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Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act

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Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act

*Paul G. Cassell**

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I. INTRODUCTION

Crime victims are virtually absent from the Federal Rules of Criminal Procedure. The sixty federal rules comprehensively cover every aspect of federal criminal proceedings—from initial appearance through preliminary hearing, arraignment, acceptance of pleas, trial, and sentencing. Yet the rules substantively mention victims only once, briefly recognizing the right of some victims to speak at sentencing.¹

The federal rules can no longer leave victims unmentioned. In October 2004, Congress passed and President Bush signed into law the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act (CVRA).² The CVRA transforms crime victims into participants in the criminal justice process by (among other things) guaranteeing them notice of court hearings, the right to attend those hearings, and the opportunity to testify at appropriate points in the process. These new victims' rights will reshape the federal criminal justice system and force significant changes to the Federal Rules of Criminal Procedure to reflect the victim's expanded role. This Article offers comprehensive proposals for changing the federal rules to both implement the CVRA and reflect sound public policy. The CVRA dictates changes like these to the Federal Rules of Criminal Procedure because only by integrating victims into the federal rules will Congress's goal of making victims participants in the process be fully realized.

This Article is divided into five parts. Following this introduction, Part II reviews the current absence of victims from the federal rules. Surprisingly, even where the rules cover issues of great concern to victims, victims somehow go unmentioned. Part II then discusses the crime victims' rights movement and concludes with a brief sketch of the events leading to the CVRA's enactment.

1. See FED. R. CRIM. P. 32(i)(4)(B); discussion *infra* note 3 and accompanying text.

2. Crime Victims' Rights Act, Pub. L. No. 108-405, 118 Stat. 2261 (2004) (codified at 18 U.S.C.A. § 3771 (West 2004 & Supp. 2005)). The CVRA was part of a much larger piece of legislation that addressed a variety of subjects, known as the "Justice for All Act." See generally Steven J. Twist, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. (forthcoming 2005).

Part III discusses why it is necessary to amend the federal criminal rules to incorporate victims. Although the CVRA is a federal statute that automatically trumps any conflicting procedural rule, procedural rules drive day-to-day courtroom practices. Given that Congress was particularly concerned about integrating victims into the fabric of the criminal justice system, the Advisory Committee on Criminal Rules should amend the rules to directly reflect the CVRA's requirements.

Part IV provides a rule-by-rule analysis of the changes needed in the Federal Rules of Criminal Procedure to implement the CVRA. Of particular importance is new language protecting crime victims' rights to be notified of and to be present and heard at public criminal proceedings. Congress should also implement the right to notice in a new rule mandating that prosecutors keep victims apprised of criminal proceedings. In addition, the rules should also reflect victims' rights to attend court proceedings and to testify at bail, plea, and sentencing hearings. Part IV also discusses other significant changes needed to conform the rules to the CVRA: defining "victim," giving victims notice before confidential information is subpoenaed, allowing victims to be heard before cases are transferred to remote districts, giving victims access to relevant parts of the pre-sentence report, permitting courts to appoint counsel for victims, and protecting the victim's right to proceedings free from unreasonable delay. Part V contains a brief conclusion.

II. THE MISSING VICTIMS OF CRIMES

Crime victims are absent from the Federal Rules of Criminal Procedure. Yet this is not because victims lack vital interests in criminal cases. As the CVRA recognizes, victims have vital concerns throughout the criminal process. This section recounts the absence of victims from the federal criminal rules, then contrasts that absence with the aims of the victims' rights movement. The movement has argued successfully before state legislatures and Congress for the recognition of crime victims' rights—with these efforts culminating in the passage of the CVRA, protecting crime victims' rights in the federal system.

A. The Victim's Absence from the Current Federal Criminal Rules

The sixty Federal Rules of Criminal Procedure provide the architecture for the entire federal criminal court process, including initial appearance, preliminary hearing, arraignment, acceptance of pleas, trial, and sentencing. One would expect that the rules would frequently mention crime victims, given the subjects—such as bail, scheduling, and restitution—that directly concern victims. Yet amazingly, the current rules substantively use the word “victim” only a single time.

The single direct reference to victims is Rule 32(i)(4)(B), which directs that before imposing a sentence, “the court must address any victim of a crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence.”³ The word “victim” appears in passing in only two other rules: Rule 12.4 requires the government to disclose to the court any organizational “victim,”⁴ and the heading of Rule 38(e) mentions “Restitution” and “Notice to Victims,” but the text of the rule does not contain the term “victim.”⁵

Victims deserve far more than the single reference in Rule 32. While later parts of this Article work through the rules section-by-section to illustrate where victims have been unfairly ignored,⁶ a few examples here will prove the point. The rules currently fail to give victims any right to be heard regarding whether a judge should accept a plea, even though the judge must evaluate the public interest in deciding whether to do so.⁷ The rules fail to require notice to victims before their confidential information is subpoenaed from third parties—such as schools or medical providers—even though victims have compelling privacy interests to protect.⁸ And the rules do not protect the victim’s right to attend trials, despite

3. FED. R. CRIM. P. 32(i)(4)(B).

4. *Id.* at 12.4(a)(2).

5. *Id.* at 38(e) (mentioning “victim” in the heading of the rule).

6. *See* discussion *infra* Part IV.

7. *See* FED. R. CRIM. P. 11; discussion *infra* notes 148–53 and accompanying text.

8. *See* FED. R. CRIM. P. 17; discussion *infra* notes 177–91, and accompanying text.

victims' long history of having at least some protected interest in observing trials and other proceedings.⁹

One provision conveniently encapsulates the surprising absence of victims from the rules: Rule 32(d)(2)(B). The drafters of this rule¹⁰ appear to have been so afraid to utter the word "victim" that they did not use the term even when describing the person harmed by a crime. Rule 32(d)(2)(B) directs that a presentence report contain "verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any *individual against whom the offense has been committed*."¹¹ The phrasing of this provision is striking for several reasons. It eschews the straightforward term "victim," preferring instead the obscuring phrase "individual against whom the offense has been committed." The provision also uses the responsibility-obscuring passive voice in describing the individual "against whom" the offense has been committed, leaving the reader to wonder who might have committed that offense (the defendant, perhaps?). Interestingly, the provision requires that information about the victim be "verified." Fair enough—until one realizes that the directly adjacent provision regarding information about the defendant lacks a similar verification requirement.¹² Why would information about the victim need to be verified while information about the defendant would not? Finally, the provision requires that victim information be stated in a "nonargumentative" style. Again, the adjacent defendant's provision contains no such direction.¹³ In short, even a rule that seemingly must mention victims—the rule dictating preparation of a presentence report describing the crime—manages to avoid mentioning the word.

B. The Victims' Rights Movement

That victims are missing from the Federal Rules of Criminal Procedure exemplifies their treatment in the modern American

9. See FED. R. CRIM. P. 43; discussion *infra* notes 269–300 and accompanying text.

10. To be clear, Congress, not the Advisory Committee on Criminal Law and Procedure, drafted the language of this rule. See Victims of Crime Act of 1984, Pub. L. No. 98-473, 98 Stat. 2014 (1984) (directly amending Rule 32).

11. FED. R. CRIM. P. 32(d)(2)(B) (emphasis added).

12. *Id.* at 32(d)(2)(A).

13. *Id.*

criminal justice system. As one commentator has described the situation, the victim is “seen at best as ‘the forgotten man’ of the system and, at worst, as being twice victimized, the second time by the very system to which he has turned for justice.”¹⁴ The absence of victims conflicts with “a public sense of justice keen enough that it has found voice in a nationwide victims’ rights movement.”¹⁵

The crime victims’ rights movement developed in the 1970s because of a perceived imbalance in the criminal justice system. Led by feminist and civil rights activists, victims’ advocates argued that the criminal justice system had become preoccupied with defendants’ rights to the exclusion of crime victims’ legitimate interests.¹⁶ These advocates urged reforms to give more attention to victims’ concerns, including protecting the victim’s right to be notified of court hearings, to attend those hearings, and to be heard at appropriate points in the process.

The victims’ rights movement received considerable impetus with the publication in 1982 of the Report of the President’s Task Force on Victims of Crime.¹⁷ The Task Force concluded that the criminal justice system “has lost an essential balance [T]he system has deprived the innocent, the honest, and the helpless of its protection The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed.”¹⁸ The Task Force advocated

14. William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 650 (1976).

15. *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (internal quotation marks omitted). See generally DOUGLAS EVAN BELOOF, PAUL G. CASSELL & STEVE J. TWIST, *VICTIMS IN CRIMINAL PROCEDURE* 29–37 (2005); Shirley S. Abrahamson, *Redefining Roles: The Victims’ Rights Movement*, 1985 UTAH L. REV. 517; Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 [hereinafter Beloof, *The Third Model of Criminal Process*]; Paul G. Cassell, *Balancing the Scales of Justice*, 1994 UTAH L. REV. 1373, 1380–82; Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 514 (1982); Erin Ana O’Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL’Y 229 (2005); William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT’L L. 37 (1996).

16. See generally BELOOF, CASSELL & TWIST, *supra* note 15, at ch. 1; Douglas E. Beloof, *The Third Wave of Crime Victims’ Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255 [hereinafter Beloof, *The Third Wave of Crime Victims’ Rights*]; Cassell, *supra* note 15, at 1381–82.

17. PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114 (1982).

18. *Id.*

multiple reforms. It recommended that prosecutors assume the responsibility for keeping victims notified of all court proceedings and bringing to the court's attention the victim's view on such subjects as bail, plea bargains, sentences, and restitution.¹⁹ The Task Force also urged that courts receive victim impact evidence at sentencing, order restitution in most cases, and allow victims and their families to attend trials even if they are also called as witnesses.²⁰ In its most sweeping recommendation, the Task Force proposed a federal constitutional amendment to protect crime victims. The Task Force proposed adding to the Sixth Amendment's protections for defendants' rights a provision allowing crime victims to be present and heard: "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."²¹

In the wake of that recommendation, crime victims' advocates considered how best to pursue a federal constitutional amendment that would protect victims' rights throughout the country. Recognizing the difficulty of obtaining the consensus required to amend the United States Constitution, advocates decided to go to the states first to pursue state victims' rights amendments. This "states-first" strategy²² met with considerable success. To date, some thirty states have adopted victims' rights amendments to their own state constitutions.²³ While these amendments take various forms, Arizona's amendment illustrates the types of rights typically protected. The Arizona constitutional provision gives victims the broad right to "be treated with fairness, respect, and dignity, and to

19. *Id.* at 63.

20. *Id.* at 72-73.

21. *Id.* at 114.

22. See S. REP. NO. 108-191, at 3 (2004), as reprinted in 2004 U.S.C.A.N.

23. ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, §§ 12, 28; COLO. CONST. art. II, § 16(a); 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. 15, § 15; LA. CONST. art. I, § 25; MD. DECL. OF RIGHTS art. 47; MICH. CONST. art. I, § 24; MISS. CONST. art. 3, § 26(A); MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28; NEV. CONST. art. I, § 8(2); N.J. CONST. art. I, § 22; N.M. CONST. art. 2, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10(a); OKLA. CONST. art. II, § 34; OR. CONST. art. I, §§ 42-43; 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, § 9(m). These amendments passed with overwhelming popular support.

be free from intimidation, harassment, or abuse, throughout the criminal justice process.”²⁴ It also specifically confers a right to “be present at, and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.”²⁵ The amendment further allows victims to be heard at bail, plea, and sentencing hearings.²⁶

The movement also successfully prodded the federal system to recognize victims’ rights. In 1982 Congress passed the first federal victims’ rights legislation, the Victim and Witness Protection Act (VWPA).²⁷ The VWPA had three primary goals: (1) to expand and protect the role of victims and witnesses in the criminal justice process; (2) to ensure that the federal government used all available resources to protect and assist victims without infringing defendants’ constitutional rights; and (3) to provide a model for state and local legislation.²⁸ Since passage of the VWPA, Congress has remained active in this area of the law, passing several acts further protecting victims’ rights, such as the Victims of Crime Act of 1984,²⁹ the Victims’ Rights and Restitution Act of 1990,³⁰ the Violent Crime Control and Law Enforcement Act of 1994,³¹ the Antiterrorism and Effective Death Penalty Act of 1996,³² and the Victim Rights Clarification Act of 1997.³³ Other federal statutes have been passed to deal with specialized victim situations such as child victims and witnesses.³⁴

24. ARIZ. CONST. art. II, § 2.1(A)(1).

25. *Id.* § 2.1(A)(3).

26. *Id.* § 2.1(A)(4).

27. Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended in scattered sections of 18 U.S.C.).

28. *Id.*

29. Pub. L. No. 98-473, 98 Stat. 2170 (1984) (codified as amended at 42 U.S.C. §§ 10601–03 (2000); 18 U.S.C. § 3013; *id.* § 3671).

30. Pub. L. No. 101-647, 104 Stat. 4820 (1990) (codified as amended at 42 U.S.C. §§ 10601, 10606–07).

31. Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of U.S.C.).

32. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of U.S.C.).

33. Pub. L. No. 105-6, 111 Stat. 12 (codified as amended at 18 U.S.C. § 3510).

34. *See, e.g.*, 18 U.S.C. § 3509 (protecting rights of child victim-witnesses); Pub. L. No. 101-647, 104 Stat. 4789 (1990).

These statutes spawned guidelines for how federal prosecutors should treat crime victims. The VWPA required the Attorney General to develop guidelines for the Department of Justice.³⁵ To implement this Act, the Attorney General developed guidelines designed to assist victims during the criminal justice process, mandating protocol, separate waiting areas at court, the prompt return of the victim's property, and victim training for law enforcement personnel.³⁶ The guidelines also directed that prosecutors notify victims about available services, major case events, consultations with the prosecutor, and the opportunity for consultation about the prosecution.³⁷ In 2000, Attorney General Reno updated and expanded the guidelines. The revised guidelines heightened the notification requirements, requiring prosecutors and law enforcement agents to notify victims of important criminal justice events and to confer with victims about important decisions in the process.³⁸

Among the federal victims' statutes, the Victims' Rights and Restitution Act of 1990 is noteworthy. This Act purported to create a comprehensive list of victims' rights in the federal criminal justice process. It commanded that "[a] crime victim has the following rights" and then listed various procedural rights, including the right to "be treated with fairness and with respect for the victim's dignity and privacy,"³⁹ to "be notified of court proceedings,"⁴⁰ to "confer with [the] attorney for the Government in the case,"⁴¹ and to attend court proceedings even if called as a witness.⁴² The statute also directed the Justice Department to make "its best efforts" to ensure

35. Victim and Witness Protection Act, Pub. L. No. 97-291, § 6(a), 96 Stat. 1248, 1252 (1982).

36. U.S. DEP'T OF JUSTICE, OFFICE OF THE ATT'Y GEN., ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (1995).

37. *Id.*

38. U.S. DEP'T OF JUSTICE, OFFICE OF THE ATT'Y GEN., ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 31-37 (2000) [hereinafter 2000 A.G. GUIDELINES]. The Guidelines were recently revised. *See* U.S. DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (2005) [hereinafter 2005 A.G. GUIDELINES].

39. 42 U.S.C. § 10606(b)(1) (repealed 2004).

40. *Id.* § 10606(b)(3) (repealed 2004).

41. *Id.* § 10606(b)(5) (repealed 2004).

42. *Id.* § 10606(b)(4) (repealed 2004). Testifying victims can attend proceedings unless the victim's testimony "would be materially affected" by hearing other testimony at trial. *Id.*

that victims' rights were protected.⁴³ Yet this federal statute never successfully integrated victims into the federal criminal justice process and instead became something of a dead letter. Because Congress passed the CVRA in 2004 to remedy the problems with the 1990 Act, a brief review of the law's shortcomings is valuable.

Curiously, the 1990 Victims' Rights and Restitution Act was codified in Title 42 of the United States Code—the Title dealing with “Public Health and Welfare.” Such placement effectively limited the Act's effectiveness because federal practitioners reflexively consult Title 18, the Title that covers “Crimes and Criminal Procedure,”⁴⁴ for guidance on criminal law issues. More prosaically, federal criminal enactments are bound together in a single West publication entitled the *Federal Criminal Code and Rules*. This publication is carried to court by prosecutors and defense attorneys and is on the desk of most federal judges. Because West Publishing never included the Victims' Rights Act in this book, the statute was essentially unknown even to experienced judges and attorneys.⁴⁵

The prime illustration of the ineffectiveness of the Victims' Rights and Restitution Act comes from the Oklahoma City bombing case.⁴⁶ While one might expect victims' rights would have been fully protected during such a high profile trial, in fact victims were denied one fundamental right: the right to observe court proceedings. During a pretrial motion hearing, the district court *sua sponte* precluded any victim who wished to provide victim impact testimony at sentencing from observing proceedings in the case.⁴⁷ The court based its ruling on Rule 615 of the Federal Rules of Evidence—the so-called “Rule on Witnesses.”⁴⁸ Thirty-five victims and survivors of

43. *Id.* § 10606(a) (repealed 2004).

44. 18 U.S.C. (2000).

45. Last year, I wrote a letter to West Publishing requesting that they include the law in their book. That request became moot with the passage of the CVRA, which moved victims' rights from obscurity in Title 42 to centrality in Title 18, thereby guaranteeing them a spot in the West publication.

46. See generally Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 515–22 (discussing the Oklahoma City bombing case in greater detail).

47. See *United States v. McVeigh*, No. 96-CR-68, 1996 WL 366268, at *2 (D. Colo. June 26, 1996).

48. *Id.* at *2–3 (discussing application of FED. R. EVID. 615).

the bombing then filed a motion for reconsideration.⁴⁹ They noted that the district court apparently had overlooked the Victims' Rights Act giving victims 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."⁵⁰ The district court denied the motion for reconsideration.⁵¹ It concluded that victims present during court proceedings would not be able to separate the "experience of trial" from "the experience of loss from the conduct in question," and, thus, their testimony at a sentencing hearing would be inadmissible.⁵² Unlike the original ruling, which was explicitly premised on Rule 615, the later ruling was more ambiguous, alluding to concerns under the Constitution, the common law, and the rules of evidence.⁵³

The victims subsequently filed a petition for writ of mandamus in the U.S. Court of Appeals for the Tenth Circuit seeking review of the district court's ruling.⁵⁴ Three months later, a Tenth Circuit panel rejected the victims' claims.⁵⁵ The circuit found "a number of problems with the excluded witnesses' reliance on the Victims' Rights Act."⁵⁶ Indeed, the circuit found that the Act created no obligations for courts:

49. Motion of Marsha and Tom Kight et al. and the National Organization for Victim Assistance Asserting Standing To Raise Rights Under the Victims' Bill of Rights and Seeking Leave To File a Brief as *Amici Curiae*, United States v. McVeigh, No. 96-CR-68-M, 1996 WL 570841 (D. Colo. Sept. 30, 1996). I represented a number of the victims on this matter on a pro bono basis, along with able co-counsel Robert Hoyt, Arnon Siegel, and Karan Bhatia of the Washington, D.C. law firm of Wilmer, Cutler, and Pickering, and Sean Kendall of Boulder, Colorado.

50. 42 U.S.C. § 10606(b)(4) (1994) (repealed 2004). The victims also relied on a similar provision found in the authorization for closed circuit broadcasting of the trial, 42 U.S.C.A. § 10608(a) (West Supp. 1998), and on a First Amendment right of access to public court proceedings. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577 (1980) (finding First Amendment right of court access).

51. *McVeigh*, 1996 WL 366268 at *25.

52. *Id.* at *24.

53. See *id.*

54. Petition for Writ of Mandamus, Kight et al. v. Matsch, No. 96-1484 (10th Cir. Nov. 6, 1996) (on file with author).

55. *United States v. McVeigh*, 106 F.3d 325, 328 (10th Cir. 1997), *superseded by statute*, 18 U.S.C. § 3510.

56. *Id.* at 334-35.

