

VICTIMIZING THE VICTIM AGAIN: WEAPONIZING CONTINUANCES IN CRIMINAL CASES

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INTRODUCTION

As the legal maxim rings true, “justice *delayed* is justice *denied*.”¹ The Magna Carta, one of the oldest sources of English and American jurisprudence and a seed of modern criminal procedure,² states the legal system “shall not . . . deny or delay Justice and right, neither the end, which is Justice, nor the meane . . . that is the law.”³ When the criminal justice process is delayed—as it often is from postponed and rescheduled proceedings—defendants and victims are subjected to stresses and anxieties.⁴ Defendants face the possibility of “oppressive incarceration prior to trial, . . . anxiety and concern accompanying public accusation,” and the risk of inadequately defending their cases.⁵ Since these stresses are a function of time, the Sixth Amendment of the United States Constitution, incorporated against the states through the Fourteenth Amendment, guarantees defendants the right to a speedy trial.⁶

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1. *Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990) (emphasis added) (“At this point, justice delayed is justice denied.”); see also *United States ex rel. De Vita v. McCorkle*, 133 F. Supp. 169, 180 (D.N.J. 1955) (“It has been said many times, ‘To delay justice is to deny justice.’”); *Pritchard v. Johnson & Johnson*, No. 19-01104-JKO, 2019 Bankr. LEXIS 2091, at *2 (Bankr. S.D. Fla. July 9, 2019) (“[T]ime is of the essence, and justice delayed is justice denied.”).

2. See generally R. H. Helmholtz, Lecture, *Magna Carta and the Law of Nature*, 62 LOY. L. REV. 869 (2016).

3. *Speedy Trial Source and Rationale*, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-6/speedy-trial#fn14amd6> (last visited Aug. 2, 2019) (quoting Ch. 40 of the 1215 Magna Carta) (first alteration in original) (emphasis added).

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

5. *Id.*

Victims are another important “party”⁷ in the trial proceedings subjected to different stresses and anxieties.⁸ While the prosecutor represents *the people*, which includes the victim, the victim may feel like the only person who has “suffered emotionally, physically, psychologically and financially.”⁹ Victims’ stresses are also a function of time as they wait to put the crimes behind them.¹⁰ Since both defendants and victims have an interest in efficiency, it would appear they desire the same thing: to avoid delay. Surprisingly, these interests are often diametrically opposed to one another.¹¹

By way of an example, imagine a criminal trial in federal court is set to begin promptly in the morning. The judge sits at the bench, police officers and witnesses sit in the hallway, and everyone in the courtroom stands as the newly selected jury is ushered into the jury box. It appears everyone is ready to proceed with trial, but the defense attorney deploys his weapon of moving the court to grant a continuance. He tactically declines to assert the right to a speedy trial with the goal of ultimately winning the case, relying in part on time eroding the prosecutor’s evidence against his client. He knows that over time evidence may disappear, witnesses may become unavailable to testify, and he can challenge the remaining witness’ credibility as time blurs their memories. On the other side of the courtroom, the victim protests the delay. The victim is frustrated because after countless interviews with police, the prosecutor, and the victim’s advocate, the case was supposed to be finally resolved that morning. The defense attorney, hiding his delay tactic, makes a boilerplate argument that the continuance is necessary to properly defend the case. A third person in the courtroom, the prosecutor, suspects the delay is unreasonable. The prosecutor is conflicted, wanting the defendant to have a

6. U.S. CONST. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation.

Id.

7. Cf. Jeff Welty, *Private Citizens Initiating Criminal Charges*, N.C. CRIM. L., (Apr. 9, 2015, 10:20 AM), <https://nccriminallaw.sog.unc.edu/private-citizens-initiating-criminal-charges/> (In the United States, the general rule is that private prosecution is prohibited. However, many states have exceptions in which private citizens may bring forth criminal charges rather than the prosecutor.).

8. *The Trauma of Victimization*, NAT’L CTR. FOR VICTIMS OF CRIME, <http://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/trauma-of-victimization#interaction> (last visited Aug. 2, 2019).

9. *Id.*

10. *See id.*

11. *See* Paul Cassell & Margaret Garvin, *Policy Paper: The Need to Enhance Victims’ Rights in the Florida Constitution to Fully Protect Crime Victims’ Rights*, UTAH L. FAC. SCHOLARSHIP (2017).

fair trial, but also understanding how an eleventh-hour delay will alienate the victim and everyone else ready to proceed with trial. Considering all the facts, the arguments, and the applicable law, the judge weighs a multitude of factors outlined in 18 U.S.C. § 3161(h) and grants the continuance, giving the defendant a stern warning and a second chance to prepare. Everyone meets at the next court date, knowing all too well this process could repeat again and again. While justice is merely *delayed* for the defendant, it is *denied* for the victim with every delay.

For victims, efficient proceedings are especially important because “[v]ictims often suffer significantly from delays in the criminal justice system”¹² that was “designed to protect them.”¹³ Each delay continues the victimization.¹⁴ Victims first suffer primary traumas when the crime occurs.¹⁵ Then once the criminal justice system gets involved, victims are at risk of secondary traumas which are “compounded and exacerbated by long delays” and mistreatment by professionals.¹⁶

For a long time “[t]he criminal justice system . . . functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard.”¹⁷ The system failed to treat victims with human respect and decency and saw victims as an evidentiary means to a prosecutorial end. One victim advocate explained the all too common experience for victims of violent crime when the criminal justice system treated her like “a piece of evidence like a fingerprint or a photograph, but not as a feeling, thinking human being”:

In 1988, I was raped by a brutal attacker. . . . My subsequent experience with the criminal justice system left me feeling violated over and over again by placing greater value on the rights of the accused versus my rights. There were needless delays—three continuances. During this time, . . . I figured I was going to get a trial. I deserved a trial. There were five victims. So to get prepared for this, I went to a victim’s self-defense group and I practiced telling my story at these different group meetings so I was prepared for my time at the trial, which never did occur. I never got a trial. But each time it

12. *Id.*

13. *Id.*

14. See CHARLES DOYLE, CONG. RESEARCH SERV., CRIME VICTIMS’ RIGHTS ACT: A SUMMARY AND LEGAL ANALYSIS OF 18 U.S.C. § 3771, at 34 (2015), <https://fas.org/sgp/crs/misc/RL33679.pdf>.

15. *The Trauma of Victimization*, *supra* note 8.

16. Brief for Arizona Voice for Crime Victims, Inc. as Amicus Curiae Supporting Petitioner, at 4, *Ryan v. Washington*, 137 S. Ct. 1581 (2017) (No.16-840) [hereinafter Brief for Arizona Voice for Crime Victims, Inc.].

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

was scheduled, the day before or the day of it was canceled and put back another month or more. I cannot explain to you what that does to a victim but it definitely helps the defendant because some of these victims in this group of five were ready to pull out and say, “Never mind. Just forget it.” That is what that does.¹⁸

At the heart of this conflict is a disparity of rights. Defendants have many constitutional protections, and rightfully so.¹⁹ The Sixth Amendment of the United States Constitution specifies, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”²⁰ The “speedy trial” doctrine is quintessential to American criminal law, with “its roots at the very foundation of our English law heritage.”²¹ For defendants, the stakes are high—the criminal justice system gives defendants great protection because “liberty itself may be at stake.”²² The duty of ensuring the Sixth Amendment right to a speedy trial rests with the prosecution to proceed diligently and the court to facilitate the proceedings; the right does not rest on the defense to request a speedy trial or do anything else to ensure the right.²³ Victims, on the other hand, are not mentioned in the United States Constitution.²⁴ Although victims have protections embedded in the Federal Rules of Criminal

18. *Rights of Crime Victims Constitutional Amendment: Hearing on H.R. Res. 64 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 106 Cong. 84, 87–88 (2002) [hereinafter *Rights of Crime Victims Hearing*] (statement of Christine Long, Member of the Bd. of Dirs. and Chairperson of the Victims’ Rights Comm., Law Enforcement All. of America, Inc.).

