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SECRET *FAITS ACCOMPLIS*: DECLINATION DECISIONS, NONPROSECUTION AGREEMENTS, AND THE CRIME VICTIM'S RIGHT TO CONFER

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SECRET *FAITS ACCOMPLIS*: DECLINATION DECISIONS, NONPROSECUTION AGREEMENTS, AND THE CRIME VICTIM'S RIGHT TO CONFER

*Zulkifl M. Zargar**

The state's monopoly power over the institution of prosecution is a feature as familiar as any in the American criminal justice system. That the criminal proceeding is between the state and the defendant leaves little doubt as to the identities of the victimized interest and the offender. But, in avenging societal harm alone, the criminal process treats another victim—the crime victim—as an outcast.

Beginning in the 1970s, the victim's rights movement mobilized to address this institutional neglect, and, by most accounts, it has triumphed. Federal and state victim's rights laws now empower victims to attend criminal proceedings, deliver impact statements at sentencings, and collect restitution awards. Perhaps no statutory right is as emblematic of the victim's acquired prominence in the criminal process than the right to confer with the prosecutor, codified in the federal Crime Victims' Rights Act of 2004 and in most states' laws.

Conferral seems an intuitive mechanism to facilitate information transfer regarding developments in a case. What remains unclear, however, is whether the law contemplates the existence of a conferral right when there is no case. What, if any, are prosecutors' obligations to confer with crime victims if they ultimately decline to bring charges?

This Note illustrates that victim exclusion, especially at the outset, portends adverse consequences for both victims and the proper functioning of the criminal process. In most jurisdictions, prosecutors are under no legal obligation to confer with victims about their declination decisions, owing primarily to a judicial reluctance to circumscribe and a statutory intent to preserve prosecutorial discretion. This Note proposes that prosecutors' offices promulgate internal guidelines to encourage—and, in some cases require—victim conferral prior to a declination decision. The guidelines

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would not aim to disturb such a decision nor would they create untenable administrative burdens for criminal justice actors or frustrate their discretion. Rather, they are animated by principles of procedural justice that emphasize process over outcome and thus seek to encourage meaningful conferral where victims are kept informed and their opinions solicited.

INTRODUCTION 345

I. VICTIM PARTICIPATION IN THE CRIMINAL JUSTICE PROCESS 349

- *A. A Brief History of the Victim's Increasing Role in the Criminal Justice Process* 350
- *B. Select Considerations for a Victim's Involvement in the Early Stages of the Criminal Justice Process* 351
  - 1. Reducing Secondary Victimization and Victim Alienation 352
  - 2. Procedural Justice as a Vehicle for Inclusion 356

II. EXAMINING THE EXISTING RIGHT TO CONFER 357

- *A. Does the Conferral Right Exist Precharge?* 358
  - 1. The CVRA 358
    - *a. In re* Wild*: The CVRA's Precharge Applicability Under a Microscope* 359
    - *b. DOJ's Narrow Reading* 363
    - *c. Congress's 2015 CVRA Amendment* 364
  - 2. The Proposed Amendment to the CVRA 365
  - 3. State Law Survey 366
- *B. What Does Conferral Include?* 367
  - 1. The CVRA 367
  - 2. The Proposed Amendment to the CVRA 370
  - 3. State Law Survey 370

III. REASONABLE CONFERRAL IN A NONPROSECUTION POSTURE 372

- *A. A Proposal to Confer* 373
  - 1. The Need for Conferral 373
  - 2. A Conferral "Right" Enshrined in Prosecutorial Guidelines 374
- *B. Limitations on Conferral and Countervailing Concerns* 376
  - 1. When to Begin Conferral 376
  - 2. What to Confer About 378

CONCLUSION 382

INTRODUCTION

> The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard.
>
> —Judge Alex Kozinski[1]

> Why didn't anyone consult me? I was the one who was kidnapped, not the State of Virginia.
>
> —Unnamed Crime Victim[2]

During an eight-year stretch between 1999 and 2007, Jeffrey Epstein and several coconspirators sexually abused over thirty minor girls, some as young as fourteen.[3] Following a tip—and a two-year joint investigation with the Palm Beach Police Department—the FBI referred the matter to the U.S. Attorney's Office for the Southern District of Florida.[4] As early as January 2007, Epstein's defense counsel began negotiating with the U.S. Attorney's Office to avoid indictment.[5] The U.S. Attorney's Office simultaneously corresponded with Epstein's victims and, pursuant to the Crime Victims' Rights Act[6] (CVRA), sent letters notifying them of their statutory rights, including the "[t]he reasonable right to confer with the attorney for the [Government] in the case."[7]

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1. Kenna v. U.S. Dist. Ct., 435 F.3d 1011, 1013 (9th Cir. 2006).

2. LOIS HAIGHT HERRINGTON ET AL., FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME 9 (1982), https://www.ncjrs.gov/pdffiles1/ovc/87299.pdf [https://perma.cc/4YCB-X5FN] (quoting unnamed crime victim).

3. *In re* Wild, 955 F.3d 1196, 1198 (11th Cir.), *vacated*, *reh'g en banc granted*, No. 19-13843, 2020 WL 4557083 (11th Cir. Aug. 7, 2020) (mem.).

4. *Id.*

5. *Id.* at 1198–99.

6. 18 U.S.C. § 3771. Congress later amended the CVRA and added two more statutory rights. *See* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227 (codified as amended at 18 U.S.C. § 3771(a)(9)–(10)); *see also infra* Parts II.A.1, II.B.1.

7. *In re Wild*, 955 F.3d at 1199 (alterations in original); *see also* 18 U.S.C. § 3771(a)(1)–(8). At the time, the CVRA afforded victims the following eight enumerated 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.

By May 2007, the U.S. Attorney's Office had drafted a fifty-three-page indictment charging Epstein with several federal offenses.[8] But just four months later, the government instead executed an "infamous" nonprosecution agreement (NPA) with Epstein in exchange for his pleading guilty to two state prostitution offenses.[9] In June 2008, Epstein pled guilty to his state crimes.[10]

At no point between the start of the investigation and the signing of the NPA did federal prosecutors "confer" with victims about the NPA, let alone tell them that it was under consideration.[11] What is more, the government continued to send victims boilerplate letters stating that their case was "currently under investigation" as late as *eight months after* signing the NPA.[12] It was not until after Courtney Wild, one of thirty-four identified victims, brought suit seeking enforcement of her CVRA rights in July 2008 that the government disclosed the NPA's existence.[13]

Wild alleged that, by keeping her in the dark about negotiations with Epstein and the NPA, prosecutors violated her right to confer under the CVRA.[14] The government countered that CVRA rights attach only upon filing charges and, given the absence of any federal charges, Wild had no CVRA rights for prosecutors to violate.[15] Over the next decade, the District Court for the Southern District of Florida issued several important rulings: (1) that the CVRA attaches before the government brings formal charges;[16] (2) that by secretly negotiating and entering into an NPA with Epstein, the government infringed Wild's right to confer;[17] and (3) that Epstein's death by apparent suicide, among other facts, mooted many of the remedies sought, including recission of the NPA.[18]

As directed by the CVRA, Wild petitioned the Eleventh Circuit Court of Appeals for a writ of mandamus to pursue her remedies.[19] Earlier this year, the Eleventh Circuit issued its opinion, calling the facts "beyond scandalous"

Pub. L. No. 108-405, 118 Stat. 2260, 2261 (2004).

8. *In re Wild*, 955 F.3d at 1199.

9. *Id.*

10. *Id.*

11. *Id.* (citing Doe 1 v. United States, 359 F. Supp. 3d 1201, 1208 (S.D. Fla. 2019)).

12. *Id.* at 1200.

13. *Id.* A second, still unnamed petitioner later joined the suit, but for clarity's sake, this Note will refer to Wild or to the petitioner in the singular. *Id.* at 1200 n.4.

14. *Id.*

15. Government's Response to Victim's Emergency Petition for Enforcement of Crime Victim Rights Act, 18 U.S.C. § 3771, at 3, Doe 1 v. United States, 359 F. Supp. 3d 1201 (S.D. Fla. 2019) (No. 08 Civ. 80736), ECF No. 15. Interestingly, prior to changing its stance once the litigation began, the government initially took the position—in the letters it had sent to victims—that the victims *did* possess CVRA rights, such as the right to confer. *See In re Wild*, 955 F.3d at 1227 (Hull, J., dissenting).

16. Does v. United States (*Doe I*), 817 F. Supp. 2d 1337, 1341 (S.D. Fla. 2011); *see also* Doe v. United States (*Doe II*), 950 F. Supp. 2d 1262, 1267 (S.D. Fla. 2013) (extending the application of the right to confer in particular to precharge stages).

17. Doe 1 v. United States (*Doe III*), 359 F. Supp. 3d 1201, 1219–20 (S.D. Fla. 2019).

18. Doe 1 v. United States (*Doe IV*), 411 F. Supp. 3d 1321, 1321–31 (S.D. Fla. 2019).

19. *In re Wild*, 955 F.3d at 1202.

and a "national disgrace" but denied Wild's petition.[20] Overruling the lower court, the majority invoked canons of statutory interpretation and principles of prosecutorial discretion to hold that CVRA rights attach only when charges are filed against the defendant.[21] The majority acknowledged that its ruling "will not prevent federal prosecutors from negotiating 'secret' plea and non-prosecution agreements, without ever notifying or conferring with victims."[22] "It's not a result we like," the majority wrote, "but it's the result we think the law requires."[23]

In so many ways, the Epstein case is a remarkable one.[24] What this Note ultimately proposes—internal guidelines to encourage or require prosecutors to confer with victims—will admittedly do little if federal prosecutors are inclined to work "hand-in-hand" with defense counsel to actively misrepresent and keep information from victims.[25] But despite its extreme nature, the case makes evident that where there are no charges, prosecutors by and large have *no* legal obligation to confer,[26] nor do any Department of Justice (DOJ) policies encourage them to confer.[27] The same is true in the states, most of which also extend to victims a conferral right.[28]

This Note intends to fill these gaps.[29] It recommends the use of guidelines because it ultimately accepts as a premise the general state of the law—that

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20. *Id.* at 1198.

21. *Id.* at 1205. In a procedural battle, Wild contested whether the predicate issue of the CVRA's precharge applicability was appropriately before the court, arguing that the government, by addressing the issue in its response to Wild's petition instead of cross-appealing that portion of the lower court's ruling, waived any such arguments. *Id.* at 1205 n.6. The Eleventh Circuit rejected Wild's argument and held that a petition for a writ of mandamus is not an ordinary appeal but an original application and that the government was free to raise any argument it wished in its response. *Id.*

22. *Id.* at 1221.

23. *Id.* at 1198. Wild successfully petitioned for en banc review, and an oral argument is scheduled for December 3, 2020. Petition for Rehearing En Banc, *In re Wild*, 955 F.3d 1196 (No. 19-13843); *see also* Order Granting Motion to Expedite En Banc Consideration, *In re Wild*, 955 F.3d 1196 (No. 19-13843), ECF No. 46. The CVRA's original cosponsors submitted an amicus brief in support of en banc review. Brief of Senator Dianne Feinstein and Former Senators Jon Kyl and Orrin Hatch as *Amici Curiae* in Support of Rehearing *En Banc*, *In re Wild*, 955 F.3d 1196 (No. 19-13843).

24. Even setting aside the Eleventh Circuit's characterization of the case, the NPA at issue also was "highly unusual" in that it immunized Epstein's coconspirators from future prosecution, none of whom had helped or cooperated with the government. Elkan Abramowitz & Jonathan Sack, *Limiting Victims' Rights: Eleventh Circuit Reads CVRA Narrowly*, N.Y.L.J. (May 27, 2020, 12:30 PM), https://www.law.com/newyorklawjournal/2020/05/27/limiting-victims-rights-eleventh-circuit-reads-cvra-narrowly/ [https://perma.cc/Y2AA-LPK6].

25. *In re Wild*, 955 F.3d at 1199.

26. *See id.* at 1205, 1221; *see also infra* Part II.A.

27. *See infra* Part II.A.1.

28. *See infra* Parts II.A.3, II.B.3.

29. This Note addresses the closed universe where victims wish to exercise their conferral rights and participate in the conventional criminal justice process. "There may well be persons and entities entitled to notification and participation who neither expect nor particularly want to be involved in the criminal justice process, the traditional focus of which has traditionally been to resolve disputes between the government and an accused offender." United States v. Turner, 367 F. Supp. 2d 319, 329 (E.D.N.Y. 2005). Consequently, this Note does not consider alternative mechanisms for seeking justice, such as restorative justice or parallel justice, nor

legislatures have not granted and courts do not recognize a judicially enforceable precharge victim's right to confer.[30] Part I discusses the contours of and barriers to victim participation in the criminal process broadly and presents procedural justice theory as a mechanism to facilitate meaningful victim participation. Procedural justice emphasizes including and giving a voice to stakeholders in a particular process even—and especially—where they have limited or no control over the outcome.[31] Part II looks to federal and state laws, including pending legislation, that establish a right to confer in order to determine whether the right attaches precharge (and thus in the absence of charges) and what conferral entails. Last, Part III argues reasonable conferral should occur in cases where the prosecutor intends to exercise their nonprosecution discretion.[32] Part III proposes language encouraging or—if signing an NPA[33]—directing the prosecutor to confer with the victim in such cases, subject to limitations such as the need for confidentiality and certain administrative costs.[34] Separately, this Note

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does it advocate for victims to choose a particular course. For an extended discussion of the merits of restorative justice in furthering victim's rights, see generally DANIELLE SERED, UNTIL WE RECKON (2019); Lara Abigail Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293 (2020). For a discussion of the utility of parallel justice in furthering victim's rights, see generally SUSAN HERMAN, PARALLEL JUSTICE FOR VICTIMS OF CRIME (2010).

30. *See infra* Part III. When referring to victim's rights or to the eponymous social movement, this Note uses the singular form, "victim's rights," instead of the plural "victims' rights." While the CVRA and most scholars use the latter, this Note uses the former because these rights are not collective but individual rights. *See* Lynne Henderson, *Revisiting Victim's Rights*, 1999 UTAH L. REV. 383, 383 n.1.

31. *See infra* Part I.B.2.