The statute charily pledges only the “best efforts” of certain executive branch personnel to secure the rights listed. The district court judge, a judicial officer not bound in any way by this pledge, could not violate the Act. Indeed, the Act’s prescriptions were satisfied once the government made its arguments against sequestration—before the district court even ruled.⁵⁷

Efforts by both the victims and the Department of Justice to obtain a rehearing were unsuccessful,⁵⁸ despite the support of separate briefs urging such a rehearing from forty-nine members of Congress, all six Attorneys General in the Tenth Circuit, and some of the leading victims’ groups in the nation.⁵⁹

In the meantime, the victims, supported by the Oklahoma Attorney General’s Office, sought remedial legislation in Congress clearly providing that victims should not have to decide between testifying at sentencing or watching the trial. A bill was introduced to provide that watching a trial in a capital case does not constitute grounds for denying a victim the chance to provide an impact statement. In a matter of weeks, Congress passed the Victims Rights Clarification Act of 1997,⁶⁰ but even that specific statute failed to protect the bombing victims’ rights. The district court in the Oklahoma City case found that the statute had constitutional problems.⁶¹

Because of the difficulty accompanying the statutory protection of victims’ rights, victims advocates decided to press for a federal constitutional amendment. They argued that the statutory

57. *Id.* at 335 (internal citation omitted).

58. *See* Order, *United States v. McVeigh*, No. 96-1469, 1997 WL 128893, at *3 (10th Cir. Mar. 11, 1997).

59. *See* Brief for Amici Curiae Washington Legal Foundation and United States Senator Don Nickles and 48 Other Members of Congress, *United States v. McVeigh*, 106 F.3d 325 (10th Cir. Feb. 14, 1997) (No. 96-1469); Brief for Amici Curiae States of Oklahoma, Colorado, Kansas, New Mexico, Utah, and Wyoming Supporting the Suggestion for Rehearing and the Suggestion for Rehearing En Banc by the Oklahoma City Bombing Victims and the United States, *United States v. McVeigh*, 106 F.3d 325 (10th Cir. Feb. 14, 1997) (No. 96-1469); Brief for Amici Curiae National Victims Center, Mothers Against Drunk Driving, National Victims’ Constitutional Amendment Network, Justice for Surviving Victims, Inc., Concerns of Police Survivors, Inc., and Citizens for Law and Order, Inc., in Support of Rehearing, *United States v. McVeigh*, 106 F.3d 325 (10th Cir. Feb. 17, 1997) (No. 96-1469).

60. Pub. L. No. 105-6, 111 Stat. 12 (1997).

61. *See generally* Cassell, *supra* note 46, at 519–20 (recounting problems).

protections could not sufficiently guarantee victims' rights. In their view, such statutes "frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia."⁶² As the Justice Department reported:

[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, and many states have responded with state statutes and constitutional provisions that seek to guarantee victims' rights. 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.⁶³

To place victims' rights in the Constitution, victims advocates—led most prominently by the National Victims Constitutional Amendment Network⁶⁴—approached the President and Congress regarding a federal amendment.⁶⁵ On April 22, 1996, Senators Kyl and Feinstein with the backing of President Clinton introduced a federal victims' rights amendment.⁶⁶ The amendment was intended to "restore, preserve, and protect, as a matter of right for the victims of violent crimes, the practice of victim participation in the administration of criminal justice that was the birthright of every American at the founding of our Nation."⁶⁷ A companion resolution was introduced in the House of Representatives.⁶⁸ The proposed amendment embodied seven core principles: (1) the right to notice of proceedings, (2) the right to be present at the proceedings, (3) the right to be heard, (4) the right to notice of the defendant's

62. Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.

63. *Focusing on the Administration of Justice and the Enforcement of Laws: Dep't of Justice Oversight Hearing Before the S. Judiciary Comm.*, 104th Cong. 23-24 (1997) (statement of Janet Reno, Att'y Gen. of the United States).

64. See <http://www.nvcan.org>. See generally Twist, *supra* note 2.

65. For a comprehensive history of victims' efforts to pass a constitutional amendment, see Twist, *supra* note 2.

66. S.J. Res. 52, 104th Cong., 2d Sess. (1996).

67. S. REP. NO. 108-191, at 1-2 (2003); see also S. REP. NO. 106-254 (2000).

68. H.R.J. Res. 174, 104th Cong., 2d Sess. (1996).

release or escape, (5) the right to restitution, (6) the right to a speedy trial, and (7) the right to reasonable protection. In a later resolution, an eighth principle was added: the right to standing to enforce these rights.⁶⁹ The 104th Congress did not pass the amendment.

On January 21, 1997, the opening day of the first session of the 105th Congress, Senators Kyl and Feinstein reintroduced the victims' rights amendment.⁷⁰ A series of hearings were held that year in both the House and the Senate.⁷¹ Kyl and Feinstein reintroduced the amendment the following year.⁷² The Senate Judiciary Committee held hearings⁷³ and passed the proposed amendment out of committee.⁷⁴ Yet again, the full Senate did not consider the amendment.

In 1999, Senators Kyl and Feinstein again proposed the amendment,⁷⁵ and on September 30, 1999, the Judiciary Committee voted, as before, to send the amendment to the full Senate.⁷⁶ But on April 27, 2000, after three days of floor debate, the amendment was shelved when it became clear that its opponents, who objected to constitutionalizing victims' rights, possessed the necessary votes to sustain a filibuster.⁷⁷ At the same time, hearings on the companion measure were held in the House.⁷⁸

Discussions about the Amendment began again soon after the 2000 presidential elections. On April 15, 2002, Senators Kyl and Feinstein reintroduced the Amendment in the Senate,⁷⁹ and the following day, President Bush announced his support.⁸⁰ On May 1,

69. See S.J. Res. 65, 104th Cong., 2d Sess. (1996).

70. S.J. Res. 6, 105th Cong., 1st Sess. (1997).

71. See, e.g., *Victims' Rights Amendment: Hearings Before the Sen. Judiciary Comm.*, 105th Cong., 2d Sess. (1997).

72. S.J. Res. 44, 105th Cong., 2d Sess. (1998).

73. *Victim's Rights Amendment: Hearings Before the Sen. Judiciary Comm.*, 105th Congress (1998).

74. See 144 CONG. REC. S11,010 (daily ed. Sept. 28, 1998) (statement of Sen. Kyl).

75. S.J. Res. 3, 106th Cong., 1st Sess. (1999).

76. 146 CONG. REC. S2966 (daily ed. Apr. 27, 2000).

77. See *id.*

78. H.R.J. Res. 64, 106th Cong., 1st Sess. (2002).

79. S.J. Res. 35, 107th Cong., 2d Sess. (2002).

80. 149 CONG. REC. S82 (daily ed. Jan. 7, 2003) (statement of Sen. Kyl).

2002, a companion measure was proposed in the House.⁸¹ On January 7, 2003, Senators Kyl and Feinstein proposed the amendment as Senate Judiciary Resolution 1. The Senate Judiciary Committee held hearings in April of that year,⁸² followed by a written report supporting the Amendment.⁸³ Shortly thereafter, a motion to proceed to consideration of the measure was withdrawn when proponents determined they did not have the sixty-seven votes necessary to pass the amendment. After it became clear that the necessary super-majority votes to amend the Constitution were not attainable, victims' advocates turned their attention to enacting a comprehensive victims' rights statute.

C. The Crime Victims' Rights Act

The Crime Victims' Rights Act ultimately resulted from a decision by the victims' movement to seek a more comprehensive and enforceable federal statute rather than to continue pursuing the more ambitious goal of a federal constitutional amendment. In April 2004, victims advocates met with Senators Kyl and Feinstein to decide whether to push yet again for a federal constitutional amendment. Conceding that the amendment had only majority support in Congress rather than the necessary super-majority, the advocates decided to press for a far-reaching federal statute protecting victims' rights in the federal criminal justice system.⁸⁴ In exchange for backing off from the federal amendment in the short term, victims' advocates received near-universal congressional support for a "broad and encompassing" statutory victims' bill of rights.⁸⁵ This new approach not only established a string of victims' rights but also provided funding for victims' legal services and created remedies for the violation of victims' rights.⁸⁶ The victims'

81. H.R.J. Res. 91, 107th Cong., 2d Sess. (2002).

82. *A Proposed Constitutional Amendment To Protect Crime Victims: Hearing on S.J. Res. 1 Before the S. Judiciary Comm.*, 108th Congress, 108-189 (2003).

83. S. REP. NO. 108-191 (2003).

84. *See* Twist, *supra* note 2.

85. 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

86. *Id.* at S4263 (statement of Sen. Feinstein).

movement is currently evaluating the success of the statute before deciding whether to continue pushing for a federal amendment.⁸⁷

The Crime Victims' Rights Act gives victims "the right to participate in the system."⁸⁸ To facilitate such participation, the Act grants victims eight specific 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.⁸⁹

Rather than relying merely on the "best efforts" of prosecutors to vindicate rights, the CVRA also contains specific enforcement

87. *Id.* (statement of Sen. Feinstein); *see also* Att'y Gen. Alberto R. Gonzales, Prepared Remarks at the Hoover Inst. Bd. of Overseers Conference (Feb. 28, 2005) (indicating that a federal victims' rights amendment remains a priority for President Bush), *available at* http://www.usdoj.gov/ag/speeches/2005/02282005_agremarkshov.htm.

88. 150 CONG. REC. S4263 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). For a description of victim participation, see Beloof, *The Third Model of Criminal Process*, *supra* note 15.

89. 18 U.S.C.A. § 3771(a) (West 2004 & Supp. 2005).

mechanisms.⁹⁰ Most importantly, it directly gives victims standing to assert their rights, addressing a flaw in the earlier enactment.⁹¹ The Act provides that rights can be “assert[ed]” by “[t]he crime victim, the crime victim’s lawful representative, and the attorney for the Government.”⁹² The victim or the government may appeal any denial of a victim’s right through a writ of mandamus on an expedited basis.⁹³ The courts are also required to “ensure that the crime victim is afforded the rights” in the new law.⁹⁴

These changes were intended to make the victim “an independent participant in the proceedings.”⁹⁵ Congress desired to modify what it viewed as the unfair treatment of crime victims; in particular, congressional sponsors of the CVRA cited the Oklahoma City bombing case as the kind of decision that they intended the new law to overrule.⁹⁶

III. THE NEED TO PLACE VICTIMS’ RIGHTS IN THE RULES

With the CVRA in place as the law of the land, the Federal Rules of Criminal Procedure should be amended to conform to the statute. While one court has derisively referred to the Act as mere “mushy, feel good legislation,”⁹⁷ it in fact substantively changes the posture of crime victims on a whole host of issues. In the wake of the Act, victims now must be folded into the process through which federal courts conduct criminal cases, including bail, plea, trial, and sentencing hearings. The Federal Rules of Criminal Procedure—the “playbook” of the federal courts—should reflect this fact.

Some might agree that victims now have a number of new rights, but nonetheless dispute the need for a rules amendment. After all, it might be argued, the CVRA in fact creates substantive rights for crime victims. Because nothing in the federal procedural

90. *Id.* § 3771(d).

91. *Cf.* Beloof, *The Third Wave of Crime Victims’ Rights*, *supra* note 16 (identifying the lack of victim standing as a pervasive flaw in victims’ rights enactments).

92. 18 U.S.C.A. § 3771(d)(1).

93. *Id.* § 3771(d)(3).

94. *Id.* § 3771(b).

95. 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

96. *Id.* at S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

97. *United States v. Holland*, 380 F. Supp. 2d 1264, 1279 (N.D. Ala. 2005).

rules can modify substantive rights,⁹⁸ the CVRA will trump any conflicting provision in the federal rules.⁹⁹ In other words, the CVRA will automatically govern federal criminal proceedings even if the rules remain as written.

While this argument is legally precise, as a practical matter, compelling reasons justify amending the federal rules to include victims. Congress intended that the CVRA's new rights not be "simply words on paper," but rather "meaningful and functional" reforms.¹⁰⁰ To that end, Congress mandated that courts shall "ensure" that crime victims are "afforded the rights" conveyed by the CVRA.¹⁰¹ To effectively ensure that victims' rights are protected, these rights must become part of the warp and woof of the criminal process. That can occur only if the federal rules—the day-to-day operations manual of the courts—spell out how to integrate victims into the process.

Judges and practitioners frequently refer to the Federal Rules of Criminal Procedure for guidance as to how to conduct hearings. If victims' rights are left out of the federal rules, the strong possibility exists that courts may mistakenly disregard victims' rights under the CVRA. A good illustration comes from Rule 11, which spells out in some detail how judges should conduct a hearing accepting a plea. The judge is required to personally inform the defendant of certain specified rights and ensure that the defendant understands he will be waiving those rights.¹⁰² The judge must also determine that the defendant is voluntarily entering the plea and that there is a factual basis for the guilty plea.¹⁰³ Under the CVRA, victims now also have the right to be heard before the judge accepts any plea.¹⁰⁴ This is a new right,¹⁰⁵ which judges are not accustomed to administering. Unless the victim's right to be heard is specifically spelled out in Rule 11's plea procedures, some judges may inadvertently disregard it.

98. *See* 28 U.S.C. § 2072(b) (2000).

99. *See, e.g.*, Miguel v. Country Funding Corp., 309 F.3d 1161, 1165 (9th Cir. 2002).

100. 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

101. 18 U.S.C.A. § 3771(b) (West 2004 & Supp. 2005).

102. FED. R. CRIM. P. 11(b)(1).

103. *Id.* at 11(b)(2), (b)(3).

104. 18 U.S.C.A. § 3771(a)(4).

105. *Cf.* 42 U.S.C. 10606(b) (listing victims' rights; right to be heard at pleas not included) (repealed by 18 U.S.C. § 3771).

The Oklahoma City bombing case further demonstrates how courts sometimes blindly follow the federal rules without considering superseding statutes. In that case, the court excluded victim-witnesses from certain proceedings, relying solely on Federal Rule of Evidence 615 in making its determination. In denying the witnesses entrance to the proceedings, the court was apparently unaware of the provision in the Victims' Rights and Restitution Act protecting a victim's right to attend.¹⁰⁶ This deficiency was called to the attention of the Advisory Committee on the Federal Rules of Evidence.¹⁰⁷ The committee acknowledged the need to include victims in the evidence rules and later added a new provision reflecting the victim's right to attend.¹⁰⁸

One reason for including victims' rights in the rules is to avoid litigation about the negative inferences that might be drawn if victims' rights are not in the rules. It is a well-settled principle of statutory construction that *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of the other). This canon of construction applies to the federal rules as much as to statutes.¹⁰⁹ Because the rules repeatedly spell out situations in which the defendant has the right to have his interests considered but say nothing about victims, it might be argued that the rules have implicitly determined that a victim's interests are irrelevant. To return to the Rule 11 plea example, given that the criminal rules specify that a court must address the defendant but lack any comparable requirement for victims, it might be inferred that victims cannot speak at plea hearings. Any such conclusion would be contrary to the plain language of the CVRA.¹¹⁰ To avoid possible confusion, the rules should be clear on this point.

An additional reason for integrating victims into the federal rules is that Congress seemingly expects this to happen. Congress adopted the CVRA with the express goal of making the new law "a formula

106. See *supra* note 45 and accompanying text.

107. See Letter from Paul G. Cassell to Advisory Comm. (on file with author).

108. See FED. R. EVID. 615 advisory committee's notes (1998 Amendments).

109. See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

110. 18 U.S.C.A. § 3771(a)(4) (Victims have "the right to be . . . heard" at any public proceeding "involving . . . [a] plea.").

for success” and a “model for our States.”¹¹¹ Congress clearly wants the new law aggressively implemented, thereby avoiding the need for further legislative action or even, possibly, a federal constitutional amendment. Congress is watching to see whether the Judiciary (and the Executive) will fully and fairly implement this new Act. As Senator Leahy warned, “Passage of this bill will necessitate careful oversight of its implementation by Congress.”¹¹²

Construing the CVRA to require changes is also appropriate because the Act is remedial legislation. As the Supreme Court has instructed, “When Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals.”¹¹³ The congressional sponsors described the victims’ rights in the CVRA as “broad rights,”¹¹⁴ the significance of which should not “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.”¹¹⁵

A final reason for amending the rules is that crime victims’ groups are looking for the effective implementation of the CVRA. They are urging that the federal rules be comprehensively amended to reflect victims’ rights; indeed, they have even suggested that Congress should directly amend the federal rules to include victims’ rights.¹¹⁶ The Judiciary would be well advised not to ignore these lobbying efforts. Victims have proven very effective at advancing legislation in Congress, particularly where they have legitimate grievances about how they have been treated.¹¹⁷

Moreover, allowing the initiative for drafting of rules to pass from the Judiciary to Congress is not ideal. The Advisory Committee on Federal Rules of Criminal Procedure includes many skilled

111. 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

112. *Id.* at S4271 (statement of Sen. Leahy).

113. *California v. Am. Stores Co.*, 495 U.S. 271, 279 n.4 (1990) (quoting *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 428 (1st Cir. 1990)).

114. 150 CONG. REC. S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

115. *Id.* (statement of Sen. Feinstein).

116. Interview with Steve J. Twist, Nat’l Victims’ Constitutional Amendment Network (March 11, 2005).

117. *See supra* notes 27–34 and accompanying text (recounting victims’ legislation passed by Congress).

members with considerable experience in drafting rules. The Committee is well aware of the CVRA. Shortly after the passage of the CVRA, the Committee withdrew a modest victim amendment it was proposing in anticipation of the need to make more extensive changes,¹¹⁸ and is already working on proposed amendments to the rules.¹¹⁹ It is preferable to have victims integrated into the federal rules through careful drafting by the Committee rather than by the potentially blunderbuss approach of direct congressional action.

For all these reasons, the Federal Rules of Criminal Procedure should be comprehensively amended to recognize the interests of crime victims and thereby to allow victims to be full participants in the criminal process.

IV. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE TO IMPLEMENT THE CVRA

With the goal of effectively implementing the CVRA firmly in mind, the remainder of this Article proposes twenty-eight specific rule changes for consideration by the Advisory Committee on Criminal Rules. The individual sections that follow first recite a specific proposed change followed by the rationale for that change as both a matter of law and of policy. For convenience, this Article discusses the proposed changes sequentially, beginning with Rule 1.

Rule 1—Definition of “Victim”

The Proposal:

Rule 1 should be amended to include the following definition of a victim:

“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

118. See *infra* note 223 and accompanying text.

119. Telephone interview with Judge Susan C. Bucklew, Chair, Adv. Comm. on Fed. Rules of Criminal Procedure (May 2005).

suitable by the court, may assume the crime victim's rights under these rules, but in no event shall the defendant be named as such guardian or representative.

The Rationale:

The CVRA directly defines “victim” using this language,¹²⁰ which ought to be folded into the rules for convenience. The rules currently define such terms as “attorney for the government,” “federal judge,” and “petty offense.”¹²¹ “Victim” should likewise be defined.

A definition is required for a second reason: Rule 32 currently contains a differing definition of “victim” as “an individual against whom the defendant committed an offense for which the court will impose sentence.”¹²² Because that definition varies from that mandated by the CVRA, it must be changed. Furthermore, the CVRA’s definition comes with an interpretative history.¹²³ The CVRA’s definition of “victim” is taken almost verbatim from the 1996 Mandatory Victims Restitution Act (MVRA).¹²⁴ In turn, the MVRA drew on the 1982 Victim Witness Protection Act (VWPA).¹²⁵ As a result, the CVRA uses a definition of “victim” that is more than twenty-two years old and that has not produced major administrative or definitional problems. Courts will be able to draw from that history to determine who qualifies as a “victim.”¹²⁶

120. 18 U.S.C.A. § 3771(e) (West 2004 & Supp. 2005).

121. See FED. R. CRIM. P. 1(b)(1), 1(b)(3), 1(b)(8).

122. *Id.* at 32(a)(2).

123. See generally BELOOF, CASSELL & TWIST, *supra* note 15, at 49–69 (reviewing different definitions of “victim” for purposes of crime victims’ legislation).

