court's order reflects an abuse of discretion or legal error. The Fifth and Tenth Circuits, however, have viewed the writ of mandamus in the common law tradition that allows appellate courts broad discretion whether to issue a writ of mandamus when crime victims' rights have been violated. This conflict among the circuit courts on such an important issue merits consideration either by the U.S. Supreme Court or Congress.

## VI. Conflict Between the CVRA and the Equal Administration of Justice

An unavoidable conflict exists between the interests of crime victims and the equal administration of justice. The principle of the equal administration of justice requires that persons committing similar crimes with similar criminal histories and backgrounds generally should be treated in a like manner.

Professors Strang and Sherman view the conflict from the crime victim's perspective:

From a victim's perspective, traditional criminal justice fails precisely because it must treat all similar offenses in similar ways, regardless of the differential impact of the offense on different victims. Attempts to create consistency for offenders may produce gross inconsistencies for victims, with costs of crime distributed unequally in ways that are far more emotional and powerful than is generally assumed.<sup>223</sup>

From the defendant's perspective, providing crime victims a significant participatory role in criminal proceedings echoes back to injustices of the colonial period when alleged crime victims played a dominant role in criminal prosecutions through a system of private prosecution. Howley and Dorris state:

During colonial times, crime victims were integral to the criminal process. The victim could pay the sheriff to pursue and arrest the defendant, and then the victim hired the prosecutor. There was no

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223. Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15 (2003).

need to provide separate rights for victims, because they were so closely involved in the pursuit of justice. In contrast, our founding fathers had great interest in the rights of criminal defendants, who had been powerless under the English system of jurisprudence. *Such a system of private prosecution was flawed, however, confining 'justice' largely to those who could afford it.* The criminal justice system therefore evolved into a system of public prosecution. The prosecutor represents the state.<sup>224</sup>

In response, crime victim advocates argue that crime victims are the ones who suffer direct harm both from the crime itself and secondary harm inflicted by the criminal trial process.<sup>225</sup> They seek to re-balance the criminal justice system so that crime victims may exercise limited trial participation rights and not be merely marginalized as witnesses. The CVRA gives crime victims "a voice, not a veto."<sup>226</sup>

#### A. *Conflict Between Victims' Rights and the Equal Treatment of Similarly Situated Defendants*

Professor Beloof, former Director of the National Crime Victim Law Institute, acknowledges that the ascendancy of the victims' rights movement leads to unequal treatment of similarly situated defendants:

Unequal treatment of defendants is perhaps the most compelling reason for denying victims the right to participate, because equal treatment of defendants stands against victim participation at virtually every stage of the criminal process. As a practical matter, however, equality of treatment of defendants has largely failed as an obstacle to laws of victim participation. *Ascendant is the victim's choice to participate in the criminal process, descendant is equal treatment among similarly situated defendants.*<sup>227</sup>

Beloof explains that unequal treatment of defendants occurs because victims are permitted to choose whether or not to informally or formally influence decision makers concerning charging or disposition, including the choice to assist either the

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224. Susan Howley & Carol Dorris, *Legal Rights for Crime Victims in the Criminal Justice System*, in VICTIMS OF CRIME 299 (Robert C. Davis, Arthur J. Lurigio, & Susan A. Herman, eds., 3d ed. 2007).

225. See *supra* note 3 and accompanying text.

226. Kyl et al., *supra* note 2, at 622.

227. Beloof, *The Third Wave*, *supra* note 8, at 298 (emphasis added).

prosecutor or the defense attorney, both, or neither: "One defendant may face a victim who seeks mercy, while another defendant may face a victim who seeks a severe sanction. A third defendant may find that the victim is not participating in the criminal process except as a witness."<sup>228</sup>

B. *Unequal Treatment of Victims: Privileged and Disadvantaged Victims*

The CVRA and other state victims' rights constitutional amendments and statutes may be contributing to the further separation of victims into two broad classes depending upon their interest and ability to take advantage of victim rights, namely, privileged and disadvantaged victims.

To the extent that sophisticated victims exercise their rights and victims lacking the skills or financial means fail to assert their rights, there is a risk that prosecutors will begin to anticipate which class of victims is most likely to exercise their rights. As a result, defendants may potentially face varying charges, pleas, or sentences based on the victims' characteristics and likelihood of involvement. From the defendants' perspective, criminal prosecution may become something akin to a lottery. Based on the victim's race, gender, social status or level of education, defendants may face outcomes of varying severity.

