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Stepping into the Gap: Violent Crime Victims, the Right to Closure, and a Discursive Shift Away from Zero Sum Resolutions

Blanche Bong Cook[1]

INTRODUCTION

When she was just twelve years old, the Somali Outlaws and the Somali Mafia started sex trafficking Jane Doe Two (JD2).[2] This continued, intermittently, for four years.[3] When JD2 was sixteen, the federal government initiated a prosecution against thirty Somali Outlaw and Somali Mafia members for sex trafficking.[4] The trial court severed the case into six different trials.[5] When JD2 was eighteen, the first of the six trials

1 Assistant United States Attorney. B.A. Vassar College. J.D. University of Michigan School of Law. The views expressed herein do not represent the views of the United States Department of Justice or the United States Attorney's Office for the Middle District of Tennessee. Some of the cases discussed within are cases I actually prosecuted. I would like to thank Beverly Moran, Melynda Price, Darryl Stewart, and Juan Floyd-Thomas for their helpful comments on previous drafts. I am extremely grateful to Mary Katherine Parrott , Molly Smith, and the other editors at the Kentucky Law Journal for their tremendous dedication and hard work. All errors are, of course, my own. I am also grateful to the Honorable Damon J. Keith, Judge for the United States Sixth Circuit Court of Appeals and long-time advocate for justice. Thank you Judge for over a half-century of inspiration.

This article originally started as a motion to assert the victims' rights to finality in the Somali Sex Trafficking Case. In that case, the district court severed the case into six different trials, resulting in prolonged litigation. Having authored the brief in United States v. Young, 657 F.3d 408 (6th Cir. 2011), I was very familiar with Speedy Trial jurisprudence, particularly the viability of Barker v. Wingo to balance litigant interests and expeditious prosecutions. During the course of researching the originally intended victims' motion, I realized that the field was ripe for scholarship, as well as activism, involving points of compromise and discourse between victims' rights and established jurisprudence. Specifically, established case law involving speedy trials is well suited to also vindicate the interest of victims' in finality. I invite readers to use this article as activism, meaning to challenge the denial of victims' rights to finality in active litigation.

2 Third Superseding Indictment at 5, United States v. Adan, No: 3:10-00260 (M.D. Tenn. Aug. 22, 2012), ECF No. 2701; Allie Shah, *3 Twin Cities Somalis Guilty of Sex Trafficking*, STAR TRIB., May 5, 2012, at 1B.

3 Shah, *supra* note 2.

4 Indictment, *Adan*, No. 3:10-00260 (M.D. Tenn. Oct. 20, 2010), ECF No. 3.

5 Motion for Severance, *Adan*, 3:10-00260 (M.D. Tenn. Feb. 8, 2012), ECF No. 1349;

began.[6] During trial, JD2 remained on the witness stand for an entire week. As part of her extensive testimony, she provided details of being bought and sold sexually within the Somali Outlaws and Somali Mafia and outside for as little as $40 and for as many as twenty times in a single day.[7] By the time all of the trials are completed, and JD2 no longer has to testify, she will have endured the agony of direct examination and cross examination for months, retelling the sordid details of being sexually commodified. She will also be in her mid-twenties and finished with college.

The Somali Sex Trafficking Case[8] raises numerous questions about a victim's right to finality, closure, and a speedy resolution. How long is too long for victims, particularly victims of violent crimes and sexual abuse, to wait before they receive closure? Does delay in criminal proceedings result in material prejudice to victims? What does that prejudice look like? What forms does it take? Should victims receive redress for delays? What recourse do victims have with respect to their interests in finality? Can victims assert an interest in a speedy disposition without upsetting the defendant's constitutionally protected rights and the government's need to vindicate the public? Do victims have equal standing with defendants? Should they? Should defendants be allowed to delay the trial in an effort to exhaust the victim?

After decades of being ignored, silenced, and marginalized, crime victims politically mobilized and pressured Congress to pass the 2004 Crime Victims' Rights Act (the "CVRA").[9] In order to comprehend the CVRA, as well as its struggles, problems, and possible solutions, it is imperative to contextualize the CVRA in its proper historical dimensions and political context. It is, in fact, a political compromise between victims' rights advocates and their opposition. It came of age during the civil rights movement as well as its backlash.[10] The CVRA, therefore, has an odd political

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Order, *Adan*, No. 3:10-00260 (M.D. Tenn. Feb. 16, 2012), ECF No. 1395.

6 Kristen Hall, *Somali Sex Trafficking Case Finishes With Split Verdict: 3 Convicted, 6 Acquitted*, HUFFINGTON POST (May 4, 2012, 6:20 PM), http://www.huffingtonpost.com/2012/05/05/somali-sex-trafficking-case_n_1483604.html.

7 *Id.*

8 To be clear, reference to the "Somali Sex Trafficking Case" is purely descriptive. It describes the ethnicity of the perpetrators as well as the victims and witnesses. In addition, it references the case as it is publically recognized, including within the Somalian community.

9 Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, § 102, 118 Stat. 2260, 2262 (2004) (codified as amended at 18 U.S.C. § 3771 (2006) (Supp. 2009)) [hereinafter CVRA].

10 The dual lineage of the Victim Rights Movement is discussed in more detail in Part II.A, *infra*. In essence, the movement emerged from both the civil rights struggles aimed at the socio-economically disenfranchised, who are also disproportionately affected by violence, as well as a populist hegemony through "get tough" on crime measures. *See* Danielle Levine, Comment, *Public Wrongs and Private Rights: Limiting the Victim's Role in A System of Public Prosecution*, 104 NW. U. L. REV. 335, 341-46 (2010); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 40-48 (2010).

lineage, backed by both conservatives interested in "get tough on crime" agendas and grassroots organizations representing the socio–economically disenfranchised, who are disproportionately victimized by violent crimes.[11] Blending these two threads together, the CVRA attempts to integrate victims into the criminal justice process after public law principles have excluded them for centuries.[12] Specifically, the CVRA provides violent crime victims with eight enumerated rights, one of which is the right to proceedings free from unreasonable delay.[13] Congress, however, did not define this right. No court has defined the right. Consequently, a victim's right to finality has remained dormant and unsubstantiated for nine years.

There are at least two reason that explain why victims lack meaningful rights: (1) adherence to the public prosecution model and (2) our Anglo American legal tradition fixated on defendants' rights. As for the public prosecution model, victims are not parties to criminal proceedings. In criminal proceedings there are only two litigants: defendants and the government.[14] Crimes are transgression against the public, not violations against individuals, therefore in criminal prosecutions, the government, not the victim, vindicates the interest of the public.[15] By contrast, in civil

11 Levine, *supra* note 10, at 341 ("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. The grassroots groups sought to be a voice for victims who were often ignored or treated without sensitivity by prosecutors. Although these groups had different motivations from the tough–on–crime conservatives, all of the groups had the same end goal: victim advocacy.") (footnote omitted); Lynn D. Lu, *Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former U.S. Attorneys*, 19 FED. SENT'G REP. 192, 193 (1997).

12 *See* 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Jon Kyl) (noting that the CVRA was designed to make crime victims "independent participants in the proceedings"); 150 CONG. REC. S4263 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein) (noting that the CVRA affords victims "the right to participate in the system").

13 18 U.S.C. § 3771(a)(7) (2006).

14 Under the doctrine of prosecutorial discretion, prosecutors have near–absolute power to determine whether to bring criminal charges, whether to pursue a prosecution, and how to negotiate a plea bargain. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) (observing that the executive is responsible for prosecuting criminal offenses and that the other branches have means to check that power: Congress through the impeachment power and the courts by dismissing malicious prosecutions); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."); Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973) ("[F]ederal courts have traditionally and, to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made."). Nothing in this article should be read to disturb prosecutorial discretion.

15 As discussed throughout this article, victims' rights lie at the intersection of adversary adjudication and third–party interests. *See, e.g.*, Paul G. Cassell & Steven Joffee, *The Crime Victim's Expanding Role in A System of Public Prosecution: A Response to the Critics of the Crime Victims'*

proceedings, individual citizens can seek vindication against the accused through damages. Whereas the goal in criminal proceedings is to redress deprivations of liberty, plaintiffs in the civil context seek the award of monetary damages. It is the tort system, not criminal prosecutions, that restore the victim to the status quo ante. Public, not private, law is the model of American prosecutions.

As to the second reason for the dearth of victims' rights, the Anglo–American legal tradition provides defendants distinct constitutional rights to guard against government tyranny, including the right to a speedy trial and to confront witnesses.[16] These rights are sometimes referred to as the

Rights Act, 105 NW. U. L. REV. COLLOQUY 164, 164 (2011) ("The American criminal justice system is often envisioned as one in which public prosecutors pursue public prosecutions on behalf of the public—leaving no room for crime victims' involvement.").

In essence, "[a]t the time of the Constitution, there existed in England a longstanding custom of private prosecution." Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 816 n.2 (1987) (Scalia, J., concurring). "[P]rivate prosecutions developed in England as a means of facilitating private vengeance." John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 515 (1994). This reflected the idea that a crime was an offense against the victim. However, "dissatisfaction with the shortcomings of a system of private prosecution" led early colonial governments to reject this system in favor of one "administered by impartial government officials rather than interested private parties." Andrew Sidman, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754, 763–64 (1976); *see also id.* at 762–63 (noting that Virginia created the Office of the Attorney General in 1643 and that Connecticut provided for a system of local public prosecutions in 1704). This shift in favor of public prosecutions reflected a philosophical movement away from the narrow conceptualization of criminal conduct as an offense against the victim towards a broader view of criminal conduct as "an offense against the sovereignty." 21 AM. JUR. 2D *Criminal Law* § 1 (1998) (citation omitted). Under this view, a wrongdoer is prosecuted, not by a private prosecutor working for the victim, but instead by a public official on behalf of (and in the name of) the sovereign who represents the "the interest[s] of society as a whole." Ferri v. Ackerman, 444 U.S. 193, 202–203 (1979); *see also* Kelly v. Robinson, 479 U.S. 36, 52 (1986) ("The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole.").

The Framers followed the colonists' lead by placing the power to prosecute crimes in the hands of disinterested public officials in the Executive Branch. *See* U.S. CONST. art. II, § 3 (establishing the duty to "take Care that the Laws be faithfully executed"); United States v. Armstrong, 517 U.S. 456, 467 (1996) ("[O]ne of the core powers of the Executive Branch of the Federal Government [is] the power to prosecute."). Consistent with the Framers' vision, the first Congress provided for the appointment in each judicial district of "a meet person learned in the law to act as attorney for the United States" and charged that person—the United States Attorney—with enforcing the federal criminal laws. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92; *see also* 28 U.S.C. § 515(a) (2006) (authorizing the Attorney General and his subordinates to conduct all litigation, "civil or criminal," on behalf of the United States); 28 U.S.C. § 547(1) (2006) (vesting United States Attorneys with the power to prosecute federal crimes). By doing so, Congress lodged squarely within the Executive Branch "the sole power to prosecute criminal cases in the federal courts." Maine v. Taylor, 477 U.S. 131, 136 (1986). Accordingly, there is no history of "any private prosecution of federal crimes." *Young*, 481 U.S. at 817 n.2 (Scalia, J., concurring).

16 Steven J. Twist summarizes these bedrocks of American jurisprudence as follows:

"zone of protection."[17] The public law model and the zone of protection endow both the prosecution and defendants with a near monopoly in the courtroom, resulting in the exclusion of third party victims and their reduction in the trial process to mere pieces of evidence or reporters of crime.[18]

This article attempts a discursive shift away from a defendant or government centered ethos into an area of clear compromise, where the rights of the defendant, victim, and state are recognized and balanced. It is imperative to note that the CVRA does not place victims on equal footing with defendants or the government.[19] Nor does the CVRA confer party

> At the soul of America's justice system lie two "good and perfect things": (1) the principle that the procedural and substantive rights of the accused must be preserved and protected as a proper restraint on the state's power to infringe individual rights to life and liberty; and (2) the practice of public prosecution, based on the theory that when a crime occurs, while it surely involves harm to a victim, it also represents an offense against the state, which tears at the fabric of our peace and community and hence creates a harm that is greater than simply the harm to the victim involved.
>
> These two "good and perfect things" have served America well. The first respects each individual as an end, as "created equal, [and] endowed by their Creator with certain unalienable Rights [to] Life, Liberty and the pursuit of Happiness." These protections of the accused include rights of habeas corpus, to a speedy and public jury trial, to know the nature and cause of the accusation, to confront adverse witnesses and have compulsory process; rights to counsel, due process and equal protection; and rights against unreasonable searches and seizures, double jeopardy, self incrimination, excessive bail or fines, cruel and unusual punishment, bills of attainder, and ex post facto laws. Overall, these rights form a zone of protection around the law-abiding, as well as the lawless, and serve to deter the abuses of government power with which the history of the world is all too familiar.

Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369, 369–70 (1999) (citations omitted). Commentators have noted the irony, however, that persons suspected of crime receive tremendous protections from governmental abuses; whereas, the defendant's victims do not share those protections, at least not in the courtroom. *E.g.*, Judith Rowland, *Illusions of Justice: Who Represents the Victim?*, 8 ST. JOHN'S J. LEGAL COMMENT. 177, 180 (1992) ("It is ironic that one suspected of a crime enjoys the right to receive physical protection from the government, while the law-abiding citizen is not entitled to such protection.").

17 Twist, *supra* note 16, at 370.

18 *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 (2007); Rowland, *supra* note 16, at 178. Professor Paul G. Cassell's work provides many of the ideological underpinning for this article. Several of his articles are discussed throughout this piece, particularly his discussion of the historical circumstances giving rise to the CVRA as discussed *supra* in Part II.

19 "A 'party' to litigation is 'one by or against whom a lawsuit is brought.'" United States *ex rel.* Eisenstein v. City of New York, 556 U.S. 928, 933 (2009) (citing BLACK'S LAW DICTIONARY 1154 (8th ed. 2004)); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 34 (1982) (defining a "party" as a person or entity "named as a party to an action and subjected to the jurisdiction of the court"). The only parties to a federal criminal prosecution, therefore, are the defendant (the person "against whom" charges are brought) and the government (the persons "by whom" charges are brought). Crime victims do not fit either of these definitions: federal criminal charges are not brought "against" crime victims, nor may such charges be brought "by" crime victims for the simple reason that victims are not imbued with the "coercive power of the state." Van Cauwenberghe v. Biard, 486 U.S. 517, 525 (1988).

Moreover, § 3771(d)(6) states that "Nothing in this chapter shall be construed to impair the

status on victims.[20] Rather, Congress endowed victims with eight specific rights, one of which is the right to closure; however, that right is not clearly defined. This article attempts to address this failure by establishing a framework for a victim's right to a reasonable amount of closure.

Some critics argue that Congress deliberately left the victim's right to finality undefined because it was reluctant to abandon the public prosecution model.[21] However, both the legislative history of the CVRA and its plain language cut against this claim. Although Congress did not abandon the public prosecution model, it did not create a meaningless CVRA. The CVRA's sponsors understood that the CVRA required additional clarification in order to illuminate its scope and meaning.[22] The sponsors, therefore, understood that the CVRA would evolve over time. In addition, the CVRA provides a clear enforcement mechanism for its eight enumerated rights, specifically a writ of mandamus.[23] Far from being an empty vehicle of political compromise, the CVRA is intended, among other things, to provide victims with standing to challenge unreasonable delay.[24]

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prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. §3771(d)(6) (2006). Far from sparking terror in the hearts of prosecutors, the CVRA clearly protects against an infringement on prosecutorial discretion. *See* United States v. Hunter, 548 F.3d 1308, 1316 (10th Cir. 2008) (relying on § 3771(d)(6) to hold that the CVRA does not usurp prosecutorial discretion); 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3936.3 (2d ed. 2012) (discussing *Hunter*); Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237, 259–60 (2009) (arguing that although the CVRA accommodates the interests of victims, it "reaffirm[s] prosecutorial discretion," and thereby reflects "Congress['s] . . . preference that the executive, not victims, prosecute criminal cases"); *see also* Steven J. Twist & Daniel Seiden, *The Proposed Victims' Rights Amendment: A Brief Point/Counterpoint*, 5 PHOENIX L. REV. 341, 365 (2012) (outlining the National District Attorneys Association and Attorneys General of forty-eight states support for victims' rights constitutional amendment).

20 *See Hunter*, 548 F.3d. at 1311 (finding parents to a gun shooting victim, which resulted from defendant's sale of a firearm to a minor, were not parties to the proceedings and did not have a tangible interest in the outcome); *see also* Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal., 435 F.3d 1011, 1016 (9th Cir. 2006).

21 *See* Blondel, *supra* note 19, at 260; *see also* Cassell & Joffee, *supra* note 15, at 167–68.

22 *See* Andrew Atkins, Note, *A Complicated Environment: The Problem with Extending Victims' Rights to Victims of Environmental Crimes*, 67 WASH. & LEE L. REV. 1623, 1636 & n.83 (2010) (citing 150 CONG. REC. S4260–01, S4271–72 (2004) (statements of Sen. Patrick Leahy)).