124. See 18 U.S.C. § 3663A(a)(2). For differences from the old law, see Twist, *supra* note 2.

125. See 18 U.S.C. § 3663(a)(2).

126. See, e.g., *Hughey v. United States*, 495 U.S. 411 (1990) (holding that VWPA limited “victim” to victims of the actual offense of conviction so that district court could not order restitution on basis of charges that were dropped as part of plea agreement); *United States v. Follet*, 269 F.3d 996 (9th Cir. 2001) (holding that a free clinic was not a “victim” of the defendant’s rape of his niece); *Moore v. United States*, 178 F.3d 994 (8th Cir. 1999) (holding that a bank customer was “victim” of attempted bank robbery under MVRA where defendant pointed a sawed-off shotgun at the customer and the teller, who were standing only two feet apart, while demanding money), *cert. denied*, 528 U.S. 943 (1999); *United States v. Sanga*, 967 F.2d 1332 (9th Cir. 1992) (holding that foreign national who conspired to be brought into United States illegally was still a “victim” of the conspiracy where her smuggler

Rule 1 also appears to be the best place to include the CVRA's language about a "representative" of a victim. This language, too, draws from the restitution statutes.¹²⁷

Rule 2—Fairness to Victims in Construction

The Proposal:

Rule 2 should be amended to require fairness to victims in construing the rules as follows:

These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration to the government, defendants, and victims, and to eliminate unjustifiable expense and delay.

The Rationale:

The CVRA broadly mandates that victims have the right to "be treated with fairness and with respect for the victim's dignity and privacy."¹²⁸ This creates a substantive right to fairness, similar to that found in various state victims' rights amendments—including the

threatened her life and forced her to work as live-in maid once she had arrived); *United States v. Bedonie*, 317 F. Supp. 2d 1285 (D. Utah 2004) (holding that "victim" in manslaughter case under MVRA was murdered person himself and not the estate), *rev'd on other grounds*, *United States v. Serawop*, 410 F.3d 656 (10th Cir. 2005). See generally John F. Wagner, Jr., Annotation, *Who Is a "Victim," So as To Be Entitled to Restitution Under Victim and Witness Protection Act*, 108 A.L.R. FED. 828 (2005).

A few new issues will need to be litigated. For example, the *Hughey* case noted above conflicts with the views of Senator Jon Kyl, co-sponsor of the CVRA, who explained that the definition of "victim" in the CVRA is an intentionally broad definition because "all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged." See 150 CONG. REC. S10,910-01 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). At least one court has suggested that, as a matter of discretion, it is desirable to notify even victims of uncharged conduct under the CVRA. See *United States v. Turner*, 367 F. Supp. 2d 319, 327 (E.D.N.Y. 2005) (concluding that, absent reason to think otherwise, any person who the government asserts has been harmed by a crime or who self-identifies as such qualifies as a "victim"); cf. *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 561 (2d Cir. 2005) (holding that the CVRA does not grant victims any rights against individuals not convicted of a crime, but the government can attempt to obtain voluntary restitution from such persons).

127. See, e.g., 18 U.S.C. § 3663A(a) (same definition of victim "representative").

128. 18 U.S.C.A. § 3771(a)(8) (West 2004 & Supp. 2005).

amendment found in Senator Kyl's home state of Arizona.¹²⁹ This broad reading was explained by Senator Kyl, who, along with Senators Feinstein and Hatch, was the primary legislative sponsor of the CVRA: "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."¹³⁰

In light of victims' new substantive right to fairness, Rule 2 should be amended to make clear that all of the rules must be construed to be fair to victims no less than to the government and defendants.

(New) Rule 10.1—Notice of Proceedings for Victims

The Proposal:

A new Rule 10.1 should be added to guarantee victims their right to notice of proceedings as follows:

Rule 10.1 Notice to Victims.

(a) Identification of Victim. During the prosecution of a case, the attorney for the government shall, at the earliest reasonable opportunity, identify the victims of the crime.

129. See, e.g., ARIZ. CONST. art. II, § 2(A)(1) (victim's right "to be treated with fairness, respect, and dignity"); see also ALASKA CONST. art. I, § 24 (victim's right "to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process"); IDAHO CONST. art. I, § 22 (victim's right "[t]o be treated with fairness, respect, dignity and privacy throughout the criminal justice process"); ILL. CONST. art. I, § 8.1 (victims "to be treated with fairness and respect for their dignity"); MICH. CONST. art. I, § 24 (victims "to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process"); N.J. CONST. art. I, ¶ 22 (victim's right to "be treated with fairness, compassion and respect by the criminal justice system"); N.M. CONST. art. II, § 24 (the "right to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process"); OHIO CONST. art. I, § 10a (victims "shall be accorded fairness, dignity, and respect in the criminal justice process"); TEX. CONST. art. I, § 30(a)(1) ("right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process"); UTAH CONST. art. I, § 28(1)(a) (victim's right to be "treated with fairness, respect, and dignity"); WIS. CONST. art. I, § 9m (victim's right to be treated with "fairness, dignity and respect for their privacy"). See generally Cassell, *supra* note 15, at 1387–88 (discussing victims' right to fairness in Utah).

130. 150 CONG. REC. 4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

(b) Notice of Case Events. During the prosecution of a crime, the attorney for the government shall make reasonable efforts to provide victims the earliest possible notice of:

(1) The scheduling, including scheduling changes and/or continuances, of each court proceeding that the victim is either required to attend or entitled to attend;

(2) The release or detention status of a defendant or suspected offender;

(3) The filing of charges against a defendant, or the proposed dismissal of all charges, including the placement of the defendant in a pretrial diversion program and the conditions thereon;

(4) The right to make a statement about pretrial release of the defendant;

(5) The victim's right to make a statement about acceptance of a plea of guilty or *nolo contendere*;

(6) The victim's right to attend public proceedings;

(7) If the defendant is convicted, the date and place set for sentencing and the victim's right to address the court at sentencing; and

(8) After the defendant is sentenced, the sentence imposed and the availability of the Bureau of Prisons notification program, which shall provide the date, if any, on which the offender will be eligible for parole or supervised release.

(c) Multiple Victims. The attorney for the government shall advise the court if the attorney believes that the number of victims makes it impracticable to provide personal notice to each victim. If the court finds that the number of victims makes it impracticable to give personal notice to each victim desiring to receive notice, the court shall fashion a reasonable procedure calculated to give reasonable notice under the circumstances.

The Rationale:

This proposed change stems from the CVRA's requirement that victims have the "right to reasonable, accurate, and timely notice of

any public court proceeding . . . involving the crime.”¹³¹ Senator Feinstein explained the importance of giving victims notice:

Victims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm. Their lives are significantly altered by the crime and they have to live with the consequences for the rest of their lives. To deny them the opportunity to know of and be present at proceedings is counter to the fundamental principles of this country. It is simply wrong.¹³²

Under the CVRA, then, victims of the crime allegedly committed by the defendant¹³³ are entitled to notice of court proceedings. The tricky issue is who should provide that notice to victims. This responsibility must fall on prosecutors and their investigative agents for several reasons. First, prosecutors and their agents are the only parties who know the identity of the victims at the outset of the case. After a bank robbery, for example, it is the FBI agents who respond and interview the tellers. Second, prosecutors and their agents continue dealing with victims throughout the course of a prosecution. They work with victims in investigating the crime, identifying potential defendants, preparing the indictment, and presenting evidence to the grand jury and at trial. Because of this working relationship, prosecutors are best situated to provide notice in most cases. Third, most crime victims lack legal counsel and are unfamiliar with federal criminal proceedings. They may need assistance from someone familiar with the process to understand what is happening. United States Attorneys’ offices, including the victim-witness components in those offices, are well situated to provide that assistance. As the President’s

131. 18 U.S.C.A. § 3771(a)(2).

132. 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein); *see also id.* at S4267 (statement of Sen. Kyl) (“It does not make sense to enact victims’ rights that are rendered useless because the victim never knew of the proceeding at which the right had to be asserted.”).

133. *See* United States v. Guevara-Toloso, 2005 U.S. Dist. LEXIS 9762 (E.D.N.Y. 2005) (noting that CVRA requires notice to victims of the crime charged against the defendant but not notice to victims of any previous crimes the defendant may have committed).

Task Force of Victims of Crime concluded, the prosecutor is “in the best position to explain to victims the legal significance of various motions and proceedings.”¹³⁴ For all these reasons, prosecutors should notify victims of their rights and of upcoming hearings.¹³⁵ Most states that have addressed the issue follow this approach.¹³⁶

The Justice Department appears to agree that it should notify victims. In the *2000 Attorney General Guidelines for Victim and Witness Assistance*, the Department required prosecutors and their

134. PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 64 (1982).

135. *But cf.* *United States v. Turner*, 367 F. Supp. 2d 319, 328 (E.D.N.Y. 2005) (concluding that, in the absence of a national rule requiring prosecutors to provide notice to victims, the court would direct the prosecutor to provide the name and contact information of each victim so that the court can ensure that notice is properly given).

136. *See, e.g.*, ALA. CODE § 15-23-62(8) (2000) (requiring law enforcement officers to give victims initial description of their rights and “[t]he name and telephone number of the office of the prosecuting attorney to contact for further information”); ARIZ. REV. STAT. § 13-4409 (2001) (requiring prosecutor to provide notice to victim of criminal proceedings); CONN. GEN. STAT. ANN. § 51-286e (2000) (requiring prosecutor to notify victim of any judicial proceedings related to the case); DEL. CODE ANN. tit. 11, § 9411 (2001) (requiring Attorney General to provide information to victim including “[n]otice of the scheduling of court proceedings and changes including trial date, case review and sentencing hearings”); GA. CODE ANN. § 17-17-8(b) (2004) (requiring prosecutor where possible to give victim “prompt advance notification of any scheduled court proceedings”); KY. REV. STAT. ANN. § 421.500.5 (LexisNexis 1992) (requiring prosecutor to provide victim “prompt notification, if possible, of judicial proceedings relating to the case”); ME. REV. STAT. ANN. tit. 15, § 6101 (2003) (requiring prosecutor to provide victims of certain crimes notice of any plea agreement and of trial date); MASS. GEN. LAWS ANN. ch. 258B, § 3 (West 2004) (requiring prosecutor to give victims notice of various rights); MICH. COMP. LAWS ANN. § 780.755(1) (West 1998) (requiring prosecutor to give victims notice of court proceedings); MINN. STAT. ANN. § 611A.03 (West 2003) (requiring prosecutor to give victim notice of plea agreement and sentencing hearing); N.M. STAT. ANN. § 31-26-9(B) (LexisNexis 2004) (requiring prosecutor to provide victim with notice of scheduled court proceedings); N.Y. [Executive] LAW. § 646a (McKinney 2005) (requiring prosecutor to provide notice of court proceedings); S.D. CODIFIED LAWS § 23A-28C-1 (2004) (requiring prosecutor to notify victim of certain hearings); TENN. CODE ANN. § 40-38-103 (2003) (requiring prosecutor to notify victim of “times, dates, and locations of all pertinent stages in the proceedings”); TEX. CODE CRIM. PROC. ANN. art. 56.08(b) (Vernon 2004) (requiring prosecutor to give victim notice of court proceedings); UTAH CODE ANN. § 77-38-3 (2004) (requiring prosecutor to give victim notice of “important criminal justice hearings”); WIS. STAT. ANN. § 972.14(2m) (West 1998) (“Before pronouncing sentence, the court shall inquire of the district attorney whether he or she has complied with § 971.095(2) and with sub. (3)(b), whether any of the victims of a crime considered at sentencing requested notice of the date, time and place of the sentencing hearing and, if so, whether the district attorney provided to the victim notice of the date, time and place of the sentencing hearing.”); WYO. STAT. ANN. § 1-40-204(b)(i) (2004) (requiring prosecutor to inform victim about all hearings). *But see* OHIO REV. CODE ANN. § 2930.06(C) (2005) (requiring court to give notice to victim of court proceedings).

agents to provide notice to crime victims. In particular, the *Guidelines* currently obligate prosecutors to provide victims with “the earliest possible notice” of:

- (a) The release or detention status of an offender or suspected offender
- (b) The filing of charges against a suspected offender, or the proposed dismissal of all charges
- (c) The scheduling, including scheduling changes and/or continuances, of each court proceeding that the victim or witness is either required to attend or entitled to attend
- (d) The acceptance of a plea of guilty or *nolo contendere* or the rendering of a verdict after trial
- (e) If the offender is convicted, the date set for sentencing, the sentence imposed¹³⁷

To avoid creating only significant new responsibilities for prosecutors and their agents, the proposed new Rule 10.1 is lifted essentially verbatim from the *2000 Attorney General Guidelines for Victim and Witness Assistance*. The 2005 revisions to the *Guidelines* continue essentially the same requirements.¹³⁸

The drafters of the CVRA also appear to believe that the notification obligations will fall primarily on prosecutors’ offices, as the CVRA authorizes an appropriation of \$22,000,000 over the next five fiscal years to the Office for Victims of Crime of the Department of Justice for enhancement of victim notification systems.¹³⁹

137. See 2000 A.G. GUIDELINES, *supra* note 38; see also U.S. DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS’ RIGHTS AND SERVICES FOR THE 21ST CENTURY 82 (1998) (“Prosecutors’ offices should notify victims in a timely manner” of all significant hearings.).

138. See 2005 A.G. GUIDELINES, *supra* note 38, at 27–29 (providing for notice to victims, although relying on the department’s Victim Notification Systems (VNS) to do this).

139. See 118 Stat. 2260, 2264 (2004); see also 150 CONG. REC. S4267 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (“[W]e authorized an appropriation of funds to assure . . . that moneys would be made available to enhance the victim notification system, *managed by the Department of Justice’s Office for Victims of Crime*, and the resources additionally to develop state-of-the-art systems for notifying crime victims of important statements of development) (emphasis added). *But cf. id.* (discussing court notification of attorneys of record and

Presumably, those enhanced new notification systems can be used to keep victims apprised of court proceedings. Moreover, the CVRA directs that the Department of Justice and its investigative agencies “shall make their best efforts to see that crime victims are *notified of*, and accorded, the rights described in subsection (a).”¹⁴⁰

Proposed new Rule 10.1 adds only two new obligations beyond those found in the *2000 Attorney General Guidelines*: (1) notice to victims of their right to make a statement regarding any proposed plea, and (2) notice to victims of their right to attend public proceedings. Both of these obligations are currently found in the 2005 Guidelines.¹⁴¹

One last issue deserves brief discussion: Is it proper for the Judiciary, through the rule-making process, to command another branch of government to take certain actions?¹⁴² The starting point for analyzing this question is the congressional command in the CVRA that the executive branch must protect victims’ rights.¹⁴³ Consequently, implementing these rights through rule changes presents no question of the courts inventing new rights or exercising some kind of “supervisory” power over federal agents.¹⁴⁴ Instead, the implementation is simply enforcing congressionally created rights through the Judiciary’s congressionally authorized rulemaking authority—an uncontroversial exercise of judicial power.¹⁴⁵ Moreover, in the CVRA, Congress commanded the courts to “*ensure* that the crime victim is afforded the rights described [in the CVRA].”¹⁴⁶ Rule changes needed to implement the CVRA thus rest

concluding “it is a relatively simple matter to add another name and telephone number or address to that list”).

140. 18 U.S.C.A. § 3771(c)(1) (West 2004 & Supp. 2005) (emphasis added).

141. See 2005 A.G. GUIDELINES, *supra* note 38, at 27 (prosecutors to notify victims of all their rights under the CVRA).

142. Victims cannot rely on the provisions of the *Attorney General Guidelines* to protect their rights because the *Guidelines* themselves state that they “are not intended to . . . and may not be relied upon to create any rights . . . enforceable at law by any person in a matter civil or criminal.” 2005 A.G. GUIDELINES, *supra* note 38, at 27.

143. 18 U.S.C.A. § 3771(c)(1).

144. Cf. Sarah Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984) (discussing more problematic applications of judicial power).

145. See *id.* at 1476–77; 28 U.S.C. §§ 2071, 2072 (establishing court rule-making power).

146. 18 U.S.C. § 3771(b) (emphasis added).

on this statutory authority as well. Additionally, this Article's proposals affecting prosecutors are closely connected to court proceedings; they deal with such things as prosecutors notifying victims of hearings and conferring with victims in anticipation thereof. It is difficult to see new separation of powers concerns arising in such contexts so closely connected to the courtroom.

Furthermore, the Federal Rules of Criminal Procedure already direct executive branch actions less directly connected to court hearings. For instance, Rule 16 directs that prosecutors must turn over various discoverable items to the defendant.¹⁴⁷ Rule 41 directs federal agents serving a warrant to leave a copy for the person whose premises are searched.¹⁴⁸ And, most controversially, Rule 5 directs that federal agents making an arrest "must take the defendant without unnecessary delay" before a judicial officer.¹⁴⁹ The kinds of rule changes discussed in this Article are far less invasive than these commands. Finally, it should be remembered that federal prosecutors serve as "officers of the court."¹⁵⁰ In that capacity, the court can be reasonably expected to facilitate victims' involvement in the criminal justice process.¹⁵¹ For all of these reasons, this proposed rule breaks no new ground in directing prosecutors to notify victims of courtroom proceedings.

Rule 11(a)(3)—Victims' Views on Nolo Contendere Pleas

The Proposal:

Rule 11's procedures on pleas should be revised to allow victims to express their views on any plea of *nolo contendere* before the court decides whether to accept it as follows:

147. FED. R. CRIM. P. 16(a)(1).

148. *Id.* at 41(f)(3).

149. *Id.* at 5(a)(1). *See generally*, OFFICE OF LEGAL POLICY, REPORT TO THE ATT'Y GEN. ON THE JUDICIARY'S USE OF SUPERVISORY POWER TO CONTROL LAW ENFORCEMENT ACTION (Dec. 15, 1986), *reprinted in* 22 MICH. J.L. & REFORM 773 (1989).

150. *See* United States v. Sells Eng., Inc., 463 U.S. 418, 466 (Burger, C.J., dissenting).

151. *See, e.g.*, State v. Casey, 44 P.3d 756 (Utah 2002), discussed *infra* notes 163–66 and accompanying text.

(a)(3) *Nolo Contendere Plea*. Before accepting a plea of *nolo contendere*, the court must consider the parties' and victims' views and the public interest in the effective administration of justice.

The Rationale:

As discussed at greater length in the immediately following sections, the CVRA gives victims the right to be heard regarding any plea, presumably including any *nolo contendere* plea. It is a natural corollary that the court should consider the victim's views before accepting any such plea.

Rule 11(b)(4)—Victims' Right To Be Heard on Pleas

The Proposal:

The court should address any victim present in court when taking a plea in order to determine whether the victim wishes to make a statement and to consider the victim's view before accepting a plea as follows:

(4) Victims' Views. Before the court accepts a plea of guilty or nolo contendere or allows any plea to be withdrawn, the court must address any victim who is present personally in open court. During this address, the court must determine whether the victim wishes to present views regarding the proposed plea or withdrawal and, if so, what those views are. The court shall consider the victim's views in acting on the proposed plea or withdrawal.

The Rationale:

The CVRA gives victims the right "to be reasonably heard at any public proceeding in the district court involving . . . [a] plea."¹⁵² Many states afford victims similar rights.¹⁵³ The rationale for a

152. 18 U.S.C.A. § 3771(a)(4) (West 2004 & Supp. 2005); see *In re Kari Ann Jacobsen*, 2005 U.S. App. LEXIS 13990 (D.C. Cir. 2005) (noting victim's right to be heard on pleas).

