VICTIMS' RIGHTS AMENDMENT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

ON

H.J. Res. 40

APRIL 25, 2013

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VICTIMS' RIGHTS AMENDMENT

THURSDAY, APRIL 25, 2013

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 11:34 a.m., in room 2237, Rayburn Office Building, the Honorable Trent Franks, (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Chabot, DeSantis, Nadler, and Scott.

Staff present: (Majority), John Coleman, Counsel; Sarah Vance, Clerk: (Minority) David Lachmann, Subcommittee Staff Director; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. The Subcommittee on the Constitution and Civil Justice will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

Today's Subcommittee on the Constitution and Civil Justice examines H.J. Res. 40, the bipartisan "Victims' Rights Amendment" to the Constitution, also known as the VRA.

An amendment to the Constitution for the rights of victims was first proposed by President Ronald Reagan's Task Force on Victims of Crime in 1982. The task force wrote, in part—do we have some feedback here? I didn't want you all to miss this quote. It is really a cool quote. [Laughter.]

The task force wrote, in part, "We do not make this recommendation lightly. The Constitution is the foundation of national freedom, the source of national spirit. But the combined experience brought to this inquiry and everything learned during its process affirmed that an essential change must be undertaken. The fundamental rights of innocent citizens cannot adequately be preserved by any less decisive action."

Victims' rights legislation amendments have enjoyed broad support at the state and Federal levels, passing by 80 percent margins in the states and securing influential bipartisan support at the highest levels of the Federal Government. Senators Kyl and Feinstein have championed victims' rights in the Senate, and multiple house and Senate hearings have been devoted to advancing victims' rights.

Despite the best efforts at the state and Federal level to bring balance through statutes or state constitutional amendments, these efforts have proven inadequate whenever they come into conflict with bureaucratic habit or traditional indifference or sheer inertia or the mere mention of an accused's rights, even when those rights are not genuinely threatened.

As the U.S. Justice Department concluded after careful review of the issue, the existing "haphazard patchwork of rules is not sufficiently consistent, comprehensive or authoritative to safeguard victims' rights." In light of the inadequacies of our current laws, it is time we amended the United States Constitution to include rights of victims of crime, and it is time for Americans who become victims of crime to have the same rights anywhere in the United States, regardless of the state in which that crime occurs.

The VRA would specifically enumerate rights for crime victims, including the right to fairness, respect and dignity; the right to reasonable notice of and the right not to be excluded from public proceedings related to the offense; the right to be heard at any release, plea, sentencing, or any other such proceeding involving any right established in the amendment; the right to proceedings free from unreasonable delay; the right to reasonable notice of the release or the escape of the accused; the right to due consideration of the crime victim's safety and privacy; and the right to restitution. Moreover, the amendment expressly provides standing for the victim to enforce the enumerated rights.

Supporters of a victims' rights amendment have included presidents George H. W. Bush, Bill Clinton, George W. Bush; Attorneys General Janet Reno, John Ashcroft, and Alberto Gonzales; Professor Larry Tribe of the Harvard Law School; the National Governors Association; 50 state attorneys general; Mothers Against Drunk Driving; the National Association of Parents of Murdered Children; the National Organization of Victims' Assistance; and finally, the National District Attorneys Association, the voice of the Nation's prosecutors.

Last year, the Phoenix Law Review, at the Phoenix School of Law, published a special issue containing articles and authors' statements regarding the Victims' Rights Amendment. I would like to ask unanimous consent to put it into the record.

Hearing no objection, so ordered.*

The issue is entitled, "A Proposed Victims' Rights Amendment to the Constitution," and it is dated April 19, 2012.

In addition, my office has received several law review articles, additional written testimony, a proclamation by Governor Brewer of Arizona recognizing this week as Arizona Crime Victims' Rights Week, and letters from victims' rights organizations, including the National District Attorneys Association, the National Organization for Victim Assistance, the National Center for Victims of Crime, and the Justice Fellowship, which we will add to the hearing record as well.**

*The material submitted for the record is not reprinted in this hearing record but is on file with the Subcommittee.

**The information referred to is available in the Appendix.

I look forward to hearing from the witnesses today on this critical issue, and I will now yield to the Ranking Member, Mr. Nadler, for his opening statement.

[The resolution, H.J. Res. 40, follows:]

IA

113TH CONGRESS
1ST SESSION

H. J. RES. 40

Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

IN THE HOUSE OF REPRESENTATIVES

APRIL 23, 2013

Mr. FRANKS of Arizona (for himself, Mr. COSTA, Mr. ROYCE, Mr. GOSAR, Mr. SCHWEIKERT, Mr. SALMON, Mr. JONES, Mr. CHABOT, Mr. MEADOWS, Mr. NUNNELEE, Mr. CRAMER, Mr. BENTIVOLIO, Mr. FLEMING, and Mr. YODER) introduced the following joint resolution; which was referred to the Committee on the Judiciary

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

"ARTICLE—

"SECTION 1. The rights of a crime victim to fairness, respect, and dignity, being capable of protection without denying the constitutional rights of the accused, shall not be denied or abridged by the United States or any State. The crime victim shall, moreover, have the rights to reasonable notice of, and shall not be excluded from, public proceedings relating to the offense, to be heard at any release, plea, sentencing, or other such proceeding involving any right established by this article, to proceedings free from unreasonable delay, to reasonable notice of the release or escape of the accused, to due consideration of the crime victim's safety and privacy, and to restitution. The crime victim or the crime victim's lawful representative has standing to fully assert and enforce these rights in any court. Nothing in this article provides grounds for a new trial or any claim for damages and no person accused of the conduct described in section 2 of this article may obtain any form of relief.

"SECTION 2. For purposes of this article, a crime victim includes any person against whom the criminal offense is committed or who is directly and proximately harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime.

"SECTION 3. This article shall be inoperative unless it has been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within 14 years after the date of its submission to the States by the Congress. This article shall take effect on the 180th day after the date of its ratification.".

○

Mr. NADLER. Thank you, Mr. Chairman. I apologize for being a little late and I thank you for holding the hearing.

First of all, I ask unanimous consent that the statement of the distinguished Ranking Member, Mr. Conyers, be placed in the record.

Mr. FRANKS. Without objection, so ordered.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

Thank you, Mr. Chairman.

Today, we examine the proposed Victims' Rights Amendment to the Constitution, an issue that has come before this Committee many times since the 104th Congress.

The timing of this hearing is especially appropriate as it coincides with the National Crime Victims Rights Week.

This hearing, therefore, provides an excellent opportunity to reflect not just on what has been accomplished, but what more we can do to aid victims of crime.

I continue to have serious reservations about amending the Constitution in order to aid victims or crime. I do not believe a constitutional amendment is necessary, and I am deeply concerned that it will undermine both the rights of defendants, and the ability of law enforcement to do its job.

As we consider the Victims' Rights Amendment, I would like us to keep the following issues in mind.

First, would a constitutional amendment actually provide any benefit to a victim of crime?

As demonstrated by prior Congresses, there has never been any action on this undertaking because of the cumbersome nature of amending the Constitution.

However, Congress has passed various measures that continue to provide meaningful assistance to victims and that protect their rights.

The Federal Crime Victims Assistance Fund—managed by the FBI and various Justice Department Divisions—provides critical assistance to victims and survivors immediately after the crime.

The Treasury Offset Program is a centralized debt collection program that helps agencies collect delinquent debts owed by criminals and to ensure that they pay restitution to crime victims. To date, these efforts have resulted in more than $24 million in restitution payments.

The Office for Victims of Crime funds programs to enhance and provide comprehensive services for victims of human trafficking.

The Drug Endangered Children Program is a collaboration among federal, state, and local nonprofit entities and the public to develop best practices to help educate law enforcement, justice system personnel, and service providers about children put in harm's way by family members involved in drugs.

There are also programs funded under the Children's Justice Act and federal funding for victim-witness coordinators in U.S. Attorneys's Offices and the FBI. In addition, federal funds support the Federal Victim Notification System, and state victim assistance formula grants.

These are just a few of the efforts to provide assistance to crime victims.

In contrast, the Victims' Rights Amendment is utterly silent about how it would provide any meaningful counseling, funding, or other assistance that experience has shown is so helpful in the wake of a crime.

The services now being provided to crime victims are invaluable, and it would make sense to augment them.

Yet, while we are wasting time on this Amendment, budget cuts, including the sequester, have reduced the resources available to help victims and law enforcement. We should build on our successes, not undermine them.

Second, we should consider how would this Amendment affect other rights under the Constitution.

In particular, I am very concerned that the Amendment would interfere with the right to a fair trial notwithstanding its broad declaration that the "rights of a crime victim to fairness, respect, and dignity, [are] capable of protection without denying the constitutional rights of the accused."

Just because we say it doesn't make it true.

Most troubling, it drastically changes the contours of a criminal trial from one in which the guilt or innocence of a defendant must be determined, instead requiring courts to behave in ways that assume guilt prior to trial.

But other aspects of this Amendment, including actions that would prejudice the jury, or allow a third party to demand that a trial move ahead when the prosecution or the defense are trying to assemble a case, could wreak havoc.

Finally, we should consider what would be the impact of a constitutional amendment on the administration of justice, particularly the effective and expeditious prosecution of criminals.

The Amendment would create numerous opportunities for litigation to interfere with the judicial process.

We have heard in the past from prosecutors and some victims rights advocates about the danger of giving so wide a group of individuals the right to sue.

For example, a person who had abused a woman for 20 years, and who was ultimately stabbed by her, would enjoy the full range of newly created constitutional rights under this Amendment.

A victim who objected to the prosecution's strategy, or the decision by a prosecutor to wait for additional evidence, for example, could sue and assert that his or her constitutional rights had been violated under this Amendment.

There are many reasons why, over the years, we have never advanced this constitutional amendment, and that we have sought legislative and administrative means of protecting the rights of victims, and assisting them in the aftermath of crime.

I want to thank the witnesses for attending. I look forward to their testimony.

Thank you, Mr. Chairman. I yield back.

Mr. NADLER. Thank you. Thank you, Mr. Chairman.

Mr. Chairman, today we consider a subject of great importance to every Member of this House, our responsibility to ensure that victims of crime have their rights respected, their needs met, and the role that everyone in the criminal justice system must play in assisting victims who have suffered great harm. It is especially suitable that we are discussing these vital issues during National Crime Victims Week.

There was a time in this country when victims of crime were not treated respectfully. At times, crime victims felt, and not without justification, that they were considered almost extraneous to the process. With greater awareness and legal protections enacted at the state and Federal levels, victims now receive all kinds of assistance, including counseling, financial assistance, notification, and the respect to which anyone who has suffered harm is entitled. We offer both financial and technical assistance to states to help them provide services to crime victims.

So while we have made great progress, we can and should do more. We could provide more funding for crime victims' programs. We could provide the training and resources necessary to ensure that our existing laws, which require notice and assistance to crime victims, are fully enforced.

One thing we did recently that will help crime victims was to put an end to the delays and obstructionism that held back the reauthorization of the Violence Against Women Act. The resources that that act provides to victims of some of the most heinous crimes is invaluable.

Crime victims also need to see the guilty party is punished and to be reassured that neither they nor anyone else will have to fear further victimization by that individual. In that regard, I have serious concerns about this proposed constitutional amendment. We have heard from law enforcement professionals that it will do more

to obstruct the wheels of justice than to provide victims with the assistance they need to put their lives back together. It will certainly spark extensive litigation in our already over-burdened criminal justice system, and it may provide an opportunity for people who do not have the best of motives to cause terrible trouble in prosecutions.

Our first obligation to crime victims is to provide assistance, but we must do the job right. Constitutional amendments may make for great headlines, but they are no substitute for the resources victims and law enforcement need. Offering symbolic gestures to crime victims and stonewalling legislation that would provide assistance to them is not the way to help victims of crime.

Cutting funding for victim assistance programs, as the sequester legislation has done in the name of fiscal austerity, is certainly not the way, and I hope that my colleagues will remember that when we take up the Balanced Budget Constitutional Amendment later this year. For example, the Crime Victims Fund was established by the Victims of Crime Act to provide funding for state victim compensation and assistance programs. The CVF, the Crime Victims Fund, provides funding for discretionary grants for private organizations' assistance, the Federal Victim Notification System, funding for victim assistance staff within the FBI and the executive office of the U.S. Attorney, funding for the Children's Justice Act Program, and compensation for victims of terrorism. It is funded through criminal fines, forfeited appearance bonds, penalties and special assessments collected by the U.S. Attorney's Office, Federal courts, and the Federal Bureau of Prisons.

Since 2002, Congress has allowed gifts, bequests and donations from private entities to be deposited into the CVF. For fiscal year 2012, Congress set the CVF distribution cap at $705 million. For fiscal year 2013, the Obama Administration requested an increase in the CVF cap by $365 million, to a total of $1.07 billion, but Congress limited funding to $705 million. According to OMB, the sequester resulted in the loss of approximately $36 million to that reduced number. This means real less services to victims of crimes.

So if we are to measure Congress' commitment to crime victims in terms of providing them with actual assistance instead of by rhetoric, then this Congress and the reckless budget cutters simply don't measure up.

Amending the Constitution is also difficult, as it should be. We have only had, since the Bill of Rights was added in 1791, 17 amendments to the Constitution, three of them in the aftermath of the Civil War. So since the Civil War, only about a dozen.

In the case of this proposed amendment, this Committee, much less this House, has not even acted on it. We do hold hearings every Congress, but that is the end of it. Debating yet another constitutional amendment that we know from long experience is going nowhere will certainly not help victims of crime. We will hold a hearing, we will talk about it today, and that will probably be the end of it. Judging from past experience, Republican congresses will hold this hearing, we will never mark up a bill, we will never pass it, and certainly the Senate won't look at it. That will help no one. Certainly it won't help victims of crime. Legislation that protects victims' rights and improves services would help victims of crime.

I hope that we can work together to improve and expand those services in the future.

I want to join the Chairman in welcoming our panel today, and I look forward to their testimony. I thank the Chairman and the witnesses, and I yield back the balance of my time.

Mr. FRANKS. I thank the gentleman.

We would now yield to the Chairman of the Committee, Mr. Goodlatte from Virginia. However, Mr. Goodlatte is not here at the moment. So without objection, if he arrives, we will allow him to make his statement at that time. Otherwise, we will place his statement in the record.

I would now yield—let's see, I think Mr. Conyers' amendment or his opening statement will be placed in the record as well.

Let me now introduce our witnesses.

Bill Montgomery is the County Attorney for Maricopa County, Arizona. Mr. Montgomery is a West Point graduate, decorated Gulf War veteran, former Deputy County Attorney, and a professional prosecutor. Mr. Montgomery earned his J.D. from Arizona State University College of Law, graduating magna cum laude and receiving the Order of the Coif. As a prosecutor with the Maricopa County Attorney's Office, he quickly gained a reputation as an aggressive prosecutor. Mr. Montgomery has helped shape legislation designed to protect victims of crime and reform child protective services, resulting in the creation of the Office of Child Welfare Investigations, and he continues to be a passionate advocate for crime victims' rights in Arizona.

Glad you are here, Bill.

John W. Gillis is a former veteran, Los Angeles police officer, a former National Director of the Office of Victims of Crime in the U.S. Department of Justice, and a champion for the rights of crime victims. Following the 1979 murder of his daughter, Louarna, Mr. Gillis became a founding member of Justice for Homicide Victims, JHV, and the Coalition of Victims' Equal Rights. Mr. Gillis was nominated by President George W. Bush and confirmed by the U.S. Senate in September, 2001, as the National Director, Office for Victims of Crime, U.S. Department of Justice. In addition to a Master of Science degree in public administration, University of Southern California, he holds a B.A. degree in political science from California State University at Los Angeles. He has studied law at Glendale College School of Law, and Mr. Gillis serves as Chief of the Maricopa County Attorney's Office Victims Services Division, and on the Board of Directors at the National Crime Victim Law Institute.

Thank you for being here, sir.

Professor Robert Mosteller—is that Mosteller? I know no one has ever gotten that wrong before. Professor Robert Mosteller is an Associate Dean for Academic Affairs at the J. Dixon Phillips Distinguished Professor of Law at the University of North Carolina School of Law. Professor Mosteller holds a B.A. in history from the University of North Carolina, where he was President of the Phi Beta Kappa, a Master's in public policy from Harvard, and a J.D. degree from Yale. After clerking on the United States Court of Appeals for the Fourth Circuit with Judge J. Braxton Craven, he worked for 7 years with the Washington, D.C. Public Defenders

Service, where he was Director of Training and Chief of the Trial Division.

Professor Doug Beloof is a law professor at Lewis and Clark School of Law. Professor Beloof is a graduate of the University of California at Berkeley and received his J.D. from Northwestern School of Law of Lewis and Clark College. Professor Beloof began his law career clerking for Justice Thomas H. Tongue of the Oregon Supreme Court. As Director of the Multnomah County Victims' Assistance Program, he worked on establishing procedures to assist victims of crime. He has been a prosecutor and a criminal defense attorney, as well as practicing tort law as a plaintiffs and defense attorney. Professor Beloof has published a casebook, Victims and Criminal Procedure, which won a national award for writing in victimology and the law. He has published numerous articles about civil liberties for crime victims and also the book Victims' Rights, a Documentary and Reference Guide.

Thank you, Professor, for being here.

Each of the witness' written statements will be entered into the record in their entirety, so I would ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a timing light in front of you. The light will switch from green to yellow, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired.

Before I recognize the witness, it is the tradition of the Subcommittee that they be sworn, so if you would please stand to be sworn.

[Witnesses sworn.]

Mr. FRANKS. Let the record reflect that the witnesses answered in the affirmative.

I would now recognize our first witness, and please turn the microphone on before you start speaking.

Mr. Montgomery?

TESTIMONY OF WILLIAM G. MONTGOMERY, MARICOPA COUNTY ATTORNEY

Mr. MONTGOMERY. Thank you, Mr. Chairman. Dear Mr. Chairman and Members of the Committee, thank you for the opportunity to appear in support of House Joint Resolution 40, the Victims' Rights Amendment, and let me also offer my gratitude to the Chairman and to Congressman Jim Costa for their continuing work on behalf of victims of crime.

For the criticism regarding partisanship in our Nation's capital, this legislation offers a ready antidote, a bipartisan approach to protecting our fellow citizens when they are harmed by crime, and this is truly a bipartisan cause. In the thousands of police reports I have read over the years as a prosecutor, I have never read of an instance in which a perpetrator checked the party affiliation of someone before victimizing them.

In addition to serving as a prosecutor, I have also worked as a victim rights attorney, advocating for crime victims in state and Federal courts. Currently, I am the elected county attorney, called a district attorney in other jurisdictions, and lead an office serving 4 million people in Maricopa County, Arizona. I am authorized over

300 prosecutors and have another 40 to 50 civil litigation attorneys on staff. Annually, we prosecute roughly 35,000 felonies.

Accordingly, my observations of the status of victim rights is based on firsthand experience in a courtroom and in working directly with victims of crime. When I tell you that patronizing arguments in opposition to the Victims' Rights Amendment are based on false assumptions and disingenuous hypotheticals, I am speaking from that firsthand experience.

As for concerns over acknowledging the victim of a crime as a victim in the courtroom, let me simply state they are unfounded. It does not shift the government's burden of proof or relieve the jury of their duty to find the facts in any given case to determine whether this victim was harmed by this particular defendant in the manner as alleged by the government. The argument that a victim's right to proceedings free from unreasonable delay ignorantly claims that trials will proceed in violation of a defendant's due process rights. This is an example of rights that can work in parallel without offense to either a defendant or a victim. A defendant has a right to a speedy trial but will not move faster than their attorney can prepare, and neither will the prosecution. Delays due to the needs of discovery or witness availability are not impacted.

Those are reasonable delays. In my experience, victims understand that. They do not seek to push trials where the danger of a retrial can affect a just outcome.

As for the argument that a constitutional right for a victim to be present throughout a trial would affect the defendant's right to a fair trial, I can only say that this argument is as false and disingenuous as the hypotheticals offered in support in written testimony presented to this Committee.

For the record, Abner Louima was never prosecuted for an offense stemming from his initial contact with police. The charges were dropped in his case, and the police officers who harmed him were sent to prison.

As for Rodney King, he was never charged for his high-speed flight from police, and the two officers involved in beating him were imprisoned.

But, as we have seen, ever since the cause of constitutional rights for victims of crime began, opponents will go to great lengths to scare lawmakers away from justice for all.

Why is a victims' rights amendment necessary? Because the inconsistent approaches to crime victim rights across our country is unacceptable for a Nation that pledges justice for all and not justice for some or justice only for the accused. What rights would a victim of the Boston Marathon bombing have if the case went to trial in a Massachusetts state court? They would have no constitutional rights to assert whatsoever, and the Supreme Judicial Court of Massachusetts has stated that a crime victim has no judicially cognizable interest in the prosecution of another.

What about the parents of children lost in the tragedy of Newtown? What if the perpetrator had been tried in state court? There, they would be able to assert state constitutional rights, unlike in Boston, just 149 miles away in an adjoining state. However, the Supreme Court of Connecticut, in reviewing their Constitution, noted a review of the language of the Victims' Rights Amendment

discloses that the amendment, while establishing many substantive rights for crime victims, does not include a right to appeal.

As for the loss of life in Tucson, Arizona from a shooting that also affected a former Member of this House, had the perpetrator gone to trial in Federal court, the crime victims would have had fewer guaranteed rights than if the case had been tried in one of our state courts following our Victims' Bill of Rights. Nevertheless, any contest between state statutory or constitutional rights and Federal constitutional rights, or Federal statutory rights and Federal constitutional rights, the result is the same. Victims lose.

To those who hesitate or shy away from amending our Constitution to protect victims, I would say, with all due respect, it is a good thing they were not in the first Congress that provided us with a Bill of Rights. It is good they were not in the 38th Congress that ended slavery, or the 39th Congress that asserted rights to equal protection and due process. It is good they were not in the 66th Congress that extended the right to vote to women, and it is good that they were not in the 87th Congress that ended the poll tax. You see, through the long course of our history, the great injustices in America have ended with constitutional justice.

In closing, let me note that Sir Winston Churchill once observed that Americans can always be counted on to do the right thing after we have tried everything else. We have tried everything else. I encourage your support for the Victims' Rights Amendment.

[The prepared statement of Mr. Montgomery follows:]

STATEMENT

OF

WILLIAM G. MONTGOMERY

MARICOPA COUNTY ATTORNEY

BEFORE THE CONSTITUTION SUBCOMMITTEE

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

IN SUPPORT OF

H. J. RES. _____

VICTIMS' RIGHTS AMENDMENT

APRIL 25, 2013

Mr. Chairman and Distinguished Members:

As one who has served as a career prosecutor and victim rights advocate[1], I am grateful for your continuing work and that of Congressman Jim Costa on behalf of victims of crime. Together you recognize the reality that, in order to honor our pledge of "justice for all" regardless of where a fellow American is victimized by crime, an amendment to our Constitution is essential to protect victims of crime in our criminal justice system. Too often, the concern as to whether the rights of victims of crime should be given the protection of our Constitution has been premised on the false calculus that any rights accorded to a crime victim must necessarily result in fewer rights for a criminal defendant. I offer the following in support of the proposition that protecting all of our citizens in the course of criminal justice proceedings is a case not of either one or the other, but a case of being able to protect both the victim and the defendant.

My experience comes primarily from working in the Maricopa County Attorney's Office; the fourth largest prosecution office in the United States with over 300 authorized prosecutors. Every day we pursue justice in each and every one of the over 35,000 felony cases we handle, on average, each year for the four million people in the

[1] I have also worked for Arizona Voice for Crime Victims as a staff attorney for the Victims Legal Assistance Project providing pro bono legal services for enforcement of victim rights under Arizona's constitution and the Federal Enforcement Project for enforcement of victim rights under the Crime Victims' Rights Act and currently serve on the Advisory Board for the National Organization for Victim Assistance.

country's fourth most populous county. I have had the privilege of leading this office since November of 2010 and previously served in the office as a line prosecutor handling hundreds of felony cases and also serving as a supervisor of auto theft prosecutions. I have also worked for crime victim advocacy organizations, appearing as attorney of record on behalf of crime victims in state and federal courts at the trial and appellate levels. It has been my distinct honor and privilege to protect the rights of victims of crime while successfully securing constitutionally-sound convictions without jeopardizing the Due Process rights of the accused.

For my entire career, Arizona crime victims have been cloaked with state constitutional protections and participatory rights, including standing to assert their rights in courts of review. Daily, I have witnessed the application of these rights in real cases – not merely discussed in hypotheticals pursuant to an esoteric intellectual exercise – real victims, real defendants, and real constitutional consequences. Nevertheless, state-level constitutional protections of rights for victims of crime sometimes fall short due to the lack of similar protections in our federal constitution.

For example, I have had trial court judges order me to not refer to the crime victim as a victim, despite a state constitutional definition, because a defense counsel objected, asserting it would unfairly prejudice her client whom the jury would be told was presumed innocent and could not be convicted absent the state proving each and every element of each offense beyond a reasonable doubt - as required by our federal constitution. I have had a trial court judge actually consider a defense counsel's objection over a victim asserting her right to tell the court what she thought a defendant should receive as a sentence, despite a state constitutional right to do so. Trial courts have ordered victims to move away from juries and sit towards the back of courtrooms

or order them to not display any emotion during testimony certain to evoke emotion from a human being absent complete disregard for the horror of a given crime. Defense attorneys have filed motions arguing that certain family members did not meet the definition of victim despite clear language to the contrary in an attempt to strip the victims of their rights under the Arizona Constitution. These cases involved the parents of child victims; certain family members in homicide cases; business victims. Each of these incidents is possible when a defendant can simply allude to federal constitutional rights to circumvent state constitutional rights and our Supremacy Clause provides fertile ground for such efforts.

Nevertheless, law enforcement, prosecutors and the courts in Arizona for over 20 years have endeavored to protect many of the same rights that are included in the proposed 2013 Victims' Rights Amendment, including such rights as the right "to fairness, respect, and dignity" ... "the right to reasonable notice of, and shall not be excluded from, public proceedings relating to the offense, to be heard at any release, plea, sentencing, or other such proceeding involving any right established by this article, ... to proceedings free from unreasonable delay, to reasonable notice of the release or escape of the accused, to due consideration of the crime victim's safety, and to restitution." For these rights our law provides that "the crime victim or the crime victim's lawful representative has standing to fully assert and enforce these rights in any court."

In all of my years working with and in the criminal justice system, I cannot recall even one case where a defendant was granted a new trial as a remedy for a violation of his rights because a crime victim chose to exercise her rights as a crime victim. The recognition and protection of victim's rights in the United States Constitution would be

a concrete exhibit of Martin Luther King's observation that "the arc of the moral universe is long but it bends towards justice." If a victim is guaranteed a right to dignity and respect, it is simply farcical that somehow this right must violate the constitutional rights of the accused. This is simply not the case and a perverse view of what we endeavor to do on a daily basis in seeking justice and raises the question: are we willing to accept a criminal justice system that then, by default, permissibly denies dignity and respect to victims of crime?

With the passage of the Crime Victims' Rights Act (CVRA), Kenna v. Dist. Court for C.D.Cal. 435 F.3d 1011 C.A.9 (Cal.) (2006) was the first landmark case recognizing the rights of federal crime victims to be heard at the sentencing of a defendant. Judge Kozinski eloquently summed up the role that crime victims endured for decades at the hands of our justice system:

> The 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.

Id. at 1013.

I would qualify Judge Kozinski's observation slightly. The Crime Victim's Rights Act sought to simply *recognize* the participatory role of crime victims. In the State of Arizona, our constitution guarantees crime victims participatory status as well as a panoply of rights that have, for the most part, been effectively implemented without undermining the rights of criminal defendants. However, when judges engage in a constitutional calculus, the absence of federal constitutional rights for victims of crime ensures that there will be an imbalance in seeking to guarantee the rights of all

participants. Amending the United States Constitution is not some zero sum game as some may argue. A crime victim's rights and defendant's rights under the Constitution can coexist. Hard evidence demonstrates that enforcement of victim's rights gives a voice to the voiceless and effectuates the goals of the criminal justice system at every turn.

Neither is there an assault on or an impediment to the "presumption of innocence." Threshold determinations of reasonable suspicion and probable cause are untouched and the status of a criminal defendant as an accused is not changed through the simple and just acknowledgment that a fellow member of our community was harmed and is a victim of a crime. Nothing in the proposed amendment shifts the burden of the government to prove beyond a reasonable doubt that the accused is the one to be held accountable for the criminal conduct in question.

With respect to the impact on a prosecutor's ability to successfully prosecute a case in the face of the rights protected by the Victim Rights Amendment, let me deal with each in turn. First is the "rights of a crime victim to fairness, respect, and dignity." As a professional prosecutor, I have never had an issue with being able to conduct myself and exercise my duties and responsibilities while treating anyone - defendant, defense attorney, court staff, judge, or witnesses - with fairness, respect, and dignity; and especially someone who was a victim of a crime. Therefore, it is a disingenuous assertion that honoring a crime victim's federal constitutional right to fairness, respect, and dignity may somehow interfere with the successful prosecution of cases. To the contrary, honoring such a right cannot help but reinforce the confidence in our criminal justice system that we want victims of crime to have when we treat them with no less regard than we treat criminal defendants. This most basic right enshrined in our federal

constitution will ensure that criminal justice systems at the federal and state levels will give due consideration and equal consideration to victims of crime as we habitually do for criminal defendants.

Second, the "rights to reasonable notice of, and shall not be excluded from, public proceedings relating to the offense" present no hindrance to successful prosecutions and do not implicate any Due Process right of an accused. Providing notice to a victim of a crime has not prevented me from successfully prosecuting any case; having crime victims present in a courtroom has actually assisted in prosecuting a case because they are often essential to the truth seeking function we serve. Moreover, criminal defendants who counted on fear and intimidation to keep a crime victim from cooperating have had to reassess their trial strategy, often resulting in a plea agreement ahead of trial. In no case has the victim's right to be present throughout a trial resulted in an appellate court finding that a defendant in Arizona was denied the right to a fair trial. Amending our federal constitution to guarantee notice to and attendance of a victim of crime will ensure a fair and consistent balancing of the interests of all involved in a criminal matter.

Third, the right "to be heard at any release, plea, sentencing, or other such proceeding involving any right established by this article" is actually a fundamental necessity that cannot fairly be said to impose on a Due Process right of an accused. Given that decisions to release a criminal defendant, to accept a plea agreement, or to sentence a defendant are all premised on considerations of the impact of any given offense to the crime victim, why shouldn't a victim provide such information firsthand? Rather than complicate or frustrate the prosecution of any given case, the involvement and participation of a crime victim has afforded me important insight into the impact of

a crime on the individual, their family, and their larger community, the very community prosecutors and courts presume to represent in resolving criminal cases. Given our criminal justice system's recognition of the value of in court testimony, a right to be heard for a victim of a crime is invaluable and crucial. Absent protections in our federal constitution of this right, assaults on common sense do occur and have required further litigation to defend as noted in the *Kenna* case above.

Fourth, the right "to proceedings free from unreasonable delay" does not impede prosecutions and is a right complimentary to an accused's right to a speedy trial. Unreasonable delay should be the foundation of any consideration in setting conferences or trials in any given criminal case. As a prosecutor, I sometimes have had to request delays in prosecuting a case due to the need to obtain additional evidence or interview witnesses. Accommodating a crime victim's right to a speedy trial and ensuring my proper preparation for a case does not conflict. A crime victim, with a steadfast interest in seeing justice done, simply does not force a prosecutor to trial when more time is needed at the risk of jeopardizing a conviction or inviting error that can raise a due process argument on appeal. Nor would the language of the proposed amendment allow such a result. Delays required for legitimate trial preparation are not "unreasonable," and hence would not provide a basis for a victim's objection. In my state, victims have had the constitutional right to a speedy trial for the last 22 years and the right has never formed the basis to force either the state or a defendant to trial without adequate time to prepare. In my experience, victims of crime understand the necessary amount of time to ready a case for trial. However, crime victims do not understand and neither do I when a court entertains a motion to continue a homicide trial so a defense attorney can go on an annual shopping trip to buy shoes.

Consequently, a state-level constitutional guarantee is not as effective as a guarantee to be found in our federal constitution.

Fifth, the right "to reasonable notice of the release or escape of the accused" cannot seriously be opposed. As a prosecutor, I cannot fathom a rational objection to be informed of a security threat to the victim's person. It is actually a recognition of our criminal justice system's failures that gives rise to the need to ensconce this right in our Constitution in the first place.

Sixth, the right "to due consideration of the crime victim's safety" is simple recognition of what prosecutors endeavor to do on a regular basis. Our criminal justice system should equally endeavor to ensure the safety of a crime victim and of the community in which the defendant committed his crime(s). Protecting this right will not hinder successful prosecutions but, instead, should keep the criminal justice system focused on correct priorities in the due administration of justice.

Seventh, the right "to restitution" is a basic right for victims of crime. I have been involved in numerous matters involving the litigation of restitution for victims of crime. The majority of the information is provided at the outset of a case when I first make contact with a crime victim and discuss the anticipated course of the case and ask questions about the degree of harm suffered, which necessarily includes economic loss resulting from the crime. Rather than complicate a prosecution, protecting a crime victim's right to be made economically whole due to the conduct the criminal is convicted of provides for a more holistic redress of the harm any given victim has suffered.

Eighth, and certainly not least in importance is the recognition that "[t]he crime victim or the crime victim's lawful representative has standing to fully assert and

enforce these rights in any court." What a cruel comedy it would be to set forth basic protections for victims of crime in our criminal justice system and then afford no means of calling attention to even inadvertent failures to honor these rights. As a professional prosecutor, I have no more room to object to someone having standing to assert rights that enhance the criminal justice system than I have room to complain about the number of criminal defense attorneys retained on any given case. For rights to have meaning, a crime victim has to have the ability to raise issues to a court. Since these rights and issues are in the narrow category of those addressing a victim of a crime, rights and issues that our criminal justice system should welcome the opportunity to address to fulfill the promise of "justice for all," there can be no real objection by a prosecutor just as there has been no real impediment to prosecutions.

The question may still be asked, though: Why do we need to amend our federal constitution? Shouldn't we endeavor to ensure more robust enforcement at the state level or insist on better enforcement of federal statutory rights? The straightforward answer is also a question: would we tolerate disparate enforcement of a criminal defendants' rights across our 50 states? Would we permit differing levels of enforcement for the right to counsel, the right against self-incrimination, or the right to be secure in one's person, house, papers, and effects, against unreasonable searches and seizures? Then why do we tolerate such a situation for fellow Americans who have been harmed because of the criminal acts of another?

Another way to illustrate the present situation crime victims face around our country is to compare the circumstances of victims of recent tragedies and what they would face if the perpetrators of each horrific instance were tried in either their state court or federal court in the state in which tragedy struck. Most immediately, what

rights would a victim of the Boston Marathon bombing have if the case went to trial in a Massachusetts state court? To begin with, they would have ***no*** constitutional rights to assert whatsoever. Because of that fact, the Supreme Judicial Court of Massachusetts was able to state that a crime victim "has no judicially-cognizable interest in the prosecution of another." Hagen v. Com., 437 Mass. 374, 375, 772 N.E.2d 32, 34 (2002). Given the relative weight accorded to constitutional rights versus statutory rights, any colorable assertion of federal constitutional rights vis-a-vis victim state statutory rights means victims lose. Even if a case were to be tried in federal court, the protections afforded by the Crime Victims' Rights Act are not constitutional and will be found wanting in the balance when measured against the constitutional protections afforded a criminal defendant.

What about the parents of children lost in the tragedy of Newtown? What if the perpetrator had been tried in state court? There, they would be able to assert state constitutional rights, unlike in Boston just 149 miles away in an adjoining state. However, they have no avenue to seek appellate review of a denial of any of their rights. As noted by the Supreme Court of Connecticut in reviewing the Connecticut constitution, "[t]urning first to the constitution, a review of the language of the victim's rights amendment discloses that the amendment, while establishing many substantive rights for crime victims, does not include a right to appeal." State v. Gault, 304 Conn. 330, 339, 39 A.3d 1105, 1111 (2012).

Arizona has suffered her share of horror, as well, with the loss of life in Tucson from a shooting that also affected a former member of this House. In a somewhat more poignant irony, had the perpetrator gone to trial in federal court, the crime victims would have had fewer guaranteed rights than if the case had been tried in one of our

state courts given the difference in weight between federal statutory rights and state constitutional rights. Nevertheless, any balancing test between state constitutional rights for a crime victim and federal constitutional rights for the accused would have had the same result as any similar balancing in any other court; in a contest of rights between an accused and a victim, the victim loses. Because there are no comparative rights for equal treatment in our criminal justice for a criminal defendant and a crime victim, there is no charge to treat each fairly.

Passage of the Victim Rights Amendment to protect basic rights for victims of crime will provide the balance in our criminal justice system that many Americans may incorrectly presume exists already. Sadly, it does not and maddeningly varies from state to state. Even with robust state laws, without providing the protections afforded by the VRA through words to be read clearly in our Constitution at all levels of our criminal justice system, the mirage of "justice for all" will go on.

Mr. FRANKS. Well, thank you, sir, very much.

And now, Mr. Gillis, we would recognize you, sir, for 5 minutes.

TESTIMONY OF JOHN W. GILLIS, MARICOPA COUNTY ATTORNEY'S OFFICE'S VICTIM SERVICES DIVISION

Mr. GILLIS. Thank you, Mr. Chairman. Mr. Chairman and distinguished Members of the Committee, thank you for the opportunity to address you on the very important issue of rights for crime victims. As we hear so often, becoming a crime victim is not something one aspires to achieve through training and education. Although many people become unintended victims of crime each day, our United States Constitution fails to specifically provide basic rights to those individuals who are victimized.

The victims are young and old. They are rich and poor. They are people of all ethnicities and colors. But our Constitution treats them all the same. It completely ignores them.

In 1979, my 22-year-old daughter, Louarna, was murdered by a gang member who wanted to move up in the gang hierarchy. Getting into the upper echelon was a long, tough climb for an ambitious gang member. The shortcut was an assault on a police officer or a member of the officer's family. He took the shortcut and murdered my daughter. He drove her to an alley where he shot her in the back of the head execution style, and then emptied the revolver in her back as she laid on the ground. He knew who she was because he had attended school with her, and he knew I was a police officer.

But within a few months after the murder, he was in custody, and a few months thereafter the trial began. During the course of the trial, my wife and I were not allowed in the courtroom for any testimony. We were relegated to sitting on the bench in the hallway while the defendant's family, friends and others were seated in the courtroom. We had to endure the sneers and jeers each time they walked past.

There are still jurisdictions within the United States where victims of crime wait in hallways, back rooms, and outside the courthouses because they are not welcome by our criminal justice system.

Over one-third of the United States have not amended their constitutions in order to provide victims in their state the right to be present in court proceedings. These states don't see the need for victims to have the right to be heard or the right to be treated with fairness and dignity. Over one-third of the states still treat victims as second-class citizens who are not deserving of constitutional rights.

The murderer of my daughter was tried for first-degree murder, and that made him eligible for the death penalty. Eleven jurors voted for first-degree and one juror voted not guilty. As we prepared for the second trial, the defendant pled guilty to second-degree murder, and that allowed him to avoid the death penalty. I was not present for the plea, I was not present for the defendant's sentencing, nor was I allowed to make an impact statement. These events were important to me and my family, and I know these events are important to the majority of America's crime victims.

Every crime victim in the United States should be guaranteed the right to be present, the right to be treated with dignity and respect, and the right to be heard should be a basic right under the Constitution. My experience as a crime victim in the criminal justice system is not unique and it is experienced by tens of thousands of crime victims across America. Like most victims, I tell my story not for sympathy or pity. I tell my story to let others know I speak from experience when I say the system needs a fix.

Two days after the September 11, 2001 terrorist attack, I was confirmed by the Senate as Director of the Office for Victims of Crime. During my first days as director, I was completely immersed in the nuances of working with many states that had victims and next-of-kin from the terrorist attack. Each state had different variations and protocol for working with victims and next-of-kin, and those variations still exist. Mass victimization events such as 9/11 and the shootings at Virginia Tech and Northern Illinois University and Delaware State University and the Boston Marathon bombing involved victims from multiple states and highlight the need for a U.S. constitutional amendment.

There are literally tens of thousands of individuals who are victimized outside their states of residence. With the expanding use of the Internet, including social media, there are no geographic boundaries. Child sexual predators reach across state lines in search of their victims. Rapists and pedophiles use social media to reach across state lines to find their victims. The pool for identity theft victims is nationwide.

Our best hope for protecting the victims' rights is a constitutional amendment, and I am optimistic that the bill will move from this Committee. My optimism is based on the fact that Members of this Committee have steadfastly supported the rights of women, the rights of children, and the rights of minorities. So I am optimistic that this Committee will support rights for victims.

This constitutional amendment would be the capstone for the individuals and groups you have fought so hard to protect. This amendment is for people who do not have the power. This amendment is for people who do not have the funds, the people who do not have the will, and the people who do not have the wherewithal to individually fight for their rights. Thank you.

[The prepared statement of Mr. Gillis follows:]

STATEMENT OF

JOHN W. GILLIS, Victim

SUPPORTING THE VICTIMS' RIGHTS AMENDMENT

H. J. Res. 40, the "Victims' Rights Amendment."

Before The:

COMMITTEE ON THE JUDICIARY'S SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

Rayburn House Office Building

APRIL 25, 2013, 11:30 AM

Mister Chairman, and Distinguished Members of the Committee, thank you for the opportunity to address you on the very important issue of rights for crime victims. As we hear so often, becoming a crime victim is not something one aspires to achieve through training and education. Although each day many people become unintended victims of crime, each day our United States Constitution fails to specifically provide basic rights to those individuals who are victimized. The victims are young and old. They are rich and poor. They are people of all ethnicities and colors. But our Constitution treats them all the same, it completely ignores them.

In 1979, my 22 year old daughter, Louarna, was murdered by a gang member who wanted to move up in the gang hierarchy. Getting in to the upper echelon was a long tough climb for an ambitious gang member; the shortcut was to assault or kill a police officer, or a member of an officer's family. He took the shortcut and murdered my daughter. He drove her to an alley where he shot her in the back of her head, execution style, and then emptied the revolver in her back as she laid on the ground. He knew who she was because they had attended the same school, and he knew I was a police

officer. Within a few months after the murder he was in custody and a few months thereafter the trial began.

During the course of the trial, my wife and I were not allowed in the courtroom for any of the testimony. We were relegated to sitting on a bench in the hallway while the defendant's family and friends were seated in the courtroom. We had to endure the sneers and jeers each time they walked past us in the hallway. There are still jurisdictions within these United States where victims of crime wait in hallways, back rooms and outside the courthouses because they are not welcomed by our criminal justice system. Over one third of these United States have not amended their constitutions in order to provide victims in their state the right to be present at court proceedings. These states don't see the need for victims to have the right to be heard, or the right to be treated with fairness and dignity. Over one third of the states still treat crime victims as second class citizens who are not deserving of constitutional protection.

The murderer of my daughter was tried for First Degree murder and that made the death penalty an option. Eleven jurors voted for first degree and one juror voted "not guilty". As we prepared for the second trial the defendant pled guilty to second degree murder and that allowed him to avoid facing the death penalty. I was not present for the plea, nor was I present at the defendant's sentencing, nor was I allowed to make an impact statement. These events were important to me and my family and I know these events are important to the majority of America's crime victims. Every crime victim in the United States should be guaranteed the right to be present, the right to be treated with dignity and respect, and the right to be heard as basic rights under the Constitution.

My experience as a crime victim in the criminal justice system is not unique and it is experienced by tens of thousands of crime victims across America. Like most crime victims, I tell my story not for sympathy or pity; I tell my story to let others know I speak from experience when I say the system needs a fix.

Seventeen states still do not recognize victims as having a constitutional right to be present at court proceedings, or the constitutional right to be treated with fairness, respect, and dignity. The Hawaii Legislature, while passing it's constitutional amendment in February of this year, put it so eloquently when they stated victims "rights should be protected in a manner no less vigorous than those of the accused". **Arkansas, Delaware, Georgia, Iowa, Kentucky, Maine, Massachusetts, Minnesota, New Hampshire, Nevada, North Dakota, New York, Pennsylvania, Rhode Island,**

South Dakota, Vermont, and Wyoming have not taken any steps to give constitutional protection to the residents of their states. But, I am extremely optimistic that this committee will do its part to ensure that Americans who are, or become, victims of crime are protected by the U. S. Constitution in all states. I am optimistic because I have looked at your individual track records and it is clear to me that you will take a stand for those of us who have been victimized by crime.

Two days after the **September 11, 2001** terrorist attack I was confirmed by the Senate as the Director of the Office for Victims of crime and served in that capacity until January 2009. During my first days as Director, I was completely immersed in the nuances of working with the many states that had victims and next of kin from the terrorist attack. Each state had different variations in protocol for working with victims and next of kin and those variations still exist. Mass victimization events such as 9/11 and the shootings at Virginia Tech, Northern Illinois University, Delaware State University, and the Boston Marathon that involve victims from multiple states highlight the need for a U.S. Constitutional Amendment.

There are literally tens of thousands of individuals who are victimized outside their state of residence. With the expanding use of the internet, including social media**, there are no geographic boundaries**. Child sexual predators reach across state lines in search of their victims. Rapist and pedophiles use social media to reach across state lines to find their victims, and the pool for identity theft victims is nationwide**.** Our best hope for protecting the rights of all victims of crime is a constitutional amendment; and, I am very optimistic that the Bill will move out of this committee. My optimism is based on the fact that members of this committee have steadfastly supported rights for women, rights for children and rights for minorities. So I am optimistic that this committee will support rights for victims. This constitutional amendment would be the capstone for the individuals and groups you have fought so hard to protect. This Amendment is for the people who do not have the power, the people who do not have the funds, the people who do not have the will, and the people who do not have the wherewithal to individually fight for their rights.

President Reagan's Task Force on Victims of Crime submitted its final report in December of 1982. The Task Force stated:

The guiding principle that provides the focus for constitutional liberties is that government must be restrained from trampling the rights of the individual citizen. The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed. To that end it is the recommendation of this Task Force that the Sixth Amendment to the Constitution of the United States be augmented...

..[W]e follow Thomas Jefferson, who said: "I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times."

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Mr. FRANKS. Thank you, Mr. Gillis.
I would now recognize Professor Mosteller for 5 minutes.

TESTIMONY OF ROBERT P. MOSTELLER, PROFESSOR, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW

Mr. MOSTELLER. Chairman Franks and Members of the Subcommittee, thank you for this opportunity to testify. I urge you not to adopt H.J. Res. 40. Victims of crime deserve society's support.

My opposition is only to amending the Constitution with unnecessary or harmful provisions.

We have amended the Constitution very rarely and should do so only for compelling reasons, which are not present. Indeed, there is a mismatch between the legitimate goals of the VRA and when a constitutional amendment is needed.

The VRA has three main goals. The first is participatory rights such as notice of hearings. This goal is broadly embraced and protected through states' constitutions and legislation. When not fully enforced, it is because of lack of resources and inertia. These provisions are not trumped by defendants' rights. Constitutionalizing them does not accomplish full enforcement.

The second, providing support, has largely disappeared from later generations of the VRA. Earlier versions provided victims the affirmative right to be protected, for instance, but not the VRA. Damage awards against the government have been eliminated. Constitutionalizing is either a non-issue or unprecedented.

The third is damage to defendants' rights. Of the three purposes, only when a Bill of Right guarantee is denied by a victim's right is a constitutional provision required. The Crime Victims' Rights Act recognizes a provision of the VRA that can deny defendants' rights. Instead of an unequivocal right to presence, it authorizes exclusion of victims who were witnesses if the court determines their testimony would be materially altered. The infamous cases of Abner Louima and Rodney King show the danger of unequivocal presence. As I clearly stated in my written testimony, but for the clear medical evidence and the videotape, Louima and King were on their way to being charged with assaulting police officers. The true perpetrators would have been beneficiaries of the VRA.

Imagine the four officers who beat King having the constitutional right to be present to coordinate their lies. No exception is recognized even when the alleged victims provide the only evidence that a defendant is guilty. Louima, King, hundreds of DNA exonerations, and the Duke lacrosse case demonstrate an essential problem with the amendment. We know at the beginning of the case the identity of the accused because that status is directly the result of being charged. However, we do not know for sure who is the victim, and more frequently whether this defendant is responsible. The effect of the amendment is to write into the Constitution the error of some in the Duke lacrosse case, rushing to judgment. The language in the preamble, the rights of a crime victim being capable of protection without denying constitutional rights of the accused, does not eliminate the problem. It has three plausible interpretations.

First, it may simply declare the drafters' intent that no conflict exists between these two rights. That doesn't eliminate the damage; it authorizes it.

Second, it can be read that when conflicting, the rights of the victim and the defendant will be balanced. Balance here means diminished, another description of denied.

The third can be read that whenever a conflict is found between the two sets of rights, defendant's constitutional rights will prevail. Only this interpretation eliminates the potential damage, and it should be added to the provision.

I note two practical problems. First, the definition of the VRA is extraordinarily broad with respect to "victim." It draws no distinction between felonies and misdemeanors or between crimes of violence and crimes that harm property. In the Federal system, misdemeanors play only a minor role. But in states, prosecutors' offices must handle a huge volume, and courts as well, with incredible speed. The North Carolina Victims' Rights Act limits covered crimes among low-grade felonies and misdemeanors, and in misdemeanors it covers only domestic violence. This Federal amendment obliterates those fine distinctions. It would add cost and harm efficiency to over-worked and under-funded state criminal justice systems without offsetting benefits.

Second, crime victims are given an unqualified right to restitution. This is not a right to an order of restitution from the convicted offender in an earlier version. It guarantees restitution and places no limit on the entity subject to paying restitution. A broad definition of "victim" and an unlimited restitution right would have serious consequences. Let me give you one example.

In North Carolina, many traffic offenses, such as speeding, are misdemeanors. A simple traffic offense now with speeding involved would become a covered offense with mandatory restitution.

In sum, the VRA would harm cost-effectiveness without materially increasing participatory rights and victim support, and it would write a rush to judgment into the Constitution.

[The prepared statement of Mr. Mosteller follows:]

STATEMENT OF PROFESSOR ROBERT P. MOSTELLER ON H. J. RES. 40 BEFORE THE HOUSE SUBCOMMITTEE ON THE CONSTITUTION, APRIL 25, 2013

I wish to thank Chairman Franks and the members of the Subcommittee on the Constitution for this opportunity to testify on House Joint Resolution 40. I am here to urge that this Subcommittee not adopt the resolution.

The subject of this hearing is extremely important. It is about victims of crime, who deserve society's support. I have been involved in the debate over proposed federal Victims' Rights Amendments for over fifteen years. I have tried to make clear throughout that my opposition is to adding unnecessary and damaging provisions as an amendment to the United States Constitution, not to providing support for and giving respect to victims.

The Mismatch between the Need for Constitutional Amendment and Legitimate VRA Concerns

We have amended the Constitution of the United States only very rarely in over 220 years as a nation. It should only be done for compelling reasons. There are no compelling reasons to adopt the proposed Victims' Rights Amendment (VRA). Indeed, there is almost an exact mismatch between the legitimate goals of the amendment and when a federal constitutional amendment is needed.

I have written a number of articles about proposals for a VRA.[1] The provisions have varied in different versions, but they have three main goals. First, some of the provisions establish Participatory Rights, such as notice of hearings. Second, provisions may provide services and aid to victims from government, such as protecting victims from violence and providing financial assistance (Providing Support). Third, some provisions have the effect of damaging defendants' rights (Defendant Damage).

While at one time they were not, the first set of provisions—Participatory Rights—are broadly embraced and protected through state constitutions and legislation. Legislation and

[1] Robert P. Mosteller & H. Jefferson Powell, *With Disdain for the Constitutional Craft: The Proposed Victims' Rights Amendment*, 78 N.C. L. REV. 371 (2000); Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443; Robert P. Mosteller, *Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY'S L.J. 1053 (1998); Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691 (1997).

These articles are attached.

resources are principally what are needed to afford these rights. The rights to notice of hearings aren't "trumped" by defendant's rights. They may not be fully enforced, but that is through ineptitude, lack of resources, or difficulty of accomplishing the task. Constitutionalizing the right does not solve any problems with full enjoyment and enforcement of these provisions.

