ON THE WINGS OF THEIR ANGELS: *THE SCOTT CAMPBELL, STEPHANIE ROPER, WENDY PRESTON, LOUARNA GILLIS, AND NILA LYNN CRIME VICTIMS' RIGHTS ACT*

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The Crime Victims' Rights Act of 2004 guarantees crime victims both participatory and substantive rights that are enforceable in federal court, including rights to notice of proceedings, the right to be present, notice of release or escape, restitution, speedy trial, safety, and the right to be heard. Empowering crime victims with rights mitigates many of the injustices that crime victims face while the government prosecutes the cases against offenders. This Article sets forth the historical background and legislative history of the new law and explains its provisions and terms.

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I. INTRODUCTION[1]

Scott Campbell, 27, the only son of Gary and Collene Campbell, was last seen on April 16, 1982. He had planned to fly in a private plane to Fargo, North Dakota with a man named Larry Cowell. Unbeknownst to Scott, Cowell and another man, Donald Dimascio, planned to murder Scott. Dimascio was hiding in the back of the plane. He broke Scott's neck and then the killers threw Scott's body into the ocean, somewhere between the mainland of Southern California and Catalina Island. His body was never found. During the trials, Scott's family was barred from entering the courtroom, while the defendants' families were ushered to reserved seats. Gary and Collene were never notified of proceedings in the case in the District Court of Appeals, or of the pre-trial release of one of the killers. They were never allowed to speak at critical stages of the proceedings, including the sentencing for both murderers.

Stephanie Roper, 22, was the daughter of Roberta and Vince Roper of Maryland. She was kidnapped by two men after her car broke down on April 3, 1982. Over the next five hours, they repeatedly raped and tortured her. They then took her to a deserted shack in another county and repeated these crimes. Stephanie made several attempts to escape. When the killers recaptured her for the last time, they beat her with logging chains, shot her to death, burned her body, and attempted to dismember her. During the trials of the killers, the court excluded Stephanie's family from the courtroom and never notified them of continuances.

Wendy Preston, 22, was murdered on June 23, 1977 in her parents' Florida home. She was a geriatric nurse, and was visiting her mother and father, Bob and Pat Preston, before leaving for the New York School of Ballet to begin a new career. While out with her friends, she mentioned that her parents would not be home for awhile. The killer overheard her, found her parents' home, broke in to find money to buy drugs, and murdered Wendy. Friends found her body six days later. Her parents were told that the state of Florida was the "victim" in this case, and that they would be notified only if they were to be called as witnesses.

Louarna Gillis, 22, John Gillis' only daughter, was murdered on January 17, 1979 as part of a gang initiation in Los Angeles. The quickest way to be initiated into the "Mexican Mafia" was to murder the daughter of a Los Angeles Police Department officer; John had been a homicide detective with the department and was at the time serving as a sergeant on the Los Angeles Police Commission. The killer targeted Louarna because he knew that she was the daughter of a police officer. He picked her up a few blocks from her home, drove her to an alley, shot her in the head as she sat in the car, pushed her into the alley, and then fired additional shots into her back. The family was not notified of critical proceedings in the killer's trial, including the arraignment. John, now the Director of the Office for Victims of Crime of the U.S. Department of Justice, was not allowed to enter the courtroom during the trial.

[1] *See generally* 150 CONG. REC. S4260–61, S4264–66 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

Nila Lynn, 69, of Peoria, Arizona, was murdered at a homeowner's association meeting on April 19, 2000 by a man unhappy with the way the association had trimmed the bushes in his yard. Nila and another woman were killed, and several men were injured. Nila died on the floor in the arms of her husband, Duane. They were three months short of their 50th wedding anniversary. Their children paid for her casket with the money they had saved for an anniversary gift. Duane wanted the killer to be sentenced to life without parole, rather than endure the lengthy appeals of a capital case. Despite having clear constitutional and statutory rights, Duane was not allowed to make a sentencing recommendation. The killer received the death penalty.

Because of these victims, their families, and the countless others who have suffered similar injustices, Congress in October 2004 passed the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act[2] (hereinafter "the CVRA"). The CVRA is the most sweeping federal victims' rights law in the history of the nation. The Act establishes substantive and procedural rights, including the right to notice of proceedings, presence, right to be heard, notice of release or escape, restitution, speedy trial, and safety for victims of crime. Equally important, through the establishment of independent victim standing, the Act creates an enforcement mechanism in federal courts so that these rights are truly meaningful. The purpose of this Article is to set forth the historical background and the legislative history of the new law and to explain its terms and provisions.

II. HISTORICAL BACKGROUND OF THE CVRA

The CVRA is the latest enactment in a forty-year civil rights movement. 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] Before the victims' movement gained momentum in the 1970s and 1980s, this country's criminal justice system had come to treat all crimes as acts committed only against the community, and consequently gave the direct victims of crime little, if any, recognition. Believing that crimes are committed against individuals just as much as they are against the community, the crime victims' rights movement has sought to guarantee rights to crime victims through the state and federal legislative process. The movement has secured federal and state statutory reforms and even state constitutional amendments to ensure that innocent victims of crime are respected by the justice system. These efforts have had only mixed success in securing enforceable rights for crime victims.

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[2] Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, (codified at 18 U.S.C. § 3771 (2004)). The entire Act is set forth in Appendix A.

[3] The full dimensions of that unjust treatment are catalogued in multiple federal reports, including the PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT (1982) during President Reagan's first term and in U.S. DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY (1998), issued during President Clinton's second term.

A. The Birth of the Victims' Movement

The movement for crime victims' rights began in the mid-1960s when a statewide victim assistance program was created in California. By 1972, victim assistance programs were operating in the Bay Area of California, Washington, D.C., and St. Louis, Missouri. These initial efforts eventually spawned a national movement to reform the legal system by recognizing that crime victims, especially women and young victims of sexual and domestic violence, were a discrete and unserved minority that deserved equal justice under law.

Victims' voices were heard when Ronald Reagan became the first President to publicly acknowledge the role of the victim in the criminal justice system by issuing a proclamation calling for the first National Victims' Rights Week in 1981 and by subsequently establishing the President's Task Force on Victims of Crime in 1982. The Task Force, after extensive hearings around the country, found that the criminal justice system had lost an "essential balance" by depriving the "innocent, the honest, and the helpless of its protection."[4] To make the legal system fair for the innocent victims of crime without "vitiat[ing] the safeguards that shelter anyone accused of crime,"[5] the Task Force proposed sixty-eight reforms in its 1982 Final Report. These proposals are the origin of many of the reforms sought by the movement for securing crime victims' rights.

The Task Force identified no quick fix for the imbalance that it concluded existed in the criminal justice system.[6] It envisioned a sustained effort by federal and state governments (as well as the private sector) to gradually restore balance to the criminal justice system.[7] The Task Force anticipated that the most immediate changes would come from legislative actions at the federal and state level.[8] The Task Force also proposed an amendment to the United States Constitution that would fully guarantee that crime victims are recognized by the justice system.[9]

B. Legislative Action at the Federal Level

The immediate effect of the President's Task Force Report was the passage of the Victim and Witness Protection Act of 1982 (VWPA),[10] the first major federal victims' rights law in the nation's history. This Act made seven specific findings about the need for protecting crime victims' rights:

> (1) Without the cooperation of victims and witnesses, the criminal justice system would cease to function; yet with few exceptions these individuals are either ignored by the criminal justice system or simply

[4] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT, *supra* note 3, at 114.
[5] *Id*.
[6] *Id*. at ii (Letter from Task Force to President Reagan).
[7] *Id*.
[8] *Id*. at 16–18.
[9] *Id.* at 114.
[10] Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982).

> used as tools to identify and punish offenders. (2) All too often the victim of a serious crime is forced to suffer physical, psychological, or financial hardship first as a result of the criminal act and then as a result of contact with a criminal justice system unresponsive to the real needs of such victim. (3) Although the majority of serious crimes falls under the jurisdiction of State and local law enforcement agencies, the Federal Government, and in particular the Attorney General, has an important leadership role to assume in ensuring that victims of crime, whether at the Federal, State, or local level, are given proper treatment by agencies administering the criminal justice system. (4) Under current law, law enforcement agencies must have cooperation from a victim of crime and yet neither the agencies nor the legal system can offer adequate protection or assistance when the victim, as a result of such cooperation, is threatened or intimidated. (5) While the defendant is provided with counsel who can explain both the criminal justice process and the rights of the defendant, the victim or witness has no counterpart and is usually not even notified when the defendant is released on bail, the case is dismissed, a plea to a lesser charge is accepted, or a court date is changed. (6) The victim and witness who cooperate with the prosecutor often find that the transportation, parking facilities, and child care services at the court are unsatisfactory and they must often share the pretrial waiting room with the defendant or his family and friends. (7) The victim may lose valuable property to a criminal only to lose it again for long periods of time to Federal law enforcement officials, until the trial and sometimes appeals are over; many times that property is damaged or lost, which is particularly stressful for the elderly or poor.[11]

In federal cases, the VWPA allows the use of victim-impact statements at sentencing hearings and provides for victim restitution. The 1982 act also encourages states to set up programs to serve crime victims. Congress amended and expanded the provisions of the VWPA in subsequent years, primarily through the Victims of Crime Act of 1984,[12] which created the Crime Victims Fund and the Office for Victims of Crime in the Department of Justice; the Victims' Rights and Restitution Act of 1990,[13] which established the best-efforts standard for "rights"; the Crime Control Act of 1990,[14] which mandated services for victims; the Violent Crime Control and Law Enforcement Act of 1994,[15] which mandated restitution for domestic violence, sexual assault, and to sexually exploited and abused children; the Mandatory Victims Restitution Act of 1996,[16] which expanded restitution; and the Victim Rights Clarification Act

[11] *Id.* § 2(a).

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

[13] Victims' Rights and Restitution Act, Pub. L. No. 101-647, tit. V, 104 Stat. 4820 (codified at 42 U.S.C. § 10606 (1990)).

[14] Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990).

[15] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

[16] Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, tit. IIA, 110 Stat. 1227 (1996).

of 1997,[17] which "clarified" for judges the victim's right to attend trial even if the victim also will speak at sentencing.

The most significant advances in securing the rights of crime victims before the CVRA are those contained in the Victims' Rights and Restitution Act of 1990 (VRRA), codified at 42 U.S.C. § 10606.[18] This law purported to provide substantive and procedural rights for victims in language that reflected several of the same principles that later would form the basis of the proposed constitutional amendment and the CVRA. Of particular importance is the VRRA's "Bill of Rights," which guaranteed crime victims:

> (1) The right to be treated with fairness and with respect for the victim's dignity and privacy.
> (2) The right to be reasonably protected from the accused offender.
> (3) The right to be notified of court proceedings.
> (4) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.
> (5) The right to confer with the attorney for the Government in the case.
> (6) The right to restitution.
> (7) The right to information about the conviction, sentencing, imprisonment, and release of the offender.[19]

The Act applies in the federal criminal justice system and was to be enforced by federal law enforcement agencies. Congress also called on the states, in this Act, to view these new rights as "goals" for their own criminal justice systems.[20]

Had the establishment of these rights reformed the culture of the justice system, there would have been little momentum for a crime victims' constitutional amendment several years later. But these federal laws proved ineffective. Their failure was evident during the prosecution of Timothy McVeigh, whose bomb destroyed the Murrah Building in Oklahoma City, Oklahoma and killed 168 people.[21] Surviving victims of the bombing sought to exercise their right under the 1990 Act to attend the trial, in which they would later testify in the sentencing phase. They were barred from attending by the trial court.

On appeal, the Tenth Circuit effectively construed the statue to be unenforceable. It found that crime victims did not even have the right to challenge their exclusion from proceedings by the trial judge. Although the court of appeals did not "categorically rule out the possibility of mandamus relief for the government in the event of a patently unauthorized and pernicious

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[17] Victim Rights Clarification Act of 1997, Pub. L. 105-6, 111 Stat. 12 (codified as amended at 18 U.S.C. § 3510 (2000)).

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

[19] *Id*. § 502.

[20] *Id*. § 506.

