Notes

VICTIMS' RIGHTS IN AN ADVERSARY SYSTEM

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ABSTRACT

The victims' rights movement argues that because the outcome of criminal prosecutions affects crime victims, the justice system should consider their interests during proceedings. In 2004, Congress passed the Crime Victims' Rights Act (CVRA), giving victims some rights to participate in the federal criminal justice system. This Note probes both the theoretical assumptions and practical implications of the CVRA. It demonstrates that the victims' rights movement revisits a long-acknowledged tension between adversary adjudication and third-party interests. It shows, however, that American law has resolved this tension by conferring party or quasi-party status on third parties. Despite some pro-victims rhetoric, Congress reaffirmed the public-prosecution model when it passed the CVRA. Instead of making victims parties or intervenors in criminal prosecutions, the CVRA asks courts and prosecutors to vindicate victims' interests. This unusual posture creates substantial conflicts for courts and prosecutors and undermines defendants' rights. To avoid these consequences, this Note argues, courts can interpret the CVRA's substantive rights narrowly. Rather than reading the CVRA as conferring broad rights on crime victims, courts should interpret the statute to simply require institutional courtesy toward crime victims. This interpretation reflects victims' nonparty status and preserves the rights and responsibilities of courts, prosecutors, and defendants.

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INTRODUCTION

In *Marbury v. Madison*[1] Chief Justice Marshall wrote, "The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."[2] Two centuries later, in 2004, Congress disrupted that division of power when it passed the Crime Victims' Rights Act (CVRA),[3] forcing courts both to step beyond deciding the rights of individuals and to second-guess executive discretion. With this statute, Congress may have transformed federal criminal prosecutions.

Prior to the CVRA, for example, the prosecution of Dan Rubin for securities fraud would have been unremarkable. In March 2007, federal prosecutors and Rubin's defense counsel negotiated a plea bargain, which the district court accepted.[4] But two of Rubin's victims, Dixie Chris Omni (Omni) and RJP Investment Company (RJP), did not like the plea agreement. Omni and RJP thought that Rubin should pay more restitution and prosecutors should provide more assistance with their civil suit against Rubin.[5] In short, prosecutors wanted to resolve the case, but the victims wanted to recover their losses.

Over the objection of the government and Rubin's defense counsel, Omni and RJP petitioned the district court based on the CVRA to vacate the plea agreement and modify Rubin's restitution order.[6] They also argued that prosecutors violated their statutory right to be treated with respect when the government contended that Omni and RJP filed the petition merely to improve their bargaining position in the civil lawsuit.[7]

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1. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

2. *Id.* at 170.

3. Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, tit. I, 118 Stat. 2260, 2261–65 (2004) (codified as amended at 18 U.S.C. § 3771 (2006) and to be codified at 42 U.S.C. §§ 10603(d)–(e)). This Note refers to the act simply as the Crime Victims' Rights Act.

4. United States v. Rubin, 558 F. Supp. 2d 441, 416 (E.D.N.Y. 2008).

5. *Id.* at 412–13, 416–17.

6. *Id.* at 412–13, 425. Under the CVRA, victims may assert their statutory rights by petitioning the district court. 18 U.S.C. § 3771(d)(3).

7. *Rubin*, 558 F. Supp. 2d at 416–17, 428; *see also* 18 U.S.C. § 3771(a)(8) (granting victims "[t]he right to be treated with fairness and with respect for [their] dignity and privacy").

The district judge chafed at the victims' request to second-guess the government and place their interests ahead of those of the parties. He refused to "prohibit[] the government from raising legitimate arguments . . . simply because the arguments may hurt a victim's feelings."[8] The court also expressed concern that "such a dispute . . . . potentially compromis[es] its ability to be impartial to the government and defendant, the only true parties to the trial."[9]

United States v. Rubin[10] demonstrates the procedural and practical problems that the CVRA creates for participants in the federal criminal justice system. Traditionally, American courts have followed the adversary system of litigation, which grants parties broad autonomy to vindicate their rights and interests before an impartial court. The adversary system has informed the constitutional, procedural, and ethical rights and obligations of the system's three primary participants: courts, prosecutors, and defendants. But because an adversary system relies on the parties to assert their interests before the court, it necessarily excludes outsiders like crime victims.

The victims' rights movement[11] has argued that excluding victims from criminal proceedings is unjust because victims have a unique interest in the outcome of criminal cases and so deserve the opportunity to have those interests represented.[12] But the movement merely restates the point that both legal realists and public interest litigators have noted: the adversary system fails to consider others whose interests litigation may affect. This Note disagrees with the conclusion of victims' rights activists and other scholars that outside interests justify changing the adversary system. Congress and the courts can give third parties intervenor or party status, which allows

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8. *Rubin*, 558 F. Supp. 2d at 428.

9. *Id.* The court continued,

> As for actual clashes between victim and government over the best way to convict, punish and seek restitution from a criminal wrongdoer, how can the court presiding over the prosecution of the defendant referee any spat between government and victim about how best to make the accused pay for his, at that point, only charged criminal conduct?

Id. at 429.

10. United States v. Rubin, 558 F. Supp. 2d 441 (E.D.N.Y. 2008).

11. For a brief history of the victims' rights movement, see Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 865–69.

12. *See infra* notes 64–65 and accompanying text.

third parties to adjudicate their rights without disrupting the adversary structure.

The CVRA does not confer party or intervenor status, however; it instead reaffirms prosecutors' responsibility to prosecute federal criminal proceedings. Yet it asks courts and prosecutors to vindicate the interests of victims, who remain nonparties under the statute. This unusual procedure places courts and prosecutors at odds with their constitutional and ethical obligations, and it undermines historic protections for criminal defendants inherent in the adversary system. Courts can and should interpret the CVRA narrowly to avoid these conflicts.

Part I of this Note outlines the cultural values that underlie adversary adjudication. It demonstrates that the adversary system—which privileges judicial independence and party autonomy—frames the federal criminal justice system, and it concludes that the system excludes third parties, including victims, by design. Part II challenges the victims' rights movement's assumption that the justice system should incorporate victims even at the expense of the adversary system. It shows that the movement has overlooked serious scholarly objections to considering third-party interests rather than focusing on the rights of the parties. And when it has crafted procedures to allow third parties to represent their interests, American law has consistently preferred to confer party status on third parties rather than abandon the adversary structure. Part III demonstrates that the CVRA fails to confer party status on victims. In an unprecedented disruption of the adversary structure, the CVRA instead compels courts and prosecutors to act as victims' advocates, a posture that undermines judicial independence, prosecutorial discretion, and defendants' rights. But courts can interpret the CVRA's substantive rights narrowly; by limiting the scope of victims' rights, courts can limit the burden on courts and prosecutors to advocate for victims and avoid many of these improprieties. This Note concludes that courts should interpret the CVRA as requiring institutional courtesy toward crime victims. But until Congress makes victims independent parties in criminal prosecutions, courts and prosecutors should not change their decisions based on the desires of victims.

I. THE AMERICAN ADVERSARY SYSTEM

A. Adversary and Inquisitorial Cultures

Western cultures resolve legal disputes through one of two basic approaches: the adversary model or the inquisitorial model.[13] The models fundamentally differ in who controls the proceedings. In the inquisitorial model, the court actively directs the case.[14] Judges in inquisitorial systems initiate proceedings, collect evidence, and determine how to construct and resolve the legal and factual issues in the case.[15] In contrast, parties in adversary systems manage their own cases. They initiate proceedings, develop the evidence, and choose the best way to argue their position before the court.[16] Judges in adversary systems act primarily as neutral "umpire[s]."[17] Rather than undertaking independent investigations, they look at the evidence the parties bring before the court and rule on the law based on the facts and arguments before them.[18]

These procedural differences reflect cultural assumptions about the purpose of legal systems.[19] In the inquisitorial model, social interests take primacy. These societies tend to view the legal system primarily as a tool to investigate and uncover the truth.[20] Unlike adversary systems, which prize rules of evidence and procedure, inquisitorial systems generally disfavor rules that might obstruct uncovering the truth.[21] For example, inquisitorial courts admit

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13. *See* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1183 (2005) (comparing the United States' adversary system with the "dark inquisitorial world of continental Europe"). Although no system is completely inquisitorial or adversarial, legal systems usually emerge from one method or the other. *Id.* at 1187.

14. *Id.* at 1188.

15. *Id.*

16. *Id.*

17. *Id.*

18. Stephen McG. Bundy & Einer Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 313, 320–21 & n.23 (1991).

19. *See* Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 280 (2002) (arguing that the United States' "cultural predilections are reflected in four important aspects of civil procedure that are peculiarly American").

20. Felicity Nagorcka, Michael Stanton & Michael Wilson, *Stranded Between Partisanship and the Truth? A Comparative Analysis of the Legal Ethics in the Adversarial and Inquisitorial Systems of Justice*, 29 MELB. U. L. REV. 448, 462–63 (2005).

21. *Id.*

evidence even if authorities improperly collected it.[22] Inquisitorial systems focus more on achieving the right result than on strictly enforcing procedures.[23]

In contrast, adversary systems value parties' rights to have their disputes resolved through a fair process monitored by a judge.[24] Although adversary systems assume that the parties' self-interests drive them to uncover the truth for the jury,[25] these cultures ultimately show less desire to achieve the correct result. For example, these legal systems tend to develop firm procedural default rules that outsiders may view as unfairly harsh.[26] But protecting the process—and thereby protecting party autonomy—justifies sacrificing some accuracy in the outcome of the litigation.