The second set of provisions—Providing Support—has largely disappeared from later generation versions of the VRA. Earlier versions and current federal legislation gave victims the right to be protected.[2] Later versions of the VRA focus the right toward the defendant's release rather than the government's guarantee of safety, providing that safety is to be given consideration. Damage awards against the government have been eliminated from the VRA. The one potentially problematic provision of the VRA, which runs counter to this trend and will be discussed later, is the apparently extraordinarily broad guarantee of restitution. Constitutionalizing these right is a non-issue.

The third and quite controversial set of effects is those that damage defendant's rights. Indeed, while it is implicitly part of the language of the victims' rights movement of balancing the scales, it is generally disavowed by many proponents of the VRA. However, of the three purposes of victim rights provisions—Participatory Rights, Providing Support, and Defendant Damage—only provisions that damage defendants' rights require a federal constitutional amendment. Only when a due process right or a specific right in the Bill of Rights is infringed by a right given to victims is a constitutional right for victims necessary. If no effect to damage defendants' rights is anticipated, there is no need for a constitutional amendment.

What is an example of a provision that denies defendant's rights, for example, to a fair trial? The Crime Victims' Rights Act (CVRA) implicitly recognizes one of these in the right not to be excluded from trial. It modifies that right by recognizing that victims who are witnesses can be excluded if their testimony might be materially altered.[3] The danger of damage is real, and serious damage could be done by the unequivocal guarantee of the proposed VRA.

Who is a Victim?

The infamous police brutality cases of Abner Louima in New York and Rodney King in Los Angeles provide examples of the problematic nature of giving special trial rights to victims. But for medical evidence of the unspeakable acts done to Louima while he was in the police station and the videotape shot by a neighbor of the beating administered by the police to King, both Louima and King were on their way to being charged with assault on police officers. In this prosecution, the true perpetrators would have been labeled as victims of that crime and would

[2] Mosteller, 29 St. Mary's L. Rev. at 1056 (describing 1995 proposed amendment); 18 U.S.C. § 3771(a)(1).

[3] 18 U.S.C. § 3771(a)(3).

have been beneficiaries of this constitutional amendment.[4] Imagine four officers who beat King having the constitutional right to be present during the testimony of each other as they made certain that all the details of their bogus story of King's attack and their necessary reaction coincided. The brilliance of the sequestration rule in evidence as recognized by ancient writers and evidence scholar Wigmore is its simplicity and its benefit in catching liars, particularly catching them in the small details of their fabrications.[5] The Victims' Rights Amendment provides no exception for presence even in highly contested cases where the alleged victims are effectively the only evidence that the defendant is guilty. It potentially obliterates this important protection to a fair trial.

The Abner Louima and Rodney King cases, hundreds of DNA exonerations, and a case I saw firsthand in North Carolina—the Duke Lacrosse case[6]—demonstrate a major problem with the amendment. We know conclusively at the beginning of a case when charges are brought who is the accused. That is a legal status in the process. However, we do not know at that point who is a victim of a crime and more frequently whether the victim was harmed by the defendant or someone not yet apprehended. The effect of the amendment is to write into the Constitution the error that critics accused some in the Duke University community of doing – rushing to judgment. Simply because of a charging decision, the VRA allocates rights potentially affecting the outcome of the defendant's trial, and it can be wrong.

Talk with anyone now in the Duke University community of giving rights that might affect a trial's outcome to the victim in the case and you are likely to be interrupted mid-sentence with the correction that the accuser was not a victim. False claims are rare. DNA exonerations tell us, however, that mistaken charges are not nearly as rare as we had hoped. Victims deserve support, respect, and assistance. However, in deciding whether the defendant is guilty of a crime against the victim, nothing should be done that rushes the judgment and potentially alters the fairness and accuracy of the trial.

The Duke Lacrosse case illustrates another area where fairness can be affected by the VRA. The prosecution and the prosecutor were undone by exculpatory DNA contained within

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[4] Mosteller, 1999 Utah L. Rev. at 466–67.

[5] *See* 6 WIGMORE, EVIDENCE § 1837 (Chadbourn rev. 1976) (tracing the origin of witness sequestration rule to the Book of Susanna in the Apocrypha, which recounts Susanna's vindication when falsely accused of adultery through Daniel's insistence on questioning her accusers separately and thereby revealing their fabrication).

[6] Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008); Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 FORDHAM L. REV. 1337 (2007).

discovery material. It took months and numerous motions by superb defense counsel to finally force this information from the prosecutor, who appeared to have delayed the discovery process as long as possible. Under the VRA, the victim has a right to a trial free of unreasonable delay. Delay is not always the exclusive fault of the defendant, but under the VRA, the victim is to be protected against such delay regardless of who caused it. The time needed for preparation of an effective defense may be sacrificed if the victim's interest in a speedy resolution of the case forces proceedings forward.

The language in the preamble, "The rights of a crime victim to fairness, respect, and dignity, being capable of protection without denying the constitutional rights of the accused . . ." does not eliminate the problem of damage to defendant rights. It has at least three plausible meanings. First, it can be read as a declaration of the drafters' intent that no conflict exists between victims' rights and defendants' rights as the amendment has been drafted. Second, it can be read that when conflicting the rights of both victims and defendants will be balanced or "harmonized." Third, it can be read that whenever a conflict is found between the two sets of rights, the constitutional rights of the defendant will prevail.

While conflict at the level of infringing on defendant's right may be rare, conflicts and damage can occur as illustrated by the Louima and King cases. So the first interpretation may be used and is sometime argued, but it is erroneous. Indeed, rather than eliminating the potential for damage to defendants' rights, it authorizes that damage. The second interpretation of balancing defendant's rights against victim's rights is simply an indirect way to say that defendant rights are been reduced and thereby denied. The second interpretation thus also authorizes rather than eliminates damage to defendants' rights.

Only the third interpretation eliminates the potential that the VRA will diminish the protections currently afforded to defendants. If the intent is not to undermine defendant's rights clear language that defendant's rights will prevail when conflict is found must be added to the text. Instead, significantly different and inadequate language has been used.

The Extraordinarily Broad Definition of Victim and Crime

The proposed VRA defines victim as including "any person against whom the criminal offense is committed or who is directly and proximately harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime."[7] This provision draws no distinction between felonies and misdemeanors and no distinction between crimes of violence and crimes that do harm to property. Earlier versions had a far more constrained definition of victims generally and specifically limited coverage to crimes of violence.[8]

[7] H.J. Res. 40 (2013).

[8] S.J. Res. 3 (1999).

A definition of this breadth in a federal constitutional provision is likely to have serious consequences when applied across a nation. In the federal system, misdemeanors play a minor role. In states and localities, the number of misdemeanors is enormous and the volume that prosecutors' offices and courts must handle with dispatch is daunting. In some jurisdictions, such as North Carolina, many traffic offenses are misdemeanors.[9] In defining victim for purposes of the North Carolina Crime Victims' Rights Act,[10] the statute is very precise and carefully limits the crimes in the lower categories of felonies and misdemeanors are covered. Indeed, for misdemeanors, the focus is primarily on domestic violence. The VRA would obliterate these careful definitions.

I suggest that writing the extraordinarily broad definition of victim in the VRA into the federal Constitution would add greatly to administrative cost and harm efficiency of an over-worked and under-funded state criminal justice system without off-setting benefits. Criminal justice systems are far from uniform across the country. Features that work well in the much more generously funded, hierarchical, and big-case oriented federal system will not necessarily work in the states.

The opposite is sometimes true as well with provisions that work well in state systems but would cause difficulties in federal prosecutions. As James Orenstein testified before this Committee in 2002 on a different version of the VRA, notice provisions, and rights to be present and to be heard may have dangerous or unintended consequences when federal prosecutors handle cases involving organized crime and prison gangs in which perpetrators and masterminds, witnesses, and victims are intertwined.[11] The careful exceptions available through legislation are not possible for broad constitutional language that must apply throughout all criminal justice systems.

The Broad Right to Restitution

Without qualification, the VRA gives all crime victims, under the extraordinarily broad definition of victims discussed above, the right "to restitution." This is not the carefully defined right of earlier versions of the VRA to "an order of restitution from the convicted offender."[12] The provision appears to guarantee restitution, not just an order of restitution, and it does not

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[9] For example, reckless driving and speeding more than fifteen miles above the speed limit are Class 2 misdemeanors. *See* N.C. GEN. STAT. §§ 20-140(d) (reckless driving); 20-141(j1) (speeding).

[10] N.C. GEN. STAT. § 15A-830 (a)(7). Section 15A-830 (a)(7)(g) states that the act applies to a specified group of misdemeanors "when committed between person who have a personal relationship," giving reference to the domestic violence statutory definition in N.C. GEN. STAT. § 50B-1(b).

[11] Hearing on H.J. Res. 91 (2002), at pp. 42–45.

[12] S.J. Res. 6 (1997).

limit the party or entities subject to paying or funding restitution to a convicted defendant. Moreover, it does not use narrow wording such as that contained in the North Carolina Constitutional provision of the right "as prescribed by law to receive restitution"[13] or similar wording of federal legislation (CVRA) of the "right to full and timely restitution as provided in law."[14] The VRA mandates restitution even if not contemplated under existing statutes.

This provision would appear to force upon states the requirement to develop restitution litigation systems whenever either personal or economic harm is done to a person as the result of a criminal offense. As noted earlier, in North Carolina many traffic offenses are misdemeanors. These include some speeding violations and reckless driving. Apparently as a matter of federal constitutional mandate, traffic court judges in North Carolina, when the speeding or reckless driving offense involves damage to person or property, would now be required to develop and enter orders of restitution in all these cases. These injuries to person and property are presently handled as actions for damages in the civil system, which the criminal justice system must now replicate whenever harm results from criminal conduct regardless of the judgment of the state legislature regarding the appropriate way to compensate those suffering injury or economic harm.

The VRA's Potential Damage to the Criminal Justice System

I believe that the enactment of the VRA will have damaging unintended consequences to the effective operation of our criminal justice systems and will be financially costly, without materially increasing participatory rights and support for victims of crime. Moreover, it can undercut bedrock, enduring protections in the criminal justice system.

William Blackstone stated that "[i]t is better that ten guilty persons escape than that one innocent suffer."[15] In the criminal litigation where a powerful government is pitted against an individual defendant with life and liberty at stake, the Bill of Rights provides protections to the accused that help guard against wrongful convictions. After the hundreds of DNA exonerations, it is absolutely clear that these protections have critical importance in our imperfect system of determining guilt. The VRA can effectively place a new weight on the scales of justice on the side of conviction and write into the Constitution a "rush to judgment" based on a designation by the charging authority. Blackstone's conception has stood the test of time and should endure.

[13] N.C. CONST. art. 1, § 37.

[14] 18 U.S.C. § 3771(a)(6).

[15] 4 WILLIAM BLACKSTONE, COMMENTARIES * 358.

Mr. FRANKS. Thank you, Professor.
Now we will recognize Professor Beloof for 5 minutes.

TESTIMONY OF DOUGLAS E. BELOOF,
LEWIS & CLARK LAW SCHOOL

Mr. BELOOF. Thank you, Chairman Franks, honorable Ranking Member. Thank you for the opportunity to speak today. I am here to support the Crime Victims' Rights Amendment to the United States Constitution, House Joint Resolution 40. For my framework, I adopt the framework of Professor Laurence Tribe, distinguished professor of constitutional law at Harvard, also a noted Democrat.

First, for a constitutional amendment to be appropriate, the people must widely agree that victims' rights deserve serious and permanent respect. Victims' state constitutional rights exist in more than two-thirds of the states, and I only need to reference the Chair's introductory remarks to reveal how accepted they are across the country. Clearly, there is wide agreement that victims' rights deserve serious and permanent respect.

Second, the right is one that is insufficiently protected under existing law and cannot be adequately protected through political action such as legislation. Fundamentally, the objective of victims' rights is to include victims' interests in the culture of the criminal justice system. Experience has shown that to change the inertia of the system, a constitutional amendment is needed. While many laws providing for rights exist, enforcement of those rights varies widely, and too frequently they are honored in the breach.

In my written testimony, I provide examples of these problems under Federal legislation. Professor Paul Cassell and former Federal Judge Paul Cassell has submitted written testimony that also provides examples of how victims' rights under statute have been honored in the breach. The point of the examples is not to deride the Justice Department or the courts. Contrary to these examples, there are many fine Federal prosecutors who routinely comply with victims' rights, and both the Clinton and Bush-era Justice Departments supported a crime victim's rights amendment. Rather, these examples reveal how statutory rights can be ignored with impunity. Moreover, the examples reveal that under the CVRA, often no remedy is provided by the courts.

On the other hand, defendants' constitutional rights are far less likely to be ignored simply because the rights are constitutional. Prosecutors universally respect defendants' rights precisely because defendants' rights are constitutional rights safeguarded by the Supreme Court. The same will occur when victims' rights are in the Constitution.

Next, a right must be one whose inclusion in the U.S. Constitution would not distort or endanger basic principles of the separation of powers among the Federal branches or the division of power between national and state governments. Separation of powers is, of course, enhanced by the amendment as the Bill of Rights is historically the place for important rights.

While Federalism is an important value, this amendment poses no threat to it. The Supreme Court dictates the baseline of defendants' rights for all the states as a Federal matter. Individual rights in criminal procedure is already Federal and has been for decades.

There is no hint, even in dicta, even by the most ardent of Federalists on the Supreme Court, that the Supreme Court will ever change this reality. Consistent with this constitutional reality, victims' rights are appropriately placed in the Federal Constitution because the Federal Constitution is the baseline of individual rights in criminal procedure in this country. Thus, the ongoing exclusion of victims' rights from the Constitution actually reduces the importance of victims' rights. Moreover, including victims' rights in the Constitution works no new damage to Federalism principles. Without a constitutional amendment, there is no national baseline for victims' rights.

Next, the right would be judicially enforceable without creating open-ended or otherwise acceptable funding obligations. One of the weakest arguments made against victims' rights has been that the administrative sky would fall. This argument has been made over and over, over the 35 years that victims have been trying to secure meaningful rights in this Nation. There is enough experience with victims' rights now, both in the states and under the Crime Victims' Rights Amendment federally, to know that the sky will not fall in the administration of justice.

In the 10 years since the passage of the Crime Victims' Rights Act, for example, the sky has remained firmly in its heavens. A review of the case law in that 10-year period reveals nothing that could credibly be described as overwhelming the administration of justice. Quite the contrary, the number of appellate and district court opinions is very small. To be sure, trial courts more frequently accommodate victims' rights than appellate court, but there is no empirical evidence that the courts have been clogged by victims' rights.

Finally, no actual constitutional rights of the accused should be violated by the amendment. In terms of conflicts with defendants' rights, in the 10 years of cases under the Crime Victims' Rights Act, there has been no Federal appellate court case that has found a conflict with the defendants' constitutional rights. In fact, the period of time Federal courts have had to find conflict is far greater than 10 years, yet no cases have found conflict with the defendants' rights.

As to accommodating the defendants' rights, the bill says, "Victims' rights, being capable of protection without violating the rights of the accused, shall not be denied or abridged by the United States or any state." This language was provided by Professor Tribe.

I believe that the only way to change an entrenched criminal justice process is for there to be a constitutional amendment. I urge you to favorably vote this bill out of Committee. Thank you, Mr. Chair.

[The prepared statement of Mr. Beloof follows:]

TESTIMONY OF PROFESSOR DOUGLAS E BELOOF
BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE OF
THE UNITED STATES HOUSE OF REPRESENTATIVES
APRIL 25, 2013
113th Congress, 1st Session

Honorable Chairman Franks and Distinguished Members,

Thank you for the opportunity to speak with you today. I am here to support H.J. Res 40, the Victims' Rights Amendment to the United States Constitution.

This Amendment contains the values that everyone in this room agrees upon – that crime victims should be treated with dignity and respect in the criminal process. However, experience teaches that this can only happen for every victim, in every case, if crime victims have enforceable rights. In order for rights to be honored, victims need recourse to remedy. For, without enforceable rights, victims' rights are merely paper promises. And, this is the cruelest kind of promise, assuring victims they have rights, only for them to discover that they do not. This was the lesson of the Oklahoma City Bombing case, a case in which many victims could not observe the trial.

After the bombing, an effort to pass a Victims' Rights Amendment occupied several years, culminating in the federal Crime Victims' Rights Act (CVRA), 18 U.S.C. 3771. The experiment with the CVRA is a decade old. What has been learned strongly supports this renewed effort to provide crime victims' constitutional rights. Moreover, lessons learned from those early drafts of the amendment led to this version, which is much improved.

I concur with Professor Tribe's framework for determining when rights should be added to the Constitution: Where there is "a needed recognition of a basic human right, where a) the right is one that people widely agree deserves serious and permanent respect b) the right is one that is insufficiently protected under existing law, c) the right is one that cannot be adequately protected through purely political action such as state or federal legislation and/or regulation, d) the right is one whose inclusion in the U.S. Constitution would not distort or endanger basic principles of the separation of powers among the federal branches, or the division of power between the national and state governments, and e) the right would be judicially enforceable without creating open-ended or otherwise acceptable funding obligations." Statement of Professor Laurence H. Tribe, Harvard University Law School, in A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings Before the Senate Judiciary Committee, 105th Cong., 1st session (1997). To this list I would add f), that no actual constitutional rights of the accused would be violated.

(A) THE PEOPLE WIDELY AGREE THAT VICTIMS' RIGHTS DESERVE SERIOUS AND PERMANENT RESPECT.

Victims' state constitutional rights exist in more than two-thirds of the states. When referred to the people, these amendments are voted in by overwhelming margins. Passage rates are typically in the 75 to 90 percent range. Douglas E Beloof, The Third Wave of Victims' Rights: Standing, Remedy and Review, 2005 B.Y.U. L. Rev. 255, 341 n. 421 (collecting

passage percentages in individual states).

At the federal level, the Crime Victims' Rights Act of 2008, 18 U.S.C. 3771, initially passed in the Senate by a vote of 96 to 1. In the House the bill was somewhat modified and passed by a 393 to 14 margin in the House. The bill then passed the Senate by unanimous consent and the President signed it into law.

Outside of Congress, support for the Amendment is strongly bipartisan. Forty nine governors, 50 state attorney generals and the National District Attorneys Association all support it. These organizations and elected officials come from both parties and hold views on other issues across the political spectrum. The organizations that support the Amendment, for example Mothers Against Drunk Driving and Parents of Murdered Children, are nonpartisan. Presidents Clinton and Bush, as well as their Attorneys General supported an amendment. In my home state of Oregon it was a Democrat Attorney General and a Democrat majority in both Houses that made Oregon state's constitutional victims' rights enforceable. Harvard Professor Laurence Tribe, who represented Al Gore in Bush v. Gore before the Supreme Court, has endorsed and participated in prior drafts, some of his language carries over into the current draft.

Clearly, there is wide agreement that victims' rights deserve serious and permanent respect.

(B) THE RIGHT IS ONE THAT IS INSUFFICIENTLY PROTECTED UNDER EXISTING LAW. AND, C) THE RIGHT IS ONE THAT CANNOT BE ADEQUATELY PROTECTED THROUGH PURELY POLITICAL ACTION SUCH AS STATE OR FEDERAL LEGISLATION.

Fundamentally, the objective of victims' rights is to include victim interests in the culture of the criminal justice system. Experience has shown that to change the inertia of the system, a constitutional amendment is needed. While many laws providing for rights exist, enforcement of the rights varies widely and too frequently they are honored in the breach.

A few case examples, from both the Bush and Obama administrations, under the Crime Victims' Rights Act, prove the point:

(1) In a criminal prosecution of British Petroleum for negligent homicide at an oil plant in Texas that killed 15 workers and injured more than 170 others, the Assistant U.S. Attorneys violated the surviving victims' rights by intentionally concealing a lenient plea agreement from the victims.[1] The Assistant U.S. Attorneys, in secrecy from the victims went to the trial court to obtain an order that the victims would be denied their rights under the Act. The federal court of Appeals ruled that the Assistant U.S. Attorneys had acted illegally and admonished it stating, "the government should have fashioned a reasonable way to inform the victims of the likelihood of criminal charges and to ascertain the victims' views on the possible details of a plea bargain." Nevertheless, the courts did not remedy the violation.

(2) In the *Antrobus* case, involving the illegal sale of a handgun that resulted in the murder of 5 people and serious injury of four others in a shopping mall in Utah, the Assistant U.S.

[1] In re Dean, 527 F.3d 391 (5th Cir. 2008).

Attorneys refused to reveal to the victims the statement made by the killer to the gun seller when the gun was purchased that he intended to commit a robbery. This statement likely would have established the murdered girl's family as victims under the act and allowed them to speak at sentencing. The victims were denied victim status by the courts and not allowed to speak at sentencing.[2] Again, the courts provided no relief.

(3) In the *Jane Does v. United States* case, Assistant U.S. Attorneys took the position that it had no obligation to tell girls who were victims of a sexual assault by billionaire Jeffrey Epstein that it was reaching a secret "non-prosecution" agreement with Epstein as part of a lenient plea arrangement. The U.S. Attorneys remarkably took the position that victims had no right under the CVRA to be treated fairly or to be told that the charges were going to be bargained away – all because the Assistant U.S. Attorneys had made the decision to reach a secret deal with the sex offender before formally filing charges against him. The federal district court hearing the matter curtly dismissed the Department's argument, explaining that "the government's interpretation ignores the additional language throughout the statute that clearly contemplates pre-charge protections . . . ."[3] Either directly or indirectly, two federal circuit courts have also rejected the position, that the assistant U.S. Attorneys can strip crime victims of their rights by the simple expedient of not obtaining a grand jury indictment.[4]

(4) In a case involving victims of mortgage fraud, Assistant U.S. Attorneys took the position that these citizens were not victims under the Crime Victims' Rights Act.[5] The Eleventh Circuit criticized the Assistant U.S. Attorneys, opining that, "Although the [victims'] petition does not seek relief against the Assistant United States Attorney prosecuting the case, we expect that attorney to be mindful of the obligations imposed by" the CVRA.

(5) In the botched "Fast and Furious" operation that led to the slaying of Border Patrol Agent Brian Terry, the Assistant U.S. Attorneys filed pleadings actually arguing that Terry was not a "victim" of illegal guns sales that lead to his murder. The Assistant U.S. Attorneys also refused to provide the Terry family with any discovery about the circumstances surrounding the murder so that they could argue to the court that they deserved rights under the CVRA. Ultimately, the

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[2] See Cassell, Paul G. Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision." 87 Denver Law Review 599 (2010). Paul Cassell is a Law Professor and former federal judge). Whether the Antrobus family fits under the CVRA definition of "victim" depends on whether the harm was the direct and proximate cause of the conduct.

[3] *Jane Does #1 and #2 v. United States*, –F.Supp.2d–, 2011 WL 4793213 at *4 (S.D. Fla. Sept. 26, 2011).

[4] In re Dean, 527 F.3d 391 (5th Cir. 2008); See In re Stewart, 552 F3d. 1285 (2008)(that rights attach before charging is an implicit prerequisite of the ruling).

[5] In re Stewart, 552 F.3d 1285 (2008).

Department reassigned the case from the District of Arizona to another prosecutor, and the Terry family was forced to settle its CVRA case for a promise from the Justice Department that it "recommend" to the Court that the Terry family receive rights under the CVRA as a matter of discretion.[6]

The point of these examples is not to deride the Justice Department. Contrary to these examples, there are many fine federal prosecutors who routinely comply with victims' rights. And, both the Clinton and Bush era Justice Departments supported a crime victims' rights amendment. Rather, these examples reveal how statutory rights can be ignored with impunity. Moreover, these examples reveal that under the CVRA often no remedy is provided by the courts.

On the other hand, defendants' constitutional rights are far less likely to be ignored, simply because the rights are constitutional. Prosecutors universally respect defendants' rights precisely because defendants' rights are constitutional rights safeguarded by the Supreme Court. The same will occur when victims' rights are in the Constitution.

D) THE RIGHT IS ONE WHOSE INCLUSION IN THE U.S. CONSTITUTION WOULD NOT DISTORT OR ENDANGER BASIC PRINCIPLES OF THE SEPARATION OF POWERS AMONG THE FEDERAL BRANCHES, OR THE DIVISION OF POWER BETWEEN THE NATIONAL AND STATE GOVERNMENTS.

Separation of powers is enhanced by the Amendment as the Bill of Rights is historically the place for important rights.

While federalism is an important value, this Amendment poses no threat to it. The Supreme Court dictates the baseline of defendant's rights for all the states. Individual rights in criminal procedure are already federal and have been for decades. There is no hint, even in dicta, that the Supreme Court will ever change this reality. Consistent with this constitutional reality, victims' rights are appropriately placed in the federal constitution because the federal constitution is the baseline of individual rights in criminal procedure.

Thus, the ongoing exclusion of victims' rights from the constitution reduces the importance of victims' rights. Moreover, including victims rights' in the constitution works no new damage to federalist principles. See, Paul G. Cassell, Barbarians at the Gates? A Reply to the Critics of the Victims Rights Amendment, 1999 Utah L. Rev 479, 531 et seq.

Without a constitutional amendment there is no national baseline for victims' rights. For example, in the recent Boston Marathon Bombing case, should the defendant recover to face charges, federal charges will provide victims' rights that are, at least, potentially enforceable.

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[6] *United States v. Avila*, No 2:11-Cr–00126, doc. #394 (D. Ariz. Jan. 31, 2012). Whether the Terry family fits under the CVRA definition of "victim" depends on whether the harm was the direct and proximate cause of the conduct. It clearly was, as ATF agent John Dodson testified at the House Committee on Oversight and Government reform, June 15, 1011: "I had no question that the individuals we were watching were acting as straw purchasers and that the weapons they purchased would soon be trafficked to Mexico and locales along the western border, where they would be used in violent crime if we did not intervene. However we did not intervene."

However, under Massachusetts law, rights remain unenforceable on review in state courts. Such disparate treatment of crime victims, simply because of the venue in which a crime occurred, makes little sense.

E) THE RIGHT WOULD BE JUDICIALLY ENFORCEABLE WITHOUT CREATING OPEN-ENDED OR OTHERWISE ACCEPTABLE FUNDING OBLIGATIONS."

One of the weakest arguments made against victims' rights has been that the administrative sky would fall. Nothing could be further from the truth. There is enough experience with victims' rights now both in the states and under the CVRA to know the sky will not fall in the administration of justice around crime victims' rights. In the ten years since the passage of the CVRA, the sky has remained firmly in the heavens. A review of the case law in that ten year period reveals nothing that could credibly be described as overwhelming the administration of the criminal process. See, 26 ALR Fed 2d 451 (collecting cases under the CVRA).

Quite the contrary. The number of federal appellate and district court opinions on the CVRA in ten years is miniscule. Id. The average number of reported appellate cases in each state is similarly small. Validity, Construction, and Application of State Constitutional or Statutory Victims' Bill of Rights, 91 A.L.R.5th 343 (collecting state cases).

To be sure, it is the trial courts that more frequently accommodate victims' rights. However, there is no empirical evidence from courts, state or federal, that victims' rights have clogged the courts. Finally, states already have victims' rights, either constitutional or statutory, so much of the infrastructure already exists in the states to accommodate a federal constitutional right.

F) NO ACTUAL CONSTITUTIONAL RIGHTS OF THE ACCUSED WOULD BE VIOLATED BY THE AMENDMENT.

In terms of conflicts with defendants' rights, in the ten years of cases under the Crime Victims' Rights Act there has been no federal appellate court case that has found a conflict with the defendants' constitutional rights. In fact, the period of time federal appellate courts have had to find a conflict is far greater than 10 years. Many states had victims' rights as early as 1982. Yet, in all that time, no federal appellate court has held that any state victims' right violates defendants' United States Constitutional rights.

The reason for this is straightforward, the CVRA was written carefully to avoid conflict with defendants' rights. The same is true of state constitutional rights for crime victims. Likewise, the Amendment before you has been carefully drafted to avoid conflict with a defendant's constitutional rights. In this regard the Amendment before you states, "Victims' rights, being capable of protection without violating the rights of the accused, shall not be denied or abridged by the United States or any state." H. J. Res. 40, pg 2 lines 3-4.

Human Rights Watch, a well-respected NGO, has published a report on crime victims' rights in America noting the ability to secure defendants' rights while providing for victims' rights as well:

> "Many people have strong interests in the functioning of the criminal justice system: victims of crime, witnesses, those accused of committing crimes, and society at large, which requires the fair and effective administration of justice. In recent decades, both internationally and inside the United States, there has been a growing demand that greater attention be paid to the interests and rights of victims of crime as well as to ensuring their access to justice.
>
> Unfortunately, the public debate on this topic too often casts the rights and interests of victims and defendants as a zero-sum game in which safeguards for defendants' rights-such as the presumption of innocence and the right to a fair trial-come at the expense of victims, and improvements in the treatment of victims impinge on defendants' rights. While there can be tensions between the legitimate interests of victims and defendants, a criminal justice system based on human rights standards can safeguard the rights of both while advancing justice and the rule of law." Human Rights Watch, U.S. Policy and International Standards on the Rights and Interests of Crime Victims, 1 (2008).

I agree with this assessment. This amendment does safeguard the rights of both defendants and victims while advancing justice and the rule of law. I urge you to favorably vote this bill out of committee.

Mr. FRANKS. Thank you, Professor Beloof.

Thank you all for your testimony.

We will now proceed under the 5-minute rule with questions, and I will begin by recognizing myself for 5 minutes.

Mr. Gillis, in addition to your personal testimony, I want you to know your personal testimony was very powerful to me. The pres-

ence of you and your wife here today is an inspiration, and I am sorry for your loss, and I am grateful that you have chosen to try to turn it into something that will help prevent others from dealing with the same kind of loss.

Mr. GILLIS. Thank you.

Mr. FRANKS. Can you describe real-life examples for existing crime victims' statutes or state constitutional amendments that have failed to provide the protections that they promised to crime victims?

Mr. GILLIS. I think I would have to refer to my case, which is still active. Although the defendant was sentenced to life in prison, he has filed numerous appeals, and just within the past year there was another appeal that has delayed his parole hearing. We have no idea what the appeal is about. We only know that we had a parole hearing and it has been offset, and we are scheduled to do another hearing.

So this has occurred throughout the time that he has been sentenced. It has been a drag financially on both my family and other victims who have to attend these hearings. We are not notified when a hearing is going to occur. Whenever I am notified, we just have to pack up. We are notified for the parole hearing, but we are not notified when there are appeals, and we are not notified when any other legal actions take place. So it is a personal issue also, and it happens to many victims across the country.

Mr. FRANKS. Yes, sir. Well, thank you.

Mr. Montgomery, in your written testimony you state that, "Too often, the concern as to whether the rights of victims of crime should be given the protection of our Constitution has been premised on the false calculus that any rights accorded to a crime victim must necessarily result in fewer rights for a criminal defendant."

Why will the protection of victims' rights not infringe on the rights of criminal defendants?

Mr. MONTGOMERY. The very simple answer, Mr. Chairman, is that victims have the same interest in a just outcome as an accused does. At the end of a particular case, you want to make sure that you have the right person who committed the crime. You want to make sure that they are sentenced to a just sentence. You don't want to have to come back and do that again. As Mr. Gillis just told the Committee and told the Chair, victims want to be done with a case and know that it was handled and the harm that was done has been addressed, and then allow them to move on with their lives as best they can.

Additionally, I had to sit and listen with amusement to the speeding ticket restitution example. You don't create a victim when you are speeding, unless it is yourself because of the fine you have to pay. Restitution is provided to a victim who has been harmed by a criminal offense. If someone hurts somebody as a result of speeding, they are usually charged with aggravated assault. But unfortunately, these are the kinds of examples that are offered, not from people who actually have experience in advocating in court and dealing with the balance between victim's rights and a defendant's rights that prove, day in and day out, with the 35,000 felonies

my jurisdiction deals with, 100,000 misdemeanors on average, we do it every day.

Mr. FRANKS. Yes, sir. Thank you.

Professor Mosteller, the right not to be excluded from public proceedings relating to the offense is a critical component of the Victims' Rights Amendment. Mr. Gillis recounted that after a gang member murdered his daughter, he and his family were relegated to a bench in the hallway of the courtroom during the trial while the defendant's family and friends were seated in the courtroom. Mr. Gillis and his family endured "sneers and jeers each time they walked past them."

Why should crime victims be barred from having a constitutional right to be present at a public trial?

Mr. MOSTELLER. Crime victims should not be barred except in very, very, very rare cases. With respect to what the amendment declares, it has a right to be present with respect to the bail hearing——

Mr. NADLER. Can you turn on your mic, Professor?

Mr. MOSTELLER. I'm sorry. It has a right to be present which affects public proceedings with respect to plea, sentencing, and release. With respect to release, no issue whatsoever. With respect to sentencing, other than capital cases, no issue whatsoever. With respect to plea, no issue whatsoever. The issues come when we are dealing with the trial in front of the jury, and it is a situation that only involves a problem if the victim is a witness. If there are multiple victims and they can be present during the time the testimony is being taken by one so that the other can hear, it suggests a problem with respect to the fairness of the trial.

I am not inventing this problem by any means out of thin air. We have basically the right with respect to the statute that says the victim has a right to be present unless the judge finds that there is going to be a material effect on the testimony. Then the victim can be excluded. That is a statute that the United States Congress passed. So it recognized in writing, and it is one of the reasons there isn't a problem with respect to the Crime Victims Act. That issue was the one that was taken out of the picture.

With respect to sentencing in death penalty cases, *Payne v. Tennessee* overruled *Booth v. Maryland*, but it did not overrule *Booth v. Maryland* with respect to whether or not a victim has the right to issue a conclusion with respect to the sentence. This amendment may well change not only the right to be heard but what you can say.

Mr. FRANKS. Thank you, sir.

I now recognize the Ranking Member for questions.

Mr. NADLER. Thank you, Mr. Chairman.

Before I begin, I want to thank Mr. Gillis for his testimony. I think he expressed in the most eloquent way the devastating and lasting impact that crime, especially crimes of such unspeakable violence and cruelty, has on its victims. It is a reminder of how important it is for all participants in the criminal justice system, the courts, prosecutors, law enforcement, Congress and state legislatures, to ensure that the rights and needs of crime victims are both respected and addressed, and I hope that this hearing will help us understand how we can best improve these efforts.

Now, Professor Mosteller, other witnesses today have argued, in the language of the amendment, that the rights of a crime victim to fairness, respect and dignity, being capable of protection without denying constitutional rights of the accused, shall not be denied or abridged by the U.S. or any state. Do we need to worry about such conflicts between the rights of the accused and the rights conferred on victims in this amendment despite that language? And if so, could you give us some examples?

Mr. MOSTELLER. Yes, we do. With respect to two of those rights, the right to respect and dignity, there is no conflict whatsoever. With respect to matters like notice, there is no effect whatsoever. But there is another word in it, and it is a general word, and it is "fairness." Fairness can also mean due process. It says fairness, and then it says moreover, and it lists other rights.

With respect to those other rights, I have spent some time with respect to the presence at the proceeding, the presence at the proceeding. In addition to that, the issue with respect to a speedy trial, a speedy trial for the victim, against undue delay. Most prosecutors, almost all prosecutors are trying to move it forward, but there are people who behave badly. Mike Nifong in the Duke lacrosse case behaved very badly. He delayed discovery. You have an argument. It is unreasonable delay. The constitutional amendment does not say unreasonable delay by the defendant. It says unreasonable delay and that can compromised by the prosecution as well. And I mentioned a third one——

Mr. NADLER. It could compromise the right of the accused to a fair trial is what you are saying?

Mr. MOSTELLER. With respect to enough time to prepare testimony. You can say this will be limited and it will be rare, and I would acknowledge it. But you cannot say that there is no danger.

Mr. NADLER. Thank you. Now, why would a court exclude a victim from a courtroom under certain circumstances? Well, you said if the victim is a witness, maybe multiple victims, to have them in the courtroom might give an opportunity to coordinate—alleged victims, because you could be wrong about who is a victim. In the Duke case, for instance, you said that had they all been present in the courtroom, they could have coordinated their testimony?

Mr. MOSTELLER. Yes, and that would be the problem. And with respect to the normal situation in which a victim is not a witness, there should be no exclusion.

Mr. NADLER. Well, could a victim act in such a way as to prejudice the jury other than that situation?

Mr. MOSTELLER. Absolutely.

Mr. NADLER. How so?

Mr. MOSTELLER. By excessive emotional outbursts. That is a limitation upon the right even of the defendant to be present. A defendant can be excluded. So these are common-sense limitations.

Mr. NADLER. Now, a defendant has a constitutional right to be present unless the judge chooses to exclude him because of his conduct. Under this amendment, would the judge have the discretion to exclude a victim or an alleged victim because of his conduct?

Mr. MOSTELLER. I would hope so. It would suggest that, at least as I read Mr. Montgomery's testimony, that that could not even be an admonition to——

Mr. NADLER. I'm sorry. It was suggested it could or could not?

Mr. MOSTELLER. Couldn't deny, that it shouldn't even be an admonition, that you are not supposed to——

Mr. NADLER. So, in other words, the wording of this amendment as it is worded might, in fact, in your judgment, preclude the judge from excluding an alleged victim who was behaving in a way that might prejudice the trial?

Mr. MOSTELLER. It could. I would hope that the reasonable application would avoid that problem.

Mr. NADLER. But one doesn't know.

Mr. MOSTELLER. Pardon?

Mr. NADLER. But one doesn't know.

Mr. MOSTELLER. One doesn't know.

Mr. NADLER. Thank you. Now, Professor Beloof cites two cases that seem relevant to the text of the proposed amendment. The Antrobus this case involved a mass shooting in which the victims were denied victim status by the court. In the murder of border patrol agent Brian Terry, Professor Beloof states that the Terry family was similarly denied victim status. In both instances, Professor Beloof points out that the CVRA, that is the Act, the Crime Victims' Rights Act, the definition of victim "depends on whether the harm was a direct and proximate cause of the conduct." That is the same language used in the text of the proposed amendment. Section 2 of the amendment reads, "A crime victim includes any person against whom the criminal offense is committed or who is directly and proximately harmed by the commission of an act which, if committed by a competent adult, would constitute a crime."

It seems to be exactly the same. So it seems that it wouldn't solve the problem. Would you comment?

Mr. MOSTELLER. It wouldn't solve that problem, and, in fact, this version added "proximate cause." It did not exist until this version. So if you went back to the version that was in this chamber last year——

Mr. NADLER. But never mind last year's version. This version?

Mr. MOSTELLER. This version has proximate cause and it. The version last year did not have proximate cause in it. It makes it just the same, and it does not guarantee any discovery right or any other right that would eliminate the problem.

Mr. NADLER. Thank you.

My time has expired.

Mr. FRANKS. Thank you, and I will now recognize the gentleman from Ohio for 5 minutes for questioning.

Mr. CHABOT. Thank you very much, Mr. Chairman.

Professor Mosteller, let me start with you, if I can. In the United States Constitution, there are a number of rights of the criminal defendant which are stated very plainly, the right to a jury trial, the right not to have to self-incriminate himself or herself, and a number of other things, right in the U.S. Constitution. Now, the innocent victim, the victim's family, they may be protected by a state constitution or perhaps a state statute, but not in the Constitution. That is what the intention of this is, to put the two at least on an equal footing.

We are talking about right now the criminal defendant who has oftentimes taken away the loved one of a family, a person who has

done something clearly wrong, something heinous. They are protected. They get the best protection possible from the U.S. Constitution. The innocent victim, the person who hasn't done anything wrong, and their family, no protection whatsoever in the U.S. Constitution, I would argue an oversight. Great document, an oversight there. The only way we can change that is to amend it. Our founders put in there a mechanism for us to do that. We have been trying to do it for years, and that is what we are trying to do today.

Oftentimes, if the U.S. Constitution says one thing and a state statute says something else, if there is a discrepancy, and sometimes there is, the U.S. Constitution is going to trump the state statute every time. A lot of us believe that is just not fair. That is why we want to change this.

Would you disagree with anything I have said? And if so, what?

Mr. MOSTELLER. I would disagree with your statement of equalizing. The status of the criminal defendant, when he is charged, and as justice Scalia said with respect to the confrontation clause, you don't deny confrontation because you think the testimony was reliable; you don't deny a fair trial, a jury trial, because the judge decides that the defendant is guilty. We do not know whether the defendant is guilty at that moment.

Our framers set up a system in a situation in which the full power of government comes down against a charged defendant, suffering the possibility of his life or liberty being destroyed, he is given process rights that lead to fairness, that protect the individual——

Mr. CHABOT. Reclaiming my time, as I have a limited amount of time, let me turn to Professor Beloof, and also to Mr. Montgomery. Would you like to respond to the question that I asked? And perhaps, if you would like to, to the Professor's answer?

Mr. BELOOF. I agree with it. I agree with it, and I disagree with much of what my colleague, Professor Mosteller, says about the substantive issues of this amendment. I don't believe the defendant's rights will be trampled in any way. The idea that somehow victims attending trial will destroy defendant's rights I disagree with.

First of all, there are police reports that lock down these witnesses statements. There are grand jury testimony that locks down these witness statements, leaving tremendous capacity for defense attorneys to destroy the credibility of witnesses. Moreover, witnesses in a trial, their attendance in a trial on more than one occasion has revealed the testimony on the stand is untrue. So barring witnesses from the courtroom actually encourages the lack of truth telling.

So this is not a one-sided issue in any regard.

As to Professor Mosteller's testimony that this has dropped a variety of things, this is in response to genuine and considered criticism in the Senate that the last version looked too much like a statute and not enough like a constitutional amendment. So we focused on the core.

Mr. CHABOT. Thank you. I am almost out of time. So, Mr. Montgomery, instead of going to you, if I could go to Mr. Gillis.

Again, we all feel great pain for what you and your family have gone through, but let me ask you this. One of the great injustices

was the fact that you were unable to go in and see what was going on, listen to what was going on, and your daughter was taken from you, and the perpetrator and the families in connection, gang members, were in there. You did not get the opportunity to speak at a number of the proceedings on behalf of, for example, sentencing and what you felt. What would you have told the court had you been given the opportunity to make a statement? What sort of input do you think your daughter and yourself should have been able to give the court?

Mr. GILLIS. I think we could have talked about how it had impacted the family. We could have also talked about what we knew about the defendant from the community. But let me also talk about us being barred from the court, having us sit in the hallway because they thought that we could be possibly a witness. It wasn't because we were a witness to anything. We were not percipient witnesses to anything. So we just sat in the hall because the defense did not want us in, and in most cases I find, during my experience as a law enforcement officer and the other experiences I have had with the criminal justice system, the defense usually does not want the victim in court because sometimes the victim has information that they can give to the prosecutor that will help direct the case. So it is one less individual that the defense has to worry about.

But most victims want to see the right person prosecuted for the crime. They don't want to see somebody unjustly accused or unjustly convicted of a crime. So keeping victims out of the court, it just doesn't make sense.

Mr. CHABOT. Thank you very much.

I yield back, Mr. Chairman.

Mr. FRANKS. Thank you, Mr. Chabot.

I would now yield to the gentleman from Virginia, Mr. Scott, for 5 minutes.

Mr. SCOTT. Thank you.

Mr. Montgomery, we don't need a Federal constitutional amendment to force you to treat people with dignity and respect, do we?

Mr. MONTGOMERY. Mr. Chairman, Mr. Scott, no, but I understand what my oath is, and I understand what my duty is in the criminal justice system. So it actually is a part of how I carry forward my duties. But I would still say to that point, the oath I took of office was to uphold the U.S. Constitution and our state constitution and the laws thereof, and we do have a victims' bill of rights in Arizona that requires me to treat a victim with fairness, respect, and dignity.

But for those who didn't go through the victims' rights seminar I went through, who don't have the same appreciation, our criminal justice system does not institutionalize that kind of treatment as much as we institutionalize the treatment of defendants.

Mr. SCOTT. Well, is there a difference in how victims are treated in states with a constitutional amendment and without a constitutional amendment?

Mr. MONTGOMERY. I believe that there is. If you are in a state without a constitutional amendment, when it is convenient to ignore a victim, when it is convenient to handle a case without taking into account——

Mr. SCOTT. Well, exactly what happens——

Mr. MONTGOMERY [continuing]. Whatever it is that they regard, they do so.

Mr. SCOTT. And I am sure when you have a constitutional amendment, some of the witnesses are ignored and disrespected. What does the victim who is disrespected then do?

Mr. MONTGOMERY. Well, within the State of Arizona and those states that do provide the ability to appeal, that information is brought to the attention of the court, and I can certainly tell you——

Mr. SCOTT. Which court? The same court? This thing says any court. I don't know what that means, you can enforce these rights in any court. Does that limit it to the court that the case is actually pending in, or can you go to another judge?

Mr. MONTGOMERY. Mr. Scott, I think what you would do is you would follow the same process that we follow in the United States and in all courts where initially you bring it before the court in which the incident or the matter is initially to be heard and then follow the regular appellate process. That is what we do in Arizona, and it works very well.

Mr. SCOTT. And is there any priority for those cases?

Mr. MONTGOMERY. It depends. Within the Federal Crime Victims' Rights Act, appellate courts, if the matter in question is at a district court level, have to rule on a mandamus quickly. In our state courts——

Mr. SCOTT. Does that take precedence over other pending cases?

Mr. MONTGOMERY. I believe that it does. They have to rule on the mandamus quickly, and that is important. What we have to keep in mind here is that we were talking about a criminal justice system where we are trying to make sure that the truth-seeking function is honored and that at the end of it a crime victim, then, when communicating to other members of our community, when communicating with their family members the resolution of the case, can say, you know what, I got harmed, and our criminal justice system took care of me, and it worked, and it was good.

Mr. SCOTT. I am just trying to figure out how this thing works, because if somebody doesn't think the prosecutor, the case is going quickly enough, how do you ascertain the reasonableness of a delay?

Mr. MONTGOMERY. Sure. Mr. Scott, we have a very well-developed body of jurisprudence on speedy trial rights for defendants. The corollary to that, then, is in looking at instances in which a victim might assert an unreasonable delay, and I will give you a great example. I will contrast it, too.

In an instance in which a defense attorney has not been able to complete interviews of witnesses and I have a victim asking me when is this going to go to trial, and I have personally prosecuted hundreds of cases, I will tell them our trial date was originally set for June. However, there are five more witnesses we need to interview, so we are going to have to delay it to complete that. That sets a reasonable delay.

Mr. SCOTT. Well, that is reasonable in your mind. Suppose it is not reasonable in the victim's mind, if they say why don't you get to work and do the work and get it done?

Mr. MONTGOMERY. Sure, and the victim can certainly bring that to the court's attention, at which point——

Mr. SCOTT. Do they have a right to a hearing on that issue?

Mr. MONTGOMERY. Oh, they have a right. When you are going to have a court hearing at which a motion to continue is going to be heard, because the defendant has a right to be there, a victim in Arizona has a right to be there, and also has a right to be heard on that point, and it happens all the time.

Mr. SCOTT. And what could be a perfunctory motion in agreement with the defendant and the prosecutor now becomes a full-blown hearing.

Mr. MONTGOMERY. And there are times when search and seizure issues are so apparent on their face, but we still give the defendant their hearing. I don't think it is unreasonable at all to give the victim of a crime 2 minutes to be heard on an issue. But let me give you an example of an unreasonable delay.

Mr. SCOTT. Wait a minute. Why do you limit it to 2 minutes? I mean——

Mr. MONTGOMERY. It really doesn't take that much time. Having practiced in court, like I said, over several hundred felonies, it doesn't take much time to permit a victim to be heard on the record. Five minutes isn't a whole lot of time, either.

Mr. SCOTT. Do they get to bring witnesses on what's reasonable? I mean, you are trying to determine whether a delay is reasonable or not.

Mr. MONTGOMERY. Sure. There is no need for witnesses. You are talking about the conduct of the case. You have counsel for each side there. You have the judge, who is sitting on the case there. Here is an unreasonable delay, though, and I would say this is why we need this in the Federal Constitution. In a homicide case in which a young child was brutally murdered, the defense attorney actually asked for a continuance for 3 weeks so that she could go on her annual shopping trip to go buy shoes. The only thing more offensive than someone trying to delay it was the fact that the court granted it.

Mr. SCOTT. Well, perhaps the court could decide maybe you have a problem getting your witness to court and you want to delay. The defendant doesn't know why you want to delay. You are just agreeing to a continuance. Do you have to articulate in court that your witness is not available, or your evidence, you have lost your evidence? Do you have to articulate that in court so that the court could rule on whether or not the continuance is reasonable or not?

Mr. MONTGOMERY. Mr. Scott, if I lost evidence and I am trying to delay a trial from starting, I believe I have committed an ethical violation when I know I can't proceed. In the instance of being able to try to find a witness——

Mr. SCOTT. Wait a minute. You are looking for the evidence.

Mr. MONTGOMERY. Well, that is different than saying I lost it.

Mr. SCOTT. Okay. Well, you don't have it, and you have to articulate in open report, "Your Honor, we are not ready because we don't have enough evidence to proceed," and the defendant ends up objecting to a continuance, so we are still trying to find evidence. Do you have to articulate that in court? I mean, the victim is say-

ing let's go, let's go, and you are in open court. They have a right to be there.

Mr. MONTGOMERY. And I don't have a problem with that. If I am going to tell the court, "Judge, I am not ready for trial today"—but the other thing to keep in mind is that most states also have a last-day setting in which a defendant has to be tried. If I am asking for a continuance and I am still within what is known as a reasonable time, I have 150 days to try a defendant of a felony who is in custody in Arizona. If I am moving from the 120th day to the 149th day, I am still within the timeframe to do it, and I am going to have a conversation with the victim.

The victim in Arizona has the right to confer with the prosecutor before the case gets resolved. I am talking to them. I am letting them know what is going on. I am also talking to the defense attorney.

Mr. SCOTT. And if they are not satisfied, do they have the right to an appeal?

Mr. MONTGOMERY. Yes, they can. They can assert their rights in trial court and they can special action in Arizona those rights to an appellate court, and this does happen on occasion. There are times when I, as the elected prosecutor in Maricopa County, will file an appeal on behalf of a crime victim to an appellate court to advocate for their rights. I am no more able to violate their constitutional rights in Arizona than I can a defendant's constitutional rights, and we do it every day.

Mr. FRANKS. Without objection, the gentleman from New York is granted 1 minute for questions.

Mr. NADLER. Thank you. I would like to ask Mr. Montgomery, and ask Professor Mosteller to comment also. The amendment says the crime victim shall have the right to various things and to restitution. That is a very open concept. So my question is, how would this work? What are the limits of it, if any? Who enforces it? How do you measure the restitution? Who is responsible for it? Let's assume that the culprit, the defendant, is adjudged guilty, is destitute. And finally, let's assume that the culprit goes to jail for 30 years or a long period of time, and when he comes out, does he then owe $30,000 even though he has no money? I mean, how does this work?

Mr. MONTGOMERY. Sure. I can offer our experience in Arizona, where we do have a constitutional right to restitution. At the conclusion of the case, the judge can enter a criminal restitution order against the defendant, ordering restitution for economic loss caused by the criminal conduct.

Mr. NADLER. Only economic loss?

Mr. MONTGOMERY. It is economic loss, correct. So you look at whether or not the victim lost work because they had to come to court. Let's use an easy example of, say, an instance in which maybe someone stole a victim's car and then crashed it. They can get the replacement cost for that vehicle.

Mr. NADLER. We know how to measure economic loss.

Mr. SCOTT. Who pays it?

Mr. NADLER. Who pays it?

Mr. MONTGOMERY. The person responsible. And in terms of holding a defendant fully——

Mr. NADLER. Let's assume he doesn't have the means. Then what?

Mr. MONTGOMERY. Get to work.

Mr. NADLER. And if he goes to jail?

Mr. MONTGOMERY. You should not be able to avoid responsibility for your criminal conduct because you say you don't have money. You had better get out there and work.

Mr. NADLER. And in a serious crime, you go to jail for 30 years. So do you delay the restitution for 30 years?

Mr. MONTGOMERY. No. They get to work in prison, and from their earnings, restitution is forwarded to the victim of crime.

Mr. FRANKS. The gentleman's time has expired, but if he wants to ask Professor Mosteller a question, then he can.

