From: Timothy Dole
Sent: 09/21/2006 07:16 AM
To: Peter McCabe
Subject: Judge Cassell's request to testify at 1/27/07 CR hearing

See Judge Cassell's e-mail below. He would like to testify at the 1/27/07 CR hearing.

----- Forwarded by Timothy Dole/DCA/AO/USCOURTS on 09/21/2006 07:11 AM -----

Paul Cassell/UTD/10/USCOURTS

09/20/2006 04:32 PM

To Timothy Dole/DCA/AO/USCOURTS@USCOURTS, Trisha Little/UTD/10/USCOURTS@USCOURTS

cc Yvette Evans/UTD/10/USCOURTS@USCOURTS, westenscowc@law.utah.edu

06 - CR - 002
Testify

Subject Re: Criminal Rules Committee's 1/27/07 public hearing
I'm interested!

Tim,

Thanks for the information. Please mark me down as making a request to testify at the January 27 hearing. Is this e-mail sufficient to make a request?

Also, because of scheduling, I would like to testify sometime before 2 PM.

Yvette -- please arrange with the University of Utah to make travel reservations for this. Carolyn Westenscow is my assistant there. The University of Utah will pay for this travel. No court funds should be expended on this trip.

I would like to fly no-stop to Reagan Thursday afternoon 1/26/07, returning non-stop Friday to SLC 1/27/07 on the 5 PM flight.

Trisha -- please block off the afternoon of 1/26 and all day 1/27/07. Thanks. PC

06 - CR - 002

Final written comments

Paul Cassell/UTD/10/USCOURTS
02/14/2007 12:10 PM

To Rules_Comments@ao.uscourts.gov
cc
bcc
Subject Cassell Comments on the Federal Rules of Criminal Procedure Amendments

Dear Secretary of the Committee on Rules of Practice and Procedure,

commentsfinal.wpd

As discussed previously, attached are my final written comments on the proposed amendments to the Federal Rules of Criminal Procedure regarding crime victims. I would appreciate it if you could substitute these comments for the tentative written comments I previously submitted in advance of the Criminal Rules Committee's public hearings and make them available to the Criminal Rules Committee.

If I can provide any further assistance, please do not hesitate to call. As noted in the written comments, I write to you as in my capacity as a law professor at the S.J. Quinney College of Law at the University of Utah. Thanks for your help.

Professor Paul Cassell
S.J. Quinney College of Law
350 S. Main
Salt Lake City, UT 84101
(801) 524-3005
(801) 526-1185 (fax)

Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure

By Paul G. Cassell

Professor of Law for the University of Utah
S.J. Quinney College of Law
332 South 1400 East
Salt Lake City, UT 84112
(801) 524-3005
utdj_cassell@utd.uscourts.gov

Draft of January 16, 2007
This a preliminary draft, subject to further revisions as may be appropriate.

Table of Contents

Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure

By Paul G. Cassell*

I. INTRODUCTION

Courts should treat crime victims fairly in the criminal process. In a nod to that goal, the Advisory Committee on the Federal Rules of Criminal Procedure has circulated for public comment proposed amendments to the rules regarding crime victims' rights. These amendments attempt to implement the recently-enacted Crime Victims' Rights Act,[1] which guarantees crime victims a series of rights, including the right to be treated fairly. Unfortunately, the proposed amendments are mere tentative, half measures that do not begin to fully protect crime victims.

This article contends that the Committee should expand its vision of the proper role for crime victims and recommend far more expansive victim protections. In the CVRA, Congress has articulated specific rights for crime victims, such as the right to be notified of court hearings, to attend those hearings, and to speak at appropriate points in the process. But along with these specific rights came the sweeping requirement that crime victims "be treated with fairness and with respect for the victim's dignity and privacy."[2] This congressional command must not be ignored. In addition, entirely apart from any congressional dictate, crime victims deserve fair treatment in the federal system. Acting for the federal judiciary, the Committee should make certain that the rules fully reflect victims' interests rather than allow the initiative for protecting victims to pass to other branches of government.

This article proceeds in five parts. Following this introduction, Part II reviews events leading to the recently-circulated amendments. The amendments were prompted by the CVRA, passed by Congress in 2004 to protect victims' rights through the federal criminal process. To comply with the CVRA, the federal criminal rules had to be amended in many places, as I argued at length and

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* Professor of Law, S.J. Quinney College of Law of the University of Utah. Thanks to Sara Sun Beale, Doug Beloof, Doug Berman, Russell Butler, Matt Cannon, Meg Garvin, Nancy King, Erik Luna, Peter McCabe, Benjamin McMurray, Ross McPhail, Dan Medwed, Wendy Murphy, Daphne Oberg, Jim Oleson, Judge James Orenstein, Alice Ristroph, Greg Skordas, Felise Thorpe Moll, Steve Twist, Stewart Young, and especially my wife Trish. Although I am also currently a federal district court judge in the District of Utah, I write this article purely as a law professor. The article does not comment on any pending cases and implies no commitment on legal issues that may arise in cases that come before me.

[1] Pub. L. No. 108-405, § 102(a), 118 Stat. 2260, 2261–62 (codified as amended at 18 U.S.C. § 3771 (Supp. 2006)).

[2] 18 U.S.C. § 3771(a)(8).

in some detail in an earlier article.[3] After receiving my suggested changes, the Advisory Committee agreed with some, but declined to adopt many of the others. The Committee's main disagreement with me was whether to proceed narrowly by changing only a few rules to track specific congressional directives or to proceed more broadly by reworking the entire body of federal criminal rules to ensure that they are all fair to crime victims. The Committee opted for the narrower approach.

Part III of this article disputes the Committee's limited vision. Congress has required that the courts must treat crime victims "with fairness" throughout the process. The only way to fully implement that command is a thorough-going reworking of the federal criminal rules to integrate victims in to the day-to-day workings of the process. The Committee's limited amendments simply ignore that congressional directive and mean that, in practice, many of the federal criminal rules will continue to overlook the legitimate interests of victims of crime.

Part IV of this article contains a rule-by-rule analysis of changes that should be made to the federal rules. Of particular importance are:

(1) Ensuring that crime victims' attorneys can appear in court (Rule 1);
(2) Providing for victim participation in the plea bargain process (Rule 11);
(3) Protecting victims' addresses and telephone numbers from improper disclosure (Rule 12);
(4) Guaranteeing victims the right to attend criminal depositions (Rule 15);
(5) Protecting victims from having personal and confidential information improperly subpoenaed (Rule 17);
(6) Considering victims' interests when cases are transferred or when a bench trial is ordered (Rules 21 and 23);
(7) Integrating victims into the sentencing process (Rule 32);
(8) Articulating victims' right to discretionary appointment of counsel (Rule 44.1);
(9) Giving victims the right to be heard at bail decisions (Rule 46);
(10) Requiring victims' views be considered before a case is dismissed (Rule 48);
(11) Protecting victims' right to a speedy trial (Rule 50);
(12) Giving victims notice of court proceedings and of their rights in those proceedings (Rule 60(a)(1));
(13) Guaranteeing victims the right to attend court proceedings (Rule 60(a)(2)); and
(14) Guaranteeing victims the right to be heard on bail, plea, sentencing, and other issues important to victims (Rule 60(a)(3)).

Finally, Part V briefly concludes by explaining that the likely consequence of the Advisory Committee failing to fully implement Congress' vision will be that Congress itself will step in to do

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[3] Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835.

the job. It would be unfortunate if the Judiciary were to abdicate its responsibilities to protect crime victims and leave the task to another branch of government.

II. VICTIMS' RIGHTS, THE CVRA, AND AMENDMENTS TO THE RULES

A. The Crime Victims' Rights Movement

The Crime Victims' Rights Movement developed in the 1970s because of a perceived imbalance in the criminal justice system. The victims' absence from criminal processes conflicted with "a public sense of justice keen enough that . . . it found voice in a nationwide victims' rights movement."[4] Victims' advocates argued that the criminal justice system had become preoccupied with defendants' rights to the exclusion of considering the legitimate interests of crime victims.[5] These advocates urged reforms to give more attention to victims' concerns, including protecting victims' rights to be notified of court hearings, to attend those hearings, and to be heard at appropriate points in the process.

The victims' movement received considerable impetus in 1982 with the publication of the Report of the President's Task Force on Victims of Crime. The Task Force concluded that the criminal justice system "has lost an essential balance . . . . [T]he system has deprived the innocent, the honest, and the helpless of its protection. . . . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be addressed."[6] The Task Force advocated multiple reforms. The Task Force recommended that prosecutors assume the responsibility for keeping victims notified of all court proceedings and bringing to the court's attention the victim's view on such subjects as bail, plea bargains, sentences,

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[4] *Payne v. Tennessee*, 501 U.S. 808, 832 (1991) (Scalia, J., concurring) (internal quotations omitted). *See generally* DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE (2d ed. 2005); Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517; Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (hereinafter cited as Beloof, *Third Model*); Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 Utah L. Rev. 479 (hereinafter Cassell, *Barbarians at the Gates*); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373 (hereinafter Cassell, *Balancing the Scales*); Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 514 (1982); William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37 (1996) Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369.

[5] *See generally* BELOOF ET AL., *supra* note 4, at 29-38; Douglas Evan Beloof, *The Third Wave of Victims' Rights: Standing, Remedy and Review*, 2005 BYU L. Rev. 255; Cassell, *Balancing the Scales, supra* note 4, at 1380-82.

[6] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114 (1982).

and restitution.[7] The Task Force also urged that courts should receive victim impact evidence at sentencing, order restitution in most cases, and allow victims and their families to attend trials even if they would be called as witnesses.[8] In its most sweeping recommendation, the Task Force proposed a federal constitutional amendment to protect crime victims' rights "to be present and to be heard at all critical stages of judicial proceedings."[9]

In the wake of the recommendation for a constitutional amendment, crime victims' advocates considered how best to pursue that goal. Realizing the difficulty of achieving the consensus required to amend the United States Constitution, advocates decided to go first to the states to enact state victims' amendments. They have had considerable success with this "states-first" strategy.[10] To date, about thirty states have adopted victims' rights amendments to their own state constitutions,[11] which protect a wide range of victims' rights.

The victims' rights movement was also able to prod the federal system to recognize victims' rights. In 1982, Congress passed the first federal victims' rights legislation, the Victim and Witness Protection Act, which gave victims the right to make an impact statement at sentencing and provided expanded restitution.[12] Since then, Congress has passed several acts which gave further protection to victims' rights, including the Victims of Crime Act of 1984,[13] the Victims' Rights and Restitution Act of 1990,[14] the Violent Crime Control and Law Enforcement Act of 1994,[15] the Antiterrorism and Effective Death Penalty Act of 1996,[16] and the Victim Rights Clarification Act of 1997.[17] Other

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[7] *Id.* at 63.

[8] *Id.* at 72-73.

[9] *Id.* at 114.

[10] *See* S. REP. 108-191, 108 Cong., 1st Sess. 3 (2004).

[11] *See* ALA. CONST. amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, §§ 12, 28; COLO. CONST. art. II, § 16a ; CONN. CONST. art. I, § 8(b); FLA. CONST. art. I, § 16(b); IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); KAN. CONST. art. 15, § 15; LA. CONST. art. 1, § 25; MD. DECL. OF RIGHTS art. 47; MICH. CONST. art. I, § 24; MISS. CONST. art. 3, § 26A; MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28; NEV. CONST. art. I, § 8; N.J. CONST. art. I, § 22; NEW MEX. CONST. art. 2, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST. art. 1, § 42; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TENN. CONST. art. 1, § 35; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WASH. CONST. art. 2, § 33; WIS. CONST. art. I, § 9m.

[12] Pub. L. No. 97-291, 96 Stat. 1248 (1982).

[13] Pub. L. No. 98-473, 98 Stat. 2170 (1984).

[14] Pub. L. No. 101-647, 104 Stat. 4820 (1990).

[15] Pub. L. No. 103-322, 108 Stat. 1796 (1994).

[16] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[17] Pub. L. No. 105-6, 111 Stat. 12 (1997).

federal statutes have been passed to deal with specialized victim situations, such as child victims and witnesses.[18]

Among these, the Victims' Rights and Restitution Act of 1990 is worth briefly highlighting. This act purported to create a comprehensive list of victim's rights in the federal criminal justice process. The act commanded that "a crime victim has the following rights"[19] and then listed various rights in the process. Among the rights were the right to "be treated with fairness and with respect for the victim's dignity and privacy,"[20] to "be notified of court proceedings,"[21] to "confer with [the] attorney for the Government in the case,"[22] and to attend court proceedings even if called as a witness unless the victim's testimony "would be materially affected" by hearing other testimony at trial.[23] The statute also directed the Justice Department to make "its best efforts" to ensure that victims received their rights.[24] Yet this act never successfully integrated victims into the federal criminal justice process and was generally regarded as something of a dead letter. Because Congress passed the CVRA in 2004 to remedy the problems with this law, it is worth briefly reviewing why it was largely unsuccessful.

Curiously, the Victims' Rights Act was codified in Title 42 of the United States Code – the title dealing with "Public Health and Welfare." As a result, the statute was generally unknown to federal judges and criminal law practitioners. Federal practitioners reflexively consult Title 18 for guidance on criminal law issues. More prosaically, federal criminal enactments are bound together in single West publication – the *Federal Criminal Code and Rules*. This single publication is carried to court by prosecutors and defense attorneys and is on the desk of most federal judges. Because West Publishing never included the Victims' Rights Act in this book, the statute was essentially unknown even to the most experienced judges and attorneys. The prime illustration of the ineffectiveness of the Victims' Rights Act comes from no less than the Oklahoma City bombing case, where victims were denied rights protected by statute in large part because the rights were not listed in the criminal rules.[25]

Because of problems like these with statutory protection of victims' rights, in 1995, victims advocates decided the time was right to press for a federal constitutional amendment. They argued that the statutory protections could not sufficiently guarantee victims' rights. In their view, such

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[18] *See, e.g.*, 18 U.S.C. § 3509 (protecting rights of child victim-witnesses).

[19] Pub. L. No. 101-647, § 502(b) (1996).

[20] *Id.* § 502(b)(1).

[21] *Id.* § 502(b)(3).

[22] *Id.* § 502(b)(5).

[23] *Id.* § 502(b)(6).

[24] *Id.* § 502(a).

[25] *See generally* Cassell, *Barbarians at the Gates?, supra* note 4, at 515-22 (discussing this case in greater detail).

statutes "frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia."[26] As the Justice Department reported:

> efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims' rights advocates have sought reforms at the state level for the past twenty years, and many states have responded with state statutes and constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights. These significant state efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.[27]

To place victims' rights in the constitution, victims advocates (led most prominently by the National Victims Constitutional Amendment Network[28]) approached the President and Congress about a federal amendment.[29] In April 22, 1996, Senators Kyl and Feinstein introduced a federal victims' rights amendment with the backing of President Clinton.[30] The intent of the amendment was to "restore, preserve, and protect, as a matter of right for the victims of violent crimes, the practice of victim participation in the administration of criminal justice that was the birthright of every American at the founding of our Nation."[31] A companion resolution was introduced in the House of Representatives.[32] The proposed amendment embodied seven core principles: (1) the right to notice of proceedings; (2) the right to be present; (3) the right to be heard; (4) the right to notice of the defendant's release or escape; (5) the right to restitution; (6) the right to a speedy trial; and (7) the right to reasonable protection. In a later resolution, an eighth principle was added: standing.[33]

The amendment was not passed in the 104th Congress. On the opening day of the first session of the 105th Congress on January 21, 1997, Senators Kyl and Feinstein reintroduced the amendment.[34] A series of hearings were held that year in both the House and the Senate.[35]

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

[27] *Victims' Rights Amendment: Hearing on S.J. Res. 6, Before the Sen. Judiciary Comm.*, 105th Cong. (1997) at 64 (statement of Janet Reno, U.S. Att'y Gen.).

[28] *See* www.nvcap.org.

[29] For a comprehensive history of victims' efforts to pass a constitutional amendment, see Jon Kyl, Steven J. Twist & Stephen Higgins, *On the Wings of their Angels, the Scott Campbell, Stephanie Roper, Wendy Preseon, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581 (2005).

[30] S.J. Res. 52, 104th Cong., 2nd Sess (Apr. 22, 1996).

[31] S. Rep. No. 108-191, at 1-2 (2003); *see also* S. Rep. 106-254 (2000).

[32] H.J. Res. 174, 104th Cong., (1996).

[33] S.J. Res. 65, 104th Cong., (1996).

[34] S.J. Res. 6, 105th Cong., (1997).

[35] *See, e.g., Victims' Rights Amendment: Hearing on S.J. Res. 6, Before the Sen. Judiciary Comm.*, 105th Cong. (1997).

Responding to some of the concerns raised in these hearings, the amendment was reintroduced the following year.[36] The Senate Judiciary Committee held hearings [37] and passed the proposed amendment out of committee.[38] The full Senate did not consider the Amendment. In 1999, Senators Kyl and Feinstein again proposed the Amendment.[39] On September 30, 1999, the Judiciary Committee again voted to send the amendment to the full Senate.[40] But on April 27, 2000, after three days of floor debate, the amendment was shelved when it became clear that its opponents had the votes to sustain a filibuster.[41] At the same time, hearings were held in the House on the companion measure there.[42]

Discussions about the Amendment began again after the 2000 presidential elections. On April 15, 2002, Senators Kyl and Feinstein again introduced the Amendment.[43] The following day, President Bush announced his support.[44] On May 1, 2002, a companion measure was proposed in the House.[45] On January 7, 2003, Senators Kyl and Feinstein proposed the amendment as S.J. Res. 1. The Senate Judiciary Committee held hearings in April of that year,[46] followed by a written report supporting the Amendment.[47] On April 20, 2004, a motion to proceed to consideration of the amendment was filed in the Senate. Shortly thereafter, the motion to proceed was withdrawn when proponents determined they did not have the sixty-seven votes necessary to pass the measure. After it had become clear that the necessary super-majority votes were not available to amend the Constitution, victims advocates turned their attention to enactment of a comprehensive victims' rights statute.

B. The Crime Victims' Rights Act.

The Crime Victims' Rights Act ultimately resulted from a decision by the victims' movement to seek a more comprehensive and enforceable federal statute rather than to pursue the dream of a federal constitutional amendment. In April 2004, victims advocates met with Senators Kyl and Feinstein to decide whether to push again for a federal constitutional amendment. Concluding that the amendment lacked the required super-majority, the advocates decided to press for a far-reaching

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[36] S.J. Res. 44, 105th Cong., (1998).

[37] *Crime Victim's Rights Constitutional Amendment: Hearings on S.J. Res. 44 Before the Sen. Judiciary Comm.*, 105th Cong. (1998).

[38] *See* 144 CONG. REC. S11,010 (Sept. 28, 1998).

[39] S.J. Res. 3, 106th Cong., 1st Sess. (1999).

[40] 146 CONG. REC. S2986 (Apr. 27, 2000)

[41] 146 CONG. REC. S2966 (Apr. 27, 2000).

[42] H.J. Res. 64, 106th Cong., 2d Sess. (2000).

[43] S.J. Res. 35, 107th Cong., 2d Sess. (2002).

[44] 149 CONG. REC. S67 (Jan. 7, 2003) (statement of Sen. Kyl).

[45] H.J. Res. 91, 107th Cong., 2d Sess.

[46] *A Proposed Constitutional Amendment to Protect Crime Victims, S.J. Res. 1: Hearings Before the Sen. Comm. on the Judiciary*, 108th Cong., 1st Sess. (2003).

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

federal statute protecting victims' rights in the federal criminal justice system.[48] In exchange for backing off from the constitutional amendment in the short term, victims' advocates received near universal congressional support for a "broad and encompassing" statutory victims' bill of rights.[49] This "new and bolder" approach not only created a bill of rights for victims, but also provided funding for victims' legal services and created remedies when victims' rights were violated.[50] The victims' movement would then see how this statute worked in future years before deciding whether to continue to push for a federal amendment.[51]

The legislation that ultimately passed – the Crime Victims' Rights Act – gives victims "the right to participate in the system."[52] It lists various rights for crime victims in the process, including the right to be notified of court hearings, the right to attend those hearings, the right to be heard at appropriate points in the process, and the right to be treated with fairness. Rather than relying merely on "best efforts" of prosecutors to vindicate the rights, the CVRA also contains specific enforcement mechanisms.[53] Most important, the CVRA directly confers standing on victim's to assert their rights, a flaw in the earlier enactment.[54] The Act provides that rights can be "assert[ed]" by "[t]he crime victim, the crime victim's lawful representative, and the attorney for the Government.[55] The victim (or the government) may appeal any denial of a victim's right through a writ of mandamus on an expedited basis.[56] The courts are also required to "ensure that the crime victim is afforded" the rights in the new law.[57] These changes were intended to make victims "an independent participant in the proceedings."[58]

C. My Proposal to Amend the Federal Rules of Criminal Procedure

In the wake of the CVRA, the Federal Rules of Criminal Procedure clearly needed to be significantly amended to comply with the statute's mandates. With this goal in mind, I prepared a

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[48] Kyl et al., *supra* note 29, at 591-92.

[49] 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[50] *Id.* at S4262 (daily ed. Apr. 22, 2004) statement of Sen. Feinstein).

[51] *Id.* at S4260 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl); *see also* Prepared Remarks of Attorney General Alberto R. Gonzales, Hoover Inst. Bd. of Overseers Conference (Feb. 28, 2005) (indicating a federal victim's rights amendment remains a priority for President Bush).

[52] 150 CONG. REC. S4263 (statement of Sen. Feinstein). For a description of victim participation, see Beloof, *Third Model, supra* note 6.

[53] 18 U.S.C. § 3771(a)

[54] *Cf.* Beloof, *Standing, Remedy and Review, supra* note 4, at 283 (identifying this as a pervasive flaw in victims' rights enactments).

[55] 18 U.S.C. § 3771(d).

[56] *Id.* § 3771(d)(3).

[57] *Id.* § 3771(b)(1).

[58] 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

comprehensive set of proposed amendments to the rules and submitted them to the Advisory Committee on the Federal Rules of Criminal Procedure.[59]

My proposals began from the premise that "victims must be folded into the process through which federal courts conduct criminal cases, including bail, plea, trial, and sentencing hearings."[60] Because the federal rules are the "playbook" of the federal courts, it seemed advisable to reflect the new role of victims throughout the rules. Moreover, Congress intended the CVRA to be "a formula for success" and a "model for our States."[61] The only way the federal rules could serve as a model, I argued, was by fully implementing victims' rights. I then proposed twenty-eight specific changes to the Federal Rules of Criminal Procedure to integrate crime victims into the federal process.[62] Each of these proposals included both specific text for an amendment and a legal justification for the change.

D. The Criminal Rules Committee Proposals.

The Advisory Committee took up my proposed rule changes in the summer of 2005. The distinguished chair of the Committee, Judge Susan Bucklew, appointed a subcommittee, chaired by Judge James Jones, to consider changes to the federal rules to implement the CVRA. The subcommittee, including its reporter (Professor Sara Sun Beale), prepared a report to the full committee recommending that only a few changes to the rules.[63] The subcommittee "felt that it would not be appropriate to create new victims rights not based upon the statute."[64] Accordingly, the Subcommittee recommended just a few changes to the rules, largely parroting a few parts of the CVRA's language.

The full Advisory Committee took up the subcommittee's proposals at its meeting on October 24-25, 2005.[65] The Advisory Committee largely agreed with the subcommittee's proposals, approving a limited set of changes to the rules to implement the CVRA. The Advisory Committee sent a report of its proposed changes to the Standing Committee on Rules of Practice and Procedure

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[59] *See* Cassell, *supra* note 3.

[60] *Id.* at 852.

[61] *Id.* at 854-55 (*quoting* 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein)).

[62] *Id.* at 856-923.

[63] Memo to the Crim. Rules Advisory Committee from the CVRA Subcommittee (Sept. 19, 2005) (hereinafter cited as "CVRA Subcommittee Mem."). This document does not appear on the helpful website regarding federal rulemaking – www.uscourts.gov/rules. To make the document more widely available, I have posted the report on my website – www.law.utah.edu/faculty/bios/cassellp/website/index.html.

[64] CVRA Subcommittee Mem. at 2.

[65] Minutes of the Advisory Committee on Crim. Rules, Oct. 24-25, 2005, http://www.uscourts.gov/rules/minutes/CR10-2005-min.pdf (hereinafter cited as Advisory Committee Minutes).

in December, 2005.[66] The Advisory Committee described its changes as seeking "to incorporate, but not go beyond, the rights created by the statute."[67] The rules were then circulated for nationwide public comment.[68] The Advisory Committee held a public hearing on the rule change in Washington, D.C. on January 26, 2007. I testified at the hearing, presenting this article as my testimony.[69]

III. The CVRA's Right to Fairness Requires Comprehensive Changes to Protect Victims

The CVRA requires fundamental changes in the Federal Rules of Criminal Procedure. The CVRA makes crime victims participants in the criminal justice process and commands in sweeping terms that the courts must treat victims with "*with fairness* and with respect for the victim's dignity and privacy."[70] To faithfully implement that directive, it is necessary to assess each of the existing rules against a fairness standard and then make changes and additions where the rules do not guarantee fair treatment to victims.

The Advisory Committee has made some useful progress in that direction. The Committee should be commended for the careful drafting of its proposed changes and the thoroughness with which it explored the topic. Moreover, it is the nature of articles such as this one to highlight points of disagreement rather than points of agreement. The Committee has seen fit to adopt several of the proposals that I recommended,[71] a fact that should not be overlooked.

Unfortunately, however, the Advisory Committee acted timidly. Instead of reviewing all the rules to determine whether they treated victims fairly, the Advisory Committee decided it would not venture beyond parroting specifically-described rights in the CVRA. The Committee's Reporter, well-regarded Duke law professor Sara Sun Beale, articulated the Committee's drafting technique as simply incorporating rights created by Congress:

> The most basic decision was how far beyond the statutory provisions the rules should go at this time. Although the CVRA enumerates a number of specific rights, it also contains general language stating that victims have a "right to be treated with

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[66] Report of the Advisory Committee on Crim. Rules, Dec. 8, 2005, http://www.uscourts.gov/rules/reports.htm (hereinafter cited as Advisory Committee Report).

[67] *Id.* at 2.

[68] Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil and Criminal Procedure* (Aug. 2006), www.uscourts.gov/rules/newrules1.html, (hereinafter cited as Proposed Amendments).

[69] All the testimony and other comments about the proposed changes can be found at www.uscourts.gov/rules/newrules10.html.

[70] 18 U.S.C. § 3771(a)(8) (emphasis added).

[71] *See, e.g., infra* notes 288-90 and accompanying text (discussing amendment to Rule 18).

fairness." Judge Cassell advocates using this general right to fairness as a springboard for a variety of victim rights not otherwise provided for in the CVRA.

> [We] concluded that the rules should incorporate, but not go beyond, the specific statutory provisions. The CVRA reflects a careful Congressional balance between the rights of the defendant, the discretion afforded to prosecution, and the new rights afforded to victims. In light of this careful statutory balance, [we] felt that it would not be appropriate to create new victims rights not based upon the statute. Rather, [we] sought to incorporate the rights Congress did afford into the rules. In so doing, [we] attempted, to the degree possible, to use the statutory language. [We] anticipate[] that the courts will develop the meaning of the statutory terms on a case-by-case basis, and [we] did not attempt to use the rules to anticipate and resolve the interpretative questions that will arise.[72]

Before debating the merits of the Advisory Committee's position, it is useful to step back and look at the forest rather than the trees. Regardless of how the CVRA's language on fairness is interpreted, should we really debate treating crime victims fairly? Presumably the general public expects the nation's criminal rules to be fair to all concerned – the government, defendants, *and* victims. Reflecting that view, for the last twenty years Congress has passed a series of laws extending rights to crime victims.[73] Even without a single word in the CVRA mentioning fairness, the Advisory Committee should carefully review the existing rules to ensure fairness for victims.

In any event, Congress has spoken. The Advisory Committee's general approach does not faithfully implement the congressional command of fair treatment, as the following sections demonstrate.