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22. *Id.*

23. *See* Won Kidane, *Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons from the Department of Labor Rules of Evidence*, 57 CATH. U. L. REV. 93, 124 n.170 (2007) (noting that under French law the "honor and conscience," C. PR. PÉN. art. 310(1), of judges binds them to discover the truth and that German law allows a court to, "upon its own motion, extend the taking of the evidence to all facts and evidence which are important for the [court's] decision," StPO § 244(2)).

24. Nagorcka et al., *supra* note 20, at 462–63.

25. *Id.* at 462.

26. *Id.* at 462–63. The Supreme Court's 2006 decision in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), illustrates the tension between adversarial and inquisitorial philosophies. One of the defendants in that case, Mario Bustillo, was a Honduran national who was prosecuted in Virginia state court without being afforded his right under the Vienna Convention to consult with the Honduran Consulate. *Id.* at 2676. Bustillo first raised this issue in a habeas corpus petition, however, and lower courts ruled that because he raised the issue on collateral rather than direct review, Bustillo was procedurally barred from litigating the claim. *Id.* at 2676–77, 2682. The International Court of Justice (ICJ) disagreed, holding that the Vienna Convention required American courts to permit defendants to raise this issue even on collateral appeal. *Id.* at 2683.

The Supreme Court rejected the ICJ's interpretation. Writing for the majority, Chief Justice John Roberts discussed at some length the difference between inquisitorial and adversary litigation. *Id.* at 2685–86. He reasoned that the ICJ overlooked the importance of procedural default rules in adversary systems. *Id.* at 2686. The ICJ's interpretation of the Vienna Convention would allow Convention claims to "trump not only procedural default rules, but any number of other rules requiring parties to present their legal claims at the appropriate time for adjudication." *Id.* These rules are so critical to preserving the fairness of adversary litigation that adversary courts enforce them even at the expense of viable legal claims. *See id.* at 2687 ("[I]t is well established that where a defendant fails to raise a *Miranda* claim at trial, procedural default rules may bar him from raising the claim in a subsequent postconviction proceeding."). The Court concluded that Bustillo's claim was procedurally barred. *Id.*

B. The Federal Justice System

American legal culture generally follows the adversary tradition.[27] As one scholar has explained, "[t]he framers, reacting against the King's autocratic judiciary, wanted both to ensure federal judicial independence from the Executive and to vest substantial adjudicatory power in the people."[28] As a result, adversary philosophy has shaped the constitutional, procedural, and ethical structure of the federal criminal justice system.

1. *Federal Courts.* Article III of the U.S. Constitution vests judicial power in the federal courts to resolve the "Cases" and "Controversies" before them.[29] The cases-and-controversies principle lays the foundation for the limited, adversary nature of the federal justice system. As Chief Justice Marshall declared in *Marbury v. Madison*, the courts resolve the rights of individuals and should not intrude on the executive's responsibility to enforce the law.[30] This limitation allows courts to make decisions based on "concrete legal issues, presented in actual cases, not abstractions,"[31] and it grants parties autonomy to vindicate their rights.[32]

The cases-and-controversies principle also preserves the separation of power between the branches of government.[33] The

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27. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 382 (1982). The American legal system is not purely adversarial. Courts of equity, for example, are rooted in inquisitorial procedure. Kessler, *supra* note 13, at 1193. But the American legal system "is considered more adversarial than most." Resnik, *supra*, at 382. And criminal cases traditionally have proceeded in adversary common law courts, not courts of equity. Charles L. Barzun, *Politics or Principle? Zechariah Chafee and the Social Interest in Free Speech*, 2007 BYU L. REV. 259, 287–88; *see also* Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1368 (2005) (distinguishing the "inquisitorial model of the courts of equity" from "the adversarial mode of the common law courts").

28. Resnik, *supra* note 27, at 381 (footnote omitted).

29. U.S. CONST. art. III, § 2, cl. 1.

30. *See supra* note 2 and accompanying text.

31. United Pub. Workers v. Mitchell, 330 U.S. 75, 89 (1947) (quoting United States v. Appalachian Elec. Power Co., 311 U.S. 377, 423 (1940)). As Justice Scalia noted, rejecting a doctrine of hypothetical jurisdiction, "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998).

32. *See* Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.").

33. Morrison v. Olson, 487 U.S. 654, 677–78 (1988). For example, the Court has long held that it cannot resolve political questions because those questions implicate the policy judgments

Supreme Court has prohibited judges from acting as policymakers rather than independent interpreters of the law: "executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution."[34] Not only does a limited judiciary protect the policymaking branches,[35] but it also frees the judiciary to focus its attention on allowing the parties to vindicate their rights before an impartial tribunal.

Ideally, the federal judiciary exhibits two key traits of adversary judges: it ensures that the proceedings give both parties a fair opportunity to present their cases, and it remains impartial toward parties.[36] First, judges bear responsibility for preserving a fair forum for litigation. The Constitution, for example, vests significant responsibility for protecting defendants' constitutional rights in the judiciary.[37] Procedurally, judges manage the proceedings and regulate the relationship between the parties.[38] Second, federal judges refrain from acting as advocates.[39] Fundamental to the American ideal of a fair forum for adjudication is the concept of the "judge as an impartial guardian for the rule of law."[40] The federal judiciary thus exhibits the adversary model's emphasis on allowing individual parties the

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of the other branches and are beyond courts' Article III jurisdiction. *E.g.*, Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring in the judgment) ("I am of the view that the basic question presented by the petitioners in this case is 'political' and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.").

34. *Morrison*, 487 U.S. at 677 (quoting Buckley v. Valeo, 424 U.S. 1, 123 (1976)).

35. Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 230 (1990).

36. *See supra* notes 17–18, 24–26 and accompanying text.

37. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1014–15 (2006).

38. For example, judges regulate discovery, FED. R. CRIM. P. 16(d), and rule on the parties' pretrial motions, FED. R. CRIM. P. 12(b)–(d).

39. Resnik, *supra* note 27, at 382.

40. Bush v. Gore, 531 U.S. 98, 129 (2000) (Stevens, J., dissenting). Federal law requires judges to recuse themselves from a case "in which [their] impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (2006). Federal judges sometimes do actively protect the rights of particularly vulnerable parties, such as pro se litigants. *E.g.*, Abbas v. Dixon, 480 F.3d 636, 639 (2d Cir. 2007). The purpose of these interventions is not for courts to assume advocacy duties; the parties remain responsible for litigating their cases. *See id.* (asking courts to "liberally construe [a pro se litigant's] pleadings" but not asking the court to litigate on the pro se plaintiff's behalf). Courts show more leniency toward technical procedural issues to prevent unfairly excluding nonlawyers. *E.g.*, *id.* Courts act, then, to preserve the fairness of the proceedings—a quintessentially adversary duty.

freedom to vindicate their interests in a fair forum. As a result, though, the federal courts exclude outsiders to the litigation, including victims.[41]

2. *The Parties.* With a limited judiciary, primary responsibility for vindicating legal rights rests with the parties to litigation.[42] With few exceptions,[43] federal courts still assume that "the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."[44]

a. The Prosecution. The responsibility to enforce the United States' laws rests with the executive branch. The Supreme Court has repeatedly protected the executive's constitutional duties to prosecute criminal offenses. The Court has held that because prosecution is a core executive function, statutes may not "impermissibly interfere" with the executive's prosecutorial powers.[45] Under the doctrine of prosecutorial discretion, prosecutors have near-absolute power to determine whether to bring criminal charges,[46] whether to pursue a prosecution, and how to negotiate a plea bargain.[47] Contrary to the suggestion of some victims' rights

41. In France's inquisitorial system, by contrast, the investigating judge may consider outside interests such as victims, animals, minority groups, or the environment and even permit those parties or their representatives to participate in the proceedings. Nagorcka et al., *supra* note 20, at 460–61.

42. *See* Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.").

43. *See infra* Part II.C.

44. *Castro*, 540 U.S. at 386 (Scalia, J., concurring in part and concurring in the judgment).

45. Morrison v. Olson, 487 U.S. 654, 660, 659–60, 695 (1988). In *Morrison*, the Court found that the statute was valid because it did not impermissibly interfere with the executive's prosecutorial power. *Id.*

46. *See id.* at 710–11 (Scalia, J., dissenting) (observing that the executive is responsible for prosecuting criminal offenses, that the other branches have means to check that balance, and that Congress can "impeach the executive who willfully fails to enforce the laws . . . and the courts can dismiss malicious prosecutions" (citation omitted)); Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973) ("[F]ederal courts have traditionally and, to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made.").

47. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

advocates, including the CVRA's drafters,[48] federal prosecutors, not victims, have carried sole responsibility to prosecute federal offenses since the Judiciary Act of 1789.[49] Federal law continues to vest all prosecutorial responsibilities in United States attorneys.[50]

Federal prosecutors represent the interests of the United States, not the interests of victims or other specific third parties. As the Supreme Court has observed, by representing the United States, federal prosecutors have a responsibility to vindicate the public's interest in justice.[51] This obligation to seek justice, though, is "twofold": prosecutors must ensure "that guilt shall not escape or innocence suffer."[52] As a result, prosecutors have a duty both to the public *and to the defendant* to make sure justice is done. Prosecutors' codes of ethics generally agree that prosecutors are "ministers of justice."[53] Additionally, prosecutors have a duty to remain impartial toward private interests.[54] Thus, federal prosecutors should consider

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48. Senator Dianne Feinstein, for example, has repeatedly relied on an inaccurate history of public prosecution in American law to justify expanding victims' rights. Promoting a victims' rights amendment to the Constitution, she argued that "a constitutional amendment will restore rights that existed when the Constitution was written. It is a little known fact that at the time the Constitution was drafted, it was standard practice for victims, not public prosecutors, to prosecute criminal cases." *Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 1 Before the S. Comm. on the Judiciary*, 108th Cong. 4 (2003) (statement of Sen. Dianne Feinstein). Later, when sponsoring a federal statute recognizing victims' rights, Senator Feinstein argued that "[v]ictims had rights until about the mid-19th century, the 1850s, when the concept of the public prosecutor was developed in our Nation." 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). In fact, "the American system of public prosecution was fairly well established by the time of the American Revolution." Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 371 (1986). And victims never have prosecuted federal criminal cases. *See infra* note 49 and accompanying text.

49. Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 700–01 (2004).

50. 28 U.S.C. § 547(1) (2006).

51. The Court has explained,

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935).

52. *Id.*

53. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1999) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

54. Young v. United States *ex rel.* Vuitton et Fils S. A., 481 U.S. 787, 804 (1987). In *Young*, Louis Vuitton, S.A. (Louis Vuitton) settled a lawsuit against the defendants for trademark infringement. *Id.* at 790. Louis Vuitton's civil attorneys convinced the trial court to appoint

the interests of third parties, including victims, but only in the broader context of society's interest in justice. They should not elevate victims' interests over the interests of the public, the community, and the defendant.

b. Defendants. In criminal prosecutions, the defendant is the prosecution's adversary. The Constitution reflects this position: as one scholar notes, "[o]ne of the animating features of the Constitution is its preoccupation with the regulation of the government's criminal powers."[55] The number of amendments in the Bill of Rights devoted to protecting defendants from government authority demonstrates the Framers' concern for ensuring that the adversary process is fair.[56] Defendants have a right to due process of law;[57] notice of charges against them; assistance of counsel; confrontation of witnesses against them; and a fair, speedy, and public trial by a jury drawn from the community.[58]

This framework protects defendants from government conduct, not the acts of private third parties outside the litigation.[59] Given the number of protections it affords to criminal defendants, the Bill of Rights appears to assume that the government is the defendant's adversary in criminal proceedings. It does not anticipate third parties such as crime victims presenting a challenge to the liberty of accused defendants. Victims' advocates therefore rightly observe that the

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them to represent the United States in a later prosecution of the defendants for continuing to infringe Louis Vuitton's trademark. *Id.* at 791–92. The Supreme Court held that it was improper to appoint the beneficiary of the court order to prosecute a contempt action claiming a violation of the settlement agreement. *Id.* at 809 (Brennan, J., announcing the judgment of the Court). The Court observed that "[r]egardless of whether the appointment of private counsel in this case resulted in any prosecutorial impropriety . . . that appointment illustrates the *potential* for private interest to influence the discharge of public duty." *Id.* at 805 (majority opinion). This influence was improper because "[t]he prosecutor is appointed solely to pursue the public interest in vindication of the court's authority. A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.* at 804.

55. Barkow, *supra* note 37, at 1012.

56. *See id.* at 1016–17 (arguing that the Bill of Rights contains structural protections for defendants in the adversary process).

57. U.S. CONST. amend. V.

58. *Id.* amend. VI.

59. *See* John O. McGinnis & Michael B. Rappaport, Colloquy Essay, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 393 n.44 (2007) ("With the exception of the Thirteenth Amendment, the Constitution does not regulate private conduct at all.").

traditional justice system prevents victims from representing their interests in criminal cases,[60] but this exclusion is by design.

II. MULTIPLE INTERESTS IN THE CRIMINAL JUSTICE SYSTEM

Victims' rights proponents have joined a number of scholars arguing that fairness requires modifying the adversary system to consider interests beside those of the parties. Section B demonstrates that these critics overlook another problem: if litigation considers third-party interests, it loses focus on the rights of the actual parties. Section C argues that American law has resolved this conflict by conferring party-like status on third parties, allowing them to vindicate their interests without undermining the adversary structure.

A. Criminal Justice in Adversary Proceedings

Because it proceeds according to adversary principles, the federal criminal justice system, like all American criminal proceedings, prizes fair process and party autonomy even at the expense of a correct result.[61] But in criminal prosecutions the stakes are particularly high. If the outcome is incorrect, either an innocent person loses that person's freedom, even life, or a guilty person escapes punishment, endangering society and leaving the victim's suffering unanswered.[62] Criminal law is uniquely emotional as a result; ensuring procedural fairness may seem like a minor concern when discussing something as explosive as child rape or executing an innocent person.[63]

Some scholars and advocates have promoted distorting adversary procedures to improve criminal prosecutions. The victims' rights

60. *E.g.*, Cardenas, *supra* note 48, at 372.

61. *See supra* notes 24–26 and accompanying text.

62. Interest groups devoted to reforming the system to achieve more accurate results demonstrate the significance of this issue. For example, the Innocence Project exists both to "free the staggering numbers of innocent people who remain incarcerated and to bring substantive reform to the system responsible for their unjust imprisonment." Innocence Project, Mission Statement, http://www.innocenceproject.org/about/Mission-Statement.php (last visited Oct. 10, 2008). Similarly, victims' rights groups such as the National Organization for Victim Assistance have argued that victims have the right to protection and "reparations." Nat'l Org. for Victim Assistance, Crime Victim & Witness Rights, http://www.trynova.org/about/victimrights.html (last visited Oct. 10, 2008).

63. The tension between process and the high-stakes nature of criminal proceedings probably in part explains the heated disagreement between the International Court of Justice and the Supreme Court in *Sanchez-Llamas v. Oregon*. *See supra* note 26.

movement contends that criminal cases should consider victims' interests in addition to the government's interests. These advocates argue that excluding victims from the justice system, especially in light of their suffering, is fundamentally unjust.[64] At least one victims' rights scholar has called for changing the adversary system to fully vindicate victims' interests.[65] Other scholars, concerned that too many defendants are wrongfully convicted, advocate greater inquisitorial proceedings to protect innocent defendants.[66]

Victims' rights proponents, at least, have enjoyed enormous success persuading Congress and state legislatures to incorporate victims into criminal prosecutions.[67] But pro-victim scholars and legislators have assumed uncritically that the law should remedy the injustice of excluding victims by incorporating them into proceedings. In their concern for victims' suffering, however, victims' rights advocates have not addressed the theoretical and practical implications of their solution. In fact, commentators have long recognized a core conflict between the adversary model and third-party interests.[68] Section B shows that scholars already have raised important objections to undermining the adversary system to help third parties. And Section C demonstrates that American law has

64. *See, e.g.*, 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (arguing, in support of the CVRA, that "[v]ictims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm"); William T. Pizzi, *Victims' Rights: Rethinking Our "Adversary System*," 1999 UTAH L. REV. 349, 349 (noting that "victims of violent crime have a stake in the trial that is different from that of the general public or even the prosecutor" and calling for greater victim participation in criminal proceedings); Judith Rowland, *Illusions of Justice: Who Represents the Victim?*, 8 ST. JOHN'S J. LEGAL COMMENT. 177, 178 (1992) (observing that "a crime victim has an 'interest' in the criminal justice process" and lamenting that only the state and the defendant have standing to participate in criminal prosecutions).

65. Pizzi, *supra* note 64, at 349.

66. Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547, 550, 551 (2008) (urging "a fundamental restructuring of the adversarial system" to "minimize the number of convictions of innocent persons" and contending that after this change "the justice system would be more focused on achieving a correct result in cases where a criminal defendant knows he is truly innocent and formally pleads innocent").

67. In addition to the CVRA, every state has passed victims' rights legislation, and a majority of states have amended their constitutions to recognize victims' rights as well. Recent Development, *The Victims' Rights Amendment*, 42 HARV. J. ON LEGIS. 525, 526–27 (2005).

68. *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 67–71 (5th ed. 2003) (describing the tension between the "private rights" and "public rights" model).

found a different solution, one which incorporates third parties without discarding the adversary system.

B. The Problem of Considering Nonparty Interests in Adversary Litigation

Classical legal scholars had no reason to question excluding victims from criminal proceedings. Adversary criminal proceedings between the government and the prosecution solidified in the nineteenth century,[69] an era that assumed that litigation could be divided into public and private law.[70] As early as the eighteenth century, William Blackstone declared that "[w]rongs are divisible into two sorts or species; *private wrongs*, and *public wrongs*."[71] For Blackstone, the quality of the wrong dictates the appropriate remedy. Because private law protects personal rights, private citizens are responsible for bringing civil suits to vindicate their interests.[72] In contrast, criminal offenses injure public rights, and so the king, as the sovereign, bears responsibility for prosecuting public offenses.[73] This legal philosophy tended to view the law as rigid and rule based rather than as an instrument of public policy.[74] The public-private distinction therefore justified public prosecutions; because criminal law's public nature necessitated a public remedy, the government, not victims, logically prosecuted criminal cases.

Beginning in the early twentieth century, legal realism challenged this assumption.[75] Legal realist theory rejects the public-

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69. *See* Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1325–26 (2002) ("[P]rivate citizens continued to initiate and litigate criminal prosecutions in New York until the 1840s or 1850s . . . .").

70. *See* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) ("The emergence of the market as a central legitimating institution brought the public/private distinction into the core of legal discourse during the nineteenth century.").

71. 3 WILLIAM BLACKSTONE, COMMENTARIES *2.

72. *Id.* at *2–3.

