

PUBLIC WRONGS AND PRIVATE RIGHTS: LIMITING THE VICTIM’S ROLE IN A SYSTEM OF PUBLIC PROSECUTION

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INTRODUCTION

The United States maintains a system of public law enforcement, whereby the state, not the individual victim, is responsible for seeking justice. Because a victim is not a party in the public prosecution model, victims’ rights advocates have argued that the criminal justice system has unfairly ignored victims’ interests.¹ Culminating in 2004 with the Crime Victims’ Rights Act (CVRA),² victims have become more formally integrated into federal criminal proceedings.³ Although the CVRA does not confer party status to victims, the Act provides victims of federal crimes with expansive rights to remedy their perceived exclusion from the criminal process. Most

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¹ See, e.g., Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 865 [hereinafter Cassell, *Treating Crime Victims Fairly*]; Judith Rowland, *Illusions of Justice: Who Represents the Victim?*, 8 ST. JOHN’S J. LEGAL COMMENT. 177, 178 (1992).

² Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act, Pub. L. No. 108-405, tit. I, 118 Stat. 2260, 2261–65 (2004) (codified as amended at 18 U.S.C. § 3771 (2006), and to be codified at 42 U.S.C. §§ 10603(d)–(e)). This Comment refers to the Act simply as the Crime Victims’ Rights Act (CVRA).

³ For a discussion of the history of victims’ rights legislation, see *infra* Part I.B.

significantly, the CVRA provides victims with standing⁴: if a district court denies any of the victims' participatory rights under the statute, the CVRA permits victims to petition the appellate court for a writ of mandamus to reopen a plea bargain or sentence.⁵

Although the CVRA seeks to address victims' legitimate concerns, its expansive rights and remedies may potentially infringe upon the public prosecution model by undermining prosecutorial and judicial discretion and threatening the rights of the accused.⁶ The problems created by the CVRA are now emerging in the federal courts, as evidenced by a circuit split on the applicable standard of review for victims' mandamus petitions. Although the standard for granting a writ of mandamus is ordinarily very high,⁷ two circuits—the Second⁸ and the Ninth⁹—have declined to use the traditional mandamus standard in the context of the Act. Instead, they have reviewed victims' petitions for either an error of law or for an abuse of discretion.¹⁰

As this Comment demonstrates, an appellate court reviewing a district court's denial of a victim's motion should apply the traditional mandamus standard of review, which promotes a narrow interpretation of the CVRA and respects the prosecutorial and judicial discretion that Congress explicitly built into the statute.¹¹ A more relaxed standard proves problematic because victims' interests may not always align with those of the prosecutor and are often at odds with those of the defendant.

Victims' rights advocates would likely argue that the misalignment between prosecutors' and victims' interests is precisely the reason for more expansive victims' rights.¹² To quote one commentator, the victim is "seen at best as 'the forgotten man' of the system and, at wors[t], as being twice victimized, the second time by the very system to which he has turned for justice."¹³

⁴ See David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004*, 28 PACE L. REV. 623, 623 (2008).

⁵ 18 U.S.C. § 3771(d)(3) (2006).

⁶ See, e.g., 18 U.S.C. § 3771(a)(7) (providing victims with the "right to proceedings free from unreasonable delay"). See *infra* Part III for further discussion of how the CVRA could infringe upon prosecutors' and defendants' interests.

⁷ See *Will v. United States*, 389 U.S. 90, 95 (1967) (stating that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy") (citations omitted); see also *infra* Part II.

⁸ See *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562 (2d Cir. 2005).

⁹ See *Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011, 1017 (9th Cir. 2006).

¹⁰ See *infra* Part II.

¹¹ See 18 U.S.C. §§ 3771(d)(2), (6) (2006).

¹² See, e.g., Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 294–96.

¹³ 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, 841 [hereinafter Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure*] (quoting *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring)) (internal quotation marks omitted, alteration in original).

Although attending to victims' interests is a serious concern, a public prosecution system must consider all interested parties: the victim, the defendant, and society. Allowing a victim in his private capacity to reopen a plea bargain or a sentence has serious practical consequences in the criminal justice system: it may infringe upon the prosecutor's ethical duty to the accused, inhibit the effective handling of a case, and overemphasize retributive considerations. To ensure that society's and defendants' interests are protected, appellate courts should adhere to the traditional mandamus standard and only grant victims' mandamus petitions when district courts have ignored the provisions of the CVRA.

Part I of this Comment discusses the history and rationale of public prosecution in the United States. It outlines the rise of the victims' rights movement within that system, including the CVRA, and concludes with a discussion of prosecutorial and judicial discretion in plea bargaining and sentencing. Part II examines the current circuit split over the proper standard of review for mandamus petitions under the Act. Part III then demonstrates the necessity of a more deferential standard of review of victims' petitions to reopen plea agreements or sentences. It argues that allowing victims to do so in ordinary cases can create significant problems for prosecutors and judges and may negatively affect the rights of the accused.

I. BACKGROUND

This Part first describes and explains the shift from a system of private to public prosecution in section A, and then discusses the rise of the victims' rights movement in section B. Section C then outlines the culmination of that movement—the CVRA. Finally, to place the CVRA in context, and to elucidate its limits, sections C.1 and C.2 provide background on prosecutorial and judicial discretion in plea agreements and sentencing.

A. *The Shift from Private to Public Prosecutors*

During colonial America and early American independence, private prosecutions played a role in the criminal process.¹⁴ Despite the debate over the extent of private prosecutions during early American history,¹⁵ the vic-

¹⁴ Erin A. O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229, 235–36 (2005).

¹⁵ For further discussion on the differing viewpoints of the role of private prosecutions in colonial America, compare Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369, 370–71, which claims that private prosecutions were the “norm in the American justice system at the time of the colonial revolution and the drafting of the Constitution,” with LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 29 (1993), which asserts that the “public prosecutor—a government officer in charge of prosecution—appeared quite early on this side of the Atlantic,” and Rachel King, *Why a Victims' Rights Constitutional Amendment Is a Bad Idea: Practical Experiences from Crime Victims*, 68 U. CIN. L. REV. 357, 367 (2000), which argues that “[c]riminal prosecution was a public duty early on . . . becoming virtually exclusively part of the public domain in the 19th century.”

tim was often responsible for many, if not all, aspects of the criminal prosecution.¹⁶ He was responsible for arresting the offender, investigating the crime, filing charges, and prosecuting the alleged criminal.¹⁷ For example, if a shopkeeper caught a thief in his store, the shopkeeper had to use his money and resources to bring the offender to justice.¹⁸ This was often an expensive undertaking; consequently, prosecuting an offender depended on the victim's financial means.¹⁹

Although private prosecutions played a role in early American history, the role of a public prosecutor appeared earlier in America than in England, "due to the greater egalitarianism of American society."²⁰ The United States developed public prosecutors for both philosophical and practical reasons.²¹ Philosophically, the Enlightenment shifted the focus of criminal prosecutions from serving the private interests of victims to the greater societal interests of deterrence, rehabilitation, and retribution.²² Practically, as the police forces, prisons, and penal codes expanded, a professional government-run prosecutorial force emerged and began to displace the private prosecution system.²³

With the shift from a private to public system of prosecution came a related shift in focus of the system; the interests of the victim were subsumed by the interests of society.²⁴ Blackstone, in his *Commentaries*, articulated the rationale behind the shift in the system: "[P]ublic wrongs, or crimes and misdemeanours, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in [its] social aggregate capacity."²⁵

¹⁶ 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, 25 (1999).

¹⁷ *Id.* To assist in arresting his assailant, the victim had "aid of the local watchman, justice of the peace, or constable for whose assistance the victim paid." *Id.*

¹⁸ FRIEDMAN, *supra* note 14, at 21.

¹⁹ See O'Hara, *supra* note 14, at 238 (noting that "the poor were disproportionately victimized relative to the rich" because the offender was more likely to be brought to justice if the victims had the financial means to do so); see also King, *supra* note 14, at 367.

²⁰ King, *supra* note 14, at 366-67; see also John L. Worrall, *Prosecution in America: A Historical and Comparative Account*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 5-6 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008) (remarking that "the most unique feature of American prosecution is that it is public . . . [which] is not a result of our British common law heritage").

²¹ Tobolowsky, *supra* note 16, at 25-26.

²² *Id.*

²³ King, *supra* note 14, at 367; see also Tobolowsky, *supra* note 16, at 21 (noting that as countries became more bureaucratic, "governments began to assume greater responsibility for the initiation and conduct of criminal prosecutions, a change which substantially reduced and often eliminated the crime victim's previous role in the criminal justice process").

²⁴ Tobolowsky, *supra* note 16, at 26.