A. The CVRA's Text and Legislative History Create a Substantive Right to Fairness

Turning to the Advisory Committee's specific justifications for not implementing the right to fairness, perhaps its most striking claim is that the right is merely some sort of a "springboard" for other specific rights. The Committee declines to implement the this right because this would "go beyond . . . the specific statutory provisions" in the CVRA. But the right to fairness *is itself one of the specific provisions* in the CVRA. The CVRA grants victims the following rights:

> (1) The right to be reasonably protected from the accused;
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused;

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[72] CVRA Subcommittee Mem., *supra* note 63, at 2. The Advisory Committee largely adopted the recommendation of the Subcommittee. To simplify this article, I will generally ascribe the views of the Subcommittee to the Advisory Committee.

[73] *See supra* notes 12-18 and accompanying text.

(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; and
(8) *The right to be treated with fairness* and with respect for the victim's dignity and privacy.[74]

As in the various state victims' bills of rights,[75] the fairness right is not mere hortatory language. The CVRA introduced these rights in the statute with the introductory clause: "A crime victim *has the following rights* . . . ."[76] Thus, the right to fairness is to be given real world application. To be sure, it is a broad right – akin to the defendant's broad right to "due process of law."[77] But to implement that right in the criminal rules is not "creating new victims rights not based upon the statute," as the Committee puts it, but simply implementing a clearly-articulated congressional command.

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[74] 18 U.S.C. § 3771(a) (emphasis added).

[75] *See, e.g.,* ALASKA CONST. art. I, § 24 (victim's right "to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process"); ARIZ. CONST., art. II, § 2(A)(1) (victim's right "to be treated with fairness, respect, and dignity"); IDAHO CONST. art. I, § 22 (victim's right "[t]o be treated with fairness, respect, dignity and privacy throughout the criminal justice process"); ILL. CONST. art. I, § 8.1 (victim's right "to be treated with fairness and respect for their dignity"); MICH. CONST. art. I, § 24 (victim's right "to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process"); N.J. CONST. art. I, § 22 (victim's right to "be treated with fairness, compassion and respect by the criminal justice system"); N.M. Const. art. II, § 24 (the "right to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process"); OHIO CONST. art. I, § 10a (victims "shall be accorded fairness, dignity, and respect in the criminal justice process"); TEX. CONST. art. I, § 30(a) ("right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process");UTAH CONST., art. I, § 28(1)(a) (victim's right to be "treated with fairness, respect, and dignity"); WISC. CONST. art. I, § 9m (victim's right to be treated with "fairness, dignity and respect for their privacy"); *see generally* Cassell, *supra* note 4, at 1387-88 (discussing victim's right to fairness in Utah).

[76] 18 U.S.C. § 3771(a) (emphasis added).

[77] U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV (due process right in state proceedings).

It is a cardinal principle of statutory construction that effect must be given to every word in a statute.[78] Under the Committee's approach, the congressional directive that crime victims be treated fairly will have no effect on any of the rules. The fairness directive will, in other words, be rendered mere surplusage – something that the Supreme Court has repeatedly cautioned against.[79] The Committee also admits that it is interpreting the CVRA narrowly, contrary to standard rule that remedial legislation is to be construed broadly.[80]

The Committee's approach also flouts the declared intentions of the Act's drafters. There is no need to guess about Congress' intent on the right of fairness. Senator Kyl, who co-sponsored the CVRA with Senator Feinstein, explained quite directly that Congress meant for the right to have substantive content:

> The broad rights articulated in this section [section 8, mandating victims be treated with fairness along with dignity and respect] *are meant to be rights themselves* and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process.[81]

Nor is there any doubt that Congress intended this command to reach the judiciary, including judicial branch components like the Advisory Committee. Again, Senator Kyl specifically addressed this point:

> Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision [section 8] is intended to direct government agencies and employees, whether they are in executive or *judicial* branches, to treat victims of crime with the respect they deserve and to afford them due process.[82]

The Advisory Committee's decision not to treat fairness as an enforceable right is so at odds with the CVRA's legislative history that one becomes curious as to why the Committee determined not to follow it. The Committee also diverged from the legislative history in several other areas.[83]

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[78] *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

[79] *See, e.g., Babbit v. Sweet Home Chapter of Comtys. for a Great Or.*, 515 U.S. 687, 698 (1995).

[80] *See, e.g., Hughes v. Box*, 814 F.2d 498, 501 (8th Cir. 1987); *Gardner & North Roofing & Siding Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 464 F.2d 838, 841 (D.C. Cir. 1972).

[81] 150 CONG. REC. 4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added); *see also* 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[82] 150 CONG. REC. 4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added); *see also* 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[83] *See, e.g., infra* note 437-40 (noting rejection of Senators Feinstein's and Kyl's views on the right to be heard on issues affecting victims' rights); *infra* note 400 (noting rejection of Senator Kyl's views on the right to be heard on speedy trial issues).

In reviewing the Advisory Committee's records, however, notably absent is *any* mention of legislative intent. The Advisory Committee does not cite the statute's legislative history even once in a twenty-page subcommittee report, in four pages of minutes of its discussions, or in twenty-six pages of proposed amendments and accompanying Advisory Committee Notes.[84] Perhaps the Advisory Committee took a different approach than the CVRA's drafters because it did not consider their stated intentions.

If, on the other hand, the Advisory Committee was aware of the drafters' intentions and declined to follow them, it is staking out a rather unusual path. It is standard practice for the Advisory Committee, no less than courts, to look to legislative history in crafting the rules.[85] With respect to the CVRA in particular, many courts have found the CVRA's legislative history highly instructive. They have good reason for relying on the history. Unlike some contentious pieces of legislation where legislators possessed divergent views, the CVRA enjoyed a broad, bi-partisan consensus.[86] It passed by a vote of 393 to 14 in the House[87] and by a voice vote in the Senate.[88] Moreover, the CVRA's co-sponsors were bipartisan, and the views they gave on the legislation were not contradicted by anyone else. Thus, as the Ninth Circuit has explained in construing the CVRA to track Senator Kyl's and Feinstein's views:

> floor statements by the sponsors of the legislation are given considerably more weight than floor statements by other members, and they are given even more weight where, as here, other legislators did not offer any contrary views. Silence, the maxim goes, connotes assent, and so we can draw from the fact that no one registered disagreement with Senators Kyl and Feinstein on this point the reasonable inference that the views they expressed reflected a consensus, at least in the Senate.[89]

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[84] *See* CVRA Subcommittee Report, *supra* note 63, at 1-20; Advisory Committee Minutes, *supra* note 65, at 13-16; Proposed Amendments, *supra* note 68, at 349-75.

[85] *See, e.g.,* FED. R. CRIM. P. 15, Advisory Committee Note to 1974 Amendment (quoting directly from the *Congressional Record* statements from drafter of relevant legislation).

[86] *United States v. Cienfuegos*, 462 F.3d 1160, 1165 (9th Cir. 2006); *see also* 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2005) (statement of Sen. Kyl) ("After extensive consultation with my colleagues, broad bipartisan consensus was reached and the language in [the CVRA] was agreed to").

[87] 150 CONG. REC. H8208-09 (daily ed. Oct. 6, 2004).

[88] 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004).

[89] *Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 435 F.3d 1011, 1015-16 (9th Cir. 2006) (internal quotations and citations omitted); *accord United States v. Sharp*, – F.Supp.2d – , 2006 WL 3477481, at *3 n.12 (E.D. Va., Nov. 22, 2006); *see also In re Kenna*, 453 F.3d 1136, 1136 (9th Cir. 2006) (looking to legislative history to interpret CVRA); *United States v. Cienfuegos*, 462 F.3d 1160, 1165 (9th Cir. 2006) (same); *United States v. Degenhardt*, 405 F. Supp. 2d 1341, 1344 (D. Utah 2006) (same); *United States v. Ingrassia*, 2005 WL 2875220 (E.D.N.Y. 2005) (same).

In light of all this, it is beyond doubt that crime victims have a substantive right to be treated with fairness (as well as with respect for their dignity and privacy) in the federal criminal justice process. Once that right is in mind, the Advisory Committee has clear duties under the Rules Enabling Act. That Act provides that the Rules "shall not abridge, enlarge or modify any substantive right."[90] Therefore, if any existing rules of criminal procedure "abridges" or even "modifies" a victim's rights to fairness, it is invalid and must be changed. Accordingly, the Advisory Committee must review all the Federal Rules of Criminal Procedure to ensure that they protect victims' right to fairness.

B. The Advisory Committee Treats the Right to Fairness Inconsistently

The Committee claimed that to implement the right to fairness would use the right as "a springboard for a variety of victim rights not otherwise provided for in the CVRA."[91] If so, the Advisory Committee was unable to consistently follow its own view. The Committee agreed with my proposed change to Rule 18; that change required that when a court determines where within a judicial district to hold a trial, it should consider not only the convenience of the defendant and the witnesses, but also the victim as well.[92] Notably, the Committee's rationale for this change was to "implement[] the victim's 'right to be treated with fairness' under the Crime Victims' Rights Act."[93] But if a change to the relatively obscure Rule 18 is appropriate in light of the victim's right to fairness, why aren't changes to many other, more significant rules also appropriate?

Further highlighting the inconsistent treatment of the right to fairness is the way the Committee handled parallel provisions in the CVRA. In a single clause, the CVRA gives victims the right to be treated not only with fairness, but also with dignity and respect; section (a)(8) of the CVRA provides that victims shall enjoy "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy."[94] The Committee used the victim's rights to dignity and respect as a "springboard" in several places. For example, the Committee proposed an amendment to prevent inappropriate subpoenas for personal or confidential information about a victim, explaining that "[t]his amendment implements the Crime Victims Rights Act, codified at 18 U.S.C. § 3771(a)(8), which states that victims have a right to respect for their 'dignity and privacy.'"[95] Similarly, the Committee proposed an amendment to prevent inappropriate release a victim's address and telephone number as part of alibi defense disclosures, explaining that "this amendment implements the victims' rights under the Crime Victims Rights Act . . . to be treated with respect for

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[90] 28 U.S.C. § 2072(b) (2000).

[91] CVRA Subcommittee Rep., *supra* note 63, at 1.

[92] *See* CVRA Subcommittee Rep., *supra* note 63, at 8 (adopting proposal from Cassell, *supra* note 3, at 878-79).

[93] Proposed Amendments, *supra* note 68, at 352; *accord* CVRA Subcommittee Mem., *supra* note 63, at 8.

[94] 18 U.S.C. § 3771(a)(8).

[95] Proposed Amendments, *supra* note 68, at 361 (Note to Proposed Rule 17(c)(3)).

the victim's dignity and privacy."[96] Why the Committee believed it appropriate to try to implement the "dignity and privacy" provisions of the CVRA but not the immediately adjacent "fairness" provision is unclear.

C. *The Advisory Committee Should Not Leave the CVRA's Interpretation to the Litigation Process.*

The Advisory Committee also justified its decision not to review the rules for fairness on the ground that it would "not attempt to use the rules to anticipate and resolve the interpretative questions that will arise" under the CVRA.[97] Yet a basic purpose – perhaps *the* basic purpose – behind the procedural rules is to lay out answers to questions that might otherwise have to be litigated. To that end, Rule 2 of criminal rules provides that "[t]hese rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."[98] It is at odds with securing simplicity in procedure to simply regurgitate the language of the CVRA in the criminal rules, leaving every interpretative question to the vagaries of litigation.

Historical examples are legion of the Advisory Committee amending the Federal Rules of Criminal Procedure precisely to resolve questions that were being (or might have been) litigated. To provide a few straightforward examples, in 1979 the Advisory Committee amended and clarified the standards for pre-sentence withdrawal of a guilty plea. The Committee noted that courts had "critically stated that the Rule offers little guidance as to the applicable standard of a pre-sentence withdrawal of plea and as a result the contours of (the presentence) standard [in the rule] are not easily defined."[99] The amendment clarified language "which as been a cause of unnecessary confusion."[100]

In 1983, the Advisory Committee changed Rule 11(a)(2) to eliminate a split of authority on conditional guilty pleas. One of the reasons for the change was to "produce much needed uniformity in the federal system on this matter."[101]

In 1994, the Committee amended rule 32(b)(2) to give defense counsel an opportunity to be present when probation officers interviewed their clients while preparing a presentence report. The Advisory Committee Notes explained that while there was no constitutional right to counsel at this point in the process, caselaw in two circuits suggested that requests of counsel to be present should be honored as a matter of prudence.[102] What is particularly interesting about this example is that the

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[96] Proposed Amendments, *supra* note 68, at 351.

[97] Proposed Amendments, *supra* note 68, at 350.

[98] FED. R. CRIM. P. 2.

[99] FED. R. CRIM. P. 32, Advisory Committee Note, 1979 Amendment to Rule 32(d) (internal quotations from two circuits omitted).

[100] *Id.*

[101] FED. R. CRIM. P. 11, Advisory Committee Note, 1983 Amendments.

[102] FED. R. CRIM. P. 32, Advisory Committee Note, 1994 Amendments.

Committee stepped in to protect the legitimate interests of defendants even in the absence of a constitutional or statutory command to do so. Of course, the CVRA creates a statutory command to the Committee to protect victims' interests.

In 2002, the Advisory Committee amended Rule 51 to provide that court rulings admitting or excluding evidence were governed by the federal rules of evidence. The reason was to avoid "the possibility that an argument might have been made" that an earlier congressional action conflicted with the rules of evidence.[103] In other words, the Advisory Committee simply anticipated and resolved an interpretive question that might otherwise have arisen.

In 2005, the Advisory Committee amended Rule 12.2 to provide sanctions for a party's failure to disclose certain alibi information. The reason for the change was to "fill[] a gap" in the rules.[104]

In all these instances (among many others), the Advisory Committee stepped in to avoid unnecessary litigation and to clarify the application of the rules. Not only is this the Committee's standard approach, but there are particularly strong reasons for not leaving clarification of crime victims' rules to case-by-case litigation. The most significant problem is that such litigation will occur only in fits and starts. Unlike the government and criminal defendants who always have legal representation, crime victims have no right to appointed counsel and are often indigent or otherwise unable to afford to hire an attorney.[105] As a result, in many cases it is an empty gesture to promise victims that they can litigate application of the rules. As a practical matter, they will often be unable to do so.[106] Indeed, the Advisory Committee seemingly compounds this problem by declining to put into the rules any restatement of courts' discretionary authority to appoint counsel for crime victims.[107]

Even in cases where victims can afford counsel to defend their legal rights, the kind of litigation that the Advisory Committee envisions will be unenlightening and formalistic. For instance, while I have proposed including a specific provision in the Rule 11 guilty plea colloquy requiring that the court address a victim before accepting a plea,[108] the Advisory Committee has not recommended any change. This failure could well spawn litigation about the victims' role in the plea process that will require courts to consider why Rule 11 fails to mention crime victims and how

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[103] FED. R. CRIM. P. 51, Advisory Committee Note, 2002 Amendments.

[104] FED. R. CRIM. P. 12.2, Advisory Committee Note, 2005 Amendments.

[105] *See* BELOOF, CASSELL & TWIST, *supra* note 4, at 381.

[106] In theory, the government is given authority to assert rights for crime victims, *see* 18 U.S.C. § 3771(d)(1), but in practice the reported cases under the CVRA thus far show few examples where the government has been willing to do so. *See, e.g., Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 435 F.3d 1011 (9th Cir. 2006) (victims' assertion of right affirmed; government does not take a position on the claim).

[107] *See infra* notes 370-78 and accompanying text (discussing proposed rule 44.1).

[108] *See infra* notes 133-38 and accompanying text.

this failure interplay with the CVRA's commands on victims' rights in the plea process. Because the CVRA guarantees victims a right in the plea process, its dictates will ultimately govern. But only the Advisory Committee can pretermit such this needless litigation about how to interpret *its* rules. In short, it would be much simpler for all concerned if Rule 11 -- and, indeed, all the other rules -- were redrafted to simply fold victims in at the appropriate point in the process.

Finally, one of the overriding goals of the CVRA is to dramatically reform the entire approach of the federal criminal justice system. As Senator Feinstein explained "[t]his legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process."[109] And Senator Kyl added, "[a] central reason for these rights is to force a change in a criminal justice culture which has failed to focus on the legitimate interests of crime victims . . . ."[110] Given Congress' clear intent to change a hostile legal culture, it makes no sense to leave victims to the mercies of litigation to determine the scope of their rights.

For all these reasons, the Federal Rules of Criminal Procedure should be amended not only to implement the narrow rights articulated in the CVRA but also its more open-ended rights, particularly the victim's right to be treated with fairness

IV. Specific Rule Changes to Comply with the CVRA

Against the backdrop of the statutory command that victims should be treated with fairness, the balance of this article will compare my specific proposals for amending the rules with those of the Advisory Committee — attempting to show the strong points of my ideas. For convenience, the article proceeds sequentially through the rules from beginning to end, relying in the case of proposed amendments on the Advisory Committee's numbering.

Rule 1 — Definition of "Victim" and "Victim's Representative"

The Proposals:

I proposed amending Rule 1 to include a definition of victim and the victim's representatives as follows:

> "Victim" means a person directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under these rules, but in no event shall the defendant be named as such guardian or representative.

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[109] 150 Cong. Rec. S4260 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).
[110] 150 Cong. Rec. S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

The Advisory Committee instead proposed to cross-reference the statutory definition of "crime victim" as follows:

> "Victim" means a "crime victim" as defined in 18 U.S.C. § 3771(e). A person accused of an offense is not a victim of that offense.

Discussion:

The rules should be amended to make clear that both a victim and the victim's representative can assert victims' rights. As an effort in that direction, I proposed amending Rule 1 to include a definition of "victim" as well as a definition of "victim's lawful representative."[111] My definitions were lifted from the CVRA.[112] In response, the Advisory Committee agreed to include a definition of "victim" but left to an Advisory Committee Note the reference to the victim's representative.

The differences between the two approaches might seem modest until one recognizes that another provision in the Advisory Committee's proposals appears to intentionally omit any reference to a victim representative. Proposed Rule 60, the Committee's "global" provision dealing with victims' rights, explains who may enforce victims' rights. In clear contrast to the CVRA's governing provision, this proposed rule omits any reference to a crime victim's representative. Proposed Rule 60 provides only that: "[t]he rights of a victim under these rules may be asserted by the victim and the attorney for the government."[113] In contrast, the CVRA enforcement provision states: "The crime victim *or the crime victim's lawful representative*, and the attorney for the Government may assert the rights described in subsection (a)."[114] Nothing in the Advisory Committee notes indicates that a crime victim's representative is among those authorized to assert the rights. The Advisory Committee also struck existing language in the rules about a victim's representative exercising the victim's right to speak at sentencing.[115]

The repeated omission of any reference to a victim's representative is unsettling given the Committee's promise to simply track the CVRA's language.[116] Its failure to track the language here

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[111] Cassell, *supra* note 3, at 856–57.

[112] *See* 18 U.S.C. § 3771(e); *see also U.S. v. Sharp*, — F.Supp.2d — , 2006 WL 3477481 at *1 (E.D. Va. , Nov. 22, 2006) (person harmed by former domestic partner of marijuana user was not "victim" entitled to provide victim impact statement pursuant to CVRA).

[113] CVRA Subcommittee Rep., *supra* note 63, at 14.

[114] 18 U.S.C. § 3771(d)(1) (emphasis added).

[115] *See* Proposed Amendments, *supra* note 68, Proposed Rule 32(i)(4)(B)(i) & (ii) (deleting language confirming permission for parent or legal guardian to exercise right to speak at sentencing for minor and incapacitated victims).

[116] *See, e.g.,* CVRA Subcommittee Rep., *supra* note 63, at 1 ("The Subcommittee concluded that the rules should incorporate, but not go beyond, the specific statutory provisions [in the CVRA].").

leaves the impression that the Committee is uncomfortable with a victim's representative asserting rights. Perhaps the Committee could make a policy argument against such representation, but Congress has said victims have the right to have representatives speak for them. The Federal Rules should follow the CVRA and state clearly that a victim's representative can assert a victim's rights.

The need for clarity on this point is heightened by pre-CVRA case law questioning any right by a victim's representative to assert victims' rights. Most notably, in one of the Oklahoma City bombing prosecutions, the Tenth Circuit rebuked a trial judge for permitting an attorney for the bombing victims to participate in oral argument at a sentencing hearing. (Full disclosure: I was the attorney in question.) The Circuit stated that "[i]n the absence of any authority permitting the participation of victims' counsel, we harbor concerns about the propriety of the district court's rulings."[117] This statement can no longer be regarded as good law in light of the CVRA's commands.[118]

Another reason for clarity is to make sure that corporate and organizational victims are able to be heard in the process. The CVRA's definition of victim ("a *person* directly and proximately harmed as a result of the commission of a Federal offense"[119]) is essentially lifted from federal restitution statutes.[120] Federal courts have consistently held that a "person" entitled to restitution includes corporate entities.[121] Of course, such legal entities cannot appear personally but only through a representative. To eliminate any doubt about the ability of corporate entities to assert their interests, the Rules should be amended to clearly state that a victim's representative can enforce victims' rights.[122]

Rule 2 — Fairness to Victims

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[117] *United States v. Fortier*, 242 F.3d 1224, 1230 (10th Cir. 2001), *cert. denied*, 543 U.S. 979 (2001).

[118] *See United States v. Degenhardt*, 405 F. Supp. 2d 1341, 1343, n.7 (D. Utah 2005) (noting that *Fortier* has now been overruled by statute).

[119] 18 U.S.C. § 3771(e) (emphasis added).

[120] *See* 18 U.S.C. § 3663(a)(1)(B)(2); 18 U.S.C. § 3663A(a)(2).

[121] *See, e.g., United States v. Martin*, 128 F.3d 1188, 1190 (7th Cir. 1997) (collecting cases); *United States v. Hand*, 863 F.2d 1100, 1103 (3rd Cir. 1988) (it makes no sense to say that "if General Motors of Chase Manhattan Bank had funds stolen, in violation of federal criminal law, a judge could not require the wrongdoers to pay restitution . . . ."); *United States v. Kirkland*, 853 F.2d 1243 (5th Cir. 1988) ("Non-human entities . . . can be "victims" entitled to restitution . . . ."); *see also United States v. Lincoln*, 277 F.3d 1112, 1113-14 (9th Cir. 2002) (discussing 18 U.S.C. § 3664, which specifically recognizes the United States as a possible victim for restitution purposes).

[122] The National Association of Criminal Defense Lawyers has proposed adding a "factfinding" hearing for determining who qualifies as a victim under the CVRA. This novel and cumbersome proposal is discussed below. *See infra* note ___-___ and accompanying text (discussing Proposed Rule 60(b)).

The Proposals:

I proposed amending Rule 2 to require fairness to victims in construing the rules as follows:

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

The Advisory Committee did not propose amending Rule 2.

Discussion:

To provide assure that crime victims are treated fairly throughout the process, it makes sense to add language incorporating crime victims in Rule 2 — the one rule that specifically mentions fairness. As discussed in the previous part of this article, the Advisory Committee does not agree that the rules should be amended to protect a victim's right to fairness and for this reason, presumably, declined to amend Rule 2. The qualifier "presumably" is needed here because the CVRA Subcommittee did not give an explanation for declining to follow my recommendation here.[123]

The fairness issues appears to be the fundamental difference between my approach and the Committee's approach — the rules are either going to treat crime victims fairly or not. As discussed in the previous part of this article, they should.

But even those who share my view on fairness might nonetheless argue that Rule 2 need not be amended because it is an interpretive rule without no substantive effect. After all, it could be argued, the rule simply calls for a "just determination" of criminal cases, arguably a symbolic command. And, in any event, that command might be flexible enough to encompass crime victims.

The debate about how Rule 2 ought to read is, however, about more than symbols. In 1946, the initial chairman of the Advisory Committee called Rule 2 "the most important rule of the whole set."[124] Rule 2 has been cited by a number of courts,[125] including the Supreme Court.[126] Rule 2 has

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[123] *See* CVRA Subcommittee Report, *supra* note 63, at 17–20 (listing Cassell proposals not adopted; Rule 2 proposal not listed).

[124] Vanderbilt, *quoted in* 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE (CRIMINAL) § 31, at 30 n.1 (2000 & Supp. 2006).

[125] *See, e.g.*, *United States v. Gupta*, 363 F.3d 1169,1174 (11th Cir. 2004); *United States v. Navarro*, 169 F.3d 228, 237 (5th Cir. 1999); *United States v. Price*, 13 F.3d 711, 724 (3d Cir. 1994); *United States v. Giovannetti*, 928 F.2d 225, 226 (7th Cir. 1991); *United States v. Campbell*, 845 F.2d 1374, 1378 (6th Cir. 1988); *United States v. Green*, 847 F.2d 622, 625 (10th Cir. 1988); *United States v. Broadus*, 664 F. Supp. 562, 596–98 (D.C. Cir. 1987); *United States*

consequences. Not only does it "set[] forth a principle of interpretation" for ambiguous rules, but the Court has used it as a basis for deviating from the rules in some circumstances.[127] Indeed, in some lower court cases, Rule 2 has proven outcome-determinative. For example, in *United States v. Broadus*,[128] the United States District Court for District of Columbia used Rule 2 as a basis for deviating from the time limits imposed by Rule 29© for the defendant to seek a new trial.[129] Relying on Rule 2, the court determined that "a seemingly plausible inference from a criminal rule cannot command blind adherence if it would deprive an accused person . . . of a just determination of his or her cause."[130] Using Rule 2 to protect defendants' legitimate interest seems entirely proper. But crime victims need the same textual support to secure their legitimate interests.

Not only is Rule 2 important, directly including crime victims in the language is important as well. Courts are used resolving disputes between prosecutors and defendants. They are not used to considering the interests of crime victims.[131] That problem is, indeed, the whole reason for the passage of the CVRA. As Senator Feinstein has explained, "In case after case we found victims and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by . . . judges focused on defendant's rights, and by a court system that simply did not have a place for them."[132] For all these reasons, Rule 2 should be amended to make clear that the rules must be construed to be fair not only to the parties, but also to victims.

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

The Proposals:

I proposed requiring that the court consider a victim's view before accepting any *nolo contendere* plea as follows:

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v. Hillard, 701 F.2d 1052, 1061 (2d Cir. 1983); *U.S. v. Personal Finance Co. of N.Y.*, 13 F.R.d. 306 (S.D.N.Y.1952).

[126] *See Carlise v. U.S.*, 517 U.S. 416 (1996).

[127] *See id.* at 424–25 (referring to *Fallen v. United States*, 378 U.S. 139 (1964)).

[128] 664 F. Supp. 592 (D.D.C. 1987).

[129] *Id.* at 598.

[130] *Id.* at 596–97.

[131] *See, e.g.,* Russell P. Butler, *What Practitioners and Judges Need to Know Regarding Crime Victims' Participatory Rights in Federal Sentencing Proceedings*, 19 FED. SENT. RPTR. 21, 21 (Oct. 2006) (noting that the CVRA heralds a "new era" for crime victims' rights); Beloof, *Third Model*, *supra* note 4, at 289 (noting "state of denial" about crime victims' rights by institutional actors).

[132] 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

Nolo Contendere Plea. Before accepting a plea of *nolo contendere*, the court must consider the parties' and victims' views and the public interest in the effective administration of justice.[133]

The Advisory Committee proposed no change to the rule.

Discussion:

It is unclear why the Advisory Committee declined to change Rule 11 to require courts to consider victims' views on *nolo* pleas. The CVRA Subcommittee purported to catalogue and briefly discuss all of my proposals that the Subcommittee declined to recommend to the full Committee. Inexplicably, my Rule 11(a)(3) proposal (along with my other Rule 11 proposals) was not mentioned[134] and, thus, there is nothing in the available records to indicate that the Advisory Committee considered it. Possibly the reason the Advisory Committee did not recommend this change was simply oversight.