Mr. MOSTELLER. We don't know what it would mean in the Federal Constitution. Words like this are unprecedented. "To restitution" is different than it was in the previous version. It used to be in one version "to an order of restitution from the convicted defendant." Is this a right to monetarily be made whole by someone? And you have a constitutional right that says "to restitution." Eighty percent of the people are indigent. What will it mean down the road? We don't have these kinds of rights in our United States Constitution. They do exist in some state constitutions, but it is unprecedented.

Mr. NADLER. It doesn't say just economic.

Mr. FRANKS. The gentleman's time has expired.

Mr. MOSTELLER. It does not say economic, and it does not say from whom.

Mr. FRANKS. The gentleman's time has expired.

Mr. NADLER. Thank you.

Mr. FRANKS. I might make the observation that if someone is to be held liable for economic loss, it probably should be the convicted offender rather than the victim.

With that, this concludes today's hearing. I want to thank all of the witnesses for attending. You have been very responsive and very insightful.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

I thank the witnesses, and I thank the Members, and I thank the audience for their attendance today.

And with that, this hearing is adjourned.

[Whereupon, at 12:43 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Material submitted by the Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Chairman, Subcommittee on the Constitution and Civil Justice

Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment

Paul G. Cassell[*]

INTRODUCTION

The Victims' Rights Amendment will likely be the next amendment to our Constitution. Currently pending before Congress, the Amendment establishes a bill of rights for crime victims, protecting their basic interests in the criminal justice process. Under the Amendment, victims of violent crimes would have the rights to receive notice about court hearings, to attend those hearings, to speak at appropriate points in the process, to receive notification if an offender is released or escapes, to obtain an order of restitution from a convicted offender, and to require the court's consideration of their interest in a trial free from unreasonable delay.[1] The Amendment has attracted considerable bipartisan support, as evidenced by its endorsement by the President[2] and strong approval in the Senate Judiciary Committee at the end of the 104th Congress.[3] Based on this vote, the widely respected *Congressional Quarterly* has identified the Amendment as perhaps the

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[*]Professor of Law, Univ. of Utah College of Law (cassellp@law.utah.edu); Executive Board of the National Victims Constitutional Amendment Network. A special note of thanks to the editors of the *Utah Law Review* for organizing this Symposium and to Susan Bandes, Doug Beloof, Lynne Henderson, Bob Mosteller, Bill Pizzi, and Steve Twist for their energetic participation. This article was supported by the University of Utah College of Law Research Fund and the University of Utah Research Committee. I appreciate suggestions and other assistance from Patricia Cassell, Karan Bhatia, Reg Brown, Edna Erez, Stephen Garvey, Edith Greene, Paul Gewirtz, Joe Hoffman, Bob Keiter, Scott Matheson, John Stein, Marlene Young, and the Symposium participants. With apologies for borrowing a title from BRYAN BURROUGH & JOHN HELYAR, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO (1990).

[1]*See* S.J. Res. 3, 106th Cong. (1999); *see also* S.J. Res. 44, 105th Cong. (1998) (adopting same list of rights one year earlier). The current text of the Amendment is reprinted as Appendix A to this Article.

[2]*See Announcement by President Bill Clinton with Introductions by Vice President Albert Gore and Remarks by Attorney General Janet Reno and Other Speakers on Victims' Rights*, June 25, 1996, *available in* LEXIS, Federal News Service: *see also* Paul G. Cassell, *Make Amends to Crime Victims*, WALL ST. J., July 20, 1999, at A22 (noting recent endorsement by Vice President Gore).

[3]*See* S. REP. NO. 105-409, at 37 (1998) (approving Amendment by 11-to-6 vote). As of this writing, in the 105th Congress the Amendment has been approved by the Subcommittee on the Constitution, Federalism, and Property Rights of the Senate Judiciary Committee.

"pending constitutional amendment with the best chance of being approved by Congress in the foreseeable future."[4]

As the Victims' Rights Amendment has moved closer to passage, defenders of the old order have manned[5] the barricades against its adoption. In Congress, the popular press, and the law reviews, they have raised a series of philosophical and practical objections to protecting victims' rights in the Constitution. These objections run the gamut, from the structural (the Amendment will change "basic principles that have been followed throughout American history"[6]), to the pragmatic ("it will lay waste to the criminal justice system"[7]), to the aesthetic (it will "trivialize" the Constitution[8]). In some sense, such objections are predictable. The prosecutors, defense attorneys, and judges who labor daily in the criminal justice vineyards have long struggled to hold the balance true between the State and the defendant. To suddenly find third parties—rather, third persons who are not even parties—threatening to storm the courthouse gates provokes, at least from some, an understandable defensiveness. If nothing else, victims promise to complicate life in the criminal justice system. But more fundamentally, if these victims' pleas for recognition are legitimate, what does that say about how the system has treated them for so many years?

Others in this Symposium have touched on overarching questions presented by the victims' challenge to the structure of our criminal justice

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[4]Dan Carney, *Crime Victims' Amendment Has Steadfast Support, But Little Chance of Floor Time*, CONG. QUART., July 30, 1998, at 1883.

[5]I use the term "man" provocatively because certain aspects of the defense resist efforts by feminists to provide justice to victims of rape and domestic violence, who are disproportionately women. *See, e.g.*, Beverly Harris Elliott, President of the National Coalition Against Sexual Assault, *Balancing Justice: How the Amendment Will Help All Victims of Sexual Assault* (visited March 6, 1999) <http://www.nvc.org/newsltr/sexass2.htm> (arguing that Amendment would encourage victims to report and assist in prosecution of acts of sexual violence); Joan Zorza, *Victims' Rights Amendment Empowers All Battered Women* (visited March 6, 1999) <http://www.nvc.org/newsltr/battwom.htm> (stating that constitutional amendment will help battered women by rebalancing criminal justice system); *see also infra* note 258 and accompanying text (discussing women and children who have died from lack of notice of offender's release).

[6]*A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. 141 (1997) [hereinafter *1997 Senate Judiciary Comm. Hearings*] (letter from various law professors opposing Amendment).

[7]*Proposals for a Constitutional Amendment to Provide Rights for Victims of Crime: Hearings on H.J. Res. 173 & H.J. Res. 174 Before the House Comm. on the Judiciary*, 104th Cong. 143 (1996) [hereinafter *1996 House Judiciary Comm. Hearings*] (statement of Ellen Greenlee, President, National Legal Aid and Defender Association).

[8]*A Proposed Constitutional Amendment to Establish a Bill of Rights for Crime Victims: Hearings on S.J. Res. 52 Before the Senate Comm. on the Judiciary*, 104th Cong. 101 (1996) [hereinafter *1996 Senate Judiciary Comm. Hearings*] (statement of Bruce Fein).

system. Professor Douglas Beloof's memorable paper persuasively demonstrates that a full appreciation of the rights of crime victims requires a "third model" that does not fit comfortably with the existing prosecution- and defendant-oriented paradigms generally used to understand the criminal process.[9] Indeed, as Professor William Pizzi's thought-provoking essay suggests, the very notion of victims having some role to play in the system is mind-boggling to professionals in the system who cannot even envision where a victim might sit in the courtroom.[10] Similar themes come to mind in reading Professor Susan Bandes's article, which skillfully describes the panoply of standing barriers that have been raised to prevent victims from obtaining admission to criminal proceedings.[11] Furthermore, Stephen Twist's insightful essay identifies the ways in which the system's zeal in protecting defense and prosecution interests has, in some ways, sown the seeds of its own destruction.[12]

My aim here is not to visit such intriguing general issues about victims in the criminal justice process, but rather to focus on how victims' rights would operate under one concrete proposal—the Victims' Rights Amendment. In particular, this Article analyzes the objections that the Amendment's opponents have raised. It should come as no great surprise that claims the Amendment simultaneously would "change basic principles that have been followed throughout American history," "lay waste to the criminal justice system," and—for good measure—"trivialize" the Constitution are not all true. This Article attempts to demonstrate that, in fact, none of these contradictory assertions is supported. A fair-minded look at the Amendment confirms that it will not "lay waste" to the system, but instead will build upon and improve it—retaining protection for the legitimate interests of prosecutors and defendants, while adding recognition of equally powerful interests of crime victims.

The objections to the Victims' Rights Amendment conveniently divide into three categories, which this Article analyzes in turn. Part I reviews normative objections to the Amendment—that is, objections to the desirability of the rights. The Part begins by reviewing the defendant-oriented objections leveled against a few of the rights, specifically the victim's right to be heard at sentencing, the victim's right to be present at trial, and the

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[9]*See* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 *passim*.

[10]*See* William T. Pizzi, *Victims' Rights: Rethinking Our "Adversary System,"* 1999 UTAH L. REV. 349 *passim*.

[11]*See* Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331 *passim*.

[12]*See* Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369 *passim*.

victim's right to a trial free from unreasonable delay. These objections lack merit. Part I concludes by refuting the prosecution-oriented objections to victims' rights, which revolve primarily around alleged excessive consumption of scarce criminal justice resources. These claims, however, are inconsistent with the available empirical evidence on the cost of victims' rights regimes in the states.

Next, Part II considers what might be styled as justification challenges—challenges that a victims' amendment is unjustified because victims already receive rights under the existing amalgam of state constitutional and statutory provisions. This claim of an "unnecessary" amendment, as advanced most prominently and capably in law review articles by Professor Robert Mosteller here and elsewhere,[13] misconceives the undeniable practical problems that victims face in attempting to secure their rights without federal constitutional protection.

Part III then turns to structural objections to the Amendment—claims that victims' rights are not properly constitutionalized, as advanced skillfully by Professor Henderson in this Symposium[14] and by others elsewhere. Contrary to this view, protection of the rights of citizens to participate in governmental processes is a subject long recognized as an appropriate one for a constitutional amendment. Moreover, constitutional protection for victims also can be crafted in ways that are sufficiently flexible to accommodate varying circumstances and varying criminal justice systems from state to state.

Finally, the Article concludes by examining the nature of the opposition to the Victims' Rights Amendment. Victims are not barbarians seeking to dismantle the pillars of wisdom from previous ages. Rather, they are citizens whose legitimate interests require recognition in any proper system of criminal justice. The Victims' Rights Amendment therefore deserves our full support.

I. NORMATIVE CHALLENGES

The most basic level at which the Victims' Rights Amendment could be disputed is the normative one: victims' rights are simply undesirable. Few of the objections to the Amendment, however, start from this premise. Instead,

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[13]*See, e.g.*, Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443 *passim* [hereinafter Mosteller, *Unnecessary Amendment*]; *see also* Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1692 (1997) [hereinafter Mosteller, *Recasting the Battle*].

[14]*See* Lynne Henderson, *Revisiting Victim's Rights*, 1999 UTAH L. REV. 383 *passim*.

the vast bulk of the opponents flatly concede the need for victim participation in the criminal justice system. For example, the senators on the Senate Judiciary Committee who dissented from supporting the Amendment[15] began by agreeing that "[t]he treatment of crime victims certainly is of central importance to a civilized society, and we must never simply 'pass by on the other side.'"[16] Additionally, various law professors who sent a letter to Congress opposing the Amendment similarly begin by explaining that they "commend and share the desire to help crime victims" and that "[c]rime victims deserve protection."[17] Further, Professor Mosteller agrees that "every sensible person can and should support victims of crime" and that the idea of "guarantee[ing] participatory rights to victims in judicial proceedings . . . is salutary."[18]

The principal critics of the Amendment agree not only with the general sentiments of victims' rights advocates but also with many of their specific policy proposals. Striking evidence of this agreement comes from the federal statute proposed by the dissenting senators, which would extend to victims in the federal system most of the same rights provided in the Amendment.[19] Other critics, too, have suggested protection for victims in statutory rather than constitutional terms.[20] In parsing through the relevant congressional hearings and academic literature, many of the important provisions of the Amendment appear to garner wide acceptance. Few disagree, for example, that victims of violent crime should receive notice that the offender has escaped from custody and should receive restitution from an offender. What is most striking, then, about debates over the Amendment is not the scattered points of disagreement, but rather the abundant points of *agreement*.[21] This harmony suggests that the Amendment satisfies a basic requirement for a constitutional amendment—that it reflect values widely shared throughout

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[15]Unless otherwise specifically noted, I will refer to the minority views of Senators Leahy, Kennedy, and Kohl as the "dissenting Senators," although a few other Senators also offered their dissenting views.

[16]S. REP. NO. 105-409, at 50 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl).

[17]*1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 140–41 (letter from various law professors).

[18]Mosteller, *Recasting the Battle*, *supra* note 13, at 1692.

[19]*See* Crime Victims Assistance Act, S. 1081, 105th Cong., 1st Sess. (1997) (providing victims with enhanced rights in trial process); *see also* S. REP. NO. 105-409, at 77 (1998) (minority views of Sens. Leahy and Kennedy) (defending this statutory protection of victims' rights).

[20]*See, e.g.*, *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 141 (letters from various law professors) ("Crime victims deserve protection, but this should be accomplished by statutes, not a constitutional amendment.").

[21]*See generally* Twist, *supra* note 12, at 378 (noting frequency with which opponents of Amendment endorse its goals).

society. There is, to be sure, normative disagreement about some of the proposed provisions in the Amendment, disagreements analyzed below. But the natural tendency to focus on points of conflict should not obscure the substantial points of widespread agreement.

While there exists near consensus on the desirability of many of the values reflected in the Amendment, a few rights are disputed on grounds that can be conveniently divided into two groups. Some rights are challenged as unfairly harming defendants' interests in the process, others as harming interests of prosecutors. That the Amendment has drawn fire from some on both sides might suggest that it has things about right in the middle. Contrary to these criticisms, however, the Amendment does not harm the legitimate interests of either side.

A. Defendant-Oriented Challenges to Victims' Rights

Perhaps the most frequently repeated claim against the Amendment is that it would harm defendants' rights. Often this claim is made in general terms, relying on little more than the reflexive view that anything good for victims must be bad for defendants. But, as the general consensus favoring victims' rights suggests, rights for victims need not come at the expense of defendants. Strong supporters of defendants' rights agree. Professor Laurence Tribe, for example, has concluded that the proposed Amendment is "a carefully crafted measure, adding victims' rights that can coexist side by side with defendants'."[22] Similarly, Senator Joseph Biden reports: "I am now convinced that no potential conflict exists between the victims' rights enumerated in [the Amendment] and any existing constitutional right afforded to defendants . . . ."[23] A recent summary of the available research on the purported conflict of rights supports these views, finding that victims' rights do not harm defendants:

> [S]tudies show that there "is virtually no evidence that the victims' participation is at the defendant's expense." For example, one study, with data from thirty-six states, found that victim-impact statutes resulted in only a negligible effect on sentence type and length. Moreover, judges interviewed in states with legislation granting rights to the crime victim indicated that the balance was not improperly tipped in favor of the victim. One article studying victim participation in plea bargaining found that

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[22]Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5. For a more detailed exposition of Professor Tribe's views, see *1996 House Judiciary Comm. Hearings*, *supra* note 7, at 238 (letter from Prof. Tribe).

[23]S. REP. NO. 105-409, at 82 (1998) (additional views of Sen. Biden).

> such involvement helped victims "without any significant detrimental impact to the interests of prosecutors and defendants." Another national study in states with victims' reforms concluded that: "[v]ictim satisfaction with prosecutors and the criminal justice system was increased without infringing on the defendant's rights."[24]

Given these empirical findings, it should come as no surprise that claims that the Amendment would injure defendants rest on a predicted parade of horribles, not any real-world experience. Yet this experience suggests that the parade will never materialize, particularly given the redrafting of the proposed amendment to narrow some of the rights it extends.[25] A careful

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[24]Chief Justice Richard Barajas & Scott A. Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 18–19 (1987) (quoting Deborah P. Kelly, *Have Victim Reforms Gone Too Far—or Not Far Enough?*, 5 CRIM. JUST., Fall 1991, at 28, 28; Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 355 (1987)) (internal footnotes omitted).

[25]As originally proposed, the Amendment extended to victims a broad right "[t]o a final disposition of the proceedings relating to the crime free from unreasonable delay." S.J. Res. 6, 105th Cong. § 1 (1997). It now provides victims a narrower right to "consideration of the interest of the victim that any trial be free from unreasonable delay." S.J. Res. 3, 106th Cong. § 1 (1999). This narrower formulation, limited to a "trial," avoids the objection that an open-ended right to a speedy disposition could undercut a defendant's post-trial, habeas corpus rights, particularly in capital cases. *See, e.g.*, *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 155 (statement of Mark Kappelhoof, ACLU Legislative Counsel) (stating that "right of habeas corpus is also threatened under [the Amendment]").

As originally proposed, the Amendment also promised victims a broad right to "be reasonably protected from the accused." S.J. Res. 6, 105th Cong. (1997). It now provides victims a right to have the "safety of the victim [considered] in determining [a] release from custody." S.J. Res. 3, 106th Cong. § 1 (1999). This narrower formulation was apparently designed, in part, to respond to the objection that the Amendment might be construed to hold offenders "beyond the maximum term or even indefinitely if they are found to pose a danger to their victims." *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 155 (statement of Mark Kappelhoof, ACLU Legislative Counsel).

Professor Mosteller has argued that these particular changes, and several others like them, were designed to move the Amendment away from providing aid to victims to instead provide nothing but a benefit to prosecutors. *See* Robert P. Mosteller, *Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY'S L.J. 1053, 1058 (1998). This strikes me as a curious view, given that these changes specifically responded to concerns expressed by advocates of defendants' rights, including Mosteller himself. *See* Mosteller, *Recasting the Battle*, *supra* note 13, at 1707 n.58. More generally, it should be clear that the proposed Amendment is not predicated on the idea of providing benefits to prosecutors. Not only has the Amendment been attacked as harming prosecution interests, *see infra* notes 127–47 and accompanying text, but it does not attempt to achieve such a favorite goal of prosecutors as overturning the exclusionary rule. *Cf.* CAL. CONST. art. I, § 28 (victims' initiative restricting exclusion of evidence); OR. CONST. art. I, § 42 (same), *invalidated*, Armatta v. Kitzhaber, 959 P.2d 49, 64 (Or. 1998) (holding that initiative violated Oregon Constitution's single subject rule). *See generally* PRESIDENT'S TASK

examination of the most-often-advanced claims of conflict with defendants' legitimate interests reveals that any purported conflict is illusory.[26]

1. The Right to Be Heard

Some opponents of the Amendment object that the victim's right to be heard will interfere with a defendant's efforts to mount a defense. At least some of these objections refute straw men, not the arguments for the Amendment. For example, to prove that a victim's right to be heard is undesirable, objectors sometimes claim (as was done in the Senate Judiciary Committee minority report) that "[t]he proposed Amendment gives victims [a] constitutional right to be heard, if present, and to submit a statement at *all* stages of the criminal proceeding."[27] From this premise, the objectors then postulate that the Amendment would make it "much more difficult for judges to limit testimony by victims *at trial*" and elsewhere to the detriment of defendants.[28] This constitutes an almost breathtaking misapprehension of the scope of the rights at issue. Far from extending victims the right to be heard at "all" stages of a criminal case including the trial, the Amendment explicitly limits the right to public "proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence."[29] At these three kinds of hearings—bail, plea, and sentencing—victims have compelling reasons to be heard and can be heard without adversely affecting the defendant's rights.

Proof that victims can properly be heard at these points comes from what appears to be a substantial inconsistency by the dissenting senators. While criticizing the right to be heard in the Amendment, these senators simultaneously sponsored federal legislation to extend to victims in the federal

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FORCE ON VICTIMS OF CRIME, FINAL REPORT 24–28 (1982) (urging abolition of exclusionary rule on victim-related grounds).

[26]Until the opponents of the Amendment can establish any conflict between defendants' rights under the Constitution and victims' rights under the Amendment, there is no need to address the subject of how courts should balance the rights in case of conflict. *Cf.* S. REP. NO. 105-409, at 22–23 (1998) (explaining reasons for rejecting balancing language in Amendment); *A Proposed Constitutional Amendment to Protect Crime Victims: Hearings on S.J. Res. 44 Before the Senate Comm. on the Judiciary*, 105th Cong. 45 (1998) [hereinafter *1998 Senate Judiciary Comm. Hearings*] (statement of Prof. Paul Cassell), *discussed in* Mosteller, *Unnecessary Amendment*, *supra* note 13, at 464–65 (discussing how balancing language might be drafted if conflict were to be proven).

[27]S. REP. NO. 105-409, at 66 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl) (emphasis added).

[28]*Id.* (emphasis added).

[29]S.J. Res. 3, 106th Cong. § 1 (1999).

system precisely the same rights.[30] They urged their colleagues to pass their statute in lieu of the Amendment because "our bill provides the very same rights to victims as the proposed constitutional amendment."[31] In defending their bill, they saw no difficulty in giving victims a chance to be heard,[32] a right that already exists in many states.[33]

A much more careful critique of the victim's right to be heard is found in a recent prominent article by Professor Susan Bandes.[34] Like most other opponents of the Amendment, she concentrates her intellectual fire on the victim's right to be heard at sentencing, arguing that victim impact statements are inappropriate narratives to introduce in capital sentencing proceedings.[35] While rich in insights about the implications of "outsider narratives," the article provides no general basis for objecting to a victim's right to be heard at sentencing. Her criticism of victim impact statements is limited to *capital* cases, a tiny fraction of all criminal trials.[36]

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[30]*See* S. 1081, 105th Cong. 1st Sess. § 101 (1997) (establishing right to be heard on issue of detention); *id.* § 121 (establishing right to be heard on merits of plea agreement); *id.* § 122 (establishing enhanced right of allocution at sentencing).

[31]S. REP. NO. 105-409, at 77 (1998) (minority views of Sens. Leahy and Kennedy).

[32]*See, e.g.*, 143 CONG. REC. S8275 (daily ed. July 29, 1997) (statement of Sen. Kennedy) (supporting statute expanding victims' rights to participate in all phases of process); *id.* at S8269 (statement of Sen. Patrick Leahy) (supporting Crime Victims' Assistance Act).

[33]*See* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1394–96 (collecting citations to states granting victims a right to be heard).

[34]*See* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 364 (1996).

[35]*See id.* at 390–93.

[36]*See id.* at 392–93. In a recent conversation, Professor Bandes stated that though her article focused on the capital context, she did not intend to imply that victim impact statements ought to be admissible in noncapital cases. Indeed, based on the proponents' argument that victim impact statements by relatives and friends are needed because the homicide victim is, by definition, unavailable, she believes such statements would seem even less defensible in nonhomicide cases. Personal Communication with Susan Bandes, Professor of Law, DePaul University (Dec. 14, 1998). This extension of her argument seems unconvincing, as the case for excluding victim statements is even weaker for noncapital cases. Not only are noncapital cases generally less fraught with emotion, but the sentence is typically imposed by a judge, who can sort out any improper aspects of victim statements. For this reason, even when victim impact testimony was denied in capital cases to juries, courts often concluded that judges could hear the same evidence. *See* Lightbourne v. Dugger, 829 F.2d 1012, 1027 (11th Cir. 1987); State v. Beaty, 762 P.2d 519, 531 (Ariz. 1988); State v. Card, 825 P.2d 1081, 1089 (Idaho 1991); People v. Johnson, 594 N.E.2d 253, 270 (Ill. 1992); State v. Post, 513 N.E.2d 754, 759 (Ohio. 1987). It is also hazardous to generalize about such testimony given the vast range of varying circumstances presented by noncapital cases. *See generally* Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825, 848–49 (1995) (noting differences between victim participation in capital and noncapital sentencings and concluding that "wholesale condemnation of victim participation under all circumstances is surely

Professor Bandes's objection is important to consider carefully because it presents one of the most thoughtfully developed cases against victim impact statements.[37] Her case, however, is ultimately unpersuasive. She agrees that capital sentencing decisions ought to rest, at least in part, on the harm caused by murderers.[38] She explains that, in determining which murderers should receive the death penalty, society's "gaze ought to be carefully fixed *on the harm they have caused* and their moral culpability for that harm."[39] Bandes then contends that victim impact statements divert sentencers from that inquiry to "irrelevant fortuities" about the victims and their families.[40] But in moving on to this point, she apparently assumes that a judge or jury can comprehend the full harm caused by a murder without hearing testimony from the surviving family members. That assumption is simply unsupportable. Any reader who disagrees with me should take a simple test. Read an actual victim impact statement from a homicide case all the way through and see if you truly learn nothing new about the enormity of the loss caused by a homicide. Sadly, the reader will have no shortage of such victim impact statements to choose from. Actual impact statements from court proceedings are accessible in various places.[41] Other examples can be found in moving accounts written by family members who have lost a loved one to a murder. A powerful example is the collection of statements from families devastated by the Oklahoma City bombing collected in Marsha Kight's affecting *Forever Changed: Remembering Oklahoma City, April 19, 1995*.[42] Kight's compelling book is not unique, as equally powerful accounts

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unwarranted").

[37]Several other articles have also focused on and carefully developed a case against victim impact statements. *See, e.g.*, Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 235 (1991) (arguing that "the fundamental evil" associated with victim statements is "disparate sentencing of similarly situated defendants"); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 986–1006 (1985) (outlining why goals of criminal statements do not support victim participation in sentencing). Because Professor Bandes's article is the most current, I focus on it here as exemplary of the critics' position.

[38]*See* Bandes, *supra* note 34, at 398.

[39]*Id.* (emphasis added).

[40]*Id.*

[41]*See, e.g.*, Booth v. Maryland, 482 U.S. 496, 509–15 (1987) (attaching impact statement to opinion); United States v. Nichols, No. 96-CR-68, 1997 WL 790551, at **1–47 (D. Colo. Dec. 29, 1997) (various victim impact statements at sentencing of Terry Nichols); United States v. McVeigh, No. 96-CR-68, 1997 WL 296395, at **1–53 (D. Colo. June 5, 1997) (various victim impact statements at sentencing of Timothy McVeigh); *A Federal Judge Speaks Out for Victims*, AM. LAWYER, Mar. 20, 1995, at 4 (statement by Federal Judge Michael Luttig at the sentencing of his father's murderers).

[42]*See* MARSHA KIGHT, FOREVER CHANGED: REMEMBERING OKLAHOMA CITY, APRIL 19, 1995 (1998).

from the family of Ron Goldman,[43] children of Oklahoma City,[44] Alice Kaminsky,[45] George Lardner Jr.,[46] Dorris Porch and Rebecca Easley,[47] Mike Reynolds,[48] Deborah Spungen,[49] John Walsh,[50] and Marvin Weinstein[51] make all too painfully clear. Intimate third-party accounts offer similar insights about the generally unrecognized, yet far-ranging consequences of homicide.[52]

Professor Bandes acknowledges the power of hearing from victims' families. Indeed, in a commendable willingness to present victim statements with all their force, she begins her article by quoting from the victim impact statement at issue in *Payne v. Tennessee*,[53] a statement from Mary Zvolanek about her daughter's and granddaughter's deaths and their effect on her three-year-old grandson:

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.[54]

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[43]*See* THE FAMILY OF RON GOLDMAN, HIS NAME IS RON: OUR SEARCH FOR JUSTICE (1997).

[44]*See* NANCY LAMB AND CHILDREN OF OKLAHOMA CITY, ONE APRIL MORNING: CHILDREN REMEMBER THE OKLAHOMA CITY BOMBING (1996).

[45]*See* ALICE R. KAMINSKY, THE VICTIM'S SONG (1985).

[46]*See* GEORGE LARDNER JR., THE STALKING OF KRISTIN: A FATHER INVESTIGATES THE MURDER OF HIS DAUGHTER (1995).

[47]*See* DORRIS D. PORCH & REBECCA EASLEY, MURDER IN MEMPHIS: THE TRUE STORY OF A FAMILY'S QUEST FOR JUSTICE (1997).

[48]*See* MIKE REYNOLDS & BILL JONES, THREE STRIKES AND YOU'RE OUT . . . A PROMISE TO KIMBER: THE CHRONICLE OF AMERICA'S TOUGHEST ANTI-CRIME LAW (1996).

[49]*See* DEOBRAH SPUNGEN, AND I DON'T WANT TO LIVE THIS LIFE (1983).

[50]*See* JOHN WALSH, TEARS OF RAGE: FROM GRIEVING FATHER TO CRUSADER FOR JUSTICE: THE UNTOLD STORY OF THE ADAM WALSH CASE (1997). Professor Henderson describes Walsh as "preaching [a] gospel of rage and revenge." Henderson, *supra* note 14, at [18]. This seems to me to misunderstand Walsh's efforts, which Walsh has explained as making sure that his son Adam "didn't die in vain." WALSH, *supra*, at 305. Walsh's Herculean efforts to establish the National Center for Missing and Exploited Children, *see id.* at 131–58, is a prime example of neither rage nor revenge, but rather a desirable public policy reform springing from a tragic crime.

[51]*See* MILTON J. SHAPIRO WITH MARVIN WEINSTEIN, WHO WILL CRY FOR STACI? THE TRUE STORY OF A GRIEVING FATHER'S QUEST FOR JUSTICE (1995).

[52]*See, e.g.*, GARY KINDER, VICTIM 41–45 (1982); JANICE HARRIS LORD, NO TIME FOR GOODBYES: COPING WITH SORROW, ANGER AND INJUSTICE AFTER A TRAGIC DEATH xii (4th ed. 1991); SHELLEY NEIDERBACH, INVISIBLE WOUNDS: CRIME VICTIMS SPEAK 19 (1986); DEBORAH SPUNGEN, HOMICIDE: THE HIDDEN VICTIMS xix–xxiii (1998); JOSEPH WAMBAUGH, THE ONION FIELD 169–71 (1973).

[53]501 U.S. 808 (1991).

[54]Bandes, *supra* note 34, at 361 (quoting *Payne*, 501 U.S. at 814–15).

Bandes quite accurately observes that the statement is "heartbreaking" and "[o]n paper, it is nearly unbearable to read."[55] She goes on to argue that such statements are "prejudicial and inflammatory" and "overwhelm the jury with feelings of outrage."[56] In my judgment, Bandes fails here to distinguish sufficiently between prejudice and *unfair* prejudice from a victim's statement. It is a commonplace of evidence law that a litigant is not entitled to exclude harmful evidence, but only *unfairly* harmful evidence.[57] Bandes appears to believe that a sentence imposed following a victim impact statement rests on unjustified prejudice; alternatively, one might conclude simply that the sentence rests on a fuller understanding of all of the murder's harmful ramifications. Why is it "heartbreaking" and "nearly unbearable to read" about what it is like for a three-year-old to witness the murder of his mother and his two-year-old sister? The answer, judging from why my heart broke as I read the passage, is that we can no longer treat the crime as some abstract event. In other words, we begin to realize the nearly unbearable heartbreak—that is, the actual and total harm—that the murderer inflicted.[58] Such a realization undoubtedly will hamper a defendant's efforts to escape a capital sentence. But given that loss is a proper consideration for the jury, the statement is not unfairly detrimental to the defendant. Indeed, to conceal such evidence from the jury may leave them with a distorted, minimized view of the impact of the crime.[59] Victim impact statements are thus easily justified because they provide the jury with a full picture of the murder's consequences.[60]

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[55]*Id.* at 361.

[56]*Id.* at 401.

[57]*See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.10, at 194 (2d ed. 1999).

[58]*Cf.* Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM. L. REV. (forthcoming 1999) ("[L]egal professionals [in South Australia] who have been exposed to [victim impact statements] have commented on how uninformed they were about the extent, variety and longevity of various victimizations, how much they have learned . . . about the impact of crime on victims . . . .").

[59]*See* Brooks Douglass, *Oklahoma's Victim Impact Legislation: A New Voice for Victims and Their Families: A Response to Professor Coyne*, 46 OKLA. L. REV. 283, 289 (1993) (offering example of jury denied truth about full impact of a crime).

[60]In addition to allowing assessment of the harm of the crime, victim impact statements are also justified because they provide "a quick glimpse of the life which a defendant chose to extinguish." *Payne*, 501 U.S. at 822 (internal quotation omitted). In the interests of brevity, I will not develop such an argument here, nor will I address the more complicated issues surrounding whether a victim's family members may offer opinions about the appropriate sentence for a defendant. *See id.* at 830 n.2 (reserving this issue); S. REP. NO. 105-409, at 28–29 (1998) (indicating that Amendment does not alter laws precluding victim opinion as to proper sentence).

Bandes also contends that impact statements "may completely block" the ability of the jury to consider mitigation evidence.[61] It is hard to assess this essentially empirical assertion, because Bandes does not present direct empirical support.[62] Clearly many juries decline to return death sentences even when presented with powerful victim impact testimony, with Terry Nichols's life sentence for conspiring to set the Oklahoma City bomb a prominent example. Indeed, one recent empirical study of decisions from jurors who actually served in capital cases found that facts about adult victims "made little difference" in death penalty decisions.[63] A case might be

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[61]Bandes, *supra* note 34, at 402.

[62]The only empirical evidence Bandes discusses concerns the alleged race-of-the-victim effect found in the Baldus study of Georgia capital cases in the 1980s. *See id.* This study, however, sheds no direct light on the effect of victim impact statements on capital sentencing, as victim impact evidence apparently was not, and indeed could not have been at that time, one of the control variables. *See* GA. CODE ANN. §§ 17-10-1.1 to -1.2 (1986) (barring victim impact testimony). Had victim impact evidence been one of the variables, it seems likely that any race-of-the-victim effect would have been reduced by giving the jurors actual information about the uniqueness and importance of the life taken, thereby eliminating the jurors' need to rely on stereotypic, and potentially race-based, assumptions. In any event, there is no need to ponder such possibilities at length here because the race-of-the-victim "effect" disappeared when important control variables were added to the regression equations. *See* McCleskey v. Zant, 580 F. Supp. 338, 366 (D. Ga. 1984) (concluding that "there is no support for a proposition that race has any effect in any single case"), *aff'd in part and rev'd in part*, 753 F.2d 877 (11th Cir. 1986), *aff'd*, 481 U.S. 279 (1987).

[63]Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1556 (1998). The study concluded that jurors would be more likely to impose death if the victim was a child, and that "extreme caution" was warranted in interpreting its findings. *Id.* It should be noted that the study data came from cases between roughly 1986 and 1993, when victim impact statements were not generally used. *See id.* at 1554. However, it is possible that a victim impact statement may have been introduced in a few of the cases in the data set after the 1991 *Payne* decision. Electronic Mail from Stephen P. Garvey, Professor, Cornell Law School, to Prof. Paul G. Cassell (Feb. 11, 1999) (on file with author).

Garvey's methodology of surveying real juries about real cases seems preferable to relying on mock jury research, which suggests that victim impact statements may affect jurors' views about capital sentencing. *See* Edith Greene, *The Many Guises of Victim Impact Evidence and Effects on Jurors' Judgments*, PSYCHOL., CRIME & L. (forthcoming 1999) (discussing mock jury research); Edith Greene & Heather Koehring, *Victim Impact Evidence in Capital Cases: Does the Victim's Character Matter?*, 28 J. APPLIED SOC. PSYCHOL. 145, 154 (1998) (finding support for hypothesis that victim impact evidence would affect jurors' capital sentencing decisions); James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in Capital Trial: Encouraging Votes for Death*, 20 AM. J. CRIM. JUST. 1, 9 (1995) (finding support for hypothesis that victim impact evidence would increase jurors' votes for death penalty). *But cf.* Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 1994 J. APPLIED SOC. PSYCHOL. 1315, 1319–30 (1994) (finding, through meta-analysis of previous research, that effects of victim characteristics on juror's

crafted from the available national data that Supreme Court decisions on victim impact testimony did, at the margin, alter some cases. It is arguable that the number of death sentences imposed in this country fell after the Supreme Court prohibited use of victim impact statements in 1987[64] and then rose when the Court reversed itself a few years later.[65] As discussed in greater length in Appendix B,[66] however, this conclusion is far from clear and, in any event, the effect on likelihood of a death sentence would be, at most, marginal.

The empirical evidence in noncapital cases also finds little effect on sentence severity. For example, a study in California found that "[t]he right to allocution at sentencing has had little net effect . . . on sentences in general."[67] A study in New York similarly reported "no support for those who argue against [victim impact] statements on the grounds that their use places defendants in jeopardy."[68] A careful scholar recently reviewed comprehensively all of the available evidence in this country and elsewhere, and concluded that "sentence severity has not increased following the passage of [victim impact] legislation."[69] It is thus unclear why we should credit

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judgments were generally inconsequential). Whether mock jury simulations capture real-world effects is open to question generally. *See* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 600 (1999) (collecting evidence on this point); *see also* Free v. Peters, 12 F.3d 700, 705–06 (7th Cir. 1994) (en banc) (finding that there is little "a priori reason" to think that results of examination setting offer insight to abilities of real juries who spend days and weeks becoming familiar with case). The concerns about the realism of mock jury research apply with particular force to emotionally charged death penalty verdicts. *See* Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase*, 16 LAW & HUM. BEHAV. 185, 191 (1992) ("[T]he very nature of the [death] penalty decision may render it an inappropriate topic for jury simulation studies.").

[64]*See Booth*, 482 U.S. at 509 (concluding that introduction of impact statement in sentencing phase of capital murder violates Eighth Amendment).

[65]*See Payne*, 501 U.S. at 830 (overruling *Booth*).

[66]*See infra* Appendix B.

[67]NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EXECUTIVE SUMMARY, VICTIM APPEARANCES AT SENTENCING HEARINGS UNDER THE CALIFORNIA VICTIMS' BILL OF RIGHTS 61 (1987) [hereinafter NIJ SENTENCING STUDY].

[68]Robert C. Davis & Barbara E. Smith, *The Effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting*, 11 JUST. QUART. 453, 466 (1994); *accord* ROBERT C. DAVIS ET AL., VICTIM IMPACT STATEMENTS: THEIR EFFECTS ON COURT OUTCOMES AND VICTIM SATISFACTION 68 (1990) (concluding that result of study "lend[s] support to advocates of victim impact statements" since no evidence indicates that these statements "put[] defendants in jeopardy [or] result in harsher sentences").

[69]Erez, *supra* note 58, at 5; *accord* Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On . . .*, 3 INT'L REV. OF VICTIMOLOGY 17, 22 (1994) [hereinafter Erez, *Victim Participation*] ("Research on the impact of victims' input on sentencing outcome is inconclusive. At best it suggests that victim input has only a limited effect."). For further

Bandes's assertion that victim impact statements seriously hamper the defense of capital defendants.

Even if such an impact on capital sentences were proven, it would be susceptible to the reasonable interpretation that victim testimony did not "block" jury understanding, but rather presented enhanced information about the full horror of the murder or put in context mitigating evidence of the defendant. Professor David Friedman has suggested this conclusion, observing that "[i]f the legal rules present the defendant as a living, breathing human being with loving parents weeping on the witness stand, while presenting the victim as a shadowy abstraction, the result will be to overstate, in the minds of the jury, the cost of capital punishment relative to the benefit."[70] Correcting this misimpression is not distorting the decision-making process, but eliminating a distortion that would otherwise occur.[71] This interpretation meshes with empirical studies in noncapital cases suggesting that, if a victim impact statement makes a difference in punishment, the description of the harm sustained by the victims is the crucial factor.[72] The studies thus indicate that the general tendency of victim impact evidence is to enhance sentence accuracy and proportionality rather than increase sentence punitiveness.[73]

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discussion of the effect of victim impact statements, see, for example, Edna Erez & Pamela Tontodonato, *The Effect of Victim Participation in Sentencing on Sentence Outcome*, 28 CRIMINOLOGY 451, 467 (1990); SUSAN W. HILLENBRAND & BARBARA E. SMITH, VICTIMS RIGHTS LEGISLATION: AN ASSESSMENT OF ITS IMPACT ON CRIMINAL JUSTICE PRACTITIONERS AND VICTIMS, A STUDY OF THE AMERICAN BAR ASSOCIATION'S CRIMINAL JUSTICE SECTION VICTIM WITNESS PROJECT 159 (1989). *See also* Edna Erez & Leigh Roeger, *The Effect of Victim Impact Statements on Sentencing Patterns and Outcomes: The Australian Experience*, 23 J. CRIM. JUSTICE 363, 375 (1995) (Australian study finding no support for claim that impact statements increase sentence severity); R. Douglas et al., *Victims of Efficiency: Tracking Victim Information Through the System in Victoria, Australia*, 3 INT'L REV. VICTIMOLOGY 95, 103 (1994) (concluding that greater information about nature of victimization makes little difference in sentencing); Edna Erez & Linda Rogers, *Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals*, 39 BRIT. J. CRIMINOLOGY 216, 234–35 (1999) (same).

[70]David D. Friedman, *Should the Characteristics of Victims and Criminals Count?: Payne v. Tennessee and Two Views of Efficient Punishment*, 34 B.C. L. REV. 731, 749 (1993).

[71]*See id.* at 750 (reasoning that *Payne* rule "can be interpreted . . . as a way of reminding the jury that victims, like criminals, are human beings with parents and children, lives that matter to themselves and others").

[72]*See* Erez & Tontodonato, *supra* note 69, at 469.

[73]*See* Erez, *Perspectives of Legal Professionals*, *supra* note 69, at 235 (discussing South Australian study); Edna Erez, *Victim Participation in Sentencing: Rhetoric and Reality*, 18 J. CRIM. JUSTICE 19, 29 (1990).

Finally, Bandes and other critics argue that victim impact statements result in unequal justice.[74] Justice Powell made this claim in his since-overturned decision in *Booth v. Maryland*, arguing that "in some cases the victim will not leave behind a family, or the family members may be less articulate in describing their feelings even though their sense of loss is equally severe."[75] This kind of difference, however, is hardly unique to victim impact evidence.[76] To provide one obvious example, current rulings from the Court invite defense mitigation evidence from a defendant's family and friends, despite the fact that some defendants may have more or less articulate acquaintances. In *Payne*, for example, the defendant's parents testified that he was "a good son" and his girlfriend testified that he "was affectionate, caring, and kind to her children."[77] In another case, a defendant introduced evidence of having won a dance choreography award while in prison.[78] Surely this kind of testimony, no less than victim impact statements, can vary in persuasiveness in ways not directly connected to a defendant's culpability;[79] yet, it is routinely allowed. One obvious reason is that if varying persuasiveness were grounds for an inequality attack, then it is hard to see how the criminal justice system could survive at all. Justice White's powerful dissenting argument in *Booth* went unanswered, and remains unanswerable: "No two prosecutors have exactly the same ability to present their arguments to the jury; no two witnesses have exactly the same ability to communicate the facts; but there is no requirement . . . [that] the evidence and argument be reduced to the lowest common denominator."[80]

Given that our current system allows almost unlimited mitigation evidence on the part of the defendant, an argument for equal justice requires, if anything, that victim statements be allowed. Equality demands fairness not only *between* cases, but also *within* cases.[81] Victims and the public generally

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[74]*See, e.g.*, Bandes, *supra* note 34, at 408 (arguing that victim impact statements play on our pre-conscious prejudices and stereotypes).

[75]*Booth*, 482 U.S. at 505, *overruled in* Payne v. Tennessee, 501 U.S. 808, 830 (1991).

[76]*See* Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 882 (1996) ("If courts were to exclude categories of testimony simply because some witnesses are less articulate than others, no category of oral testimony would be admissible.").

[77]*Payne*, 501 U.S. at 826.

[78]*See* Boyde v. California, 494 U.S. 370, 382 n.5 (1990). *See generally* Susan N. Cornille, Comment, *Retribution's "Harm" Component and the Victim Impact Statement: Finding a Workable Model*, 18 U. DAYTON L. REV. 389, 416–17 (1993) (discussing *Boyde*).

[79]*Cf.* Walton v. Arizona, 497 U.S. 639, 674 (1990) (Scalia, J., concurring) (criticizing decisions allowing such varying mitigating evidence on equality grounds).

[80]*Booth*, 482 U.S. at 518 (White, J., dissenting).

[81]*See* Gewirtz, *supra* note 76, at 880–82 (developing this position); *see also* Beloof, *supra* note 9, at 291 (noting that this value is part of third model of criminal justice); PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 16 (1982) (for laws to be

perceive great unfairness in a sentencing system with "one side muted."[82] The Tennessee Supreme Court stated the point bluntly in its decision in *Payne*, explaining that "[i]t is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant . . . without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims."[83] With simplicity but haunting eloquence, a father whose ten-year-old daughter, Staci, was murdered, made the same point.[84] Before the sentencing phase began, Marvin Weinstein asked the prosecutor for the opportunity to speak to the jury because the defendant's mother would have the chance to do so.[85] The prosecutor replied that Florida law did not permit this.[86] Here was Weinstein's response to the prosecutor:

> What? I'm not getting a chance to talk to the jury? He's not a defendant anymore. He's a murderer! A convicted murderer! The jury's made its decision. . . . His mother's had her chance all through the trial to sit there and let the jury see her cry for him while I was barred.[87] . . . Now she's getting another chance? Now she's going to sit there in that witness chair and cry for her son, that murderer, that murderer who killed my little girl! Who will cry for Staci? Tell me that, who will cry for Staci?[88]

There is no good answer to this question,[89] a fact that has led to a change in the law in Florida and, indeed, all around the country. Today the laws of the overwhelming majority of states admit victim impact statements in capital and other cases.[90] These prevailing views lend strong support to the

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respected, they must be just—not only to accused, but to victims as well).

[82]*Booth*, 482 U.S. at 520 (Scalia, J., dissenting); *accord* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 77 (1982); Gewirtz, *supra* note 76, at 825–26.

[83]Tennessee v. Payne, 791 S.W.2d 10, 19 (1990), *aff'd*, 501 U.S. 808 (1991).

[84]*See* SHAPIRO, *supra* note 51, at 215.

[85]*See id.* at 215–16.

[86]*See id.*

[87]Weinstein was subpoenaed by the defense as a witness and therefore required to sit outside the courtroom. *See id.* at 215–16.

[88]*Id.* at 319–20.

[89]A narrow, incomplete answer might be that neither the defendant's mother nor the victim's father should be permitted to *cry* in front of the jury. But assuming an instruction from the judge not to cry, the question would still remain why the defendant's mother could testify, but not the victim's father.

[90]*See, e.g.*, ARIZ. REV. STAT. §§ 13-4410(C), -4424, -4426 (1989); MD. CODE art. 41, § 4-609(d) (1993); N.J. STAT. ANN. § 2C:11-3c(6) (1995); UTAH CODE ANN. § 76-3-207(2) (1998). *See generally Payne*, 501 U.S. at 821 (finding that Congress and most states allow victim impact statements); State v. Muhammad, 678 A.2d 164, 177–78 (N.J. 1996) (collecting

conclusion that equal justice demands the inclusion of victim impact statements, not their exclusion.

These arguments sufficiently dispose of the critics' main contentions.[91] Nonetheless, it is important to underscore that the critics generally fail to grapple with one of the strongest justifications for admitting victim impact statements: avoiding additional trauma to the victim. For all the fairness reasons just explained, gross disparity between defendants' and victims' rights to allocute at sentencing creates the risk of serious psychological injury to the victim.[92] As Professor Douglas Beloof has nicely explained, a justice system that fails to recognize a victim's right to participate threatens "secondary harm"—that is, harm inflicted by the operation of government processes beyond that already caused by the perpetrator.[93] This trauma stems

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state cases upholding victim impact evidence in capital cases). These laws answer Bandes's brief allusion to the principle of *nulla poena sine lege* (the requirement of prior notice that particular conduct is criminal). *See* Bandes, *supra* note 34, at 396 n.177. Because murderers are now plainly on notice that impact testimony will be considered at sentencing, the principle is not violated. Murderers can also fully foresee the possibility of victim impact testimony. Murder is always committed against "a 'unique' individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable." *Payne*, 501 U.S. at 838 (Souter, J., concurring). Moreover, it is unclear the extent to which *nulla poena sine lege* is designed to regulate sentencing decisions. The principle is one that "condemns judicial crime creation," Bynum v. State, 767 S.W.2d 769, 773 n.5 (Tex. Crim. App. 1989), but not the crafting of appropriate penalties for a previously defined crime like capital murder.

[91]Professor Bandes and others also have suggested that the admission of victim impact statements would lead to offensive mini-trials on the victim's character. *See, e.g.*, Bandes, *supra* note 34, at 407–08. However, a recent survey of the empirical literature concludes that "[c]oncern that defendants would challenge the content of [victim impact statements] thereby subjecting victims to unpleasant cross examination on their statements has also not materialized." Erez, *supra* note 58, at 6. In neither the McVeigh trial nor the Nichols trial, for example, did aggressive defense attorneys cross-examine the victims at any length about the impact of the crime.

[92]For general discussion of the harms caused by disparate treatment, see LINDA E. LEDRAY, RECOVERING FROM RAPE 125 (2d ed. 1994) (noting that it is important in healing process for rape victims to take back control from rapist and to focus their anger towards him); LEE MADIGAN & NANCY C. GAMBLE, THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM 97 (1989) (noting that during arraignment, survivors "first realized that it was not their trial, [and] that the attacker's rights were the ones being protected."); Beloof, *supra* note 9, at 294–96 (explaining that victims are exposed to two types of harms: the first from crime itself, and the second, from criminal process); Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 72 (1987) (noting that "victims want[] more than pity and politeness; they want[] to participate"); Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 58 (1987) (discussing ways in which victims feel aggrieved from unequal treatment).

[93]*See generally* SPUNGEN, *supra* note 52, at 10 (explaining concept of secondary victimization); DOUGLAS E. BELOOF, *Constitutional Civil Rights of Crime Victim Participation: The Emergence of Secondary Harm as a Rational Principle*, *in* VICTIMS IN CRIMINAL

from the fact that the victim perceives that the "system's resources are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's hands."[94] As two noted experts on the psychological effects of crime have concluded, failure to offer victims a chance to participate in criminal proceedings can "result in increased feelings of inequity on the part of the victims, with a corresponding increase in crime-related psychological harm."[95] On the other hand, there is mounting evidence that "having a voice may improve victims' mental condition and welfare."[96] For some victims, making a statement helps restore balance between themselves and the offenders.[97] Others may consider it part of a just process or may want "to communicate the impact of the offense to the offender."[98] This multiplicity of reasons explains why victims and surviving family members want so desperately to participate in sentencing hearings, even though their participation may not necessarily change the outcome.[99]

The possibility of the sentencing process aggravating the grievous injuries suffered by victims and their families is generally ignored by the Amendment's opponents. But this possibility should give us great pause before we structure our criminal justice system to add the government's insult to criminally inflicted injury. For this reason alone, victims and their families, no less than defendants, should be given the opportunity to be heard at sentencing.

PROCEDURE 10–18 (1999) (explaining concept of secondary harm);.

[94]Task Force on the Victims of Crime and Violence, *Executive Summary: Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 AM. PSYCHOLOGIST 107, 109 (1985).

[95]Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 21 (1987) (collecting evidence on this point); *see also* Ken Eikenberry, *The Elevation of Victims' Rights in Washington State: Constitutional Status*, 17 PEPP. L. REV. 19, 26–32 (1989) (studying positive impacts of Washington's victims' rights constitutional amendment); Erez, *supra* note 58, at 8–10 ("The cumulative knowledge acquired from research in various jurisdictions . . . suggests that victims often *benefit* from participation and input."); Jason N. Swensen, *Survivor Says Measure Would Dignify Victims*, THE DESERET NEWS (Salt Lake City), Oct. 21, 1994, at B4 (noting anguish widow suffered when denied chance to speak at sentencing of husband's murderer).

[96]Erez, *supra* note 58, at 10.

[97]*See id.*

[98]*Id.* at 10; *see also* S. REP. NO. 105-409, at 17 (1998) (finding that victims' statements have important "cathartic" effects).

[99]*See* Erez, *supra* note 58, at 10 ("[T]he majority of victims of personal felonies wished to participate and provide input, even when they thought their input was ignored or did not affect the outcome of their case. Victims have multiple motives for providing input, and having a voice serves several functions for them . . . .") (internal footnote omitted).