Decisions involving prosecutorial discretion, such as charging, plea bargaining, and sentencing recommendations, are susceptible to political and public influence as well. In many instances crime victims justifiably receive a tremendous outpouring of sympathy from the public. Public sympathy for victims, however, can sometimes depend on the gender, race, and economic status of the victim.<sup>229</sup> This combination of public attention, based on the emotional appeal and selective involvement of the victim, has the potential to disproportionately interfere with the prosecutors' task of trying to produce a just outcome.<sup>230</sup>

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228. *Id.*

229. See David Hancock, *A Tale Of Two Kidnappings*, CBS NEWS, June 20, 2002, <http://www.cbsnews.com/stories/2002/06/20/national/main512915.shtml>.

230. See Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825 (1995) (reviewing GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* (1995)).

## VII. Potential Conflict Between the CVRA and the Independence of Public Prosecutor

The United States Supreme Court defined the role of the public prosecutor in 1935 in *Berger v. United States*, as follows:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>231</sup>

Professor Bennett Gershman contends that implementing the prosecutor's duty to "do justice"<sup>232</sup> requires that "a prosecutor, in making official decisions and judgments, behave not as a partisan for any particular constituency, but, rather, in a manner that is neutral to each constituency."<sup>233</sup> He argues that the prosecutor does not represent a private client, including the crime victim; rather, a prosecutor's "clients" are "the people who live in the prosecutor's jurisdiction, including police, witnesses, crime victims, and even the accused."<sup>234</sup>

Gershman's concern is that a prosecutor's relationship with a crime victim may violate a prosecutor's duty of neutrality and create an actual or apparent conflict of interest. As an example, he states, "[T]o the extent that a prosecutor allows the victim to play a substantial and influential role in critical discretionary

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231. 295 U.S. 78, 88 (1935).

232. The "do justice" standard, the accepted standard for defining the prosecutor's role, has been adopted by every state. See e.g., MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1983); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13(3) (1980); ABA Standards for Criminal Justice, Standard 3-1.2(c) (1993); Nat'l Prosecution Standards, Standard 1.1 (1991). These standards do not specifically address a prosecutor's ethical responsibilities to crime victims.

233. Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 562 (2005).

234. *Id.* at 563.

decisions—charging, plea bargaining, and sentencing—the prosecutor may violate the duty of neutrality.”<sup>235</sup>

Gershman acknowledges that the prosecutor’s obligation to behave neutrally does not mean that a prosecutor should be indifferent to the harm committed against a crime victim. He states:

Indeed, a prosecutor should feel personally outraged at such conduct, and if morally convinced of the defendant’s guilt, is allowed, and indeed, obligated, to advocate that view zealously by any lawful and ethical means. A prosecutor does not serve justice, however, when she undertakes her official functions for personal or political reasons, has an “ax to grind” against the defendant, or has a special motivation to favor the victim or satisfy a victim’s private agenda if that agenda is inconsistent with the prosecutor’s public duty to serve all the people neutrally, i.e., equally and fairly.<sup>236</sup>

Walker A. Matthews argues that balancing the interests of the victim against those of society creates an ethical conflict of interest that cannot be reconciled.<sup>237</sup> Victims are understandably most interested in their case and the fate of the defendant that caused them harm. The prosecutor, however, must balance a variety of interests, including liberty and due process, public order and safety, and governmental economy and efficiency.<sup>238</sup>

Matthews illustrates this conflict with an example in which the defendant causes harm to a victim while committing several armed robberies.<sup>239</sup> Of available punishments, the victim will likely seek something toward the maximum permitted under the particular statute. The prosecutor, however, must consider alternative punishments based on notions of equal administration of justice, public safety, and governmental efficiency. Hence, the prosecutor may choose lesser punishments than those envisioned by the victim because other persons guilty of

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235. *Id.* at 564.

236. *Id.* at 562-563. See also *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980); *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984).

237. See Walker A. Matthews, III, Note, *Proposed Victims’ Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL ETHICS 735 (1998).

238. *Id.* at 745.

239. *Id.* at 746.

the same crime and with similar records were not punished as harshly. In addition, the prosecutor may have an opportunity to negotiate a plea bargain whereby a lenient sentence is offered in exchange for information concerning other crimes and the capture of accomplices, thus improving public safety and promoting governmental efficiency.<sup>240</sup> Such decisions might be interpreted as anti-victim, but are essential to properly executing the duties of a prosecutor. Matthews believes that while prosecutors may be aware of possible victim influence on their decisions, natural tendencies to sympathize with victims would undoubtedly affect their judgment.<sup>241</sup>

The CVRA—and state constitutions and statutes with similar provisions—at a minimum, sends mixed messages to a conscientious prosecutor. First, the CVRA provides crime victims with a “reasonable right to confer with the attorney for the Government in the case,” which presumably applies at all stages of the prosecution of the accused.<sup>242</sup> Crime victims desiring to exercise their CVRA trial rights are likely to attempt to influence prosecutor decision-making when prosecutors have critically important discretionary choices to make, such as those concerning pre-trial release, charging, pleas, and sentencing. Interested victims may threaten or actually use their CVRA rights to be “reasonably heard at any public proceeding in the district court involving release, plea, sentencing . . . .”<sup>243</sup> Privileged victims may use their resources to hire a private attorney,<sup>244</sup> who may influence a prosecutor’s exercise of discretion, use or threaten to use the media, and employ private investigative resources.<sup>245</sup>

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240. *Id.*

241. *See id.* at 744 (arguing that implementation of victims’ rights may require the prosecutor to become the de facto representative of the victim and might affect the prosecutor’s ability to make impartial decisions because of an unconscious priority placed on victim interests).