[21] For a full description of the victims' litigation, *see* Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479 (1999).

use of the sequestration power," the court upheld the pre-trial order prohibiting victims from attending McVeigh's trial on the traditional rule authorizing the sequestration of witnesses.[22] The court reasoned that "the statute charily pledges only the 'best efforts' of certain executive branch personnel to secure the rights listed."[23] It found that the government fulfilled that limited obligation merely by arguing against sequestration, and thus the judge did not violate the Act by entering the sequestration order.[24] The court pointed out that Congress explicitly stated in the VRRA that the Act "does not create a cause of action or defense in favor of any person arising out of the failure to accord to a victim the rights enumerated."[25] Thus, the VRRA "does not grant [victims] standing to seek review of orders relating to matters covered by the Act."[26]

The Tenth Circuit succinctly stated the problem with the VRRA. The Act did not "grant standing to seek review of orders relating to matters covered by the Act."[27] In other words, the Act did not give anyone the right to enforce it. The culture of the justice system could not, under these conditions, be reformed.

C. *Legislative Action at the State Level*

Similar problems arose at the state level. Victims' advocates achieved success in passing reform measures, but were less successful in transforming those reforms into effective rights. These advocates sought constitutional amendments in the states long before seeking a federal amendment.[28] As explained in testimony before the Senate Judiciary Committee:

> The "states-first" approach drew the support of many victim advocates. Adopting state amendments for victim rights would make good use of the "great laboratory of the states," that is, it would test whether such constitutional provisions could truly reduce victims' alienation from their justice systems while producing no negative, unintended consequences.[29]

The results of the drive to seek state reforms have been dramatic, and yet disappointing. A total of thirty-three states now have state victims' rights

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[22] United States v. McVeigh, 106 F.3d 325, 328, 335 (10th Cir. 1997).

[23] *Id.* at 335; *see* 42 U.S.C. § 10606(a) ("Officers and employees of . . . departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that victims of crime are accorded the rights described in subsection (b) of this section").

[24] *McVeigh*, 106 F.3d at 335.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *See* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1381–83 (1994) (recounting the history of crime victims' rights).

[29] *A Bill Proposing an Amendment to the Constitution of the United States to Protect the Rights of Victims of Crime: Hearing on S.J. Res. 52 Before the Senate Comm. on the Judiciary*, 104th Cong. 40 (1996) (statement of Robert E. Preston).

amendments,[30] and every state has some form of a victims' rights statute. But, these laws, on the whole, have failed to establish meaningful and enforceable rights for crime victims. As Professor (now Judge) Paul G. Cassell has concluded, "the state amendments and related federal and state legislation are generally recognized by those who have carefully studied the issue to have been insufficient to fully protect the rights of crime victims."[31] The U.S. Department of Justice also has found that the current protections for victims are inadequate, and that they will remain inadequate until a federal constitutional amendment is enacted. As then-Attorney General Janet Reno testified:

> [E]fforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims' rights advocates have sought reforms at the state level for the past twenty years . . . However, these efforts have failed to fully safeguard victims' rights. These significant state efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.[32]

The reasons for the failure of the state amendments, which establish rights that always stand in the shadow of defendants' superior federal constitutional rights, include the lack of effective enforcement mechanisms.[33]

D. Article V Process Toward a Constitutional Amendment

The ineffectiveness of the state crime victims' rights amendments ultimately led to the effort to pass a federal constitutional amendment. The federal amendment first was proposed by the Reagan Task Force as a device that would fully secure rights for "a group oppressively burdened by a system designed to protect them."[34] The proposed amendment would augment the Sixth Amendment to the Constitution[35] by adding to it the following:

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[30] *See* ALA. CONST. amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16a; CONN. CONST. art. I, § 8(b); FLA. CONST. art. I, § 16(b); IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); KAN. CONST. art. XV, § 15; LA. CONST. art. I, § 25; MD. CONST. DECL. OF RIGHTS art. XLVII; MICH. CONST. of 1963, art. I, § 24; MISS. CONST. art. III, § 26A; MO. CONST. art. I, § 32; MONT. CONST. art II, § 28; NEB. CONST. art. I,§ 28; NEV. CONST. art. I, § 8; N.J. CONST. art. I, § 22; NEW MEX. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST. art. I, § 42; R.I. CONST. art. I, § 23; S.C. CONST. art. I,§ 24; TENN. CONST. art. I, § 35; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WASH. CONST. art. I, §35; WIS. CONST. art. I, § 9m. These amendments passed with overwhelming popular support.

[31] *A Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 3 Before the Senate Comm. on the Judiciary*, 106th Cong. 25 (1999) [hereinafter *Hearings*] (statement of Paul Cassell, Professor of Law, University of Utah College of Law).

[32] *A Bill Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims: Hearing on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. 64 (1997) (statement of Janet Reno, Attorney General of the United States).

[33] *See generally* Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy and Review*, 2005 BYU L. REV. ___ (forthcoming 2005).

[34] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT, *supra* note 3, at 114.

[35] *Id.*

"Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings."[36]

In April 1985, a national conference of citizen activists and mutual assistance groups organized by the National Organization for Victim Assistance (NOVA) and Mothers Against Drunk Driving (MADD) met to consider how to enact this proposal as a federal constitutional amendment.[37] After a series of meetings and the formation of the National Victims Constitutional Amendment Network (NVCAN),[38] proponents decided instead to begin by seeking to enact state constitutional amendments before pursuing a federal constitutional amendment. Later—after a decade of advocacy—the leaders of the movement concluded that the state and federal reforms had failed to produce meaningful and enforceable rights for crime victims. The time had come to enact a federal constitutional amendment.[39]

The first proposed federal constitutional amendment to protect the rights of crime victims, S.J. Res. 52, was introduced in 1996.[40] It embodied seven core principles: notice of proceedings; presence at proceedings; right to be heard; notice of release or escape; restitution; speedy trial; and priority for victim safety. A similar resolution (H.R. Res. 174) was introduced in the U.S. House of Representatives. On April 23, 1996, the Senate Committee on the Judiciary held a hearing on S.J. Res. 52, and, later that year, the House Committee on the Judiciary held hearings on the companion proposal.[41] At the end of the 104th Congress, a revised version of the amendment was introduced (S.J. Res. 65). To the seven core principles, another was added: standing. In 1997, the same version of the revised amendment, S.J. Res. 6, was introduced. On April 16, 1997, the Senate Judiciary Committee held a hearing on S.J. Res. 6. On June 25, 1997, the House Judiciary Committee held a hearing on H.J. Res. 71, which had been introduced on April 15, 1997.[42]

Changes continued to be made to the language of the federal amendment as all interested parties, including the Department of Justice, expressed their views about the original draft. The result of this process was S.J. Res. 44, which was introduced in the Senate on April 1, 1998. On April 28, 1998, the Senate Judiciary Committee held a hearing on S.J. Res. 44. On July 7, 1998, the

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[36] *Id*.

[37] *See* LeRoy L. Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, 34 WAYNE L. REV. 125, 129 (1987).

[38] *See National Victim Constitutional Amendment Network*, *at* http://www.nvcan.org.

[39] S. REP. NO. 106-254 (2000) ("With the passage of and experience with these State constitutional amendments came increasing recognition of both the national consensus supporting victims' rights and the difficulties of protecting these rights with anything other than a Federal amendment. As a result, the victims' advocates—including most prominently the National Victim Constitutional Amendment Network (NVCAN)—decided in 1995 to shift its focus toward passage of a Federal amendment").

[40] United States Senators Kyl (R-AZ) and Feinstein (D-CA) introduced S. J. Res 52 on April 22, 1996.

[41] *Proposals for a Constitutional Amendment to Provide Rights for Victims of Crime: Hearing on H.R. 173 and H.R. 174 Before the House Comm. on the Judiciary,* 104th Cong. 91 (1996).

[42] H. J. Res. 71, 105th Cong. (1997).

committee held an executive business meeting on S.J. Res. 44. On July 7, after debate at three executive business meetings, the committee approved S.J. Res. 44, with a substitute amendment by the authors, by a vote of 11 to 6. However, the resolution was not brought to the floor of the Senate.

The language of the committee-approved resolution was resurrected in 1999 as S.J. Res. 3, which was co-sponsored by thirty-three Senators. On March 24, 1999, the Senate Judiciary Committee held a hearing on S.J. Res. 3. On May 26, 1999, the Judiciary Committee's Subcommittee on the Constitution, Federalism, and Property Rights approved S.J. Res. 3, with an amendment, and reported it to the full committee by a vote of four to three. On September 30, 1999, the Judiciary Committee approved S.J. Res. 3 with a sponsors' substitute amendment by a vote of twelve to five. On April 27, 2000, after three days of debate on the floor of the Senate, consideration of the amendment was halted when it became likely that opponents would be able to sustain a filibuster.[43]

During the 2000 elections, the Republican and Democratic presidential candidates both endorsed a crime victims' rights amendment. After the election, a series of meetings was held with officials from the Bush administration in an effort to reach a consensus on the language of a crime victims' rights amendment to the Constitution.[44] Such a consensus always had eluded proponents in discussion with the previous administration. As one victim rights' group later summarized the history:

> For at least two years before the full Senate took up the proposal, the Justice Department had been expressing reservations about certain provisions of the Kyl-Feinstein proposal. Organizations like the National Victims Constitutional Amendment Network (NVCAN) and NOVA had written letters to Attorney General Janet Reno expressing disagreement with the Department's positions and requesting meetings to seek resolution. Those letters went unanswered.[45]

The Clinton administration rejected language that Paul Cassell had publicly suggested over a year earlier: "Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by the Constitution. In cases of conflict, the rights of the accused or convicted offender and the victim shall be reasonably balanced."[46]

Under Attorney General John Ashcroft, the Justice Department, at the urging of Senators Kyl and Feinstein, agreed to specific language that addressed the concerns of prosecutors, defendants, and victims. The consensus language became S.J. Res. 35, which was introduced on April 15, 2002. The

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[43] 148 CONG. REC. S2679 (daily ed. Apr. 15, 2002) (statement of Sen. Feinstein) ("Ultimately, in the face of a threatened filibuster, Senator Kyl and I decided to withdraw the amendment.")

[44] *See National Organization for Victim Assistance*, NOVA NEWSLETTER, Volume 19, Issue Number 10–12, 2002.

[45] *Id.*

[46] *Id.*

following day, President Bush announced his support for the amendment.[47] On May 1, 2002, Representative Steve Chabot (R-OH) introduced a companion House Resolution, H.J. Res. 91. A hearing before the House Judiciary Committee's Subcommittee on the Constitution was held on May 9, 2002, and a Senate hearing on S.J. Res. 35 was held on July 17, 2002. Neither of these resolutions, however, were reported out of committee.

Senate Joint Resolution 1 was introduced on January 7, 2003.[48] Representative Chabot introduced the same amendment in the House on April 10, 2003. The Senate Judiciary Committee held a hearing on April 8, 2003 entitled "A Proposed Constitutional Amendment to Protect Crime Victims, S.J. Res. 1."[49] At this hearing, the amendment's sponsor noted:

> The Constitution provides defendants a variety of rights, but none for victims of crime, and in certain situations where State constitutions and State statutes have attempted to provide rights to victims of crime, we have found that those rights have not been uniformly effected by the courts and that victims, therefore, continue to suffer, notwithstanding those laudable provisions.[50]

A study conducted by the National Institute of Justice found that even in those states whose statutes and amendments promise crime victims the strongest protection, fewer than 60 percent of crime victims were notified of sentencing hearings, and fewer than 40 percent were notified of the pretrial release of the defendant.[51]

The Senate Judiciary Committee filed a report endorsing Senate Joint Resolution 1 on November 7, 2003.[52] On April 20, 2004, a motion to proceed to consideration of the measure was filed in the full Senate. That same day, however, the motion to proceed was withdrawn—again, the sponsors concluded that they probably lacked the 67 votes needed to pass the measure. In sum, after almost a decade of effort, it appeared there was little hope in the 108th Congress of gaining approval of a federal constitutional amendment for crime victims' rights.

III. THE CRIME VICTIMS' RIGHTS ACT

During Crime Victims' Week in April 2004, victims' advocates resolved to break the log jam. They suspended their effort to amend the U.S. Constitution and turned instead toward enacting a comprehensive federal statute. They decided to test once and for all whether a strong federal statute could preserve and protect victims' rights.

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[47] *President Calls for Crime Victims' Rights Amendment*, *available at* http://www.whitehouse.gov/news/releases/2002/04/20020416-1.html.