²⁵ 4 WILLIAM BLACKSTONE, COMMENTARIES *5. Blackstone continued in more detail explaining the public nature of specific crimes:

Murder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set,

Although Blackstone viewed crimes as public wrongs because they affect the entire community, he acknowledged that “every public offense is also a private wrong” because it simultaneously affects the individual.²⁶ Blackstone believed, however, that victims’ means of redress were through private, civil remedies.²⁷ Partly due to Blackstone’s significant influence on both English and American legal thought,²⁸ tort law developed significantly in both English and American courts during the nineteenth century.²⁹ The emergence of tort law—a private means of redress—served to preserve victims’ interests, whereas the focus of criminal law shifted to address a separate set of considerations.

In conjunction with the emerging view during early American history that prosecutions were of an inherently public nature, the founding fathers also created a constitutional system that charged the Executive with the responsibility to “take care that the laws be faithfully executed.”³⁰ Derived from the Take Care Clause of the Constitution,³¹ the President, and in turn, federal prosecutors, have wide discretion to determine how best to execute the laws faithfully.³² Consequently, the prosecutor has almost full discretion to decide how to prosecute a criminal violation, including whether to file an indictment and whether to reach a plea agreement.³³

for others to do the like. Robbery may be considered in the same view . . . [because] the *public* mischief is the thing, for the prevention of which our laws have made it a capital offence. In these gross and atrocious injuries the private wrong is swallowed up in the public.

Id. at *6.

²⁶ *Id.* at *5.

²⁷ *Id.* at *7 (stating that the manner of restoring to victims their rights was “the object of our inquiries in the preceding book of these commentaries [Private Wrongs]”); see also John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *YALE L.J.* 524, 548 (2005) (asserting that Blackstone saw tort actions in the common law courts as the “primary avenue of redress for victims”).

²⁸ See Goldberg, *supra* note 27, at 560 (noting that the *Commentaries* served as a basis for early American legal practice).

²⁹ See Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 *YALE L.J.* 1717, 1730–32 (1981) (discussing the emergence of tort law in the nineteenth century).

³⁰ U.S. CONST. art. II, § 3.

³¹ See *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (stating that “[t]he executive power is vested in the President of the United States, who is required to take care that the laws be faithfully executed. The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed . . . [I]t is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case.”) (citations omitted).

³² See, e.g., *Wayte v. United States*, 470 U.S. 598, 607–08 (1985) (approving of selective prosecution because “[i]n our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute”).

³³ *Id.*; see also *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (stating that the constitutional grant of executive power to the Executive Branch “does not mean some of the executive power, but *all* of the executive power”); *United States v. Batchelder*, 442 U.S. 114, 124 (1979) (“Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor’s discretion.”); *The Confiscation Cases*, 74 U.S. 454, 458–59 (1869) (“Whether

The framers, though vesting significant discretion in the Executive Branch, remained concerned with the power and reach of the federal government.³⁴ As such, the Bill of Rights contains multiple provisions—specifically, the Fourth, Fifth, and Sixth Amendments—that protect the defendant against overreaching by the federal government.³⁵ These constitutional protections for criminal defendants remain central to the discussion of victims' rights generally and the CVRA specifically.

B. *The Rise of Victims' Rights*

During the 1960s, the Supreme Court, led by Chief Justice Earl Warren, established a number of new protections for criminal defendants.³⁶ In response to the Warren Court's concern for the criminal defendant, victimology, the science of studying victims, gained momentum.³⁷ Prompted by victims' expressions of frustration with and their exclusion from the criminal justice process, researchers examined the psychology of victimization and explored proposals to make the system more inclusive of and responsive to victims.³⁸ Victims desired the reemergence of restitution remedies and increased victim participation in the criminal justice process.³⁹

Although this emerging field served victims' interests, it was also a product of political developments in the 1960s and 1970s.⁴⁰ Many conservatives did not agree with the liberal and defendant-oriented policies of the

tested, therefore, by the requirements of the Judiciary Act, or by the usage of the government, or by the decisions of this court, it is clear that all such suits, so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney-General.”). For further discussion of these powers, see Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1025 (2006), and Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 743–55 (1996).

³⁴ King, *supra* note 14, at 368.

³⁵ U.S. CONST. amend. IV (prohibition against unlawful search and seizure); U.S. CONST. amend. V (grand jury requirement, prohibition against double jeopardy, no requirement to self-incriminate, and the necessity of due process); U.S. CONST. amend. VI (right to have a speedy trial, to know the charges, to confront witnesses, and to obtain counsel).

³⁶ See, e.g., *Katz v. United States*, 389 U.S. 347, 353 (1967) (holding that government's activities in electronically listening to defendant's telephone conversation in public telephone booth constitutes a search and seizure in violation of the Fourth Amendment); *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966) (holding that statements obtained from defendants without full warning of constitutional rights are inadmissible as having been obtained in violation of Fifth Amendment); *Escobedo v. Illinois*, 378 U.S. 478, 490–91 (1964) (holding that refusal by the police to honor defendant's request to consult with his lawyer during the course of an interrogation constitutes a violation of the Sixth Amendment); *Gideon v. Wainwright*, 372 U.S. 335, 343–44 (1963) (holding that the Sixth Amendment right to counsel applies to the states and an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for him); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that evidence obtained by unconstitutional search was inadmissible in both state and federal courts).

³⁷ ROBERT ELIAS, *THE POLITICS OF VICTIMIZATION: VICTIMS, VICTIMOLOGY, AND HUMAN RIGHTS* 17–19 (1986); Tobolowsky, *supra* note 16, at 26–27.

³⁸ Tobolowsky, *supra* note 16, at 26–27.

³⁹ *Id.* at 27.

⁴⁰ ELIAS, *supra* note 37, at 19–20.

Warren Court, especially as the crime rate rose during this period.⁴¹ This backlash coincided with the alleged failure of the tenets of the liberal crime policy model: rehabilitating criminals and eradicating the perceived root social causes of crime, namely, poverty, discrimination, and lack of education.⁴² Conservatives believed that the Warren Court's decisions "handcuffed" the police, making it impossible to combat crime adequately.⁴³ In response to the increased protections the accused received, conservatives championed victims' rights in order to promote their "tough on crime" agenda and strengthen the hand of the prosecutor and police.⁴⁴

During the 1970s, emerging grassroots movements also promoted the role of the victim.⁴⁵ These groups included the women's movement, which focused on victims of domestic violence and sexual assault;⁴⁶ Mothers Against Drunk Driving (MADD); the civil rights movement; and those who advocated on behalf of children, consumers, homosexuals, and the elderly.⁴⁷ The grassroots groups sought to be a voice for victims who were often ignored or treated without sensitivity by prosecutors.⁴⁸ Although these groups had different motivations from the tough-on-crime conservatives, all of the groups had the same end goal: victim advocacy.

Albeit grounded in different ideological principles and located on opposite ends of the political spectrum, the conservatives and the grassroots groups saw the benefit of uniting given their convergence of interests; they came together to advance a policy agenda neither could have achieved alone.⁴⁹ Erin O'Hara, in discussing the confluence of these two groups—the grassroots movements and the conservatives—referred to them as the "Baptists and Bootleggers," respectively.⁵⁰ She explained that "[t]he 'Bootleggers' need[ed] a public interest face to make their reforms seem more popular, and the 'Baptists' need[ed] a group with a significant personal stake in the outcome to relentlessly finance or otherwise help to push through the legislation."⁵¹ Because of this unlikely alliance, the victims'

⁴¹ *Id.* at 19.

⁴² Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 943–44 (1985) [hereinafter Henderson, *Wrongs of Victim's Rights*].

⁴³ ELIAS, *supra* note 37, at 19; Henderson, *Wrongs of Victim's Rights*, *supra* note 42, at 946–47.

⁴⁴ Henderson, *Wrongs of Victim's Rights*, *supra* note 42, at 947–48.

⁴⁵ ELIAS, *supra* note 37, at 20.

⁴⁶ The women's movement of the 1970s was one of the pioneers of the victims' rights movement because of police and prosecutors' inadequate handling of rape and domestic violence cases. See Charles F. Baird & Elizabeth E. McGinn, *Re-Victimizing the Victim: How Prosecutorial and Judicial Discretion Are Being Exercised to Silence Victims Who Oppose Capital Punishment*, 15 STAN. L. & POL'Y REV. 447, 451–52 (2004).

⁴⁷ ELIAS, *supra* note 37, at 20; Henderson, *Wrongs of Victim's Rights*, *supra* note 42, at 948–50.

⁴⁸ Baird & McGinn, *supra* note 46, at 451.

⁴⁹ O'Hara, *supra* note 14, at 242.

