

5-25-2022

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Recommended Citation

Margaret Garvin, *Giving Meaning to the Apostrophe in Victim[']s Rights*, 87 Brook. L. Rev. 1109 (2022).
Available at: <https://brooklynworks.brooklaw.edu/blr/vol87/iss4/2>

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Giving Meaning to the Apostrophe in Victim[']s Rights

Margaret Garvin[†]

INTRODUCTION

“Those who [care] will get it right but those who can’t be bothered will just carry on sprinkling [the apostrophe] about where they feel it looks nice.”—John Richards¹

I have clear memories of my grade school English grammar lessons. I loved diagramming sentences, as the process made language more concrete for me. That was until I learned about possessive nouns. Possessive nouns function as adjectives, meaning that when diagramming the sentence, that “noun” goes where an adjective would be placed. To add more complexity, apostrophe placement on the possessive noun, which denotes whether it is a singular or plural possessive noun, has the power to shift ownership. To my young brain, the concreteness of language was lost. Fortunately, my frustration passed and later, when I would see the absence or misplacement of an apostrophe on a billboard or in some other public space, I would pause, quickly diagram the sentence in my head, and laugh as I remembered my own youthful confusion. But in 2003, I became a lawyer for crime victims and the confusion and frustration of my youth returned; but now with far greater stakes.

Every state and federal jurisdiction in the United States has statutory or state constitutional rights for crime victims.²

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¹ Colleen Flaherty, *RIP, Apostrophe Protection Society*, INSIDE HIGHER EDUC. (Dec. 3, 2019, 3:00 AM) (quoting John Richards, founder of The Apostrophe Protection Society, on why he is shutting down the society’s website), <https://www.insidehighered.com/quicktakes/2019/12/03/rip-apostrophe-protection-society> [<https://perma.cc/32ZA-CTS3>].

² See Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy’s Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 103, 105 (2020); Michael E. Solimine & Kathryn Elvey, *Federalism, Federal Courts, and Victims’ Rights*, 64 CATH. U. L. REV. 909, 909–10 (2015); Paul G. Cassell, *The Maturing Victims’ Rights Movement*, 13 OHIO ST. J. CRIM. L. 1, 2 (2015); Paul G. Cassell, *The*

There is, however, no consistency in the constitutional provisions, legislation, or in the case law interpreting them regarding the use or placement of an apostrophe on “victim.” There are victims’ rights, victim’s rights, victims rights, and victim rights.³ This inconsistency may seem a minor grammatical or typographical error, but I argue it is much more insidious. Properly analyzed, when a case involves a crime victim and rights that were passed into law for crime victims the proper construction is that of a singular possessive noun—victim’s rights. Any apostrophe omission, misplacement, or disregard erases the victim due to either fundamental confusion regarding the ownership of the rights or an intentional cooptation of those rights.

This essay argues that getting the apostrophe correct is critical to fulfilling the promise of rights—full agency in a system that far too often erases and revictimizes crime victims.⁴ The essay proceeds in four parts. Part I provides a brief history of the role of crime victims and their rights in criminal justice in the United States. Part II discusses victim standing to assert their rights and the consensus that government actors cannot own the rights afforded to victims. Part III looks at federal cases involving government assertions of rights and interests in the context of a subpoena duces tecum for a crime victim’s records, identifying ways in which courts err in apostrophe placement. Part IV posits that even if courts properly recognize the singular possessive noun—victim’s rights—victim agency will continue to

Victims’ Rights Amendment: A Sympathetic, Clause-by-Clause Analysis, 5 PHX. L. REV. 301, 304 (2012). See generally Louis P. Yob, *The Special Victim Counsel Program at Five Years: An Overview of Its Origins and Development*, 1 ARMY LAW. 64 (2019) (identifying military victims’ rights codified at Article 6b of the Uniform Code of Military Justice and discussing the Air Force victim counsel program’s role in protecting those rights).

³ The disparate approaches can be readily seen even with a simple search of statutory provisions. See, e.g., 18 U.S.C. § 3771 (titled “Crime victims’ rights”); IND. CODE ANN. 35-40-5-9 (West, Westlaw through legislation of the 2022 Second Reg. Sess.) (titled “Right to be informed of victim’s rights”); KY. REV. STAT. ANN. § 15.245 (West, Westlaw through laws effective April 26, 2022) (titled “Witness and victim rights pamphlet; preparation; distribution”).

⁴ See, e.g., Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 19, 25 (1987) (describing victims’ victimization by the criminal justice system and how participation can help avoid this); Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOC. JUST. RSCH. 313, 314 (2002) (noting that “secondary victimization” by the criminal justice system can negatively influence victims’ “self-esteem, faith in the future, trust in the legal system, and faith in a just world”). See generally *Polyvictims: Victims’ Rights Enforcement as a Tool to Mitigate “Secondary Victimization” in the Criminal Justice System*, VICTIM L. BULL. (Nat’l Crime Victim L. Inst., Portland, Or.), Mar. 2013, <http://law.lclark.edu/live/files/13798-polyvictims-victims-rights-enforcement-as-a-tool> [<https://perma.cc/7E5D-9ED7>] (discussing victims’ rights enforcement as mitigation for the unique challenges that polyvictims face in accessing justice).

be denied if courts do not go further. I conclude this Part and the essay by proposing that to close the gap between mere rights ownership and true victim agency requires victim counsel.

