

Winter 2014

## Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges Are Filed

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### Recommended Citation

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<https://scholarlycommons.law.northwestern.edu/jclc/vol104/iss1/2>

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## **CRIME VICTIMS' RIGHTS DURING CRIMINAL INVESTIGATIONS?**

### **APPLYING THE CRIME VICTIMS' RIGHTS ACT BEFORE CRIMINAL CHARGES ARE FILED**

**PAUL G. CASSELL\***

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*This Article addresses whether crime victims should have rights during criminal investigations, using the Crime Victims' Rights Act (CVRA) as the focal point for our discussion. This is a critical issue, as many criminal cases may never proceed to formal charging. If crime victims have no rights during criminal investigations, then many crime victims will never have any rights at all.*

*The issue of whether crime victims have rights in the criminal justice process recently came to a head when the Justice Department released a memorandum contending that the CVRA does not extend crime victims any rights until prosecutors choose to file formal criminal charges. This led the CVRA's Senate cosponsor, then-Senator Jon Kyl, to fire off an angry letter to the Justice Department attacking its position. In our Article, we side with the Act's cosponsor. We believe that, properly understood, the CVRA does extend crime victims' rights during criminal investigations.*

*Our Article proceeds in four parts. First, it highlights the importance of applying the Act before the formal filing of charges by illustrating how dozens of victims in a notorious federal sex abuse case were deprived of the*

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*ability to participate meaningfully in the criminal process when federal prosecutors narrowly interpreted their responsibilities under the Act. Second, the Article reviews the purpose, text, structure, and history of the CVRA, concluding that they all support the conclusion that crime victims have rights during criminal investigations. Third, our Article critiques the Department’s memorandum, demonstrating that the Department’s analysis is unpersuasive. Fourth and finally, the Article provides a specific approach for determining when rights should attach—specifically when federal law enforcement agencies have identified a crime with sufficient precision to send a “target” letter to a criminal defendant. We also observe that federal and state prosecutors have already accorded rights to victims before formally filing charges, which further undermines the Department’s overly narrow construction of the Act.*

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## INTRODUCTION

In recent years, federal and state enactments have given crime victims extensive rights to participate in criminal cases. Many of these rights apply only after the filing of criminal charges, such as the victim's right to be heard during court proceedings. A crime victim's right to deliver an impact statement at sentencing, for instance, can only be exercised after a prosecutor has filed charges against a defendant and obtained a conviction. Other rights, however, can apply even before the formal filing of charges. As one example, the Crime Victims' Rights Act (CVRA)<sup>1</sup> extends to federal crime victims the right to "confer" with prosecutors. But can victims exercise this right before charges have been filed?

This question has tremendous practical importance. In many cases, prosecutors negotiate pleas well before any charges are ever drafted. If crime victims' rights enactments do not extend rights to victims until the formal filing of charges, then crime victims can be effectively excluded from the plea bargaining process. Yet the exclusion of victims in early stages of a criminal case affects more than just the content of a plea deal. Crime victims will also lose other important rights in the process if the formal filing of charges is the necessary trigger for those rights. If, for example, prosecutors work out a nonprosecution agreement with an offender, they need not notify his victims of what they are doing or of the fact that potential charges will never be filed.

The issue of pre-charging rights has most prominently surfaced in connection with federal cases. In 2010, the Department of Justice's Office of Legal Counsel (OLC) weighed in on the issue and released a legal opinion arguing that victims of federal crimes have no CVRA rights during a federal criminal investigation.<sup>2</sup> The Justice Department took the position that rights under the CVRA do not apply until prosecutors formally initiate criminal proceedings by filing a complaint, information, or indictment. The Department claims to find support for that limiting interpretation of the statute in its plain language and legislative history.

Shortly after the Department released its opinion, one of the CVRA's congressional sponsors, then-Senator Jon Kyl, sent a letter to Attorney General Eric Holder strenuously objecting to the Department's conclusions. Senator Kyl directly stated his view that "[w]hen Congress enacted the

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<sup>1</sup> Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, 118 Stat. 2260, 2261-65 (2004) (codified as amended at 18 U.S.C. § 3771 (2012) and 42 U.S.C. § 10603(d)-(e) (2006)).

<sup>2</sup> The Availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004, 35 Op. O.L.C. 1 (Dec. 17, 2010) [hereinafter OLC CVRA Rights Memo], *available at* <http://goo.gl/fHmCL4>.

CVRA, it intended to protect crime victims throughout the criminal justice process—from the investigative phases to the final conclusion of a case.”<sup>3</sup> Senator Kyl contested the Department’s analysis of the statute and, in particular, its use of statements from him during Congress’s consideration of the CVRA.

This Article sides with the CVRA’s cosponsor and concludes that crime victims’ CVRA rights attach before formal charging. Both the CVRA’s plain language and its legislative history lead inexorably to this conclusion, as every court that has considered this issue has concluded. This Article also contends that, as a matter of sound public policy, crime victims should have rights before the formal filing of criminal charges.

This Article proceeds in four parts. Part I frames the issues under discussion by defending the importance of extending rights to crime victims during criminal investigations. Part I also provides background on victims’ rights and gives a concrete illustration of a case in which the question of pre-charging rights for crime victims has arisen—specifically, the Jeffrey Epstein sex abuse case before a federal court in Florida. In that case, girls victimized by Epstein have argued that they should have been consulted about a federal nonprosecution agreement; Department attorneys have responded that because prosecutors never filed charges, government officials had no formal obligations to inform the girls.

Part II reviews the CVRA’s purpose, text, structure, and legislative history. This review establishes that the CVRA extends rights to crime victims before formal charges are filed.

Part III critiques OLC’s position that the CVRA extends rights to victims only after prosecutors have lodged charges in court. The Department’s proffered arguments do not withstand close scrutiny, particularly in light of the fact that the CVRA covers federal agencies involved in the “detection” and “investigation” of crime,<sup>4</sup> and specifically authorizes crime victims to file CVRA motions in situations where “no prosecution is underway.”<sup>5</sup>

Part IV then proposes a specific approach for determining when crime victims’ CVRA rights attach. This Part explains that the rights should attach when federal law enforcement or prosecuting agencies have identified a federal crime and a particular victim with sufficient precision that they would send a “target” letter to a criminal defendant in similar circumstances. If prosecutors have sufficient information to provide notice

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<sup>3</sup> Letter from Jon Kyl, U.S. Sen., to Eric H. Holder, Jr., Att’y Gen. (June 6, 2011), reprinted in 157 CONG. REC. S3608 (daily ed. June 8, 2011) (statement of Sen. Jon Kyl).

<sup>4</sup> 18 U.S.C. § 3771(c)(1).

<sup>5</sup> *Id.* § 3771(d)(3).

to a potential criminal of his rights, they can do the same for his victims. This Part also notes that the Department of Justice and state prosecutors already successfully provide rights to victims before charging. This successful experience strongly suggests that providing rights to victims early in the criminal justice process will not be unduly burdensome.

#### I. THE ISSUE OF RIGHTS FOR CRIME VICTIMS DURING CRIMINAL INVESTIGATIONS

To consider the question of whether victims should have rights during criminal investigations, some understanding of the underlying purposes of victims' rights enactments will be useful. These enactments are typically designed to make victims participants in all phases of the criminal justice process.<sup>6</sup> Congress drafted the CVRA, for example, broadly to make crime victims participants in criminal cases. The Jeffrey Epstein sex abuse case demonstrates the importance of victim participation even before charges are filed.

##### A. A BRIEF HISTORY OF CRIME VICTIMS' RIGHTS

The crime victims' rights movement has sought to make crime victims important participants in the criminal justice process. The movement began in the wake of the Warren Court revolution, which extended new rights to criminal defendants.<sup>7</sup> With the courts paying increasing attention to criminal defendants, crime victims' advocates began to argue that the victims themselves had been overlooked.<sup>8</sup> The movement gained great visibility in the early 1980s when President Ronald Reagan appointed the President's Task Force on Victims of Crime.<sup>9</sup> The Task Force published a report concluding that "the criminal justice system has lost an essential balance. . . . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed."<sup>10</sup>

The Task Force chronicled how crime victims were treated in all stages of the criminal justice process, from the police investigation through

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<sup>6</sup> See DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE 3–39 (3d ed. 2010) (describing reforms from a historical perspective); see also, e.g., 18 U.S.C. § 3771(a) (2012).

<sup>7</sup> See BELOOF, CASSELL & TWIST, *supra* note 6, at 3–39 (describing the history of victims' rights in American law and the early days of the modern movement).

<sup>8</sup> See, e.g., William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 651–55 (1976).

<sup>9</sup> Exec. Order 12,360, 47 Fed. Reg. 17,975 (Apr. 27, 1982); see also PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT, at ii (1982).

<sup>10</sup> PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT, *supra* note 9, at 114.

court proceedings, and ultimately to any parole or other release of the criminal. The Task Force then made a series of recommendations for all criminal justice agencies, including the police, prosecutors, and the courts.<sup>11</sup> The recommendations were designed to allow crime victims to receive information about, and to participate in, criminal cases.

In its most far-reaching recommendation, the Task Force proposed amending the U.S. Constitution to protect victims' rights.<sup>12</sup> The proposed amendment would have built on existing constitutional rights for criminal defendants by extending similar rights to crime victims.<sup>13</sup>

After the publication of the report, crime victims' advocates secured the passage of a series of state constitutional and legislative reforms. These measures guaranteed victims' rights in the criminal process, such as the right to be notified of court proceedings, to attend those proceedings, and to speak at appropriate points in the process, such as plea bargaining and sentencing. The measures were embodied in state statutes and, in more than thirty states, state constitutional "bills of rights" for crime victims.<sup>14</sup> While many of the measures had narrow participatory rights,<sup>15</sup> some of the amendments also contained more open-ended language, promising victims a right to fair treatment "throughout the criminal justice process."<sup>16</sup>

After successfully passing many state constitutional amendments, crime victims' rights advocates sought to achieve the Task Force's broadest recommendation: to secure protection for victims' rights in the U.S. Constitution. In 1996, victims' advocates proposed a Victims' Rights Amendment in a Rose Garden ceremony attended by President Bill Clinton.<sup>17</sup> The proposed amendment contained a list of rights for crime victims, largely paralleling the rights contained in state victims' rights

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<sup>11</sup> See *id.* at 56–82.

<sup>12</sup> *Id.* at 114.

<sup>13</sup> *Id.* at 114–15.

<sup>14</sup> For a map depicting the states with (and without) such amendments, see *State Victim Rights Amendments*, NAT'L VICTIMS' CONSTITUTIONAL AMENDMENT PASSAGE, <http://goo.gl/znI4YW> (last visited Nov. 26, 2013); for discussion, see *infra* Part IV.D (discussing legislative reforms in a number of states).

<sup>15</sup> See, e.g., CAL. CONST. art. I, § 28; MICH. CONST. art. I, § 24; N.C. CONST. art. I, § 37. For a detailed discussion of how one state constitutional amendment is intended to operate, see generally Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373.

<sup>16</sup> E.g., ARIZ. CONST. art. II, § 2.1(A)(1); MICH. CONST. art. I, § 24(1); TEX. CONST. art. I, § 30(a)(1); see CAL. CONST. art. I, § 28(b)(1) ("throughout the criminal or juvenile justice process").

<sup>17</sup> John M. Broder, *Clinton Calls for Victims' Rights in Constitution*, L.A. TIMES, June 26, 1996, at A1. For detailed discussions of the legislative efforts, see Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835, 847–50.

amendments.<sup>18</sup> Congress considered the amendment several times, but it never obtained the requisite two-thirds support in both houses to secure the Amendment's approval.<sup>19</sup> Critics quarreled not so much with the goals of the amendment but rather with the necessity of constitutionalizing such rights.<sup>20</sup>

#### B. THE CRIME VICTIMS' RIGHTS ACT

Unable to obtain the necessary supermajority to pass a federal constitutional amendment, in April 2004, crime victims' rights advocates decided to focus on federal legislation protecting crime victims. In exchange for backing off from their efforts to pass a constitutional amendment, crime victims' advocates received near-universal congressional support for a "broad and encompassing" statutory victims' bill of rights.<sup>21</sup> Victims' advocates sought to expand on the protections found in other previously-enacted victims' rights statutes, including, notably, the Victims' Rights and Restitution Act of 1990.<sup>22</sup> That statute had also included a bill of rights for crime victims, yet because of limited enforcement mechanisms, crime victims had been unable to secure court protection of the rights listed in the statute.<sup>23</sup>

The statute that Congress passed to solve these problems—the Crime Victims' Rights Act of 2004—gave victims “the right to participate in the

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<sup>18</sup> See Cassell, *supra* note 17, at 848–49. For the pros and cons of the amendment as originally introduced, compare Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479 [hereinafter Cassell, *Barbarians at the Gates?*], and Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369, with Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443. For a more recent discussion of a newer version of the amendment, see Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHOENIX L. REV. 301 (2012).

<sup>19</sup> Hon. Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 588–91 (2005).

<sup>20</sup> *Proposed Constitutional Amendment to Protect Crime Victims, S.J. Res. 1: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 128–29 (2003) (statement of Sen. Patrick Leahy); see also Steven J. Twist & Daniel Seiden, *The Proposed Victims' Rights Amendment: A Brief Point/Counterpoint*, 5 PHOENIX L. REV. 341, 356, 378 (2012) (illustrating that the necessity dispute has endured to the present day).

<sup>21</sup> 150 CONG. REC. 7295 (2004) (statement of Sen. Dianne Feinstein); see also Kyl et al., *supra* note 19, at 591–93.

<sup>22</sup> Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, 104 Stat. 4820 (codified as amended at 42 U.S.C. §§ 10601, 10606–07 (2006)).