⁵⁰ *Id.*

⁵¹ *Id.*

rights movement gained steam during the late 1970s, elevating to national prominence.⁵²

Victims' rights truly reached national importance when President Reagan established the President's Task Force on Victims of Crime in 1982.⁵³ The President's Task Force on Victims of Crime Final Report (Task Force Report), completed in December 1982, began by declaring that "[s]omething insidious has happened in America: crime has made victims of us all."⁵⁴ Couched in crime-fighting rhetoric, the Task Force Report laid out a series of legislative proposals to "address the needs of the millions of Americans and their families who are victimized by crime every year and who often carry its scars into the years to come."⁵⁵

Many of the proposals in the Task Force Report focused on allowing greater victim participation in the criminal justice process.⁵⁶ The proposals urged legislation that encouraged police and prosecutors to inform victims about the status of their cases.⁵⁷ The Task Force Report included a provision that prosecutors should have an obligation "to bring to the attention of the court the views of victims of violent crime on bail decisions, continuances, plea bargains, dismissals, sentencing, and restitution."⁵⁸ It also recommended that federal and state legislatures should require victim impact statements at sentencing.⁵⁹ Lastly, the Task Force Report suggested that parole authorities should notify victims of parole hearings and allow crime victims to "attend parole hearings and make known the effect of the offender's crime on them."⁶⁰

The Task Force also recommended amending the Constitution to address victims' concerns.⁶¹ The Task Force Report suggested amending the Sixth Amendment to include the following: "Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings."⁶² The Report urged the adoption of the Amendment because it claimed that "the criminal justice system has lost

⁵² Henderson, *Wrongs of Victim's Rights*, *supra* note 42, at 949–50.

⁵³ Baird & McGinn, *supra* note 46, at 452.

⁵⁴ PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME FINAL REPORT, at vi (1982), available at <http://www.ojp.gov/ovc/publications/presdntstskforcrprt/87299.pdf>.

⁵⁵ *Id.* at vii.

⁵⁶ Tobolowsky, *supra* note 16, at 30.

⁵⁷ PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME FINAL REPORT, *supra* note 54, at 57, 63.

⁵⁸ *Id.* at 63.

⁵⁹ *Id.* at 33.

⁶⁰ *Id.* at 83.

⁶¹ *Id.* at 114–15.

⁶² *Id.* at 114. The text of the Sixth Amendment reads as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

an essential balance . . . [because] the system has deprived the innocent, the honest, and the helpless of its protection.”⁶³

Following the publication of the Task Force Report, Congress began to pass a series of victims’ rights statutes.⁶⁴ First, it passed the Victim and Witness Protection Act of 1982 (VWPA),⁶⁵ which aimed “to strengthen existing legal protections for victims and witnesses of federal crimes and require the U.S. Attorney General to develop additional legislative proposals and guidelines toward this end.”⁶⁶ Through the VWPA, Congress afforded victims greater rights during criminal proceedings by (1) amending the Federal Rules of Criminal Procedure to require that the sentencing judge be given a victim impact statement prior to the sentencing decision, (2) requiring restitution for crimes involving loss of property or personal injury, (3) imposing civil liability for the federal government for any bodily injury caused by a dangerous person who escaped or was released from prison, and (4) requiring that the Attorney General create guidelines for the fair treatment of victims of crimes.⁶⁷ Although an important first step for victims’ rights advocates, it did not mandate victim participation in criminal proceedings aside from permitting victims to submit victim impact statements. Two years later, in 1984, Congress passed the Victims of Crime Act,⁶⁸ which created a Crime Victims Fund, the proceeds of which went to states to augment and enlarge victims’ services.⁶⁹ In 1990, Congress enacted the Victims’ Rights and Restitution Act,⁷⁰ also known as the “Victims’ Bill of Rights.”⁷¹ It was the most significant federal legislation addressing victims’ rights prior to the passage of the CVRA⁷² because it integrated victims into the criminal process: it granted victims statutory rights to be notified of and present at court proceedings, to confer with the prosecutor, and to be informed of the defendant’s conviction, sentencing, imprisonment, and release.⁷³ However, the Oklahoma City bombing in 1995 revealed the limits of the Victims’ Rights and Restitution Act because victims who provided victim impact testimony were denied the right to attend Timothy McVeigh’s trial with no means of appeal.⁷⁴ Responding to

⁶³ PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME FINAL REPORT, *supra* note 54, at 114.

⁶⁴ Baird & McGinn, *supra* note 46, at 453.

⁶⁵ Pub. L. No. 97-291, 96 Stat. 1248, S 2(b)(1) (codified at 18 U.S.C. §§ 1512–15 (1988), and 18 U.S.C. §§ 3579–80 (1982)). Pub. L. No. 98-473, S 212, 98 Stat. 1837, 1987 (1984), amended §§ 3579–80 and relocated the sections to 18 U.S.C. §§ 3663–64 (2006).

⁶⁶ S. REP. NO. 97-532, at 9 (1982).

⁶⁷ *Id.* at 9–10.

⁶⁸ 42 U.S.C. § 10601 (2006).

⁶⁹ Baird & McGinn, *supra* note 46, at 454.

⁷⁰ 42 U.S.C. § 10606, *repealed by* Pub. L. No. 108-405, tit. I, § 102(c), 118 Stat. 2264 (2004).

⁷¹ Baird & McGinn, *supra* note 46, at 454.

⁷² Aaronson, *supra* note 4, at 628.

⁷³ Baird & McGinn, *supra* note 46, at 454.

⁷⁴ Aaronson, *supra* note 4, at 629; Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure*, *supra* note 13, at 845–46. Professor Cassell also believes the Victims’ Rights and Restitu-

the public's reaction to the victims' exclusion from the Timothy McVeigh trial, beginning in 1996, members of Congress began to push for a constitutional amendment to protect victims' rights.⁷⁵

In 2003, victims' rights returned to the national stage as a result of the determination of Senators Jon Kyl and Dianne Feinstein. Through their efforts, the Senate Judiciary Committee considered a victims' rights amendment to the Constitution.⁷⁶ The amendment's sponsors never put it to a vote on the Senate floor because it was not likely to pass, but the mere fact that the Judiciary Committee approved the proposed amendment revealed the resurgence of the victims' rights movement.⁷⁷

C. *The Crime Victims' Rights Act of 2004*

Although the proposed constitutional amendment never made it to the Senate floor for a vote, the victims' rights movement achieved its largest victory just one year later with the passage of the Crime Victims' Rights Act (CVRA).⁷⁸ Senators Jon Kyl and Dianne Feinstein, having recognized that a constitutional amendment lacked the support of the necessary congressional supermajority, pushed instead for expansive legislation for victims' rights.⁷⁹ For the first time, Congress enacted legislation that explicitly required federal courts and prosecutors to allow victims to participate in all phases of a federal criminal proceeding.⁸⁰ The legislation moved the victim

tion Act fell short because of its location in the United States Code. *Id.* at 845. He argues that it was relatively unknown to most attorneys and judges because it was located in Title 42—the Title that addresses “The Public Health and Welfare”—whereas most criminal statutes are located in Title 18—the Title that covers “Crimes and Criminal Procedure.” *Id.*

⁷⁵ S. REP. NO. 108-191, at 3–6 (2003). These efforts continued throughout the 1990s, as described in detail throughout the Senate Report. *Id.* The purpose of the constitutional amendment was to “restore, preserve, and protect, as a matter of right for the victims of violent crimes, the practice of victim participation in the administration of criminal justice that was the birthright of every American at the founding of our Nation.” Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure*, *supra* note 13, at 848 (quoting S. REP. NO. 108-191, at 1–2).

⁷⁶ S. REP. NO. 108-191, at 1.

⁷⁷ Andrew Nash, Note, *Victims by Definition*, 85 WASH. U. L. REV. 1419, 1429 (2008).

⁷⁸ 18 U.S.C. § 3771 (2006).

⁷⁹ Cassell, *Treating Crime Victims Fairly*, *supra* note 1, at 869.

⁸⁰ The statute directly confers eight rights to crime victims. The statute reads as follows:

- (a) Rights of crime victims—A crime victim has the following rights:
- (1) The right to be reasonably protected from the accused.
 - (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
 - (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
 - (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
 - (5) The reasonable right to confer with the attorney for the Government in the case.
 - (6) The right to full and timely restitution as provided in law.
 - (7) The right to proceedings free from unreasonable delay.

from a passive observer at a proceeding to an active participant;⁸¹ victims' participatory rights under the CVRA included the right to be "reasonably heard" at all stages of the criminal case, from the initial appearance of the defendant to parole hearings.⁸² Specifically, the CVRA expanded victims' rights in two important areas: plea bargaining and sentencing. The Act gave victims the "right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding"⁸³ and the "reasonable right to confer with the attorney for the Government in the case."⁸⁴

The most dramatic aspect of the CVRA is its enforcement mechanism—the victim's ability to reopen a plea bargain or sentence through a writ of mandamus if she believes that the district judge or prosecutor denied her one of her rights under the statute.⁸⁵ The CVRA requires the district court to "take up and decide any motion asserting a victim's right."⁸⁶ The Act continues that "[i]f the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed."⁸⁷ No other victims' rights statute has given victims the ability to appeal a district court's decision regarding their participatory rights.⁸⁸

Although the CVRA significantly broadens victims' rights by granting victims standing, the statute also includes important limitations. First, the CVRA ensures that federal prosecutors can enforce the victims' rights, but that it shall not "be construed to impair [their] prosecutorial discretion."⁸⁹ Second, because a victim's right to participate must pass a test of reasonableness,⁹⁰ the CVRA implicitly provides for judicial discretion. In *In re W.R. Huff Asset Management Co.*, the Second Circuit explained that "[m]ost of the rights provided to crime victims under the CVRA require an assessment of 'reasonableness.' The district court is far better positioned to

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

18 U.S.C. §§ 3771(a)(1)–(8).

⁸¹ See *supra* notes 64–71. For example, the Victim and Witness Protection Act requires the judge to consider written victim impact statements, *supra* note 67 and accompanying text, whereas the CVRA arguably allows the victim to speak in open court during sentencing. 18 U.S.C. § 3771(a)(4).