I. A BRIEF HISTORY OF RIGHTS FOR VICTIMS

While a detailed recitation of the history of rights is not possible or necessary here, key highlights provide context for this essay's call for apostrophe clarity. Crime victims have a long history of having a participatory role in criminal investigation and prosecution in this country, a role which began to regress in the late nineteenth century and continued regressing through the mid-twentieth century.⁵ This regression most clearly manifests in the near exclusive control of process by the public prosecutor, with victims' only official role being that of a witness or piece of evidence in the case. Ultimately, the regression led to the "victim-exclusion model of criminal justice"—a model in which victims lacked independent, participatory status.⁶ As then President Ronald Reagan's Task Force on Victims of Crime noted in 1982, the criminal justice system had begun "treating the victim with institutionalized disinterest."⁷

Recognizing the significant harm this model caused crime victims, the modern Crime Victims' Rights Movement (Movement)⁸ emerged with a goal of improving the criminal justice system by reclaiming a meaningful role for crime victims

⁵ See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 1–28 (2012) (describing the history of the criminal justice system as it "morphed from a public morality play into a speedy plea-bargaining machine, hidden and insulated from the public"); Douglas E. Belof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135, 1138–47 (2007) (discussing the decline of private prosecutions); Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 518–20 (1982) (explaining that the loss of private prosecutions accentuated the alienation of the crime victim); William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, (1976) (discussing how "[t]he victim's role in the criminal justice process has been reduced to a minimum"); see also *Fundamentals of Victims' Rights: A Brief History of Crime Victims' Rights in the United States*, VICTIM L. BULL. (Nat'l Crime Victim L. Inst., Portland, Or.), Nov. 2011, at 1, <https://law.lclark.edu/live/files/11822-fundamentals-of-victims-rights-a-brief-history-of.pdf> [<https://perma.cc/Z26M-6C6Z>] (discussing the evolution of victims' rights in the criminal justice system).

⁶ See Meg Garvin, *Victims and the Supreme Court's Eighth Amendment Jurisprudence in Miller v. Alabama: A Tale of a Constitutive Paradox for Victims*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 311 (2013) [hereinafter Garvin, *Constitutive Paradox*].

⁷ PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT, at vi (1982) (concluding, after national listening sessions, that the American criminal justice system had become "appallingly out of balance . . . serv[ing] lawyers and judges and defendants, [while] treating the victim with institutionalized disinterest").

⁸ The plural possessive "Victims' Rights Movement" is an intentional placement of the apostrophe. The Movement aims to move the entire class of persons—victims—back into a participatory status by affording them procedural and substantive rights.

through rights.⁹ In 2006, the first appellate case to interpret the federal Crime Victims' Rights Act of 2004¹⁰ (CVRA), recognized the fundamental shift of the Movement, stating:

[t]he criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice process.¹¹

Today, the federal government and all states have statutes, and most states have adopted state constitutional amendments, affording rights to crime victims.¹² Rights afforded to crime victims include procedural rights such as the rights to be notified, present, and heard at key proceedings in a criminal case—from pretrial release to change of plea to sentencing, and substantive rights such as privacy, protection, and restitution.¹³ The number and breadth of statutory and constitutional rights passed into law for victims has resulted in the Movement being labeled “one of the most successful civil liberties movements of recent times.”¹⁴ When judging the Movement solely by passage of laws, there is little doubt of the veracity of this claim. When judging the Movement by apostrophe clarity, however, the answer is far less clear.

⁹ See Douglas E. Beloof, *The Third Wave of Victims' Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. REV. 255 (2005) [hereinafter Beloof, *Third Wave*] (discussing three waves in victims' rights movement and arguing for federal and state constitutional amendments and state legislation to allow victims to seek enforcement of their rights in appellate courts); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1381–82 (1994) (discussing 1980s push to establish a US constitutional amendment for victims' rights); Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 543–46 (1985) (discussing state changes to judicial procedures “to fit the needs of victims” and the 1980s proposal for a federal constitutional amendment to give victims rights to be heard in court). For a discussion of how victim integration into the criminal justice system may result in a more beneficial process, see Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 953–55 (1996) (analyzing victim participation as a partial solution to problems associated with the criminal justice system).

¹⁰ 18 U.S.C. § 3771.

¹¹ *Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011, 1013 (9th Cir. 2006).

¹² See *supra* note 2.

¹³ See, e.g., 18 U.S.C. § 3771. See generally *Fundamentals of Victims' Rights: A Summary of 12 Common Victims' Rights*, VICTIM L. BULL. (Nat'l Crime Victim L. Inst., Portland, Or.), Nov. 2011, <https://law.lclark.edu/live/files/11823-fundamentals-of-victims-rights-a-summary-of-12.pdf> [<https://perma.cc/WRW8-YW7J>] (summarizing twelve common victims' rights).

¹⁴ John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 689–90 (2002) [hereinafter Gillis & Beloof, *Maturing Movement*].

II. CLARIFYING OWNERSHIP: IT IS THE CRIME VICTIM'S APOSTROPHE

Agency includes concepts of self-definition, which is “the fundamental determination of how one conceives of oneself both as an individual and as a community member,” and self-direction, which is “the charting of one’s direction in life.”¹⁵ In the context of rights, an apostrophe is the keystone of agency. The person with the apostrophe owns the rights and thereby has the power to identify with those rights and to exercise, waive, or authorize the exercise of those rights. For crime victims, agency means that they can choose whether and how to participate in or disengage from the system, and if participating, choose whether, when, and how to be heard regardless of the other actors. True agency requires standing.

Standing to assert and control rights is fundamental to meaningful rights.¹⁶ Recent codifications of rights for victims afford explicit standing to the crime victim. For instance, the CVRA provides that “[t]he crime victim or the crime victim’s lawful representative, and the attorney for the Government may assert the rights described in subsection (a).”¹⁷ At the state level, many of the most recent provisions make victim standing explicit, and explicitly condition prosecutor standing upon a victim’s request for them to act on their behalf. For instance, Florida’s Constitution provides:

[t]he victim, the retained attorney of the victim, a lawful representative of the victim, or the office of the state attorney *upon request of the victim*, may assert and seek enforcement of the rights enumerated in this section and any other right afforded to a victim by law in any trial or appellate court, or before any other authority with jurisdiction over the case, as a matter of right.¹⁸

¹⁵ Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67, 69–70 (2015) [hereinafter Garvin & Beloof, *Victim Agency*] (discussing the relationship of autonomy and agency and explaining why agency matters for crime victims).

