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THE CRIME VICTIM'S EXPANDING ROLE IN A SYSTEM OF PUBLIC PROSECUTION: A RESPONSE TO THE CRITICS OF THE CRIME VICTIMS' RIGHTS ACT

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INTRODUCTION

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. However, state and federal statutes and state constitutional amendments have challenged this vision. Perhaps the best example of such a challenge comes from the Crime Victims' Rights Act ("CVRA"), a federal statute passed by Congress in 2004 that guarantees victims a series of rights in federal criminal proceedings.[1]

Although the CVRA has received broad bipartisan support,[2] it also has its critics. One recent example of such criticism comes from Danielle Le-

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[1] *See* Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, tit. I, 118 Stat. 2260, 2261–65 (2004) (codified as amended at 18 U.S.C. § 3771 (2006) and to be codified at 42 U.S.C. §§ 10603(d)–(e)) (link). This Essay refers to the act simply as the Crime Victims' Rights Act, or CVRA. Specifically, the CVRA gives crime victims 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 public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; (5) The reasonable right to confer with the attorney for the Government in the case; (6) The right to full and timely restitution as provided in law; (7) The right to proceedings free from unreasonable delay; and (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

Id. § 3771(a)(1)–(8).

[2] *See* Danielle Levine, *Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution*, 104 NW. U. L. REV. 335, 361 (2010) (noting that "the victims' rights movement has

vine's thoughtful piece, published in the *Northwestern University Law Review*, entitled "Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution."[3] In her article, Levine advances both a procedural and substantive challenge to the rights granted to crime victims by the CVRA.[4] First, in her procedural challenge—a position that a minority of federal circuit courts have adopted—Levine argues that victims should be able to challenge denials of their rights by district courts only in the rare circumstance of a "clear and indisputable" error.[5] From a substantive perspective, Levine contends that giving victims ordinary appellate review when their rights are denied would interfere with the discretion that American prosecutors regularly exercise in criminal cases, and could even "threaten the fair and just adjudication of a criminal case."[6]

These arguments are typical of attacks on the CVRA. In this brief rejoinder, we respond to both of Levine's claims—a response that we hope will illustrate more generally how attacks on crime victims' rights are misguided. Part I begins by providing a quick review of the CVRA and the charges advanced by its critics. Part II then turns to the question of the appropriate standard of review for crime victims' appeals brought under the CVRA. In contrast to the position staked out by its critics, including Levine, crime victims should receive ordinary appellate review, because such review is both consistent with Congressional intent and, more importantly, such review is dictated by common sense. Finally, Part III addresses the substantive argument that rights granted to crime victims may somehow interfere with the administration of justice. Part IV concludes that victims' rights do not impair the just adjudication of criminal cases, but rather improve it.

I. THE CVRA AND ITS CRITICS

The history of the crime victims' rights movement has been chronicled at length elsewhere.[7] For present purposes, it is enough to note that victims' rights advocates made considerable progress in the late 1980's and early 1990's by passing state constitutional amendments and statutes extending

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tremendous political support . . . [and] is appealing to both conservatives who want to be tough on crime and liberals who want to give a voice to those in need of an advocate.") (link).

[3] *See id.*

[4] *See id.*

[5] *Id.* at 351.

[6] *Id.* at 361.

[7] *See, e.g.*, DOUGLAS E. BELOOF, PAUL G. CASSELL, & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE 5–17 (3d ed. 2010); Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835, 841–50; Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 865–70 (link); Steven J. Joffee, *Validating Victims: Enforcing Victims' Rights Through Mandatory Mandamus*, 2009 UTAH L. REV. 241, 242–45 (link).

rights to crime victims in the criminal process.[8] These victims' rights have included the right to attend court hearings and to be heard regarding plea bargains and sentences.[9]

Building on this progress, in 1995, victims' advocates made an effort to enact a federal constitutional amendment designed to place victims' rights on a firm foundation.[10] To bring this goal to fruition, the advocacy movement—lead most prominently by the National Victims Constitutional Amendment Network—approached the President and Congress with a proposed amendment.[11] As a result of these discussions, on April 22, 1996, Senators Jon Kyl, Orrin Hatch, and Dianne Feinstein, with the backing of President Bill Clinton, introduced a federal victims' rights amendment.[12] The intent of this amendment was to "restore, preserve, and protect, as a matter of right for the victims of violent crimes, the practice of victim participation in the administration of criminal justice that was the birthright of every American at the founding of our Nation."[13] The amendment would have extended a series of rights to crime victims, including:

> the 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.[14]

Although the proposed amendment received significant backing in Congress, it never succeeded in attracting the required two-thirds support.[15] As a result, in 2004, the victims' rights movement instead pressed for a far-reaching federal statute designed to protect victims' rights in the federal

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[8] *See* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM L. 611, 614–15 (2009) (link).

[9] *See id.*

[10] *See id.* at 615.

[11] *Id*. *See generally* Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 UTAH. L. REV. 369 (advocating for the crime victims' amendment). For more information about the federal constitutional victims' rights amendment, see National Victims' Constitutional Amendment Passage, www.nvcan.org (link).

[12] *See* S.J. Res. 104-52, 104th Cong. (Apr. 22, 1996) (link).

[13] S. REP. NO. 108-191, at 1–2 (2003); *see* S. REP. NO. 106-254, at 1–2 (2000).

[14] S.J. Res. 1, 108th Cong. (Jan. 7, 2003).