153. See, e.g., CONN. CONST. art. 1, § 8 (giving victim right to be heard and to object to plea agreement); MO. CONST. art. 1, § 32 (giving victim right to be heard at plea hearing); UTAH CONST. art. I, § 28(1)(b) (giving victim the "right to be heard at important criminal justice hearings related to the victim"); ALA. CODE § 15-23-71 (2000) (giving victim right to be present at plea hearing and requiring prosecutor to confer with victim about plea); ARIZ.

victim's right to be heard regarding a plea is to provide the judge with as much information as possible. The court is under no obligation to accept a plea proposed by the parties.¹⁵⁴ After hearing from the victim about the plea, the court can determine what weight to give to the victim's views.¹⁵⁵

To implement the victim's right to be heard regarding a plea, the proposed rule change requires the court to directly address any victim present in court. This is consistent with the CVRA's legislative history that explains that "[t]his provision is intended to allow crime victims to directly address the court in person."¹⁵⁶ The language of the proposed rule is lifted from an earlier paragraph in Rule 11, which requires the court to "address the defendant personally in open court" "before accepting a plea of guilty."¹⁵⁷ Victims should be treated even-handedly. It may be important for the judge to address victims directly because many victims will lack the assistance of counsel. As novices in legal proceedings, victims may be uncertain about exactly when in the process they should present their views. By addressing victims, the court will eliminate that uncertainty and ensure that the victim's right to be heard is vindicated.

REV. STAT. § 13-4423 (2001) (giving victim right to be present and heard at plea hearing and requiring prosecutor to confer with victim about plea); MINN. STAT. ANN. § 611A.03 (West 2003) (giving victim right to be heard at plea hearing); MISS. CODE ANN. § 99-43-33 (2000) (giving victim right to make statement at plea hearing); N.H. REV. STAT. § 21-M:8-k (2000) (giving victim right to be heard at plea hearing); R.I. STAT. § 12-28-4.1 (2000) (giving victim right to make statement at plea hearing). *See generally* BELOOF, CASSELL & TWIST, *supra* note 15, at 476-94 (discussing victims and pleas); Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301 (1987).

154. *See, e.g.*, *United States v. Bean*, 564 F.2d 700 (5th Cir. 1977).

155. *But cf.* GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 252, 257-58 (1995) (proposing that victims have a veto over any plea); Bennett L. Gershman, *Crimes Against Victims: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. (forthcoming 2005) (discussing situations in which victims have effectively been given a veto over pleas); Karen L. Kennard, Comment, *The Victim's Veto: A Way To Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 437 (1989) (advocating that victims be given a veto over any plea).

156. 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

157. FED. R. CRIM. P. 11(b)(2).

*Rule 11(c)(1)—Prosecution To Consider Victims' Views on Pleas**The Proposal:*

The prosecution should be required to consider the victims' views in developing any proposed plea arrangement as follows:

(1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding *pro se*, may discuss and reach a plea agreement. The court must not participate in these discussions. The attorney for the government shall make reasonable efforts to notify identified victims of, and consider the victims' views about, any proposed plea negotiations. If the defendant pleads guilty or *nolo contendere* to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will . . .

The Rationale:

The proposed change requires prosecutors to make reasonable efforts to notify victims about possible plea bargains and to consider the victim's views regarding those pleas. This requirement is taken essentially verbatim from the *Attorney General Guidelines for Victim and Witness Assistance*, which direct prosecutors to "make reasonable efforts to notify identified victims of, and consider victims' views about, prospective plea negotiations."¹⁵⁸ Twenty-nine states already require prosecutors to "consult with" or "obtain the views of" victims at the plea agreement stage.¹⁵⁹

The proposed rule helps to implement not only a victim's right to be heard at plea proceedings but also the right to "confer with the attorney for the Government."¹⁶⁰ Given that victims have the right to confer, the conferring should take place at the most salient points in the process. As Senator Feinstein explained, "This right [to confer] is intended to be expansive. For example, the victim has the

158. 2005 A.G. GUIDELINES, *supra* note 38, at 30 (defining what can be considered in determining whether notice is reasonable in a particular case); *see also* OFFICE FOR VICTIMS OF CRIME, *supra* note 137, at 75 ("Prosecutors should make every effort . . . to consult with the victim on the terms of any negotiated plea . . .").

159. OFFICE FOR VICTIMS OF CRIME, *supra* note 137, at 75.

160. 18 U.S.C.A. § 3771(a)(5) (West 2004 & Supp. 2005).

right to confer with the Government concerning any critical stage or disposition of the case.”¹⁶¹ Because the overwhelming majority of federal criminal cases are resolved by a plea, a conference between the victim and the prosecutor regarding the plea will be critical in most cases. Reflecting that fact, the rules should follow the approach taken by the majority of states, directing prosecutors to consult with victims about pleas.

Rule 11(c)(2)—Court To Be Advised of Victim Objections to Plea

The Proposal:

Prosecutors (and victims’ attorneys) should be required to advise the court whenever they are aware that the victim objects to a proposed plea agreement as follows:

(2) *Disclosing a Plea Agreement.* The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. When a plea is presented in open court, the attorney for the government or the attorney for any victim shall advise the court when the attorney is aware that the victim has any objection to the proposed plea agreement.

The Rationale:

When an attorney for the victim or for the government is aware that a victim objects to a plea, that information should be relayed to the court. In those rare cases where the victim has an attorney, the attorney will obviously raise the victim’s objection. The proposed rule change clarifies the prosecutor’s corresponding and equal obligation to communicate this information to the court.

The CVRA appears to obligate prosecutors to relay a victim’s objection to the court, commanding them to use their “best efforts” to enforce victims’ rights.¹⁶² Part of those “best efforts” would seem to be conveying objections to the court. Victims are often untrained in the law and unexpectedly thrust into criminal proceedings; they may well believe that prosecutors automatically relay to the court

161. 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

162. 18 U.S.C.A. § 3771(c).

their objections to the plea. The proposed rule avoids such confusion by requiring the prosecutor to notify the court of a victim's concern. The rule is limited to situations where the prosecutor is aware of an objection.

This approach is consistent with the instructive case of *State v. Casey*,¹⁶³ which considered whether a victim's objection to a plea made to a prosecutor was sufficient to trigger the victim's right to be heard under the Utah Constitution.¹⁶⁴ In *Casey*, the victim told the prosecutor that she opposed a plea arrangement. The prosecutor refused to convey the victim's concern to the court, and the trial judge accepted the plea. The victim then obtained legal counsel and appealed to the Utah Supreme Court, urging that under the Utah Victims' Rights Amendment, her right to be heard regarding a plea had been violated. The State responded that the victim was obligated to ask the trial court directly to be heard rather than relying on the prosecutor to pass that information along. In rejecting the State's argument, the Utah Supreme Court explained that prosecutors, no less than other actors in the criminal justice system, were required to assist victims throughout the process.¹⁶⁵ More important for present purposes, the court also concluded that prosecutors had ethical obligations as officers of the court to convey that information to the judge:

Prosecutors must convey such requests [to be heard] because they are obligated to alert the court when they know that the court lacks relevant information. This duty, which is incumbent upon all attorneys, is magnified for prosecutors because, as our case law has repeatedly noted, prosecutors have unique responsibilities. . . . The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . in a criminal prosecution is not that it shall win . . . but that justice shall be done.¹⁶⁶

Applying the reasoning of *Casey* to analogous rights in the CVRA, federal prosecutors must, as officers of the court, convey a

163. 44 P.3d 756 (Utah 2002). I represented the victim in this case.

164. See generally Nicole G. Farrell, *Recent Case Development*, 2003 UTAH L. REV. 716.

165. *Casey*, 44 P.3d at 763.

166. *Id.* at 764 (internal quotations and citations omitted).

victim's request to be heard regarding a plea. Indeed, the prosecutor should convey not only the request to be heard but also the fact that the victim objects to the plea. In deciding whether to accept a plea, the court must consider the public interest.¹⁶⁷ As the Tenth Circuit has explained, "Rule 11 also contemplates the rejection of a negotiated plea when the district court believes that bargain is too lenient, or otherwise *not in the public interest.*"¹⁶⁸ When the prosecutor is aware of an objection from a keenly interested member of the public—the victim—the court should not be left in the dark about it.

An alternative way of drafting the rule is to require courts to inquire of prosecutors whether the victim has been advised of the proposed plea and whether the victim wishes to make a statement concerning it.¹⁶⁹ For example, Oregon requires the court to ask the prosecutor whether the victim has been consulted about a plea and, if so, what the victim's view is:

Before the judge accepts a plea of guilty or no contest, the judge shall ask the district attorney if the victim requested to be notified and consulted regarding plea discussions. If the victim has made such a request, the judge shall ask the district attorney if the victim agrees or disagrees with the plea discussions and agreement and the victim's reasons for agreement or disagreement.¹⁷⁰

South Dakota law contains a similar requirement that prosecutors disclose "any comments" by the victim about the plea.¹⁷¹ Texas law requires the court to ask the prosecutor whether a victim impact statement has been submitted;¹⁷² if so, the court must review that

167. *See, e.g.*, *United States v. Bean*, 564 F.2d 700 (5th Cir. 1977).

168. *United States v. Carrigan*, 778 F.2d 1454, 1462 (10th Cir. 1985) (emphasis added) (quoting *United States v. Miller*, 722 F.2d 562, 563 (9th Cir. 1983)).

169. *See* OFFICE FOR VICTIMS OF CRIME, *supra* note 137, at 108 ("Judges should facilitate the input of crime victims into plea agreements . . . and they should request that prosecuting attorneys demonstrate that reasonable efforts were made to confer with the victim.").

170. OR. REV. STAT. § 135.406(1)(b) (2003).

171. S.D. CODIFIED LAWS § 23A-7-9 (2004) ("The prosecuting attorney shall disclose on the record any comments on the plea agreement made by the victim, or his designee, of the defendant's crime to the prosecuting attorney.").

172. TEX. CODE CRIM. PROC. ANN. art. 26.13(e) (Vernon Supp. 2004) ("Before accepting a plea of guilty or a plea of *nolo contendere*, the court shall inquire as to whether a

statement.¹⁷³ Finally, before an Arizona court accepts a plea, the prosecutor must advise the court that reasonable efforts were made to confer with the victim about the plea and the victim's view regarding it.¹⁷⁴

The rule proposed here is narrower than these state formulations: it requires only that a prosecutor confer with the victim about the plea and inform the court if the victim *objects*. For many significant categories of federal cases (e.g., typical drug trafficking offenses, felons in possession of a firearm, etc.), there will be no victim, much less a victim objection. In such cases, to require some sort of victim inquiry by the court or victim certification by the prosecutor would unnecessarily waste time. The proposed rule requires only that the prosecutor report a victim's objection—in which case the court will presumably want to more carefully consider whether to accept a plea.

*Rule 12.1—Victim Addresses and Phone Numbers
Not Disclosed for Alibi Purposes*

The Proposal:

The Government currently must disclose the address and telephone numbers of any witnesses, including the victim, that it plans to use to disprove an alibi. This rule should be changed to protect the victim's privacy, excluding their information from this requirement.

(b) Disclosing Government Witnesses.

(1) *Disclosure.* If the defendant serves a Rule 12.1(a)(2) notice [regarding intent to present an alibi defense], an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(A) the name, ~~address, and telephone number~~ of each witness and the address and telephone number of each witness (other than a victim) that the government intends

victim impact statement has been returned to the attorney representing the state and ask for a copy of the statement if one has been returned.”).

173. *See id.*

174. ARIZ. REV. STAT. ANN. § 13-4423(b)(1) (2001).

to rely on to establish the defendant's presence at the scene of the alleged offense; and

(B) each government rebuttal witness to the defendant's alibi defense

. . . .

(c) Continuing Duty to Disclose. Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness, and the address and telephone number of each additional witness (other than a victim) if:

- (1) the disclosing party learns of the witness before or during trial; and
- (2) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

In addition, a similar change should be made to Rule 12.3 regarding the addresses and telephone numbers of victims who will be used to disprove a public-authority defense.

The Rationale:

This proposed change implements the victim's right to be "reasonably protected from the accused."¹⁷⁵ The victim cannot be reasonably protected if the defendant, without good reason, is given the victim's address and telephone number. The proposed rule strikes the current requirement that the prosecutor must *automatically* give the defendant the victim's address and telephone number even without any showing of need. Nothing in the rule, however, would bar the defendant from requesting that information by filing an appropriate motion. The court could then determine whether any such motion had merit.¹⁷⁶

175. 18 U.S.C.A. § 3771(a)(1) (West 2004 & Supp. 2005).

176. *Cf.* United States v. Wills, 88 F.3d 704, 709–10 (9th Cir. 1996) (allowing delayed disclosure of alibi witness because witness feared for safety and defendant had violent history and allowing ex parte hearing because of need to keep identity of witness from the defendant).

*Rule 15—Victims' Right To Attend Pre-Trial Depositions**The Proposal:*

Rule 15 should allow victims to attend any public deposition in a case as follows:

(i) Victims Can Attend. A Victim can attend any public deposition taken under this rule under the same conditions as govern a victim's attendance at trial.

The Rationale:

Victims have the right “not to be excluded from any . . . public court proceeding,” except in rare cases where their testimony will be materially affected.¹⁷⁷ Depositions authorized by Rule 15 are for the purpose of preserving evidence for trial,¹⁷⁸ and thus are effectively an extension of the trial. Victims accordingly have the right to attend such proceedings, if public, under the same conditions governing their attendance at trial. To avoid any confusion over this issue, the proposed rule change directly states that conclusion.

Because victims can be excluded from the trial in certain rare situations where their testimony would be materially affected,¹⁷⁹ they can likewise be excluded from a deposition in those situations. The proposed rule simply applies the limitations on attending trial to the deposition setting by providing that the “same conditions” apply to the victim's attendance at the deposition.

177. 18 U.S.C.A. § 3771(a)(3).

178. *See, e.g.*, *United States v. Edwards*, 69 F.3d 419, 437 (10th Cir. 1995).

179. 18 U.S.C.A. § 3771(a)(3), discussed *infra* notes 276–308 and accompanying text.

*Rule 17—Victims’ Right to Notice of Subpoena
of Confidential Information*

The Proposal:

Rule 17 regarding subpoenas should be modified to give victims notice before personal or confidential information is subpoenaed and to allow victims to file a motion to quash such a subpoena as follows:

(h)(2) Victim Information. After indictment, no record or document containing personal or confidential information about a victim may be subpoenaed without a finding by the court that the information is relevant to trial and that compliance appears to be reasonable. If the court makes such a finding, notice shall then be given to the victim, through the attorney for the government or for the victim, before the subpoena is served. On motion made promptly by the victim, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

The Rationale:

The existing rules governing subpoenas are flawed because they allow the parties to subpoena personal or confidential information about a victim from third parties without the victim’s knowledge. This issue arose recently in the Utah state criminal proceedings involving the kidnapping of Elizabeth Smart. Elizabeth was kidnapped from her home in Salt Lake City, Utah. She was found nearly nine months later with a local transient and his wife, who had taken Elizabeth at knifepoint.¹⁸⁰ Attorneys for Elizabeth’s alleged kidnapper subpoenaed class records from her high school—class and teacher lists, report cards, and disciplinary and attendance records—and medical records from her hospital.¹⁸¹ While the hospital refused to turn over the requested records, the school willingly turned over the requested records without notice to the Smart family. Elizabeth’s father learned about the subpoena only after her school records had already been turned over to defense counsel. The Smart family

180. See generally ED SMART & LOIS SMART WITH LAURA MORTON, BRINGING ELIZABETH HOME: A JOURNEY OF FAITH AND HOPE (2003).

181. Stephen Hunt, *Defense Blasted for Obtaining Smart’s School Records*, SALT LAKE TRIB., Jan. 14, 2005, at B2.

attorney then filed a motion to return the records to the school. Prosecutors in the case have objected to the fact that they were not given an opportunity to file a motion to quash.¹⁸² The matter is still under review in state court.

The problem that occurred in the Smart case under the Utah rules could also occur under the federal rules.¹⁸³ The federal rules currently allow the witness to whom the subpoena is issued to object,¹⁸⁴ but there is no provision for notifying the victim when personal or confidential information has been subpoenaed from another witness.

Serving such subpoenas without notice to the victim violates the provisions of the CVRA guaranteeing victims the rights to be treated “with respect for the victim’s dignity and privacy” and “with fairness.”¹⁸⁵ Allowing subpoenas to go directly to third-party custodians of records can fail to protect privacy if the custodian is disinterested or disinclined to protect the victim’s privacy. Such a scenario is not far-fetched; a third party who is subpoenaed will often have no interest in incurring legal fees to protect a victim’s rights. Even if interested, third parties may not fully understand the sensitive nature of certain victim information. Victims may also have important statutory rights to protect. In the Elizabeth Smart case, for example, the school may have violated the Family Educational Rights and Privacy Act by turning over private information about Elizabeth.¹⁸⁶

Subpoenas served without notice to victims may also raise constitutional concerns.¹⁸⁷ It is well settled that a right to privacy is implicitly incorporated within the protections guaranteed under the

182. Pat Reavy, *Quash Smart Subpoenas, DA Says*, DESERET MORNING NEWS, Feb. 1, 2005, at B3.

183. See Letter from Gregory G. Skordas, attorney for Elizabeth Smart, to Judge Susan Bucklew (May 23, 2005) (on file with author) (proposing changes to the federal rules to avoid recurrence of this problem in federal court).

184. FED. R. CRIM. P. 17(c).

185. 18 U.S.C.A. § 3771(a)(8).

186. Pat Reavy, *Elizabeth Wants Records Returned*, DESERET MORNING NEWS, Jan. 15, 2005, at B3; see 20 U.S.C. § 1232g (2000) (establishing rights of privacy in educational records).

187. See generally Wendy J. Murphy, *Using the Federal Courts To Make State Courts Respect Victims’ Rights*, 9 LEWIS & CLARK L. REV. (forthcoming 2005) (discussing federal constitutional rights of privacy for victims’ confidential records).

United States Constitution. The Supreme Court “has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”¹⁸⁸ Supreme Court precedent establishes two lines of privacy interests: (1) the “individual interest in avoiding disclosure of personal matters” and (2) “the interest in independence in making certain kinds of important decisions.”¹⁸⁹ In essence, the right to privacy includes an individual’s interest in making certain decisions that fundamentally affect his or her person “free from unwarranted governmental intrusion.”¹⁹⁰ In light of interests such as these, several courts have held that crime victims’ records—such as rape crisis counseling records—are not subject to subpoena.¹⁹¹

The proposed new rule protects victims’ statutory and potential constitutional interests in two ways. First, the court is required to make a preliminary determination that the subpoena seeks information relevant at trial and that compliance appears to be reasonable. This is consistent with the trial court’s existing power to quash unreasonable subpoenas, including subpoenas directed at crime victims.¹⁹² Second, if the court makes a preliminary determination that the subpoena is appropriate, the victim would then receive notice of the subpoena. To avoid harassment, the notice would be provided either through the victim’s own attorney or, more commonly, through the prosecutor.

The proposed rule makes no *substantive* change in the right of the party to obtain appropriate information through a subpoena. Instead, it merely changes procedures to ensure victims are treated fairly by having the opportunity to file a motion to quash where such

188. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

189. *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977).

190. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *see also* *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684–85 (1977).

191. *See, e.g.*, *State ex rel. Romley v. Superior Courts*, 836 P.2d 445, 451–52 (Ariz. Ct. App. 1992) (crime victim had the right to deny defendant access to medical records); *Commonwealth v. Wilson*, 602 A.2d 1290, 1296–97 (Pa. 1992). *See generally* Tera Jckowski Peterson, *Distrust and Discovery: The Impending Debacle in Discovery of Rape Victims’ Counseling Records in Utah*, 2001 UTAH L. REV. 695; Anna Y. Joo, Note, *Broadening the Scope of Counselor-Patient Privilege To Protect the Privacy of the Sexual Assault Survivor*, 32 HARV. J. ON LEGIS. 255 (1995).