<sup>23</sup> See, e.g., *United States v. McVeigh*, 106 F.3d 325, 328 (10th Cir. 1997) (per curiam) (refusing to enforce a victim's right to attend a trial); Cassell, *Barbarians at the Gates?*, *supra* note 18, at 515–22 (discussing *McVeigh*).



system.”<sup>24</sup> It extended broad rights to crime victims, including “[t]he right to be treated with fairness and with respect for the victim’s dignity and privacy”<sup>25</sup> and “[t]he reasonable right to confer with the attorney for the Government in the case.”<sup>26</sup> It also commanded that these rights must be afforded by the Justice Department “and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime.”<sup>27</sup> The CVRA also contained specific enforcement mechanisms. The Act provided that rights can be “assert[ed]” by “[t]he crime victim or the crime victim’s lawful representative, and the attorney for the Government . . . .”<sup>28</sup> The courts were also required under the Act to “ensure that the crime victim is afforded the rights” given by the law.<sup>29</sup>

Congress appeared to have at least two goals in mind in passing the CVRA. The first was simply to ensure that crime victims understood what was happening in the criminal justice process. This goal is apparent from the fact that the CVRA gives crime victims rights to notification about various court hearings, as well as more general rights to confer with prosecutors and to be treated with fairness.<sup>30</sup> The CVRA’s Senate sponsors explained:

In case after case we found victims, and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by prosecutors to[o] busy to care enough, by judges focused on [defendants’] rights, and by a court system that simply did not have a place for them.<sup>31</sup>

In passing the CVRA, Congress sought to change the system’s obliviousness to crime victims that often “left crime victims and their families victimized yet again.”<sup>32</sup>

A second overarching purpose of the CVRA was to allow crime victims to play a role in the criminal justice process. Through the CVRA, Congress intended to make victims “independent participant[s]” in the criminal justice process.<sup>33</sup> The CVRA extends to crime victims a series of “rights” in the criminal justice process—rights that the victims have

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<sup>24</sup> 150 CONG. REC. 7297; *see* 18 U.S.C. § 3771 (2012). For a description of victim participation, *see* BELOOF, CASSELL & TWIST, *supra* note 6, at 728–33.

<sup>25</sup> 18 U.S.C. § 3771(a)(8).

<sup>26</sup> *Id.* § 3771(a)(5).

<sup>27</sup> *Id.* § 3771(c)(1).

<sup>28</sup> *Id.* § 3771(d)(1).

<sup>29</sup> *Id.* § 3771(b)(1).

<sup>30</sup> *See id.* § 3771(a).

<sup>31</sup> 150 CONG. REC. 7296 (2004) (statement of Sen. Dianne Feinstein).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 7302 (statement of Sen. Jon Kyl).

independent standing to assert.<sup>34</sup> Congress viewed these provisions as establishing a victim's right "to participate in the process where the information that [victims] and their families can provide may be material and relevant . . . ."<sup>35</sup>

Congress appears to have had both intrinsic and instrumental reasons for wanting crime victim participation. Congress clearly thought that such participation was valuable in its own right. Senator Kyl embodied this belief and explained his decision to become involved in the crime victims' rights movement because of his discovery that victims:

were suffering through the trauma of the victimization and then being thrown into a system which they did not understand, which nobody was helping them with, and which literally prevented them from participation in any meaningful way. I came to realize there were literally millions of people out there being denied these basic rights . . . .<sup>36</sup>

But Congress also thought crime victim participation in the criminal justice system could be instrumentally useful. For example, in protecting a victim's right to be heard by those determining a defendant's sentence, a victim might be able to provide important information that could alter that sentence. As a result, the sentence might reflect a fuller appreciation of the danger posed by a defendant, and the judge might take appropriate steps to prevent others from being victimized.<sup>37</sup>

Congress also intended to ensure that crime victims were not revictimized in the criminal justice process—that is, that they would not suffer what scholars have called "secondary harm" in the process.<sup>38</sup> The concern is that victims suffer when they are excluded from the criminal justice process. Congress sought to end that suffering by making victims meaningful participants in criminal cases.<sup>39</sup>

#### C. AN ILLUSTRATION OF THE PRE-CHARGING ISSUE: THE JEFFREY EPSTEIN CASE

Given the potentially expansive scope of victims' rights under both state provisions and the CVRA, a critical question arises about how to apply them: Do the rights come into existence only after prosecutors formally file

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<sup>34</sup> Compare 18 U.S.C. § 3771(d), with Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331, 344–45 (illustrating the debate surrounding victim standing prior to adoption of the CVRA).

<sup>35</sup> 150 CONG. REC. 7296 (statement of Sen. Dianne Feinstein).

<sup>36</sup> *Id.* at 7298 (statement of Sen. Jon Kyl).

<sup>37</sup> *Id.*

<sup>38</sup> See, e.g., Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 294–96; Richard A. Bierschbach, *Allocation and the Purposes of Victim Participation Under the CVRA*, 19 FED. SENT'G REP. 44, 46 (2006).

<sup>39</sup> 150 CONG. REC. 7298 (statement of Sen. Jon Kyl).

criminal charges? Or do they attach at some earlier point in the process? *Does v. United States*, a federal case in the U.S. District Court for the Southern District of Florida, usefully illustrates the issue.<sup>40</sup> In that case, the U.S. Attorney's Office for the Southern District of Florida developed considerable evidence that Jeffrey Epstein, a billionaire with extensive political and social connections,<sup>41</sup> had sexually molested more than thirty young girls between 2001 and 2007 at his West Palm Beach mansion.<sup>42</sup> The U.S. Attorney's Office entered into contentious plea negotiations with Epstein over how the case should be resolved. The prosecutors initially sought a resolution that would have required Epstein to plead guilty to at least a felony sex offense. After pressure from Epstein, for reasons that have never been clearly explained,<sup>43</sup> the U.S. Attorney's Office agreed to enter into a nonprosecution agreement. Under the agreement, the U.S. Attorney's Office agreed not to prosecute him and, in exchange, Epstein agreed to plead guilty to two state felonies for soliciting prostitution with a minor. After entering those guilty pleas, Epstein was sentenced to only eighteen months in state jail.<sup>44</sup> No federal charges were ever filed and

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<sup>40</sup> *Does v. United States*, 817 F. Supp. 2d 1337 (S.D. Fla. 2011). In the interest of full disclosure, two of the authors of this Article (Cassell and Edwards) are co-counsel for the victims in this case. The statement of the facts in this Article draws heavily on the victims' allegations as they have detailed in their pending motion for summary judgment in the case. See Jane Doe #1 & Jane Doe #2's Motion for Finding of Violations of the Crime Victims' Rights Act and Request for a Hearing on Appropriate Remedies at 3–23, *Does*, 817 F. Supp. 2d 1337 (No. 9:08-cv-80736-KAM) [hereinafter Jane Doe Motion] (providing fifty-three proposed facts in the case). The U.S. Attorney's Office has generally disputed some of these allegations without offering specifics as to what happened. See, e.g., United States' Response to Jane Doe #1 & Jane Doe #2's Motion for Finding of Violations of the Crime Victim Rights Act and Request for a Hearing on Appropriate Remedies at 34–43, *Does*, 817 F. Supp. 2d 1337 (No. 9:08-cv-80736-KAM) [hereinafter United States' Response]. As of this writing, Epstein has declined to intervene in the case to dispute the allegations.

<sup>41</sup> See, e.g., Paul Harris, *Prince Andrew's Link to Sex Offender Jeffrey Epstein Taints Royalty in US*, *GUARDIAN* (Mar. 12, 2011), <http://goo.gl/0I4vAE>; Landon Thomas Jr., *Jeffrey Epstein: International Moneyman of Mystery*, *N.Y. MAG.*, <http://goo.gl/11Cayc> (last visited Nov. 26, 2013).

<sup>42</sup> See Jane Doe Motion, *supra* note 40, at 3–4; Abby Goodnough, *Questions of Preferential Treatment Are Raised in Florida Sex Case*, *N.Y. TIMES*, Sept. 3, 2006, at A19.

<sup>43</sup> The U.S. Attorney responsible for the plea deal later revealed that after negotiations started, “[w]hat followed was a year-long assault on the prosecution and the prosecutors” by Epstein. Letter from R. Alexander Acosta, former U.S. Att’y, to Whom It May Concern (Mar. 20, 2011), reprinted in Conchita Sarnoff, *Behind Pedophile Jeffrey Epstein's Sweetheart Deal*, *DAILY BEAST* (Mar. 25, 2011, 3:17 AM), <http://goo.gl/kyveiF>. Acosta, however, claimed that the pressure did not influence the ultimate disposition of the case. *Id.*

<sup>44</sup> Landon Thomas Jr., *From Paradise to County Jail: A Billionaire Financial Adviser Will Serve 18 Months in Sex Case*, *N.Y. TIMES*, July 1, 2008, at C1.

Epstein spent much of the jail term on “work release” to his luxurious office.<sup>45</sup>

The U.S. Attorney’s Office did not tell Epstein’s victims about the nonprosecution agreement until well after it had taken effect. To the contrary, even after the nonprosecution agreement had been signed, the Office continued to tell the victims that the case was still “under investigation” and that they should be “patien[t].”<sup>46</sup> When the victims learned of the agreement, two of them (Jane Doe Number One and Jane Doe Number Two) filed suit in federal court under the Crime Victims’ Rights Act, arguing that the prosecutors had violated their CVRA right to confer as well as their right to be treated fairly.<sup>47</sup> The victims contended that prosecutors should have conferred with them about the nonprosecution agreement before it became final.

In response, the U.S. Attorney’s Office argued primarily that it was under no obligation to extend the victims any rights under the CVRA. It was the Government’s blunt position that “CVRA rights do not attach in the absence of federal criminal charges filed by a federal prosecutor.”<sup>48</sup> In short, the Government argued it was not required to confer in any way with the victims, or even treat them fairly, because the CVRA was not yet in play. The issue is thus squarely framed: Is the Government correct in its assertion that it has no CVRA obligations in cases like the Epstein case where federal prosecutors never lodged federal charges against a suspect? In view of the CVRA’s prominence, resolution of this issue may shed important light on the nature of crime victims’ enactments and the breadth of the role that crime victims should have in the criminal justice process.

## II. THE CVRA’S APPLICATION BEFORE FORMAL CHARGES ARE FILED

To analyze the issue of whether the CVRA extends rights to crime victims before prosecutors have formally filed charges, it is useful to look at the CVRA’s purposes, language, and judicial interpretations. This Part looks at each of these three issues in turn.

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<sup>45</sup> See Michele Dargan, *Feds Say They Treated Epstein Victims Fairly*, PALM BEACH DAILY NEWS (Apr. 8, 2011, 7:23 PM), <http://goo.gl/rTGDeD>; Conchita Sarnoff, *Billionaire Pedophile Goes Free*, DAILY BEAST (July 20, 2010, 7:05 PM), <http://goo.gl/MSTi17>.

<sup>46</sup> See Jane Doe Motion, *supra* note 40, at 14, 16 (internal quotation marks and citations omitted).

<sup>47</sup> See Emergency Victim’s Petition for Enforcement of Crime Victim’s Rights Act, 18 U.S.C. Section 3771 at 2, *Does v. United States*, 817 F. Supp. 2d 1337 (S.D. Fla. 2011) (No. 9:08-cv-80736-KAM).

<sup>48</sup> United States’ Response, *supra* note 40, at 7.

## A. THE CVRA'S PURPOSES

An analysis of the CVRA's application before prosecutors have filed charges must begin by assessing the CVRA's purposes because any interpretation of the CVRA that is divorced from the statute's purposes would run the risk of defeating the statute's aims. It is axiomatic that courts should "give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question."<sup>49</sup>

As discussed above,<sup>50</sup> one important goal of the CVRA was to keep crime victims informed about any developments in the criminal justice process. But the need to be informed does not begin with the filing of a formal criminal charge. A crime victim needs to know what is happening before formal charging—during a criminal investigation, for example—just as much as she needs to know what is happening in court. Indeed, she may have a greater need to know, as she may be concerned that the criminal who harmed her is still on the loose, posing a danger to her.

Similarly, concerning the second purpose—facilitating victim participation<sup>51</sup>—without a right to pre-charging involvement, victims may be effectively shut out of the process entirely. The Epstein case provides a useful illustration of why the CVRA must be understood to extend rights to victims prior to indictment. The prosecutors handling the investigation reached an agreement with Epstein that barred federal prosecution of sex offenses committed against dozens of victims, including Jane Doe Number One and Jane Doe Number Two. If CVRA rights did not extend to the negotiations surrounding the agreement, then the victims *never* would have had any ability to participate in the resolution of the case.<sup>52</sup>

A construction of the CVRA that extends rights to victims before charges are filed would be entirely consistent with the CVRA's participatory purpose. If victims have the ability to participate in a pre-charging plea bargaining process, for example, victims can help ensure that prosecutors do not overlook anything that should be covered in the plea deal. For example, victims might be able to obtain agreement to a "no contact" order or valuable restitution—points that the prosecutor might fail

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<sup>49</sup> *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1409 (2010) (quoting *United States v. Bornstein*, 423 U.S. 303, 310 (1976)) (internal quotation marks omitted).

<sup>50</sup> See *supra* notes 24–27.

<sup>51</sup> See *supra* notes 28–29.

<sup>52</sup> Even the Justice Department seems to recognize this point. As a matter of policy, the Department extends to victims the right to confer with prosecutors in situations where plea discussions occur before charges have been brought. U.S. DEP'T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 41–42 (2011 ed., rev. May 2012) [hereinafter ATTORNEY GENERAL GUIDELINES].

to consider in crafting a plea. Similarly, allowing victims to participate early in the process avoids retraumatizing victims. Again, as the Epstein case usefully illustrates, it may be extremely difficult for victims to discover after the fact that potential criminal charges against a criminal who has abused them have been secretly bargained away. Jane Doe Number One and Jane Doe Number Two, for example, were outraged when they discovered prosecutors had entered into an agreement blocking any prosecution of sex offenses Epstein committed against them—and all without telling them.<sup>53</sup>

In short, the purposes animating the CVRA all suggest that the Act was meant to, and should, extend rights to crime victims before formal charges are filed.