[48] Senators Kyl and Feinstein introduced S.J. Res. 1, § 2 108th Cong. (2003).

[49] *Proposed Constitutional Amendment to Protect Crime Victims, S.J. Res. 1: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. 1 (2003) (Statement of Sen. Kyl).

[50] *Id.*

[51] DEAN G. KILPATRICK ET AL., *The Rights of Crime Victims—Does Legal Protection Make a Difference?,* NATIONAL INSTITUTE OF JUSTICE, RESEARCH IN BRIEF 4 (Dec. 1998).

[52] S. REP. NO. 108-191 (2003).

A. Legislative History of the CVRA

On April 21, 2004, the "Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act" was introduced.[53] On April 22, 2004, the decision to move from the constitutional amendment to statutory protections was explained on the floor of the Senate:

> After 8 years of work on the Federal constitutional amendment, supported by President Bush and the Attorney General, we were able to schedule, after we passed the bill through the Judiciary Committee, that constitutional amendment for floor action today. Knowing we would not have the 67 votes to pass it, we decided it was time to get something tangible in statute to protect the rights of victims, and accompanying it could be a modest appropriation of money to help actually support these victims in court when that was necessary and called for.[54]

That day, the bill was approved by the Senate by a vote of 96 to 1. On September 21, 2004, Representative James Sensenbrenner (R-WI), Chairman of the House Committee, on the Judiciary introduced House Resolution 5107, the "Justice for All Act of 2004."[55] This legislation included among its various measures a companion version of the Senate crime victims' rights bill.[56] At a business meeting of the House Judiciary Committee, Chairman Sensenbrenner explained the purpose of the bill:

> Victims of crime have long complained that they are the forgotten voice in the criminal justice system. For example, Roberta Roper, whose daughter Stephanie was kidnapped, brutally raped, tortured, and murdered in 1982, testified . . . that—unlike her daughter's killers—she had no rights to be informed, no rights to attend the trial, and no rights to be heard before sentencing. Her experience, and that of many others like her, have led victims' rights advocates to push for a victims' rights statute to counterbalance the rights provided to the accused under the Constitution.[57]

Like the Senate measure, the House measure contained eight enumerated rights, but had some important differences. For example, under the House version, a victim seeking to enforce the right to be heard at a plea or sentencing proceeding for which the victim did not receive notice could not have the

[53] S. 2329, 108th Cong. (2004) (introduced by Senator Jon Kyl).

[54] 150 CONG. REC. S4260 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[55] This bill was a combination of S. 1700, H.R. 3214, and S. 2329. The House Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on "Advancing Justice Through the Use of Forensic DNA Technology" on July 17, 2003. The House Committee on the Judiciary issued a report on the bill. H.R. REP. NO. 108-711 (2004).

[56] On October 1, 2003, Senator Hatch introduced S. 1700, entitled "Advancing Justice Through DNA Technology Act of 2003." Representative Sensenbrenner introduced the House related bill, H.R. 3214. The House Committee on the Judiciary issued a written report on the bill, H.R. REP. NO. 108-321. No further action was taken on this bill.

[57] H.R. REP. NO. 108-711 (2003).

proceeding reopened or redone.[58] The Senate rejected this restriction. The compromise language, which allows under controlled conditions, plea and sentencing proceedings to be reopened, as well as other proceedings without the controlling conditions,[59] clearly evidences Congress's intent that the rights established be enforced, even if it means vacating decisions and redoing proceedings at which the victim would then be given the right to participate. Throughout the summer and fall of 2004, such compromises were reached between parties in the Senate, the House, the Justice Department, and crime victims' rights groups, and are reflected in the final language of the legislation. On October 6, 2004, House Resolution 5107 passed the House by a vote of 393 to 14. House Concurrent Resolution 519 corrected the enrollment of House Resolution 5107. On October 9, 2004, the bill passed the Senate by unanimous consent and without amendment. On October 30, 2004, it was signed into law by President Bush.[60]

B. The Meaning of the CVRA

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 remainder of this Article reviews the specific provisions of the CVRA and describes how Congress intends them to operate.

1. Rights of Crime Victims

The CVRA moves victims' rights from the relative obscurity (at least for criminal law practitioners and judges) of Title 42 and places them at the heart of the federal criminal code, Title 18, where they are incorporated into the basic legal standards that govern criminal cases.

The CVRA begins with the unequivocal statement that "a crime victim has the following rights."[61] This introductory clause, like its predecessor in the VRRA, clearly establishes specific guarantees. The language was agreed to by the bill's authors "[a]fter extensive consultation" and after a "broad bipartisan

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[58] House Resolution 5107, as originally introduced in the House, stated, "[i]n no case shall a failure to afford a right under this chapter provide grounds . . . to reopen a plea or a sentence, except in the case of restitution as provided in title 18." H.R. 5107 (2004).

[59] The final language of 18 U.S.C. § 3771(d)(5) reads as follows:

> "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."

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

[61] 18 U.S.C. § 3771(a) (2004).

consensus was reached."[62] The authors also made clear, however, that this declaration of rights is not intended "to limit any laws in favor of crime victims that may currently exist, whether these laws are statutory, regulatory, or found in case law."[63]

The CVRA also broadly defines the term "crime victim." According to the statute,

> the 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 representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.[64]

The CVRA's definition of a crime victim is based on the federal restitution statutes.[65] It is broader than the definition employed in Rule 32 of the Federal Rules of Criminal Procedure, which limits the meaning of victim to the "individual against whom the defendant committed an offense *for which the court will impose sentence*."[66] Such a limitation to offenses for which the court "will impose sentence" does not appear in the CVRA. Thus, the CVRA could be applied to victims of counts dismissed in a plea agreement, for example.

While most of the rights guaranteed by the CVRA apply in the context of legal proceedings following arrest and charging, other important rights are triggered by the harm inflicted by the crime itself. For example, the right to be treated with fairness, the right to be reasonably protected from the accused (who may qualify as the accused before his arrest), and the right to be treated with respect for the victim's dignity and privacy each may arise without regard to the existence of legal proceedings. If any doubts remain on this point, the CVRA sweeps them away with its proviso that the rights established by the Act may be asserted "if no prosecution is underway, in the district court in the district in which the crime occurred."[67]

The CVRA's "harm" predicate for the application of its guarantees is limited to that harm which is "directly and proximately" caused by the offense.[68] These terms necessarily invoke the concept of "foreseeability," which has been liberally interpreted in other victims' statutes.[69] Simply put,

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[62] 150 CONG. REC. S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[63] *Id.*

[64] 18 U.S.C. § 3771(e) (2004).

[65] *See* 18 U.S.C. §§ 3663(a)(1)(A), 3663A (2004).

[66] FED. R. CRIM. P. 32(a) (emphasis added).

[67] 18 U.S.C. § 3771(d)(3) (2004).

[68] 18 U.S.C. § 3771(e).

[69] United States v. Moore, 178 F.3d 994, 1001 (8th Cir. 1999) (holding that customer of bank in bank robbery was victim); United States v. Checora, 175 F.3d 782, 795 (10th Cir. 1999) (holding that juvenile children of manslaughter victim were also victims.); United States. v. Metzger, 233 F.3d 1226, 1227−28 (10th Cir. 2000) (holding that bystander shot by police was "reasonably foreseeable" victim of bank robbery); United States. v. Donaby, 349

crime foreseeably has far-reaching consequences. As United States Supreme Court Justice David Souter noted in his concurring opinion in *Payne v. Tennessee*, for example: "Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and, after it happens, other victims are left behind."[70]

In recognition of the suffering of those victims "left behind," the CVRA broadly defines who can serve as a representative of the victim. Unlike the former VRRA, which allowed a single member of the family to represent a victim's interests, the CVRA allows "family members" to so serve.[71] The notion, embodied in the former law, that only one family member suffered "direct physical, emotional, or pecuniary harm" as a result of the murder or incapacitation of a parent, child, or sibling, for example, is belied by any visit to a Parents of Murdered Children meeting. The broader definition of who is harmed not only is more just, but it is more closely grounded in the harsh realities of crime.

Finally, the CVRA closes an absurd loophole in the definition of who may represent a victim's interests. In the VRRA, this definition "neither explicitly cover[ed] nor explicitly exclude[d] culpable persons."[72] Under the CVRA, the defendant may not represent the victim's interests.[73]

a. The right to be reasonably protected from the accused.

The first right guaranteed by the CVRA is a broad and open-ended right to be "reasonably protected from the accused." This right has been embedded in federal law since the enactment of the VRRA; yet, presumably because victims lacked standing to sue to enforce it, in fifteen years it has had no judicial construction. The same language guaranteeing protection from the accused is found in the constitutions of eight states, and similar language is found in the constitutions of another five states[74]—again without apparent judicial construction.

The placement of this right as the first right is quite deliberate. Senator Feinstein thought the right so important that she directed during the drafting that it be moved from paragraph 2 of the lists of rights in the VRRA to paragraph 1 of the new law. This placement reinforces the principle that government's first and foremost obligation to its citizens is to protect them—especially those who already have been victims of a crime.

F.3d 1046, 1055 (7th Cir. 2003) (holding that the Police department was a victim when its vehicle was damaged by "foreseeable" police chase).

[70] 501 U.S. 808, 838−39 (1991) (Souter, J., concurring).

[71] 18 U.S.C. § 3771(e).

[72] ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (2000) (The defendant might qualify, for example, in cases where he and the victim are related).

[73] "[B]ut in no event shall the defendant be named as such guardian or representative." 18 U.S.C. § 3771(e).

[74] Alaska, Connecticut, Illinois, Michigan, New Mexico, Oregon, South Carolina, and Texas have the "reasonably protected" language and Missouri, Ohio, Oregon, Virginia, and Wisconsin have language requiring "reasonable protection." See *supra* note 30 for the citations to the state amendments.

This first right requires the government to take *reasonable* steps to protect crime victims. As stated in the Senate during final passage of the law:

> Of course the government cannot protect the crime victim in all circumstances. However, where reasonable, the crime victim should be provided accommodations such as a secure waiting area, away from the defendant before and after [court proceedings][75] and during breaks . . . . The right to protection also extends to require reasonable conditions of pre-trial and post-conviction [release][76] that include protections for the victim's safety.[77]

The CVRA's right to protection is broader than that provided in the 2004 proposed federal constitutional amendment. The proposed amendment only provided a "right to adjudicative decisions that duly consider the victim's safety." Such language would have given victims the right to have their safety "duly" considered, for example, when a decision is made to release or impose conditions of release on the defendant. The right established in the CVRA certainly includes this, but goes further to create a substantive right to have the victim's safety made not simply a consideration in release decisions, but a requirement. Ideally, the court's release order would describe how the safety of the victim is protected. If the victim seeks an order to enforce her right to safety, and the court denies relief, the reasons for the denial must be "clearly stated on the record."[78]

A critical time for applying the victim's "right to be protected from the accused" is when the court considers an initial release of a defendant after his arrest. Pre-trial release is preceded by an initial appearance held pursuant to Rule 5 of the Federal Rules of Criminal Procedure. Rule 5(d) directs the judge (or magistrate judge) to "detain or release the defendant as provided by statute or these rules."[79] The CVRA's requirement of victim safety is just such a statute—one that governs release decisions.

Congress' concern for the safety of crime victims is appropriate and just. The United States Supreme Court has recognized the "primary concern of every government . . . [is] for the safety and indeed the lives of its citizens."[80] In the past, victims have been grievously harmed—even murdered—because courts have been inattentive to their needs while making decisions about pre-trial release of the accused.

If the right to safety is to be fairly and meaningfully implemented, victims must be given notice of the initial appearance of the defendant so that they might attend and be heard on whether and how the defendant is released. Practical difficulties attendant to providing victims notice of initial appearances will have to be addressed. In particular, the Rule 5 hearing must be scheduled

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[75] Inadvertedly omitted in original text.

[76] The word "relief" appears in the text of the Congressional Record, but it is a mistake and should read "release."

[77] 150 CONG. REC. S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[78] 18 U.S.C. § 3771(b) (2004).

[79] FED. R. CRIM. P. 5(d)(3).

[80] United States v. Salerno, 481 U.S. 739, 755 (1987).

so as to allow enough time to give victims proper notice. The Rules of Criminal Procedure may well need to be amended in order to address the need to give victims adequate notice. Judge Cassell has offered excellent specific suggestions to this end.[81] The Advisory Committee on Criminal Rules is apparently considering such proposals at this time.

b. 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.