2. The Right to Be Present at Trial

The allegation that the Amendment will impair defendants' rights is most frequently advanced in connection with the victim's right to be present at trial.[100] The most detailed and careful explication of the argument is Professor Mosteller's, advanced in this Symposium and elsewhere[101] and recently relied upon by the dissenting senators of the Judiciary Committee.[102] In brief, Mosteller believes that fairness to defendants requires that victims be excluded from the courtroom, at least in some circumstances, to avoid the possibility that they might tailor their testimony to that given by other witnesses.[103] While I admire the clarity and doggedness with which Mosteller has set forth his position, I respectfully disagree with his conclusions for reasons to be articulated at length elsewhere.[104] Here it is only necessary to note that even this strong opponent of the Amendment finds himself agreeing with the value underlying the victim's right. He writes: "Many victims have a special interest in witnessing public proceedings involving criminal cases that directly touched their lives."[105] This view is widely shared. For instance, the Supreme Court has explained that "[t]he victim of the crime, the family of the victim, [and] others who have suffered similarly . . . have an interest in observing the course of a prosecution."[106] Victim concern about the prosecution stems from the fact that society has withdrawn "both from the victim and the vigilante the enforcement of criminal laws, but [it] cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution."[107]

Professor Mosteller also seems to suggest that defendants currently have no constitutional right to exclude victims from trials, meaning that his

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[100]Technically, the right is "not to be excluded." *See infra* notes 136–39 and accompanying text (explaining reason for this formulation).

[101]*See* Mosteller, *Unnecessary Amendment*, *supra* note 13, at 457–69; *see also* Mosteller, *Recasting the Battle*, *supra* note 13, at 1698–1704.

[102]*See* S. REP. NO. 105-409, at 66 & n.44 (1998) (citing Mosteller).

[103]*See* Mosteller, *Unnecessary Amendment*, *supra* note 13, at 465 (finding that in specific situations, defendant's "due process right to a fair trial may require exclusion of [victim-] witnesses").

[104]*See* Paul G. Cassell & Douglas E. Beloof, The Victim's Right to Attend the Trial 10–18 (1999) (working manuscript, on file with author) (responding to Mosteller's view that victim's presence in courtroom infringes on defendant's rights).

[105]Mosteller, *Recasting the Battle*, *supra* note 13, at 1699.

[106]Gannett Co. v. DePasquale, 443 U.S. 368, 428 (1979) (Blackmun, J., concurring in part and dissenting in part).

[107]Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980) (plurality opinion); *see also* Pizzi, *supra* note 10, at [4] (noting importance of victim's right to attend trials).

argument rests purely on policy.[108] Mosteller's policy claim is not the general one that most victims ought to be excluded, but rather the much narrower one that "victims' rights to attend . . . proceedings should be guaranteed unless their presence threatens accuracy and fairness in adjudicating the guilt or innocence of the defendant."[109] On close examination, it turns out that, in Mosteller's view, victims' attendance threatens the accuracy of proceedings not in a typical criminal case, but only in the atypical case of a crime with multiple victims who are all eyewitness to the same event and who thus might tailor their testimony if allowed to observe the trial together.[110] This is a rare circumstance indeed, and it is hard to see the alleged disadvantage in this unusual circumstance outweighing the more pervasive advantages to victims in the run-of-the-mine cases.[111] Moreover, even in rare circumstances of multiple victims, other means exist for dealing with the tailoring issue. For example, the victims typically have given pretrial statements to police, grand juries, prosecutors, or defense investigators that would eliminate their ability to change their stories effectively.[112] In addition, the defense attorney may argue to the jury that victims have tailored their testimony even when they have not[113]—a fact that leads some critics of the Amendment to conclude that this provision will, if anything, help defendants rather than harm them. The dissenting Senators, for example, make precisely this helps-the-defendant

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[108]*See* Mosteller, *Recasting the Battle*, *supra* note 13, at 1701 n.29 ("I question whether the practice [permitting multiple victim-eyewitnesses to remain in the courtroom and hear the testimony of others] would violate a defendant's constitutional rights, although I acknowledge that the result is not entirely free from doubt."). In his article in this Symposium, Professor Mosteller has amplified his view somewhat, taking the position that "in extreme factual situations" a defendant will have a constitutional right to exclude witnesses. *See* Mosteller, *Unnecessary Amendment*, supra note 13, at 465. His position, however, seems to rest largely on policy grounds.

[109]Mosteller, *Recasting the Battle*, *supra* note 13, at 1699; *see also* Mosteller, *Unnecessary Amendment*, *supra* note 13, at 449–50 (finding that "the most important reason" that victims' rights are not fully enforced is lack of resources and personnel).

[110]*See* Mosteller, *Recasting the Battle*, *supra* note 13, at 1700 (arguing that, in cases of multiple victims, "a substantial danger exists" that victim-witnesses will be influenced during testimony of others); Mosteller, *Unnecessary Amendment*, *supra* note 13, at 465 (similar argument).

[111]*See* Erez, *Victim Participation*, *supra* note 69, at 29 (criticizing tendency of lawyers "to use an atypical or extreme case to make their point" and calling for public policy in the victims area to be based on more typical cases); *cf.* Robert P. Mosteller, Book Review, *Popular Justice*, 109 HARV. L. REV. 487, 487 (1995) (critiquing George P. Fletcher's book, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995), for "ignor[ing] how the criminal justice system operates in ordinary" cases).

[112]*See* Cassell, *supra* note 104 (explaining how prior statements would make it difficult for victim to change story).

[113]*See* S. REP. NO. 105-409, at 82 (1998) (additional views of Sen. Biden).

argument,[114] although at another point they present the contrary harms-the-defendant claim.[115] In short, the critics have not articulated a strong case against the victim's right to be present.

3. The Right to Consideration of the Victim's Interest in a Trial Free from Unreasonable Delay

Opponents of the Amendment sometimes argue that giving victims a right to "consideration" of their interest "that any trial be free from unreasonable delay"[116] would impinge on a defendant's right to prepare an adequate defense. For example, the dissenting senators in the Judiciary Committee claimed that "the defendant's need for more time could be outweighed by the victim's assertion of his right to have the matter expedited, seriously compromising the defendant's right to effective assistance of counsel and his ability to receive a fair trial."[117] Similarly, Professor Mosteller advances the claim here that this right "also affect[s] substantial interests of the defendant and may even alter the outcomes of cases."[118]

These arguments fail to consider the precise scope of the victim's right in question. The right the Amendment confers is one to "*consideration* of the interest of the victim that any trial be free from *unreasonable* delay."[119] The opponents never seriously grapple with the fact that, by definition, all of the examples that they give of defendants legitimately needing more time to prepare would constitute reasons for "reasonable" delay. Indeed, it is interesting to note similar language in the American Bar Association's directions to defense attorneys to avoid "unnecessary delay" that might harm victims.[120] The victim's right, moreover, is to "consideration" of the victim's interests. The proponents of the Amendment could not have been clearer

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[114]*See id.* at 61 (minority views of Sens. Leahy, Kennedy, and Kohl) ("[T]here is also the danger that the victim's presence in the courtroom during the presentation of other evidence will cast doubt on her credibility as a witness . . . . Whole cases . . . may be lost in this way.").

[115]*See id.* at 65 (minority views of Sens. Leahy, Kennedy, and Kohl) ("Accuracy and fairness concerns may arise . . . where the victim is a fact witness whose testimony may be influenced by the testimony of others.").

[116]S.J. Res. 3, 106th Cong. § 1 (1999).

[117]S. REP. NO. 105-409, at 66 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl).

[118]Mosteller, *Unnecessary Amendment*, *supra* note 13, at 473; *see also* Mosteller, *Recasting the Battle*, *supra* note 13, at 1706–08 ("[L]egislation enacted under § 3 of the . . . Amendment to enforce the right to final disposition free from unreasonable delay may conflict with the right to effective assistance of counsel and with basic due process rights.").

[119]S.J. Res. 3, 106th Cong. § 1 (1999).

[120]A.B.A., SUGGESTED GUIDELINES FOR REDUCING ADVERSE EFFECTS OF CASE CONTINUANCES AND DELAYS ON CRIME VICTIMS AND WITNESSES 4 (1985).

about the intent to allow legitimate defense continuances. As the Judiciary Committee explained:

> The Committee intends for this right to allow victims to have the trial of the accused completed as quickly as is reasonable under all of the circumstances of the case, giving both the prosecution and the defense a reasonable period of time to prepare. The right would not require or permit a judge to proceed to trial if a criminal defendant is not adequately represented by counsel.[121]

Such a right, while not treading on any legitimate interest of a defendant, will safeguard vital interests of victims. Victims' advocates have offered repeated examples of abusive delays by defendants designed solely for tactical advantage rather than actual preparation of the defense of a case.[122] Abusive delays appear to be particularly common when the victim of the crime is a child, for whom each day up until the case is resolved can seem like an eternity.[123] Such cases present a strong justification for this provision in the Amendment. Nonetheless, writing in this Symposium, Professor Mosteller advances the proposition that this right "should undergo rigorous debate on [its] merits and should not slide in under the cover of a campaign largely devoted to giving victims' rights to notice and to participate in criminal proceedings."[124] This seems a curious argument, as the victims community has tried to debate this right "on its merits" for years. As long ago as 1982, the President's Task Force on Victims of Crime offered suggestions for protecting a victim's interest in a prompt disposition of the case.[125] In the years since then, it has been hard to find critics of victims' rights willing to contend, on the merits, the need for protecting victims against abusive delay.[126] If anything, the time has arrived for the opponents of the victim's

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[121]S. REP. NO. 105-409, at 3 (1998); *see also 1998 Senate Judiciary Comm. Hearings*, *supra* note 26, at 37–38 (statement of Prof. Paul Cassell) (discussing factors that could be used to evaluate victims' claims of unreasonable delay).

[122]*See, e.g.*, *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 115–16 (statement of Paul G. Cassell, Professor of Law, University of Utah College of Law) (describing such a case); *see also* Paul G. Cassell & Evan S. Strassberg, *Evidence of Repeated Acts of Rape and Child Molestation: Reforming Utah Law to Permit the Propensity Inference*, 1998 UTAH L. REV. 145, 146 (discussing case where defendant delayed trial three years by refusing to hire counsel and falsely claiming indigency).

[123]*See* Cassell, *supra* note 33, at 1402–05 (providing illustration).

[124]Mosteller, *Unnecessary Amendment*, *supra* note 13, at 473.

[125]*See* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME. FINAL REPORT 76 (1982).

[126]*Cf.* Henderson, *supra* note 14, at 419 (conceding that "reasonableness" language might "allow judges to ferret out instances of dilatory tactics while recognizing the genuine need for time," but concluding that constitutional amendment is not needed to confer this power on

right to proceedings free from unreasonable delay to address the serious problem of unwarranted delay in criminal proceedings or to concede that, here too, a strong case for the Amendment exists.

B. Prosecution-Oriented Challenges to the Amendment

Some objections to victims' rights rest not on alleged harm to defendants' interests but rather on alleged harm to the interests of the prosecution. Often these objections surprisingly come from persons not typically solicitous of prosecution concerns,[127] suggesting that some skepticism may be warranted. In any event, the arguments lack foundation.

It is sometimes argued that only the State should direct criminal prosecutions. This claim might have some bite against a proposal to allow victims to initiate or otherwise control the course of criminal prosecutions,[128] but it has little force against the proposed amendment. The Victims' Rights Amendment assumes a prosecution-directed system and simply grafts victims' rights onto it. Victims receive notification of decisions that the prosecution makes and, indeed, have the right to provide information to the court at appropriate junctures, such as bail hearings, plea bargaining, and sentencing. However, the prosecutor still files the complaint and moves it through the system, making decisions not only about which charges, if any, to file, but also about which investigative leads to pursue and which witnesses to call at trial. While victims can "follow[] their own case down the

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judges).

[127]*See, e.g.*, Scott Wallace, *Mangling the Constitution: The Folly of the Victims' Rights Amendment*, WASH. POST, June 28, 1996, at A21 (op-ed piece from special counsel with National Legal Aid and Defender Association warning that Amendment would harm police and prosecutors).

[128]*See, e.g.*, Peter L. Davis, *The Crime Victim's "Right" to a Criminal Prosecution: A Proposed Model Statute for the Governance of Private Criminal Prosecutions*, 38 DEPAUL L. REV. 329, 330 (1989) (proposing statute to govern private criminal prosecutions). *See generally* DOUGLAS BELOOF, VICTIMS IN CRIMINAL PROCEDURE 235–357 (1999) (comprehensively discussing current means of victim involvement in charging process). Allowing victims to initiate their own prosecutions is no novelty, as it is consistent with the English common-law tradition of private prosecutions, brought to the American colonies. *See* 1 SIR JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 493–503 (1883); Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 521–22; Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 359, 384 (1986); Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 125–26 (1984); William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 651–54 (1976).

assembly line" in Professor Beloof's colorful metaphor,[129] the fact remains that the prosecutor runs the assembly line. This general approach of grafting victims' rights onto the existing system mirrors the approach followed by all of the various state victims' amendments, and few have been heard to argue that the result has been interference with legitimate prosecution interests.

Perhaps an interferes-with-the-prosecutor objection might be refined to apply only against a victim's right to be heard on plea bargains, since this right arguably hampers a prosecutor's ability to terminate the prosecution. But today, it is already the law of many jurisdictions that the court must determine whether to accept or reject a proposed plea bargain after weighing all relevant interests.[130] Given that victims undeniably have relevant, if not compelling, interests in proposed pleas, the Amendment neither breaks new theoretical ground nor displaces any legitimate prosecution interest. Instead, victim statements simply provide more information for the court to consider in making its decision. The available empirical evidence also suggests that victim participation in the plea bargaining process does not burden the courts and produces greater victim satisfaction even where, as is often the case, victims ultimately do not influence the outcome.[131]

In addition, critics of victim involvement in the plea process almost invariably overlook the long-standing acceptance of judicial review of plea bargains. These critics portray pleas as a matter solely for a prosecutor and a defense attorney to work out. They then display a handful of cases in which the defendant was ultimately acquitted at trial after courts had the temerity to reject a plea after hearing from victims. These cases, the critics maintain, prove that any outside review of pleas is undesirable.[132] The possibility of an

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[129]Beloof, *supra* note 9, at 296 (referring to HERBERT PACKER, THE LIMITS OF CRIMINAL SANCTION 163 (1968)).

[130]For cogent explication of the law on this issue, see BELOOF, *supra* note 128, at 462–88 (1999). *See also* NATIONAL CONFERENCE OF THE JUDICIARY ON THE RIGHTS OF VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, STATEMENT OF RECOMMENDED JUDICIAL PRACTICES 10 (1983) (recommending victim participation in plea negotiations).

[131]*See, e.g.*, DEBORAH BUCHNER ET AL., INSLAW, INC., EVALUATION OF THE STRUCTURED PLEA NEGOTIATION PROJECT: EXECUTIVE SUMMARY 15, 21 (1984) (examining effects of structured plea negotiations in which judge, defendant, victim, prosecutor, and defense attorney all participate).

[132]*See, e.g.*, S. REP. NO. 105-409, at 60–61 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl).

An illustration of this position is found in recent testimony by former federal prosecutor Beth Wilkinson. She argued that if victims had been heard during the Oklahoma City bombing case they would have prevented a government plea agreement with Michael Fortier and hurt the prosecution's case against Timothy McVeigh and Terry Nichols. *See Testimony of Beth A. Wilkinson Before the Senate Judiciary Comm. on the Proposed Victims' Rights Amendment* (Mar. 24, 1999) <http://www.senate.gov/~judiciary/32499bw.htm> (cited in Mosteller, *Unnecessary Amendment*, *supra* note 13, at 463 n.57). Wilkinson's argument is flawed because

erroneous rejection of a plea is, of course, inherent in any system allowing review of a plea. In an imperfect world, judges will sometimes err in rejecting a plea that, in hindsight, should have been accepted. The salient question, however, is whether as a whole judicial review does more good than harm—that is, whether, on balance, courts make more right decisions than wrong ones. Just as cases can be cited where judges possibly made mistakes in rejecting a plea, so too cases exist where judges rejected plea bargains that were unwarranted.[133] These reported cases of victims persuading judges to reject unjust pleas form just a small part of the picture, because in many other cases, the mere prospect of victim objection undoubtedly has restrained prosecutors from bargaining cases away without good reason. My strong sense is that judicial review of pleas by courts after hearing from victims more often improves rather than retards justice. The failure of the critics to contend on the issue of *net* effect and the growing number of jurisdictions that allow victim input[134] is strong evidence for this conclusion.

Another prosecution-based objection to victims' rights is that, while they are desirable in theory, in practice they would be unduly expensive.[135] Here again, prominent critics must distort the language of the Amendment to

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it assumes, without giving any good reason, that the judge would have simply rejected the plea if the victims had opposed it. In any event, the great majority of the victims would have supported the plea if the government had explained it to them. *See Hearings on S.J. Res. 3 Before the Senate Comm. on the Judiciary*, 106th Cong. (forthcoming 1999) [hereinafter *1999 Senate Judiciary Comm. Hearings*] (statement of Marsha A. Kight, Director of Families and Survivors United, Oklahoma City). Moreover, Fortier's testimony was not important to obtaining the convictions of McVeigh and Nichols, as the jurors later made clear. *See id.*

If anything, the handling of the Fortier plea demonstrates that even federal statutes do not effectively protect victims' rights. In an effort to ram the Fortier plea through, the prosecution did not notify the victims about it. *See id.* Both of these failures were apparent violations of federal law. *See* 42 U.S.C. § 10606(b)(3) (1994) (giving victims right "to be notified of court proceedings"); *id.* § 10606(b)(5) (giving victims right "to confer with [the] attorney for the government"); *see supra 1999 Senate Judiciary Comm. Hearings* (statement of Marsha Kight) (noting these violations of federal law).

[133]*See, e.g.*, People v. Stringham, 253 Cal. Rptr. 484, 488–96 (Cal. App. 1988) (rejecting unwarranted plea bargain).

[134]*See* BELOOF, *supra* note 128, at 462.

[135]Sometimes the argument is cast not in terms of the Amendment diminishing prosecutorial resources, but rather victim resources. For example, Professor Henderson urges rejection of the Amendment on grounds that "we need to concentrate on things that aid recovery" by spending more on victim assistance and similar programs. Henderson, *supra* note 14, at 441; *see also* Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 606 (1998) (noting benefits of programs to help victims deal with trauma). But there is no incompatibility between passing the Amendment and expanding such programs. Indeed, if the experience at the state level is any guide, passage of the Amendment will, if anything, lead to an increase in resources devoted to victim-assistance efforts because of their usefulness in implementing the rights contained in the Amendment.

manufacture a point in their favor. For example, the dissenting Senators claimed that the victim's right "not to be excluded *from*" the trial equates with a victim's right to be transported *to* the trial. They then conclude that "[t]he right not to be excluded could create a duty for the Government to provide travel and accommodation costs for victims who could not otherwise afford to attend."[136] This fanciful objection runs contrary to both the plain language of the Amendment and the explicit statements of its supporters and sponsors. The underlying right is not for victims to be transported to the courthouse, but simply to enter the courthouse once there. As the Senate Judiciary Committee report explains, "The right conferred is a negative one—a right '*not* to be excluded'—to avoid the suggestion that an alternative formulation—a right "to attend"—might carry with it some governmental obligation to provide funding . . . for a victim to attend proceedings."[137] The objection also runs counter to current interpretations of comparable language in other enactments. Federal law and many state constitutional amendments already extend to victims the arguably more expansive right "to be present" at or "to attend" court proceedings.[138] Yet no court has interpreted any one of these provisions as guaranteeing a victim a right of transportation and lodging at public expense. The federal amendment is even less likely to be construed to confer such an unprecedented entitlement because of its negative formulation.[139]

Once victims arrive at the courthouse, their attendance at proceedings imposes no significant incremental costs. In exercising their right to attend, victims simply can sit in the benches that have already been built. Even in cases involving hundreds of victims, innovative approaches such as closed-

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[136]S. REP. NO. 105-409, at 63 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl).

[137]*Id.* at 26. The government, of course, already provides travel and accommodation expenses for the many victims who are witnesses in criminal cases.

[138]For right "to be present" formulations, see, for example, 42 U.S.C. § 10606(b)(4) (1994); ALASKA CONST. art. I, § 24; ARIZ. CONST. art. 2, § 2.1(A)(3)–(4); IDAHO CONST. art. I, § 22(4), (6); ILL. CONST. art. I, § 8.1; IND. CONST. art. I. § 13(b); MISS. CODE ANN. § 59-36-5(2) (1994); MO. CONST. art. I, § 32(1)(i); NEV. CONST. art. I, § 8(2)(b); N.M. CONST. art. II, § 24(A)(5); N.C. CONST. art. I, § 37(1)(a); OKLA. CONST. art. II, § 34A; S.C. CONST. art. I, § 24(A)(3); UTAH CONST. art. I, § 28(1)(b); *see also* ARK. CODE ANN.§ 16-41-101 (1994) (Rule 616). For a right "to attend" formulation, see MICH. CONST. art. I, § 24(1).

[139]An Alabama statute also uses this phrasing without reported deleterious consequences. *See* ALA. CODE § 15-14-54 (1995) (recognizing victim's right "not [to] be excluded from court or counsel table during the trial or hearing or any portion thereof.").

circuit broadcasting have proven feasible.[140] As for the victim's right to be heard, the state experience reveals only a modest cost impact.[141]

Most of the cost arguments have focused on the Amendment's notification provisions. Yet, it is already recognized as sound prosecutorial practice to provide notice to victims. The National Prosecution Standards prepared by the National District Attorneys Association recommend that victims of violent crimes and other serious felonies should be informed, where feasible, of important steps in the criminal justice process.[142] In addition, many states have required that victims receive notice of a broad range of criminal justice proceedings. Nearly every state provides notice of the trial, sentencing, and parole hearings.[143] In spite of the fact that notice is already required in many circumstances across the country, the dissenting senators on the Judiciary Committee argued that the "potential costs of [the Amendment's] constitutionally mandated notice requirements alone are staggering."[144] Perhaps these predictions should simply be written off as harmless political rhetoric, but it is important to note that these suggestions are inconsistent with the relevant evidence. The experience with victim notice requirements already used at the state level suggests that the costs are relatively modest, particularly since computerized mailing lists and automated telephone calls can be used. The Arizona amendment serves as a good illustration. That amendment extends notice rights far beyond what is called for in the federal amendment;[145] yet, prosecutors have not found the

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[140]*See* 42 U.S.C.A. 10608(a) (West Supp. 1998) (authorizing closed circuit broadcast of trials whose venue has been moved more than 350 miles). This provision was used to broadcast proceedings in the Oklahoma City bombing trial in Denver back to Oklahoma City.

[141]*See, e.g.*, NIJ SENTENCING STUDY, *supra* note 67, at 59 (stating that right to allocute in California "has not resulted in any noteworthy change in the workload of either the courts, probation departments, district attorneys' offices or victim/witness programs"); *id.* at 69 (finding no noteworthy change in workload of California parole board); Erez, *Victim Participation*, *supra* note 69, at 22 ("Research in jurisdictions that allow victim participation indicates that including victims in the criminal justice process does not cause delays or additional expense."); *see also* DAVIS ET AL., *supra* note 68, at 69 (noting that expanded victim impact program did not delay dispositions in New York).

[142]NATIONAL DISTRICT ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS § 26.1, at 92 (2d ed. 1991).

[143]*See* NATIONAL VICTIM CENTER, 1996 VICTIMS' RIGHTS SOURCEBOOK: A COMPILATION AND COMPARISON OF VICTIMS' RIGHTS LEGISLATION 24 (collecting statutes).

[144]S. REP. NO. 105-409, at 62 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl).

[145]The Arizona Amendment extends notification rights to all crime victims, not just victims of violent crime as provided in the federal amendment. *Compare* ARIZ. CONST. art. II § 2.1(A)(3), (C), *with* S.J. Res. 3, 106th Cong. § 2 (1999).

expense burdensome in practice.[146] As a result of the existing state notification requirements, any incremental expense in Arizona from the federal amendment should be quite modest.

The only careful and objective assessment of the costs of the Amendment also reaches the conclusion that the costs are slight. The Congressional Budget Office reviewed the financial impact of not just the notification provisions of the Amendment, but of all its provisions, on the federal criminal justice system. The CBO concluded that, were the Amendment to be approved, it "could impose additional costs on the Federal courts and the Federal prison system . . . . However, CBO does not expect any resulting costs to be significant."[147]

This CBO report is a good one on which to wrap up the discussion of normative objections to the Amendment. Here is an opportunity to see how the critics' claims fare when put to a fair-minded and neutral assessment. In fact, the critics' often-repeated allegations of "staggering" costs were found to be exaggerated.

II. JUSTIFICATION CHALLENGES

A. The "Unnecessary" Constitutional Amendment

Because the normative arguments for victims' rights are so powerful, some critics of the Victims' Rights Amendment take a different tack and mount what might be described as a justification challenge. This approach concedes that victims' rights may be desirable, but maintains that victims already possess such rights or can obtain such rights with relatively minor modifications in the current regime. The best single illustration of this attack is found in Professor Mosteller's article in this Symposium, entitled *The Unnecessary Victims' Rights Amendment*.[148] There, Mosteller contends that a constitutional amendment is not needed because the obstacles that victims face—described by Mosteller as "official indifference" and "excessive judicial deference"—can all be overcome without a constitutional amendment.[149]

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[146]*See* Richard M. Romley, *Constitutional Rights for Victims: Another Perspective*, THE PROSECUTOR, May 1997, at 7 (noting modest cost of state amendment in Phoenix); *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 97 (1997) (statement of Barbara LaWall, Pima County Prosecutor) (noting that cost has not been problem in Tucson).

[147]CONGRESSIONAL BUDGET OFFICE COST ESTIMATE, S.J. RES. 44, *reprinted in* S. REP. NO. 105-409, at 39–40 (1998).

[148]Mosteller, *Unnecessary Amendment*, *supra* note 13.

[149]*Id.* at 449; *see also* Mosteller, *Recasting the Battle*, *supra* note 13, at 1711–12 (developing similar argument).

Professor Mosteller's clearly developed position is ultimately unpersuasive because it supplies a purely theoretical answer to a practical problem. In theory, victims' rights could be safeguarded without a constitutional amendment. It would only be necessary for actors within the criminal justice system—judges, prosecutors, defense attorneys, and others—to suddenly begin fully respecting victims' interests. The real-world question, however, is how to actually trigger such a shift in the *Zeitgeist*. For nearly two decades, victims have obtained a variety of measures to protect their rights. Yet, the prevailing view from those who work in the field is that these efforts "have all too often been ineffective."[150] Rules to assist victims "frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia."[151] The view that state victim provisions have been and will continue to be often disregarded is widely shared, as some of the strongest opponents of the Amendment seem to concede the point. For example, Ellen Greenlee, President of the National Legal Aid and Defender Association, bluntly and revealingly told Congress that the state victims' amendments "so far have been treated as mere statements of principle that victims ought to be included and consulted more by prosecutors and courts. A state constitution is far . . . easier to ignore[] than the federal one."[152]

Professor Mosteller attempts to minimize the current problems, conceding only that "existing victims' rights are not uniformly enforced."[153] This is a grudging concession to the reality that victims' rights are often denied today, as numerous examples of violations of rights in the congressional record and elsewhere attest.[154] A comprehensive view comes from a careful study of the issue by the Department of Justice. As reported by the Attorney General, the Department found that

> efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims' rights advocates have sought reforms at the state level for the past twenty years,

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[150]Tribe & Cassell, *supra* note 22, at B5; *see, e.g., 1996 Senate Judiciary Comm. Hearings*, *supra* note 8, at 109 (statement of Steven Twist) ("There are victims of arson in Atlanta, GA, who have little or no say, as the victims . . . of an earlier era had about their victimization."); *id.* at 30 (statement of John Walsh) (stating that victims' rights amendments on state level do not work); *id.* at 26 (statement of Katherine Prescott) ("Victims' roles in the prosecution of cases will always be that of second-class citizens" if victims' rights are only specified in state statutes).

[151]Tribe & Cassell, *supra* note 22, at B5.

[152]*1996 House Judiciary Comm. Hearings*, *supra* note 7, at 147.

[153]Mosteller, *Unnecessary Amendment*, *supra* note 13, at [4].

[154]*See, e.g., 1998 Senate Judiciary Comm. Hearings*, *supra* note 26, at 103–06 (statement of Marlene Young).

> and many states have responded with state statutes and constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights. These significant state efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.[155]

Similarly, an exhaustive report from those active in the field concluded that "[a] victims' rights constitutional amendment is the only legal measure strong enough to rectify the current inconsistencies in victims' rights laws that vary significantly from jurisdiction to jurisdiction on the state and federal levels."[156]

Hard statistical evidence on noncompliance with victims' rights laws confirms these general conclusions about inadequate protection. A 1998 report from the National Institute of Justice ("NIJ") found that many victims are denied their rights and concluded that "enactment of State laws and State constitutional amendments alone appears to be insufficient to guarantee the full provision of victims' rights in practice."[157] The report found numerous examples of victims not provided rights to which they were entitled. For example, even in several states identified as giving "strong protection" to victims rights, fewer than 60% of the victims were notified of the sentencing hearing and fewer than 40% were notified of the pretrial release of the defendant.[158] A follow-up analysis of the same data found that racial minorities are less likely to be afforded their rights under the patchwork of existing statutes.[159] Professor Mosteller dismisses these figures with the essentially *ad hominem* attack that they were collected by the National Victim Center, which supports a victims' rights amendment.[160] However, the data themselves were collected by an independent polling firm.[161] Mosteller also

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[155] *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 64 (statement of Att'y Gen. Reno).

[156] OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 10 (1998).

[157] NAT'L INST. OF JUSTICE, RESEARCH IN BRIEF, THE RIGHTS OF CRIME VICTIMS—DOES LEGAL PROTECTION MAKE A DIFFERENCE? 1 (Dec. 1998) [hereinafter NIJ REPORT]. An earlier version of essentially the same report is reprinted in *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 15.

[158] NIJ REPORT, *supra* note 157, at 4 exh.1.

[159] *See* NATIONAL VICTIM CENTER, STATUTORY AND CONSTITUTIONAL PROTECTION OF VICTIMS' RIGHTS, IMPLEMENTATION AND IMPACT ON CRIME VICTIMS, SUB-REPORT: COMPARISON OF WHITE AND NON-WHITE CRIME VICTIM RESPONSES REGARDING VICTIMS' RIGHTS 5 (1997) [hereinafter NVC RACE SUB-REPORT] ("[I]n many instances non-white victims were less likely to be provided those [crime victims'] rights . . . .").

[160] *See* Mosteller, *Unnecessary Amendment*, *supra* note 13, at 447 n.13.

[161] *See* NIJ REPORT, *supra* note 157, at 11.

cites one internal Justice Department reviewer who stated during the review process in conclusory terms that the report was unsatisfactory and should not be published.[162] The conclusion of the NIJ review process, however, after hearing from all reviewers, including apparently favorable peer reviews, was to publish the study.[163] Finally, Mosteller criticizes the data as resting on unverified self-reported data from crime victims. However, since the research question was how many victims had been afforded their rights, asking victims, rather than the agencies suspected of failing to provide rights, would appear to be a standard methodological approach. The study also obtained a very high response rate (83%) from the victims interviewed,[164] suggesting that the findings are not due to any kind of responder bias. And given the magnitude of the alleged failures to provide victims' rights—ranging up to 60% and more—the general dismissal picture presented by the NIJ report is clear. Opponents of the Amendment offer no competing statistics, and such other data as exist tend to corroborate the NIJ findings of substantial noncompliance.[165]

Given such statistics, it is interesting to consider what the defenders of the status quo believe is an acceptable level of violation of rights. Suppose new statistics could be gathered that show that victims' rights are respected in 75% of all cases, or 90%, or even 98%. America is so far from a 98% rate for affording victims rights that my friends on the front lines of providing victim services probably will dismiss this exercise as a meaningless law school hypothetical. But would a 98% compliance rate demonstrate that the amendment is "unnecessary"? Even a 98% enforcement rate would leave numerous victims unprotected. As the Supreme Court has observed in response to the claim that the Fourth Amendment exclusionary rule affects

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[162]*See* Mosteller, *Unnecessary Amendment*, *supra* note 13, at 447 n.13 (citing Memorandum from Sam McQuade, Program Manager, NIJ, to Jeremy Travis, Director, NIJ (May 16, 1997)).

[163]NAT'L INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, GUIDE TO WRITING REPORTS FOR NIJ: POLICY, REQUIREMENTS, AND PROCEDURES 3 (1998) (listing procedures for NIJ's publication process, including external peer review panel).

[164]*See* NIJ REPORT, *supra* note 157, at 3. Professor Mosteller criticizes the NIJ's reported 83% response figure, suggesting that it was actually as low as 29%. *See* Mosteller, *Unnecessary Amendment*, *supra* note 13, at 447 n.13. I will not take time here to explain why I disagree with his 29% calculation, but simply press the point that he offers no specific reason for believing that the basic finding of the NIJ would have been any different had the response rate been higher.

[165]*See, e.g.*, HILLENBRAND & SMITH, *supra* note 69, at 112 (noting that prosecutors and victims consistently report that victims are "not usually" given notice or consulted in significant proportion of cases); Erez, *Victim Participation*, *supra* note 69, at 26 (finding that victims are rarely informed of right to make statements and victim impact statements are not always prepared).

"only" about 2% of all cases in this country, "small percentages . . . mask a large absolute number of" cases.[166] A rough calculation suggests that even if the Victims' Rights Amendment improved treatment for only 2% of the violent crime cases it affects, a total of about 30,000 victims would benefit each year.[167] Even more importantly, we would not tolerate a mere 98% "success" rate in enforcing other important rights. Suppose that, in opposition to the Bill of Rights, it had been argued that 98% of all Americans could worship in the religious tradition of their choice, 98% of all newspapers could publish without censorship from the government, 98% of criminal defendants had access to counsel, and 98% of all prisoners were free from cruel and unusual punishment. Surely the effort still would have been mounted to move the totals closer to 100%. Given the wide acceptance of victims' rights, they deserve the same respect.

Professor Mosteller does not spend much time reviewing the level of compliance in the current system, instead moving quickly to the claim that the Amendment will "not automatically eliminate[]" the problem of official indifference to victims' rights.[168] But the key issue is not whether the Amendment will "eliminate" indifference, but rather whether it will reduce indifference—thereby improving the lot of victims. Here the posture of the Amendment's critics is quite inconsistent. On the one hand, they posit dramatic *damaging* consequences that will reverberate throughout the system after the Amendment's adoption, even though those consequences are entirely unintended. Yet, at the same time, they are unwilling to concede that the Amendment will make even modest *positive* consequences in the areas that it specifically addresses.

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[166]United States v. Leon, 468 U.S. 897, 907–08 n.6 (1984); *see also* CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 43–44 (1993) (worrying about effect of exclusionary rule, if 5% of cases are dismissed due to *Miranda* violations and 5% are dismissed due to search problems).

[167]FBI estimates suggest an approximate total of about 2,303,600 arrests for violent crimes each year, broken down as follows: 729,900 violent crimes within the crime index (murder, forcible rape, robbery, aggravated assault), 1,329,000 other assaults, 95,800 sex offenses, and 149,800 offenses against family and children. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1996, at 214 tbl.29 (1997). A rough estimate is that about 70% of these cases will be accepted for prosecution, within the adult system. *See* Brian Forst, *Prosecution and Sentencing*, *in* CRIME 363–64 (James Q. Wilson & Joan Petersilia eds., 1995). Assuming the Amendment would benefit 2% of the victims within these charged cases produces the figure in text. For further discussion of issues surrounding such extrapolations, see Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 438–40; Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And From* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 514–16 (1998).

[168]Mosteller, *Unnecessary Amendment*, *supra* note 13, at 449.

The best view of the Amendment's effects is a moderate one that avoids the varying extremes of the critics. Of course the Amendment will not eliminate all violations of victims' rights, particularly because practical politics have stripped from the Amendment its civil damages provision.[169] But neither will the Amendment amount to an ineffectual response to official indifference. On this point, it is useful to consider the steps involved in adopting the Amendment. Both the House and Senate of the United States Congress would pass the measure by two-thirds votes. Then a full three-quarters of the states would ratify the provision.[170] No doubt these events would generate dramatic public awareness of the nature of the rights and the importance of providing them. In short, the adoption of the Amendment would constitute a major national event. One might even describe it as a "constitutional moment" (of the old fashioned variety) where the nation recognizes the crucial importance of protecting certain rights for its citizens.[171] Were such events to occur, the lot of crime victims likely would improve considerably. The available social science research suggests that the primary barrier to successful implementation of victims' rights is "the socialization of [lawyers] in a legal culture and structure that do not recognize the victim as a legitimate party in criminal proceedings."[172] Professor Mosteller seems to agree generally with this view, explaining that "officials fail to honor victims' rights largely as a result of inertia, past learning, insensitivity to the unfamiliar needs of victims, lack of training, and inadequate or misdirected institutional incentives."[173] A constitutional amendment, reflecting the instructions of the nation to its criminal justice system, is perfectly designed to attack these problems and develop a new legal culture supportive of victims. To be sure, one can paint the prospect of

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[169]*See* S.J. Res. 3, 106th Cong. § 2 (1999). *See generally* Cassell, *supra* note 33, at 1418–21 (discussing damages actions under victims' rights amendments).

[170]*See* U.S. CONST. art. V.

[171]*Cf.* 1 BRUCE ACKERMAN, WE THE PEOPLE *passim* (1990) (discussing "constitutional moments").

[172]Erez, *Victim Participation*, *supra* note 69, at 29; *see also* WILLIAM PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT 196–97 (1999) (discussing problems with American trial culture); Pizzi, *supra* note 10, at 359–60 (noting trial culture emphasis on winning and losing that may overlook victims); William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 37–40 (1996) ("So poor is the level of communication that those within the system often seem genuinely bewildered by the victims' rights movement, even to the point of suggesting rather condescendingly that victims are seeking a solace from the criminal justice system that they ought to be seeking elsewhere.").

[173]Mosteller, *Unneccesary Amendment*, *supra* note 13, at 449.

such a change in culture as "entirely speculative."[174] Yet this means nothing more than that, until the Amendment passes, we will not have an opportunity to precisely assay its positive effects. Constitutional amendments have changed our legal culture in other areas, and clearly the logical prediction is that a victims' amendment would go a long way towards curing official indifference. This hypothesis is also consistent with the findings of the NIJ study on state implementation of victims' rights. The study concluded that "[w]here legal protection is strong, victims are more likely to be aware of their rights, to participate in the criminal justice system, to view criminal justice system officials favorably, and to express more overall satisfaction with the system."[175] It is hard to imagine any stronger protection for victims' rights than a federal constitutional amendment. Moreover, we can confidently expect that those who will most often benefit from the enhanced consistency in protecting victims' rights will be members of racial minorities, the poor, and other disempowered groups. Such victims are the first to suffer under the current, "lottery" implementation of victims' rights.[176]

Professor Mosteller devotes much of his article to challenging the claim that the Amendment is needed to block excessive official deference to the rights of criminal defendants. Proponents of the Amendment have argued that, given two hundred years of well-established precedent supporting defendants' rights, the apparently novel victims' rights found in state constitutional amendments and elsewhere too frequently have been ignored on spurious grounds of alleged conflict.[177] Professor Mosteller, however, rejects this argument on the ground that there is no "currently valid appellate opinion reversing a defendant's conviction because of enforcement of a provision of state or federal law or state constitution that granted a right to a victim."[178] As a result, he concludes, there is no evidence of a "significant body of law that would warrant the remedy of a constitutional amendment."[179]

This argument does not refute the case for the Amendment, but rather is a mere straw man created by the opponents. The important issue is not whether victims' rights are thwarted by a body of *appellate* law, but rather whether they are blocked by *any* obstacles, including most especially obstacles at the trial level where victims must first attempt to secure their

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[174]*Id.* at 447.

[175]NIJ REPORT, *supra* note 157, at 10.

[176]*See supra* note 159 and accompanying text (noting that minority victims are least likely to be afforded rights today); *cf.* Henderson, *supra* note 14, at 421–22 (criticizing "lottery approach" to affording victims' rights).

[177]*See, e.g.*, *infra* Part II.B (discussing victims' rights in Oklahoma City bombing case).

[178]Mosteller, *Unnecessary Amendment*, *supra* note 13, at 452.

[179]*Id.* at 453; *see also* S. REP. NO. 105-409, at 51–52 (1998).

rights. One would naturally expect to find few appellate court rulings rejecting victims' rights; there are few victims' rulings anywhere, let alone in appellate courts. To get to the appellate level—in this context, the "mansion" of the criminal justice system—victims first must pass through the "gatehouse"—the trial court.[180] That trip is not an easy one. Indeed, one of the main reasons for the Amendment is that victims find it extraordinarily difficult to get anywhere close to appellate courts. To begin with, victims may be unaware of their rights or discouraged by prosecutors from asserting them. Even if aware and interested in asserting their rights in court, victims may lack the resources to obtain counsel. Finding counsel, too, will be unusually difficult, since the field of victims' rights is a new one in which few lawyers specialize.[181] Time will be short, since many victims' issues, particularly those revolving around sequestration rules, arise at the start of or even during the trial. Even if a lawyer is found, she must arrange to file an interlocutory appeal in which the appellate court will be asked to intervene in ongoing trial proceedings in the court below. If victims can overcome all these hurdles, the courts still possess an astonishing arsenal of other procedural obstacles to prevent victim actions, as Professor Bandes's paper in this Symposium cogently demonstrates.[182] In light of all these hurdles, appellate opinions about victim issues seem, to put it mildly, quite unlikely.

One can interpret the resulting dearth of rulings as proving, as Professor Mosteller would have it, that no reported appellate decisions strike down victims' rights. Yet it is equally true that, at best, only a handful of reported appellate decisions uphold victims' rights. This fact tends to provide an explanation for the frequent reports of denials of victims' rights at the trial level. Given that these rights are newly created and the lack of clear appellate sanction, one would expect trial courts to be wary of enforcing these rights against the inevitable, if invariably imprecise, claims of violations of a defendant's rights.[183] Narrow readings will be encouraged by the asymmetries

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[180]*Cf.* Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, *in* YALE KAMISAR ET AL., CRIMINAL JUSTICE IN OUR TIME 19 (1965) (famously developing this analogy in context of police interrogation).

[181]*See* Henderson, *supra* note 14, at 429. Hopefully this situation may improve with the publication of Professor Beloof's law school casebook on victim's rights, *see* BELOOF, *supra* note 128, which may encourage more training in this area.

[182]*See* Susan Bandes, *supra* note 11, *passim*; *see also* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273 (1991) [hereinafter Bandes, *The Negative Constitution*] (discussing courts' reluctance to review government inaction in protection of constitutional rights); Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 229–30 (1990) (noting how courts limit and define issues in case).

[183]As shown in Part I.A, *supra*, victims' rights do not actually conflict with defendant's rights. Frequently, however, it is the defendant's mere *claim* of alleged conflict, not carefully considered by the trial court, that ends up producing (along with the other contributing factors)

of appeal—defendants can force a new trial if their rights are denied, while victims cannot.[184] Victims, too, may be reluctant to attempt to assert untested rights for fear of giving a defendant grounds for a successful appeal and a new trial.[185]

In short, nothing in the appellate landscape provides a basis for concluding that all is well with victims in the nation's trial courts. The Amendment's proponents have provided ample examples of victims denied rights in the day-to-day workings of the criminal trials. The Amendment's opponents seem tacitly to concede the point by shifting the debate to the more rarified appellate level. Thus, here again, the opponents have not fully engaged the case for the Amendment.

As one final fallback position, the Amendment's critics maintain that it will not "eliminate" the problems in enforcing victims' rights because some level of uncertainty will always remain.[186] However, as noted before, the issue is not *eliminating* uncertainty, but *reducing* it. Surely giving victims explicit constitutional protection will vindicate their rights in many circumstances where today the trial judge would be uncertain how to proceed. Moreover, the Amendment's clear conferral of "standing" on victims[187] will help to develop a body of precedents on how victims are to be treated. There is, accordingly, every reason to expect that the Amendment will reduce uncertainties substantially and improve the lot of crime victims.

B. The Oklahoma City Illustration of the "Necessary" Amendment

On assessing whether the Amendment is "necessary," it might be said that "a page of history is worth a volume of logic."[188] To be sure, one can cite examples of victims who have received fair treatment in the criminal justice system, as Professor Henderson's moving narrative about her treatment during the prosecution of her rapist demonstrates.[189] Nonetheless, this and

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the denial of victims' rights.

[184]*See* Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 5–7 (1990) (examining consequences of asymmetric risk of legal error in criminal cases); *see also* Erez & Rogers, *supra* note 69, at 228–29 (noting reluctance of South Australian judges to rely on victim evidence because of appeal risk).

[185]*See* Paul G. Cassell, *Fight for Victims' Justice is Going Strong*, THE DESERET NEWS, July 10, 1996, at A7 (illustrating this problem with uncertain Utah case law on victim's right to be present).

[186]Mosteller, *Unnecessary Amendment*, *supra* note 13, at 464.

[187]*See* S.J. Res. 3, 106th Cong. § 2 (1999) ("Only the victim or the victim's legal representative shall have standing to assert the rights established by this article . . . .").

[188]New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.).

[189]*See* Henderson, *supra* note 14, at 433–41.

other examples hardly make the case against reform, as even Henderson seems to concede that there is a need for improvement in many cases.[190] The question then becomes whether a constitutional amendment would operate to spur that improvement. Here it is necessary to look not at the system's successes in ruling on victims' claims, but rather at its failures. The Oklahoma City bombing case provides an illustration of the difficulties victims face in having their claims considered by appellate courts.

During a pre-trial motion hearing in the Timothy McVeigh prosecution, the district court *sua sponte* issued a ruling precluding any victim who wished to provide victim impact testimony at sentencing from observing any proceeding in the case.[191] The court based its ruling on Rule 615 of the Federal Rules of Evidence—the so-called "rule on witnesses."[192] In the hour that the court then gave to victims to make this wrenching decision about testifying, some of the victims opted to watch the proceedings; others decided to leave Denver to remain eligible to provide impact testimony.[193]

Thirty-five victims and survivors of the bombing then filed a motion asserting their own standing to raise their rights under federal law and, in the alternative, seeking leave to file a brief on the issue as *amici curiae*.[194] The victims noted that the district court apparently had overlooked the Victims' Bill of Rights, a federal statute guaranteeing victims the right (among others) "to be present at all public court proceedings, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial."[195]

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[190]*See id.* at 434.

[191]*See* United States v. McVeigh, No. 96-CR-68, 1996 WL 366268, at *2 (D. Colo. June 26, 1996).

[192]*Id.* at **2–3 (discussing application of FED. R. EVID. 615).

[193]*See 1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 73 (statement of Marsha Kight).

[194]Motion of Marsha and Tom Kight et al. and the National Organization for Victim Assistance Asserting Standing to Raise Rights Under the Victims' Bill of Rights and Seeking Leave to File a Brief as *Amici Curiae*, *United States v. McVeigh*, No. 96-CR-68-M, 1996 WL 570841 (D. Colo. Sept. 30, 1996). I represented a number of the victims on this matter on a pro bono basis, along with able co-counsel Robert Hoyt, Arnon Siegel, and Karan Bhatia of the Washington, D.C. law firm of Wilmer, Cutler, and Pickering, and Sean Kendall of Boulder, Colorado. For a somewhat fuller recounting of the victims' issues in the case, see *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 106–13 (statement of Paul Cassell).

[195]42 U.S.C. § 10606(b)(4) (1994). The victims also relied on a similar provision found in the authorization for closed circuit broadcasting of the trial, 42 U.S.C.A. § 10608(a) (West Supp. 1998), and on a First Amendment right of access to public court proceedings, *see* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577 (1980) (finding First Amendment right of court access).

The district court then held a hearing to reconsider the issue of excluding victim witnesses.[196] The court first denied the victims' motion asserting standing to present their own claims, allowing them only the opportunity to file amicus briefs.[197] After argument by the Department of Justice and by the defendants, the court denied the motion for reconsideration.[198] It concluded that victims present during court proceedings would not be able to separate the "experience of trial" from "the experience of loss from the conduct in question," and, thus, their testimony at a sentencing hearing would be inadmissible.[199] Unlike the original ruling, which was explicitly premised on Rule 615, the October 4 ruling was more ambiguous, alluding to concerns under the Constitution, the common law, and the rules of evidence.[200]

The victims then filed a petition for writ of mandamus in the U.S. Court of Appeals for the Tenth Circuit seeking review of the district court's ruling.[201] Because the procedures for victims appeals were unclear, the victims filed a separate set of documents appealing from the ruling.[202] Similarly, the Department of Justice, uncertain of precisely how to proceed procedurally, filed both an appeal and a petition for a writ of mandamus.

Three months later, a panel of the Tenth Circuit rejected—without oral argument—both the victims' and the Department's claims on jurisdictional grounds. With respect to the victims' challenges, the court concluded that the victims lacked "standing" under Article III of the Constitution because they had no "legally protected interest" to be present at the trial and consequently had suffered no "injury in fact" from their exclusion.[203] The Tenth Circuit also found that the victims had no right to attend the trial under any First Amendment right of access.[204] Finally, the Tenth Circuit rejected, on jurisdictional grounds, the appeal and mandamus petition filed by the Department.[205] Efforts by both the victims and the Department of Justice to obtain a rehearing were unsuccessful,[206] even with the support of separate

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[196]*See* United States v. McVeigh, No. 96-CR-68, 1996 WL 578525, at **16–25 (D. Colo. Oct. 4, 1996).

[197]*See id.* at *16.

[198]*See id.* at *25.

[199]*Id.* at *24.

[200]*See id.*

[201]Petition for Writ of Mandamus, Kight et al. v. Matsch, No. 96-1484 (10th Cir. Nov. 6, 1996) (on file with author).

[202]*See* United States v. McVeigh, 106 F.3d 325, 328 (10th Cir. 1997).

[203]*Id.* at 334–35.

[204]*See id.* at 335; *see supra* note 195 (discussing right of access for press under First Amendment).

[205]*See McVeigh*, 106 F.3d at 333.

[206]*See* Order, United States v. McVeigh, No. 96-1469, 1997 WL 128893, at *3 (10th Cir. Mar. 11, 1997).

briefs urging rehearing from forty-nine members of Congress, all six Attorneys General in the Tenth Circuit, and some of the leading victims' groups in the nation.[207]

In the meantime, the victims, supported by the Oklahoma Attorney General's Office, sought remedial legislation in Congress clearly stating that victims should not have to decide between testifying at sentencing and watching the trial. The Victims' Rights Clarification Act of 1997 was introduced to provide that watching a trial does not constitute grounds for denying the chance to provide an impact statement. Representative Wexler, a supporter of the legislation, observed the painful choice that the district court's ruling was forcing on the victims:

> As one of the Oklahoma City survivors put it, a man who lost one eye in the explosion, "'It's not going to affect our testimony at all. I have a hole in my head that's covered with titanium. I nearly lost my hand. I think about it every minute of the day.'"
>
> That man, incidentally, is choosing to watch the trial and to forfeit his right to make a victim impact statement. Victims should not have to make that choice.[208]

The measure passed the House by a vote of 418 to 19.[209] The next day, the Senate passed the measure by unanimous consent.[210] The following day, President Clinton signed the Act into law,[211] explaining that "when someone

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[207]*See* Brief for Amici Curiae Washington Legal Foundation and United States Senators Don Nickles and 48 Other Members of Congress, United States v. McVeigh, 106 F.3d 325 (10th Cir. Feb. 14, 1997) (No. 96-1469) (on file with author) (warning that decision meant that victims of federal crimes will never be heard for violations of their rights); Brief for Amici Curiae States of Oklahoma, Colorado, Kansas, New Mexico, Utah, and Wyoming Supporting the Suggestion for Rehearing and the Suggestion for Rehearing En Banc by the Oklahoma City Bombing Victims and the United States, United States v. McVeigh, 106 F.3d 325 (10th Cir. Feb. 14, 1997) (No. 96-1469) (on file with author) (warning that decision created "an 'important problem' for the administration of justice within the Tenth Circuit"); Brief for Amici Curiae National Victims Center, Mothers Against Drunk Driving, the National Victims' Constitutional Amendment Network, Justice for Surviving Victims, Inc., Concerns of Police Survivors, Inc., and Citizens for Law and Order, Inc., in Support of Rehearing, United States v. McVeigh, 106 F.3d 325 (10th Cir. Feb. 17, 1997) (No. 96-1469) (on file with author) (warning that decision will "preclude anyone from exercising any rights afforded under the Victims' Bill of Rights").

[208]143 CONG. REC. H1050 (daily ed. Mar. 18, 1997) (statement of Rep. McCollum).

[209]*See id.* at H1068 (five members not voting).