⁸² 18 U.S.C. § 3771(a)(4).

⁸³ *Id.*

⁸⁴ *Id.* § 3771(a)(5).

⁸⁵ *Id.* §§ 3771(d)(1)–(3) (2006); see also Aaronson, *supra* note 4, at 626 (noting that the CVRA can be distinguished from other crime victims' legislation because it grants standing to victims to appeal violations of their rights).

⁸⁶ 18 U.S.C. § 3771(d)(3).

⁸⁷ *Id.*

⁸⁸ See Aaronson, *supra* note 4, at 626.

⁸⁹ 18 U.S.C. § 3771(d)(6). A prosecutor's decision not to assert a victim's right does not preclude a victim from independently doing so. However, a victim cannot force a prosecutor to enforce one of his rights; he must do so independently if the prosecutor refuses.

⁹⁰ See 18 U.S.C. § 3771(a)(4) ("the right to be *reasonably* heard") (emphasis added).

make these assessments and to determine what constitutes ‘a reasonable procedure’ for effecting these rights than a court of appeals.”⁹¹ Reading the CVRA in its entirety in conjunction with the Second Circuit’s discussion, the Act provides for judicial discretion.

The CVRA also augments the district judge’s discretion when there are multiple crime victims, such as in the Oklahoma City bombing.⁹² If the district judge determines that it is impracticable to permit all the victims to assert their substantive rights under the Act, the CVRA requires the judge to “fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.”⁹³

Because the CVRA’s limitations stem from prosecutorial and judicial discretion and its remedy relates to reopening a plea or a sentence through a mandamus petition, it is necessary to discuss the nature of prosecutorial and judicial discretion in plea bargaining and sentencing in federal criminal cases. The following two subsections discuss the nature of prosecutorial and judicial discretion in each context.

1. Prosecutorial and Judicial Discretion in Plea Bargaining.— Prosecutors have wide discretion over whether to prosecute and what charge to file.⁹⁴ This discretion is the source of their ability to plea bargain with defendants.⁹⁵ Not only must prosecutors exercise their discretion in a disinterested manner,⁹⁶ but their plea bargaining decisions must also be made in the way that best serves the public interest.⁹⁷

When a prosecutor presents a negotiated plea to the court, the district judge must decide if he is going to approve it before a plea of guilty is entered.⁹⁸ According to Federal Rule of Criminal Procedure 11, if the plea bargain is a charge bargain⁹⁹ the court must consider whether the plea is voluntary¹⁰⁰ and whether there is a factual basis for the plea.¹⁰¹

⁹¹ 409 F.3d 555, 563 (2d Cir. 2005) (citations omitted).

⁹² 18 U.S.C. § 3771(d)(2) (2006).

⁹³ *Id.*

⁹⁴ *See supra* Part I.A.

⁹⁵ *See supra* note 33 and accompanying text.

⁹⁶ *See* MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2008) (stating that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate”).

⁹⁷ Patricia Moran, Note, *Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of The Federal Rules of Criminal Procedure*, 54 FORDHAM L. REV. 1141, 1161 (1986) (stating that “plea and sentencing recommendations should result from an impartial evaluation of how best to serve the interests of the public”); *see also* Young v. United States *ex rel.* Vuitton et Fils, 481 U.S. 787, 804 (1987) (asserting that “[t]he prosecutor is appointed solely to pursue the public interest”); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980) (noting that prosecutors “must serve the public interest”).

⁹⁸ FED. R. CRIM. P. 11.

⁹⁹ A charge bargain occurs when the prosecutor allows a defendant to plead guilty to a lesser charge. WAYNE R. LEFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE 967 (4th ed. 2004). There are three basic types of plea bargains; two of which can be categorized as charge bargains. *Id.* The first type of charge bargain is when the prosecutor agrees to allow the defendant to plead guilty to a less serious charge. *Id.* The second type of charge bargain is when the prosecutor agrees to drop or

As discussed throughout this subsection, both the prosecutor and the judge exercise discretion in the plea bargaining process. However, the purpose of giving discretion to the judge is different from the rationale supporting prosecutorial discretion; the main purpose of the judge's discretion is to protect the defendant.¹⁰² Although Federal Rule of Criminal Procedure 48 does not address plea agreements, but rather dismissals of criminal complaints or indictments, a brief discussion of it is illustrative of the judge's role in accepting or rejecting a plea agreement. In discussing Rule 48, the Supreme Court stated in *Rinaldi v. United States*, “[t]he principal object of the ‘leave of court’ requirement [of Rule 48(a)] is apparently to protect a defendant against prosecutorial harassment, e.g., charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant’s objection.”¹⁰³ The *Rinaldi* Court held that trial courts did not have the power to refuse a dismissal of a charge unless it was to safeguard the defendant or was “clearly contrary to manifest public interest”¹⁰⁴—a high standard to meet.¹⁰⁵

Similar to dismissals, a prosecutor must have blatantly abused his discretion for a district judge to overrule the prosecuting attorney’s plea decision in the name of the public interest. At least one appellate court has directly compared Rule 48(a) to Rule 11 in measuring the extent of the trial judge’s discretion in evaluating a plea agreement.¹⁰⁶ Analogous to the *Rinaldi* Court’s reasoning in the Rule 48 context, the Court of Appeals for the District of Columbia in *United States v. Ammidown* determined that trial judges could reject a plea based on the public interest, but set the bar high for their ability to do so:

not file other charges when a defendant pleads guilty to one of the charges. *Id.* The third type of plea bargain, a sentencing bargain, is when the prosecutor promises to seek leniency in sentencing if the defendant pleads guilty to the original charge. *Id.* This Comment does not address sentence bargains because under the CVRA, a victim may only make a motion to reopen a plea if the accused has not pled to the highest offense charged. See 18 U.S.C. § 3771(d)(5)(C) (2006).

¹⁰⁰ FED. R. CRIM. P. 11(b)(2). The rule specifically states that “[b]efore accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).” *Id.*

¹⁰¹ FED. R. CRIM. P. 11(b)(3).

¹⁰² See FED. R. CRIM. P. 7(e); FED. R. CRIM. P. 11(b)(2)–(3); FED. R. CRIM. P. 48(a); see also Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 321, 327 (1987).

¹⁰³ 434 U.S. 22, 29 n.15 (1977) (per curiam).

¹⁰⁴ *Id.* at 30; see also *In re United States*, 345 F.3d 450, 453 (7th Cir. 2003). In the latter case, Judge Posner discussed in dicta that:

A judge could not properly refuse to enforce a statute because he thought the legislators were acting in bad faith or that the statute disserved the public interest; it is hard to see, therefore, how he could properly refuse to dismiss a prosecution merely because he was convinced that the prosecutor was acting in bad faith or contrary to the public interest.

Id.

¹⁰⁵ Almost every district court that has denied the request of a prosecutor who moves to drop a charge under Rule 48(a) as part of a plea has been reversed. *In re United States*, 345 F.3d at 453.

¹⁰⁶ See *United States v. Ammidown*, 497 F.2d 615, 618–23 (D.C. Cir. 1973).

[T]rial judges are not free to withhold approval of guilty pleas on [a public interest] basis merely because their conception of the public interest differs from that of the prosecuting attorney. The question is not what the judge would do if he were the prosecuting attorney, but whether he can say that the action of the prosecuting attorney is such a departure from sound prosecutorial principle as to mark it an abuse of prosecutorial discretion.¹⁰⁷

Therefore, although the *Ammidown* court acknowledged that a district judge may consider the public interest when determining whether to accept or reject a plea, it also concluded that ordinarily the “change in grading of an offense presents no question of the kind of action that is reserved for the judiciary.”¹⁰⁸

2. *Judicial Discretion in Sentencing.*—In *Gall v. United States*, the Supreme Court established the standard of review for appellate courts reviewing a district court’s sentencing decision.¹⁰⁹ The Court held that “courts of appeals must review all sentences—whether inside, just outside, or significantly outside the [Sentencing] Guidelines range—under a deferential abuse-of-discretion standard.”¹¹⁰ So long as the district judge provided written justification for his decision and made no procedural error,¹¹¹ the appellate court must review the reasonableness of the sentence based on an abuse of discretion standard.¹¹² An appellate court’s belief that a different sentence may have been more appropriate is insufficient to justify reversal of the district judge.¹¹³

The Sentencing Guidelines provide a policy statement regarding victims’ rights. The Guidelines state that, “[i]n any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in [the CVRA] and in any other provision of Federal law pertaining to the treatment of crime victims.”¹¹⁴ Because a policy statement is one of the factors a district judge should consider when fashioning a sentence,¹¹⁵ the judge should consider the requirements of the CVRA.