#### B. THE CVRA'S PLAIN LANGUAGE

While the general purposes of the CVRA support a broad interpretation of the Act, it is important to examine whether those purposes have been expressed in the Act's language. Without a linkage to the Act's text, the general purpose might not provide a sound basis for interpretation.<sup>54</sup> But the CVRA's plain language makes clear that Congress intended for the law to provide at least some rights to crime victims throughout the criminal justice process, even before the filing of criminal charges.

According to its text, the CVRA provides eight specifically enumerated rights for crime victims and an additional right to be reasonably notified of these rights.<sup>55</sup> Some of these rights presuppose the formal filing of criminal charges. For instance, the CVRA extends to victims the “right to reasonable, accurate, and timely notice of any public court proceeding.”<sup>56</sup> That particular right obviously does not apply before charges are filed, as no “court proceedings” exist before a defendant is charged.

But the CVRA also promises crime victims rights that are not specifically tied to court proceedings. Perhaps most expansively, the CVRA guarantees victims the “right to be treated with fairness and with

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<sup>53</sup> Without disclosing confidential attorney–client communications, this fact is readily apparent from victims' filings in the Epstein case. *See, e.g.*, Jane Doe Motion, *supra* note 40, at 17 (stating that the victims relied on the U.S. Attorney's Office representatives “to their detriment[,]” that if they knew the true facts, “they would have taken steps to object” to the plea agreement, and that they believed criminal prosecution to be “extremely important”).

<sup>54</sup> *See* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 56 (2012).

<sup>55</sup> 18 U.S.C. § 3771(a) (2012) (enumerating eight rights); *id.* § 3771(c)(1) (requiring government officers use “their best efforts” to notify victims of their rights).

<sup>56</sup> *Id.* § 3771(a)(2).

respect for the victim's dignity and privacy,"<sup>57</sup> a broad right that does not appear to be directly linked to a filed court case. Similarly, the CVRA promises victims the "reasonable right to confer with the attorney for the Government *in the case*."<sup>58</sup> In this section, the CVRA's drafters appear to have eschewed a reference to court proceedings, using a broader term instead. Of course, a "case" can refer both to a judicial case before a court and an investigative case pursued by a law enforcement officer. It is common usage to say such things as, "The police officer investigated and solved the case." Dictionary definitions of the word "case" support this varied interpretation.<sup>59</sup>

If there remained any doubts about whether the CVRA applies during the investigative part of the criminal justice process, two other provisions in the CVRA resolve them. The CVRA specifically directs that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the *detection, investigation*, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in [the CVRA]."<sup>60</sup> Of course, there would be no reason to direct that agencies involved in the "detection" and "investigation" of crime have CVRA obligations if the Act did not extend to pre-charging situations. Congress thus directly envisioned the victims' rights law to apply during the "detection" and "investigation" phases of criminal cases.

Similarly, the CVRA's venue provision instructs that crime victims who seek to assert rights in pre-charging situations should proceed in the court where the crime was committed: "The rights described in subsection (a) [of the CVRA] shall be asserted in the district court in which a defendant is being prosecuted for the crime or, *if no prosecution is underway*, in the district court in the district in which the crime occurred."<sup>61</sup> Here again, it is hard to see why this provision would be necessary unless the CVRA applies before the formal filing of charges.

For all these reasons, the CVRA's plain language indicates that the victims have protected rights under the Act even before charges are filed.

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<sup>57</sup> *Id.* § 3771(a)(8).

<sup>58</sup> *Id.* § 3771(a)(5) (emphasis added).

<sup>59</sup> *See, e.g.*, BLACK'S LAW DICTIONARY 243–44 (9th ed. 2009) (defining, among the definitions of "case," a "test case" as "[a] criminal investigation" as in "the Manson case"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 345 (1993) (defining "case" as "a circumstance or situation (as a crime) requiring investigation or action by the police or other agency").

<sup>60</sup> 18 U.S.C. § 3771(c)(1) (emphasis added).

<sup>61</sup> *Id.* § 3771(d)(3) (emphasis added).

C. COURTS RECOGNIZE THAT CRIME VICTIMS HAVE CVRA RIGHTS BEFORE CHARGING

Because crime victims lack a right to appointed counsel, many victims have difficulty litigating the scope of their rights.<sup>62</sup> But in a few cases, victims have been able to secure counsel to argue that they have rights in the criminal justice process during the investigation of federal crimes. When those cases have reached the issue of whether the CVRA applies before charges have been filed, courts have uniformly agreed with the victims' position.

Perhaps the leading case to date to assess this question is the Fifth Circuit's decision in *In re Dean*.<sup>63</sup> There, a wealthy corporate criminal defendant reached a generous plea deal with the Government—a deal that the Government filed for approval with the district court without conferring with the victims. Citing procedural rights under the CVRA, the victims requested that the trial court reject the plea agreement.<sup>64</sup> The District Court for the Southern District of Texas specifically concluded that victims' CVRA rights could apply during the investigation of the crime: "There are clearly rights under the CVRA that apply before any prosecution is underway."<sup>65</sup> The district court concluded, however, that the Government had not violated the CVRA because it had secured judicial permission to dispense with notification to victims.<sup>66</sup>

The victims sought appellate review in the Fifth Circuit.<sup>67</sup> There, the court concurred with the district court that CVRA rights apply before trial. Unlike the district court, however, it held that the Government had violated the victims' rights:

The district court acknowledged that "[t]here are clearly rights under the CVRA that apply before any prosecution is underway." Logically, this includes the CVRA's establishment of victims' "reasonable right to confer with the attorney for the Government." At least in the posture of this case (and we do not speculate on the

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<sup>62</sup> John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 693 (2002).

<sup>63</sup> 527 F.3d 391 (5th Cir. 2008). Other aspects of the case are discussed in Paul G. Cassell & Steven Joffe, *The Crime Victims' Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U. L. REV. COLLOQUY 164, 172–76 (2011).

<sup>64</sup> *In re Dean*, 527 F.3d at 392.

<sup>65</sup> *United States v. BP Prods. N. Am. Inc.*, No. H-07-434, 2008 WL 501321, at \*11 (S.D. Tex. Feb. 21, 2008).

<sup>66</sup> *Id.* at \*1, \*19.

<sup>67</sup> For discussion of the difficulties crime victims face to obtain appellate review of their claims, see generally Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U. L. REV. 599 (2010).



applicability to other situations), the government should have fashioned a reasonable way to inform the victims of the likelihood of criminal charges and to ascertain the victims' views on the possible details of a plea bargain.<sup>68</sup>

The Fifth Circuit then remanded the matter to the district court to determine the appropriate remedy for the violation of the victims' rights.<sup>69</sup>

The Fifth Circuit's decision in *Dean* has been cited favorably in four recent district court decisions, which provides further support for the conclusion that the CVRA applies before charges have been filed. In *United States v. Rubin*,<sup>70</sup> victims of a federal securities fraud argued that they had CVRA rights even before prosecutors filed a superseding indictment covering the specific crimes affecting the victims. Citing *Dean*, the District Court for the Eastern District of New York agreed that the rights were expansive and could apply before charges were filed but were subject to the outer limit that the Government has at least "contemplated" charges.<sup>71</sup>

Similarly, in *United States v. Oakum*,<sup>72</sup> the District Court for the Eastern District of Virginia considered a claim that CVRA rights did not apply until after a defendant had been convicted. In rejecting that argument, the court agreed with the *Dean* court that victims acquire rights even before a prosecution begins.<sup>73</sup>

The District Court for the Northern District of Indiana held to the same effect in *In re Petersen*.<sup>74</sup> There, the court held that a victim's right to be treated with fairness and with respect for [his or her] dignity and privacy "may apply before any prosecution is underway and isn't necessarily tied to a 'court proceeding' or 'case.'" <sup>75</sup> The court, however, found that the "conclusory allegations" in the victims' petition did not "create a plausible claim for relief under the CVRA."<sup>76</sup>

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<sup>68</sup> *In re Dean*, 527 F.3d at 394 (internal citations omitted).

<sup>69</sup> *Id.* at 396. On remand, the district court held additional hearings in which the victims participated, satisfying their CVRA rights. See *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655, 660 (S.D. Tex. 2009).

<sup>70</sup> 558 F. Supp. 2d 411 (E.D.N.Y. 2008).

<sup>71</sup> *Id.* at 419 (internal citation omitted). *Rubin's* suggestion about limitations that apply to pre-indictment assertions of rights is discussed at notes 184–187 and 193 *infra* and accompanying text.

<sup>72</sup> No. 3:08cr132, 2009 WL 790042 (E.D. Va. Mar. 24, 2009).

<sup>73</sup> *Id.* at \*2.

<sup>74</sup> No. 2:10-CV-298 RM, 2010 WL 5108692 (N.D. Ind. Dec. 8, 2010).

<sup>75</sup> *Id.* at \*2 (citing *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008); *United States v. BP Prods. N. Am. Inc.*, H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008)).

<sup>76</sup> *Id.* *Petersen* also held that one specific CVRA right—the right to confer—only applies after charges have been filed. *Id.* But the authorities *Petersen* cites for that proposition prove no such thing. Confusingly, *Petersen* cited the Fifth Circuit's ruling in

Perhaps the most extensive discussion of this issue has come from the Epstein case discussed earlier.<sup>77</sup> Overruling the Government's argument that the CVRA only applies after the formal filing of charges, *Does v. United States* held that "the statutory language clearly contemplates pre-charge proceedings."<sup>78</sup> The court in *Does* explained that "[c]ourt proceedings involving the crime are not limited to post-complaint or post-indictment proceedings, but can also include initial appearances and bond hearings, both of which can take place before a formal charge."<sup>79</sup> The court also noted that the CVRA's "requirement that officials engaged in 'detection [or] investigation' [of crimes] afford victims the rights enumerated in subsection (a) surely contemplates pre-charge application of the CVRA."<sup>80</sup> Finally, the court in *Does* noted that "[i]f the CVRA's rights may be enforced before a prosecution is underway, then, to avoid a strained reading of the statute, those rights must attach before a complaint or indictment formally charges the defendant with the crime."<sup>81</sup>

In sum, the relevant case law unanimously agrees that the CVRA extends rights to crime victims before charges have been filed.

### III. THE JUSTICE DEPARTMENT'S UNPERSUASIVE POSITION

Despite the CVRA's broad remedial purposes, its expansive language referring to investigations, and the unanimous case law extending rights to victims prior to defendants being charged, the OLC released a memorandum in 2011 concluding that CVRA rights attach only "from the time that criminal proceedings are initiated (by complaint, information, or indictment)."<sup>82</sup> OLC's analysis is unpersuasive. Although OLC's opinion

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*Dean* for support; but (as just explained above) *Dean* held exactly the opposite. Similarly, *Petersen* cites other cases involving the right to confer after charges have been filed. *Id.* But none of these cases actually presented the issue of the CVRA's application to pre-indictment situations, since charges had already been filed in each of these cases. *See, e.g., In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008).

<sup>77</sup> *Does v. United States*, 817 F. Supp. 2d 1337 (S.D. Fla. 2011).

<sup>78</sup> *Id.* at 1341.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1342.

<sup>81</sup> *Id.* Recently, the district court in the *Does* case also rejected Government efforts to dismiss the action. The district court found that, if the victims could prove the factual allegations they have made, then they would be entitled to relief, including potentially the relief of invalidating the nonprosecution agreement that Epstein obtained from the Government. *Does v. United States*, No. 9:08-cv-80736-KAM, 2013 WL 3089046, at \*3 (S.D. Fla. June 19, 2013).

<sup>82</sup> OLC CVRA Rights Memo, *supra* note 2, at 1. Although the opinion is dated December 17, 2010, it was publicly released on May 20, 2011. *See* Letter from Jon Kyl, *supra* note 3.

invokes the CVRA's definition of crime "victim," its legislative intent, and its structure, a closer reading of each demonstrates little support for the notion that crime victims must await the formal filing of charges before accruing CVRA rights.

A. OLC'S MISREADING OF THE CVRA'S DEFINITION OF "VICTIM"

OLC's lead argument is that the CVRA's definition of "victim" presupposes that criminal charges have been formally filed.<sup>83</sup> The CVRA defines a "victim" who is protected as "a person directly and proximately harmed as a result of the commission of a Federal *offense*."<sup>84</sup> Focusing on the word "offense," OLC concedes that it does not "conclusively resolve" the question of when rights attach. Nevertheless, OLC claims that the word "naturally suggests that a person's status as a 'crime victim' can only be determined after there has been a formal decision to charge a defendant with a particular Federal offense."<sup>85</sup> OLC goes on to elaborate:

Under this reading, the earliest that a "crime victim" under the Act could be identified would be upon the filing of a criminal complaint—that is, at the earliest point at which there is a sworn written statement of probable cause to believe that a particular defendant committed an identified Federal offense and hence the first point at which it is possible with any certainty to identify a "crime victim" directly and proximately harmed by the commission of that offense.<sup>86</sup>

OLC is disingenuous in asserting that the "first point" at which a person has been harmed by a federal crime arises only after a criminal complaint has been filed. The Department routinely makes such determinations at earlier points in criminal cases, such as when it sends a "target letter" to a defense attorney during a grand jury investigation.<sup>87</sup> Indeed, OLC remarkably ignores the fact that the Department is directly *required* to identify victims of a crime before the filing of a criminal complaint, both by statute and through internal policy directives.

The Victims' Rights and Restitution Act of 1990 (VRRRA)<sup>88</sup> requires the Department to identify victims before the filing of a criminal complaint.

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<sup>83</sup> OLC CVRA Rights Memo, *supra* note 2, at 6.

<sup>84</sup> 18 U.S.C. § 3771(e) (2012) (emphasis added).

<sup>85</sup> OLC CVRA Rights Memo, *supra* note 2, at 5.