Victims cannot assert a right at a court hearing if they missed the hearing because they were given no notice of it. The CVRA, recognizing this fact, guarantees a right to notice. The importance of this right was noted during debate of the legislation on the floor of the Senate:

> The notice provisions are important because if a victim fails to receive notice of a public proceeding in the criminal case at which the victim's right could otherwise have been exercised, that right has effectively been denied. . . . Equally important to this right to notice of public proceedings is the right to notice of the escape or release of the accused. This provision helps to protect crime victims by notifying them that the accused is out on the streets.[82]

Witnesses testifying before both the House and Senate Judiciary Committees gave compelling accounts of the devastating effects on crime victims of learning that proceedings were held in their case without their knowledge. In 1982, the *President's Task Force on Victims of Crime: Final Report* recommended that victims be kept apprised of criminal justice proceedings. Since then, many states have enacted requirements that victims be notified of court hearings. But the effort has not been completely successful. A recent U.S. Justice Department report found that some states have not adopted any laws requiring that victims be given notice of proceedings, and even of those states that have done so, many have failed to implement mechanisms that make such notice a reality.[83]

"Timely" notice means that the victim be informed sufficiently in advance of a public proceeding that she is able to arrange her affairs so that she may attend. Often, criminal courts schedule proceedings, whether at the last minute or well in advance, without giving any notice to the victim. Of course, such proceedings render meaningless any participatory right granted to the victim. It goes without saying that the defendant, the state, and the court always have notice of proceedings; failure to provide such notice to any of these three would

[81] Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 B.Y.U. L. REV. ___ (forthcoming 2005).

[82] 150 CONG. REC. S4267–68 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[83] U. S. DEPT OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 13 (1998).

render void any action taken by the court. Victims simply seek equal consideration. Principles of fairness and decency demand no less.

The CVRA also requires that notice of particular proceedings be "accurate."[84] Victims often describe being told to arrive at a certain time, on a certain date, for a proceeding, only to discover that the time and date of the hearing have been changed. The standard of accuracy imposed by the CVRA requires that those providing notice be as careful giving information to the victim as they are when they are providing notice to the defendant, the lawyers, or the court itself.

The "public court proceedings" for which notice is required, according to the Department of Justice, include, "for example, hearings on motions to quash subpoenas and motions for return of property, arraignments, bail hearings, hearings on pre-trial motions, trials, plea proceedings, sentencing hearings, appellate arguments, . . . hearings regarding collateral attack motions . . . [and] post-judgment hearings such as hearings on probation violations and parole hearings. Some courts may also interpret this language broadly to apply to public court hearings involving restitution enforcement."[85] To this list, the CVRA adds initial appearances pursuant to Rule 5, pre-trial conferences on scheduling issues, and any other proceedings which the defendant has a right to attend. This notice requirement also expressly applies to parole proceedings. Further, notice of "any release" requires notice of a release following an initial appearance or any other pre-trial release. Again, the Rules of Criminal Procedure may need to be amended to accommodate this right. Victims' right to safety requires that every reasonable effort be made to achieve full and fair implementation of this right.

The statute recognizes that in certain cases—those involving large numbers of victims, for example—the notice requirement might prove extremely difficult or impossible to fulfill.[86] In almost all cases, however, notice is possible and is therefore required. Each of the participatory rights established in the CVRA depend first on the victim's receipt of notice. Notice is essential.

Finally, reasonable and timely notice of the defendant's release or escape is a matter of profound importance to victims' safety in cases of violent crime. Twenty years after the *President's Task Force on Victims of Crime: Final Report*, victims still are learning "by accident"[87] about the release of the person

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[84] 18 U.S.C. § 3771(a)(2) (2004).

[85] U.S. DEP'T. OF JUSTICE, PRELIMINARY GUIDANCE ON TITLE I OF THE JUSTICE FOR ALL ACT OF 2004, 3 (2004).The Guidance indicates that the "VNS (Victim Notification System) should continue to be the primary mechanism for notifying victims of . . . proceedings," but also notes that office should consider "providing notice telephonically" in an "emergency or other last minute hearing or a change in the time or date of a hearing."

[86] 18 U.S.C. § 3771(d)(2) (2004), see discussion *infra*.

[87] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT *supra* note 4, at 4−5 (1982). ("'One morning I woke up, looked out my bedroom window and saw the man who had assaulted me standing across the street staring at me. I thought he was in jail.'—a victim").

accused or convicted of attacking them.[88] A recent Justice Department report documents cases of crime victims, including women and children, being killed by defendants or convicted felons who had recently been released from prison.[89] Properly enforced, the CVRA will bring such outrages to an end.

The failure to give victims notice of key events in their cases is increasingly less defensible in an era of technological advances. Automatic phone systems, Internet-based notice systems, and other modern notification technologies are widely available. As the Senate Committee on the Judiciary Report to Senate Joint Resolution 3 noted, "[n]ew technologies are becoming more widely available that will simplify the process of providing this notice. For example, automated voice response technology exists that can be programmed to place repeated telephone calls to victims whenever a prisoner is released, which would be reasonable notice of the release. As technology improves in this area, what is 'reasonable' may change as well."[90]

c. 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.

The CVRA guarantees victims a right "not to be excluded from any public court proceeding," except in very limited circumstances. This right will supersede, with one very narrow exception, the usual sequestration rule that is applied to crime victims.

Federal Rule of Evidence 615 establishes the federal rule for sequestration.[91] It excludes all witnesses from trials, with four exceptions. The most relevant exception for victims' rights is the exception for "a person authorized by statute to be present."[92] This exception was added to Rule 615 in 1998, after Congress enacted the Victims Rights Clarification Act of 1997.[93] This statute was enacted in response to the exclusion of Oklahoma City bombing victims from Timothy McVeigh's trial. This statute, which later

[88] *See* Kilpatrick et al., *supra* note 51, at 4, finding that even in states that gave "strong protection" to victims' rights, fewer than 60 percent of victims were notified of the sentencing hearing and fewer than 40 percent were notified of the pretrial release of the defendant.

[89] U. S. DEPT OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 13 (1998). ("Notification of victims when defendants or offenders are released can be a matter of life and death. Around the country, there are a large number of documented cases of women and children being killed by defendants and convicted offenders recently released from jail or prison. In many of these cases, the victims were unable to take precautions to save their lives because they had not been notified of the release.").

[90] S. REP. NO. 106-291 (2000).

[91] FED. R. EVID. 615 ("Exclusion of Witnesses").

[92] *Id*.

[93] FED. R. EVID. 615 advisory committee's note. Victims Rights Clarification Act of 1997, codified as amended at 18 U.S.C. § 3510 (1997).

proved ineffective, provides that a judge may not bar a victim because the victim also may testify at a sentencing hearing.

The CVRA's attendance provision reasserts the right not to be excluded from any public court proceedings, but also adds the following important clarification: the victim must be allowed to attend "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."[94] This provision is a compromise between earlier Senate versions of the Act that did away entirely with the sequestration rule, and earlier House versions that did not do enough to enforce the VRRA's "right" to not be excluded from court proceedings.

The proposed Senate statute (S. 2329), like the proposed constitutional amendment (S. J. Res. 1), did away with the sequestration rule altogether: it simply declared that the victims have the "right not to be excluded from [any] such public proceedings." In this respect, the proposed constitutional amendment and the proposed Senate legislation mirror law already in effect at the state level. For example, in Arizona, the "right to be present at . . . all criminal proceedings where the defendant has a right to be present" has been a part of the state constitution since November 1990.[95] In Alabama, the law provides that victims not only may be in the courtroom during trial, but that they may also sit at the counsel table.[96] The Alabama statute has been upheld against a constitutional challenge brought by a convicted defendant in a capital case in which the victim's widow sat at counsel table with the prosecutor and at one point during the autopsy testimony "did begin to cry."[97] The court concluded that in the context of the entire trial, the "record indicates no prejudice from the trial court's allowing [the widow] to be present . . . ."[98]

In contrast, the original bill proposed in the House of Representatives contained language similar to 10606 (b)(4) of the VRRA, which lacks clarity as to when the sequestration rule applies.[99] The House version merely provided that a victim-witness could be sequestered whenever his testimony would be *materially affected* by his presence at the court proceedings: it set no evidentiary standard for determining when such prejudice is present. Because the House version inevitably would have excluded more victims from court proceedings than the Senate approach, it was rejected by the Senate.

As a compromise between the earlier Senate and the House versions, the CVRA adopts a strict and narrow standard for the circumstances in which sequestration can be required. The exceptions apply only in the very unlikely event that the "court, after receiving *clear and convincing evidence*, determines that the testimony by the victim would be *materially altered* if the victim heard

[94] 18 U.S.C. § 3771(a)(3) (2004) (emphasis added).

[95] ARIZ. CONST. art II, § 2.1(A)(4).

[96] ALA. CODE § 15-14-53 (1975).

[97] Crowe v. State, 485 So. 2d 351 (Ala. Crim. App. 1984), *rev'd on other grounds,* 485 So. 2d 373 (Ala. 1986).

[98] *Id.* at 363.

[99] H.R. REP. NO. 5107 (as originally reported by the House).

other testimony at the proceeding."[100] Clear and convincing evidence is a demanding standard of proof. It means that the evidence for the thing to be proved makes that thing highly probable or reasonably certain.[101] The party advocating the victim's exclusion has the burden of producing such evidence and persuading the court that the victim's testimony would be materially altered.

This standard should make the exclusion of the victim quite rare. In addition, section (b) of the CVRA requires that "[b]efore making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding."[102] In the unlikely event that the standard for the exception is met, section (b) requires that "[t]he reasons for any decision denying relief under this chapter shall be clearly stated on the record."[103] A judge must explain in detail the precise reasons why the victim is being excluded.

Although the right not to be excluded should prevail in most cases, this right still is limited in several ways. The language of (a)(3) was drafted in a way to ensure that the government would not be responsible for paying for victims' travel and lodging to a place where they could attend the proceedings. Also, the right is limited to public proceedings; thus, grand jury proceedings are excluded from the right. Furthermore, the government or the defendant can request, and the court can order, judicial proceedings to be closed under existing laws. This provision is not intended to alter those laws or procedures in any way. There may be organized crime cases or cases involving national security that require procedures that deny a victim the right not to be excluded. This is as it should be. National security matters and organized crime cases are especially challenging and at times there is a vital need for closed proceedings. In such cases, the proceedings are not intended to be interpreted as "public proceedings" under the CVRA. In this regard, it is not Congress's intent to alter 28 C.F.R. § 50.9 in any respect.

Even with these limitations, the CVRA allows crime victims, in the vast majority of cases, to attend the hearings and trial of the case involving their victimization, including pre-trial, trial, or post-trial proceedings.

d. The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

The right to be "heard" joins the rights to "notice" and "not to be excluded" to form the foundation for the fair treatment of victims in the federal criminal-justice system. The CVRA expressly establishes the right to be heard,

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[100] 18 U.S.C. § 3771(a)(3) (emphasis added).

[101] "[C]lear and convincing evidence: Evidence 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." BLACK'S LAW DICTIONARY 596 (8th ed. 2004).

[102] 18 U.S.C. § 3771(b) (2004).