19. *E.g.*, U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .”); U.S. CONST. amend. VI (“The accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense.”); U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

20. U.S. CONST. amend. VI.

21. Seth Osnowitz, Note, *Demanding a Speedy Trial: Re-Evaluating the Assertion Factor in the Barker v. Wingo Test*, 67 CASE W. RES. 273, 276 (2016) (quoting *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967)).

22. *Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787, 810 (1987).

23. R.P. Davis, Annotation, *Waiver or Loss of Accused’s Right to a Speedy Trial*, 57 A.L.R. 2d 302, *1 (citing *Ex parte Altman*, 34 F. Supp. 106, 108 (S.D. Cal. 1940)).

24. Roger Pilon, *A Victims’ Rights Amendment*, CATO INST., Apr. 16, 1997, <https://www.cato.org/publications/congressional-testimony/victims-rights-amendment> (“The Constitution lists numerous rights of defendants, they say, but is silent regarding victims.”).

Procedure²⁵ and the Federal Rules of Evidence,²⁶ no protections address victims' rights to expediency in the same way the Sixth Amendment protects defendants.²⁷ And again, there is good reason for that.²⁸ The defendant is the one whose liberty is at stake and remains innocent until proven guilty,²⁹ and this Note does not advocate for making victims' rights equal to defendants' rights. But the scenario above demonstrates that something must be done to better protect victims' rights while respecting defendants' rights. When a party seeks a continuance in federal court, the judge must explain his or her reasoning for denying or granting the continuance considering many factors under 18 U.S.C. § 3161(h)(7)(B)—none of which directly address the victim.³⁰ This is how continuances can be used as weapons, which unfortunately results in revictimizing the victim.

Part I of this Note begins with a brief history of the victims' rights movement, outlining how the movement has slowly gained momentum in the federal courts and has quickly progressed at the state level. Part II explains the relative nature of defendants' right to a speedy trial, the test established in the landmark case *Barker v. Wingo*,³¹ and how defense attorneys can manipulate the nuances of the right by delaying the case without violating the right to a speedy trial. Part III analyzes the two steps of victim trauma, beginning with the primary trauma of crime victimization followed by secondary trauma and revictimization during the criminal justice process. Part

25. *E.g.*, FED. R. CRIM. P. 18 (in deciding venue, the court must account for the convenience of any victim); FED. R. CRIM. P. 21(b) (in transfer of venue for trial, the court may move the trial for the convenience of any victim); FED. R. CRIM. P. 32(i)(4)(B) (the court “must permit the victim to be reasonably heard”); FED. R. CRIM. P. 32(d)(2)(B) (the “financial, social, psychological, and medical impact[s]” of a victim must be taken into consideration for sentencing); FED. R. CRIM. P. 60(a)(1)–(3) (the victim is entitled to “[n]otice of a [p]roceeding”; the victim will not be “exclude[d] . . . from a public court”; the right to be “[h]eard on [r]elease, a [p]lea, or [s]entencing.”).

26. *E.g.*, FED. R. EVID. 412(a)(1)–(2) (evidence of the victim's sexual history or sexual predisposition is inadmissible); FED. R. EVID. 611(a)(3) (witnesses, including victims, are protected from harassment and embarrassment).

27. *See* Pilon, *supra* note 24.

28. *Id.* Proponents of overly zealous victims' rights often emphasize:

a constitutional “imbalance” between the rights of defendants and the rights of victims. . . . There is a fundamental reason for that “imbalance.” It has to do with the very purpose and structure of the Constitution. As the Declaration of Independence makes clear, the basic purpose of government is to secure our rights—against both domestic and foreign threats.

Id.

29. *Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787, 798 (1987).

30. 18 U.S.C. § 3161(h)(7)(B)(i)–(iv) (2019); *Speedy Trial Act of 1974*, U.S. DEP'T. OF JUST., <https://www.justice.gov/jm/criminal-resource-manual-628-speedy-trial-act-1974> (last visited Nov. 23, 2019).

31. *Barker v. Wingo*, 407 U.S. 514 (1972).

IV addresses the countervailing interests of the defendant, the victim, and the prosecution. Finally, Part V suggests adding the victims' "right to proceedings free from unreasonable delay" from the Crime Victims' Rights Act 18 U.S.C. § 3771, as a factor the district judge will consider when deciding to grant or deny a continuance under 18 U.S.C. § 3161. Adding this factor would help avoid mere *delays* of justice from developing into complete *denials* of justice.

PART I: A BRIEF HISTORY OF VICTIMS' RIGHTS IN FEDERAL AND STATE COURTS

A. *The President's Task Force of 1982*

The victims' rights movement began in the 1970s in response to victim marginalization.³² A decade later, the President's Task Force on Victims of Crime in 1982 ("Task Force") found the criminal justice system had become imbalanced, and "[t]he victims of crime ha[d] been transformed into a group oppressively burdened by a system designed to protect them."³³ The most pressing burden was that victims were often uninformed about proceedings and therefore not present for them.³⁴ If they were present, their concerns often went unheard.³⁵ To redress these imbalances, the Task Force called for multiple reforms, the most essential of which was to implement the rights "to be present and to be heard at all critical stages of judicial proceedings."³⁶ To enact these newly established rights, the Task Force recommended that the prosecution be responsible for informing victims of their case proceedings and giving victims a chance to enter victim-impact evidence at bail, sentencing, and parole hearings.³⁷ This reform increased victims' control by giving them an "independent participatory role" in all critical stages of their cases.³⁸

The Task Force expressed the importance of victims participating in criminal cases both for successful convictions in individual cases and, on a larger scale, the prevention of future crime.³⁹ Successful prosecution may be

32. Cassell & Garvin, *supra* note 11.

33. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 116 (1982) [hereinafter THE TASK FORCE].

34. *See generally id.*

35. *See generally id.*

36. *Id.* at 114.

37. *Id.* at 64–65.

38. *History of Victims' Rights*, NAT'L CRIME VICTIM L. INST., https://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/history_of_victims_rights/ (last visited Nov. 24, 2019).

39. *See* THE TASK FORCE, *supra* note 33, at 76–78.

“absolutely dependent” upon the cooperation of crime victims when they are key witnesses.⁴⁰ Victim participation is invaluable to preventing future crimes because “[w]ithout their help, the system cannot hold criminals accountable and stem the tide of future crime.”⁴¹ But even after this reform, the question remained: are these new rights—the rights to be present and to be heard—enough?

B. *A Review of the Task Force in 2000*

In a hearing before the House of Representatives on the “Rights of Crime Victims Constitutional Amendment” in 2000, Congress addressed successes and shortcomings of victims’ rights since the Task Force’s recommendations were implemented in 1982.⁴² Some states had adopted their own victims’ rights acts, and at the hearing, Congress acknowledged these initiatives in the “great laboratory of the states” had “been overwhelmingly successful,” but this success was overshadowed by the sentiment that “the experiment ha[d] failed to *adequately* protect victims’ rights.”⁴³ Even after some success in the states, the need for standardized victims’ rights in the federal system was growing, as the goals outlined in the Task Force proved difficult to implement.⁴⁴

C. *The Creation of the Federal Crime Victims’ Rights Act in 2004*

At the federal level, Congress did not enact legislation until 2004 with the Crime Victims’ Rights Act 18 U.S.C. § 3771 (“the CVRA” or “the Act”) which remains the standard for victims’ rights in the federal courts.⁴⁵ The most recent version of the CVRA enumerates ten rights for crime victims.⁴⁶ The Act aims to remedy victims being uninformed, unheard, and unfairly treated in criminal proceedings.⁴⁷ Since victims were often uninformed, victims were given the right to “timely notice” of public court proceedings and parole

40. Rachele K. Hong, Note, *Nothing to Fear: Establishing an Equality of Rights for Crime Victims through the Victims’ Rights Amendment*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 207, 211 (2002).