¹⁶ See 150 CONG. REC. S10,912 (daily ed. Oct. 9, 2004) (statement of Sen. Jon Kyl) (speaking of the enforcement provisions of the CVRA and noting, “This provision ensures that crime victims have standing to be heard in trial courts so that they are heard at the very moment when their rights are at stake and this, in turn, forces the criminal justice system to be responsive to a victim’s rights in a timely way.”).

¹⁷ 18 U.S.C § 3771 (d)(1); see also *Doe v. United States*, 950 F. Supp. 2d 1262, 1269 (S.D. Fla. 2013) (“It is apparent, through the passage of the CVRA, that Congress has enacted a statute expressly conferring certain legal rights upon ‘crime victims,’ the invasion of which creates standing to seek relief under the CVRA, even though no cognizable injury would exist without the statute.”).

¹⁸ FLA. CONST. art. I, § 16(c) (emphasis added); see also N.D. CONST. art. I, § 25(2) (providing “[t]he victim, the retained attorney of the victim, a lawful representative of the victim, or the attorney for the government upon request of the victim may assert and seek enforcement of the rights enumerated in this section and any other right afforded to a victim by law in any trial or appellate court . . . as a matter of right); OHIO CONST. art. I, § 10a(B) (“The victim, the attorney for the government upon

Knowing that victims have standing to act on their rights is one part of agency; identifying legal constraints on other actors' ability to exercise the rights is another. With regard to an accused, statutory and constitutional rights provisions for victims generally include explicit prohibitions on the accused's exercise of a victim's rights.¹⁹ With regard to prosecutorial constraints, it is a well-established principle of law that the government does not represent the victim in a criminal case, and, in fact, has a duty to represent the interests of the state.²⁰ In addition, courts have recognized that the rights of a crime victim cannot be waived by any other actor in the system.²¹

This landscape of affirmative victim standing, coupled with constrained authority of other actors, makes a great deal of practical sense. It has long been recognized that no one in the criminal justice system other than the victim has the exclusivity of interest such that they could be expected to advocate as

request of the victim, or the victim's other lawful representative, in any proceeding involving the criminal offense or delinquent act against the victim or in which the victim's rights are implicated, may assert the rights enumerated in this section and any other right afforded to the victim by law."); OR. CONST. art. I, § 42(3)(b), 42(4) ("A victim may assert a claim for a right established in this section in a pending case, by a mandamus proceeding if no case is pending or as otherwise provided by law. . . . Upon the victim's request, the prosecuting attorney, in the attorney's discretion, may assert and enforce a right established in this section."); WIS. CONST. art. I, § 9m(4)(a) ("[T]he victim, the victim's attorney or other lawful representative, or the attorney for the government upon request of the victim may assert and seek in any circuit court or before any other authority of competent jurisdiction, enforcement of the rights in this section and any other right, privilege, or protection afforded to the victim by law.").

¹⁹ See, e.g., 18 U.S.C. § 3771(d)(1) (providing "[a] person accused of the crime may not obtain any form of relief under this chapter"); see also 150 CONG. REC. S10,912 (daily ed. Oct. 9, 2004) (statement of Sen. Jon Kyl) (speaking of the enforcement provisions of the CVRA and noting, "This prohibition prevents the individual accused of the crime from distorting a right intended for the benefit of the individual victim into a weapon against justice.").

²⁰ See Beloof, *Third Wave*, supra note 9, at 338 (discussing flaws with prosecutorial control of victims' rights and noting that "the state is far from a consistent advocate for crime victims' rights"); State ex rel. Romley v. Superior Ct., 891 P.2d 246, 250 (Ariz. Ct. App. 1995) (recognizing that at times "the wishes of the victim may be adverse to those of the prosecution," and detailing case law finding that a prosecutor does not "represent" the victim in a criminal trial). See generally Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559 (2005) (discussing prosecutorial neutrality in the context of ethical obligations, conflicting duties, and victims' rights).

²¹ See, e.g., State v. Warner, 812 P.2d 1079, 1082 (Ariz. Ct. App. 1990) (holding that the state has no authority to waive a victim's right to refuse a defense interview); People v. Brown, 54 Cal. Rptr. 3d 887, 896 (Cal. Ct. App. 2007) ("Victim restitution may not be bargained away by the People."); Wilson v. Commonwealth, 839 S.W.2d 17, 21 (Ky. Ct. App. 1992) (holding that the rights guaranteed Kentucky victims "belong to the victim independent of the Commonwealth, and cannot be plea bargained away without the crime victim's actual approval"); People v. Meconi, 746 N.W.2d 881, 885 (Mich. Ct. App. 2008) (Sawyer, J. concurring) (noting that "[t]he right of the victim to attend the trial belongs to the victim, not the prosecutor," and finding that the prosecutor's agreement to a sequestration order could not waive the right); State v. Robinson, No. C1-02-1957, 2003 WL 21694412, at *3 (Minn. Ct. App. July 22, 2003) (holding that a victim's right to present an impact statement at sentencing is "not susceptible to waiver by the prosecutor").

vehemently for the victim's rights or interests as the victim themselves.²² Put even more concretely,

Absent standing for victims, the defendant and prosecutor are vested with control over the existence and the scope of the victims' rights controversy. The parties may not be interested in defending victims' rights or may take a position that denies the rights their full potential. For example, if the parties agree that victims' rights violations do not concern them, the rights issue will die regardless of whether appellate courts would ultimately agree with victims' concerns. Furthermore, there are circumstances in which the state and defendants are both adverse to victims' interests, like a victim's right to speak in opposition to plea agreements. The parties may act to prevent or circumscribe the exercise of victims' rights by refusing to provide notice of a right or of a hearing date.²³

Armed with this foundation that victims have standing to exercise or waive their rights and other actors are constrained with regard to the rights, it seems self-evident that the apostrophe—and all of its power—should lie with the crime victim as a singular possessive noun. Unfortunately, the cloud of confusion I experienced in grade school seems to have settled over the courts. Case law analyzing who has standing to assert the rights of crime victims in the context of subpoenas duces tecum for victim information reveals this confusion.