Perhaps the Advisory Committee was relying on its "global" rule on victims' rights (Rule 60) which provides that "[t]he court must permit a victim to be reasonably heard at any public proceeding in the district court concerning . . . [a] plea . . . involving the crime." [135] But that rule deals solely with the subject of being "heard." Once the court has heard the victim, the question remains what the court should *do* with the victim's statement. Currently Rule 11(a)(3) specifies that the court must consider "the parties'" views on a *nolo* plea — but it makes no mention of the victim's views.[136] The CVRA now mandates that victims must be "reasonably heard" at any proceeding involving a "plea."[137] It is hard to see how anyone could argue that a victim is reasonably heard when, after making a statement about the *nolo* plea, the court is not required to even consider it. The rule should be amended to require courts to consider victims' statements.

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

The Proposals:

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[133] Cassell, *supra* note 3, at 865–66.

[134] CVRA Subcommittee Mem., *supra* note 3, at 17–20.

[135] Proposed Amendments, *supra* note 67, Rule 60(a)(3).

[136] The rule does mention that the court should consider "the public interest in the administration of justice" in reviewing a *nolo* plea. *See* FED. R. CRIM. P. 11(a)(3). But this broad phrase does not appear to encompass the views of particular actors regarding a plea, as made clear by the fact that the rule separately lists "the parties' views" as something the court must consider.

[137] 18 U.S.C. § 3771(a)(4).

I proposed that the court should be required to address any victim present when a plea is taken to determine whether the victim wishes to make a statement and to consider the victim's view before accepting a plea, as follows:

> **Rule 11(b)(4) Victims' Views.** Before the court accepts a plea of guilty or *nolo contendere* or allows any plea to be withdrawn, the court must address any victim who is present personally in open court. During this address, the court must determine whether the victim wishes to present views regarding the proposed plea or withdrawal and, if so, what those views are. The court shall consider the victim's views in acting on the proposed plea or withdrawal.

The Advisory Committee recommended no change to Rule 11.

Discussion:

It is hard to understand why the Advisory Committee declined to recommend changing Rule 11 to require that victims be addressed, as it did not discuss the idea.[138] If the Advisory Committee deliberately rejected this idea, it has given no explanation and it is hard to see any justification for the Committee's position. The CVRA gives victims the right to "to be reasonably heard at any public proceeding in the district court involving . . . [a] plea."[139] To implement the victim's right to be heard regarding a plea, my proposed rule change merely required the court to directly address any victim who is present in court and to consider any views the victim expressed. This is consistent with the CVRA's legislative history which explains that "[t]his provision is intended to allow crime victims to directly address the court in person."[140] The language of the proposed rule is lifted from an earlier paragraph in Rule 11, which requires the court "[b]efore accepting a plea of guilty" to "address the defendant personally in open court."[141] Victims should be treated even-handedly with defendants. It may also be important for the judge to address victims directly because many victims will lack the assistance of counsel. Untrained in legal proceedings, victims may be uncertain about exactly when in the process they should present their views. Having the court address the victim will eliminate that uncertainty and ensure that the victim's right to be heard is vindicated.

The Advisory Committee's "global" rule on victims' rights (Rule 60) does briefly address pleas. Tracking language in the CVRA, the Advisory Committee would require the court to "permit a victim to be reasonably heard at any public proceeding . . . concerning . . . [a] plea."[142] But this brief mention in the rule is inferior to my specific proposal for several reasons. First, Rule 11 is the "script" when federal judges accept guilty pleas. Victims should be directly included here so that

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[138] *See supra* note 134 and accompanying text (noting the absence of any mention of my Rule 11 proposals as those the Subcommittee rejected).

[139] 18 U.S.C § 3771(a)(4).

[140] 150 CONG. REC. S 4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[141] FED. R. CRIM. P. 11(b)(2).

[142] Proposed Amendments, *supra* note 68, Rule 60(a)(3).

judges do not inadvertently overlook victims' rights. Second, stating only that victims may be "reasonably heard" regarding a plea, without explaining how that will occur, invites litigation and uncertainty. For example, is a victim reasonably heard when allowed to be heard only through written submission?[143] Is a victim treated "fairly" if the court is required to address the defendant in open court but not to address the victim? If the court does not address the victim, when should the victim try to interrupt the proceedings to be heard? Should the victim's views enter into the court's calculation about whether to accept the plea? All of these questions are answered in a simple and straightforward way by my proposal — a proposal which the Advisory Committee should adopt.

Rule 11(c)(1) — Prosecution To Consider Victims' Views on Pleas

The Proposals:

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

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

The Advisory Committee did not recommend any change.

Discussion:

My proposed change required prosecutors to make reasonable efforts to notify victims about pleas and to consider the victims' views regarding pleas. This requirement was taken verbatim from the *Attorney General Guidelines for Victim and Witness Assistance*, which already directs prosecutors to "make reasonable efforts to notify identified victims of, and consider victims views

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[143] *Cf. United States v. Degenhardt*, 405 F. Supp.2d 1341, 1345–46 (D. Utah 2005) (victim must be heard orally at sentencing); *United States v. Turner,* 367 F. Supp. 2d 319, 333 (E.D.N.Y. 2005) (noting in dicta that § 3771(a)(4) "require[s] the victim to be given an opportunity actually to be 'heard' rather than afforded some alternate means of communicating her views"), *cf. United States v. Marcello,* 370 F. Supp. 2d 745, 749 (N.D. Ill. 2005) (holding that "in detention hearings, the victim's right to be reasonably heard does not mandate oral statements, particularly when the [victim] has no personal knowledge of the guilt of the defendant(s) and offers an opinion only on a matter that is not in dispute").

about, any proposed or contemplated plea negotiations."[144] About twenty-nine states already require prosecutors to "consult with" or "obtain the views of" victims at the plea agreement stage.[145]

Perhaps the Advisory Committee overlooked this proposed change.[146] Yet it is an important one that implements not only a victim's right to be heard at plea proceedings but also the rights to "confer with the attorney for the government"[147] and to be "treated with fairness."[148] Given that victims have the right to confer, the conferring should take place at the most salient points in the process. As Senator Feinstein explained, "This right [to confer] is intended to be expansive. For example, the victim has the right to confer with the Government concerning any critical stage or disposition of the case."[149] Because the overwhelming majority of federal criminal cases are resolved by a plea, a conference between the victim and the prosecutor regarding the plea will be critical in most cases. Reflecting that fact, the Rules should follow the approach of the majority of states in directing prosecutors to consult with victims about pleas.

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

The Proposals:

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

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

The Advisory Committee proposed no change to this rule.

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[144] U.S. DEP'T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 33 (May 2005); *see also id.* (defining what can be considered in determining whether notice is reasonable in a particular case); U.S. DEP'T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 87 (1997) ("Prosecutors should make every effort . . . to consult with the victim on the terms of any negotiated plea . . . .").

[145] OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD, *supra* note 138, at 75.

[146] *See supra* note 134 and accompanying text (noting listing of Cassell proposals rejected; Rule 11 proposals not listed).

[147] 18 U.S.C. § 3771(a)(5).

[148] *Id.* § 3771(a)(8).

[149] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

Discussion:

In circumstances where an attorney (either for the government or for the victim) is aware of a victim's objection to a plea, that information should be relayed to the court. The victim's attorney will, no doubt, do this on her own initiative. The rule is intended to clarify that the prosecutor is under an equal obligation to communicate this information to the court.

While the Advisory Committee may have overlooked this proposal,[150] it is necessary because the CVRA implicitly obligates prosecutors to communicate a victim's objection to the court. The CVRA commands that prosecutors use their "best efforts" to enforce victims' rights.[151] Victims are often untrained in the law and unexpectedly thrust into criminal proceedings; they may well believe that prosecutors automatically relay their objections to the plea to the court. The proposed rule avoids confusion by requiring the prosecutor to notify the court of a victim's concern. The rule is limited to situations where the prosecutor is aware of an objection.

This approach is consistent with the leading case of *State v. Casey*,[152] which considered whether a victim's request to be heard regarding a plea made to the prosecutor was sufficient to trigger the victim's constitutional right to be heard.[153] In *Casey*, the victim told the prosecutor that she wished to be heard in opposition to a plea. The prosecutor refused to convey that information to the court and the trial judge accepted the plea. When the issue reached the Utah Supreme Court, the court concluded that the prosecutor had an ethical obligation as an officer of the court to convey that information to the judge:

> Prosecutors must convey such requests [to be heard] because they are obligated to alert the court when they know that the court lacks relevant information. This duty, which is incumbent upon all attorneys, is magnified for prosecutors because, as our case law has repeatedly noted, prosecutors have unique responsibilities. . . . The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . in a criminal prosecution is not that it shall win . . . but that justice shall be done.[154]

Applying the reasoning of *Casey* to analogous rights in the CVRA, federal prosecutors must, as officers of the court, convey a victim's request to be heard regarding a plea. Indeed, the prosecutor should convey not only that request to be heard but also the fact that the victim has an objection to the plea. In deciding whether to accept a plea, the court must consider the public

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[150] *See supra* note 134 and accompanying text (noting listing of Cassell proposals rejected; Rule 11 proposals not mentioned).

[151] 18 U.S.C. 3771(c).

[152] 44 P.3d 756 (Utah 2002). I served as *pro bono* counsel for the victim in the case.

[153] *See generally Recent Developments in Utah Law*, 2003 UTAH L. REV. 716.

[154] *Id.* at 764 (internal quotations and citations omitted).

interest.[155] As the Courts of Appeal have explained, "'Rule 11 also contemplates the rejection of a negotiated plea when the district court believes that bargain is too lenient, or otherwise *not in the public interest.*'"[156] When the prosecutor is aware of an objection from that a keenly-interested member of the public — the victim — the court should not be left in the dark about it, as provided in my proposed rule.[157]

Rules 12.1 and 12.3 — Victim Addresses and Phone Numbers Not Disclosed for Alibi and Public-Authority Defense Purposes

The Proposals:

Rule 12 currently requires the government to disclose the address and telephone numbers of any witness, including any victim, that it plans to use to disprove a defendant's alibi. I proposed amending Rule 12 to protect the victim's privacy, by excluding their addresses and telephone numbers from this requirement as follows:

(a) Government's Request for Notice and Defendant's Response.

(1) Government's Request. An attorney for the government may request in writing that the defendant notify an attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense.

(2) Defendant's Response. Within 10 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:

(A) each specific place where the defendant claims to have been at the time of the alleged offense;

(B) the name~~, address, and telephone number~~ of each alibi witness and the address and telephone number of each witness (other than a victim) on whom the defendant intends to rely.[158]

(b) Disclosing Government Witnesses.

(1) *Disclosure.* If the defendant serves a Rule 12.1(a)(2) notice [regarding intent to present an alibi defense], an attorney for the government must disclose in writing to ~~the defendant or~~[159] the defendant's attorney:

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[155] *See, e.g., United States v. Bean*, 564 F.2d 700, 704 (5th Cir. 1977).

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

[157] For alternative ways of drafting this rule, see Cassell, *supra* note 3, at 871–72 (noting that several states require courts to inquire of prosecutors whether the victim has been advised of the proposed plea and whether the victim wishes to make a statement concerning it).

[158] This amendment to rule 12.1(a)(2)(B) was not in my previous proposal. It is included here for the reasons discussed at note 185 *infra* and accompany text.

[159] The excision of the phrase "the defendant or" was not in my previous proposal. It is included here for reasons discussed at note 168 *infra* and accompanying text.

(A) the name~~, address, and telephone number~~ of each witness and the address and telephone number of each witness (other than a victim) that the government intends to rely on to establish the defendant's presence at the scene of the alleged offense; and

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

(2) ***Time to Disclose.*** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

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

(1) the disclosing party learns of the witness before or during trial; and

(2) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

In addition, I proposed making a similar change to Rule 12.3 regarding the address and telephone number of victims who will be used to disprove a public-authority defense.

The Advisory Committee proposed more limited protection for victims' addresses and telephone numbers:

(b) Disclosing Government Witnesses.

(1) ***Disclosure.***

(A) *In general.* If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(i) ~~(A)~~ the name, ~~address, and telephone number~~ of each witness and the address and telephone number of each witness (other than a victim) that the government intends to rely on to establish the defendant's presence at the scene of the alleged offense; and

(ii) ~~(B)~~ each governmental rebuttal witness to the defendant's alibi defense.

(B) Victim's Address and Telephone Number. If the government intends to rely on a victim's testimony to establish the defendant's presence at the scene of the alleged offense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows the preparation of the defense and also protects the victim's interests.

(c) Continuing Duty to Disclose.

(1) **In General**. Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name; of each additional witness and the address; and telephone number of each additional witness — other than a victim — if:

(A) ~~(1)~~ the disclosing party learns of the witness before or during trial; and

(B) ~~(2)~~ the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

(2) ***Address and Telephone Number of an Additional Victim Witness***. The telephone number and address of an additional victim witness must not be disclosed except as provided in (b)(1)(B).

(d) Exceptions. For good cause, the court may grant an exception to any requirement of Rule 12.1(a)-(c).

The Advisory Committee also proposed adding an Advisory Committee note as follows:

> **Subdivisions (b) and (c).** The amendment implements the victims' rights under the Crime Victims' Rights Act to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests. For example, the court might authorize the defendant and his counsel to meet with the victim in a manner and place designated by the court, rather than giving the defendant the name and address of a victim who fears retaliation if the defendant learns where he or she lives.
>
> In the case of victims who will testify concerning an alibi claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (c).

Discussion:

The Advisory Committee agrees with me that the current rule providing that a victim's address and telephone number be *automatically* disclosed whenever an alibi is at stake conflicts with the CVRA. This information can often be very sensitive for a crime victim, as it could allow the defendant to find and harm a victim. The difference between our proposals is that I would simply strike the requirement that a victim's address and telephone number be disclosed to the defense while the Advisory Committee would add specific language allowing a court to order production of the address and telephone number based on a defense showing of "need."

The Advisory Committee's approach highlights an inconsistency in the way it handles defendants' interests and victims' interests. The Committee has chosen to spell out in the rules how a defendant can obtain access to a victim's address and telephone number. Of course, if the Constitution or a statute already requires the prosecutor to turn over that personal information, any rule is simply an irrelevancy. Presumably, the reason that the Advisory Committee added the language is because it knows that the language is not irrelevant — that is, that the Constitution and statute do not always require production of this information.[160] Obviously, nothing is wrong with the Advisory Committee drafting the rules that go beyond the Constitution and statutes to protect defendants' legitimate interests. That approach is, indeed, commendable. What is wrong is for the Committee to work through its rules to make sure *defendants* are treated fairly — even in the absence of an overarching statutory command to that effect — while it would not be willing to do the same for crime victims, even where the CVRA directly commands that victims be treated "with fairness."

In any event, the Committee's proposal is decidedly unfair. The Committee proposes a two-pronged approach:

> If the government intends to rely on a victim's testimony to establish the defendant's presence at the scene of the alleged offense and the defendant establishes a need for the victim's address and telephone number, the court may:
>
> (i) order the government to provide the information in writing to the defendant or the defendant's attorney; or
>
> (ii) fashion a reasonable procedure that allows the preparation of the defense and also protects the victim's interests.

Notice that the court can order disclosure of the victim's address upon a mere showing by the defendant of "a need," by proceeding under subparagraph (i) of the proposed rule; the requirement to protect the victim's interests is triggered only if the court chooses to proceed under paragraph (ii). And the proposed rule fails to give any guidance on when the court should proceed under paragraph (ii) as opposed to paragraph (I).

The Advisory Committee's specifically listing of two ways in which the court can avoid the requirements of withholding a victim's name seems entirely unnecessary. Subsection (d) of the Rule already allows a court to grant an exception to any of the requirements of the rule for "good cause."[161] This exception has been used to justify the government's non-disclosure of its witnesses

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[160] *See generally infra* notes 243–48 and accompanying text (reviewing case law establishing that criminal defendants lack any constitutional or statutory right to discovery); *infra* notes 258–63 and accompanying text (discussing Jencks Act limitations on disclosure of witness identities).

[161] FED. R. CRIM. P. 12(d).

in situations where their safety might be jeopardized.[162] There is, accordingly, no need to add "wiggle room" language in Rule 12.1 as it already exists.

More important, the Advisory Committee's approach is fundamentally flawed. It makes no sense to require that the victim's interests be considered only half the time — i.e., only where the court proceeds under paragraph (ii) but not under paragraph (i). More important, since the Committee appears to agree that disclosing a victim's address raises obvious safety concerns, allowing disclosure without any consideration of the victim's interests violates the CVRA's command that the victim must be "reasonably protected from the accused."[163] A court proceeding under paragraph (i) would be under no obligation to "protect[] the victim's interests" (as paragraph (ii) specifically provides), since it is a standard rule of construction that *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of the other).[164] At a bare minimum, the CVRA requires redrafting the rule so that victims' interests are *always* considered before a court can order production of a victim's address.

Also interesting are the choices that the Advisory Committee specifically lists for a judge. The options given are (i) "order the government to provide the information in writing" or (ii) "fashion a reasonable procedure that allows the preparation of the defense and also protects the victim's interests." The listing of these two (and only these two) options seems to imply that the court does not have a third option — i.e., (iii) decline to order a victim's address be turned over. It is simply not the case that every time the defendant can establish a "need" for information (no matter how trivial or how remotely connected to the case) the court should either disclose a victim's address or fashion some other procedure toward the same end.

Even where the defendant can establish need, it may be the case that victims' safety interests will prevail. For example, in *United States v. Wills*,[165] the district court allowed the government to delay the disclosure of the name of a witness because the witness feared for her safety and the defendant had a violent history. On appeal to the Ninth Circuit, the defendant sought reversal of his conviction, arguing that "the district court abused its discretion in finding good cause to permit the government to withhold [the witness] from its alibi rebuttal list and witness list."[166] Before his trial, Wills had provided the government with the name of one alibi witness. In response, the government filed a sealed, *ex parte* application under Rule 12.1(e) seeking an exception to its obligation to disclose its alibi rebuttal witness to the defense.[167] Based on the defendant's violent history and

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[162] *See, e.g., United States v. Causey*, 834 F.2d 1277, 1282 (6th Cir. 1987) (noting that, in light of Rule 12(d), any penalty for violating the rule is "neither mandatory nor absolute").

[163] 18 U.S.C. 3771(a)(1).

[164] *See, e.g., Swanson v. United States*, 224 F.2d 795 (9th Cir. 1955) (applying the principle of *expressio unius est exclusio alterius* when constructing FED. R. CRIM. P. 46(f)(1)).

[165] 88 F.3d 704, 710 (9th Cir. 1996).

[166] *Id.* at 708 (internal quotations omitted).

[167] *Id.* at 709.

apparent ability to "induc[e] others to commit crimes on his behalf," the court allowed the government to delay the disclosure of the witness.[168]

Wills noted that two other circuits had addressed or commented on the issue. The Sixth Circuit, in *United States v. Causey*,[169] held that good cause existed to justify the nondisclosure of a witness to the defense. *Causey* found evidence in the record indicating that witnesses were being threatened in an attempt to prevent them from testifying.[170] "In such a situation, the physical safety and protection of potential witnesses constitutes a proper consideration of a trial court in determining whether good cause exists to justify nondisclosure of witnesses to opposing counsel and thus noncompliance with Rule 12.1."[171] Similarly, in *United States v. Elizondo*,[172] the Seventh Circuit cited *Causey* for the proposition that the protection of potential witnesses could justify postponing disclosure.[173] Following the reasoning of the Sixth and Seventh Circuits, *Wills* held that the "district court did not abuse its discretion in finding that good cause existed to authorize the Government to delay disclosure of [the witness's] identity."[174]

The Advisory Committee might respond to these criticisms of its proposal this by pointing to discretionary language in its proposal; the proposed rule states that the court "may" order production of the evidence or the fashioning of an alternative procedure. But given the obvious safety concerns that attend disclosure of the victim's home address to the defense, the Advisory Committee should exercise extreme caution. More important, courts have no discretion to ignore the commands of the CVRA. Courts must always protect a victim's right "to be reasonably protected from the accused."[175] The proposed rule does not faithfully implement that instruction. Indeed, the safety problems attendant to the Committee's proposal are heightened by fact that disclosure is authorized to "*the defendant* or the defendant's attorney." It does not take a great deal of imagination to foresee problems arising from telling criminal defendants themselves exactly where the victims who will testify against them live. In fairness to the Advisory Committee, it was only tracking language used elsewhere in Rule 12.[176] All of Rule 12 should be redrafted to require disclosure only to defense counsel, rather than to the defendant personally.[177]

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[168] *Id.* at 710.

[169] 834 F.2d 1277 (6th Cir. 1987).

[170] *Id.* at 1282.

[171] *Id.*

[172] 920 F.2d 1308 (7th Cir. 1990).

[173] *Id.* at 1314.

[174] 88 F.3d at 710.

[175] 18 U.S.C. 3771(a)(1).

[176] *See, e.g.*, FED. R. CRIM. P. 12(b)(1).

[177] Of course, if the defendant were acting *pro se*, *see Faretta v. California*, 422 U.S. 806, 807 (1975), then he would be counsel in the matter.

This may be a convenient place to highlight another defect in the Committee's proposal — the crime victim will have no right to be heard on whether her address should be handed over the defendant. As discussed shortly,[178] I had originally proposed allowing victims to be heard "on any matter directly affecting a victim's right" — e.g., whether disclosing a victim's home address violates the victim's right to reasonable protection. The Advisory Committee waters down that proposal, recommending only that the victim must "be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime."[179] Under the Advisory Committee's formulation, therefore, crime victims would seemingly have no right to be heard on disclosure of their address. This is not a matter concerning "release, plea, or sentencing" and, in many cases, this issue will be decided by written pleadings rather than in a "public proceeding." Nothing better illustrates the unfairness of the Advisory Committee's proposals then its refusal to guarantee that a crime victim will be heard on the subject of whether *her home address* will be turned over to a defendant accused of victimizing her!

Compounding all these problems is one more: The Advisory Committee appears to encourage the use of crime victim depositions or other face-to-face meetings between victims and defendants. In its proposed Note to the amended rule, the Advisory Committee describes as one possible procedure for dealing with a defense request for a victim's home address that "the court might authorize the defendant and his counsel to meet with the victim in a manner and place designated by the court, rather than giving the defendant the name and address of victim."[180] This Note raises a host of problems. Most importantly, a federal court lacks jurisdiction to require a crime victim to appear at a face-to-face, pretrial meeting with the defendant. The "'[f]ederal courts are courts of limited jurisdiction,'"[181] and federal judges have no general power to compel private citizens to meet with defendants before a trial.[182] Moreover, the Advisory Committee seems to envision that such orders could issue without the victim even being heard on the subject, a deprivation of liberty without due process of law.[183]

Even if the court had authority and had considered a victim's arguments, a face-to-face meeting with the defendant raises other problems. Such a meeting is a deposition in all but name. Yet Rule 15 provides stringent limits on the circumstances in which a defendant can depose a victim.

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[178] *See* notes 425-40 infra and accompanying text (discussing proposed Rule 60(a)(3)).

[179] Proposed Amendments, *supra* note 68, Rule 60.

[180] Proposed Amendments, *supra* note 68.

[181] *Rasul v. Bush*, 542 U.S. 466, 489 (2004) (quoting *Kokkenen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 377 (1994)).

[182] *See, e.g., State* ex rel. *Beach v. Norblad*, 781 P.2d 349, 350 (Or. 1989) (reversing trial court order requiring crime victim to allow defense counsel to examine her home for evidence; victim "is under no obligation to obey an order that the defendant trial judge lacked authority to issue"); *State v. Gabrielson*, 464 N.W.2d 434, 438 (Iowa1990) (finding no constitutional, statutory, or other authority for trial court to order a psychiatric examination of a sexual abuse victim).

[183] *See* U.S. CONST. amend. XIV.

In particular, any deposition is limited to "exceptional circumstances" and a deposition for discovery purposes is not permitted.[184] The Advisory Committee Note suggesting a meeting between a victim and a defendant does an end-run around these limitations.

In light of all these concerns, the best approach is simply to strike the existing requirement that a victim's address and phone number be turned over as part of an alibi defense, as I proposed. It should also be noted that this proposal raises no due process concerns that might stem from a one-sided reciprocal discovery rule. The proposal applies even handedly to both prosecution and the defense. Neither side is required to disclose the address or telephone number of a victim, thus complying with the Supreme Court's instruction that "in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street."[185] In any event, protecting victims from serious harm is certainly a strong state interest that would justify any incidental effect on defense preparations for trial.

Finally, however one ends up on the proper formulation of the address issue under Rule 12.1 (governing alibi defenses), the same formulation ought to be used in Rule 12.3 (governing public-authority defenses). Although I made this recommendation in my article,[186] the Advisory Committee appears to have overlooked this parallel provision in need of amendment. So that it is not overlooked again, I will set out the proposal in full. Tracking my recommendations for Rule 12.1, I recommend a parallel amendment to Rule 12.3 as follows:

Rule 12.3 Notice of a Public-Authority Defense

. . .

(4) **Disclosing Witnesses.**

(A) **Government's Request**. An attorney for the government may request in writing that the defendant disclose the name~~, address, and telephone number~~ of each witness and the address and telephone number of each witness (other than the victim) the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than 20 days before trial.

(B) **Defendant's Response**. Within 7 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name~~, address and telephone number~~ of each witness~~.~~ and the address and telephone number of each witness (other than the victim).

© **Government's Reply**. Within 7 days after receiving the defendant's statement, an attorney for the government must serve on ~~the defendant or~~ the defendant's attorney a written statement of the name~~, address, and telephone number~~

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[184] CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE (CRIMINAL) § 241, at 11 (2000 & Supp. 2006); *see, e.g., In re United States*, 878 F.2d 153, 157 (5th Cir. 1989).

[185] *Wardius v. Oregon*, 412 U.S. 470, 475 (1973).

[186] Cassell, *supra* note 3, at 873.

of each witness, and the address and telephone number of each witness (other than the victim), the government intends to rely on to oppose the defendant's public-authority defense.

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

(1) the disclosing party learns of the witness before or during trial; and

(2) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier.

Rule 15 — Victims' Right to Attend Pre-Trial Depositions

The Proposals:

I proposed amending Rule 15 to allow victims to attend any public depositions as follows:

(i) Victims Can Attend. Victims can attend any public deposition taken under this rule under the same conditions as govern a victim's attendance at trial.[187]

The Advisory Committee did not propose any change to Rule 15.

Discussion:

Rule 15 authorizes depositions for the purpose of preserving evidence for trial,[188] thus, such depositions are an extension of the trial. Victims, accordingly, have the right to attend such proceedings (if they are public)[189] under the same conditions governing their attendance at trial. To avoid any confusion over this issue, the proposed rule change directly states that fact.

The Advisory Committee declined to adopt this recommendation, concluding that depositions "do not fall within the CVRA, which refers only to the victim's right not to be excluded from 'public *court* proceedings.'"[190] But here, again, the Committee has taken too narrow a view of the CVRA. It is simply unfair to victims to exclude them from a deposition in a criminal case — and, thus, a violation of the CVRA's command that victims be treated with fairness.

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[187] *Cassell*, *supra* note 3, at 874.

[188] *See, e.g., United States v. Edwards*, 69 F.3d 419, 437 (10th Cir. 1994).

[189] *Cf. United States V. L.M.*, 425 F. Supp. 2d 948 (N.D. Iowa 2006) (finding juvenile proceedings to be covered by the CVRA only insofar as they are *public* court proceedings).

[190] CVRA Subcommittee Mem., *supra* note 63, at 17 (emphasis in original) (quoting 18 U.S.C. § 3771(a)(3)).

The simplest proof of this conclusion is to consider the rights of criminal defendants at depositions. Rule 15 itself directly guarantees criminal defendants a right to attend a deposition.[191] Originally the rule was silent on a defendant's presence, but in the 1975 enactment of the rule,[192] a defendant was guaranteed the right to attend.[193] Presumably, a major reason the Advisory Committee added this language was to ensure fairness to defendants.[194] Indeed, after an indictment, "Rule 15 depositions might constitute a 'critical stage' in a prosecution — requiring the presence of counsel — because of the potential consequences of such depositions at trial."[195] Just as the Committee acted in 1975 to ensure defendants were treated fairly at criminal depositions, it should now do the same for victims.