41. A REPORT ON THE PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME: FOUR YEARS LATER, at ii (1986).

42. See generally *Rights of Crime Victims Hearing*, *supra* note 18.

43. *Id.* at 23 (emphasis added) (statement of Rep. Steve Chabot, Ohio).

44. See generally *id.*

45. See Crime Victims’ Rights, 18 U.S.C. § 3771 (2019).

46. 18 U.S.C. § 3771(a)(1)–(10).

47. See *id.*

proceedings.⁴⁸ Victims were often forced into sequestration in their cases and uninformed about the trial itself,⁴⁹ so they were given the right “not to be excluded from any such public court proceeding.”⁵⁰ Even if victims were informed of their cases they could rarely address the court so they were given the right to be “heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.”⁵¹ To redress being unfairly treated, victims were given the right “to be treated with fairness and with respect for the victim’s dignity and privacy.”⁵² Combining the effects of all of the previously explained rights, the “right to proceedings free from unreasonable delay” is especially important because it allows victims to be informed, heard, and fairly treated.⁵³ In practice, this right should ensure victims are informed of their case schedules, heard from when they object to a proposed schedule, and fairly treated by respecting their time, mental health, and other interests when setting a case schedule.

D. *Success at the State Level in the Late 1980s*

The states worked considerably faster than the federal government in codifying the sentiments of the 1982 Task Force, with Rhode Island adopting the first state constitutional amendment in 1986.⁵⁴ Over time, states strengthened their constitutional protections of victims’ rights by adopting more thorough victims’ rights amendments.⁵⁵ California was the first to adopt the most comprehensive victims’ rights amendment in 2008 called “Marsy’s Law.”⁵⁶ Many other states have adopted this amendment,⁵⁷ giving victims the

48. 18 U.S.C. § 3771(a)(2); Cassell & Garvin, *supra* note 11. Some state victims’ rights statutes have more detail than the federal right. *Id.* For example, the Utah Rights of Crime Victims Act details that “[w]ithin seven days of the filing of felony criminal charges against a defendant, the prosecuting agency shall provide an initial notice to reasonably identifiable and locatable victims of the crime contained in the charges.” *Id.* (quoting Utah Code Ann. § 77-38-3(1)) (alteration in original).

49. *About Victims’ Rights*, VICTIMLAW, <https://victimlaw.org/victimlaw/pages/victimsRight.jsp> (last visited Nov. 24, 2019).

50. 18 U.S.C. § 3771(a)(3).

51. 18 U.S.C. § 3771(a)(4).

52. 18 U.S.C. § 3771(a)(8).

53. 18 U.S.C. § 3771(a)(7).

54. Cassell & Garvin, *supra* note 11.

55. *Id.*

56. *Id.*

57. Illinois adopted Marsy’s Law in 2014. *Id.* North Dakota and South Dakota followed in 2016. *Id.* Ohio subsequently adopted Marsy’s Law in 2017. *Id.* Florida is the most recent to adopt the law in November 2018. Samantha J. Gross, *Florida Voters Pass Amendment 6 on Rights of Crime Victims*, MIAMI HERALD (Nov. 6, 2018), <https://www.miamiherald.com/news/politics-government/state-politics/article>

right to due process, to be treated fairly and with respect, to be free from intimidation, to be heard and considered in setting bail, and other rights.⁵⁸ One of these newly incorporated rights was the right to proceedings free from unreasonable delay.⁵⁹

Florida was one of the first states to adopt a victims' rights amendment in 1988.⁶⁰ The brief amendment stated in its entirety:

Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.⁶¹

Even from its inception, it appeared there could be conflicts between victims' and defendants' interests due to the importance of the defendant's rights. In November 2018, Florida expanded its original victims' rights amendment from merely granting the rights to be informed, present, and heard to include fifteen additional rights.⁶² The amendment passed with a 61.6% vote in favor of increasing victims' rights.⁶³ Exactly thirty years after the

220678905.html. Other states such as Georgia, Idaho, Kentucky, Maine, Nevada, North Carolina, Oklahoma, and Wisconsin are attempting to add Marsy's Law. Cassell & Garvin, *supra* note 11.

58. See Cassell & Garvin, *supra* note 11.

59. *Id.*

60. *Id.* (citing FLA. CONST. art. I, § 16(b)).

61. *Id.* (quoting FLA. CONST. art. I, § 16(b)).

62. Gross, *supra* note 57; *What does Marsy's Law for Florida Provide Victims and Their Families?*, MARSY'S L. FOR FLA., https://www.marsyslawforfl.com/what_does_marsy_s_law_for_florida_provide_victims_and_their_families (last visited Aug. 2, 2019). Marsy's Law also includes the rights:

[t]o be treated with dignity, respect, courtesy, sensitivity and fairness[;] [t]o have standing in court[;] . . . [t]o have information or records protected that could be used to locate or harass the victim or which could disclose confidential or privileged information about the victim[;] . . . [t]o reasonable protection from the accused throughout the justice process[;] [t]o confer with the attorney for the government[;] [t]o be informed by and provide input to the attorney for the government about any case disposition agreement including a plea agreement, deferred prosecution agreement or diversion agreement before a decision is made concerning such agreement[;] . . . [t]o have any monies or property collected from any person who has been ordered to make restitution be first applied to the restitution owed to the victim before paying any amounts owed to the government[;] [t]o compensation as provided by the law[;] [t]o timely information about the outcome of the case[;] [and] [t]o timely notice about all rights in this section, or as provided by law, including the enforcement of these rights.

Id.

63. *Florida Amendment 6: Enact Marsy's Law*, CNN, <https://www.cnn.com/election/2018/results/florida/ballot-measures/2> (last visited Jan. 7, 2020).

original amendment was passed, the new amendment grants significantly more rights to victims.⁶⁴

PART II: TACTICALLY DECLINING TO ASSERT THE RIGHT TO A SPEEDY TRIAL

A. *Barker v. Wingo: A Notoriously Unreasonable Delay*

Because the defendant has the right to a speedy trial, and the victim has the analogous right to proceedings free from unreasonable delay,⁶⁵ one might assume that the defendant and victim have identical goals in efficiency. Contrary to this assumption, defendants' and victims' interests are often diametrically opposed.⁶⁶ Sometimes the defendant wants to delay the case to improve his defense.⁶⁷ Lengthened time between a crime and trial means that evidence may be lost, witnesses' memories may fade, or witnesses may become unavailable to testify, which can seriously weaken the prosecution's case.⁶⁸ In this way, the right to a speedy trial is a unique constitutional right because it is perhaps the only right that does not prejudice the defendant's case per se when he or she declines to assert it.⁶⁹ The *Barker* case illustrates how—before the era of victims' rights—defendants could delay their own cases for an “extraordinary” amount of time without consequence.⁷⁰ *Barker* demonstrates the paradox that even dramatic delays may not violate the right to a speedy trial.⁷¹

In 1958, the defendant, Willie Barker, and his accomplice, Silas Manning, murdered an elderly couple after breaking into their home in Kentucky.⁷² The prosecutor tried the defendants separately, beginning with Manning in 1958.⁷³ That trial turned out to be the first of six.⁷⁴ During Manning's trials, Barker

64. See *What does Marsy's Law for Florida Provide Victims and Their Families?*, *supra* note 62.

65. Cassell & Garvin, *supra* note 11.

66. See *id.*

67. See *Barker v. Wingo*, 407 U.S. 514, 521 (1972).

68. *Id.*

69. *Id.* Contrast this to the Fifth Amendment right against self-incrimination. U.S. CONST. amend. V. If, for example, the defendant was deprived of that right and then forced to testify and be cross-examined, the defendant's case *would* be prejudiced per se. *Barker*, 407 U.S. at 521.