[15] *See* Cassell, *supra* note 8, at 615.

criminal justice system.[16] In exchange for setting aside the federal amendment in the short term, victims' advocates received near-universal congressional support for a "broad and encompassing" statutory victims' bill of rights.[17] This "new and bolder" approach—known as the Crime Victims' Rights Act—not only created a baseline of victims' rights, but also provided funding for victims' legal services and created remedies for violations of victims' rights.[18]

It is important to understand two key features of this legislation. First, the CVRA includes a guaranteed right for all victims in federal cases to be "reasonably heard" regarding plea bargains and sentences.[19] Second, unlike earlier legislation,[20] the CVRA contains an explicit enforcement mechanism that entitles victims who believe their rights have been violated by a trial court to seek mandamus review in the appellate courts.[21]

In the five years since the CVRA's passage, its critics have contended that it has the potential to unduly expand the rights of crime victims in criminal proceedings.[22] In such critics' views, the CVRA threatens both prosecutorial and judicial independence.[23] Specifically, Levine describes a series of "worrisome repercussions related to the proliferation of victims' rights," which she believes can be avoided only if the CVRA's mandamus provision is narrowly construed.[24] Thus, relying on traditional mandamus standards from other contexts, Levine urges that the CVRA's enforcement provision allow victims to obtain redress only for "flagrant abuses of the law."[25] In support of this position, Levine contends that this standard "respects the prosecutorial and judicial discretion," which Congress "explicitly built into the statute."[26] According to Levine, adopting this standard will allow prosecutors and judges "to maintain their independence and discretion" and keep our system of public, rather than private, prosecutions.[27] Others have advanced the similar argument that the CVRA "fundamentally gives

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[16] Jon Kyl et al., *On the Wings of their Angels:* The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, 9 LEWIS & CLARK L. REV. 581, 583 (2005).

[17] 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[18] *Id.* at S4262.

[19] 18 U.S.C. § 3771(a)(5) (2006) (link).

[20] *See* Joffee, *supra* note 7, at 244 (citing the Victims of Crime Act of 1984, the Victims' Rights and Restitution Act of 1990, the Violent Crime Control and Law Enforcement Act of 1994, and the Victims Rights Clarification Act of 1997).

[21] 18 U.S.C. § 3771(d)(3) (2006) (link).

[22] *See, e.g.*, Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237, 271 (2008).

[23] *See, e.g.*, Levine, *supra* note 2, at 361.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 336.

[27] *Id.* at 361.

victims very little power" because "perhaps Congress simply was unwilling to abandon the existing public prosecution model."[28]

II. RESTRICTING THE CVRA'S APPELLATE REVIEW PROVISION TO FLAGRANT ABUSES OF THE LAW IS CONTRARY TO THE LETTER OF THE CVRA

Levine's position that appellate courts should have discretion when reviewing victims' claims contravenes the plain language of the CVRA. Specifically, the CVRA's enforcement provision provides that whenever a victim is denied any of her enumerated rights, the victim "may petition the court of appeals for a writ of mandamus. . . . [which] [t]he court . . . *shall take up and decide* . . . forthwith . . . ."[29] Under Levine's approach, however, an appellate court would not be required to "take up and decide" a victim's petition for relief. Instead, an appellate court could find a violation but nonetheless decide not to remedy the wrong that occurred in the district court.[30] In doing so, an appellate court would have to disregard the underlying purpose of the CVRA's appellate review provision.[31] For example, one of the leading authorities on crime victims' rights has recognized in discussing the CVRA's mandamus provision that:

> [T]he problem in review of victims' rights is not the unavailability of writ review, but rather the discretionary nature of writs. The solution to the review problem is to provide for nondiscretionary review of victims' rights violations. . . . One could not credibly suggest that criminal defendants' constitutional rights are to be reviewed only in the discretion of the court. . . . The solution of Congress in [the CVRA] is excellent, providing for a nondiscretionary writ of mandamus.[32]

Levine, however, argues that such discretionary review is appropriate. Citing a rule of statutory construction involving "borrow[ed] terms of art," Levine contends that because Congress referred to "mandamus" in the

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[28] Blondel, *supra* note 22, at 260.

[29] 18 U.S.C. § 3771(d)(3) (2006) (emphasis added).

[30] For a concrete illustration, see *In re Dean*, 527 F.3d 391 (5th Cir. 2008) (despite the strength of the victims' claim, the district court did not grant the victims of the explosion any relief).

[31] *See* Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 347–48 (link).

[32] *Id.*

CVRA, it also intended to import discretionary mandamus principles.[33] This reasoning is flawed.[34]

In the CVRA, Congress expressly altered the conventional discretion that would otherwise apply to the review of ordinary mandamus petitions by requiring appellate courts to "take up and decide" CVRA petitions.[35] Through this modification of the traditional mandamus standard, Congress sought to create a powerful new remedy that would fully protect crime victims and allow them to obtain expedited review of trial court actions before events in the trial court progressed beyond the point of remedy.[36] Given this desire for quick action, Congress chose the vehicle of a "writ of mandamus" for crime victims' review of trial court actions.[37] However, rather than intending to require victims to comply with ordinary mandamus standards, Congress sought to forge that tool into a powerful new remedy that would fully protect crime victims through its inclusion of the "shall take up and decide" language.[38]

Both the Second and Ninth Circuits have recognized this straightforward conclusion.[39] In *In re W.R. Huff Management Co.*, the Second Circuit specifically recognized that "a petition seeking relief pursuant to the mandamus provision set forth in [the CVRA] need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus."[40] Likewise, in *Kenna v. United States District Court*, the Ninth Circuit held that:

> [T]he CVRA contemplates active review of orders denying victims' rights claims even in routine cases. The CVRA explicitly gives victims aggrieved by a district court's order the right to petition for review by writ of mandamus, provides for expedited review of such a petition, allows a single judge to make a decision thereon, and requires a reasoned decision in case the writ is denied. The CVRA creates a unique regime that does, in fact, contemplate rou-

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[33] *See* Levine, *supra* note 2, at 351 (*citing In re* Antrobus, 519 F.3d 1123, 1124 (10th Cir. 2008)).

[34] For a discussion of the inapplicability of the "borrowed terms of art" rule of statutory construct to the CVRA's mandamus provision, see Joffee, *supra* note 7, at 251–54.