242. 18 U.S.C. § 3771(a)(5) (2004).

243. *Id.* § 3771(a)(4).

244. *See* 18 U.S.C. § 3771(d)(1) (providing that a victim’s lawful representative may assert the crime victim’s rights); 18 U.S.C. § 3771(c)(2) (“The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection(a).”).

245. *See, e.g.,* *State v. von Bulow*, 475 A.2d 95 (R.I. 1984) (victim’s family hired a private attorney and undertook their own investigation).



Second, the CVRA encourages prosecutors to become spokespersons and representatives of crime victims. It provides that the attorney for the Government may assert any of the crime victims' rights along with the crime victim.<sup>246</sup> The CVRA imposes on the officers and employees of the Department of Justice a duty to "make their best efforts to see that crime victims are notified of, and accorded all of their rights."<sup>247</sup>

Third, the CVRA encourages, but does not require, prosecutors to become agents of crime victims in the event of an appeal of a violation of a crime victim's rights: "In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates."<sup>248</sup>

Fourth, the CVRA requires that the Attorney General "promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims."<sup>249</sup> The Attorney General is required to designate an administrative authority within the Department of Justice to "receive and investigate complaints relating to the provision of violation of the rights of a crime victim."<sup>250</sup> In addition, the Attorney General must "require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims . . . ." <sup>251</sup> The Attorney General's regulations shall "contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims."<sup>252</sup>

Fifth, the CVRA authorizes five categories of funds for the Department of Justice and, as to one category, also to States and tribal governments, to implement various provisions of the CVRA.<sup>253</sup>

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246. 18 U.S.C. § 3771(d)(1).

247. *Id.* § 3771(c)(1).

248. *Id.* § 3771(d)(4).

249. *Id.* § 3771(f)(1).

250. *Id.* § 3771(f)(2)(A).

251. *Id.* § 3771(f)(2)(B).

252. *Id.* § 3771(f)(2)(C).

253. 18 U.S.C. § 1404(D)(b)(1)-(5).

These detailed provisions, taken together, appear to reflect a Congressional purpose to forge a closer relationship between prosecutors and crime victims. On the other hand, the CVRA includes two provisions designed to protect prosecutors from the undue influence of crime victims. First, the CVRA may not be construed "to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligations to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages."<sup>254</sup> Second, "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction."<sup>255</sup>

Did Congress, intentionally or not, create or encourage an environment in which prosecutorial independence is likely to be compromised? Will the CVRA have the likely effect of pressuring prosecutors to behave as partisans for a particular constituency, crime victims? Does the CVRA provide prosecutors with "a special motivation to favor the victim or satisfy a victim's private agenda if that agenda is inconsistent with the prosecutor's public duty to serve all the people neutrally, i.e., equally and fairly?"<sup>256</sup> In sum, does the CVRA create additional sources of pressure that may affect the prosecutor's ability to "do justice," especially in situations when the law enforcement interests of the prosecutor and the victims' interests do not coincide?

The increased role of the victim in the criminal justice system during the last twenty-five years and the recent enactment of the CVRA, with its path breaking judicial enforcement remedies and an administrative framework that encourages prosecutorial compliance, suggest a need for organizations, such as the American Bar Association, the Department of Justice, and the National District Attorneys Association, to review their standards and guidelines that address a prosecutor's ethical responsibilities to crime victims in relation to their responsibilities as law enforcement officers and to other criminal justice participants.<sup>257</sup>

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254. 18 U.S.C. § 3771(d)(6).

255. *Id.*

256. *Id.*

257. *Id.* See *supra* note 232 (identifying some of the sources of criminal justice standards and guidelines). The American Bar Association is in the process of up-

Specific standards and guidelines should support the federal and state prosecutors' historically independent role so eloquently articulated by the Supreme Court in *Berger v. United States*.<sup>258</sup> For example, Arizona provides that in the event of a conflict of interest between a prosecutor and crime victim, the prosecutor has the responsibility to direct the victim to the "appropriate legal referral, legal assistance, or legal aid agency."<sup>259</sup>

At the state and local level, an even greater need exists for the development of more specific standards and guidelines. While federal prosecutors are appointed by the U.S. Attorney General, state prosecutors are typically elected and must stand for re-election when their terms end, which often are for relatively short periods of time. State prosecutors, usually representing smaller population groups, are subject to more pressure at the local level than Federal prosecutors. A tendency to side with victim interests might become commonplace as more victims, whose interests are associated with maintaining the goodwill of the community, become active participants in the criminal justice system.