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

71. *Id.* at 533–34.

72. *Id.* at 516.

73. *Id.*

74. *Id.* at 516–17 (“The first trial ended in a hung jury. A second trial resulted in a conviction, but the Kentucky Court of Appeals reversed because of the admission of evidence obtained by an

was granted *sixteen* continuances spanning *five years* as he “was gambling” on the chances his accomplice would be acquitted and unable to testify against him.⁷⁵ Barker lost this gamble when Manning was finally convicted, and Manning testified as the chief prosecution witness against him.⁷⁶ Despite his best efforts to delay his case, Barker was convicted of two counts of murder.⁷⁷ After delaying his case for five years, Barker appealed his conviction claiming his right to a speedy trial was violated.⁷⁸

B. *Four Factors for Determining if a Delay is Reasonable*

The Supreme Court rejected Barker’s speedy trial argument and affirmed his convictions.⁷⁹ It found the trial court did not infringe Barker’s right to a speedy trial by weighing four factors.⁸⁰ These four factors created a flexible balancing test the courts still use today which weighs the “[1] [l]ength of delay, [(2)] the reason for the delay, [(3)] the defendant’s assertion of his right, and [(4)] prejudice to the defendant.”⁸¹ The most important factor in Barker’s case was that the defense tactically delayed the case by asking for five years’ worth of continuances.⁸² While the Supreme Court noted these four factors are not exhaustive, it did not consider the interests of the victims in the analysis.⁸³

First, the court weighs the length of delay, given the unique circumstances of the case.⁸⁴ This factor accounts for the “necessarily relative” nature of delays; what may be an unreasonably long delay in one case may not be unreasonably long in another.⁸⁵

illegal search. At his third trial, Manning was again convicted, and the Court of Appeals again reversed because the trial court had not granted a change of venue. A fourth trial resulted in a hung jury. Finally, after five trials, Manning was convicted, in March 1962, of murdering one victim, and after a sixth trial, in December 1962, he was convicted of murdering the other.” (citations omitted)).

75. *Id.* at 517–18, 535.

76. *Id.* at 518.

77. *Id.*

78. *Id.*

79. *Id.* at 536.

80. *Id.* at 530, 536.

81. *Id.* at 530.

82. *Id.* at 535.

83. *See id.* at 530.

84. *Id.* at 530–31.

85. *Id.* at 522 (citing *Beavers v. Haubert*, 198 U.S. 77, 87 (1905)).

Second, in addressing the reason for delay, the trial judge applies a spectrum of weight to different reasons with critical attention to whether the delays are used to harm the defense's case:

A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.⁸⁶

Third, the court weighs if the defendant invoked his or her right to a speedy trial.⁸⁷ While the court never assumes the defendant waives the right entirely unless there is a formal and express waiver, the Supreme Court warned that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."⁸⁸

Fourth, the court weighs the prejudice to the defendant.⁸⁹ There are three prejudices to the defendant when cases are delayed, the first being "oppressive pretrial incarceration" and the second being "anxiety and concern of the accused."⁹⁰ The third and most critical prejudice to the defendant is when the defense's case is impaired.⁹¹ This prejudice is paramount because the defendant must be able to adequately defend his or her case.⁹²

In using this four-factor balancing test, the *Barker* court only looked to the defendant's interests to determine if he was deprived of his right to a speedy trial; the victims' surviving family members' interests were not considered.⁹³ The closest the court came to acknowledging the victims' interests was by noting "there is a *societal* interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused."⁹⁴ The victims' interests were not explicitly mentioned because in 1972 victims'

86. *Id.* at 531 (footnote omitted).

87. *Id.*

88. *Id.* at 531–32.

89. *Id.* at 532.

90. *Id.* (citing *United States v. Ewell*, 383 U.S. 116, 120 (1966)).

91. *Id.* (citing *Ewell*, 383 U.S. at 120).

92. *Id.*

93. *Id.* at 533–36.

94. *Id.* at 519 (emphasis added).

“right to proceedings free from unreasonable delay” and other rights did not yet exist.

PART III: HOW UNREASONABLE DELAY VICTIMIZES THE VICTIMS AGAIN

A. *Primary Trauma of Crime Victimization*

Victims are often traumatized twice: from primary trauma during the crime itself and then from secondary trauma from their experiences with the criminal justice system either from delays or mistreatment by criminal justice professionals.⁹⁵ Crime directly causes primary trauma to victims, which may be emotional, physical, and financial.⁹⁶ A violent robbery, for example, can leave a victim feeling shocked and scared as he or she copes with physical injuries from the confrontation and financial injuries from having personal belongings and money stolen. While physical and financial harm is easy to see, emotional harm is more complex.⁹⁷ One such complex condition, Post-Traumatic Stress Disorder (“PTSD”), is “the most consistently documented consequence” of crime.⁹⁸ These primary traumas can be long-term and affect more than just victims, including family members and friends as they cope with the aftermath of crime.⁹⁹

B. *Secondary Trauma: Delays*

Victims may experience secondary traumas during the trial process in two ways: delays in their cases and mistreatment by professionals in the criminal justice system.¹⁰⁰ Victims’ trauma can be “compounded and exacerbated by long delays.”¹⁰¹ Such delays are common from “conflicts, continuances, and

95. See *The Trauma of Victimization*, *supra* note 8.

96. *Id.*

97. See Brief for Arizona Voice for Crime Victims, Inc., *supra* note 16, at 6–8.

98. Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. TRAUMATIC STRESS 119, 119 (2003).

99. *Id.* at 127.

100. See, e.g., Paul Cassell, Opinion, *Do Crime Victims Have an Interest in Avoiding Unreasonable Delay in Criminal Appeals?*, WASH. POST (Feb. 3, 2017), [http://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/03/do-crime-victims-have-an-interest-in-avoiding-unreasonable-delay-in-criminal-appeals/?noredirect=on](http://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/03/do-crime-victims-have-an-interest-in-avoiding-unreasonable-delay-in-criminal-appeals/?hpid=hp-top-news-story%3Ahomepage%2Fstory&hpid=hp-top-news-story%3Ahomepage%2Fstory).

101. *Id.*

other unexpected delays throughout the course of trial.”¹⁰² A case may even be continued the morning of trial after the victim is at court.¹⁰³ For victims, having their case repeatedly continued can be a cause of significant frustration because victims cannot “put the crime behind them” and ultimately “continue to be victimized.”¹⁰⁴ Victims undergo stress in court because they are “heightened emotionally with anxiety and anticipation of the impending trial.”¹⁰⁵ Each time a case is continued, the victim must return to court with the same anxiety and anticipation and face the accused again and again. For victims suffering from PTSD, repeated courtroom exposure can “increase[] the risk that PTSD symptoms will reappear in the victim” when a case is continued.¹⁰⁶

C. *Secondary Trauma: Mistreatment by Professionals*

Criminal justice professionals cause the most secondary trauma to victims.¹⁰⁷ Victims may feel they are “losing complete control” when “not directly involved in the prosecution or sentencing of the offender.”¹⁰⁸ When victims feel like an ancillary part of the process, they suffer again from secondary victimization.¹⁰⁹ This might happen when they go uninformed

102. Cassell & Garvin, *supra* note 11 (quoting Mary Beth Ricke, Note, *Victims' Right to a Speedy Trial: Shortcomings, Improvements, and Alternatives to Legislative Protection*, 41 WASH. U. J.L. & POL'Y 181, 183 (2013)).