23 Congress articulated the CVRA's enforcement mechanism through mandamus relief as follows:

> If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

18 U.S.C. § 3771(d)(3) (2006).

24 18 U.S.C. § 3771(a)(7). *See* discussion *infra* Part IV.

In addition to Congress's clear pronouncements, the Supreme Court has suggested that a victim's right to finality exists separate and apart from that of the defendant.[25]

Several victims' rights advocates argue that all of the attempts to vest victims with statutory rights have failed.[26] Sex trafficking cases, in particular, bring the inequalities between defendants and victims into sharp relief.[27] Without constitutionally recognized victims' rights,

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25 Barker v. Wingo, 407 U.S. 514, 519–20 (1972). In *Barker*, the Supreme Court acknowledged that:

> [T]here is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts, which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system. In addition, persons released on bond for lengthy periods awaiting trial have an opportunity to commit other crimes. It must be of little comfort to the residents of Christian County, Kentucky, to know that Barker was at large on bail for over four years while accused of a vicious and brutal murder of which he was ultimately convicted. Moreover, the longer an accused is free awaiting trial, the more tempting becomes his opportunity to jump bail and escape. Finally, delay between arrest and punishment may have a detrimental effect on rehabilitation.

Id. (footnotes omitted).

26 Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHOENIX L. REV. 301 (2012) [hereinafter Cassell, *Victims' Rights Amendment*].

27 Sex trafficking victims are rarely persons of means. Furthermore, victims do not have the right to counsel. For victims, this combination of disadvantages creates a formula for vulnerability throughout the criminal justice process, as well as an opening for a second wave of traumatization. *See generally* George K. Goodhue, Comment, Maryland v. Craig: *Balancing Sixth Amendment Confrontation Rights with the Rights of Child Witnesses in Sexual Abuse Trials*, 26 NEW ENG. L. REV. 497, 498 (2001) ("An extensive body of professional research clearly demonstrates that many victimized children, when forced to testify in open court in the presence of the accused, suffer a second victimization and traumatization."); Lynette M. Parker, *Increasing Law Students' Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center*, 21 GEO. IMMIGR. L.J. 163, 176 (2007) ("Researchers and scholars have noted that for many traumatized clients litigation and the legal process can result in re-traumatization."). *See also* Roger K. Pitman et al., *Legal Issues in Posttraumatic Stress Disorder*, *in* TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY 378, 378–97 (B.A. van der Kolk ed. 1996); James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 HOUS. L. REV. 1205, 1274 (2004) (noting that the effect of the legal process on sexual assault victims "has been referred to as the 'second injury' or 'second wound'"); Edward J. Hickling et al., *The Psychological Impact of Litigation: Compensation Neurosis, Malingering, PTSD, Secondary Traumatization, and Other Lessons from MVAS*, 55 DEPAUL L. REV. 617, 630 (2006) (citations omitted); Jennifer L. Wright, *Therapeutic Jurisprudence in an Interprofessional Practice at the University of St. Thomas Interprofessional Center for Counseling and Legal Services*, 17 ST. THOMAS L. REV. 509, 509 n.11 (2005) ("The risk of re-traumatization of clients who have to repeat and relive their experiences of abuse, first in the lawyer's office and then in court, is serious.").

However, as Parker points out, if the legal process is handled correctly, it may be therapeutic. As an example, Parker cites Yael Danieli discussing the importance of "public witnessing and giving testimony," as well as a "judgment by the court" acknowledging the harm done to the survivor, and the "generat[ion] of records" documenting the harm committed against the survivor. Yael Danieli, *Reappraising the Nuremberg Trials and Their Legacy: The Role of*

these advocates argue, there will never be equality between victims and defendants in the courtroom. Consequently, a constitutional amendment is fundamentally necessary to endow victims with any meaningful rights.[28] Indeed, it is difficult to equate rights that stem from the Constitution, as is the case for defendants, with rights that are derived from statutes, as is currently the case with victims. Unfortunately for victims' rights advocates, an amendment to the Constitution requires, among other things, a two-thirds majority in both the House and Senate.[29] This presents a near insurmountable hurdle and explains decades of failed efforts to amend the Constitution.[30] Nothing in this article should be read to supplant any effort to amend the Constitution to include a victim's bill of rights. Rather, this article offers a stopgap measure that uses existing case law in order to give the CVRA both meaning and traction.

In order to provide more traction to CVRA-recognized victims' rights, courts can apply existing speedy trial analysis to a victim's right to finality in order to give that right meaning, while simultaneously balancing the interests of the defendant, the victim, and the government.[31] Specifically, courts can apply the four-prong *Barker v. Wingo* test to determine whether a victim's right to finality has been violated.[32] The beauty of this process is that the test has already balanced judicial efficiency and economy against defendants' rights and prosecutorial discretion. *Barker* accomplishes this balance by asking four questions: (1) did the litigant assert the right; (2) was there delay; (3) who caused the delay; and (4) was the litigant prejudiced?[33] Each question demonstrates the flexibility of the test to accommodate varying circumstances and interests. Properly applied, the *Barker* test can be used to protect the legitimate rights of prosecutors and defendants, while recognizing equally powerful victims' interests.

By engaging in the *Barker* analysis, courts can harmonize the interests of crime victims with the constitutional rights of the accused, as well as the discretionary needs of prosecutors. In order to make the most compelling argument for grafting *Barker* onto the victim's right to finality, this article does several things. First, Part I traces the history of the speedy trial doctrine in order to set the historical and legal context for superimposing *Barker* onto the victim's right to finality. Part II chronicles the history of the crime victims' rights movement in order to contextualize the CVRA within its political origins and, thereby, explain its weaknesses. Part III analyzes the CVRA itself in order to explicate Congress's clear intention to give

Victims in International Law, 27 CARDOZO L. REV. 1633, 1640 (2006).

28 Cassell, *Victims' Rights Amendment*, *supra* note 26, at 302.

29 U.S. CONST. art. V.

30 *See generally* Cassell, *Victims' Rights Amendment*, *supra* note 26.

31 Cassell, *Victims' Rights Amendment*, *supra* note 26, at 327–28.

32 *Barker*, 407 U.S. at 530; Cassell, *Victims' Rights Amendment*, *supra* note 26, at 327–28.

33 *Id.*

victims standing to challenge unreasonable delays in criminal proceedings. Part IV attempts to harmonize victims' right to finality with speedy trial jurisprudence in order to give that right meaning while balancing the interests of all litigants.

I. SPEEDY TRIAL JURISPRUDENCE

Different historical circumstances and political concerns created the defendant's right to a speedy trial, as opposed to the victim's right to finality. Victims' rights critics and skeptics draw from these differences to subjugate victims' rights to those of defendants, some even urging the eradication of victims' rights entirely. The defendant's right to a speedy trial and ability to control the criminal prosecution clock springs from centuries of Anglo–American law that rightfully fixated on protecting individual liberties from government tyranny. To that end, two sources guarantee a defendant's right to a speedy trial: the Sixth Amendment and the Speedy Trial Act (SPA).[34] Both of these measures prevent defendants from languishing in prison and allowing delays to erode their defense.

By contrast, the defendant's victims do not share constitutional protections and centuries of time-honored analysis to support their rights. Congress created the victim's right to finality in 2004, as discussed in Part III. Relative to the defendant's right to a speedy trial, the victim's right to finality is historically weaker and relatively embryonic. The defendant, not the victim or the government, exercises tremendous control over the criminal prosecution clock.[35] In some cases, defendants can manipulate the clock in order to exhaust the patience and resolve of the victim to testify. This ability to manipulate the prosecution clock is exactly why victims should have the ability to seek redress from unreasonable delay.

Congress, through the CVRA, has endowed victims with the ability to challenge unreasonable delay in court proceedings. In speedy trial jurisprudence, courts have already fashioned balancing tests to ensure judicial efficiency and economy, while balancing the interests of all litigants. Courts can, and should, extend those same balancing tests to protect the victim's right to finality. Centuries of jurisprudence have defined the limits and scope of judicial efficiency within the confines of the litigants' rights. A victim's interest in closure is one more factor that ought to be weighed meaningfully in the balance.

34 18 U.S.C. § 3661 (2006).

35 *See generally* Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369 (1999).

A. The Sixth Amendment Right to a Speedy Trial

1. *History.*—The Sixth Amendment guarantees a criminal defendant a right to a speedy trial.[36] Centuries of jurisprudence have defined the contours and limitations of this right.[37] Anglo–American law first articulated the right in the 1215 Magna Carta: "We will sell to no man, we will not deny or defer to any man either justice or right."[38] Five centuries later, Sir Edward Coke noted that England sought to ensure that prisoners would not "be long detained, but at their next coming have given the prisoner full and speedy justice."[39] Early colonial constitutions also noted the right to a speedy trial.[40] In 1791, Congress ratified the Sixth Amendment, and the right to a speedy trial became a safeguard against government discretion and consequent tyranny.[41]

2. *Founder's Intent.*—The Framers had two purposes behind the Sixth Amendment Speedy Trial Clause: (1) to prevent defendants from languishing in jail during pretrial detention, and (2) to ensure a defendant's right to a fair trial.[42] Pretrial incarceration can have detrimental effects on a defendant, including heightened public scrutiny, employment termination, strained family relationships, and anxieties related to imprisonment.[43] Trial delay can also lead to unavailable witnesses, faded memories, lost or destroyed evidence, and a defendant's dwindling resolve to withstand a plea offer.[44] Although these dangers threaten the victim, prosecution, and the defense, only the defendant's life, liberty, and property are at stake in a criminal proceeding.[45] These distinctions are often used to reject equalizing the playing field between the defendant and victim in the courtroom; however, rules designed to effectuate judicial economy and efficiency can also balance the sometimes competing interests of the victim, the state, the government, and the defendant, as argued in Part IV.

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36 Klopfer v. North Carolina, 386 U.S. 213, 225–26 (1967).

37 *See, e.g.*, Patrick Ellard, Note, *Learning from Katrina: Emphasizing the Right to A Speedy Trial to Protect Constitutional Guarantees in Disasters*, 44 AM. CRIM. L. REV. 1207, 1209–10 (2007).

38 *Klopfer*, 386 U.S. at 223–26 (documenting long history of Sixth Amendment Speedy Trial Right); *see also* United States v. Provoo, 17 F.R.D. 183, 196 (D. Md. 1955). This phrase illuminates the idea that the sovereign cannot "defer" or postpone a trial for the accused.

39 *Klopfer*, 386 U.S. at 224 (quoting SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45 (London, 5th ed. 1797)).

40 *Id.* at 225 (noting the inclusion of a speedy trial provision in the early colonial bill of rights and the Virginia Declaration of Rights of 1776).

41 U.S. CONST. amend. VI; *see also* Ellard, *supra* note 37, at 1210.

42 *See* United States v. Dunn, 459 F.2d 1115, 1119 (D.C. Cir. 1972).

43 Barker v. Wingo, 407 U.S. 514, 533 (1972).

44 *Id.* at 532.

45 *Id.* at 527.

3. *Application and Scope.*—The Sixth Amendment right to a speedy trial "is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution."[46] A prosecution begins, for speedy trial purposes, at the point of an indictment, information, or arrest, whichever occurs first.[47] The defendant's right is satisfied at the beginning of trial or voir dire.[48]

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46 United States v. Marion, 404 U.S. 307, 313 (1971). A defendant's rights under the Speedy Trial Clause of the Sixth Amendment are triggered by "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge." *Id.* at 320 (stating any delay before this time must be scrutinized under the Due Process Clause of the Fifth Amendment, not the Sixth Amendment's Speedy Trial Clause).

47 *Id.* at 320. In *United States v. Marion*, Justice Douglas disagreed, arguing that the "right to a speedy trial is the right to be brought to trial speedily which would seem to be as relevant to pretrial indictment delays as it is to post–indictment delays." *Id.* at 328 (Douglas, J., concurring). In *United States v. MacDonald*, the Court granted certiorari on the following issues:

> [W]hether the time between dismissal of military charges and a subsequent indictment on civilian criminal charges should be considered in determining whether the delay in bringing respondent to trial for the murder of his wife and two children violated his rights under the Speedy Trial Clause of the Sixth Amendment.

United States v. MacDonald, 456 U.S. 1, 3 (1982). In *MacDonald*, the Court did not find a speedy trial violation where, in May of 1970, the government proceeded with a murder charge against the defendant under military law but dismissed the charge in October of that year. *Id.* at 4–6. The defendant was discharged in December. In June 1972, the government reopened the investigation, but a grand jury was not convened until August of 1974. The defendant was not indicted until January 1975. The Supreme Court found that the period between dismissal of the first charge and the later indictment had none of the characteristics that called for application of the speedy trial clause. *Id.* at 10. Nevertheless, the period between arrest and indictment must be considered in evaluating a speedy trial claim. *Id.* Both *Marion* and *MacDonald* were applied in *United States v. Loud Hawk*, holding the speedy trial guarantee inapplicable to the period during which the government appealed dismissal of an indictment, since during that time the suspect had not been subject to bail or otherwise restrained. United States v. Loud Hawk, 474 U.S. 302, 311–12 (1986).

Significantly, the Court has found that the speedy trial right attaches where an interest it seeks to protect is threatened. *Barker*, 407 U.S. at 532. For example, the concerns of the speedy trial right are pretrial incarceration, heightened public scrutiny, employment termination, strained family relationships, and anxieties related to imprisonment. *Marion*, 404 U.S. at 320. As a result, the Court has found that the right attaches at the moment a formal prosecution begins or an actual arrest is made, not at the point of investigation. *Id.* Similarly, as argued in Part III, when the right to finality is applied to the victim, it should attach when the victim's interest are jeopardized.

48 *See* United States v. Young, 657 F.3d 408, 416 (6th Cir. 2011) ("[F]or purposes of the Speedy Trial Act, trial begins with *voir dire*."). It should also be noted that for purposes of the Speedy Trial Act:

> [A] district court may not attempt to evade the spirit of the Act by conducting *voir dire* within the statutory time limits and then ordering a prolonged recess with an intent to pay mere 'lip service' to the Act's requirements. Arguably, in the constitutional context, if the beginning of *voir dire* were a pretense, a constitutional speedy–trial claim might be preserved.

4. *When is the Right Denied?*—Unlike the Speedy Trial Act (SPA),[49] the Supreme Court refused to set a specific number of days for a Sixth Amendment speedy trial violation.[50] As the Supreme Court has noted, "[t]he right of a speedy trial is necessarily relative."[51] Thus, each prosecution requires careful balancing between the desire to prevent unreasonable delay and the time necessary for litigation. In order to accommodate the competing interests involved in litigation, the Court developed an ad hoc balancing test that addresses the following four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertions of his right, and (4) prejudice to the defendant.[52] None of these factors is "a necessary or a sufficient condition to the finding of a deprivation of the right of speedy trial," but the factors are related and "must be considered together with such other circumstances as may be relevant . . . in a difficult and sensitive balancing process."[53]

a. Length of Delay

The first *Barker* factor—the length of the delay—serves as a threshold or "triggering mechanism" for speedy-trial analysis.[54] A delay of at least one year in bringing a defendant to trial will trigger a rebuttable presumption of violation, with the level of judicial scrutiny increasing in direct proportion to the length of delay.[55] Depending on the circumstances of each individual case, a longer delay may be constitutional and a shorter delay may be unconstitutional.

Id. at 416–17 (quoting United States v. Scaife, 749 F.2d 338, 343 (6th Cir.1984)).

49 18 U.S.C. § 3161 (2006 & Supp. 2011).

50 *Barker*, 407 U.S. at 521.

51 Beavers v. Haubert, 198 U.S. 77, 87 (1905). "Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances." Pollard v. United States, 352 U.S. 354, 361 (1957). This conception of the rights as a relative one flows from our recognition of the fact that "the ordinary procedures for criminal prosecution are designed to move at a deliberate pace." United States v. Ewell, 383 U.S. 116, 120 (1966).

52 *Barker*, 407 U.S. at 530. For the federal courts, Congress under the Speedy Trial Act of 1974 imposed strict time deadlines, replacing the *Barker* factors. *See* discussion *infra* Part I.B. However, in the federal courts, a defendant can bring a speedy trial claim under the Constitution or the Act.

53 *Barker*, 407 U.S. at 533.

54 *Id.* at 530.

55 *See Dodgett v. United States*, 505 U.S. 647 (1992) (considering the notion of "presumptive prejudice"). Other courts have generally found presumptive prejudice where the delay is more than a year. *See, e.g.*, Amos v. Thornton, 646 F.3d 199, 206 (5th Cir. 2011).

b. Reason for Delay

The second *Barker* factor is the reason for the delay. Courts will allow for delays attributable to legitimate reasons, for example the filing and deciding of motions,[56] interlocutory appeals,[57] defendant's need for additional time to build a viable defense, and the scheduling of key witnesses. Delays attributable to illegitimate reasons may, however, prove fatal to the prosecution. For example, the government's deliberate attempt to delay proceedings and obstruct the defense, as well as negligently misplacing a defendant's file or losing evidence may result in dismissal.