The Sentencing Guidelines similarly contain additional provisions that allow the sentencing judge to consider victims in other important ways

¹⁰⁷ *Id.* at 622.

¹⁰⁸ *Id.*; see also *United States v. Miller*, 722 F.2d 562, 565–66 (9th Cir. 1983) (holding that trial judges have very narrow discretion in rejecting charge bargains).

¹⁰⁹ 552 U.S. 38, 41 (2007).

¹¹⁰ *Id.*

¹¹¹ Examples of procedural errors include failing to calculate the applicable Guideline range, deciding a sentence on clearly mistaken facts, and neglecting to provide an explanation for his departure. *Id.* at 51.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ U.S. SENTENCING GUIDELINES MANUAL § 6A1.5 (2008).

¹¹⁵ There are seven factors a judge should consider when determining a sentence, a policy statement being one of them. 18 U.S.C. § 3553(a) (2006).

when calculating a sentence. These considerations include adjustments based on whether the victim was vulnerable,¹¹⁶ an official,¹¹⁷ or physically restrained by her assailant.¹¹⁸ The Sentencing Guidelines also address how a court should determine restitution for the victim.¹¹⁹

The Sentencing Guidelines, therefore, expressly provide for a judge's consideration of victims. Because the guidelines address specific issues pertaining to victims, a judge's consideration of victims' rights is part of his undertaking when fashioning a sentence. However, since *Gall*, the judge need only consider and evaluate these issues; he is not bound by them so long as he provides sufficient justification for his departure from the Guidelines' recommendation and makes an individualized assessment of the defendant. Consequently, although the Guidelines provide recommendations regarding victims, they are simply recommendations. The district judge is free to depart from them so long as he explains his decision.

II. THE CONFLICT SURROUNDING THE MEANING OF MANDAMUS

If a victim believes that the prosecutor or judge has denied his rights, he can file a motion for relief with the district court under the provisions of the CVRA.¹²⁰ District courts have granted victims'¹²¹ or the government's motions to assert the CVRA¹²² or moved sua sponte to ensure enforcement of the CVRA.¹²³ If the district court denies the victim's motion, the CVRA provides that the victim can petition the appellate court for a writ of mandamus to overturn the district court's decision.¹²⁴ Four circuits have confronted this exact situation, and they have all struggled to determine the proper standard of appellate review to apply to victims' mandamus petitions.¹²⁵ Given this conflict, it is necessary to outline the traditional standard and the interpretation each circuit has adopted.

Mandamus is a legal term of art in the common law tradition.¹²⁶ According to the Supreme Court in *Will v. United States*, the writ of manda-

¹¹⁶ U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (2008).

¹¹⁷ *Id.* § 3A1.2.

¹¹⁸ *Id.* § 3A1.3.

¹¹⁹ *Id.* § 5E1.1.

¹²⁰ 18 U.S.C. § 3771(d)(3) (2006).

¹²¹ *See, e.g.,* *United States v. Keifer*, No. 2:08-CR-162, 2009 WL 414472, at *4 (S.D. Ohio Feb. 18, 2009).

¹²² *See, e.g.,* *United States v. Johnson*, 362 F. Supp. 2d 1043, 1053–56 (N.D. Iowa 2005).

¹²³ *See, e.g.,* *United States v. Heaton*, 458 F. Supp. 2d 1271 (D. Utah 2006); *United States v. Turner*, 367 F. Supp. 2d 319, 320 (E.D.N.Y. 2005).

¹²⁴ 18 U.S.C. § 3771(d)(3).

¹²⁵ *See In re Dean*, 527 F.3d 391, 393–94 (5th Cir. 2008); *In re Antrobus*, 519 F.3d 1123, 1124–25 (10th Cir. 2008); *Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011, 1017 (9th Cir. 2006); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 561–62 (2d Cir. 2005). Although faced with the issue, the Sixth and the Fourth Circuits avoided addressing the proper standard. *See In re Simons*, 567 F.3d 800, 800–01 (6th Cir. 2009); *In re Brock*, 262 F. App'x 510, 511–12 (4th Cir. 2008).

¹²⁶ *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

mus “has traditionally been used in the federal courts only ‘to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.’”¹²⁷ Normally, the writ of mandamus is a “drastic and extraordinary”¹²⁸ remedy, and as such, it is only used in extreme cases.¹²⁹ Consequently, “only exceptional circumstances amounting to a judicial ‘usurpation of power’ will justify the invocation of this extraordinary remedy.”¹³⁰

Two courts of appeals, the Second Circuit in *In re W.R. Huff Asset Management Co.*,¹³¹ and the Ninth Circuit in *Kenna v. U.S. District Court*,¹³² determined that an appellate review standard not normally associated with mandamus—review for legal error or abuse of discretion—applies. Taking the contrary position, the Fifth Circuit in *In re Dean*,¹³³ and the Tenth Circuit in *In re Antrobus*,¹³⁴ concluded that the traditional mandamus standard applies.

The Second and the Ninth Circuits determined that because Congress chose “a petition for mandamus as a mechanism by which a crime victim may appeal . . . a petitioner seeking relief . . . need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus.”¹³⁵ Judge Kozinski, writing for the Ninth Circuit in *Kenna*, acknowledged that mandamus is typically only used in rare circumstances, but he reasoned that the court need not apply the traditional mandamus standard because “the CVRA contemplates active review of orders denying victims’ rights claims even in routine cases.”¹³⁶ The Ninth and the Second Circuits determined that appellate courts should review district court decisions for abuse of discretion.¹³⁷ Mandamus is traditionally an extraordinary remedy, but the Second and the Ninth Circuits relaxed the standard specifically for victims bringing mandamus petitions under the CVRA.

Disagreeing with their sister circuits, the Fifth and the Tenth Circuits determined that under the plain language of the statute, the ordinary mandamus standard should apply.¹³⁸ The Fifth Circuit accorded with the Tenth

¹²⁷ *Will v. United States*, 389 U.S. 90, 95 (1967) (quoting *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943)).

¹²⁸ *Ex parte Fahey*, 332 U.S. 258, 259 (1947); see also *Will*, 389 U.S. at 106–07.

¹²⁹ *Fahey*, 332 U.S. at 260.

¹³⁰ *Will*, 389 U.S. at 95 (quoting *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)).

¹³¹ 409 F.3d 555, 563 (2d Cir. 2005).

¹³² 435 F.3d 1011, 1017 (9th Cir. 2006).

¹³³ 527 F.3d 391, 394 (5th Cir. 2008).

¹³⁴ 519 F.3d 1123, 1124–25 (10th Cir. 2008).

¹³⁵ *In re W.R. Huff*, 409 F.3d at 562; accord *Kenna*, 435 F.3d at 1017.

¹³⁶ 435 F.3d at 1017. It is unclear from the opinion why Judge Kozinski believed that the CVRA contemplated such a regime.

¹³⁷ *Id.*; *In re W.R. Huff*, 409 F.3d at 563.

¹³⁸ *In re Dean*, 527 F.3d at 394; *In re Antrobus*, 519 F.3d at 1124–25.

Circuit, which, quoting the landmark Supreme Court case *Morrisette v. United States*,¹³⁹ reasoned that mandamus is a legal term of art and therefore courts should apply the standard associated with it:

[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.¹⁴⁰

Both circuits reasoned that “mandamus is a well worn term of art in our common law tradition,” and therefore Congress intended that victims petitioning an appellate court should be subject to the strict mandamus standard.¹⁴¹ The Tenth Circuit determined that Congress knew the implications of the term mandamus and could have used “immediate appellate review” or “interlocutory appellate review” if it intended for that to be the standard.¹⁴² The circuits decided that the victims did not meet the high standard of mandamus because the Fifth Circuit found the right to the writ was “not appropriate under the circumstances”¹⁴³ and the Tenth Circuit found the right to the writ was not “clear and indisputable.”¹⁴⁴ In other words, the Fifth and the Tenth Circuits determined that the district courts’ decisions to deny the victims’ petitions were not extraordinary circumstances and the courts did not usurp their powers.

III. THE LIMITS OF VICTIMS’ RIGHTS

The Fifth and the Tenth Circuits based their decisions to use the traditional mandamus standard on statutory interpretation. Although this Comment agrees with the ultimate result, it argues that a substantive rationale also supports applying the traditional mandamus standard. As outlined in Part I.A, the Constitution vests the Executive Branch with wide prosecutorial discretion, and it provides for extensive protections for the criminal defendant.¹⁴⁵ The American model of public prosecution attempts to balance those two competing interests. When courts review victims’ petitions under normal appellate standards, they run the risk of elevating victims—private individuals—to a status equal to or greater than that of the parties.¹⁴⁶

¹³⁹ 342 U.S. 246 (1952).