[35] *See* 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). Because Senator Feinstein was the co-sponsor of the CVRA and no contrary views were offered, her views are entitled to considerable weight in interpreting the statute. *See* Kenna v. U.S. Dist. Court for C.D. Cal., 435 F.3d 1011, 1015 (9th Cir. 2006) (relying heavily on Sen. Feinstein's floor statements as a sponsor of the CVRA) (link).

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

[37] *See id.*

[38] *See* 18 U.S.C. § 3771(d)(3) (2006).

[39] *See Kenna*, 435 F.3d at 1017; *In re* W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 562–63 (2d Cir. 2005) (link).

[40] 409 F.3d at 562.

> tine interlocutory review of district court decisions denying rights asserted under the statute.[41]

The CVRA further reinforces these conclusions by broadly commanding that crime victims must "be treated with fairness" throughout the criminal justice process.[42] Moreover, the CVRA directs that "[i]n any court proceeding"—presumably including appellate proceedings—"the court shall ensure that the crime victim is afforded the rights described in [the CVRA]."[43] This Congressional command—that appellate courts *ensure* that crime victims are *afforded* their rights—would be fatally compromised if courts were permitted to deny or withhold relief as a matter of discretion or deference.

Levine notes these arguments, but dismisses them for two reasons. First, she contends that allowing victims to pursue mandamus relief would "essentially give[] victims the same rights as the defendant or the prosecution."[44] Apparently, Levine views this as an undesirable result. But to many others, this will be a long overdue correction to a system that "has lost an essential balance . . . [by] depriv[ing] the innocent, the honest, and the helpless of its protection . . . ."[45] Indeed, it is noteworthy that the CVRA's legislative history indicates that Congress wanted to "balance the scales of justice"[46] because it recognized that "criminal defendants ha[d] an array of rights under the law, [and] that crime victims ha[d] few meaningful rights."[47] Other commentators have reached similar conclusions.[48]

Regardless of Congress's desire to "balance the scales of justice," however, Levine's claim that the CVRA places victims on completely equal footing with prosecutors or defendants is simply incorrect. Rather, the CVRA only allows victims to obtain appellate review of violations of their rights guaranteed by the Act. In fact, the Act's enforcement provision specifically provides victims with appellate review only when their enumerated

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[41] 435 F.3d at 1017.

[42] 18 U.S.C. § 3771(a)(8) (2006).

[43] 18 U.S.C. § 3771(b)(1).

[44] Levine, *supra* note 2, at 359.

[45] Kyl et al., *supra* note 16, at 584 (quoting PRESIDENT'S TASK FORCE ON VICTIM OF CRIME: FINAL REPORT (1982)).

[46] *See* 150 CONG. REC. S4265 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl); *see also* 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) ("[T]he scales of justice are out of balance . . . ."); 150 CONG. REC. S4270 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) ("Victims' rights are about a fair and balanced criminal justice system—one that considers defendant's rights as well as victims' rights.").

[47] 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[48] *See, e.g.*, Elijah Lawrence, Note, *Victim Opinion Statements: Providing Justice for Grieving Families*, 12 J.L. & FAM. STUD. 511 (2010) (link).

rights are violated.[49] Thus, in contrast to a prosecutor, a victim who is simply dissatisfied with the length of a prison sentence given to a defendant would not be able to seek mandamus review.[50]

Levine's second objection to giving victims ordinary appellate review is that it would allow an appellate court to substitute its judgment for that of the district court on sentencing issues.[51] Levine argues that this result would contradict the Supreme Court's recent pronouncement in *Gall v. United States* that district court sentencing judgments should be presumed to be reasonable.[52] However, this objection is also wide of the mark. First, the holding in *Gall* relates only to appeals of *sentencing* issues.[53] Thus, *Gall* provides no basis for restricting crime victim appeals of other issues, such as violations of victims' rights at bail hearings or during the plea bargaining process. Second, even with regard to sentencing issues, Levine's objection assumes that a victim could appeal a judge's discretionary decision to sentence a defendant to a particular term of imprisonment. But as previously explained, under the CVRA, a victim is only able to appeal a violation of her statutory rights, rather than appeal a mere disagreement with the judge's sentencing philosophy.

A good illustration of the problems associated with an approach barring all victim appellate challenges is found in the Fifth Circuit's decision of *In re Dean*.[54] In *Dean*, the defendant—the American subsidiary of the well-known petroleum company BP—and the prosecution arranged a secret plea bargain to resolve the company's criminal liability for violations of environmental laws.[55] These violations resulted in the release of dangerous gas into the environment, leading to a catastrophic explosion in Texas City, Texas, that killed fifteen workers and injured scores more.[56] Because the Government did not notify or confer with the victims before reaching the plea bargain with BP, the victims sued to secure protection of their guaran-

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[49] 18 U.S.C. § 3771(d)(3) (2006). The enumerated rights in the statute are primarily those found in 18 U.S.C. § 3771(a), namely the right to reasonable protection from the accused; to notice of court hearings; to not be excluded from public hearings; to be reasonably heard on bail for defendants, pleas, and sentencing; to confer with the prosecutor; to restitution; to be free from unreasonable delay; and to be treated with fairness. 18 U.S.C. § 3771(a).

[50] A victim *is*, however, entitled to appeal a restitution decision by a judge, as an erroneous restitution decision deprives a victim of "[t]he right to full and timely restitution as provided in law." 18 U.S.C. §3771(a)(6).

[51] *See* Levine, *supra* note 2, at 348–49.

[52] 552 U.S. 38, 40 (2007).

[53] *See id.* at 41 ("We now hold that, while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.").

[54] 527 F.3d 391 (5th Cir. 2008) (link). In the interests of full disclosure, one of the present authors (Cassell) served as pro bono legal counsel for the victims in the *Dean* criminal case.

[55] *See* United States v. BP Prods. N. Am. Inc., 2008 U.S. Dist. LEXIS 12893, **3–18 (S.D. Tex. Feb. 21, 2008).