<sup>86</sup> *Id.*

<sup>87</sup> A target letter explains the procedural process underlying an indictment and places the defendant on notice of the general nature of the government's criminal investigation. See U.S. DEP'T OF JUSTICE, TITLE 9: U.S. ATTORNEYS' CRIMINAL RESOURCE MANUAL § 160, [hereinafter CRIMINAL RESOURCE MANUAL] available at <http://goo.gl/YHLDke> (providing an example target letter); *infra* Part III.A (developing this point further).

<sup>88</sup> Pub. L. No. 101-647, 104 Stat. 4820 (codified as amended at 42 U.S.C. §§ 10601, 10606–07 (2006)).

Passed in 1990, the VRRRA provided crime victims with a set of procedural rights similar to those found in the CVRA, along with rights to notification about victim services.<sup>89</sup> In 2004, the CVRA repealed and replaced the section of the VRRRA listing procedural rights, while leaving other parts of the VRRRA intact.<sup>90</sup> Under the remaining parts of the VRRRA, the Justice Department must inform victims of federal crimes of services that are available to them, including “emergency medical and social services,” counseling, and support.<sup>91</sup> The Department is further obligated to keep victims fully informed about “the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation.”<sup>92</sup> These rights to notice about “emergency medical and social services”<sup>93</sup> as well as to the “status of the investigation of the crime”<sup>94</sup> obviously require the Department to identify victims of federal crimes before formal charges have been filed. Indeed, the VRRRA makes this point clear by directing the Department to not only notify the victim about the status of the investigation but also about the later “filing of charges against a suspected offender.”<sup>95</sup> The VRRRA then extends victims’ rights to information through the rest of the criminal justice process by requiring the Department to provide notice to victims of such things as the imposed sentence and the defendant’s release.<sup>96</sup>

The VRRRA not only requires the Department to identify victims during the investigation of a crime, it also defines those victims in a very similar fashion to the CVRA. The VRRRA defines “victim” as a “person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime.”<sup>97</sup> Thus, the Department is already routinely identifying persons who have been “harmed” by federal crimes shortly after the commission of those crimes and well before formal charging.

The Attorney General has also promulgated internal guidelines requiring Justice Department components to identify victims rapidly after a crime. The *Attorney General Guidelines for Victim and Witness Assistance* provide that “Department responsibilities to crime victims begin as soon as possible after the detection of a crime at which they may be undertaken

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<sup>89</sup> See *supra* notes 22–23 and accompanying text.

<sup>90</sup> Justice for All Act of 2004, Pub. L. No. 108-405, § 102(a), 118 Stat. 2260, 2261 (2004) (codified at 18 U.S.C. § 3771(a) (2012)).

<sup>91</sup> See 42 U.S.C. § 10607(c).

<sup>92</sup> *Id.* § 10607(c)(3)(A).

<sup>93</sup> *Id.* § 10607(c)(1)(A).

<sup>94</sup> *Id.* § 10607(c)(3)(A).

<sup>95</sup> *Id.* § 10607(c)(3)(C).

<sup>96</sup> *Id.* § 10607(c)(3)(G).

<sup>97</sup> *Id.* § 10607(e)(2).

without interfering in the investigation. Generally, this point in time is defined by the opening of a criminal investigation.”<sup>98</sup>

Given the way the two statutes work, it would make no sense to artificially confine the CVRA’s reach until after the filing of a criminal complaint. Before then, victims will have often received information from the Department about the status of the investigation. They might wish to confer with prosecutors about how the case is proceeding, and the CVRA extends to them a right to confer.<sup>99</sup> Similarly, while the Department is notifying victims about the services they may receive and the status of an investigation, it is important that the victims be treated fairly. The CVRA extends the right to be treated fairly.<sup>100</sup> Indeed, it would be absurd to think that Congress wanted to permit the Justice Department to treat crime victims unfairly until criminal charges have been filed.

Instead of recognizing Congress’s intent, OLC’s 2011 memorandum simply cites to a series of cases in which courts concluded that a victim of uncharged conduct should not be afforded statutory protections.<sup>101</sup> Yet none of these cases—*United States v. Turner*,<sup>102</sup> *Searcy v. Paletz*,<sup>103</sup> or *Searcy v. Skinner*<sup>104</sup>—provide strong support for OLC’s position. *Turner* is a particularly poor fit. Although OLC’s memorandum characterizes *Turner* as excluding victims of uncharged conduct,<sup>105</sup> the magistrate judge adopted an inclusive reading of the statute precisely because of his reservations about the CVRA’s legislative history and plain language. The judge suggested that “any person who self-identifies as [a victim]” could be presumed to qualify for protection under the CVRA as a preliminary matter.<sup>106</sup> In fact, the line quoted by the Department is lifted out of context. The full sentence reads: “While the offense charged against a defendant can

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<sup>98</sup> ATTORNEY GENERAL GUIDELINES, *supra* note 52, at 7 (internal citations omitted); *see also* 42 U.S.C. § 10607(b).

<sup>99</sup> 18 U.S.C. § 3771(a)(5) (2012) (preserving “[t]he reasonable right to confer with the attorney for the Government in the case”).

<sup>100</sup> *Id.* § 3771(a)(8) (preserving “[t]he right to be treated with fairness and with respect for the victim’s dignity and privacy”).

<sup>101</sup> OLC CVRA Rights Memo, *supra* note 2, at 6 n.6.

<sup>102</sup> 367 F. Supp. 2d 319 (E.D.N.Y. 2005).

<sup>103</sup> No. 6:07-1389-GRA-WMC, 2007 WL 1875802 (D.S.C. June 27, 2007).

<sup>104</sup> No. 6:06-1418-GRA-WMC, 2006 WL 1677177 (D.S.C. June 16, 2006).

<sup>105</sup> OLC CVRA Rights Memo, *supra* note 2, at 6 n.6.

<sup>106</sup> *Turner*, 367 F. Supp. 2d at 327 (“Instead, I have taken and will continue to follow an inclusive approach: absent an affirmative reason to think otherwise, I will presume that any person whom the government asserts was harmed by conduct attributed to a defendant, as well as any person who self-identifies as such, enjoys all of the procedural and substantive rights set forth in § 3771.”).

serve as a basis for identifying a 'crime victim' as defined in the CVRA, the class of victims with statutory rights may well be broader."<sup>107</sup>

*Paletz* and *Skinner* similarly provide scant support for the Department's position. In *Skinner*, a prison inmate attempted to bring a pro se *civil* suit against another inmate for allegedly attacking him during incarceration.<sup>108</sup> In dismissing the suit in an unpublished decision, the district court recognized that the Government had expressly declined to bring charges against the other inmate and concluded that the CVRA did not create a "mechanism to bring an action against Defendant directly."<sup>109</sup> In *Paletz*, that same inmate brought a similar pro se claim against another inmate, the Federal Bureau of Prisons, the FBI, and the U.S. Attorney General.<sup>110</sup> In a parallel, unpublished decision, the district court dismissed the suit, noting that the CVRA is designed to give victims certain rights "within the prosecutorial process against a criminal defendant."<sup>111</sup>

Because *Skinner* and *Paletz* involve (apparently frivolous) *civil* suits, they say nothing about the CVRA's reach in criminal cases, and any language to that effect would be pure dicta. Moreover, the courts' terse analysis in both cases does not contain any substantive discussion of whether CVRA rights apply in criminal cases before the filing of charges. Instead, the courts simply cited to language from a Second Circuit decision that stated that the CVRA does not give victims any rights against defendants until those defendants have been convicted<sup>112</sup>—a holding clearly limited to restitution, as many other CVRA rights clearly apply before conviction.<sup>113</sup> Reviewing these two cases in an extended, published opinion, the U.S. District Court for the Southern District of Texas noted that reading these two decisions as standing for the proposition that charges must be filed for CVRA rights to attach "appears inconsistent with the CVRA recognition of certain subsection (a) rights that apply during investigation, before any charging instrument is filed."<sup>114</sup> As a result, OLC

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<sup>107</sup> *Id.* at 326.

<sup>108</sup> *Skinner*, 2006 WL 1677177, at \*1–2.

<sup>109</sup> *Id.* at \*2.

<sup>110</sup> *Searcy v. Paletz*, No. 6:07-1389-GRA-WMC, 2007 WL 1875802, at \*1–2 (D.S.C. June 27, 2007).

<sup>111</sup> *Id.* at \*2.

<sup>112</sup> *Id.* ("However, 'the CVRA does not grant victims any rights against individuals who have not been convicted of a crime.'" (quoting *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 564 (2d Cir. 2005))).

<sup>113</sup> Of course, a defendant cannot be ordered to pay restitution as part of his sentence until he has been found guilty. See 18 U.S.C. § 3664 (2012) (describing sentencing procedures for ordering restitution).

<sup>114</sup> *United States v. BP Prods. N. Am. Inc.*, No. H-07-434, 2008 WL 501321, at \*12 n.7 (S.D. Tex. Feb. 21, 2008).

vastly overstates its position when it asserts that “most courts . . . have declined to extend enforceable rights under the CVRA to alleged victims of conduct that did not lead to criminal proceedings.”<sup>115</sup> All the courts that have actually reached the issue have concluded exactly the opposite.<sup>116</sup>

#### B. OLC’S DISTORTION OF THE CVRA’S STRUCTURE AND LEGISLATIVE HISTORY

The next section of OLC’s memorandum maintains that the CVRA’s structure and legislative history lead to the conclusion that the CVRA is “best understood” as extending rights after charges have been filed. Here again, OLC’s analysis is truncated at best and misleading at worst.

OLC begins this part of its analysis by observing that some of the rights in the CVRA are limited to court proceedings. OLC notes, for example, that the CVRA gives victims the “right to reasonable, accurate, and timely notice of any public *court proceeding* . . . involving the crime.”<sup>117</sup> But the fact that some of the rights listed in the CVRA apply to court proceedings hardly means that all of the rights are to be so restricted. The federal criminal justice process includes stages that are pre-charging, post-charging, and post-conviction. It would hardly be surprising to find that a statute that Congress intended to be “broad and encompassing”<sup>118</sup> covered events occurring after the filing of charges.

Indeed, OLC appears to recognize that at least three of the rights listed in the CVRA could easily apply before charges are filed: (1) the “right to be reasonably protected from the accused”; (2) the “reasonable right to confer with the attorney for the Government in the case”; and (3) the “right to be treated with fairness and with respect for the victim’s dignity and privacy.”<sup>119</sup> None of these rights explicitly refer to court “proceedings” or other events (such as parole hearings) that necessarily occur after the filing of formal charges.<sup>120</sup>

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<sup>115</sup> OLC CVRA Rights Memo, *supra* note 2, at 5–6. Notably, the Department does not embrace the language from *Huff* found within the *Skinner* and *Paletz* decisions because presumably such an approach would be contrary to many of the rights found in the CVRA.

<sup>116</sup> *See infra* Part I.C.

<sup>117</sup> OLC CVRA Rights Memo, *supra* note 2, at 6 (emphasis added) (quoting 18 U.S.C. § 3771(a)(2)).

<sup>118</sup> 150 CONG. REC. 7295 (2004) (statement of Sen. Dianne Feinstein).

<sup>119</sup> OLC CVRA Rights Memo, *supra* note 2, at 7–8, 10 (quoting 18 U.S.C. § 3771(a)(1), (5), (8)).

<sup>120</sup> OLC appears to have overlooked another right that could well apply before charges are filed: the right to be notified of one’s rights under the CVRA. *See* 18 U.S.C. § 3771(c)(1) (requiring prosecutors to “make their best efforts to see that crime victims are notified of, and accorded, the rights described in [the CVRA]”); *United States v. Rubin*, 558 F. Supp. 2d 411, 428 (E.D.N.Y. 2008) (discussing potential application of the right to

For purposes of this Article, it is appropriate to focus on the last two of these three rights: the right to confer and the right to fair treatment. The first of these three rights—the right to be reasonably protected—is already clearly extended by another statute to crime victims before the filing of charges. While OLC does not acknowledge this fact, the VRRRA extends the first right to crime victims, directing that a “responsible official shall arrange for a victim to receive reasonable protection from a *suspected* offender and persons acting in concert with or at the behest of the *suspected* offender.”<sup>121</sup> Because a “suspected” offender obviously exists before the filing of criminal charges, the VRRRA envisions the right to protection being provided as soon as is practical after a victim suffers from the commission of a crime. Additionally, the sections of the *Attorney General Guidelines for Victim and Witness Assistance* addressing the VRRRA direct that Justice Department components must provide reasonable protection even before the filing of criminal charges.<sup>122</sup> So, under the VRRRA, the Justice Department should already be providing reasonable protection for a victim before an offender is indicted, regardless of how the CVRA is interpreted.<sup>123</sup>

The VRRRA, however, does not contain a right to confer and a right to fair treatment and respect for the victim’s dignity. Therefore, if victims are going to receive these statutory rights before trial, these rights must be found in the CVRA. With regard to the CVRA provision that victims have the “reasonable right to confer with the attorney for the Government in the case,”<sup>124</sup> OLC contends that “[t]he phrase ‘in the case’ implies the pendency of a judicial proceeding.”<sup>125</sup> To bolster its conclusion, OLC then cites *Black’s Law Dictionary*, which includes among its several definitions of the word “case” the definition “a civil or criminal proceeding.”<sup>126</sup> But OLC does not acknowledge that *Black’s Law Dictionary* also defines and exemplifies a “case” more broadly as a “criminal investigation <the

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notification of rights before charges are filed). For purposes of this Article, it is not necessary to explore this right in detail. If other CVRA rights apply before charges are filed, *a fortiori* this right does as well. If a victim has a right, presumably the victim should be notified of the existence of that right.

<sup>121</sup> 42 U.S.C. § 10607(c)(2) (2006) (emphasis added).

<sup>122</sup> See ATTORNEY GENERAL GUIDELINES, *supra* note 52, at 7–8, 26–28.

<sup>123</sup> Exactly what “reasonable protection” means, however, remains uncertain. See generally Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims’ Rights Act, and the Victim’s Right to Be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47 (2010) (suggesting the right has not been adequately defined and proposing ways to do so).