¹⁴⁰ *In re Antrobus*, 519 F.3d at 1127–28 (quoting *Morrisette*, 342 U.S. at 263) (alteration in original); accord *In re Dean*, 527 F.3d at 394 (stating that it is in “accord with the Tenth Circuit for the reasons stated in its opinion”).

¹⁴¹ *In re Dean*, 527 F.3d at 394; *In re Antrobus*, 519 F.3d at 1127.

¹⁴² *In re Antrobus*, 519 F.3d at 1124.

¹⁴³ *In re Dean*, 527 F.3d at 394 (the court declined to address whether the petitioner’s right to the writ was “clear and indisputable” because it found the “writ of mandamus [was] not ‘appropriate under the circumstances’”).

¹⁴⁴ *In re Antrobus*, 519 F.3d at 1125–26.

¹⁴⁵ See *supra* Part I.A.

¹⁴⁶ See *infra* Parts III.A–B.

This shifting of status can create significant dangers; most notably, it can conflict with prosecutors' ethical duty to the accused, threaten the effective handling of a case, and elevate retribution over deterrence and rehabilitation. To protect against these dangers and ensure that the public prosecution model remains intact, appellate courts should apply the traditional mandamus standard, which affords appropriate discretion to prosecutors and district judges. In order to show the substantive problems with applying a lesser standard of review, this Comment discusses two contexts, plea bargaining and sentencing.¹⁴⁷ It examines the consequences of the lower standard in *In re Dean*¹⁴⁸ and *Kenna v. U.S. District Court*.¹⁴⁹

A. Plea Bargaining and *In re Dean*

Founded on the principle of prosecutorial discretion, a trial judge's discretion to reject a charge plea is very limited.¹⁵⁰ Yet when appellate courts apply a traditional appellate review standard such as review for abuse of discretion rather than the higher mandamus standard, they essentially give the victim a greater ability to challenge the prosecutor's discretionary choices than the trial judge herself. This Comment does not suggest that victims should not be able to voice their views to prosecutors in the course of plea bargaining, but merely that district judges should rarely reopen a plea simply based on the victim's desire to do so. Judges should respect the prosecutor's discretion and obligation to both the defendant and society at large. To that end, a victim's claim that the district judge wrongfully denied her rights should be construed narrowly—through the use of the traditional mandamus standard.

Part and parcel of prosecutorial discretion is the prosecutor's duty "to seek justice, not merely to convict."¹⁵¹ Ideally, a prosecutor pursues justice not only for the victims in an individual case,¹⁵² but also for the public and

¹⁴⁷ This Comment looks at plea bargaining and sentencing because they are the two decisions which the victim can attempt to reopen if he believes that his rights under the CVRA have been infringed. 18 U. S. C. § 3771(d)(5) (2006).

¹⁴⁸ 527 F.3d 391 (5th Cir. 2008).

¹⁴⁹ 435 F.3d 1011 (9th Cir. 2006).

¹⁵⁰ See *supra* Part I.C.1.

¹⁵¹ *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 803 (1987) (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1982)).

¹⁵² This Comment does not argue that plea bargaining as it exists today meets the ideal that federal prosecutors always or even often attain justice. The merits and problems of plea bargaining are outside the scope of this Comment. For a discussion of the problems with plea bargaining, see Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 652 (1981), which argues that "plea bargaining remains an inherently unfair and irrational process," and Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992), which calls for the abolishment of plea bargaining because it permits innocent defendants to bargain away their rights. For a discussion supporting plea bargaining, see Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992) ("Black markets are better than no markets. Plea bargains are preferable to mandatory litigation—not because the analogy to contract is overpowering, but because compromise is better than conflict.").

the defendant.¹⁵³ Treating the victim's concerns as paramount elevates the private individual above the public—the very opposite of what our criminal justice system seeks to achieve. Washington Supreme Court Justice James M. Dolliver summed up this concept aptly: “[E]mphasizing the conflict between the victim and the accused and placing the victim in the role of a quasi-prosecutor or co-counsel . . . represents a dangerous return to the private blood feud mentality.”¹⁵⁴

Justice Dolliver's concern has significant immediate consequences: expansive victims' rights may potentially conflict with the Supreme Court's delineation of the prosecutor's duties in *Young v. United States ex rel. Vuitton et Fils*¹⁵⁵ and the prosecutor's ethical obligations to the accused as set forth in the *Model Rules of Professional Conduct*.¹⁵⁶ The Supreme Court asserted that a prosecutor represents “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”¹⁵⁷ The *Model Rules of Professional Conduct* also impose special rules for prosecutors, many of which embrace the Court's vision of a prosecutor in *Young* and provide for specific protections for the defendant.¹⁵⁸ If prosecutors are in essence called to advocate on behalf of the victim, they may jeopardize their ethical obligation to the defendant and the public at large.¹⁵⁹ The prosecutor is less likely to act in an objective fashion if he is guided by a private party such as a victim.¹⁶⁰

Despite these ethical concerns, victims' advocates call for more expansive participatory rights in the plea bargaining process because victims' in-

¹⁵³ See *supra* Part I.A.

¹⁵⁴ King, *supra* note 14, at 394 (quoting James M. Dolliver, *Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come*, 34 WAYNE L. REV. 87, 90 (1987)).

¹⁵⁵ 481 U.S. 787 (1987). At issue in *Young* was the constitutionality of whether a party could hire a private prosecutor to prosecute criminal contempt. *Id.* at 790. The Court held that private parties cannot undertake contempt prosecutions for alleged violations of a court order. *Id.* at 790. One commentator has argued that the decision in *Young* boils down to a basic proposition: “prosecutions by private ‘interested’ parties rather than by the State or a ‘disinterested’ prosecutor are unjust or unfair per se.” Joan Meier, *The “Right” to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85, 95 (1992).

¹⁵⁶ See MODEL RULES OF PROF'L CONDUCT R. 3.8 (2008). Rule 3.8 requires that prosecutors take certain actions to ensure the procedural and substantive rights of defendants. See *id.*; see also Aaronson, *supra* note 4, at 675–81 (discussing the potential conflict of interest between the CVRA and the prosecutor's duties).

¹⁵⁷ *Young*, 481 U.S. at 803 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

¹⁵⁸ MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2008). The comment explains that the “prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.” *Id.*

¹⁵⁹ See MODEL RULES OF PROF'L CONDUCT R. 3.8 (2008); see also King, *supra* note 14, at 393–94; Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237, 262–63 (2008).

¹⁶⁰ John A.J. Ward, Note, *Private Prosecution—The Entrenched Anomaly*, 50 N.C. L. REV. 1171, 1175 (1972).

terests may diverge from those of the prosecutor.¹⁶¹ Some commentators view the scope of the “interests of the state” as exaggerated; they claim that the interests of the state are quite narrow and really only include the immediate needs of the prosecutor’s office.¹⁶² Victims are, however, only one of the prosecutor’s considerations in serving the public interest, and “a powerful and meaningful criminal justice system requires public enforcement rather than private vindication.”¹⁶³ As Professor Stephen Schulhofer explains:

Why should a person who would be instantly disqualified from serving on the defendant’s jury be granted a veto over the terms of a disposition by plea? If the plea bargaining system is to be retained at all, why should victims have control over decisions that we want to further public, not private, purposes?¹⁶⁴

Prosecutors should consider victims’ concerns, but they must take other factors into account in making decisions.¹⁶⁵ Prosecutors have limited resources; they have the best understanding of the government’s financial means and the number of cases they are able to prosecute.¹⁶⁶ Even if prosecutors had unlimited funds to prosecute cases, maximum criminal enforcement does not always go hand in hand with sound policy.¹⁶⁷ First, prosecutors must consider the equal administration of justice among similarly situated defendants.¹⁶⁸ Second, prosecution of one case can undercut the successful prosecution of another, possibly more extensive criminal action.¹⁶⁹ Third, prosecutors might plea bargain with one defendant if he cooperates as a means to convict a more significant or dangerous criminal.¹⁷⁰

The Fifth Circuit case *In re Dean*¹⁷¹ exemplifies the normative desirability of a high standard of review. The Fifth Circuit decided to use the traditional mandamus standard, not for policy reasons, but based on statutory interpretation.¹⁷² Because of the high standard for granting a writ of man-

¹⁶¹ See, e.g., Baird & McGinn, *supra* note 46, at 449.

¹⁶² See, e.g., GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS’ RIGHTS IN CRIMINAL TRIALS 192–93 (1995).

¹⁶³ Meier, *supra* note 155, at 118.

¹⁶⁴ Stephen J. Schulhofer, *The Trouble with Trials; The Trouble with Us*, 105 YALE L.J. 825, 847 (1995) (reviewing GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS’ RIGHTS IN CRIMINAL TRIALS (1995)); see also Lynne Henderson, *Whose Justice? Which Victims?*, 94 MICH. L. REV. 1596, 1607 (1996) [hereinafter Henderson, *Whose Justice*] (reviewing FLETCHER, *supra*) (arguing that a victim veto “over plea bargains places the state’s penal resources in the hands of individuals, again making criminal convictions more a matter of private, rather than public, law”).