[103] *Id.*

not as a witness but rather as an independent participant, at critical public proceedings, including release, plea, sentencing, and parole hearings. The meaning of this right was noted during final passage of the CVRA:

> This provision is intended to allow crime victims to directly address the court in person. It is not necessary for the victim to obtain the permission of either party to do so. This right is a right independent of the government or the defendant that allows the victim to address the court. To the extent the victim has the right to independently address the court, the victim acts as an independent participant in the proceedings.[104]

Statements on the floor of the Senate also made clear that the right to be heard includes the victim's right to appear before the court and either directly address the court or otherwise communicate the victim's views to the court by some alternative means:

> It is not the intent of the term "reasonably" in the phrase "to be reasonably heard" to provide any excuse for denying a victim the right to appear in person and directly address the court. Indeed, the very purpose of this section is to allow the victim to appear personally and directly address the court. This section would fail in its intent if courts determined that written, rather than oral communication, could generally satisfy this right. On the other hand, the term "reasonably" is meant to allow for alternative methods of communicating a victim's views to the court when the victim is unable to attend the proceedings.[105]

i. Release Proceedings

The first hearing at which the victim has the right to be heard is the release hearing. Release hearings can include both post-arrest and post-conviction public release proceedings. Thus, a victim of domestic violence has the right to tell a judge at an initial appearance about the circumstances of the assault and the need for any special conditions of release that may be necessary to protect her safety. The right also extends to post-conviction public release proceedings, for example parole or conditional release hearings. Even jurisdictions that have abolished parole in favor of "truth in sentencing" regimes may still have conditional release. Only if the jurisdiction also has a "public proceeding" before such a conditional release, would the right attach. The language would extend, however, to any post-conviction public proceeding that could lead to the release of the convicted offender.

ii. Plea Bargain Proceedings

Victims have the right to be heard at plea proceedings. When a case is resolved through a plea bargain without the victim's knowledge or participation, a grave injustice has been committed by the authorities. One of the more famous quotes reported in the Reagan Task Force report was from a

[104] 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).
[105] *Id.*

woman in Virginia: "Why didn't anyone consult me? I was the one who was kidnapped, not the State of Virginia."[106] This cry for justice, for a voice, not a veto, is heard throughout the country still. To be effective, the right to be heard must be applied in a way that permits the victim to address the court before the judge exercises discretion to accept or reject a plea. Only in this way will this right be exercised as Congress intended it to be.

iii. Public Sentencing Proceedings

The right to be heard also extends to public sentencing proceedings. The victim is given the right to address the sentencing authority (judge or jury) as an independent participant in the proceedings. It should be noted that the victim's right to be heard at sentencing is not the right to be a witness. Rather, it is an independent right of allocution, not dependent on the victim being called to the witness stand. In this way, the right parallels the right of the defendant to speak at trial. This right is important for the victim as well; for example, in homicide cases, there is no way the fact-finder can assess the full harm caused by a murder without hearing testimony from the surviving family members.[107]

Critics of a victim's right to be heard acknowledge the power of hearing from victims' families.[108] Consider, for example, the victim impact statement at issue in *Payne v. Tennessee*,[109] where victim Mary Zvolanek speaks about her daughter's and granddaughter's deaths and their effect on her three-year-old grandson:

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.[110]

As Professor Cassell noted, opponents of victims' rights quite accurately observe that the statement is "heartbreaking" and "[o]n paper, it is nearly unbearable."[111] Professor Susan Bandes, however, has argued that such statements are also "prejudicial and inflammatory" and "overwhelm the jury with feelings of outrage."[112] Here, the critics fail to distinguish between prejudice and unfair prejudice as evidence law requires: a litigant is entitled to have unfairly harmful evidence excluded, not merely harmful evidence.[113] The evidence of a three-year-old victim of a crime may be considered harmful, but is not considered unfair.[114]

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[106] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT, *supra* note 3, at 9.
[107] *Hearings, supra* note 31, at 25.
[108] *Id*. at 31−36.
[109] 501 U.S. 808 (1991).
[110] *Id*. at 814−15.
[111] *Hearings, supra* note 31, at 32.
[112] *Id*.
[113] *Id*.
[114] *Id*.

The right to be heard at sentencing is not limited in any way by the text of the statute, other than that which is communicated must be "reasonable." This raises questions about the scope of what the victim can say at sentencing, especially in capital cases. The Supreme Court has considered and reconsidered the extent to which victim impact statements can be used in court proceedings.

For example, while the Supreme Court in *Booth v. Maryland*[115] ruled that victim impact statements violated a defendant's Eight Amendment right to be free from cruel and unusual punishment, the Court in *Payne*[116] explicitly overruled *Booth* as to victim impact statements (VIS).

In *Booth*, the Supreme Court noted:

> The VIS in this case provided the jury with two types of information. First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members' opinions and characterizations of the crimes and the defendant.[117]

With regard to the second type of information, the victim impact statement in *Booth* only referred obliquely to a sentencing recommendation: The victims' son said "he 'doesn't think anyone should be able to do something like that and get away with it.'"[118] The victims' daughter said "[s]he doesn't feel that the people who did this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this."[119]

The *Booth* Court held that all of the aforementioned statements were *per se* inadmissible under the Eighth Amendment's prohibition against "cruel and unusual punishment," and later extended that holding to include statements by the prosecutor regarding the qualities of the murdered person in *South Carolina v. Gathers*.[120]

Four years later, in *Payne*, the Supreme Court reconsidered *Booth* and *Gathers*.[121] It partially overruled both.[122]

The *Payne* Court noted that many people—the killer's girlfriend and parents, and even a psychologist—were allowed to testify favorably for defendant Payne at the sentencing phase.[123] On the other hand, very little was allowed to be said about the victim, per *Booth*.[124] In calling the *Booth* decision a manifestation of unfairness, the Supreme Court in *Payne* quoted the Tennessee Supreme Court approvingly:

> It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the

115 482 U.S. 496 (1987).
116 501 U.S. 808, 830 (1991).
117 *Booth*, 482 U.S. at 502.
118 *Id.* at 508.
119 *Id*.
120 490 U.S. 805, 810−11 (1989).
121 *Payne*, 501 U.S. at 808.
122 *Id.*
123 *Id*. at 825−26.
124 *Id*. at 826.

> background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.[125]

In *Payne*, the Supreme Court was presented in the record only with the portions of *Booth* and *Gathers* that had to do with victim impact statements concerning the characteristics of the murder victim and the impact of that crime on the murder victim's family. The court was not presented in the record with a statement dealing with the family members' "characterization and opinions about . . . the appropriate sentence."[126] It therefore confined its ruling to the two factors in the impact statements that were before it, and did not state whether, if presented with the third factor dealing with sentence opinions, its overruling of *Booth* and *Gathers* would also apply to that factor.[127]

The clearest reading of *Payne* is that the Supreme Court, if confronted with the question of sentence opinions, would rule that a victim may offer one. The same reasons the *Payne* Court found compelling for allowing a victim to provide impact statements concerning the characteristics of the murder victim and the impact of that crime on the murder victim's family are also present when a victim recommends the appropriate sentence to be imposed on a convicted criminal. The basic underpinning of the *Payne* Court's overturning of *Booth* and *Gathers* was fairness—fairness to the victim and fairness in the system of administering justice by allowing the prosecution and the defense to provide the same type of evidence:

> "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." By turning the victim into a 'faceless stranger at the penalty phase of a capital trial,' *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.[128]

In writing for the majority in *Payne*, Chief Justice Rehnquist quoted Justice Cardozo in *Snyder v. Massachusetts*:[129] "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be so

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[125] *Id*. (quoting State v. Payne, 791 S.W.2d 10, 19 (Tenn. 1990)).

[126] *Payne*, 501 U.S. at 835 n.1; Although the *Payne* Court characterized the *Booth* decision as having held that the admission of a victim's family members' statements about the appropriate sentence violated the Eighth Amendment, the victim impact statement in *Booth* only referred obliquely to a sentencing recommendation: The victims' son said "he 'doesn't think anyone should be able to do something like that and get away with it." *Booth*, 482 U.S. at 508. The victims' daughter said "[s]he doesn't feel that the people who did this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this." *Id*. Neither of these statements were characterized by the *Booth* court as having been sentencing opinions, but rather "family members' opinions and characterizations of the crimes." *Id*.

[127] *Payne*, 501 U.S. at 830.

[128] *Id*. at 825 (internal citations omitted).

[129] 291 U.S. 97 (1934).

strained till it is narrowed to a filament. We are to keep the balance true."[130] In keeping the balance true, the Supreme Court, when it is finally presented the question of the constitutionality of allowing victims to give sentencing opinions, would likely consider that even as the defendant and his family are allowed to offer their opinion regarding the sentence, so also should the murder victim's family's right to do so be protected.

Since the issuance of the opinion in *Payne*, courts have split on the question of whether *Booth*'s bar on a victim's offering a sentencing recommendation has been implicitly overturned by *Payne*. The Oklahoma Court of Criminal Appeals (the highest criminal court in Oklahoma) has held that *Booth* was implicitly overruled in its entirety.[131] The Oklahoma state courts have ruled that, because of *Payne*, *Booth* no longer prohibits a victim's family member from presenting "characterizations and opinions about the crime, the defendant, and the appropriate punishment."[132] In *Conover v. State*, the Oklahoma court held that *Payne* "implicitly overruled that portion of *Booth* regarding characterizations of the defendant and opinions of the sentence."[133] The United States Supreme Court has denied certiorari in the Oklahoma cases that have allowed victims to present their opinions about the sentence.[134]

However, other courts have held that victims still may not offer their opinion as to the sentence in a capital case.[135] In *Robison v. Maynard*,[136] the Tenth Circuit Court of Appeals concluded:

> [A]llowing any person to opine whether the death penalty should be invoked would interfere with the jury's performance of its duty to exercise the conscience of the community. Because the offense was committed not against the victim but against the community as a whole, in Oklahoma only the community, speaking through the jury, has the right to determine what punishment should be administered.[137]

And yet, the victim is not "any person" as the Tenth Circuit suggests, but rather the person who has suffered the most profound effects of a crime. The U.S. Supreme Court has not accepted the Tenth Circuit's characterization that a crime is committed only against the community as a whole and not the victim in particular. In *Calderon v. Thompson*, the Supreme Court noted "the 'powerful and legitimate interest in punishing the guilty' [in capital cases], *an*

[130] *Id.* at 122.

[131] *See, e.g.,* Murphy v. State, 47 P.3d 876, 885 (Okla. Crim. App. 2002); Turrentine v. State, 965 P.2d 955 (Okla. Crim. App. 1998), *cert. denied*, 525 U.S. 1057 (1998); Conover v. State, 933 P.2d 904, 920 (Okla. Crim. App. 1997) (holding that *Payne* "implicitly overruled that portion of *Booth* regarding characterizations of the defendant and opinions of the sentence").

[132] *See, e.g., Murphy,* 47 P.3d at 885.

[133] *Conover*, 933 P.2d at 920.

[134] *See Turrentine,* 965 P.2d at 955; Young v. State, 12 P.3d 20 (Okla. Crim. App. 2000), *cert. denied*, 532 U.S. 1055 (2001).

[135] *See, e.g.*, Witter v. State, 921 P.2d 886, 896 (Nev. 1996).

[136] 829 F.2d 1501, 1505 (10th Cir. 1992).

[137] *Id*. at 1505.

interest shared by the State and the victims of crime alike."[138] Allowing the victim to opine in no way interferes with the jury's performance of its duty. The victim has a voice, not a veto.

Another instance of a court disallowing a victim to suggest a sentence is the Arizona case of *Lynn v. Reinstein*,[139] in which Duane Lynn, husband of the Nyla Lynn, one of the murdered victims, wanted to ask the jury for life imprisonment and not the death penalty. Arizona law specifically afforded a defendant a right of allocution during the penalty phase of a capital trial.[140] This right of allocution permitted not only the defendant, but also his family, to recommend a sentence to the jury.[141] However, the Arizona Supreme Court held that "the Eighth Amendment to the United States Constitution prohibits a victim from making a sentencing recommendation to the jury in a capital case," even when the recommendation would be for life and not death. In contrast to the Oklahoma courts, Arizona Supreme Court ruled that "*Payne* did not overrule and indeed left intact that portion of *Booth* that the Court itself has characterized as prohibiting victims from recommending a sentence in a capital case."[142]

Even though the Supreme Court refused to take up Duane Lynn's case,[143] nothing in the text of the Eighth Amendment or the history of its interpretation by American courts of law supports the conclusion reached by the Arizona Supreme Court that "the Eighth Amendment to the United States Constitution prohibits a victim from making a sentencing recommendation to the jury in a capital case." Again, the cornerstone of the *Payne* Court's decision to overrule *Booth* and *Gathers* was fairness—fairness to the victim and fairness in the administration of justice. The *per se* bar to victim impact statements erected by *Booth* "unfairly weighted the scales in a capital trial."[144]

Furthermore, the *Payne* Court has provided answers to legitimate concerns that a victim could make a sentencing recommendation that will give the victim an undue emotional influence over the jury. Although, as a general proposition, "it [is] desirable for the jury to have as much information before it as possible when it makes the sentencing decision,"[145] there are still limitations under the U.S. Constitution that protect the defendant. As stated in *Payne*, a statement

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[138] 523 U.S. 538, 556 (1998) (quoting Herrera v. Collins, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring) (emphasis added).