<sup>124</sup> 18 U.S.C. § 3771(a)(5).

<sup>125</sup> OLC CVRA Rights Memo, *supra* note 2, at 8.

<sup>126</sup> *Id.* (citing BLACK’S LAW DICTIONARY, *supra* note 59, at 243).



Manson case>.”<sup>127</sup> Thus, *Black’s Law Dictionary* does not help resolve the dispute as to which of the two meanings should be used, as there are clearly differing meanings. While OLC’s reading may be a permissible one, so is a pro-victim reading.

OLC also turns to the CVRA’s legislative history to bolster its conclusion. But, here again, its analysis is misleading. OLC relies on a passage from Senate floor colloquy between Senators Jon Kyl and Dianne Feinstein regarding the CVRA’s scope. In OLC’s recounting of the legislative history, the floor statements “emphasize that the right to confer relates to the conduct of criminal proceedings after the filing of charges.”<sup>128</sup> For instance, OLC quotes Senator Kyl stating that “[u]nder this provision, victims are able to confer with the Government’s attorney about proceedings *after charging*.”<sup>129</sup>

This is a truncated and deceptive description of the legislative history, so much so that Senator Kyl sent an angry letter to Attorney General Eric Holder complaining about the distortion. On June 6, 2011, the Senator wrote to “express [his] surprise that [OLC is] so clearly quoting [his] remarks out of context.”<sup>130</sup> Senator Kyl then went on to observe that the colloquy began by noting that the right to confer “*is intended to be expansive*.”<sup>131</sup> The Senator further discussed various “examples” of when the right to confer applied, including “any critical stage or disposition of the case. *The right, however, is not limited to these examples*.”<sup>132</sup> It was against that backdrop that Senator Kyl gave the example of conferring about proceedings “after charging.”

In his letter to Attorney General Holder, Senator Kyl also noted that he had:

made clear that crime victims had rights under the CVRA even before an indictment is filed. For example, . . . I made clear that crime victims had a right to consult about both ‘the case’ and ‘case proceedings’—i.e., both about how the case was being handled before being filed in court and then later how the case was being handled in court ‘proceedings.’<sup>133</sup>

Senator Kyl further commented that he had discussed the CVRA’s potential application in grand jury proceedings, an application that required the Act

<sup>127</sup> BLACK’S LAW DICTIONARY, *supra* note 59, at 244.

<sup>128</sup> OLC CVRA Rights Memo, *supra* note 2, at 9.

<sup>129</sup> *Id.* (emphasis added) (quoting 150 CONG. REC. 7302 (2004) (statement of Sen. Jon Kyl) (internal quotation marks and citation omitted).

<sup>130</sup> Letter from Jon Kyl, *supra* note 3.

<sup>131</sup> *Id.* (quoting 150 CONG. REC. S4260, S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein)).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

to extend rights before indictment.<sup>134</sup> Thus, if anything, the legislative history does not support OLC's conclusion—it contradicts it.<sup>135</sup>

OLC should have had no doubt as to the intent of Senator Kyl and his cosponsors at the time of the Act's passage. Shortly after shepherding the CVRA through the Congress, Senator Kyl cowrote a law review article about the Act.<sup>136</sup> In that article, he directly indicated that the CVRA applies before charges are filed. Senator Kyl and his coauthors wrote:

While most of the rights guaranteed by the CVRA apply in the context of legal proceedings following arrest and charging, other important rights are triggered by the harm inflicted by the crime itself. For example, the right to be treated with fairness, the right to be reasonably protected from the accused (who may qualify as the accused before his arrest), and the right to be treated with respect for the victim's dignity and privacy each may arise without regard to the existence of legal proceedings.<sup>137</sup>

Remarkably, OLC cited Senator Kyl's law review article (in a footnote), but then concluded without explanation that the CVRA cosponsor's views were for some reason different than Congress's.<sup>138</sup>

OLC also appears to acknowledge that its interpretation of the CVRA could well contradict what it describes as prosecutorial "good practice."<sup>139</sup> OLC noted that some Justice Department components (for example, the Environmental and Natural Resources Division) had advocated that the right to confer should apply during pre-charging plea discussions.<sup>140</sup> OLC then acknowledged that limiting the right to confer until after formal charging could "reduce the impact of a victim's participation in subsequent court proceedings."<sup>141</sup> OLC attempted to dodge this problem by explaining: "The question before us, though, is not whether it would be advisable as a matter of good practice . . . for Government attorneys to confer with victims pre-charge when appropriate . . ."<sup>142</sup> OLC then explained that even under its narrow interpretation of the statute, "the CVRA would still ensure that

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<sup>134</sup> *Id.*

<sup>135</sup> Attorney General Holder never sent a response to Senator Kyl's letter. But Assistant Attorney General Ronald Weich sent a belated response. Letter from Ronald Weich, Assistant Att'y Gen., to Jon Kyl, U.S. Sen. (Nov. 3, 2011) (on file with authors). That response did not address Senator Kyl's concern that his remarks were being quoted out of context.

<sup>136</sup> See generally Kyl et al., *supra* note 19.

<sup>137</sup> *Id.* at 594.

<sup>138</sup> OLC CVRA Rights Memo, *supra* note 2, at 8 n.7.

<sup>139</sup> *Id.* at 10.

<sup>140</sup> *Id.* at 9 (citations omitted) (discussing an interdepartmental memorandum addressing this question).

<sup>141</sup> *Id.* at 10.

<sup>142</sup> *Id.*

the victim has an opportunity to be heard by the court, and by the Government, before the court accepts the plea.”<sup>143</sup>

But OLC failed to recognize that its interpretation of the CVRA rendered the right to be heard a nullity in many important cases—including, notably, the Epstein case.<sup>144</sup> Where prosecutors and defense attorneys work out a nonprosecution agreement that agreement will never be presented to a court for review. Thus, in cases where the need for victim participation may be the greatest—that is, in cases where the Government is considering never filing any charges—OLC’s interpretation would bar victims from having any rights at all.

Even in situations where a prosecutor works out a plea agreement, OLC’s interpretation is problematic. As OLC recognizes, prosecutors and defense counsel commonly work out pre-indictment plea agreements (particularly in white-collar cases), under which a defendant will plead guilty to certain charges.<sup>145</sup> Then, the parties jointly present to the district court a criminal “information” (that is, a recitation of the charges drafted by the prosecutor but never presented to the grand jury<sup>146</sup>) and a plea agreement, asking the court to file the criminal information and simultaneously accept the guilty plea. As the OLC memorandum acknowledges, a crime victim would have the right to object to the plea agreement, because the CVRA gives crime victims the “right to be reasonably heard” at any public proceedings involving a plea.<sup>147</sup> But under OLC’s interpretation of the CVRA, a crime victim has no right to notice of court hearings until the charges are filed. Thus, if the information and plea are filed simultaneously, as is often the case, two scenarios are possible. A victim could have no prior right to notice of the proceeding at which the plea was being accepted, or alternatively (if the act of filing the information in the course of accepting a plea triggers a notification right), the district court would be required to stop in the middle of proceedings and ensure that notification was belatedly provided. Of course, these difficulties are all avoided if the right to confer is properly construed as attaching before charges are filed, such as during plea negotiations between prosecutors and defense attorneys.

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<sup>143</sup> *Id.*

<sup>144</sup> The OLC opinion was publicly released on May 20, 2011. Perhaps not coincidentally, this release date was shortly before the Government filed its response in the Epstein case.

<sup>145</sup> See OLC CVRA Rights Memo, *supra* note 2, at 9 (acknowledging the potential effect of the CVRA on plea negotiations).

<sup>146</sup> See FED. R. CRIM. P. 7(b).

<sup>147</sup> 18 U.S.C. § 3771(a)(4) (2012); OLC CVRA Rights Memo, *supra* note 2, at 6–7.

More importantly, extending the right in this fashion will not be unduly burdensome for federal prosecutors. After the OLC memorandum was made public, the Department amended the *Attorney General Guidelines for Victim and Witness Assistance* to require prosecutors to make reasonable efforts toward a goal of providing victims with a meaningful opportunity to offer their views before plea agreements are formally reached.<sup>148</sup> “In circumstances where plea negotiations occur before a case has been brought, Department policy is that this should include reasonable consultation prior to the filing of a charging instrument with the court.”<sup>149</sup> Thus, Department policy already extends pre-charging rights to victims. The CVRA should be understood as having the same scope.

OLC also notes that the CVRA right “to be treated with fairness and with respect for the victim’s dignity and privacy” is a right that could apply before charges are filed.<sup>150</sup> Indeed, OLC is forced to concede (as district courts have recognized) that the “right to be treated with fairness and with respect for the victim’s dignity and privacy may apply with great force during an investigation, before any charging instrument has been filed.”<sup>151</sup>

OLC nonetheless maintains that the right to fairness only applies after charges have been filed. OLC relies on the canon of statutory construction *noscitur a sociis*, meaning that words are known by their companions,<sup>152</sup> for its interpretation of the CVRA. OLC argues that because the other seven enumerated rights are limited to post-charging situations, the eighth right should be as well. Of course, this argument assumes that OLC’s construction of the other seven rights is correct—a point very much in dispute.<sup>153</sup> If, for example, the right to confer applies before charges are filed, then presumably *noscitur a sociis* would cut the other way—the right to fairness should likewise be construed as applying before charges are filed.

Moreover, OLC omits from its discussion of the fairness provision any assessment of the CVRA’s purposes. In construing a statute, a court must consider the “purpose and context” of the statute.<sup>154</sup> In describing the fairness provision, Senator Kyl emphasized that it conferred a “broad”

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<sup>148</sup> ATTORNEY GENERAL GUIDELINES, *supra* note 52, at 41–42.

<sup>149</sup> *Id.* at 41.

<sup>150</sup> OLC CVRA Rights Memo, *supra* note 2, at 10 (quoting 18 U.S.C. § 3771(a)(8)).

<sup>151</sup> *Id.* (quoting *United States v. BP Products North America Inc.*, No. H-07-434, 2008 WL 501321, at \*11 (S.D. Tex. Feb. 21, 2008) (internal quotation marks omitted)).

<sup>152</sup> *Id.* at 11.

<sup>153</sup> *See supra* Part III.A.

<sup>154</sup> *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331 (2011).

right.<sup>155</sup> The reason for adopting such a broad right was that “[t]oo often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct Government agencies and employees, whether they are in the executive or judiciary branch, to treat victims of crime with the respect they deserve.”<sup>156</sup> OLC’s failure to consider the purposes underlying the CVRA is a glaring oversight.

OLC never attempts to explain why the CVRA’s drafters would want victims to have a right to fair treatment once criminal charges were filed but possess no such right before the filing of criminal charges. Clearly, many victims can and do suffer secondary victimization during criminal investigations, such as when sexual assault victims are treated inappropriately by law enforcement agents.<sup>157</sup> It would contradict the purpose of preventing victim mistreatment in the criminal justice system to artificially limit the right to fairness to the point at which charges are filed. The right to fairness logically applies at all stages of the criminal justice process.

#### C. OLC’S INEFFECTIVE RESPONSE TO THE CVRA’S COVERAGE AND VENUE PROVISIONS

At the end of its memorandum, OLC finally discusses what it identifies as the two strongest arguments for construing the CVRA as applying before charging: the coverage provision and the venue provision. OLC acknowledges, as it must, that the CVRA’s coverage extends to any federal employee engaged in “the *detection, investigation* or prosecution of crime.”<sup>158</sup> Such employees “shall make their best efforts to see that crime victims are notified of, and accorded, the rights” afforded by the statute.<sup>159</sup> Notably, this duty applies to individuals not just in the Justice Department (where all federal prosecutors are located) but other agencies as well, such

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<sup>155</sup> 150 CONG. REC. 7303 (2004) (statement of Sen. Jon Kyl).

<sup>156</sup> *Id.*

<sup>157</sup> See SUSAN ESTRICH, REAL RAPE 50–51 (1987) (describing how a rape victim’s sexual history may be used against her in court proceedings); Beloof, *supra* note 38, at 309–10 (collecting examples of victims’ issues that arise during the investigative process); see also PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT, *supra* note 10, at 57–62 (making recommendations for how police should treat victims during the criminal justice process).

<sup>158</sup> OLC CVRA Rights Memo, *supra* note 2, at 15 (quoting 18 U.S.C. § 3771(c)(1) (2012)) (internal quotation marks omitted).

<sup>159</sup> 18 U.S.C. § 3771(c)(1).

as environmental crimes investigators in the Environmental Protection Agency (EPA).<sup>160</sup>

This coverage provision would seem to answer any lingering question about whether the CVRA applies before charging. In directing that federal employees engaged in the “detection” and “investigation” of crime must respect victims’ rights, Congress wanted broad rights extending beyond just the prosecution of a case. As the district court concluded in the Epstein case, this provision “surely contemplates pre-charge application of the CVRA.”<sup>161</sup>

OLC gamely maintains, however, that Congress was simply trying to provide that federal law enforcement agents should provide rights to victims when a criminal case moves to its prosecution phase. OLC noted the uncontroversial point that law enforcement agents “often develop a relationship of trust with crime victims during the investigation that continues as they assist crime victims in negotiating active criminal proceedings.”<sup>162</sup> OLC then asserted:

Given this continuing active role that agents typically play during criminal prosecutions, we find the fact that the CVRA assigns responsibility to them, together with the attorney for the Government, to . . . accord them their rights under the CVRA to be entirely consistent with our conclusion that those rights arise only once the Government has initiated criminal proceedings.<sup>163</sup>

But OLC’s contorted position never explains why Congress found it necessary to break out three separate phases of the criminal justice process: the “detection,” “investigation,” and “prosecution” of crime. If the congressional intent was simply to cover, for example, FBI agents or EPA agents during the post-charging phase of a case, it could have simply omitted those words from the CVRA. An FBI agent, for example, would be engaged in the “prosecution” of the case when assisting the victim after the formal filing of charges. On OLC’s reading of the statute, the words “detection” and “investigation” become meaningless, contrary to the well-known canon of construction *verba cum effectu sunt accipienda*, which means that, if possible, every word and every provision is to be given effect.<sup>164</sup>

OLC also suggests that the “most significant” argument supporting pre-charging application of rights is the venue provision, which allows

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<sup>160</sup> See Kyl et al., *supra* note 136, at 615 (“Notice should be given to the fact that it applies not just to the Department of Justice, but to all ‘departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime.’” (citation omitted)).