Courts have also imposed an active duty on the trial court and the prosecution to act expeditiously. In *Barker*, the Supreme Court noted, "The government, and for that matter, the trial court are not without responsibility for the expeditious trial of criminal cases."[58] The Court went on to emphasize that the primary burden to bring a case to trial rests with the prosecution and the courts.[59] In *Vermont v. Brillon*,[60] the Supreme Court stated that "institutional problems" and other "[d]elay resulting from a systemic breakdown . . . could be charged to the State."[61] It is important to note the Court's warning to both the government and lower courts to try cases expeditiously because the same admonishment should apply equally to victims' claims of unreasonable delay.

As examples of impermissible delay resulting from systemic breakdowns, two cases from the Sixth Circuit are worth noting: *United States v. Graham*,[62]

56 *See, e.g.*, United States v. Young, 657 F.3d 408, 415 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 1647 (2012). In *Young*, the court found that the case had "generated 3,628 docket entries related to 'complex motions'—many of them filed by Young." *Id.* The Sixth Circuit noted, "[w]hen a party makes motions, it cannot use the delay caused by those motions as a basis for a speedy-trial claim." *Id.*

57 United States v. Loud Hawk, 474 U.S. 302, 304–05 (1986). Under *Loud Hawk*, a party having sought the aid of judicial process cannot, in general, complain about the length of the process. *Id.* at 316–17. The *Loud Hawk* court found that a delay resulting from an interlocutory appeal would weigh against the government if the appeal were "clearly tangential or frivolous," but a "reversal[] by the Court of Appeals [is] prima facie evidence of the reasonableness of the Government's action." *Id.* at 315–16.

58 *Barker*, 407 U.S. at 527 n.27 (quoting Hodges v. United States, 408 F.2d 543, 551 (8th Cir. 1969)).

59 *Barker*, 407 U.S. at 529.

60 Vermont v. Brillon, 129 S.Ct. 1283 (2009).

61 *Id.* at 1292–93.

62 United States v. Graham, 128 F.3d 372 (6th Cir. 1997). Defense advocates have remarked that courts rarely find a speedy trial violation because (1) trial courts are allowed to bury any period of delay in an "interest of justice" rubric and (2) dismissal with prejudice is a very drastic remedy. *See, e.g.*, Ellard, *supra* note 37, at 1216. In *Graham*, Judge Keith explained the harsh consequences for dismissal with prejudice as follows:

> It is because the Sixth Amendment right to a speedy prosecution is so

and *Maples v. Stegall*.[63] Again, it is important to note the Court's stance toward systemic breakdowns because the Court's admonishment should apply equally to victims' claims of unreasonable delay. In *United States v. Graham*, the Sixth Circuit found a speedy trial violation where a district court took eight years to resolve a discovery dispute and failed to appoint counsel for a co–defendant for over a year. In those circumstances, according to the court, "much of the blame for the delay . . . [fell] on the government and on the district court."[64] Similarly, in *Maples*, the Sixth Circuit found another speedy trial violation when a state court took an unreasonably long time to adjudicate an entrapment motion, in part because of a co–defendant's delay. The court found that the trial court "should have been vigilant about the co–defendant's dilatory filing"[65] and that the trial court "'failed to assert itself in an attempt to move the process along.'"[66]

c. Defendant's Assertion of the Right

The third *Barker* factor asks whether the defendant asserted a right to a speedy trial. In *Barker*, the Supreme Court emphasized that the "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."[67] In general, defendants must assert their Sixth Amendment right by filing a timely motion before the trial court. If the defendant fails to assert the right or acquiesces in the face of protracted pretrial delays, he may not raise the issue for the first time on appeal, unless the defendant's failure to raise the issue earlier was due to her or his attorney's negligence.[68] Defendants who delay prosecution by inundating the trial court with frivolous pretrial motions are also treated as having forfeited their right to a speedy trial. The law does not allow defendants to profit from their own wrong under these circumstances.[69] The defendant's

> fundamental to our justice system, yet so difficult to define in a concrete manner, that it is incumbent upon our Court to zealously defend it. It is only by forcefully admonishing those that flout this right that the Court can define boundaries to guide litigants and courts, and prevent abuses of the right such as the case before us. Here, the delay was eight times that necessary to trigger judicial review, and the presumption of prejudice is undiluted by dilatory tactics on the part of the defense. Thus, the defendants are entitled to relief.

Graham, 128 F.3d at 376.

63 Maples v. Stegall, 427 F.3d 1020 (6th Cir. 2005).

64 *Graham*, 128 F.3d at 375.

65 *Maples*, 427 F.3d at 1028.

66 *Id.* (quoting *Graham*, 128 F.3d at 373).

67 Barker v. Wingo, 407 U.S. 514, 532 (1972).

68 *See, e.g.*, United States v. Young, 657 F.3d 408, 415 (6th Cir. 2011), *cert. denied*, 132 S.Ct. 1647 (2012) (finding defendant's aggressive motions practice, filing of continuances and acquiescing to the continuance motions of his co–conspirators, and failing to assert his right for seven years indicated an unwillingness to be tried speedily).

69 *See, e.g.*, United States v. Auerbach, 420 F.2d 921, 924 (5th Cir. 1969) ("Having sought the aid of the judicial process and realizing the deliberateness that a court employs in

acquiescence in delay when it works to his advantage should be considered against his later assertion that he was denied the guarantee, and the defendant's responsibility for the delay is conclusive.

It is also important to note that when a court analyzes whether the defendant asserted a right to a speedy trial, the court will evaluate the defendant's assertion within the context of his other actions. In *United States v. Young*[70] for example, where the Sixth Circuit evaluated a delay just short of eleven years, the court found that the defendant's behavior undermined his speedy trial claim. Young repeatedly asked for and joined continuances; he never filed a motion for an immediate trial; he did not assert his right to a speedy trial in letters he wrote to the court; and he filed his first motion to dismiss while the district court lacked jurisdiction because of the first interlocutory appeal.[71]

d. Prejudice

The final *Barker* element is prejudice to the defendant. The prejudice inquiry protects three interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize the anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."[72] Of these, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."[73] Courts will find any delay, including those that are shorter than a year, unconstitutional where the delay severely limited the accused's ability to defend. For example, courts find the death of an alibi witness, who would have been available for a timely trial, prima facie proof of prejudice.[74]

In *United States v. Loud Hawk*, the Supreme Court found that a ninety month delay, caused by an interlocutory appeal, did not weigh against the government and the possibility of consequent prejudice to defendant did

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reaching a decision, the defendants are not now able to criticize the very process which they so frequently called upon.").

70 *Young*, 657 F.3d at 414.

71 *Id.* at 415. It should be noted, however, that because victims are unrepresented parties and do not have counsel, their failure to assert a right to finality should not constitute waiver. *See* discussion *infra* Part IV.3.

72 *Barker*, 407 U.S. at 532.

73 *Id.* However, "[w]hen the government prosecutes a case with reasonable diligence, a defendant who cannot demonstrate how his defense was prejudiced with specificity will not make out a speedy trial claim no matter how great the ensuing delay." *Young*, 657 F.3d at 418 (quoting United States v. Howard, 218 F.3d 556, 564 (6th Cir. 2000)). The Sixth Circuit has also held that specific prejudice must be "substantial prejudice" for a defendant to prevail on a speedy-trial claim. United States v. White, 985 F.2d 271, 276 (6th Cir. 1993).

74 In *Barker* the Supreme Court noted "[i]f witnesses die or disappear during a delay, the prejudice is obvious." *Barker*, 407 U.S. at 532.

not trigger a violation.[75] Moreover, the courts of appeals routinely reject Sixth Amendment speedy trial challenges in the absence of a showing of prejudice.[76] However, in *Doggett v. United States*,[77] the Supreme Court held that an "extraordinary" eight-and-one-half-year delay between the defendant's indictment and arrest resulted from the government's "egregious persistence in failing to prosecute" the defendant.[78] As a result, according to the Court, the government violated the defendant's right to a speedy trial even in the absence of "affirmative proof of particularized prejudice."[79]

5. *Criticism of the Speedy Trial Right.*—Although the *Barker v. Wingo* test guards against gross prosecutorial delay and systemic breakdowns in court systems, many defense attorneys argue that courts rarely find a speedy trial violation.[80] For instance, in *Barker v. Wingo*, the Supreme Court held that despite a five year delay between indictment and trial, there was no violation.[81] Critics advance two reasons for the Court's reluctance. First, although framed as a defendant's right, it is in fact defense lawyers who have the greatest incentive to delay a trial. Second, the Court has encouraged legislatures as well as courts through their rule-making powers to address the problems of delay by adopting their own rules for reducing delay.[82] Still, the constitutional right to a speedy trial serves to protect against

75 United States v. Loud Hawk, 474 U.S. 302, 317 (1986).

76 *See, e.g.*, United States v. Baker, 63 F.3d 1478, 1497 (9th Cir. 1995); United States v. Tannehill, 49 F.3d 1049, 1054 (5th Cir. 1995).

77 Doggett v. United States, 505 U.S. 647 (1992).

78 *Id.* at 657.

79 *Id.* at 652, 655, 657.

80 This is particularly true in cases where defendants cannot demonstrate actual prejudice and where defendants were not detained pretrial. *See, e.g.*, United States v. Brown, 498 F.3d 523, 532 (6th Cir. 2007) (finding no speedy trial violation because defendant failed to show ten month delay caused actual prejudice because defendant would have been incarcerated anyway); United States v. Frye, 489 F.3d 201, 212–13 (5th Cir. 2007) (finding no speedy trial violation because no witnesses were made unavailable and defendant suffered no actual prejudice); United States v. White, 443 F.3d 582, 591 (7th Cir. 2006) (finding no speedy trial violation because defendant failed to show nine month delay caused actual prejudice); United States v. Casas, 425 F.3d 23, 35 (1st Cir. 2005) (finding no speedy trial violation because defendants failed to show forty-one month delay caused actual prejudice); United States v. Dent, 149 F.3d 180, 185 (3d Cir. 1998) (finding no speedy trial violation because defendant failed to show five year delay caused actual prejudice because defendant did not diligently seek allegedly lost witnesses and dimmed memory helped his defense); United States v. Jones, 129 F.3d 718, 724 (2d Cir. 1997) (finding no speedy trial violation because defendant failed to show thirty day delay caused actual prejudice). *But see, e.g.*, United States v. Ingram, 446 F.3d 1332, 1336 (11th Cir. 2006) (finding speedy trial violation when first three *Barker* factors weighted heavily against government, eliminating need to show actual prejudice).

81 Barker v. Wingo, 407 U.S. 514, 534 (1972).

82 *Id.* at 523 ("The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise.").

government excess, whether in the form of prosecutorial misconduct, court inefficiency, or government negligence.[83]

B. The Speedy Trial Act

The Speedy Trial Act of 1974 (SPA) specifically implements a defendant's Sixth Amendment right to a speedy trial.[84] Congress had three concerns in enacting the SPA: (1) the rising crime rate in the 1960s,[85] (2) the increasing backlog of cases in the federal courts, and (3) the increase in the number of defendants who were jumping bail during extended pretrial release.[86] In order to address these concerns, the SPA sets a specific number of days within which a defendant must be arraigned[87] and brought to trial.[88] The information or indictment must be filed within thirty days from the date of arrest or service of the summons.[89] Voir dire must begin within seventy days from the date of the information or indictment, or from the defendant's initial appearance, whichever is later.[90] The sanction for SPA violations is dismissal with or without prejudice to reprosecution.[91]

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83 For example, in *Doggett v. United States*, the Supreme Court considered whether the government violated the defendant's speedy trial right during an eight and one-half year delay between the defendant's indictment and arrest. Doggett, 505 U.S. at 650. The Court found that the government negligently pursued the defendant by failing to question whether the defendant remained in hiding abroad. *Id.* at 652–53. The Court held that the government violated the defendant's right to a speedy trial because the delay had presumptively prejudiced the defendant's ability to prepare an adequate defense. *Id.* at 658.

84 18 U.S.C. § 3161 (2006 & Supp. 2011).

85 *See* ANTHONY PARTRIDGE, FED. JUDICIAL CTR., LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, at 11 (1980).

86 *See* 117 Cong. Rec. 3405–06 (1971) (remarks of Sen. Ervin, sponsor of S. 895, 92d Cong. (1971) an early version of the SPA).

87 18 U.S.C. § 3161(b) (2008) ("Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.").

88 *Id.* § 3161(c)(1) ("In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date . . . of the information or indictment . . . .").

89 *Id.* § 3161(b).

90 *Id.* § 3161(c)(1). In cases involving more than one defendant, the speedy trial clock starts to run on the date of the indictment common to each defendant. *See* United States v. Smith, No. 11–5520, slip op. at 3 (6th Cir. Jan. 7, 2013).

91 When determining prejudice, the court must consider the seriousness of the offense, the circumstances leading to dismissal, and the impact that reprosecution would have on the administration justice and of the SPA. 18 U.S.C. § 3162(a)(1)–(a)(2) (2006 & Supp. 2011). In *United States v. Taylor*, 487 U.S. 326 (1988), the Supreme Court held that a trial court must examine each statutory factor in deciding to dismiss charges with prejudice. *Id.* at 336–37. The Court in *Taylor* found that a minor violation of the time limitations of the Act that did not prejudice the defendant's trial preparation did not justify the dismissal with prejudice of an indictment charging serious drug offenses. *Id.* at 343. Obviously, dismissal of an action is not a

Because the courts recognize the complexity of criminal proceedings, several periods of delay are legitimately subtracted from the speedy trial clock, for example the time it takes to file and decide motions, a defendant's right to continue trial in order to prepare a viable defense, and the time for interlocutory appeals.[92] Each of these periods of time would remain legitimate reasons for delay when grafting *Barker* onto a victim's right to finality, as argued in Part IV.

The SPA is an example of both Congress and the courts adopting rules to ameliorate the increasing complexities of case backlog and judicial economy, while balancing the legitimate interests of the defendant, trial court, appellate court, and the government. Although the SPA has been moderately successful at reducing the time from criminal arrest to trial, there remains significant delay in criminal cases. Furthermore, with the advent of the Racketeer Influenced and Corrupt Organizations Act (RICO)[93] and the Continuing Criminal Enterprise statute (CCE),[94] federal prosecutions are growing increasingly more complex and lengthy.[95] The following tables provide some indication of delay based on the number of pending cases in the federal courts:

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proper sanction for victims as discussed in Part IV.B, which explores appropriate sanctions for victims denied a right to finality.

92 Certain pretrial delays are automatically excluded from the SPA's time limits, such as delays caused by pretrial motions. 18 U.S.C. § 3161(h)(1)(D) (2006 & Supp. 2011). In *Henderson v. United States*, 476 U.S. 321 (1986), the Supreme Court held that § 3161(h)(1)(D), which at the time was § 3161(h)(1)(F), excludes "all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is 'reasonably necessary.'" *Id.* at 330. The Act also excludes a reasonable period (up to thirty days) during which a motion is actually "under advisement" by the court. 18 U.S.C. § 3161(h)(1)(H). Other delays excluded from the Act's time limits include delays caused by the unavailability of the defendant or an essential witness, *Id.* § 3161(h)(3); delays attributable to a co-defendant, *Id.* § 3161(h)(6); and delays attributable to the defendant's involvement in other proceedings, including delays resulting from an interlocutory appeal. *Id.* § 3161(h)(1)(B)–(C). Note, however, that the thirty-day defense preparation period provided for in Section 3161(c)(2) is calculated without reference to the Section 3161(h) exclusions.

In addition, a period of delay to allow the defendant to demonstrate his good conduct and a "period of delay resulting from the absence or unavailability of the defendant or an essential witness" are excluded. *Id.* § 3161(h)(3)(A). Furthermore, delay because a continuance is granted by a judge on his own motion or at the request of the defendant or government is also excluded. *Id.* § 3161(h)(7)(A). In order to respect the legitimate interests of both the defendant and the government, all of these exclusions should also apply to victims' claims of unreasonable delay.

93 18 U.S.C. §§ 1961–1968 (2006 & Supp. 2011).

94 21 U.S.C. § 848 (2006).

95 KENNETH CARLSON & PETER FINN, BUREAU OF JUSTICE STATISTICS, PROSECUTING CRIMINAL ENTERPRISES: FEDERAL OFFENSE AND OFFENDERS 2 (1993), *available at* http://bjs.gov/content/pub/pdf/pce.pdf ("Whether disposed by plea or trial, CCE cases took considerably longer to resolve than other drug trafficking cases. Racketeering cases took somewhat longer to dispose than cases that involved the corresponding underlying offenses, and approximately 50% longer than the average for all offenses").