103. This is the very event that inspired this Note. Though it should be noted that most continuances are made by motion, it is not uncommon to ask the court for a continuance directly even after the victim and defendant are in the courtroom together.

104. DOYLE, *supra* note 14, at 35 (quoting 150 CONG. REC. S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein)).

105. Brief for Arizona Voice for Crime Victims, Inc., *supra* note 16, at 6–7; Mary Beth Ricke, Note, *Victims' Right to a Speedy Trial: Shortcomings, Improvements, and Alternatives to Legislative Protection*, 41 WASH. U. J.L. & POL'Y 181, 183 (2013).

106. Ricke, *supra* note 102, at 193.

107. *The Trauma of Victimization*, *supra* note 8. This alarming fact has prompted the National Center for Victims of Crime to publish trainings for professionals in the criminal justice system and to hold an annual conference: The National Training Institute which “emphasizes a multidisciplinary approach to sharing promising practices, current research, and effective programs and policies that are victim-centered.” *About the National Training Institute*, NAT'L CTR. FOR VICTIMS OF CRIME, <http://victimsofcrime.org/training/national-training-institute/2018-national-training-institute> (last visited Nov. 24, 2019). The training is directed towards “law enforcement, victim service professionals, allied practitioners, policymakers, and researchers” with the goal of providing better care of all types of victims. *Id.*

108. *The Trauma of Victimization*, *supra* note 8.

109. *See id.*

about proceedings, unheard from during the process, and unfairly treated by criminal justice professionals.¹¹⁰

D. *Reducing Secondary Trauma*

The criminal justice system can help victims recover and regain control over their lives by treating victims fairly and with respect.¹¹¹ Historically, victims “lacked any meaningful role in the criminal justice process” which made their recovery more difficult.¹¹² Now the CVRA gives victims the right to be informed, heard, and treated fairly, which allows them to “feel that they are a part of a team effort” working with the prosecution to find a just resolution to their cases.¹¹³ One way victims can participate is through victim-impact statements.¹¹⁴ The seminal case *Payne v. Tennessee* held that victim-impact statements at capital sentencing hearings are admissible evidence.¹¹⁵ That rule has now expanded to other types of hearings.¹¹⁶ Victims in all federal sentencings and “virtually all state sentencings” may make a victim-impact statement.¹¹⁷ In federal courts, Rule 32(d)(2)(B) gives victims the right to deliver victim-impact statements during sentencings for all crimes to discuss the “financial, social, psychological, and medical impact” the crimes had on them.¹¹⁸ Victims who make victim-impact statements often report improved satisfaction with the criminal justice system because of the opportunity to participate and to confront the defendant.¹¹⁹ Victim-impact statements can empower victims and allow them “to regain a sense of dignity and respect

110. *See id.*

111. Morna Murray et al., *Listen to My Story: Communicating with Victims of Crime* U.S. DEP'T OF JUSTICE OFFICE FOR VICTIMS OF CRIME (Aug. 2005), https://www.ovc.gov/pdfxt/listen_to_my_story_vdguide.pdf.

112. Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 559 (2005).

113. *The Trauma of Victimization*, *supra* note 8.

114. *See generally* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009).

115. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

116. Cassell, *supra* note 114, at 611, 613–15.

117. *Id.* at 611.

118. FED. R. CRIM. P. 32(d)(2)(B) (“The presentence report must also contain the following: . . . information that assesses any financial, social, psychological, and medical impact on any victim.”).

119. *Victim Impact Statements*, NAT'L CTR. FOR VICTIMS OF CRIME, <http://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victim-impact-statements> (last visited Nov. 25, 2019).

rather than feeling powerless and ashamed.”¹²⁰ The victims’ participation in their cases often means “the difference between a healing experience and one that exacerbates the initial trauma.”¹²¹ Swift and participatory proceedings in the criminal justice process allow victims to regain control over their lives sooner.¹²²

PART IV: A DEEPER LOOK AT CONFLICTING INTERESTS

A. *The Interests of the Victim*

Victims deserve justice after crime. However, justice delayed is justice denied to victims who are revictimized with secondary traumas due to unreasonable delays and mistreatment by criminal justice professionals.¹²³ In 2005, Professor Paul Cassell, a former District Judge in Utah, suggested adding a rule to the Federal Rules of Criminal Procedure to guarantee the victim the right to proceedings free from unreasonable delay.¹²⁴ The proposal stated: “A victim has the right to be heard regarding any motion to continue any proceeding. If the court grants a motion to continue over the objection of the victim, the court shall state its reasons in the record.”¹²⁵ Such a provision would allow victims to be heard on a motion for a continuance.¹²⁶ Continuances pose a special risk of retraumatizing victims as it exacerbates victims’ primary traumas.¹²⁷ Allowing victims to object to a continuance

120. Jane W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 41 (2001); see also Cassell, *supra* note 114, at 622 (quoting *Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1016 (9th Cir. 2006)).

121. Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims’ Mental Health*, 23 J. TRAUMATIC STRESS 182, 182, 184 (2010).

122. See Cassell & Garvin, *supra* note 11.

123. See *The Trauma of Victimization*, *supra* note 8.

124. 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, 918–19 (2005).

125. *Id.* at 919.

126. *Id.*; see also Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 947 (2007).

127. Brief for Arizona Voice for Crime Victims, Inc., *supra* note 16, at 6–7.

would minimize this risk.¹²⁸ Lamentably, fifteen years later, this proposal still has not been adopted in the Federal Rules of Criminal Procedure.¹²⁹

While the federal courts have not implemented such a right, some state courts have granted victims this proposed right.¹³⁰ Colorado, for example, places the responsibility on the prosecution to “inform the victim of any pending motion that may substantially delay the prosecution.”¹³¹ The prosecution then has the additional responsibility to “inform the court of the victim’s position on the motion, if any. If the victim has objected, the court shall state in writing or on the record prior to granting any delay that the objection was considered.”¹³² This two-step process of (1) informing the victim of the potential delay, and then (2) relaying the victim’s response to the court insulates victims from having their rights to proceedings free from unreasonable delay violated.¹³³ While Colorado’s additional protection to its victims is a step in the right direction, this individualized state law highlights a jurisdictional disadvantage: some victims are protected more than others merely because of where they were victimized.¹³⁴

B. *The Interests of the Defendant*

The prosecution must prove every element of the crime during trial.¹³⁵ In contrast, the defense has no burden in a criminal trial, but directs the attention of the jury to any reasonable doubt in the prosecution’s allegations.¹³⁶ Since the defense has no burden to prove innocence, one common defense strategy

128. *Cf. id.* at 8–9 (citing *State v. Dixon*, 250 P.3d 1174, 1184 (Ariz. 2011)) (holding that the trial court appropriately denied the defendant’s request for a final continuance after granting several because Rule 8.5(b) of the Arizona Rules of Criminal Procedure “expressly directs the trial judge to consider the rights of victims, who, like the defendant, are entitled . . . to a speedy disposition of criminal charges.”).

129. *See* FED. R. CRIM. P. 12(b)(1) (restricting the right to object to motions for continuances to “part[ies]”); FED. R. CRIM. P. 60 (enumerating victim’s rights in criminal proceedings which do not include the right to object to continuances).

130. *E.g.*, COLO. REV. STAT. § 24-4.1-303(3) (2019).

131. *Id.*

132. *Id.*

133. *Id.*

134. *See generally Marsy’s Law for All*, BALLOTPEDIA, https://ballotpedia.org/Marsy%27s_Law_for_All (last visited Nov. 25, 2019) (listing the states in which Marsy’s Law or a constitutional amendment protecting victims’ rights have passed).