¹⁶⁵ See Aaronson, *supra* note 4, at 676–77.

¹⁶⁶ United States v. Ammidown, 497 F.2d 615, 621 (D.C. Cir. 1973).

¹⁶⁷ See Aaronson, *supra* note 4, at 676–77.

¹⁶⁸ *Id.*

¹⁶⁹ See Ammidown, 497 F.2d at 621.

¹⁷⁰ See STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 1032 (8th ed. 2007).

¹⁷¹ 527 F.3d 391 (5th Cir. 2008).

¹⁷² See *id.* at 394.

damus, the appellate court affirmed the district court. If the Fifth Circuit had used an abuse of discretion standard, it likely would have reversed.¹⁷³

In *In re Dean*, an explosion occurred at BP Products's oil refinery, killing fifteen people and injuring more than 170.¹⁷⁴ The government told the court in an ex parte proceeding that it was going to sign a plea agreement with the defendant, and asserted that due to the number of victims, it would not be practicable to consult with them.¹⁷⁵ The government argued that notifying the victims would result in extensive media coverage, which would impair the plea negotiation process and possibly prejudice the case if no plea was reached.¹⁷⁶ The district court agreed with the government's argument, and it directed the government to notify all the victims after the plea agreement had been finalized.¹⁷⁷

Some of the victims objected to the plea agreement for three reasons: "the fine was too low; the probation conditions were too lenient; and certain CVRA requirements had been violated."¹⁷⁸ The victims argued to the district court that "if there was a choice between protecting the rights of the crime victims or the rights of BP Products, the CVRA required the government to side with the victims."¹⁷⁹ The district court disagreed with the victims and denied their request to have the court reject the plea agreement.¹⁸⁰ It held that the prosecution's need for confidential negotiations and its concern with the defendant's right to a fair trial were overriding considerations.¹⁸¹ The court noted that the victims were involved in the entire process, but there were limits to their rights because of the prosecution's countervailing obligations.¹⁸² Consequently, the victims petitioned the Fifth Circuit to issue a writ of mandamus to reopen the plea agreement.¹⁸³

The Fifth Circuit agreed with the Tenth Circuit that the traditional standard of review for mandamus petitions was proper.¹⁸⁴ Without much explanation, the court determined that the victims did not satisfy the traditional high standard because for "prudential reasons," the writ was "not appropriate under the circumstances."¹⁸⁵ However, unlike the Tenth Circuit, the Fifth Circuit included extensive dicta in its opinion. It believed that the

¹⁷³ *Id.* at 394–96.

¹⁷⁴ *Id.* at 392.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *In re Dean*, 527 F.3d at 393.

¹⁷⁸ *Id.*

¹⁷⁹ United States v. B.P. Prods. N. Am., Inc., No. H-07-434, 2008 WL 501321, at *17 (S.D. Tex. Feb. 21, 2008).

¹⁸⁰ *Id.* at *22.

¹⁸¹ *Id.* at *19.

¹⁸² *Id.* ("The court order ensured full notice under the CVRA and a full opportunity to communicate information and views before and during the entry of the plea.")

¹⁸³ See *In re Dean*, 527 F.3d at 392.

¹⁸⁴ *Id.* at 394.

¹⁸⁵ *Id.* (internal quotation marks omitted).

district court did not act in accordance with the CVRA because it allowed the government to use an ex parte proceeding and to file a very brief ex parte motion without notifying the victims for three months.¹⁸⁶ The Fifth Circuit rejected two central justifications for the district court's ex parte order. First, it did not think that 185 victims were too many to impose a tremendous burden on the government.¹⁸⁷ Second, it believed that the district court erred under the CVRA in its decision to allow the government not to confer with the victims because of potential prejudice to the defendant.¹⁸⁸ The appellate court did not agree that forcing the government to confer with the victims infringed upon prosecutorial discretion.¹⁸⁹

The Fifth Circuit's dicta reveal that if it had used an abuse of discretion standard, the court likely would have reached the opposite result on the merits. This decision would cause serious ethical problems, and it would have severely undermined both prosecutorial and judicial discretion. In terms of ethical concerns, the *Model Rules of Professional Conduct* explicitly state that prosecutors shall "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."¹⁹⁰ The prosecutor in this case did not notify the victims for that very reason: he believed that notifying the victims would create extensive media attention which could prejudice the trial if no plea were reached.¹⁹¹ The prosecutor did not ignore the victims; he made a choice based on all the competing issues in the case. Similarly, the district judge did not ignore the victims either; he merely decided that in the interest of justice, the victims' participation should be limited.

B. Sentencing and Kenna

As in the case of plea bargaining, appellate courts reviewing victims' petitions for writs of mandamus to reopen a sentence should apply the strict mandamus standard. Two general principles support this argument. First, victims should not have the same rights as parties to the proceeding. Second, sentencing involves considering a multitude of factors beyond the interests or preferences of the victim. This Comment addresses each of these principles in turn.

First, if the U.S. government or the defendant appeals a district court's sentence, under *Gall*, the judge's determination is reviewed for an abuse of

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 394–95.

¹⁸⁸ *Id.* at 395.

¹⁸⁹ *In re Dean*, 527 F.3d at 395.

¹⁹⁰ MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (2008). Although the prosecutor would never have spoken directly with the media in this case, notifying the victims would have arguably had the same effect because it was likely they would have spoken to the press. *United States v. B.P. Prods. N. Am., Inc.*, No. H-07-434, 2008 WL 501321, at *7 (S.D. Tex. Feb. 21, 2008).

¹⁹¹ *In re Dean*, 527 F.3d at 392.

discretion.¹⁹² Given that victims are not parties to the proceeding, victims should not have the same or more rights than the parties do. While a district court judge must allow victims to be *reasonably* heard in order to comply with the CVRA, the reviewing court should not grant the victims' mandamus petitions because it disagrees with the trial court's decision to reasonably limit the victims' participation during sentencing. To do so would be the equivalent of applying a *de novo* standard of review. For example, if there were multiple crime victims and the judge provided reasonable justification for her decision not to grant the victims their full rights under the CVRA, she acted within the bounds of her discretion. The CVRA explicitly allows for a judge to "fashion a reasonable procedure" to give effect to the substantive provisions of the Act.¹⁹³ Even under the abuse of discretion standard, an appellate court's finding that it would have acted differently should not be grounds for reversal. To do so would in essence give victims a greater ability to reopen a sentence than the defendant or prosecution. Consequently, an appellate court should only grant the petition for mandamus if the district judge ignored the procedural requirements of the CVRA without explanation.

Second, judges consider a variety of factors, including the victims' interests, when sentencing a defendant. The victims' desired sentence should not necessarily affect the judge's sentencing analysis.¹⁹⁴ Therefore, while the CVRA mandates that judges listen to victims, it in no way dictates that judges must agree with their sentencing preferences. Although the CVRA grants victims only procedural rights during sentencing, the traditional mandamus standard ensures that district judges do not feel pressured to comply with victims' sentencing desires out of fear of reversal on procedural grounds. While the abuse of discretion standard is deferential, the heightened mandamus standard provides greater insulation to the trial judge by preventing appellate review in routine cases.

Important policy considerations support this argument. Victims tend to advocate for longer sentences,¹⁹⁵ and although they have valid concerns, judges must take the other factors discussed in *Gall* into account.¹⁹⁶ In our system of public prosecution, there are multiple goals of criminal justice, including deterrence, incapacitation, rehabilitation, and retribution.¹⁹⁷ Vic-

¹⁹² *Gall v. United States*, 552 U.S. 38, 41 (2007); see also *supra* Part I.C.2.

¹⁹³ As discussed *supra* Part I.C, the CVRA provides that when "the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights [afforded by the Act], the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings." 18 U.S.C. § 3771(d)(2) (2006).

¹⁹⁴ See *United States v. Hughes*, 283 F. App'x 345, 354 n.7 (6th Cir. 2008) (questioning "why the particular desires of this victim should affect the legal analysis necessary for sentencing [the defendant]").

¹⁹⁵ See Aaronson, *supra* note 4, at 676; see also Barkow, *supra* note 33, at 1030.

¹⁹⁶ 552 U.S. at 50 n.6. Examples of factors include deterrence and rehabilitation.