[210]*See* 143 CONG. REC. S2509 (daily ed. Mar. 19, 1997) (statement of Sen. Nickles).

[211]*See* Pub. L. No. 105-6, *codified at* 18 U.S.C.A. § 3510 (West Supp. 1998).

is a victim, he or she should be at the center of the criminal justice process, not on the outside looking in."[212]

The victims then promptly filed a motion with the district court asserting a right to attend under the new law.[213] The victims explained that the new law invalidated the court's earlier sequestration order and sought a hearing on the issue.[214] Rather than squarely uphold the new law, however, the district court entered a new order on victim-impact witness sequestration.[215] The court concluded that "any motions raising constitutional questions about this legislation would be premature and would present issues that are not now ripe for decision."[216] Moreover, the court held that it could address issues of possible prejudicial impact from attending the trial by conducting a voir dire of the witnesses *after* the trial.[217] The district court also refused to grant the victims a hearing on the application of the new law, concluding that its ruling rendered their request "moot."[218]

After that ruling, the Oklahoma City victim impact witnesses—once again—had to make a painful decision about what to do. Some of the victim impact witnesses decided *not* to observe the trial because of ambiguities and uncertainties in the court's ruling, raising the possibility of excluding testimony from victims who attended the trial.[219] The Department of Justice also met with many of the impact witnesses, advising them of these substantial uncertainties in the law, and noting that any observation of the trial would create the possibility of exclusion of impact testimony.[220] To end this confusion, the victims filed a motion for clarification of the judge's order.[221] The motion noted that "[b]ecause of the uncertainty remaining under

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[212]William J. Clinton, Statement by the President, Mar. 19, 1997 (visited May 17, 1999) <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1997/3/20/6.text.1>.

[213]*See* Memorandum of Marsha Kight et al. on the Victims Rights Clarification Act of 1997, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 144614, at *3 (D. Colo. Mar. 21, 1997).

[214]*See* Motion of Marsha Kight et al. for Hearing, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 144564, at *1 (D. Colo. Mar. 21, 1997).

[215]*See* Order Amending Order Under Rule 615, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 136343, at *3 (D. Colo. Mar. 25, 1997).

[216]*Id.*

[217]*See id.*

[218]*See* Order Declaring Motion Moot, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 136344, at *1 (D. Colo. Mar. 25, 1997).

[219]*See 1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 111 (statement of Prof. Paul Cassell); *id.* at 70 (statement of Marsha Kight).

[220]*See id.* at 111 (statement of Prof. Paul Cassell).

[221]*See* Request of the Victims of the Oklahoma City Bombing and the National Organization for Victim Assistance for Clarification of the Order Amending the Order Under Rule 615, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 159969, at **1, 2 (D. Colo. Apr. 4, 1997) (requesting that court clarify ruling in which victim impact testimony could be

the Court's order, a number of the victims have been forced to give up their right to observe defendant McVeigh's trial. This chilling effect has thus rendered the Victims' Rights Clarification Act of 1997 . . . for practical purposes a nullity."[222] Unfortunately, the effort to obtain clarification did not succeed, and McVeigh's trial proceeded without further guidance for the victims.

After McVeigh was convicted, the victims filed a motion to be heard on issues pertaining to the new law.[223] Nonetheless, the court refused to allow the victims to be represented by counsel during argument on the law or during voir dire about the possible prejudicial impact of viewing the trial.[224] The court, however, concluded (as the victims had suggested all along) that no victim was in fact prejudiced as a result of watching the trial.[225]

This recounting of the details of the Oklahoma City bombing litigation leaves no doubt about the difficulties that victims face with mere statutory protection of their rights. For a number of the victims, the rights afforded in the Victims' Rights Clarification Act of 1997 and the earlier Victims' Bill of Rights were not protected. They did *not* observe the trial of defendant Timothy McVeigh because of lingering doubts about the constitutional status of these statutes.

Not only were these victims denied their right to observe the trial, but perhaps equally troubling is that the fact that they were never able to speak even a single word in court, through counsel, on this issue. This denial occurred in spite of legislative history specifically approving of victim participation. In passing the Victims' Rights Clarification Act, the House Judiciary Committee stated that it "assumes that both the Department of Justice *and victims* will be heard on the issue of a victim's exclusion, should a question of their exclusion arise under this section."[226] In the Senate, the

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denied).

[222]*Id.* at *2.

[223]*See* Motion of the Victims of the Oklahoma City Bombing to Reassert the Motion for a Hearing on the Application of the Victim Rights Clarification Act of 1997, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 312104, at *6 (D. Colo. June 2, 1997) (arguing for opportunity to participate in any argument or constitutionality and application of Act).

[224]*See* Hearing on Victims Rights Clarification Act, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 290019, at *7 (D. Colo. June 3, 1997) (concluding that statute does not "create[] standing for the persons who are identified as being represented by counsel in filing that brief").

[225]*See, e.g.*, Examination of Diane Leonard, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 292341, at *4 (D. Colo. June 4, 1997) (testifying that she was not unduly influenced by trial proceedings).

[226]H.R. REP NO. 105-28, at 10 (1997) (emphasis added). Supporting this statement was the fact that, while the Victims Bill of Rights apparently barred some civil suits by victims, 42 U.S.C. § 10606(c), the new law contained no such provision. This was no accident. As the

primary sponsor of the bill similarly stated: "In disputed cases, the courts will hear from the Department of Justice, *counsel for the affected victims*, and counsel for the accused."[227] Yet, the victims were never heard.

Some might claim that this treatment of the Oklahoma City bombing victims should be written off as atypical. However, there is every reason to believe that the victims here were far *more* effective in attempting to vindicate their rights than victims in less notorious cases. The Oklahoma City bombing victims were mistreated while the media spotlight was on—when the nation was watching. The treatment of victims in forgotten courtrooms and trials is certainly no better, and in all likelihood much worse. Moreover, the Oklahoma City bombing victims had five lawyers working to press their claims in court—a law professor familiar with victims' rights, three lawyers at a prominent Washington, D.C. law firm, and a local counsel in Colorado—as well as an experienced and skilled group of lawyers from the Department of Justice. In the normal case, it often will be impossible for victims to locate a lawyer willing to pursue complex and unsettled issues about their rights without compensation. One must remember that crime most often strikes the poor and others in a weak position to retain counsel.[228] Finally, litigating claims concerning exclusion from the courtroom or other victims' rights promises to be quite difficult. For example, a victim may not learn that she will be excluded until the day the trial starts. Filing effective appellate actions in such circumstances promises to be practically impossible. It should therefore come as little surprise that this litigation was the *first* in which victims sought federal appellate court review of their rights under the Victims' Bill of Rights, even though that statute was passed in 1990.

The undeniable, and unfortunate, result of that litigation has been to establish—as the only reported federal appellate ruling—a precedent that will make effective enforcement of the federal victims' rights statutes quite difficult. It is now the law of the Tenth Circuit that victims lack "standing" to be heard on issues surrounding the Victims' Bill of Rights and, for good measure, that the Department of Justice may not take an appeal asserting rights for victims under the statute.[229] For all practical purposes, the treatment

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Report of the House Judiciary Committee pointedly explained: "The Committee points out that it has not included language in this statute that bars a cause of action by the victim, as it has done in other statutes affecting victims' rights." H.R. REP NO. 105-28 at 10 (1997).

[227] 143 CONG. REC. S2507 (daily ed. Mar. 19, 1997) (statement of Sen. Nickles).

[228] *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENT CRIME IN THE UNITED STATES 8 (1991) (noting that crime is more likely to strike low-income families); *cf.* Henderson, *supra* note 135, at 579 (noting that many crime victims come from disempowered groups).

[229] *See* United States v. McVeigh, 106 F.3d 325, 335–36 (10th Cir. 1997) (finding that victims lack standing to challenge law).

of crime victims' rights in federal court in Utah, Colorado, Kansas, New Mexico, Oklahoma, and Wyoming has been remitted to the unreviewable discretion of individual federal district court judges. The fate of the Oklahoma City victims does not inspire confidence that all victims' rights will be fully enforced in the future. Even in other circuits, the Tenth Circuit ruling, while not controlling, may be treated as having persuasive value. If so, the Victims' Bill of Rights will effectively become a dead letter.

The Oklahoma City bombing victims would never have suffered these indignities if the Victims' Rights Amendment had been the law of the land. First, the victims would never have been subject to sequestration. The Amendment guarantees all victims the constitutional right "not to be excluded from[] any public proceedings relating to the crime."[230] This would have prevented the sequestration order from being entered in the first place. Moreover, the Amendment affords victims the right "to be heard, if present, . . . at [a public] proceeding[] to determine a . . . sentence."[231] This provision would have protected the victims' right to provide impact testimony. Finally, the Amendment provides that "the victim . . . shall have standing to assert the rights established by this article,"[232] a protection guaranteeing the victims, through counsel, the opportunity to be heard to protect those rights.

Critics of the Victims' Rights Amendment have cited the Oklahoma City remedial legislation as an example of the "ability of victims to secure their interests through popular political action"[233] and "a paradigmatic example of how statutes, when properly crafted, can and do work."[234] This sentiment is far wide of the mark. To the contrary, the Oklahoma City case provides a compelling illustration of why a constitutional amendment is "necessary" to fully protect victims' rights in this country.

III. STRUCTURAL CHALLENGES

A final category of objections to the Victims' Rights Amendment can be styled as "structural" objections. These objections concede both the normative claim that victims' rights are desirable and the factual claim that such rights are not effectively provided today. These objections maintain, however, that a federal constitutional amendment should not be the means

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[230]S.J. Res. 3, 106th Cong. § 1 (1999).

[231]*Id.*

[232]*Id.* § 2.

[233]Mosteller, *Unnecessary Amendment*, *supra* note 13, at 460.

[234]S. REP. NO. 105-409, at 56 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl).

through which victims' rights are afforded. These objections come in three primary forms. The standard form is that victims' rights simply do not belong in the Constitution as they are different from other rights found there. A variant on this critique is that any attempt to constitutionalize victims' rights will lead to inflexibility, producing disastrous, unintended consequences. A final form of the structural challenge is that the Amendment violates principles of federalism. Each of these arguments, however, lacks merit.

A. Claims that Victims' Rights Do Not Belong in the Constitution

Perhaps the most basic challenge to the Victims' Rights Amendment is that victims' rights simply do not belong in the Constitution. The most fervent exponent of this view may be constitutional scholar Bruce Fein, who has testified before Congress that the Amendment is improper because it does not address "the political architecture of the nation."[235] Putting victims' rights into the Constitution, the argument runs, is akin to constitutionalizing provisions of the National Labor Relations Act or other statutes, and thus would "trivialize" the Constitution.[236] Indeed, the argument concludes, to do so would "detract from the sacredness of the covenant."[237]

This argument misconceives the fundamental thrust of the Victims' Rights Amendment, which is to guarantee victim participation in basic governmental processes. The Amendment extends to victims the right to be notified of court hearings, to attend those hearings, and to participate in them in appropriate ways. As Professor Tribe and I have explained elsewhere:

> These are rights not to be victimized again through the process by which government officials prosecute, punish and release accused or convicted offenders. These are the very kinds of rights with which our Constitution is typically and properly concerned—rights of individuals to participate in all those government processes that strongly affect their lives.[238]

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[235] *Proposals to Provide Rights to Victims of Crime: Hearings on H.J. Res. 71 & H.R. 1322 Before the House Comm. on the Judiciary*, 105th Cong. 96 (1997) (statement of Bruce Fein).

[236] *1996 Senate Judiciary Comm. Hearings*, *supra* note 8, at 101 (statement of Bruce Fein).

[237] *Id.* at 100. For similar views, see, for example, Stephen Chapman, *Constitutional Clutter: The Wrongs of the Victims' Rights Amendment*, CHI. TRIB., Apr. 20, 1997, at A21; *Cluttering the Constitution*, N.Y. TIMES, July 15, 1996, at A12.

[238] Tribe & Cassell, *supra* note 22, at B5.

Indeed, our Constitution has been amended a number of times to protect participatory rights of citizens. For example, the Fourteenth and Fifteenth Amendments were added, in part, to guarantee that the newly freed slaves could participate on equal terms in the judicial and electoral processes, the Seventeenth Amendment to allow citizens to elect their own Senators, and the Nineteenth and Twenty-Sixth Amendments to provide voting rights for women and eighteen-year-olds.[239] The Victims' Rights Amendment continues in that venerable tradition by recognizing that citizens have the right to appropriate participation in the state procedures for punishing crime.

Confirmation of the constitutional worthiness of victims' rights comes from the judicial treatment of an analogous right: the claim of the media to a constitutionally protected interest in attending trials. In *Richmond Newspapers, Inc. v. Virginia*,[240] the Court agreed that the First Amendment guaranteed the right of the public and the press to attend criminal trials.[241] Since that decision, few have argued that the media's right to attend trials is somehow unworthy of constitutional protection, suggesting a national consensus that attendance rights to criminal trials are properly the subject of constitutional law. Yet, the current doctrine produces what must be regarded as a stunning disparity in the way courts handle claims of access to court proceedings. Consider, for example, two issues actually litigated in the Oklahoma City bombing case. The first was the request of an Oklahoma City television station for access to subpoenas for documents issued through the court. The second was the request of various family members of the murdered victims to attend the trial, discussed previously.[242] My sense is that the victims' request should be entitled to at least as much respect as the media request. However, under the law that exists today, the television station has a First Amendment interest in access to the documents, while the victims' families have no constitutional interest in challenging their exclusion from the trial.[243] The point here is not to argue that victims deserve greater constitutional protection than the press, but simply that if press interests can

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[239]U.S. CONST. amends. XIV, XV, XIX, XXVI.

[240]448 U.S. 554 (1980).

[241]*See id.* at 557 (stating that right to attend criminal trials is implicit in guarantees of First Amendment).

[242]*See supra* Part II.B.

[243]*Compare* United States v. McVeigh, 918 F. Supp. 1452, 1465–66 (W.D. Okla. 1996) (recognizing press interest in access to documents), *with* United States v. McVeigh, 106 F.3d 325, 335–36 (10th Cir. 1997) (finding that victims do not have standing to raise First Amendment challenge to order excluding them from trial). *See also* United States v. McVeigh, 119 F.3d 806, 814–15 (10th Cir. 1997) (recognizing First Amendment interest of press in access to documents, but sufficient findings made to justify sealing order).

be read into the Constitution without somehow violating the "sacredness of the covenant," the same can be done for victims.[244]

Professor Henderson has advanced a variant on the victims'-rights-don't-belong-in-the-Constitution argument with her claim that "a theoretical constitutional ground for victim's rights" has yet to be provided.[245] Law professors, myself included, enjoy dwelling on theory at the expense of real-world issues, but even on this plane, the objection lacks merit. Henderson seems to concede, if I read her correctly, that new constitutional rights can be justified on grounds that they support individual dignity and autonomy.[246] In her view, then, the question becomes one of discovering which policies society should support as properly reflecting individual dignity and autonomy. On this score, there is little doubt that society currently believes that a victim's right to participate in the criminal process is a fundamental one deserving protection. As Professor Beloof has explained at length in his piece here, "It is time to face the fact that the law now acknowledges the importance of victim participation in the criminal process."[247]

A further variant on the unworthiness objection is that our Constitution protects only "negative" rights against governmental abuse. Professor Henderson writes here, for example, that the Amendment's rights differ from others in the Constitution, which "tend to be individual rights *against* government."[248] Setting aside the possible response that the Constitution ought to recognize affirmative duties of government,[249] the fact remains that

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[244]In this way, the Amendment does not detract from First Amendment liberties, but expands them. *But cf.* Henderson, *supra* note 14, at 420 (suggesting that victims' rights arguably could affect First Amendment liberties, but conceding that "advocates of the Amendment have not argued for a balancing of victim's rights against the rights of the press").

[245]*Id.* at 386.

[246]*See id.* at 396–400.

[247]Beloof, *supra* note 9, at 289; *see also id.* at 328 app. a (compiling victim participation laws from state to state); Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. OF INT'L & COMP. L. 839, 868–72 (1997) (discussing fundamental nature of victims' rights); Note, *Passing the Victims' Rights Amendment: A Nation's March Toward a More Perfect Union*, 24 CRIM. & CIV. CONFINEMENT 647, 681–85 (1998) (same). *See generally* BELOOF, *supra* note 128, *passim* (legal case book replete with examples of victims' rights in process).

[248]Henderson, *supra* note 14, at 397; *see also 1996 House Judiciary Comm. Hearings*, *supra* note 7, at 194 (statement of Roger Pilon) (stating that Amendment has "feel" of listing "'rights' not as liberties that government must respect as it goes about its assigned functions but as 'entitlements' that the government must affirmatively provide"); Bruce Shapiro, *Victims & Vengeance: Why the Victims' Rights Amendment Is a Bad Idea*, THE NATION, Feb. 10, 1997, at 16 (suggesting that Amendment "[u]pends the historic purpose of the Bill of Rights").

[249]*See* Bandes, *The Negative Constitution*, supra note 182, at 2308–09 (suggesting that Constitution should be read to recognize and protect affirmative rights).

the Amendment's thrust is to check governmental power, not expand it.[250] Again, the Oklahoma City case serves as a useful illustration. When the victims filed a challenge to a sequestration order directed at them, they sought the liberty to attend court hearings. In other words, they were challenging the exercise of government power deployed against them, a conventional subject for constitutional protection. The other rights in the Amendment fit this pattern, as they restrain government actors, rather than extract benefits for victims. Thus, the State must give notice before it proceeds with a criminal trial; the State must respect a victim's right to attend that trial; and the State must consider the interests of victims at sentencing and other proceedings. These are the standard fare of constitutional protections, and indeed defendants already possess comparable constitutional rights. Thus, extending these rights to victims is no novel creation of affirmative government entitlements.[251]

Still another form of this claim is that victims' rights need not be protected in the Constitution because victims possess power in the political process—unlike, for example, unpopular criminal defendants.[252] This claim is factually unconvincing because victims' power is easy to overrate. Victims' claims inevitably bump up against well-entrenched interests within the criminal justice system,[253] and to date, the victims' movement has failed to achieve many of its ambitions. Victims have not, for example, generally

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[250]*See* Beloof, *supra* note 9, at 295 n.32.

[251]Perhaps some might quibble with this characterization as applied to a victim's right to an order of restitution, contending that this is a right solely directed against deprivations perpetrated by private citizens. However, the right to restitution is a right against government, as it is a right to "an *order* of restitution," an order that can only be provided by the courts. In any event, even if the restitution right is somehow regarded as implicating private action, it should be noted that the Constitution already addresses private conduct. The Thirteenth Amendment forbids "involuntary servitude," U.S. CONST. amend. XIII, a provision that encompasses private violation of rights. *See, e.g.*, United States v. Kozminski, 487 U.S. 931, 942 (1988) (stating that Thirteenth Amendment extends beyond state action). *See generally* Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* Deshaney, 105 HARV. L. REV. 1359, 1365–68 (1992) (discussing contours of Thirteenth Amendment); Henderson, *supra* note 14, at 387–88 (noting "good arguments" that Thirteenth Amendment "appl[ies] to the acts of individuals").

[252]*See, e.g.*, *1996 Senate Judiciary Comm. Hearings*, *supra* note 8, at 100 (statement of Bruce Fein) (stating that defendants are subject to whims of majority); Henderson, *supra* note 14, at 400 (asserting that victims' rights are protected through democratic process); Mosteller, *supra* note 13, at 474 (maintaining that defendants are despised and politically weak, thus needing constitutional protection).

[253]*See* Andrew J. Karmen, *Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. OF LEGAL COMMENT. 157, 162–69 (1992) (stating that if victims gain influence in criminal justice process, they will inevitably conflict with officials).

obtained the right to sue the government for damages for violations of their rights, a right often available to criminal defendants and other ostensibly less powerful groups. Additionally, the political power claim is theoretically unsatisfying as a basis for denying constitutional protection. After all, freedom of speech, freedom of religion, and similar freedoms hardly want for lack of popular support, yet they are appropriately protected by constitutional amendments. A standard justification for these constitutionally guaranteed freedoms is that we should make it difficult for society to abridge such rights, to avoid the temptation to violate them in times of stress or for unpopular claimants.[254] Victims' rights fit perfectly within this rationale. Institutional players in the criminal justice system are subject to readily understandable temptations to give short shrift to victims' rights, and their willingness to protect the rights of unpopular crime victims is sure to be tested no less than society's willingness to protect the free speech rights of unpopular speakers.[255] Indeed, evidence exists that the biggest problem today in enforcing victims' rights is inequality, as racial minorities and other less empowered victims are more frequently denied their rights.[256]

A final worthiness objection is the claim that victims' rights "trivialize" the Constitution,[257] by addressing such a mundane subject. It is hard for anyone familiar with the plight of crime victims to respond calmly to this claim. Victims of crime literally have died because of the failure of the criminal justice system to extend to them the rights protected by the Amendment. Consider, for example, the victims' right to be notified upon a prisoner's release. The Department of Justice recently explained that

> [a]round the country, there are a large number of documented cases of women and children being killed by defendants and convicted offenders recently released from jail or prison. In many of these cases, the victims

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[254]*See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (stating that we should be vigilant against attempts to infringe on free speech rights, unless danger and threat is immediate and clear); *see also* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–52 (1985) (arguing that First Amendment should be targeted to protect free speech rights even at worst times).

[255]*See* Karmen, *supra* note 253, at 168–69 (explaining why criminal justice professionals are particularly unlikely to honor victims' rights for marginalized groups).

[256]*See* NVC RACE SUB-REPORT, *supra* note 159, at 5 ("[I]n many instances non-white victims were less likely to be provided [crime victims'] rights . . . .").

[257]*1996 Senate Judiciary Comm. Hearings*, *supra* note 8, at 101 (statement of Bruce Fein); *see also* S. REP. NO. 105-409, at 54 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl) ("We should not diminish the majesty of the Constitution . . . .").

> were unable to take precautions to save their lives because they had not been notified.[258]

The tragic unnecessary deaths of those victims is, to say the least, no trivial concern.

Other rights protected by the Amendment are similarly consequential. Attending a trial, for example, can be a crucial event in the life of the victim. The victim's presence can not only facilitate healing of debilitating psychological wounds,[259] but also help the victim try to obtain answers to haunting questions. As one woman who lost her husband in the Oklahoma City bombing explained, "When I saw my husband's body, I began a quest for information as to exactly what happened. The culmination of that quest, I hope and pray, will be hearing the evidence at a trial."[260] On the other hand, excluding victims from trials—while defendants and their families may remain—can itself revictimize victims, creating serious additional or "secondary" harm from the criminal process itself.[261] In short, the claim that the Victims' Rights Amendment trivializes the Constitution is itself a trivial contention.

B. The Problem of Inflexible Constitutionalization

Another argument raised against the Victims' Rights Amendment is that victims' rights should receive protection through flexible state statutes and amendments, not an inflexible, federal, constitutional amendment. If victims' rights are placed in the United States Constitution, the argument runs, it will be impossible to correct any problems that might arise. The Judicial Conference explication of this argument is typical: "Of critical importance, such an approach is significantly more flexible. It would more easily accommodate a measured approach, and allow for 'fine tuning' if deemed

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[258]OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 13–14 (1998); *see* Jeffrey A. Cross, Note, *The Repeated Sufferings of Domestic Violence Victims Not Notified of Their Assailant's Pre-Trial Release from Custody: A Call for Mandatory Domestic Violence Victim Notification Legislation*, 34 J. FAM. L. 915, 932–33 (1996) (arguing for legislation that requires notification to victim when assailant is released from prison).

[259]*See supra* notes 92–99 and accompanying text (discussing how victim participation can have healing effect).

[260]*1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 110 (statement of Paul Cassell) (quoting victim).

[261]*See supra* notes 92–99 and accompanying text.

necessary or desirable by Congress after the various concepts in the Act are applied in actual cases across the country."[262]

This argument contains a kernel of truth because its premise—that the Federal Constitution is less flexible than state provisions—is undeniably correct. This premise is, however, the starting point for the victims' position as well. Victims' rights all too often have been "fine tuned" out of existence. As even the Amendment's critics agree, state amendments and statutes are "far easier . . . to ignore,"[263] and for this very reason victims seek to have their rights protected in the Federal Constitution. To carry any force, the argument must establish that the greater respect victims will receive from constitutionalization of their rights is outweighed by the unintended, undesirable, and uncorrectable consequences of lodging rights in the Constitution.

Such a claim is untenable. To begin with, the Victims' Rights Amendment spells out in considerable detail the rights it extends. While this wordiness has exposed the Amendment to the charge of "cluttering the Constitution,"[264] the fact is that the room for surprises is substantially less than with other previously adopted, more open-ended amendments. On top of the Amendment's precision, its sponsors further have explained in great detail their intended interpretation of the Amendment's provisions.[265] In response, the dissenting Senators were forced to argue not that these explanations were imprecise or unworkable, but that courts simply would ignore them in interpreting the Amendment[266] and, presumably, go on to impose some contrary and damaging meaning. This is an unpersuasive leap because courts routinely look to the intentions of drafters in interpreting constitutional language no less than other enactments.[267] Moreover, the assumption that courts will interpret the Amendment to produce great mischief requires justification. One can envision, for instance, precisely the same arguments about the need for flexibility being leveled against a

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[262]S. REP. NO. 105-409, at 53 (1998) (reprinting Letter from George P. Kazen, Chief U.S. District Judge, Chair, Comm. on Criminal Law of the Judicial Conference of the United States, to Sen. Edward M. Kennedy, Senate Comm. on the Judiciary 2 (Apr. 17, 1997)).

[263]*1996 House Judiciary Comm. Hearings*, *supra* note 7, at 147 (statement of Ellen Greenlee, Nat'l Legal Aid & Defender Assoc.).

[264]*Cluttering the Constitution*, N.Y. TIMES, July 15, 1996, at A12 (arguing that political expediency is no excuse for amending Constitution).

[265]*See* S. REP. NO. 105-409, at 22–37 (1998) (considering specific analysis of each section of Amendment).

[266]*See id.* at 50–51 (minority views of Sens. Leahy, Kennedy, and Kohl) (arguing that "courts will not care much" for analysis in Senate Report).

[267]*See, e.g.*, U.S. Term Limits, Inc. v. Thorton, 514 U.S. 779, 790 (1995).

defendant's right to a trial by jury.[268] What about petty offenses?[269] What about juvenile proceedings?[270] How many jurors will be required?[271] All these questions have, as indicated in the footnotes, been resolved by court decision without disaster to the Union. There is every reason to expect that the Victims' Rights Amendment will be similarly interpreted in a sensible fashion. Just as courts have not read the seemingly unqualified language of the First Amendment as creating a right to yell "Fire!" in a crowded theater,[272] they will not construe the Victims' Rights Amendment as requiring bizarre results.[273]

In any event, the claim of unintended consequences amounts to an argument about language—specifically, that the language is insufficiently malleable to avoid disaster. An argument about inflexible language can be answered with language providing elasticity. The Victims' Rights Amendment has a provision addressed precisely to this point. The Amendment provides that "[e]xceptions to the rights established by this article may be created . . . when necessary to achieve a compelling interest."[274] Any parade of horribles collapses under this provision. A serious unintended consequence under the language of the Amendment is, by definition, a compelling reason for creating an exception. Curiously, those who argue that the Amendment is not sufficiently flexible to avoid calamity have yet to explain why the exceptions clause fails to guarantee all the malleability that is needed.

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[268]*See* U.S. CONST. amend. VI ("[T]he accused shall enjoy the right to a . . . trial[] by an impartial jury . . . .").

[269]*See* Baldwin v. New York, 399 U.S. 66, 73–74 (1970) (holding that jury trial is required for petty offenses as long as possible jail time exceeds six months).

[270]*See* McKeiver v. Pennsylvania, 403 U.S. 528, 549–51 (1971) (holding that jury trial is not required in juvenile proceedings).

[271]*See* Williams v. Florida, 399 U.S. 78, 103 (1970) (holding that six-person jury satisfies Sixth Amendment).

[272]*See* Schenck v. United States, 249 U.S. 47, 52 (1919) (noting that First Amendment does not allow person to yell "Fire!" in crowded theater).

[273]Critics of the Amendment have been forced to use improbable examples to suggest that the Amendment will create unintended difficulties. *See 1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 117–21 (statement of Paul Cassell). It is interesting on this score to note that the law professors opposed to the Amendment were unable to cite any real-world examples of language in the many state victims' rights amendments that has produced serious unintended consequences. *See id.* at 140 (letter from law professors); *1996 House Judiciary Comm. Hearings*, *supra* note 7, at 225 (letter from law professors).

[274]S.J. Res. 3, 106th Cong. § 3 (1999).

C. Federalism Objections

A final structural challenge to the Victims' Rights Amendment is the claim that it violates principles of federalism by mandating rights across the country. For example, a 1997 letter from various law professors objected that "amending the Constitution in this way changes basic principles that have been followed throughout American history. . . . The ability of states to decide for themselves is denied by this Amendment."[275] Similarly, the American Civil Liberties Union warned that the Amendment "constitutes [a] significant intrusion of federal authority into a province traditionally left to state and local authorities."[276]

The inconsistency of many of these newfound friends of federalism is almost breathtaking. Where were these law professors and the ACLU when the Supreme Court federalized a whole host of criminal justice issues ranging from the right to counsel, to *Miranda*, to death penalty procedures, to search and seizure rules, among many others? The answer, no doubt, is that they generally applauded nationalization of these criminal justice standards despite the adverse effect on the ability of states "to decide for themselves." Perhaps the law professors and the ACLU have had some epiphany and mean now to launch an attack on the federalization of our criminal justice system, with the goal of returning power to the states. Certainly quite plausible arguments could be advanced in support of trimming the reach of some federal doctrines.[277] But whatever the law professors and the ACLU may think, it is unlikely that we will ever retreat from our national commitment to afford criminal defendants basic rights like the right to counsel. Victims are not asking for any retreat, but for an extension—for a national commitment to provide basic rights in the process to criminal defendants *and* to their victims. This parallel treatment works no new damage to federalist principles.[278]

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[275] *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 140–41 (letter from law professors); *see also* Mosteller, *Unnecessary Amendment*, *supra* note 13, at 444 (suggesting that "flexible uniformity" may be accomplished through federal legislation and incentives).

[276] *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 159.

[277] *See, e.g.*, Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 701–02 (1988) (arguing for reduction of federal involvement in *Miranda* rights); Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 63–70 (1996) (arguing that state constitutional development has reduced need for federal protections).

[278] If federalism were a serious concern of the law professors, one would also expect to see them supporting language in the Amendment guaranteeing flexibility for the states. Yet, the professors found fault with language in an earlier version of the Amendment that gave both Congress *and the states* the power to "enforce" the Amendment. *See 1997 Senate Judiciary*

Precisely because of the constitutionalization and nationalization of criminal procedure, victims now find themselves needing constitutional protection. In an earlier era, it may have been possible for judges to informally accommodate victims' interests on an ad hoc basis. But the coin of the criminal justice realm has now become constitutional rights. Without those rights, victims have not been taken seriously in the system. Thus, it is not a victims' rights amendment that poses a danger to state power, but the *lack* of an amendment. Without an amendment, states cannot give full effect to their policy decision to protect the rights of victims. Only elevating these rights to the Federal Constitution will solve this problem. This is why the National Governor's Association—a long-standing friend of federalism—has strongly endorsed the Amendment:

> The rights of victims have always received secondary consideration within the U.S. judicial process, even though states and the American people by a wide plurality consider victims' rights to be fundamental. Protection of these basic rights is essential and can only come from a fundamental change in our basic law: the U.S. Constitution.[279]

While the Victims' Rights Amendment will extend basic rights to crime victims across the country, it leaves considerable room to the states to determine how to accord those rights within the structures of their own systems. For starters, the Amendment extends rights to a "victim of a crime of violence, as these terms may be defined by *law*."[280] The "law" that will define these crucial terms will come from the states. Indeed, states retain a bedrock of control over all victims' rights provisions—without a state statute defining a crime, there can be no "victim" for the criminal justice system to consider.[281] The Amendment also is written in terms that will give the states considerable latitude to accommodate legitimate local interests. For example, the Amendment only requires the states to provide "reasonable" notice to victims, avoiding the inflexible alternative of mandatory notice (which, by the way, is required for criminal defendants[282]).

Comm. Hearings, *supra* note 6, at 141 (letter from law professors).

[279]National Governors Association, Executive Committee Policy 23.1 ("Protecting Victims' Rights") (effective winter 1997 to winter 1999) (visited Mar. 3, 1999) <http://www.nga.org/Pubs/Policies/EC/ec23.asp>.

[280]S.J. Res. 3, 106th Cong. § 1 (1999) (emphasis added).

[281]*See* BELOOF, *supra* note 128, at 41–43 (discussing and listing various legal definitions of "victim").

[282]*See* United States v. Reiter, 897 F.2d 639, 642–44 (2d Cir. 1990) (requiring notice to apprise defendant of nature of proceedings against him).

In short, federalism provides no serious objection to the Amendment. Any lingering doubt on the point disappears in light of the Constitution's prescribed process for amendment, which guarantees ample involvement by the states. The Victims' Rights Amendment will not take effect unless a full three-quarters of the states, acting through their state legislatures, ratify the Amendment within seven years of its approval by Congress.[283] It is critics of the Amendment who, by opposing congressional approval, deprive the states of their opportunity to consider the proposal.[284]

CONCLUSION

This Article has attempted to review thoroughly the various objections leveled against the Victims' Rights Amendment, finding them all wanting. While a few normative objections have been raised to the Amendment, the values undergirding it are widely shared in our country, reflecting a strong consensus that victims' rights should receive protection. Contrary to the claims that a constitutional amendment is somehow unnecessary, practical experience demonstrates that only federal constitutional protection will overcome the institutional resistence to recognizing victims' interests. And while some have argued that victims' rights do not belong in the Constitution, in fact the Victims' Rights Amendment addresses subjects that have long been considered entirely appropriate for constitutional treatment.

Stepping back from these individual objections and viewing them as a whole reveals one puzzling feature that is worth a few concluding observations. While some of the objections are thoughtfully advanced,[285] many are contradicted by either specific language in the Amendment or real-world experience with the implementation of victims' rights programs. I hasten to add that others have observed this phenomenon of unsustainable arguments being raised against victims' rights. One careful scholar in the field of victim impact statements, Professor Edna Erez, comprehensively reviewed the relevant empirical literature and concluded that the actual experience with

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[283] *See* U.S. CONST. amend. V; S.J. Res. 3. 106th Cong. Preamble (1999); *see also* THE FEDERALIST No. 39 (James Madison) (discussing process of amending Constitution).

[284] *Cf.* RICHARD B. BERNSTEIN, AMENDING AMERICA 220 (1993) (recalling defeat of Equal Rights Amendment in states and observing that "[t]he significant role of state governments as participants in the amending process is thriving"); Mosteller, *Unnecessary Amendment*, *supra* note 13, at 451 n.21 (noting that "unfunded mandates" argument is "arguably inapposite for a constitutional amendment that must be supported by three-fourths of the states since the vast majority of states would have approved imposing the requirement on themselves").

[285] For three particularly thoughtful discussions of criticisms of the Amendment, see Bandes, *supra* note 11, *passim*; Mosteller, *Unnecessary Amendment*, *supra* note 13, *passim*; Henderson, *supra* note 14, *passim*.

victim participatory rights "suggests that allowing victims' input into sentencing decisions does not raise practical problems or serious challenges from the defense. Yet there is a persistent belief to the contrary, particularly among legal scholars and professionals."[286] Erez attributed the differing views of the social scientists (who had actually collected data on the programs in action) and the legal scholars primarily to "the socialization of the latter group in a legal culture and structure that do not recognize the victim as a legitimate party in criminal proceedings."[287]

The objections against the Victims' Rights Amendment, often advanced by attorneys, provide support for Erez's hypothesis. Many of the complaints rest on little more than an appeal to retain a legal tradition that excludes victims from participating in the process, to in some sense leave it up to the "professionals"—the judges, prosecutors, and defense attorneys—to do justice as they see fit. Such entreaties may sound attractive to members of the bar, who not only have vested interests in maintaining their monopolistic control over the criminal justice system, but also have grown up without any exposure to crime victims or their problems. The "legal culture" that Erez accurately perceived is one that has not made room for crime victims. Law students learn to "think like lawyers" in classes such as criminal law and criminal procedure, where victims' interests receive no discussion. In the first year in criminal law, students learn in excruciating detail to focus on the state of mind of a criminal defendant, through intriguing questions about mens rea and the like.[288] In the second year, students may take a course on criminal procedure, where defendants' and prosecutors' interests under the constitutional doctrine governing search and seizure, confessions, and right to counsel are the standard fare. Here, too, victims are absent.[289] The most popular criminal procedure casebook, for example, spans some 877 pages;[290]

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[286]Erez, *Victim Participation*, *supra* note 69, at 28; *accord* Deborah P. Kelly & Edna Erez, *Victim Participation in the Criminal Justice System*, *in* VICTIMS OF CRIME 231, 241 (Robert C. Davis ed., 2d ed. 1997).

[287]*Id.* at 29; *see also* Erez & Rogers, *supra* note 69, at 234–35 (noting similar barriers to implementing victims reforms in South Australia); Edna Erez & Kathy Laster, Neutralizing Victim Reform: Legal Professionals' Perspectives on Victims and Impact Statements *passim* (Dec. 16, 1998) (unpublished manuscript, on file with author) (discussing how and why legal professionals resist reform of criminal justice process through increased victim participation).

[288]For a good example of the standard criminal law curriculum, see ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW AND PROCEDURE: CASES AND MATERIALS (7th ed. 1989).

[289]For a comprehensive and cogent examination of the absence of victims in criminal procedure courses, see Douglas E. Beloof, Are Your Criminal Procedure Students Out of Touch? A Review of Criminal Procedure Casebooks for Material on the Role of the Crime Victim (unpublished manuscript, on file with author).

[290]YALE KAMISAR ET AL., BASIC CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS (8th ed. 1994).

yet, victims' rights appear only in two paragraphs, made necessary because in California, a victims' rights initiative affected a defendant's right to exclude evidence.[291] Finally, in their third year, students may take a clinical course in the criminal justice process, where they may be assigned to assist prosecutors or defense attorneys in actual criminal cases. Not only are they never assigned to represent crime victims, but in courtrooms they will see victims frequently absent, or participating only through prosecutors or the judicial apparatus, such as probation officers.

Given this socialization, it is no surprise to find that when those lawyers leave law school, they become part of a legal culture unsympathetic, if not overtly hostile, to the interests of crime victims.[292] The legal insiders view with great suspicion demands from the outsiders—the barbarians, if you will—to be admitted into the process. A prime illustration comes from Justice Stevens's concluding remarks in his dissenting opinion in *Payne v. Tennessee*.[293] He found it almost threatening that the Court's decision admitting victim impact statements would be "greeted with enthusiasm by a large number of concerned and thoughtful citizens."[294] For Justice Stevens, the Court's decision to structure this rule of law in a way consistent with public opinion was "a sad day for a great institution."[295] To be sure, the Court must not allow our rights to be swept away by popular enthusiasm. But when the question before the Court is the separate and ancillary one of whether to recognize rights for victims, one would think that public consensus on the legitimacy of those rights would be a virtue, not a vice. As Professor Gewirtz has thoughtfully concluded after reviewing this same passage, "[T]he place of public opinion cannot be dismissed so quickly, with 'a sad day' proclaimed because a great public institution may have tried to retain the confidence of its public audience."[296]

Justice Stevens's views were, on that day at least,[297] in the minority, but in countless other ways, his antipathy to recognizing crime victims prevails in the day-to-day workings of our criminal justice system. Fortunately, there is a way to change this hostility, to require the actors in the process to

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[291]*See id.* at 60 (discussing CAL. CONST. art. I, § 28, the "truth-in-evidence" provision).

[292]One hopeful sign of impending change is the publication of an excellent casebook addressing victims in criminal procedure. *See* BELOOF, *supra* note 128.

[293]501 U.S. 808 (1991).

[294]*Id.* at 867 (Stevens, J., dissenting).

[295]*Id.* (Stevens, J., dissenting).

[296]Gewirtz, *supra* note 76, at 893.

[297]*Cf.* South Carolina v. Gathers, 490 U.S. 805, 811–12 (1989) (finding victim impact statements in capital cases unconstitutional); Booth v. Maryland, 482 U.S. 496, 508 (1987) (same).

recognize the interests of victims of crime. As Thomas Jefferson once explained,

> Happily for us, . . . when we find our constitutions defective and insufficient to secure the happiness of our people, we can assemble with all the coolness of philosophers, and set them to rights, while every other nation on earth must have recourse to arms to amend or to restore their constitutions.[298]

Our nation, through its assembled representatives in Congress and the state legislatures, should use the recognized amending power to secure a place for victims' rights in our Constitution. While conservatism is often a virtue, there comes a time when the case for reform has been made. Today the criminal justice system too often treats victims as second-class citizens, almost as barbarians at the gates that must be repelled at all costs. The widely shared view is that this treatment is wrong, that victims have legitimate concerns that can—indeed must—be fully respected for the system to be fair and just. The Victims' Rights Amendment is an indispensable step in that direction, extending protection for the rights of victims while doing no harm to the rights of defendants and of the public. The Amendment will not plunge the criminal justice system into the dark ages, but will instead herald a new age of enlightenment. It is time for the defenders of the old order to recognize these facts, to help swing open the gates, and welcome victims to their rightful place in our nation's criminal justice system.

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[298] Thomas Jefferson, Letter to C.W.F. Dumas, Sept. 1787, *reprinted in* THE JEFFERSONIAN CYCLOPIDIA 198 (John P. Foley ed., 1900).

APPENDIX A. TEXT OF THE PROPOSED VICTIMS' RIGHTS AMENDMENT

106TH CONGRESS, 1ST SESSION

S. J. RES. 3

Proposing an amendment to the Constitution of the United States to protect
the rights of crime victims.

IN THE SENATE OF THE UNITED STATES

JANUARY 19, 1999

Mr. KYL (for himself, Mrs. FEINSTEIN, Mr. BIDEN, Mr. GRASSLEY, Mr. INOUYE, Mr. DEWINE, Ms. LANDRIEU, Ms. SNOWE, Mr. LIEBERMAN, Mr. MACK, Mr. CLELAND, Mr. COVERDELL, Mr. SMITH of New Hampshire, Mr. SHELBY, Mr. HUTCHINSON, Mr. HELMS, Mr. FRIST, Mr. GRAMM, Mr. LOTT, and Mrs. HUTCHISON) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid for all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE—

"SECTION 1. A victim of a crime of violence, as these terms may be defined by law, shall have the rights:

"to reasonable notice of, and not to be excluded from, any public proceedings relating to the crime;

"to be heard, if present, and to submit a statement at all such proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence;

"to the foregoing rights at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;

"to reasonable notice of and an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence;[299]

"to reasonable notice of a release or escape from custody relating to the crime;

"to consideration of the interest of the victim that any trial be free from unreasonable delay;

"to an order of restitution from the convicted offender;

"to consideration for the safety of the victim in determining any conditional release from custody relating to the crime; and

"to reasonable notice of the rights established by this article.

"SECTION 2. Only the victim or the victim's lawful representative shall have standing to assert the rights established by this article. Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article in future proceedings, without staying or continuing a trial. Nothing in this article shall give rise to or authorize the creation of a claim for damages against the United States, a State, a political subdivision, or a public officer or employee.

"SECTION 3. The Congress shall have the power to enforce this article by appropriate legislation. Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest.

"SECTION 4. This article shall take effect on the 180th day after the ratification of this article. The right to an order of restitution established by this article shall not apply to crimes committed before the effective date of this article.

"SECTION 5. The rights and immunities established by this article shall apply in Federal and State proceedings, including military proceedings to the

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[299]This clause was added during deliberations in the Subcommittee on the Constitution, Federalism, and Property Rights.

extent that the Congress may provide by law, juvenile justice proceedings, and proceedings in the District of Columbia and any commonwealth, territory, or possession of the United States."

APPENDIX B: DO VICTIM IMPACT STATEMENTS INCREASE THE NUMBER OF DEATH SENTENCES?

While much speculation has been bandied about concerning the effect of victim impact statements on capital sentences, surprisingly little hard research on the subject has been conducted. The available empirical research on victim impact statements in noncapital cases has generally found, at most, a modest effect on sentence severity.[300] This Appendix offers some tentative empirical observations that support the same conclusion about victim impact statements in capital cases.

In 1991, the Supreme Court specifically approved the admission of victim impact statements in capital cases in *Payne v. Tennessee*.[301] This decision triggered a number of scholarly articles suggesting that the effect would be to make it easier for prosecutors to obtain death sentences,[302] but empirical follow-up on this question has been scant. One possible way of researching the assertion is simply to look at the total number of death sentences returned after *Payne* to determine whether they increased. In the same vein, it may be useful to examine whether the number of death sentences decreased after *Booth v. Maryland*,[303] the Supreme Court's decision four years earlier in 1987 barring victim impact statements in capital cases.

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[300]*See supra* notes 62–73 and accompanying text (asserting that empirical evidence suggests that victim impact statements might have modest effect on sentence severity).

[301]501 U.S. 808, 832–33 (1991) (holding that Eighth Amendment does not prohibit State from choosing to admit certain evidence with regard to victim's personal characteristics or impact of crime).

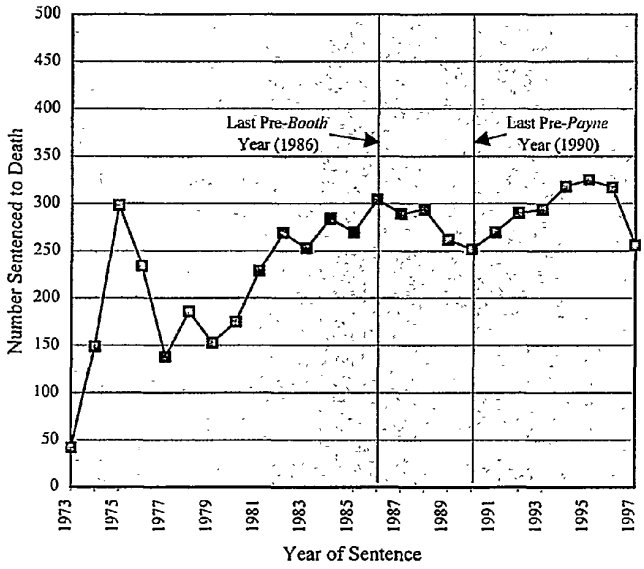
[302]*See, e.g.*, Jonathan H. Levy, Note, *Limiting Victim Impact Evidence and Argument After* Payne v. Tennessee, 45 STAN. L. REV. 1027, 1046 (1993) (asserting that victim impact statements will motivate jurors to impose death penalties out of emotion); Beth E. Sullivan, Note, *Harnessing* Payne*: Controlling the Admission of Victim Impact Statements to Safeguard Capital Sentencing Hearings from Passion and Prejudice*, 25 FORDHAM URB. L.J. 601, 630 (1998) (noting that victim impact statements create greater possibilities for prosecutors to seek death penalty).

[303]482 U.S. 496, 502–03 (1987) (holding that victim impact statements create risk that "a death sentence will be based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process'").

Such time series analyses have been used to investigate the impact of other legal changes[304] and constitute a standard way of analyzing legal reforms.[305]

The time series for death sentences returned in this country over the last quarter century is shown in Figure 1.[306]

FIGURE 1: DEFENDANTS SENTENCED TO DEATH
(1973 TO 1997)



[304] *See, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1072–74 (1998) (using time series analysis to consider effects of *Miranda*); Raymond A. Atkins & Paul H. Rubin, Effects of Criminal Procedure on Crime Rates: Mapping of the Consequences of the Exclusionary Rule *passim* (1998) (unpublished manuscript, on file with author) (utilizing time series analysis to chart exclusionary rule's harmful effect on crime rates).

[305] *See* Donald T. Campbell, *Reforms as Experiments*, 24 AM. PSYCHOLOGIST 409, 417 (1969) (concluding that time series analysis is common method of investigating reform measures); D.J. Pyle & D.F. Deadman, *Assessing the Impact of Legal Reform by Intervention Analysis*, 13 INT'L REV. L. & ECON. 193, 194–96 (1993) (concluding that time series analysis is common method for analyzing economic and social data).

[306] The data is taken from BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1997, at 13 (1998) [hereinafter CAPITAL PUNISHMENT (year)].

As the chart reveals, after an initial shake-out period in the mid-1970s,[307] the number of death sentences imposed generally climbed through 1986. Then, in 1987, the Court held in *Booth* that victim impact statements could not be used in capital cases. Death sentences declined slightly. Finally, in 1991, the Court reversed itself in *Payne*, allowing such statements. Death sentences thereafter increased modestly before turning to a level only slightly above that before *Payne*. The raw data would therefore suggest the possibility of a short term, meager association between victim impact statements and death sentences.

A small note on timing is in order. Both *Booth* and *Payne* were handed down by the Court in mid-year (on June 15 and June 27 respectively). Thus, the vertical lines in Figure 1 depicting the "last pre-*Booth* year" and the "last pre-*Payne*" year are drawn to show the last year in which death sentences were unaffected by the ensuing Supreme Court decision, assuming the Court's decision affected capital cases as soon as it was announced. These timing assumptions are open to question. It is possible that prosecutors "anticipated" *Booth* by restricting their use of victim impact statements to avoid the possibility of reversal. The Court agreed to review the case on October 15, 1986,[308] so perhaps the last year entirely unaffected by *Booth* was 1985, not 1986. Also, *Payne* may not have resulted in the immediate use of victim impact statements. Defendants might have continued to have been tried under the old law for months afterwards because of the problem of giving notice to them that such evidence would be introduced[309] and of adding authorizations for the use of impact statements.[310]

Before a causal inference could be drawn that the fluctuations shown in Figure 1 are attributable to the Court's decision on victim impact statements,

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[307] In *Furman v. Georgia*, 408 U.S. 238, 256–57 (1972), the Court concluded that the death penalty as then administered was arbitrary and capricious. States responded with new statutes more carefully defining death penalty offenses, reflected in an increasing number of capital sentences from 1973 through 1975. In 1976, the Court upheld some of these statutes but struck down those with mandatory features. *Compare* Gregg v. Georgia, 428 U.S. 153, 206–08 (1976) (upholding Georgia's death penalty statute), *with* Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976) (invalidating North Carolina's mandatory death penalty statute). The invalidation of those statutes likely accounts for the drop in death penalties in 1976 and 1977.

[308] 479 U.S. 882, 882 (1986) (granting writ of certiorari).

[309] *But cf.* Free v. Peters, 12 F.3d 700, 703 (7th Cir. 1993) (holding that defendant could not argue against application of *Payne* on ground that it was new rule); State v. Card, 825 P.2d 1081, 1088–90 (Idaho 1991) (applying *Payne* retroactively).

[310] *See, e.g.*, UTAH CODE ANN. § 76-3-207(2)(a)(iii) (Supp. 1998) (allowing use of impact statements); Crime Victim Rights Amendments, ch. 352, § 5, 1995 Utah Laws 1361 (amending this provision).

alternate causes would need to be carefully and fully considered.[311] I leave this task to others. One issue that should be examined is whether the number of homicides changed during the period, particular homicides for which the death penalty was a serious prospect.[312] Another possibility is that internal changes in sentencing procedures within large states returning the most capital sentences caused the fluctuations.[313] Still another obvious alternate causality is other Supreme Court decisions around the time of *Booth* and *Payne* that might have made it easier or harder for prosecutors to obtain capital sentences. The Supreme Court death penalty jurisprudence has not been, shall we say, a model of perfect consistency over time. At almost the same time that the Court blocked the use of victim statements in *Booth*, it also increased the ability of defendants to introduce mitigating evidence. In 1985, the Court held that defendants must be given access to a competent psychiatrist at trial and sentencing if mental state is an issue.[314] In 1986, the Court significantly expanded the types of mitigating evidence that defendants could introduce by invalidating contrary state evidentiary rules.[315] And in 1989, the Court expanded the circumstances in which juries should be instructed about the effect of mitigating evidence.[316] It is possible that these decisions, and not *Booth*, explain the 1987–1990 dip in death penalties. The Court also handed down other decisions favorable to death penalty prosecutions at about the time of *Payne* that might explain the rise in death penalties in recent years.[317]

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[311]For an introduction to some of these issues, see Cassell & Fowles, *supra* note 304, at 1107–19; John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1149–51 (1998); Paul G. Cassell & Richard Fowles, *Falling Clearance Rates After* Miranda*: Coincidence or Consequence?*, 50 STAN. L. REV. 1181, 1181 (1998).