32. This Note uses the phrase "nonprosecution discretion" when referring to prosecutorial discretion to decline to bring charges, since it more appropriately describes "the discretionary and plenary power *not* to prosecute." *See* Alexander A. Zendeh, Note, *Can Congress Authorize Judicial Review of Deferred Prosecution and Nonprosecution Agreements?: And Does It Need To?*, 95 TEX. L. REV. 1451, 1453 n.16 (2017) (quoting PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 925 (6th ed. 2014)); *see also infra* note 84 and accompanying text. Bringing prosecutions is a different matter—while a federal prosecution is ordinarily initiated by the executive branch, some states do allow private prosecution on behalf of the state. *See, e.g.*, Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 867–73 (2018) (recounting the near abolishment of private prosecution in the states). Such actions are beyond the scope of this Note, which deals with the standard public prosecution scheme.

33. This Note takes no position on the *propriety* of exercising nonprosecution discretion or entering into an NPA. For select critiques on the use of NPAs in particular, see *infra* note 253 and accompanying text.

34. As a preface, there is a robust body of literature criticizing the trend of increasing victim involvement in the criminal justice process. Many such concerns deal with the undesirable consequences—including for victims—of increased victim participation in criminal prosecution, at its core an adversarial process concerned only with the interests of the parties to the litigation. *See generally* Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233 (1991); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985); Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237 (2008); Danielle Levine, Comment, *Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution*, 104 NW. U. L. REV. 335 (2010). Because this Note ultimately addresses victim's rights in a *nonprosecution* posture, it does not fully evaluate the merits of such critiques. However, to the extent that some criticisms relate to nonprosecution alone, they are addressed in Part III. In any event,

recognizes that *potential* defendants may oppose a policy that encourages or requires prosecutors to confer with victims in a nonprosecution posture for fear that they may well become *actual* defendants, and Part III also addresses this concern.

I. VICTIM PARTICIPATION IN THE CRIMINAL JUSTICE PROCESS

The crime victim was once a central player in the American criminal prosecution—as a private citizen, she hired investigators and prosecuted perpetrators at her own expense.[35] For a variety of reasons, however, including the idea that crime primarily damages society—not the individual—and the embracing of a punishment apparatus to redress societal harm, the crime victim was eventually relegated to an outsider status.[36] No longer the primary decision maker nor a direct recipient of benefits, the crime victim came to occupy only the roles of complainant and witness for the prosecution.[37] In 1971, Lewis Powell declared that "the victims of crime have become the forgotten men of our society."[38] With the adoption of Federal Rule of Evidence 615 several years later, which granted either party the right to exclude from trial any witnesses,[39] including victims, the crime victim's exclusion was fully achieved.[40]

Part I.A briefly describes the rise of the victim's rights movement against this history of exclusion and the corresponding reinsertion of the victim into the criminal justice process. Part I.B then narrows the focus to the utility of victim involvement in the early stages of a criminal case and presents procedural justice as a means for facilitating such involvement.

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this Note operates under the premise that victim participation has become and will continue to be a fixture in our criminal justice system. *See* Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229, 233 (2005).

35. *See* Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 521.

36. *See, e.g.*, William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 654–68 (1976) (providing a detailed examination of the victim's declining role with the emergence of public prosecution in the United States); *see also* HERRINGTON ET AL., *supra* note 2, at vi ("Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest.").

37. *See* Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 519–20 (1982); Andrew J. Karmen, *Who's Against Victims' Rights?: The Nature of the Opposition to Pro-victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT. 157, 158 (1992); *see also* McDonald, *supra* note 36, at 673.

38. Jill Lepore, *The Rise of the Victims'-Rights Movement*, NEW YORKER (May 14, 2018), https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement [https://perma.cc/9N6Z-ESEM].

39. FED. R. EVID. 615 notes of advisory committee on proposed rules (omitting victims from the list of exceptions).

40. DOUGLAS E. BELOOF, VICTIMS' RIGHTS: DOCUMENTARY AND REFERENCE GUIDE 19 (2012).

A. A Brief History of the Victim's Increasing Role in the Criminal Justice Process

The victim's rights movement began as an "unlikely marriage of conservatism and feminism."[41] The conservative-led "tough-on-crime" campaign found valuable fuel in a series of defendant-friendly rulings by the Warren Court, which, in just a five-year span in the 1960s, recognized the exclusionary rule, *Miranda* rights, and the right to counsel for indigent criminal defendants.[42] National crime rates, which rose steadily in the 1960s, continued to increase and reached a peak in 1981.[43] Meanwhile, women's groups led a successful public awareness campaign focused on rape and domestic violence and established community-based rape crisis centers and domestic violence shelters.[44] In 1975, Susan Brownmiller published *Against Our Will: Men, Women, and Rape*, a particularly influential book that sought to redefine rape as a crime of "physical assault," not just one against "sexual morality," and brought public attention to the institutional insensitivity exhibited toward sexual assault victims.[45]

A seminal moment arrived in 1982, when President Ronald Reagan convened the President's Task Force on Victims of Crime.[46] Partly clothed in law-and-order rhetoric, the task force's report opened by proclaiming, "Something insidious has happened in America: crime has made victims of us all."[47] The report recommended that legislatures, police, prosecutors, and the judiciary each acknowledge, support, and include victims in the criminal justice process.[48]

While many of the earliest reforms addressed victims' services programs and the need to ease the burden on crime victims as witnesses,[49] later proposals dealt with expanding the role of the victim beyond that of a witness.[50] Some of these proposals included: allowing victims to communicate their views regarding a negotiated guilty plea, permitting the use of victim impact statements at the sentencing of convicted offenders, and

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41. *See* Lepore, *supra* note 38.

42. *Id.*

43. STEVEN DERENE ET AL., NAT'L VICTIM ASSISTANCE ACAD., TRACK 1 PARTICIPANT TEXT: CHAPTER 2: HISTORY OF THE CRIME VICTIMS' RIGHTS MOVEMENT IN THE UNITED STATES 11 (2007), https://www.ovcttac.gov/views/TrainingMaterials/NVAA/dspNVAACurriculum.cfm [https://perma.cc/6RWH-TDAE].

44. *See id.*; Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 118–19, 118 nn.4–5 (1984).

45. DERENE ET AL., *supra* note 43, at 8; *see also* Gittler, *supra* note 44, at 118 n.4.

46. *See* HERRINGTON ET AL., *supra* note 2, at ii.

47. *See id.* at vi.

48. *See id.* at 15–85.

49. *See* Gittler, *supra* note 44, at 123–24. In 1968, the federal government created the Law Enforcement Assistance Administration, an agency tasked with, inter alia, funding victim-witness programs. By 1979, it had funded over ninety such programs. *See id.* at 122 n.12; Marie Manikis, *Contrasting the Emergence of the Victims' Movements in the United States and England and Wales*, SOCIETIES, June 2019, at 1, 3. According to one published review, there were 280 such programs in 1980 and by 1990 that number had risen to 5000. LESLIE SEBBA, THIRD PARTIES: VICTIMS AND THE CRIMINAL JUSTICE SYSTEM 23 (1996).

50. *See* Gittler, *supra* note 44, at 121–24.

mandating financial restitution to victims as part of sentencing.[51] Others were more sweeping: the task force's report went as far as to endorse the adoption of a constitutional amendment that would grant victims the right "to be present and to be heard at all critical stages of judicial proceedings."[52]

To date, more than thirty states have passed victim's rights constitutional amendments and all fifty have enacted some statutory victim's rights.[53] Congress has done its own part—beginning with the Victim and Witness Protection Act of 1982,[54] it enacted a raft of legislation including the Victims' Rights and Restitution Act of 1990[55] (VRRA), the Victim Rights Clarification Act of 1997,[56] and, most recently, the CVRA.[57]

B. Select Considerations for a Victim's Involvement in the Early Stages of the Criminal Justice Process

The gains in victim participation can be divided broadly into two categories: (1) "service" rights, which encompass institutional responses to the needs of victims, including compensation, assistance, and information

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51. *See id.* at 124; *see also* LOIS HAIGHT HERRINGTON ET AL., FOUR YEARS LATER: A REPORT ON THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME 4 (1986), https://www.ncjrs.gov/pdffiles1/ovc/102834.pdf [https://perma.cc/85HR-8PTZ] (summarizing state legislation codifying some of the task force's original victim participation recommendations); AM. BAR ASS'N, GUIDELINES FOR FAIR TREATMENT OF VICTIMS AND WITNESSES IN THE CRIMINAL JUSTICE SYSTEM (1983), *reprinted in* BELOOF, *supra* note 40, at 80, 80–82 (enumerating victim inclusion guidelines).

52. HERRINGTON ET AL., *supra* note 2, at 114. For comprehensive analyses on the merits of a victim's rights constitutional amendment, compare Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443 *passim*, with Paul G. Cassell, *Barbarians at the Gates?: A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479 *passim*.

53. *See About Victims' Rights*, VICTIMLAW (Aug. 2, 2020, 10:44 PM), https://victimlaw.org/victimlaw/pages/victimsRight.jsp [https://perma.cc/X4XT-RPDK]; *see also* Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 587–88 (2005).

54. Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended in scattered sections of 18 U.S.C.) (allowing the use of victim impact statements at sentencing).

55. Pub. L. No. 101-647, 104 Stat. 4820 (repealed 2004) (establishing enumerated victim's rights). The VRRA was unusually codified in title 42 of the U.S. Code. Professor Paul G. Cassell has argued that this location meant that practitioners, who turned reflexively to title 18 for guidance on criminal law, largely did not know about the statute. *See Victims' Rights Amendment: Hearing on H.R.J. Res. 40 Before the Subcomm. on the Const. and Civ. Just. of the H. Comm. on the Judiciary*, 113th Cong. 132–33 (2013) [hereinafter *Hearing on H.R.J. Res. 40*] (statement of Paul G. Cassell, Ronald N. Boyce Presidential Professor of Criminal Law, S.J. Quinney College of Law at the University of Utah); H.R. REP. NO. 108-711, at 4 (2004) (explaining that the need for enacting the CVRA stemmed partly from the weaknesses of the VRRA). The VRRA also provided no means for victims to enforce their rights, as was revealed by the nonappealable sequestration of victims in the Oklahoma City bombing trial. *See* David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004*, 28 PACE L. REV. 623, 629 (2008).

56. Pub. L. No. 105-6, 111 Stat. 12 (codified as amended at 18 U.S.C. § 3510) (clarifying for judges a victim's right to attend trial even if the victim plans to speak at sentencing).

57. *See* 150 CONG. REC. 7297 (2004) (statement of Sen. Dianne Feinstein); Kyl et al., *supra* note 53, at 585–86 (intending to give victims "the right to participate in the system").

regarding developments in the criminal case; and (2) "procedural" rights, which permit victims to supply relevant information and their opinions to criminal justice authorities at particular junctures.[58] Both categories are salient in the early stages of a criminal case, when there are articulable societal interests in truth seeking[59] as a subset of effective crime control and in improving victim satisfaction with criminal justice decision-making.[60]

Part I.B.1 describes victim alienation broadly and in the lead-up to the charging decision. Part I.B.2 introduces components of procedural justice theory that facilitate successful victim involvement.

1. Reducing Secondary Victimization and Victim Alienation

A central motivation of the efforts to achieve and expand participatory rights for victims is tackling the problem of secondary victimization—harm that the government itself inflicts after the victim is already victimized by the crime.[61] Victims often describe their experiences with the criminal process as retraumatizing, many of them expressing that they faced outright hostility.[62] Studies that focus on the impact of trials on victims note that even where some victims reported being satisfied with the outcome, they found the process strenuous and harmful.[63] But trials are an increasingly rare phenomenon.[64] Prosecutors resolve over 95 percent of all convictions through pleas.[65] So even while victims may have a voice at trial, in reality their voices are often excluded entirely, except at sentencing.[66] This can

58. *See* Manikis, *supra* note 49, at 35–36.

59. *See* Stacy Caplow, *What If There Is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1, 10–11, 11 n.34 (1998); Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 328–29 (2007).

60. *See* O'Hear, *supra* note 59, at 326–28; Dana Pugach & Michal Tamir, *Nudging the Criminal Justice System into Listening to Crime Victims in Plea Agreements*, 28 HASTINGS WOMEN'S L.J. 45, 54 (2017).

61. *See* BELOOF, *supra* note 40, at 48; Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement*, 9 DREXEL L. REV. 43, 65 (2016); Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. TRAUMATIC STRESS 182, 182–83 (2010); *see also* 150 CONG. REC. 7303 (statement of Sen. Jon Kyl) ("Too often victims of crime experience a secondary victimization at the hands of the criminal justice system."). *But see* Henderson, *supra* note 30, at 402 (arguing that it is often difficult to attribute victim trauma to the legal process alone and that the general lack of empirical information on how the system can best reduce trauma does not justify modifying the criminal process around these difficulties).

62. *See* SERED, *supra* note 29, at 30–31. One crime victim stated that her "sense of disillusionment with the judicial system is many times more painful [than the crime itself]" and that "[she] could not, in good faith, urge anyone to participate in [the] hellish process." Giannini, *supra* note 61, at 64 (first alteration in original) (quoting S. REP. NO. 97-532, at 37 (1982)).

63. *See* SERED, *supra* note 29, at 31.

64. *See id.* at 30.

65. *See id.*; Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—and What Can Be Done About It*, 111 NW. U. L. REV. 1429, 1432 (2017) (indicating that, in 2015, 2.9 percent of federal defendants and possibly fewer than 2 percent of state defendants went to trial).

66. *See* SERED, *supra* note 29, at 30.

stand in conflict with victims' needs, as many victims report that they want updates on the status of their cases[67] and that they wish to have their voices heard, their harm publicly acknowledged, and their experiences validated.[68] Studies conducted in the United States and abroad demonstrate that victim satisfaction correlates with victims' sense of inclusion and empowerment in the criminal justice process.[69] And, conversely, victim dissatisfaction correlates with an inability to participate despite an expressed desire to do so.[70]

Other commentators have tied victim alienation to the "dark figure" of unreported crime, suggesting that victims who have experienced alienation or trauma induced by the criminal justice system may be reluctant to reach out to authorities with their complaints in the future.[71] National data shows that the strongest predictor of victimization is previous victimization.[72] And most crime (including violent crime) is, in fact, not reported.[73]

These observations highlight the often reactive nature of law enforcement. Victims, by way of their ability to "activate[] the machinery of the criminal justice system,"[74] are initial decision makers and, to the extent that decisions made at the earliest points have the greatest capacity to affect the functioning of the system, they occupy a critical gatekeeping role.[75] From the criminal justice system's perspective, then, it is vital that members of the public are willing to participate in and perform such tasks.[76]

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67. *See id.* at 39.

68. *See* Parsons & Bergin, *supra* note 61, at 182.

69. *See* Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 162–63 (2003).