[139] 68 P.3d 412 (Ariz. 2003), *cert. denied*, 540 U.S. 1141 (2004).

[140] *See* ARIZ. CONST. art. II, § 2.1(4).

[141] *See* State v. Gonzales, 892 P.2d 838, 851 (Ariz. 1995) (permitting statement from family members that they "would continue a relationship with [defendant] if he were sentenced to prison instead of death"). *See also* Wayne A. Logan, *Opining On Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517, 545−46 (2000) ("[C]ourts regularly allow 'pleas for mercy' by defense witnesses. Allocution, when the capital defendant himself addresses the sentencing authority on the question of death, inevitably bears a close similarity as well.") (citations omitted).

[142] *Lynn*, 68 P.3d at 416.

[143] *See Lynn* 540 U.S. at 1141 (2004) (denying cert.).

[144] Payne v. Tennessee, 501 U.S. 808, 822 (1991).

[145] *Id.* at 821 (quoting Gregg v. Georgia, 428 U.S. 153, 203−04 (1976) (plurality opinion)).

cannot be "so unduly prejudicial that it renders the trial fundamentally unfair."[146] Any risk that a victim's sentencing recommendation to a capital jury would be unduly prejudicial is addressed by the evidentiary rules, under which "courts routinely exclude evidence that is unduly inflammatory," or by the Constitution's Due Process Clause.[147]

Still, a clear characteristic of the "evolving standards of decency that mark the progress of a maturing society"[148] is the recognition that victims, like defendants, should have a voice at sentencing. Indeed, research has not identified any court decision holding that the Constitution prohibits victims from recommending the appropriate sentence in non-capital cases; in those cases, the practice is routinely allowed. While "death is different," no salient differences distinguish capital and non-capital cases when it comes to the right of allocution. Absent a victim sentencing recommendation, a capital jury is left to speculate what the victim might think about the appropriate sentence. Such speculation invites error. The jury's speculation, fueled by the victim's silence, leads to the very arbitrariness condemned by the Supreme Court.

In short, while a relative of a victim of a murder, in most instances, can provide a statement at a sentencing proceeding concerning the impact of a crime on the victim's family, it remains to be seen whether a victim can suggest an appropriate sentence for a convicted criminal. There is nothing in the CVRA that denies the victim's right to make a sentence recommendation at a public sentencing proceeding. The CVRA, in fact, implicitly grants this right. Whether the CVRA results in victims recommending sentences in capital cases will eventually be decided by the Supreme Court. The CVRA promotes just such judicial resolution through victim standing and the special mandamus provisions.[149]

iv. Parole Hearings

Under the CVRA, victims have the right to attend public parole proceedings and to be heard at those proceedings. The importance of the victim's right to speak at parole proceedings is underscored by the Arizona case of *State ex rel. Hance v. Arizona Board of Pardons and Paroles*.[150] During debate of the CVRA on the Senate floor, this case was discussed to illustrate the importance of this right:

> [T]he woman [was] brutally raped and slashed and left to die [but] recovered. Her perpetrator was convicted and put into prison. He had a parole hearing and the parole board decided to release him prematurely. She got no notice of that. She got no opportunity to be present.[151]

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[146] *Id.* at 825.
[147] *Id.* at 831 (O'Connor, J., concurring).
[148] Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).
[149] See discussion *infra*.
[150] 875 P.2d 824 (Ariz. Ct. App. 1993).
[151] 150 CONG. REC. S4260 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

The action of the parole board violated the victim's state constitutional rights to notice of the proceeding, the right to be present, and the right to be heard. The victim, through the prosecuting attorney, filed a special action in the Arizona Court of Appeals challenging the board's action and seeking to reverse it and have the court order a new hearing. The court did precisely that. On the second hearing, the board denied parole to the rapist.

The right to be heard at parole hearings was equally important to Senator Feinstein. As she said during a debate on the crime victims' federal constitutional amendment:

> What really focused my attention on the need for greater protection of victims' rights was a particularly horrifying case in 1974, in San Francisco, when a man named Angelo Pavageau broke into the house of the Carlson family in Portero Hill. Pavageau tied Mr. Carlson to a chair, bludgeoning him to death with a hammer, a chopping block, and a ceramic vase. He then repeatedly raped Carlson's 24-year-old wife, breaking several of her bones. He slit her wrist, tried to strangle her with a telephone cord, and then, before fleeing, set the Carlson's home on fire—cowardly retreating into the night, leaving this family to burn up in flames. But Mrs. Carlson survived the fire. She courageously lived to testify against her attacker. But she has been forced to change her name and continues to live in fear that her attacker may, one day, be released. When I was Mayor of San Francisco, she called me several times to notify me that Pavageau was up for parole. Amazingly, it was up to Mrs. Carlson to find out when his parole hearings were. . . . I believe this case represents a travesty of justice—It just shouldn't have to be that way. I believe it should be the responsibility of the state to send a letter through the mail or make a phone call to let the victim know that her attacker is up for parole, and she should have the opportunity to testify at this hearing.[152]

Congress intends the CVRA's parole provision to be read expansively so that victims' rights are protected and enforced in court, as they were in Arizona, when violations occur.

e. The reasonable right to confer with the attorney for the government in the case.

This provision is taken from § 10606(b)(5) of the former VRRA. The scope of the "confer" right is still governed by the limited notice and information provisions of 42 U.S.C. § 10607(c), but also is expanded to include consultation in all criminal proceedings. This understanding is supported by the legislative history:

> Of course, in providing victim information or opinion it is important that the victim be able to confer with the prosecutor concerning a variety of matters and proceedings. Under (a)(5), the victim has a reasonable right to confer with the attorney for the government in the case. This right is intended to be expansive. For example, the victim has the right to confer

[152] 145 CONG. REC. S709 (daily ed. Jan. 19, 1999) (statement of Sen. Feinstein).

> with the government concerning any critical stage or disposition of the case. The right, however, it is not limited to these examples.[153]

However, the right to "consult" is different from a right to "command." As explained in the Congressional Record:

> This right to confer does not give the crime victim any right to direct the prosecution. Prosecutors should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions. Under this provision, victims are able to confer with the government's attorney about proceedings after charging. I would note that the right to confer does [not] impair the prosecutorial discretion of the Attorney General or any officer under his direction, as provided [in] (d)(6).[154]

f. The right to full and timely restitution as provided in law.

This provision expands prior law[155] by requiring "full and timely restitution as provided in law."[156] The award of restitution, which must be "as provided in law," is governed generally by the Mandatory Victims Restitution Act of 1996 (MVRA),[157] and the earlier Victim and Witness Protection Act of 1982.[158] The MVRA requires that a court enter a restitution order for each defendant[159] without regard to the defendant's economic circumstances in every case involving a conviction for certain enumerated offenses.[160]

The requirement of "full" is meant to embrace constructions of the MVRA accepted in cases like *United States v. Bedonie*.[161] As noted in the legislative history of the CVRA:

> This section provides the right to full and timely restitution as provided in law. We specifically intend to endorse the expansive definition of restitution given by Judge Cassell in *U.S. v. Bedonie* and *U.S. v. Serawop* in May 2004. This right, together with the other rights in the [A]ct to be

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153 150 CONG. Rec. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

154 *Id.*

155 42 U.S.C. § 10606(b)(6) (2004) ("The right to restitution.").

156 18 U.S.C. § 3771(a)(6) (2004).

157 Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, 110 Stat. 1227 (1996).

158 Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982).

159 There are some exceptions in mass victim cases or in cases where determining the amount of restitution would be so complicated as to unduly prolong sentencing.

160 A crime of violence as defined in 18 U.S.C. § 16 (2000) includes any offense against property under Title 18, or under certain provisions of the Controlled Substances Act, including crimes committed by fraud and deceit, crimes relating to tampering with consumer products and where an identifiable victim has suffered a physical injury or pecuniary loss (18 U.S.C. § 3663A(c)(1) (2004)), for past due child support (18 U.S.C. § 228 (1998)), sexual abuse (18 U.S.C. § 2248 (1994)), sexual exploitation and other child abuse (18 U.S.C. § 2259 (2000)), domestic violence (18 U.S.C. § 2246 (1998)) and telemarketing fraud (18 U.S.C. § 2327 (1994)).

161 317 F. Supp. 2d 1285 (D. Utah 2004) (imposing future lost wages in a case involving the death of the victim).

> heard and confer with the government's attorney in this [A]ct, means that existing restitution laws will be more effective.[162]

Whereas under previously discretionary statutes[163] and Title 15 fraud cases restitution was discretionary with the court, the CVRA makes restitution a victim's right. Because the victim has a right to restitution, discretion on this matter no longer exists.

g. The right to proceedings free from unreasonable delay.

Delay in the criminal justice system is, shall we say, getting old. The time it takes for a case to go to trial in the federal courts has more than doubled in the last twenty years, as has the time for a case to be disposed of by plea.[164] While the defendant has a constitutional right to a "speedy and public trial,"[165] the victim has no similar right and, therefore, no countervailing balance when the defendant in fact wants delay (as often occurs) and the government does not object. This lack of balance has resulted in a legal culture that accommodates, perhaps some would say indulges, delay to the detriment of the victim.

Implementing the victim's right to a speedy trial—the right to be free from unreasonable delay—has proven to be difficult. The case of Hal Bone of Phoenix, Arizona is instructive here. Hal Bone, the victim of an attempted robbery by a Phoenix gang member, had summoned the courage to report the offense and help the police track down the suspect so he could not hurt others. Hal was scheduled to testify against the defendant in January of 1996. He was murdered on Thanksgiving Day of 1995. The defendant and another member of the same gang murdered Hal so he could not testify.

Arizona, one of thirty-three states with a state constitutional amendment upholding victims' rights,[166] has one of the stronger state amendments. Three of its guarantees are the "rights" to due process, to a "speedy trial," and to a "prompt and final conclusion of the case after conviction."[167] Arizona victims even have standing to assert their rights in court.[168]

Unfortunately for Sally Goelzer and Jim Bone, Hal's sister and brother, these rights were hollow promises. The murderers' trial did not begin until

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[162] 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[163] *See* 18 U.S.C. § 3663 (2004)

[164] Administrative Office of the Courts, *U.S. District Court, Civil and Criminal Median Times (Month)-Filing to Disposition* (June 2004), *at* http://www.uscourts.gov/judicialfactsfigures/contents.html.

[165] U.S. CONST. amend. VI.

[166] ARIZ. CONST. art. II, § 2.1 (enacted and became effective November, 1990).

[167] ARIZ. CONST. art. II § 2.1(A). *But see* State *ex rel*. Napolitano v. Brown, 982 P.2d 815, 817 (Ariz. 1999) (holding that the referenced sub-section and paragraph "creates no right" for the victim. The case is shocking in the length it goes to eviscerate the guarantee of the state constitution, in order to protect the monopoly rulemaking authority that the Arizona Supreme Court has constructed for itself, only further demonstrating the need for a Federal amendment.).

[168] ARIZ. REV. STAT. § 13-4437(A) (1992) ("The victim has standing to seek an order or to bring a special action mandating that the victim be afforded any right or to challenge an order denying any right . . . .").

January of 1999, more than four years after their arrest. Continuances were constantly granted without notice to Jim and Sally, and without any consideration for their rights. The defendants were convicted of first degree murder, but by the late summer of 2000—more than a year after trial—they had not yet been sentenced. Again, despite the victims' state constitutional rights, continuances were granted without notice to them and without respecting their rights to be heard. Finally, the ordeal came to an end when the two murderers were sentenced in July and August of 2001,[169] more than five years after Hal's murder, and two-and-a-half years after the convictions.