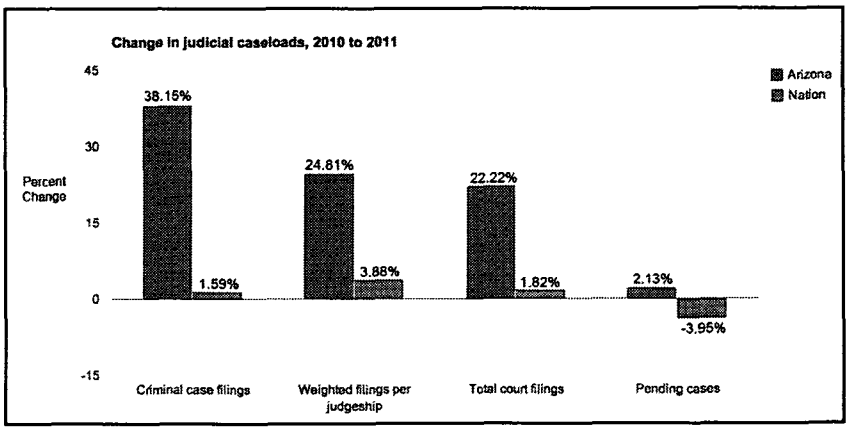
Table 1

Judicial Caseload Indicators
12–Month Periods Ending March 31[96]

Judicial Caseload	2002	2007	2010	2011	% Change Since 2002	% Change Since 2007	% Change Since 2010
U.S. Courts of Appeals							
Cases Filed	56,534	60,668	56,790	55,753	-1.4	-8.1	-1.8
CasesTerminated	57,607	65,308	60,316	58,349	1.3	-10.7	-3.3
Cases Pending	39,242	53,085	47,036	44,440	13.2	-16.3	-5.5
U.S. District Courts							
Criminal (IncludesTransfers)							
Defendants Filed	84,389	87,479	98,798	103,638	22.8	18.5	4.9
DefendantsTerminated	77,988	90,043	98,062	99,131	27.1	10.1	1.1
Defendents Pending	73,277	98,320	106,249	110,756	51.1	12.6	4.2

Table 2

As an example of extensive delay, the pending cases in Arizona are particularly interesting to note[97]:



In many prosecutions, the defendant is the only litigant disinterested in a speedy resolution because delay can favor the defendant.[98] The

96 ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS MARCH 31, 2011 6 (2011), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/front/IndicatorsMar11.pdf.

97 Victoria Pelham, *A Year into Emergency, Arizona Federal Courts Still Face "Dire" Situation*, CRONKITE NEWS, Mar. 14, 2012, http://cronkitenewsonline.com/2012/03/a-year-into-emergency-arizona-federal-courts-still-face-dire-situation/.

98 The Senate Judiciary Committee concluded that "efforts by defendants to unreasonably delay proceedings are frequently granted, even in the face of State constitutional amendments and statutes requiring otherwise." Twist, *supra* note 16, at 377 (citing S. Rep. No.

prosecution's witnesses may lose their resolve to testify or otherwise become unavailable; their memories may fade; corroborating evidence may be lost; the case may grow stale and receive less priority; frequent personnel changes in the prosecutor's office may mean that the office must re-staff a lingering case, requiring each new prosecutor to learn the case from the beginning; with frequent changes in personnel, mistakes can happen, such as the loss of evidence or the mishandling of exculpatory materials; the patience of victims may be frustrated and dwindle; defendant's aggressive motions practice may consume the government's resources; and the government may broker more generous plea offers in order to combat the damage caused by all of these things. Given these advantages, particularly where the court does not detain the defendant, defendants may sometimes have little, if any interest, in seeking a speedy resolution.

II. The Politicization of Crime and the Victims' Rights Movement

As noted in Part I, the Sixth Amendment, the Speedy Trial Act (SPA),[99] and centuries of jurisprudence provide defendants with considerable control over the speedy trial clock. The defendant's speedy trial right is a part of a matrix of substantive and procedural rights that guard against government excess.[100] Victims, by contrast, do not have constitutional rights. In fact, victims are not parties to the criminal proceeding at all. As such, the Constitution does not articulate rights for victims. Victims lack constitutional legitimacy, including the right to counsel, which would safeguard their ability to vindicate their interests. Sex trafficking and other cases involving socio-economically disadvantaged victims highlight the power imbalance between victims and defendants in the courtroom. This is particularly problematic because the criminal proceeding itself presents another opportunity to re-victimize the victim or to subject the victim to a second wave of trauma. This trauma may include prolonged proceedings that eviscerate a victim's ability to put the incident behind her; violations of privacy rights; and anxiety from unresolved prosecutions and anticipated testimony. Lacking any representation in the courtroom, victims are vulnerable to the defendant, the prosecution, and the courts. To date, recent statutes and political compromise have created embryonic victims' rights.[101] Consequently, defendants and victims do not share equal footing. Currently, the Constitution makes defendants more powerful than their victims within the criminal justice process. Without constitutional legitimacy, victims' rights will remain subordinate to those of defendants'.[102]

105-409, at 19 (1998)).

99 18 U.S.C.§ 3161 (2006 & Supp. 2011).

100 Twist, *supra* note 16, at 369.

101 *See, e.g.*, 18 U.S.C. § 3771 (2006) (Supp. 2009) (enacted in 2004).

102 The continued imbalance of power between victims and defendants, despite

In addition to this constitutional imbalance, both defense advocates and prosecutors have responded with great fear and trepidation when confronted with expanded victims' rights. Defense advocates argue that integrating victims into the criminal justice system will intrude on defendants' constitutional rights. Prosecutors claim that expanded victims' rights will diminish greatly needed prosecutorial discretion. Prosecutors also claim that victims' rights will add another variable into the already complex web of prosecution.[103] Prosecutors may also fear that expanded victims' rights will ultimately become their responsibility, in addition to vindicating the government.

numerous efforts at legislation, has led several leading victims' commentators to renew their efforts to amend the Constitution. *See, e.g.*, Cassell, *Victims' Rights Amendment*, *supra* note 26, at 301–02. Sex trafficking cases, in particular, highlight the power imbalance between the victim and the defendant in the courtroom. For example, unlike the defendant, a victim does not have the right to counsel. Unlike the defendant, a victim is not a party to a criminal proceeding. Thus, the role of the victim in a criminal case is reduced to an unrepresented piece of evidence, vulnerable to further exploitation and degradation within the criminal justice process. Hypothetically, a district court judge could allow defendants, in a sex trafficking case, to subpoena the psychological and psychiatric records of the victim. The district court judge could further allow defendants to use those records to cross-examine the victim. Unless the government decides to oppose the district court, the victim is left completely vulnerable and with little form of redress. Such power imbalance necessitates a constitutionally based equality between victim and defendant. At a bare minimum, victims of violent crimes and sexually related crimes, particularly juveniles, should have a constitutionally based right to counsel. Without it, they are highly vulnerable to further humiliation, degradation, and exploitation within the criminal justice process. The need for representation for sex trafficking victims is the subject of my next law review article.

103 *See generally* Maureen E. Laflin, *Remarks on Case-Management Criminal Mediation*, 40 IDAHO L. REV. 571, 573, 593–597 (2004).

The imbalance of power between victims and defendants and the active resistance to the role of victims in the criminal justice process may explain the failure of several corrective statutes, discussed later in this section. The imbalance of historic power, active resistance toward, and lack of political support and momentum may also explain Congress' failure to define key provisions in the Crime Victims' Rights Act (CVRA), particularly the victim's right to finality. These same detriments also explain renewed efforts to amend the Constitution to include a victims' bill of rights.[104] In order to comprehend the tension between victims' interests, defendants' rights, and prosecutorial discretion, it is imperative to lay out the history of the victims' rights movement, its culmination in the CVRA, and the regenerative efforts to amend the Constitution.

A. Background

Centuries of American legal jurisprudence have created an imbalance of power between victims and defendants. Since the founding of the American Republic, the criminal justice system has typically treated crime as a violation against societal order, which the government must vindicate, not a private right of action between the accused and the accuser. As a result, two litigants dominated the criminal court: the government and the defendant. Within this contentious framework, the Constitution endowed defendants with numerous procedural and substantive rights as a proper restraint against government excess, particularly the power of the government to violate a defendant's rights to life, liberty, and property.[105]

104 *Id.*

105 Twist, *supra* note 16, at 369–70.

This bulwark of defendants' rights brings into sharp relief the relative paucity of victims' rights within the context of the courtroom and criminal prosecutions. The broad spectrum of defendants' rights is one small portion of the larger historical context from which the victims' rights movement emerged. The larger political and historical context of the movement involved the highly contentious politicization of crime. This politicization of crime became amplified in the mid–1960s, which marks the birth of the movement as well as an increase in crime.[106] The period was also marked with the rise of the civil rights movement, along with other grassroots activities, and backlash toward all of those forces of change.[107] Within this cauldron swelled an increase in criminal prosecution, an emphasis on defendants' rights, political traction for "get tough on crime" agendas, and a simultaneous silencing

106 *See* ALEXANDER, *supra* note 10, at 40–48; ROBERT ELIAS, THE POLITICS OF VICTIMIZATION: VICTIMS, VICTIMOLOGY, AND HUMAN RIGHTS 17–19 (1986); 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, 26–27 (1999). There are numerous explanations for this dramatic increase in crime. However, the following explanation is offered to contextualize the beginning of the movement and the simultaneous politicization of crime at the time of the movement's genesis. The 1950s and 1960s marked a period of continuous migrations of African Americans to northern urban centers in search of better living conditions and away from the treachery and lynch mobs of the south. Alice M. Thomas, *The Racial Wealth Divide Through the Eyes of the Younger Family: Undoing America's Legacy of Wealth Inequality in Search of the Elusive American Dream Utilizing A Sankofa Model of Transitional Justice*, 5 FLA. A & M U. L. REV. 1, 16–17 (2009). Upon arrival in northern industrial centers, however, African Americans often found themselves pitted against ethnic whites for wage labor. Blanche Bong Cook, *A Paradigm for Equality: The Honorable Damon J. Keith*, 47 WAYNE L. REV. 1161, 1171 (2002). During the Second Reconstruction, the gains of the civil rights era such as busing, nominal residential integration and affirmative action placed the core of the New Deal coalition, namely Blacks and working and middle class Whites, in bitter competition over jobs, schools, neighborhoods and in a broader sense over intangibles such as prestige, authority and social space. *Id.* For reasons directly related to racism, hegemony, and pseudospeciation, many African Americans were shut out of an opportunity to integrate fully into the socio–economic core or heartland of America, particularly in employment. *Id.* at 1169; Clarence Lusane, *In Perpetual Motion: The Continuing Significance of Race and America's Drug Crisis*, 1994 U. CHI. LEGAL F. 83, 85 (1994). This refusal to integrate African Americans into the workforce, coupled with systemic educational disadvantage, left many African Americans at the mercy of underground and, often illegal, economies. *Id.* at 88. The problems of employment, the increased drug trafficking trade, and the war on drug agendas, therefore, according to these commentators, explain the sudden increase in crime statistics. As explained *infra* note 108, the war on drugs and the politicization of crime provide important backdrops to the movement and explain a part of its political traction.

107 *See* ALEXANDER, *supra* note 10, at 40–48; ELIAS, *supra* note 106, at 17–19; Levine, *supra* note 10, at 335, 341.

of the victim's interest in favor of the defendant and the prosecution.[108]

108 The movement emerged from a cauldron of competing narratives. "Get Tough on Crime" agendas were just one of many historical examples of a populist hegemony. In populist hegemony, ruling class whites use race to align the interests of poor and working class whites with their own. Cook, *supra* note 106, at 1169. Using "Get Tough on Crime" rhetoric, the Republican Party has successfully played the "race card" to break up the New Deal Constituency. *Id.* at 1170–71. The "Get Tough on Crime" agenda "was a part of a highly successful Republican Party strategy—often known as the Southern Strategy—of using racially coded political appeals on issues of crime and welfare to attract poor and working class white voters who were resentful of, and threatened by, desegregation, busing, and affirmative action." Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 15 (2011). The following are two widely publicized examples of the GOP play of the "race card": (1) Ronald Reagan's condemnation of the "Chicago welfare queen;" and (2) George Bush's use of Willie Horton to represent the depraved criminal. *See* KENNETH O'REILLY, NIXON'S PIANO: PRESIDENTS AND RACIAL POLITICS FROM WASHINGTON TO CLINTON 360, 381–88 (1995). "[R]acial tensions in the New Deal coalition were further exacerbated by (1) race conscious remedial measures that clashed with White working class–interests; and (2) the growth of suburbia, which established a jurisdictional and geographic boundary between White counties and dark cities." Cook, *supra* note 106, at 1171. "Republican party strategists found that thinly veiled promises to 'get tough' on 'them'—the racially defined others—could be highly successful in persuading poor and working class whites to defect from the Democratic New Deal Coalition and join the Republican Party." Alexander, *supra*.

"The GOP's [vindication] of "victimized" and "innocent" White males provided the party with a greatly needed cosmetic facelift. Once viewed as the party of the wealthy and corporate America, the GOP used race and taxes to capitalize on the racial tensions within the New Deal coalition. By appropriating the language and posture of political oppression, the GOP became the advocate and defender of a new conservative egalitarianism, namely those Whites who felt 'victimized' by remedial efforts to more fairly distribute power." Cook, *supra* note 106, at 1171–72.

The "Get Tough on Crime" agendas created two images in the popular imagination: (1) demonized black males as criminals, for example Willie Horton, and the contrasting (2) pure, pristine, and innocent victim. As part of the demonization and vilification of black males, for example, black men became synonymous with crack distribution. ALEXANDER, *supra* at 10 (stating the Reagan administration seized crack to publicize inner–city crack babies, crack mothers, the so–called "crack whores," and drug–related violence in order to make inner–city crack abuse and violence a media sensation that would bolster public support for the drug war and would lead Congress to devote millions of dollars in additional funding to it).

The tension between the civil rights struggle and its retrenchment were also reflected in jurisprudential philosophies. These philosophies primarily converged around the axis of social injustice and individual responsibility. While liberals focused on the social causes of crime; conservatives "concentrated on perceived individual wickedness as the cause of crime." Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 943 (1985). From the post–world War II era through the mid–1960s, liberal theories on crime prevention prevailed, emphasizing the protection of defendants from government excess; addressing the social reasons for crime, such as poverty, marginalization, lack of education, discrimination; and stressing rehabilitation in sentencing as opposed to punishment. *Id.* The liberal agenda also addressed victims, "and took the form of 'victim's compensation' statutes in the early and mid–sixties." *Id.* at 944. After the mid–1960s, however, liberalism began to wane in the face of "the ever–present national fear of interracial crime"; the politicization of victims; and "the reality and fear produced by photographs and news reports of riots, burning cities, and vicious and barbaric crimes." *Id.* at 945 n.43 (citing S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN & RAPE 230 (1975) ("No single event ticks off America's political schizophrenia with

All of these forces gave rise to the movement.[109]

It is important to note the ironic lineage of the movement in order to politically and historically contextualize it.[110] Furthermore, the movement's historic and political context explains its current form, potential problems, and its agenda. Some commentators argue that conservatives have coopted the dramatic symbol of the victim in order to advance a populist hegemony. Regardless of that possible historical truth, victims' advocates on both sides of the political spectrum agree that victims require more protection and power to vindicate their own interests.

The movement found its genesis in competing narratives. The movement started at the intersection of conservative "get tough on crime" agendas and also grass roots civil rights organizations. Originally, the movement assisted previously excluded crime victims through the criminal justice process with the founding of victim assistance programs in California, Washington, D.C., and Missouri.[111] However, the movement's

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greater certainty than the case of a black man raping a white woman. . . . Racism and sexism and the fight against both converge at the point of interracial rape, a baffling crossroads of an authentic, peculiarly American, dilemma.")). Some may argue, therefore, that given the perceived failures of liberalism and the effectiveness of a populist hegemony, conservatives seized the useful symbol of victims to advance their political agenda.

109 Paul G. Cassell, a leading scholar in the field of victims' rights advocacy, has chronicled and mapped the history of the movement in several publications. *See, e.g.*, Cassell, *Victims' Rights Amendment*, *supra* note 26, at 303–05 (2012). Cassell has chronicled the history of the movement in several publications. *See generally* DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE 713–28 (3d ed. 2010); 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 [hereinafter Cassell, *Balancing the Scales*]. Large parts of the instant section are directly attributable to his work.

In addition, Judith Rowland, a former prosecutor and current victims' rights advocate, interestingly characterizes the movement as follows:

> A strong argument can be made that ordinary citizens, along with participatory rights in the criminal process, should receive the same protections that criminals do. It is precisely to these tasks that the victims' rights movement addresses itself. It is neither an anti-defendants' rights movement, nor an attempt to undermine the strength and fairness of the criminal justice process. The victims' rights movement does, however, advocate a reexamination of the victim's place vis-a-vis both the government and its duty to protect and to include victims as parties in interest with standing of their own.

Judith Rowland, *supra* note 16, at 181.

110 This contextualization is necessary in order to understand the movement's agenda, priorities, and perhaps problems. For example, if the movement had as its priority poor and disenfranchised persons of color, who are disproportionately impacted by violent crime, then the movement's priorities might include counsel for crime victims as well as constitutional safeguards. This is particularly important for the socio-economically disenfranchised because they are often ill-served by the criminal justice process, lacking the means necessary to access legal services and to navigate the criminal justice process.