¹⁹⁷ For a compelling argument that the victim does not aid the sentencing judge in considering the first three factors, see Henderson, *Wrongs of Victim's Rights*, *supra* note 42, at 987–90.

tims tend to focus only on the retributive aspects of punishment,¹⁹⁸ whereas judges are charged with considering them all.¹⁹⁹

The Ninth Circuit case, *Kenna v. U.S. District Court*, exemplifies why appellate courts should maintain the traditional mandamus standard when reviewing victims' petitions, as well as the danger of ordinary appellate review.²⁰⁰ In *Kenna*, the two defendants defrauded millions of dollars from multiple victims.²⁰¹ Each defendant pleaded guilty, and more than sixty of the victims submitted victim impact statements.²⁰² At the first defendant's sentencing, several of the victims spoke about the effects of the crime on their lives.²⁰³ At the second defendant's sentencing, the district judge refused to hear the victims speak in person because he claimed that he heard them at the other defendant's sentencing and re-reviewed all their statements.²⁰⁴ Because the district court refused to hear the victims speak at the second defendant's sentencing, *Kenna*, one of the victims, petitioned the Ninth Circuit for a writ of mandamus to reopen the sentence.²⁰⁵

The disagreement between *Kenna* and the district court was over the meaning of "the right to be reasonably heard."²⁰⁶ The district court contended the scope of the right lay within the district court's discretion; *Kenna* argued it meant he was entitled to speak in open court.²⁰⁷ Judge Kozinski interpreted the CVRA's right to be "reasonably heard" as the victims' right to speak in open court.²⁰⁸

Judge Kozinski determined that because "the CVRA creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute," ordinary mandamus standards did not apply.²⁰⁹ The Ninth Circuit concluded that the district court committed an error of law in refusing to allow the victim to speak at the second defendant's sentencing.²¹⁰ In reaching this decision, the

¹⁹⁸ *See id.* at 994, 996.

¹⁹⁹ *Gall*, 552 U.S. at 50 n.6 (discussing the various factors judges consider in sentencing).

²⁰⁰ 435 F.3d 1011 (9th Cir. 2006). Judge Friedman's concurrence in *Kenna* voiced similar fears regarding the "seemingly broad sweep of the opinion" because of the expansiveness of "the mandamus writ the court issue[d]." *Id.* at 1018–19 (Friedman, J., concurring). The concurrence essentially argued that victims should not have an absolute right to speak at a sentencing and that the district judge should have some discretion in determining which victims can speak. *Id.*

²⁰¹ *Id.* at 1012.

²⁰² *Id.* at 1013.

²⁰³ *Id.*

²⁰⁴ *Id.* The first defendant received a sentence of 240 months, whereas the second defendant received a sentence of 135 months. *Id.*

²⁰⁵ *Kenna*, 435 F.3d at 1013.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1016.

²⁰⁹ *Id.* at 1017.

²¹⁰ *Id.*

Ninth Circuit reviewed the district judge's decision for abuse of discretion, establishing routine appellate review for victims.²¹¹

The problem with Judge Kozinski's opinion is twofold. First, holding that appellate courts should review victims' mandamus petitions for abuse of discretion essentially gives victims the same rights as the defendant or the prosecution with respect to appealing a sentence. The Supreme Court held in *Gall* that if a defendant or the prosecution appeals, the appellate court reviews the sentence for abuse of discretion.²¹² It would be one thing if the district judge did not even consider the victims, but in *Kenna*, that was not the case. Given the number of victims, the judge acted well within his discretion under the CVRA in deciding how best to afford victims their rights.²¹³

The second problem with Judge Kozinski's opinion is that it runs counter to the Supreme Court's reasoning in *Gall*. So long as the district court judge addressed and considered the relevant sentencing considerations, his sentencing decision should be presumed to be reasonable. Here, the judge was within his bounds because the CVRA allows a judge to use her discretion by permitting her to "fashion a reasonable procedure" in cases with multiple victims.²¹⁴ Under *Gall*, if the defendant or the prosecution had appealed, the question would not be whether the Ninth Circuit disagreed with the district judge's decision, but rather whether the judge provided reasonable justification for the sentence. In essence, the *Kenna* court did that which *Gall* forbids: it substituted its judgment for that of the district court.²¹⁵

In re Dean and *Kenna* demonstrate the significance of the standard of review for mandamus petitions: a higher standard affords the district court judge far greater discretion to balance the rights of the defendant, the rights of the victim, and the interests of society. A lower standard of review creates a system that allows private interests to trump public concerns. In both *In re Dean* and *Kenna*, the district court judge justified his decision to limit the victims' participatory rights. Each appellate court disagreed with the district court judge's determination. However, only the Ninth Circuit reversed the district court by applying a lower standard of review. In doing so, it effectively gave private individuals, the victims, the same ability to

²¹¹ *Kenna*, 435 F.3d at 1017.

²¹² *Gall v. United States*, 552 U.S. 38, 56 (2007).

²¹³ See 18 U.S.C. § 3771(d)(2) (2006) (providing that "where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure").

²¹⁴ *Id.*

²¹⁵ The Ninth Circuit could not directly vacate the defendant's sentence due to constitutional due process considerations because the defendant was not given the opportunity to respond. See *Kenna*, 435 F.3d at 1017. However, the court allowed the victim to file a motion with the district court to reopen the sentence to give the defendant an ability to be heard. *Id.* If the district court refused to reopen the sentence, the victim would have the ability to re-petition the appellate court. *Id.* at 1018.

win an appeal of a sentence than the two parties in the case—the defendant and the state. Likewise, if the Fifth Circuit had applied a lower standard of review and granted the victims’ petition, the decision would have infringed upon the defendant’s procedural rights and the prosecutor’s discretion and ethical obligations.

Victims’ advocates may object that adhering to the traditional mandamus standard would turn the CVRA into mere rhetoric.²¹⁶ As a result, they argue for more stringent appellate review to ensure the enforcement of the CVRA.²¹⁷ Advocates claim that only nondiscretionary appellate review will ensure that victims are afforded their rights under the CVRA.²¹⁸ Accordingly, applying the traditional mandamus standard would leave victims “to the mercy of the very trial court that may have erred” because victims would have little recourse if they believed their rights were denied.²¹⁹ They argue that in order to give meaning and substance to the CVRA, routine appellate review is necessary.²²⁰

Although it is true that the high standard provides prosecutors and judges with greater discretion to determine how to afford victims their rights under the CVRA, it would not eviscerate the Act. Even under a high standard of review, neither prosecutors nor district judges would be free to ignore the requirements of the CVRA. However, they would have the necessary flexibility to appropriately balance victims’ concerns with other important considerations. Using the traditional mandamus standard ensures that the system of public prosecution remains intact without subverting congressional intent. As the Tenth Circuit stated, “mandamus is a well worn term of art in our common law tradition,”²²¹ and when Congress borrows a legal term of art, “it presumably knows and adopts the cluster of ideas that were attached to each borrowed word.”²²² Therefore, the substantive justifications for the traditional standard—protection of the defendant and respect for prosecutorial and judicial discretion—coincide with the text of the CVRA.

²¹⁶ See, e.g., Steven Joffe, Note, *Validating Victims: Enforcing Victims’ Rights Through Mandatory Mandamus*, 2009 UTAH L. REV. 241, 253.

²¹⁷ See generally *id.* (detailing the evolution of the goals of the victims’ rights movement and arguing that proper construction of the CVRA requires nondiscretionary appellate review through mandamus).

²¹⁸ *Id.* at 253–54.

²¹⁹ *Id.* at 254 (quoting 150 CONG. REC. S10,912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl)).

²²⁰ See, e.g., Jon Kyl, Steven J. Twist & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9 LEWIS & CLARK L. REV. 581, 619–20 (2005).

²²¹ *In re Antrobus*, 519 F.3d 1123, 1127 (10th Cir. 2008).

²²² *Id.* at 1127–28 (quoting *Morrisette v. United States*, 342 U.S. 246, 263 (1952)).

CONCLUSION

Victims' rights advocates have been successful at securing victims formal participatory rights throughout each phase of a criminal proceeding. That success reached its height with the passage of the CVRA. The CVRA gives victims the ability to assert their rights in the district court and petition the appellate court for a writ of mandamus to review any denial of those rights.

Despite victims' ability to assert their rights formally during a criminal proceeding, the legislation can and should be interpreted to maintain our system of public prosecution. By using the traditional standard for mandamus petitions, the goals of the CVRA can still be met. Prosecutors and judges will have to consider victims' interests because they know that if they ignore them to an unacceptable extent, victims have a means to remedy any violation of the CVRA. However, prosecutors and judges should be able to maintain their independence and discretion; their professional judgment should not be overruled because an appellate judge may have acted differently. Only flagrant abuses of the law warrant a grant of a mandamus petition.

As this Comment has shown, prosecutorial and judicial discretion are fundamental to a system of public prosecution. Whether it is a plea agreement or a sentence, both prosecutors and judges must take a variety of factors into consideration. Those factors include the interests of the victim, but they also include the rights of the defendant and society as a whole. Victims deserve to be treated respectfully and integrated into the criminal process; however, forcing prosecutors and judges to elevate victims over the defendant and the public may threaten the fair and just adjudication of a criminal case.

Despite worrisome repercussions related to the proliferation of victims' rights, the victims' rights movement has tremendous political support. It is appealing to both conservatives who want to be tough on crime and liberals who want to give a voice to those in need of an advocate. However, when assessing victims' rights, we must remember Justice Holmes's prescient concern: "immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."²²³ Victims' rights, while clearly a valid concern, represent this hydraulic pressure. We must take heed of Justice Holmes's words and remember our criminal justice system is one of public wrongs, not private rights.

²²³ *N. Sec. Co. v. United States*, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting).