The physical, emotional, and financial toll of these delays were considered in the drafting of the CVRA. As noted in the Congressional Record:

> This provision does not curtail the government's need for reasonable time to organize and prosecute its case. Nor is the provision intended to infringe on the defendant's due process right to prepare a defense. Too often, however, delays in criminal proceedings occur for the mere convenience of the parties and those delays reach beyond the time needed for defendant's due process or the government's need to prepare. The result of such delays is that victims cannot begin to put the criminal justice system behind them and they continue to be victimized. It is not right to hold crime victims under the stress and pressure of future court proceedings merely because it is convenient for the parties or the court.
>
> This provision 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.
>
> I would add that the 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. A central reason for these rights is to force a change in a criminal justice culture which has failed to focus on the legitimate interests of crime victims, a new focus on limiting unreasonable delays in the criminal process to accommodate the victim is a positive start.[170]

In determining what delay is "unreasonable," the courts can look to the precedents that exist which interpret a defendant's right to a speedy trial. These cases focus on such issues as the length of the delay, the reason for the delay, any assertion of a right to a speedy trial, and any prejudice to the defendant.[171] Courts will no doubt develop a similar approach for evaluating victims' claims. In developing such an approach, courts will undoubtedly recognize the purposes that the victim's right is designed to serve.[172]

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[169] State of Arizona v. Richard Steven Rivas III, CR 1995-011372 (Maricopa County) (Sentencing Aug. 24, 2001); State of Arizona v. James Anthony Sanchez, CR 1995-011372 (Maricopa County) (Sentencing July 9, 2001).

[170] 150 CONG. REC. S10911.

[171] *See* Barker v. Wingo, 407 U.S. 514, 530−33 (1972).

[172] *Cf. id*. at 532 (defendant's right to a speedy trial must be "assessed in the light of the interests of defendants which the speedy trial right was designed to protect.").

One court has already made reference to the right to be free from unreasonable delay in this manner. In *United States v. Eight Auto. with Fraudulently Obtained Ohio and New York State Div. of Motor Vehicle Titles*,[173] victims of a scheme to fraudulently resell wrecked cars that contained stolen parts moved to compel the government to return automobiles seized as evidence. Noting that it must balance the government's interest in preserving and examining potential evidence against the victim's interest in regaining use of property, the court held that under the facts at issue, the government should be given a reasonable opportunity to vindicate its evidentiary interest. In dicta, however, the court cited to the CVRA and noted the crime victim's enforceable right to proceedings free from delay by stating "if the government continues to take the position, implicit in their response to the instant motion, that the petitioners must await the conclusion of [a separate trial] to regain their car, then petitioners will have standing, independent of the government's, to intervene in the case to contest any 'unreasonable delay' of that trial."[174]

h. The right to be treated with fairness and with respect for the victim's dignity and privacy.

The legislative history is clear that these rights, which have been lying dormant in the former VRRA for almost 15 years, are intended to be expansive, enforceable, and not merely symbolic.

> 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. Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process.[175]

The right to be treated with fairness is found in the constitutions of eighteen states[176] often as a part of an express grant of due process. The concepts are inextricably linked; as the legislative history makes clear: "fairness includes the notion of due process." Fairness requires that victims be given notice and an opportunity to be heard. This right to fairness requires that the victim be given notice and the right to be heard, even at stages not specifically enumerated by § 3771(b) of the CVRA. Fairness requires, for example, that the victim be given the opportunity to be heard on the matter of a delay requested by the defendant, especially in light of the victim's right to proceedings free from unreasonable delay.

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[173] United States v. Eight Auto. with Fraudulently Obtained Ohio and Div. of Motor Vehicle Titles, 356 F. Supp. 2d 223 (D. E.D.N.Y. 2005).

[174] *Id*.

[175] *See* 150 CONG. REC. S10911.

[176] Alaska, Arizona, Connecticut, Idaho, Illinois, Indiana, Louisiana, Michigan, Mississippi, New Jersey, New Mexico, Ohio, Oklahoma, South Carolina, Texas, Utah, Virginia, and Wisconsin.

The right to be treated "with respect for the victim's dignity and privacy," may be applied in a variety of contexts and again, as a matter of fairness, should form the basis for additional opportunities for the victim to be heard, when those contexts arise in court. For example, a victim should be allowed to oppose a defense discovery request for the reproduction of child pornography, the release of personal records of the victim, or the release of personal identifying or locating information about the victim. The right to fairness, coupled with this right to "dignity and privacy," should allow the victim to file motions to seal those records and allow for restrictions on access to the victim's testimony.

2. *Rights Must Be "Afforded"*

The next section of the CVRA begins as follows: "In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)."[177]

This section is a clear congressional declaration that the rights established in section (a) are no longer aspirational, as they were under the former law, but are the command of the law. As explained in the Congressional Record:

> It is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process. This legislation is meant to ensure that cases like the McVeigh case, where victims of the Oklahoma City bombing were effectively denied the right to attend the trial and to avoid federal appeals courts from determining, as the Tenth Circuit Court of Appeals did, that victims had no standing to seek review of their right to attend the trial under the former victims' law that this bill replaces.[178]

Section (b) goes on to say: "Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding."[179] This language directs the court to use its best efforts to devise ways in which a victim, in the unlikely event of being excluded from the courtroom, may nevertheless observe the proceedings from a distance. The means may vary from location to location and might include closed circuit television, for example.

Section (b) of § 3771 of the CVRA concludes: "The reasons for any decision denying relief under this chapter shall be clearly stated on the record."[180] This provision will enable those in the legal community to ascertain in the future, whether the rights established in the CVRA are effective substitutes for constitutional rights. Without a body of jurisprudence under the new law, the hypothesis that statutes are sufficient could not be fully and fairly

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[177] 18 U.S.C. § 3771(b).

[178] 150 CONG. REC. S10911.

[179] 18 U.S.C. § 3771(b).

[180] *Id.*

tested. This section directs that records be made of the reasons for the denial of an asserted right. The record serves two functions: (1) it provides a basis for a review on mandamus and (2) it builds a record of construction that Congress can later evaluate. As noted in the Congressional Record:

This provision is critical because it is in the courts of this country that these rights will be asserted and it is the courts that will be responsible for enforcing them. Further, requiring a court to provide the reasons for denial of relief is necessary for effective appeal of such denial.[181]

3. Best Efforts To Accord Rights

a. GOVERNMENT—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).

This subsection, taken from the current law, no longer serves as a reason not to enforce the established rights,[182] but rather fulfills its original intent to raise the bar for government officials who so clearly are the keepers of the culture. Notice should be given to the fact that it applies not just to the Department of Justice, but to all "departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime."

b. ADVICE OF ATTORNEY—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).

Under the CVRA, victims may be represented by counsel at their expense to assert their rights in court. This section merely directs the government to advise victims of this right. As noted in the Congressional Record:

> [T]his provision requires that the government inform the victim that the victim can seek the advice of the attorney, such as from the legal clinics for crime victims contemplated under this law, such as the law clinics at Arizona State University and those supported by the National Crime Victim Law Institute at the Law School at Lewis and Clark College in Portland, Oregon. This is an important protection for crime victims because it ensures the independent and individual nature of their rights.[183]

c. NOTICE—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

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[181] 150 CONG. REC. S10911.
[182] *See* U.S. v. McVeigh, 153 F.3d 1166, 1176 (10th Cir. 1998).
[183] 150 CONG. REC. S10911.

Much was made during the debate over the constitutional amendment that the notice provisions might endanger the safety of certain victims of domestic violence or gang offenses on the theory that there may be times, however rare, when giving notice of the release of the offender will put the offender in harm's way.[184] This concern was addressed in Senate Joint Resolution 1, section 2 with an exceptions clause for "public safety" or "compelling necessity."[185] The same concern motivated the inclusion of this language in the CVRA. As was noted in the legislative history, the language:

> [L]imits the right to notice of release where such notice may endanger the safety of the person being released. There are cases, particularly in domestic violence cases, where there is danger posed by an intimate partner if the intimate partner is released. Such circumstances are not the norm, even in domestic violence cases as a category of cases. This exception should not be relied upon as an excuse to avoid notifying most victims.[186]

4. Enforcement and Limitations

a. 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).

This provision's simple yet profound directive—"[t]he crime victim . . . may assert the rights"—is the lynch-pin of the entire law, without which it would be as ineffective as the former VRRA. It gives the victim standing to defend his rights. As stated in the Record:

> This provision allows a crime victim to enter the criminal trial court during proceedings involving the crime against the victim, to stand with other counsel in the well of the court, and assert the rights provided by this bill. This provision ensures that crime victims have standing to be heard in trial courts so that they are heard at the very moment when their rights are at stake and this, in turn, forces the criminal justice system to be responsive to a victim's rights in a timely way. . . . The provision allows the crime victim's representative and the attorney for the government to go into a criminal trial court and assert the crime victim's rights. The inclusion of representatives and the government's attorney in the provision are important for a number of reasons. First, allowing a representative to assert a crime victim's rights ensures that where a crime victim is unable to assert the rights on his or her own for any reason, including incapacity, incompetence, minority, or death, those rights are not lost. The representative for the crime victim can assert the rights. Second, a crime victim may choose to enlist a private attorney to represent him or her in the criminal case—this provision allows that

[184] 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[185] S.J. Res. 1, § 2 108th Cong. (2003) ("These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity").

[186] 150 CONG. REC. S10911−12.

> attorney to enter an appearance on behalf of the victim in the criminal trial court and assert the victim's rights. The provision also recognizes that, at times, the government's attorney may be best situated to assert a crime victim's rights either because the crime victim is not available at a particular point in the trial or because, at times, the crime victim's interests coincide with those of the government and it makes sense for a single person to express those joined interests. Importantly, however, the provision does not mean that the government's attorney has the authority to compromise or co-opt a victim's right. Nor does the provision mean that by not asserting a victim's right the government's attorney has waived that right. The rights provided in this bill are personal to the individual crime victim and it is that crime victim that has the final word regarding which of the specific rights to assert and when. Waiver of any of the individual rights provided can only happen by the victim's affirmative waiver of that specific right. In sum, without the ability to enforce the rights in the criminal trial and appellate courts of this country any rights afforded are, at best, rhetoric. We are far past the point where lip service to victims' rights is acceptable. The enforcement provisions of this bill ensure that never again are victim's rights provided in word but not in reality.[187]

It must be noted again that the victim's right established here is independent of the government and that the victim exercises rights not through the prosecutor or the courts but rather as an independent participant. While the role of a "participant" may be legally distinguishable from that of a "party,"[188] participants are afforded the rights and the standing to assert them under the CVRA even if they are not parties to a case.

Section (d)(1) concludes: "A person accused of the crime may not obtain any form of relief under this chapter."[189] This part of the provision is intended simply to make explicit the rule that the defendant may not benefit from a denial of victims' rights. It "prevents the individual accused of the crime from distorting a right intended for the benefit of the individual victim into a weapon against justice."[190]

b. MULTIPLE CRIME VICTIMS—In a case where the court finds that the number of crime victims makes it impracticable 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.

When a crime has so many victims that it becomes impracticable to provide notice, or the right to be present, or the right to be heard, or even the right to restitution (presumably, in any case where a victim, even of a large group, can show a threat to safety, no exception would apply), the court may

[187] 150 CONG. REC. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[188] *See* Lynn v. Reinstein, 68 P.3d at 412 (Ariz. 2003), *cert. denied*, 540 U.S. 1141 (2004).

[189] 18 U.S.C. § 3771(d)(1) (2004).

[190] 150 CONG. REC. S10912.

provide for "a reasonable procedure" to protect the victim and yet not undermine the fair administration of justice. This was the meaning behind the exceptions clause in Senate Joint Resolution 1 section 2, which allowed for exceptions to be "dictated by a substantial interest in . . . the administration of criminal justice." As the legislative history of the CVRA makes clear, Congress understood the need for this limited exception:

> [I]t is an unfortunate reality that in today's world there are crimes that result in multiple victims. The reality of those situations is that a court may find that the sheer number of victims is so large that it is impracticable to accord each victim the rights in this bill. The bill allows that when the court makes that finding on the record the court must then fashion a procedure that still gives effect to the bill and yet takes into account the impracticability. For instance, in the Oklahoma City bombing case the number of victims was tremendous and attendance at any one proceeding by all of them was impracticable so the court fashioned a procedure that allowed victims to attend the proceedings by close circuit television. This is merely one example. Another may be to allow victims with a right to speak to be heard in writing or through other methods. Importantly, courts must seek to identify methods that fit the case before that to ensure that despite the high number of crime victims, the rights in this bill are given effect. It is a tragic reality that cases may involve multiple victims and yet that fact is not grounds for eviscerating the rights in this bill. Rather, that fact is grounds for the court to find an alternative procedure to give effect to this bill.[191]

c. MOTION FOR RELIEF AND WRIT OF MANDAMUS—The rights described in subsection (a) 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 or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith 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.