III. APOSTROPHE CONFUSION IN COURT ANALYSES OF SUBPOENAS FOR VICTIM RECORDS

This Part looks at federal district courts'²⁴ analyses of government standing to assert CVRA rights in the face of a Federal Rule of Criminal Procedure 17(c)(3) subpoena for personal or confidential information about a victim.²⁵ Because

²² *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981) (upholding a crime victim's right to seek appellate relief, reasoning that victims cannot rely on the government to advance their interests, as it does not "share[] these interests to the extent that they might be viewed as a champion of the victim's rights").

²³ Beloof, *Third Wave*, *supra* note 9, at 337.

²⁴ The focus on federal district courts rather than appellate courts has two drivers: (1) the limited appellate case law on this specific topic; and (2) the reality that subpoena practice is most robust at the trial level of proceedings.

²⁵ Far beyond the scope of this essay is the academic debate over the propriety of the Supreme Court's standing jurisprudence as applied to government standing to prosecute crimes. See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1080 (2015) ("The Supreme Court apparently never intended that the injury in fact, causation, and redressability requirements would apply to the federal and state governments in the same way as to private litigants. In perhaps the most obvious illustration, the government need not make a showing of personal injury to itself or anyone else in order to initiate a criminal prosecution."); see also Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2245 (1999).

Rule 17(c)(3) subpoenas place victim privacy at risk,²⁶ and privacy is recognized to be amongst the most critical of rights for victims,²⁷ this is fruitful ground for analyzing where courts are placing the apostrophe.²⁸

Victims of crime have numerous rights that are at issue when a Rule 17(c)(3) subpoena seeks their personal or confidential information.²⁹ Among the CVRA rights at issue are the right to protection and the right to be treated with fairness, dignity, and respect for privacy,³⁰ with the right to fairness being recognized as a right to due process.³¹ Rule 17(c)(3) also affords procedural rights to victims, providing that

a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.³²

²⁶ See FED. R. CRIM. P. 17(c)(3). Among the personal or confidential information that may be sought by such subpoenas: medical and mental health records, social media accounts, cellular telephone records, educational records, and more.

²⁷ See Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 473 (2005) (“For most sexual assault victims, privacy is like oxygen; it is a pervasive, consistent need at every step of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot.”).

²⁸ While this essay focuses on agency and standing at the intersection of Federal Rule 17(c)(3) and the CVRA, courts confront the apostrophe question in other rights settings as well. See, e.g., *United States v. L.M.*, 425 F. Supp. 2d 948, 951 (N.D. Iowa 2006) (noting without analysis that the parties agree that the government has standing to assert CVRA rights in a juvenile proceeding because of the CVRA’s standing provision and affirmative obligation on prosecutors to ensure the rights); *State v. Fisk*, No. 28789, 2021 WL 2394580, at *5–6 (Ohio Ct. App. June 11, 2021) (holding that the government lacked standing to assert a victim’s right to restitution on cross-appeal because the state constitutional amendment did not explicitly afford the government standing, but failing to analyze independent interest standing), *appeal accepted*, 165 Ohio St. 3d 1490 (2021).

²⁹ These include their federal constitutional rights to privacy. See, e.g., *Whalen v. Roe*, 429 U.S. 589, 598–99 (1977) (recognizing that the US Constitution provides a right to personal privacy, which includes an “individual interest in avoiding disclosure of personal matters”); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) (recognizing that “[t]he Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy” and that “[i]ts protection extends to offenders as well as to the law abiding”), *abrogation on other grounds recognized by Arizona v. Grant*, 556 U.S. 332, 351 (2009).

³⁰ See 18 U.S.C. § 3771(a)(1) (guaranteeing victims the “right to be reasonably protected from the accused”); § 3771(a)(8) (guaranteeing victims the “right to be treated with fairness and with respect for [their] dignity and privacy”).

³¹ 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Jon Kyl) (“The broad rights articulated in [(a)(8)] are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process. Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process.”).

³² FED. R. CRIM. P. 17(c)(3).

Upon motion, the court can quash or modify unreasonable or oppressive subpoenas.³³

In the cases discussed below, courts are confronted with government motions to quash a Rule 17(c)(3) subpoena and must decide whether the government has standing to do so based on the CVRA or independent interests in the subpoena. Court analyses fall into one of three categories. First, courts that hold the government has independent standing to move to quash a subpoena based solely on CVRA language. These courts create a type of co-ownership of the rights which risks cooptation of the rights. Second, courts that find the government has standing to move to quash a subpoena based upon the government's independent interests, seemingly regardless of the victim's position. These courts essentially erase the victim from decisions directly impacting them. Finally, one court has determined that the CVRA should be read as the singular possessive "victim's right" with exclusive ownership of the CVRA rights vested in the victim. Even in this final category, the court displays disregard for real victims. Thus, each court's construction confounds victim agency.

A. *Co-Ownership or Cooptation of CVRA Rights*

Some courts hold that the government has independent standing to move to quash subpoenas for victims' confidential and privileged records based on the plain language of the CVRA regarding standing. In essence, because the individual victim is not factored, these courts are treating the word "victim" as a common adjective modifying rights, or an abstract plural possessive noun such that an individual victim's interest is deemed unnecessary to the analysis.

For instance, in *United States v. Crutchfield*, the defendant obtained ex parte subpoenas; the government sought disclosure of copies of the subpoenas, a stay of the date of compliance, and reasonable time to file a motion to quash.³⁴ In response, the defendant argued that the government lacked "standing to object to or quash the subpoenas."³⁵ In analyzing whether the government had standing, the court recited the CVRA's provisions affording the attorney for the government standing to assert

³³ *Id.* (providing "[o]n motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive").

³⁴ *United States v. Crutchfield*, No. 5:14-CR-00051-DLJ (PSG), 2014 WL 2569058, at *1 (N.D. Cal. June 6, 2014).