[312]Murder rates went up modestly from 1984 to 1991. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1993, at 284.

[313]For example, much of the 1986–87 drop in death penalties is apparently explained by changes in Illinois. *Compare* CAPITAL PUNISHMENT 1986, *supra* note 306, at 5 tbl.4 (25 death sentences in Illinois in 1986). *with* CAPITAL PUNISHMENT 1987, *supra* note 306, at 6 tbl.4 (11 death sentences in Illinois in 1987). Much of the 1990–91 rise in death penalties is apparently explained by changes in Florida. *Compare* CAPITAL PUNISHMENT 1990, *supra* note 306, at 6 tbl.4 (31 death sentences in Florida in 1990), *with* CAPITAL PUNISHMENT 1991, *supra* note 306, at 8 tbl.4 (45 death sentences in Florida in 1991).

[314]*See* Ake v. Oklahoma, 470 U.S. 68, 84–87 (1985) (holding that denial of access to psychiatrist was violation of due process).

[315]*See* Skipper v. South Carolina, 476 U.S. 1, 4–8 (1986) (excluding mitigating evidence violated Eighth Amendment).

[316]*See* Penry v. Lynaugh, 492 U.S. 302, 337–40 (1989) (holding that sentencing body must be allowed to consider mental retardation as mitigating factor).

[317]*See, e.g.*, Graham v. Collins, 506 U.S. 461, 475–78 (1993) (restricting *Penry*); Johnson v. Texas, 509 U.S. 350, 369–73 (1993) (distinguishing *Penry*); Schad v. Arizona, 501 U.S. 624, 646–48 (1991) (holding that defendant was not necessarily entitled to instructions on every lesser included offense).

These and other potentially complicating factors would have to be assessed before any firm conclusions could be reached about the aggregate death penalty data plotted in Figure 1. Nevertheless, even assuming that all other factors but the Court's victim impact decisions could be ruled out as causes of the changes, the relative magnitude of the changes appear to be, at most, modest.[318]

Until we have further analysis of the data, lack of firm proof that *Payne* increased the number of death penalty convictions should count heavily against Professor Bandes and others who argue against admitting victim impact statements because of their effects on juries.[319] Allowing surviving family members to make impact statements clearly improves the perceived fairness of the process[320] and we have no proof that juries have been influenced, let alone unfairly influenced.[321]

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[318]The 1986 data divided by the 1988 data (the first full year under *Booth*), suggests that death penalties fell by 4% when victim impact evidence was banned in *Booth*. The 1992 data divided by the 1990 data (the first full year under *Payne*), suggests that death penalties rose by 15% when victim impact evidence was allowed in *Payne*. Using a longer time horizon, the 1997 data divided by the 1990 data suggests only a 2% rise in death penalty convictions after *Payne*. These calculations assume, in addition to the many other caveats noted in text, no confounding trends.

[319]*See* Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements* 1999 UTAH L. REV. 545 *passim*.

[320]*See supra* notes 81–90 and accompanying text.

[321]*Cf. supra* notes 27–99 and accompanying text (arguing that, even if *Payne* increased death sentences, this was a just result).

STATEMENT

OF

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BEFORE

THE HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON THE CONSTITUTION

ON

THE VICTIM'S RIGHTS AMENDMENT

ON

APRIL 25, 2013

WASHINGTON, D.C.

I. INTRODUCTION

Mr. Chairman and Distinguished Members of the Subcommittee:

I am pleased to submit testimony in support of House Joint Resolution 40. I am the Ronald N. Boyce Presidential Professor of Criminal Law from the S.J. Quinney College of Law at the University of Utah and a former U.S. District Court Judge from the District of Utah (2002 to 2007).

Introduced by Representatives Trent Franks (R-AZ) and Jim Costa (D-CA), House Joint Resolution 40 is a proposed amendment to the United States Constitution that would protect crime victims' rights throughout the criminal justice process. The Victims' Rights Amendment ("VRA") would extend to crime victims a series of rights, including the right to be notified of court hearings, the right to attend those hearings, and the right to speak at particular court hearings (such as hearings regarding bail, plea bargains, and sentencing). Similar proposed amendments have been introduced in Congress since 1996.

The normative issues regarding the justification for such a constitutional amendment have been discussed at length elsewhere.[1] For example, in 1999 I helped organize a *Utah Law Review* symposium regarding the VRA.[2] There, I argued that the Constitution should be

[1] *Compare, e.g.*, Steven J. Twist & Daniel Seiden, *The Proposed Victims' Rights Amendment: A Brief Point/Counterpoint*, 5 PHOENIX L. REV. 341 (Apr. 2012), *and* Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369, *with* Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443. *See generally* DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE 713-28 (3d ed. 2010); Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 856-58 (1997); Victoria Schwartz, Recent Development, *The Victims' Rights Amendment*, 42 HARV. J. ON LEGIS. 525 (2005); Rachelle K. Hong, *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, 219-20 (2002).

[2] *See* Symposium, *Crime Victims' Rights in the Twenty-First Century*, 1999 UTAH L. REV. 285. This testimony, too, is drawn for a symposium – recently organized by the capable editors of the *Phoenix Law Review*. My testimony tracks my article published there.

amended to enshrine crime victims' rights.[3] I reviewed the various objections leveled against the VRA, finding them all wanting.[4] I concluded that a fair-minded look at the Amendment confirmed that the VRA would build upon and improve our nation's criminal justice system — retaining protection for the legitimate interests of prosecutors and defendants, while adding recognition of equally powerful interests of crime victims.

The objections to the Victims' Rights Amendment conveniently fell into three categories, which my 1999 Article analyzed in turn. The first part reviewed normative objections to the Amendment—that is, objections to the desirability of the rights. The part began by reviewing the defendant-oriented objections leveled against a few of the rights, specifically the victim's right to be heard at sentencing, the victim's right to be present at trial, and the victim's right to a trial free from unreasonable delay. These objections all lack merit. I concluded by refuting the prosecution-oriented objections to victims' rights, which revolve primarily around alleged excessive consumption of scarce criminal justice resources. These claims, however, are inconsistent with the available empirical evidence on the limited cost of victims' rights regimes in the states.

The next part considered what might be styled as justification challenges—challenges that a victims' amendment is unjustified because victims already receive rights under the existing amalgam of state constitutional and statutory provisions. This claim of an "unnecessary" amendment misconceives the undeniable practical problems that victims face in attempting to secure their rights without federal constitutional protection.

The final part then turned to structural objections to the Amendment—claims that victims' rights are not properly constitutionalized. Contrary to this view, protection of the rights

[3] Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479.
[4] *Id.* at 533.

of citizens to participate in governmental processes is a subject long recognized as an appropriate one for a constitutional amendment. Moreover, constitutional protection for victims also can be crafted in ways that are sufficiently flexible to accommodate varying circumstances and varying criminal justice systems from state to state.

For the convenience of the Subcommittee, a copy of my law review article is attached to this testimony as Exhibit "A" – and I will be happy to expand on any of the issues discussed there. My goal in this written testimony is to move beyond the policy debates surrounding the VRA. In the remainder of my written testimony I provide a clause-by-clause analysis of the current version of the Victims' Rights Amendment, explaining how it would operate in practice. In doing so, it is possible to draw upon an ever-expanding body of case law from the federal and state courts interpreting state victims' enactments. The fact that these enactments have been put in place without significant interpretational issues in the criminal justice systems to which they apply suggests that a federal amendment could likewise be smoothly implemented.

Part II of this testimony briefly reviews the path leading up to the current version of the Victims' Rights Amendment. Part III then reviews the version clause-by-clause, explaining how the provisions would operate in light of interpretations of similar language in the federal and state provisions. Part IV gives an illustration of a recent case in which the Amendment would have made a difference for crime victims. Part V draws some brief conclusions about the project of enacting a federal constitutional amendment protecting crime victims' rights.

II. A BRIEF HISTORY OF THE EFFORTS TO PASS A VICTIMS' RIGHTS AMENDMENT[5]

[5] This section draws upon the following articles: Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHOENIX L. REV. 301 (2012); Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U.L. REV. 599 (2010); Paul G. Cassell & Steven Joffee, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U. L. REV. COLLOQUY 164 (2010); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861.

A. The Crime Victims' Rights Movement

The Crime Victims' Rights Movement developed in the 1970s because of a perceived imbalance in the criminal justice system. The victims' absence from criminal processes conflicted with "a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement."[6] Victims' advocates argued that the criminal justice system had become preoccupied with defendants' rights to the exclusion of considering the legitimate interests of crime victims.[7] These advocates urged reforms to give more attention to victims' concerns, including protecting victims' rights to be notified of court hearings, to attend those hearings, and to be heard at appropriate points in the process.[8]

The victims' movement received considerable impetus in 1982 with the publication of the Report of the President's Task Force on Victims of Crime ("Task Force").[9] The Task Force concluded that the criminal justice system "has lost an essential balance . . . . [T]he system has deprived the innocent, the honest, and the helpless of its protection. . . . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed."[10] The Task Force advocated multiple reforms, such as prosecutors assuming the responsibility for keeping victims notified of all court proceedings and

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[6] Payne v. Tennessee, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (internal quotations omitted). *See generally* BELOOF, CASSELL & TWIST, *supra* note 1, at 3-35; Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517; Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 [hereinafter Beloof, *Third Model*]; Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373 [hereinafter Cassell, *Balancing the Scales*]; Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 514 (1982); William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37 (1996); Collene Campbell et al., *Appendix: The Victims' Voice*, 5 PHOENIX L. REV. (forthcoming Apr. 2012).

[7] *See generally* BELOOF, CASSELL & TWIST, *supra* note 1, at 29-38; Douglas E. Beloof, *The Third Wave of Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255 [hereinafter Beloof, *Standing, Remedy, and Review*]; Cassell, *Balancing the Scales*, *supra* note 6, at 1380-82.

[8] *See* sources cited *supra* note 7.

[9] LOIS HAIGHT HERRINGTON ET AL., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT (1982), *available at* http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/87299.pdf.

[10] *Id.* at 114.

bringing to the court's attention the victim's view on such subjects as bail, plea bargains, sentences, and restitution.[11] The Task Force also urged that courts should receive victim impact evidence at sentencing, order restitution in most cases, and allow victims and their families to attend trials even if they would be called as witnesses.[12] In its most sweeping recommendation, the Task Force proposed a federal constitutional amendment to protect crime victims' rights "to be present and to be heard at all critical stages of judicial proceedings."[13]

In the wake of the recommendation for a constitutional amendment, crime victims' advocates considered how best to pursue that goal. Realizing the difficulty of achieving the consensus required to amend the United States Constitution, advocates decided to try and first enact state victims' amendments. They have had considerable success with this "states-first" strategy.[14] To date, more than thirty states have adopted victims' rights amendments to their own state constitutions,[15] which protect a wide range of victims' rights.

The victims' rights movement was also able to prod the federal system to recognize victims' rights. In 1982, Congress passed the first specific federal victims' rights legislation, the Victim and Witness Protection Act, which gave victims the right to make an impact statement at sentencing and expanded restitution.[16] Since then, Congress has passed several acts which gave further protection to victims' rights, including the Victims of Crime Act of 1984,[17] the Victims'

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[11] *Id.* at 63.
[12] *Id.* at 72-73.
[13] *Id.* at 114 (emphasis omitted).
[14] *See* S. REP. NO. 108-191 (2003).
[15] *See* ALA. CONST. of 1901, amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16a; CONN. CONST. art. XXIX, § b; FLA. CONST. art. I, § 16(b); IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. 1, § 13(b); KAN. CONST. art. 15, § 15; LA. CONST. art. 1, § 25; MD. DECLARATION OF RIGHTS, art. 47; MICH. CONST. of 1963, art. 1, § 24; MISS. CONST. art. 3, § 26A; MO. CONST. art. I, § 32; MONT. CONST. art. 2, § 28; NEB. CONST. art. 1, § CI-28; NEV. CONST. art. 1, § 8(2); N.J. CONST. art. 1, para. 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST. art. I, §§ 42-43; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TENN. CONST. art. I, § 35; TEX. CONST. art. 1, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m.
[16] Pub. L. No. 97-29I, 96 Stat. 1248 (1982).
[17] Pub. L. No. 98-473, 98 Stat. 1837 (1984).

Rights and Restitution Act of 1990,[18] the Violent Crime Control and Law Enforcement Act of 1994,[19] the Antiterrorism and Effective Death Penalty Act of 1996,[20] the Victim Rights Clarification Act of 1997,[21] and, most recently, the Crime Victims' Rights Act ("CVRA").[22] Other federal statutes have been passed to deal with specialized victim situations, such as child victims and witnesses.[23]

Among these statutes, the Victims' Rights and Restitution Act of 1990 ("Victims' Rights Act") is worth discussing. This Act purported to create a comprehensive set of victims' rights in the federal criminal justice process.[24] The Act commanded that "a crime victim has the following rights."[25] Among the listed rights were the right to "be treated with fairness and with respect for the victim's dignity and privacy,"[26] to "be notified of court proceedings,"[27] to "confer with [the] attorney for the Government in the case,"[28] and to attend court proceedings even if called as a witness unless the victim's testimony "would be materially affected" by hearing other testimony at trial.[29] The Victims' Rights Act also directed the Justice Department to make "its best efforts" to ensure that victims received their rights.[30] Yet this Act never successfully integrated victims into the federal criminal justice process and was generally regarded as something of a dead letter. Because Congress passed the CVRA in 2004 to remedy the problems with this law, it is worth briefly reviewing why it was largely unsuccessful.

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[18] Pub. L. No. 101-647, 104 Stat. 4789 (1990).
[19] Pub. L. No. 103-322, 108 Stat. 1796 (1994).
[20] Pub. L. No. 104-132, 110 Stat. 1214 (1996).
[21] Pub. L. No. 105-6, 111 Stat. 12 (1997).
[22] Pub. L. No. 108-405, 118 Stat. 2260 (2004).
[23] *See, e.g.*, 18 U.S.C. § 3509 (2009) (protecting rights of child victim-witnesses).
[24] Pub. L. No. 101-647, § 502, 104 Stat. 4789 (1990).
[25] *Id.* § 502(b).
[26] *Id.* § 502(b)(1).
[27] *Id.* § 502(b)(3).
[28] *Id.* § 502(b)(5).
[29] *Id.* § 502(b)(4).
[30] *Id.* § 502(a).

Curiously, the Victims' Rights Act was codified in Title 42 of the United States Code—the title dealing with "Public Health and Welfare."[31] As a result, the statute was generally unknown to federal judges and criminal law practitioners. Federal practitioners reflexively consult Title 18 for guidance on criminal law issues.[32] More prosaically, federal criminal enactments are bound together in a single publication—the *Federal Criminal Code and Rules*.[33] This book is carried to court by prosecutors and defense attorneys and is on the desk of most federal judges. Because the Victims' Rights Act was not included in this book, the statute was essentially unknown even to many experienced judges and attorneys. The prime illustration of the ineffectiveness of the Victims' Rights Act comes from no less than the Oklahoma City bombing case, where victims were denied rights protected by statute in large part because the rights were not listed in the criminal rules.[34]

Because of problems like these with statutory protection of victims' rights, in 1995 crime victims' advocates decided the time was right to press for a federal constitutional amendment. They argued that statutory protections could not sufficiently guarantee victims' rights. In their view, such statutes "frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia."[35] As the Justice Department reported:

> [E]fforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims [sic] rights advocates have sought reforms at the State level for the past 20 years and many States have responded with State statutes and constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights.

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[31] Pub. L. No. 101-647, 104 Stat. 4820 (1990); *see* 42 U.S.C. § 10606 (repealed by Pub. L. No. 108-405, tit. 1, § 102(c), 118 Stat. 2260 (2004)).
[32] *See generally* U.S.C. tit. 18.
[33] THOMSON WEST, FEDERAL CRIMINAL CODE AND RULES (2012 ed. 2012).
[34] *See generally* Cassell, *supra* note 3, at 515-22 (discussing this case in greater detail).
[35] Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.

> These significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.[36]

To place victims' rights in the Constitution, victims advocates (led most prominently by the National Victims Constitutional Amendment Network[37]) approached the President and Congress about a federal amendment.[38] In April 22, 1996, Senators Kyl and Feinstein introduced a federal victims' rights amendment with the backing of President Clinton.[39] The intent of the amendment was "to restore, preserve, and protect, as a matter of right for the victims of violent crimes, the practice of victim participation in the administration of criminal justice that was the birthright of every American at the founding of our Nation."[40] A companion resolution was introduced in the House of Representatives.[41] The proposed amendment embodied seven core principles: (1) the right to notice of proceedings; (2) the right to be present; (3) the right to be heard; (4) the right to notice of the defendant's release or escape; (5) the right to restitution; (6) the right to a speedy trial; and (7) the right to reasonable protection. In a later resolution, an eighth principle was added: standing.[42]

The amendment was not passed in the 104th Congress. On the opening day of the first session of the 105th Congress on January 21, 1997, Senators Kyl and Feinstein reintroduced the amendment.[43] A series of hearings were held that year in both the House and the Senate.[44] Responding to some of the concerns raised in these hearings, the amendment was reintroduced

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[36] *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. 64 (1997) (statement of Janet Reno, U.S. Att'y Gen.).
[37] *See* NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (last visited Mar. 22, 2012).
[38] *See* Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581 (2005) (providing a comprehensive history of victims' efforts to pass a constitutional amendment).
[39] S.J. Res. 52, 104th Cong. (1996).
[40] S. REP. NO. 108-191, at 1-2 (2003); *see also* S. REP. NO. 106-254, at 1-2 (2000).
[41] H.R.J. Res. 174, 104th Cong. (1996).
[42] S.J. Res. 65, 104th Cong. (1996).
[43] S.J. Res. 6, 105th Cong. (1997).
[44] *See, e.g., A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. (1997).

the following year.[45] The Senate Judiciary Committee held hearings[46] and passed the proposed amendment out of committee.[47] The full Senate did not consider the amendment. In 1999, Senators Kyl and Feinstein again proposed the amendment.[48] On September 30, 1999, the Judiciary Committee again voted to send the amendment to the full Senate.[49] But on April 27, 2000, after three days of floor debate, the amendment was shelved when it became clear that its opponents had the votes to sustain a filibuster.[50] At the same time, hearings were held in the House on the companion measure there.[51]

Discussions about the amendment began again after the 2000 presidential elections. On April 15, 2002, Senators Kyl and Feinstein again introduced the amendment.[52] The following day, President Bush announced his support.[53] On May 2, 2002, a companion measure was proposed in the House.[54] On January 7, 2003, Senators Kyl and Feinstein proposed the amendment as S.J. Res. 1.[55] The Senate Judiciary Committee held hearings in April of that year,[56] followed by a written report supporting the proposed amendment.[57] On April 20, 2004, a motion to proceed to consideration of the amendment was filed in the Senate.[58] Shortly thereafter, the motion to proceed was withdrawn when proponents determined they did not have

[45] S.J. Res. 44, 105th Cong. (1998).
[46] *A Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 44 Before the S. Comm. on the Judiciary*, 105th Cong. (1998).
[47] *See* 144 CONG. REC. 22496 (1998).
[48] S.J. Res. 3, 106th Cong. (1999).
[49] *See* 146 CONG. REC. 6020 (2000).
[50] *Id.*
[51] H.R.J. Res. 64, 106th Cong. (1999).
[52] S.J. Res. 35, 107th Cong. (2002).
[53] Press Release, Office of the Press Sec'y, President Calls for Crime Victims' Rights Amendment (Apr. 16, 2002) (on file with author).
[54] H.R.J. Res. 91, 107th Cong. (2002).
[55] S. REP. NO. 108-191, at 6 (2003).
[56] *Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 1 Before the S. Comm. on the Judiciary*, 108th Cong. (2003).
[57] S. REP. NO. 108-191.
[58] Kyl et al., *supra* note 38, at 591.

the sixty-seven votes necessary to pass the measure.[59] After it became clear that the necessary super-majority was not available to amend the Constitution, victims' advocates turned their attention to enactment of a comprehensive victims' rights statute.

B. The Crime Victims' Rights Act

The CVRA ultimately resulted from a decision by the victims' movement to seek a more comprehensive and enforceable federal statute rather than pursuing the dream of a federal constitutional amendment. In April of 2004, victims' advocates met with Senators Kyl and Feinstein to decide whether to again push for a federal constitutional amendment. Concluding that the amendment lacked the required super-majority, the advocates decided to press for a far-reaching federal statute protecting victims' rights in the federal criminal justice system.[60] In exchange for backing off from the constitutional amendment in the short term, victims' advocates received near universal congressional support for a "broad and encompassing" statutory victims' bill of rights.[61] This "new and bolder" approach not only created a bill of rights for victims, but also provided funding for victims' legal services and created remedies when victims' rights were violated.[62] The victims' movement would then see how this statute worked in future years before deciding whether to continue to push for a federal amendment.[63]

The legislation that ultimately passed—the Crime Victims' Rights Act—gives victims "the right to participate in the system."[64] It lists various rights for crime victims in the process, including the right to be notified of court hearings, the right to attend those hearings, the right to

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[59] *Id.*
[60] *Id.* at 591-92.
[61] 150 CONG. REC. 7295 (2004) (statement of Sen. Feinstein).
[62] *Id.* at 7296 (statement of Sen. Feinstein).
[63] *Id.* at 7300 (statement of Sen. Kyl); *see also* Prepared Remarks of Attorney Gen. Alberto R. Gonzales, Hoover Inst. Bd. of Overseers Conference (Feb. 28, 2005) (indicating a federal victim's rights amendment remains a priority for President Bush).
[64] 18 U.S.C. § 3771 (2006); 150 CONG. REC. 7297 (2004) (statement of Sen. Feinstein); *see* Beloof, *Third Model*, *supra* note 7 (providing a description of victim participation).

be heard at appropriate points in the process, and the right to be treated with fairness.[65] Rather than relying merely on best efforts of prosecutors to vindicate the rights, the CVRA also contains specific enforcement mechanisms.[66] Most important, the CVRA directly confers standing on victims to assert their rights, a flaw in the earlier enactment.[67] The Act provides that rights can be "assert[ed]" by "[t]he crime victim or the crime victim's lawful representative, and the attorney for the Government."[68] The victim (or the government) may appeal any denial of a victim's right through a writ of mandamus on an expedited basis.[69] The courts are also required to "ensure that the crime victim is afforded" the rights in the new law.[70] These changes were intended to make victims "an independent participant in the proceedings."[71]

C. The Less-than-Perfect Implementation of the CVRA

Since the CVRA's enactment, its effectiveness in protecting crime victims has left much to be desired. The General Accountability Office ("GAO") reviewed the CVRA four years after its enactment in 2008, and concluded that "[p]erceptions are mixed regarding the effect and efficacy of the implementation of the CVRA, based on factors such as awareness of CVRA rights, victim satisfaction, participation, and treatment."[72]

Crime victims' advocates have tested some of the CVRA's provisions in federal court cases. The cases have produced uneven results for crime victims, with some of them producing crushing defeats for seemingly valid claims.

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[65] § 3771.
[66] *Id.* § 3771(c).
[67] *Cf.* Beloof, *Standing, Remedy, and Review*, *supra* note 8, at 283 (identifying this as a pervasive flaw in victims' rights enactments).
[68] § 3771(d).
[69] *Id.* § 3771(d)(3).
[70] *Id.* § 3771(b)(1).
[71] 150 CONG. REC. 7302 (2004) (statement of Sen. Kyl).
[72] U.S. GOV'T ACCOUNTABILITY OFFICE, CRIME VICTIMS' RIGHTS ACT: INCREASING AWARENESS, MODIFYING THE COMPLAINT PROCESS, AND ENHANCING COMPLIANCE MONITORING WILL IMPROVE IMPLEMENTATION OF THE ACT 12 (Dec. 2008).

Among the most disappointing losses for crime victims has to be litigation involving Ken and Sue Antrobus's efforts to deliver a victim impact statement at the sentencing of the defendant who had illegally sold the murder weapon used to kill their daughter.[73] After the district court denied their motion to have their daughter recognized as a crime victim under the CVRA, the Antrobuses made four separate trips to the Tenth Circuit in an effort to have that ruling reviewed on its merits—all without success. In the first trip, the Tenth Circuit rejected the holdings of at least two other circuit courts to erect a demanding, clear, and indisputable error standard of review. Having imposed that barrier, the court then stated that the case was a close one, but that relief would not be granted—with one concurring judge noting that sufficient proof of the Antrobuses' claim might rest in the Justice Department's files.[74]

The Antrobuses then returned to the district court, where the Justice Department refused to clarify the district court's claim regarding what information rested in its files.[75] The Antrobuses sought mandamus review to clarify and discover whether this information might prove their claim, which the Justice Department "mooted" by agreeing to file that information with the district court and not oppose any release to the Antrobuses.[76] But the district court again stymied the Antrobuses' attempt by refusing to grant their unopposed motion for release of the documents.[77]

The Antrobuses then sought appellate review of the district court's initial "victim" ruling, only to have the Tenth Circuit conclude that they were barred from an appeal.[78] However, the Tenth Circuit said the Antrobuses "should" pursue the issue of release of the material in the

[73] *See generally* Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U.L. REV. 599 (2010). In the interest of full disclosure, I represented the Antrobuses' in some of the litigation on a pro bono basis.
[74] *In re* Antrobus, 519 F.3d 1123, 1126-27 (10th Cir. 2008) (Tymkovich, J., concurring).
[75] *In re* Antrobus, 563 F.3d 1092 (10th Cir. 2009).
[76] *Id.* at 1095.
[77] United States v. Hunter, No. 2:07CR307DAK, 2008 U.S. Dist. LEXIS 108582, at *1-2 (D. Utah Mar. 17, 2008).
[78] United States v. Hunter, 548 F.3d 1308, 1317 (10th Cir. 2008).

Justice Department's files in the district court.[79] So they did—only to lose again in the district court.[80] On a final mandamus petition to the Tenth Circuit, the court ruled—among other things—that the Antrobuses had not been diligent enough in seeking the release of the information.[81] With the Antrobuses' appeals at an end, the Justice Department chose to release discovery information about the case—not to the Antrobuses, but to the *media*.[82]

Another case in which victims' rights advocates were disappointed arose in the Fifth Circuit's decision *In re Dean*.[83] In *Dean*, the defendant—the American subsidiary of well-known petroleum company BP—and the prosecution arranged a secret plea bargain to resolve the company's criminal liability for violations of environmental laws.[84] These violations resulted in the release of dangerous gas into the environment, leading to a catastrophic explosion in Texas City, Texas, which killed fifteen workers and injured scores more.[85] Because the Government did not notify or confer with the victims before reaching a plea bargain with BP, the victims sued to secure protection of their guaranteed right under the CVRA "to confer with the attorney for the Government."[86]

Unfortunately, despite the strength of the victims' claim, the district court did not grant the victims of the explosion any relief, leading them to file a CVRA mandamus petition with the Fifth Circuit.[87] After reviewing the record, the Fifth Circuit agreed with the crime victims that the district court had "misapplied the law and failed to accord the victims the rights conferred by

[79] *Id.* at 1316-17.
[80] United States v. Hunter, 2009 U.S. Dist. LEXIS 90822, at *2–4 (D. Utah Feb. 10, 2009).
[81] *In re Antrobus*, 563 F.3d at 1099.
[82] Nate Carlisle, *Notes Confirm Suspicions of Trolley Square Victim's Family*, SALT LAKE TRIB., June 25, 2009, http://www.sltrib.com/news/ci_12380112.
[83] *In re* Dean, 527 F.3d 391 (5th Cir. 2008). In the interest of full disclosure, I served as pro bono legal counsel for the victims in the *Dean* criminal case. *See generally* Paul G. Cassell & Steven Joffee, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U. L. REV. COLLOQUY 164 (2010).
[84] *See* United States v. BP Prods. N. Am. Inc., No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008).
[85] *See In re* Dean, 527 F.3d at 392.
[86] *Id.* at 394.
[87] *See id.* at 392.

the CVRA."[88] Nonetheless, the court declined to award the victims any relief because it viewed the CVRA's mandamus petition as providing only discretionary relief.[89] Instead, the court of appeals remanded to the district court. The court of appeals noted that "[t]he victims do have reason to believe that their impact on the eventual sentence is substantially less where, as here, their input is received after the parties have reached a tentative deal."[90] Nonetheless, the court of appeals thought that all the victims were entitled to was another hearing in the district court.[91] After a hearing, the district court declined to grant the victims any further relief.[92]

One other disappointment of the victims' rights movement is worth mentioning. When the CVRA was enacted, part of the law included funding for legal representation of crime victims.[93] And immediately after the law was enacted, Congress provided funding for this purpose. The National Crime Victim Law Institute proceeded to help create a network of clinics around the country for the purpose of providing pro bono representation for crime victims' rights.[94]

Sadly, in recent months, the congressional funding for the clinics has diminished. As a result, six clinics have had to stop providing rights enforcement legal representation. As of this writing, the only clinics that remain open for rights enforcement are in Colorado, Maryland, New Jersey, Arizona, Utah, and Oregon. The CVRA vision of an extensive network of clinics supporting crime victims' rights clearly has not been achieved.

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[88] *Id.* at 394.
[89] *Id.* at 396.
[90] *Id.* at 396.
[91] *Id.*
[92] United States v. BP Prods. N. Am. Inc., 610 F. Supp. 2d 655, 730 (S.D. Tex. 2009).
[93] *See National Clinic Network*, NAT'L CRIME VICTIM L. INST., http://law.lclark.edu/centers/national_crime_victim_law_institute/projects/clinical_network/ (last visited Mar. 23, 2012).
[94] *See id.*

III. THE PROVISIONS OF THE VICTIMS' RIGHTS AMENDMENT[95]

Because of the problems with implementing the CVRA, in early 2012 the National Victim Constitutional Amendment Network ("NVCAN") decided it was time to re-approach Congress about the need for constitutional protection for crime victims' rights.[96] Citing the continuing problems with implementing other-than-federal constitutional protections for crime victims, NVCAN proposed to Congress a new version of the Victims' Rights Amendment. In April 2013, Representatives Trent Franks (R-AZ) and Jim Costa (D-CA) introduced the VRA as H.R.J. Res. 40.[97] As introduced, the amendment would extend crime victims constitutional protections as follows:

> Section 1. The rights of a crime victim to fairness, respect, and dignity, being capable of protection without denying the constitutional rights of the accused, shall not be denied or abridged by the United States or any State. The crime victim shall, moreover, have the rights to reasonable notice of, and shall not be excluded from, public proceedings relating to the offense, to be heard at any release, plea, sentencing, or other such proceeding involving any right established by this article, to proceedings free from unreasonable delay, to reasonable notice of the release or escape of the accused, to due consideration of the crime victim's safety and privacy, and to restitution. The crime victim or the crime victim's lawful representative has standing to fully assert and enforce these rights in any court. Nothing in this article provides grounds for a new trial or any claim for damages and no person accused of the conduct described in section 2 of this article may obtain any form of relief.
>
> Section 2. For purposes of this article, a crime victim includes any person against whom the criminal offense is committed or who is directly and proximately harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime.
>
> Section 3. This article shall be inoperative unless it has been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within 14 years after the date of its submission to the States by the Congress. This article shall take effect on the 180th day after the date of its ratification.[98]

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[95] This section draws heavily on Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-By-Clause Analysis*, 5 PHOENIX L. REV. 301 (2012).
[96] NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (last visited Apr. 4, 2013). This organization is a sister organization to NVCAN and supports the passage of a Victims' Rights Amendment. *Id.*
[97] H.R.J. Res. 40, 113th Cong. (2013).
[98] *Id.*

This proposed amendment is a carefully crafted provision that provides vital rights to victims of crime while at the same time protecting all other legitimate interests. Because those who are unfamiliar with victims' rights provisions may have questions about the language, it is useful to analyze the amendment section-by-section. Language of the resolution is italicized and then discussed in light of generally applicable legal principles and existing victims' case law. What follows, then, is my understanding of what the amendment would mean for crime victims in courts around the country.

A. Section 1

The rights of a crime victim . . .

This clause extends rights to victims of both violent and property offenses. This is a significant improvement over the previous version of the VRA—S.J. Res. 1—which only extended rights to "victims of violent crimes."[99] While the Constitution does draw lines in some situations,[100] ideally crime victims' rights would extend to victims of both violent and property offenses. The previous limitation appeared to be a political compromise.[101] There appears to be no principled reason why victims of economic crimes should not have the same rights as victims of violent crimes.[102]

[99] S.J. Res. 1, 108th Cong. (2003). The previous version of the amendment likewise did not automatically extend rights to victims of non-violent crimes, but did allow extension of rights to victims of "other crimes that Congress may define by law." *Compare id. with* S.J. Res. 6, 105th Cong. (1997). This language was deleted from S.J. Res. 1. S.J. Res. 1, 108th Cong. (2003).

[100] Various constitutional provisions draw distinctions between individuals and between crimes, often for no reason other than administrative convenience. For instance, the right to a jury trial extends only to cases "where the value in controversy shall exceed twenty dollars." U.S. CONST. amend. VII. Even narrowing our view to criminal cases, frequent line-drawing exists. For instance, the Fifth Amendment extends to defendants in federal cases the right not to stand trial "unless on a presentment or indictment of a Grand Jury"; however, this right is limited to a "capital, or otherwise infamous crime." U.S. CONST. amend. V. Similarly, the right to a jury trial in criminal cases depends in part on the penalty a state legislature decides to set for any particular crime.

[101] S. REP. NO. 106-254, at 45 (2000).

[102] *See* Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39 (2001).

The VRA defines the crime victims who receive rights in Section 2 of the amendment. This definition is discussed below.[103]

The VRA also extends *rights* to these crime victims. The enforceable nature of the rights is discussed below as well.[104]

. . . to fairness, respect, and dignity . . .

The VRA extends victims' rights to *fairness, respect, and dignity*. The Supreme Court has already made clear that crime victims' interests must be considered by courts, stating that "in the administration of criminal justice, courts may not ignore the concerns of victims"[105] and that "justice, though due to the accused, is due to the accuser also."[106] This provision would provide clear constitutional grounding for these widely-shared sentiments.

The rights to fairness, respect, and dignity are not novel concepts. Similar provisions have long been found in state constitutional amendments.[107] The Arizona Constitution, for instance, was amended in 1990 to extend to victims exactly the same rights: to be treated "with fairness, respect, and dignity."[108] Likewise, the CVRA specifically extends to crime victims the right "to be treated with fairness and with respect for the victim's dignity and privacy."[109]

The caselaw developing under the CVRA provides an understanding of the kinds of victims' interests these rights protect. Senator Kyl offered these examples of how these rights might apply under the CVRA: "For example, a victim should be allowed to oppose a defense discovery request for the reproduction of child pornography, the release of personal records of

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[103] *See infra* Part III.B.
[104] *See infra* notes 212-16 and accompanying text.
[105] Morris v. Slappy, 461 U.S. 1, 14 (1983).
[106] Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).
[107] *See, e.g.*, ARIZ. CONST. art. II, § 2.1(A)(1); IDAHO CONST. art. I, § 22(1); ILL. CONST. art. I, § 8.1(a)(1); MD. DECLARATION OF RIGHTS, art. 47(a); N.J. CONST. art. I, para. 22; TEX. CONST. art. 1, § 30(a)(1); WIS. CONST. art. I, § 9m; UTAH CONST., art. I, § 28(1)(a).
[108] ARIZ. CONST. art. II, § 2.1(A)(1).
[109] 18 U.S.C. § 3771(a)(8) (2006).

the victim, or the release of personal identifying or locating information about the victim."[110] Since the enactment of the CVRA, courts have applied the CVRA's rights to fair treatment in various contexts. For example, the Sixth Circuit concluded that unexplained delay in ruling on a crime victim's motion for three months raised fairness issues.[111] Other district courts have ruled that a victim's right to fairness (and to attend court proceedings) is implicated in any motion for a change of venue.[112] Another district court has ruled that the victim's right to fairness gives the court the right to hear from a victim during a competency hearing.[113] And another district court has stated that the victim's right to be treated with fairness is implicated in a court's decision of whether to dismiss an indictment.[114]

The CVRA rights of victims to be treated with respect for their dignity and privacy have also been applied in various settings.[115] Trial courts have used the rights to prevent disclosure of sensitive materials to defense counsel[116] and to the public,[117] particularly in extortion cases where disclosure of the material would subject the victim to precisely the harm threatened by the defendant.[118] Another court has ruled that the right to be treated with dignity means that the prosecution could refer to the victim as a "victim" in a case.[119] Still another district court used

[110] Kyl et al., *supra* note 39, at 614.
[111] *In re* Simons, 567 F.3d 800, 801 (6th Cir. 2009).
[112] United States v. Agriprocessors, Inc., No. 08-CR-1324-LRR, 2009 WL 721715, at *2 n.2 (N.D. Iowa Mar. 18, 2009); United States v. Kanner, No. 07-CR-1023-LRR, 2008 WL 2663414, at *8 (N.D. Iowa June 27, 2008).
[113] United States v. Mitchell, No. 2:08CR125DAK, 2009 WL 3181938, at *8 n.3 (D. Utah Sept. 28, 2009).
[114] United States v. Heaton, 458 F. Supp. 2d 1271, 1272-73 (D. Utah 2006).
[115] *See generally* Fern L. Kletter, Annotation, *Validity, Construction and Application of Crime Victim's Rights Act (CVRA), 18 U.S.C.A. § 3771*, 26 A.L.R. FED. 2D 451 (2008).
[116] United States v. Darcy, No. 1:09CR12, 2009 WL 1470495, at *1 (W.D.N.C. May 26, 2009).
[117] Gueits v. Kirkpatrick, 618 F. Supp. 2d 193, 198 n.1 (E.D.N.Y. 2009) *rev'd on other grounds*, 612 F.3d 118 (2d Cir. 2010); United States v. Madoff, 626 F. Supp. 2d 420, 425-28 (S.D.N.Y. 2009); *United States v. Patkar*, No. 06-00250 JMS, 2008 WL 233062, at *3-5 (D. Haw. Jan. 28, 2008).
[118] United States v. Robinson, Cr. No. 08-10309-MLW, 2009 WL 137319, at *1-3 (D. Mass. Jan. 20, 2009).
[119] United States v. Spensley, No. 09-CV-20082, 2011 WL 165835, at *1-2 (C.D. Ill. Jan. 19, 2011).

the rights to dignity and privacy to prohibit the display of graphic videos to persons other than the jury and restrict a sketch artist's activities, particularly because the victim was mentally-ill.[120]

> *. . . being capable of protection without denying the constitutional rights of the accused . . .*

This preamble was authored by Professor Laurence Tribe of Harvard Law School.[121] It makes clear that the amendment is not intended to, nor does it have the effect of, denying the constitutional rights of the accused. Crime victims' rights do not stand in opposition to defendants' rights but rather parallel to them.[122] For example, just as a defendant possesses a right to speedy trial,[123] the VRA would extend to crime victims a corresponding right to proceedings free from unreasonable delay.

If any seeming conflicts were to emerge between defendants' rights and victims' rights, courts would retain the ultimate responsibility for harmonizing the rights at stake. The concept of harmonizing rights is not a new one.[124] Courts have harmonized rights in the past; for example, accommodating the rights of the press and the public to attend criminal trials with the rights of criminal defendants to a fair trial.[125] Courts can be expected to do the same with the VRA.

At the same time, the VRA will eliminate a common reason for failing to protect victims' rights: the misguided view that the mere assertion of a defendant's constitutional right automatically *trumps* a victim's right. In some of the litigated cases, victims' rights have not

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[120] United States v. Kaufman, Nos. CRIM.A. 04-40141-01, CRIM.A. 04-40141-02, 2005 WL 2648070, at *1-4 (D. Kan. Oct. 17, 2005).
[121] *Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 1 Before the S. Comm. on the Judiciary*, 108th Cong. 230 (2003) (statement of Steven J. Twist).
[122] *See generally* Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 16-19 (1997).
[123] U.S. CONST. amend. VI.
[124] *See* Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.
[125] *See, e.g.*, Press-Enter. Co. v. Superior Court, 478 U.S. 1, 9 (1986) (balancing the "qualified First Amendment right of public access" against the "right of the accused to a fair trial").

been enforced because defendants have made vague, imprecise, and inaccurate claims about their federal constitutional due process rights being violated. Those claims would be unavailing after the passage of a federal amendment. For this reason, the mere fact of passing a Victims' Rights Amendment can be expected to bring a dramatic improvement to the way in which victims' rights are enforced, even were no enforcement actions to be brought by victims or their advocates.

. . . shall not be denied or abridged by the United States or any State.

This provision would ensure that the rights extended by Section 1 actually have content—specifically, that they cannot be denied in either the federal or state criminal justice systems. The VRA follows well-plowed ground in creating criminal justice rights that apply to both the federal and state cases. Earlier in the nation's history, the Bill of Rights was applicable only against the federal government and not against state governments.[126] Since the passage of the Fourteenth Amendment,[127] however, the great bulk of criminal procedure rights have been "incorporated" into the Due Process Clause and thereby made applicable in state proceedings.[128]

It is true that plausible arguments could be made for trimming the reach of incorporation doctrine.[129] But it is unlikely that we will ever retreat from our current commitment to afford criminal defendants a basic set of rights, such as the right to counsel. Victims are not asking for any retreat, but for an extension—for a national commitment to provide basic rights in the

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[126] *See* Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).
[127] U.S. CONST. amend. XIV.
[128] U.S. CONST. amend. V.; *see, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Malloy v. Hogan, 378 U.S. 1 (1964).
[129] *See, e.g.*, Donald A. Dripps, *Foreword: Against Police Interrogation And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 701–02 (1988) (arguing for reduction of federal involvement in *Miranda* rights); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965) (criticizing interpretation that would become so extensive as to produce, in effect, a constitutional code of criminal procedure); Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 63–70 (1996) (arguing that state constitutional development has reduced need for federal protections).

process to criminal defendants *and* to their victims. This parallel treatment works no new damage to federalist principles.

Indeed, precisely because of the constitutionalization and nationalization of criminal procedure, victims now find themselves needing constitutional protection. In an earlier era, it may have been possible for judges to informally accommodate victims' interests on an ad hoc basis. But the coin of the criminal justice realm has now become constitutional rights. Without such rights, victims have all too often not been taken seriously in the system. Thus, it is not a victims' rights amendment that poses a danger to state power, but the *lack* of an amendment. Without an amendment, states cannot give full effect to their policy decisions to protect the rights of victims. Only elevating these rights to the Federal Constitution will solve this problem. This is why the National Governor's Association—a long-standing friend of federalism—endorsed an earlier version of the amendment, explaining:

> The rights of victims have always received secondary consideration within the U.S. judicial process, even though states and the American people by a wide plurality consider victims' rights to be fundamental. Protection of these basic rights is essential and can only come from a fundamental change in our basic law: the U.S. Constitution.[130]

It should be noted that the States and the federal government, within their respective jurisdictions, retain authority to define, in the first instance, conduct that is criminal.[131] The power to define victim is simply a corollary of the power to define criminal offenses and, for state crimes, the power would remain with state legislatures.

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[130] NAT'L GOVERNORS ASS'N, POLICY 23.1 (1997).

[131] *See, e.g.*, United States v. L. Cohen Grocery Co., 255 U.S. 81, 87 (1921) ("Congress alone has power to define crimes against the United States.").

It is important to emphasize that the amendment would establish a floor—not a ceiling—for crime victims' rights[132] and States will remain free to enact (or continue, as indeed many have already enacted) more expansive rights than are established in this amendment. Rights established in a state's constitution would be subject to the independent construction of the state's courts.[133]

> *The crime victim shall, moreover, have the rights to reasonable notice of . . . public proceedings relating to the offense . . .*

The victims' right to reasonable notice about proceedings is a critical right. Because victims and their families are directly and often irreparably harmed by crime, they have a vital interest in knowing about any subsequent prosecution. Yet in spite of statutes extending a right to notice to crime victims, some victims continue to be unaware of that right. The recent GAO Report, for example, found that approximately twenty-five percent of the responding federal crime victims were unaware of their right to notice of court hearings under the CVRA.[134] Even larger percentages of failure to provide required notices were found in a survey of various state criminal justice systems.[135] Distressingly, the same survey found that racial minority victims were less likely to have been notified than their white counterparts.[136]

The Victims' Rights Amendment would guarantee crime victims a right to *reasonable notice*. This formulation tracks the CVRA, which extends to crime victims the right "to reasonable . . . notice" of court proceedings.[137] Similar formulations are found in state

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[132] *See* S. REP. NO. 105–409, at 24 (1998) ("In other words, the amendment sets a national 'floor' for the protecting of victims rights, not any sort of 'ceiling.' Legislatures, including Congress, are certainly free to give statutory rights to all victims of crime, and the amendment will in all likelihood be an occasion for victims' statutes to be re-examined and, in some cases, expanded.").
[133] *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983).
[134] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 73, at 82.
[135] National Victim Center, *Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights*, *in* BELOOF, CASSELL & TWIST, *supra* note 1, at 631.
[136] *Id.*
[137] 18 U.S.C. § 3771(a)(2) (2006).

constitutional amendments. For instance, the California State Constitution promises crime victims "reasonable notice" of all public proceedings.[138]

No doubt, in implementing language Congress and the states will provide additional details about how reasonable notice is to be provided. I will again draw on my own state of Utah to provide an example of how notice could be structured. The Utah Rights of Crime Victims Act provides 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, except as otherwise provided in this chapter."[139] The initial notice must contain information about "electing to receive notice of subsequent important criminal justice hearings."[140] In practice, Utah prosecuting agencies have provided these notices with a detachable postcard or computer generated letter that victims simply return to the prosecutor's office to receive subsequent notices about proceedings. The return postcard serves as the victims' request for further notices. In the absence of such a request, a prosecutor need not send any further notices.[141] The statute could also spell out situations where notice could not be reasonably provided, such as emergency hearings necessitated by unanticipated events. In Utah, for instance, in the event of an unforeseen hearing for which notice is required, "a good faith attempt to contact the victim by telephone" meets the notice requirement.[142]

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[138] CAL. CONST. art. I, § 28(b)(7).

[139] UTAH CODE ANN. § 77-38-3(1) (West, Westlaw through 2011 Legis. Sess.). The "except as otherwise provided" provision refers to limitations for good faith attempts by prosecutors to provide notice and situations involving more than ten victims. *Id.* § 77-38-3(4)(b), (10). *See generally* Cassell, *Balancing the Scales*, *supra* note 7 (providing information about the implementation of Utah's Rights of Crime Victims Act and utilized throughout this paragraph).

[140] § 77-38-3(2). The notice will also contain information about other rights under the victims' statute. *Id.*

[141] *Id.* § 77-38-3(8). Furthermore, victims must keep their address and telephone number current with the prosecuting agency to maintain their right to notice. *Id.*

[142] *Id.* § 77-38-3(4)(b). However, after the hearing for which notice was impractical, the prosecutor must inform the victim of that proceeding's result. *Id.*

In some cases, i.e., terrorist bombings or massive financial frauds, the large number of victims may render individual notifications impracticable. In such circumstances, notice by means of a press release to daily newspapers in the area would be a reasonable alternative to actual notice sent to each victim at his or her residential address.[143] New technologies may also provide a way of affording reasonable notice. For example, under the CVRA, courts have approved notice by publication, where the publication directs crime victims to a website maintained by the government with hyperlinks to updates on the case.[144]

> *The crime victim shall, moreover, . . . not be excluded from, public proceedings relating to the offense . . .*

Victims also deserve the right to attend all public proceedings related to an offense. The President's Task Force on Victims of Crime held hearings around the country in 1982 and concluded:

> The crime is often one of the most significant events in the lives of victims and their families. They, no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial.[145]

Several strong reasons support this right, as Professor Doug Beloof and I have argued at length elsewhere.[146] To begin with, the right to attend the trial may be critical in allowing the victim to recover from the psychological damage of a crime. "The victim's presence during the trial may also facilitate healing of the debilitating psychological wounds suffered by a crime victim."[147]

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[143] United States v. Peralta, No. 3:08cr233, 2009 WL 2998050, at *1-2 (W.D.N.C. Sept. 15, 2009).
[144] United States v. Skilling, No. H-04-025-SS, 2009 WL 806757, at *1-2 (S.D. Tex. Mar. 26, 2009); United States v. Saltsman, No. 07-CR-641 (NGG), 2007 WL 4232985, at *1-2 (E.D.N.Y. Nov. 27, 2007); United States v. Croteau, No. 05-CR-30104-DRH, 2006 U.S. Dist. LEXIS 23684, at *2-3 (S.D. Ill. 2006).
[145] HERRINGTON ET AL., *supra* note 10, at 80.
[146] *See* Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005).
[147] Ken Eikenberry, *Victims of Crimes/Victims of Justice*, 34 WAYNE L. REV. 29, 41 (1987).

Concern about psychological trauma becomes even more pronounced when coupled with findings that defense attorneys have, in some cases, used broad witness exclusion rules to harm victims.[148] As the Task Force found:

> [T]his procedure can be abused by [a defendant's] advocates and can impose an improper hardship on victims and their relatives. Time and again, we heard from victims or their families that they were unreasonably excluded from the trial at which responsibility for their victimization was assigned. This is especially difficult for the families of murder victims and for witnesses who are denied the supportive presence of parents or spouses during their testimony.
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> . . . .
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> Testifying can be a harrowing experience, especially for children, those subjected to violent or terrifying ordeals, or those whose loved ones have been murdered. These witnesses often need the support provided by the presence of a family member or loved one, but these persons are often excluded if the defense has designated them as witnesses. Sometimes those designations are legitimate; on other occasions they are only made to confuse or disturb the opposition. We suggest that the fairest balance between the need to support both witnesses and defendants and the need to prevent the undue influence of testimony lies in allowing a designated individual to be present regardless of his status as a witness.[149]

Without a right to attend trials, "the criminal justice system merely intensifies the loss of control that victims feel after the crime."[150] It should come as no surprise that "[v]ictims are often appalled to learn that they may not be allowed to sit in the courtroom during hearings or the trial. They are unable to understand why they cannot simply observe the proceedings in a supposedly public forum."[151] One crime victim put it more directly: "All we ask is that we be treated just like a criminal."[152] In this connection, it is worth remembering that defendants never

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[148] *See generally* OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, THE CRIME VICTIM'S RIGHT TO BE PRESENT 2 (2001) (showing how defense counsel can successfully argue to have victims excluded as witnesses).
[149] HERRINGTON ET AL., *supra* note 10, at 80.
[150] Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 72 (1987).
[151] Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 58 (1987).
[152] *Id.* at 59 (quoting Edmund Newton, *Criminals Have All the Rights*, LADIES' HOME J., Sept. 1986).

suggest that *they* could be validly excluded from the trial if the prosecution requests *their* sequestration. Defendants frequently take full advantage of their right to be in the courtroom.[153]

To ensure that victims can attend court proceedings, the Victims' Rights Amendment extends them this unqualified right. Many state amendments have similar provisions.[154] Such an unqualified right does not interfere with a defendant's right for the simple reason that defendants have no constitutional right to exclude victims from the courtroom.[155]

The amendment will give victims a right not to be excluded from public proceedings. The right is phrased in the negative—a right *not* to be excluded—thus avoiding the possible suggestion that a right "to attend" carried with it a victim's right to demand payment from the public fisc for travel to court.[156]

The right is limited to *public* proceedings. While the great bulk of court proceedings are public, occasionally they must be closed for various compelling reasons. The Victims' Rights Amendment makes no change in court closure policies, but simply indicates that when a proceeding is closed, the victim may be excluded as well. An illustration is the procedures that courts may employ to prevent disclosure of confidential national security information.[157] When court proceedings are closed to the public pursuant to these provisions, a victim will have no

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[153] *See* LINDA E. LEDRAY, RECOVERING FROM RAPE 199 (2d ed. 1994) ("Even the most disheveled [rapist] will turn up in court clean-shaven, with a haircut, and often wearing a suit and tie. He will not appear to be the type of man who could rape.").