73. 4 *id.* at *2.

74. *See* JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 31, 44 (1995) (explaining that nineteenth-century legal scholars viewed the law as founded on sharp dichotomies such as public-private that dictate the "essential character" of legal fields).

75. *See* Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005) ("The legal realist movement flourished back in the 1920s and 30s . . . ."); Horwitz, *supra* note 70, at 1426 (tracing the legal realists' assault on the public-private dichotomy to the 1905 Supreme Court opinion *Lochner v. New York*).

private distinction; it teaches that private law affects public interests, and public rules affect private life.[76] For example, public legislation regulating railroads, labor, and agriculture shapes the private contractual relationships of parties.[77] Public interests, such as the public's interest in avoiding nuisances, limit property owners' rights.[78] And even though the family represents one of the most private areas of an individual's life, the family also plays a central role in shaping civil society by raising future generations.[79] As a result, the state, often acting through a welfare agency, routinely intervenes in family life to make sure that families are performing this role to society's standards.[80] By showing the fallacy of the public-private distinction, legal realism undermines a key justification for public rather than private prosecutions.[81] Legal realism agrees with victims' rights advocates: criminal prosecutions affect private as well as public interests.

This brand of legal realism is essentially descriptive. But since the 1960s and 1970s, many legal scholars have used aspects of legal realism prescriptively. Public interest scholarship argues that because litigation affects public interests, lawyers should use it to drive public policy.[82] Rejecting court neutrality, this theory requires courts to act as regulatory agents, supervising complex and ongoing social policy efforts such as reforming prisons and mental hospitals, desegregating

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76. James Boyle, *Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance*, 78 CORNELL L. REV. 371, 378–79 (1993).

77. Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 202–03 (1937).

78. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 21–26 (1927).

79. *See* Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1356 (1982) ("It has been common forever to speak of the public functions of the family in producing and socializing 'the next generation.'").

80. *Id.*

81. *See id.* at 1357 (arguing that one cannot "take the public/private distinction seriously as a description, as an explanation, or as a justification of anything").

82. *E.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 *passim* (1976). Professor Chayes argues that

> just as the traditional concept reflected and related to a system in which social and economic arrangements were remitted to autonomous private action, so the new model reflects and relates to a regulatory system where these arrangements are the product of positive enactment. In such a system, enforcement and application of law is necessarily implementation of regulatory policy. Litigation inevitably becomes an explicitly political forum and the court a visible arm of the political process.

Id. at 1304.

schools, and improving public housing.[83] The idea that litigation can effect social change for group interests remains popular in American legal culture; for example, the gay community has combated social discrimination by litigating against the military's "don't-ask-don't-tell" policy and for judicial recognition of gay marriage.[84] Victims' rights advocacy, which also emerged in the 1960s and 1970s,[85] mirrors public interest scholarship. Rather than using private litigation to achieve public goals, it argues that public prosecutions should consider private interests.

But public interest litigation has proven difficult to square with the structural and especially the ethical culture of the adversary system.[86] Professor Derrick A. Bell, in his classic treatment of the issue, demonstrates that lawyers litigating school desegregation cases after *Brown v. Board of Education*[87] often failed their ethical obligations to their clients.[88] Adversary attorneys owe their loyalty to best vindicating their clients' rights *and interests*[89]—but when litigating post-*Brown* desegregation cases, attorneys generally considered long-term social policy goals rather than the client's immediate needs.[90] For example, the NAACP's attorneys and donors saw litigation as a vehicle to obtain widespread racial desegregation.[91] But by the 1970s, some clients began to want more immediate concerns addressed instead, such as improving educational quality or minimizing busing to violent white neighborhoods.[92] When the lawyers acted to promote desegregation even at the expense of their clients' interests, Bell

83. Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1266–67.

84. William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1635–42 (1997).

85. Indeed, some commentators have linked the victims' rights movement to larger social rights' movements of the era. *E.g.*, Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825, 825 (1995) (book review).

86. *See* Rubenstein, *supra* note 84, at 1626 (observing that group litigation creates conflicts within the group and arguing that "our current procedural and ethical rules too heavily favor individualism alone").

87. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

88. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 472 (1976).

89. MODEL RULES OF PROF'L CONDUCT pmbl., ¶ 2 (1999).

90. Bell, *supra* note 88, at 482–93.

91. *Id.* at 488–93.

92. *Id.* at 482.

argues, they violated their fundamental responsibility to act as adversary advocates.[93]

Professor Bell's article demonstrates that public interest litigation forgets legal realism's other lesson: just as private litigation affects public interests, public litigation affects private interests. The NAACP lawyers Bell critiques had noble intentions, but their ultimate aim—to promote desegregation as educational and social policy—did not always match the interests of their actual clients. Because these lawyers chose to act through the adversary process rather than by lobbying legislators or the executive branch, they placed themselves in an impossible ethical situation. Victims' rights scholars have failed to acknowledge that asking the justice system to vindicate private rather than public interests could create similar ethical problems. As Chief Justice Marshall observed,[94] adversary litigation is designed to vindicate the rights of the parties. It becomes difficult to do so when lawyers and the courts are representing other interests instead.

C. Representing Multiple Interests in Adversary Proceedings

The adversary system thus creates conflict between the rights of litigants and the interests of third parties. Victims' rights proponents and other scholars have proposed ignoring inconvenient aspects of the adversary process. Although this approach is tempting, particularly in light of the consequences of criminal prosecutions, Professor Bell's observations demonstrate that it overlooks important counterarguments. This Section demonstrates that American law has resolved the conflict between litigants and third parties differently than these scholars have proposed. Rather than undermining adversary litigation, American law has created a variety of procedural devices that confer party or quasi-party status on interested third parties or allow them to present their position to the court without litigating the case's merits. These solutions allow third parties to litigate their interests without disrupting two key features of the adversary system: party autonomy and court neutrality.

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93. *See id.* at 472 ("[I]t is difficult to provide standards for the attorney and protection for the client where the source of the conflict is the attorney's ideals. . . . 'No servant can serve two masters . . . .'" (quoting *Luke* 16:13 (King James))).

94. *See supra* note 2 and accompanying text.

The amicus curiae device allows outsiders to present legal arguments to appellate courts without having party status. A third party with an interest in an appellate case may ask the court or the parties for permission to file a brief presenting relevant and useful additional arguments to the court.[95] The broadness of the standards for filing an amicus brief is balanced by the narrowness of an amicus curiae's formal power. An amicus curiae only has the right, after permission, to file a brief;[96] it cannot litigate the merits of a legal claim.[97] The court retains total discretion whether and how to consider the amicus brief,[98] and the parties remain responsible for shaping the issues and arguments for appeal.[99] This device allows third parties to share their perspective with the court without requiring the court or the parties to change their behavior or decisions.

Third parties may obtain permission to litigate the merits of a claim related to a civil case by intervening in the proceedings. The Federal Rules of Civil Procedure authorize two kinds of intervention. Parties with a "cognizable legal interest" in the subject of the case have a right to intervene[100] unless one of the parties already "adequately" represents that interest.[101] Permissive intervention allows third parties to adjudicate additional claims they have that share "common questions of law and fact" with the main case.[102]

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95. *See* SUP. CT. R. 37 (requiring permission either from the Court or the parties to file an amicus curiae brief and stating that "[a]n *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court"); FED. R. APP. P. 29(a)–(b) (requiring an amicus curiae to obtain permission either from the court or the parties and to file a motion with the proposed brief stating "the movant's interest" and "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case").

96. 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3975.1 (3d ed. 1999).

97. United States v. Michigan, 940 F.2d 143, 165–66 (6th Cir. 1991).

98. *See id.* at 165 ("[P]articipation as an amicus . . . continues to be[] a privilege within the sound discretion of the courts . . . ." (internal quotation marks omitted)).

99. *See* Bano v. Union Carbide Corp., 273 F.3d 120, 127 n.5 (2d Cir. 2001) ("[A]n amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (quoting Resident Council v. U.S. Dep't of Hous. & Urban Dev., 980 F.2d 1043, 1049 (5th Cir. 1993))).

100. Brody *ex rel.* Sugzdinis v. Spang, 957 F.2d 1108, 1116 (3d Cir. 1992); *see also* FED. R. CIV. P. 24(a)(2) (granting third parties a right to intervene if the litigation ultimately would injure the third party's interest in the "property or transaction that is the subject of the action").

101. FED. R. CIV. P. 24(a)(2).

102. *Id.* 24(b)(1)(B); United Keetoowah Band of Cherokee Indians of Okla. v. United States, 78 Fed. Cl. 303, 304, 306 (2007).

Intervenors are treated like the original parties and may litigate the merits of their claims.[103] The intervenor device therefore preserves the adversary structure by treating intervenors as parties, which avoids distorting the role of the original parties or the judge.

Some statutes simply confer party status on outsiders to litigation. Qui tam statutes, for example, allow private citizens to bring civil claims in the government's name.[104] The most commonly litigated qui tam statute is the federal False Claims Act,[105] under which citizens may bring civil fraud claims in the name of the United States.[106] Once a citizen, called a "relator,"[107] brings a qui tam suit, the government may intervene.[108] If the government does not intervene, the relator prosecutes the case on the government's behalf.[109] Even if the government does intervene, the relator remains a party to the action.[110] But the government and the relator litigate their cases separately and then share in the recovery,[111] much like coplaintiffs in any civil proceeding.