³⁵ *Id.*

CVRA rights,³⁶ and creating an affirmative obligation on the prosecutor to make their best efforts to protect the rights.³⁷ The court also looked to the commentary to Rule 17, indicating that the rule was intended to implement the CVRA.³⁸ With no analysis of the language the court concluded,

[i]n light of this history, although the protections afforded by Rule 17(c)(3) are not specifically bestowed by the Crime Victims' Rights Act, the court finds that the standing bestowed by the statute extends to derivative rules created to ensure its application. The government has sufficient standing to challenge the subpoenas ["on behalf of the victims"].³⁹

While the court states that the government is acting "on behalf of the victims,"⁴⁰ notably absent from the court's discussion is articulation of the actual victims' positions or confirmation that the government was, in fact, acting on their behalf.

Similarly, in *United States v. Levine*, the defendant was charged with various crimes, including possession with intent to distribute, distribution of heroin and fentanyl, and distribution of these same drugs causing death.⁴¹ The defendant moved for an order authorizing a subpoena for the medical records of the victim who died, allegedly from drugs the defendant provided.⁴² The government, "[o]n behalf of" the deceased victim's family, opposed the request.⁴³ The court resolved the standing question by noting

³⁶ *Id.* at *2 n.9 (quoting 18 U.S.C. § 3771(d)(1), which provides that "[t]he crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in [18 U.S.C. § 3771 (a)]").

³⁷ *Id.* at *2. This affirmative obligation is codified in 18 U.S.C. § 3771(c)(1), which provides that "[o]fficers and employees of the Department of Justice . . . shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in [18 U.S.C. § 3771(a)]."

³⁸ *Id.* at *2 n.8.

³⁹ *Id.* at *1.

⁴⁰ *Id.*

⁴¹ *United States v. Levine*, No. 17-CR-55V(SR), 2019 WL 2097912, at *1 (W.D.N.Y. May 14, 2019).

⁴² *Id.*

⁴³ *Id.* The family of a deceased victim are legally crime victims under the CVRA which provides:

[T]he term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.

...

In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

that “[u]nder the Victims’ Rights Act, 18 U.S.C. § 3771(a)(8), the government has standing to challenge a subpoena on behalf of a victim.”⁴⁴ Again, there is no discussion or analysis of the victim’s position beyond the language “on behalf of.”⁴⁵

To be clear, I am not asserting that the prosecutors in either of these cases failed to seek input from victims, were disingenuous when they said they were acting on behalf of the victims, nor that they acted contrary to any victim’s interests. Rather, I am pointing to the lack of decisional discussion of the individual victim’s positions on the readily accessible record.⁴⁶ The lack of discussion regarding the victim’s position or their request to the government, leads to an impression of disregard; this silence can lead to interpretations that the government has co-ownership of the CVRA rights, and ultimately cooptation of rights. While it is undoubtedly desirable for the government to assert CVRA rights on behalf of a crime victim upon their request, allowing such action without evidence of court inquiry into or confirmation of the victim’s request and position erases the victim from the public record and the rights discourse.⁴⁷

B. Irrelevance of the Apostrophe—Independent Government Interest

In *United States v. Raineri*, in the context of a witness subpoena, the Seventh Circuit articulated a test of standing to move to quash subpoenas addressed to another.⁴⁸ The court noted: “A party has standing to move to quash a subpoena addressed to another if the subpoena infringes upon the movant’s legitimate interests” and that “[t]he prosecution’s standing rested upon its interest in preventing undue lengthening of the trial, undue harassment of its witness, and prejudicial over-emphasis on [the witness’s] credibility.”⁴⁹

⁴⁴ *Levine*, 2019 WL 2097912, at *2 (citing other federal district courts, including *Crutchfield*).

⁴⁵ *Id.*

⁴⁶ There may be filings that detail victim position and confirm such position is knowingly and voluntarily taken; however, there is no evidence on the face of the decision of these or how they may have informed the court’s decision.

⁴⁷ The absence of the victim from public decision texts is not merely semantics. The law is a constitutive rhetorical act, which is, at every moment, constructing community and cultural norms. See generally James B. White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985); Philip N. Meyer, *Will You Please Be Quiet, Please?: Lawyers Listening to the Call of Stories*, 18 VT. L. REV. 567, 570 (1994) (“The law . . . speaks univocally, and systematically excludes the voices and stories of those who ought to be included in the community of authoritative speech.”).

⁴⁸ *United States v. Raineri*, 670 F.2d 702 (7th Cir. 1982).

⁴⁹ *Id.* at 712. There is nothing in the decision that indicates the court saw this list of interests as exhaustive.

Federal district courts applying *Raineri* have, at times, held that the government has an independent interest sufficient for standing to move to quash third party subpoenas for crime victim information and records.⁵⁰ Notably, in the context of subpoenas for records of a victim of sexual violence there is long-standing recognition that the government has an interest in preventing undue harassment of, and protecting the privacy of sexual assault victims;⁵¹ interests that would certainly be at play in a subpoena context. Where the government fails to articulate an independent interest, courts have held it lacks standing to move to quash a subpoena for a victim's information or records.⁵²

⁵⁰ See, e.g., *United States v. Jenkins*, 895 F. Supp. 1389, 1391, 1393 (D. Haw. 1995) (holding that the government had standing to move to quash a subpoena issued to medical centers for the medical records of a rape victim due to its "interest in protecting the victim against harassment").

State courts have also applied *Raineri* and reached similar conclusions. See, e.g., *People v. Spykstra*, 234 P.3d 662, 666–67 (Colo. 2010) (finding, in a child sexual assault case in which the defendant issued subpoenas *duces tecum* to the child's parents for various electronic devices, that the district attorney had independent interests in case management, "the prevention of witness harassment," and ensuring propriety of subpoenas sufficient to afford standing to move to quash); *Commonwealth v. Lam*, 827 N.E.2d 209, 213–14 (Mass. 2005) (noting that "[a] majority of [federal] courts interpreting Fed.R.Crim.P. 17(c)," upon which the state version of the rule at issue was based, have found standing for the government to oppose the third party subpoenas *duces tecum* seeking victim information, and holding in alignment with these because the state can assist the court with knowing if a subpoena "involves an improper 'fishing expedition'" and "of course, also has an interest in preventing unnecessary harassment of a complainant and other Commonwealth witnesses caused by burdensome, frivolous, or otherwise improper discovery requests" (quoting *Commonwealth v. Lampron*, 806 N.E.2d 72, 77 (Mass. 2004))).