192. *See, e.g.*, *Amsler v. United States*, 391 F.2d 37, 51 (9th Cir. 1967) (upholding trial court’s decision to quash subpoena directed to kidnapping victim’s father for lack of materiality).

a motion is appropriate. The court is then authorized to grant the victim's motion to quash under the same standards that already apply to other motions to quash—where compliance would be “unreasonable or oppressive.”¹⁹³

The proposed change does not interfere with the legitimate interests of the government or defendants. The change will not hamper government investigations because it applies only to subpoenas issued after indictment. Before indictment, a victim's privacy is protected through grand jury secrecy. After indictment, the only legitimate purpose for a subpoena by either the government or the defendant is to obtain testimony or evidence for trial or similar court hearing. Rule 17 does not permit a subpoena for discovery purposes,¹⁹⁴ although upon a proper showing a party can obtain pre-trial access to materials.¹⁹⁵ Therefore, when challenged by a victim on a motion to quash, the party seeking the evidence will prevail upon a proper showing that the subpoena is appropriate. The only change made by the rule, then, is to require preliminary screening by the court when confidential information is involved and give the victim the opportunity for court review in cases where legitimate interests are at stake. Constitutional interests in privacy and the victim's right to be treated “with fairness” require nothing less.

Rule 18—Victims' Interests Considered in Setting Place of Prosecution

The Proposal:

Rule 18 should be amended to require the court to consider the convenience of victims in setting the place of prosecution as follows:

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

193. See FED. R. CRIM. P. 17(c)(2).

194. See generally *United States v. Nixon*, 418 U.S. 683, 689 (1974).

195. See *id.* at 699.

The Rationale:

This change helps to implement a victim's right under the CVRA to be treated "with fairness."¹⁹⁶ The rule change is modest. Rule 18 already requires the court to consider the convenience of the "witnesses" in a case. In many cases, of course, the victim will be a witness. But for clarity in those cases, and to account for cases in which the victim will not be a witness, the rule should be amended to refer specifically to victims.

*Rule 20—Victims' Views Considered Regarding Consensual Transfer**The Proposal:*

Rule 20 should be amended to allow the court to consider the victims' views in any decision to transfer a case as follows:

(a) **Consent to Transfer.** A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present if:

(1) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and

(2) the United States attorneys in both districts approve the transfer in writing after consultation with any victim. If any victim objects to the transfer, the United States attorney in the transferring district or the victim's attorney shall advise the court where the indictment or information is pending of the victim's concerns.

A similar change should be made to Rule 20(d) regarding transfer of juvenile proceedings.

196. 18 U.S.C.A. § 3771(a)(8) (West 2004 & Supp. 2005).

The Rationale:

As with the previous proposal, this change implements the victim's right under the CVRA to be "treated with fairness."¹⁹⁷ The procedure for transferring a case for a plea is not constitutionally required, but rather is designed for the convenience of the defendant and the government.¹⁹⁸ In considering whether such administrative reasons justify a transfer, the concerns of the victim appropriately enter into the balance. For reasons similar to those discussed above in connection with changes regarding plea procedures, the prosecution would be directed to confer with the victim and to advise the court of any objection to the transfer.¹⁹⁹

*Rule 21—Victims' Views Considered Regarding Transfer for Prejudice**The Proposal:*

Rule 21 should be amended as follows to require consideration of the victim's interest in whether a case should be transferred:

(e) Victims' Views. The court shall not transfer any proceeding without giving any victim an opportunity to be heard. The court shall consider the views of the victim in making any transfer decision.

The Rationale:

Rule 21 authorizes the trial judge to transfer a case to avoid prejudice or for the convenience of the parties. The proposed rule would require that the court consider the victim's concerns in making any such transfer decision. Such consideration would seem to be part and parcel of protecting the victim's right to be "treated with fairness." In addition, the vicinage provision of Article III and the public's First Amendment right of access to trials give constitutional dimensions to the victim's interest in transfer decisions.

197. *Id.* § 3771(a)(8).

198. *See generally* WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 321, at 357–58.

199. *See supra* notes 158–174 and accompanying text.

Victims may have compelling interests in observing the trial in their local community.²⁰⁰ Traveling to a remote location to watch the trial may be financially difficult for many victims and impossible for indigent victims. Moreover, forcing victims to travel to distant communities alone may deprive them of the accompaniment and support of family and friends, which may be especially important when observing emotionally charged court proceedings.

Defendants, too, have the right to have cases tried locally. Under the Sixth Amendment, “[i]n all criminal prosecutions, *the accused* shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”²⁰¹ This right might be viewed as the defendant’s to assert or waive as circumstances dictate. For federal cases, however, the vicinage right is not exclusively placed in the hands of the defendant. Instead, Article III provides that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial *shall* be held in the State where the said Crimes have been committed.”²⁰²

This difference in language supports the reading that the federal provision is a structural guarantee designed to protect broader interests than the defendant’s alone.²⁰³ Moreover, the provision provides for trial in the state where the crime was committed. In most cases, this state would be where the victim resided; whether the defendant also resided in that state would be incidental.

An understanding of the Article III provision as protecting the community’s interest is bolstered by the Supreme Court’s decisions on right of public access to trials. In cases such as *Richmond Newspapers, Inc. v. Virginia*,²⁰⁴ the Court has held that a guarantee of the public’s right to attend trials is implicit in the First Amendment. Compelling victims’ interests underlie this guarantee. As the Court has explained, “the presence of interested spectators

200. See generally BELOOF, CASSELL & TWIST, *supra* note 15, 392–99 (reviewing case law on the victim’s interest in venue decisions).

201. U.S. CONST. amend. VI (emphasis added).

202. *Id.* art. III, § 2, cl. 3 (emphasis added).

203. See Steven A. Engel, *The Public’s Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1687 (2000); see also Drew L. Kirshen, *Vicinage*, 29 OKLA. L. REV. 803 (1976).

204. 448 U.S. 555 (1980).

may keep [the defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions."²⁰⁵ In addition, "public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct."²⁰⁶ As Justice Blackmun has emphasized, "The victim of the crime, the family of the victim, [and] others who have suffered similarly . . . have an interest in observing the course of a prosecution."²⁰⁷ Victims are vitally interested in observing criminal trials because society has withdrawn "both from the victim and the vigilante the enforcement of criminal laws, but [it] cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution."²⁰⁸ To be sure, transferring a trial to a distant city may not flatly violate the public right of access to a trial, but it can surely burden the rights of the public, including the victim, which suggests that victims ought to be heard before any such decision is made.

The Article III vicinage provision and the public right of access to trials provide constitutional underpinnings for construing the victim's rights under the CVRA to include a right to be heard on transfer proceedings. In addition, Congress has mandated that victims be treated with fairness. This is a broad provision intended to be broadly construed and to give victims a right to due process. As Senator Kyl has stated,

The *broad rights* articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes *the notion of due process*. 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*.²⁰⁹

205. *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979) (internal citation omitted).

206. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509 (1984).

207. *Gannett Co.*, 443 U.S. at 428 (Blackmun, J., concurring in part and dissenting in part).

208. *Richmond Newspapers*, 448 U.S. at 571.

209. 150 CONG. REC. S10,910–11 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphases added).

Clearly, Congress intended to afford crime victims a broad right to due process in criminal proceedings. Due process, of course, uncontroversially includes a right to be heard.²¹⁰ Thus, victims should be heard before the court makes a transfer decision.

Concluding that victims have a right to be heard on transfer decision does not mean, of course, that they will dictate the transfer decision. In some cases, the defendant will be able to establish sufficiently pervasive prejudice in a particular community to entitle him to a change of venue to protect his constitutional rights.²¹¹ But the limited point here is that victims may provide an important perspective that the judge ought to consider in reaching a decision. Moreover, even if the judge decides to transfer a case, the victims may have valuable information for the judge on where to transfer the case to (e.g., to an adjacent state rather than a distant one).

An illustration of the general approach of the proposed rule comes from *State v. Timmendequas*,²¹² a capital case decided by the New Jersey Supreme Court. In *Timmendequas*, the trial judge imported a jury from a distant community rather than force the family of a murdered young girl to travel to another district. Construing New Jersey state law provisions similar to the CVRA's, the New Jersey Supreme Court explained that the trial judge properly considered the views of the victim's family:

Over the past decade, both nationwide and in New Jersey, a significant amount of legislation has been passed implementing increased levels of protection for victims of crime. Specifically, in New Jersey, the Legislature enacted the "Crime Victim's Bill of Rights." That amendment marked the culmination of the Legislature's efforts to increase the participation of crime victims in the criminal justice system.

210. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (acknowledging that "[t]he fundamental requisite of due process of law is the opportunity to be heard" (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914))).

211. *See, e.g.*, *Irvin v. Dowd*, 366 U.S. 717 (1961) (holding that prisoner should have been granted change of venue where pre-trial publicity caused prejudice). *But cf.* FLETCHER, *supra* note 155, at 252 (calling for abolition of a defendant's right to change venue because it "is, in effect, to accord the defense a whole preemptory challenge against the entire community").

212. 737 A.2d 55 (N.J. 1999).

The purpose of the Victim's Rights Amendment was to "enhance and protect the necessary role of crime victims and witnesses in the criminal justice process. In furtherance of [that goal], the improved treatment of these persons should be assured through the establishment of specific rights." One of the enumerated rights guaranteed for victims is "[t]o have inconveniences associated with participation in the criminal justice process minimized to the fullest extent possible."

. . . .

. . . The [trial] court explicitly stated that it was not favoring the rights of the victims over those of defendant. Rather, it was simply taking their concerns into consideration, as it had not done previously. Taking the concerns of the victim's family into account does not constitute error, *provided* that the constitutional rights of the defendant are not denied or infringed on by that decision.²¹³

Just as the New Jersey courts have recognized that victims' interests should be considered in transfer decisions, the federal courts should do the same. Therefore, Rule 21 should be amended to allow victims to provide information to the judge on transfer decisions.

Rule 23—Victims' Views Considered Regarding Non-Jury Trial

The Proposal:

The court should be required to consider the views of victims before allowing waiver of a jury trial as follows:

Rule 23. Jury or Nonjury Trial

(a) Jury Trial. If the defendant is entitled to a jury trial, the trial must be by jury unless:

- (1) the defendant waives a jury trial in writing;
- (2) the government consents; and
- (3) the court approves after considering the views of any victims.

213. *Id.* at 76 (internal citations omitted). The hardship to the victim was established via affidavits from the victim's family provided to the court by the prosecutor.

The Rationale:

In the federal courts the “preferred” trial method is a jury trial.²¹⁴ As Justice Blackmun has explained, the public has interests, independent of a criminal defendant, in monitoring judges, police, and prosecutors—and in being educated about “the manner in which criminal justice is administered.”²¹⁵ Nonetheless, the Supreme Court has concluded that defendants can waive their right to a jury trial.²¹⁶ To help protect the general public interest in trial by jury, Rule 23 requires not only prosecutor approval²¹⁷ but also judicial approval before proceeding by way of bench trial. This approval requires careful weighing of the competing concerns. The Supreme Court has instructed that

the duty of the trial court [in considering whether to approve a jury trial waiver] is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.²¹⁸

This is a “serious and weighty responsibility.”²¹⁹

214. See *Singer v. United States*, 380 U.S. 24, 35 (1965) (“Trial by jury has been established by the Constitution as the ‘normal and preferable mode of disposing of issues of fact in criminal cases.’” (citation omitted)). See generally Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 68 (2003).

215. *Gannett Co. v. DePasquale*, 443 U.S. 368, 428 (1979) (Blackmun, J., dissenting in part).

216. See *Patton v. United States*, 281 U.S. 276 (1930). *But cf.* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1196–98 (1991) (mounting a strong argument against *Patton* and noting that before 1930 court decisions had held jury trial could not be waived).

217. FED. R. CRIM. P. 23(a)(2). *But cf.* Adam H. Kurland, *Providing a Criminal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call To Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. DAVIS L. REV. 309 (1993) (suggesting that prosecutorial consent should be eliminated by the legislature). See generally ABA STANDARDS FOR CRIMINAL JUSTICE § 15-1.2, cmt. at 15.17 (2d ed. 1980) (concluding that arguments in favor of requiring prosecutorial approval of jury trial waivers outweigh those against).

218. *Patton*, 281 U.S. at 312–13.

219. *United States v. Saadya*, 750 F.2d 1419, 1421 (9th Cir. 1985) (internal quotation omitted).

To discharge that serious and weighty responsibility, the trial court should receive as much information as possible. The victim is often well situated to provide information about how the public will view a non-jury trial. The proposed rule change takes the modest step of requiring the court to hear the victim before approving any non-jury trial, a step that is consistent with the CVRA's command that victims be treated with fairness.

Importantly, this change would not interfere with defendants' rights. The Supreme Court has squarely held that the defendant lacks any constitutional right to unilaterally elect a bench trial.²²⁰ Of course, in some circumstances, despite a victim's objection, a non-jury trial nonetheless will be appropriate. Moreover, in extreme cases, the defendant may have a *right* to a non-jury trial where pretrial publicity has pervasively tainted the jury pool.²²¹ Nothing in the proposed rule change would interfere with a court's right to approve a bench trial in such circumstances, so long as the court considers the victim's perspective as part of the approval process.

Rule 32(a)—Deleting Old Definition of "Victim"

The Proposal:

The definition of "victim" currently contained in Rule 32 should be stricken as follows:

Rule 32. Sentencing and Judgment

~~(a) **Definitions.** The following definitions apply under this rule:~~

~~(1) "Crime of violence or sexual abuse" means:~~

~~(A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or~~

~~(B) a crime under 18 U.S.C. §§ 2241–2248 or §§ 2251–2257.~~

220. *Singer v. United States*, 380 U.S. 24, 36 (1965) (finding that waiver of jury trial may be conditioned on consent of prosecutor); *cf.* *Kurland*, *supra* note 217, at 340–46 (urging that the rules be amended to create such a right, but not considering in any way the victim's interests involved).

221. *See Singer*, 380 U.S. at 37–38 (leaving this question open).

~~(2) “Victim” means an individual against whom the defendant committed an offense for which the court will impose sentence.~~

The Rationale:

The old definition of victim in Rule 32 is now too narrow, as it is limited to crimes of violence or sexual abuse. The CVRA, in contrast, includes all victims within its protections. In the proposed new rules, “victim” would be defined in Rule 1.²²² Accordingly, the narrower definition found here can simply be eliminated. The Advisory Committee on Criminal Rules is well aware of this issue, having withdrawn a previous proposal to expand Rule 32 to include all victims in the wake of the CVRA.²²³

*Rule 32(c)(1)(B)—Presentence Report Considering
Restitution in All Cases*

The Proposal:

Rule 32(c)(1)(B) should be amended to require that the presentence report contain restitution information in all cases as follows:

(c) Presentence Investigation.

(1) Required Investigation.

(A) *In General.* The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

- (i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or
- (ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

222. See *supra* notes 120–27 and accompanying text.

223. See Letter from Ed Carnes, Chair of the Advisory Comm. on Federal Rules of Criminal Procedure, to Hon. David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure (May 18, 2004) (on file with the author) (noting that proposed expansion of Rule 32 should be withdrawn if the CVRA was passed).

(B) Restitution. If the law ~~requires~~ permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

The Rationale:

As currently written, the rule directs that a presentence report contain information about restitution only when the law “requires” restitution. The proposed amendment directs that all presentence reports contain appropriate restitution information whenever the law “permits” restitution. If the law permits restitution, the court ought to receive information sufficient to allow it to determine whether to order such restitution. Only with such knowledge can the court appropriately exercise its discretion.

In most cases, restitution is covered by one of two federal statutes: the Mandatory Victims Restitution Act of 1996 (MVRA),²²⁴ and its predecessor, the Victim and Witness Protection Act of 1982 (VWPA).²²⁵ For all crimes of violence and certain crimes against property, the MVRA firmly directs that “[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [certain offenses such as crimes of violence] . . . the court *shall* order . . . that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim’s estate.”²²⁶ For other crimes, the earlier VWPA controls. It permits the court to order restitution in its discretion after considering various relevant factors.²²⁷

In its current form, Rule 32(c)(1)(B) suggests that the probation officer is required to include restitution information only in a case covered by the MVRA because only then is restitution (in the language of the current rule) “required.”²²⁸ No sound reason exists

224. 18 U.S.C. §§ 3663A, 3664 (2000).

225. *Id.* §§ 3663, 3664. *See generally* United States v. Bedonie, 317 F. Supp. 2d 1285 (D. Utah 2004) (discussing different statutes), *rev’d on other grounds*, United States v. Serawop, 410 F.3d 656 (10th Cir. 2005).

226. 18 U.S.C. § 3663A(a)(1) (emphasis added); *see* United States v. Monts, 311 F.3d 993, 1001 (10th Cir. 2002) (holding that restitution under the MVRA is mandatory).

227. 18 U.S.C. § 3663A(a)(3); *see* United States v. Fountain, 768 F.2d 790, 801 (7th Cir. 1985) (holding that restitution under the VWPA is discretionary).

228. FED. R. CRIM. P. 32(c)(1)(B).

for such a limitation, particularly after the enactment of the CVRA. The CVRA guarantees that victims have “the right to full and timely restitution as provided in law.”²²⁹ Even when the court is proceeding under the discretionary VWPA, without appropriate information in the presentence report, the court cannot determine whether to exercise its discretion to award restitution. Therefore, the rule should be changed to require that the presentence report contain restitution information, from which the court can determine whether to make a restitution award.

*(New) Rule 32(c)(3)—Probation Officer To Seek
Out Victim Information*

The Proposal:

The probation officer preparing a presentence report should be directed to determine whether a victim wishes to provide information for the report as follows:

(3) *Victim Information.* The probation officer must determine whether any victim wishes to provide information for the presentence report.

The Rationale:

Under the CVRA, the victim has “[t]he right to be reasonably heard at any public proceeding in the district court involving . . . sentencing”²³⁰ This right clearly encompasses the victim’s right to allocate, or make an oral statement at sentencing, as discussed below in connection with Rule 32(i).²³¹ However, the right to be “reasonably heard” also appears to include the opportunity to provide information to the probation office during preparation of the presentence report.

As Senator Kyl explained, the victim’s right to be heard at sentencing should be broadly construed:

229. 18 U.S.C.A. § 3771(a)(6) (West 2004 & Supp. 2005).

230. 18 U.S.C.A. § 3771(a)(4).

231. *See infra* notes 273–75 and accompanying text.

[The CVRA] provides victims the right to reasonably be heard at any public proceeding involving . . . sentencing. 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 When a victim invokes this right during . . . sentencing proceedings, it is intended that . . . he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victims' family and the community, and sentencing recommendations

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. Such circumstances might arise, for example, if the victim is incarcerated on unrelated matters at the time of the proceedings or if a victim cannot afford to travel to a courthouse. In such cases, communication by the victim to the court is permitted by *other reasonable means*.²³²

In light of this legislative history, victims undoubtedly have a right to make an in-court statement at sentencing as part of their right "to be heard." But they also have the right to communicate in other ways with the court. At sentencing, an obvious alternative way is via the probation officer. If there is any doubt about whether the right "to be heard" covers communications to the probation officer, the right "to be treated with fairness" comfortably covers such a requirement.

The proposed rule requires that the probation office affirmatively seek out the victim. It is unlikely that a probation officer could properly prepare a thorough presentence report without obtaining the victim's views. Indeed, the rules already require the officer to include victim information in the report.²³³ Because there is no way

232. 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphases added); *see also id.* (statement of Sen. Feinstein).

233. *See supra* notes 10–13 and accompanying text (discussing Rule 32(d)(2)(B)).

to know in advance whether the victim will have relevant information for the report, the probation officer should be required to investigate that possibility. Of course, nothing in the proposed rule change would require the probation officer to include irrelevant or argumentative information in the report.

*Rule 32(d)(2)(B)—Presentence Report To Contain
Victim Information*

The Proposal:

Rule 32(d)(2)(B) should be amended to refer directly to victims in describing the content of the presentence report and to conform to the style used for information about defendants as follows:

(2) Additional Information. The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

- (i) any prior criminal record;
- (ii) the defendant's financial condition; and
- (iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) ~~verified information, stated in a nonargumentative style,~~ that assesses the financial, social, psychological, and medical impact on ~~any individual against whom the offense has been committed~~ any victim of the crime . . .