[56] *See In re* Dean, 527 F.3d at 392.

teed right under the CVRA to "to confer with the attorney for the Government."[57]

Unfortunately, despite the strength of the victims' claim, the district court did not grant the victims of the explosion any relief, leading them to file a CVRA mandamus petition with the Fifth Circuit.[58] After reviewing the record, the Fifth Circuit agreed with the crime victims that the district court had "misapplied the law and failed to accord the victims their rights conferred by the CVRA . . . ."[59] Nonetheless, the court declined to award the victims any relief because it viewed the CVRA's mandamus petition as providing only discretionary relief.[60]

Levine applauds this result, noting that "[t]he Fifth Circuit's dicta reveal that if it had used an abuse of discretion standard, the court likely would have reached the opposite result on the merits."[61] The Fifth Circuit was able to escape this result by using the "clear and indisputable error" standard, which virtually licensed the district court judge to abuse her discretion. Still, even after suggesting that the trial court judge had abused her discretion,[62] Levine supports this result by contending that a reversal would have led to a potential violation of prosecutorial ethics.[63] Specifically, Levine claims that the prosecutor would have been required to notify the victims of a proposed plea bargain, thereby leading to potentially prejudicial pre-trial publicity.[64]

What Levine fails to note, however, is that prejudice to plea negotiations could only justify violating the CVRA if the Constitution forced this stark result. This is because, as an Act of Congress, the CVRA was binding on the prosecution and the district court unless it was deemed positively unconstitutional.[65] However, the simple fact is that "there is no constitutional right to plea bargain."[66] Moreover, BP did not have to engage in plea discussions with the Government if it thought that such discussions would be

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[57] *Id.* at 394.

[58] *See id.* at 392.

[59] *Id.* at 394.

[60] *Id.* at 396.

[61] Levine, *supra* note 2, at 356.

[62] In *Dean*, the victims argued to the district court that they had been denied (among other things) their CVRA right to confer with the prosecutor because of an *ex parte* procedure used during the plea bargaining process. *See, e.g.*, Victims' Reply to Government's Response to Victims' Motion Filed Pursuant to the Crime Victims' Rights Act, United States v. BP Products North America Inc., Crim. No. H-07-434 (S.D. Tex. 2008), 2008 U.S. Dist. LEXIS 12893. Levine never directly discusses whether or not the victims were correct in their argument. She does note, however, that if the Fifth Circuit had a less deferential standard of review, it would have likely found that the trial judge had abused her discretion. *Id.* at 360.

[63] *See id.* at 356.

[64] *Id.*

[65] *See* U.S. CONST. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . .") (link).

[66] Weatherford v. Bursey, 429 U.S. 545, 561 (1977) (link).

harmful to its interests. BP could not demand a right to plea bargain in secret in violation of the CVRA. The same conclusion applies viewing the facts from the prosecution's perspective. If the prosecution truly faced the choice between protecting the congressionally-guaranteed rights of crime victims and reaching a deal with a criminal, the CVRA requires it to side with victims.

Because there is no constitutionally protected right to plea bargain, it was entirely unnecessary to withhold from the victims the fact that plea negotiations were occurring. The Government could have first asked BP whether it wanted to move forward with plea discussions, even though the victims would then have been told about them. The choice that BP would then have faced would have been no different than that of many other criminals—go to trial on the charges filed by the Government or engage in potentially advantageous plea discussions. Moreover, if the matter ultimately proceeded to trial, the court could address any concern about prejudicial publicity through voir dire. Though publicity resulting from acknowledgment of plea discussions might have required more extensive voir dire, this slight complication cannot justify the prosecution's decision to dispense entirely with the victims' rights, particularly when the Supreme Court has cautioned that "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial."[67]

Even assuming *arguendo* that secrecy about the negotiations was somehow constitutionally required, the prosecution still had alternative options that would have given effect to the victims' rights while satisfying privacy concerns. These potential options included: (1) meeting with the attorneys that represented the victims in the civil suits against BP under any appropriate protective order the court might have required; (2) appointing a guardian ad litem to represent the victims under a protective order; and (3) meeting with the victims and discussing what plea offer the Government might itself extend without commenting on BP's preferences. These obvious alternatives would have fully protected any purported "right" of BP to plea bargain, while simultaneously protecting the victims' actual and enumerated rights under the CVRA.

Viewed in this light, the Fifth Circuit's decision in *Dean*—along with Levine's endorsement of it—provides a good case study of what happens to victims when CVRA rights are not respected. In *In re Dean*, the victims were deprived of any meaningful opportunity to confer with the prosecutor at a time when it might have made a difference.[68] As a result, the victims were able to raise their concerns only after a binding plea agreement had already been reached between the prosecution and the defense.[69] The victims' main concern was that the plea agreement provided inadequate assurances

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[67] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 554 (1976) (link).

[68] *See* 527 F.3d 391, 394 (5th Cir. 2008) (link).

[69] *See id.*

that the defendant would fix the insufficient safety measures that were in place at the time of the explosion, which led to the death and injuries of the workers at the plant.[70] However, despite these concerns, the district judge simply accepted the plea that the prosecution and the defense had negotiated, concluding that she would not add additional safety protections for workers and the public into the agreement.[71]

What the plea agreement might have looked like if the victims had been able to confer with the prosecutor in a timely fashion will never be known for certain. What is known for certain now, with the benefit of hindsight, however, is that the victims' concerns were well-founded. In 2009, following a six-month investigation, the United States Occupational Safety and Health Administration ("OSHA") announced that BP had failed to abate the hazards that were part of the plea agreement it had entered into.[72] Furthermore, OSHA found that BP had also committed an additional 439 "willful violations of industry standards for safety management processes" since the plea agreement was reached.[73] As a result of these findings, OSHA issued an $87.4 million fine against BP,[74] and the government made unsuccessful efforts to revoke BP's probation and reinstate charges against the company.[75] And, in addition to these violations, BP of course has had (to put it mildly) additional environmental and safety problems in its off-shore drilling operations in the Gulf of Mexico[76]—problems that might have been addressed if the Texas City victims' proposals had been made part of the plea bargain in the BP case.[77] Problems that might

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[70] *See* Victims' Joint Mem in Opp'n to Plea Agreement at 25–30, United States v. BP Prods. N. Am., Inc., 610 F. Supp. 2d 655 (S.D. Tex. 2009) (No. 4:07-CR-434) [hereinafter Victims' Plea Opposition] (link).