Other procedures permit a litigant to stand in the shoes of a third party that, for some reason, cannot vindicate its own interests. The derivative suit allows shareholders to bring claims on behalf of a corporation when the corporation's officers and directors will not.[112] Because only the corporation is a party, not the shareholder as an individual, the basic adversary structure remains. A series of Supreme Court decisions also have relaxed the standing requirement and permitted a litigant to vindicate the rights and interests of a third party that cannot join an action if the litigant shares a relationship with the third party.[113] For example, defendants may raise equal protection claims on behalf of jurors excluded from the defendant's

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103. Schneider v. Dumbarton Developers, Inc., 767 F.2d 1007, 1017 (D.C. Cir. 1985).

104. Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 949 (2007).

105. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 (2000).

106. 31 U.S.C. § 3730(b)(1) (2000); *Vt. Agency of Natural Res.*, 529 U.S. at 769.

107. Broderick, *supra* note 104, at 952.

108. 31 U.S.C. § 3730(b)(2).

109. *Id.* § 3730(b)(4)(B).

110. *Id.* § 3730(c)(1).

111. *Id.* §§ 3730(c), (d)(1).

112. DEBORAH A. DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE § 1:1 (2003).

113. FALLON ET AL., *supra* note 68, at 175–76.

trial through race-based peremptory challenges.[114] This procedure preserves the litigant's autonomy because the litigant chooses whether and how to vindicate the third party's interests. Neither the court nor the party has a duty to litigate on the third party's behalf.

Congress and the courts have developed a variety of methods to permit third parties to represent their interests in Article III litigation. Procedural rules and statutes may allow the third party to act as an amicus curiae, intervene in the case, or simply obtain party status. They also may allow litigants to bring a claim on behalf of a third party. None of these devices imposes a duty on a litigant to represent a third party's interests even if those interests are at odds with the litigant's own. And none requires courts to vindicate the rights of outsiders to the litigation without first conferring party status. These devices therefore preserve party autonomy and judicial independence—two critical traits of the federal justice system that the CVRA ignores.

III. THE CRIME VICTIMS' RIGHTS ACT IN THE FEDERAL JUSTICE SYSTEM

The CVRA provides little guidance to courts and prosecutors incorporating the statute into federal prosecutions; as a result, the statute's impact on the federal justice system is uncertain. This Part examines the statute's text, particularly its enforcement provisions, and concludes that the CVRA really asks for institutional courtesy toward victims, not sweeping changes to federal prosecutions. Section A shows that the statute's vague rights and conflicted legislative history leave room for interpretation. Section B argues that the statute's enforcement provisions fail to confer party or intervenor status on victims, indicating that the CVRA gives victims little real power. Instead, the CVRA requires courts and prosecutors to vindicate victims' interests. This procedural posture forces courts to act as advocates—even against the accused—and forces prosecutors to promote interests that may conflict with the government's own. But Section C demonstrates that many of the CVRA's provisions permit a much narrower interpretation. Because Congress has not rejected the public prosecution model, and because a broad interpretation of the CVRA could present real conflicts for courts

114. Powers v. Ohio, 499 U.S. 400, 415 (1991).

and prosecutors, courts should narrowly interpret the statute to require institutional courtesy rather than sweeping new rights.

A. The Crime Victims' Rights Act: Statutory History and Text

Congress passed the CVRA as a compromise between victims' rights advocates, who had fought for nearly a decade to pass a constitutional victims' rights amendment, and congressional opponents of the proposed amendment.[115] Because Congress rushed to pass the statute, the legislative history supporting the CVRA is sparse, consisting only of two floor statements by the statute's sponsors, Senators Dianne Feinstein and Jon Kyl.[116] These floor statements support multiple interpretations of the CVRA's purpose, reflecting the statute's history as a compromise. On one hand, its drafters took pains to stress that the rights in the CVRA "do not come at the expense of defendant's [*sic*] rights."[117] But they also demanded that courts and prosecutors avoid "whittl[ing] down or marginaliz[ing]" victims' rights and "treat victims of crime with the respect they deserve and . . . afford them due process."[118] Overall the floor statements appear designed to appease both victims' proponents and skeptics of victims' rights; as a result, the statute's legislative history and purpose leave considerable room for interpretation.[119]

The CVRA's ambiguous statutory text exacerbates the confusion that this conflicted legislative history may create. The CVRA developed from a proposed constitutional amendment.[120] When it became clear that Congress would not approve the amendment,

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115. *See* 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (discussing the victims' rights amendment's authors' struggles to garner support for a federal constitutional amendment); Jon Kyl, Steven J. Twist & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 588–91 (2005) (reciting the history of the failed proposed victims' rights amendment).

116. Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1015–16 (9th Cir. 2006); United States v. Turner, 367 F. Supp. 2d 319, 323 n.3 (E.D.N.Y. 2005) (mem.).

117. 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

118. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

119. *Compare* United States v. Holland, 380 F. Supp. 2d 1264, 1279 (N.D. Ala. 2005) (mem.) (calling the CVRA "the new, mushy, 'feel good statute'"), *with* United States v. Heaton, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006) (mem.) ("Congress plainly intended to give victims broad rights to fair treatment.").

120. *See Turner*, 367 F. Supp. 2d at 323 n.3 (describing the CVRA's origins in a proposed victims' rights amendment).

victims' rights proponents passed the measure as a statute instead.[121] As a result, the CVRA reads more like an amendment than a statute, with sweeping statements of rights and no discussion of how those rights should be implemented. It grants victims eight substantive and procedural rights: the right to be reasonably protected from the accused, the right to be notified of public proceedings, the right not to be excluded from public proceedings, the right to be heard at designated proceedings, the right to proceedings free from unreasonable delay, the right to confer with the prosecution, the right to restitution as permitted by law, and the right to be treated with fairness and respect for their dignity and privacy.[122] Nowhere does the statute state how these rights should affect courts' and prosecutors' decisions during criminal proceedings.

The CVRA also fails to explain another important detail: how courts and prosecutors should recognize victims' rights when prosecutors have not yet brought criminal charges. It defines "victim" as a person who is "directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."[123] Although the statute does not define "offense," its legislative history and plain language appear to confer victim status even if the government has not brought charges.[124]

It is odd that a statute with such broad language and expansive application provides no guidance to the courts and prosecutors who actually apply it to federal prosecutions. The explanation for this omission is probably political: passing the CVRA presented an opportunity to help crime victims, a broadly sympathetic group. In its

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121. *Id.*

122. 18 U.S.C. § 3771(a) (2006).

123. *Id.* § 3771(e). For a discussion of the difficulty of determining who is a "victim" within the meaning of the statute, see United States v. Sharp, 463 F. Supp. 2d 556, 561–67 (E.D. Va. 2006) (mem.).

124. *See* 18 U.S.C. § 3771(d)(3) (allowing a victim to seek a writ of mandamus for denial of any statutory rights "if no prosecution is underway, in the district court in the district in which the crime occurred"); 150 CONG. REC. S10,912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (claiming to have written "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"). The practical difficulties of this interpretation have led the Department of Justice to apply the CVRA only to charged conduct. *See* OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 9 (2005), *available at* http://www.usdoj.gov/olp/final.pdf ("[A] victim is 'a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia' . . . if the offense is charged in federal district court." (quoting 18 U.S.C. § 3771(e)).

haste to pass popular legislation, however, Congress did not bother considering the CVRA's practical implications. As a result, Congress passed a statute that—probably unintentionally—conflicts with the basic structure of the federal criminal justice system.

B. Enforcing the CVRA in an Adversary System

1. *The CVRA's Enforcement Provisions.* Its drafters claimed that the CVRA "mak[es] victims independent participants in the criminal justice process"[125] and gives victims the chance to enforce their participation rights.[126] But the CVRA does not change federal prosecutors' constitutional and statutory responsibilities to enforce federal criminal law. The statute expressly states that it does not infringe prosecutorial discretion.[127] And nowhere does the CVRA suggest that it confers party or even intervenor status on victims.[128] The government and the defendant thus remain the sole parties to criminal prosecutions.

Because victims have no formal status under the CVRA, courts and prosecutors ultimately bear responsibility to vindicate victims' interests. Under the CVRA, trial courts must ensure that victims are afforded their statutory rights.[129] Government officials, including prosecutors, must "make their best efforts to see that crime victims are notified of, and accorded," their rights under the CVRA.[130] Victims and their legal representatives may petition a district court and then an appellate court if they are not being accorded their rights.[131] But the plain language of the statute requires courts and prosecutors to protect victims' rights before the victim files a petition—the victim may petition for enforcement if courts and prosecutors fail their obligations. The CVRA thus turns courts and prosecutors into victims' advocates. In contrast, victims only have indirect power to influence the system. They cannot seek party or

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

126. The CVRA is the first enforceable victims' rights statute in the federal system. 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

127. 18 U.S.C. § 3771(d)(6).

128. *See* United States v. Rubin, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008) ("So far as the Court can divine, however, victims in this posture are not accorded formal party status, nor are they even accorded intervenor status as in a civil action.").

129. 18 U.S.C. § 3771(b)(1).

130. *Id.* § 3771(c)(1).

131. *Id.* §§ 3771(d)(1), (3).

intervenor status; only the court, prosecutors, and defendants remain direct participants.

Congress could have made victims substantial participants to criminal proceedings. The CVRA could have made victims coparties with the government, like qui tam plaintiffs, or it could have created an intervenor posture in criminal cases, as it did in civil cases. More radically, Congress could have abandoned the public prosecution system and asked victims to prosecute criminal cases, or it could have made prosecutors representatives of the victim rather than the public, similar to plaintiffs in derivative suits. At best, by giving victims the right "to be heard" on limited subjects, Congress probably made victims little more than amici curiae. Like amici curiae, then, victims remain nonparties to criminal proceedings with no right to litigate the merits of a criminal case.