135. *In re Winship*, 397 U.S. 358, 361 (1970); *see also Burden of Proof*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/burden_of_proof (last visited Aug. 2, 2019).

136. *See In re Winship*, 397 U.S. at 364 (“Due process commands that no man shall lose his liberty unless the Government has borne the burden of convincing the factfinder of his guilt . . . beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

is to weaken the prosecution's case by allowing time to pass.¹³⁷ Time is the enemy of any criminal investigation or criminal prosecution. Even a moderate lapse in time increases the risk of witness' memories fading and multiplies the possibility of inconsistent statements that may be used to attack their credibility.¹³⁸ The Supreme Court in *Barker* reasoned that “[a]s the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so.”¹³⁹ This ought to be contrasted with a case in which a delay is necessary to collect evidence of an alibi or to prepare a defense. Moving the court to grant a continuance to collect exculpatory evidence or synthesize exculpatory evidence into a legal theory of a case is aligned with the goals of the criminal justice system—to discover the truth and achieve a just result—and ought to be considered reasonable delay. In other words, a delay to uncover exculpatory evidence is reasonable, but a delay to erode evidence that proves culpability beyond a reasonable doubt is unreasonable.

The American Bar Association's (“ABA”) Criminal Justice Standards for the Defense Function limits the use of delays: “[d]efense counsel should use procedural devices that will cause delay only when there is a legitimate basis for their use.”¹⁴⁰ Ever since *Barker* in 1972, the courts have directly expressed fear that defense attorneys may illegitimately strengthen a case when they wait for evidence to be lost over time, for witnesses to become unavailable, or even to “gambl[e]” on the conviction of a co-defendant.¹⁴¹ Delays can also be advantageous in high-profile cases.¹⁴² Take, for example, the notoriously long

137. William Glaberson, *Courts in Slow Motion, Aided by the Defense*, N.Y. TIMES (Apr. 14, 2013), <https://www.nytimes.com/2013/04/15/nyregion/justice-denied-courts-in-slow-motion-aided-by-defense.html> (“[T]he true masters of delay are the defense lawyers. For them, muddled memories and lost witnesses—the passage of time itself—are the ingredients for getting clients off.”).

138. Joyce W. Lacy & Craig E. L. Stark, *The Neuroscience of Memory: Implications for the Courtroom*, 14 NAT. REV. NEUROSCIENCE, 649, 653 (2013) (“Memory distortions in humans may occur simply with the passage of time. This is partly because over time, memories typically become less episodic (highly detailed and specific) and more semantic (more broad and generalized), as the information is repeatedly retrieved and re-encoded in varying contexts.”).

139. *Barker v. Wingo*, 407 U.S. 514, 521 (1972).

140. CRIMINAL JUSTICE STANDARDS FOR THE DEF. FUNCTION PART 1 § 4-1.9(b) (AM. BAR ASS'N 2019).

141. *See Barker*, 407 U.S. at 535–36.

142. *See, e.g., Jennifer Vineyard, R. Kelly's Child-Pornography Trial: Why Has it Taken So Long?*, MTV (May 8, 2008), <http://www.mtv.com/news/1587125/r-kellys-child-pornography-trial-why-has-it-taken-so-long/>.

six-year prosecution of R. Kelly for child pornography.¹⁴³ In that case, the defense tactically delayed as long as possible so that the growing victim looked less and less like the child victimized in the video evidence.¹⁴⁴ In situations such as these, the defense attorney uses a continuance to unreasonably delay the case rather than for its intended use.¹⁴⁵

Another way the defense can delay the case is by moving the court to sanction the government with a continuance, for example, with an allegation of a discovery violation.¹⁴⁶ The seminal case in discovery violations is *Brady v. Maryland*.¹⁴⁷ To properly defend a case, defendants are protected by the Fifth and Fourteenth Amendments which require the government to disclose certain types of evidence to the defense.¹⁴⁸ A *Brady* violation occurs when three elements are present: material evidence is “[1] favorable to the accused, either because it is exculpatory, or because it is impeaching; [(2)] that evidence must have been suppressed by the State, either willfully or inadvertently; and [(3)] prejudice must have ensued.”¹⁴⁹ The prosecution need not disclose all evidence, only evidence material to guilt or punishment.¹⁵⁰ The prosecutor has an “affirmative duty to learn of and disclose any exculpatory or impeachment evidence known to other government agents, including any agents or officers involved in the investigation.”¹⁵¹ This duty to disclose evidence to the defense extends to evidence that the defense has not requested.¹⁵²

143. *Id.* (In a child pornography case, it took six years to prosecute R. Kelly who waived his right to a speedy trial in an attempt to win his case through the loss of evidence, “and that delay . . . only helped serve the defense—as memories fade[d] and the alleged victim look[ed] less like the girl on the tape and more like a grown woman.”).

144. *Id.*

145. *See id.*; *see generally* CRIMINAL JUSTICE STANDARDS FOR THE DEF. FUNCTION PART 1 § 4-1.9(b) (AM. BAR ASS’N 2019) (noting that defense counsel should only seek delay “where there is a legitimate basis for their use”).

146. *See, e.g.*, ILL. S. CT. R. 415(g)(i) (“If . . . a party has failed to comply with an applicable discovery rule . . . the court may . . . grant a continuance.”).

147. *Brady v. Maryland*, 373 U.S. 83 (1963).

148. *Article: II. Preliminary Proceedings*, 47 GEO. J.L. ANN. REV. CRIM. PROC. 273, 414 (2018).

149. *Strickler v. Green*, 527 U.S. 263, 281–82 (1999).

150. *United States v. Bagley*, 473 U.S. 667, 682 (1985) (“[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”).

151. *Article: II. Preliminary Proceedings, supra* note 148, at 420–23 (footnotes omitted) (Evidence that does not need to be disclosed includes: “(1) neutral, irrelevant, speculative, or inculpatory evidence; (2) evidence available to the defense from other sources; (3) evidence the defense already possesses; or (4) evidence of which the prosecutor could not reasonably be thought to have imputed knowledge or control.”).

152. *See Bagley*, 473 U.S. at 681–82 (citing cases in which disclosure was required despite no request by the defense).

If a *Brady* violation has taken place during pretrial proceedings, the government must disclose the evidence, and the court may sanction the prosecution for failure to do so.¹⁵³ Federal Rule of Criminal Procedure 16(d)(2)(B) authorizes to court to grant continuances as a sanction under these circumstances.¹⁵⁴ As the most severe sanction, the court can dismiss the case, but dismissals are rare.¹⁵⁵ More likely, the court will grant a continuance so the defense can review the new evidence.¹⁵⁶ The delay ought to be considered unreasonable when new evidence is irrelevant, will take an unreasonably long time to review, or will delay the court longer than necessary.

C. *The Three Responsibilities of the Prosecution*

While the prosecution is responsible for the interests of society, it also must ensure a speedy trial for the defendant and protect the victims' right to proceedings free from unreasonable delay.¹⁵⁷ The prosecution "must attempt to reconcile this tripartite responsibility to protect the public from harm and protect the rights of the accused while at the same time protecting the rights of the victim."¹⁵⁸ The best way to balance these three interests is to act neutrally and justly.¹⁵⁹ Even if the prosecution finds particular difficulty in balancing the interest neutrally, it must abide by professional ethics.¹⁶⁰ But there is little guidance on how to do this.¹⁶¹ Two sources of ethics, the ABA's Model Rules of Professional Conduct and the Model Code of Professional Responsibility, give prosecutors rules for protecting the interests of defendants, but no rules for protecting the interests of victims.¹⁶²

Another guide, the National Prosecution Standards, instruct prosecutors that their "primary responsibility . . . is to see that justice is accomplished."¹⁶³ In prosecuting a defendant, the prosecutor has the important role of facilitating

153. Cynthia Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 443–44 (2010).

154. FED. R. CRIM. P. 16(d)(2)(B).

155. Angélica D. Zayas, *Speedy Trial, Speedy Games*, 76 FLA. B.J., Dec. 2002, at 26, 30.

156. *Id.*

157. Gershman, *supra* note 112, at 559.

158. *Id.* at 561.