70. *See id.* at 163.

71. *See* Goldstein, *supra* note 37, at 518–19; *see also* HERMAN, *supra* note 29, at 40–42. Whether low reporting or noncooperation is a direct function of negative attitudes about criminal justice authorities remains an open question, but survey evidence illustrates that such perceptions are a meaningful factor in reporting behavior. *See* SEBBA, *supra* note 49, at 111–12. One national survey indicates that victims underreport primarily due to a belief that police and prosecutors will not help them. *See* ALL. FOR SAFETY & JUST., CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS' VIEWS ON SAFETY AND JUSTICE 11 (2016), https://allianceforsafetyandjustice.org/wp-content/uploads/2019/04/Crime-Survivors-Speak-Report-1.pdf [https://perma.cc/V99L-27Z4]. Other factors that might persuade victims to forgo participation include inconvenience, a desire to retain privacy, a lack of influence over the process, the perceived inability of the system to effectively solve particular crimes, or a rejection of the retributive system of justice. *See* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 306.

72. *See* ALL. FOR SAFETY & JUST., *supra* note 71, at 7.

73. *See* RACHEL E. MORGAN & BARBARA A. OUDEKERK, BUREAU OF JUST. STAT., CRIMINAL VICTIMIZATION, 2018, at 8 (2019), https://www.bjs.gov/content/pub/pdf/cv18.pdf [https://perma.cc/W7VS-HWWW]; *see also* SERED, *supra* note 29, at 30.

74. Karmen, *supra* note 37, at 158.

75. *See* SEBBA, *supra* note 49, at 28; *see also* Deborah P. Kelly, *Victims' Perceptions of Criminal Justice*, 11 PEPP. L. REV. 15, 20 (1984) (citing studies indicating that 87 percent of reported crime is reported by victims).

76. *See* SEBBA, *supra* note 49, at 28. Victim's rights statutory language sometimes expressly recognizes the system's interest in participation. *See, e.g.*, WASH. REV. CODE § 7.69.010 (2020) (recognizing "the civic and moral duty of victims . . . to fully and voluntarily cooperate with law enforcement and prosecutorial agencies"). This societal interest in participation can sometimes stand in conflict with what Professor Douglas Beloof

Parsing negative attitudes in relation to prosecutors alone is a difficult enterprise, in part because the prosecutorial function, unlike the police or court function, is the least visible among criminal justice authorities.[77] But one recent national survey indicated that only one in ten victims reported receiving assistance from a district attorney's or prosecutor's office.[78]

This minimization of the victim's role may be acute at the outset, when the prosecutor must decide whether to bring a charge.[79] Even though the victim frequently retains control over whether to report in the first instance,[80] she has no formal role in the charging decision.[81] Of course, a prosecutor has wide discretion to involve the victim informally at this stage and often does. Indeed, what a victim brings to the table can be an important part of the decision-making behind whether to charge and which particular charges to select.[82] But a prosecutor is virtually under no obligation to involve a

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terms the "Victim Participation Model," which, at its core, values the "primacy of the individual victim" and supports the victim's subsequent *choice* in deciding whether to participate in the criminal justice process, acknowledging that the prospect of secondary victimization may mean different things to different victims. *See* Beloof, *supra* note 71, at 296–98.

77. *See* SEBBA, *supra* note 49, at 98.

78. ALL. FOR SAFETY & JUST., *supra* note 71, at 11. A possible explanation for this experience is that prosecutors' offices do not have a culture that emphasizes community relations and are otherwise viewed as organizations in which an individual citizen's interests seem unimportant. *See* SEBBA, *supra* note 49, at 100. One scholar describes case processing within this organizational structure as "an assembly line" of different actors "without much oversight and quality control," meaning that the prosecutor often has minimal contact with the victim. *See* Caplow, *supra* note 59, at 14. In the urban criminal justice context with which she is familiar,

> [a]t the early stages of a case, before any decisions about the direction of the prosecution have been made, the ADA [Assistant District Attorney] who eventually will handle the trial and the plea negotiations has not even been assigned. Given this discontinuity and disconnectedness, it is easy to see how a prosecutor can enter a plea bargain or even dismiss a case without the complainant's knowledge, input, or acquiescence.

Id.

79. *See* Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 59 (1999); *see also supra* note 78 and accompanying text.

80. *See supra* notes 74–76 and accompanying text.

81. *See* Tobolowsky, *supra* note 79, at 59. In contrast, the victim often does have a role when it comes to decisions regarding pleas, most prominently at a plea hearing where she is able to address the court before a plea is entered. *See, e.g.*, FED. R. CRIM. P. 60(a)(3) ("The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime."); ARIZ. REV. STAT. ANN. § 13-4423(A) (2020) ("On request of the victim, the victim has the right to be present and be heard at any proceeding in which a negotiated plea . . . will be presented to the court."). Many states also require prosecutors to consult with victims regarding plea negotiations. *See* Tobolowsky, *supra* note 79, at 64 & n.168 (collecting state statutes); *see also infra* Part II.A.3.

82. *See* Beloof, *supra* note 71, at 313; Tobolowsky, *supra* note 79, at 59. For example, it is often the case that an adult rape victim exercises considerable control over whether the perpetrator will be charged, a reality that predates even the enactment of victim's rights laws. *See* Beloof, *supra* note 71, at 300. *But see generally* Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853 (1994) (examining "no-drop" policies that limit a prosecutor's discretion to drop charges where the victim is unwilling to cooperate). Separately, and

victim.[83] What might help explain the lack of a formal, enforceable role for victims is the settled case law indicating that an exercise of nonprosecution discretion, for any reason (or no reason), is unreviewable.[84] Another is the well-established principle that a victim is not a prosecutor's client.[85] Even the language in federal and state victim's rights laws themselves is deferential to prosecutorial discretion.[86] To rectify this perceived inequity, one scholar has proposed that victims should be accorded an enforceable right to participate in the charging decision,[87] another has recommended that victims

controversially, prosecutors also routinely consider victim characteristics in deciding whether to pursue charges. *See, e.g.*, Tamara Rice Lave, *The Prosecutor's Duty to "Imperfect" Rape Victims*, 49 TEX. TECH L. REV. 219, 238–39 (2016) (arguing that it is generally unethical for a prosecutor to decline rape charges based on characteristics such as the victim's race or socioeconomic status); John W. Stickels et al., *Elected Texas District and County Attorneys' Perceptions of Crime Victim Involvement in Criminal Prosecutions*, 14 TEX. WESLEYAN L. REV. 1, 7–9 (2007) (discussing nonlegal factors such as a victim's age, gender, race, and employment status).

83. *See* Beloof, *supra* note 71, at 313; Tobolowsky, *supra* note 79, at 59. There are a few exceptions as some states have enacted legislation providing victims an opportunity to confer with or submit statements to prosecutors prior to a final charging decision. *See, e.g.*, ARIZ. REV. STAT. § 13-4408(B); MASS. GEN. LAWS ANN. ch. 258B, § 3(g) (West 2020); N.J. STAT. ANN. § 52:4B-36(m) (West 2020); *see also infra* Part II.A.3.

84. *See, e.g.*, Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."); Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973) ("[F]ederal courts have traditionally and, to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made."). As the U.S. Supreme Court elaborated when addressing passive prosecutorial enforcement, examining the government's charging discretion reveals the limitations of judicial review. *See* Wayte v. United States, 470 U.S. 598, 607 (1985) ("This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern."); *see also supra* note 32 and accompanying text. A limited exception to unreviewability exists under the Constitution for selective prosecution based on impermissible criteria such as race, but such claims are largely futile due to the difficulty of obtaining discovery. *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 42–46 (1998).

85. *See* MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2018) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); Caplow, *supra* note 59, at 4–5 (noting the "critical absence of an individual client to whom a [prosecutor] owes allegiance" and that "[n]one of the values embraced by client-centered decision making" are present "in the prosecutorial decision about whether, whom and what to charge"); Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 596 (2019) ("Crime victims may express their preferences and may even have a legal right to weigh in, but they are not clients.").

86. *See, e.g.*, 18 U.S.C. § 3771(d)(6) ("Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction."); OHIO REV. CODE ANN. § 2930.06(A) (West 2020) (indicating that a "prosecutor's failure to confer with a victim . . . do[es] not affect the validity" of a decision to dismiss charges, a plea, or any other disposition); *see also infra* Part II.B.3.

87. *See* Sarah N. Welling, *Victims in the Criminal Process: A Utilitarian Analysis of Victim Participation in the Charging Decision*, 30 ARIZ. L. REV. 85, 105–16 (1988).

should be able to seek judicial review of a nonprosecution decision,[88] and yet another has gone as far as to suggest that victims should hold veto power.[89] Setting aside the merits or likelihood of implementing such remedies, other scholars have endorsed elements of procedural justice theory to improve victim satisfaction with criminal justice decision-making broadly, notwithstanding the outcomes of such decisions.[90] The next section introduces procedural justice theory and its purported utility for accomplishing this goal.

2. Procedural Justice as a Vehicle for Inclusion

Procedural justice theory posits that individuals base their ideas of fairness not just on the substance of a particular authority's final decision but also on the process by which that decision was reached.[91] Social psychology research reveals that while *decision makers* evaluate fairness primarily based on outcomes, *decision recipients* focus primarily on the processes.[92] More specifically, "people care whether their treatment (and not simply their outcomes) is fair because fair treatment indicates something critically important to them—their status within their social group."[93] Membership in a social group provides self-validation.[94] When individuals believe that they are being excluded, especially by an authority figure representing the state, their sense of dignity erodes.[95] As the procedural justice theorist Tom Tyler explains, "[p]eople value the affirmation of their status by legal authorities as competent, equal, citizens and human beings, and they regard procedures as unfair if they are not consistent with that affirmation."[96]

To the extent that victims' experiences do not comport with these procedural justice norms, victims may question the legitimacy of decision makers and consequently avoid cooperating with authorities in the future.[97] Scholars have proposed that legal authorities focus on four core attributes of the process: whether (1) victims have an opportunity to share their stories

88. *See* Paul S. Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPP. L. REV. 23, 58 (1984).

89. *See* Beloof, *supra* note 71, at 313.

90. *See, e.g.*, Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victim's Right to Be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 85–103 (2010); O'Hear, *supra* note 59, at 326–32. The utility of procedural justice in victim's rights reform has also been explored in the British criminal justice system. *See generally* Mary Iliadis & Asher Flynn, *Providing a Check on Prosecutorial Decision-Making: An Analysis of the Victims' Right to Review Reform*, 58 BRIT. J. CRIMINOLOGY 550 (2017).

91. Giannini, *supra* note 90, at 85; Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 420–22 (2008).

92. O'Hear, *supra* note 91, at 412.

93. Giannini, *supra* note 90, at 89 (quoting Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 ANN. REV. PSYCH. 527, 529–30 (2001)).

94. *See id.* at 90.

95. *See id.*

96. Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 440–41 (1992).

97. *See* Giannini, *supra* note 90, at 88; O'Hear, *supra* note 59, at 327.

("voice"), (2) the authorities are unbiased ("neutrality"), (3) the authorities are caring and reliable ("trustworthiness"), and (4) victims are treated with dignity and respect ("dignity").[98] In short, even when victims disagree with the final outcome, such as a negative charging decision or the terms of a particular plea agreement, the presence of these attributes can nonetheless cultivate a positive relationship with criminal justice authorities.[99] Moreover, the four-factor approach outlined above helps accomplish two major goals of the criminal justice system. The first, which parallels the aims of victim's rights laws, is to send a message to the victim that reaffirms their dignity and reduces secondary victimization.[100] The second is to further the system's utilitarian agenda, which includes not only the immediate goals of accurate guilt determination and proportionate punishment[101] but also the larger aims of advancing effective crime control, promoting public respect for criminal justice decision-making, and building a "satisfied citizenry."[102]

Before this Note proceeds in Part III to apply procedural justice principles to victim conferral in certain nonprosecution postures,[103] Part II introduces the right to confer and assesses its legal foundations. Part II chiefly discusses the interrelated questions of (1) whether there is a basis to extend the conferral right to instances where there are no charges and (2) what the law contemplates conferral to include.

II. EXAMINING THE EXISTING RIGHT TO CONFER

The right to confer, as described by a leading hornbook on criminal procedure, is the "most ambiguous of the lot" of victim consultation requirements, which exist both at the federal level and in about two-thirds of the states.[104] Much of the uncertainty derives from the laws themselves. Many state provisions fail to specify when conferral must begin, nor do they provide any hint as to its contemplated subject matter.[105] Some state provisions, however, expressly extend the conferral right in plea negotiations or plea agreements.[106] But, few require conferral regarding an exercise of nonprosecution discretion.[107]

The statutory language establishing the federal CVRA right to confer also lacks clarity.[108] This uncertainty across jurisdictions is partly explained by a lack of case law. Vindicating their rights in court is prohibitively expensive

98. Giannini, *supra* note 90, at 90–91; O'Hear, *supra* note 59, at 326–27.

99. *See* O'Hear, *supra* note 59, at 326–27.

100. *See* Giannini, *supra* note 90, at 91.

101. O'Hear, *supra* note 59, at 326–27.

102. *See* Giannini, *supra* note 90, at 88–89.

103. Scholars have previously proposed applying these principles to the victim's right to be reasonably protected from the accused, *see id.* at 96–103, and to plea bargaining with a defendant. *See* O'Hear, *supra* note 59, at 326–32.

104. 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.3(f) (4th ed. 2019).

105. *See infra* Parts II.A.3, II.B.3.

106. *See infra* Part II.A.3.

107. *See infra* Parts II.A.3, II.B.3.

108. *See infra* Part II.A.1.

for most victims,[109] is only an option at the federal level and in a few states, and is often dependent on an unpromising petition for a writ of mandamus.[110]

With these shortcomings in mind, Part II focuses on two related inquiries. First, Part II.A examines the availability of a conferral right in the absence of charges. Second, Part II.B inspects what the law expects conferral to include.

A. Does the Conferral Right Exist Precharge?

Part II.A.1 focuses on the CVRA's legislative history and case law, as well as the DOJ's interpretations of the conferral right's precharge applicability. Part II.A.2 considers a proposed amendment to the CVRA and its possible impact on the legal framework. Finally, Part II.A.3 briefly examines state conferral rights and their precharge status.