111 Initially, these programs focused on assisting women and young victims of sexual and domestic violence. *See* 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

interests also dovetailed with other emerging grass roots activities as well as conservative "get tough on crime" agendas. While conservatives may have coopted the symbolic value of victims, these other grass roots movements included: "the women's movement, which focused on victims of domestic violence and sexual assault; Mothers Against Drunk Driving (MADD); the civil rights movement; and those who advocated on behalf of children, consumers, homosexuals, and the elderly."[112] Although these groups had different political motivations and possible world views informing their politics, all agreed that victims required rights and power to better effectuate their interests and to protect themselves from a second wave of trauma.[113]

Between 1960 and 1970, highly publicized cases involving egregious crimes and marginalized victims increased the movement's popularity, public acceptance, and political momentum.[114] No better examples exist than the cases involving the namesakes of the CVRA, Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn. All of these individuals were brutally murdered and their families experienced a second wave of violation through the criminal justice process. This second wave of trauma included being excluded from the courtroom and court proceedings, being refused an opportunity to have any meaningful input during sentencing, and failing to receive notice of pending court dates and continuances.[115]

L. REV. 581, 584 (2005).

112 Danielle Levine, *supra* note 10, at 341.

113 *Id.*

114 Cassell, *Victims' Rights Amendment*, *supra* note 26, at 303 (citing Payne v. Tennessee, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (internal quotations omitted)). *See generally* BELOOF, CASSELL & TWIST, *supra* note 109, at 3–35; Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517 (1985); Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (1999); Collene Campbell, *Statement from the Author*, 5 PHOENIX L. REV. 379 (2012); Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515 (1982); William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37 (1996); *see also* Cassell, *Balancing the Scales*, *supra* note 109, at 1381.

It is also interesting to note that the crime victims' rights movement gains momentum alongside of what Michelle Alexander points to as the law and order rhetoric propagated by the Republican Party to criminalize civil rights activists and to vilify blacks in an effort to obstruct the Democratic Party's New Deal coalition, specifically using racially charged rhetoric, like "Get Tough on Crime", to appeal to white sentiment and force alliance with the Republican Party. ALEXANDER, *supra* note 10, at 40–49.

115 As an example of the effectiveness of highly publicized cases to capture public outrage and the compelling nature of crime victims' stories, Senator Jon Kyl (R–AZ), one of the CVRA sponsors, compelling described the brutal murders of the CVRA's namesakes, all of whom were victims of brutal murders, and the courts' treatment of their families as follows:

> Scott Campbell, 27, the only son of Gary and Collene Campbell, was last seen on April 16, 1982. He had planned to fly in a private plane to Fargo, North Dakota

The effective use of these highly publicized cases and their compelling stories ignited public outrage. This outrage found further traction in the "get tough on crime" agendas of the GOP and in particular, President Regan.[116] Reagan created the National Victims' Rights Week and the President's Taskforce on Victims of Crime (the "Taskforce").[117]

In 1982, the Taskforce conducted several hearings and issued a report. The report concluded that the American "criminal justice system had

with a man named Larry Cowell. Unbeknownst to Scott, Cowell and another man, Donald Dimascio, planned to murder Scott. Dimascio was hiding in the back of the plane. He broke Scott's neck and then the killers threw Scott's body into the ocean, somewhere between the mainland of Southern California and Catalina Island. His body was never found. During the trials, Scott's family was barred from entering the courtroom, while the defendants' families were ushered to reserved seats. Gary and Collene were never notified of proceedings in the case in the District Court of Appeals, or of the pre-trial release of one of the killers. They were never allowed to speak at critical stages of the proceedings, including the sentencing for both murderers.

Stephanie Roper, 22, the daughter of Roberta and Vince Roper of Maryland, was kidnapped by two men after her car broke down on April 3, 1982. Over the next five hours, they repeatedly raped and tortured her. They then took her to a deserted shack in another county and repeated these crimes. Stephanie made several attempts to escape. When the killers recaptured her for the last time, they beat her with logging chains, shot her to death, burned her body, and attempted to dismember her. During the trials of the killers, the court excluded Stephanie's family from the courtroom and never notified them of continuances.

Wendy Preston, 22, was murdered on June 23, 1977 in her parents' Florida home. She was a geriatric nurse, and was visiting her mother and father, Bob and Pat Preston, before leaving for the New York School of Ballet to begin a new career. While out with her friends, she mentioned that her parents would not be home for a while. The killer overheard her, found her parents' home, broke in to find money to buy drugs, and murdered Wendy. Friends found her body six days later. Her parents were told that the government of Florida was the "victim" in this case, and that they would be notified only if they were to be called as witnesses.

Louarna Gillis, 22, John Gillis' only daughter, was murdered on January 17, 1979 as part of a gang initiation in Los Angeles. The quickest way to be initiated into the "Mexican Mafia" was to murder the daughter of a Los Angeles Police Department officer; John had been a homicide detective with the department and was at the time serving as a sergeant on the Los Angeles Police Commission. The killer targeted Louarna because he knew that she was the daughter of a police officer. He picked her up a few blocks from her home, drove her to an alley, shot her in the head as she sat in the car, pushed her into the alley, and then fired additional shots into her back. The family was not notified of critical proceedings in the killer's trial, including the arraignment. John, now the Director of the Office for Victims of Crime of the U.S. Department of Justice, was not allowed to enter the courtroom during the trial.

Nila Lynn, 69, of Peoria, Arizona, was murdered at a homeowner's association meeting on April 19, 2000 by a man unhappy with the way the association had trimmed the bushes in his yard. Nila and another woman were killed, and several men were injured. Nila died on the floor in the arms of her husband, Duane. They were three months short of their 50th wedding anniversary. Their children paid for her casket with the money they had saved for an anniversary gift. Duane wanted the killer to be sentenced to life without parole, rather than endure the lengthy appeals of a capital case. Despite having clear constitutional and statutory rights, Duane was not allowed to make a sentencing recommendation. The killer received the death penalty.

Kyl et al., *supra* note 111, at 582–83.

116 The movement dovetailed into President Reagan's political agenda to "Get Tough on Crime." In her highly influential and probing work, *The New Jim Crow*, Michelle Alexander notes, Reagan's racially coded get tough on crime strategies proved extraordinarily effective, as twenty-two percent of all Democrats defected from the party to vote for him. ALEXANDER, *supra* note 10, at 49. As Alexander notes, the year 1982 also marks the year Reagan announced his war on drugs, a war that Alexander interestingly labels a "New Jim Crow." *Id.*

117 Kyl et al., *supra* note 111, at 584.

lost an 'essential balance' . . . depriving 'the innocent, the honest, and the helpless of its protection'" . . . [and transforming crime victims into] a group oppressively burdened by a system designed to protect them."[118] To correct this imbalance, the Taskforce made several recommendations, including a federal constitutional amendment to protect crime victims' rights "to be present and to be heard at all critical stages of judicial proceedings," including bail decisions, continuances, plea bargains, dismissals, sentencing, and restitution.[119]

Efforts to amend the Constitution, however, faced severe debate and an insurmountable hurdle, requiring a two–thirds supermajority in both the House and Senate.[120] The amendment supporters never achieved the requisite support.[121] Consequently, the movement abandoned the constitutional amendment and reached political compromises between victims' advocates and congressional detractors. The compromises took the form of federal statutes that endowed victims with several substantive and procedural rights.[122] In 1982, the movement appeared to achieve part of its objectives when Congress passed the first federal victims' rights statute, the Victim and Witness Protection Act (VWPA).[123] The VWPA granted crime victims the right to make victim–impact statements at sentencing hearings and provided for increased victim restitution.[124] After the enactment of the VWPA, Congress attempted to expand the scope of these provisions through additional legislation in the Victims of Crime Act of 1984,[125] the Victims' Rights and Restitution Act of 1990,[126] the Violent Crime Control

118 *Id.* at 584–88.

119 *Id.* at 588–89; *see also* 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, 842 [hereinafter Cassell, *Recognizing Victims*] ("The Task Force proposed adding to the Sixth Amendment's protections for defendants' rights a provision allowing crime victims to be present and heard: '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.'").

120 The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several states . . . .

U.S. CONST. art. V.

121 *See* Cassell, *Recognizing Victims*, *supra* note 111, at 842.

122 *See id.* at 842–43.

123 Victim and Witness Protection Act of 1982, Pub. L. No. 97–291, 96 Stat. 1248 (codified as amended in scattered sections of 18 U.S.C.).

124 *Id.* §§ 3–4. *See also* S. REP. No. 97–532, at 9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515.

125 Victims of Crime Act of 1984, Pub. L. No. 98–473, § 1401–04, 98 Stat. 1837, 2170–73, (codified as amended at 42 U.S.C. §§ 10601–03 (2006)) (creating a crime fund and the Department of Justice Office for Victims of Crime).

126 Victims' Rights and Restitution Act of 1990, Pub. L. No. 101–647, tit. V, 104 Stat.

and Law Enforcement Act of 1994,[127] and the Victim Rights Clarification Act of 1997.[128]

Initially, these statutory achievements appeared to advance victims' interests, but eventually proved ineffective.[129] The 1997 trial of Oklahoma City bomber Timothy McVeigh revealed the ineffectiveness of these statutes.[130] During McVeigh's trial, the district court excluded any victim wishing to provide sentencing statements from all court proceedings in the case, including the trial.[131] The excluded victims had no right to appeal, and therefore, no recourse.[132] After public outrage over the exclusion,[133] the movement politically mobilized to amend the Constitution.[134]

By the mid–1990s, the politicization of crime had turned decidedly more conservative.[135] After successful discussions in Congress and with the President,[136] both democratic and republican representatives began

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4789, 4820 (codified as amended at 42 U.S.C. §§ 10601, 10606 (2006)). The act created a comprehensive bill of rights for crime victims in the federal criminal justice system including: the right to be treated with fairness and respect; the right to be notified of all court proceedings; the right to confer with the government's attorney; and the right to attend all court proceedings. *Id.* at 4820.

127 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, sec. 2248, § 2259, 108 Stat. 1796, 1907–09 (codified as amended in scattered sections of 18, 21, 28 & 42 U.S.C. (2006)) (mandating restitution for sexual assault and domestic violence to abused and sexually exploited children).

128 Victim Rights Clarification Act of 1997, 18 U.S.C. § 3510 (2006). This act clarified for judges a crime victims' right to attend court proceedings even if the victim intends to give impact testimony at sentencing, section 2 of the Victim Rights Clarification Act of 1997, following the highly publicized McVeigh case, *infra* note 129.

129 *See* H.R. REP. No. 108–711, at 4 (2004), *reprinted in* 2005 U.S.C.C.A.N. 2274, 2277 (noting the rights conferred by CVRA largely already existed in Title 42 of the United States Code, but without any independent enforcement mechanism); *see also* United States v. McVeigh, 106 F.3d 325, 334–35 (10th Cir. 1997) (holding that victims lacked independent standing under 1990 statute to challenge sequestration order); Kyl et al., *supra* note 111, at 586. *But see* Crime Victims' Rights Act, 18 U.S.C. § 3771 (2006) (Supp. 2009). Unlike previous victims' rights statutes, the CVRA provides crime victims standing to vindicate eight procedural and substantive rights in criminal cases independently of prosecutors, *id.* § 3771(d), and also imposes on the judiciary an affirmative, proactive duty to "ensure" that those rights are "afforded," *id.* § 3771(b).

130 *See McVeigh*, 106 F.3d 325.

131 *See id.* at 328; *see also* 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

132 *McVeigh*, 106 F.3d at 335.

133 *See* Jo Thomas, *New Law Forces a Reversal in Oklahoma Bombing Case*, N.Y. TIMES, Mar. 26, 1997, at A18.

134 *See* Cassell, *Treating Crime Victims Fairly*, *supra* note 18, at 867.

135 *See supra* note 108 and accompanying text; *see also* Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility And LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 31–33 (2007) (discussing the politicization of crime in the context of juvenile cases).

136 *See* Cassell & Joffee, *supra* note 15, at 166. For more information about the federal constitutional victims' rights amendment, see H.R.J. Res. 106, 112th Cong. (2012) *available at*

their efforts to amend the Constitution. On April 22, 1996, Senators Jon Kyl (R–AZ), Orrin Hatch (R–UT), and Dianne Feinstein (D–CA), with the backing of President Bill Clinton, introduced a federal victims' rights amendment in the Senate.[137] The intent of the amendment was to "restore and preserve, 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."[138] The amendment sought to extend the following rights to crime victims:

> [T]he right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused; the rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and the right to adjudicative decisions that duly consider the victim's safety, *interest in avoiding unreasonable delay*, and just and timely claims to restitution from the offender.[139]

Again, the amendment failed to achieve the requisite supermajority.[140] Over the next eight years, Senators Kyl and Feinstein continued to propose the amendment, but, despite the support of both Presidents Clinton and Bush, the amendment failed to obtain the necessary supermajority.[141]

From 1996 through 2004, both the Senate and House held hearings to consider the proposals.[142] The amendment received strong support;

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http://www.nvcap.org/legis/112/VRAtext.html.

137 Cassell & Joffee, *supra* note 15, at 166 (citing S.J. Res. 52, 104th Cong. (1996)). It is important to note that, in 1995, the politicization of crime had turned decidedly more conservative than the ascendant years of liberalism from the post–world War II era through the mid–1960s. *See* discussion, *supra* note 108. At this time, Democrats were equally competing for the "Get Tough on Crime" mantel. *See* Alexander, *supra* note 108, at 17. As evidence of democratic willingness to engage the posture of getting tough on crime, President Clinton's policies resulted in the largest increases in federal and state prison inmates of any president in American history. *Id.*

138 S. REP. No. 106–254, at 1–2 (2000).

139 S.J. Res. 1, 108th Cong. (2003) (emphasis added).

140 *See* Cassell & Joffee, *supra* note 15, at 166.

141 Despite the movement's contentious and ironic beginnings, the efforts to amend the constitution were endorsed by Presidents and Attorneys General of both major political parties and had broad, bipartisan support in both houses of Congress, in every state, and among victim advocacy groups. *See* S. REP. No. 108–191, at 3–8 (2003). However, as discussed throughout this article, support for the amendment lacked unanimity. Indeed, crime victims and their advocates differed in their views about the proposed amendment. Some outright opposed the amendment arguing that it was unnecessary, that it might prove harmful to effective law enforcement and therefore counterproductive, and that it might infringe on the constitutional rights of the accused. *See id.* at 57, 73, 82–87 (reflecting minority views citing testimony of victims of September 11, 2001, terrorist attacks and of the Oklahoma City bombing). Ultimately, the amendment's sponsors abandoned the proposal and replaced it with the CVRA, recognizing that the CVRA would need further fine-tuning by the courts.

142 *See* H.J. Res. 48, 108th Cong. (2003); S.J. Res. 1, 108th Cong. (2003); H.J. Res. 91,

however, there has never been enough momentum to overcome strong minority opposition.[143] Given the Constitution's directive that amendments can only be referred to the states upon a two–thirds vote of both houses, the minority has continuously and successfully thwarted the amendment's passage.[144] Without the requisite political support to muster a chance of passing, the amendment was never put to a vote on the Senate floor, "but the mere fact that the Judiciary Committee approved the proposed amendment revealed the resurgence of the victims' rights movement."[145]

Critics of the amendment advance several reasons for opposing it. These criticisms are noteworthy because they anticipate many of the counter arguments against using the *Barker* test to substantiate a victim's right to finality, discussed in greater detail in Part IV. These criticisms include each of the following claims: (1) a statute[146] is more appropriate to secure victims' rights, as opposed to an amendment;[147] (2)

107th Cong. (2002); S.J. Res. 35, 107th Cong. (2002); H.J. Res. 64, 106th Cong. (1999); S.J. Res. 3, 106th Cong. (1999); H.J. Res. 71, 105th Cong. (1997); S.J. Res. 6, 105th Cong. (1997); H.J. Res. 174, 104th Cong. (1996); S.J. Res. 52, 104th Cong. (1996).

143 Twist & Seiden, *supra* note 19, at 345.

144 *Id.*

145 Levine, *supra* note 10, at 344.

146 Congressional opposition to an amendment argued that there was no "pressing need" to justify amending the constitutions. *See* S. REP. No. 108–191, at 57 (2003) ("Amendment is appropriate only when there is a pressing need that cannot be addressed by other means. No such need exists in order to protect the rights of crime victims. . . . Nothing in our current Constitution inhibits the enactment of State or federal laws that protect crime victims."). Contrary to claims made concerning the absence of a "pressing need," as discussed by Cassell *supra* note 26 and *Twist* supra note 16, sex trafficking cases bring into sharp relief the inequality between victims and defendants in the courtroom. Although only a defendant's life, liberty, and property may be at stake in a criminal proceeding, victims are vulnerable to a second wave of violations during the criminal justice process, which includes the right of the accused to cross–examine victims vigorously; fear and anxiety from anticipated testimony, which unreasonable delay may only exacerbate; invasions into the victims privacy; and an inability to reach closure, again heightened by unreasonable delay. Unlike defendants, victims do not have constitutionally endowed rights or the right to representation. As a result, victims do not have the ability to defend themselves against what may sometimes be an assault by the defendant against the victim in the courtroom. If the government does not defend the victim, which is it not under an obligation to do, the victim is left vulnerable to the vagaries of litigation without recourse or counsel. Unless victims receive equally endowed protections in the constitution, defendant's rights will continue to trump victim's interest with little or no check against abuses, save court and prosecutorial discretion. Thus, for victims, there is, in fact, a pressing need that cannot be addressed, completely, by other means.