[71] *See BP Prods*., 610 F. Supp. 2d at 720–22.

[72] *See, e.g.*, Associated Press, *BP Fined Record $87 Million for Refinery Blast*, MSNBC (Oct. 30, 2009), http://www.msnbc.msn.com/id/33549487 (link); *OSHA Levies a Record Fine Against Oil Giant BP*, OMB WATCH (Nov. 10, 2009), http://www.ombwatch.org/node/10551 (link).

[73] *See OSHA Levies a Record Fine*, *supra* note 72.

[74] *Id*.

[75] *See* BP TEXAS CITY PLANT EXPLOSION TRIAL, http://www.texascityexplosion.com/ (last visited Nov. 15, 2010) (describing, in the "What's New" scroll column, the Department of Justice's refusal to revoke BP's probation) (link). For more information regarding the explosion and subsequent litigation, see *id.*

[76] *See, e.g.*, Opening Statement of Rep. Henry A. Waxman, Chairman, Comm. on Energy & Commerce, Inquiry into the Deepwater Horizon Gulf Coast Oil Spill, Subcomm. on Oversight & Investigations 2 (2010) (noting that the BP "catastrophe appears to have been caused by a calamitous series of equipment and operational failures" and that if BP "had been more careful, 11 lives might have been saved and our coastline protected.") (link); *see also Outer Continental Shelf Oil and Gas Strategy and Implications of the Deepwater Horizon Rig Explosion: Parts 1 and 2: Oversight Hearing Before the H. Comm. on Natural Resources*, 111th Cong., 2d Sess. (May 26–27, 2010) (link).

[77] This "what if" hypothetical is, to be sure, a hypothetical. But the victims in the BP case specifically asked the district court to reject the plea because it failed to include a court order requiring "BP to create and implement [an "Effective Ethics and Compliance"] program as respects its [Process Safety Management (PSM)] obligations under Federal law, and that the Court appoint an independent engineer-

have been addressed earlier seem to have culminated in the spring and summer of 2010 in the environmental and safety catastrophes that stemmed from BP's drilling operations off the coast of Louisiana.[78]

Through the CVRA, Congress intended to ensure that victims would receive several important rights, including the right to confer with the government prosecutor. Yet as *Dean* demonstrates, Levine's position would obliterate these rights by permitting district court judges to arbitrarily deny them without concern of reversal. Such a result is dangerous and contrary to the language of the CVRA.

III. THE CVRA'S LEGISLATIVE HISTORY SHOWS CONGRESS PLAINLY INTENDED FOR CRIME VICTIMS TO HAVE FULL APPELLATE REVIEW

As just discussed, the plain language of the CVRA demonstrates that Congress wanted crime victims to have ordinary appellate review whenever a trial court denies their rights. The CVRA's legislative history further supports this conclusion. However, Levine completely ignores this history and endorses the stringent mandamus standard of appellate review of victims' appeals. Remarkably, Levine hardly stands alone: three Courts of Appeals—the Fifth, Sixth, and Tenth Circuits—have adopted similar approaches to the standard of review, limiting crime victims to appellate relief only for extraordinary error by the district court.[79]

The CVRA's legislative history leaves no doubt that, contrary to this position, Congress clearly intended for victims to have ordinary appellate review. For instance, Senator Jon Kyl, one of the CVRA's co-sponsors, specifically explained that:

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ing expert, or experts, according to the need, knowledgeable in refinery operations and PSM requirements, to work under the direction of the Probation Office as a Monitor of the implementation of the program." *Victims' Plea Opposition*, *supra* note 70, at 36. The district court ultimately rejected the victims' argument, essentially finding that BP could be relied upon to do its own safety compliance program, as monitored by Government agencies. *See* United States v. BP Prods. N. Am., Inc., 610 F.Supp.2d 655, 722 (S.D. Tex. 2009). Had the district court instead followed the recommendation of the victims, knowledgeable and independent safety experts would have been working inside BP trying to change what government investigators had identified as a widespread, long ingrained culture of lack of focus on process safety. U.S. CHEM. SAFETY & HAZARD INVESTIGATION BD., INVESTIGATION REPORT: REFINERY EXPLOSION AND FIRE 142–95 (2007), *available at* http://www.csb.gov/assets/document/CSBFinalReportBP.pdf (link). Whether this would have changed the culture at the refinery—and within other sectors of BP—remains a matter of conjecture. But surely from a public policy perspective such endeavors must be regarded as a significant positive, not negative, development.

[78] *See* Jad Mouawad, *For BP, a History of Spills and Safety Lapses*, N.Y. TIMES (May 9, 2010), http://www.nytimes.com/2010/05/09/business/09bp.html ("Despite those repeated promises to reform, BP continues to lag [sic] other oil companies when it comes to safety, according to federal officials and industry analysts.") (link).

[79] *See In re* Acker, 596 F.3d 370, 372 (6th Cir. 2010) (link); *In re* Dean, 527 F.3d 391, 394 (5th Cir. 2008); *In re* Antrobus, 519 F.3d 1123, 1124 (10th Cir. 2008) (link).