Victims also deserve the right to attend pretrial depositions because they are now participants in the criminal justice process. As the Fifth Circuit explained in reversing a trial court which had allowed an *ex parte* deposition, "depositions are *never* ordered where one party to the suit can be present, ask the questions, and hear the answers, and the opposing party in the case is not only prevented from being present and asking questions, but is also denied even the opportunity to know what the questions and answers are."[196] The Fifth Circuit further noted that such "a procedure is not only wholly unauthorized, it is contrary to the most basic presuppositions of our adversary system of litigation."[197] Because a crime victim is now "an independent participant in the proceedings,"[198] the same considerations demand that victims be able to attend a pretrial deposition. To be sure, crime victims (like other members of the public) will have the opportunity to hear deposition testimony when it is introduced at trial.[199] But that may be a pale substitute for actually observing a witness testify in person.[200] Victims may also be able to facilitate the truth-seeking process by watching witnesses at the deposition at alerting prosecutors (or defense attorneys) to any false

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[191] *See* FED. R. CRIM. P. 15(d)(1)–(2).

[192] The Advisory Committee recommended various changes to the rule in 1974, which Congress modified somewhat in 1975. *See* WRIGHT, *supra* note 174, § 241, at 7–8. The changes discussed in this article were initiated by the Advisory Committee.

[193] WRIGHT, *supra* note 174, § 244, at 37.

[194] Part of the rationale may have also been to facilitate admission of the deposition testimony at trial, as a defendant has a right to confront adverse witnesses at trial. But the Confrontation Clause does not always guarantee defendants a right to attend a deposition, *see, e.g., United States v. Salim*, 855 F.2d 944 (2d Cir. 1988), so the defendant's right to attend the deposition must rest on a broader justification than implementing constitutional requirements.

[195] *United States v. Hayes*, 231 F.3d 663, 674 (9th Cir. 2000).

[196] *In re United States*, 878 F.2d 153, 157 (5th Cir. 1989).

[197] *Id.*

[198] 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[199] *See United States v. McDougal*, 103 F.3d 651, 659 (8th Cir. 1996).

[200] *See generally* Douglas E. Beloof & Paul G. Cassell, *The Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 534–38 (2005) (discussing reasons victims need to hear testimony in person).

statements that are being made.[201] Rule15 should, therefore, be amended to ensure that crime victims have a right to attend any deposition.

Rule 17 — Victims' Right to Notice of Subpoena of Confidential Information

The Proposals:

I recommended amending Rule 17 to ensure that subpoenas to third parties seeking personal and confidential information about crime victims would not be abused. Initially, I proposed requiring a court determination of relevance at trial and notice to a victim as follows:

> **Rule 17(h)(2)– Victim Information.** After indictment, no record or document containing personal or confidential information about a victim may be subpoenaed without a finding by the court that the information is relevant to trial and that compliance appears to be reasonable. If the court makes such a finding, notice shall then be given to the victim, through the attorney for the government or for the victim, before the subpoena is served. On motion made promptly by the victim, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.[202]

The Advisory Committee proposed more limited protections for such information as follows:

> **Rule 17(c)(3) –*Subpoena for Personal or Confidential Information About Victim*.** After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may not be served on a third party without a court order, which may be granted ex parte. Before entering the order, the court may require that notice be given to the victim so that the victim has an opportunity to move to quash or modify the subpoena.

The Advisory Committee also proposed the following note to accompany the rule change:

> **Subdivision(c)(3).** This amendment implements the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(a)(8), which states that victims have a right to respect for their "dignity and privacy." The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. Third party subpoenas raise special concerns because a third party may not assert the victim's interests, and the victim may be unaware of the subpoena. Accordingly, the amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The amendment also provides a mechanism for notifying the victim, and

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[201] *See id.* at 544-45 (advancing this argument about victims attending trials).

[202] Cassell, *supra* note 3, at 875.

makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2) on the grounds that it is unreasonable or oppressive.

The amendment applies only to subpoenas served after a complaint, indictment, or information has been filed. It has no application to grand jury subpoenas. When the grand jury seeks the production of personal or confidential information, grand jury secrecy affords substantial protection for the victim's privacy and dignity interests.

The amendment seeks to protect the interests of the victim without unfair prejudice to the defense. It permits the defense to seek judicial approval of the subpoena ex parte, because requiring the defendant to make and support the request in an adversarial setting may force premature disclosure of defense strategy to the government. The court may approve or reject the subpoena ex party, or it may provide notice to the victim, who may then move to quash. In exercising its discretion, the court should consider the relevance of the subpoenaed material to the defense, whether giving notice would prejudice the defense, and the degree to which the subpoenaed material implicates the privacy and dignity interests of the victim.

Having seen the Advisory Committee proposal and accompanying note, I am concerned that the limits on subpoenas found in the United States Supreme Court's decision in *United States v. Nixon*[203] might be vitiated by a broad rule. To ensure courts consistently apply *Nixon*'s substantive and procedural standards to victim-related subpoenas, I am modifying my earlier proposal to require a court determination of specificity, relevance, and admissibility at trial, as well as notice to the victim, as follows (new language italicized):

> **Rule 17(c)(3) – *Subpoena for Personal or Confidential Information About Victim*.** After a *complaint*, indictment, *or information* is filed, no record or document containing personal or confidential information about a victim may be subpoenaed without a finding by the court that the information is *specifically described*, relevant to *and admissible at* trial, and that compliance appears to be reasonable. If the court makes such a *tentative* finding, notice shall then be given to the victim, through the attorney for the government or for the victim, before the subpoena is served. On motion made promptly by the victim, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive *and may ask the court to revisit any tentative findings. A subpoena shall not be used for discovery purposes or to obtain information for impeachment at trial.*

Discussion:

The issues involved in the Rule 17 amendments are complicated and very important. It is useful to divide the discussion into three parts: (1) the problem the proposals address; (2) the

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[203] 418 U.S. 683 (1974).

procedural flaws in the Advisory Committee's proposal allowing *ex parte* subpoenas; and (3) the general lack of authority for subpoenas seeking crime victim information.

(1) The Problem of Subpoenaing Confidential Victim Information

The existing rules governing subpoenas are flawed because they allow the parties to subpoena personal or confidential information about a victim from third parties without the victim knowing. This issue was highlighted recently in the notorious Utah state criminal proceedings involving the kidnapping of Elizabeth Smart.[204] Attorneys for Elizabeth's alleged kidnapper subpoenaed class records from her high school (class and teacher lists, report cards, and disciplinary and attendance records) and medical records from her hospital.[205] The school turned over the requested records without notice to the Smart family, while the hospital refused to turn over the requested records. When Elizabeth's father learned that her school records had been turned over to defense counsel, he filed a motion to have the records returned to the school. Prosecutors in the case also objected that they were not given an opportunity to file a motion to quash.[206] The matter is apparently still under review in the state courts.

The problem that occurred in the Smart case under the Utah state rules could occur under the federal rules — as the attorney for Elizabeth Smart pointed out to the Advisory Committee in a letter.[207] The federal rules currently permit an objection from the *witness* to whom the subpoena for documents or records is issued,[208] but there is no provision for notifying the interested party (e.g., the *victim*) when personal or confidential information is subpoenaed from a third party.

A recent federal case illustrates the problem under the current rules.[209] In an assault case, defense counsel used Federal Rule of Criminal Procedure 17(c) to obtain a subpoena for the victim's medical records held by the Veterans Administration. The federal district judge approved the subpoena and issued an order, ex parte and under seal, directing the VA to provide defense counsel with the records. Defense counsel then obtained the records, all without knowledge of the prosecutor or the victim. These records included extraordinarily intimate information about the victim,

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[204] *See generally* ED SMART & LOIS SMART, BRINGING ELIZABETH HOME: A JOURNEY OF FAITH AND HOPE (2003).

[205] Stephen Hunt, *Defense Blasted for Obtaining Smart's School Records*, SALT LAKE TRIB., Jan. 14, 2005, at B2.

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

[207] *See* Letter from Gregory G. Skordas, attorney for Elizabeth Smart, to Judge Susan Bucklew (May 23, 2005) (on file with author).

[208] FED. R. CRIM. P. 17(c).

[209] *See* E-mail from Rod J. Rosenstein, U.S. Attorney for the District of Maryland to Russell Butler, Maryland Crime Victims' Resource Center (Jan. 3, 2007), *reprinted in* Testimony of Russell Butler to the Federal Criminal Rules Advisory Comm. (Jan. 19, 2007), available on http://www.uscourts.gov/rules/2006_Criminal_Rules_Comments_Chart.html.

including sensitive medical conditions, medications, psychiatric counseling and the like. The matter came to the prosecutor's attention (and, thus, the victim's attention) only because defense counsel "warned" the prosecutor, while attempting to negotiate a favorable plea, that taking the case to rial would cause irreparable harm to the victim because, by the time the defense attorney got finished with the victim, the victim would never trust a therapist again. All this happened without any notice to the victim and without any opportunity to present arguments against disclosure of this sensitive information.

Allowing such subpoenas to be delivered without notice to the victim violates the CVRA's provisions guaranteeing victims the rights to be treated "with respect for the victim's dignity and privacy" as well as "with fairness."[210] With respect to the protection for dignity and privacy, allowing subpoenas to go directly to third-party custodians of records could provide no protection if the custodian is disinclined to protect the victim's privacy. Subpoenas without notice to victims also raise fairness concerns, particularly if issues implicating the right of privacy are concerned.[211]

(2) Procedural Problems with the Advisory Committee Approach

To ensure protection of crime victims' rights when subpoenas for confidential information are issued, it is necessary to change the federal rules. I proposed an amendment to guarantee notice to crime victims as well as a court determination that the information was relevant at trial before victims' personal and confidential information could be subpoenaed. The Advisory Committee agreed that Rule 17 needed to be amended, but it proposed more limited protections for victims. The Committee would require court approval before any subpoena issues to a third party seeking information about a victim. However, the court would have discretion about whether to give the victim an opportunity to be heard on the subpoena; and there are no substantive limits on the kinds of information that defendants can subpoena.

Turning first to the procedural problems with the Advisory Committee proposal, the Committee would essentially remit the entire issue of whether to issue a subpoena for personal or confidential information (and, indeed, whether to even tell a victim about such a subpoena) to the discretion of the court. The only protection the Committee offers is the requirement of a court order approving such a subpoena. The Committee gives courts discretion to notify the victim or simply issue the subpoena *ex parte.*

Allowing the issuance of *ex parte* subpoenas is plainly unfair to victims. When a victim's *personal* or *confidential* information is at stake, it is truly hard to understand how anyone could argue that allowing it to be turned over to the defense without any opportunity to be heard treats victims "fairly," as the CVRA requires.

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[210] 18 U.S.C. § 3771(a)(8).

[211] *See infra* notes 283–87 and accompanying text.

The Advisory Committee does not clearly explain when a court should proceed *ex parte* and when it should follow the standard practice of giving notice to the victim as the affected party. The only justification the Committee gives for the extraordinary step of allowing *ex parte* procedures is to avoid forcing "premature disclosure of defense *strategy* to the government."[212] But when a victim's confidential information is at stake, some interest in concealing "strategy" from the opposing party can hardly be sufficient grounds for *ex parte* issuance of a subpoena. As the Supreme Court has bluntly explained, our adversary system is not "a poker game in which players enjoy an absolute right always to conceal their cards until played."[213]

Allowing *ex parte* procedures violates basic principles of fairness. The American Bar Association raised this point quite effectively in its comments to the Advisory Committee on Rule 17. The ABA explained that Canon 3(B)(7) of the Model Code of Judicial Conduct provides in pertinent part that "[a] judge shall accord to every person who has a legal interest in the proceedings, or that person's lawyer, the right to be heard according to law."[214] Rule 17 would allow that precept to be violated by denying some victims a chance to heard before compromising their legal rights to confidentiality in personal and confidential information. Similarly, the ABA noted that its Model Code of Judicial Conduct generally forbids courts from considering ex parte communications.[215] Rule 17, of course, flies in that face of that well-established prohibition. While the Model Code of Judicial Conduct is not binding on federal courts, its principles have generally been viewed as instructive.[216]

Defense attorneys would also be treading on ethical thin ice under proposed Rule 17. The ABA also pointed out that the Model Rules of Professional Conduct and the ABA Criminal Justice Standards both provide that "[i]n representing a client, a lawyer shall not . . . use methods of obtaining evidence that violates the legal rights of such a [third] person."[217] When defense attorneys obtain ex parte subpoenas for a victim's confidential information, they may very well violate the

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[212] Proposed Amendments, *supra* note 68, Rule 17, at 363 (emphasis added).

[213] *Williams v. Florida*, 399 U.S. 78, 82 (1970) (citing William J. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1960 WASH. U.L.Q. 279, 292 (1960)).

[214] MODEL CODE OF JUD. CONDUCT. Canon 3(B)(7), *cited in* Letter from Robert M.A. Johnson, Chair, ABA Criminal Justice Section, to Hon. Peter G. McCabe, Secretary of the Committee on Rules of Practice and Procedure (Feb. 1, 2007), available at www.uscourts.gov/rules/2006_Criminal_Rules_Comments_Chart.htm.

[215] ABA MODEL CODE OF JUD. CONDUCT Cannon 3(B)(7), *cited in* Letter from Robert M.A. Johnson, Chair, ABA Criminal Justice Section, to Hon. Peter G. McCabe, Secretary of the Committee on Rules of Practice and Procedure (Feb. 1, 2007), available at www.uscourts.gov/rules/2006_Criminal_Rules_Comments_Chart.htm.

[216] *See* Debra Lynn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 679 (2005), citing to *U.S. v. Will*, 449 U.S. 200 (1980) and *Hanrahan v. Hampton*, 446 U.S. 1301 (1980).

[217] MODEL RULES PROF. CONDUCT Rule 4.4(a); ABA CRIM. JUST. STD. 4-4.3.

rights of the victim, such as the right to confidentiality preserved in the doctor-patient privilege or psychotherapist-privilege.

For reasons such as these, the federal rape shield rule (among other examples) properly requires defendants to *always* provide notice to the court — and to the victim — before seeking to introduce evidence about a rape victim's prior sexual history.[218] The rape shield rule does not create any exception for situations that might lead to disclosure of defense "strategy." Rule 17 should follow the same approach and insure that victims *always* have an opportunity to contest disclosure of their personal and confidential information in court.

Any defense interest in withholding strategy must give way to facially-neutral rules. Both my proposed amendment and the Advisory Committee's proposed amendment apply even-handedly to *both* the prosecution and the defense. Thus, the amendments are not designed to force disclosure of *defense* strategy, as they may also force disclosure of *prosecution* strategy if it is the prosecution who subpoenas confidential victim information. Due process is satisfied as long as the prosecution and the defense have reciprocal rights and courts apply the rules consistently.[219]

The objectionable feature of the Advisory Committee proposal is that the subpoena could be issued without notice to a crime victim. A narrower issue is whether certain pleadings could be filed on this question on an *ex parte* basis. Such *ex parte* might be appropriate, in the sense that once the court gives notice that it is considering whether to issue a subpoena, then the defendant, the government, or, indeed, the victim might wish to file parts of their pleadings under seal for good cause shown. Requests for such sealing could be handled in the ordinary course of litigation – once the victim knew that such litigation was occurring.

Even if there is some tangential defense interest in conceding strategy, the Advisory Committee proposal addresses it in the most haphazard way. Consider the Elizabeth Smart example mentioned earlier, in which the defense sent *ex parte* subpoenas to Elizabeth's school and hospital. Under the Committee's proposal, a court could still decide to approve those subpoenas *ex parte* to prevent disclosure of some secret defense "strategy." But once the school and the hospital received the subpoenas, nothing would bar *them* from revealing the subpoenas' existence to the victim — and, indeed, the world. Thus, the interest the Committee purports to protect (concealing defense trial strategy) would actually be protected only when the third party, for whatever reason, chose not reveal

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[218] *See* FED. R. EVID. 412(c)(1)(B). It is noteworthy that the federal rape shield rule contains no "ex parte" procedures or exemptions for protecting defense "strategy."

[219] *See Wardius v. Or.*, 412 U.S. 470, 475–76 (1973); *United States v. Bahamonde*, 445 F.3d 1225, 1229 (9th Cir. 2006); *Newman v. Hopkins*, 192 F.3d 1132, 1135 (8th Cir. 1999); *United States* ex rel. *Veal v. DeRobertis*, 693 F.2d 642, 646–47 (7th Cir. 1982). Indeed, such reciprocity may not even be required if "significant government interests" support its omission. *Wardius*, 412 U.S. at 476.

the subpoena. In the Smart case, for instance, the school did not reveal the defense "strategy"[220] because it simply handed the materials over to the defense — in possible contravention of the Family Educational Rights and Privacy Act.[221] But the hospital refused to hand over Elizabeth's records and contacted the Smart family, which ultimately led to a public outcry over the subpoenas. There is no rhyme or reason to a procedure that is supposed to protect defense strategy but that actually turns on the happenstance of whether third parties choose to notify crime victims or the public about subpoenas they receive.

The flukiness of the Committee's approach becomes even clearer when one realizes that defense "strategy" can be protected only where the confidential information happens to rest in the hands of a third party rather than the victim herself. Consider, for example, a rape victim who has talked to a rape crisis counselor, who takes notes of the meeting. A defendant might attempt to subpoena those notes from the counselor.[222] But if the counselor had previously transferred the notes back to the rape victim, then the subpoena would have to be directed to the victim herself — and the victim could then move to quash the subpoena. This is not some academic hypothetical, as rape counselors in Pennsylvania in the 1980s used precisely this procedure to protect their clients against abusive defense subpoenas.[223] Moreover, rape counselors — and, indeed, most third parties involved in maintaining the personal and confidential information of victims — will probably have very strong incentives for disclosing the fact of the subpoena to the victim, because of both ethical and legal considerations.[224] Thus, the Committee's use of *ex parte* procedures will protect defense strategy from disclosure in only the most random way.

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[220] Such as it was — apparently the only reason for the subpoenas was to try and dig up some "dirt" on the young kidnapping victim. *See* Stephen Hunt, *Defense Blasted for Obtaining Smart's School Records*, SALT LAKE TRIB., Jan. 14, 2005, at B2.

[221] 20 U.S.C. § 1232g (2000).

[222] As will be discussed shortly in the next section of this article, such a subpoena would likely be inappropriate for substantive reasons as well.

[223] The Pennsylvania Supreme Court initially found that records held by rape counseling centers were subject to only limited protection from defense subpoenas. *See In re Pittsburgh Action Against Rape*, 428 A.2d 126, 132 (Pa. 1981). The results of that unfortunate decision were swift. Rape victims requested the return of their records from the center and, in some cases, even requested termination of the counseling relationship. *See Commonwealth v. Wilson*, 602 A.2d 1290, 1294 n.6 (Pa. 1992), *cert. denied*, 504 U.S. 977 (1992); Beth Stouder, Note, *Criminal Law and Procedure (Evidence) — Pennsylvania Establishes New Privilege for Communications Made to a Rape Crisis Center Counselor*, 55 TEMP. L.Q. 1124, 1145 (1982). In light of this serious problem, the Pennsylvania Legislature enacted a new, absolute privilege protecting communications to rape crisis counselors from any disclosure without the consent of the victim. *See* PA. CON. STAT. § 5945.1(b) (upheld against constitutional attack in *Wilson*, 602 A.2d at 1297).

[224] *Cf.* Health Insurance Portability and Accountability Act, 42 U.S.C. 201 *et seq.* (2000 & Supp. 2006).

The impossibility of truly ex parte procedures for Rule 17 subpoenas to third-parties has been recognized by several court decisions. For example, in *United States v. Urlacher*,[225] the defendant sought to use Rule 17 to subpoena financial, family, and employment information concerning an individual believed by the defendant to be the Government's main witness at trial. The court declined to approve the subpoena *ex parte*, explaining that the custodian of the records "has a Rule 17(c) motion to quash or modify, and one cannot easily imagine that such a motion should be heard and decided in secret and hidden from the opposing party and the public."[226] The court went on to explain the constitutional difficulties presented by such an approach, given that the First Amendment creates a general public right of access to court proceedings.[227]

Even if there is some arguable defense interest in not disclosing "strategy," that interest must be subordinated to the compelling victim interests that are at stake. My proposal (and the Advisory Committee's) applies to third-party subpoenas directed to the victim's *personal or confidential* information. Congress has commanded that victims must not only be treated with "fairness," but also "with respect for the victim's dignity and privacy."[228] Protecting dignity and privacy requires a hearing when confidential information is at stake.

The Advisory Committee Note on the Committee's proposal does obliquely deal with this issue — in a way that misstates the relevant legal landscape. The Advisory Committee Note accompanying the proposed Rule 17 amendment states vaguely that, "[i]n exercising its discretion [about whether to give notice of a request for a subpoena], the court should consider the relevance of the subpoenaed material to the defense, whether giving notice would prejudice the defense, and the degree to which the subpoenaed material implicates the privacy and dignity interests of the victim."[229] This imprecise listing of discretionary factors misstates the law. The court is not required to "consider" some victim-related factors and then make a discretionary decision. The CVRA commands that victims have "the right" to "be treated . . . with respect for the victim's dignity and privacy." Thus, if withholding notice to a victim notice fails to respect the victim's dignity and privacy (as I believe it invariably will), then the court *must* give notice — end of story.[230] The

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[225] 136 F.R.D.550 (W.D.N.Y. 1991)

[226] *Id.* at 556.

[227] *Id.*. *But cf. United States v. Beckford*, 994 F.Supp. 101 (E.D. Va. 1997) (noting that *Urlacher* states the majority rule, but concluding that ex parte procedures should be permitted in "exceptional circumstances").

[228] 18 U.S.C. § 3771(a)(8).

[229] *See* Proposed Amendments, *supra* note 68, Rule 17.

[230] In theory, the Advisory Committee could argue that the CVRA is unconstitutional in this respect and, therefore, must give way. But the CVRA is presumed to be constitutional and the case law strongly supports the Act. *See, e.g., Wardius v. Oregon*, 412 U.S. 470, 475 (1973) (finding no constitutional barrier to reciprocal discovery rules that act as a "two-way street"). *Cf. Forsythe v. Walters*, 38 Fed. Appx. 734, 737 (3d Cir. 2005) (finding that "application of the CVRA does not exact a punishment and therefore the CVRA can not violate the Ex Post Facto Clause").

CVRA flatly directs: "In any court proceedings involving an offense against a crime victim, the court *shall ensure* that the crime victim is afforded the rights described [in the CVRA]."[231]

The Advisory Committee Note is also an incomplete listing of the victim's rights that are implicated in decisions about issuing subpoenas. From a procedural perspective, if the court holds a hearing on whether to issue the subpoena, the CVRA entitles a crime victim to notice of that proceeding[232] and to an opportunity to attend that hearing, unless the victim's testimony would clearly be materially affected from attending the hearing.[233] From a substantive perspective, subpoenas for personal or confidential materials are often outside the scope of legitimate discovery, as will be explained in the next section. Such subpoenas can also implicate a victim's right to "be reasonably protected from the accused."[234] For example, a defense subpoena to the Department of Motor Vehicles for address information could very directly jeopardize a victim's safety.[235] Yet the Advisory Committee Note makes no mention of such legitimate factors — factors the CVRA requires courts to consider.

Finally, given all this, if disclosure of defense "strategy" somehow remains the overriding issue in handling a subpoena, there are less-abusive means for dealing with the problem. For example, a court could give the victim notice of the subpoena but also enter an order forbidding the prosecution from using any information it might learn as a result of this disclosure. Such an order is far preferable to the *ex parte* procedure proposed by the Advisory Committee.

For all these reasons, the Advisory Committee's proposal is insufficiently protective of crime victims' procedural rights.

(3) The Lack of a Basis for Defense Subpoenas for Confidential Information

The Advisory Committee's approach is not only procedurally flawed but also substantively flawed. In particular, the Committee arguably expands a defendant's power to subpoena confidential material from a victim, thereby creating new rights for defendants at the expense of victims' rights under the CVRA. This violates the Rules Enabling Act, which provides that court-promulgated rules shall not "abridge, enlarge or modify any substantive right."[236]

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[231] 18 U.S.C. § 3771(b)(1) (emphasis added).

[232] *Id.* § 3771(a)(2)

[233] *Id.* § 3771(a)(3).

[234] *Id.* § 3771(a)(1).

[235] In addition, the ability to subpoena such information would directly undermine current case law, which grants the defendant no right to disclosure of the names and addresses of government witnesses before trial. *See infra* notes 259-76 and accompanying text for further discussion of this point.

[236] 28 U.S.C. § 2072(b).

The Advisory Committee's proposed rule would read: "[A] subpoena requiring the production of personal or confidential information about a victim may not be served on a third party without a court order, which may be granted ex parte."[237] The clear implication of this sentence is that, *with* a court order, a subpoena can be served on a third party requiring production of personal or confidential information. Nothing in the proposed rules (or the Advisory Committee notes) appears to require any further showing before the subpoena would issue. This seems to give defendants unrestrained subpoena power over confidential information. If this implication is correct, then the Advisory Committee has, remarkably, taken a law designed to provide more protection for victims and used it to create less.

The governing law on subpoenas comes from *United States v. Nixon*,[238] which interpreted Rule 17 to require a subpoenaing party to show relevancy, admissibility, specificity of any information sought.[239] In particular, for a subpoena to issue before trial, *Nixon* requires the moving party to show:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."[240]

Because of this governing law, I proposed that Rule 17 should itself identify restrictions on a defendant's ability to subpoena confidential information. My proposal incorporates specificity, relevancy, and admissibility components — conforming with, rather than altering, the law. My current proposal[241] requires the information be specifically described and admissible at trial — and it bars evidence sought for impeachment purposes only. In contrast, the Advisory Committee seemingly enlarges the substantive rights of defendants by failing to reference even a single *Nixon* factor in its proposal. Thus, unless a court takes it upon itself to ensure the relevancy, specificity, and admissibility of the subpoenas, the Advisory Committee proposal might provide the defendant with license to conduct the very "fishing expedition" that *Nixon* forbids.

The proposed Advisory Committee Note adds to this confusion. The Note indicates that in considering whether to issue the subpoena, the court should consider "the relevance of the

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[237] Proposed Amendments, *supra* note 68, Rule 17(c)(3) at 362.

[238] 418 U.S. 683 (1974).

[239] *Id.* at 700.

[240] *Id.* at 699 (citing *United States v. Iozia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952)).

[241] My earlier proposal specifically required that no subpoena would issue "without a finding by the court that the information is *relevant to trial*." Cassell, *supra* note 3, at 875 (emphasis added). In view of the importance of the *Nixon* factors, it now seems desirable to spell them all out, as my current proposal does.

subpoenaed material to the defense."[242] But this is an overly-broad formulation. The court should only consider the relevance of the material to the defense *at trial*, since this is the only permissible basis for a subpoena.

Current law clearly limits Rule 17 subpoenas to evidence that is admissible at trial. The reason for *Nixon*'s limitations of relevance, admissibility, and specificity is that subpoenas are "not intended to provide a means of discovery for criminal cases" but only to "expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials."[243] With regard to admissibility, *Nixon* explained that "[g]enerally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial."[244] In other words, documents sought for the narrow purpose of impeachment are not evidentiary for the purposes of Rule 17.[245] In *Nixon*, only because the prosecutor made a sufficient preliminary showing that the subpoenaed tapes contained "evidence admissible with respect to the offenses charged in the indictment" and that the evidence could be validly used as non-impeachment evidence, did the Court find the evidence to be subpoenable.[246] Courts apply *Nixon*'s admissibility test strictly, rejecting, for example, subpoenas for hearsay evidence that would be inadmissible at trial.[247]

The cases have recognized that broad subpoenas run afoul of these limitations — including subpoenas seeking information about crime victims.[248] For example, in *United States v. Hang*,[249] the Eighth Circuit affirmed the district court's refusal to issue subpoenas designed to uncover documents relating to the mental health of a victim and various witnesses.[250] The court described the broad and speculative nature of the request directed toward a hospital, observing that the defense was "'hard-pressed' to describe the information it hoped to discover in the materials."[251] Consistent with *Nixon*, the court found the defendant's request "exemplified his 'mere hope' that the desired documents would produce favorable evidence, and a Rule 17(c) subpoena cannot properly be issued upon a 'mere hope.'"[252] Similarly, in *State v. Percy*,[253] the Vermont Supreme Court upheld the lower court's refusal to order production by the victim. The defendant had requested production of the victim's

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[242] Proposed Amendments, *supra* note 68, Rule 17.