147 Again, detractors from the amendment argued that a statute, as opposed to an amendment, would provide the necessary flexibility to adapt the adversarial system to a new party to the litigation, namely victims. S. REP. No. 105–409, at 53 (1998) ("[S]uch an approach is significantly more flexible. It would more easily accommodate a measured approach, and allow for the 'fine tuning' if deemed necessary or desirable by Congress after the various concepts in the Act are applied in actual cases across the country.") (quoting Letter from George P. Kazen, Chief U.S. Dist. Judge, Chair, Comm. on Criminal Law of the Judicial Conference of the U.S.,

an amendment could "open a Pandora's box of dangerous and unintended consequences,"[148] like restricting prosecutorial discretion, particularly with regard to plea bargaining; (3) an amendment would undermine the defendant's constitutional rights, such as the right to a fair trial; (4) an amendment would impose tremendous costs on the system, including the danger of providing crime victims with attorneys and the appointment of more judges to alleviate case backlog; and (5) drafting an amendment is highly problematic.[149] With each introduction into the Senate, the language of the amendment changed significantly,[150] thereby arming opponents with claims that the frequent changes to the language reflected uncertainty about the amendment's reach.[151]

After failing to achieve a supermajority, the movement mobilized again around a comprehensive federal statute that could overcome the deficiencies of the previous statutes.[152] The result was the Crime Victims' Rights Act ("CVRA").[153] The CVRA is a political compromise between victims' rights advocates and their opposition.[154] The CVRA gave nonparty crime victims eight enumerated rights, along with the unprecedented power to enforce those rights in the district court and, if necessary, in an appellate court through mandamus relief.[155] It did not, however, disturb the public prosecution model of criminal prosecutions, nor related principles of prosecutorial discretion, nor the nonparty status of crime victims. On April 21, 2004, Senators Kyl and Feinstein introduced the CVRA, which President Bush signed into law on October 9, 2004. At the time of its ratification, it was heralded as "the most sweeping federal victims' rights law in the history of the nation."[156]

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to Sen. Edward M. Kennedy, Senate Comm. on the Judiciary, at 2 (Apr. 17, 1997)). It should be noted however, that fine-tuning is available through the courts through legal opinions should victims receive a constitutional amendment. It should also be noted that victims have had a statutory right to finality, which has remained undefined since 2004.

148 Atkins, *supra* note 22, at 1633 (citing S. REP. No. 108-191, at 58).

149 *Id.* (footnotes omitted).

150 *Id.* (comparing S.J. Res. 44, 105th Cong. (1998), and S.J. Res. 6, 105th Cong. (1997), with S.J. Res. 35, 107th Cong. (2002) and S.J. Res. 3, 106th Cong. (1999)).

151 *Id.*; *see* S. REP. No. 108-191, at 94 ("There have been some 64 drafts of this proposed constitutional amendment, and they have differed substantially. . . . The fact that this proposal changes in form and substance from year to year does not inspire confidence that we have discerned the correct formulation.").

152 Cassell & Joffee, *supra* note 15, at 166-67 (citing Jon Kyl et al., *supra* note 111, at 583).

153 18 U.S.C. § 3771 (2006) (Supp. 2009).

154 *See* Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal., 435 F.3d 1011, 1016 (9th Cir. 2006).

155 18 U.S.C. § 3771 (2006) (Supp. 2009).

156 Kyl et al., *supra* note 111, at 583. Although the CVRA is a political compromise, support for an amendment did not dissipate with the enactment of the CVRA. Notwithstanding the enactment of the CVRA, the frustration of crime victims and their families continues to

III. 2004 CRIME VICTIMS' RIGHTS ACT

The CVRA embodies a political compromise between victims' rights advocates and congressional opposition to an amendment.[157] Because Congress rushed to pass the CVRA, it suffers from a dearth of legislative history.[158] The sponsors of the bill abruptly introduced it after failing to amend the Constitution.[159] Neither the Senate nor the House held hearings.[160] The Senate did not publish a committee report.[161] Although the House published a report,[162] it failed to provide guidance, neglecting to define a "crime victim," for example.[163] Despite this dearth of legislative

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fuel the calls for a constitutional amendment. At the Congressional hearings on the proposed amendment, relatives of the CVRA's namesakes testified to failures by the government and courts to recognize their statutorily-guaranteed interests. *See, e.g.*, S. REP. NO. 108–191, at 9–10, 12. Indeed, several victims' right advocates have warned that the CVRA is merely a test. Senator Feinstein warned: "This will be a test, and I, for one, will be watching it closely. . . . [W]e will see whether the enforcement rights contained in this bill are adequate. If not, you can be sure as the Sun will rise tomorrow, we will be back with a constitutional amendment." 150 CONG. REC. S4260, S4263 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein); *see also id.* at S4266 (statement of Sen. Kyl) ("If it does not work, we will be able to come back and pursue the constitutional remedy."). In the same vein, advocacy groups warned: "The new victim rights act will surely advance our movement. Either it will prove to be totally effective or it will prove at the Federal level what has been demonstrated repeatedly in the states–that statutes alone do not insure that all victims have their rights recognized and enforced all the time." Press Release, NVCAP, MADD, POMC, & NOVA, Nat'l Victims' Constitutional Amendment Passage, Crime Victim Advocates Applaud Enactment of "Ground-Breaking" Fed. Victim Rights Law (Nov. 1, 2004), *available at* http://www.nvcap.org/docs/cvra/Press_Release.doc.

157 150 CONG. REC. S4260, S4261–62 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein); *see* Kenna, 435 F.3d at 1016.

158 *See* 150 CONG. REC. S4260, S4261–62 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (discussing the victims' rights amendment's authors' struggles to garner support for a federal constitutional amendment); Kyl et al., *supra* note 111, at 588–91 (reciting the history of the failed proposed victims' rights amendment); *see also* Kenna, 435 F.3d at 1015–16; United States v. Turner, 367 F. Supp. 2d 319, 323 n.3 (E.D.N.Y. 2005) (stating CVRA legislative history consists only of two floor statements by the statute's sponsors, Senators Dianne Feinstein and Jon Kyl).

159 *See* 150 CONG. REC. S4260, S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) ("[A]fter numerous Judiciary Committee subcommittee hearings, committee hearings, markups, putting the victims' rights constitutional amendment out on the Senate floor in a prior session . . . and recognizing that we didn't have the 67 votes necessary for a constitutional amendment—both Senator Kyl and I . . . decided that we should compromise.").

160 Atkins, *supra* note 22, at 1635; *see, e.g.*, H.R. REP. NO. 108–711, at 5 (2004) ("No hearings were held in the Committee on the Judiciary on H.R. 5107."), *reprinted in* 2005 U.S.C.C.A.N. 2274, 2278.

161 Atkins, *supra* note 22, at 1635; *see* United States v. Atl. States Cast Iron Pipe Co., 612 F. Supp. 2d 453, 460 (D.N.J. 2009) ("[T]here was no Senate Committee report on the CVRA.").

162 Atkins, *supra* note 22, at 1635.

163 *Id.* (citing *Alt. States Cast Iron Pipe Co.*, 612 F. Supp. 2d at 460 ("The House Committee report was silent on the meaning of that term, [referring to the definition of a victim under

history, the CVRA incorporated several of the amendments provisions.[164] As such, "the CVRA reads more like an amendment than a statute, with sweeping statements of rights and no discussion of how those rights should be implemented."[165]

The floor statements of Senators Feinstein, Kyl, and Leahy do, however, provide some insights into the CVRA's legislative intent.[166] In their floor statements, the sponsors anticipated a wide category of crime victims,[167] and particularly victims of the most egregious violent crimes.[168] Indeed, the CVRA's namesakes,[169] Scott Campbell, Stephanie Roper, Wendy Preston, Louarna, and Nila Lynn, were all violently murdered. Most importantly, the bill's sponsors anticipated that the CVRA would evolve with future clarifications.[170]

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the Act] . . . .")). *See generally* H.R. REP. NO. 108–711 (describing the underlying reasons for the necessity of the bill, but providing little guidance as to its application, focusing instead primarily on other portions of the bill dealing with DNA evidence and technology), *reprinted in* 2005 U.S.C.C.A.N. 2274.

164 *See* 150 CONG. REC. S4260, S4264 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) ("The legislation, as I will describe in a moment, will attempt to accomplish as much as possible the same goals the Constitutional amendment which has been pending before us would have accomplished.").

165 Blondel, *supra* note 19, at 258.

166 At least one federal court has used the sponsors' floor statements, coupled with the legislative history of the committee report for the abandoned constitutional amendment, to derive a liberal reading of the CVRA and its provisions. *See* Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal., 435 F.3d 1011, 1015–16 (9th Cir. 2006).

167 *See* 150 CONG. REC. S4260, S2470 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) ("A 'crime victim' is defined as a person directly and proximately harmed as a result of any offense, felony or misdemeanor. This is an intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged.")

168 Atkins, *supra* note 22, at 1636; *see* 150 CONG. REC. S4260, S2464 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) ("The one circumstance that seemed to be the most frequent is: My mother was murdered . . . and I could not attend the trial. . . . The other circumstance . . . [is] where a crime has been committed, the perpetrator has been convicted and is in prison or jail, but unbeknown to the victim . . . the individual gets out of jail."). It is also interesting to note that every crime victim that the bill's sponsors invited to the floor debate was a surviving family member of an individual who had been murdered. *See id.* at S4265–66 (describing a victim whose wife was brutally murdered, a victim whose daughter was killed, a victim whose son and brother were killed, and another victim whose daughter was raped and murdered).

169 *See supra* note 107 and accompanying text.

170 Atkins, *supra* note 22, at 1636 (citing 150 CONG. REC. S4260, S4272 (daily ed. Apr. 22, 2004) (statement of Sen. Leahy) ("Fortunately, however, this is to be a statute, not a constitutional amendment, and it can be modified and improved. We will be able to make it better as we go along."); 150 CONG. REC. S4271 (daily ed. Apr. 22, 2004) (statement of Sen. Leahy) ("Over time, we will be able to modify and fine-tune the statute so that it provides an appropriate degree of protection for the rights of crime victims."); *id.* ("In addition, as Chief Justice Rehnquist and others have pointed out, statutes are more easily corrected if we find, in hindsight, that they need correction, clarification, or improvement.")). It could also be

Through the CVRA, Congress integrated victims into all phases of the criminal justice proceedings and attempted to protect them from a second wave of victimization or secondary traumatization.[171] The CVRA reflects Congress's effort "to correct . . . the legacy of . . . poor treatment of crime victims in the criminal process,"[172] and to overcome the failings of previous legislation. Through the CVRA, Congress ensured that crime victims were no longer treated "like good Victorian children—seen but not heard."[173]

Congress drafted the CVRA to bring together three critical components: "rights, remedies, and resources."[174] The Act defines "crime victim" as "a person directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia."[175] The Act endows victims with the following eight enumerated rights:

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

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argued that the failings of the CVRA and experiments with it may further blueprint a possible amendment.

171 Senator Kyl specifically addressed this point: "Too often victims of crime experience a secondary victimization at the hands of the criminal justice system." 150 CONG. REC. S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

172 As Senator Feinstein explained, "[t]his legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process." 150 CONG. REC. S4260, S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

173 Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal., 435 F.3d 1011, 1013 (9th Cir. 2006).

174 150 CONG. REC. S4260, S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

175 18 U.S.C. § 3771(e) (2006) (Supp. 2009).

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.[176]

Despite Congress's clear intent to create enforceable rights, Congress did not define "[t]he right to proceedings free from unreasonable delay." The CVRA's sponsors, however, indicated that "[t]his provision does not curtail the government's need for reasonable time to organize and prosecute its case" or "infringe on the defendant's due process right to prepare a defense."[177] Rather, this right was intended to require courts to reject motions to continue made only for the convenience of the parties that go beyond either party's need to prepare.[178] The statute provides no further guidance explaining when proceedings are unreasonably delayed. No court has defined this right. Lacking this guidance, the provision remains empty.[179] In fact, critics of the CVRA have argued the CVRA "fundamentally gives victims very little power," suggesting "perhaps Congress simply was unwilling to abandon the existing public prosecution model."[180] The plain language of the CVRA, however, belies this claimed congressional reluctance. The CVRA states, "[i]n any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded" these rights.[181] Courts have recognized that this language places an independent proactive obligation on the judiciary to ensure victims' rights under the CVRA.[182] As further emphasis, Congress has

176 18 U.S.C. § 3771(a) (2006).

177 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

178 *See id.*

179 Harvard Law School Professor Laurence Tribe has observed this failure: "[T]here appears to be a considerable body of evidence showing that, even where statutory or regulatory or judge-made rules exist to protect the participatory rights of victims, such rights often tend to be honored in the breach . . . ." Laurence H. Tribe, *In Support of a Victims' Rights Constitutional Amendment*, RESPONSIVE COMMUNITY, Winter 1997–98, at 53, 55. As a consequence, Professor Tribe has concluded that crime victims' rights "are the very kinds of rights with which our Constitution is typically and properly concerned." *Id.* at 54; *see also* Twist & Seiden, *supra* note 19, at 355.

180 Blondel, *supra* note 19, at 260. It may also be true that Congress left certain provisions empty in order to allow the courts to fine tune meaning on a case-by-case basis. Courts are perfectly suited for this role. Grafting *Barker* onto a victim's right to finality may be the exact kind of balancing Congress envisioned for the courts. Grafting would enable courts to balance the interests of all parties involved while still recognizing a victim's right to finality. *See* discussion *infra* Part IV.

181 18 U.S.C. § 3771(b)(1) (2006); *In re* W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 561 (2d Cir. 2005).

182 *See, e.g.*, United States v. Saltsman, No. 07-CR-641, 2007 WL 4232985, at *1 (E.D.N.Y. Nov. 27, 2007); United States v. Turner, 367 F. Supp. 2d 319, 323 (E.D.N.Y. 2005); United States v. Tobin, No. 04-CR-216-01-SM, 2005 WL 1868682, at *1-2 (D.N.H. July 22, 2005).

required that crime victims receive their rights "[i]n any court proceeding involving an offense against a crime victim . . . ."[183]

Furthermore, under the plain language of the CVRA, Congress went on to provide for mandatory mandamus to enforce victims' rights.[184] The CVRA provides that "[t]he court of appeals shall take up and decide [a petition for mandamus] forthwith within 72 hours after the petition has been filed," and if the appellate court "denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion."[185] By providing for mandatory mandamus review, the CVRA corrected the pre–existing federal statutory scheme, which lacked an enforcement mechanism, replacing it with both the procedure and remedy for appeal.[186]

Congress's use of the phrase "shall take up and decide," while simultaneously referencing "mandamus," has unleashed a Pandora's Box of debate concerning the appropriate standard of review for appeals brought under the CVRA.[187] On one side, some judges and lawyers argue for a restrictive reading of the CVRA. They claim that by using the term "mandamus," Congress intended its traditional meaning, subject to a "clear and indisputable right" standard of review.[188] On the other side, victims' rights advocates argue for a much more expansive reading of the CVRA. They claim that Congress intended the words "shall take up and decide" to transform the traditionally discretionary mandamus standard into a mandatory standard requiring ordinary appellate review, such as abuse of discretion, legal error, or *de novo*, depending on the circumstances.[189]

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183 18 U.S.C. § 3771(b)(1) (2006).

184 *See* 18 U.S.C. § 3771(d)(3) (2006) ("the movant may petition the court of appeals for a writ of mandamus"); 18 U.S.C. § 3771(d)(5)(B) (2006) ("A victim may make a motion to re–open a plea or sentence only if . . . the victim petitions the court of appeals for a writ of mandamus within 10 days . . . ."); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d at 562.

185 18 U.S.C. § 3771(d)(3) (2006).

186 Remarking on the need for the CVRA to fix the lack of an enforcement mechanism, Senator Kyl referenced the McVeigh debacle as follows:

> This legislation is meant to ensure that cases like the McVeigh case, where victims of the Oklahoma City bombing were effectively denied the right to attend the trial[,] [do not occur again] and to avoid federal appeals courts from determining, as the Tenth Circuit Court of Appeals did, that victims had no standing to seek review of their right to attend the trial under the former victims' law that this bill replaces.

150 CONG. REC. S10,910–11 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

187 *See, e.g.*, *In re* Simons, 567 F.3d 800, 801 (6th Cir. 2009) (noting the "split of authority among the circuit courts as [to] whether a petition for a writ of mandamus under the CVRA is reviewed under the traditional standard applied to petitions under the All Writs Act or a more lenient, appellate–review standard").