1. The CVRA

The CVRA was enacted with nearly unanimous support and little discussion.[111] It borrowed much of its language from earlier failed proposals to adopt a victim's rights constitutional amendment, which would have naturally applied in both state and federal contexts.[112] As a result, its phrasing is "sparse" in "technical detail" and lacking in procedural guidance.[113] Even so, Senator Dianne Feinstein, a cosponsor of the CVRA, proclaimed that the right to confer is "intended to be expansive" and applies to "any critical stage or disposition of the case."[114]

But most courts have not been willing to interpret this right, or any CVRA right, quite so broadly.[115] The Eleventh Circuit,[116] Sixth Circuit,[117] Eastern District of New York,[118] District of Connecticut,[119] Northern District of

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109. *See* Pugach & Tamir, *supra* note 60, at 51. Scholars have noted that both the government and the defense possess a litigation cost advantage over the victim. *Id.* at 51 n.40. For example, most of the published CVRA mandamus petitions between 2012 and 2017 reveal cases where victims faced fewer resource constraints, either because they were corporations, aggregated to file suit, or stood to recover a large restitution reward. *Id.* at 51 & n.41.

110. *See, e.g.*, S.C. CONST. art. I, § 24(B) (indicating that the enumerated rights may be subject to a writ of mandamus); 18 U.S.C. § 3771(d)(3) (directing victims to petition the court of appeals for a writ of mandamus if the district court denies the relief sought); UTAH CODE ANN. § 77-38-11(2)(a)(i) (LexisNexis 2020) (permitting victims to bring an action for a writ of mandamus defining or enforcing their rights).

111. Fed. Ins. Co. v. United States, 882 F.3d 348, 357–58 (2d Cir. 2018).

112. *Id.* at 358.

113. *Id.*

114. 150 CONG. REC. 7302 (2004) (statement of Sen. Dianne Feinstein). Senator Jon Kyl, another cosponsor, agreed. *Id.* at 22,952.

115. *See infra* notes 117–21 and accompanying text.

116. *See In re* Wild, 955 F.3d 1196, 1196 (11th Cir.), *vacated*, *reh'g en banc granted*, No. 19-13843, 2020 WL 4557083 (11th Cir. Aug. 7, 2020) (mem.).

117. *See In re* Acker, 596 F.3d 370, 373 (6th Cir. 2010) (noting it is "uncertain" whether a CVRA right can attach prior to the filing of charges).

118. *See* United States v. Rubin, 558 F. Supp. 2d 411, 429 (E.D.N.Y. 2008).

119. *See* United States v. Daly, No. 11cr121, 2012 WL 315409, at *4 (D. Conn. Feb. 1, 2012) (holding that CVRA rights attach "no sooner than the point in time when an offense has been charged").

Indiana,[120] and Northern District of Ohio[121] have each declined to recognize an enforceable CVRA right prior to the filing of a charging instrument.

In *United States v. Rubin*,[122] the Eastern District of New York found that CVRA rights attached only once the alleged criminal conduct involving the victims was incorporated and charged in a superseding indictment.[123] The court still acknowledged the inherent difficulty in locating a point in time when such rights should attach.[124] It noted that, "[q]uite understandably, movants perceive their victimization as having begun long before the government got around to filing the superseding indictment."[125] But the court also underscored the problems associated with granting rights before the commencement of a criminal case.[126] Such rights would have to be circumscribed by "logical limits" as it would be inaccurate to read the CVRA to "include the victims of uncharged crimes that the government has not even contemplated."[127]

a. In re Wild*: The CVRA's Precharge Applicability Under a Microscope*

Given the relative lack of CVRA case law, this year's fifty-three-page Eleventh Circuit decision (and sixty-seven-page dissent) in the Epstein litigation is by far the most exhaustive judicial analysis of the CVRA's precharge applicability.[128] The majority held that, as a matter of first impression, the right to confer—and the entire CVRA—attaches only when criminal proceedings are initiated, relying on: (1) the text and structure of the CVRA, (2) the historical context surrounding its passage, and (3) the prosecutorial discretion it intends to safeguard.[129]

Looking to the CVRA's text and structure, the court evaluated each of the eight enumerated rights and held that all attach following the institution of criminal proceedings.[130] Four of the eight rights, by their own terms, apply

120. *See In re* Petersen, No. 10-CV-298, 2010 WL 5108692, at *2 (N.D. Ind. Dec. 8, 2010) (holding that the CVRA right to confer arises only after a defendant is charged).

121. *See* United States v. Merkosky, No. 02cr-0168-01, 2008 WL 1744762, at *2 (N.D. Ohio Apr. 11, 2008) (concurring with authorities for the proposition that CVRA rights attach only when a prosecution is underway).

122. 558 F. Supp. 2d 411 (E.D.N.Y. 2008).

123. *See id.* at 429.

124. *See id.* at 419.

125. *Id.*

126. *See id.*

127. *Id.* Some commentators have taken the *Rubin* court's language to mean that it expressly recognized the expansive nature of CVRA rights and left open the possibility that they may attach prior to indictment. *See* Paul G. Cassell et al., *Crime Victims' Rights During Criminal Investigations?: Applying the Crime Victims' Rights Act Before Criminal Charges Are Filed*, 104 J. CRIM. L. & CRIMINOLOGY 59, 74 (2014).

128. *See generally In re* Wild, 955 F.3d 1196 (11th Cir.), *vacated*, *reh'g en banc granted*, No. 19-13843, 2020 WL 4557083 (11th Cir. Aug. 7, 2020) (mem.). Though the Eleventh Circuit has since agreed to rehear the case en banc—and in so doing vacated the panel's earlier denial of a writ of mandamus—the April decision's extensive analysis still warrants a deeper discussion here.

129. *Id.* at 1205.

130. *Id.* at 1206–08.

to "proceedings."[131] The court noted that a fifth right, which guarantees victims protection from the "accused," is best read to presuppose the charging of a defendant.[132] It also found a sixth right, which provides victims "full and timely restitution," to presuppose initiation, and even termination, of a criminal proceeding.[133] The remaining two rights formed the basis for the petition.[134]

As for the "reasonable right to confer with the attorney for the Government in the case," the court held that two contextual reasons counsel in favor of finding that, as used in the provision, "the case" indicates an ongoing judicial proceeding as opposed to an investigation.[135] First, the majority stated that a "case" specifically in the criminal context signifies that a proceeding has commenced.[136] Second, the majority stated that a pending case makes a singular "attorney for the Government" easily identifiable. For the same reason, the court noted that there are many investigations to which no attorney is assigned.[137] And, finally, as for the "right to be treated with fairness and with respect," the court observed that it has no temporal restriction, explicit or implicit.[138] On balance, then, and in light of the statutory canon *noscitur a sociis*—that words are understood by the company they keep—the court held that this final right is also best read to apply postcharge.[139]

Wild's main textualist arguments dealt with the CVRA's "coverage" and "venue" provisions.[140] The first provision states that DOJ officers "engaged in the detection, investigation, or prosecution of crime" must make best efforts to ensure victims are notified of and accorded their rights.[141] Though the use of "detection" and "investigation" appear to bear on the temporal scope of CVRA rights, the majority held that this provision is best read as a "to whom" and not a "when" provision.[142] By the same token, the majority

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131. *Id.* at 1206; *see also supra* note 7.

132. *In re Wild*, 955 F.3d at 1206; *see also* 18 U.S.C. § 3771(a)(1) ("The right to be reasonably protected from the accused.").

133. *In re Wild*, 955 F.3d. at 1207; *see also* 18 U.S.C. § 3771(a)(6) ("The right to full and timely restitution as provided in law.").

134. *See In re Wild*, 955 F.3d. at 1207.

135. *See id.*; *see also* 18 U.S.C. § 3771(a)(5).

136. *See In re Wild*, 955 F.3d. at 1207. The dissent supplied its own textualist arguments for why a criminal "case" is inclusive of an investigation. *See id.* at 1239 (Hull, J., dissenting).

137. *Id.* at 1207–08. The dissent noted that, as a practical matter, prosecutors are routinely assigned to handle precharge matters and that this is especially unremarkable in white-collar cases where defense counsel negotiate with already assigned prosecutors to obtain favorable preindictment plea deals. *See id.* at 1240 (Hull, J., dissenting).

138. *See id.* at 1208 (majority opinion).

139. *Id.* The dissent found the plain text of both rights invoked in the petition to be unambiguous. That is, it treated as intentional Congress's choice not to explicitly anchor these two rights in temporal contexts such as a "proceeding." *See id.* at 1236 (Hull, J., dissenting).

140. *See id.* at 1210.

141. 18 U.S.C. § 3771(c)(1) ("Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).").

142. *In re Wild*, 955 F.3d at 1210.

noted that were it not to adopt that reading, there would be no textual basis limiting the CVRA's applicability to a later stage, such as the NPA context.[143] It would open the floodgates to requiring law enforcement officers to consult with victims before convening a lineup, conducting a raid, or obtaining a search warrant.[144]

The majority conceded that Wild stood on firmer ground with respect to the venue provision.[145] This provision directs victims to assert their rights either in the court in which the defendant is being prosecuted or, "if no prosecution is underway," in the court in which the crime occurred.[146] Both the dissent and the lower court agreed that "no prosecution is underway" must necessarily mean that the defendant has not yet been charged.[147] The majority acknowledged that this is a plausible reading.[148] But when considering the remainder of the CVRA's text and the adverse practical implications of Wild's interpretation, the majority discussed alternative readings of the venue provision more consistent with its own interpretation.[149]

In its preferred reading, the majority noted that "no prosecution is underway" could refer to the time between the filing of a criminal complaint and a formal indictment.[150] The majority supported this reading by citing the well-established precedent that, for the purposes of the Sixth Amendment right to counsel, a "prosecution" begins at a defendant's initial appearance before a judicial officer, not at the filing of a complaint.[151] The court reasoned that this reading sensibly applies where, for instance, a victim wishes to confer with the prosecutor after the filing of a complaint about whether the defendant should be granted pretrial release at the initial appearance.[152]

Next, the court looked at the CVRA's historical context and compared the Act to the earlier VRRA.[153] The VRRA, by its own terms, grants victims certain precharge rights and services.[154] In essence, the court observed that Congress obviously knew about the VRRA when it enacted the CVRA, which repealed portions of the VRRA but left intact those provisions that supply precharge rights and services.[155] Because Congress knows how to extend precharge rights to victims expressly, the court found Congress's

143. *See id.* at 1211.
144. *See id.*
145. *See id.* at 1212.
146. 18 U.S.C. § 3771(d)(3); *see also infra* note 169 and accompanying text.
147. *See In re Wild*, 955 F.3d at 1212, 1238.
148. *See id.* at 1212.
149. *See id.*
150. *See id.*
151. *See id.* The dissent responded by indicating that, also for the purposes of a "prosecution," the Sixth Amendment's speedy trial right can apply as early as the time of arrest. *See id.* at 1238 n.17 (Hull, J., dissenting).
152. *See id.* at 1213.
153. *See id.* at 1214.
154. *See id.*
155. *See id.* at 1214–15.

silence when enacting the CVRA, in the face of this knowledge, to be intentional.[156]

The court termed its final consideration—the principle of prosecutorial discretion—a "weighty one."[157] Section 3771(d)(6) of the CVRA explicitly prohibits any interpretation of the entire CVRA that "impair[s] the discretion of the Attorney General or any officer under his direction."[158] The court then indicated two ways in which the CVRA's precharge applicability would "impair" the very discretion the CVRA seeks to safeguard.[159]

First, to claim statutory protection under the CVRA, victims must demonstrate to the court that they are crime victims as defined by the Act.[160] A victim must be "a person directly and proximately harmed as a result of the commission of a Federal offense."[161] In the absence of any charges, the court observed that it was ill-equipped to make this determination because doing so would entail conducting a "trial" and making legal findings about offenses yet to be identified.[162] Such a proceeding, the court concluded, would "exert enormous pressure" on the charging decision and likely impair an ongoing investigation.[163]

Second, the court held that its enforcement of precharge CVRA rights would both quantitatively and qualitatively intrude on prosecutorial discretion.[164] Quantitatively, the court stated that interventions would be multiplied as judges would be empowered to compel prosecutors to consult with victims before witness interviews, warrant applications, interrogations, and the like.[165] Qualitatively, the court stated that the principle of separation of powers counsels that unless and until charges are filed—at which point the prosecutor cedes some control and management of the case to the court—the prosecutor's discretion is both "exclusive" and "absolute."[166] The court concluded that recognizing enforceable precharge rights would "contravene[] the background expectation of executive exclusivity."[167]

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156. *See id.* at 1215. Wild did not proceed under the VRRA because, as mentioned above, it does not grant judicially enforceable rights. *See id.* at 1215 n.22.

157. *Id.* at 1216.

158. 18 U.S.C. § 3771(d)(6).

159. *See In re Wild*, 955 F.3d at 1216.

160. *Id.* at 1217.

161. 18 U.S.C. § 3771(e)(2).

162. *See In re Wild*, 955 F.3d at 1217.

163. *Id.*

164. *See id.* at 1218.

165. *See id.* The dissent contended that the statute itself provides the desired limiting principles by, inter alia, qualifying the right to confer as a "reasonable" right and by explicitly safeguarding prosecutorial discretion. *See id.* at 1246 (Hull, J., dissenting). But the dissent found the late, indictment-drafting stage in Epstein's case to warrant attachment of the conferral right. *See id.* The majority construed this latter reasoning as one cleverly crafted to capture the facts of this case without risking a slippery slope. *See id.* at 1221.

166. *Id.* at 1218.

167. *Id.* Apart from setting forth its own textualist arguments for why the CVRA right to confer applies precharge, the dissent also countered the majority's floodgates and separation of powers by observing that "since the Fifth Circuit's 2008 [*In re Dean*] decision and the District Court's 2011 [*Doe I*] decision, there has been no flood of civil suits by victims, no evidence of victims' abuse of their CVRA rights, and no prosecutors' complaints about

As of this writing, while we await a new opinion from an en banc Eleventh Circuit, there appear to be only two federal courts remaining that have extended the CVRA conferral right to the precharge stages of a case. Twelve years ago, the Fifth Circuit, albeit in a case where the issue was not contested by the parties, stated that the right to confer can apply specifically in precharge *plea negotiations*.[168] The court asserted that Congress, by enacting the CVRA, made a "policy decision" that victims have a right to inform the plea bargaining process by conferring with the government prior to the signing of an agreement.[169] And eleven years ago, the Eastern District of Virginia, in an unpublished opinion regarding a motion in limine, agreed with the Fifth Circuit's decision that the CVRA can apply prior to a plea agreement.[170]

b. DOJ's Narrow Reading

DOJ's Office of Legal Counsel (OLC) contends that CVRA rights only apply once the government brings formal charges.[171] In a sixteen-page opinion, the OLC analyzes the CVRA's "text, structure, purpose, and legislative history," concluding that this position is the best reading of the statute.[172]

Some of the OLC's arguments, including those supporting its interpretation of "the case" and "the attorney for the Government" within the CVRA's right to confer, were informally adopted by the Eleventh Circuit in its recent decision.[173] The OLC acknowledges that its narrow reading may reduce the impact of victim participation, for instance, at a plea hearing (assuming that there was no prior conferral), but it nonetheless emphasizes

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impairment of their prosecutorial discretion." *Id*. at 1226 (Hull, J., dissenting). *But see supra* note 111 and accompanying text (describing cost barriers that victims face to file suit and vindicate their rights).