159. *See id.*

160. *Id.* at 561–62.

161. *Id.* at 562.

162. *Id.*; *see also* MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2016).

163. Gershman, *supra* note 112, at 562 n.15 (quoting NAT'L PROSECUTION STANDARDS, Standard 1.1 (1991)).

complete and honest testimony from witnesses to the jury.¹⁶⁴ Victims of personal crimes are crucial witnesses, especially when they may be the only witness, such as in a domestic battery or sexual assault.¹⁶⁵ The prosecutor must then prioritize the relationship with the victim to foster trust and honest communication to ensure honest testimony.¹⁶⁶ An alienated victim could lose trust in the prosecution, decide the stresses of the criminal justice process are not worth it, and recant their allegations out of despair.¹⁶⁷ The relationship between the prosecutor and the victim could mean the difference between convicting a guilty defendant with the ultimate goal of stemming the tide of future crime and dismissing the case and releasing the defendant back into society without any consequences for his crimes.¹⁶⁸

Victim advocates are a member of the criminal justice system who help ease the burden on the prosecution to balance the interests of the people, the defendant, and the victim, by solely advocating for the victim's rights.¹⁶⁹ The main role of the victim advocate is to support the victim by keeping the victim informed and safe.¹⁷⁰ Safety is a primary concern of the victim advocate who aims to educate the victim on crime prevention and notifies the victim if a convicted and incarcerated defendant is released or escapes.¹⁷¹ The victim advocate explains the victim's legal rights, the criminal justice process, compensation applications, victim-impact statements, and parole boards.¹⁷² Besides providing information, the victim advocate arranges services for the

164. *See id.* at 561.

165. *See id.* at 572 (“The prosecutor knows that cases that hinge on single eyewitness identifications are notoriously difficult . . .”).

166. *Id.* at 573.

167. Stacy Caplow, *What if There Is No Client?: Prosecutors as “Counselors” of Crime Victims*, 5 CLINICAL L. REV. 1, 21 (1998).

As time goes on without any active involvement or connection to the prosecution, victims [lose] interest, or become disheartened and cynical. They lose their proprietary interest in both the process and the outcome of the case. Victims also [lose] faith that the process has the capacity to achieve personal justice for them when they are so alienated from the day-to-day developments.

Id.

168. *Id.* (“In the absence of a relationship of trust and collaboration, it is also not surprising that the victim might [lose] commitment to the case, particularly after the typical adjournments and delays, resulting in a dismissal or a disproportionately low guilty plea.”).

169. *See What is a Victim Advocate?*, NAT'L CTR. FOR VICTIMS OF CRIME, <http://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/what-is-a-victim-advocate-> (last visited Dec. 3, 2019).

170. *Id.*

171. *Id.*

172. *Id.*

victim such as housing, transportation, funerals, and may intervene with landlords, creditors, and employers.¹⁷³

Since the prosecution runs the risk of favoring victims' interests disproportionately, thereby affecting their neutrality towards their tripartite responsibilities, the victim advocate can have a more personal relationship with the victim.¹⁷⁴ With trust and confidence, victims can feel more involved in the process by having someone with whom they can candidly and intimately discuss their concerns.¹⁷⁵ The victim advocate can then communicate these concerns to the prosecution, saving the victim embarrassment of talking about such intimate topics directly with the prosecutor.¹⁷⁶ In this way, the victim advocate acts as a liaison between the prosecution and the victim.¹⁷⁷

PART V: PROPOSAL: ADDING "THE VICTIM'S RIGHT TO PROCEEDINGS FREE FROM UNREASONABLE DELAY" TO 18 U.S.C. § 3161

In federal court, defendants can delay their cases by moving the court to grant a continuance without violating the right to a speedy trial or even prejudicing their cases.¹⁷⁸ The district judge must rely on the factors in 18 U.S.C. § 3161(h)(7)(B) to decide whether to grant or deny the continuance, but the interests of the victim or surviving family members are not explicitly considered in this section.¹⁷⁹ Federal district judges have "broad discretion" to grant or deny a continuance."¹⁸⁰ He or she *hopefully* includes the victim's interests in the analysis, but 18 U.S.C. § 3161(h)(7)(A)–(B) does not enumerate the victim's interests; the closest the statute comes to requiring judges to consider the victim's interests is considering the "ends of justice" in weighing "the best interest of the public" against the defendant's interests.¹⁸¹

173. *Id.*

174. *See id.*

175. *See id.*

176. *See id.*

177. *See id.*

178. *See* 18 U.S.C. § 3161(h)(7)(A)–(B) (2019); *see generally* *Barker v. Wingo*, 407 U.S. 514 (1972).

179. 18 U.S.C. § 3161(h)(7)(B)(i)–(iv) (For example, the judge weighs whether "failure to grant such a continuance in the proceedings would . . . result in a miscarriage of justice[,] . . . it is unreasonable to expect adequate preparation for pretrial proceedings or[,] . . . would deny the defendant reasonable time to obtain counsel, . . . or the attorney for the Government the reasonable time necessary for effective preparation. . .").

180. *United States v. Kloehn*, 620 F.3d 1122, 1126 (9th Cir. 2010) (quoting *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir. 1985)).

181. 18 U.S.C. § 3161(h)(7)(A).

While both the victim and the public as a whole desire efficiency,¹⁸² a victim's right to proceedings free from unreasonable delay ought to be a distinct consideration—focusing on the victim alone—for the district judge to consider.¹⁸³ It is crucial to remember that from the victim's perspective, he or she may feel like the only person who has “suffered emotionally, physically, psychologically and financially” from both the crime itself and the criminal justice system.¹⁸⁴ Victims desire efficiency in their own criminal cases in order to return to normal life and to prevent future victimization for themselves and others.¹⁸⁵

The truth of the matter is that courts will likely grant continuances because defendants have such strong interests in adequately defending their cases because they are still presumed innocent, and their liberty is on the line.¹⁸⁶ Adding the victim's right to proceedings free from unreasonable delay would not overturn the sound principles of heavily weighing the defendant's interests against the ends of justice. Rather, adding the right would be a safeguard to victim's rights by ensuring the district judge, in his or her broad discretion,¹⁸⁷ considers the victim's rights before ruling on the continuance. This individual attention and personalization of the victim's interests counteracts the risk of treating victims as a whole like mere witnesses, or worse, like “piece[s] of evidence” by drawing attention to their unique circumstances and needs.¹⁸⁸ This would meet the goals of the President's Task Force to make victims heard, present, and treated with fairness and respect.¹⁸⁹

Some district judges around the country, and particularly from the West, have *sua sponte* identified the victim's right to proceedings free from

182. See Brief for Arizona Voice for Crime Victims, Inc., *supra* note 16, at 11–12; see, e.g., *United States v. Pomrenke*, No. 1:15CR00033, 2015 U.S. Dist. LEXIS 165287, at *3 (W.D. Va. Dec. 10, 2015) (“Certainly, the public is the loser when a criminal trial is not prosecuted expeditiously, as suggested by the aphorism, ‘justice delayed is justice denied.’”) (emphasis omitted).

183. Cf. *Rights of Crime Victims Hearing*, *supra* note 18, at 117–21 (statement of Steven J. Twist, member of the Steering Comm., Nat'l Victims' Const. Amend. Network and Former Chief Assistant Att'y Gen. of Ariz.).