[243] *United States v. Nixon*, 418 U.S. 683, 698–99 (1974) (emphasis removed).

[244] *Id.* at 701.

[245] *See United States v. Cherry*, 876 F. Supp. 547, 553 (S.D.N.Y. 1995).

[246] *Nixon*, 418 U.S. at 701–702.

[247] *See, e.g.*, *Cherry*, 876 F. Supp. at 553.

[248] *Cf. United States v. Alexander*, 1996 U.S. App. LEXIS 1662, *16–17 (9th Cir. Jan. 18, 1996); *United States v. Cherry*, 1991 U.S. App. LEXIS 18192, *11–13 (4th Cir. Aug. 12, 1991); *Amsler v. United States*, 381 F.2d 37, 51 (9th Cir. 1967).

[249] 75 F.3d 1275 (8th Cir. 1996).

[250] *Id.* at 1283–84.

[251] *Id.* at 1283.

[252] *Id.* (citing *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980)).

[253] 548 A.2d 408 (Vt. 1988).

mental health information, arguing it was necessary for him to present his defense.[254] The Vermont Supreme Court rejected the defendant's arguments, finding that he made no showing of the materiality or helpfulness of the information — "indeed, [the] defendant essentially admitted the underlying acts."[255] The court also found it notable that the information sought was in the hands of a third party — not the State — and that the defendant made a broad request, rather than specifying particular records in the subpoena.[256] In aggregate, the court considered those factors "fatal" to the defendant's request.[257]

These cases were all decided against a constitutional backdrop that must favor crime victims: a criminal defendant has no constitutional right to conduct discovery, while confidential and personal information of crime victims may be protected by a constitutional right of privacy.

The Supreme Court has clearly held that "[t]here is no general constitutional right to discovery in a criminal case."[258] Indeed, the Constitution "has little to say regarding the amount of discovery which the parties must be afforded."[259] The only remotely-related due process requirement the Court has recognized is the requirement that prosecutors disclose evidence that is favorable to the accused and material to guilt or punishment[260] — evidence that would deprive the defendant of a fair trial if not disclosed.[261] But even this rule — the *Brady* rule — is not a discovery rule and it does not reflect any discovery rights. Rather, it is a "self-executing constitutional rule" — a rule of "fairness and minimum prosecutorial obligation."[262] Recognizing this, the Supreme Court has carefully circumscribed *Brady*: "An interpretation of *Brady* to create a broad, constitutionally required right of discovery would entirely alter the character and balance of our present system of criminal justice."[263] Indeed, *Brady*'s requirements are incongruous with traditional discovery, as *Brady* does not even apply at pre-trial stages.[264] Rule 16 of the Federal Rules of Criminal Procedure was built on this foundation. The assumption that no right to discovery exists "is still the underlying predicate for Rule 16."[265]

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[254] *Id.* at 413.

[255] *Id.* at 414–15.

[256] *Id.* at 414.

[257] *Id.* at 415.

[258] *Weatherford v. Busey*, 429 U.S. 545, 559 (1977); *see also United States v. Ruiz*, 536 U.S. 622, 629 (2002) (quoting *Weatherford*, 429 U.S. at 559).

[259] *Wardius v. Oregon*, 412 U.S. 470, 474 (1973).

[260] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[261] *United States v. Bagley*, 473 U.S. 667, 675 (1985).

[262] *United States v. Garrett*, 238, F.3d 293, 302 (5th Cir. 2000) (citation and internal quotations omitted).

[263] *Bagley*, 473 U.S. at 675 n.7 (citation and internal quotations omitted).

[264] *United States v. Frick*, 490 F.2d 666, 671 (5th Cir. 1978).

[265] *United States v. Oxman*, 740 F.2d 1298, 1307 (3d Cir. 1984).

Because there is no constitutional right to discovery, discovery is determined largely by statute and court rule.[266] Discovery statutes typically apply to exculpatory material within the possession or control of the state.[267] For example, in the Supreme Court case of *Pennsylvania v. Ritchie*,[268] the defendant sought recorded statements made to a youth counselor concerning an alleged assault. The recorded statements were taken and possessed by Pennsylvania's Children and Youth Services, a state-created agency. The Court concluded that due process considerations required an *in camera* review of the records to see whether they might contain information material to the defense. The Court explained that "[i]t is well settled that *the government* has the obligation to turn over evidence *in its possession* that is both favorable to the accused and material to guilt or punishment."[269] The Court cited the well-known decision of *Brady v. Maryland*,[270] as authority for this conclusion.

Ritchie and other cases relying on *Brady* have no relevance to the issue of subpoenas to third parties. "*Brady* imposes a constitutional duty *on prosecutors* to turn over exculpatory evidence . . . ."[271] The rationale for such a rule is that the prosecutor, after initiating criminal charges, should not be the "architect" of an unfair proceeding.[272] Plainly, crime victims (and third parties holding records about crime victims) are not state actors. They are not architects of the criminal proceedings and, therefore, are not subject to these constitutional restrictions on state action. The Seventh Circuit explained this point nicely in *United States v. Hach*.[273] There, the defendant sought to compel a third-party witness to turn over her medical and psychiatric records to the court for *in camera* review. The witness refused to release her records, which were not held by any government agency. The government argued it was powerless to force her to accede to the demand. The Seventh Circuit agreed, holding that "a failure to show that the records a defendant seeks are in the government's possession is fatal to a *Ritchie* claim."[274] The Seventh Circuit noted that the two other opinions it

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[266] *See* 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 20.3m, at 883 (2d ed. 1999).

[267] *See, e.g.,* FED. R. CRIM. P. 16(a) (requiring "the government" to disclose to the defense various kinds of information).

[268] 480 U.S. 39 (1987).

[269] *Id.* at 57 (emphases added).

[270] 373 U.S. 83 (1963); *see id.* (holding government must disclose exculpatory evidence in its possession to the defense).

[271] *Bolduc v. United States*, 402 F.3d 50, 56 n.6 (1st Cir. 2005) (emphasis added). Courts have held that *Brady* obligations extend *only* to prosecutors, because the Supreme Court has not imposed this duty on others. *See Villasana v. Wilhoit*, 368 F.3d 976, 979 (8th Cir. 2004).

[272] *See Brady*, 373 U.S. at 88.

[273] 162 F.3d 937 (7th Cir. 1998).

[274] *Id.* at 947. The Seventh Circuit also noted that the Wisconsin Supreme Court had reached a contrary conclusion, relying on state law grounds. The Wisconsin decisions do not offer a principled reason for extending *Ritchie* to private records and should not be regarded as persuasive authority here. *See State v. Shiffra*, 499 N.W.2d 719, 722 (Wis. Ct. App. 1993) (concluding that the issue of application of *Ritchie* to private records had already been decided in

could locate on the due process question had reached precisely the same conclusion.[275] In *United States v. Skorniak*,[276] the Eighth Circuit held that a defendant could not subpoena medical records of a witness. And the government is under no obligation to seek out potentially exculpatory evidence, the court reasoned.[277] Similarly, a Maryland appellate court, in *Goldsmith v. State*,[278] denied a defendant's attempt to obtain access to a witness' psychiatric record. After examining the relevant authorities, the court explained: "we find no common law, court rule, statutory or constitutional requirement that a defendant be permitted pre-trial discovery of privileged records held by a third party."[279] Thus, crime victims (and third parties holding information about crime victims) will only rarely – if ever – have information a defendant is constitutionally entitled to examine.

Because a defendant has no constitutional right to discovery, any such claim must rest on a statute. Yet the federal statutes, if anything, cut against broad discovery claims. The Jencks Act,[280] for example, restricts access to statements by government witnesses. It specifically mandates that only *after* a government witness testifies on direct examination shall the statement of the witness be the subject of discovery.[281] The Jencks Act does not even allow access to all statements — a witness statement need only be produced if the statement "relates to the subject matter 'as to which the witness has testified'" not if it merely "relates to the subject matter 'at issue in [the] case.'"[282] Even then, only a "'substantially verbatim recital of an oral statement made by said witness to an agent'" is discoverable under the Jencks Act.[283] Although the Act was meant to preserve defendants' right to access information that might aid in impeaching government witnesses at trial, "the legislative history expresses a much greater concern with limiting the application of the *Jencks* decision so that it would not hamper the workings of law enforcement by forcing wholesale disclosure of government materials and files."[284]

State v. S.H.); *State v. S.H.*, 465 N.W.2d 238 (Wis Ct. App. 1999) (applying *Ritchie* to private records without any discussion of the issue).

[275] Other courts have reached the same result. *See, e.g., State* ex rel. *Romley v. Superior Court*, 836 P.2d 445, 451–52 (Ariz. Ct. App. 1992) ("*Brady* emphasizes suppression of evidence by the prosecution, but does not require the victim to cooperate with the defense [to produce medical records held by the victim]"); *United States v. Hall*, 171 F.3d 1133, 1146 (8th Cir. 1999) (upholding decision not to compel disclosure of witness medical and psychiatric records: "the government has no obligation to obtain for a defendant records that it does not already have in its possession or control").

[276] 59 F.3d 750 (8th Cir. 1995).

[277] *Id.* at 755–56.

[278] 651 A.2d 866 (Md. App. 1995).

[279] *Id.* at 871.

[280] 18 U.S.C. § 3500 (2000).

[281] *See id.*; *see also* FED. R. CRIM. P. 26.2 (integrating Jencks Act into the federal rules).

[282] *United State v. Susskind*, 4 F.3d 1400, 1404 (6th Cir. 1993).

[283] *United States v. Martinez*, 87 F.3d 731, 739 (5th Cir. 1996) (quoting *Palermo v. United States*, 360 U.S. 343, 351 (1959)).

[284] *United States v. Bobadilla-Lopez*, 954 F.2d 519, 521 (9th Cir. 1992).

The Jencks Act also bars any pre-trial disclosure of witness statements. "Congress provided for discovery of statements only after the witness has testified, out of concern for witness intimidation, subornation of perjury, and other threats to the integrity of the trial process."[285] Courts have held true to this congressional determination, blocking defense efforts to obtain pretrial discovery about government witnesses. For example, in *United States v. Coppa*,[286] the Second Circuit overturned the district court's approval of a scheduling order requiring the government to identify its witnesses in advance of trial.[287] The district court, "mindful of [the Act's] concern" for witness safety, had allowed the government to file *ex parte* motions delaying discovery of the witnesses' identity where such disclosure would pose a threat to the witnesses' lives or safety.[288] The Second Circuit, however, found this protection insufficient to meet the witness-protective goals of the Jencks Act. Specifically, the court determined "this remedy does not address the Government's justifiable concerns regarding the risk of witness tampering in circumstances where there is no evidence that the life or safety of a prospective witness is in danger."[289] In other words, Jencks Act protection is not limited to situations where the government shows an actual danger to witnesses — its witness-protective qualities reach much further.[290]

The lack of grounds for subpoenas seeking victim information is more evident when viewed against a legal landscape that gives defendants no right before trial to obtain even the names of government witnesses. Current law provides no basis for the pre-trial disclosure of the names and addresses of government witnesses – including witnesses who are crime victims. For one thing, Rule 16, which governs discovery and inspection in criminal cases, contains no provisions for such disclosure. This omission was purposeful and mirrors the witness-protective purposes of the Jencks Act:

> A majority of the Conferees [i.e., Congressional members determining the language of Rule 16] believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contact directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.[291]

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[285] *United States v. Tarantino*, 846 F.2d 1384, 1414 (D.C. Cir. 1988).

[286] 267 F.3d 132 (2d Cir. 2001).

[287] *Id.* at 138.

[288] *Id.*

[289] *Id.* at 139.

[290] *See also United States v. Presser*, 844 F.2d 1275, 1285 (6th Cir. 1988) ("[P]roviding the defense with such a broad right of pre-trial discovery would vitiate an important function of the Jencks Act, the protection of potential government witnesses from threats of harm or other intimidation before the witnesses testify at trial.")

[291] H.R. REP. NO. 94-414, at 12 (1975) (Conf. Rep.), *as reprinted in* 1975 U.S.C.C.A.N. 713, 716.

Rule 16, therefore, along with other criminal discovery rules, "do not entitle defendant[s] to pretrial discovery of names and addresses of prospective government witnesses or persons who have knowledge of the case."[292]

By statute, capital cases are exempt from this rule. In capital cases, the accused is entitled to a copy of the indictment and a list of juror and witness names and address — but only three days in advance of the trial.[293] And notably, the same statute explicitly provides for the withholding of this information "if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person."[294] No statute authorizes similar disclosures in non-capital cases. As the Eighth Circuit noted in *United States v. Hutchings*,[295] "[n]either [Rule 16(a)] governing information subject to disclosure by the Government in criminal cases, nor any other federal rule or statute requires the Government to supply names of potential witnesses to a criminal defendant in a non-capital case."[296] Many other courts have reached substantially the same conclusion.[297]

A few older cases held that district courts possess authority to compel the government to disclose the identity of its witnesses before trial. However, the basis for such grants of authority now seems defunct. For instance, in *United States v. Armstrong*,[298] the Ninth Circuit recognized no authority exists in the federal rules for requiring the government to disclose the names of its witnesses.[299] Still, the court held that district courts have authority to require such disclosure based on Federal Rule of Criminal Procedure 57(b).[300] This rule acts as kind of a stop-gap; in the absence of controlling law, it allows judges to "regulate practice in any manner consistent with federal law, these rules, and the local rules of the district."[301] In light of the conference report on Rule 16, compelling disclosure of witness names before trial appears inconsistent with the federal rules. And even if the Ninth Circuit's approach was valid at the time *Armstrong* was decided, such an approach is no longer valid in light of the CVRA. Rule 57(b) only provides a basis for court authority in the absence of controlling law — since 2004, the CVRA has controlled the treatment of victims. The CVRA clearly mandates a victim be "reasonably protected from the accused,"[302] as well as treated

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[292] *United States v. Laurins*, 660 F. Supp. 1579, 1584 (N.D. Cal. 1987).

[293] *See* 18 U.S.C. § 3432 (2000).

[294] *See id.*

[295] 751 F.2d 230 (8th Cir. 1984).

[296] *Id.* at 236; *accord United Stats v. House*, 939 F.2d 659, 663 (8th Cir. 1991) ("Criminal defendants in non-capital cases are not entitled to pretiral disclosure of witnesses").

[297] *See, e.g.*, *United States v. Pearson*, 340 F.3d 459, 468 (7th Cir. 2003); *United States v. Bejasa*, 904 F.2d 137, 139 (2d Cir. 1990); *United States v. Barrett*, 766 F.2d 609, 617 (1st Cir. 1985); *United States v. Conder*, 423 F.2d 904, 910 (6th Cir. 1970).

[298] 621 F.2d 951 (9th Cir. 1980).

[299] *Id.* at 955.

[300] *Id.*

[301] FED. R. CRIM. P. 57(b).

[302] 18 U.S.C. § 3771(a)(1).

with "fairness and with respect for the victim's dignity and privacy."[303] Disclosure of a victim's name and address before trial is governed by these mandates, rather than vague gap-filling provisions.

If a defendant cannot even validly compel disclosure of a victim's name and address in advance of trial, it is nonsensical to think a defendant could validly subpoena the same information from the Department of Motor Vehicles or the telephone company — and it is incredible to think a defendant could use the Advisory Committee's rule to subpoena even more personal victim information. The rules would be backward indeed if a defendant were able to subpoena a victim's confidential mental health records in a legal system that disallows compelled disclosure of a witness's name or address. Instead, the only rational conclusion is that because defendants have no right to witnesses' identifying information, they certainly have no right to other sorts of victim-related discovery. Clearly, then, defendants have little constitutional or statutory "heft" behind an argument for subpoenas directed at obtaining victim information.

On the other hand, victims will often have legitimate reasons for resisting such subpoenas — reasons that are protected not only by the CVRA but also by the Constitution, under current case law, as part of the right of privacy.[304] One aspect of this due process privacy right is "the individual interest in avoiding disclosure of personal matters"[305] or, in other words, "the privacy interest in keeping personal facts away from the public eye."[306] Consider, for example, the privacy of therapeutic counseling communications. Federal case law establishes that such communications are protected by a constitutional privacy right[307] — a right that would be gutted if defendants were

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[303] *Id.* § 3771(a)(8).

[304] My discussion of these issues draws heavily on thoughts from an extremely knowledgeable crime victims' litigator — Wendy Murphy. *See* Wendy J. Murphy, Crime Victims, Not Defendants, Enjoy Constitutional Rights When the Accused Seeks Access to Private Third-Party Records (2007) (hereinafter Murphy, Crime Victims); *see also* Wendy J. Murphy, *"Federalizing" Victims' Right to Hold State Courts Accountable*, 9 LEWIS & CLARK L. REV. 647 (2005).

[305] *Whalen v. Roe*, 429 U.S. 589, 598–99 (1977). In his *Whalen* concurrence, Justice Brennan asserted that if a statute allowed indiscriminate disclosure of personal medical records "such a deprivation [of privacy] would only be consistent with the Constitution if it were necessary to promote a compelling state interest." *Id.* at 607 (Brennan, J., concurring).

[306] *United States Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 769 (1989).

[307] *See Borucki v. Ryan*, 827 F.2d 836, 845 (1st Cir. 1987) (recognizing right to privacy issues that arise with regard to communications to mental health workers); *Caesar v. Mountanos*, 542 F.2d 1064, 1072 (9th Cir. 1976) (finding psychotherapist-patient communications fall within right to privacy); *Hawaii Psychiatric Soc'y v. Ariyoshi*, 481 F. Supp. 1028, 1038 (D. Hawaii 1979) (finding zone of autonomy protects decision to communicate personal information to psychiatrist); *see also Nat'l Transp. Safety Bd. v. Hollywood Mem. Hosp.*, 735 F. Supp. 423, 424 n.2 (S.D. Fla. 1990) (citation and internal quotations omitted).

allowed to freely subpoena victims' mental health records. Moreover, some courts and commentators suggested the Fourth Amendment's prohibition against unreasonable searches and seizures applies to (and may prohibit) court-mandated discovery of victims.[308]

For all these reasons, a defense subpoena seeking third-party information about a crime victim rests on extraordinarily shaky ground. The Advisory Committee must ensure that through casual drafting, it does not inadvertently invite *more* defense subpoenas for such information. The Advisory Committee's current draft may well have that effect, by seemingly authorizing such subpoenas without regard to the numerous restrictions governing their use (and even allowing them to be issued *ex parte*). The Committee should, instead, follow my approach by indicating very clearly that such subpoenas are only allowed where specifically-identified evidence will be obtained that is relevant to and admissible at trial, and that is otherwise reasonable. As a weaker but still positive alternative, the Committee could include an Advisory Committee Note making this point clear. One possible note would be:

> Rule 17(c)(3) is intended to provide greater procedural protection for crime victims than exists under current law. It is not intended to expand in any way the permissible grounds for defense subpoenas. Like other trial subpoenas, a defense subpoena seeking victim information must narrowly request only information admissible at trial and may not be used for discovery. *See United States v. Nixon*, 418 U.S. 683 (1974) (requiring subpoenaing party to "clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity"). A defense subpoena must also not tread on a crime victim's constitutionally-protected privacy interests, *see Whalen v. Roe*, 429 U.S. 589, 598–99 (1977), or statutorily-protected interests to respect for privacy and dignity, *see* Crime Victims' Rights Act, 18 U.S.C. § 3771(a) (2000 & Supp. 2006). As a result, such subpoenas will only rarely be proper. *See generally* Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, Manuscript (forthcoming as a law review article 2007).

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[308] *See, e.g.*, *People v. Nokes*, 183 Cal. App. 3d 468, 476–78 (1986) (reviewing Fourth Amendment precedent in its determination of the validity of court-ordered examinations of victims and determining precedent to be contrary to allowing such examinations); *see also* Murphy, Crime Victims, *supra* note 304 ("The Fourth Amendment is not only a right of criminal defendants, but a 'right of the people' to be free from unreasonable searches of their 'persons, houses, papers and effects' . . . . Therefore, the Fourth Amendment protections extended to criminal defendants in *Boyd* must also be extended to the third parties impacted by criminal litigation."); Troy Andrew Eid, Note, *A Fourth Amendment Approach to Compulsory Physical Examinations of Sex Offense Victims*, 57 U. CHI. L. REV. 873, 894 (1990) (arguing that court-mandated physical examinations of victims of sexual crimes are prohibited by the Fourth Amendment, as interpreted by the Supreme Court). *But cf. Borucki v. Ryan*, 827 F.2d 836, 844 (1st Cir. 1987) (finding information the Fourth Amendment protects from seizure is not "necessarily entitled to protection under a right of nondisclosure originating in the fourteenth amendment").

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

The Proposals:

I proposed amending Rule 18 to require the court to consider the convenience of victims in setting the place of prosecution as follows:

> **Rule 18. Place of Prosecution and Trial**
> Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.[309]

The Advisory Committee adopted this proposal verbatim.[310]

Discussion:

Little need be said about the Advisory Committee's agreement with my proposal here, other than to note that Committee's rationale for this change was "to implement the victim's 'right to be treated with fairness' under the Crime Victims' Rights Act."[311] Why the Advisory Committee chose to implement the victims' fairness rights in Rule 18 — and only Rule 18 — is not immediately clear.[312]

Rule 20 — Victims' Views Considered Regarding Consensual Transfer

The Proposals:

I proposed that Rule 20 be amended to allow the court to consider the victim's views in any decision to transfer a case as follows:

> **Rule 20. Transfer for Plea and Sentence**
>
> **(a) Consent to Transfer.** A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present if:
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> (1) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending,

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[309] Cassell, *supra* note 3, at 878–79.
[310] *See* Proposed Amendments, *supra* note 68, at 364.
[311] *Id.* at 352.
[312] *See supra* notes 90-92 and accompanying text (discussing this point).

consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and
(2) the United States Attorneys in both districts approve the transfer in writing after consultation with any victim. If any victim objects to the transfer, the United States attorney in the transferring district or the victim's attorney shall advise the court where the indictment or information is pending of the victim's concerns.[313]

I also proposed a similar change should be made to Rule 20(d) regarding transfer of juvenile proceedings.

The Advisory Committee recommended no change to Rule 20.

Discussion:

The Advisory Committee rejected this proposed change for the following reasons:

> The CVRA does not specifically address transfer. It does give the victim a right to confer with the attorney for the government, 18 U.S.C. § 3771(a)(5), but that is not the same as requiring the attorney for the government to notify the court of the victim's views regarding transfers. Indeed, the CVRA provides that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6). Accordingly, the CVRA contemplates that the attorney for the government will consider the victim's interests in exercising prosecutorial discretion, including the discretionary determination whether to consent to a Rule 20 transfer. The Subcommittee was not persuaded that the rule should disturb this statutory balance by requiring the attorney for the government to advise the court of a victim's objection to a Rule 20 transfer. In appropriate cases, the attorney for the government should appraise the court of the victim's view.[314]

The Advisory Committee is able to claim that the CVRA does "not specifically address transfer" only because it reviewed an amputated CVRA — i.e., a CVRA without a right to fairness. Under a fair reading of the CVRA, the right to fairness applies "specifically" to Rule 20 transfer decisions, no less than the Rule 18 decision to set the place of prosecution just discussed and, indeed, all other decisions in the criminal justice process. Thus, the Advisory Committee has unfairly stacked the deck in deciding that it would not "disturb this statutory balance," when it chose not to weigh the victim's right to fairness as part of that balance.

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[313] *See* Cassell, *supra* note 3, at 880.

[314] CVRA Subcommittee Mem., *supra* note 3, at 17.

Even under its truncated view of the statute, the Advisory Committee does envision that the prosecutors will conferring with victims about Rule 20 transfer decisions. But the Committee did not want to require prosecutors to notify courts of a victim's objection, venturing only that "*[i]n appropriate cases*, the attorney for the government should appraise the court of the victim's view." The Committee is coy on the question of when it would *not* be appropriate for the prosecutor to notify a court of the victim's views. Whenever an unrepresented crime victim objects to transferring a case, prosecutors, as officers of the court, have a duty to pass that objection along to the court as relevant information bearing on the transfer decision.[315] The rule should state that fact directly.

Finally, nothing in my proposal would "impair" prosecutorial discretion. My proposal deals solely with ensuring that victim information is passed along to the judge who must approve a transfer decision. The government remains entirely free to make whatever decision it wants on the issue and argue whatever position it believes is appropriate. Moreover, the CVRA itself envisions that the government may have obligations to assert victims' rights. For starters, the CVRA requires prosecutors to "make their best efforts" to see that victims are "accorded" their rights.[316] In addition, the CVRA gives prosecutors the ability to "assert" victims' rights. This provision was designed to ensure that victims' rights are not inadvertently lost because a victim lacks legal counsel. As Senator Kyl explained, "This provision also recognized that, at times, the government's attorney may be best situated to assert a crime victim's right . . . because the crime victim is not available at a particular point in the trial . . . ."[317] In light of their obligations to accord victims their rights and to enforce those rights, the government should at least inform the court when a victim has concerns about a transfer.

Rule 21 — Victims' Views Considered Regarding Transfer for Prejudice

The Proposals:

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

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

The Advisory Committee recommended no change to this rule.

Discussion:

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[315] *Cf. State v. Casey*, 44 P.3d 756, 764 (Utah 2002) (noting prosecutors' obligation to relay victim's request to be heard to the court).

[316] 18 U.S.C. § 3771(c)(1).

[317] 150 CONG. REC. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

The Advisory Committee rejected this change because, in its view, the fact that the CVRA did not specifically address transfer decisions precluded any amendment:

> Judge Cassell grounds his proposal on the general provision of the CVRA that gives a victim a right to be treated with "fairness." 18 U.S.C. § 3771(a)(8). The Subcommittee was not persuaded that this general language warranted an amendment that would require the court to consider the victim's views. In the case of transfers for prejudice, the preferences of the victim could not outweigh the defendant's right to a fair proceeding. In the case of transfers for convenience, the statutory right to confer with the attorney for the government provides the mechanism for incorporating the victim's views. As in the case of Rule 20, the Subcommittee declined to go beyond the carefully crafted limitations of the statute. In appropriate cases, the attorney for the government should appraise the court of the victim's views.[318]

Once again, the Advisory Committee's position clashes with the statute. The Committee does not argue (nor does it seem plausible to argue) that transferring a case to a distant location without even considering the victim's view treats the victim fairly — as the CVRA demands. Instead, the Committee ducks the implications of the right to fairness because it is "general language," as though a "general" command from Congress can be ignored.

Perhaps recognizing the weakness of its position, the Advisory Committee goes on to craft a policy argument against victims being heard. It divides transfer cases into two types — those for convenience and those for prejudice — and concludes that victims should not enjoy a guaranteed right to be heard in either situation. In neither case is the analysis convincing.

With regard to transfers for convenience, the Committee contends that the victim's right to confer with prosecutors is sufficient protection. But a victim's conference with those very same government authorities who find it convenient to move the case hardly will give victims much comfort — much less the right to fairness that Congress has mandated. The Committee also is less than clear when it says that prosecutors should advise the court of the victim's objections "in appropriate cases." It is hard to think of *any* case when a prosecutor would be justified in concealing an unrepresented victim's concerns[319] from the court. It is far simpler — and, more to the point, simply fair — to ensure that the court will always consider a victim's views on transfer.

With regard to transfers to avoid prejudice, the Advisory Committee concludes that a victim's views could not "outweigh" the defendant's right to a fair proceeding. But no one argues that victims' views will necessarily outweigh a defendant's argument; the limited point is simply that victims' views should be considered in the balance. Moreover, a victim may be able to demonstrate

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[318] CVRA Subcommittee Mem., *supra* note 63, at 18.