168. *See In re* Dean, 527 F.3d 391, 394 (5th Cir. 2008). As the *In re Wild* majority noted, the Fifth Circuit's discussion of the CVRA's precharge rights was technically dicta, given its ultimate ruling. *See In re Wild*, 955 F.3d at 1219 n.25.

169. *In re Dean*, 527 F.3d at 395.

170. *See* United States v. Okun, No. 08cr132, 2009 WL 790042, at *2 (E.D. Va. Mar. 24, 2009).

171. The Availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004, 35 Op. O.L.C. 1, 1 (2010) [hereinafter 2010 OLC Opinion]. Though the document is now ten years old, OLC opinions are treated as binding within the executive branch. *See* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451 (2010). For an opposing perspective on the OLC's legal analysis, see generally Cassell et al., *supra* note 127. Senator Jon Kyl also contested the OLC's conclusions and subsequently wrote two letters to then Attorney General Eric Holder arguing that the CVRA right to confer *was* intended to attach precharge. *See* 157 CONG. REC. S7060–61 (daily ed. Nov. 2, 2011) (statement of Sen. Jon Kyl); 157 CONG. REC. S3608–09 (daily ed. June 8, 2011) (statement of Sen. Jon Kyl).

172. 2010 OLC Opinion, *supra* note 171, at 4.

173. *Id.* at 8–9.

that prosecutors remain free to exercise their discretion to confer when they please.[174]

On this point, the OLC's disclaimer at the outset is noteworthy—it claims that its final opinion is limited to examining statutory *obligations* under the CVRA and that it contains no opinion on whether the DOJ should provide rights prior to the filing of charges "as a matter of good practice."[175] Finally, and most salient to this Note's inquiry, the OLC unequivocally states that conferral does not apply in the context of charging decisions, which it believes are "beyond the ambit" of the CVRA.[176]

Turning to the DOJ's guidelines, it is clear that the department has adopted the OLC opinion. In the latest version of the "Attorney General Guidelines for Victim and Witness Assistance" ("AG Guidelines"), the DOJ states that "CVRA rights attach when criminal proceedings are initiated by complaint, information, or indictment."[177] Perhaps as a nod to the OLC's "good practice" language, the AG Guidelines assert that prosecutors "should make reasonable efforts" to both notify victims and consider their views about "prospective plea negotiations."[178] There is *no* mention of conferral regarding a decision not to proceed with a prosecution.[179]

c. Congress's 2015 CVRA Amendment

In 2015, Congress amended the CVRA, most prominently adding a ninth enumerated right "to be informed in a timely manner of any plea bargain or deferred prosecution agreement."[180] The House of Representatives' report accompanying the legislation expressly noted that pursuant to the OLC opinion, federal prosecutors had not been required to notify victims about a plea agreement or deferred prosecution agreement (DPA) that was finalized prior to the filing of a formal charge.[181] The amendment thus clarified

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174. *Id.* at 10. The OLC noted that a subdivision of DOJ, the Environmental and Natural Resources Division, had recommended in an internal memo that the conferral right should apply to precharge plea negotiations. *Id.* at 9.

175. *Id.* at 2. This distinction between legal obligations and good practice also featured in the Eleventh Circuit's recent decision. *See In re* Wild, 955 F.3d 1196, 1221 (11th Cir.), *vacated*, *reh'g en banc granted*, No. 19-13843, 2020 WL 4557083 (11th Cir. Aug. 7, 2020) (mem.).

176. 2010 OLC Opinion, *supra* note 171, at 9–10.

177. OFF. OF JUST. PROGRAMS, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 8 (2012), https://www.justice.gov/sites/default/files/olp/docs/ag_guidelines2012.pdf [https://perma.cc/VST9-MBMF].

178. *Id.* at 41; 2010 OLC Opinion, *supra* note 171, at 2.

179. OFF. OF JUST. PROGRAMS, *supra* note 177, at 41–42.

180. Justice for Victims of Trafficking Act of 2015, Pub. L. No. 144-22, 129 Stat. 227, 240 (codified at 18 U.S.C. § 3771(a)(9)–(10)). Plea agreements and DPAs are similar in that both require court involvement, while NPAs do not. *See* United States v. Fokker Servs. B.V., 818 F.3d 733, 738 (D.C. Cir. 2016) (explaining that charges are filed subject to DPAs, but that none are filed subject to NPAs, where the agreement is maintained by the parties alone). Separately, the *In re Wild* decision considered the CVRA at the time the underlying litigation commenced (2008), and so it did not incorporate this amendment into its analysis. *See In re Wild*, 955 F.3d at 1231 (Hull, J., dissenting).

181. *See* H.R. REP. NO. 114-7, at 7 (2015).

Congress's intent that crime victims be notified of such agreements, even if they are reached precharge.[182] Shortly after the amendment was enacted, the DOJ filed a brief in the Southern District of New York, again arguing that the CVRA applies only after criminal charges are filed or in the "closely-related context of plea bargains or deferred prosecution agreements."[183] In short, the DOJ maintained that outside the narrow context of the newly enacted amendment, CVRA rights were still tied to the commencement of criminal proceedings.[184]

As this section has illustrated, courts have mainly confronted the issue of a precharge right to confer in the context of either plea negotiations or related negotiations implicating an NPA. Outside of the Epstein litigation culminating with *In re Wild*, no federal court has addressed whether the CVRA right to confer exists in a *nonprosecution* posture.[185] The next section briefly examines pending legislation to further amend the CVRA and discusses its implications for a precharge right to confer.

2. The Proposed Amendment to the CVRA

On October 17, 2019, Representative Jackie Speier introduced the Courtney Wild Crime Victims' Rights Reform Act of 2019,[186] named in honor of Epstein's victim.[187] The bill proposes to expand the right to confer to include conferral "about any plea bargain or *other resolution* of the case before such plea bargain or resolution is presented to the court or *otherwise finalized*."[188] Relatedly, it seeks to further amend the 2015 enactment of the right to notification of plea bargains and DPAs by adding the right to

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182. *Id.*

183. *See* Reply Memorandum of Law in Further Support of Respondents' Motion to Dismiss the Petition at 5, Jordan v. U.S. Dep't of Just., 173 F. Supp. 3d 44 (S.D.N.Y. 2016) (No. 15 Civ. 1028), ECF No. 17.

184. *Id.* In a 2017 brief filed in the Southern District of Florida, DOJ read the new amendment to *not* require advance notice of a plea offer or a proposed deferred prosecution agreement but rather notice "in a timely manner" *after* such an agreement has come into existence. *See* Government's Response and Opposition to Petitioners' Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment at 8, *Doe III*, 359 F. Supp. 3d 1201 (S.D. Fla. 2019) (No. 08 Civ. 80736), ECF No. 408.

185. *See Jordan*, 173 F. Supp. 3d at 51 (observing that no federal court has addressed whether CVRA rights can be invoked at pre-negotiation stages, such as the investigatory stage); KERSTIN BRAUN, VICTIM PARTICIPATION RIGHTS: VARIATION ACROSS CRIMINAL JUSTICE SYSTEMS 109–10 (2019) (noting that the application of CVRA rights to a nonprosecution context appears "opaque").

186. H.R. 4729, 116th Cong. (2019). Among its proposals are a fee-shifting provision for attorneys' fees and expenses and an award of up to $15,000 for intentional violations of CVRA rights. *See id.* §§ 2–3. Given the existing cost barriers to vindicating CVRA rights, these provisions may help relieve such burdens. *See supra* note 109 and accompanying text

187. *See* Press Release, Congresswoman Jackie Speier, Rep. Speier Introduces Bipartisan Courtney Wild Crime Victims' Rights Reform Act of 2019 to Rectify Injustices Faced by Epstein's Victims, (Oct. 17, 2019), https://speier.house.gov/2019/10/rep-speier-introduces-bipartisan-courtney-wild-crime-victims-rights-reform-act-of-2019-to-rectify-injustices-faced-by-epstein-s-victims [https://perma.cc/44L5-UAZK].

188. H.R. 4729 § 2(1)(A) (emphasis added).

notification of NPAs and any "referral of a criminal investigation to another Federal, State, or local law enforcement entity."[189]

At first glance, the provisions appear to target NPAs and associated referrals alone, at least those that bear a resemblance to the ones employed in the Epstein litigation. But the proposed amendment's reference to "other resolution[s]" may encompass certain other nonprosecution decisions.[190] As of this writing, the bill has not left the committee—it was first introduced in the House Judiciary Committee and then referred to the Subcommittee on Crime, Terrorism, and Homeland Security about a month later.[191]

3. State Law Survey

State constitutions are replete with examples of broad language granting rights to confer without supplying any context.[192] States' statutory conferral rights that do contain specific language refer predominantly to plea negotiations and plea agreements.[193] In so doing, they often explicitly provide for conferral rights only after a prosecutor files charges and dispel the idea that such rights could apply, for instance, to *precharge* plea negotiations.[194] And unlike the CVRA, state provisions generally provide no enforcement mechanisms to vindicate rights, meaning that few courts have ever addressed the narrow question of whether conferral rights attach in the absence of charges.[195]

There are, however, a few states that appear to grant victims a conferral right with respect to an exercise of nonprosecution discretion. Tennessee requires that its prosecutors confer with victims prior to a final disposition,

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189. *Id.* § 2(1)(B).

190. *Id.* § 2(1)(A).

191. *See H.R. 4729—Courtney Wild Crime Victims' Rights Reform Act of 2019*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/4729/committees [https://perma.cc/PY3K-BZHH] (last visited June 22, 2020).

192. *See, e.g.*, ALASKA CONST. art. I, § 24 (granting "the right to confer with the prosecution"); ILL. CONST. art. I, § 8.1(a)(4) (granting "[t]he right to communicate with the prosecution"); MICH. CONST. art. I, § 24(1) (granting the "right to confer with the prosecution"); N.C. CONST. art. I, § 37(1a)(h) (granting "the right to reasonably confer with the prosecution"); TEX. CONST. art. I, § 30(b)(3) (granting "the right to confer with a representative of the prosecutor's office"). *But see, e.g.*, S.C. CONST. art. I, § 24(A)(7) (granting the right to "confer with the prosecution, after the crime against the victim has been charged, before the trial or before any disposition and [be] informed of the disposition").

193. *See* OFF. FOR VICTIMS OF CRIME, LEGAL SERIES BULLETIN # 7: VICTIM INPUT INTO PLEA AGREEMENTS 1–2 (2002), https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin7/ncj189188.pdf [https://perma.cc/4WGP-TYZJ]; *see also* Tobolowsky, *supra* note 79, at 63–65, 64 nn.168–71.

194. *See* LAFAVE ET AL., *supra* note 104, § 13.1(a); Brown, *supra* note 32, at 880. This treatment of *conferral* rights with prosecutors stands in contrast to *notification* rights in relation to law enforcement broadly, which most states do provide early in the criminal process, *see* Cassell et al., *supra* note 127, at 102, as does the federal government. *See* 34 U.S.C. § 20141(c)(3) (enumerating notice requirements to victims by a "responsible official").

195. *See* Cassell et al., *supra* note 127, at 101; *see also, e.g.*, *Ex parte* Littlefield, 540 S.E.2d 81, 85 n.5 (S.C. 2000) (holding that victims obtain the right to confer once the case proceeds to indictment).

such as the "decision not to proceed with a criminal prosecution."[196] Massachusetts provides victims with an opportunity to confer with the prosecution before, inter alia, an "act by the commonwealth terminating the prosecution."[197] Meanwhile, Arizona not only requires that prosecutors confer with victims regarding their views on a "decision not to proceed with a criminal prosecution"[198] but also mandates that prosecutors provide victims with "the reason for declining to proceed with the case."[199] Finally, New Jersey, while not commenting on *conferral* before or in the absence of charges, permits victims to submit a written statement to the prosecution, which must be considered before they make a final decision on whether to file charges.[200]

B. What Does Conferral Include?

One may understandably think the Arizona conferral statutes, in explicitly referencing the victim's "views" and the prosecutor's "reasons" for declining charges, present concrete examples of what the law contemplates conferral to include.[201] However, in both statutory provisions and case law, the prevailing method to explain the substance of conferral is to look to its limitations. That is, the right to confer is often defined by what it is *not* meant to encompass.[202]

Part II.B.1 focuses on the substance and boundaries of conferral in the CVRA, looking to its legislative history, case law, and certain DOJ interpretations. Part II.B.2 briefly recounts pending legislation and its purported view on the substance of CVRA conferral. Last, Part II.B.3 examines the subject matter and limitations of conferral in the states.

1. The CVRA

Though Senator Jon Kyl, a cosponsor of the CVRA, repeatedly emphasized the CVRA's expansive nature in the legislative record,[203] he was equally prepared to note where its reach did not extend.[204] He declared that the right to confer did not grant the victim any authority to direct the prosecution.[205] Of course, as discussed previously, the statute itself provides that none of its provisions can be construed to impair prosecutorial discretion.[206] That provision, as well as Senator Kyl's commentary,

196. TENN. CODE ANN. § 40-38-114(a) (2020).
197. MASS. GEN. LAWS ANN. ch. 258B, § 3(g) (2020). The statute separately references the filing of a nolle prosequi, or dismissal of charges, suggesting that this language may be broader. *See id.*
198. ARIZ. REV. STAT. ANN. § 13-4419(A) (2020).
199. *Id.* § 13-4408(B).
200. N.J. STAT. ANN. § 52:4B-36(m) (West 2020).
201. *See supra* Part II.A.3.
202. *See infra* Parts II.B.1, II.B.3.
203. *See supra* Part II.A.1.
204. *See* 150 CONG. REC. 7302 (2004) (statement of Sen. Jon Kyl).
205. *See id.*
206. *See* 18 U.S.C. § 3771(d)(6).

comports with the extensive case law predating the CVRA that keeps prosecutorial discretion fully intact.[207] But courts have had some opportunities to interpret the extent to which prosecutorial discretion may be curtailed.