The Rationale:

As discussed at the outset of this article,²³⁴ Rule 32(d)(2)(B) typifies the victim's absence from the current federal rules by failing to use the word "victim" in describing what information belongs in a presentence report. In addition, the rule should be amended to conform to the style used in describing the presentence report's information about the defendant. The rule dealing with the

234. See *supra* notes 10–13 and accompanying text.

defendant's background²³⁵ contains no requirement that information be "verified" or stated in a "non-argumentative style." As a matter of even-handedness, no such requirement should be listed for victim information. Of course, well-trained federal probation officers will no doubt attempt to verify *all* information in the presentence report and phrase *all* of the report in a non-argumentative style. The peculiarity in the current rule is that, among the numerous subjects covered by the rules, the verification and non-argumentative style requirements apply to victim information alone.

Rule 32(e)—Prosecutor To Disclose Presentence Report to Victim

The Proposal:

The prosecutor should be required to disclose relevant parts of the presentence report to victims as follows:

(e) Disclosing the Report and Recommendation.

(1) *Time to Disclose.* Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) *Minimum Required Notice.* The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. The attorney for the government shall, if any victim requests, communicate the relevant contents of the presentence report to the victim.

The Rationale:

The presentence report plays a critical role in the federal sentencing process. The report contains information about the crime, the background of the defendant, the impact of the crime on the victim, and other matters relevant to sentencing. Most important, the report also contains a calculation under the Federal

235. FED. R. CRIM. P. 32(d)(2)(A).

Sentencing Guidelines specifying a range for any recommended prison sentence (e.g., forty-six to fifty-seven months). While judges need not slavishly impose a sentence within this range,²³⁶ most trial judges give significant weight to the Guidelines calculation,²³⁷ and appellate courts have discouraged straying too far from the Guidelines without good reason.²³⁸

The CVRA entitles victims to be heard on disputed Guidelines issues and, as a corollary, entitles them to the right to review parts of the presentence report relevant to those issues. The CVRA gives victims “[t]he right to be reasonably heard at any public proceeding in the district court involving . . . sentencing”²³⁹ This codifies the right of crime victims to provide what is known as a “victim impact statement” to the court.²⁴⁰ The victim’s right to be heard, however, is not narrowly circumscribed to just impact information. To the contrary, the right conferred is a broad one—to be “reasonably heard” at the sentencing proceeding.

The victim’s right to be “reasonably heard” is best understood as giving the victim the opportunity to speak about disputed issues regarding the Sentencing Guidelines calculation. As Senator Kyl explained, the right to be heard includes the right to make sentencing recommendations:

When a victim invokes this right [to be heard] during . . . sentencing proceedings, it is intended that the [sic] he or she be allowed to provide all three types of victim impact [information]: the character of the victim, the impact of the crime on the victim,

236. See *United States v. Booker*, 125 S. Ct. 738 (2005).

237. See, e.g., *United States v. Wilson*, 350 F. Supp. 2d 910, 912 (D. Utah 2005) (giving “heavy weight” to Guidelines recommendation).

238. See, e.g., *United States v. Dalton*, 404 F.3d 1029 (8th Cir. 2005); *United States v. Rogers*, 400 F.3d 640 (8th Cir. 2005).

239. 18 U.S.C.A. § 3771(a)(4) (West 2004 & Supp. 2005).

240. See generally BELOOF, CASSELL & TWIST, *supra* note 15, at 625–67 (discussing victim impact statements); 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, 1395–96; cf. Dan Narled, *State, Be Not Proud: A Retroactive Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407 (2005).

the victim's family and the community, and *sentencing recommendations*.²⁴¹

A "sentencing recommendation" will often directly implicate Guidelines issues. For example, if the victim wishes to recommend a hundred-month sentence when the maximum guideline range is only fifty-seven months, that sentencing recommendation is essentially meaningless unless a victim can provide a basis for recalculating the Guidelines or departing or varying from them.²⁴²

Because a victim has the right to be heard on a Guidelines issue, a victim also has the right to see the document which contains the Guidelines calculations—the presentence report.²⁴³ Congress intended the victim's right to be heard to be construed broadly, as Senator Feinstein stated: "The victim of crime, or their counsel, should be able to provide *any information*, as well as their opinion, directly to the court concerning the . . . sentencing of the accused."²⁴⁴ It is hard to see how victims can meaningfully provide "any information" that would have a bearing on the sentence without being informed of the Guidelines calculations that likely will drive the sentence and reviewing the document that underlies those calculations.

An independent basis for victims reviewing presentence reports is within the victim's broad right under the CVRA to be "treated with fairness."²⁴⁵ This right easily encompasses a right of access to relevant parts of the presentence report. The victim's right to fairness gives victims a free-standing right to due process. As Senator Kyl instructed, "Of course, *fairness includes the notion of due process*

241. 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added). *See generally* BELOOF, CASSELL & TWIST, *supra* note 15, at ch. 10 (discussing three types of victim impact information).

242. *See* United States v. Wilson, 355 F. Supp. 2d 1269, 1272–73 (D. Utah 2005) (discussing departures and variances from the Guidelines).

243. Magistrate Judge Orenstein of the Eastern District of New York, who has written many thoughtful opinions on the CVRA, has taken a contrary position. *See* Report and Recommendation, United States v. Ingrassis, No. CR 04-0455 at 31 (E.D.N.Y. Sept. 7, 2005) ("[I]n the absence of any change to applicable rules or the Guidelines, the court is under no legal obligation to ensure such disclosure" of the presentence report.). For the reasons explained here, I think he takes too narrow a view of the victim's rights at sentencing.

244. 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (emphasis added).

245. 18 U.S.C.A. § 3771(a)(8) (West 2004 & Supp. 2005).

This provision is intended to direct government agencies and employees, whether they are in the executive or judicial branches, to treat victims of crime with the respect they deserve *and to afford them due process.*²⁴⁶ Due process principles dictate that victims have the right to be apprised of Guidelines calculations and related issues. The Supreme Court has explained that “[i]t is . . . fundamental that the right to . . . an opportunity to be heard ‘must be granted at a meaningful time and *in a meaningful manner.*’”²⁴⁷ It is not “meaningful” for victims to make sentencing recommendations without the benefit of knowing what everyone else in that courtroom knows: the recommended Guidelines range and how that range was derived. Congress plainly intended to pass a law establishing “[f]air play for crime victims, *meaningful participation* of crime victims in the justice system, [and] protection against a government that would take from a crime victim the dignity of due process.”²⁴⁸ In federal sentencing today, meaningful participation means participation regarding Guidelines issues.

It is interesting that the federal law allowing appointment of a guardian ad litem for juvenile victims appears to allow for access to the presentence report. The law guarantees that, upon appointment, a guardian ad litem “may have access to all reports, evaluations and records, except attorney’s work product, necessary to effectively advocate for the child.”²⁴⁹ In a recent federal “shaken baby” case in Arizona, a guardian for the child victim received access to the presentence report under this provision.²⁵⁰ The guardian in that case found it exceedingly difficult to formulate an appropriate sentencing recommendation without access to the presentence report. After successfully gaining access to the report, she found a need to change her original recommendation. She later reported that “[b]ut for the

246. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphases added).

247. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

248. 150 CONG. REC. S4264 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added).

249. *See* 18 U.S.C. § 3509(h)(2) (2000).

250. *See* *United States v. James*, No. CR-04-0651-PCT-JAT (D. Ariz. 2005).

disclosure, I would have ended up making a mis-informed recommendation.”²⁵¹

A victim’s right to review the presentence report is also important to ensure proper restitution. Federal law guarantees most victims of serious crimes the right to restitution.²⁵² Reinforcing those laws, the CVRA guarantees that victims have “[t]he right to full and timely restitution as provided in law.”²⁵³ As a practical matter, many of the calculations supporting a restitution award will rest on information in the presentence report. While the restitution statutes have their own detailed procedural provisions,²⁵⁴ the presentence report is clearly a central part of the restitution process. If a presentence report fails to accurately recount restitution figures, crime victims may be short-changed. For all these reasons, the CVRA should be understood as giving victims the right to review relevant parts of the presentence report and to be heard before a court makes any final conclusions about Guidelines calculations and other sentencing issues. Many states follow a similar approach and give victims access to the presentence report.²⁵⁵

In February 2005, I testified before the Sentencing Commission to recommend a change in the *U.S. Sentencing Commission Guidelines Manual* along the lines of the proposals contained in this

251. E-mail from Keli Luther, Arizona Voice for Victims, to Paul G. Cassell (June 20, 2005) (on file with author).

252. See 18 U.S.C. § 3663A (Mandatory Victims Restitution Act); see also *id.* § 3663 (Victim Witness Protection Act).

253. 18 U.S.C.A. § 3771(a)(6) (West 2004 & Supp. 2005).

254. 18 U.S.C. § 3664.

255. ALA. CODE § 15-23-73 (1975) (“victim shall have the right to review a copy of the pre-sentence investigative report, subject to the applicable federal or state confidentiality laws”); ALASKA STAT. § 12.55.023 (2004) (giving victim right to look at portions of sentencing report); ARIZ. CONST. art. 2, § 2.1 (giving victim right to review presentence report when available to the defendant); ARIZ. REV. STAT. ANN. § 13-4425 (2004) (giving victim right to review presentence report “except those parts excised by the court or made confidential by law”); FLA. STAT. ANN. § 960.001 (2000) (giving victim right to review presentence report); IDAHO CODE § 19-5306 (2004) (giving victim right to review presentence report); IND. STAT. ANN. 35-40-5-6(b) (2004) (giving victim right to read and “respond to” material contained in the presentence report); LA. CONST. art. 1, § 25 (giving victim “right to review and comment upon the presentence report”); MONT. CODE ANN. § 46-18-113 (2005) (giving prosecutor discretion to disclose contents of presentence report to victim); OR. REV. STAT. ANN. § 137.077 (2003) (presentence report may be made available to victim); see also COLO. REV. STAT. § 24-72-304(5) (2005) (giving prosecutor discretion to allow victim or victim’s family to see presentence report).

Article.²⁵⁶ In particular, I suggested that the Commission change its current rule, which allows only the parties to see the presentence report.²⁵⁷ The Practitioners' Advisory Group to the Sentencing Commission later disputed my proposal. In a letter to the Commission,²⁵⁸ they argued that “[n]othing in the CVRA or its legislative history states that crime victims should be permitted to review portions of the presentence report, dispute guidelines calculations, raise grounds for departure, or, as such rights would seem to imply, appeal a sentence on factual or legal grounds.”²⁵⁹ The Practitioners' Group also cited the drafting history of the proposed constitutional amendment protecting victims' rights, which they thought was limited to giving a victim merely the right to “allocute” at sentencing—that is, merely to provide victim impact information.²⁶⁰

The Practitioners' Group's arguments are flawed for several reasons. First, the Group too narrowly views the relevant legislative history of the CVRA. As explained above, Congress intended for victims to have broad rights in the sentencing process, including rights to be reasonably heard in a meaningful manner.²⁶¹ It is not reasonable to deprive victims of the critical information in the presentence report. Second, the Practitioners' Group inaccurately describes the relevant history of the Victims' Rights Amendment. It is true that the proposed constitutional amendment contained a right to be “reasonably heard,” just as the CVRA does. However, the Practitioner's Group fails to recognize that the legislative history of the amendment suggests that Congress was taking an expansive view of the victim's right to be heard at sentencing, including a view that

256. See *The Effect of United States v. Booker on the Federal Sentencing Guidelines: Hearing Before the U.S. Sentencing Comm'n* (Feb. 15, 2005) (statement of Paul G. Cassell, United States Judge for the District of Utah), available at http://www.usc.gov/hearings/02_15_05/cassell_testimony.pdf.

257. U.S. SENTENCING COMM'N, 1 Federal Sentencing Guidelines § 6A1.2 (West 2004).

258. Letter from Amy Baron-Evans & Mark Flanagan to Hon. Ricardo H. Hinojosa (Feb. 28, 2005), available at http://sentencing.typepad.com/sentencing_law_and_policy/files/pag_letter.doc.

259. *Id.* at 2.

260. *Id.*

261. See *supra* notes 239–44 and accompanying text.

would embrace a victim's right to make a specific sentencing recommendation.²⁶²

Most important, the Practitioners' Group's letter fails to consider the impact of denying the victim access to the presentence report on the victim's right to fairness. Presumably the Group, comprised primarily of defense attorneys, would be outraged if defendants were sentenced without receiving notice about relevant parts of the presentence report, because of the defendant's due process rights. But victims now also have due process rights during sentencing, which make it clear that they should receive the same information.

The Practitioners' Group raises one concern that can be readily dispelled. The Group wonders whether a victim's right to be heard on Guidelines issues implies a general right to appeal a sentence. It would not. The CVRA contains its own specific remedial provision, which permits victims to appeal only denials of their rights.²⁶³ It specifically allows a victim to file a motion "to re-open . . . a sentence" only for violations of the victim's "right to be heard."²⁶⁴ Moreover, while victims possess due process protections, due process does not guarantee a right to an appeal.²⁶⁵ Finally, the Sentencing Reform Act spells out the limited rights of appeal on Guidelines issues available to only the government and the defense.²⁶⁶ For all these reasons, victims have the right to review relevant parts of the

262. The Group cites a 2000 Senate Judiciary Committee Report regarding the Victims' Rights Amendment, which referenced a Tenth Circuit decision restricting the right of victims to present a sentencing recommendation. *See* Letter from Amy Baron-Evans, *supra* note 258 (citing S. REP. NO. 106-254, at 12 (2000) (discussing *Robinson v. Maynard*, 943 F.2d 1216 (10th Cir. 1991))). By 2003, however, the same passage in the Senate Judiciary Committee Report was changed to remove the citation to that case and instead to cite a leading proponent of expansive rights for victims to give judges specific sentencing recommendations:

Victim impact statements concerning the character of the victim and the impact of the crime remain constitutional. *See* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282 (2003).

The Committee does not intend to alter or comment on laws existing in some States allowing for victim opinion as to the proper sentence.

S. REP. NO. 108-191, at 38 (2003). It is hard to see anything in this history suggesting that Congress wanted victims to be deprived of the chance to review presentence reports.

263. 18 U.S.C.A. § 3771(d)(5) (West 2004 & Supp. 2005). *See generally In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 561-64 (2d Cir. 2005) (discussing appeals under CVRA).

264. 18 U.S.C.A. § 3771(d)(5).

265. *See McKane v. Durston*, 153 U.S. 684 (1894).

266. 18 U.S.C. § 3742 (2000).

presentence report and to be heard on Guidelines issues in the trial court, but if the court properly hears them on the Guidelines issues, victims would not have the right to appeal the sentence the court ultimately imposes.

Because victims have a right of access to the presentence report, the question arises of how to provide that access. Nothing in current law precludes releasing presentence reports to victims. While 18 U.S.C. § 3552 *requires* disclosure to government and defense counsel, it does not forbid further dissemination. Several federal courts have held that circulation of reports to third parties is proper on a showing of particularized need approved by the court.²⁶⁷ Some courts' local rules also allow additional distribution with court approval.²⁶⁸ Victims always have a particularized need for access to the Guidelines calculations and related parts of the presentence report; without such access they are unable to effectively make their sentencing recommendation.

In view of that legal landscape, there are three ways in which the Federal Rules of Criminal Procedure might deal with disclosure of the presentence reports to victims:

(1) *Complete Disclosure.* The rules could direct full disclosure of the presentence report to the victim. While no statute bars this approach, legitimate policy objections might be raised. Some reports may contain sensitive private information about the defendant such as results of psychiatric examinations, prior history of drug use, or childhood sexual abuse. Some reports may also reveal confidential law enforcement information that should not be widely circulated. Victims may not always need access to these parts of the report. While a number of states give victims unfettered right to access the presentence report,²⁶⁹ a more limited approach seems appropriate in the federal system.

267. *See, e.g.*, United States v. Corbitt, 879 F.2d 224, 238 (7th Cir. 1989) (compelling, particularized need standard); United States v. Schlette, 842 F.2d 1574, 1579 (9th Cir. 1988) (interests of justice standard); United States v. Charmer Indus., Inc., 711 F.2d 1164, 1174 (2d Cir. 1983) (compelling need standard).

268. *See, e.g.*, D. UTAH CRIM. LOCAL R. 32-1(c) (presentence reports not released without order of the court).

269. *See supra* note 255.

(2) *Selective Disclosure*. The rules could direct that the probation office redact any presentence report to remove confidential information and then provide the redacted report to the victim. This approach, too, is problematic; it would require considerable work by busy probation officers to prepare an additional document—a redacted report—presumably only after consulting with the attorneys on both sides of the case about what might be viewed as confidential.

(3) *Disclosure through Prosecutors*. The simplest solution to the competing concerns is to disclose the report to victims through an intermediary: the prosecutor. The prosecutor would serve as the filter for confidential information and assist the victim by highlighting critical parts of the report. Opponents might object that this approach would burden prosecutors, who are no less busy than probation officers. But the CVRA already gives victims the right to “confer” with prosecutors,²⁷⁰ and presumably they will confer regarding the important topic of sentencing. Moreover, many U.S. Attorney’s Offices already have Victim-Witness Coordinators who communicate with victims regarding impact statements. The CVRA also authorizes increased funding of \$22 million for the Victim-Witness Assistance Programs in U.S. Attorney’s Offices, presumably enabling those offices to expand their victim services.²⁷¹

It might be burdensome to require that prosecutors disclose presentence reports to victims in all cases, even when they are not interested in such disclosure. Accordingly, disclosure of the report should be required only upon request of a victim.

For all those reasons, the Commission should amend the rules to give requesting victims access to presentence reports through the prosecutor. In addition, some of the aspects of preparing and disclosing presentence reports are covered in Chapter 6.A of the *United States Sentencing Guidelines Manual*.²⁷² The *Manual* falls within the jurisdiction of the U.S. Sentencing Commission. Accordingly, the Advisory Committee on Criminal Rules should

270. 18 U.S.C.A. § 3771(a)(5) (West 2004 & Supp. 2005).

271. See 118 Stat. 2260, 2264 (2004).

272. See *supra* note 257 and accompanying text.

coordinate with the Commission to ensure that any changes in the Criminal Rules are consistent with the provisions of the *Manual*.

*Rule 32(f), (h), (i)—Victim Opportunity To Object
to Presentence Report*

The Proposal:

Rule 32(f), (h), and (i) should be amended to allow the victim to object to the presentence report as follows:

(f) Objecting to the Report.

(1) *Time To Object.* Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. The attorney for the government or for the victim shall raise for the victim any reasonable objection by the victim to the presentence report.

(2) *Serving Objections.* An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) *Action on Objections.* After receiving objections, the probation officer may meet with the parties and the victim to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

....

(h) Notice of Possible Departure from Sentencing Guidelines.

Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission or in a victim impact statement, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. The attorney for the government or for the victim shall advise defense counsel and the court of any ground identified by the victim that might reasonably serve as a basis for departure.

(i) Sentencing.

(1) *In General.* At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys and any victims to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party or any victim to make a new objection at any time before sentence is imposed.

(2) *Introducing Evidence; Producing a Statement.* The court may permit the parties or the victim to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)–(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) *Court Determinations.* At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

The Rationale:

For the reasons explained in the preceding section, the victim's right to be "reasonably heard" at a sentencing hearing encompasses the right to be heard on Sentencing Guidelines issues. Congress

intended that the victim become a participant in the process with rights “independent of the Government or the defendant.”²⁷³ Those independent rights include the opportunity to make “sentencing recommendations.”²⁷⁴ Given that matters in the presentence report may often determine what effect a sentencing recommendation will have, the victim’s right presumably extends to participating in the process that determines the Guideline range.

The changes in Rule 32 noted above simply incorporate the victim in the Guidelines process. Changing the rule in this fashion would also clarify the appropriate sequencing of sentencing hearings. Rule 32(i) already allows the victim to submit “any information” about the sentencing.²⁷⁵ Yet if the experience in my court is any guide, the victim’s allocution frequently occurs only after the court has decided all the issues surrounding the presentence report. For the victim’s right to provide information to the court to truly have meaning, the victim’s information must be presented early enough to potentially affect critical sentencing issues, including issues about Guidelines calculations.