> [W]hile mandamus is generally discretionary, [the CVRA mandamus] provision means that courts *must* review these cases. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures review and encourages courts to *broadly defend* the victims' rights.
>
> Without the right to seek appellate review and a guarantee that the appellate court will hear the appeal and order relief, a victim is left to the mercy of the very trial court that may have erred. This country's appellate courts are designed to *remedy errors of lower courts and this provision requires them to do so for victim's* [sic] *rights*.[80]

Similarly, *the CVRA's sponsors have instructed that this appellate review provision "provides that [the appellate] court shall take the writ and shall order the relief necessary to protect the crime victim's right,"*[81] *and that crime victims must "be able to have denials of those rights reviewed at the appellate level, and to have the appellate court take the appeal and order relief."*[82]

Moreover, in sharp contradiction to Levine's conclusion that the CVRA simply imports a "common law tradition,"[83] Senator Feinstein, the Act's other co-sponsor, specifically noted that the CVRA would create "a *new use* of a very old procedure, the writ of mandamus [by] . . . establish[ing] a procedure where a crime victim can, in essence, immediately appeal a denial of [her] rights."[84] Additionally, Senator Feinstein emphasized that the CVRA's "mandamus procedure allows an appellate court to take timely action to ensure that the trial court follows the rule of law set out in this statute."[85]

Given this legislative history, Levine's position fails to give effect to Congress's design. Surely, Congress did not intend for appellate courts to be able to rein in only flagrant violations of the CVRA. Instead, Congress wanted all victims to receive their rights all of the time. Based on this goal, Congress tried to avoid situations like that in *Dean*, where the Fifth Circuit specifically recognized that victims' rights had been violated, but still chose to deny the victims any relief.[86] The *Dean* approach defies the basic architecture of the CVRA and confirms the fears articulated by the CVRA's

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[80] 150 CONG. REC. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphases added).

[81] 150 CONG. REC. S4270 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[82] *Id.* (statement of Sen. Kyl).

[83] *See* Levine, *supra* note 2, at 349–51.

[84] 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[85] *Id.*

[86] *See In re* Dean, 527 F.3d 391, 394 (5th Cir. 2008).

sponsors, who stated that, "without the ability to enforce [victims'] rights in the criminal trial and appellate courts of this country any rights afforded are, at best, rhetoric."[87]

IV. SOUND PUBLIC POLICY SUPPORTS GIVING VICTIMS FULL RIGHTS IN THE PROCESS

Congress intended the CVRA to give crime victims participatory rights in the criminal justice process. We also understand Levine's noteworthy article to attack crime victims' rights more broadly. Specifically, apart from narrowly construing the federal victims' rights statute, Levine argues that emphasizing crime victims' rights is contrary to both historical practices and contemporary understandings of good public policy.[88] Both critiques merit response because they misunderstand the important underpinnings for crime victims' rights.

A. Crime Victims' Rights Are Consistent with the Original Understanding of Justice

Historically speaking, crime victims have long played an important role in the criminal process. Levine's argument to the contrary begins by dismissing this country's practice of private prosecutions—that is, prosecutions brought by crime victims.[89] Levine relies heavily on Blackstone's influential *Commentaries on English Law* as support for the proposition that the colonists understood crimes to be solely public wrongs.[90] However, the victim-orientation of private prosecutions cannot be so quickly dismissed. Indeed, as Levine recognizes, Blackstone himself explained that "[i]n all cases . . . crime includes an injury" because "every public offense is also a private wrong, and [thus] . . . it affects the individual, and . . . likewise . . . the community."[91] Given this understanding, it is not surprising that early American criminal prosecutions were, as in England,[92] often brought by the victim—a private prosecutor—rather than by a government agency.[93]

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[87] 150 CONG. REC. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

[88] *See* Levine, *supra* note 2, at 339 (discussing Blackstone and other historical materials); *id.* at 352–60 (discussing contemporary cases involving victims' rights).

[89] *See id.* at 338 ("With the shift from a private to public system of prosecution came a related shift in focus of the system; the interests of the victim were subsumed by the interests of society.").

[90] *See* Levine, *supra* note 2, at 337–39 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *5).

[91] BLACKSTONE, *supra* note 90, at *5.

[92] *See* 1 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 249 (Lenox Hill Pub. 1973) (1883). Private prosecution continues to be available in England today. *See* Private Prosecutions, CROWN PROSECUTION SERVICE, http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/index.html (providing information about initiating private prosecutions) (link).

[93] *See, e.g.*, William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 651–53 (1976).

Levine acknowledges these facts, but still believes that the Constitution essentially transferred prosecuting discretion to the executive branch.[94] To our mind, this view pays insufficient attention to the fact that histories of the eighteenth century criminal justice system in the United States—including the period before, during, and *after* the framing of the Constitution—reveal that victims often directly prosecuted criminal cases.[95] Professor William McDonald has summarized the period: "Even after identification and arrest, the victim carried the burden of prosecution . . . [by] retain[ing] an attorney and pa[ying] to have the indictment written and the offender prosecuted."[96] Indeed, early Americans preferred a system of private prosecution because it avoided the tyranny of government prosecutors and the expense of public-funded prosecutions.[97] Thus, legal scholars report that private prosecutions were the dominant form of prosecution during the colonial period.[98]

Levine appears to believe that the practice of private prosecution came to an end with the ratification of the Constitution and its creation of a strong Executive branch of the federal government tasked with prosecuting crimes.[99] Yet at the state level, private prosecution extended well into the nineteenth century.[100] For example, the most thorough study of private prosecution in the United States—Professor Steinberg's historical review of nineteenth century prosecution in Philadelphia—reveals that direct victim prosecution of some types of crimes continued until at least 1875.[101] Specifically, Steinberg concluded that victims routinely prosecuted cases themselves during the early- to mid-1800s:

> The discretion of the private parties in criminal cases was not checked by the public prosecutor. Instead, the public prosecutor in most cases adopted a stance of passive neutrality. He was essentially a clerk, organizing the court calendar and presenting cases to grand and petit juries. Most of the time, he was either superseded by a private attorney

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[94] *See* Levine, *supra* note 2, at 339.

[95] *See* McDonald, *supra* note 93, at 651–56 (indicating that victims played prominent roles in prosecutions from Colonial times through the mid-1800s).