In *Jordan v. Department of Justice*,[208] the court addressed the substance of the right to confer. The plaintiff, Gigi Jordan, had lodged a complaint with the authorities against her ex-husband claiming she was a victim of his financial fraud schemes.[209] She sent documents detailing fraudulent activity to a prosecutor and subsequently met with the prosecutor for an hour to discuss her allegations.[210]

Although no charges were filed against her ex-husband, Jordan filed suit seeking enforcement of her CVRA rights, including her right to confer.[211] The court did not address whether the conferral right applied at such an early stage[212] but nonetheless found that, even if it did, prosecutors had complied with their conferral responsibilities.[213] In short, the court held that receiving and reviewing documents and meeting with the plaintiff for an hour constituted sufficient conferral as applied to the facts.[214] The court also noted that, while individuals who feel victimized should attempt to convince authorities to pursue prosecution, "they cannot dictate the manner, timing, or quantity of conferrals."[215]

In a Fifth Circuit case, DOJ had been contemplating criminal charges following an explosion at a refinery that killed fifteen people and injured 170 others.[216] Before reaching a plea agreement, the government filed an ex parte motion requesting that the district court formulate procedures under the CVRA's exception for numerous crime victims,[217] since notification would not be "practicable" and would lead to media coverage that could "impair" the negotiation process and prejudice the case.[218]

The district court promptly issued the ex parte order, which prohibited the government from notifying the victims prior to signing the plea agreement and directed the government to complete its CVRA obligations afterward but in advance of the agreement being entered in court.[219] The Fifth Circuit

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207. *See supra* note 84 and accompanying text.
208. 173 F. Supp. 3d 44 (S.D.N.Y. 2016).
209. *Id.* at 46–47.
210. *Id.* at 47.
211. *Id.* at 48–49.
212. *See* Reply Memorandum of Law in Further Support of Respondents' Motion to Dismiss the Petition, *supra* note 183, at 3–4.
213. *Jordan*, 173 F. Supp. 3d at 52. In its briefing, the government took the rare step of revealing that it had not even opened an investigation into the matter. *Id.*
214. *See id.*
215. *Id.* at 53.
216. *In re* Dean, 527 F.3d 391, 392 (5th Cir. 2008).
217. *See* 18 U.S.C. § 3771(d)(2) ("In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.").
218. *In re Dean*, 527 F.3d at 392.
219. *Id.* at 393.

found a CVRA violation and held that (1) neither notification to nor conferral with less than 200 individuals was impracticable and (2) the prospect of impairing the negotiations through undue influence did not warrant the abdication of conferral obligations.[220] The court indicated that the "policy decision" underlying the right of conferral meant that victims have a right to inform the plea negotiation process, regardless of whether they seek to hinder a particular plea offer or facilitate the reaching of another.[221]

These holdings help illustrate the boundaries of conferral obligations as they relate to prosecutors seeking to exercise their discretion. Other inquiries into conferral have indirectly focused on such discretion not by evaluating the conduct of prosecutors but by considering affirmative requests for information by victims themselves.[222] For example, the plaintiff before the *Jordan* court sought additional meetings with the government in connection with her ex-husband's financial fraud scheme.[223] The court found this request unavailing and remarked that the CVRA does not create a "self-effectuating right" irrespective of its effect on "resources, any pending investigation, or prosecutorial discretion."[224] The court observed that the right to confer, by its own terms, is not absolute but "reasonable."[225] Similarly, the court in *Rubin* recognized that the term "reasonable" supplies the government with critical flexibility and held that the information-gathering feature of the conferral right is logically constrained by its "*relevance* to a victim's right to *participate*" in the criminal justice process; in short, it does not sanction "an unbridled gallop" to the information in the government's records.[226]

As for the government's own views, DOJ has interpreted the boundaries of the right as explained in Part II.A.1.c above. To reiterate, the AG Guidelines reference the substance of conferral primarily in the context of

220. *Id.* at 395.

221. *Id.*; *see also* United States v. Stevens, 239 F. Supp. 3d 417, 423 (D. Conn. 2017) ("Often enough, victims may urge the prosecutor to deal severely with defendants who have hurt them. Some victims, however, may urge leniency for reasons of mercy, compassion, or forgiveness. Whatever the views that a victim may have, the integrity of a criminal prosecution is stronger if the prosecutor learns about these views if possible before making major decisions in a case.").

222. In the CVRA's legislative record, Senator Feinstein emphasized that, to the extent that prosecutors provide victims information or opinions, the right to confer is an appropriate vehicle for doing so. *See* 150 CONG. REC. 7302 (2004) (statement of Sen. Dianne Feinstein). The Eastern District of New York has interpreted this legislative history to distinguish conferral from the various CVRA rights to be heard—it has concluded that the conferral right allows victims to obtain information on which they can then base their input while exercising their rights to be heard. *See* United States v. Ingrassia, No. CR-04-0455, 2005 WL 2875220, at *17 n.11 (E.D.N.Y. Sept. 7, 2005). Instead of enacting an affirmative disclosure right, the court reasoned, the drafters of the statute contemplated conferral as encompassing such information transfer. *Id.*

223. Jordan v. U.S. Dep't of Just., 173 F. Supp. 3d 44, 52 (S.D.N.Y. 2016).

224. *Id.* (quoting United States v. Rubin, 558 F. Supp. 2d 411, 420 (E.D.N.Y. 2008)).

225. *Id.* at 51.

226. United States v. Rubin, 558 F. Supp. 2d 411, 425 (E.D.N.Y. 2008) (emphasis added) (citing *Ingrassia*, 2005 WL 2875220, at *17).

plea negotiations.[227] To the extent that the OLC opinion directly addresses the relationship between discretion and conferral, it states that prosecutors are free to confer as they wish but are not obligated to do so prior to bringing charges.[228] Where any negotiations relate to the charging decision, however, the OLC considers them to be outside the ambit of conferral.[229]

2. The Proposed Amendment to the CVRA

The pending legislation to amend the CVRA does not comment on the substance (or limitations) of conferral beyond including language that the right to confer must extend to plea bargains or other resolutions before they are finalized.[230] Separately, however, the legislation does contemplate imposing safeguards on any notification made to victims about NPAs or referral to other agencies.[231] For example, the bill stipulates that victims may be required to maintain confidentiality as to any disclosed nonpublic information learned if the government can show good cause grounded in concern for public safety or the needs of an ongoing investigation.[232] The duty of confidentiality, in turn, is not to be greater than the one imposed on the government or the defendant.[233] Finally, as an enforcement mechanism, the bill permits the attorney general to assess civil penalties, subject to notice and opportunity for a hearing, for any breaches of confidentiality by victims.[234]

3. State Law Survey

This section discusses three ways in which state laws indicate the substance of and limitations to conferral by: (1) acknowledging the importance of preserving prosecutorial discretion, (2) restricting the subject matter of conferral by narrowly defining "crime" or "victim" in victim's rights laws to include only specific crimes, and (3) mandating consideration of the victim's views.

Just as the CVRA explicitly recognizes the established nature of prosecutorial discretion,[235] so to do the various state constitutions and statutes that grant the right to confer, often by denying victims remedies when prosecutors violate their rights.[236] Even the scant case law available on

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227. *See supra* Part II.A.1.
228. *See supra* Part II.A.1.
229. *See* 2010 OLC Opinion, *supra* note 171, at 9–10.
230. Courtney Wild Crime Victims' Rights Reform Act of 2019, H.R. 4729, 116th Cong. § 2(1)(A) (2019).
231. *See id.* § 2(1)(B).
232. *Id.*
233. *Id.*
234. *Id.*
235. *See* 18 U.S.C. § 3771(d)(6).
236. *See, e.g.*, ILL. CONST. art. I, § 8.1(b) (prohibiting a construction of rights that impairs prosecutorial discretion); NEV. CONST. art. 1, § 8A2 (prohibiting a construction of rights that impairs prosecutorial discretion); COLO. REV. STAT. § 24-4.1-303(4) (2020) (indicating that the duty to confer does not limit prosecutors' discretion with respect to handling charges);

conferral[237] confirms this approach and has upheld the principle that the right to confer cannot intrude on prosecutorial discretion. For example, the Tennessee Supreme Court has held that the right to confer does not include the power to direct a prosecution in any manner.[238] In other instances, where courts did not specifically address conferral rights but rather victim's rights broadly, they have likewise held that such rights do not empower victims to challenge the charging discretion of prosecutors.[239] Much like the federal courts described above, a Texas court preserved this discretion when addressing whether victims are entitled to discovery in a pending criminal matter as part of their conferral right. It held that the state legislature sought to rectify victim alienation by giving victims access to the prosecutor, not to the prosecutor's files.[240]

Many states also limit the application of their victim's rights laws, including conferral rights, by statutorily restricting the crimes that confer victims rights.[241] For instance, North Carolina defines a crime victim as any person against whom there is probable cause to believe that one of a number of enumerated crimes was committed, including all felonies and serious misdemeanors.[242] It also permits the district attorney to decide whether the commission of a particular crime, if not otherwise listed, may still grant victims status as a victim under the law.[243] Colorado individually lists every offense, act, or violation that, if committed, would grant victim status.[244] And New York catalogues all offenses for which the right to confer, in particular, is triggered and includes only certain felonies.[245]

Finally, some state statutes go beyond using the broad terms "confer" and "consult" and provide some guidance as to what conferral may include. As discussed in Part II.A.3, Arizona requires that its prosecutors confer with victims about their "views" regarding, inter alia, a decision not to proceed with a prosecution.[246] A complementary Arizona statute requires that this

N.Y. EXEC. LAW § 642(1) (McKinney 2020) (indicating that the district attorney's failure to confer does not void a disposition); WIS. STAT. § 971.095(2) (2020) (indicating that the duty to confer does not limit prosecutors' discretion with respect to handling charges); *see also* Brown, *supra* note 32, at 863.

237. *See supra* Part II.A.3.

238. *See* State v. Layman, 214 S.W.3d 442, 453 (Tenn. 2007).

239. *See, e.g.*, Gansz v. People, 888 P.2d 256, 258–59 (Colo. 1995) (en banc) (finding that victims have no right to contest prosecutors' dismissal of charges); People v. Williams, 625 N.W.2d 132, 135 (Mich. Ct. App. 2001) (finding that victims have no right to determine whether prosecution should go forward or be dismissed); Reed v. Becka, 511 S.E.2d 396, 400 (S.C. Ct. App. 1999) (finding that prosecutorial discretion is neither contracted nor limited by victim's rights laws).

240. State *ex rel.* Hilbig v. McDonald, 839 S.W.2d 854, 858–59 (Tex. App. 1992).

241. The CVRA also provides a restriction, but it is a causation threshold—the victim must be directly and proximately harmed as a result of the crime. *See* 18 U.S.C. § 3771(e)(2)(A). It does not, however, limit the definition of crimes, as any federal offense qualifies. *See id.*

242. N.C. GEN. STAT. § 15A-830(a)(7) (2020).

243. *See id.* § 15A-824(1).

244. *See* COLO. REV. STAT. § 24-4.1-302(1) (2020).

245. *See* N.Y. EXEC. LAW § 642(1) (McKinney 2020).

246. ARIZ. REV. STAT. ANN. § 13-4419(A) (2020).

conferral include the "reasons" for the declination decision.[247] Tennessee likewise mandates that its prosecutors confer with victims about their views regarding a decision not to proceed with a prosecution.[248] Most other state conferral statutes also include language referring to consideration of the victim's "views" or "opinions" but reject its application to preindictment dispositions.[249]

As Part II illustrates, the right to confer, both under the CVRA and in the states, can serve an important purpose in achieving victim participation in the early stages of the criminal justice process. But what the law has not done is extend this right to nonprosecution postures.[250] To be sure, there are myriad valid reasons for not doing so.[251] Yet the general absence of an enforceable victim's right to confer about declination decisions does not mean that conferral need not accompany exercises of nonprosecution discretion. The next part proposes when and how such a conferral "right" should be established.

III. REASONABLE CONFERRAL IN A NONPROSECUTION POSTURE

The Epstein litigation understandably drew the ire of many. How was it possible, in a case where the government identified thirty-four victims of alleged sex trafficking and drafted a fifty-three-page indictment, that prosecutors would instead *secretly* bind themselves to an NPA? To the Eleventh Circuit (and the lower court), there is no acceptable answer.[252] NPAs are especially controversial exercises of nonprosecution discretion[253] and present unique challenges to a victim's ability to participate in the criminal justice process.[254] But exercises of nonprosecution discretion not memorialized in NPAs and DPAs can likewise be controversial and exclude

247. *Id.* § 13-4408(B).

248. TENN. CODE ANN. § 40-38-114(a) (2020).

249. *See, e.g.*, ALA. CODE § 15-23-64 (2020); GA. CODE ANN. § 17-17-11 (2020); N.Y. EXEC. LAW § 642(1); VA. CODE § 19.2-11.01(A)(4)(d) (2020); W. VA. CODE § 61-11A-6(a)(5) (2020); *see also* Brown, *supra* note 32, at 880.

250. *See infra* Part III.A.1.

251. *See infra* Parts III.A.1, III.B.

252. *See In re* Wild, 955 F.3d 1196, *passim* (11th Cir.), *vacated*, *reh'g en banc granted*, No. 19-13843, 2020 WL 4557083 (11th Cir. Aug. 7, 2020) (mem.); *Doe III*, 359 F. Supp. 3d 1201, 1219–20 (S.D. Fla. 2019).

253. *See* Zendeh, *supra* note 32 at 1457, 1457 & n.42. *See generally* Brandon L. Garrett, *The Metamorphosis of Corporate Criminal Prosecutions*, 101 VA. L. REV. ONLINE 60 (2016); David M. Uhlmann, *Deferred Prosecution and Non-prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295 (2013). DOJ primarily uses NPAs, along with DPAs, in the corporate context. Their use has skyrocketed: between 1992 and 2000, DOJ negotiated thirteen such agreements, but over 500 DPAs and NPAs have been negotiated since. *See* Uhlmann, *supra*, at 1316; *2019 Year-End Update on Corporate Deferred Prosecution Agreements and Non-prosecution Agreements*, GIBSON DUNN (Jan. 8, 2020), https://www.gibsondunn.com/2019-year-end-npa-dpa-update/ [https://perma.cc/GGD9-WTB2]. Judge Emmett Sullivan, district judge for the District of Columbia, and Professor Brandon Garrett, however, believe the use of DPAs and NPAs in the corporate context is undesirable and that they should be used more broadly for individual offenders instead. *See* Garrett, *supra*, at 70 & n.42.