Victims' proponents might argue that Congress would not draft such a narrow statute. But the CVRA suggests why Congress created an enforcement provision that fundamentally gives victims very little power: perhaps Congress simply was unwilling to abandon the existing public prosecution model. By restricting victim participation and reaffirming prosecutorial discretion, Congress expressed its preference that the executive, not victims, prosecute criminal cases. But as the rest of this Section indicates, placing the burden instead on courts and prosecutors to vindicate victims' rights may upset the basic structure of the federal criminal justice system.

2. *Courts.* Enforcing victims' interests can place courts at odds with the parties. For example, in *In re Dean*,[132] prosecutors were investigating whether to bring criminal charges against BP Products North America (BP) after an explosion at a refinery that BP owned killed fifteen people.[133] The government and the district court agreed that given the publicity surrounding the case and the possibility of prejudicing BP, the government did not need to confer with the victims.[134] Prosecutors argued that communicating with victims would "impair the plea negotiation process."[135] The Court of Appeals for the Fifth Circuit held that prosecutors had to confer with victims,

132. *In re* Dean, 527 F.3d 391 (5th Cir. 2008) (per curiam).

133. *Id.* at 392.

134. *Id.*

135. *Id.* (quoting federal prosecutors).

although it refused to compel the trial court to reject the plea agreement.[136] Under the Fifth Circuit's interpretation, a trial court would have to force victim participation in plea negotiations over the objections of the parties and despite concerns that victim participation would prejudice the defendant. And by the plain terms of the CVRA, the court would have to do so even if the victim did not first object. Thus the CVRA disrupts the most fundamental division of responsibility in adversary litigation: it does not rely on a party to the litigation to vindicate that party's rights (or even to vindicate an outsider's rights on the outsider's behalf); instead, it asks courts to vindicate the rights and interests of a nonparty.

The CVRA also places courts in conflict with prosecutors' statutory and constitutional discretion. The core of the *Rubin* case[137] was a dispute between prosecutors, who wanted to resolve the case, and the victims, who wanted to recover as much of their loss through restitution and civil damages as possible.[138] Because Omni and RJP were not parties, they demanded that the court vindicate their interest in recovery at the expense of the government's right, as a party, to litigate its case. The *Rubin* victims therefore asked the court to infringe an adversary party's autonomy. And because the party was the government exercising an executive function, the *Rubin* victims were fundamentally asking the court to overlook prosecutors' statutory and constitutional responsibilities to prosecute federal crimes. Federal courts, generally reluctant to interfere with prosecutorial discretion, have an obligation under the CVRA to second-guess prosecutors' decisions on behalf of a nonparty with no right to adjudicate the case.

The *Rubin* decision highlighted another problem for courts enforcing victims' rights: victims' interests often conflict with the rights and interests of the accused, placing courts in the uncomfortable position of vindicating a victim's rights while the

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136. *Id.* at 395. The appellate court stated that the trial court could decide what weight, if any, to give the victims' absence from negotiations when deciding whether to accept the plea agreement. *Id.* In July 2008, the Supreme Court refused to stay enforcement of the plea agreement. Dean v. U.S. Dist. Court, 128 S. Ct. 2996, 2996 (2008).

137. *See supra* notes 4–9 and accompanying text.

138. United States v. Rubin, 558 F. Supp. 2d 411, 425–26 (E.D.N.Y. 2008) (reporting that Omni and RJP argued that "the government has not provided information with which to pursue restitution in this case and in their civil suit" and that "the government submitted on behalf of victims a restitution claim . . . that significantly undervalues their loss").

accused continues to enjoy the presumption of innocence.[139] This duty clashes with a court's responsibility to protect defendants' rights during criminal proceedings.[140] In *Rubin*, for example, the victims wanted the court to increase restitution over the objection of the prosecution and the defense.[141] Their petition created two problems for the court. First, when asked to vindicate *victims'* rights, the court had to assume that the victims had suffered at the hands of the defendant—an assumption that directly conflicts with the presumption of innocence.[142] Second, the victims wanted the court to step beyond its neutrality, a core aspect of adversary judging, and encourage the prosecution to make the plea agreement harsher for the defendant. As the *Rubin* court aptly summarized, "[i]t is hard to comprehend, in any case, how a court presiding over the prosecution of a defendant could engage in sidebar dispute resolution between a victim and the government regarding the strategic decisions of the government about the very prosecution the Court is to try impartially."[143]

3. *Prosecutors.* Prosecutors have an ethical responsibility to vindicate the public's interest in ensuring just enforcement of the United States' criminal laws.[144] But the CVRA asks prosecutors to make their "best efforts" to enforce victims' rights.[145] Although the statute disclaims any infringement on prosecutorial discretion,[146] it

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139. One district court explained the conundrum:

> The CVRA defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." At this stage of the case, however, the defendant continues to enjoy a presumption that he is innocent of the charge that he committed a Federal offense. Strictly speaking, then, I might be constrained to presume that there is no person who meets the definition of "crime victim" in this case. That syllogism—which renders the CVRA inapplicable to this or any other criminal case unless and until the defendant is proved guilty beyond a reasonable doubt—produces an absurd result that I must presume Congress did not intend. Nevertheless, I cannot ignore the possibility that by requiring me to afford rights to "crime victims" in this case, the CVRA may impermissibly infringe upon the presumption of Turner's innocence.

United States v. Turner, 367 F. Supp. 2d 319, 325–26 (E.D.N.Y. 2005) (mem.) (citation omitted) (quoting 18 U.S.C. § 3771(e)(2006)).

140. *See supra* note 58 and accompanying text.

141. *Rubin*, 558 F. Supp. 2d at 412–13.

142. *Turner*, 367 F. Supp. 2d at 325–26.

143. *Rubin*, 558 F. Supp. 2d at 427–28.

144. *See supra* Part I.B.2.a.

145. 18 U.S.C. § 3771(c)(1) (2006).

146. *Id.* § 3771(d)(6).

does give victims the "reasonable right to confer" with the prosecution.[147] The CVRA also allows prosecutors to petition the district and appellate courts for relief if victims are not afforded their rights.[148]

Representing victims' private interests creates an ethical conflict for prosecutors as soon as the victims' interests diverge from those of the public. In *Young v. United States ex rel. Vuitton et Fils S. A.*,[149] the Supreme Court discussed the conflict that prosecutors face when representing private interests during a criminal proceeding:

> A prosecutor may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client. Conversely, a prosecutor may be tempted to abandon a meritorious prosecution if a settlement providing benefits to the private client is conditioned on a recommendation against criminal charges.[150]

Young addressed the appointment of a private attorney whose client had a financial stake in the outcome of the proceedings to prosecute a criminal contempt case.[151] Although the CVRA does not make victims the clients of federal prosecutors, as was the situation in *Young*, it does appear to ask prosecutors to consider victims' interests in a new or more significant light. And as *Rubin* demonstrated, victims may have financial interests—or even simply emotional interests—that drive them to demand harsher treatment of defendants than the prosecutor may consider wise. Had the prosecutors in *Rubin* assisted Omni and RJP with their efforts to recover their financial losses criminally and civilly, the prosecutors would have verged on committing the very improprieties the *Young* Court denounced.

And like the courts, prosecutors' ethical responsibilities include seeking justice for all parties, including the accused.[152] For example, in *Dean*, the trial court granted an ex parte order for the government relieving it of its responsibilities to notify and confer with the victims of the BP explosion because, given the high-profile nature of the case, "any public notification of a potential criminal disposition resulting

147. *Id.* § 3771(a)(5).
148. *Id.* § 3771(d)(1).
149. Young v. United States *ex rel.* Vuitton et Fils S. A., 481 U.S. 787 (1987).
150. *Id.* at 805.
151. For a discussion of the facts in the *Young* case, see *supra* note 54.
152. *See supra* Part I.B.2.a.

from the government's investigation . . . would prejudice BP."[153] The Fifth Circuit rejected the lower court's conclusion that ordering the government to disclose the existence of its investigation would infringe prosecutorial discretion.[154] But the Fifth Circuit did not address the ethical problem prosecutors faced—by acting cautiously to protect BP's rights, the government was fulfilling its duty to the public interest. When prosecutors place the rights of victims, who are not even parties to the litigation, before the rights of defendants, who enjoy substantial constitutional protections, they appear to violate—or at least undermine—their ethical duty to defendants.

Because the CVRA does not infringe or modify prosecutors' statutory and constitutional duties to enforce criminal law, the statute forces prosecutors to vindicate victim's interests while representing the government's interests—even if they conflict. None of the devices discussed in Part II.C asked a party to litigate interests that conflicted with its own goals. Unless the CVRA is nothing more than a reminder that prosecutors should consider victims' interests when deciding how the government should proceed,[155] it is an unprecedented infringement of party autonomy and prosecutorial discretion.

4. *Defendants.* Finally, the CVRA places defendants in the difficult position of combating a nonparty whose interests are generally opposed to their own. For example, in *United States v. Tobin*,[156] the New Hampshire Democratic Party (NHDP) claimed that it was a victim of the defendant's efforts to jam phone lines set up to facilitate NHDP's "get out the vote" campaign.[157] The government and defense jointly moved to continue the trial until December, 2005[158]—after November elections. The NHDP argued that the extension violated its rights under the CVRA and asked the court to

153. *In re* Dean, 527 F.3d 391, 395 (5th Cir. 2008) (per curiam) (alteration in original) (quoting United States v. BP Prods. N. Am. Inc., No. H-07-434, 2008 WL 501321, at *2 (S.D. Tex. Feb. 21, 2008)).