Courts also consistently find such interest when the third-party subpoena is for records of a cooperating witness. See, e.g., *United States v. Lopez*, No. 15-CR-252 (S-3) (PKC), 2021 WL 4033886, at *1 (E.D.N.Y. Sept. 3, 2021) (finding the government had standing to move to quash subpoena for records of cooperating witness); *United States v. Cole*, No. 19-CR-869 (ER), 2021 WL 912425, at *2 (S.D.N.Y. Mar. 10, 2021) (noting that preventing "undue harassment of a cooperating witness is a legitimate" interest for purposes of standing, and holding that the government had standing to move to quash subpoena for employment history of cooperating witness (quoting *United States v. Bergstein*, No. 16-CR-746 (PKC), 2017 WL 6887596, at *2–3 (S.D.N.Y. Dec. 28, 2017))); *United States v. Giampa*, No. S 92-CR-437 (PKL), 1992 WL 296440, at *1 (S.D.N.Y. Oct. 7, 1992) (finding, in a case involving witnesses in witness protection, that the government had standing to move to quash subpoenas based on the government's "interest in preventing any undue lengthening of the trial, any undue harassment of [the witness] and his family, and any prejudicial over-emphasis on [the witness's] credibility").

⁵¹ See, e.g., *Michigan v. Lucas*, 500 U.S. 145, 149–50 (1991) (addressing the state rape shield's notice-and-hearing requirement and finding that the law "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy"); *People v. Ramirez*, 64 Cal. Rptr. 2d 9, 12–13 (Cal. Ct. App. 1997) (citations omitted) ("There can be little dispute that the state's interest in protecting the privacy of sex offense victims is extremely strong and fully justified."); *State v. Gilfillan*, 998 P.2d 1069, 1075 (Ariz. Ct. App. 2000) (in context of Arizona rape shield, quoting *Lucas* for the proposition that rape shield laws "represent[] a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy").

⁵² See, e.g., *United States v. Lester*, No. 1:14-CR-00236-DAD-BAM-1, 2016 WL 5109611, at *2 (E.D. Cal. Sept. 19, 2016) (finding the government lacked standing to move to quash a post-conviction subpoena for business records of the victim because "it fail[ed] to

Regardless of case outcome, when analyzing the independent interests of the government for purposes of standing, the individual victim and their interests is absent from courts' discussion. This makes it impossible to determine from the face of a decision whether the victim agrees or disagrees with the government's action (or whether they were even aware of it). Once again, the victim is erased from the public discourse despite their interest in the matter.⁵³

C. *Exclusivity of Victim Ownership—But Still Lacking Agency*

In *United States v. Ray*, the defendant was charged with offenses, including extortion conspiracy, extortion, sex trafficking, forced labor, and money laundering.⁵⁴ The defendant issued Federal Rule 17(c)(3) ex parte subpoenas to various medical providers seeking the records of a number of victims.⁵⁵ Upon learning of the subpoenas from counsel for one of the victims, the government moved to quash them on behalf of all of the victims whose information was sought; a motion that was joined by two of the victims through counsel.⁵⁶ The court held that “the Government has no standing to oppose or move to quash subpoenas for which the Court has not received a specific objection from a victim.”⁵⁷ The court first declined to find government standing under Rule 17, noting that Rule 17(c)'s language afforded the victim, not the government, notice of subpoenas and an opportunity to move to quash or modify or otherwise object.⁵⁸ In rejecting the government's argument that

elaborate on how the subpoena amounts to undue harassment” of the victim); *State v. Johnson*, 538 S.W.3d 32, 55 (Tenn. Crim. App. 2017) (finding that none of the legally protectable interests identified in *Raineri* existed to afford the government independent standing to file a motion to quash the defense subpoenas for the sexual assault victim's phone and other social media data, and rejecting arguments that the victims' rights constitutional amendment afforded the government standing). In cases involving nonvictim subpoenas, courts hold similarly. *See, e.g., United States v. Nachamie*, 91 F. Supp. 2d 552, 559–60 (S.D.N.Y. 2000) (holding that the government had no standing where it could not assert that it had a legitimate independent interest in quashing Rule 17(c) subpoenas); *United States v. Chea*, No. 2:18-CR-00123-KJM-1, 2019 WL 2465492, at *3 (E.D. Cal. June 13, 2019) (denying prosecutor standing to move to quash a subpoena issued to the police department for disciplinary records because the government had not met burden of establishing standing).

⁵³ As noted above, this absence creates meaning. *See supra* text accompanying notes 43–47.

⁵⁴ *United States v. Ray*, 337 F.R.D. 561, 564–65 (S.D.N.Y. 2020).

⁵⁵ *Id.* at 565.

⁵⁶ *Id.* at 566.

⁵⁷ *Id.* at 569.

⁵⁸ *Id.* Rule 17(c)(3) provides in full:

Subpoena for Personal or Confidential Information About a Victim. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be

despite the apparent limits of Rule 17(c) standing, the CVRA afforded it standing, the court stated:

The statutory language of the CVRA does not give the Government the independent right to assert that information be maintained confidential on the victim's behalf when the victim does not ask for it to be kept confidential. "The right to be treated with fairness and with respect for the victim's dignity and privacy," as required by the [CVRA], is satisfied when the Court recognizes her individual dignity and autonomy including her right to make her own personal choices whether to ask that her personal information be kept confidential or be publicized.⁵⁹

The decision is a clear determination that the CVRA rights belong solely to the victim. In fact, the court explicitly acknowledged this when it noted that "The Government has the right to assert the victim's right to privacy, *provided that the victim herself wants the Government to assert it.*"⁶⁰

While such recognition of individual ownership is foundational to securing for victims an independent, meaningful participatory role, the court failed to take a next critical step in safeguarding agency. Nowhere in the decision does the court inquire into the positions of the unrepresented victims, nor does it create a meaningful opportunity for information about their positions to surface. This failure occurs despite the CVRA's mandate that courts "shall ensure that the crime victim is afforded [their] rights."⁶¹ In *Ray*, we have a glimpse of hope for victim agency that is rendered moot nearly immediately by systemic failure to timely and meaningfully invite the victim into the conversation regarding their own rights.