[96] *Id.* at 652.

[97] *Id.* at 653.

[98] For a summary of some of these studies, see Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 571–72 (1984).

[99] *See* Levine, *supra* note 2, at 339–40.

[100] *See, e.g.*, ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880, at 92 (1989) (link).

[101] *Id.* at 224–25 (pinpointing the 1875 election of police magistrates as a turning point which separates the early era of private prosecution from the current era of public prosecution).

> or simply let the private prosecutor and his witnesses take the stand and state their case.[102]

In support of this conclusion, Steinberg cites numerous examples of private prosecutors handling cases in the daily Philadelphia criminal docket.[103] Thus, in Philadelphia—the only city for which a comprehensive nineteenth century history of criminal justice has been compiled—private prosecution continued for decades after the American Revolution.[104]

Steinberg's detailed historical account of the routine functioning of the criminal justice system in a major American city is important because it discredits Levine's suggestion that public prosecutors functionally replaced private prosecutors shortly after the American Revolution.[105] This historical error can be attributed to the fact that Levine takes statutory creation of the office of public prosecutor as proof of the end of private prosecution.[106] However, as recognized elsewhere, such conclusions "naturally overemphasize[] the importance of the public prosecutor, since a private prosecution system inherited from English common law would not appear in legislation."[107]

While private prosecutions were important, the office of the public prosecutor also developed in the early nineteenth century.[108] As Levine correctly recognizes, the rise of the public prosecutor can be traced largely to the problem of private prosecutors abandoning cases.[109] However, the rise of public prosecutors hardly means that private prosecutions disappeared. For example, historian Robert Ireland suggests that "[b]y 1820, most states had established local public prosecutors," but that "because of deficiencies in the office of public prosecutor, privately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century."[110]

One reason why these private prosecutions endured for so long was because citizens did not trust government lawyers' abilities and were concerned with the assumption of prosecutorial duties by the government.[111]

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[102] *Id.* at 82.

[103] *See, e.g.*, *id.* at 49–51; *see also id.* at 63–69 (describing private prosecutions more generally); *id.* at 72–73 (describing private prosecutions of property cases).

[104] *See id.* at 25, 224–32 (recounting evidence of the shift in the mid-1800s from private to public prosecution).

[105] *See* Levine, *supra* note 2, at 337–38.

[106] *See id.*

[107] *See* Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function?* Morrison v. Olson *and the Framers' Intent*, 99 YALE L.J. 1069, 1072 n.14 (1990).

[108] *See* Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995).

[109] Levine, *supra* note 2, at 338.

[110] Ireland, *supra* note 108, at 43.

[111] *See id.* at 44–46.

Another reason was the need for victims and their families to secure legal representation commensurate with that of defendants.[112] For example, Ireland noted that "[t]he presence of able defense attorneys whose collective talent clearly surpassed that of the public prosecutor often deepened the dilemma of victims of crime or their survivors who desired legal retribution."[113] Specifically, "[t]his imbalance almost compelled those who sought criminal convictions to hire private attorneys to help prosecute if the prosecution was to have any chance to secure a conviction."[114] Because of this dynamic, privately funded attorneys were most commonly sought in murder cases and cases involving sexual assault.[115]

Although private prosecution was firmly entrenched in the history of the colonies and the states, it does not appear to have been extensively used in the federal system. Thus, it is not surprising that Levine focused her historical review on the federal system.[116] The federal system has always been a small part of the American criminal justice apparatus, handling the small percentage of crimes in which there is a unique federal interest. Moreover, it is readily understandable why private prosecutions played a smaller role in these specialized federal cases. The early federal criminal code established crimes against the federal government, and public officials accordingly prosecuted these public crimes.[117] From the very inception of the federal system starting with the Judiciary Act of 1789, public prosecutors—including the Attorney General and U.S. Attorneys—were available to prosecute federal cases.[118] Nonetheless, private citizens still had some limited involvement in federal criminal prosecutions.[119] For instance, private citizens could initiate prosecutions by obtaining bench warrants from magistrates to arrest defendants and by presenting evidence of crimes directly to grand juries.[120] Additionally, private citizens could pursue a private *qui tam* action for some offenses,[121] a vestige of private prosecution that remains viable to this day.

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[112] *See id.* at 45–46.

[113] *Id.* at 45.

[114] *Id.* at 45–46.

[115] *Id.* at 46 & n.7.

[116] *See* Levine, *supra* note 2, at 339–40 (discussing the federal criminal justice system and constitutional provisions regulating the federal system).

[117] Dangel, *supra* note 107, at 1083; *accord* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 293–96 (1989) (indicating that the Judiciary Act of 1789 vested district attorneys with full authority over whether to prosecute federal crimes in their districts) (link).

[118] *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1924).

[119] *See* Dangel, *supra* note 107, at 1083.

[120] *Id.*

[121] *Id.*

In sum, to the extent that Levine is trying to make a historical argument against victims' rights, the argument simply fails. Historically speaking, at the time of the ratification of the Constitution, crime victims not only had rights in the criminal process, but victims could also use the public prosecution process to file and pursue their own criminal charges.

B. The Importance of Modern Victims' Rights

Of course, history does not end debates about contemporary issues of public policy. Even though most crime victims could traditionally pursue their own criminal charges, the issue remains whether crime victims should have rights in the criminal process in the twenty-first century. Levine suggests that crime victims should not have such rights because these rights will allow victims to meddle with a system of conscientious prosecutors and wise judges that properly resolve criminal cases today.[122] Levine's position is susceptible to the rejoinder that not all prosecutors are conscientious and not all judges are wise. But for purposes of this brief Response, we will simply assume that prosecutors and judges are all trying to do the right thing and that they are generally capable people. Even on these premises, however, a compelling case for crime victims' rights remains. Properly understood, crime victims' rights are not barriers to an effectively functioning criminal justice system, but rather an important part of such a system.