<sup>161</sup> Does v. United States, 817 F. Supp. 2d 1337, 1342 (S.D. Fla. 2011).

<sup>162</sup> OLC CVRA Rights Memo, *supra* note 2, at 15.

<sup>163</sup> *Id.*

<sup>164</sup> See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979).

crime victims to assert CVRA rights “in the district court in which a defendant is being prosecuted for the crime or, *if no prosecution is underway*, in the district court in the district in which the crime occurred.”<sup>165</sup> The Department contends that this language refers quite narrowly to the “period of time between the filing of a complaint and the initiation of formal charges.”<sup>166</sup> In support of its position, the Department cites a Fourth Circuit case interpreting the Sixth Amendment right to counsel, which held that a “prosecution” for purposes of that Amendment does not begin when a criminal complaint is filed.<sup>167</sup> In OLC’s view, the venue provision’s direction that victims should assert rights when “no prosecution is underway” applies only to the limited time between when the Government files a complaint against a defendant and some later point when the “prosecution” actually begins. OLC notes that the filing of a complaint triggers an initial appearance, where crime victims can have important interests at stake, such as the right to be heard about a defendant’s release on bail. OLC believes it is only to such post-complaint, yet pre-indictment, proceedings (i.e., the initial appearance) that the venue provision’s “no-prosecution-underway” language covers.

As a preliminary matter, OLC’s interpretation of the word “prosecution” in the Department’s narrow construction of the venue provision is a twisted one, at odds with the way that term is conventionally used. The filing of a complaint is typically viewed as the start of a criminal prosecution. For example, the leading criminal procedure hornbook states that “[w]ith the filing of the complaint, the arrestee officially becomes a ‘defendant’ *in a criminal prosecution*.”<sup>168</sup>

Moreover, having specifically rejected the filing of the criminal complaint as the starting point for a “prosecution” within the CVRA’s venue provision, OLC refuses to consider the implications of its alterative starting point: the formal filing of an indictment. OLC states that “a prosecution of a felony must commence with the return of an indictment by a grand jury,” citing the *Federal Rules of Criminal Procedure*.<sup>169</sup> Yet OLC does not pause to recognize that, while felonies proceed by way of indictment, misdemeanors can proceed not only by indictment but also by complaint.<sup>170</sup> The CVRA draws no distinction between misdemeanor and

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<sup>165</sup> OLC CVRA Rights Memo, *supra* note 2, at 14 (quoting 18 U.S.C. § 3771(d)(3) (2012)).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* (citing *United States v. Alvarado*, 440 F.3d 191, 200 (4th Cir. 2006)).

<sup>168</sup> WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 1.2(g), at 11 (5th ed. 2009) (emphasis added).

<sup>169</sup> OLC CVRA Rights Memo, *supra* note 2, at 14 (citing FED. R. CRIM. P. 7(a)(1)).

<sup>170</sup> FED. R. CRIM. P. 58(b)(1) (“The trial of a misdemeanor may proceed on an indictment, information, *or complaint*.” (emphasis added)).

felony offenses, broadly extending its protections to victims of any federal offense.<sup>171</sup> Thus, under OLC's interpretation that the filing of a complaint does not trigger the CVRA, many victims who are entitled to CVRA protections—i.e., victims of misdemeanor offenses prosecuted by way of complaint—will never have proper venue to assert those rights because, according to OLC's strained argument, no prosecution ever started in their cases.

Even limiting the focus to felony cases, OLC misleadingly describes the Sixth Amendment case law. It is not immediately clear why one would look to the right to counsel to determine the breadth of the term “prosecution” in the Sixth Amendment. The right to counsel is not the only right found in that Amendment. The Amendment also extends, for example, a right to a speedy trial in all criminal “prosecutions.”<sup>172</sup> The case law on the speedy trial right makes clear that the right “may attach before an indictment and as early as the time of arrest and holding to answer a criminal charge.”<sup>173</sup>

In any event, the right to counsel cases are quite clear in providing that a Sixth Amendment “prosecution” can (and often does) begin well before an indictment.<sup>174</sup> The Supreme Court has directly held that the Sixth Amendment's right to counsel attaches “at or after the time that judicial proceedings have been initiated against [a person]—‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’”<sup>175</sup> Thus, under this controlling precedent, some earlier point in time before indictment is the triggering point of a Sixth Amendment “prosecution.”

The cases that OLC cites are not to the contrary. It is true that some federal appeals courts have stated that the mere filing of a criminal complaint does not trigger a Sixth Amendment right to counsel.<sup>176</sup> But there is a split of authority on this question, as OLC acknowledges in a footnote.<sup>177</sup> More importantly for purposes of this Article, the cases holding

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<sup>171</sup> See 18 U.S.C. § 3771(e) (2012).

<sup>172</sup> U.S. CONST. amend. VI.

<sup>173</sup> *United States v. Gouveia*, 467 U.S. 180, 190 (1984) (quoting *United States v. MacDonald*, 456 U.S. 1, 6–7 (1982)) (internal quotation marks omitted).

<sup>174</sup> See, e.g., *Texas v. Cobb*, 532 U.S. 162, 172–73 (2001).

<sup>175</sup> *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

<sup>176</sup> See, e.g., *United States v. Alvarado*, 440 F.3d 191, 196 (4th Cir. 2006).

<sup>177</sup> OLC CVRA Rights Memo, *supra* note 2, at 14 n.15 (citing *Hanrahan v. United States*, 348 F.2d 363, 366 n.6 (D.C. Cir. 1965)); see WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 6.4(e), at 670 (3d ed. 2007) (“There is an apparent split of authority on the question of whether the filing of a complaint is alone enough to give rise to a Sixth Amendment right to counsel, though the difference probably is explainable by the fact that



that the mere filing of a complaint does not start a Sixth Amendment prosecution also make clear that a later court hearing would start such a prosecution. For instance, in the Fourth Circuit case cited by OLC, *United States v. Alvarado*, the court reasons that “the main reason a law enforcement officer files [] a complaint is to establish probable cause for an arrest warrant. The criminal process is still in the investigative stage, and the adverse positions of government and defendant have yet to solidify.”<sup>178</sup> Relying on that reasoning, the Fourth Circuit refused to find that the right to counsel had attached merely because a police officer had filed a complaint to get an arrest warrant. But the Fourth Circuit distinguished that situation from “the initiation of adversary judicial proceedings against the defendant.”<sup>179</sup> An initial appearance would be such an adversary proceeding—i.e., it would be a “prosecution” under the Sixth Amendment. In light of this, OLC’s position that the CVRA’s venue provision’s “no-prosecution-underway” reference covers proceedings, such as an initial appearance, does not work.

The only sensible way to construe the CVRA’s venue provision is to read it as conveniently dividing criminal cases into two phases: a prosecution phase and an earlier investigative phase when “no prosecution is under way.”<sup>180</sup> Senator Kyl, for instance, has noted that if there are any doubts about how to construe the CVRA, this venue provision “sweeps them away.”<sup>181</sup> Once again, the language that Congress used leads inexorably to the conclusion that the CVRA extends rights to victims before the filing of criminal charges.

#### IV. WHEN PRE-CHARGING RIGHTS ATTACH UNDER THE CVRA

The zeal with which OLC argues against applying CVRA rights before charging raises the question of why it protests so much. Although OLC never articulated this concern, perhaps OLC worried that pre-charging rights would be difficult to administer. Such concerns should evaporate with a workable construction of when pre-charging rights attach. In this Part, we propose such a construction, suggesting that CVRA rights should attach when substantial evidence exists that a specific person has been directly and proximately harmed as the result of a federal crime. This approach appears to already be the method that the Department is taking, as

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this document is used for multiple purposes.”); *see also* *Felder v. McCotter*, 765 F.2d 1245, 1248 (5th Cir. 1985) (citing Texas law).

<sup>178</sup> *Alvarado*, 440 F.3d at 200 (citations omitted) (internal quotation marks omitted).

<sup>179</sup> *Id.* (quoting *United States v. Gouveia*, 467 U.S. 180, 187 (1984)).

<sup>180</sup> 18 U.S.C. § 3771(d)(3) (2012).

<sup>181</sup> Kyl et al., *supra* note 19, at 594.

it has extended many rights to victims before the formal filing of criminal charges as a matter of internal policy.<sup>182</sup> This approach appears to be workable, as a number of states extend rights to victims during the investigative process.<sup>183</sup>

#### A. A TEST FOR DETERMINING WHEN RIGHTS ATTACH

As explained in the earlier Parts of this Article, the CVRA clearly envisions that crime victims would have rights in the criminal justice process before the return of indictments or the filing of criminal complaints. The question then as to how much earlier in the process crime victims have rights naturally arises. Does the CVRA apply one second after a federal crime has been committed? Or does it apply at some later point during an investigation?

This issue was nicely framed by the U.S. District Court for the Eastern District of New York in a securities fraud case. In the first indictment underlying the case, the charged crime did not include various victims. A later superseding indictment broadened the charges to include those missing individuals. When they brought a suit under the CVRA, the court noted that “[q]uite understandably, movants perceive their victimization as having begun long before the government got around to filing the superseding indictment.”<sup>184</sup> The court, however, explained that there must be “logical limits” to crime victims’ rights before the filing of charges.<sup>185</sup> The court noted:

For example, the realm of cases in which the CVRA might apply despite no prosecution being ‘underway,’ cannot be read to include the victims of uncharged crimes that the government has not even contemplated. It is impossible to expect the government, much less a court, to notify crime victims of their rights if the government has not verified to at least an elementary degree that a crime has actually taken place, given that a corresponding investigation is at a nascent or theoretical stage.<sup>186</sup>

The logical limits that the CVRA envisions could come from how the Justice Department interacts with criminals during the investigation of a crime. Crime victims’ rights advocates are fond of saying that victims “only want to be treated like criminals”—that is, they simply want to have the same kinds of rights as criminals receive, such as the right to be notified

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<sup>182</sup> See, e.g., ATTORNEY GENERAL GUIDELINES, *supra* note 52, at 41–42 (discussing the right to confer regarding plea bargains).

<sup>183</sup> See *infra* Part III.D.

<sup>184</sup> *United States v. Rubin*, 558 F. Supp. 2d 411, 419 (E.D.N.Y. 2008).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

of court hearings and to attend those hearings.<sup>187</sup> So it is instructive to notice that the Justice Department policy is to extend certain rights to suspected criminals during certain points in the investigative process. That policy might provide guidance on when crime victims' rights would attach.

Of particular interest here is the Department's policy for grand jury subpoenas issued to a "target" of a criminal investigation. When such a target is subpoenaed to testify before a grand jury, the Department of Justice will advise that target of his rights, such as the right to refuse to answer any question that might be incriminating.<sup>188</sup> The Department of Justice defines a "target" of a criminal investigation as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant."<sup>189</sup>

If the Department's investigation has coalesced sufficiently so that it can provide notice of rights to putative defendants, it should likewise be in a position to provide notice of rights to that defendant's victims. Combining the Department's definition of "target" with the CVRA's coverage and definition-of-victim provisions produces a formulation whereby CVRA rights attach in (at least) the following circumstances:

*CVRA rights attach when an officer or employee of the Department of Justice or any other department or agency of the United States engaged in the detection, investigation, or prosecution of crime has substantial evidence that an identifiable person has been directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia, and in the judgment of the officer or employee, that person is a putative victim of that offense.*

This formulation borrows from the CVRA's coverage provision<sup>190</sup> to define the relevant universe of substantial evidence as that in the possession of the Justice Department or other federal agencies. For instance, if state law enforcement officers are investigating a bank robbery, the fact that the robbery might also be prosecuted federally<sup>191</sup> does not make the teller at the bank a federal "victim" of the crime until evidence regarding the crime comes into the possession of a federal agency. The formulation also tracks the CVRA's definition of "victim" in limiting the universe of potential

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<sup>187</sup> See, e.g., Cassell, *supra* note 15, at 1376–85 (describing the rationale underpinning state victims' rights statutes).

<sup>188</sup> CRIMINAL RESOURCE MANUAL, *supra* note 87, § 9-11.151.

<sup>189</sup> *Id.*

<sup>190</sup> 18 U.S.C. § 3771(e) (2012).

<sup>191</sup> *Id.* § 2113.

victims to those who have been “directly and proximately harmed.”<sup>192</sup> Finally, the formulation requires some federal officer or employee to evaluate the evidence and reach the conclusion that a federal offense has been committed that harmed the person in question. This determination responds to the observation by the District Court for the Eastern District of New York that the CVRA “cannot be read to include the victims of uncharged crimes that the government has not even contemplated.”<sup>193</sup> At the same time, such a formulation obviously does not require the filing of formal criminal charges, or even the preparation of formal criminal charges. Instead, all that is required is for the Department to recognize that a person is a putative victim of a federal offense, just as all that is required for the mailing of a target letter to a subpoenaed suspected criminal, is recognition that he is a putative defendant in a federal case.

#### B. APPLYING THE TEST TO THE EPSTEIN CASE

To illustrate how the test would operate, it is useful to examine the facts of the Epstein case. Applying the proposed test to that case produces straightforward answers, which suggests that the test would be workable in practice.

From 2001 to 2007, Jeffrey Epstein sexually abused more than thirty minor girls in his mansion, including Jane Doe Number One and Jane Doe Number Two.<sup>194</sup> Initially, of course, his acts of abuse were secret, unknown to law enforcement. During that period of time, the victims would not have had rights under the CVRA.