[319] In the case of a represented victim, the prosecutor could reasonably rely on the victim's counsel to present appropriate arguments.

that a defendant's argument is unsupported or that other, less burdensome alternatives to transferring a case exist. Surely these are sufficiently reasons to let a victim be heard before a case is moved.

The Advisory Committee also appears to overlook the constitutional grounding that a victim opposition to a transfer decision will enjoy. In contrast to the Sixth Amendment, which gives defendants in a state prosecution a right to trial in their home state,[320] Article III simply commands that in a federal prosecution, "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial *shall* be held in the state where the said crimes have been committed."[321] This Article III vicinage right was designed to protect not only the rights of the defendant but also the rights of the community — including victims in the community.[322] The provision is designed to secure a trial within the same political community ("the state") in which the victim would likely reside.[323]

An understanding of the Article III provision as protecting the community's interest is bolstered by the Supreme Court's decisions on right of public access to trials. In cases such as *Richmond Newspapers, Inc. v. Virginia*,[324] the Court has held that implicit in the First Amendment is a guarantee of the public's right to attend trials. Compelling victims' interests underlie this guarantee. As the Court has explained, "public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct."[325] And as Justice Blackmun has emphasized, "The victim of the crime, the family of the victim, [and] others who have suffered similarly, ... have an interest in observing the course of a prosecution."[326] Victims are vitally interested in observing criminal trials because society has withdrawn "both from the victim and the vigilante the enforcement of criminal law, but [it] cannot erase from people's consciousness the fundamental, natural yearning to see justice done — or even the urge for retribution."[327]

For purposes of this article, it is not necessary to definitively trace how victims' constitutional interests play out against a defendant's right to avoid a prejudicial trial. The very limited point here is merely that victims should be heard on any transfer, so that a judge can make a fully informed decision. Even if the judge determines to transfer a case, the victim may have

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[320] U.S. CONST. amend. VI ("In all criminal prosecutions, *the accused* shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."(emphasis added)).

[321] U.S. CONST., art. III, § 2 (emphasis added).

[322] *See generally* Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658 (2000); Cassell, *supra* note 3, at 880–84; *see also* Drew L. Kirshen, *Vicinage*, 29 OKLA L. REV. 803 (1976).

[323] *See United States v. Bishop*, 76 F.Supp. 866, 868 (D. Or. 1948).

[324] 448 U.S. 555 (1980).

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

[326] *Gannett Co. v. DePasquale*, 443 U.S. 368, 428 (1979) (Blackmun, J., concurring in part and dissenting in part).

[327] *Richmond Newspapers*, 448 U.S. at 571.

valuable information for the judge on where to transfer the case (e.g., to an adjacent district or state rather than a distant one) or how to impanel an unbiased jury (e.g., importing a jury rather than exporting the trial).[328]

An illustration of the general approach of the proposed rule comes from in the leading case of *State v. Timmendequas*,[329] decided by the New Jersey Supreme Court. *Timmendequas* was a capital case in which the trial judge imported a jury from a distant community rather than force the family a murdered young girl to travel to another district. Construing New Jersey state law provisions similar to the CVRA's, the New Jersey Supreme Court explained that the trial judge properly considered the views of the victim's family:

> Over the past decade, both nationwide and in New Jersey, a significant amount of legislation has been passed implementing increased levels of protection for victims of crime. Specifically, in New Jersey, the Legislature enacted the "Crime Victim's Bill of Rights." That amendment marked the culmination of the Legislature's efforts to increase the participation of crime victims in the criminal justice system.
>
> The purpose of the Victim's Rights Amendment was to "enhance and protect the necessary role of crime victims and witnesses in the criminal justice process. In furtherance of [that goal], the improved treatment of these persons should be assured through the establishment of specific rights." One of the enumerated rights guaranteed for victims is "[t]o have inconveniences associated with participation in the criminal justice process minimized to the fullest extent possible."
>
> . . .
>
> The [trial] court explicitly stated that it was not favoring the rights of the victims over those of defendant. Rather, it was simply taking their concerns into consideration, as it had not done previously. Taking the concerns of the victim's family into account does not constitute error, provided that the constitutional rights of the defendant are not denied or infringed on by that decision.[330]

Timmendequas demonstrates that victims can have legitimate interests in transfer decisions that can be accommodated without violating defendants' rights. Rule 21 ought to be amended to allow victims to provide that kind of information to the judge before any transfer decision is made.

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

The Proposals:

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[328] *See generally* BELOOF, CASSELL & TWIST, *supra* note 4, at 392–99, (reviewing case law on the victim's interest in venue decisions).

[329] 737 A.2d 55 (N.J. 1999), *cert. denied*, 534 U.S. 858 (2001).

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

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

> **Rule 23. Jury or Nonjury Trial**
> (a) **Jury Trial**. If the defendant is entitled to a jury trial, the trial must be by jury unless:
> (1) the defendant waives a jury trial in writing;
> (2) the government consents; and
> (3) the court approves after considering the views of any victims.

The Advisory Committee did not recommend any change to this rule.

Discussion:

Here again, the Advisory Committee declined to adopt my recommendation because it goes "beyond the specific provisions of the CVRA, which do not address the issues whether the trial should be to the court or to a jury."[331] It is not necessary to repeat the arguments about the victims' right to fairness here, other than to note that the "preferred" trial method in the federal courts is a jury trial.[332] Why it is fair to deviate from that preferred method without even listening to the victims is not immediately clear.

But, for the sake of argument, assume that nothing in the CVRA requires the Advisory Committee to change this rule. The fact remains that the Advisory Committee could still change the rule if there were good reasons to do so. In view of this fact, it is surprising that the Committee never defends the logic behind allowing a court to dispense with a jury trial without even hearing from a victim. To help protect the general public interest in trial by jury, Rule 23 currently requires not only prosecutor approval,[333] but also court approval.[334] Any approval requires careful weighing of the competing concerns. The Supreme Court has instructed that "the duty of the trial court . . . [in considering whether to approve a jury trial waiver] is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increased

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[331] CVRA Subcommittee Mem., *supra* note 63, at 18.

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

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

[334] *Cf.* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1196-98 (1991) (suggesting that jury trial right might not be waivable).

in degree as the offenses dealt with increase in gravity."[335] This is a "serious and weighty" responsibility.[336]

To discharge that serious and weighty responsibility, the Advisory Committee should draft Rule 23 so that the trial court should receive as much relevant information as possible. The victim may be well-situated to provide useful information about how the public will view a non-jury trial. The proposed rule change takes the modest step of allowing the victim to be heard before the court approves any non-jury trial.

(New) Rules 32(e), (f), (h), and (i) – Disclosure of the Pre-Sentence Report to Victims and Opportunity for Victims to Object and Be Heard[337]

The Proposals:

In the federal system, the presentence report is a critical part of the sentencing process. I therefore recommended that the prosecutor should be required to disclose relevant parts of the presentence report to victims as follows:

> **(e) Disclosing the Report and Recommendation.**
>
> **(1) Time to Disclose.** Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.
>
> **(2) Minimum Required Notice.** The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. <u>The attorney for the government shall, if any victim requests, communicate the relevant contents of the presentence report to the victim.</u>

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[335] *Patton v. United States*, 281 U.S. 276, 312-13 (1930).

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

[337] In addition to the changes to Rule 32 discussed here, the Advisory Committee essentially adopted verbatim my proposals to amend Rules 32(a), 32(c)(1)(B), and 32(d)(2)(B). *Compare* Cassell, *supra* note 3, at 886, 887, 891 *with* Proposed Amendment, *supra* note 68, Rules 32(a), 32(c)(1)(B), and 32(d)(2)(B). There is, accordingly, no need to discuss those proposed rules here.

The Advisory Committee also declined to add my proposal that the probation officer determine whether the victim wished to have any material included in the presentence report. *See* Cassell, *supra* note 3, at 889. Because probation officers frequently do this already, the subject is not worth debating here.

(3) Sentence Recommendation. By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

I further recommended that victims be given the opportunity to object to and be heard on disputed issues in the presentence report as follows:

(f) Objecting to the Report.

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

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

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

. . . .

(h) Notice of Intent to Consider Other Sentencing Factors.[338] Before the court may rely on a ground not identified either in the presentence report or in a party's prehearing submission or in a victim impact statement, the court must give the parties reasonable notice that it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence. The notice must specify any ground not earlier identified on which the court is contemplating a departure or a non-guideline sentence. The attorney for the government or for the victim shall advise defense counsel and the court of any ground identified by the victim that might reasonably serve as a basis for departure.

(i) Sentencing.

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

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

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

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

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[338] This Rule was amended in December 2006, after my earlier article was published, to change "departure" language to conform with the new, post-*Booker* regime. I have accordingly changed the language quoted in the text above to conform to the current language.

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

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

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

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

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

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.[339]

The Advisory Committee recommended no changes to these rules.

Discussion:

The CVRA entitles victims to be heard on disputed Guidelines issues and, as a consequence, to review parts of the presentence report relevant to those issues. The CVRA gives victims "the right to be reasonably heard at any public proceeding in the district court involving . . . sentencing . . . ."[340] The CVRA provision (among other things) codifies the right of crime victims to give in court what is known as a "victim impact statement."[341]

The victim's right to be heard, however, is not narrowly circumscribed to just impact information. To the contrary, the right conferred is a broad one – to be "reasonably heard" at the sentencing proceeding. The victim's right to be "reasonably heard" implicitly includes a right for the victim to speak to disputed Guidelines issues. As Senator Kyl explained, the victim's right includes the right to make sentencing recommendations:

> When a victim invokes this right during . . . sentencing proceedings, it is intended that he or she be allowed to provide all three types of victim impact: the character of

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[339] Cassell, *supra* note 3, at 901-03.

[340] 18 U.S.C. § 3771(a)(4).

[341] *See generally* BELOOF, CASSELL & TWIST, *supra* note 4, at 625-90 (2d ed. 2006) (discussing victim impact statements); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1395-96 (same).

> the victim, the impact of the crime on the victim, the victim's family and the community, and *sentencing recommendations*.[342]

A "sentencing recommendation" will often directly implicate Guidelines issues, particularly where a court gives significant weight to the Guidelines calculation (as most currently do).[343] For example, if the victim wishes to recommend a 60-month sentence when the maximum guideline range is only 30 months, that sentencing recommendation may be meaningless unless a victim can provide a basis for recalculating the Guidelines or departing or varying[344] from the Guidelines.

Congress intended the victim's right to be heard to be construed broadly, as Senator Feinstein stated: "The victim of crime, or their counsel, should be able to provide *any information*, as well as their opinion, directly to the court concerning the . . . sentencing of the accused."[345] Again, it is hard to see how victims can meaningfully provide "any information" that would have a bearing on the sentence without being informed of the Guidelines calculations that likely will drive the sentence.

In addition, an independent basis for victims reviewing presentence reports is the victim's broad right under the CVRA to be "treated with fairness"[346] and right to restitution, as I argued in my earlier article.[347]

For all these reasons, the CVRA should be understood as giving victims the right to relevant information in the presentence report about the Guidelines and to be heard before a court makes any final conclusions about Guidelines calculations and other sentencing matters. Many states follow a similar approach and give victims access to presentence reports as part of the victim-impact process.[348]

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[342] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added). *See generally* BELOOF, CASSELL & TWIST, *supra* note 4, chapt. 10 (discussing three types of victim impact information).

[343] *See, e.g., United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005) (giving "heavy weight" to Guidelines recommendation).

[344] *See United States v. Wilson*, 355 F. Supp. 2d 1269, 1272 (D. Utah 2005) (discussing "departures" and "variances").

[345] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (emphasis added).

[346] 18 U.S.C. § 3771(a)(8).

[347] Cassell, *supra* note 3, at 894-96; *see also* Testimony of Paul G. Cassell to the U.S. Sentencing Comm'n (Feb. 15, 2005) (available on http://sentencing.typepad.com) (advancing similar arguments).

[348] ALA. CODE § 15-23-73 (1975) ("victim shall have the right to review a copy of the pre-sentence investigative report, subject to the applicable federal or state confidentiality laws"); ALASKA STAT. § 12.22.023 (giving victim right to look at portions of sentencing report); ARIZ. CONST. art. II, § 2.1 (giving victim right to review pre-sentence report when available to the defendant); ARIZ. REV. STAT. ANN. § 13-4425 (giving victim right to review pre-sentence report

Since I made my proposal, the Ninth Circuit has considered the question of whether to reverse a district court that declined to provide the *entire* presentence report to a fraud victim. In an opinion containing only one substantive paragraph, the Ninth Circuit affirmed the district court, which had rejected a victim's argument that "the CVRA confers a general right for crime victims to obtain disclosure of the [presentence report]."[349] The Ninth Circuit stated tersely that the district court did not "commit legal error."[350]

Although strong arguments can be made against *Kenna*,[351] the case is not on point to my proposal. First, *Kenna* involved a claim of a "general right" to access to the presentence report, apparently untethered to any particular need for access. My amendment would be limited to situations where victims seek "relevant" contents of the presentence report to make a victim impact statement at sentencing. Second, the victim in *Kenna* sought the entire presentence report. The Ninth Circuit pointedly observed: "We note that Kenna refused the district court's offer to consider disclosure of specific portions of the PSR."[352] My proposal tracks what the district court offered to Kenna – that a victim would have access to "relevant contents of the presentence report."

Because victims have a right of access to relevant parts of the presentence report, the question then arises of how to provide that access. In my earlier article, I recommended the simplest solution to the competing concerns would be to disclose the report, upon request, to victims through the prosecutor. The prosecutor could filter out irrelevant confidential information and assist the victim by highlighting critical parts of the report. It might be objected that this approach would burden prosecutors. But the CVRA already gives victims the right to "confer" with prosecutors[353] – and presumably they will be conferring regarding the important topic of sentencing. It is important to emphasize that my proposal would require prosecutors to give all relevant information to the victim; in other words, prosecutors would serve as a conduit to the victim, but not a controller of the victim.

The Advisory Committee declined to adopt my proposal, opining that "the prosecutor should remain the victim's source of information regarding the sentencing process and the contents of the

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"except those parts excised by the court or made confidential by law"); COL. REV. STAT. § 24-72-304(5) (giving prosecutor discretion to allow victim or victim's family to see pre-sentence report); FLA. STAT. § 960.001 (giving victim right to review pre-sentence report); IDAHO CODE ANN. § 19-5306 (giving victim right to review pre-sentence report); IND. CODE § 35-40-5-6(b) (giving victim right to read and "respond to" material contained in the pre-sentence report); LA. CONST. art. I, § 25 (giving victim "right to review and comment upon the presentence report"); MONT. CODE ANN. § 46-18-113 (giving prosecutor right to disclose contents of pre-sentence report to victim); OR. REV. STAT. §137.077 (pre-sentence report must be made available to victim).

[349] *In re Kenna*, 453 F.3d 1136, 1137 (9th Cir. 2006).

[350] *Id.*

[351] *See* Pet.'s Brief, *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006).

[352] *In re Kenna*, 453 F.3d at 1137.

[353] 18 U.S.C. § 3771(a)(5).

presentence report, and the prosecutor should have discretion to determine what information from the presentence report should be imparted to the victim."[354] This reasoning clashes directly with the CVRA's guiding principle: that victims deserve their own rights in the criminal process. Congress wanted victims to become participants with rights "independent of the government or the defendant . . . ."[355] For this reason, the CVRA allows both the victim to assert rights independently of the government.[356] Senator Kyl explained the victim's right to independent action directly: "[There is no authority for] the government's attorney . . . to compromise or co-opt a victim's right. . . . The rights provided in this bill are personal to the individual crime victim and it is that crime victim that has the final word regarding which of the specific rights to assert and when."[357]

One of the victim's independent rights includes the opportunity to make "sentencing recommendations."[358] Congress' command that victims be independent participants can not be faithfully implemented if prosecutors control the information victims receive. If allowed to do so, prosecutors could simply feed the victim information supporting the government's view, while withholding information undercutting it.[359] Nothing in the CVRA provides any support for this approach.[360]

The Advisory Committee was also concerned that presentence reports "are typically treated as confidential, because they include a great deal of personal information about the defendant . . . ."[361] But this concern was easily handled by my requirement that prosecutors pass along only "relevant" contents of the presentence reports. Personal information only tangentially connected to sentencing issues would not be disclosed. And if personal information about the defendant were

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[354] CVRA Subcommittee Mem., *supra* note 63, at 18.

[355] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[356] *See* 18 U.S.C. § 3771(d)(1) (a victim's rights may be asserted by both the prosecutor and the victim or victim's representative).

[357] 150 CONG. REC. S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[358] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[359] The Advisory Committee's view that prosecutors should control what information the victim receives is so fundamentally at odds with the animating principles of the CVRA that it makes one wonder where it came from. Interestingly the view seems to have originated in a small subcommittee with a representative from the Justice Department but no crime victim's representative. *See* CVRA Subcommittee Mem., *supra* note 3, at 1 (noting that Deborah Rhodes, Counselor to the Asst. Atty. Gen. of the Criminal Division, served on the Subcommittee drafting this language).

[360] At another point in its memorandum, the CVRA Subcommittee refers to 18 U.S.C. § 3771(c)(6), which provides that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." But the simple act of giving information in a court document (the PSR) to crime victims does not impair the government's decision of whether and how to prosecute a defendant. *See supra* notes 295-96 and accompanying text (discussing impairment issue under Rule 20).

[361] CVRA Subcommittee Mem., *supra* note 3, at 18.

directly connected to sentencing issues, then fairness entitles the victim to that information to formulate a sentencing recommendation. After all, by the time of sentencing, the defendant has been found guilty, beyond a reasonable doubt, of harming a victim. By committing a crime against the victim, the defendant has certainly forfeited some privacy interests – including the chance to keep from the victim information relevant to sentencing. It is also important to recall that this information is not truly confidential in the sense that no one else will see it. It has already been disclosed to the probation officer, defense counsel, the prosecutor, and the judge.

Once the victim receives relevant information from a presentence report, the victim no less than other participants at sentencing should be entitled to be heard on any disputed issues. For example, in a fraud cause, if the defendant claims to have swindled only $5,000 and the government claims the loss is $10,000, the victim should be entitled to press her argument that the loss was $40,000. To do otherwise, is to deprive the victim of an opportunity to participate in the sentencing process and to turn the victim impact statement into a meaningless charade.

The Advisory Committee's view on this point is curious. The Advisory Committee did not directly quarrel with the position that victims should have the opportunity to be heard on disputed sentencing issues. Instead, the Advisory Committee would only go so far as to suggest that it

> felt it would be desirable for the courts gradually to flesh out what the right to be heard means in this [sentencing] context (determining, for example, when the right to be heard would include the right to introduce evidence). It is by no means clear that the CVRA contemplates that victims will be entitled to access all of the particulars of the presentence report and be entitled to litigate issues concerning the application of various guidelines, etc.[362]

This view is objectionable on many levels. First, given the congressional purpose of fundamentally changing the way crime victims are treated in the criminal justice process, it can hardly be desirable for courts to "gradually" determine what rights victims have. As Senator Kyl explained, "A central reason for these rights is to force a change in a criminal justice culture which has failed to focus on the legitimate interests of crime victims."[363] The CVRA was "meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process."[364]

Second, the Committee diffidently opines that "[i]t is by no means clear" that victims have the right to litigate disputed issues.[365] I will turn to the substance of that claim in a second. But even assuming it to be true, a fundamental purpose of the Federal Rules of Criminal Procedure is to

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[362] CVRA Subcommittee Mem., *supra* note 3, at 19.

[363] 150 CONG. REC. S10910-01, S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[364] 150 CONG. REC. S10899 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl); *see also* 150 CONG. REC. S4260 (Apr. 22, 2004) (statement of Sen. Feinstein) (describing the CVRA as a "new and bolder approach than has ever been tried before in our Federal System").

[365] CVRA Subcommittee Mem., *supra* note 3, at 19.

provide clarity on issues that would otherwise have to be litigated.[366] The Advisory Committee could be "clear" that victims can litigate by simply putting in place my proposed rule. To do otherwise is, unfortunately, to invite continued uncertainty over a point of vital importance to crime victims.

Finally, perhaps the reason that the Committee would venture only that it is unclear whether victims have the right to dispute sentencing issues was a reluctance to stake out the contrary position. To maintain that victims cannot dispute sentencing issues would collide with both statutes and common sense. As for statutory requirements, it is hard to understand how victims will be "reasonably heard" at sentencing (as the CVRA commands) if they cannot contest the factors that may well drive a sentence – the sentencing guideline calculations. Moreover, Congress has already directly mandated that victims will have the opportunity to dispute sentencing factors when they relate to restitution.[367] Thus, if the Advisory Committee really wanted to stake out a victims-can't-litigate-at-sentencing position, it would have to awkwardly carve out a restitution exception. Finally, a victim is simply not treated with "fairness" if she is entirely excluded from the guidelines process. The Supreme Court has explained that "[i]t is . . . fundamental that the right to . . . an opportunity to be heard 'must be granted at a meaningful time and *in a meaningful manner*.'" [368] It is not "meaningful" for victims to make sentencing recommendations without the benefit of knowing what everyone else in that courtroom knows – what the recommended Guidelines range is. Yet Congress plainly intended to pass a law establishing "[f]air play for crime victims, *meaningful participation* of crime victims in the justice system, protection against a government that would take from a crime victim the dignity of due process . . . ."[369]

By building victims in to the guidelines process, my proposal would also provide an important procedural protection to defendants. My proposed amendment to Rule 32(f) would require that the victim's attorney or the prosecutor would raise any reasonable objection to the pre-sentence report before the sentencing hearing, so that it could be discussed at a pre-sentence conference and then presented in an organized fashion to the sentencing judge. I would also require either the victim's attorney or the prosecutor to give notice to defense counsel and the court where an upward departure argument might rest on any information provided by the victim.[370] Setting up the procedures in this way creates an orderly process for victim objections to affect sentencing – with fair notice to the defense. Otherwise, the court – and the defendant – might hear for the first time

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[366] *See supra* notes 100-03 and accompanying text (providing illustrations of rules changes made to provide clarity).

[367] *See* 18 U.S.C. § 3664(d)(2) (probation officer shall disclose to victim amount subject to restitution as calculated by the probation officer and the opportunity of the victim to file an affidavit seeking greater restitution); *see also* 18 U.S.C. § 3771(a)(6) (giving victims "the right to full and timely restitution as provided in law").

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

[369] 150 CONG. REC. S4264 (Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added); *see also Kenna v. United States District Court,* 435 F.3d 1011, 1017 (9th Cir. 2006).

[370] *See* Cassell, *supra* note 3, at 901-03.

at sentencing the court was considering an upward departure based on information in the victim impact statement.

The courts of appeals have split on the need for advance notice of an upward departure based on victim impact statements. In *United States v. Dozier*,[371] the Tenth Circuit held that a district court is required to give notice to a defendant before departing upward from the advisory guideline range based on victim impact statements. The breadth of that holding may be limited, however, by unusual facts: the presentence report did not identify victim impact information as a possible basis for an upward departure and the government conceded that a sentencing remand was appropriate. The Third Circuit has expressly declined to follow *Dozier*. In *United States v. Vampire Nation*,[372] the Third Circuit held that, in light of the Supreme Court's decisions making the Sentencing Guideline advisory,[373] a defendant is always on notice that a judge might find a sentencing factor calling for a sentence higher than that advised by the Guidelines. With respect to victim impact statements, the Third Circuit highlighted the fact that victim impact statements at the sentencing hearing might provide a new, previously-undisclosed ground for an upward (or downward) departure:

> The right of victims to be heard is guaranteed by the Crime Victims' Rights Act ("CVRA") . . . . The right is in the nature of an independent right of allocution at sentencing. *See* 18 U.S.C. § 3771(a)(4) (affording victims a "right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding"). Under the CVRA, courts may not limit victims to a written statement. *See Kenna v. United States District Court,* 435 F.3d 1011, 1017 (9th Cir. 2006) (Kozinski, J.) ("Limiting victims to written impact statements, while allowing the prosecutor and the defendant the opportunity to address the court, would treat victims as secondary participants in the sentencing process. The CVRA clearly meant to make victims full participants."). Given that it would be impossible to predict what statements victims might offer at sentencing, it would be unworkable to require district courts to provide advance notice of their intent to vary their discretionary sentence based on victim statements that had not yet been made.[374]

The contrasting positions of the Tenth and Third Circuits is part of a larger disagreement between the circuits on the extent to which the notice requirements in the criminal rules continue to operate under the now-"advisory" Sentencing Guidelines regime.[375] Focusing specifically on the

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[371] 444 F.3d 1215 (10th Cir. 2006).

[372] 451 F.3d 189 (3d Cir. 2006), *cert denied*, 127 S.Ct. 424 (2006).

[373] *See United States v. Booker*, 542 U.S. 956 (2004).

[374] *Vampire Nation*, 451 F.3d at 197 n.4.

[375] The Second, Fourth, and Ninth Circuits have ruled that Rule 32(h) continues to apply. *See United States v. Anati*, 457 F.3d 233 (2d Cir. 2006); *United States v. Davenport*, 445 F.3d 366, 371 (4th Cir. 2006); *United States v. Evans-Martinez*, 448 F.3d 1163, 1167 (9th Cir. 2006). The Third, Seventh, and Eighth Circuits have held the opposite. *See United States v. Vampire*

issue of victim impact information, the Third Circuit is correct that, under the current rules, it is "unworkable" to provide advance notice of upward (or downward[376]) departures based on victim allocution at the sentencing hearing. Under my proposal, however, victims would be integrated into the pre-sentence process for determining guidelines issues, thereby insuring that the defense has fair notice of any upward departure and the government has fair notice of any downward departure. Regardless of whether the Guidelines are advisory, this is the fairest way to proceed for defendants, the prosecution, and victims.

(New) Rule 32(i)(4) — Victims' Right to be Reasonably Heard at Sentencing

The Proposals:

Even before passage of the CVRA, the Federal Rules of Criminal Procedure gave victims of crimes of violence or sexual abuse the right to be heard at sentencing. After the CVRA extended such rights to all victims, I proposed simply striking the limitation in the rule so that it would apply to all victims as follows:

> **(B) By a Victim**. Before imposing sentence, the court must address any victim of ~~a~~ the crime ~~of violence or sexual abuse~~ who is present at sentencing and must permit the victim to speak or submit any information about the sentence . . . .[377]

The Advisory Committee tracked my change of striking the crimes of violence and sexual abuse limitation; but the Committee also substituted language from the CVRA about being reasonably heard as follows:

> **(B) By a Victim**. Before imposing sentence, the court must address any victim of ~~a~~ the crime ~~of violence or sexual abuse~~ who is present at sentencing and must permit the victim ~~to speak or submit any information about the sentence~~ to be reasonably heard.[378]

Nation, 451 F.3d 189, 195-98 (3d Cir. 2006); *United States v. Walker*, 447 F.3d 999, 1006-07 (7th Cir. 2006); *United States v. Egenberger*, 424 F.3d 803, 805 (8th Cir. 2005). The First and Eleventh Circuits have held only that the failure to provide notice does not constitute plain error. *United States v. Mateo*, 2006 WL 1195676, at *1 (1st Cir. May 5, 2006); *United States v. Simmerer*, 156 Fed. Appx. 124, 128 (11th Cir. 2005).

[376] For a helpful correction to the idea that victims' interests are always adverse to defense interests at sentencing, see Benjamin McMurray, *The Mitigating Power of a Victim Focus at Sentencing*, 19 FED. SENT'ING RPTR. __ (forthcoming 2007).

[377] Cassell, *supra* note 3, at 903.

[378] Proposed Amendments, *supra* note 68, Rule 32(i)(4)(B). The Advisory Committee also proposes striking out existing language in the rule allowing guardians or family members to exercise the right to speak on behalf of minor and incapacitated victims. For criticism of this deletion, see *supra* notes 112-17 and accompanying text.

Discussion:

My proposal retained the current language in Rule 32 allowing the victim "to speak or submit any information about the sentence"; the Advisory Committee would allow the victim "to be reasonably heard" at sentencing – language lifted from the CVRA.