The statute sets up the following procedure for enforcement of the rights established:

1. The victim, either directly, through the government prosecutor, or through the victim's counsel, asserts in the district court, a right established in the CVRA. This may be done in open court or in a pleading.

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191 *Id.*

2. The court must "ensure that the crime victim is afforded the rights," and must "take up and decide any motion asserting a victim's right forthwith."[192]

3. "If the district court denies the relief sought," it must "clearly state on the record" the court's "reasons for any decision denying relief."[193]

4. Either the victim or counsel may (immediately) petition the court of appeals for a writ of mandamus. The petition should state the statutory basis for the writ, the right asserted, should attach the written decision of the district court denying the right or the relief sought, and should request specific relief, supported by a memorandum. The format for a mandamus petition is set forth in FRAP 21(a)(2)(A).

5. Under FRAP 21(b), no answer to a petition for mandamus may be filed unless ordered by the court. Given the time constraints under the CVRA, the court will have to address each case and fashion appropriate time frames if a responsive pleading is to be filed.

6. Within 72 hours, the court of appeals "shall take up and decide [the] application."

7. In the meantime, proceedings should not be stayed or continued for more than five days.

8. The court of appeals may hear argument on the petition.

9. If the court of appeals denies the relief sought, it must clearly state its reasons "on the record in a written opinion."

Through its mandamus jurisdiction, the court of appeals compels the district court to "exercise its authority when it is its duty to do so."[194] In other contexts, the mandamus remedy is an extraordinary and discretionary remedy. The CVRA alters this general rule and mandates that the writs be "take[n] up and decide[d]." This is consistent with the CVRA's goal of testing the rights established and creating a body of case law construing them. This was the explicit intent of Congress:

> This subsection provides that a crime victim who is denied any of his or her rights as a crime victim has standing to seek appellate review of that denial. Specifically, the provision allows a crime victim to apply for a writ of mandamus to the appropriate appellate court. The provision provides that court shall take the writ and shall order the relief necessary to protect the crime victim's right. This provision is critical for a couple

[192] 18 U.S.C. § 3771.
[193] 18 U.S.C. § 3771(d)(3).
[194] Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

> 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.
>
> Without the right to seek appellate review and a guarantee that the appellate court will hear the appeal and order relief, a victim is left to the mercy of the very trial court that may have erred. This country's appellate courts are designed to remedy errors of lower courts and this provision requires them to do so for victim's rights. 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. It is the clear intent and expectation of Congress that the district and appellate courts will establish procedures that will allow for a prompt adjudication of any issues regarding the assertion of a victim's right, while giving meaning to the rights we establish.[195]

d. ERROR—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.

Victims' rights issues have, in the past, been difficult to get before the appellate courts. This provision is designed to facilitate the development of a victims' rights jurisprudence by allowing the government to raise on appeal questions of victims' rights interpretation and enforcement. This section:

> [A]lso provides an enforcement mechanism. This section provides that in any appeal, regardless of the party initiating the appeal, the government can assert as error the district court's denial of a crime victim's right. This subsection is important for a couple of reasons. First, it allows the government to assert a victim's right on appeal even when it is the defendant who seeks appeal of his or her conviction. This ensures that victims' rights are protected throughout the criminal justice process and that they do not fall by the wayside during what can often be an extended appeal that the victim is not a party to.[196]

e. LIMITATION ON RELIEF—In no case shall a failure to afford a right under this chapter provide grounds for a new trial.

The provision was initially in the House version.[197] The CVRA contains this language as well.[198] Considerations of double jeopardy and finality of

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[195] 150 CONG. REC. S10912.
[196] *Id*.
[197] H.R. 5107.
[198] 18 U.S.C. § 3771(d)(5).

judgments govern the relief that may be sought if a right was denied to the victim during the trial and no immediate relief was sought through *mandamus*.

This subsection of the CVRA goes on to state the following:

> 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.

Implicit in this subsection is the authority for the victim to file motions to vacate proceedings that are held in derogation of victims' rights and to seek reconsideration of the decisions made, with only limited exceptions. This provision is not intended to prevent courts from vacating decisions in non-trial proceedings—such as proceedings involving release, delay, pleas, or sentencing proceedings—in which victims' rights were not protected, and ordering those proceedings to be redone. It is important for victims' rights to be asserted and protected throughout the criminal justice process, and for courts to have the authority to redo proceedings such as release, delay, pleas, and sentencing proceedings where victims' rights are abridged.[199] For plea and sentencing proceedings to be re-opened these conditions must be met:

> 1. The victim must have asserted the right at issue before or during the proceeding. This condition will be satisfied upon the filing of a notice of appearance and a notice of assertion of rights in the victim's case;
>
> 2. The victim has sought enforcement of the right in the district court, been denied, and sought relief through the mandamus procedure in the court of appeals within ten days; and
>
> 3. In the case of a plea the defendant "has not pled to the highest offense charged."

f. 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.

Victims do not seek enforcement of their rights through collateral civil actions for damages. Subsection (6) concludes: "Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction."[200] This language was added to make it clear, as

[199] 150 CONG. REC. S10912.
[200] 18 U.S.C. § 3771(d)(6).

indeed it is in the text elsewhere, that nothing in the CVRA gives the victim the right to control either the prosecutor or the case. The statute gives to victims a voice, not a veto.

IV. CONCLUSION

The remaining portions of the CVRA require the Department of Justice to establish internal mechanisms that will ensure faithful attention to victims' rights by department employees, authorize the appropriation of funds for victims' rights enforcement, and require that the GAO and the Administrative Office of the Courts study the impact of the new law. Principal among the appropriation authorizations is funding for legal clinics to provide victims with access to legal representation for the purpose of enforcing their rights.

Whether the CVRA has the power to change the legal culture in the United States will soon be known as the case law develops. A watchful Congress, indeed a watchful nation, will monitor the law as it unfolds. And Gary and Collene Campbell, Vince and Roberta Roper, Bob and Pat Preston, John and Patsy Gillis, and Duane Lynn will also be watching.

APPENDIX

JUSTICE FOR ALL ACT OF 2004

TITLE I—SCOTT CAMPBELL, STEPHANIE ROPER, WENDY PRESTON, LOUARNA GILLIS, AND NILA LYNN CRIME VICTIMS' RIGHTS ACT

SEC. 101. SHORT TITLE.

This title may be cited as the "Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act".

SEC. 102. CRIME VICTIMS' RIGHTS.

(a) Amendment to Title 18—Part II of title 18, United States Code, is amended by adding at the end the following:

"CHAPTER 237—CRIME VICTIMS' RIGHTS

"Sec.

"3771. Crime victims' rights.

§ 3771. Crime victims' rights

"(a) RIGHTS OF CRIME VICTIMS.—A crime victim has the following rights:

"(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.

"(b) RIGHTS AFFORDED.—In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The

reasons for any decision denying relief under this chapter shall be clearly stated on the record.

"(c) BEST EFFORTS TO ACCORD RIGHTS.—

"(1) GOVERNMENT.—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).

"(2) ADVICE OF ATTORNEY.—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).

"(3) NOTICE.—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

"(d) ENFORCEMENT AND LIMITATIONS.—

"(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). A person accused of the crime may not obtain any form of relief under this chapter.

"(2) MULTIPLE CRIME VICTIMS.—In a case where the court finds that the number of crime victims makes it impracticable 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.

"(3) MOTION FOR RELIEF AND WRIT OF MANDAMUS.—The rights described in subsection (a) 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 or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith 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.

"(4) ERROR.—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.

"(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.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

"(6) 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. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

"(e) DEFINITIONS.—For the purposes of this chapter, the 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 representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

"(f) PROCEDURES TO PROMOTE COMPLIANCE.—

"(1) REGULATIONS—Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall 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.

"(2) CONTENTS.—The regulations promulgated under paragraph (1) shall—

"(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

"(B) 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, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

"(C) 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; and

"(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.

(b) TABLE OF CHAPTERS.—The table of chapters for part II of title 18, United States Code, is amended by inserting at the end the following:

"237. Crime victim's rights ....3771.

(c) REPEAL.—Section 502 of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10606) is repealed.

SEC. 103. INCREASED RESOURCES FOR ENFORCEMENT OF CRIME VICTIMS' RIGHTS.

(a) CRIME VICTIMS LEGAL ASSISTANCE GRANTS.—The Victims of Crime Act of 1984 (42 U.S.C. 10601 et seq.) is amended by inserting after section 1404C the following:

"SEC. 1404D. CRIME VICTIMS LEGAL ASSISTANCE GRANTS.

"(a) In General—The Director may make grants as provided in section 1404(c)(1)(A) to State, tribal, and local prosecutors' offices, law enforcement agencies, courts, jails, and correctional institutions, and to qualified public and private entities, to develop, establish, and maintain programs for the enforcement of crime victims' rights as provided in law.

"(b) PROHIBITION.—Grant amounts under this section may not be used to bring a cause of action for damages.

"(c) FALSE CLAIMS ACT.—Notwithstanding any other provision of law, amounts collected pursuant to sections 3729 through 3731 of title 31, United States Code (commonly known as the 'False Claims Act'), may be used for grants under this section, subject to appropriation.

(b) AUTHORIZATION OF APPROPRIATIONS.—In addition to funds made available under section 1402(d) of the Victims of Crime Act of 1984, there are authorized to be appropriated to carry out this title—

(1) $2,000,000 for fiscal year 2005 and $5,000,000 for each of fiscal years 2006, 2007, 2008, and 2009 to United States Attorneys Offices for Victim/Witnesses Assistance Programs;

(2) $2,000,000 for fiscal year 2005 and $5,000,000 in each of the fiscal years 2006, 2007, 2008, and 2009, to the Office for 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, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice for staff to administer the appropriation for the support of organizations as designated under paragraph (4);

(4) $7,000,000 for fiscal year 2005 and $11,000,000 for each of the fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice, for the support of organizations 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 chapter 237 of title 18, United States Code; and

(5) $5,000,000 for fiscal year 2005 and $7,000,000 for each of fiscal years 2006, 2007, 2008, and 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.

(C) INCREASED RESOURCES TO DEVELOP STATE-OF-THE-ART SYSTEMS FOR NOTIFYING CRIME VICTIMS OF IMPORTANT DATES AND DEVELOPMENTS—The Victims of Crime Act of 1984 (42 U.S.C. 10601 et seq.) is amended by inserting after section 1404D the following:

"SEC. 1404E. CRIME VICTIMS NOTIFICATION GRANTS.

(a) IN GENERAL—The Director may make grants as provided in section 1404(c)(1)(A) 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 relating to the criminal proceedings at issue in a timely and efficient manner, provided that the jurisdiction has laws substantially equivalent to the provisions of chapter 237 of title 18, United States Code.

(b) INTEGRATION OF SYSTEMS—Systems developed and implemented under this section may be integrated with existing case management systems operated by the recipient of the grant.

(c) AUTHORIZATION OF APPROPRIATIONS.—In addition to funds made available under section 1402(d), there are authorized to be appropriated to carry out this section—

(1) $5,000,000 for fiscal year 2005; and

(2) $5,000,000 for each of the fiscal years 2006, 2007, 2008, and 2009.

(d) FALSE CLAIMS ACT—Notwithstanding any other provision of law, amounts collected pursuant to sections 3729 through 3731 of title 31, United States Code (commonly known as the 'False Claims Act'), may be used for grants under this section, subject to appropriation.

SEC. 104. REPORTS.

(a) Administrative Office of the United States Courts—Not later than 1 year after the date of enactment of this Act and annually thereafter, the Administrative Office of the United States Courts, for each Federal court, shall report to Congress the number of times that a right established in chapter 237 of title 18, United States Code, is asserted in a criminal case and the relief requested is denied and, with respect to each such denial, the reason for such denial, as well as the number of times a mandamus action is brought pursuant to chapter 237 of title 18, and the result reached.

(b) GOVERNMENT ACCOUNTABILITY OFFICE.—

(1) STUDY.—The Comptroller General shall conduct a study that evaluates the effect and efficacy of the implementation of the amendments made by this title on the treatment of crime victims in the Federal system.

(2) REPORT.—Not later than 4 years after the date of enactment of this Act, the Comptroller General shall prepare and submit to the appropriate committees a report containing the results of the study conducted under subsection (a).