In 2006, Epstein’s acts of abuse came to the attention of the Palm Beach Police Department, which began investigating the case.<sup>195</sup> At this point, once again, the victims would not have had rights under the proposed CVRA test. The CVRA extends rights in the federal criminal justice process. A state investigation does not trigger the CVRA (although it may trigger certain state law protections, as discussed below).<sup>196</sup>

At some point in 2006, the Palm Beach Police Department asked the FBI to investigate Epstein on federal sex offenses, such as using a means of

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<sup>192</sup> See *id.* § 3771(e).

<sup>193</sup> *United States v. Rubin*, 558 F. Supp. 2d 411, 419 (E.D.N.Y. 2008).

<sup>194</sup> As above, see *supra* notes 34–41 and accompanying text, this part of the Article draws on the factual allegations made by the victims in this case—allegations that Epstein has not intervened to dispute. See Jane Doe Motion, *supra* note 40, at 3–23.

<sup>195</sup> See Probable Cause Affidavit, Palm Beach Police Department: Police Case No. 05-368(1) (May 1, 2006), available at <http://goo.gl/fAPFw5>; see also Statement of Undisputed Facts, *Epstein v. Rothstein*, No. 50 2009 CA 040800XXXXMBAG (Fla. Cir. Ct. Sept. 22, 2010), available at <http://goo.gl/DzMbe8>.

<sup>196</sup> See *supra* notes 178–95 and accompanying text as well as *infra* Part IV.D.

interstate communication in connection with sex offenses and traveling in interstate commerce for the purpose of engaging in illicit sexual conduct with minors.<sup>197</sup> The local police provided the FBI with information, which the FBI then investigated. Following an investigation, the FBI determined that the allegations of abuse against Epstein were credible, and it presented the case to the U.S. Attorney's Office for the Southern District of Florida. In 2007, the Office contacted counsel for Jeffrey Epstein and began negotiating a resolution of the case against him.<sup>198</sup>

Under our proposed test, the victims would not have had CVRA rights the first moment that the FBI became aware of Epstein's possible commission of sex offenses. But after the FBI developed substantial evidence of those sex offenses, identified victims of those offenses, and presented the case to the appropriate U.S. Attorney's Office for prosecution, CVRA rights would have attached. Accordingly, the FBI would have been required to notify the identified victims of their rights under the CVRA (as well as under the VRRRA). From that point forward in the case, the victims would have had CVRA rights, such as the right to fair treatment and the right to confer with prosecutors. In this case, the victims would have had the right to confer with prosecutors about the nonprosecution agreement that they ultimately reached with Epstein.<sup>199</sup>

#### C. CURRENT DEPARTMENT POLICY ON PRE-CHARGING RIGHTS

One objection that might be made to the formulation offered above is that it might unduly burden federal law enforcement officers and prosecutors, who would need to make judgment calls about when an investigation has coalesced to the point where "victims" are in existence, "substantial evidence" has been collected, and notice of rights has to be provided. Any such objection would be ill-founded, though, as it does not appear that implementing such an approach would be difficult.<sup>200</sup> Presumably the Justice Department has already been providing such rights in at least Texas, Louisiana, and Mississippi to comply with the Fifth

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<sup>197</sup> See 18 U.S.C. §§ 2422(b), 2423(b), (e) (2012).

<sup>198</sup> A more substantial summary of the case is available in case filings. See Jane Doe Motion, *supra* note 40.

<sup>199</sup> See *supra* Part II.

<sup>200</sup> This Article does not discuss mass victim cases in which notice needs to be provided to hundreds of victims. But in such situations, the CVRA already provides for "reasonable" alternative procedures. 18 U.S.C. § 3771(d)(2) (2012). The Department of Justice, for example, has used websites to provide notice in terrorism cases to large numbers of victims. See, e.g., United States v. Ingrassia, No. CR-04-0455ADSJO, 2005 WL 2875220, at \*4 (E.D.N.Y. Sept. 7, 2005); *Criminal Division's Victim Notification Program*, U.S. DEP'T OF JUSTICE, <http://goo.gl/6H6IEk> (last visited Dec. 4, 2013).

Circuit's 2008 ruling in *In Re Dean*, which held that the CVRA extends rights to victims before defendants are charged.<sup>201</sup> We have not seen any reports that providing the rights has been difficult.

Perhaps the reason for the lack of any reported difficulty is that the Department's current policy on crime victims' rights already requires notices to victims during investigations. The Justice Department has promulgated the *Attorney General Guidelines for Victim and Witness Assistance*, the latest edition of which is from May 2012. The *Guidelines* discuss crime victims' rights under both the CVRA and the earlier VRRRA. Because of the OLC memorandum discussed above, the *Guidelines* limit CVRA rights until after the time "when criminal proceedings are initiated by complaint, information, or indictment."<sup>202</sup> The Department, however, provides hortatory guidance that Justice Department employees shall make "best efforts" to notify crime victims about their CVRA rights "as early in the criminal justice process as is feasible and appropriate."<sup>203</sup>

Of greater interest, however, is the Department's mandatory policy regarding notification regarding crime victim services under the VRRRA. The *Guidelines* explain how "Department responsibilities to crime victims begin as soon as possible after the detection of a crime at which they may be undertaken without interfering in the investigation."<sup>204</sup> The *Guidelines* then direct the appropriate "responsible official" to provide crime victims with "information about services available to them."<sup>205</sup> This information must be provided at "the earliest opportunity after detection of a crime at which it may be done without interfering with an investigation."<sup>206</sup>

The Department appears to have little difficulty implementing this requirement. Evidence of this fact comes from the Justice Department itself, which responded to the letter from Senator Kyl discussed earlier questioning why the Department was not applying the CVRA before charges were filed.<sup>207</sup> In its response, the Department noted that OLC had issued an opinion that the CVRA did not extend rights before the formal filing of charges.<sup>208</sup> "Even so," the Department explained, "the new AG Guidelines go further and provide that Department prosecutors should make

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<sup>201</sup> 527 F.3d 391 (5th Cir. 2008).

<sup>202</sup> ATTORNEY GENERAL GUIDELINES, *supra* note 52, at 8.

<sup>203</sup> *Id.* at 35.

<sup>204</sup> *Id.* at 26 (citing 42 U.S.C. § 10607(b) (2006)).

<sup>205</sup> *Id.* at 29 (citing 42 U.S.C. § 10607(b)(2)). Elsewhere, the *Guidelines* define the official who is responsible as the appropriate federal law enforcement officer during the investigation of the crime or the U.S. Attorney once charges have been filed. *Id.* at 25–26.

<sup>206</sup> *Id.* at 29.

<sup>207</sup> See *supra* notes 130–33 and accompanying text.

<sup>208</sup> Letter from Ronald Weich, *supra* note 135, at 2.

reasonable efforts to notify identified victims of, and consider victims' views about, prospective plea negotiations, even prior to the filing of a charging instrument with the court.<sup>209</sup>

The Department also noted that it provided extensive pre-charging notifications to victims under the VRRRA:

Pursuant to the Victims' Rights and Restitution Act of 1990 (VRRRA), the Department identifies victims and provides to them service referrals, reasonable protection, notice concerning the status of the investigation, and information about the criminal justice process prior to the filing of any charges. The Department's investigative agencies provide such services to thousands of victims every year, whether or not the investigation results in a federal prosecution.<sup>210</sup>

Quantifying the scope of this undertaking with regard to one federal investigative agency, the Department explained:

[T]he [FBI] alone reports that it provided more than 190,000 services to victims during the past fiscal year [FY 2011], including case status updates, assistance with compensation applications and referrals, and counseling referrals. From sexual assaults in Indian Country to child pornography and human trafficking to mass violence and overseas terrorism, FBI victim specialists provide much-needed immediate and ongoing support and information to victims. The FBI addresses victim safety issues when needed, providing on-scene response and crisis intervention services in thousands of investigations. With regard to sexual assault victims, FBI personnel arrange for and often accompany victims to forensic sexual assault medical examinations and provide assistance with HIV/STD testing.<sup>211</sup>

In view of the Department's existing notifications and provision of services before charges are filed under the VRRRA, it is hard to conceive how any viable claim could be made that it would be difficult to provide similar rights under the CVRA. The four rights that would be potentially in play before charging would be the right to reasonable protection, the right to fair treatment, and the right to confer with prosecutors, along with the predicate right to notice of these rights.<sup>212</sup> The VRRRA already requires the Department to provide reasonable protection, so this would not be an expanded obligation.<sup>213</sup> Similarly, the *Guidelines* already require prosecutors to confer with victims about plea agreements (the most common situation where victims want to confer), so it is hard to imagine how extending this right would create any undue burden.<sup>214</sup> Additionally, the right to "fair treatment" could only be a problem if the Department

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 2–3.

<sup>211</sup> *Id.* at 3.

<sup>212</sup> 18 U.S.C. § 3771(a)(1), (5), (8), (c)(1) (2012).

<sup>213</sup> *See* 42 U.S.C. § 10607(c)(2) (2006).

<sup>214</sup> *See* ATTORNEY GENERAL GUIDELINES, *supra* note 52, at 41–42.

wanted to treat victims unfairly. Given its repeated and professed commitment to crime victims, here too this obligation should not be burdensome. And finally, with regard to providing notice of CVRA rights to victims, the fact that the Department currently provides notice of VRRRA rights indicates that it should not be difficult to provide notice of CVRA rights as well.

Indeed, it is possible that the Department's notification letters under the VRRRA already include this information. Interestingly, in the Epstein case, the FBI notified Jane Doe Number One and Jane Doe Number Two that they had rights in the criminal justice process. As early as June 7, 2007—more than three months before it concluded a nonprosecution agreement with Epstein—the U.S. Attorney's Office sent a notice to Jane Doe Number One stating “your case is under investigation.”<sup>215</sup> The notice also informed Jane Doe Number One that “as a victim and/or witness of a federal offense, you have a number of rights.”<sup>216</sup> Among the rights that the U.S. Attorney's Office told Jane Doe that she possessed was “[t]he reasonable right to confer with the attorney for the United States in the case.”<sup>217</sup> Of course, she would not have had those rights if she was not covered by the CVRA. The FBI therefore apparently assumed that the CVRA already applied in the Epstein case. It was only later, when the matter went into litigation, that the Department of Justice reversed course. This change in course underscores the problems arising out of the OLC memorandum and the Department's current interpretation of the CVRA.

#### D. STATE LAW EXTENSION OF PRE-CHARGING RIGHTS

The focus of this Article so far has been crime victims' rights in the federal system. But in concluding, it is instructive to note how a number of states offer parallel rights for crime victims, including the right to confer with prosecutors. In fact, several states have extended such rights prior to formally filing of charges against defendants—without reported difficulty, so far as we are aware. This confirms our inference that extending CVRA rights to crime victims before the formal filing of criminal charges is both feasible and desirable.

A general overview of state laws illustrates the broad protections afforded to victims in state criminal justice systems. Nearly two-thirds of states have adopted constitutional provisions to protect victims throughout

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<sup>215</sup> Letter from A. Marie Villafaña, Assistant U.S. Att'y, to Jane Doe #1 (June 7, 2007), reprinted in Jane Doe Motion, *supra* note 40, at ex. C.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*



the criminal justice process.<sup>218</sup> Moreover, every state has adopted a statute that either enforces its constitutional amendment or creates independent statutory rights for crime victims.<sup>219</sup> As a result, state legislatures and state employees have attempted to give victims a voice in the criminal justice process across the country.

Notably, while the strength of these rights varies from state to state,<sup>220</sup> nearly forty states require the prosecuting attorney to notify or confer with the victim regarding plea negotiations.<sup>221</sup> Several jurisdictions involve the victim in the charging decision.<sup>222</sup> In some states, law enforcement and prosecutors must involve the victim at any “critical”<sup>223</sup> or “crucial”<sup>224</sup> stage of the criminal proceeding; and in a minority of jurisdictions, the judge must ascertain whether the prosecutor has afforded the victim statutory protections prior to accepting a plea agreement.<sup>225</sup>

The general contours of state provisions suggest that several state governments have recognized the value in informing victims of their rights and involving them in the criminal process prior to the formal filing of charges.<sup>226</sup> Indeed, a brief look at the statutory protections illustrates the extent to which states have attempted to afford protections to victims long before the formal filing of charges.

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<sup>218</sup> See *Victims’ Rights Laws by State*, NAT’L CRIME VICTIM L. INST. (Oct. 17, 2013), <http://goo.gl/pdDx1w> (listing and linking to state laws and constitutional amendments).

<sup>219</sup> See LAFAVE ET AL., *supra* note 168, § 21.3(f), at 1041–42.

<sup>220</sup> See generally DEAN G. KILPATRICK ET AL., NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, *THE RIGHTS OF CRIME VICTIMS—DOES LEGAL PROTECTION MAKE A DIFFERENCE?* (1998), available at <http://goo.gl/EzH61S>.

<sup>221</sup> See Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President’s Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 64 & n.168 (1999) (citing to victims’ rights statutes in Connecticut, Illinois, and Michigan, among others). Unfortunately, as some commentators have noted, the notice and conferral provisions in some states are ambiguous, and the absence of case law precludes a definitive understanding of the reach of the right in some jurisdictions. See LAFAVE ET AL., *supra* note 168, § 21.3(f), at 1041–42; see also, e.g., KAN. STAT. ANN. § 74-7333(a)(5) (2002) (“The views and concerns of victims should be ascertained and the appropriate assistance provided throughout the criminal process.”). In some jurisdictions, the ambiguous use of an illustrative list could be read as suggesting that a particular right, such as conferral, hinges on formal charges. See, e.g., KY. REV. STAT. ANN. § 421.500(6) (LexisNexis Supp. 2012) (requiring consultation on “disposition of the case including dismissal, release of defendant pending judicial proceedings, any conditions of release, a negotiated plea, and entry into a pretrial diversion program,” but failing to define “disposition” or “case”).