In this case, the Advisory Committee has paradoxically used the CVRA as an occasion for possibly *restricting* victims' rights. Under Rule 32(i)(4)'s current language, there is no doubt that the victim could "speak" at sentencing (that is, give an oral statement). Under the proposed language, litigation could result about whether victims could be "reasonably heard" without being allowed to speak (that is, be confined to purely written submissions). Indeed, during the Advisory Committee meeting on the proposal, the Advisory Committee reporter conceded that "courts would have to construe exactly what [the phrase] meant as situations came before them."[379]

It is worth reflecting for a moment on how backward the Advisory Committee's approach to this issue is. Before the CVRA's enactment, victims of crimes of violence and sexual assault had the right under Rule 32(i) "to speak" at sentencing (along with the right to submit information). When Congress enacted the CVRA, the Advisory Committee and the Judicial Conference had both approved broadening that rule to give *all* victims the right to speak.[380] (The Judicial Conference withdrew this proposed rule to allow reconsideration in light of the CVRA.) The CVRA gave victims the right to be "reasonably heard" at sentencing. Of course, the CVRA's obvious goal was to significantly *expand* the rights of crime victims. With respect to the right to speak in particular, one of the CVRA's primary sponsors stated: "this section would fail in its intent if courts determined that written, rather than oral communication, could generally satisfy this right."[381] Yet, in the wake of all this, the Advisory Committee now proposes a rule that does not guarantee that victims have the right to speak, leaving this to the courts to construe on a case-by-case basis. This retreat on victims' rights truly stands the CVRA on its head.

The Advisory Committee should directly state that victims have the right to speak at sentencing – as the only courts to have reached the issue have held.[382] Judge Kozinski's opinion in

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[379] Advisory Committee Minutes, *supra* note 65, at 14 (comment of Prof. Beale).

[380] *See* http://www.uscourts.gov/rules/index.html. (Criminal Rules Docket (Historical)).

[381] 150 CONG. REC. S10910, S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[382] *See United States v. Kenna*, 435 F.3d 1011 (9th Cir. 2006); *United States v. Degenhardt*, 405 F. Supp. 2d 1341 (D. Utah. 2005); *see also United States v. Turner*, 367 F. Supp. 2d 319, 333 (E.D.N.Y. 2005) (opining in dicta that § 3771(a)(4) "require[s] the victim to be given an opportunity actually to be 'heard' rather than afforded some alternate means of communicating her views"); *cf. United States v. Marcello,* 370 F. Supp. 2d 745, 749 (N.D. III. 2005) (holding that in the unique context of detention hearings, victims have no right to speak, particularly when the witness has no direct information to provide the court).

United States v. Kenna makes the point very well.[383] He explained that the CVRA's legislative history "disclose[s] a clear congressional intent to give crime victims the right to speak at proceedings covered by the CVRA."[384] The court first highlighted the following statement by Senator Kyl:

> It is not the intent of the term "reasonably" in the phrase "to be reasonably heard" to provide any excuse for denying a victim the right to appear in person and directly address the court. Indeed, the very purpose of this section is to allow the victim to appear personally and directly address the court.[385]

Senator Dianne Feinstein, another primary sponsor of the bill, remarked that Senator Kyl's understanding of the bill was "[her] understanding as well."[386]

In addition to these floor statements, the *Kenna* court cited to a committee report for the proposed constitutional amendment to protect victims' rights. The Senate Report on the amendment – an amendment that contained language nearly identical to the language in the eventually enacted CVRA – reads that:

> The victim's right is to "be heard." The right to make an oral statement is conditioned on the victim's presence in the courtroom . . . . [V]ictims should always be given the power to determine the form of the statement. Simply because a decision making body, such as the court . . . has a prior statement of some sort on file does not mean that the victim should not again be offered the opportunity to make a further statement . . . . The Committee does not intend that the right to be heard be limited to "written" statements, because the victim may wish to communicate in other appropriate ways.[387]

Based on this legislative history, *Kenna* concluded that crime victims have the right to speak at CVRA-covered proceedings.[388] *Kenna* explained that this interpretation advanced the purposes of the CVRA, for the "statute was enacted to make crime victims full participants in the criminal justice system."[389] The Advisory Committee should follow that lead and provide that victims are guaranteed

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[383] *See generally* Douglas E. Beloof, *Judicial Leadership at Sentencing under the Crime Victims' Rights Act: Judge Kozinki in* Kenna *and Judge Cassell in* Degenhardt, 19 FED. SENT. REPTR. 36 (2006).

[384] *Kenna,* 435 F.3d at 1016.

[385] *Id.* at 1015 (quoting 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyle)).

[386] *Id.* (quoting 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein)).

[387] *Id.* (quoting S. Rep. No. 108-191, at 38 (2003)).

[388] *Id.* at 1016.

[389] *Id.*

a right to speak at sentencing. Of course, in cases involving numerous victims (e.g., a massive fraud cause), the CVRA itself allows the courts to fashion a "reasonable procedure" to accommodate the competition concerns.[390]

Rule 44.1 — Discretionary Appointment of Counsel for Victim

The Proposals:

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

> **Rule 44.1 Counsel for Victims.**
> When the interests of justice require, the court may appoint counsel for a victim to assist the victim in exercising their rights as provided by law.[391]

The Advisory Committee did not propose any change in the rules on this subject.

Discussion:

The Advisory Committee never discussed this particular proposed change, so it is possible that its failure to adopt it was an oversight.[392] In any event, here it is perhaps useful to emphasize just a few points in favor of this proposal.

While the CVRA does not *create* a right to counsel for victims, nothing in the Act deprived the courts of their pre-existing inherent authority. The courts generally have the right to appoint volunteer counsel in civil cases,[393] a power that would seem to extend to criminal cases. Indeed, the Supreme Court has left open the question of whether federal courts possess the inherent authority to *require* counsel to provide legal services to the poor.[394] The local rules of some federal courts already explicitly recognize this power.[395] In addition, Title 28 broadly permits the court in both civil and criminal cases to "request an attorney to represent *any person* unable to afford counsel."[396]

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[390] 18 U.S.C. § 3771(d)(2).

[391] Cassell, *supra* note 3, at 912-16.

[392] *See* CVRA Subcommittee Mem., *supra* note 63, at 17-20 (listing my proposals that the Subcommittee decided not to recommend; my proposed Rule 44.1 change not among them).

[393] *See generally* Judy E. Zelin, *Court Appointment of Attorney to Represent, Without Compensation, Indigent in Civil Action*, 52 A.L.R. 4TH 1063 (1987 & Supp. 2004).

[394] *Mallard v. United States District Court*, 490 U.S. 296, 307 & n.8 (1989).

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

[396] 28 U.S.C. § 1915(e)(1) (emphasis added).

And before *Gideon v. Wainwright*,[397] courts could request that lawyers provide assistance to indigent criminal defendants. Presumably, that same power extends to requesting assistance for crime victims.[398] In light of all these facts, federal courts have the inherent power to request attorneys to represent indigent crime victims.

An illustration of this power if found in a decision by the U.S. District Court for the Western District of North Carolina in *United States v. Stamper*.[399] In this rape case, a dispute arose over the admission of certain psychiatric reports concerning the victim that the defense alleged demonstrated a pattern of making false allegations of sexual abuse. She requested independent counsel to protect her privacy interests. After consulting with the victim, the court appointed counsel for her. The court then allowed her counsel to participate in hearings regarding the evidence, including cross-examination of the relevant witnesses.[400]

The proposed rule would simply confirm the existing discretionary power of the courts to appoint volunteer counsel demonstrated in cases like *Stamper*. The rule is purely discretionary (the court "may" appoint counsel) and is limited to situations where the interests of justice require appointment. The rule does not address payment for counsel, as this matter must be left to subsequent appropriations from Congress. The court, however, can ask for volunteer counsel to assist victims pro bono.

Finally, it might be argued that it is unnecessary to address this subject in a rule, because the court's inherent authority to appoint counsel exists even without a rule. Both courts and victims, however, will find it useful to have this authority close at hand in the criminal rules. Rule 44 already covers the subject of appointing counsel for defendants in great detail, so adding a Rule 44.1 addressing victims' counsel is a natural corollary. In addition, prosecutors are obligated by the CVRA, "in the event of any material conflict of interest between the prosecutor and the crime victim" to "advise the crime victim of the conflict and take reasonable steps to direct the crime victim to the appropriate legal referral, legal assistance, or legal aid agency."[401] This may frequently require prosecutors to help victims obtain legal counsel. Accordingly, a separate rule on this subject is appropriate.

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

Rule 46 — Victims' Right to Be Heard Regarding Defendant's Release from Custody

The Proposal:

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[397] 372 U.S. 335 (1963).

[398] *See* BELOOF, CASSELL & TWIST, *supra* note 4, at 381-82 (suggesting this conclusion).

[399] 766 F.Supp. 1396 (W.D.N.C. 1991).

[400] *Id.* at 1397.

[401] 18 U.S.C. § 3771(c)(2).

I proposed that a victim should be given the right to offer views regarding the defendant's release from custody – and that the court should consider those views – as follows:

> **(k) Victims' Right to Be Heard.** A victim has the right to be heard regarding any decision to release the defendant. The court shall consider the views of victims in making any release decision, including such decisions in petty cases. In a case where the court finds that the number of victims makes it impracticable to accord all of the victims the right to be heard in open court, the court shall fashion a reasonable procedure to facilitate hearing from representative victims.[402]

The Advisory Committee proposed no change to this rule. It did, however, propose a global rule that would give victims a right to be heard at proceedings involving release:

> **Rule 60. Victims**
> **(a) Rights of Victims.**
> . . . .
> **(3) Right to Be Heard.**
> The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release . . . involving the crime.[403]

Discussion:

The Advisory Committee's global proposal gives victims the right to be "heard" on release decisions; but it fails to spell out what effect, if any, the victim's statement would have after the court heard the victim. In other words, the Advisory Committee proposal seemingly codifies an empty gesture.

In contrast, my proposal would take the straightforward and important step of requiring a court to consider the views of the victim in determining any release decision.[404] That requirement is added directly into the rule governing release decisions – Rule 46. Adding a specific rule with specific consequences is far preferable to the Advisory Committee's approach and is consistent with the CVRA's goal of ensuring "reasonable conditions of pre-trial and post-conviction relief that include protections for the victim's safety."[405]

Rule 48 — Victims' Views on Dismissal to be Considered

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[402] Cassell, *supra* note 3, at 917.

[403] Proposed Amendments, *supra* note 68, Rule 60(a)(3).

[404] Existing law has places where a victim's views could profitably be brought to bear. *See, e.g.,* 18 U.S.C. § 3142(c) (court to consider whether release of the defendant "will endanger the safety of any other person").

[405] *See, e.g.,*150 CONG. REC. S10910-01 (daily ed. Oct. 9, 2005) (statement of Sen. Kyl).

The Proposals:

I proposed that the court should be required to consider the views of victims in deciding whether to grant a government's motion to dismiss a case as follows:

> **Rule 48. Dismissal**
> **(a) By the Government.** The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent. In deciding whether to grant the government's motion to dismiss, the court shall consider the views of any victims.

The Advisory Committee proposed no change to this rule.

Discussion:

The Advisory Committee declined to adopt this recommendation for several reasons:

> The Subcommittee recognized that victims will have a great interest in whether charges are dismissed. The CVRA does not, however, explicitly address dismissals, and it speaks only of not excluding the [victim] from, and providing the [victim with] . . . a right to be reasonably heard at public proceedings in the district court. If the government moves for dismissal there is ordinarily no public proceeding. (When there is a public proceeding, the victim's right not to be excluded, and to be reasonably heard is provided for in Rule [60].)
>
> In light of the statutory statement in 18 U.S.C. § 3771(d)(6) that nothing in the CVRA "shall be construed to impair the prosecutorial discretion of the Attorney General," as well as the separation of powers issues raised by judicial review of the government's decision to terminate a prosecution, the Subcommittee was not persuaded that the rule should be amended to require the court to consider the victim's views on dismissal. When there is no public court proceeding, the victim's views will be taken into account through the right to confer with the government under 18 U.S.C. § 3771(a)(5).[406]

The Advisory Committee's opening premise is clear enough – victims do indeed have "great interest" in whether charges are dismissed. But after this promising start, the Committee's logic is hard to track. The Committee seems to be of the view that, in situations where a court considers a motion to dismiss at a public proceeding, the victim would be heard.[407] Yet the proposed Rule the

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[406] CVRA Subcommittee Mem., *supra* note 63, at 20.

[407] *Id.* ("When there is a public proceeding, the victim's right not to be excluded, and to be reasonably heard is provided for in Rule [60].").

Committee cites for this proposition – proposed Rule 60[408] – is actually drafted so narrowly that the victim would have no right to be heard on such a motion.[409]

In situations where the court considered a motion to dismiss without a public proceeding, the Advisory Committee takes the view that the CVRA does not "explicitly address" the subject. This view assumes, of course, that the victim's right to fairness does not come into play when the prosecution moves to drop previously-filed charges. This assumption is incorrect. Rule 48 already requires leave of court for a dismissal. In determining whether to grant leave, current caselaw requires the court to consider whether dismissal is "clearly contrary to manifest public interest."[410] The existing caselaw requires that the impact on a victim be considered in addressing a motion to dismiss. A dismissal is "clearly contrary to the public interest" if the prosecutor appears to be motivated by animus toward the victim.[411] Under the command of the CVRA, the victim thus must be treated with fairness when the dismissal motion is addressed, as my proposal provides.

When the government files a motion to dismiss criminal charges involving a specific victim, the only way to protect that victim's right to be treated fairly is to consider the victim's views on the dismissal.[412] To treat a person with "fairness" is conventionally understood as treating them "justly" and "equitably."[413] A victim is not treated justly and equitably if her views are not even before the court.

The Advisory Committee also alludes vaguely to "separation of powers issues raised by judicial review of the government's decision to terminate a prosecution." Here the Advisory Committee may be stepping out of line and questioning the Supreme Court. In 1944, the Court itself added the requirement to Rule 48 that prosecutors obtain leave of court before dismissing any indictment.[414] Thus, if there are separation of powers "issues" about judicial review of dismissals, they have existed for more than half a century by virtue of Supreme Court action.

The Advisory Committee's next argument is that to allow victims to be heard on dismissals would violate the CVRA's requirement that nothing in the Act "shall be construed to impair the

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[408] In the Subcommittee draft, the Rule cited is actually numbered Rule 43.1. *See* CVRA Subcommittee Mem., *supra* note 63, at 20. Later, without any substantive change, Rule 43.1 was renumbered as Rule 60.

[409] *See* Proposed Amendments, *supra* note 68, Rule 60 (giving victims a right to be heard only as to proceedings concerning "release, plea, or sentencing") (discussed at *infra* notes 425-40 and accompanying text).

[410] *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975).

[411] *In re Richards*, 213 F.3d 773, 787 (3d Cir. 2000); *see also United States v. Hamm*, 659 F.2d 624, 629–30 (5th Cir. 1981).

[412] *Accord United States v. Heaton*, 458 F. Supp. 2d 1271 (D. Utah 2006) (Cassell, J.).

[413] BLACK'S LAW DICTIONARY 633 (8th ed. 2004) (definition of adj. "fair").

[414] *See* FED. R. CRIM. P. 48, Advisory Committee Note regarding 1944 adoption.

prosecutorial discretion of the Attorney General."[415] But it is hard to understand how allowing information from a victim to go to a court "impairs" the government's discretion. Particularly given that courts must already review the public interest in reviewing dismissal motions, Executive Branch power is not impaired when a court hears from a victim in making *its* determination whether to approve.[416]

The Advisory Committee's final argument is that "[w]hen there is no public court proceeding, the victim's views will be taken into account through the right to confer with the government . . . ."[417] The passive voice ("taken into account") obscures the overarching fact that it is the government itself that is proposing to dismiss the charges. The victim deserves to be heard not merely by the government agency proposing to drop the charges, but by the independent branch of government – the judiciary – that will review that proposal.

For all these reasons, Rule 48 should be amended to ensure that victims are heard because charges are dismissed.

Rule 50 — Victims' Right to Proceedings Free From Unreasonable Delay

The Proposals:

I proposed that a victim's right to proceedings free from unreasonable delay should be recognized as follows:

> **Rule 50. Prompt Disposition**
> **(a) Scheduling Preference.** Scheduling preference must be given to criminal proceedings as far as practicable.
> **(b) Defendant's Right Against Delay.** The court shall assure that the defendant's right to a speedy trial is protected, as provided by the Speedy Trial Act.
> **(c) Victim's Right Against Delay.** The court shall assure that a victim's right to proceedings free from unreasonable delay is protected. A victim has the right to be heard regarding any motion to continue any proceeding. If the court grants a motion to continue over the objection of a victim, the court shall state its reasons in the record.[418]

The Advisory Committee proposed no change to this Rule.

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[415] 18 U.S.C. § 3771(d)(6).

[416] *See Heaton*, 458 F. Supp. 2d at 1271-73 (reaching this conclusion). In *Heaton*, the government did not challenge this holding and, after the decision requiring it to submit the victim's views, filed a pleading to that effect, all without any apparent separation of powers problem.

[417] CVRA Subcommittee Mem., *supra* note 3, at 19.

[418] Cassell, *supra* note 3, at 918-21.

Discussion:

Victims have speedy trial rights under the CVRA, which grants victims the right "to proceedings free from unreasonable delay."[419] In addition, child victims previously had the right to a "speedy trial" in certain situations.[420]

In view of these statutory rights, I proposed supplementing the existing rule on scheduling (Rule 50) to fold in victims' rights. The Advisory Committee did not explicitly discuss this proposal, suggesting that its failure to act was possibly due to oversight.[421] Further suggesting oversight is the Committee's repeated statements that it "sought to incorporate, but not go beyond, the rights created by statute" and that it "adopted the statutory language whenever possible."[422] Yet under the Advisory Committee's proposed changes, victims' speedy trial rights under the CVRA are not incorporated into the rules.

Victims should have their rights regarding scheduling reflected in the rule dealing with scheduling issues. My proposed rule closely tracks the language of the CVRA. It does add a provision that victims would be heard on a motion to continue a proceeding. This provision is directly consistent with the definitive legislative history. As Senator Kyl explained: "This provision [in the CVRA] should be interpreted so that any decision to schedule, reschedule, or continue criminal cases *should include victim input* through the victim's assertion of the right to be free from unreasonable delay."[423] My proposed rule also requires that the court state its reason for granting any continuance. This requirement stems from a recommendation from the President's Task Force on Victims of Crime. The Task Force noted "the inherent human tendency to postpone matters, often for insufficient reason," and accordingly recommended that "reasons for any granted continuance . . . be clearly stated on the record."[424] Several states have adopted similar provisions.[425]

Rule 53 — Closed-Circuit Transmission of Proceedings for Victims

The Proposals:

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[419] 18 U.S.C. § 3771(a)(7).

[420] 18 U.S.C. § 3509(j).

[421] *See* CVRA Subcommittee Mem., *supra* note 63, at 17-20 (cataloging my proposals that the Subcommittee did not adopt; Rule 50 not mentioned).

[422] Proposed Amendments, *supra* note 68 at 350.

[423] 150 CONG. REC. S10910-01 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

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

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

I proposed that closed-circuit transmission of court proceedings for victims should be authorized as follows:

> **Rule 53. Courtroom Photographing and Broadcasting Prohibited**
>
> **(a) General Rule.** Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.
>
> **(b) Closed-Circuit Transmission for Victims.** In order to permit victims of crime to watch criminal trial proceedings, the court may authorize closed-circuit televising of the proceedings for viewing by victims or other persons the court determines have a compelling interest in doing so.

The Advisory Committee proposed no change to this rule.

Discussion:

I proposed to facilitate a victim's protected right to attend a trial by allowing closed-circuit broadcasting of a trial. The Advisory Committee did not act on this proposal for reasons that are unclear, as it did not include this proposed change in the catalogue of my proposals that it was rejecting.[426]

Perhaps the Advisory Committee felt that it had sufficiently addressed the subject in its proposed changes to Rule 60. There the Committee simply tracked language in the CVRA and provided that "[i]f the court finds that the number of victims makes it impracticable to accord all of the victims the rights described in subsection (a), the court must fashion a reasonable procedure to give effect to these rights that does not unduly complicate or prolong the proceedings."[427] Thus, in a situation where numerous victims might overwhelm courtroom seating capacity, the court might craft a reasonable alternative procedure to assure attendance rights. One such reasonable procedure would appear to be closed-circuit transmission of court proceedings to a facility sufficiently large to accommodate all the victims. This was the procedure followed in the Oklahoma City bombing case.[428]

But tracking the CVRA is not enough. The language for my proposed rule comes from another statute, 42 U.S.C. § 10608(a), which authorizes closed-circuit transmissions "notwithstanding any provision of the Federal Rules of Criminal Procedure to the contrary" in cases in which a proceeding has been transferred more than 350 miles. The Advisory Committee

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[426] CVRA Subcommittee Mem., *supra* note 63, at 17-20.

[427] Proposed Amendments, *supra* note 68, Rule 60(b)(3) (tracking 18 U.S.C. § 3771(d)(2)).

[428] Jo Thomas, *Trial to be Shown in Oklahoma for Victims*, THE NEW YORK TIMES, Jan. 30, 1997, at A14; Paul G. Cassell & Robert F. Hoyt, *The Tale of Victims' Rights,* LEGAL TIMES, Dec. 23, 1996, at 32.

repeatedly proposes folding language from the CVRA straight into the Federal Rules of Criminal Procedure. But if the goal is to fold statutes into the rules, other relevant victim's statutes should be folded in as well.

While folding in a provision on closed-circuit broadcasting, there appears to be no good reason to limit such transmissions to such situations where venue has been transferred. The CVRA mandates that the courts must always craft "reasonable procedures" to protect the rights of multiple victims. The proposed rule simply authorizes courts to allow such transmissions in appropriate cases. Interestingly, the CVRA's drafters specifically endorsed the closed-circuit procedure.[429]

For reasons that have yet to be articulated, the Advisory Committee has not only failed to act on my proposal but it has left in place a conflict between a statute and Rule 53. As noted above, 42 U.S.C. § 10608(a) specifically trumps Rule 53 in situations where cases have been transferred more than 350 miles. The Rules should at least be amended to fix that conflict.[430] While fixing that problem, the Advisory Committee should also adopt my change which faithfully implements the CVRA's commands.

(New) Rule 60(a)(1) — Notice of Proceedings for Victims

The Proposals:

I proposed requiring federal prosecutors to give notice to crime victims of their rights and the court process as follows:

> **Rule 10.1 Notice to Victims.**
> **(a) Identification of Victim.** During the prosecution of a case, the attorney for the government shall, at the earliest reasonable opportunity, identify the victims of the crime.
> **(b) Notice of Case Events.** During the prosecution of a crime, the attorney for the government shall make reasonable efforts to provide victims the earliest possible notice of:

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[429] *See* 150 CONG. REC. S10910-01 (Oct. 9, 2004) (statement of Sen. Kyl) (noting that, because of multiple victims in the Oklahoma City bombing case, closed-circuit broadcasting used; this is "merely one example" of how a court could fashion an appropriate procedure to accommodate multiple victims).

[430] Perhaps it could be argued that Rule 53 itself accommodates any conflict because its prohibition of broadcasting applies "except as otherwise provided by a statute or these rules . . . ." FED. R. CRIM. P. 53. But reliance on that language is a bit odd because it should go without saying that nothing in the Rules can trump a substantive statute passed by Congress. *See* 28 U.S.C. § 2072(b). Moreover, as a simple matter of drafting clarity, it is desirable to have the rules themselves avoid conflicts with statutes. Otherwise, courts may inadvertently follow the rules in violation of the statutory command. *See, e.g.,* Cassell, *Barbarians at the Gates*, *supra* note 4, at 516 (recounting how this happened in the Oklahoma City bombing case).

(1) The scheduling, including scheduling changes and/or continuances, of each court proceeding that the victim is either required to attend or entitled to attend;
(2) The release or detention status of a defendant or suspected offender;
(3) The filing of charges against a defendant, or the proposed dismissal of all charges, including the placement of the defendant in a pretrial diversion program and the conditions thereon;
(4) The right to make a statement about pretrial release of the defendant;
(5) The victim's right to make a statement about acceptance of a plea of guilty or *nolo contendere*;
(6) The victim's right to attend public proceedings;
(7) If the defendant is convicted, the date and place set for sentencing and the victim's right to address the court at sentencing; and
(8) After the defendant is sentenced, the sentence imposed and the availability of the Bureau of Prisons notification program, which shall provide the date, if any, on which the offender will be eligible for parole or supervised release.

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

The Advisory Committee proposed to add language in its global victims rule (Rule 60(a)(1)) that would give victims notice only of court proceedings:

Rule 60. Victims

(a) Rights of Victims.

(1) Notice of a Proceeding. The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime.

Discussion:

The difference between my proposal and the Advisory Committee's is that I would give victims notice of both the hearings held in a case *and* the fact that they can speak at some of those hearings; in contrast, the Advisory Committee would give victims notice only of the hearings. For example, I would place in the rule a requirement that victims be notified of their right to make a statement at bail, plea, and sentencing hearings and told when the hearings would be held. The Advisory Committee would tell the victim only when the hearings would be held.[431]

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[431] The Committee did agree with my recommendation that the notice should be provided by the Justice Department, not the courts. *See* Cassell, *supra* note 3, at 861-64. Originally, the CVRA Subcommittee had proposed that the rules be silent on this important issue. *See* Minutes of Oct. 24, 2005 Advisory Committee Meeting, *supra* note 65, at 14 (suggestion that "it is not

The Committee proposal disregards both the law and sound public policy. To start with the law, the CVRA itself quite clearly directs that government investigating and prosecuting agencies "shall make their best efforts to see that crime victims are *notified of*, and accorded, *their rights* [in the CVRA]."[432] Because the Advisory Committee's promised approach was to "incorporate, but not go beyond, the rights created by the statute,"[433] it is surprising to see that, for unexplained reasons, the Committee decided not to incorporate the CVRA's right for victims to be "notified of . . . their rights." Here again, perhaps the Advisory Committee simply overlooked this right of victims.[434]

As a policy matter, leaving out this right threatens to cripple crime victims' right to speak at bail, plea, and sentencing hearings. If victims are unaware of their rights to speak, they may unwittingly forfeit that right. Of course, few victims are knowledgeable about the steps in the criminal justice process. Just as criminal defendants receive advice of their *Miranda* "rights," victims should receive advice of their rights.

Although the Committee did not justify its decision to exclude the right to notice, it might conceivably argue that because this right does not involve the conduct of a public judicial proceeding, it does not belong in the rules. The Committee advanced such an argument to defend its decision to ignore some other aspects of the CVRA in its proposed rule changes.[435]

Such an argument, at least if advanced with respect to notice issues, would lack merit. First, and most important, the rights at issue are directly bound up with judicial proceedings: at issue is notice about the right to speak at bail, plea, and sentencing *proceedings*. Moreover, this right directly bears on those proceedings. It is designed to ensure that a judge at these hearings will have all relevant information, including information from crime victims.

Second, it is not true that the Federal Rules of Criminal Procedure only cover judicial proceedings. To provide a few straightforward examples: Rule 11 authorizes prosecutors and defense attorneys to "discuss and reach a plea agreement";[436] Rule 16 provides that, upon request, a prosecutor "must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of

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clear whose burden it would be to provide such notice" and "Professor Beale recommended the passive phrasing."). Apparently at some point after the meeting, the Advisory Committee chose to place the notification burden squarely on the government. *See* Advisory Committee Rep., *supra* note 66, at 5. The Advisory Committee apparently recognized that this requirement was already the law, as found in another statute, 42 U.S.C. § 10607(b) & (c)(3)(A)-(D).

[432] 18 U.S.C. § 3771(c)(1) (emphases added).

[433] Advisory Committee Report, *supra* note 66, at 2.

[434] *See* CVRA Subcommittee Rep., *supra* note 63, at 17-20 (purporting to catalog Cassell proposals rejected; notice of rights not included).

[435] *See id.* at 13 (listing rights that "seem to fall outside the parameters of the Federal Rules of Criminal Procedure:).