IV. MAKING THE APOSTROPHE MEANINGFUL: COUNSEL FOR CRIME VICTIMS

Recognizing the singular possessive noun—victim's rights—as in *Ray* is a necessary step to ensuring victim agency. But correct assignment of the apostrophe, while necessary, is insufficient, particularly when victim privacy is at stake. So, what else is necessary? Reflecting further on *Ray*, we find an answer.

served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

FED R. CRIM. P. 17(c)(3).

⁵⁹ *Ray*, 337 F.R.D. at 570.

⁶⁰ *Id.* at 571 (emphasis added).

⁶¹ 18 U.S.C. § 3771(b)(1) (providing "the court shall ensure that the crime victim is afforded the rights described in subsection (a)").

In *Ray*, the facts reveal that two of the victims had counsel who joined the government's motion to quash the subpoenas.⁶² The rest of the victims in the same case were seemingly left without an opportunity to meaningfully participate. Thus, for victim agency to be realized, the same thing that is necessary for other litigants to meaningfully participate and exercise rights is necessary for crime victims—i.e., counsel.

Certainly, in an ideal world, those with and without counsel would have equal agency in law, however, it is well-recognized that representation by an attorney holds the most promise for positive outcomes.⁶³ The Supreme Court has long recognized this reality in the context of criminal defendants.⁶⁴ In writing for the majority in *Gideon*, Justice Black stated, “reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”⁶⁵ Notably, a 2006 American Bar Association Task Force report found nonlawyers “are destined to have limited success no matter how valid their position may be, especially if opposed by a lawyer.”⁶⁶ Recognizing the need for paid for counsel in a variety of civil contexts has given rise to what is known as “civil *Gideon*.”⁶⁷ While these sources and most

⁶² *Ray*, 337 F.R.D. at 564.

⁶³ See, e.g., Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 70 (2007) (discussing the need for counsel in civil cases); Emily Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881 (2016) (reviewing empirical research on better outcomes for litigants with lawyers); THE WIS. PRO SE WORKING GRP., COMM. OF THE OFF. OF THE CHIEF JUST. OF THE WIS. SUP. CT., MEETING THE CHALLENGE OF SELF-REPRESENTED LITIGANTS IN WISCONSIN (2000), <http://www.wisconsininfathers.org/prosereport.pdf> [<https://perma.cc/U78F-AZWF>] (discussing the challenges faced by pro se litigants).

⁶⁴ See *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (internal citations omitted) (quoting Justice Sutherland in *Powell v. Alabama*, “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he ha[s] a perfect one. He requires the guiding hand of counsel at every step in the proceedings. . . .” (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932))).

⁶⁵ *Id.* at 344.

⁶⁶ Am. Bar Ass'n Task Force on Access to Civ. Just., *ABA Resolution on Civil Right to Counsel*, 15 TEMP. POL. & C.R. L. REV. 507, 517 (2006).

⁶⁷ *Gideon and Civil Right to Counsel*, NAT'L COAL. FOR A CIV. RT. TO COUNS., http://civilrighttocounsel.org/about/criminal_and_civil_rights_to_counsel [<https://perma.cc/P9N2-YYBL>]. The National Coalition for a Civil Right to Counsel tracks developments in civil right to counsel laws. *Status Map*, NAT'L COAL. FOR A CIV. RT. TO COUNS., <http://www.civilrighttocounsel.org/map> [<https://perma.cc/LFA4-KQ85>]. Civil *Gideon* draws upon Supreme Court jurisprudence that recognizes that constitutional due process requires appointment of counsel in certain circumstances beyond criminal defense. See *In re Gault*, 387 U.S. 1, 20, 34–36 (1967) (recognizing a right to counsel in

discussion is about counsel for criminal defendants and civil litigants,⁶⁸ when one recognizes the proper constraints on government representation of victim interests in criminal cases despite victims being haled into court, and the significant risks to a victim's rights, particularly in the context of a Rule 17(c)(3) subpoena, extending the theory is not a significant leap.

The idea that crime victims should have counsel to protect their rights during criminal investigation and prosecution is not novel.⁶⁹ In civilian justice, the US Department of Justice's Office for Victims of Crime has funded legal service programs to provide lawyers to crime victims to seek enforcement of their rights in criminal cases (state and federal) since early this century.⁷⁰ In 2013, following an Air Force pilot program, the US Armed Forces launched its special victim counsel/victim legal counsel programs, which afford victims of sexual violence, and more recently domestic violence, access to independent lawyers to protect their rights during military criminal justice.⁷¹ Courts have also, at times, recognized their inherent authority to appoint lawyers for crime victims.⁷²

juvenile delinquency proceedings based on due process and noting, "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 34–35 (1981) (adopting case-by-case approach to Fourteenth Amendment due process right to counsel in termination of parental rights cases).

⁶⁸ Among the calls for a civil right to counsel are specific calls for counsel for victims of domestic violence in various civil contexts. *See, e.g.*, Amanda Anna Saber, Note, *Personal Safety or Homelessness: The Choice a Domestic Violence Victim Has to Fight an Eviction Proceeding Without Counsel*, 58 SANTA CLARA L. REV. 345, 361–67 (2018) (proposing a framework for right to counsel for domestic violence victims facing eviction); Lisa E. Martin, Comment, *Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim's Right to Counsel*, 34 GONZ. L. REV. 329, 336–52 (1998) (arguing that due process includes the right to court-appointed counsel for indigent domestic violence victims).

⁶⁹ *See, e.g.*, Gillis & Beloof, *Maturing Movement*, *supra* note 14, at 696 (arguing "[i]t is time to bring in the lawyers").