188 *Id.*

189 Under traditional mandamus review, a writ of mandamus is an "extraordinary remedy." *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d at 562. A court "grants mandamus relief when the district court has usurped power or clearly abused its discretion." *Id.* A writ of mandamus may issue only if (1) the petitioner has "no other adequate means" to attain the

Regardless of the compromises made in assessing the standard of review, Congress provided victims with a right to finality. Although undefined, both the right and the means of its enforcement exist. Most importantly, the means of substantiating a victim's right to finality already exist in speedy trial jurisprudence.[190]

IV. Harmonizing the Victim's Right to Finality

Despite CVRA's problems, Congress recognized the need for victims of violent crimes to have finality and closure. Through the CVRA, Congress endowed victims with a right to proceedings free from unreasonable delay. Congress gave victims the means to enforce this right through a writ of mandamus. However, the right has remained largely dormant for nine years in part because neither Congress nor any court has defined it. Nevertheless, the CVRA sponsors understood that a victim's right to finality would evolve through additional clarification.[191] The CVRA sponsors also understood that courts had to balance a victim's interest in finality against the rights

desired relief; (2) the petitioner has demonstrated a right to the issuance of a writ that is "clear and indisputable;" and (3) the issuing court, in the exercise of its discretion, is satisfied that the writ is "appropriate under the circumstances." *In re* United States, 397 F.3d 274, 282 (5th Cir. 2005) (quoting Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367, 380–81 (2004)). Accordingly, "mere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of the writ." *In re* "Agent Orange" Prod. Liab. Litig., 733 F.2d 10, 13 (2d Cir. 1984) (quoting United States v. DiStefano, 464 F.2d 845, 850 (2d Cir. 1972)).

The standard is not as clear for writs of mandamus under the CVRA. No statutory prescription or historical tradition exists to determine the appropriate standard. *W.R. Huff Asset Mgmt. Co.* 409 F.3d at 563. As a result, circuit courts are divided as to whether a writ of mandamus under the CVRA should be reviewed under these traditional mandamus standards or under a more lenient, appellate-level review. *See In re* Simons, 567 F.3d 800, 801 (6th Cir. 2009) (noting the "split of authority among the circuit courts as [to] whether a petition for a writ of mandamus under the CVRA is reviewed under the traditional standard applied to petitions under the All Writs Act or a more lenient, appellate-review standard"). The cases underscore that the standard of review affects the expansiveness of the CVRA itself. *Compare In re* Dean, 527 F.3d 391, 394 (5th Cir. 2008) (applying traditional mandamus standard to petition under CVRA), *and In re* Antrobus, 519 F.3d 1123, 1125 (10th Cir. 2008) (same), *with W.R. Huff Asset Mgmt. Co.*, 409 F.3d at562–63 (finding more lenient abuse of discretion standard applicable to victims' petitions under the CVRA), *and* Kenna v. U.S. Dist. Court for the Cen. Dist. of Cal., 435 F.3d 1011, 1017 (9th Cir. 2006) (same).

190 *See* discussion *infra* Part IV.

191 150 Cong. Rec. S4260–01, S4272 (daily ed. Apr. 22, 2004) (statement of Sen. Leahy) ("Fortunately, however, this is to be a statute, not a constitutional amendment, and it can be modified and improved. We will be able to make it better as we go along."); *id.* at S4271 ("Over time, we will be able to modify and fine-tune the statute so that it provides an appropriate degree of protection for the rights of crime victims."); *id.* at S4271 ("In addition, as Chief Justice Rehnquist and others have pointed out, statutes are more easily corrected if we find, in hindsight, that they need correction, clarification, or improvement.").

and interests of both the government and defendant.[192] This clarification is readily available in centuries of jurisprudence undergirding defendants' right to a speedy trial. This jurisprudence has already balanced the need for judicial economy against the interests of the litigants.

Grafting the *Barker v. Wingo* test onto victims' right to finality provides traction and substance to the right, while simultaneously balancing the rights of all parties. Grafting *Barker* also demonstrates that crime victims' interests do not stand in opposition to defendants' rights but rather parallel to them. Victims are not entitled to proceedings free from any delay; rather, victims are entitled to proceedings free from unreasonable delay.[193] By using the *Barker* test in the context of victims' rights, courts would retain the ultimate power to harmonize any conflicts between the defendant's rights and the victim's interest.[194]

A. Applying Barker

The *Barker v. Wingo* test can be retrofitted to substantiate the victim's right to finality while simultaneously balancing the needs and interests of all litigants.[195] In applying the test, the courts would weigh the same four variables: (1) length of the delay; (2) reason for the delay; (3) whether and when the victim asserted her right; and (4) whether the victim suffered prejudice as a result of the delay.[196] It is imperative to note, however, that the victim's right to finality, like the defendant's right to a speedy trial, has an amorphous quality because it must exist in harmony with competing interests. Like a defendant's right to a speedy trial, a victim's right to finality cannot be quantified into a specified number of days, months, or years. As a result, any inquiry into whether the right has been violated would require

192 *See* 18 U.S.C. § 3771(b)(1) (2006); 18 U.S.C. § 3771(d)(3) (2006) ("the movant may petition the court of appeals for a writ of mandamus"); 18 U.S.C. § 3771(d)(5)(B) (Supp. 2009) ("A victim may make a motion to re–open a plea or sentence only if . . . the victim petitions the court of appeals for a writ of mandamus within 10 days . . . .").

193 *See* Cassell, *Victims' Rights Amendment*, *supra* note 26, at 301–02.

194 "The concept of harmonizing rights is not a new one." Cassell, *Victims' Rights Amendment*, *supra* note 26, at 316 (citing Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in The Constitution*, L.A. TIMES, July 6, 1998, at B5). "Courts have harmonized rights in the past; for example, accommodating the rights of the press and the public to attend criminal trials with the rights of criminal defendants to a fair trial." *Id.* Courts, therefore, are free to do the same with the victim's right to finality under the CVRA.

195 Cassell argues that the case law underlying *Barker v. Wingo* and the defendant's right to a speedy trial can support a constitutional amendment authorizing a victim's right to finality. Cassell, *Victims' Rights Amendment*, *supra* note 26, at 316. Nothing in this article should be construed as supplanting any effort to amend the Constitution to provide for victims' rights. Instead, the instant article provides for an interim measure, utilizing the existing CVRA until such time as victims are able to gain the requisite level of political support to amend the constitution.

196 *See* Barker v. Wingo, 407 U.S. 514, 530 (1972).

a functional analysis of the right in the particular facts and context of the particular case.

1. *Length of Delay.*—The court would determine the first prong: whether a delay occurred.[197] As the Court reasoned in *Barker*, it would be impossible to determine with precision when the right to finality has been denied.[198] Thus, it would not be possible to fix a specific number of days when the right is violated. If, for example, the defendant moves for a sixty day continuance in order to accommodate a key defense witness, granting the continuance would not violate a victim's right.[199] The victim's right would necessarily succumb to the defendant's legitimate interest in taking the time necessary to launch a viable defense. However, in some circumstances, the record may demonstrate an effort by the defendant to deliberately delay the proceedings in order to thwart a speedy resolution, including efforts to exhaust the victim or some other strategic or tactical reason. In such cases, courts may find a violation. Given the many variables at work in a prosecution, it is impossible to outline every occasion in which a violation may occur.[200] Nevertheless, the flexibility of the *Barker* test is suited for a careful analysis of each individual case and the competing interests at stake.

As in *Barker*, the length of the delay serves as a threshold or "triggering mechanism" for analysis.[201] However, courts would have to adjust the time the "speedy clock" starts and when it stops to accommodate the rights and interests of the victim. As with a defendant's right to a speedy trial, the victim's right would start, or vest, at the moment of the charging instrument. Statutes of limitations arguably protect a victim's interest prior to the charging instrument.[202] Statutes of limitations also protect the government's ability to investigate and build a viable case, while preventing undue delay in initiating a prosecution.[203] Unlike a defendant, however, the

197. *See In re* Simons, 567 F.3d 800, 801 (6th Cir. 2009).

198 *Barker*, 407 U.S. at 521.

199 *See id.* at 522–23 (noting that "[i]f, for example, the State moves for a 60–day continuance, granting that continuance is not a violation of the right to speedy trial unless the circumstances of the case are such that further delay would endanger the values the right protects.")

200 It is imperative to note, as the court did in *Barker*, that a victim's right to finality, like a defendant's right to a speedy resolution, is necessarily relative and it is consistent with delays; however, the defendant's right to a speedy resolution "does not preclude the rights of public justice." *Id.* at 522 (quoting Beavers v. Haubert, 198 U.S. 77, 87 (1905)).

201 *Id.* at 530.

202 *But see* United States v. MacDonald, 456 U.S. 1, 15 (1982) (Marshall, J. dissenting) (arguing that speedy trial should extend beyond the actual charging instrument).

203 Statute of limitations guard against delay between the time the government discovers sufficient evidence to proceed against a suspect and the time of instituting those proceedings and represent a legislative judgment with regard to permissible periods of delay.

victim's interest does not vest when a defendant is arrested, as it is not the victim's interest in finality at issue. The time between the arrest and the charging instrument belongs to the defendant's quiver of rights, which both the Sixth Amendment and SPA protect.

As to the time that the victim's speedy clock stops, unlike a defendant, the CVRA extends the victim's right to finality beyond voir dire through sentencing, the judgment, and appeal. In addition, a victim's need for closure extends beyond the beginning of a trial and may be infringed by unreasonably long periods of delay during both trial and appeals. The plain language of the CVRA supports this interpretation. According to the CVRA, victims have the right "to proceedings free from unreasonable delay."[204] Thus, the CVRA entertains multiple proceedings, which would include sentencing as well as appeals. In fact, the victim's other enumerated rights under the CVRA specifically entitle victims "to full and timely restitution"[205] as well the right to be heard at sentencing,[206] all of which extend beyond voir dire.[207]

Just as in *Barker*, a delay of at least one year in bringing a defendant to trial would trigger a rebuttable presumption of violation, with the level of judicial scrutiny increasing in direct proportion to the length of delay. Depending on the circumstances of each individual case, a longer delay may be permissible and a shorter delay may be impermissible, depending on the circumstances. For example, reasonable delay in prosecuting a basic street crime is considerably less than for a complex conspiracy, RICO, or CCE charges.

2. *Reason for the Delay.*—This second prong presents the courts with an opportunity to weigh all of the competing interests between the government, defendant, and victim against the backdrop of judicial economy and

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CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1496 (2004).

204 18 U.S.C. § 3771(a)(2)(7) (2006).

205 18 U.S.C. § 3771(a)(2)(6).

206 18 U.S.C. § 3771(a)(2)(4). The Sentencing Guidelines also 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." U.S. SENTENCING GUIDELINES MANUAL § 6A1.5 (2012) (citing 18 U.S.C. § 3771 (Supp. 2009)).

207 As further evidence of Congress intent to vest victims with a right to timely proceedings beyond voir dire, the CVRA mandates that the court of appeals "shall take up and decide" mandamus petitions "within 72 hours after the petition has been filed." The seventy-two hour window further evinces Congress' sensitivity toward a victims' right to speediness as well as a victim's rights to timely proceedings, which include mandamus review. 18 U.S.C. § 3771(d)(3) (2006).

efficiency.[208] Under this prong, courts would be free to subtract reasonable delay from the equation, including the time a defendant needs to build a viable defense.[209] Moreover, courts would have the necessary discretion to accommodate delays for case–specific needs. Applying *Barker* would not supplant a defendant's rights nor make victims co–equal parties in the criminal justice process. Rather, all of the following would be deemed appropriate reasons for delay: a defendant's right to file motions and have those motions decided; any time necessary to prepare a viable defense, including the time needed to track down witnesses, study scientific evidence, and meet with experts; any periods necessary to file and decide interlocutory appeals or the victim's writs of mandamus; time needed to determine the defendant's competency or physical capacity; delays occasioned by the defendant's transfer or removal; any time necessary to transport the defendant; and the time the trial court may need to consider a plea agreement. By subtracting this time, courts would balance the victim's rights against those of the defendant, not supplant one for the other or privilege one over the other.

However, a defendant's efforts to delay proceedings in an effort to exhaust or frustrate the victim should be weighed against the defendant and in favor of the victim's right to closure. Examples of impermissible conduct that might be deemed violative of the victim's right to a speedy disposition include: (1) knowingly setting a case for trial without disclosing the fact that a necessary witness would be unavailable; (2) filing a motion solely for the purpose of delay, knowing the motion is totally frivolous and without merit; and (3) making false statements for the purpose of obtaining a continuance which are material to the granting of a continuance.

Similarly, as in speedy trial jurisprudence, the government's attempt to delay the trial deliberately in order to hamper the defense should be weighed heavily against the government.[210] This weighing should not cause waves of alarm among the ranks of prosecutors, because current precedent rests primary responsibility for expeditious prosecutions with both the government and courts. Arguably, the plain language of CVRA further solidifies a preexisting, affirmative, and proactive duty on the courts to conduct proceedings expeditiously. The Act mandates that courts

208 The CVRA Senate sponsors indicated that the statutory right to proceedings free from unreasonable delay neither "curtail[s] the Government's need for reasonable time to organize and prosecute its case" nor "infringe[s] on the defendant's due process right to prepare a defense." *See* 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). On the other hand, delays for other reasons, particularly "for the mere convenience of the parties," must take into account the victim's countervailing interest in a speedy trial. *Id.* at S4269.

209 Reasonable delay would also include all periods of time specifically enumerated in the SPA. 18 U.S.C. § 3161(h)(1) (2009).

210 Barker v. Wingo, 407 U.S. 514, 531 (1972).

"ensure that the crime victim is afforded the rights described" therein.[211] Thus, the plain language of the CVRA envisions proactive measures by the court to safeguard a victim's right to closure and finality.[212]

As in *Barker*, since the responsibility of overcrowded courts and negligence must rest with the government and not the defendant or victim, these neutral reasons for delay should be weighed less heavily. Courts should give less weight to neutral reasons for delay, such as negligence, overcrowded courts, heavy dockets, or excessive time to decide complex motions; however, courts would consider these factors because the ultimate responsibility for such circumstances rests with the government and the courts rather than with the defendant or victim. In these particular cases the use of *Barker* would simply provide victims an opportunity to raise an issue that precedent has already established.[213]

3. *Assertion of Rights.*—In the context of victims' rights, this third prong highlights a profound obstacle for victims and paradox in the CVRA.[214] The plain language of the CVRA requires an affirmative assertion of the victim's enumerated rights, including the right to finality.[215] The CVRA correctly requires this assertion at the trial court level because the district court should have an opportunity to correct a problem, particularly where it occupies a front row view of the complexities and vagaries of the

211 18 U.S.C. § 3771(d)(3) (2006).

212 If, for example, a defendant files a speedy trial motion demanding a prompt trial or a continuance, seeking delay, the court should, sua sponte, raise the victim's interest in finality as part of the variables the court must consider. 18 U.S.C. § 3771(a)(7) (2006); United States v. Turner, 367 F. Supp. 2d 319, 336 (E.D.N.Y. 2005). In addition to the proactive duty placed upon the court, the CVRA explicitly requires that "[t]he reasons for any decision denying relief under this chapter shall be clearly stated on the record." 18 U.S.C. § 3771(b) (2006). Although not codified as part of § 3771, the CVRA also includes a requirement that the Administrative Office of the United States Courts report annually to Congress, on a court–by–court basis, "the number of times that a right established in chapter 237 of Title 18, United States Code, is asserted in a criminal case and the relief requested is denied and, with respect to each such denial, the reason for such denial, as well as the number of times a mandamus action is brought pursuant to chapter 237 of Title 18, and the result reached." Pub. L. No. 108–405, § 104(a).

213 *See, e.g.*, Doggett v. United States, 505 U.S. 647, 657 (1992) ("The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it.").

214 Cassell, *Victims' Rights Amendment*, *supra* note 26, at 328.

215 The CVRA's "Enforcement and Limitations" section requires an assertion of any enumerated right in the following language:

> The rights described in subsection (a) 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.

18 U.S.C. § 3771(d)(3) (2006).

prosecution.[216] The district court is in the best position to decide whether relief is warranted under the CVRA, as it has insights into the complexities of a pending litigation.[217] The district court is also in a position to adjust the speed of the proceedings. Similarly, most of the rights provided to crime victims under the CVRA, including the right to finality, require an assessment of "reasonableness."[218] The district court is in the position to make these assessments and to determine what constitutes "a reasonable procedure" for affecting these rights.[219] Furthermore, the trial court is in a privileged position to police the efficiency of the proceedings.

The CVRA does not, however, mandate that the victim assert the right.[220] It could be that the government could assert the right to finality on behalf of the victim. However, there may be circumstances in which the government and the victim do not share the same interests in finality. For example, delay may work to the government's advantage, when the same period of delay may prejudice the victim. Given that the victim and the government may have a divergence of interests, there is no guarantee that the government would file a motion on the victim's behalf.[221]

Unlike defendants, however, victims of violent crimes are not guaranteed an attorney. More often times than not, victims of violent crimes are rarely persons of means. This is particularly true for sex trafficking victims. Victims proceeding pro se face near insurmountable hurdles in navigating the criminal justice process, let alone in obtaining a writ of mandamus. This absence of representation, which disproportionately affects persons of color, has led many to argue that victims of violent crimes, particularly juvenile victims of violent crimes, should be afforded the right to counsel.[222] Without representation a victim's ability to vindicate any right is a fiction.