[436] FED. R. CRIM. P. 11(c)(1).

these items, if the item is within the government's possession, custody, or control";[437] Rule 41 requires a police officer executing a search warrant to "give a copy of the warrant and a receipt for the property taken to the person from whom . . . the property was taken";[438] and Rule 49 requires parties to serve their legal pleadings on each other.[439] Although these rights may have some ultimate effect on a court proceeding, none of them involves the conduct of a judicial proceeding. If they are "in bounds" for the Rules of Criminal Procedure, the subject of notice about rights to a hearing would seem to fit comfortably as well.

Turning to how to draft a rule giving victims notice of their rights, it is easy to reformulate my proposal so that it tracks the more abbreviated style preferred by the Advisory Committee. Such a rule would read as follows (underlined language being added to the Committee's proposed language):

> **(1) Notice of a Proceeding.** The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime and of the rights the victim has at those proceedings.

It is not unreasonable to ask prosecutors to give victims notice of their rights. As long ago as 1982, the President's Task Force of Victims of Crime concluded that the prosecutor is "in the best position to explain to victims the legal significance of various motions and proceedings."[440] The *Attorney General Guidelines for Victim and Witness Assistance* already require prosecutors and their agents to provide notice to crime victims for their rights,[441] as do some states.[442] To ensure that the Justice Department has sufficient resources to provide notice, the CVRA authorizes $22 million over the next five fiscal years to the Office for Victims of Crime of the Department of Justice for enhancement of victim notification systems.[443] The Advisory Committee should therefore add language to its proposed rule change to require prosecutors to give victims notice of their rights.

(New) Rule 60(a)(1) – Proceeding Without Notice to a Victim

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[437] FED. R. CRIM. P. 16(a)(1)(E).

[438] FED. R. CRIM. P. 41(f)(3)(A).

[439] FED. R. CRIM. P. 49(a) & (b).

[440] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 64 (1982).

[441] *See* . ATTORNEY GENERAL GUIDELINES, *supra* note 138, at 23.

[442] *See, e.g.,* ALA. CODE. § 15-23-62 (requiring law enforcement officers to give victims initial description of their rights and "[t]he name and telephone number of the office of the prosecuting attorney to contact for further information)

[443] *See* PUB. L. NO. 108-405, 118 Stat. 2260, 2264 (2004); *see also* 150 CONG. REC. SS4267 (daily ed. April 22, 2004) (statement of Sen. Kyl) ("we authorized an appropriation of to assure . . . that moneys would be made available to enhance the victim notification system, *managed by the Department of Justice's Office for Victims of Crime*, and the resources additionally to develop state-of-the-art systems for notifying crime victims of important statements of development).

The Proposals:

I proposed spelling out what would happen in circumstances where a court wanted to proceed with a hearing but no notice had been given to a victim as follows:

> **(b) Proceeding With and Without Notice.** The court may proceed with a public proceeding without a victim if proper notice has been provided to that victim under Rule 10.1. The court may proceed with a public proceeding (other than a trial or sentencing) without proper notice to a victim only if doing so is in the interests of justice, the court provides prompt notice to that victim of the court's action and of the victim's right to seek reconsideration of the action if a victim's right is affected, and the court ensures that notice will be properly provided to that victim for all subsequent public proceedings.[444]

The Advisory Committee did not propose any such change.

Discussion:

It seemed desirable to me to spell out how courts should proceed when victims lacked notice of a hearing. In contrast, the Advisory Committee has chosen not to address the subject.

By not addressing the subject, the Advisory Committee may be suggesting that the court is forbidden from moving forward when a victim has not been given notice of a proceeding. The caselaw make clear that when a defendant has not been given notice, any subsequent court action is void.[445] The CVRA's legislative history shows that the same rule was to apply for victims. As Senator Kyl explained, "It does not make sense to enact victims' rights that are rendered useless because the victim never knew of the proceeding at which the right had to be asserted. Simply put, a failure to provide notice of proceedings at which a right can be asserted is equivalent to a violation of the right itself."[446]

In light of the fact that a court might otherwise be barred from proceeding when a victim has not been given notice, it still seems preferable to me to spell out a way to allow the court to move forward while simultaneously protecting victims' interests. But I will not elaborate the point further here.

(New) Rule 60(a)(2) — Victims' Right to Attend Trials

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[444] Cassell, *supra* note 3, at 908-10. I proposed adding this as new Rule 43.1, but discuss it here as new Rule 60(a)(1) to track the Committee's nomenclature.

[445] *See* WRIGHT, *supra* note 174, § 721, at 13.

[446] 150 CONG. REC. S10910-01 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (reprinted in Appendix B).

Both the Advisory Committee and I proposed a rule that guarantee victims the right to attend court proceedings except in those very rare instances where the victim's testimony would be materially altered by attending the trial.[447] Because the Advisory Committee proposal essentially tracks my proposal, it is not necessary to discuss this issue here.

(New) Rule 60(a)(3) — Victims' Right to be Heard on Bail, Plea, Sentencing and Other Issues

The Proposals:

I proposed not only specific rules allowing victim to be heard at release, plea, and sentencing hearings but also a general rule giving victims the right to be heard on all issues directly affecting their rights as follows:

> **Right to be Heard on Victims' Issues**. In addition to rights to be heard established elsewhere in these rules, at any public proceeding at which a victim has the right to attend, the victim has the right to be heard on any matter directly affecting a victim's right.[448]

The Advisory Committee proposed only a narrow rule giving victims the right to be heard at only three specific points in the process – bail, plea, and sentencing hearings:

> ***Right to Be Heard***. 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.[449]

Discussion:

The Advisory Committee's proposed general rule on the victim's right to be heard is inferior to weaving that right into the specific rules on release, plea, and sentencing. This issue is discussed earlier in this article.[450] The larger issue to pursue here is the silence of the Advisory Committee on how a court should proceed when a victim's rights under the CVRA are at stake in other proceedings. For example, what if the court is considering continuing a trial in violation of a

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[447] *See* Cassell, *supra* note 3, at 904-11; Proposed Amendments, *supra* note 68, Rule 60(a)(2); *see also* Beloof & Cassell, *supra* note 200, at 519-20 (concluding that the CVRA grants a "nearly unqualified" right for the victim to attend a trial); *In re Mikhel*, 453 F.3d 1137 (9th Cir. 2006) (reversing district court decision excluding victims from trial under the CVRA).

[448] Cassell, *supra* note 3, at 905, 911.

[449] Proposed Amendments, *supra* note 68, Rule 60(a)(3) at 371.

[450] *See supra* notes 383-94 and accompanying text (proposing amendments to Rule 48 regarding release); *supra* notes 133-38 and accompanying text (proposing amendments to Rule 11 regarding pleas); *supra* notes 317-56 and accompanying text (proposing amendments to Rule 32).

victim's right to "proceedings free from unreasonable delay"?[451] Or excluding the victim from a proceeding in violation of a victim's right "not to be excluded from . . . public court proceedings"?[452] Or turning over to the defense personal and confidential information about the victim in violation of a victim's right "to be treated with fairness and with respect for the victim's dignity and privacy."[453] Or giving a defendant the victim's home address in an alibi situation in violation of the victim's right to be "reasonably protected from the accused."[454]

My proposed rule would state directly that the victim has the right to be heard on such issues. How the Advisory Committee would handle such issues is unclear. The Advisory Committee's proposed rule on the victim's right to be heard only confers such a right for three specific hearings. The listing of three hearings might seem to suggest victims could not be heard elsewhere. But denying victims a chance to be heard at other hearings where their rights are implicated is such an obvious violation of fundamental notions of fairness (not to mention the victim's right to fairness under the CVRA) that one should be reluctant to ascribe that conclusion to the Advisory Committee.

Part of the confusion here may stem from two different ways in which victims can be heard. The first way is when the victim's statement is effectively built into the proceeding at issue. At sentencing hearings, for example, the CVRA envisions a specific point in the process where the victim will have a chance to make a statement – the victim's allocution.[455] This is what the CVRA means when it refers to the victim's "right to be heard" at sentencing proceedings (along with plea and bail proceedings). But the listing of victims' rights to be heard at those three specific hearings could not possibly have meant that victims would have to remain silent at all other hearings.

The CVRA envisions victims being heard in second sense – in arguing in favor of their rights. The CVRA directly gives victims and their representatives the right to "assert" their rights.[456] These rights can be asserted by a victim's representative (i.e., an attorney).[457] The CVRA also allows victims to file motions asserting their rights which must be taken up "forthwith."[458] These are all ways in which victims can properly be heard.[459]

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[451] 18 U.S.C. § 3771(a)(7) (2006).

[452] *Id.* § 3771(a)(3).

[453] *Id.* § 3771(a)(8); *see also supra* notes 192-287 and accompanying text (discussing amendments to Rule 17).

[454] *Id.* § 3771(a)(1); *see also supra* notes 154-77 and accompanying text (discussing this question).

[455] *See supra* notes 321-24 and accompanying text (discussing victim allocution).

[456] 18 U.S.C. § 3771(d)(1) (2006).

[457] *Id.* § 3771(d)(1).

[458] *Id.* § 3771(d)(3).

[459] *See, e.g., United States v. Tobin*, 2005 WL 1868682 (D.N.H. 2005) (allowing putative victim to assert right to proceedings free from unreasonable delay even though bail, plea, or sentencing hearing not at issue).

The CVRA's legislative history makes it unmistakably clear that victims would be heard at other points in the process. Senator Feinstein explained that the basic goal of the CVRA was to give victims the right to "participate in the process where the information that victims and their families can provide may be material and relevant . . . ."[460] Senator Kyl also noted that the Act's enforcement provisions would give victims rights to be heard throughout the process:

> [The CVRA's enforcement provisions] allow[] a crime victim to enter the criminal trial court during proceedings involving the crime against the victim, to stand with other counsel in the well of the court, and assert the rights provided by this bill. This provision ensures that crime victims have standing *to be heard* in trial courts so that *they are heard* at the very moment when their rights are at stake and this, in turn, forces the criminal justice system to be responsive to a victim's rights in a timely way.[461]

As one illustration of how this right to be heard operates, consider the victim's right to proceedings free from unreasonable delay.[462] Presumably, this right encompasses a victim's opportunity to be heard before a case is delayed. As Senator Kyl stated: "This provision should be interpreted so that any decision to schedule, reschedule, or continue criminal cases *should include victim input* through the victim's assertion of the right to be free from unreasonable delay."[463]

In view of the all different ways in which crime victims can be heard, it is appropriate to have rule that speaks broadly to the subject and protects a victim's right to be heard whenever her rights are at stake. My proposed rule achieves that goal.

(New) Rule 60(b) — Enforcement of Victims' Rights

The Proposals:

I proposed folding into the procedures a victim's right to assert an error as follows:

> **Rule 51. Preserving Claimed Error**
> **(a) Exceptions Unnecessary.** Exceptions to rulings or orders of the court are unnecessary.
> **(b) Preserving a Claim of Error.** A party or a victim may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party

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[460] 150 CONG. REC. S4260-01 (Apr. 22, 2004) (statement of Sen. Feinstein).

[461] 150 CONG. REC. S4260, S4269 (Apr. 22, 2004) (statement of Sen. Feinstein) (emphases added).

[462] 18 U.S.C. § 3771(a)(7).

[463] 150 CONG. REC. S10910-01 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added) (reprinted in Appendix B).

or a victim does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.[464]

The Advisory Committee proposed incorporating some of the language of the CVRA dealing with enforcement of victims' rights as follows:

> **Rule 60. Victim's Rights.**
>
> . . .
>
> **(b) Enforcement and Limitations.**
>
> **(1)** ***Time for Decision.*** The court must promptly decide any motion asserting a victim's rights under these rules.
>
> **(2)** ***Who May Assert Rights***. The rights of a victim under these rules may be asserted by the victim or the attorney for the government.
>
> **(3)** ***Multiple Victims.*** If the court finds that the number of victims makes it impracticable to accord all of the victims the rights described in subsection (a), the court must fashion a reasonable procedure to give effect to these rights that does not unduly complicate or prolong the proceedings.
>
> **(4)** ***Where Rights may be Asserted.*** The rights described in subsection (a) must be asserted in the district in which a defendant is being prosecuted for the crime.
>
> **(5)** ***Limitations on Relief***. A victim may make a motion to re-open a plea or sentence only if:
>
> (A) the victim has asked to be heard before or during the proceeding at issue and the request was denied;
>
> (B) the victim petitions the court of appeals for a writ of mandamus within 10 days of the denial and the writ is granted; and
>
> (C) in the case of a plea, the accused has not pleaded to the highest offense charged.
>
> **(6)** ***No New Trial.*** In no case is a failure to afford a victim any right under these rules ground for a new trial.

Discussion:

I proposed to essentially create a rule for victims to assert error, leaving additional details to be treated elsewhere. The Advisory Committee proposed to fold into the Rules of Criminal Procedure some of the enforcement provisions and restrictions in the CVRA.

Because the Advisory Committee's proposal largely tracks the CVRA, much in it is unobjectionable. But the Committee deviates from the CVRA's language in four places for reasons

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[464] Cassell, *supra* note 3, at 921-22.

that are unexplained – and unexplainable. The patient reader of this article may not be surprised that all four of these deviations operate in the same direction – to *reduce* a crime victim's rights from what Congress has commanded.

First, in Proposed Rule 60(b)(1), the Advisory Committee has watered down the CVRA's directive that a court must decide any victim's motion "forthwith"[465] to "promptly." While there is nothing wrong with this change as a matter of style,[466] it does appear to reduce the speed with which courts will have to act to enforce victims' rights. "Forthwith" can be interpreted to be more exacting requirement than "promptly."[467] Given that the Advisory Committee's premise that, where possible, it "should incorporate" the language of the CVRA,[468] it is unclear why it chose to substitute "promptly" for the "forthwith" requirement.

Second, in Proposed Rule 60(b)(2), the Advisory Committee has inexplicably left out the right of the victim's representative to assert a victim's right (along with the victim herself and the prosecutor).[469] This omission is criticized earlier in this article.[470]

Third, in Proposed Rule 60(b)(5)(a) through (c), the Advisory Committee sets out three requirements for a victim to file a motion reopen a sentence – requirements taken straight from the CVRA.[471] Without explanation, however, the Advisory Committee then leaves out the CVRA's qualification to these restrictions – "[t]his paragraph does not affect the victim's right to restitution as provided in Title 18, United States Code."[472]

Fourth, and most important, in Proposed Rule 60(b)(4), the Advisory Committee has left out the CVRA's venue provision which allows a victim to assert her rights "*if no prosecution is underway, in the district court in the district in which the crime occurred.*"[473] In contrast to the other three omissions just noted, the Advisory Committee specifically discussed whether to track the

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[465] 18 U.S.C. § 3771(d)(3) (2006).

[466] *See* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 372 (2d ed. 1995).

[467] *See, e.g., Amella v. United States*, 732 F.2d 711, 713 (9th Cir. 1984) ("[I]t is clear that the term ['forthwith'] connotes action which is prompt [*and*] immediate, without delay, and with reasonable dispatch.") (internal citation omitted and order rearranged); *Ayers v. Coughlin*, 530 N.E.2d 373, 375 (N.Y. 1988) ("We reiterate that the statutory mandate to commit individuals to the officials responsible for their custody 'forthwith' means that it is done without delay, at once, promptly. 'Forthwith' signals immediacy.").

[468] Proposed Amendments, *supra* note 68, at 350.

[469] *Compare* PROPOSED FED. R. CRIM. P. 60(b)(2) *with* 18 U.S.C. § 3771(d)(1) (victims' rights may be asserted by "[t]he crime victim *or the crime victim's lawful representative*, and the attorney for the Government") (emphasis added).

[470] *See supra* notes 110-17 and accompanying text.

[471] *See* 18 U.S.C. § 3771(d)(5)(a)-(c).

[472] *Id.* § 3771(d)(5).

[473] *Id.* § 3771(d)(3) (emphasis added).

italicized language in its proposed rule on asserting rights, declining to leave the statutory language in the rules:

> Judge Levi expressed concern over the final phrase in Rule [60(b)(4)], which gives a victim the right to assert rights "if no prosecution is underway, in the court in the district in which the crime occurred." Judge Jones said the Crime Victims Rights Act affords victims certain rights even in the absence of a case. Judge Levi noted, however, that the criminal rules only apply to proceedings in filed cases. Judge Jones explained that the subcommittee had decided to include it because there might be a pre-prosecution proceeding of some sort to which the provision might apply. There was discussion as to whether a grand jury investigation might qualify as such. Professor Beale said that, while the Act might give victims certain rights, such as being treated respectfully, Judge Levi was probably correct that the rights covered by the criminal rules could only be asserted with respect to a case being prosecuted. After further discussion, Judge Jones said the phrase would be deleted, as Judge Levi had suggested.[474]

This resulted in the Advisory Committee proposing a rule that recites only half of the CVRA's venue provision. The rule as proposed by the Committee provides that "[t]he rights described in [the rules] must be asserted in the district in which a defendant is being prosecuted for the crime,"[475] leaving silent what a victim should do if no prosecution is underway.

Once again, the confusion that the Advisory Committee discovered in the statute stems from the Committee's failure to give effect to the victim's right to fairness. The CVRA extends the requirement for fair treatment not only to prosecutors and courts, but also to all "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 . . . ."[476] (I will call this the CVRA's "coverage provision.") It is, of course, easily conceivable that investigative agencies might violate a victim's right to fairness before formal criminal proceedings were initiated. Because "no prosecution is underway" in such circumstances, the victim would need to assert their rights (in the language of the CVRA's venue provision) "in the district court in the district in which the crime occurred."

Under the Advisory Committee's proposal, a victim who is treated unfairly by a federal investigative agency will lack any place to assert her right to fair treatment – in contravention of a teaching that traces back at least to *Marbury v. Madison* that "where there is a legal right, there is also a legal remedy."[477] The Advisory Committee, however, seems to think that this is not a problem

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[474] Advisory Committee Minutes, *supra* note 65, at 15 (discussing now-renumbered Rule 43(1)(b)(3)).

[475] *See* discussion of Proposed Rule 60(b)(4), *infra.*

[476] 18 U.S.C. § 3771(c)(1) (2006) (emphasis added).

[477] *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

to be addressed in the rules – because the rights covered by the criminal rules "could only be asserted with respect to a case being prosecuted." But, of course, this assumption depends on limiting the rights in the CVRA to such narrow provisions as the right to be "heard" on sentencing and other issues, because these rights attach only to "any public proceeding."[478] This assumption fails if the right to be treated fairly (not to mention the right to be treated with dignity and respect) is in the mix – as CVRA's plain language demands.

The Advisory Committee seemed to recognize the venue problem for cases with no prosecution underway when it discussed the fact that victims may now have rights in the grand jury process (a subject squarely covered by the criminal rules[479]). But other examples exist as well. For example, federal agents may improperly tread on a victim's rights through a search warrant (another subject covered by the criminal rules[480]). Or in the course of their investigation, they may mishandle evidence in a way that treads on a victim's dignity (improperly disseminating a nude or pornographic photograph of a victim, for instance.[481]) In all these situations, a victim is at least entitled to a forum to assert her rights to be treated with fairness and with respect for her dignity and privacy – yet the Advisory Committee has excised the CVRA's venue provision that provides the forum.

It is important to emphasize one argument the Advisory Committee does *not* appear to make: that the CVRA applies only to charged crimes. Any such argument would not only fly squarely in the face of the CVRA's venue and coverage provisions applying victims' rights against investigating agencies, but also of the CVRA's clear legislative history. Discussing the CVRA's definition of a crime victim,[482] Senator Kyl said the statute used an "intentionally broad definition because all victims of crime deserve to have their rights protected, *whether or not they are the victim of the count charged*."[483]

At least one federal magistrate judge has suggested, in dicta, that – in spite of Senator Kyl's plain statement – the CVRA might not apply until charges have been filed.[484] His primary reason for doing so, however, was that the Supreme Court's decision in *Hughey v. United States*,[485]

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[478] 18 U.S.C. § 3771(a)(4). *See generally* discussion of Proposed Rule 60(a)(3), *infra*.

[479] FED. R. CRIM. P. 6. *See generally* BELOOF, CASSELL & TWIST, *supra* note 4, at 335-79 (discussing victims' rights and the grand jury process).

[480] *See* FED. R. CRIM. P. 41.

[481] *Cf. Donohue v. Hoey*, 109 Fed.Appx. 340 (not selected for publication in the Federal Reporter), 2004 WL 2095661 (10th Cir.(Colo.)), Sep 21, 2004 (No. 02-1405)(finding no § 1983 right to damages for alleged mishandling of nude photograph during state police investigation).

[482] *See supra* notes 110-11 and accompanying text (discussing amendments to Rule 1).

[483] 150 CONG. REC. S10910, 10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl); *cf. United States v. Heaton*, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006) ("Although some of the other rights in the Crime Victims' Rights Act (such as the right to be heard and the right to not be excluded) are limited to 'public proceedings,' the right to fairness is not so restricted.").

[484] *United States v. Turner*, 367 F. Supp. 2d 319 (E.D.N.Y. 2005) (Orenstein, M.J.).

[485] 495 U.S. 411 (1990).

suggested this result. To be sure, the victims statute at issue in *Hughey* (the Victim Witness Protection Act) did employ a similar definition of "victim" that to found in the CVRA. But *Hughey* turned on the fact that other language in the restitution statute provided that "a defendant *convicted* of an offense" may be ordered to "make restitution to any victim *of such offense*."[486] Such a straightforward holding says little about statutes – such as the "fairness" provision in the CVRA – that contains no such limiting language regarding persons "convicted . . . of [an] offense." Moreover, the magistrate judge did not discuss the CVRA's coverage and venue provisions, which plainly dictate that the CVRA applies to crimes not yet charged.[487] For all these reasons, the Advisory Committee should apply the CVRA as written and include a venue provision both for prosecuted and not-yet-prosecuted crimes.

The Advisory Committee should not, however, add in a provision for fact-finding hearing to determine whether someone is a "victim" of crime. In its comment on the pending proposed amendments, the National Association of Criminal Defense Lawyers has proposed such a procedure. The rationale it gives is that "the conferring of 'rights' on the 'victim' comes, in general, as the expense of the defendant. Thus, due process requires that a provision be added to these Rules for a factfinding hearing, to be held whenever the proper labeling of a person as 'victim,' is in dispute . . . ."[488]

The NACDL's rationale is patently defective. The rights in the CVRA do not interfere with any rights of the defendant, as pointed out throughout this article. For instance, for victims to be notified of court hearings, to attend those hearings, and to speak at those hearings does not interfere with the defendant's right to be notified of those hearings, attend those hearings, and to speak at those hearings. Perhaps this is why the NACDL could only assert that "in general" victims' rights harm defendants – the NACDL did not provide a single supporting example.

Moreover, the procedure that the NACDL would put in place – a full evidentiary hearing with the defendant able to cross-examine the victim to be determine "victim" status – is novel and

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[486] *Id.* at 415-16 (emphases added).

[487] It is also obvious that "the CVRA does not grant victims any rights against *individuals* who have not been convicted of a crime." *In re W.R. Huff Asset Mgmt. Co., LLC*, 409 F.3d 555, 564 (2d Cir .2005) (emphasis added); *accord Searcy v. Skinner*, No. 6:06-1418-6RA-WMC, 2006 WL 1677177 (D.S.C. June 16, 2006). Like the constitutional amendment it was patterned on, the CVRA extends rights against *the government* – that is, rights "not to be victimized again through the process by which government officials prosecute, punish, and release accused or convicted offenders." Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constituiton*, L.A. TIMES, July 6, 1998; *accord* S. REP. 106-254, 106th Cong. 2d Sess. (Victims' Rights Amendment designed to guarantee victims participatory rights in government process). That is why the CVRA that the rights must be afforded by government agencies and actors. *See* 18 U.S.C. § 3771(c)(1).

[488] Statement of Peter Goldberger on Behalf of the Nat'l Assoc. of Crim. Defense Lawyers Before the Advisory Comm. on Criminal Rules 4 (Jan. 26, 2007).

unwarranted. While crime victims' rights have existed in all 50 states and the federal system for the last two decades, no jurisdiction has ever required anything like this.[489] Instead, procedural issues of how to determine victim status are left to the sound discretion of the trial courts.

To give a defendant an automatic right to challenge victim status raises constitutional and other problems. A defendant who simply complained about a victim designation would lack "standing" under Article III of the Constitution, because there would be no "threatened or actual injury resulting from the putatively illegal action."[490] Moreover, to give defendants free license to cross-examine victims about whether they were truly victims would obviously create a right to discovery in a criminal case that contradicts current law[491] and circumvents the stringent limitations on depositions of witnesses found in Rule 15.[492] The potential for abusive questioning of victims in such hearings (where no jury is present to be alienated) should also not be overlooked.[493] The victims' rights provisions in this country have never been used to give defendants new rights to question and potentially traumatize victims. The CVRA's expansion of victims' rights should not be the occasion to start.

V. CONCLUSION

This article has tried to make the case for specific changes to the Federal Rules of Criminal Procedure to protect crime victims' rights, particularly those rights listed in the CVRA. The article has attempted to sketch out one way that the rules could be amended to do this while at the same time demonstrating that the Advisory Committee's pending victims' rights proposals are too restricted. In concluding the article, it may be useful to raise broader concerns about the Advisory Committee's minimalist approach.

In reviewing the Advisory Committee's proposals, some might reach the conclusion that the Committee treated the victims issue as a chore to be survived rather than an opportunity to be seized. One can read the Committee's proposals and the minutes of its discussions without finding much enthusiasm for the idea of crime victims becoming a part of the criminal justice process. This reluctance may be part of a larger phenomenon of hostility by the legal culture to crime victims, as other scholars and I have argued elsewhere.[494]

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[489] Communication from Professor Douglas Beloof, Director of the National Crime Victims Law Institute (Jan. 19, 2007) (on file with author).

[490] *Warth v. Seldin*, 422 U.S. 490, ___ (1975) (internal quotation omitted).

[491] *See supra* notes ___-___ and accompanying text.

[492] *See supra* notes ___-___ and accompanying text.

[493] *See* Cassell, *supra* note 4, at 1434-37 (explaining how cross-examination of victims at Utah's preliminary hearings has traumatized victims).

[494] *See, e.g.,* Cassell, *supra* note 4, at 534 ("The 'legal culture' . . . is one that has not made room for crime victims"); Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On . . . .*, 3 INT'L REV. OF VICTIMOLOGY 28, 29 (1994) (noting socialization of legal scholars "in a culture and structure that do not recognize the victim as a legitimate party in

Any lack of interest in crime victims is regrettable and might lead to harmful consequences. Congress has decided that crime victims must be fully integrated into the federal criminal justice system. The Rules of Criminal Procedure are, obviously, an important part of that system and must fully reflect the congressionally-protected interests of crime victims. If the judiciary will not do the job, no doubt Congress will step in to finish the task. Indeed, Congress will be looking carefully at the CVRA's effectiveness in changing the system in 2008, as it directed the General Accounting Office to "prepare and submit to the appropriate committees a report" on the effectiveness of the Act at that time.[495]

It would be unfortunate if initiative for rules on crime victims were to pass from the courts to Congress. The courts do have institutional advantages in assessing changes in the rules.[496] The rulemaking committees are staffed with judges who have long experience in applying rules of procedure. And the rulemaking process itself guarantees considerable public involvement and careful deliberation about any rules that are ultimately adopted.

But having a good rulemaking process is one thing; producing a good product is another. Unfortunately, the Advisory Committee's current proposals do not treat crime victims fairly and, even more indisputably, do not fully implement Congress' commands in the CVRA. As the CVRA directs, crime victims are now participants in the federal criminal justice system. The Federal Rules of Criminal Procedure must faithfully reflect that new reality and ensure that crime victims, no less than prosecutors and defendants, are treated fairly throughout the process.

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criminal proceedings"); *see also* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 964 (2006) (suggesting crime victims can effectively monitor the behavior of "insiders" in the system).

[495] *Id.* at §104(b)(2).

[496] *See generally* Peter McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655,1687-91 (1995).