254. *See infra* Part III.A.1.

victims.[255] Still, instituting victim involvement prior to a declination decision may have adverse consequences of its own.[256] Thus, striking a balance between meaningful conferral on the one end and discretionary decision-making on the other is critical.

Part III recommends a resolution: prosecutors' offices should promulgate guidelines, grounded in procedural justice, that encourage conferral with victims in certain cases where a prosecutor decides not to file charges. And when a prosecutor intends to sign an NPA, this Note advocates that they *must* confer with victims before doing so, absent a showing of good cause. In turn, Part III.A introduces the proposed guidelines, and Part III.B considers their implications.

A. A Proposal to Confer

Prosecutorial guidelines offer a viable means of incentivizing prosecutors to confer with crime victims given the general reluctance of courts to constrain[257] and the intent of victim's rights laws to preserve prosecutorial discretion.[258] Part III.A.1 argues the need for conferral in some nonprosecution postures, especially in the context of NPAs. Part III.A.2 presents model guidelines that prosecutors' offices should adopt to effectuate a conferral "right."

1. The Need for Conferral

As Part I.B.1 illustrated, to the extent that victims may be less willing to cooperate with criminal justice authorities because they perceive the process and its actors as unfair or insufficiently attentive to their needs, society's goals of effective crime control may suffer.[259] Prosecutors have a direct impact on victims by virtue of their ability to move a case forward. But too often, when a prosecutor elects not to bring charges, the victim's role may be nonexistent.[260] Indeed, as one scholar has noted, the victim practically vanishes following an arrest.[261]

As a consequence, the conferral right is valuable for victims as a vehicle to both obtain information from prosecutors about important case developments and to provide information of their own—facts or opinions that keep the prosecution apprised of the victim's perspectives.[262] Legal authorities recognize that conferral has clear, articulable benefits in certain

255. *See generally* Colin Taylor Ross, Note, *Policing Pontius Pilate: Police Violence, Local Prosecutors, and Legitimacy*, 53 HARV. J. ON LEGIS. 755 (2016).
256. *See infra* Part III.B.
257. *See supra* Parts II.A.1.a, II.B.1.
258. *See supra* Part II.B.3.
259. *See supra* Part I.B.1.
260. *See supra* Part I.B.1; *see also supra* note 78 and accompanying text.
261. *See* Caplow, *supra* note 59, at 18.
262. *See supra* Part II.B.1; *see also supra* notes 221–22.

precharge contexts, such as plea negotiations.[263] Given that almost all federal and state convictions are now obtained by plea bargains, this recognition is not surprising.[264]

But pleas are entered into publicly before a court.[265] NPAs, on the other hand, are maintained by private parties.[266] Put simply, entering into an NPA without notice or conferral may be more damaging than entering into a plea agreement without the same because once the former is signed, the matter is closed and there is *no* later opportunity for victims to provide input.[267] However, outside of possibly the Fifth Circuit[268] and the Eastern District of Virginia,[269] prosecutors can freely choose to ignore victims before declining to charge or signing an NPA.[270] And states, apart from a select few, categorically do not grant victims a right to confer in such instances.[271] In the next section and in the spirit of the OLC's "good practice" language, as discussed above, this Note proposes that prosecutors' offices take it upon themselves to fill this gap and confer in certain nonprosecution postures.[272]

2. A Conferral "Right" Enshrined in Prosecutorial Guidelines

As a threshold matter, federal prosecutors across the country are already subject to certain statutory duties with respect to the fair treatment of victims.[273] The AG Guidelines set out uniform standards for prosecutors regarding victim treatment and assistance,[274] and many state statutes obligate prosecutors to confer with victims.[275]

The current AG Guidelines state that prosecutors "should make reasonable efforts to notify identified victims of, and consider victims' views about, prospective plea negotiations."[276] They go on to specify that, "[i]n circumstances where plea negotiations occur before a case has been brought, Department policy is these efforts should include reasonable consultation

263. *See supra* Parts II.A.1, II.B.1, II.A.3; *see also* 18 U.S.C. § 3771(a)(9) (recognizing a crime victim's "right to be informed in a timely manner of any plea bargain or deferred prosecution agreement").

264. *See supra* note 65 and accompanying text.

265. *See, e.g.*, FED. R. CRIM. P. 60(a)(3) ("The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime."); ARIZ. REV. STAT. ANN. § 13-4423(A) (2020) ("On request of the victim, the victim has the right to be present and be heard at any proceeding in which a negotiated plea . . . will be presented to the court.").

266. *See supra* note 180.

267. *See Doe III*, 359 F. Supp. 3d 1201, 1220 & n.6 (S.D. Fla. 2019).

268. *See In re* Dean, 527 F.3d 391, 394 (5th Cir. 2008).

269. *See* United States v. Okun, No. 08cr132, 2009 WL 790042, at *2 (E.D. Va. Mar. 24, 2009).

270. *See supra* Part II.A.1.

271. *See supra* Part II.A.3.

272. *See* 2010 OLC Opinion, *supra* note 171, at 2.

273. *See, e.g.*, 34 U.S.C. § 20141(c)(3)(A)–(G) (enumerating duties to notify victims under certain circumstances).

274. *See generally* OFF. OF JUST. PROGRAMS, *supra* note 177.

275. *See* Tobolowsky, *supra* note 79, at 64–65, 64 nn.168–71; *see also supra* Part II.A.3.

276. OFF. OF JUST. PROGRAMS, *supra* note 177, at 41.

prior to the filing of a charging instrument with the court."[277] Factors bearing on the extent of conferral can include the impact on public and personal safety, the number of victims, whether time is of the essence, and whether there is a need for confidentiality.[278]

Given this useful language, this Note proposes the promulgation of victim conferral guidelines that retain some of the discretionary elements of the existing obligations in plea negotiations. The proposed guidelines would read:

> Prospective Declination Decisions:
>
> (a) Conferral consists of the reasonable solicitation and consideration of the victim's views on any information the prosecutor shares.
>
> (b) In serious offense[279] cases, a prosecutor should make reasonable efforts to confer with victims and provide victims with an explanation of a forthcoming nonprosecution decision.
>
> (c) In serious offense cases where the prosecutor enters a nonprosecution agreement, the prosecutor shall, absent a showing of good cause, confer with victims in a reasonable, timely manner prior to the signing of the agreement.

The considerations that may favor or disfavor substantive conferral in both provisions are similar to those already catalogued in the AG Guidelines with one additional factor: whether relaying any information has the risk of prejudicing uncharged individuals.[280] Provision (c), which borrows language from the pending legislation to amend the CVRA, treats NPAs differently in that it requires prior conferral absent a showing of good cause.[281] Because only conferral regarding NPAs is required and the burden is placed on the government to affirmatively prove relief from the requirement, the guidelines do not envision a distinct remedy for victims.

This Note also endorses adoption of these guidelines in the state context. While states like Arizona[282] and, to a lesser extent, Massachusetts,[283] Tennessee,[284] and New Jersey,[285] require prosecutors to consider victim input before a declination decision, most states do not.[286] As a result, these

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277. *Id.*

278. *See id.* at 42.

279. One possible way to define "serious offenses" is to present a list of federal offenses, in the same way that some states designate that the commission of certain crimes grants victims eligibility to invoke their rights. *See supra* Part II.B.3. Another way is to provide a list but also accord the prosecution discretion to include other offenses in its analysis, as is the case in North Carolina. *See* N.C. GEN. STAT. § 15A-824(1) (2020); *see also infra* Part III.B.2.

280. *See infra* Part III.B.2.

281. *See* Courtney Wild Crime Victims' Rights Reform Act of 2019, H.R. 4729, 116th Cong. § 2(1)(B) (2019). As in the bill, the good cause requirement in the proposed guidelines is met through a showing of necessity in relation to public safety concerns or to the integrity of ongoing investigations. *See id.*

282. *See* ARIZ. REV. STAT. ANN. §§ 13-4408(B), -4419(A) (2020).

283. *See* MASS. GEN. LAWS ch. 258B, § 3(g) (2020).

284. *See* TENN. CODE ANN. § 40-38-114(a) (2020).

285. *See* N.J. STAT. ANN. § 52:4B-36(m) (West 2020).

286. *See supra* Part II.A.3.

guidelines may encourage conferral in the absence of any statutory obligations.

Lastly, understanding how the need for prosecutorial discretion interacts with the need for meaningful conferral is critical to the sensible implementation of the proposed guidelines. This Note advocates adopting the four-factor procedural justice framework once a prosecutor elects to confer with a victim.[287] The chief factor relevant here is voice—whenever feasible, prosecutors should allow victims to share their narratives and their views about a declination.[288] Emphasizing procedural justice during conferral helps ensure fair treatment of victims and will promote their satisfaction with the decision-making process, even if they find the final outcome unfavorable.[289]

B. Limitations on Conferral and Countervailing Concerns

Part III.B.1 examines when conferral should be initiated and Part III.B.2 excavates its substance. In doing so, both sections address several countervailing concerns that may weigh in favor of curtailing conferral.

1. When to Begin Conferral

This Note recommends that deciding when conferral should begin is best left to the discretion of the prosecutor. As the *Rubin* court observed, it makes little sense for victims to confer soon after the time of their victimization.[290] Nor is it always practical or helpful for them to do so if the government has yet to contemplate any charges.[291] To adopt such a presumption in favor of conferral would unnecessarily burden the government, its resources, and the pendency of various investigations.[292] Ultimately, a victim-centered system need not be a victim-ruled one.[293]

Professor Paul Cassell has argued that CVRA rights, including conferral rights, should attach when an agency employee "engaged in the detection, investigation, or prosecution of crime has substantial evidence that an identifiable person has been directly and proximately harmed as a result of the commission of a federal offense" and, in the employee's judgment, "that person is a putative victim of that offense."[294] This framework, however, does not adequately address the valid concerns of the *In re Wild* and *Rubin* courts.[295] Agency personnel routinely identify victims very early on in the

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287. *See supra* Part I.B.2.
288. *See* Giannini, *supra* note 90, at 90–91; O'Hear, *supra* note 59, at 326–27.
289. *See supra* Part I.B.2.
290. *See* United States v. Rubin, 558 F. Supp. 2d 411, 419 (E.D.N.Y. 2008).
291. *See id.*
292. *See id.* at 425; *see also* Jordan v. U.S. Dep't of Just., 173 F. Supp. 3d 44, 52–53 (S.D.N.Y. 2016).
293. *See* SERED, *supra* note 29, at 33.
294. *See* Cassell et al., *supra* note 127, at 92–93.
295. *See supra* Part II.A.

criminal justice process—indeed, many notification rights turn on such identifications.[296]

But, as Professor Robert Mosteller explained in his congressional testimony on the potential hazards of enacting a victim's rights constitutional amendment, this identification may derive from mistakes or, worse, dishonesty.[297] Professor Mosteller recounted notable police brutality cases in which the victims were almost charged as perpetrators, as well as the many DNA exonerations in which victim evidence was the *only* evidence of the defendant's guilt.[298] He makes clear that while the legal system is designed to preliminarily identify a defendant at the outset, it is not often obvious who the victim is or even whether the victim was harmed by the defendant or by someone yet to be apprehended.[299] As Professor Lynne Henderson adds, victims can also be offenders—in the classic case of a domestic violence victim who fights back and is thereafter charged, the questions of when and to whom victim status should attach are difficult to resolve.[300] Thus, attaching conferral rights as early as Professor Cassell suggests and subject only to the independent judgment of individual agency employees poses risks that are independent of the strain on resources and prosecutorial discretion.[301]

Thus, the proposed guidelines offer prosecutors necessary leeway in deciding when to begin conferral, which comports with federal and state laws' recognition of prosecutorial discretion.[302] But the guidelines would impose duties at stages when conferral ought to be an important consideration—in the lead-up to a declination decision. Put another way, the inquiries of when and whether to confer at all converge at this juncture. Both the *In re Wild* and *Rubin* courts recognized the utility of conferral prior to a declination decision.[303] Operating under procedural justice principles, the guidelines presume that there is a net positive benefit to effectuating conferral before exercising nonprosecution discretion, in the absence of any countervailing reasons.

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296. *See, e.g.*, 34 U.S.C. § 20141(c)(3) (requiring a responsible official to give victims the "earliest possible notice" of enumerated events).

297. *See Hearing on H.J. Res. 40*, *supra* note 55, at 35–36 (statement of Robert P. Mosteller, Professor, University of North Carolina School of Law).

298. *See id.*

299. *See id.*

300. *See* Henderson, *supra* note 30, at 404.

301. Needless to say, it may be also be ill-advised to tie attachment of victim status for the purposes of the right to confer with a *prosecutor* to the determinations of, for example, nonlawyer government personnel who are not subject to the phalanx of regulations, including professional rules, that govern lawyers. *See, e.g.*, U.S. Dep't of Just., Just. Manual § 9-2.101 (2018) (indicating that DOJ attorneys should familiarize themselves with the American Bar Association Criminal Justice Standards); MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2018) (setting out a prosecutor's responsibilities).

302. *See supra* Parts II.A.1, II.A.3, II.B.1, II.B.3.

303. The *In re Wild* majority concluded with the admonition that in the absence of criminal proceedings, prosecutors should not secretly engage in plea negotiations or nonprosecution agreements without conferring with victims. *See In re* Wild, 955 F. 3d 1196, 1221 (11th Cir.), *vacated*, *reh'g en banc granted*, No. 19-13843, 2020 WL 4557083 (11th Cir. Aug. 7, 2020) (mem.); United States v. Rubin, 558 F. Supp. 2d 411, 419 (E.D.N.Y. 2008).