As with the changes discussed in the previous section, changes in the *Sentencing Guidelines Manual* are also required here. The Advisory Committee also should coordinate with the Sentencing Commission to ensure that its actions are consistent.

*Rule 32(i)(4)—Conforming Amendment to Victims’
Right To Be Heard*

The Proposal:

Rule 32(i)(4) should be amended to conform the definition of victim to that found in the CVRA as follows:

(B) By a Victim. Before imposing sentence, the court must address any victim of ~~a the crime of violence or sexual abuse~~ the crime of violence or sexual abuse who is present at sentencing and must permit the victim to speak or submit any information about the sentence. ~~Whether or not the victim is~~

273. 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

274. *Id.*

275. FED. R. CRIM. P. 32(i)(4)(B).

~~present, a victim's right to address the court may be exercised by the following persons if present:~~

- ~~(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or~~
- ~~(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.~~

The Rationale:

As noted earlier,²⁷⁶ Rule 32 currently contains a definition of "victim" that is narrower than the CVRA's definition. The simplest fix is simply to strike the definition of victim and victim's representative here and include an appropriate definition in Rule 1.

(New) Rule 43.1—Victim's Right To Attend Trials

The Proposal:

A new rule implementing the victim's right to be present at trials and other proceedings should be added as follows:

Rule 43.1 Victim's Presence

(a) Victim's Right To Attend. A victim has the right to attend any 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. Before making any determination to exclude a victim, 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 to exclude a victim shall be clearly stated on the record.

(b) Proceeding With and Without Notice. The court may proceed with a public proceeding without a victim if proper notice has been provided to that victim under Rule 10.1. The court may proceed with a public proceeding (other than a trial or sentencing)

276. See discussion *supra* notes 120–27, 220–23 and accompanying text discussing Rules 1 and 32(a).

without proper notice to a victim only if doing so is in the interest of justice, the court provides prompt notice to that victim of the court's action and of the victim's right to seek reconsideration of the action if a victim's right is affected, and the court ensures that notice will be properly provided to that victim for all subsequent public proceedings.

(c) Numerous Victims. If the court finds that the number of victims makes it impracticable to accord all of the victims the right to be present, the court shall fashion a reasonable procedure to facilitate victims' attendance.

(d) Right To Be Heard on Victims' Issues. In addition to rights to be heard established elsewhere in these rules, at any public proceeding at which a victim has the right to attend, the victim has the right to be heard on any matter directly affecting a victim's right.

The Rationale:

The rules should reflect the CVRA's command that victims have the right to attend public proceedings in all but the most unusual circumstances. The CVRA guarantees victims the right to attend a 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."²⁷⁷ This is a fundamental right for victims. A crime is often a very significant event in the life of a victim, and the trial, too, may be extremely important. Victims deserve to see in person whether justice is being done and should be exempted from the rule requiring trial witnesses to sit outside the courtroom.²⁷⁸ The CVRA adopts this approach by

allow[ing] crime victims, in the vast majority of cases, to attend the hearings and trial of the case involving their victimization. This is so important because crime victims share an interest with the

277. 18 U.S.C.A. § 3771(a)(3) (West 2004 & Supp. 2005).

278. See generally PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 80 (1982) (urging that victims be able to attend trial); Douglas E. Beloof & Paul G. Cassell, *The Victim's Right To Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005) (developing this argument at length).

government in seeing that justice is done in a criminal case and this interest supports the idea that victims should not be excluded from public criminal proceedings, whether these are pretrial, trial, or post-trial proceedings.²⁷⁹

Most states have also adopted language affirming a victim's right to attend court proceedings, including the trial.²⁸⁰

One way of addressing the victim's right to attend would be to leave the matter to the Federal Rules of Evidence. Federal Rule of Evidence 615—the so-called “rule on witnesses”—requires exclusion of witnesses with certain exceptions, including the fourth exception for “a person authorized by statute to be present.”²⁸¹ This exception was added to cover crime victims,²⁸² who had a right to attend trials subject to certain conditions even before the passage of the CVRA.²⁸³ Without the explicit listing of this exception, some trial courts simply overlooked the victim's right to attend—most notoriously in the Oklahoma City bombing trial.²⁸⁴

279. 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

280. *See, e.g.*, ARIZ. CONST. art. II, § 2.1(A) (“To preserve and protect victims’ rights to justice and due process, a victim of crime has a right: . . . [t]o be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.”); COLO. CONST. art. II, § 16a (“Any person who is a victim of a criminal act, or such person’s designee, legal guardian, or surviving immediate family members if such person is deceased, shall have the right to be heard when relevant, informed, and *present* at all critical stages of the criminal justice process.” (emphasis added)); IDAHO CONST. art. I, § 22 (“A crime victim, as defined by statute, has the following rights: . . . (4) to be *present* at all criminal justice proceedings . . .”) (emphasis added); LA. CONST. art. I, § 25 (“As defined by law, a victim of crime shall have the right to . . . be *present* . . . during all critical stages of preconviction . . . proceedings . . .”) (emphasis added); MICH. CONST. art. I, § 24 (“Crime victims . . . shall have the following rights . . . The right to *attend trial* and all other court proceedings the accused has the right to attend.” (emphasis added)); MISS. CONST. ANN. art. III, § 26A (2000) (“Victims of crime . . . shall have the right . . . to be *present* . . . when authorized by law, during public hearings.” (emphasis added)); MO. CONST. art. I, § 32 (“Crime victims, as defined by law, shall have the following rights . . . (1) the right to be *present* at all criminal justice proceedings at which the defendant has such right . . .”) (emphasis added)); MISS. CODE ANN. § 99-43-21 (2000) (“The victim has the right to be *present* throughout all criminal proceedings as defined in Section 99-43-1.” (emphasis added)). *See generally* Beloof & Cassell, *supra* note 278, (collecting all state statutes and rules pertaining to the victim's right to attend).

281. FED. R. EVID. 615(4).

282. *See* FED. R. EVID. 615, Adv. Comm. Notes, 1998 Amendments.

283. *See* 42 U.S.C. § 10606 (1990) (replaced by the CVRA).

284. *See supra* notes 35–58 and accompanying text; Beloof & Cassell, *supra* note 278, at 514–17.

Merely relying on Rule 615 to protect the victim's right to attend proceedings, however, would be inadequate. First, the defendant's right to attend proceedings is deemed sufficiently important to merit treatment in a specific rule in the Federal Rules of Criminal Procedure—Rule 43. This proposed victim's rule, Rule 43.1, would even-handedly mirror that treatment for victims.

Second, Federal Rule of Evidence 615 does not comprehensively address the victim's right to attend proceedings. For starters, it would seem that the Advisory Committee Notes in the Federal Rules of Evidence now need a revision to reference the CVRA. Otherwise, judges, prosecutors, and defense counsel might simply be unaware that a victim is now "authorized by statute"—the CVRA—to be present.²⁸⁵ Even if legal professionals realize the CVRA's ramifications, most crime victims are not lawyers and lack experience in the criminal justice system. Therefore, their rights need to be laid out in the most direct manner possible by listing their right to attend any public court proceeding in the criminal rules.

Finally, providing the details of the victim's right to attend is important for practical reasons. The CVRA qualifies the victim's right to attend by requiring exclusion in those rare cases when the victim's testimony "would be materially altered if the victim heard other testimony at that proceeding."²⁸⁶ The CVRA, however, contains additional procedural requirements that judges must follow before excluding a victim in such situations: "Before making a determination . . . [to exclude a victim], 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."²⁸⁷ Presumably, these reasonable alternatives include having the victim testify first and then watching all the following witnesses testify,²⁸⁸ something judges are authorized to require.²⁸⁹ The Act also requires that "[t]he reasons for any decision denying relief under this chapter shall be clearly stated on

285. The current Advisory Committee Notes reference the old Victims Rights Act, which contains a narrower formulation of the victim's right to attend than found in the CVRA. *See* Beloof & Cassell, *supra* note 278, at 514–19.

286. 18 U.S.C.A. § 3771(a)(3) (West 2004 & Supp. 2005).

287. *Id.* § 3771(b).

288. *See* Beloof & Cassell, *supra* note 278, at 540–43 (discussing this approach).

289. *See* FED. R. EVID. 611(a) (judge controls "order" of evidence).

the record.”²⁹⁰ These procedural requirements are new and potentially complex. Moreover, issues surrounding victim attendance at criminal proceedings are likely to occur frequently. Victims can appeal any exclusion order, and appellate courts must take up those appeals expeditiously.²⁹¹ Accordingly, it is important that lawyers, judges, and victims have the new rule and its procedural requirements at their fingertips, rather than being forced to dig it out through some cross-reference to the United States Code. For all these reasons, subsection (a) of the proposed rule simply tracks verbatim the substantive and procedural requirements of the CVRA.

Proposed Rule 43.1(a) also limits the victim’s right to attend “public” proceedings. It is clear that the CVRA intended to make no change in the circumstances in which proceedings could be closed to the public. As Senators Kyl and Feinstein explained in a colloquy regarding the law: “[T]he Government or the defendant can request, and the court can order, judicial proceedings to be closed under existing laws. This provision [of the CVRA] is not intended to alter those laws or their procedures in any way”²⁹²

Proposed Rule 43.1(b) turns to the potentially complex subject of whether the court may go forward with a proceeding when the victim is not present. Of course, if the victim has been properly notified but has elected not to attend the proceeding, no problem arises. The difficult issue is what to do when the victim is absent because of lack of notice of the proceeding. It could be argued that the court has no choice but to reschedule such a proceeding, just as it would be required to reschedule a proceeding when the defendant had not received notice. The CVRA mandates that courts “shall ensure” that crime victims are accorded their rights,²⁹³ and one of the rights is notice for court proceedings.²⁹⁴ If the victim has not received notice of a proceeding, then going forward with the proceeding arguably violates the victim’s rights under the CVRA. As Senator Kyl explained:

290. 18 U.S.C.A. § 3771(b).

291. *Id.* § 3771(d)(3).

292. 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (colloquy between Sen. Kyl and Sen. Feinstein) (explaining that “[i]n this regard, it is not our intent to alter 28 C.F.R. Sec. 50.9 in any respect”).

293. 18 U.S.C.A. § 3771(b).

294. *Id.* § 3771(a)(2).

It does not make sense to enact victims' rights that are rendered useless because the victim never knew of the proceeding at which the right had to be asserted. Simply put, a failure to provide notice of proceedings at which a right can be asserted is equivalent to a violation of the right itself.²⁹⁵

Proposed Rule 43.1(b) stakes out a position more limited than an absolute requirement of proper victim notification. Except for trials and sentencings (which are discussed below), proposed Rule 43.1(b) would allow the court to move forward with a proceeding without notice to the victim provided that three conditions are met: (1) doing so is in the interests of justice, (2) the court provides prompt notice to the victim of the court's action and of the victim's right to seek reconsideration of the action if a victim's right is affected, and (3) the court ensures that notice will be properly provided to the victim for all subsequent public proceedings.

Each of these three conditions serves an important purpose. To begin with, the court should not go forward unless the interests of justice are served—the first requirement. The court should also notify the victim of the opportunity to seek reconsideration of the court's action if a victim's right is affected—the second requirement. For example, if the court holds a bail hearing without proper notice to the victim and decides to release a defendant, the victim should be advised of this fact and of the right to ask the court to reconsider that bail decision. (The CVRA, as noted earlier, gives victims the right to provide information regarding bail decisions.²⁹⁶) Finally, if the court is moving forward without proper notice to a victim at a particular proceeding, it seems only fair that the problem be solved for future proceedings—the third requirement.

For two important proceedings—trial and sentencing—the proposed rule would bar a court from moving forward without proper notice to the victim. This is consistent with the CVRA's directive that “in any court proceeding involving an offense against a crime victim, the court *shall ensure* that the crime victim is afforded the rights [in the CVRA].”²⁹⁷ If the victim has not been notified of a

295. 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

296. See 18 U.S.C.A. § 3771(a)(4) (discussed at *supra* notes 104–10 and accompanying text).

297. *Id.* § 3771(b) (emphasis added).

trial or sentencing, the only way the court can “ensure” that the victim’s right is protected is to delay the trial or sentencing until the victim receives notice. This is entirely appropriate; a victim of a crime deserves the opportunity to see the trial of her victimizer and to speak at sentencing. A modest delay in these proceedings is a small price to pay for respecting the victim’s rights. Moreover, neither a trial nor a sentencing can be repeated. Double jeopardy principles may well forbid retrial even when a victim has received no notice,²⁹⁸ and the CVRA itself bars a new trial remedy.²⁹⁹ Sentencings would appear to be subject to limitations that might prevent a crime victim from obtaining a resentencing³⁰⁰—although the CVRA directly allows for re-sentencings in certain limited circumstances.³⁰¹

While neither trial nor sentencing could proceed without proper notice to the victim, this restriction will affect only a small number of cases for a short period of time. Many federal cases lack a specifically identifiable victim (e.g., drug and immigration offenses) and thus are not covered by the CVRA. In those cases with a victim, a significant percentage of victims may waive any right to receive notice. In cases where victims choose to receive notice, presumably the notice will be properly given the vast majority of the time. Even apart from notice requirements, most victims will be trial witnesses and therefore will have been notified of the trial by a subpoena. Victims will also often be aware of sentencings through the work of probation officers in preparing presentence reports.³⁰² In the tiny fraction of cases where notice has not been properly provided, notice will often be only a

298. See U.S. CONST. amend. V. See generally Beloof, *The Third Wave of Crime Victims’ Rights*, *supra* note 16, at 303–04 (discussing double jeopardy barriers to remedying violations of victim’s rights).

299. 18 U.S.C.A. § 3771(d)(5).

300. See FED. R. CRIM. P. 35(c) (correction of sentence allowed only for technical or other clear error). Whether denial of a victim’s right constitutes “clear error” subject to correction presumably will need to be resolved in future cases. *Cf.* United States v. Bedonie, 413 F.3d 1126 (10th Cir. 2005) (remedying error in restitution award not permitted after imposition of sentence).

301. 18 U.S.C.A. § 3771(d)(5) (authorizing a victim motion to “re-open a . . . sentence” if the victim’s right to be heard was denied); see 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (discussing this provision). In light of these provisions, the Advisory Committee may need to consider redrafting Rule 35 to allow reopening of sentences imposed in violation of victims’ rights.

302. See *supra* notes 231–34 and accompanying text (discussing probation officers collecting victim information for presentence reports).

telephone call away. While the burdens of delaying a trial or sentencing are not trivial, Congress has determined that the victim's rights must take precedence. Proposed subsection (b) faithfully implements that determination.

Subsection (c) of the proposed rule deals with the victim's right to attend in situations involving multiple victims. Congress has recognized that in some cases, such as the Oklahoma City bombing case, it is impossible to afford all victims the opportunity to attend trials. Accordingly, the CVRA provides that where "the number of crime victims makes it impracticable" to protect rights for all victims, the court "shall fashion a reasonable procedure" to give effect to victims' interests.³⁰³ Possible procedures include closed-circuit transmission of the proceedings to a ceremonial courtroom, auditorium, or other facility that can accommodate many people. To permit such transmission, an amendment to Rule 53 is proposed below.³⁰⁴

Subsection (d) gives victims a general right to be heard on issues "directly affecting" their rights. The CVRA specifically mandates that victims have the right to be heard with regard to release of the defendant, a plea, or a sentence.³⁰⁵ The right to be heard at these hearings has been addressed elsewhere in these proposed rules,³⁰⁶ but courts will sometimes consider other issues that directly affect victims' rights. For example, courts may consider whether to release the address and telephone number of the victim to the defendant.³⁰⁷ It makes little sense for the court to decide this issue without hearing from the victim, particularly since the CVRA gives victims the right "to be reasonably protected from the accused."³⁰⁸ Subsection (d) would cover such situations by allowing victims who are present at a hearing to be heard on issues "directly" affecting their rights.

303. 18 U.S.C.A. § 3771(d)(2).

304. See *infra* notes 340–42 and accompanying text.

305. 18 U.S.C.A. § 3771(a)(4) (discussed at *supra* notes 104, 230 and accompanying text).

306. See *supra* note 296 and accompanying text (bail hearings); *supra* note 110 and accompanying text (plea hearings); *supra* note 275 and accompanying text (sentencing hearings).

307. See *supra* notes 175–76 and accompanying text (discussing changes to Rule 12.1).

308. 18 U.S.C.A. § 3771(a)(1).

*Rule 44.1—Discretionary Appointment of Counsel for Victim**The Proposal:*

The court's discretionary authority to appoint counsel for a victim should be included in a new rule as follows:

Rule 44.1 Counsel for Victims.

When the interests of justice require, the court may appoint counsel for a victim to assist the victim in exercising his or her rights.

The Rationale:

An argument could be made that the CVRA guarantees crime victims the right to appointed counsel. After all, the CVRA guarantees victims the right to be “treated with fairness” and fairness can be understood as embracing the assistance of counsel.³⁰⁹ But on closer examination, it becomes clear that nothing in the CVRA directly mandates counsel for victims. As Senator Kyl explained, “This bill does not provide victims with a right to counsel but recognizes that a victim may enlist counsel on their own.”³¹⁰

While the CVRA does not *require* judges to appoint counsel for victims, nothing in it prevents judges from doing so in appropriate cases, particularly under prevailing case law demonstrating that federal courts have inherent authority to make such appointments. Because this authority may not be well known to judges (or to victims), the authority should be clearly laid out in the Federal Rules of Criminal Procedure.

A number of federal courts have recognized inherent judicial authority to appoint lawyers for indigent litigants in both civil and criminal cases.³¹¹ While these cases do not directly involve

309. *Cf. Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (discussing “fairness” to the defendant as a reason for recognizing a right to appointed counsel).

310. 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

311. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 73 (1932) (holding, in a capital case, that courts have the power to appoint counsel and that “[a]ttorneys are officers of the court, and are bound to render service when required by such an appointment”); *United States v. Bertoli*, 994 F.2d 1002, 1015–18 (3d Cir. 1993) (holding that the court has inherent power to order defendant’s retained law firm to remain as standby counsel at a criminal trial when defendant

appointment of counsel for crime victims, their principles clearly apply to victims. Illustrative of these decisions is the thoughtful analysis by the U.S. District Court for the District of Nebraska in *Bothwell v. Republic Tobacco Co.*³¹² *Bothwell* presented four grounds for its holding that courts have inherent power to appoint attorneys to represent indigent litigants:

1) courts possess the inherent power to bring to their assistance those “instruments” necessary to ensure a “fair and just” adjudicative process in individual cases; 2) in many, if not most, cases, due to the adversarial nature of our system, lawyers are a necessary component in ensuring such a “fair and just” process; 3) to a significant degree, neither the private marketplace nor public or charitable efforts provide indigent litigants with adequate access to legal assistance; and 4) to that extent, such failure threatens the reliability of the results of the adversarial process.³¹³

These grounds readily apply to appointing attorneys for indigent victims when important rights under the CVRA are at stake. Without

elects to represent himself *pro se*); *United States v. Accetturo*, 842 F.2d 1408, 1412–16 (3d Cir. 1988) (holding that courts have inherent power to appoint counsel during a criminal trial proceeding but that the power does not extend to appointing lawyers licensed in other states); *United States v. Bowe*, 698 F.2d 560, 566–67 (2d Cir. 1983) (noting that a court has inherent authority to appoint counsel for an indigent witness who may incriminate herself during testimony in a criminal case); *Williamson v. Vardeman*, 674 F.2d 1211, 1212–16 (8th Cir. 1982) (upholding a state court judge’s appointment of *pro bono* counsel in criminal case as constitutional although noting that forcing an attorney to advance his own funds may be unconstitutional); *Tyler v. Lark*, 472 F.2d 1077, 1079 (8th Cir. 1973) (noting that in civil rights cases, “representation of indigents upon court order has been a traditional obligation of the lawyer which he assumes when he becomes a member of the bar”); *Dolan v. United States*, 351 F.2d 671, 672 (5th Cir. 1965) (holding, in a criminal case, that lawyers implicitly consent to be appointed by courts *pro bono* when accepting a license to practice law); *United States v. Dillon*, 346 F.2d 633, 635–36 (9th Cir. 1965) (holding, in a criminal case, that there is “an obligation on the part of the legal profession to represent indigents upon court order, without compensation”). *But cf.* *Colbert v. Rickmon*, 747 F. Supp. 518, 527 (W.D. Ark. 1990) (holding that courts have no inherent power to order attorneys to represent indigent clients). *See generally* Jerry L. Anderson, *Court-Appointed Counsel: The Constitutionality of Uncompensated Conscriptio*, 3 GEO. J. LEGAL ETHICS 503 (1989) (discussing the trend against requiring lawyers to take uncompensated court appointments); Bruce Andrew Green, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366 (1981) (discussing the constitutionality of *pro bono* court appointments); Judy E. Zelin, *Court Appointment of Attorney To Represent, Without Compensation, Indigent in Civil Action*, 52 A.L.R. 4th 1063 (1987 & Supp. 2004).