[154] *See, e.g.*, ALASKA CONST. art. I, § 24 (right "to be present at all criminal . . . proceedings where the accused has the right to be present"); MICH. CONST., art. I, § 24(1) (right "to attend the trial and all other court proceedings the accused has the right to attend"); OR. R. EVID. 615 (witness exclusion rule does not apply to "victim in a criminal case"). *See* Beloof & Cassell, *supra* note 146, at 504-19 (providing a comprehensive discussion of state law on this subject).

[155] *See* Beloof & Cassell, *supra* note 145, at 520-34. *See, e.g.*, United States v. Edwards, 526 F.3d 747, 757-58 (11th Cir. 2008).

[156] *Cf.* ALA. CODE § 15-14-54 (Westlaw through 2012 Legis. Sess.) (right "not [to] be excluded from court . . . during the trial or hearing or any portion thereof . . . which in any way pertains to such offense").

[157] *See generally* WAYNE R. LAFAVE ET. AL., CRIMINAL PROCEDURE § 23.1(b) (3d ed. 2007) (discussing court closure cases).

right to attend. Finally, the victims right to attend is limited to proceedings relating to the offense, rather than open-endedly creating a right to attend any sort of proceedings.

Occasionally the claim is advanced that a Victims' Rights Amendment would somehow allow victims to "act[] in an excessively emotional manner in front of the jury or convey their opinions about the proceedings to that jury."[158] Such suggestions misunderstand the effect of the right-not-to-be-excluded provision. In this connection, it is interesting that no specific illustrations of a victims' right provision actually being interpreted in this fashion have, to my knowledge, been offered. The reason for this dearth of illustrations is that courts undoubtedly understand that a victims' right to be present does not confer any right to disrupt court proceedings. Here, courts are simply treating victims' rights in the same fashion as defendants' rights. Defendants have a right to be present during criminal proceedings, which stems from both the Confrontation and Due Process Clauses of the Constitution.[159] Courts have consistently held that these constitutional rights do not confer on defendants any right to engage in disruptive behavior.[160]

> *The crime victim shall, moreover, have the rights . . . to be heard at any release, plea, sentencing, or other such proceeding involving any right established by this article . . .*

Victims deserve the right to be heard at appropriate points in the criminal justice process, and thus deserve to participate directly in the criminal justice process. The CVRA promises crime victims "[t]he right to be reasonably heard at any public proceeding in the district court

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[158] Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1702 (1997).

[159] *See* Diaz v. United States, 223 U.S. 442, 454-555 (1912); Kentucky v. Stincer, 482 U.S. 730, 740-44 (1987).

[160] *See, e.g.*, Illinois v. Allen, 397 U.S. 337 (1970) (defendant waived right to be present by continued disruptive behavior after warning from court); Saccomanno v. Scully, 758 F.2d 62, 64-65 (2d Cir. 1985) (concluding that defendant's obstreperous behavior justified his exclusion from courtroom); Foster v. Wainwright, 686 F.2d 1382, 1387 (11th Cir. 1982) (defendant forfeited right to be present at trial by interrupting proceeding after warning by judge, even though his behavior was neither abusive nor violent).

involving release, plea, or sentencing."[161] A number of states have likewise added provisions to their state constitutions allowing similar victim participation.[162]

The VRA identifies three specific and one general points in the process where a victim statement is permitted. First, the VRA would extend the right to be heard regarding any *release* proceeding—i.e., bail hearings. This will allow, for example, a victim of domestic violence to warn the court about possible violence should the defendant be granted bail. At the same time, however, it must be emphasized that nothing in the VRA gives victims the ability to veto the release of any defendant. The ultimate decision to hold or release a defendant remains with the judge or other decision-maker. The amendment will simply provide the judge with more information on which to base that decision. Release proceedings would include not only bail hearings but other hearings involving the release of accused or convicted offenders, such as parole hearings and any other hearing that might result in a release from custody. Victim statements to parole boards are particularly important because they "can enable the board to fully appreciate the nature of the offense and the degree to which the particular inmate may present risks to the victim or community upon release."[163]

The right to be heard also extends to any proceeding involving a plea. Under the present rules of procedure in most states, every plea bargain between a defendant and the state to resolve

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[161] 18 U.S.C. § 3771(a)(4) (2006).

[162] *See, e.g.*, ARIZ. CONST. art II, § 2.1(A)(4) (right to be heard at proceedings involving post-arrest release, negotiated pleas, and sentencing); COLO. CONST. art. II, § 16a (right to be heard at critical stages); FLA. CONST. art. I, § 16(b) (right to be heard when relevant at all stages); ILL. CONST. art. I, § 8.1(4) (right to make statement at sentencing); KAN. CONST. art. 15, § 15(a) (right to be heard at sentencing or any other appropriate time); MICH. CONST. of 1963, art. I, § 24(1) (right to make statement at sentencing); MO. CONST. art. I, § 32(1)(2) (right to be heard at guilty pleas, bail hearings, sentencings, probation revocation hearings, and parole hearings, unless interests of justice require otherwise); N.M. CONST. art. II, § 24(A)(7) (right to make statement at sentencing and post-sentencing hearings); R.I. CONST. art. I, § 23 (right to address court at sentencing); WASH. CONST. art. I, § 35 (right to make statement at sentencing or release proceeding); WIS. CONST. art. I, § 9m (opportunity to make statement to court at disposition); UTAH CONST. art. I, § 28(1)(b) (right to be heard at important proceedings).

[163] Frances P. Bernat et al., *Victim Impact Laws and the Parole Process in the United States: Balancing Victim and Inmate Rights and Interests*, 3 INT'L REV. VICTIMOLOGY 121, 134 (1994).

a case before trial must be submitted to the trial court for approval.[164] If the court believes that the bargain is not in the interest of justice, it may reject it.[165] Unfortunately in some states, victims do not always have the opportunity to present to the judge information about the propriety of the plea agreements. Indeed, it may be that in some cases "keeping the victim away from the judge . . . is one of the prime motivations for plea bargaining."[166] Yet victims have compelling reasons for some role in the plea bargaining process:

> The victim's interests in participating in the plea bargaining process are many. The fact that they are consulted and listened to provide them with respect and an acknowledgment that they are the harmed individual. This in turn may contribute to the psychological healing of the victim. The victim may have financial interests in the form of restitution or compensatory fine . . . . [B]ecause judges act in the public interest when they decide to accept or reject a plea bargain, the victim is an additional source of information for the court.[167]

It should be noted that nothing in the Victims' Rights Amendment requires a prosecutor to obtain a victim's approval before agreeing to a plea bargain. The language is specifically limited to a victim's right to be heard regarding a plea proceeding. A meeting between a prosecutor and a defense attorney to negotiate a plea is not a *proceeding* involving the plea, and therefore victims are conferred no right to attend the meeting. In light of the victim's right to be heard regarding any deal, however, it may well be the prosecutors would undertake such consultation at a mutually convenient time as a matter of prosecutorial discretion. This has been the experience in my state of Utah. While prosecutors are not required to consult with victims before entering plea agreements, many of them do. In serious cases such as homicides and rapes,

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[164] *See generally* BELOOF, CASSELL & TWIST, *supra* note 1, at 422 (discussing this issue).
[165] *See, e.g.*, UTAH R. CRIM. P. 11(e) ("The court may refuse to accept a plea of guilty . . . ."); State v. Mane, 783 P.2d 61, 66 (Utah Ct. App. 1989) (following Rule 11(e) and holding "[n]othing in the statute requires a court to accept a guilty plea").
[166] HERBERT S. MILLER ET AL., PLEA BARGAINING IN THE UNITED STATES 70 (1978).
[167] BELOOF, CASSELL & TWIST, *supra* note 1, at 423.

Utah courts have also contributed to this trend by not infrequently asking prosecutors whether victims have been consulted about plea bargains.

As with the right to be heard regarding bail, it should be noted that victims are only given a voice in the plea bargaining process, not a veto. The judge is not required to follow the victim's suggested course of action on the plea, but simply has more information on which to base such a determination.

The Victims' Rights Amendment also would extend the right to be heard to proceedings determining a sentence. Defendants have the right to directly address the sentencing authority before sentence is imposed.[168] The Victims' Rights Amendment extends the same basic right to victims, allowing them to present a victim impact statement.

Elsewhere I have argued at length in favor of such statements.[169] The essential rationales are that victim impact statements provide information to the sentencer, have therapeutic and other benefits for victims, explain the crime's harm to the defendant, and improve the perceived fairness of sentencing.[170] The arguments in favor of victim impact statements have been universally persuasive in this country, as the federal system and all fifty states generally provide victims the opportunity to deliver a victim impact statement.[171]

Victims would exercise their right to be heard in any appropriate fashion, including making an oral statement at court proceedings or submitting written information for the court's

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[168] *See, e.g.*, FED. R. EVID. 32(i)(4)(A); UTAH R. CRIM. P. 22(a).
[169] Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009).
[170] *Id.* at 619-25.
[171] *Id.* at 615; *see also* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 299-305 (2003).

consideration.[172] Defendants can respond to the information that victims provide in appropriate ways, such as providing counter-evidence.[173]

The victim also would have the general right to be heard at a proceeding involving any right established by this article. This allows victims to present information in support of a claim of right under the amendment, consistent with normal due process principles.[174]

The victim's right to be heard under the VRA is subject to limitations. A victim would not have the right to speak at proceedings other than those identified in the amendment. For example, the victims gain no right to speak at the trial. Given the present construction of these proceedings, there is no realistic design for giving a victim an unqualified right to speak. At trial, however, victims will often be called as witnesses by the prosecution and if so, they will testify as any other witness would.

In all proceedings, victims must exercise their right to be heard in a way that is not disruptive. This is consistent with the fact that a defendant's constitutional right to be heard carries with it no power to disrupt the court's proceedings.[175]

. . . to proceedings free from unreasonable delay . . .

This provision is designed to be the victims' analogue to the defendant's right to a speedy trial found in the Sixth Amendment.[176] The defendant's right is designed, *inter alia*, "to minimize anxiety and concern accompanying public accusation" and "to limit the possibilities

[172] A previous version of the amendment allowed a victim to make an oral statement or submit a "written" statement. S.J. Res. 6, 105th Cong. (1997). This version has stricken the artificial limitation to written statements and would thus accommodate other media (such as videotapes or Internet communications).

[173] *See generally* Paul G. Cassell & Edna Erez, *Victim Impact Statements and Ancillary Harm: The American Perspective*, 15 CAN. CRIM. L. REV. 149, 175-96 (2011) (providing a fifty state survey on procedures concerning victim impact statements).

[174] Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) ("For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard." (internal quotation omitted)).

[175] *See* FED. R. CRIM. P. 43(b)(3) (noting circumstances in which disruptive conduct can lead to defendant's exclusion from the courtroom).

[176] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . .").

that long delay will impair the ability of an accused to defend himself."[177] The interests underlying a speedy trial, however, are not confined to defendant. Indeed, the Supreme Court has acknowledged that:

> [T]here is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system.[178]

The ironic result is that in many criminal courts today the defendant is the only person without an interest in a speedy trial. Delay often works unfairly to the defendant's advantage. Witnesses may become unavailable, their memories may fade, evidence may be lost, or the case may simply grow stale and receive a lower priority with the passage of time.

While victims and society as a whole have an interest in a speedy trial, the current constitutional structure provides no means for vindication of that right. Although the Supreme Court has acknowledged the "societal interest" in a speedy trial, it is widely accepted that "it is rather misleading to say . . . that this 'societal interest' is somehow part of the right. The fact of the matter is that the 'Bill of Rights, of course, does not speak of the rights and interests of the government.'"[179] As a result, victims frequently face delays that by any measure must be regarded as unjustified and unreasonable, yet have no constitutional ability to challenge them.

It is not a coincidence that these delays are found most commonly in cases of child sex assault.[180] Children have the most difficulty in coping with extended delays. An experienced victim-witness coordinator in my home state described the effects of protracted litigation in a

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[177] Smith v. Hooey, 393 U.S. 374, 378 (1969) (citing United States v. Ewell, 383 U.S. 116, 120 (1966)).
[178] Barker v. Wingo, 407 U.S. 514, 519 (1972).
[179] LAFAVE ET. AL., *supra* note 157, at § 18.1(b) (footnote omitted).
[180] *See A Proposed Constitutional Amendment to Establish A Bill of Rights for Crime Victims: Hearing on S.J. Res. 52 Before the S. Comm. on the Judiciary*, 104th Cong. 29 (1996) (statement of John Walsh).

recent case: "The delays were a nightmare. Every time the counselors for the children would call and say we are back to step one. The frustration level was unbelievable."[181] Victims cannot heal from the trauma of the crime until the trial is over and the matter has been concluded.[182]

To avoid such unwarranted delays, the Victims' Rights Amendment will give crime victims the right to proceedings free from unreasonable delay. This formulation tracks the language from the CVRA.[183] A number of states have already established similar protections for victims.[184]

As the wording of the federal provision makes clear, the courts are not required to follow victims demands for scheduling trial or prevent all delay, but rather to insure against "unreasonable" delay.[185] In interpreting this provision, the court can look to the body of case law that already exists for resolving defendants' speedy trial claims. For example, in *Barker v. Wingo*, the United States Supreme Court set forth various factors that could be used to evaluate a defendant's speedy trial challenge in the wake of a delay.[186] As generally understood today, those factors are: (1) the length of the delay; (2) the reason for the delay; (3) whether and when the defendant asserted his speedy trial right; and (4) whether the defendant was prejudiced by the delay.[187] These kinds of factors could also be applied to victims' claims. For example, the length of the delay and the reason for the delay (factors (1) and (2)) would remain relevant in assessing victims' claims. Whether and when a victim asserted the right (factor (3)) would also

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[181] Telephone Interview with Betty Mueller, Victim/Witness Coordinator, Weber Cnty. Attorney's Office (Oct. 6, 1993).
[182] *See* HERRINGTON ET AL., *supra* note 10, at 75; *Utah This Morning* (KSL television broadcast Jan. 6, 1994) (statement of Corrie, rape victim) ("Once the trial was over, both my husband and I felt we had lost a year and a half of our lives.").
[183] 18 U.S.C. § 3771(a)(7) (2006).
[184] *See* ARIZ. CONST. art. II, § 2.1(A)(10); CAL. CONST. art. I, § 29; ILL. CONST. art. I, § 8.1(a)(6); MICH. CONST. art. I, § 24(1); MO. CONST. art. I, § 32(1)(5); WIS. CONST. art I, § 9m.
[185] *See, e.g.*, United States v. Wilson, 350 F. Supp. 2d 910, 931 (D. Utah 2005) (interpreting CVRA's right to proceedings free from unreasonable delay to preclude delay in sentencing).
[186] Barker v. Wingo, 407 U.S. 514, 530-33 (1972).
[187] *See id. See generally* LAFAVE ET AL., *supra* note 157, at § 18.2.

be relevant, although due regard should be given to the frequent difficulty that unrepresented victims have in asserting their legal claims. Defendants are not deemed to have *waived* their right to a speedy trial simply through failing to assert it.[188] Rather, the circumstances of the defendant's assertion of the right is given "strong evidentiary weight" in evaluating his claims.[189] A similar approach would work for trial courts considering victims' motions. Finally, while victims are not *prejudiced* in precisely the same fashion as defendants (factor (4)), the Supreme Court has instructed that "prejudice" should be "assessed in the light of the interests of defendants which the speedy trial right was designed to protect," including the interest "to minimize anxiety and concern of the accused" and "to limit the possibility that the [defendant's presentation of his case] will be impaired."[190] The same sorts of considerations apply to victims and could be evaluated in assessing victims' claims.

It is also noteworthy that statutes in federal courts and in most states explicate a defendant's right to a speedy trial. For example, the Speedy Trial Act of 1974 specifically implements a defendant's Sixth Amendment right to a speedy trial by providing a specific time line (seventy days) for starting a trial in the absence of good reasons for delay.[191] In the wake of the passage of a Victims' Rights Amendment, Congress could revise the Speedy Trial Act to include not only defendants' interests but also victims' interests, thereby answering any detailed implementation questions that might remain. For instance, one desirable amplification would be a requirement that courts record reasons for granting any continuance. As the Task Force on Victims of Crime noted, "the inherent human tendency [is] to postpone matters, often for

[188] *See Barker*, 407 U.S. at 528 ("We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right.").
[189] *Id.* at 531-32.
[190] *Id.* at 532.
[191] Pub. L. No. 96-43, 93 Stat. 327 (codified as amended at 18 U.S.C. §§ 3161-74) (2008).

insufficient reason," and accordingly the Task Force recommended that the "reasons for any granted continuance . . . be clearly stated on the record."[192]

. . . to reasonable notice of the release or escape of the accused . . .

Defendants and convicted offenders who are released pose a special danger to their victims. An unconvicted defendant may threaten, or indeed carry out, violence to permanently silence the victim and prevent subsequent testimony. A convicted offender may attack the victim in a quest for revenge.

Such dangers are particularly pronounced for victims of domestic violence and rape. For instance, Colleen McHugh obtained a restraining order against her former boyfriend Eric Boettcher on January 12, 1994.[193] Authorities soon placed him in jail for violating that order.[194] He later posted bail and tracked McHugh to a relative's apartment, where on January 20, 1994, he fatally shot both Colleen McHugh and himself.[195] No one had notified McHugh of Boettcher's release from custody.[196]

The VRA would ensure that victims are not suddenly surprised to discover that an offender is back on the streets. The notice is provided in either of two circumstances: either a *release*, which could include a post-arrest release or the post-conviction paroling of a defendant, or an *escape*. Several states have comparable requirements.[197] The administrative burdens associated with such notification requirements have recently been minimized by technological

[192] HERRINGTON ET AL., *supra* note 10, at 76; *see* ARIZ. REV. STAT. ANN. §13-4435(F) (Westlaw through 2012 Legis. Sess.) (requiring courts to "state on the record the specific reason for [any] continuance"); UTAH CODE ANN. § 77-38-7(3)(b) (Lexis Nexis, LEXIS through 2011 Legis. Sess.) (requiring courts, in the event of granting continuance, to "enter in the record the specific reason for the continuance and the procedures that have been taken to avoid further delays").

[193] Jeffrey A. Cross, Note, *The Repeated Sufferings of Domestic Violence Victims Not Notified of Their Assailant's Pre-Trial Release from Custody: A Call for Mandatory Domestic Violence Victim Notification Legislation*, 34 U. LOUISVILLE J. FAM. L. 915, 915-16 (1996).

[194] *See id.*

[195] *Id.*

[196] *See id.* (providing this and other helpful examples).

[197] *See, e.g.*, ARIZ. CONST. art. II, § 2.1 (victim's right to "be informed, upon request, when the accused or convicted person is released from custody or has escaped").

advances. Many states have developed computer-operated programs that can place a telephone call to a programmed number when a prisoner is moved from one prison to another or released.[198]

. . . to due consideration of the crime victim's safety . . .

This provision builds on language in the CVRA guaranteeing victims "[t]he right to be reasonably protected from the accused."[199] State amendments contain similar language, such as the California Constitution extending a right to victims to "be reasonably protected from the defendant and persons acting on behalf of the defendant" and to "have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant."[200]

This provision guarantees that victims' safety will be considered by courts, parole boards, and other government actors in making discretionary decisions that could harm a crime victim.[201] For example, in considering whether to release a suspect on bail, a court will be required to consider the victim's safety. This dovetails with the earlier-discussed provision giving victims a right to speak at proceedings involving bail. Once again, it is important to emphasize that nothing in the provision gives the victim any sort of a veto over the release of a defendant; alternatively, the provision does not grant any sort of prerogative to *require* the release of a defendant. To the contrary, the provision merely establishes a requirement that *due consideration* be given to such concerns in the process of determining release.

Part of that consideration will undoubtedly be whether the defendant should be released subject to certain conditions. One often-used condition of release is a criminal protective

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[198] *See About VINELink*, VINELINK, https://www.vinelink.com/ (last visited on Mar. 23, 2012).
[199] 18 U.S.C. § 3771(a)(1) (2006).
[200] CAL. CONST. art. I, § 28(b)(2)-(3).
[201] In the case of a mandatory release of an offender (*e.g.*, releasing a defendant who has served the statutory maximum term of imprisonment), there is no such discretionary consideration to be made of a victim's safety.

order.[202] For instance, in many domestic violence cases, courts may release a suspected offender on the condition that he[203] refrain from contacting the victim. In many cases, *consideration* of the safety of the victim will lead to courts crafting appropriate *no contact* orders and then enforcing them through the ordinary judicial processes currently in place.

. . . to due consideration of the crime victim's . . . privacy . . .

The VRA would also require courts to give "due consideration" to the crime victim's privacy. This provision building on a provision in the CVRA, which guarantees crime victims "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy."[204] Various states have similar provisions. Arizona, for example, promises crime victims the right "[t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process."[205] Similarly, California extends to victims the right "[t]o be treated with fairness and respect for his or her privacy and dignity . . . ."[206] The federal constitution appropriately should include such rights as well.

. . . to restitution . . .

This right would essentially constitutionalize a procedure that Congress has mandated for some crimes in the federal courts. In the Mandatory Victims Restitution Act ("MVRA"),[207] Congress required federal courts to enter a restitution order in favor of victims for crimes of violence. Section 3663A states that "[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [a crime of violence as defined in 18 U.S.C. § 16] . . . the

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[202] *See generally* BELOOF, CASSELL & TWIST, *supra* note 1, at 310-23.
[203] Serious domestic violence defendants are predominantly, although not exclusively, male.
[204] 18 U.S.C. § 3771(a)(8).
[205] ARIZ. CONST., art. II, § 2.1.
[206] Cal. Const., art. I, § 28(b)(1).
[207] 18 U.S.C. §§ 3663A, 3664 (2006).

court *shall* order . . . that the defendant make restitution to the victim of the offense."[208] In justifying this approach, the Judiciary Committee explained:

> The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.[209]

While restitution is critically important, the Committee found that restitution orders were only sometimes entered and, in general, "much progress remains to be made in the area of victim restitution."[210] Accordingly, restitution was made mandatory for crimes of violence in federal cases. State constitutions contain similar provisions. For instance, the California Constitution provides crime victims a right to restitution and broadly provides:

> (A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.
> (B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.
> (C) All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim.[211]

The Victims' Rights Amendment would effectively operate in much the same fashion as the MVRA, although it would elevate the importance of restitution.[212] Courts would be required to enter an order of restitution against the convicted offender. Thus, the offender would be legally obligated to make full restitution to the victim. However, not infrequently offenders lack

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[208] § 3663A(a)(1) (emphasis added).
[209] S. REP. NO. 104-179, at 12-13 (1995) (*quoting* S. REP. NO. 97-532, at 30 (1982)). This report was later adopted as the legislative history of the MVRA. *See* H.R. CONF. REP. NO. 104-518, at 111-12 (1996).
[210] S. Rep. 104-179, at 13.
[211] CAL. CONST. art. I, § 28(b)(13).
[212] A constitutional amendment protecting crime victims' rights would also help to more effectively ensure enforcement of existing restitution statutes. For example, the federal statutes do not appear to be working properly, at least in some cases. I discuss this issue at greater length in Part IV, *infra*.

the means to make full restitution payments. Accordingly, the courts can establish an appropriate repayment schedule and enforce it during the period of time in which the offender is under the court's jurisdiction.[213] Moreover, the courts and implementing statutes could provide that restitution orders be enforceable as any other civil judgment.

In further determining the contours of the victims' restitution right, there are well-established bodies of law that can be examined.[214] Moreover, details can be further explicated in implementing legislation accompanying the amendment. For instance, in determining the compensable losses, an implementing statute might rely on the current federal statute, which includes among the compensable losses medical and psychiatric services, physical and occupational therapy and rehabilitation, lost income, the costs of attending the trial, and in the case of homicide, funeral expenses.[215]

> *The crime victim or the crime victim's lawful representative has standing to fully assert and enforce these rights in any court.*

This language will confer standing on victims to assert their rights. It tracks language in the CVRA, which provides that "[t]he crime victim or the crime victim's lawful representative . . . may assert the rights described [in the CVRA]."[216]

Standing is a critically important provision that must be read in connection with all of the other provisions in the amendment. After extending rights to crime victims, this sentence ensures that they will be able to *fully* enforce those rights. In doing so, this sentence effectively

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[213] *Cf.* 18 U.S.C. § 3664 (2006) (establishing restitution procedures).
[214] *See generally* Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of Criminal Courts*, 30 UCLA L. REV. 52 (1982). *Cf.* RESTATEMENT (FIRST) OF RESTITUTION (2011) (setting forth established restitution principles in civil cases).
[215] *See* § 3663A.
[216] § 3771(d)(1).

overrules derelict court decisions that have occasionally held that crime victims lack standing or the full ability to enforce victims' rights enactments.[217]

The Victims' Rights Amendment would eliminate once and for all the difficulty that crime victims have in being heard in court to protect their interests by conferring standing on the victim. A victim's lawful representative can also be heard, permitting, for example, a parent to be heard on behalf of a child, a family member on behalf of a murder victim, or a lawyer to be heard on behalf of a victim-client.[218] The VRA extends standing only to victims or their representatives to avoid the possibility that a defendant might somehow seek to take advantage of victims' rights. This limitation prevents criminals from clothing themselves in the garb of a victim and claiming a victim's rights.[219] In Arizona, for example, the courts have allowed an unindicted co-conspirator to take advantage of a victim's provision.[220] Such a result would not be permitted under the Victims' Rights Amendment.

> *Nothing in this article provides grounds for a new trial or any claim for damages . . .*

This language restricts the remedies that victims may employ to enforce their rights by forbidding them from obtaining a new trial or money damages. It leaves open, however, all other possible remedies.

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[217] *See, e.g.*, United States v. McVeigh, 106 F.3d 325 (10th Cir. 1997); Cassell, *supra* note 3, at 515-22 (discussing the *McVeigh* case). The CVRA's standing provisions specifically overruled *McVeigh*, as is made clear in the CVRA's legislative history:

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

150 CONG. REC. 7303 (2004) (statement of Sen. Feinstein).

[218] *See* BELOOF, CASSELL & TWIST, *supra* note 1, at 61-64 (discussing representatives of victims).

[219] *E.g.*, KAN. CONST. art. 15, § 15(c).

[220] *See* Knapp v. Martone, 823 P.2d 685, 686-87 (Ariz. 1992) (en banc).

A dilemma posed by enforcement of victims' rights is whether victims are allowed to appeal a previously-entered court judgment or seek money damages for non-compliance with victims' rights. If victims are given such power, the ability to enforce victims' rights increases; on the other hand, the finality of court judgments is concomitantly reduced and governmental actors may have to set aside financial resources to pay damages. Depending on the weight one assigns to the competing concerns, different approaches seem desirable. For example, it has been argued that allowing the possibility of victim appeals of plea bargains could even redound to the detriment of crime victims generally by making plea bargains less desirable to criminal defendants and forcing crime victims to undergo more trials.[221]

The Victims' Rights Amendment strikes a compromise on the enforcement issue. It provides that *nothing in this article* shall provide a victim with grounds for overturning a trial or for money damages. These limitations restrict some of the avenues for crime victims to enforce their rights, while leaving many others open. In providing that nothing creates those remedies, the VRA makes clear that it—by itself—does not automatically create a right to a new jury trial or money damages. In other words, the language simply removes this aspect of the remedies question for the judicial branch and assigns it to the legislative branches in Congress and the states.[222] Of course, it is in the legislative branch where the appropriate facts can be gathered and compromises struck to resolve which challenges, if any, are appropriate in that particular jurisdiction.

It is true that one powerful way of enforcing victims' rights is through a lawsuit for money damages. Such actions would create clear financial incentives for criminal justice agencies to comply with victims' rights requirements. Some states have authorized damages

[221] *See* Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 350 (1987).
[222] Awarding a new trial might also raise double jeopardy issues. Because the VRA does not eliminate defendant's rights, the VRA would not change any double jeopardy protections.

actions in limited circumstances.[223] On the other hand, civil suits filed by victims against the state suffer from several disadvantages. First and foremost, in a time of limited state resources and pressing demands for state funds, the prospect of expensive awards to crime victims might reduce the prospects of ever passing a Victims' Rights Amendment. A related point is that such suits might give the impression that crime victims seek financial gain rather than fundamental justice. Because of such concerns, a number of states have explicitly provided that their victims' rights amendments create no right to sue for damages.[224] Other states have reached the same destination by providing explicitly that the remedies for violations of the victims' amendment will be provided by the legislature, and in turn by limiting the legislatively-authorized remedies to other-than-monetary damages.[225]

The Victims' Rights Amendment breaks no new ground but simply follows the prevailing view in denying the possibility of a claim for damages under the VRA. For example, no claim could be filed for money damages under 18 U.S.C. § 1983 per the VRA.

Because money damages are not allowed, what will enforce victims' rights? Initially, victims' groups hope that such enforcement issues will be relatively rare in the wake of the passage of a federal constitutional amendment. Were such an amendment to be adopted, every judge, prosecutor, defense attorney, court clerk, and crime victim in the country would know about victims' rights and that they were constitutionally protected in our nation's fundamental

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[223] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4437(B) (Westlaw through 2012 Legis. Sess.) ("A victim has the right to recover damages from a governmental entity responsible for the intentional, knowing or grossly negligent violation of the victim's rights . . . ."); *see also* Davya B. Gewurz & Maria A. Mercurio, Note, *The Victims' Bill of Rights: Are Victims All Dressed Up with No Place to Go?*, 8 ST. JOHN'S J. LEGAL COMMENT. 251, 262-65 (1992) (discussing lack of available redress for violations of victims' rights).

[224] *See, e.g.*, KAN. CONST. art. 15, § 15(b) ("Nothing in this section shall be construed as creating a cause of action for money damages against the state . . . ."); MO. CONST. art. 1, § 32(3) (same); TEX. CONST. art. 1, § 30(e) ("The legislature may enact laws to provide that a judge, attorney for the state, peace officer, or law enforcement agency is not liable for a failure or inability to provide a right enumerated in this section.").

[225] *See, e.g.*, ILL. CONST. art. I, § 8.1(b) ("The General Assembly may provide by law for the enforcement of this Section."); 725 ILL. COMP. STAT. ANN. 120/9 (West, Westlaw through 2011 Legis. Sess.) ("This Act does not . . . grant any person a cause of action for damages [which does not otherwise exist].").

charter. This is an *enforcement* power that, even by itself, goes far beyond anything found in existing victims' provisions. The mere fact that rights are found in the United States Constitution gives great reason to expect that they will be followed. Confirming this view is the fact that the provisions of our Constitution—freedom of speech, freedom of the press, freedom of religion—are all generally honored without specific enforcement provisions. The Victims' Rights Amendment will eliminate what is a common reason for failing to protect victims' rights—simple ignorance about victims and their rights.

Beyond mere hope, victims will be able to bring court actions to secure enforcement of their rights. Just as litigants seeking to enforce other constitutional rights are able to pursue litigation to protect their interests, crime victims can do the same. For instance, criminal defendants routinely assert constitutional claims, such as Fourth Amendment rights,[226] Fifth Amendment rights,[227] and Sixth Amendment rights.[228] Under the VRA, crime victims could do the same.

No doubt, some of the means for victims to enforce their rights will be spelled out through implementing legislation. The CVRA, for example, contains a specific enforcement provision designed to provide accelerated review of crime victims' rights issues in both the trial and appellate courts.[229] Similarly, state enactments have spelled out enforcement techniques.

One obvious concern with the enforcement scheme is whether attorneys will be available for victims to assert their rights. No language in the Victims' Rights Amendment provides a basis for arguing that victims are entitled to counsel at state expense.[230] To help provide legal

[226] Mapp v. Ohio, 367 U.S. 643 (1961).
[227] Arizona v. Fulminante, 499 U.S. 279 (1991).
[228] Gideon v. Wainwright, 372 U.S. 335 (1963).
[229] 18 U.S.C. § 3771(d)(3) (2006).
[230] *Cf. Gideon*, 372 U.S. 335 (defendant's right to state-paid counsel).

representation to victims, implementing statutes might authorize prosecutors to assert rights on behalf of victims, as has been done in both federal and state enactments.[231]

> *. . . and no person accused of the conduct described in section 2 of this article may obtain any form of relief.*

This provision simply insures that the VRA is used by those who need protection – victims of crime, rather than those who commit crimes. Similarly provisions are found in state amendments. For example, Arizona has provided that a representative of a "victim" of a crime cannot include a person "in custody for an offense" or "the accused."[232] A comparable provision appears appropriate for the VRA.

B. Section 2

> *For purposes of this article, a crime victim includes any person against whom the criminal offense is committed or who is directly and proximately harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime.*

Obviously an important issue regarding a *Victims'* Rights Amendment is who qualifies as a victim. The VRA broadly defines the victim, by offering two different definitions—either of which is sufficient to confer victim status.

The first of the two approaches is defining a victim as including any person against whom the criminal offense is committed. This language tracks language in the Arizona Constitution, which defines a "victim" as a "person against whom the criminal offense has been committed."[233] This language was also long used in the Federal Rules of Criminal Procedure, which until the passage of the CVRA defined a "victim" of a crime as one "against whom an

[231] *See, e.g.*, § 3771(d)(1); UTAH CODE ANN. § 77-38-9(6) (West, Westlaw through 2011 Legis. Sess.).
[232] Ariz. Const., art. II, § 12.1(12)(C).
[233] ARIZ. CONST. art. II, § 2.1(C).

offense has been committed."[234] Litigation under these provisions about the breadth of the term *victim* has been rare. Presumably this is because there is an intuitive notion surrounding who had been victimized by an offense that resolves most questions.

Under the Arizona amendment, the legislature was given the power to define these terms, which it did by limiting the phrase "criminal offense" to mean "conduct that gives a peace officer or prosecutor probable cause to believe that . . . [a] felony . . . [or that a] misdemeanor involving physical injury, the threat of physical injury or a sexual offense [has occurred]."[235] A ruling by the Arizona Court of Appeals, however, invalidated that definition, concluding that the legislature had no power to restrict the scope of the rights.[236] Since then, Arizona has operated under an unlimited definition—without apparent difficulty.

The second part of the two-pronged definition of victim is a person who is directly and proximately harmed by the commission of a crime. This definition follows the definition of victim found in the CVRA, which defines "victim" as a person "directly and proximately harmed" by a federal crime.[237]

The proximate limitation has occasionally lead to cases denying victim status to persons who clearly seemed to deserve such recognition. A prime example is the Antrobus case, discussed earlier in this testimony.[238] In that case, the district court concluded that a woman who had been gunned down by a murderer had not been "proximately" harmed by the illegal sale of the murder weapon.[239] Whatever the merits of this conclusion as a matter of interpreting the

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[234] *See* FED. R. CRIM. P. 32(f)(1) (2000) (amended 2008); *see also* FED. R. CRIM. P. 32 advisory committee's note discussing 2008 amendments).
[235] ARIZ. REV. STAT. ANN. § 13-4401(6)(a)-(b) (West, Westlaw through 2012 Legis. Sess.), *held unconstitutional by* State *ex. rel.* Thomas v. Klein, 214 Ariz. 205 (2007).
[236] State *ex rel.* Thomas v. Klein, 150 P.3d 778, 782 (Ariz. Ct. App. 2007) ("[T]he Legislature does not have the authority to restrict rights created by the people through constitutional amendment.").
[237] 18 U.S.C. § 3771(e) (2006) (emphasis added).
[238] *See supra* notes 73-82 and accompanying text.
[239] United States v. Hunter, No. 2:07CR307DAK, 2008 WL 53125, at *5 (D. Utah 2008).

CVRA, it makes little sense as a matter of public policy. The district judge should have heard the Antrobuses before imposing sentence.[240] And hopefully other courts will broadly interpret the term "proximately" to extend rights to those who most need them. It is interesting in this connection to note that a federal statute that has been in effect for many years, the Crime Control Act of 1990, has broadly defined "victim" as "a person that has suffered *direct* physical, emotional, or pecuniary *harm* as a result of the commission of a crime."[241]

One issue that Congress and the states might want to address in implementing language to the VRA is whether victims of *related* crimes are covered. A typical example is this: a rapist commits five rapes, but the prosecutor charges one, planning to call the other four victims only as witnesses. While the four are not *victims* of the charged offense, fairness would suggest that they should be afforded victims' rights as well. In my state of Utah, we addressed this issue by allowing the court, in its discretion, to extend rights to victims of these related crimes.[242] An approach like this would make good sense in the implementing statutes to the VRA.

Although some of the state amendments are specifically limited to natural persons,[243] the Victims' Rights Amendment would—like other constitutional protections—extend to corporate entities that were crime victims.[244] The term person in the VRA is broad enough to include corporate entities.

The Victims' Rights Amendment would also extend rights to victims in juvenile proceedings. The VRA extends rights to those directly harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime. The need for such language

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[240] *See* Cassell, *supra* note 169, at 616-19.
[241] 42 U.S.C.A. § 10607(e)(2) (Westlaw through 2012 P.L. 112-89) (emphasis added).
[242] *See, e.g.*, UTAH CODE ANN. § 77-38-2(1)(a) (West, Westlaw through 2011 Legis. Sess.) (implementing UTAH CONST. art. I, § 28).
[243] *See id.*
[244] *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (First Amendment rights extend to corporate entities).

stems from the fact that juveniles are not typically prosecuted for crimes but for delinquencies—in other words, they are not handled in the normal criminal justice process.[245] From a victim's perspective, however, it makes little difference whether the robber was a nineteen-year-old committing a crime or a fifteen-year-old committing a delinquency. The VRA recognizes this fact by extending rights to victims in both adult criminal proceedings and juvenile delinquency proceedings. Many other victims' enactments have done the same thing.[246]

IV. AN ILLUSTRATION OF A CASE WHERE THE AMENDMENT WOULD MAKE A DIFFERENCE.

I know that others will be providing important testimony to the Subcommittee about how the VRA would make an real world difference for crime victims across the country. But I wanted to offer one illustration of how, even in the federal system under the CVRA, statutory crime victims' rights are being subverted. I attempted to provide this testimony to the Subcommittee last year, but was unable to do so because I was unable to determine whether judicial sealing orders precluded me from informing the Subcommittee what has happened.[247] Since then, a number of the documents involved in the case have been unsealed and entered into the public record. Sadly these documents and other public record information show that the U.S. Attorney's Office for the Eastern District of New York has not complied with important provisions in the MVRA and CVRA. The fact that the Office believes that it can ignore even a federal statute commanding that crime victims' receive rights provides one clear illustration of the need to elevate crime victims' protections to the constitutional level.

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[245] *See, e.g.*, Brian J. Willett, *Juvenile Law vs. Criminal Law: An Overview*, 75 TEX. B.J. 116 (2012).
[246] *See, e.g.*, United States v. L.M., 425 F. Supp. 2d 948 (N.D. Iowa 2006) (construing the CVRA as extending to juvenile cases, although only *public* proceedings in such cases).
[247] *See* Letter from Paul G. Cassell to Hon. Lamar Smith, Chairman, Comm. on the Judiciary (May 10, 2012), *reprinted in* PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO PROTECT THE RIGHTS OF CRIME VICTIMS: HRNG BEFORE THE SUBCOMM. ON THE CONSTITUTION OF THE HOUSE JUDICIARY COMM., Serial No. 112-113 (Apr. 26, 2012), at p. 202. I discuss these circumstances at greater length below.

Factual Background of the Doe *Case*[248]

The case involves a defendant who I will call "John Doe."[249] Doe pled guilty in 1998 to racketeering for running a stock fraud that stole more than forty million dollars from victims.[250] Doe then provided unspecified cooperation to the Government. In 2004, he came up for sentencing. The U.S. Attorney's Office declined to provide the list of Doe's victims to the probation office, preventing the probation office from contacting the victims.[251] As a result, the pre-sentence report did not include any restitution, even though a restitution order was "mandatory" under the Mandatory Victim Restitution Act. [252] In any event, when he was ultimately sentenced five years later in 2009, Doe escaped paying to his victims any restitution for the more than forty million dollars that he pilfered.[253] Doe's victims received no notice of the sentencing, even though the Crime Victims' Rights Act requires notice to victims of all public court hearings.[254]

Of course, Doe's 1999 conviction should have signaled the end of Doe's business career and created the possibility of restitution for the victims of his crimes. Unfortunately, the

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[248] All of the information recounted in this testimony comes from public sources. For a general overview of the proceedings in the case, see the recently-unsealed docket sheet for U.S. v. Doe, No. 98-CR-1101-01 (E.D.N.Y.) (docket entries from Dec. 3, 1998, to Mar. 27, 2013).

[249] The name of "Doe" is now public record, as the judge presiding over the matter recently unsealed it and the press has widely discussed it. *See, e.g.,* Andrew Keshner, *Judge Orders Unsealing in U.S. Cooperation Case*, N.Y.L.J., Mar. 14, 2013; *see also* United States v. John Doe, No. 98-CR-1101-01, doc. #101, at 1 (government motion to put Doe's name into the public record in the case). Out of an abundance of caution, however, I do not recount the name in this testimony.

[250] Petn. for Writ of Certiorari at 4-6, Roe v. United States, No. 12-112 (U.S. Supreme Court May 10, 2012).

[251] *Id.* at 7.

[252] *Id.*

[253] *Id.* at 22. *See* United States v. John Doe, No. 98-CR-1101-01, doc. 35, at 4 (available on PACER); Petition for Rehearing at 5-6, Roe v. United States, No. 12-112 (U.S. Supreme Court Apr. 19, 2013). Cf. United States v. John Doe, No. 98-CR-1101-01, doc. 137 at 23-24 n.5 (Doe agrees that MVRA applied at his sentencing but contends that identification of victims was impractical).

[254] Petition for Rehearing at 1-6, Roe v. United States, No. 12-112 (Apr. 19, 2013) (public record pleading awaiting docketing in the Supreme Court).

Government concealed what it was doing by keeping the entire case under unlawful seal.[255] And Doe wasted little time in resuming his old tricks and defrauding new victims.[256] By 2002, he had infiltrated a real estate venture and used it to launder tens of millions of dollars, skim millions more in cash, and once again defraud his investors and partners.[257] An attorney, who I will call "Richard Roe," represents many of Doe's victims. While preparing a civil RICO complaint against Doe, Roe received – unsolicited – documents from a whistleblower at Doe's company that provided extensive information about Doe's earlier crimes.[258] Those documents included a presentence report ("PSR") from the 1998 case, which revealed that Doe was hiding his previous conviction from his partners in the new firm.[259] In May 2010, Roe filed the RICO complaint on behalf of Doe's victims in U.S. District Court for the Southern District of New York, with portions of the PSR attached as an exhibit.[260] Instead of taking steps to help Doe's victims recover for their losses, two district courts quickly swung into action to squelch any public reference to the earlier criminal proceedings and to punish Roe for disclosing evidence of Doe's crimes.[261] The S.D.N.Y. court sealed the civil RICO complaint four days after Roe filed it.[262] And the E.D.N.Y. court in which Doe was secretly prosecuted issued a temporary restraining order barring Roe from disseminating the PSR and other documents – even though Roe was not a party to that case, and even though the court could not identify any actual sealing or other order

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[255] As to whether the case was ever actually sealed, it remains unclear whether the district judge ever actually entered a formal sealing order. Thus, without a sealing order, it is more accurate to say not that the case has been "under seal" but rather that it has been "hidden." Petn. for Writ of Certiorari at 1, Roe v. United States, No. 12-112 (Mar. 5, 2013); *see also* Petition for Rehearing at 1-6, Roe v. United States, No. 12-112 (Apr. 19, 2013) (discussing uncertainty about sealed nature of the case)..

[256] Reply in Support of Petn. for Writ of Certiorari at 1, Roe v. United States, No. 12-112 (Mar. 5, 2013).

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *Id.*; *see also* Petition for Rehearing at 1-6, Roe v. United States, No. 12-112 (Apr. 19, 2013).

[262] Reply in Support of Petn. for Writ of Certiorari at 2, Roe v. United States, No. 12-112 (Mar. 5, 2013); *see also* John Doe's Memo. of Law in Support of Order Directing Return of Sealed and Confidential Materials, U.S. v. Doe, No. 11-CR-1101-ILG (May 18, 2010) (doc. #51).

that applied to Roe.[263] The court subsequently converted the TRO into a permanent injunction, and the Second Circuit affirmed.[264]

Roe sought review in the U.S. Supreme Court by filing a petition for a writ of certiorari, raising both First Amendment argues and crime victims' rights arguments.[265] The National Organization for Victim Assistance (NOVA) filed an amicus brief, highlighting the fact the petition presented important issues about crime victims' rights – specifically the fact that the Government believed it could avoid compliance with crime victims' rights statutes through the simply expedient of hiding the case from the victims and other members of the public.[266] The Solicitor General filed an opposition to the certiorari petition, studiously avoiding any discussion of whether the Government had complied with the crime victims' rights statute.[267] The Supreme Court recently denied review. The net result is that victims of Doe's crimes, including a number of Holocaust survivors, have yet to recover any of their lost funds.[268] And Doe continues to live well off of money that he stole from his victims.[269]

Violation of the Mandatory Victim Restitution Act.

The Doe case illustrates how, without constitutional protection, even a federal statute can be insufficient to full assure that crime victims receive their rights. In 1996, Congress enacted a statute – the Mandatory Victim Restitution Act (MVRA) -- to guarantee that victims of certain

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[263] Reply in Support of Petn. for Writ of Certiorari at 2, Roe v. United States, No. 12-112 (Mar. 5, 2013).
[264] Roe v. U.S., 428 Fed.Appx.60, 2011 WL 2559016 (2d Cir. 2011). I assisted Mr. Roe as legal counsel for part of the proceedings before the Second Circuit.
[265] Roe was represented by two very capable appellate attorneys, Richard E. Lerner, Esq., and Paul Clement, former Solicitor General of the United States.
[266] Brief *Amicus Curiae* of the National Organization for Victim Asst., Roe v. U.S., No. 12-112 (Aug. 27, 2012). Along with Professor Douglas Beloof of Lewis & Clark Law School and Professor Amy Wildermuth of the University of Utah College of Law, I served as counsel on the brief.
[267] (Redacted) Brief for the U.S. in Opposition, Roe v. U.S., No. 12-112 (Feb. 2013). The only comment that the Solicitor General made on this question was that the Second Circuit had not reached the issues below and therefore, in the view of the Solicitor General, the Supreme Court should not reach the issue. *Id.* at 17.
[268] Reply in Support of Petn. for Writ of Certiorari at 12, Roe v. United States, No. 12-112 (Mar. 5, 2013); Petition for Rehearing at 5-6, Roe v. United States, No. 12-112 (Apr. 19, 2013).
[269] Reply in Support of Petn. for Writ of Certiorari at 24 (*citing* Petn. for Writ of Certiorari at 8).

crimes would always receive restitution.[270] As the title indicates, the specific purpose of the MVRA was to make restitution "mandatory."

Congress enacted the MVRA specifically to eliminate any judicial discretion to decline to award restitution. The MVRA amended the Victim and Witness Protection Act of 1982 (VWPA), which had provided for restitution to be ordered in the court's discretion. Congress was concerned that leaving restitution to the good graces of prosecutors and judges resulted in few victims recovering their losses. As the legislative history explains, "Unfortunately, . . . while significant strides have been made since 1982 toward a more victim-centered justice system, much progress remains to be made in the area of victim restitution."[271] Congress noted that despite the VWPA, "federal courts ordered restitution in only 20.2 percent of criminal cases.[272]

To fix the problem of inadequate restitution to victims, Congress made restitution for certain offenses – including the racketeering crime at issue in *Doe*[273] – mandatory. As the Supreme Court recently explained:

> Amending an older provision that left restitution to the sentencing judge's discretion, the statute before us (entitled "The Mandatory Victims Restitution Act of 1996") says " *[n]otwithstanding any other provision of law,* when sentencing a defendant convicted of [a specified] offense . . . , the court *shall* order ... that the defendant make restitution to the victim of the offense." § 3663A(a)(1) (emphasis added); cf. § 3663(a)(1) (stating that a court "may" order restitution when sentencing defendants convicted of other specified crimes). The Act goes on to provide that restitution shall be ordered in the "full amount of each victim's losses" and "without consideration of the economic circumstances of the defendant." § 3664(f)(1)(A).[274]

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[270] Pub. L. 104-132, Title II, § 204(a), Apr. 4, 1996, 110 Stat. 1227, codified at18 U.S.C. § 3663A.
[271] S. Rep. 104-179 at 13, 104th Cong., 1st Sess. (Dec. 6,1995).
[272] *Id.* (*citing* United States Sentencing Commission Annual Report 1994, table 22).
[273] The MVRA covers crimes of violence and any offense against property under Title 18, including crimes of fraud and deceit. 18 U.S.C. § 3663A(c)(1)(A). The Second Circuit (along with many other courts) has held that RICO offenses, including "pump and dump" stock frauds, are covered by the MVRA. *See, e.g., United States v. Reifler*, 446 F.3d 64 (2d Cir. 2006) (noting that MVRA applies to "pump and dump" stock frauds and collecting supporting cases).
[274] *Dolan v. United States*, 130 S.Ct. 2533, 2539 (2010) (emphasis in original). Congress did allow courts to dispense with restitution in cases where it would be impracticable to order, due either to the large number of victims or the difficulty of calculating restitution. 18 U.S.C. § 3663A(c)(3). Nothing in the certiorari petition suggests any

To help implement restitution for crime victims, the federal judiciary has also acted. The Federal Rules of Criminal Procedure provide that the pre-sentence report "must" contain "information that assesses any *financial,* social, psychological, and medical impact on any victim."[275] And specifically with regard to cases where the law provides for restitution, the pre-sentence report "must" contain "information sufficient for a restitution order."[276]

It is ancient law that Congress has the power to fix the sentence for federal crimes.[277] Indeed, it is well settled that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion."[278] In the *Doe* case, the U.S. Attorney's Office for the Eastern District of New York decided that it can override the Congress' command that restitution is mandatory in the name of securing cooperation from Doe – and then conceal what it is doing from public scrutiny. It did this first by refusing to provide victim information to the probation office, in contravention of the Federal Rules of Criminal Procedure. And then it asked for – and received from the district court – a sentence without restitution. In doing so, the U.S. Attorney's Office violated the MVRA.

While the MVRA mandates restitution in cases such as *Doe*, it is important to understand that the MVRA does not require disclosure of the names of confidential informants. Rather, the MVRA only requires that convicted defendants pay full restitution. Any legitimate Government interest in keeping the defendant's name confidential does not interfere with requiring that defendant to pay restitution to his victims. Restitution payments can, of course, be made through intermediaries, such as the U.S. Attorney's Office or the Probation Office, which could screen

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such findings were made here. Nor does it seem plausible that such findings could have been made, since Doe's co-defendants were apparently ordered to pay restitution without difficulty. *See* Cert. Petn. at 5-6.

[275] Fed. R. Crim. P. 32(d)(2)(B) (emphasis added).

[276] Fed. R. Crim. P. 32(d)(2)(D).

[277] *United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76 (1820).

[278] *Chapman v. United States*, 500 U.S. 453, 467 (1991) (*citing Ex Parte United States*, 242 U.S. 27 (1916)).

out any locating information about a defendant. The Government is also free to pursue its interests through other means, such as placing an informant into the witness protection program,[279] or by limiting disclosure of only the fact of his cooperation.

The one thing the MVRA clearly precludes, however, is the Government buying cooperation with crime victims' money. The Government is not free to tell a bank robber, for example, that he can keep his loot bag if he will testify in other cases. And in the *Doe* case, the U.S. Attorney's Office was not free to tell Doe that he could keep millions of dollars that he had fraudulently obtained from crime victims rather than requiring him to pay the money back.[280]

Violation of the Crime Victim's Rights Act.

The U.S. Attorney's Office's violations of victims' rights in the *Doe* case are not confined to the MVRA. Unfortunately, the Office also disregarded another important crime victims' rights statute: The Crime Victim's Rights Act (CVRA).[281]

As discussed earlier,[282] in 2004 Congress passed the CVRA because it found that, in case after case, "victims, and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by prosecutors too busy to care enough, by judges focused on defendant's rights, and by a court system that simply did not have

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[279] *See* 18 U.S.C. § 3521 *et seq.* The Witness Protection Program statutes provide ways in which civil judgment creditors can pursue actions against persons in the witness protection program. *See* 18 U.S.C. § 3523.

[280] The Government actions not only violated the MVRA, but also another important provision of law: 18 U.S.C. § 1963(a)(3). This provision requires a court to order a convicted RICO defendant to forfeit "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly from racketeering activity."