⁷⁰ The National Crime Victim Law Institute, a nonprofit institute based in Portland, Oregon at Lewis & Clark Law School, has been funded in part by the US Department of Justice's Office for Victims of Crime since 2002 to increase access to no cost legal assistance for crime victims seeking to assert their rights in state and federal courts. *See History of NCVLI*, NAT'L CRIME VICTIM L. INST. (2019), https://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/history_of_ncvli/ [<https://perma.cc/6FPJ-439Y>].

⁷¹ *See Yob*, *supra* note 2, at 66–68; *see also* 10 U.S.C. § 1044e.

⁷² *See, e.g.*, *State v. Lozano*, 616 So. 2d 73, 74–78 (Fla. Dist. Ct. App. 1993) (relying on state constitutional victims' rights, the court made a discretionary appointment of a lawyer for the crime victims in a police shooting case); *see also* *United States v. Nachamie*, 91 F. Supp. 2d 552, 560–61 (S.D.N.Y. 2000) (stating in the context of a Rule 17(c) subpoena: "[T]he Government cannot undertake to act as counsel to its witnesses. If a Government witness needs counsel, and cannot afford to retain his or her own counsel, the Court would consider the appointment of counsel. But the Government's interests and that of its witnesses are not identical and it would therefore be inappropriate for the Government's attorney to act as counsel to its witnesses."); *United States v. Ray*, 337 F.R.D. 561, 564 (S.D.N.Y. 2020) (noting, without explanation, that one of the victims in the case had "appointed" counsel); DOUGLAS E. BELOOF ET AL., VICTIMS IN

The CVRA imposes an independent duty on courts to “ensure that the crime victim is afforded [their] rights.”⁷³ Minimally, this duty should require that when a court is faced with a Rule 17(c)(3) subpoena for a crime victim’s personal and confidential records, the court conduct a meaningful inquiry into the victim’s independent position regarding their rights, and their position regarding the government’s authority over those rights. If this inquiry reveals the victim is not knowingly and voluntarily asserting or waiving their rights, courts must consider the necessity of appointment of counsel for the victim.

It is apparent that independent lawyers for [crime] victims are needed to ensure victims can knowingly and voluntarily choose whether and when to engage with the criminal justice system and, having engaged, whether to exercise or waive any specific right. . . . [T]here is a plethora of legal issues that victims grapple with that require independent counsel.⁷⁴

Courts have practices in place for appointment of paid for counsel for indigent persons, as well as processes for appointment of guardians ad litem for children or other vulnerable persons. These same avenues can and should be activated when a Rule 17(c)(3) subpoena is seeking information from unrepresented crime victims. Opponents may cry foul, raising arguments based on cost. Such opposition ignores the fact that these issues are already before the courts. Subpoenas are issued daily and courts have to assess their propriety, weighing victims’ rights to privacy, protection, and due process without the benefit of skilled, adversarial presentation of these issues. Ensuring the courts have sufficient information to make a reasoned decision on such critical rights is far less costly than allowing the erosion of such rights.

Fundamentally, the failure to take the step toward victim counsel leaves the victim “seen but not heard”—an outcome that undermines the victim’s rights, revictimizes crime victims, and is an abdication of the court’s duty.

CRIMINAL PROCEDURE 225–27 (4th ed. 2018) (discussing the victims desire and need for legal representation; noting that court authority to appoint in civil cases “probably extends to appointing attorneys to represent victims of crime in criminal proceedings”); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 941–43 (2007) (proposing a new federal rule making explicit a court’s authority to appoint counsel for a victim, and noting that “courts generally have the right to appoint volunteer counsel in civil cases, a power that would seem to extend to criminal cases”); 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, 912–17 (2005) (proposing a federal rule making explicit a court’s authority to appoint counsel for a victim, and collecting existing civil and criminal case law regarding court authority to so appoint).

⁷³ 18 U.S.C. § 3771(b)(1) (2015) (providing “the court shall ensure that the crime victim is afforded the rights described in subsection (a)”).

⁷⁴ Garvin & Beloof, *Victim Agency*, *supra* note 15, at 86.

CONCLUSION

The CVRA affords numerous rights, including the rights to be “*treated with fairness and . . . dignity*,”⁷⁵ all which are intended to prevent or at least mitigate systemic revictimization through reintegration of victims into a meaningful participatory role.⁷⁶ This vision requires a construction of CVRA rights as “*victim’s rights*”—singular possessive. Because ownership of rights is not coterminous with agency to act upon those rights, courts must start the singular, possessive noun but must inquire further. What does the individual victim want to do with the right that they own? Often answering this deeper inquiry will require counsel for the victim. For courts to fulfill their duty to ensure victims are afforded their rights and for victims to be able to chart their own direction, which is particularly critical when their personal and confidential information is at risk, we have to take this step.

⁷⁵ 18 U.S.C. § 3771(a)(8) (emphasis added) (guaranteeing victims the “right to be treated with fairness and with respect for [their] dignity and privacy”).

⁷⁶ See Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity’s Evolution in the Victims’ Rights Movement*, 9 DREXEL L. REV. 43, 99 (2016) (discussing the history of the term dignity and arguing that codification of the right in state and federal victim legislation “has elevated dignity from a background explanatory norm to a procreative power that enables courts and advocates to develop an extended body of rights for crime victims”); Garvin, *Constitutive Paradox*, *supra* note 6, at 308–09 (discussing Supreme Court jurisprudence of the term “dignity” as well as the positive right to dignity afforded to crime victims); Michael M. O’Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 326, 331–32 (2007) (calling for guidelines for prosecutorial charging and plea bargains and positing that victim participation in the process may further dignity); Douglas E. Beloof, *Dignity, Equality, and Public Interest for Defendants and Crime Victims in Plea Bargains: A Response to Professor Michael O’Hear*, 91 MARQ. L. REV. 349, 349–50 (2007) (responding to Professor O’Hear regarding participation as furthering dignity).