<sup>222</sup> See Tobolowsky, *supra* note 221, at 59–60.

<sup>223</sup> E.g., LA. REV. STAT. ANN. §§ 46:1842(2), 46:1844(K) (2010).

<sup>224</sup> E.g., FLA. CONST. art. I, § 16(b) (refraining from identifying the term).

<sup>225</sup> See LAFAVE ET AL., *supra* note 168, § 21.3(f), at 1041.

<sup>226</sup> See *Victims’ Rights Laws by State*, *supra* note 218.

For example, Arizona has adopted a constitutional amendment and statutes that expansively protect victims. Under Arizona law, the definition of victim hinges on whether a criminal offense has been committed, and the term “criminal offense” is defined as “conduct that gives a peace officer *or* prosecutor probable cause to believe” a crime has occurred.<sup>227</sup> In short, a victim’s status does not hinge on the formal filing of charges but rather on the criminal conduct itself.<sup>228</sup> Arizona law enforcement personnel must give information to victims describing their rights as soon as possible, even if formal charges have not yet been filed, and a victim may request that the prosecutor discuss the disposition of the case, including “a decision not to proceed with a criminal prosecution, dismissal, plea, or sentence negotiations and pretrial diversion programs.”<sup>229</sup> A victim may even pursue some rights if counts are dismissed.<sup>230</sup> Arizona courts have also permitted victims to invoke their rights in the context of civil forfeiture proceedings.<sup>231</sup>

Hawaii’s victims’ rights statute illustrates how a state has defined the term “case” more expansively than the limited definition advocated by the Department in order to facilitate victim participation. By statute in Hawaii, victims must, upon request, be informed of “major developments” in any felony case.<sup>232</sup> Along a similar vein, the prosecuting attorney must consult or advise the victim about any plea negotiations.<sup>233</sup> Interestingly, however, the Hawaii legislature defined “major developments” as “arrest or release of the suspect by the police, case deferral by the police, referral to the prosecutor by the police, rejection of the case by the prosecutor, preliminary hearing date, grand jury date, trial and sentencing dates, and the disposition of the case.”<sup>234</sup> The usage of the term “case” and the plain language of the provisions demonstrate that victims in the State of Hawaii are entitled to a notification right and a possible consultation right long before formal charges are filed.

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<sup>227</sup> ARIZ. REV. STAT. ANN. § 13-4401(6) (2010) (emphasis added); *see State ex rel. Thomas v. Klein*, 150 P.3d 778, 780–81 (Ariz. Ct. App. 2007) (noting the original version defined a criminal offense as a violation of a statute).

<sup>228</sup> Under Arizona law, the “rights and duties that are established by this chapter arise on the arrest *or* formal charging of the person or persons who are alleged to be responsible for a criminal offense against a victim.” ARIZ. REV. STAT. ANN. § 13-4402(A) (2010) (emphasis added).

<sup>229</sup> ARIZ. REV. STAT. ANN. § 13-4419(A) (2010).

<sup>230</sup> *See* ARIZ. REV. STAT. ANN. § 13-4402.01(A).

<sup>231</sup> It appears, however, that the criminal proceeding may have been parallel to the civil forfeiture proceeding. *See State v. Lee*, 245 P.3d 919, 923–24 (Ariz. Ct. App. 2011).

<sup>232</sup> HAW. REV. STAT. ANN. § 801D-4(a)(1) (LexisNexis 2007).

<sup>233</sup> *See id.*

<sup>234</sup> *Id.* § 801D-2.

Other states also expressly extend rights before the filing of charges. Colorado guarantees rights at “all critical stages of the criminal justice process[,]” which includes both the filing of charges and the decision to not file charges.<sup>235</sup> In Missouri, victims have the right:

on charged cases or submitted cases where no charge decision has yet been made, to be informed by the prosecuting attorney of the status of the case and of the availability [of different forms of compensation and assistance] and of any final decision by the prosecuting attorney not to file charges.<sup>236</sup>

In New Jersey, officials typically send a letter informing the victim “that the case has been referred to the prosecutors’ office and explains and offers the services available from the county office of victim-witness advocacy.”<sup>237</sup> Subsequent letters to the victim ensure that the victim has notice of a series of decisions long before indictment,<sup>238</sup> and the office actively solicits information in order to “help the prosecutor’s office decide whether or not to prosecute a case.”<sup>239</sup> Along a similar vein, the Massachusetts legislature included a provision that makes it clear that nothing should prevent a prosecutor from providing victim services to persons injured by the commission of a crime, even though a complaint or indictment has not yet been issued.<sup>240</sup>

In addition to extending rights before the filing of charges, several states require consultation before the prosecutor reaches a plea agreement with the defendant. For example, Idaho’s statute provides that a victim must be given an opportunity “to communicate with the prosecution in criminal or juvenile offenses, and be advised of any proposed plea agreement by the prosecuting attorney prior to entering into a plea agreement in criminal or juvenile offenses involving crimes of violence, sex

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<sup>235</sup> COLO. CONST. art. II, § 16a; COLO. REV. STAT. § 24-4.1-302(1) (2013). *But see* COLO. REV. STAT. § 24-4.1-302.5(1)(f) (2012) (limiting conferral right, in particular, to later stages of a criminal proceeding). Despite these limitations on the conferral right, victims retain the ability to be heard at any hearing involving a plea. *See id.* § 24-4.1-302.5.

<sup>236</sup> MO. ANN. STAT. § 595.209(10) (West 2011).

<sup>237</sup> OFFICE OF VICTIM-WITNESS ADVOCACY, N.J. DEP’T OF LAW & PUB. SAFETY, A CRIME VICTIM’S GUIDE TO THE CRIMINAL JUSTICE SYSTEM 4 (2d ed. 1997); *see also* N.J. CONST. art. I, § 22. *Compare* 18 U.S.C. § 3771 (2012), *with* N.J. STAT. ANN. § 52:4B-36 (West 2009). In addition to the rights similar to the federal legislation, New Jersey law provides for the right “[t]o be advised of case progress and final disposition and to confer with the prosecutor’s representative so that the victim may be kept adequately informed . . . .” *Id.* § 52:4B-36(k).

<sup>238</sup> *See* OFFICE OF VICTIM-WITNESS ADVOCACY, *supra* note 237, at 4 (including pre-grand jury remand, administrative dismissal, grand jury remand, grand jury dismissal, and indictment returned).

<sup>239</sup> *Id.* at 26 (describing victim involvement at grand jury and arraignment stages of the proceeding).

<sup>240</sup> *See* MASS. ANN. LAWS ch. 258B, § 2 (LexisNexis 2004).

crimes or crimes against children.”<sup>241</sup> In Indiana, the plain language of its statute leaves open the possibility of a conferral right before formal charges to the extent that the statute includes two separate time frames: “after a crime . . . has been charged” *or* “before any disposition of a criminal case involving the victim.”<sup>242</sup>

To be sure, not all states have afforded victims a voice throughout the entirety of the criminal justice process.<sup>243</sup> In some states, the statutes are ambiguous.<sup>244</sup> In a handful of states, there is clear language limiting rights until after the filing of charges. For example, Louisiana constrains the conferral right to criminal matters “in which formal charges have been filed by the district attorney’s office.”<sup>245</sup> Yet, unlike the federal CVRA, this statute specifically excludes pre-charging situations. And, in any event, despite Louisiana’s limitation on a particular right within the statute, the legislature in this state still often saw fit to provide the victim with notification rights, even in the absence of the formal filing of charges.<sup>246</sup>

Very few state courts have ever considered the precise issue of whether conferral rights may attach prior to the formal filing of charges. This is likely caused by the fact that, unlike the federal statute, many state statutes fail to provide the victim with a procedural mechanism for challenging the conduct of prosecutors or law enforcement agencies.<sup>247</sup> However, in rare cases, state courts have implicitly recognized that a meaningful interpretation of victims’ rights should include some rights prior to filing.

For example, a Connecticut court concluded that a company injured by the delinquent act of a minor was entitled to information about the case

<sup>241</sup> IDAHO CODE ANN. § 19-5306(1)(f) (2004). As in the case of most of the state statutes, the Idaho statute is not without ambiguity. A different provision within the statute makes the notification right contingent “[u]pon the filing of a criminal complaint or juvenile petition . . . .” *Id.* § 19-5306(2).

<sup>242</sup> IND. CODE ANN. § 35-40-5-3(b) (West 2012); *id.* § 35-40-1-1 (failing to define “case”).

<sup>243</sup> *See, e.g.*, MD. CONST. art. 47(b) (“In a case originating by indictment or information filed in a circuit court, a victim of crime shall have the right to be informed . . .”).

<sup>244</sup> In Delaware, for example, the statute contains an additional limitation in the conferral provision that is noticeably absent from the duty imposed on law enforcement to provide information about the victim’s rights to that victim. *Compare* DEL. CODE ANN. tit. 11, § 9405 (2007), *and* DEL. CODE ANN. tit. 11, § 9411 (2007) (imposing additional requirements after the Attorney General commences the prosecution), *with* DEL. CODE ANN. tit. 11, § 9410 (2007). Query whether the limitations imposed in one section should be inferred in the other under the doctrine of *expressio unius est exclusio alterius*.

<sup>245</sup> LA. REV. STAT. ANN. § 1844(D)(1) (2010).

<sup>246</sup> *See id.* § 1844.

<sup>247</sup> *See generally* Douglas E. Beloof, *The Third Wave of Crime Victims’ Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 300–23 (discussing problems with remedies in victims’ rights statutes).

contained in a police file in a civil proceeding, even though it appears that there was little indication that criminal charges had been filed.<sup>248</sup> Similarly, the South Carolina Supreme Court, while limiting the ability of the victim to challenge the conduct of a prosecutor, concluded that the same rights under the state constitution must attach prior to the formal filing of an indictment.<sup>249</sup> Other courts have even permitted a victim to recover compensation or reparations for unindicted or acquitted conduct.<sup>250</sup>

In other words, while few state judiciaries have addressed the precise timing of state crime victims' rights, those that have addressed the question have typically found that the rights do extend to pre-charging situations.

Despite the relative dearth of state court cases, it is worth noting that most state statutes unequivocally provide for notification rights early in the criminal process.<sup>251</sup> For example, the Illinois statute imposes a limited duty on law enforcement agencies to keep victims informed of the status of an investigation until the accused is apprehended or the agency discontinues the investigation.<sup>252</sup> Similarly, law enforcement agencies in Iowa must keep the victim apprised of the investigation "until the alleged assailant is apprehended or the investigation is closed."<sup>253</sup> Michigan's statute requires law enforcement to provide information within a mere twenty-four hours of contact between the agency and the victim.<sup>254</sup>

In sum, while state law on crime victims' rights before charging is not fully developed, what law exists tends to support the position that crime victims deserve rights before the formal filing of charges. This law fits the long-standing trend in states toward expanding protections for crime

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<sup>248</sup> See *In re James B., Jr.*, 714 A.2d 735 (Conn. Super. Ct. 1998).

<sup>249</sup> See *Ex parte Littlefield*, 540 S.E.2d 81, 85 (S.C. 2000).

<sup>250</sup> See Kimberly J. Winbush, Annotation, *Persons or Entities Entitled to Restitution as "Victim" Under State Criminal Restitution Statute*, 92 A.L.R. 5TH 35, 35 (2001) (recounting cases in which unnamed victims were entitled to restitution).

<sup>251</sup> See, e.g., MINN. STAT. ANN. § 611A.0315(a) (West 2009) (requiring a prosecutor to "make every reasonable effort to notify a victim of domestic assault . . . or harassment that the prosecutor has decided to decline prosecution of the case" but providing the right to participate in proceedings to circumstances in which the offender has been charged).

<sup>252</sup> See 725 ILL. COMP. STAT. ANN. 120/4.5 (2008).

<sup>253</sup> IOWA CODE ANN. § 915.13(1)(f) (West 2003).

<sup>254</sup> See MICH. COMP. LAWS ANN. § 780.753 (West 2007). Michigan's conferral right is particularly ambiguous, because the notification requirement imposed upon the prosecuting attorney contains a time limitation (after arraignment), but the legislature did not include an express time limitation on the conferral right. See MICH. COMP. LAWS ANN. § 780.756(3) (West 2007) (requiring the victim have the opportunity to consult prior to "any negotiation that may result in a dismissal, plea or sentence bargain, or pretrial diversion"); see also MISS. CODE ANN. § 99-43-7(1) (2007) (imposing a requirement on law enforcement officials to notify a victim within seventy-two hours).

victims.<sup>255</sup> The decision by state legislators to extend notification or conferral rights to crime victims demonstrates an express recognition that crime victims' meaningful participation in the criminal justice process may involve granting those victims rights before indictment.

#### CONCLUSION

Crime victims have important rights at stake in the criminal justice process, even before prosecutors formally file criminal charges. It is hardly surprising, therefore, to find that a federal law that Congress in fact designed to create "broad and encompassing" rights for victims protects victims during a criminal investigation. As this Article has explained, interpreting the CVRA to cover crime victims during the pre-charging phase of a case is consistent with the statute's purposes, text, legislative history, and interpretive case law. And state criminal justice systems also appear to be moving in that direction.

The Justice Department's contrary interpretation seems unlikely to prevail when challenged. The CVRA signals a paradigm shift in the way that crime victims are to be treated, at least within the federal criminal justice system. Before enactment of the law, federal investigators and prosecutors might have been able to keep victims at arm's length, refusing to confer with them about the case and otherwise ignoring or even mistreating them during the process. But those days are over. The CVRA promises victims that they now have the right to confer with prosecutors and the right to be treated fairly while their cases are investigated. It is time for the Department of Justice to recognize and embrace that new reality.

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<sup>255</sup> See Jeffrey A. Parness et al., *Monetary Recoveries for State Crime Victims*, 58 CLEV. ST. L. REV. 819, 850 (2010); Tobolowsky, *supra* note 221, at 59 (describing a "significant expansion of victim rights to be consulted by the prosecutor and heard by the court").