[281] 18 U.S.C. § 3771.

[282] *See* Part II.B., *supra.*

a place for them."[283] To avoid having crime victims "kept in the dark," Congress enacted a bill of rights for crime victims extending them rights throughout the criminal justice process.[284]

In *Doe*, the U.S. Attorney's Office violated the CVRA at the 2009 sentencing of John Doe, if not much earlier in the process, by keeping crime victims in the dark.[285] It is not clear from the record whether Doe was sentenced in public or not. It appears to be the position of the U.S. Attorney's Office is that "Doe was sentenced in public, though under the name Doe . . . ."[286] If Doe truly was sentenced in public, then his sentencing was a "public court proceeding" and Doe's crime victims were entitled to (among other rights) accurate and timely notice of that proceeding, as well as notice of their right to make a statement at sentencing.[287] So far as appears in the record, the U.S. Attorney's Office never gave the victims that notice of any public hearing.[288]

On the other hand, even assuming for sake of argument that Doe was properly sentenced in secret,[289] then other provisions of the CVRA would have been in play. At a minimum, the U.S. Attorney's Office would have been obligated to notify the victims in this case of the rights that they possessed under the CVRA.[290] Moreover, the U.S. Attorney's Office would have been obligated to provide crime victims' rights that were not connected to public proceedings, such as

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[283] 150 CONG. REC. 4262 (Apr. 22, 2004) (statement of Sen. Kyl). *See generally* Hon. Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights* Act, 9 LEWIS & CLARK L. REV. 581 (2005).
[284] 18 U.S.C. § 3771.
[285] While John Doe was indicted before the CVRA's 2004 enactment, he was sentenced on October 23, 2009 – five years after the Act was in place. At his sentencing, the CVRA's procedures plainly applied. *See United States v. Eberhard*, 525 F.3d 175, 177 (2d Cir. 2008) (rejecting defendant's Ex Post Facto challenge to application of the CVRA to a sentencing for a crime committed before the Act's passage).
[286] Petn. for Writ of Certiorari at 9, Roe v. United States, No. 12-112 (Mar. 5, 2013); Petition for Rehearing at 5-6, Roe v. United States, No. 12-112 (Apr. 19, 2013).
[287] 18 U.S.C. § 3771(a)(2) & (4).
[288] Petition for Rehearing at 5-6, Roe v. United States, No. 12-112 (Apr. 19, 2013).
[289] This issue of closed sentencing proceedings is a complicated one that I do not address here.
[290] *See* 18 U.S.C. § 3771(c)(1).

the right to confer with prosecutors and the right to receive full restitution.[291] Here again, nothing in the record shows that the victims received any of these rights – or, indeed, that the U.S. Attorney's Office gave even a second's thought to crime victims' rights.[292]

To be clear, it is not the case that crime victims' rights require public disclosure of everything in the criminal justice process. In some situations, secrecy can serve important interests, including the interests of crime victims.[293] And strategies no doubt exist for accommodating both crime victims' interests in knowing what is happening in the criminal justice process and the Government's legitimate need for secrecy.[294] The limited point here is that federal prosecutors cannot use an interest in securing cooperation as a basis for disregarding the CVRA.

In the *Doe* case, the U.S. Attorney's Office's willingness to ignore the CVRA has a "business as usual" feel to it – suggesting that many other victims are having their rights violated by the Government though the simple expedient of hiding the case. Since the U.S. Attorney's Office apparently believes that it can ignore federal statutes, one way to insure compliance with victims' rights enactments is to elevate them to the status of constitutional rights.

This Subcommittee Should Ask the U.S. Attorney's Office to Explain Its Actions

This Committee may wish to consider sending an inquiry to the U.S. Attorney's Office for the Eastern District of New York to explain how it has handled crime victims' rights in the *Doe* case. Sadly it is my conclusion that the U.S. Attorney's Office is hindering the public and

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[291] 18 U.S.C. § 3771(a)(5) & (6).
[292] Petition for Rehearing at 5-6, Roe v. United States, No. 12-112 (Apr. 19, 2013).
[293] *See* Tim Reagan & George Cort, Fed. Judicial Ctr., Sealed Cases in Federal Courts 19-20 (2009) (discussing sealing of cases to protect victims of sexual offenses) (available at http://www.fjc.gov/public/pdf.nsf/lookup/sealcafc.pdf/$file/sealcafc). *See also Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 608 (1981) ("A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim" during a sex offense trial).
[294] *See* Brief Amicus Curiae of the National Organization for Victim Asst. at14-15, Roe v. U.S., No. 12-112 (Aug. 27, 2012).

this Subcommittee from learning how it treated crime victims in this case. I set out a chronology of what has happened so that the Subcommittee and other can reach their own conclusion on these issues.[295]

When I was preparing testimony for the Subcommittee last year, I was aware from public and other sources of the *Doe* case and the fact that the U.S. Attorney's Office had failed to obtain restitution for crime victims because it wanted cooperation from a defendant. I thought that this would be an important illustration of the need for a constitutional amendment. The case, however, had been subject to extensive litigation concerning the existence and scope of various sealing orders.

Because I wished to communicate my information to this Subcommittee while fully complying with court orders, I prepared draft testimony outlining my concerns about the *Doe* case. On April 9, 2012, I sent a full draft of my proposed testimony to the U.S. Attorney's Office for the Eastern District of New York, asking it to confirm that the testimony was accurate and in compliance with any applicable sealing orders. I further asked, if it did transgress a sealing order, for instruction on how the testimony could be redacted or made more general to avoid compromising any legitimate government interest reflected in the sealing order.

On April 19, 2012, the Office responded that, in its view, my testimony was not accurate and that "[w]e are unable to comment further because the case is sealed." The Office further responded that it believed my testimony would violate applicable sealing orders, particularly an order entered by the Second Circuit on March 28, 2011 in the *Roe* case. Specifically, the Office stated: "While it is unclear what the source of your proposed testimony regarding the *Roe* case is, to the extent that you rely on any of the documents that were or remain the subject of

[295] The following information comes from correspondence with the identified parties, copies of which I retain at my office at the University of Utah.

litigation in *Roe*, those documents are under seal. We believe it would violate the relevant sealing orders for you to reveal in any way, and in any forum, those documents or their contents." The Office also noted that the Second Circuit order had appointed Judge Cogan of the Eastern District of New York for the purpose of ensuring compliance with court sealing orders. The Office attached the Second Circuit order to its letter and offered to answer any further questions that I had.

I then received permission from the U.S. Attorney's Office to contact the General Counsel's Office for the University of Utah to receive legal advice on how to deliver the substance of my testimony.

On April 21, 2012, John Morris, the General Counsel for the University of Utah, sent a letter to Judge Cogan, writing on my behalf to determine whether my proposed testimony would violate any judicial sealing orders and, if a portion of his testimony violates any sealing order, whether the testimony could be made more general or redacted so that Congress is made aware of the legal issue that has arisen in this case without compromising the identity of any cooperating individual and thereby bringing it into compliance with the court's sealing orders.

In addition, two days later, on April 23, 2012, I took up the Office's offer to answer questions and sent six additional questions to the Office. Specifically, my questions were:

> 1. You indicate that you are unable to "comment further" about the underlying criminal case because it is under seal. Are you able to at least indicate whether the Government believes that it complied with all provisions of the Crime Victims' Rights Act, 18 U.S.C. § 3771, and with all provisions of any applicable restitution statute, *e.g.,* 18 U.S.C. § 3663 and 3663A – in other words, are you able to indicate whether the Government fully complied with the law?
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> 2. You sent me a copy of the Second Circuit's June 29, 2011, decision, remanding to the district court for (inter alia) a ruling on the government's unsealing motion filed March 17, 2011. Can you advise as to whether a ruling has been reached on that unsealing motion, which has been pending for more than a year?

> 3. Would any of my testimony be permissible if the Government's unsealing motion were granted?
>
> 4. If parts of my testimony would not be permissible even if the Government's unsealing motion were granted, is the Government willing to file an additional motion allowing unsealing to the very limited extent necessary to permit me to deliver my testimony?
>
> 5. If my testimony is not currently permissible under the sealing motion and the Government is not willing to file an additional unsealing motion, is the Government willing to advise me how to comply with its view of the sealing orders it has obtained, by me either making my testimony more general or redacting a part of my current testimony? In other words, is there a way for Congress to have the substance of my concern without jeopardizing your need for secrecy about the name of the informant? I thought I had struck this balance already, but apparently you disagree. Can you help me strike that balance?
>
> 6. Is there some way for the Government to assist me to make my testimony more accurate. You assert that it is inaccurate, but then refuse to provide any further information. Can you, for example, at least identify which sentence in my proposed testimony is inaccurate?

On April 24, 2012, the U.S. Attorney's Office sent a letter to Mr. Morris indicating that it "was appropriate under the circumstances" for me to have inquired of Judge Cogan, through counsel, about whether his proposed testimony would violate any sealing orders. The Office further stated that "we believe the best course at this juncture is to await further guidance from Judge Cogan" on the request. The Office also indicated that it preferred to deal through legal counsel on the subject of any additional questions.

On April 25, 2012, Mr. Morris wrote on my behalf to repeat the six questions for me. On April 25, 2012, the Office sent an e-mail in which it stated that the previous letter would serve as the response to the questions for "the time being."

On May 7, 2012, Mr. Morris received a letter from Judge Cogan in which he stated "I do not believe it would be appropriate to furnish what would in effect be an advisory opinion as to the interpretation of the injunctive orders entered by Judge Glasser and the Second Circuit."

On May 9, 2012, Mr. Morris sent a letter to the U.S. Attorney's Office, pointing out Judge Cogan's decision not to provide further clarification and seeking additional assistance from the

Office in answering the six questions I had asked and in helping me provide testimony that would not violate any judicial sealing orders but would communicate the substance of my concern to Congress.

On May 9, 2012, the U.S. Attorney's Office sent the following terse reply: "We have received your letter from earlier today. In connection with the matter to which your letter refers, the government complied in all aspects with the law. We are unable to answer your other questions as doing so would require us either to speculate or to comment on matters that have been sealed by the United States Court of Appeals for the Second Circuit and the United States District Court for the Eastern District of New York."

In light of all this was unable to provide testimony on the subject to the Subcommittee last year. On May 10, 2012, I sent a letter to the Subcommittee informing it what had happened.[296]

This year I was again invited to provide testimony to the subcommittee, including a specific request that I provide information (if possible) about the *Doe* case.[297] Accordingly, in light of this request, on April 11, 2013, Mr. Morris sent a letter on my behalf to the U.S. Attorney's Office. The letter included a full draft of my testimony and requested that the Office advise if the testimony was covered by any sealing order, particularly in light of the fact that many documents in the *Doe* case had recently been unsealed. The letter also requested the Office's assistance in confirming whether or not the recounting of the facts in the *Doe* case was accurate.

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[296] *See* Letter from Paul G. Cassell to Hon. Lamar Smith, Chairman, Comm. on the Judiciary (May 10, 2012), *reprinted in* PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO PROTECT THE RIGHTS OF CRIME VICTIMS: HRNG BEFORE THE SUBCOMM. ON THE CONSTITUTION OF THE HOUSE JUDICIARY COMM., Serial No. 112-113 (Apr. 26, 2012), at p. 202. I discuss these circumstances at greater length below.

[297] Letter from Trent Franks, United States Congress, to Professor Paul G. Cassell (Apr. 5, 2013).

On April 18, 2013, the Office sent back a short (two-sentence) letter to Mr. Morris, indicating that it could not give any advice on my testimony. This response was at odds with the response that the Office had sent the previous year (in the April 19, 2012 letter), in which at that time the Office claimed that delivering my testimony would have been (at that time) in violation of the Second Circuit's sealing order and was inaccurate. Now the Office claims that it cannot advise on these same subjects. As a result, I have made my own determination that I can provide this information to the Subcommittee because it all relies on public record information, as indicated by the extensive footnotes attached to the testimony. I also believe that it is accurate, in view of the U.S. Attorney's Office's unwillingness to contest any of the facts discussed.

For all the reasons outlined above, it continues to be my view that the U.S. Attorney's Office has not complied with crime victims' rights statutes in this case – specifically the CVRA and the MVRA. And more important given the subject on this hearing, based on this fact, it continues to be my view that it is more desirable now than ever to elevate the prominence of crime victims' rights by placing them into the Constitution.

The Subcommittee should, however, have not merely my thoughts on this case but rather full information about it in reaching its own conclusions. Accordingly, the Subcommittee may wish to send an inquiry to the U.S. Attorney's Office asking it to provide information on how it has handled crime victims' rights in this case – information that could then form part of the Subcommittee's record.

The urgency of the having the U.S. Attorney's Office explain itself only increases given the fact that the CVRA violations are not confined to earlier events, but are on-going. Every day that the Office withholds notice from the victims in this case about the continuing proceedings that are occurring in this case is a day in which the Office is violating the CVRA. The

Subcommittee should inquire into what appears to be on-going violations of important federal crime victims' statutes.

V. CONCLUSION

As explained in this testimony, H.J. Res. 40, the proposed Victims' Rights Amendment, draws upon a considerable body of crime victims' rights enactments, at both the state and federal levels. Many of the provisions in the VRA are drawn word-for-word from these earlier enactments, particularly the federal CVRA. In recent years, a body of case law has developed surrounding these provisions. This testimony has attempted to demonstrate how these precedents provide a sound basis for interpreting the scope and meaning of the Victims' Rights Amendment. This testimony has also tried to provide a real world example of how even crime victims' rights protected by federal statute can be ignored – and are continuing to be ignored.

The existence of precedents interpreting crime victims' provisions may prove important. In the past, some legal scholars have opposed a Victims' Rights Amendment, claiming that it would somehow be unworkable or lead to dire consequences. Such opposition tracks general opposition to victims' rights reforms, even though the real-world experience with the reforms is quite positive. For example, one careful scholar in the field of victim impact statements, Professor Edna Erez, comprehensively reviewed the relevant empirical literature and concluded that the actual experience with victim participatory rights "suggests that allowing victims' input into sentencing decisions does not raise practical problems or serious challenges from the defense. Yet there is a persistent belief to the contrary, particularly among legal scholars and professionals."[298] Erez attributed the differing views of the social scientists (who had actually collected data on the programs in action) and the legal scholars primarily to "the socialization of

[298] Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On . . .*, 3 INT'L REV. OF VICTIMOLOGY 17, 28 (1994); *accord* Deborah P. Kelly & Edna Erez, *Victim Participation in the Criminal Justice System, in* VICTIMS OF CRIME 231, 241 (Robert C. Davis et al. eds., 2d ed. 1997).

the latter group in a legal culture and structure that do not recognize the victim as a legitimate party in criminal proceedings."[299]

The developing case law under federal and state victims' rights enactments may help change that socialization, leading legal scholars and criminal justice practitioners to generally accept a role for crime victims. Crime victims' rights are now clearly established throughout the country (even if the implementation of these rights is uneven and still leaves something to be desired, even in federal cases). In tracing the language used in the Victims' Rights Amendment to those earlier enactments, this testimony may help lay to rest an argument that is sometimes advanced against a crime victims' rights amendment: that courts will have to guess at the meaning of its provisions. Any such argument would be at odds with the experience in federal and state courts over the last several decades, in which sensible constructions have been given to victims' rights protections. If a Victims' Rights Amendment were to be adopted in this country, there is every reason to believe that courts would construe it in the same commonsensical way, avoiding undue burdens on the nation's criminal justice systems while helping to protect the varied and legitimate interests of crime victims.

[299] Erez, *supra* note 242, at 29; *see also* Cassell, *supra* note 3, at 533-34; Edna Erez & Leigh Roeger, *The Effect of Victim Impact Statements on Sentencing Patterns and Outcomes: The Australian Experience*, 23 J. CRIM. JUSTICE 363, 375 (1995).

Remarks of Jan Withers
National President, Mothers Against Drunk Driving
Subcommittee on the Constitution and Civil Justice
In Support of the Victims Rights Amendment to the Constitution
April 25, 2013

Chairman Franks and Ranking Member Nadler, thank you for the opportunity to submit testimony in support of the Victims Rights Amendment to the U.S. Constitution. I represent tens of thousands of families who are victims of the 100 percent preventable crime of drunk driving. You may know that in 2011, almost 10,000 people were killed in America and over 300,000 were injured as a result of a drunk driver. As one of the largest victim service organizations in the country, we served over 60,000 DUI victims in 2012 or a victim every eight minutes. They come to us for help when they feel the most helpless.

Unfortunately, all too often we see victims re-victimized by a justice system set up to protect the offender at all costs. Victims of crimes such as drunk driving are often denied basic rights, like being informed of court proceedings and developments in their case. They can also be denied the right to be present in the courtroom or to make a victim impact statement.

I know the pain of this reality all too well. After my daughter Alisa was killed by a drunk driver, my family and I poured our energy into the court proceedings. This was how we could best handle the loss of Alisa and our grief. My family wanted to speak on her behalf because she was unable to do so herself. Tragically, because the judge agreed to a last minute change of date for the sentencing hearing, I missed my chance to speak for Alisa.

I was furious and devastated. After the pain of losing my daughter, I was again victimized by the criminal justice system. My children felt the same. They called it "justice for the criminal *only*." This tragedy haunts them to this day. The irony is that the sentence had already been agreed upon at the plea hearing. To hear us would have in no way changed the outcome, but to deny us our right to be present and heard was yet another victimization.

I am not alone. The reality is that the U.S. Constitution contains a number of provisions protecting the criminal defendant and not one protecting the victim of his or her alleged crime.

That is why MADD is proud to stand with other victim's rights groups and to urge Congress to pass a Constitutional Amendment providing for crime victims' rights. There are currently statutes in every state protecting crime victims' rights. However, only a defendant's rights are protected by the Constitution. Consequently, far too often, the victims' rights are trumped by the offender's rights. Only a Constitutional amendment would even playing field.

Therefore, MADD respectfully requests that you pass the Victim's Rights Amendment and advance this worthy Constitutional amendment.

Thank you for your consideration.

Testimony on the US Constitutional Amendment for Victims Rights

April 2013

By

Susan S. Russell, M.A.

Good Day,

Thank you for the opportunity to submit testimony on the Constitutional Amendment for Victims Rights. My name is Susan Russell. I live and have resided in Warren, Vermont for 22 years. However, on June 19, 1992, I became more than just a resident of Vermont, reportable the safest state in the nation, when I became the victim of a horrendous kidnapping, sexual assault and attempted murder. Although my perpetrator was a stranger to me, he was from my small and rural community of approximately 2,500 This stranger kidnapped me, raped me, and beat me, fracturing my nose and several facial bones. He then drove me to a remote wilderness area, where he took a tire iron and fractured my skull in three places. I, now, have a one and half inch dent in my head that serves as a reminder, although I will never ever forget this horrific experience. This man then left me to die, discarding my body into the woods, but I survived. Luckily I awoke hours later and managed to crawl a 1/10 of a mile to where 5 teenagers had camped for the night. Nothing short of a miracle can explain why I survived and am alive today. And those these are my words and my story; I speak for many victims who cannot speak for one reason or another. It takes a tremendous amount of courage to tell you my story, but I do so, because as a victim/survivor I can speak to you with the experience and knowledge of being a victim.

My perpetrator was caught 4 days after my attack and then the long arduous process of being thrown into the unknown and confusing criminal justice system began. At the time of my interaction with the criminal justice system there was very little in place regarding victims' rights. And although many changes have been made victims/survivors are still being denied their rights and have no way to enforce their rights. I want to take this opportunity to highlight some of the major key points that if there was a Constitutional Amendment perhaps I would not experience the continued injustices of our criminal justice system.

The right to just and timely claims to restitution from the offender.

Due to physical injuries I sustained as a result of my offender's actions, I suffered severe financial loss even with medical insurance and Victim's Compensation. I was out of work for almost a year. And yet, the judge did not order restitution. I was told that my offender had no money and/or property. However, a few years ago I was told that my offender was working in prison making $7.25 an hr, yet I would never obtain any restitution due to the fact there was none ordered. Furthermore, I was told that if I wanted to try and claim restitution I would have to return to court and by returning to court, I could jeopardize the current sentence my offender is currently serving. A Constitutional Amendment would ensure that restitution was ordered.

The right to reasonable and timely notice of any release or escape of the accused:

In Nov. 1992 my offender managed to escape from a secure courtroom fled across the street and was apprehended by a friend of mine who happened to be attending the

hearing. I first heard about my offender's escape through my friend and the newspaper. Had a Constitutional Amendment been in place perhaps I would have learned about this through a more timely notification process and would not have had to read about it on the front page of the next morning's newspaper.

The right to be heard at sentencing:

In my case I was persuaded by the State Attorney to accept a plea agreement. I was told although the evidence against my offender was high and there was an 80 % change of winning the case that there was a 20 % chance of losing the case. I did not want to see this man set free under any circumstances and chose not to take the risk even though it was only 20 %. The terms of the plea agreement was 25-50 years. The Parole Board strongly recommended 50 years to life. In the end the Judge stated that "the mitigating circumstances outweighed the aggravating circumstances" and sentenced him to 20-30 yrs. While this may seem like many years, it is not when the truth is that he will only serve 1/3 of his sentence.

The fact is this offender will "Max out" in April 2015 having served 23 years and having been denied parole. He has not once participated in any treatment programs and continues to this day to file appeals with VT Attorney General's office. He will be brought back to VT, as he is currently housed in a Kentucky jail and be released in VT with no one, nor agency to supervise him. He will be released, perhaps with no place to live, and no job etc… His only requirement will be to register with the VT Sex Offender Registry.

In 1992, Vermont did not have a Victims Bill of Rights and I recall working hard to advocate for the passage of Vermont's Victims Bill of Rights in 1996. However, while it has been said that crime victims are assured their rights due to these state and other federal laws, I can tell you from my personal and professional experiences as a victim/survivor and a victim advocate for many years these laws are not sufficiently consistent, comprehensive or authoritative, nor do they hold the system, agencies, accountable and therefore do not safeguard our rights. There are countless stories where these laws have failed to provide adequate and necessary protection for the rights of victims as these state statutory rights can be changed at the whims of the legislative majority and they do not provide adequate means to hold these systems and agencies accountable when it fails to provide victim's these rights.

The Right to Notification and Information:

The following are two personal examples that have occurred to me in which my rights were denied. I received several letters from the VT Department of Corrections during the past decade that were not timely, nor accurate and misleading. I recall it took several days and many phone calls before I finally received the right information. **VT Title 13: Section 5305: Information concerning release state that "victims have a right to 30 days notification of parole board hearings". Yet, these letters came with less than 15 days to the hearing.**

Here is another example in which my right to 30 day notification and accurate information has been denied. On August 1st 2010 while I was out of town the VT Department of Corrections VINES automatic notification system began calling our house

every 30 minutes to inform us of a parole board hearing on August 11, 2010. We had problems in that it filled our answering machine and my husband could not turn off the system using the pin number. Due to the fact it was a Sunday we could not reach anyone to stop the calls. And my 91 year old father who lived with us at the time, had a "life line" which uses this phone number and this could have compromised his life line alert, had been needed. My husband commented that he felt like he was being "terrorized by these phone calls." However, what was most disturbing is that once again the information was inaccurate. There was no scheduled parole board hearing that year and the next parole board hearing he would have been eligible for was August 2011.

Summary

These state or federal laws are unable to match the constitutionally protected rights of the offenders. State Constitutions live in the shadow of the U.S. Constitution. **The result is that we crime victim/survivors remain and will remain second-class citizens in our nation's system of justice until an Amendment such as thus is implemented. It is the only law that carries the weight and accountability needed to create a more balanced and equal justice system for all**. Rights without Remedy are merely Rhetoric These rights that I stand before and ask for are **human rights**, which all American Citizens deserve, a right to fundamental fairness in a justice system. Criminal defendants have almost 2 dozen separate constitutional rights 15 of these are provided by amendments to the US Constitution. Constitutional amendments such as enfranchising newly free slaves and the right for women to vote were all changes for the better, ending

the exclusion of those who deserve and paid a heavty price to be inclusive. The Crime Victims' Rights Amendment will bring a balance to the system by giving crime victims the right to be informed, present, heard at critical stages throughout their case and it will duly consider the victim's just and timely claims to restitution from the offender.

There is considerable support for this amendment. State constitutional amendments have won overwhelming approval in 33 states; **The Constitution belongs to all of us and therefore I ask you to support and assist the people who have suffered and have lost the most, the crime victims of this country. Thank you.**

Keynote Address
John W. Gillis
Director, Office for Victims of Crime

North Carolina Victim Assistance Network's (NCVAN)
Seventeenth Annual Training Conference

Wednesday, August 20, 2003

Thank you and good afternoon.

I am honored to be part of the **North Carolina Victim Assistance Network's Seventeenth Annual Training Conference**, and to join such a wonderful group of survivors, crime victim advocates, law enforcement officials, allied professionals, and victim service providers from across the state. Each one of you brings a commitment to your work and a unique perspective that makes you a valuable asset to victim services. On behalf of the Office for Victims of Crime, the U.S. Department of Justice, and for victims across the country, and especially for those victims whose voices have been stilled, thank you for being here and for making victim advocacy a priority in your life and work. I want to say a special thank you to Donna Pygott, the Executive Director of NCVAN; Cathy Purvis, the President of NCVAN; and Lisa Correll, Conference

Planner, for inviting me to join you. I also want to congratulate the **North Carolina Victim Assistance Network** for its continued efforts over the years to help North Carolina's crime victims, and for organizing such a successful conference.

On a personal note, I'm pleased to stand before you today, as the Director of the Office for Victims of Crime, and as the first-ever victim of a violent crime to lead the Federal Government's chief office for addressing crime victim issues. While my appointment by President George W. Bush in September of 2001 has been the high point in my own personal journey from victim to advocate, like most victims, I would return to a simpler life to have my daughter back. Her murder 23 years ago has directed many of my professional and personal choices. I feel privileged to lead OVC. But I recognize that this is a tremendous responsibility. It's a responsibility to our Nation's victims of homicide, domestic violence, physical and sexual assault, robbery and other crimes, and to those who serve victims. I have a personal commitment beyond my responsibilities to this position and I assure you, you have a partner and a friend in Washington.

Under my leadership, OVC's guiding principle has been **Putting Victims First.** It expresses my vision that OVC's responsibility should be first and foremost to the people it was created to serve. No one understands better than victims the pain and injustice caused by crime and violence. No one is in a better position to tell us where the weaknesses are in our system. My experience as a law enforcement officer, parent of a murdered child, victim advocate, homicide survivor, father, and American citizen is reflected in the new direction OVC is now moving.

At the time of my daughter's murder, I was involved in investigating gang activity as a member of the Los Angeles Police Department. Louarna was targeted because the murder of an officer's daughter would earn her killer special recognition from his gang. Working on the streets of Los Angeles, I had seen my share of violence and encountered many victims. But there was nothing that could have prepared me for this life-altering event. Like many of you who may have been victimized, I experienced what it feels like to wake up each morning in a nightmare and hope that at some point this terrible dream would end. I know what it's like to feel helpless, angry, confused, and bitter. Justice seemed far away and almost meaningless. I can still recall the expressions of sympathy,

grand statements offered by loved ones and acquaintances—some heartfelt, some hinting of blame, some just repetitious sayings that are suppose to bring comfort. I found like many victims, I couldn't and wouldn't be comforted. There wasn't much that was helpful. I also experienced the personal and financial impact that violent crime exacts on its victims. But I also recognized that other people with similar experiences could understand this senselessness. This painful and very personal experience gave me a unique understanding of the hardships victims face.

So after 26 years of service, I retired from the LAPD and looked for opportunities to reach out to victims and to change how victims are treated. Each opportunity led to another and another and then, ultimately to my appointment by President Bush as OVC's Director. This position has given me the opportunity to truly make a difference in the lives of crime victims.

It has taken 4 decades to get victims issues to the forefront of our nation, at the cost of many lost and broken lives.
But I know each one of you knows that there is still a lot of work to do. True, we can celebrate tremendous statutory gains over the years. The tally of victims' rights laws has surpassed

27,000, and every state has passed a victims' bill of rights. Yet, as we speak, 17 states still lack constitutional amendments for crime victims and the 33 states that do have such amendments have constructed them differently. These differences pose serious law enforcement challenges particularly in cases involving more than one state.

Further, there is no uniformity in the implementation of these statutes. Proponents of the proposed Victims' Rights Amendment believe that the only remedy is to amend the U.S. Constitution, a recommendation made 20 years ago by President Ronald Reagan's task force on crime. President Bush endorsed the bipartisan amendment which is currently before Congress that will provide victims of violent crime certain specific rights, such as timely notice of public proceedings involving offenders and an opportunity to be heard at sentencing. Last year, the President declared, in reference to this Amendment, "Our legal system properly protects the rights of the accused in the Constitution, but it does not provide similar protection for the rights of victims, and that must change!" I too believe that it must change, and I am proud to be working for an administration that recognizes this fact. Attorney General John Ashcroft, following the President's lead, put it candidly when he said: "Government can do more than it has

done in the past. We can offer victims a new guarantee of inclusion in the process of justice."

In recent months, I have met with lawyers and others in the legal field to discuss the victims' rights issue. I have also been hearing from victims about the positive and negative aspects of their experiences with the criminal justice system. In a number of cases, as in my case as well, victims of violent crime continue to indicate that the negative aspects of the criminal justice process compounded their victimization. I am alarmed to learn that the lack of enforcement of existing victims' rights laws around the country jeopardizes the safety of many victims. Victims continue to be intimidated and harassed by offenders or those awaiting trial. Lenient bail and early releases should include input from victims. There is so much to do on so many fronts. A large number of these laws exist today thanks to the grassroots efforts and courage of committed men and women, many of whom were victims themselves. To build on their efforts, I approved a landmark project, the National Crime Victim Law Institute, through which private attorneys will provide *pro bono* legal assistance to victims asserting their statutory and constitutional rights. This project is one step on a very long road to enforcing current victims' rights.

In 2002, I launched the Victims' Rights Education Project. This project focuses on the development of informational and educational materials explaining the legal rights available to crime victims. Before we can successfully implement victims' rights laws, victims must be aware of what their rights are at the state and federal levels.

We are no longer operating in a vacuum in Washington, DC. We continue to improve communication to hear directly from victims and put their needs and concerns at the center of OVC's initiatives. I have been convening a series of **Victims Roundtable Discussions** around the country. These discussions have allowed me to hear directly from victims, survivors, and those dedicated to serving them. Roundtable participants share with me the fears, needs, and frustrations they experience as they struggle to mend their lives after being victimized. The first roundtable was held in San Diego, California, in January 2002. Since then, I have had the opportunity to meet with more than 200 victims from more than 30 states and Indian Country. We are learning a great deal from victims' experiences to improve our services. OVC will develop training videos on victims' needs to educate my staff, state assistance and compensation administrators, service providers, law enforcement, and other allied professionals.

And I cannot fail to mention the importance of small **grassroots organizations** that provide services to victims. Grassroots organizations are the pioneers of the victims' movement and much more. Today, many organizations are managed by victims and survivors. These organizations provide invaluable support to victims who need it, and do so with no help from Washington. In my early work, when I just started helping other victims, I remember spending large sums of out-of-pocket money for newsletters, postage, stationery, etc., for which there was no reimbursement. Many of you in this room know exactly what I mean. It was hard! And sometimes discouraging, but it was what I felt I should do. So last year, I started a grant program called **Helping Outreach Programs to Expand, or HOPE.** This project gives small organizations an opportunity to apply for up to $5,000 to help them continue assisting victims. To date, OVC has approved 142 grassroots organizations under this project.

Another priority of mine is to foster the creation of **collaborative alliances** for the benefit of all crime victims. Such alliances have proven effective in past incidents of terrorism and mass victimization.

Underlying this priority is the recognition that victim advocates and service providers cannot serve all and do all. It is simply unreasonable to think otherwise. The needs and challenges of our field make it imperative that we join forces with our allies in criminal justice and other disciplines. In addition, it is a fact that many crime victims never see a trained victim service provider. In many cases, it is to a law enforcement officer, social worker, medical professional, or mental health provider that a victim tells his or her story. Therefore, we must enlist the aid of these professionals.

To this end, we've started working closely with the **faith community,** supporting chaplaincy training and seminary programs and projects that create networks of victim assistance and faith-based programs. In general, people in crisis turn to the clergy far more often than any other group or resource. I am sure that many of you here today can identify with the feelings of powerlessness that often grip victims in the face of violent crime. Many victims find solace in spirituality. In contrast, crime leads other victims to question their spiritual framework, their view of the world, of themselves, and of life itself. We at OVC fully appreciate the critical role the faith community plays in helping crime victims cope with their victimization and ultimately regain a sense of meaning in their

lives. Spiritual leaders may not know what to do when approached by a victim for support or special victim services. We have addressed this by developing programs and tools that will help.

We are also supporting programs for law enforcement agencies to bolster their response to victims. As you know, a victim's first and often only encounter with the criminal justice system is through a law enforcement officer. Having served as one for 26 years, I can attest to the tremendous need for training for law enforcement. Theirs is a difficult job and sometimes their desire to get the offender or make an arrest can lead to little sensitivity when questioning victims.

As OVC has been working to put victims first, we have also had to take steps to ensure that this vision rings true for ALL victims—not just some victims. I have directed OVC to advance special programs to reach and support victim populations that have been traditionally not served or underserved through traditional service delivery channels. These populations include victims who are American Indian, disabled, elderly, limited-English speakers, and victims located in geographically isolated rural areas. I have made it an especially high priority to help alleviate barriers to the delivery

of much-needed victim services. My hope is that the terms not served and underserved will eventually be 'underused' in reference to crime victims.

In closing, I would like to thank once again the **North Carolina Victim Assistance Network** for including me in this conference. I want to also recognize each one of you. Thank you for your courageous commitment. It is inspiring, and has been the very fuel for the progress we have witnessed in our field in the last 30 years. In April of this year, the 2003 National Crime Victims' Rights Week took place and 7 individuals were recognized and honored for their achievements and contributions. I would also like to acknowledge three former Crime Victims' Rights Week awardees who are native North Carolinians and who have also been invited to participate in this conference event: Augustus A. "Dick" Adams, Chairman, North Carolina Victim Compensation Commission (1995 recipient); Mr. Harlie Wilson, (1999 recipient) Note: Mr. Wilson has been invited to the Conference, however, he is 80 years old and believed to be bedridden.; and Lynne Ward Crout, Victim/Witness Coordinator, U.S. Attorney's Office for the Western District of North Carolina (2002 recipient).

I want to express my commitment to you as I urge you to continue your work for victims of crime and violence. Know that OVC will pursue initiatives, provide leadership, and support to you and your colleagues around the country. Our Nation's recent and painful experiences with tragedies of terror, mass violence, and war have made us more aware and sensitive to the plight and horror that crime victims nationwide endure daily. Today, it takes courage to live, to care, and to dream. As advocates, service providers, and allied professionals, we are all challenged to be courageous and continue to fight the good fight. The victims for whom we do so deserve our best as they face the worst. Let's keep fighting to meet their needs, to protect their rights, to give them hope, and to safeguard their dignity. Let's fulfill the promise.

Thank you, and enjoy the conference.

Janice K. Brewer
Governor

Office of the Governor

*** ARIZONA CRIME VICTIMS' RIGHTS WEEK ***

WHEREAS, 18.7 million Americans are victims of crime each year and each crime affects many more, including families, friends, and communities; and

WHEREAS, crime exacts an emotional, physical, psychological, and financial toll on victims as they have lost loved ones, lifesavings, physical and mental health, and often their sense of security that has the potential to irravocably change the course of their lives forever; and

WHEREAS, more than 20 years of progress for crime victims stands on the shoulders of dedicated advocates and brave victims who overcame shame, isolation, and indifference to gain a voice, rights, and respect; and

WHEREAS, we applaud the progress that our Nation and Arizona have made in recognizing crime's impact on victims and celebrate advocates and survivors who, through their determination, brought rights and resources for victims and have changed the course of history; and

WHEREAS, history teaches us that, by working together, we can help victims of crime reshape their destinies and ensure they receive the support they need, the respect they deserve, and the rights they have earned; and

WHEREAS, while Arizona has been a national leader in establishing constitutional rights for crime victims, including the Arizona Crime Victims' Bill of Rights; we recognize that much work remains if we are to achieve the promises that our Constitution makes to crime victims; and

WHEREAS during this year we should re-dedicate ourselves to enshrining the rights of victims in the U. S. Constitution; and

WHEREAS, the Arizona Constitution preserves and protects for crime victims the rights, among others, to justice and due process, the rights to a speedy trial and to a prompt conclusion of the case after the conviction, and the rights to be present at and, upon request, to be informed of all criminal proceedings where the defendant has a right to be present and to be heard at every post arrest release decision, a negotiated plea and sentencing, and yet we know these rights, among others, are still too often denied to victims; and

WHEREAS, National Crime Victims' Rights Week provides an opportunity for us to extend the vision to reach every victim, and to recommit to working together in providing the rights guaranteed to victims by our State Constitution, to help them overcome the harm caused by crime and so that they might be treated with dignity and respect; and

WHEREAS, the State of Arizona is joining forces with victim service programs, criminal justice officials, and concerned citizens throughout Arizona and America to raise awareness of victims' rights and observe National Crime Victims' Rights Week.

NOW, THEREFORE, I, Janice K. Brewer, Governor of the State of Arizona, do hereby proclaim April 21 - 27, 2013 as

*** ARIZONA CRIME VICTIMS' RIGHTS WEEK ***

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Arizona

Janice K. Brewer
GOVERNOR

DONE at the Capitol in Phoenix on this eighteenth day of March in the year Two Thousand and Thirteen, and of the Independence of the United States of America the Two Hundred and Thirty-seventh.

ATTEST:

Ken Bennett
Secretary of State

National District Attorneys Association
99 Canal Center Plaza, Suite 330, Alexandria, VA 22314
703.549.9222 (o) • 703.836.3195 (f)
www.ndaa.org

April 8, 2013

The Honorable Trent Franks
House of Representatives
2435 Rayburn Building
Washington, DC 20515

The Honorable Jim Costa
House of Representatives
1314 Longworth House Office Building
Washington, DC 20515

Dear Congressmen Franks and Costa:

On behalf of the National District Attorneys Association, the oldest and largest organization representing the interests of America's 39,000 state and local prosecutors, we wish to express our strong support for proposing an amendment to the U.S. Constitution to protect the rights of crime victims (Victims' Rights Amendment).

Inclusion of victims' rights in our U.S. Constitution will ensure that crime victims will be treated with fairness, dignity and respect within our criminal justice system and that, within that system, they will be afforded needed and meaningful rights, including the opportunity to participate at all critical stages of their cases.

Inasmuch as America's prosecutors are the staunchest advocates for victims within our criminal justice system, we are proud to advocate on their behalf within the halls of Congress. We call upon the Congress to pass the amendment and the states to ratify it.

The National District Attorneys Association appreciates all of your hard work and support for America's victims of crime and your ongoing support for state and local law enforcement. Thank you for your continued support for America's state and local prosecutors.

Sincerely,

Michael Wright
President

Scott Burns
Executive Director

To Be the Voice of America's Prosecutors and to Support Their Efforts to Protect the Rights and Safety of the People

25 MARCH 2013

NOVA
National Organization for Victim Assistance

Re: House Joint Resolution for Crime Victims' Rights

Dear Honorable Congressman Franks and Honorable Congressman Costa,

On behalf of the National Organization for Victim Assistance (NOVA) Board of Directors, the NOVA Staff, the tens of thousands strong NOVA network, and millions of crime victims, we ardently and fully support your House Joint Resolution representing an Amendment to the United States Constitution for crime victims' rights.

The proposed Constitutional Amendment represents the ideals codified in the Preamble of the United States Constitution, "…in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity…"

We are a nation founded on the Rule of Law. Our NOVA supporters and constituents firmly believe the proposed Constitutional Amendment represents and further affirms the inalienable rights of life, liberty and the pursuit of happiness. The proposed Constitutional Amendment articulates what most Americans wrongly assume to be true, that victims of crime have protections in the US Constitution similar to the accused.

To date, thirty-three of the fifty United States have some form of victims' rights in their state constitutions. This reflects a vast majority perspective of their importance and value. At the same time, there is no consistency for the same citizens across the various states and state constitutional amendments and statutes have only demonstrated a patchwork approach to what should be declared full and protected rights for all Americans.

Some argue that we don't need a Constitutional Amendment represents since victims' rights are found in many state constitutions. However, victims in seventeen states have virtually no victims' rights and protections. Case law demonstrates the dearth of options those victims have and the cruelty they experience at the hands of the justice system. Moreover, even in states with robust victims' rights, those reforms have proven inadequate to change the culture of the justice system in ways that protect and honor the rights of victims and at a national level.

Providing victims long-overdue constitutional rights will not take away rights from the accused. The twenty-three constitutional rights of the accused will remain. We simply seek to rectify that there are currently no rights for victims of crime.

Most sincerely,

Rhonda D. Barner

Rhonda Barner
President, NOVA Board of Directors

510 King Street, Suite 424 • Alexandria, VA 22314 • 703-535-6682 • www.trynova.org

THE NATIONAL CENTER FOR
Victims of Crime

March 25, 2013

The Honorable Trent Franks
United States House of Representatives
Washington, DC 20515-0302

Dear Congressman Franks:

The National Center for Victims of Crime is writing to express our strong support for your proposed Victims' Rights Constitutional Amendment. The National Center is a nonprofit organization that advocates for victims' rights, trains professionals who work with victims, and serves as a trusted source of information on victims' issues. Our mission is to forge a national commitment to help victims of crime rebuild their lives. The National Center believes that crime victim justice as an integral part of the criminal justice system.

Your proposal would guarantee that every victim of crime has the right to certain basic legal rights including the right to reasonable notice public proceedings related to the offense; the right not to be excluded from such proceedings, the right to be heard at certain criminal justice proceedings affecting their rights and interests, the right to proceedings free from unreasonable delay, the right to be informed of the release or escape of the accused, the right to have their safety considered, and the right to restitution. This amendment would also give victims the legal standing to assert those rights in court.

While legal rights for crime victims are already provided by state constitutional amendments in 32 states, and by statute in all states and at the federal level, those rights vary in strength and scope. Incorporation of these rights into the United States Constitution is important to ensure their full protection. Enshrining crime victims' rights in our nation's fundamental law will also provide that any crime victim anywhere in the country can expect the same basic level of victims' rights.

We applaud you for sponsoring this important measure, and for your support for victims of crime. We urge your colleagues to join you in passing this measure.

Sincerely,

Mai Fernandez

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FOR IMMEDIATE RELEASE

April 24, 2013

JUSTICE FELLOWSHIP WILL ENDORSE VICTIMS' RIGHTS AMENDMENT ON CAPITOL HILL

(Lansdowne, VA) Justice Fellowship President Craig DeRoche today endorsed the *Victims' Rights Amendment*, which would provide that a crime victim shall have rights to reasonable notice of, and shall not be excluded from, public proceedings related to the offense by which they were affected-as well as rights to be heard at any release, plea, or sentencing.

On Thursday, April 25th, 2013, Justice Fellowship's Senior Policy Advisor, Heather Rice-Minus, will join Congressman Trent Franks (R-AZ), Congressman Jim Costa (D-CA), and Congressman Ed Royce (R-CA) at a press conference prior to the Constitution and Civil Justice Subcommittee's hearing on the *Victims' Rights Amendment*. Rice-Minus will address why Justice Fellowship believes that this amendment will advance Justice Fellowship's goals to both respect victims and transform offenders.

In support of this amendment DeRoche stated, "When our justice system confronts the reality that crime is not just an offense against the state but against real people, only then will victims, offenders, and our communities be restored. As this amendment moves forward and the language is debated, we welcome the opportunity to share our insight on how to best advance victims' standing based on our experience to improve the justice system as a whole."

Thursday's press conference is at 10:00 a.m. at The House Triangle (outside southeast corner of Capitol building, Washington, D.C.).

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Statement of Judiciary Chairman Bob Goodlatte
Subcommittee on the Constitution and Civil Justice
H. J. Res. 40, the "Victims' Rights Amendment"
April 25, 2013

Today, the Subcommittee on the Constitution and Civil Justice convenes to hear testimony concerning H.J. Res. 40, the Victims' Rights Amendment to the United States Constitution. The purpose of the victims' rights amendment is to ensure that the important rights of crime victims are protected.

Today's hearing is particularly significant because it coincides with National Crime Victims' Rights week where communities throughout the country raise awareness for victims' rights while also honoring crime victims and those that advocate on their behalf. I would like to thank Chairman Franks for introducing the Victims' Rights Amendment this week, and for his dedicated attention to this issue.

Countless Americans are victims of crime each year. These victims are ordinary Americans who each day are struggling to overcome the fear and loss caused by the acts of criminals. Even now, victims in communities across the United States are working to mend the recent wounds caused by evil acts in places like Boston, Newtown, Aurora and elsewhere. This hearing provides an opportunity for this Committee to determine what should be done to better serve the needs of crime victims.

Congress has passed several acts that have given protection to crime victims, including: the Victim and Witness Protection Act; the Victims of Crime Act of 1984; the Victims' Rights and Restitution Act of 1990; the Violent Crime Control and Law Enforcement Act of 1994; the Antiterrorism and Effective Death Penalty Act of 1996; and the Victims' Rights Clarification Act of 1997.

In 2004, the Crime Victims' Rights Act or CVRA was enacted as the first federal law to provide crime victims in federal criminal cases with a set of enforceable rights. The CVRA's purpose was to safeguard justice for crime victims while preserving the constitutional rights of the accused. According to some advocates, scholars, and crime victims, however, our federal crime victims' rights laws have proved ineffective in providing victims with adequate protections.

Crime victims must be afforded the dignity and respect they deserve in our criminal justice system. My hope is that this hearing will bring further awareness regarding crime victims' rights, and will inform this committee about ways to ensure that crime victims are treated in the best possible manner.

Again, I thank Chairman Franks, and look forward to the witnesses' testimony today.

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SUPPLEMENT TO TESTIMONY

OF

WILLIAM G. MONTGOMERY

MARICOPA COUNTY ATTORNEY

BEFORE THE CONSTITUTION SUBCOMMITTEE

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

IN SUPPORT OF

H. J. RES. 40

VICTIMS' RIGHTS AMENDMENT

Dear Chairman Franks and Distinguished Members,

Pursuant to questions posed to me following my verbal testimony and those fielded by other witnesses, I offer the following regarding proposed protections for rights to restitution and to proceedings free from unreasonable delay.

RESTITUTION

Restitution is defined by Black's Law Dictionary, 9th Ed. 2009, as the "full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation." H.J. Res. 40 defines victim as a "person against whom the criminal offense is committed or who is directly and proximately harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime." Accordingly, restitution can only be ordered where a criminal offense is committed ***against*** someone. Therefore, not every crime, such as a criminal citation for speeding, permits an award of restitution. Arizona courts have dealt with this particular issue in considering whether a conviction for leaving the scene of an accident, even an accident caused by the defendant, occurred. "The criminal offense of leaving the scene of an injury accident did not result in the aggravation of injuries sustained in the underlying accident. All of the injuries for which the state seeks restitution were caused by Martinez' violation of A.R.S. § 28–754(A), a civil traffic offense." *State ex rel. McDougall v. Superior Court In & For Cnty. of Maricopa*, 186 Ariz. 218, 220, 920 P.2d 784, 786 (Ct. App. 1996).

Federal courts conduct a similar analysis incorporating language used to define a victim under the CVRA. "In making [a restitution] determination, we must (1) look to the offense of conviction, based solely on facts reflected in the jury verdict or admitted by the defendant; and then (2) determine, based on those facts, whether any person or persons were "directly and proximately harmed as a result of the commission of [that] Federal offense." *Atl. States Cast Iron Pipe Co.*, 612 F.Supp.2d at 536 (collecting cases stating that this is the methodology used by courts in making this determination)." *In re McNulty*, 597 F.3d 344, 351 (6th Cir. 2010). In reviewing whether McNulty was due restitution, the court noted, "[t]he alleged harm to McNulty stemmed from his firing for refusing to participate in the conspiracy and his "blackballing" from employment with packaged-ice companies until he stopped working with the government in exposing the conspiracy." *Id.* at 352. The court concluded that, even if McNulty suffered the harms as set forth, "they are not criminal in nature, nor is there any evidence that they are normally associated with the crime of antitrust conspiracy." *Id.* Consequently, no restitution was awarded as McNulty was not a "victim" for purposes of restitution.

PROCEEDINGS FREE FROM UNREASONABLE DELAY

A crime victim's right to proceedings free from unreasonable delay do not conflict with a defendant's right to a speedy trial, nor do they implicate a defendant's right to a fair trial. The basic understanding of a defendant's right to a speedy trial overlaps with many of the same concerns a victim has to be free from unreasonable delay. For the Defendant, as discussed in United *States v. Ewell*, 383 U.S. 116, 120, 86 S. Ct. 773, 776, 15 L. Ed. 2d 627 (1966), "[t]his guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *Ewell*, 383 U.S. at 120, 86 S.Ct. at 776. Likewise, a crime victim seeks to minimize anxiety over the uncertainty of the trial process and concern over a long delay impairing the ability of a case to be fairly tried. Nonetheless, "[a] requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." *Id.* Finally, "[t]he delay must not be purposeful or oppressive." *Id.* (internal quotations and citation omitted).

In fact, whenever defendants seeks to assert issues that may delay a trial, they are creating a conflict for themselves which must be reconciled since "the demands of due process and the requirement of a speedy trial conflict" in those instances. *United States v. Jones*, 524 F.2d 834, 850 (D.C. Cir. 1975) (internal alteration and citation omitted). As for what exactly is reasonable or unreasonable, not even the United States Supreme Court has sought to identify with any specificity. *See Barker v. Wingo*, 407 U.S. 514, 523, 92 S. Ct. 2182, 2188, 33 L. Ed. 2d 101 (1972) (noting that the Court could "find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise.").

Generally, a court must consider four factors when determining whether a defendant's right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. *See Barker* 407 U.S. at 530. "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id.* The Supreme Court has acknowledged that delays of one year trigger the analysis into the other Barker factors. *Doggett v. United States*, 505 U.S. 647, 652 n. 1, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992).

Delays which courts have found that do not violate a defendant's right to a speedy trial would not presumptively violate a victim's right to proceedings free from unreasonable delay. For example, the filing of pretrial motions to address issues of 4th or 5th Amendment concerns or if the defendant is eluding the government, *see e.g. U.S. v. Sperow*, C.A.9 (Or.) 2007, 494 F.3d 1223; *U.S. v. Wanigasinghe*, C.A.7 (Wis.) 2008, 545 F.3d 595; *U.S. v. Arceo*, C.A.7 (Ill.) 2008, 535 F.3d 679; *U.S. v. DeClue*, C.A.6 (Tenn.) 1990, 899 F.2d 1465; *Perron v. Perrin*, C.A.1 (N.H.) 1984, 742 F.2d 669. A delay in availability of defense counsel did not cause constitutional concern. *See Middlebrook v. Carroll*, 470 F. Supp. 2d 411, 421-22 (D. Del. 2007). With respect to witnesses, the absence or unavailability of a witness would also justify a delay in a trial for 6th Amendment purposes. *See Barker*, 407 U.S. 514. Therefore, a corollary inquiry would find such a delay reasonable for a victim's inquiry.

"Finally, in attempting to balance the conduct of the parties, the Court may take into consideration the nature of the case. In *Barker v. Wingo*, *supra*, the Supreme Court indicated that more delay would be acceptable in the trial of a complex case than in the trial of a simple one. Likewise it would appear to be reasonable that, when the resolution of a speedy trial issue will result either in a trial or a dismissal of the indictment, more delay might be acceptable with respect to an offense that involved personal violence or threats thereof than could reasonably be tolerated in connection with offenses that by allegation involve commercial fraud only." *United States v. Bailey*, 399 F. Supp. 526, 531 (M.D. Fla. 1975)

CONCLUSION

Rights to restitution and to be free from unreasonable delay are important rights that the VRA can and should protect and are rights that our criminal justice system can accommodate without violating the rights of an accused. Just as our criminal justice system responded to the need to provide counsel for an accused or to ensure law enforcement advise a suspect of their right to remain silent in advance of interrogation, we have adjusted to ensure that our criminal justice system is responsive to the rights of those involved in pursuit of "justice for all." We can and must include victims of crime when we say "all."

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