154. *Id.*

155. For a discussion of how prosecutors may consider victims' interests, see *supra* Part I.B.2.a.

156. United States v. Tobin, No. 04-cr-216-01-SM (D.N.H. July 22, 2005).

157. *Id.* at 2.

158. *Id.* at 1.

reject the extension.[159] The court observed that it could not "deprive either criminal defendants or the government of a full an [*sic*] adequate opportunity to prepare for trial. The defendant's right to adequate preparation is, of course, of constitutional significance as well."[160] The court prioritized the parties' rights over the victim's desire to proceed to trial prior to election day. But under the CVRA, which grants victims both the right to proceedings free from unreasonable delay[161] and quasi–due process rights,[162] courts could accelerate proceedings to the detriment of the defendant's right to prepare a case.

This posture conflicts with the defendant's position as an adversary to the government, which even the Bill of Rights recognizes as a particularly delicate position.[163] Although prosecutors have an ethical responsibility to defendants, the courts remain primarily responsible for protecting defendants' statutory and constitutional rights during criminal proceedings.[164] And because the CVRA does not make victims parties to the proceedings, courts must step in and represent victims' interests even when they conflict with defendants' interests. But courts are not litigants—they are responsible for ruling on legal questions, including whether the government's conduct has violated the defendant's constitutional rights. Defendants therefore have no way to challenge the court's representation of the victims' interests during the proceedings. The CVRA therefore not only conflicts with courts' responsibilities to protect defendants' rights; it also makes the court, responsible for ensuring fairness to both parties, the adversary of the defendant.

C. Interpreting the CVRA

Congress may have tried to protect prosecutorial discretion by refusing to confer party status on victims, but it created other problems for courts and prosecutors by forcing them to advocate for victims' interests. This Section argues that a careful, narrow reading of the CVRA's rights provisions could avoid many of these conflicts.

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159. *Id.* at 2.
160. *Id.* at 4.
161. 18 U.S.C. § 3771(a)(7) (2006).
162. *See infra* note 168 and accompanying text.
163. *See supra* Part I.B.2.b.
164. *See supra* note 58 and accompanying text.

This Section presents six[165] statutory provisions that could either give the victim a substantial voice in prosecutions or simply ask courts and prosecutors to show courtesy toward victims without changing their decisionmaking processes. Courts should adopt this narrower reading to preserve the public prosecution model that Congress refused to abandon.

First, the provision giving victims the right "to be treated with fairness and with respect for the victim's dignity and privacy" could justify giving victims broad rights to influence many stages of the criminal prosecution.[166] The CVRA's drafters asked courts and prosecutors to read this right expansively.[167] The drafters explained that "[t]he broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational," and they argued that "the right to be treated with fairness" includes "the notion of due process," but they did not explain how they intended the right to operate in practice.[168] As some commentators have already contended, loose language like "fairness" and "respect" could confer sweeping new rights throughout the federal criminal justice system.[169]

But this right also could simply ask courts and prosecutors to show consideration to victims as long as doing so does not come at

165. This Section does not discuss a victim's right to notification of public proceedings, 18 U.S.C. § 3771(a)(2), and not to be excluded from public proceedings, *id.* § 3771(a)(3), because those rights are relatively straightforward and present fewer ethical problems for courts and prosecutors.

166. *Id.* § 3771(a)(8).

167. Senator Kyl argued that "[i]t is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch." 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

168. *Id.* at S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl); *see also id.* (statement of Sen. Feinstein) (agreeing with Senator Kyl).

169. For example, Professor Paul Cassell has argued that

> [t]he 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 fairness and with respect for the victim's dignity and privacy." 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.

Cassell, *supra* note 11, at 872 (emphasis omitted) (footnote omitted) (quoting 18 U.S.C. § 3771(a)(8)).

the expense of the participants' rights and duties.[170] This interpretation would make more sense in light of the CVRA's failure to create anything approaching party status for victims.[171] If Congress wanted to preserve prosecutorial discretion but also incorporate victims into the system,[172] perhaps reading this right as a reminder to courts and prosecutors that they should treat victims thoughtfully best reflects the compromise that led to the statute's enactment.

Another potentially groundbreaking provision grants victims "[t]he right to proceedings free from unreasonable delay,"[173] recognizing that victims have an interest in rapid proceedings independent from prosecutors and the accused. The CVRA's drafters claimed that this provision "does not curtail the government's need for reasonable time to organize and prosecute its case" or "infringe on the defendant's due process right to prepare a defense."[174] Instead, this right was intended to require courts to reject motions to continue proceedings made only for the convenience of the parties that go beyond either party's need to prepare.[175] The statute provides no further guidance explaining when proceedings are unreasonably delayed.

Courts could read this statute strictly and accelerate the case over the objection of the parties, or courts could rely on the drafters' acknowledgement that the parties have a right to fully prepare their cases and rarely, if ever, hasten the proceedings on the victim's behalf.[176] To avoid interfering with the parties' rights to choose how to litigate their cases, courts should follow the latter approach. The CVRA does not make victims parties, and so victims should not have

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170. *See, e.g.*, United States v. Rubin, 558 F. Supp. 2d 411, 427–28 (E.D.N.Y. 2008) (refusing to "prohibit[] the government from raising legitimate arguments in support of its opposition to a motion simply because the arguments may hurt a victim's feelings or reputation").

171. *See supra* Part III.B.1.

172. *See supra* Parts III.A–B.

173. 18 U.S.C. § 3771(a)(7). The purpose of this provision was to vindicate the victim's interest in repose. *See* 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) ("It is not right to hold crime victims under the stress and pressure of future court proceedings merely because it is convenient for the parties or the court.").

174. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

175. *Id.*

176. *See* United States v. Tobin, No. 04-cr-216-01-SM, slip op. at 4 (D.N.H. July 22, 2005) ("Although the [victim's] interest in having this case proceed forthwith is important, of equal importance is the court's duty to ensure that both the defendant and government receive due process and a fair trial.").

a real voice in determining the pace of litigation; nor should courts represent that voice against the government and the accused. One court observed,

> This litigation may be proceeding with less speed than the [victim] would prefer, given its own discrete interests, but it is worthwhile to reflect on the old adage that the wheels of justice grind slowly, but they grind exceedingly fine. The alternative – precipitous spinning of the powerful wheels of justice merely to satisfy popular demand – runs the unacceptable risk of those wheels running over the rights of both the accused and the government, and in the end, the people themselves.[177]

The victim's "reasonable right to confer with the attorney for the Government in the case"[178] also may threaten the government's autonomy. Although the CVRA preserves prosecutorial discretion, this provision has led many victims to ask courts to reject plea agreements or vacate guilty pleas on the ground that the victims did not sufficiently confer with the prosecution regarding the plea.[179] Confronted with this situation, the Fifth Circuit proposed reading the statute to ask prosecutors to converse with victims "before ultimately exercising [their] broad discretion."[180] Although the CVRA's drafters claimed that "[t]his right is intended to be expansive,"[181] the Fifth Circuit's interpretation conforms to the drafters' floor statements on the issue.[182] By asking prosecutors to communicate with victims without necessarily changing their decisionmaking based on the victim's interests, the Fifth Circuit's approach avoids forcing prosecutors to represent conflicting interests and avoids placing courts in the awkward position of second-guessing prosecutors'

177. *Id.*

178. 18 U.S.C. § 3771(a)(5).

179. *E.g.*, *In re* Dean, 527 F.3d 391, 394–95 (5th Cir. 2008) (per curiam).

180. *Id.* at 395. The Fifth Circuit decided that the district court should not have exempted prosecutors from this requirement, but it concluded that the injury to victims was not sufficient to warrant mandamus relief. *Id.*

181. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl); 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

182. Senator Feinstein explained that this right is expansive in the sense that it applies at "any critical stage or disposition of the case." 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). Prosecutors merely "should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions." *Id.* at S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

decisions. This provision should encourage prosecutors to act courteously toward victims while continuing to represent the United States' interests.

Some CVRA provisions ultimately reinforce existing law without creating new rights. "The right to be reasonably protected from the accused"[183] is a particularly ambiguous provision. Although even Senator Kyl recognized that "the government cannot protect the crime victim in all circumstances," he did not explain in what circumstances the right should apply.[184] Victims could demand federal protection based on this provision. The *Rubin* victims argued that because the government investigated, arrested, and placed Rubin on bond while he was defrauding them, Omni and RJP were denied their rights under this provision.[185] But the *Rubin* court found a limiting principle in the statutory text: it concluded that because Rubin had not been "accused" of defrauding Omni and RJP at that time, they had no rights under the CVRA "beyond that of general law to be protected from criminal conduct by Rubin or anyone else."[186]

Even once the defendant is formally charged, however, it is not clear what responsibilities this provision creates. The CVRA's drafters argued it requires protection for victims when courts place defendants on release.[187] Yet existing federal release law already considers victim safety, and so this provision does not appear to contribute new rights.[188] Courts could grant release less often or with harsher terms based on this right, particularly if they considered it with the victim's right to be heard on the issue of release.[189] But the CVRA's plain text does not require them to do so, and forcing a court to change its decision about whether to grant freedom to the accused based on the interests of a nonparty would conflict with the court's

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183. 18 U.S.C. § 3771(a)(1).