184. *The Trauma of Victimization*, *supra* note 8.

185. See generally MURRAY ET AL., *supra* note 111.

186. See *United States v. Ewell*, 383 U.S. 116, 120 (1966).

187. *But cf.* *United States v. Kloehn*, 620 F.3d 1122, 1126–28 (9th Cir. 2010) (acknowledging that the district judge has “broad discretion” to grant or deny continuances, but focusing mainly on the effect of the continuance on the defense and the government).

188. *Rights of Crime Victims Hearing*, *supra* note 18, at 89 (statement of Christine Long, Member of the Bd. of Dirs. and Chairperson of the Victims' Rights Comm., Law Enforcement All. of America, Inc.).

189. See generally THE TASK FORCE, *supra* note 33.

unreasonable delay.¹⁹⁰ Two such cases out of the Ninth Circuit rely in part on the case law that judges may deny a continuance if it “is part of a pattern of dilatory activity.”¹⁹¹ District Judge Ann Aiken from the District of Oregon denied a defendant’s motion to continue his jury trial, relying in part on the CVRA and the risk of revictimizing a minor victim:

I note that granting a continuance at this juncture would risk violating the rights of the minor victims and witnesses. Crime victims have “the right to proceedings free from unreasonable delay.” 18 U.S.C. § 3771(a)(7). Moreover, because this is a proceeding in which children will be called to give testimony, the government has requested that this case be designated as “of special public importance,” pursuant to 18 U.S.C. § 3509[(j)]. Such designation requires the Court to “ensure a speedy trial in order to minimize the length of time the child must endure the stress of involvement with the criminal process.” *Id.* The statutory rights outlined above and the designation of this case as of special importance further weigh against granting a continuance.¹⁹²

Also, from the Ninth Circuit, District Judge Robert C. Jones from the District of Nevada denied a motion for a sixty-day continuance noting:

The Court has previously granted three of Defendant’s requests to continue the trial, which have already delayed the trial for more than a year. Finally, the Court recognizes the Government’s concerns regarding the impact of delay on the victims involved in the trial. (*See* 18 U.S.C. § 3771(a)(7) (“A crime victim has . . . [t]he right to proceeding free from unreasonable delay.”)). The trial should not be delayed further.¹⁹³

From the Tenth Circuit, District Judge Paul Cassell from the District of Utah, in the same year Congress passed the CVRA, denied a continuance for sentencing and held the matter in abeyance for ten days:

The Wilson sentencing has already been delayed more than a month. As noted above, defendant Wilson’s crimes are extremely serious and have caused considerable trauma and anxiety to his victims. Congress has recently

190. *See, e.g.*, *United States v. Biggs*, No. 1:15-cr-00225-AA, 2018 U.S. Dist. LEXIS 20919, at *5–6 (D. Or. Feb. 7, 2018); *United States v. Abrams*, No. 3:14-cr-0069-RCJ-WGC, 2016 WL 107945, at *2 (D. Nev. Jan. 8, 2016); *United States v. Wilson*, 350 F. Supp. 2d 910, 931 (D. Utah 2005).

191. *United States v. Flewitt*, 874 F.2d 669, 675 (9th Cir. 1989).

192. *Biggs*, 2018 U.S. Dist. LEXIS 20919, at *5–6.

193. *Abrams*, 2016 WL 107945, at *2 (alteration in original).

mandated that victims have the right “to proceedings free from unreasonable delay.” The court sees no reason for delay.¹⁹⁴

Although such explicit recognition of the right to proceedings free from unreasonable delay is a laudable development for victims’ rights, the jurisdictional disadvantage remains—some victims will be treated differently just because of where their victimization took place.¹⁹⁵ Standardizing 18 U.S.C. § 3161 to include the victim’s right to proceedings free from unreasonable delays would ensure all victims in all federal courts have the benefit of their rights, not just those lucky enough to have their case before a district judge who will consider their individual interests. The judiciary ought to strive for a consistent and predictable system in which victims around the country are treated fairly.

CONCLUSION

The criminal justice system protects defendants from the stresses of public accusation, incarceration before trial, and the risk of properly defending a case with the right to a speedy trial.¹⁹⁶ Victims have no such similarly founded constitutional right,¹⁹⁷ but victims do have “the right to proceedings free from unreasonable delay” under the CVRA.¹⁹⁸ This right serves as a parallel right to the defendant’s right to a speedy trial.¹⁹⁹ Although both rights give the defendant and victim the right to speedy proceedings, the two often have opposing goals when actually implementing these rights.²⁰⁰ Due to the uniquely relative nature of the Sixth Amendment, waiving the right to a speedy trial does not prejudice the defendant’s case per se.²⁰¹ One way to strategically delay a case is by weaponizing continuances—without regard to the stress and trauma which revictimizes the victim. This attack seeks an unreasonable delay to gamble on either evidence disappearing or witnesses becoming unavailable. Even though Congress intended to remedy such revictimization,²⁰² it is still true today that the goals of the CVRA have proven inadequate jurisdiction to

194. *Wilson*, 350 F. Supp. 2d at 931 (quoting 18 U.S.C. § 3771(a)(7)) (footnote omitted).

195. *See generally Marsy’s Law for All*, *supra* note 134.

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

197. *See* U.S. CONST. amend. VI.

198. *Crime Victims’ Rights*, 18 U.S.C. § 3771(a)(7) (2019).

199. *Cassell & Garvin*, *supra* note 11.

200. *See id.*

201. *Barker v. Wingo*, 407 U.S. 514, 521 (1972).

202. *See* DOYLE, *supra* note 14, at 1.

jurisdiction because victims are treated differently based solely on where their victimization took place.²⁰³ Not only are victims' rights laws different among the states,²⁰⁴ but in the federal system, some judges sua sponte address the right to proceedings free from unreasonable delays while others may not because there is no requirement to do so under 18 U.S.C. § 3161(h).²⁰⁵ When the defense does seek a continuance, the district judge has broad discretion to make an important decision.²⁰⁶ As reflected in other areas of criminal justice, that decision should be consistent and predictable.²⁰⁷ In an area of the law where delay is common, and seemingly inevitable, it is necessary to give all defendants and victims fair consideration to avoid mere *delays* of justice from becoming total *denials* of justice.

203. See generally *Marsy's Law for All*, *supra* note 134; see also 18 U.S.C. § 3161(h)(7)(B)(i)–(iv) (2019).

204. *Victims' Rights*, NAT'L CTR. FOR VICTIMS OF CRIME, <https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victims'-rights> (last visited Dec. 5, 2019).

205. See, e.g., *United States v. Biggs*, No. 1:15-cr-00225-AA, 2018 U.S. Dist. LEXIS 20919, at *5–6 (D. Or. Feb. 7, 2018); *United States v. Abrams*, No. 3:14-cr-0069-RJ-WGC, 2016 WL 107945, at *2 (D. Nev. Jan. 8, 2016); *United States v. Wilson*, 350 F. Supp. 2d 910, 931 (D. Utah 2005).

206. *United States v. Kloehn*, 620 F.3d 1122, 1126–27 (9th Cir. 2010) (quoting *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir. 1985)).

207. See generally *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (In discussing the importance of stare decisis in appellate review, the court noted that the court system seeks to promote “the evenhanded, predictable, and consistent development of legal principles.”). Consistency, in contrast to discriminatory application of the law to some individuals, is also paramount in criminal sentencings. See U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, introductory cmt. (U.S. SENTENCING COMM’N 2018) (citations omitted) (“Using such a framework in a uniform manner will help ‘secure nationwide consistency,’ ‘avoid unwarranted sentencing disparities,’ ‘provide certainty and fairness,’ and ‘promote respect for the law.’”).