From the crime victims' perspective, the above discussion does not undercut the need or rationale for granting crime victims independent, meaningful participatory rights in the criminal justice system. Ironically, the independent role of the public prosecutor affirms the need for meaningful victims' rights. It is because of the tradition of prosecutorial independence that prosecutors cannot be counted on to protect victims' rights. There is no guaranty or assurance that a prosecutor's interest will not conflict with a crime victim's interest. For example, a prosecutor and a defense attorney may agree upon a plea bargain that the crime victim opposes. In this situation, both the government's and defendant's interests are adverse to the vic-

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dating its Standards for Criminal Justice, Prosecution Function. Also, the National District Attorneys Association is in the process of updating its National Prosecution Standards.

258. See *supra* note 232 and accompanying text.

259. ARIZ. R. CRIM. P. 39(c)(3) (2008) ("In any event of any conflict of interest between the state or any other prosecutorial entity and the wishes of the victim, the prosecutor shall have the responsibility to direct the victim to the appropriate legal referral, legal assistance, or legal aid agency.").

tim's interest in exercising the right to speak in court in opposition of the plea agreement.<sup>260</sup>

Victim advocate Beloof agrees that "prosecutorial control of victims' rights provides fertile ground for ethical conflicts of interest."<sup>261</sup> Beloof observes:

It is a mistake to define the state and victims as nonadversaries simply because both are harmed by the criminal act and share an interest in punishment. Adversariness exists when prosecutors violate victims' rights. Moreover, the public prosecutor is obligated to the public interest. When the public interest and victims' rights coincide, perhaps no conflict exists. However, when there is a conflict, the prosecution cannot reasonably be expected to defend victims' rights.<sup>262</sup>

The provisions of the CVRA discussed above increase the potential for ethical conflicts of interest and add to the pressure on prosecutors to shift their role from that of law enforcement officer toward victim advocate. Prosecutors have a responsibility to develop rules, standards, and guidelines, supported by appropriate training and supervision, to ensure integrity in the exercise of prosecutorial discretion. The courts need to exercise the utmost diligence to ensure that defendants' rights are fully protected when, as frequently occurs, prosecutor and victim interests are closely aligned.

### VIII. Conclusion

The Crime Victims' Rights Act (CVRA) of 2004 is a seminal contribution to advancing crime victims' rights through the creation of a new judicial enforcement regime. In addition to providing crime victims with a number of trial participation rights, the CVRA provides an overarching right to be "treated with fairness and with respect for the victim's dignity and privacy"<sup>263</sup> that has been equated by some victim advocates as creating a general "due process" right. As crime victims receive better treatment and greater respect, their cooperation with police, prosecutors, and judges is likely to increase.

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260. See Douglas E. Beloof, *The Third Wave*, *supra* note 8, at 337.

261. *Id.*

262. *Id.*

263. 18 U.S.C. § 3771(a) (2004).

A significant benefit of the CVRA's judicial enforcement regime is the development of a new body of case law, interpreting and applying victims' rights and setting standards to guide the conduct of trial judges, prosecutors, defense attorneys, and other criminal justice officials. Some of these new cases decided by the trial and appellate courts reflect the challenge of interpreting and applying the CVRA's general, sometimes ambiguous language, with little legislative history for guidance.

The CVRA's benefits are not without criminal justice system costs. Crime victims' rights, as applied, may conflict with a defendant's statutory, due process and other constitutional rights. A conflict also exists between crime victims' rights and the equal administration of justice requiring that persons committing similar crimes with similar criminal histories and backgrounds generally should be treated in a like manner. Crime victims can choose, for example, whether to seek revenge, mercy, or forego exercising their rights. Further, as the CVRA seeks to forge a closer relationship between prosecutors and crime victims, there is a risk that the traditional role of the independent, public prosecutor may shift from that of law enforcement officer toward victim advocate.

Congressional sponsors intended that the CVRA's rights and remedies serve as a model for the states. If equivalent provisions to the CVRA are eventually enacted and implemented by the states, as intended, a revolution in criminal procedure will have been achieved. Crime victims would be accommodated, not as equals, but as participants with rights and the ability to enforce those rights.

The proponents of a victims' rights constitutional amendment are monitoring the implementation of the CVRA by prosecutors, judges and others. If the CVRA does not effect the change proponents are seeking, crime victims' rights advocates have promised to renew their drive for an amendment to the U.S. Constitution.