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

217 *In re W.R. Huff*, 409 F.3d at 563.

218 *Id.*

219 *Id.*

220 The CVRA's "Enforcement and Limitations" section requires an assertion of any enumerated right in the following language:

> The Crime Victim or the Crime Victim's Lawful Representative, and the attorney for the government may assert the rights in subsection (a).

18 U.S.C. § 3771(d)(1) (2006).

221 It should also be noted that the government does not represent the victim. The victim is not the government's client; rather, the prosecution represents the interests of the public. As the Supreme Court has explained:

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

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

222 According to Tribe and Cassell:

Given these difficulties, as with a defendant's assertion of the speedy trial right, victims should not be deemed to have waived their right to finality simply through failing to assert it or remaining silent in the face of continuances.[223]Rather, the circumstances of the victim's assertion, or lack of it, like that of the defendant's, should be one factor weighed within the context of the case, but should not alone be dispositive.[224] This is particularly true where victims are unaware—as they often are—that continuances are being requested or granted and therefore are not in a position to object. This unawareness may also require victims to be notified of motions to continue and to have an opportunity to object on the record.

There may also be cases where both the defendant and victim assert that their respective rights to a speedy resolution have been violated. There may be cases where both the defendant and victim agree that there has been unnecessary delay where, for example, defense counsel acquiesces in long delay without adequately informing the defendant, or in cases where the court has not appointed counsel for the defendant for an inordinate period of time. Indeed, providing traction to the victim's right may also strengthen the defendant's assertion of the right to a speedy resolution in these circumstances. However, as discussed later in this section, dismissal is not a viable remedy for the victim. Instead, courts would be free to fashion an appropriate remedy.

> Congress and the states already have passed a variety of measures to protect the rights of victims. Yet the reports from the field are that they have all too often been ineffective. Rules to assist victims frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia or the mere mention of an accused's rights—even when those rights are not genuinely threatened.
>
> Moreover, because we lack the resources to provide victims the guiding hand of appointed legal counsel in the criminal process, victims are largely left to stumble on their own through a "haphazard patchwork" of rules "not sufficiently consistent, comprehensive or authoritative to safeguard victims' rights," the Justice Department concluded after careful study. Empirical confirmation of this failure comes from a National Institute of Justice study reporting that today "large numbers of victims are being denied their legal rights." The same study found that victims' rights are more frequently denied to racial minorities and presumably other disfavored groups who are unable to assert their interests effectively. Only an unequivocal constitutional mandate will translate paper promises into real guarantees for all victims.

Laurence H. Tribe & Paul G. Cassell, *Perspective on the Law; Embed the Rights of Victims in the Constitution; A Proposed Amendment Protects Victims, Without Running Roughshod over the Rights That Are Due the Accused*, 9 LEWIS & CLARK L. REV. 663 (2005); *see also* Tanya Asim Cooper, *Sacrificing the Child to Convict the Defendant: Secondary Traumatization of Child Witnesses by Prosecutors, Their Inherent Conflict of Interest, and the Need for Child Witness Counsel*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 239, 244 (2011).

223 *See* Barker v. Wingo, 407 U.S. 514, 528 (1972) ("We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right."); Cassell, *Victims' Rights Amendment*, *supra* note 26, at 328.

224 Cassell, *Victims' Rights Amendment*, *supra* note 26, at 339 (citing *Barker*, 407 U.S. at 531–32).

4. *Prejudice.*—As to the fourth prong, victims may not experience prejudice in the same manner as defendants. Victims obviously do not experience the pain of pre–trial incarceration or the impairments that long passages of time can cause to the defendant's ability to defend. Nevertheless, victims do experience prejudice. The subsequent prejudice to the victim should be assessed in light of the right Congress designed to protect. Seen in this light, prejudice to the victim may include pain and anxiety caused by a lack of finality; the withering ability of the victim to testify and pinpoint evidence that can corroborate the victim's testimony; the victim's loss of memory caused by long delays; deliberate attempts by the defendant to wear down the victim's resolve to testify; and interruption to the victim's ability to lead a normal life as a result of inordinate delay.[225] Arguably the damage caused by unreasonable delay to the witness's ability to recall past events "skews the fairness of the entire system."[226] This is particularly problematic where the loss of the witness's memory may not be reflected in the record because what has been forgotten cannot be demonstrated.[227]

B. Remedy

The remedy for a constitutional violation of the defendant's right to a speedy trial is dismissal of the indictment or reversal of the conviction if the assertion of the right is made post trial.[228] The Supreme Court has noted that this remedy is "unsatisfactorily severe" but "is the only possible remedy," reasoning that a speedy trial violation, unlike other Sixth Amendment rights, cannot be cured by a new trial.[229] Obviously, dismissal of the charge or reversal of the conviction is no remedy for victims. Again, speedy jurisprudence would have to be modified to accommodate the rights, needs, and interests of the victim. Courts should fashion a remedy based on the particular interest invaded in the particular case.

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225 The ineffectiveness of the CVRA has left many victims' rights advocates, including Cassell, to re–assert the need for a constitutional amendment. Cassell also suggests that:

> In the wake of the passage of a Victims' Rights Amendment, Congress could revise the Speedy Trial Act to include not only defendants' interests but also victims' interests, thereby answering any detailed implementation questions that might remain. For instance, one desirable amplification would be a requirement that courts record reasons for granting any continuance. As the Task Force on Victims of Crime noted, "the inherent human tendency [is] to postpone matters, often for insufficient reason," and accordingly the Task Force recommended that the "reasons for any granted continuance . . . be clearly stated on the record."

Cassell, *Victims' Rights Amendment*, *supra* note 26, at 328 (quoting LOIS HAIGHT HERRINGTON ET AL., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT (1982), http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/87299.pdf).

226 *Barker*, 407 U.S. at 532.

227 *See id.* (discussing prejudices to the defendant caused by long passages of unreasonable delay to the entire prosecution).

228 *Id.* at 522.

229 *Id.*

In re Simons provides an illustrative example of a court fashioning a remedy suited to the particularities of the case.[230] There, the victim witness moved the trial court to unseal the record. The Sixth Circuit held that the failure of the district court to rule on the motion for a three-month period could be "construed as an effective denial of rights under the CVRA,"[231] particularly where the CVRA directs the district court to "take up and decide any motion asserting a victim's right forthwith."[232] In fashioning a remedy, the Sixth Circuit directed the district court to rule on the victim's motion two weeks from the entry of its order.[233] Interestingly, Judge Clay dissented, arguing that the district court should not be allowed an additional two weeks to decide the motion, but should be directed to unseal "forthwith."[234]

Another illustrative example of a court fashioning a balanced—yet substantive—remedy is found in *United States v. Tobin*.[235] There, the government alleged that the defendant "conspired with others to interfere with New Hampshire citizens' rights to vote freely, by jamming phone lines set up to facilitate the 'get out the vote' efforts by the NHDP [New Hampshire Democratic Party] and the Manchester Professional Firefighters' Association." The NHDP, as the victim, filed an objection to a second continuance in the case. The district court rejected the victim's objection. In doing so, the court correctly reasoned: "Congress, in enacting the CVRA did not mean to undermine the Speedy Trial Act, nor to deprive either criminal defendants or the government of a full an[d] adequate opportunity to prepare for trial."[236] As a result, the court did not find that a trial within seven months of the superseding indictment constituted "unreasonable delay."[237] Although the court rejected the victim's motion, it concluded:

> [R]ecognizing the statutory right of victims (which, if the allegations are proven, include the entire body-politic and not just the organized NHDP) and taking into account the court's statutory obligation to "ensure that [all] crime victim[s][are] afforded the rights described," the parties are hereby put on notice that no further continuance will be granted in the absence of extraordinary circumstances.[238]

230 *In re* Simons, 567 F.3d 800 (6th Cir. 2009).

231 *Id.* at 801.

232 *Id.* at 800 (quoting 18 U.S.C. § 3771 (2006) (Supp. 2009)).

233 *Id.* at 801.

234 *Id.* at 801–02 (Clay, J., dissenting).

235 United States v. Tobin, No. 04-CR-216-01-SM, 2005 WL 1868682 (D.N.H. July 22, 2005).

236 *Id.* at *2 (citation omitted).

237 *Id.*

238 *Id.* (alteration in original) (citation omitted).

It is imperative to note that, as a result of the victim's efforts to avoid unreasonable delay, the court put all parties on notice that it was actively policing the speed of the proceedings.[239]

C. Harmony

Several commentators speculate that Congress deliberately left provisions of the CVRA undefined because it did not want to abandon the public prosecution model.[240] Indeed, defense advocates assert that expanded victims' rights will violate centuries of constitutionally recognized defendants' rights and the "zone of protection," with enormous expense to tax payers.[241] Prosecutors also fear that more powerful victims' rights will add another complexity to the already dizzying problems inherent in any prosecution. These same critics also claim that the CVRA threatens both prosecutorial and judicial independence.[242]

Despite its criticisms, however, Congress has in fact acted. Through the CVRA, Congress has endowed victims of violent crime with eight enumerated rights and the means for their enforcement. As Cassell and Tribe correctly point out, "[t]hese are the very kinds of rights with which our Constitution is typically and properly concerned—rights of individuals to participate in all those government processes that strongly affect their lives."[243] Although a victim's right to finality is not constitutionally endowed, it is a creation of statute. Rather than supplanting defendants' rights and the government's interests, grafting *Barker* onto the victim's right to finality is one example of the manner in which courts can properly balance the needs and interests of all litigants in the field of criminal prosecution.

The Supreme Court in *Barker* concerned itself with judicial efficiency, judicial economy, and a balancing of all the interests involved in criminal prosecution. *Barker*'s four–prong test, therefore, is divinely suited to provide closure to victims without supplanting the defendant's rights and the government's interests. The ad hoc *Barker v. Wingo* test is sufficiently flexible to accommodate varying circumstances and interests. The test protects the legitimate interests of prosecutors and the rights of the

239 *See also* Fern L. Kletter, Annotation, *Validity, Construction, and Application of Crime Victims' Rights Act (CVRA), 18 U.S.C.A. § 3771*, 26 A.L.R. FED. 2D 451 (2008) (collecting cases in which courts have enforced victims' right to proceedings free from unreasonable delay).

240 *E.g.*, Blondel, *supra* note 19, at 260.

241 *See* Atkins, *supra* note 22, at 1649 (discussing legislators' concerns of possible problems resulting from expanded victims' rights).

242 *See, e.g.*, Blondel, *supra* note 19, at 240.

243 Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 523 (1999) (quoting Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5).

defendants, while adding recognition and guidance for equally compelling victims' interests.[244]

As set forth in Part I, the defendant's right to a speedy trial is designed, among other things, to prevent unreasonably long pretrial incarceration, "to minimize anxiety and concern accompanying public accusation,"[245] and "to limit the possibilities that long delay will impair the ability of an accused to defend himself."[246] The interests underlying a speedy trial, however, are not limited to the defendant alone. The Supreme Court has acknowledged that:

> [T]here is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system. [247]

Although the Supreme Court has acknowledged a societal interest in a speedy trial, many victims' rights scholars note that this right has a limited existence given the defendant's right to a speedy trial and the CVRA's limitations. Moreover, the Bill of Rights does not address the rights and interests of "society" or the victim. Consequently, as Cassell asserts, "[V]ictims frequently face delays that by any measure must be regarded as unjustified and unreasonable," and yet they have no substantive ability to challenge them.[248] It is highly unacceptable that "these delays are found most commonly in cases of child sex assault,"[249] as "[c]hildren have the most difficulty in coping with extended delays."[250] "Victims cannot heal

244 It is imperative to note that applying *Barker* to a victim's right to finality would not bring about the parade of horribles that so often plague prosecutors' reactions to the CVRA. Specifically, applying *Barker* would not "compromise prosecutorial discretion and independence" by allowing a victim to "effectively dictate policy decisions," "place unknowing, and unacceptable, restrictions on prosecutors," or "override the professional judgment of the prosecutor" regarding investigation, timing, disposition, or sentencing, as it was feared would result from the VRA. S. REP. No. 108–191, at 74 (2003) (minority views of Senators Leahy, Kennedy, Kohl, Feingold, Schumer, and Durbin). *Contra* Twist & Seiden, *supra* note 19, at 365–66 (arguing that language in the VRA would not cause the aforementioned problems asserted by the Minority Senators).

245 United States v. Ewell, 383 U.S. 116, 120 (1966).

246 *Id.*

247 Barker v. Wingo, 407 U.S. 514, 519 (1972) (citing REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 256 (1966)).

248 Cassell, *Victims' Rights Amendment*, *supra* note 26, at 326–27 (quoting WAYNE R. LAFAVE ET. AL., CRIMINAL PROCEDURE § 18.1(b) (3d ed. 2007)).

249 *Id.* at 327 (citation omitted).

250 *Id.*

from the trauma of the crime until the trial is over and the matter has been concluded."[251]

Conclusion

The Somali sex trafficking case is hardly an outlier. With the advent of both RICO and the CCE, federal prosecutions have and will grow increasingly more lengthy and complex.[252] Delays in prosecutions are expected and commonplace. Despite our constitutional structure that assumes defendants above all others seek a speedy trial, defendants often lack any interest in a speedy resolution.[253] Indeed, defendants often have increased incentive to delay proceedings, hoping to wear down the resolve and resources of both the witnesses and the government. Despite our constitutional concerns for defendants, victims of violent crime, and particularly sexually violent crimes, must be protected from a second wave of victimization through the trial process. Congress endowed victims with a right to closure, specifically protection from proceedings free from unreasonable delay. Nothing in this article advocates supplanting constitutionally endowed defendant rights. Nor does this article suggest that the CVRA sets victims upon equal footing with either the government or the defendant. However, Congress has provided victims with a measure of standing to challenge unreasonable (emphasis on "unreasonable") delay.

Although freedom from unreasonable delay is a specifically enumerated right, the right has remained largely dormant under the CVRA.[254] In fact, some have speculated that Congress deliberately left key CVRA provisions undefined because "Congress simply was unwilling to abandon the existing public prosecution model."[255] Nevertheless, the CVRA specifically enumerates the victim's right to proceedings free from unreasonable delay and provides a mechanism for its enforcement through a writ of mandamus. Furthermore, the CVRA gives courts the authority to define its contours.

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251 *Id.* at 327 (citing Lois Haight Herrington et al., President's Task Force on Victims of Crime: Final Report (1982), *available at* http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/87299.pdf.; *Utah This Morning* (KSL television broadcast Jan. 6, 1994) (statement of Corrie, rape victim) ("Once the trial was over, both my husband and I felt we had lost a year and a half of our lives.")).

252 *See* Kenneth Carlson & Peter Finn, U.S. Dep't of Justice, Federal Offenses and Offenders: Prosecuting Criminal Enterprises (1993), *available at* https://www.ncjrs.gov/pdffiles1/Digitization/142524NCJRS.pdf ("Whether disposed by plea or trial, CCE cases took considerably longer to resolve than other drug trafficking cases. Racketeering cases took somewhat longer to dispose than cases that involved the corresponding underlying offenses, and approximately 50% longer than the average for all offenses.").

253 *See* Cassell, *Victims' Rights Amendment*, *supra* note 26.

254 *See In re* Simons, 567 F.3d 800, 800–01 (6th Cir. 2009).

255 Blondel, *supra* note 19, at 260.

Rather than engaging a one–sided struggle to supplant defendants' rights or evoking the parade of horribles terrifying many prosecutors, this article attempts a discursive shift toward using existing jurisprudence to give victims' rights meaning, while simultaneously balancing the rights of all litigants.

In the final analysis, this article explores how existing forms of jurisprudence can be used to give victims' rights meaning while at the same time balancing the rights and needs of all litigants involved in the criminal justice proceeding. By doing so, this article seeks to complement rather than supplant any efforts to advance the cause of victims, including renewed efforts to pass a constitutional amendment. Adding a discursive shift away from defendant centered rights or the primacy of the government into an area of balance and compromise is important in two different ways. First, it shapes the direction of potential reform. Although Congress has acted through the CVRA, its provisions lie largely dormant, leaving many to argue that the CVRA has not successfully integrated victims into the criminal process. By demonstrating the potential for compromise and a balance of interests, courts and litigants may be more inclined to utilize the CVRA's provisions.

Secondly, engaging a defendant, victim, or state centered ethos invites an adversarial relationship between prosecutors, defense attorneys, victims, and victims' right advocates. By antagonizing litigants and creating opposing political forces, obvious areas of compromise and coalescence are perilously ignored. By contrast, grafting *Barker* onto victims' right to finality utilizes centuries of tried and true jurisprudence already devoted to issues of judicial efficiency and economy. This discursive shift may encourage other areas of potential compromise within the confines of the CVRA. Only when that happens, under the current circumstances, can victims be truly integrated into the centuries–old forum of criminal proceedings.