184. 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

185. United States v. Rubin, 558 F. Supp. 2d 411, 419 (E.D.N.Y. 2008).

186. *Id.* at 420.

187. 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

188. One district court interpreting the CVRA observed as much:

> Regardless of what this right might entail outside the bail context, it appears to add no new substance to the protection of crime victims afforded by the Bail Reform Act, which already allows a court to order reasonable conditions of release or the detention of an accused defendant to "assure . . . the safety of any other person."

United States v. Turner, 367 F. Supp. 2d 319, 332 (E.D.N.Y. 2005) (mem.) (alteration in original) (quoting 18 U.S.C. § 3142(c)(1) (2000)).

189. 18 U.S.C. § 3771(a)(4) (2006).

role as protector of a defendant's rights. The drafters' other statements about this provision counsel a more limited reading. Aside from the release issue, Senator Kyl simply asked courts to reasonably "provide[] accommodations such as a secure waiting area, away from the defendant."[190] Senator Kyl appears to ask courts to be courteous. This reading allows courts to remain impartial, particularly toward the defendant, and it prevents imposing on courts general responsibility to ensure that federal law enforcement and federal prosecutors are providing protection for victims.

Another provision that fundamentally restates existing law is "[t]he right to full and timely restitution as provided in law."[191] The CVRA's drafters endorsed a definition of restitution that includes compensating the victim's family for the victim's lost future income in homicide cases.[192] This provision contributes to criminal proceedings, then, by clarifying existing law.[193] But because the CVRA recognizes the right to restitution "as provided in law,"[194] courts uniformly have concluded that the CVRA does not change victims' access to restitution.[195]

Many of these interpretations appear to give victims no real right to participate in the proceedings, which the CVRA's drafters claimed was the statute's purpose.[196] But one provision could give victims an opportunity to participate without upsetting the role of the court or the rights of the parties. The CVRA gives victims the right to be "reasonably heard at any public proceeding in the district court

190. 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

191. 18 U.S.C. § 3771(a)(6).

192. *See* 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (endorsing two decisions by Judge Cassell, then on the District Court of Utah, that interpreted federal restitution statutes to include lost future income).

193. *See* United States v. Bedonie, 317 F. Supp. 2d 1285, 1302–04 (D. Utah. 2004) (mem.) (interpreting the language and legislative intent of existing federal restitution statutes to authorize lost income restitution in homicide cases).

194. 18 U.S.C. § 3771(a)(6).

195. *E.g.*, *In re* W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 563–64 (2d Cir. 2005) (affirming the establishment of a restitution fund that did not fully compensate all victims because the Mandatory Victim Restitution Act allows courts to limit restitution when the number of victims makes full compensation difficult); United States v. Lay, 456 F. Supp. 2d 869, 871–72, 875 (S.D. Tex. 2006) (mem.) (concluding that the CVRA could not overcome the abatement doctrine, which required vacation of Kenneth Lay's conviction because he could not appeal his conviction after his death).

196. *See supra* notes 125–26 and accompanying text.

involving release, plea, sentencing, or any parole proceeding."[197] Senator Kyl argued that it makes victims "independent participant[s]" and ensures that they may give victim impact statements.[198] Federal statues already permit victim impact evidence during some sentencing proceedings,[199] and the Federal Rules of Criminal Procedure allow victims of violent or sexual crimes to address the court.[200] But the CVRA appears to be the first federal statute to confer a general right on victims of all federal crimes to speak to the court at sentencing,[201] expanding the role of controversial victim impact evidence in federal criminal proceedings.[202]

The CVRA does not explain how much weight, if any, courts should give victims' opinions. Courts could use this provision to justify imposing harsher release terms or sentences. On the other hand, as the Sixth Circuit observed, it is not clear "why the particular desires of [the] victim should affect the legal analysis necessary for sentencing" the defendant.[203] Courts could treat victims essentially like amici curiae, because, like amici curiae, victims have no clear

197. 18 U.S.C. § 3771(a)(4).

198. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

199. *E.g.*, 18 U.S.C. § 2319A(d) (2006) (copyright infringement); 18 U.S.C. § 3593(a) (2006) (capital sentencing).

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

201. Lower courts disagree whether the CVRA gives victims the right to speak or to simply present their perspective in writing. *Compare* United States v. Marcello, 370 F. Supp. 2d 745, 748 (N.D. Ill. 2005) (mem.) ("[T]he statute requires only that a victim be reasonably heard, and . . . Congress's use of that term of art does not require that a trial court accept oral statements in all situations."), *with* Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1016 (9th Cir. 2006) ("The statements of the sponsors of the CVRA and the committee report for the proposed constitutional amendment disclose a clear congressional intent to give crime victims the right to speak at proceedings covered by the CVRA."). The CVRA's drafters, however, intended for victims to have the right to speak. 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl); 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

202. Many commentators have criticized victim impact evidence as inflammatory and prejudicial. *E.g.*, Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 395 (1996) ("Victim impact statements evoke . . . a complex set of emotions directed toward the defendant, including hatred, fear, racial animus, vindictiveness, undifferentiated vengeance, and the desire to purge collective anger." (footnote omitted)); Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 426 (2003) (arguing that victim impact evidence "diverts the jury's attention away from the crime and the defendant and toward the character of the victim and the crime's effect on his family").

203. United States v. Hughes, No. 06-6461, 2008 WL 2604249, at *7 n.7 (6th Cir. June 26, 2008).

statutory right to have their arguments considered. Victims still could have the satisfaction of expressing their feelings without necessarily affecting the court's decisionmaking, avoiding conflicts for the judges and prosecutors who otherwise would have to treat the defendant more harshly. And if Congress has not given victims the right to adjudicate their interest in harsher treatment of defendants, then courts should not use vague language about a right *to be heard* to create it.

Some might object that interpreting the CVRA this narrowly eviscerates the statute. But this reading still requires the federal justice system to incorporate victims; it simply avoids making them independent parties. After the CVRA, victims may express their opinions to prosecutors and, during some proceedings, to the court.[204] The CVRA also makes it more difficult for courts to exclude victims from public court proceedings,[205] and it requires prosecutors to notify victims of those public proceedings in advance.[206] In short, the CVRA allows victims to witness some proceedings, talk to prosecutors, and communicate with the court. These rights still respect victims' unique investment in the proceedings. But narrowly interpreting the CVRA makes sense in light of Congress's refusal to replace the public-prosecution model. Limiting victims' influence over the prosecution matches their lack of formal party status, and it generally avoids many problems that forcing courts and prosecutors to advocate for crime victims creates. If Congress wishes to make victims parties, it may do so. Until then, courts should tread carefully before reading the CVRA too broadly.

CONCLUSION

This Note probes whether some ends justify the means necessary to achieve them. Victims' rights scholars have argued, with considerable political success, that it is worth changing the means of criminal justice—the traditional adversary process between the

204. *See supra* notes 178–82, 196–202 and accompanying text.

205. *See* 18 U.S.C. § 3771(a)(3) (2006) (requiring courts to find, by clear and convincing evidence, that a victim's presence at a public proceeding would "materially alter[]" the victim's testimony before excluding the victim from the courtroom). This provision contrasts with the Federal Rules of Evidence, which generally allow courts total discretion to exclude witnesses from the courtroom. FED. R. EVID. 615.

206. 18 U.S.C. § 3771(a)(2).

government and the defendant—to promote the victim's well-being. Their arguments echo an old debate among legal scholars about the adversary system's effect on third-party interests. It also probes one of the most vexing problems of criminal justice: with so much at stake, why not manipulate procedure to ensure a better outcome for victims, defendants, or the public at large?

But valuing the right result over the right process has consequences. Because American law continues to follow the adversary tradition, promoting essentially inquisitorial values undermines the way American procedure actually operates. The CVRA's potential effect on the federal criminal justice system illustrates this problem. It places courts in the awkward position of second-guessing prosecutorial discretion and vindicating victims' interests against the rights of criminal defendants. Prosecutors also must represent victims in criminal proceedings, undermining prosecutors' traditional role as ministers of justice and forcing them to vindicate interests that may conflict with the government's own. And defendants rely on courts and, to a lesser extent, prosecutors to protect their constitutional rights, a protection that the CVRA may enervate.

American law has developed a number of solutions for the conflict between the adversary process and third-party interests. Some devices, like the amicus curiae devices, allow third parties to present their position without giving third parties power to vindicate their rights vis-à-vis the real parties. Otherwise, American law has either conferred some kind of party or intervenor status on third parties or asked a litigant to stand in the third party's shoes before the court. None of the devices presented in this Note requires the court to vindicate the interests of nonparties or forces litigants to represent interests contrary to their own.

The CVRA does not confer party or intervenor status on crime victims. Despite some pro-victim rhetoric, Congress explicitly preserved the public-prosecution model and claimed that the statute did not affect defendants' rights. In short, even Congress was unwilling to change the fundamental structure of the justice system to promote victims' interests. Both victims' nonparty status and the limited nature of many of the CVRA's substantive rights demonstrate Congress's reluctance to upset the status quo.

This Note proposes a way to interpret the CVRA that remains true to the statute's text and generally avoids disrupting the basic

structure of the federal adversary process. Rather than conferring broad rights on crime victims, courts and others should simply show courtesy and respect toward crime victims. They should allow victims to attend public proceedings and share their thoughts. They should communicate with victims and remember them when release or restitution law requires it. But courts and prosecutors should not change their decisionmaking for victims. By observing this distinction, they can implement the statute that Congress crafted and the justice system demands.