312. 912 F. Supp. 1221 (D. Neb. 1995).

313. *Id.* at 1229.

an attorney to press her claims, a victim may be unable to obtain a “fair and just” adjudicative process.³¹⁴ Moreover, crime victim representation appears to be a prime example of a situation where “neither the private marketplace nor public or charitable efforts provide indigent litigants with adequate access to legal assistance.”³¹⁵ No financial incentive will drive lawyers to represent victims in criminal cases.³¹⁶ And while pro bono representation for victims is expanding,³¹⁷ it still falls far short of the needs of victims in the federal system. The fourth and final requirement—that the failure of attorneys to represent the indigent client threatens the reliability of the system—is also present where rights under the CVRA are at stake. Neither the prosecutor nor the defendant has a personal stake in the victim’s rights, and, frequently, they will have other priorities and interests that may even be adverse to the rights of the victim.³¹⁸ Accordingly, courts have inherent authority to appoint counsel to represent indigent victims and, indeed, may even be able to require

314. See generally John W. Gillis & Douglas Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 692 (2002).

315. *Bothwell*, 912 F. Supp. at 1229.

316. See Gillis & Beloof, *supra* note 314, at 698–700.

317. See *infra* note 324 and accompanying text (discussing funding in the CVRA for the National Crime Victims Law Institute and other legal clinics for victims).

318. See Gillis & Beloof, *supra* note 314, at 692.

counsel to serve without compensation.³¹⁹ The local rules of some federal courts already explicitly recognize this power.³²⁰

In addition to this inherent authority, federal courts appear to possess statutory authority to make such an appointment. Title 28 broadly permits the court in both civil and criminal cases to “request an attorney to represent *any person* unable to afford counsel.”³²¹ Moreover, at least one statute already directly authorizes federal courts to appoint counsel for child victims in certain cases. Title 18 U.S.C. § 3509 provides, “The court may appoint a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child.” Congress, however, has not yet provided funding for this particular right.³²² Finally, in unusual circumstances where a crime victim may also face possible criminal charges of his or her own, the Criminal Justice Act would authorize appointment of and payment for defense counsel.³²³

Proposed Rule 44.1 would confirm the existing discretionary power of the courts to appoint volunteer counsel. The rule is purely discretionary (the court “may” appoint counsel) and is limited to

319. See *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 307 & n.8 (1989) (leaving open the question of whether federal courts possess the inherent authority to *require* counsel to provide legal services to the poor). Several lower courts have concluded that appointment without compensation is proper. See *Bothwell*, 912 F. Supp. at 1230–34 (counsel have a duty to serve without compensation); *Family Division Trial Lawyers of the Superior Court-D.C. v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1984) (rejecting argument that *pro bono* appointment violates the Thirteenth Amendment because attorneys can take steps to avoid the *pro bono* appointments and holding that *pro bono* court appointments are not *per se* “takings,” as accepting court ordered representation of indigents is a condition of receiving a law license, but excessive burden could present takings problem); *Williamson v. Vardeman*, 674 F.2d 1211, 1211 (8th Cir. 1982) (noting that *pro bono* service is a voluntary obligation undertaken by attorneys when they apply for a license to practice law); *Tyler v. Lark*, 472 F.2d 1077, 1079–80 (8th Cir. 1973) (no takings problem with appointment); *United States v. Dillon*, 346 F.2d 633, 635–36 (9th Cir. 1965) (no taking problems with appointment). *But see State ex rel. Scott v. Roper*, 688 S.W.2d 757, 759–70 (Mo. 1985) (questioning power of courts to appoint counsel without providing compensation).

320. See, e.g., D. UTAH CIV. R. 83-1.1(b)(3) (1997) (“Any attorney who is admitted to the bar of this court must agree, as a condition of such admission, to engage in a reasonable level of pro bono work when requested to do so by the court.”).

321. 28 U.S.C. § 1915(e)(1) (2000) (emphasis added).

322. Memorandum from the Administrative Office of the United States Courts to the United States District Court Judges and the United States Magistrate Judges (March 19, 1991) (available from the Administrative Office).

323. See 18 U.S.C. § 3006A(a)(1).

situations where the interests of justice require appointment. The rule does not address payment for counsel, as this matter must be left to subsequent appropriations from Congress. The court, however, can ask for volunteer counsel to assist victims on a pro bono basis.

There is reason to expect that some attorneys will volunteer. Not only are many attorneys willing to undertake pro bono representation, but the CVRA itself authorizes millions of dollars in funding for victim representation around the country. The authorization includes support for the National Crime Victims Law Institute at the Northwestern School of Law at Lewis and Clark College to help establish eleven legal offices around the country representing crime victims.³²⁴

Finally, it might be argued that it is unnecessary to address this subject in a rule because the court's inherent authority to appoint counsel exists even without a rule. Both courts and victims, however, will find it useful to have this authority spelled out in the criminal rules to eliminate any lingering doubt. In addition, the CVRA obliges prosecutors to eliminate any lingering doubt in the event of any material conflict of interest between the prosecutor and the victim by "advis[ing] the crime victim that the crime victim can seek the advice of an attorney."³²⁵ This requirement may frequently require prosecutors to help victims obtain legal counsel. Accordingly, a separate rule on this subject is appropriate.

For all these reasons, the rules should be amended to recognize the court's authority to appoint volunteer counsel to represent a crime victim.

324. See 42 U.S.C. 10603(d) (2000); *see also* 150 CONG. REC. S4266 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (noting appropriations for the National Crime Victims Law Institution "to provide grants and assistance to lawyers to help victims of crime in court" with funding sufficient to "provide for two new regional offices and nine specific clinics"). For more information on NCVLI, see <http://www.ncvli.org>.

325. 18 U.S.C.A. § 3771(c)(2) (West 2004 & Supp. 2005).

Rule 46—Victims’ Right To Be Heard Regarding Defendant’s Release from Custody

The Proposal:

Victims should be explicitly given the right to be heard regarding the defendant’s release from custody as follows:

(k) Victims’ Right To Be Heard. A victim has the right to be heard regarding any decision to release the defendant. The court shall consider the views of victims in making any release decision, including such decisions in petty cases. In a case where the court finds that the number of victims makes it impracticable to accord all of the victims the right to be heard in open court, the court shall fashion a reasonable procedure to facilitate hearing from representative victims.

The Rationale:

The CVRA guarantees victims the right “to be reasonably heard” at “any public proceeding . . . involving release.”³²⁶ A similar right already exists for victims of stalking offenses.³²⁷ This proposed rule simply recognizes a victim’s right “to be reasonably heard” and further directs the court to consider the victim’s input. The victim’s right to be heard would be meaningless if the court did not consider the victim’s views. Moreover, existing law appears to recognize that the court should consider the victim’s concerns.³²⁸

Rule 48—Victims’ Views on Dismissal To Be Considered

The Proposal:

The court should be required to consider the views of victims in deciding whether to grant a government motion to dismiss charges as follows:

326. 18 U.S.C.A. § 3771(a)(4).

327. 18 U.S.C. § 2263.

328. *See, e.g.*, 18 U.S.C. § 3142(c) (court to consider whether release of the defendant “will endanger the safety of any other person”).

Rule 48. Dismissal

(a) **By the Government.** The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent. In deciding whether to grant the government's motion to dismiss, the court shall consider the views of any victims.

The Rationale:

This proposed change would implement a victim's right to be "treated with fairness" and to be heard at any proceeding "involving release" of the defendant by requiring the court to consider the views of the victim before granting a government motion to dismiss a charge. The rule already requires leave of court before a dismissal can be approved. In determining whether to grant leave, the court should consider whether dismissal is "clearly contrary to manifest public interest."³²⁹ Among the relevant factors in making this public interest determination is whether the prosecution's motion to dismiss is motivated by "animus towards the victim."³³⁰ The proposed rule would simply require the court to consider the views of the victim in making this determination, leaving the weight to afford those views up to the court.

*Rule 50—Victims' Right to Proceedings Free from
Unreasonable Delay*

The Proposal:

A victim's right to proceedings free from unreasonable delay should be recognized as follows:

Rule 50. Prompt Disposition

(a) **Scheduling Preference.** Scheduling preference must be given to criminal proceedings as far as practicable.

329. United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975).

330. *In re Richards*, 213 F.3d 773, 787 (3d Cir. 2000).

(b) Defendant’s Right Against Delay. The court shall assure that the defendant’s right to a speedy trial is protected, as provided by the Speedy Trial Act.

(c) Victim’s Right Against Delay. The court shall assure that a victim’s right to proceedings free from unreasonable delay is protected. A victim has the right to be heard regarding any motion to continue any proceeding. If the court grants a motion to continue over the objection of a victim, the court shall state its reasons in the record.

The Rationale:

Under the CVRA, a victim has a right “to proceedings free from unreasonable delay.”³³¹ A number of states have similar provisions.³³²

331. 18 U.S.C.A. § 3771(a)(7). Even before the adoption of the CVRA, child victims had the right to a “speedy trial” in certain situations. 18 U.S.C. § 3509(j).

332. *See, e.g.*, ARIZ. REV. STAT. § 13-4435 (2001) (“In any criminal proceeding in which a continuance is requested, the court shall consider the victim’s views and the victim’s right to a speedy trial.”); CAL. PENAL CODE § 1050(a) (2005) (stating policy of the California legislation that “[e]xcessive continuances . . . cause substantial hardship to victims and other witnesses It is therefore recognized that the people, the defendant, and the victims and other witnesses have the right to an expeditious disposition”); DEL. CODE ANN. tit. 11, § 9423 (2001) (“In ruling on any motion or other request for a delay or continuance . . . the court shall consider and give weight to any adverse impact such delay or continuance might have on the well-being of any victim”); 730 ILL. COMP. STAT. ANN. 5/5-4-3.1(c) (West 2005) (“[V]ictim shall be notified of the date and time of hearing [on any motion for continuance] and shall be provided an opportunity to address the court on the impact the continuance may have on the victim’s well-being.”); LA. REV. STAT. ANN. § 46:1844 (1999) (“When ruling on a defense motion for continuance, the court shall consider the impact on the victim.”); MISS. CODE ANN. § 99-43-19 (2000) (“[T]he court . . . should make every reasonable effort to consider whether granting [a] continuance shall be prejudicial to the victim.”); R.I. GEN. LAWS § 11-37-11.2 (2000) (“[T]he court shall consider any adverse impact the delay or continuance may have on the well-being of the victim”); TENN. CODE § 40-38-116(a) (2003) (“In any criminal proceeding in which a continuance is requested, the court shall consider the victim’s views and the victim’s right to a speedy trial. If the continuance is granted over the victim’s objection, the court shall state on the record the reason for the continuance and the procedures that have been taken to avoid further delays.”); WYO. STAT. ANN. § 1-40-207 (2004) (“The court shall consider the victim’s interest and circumstances when . . . granting or denying continuances.”).

Some states limit speedy trial rights to child victims. *See, e.g.*, ALA. CODE § 15-25-6 (2000) (“In ruling on any motion . . . for . . . continuance . . . the court shall consider and give weight to any adverse impact the delay or continuance may have on the well-being of a child victim or witness.”); DEL. CODE ANN. tit. 11, § 5133 (2001) (same); IDAHO CODE ANN. § 19-110 (2004) (same); KY. REV. STAT. ANN. § 421.510 (LexisNexis 1992) (same); N.Y. PENAL LAW § 642-a (2005) (same); N.D. CENT. CODE § 12.1-35-05 (2003) (same);

The proposed rule would give effect to this right. Of course, in some situations, delay is reasonable. In others, however, the court should deny a motion to continue in order to wrap up the proceedings and possibly bring closure to a victim. As Senator Feinstein has explained,

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 crime 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.³³³

The proposed rule gives victims a right against unreasonable delay in subsection (c). To ensure that defendants' rights are reasonably protected, a new subsection (b) is added recognizing defendants' rights in the Speedy Trial Act.³³⁴ The existing rule's direction to give scheduling preference to criminal cases would remain in subsection (a).

The proposal also gives victims the right to be heard on any continuance. This is consistent with the drafters' intent, as at least one court has already opined.³³⁵ As Senator Kyl stated, "This provision [in the CVRA] 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."³³⁶

WIS. STAT. § 971.105 (2005) (same). For general review of the victim's right to a speedy trial, see generally BELOOF, CASSELL & TWIST, *supra* note 15, at 383-91; Cassell, *Balancing the Scales of Justice*, *supra* note 15, at 1406.

333. 150 CONG. REC. S4268-69 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

334. 18 U.S.C. §§ 3161-3174.

335. *United States v. Turner*, 367 F. Supp. 2d 319, 334 n.14 (E.D.N.Y. 2005) (recognizing victim's "participatory right" with respect to delays in a criminal case).

336. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added).

The proposed rule also requires that the court state its reason for granting any continuance. This requirement stems from a recommendation from the President's Task Force on Victims of Crime, which noted "the inherent human tendency to postpone matters, often for insufficient reason," and accordingly recommended that "reasons for any granted continuance . . . be clearly stated on the record."³³⁷ Several states have adopted similar provisions.³³⁸

Rule 51—Claiming Error Regarding Victims' Rights

The Proposal:

The procedures for a victim to assert error should be spelled out in the rules as follows:

Rule 51. Preserving Claimed Error

(a) **Exceptions Unnecessary.** Exceptions to rulings or orders of the court are unnecessary.

(b) **Preserving a Claim of Error.** A party or a victim may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party or a victim does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

The Rationale:

The CVRA authorizes victim appeals and includes procedures for expedited handling of those appeals.³³⁹ The proposed rule would

337. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 76 (1982).

338. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4435(B) (2001) (courts required to "state on the record the reason for [any] continuance"); UTAH CODE ANN. § 77-38-7(3)(b) (2004) (court required to "enter in the record the specific reason for the continuance and the procedures that have been taken to avoid further delays").

339. *See* 18 U.S.C.A. § 3771(d)(3) (West 2004 & Supp. 2005).

incorporate victims into the existing rule regarding preservation of errors.

Rule 53—Closed-Circuit Transmission of Proceedings for Victims

The Proposal:

Closed-circuit transmission of court proceedings for victims should be authorized as follows:

Rule 53. Courtroom Photographing and Broadcasting Prohibited

(a) General Rule. Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

(b) Closed-Circuit Transmission for Victims. In order to permit victims of crime to watch criminal trial proceedings, the court may authorize closed-circuit televising of the proceedings for viewing by victims or other persons the court determines have a compelling interest in doing so.

The Rationale:

The CVRA grants victims the right to attend trials, as noted previously in connection with proposed Rule 43.1.³⁴⁰ At the same time, however, the CVRA recognizes that in situations with numerous victims, the court may have to craft “a reasonable procedure” to protect victims’ rights.³⁴¹ One such reasonable procedure would appear to be closed-circuit transmission of court proceedings to a facility sufficiently large to accommodate all the victims. This was the procedure followed in the Oklahoma City bombing case.³⁴²

340. See *supra* notes 277–308 and accompanying text.

341. 18 U.S.C.A. § 3771(d)(2).

342. See Paul G. Cassell & Robert F. Hoyt, *The Tale of Victims’ Rights*, LEGAL TIMES, Dec. 23, 1996, at 32; Jo Thomas, *Trial to Be Shown in Oklahoma for Victims*, N.Y. TIMES, Jan. 30, 1997, at A14.

The proposed rule would authorize such transmission in appropriate cases. The language for the proposed rule comes from 42 U.S.C. § 10608(a), which authorizes closed-circuit transmissions “notwithstanding any provision of the Federal Rules of Criminal Procedure to the contrary” in cases in which a proceeding has been transferred more than 350 miles—as was the case with the Oklahoma City bombing trial. In light of the CVRA’s mandate that the court must always craft “a reasonable procedure” to protect the rights of multiple victims, there is no compelling reason to tie the device to such geographical circumstances. The proposed rule authorizes courts to allow such transmissions in any appropriate case.

Rule 58—Victims and Petty Offenses

The Proposal:

Courts should hear from victims regarding sentences in petty cases as follows:

Rule 58. Petty Offenses and Other Misdemeanors.

....

(3) *Sentencing.* The court must give the defendant an opportunity to be heard in mitigation and then proceed immediately to sentencing. The court must also give victims an opportunity to be heard. The court may, however, postpone sentencing to allow the probation service to investigate or to permit either party to submit additional information.

The Rationale:

The CVRA gives a “victim” the right to be heard at sentencing. The CVRA defines “victim” as including anyone who is directly and proximately harmed by “a Federal offense.”³⁴³ The Act does not limit those offenses to felonies or misdemeanors. Accordingly, a victim has a right to be heard at sentencing for any petty offense, as would be reflected in the proposed rule.

343. 18 U.S.C.A. § 3771(e).

CONCLUSION

The CVRA commands that victims be made participants in the federal criminal process and thus requires significant changes to the Federal Rules of Criminal Procedure. This Article has provided one possible and comprehensive way to implement that congressional command with specific language and supporting analysis for each change. Undoubtedly there are other ways of implementing the CVRA. However, since the Advisory Committee will be making many decisions about how to best change the rules, one concluding thought may be worth highlighting.

Congress will be paying close attention to how courts protect the rights of future victims. Indeed, the CVRA directs the Administrative Office for the U.S. Courts to report each year the number of times that victims have attempted to assert their rights and been denied the requested relief.³⁴⁴ More generally, Congress views the new Act as an important step to protecting crime victims—a “new and bolder approach, than has ever been tried before in our Federal system.”³⁴⁵ Congress is eagerly awaiting the results of this approach. As Senator Leahy warned, “Passage of this bill will necessitate careful oversight of its implementation by Congress.”³⁴⁶ Victims’ advocates, too, will be watching carefully.³⁴⁷

In light of this thorough and ongoing interest, the judiciary should not merely attempt a “quick fix” or minimalist approach to implementing the CVRA, but should comprehensively protect crime victims’ rights by changes in court rules. If Congress believes that the federal rules fail to faithfully reflect crime victims’ concerns, it can directly amend the rules. But such direct amendments may not sufficiently attend to the needs of the judicial branch or others involved in the criminal justice process. It is in that spirit of eliminating any need for congressional intervention that this Article

344. 18 U.S.C.A. § 3771, Historical and Statutory Notes (requiring the Administrative Office of the courts to file an annual report with Congress concerning the number of times a victim’s right is asserted and denied by federal courts).

345. 150 CONG. REC. S4263 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

346. *Id.* at S4271 (daily ed. Apr. 22, 2004) (statement of Sen. Leahy).

347. *United States v. Turner*, 367 F. Supp. 2d 319, 337 (E.D.N.Y. 2005) (noting that victims’ advocates “will be watching to see how federal courts and prosecutors carry out the new law’s mandate”).

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Recognizing Victims in the Federal Rules

offers proposals to fully and faithfully implement the congressional directive that victims be integrated into the criminal justice process.

In the final analysis, whether the courts or Congress redraft the rules is less important than that the redrafting occur. As commanded in the CVRA, crime victims are now participants in federal criminal cases. That new reality must be reflected throughout the Federal Rules of Criminal Procedure.