Crime victims' rights form part of the checks and balances that ensure a properly functioning criminal justice process. Consider the example of plea bargaining. To our minds, the BP case discussed above is an example of a flawed plea bargain.[123] The BP case shows that having crime victims scrutinize plea deals and present any objections to a judge for review can potentially improve the plea bargaining process. Against a backdrop of effective crime victims' rights, prosecutors (and defense attorneys) know that whatever arrangement they come up with cannot simply pass through the system without notice. Instead, crime victims can highlight any defects for a judge, who will make the ultimate determination of whether to sign off on a plea deal. This can serve to ensure that plea bargains truly serve the public interest, which is the general standard against which plea bargains are assessed by courts.[124]

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[122] *See, e.g.*, Levine, *supra* note 2, at 361 ("Victims deserve to be treated respectfully and integrated into the criminal process; however, forcing prosecutors and judges to elevate victims over the defendant and the public may threaten the fair and just adjudication of a criminal case."). *See generally id.* at 352–53 (discussing prosecutors' duty to pursue cases in the public interest); *id.* at 356 (discussing judges' obligation to impose a proper sentence based on many factors).

[123] *See supra* text accompanying notes 67–78.

[124] *See, e.g.*, FED. R. CRIM. P. 11 (link); United States v. Carrigan, 778 F.2d 1454, 1462 (10th Cir. 1985) ("Rule 11 . . . contemplates the rejection of a negotiated plea when the district court believes that bargain is too lenient, or otherwise *not in the public interest*." (quoting United States v. Miller, 722 F.2d 562, 563 (9th Cir.1983))) (link).

In addition to any structural safeguard that crime victims' rights present, it is perhaps even more important that they extend to crime victims the opportunity to participate in the criminal justice system. Absent from Levine's vision of the criminal justice system is any recognition of the importance for crime victims to have a role at important junctures in the process, like sentencing. Giving victims a chance to participate in the rite of allocution at sentencing can have important benefits for the victim. As one federal district court judge put it in discussing victim impact statements, "[E]ven if a victim has nothing to say that would directly alter the court's sentence, a chance to speak still serves important purposes. . . . '[Victim] allocution is both a rite and a right.'"[125] Professor Mary Giannini observes that, by delivering a victim impact statement in court,

> the victim gains access to a forum that directly and individually acknowledges her victimhood. 'The moment of sentencing is among the most public, formalized, and ritualistic parts of a criminal case. By giving victims a clear and uninterrupted voice at this moment on par with that of defendants and prosecutors, a right to allocute signals both society's recognition of victims' suffering and their importance to the criminal process.'[126]

There may be therapeutic aspects to a victim giving a victim impact statement. As one victim explained the process, "The victim impact statement allowed me to construct what had happened in my mind. I could read my thoughts . . . . It helped me to know that I could deal with this terrible thing."[127] Another victim said, "[W]hen I read [the victim impact statement] [in court], it healed a part of me—to speak to [the defendant] and tell him how much he hurt me."[128] Still another victim reported, "I believe that I was helped by the victim impact statement. I got to tell my step-father what he did to me. Now I can get on with my life."[129] And, if the judge ac-

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[125] United States v. Degenhardt, 405 F. Supp. 2d 1341, 1349 (D. Utah. 2005) (quoting United States v. De Alba Pagan, 33 F.3d 125, 129 (1st Cir. 1994)) (link).

[126] Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 431, 452 (2008) (quoting Richard A. Bierschbach, *Allocution and the Purposes of Victim Participation Under the CVRA*, 19 FED. SENT'G REP. 44, 46 (2006)).

[127] NAT'L VICTIMS' CONSTITUTIONAL AMENDMENT NETWORK, VICTIMS' RIGHTS EDUCATION PROJECT TALKING POINTS KIT 31 (2004) (quoting A Crime Victim, *Impact Statements: A Victim's Right to Speak, a Nation's Responsibility to Listen* (1994)), www.nvcap.org/vrep/NVCANVREPTalkingPoints.pdf (link).

[128] Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1395 n.107.

[129] *Id.*

knowledges what the victim has said in the statement, the judge's words can be (as one victim put it) "balm for her soul."[130]

These healing effects are not unusual. One thorough assessment of the literature on victim participation explained, "The cumulative knowledge acquired from research in various jurisdictions, in countries with different legal systems, suggests that victims often *benefit* from participation and input. With proper safeguards, the overall experience of providing input can be positive and empowering."[131] Thus, the consensus appears to be that victim impact statements allow the victim "to regain a sense of dignity and respect rather than feeling powerless and ashamed."[132]

It is precisely because of these benefits to victims that Congress passed the CVRA. Congress was worried that "[t]oo often victims of crime experience a secondary victimization at the hands of the criminal justice system."[133] Congress properly understood that victims will be harmed if they are left entirely outside the process. Nothing in the arguments advanced by Levine and other critics of the CVRA undermines that fundamental insight.

CONCLUSION

The Crime Victims' Rights Act will surely not be the last piece of legislation extending rights to crime victims. Across the country at both the federal and state levels, there is growing recognition that crime victims have an important role to play in criminal proceedings. And that role is one that must be protected by both trial and appellate courts. Those who argue for keeping victims outside the process are defending a view of criminal processes that is neither historically justified nor good public policy. Crime victims now have protected rights in both federal and state criminal proceedings. As well they should.

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[130] Amy Propen & Mary Lay Schuster, *Making Academic Work Advocacy Work: Technologies of Power in the Public Arena*, 22 J. BUS. & TECHNICAL COMM. 299, 318 (2008).

[131] Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment* and *Enhancement of Justice*, 1999 CRIM. L. REV. 545, 550–51.

[132] Kenna v. United States Dist. Court, 435 F.3d 1011, 1016 (9th Cir. 2006) (quoting Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 41 (2001)) (link); *see also Cassell*, *supra* note 8, at 621 (describing the "therapeutic aspects" of victim impact statements).

[133] 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).