2. What to Confer About

The proposed guidelines envision conferral to be straightforward—the prosecutor provides victims the reasons for a nonprosecution decision and the victim provides their opinions or views on the decision. DOJ already keeps internal records of the reasons for certain declination decisions. When a prosecutor declines charges in cases referred by any agency, DOJ's *Justice Manual* requires that the prosecutor's files reflect that decision and the "reason for it."[304] All NPAs signed in return for a person's cooperation are recorded, primarily because the terms of the agreement may become important in future litigation and because the agreement serves to identify individuals the government has agreed not to prosecute.[305]

Providing victims with the reasons for declination, subject to limitations, furthers the procedural justice agenda—transparency may lead victims to believe that prosecutors are neutral and trustworthy actors.[306] It may likewise demonstrate to victims that they too are respected actors in the criminal justice system.[307] Providing reasons is also a hallmark principle of administrative law.[308] To the extent that unilateral prosecutorial decisions are properly described as administrative decisions,[309] disclosures align incentives to achieve consistency—treating similar cases in a similar fashion.[310] Unequal treatment in charging decisions is a long-standing criticism of prosecutorial discretion.[311] Insofar as a victim's rights measure can ameliorate this inconsistency, or at least reduce the opaque nature of charging decisions, the larger public and not just the victim has much to gain.[312]

But the subject or extent of conferral can implicate many legitimate concerns. As a threshold matter, navigating the prosecutor-victim

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304. *See* U.S. Dep't of Just., *supra* note 301, § 9-2.020.

305. *See id.* § 9-27.650.

306. *See* O'Hear, *supra* note 59, at 340–41.

307. *See id.*

308. *See* Aaron L. Nielson, *The Policing of Prosecutors: More Lessons from Administrative Law*, 123 DICK. L. REV. 713, 727–28 (2019).

309. *See, e.g.*, Rachel E. Barkow, *Criminal Law as Regulation*, 8 N.Y.U. J.L. & LIBERTY 317, 326–27 (2014).

310. *See* Nielson, *supra* note 308, at 728. *But see* Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 489 (2015) (noting that providing reasons can often conflict with other values, such as efficiency). Selective transparency, however, as a middle ground is also problematic and can manifest as biased enforcement. *See* Nielson, *supra* note 308, at 730–31.

311. *See, e.g.*, James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1554–57 (1981).

312. *See id.* at 1559–60; *see also* Marie Manikis, *Expanding Participation: Victims as Agents of Accountability in the Criminal Justice Process*, 2017 PUB. L. 63, 68–71; O'Hear, *supra* note 59, at 341. The concept of using internal guidelines as a check on prosecutorial discretion is not new, but this Note proposes that guidelines created for victim conferral about declination decisions in particular may yield similar benefits. *See, e.g.*, Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971).

relationship is a delicate process.[313] A prosecutor can and should attempt to communicate with victims prior to the conferral to set reasonable expectations for the development of the case[314] and dispel any expectation that the prosecutor is the victim's client or acting in the victim's interest.[315] And while procedural justice goals emphasize a victim's "voice," they also value honesty and trustworthiness, which means a prosecutor should also convey that what victims find emotionally or experientially relevant may not hold legal importance for the case.[316]

Moreover, there are a number of concerns that may warrant limiting conferral in a given matter: administrative burdens on efficiency and transaction costs, a legitimate need for confidentiality, ethical concerns about prejudicing uncharged individuals, or an undue victim influence on the charging decision with ramifications for potential defendants.

Administrative burdens can arise in many forms. To start, conferral redirects already scarce criminal justice resources.[317] Some cases may require more conferral than others. Some victims may be hard to track down. Others may be unresponsive. And in the "assembly line" of case processing at a district attorney's office, which can resolve high volumes of routine, low-level cases with breakneck speed, conferral may incur simply prohibitive costs.[318] The ensuing delays may also prejudice defendants,[319] who may have elected, at great risk, to cooperate with the government in exchange for nonprosecution.

The proposed guidelines account for some of these concerns. The narrowing of eligible crimes keeps only the more serious offenses in play.[320] Preserving prosecutorial discretion through language such as "reasonable efforts" provides prosecutors with the "vital flexibility" they need when confronting logistical difficulties.[321] As the *Jordan* court noted with respect to CVRA conferral, the "manner, timing, or quantity of conferrals" is appropriately within the ken of prosecutors, not victims.[322]

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313. *See, e.g.*, Jeffrey K. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships*, 48 S. TEX. L. REV. 695, 731–32 (2007) (arguing that victims should be treated as unrepresented individuals who misunderstand the prosecutor-victim relationship).

314. *See* O'Hear, *supra* note 59, at 337.

315. *See id.* at 333; Pokorak, *supra* note 313, at 731–32.

316. *See* Henderson, *supra* note 30, at 409.

317. *See* O'Hear, *supra* note 59, at 332.

318. *See supra* note 78 and accompanying text.

319. *See* O'Hear, *supra* note 59, at 332.

320. *See Hearing on H.J. Res. 40*, *supra* note 55, at 33 (statement of Robert P. Mosteller, Professor, University of North Carolina School of Law).

321. *See* United States v. Turner, 367 F. Supp. 2d 319, 332 (E.D.N.Y. 2005); *see also In re* Wild, 955 F.3d 1196, 1246 11th Cir.), *vacated*, *reh'g en banc granted*, No. 19-13843, 2020 WL 4557083 (11th Cir. Aug. 7, 2020) (mem.) (Hull, J., dissenting). *But see* O'Hear, *supra* note 59, at 343 (noting the problem of "recalcitrant prosecutors" who may seek to build too much discretion into certain guidelines).

322. *See* Jordan v. U.S. Dep't of Just., 173 F. Supp. 3d 44, 52–53 (S.D.N.Y. 2016). Separately, at least one scholar has suggested that prosecutors may enlist staff assistance to effectuate conferral, though the use of intermediaries may incur its own costs. *See* O'Hear, *supra* note 59, at 333. The proposed guidelines do not envision nonprosecutors leading

Next, a legitimate need for maintaining confidentiality may justify restricting the substance of conferral. Courts have noted this concern and held that conferral, at least as constituted in statute, is relevant only insofar as it accords victims a participatory right and access to prosecutors. It does not sanction limitless information gathering.[323] The AG Guidelines provide for confidentiality as a consideration during conferral, and the proposed guidelines would not materially change this calculus.[324]

The Oklahoma City bombing prosecution provides one illustration of how the need for confidentiality may outweigh the interest in complete disclosure. Michael and Lori Fortier, though not participants in the bombing conspiracy, knew about the plan.[325] In seeking to solidify their case against the bomber, Timothy McVeigh, prosecutors permitted Michael Fortier to plead to lesser charges in exchange for his testimony against McVeigh and granted Lori Fortier immunity from prosecution for the same.[326] Prosecutors knew that the Fortiers' testimony was vital to the case but, because the Fortiers testified in the grand jury, which implicated secrecy rules, prosecutors could not share with the victims why they chose to strike a deal with the Fortiers.[327] One of the prosecutors later remarked that although victims may have wanted more serious charges pressed or a detailed explanation for the cooperation agreement, doing so could have diverted significant prosecutorial resources and led to the loss of critical evidence.[328]

The prospect of publicly disclosing statements that have a likelihood of prejudicing uncharged individuals may also limit the substance of conferral. DOJ ordinarily constrains these comments,[329] as do ethics rules.[330] But they do not outright prohibit them.[331] In fact, the American Bar Association's Standards for Criminal Justice, which DOJ encourages its lawyers to learn[332] and which otherwise catalog concerns of prejudice to uncharged

conferral sessions. *See, e.g.*, United States v. Stevens, 239 F. Supp. 3d 417, 421 (D. Conn. 2017) ("The CVRA does not contemplate that prosecutors will outsource all 'victim' communications to coordinators or other administrative personnel.").

323. *See supra* Parts II.B.1, II.B.3.

324. *See* OFF. OF JUST. PROGRAMS, *supra* note 177, at 42.

325. Pierre Thomas, *McVeigh Friend Takes Plea Deal; Pact in Oklahoma Bomb Case Calls for Fortier's Testimony*, WASH. POST (Aug. 9, 1995), https://www.washingtonpost.com/wp-srv/national/longterm/oklahoma/stories/ok080995.htm [https://perma.cc/VG9M-RCSQ].

326. *See id.*

327. *See* Henderson, *supra* note 30, at 422.

328. *See A Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 3 Before the S. Comm. on the Judiciary*, 106th Cong. 19 (1999) (statement of Beth A. Wilkinson).

329. *See, e.g.*, U.S. Dep't of Just., *supra* note 301, § 9-27.760 (limiting public identification and allegations of wrongdoing by uncharged parties).

330. *See* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.10(c) (AM. BAR ASS'N 2017) ("The prosecutor may make a public statement explaining why criminal charges have been declined or dismissed, but must take care not to imply guilt or otherwise prejudice the interests of victims, witnesses or subjects of an investigation.").

331. *See supra* notes 329–30.

332. *See* U.S. Dep't of Just., *supra* note 301, § 9-2.101. *But see id.* (noting that the standards are not official DOJ policy).

individuals,[333] still urge prosecutors to consult with victims prior to exercising nonprosecution discretion.[334] The proposed guidelines contemplate, subject to the confidentiality considerations above, that prosecutors may properly give reasons for declination without implying guilt or prejudicing the interests of uncharged individuals.[335]

Finally, there may be a concern that conferral prior to declination allows the victim to unduly influence the declination decision with undesirable consequences for the potential defendant, including the filing of charges.[336] Potential defendants may wonder whether they are up against not one but two adversaries. Ordinarily, defendant-oriented criticisms of victim involvement in the criminal process deal with what occurs after there is a "defendant," in other words, when an individual is formally accused.[337]

But to the extent that the argument is that the proposed guidelines will *independently* create issues for potential defendants, this concern is largely unavailing. First, while prosecutors enjoy virtually unreviewable discretion in their charging decisions, they are still subject to constraints if they do ultimately bring charges. The defendant may challenge the sufficiency of the evidence, bring constitutional claims of retaliation or discrimination, or even contest the motivation of the prosecution if it was impermissibly directed by the victim.[338] Second, victims have an independent and legitimate interest in fairness and due process; they are citizens and may even some day be defendants.[339] Professor Henderson contends that some communities, such as racial minorities, may value procedural safeguards over a "winning at all costs" mentality.[340] Third, the stereotype of victims as vengeful is overstated

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333. *See* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.10(c) (AM. BAR ASS'N 2017).

334. *See id.* § 3-3.4(i) ("Consistent with any specific laws or rules governing victims, the prosecutor should provide victims of serious crimes, or their representatives, an opportunity to consult with and to provide information to the prosecutor, prior to making significant decisions such as whether or not to prosecute . . . .").

335. There are already some instances of outright *public* disclosures of declination decisions, which the proposed guidelines do not address. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 8.147 (2020) (requiring the state's attorney general to issue a report when the office declines to file charges against a police officer who kills an unarmed civilian). This gubernatorial executive order will be superseded (in April 2021) by a statute that was recently signed into law in the aftermath of the George Floyd protests. The statute is different than the executive order in many key respects, but it retains the requirement that the New York Attorney General issue a public report explaining the reasons for a declination decision. NEW YORK EXEC LAW § 70-B(6)(b) (McKinney 2020).

336. *See, e.g.*, Paul H. Robinson, *Should the Victims' Rights Movement Have Influence Over Criminal Law Formulation and Adjudication?*, 33 MCGEORGE L. REV. 749, 756 & n.24 (2002) (arguing that victim input prior to finalizing dispositions such as plea agreements constitutes an attempt to influence).

337. *See supra* note 34.

338. *See* Welling, *supra* note 87, at 109–113; *see also supra* Part II.B.3. *But see* Davis, *supra* note 84, at 42–46 (noting the difficulty of alleging selective prosecution based on race).

339. *See* Henderson, *supra* note 30, at 417–18.

340. *See id.* at 418.

and, in reality, many victims can and do urge leniency.[341] And fourth, as scholars have observed, the prevailing criticism of prosecutors with respect to victim involvement is that they are insufficiently attentive to victims' needs, certainly not that they are victims' surrogates.[342] If prosecutors are attentive, evidence suggests that they are more likely to persuade the victim to adopt the prosecutor's own interpretation of the case rather than the other way around.[343] As Professor Bennett Gershman, a former prosecutor, has noted, most prosecutors undoubtedly believe that they have the ultimate authority to make decisions, regardless of the victims' views.[344] Where the guidelines are most likely to apply and alter a prosecutor's conduct is where a prosecutor may hesitate or be otherwise reluctant to speak to victims even, and especially, in the absence of a justifiable reason.

CONCLUSION

Today, victim participation is a mainstay of the criminal process. No longer limited to occupying a complainant or witness role, victims are now present or heard at various junctures following the commencement of a criminal proceeding. What remains unclear is what role, if any, victims should play if there is no criminal prosecution. In particular, to what extent should prosecutors inform and confer with victims before they ultimately choose to exercise their nonprosecution discretion? And, at what cost?

For victims who wish to be involved in the criminal process and for whom the earliest stages are often alienating, a declination decision has the potential to minimize or eliminate their participation entirely. Procedural justice theory predicts that such exclusion can result in adverse consequences not just for victims and their respect for legal authorities but also for the public's perception of criminal justice decision-making writ large. Because the law largely imposes no conferral obligations on a prosecutor prior to a charging decision, there exist no reliable procedural principles to ensure or even

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341. *See* SERED, *supra* note 29, at 28–29; Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 954 (2006); Henderson, *supra* note 30, at 424–25.

342. *See supra* Part I.B.1.

343. *See* Henderson, *supra* note 30, at 423. The Fifth Circuit supports this perspective, as it did not find the prospect of undue influence in engaging victims prior to a plea bargain to constitute an impermissible burden on either the prosecution or the defendants. *See In re* Dean, 527 F.3d 391, 395 (5th Cir. 2008). There is, of course, the separate issue of prosecutorial bias, which may manifest itself by elevating some victims over others, even with similar crimes. *See id.* at 428–29, 429 n.179 (indicating evidence of bias against Black and female victims); *see also supra* note 82. *But cf.* Green, *supra* note 85, at 597 (indicating that the decentralized nature of prosecutors' offices and the lack of uniform procedures to regulate discretion lead to different outcomes in similar cases); Leslie B. Arffa, Note, *Separation of Prosecutors*, 128 YALE L.J. 1078, 1124–27 (2019) (noting the different enforcement patterns across federal districts for similar crimes). Without empirical evidence, however, it is not clear that the proposed guidelines would create or worsen this bias on their own. To the contrary, in encouraging or requiring conferral in cases where prosecutors may otherwise ignore victims due to bias, the guidelines may help ameliorate this problem.

344. Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 574 (2005).

encourage conferral before a prosecutor exercises his or her nonprosecution discretion.

To fill this void, this Note proposes the adoption of prosecutorial guidelines, grounded in elements of procedural justice theory, that urge or, with respect to NPAs, require prosecutors to confer with victims prior to declination. And, in recognition of various countervailing interests, the guidelines build in necessary flexibility. If criminal justice actors are truly sincere in their belief that victims should be a part of the process, then they should do their best to explain to victims why they see fit not to start the process at all.