PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO PROTECT THE RIGHTS OF CRIME VICTIMS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

ON

H.J. Res. 106

APRIL 26, 2012

Serial No. 112–113

Printed for the use of the Committee on the Judiciary

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PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO PROTECT THE RIGHTS OF CRIME VICTIMS

THURSDAY, APRIL 26, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:30 p.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Scott and Quigley.

Staff Present: (Majority) Jacki Pick, Counsel; Sarah Vance, Clerk; (Minority) David Lachmann, Subcommittee Staff Director; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. First, let me just say thank you to all of you for your patience. We had to vote on the floor, which slowed us down. It has been the proverbial train wreck in slow motion. So thank you for your patience.

Today the Subcommittee on the Constitution examines H.J. Res. 106, the bipartisan victims' rights amendment to the Constitution, also sometimes called the VRA.

[The information referred to follows:]

LA

112TH CONGRESS
2D SESSION

H. J. RES. 106

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

IN THE HOUSE OF REPRESENTATIVES

MARCH 26, 2012

Mr. FRANKS of Arizona (for himself and Mr. COSTA) introduced the following joint resolution; which was referred to the Committee on the Judiciary

---

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 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 harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime.

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

○

Mr. FRANKS. Without objection, the Chair is authorized to declare a recess of the Committee at any time and he may have to do that in this case for a few moments.

Victims' rights legislation and 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 of the State and Federal level to bring balance through statutes or State constitutional amendments, these efforts have been proven to be inadequate whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia, or the mere mention of 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, quote, "haphazard patchwork of rules" is, quote, "not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights." The VRA would specifically enumerate rights for crime victims, including the right to fairness, respect, and dignity; the right to reasonable notice of and not to be excluded from public proceedings related to the offense; the right to be heard at any release, plea, sentencing, or 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 escape of the accused; the right to due consideration of the crime victim's safety; and the right to restitution. Moreover, the amendment expressly provides standing for the victim to enforce enumerated rights.

Supporters of a victims' rights amendment have included President George W. Bush, President Bill Clinton, and President H.W. Bush, George H.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 for Victims' Assistance; and finally, the National District Attorneys Association, the voice of the Nation's prosecutors.

And on this point I find it ironic that the Democratic-invited witness from the ACLU claims to speak on behalf of Nation's prosecutors when she writes in her testimony that prosecutorial discretion would be compromised by this amendment, and that prosecutors would become less able to convict criminals; that their right to be heard hurts the effort of prosecutors and the cause of victims. In fact, the National District Attorneys Association sent us letters just this week saying just the opposite. And I will quote their letter.

Quote: The National District Attorneys Association, representing America's prosecutors, wishes to express strong support for H.J.Res. 106, the victims' rights amendment. Inclusion of victims' rights in our U.S. Constitution will ensure that victims' rights and crime victims will be treated with fairness, dignity, and respect within our criminal justice system, and if within that system, they will be afforded needed and meaningful rights, including the oppor-

tunity 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 this Congress to pass the amendment and the States to ratify it, unquote.

Now I would ask unanimous consent to enter this letter from the NDAA into the record. Without objection.

[The information referred to follows:]

National District Attorneys Association
44 Canal Center Plaza, Suite 110, Alexandria, Virginia 22314
703.549.9222/703.836.3195Fax
www.ndaa.org

April 26, 2012

The Honorable Trent Franks
House of Representatives
2435 Rayburn Building
Washington, D.C. 20515

The Honorable Jim Costa
House of Representatives
1314 Longworth House Office Building
Washington, D.C. 20515

Dear Congressmen Franks and Costa:

The National District Attorneys Association, representing America's prosecutors, wishes to express our strong support for the adoption of H.J.Res.106 – 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.

Sincerely,

Jan Scully, President
National District Attorneys Association

To Be the Voice of America's Prosecutors and to Support Their Efforts to Protect the Rights and Safety of the People

---

Mr. FRANKS. In addition, my office has received more than 30 letters from crime victims' organizations and the families of crime victims, which we will add to the hearing as well—the record as well.

[The information referred to follows:]

April 20, 2012

TO: Ms. Jackie Pick, Deputy Chief of Staff and Counsel for the Subcommittee

FROM: Dr. Martin D. Bradshaw, NM Force 100 Co-Chair (www.Force100.org)

SUNJECT: Support for H.J. Res. 106, Victim's Rights Amendment

I am writing to express my strong support for the House Joint Resolution 106, the proposed Victim's Rights Amendment, which will be heard by the Subcommittee on April 26, 2012.

This Amendment is long overdue because current laws stack the deck heavily in favor of the criminals over the victims of their crimes. My cousin, Scott Campbell, was brutally murdered in April of 1982 in California. In May of 1988, his uncle, world renowned racing legend, Mickey Thompson and his wife Trudy were gunned down in the driveway of their California home. My cousins, Gary and Collene Campbell, the parents of Scott and sister of Mickey, spent years and years trying to bring the murderers of their loved ones to justice and found out that while the Constitution of the US provides twenty three rights for accused criminals, there are, at present, no rights for the victims of their crimes.

Collene and Gary have personally related to me how they were denied the right to be present in the courtroom during the trials and were not accorded the right be notified of hearings relating to the cases. The defense lawyers requested delay after delay, causing the trials of Mickey and Trudy's killer to drag on for nineteen years, with sixty five court appearances. Gary and Collene felt that the "right to a speedy trial" was not accorded to them as victim.

Congressmen, it is long past time to get this Amendment to our Constitution passed. Please fight for this legislation for all crime victims across our great country.

WHY WE NEED A VICTIMS RIGHTS AMENDMENT TO THE US CONSTITUTION (HJR106)

We have had considerable experience with victim's rights legislation in many states across the country. Our understanding of these laws is perhaps greatest in Illinois, where our daughter Renée was murdered, and in our home state of Georgia, where we have worked to strengthen the state's Crime Victims Bill of Rights.

Both Georgia and Illinois have a problem which undoubtedly occurs in most other states: the lack of enforceability of the victim laws. That means simply that these so-called "rights" can be ignored or denied with total impunity and the victim has absolutely no recourse. As a lawyer in Illinois once told us of the Illinois law, it is "essentially "VOID WHEN NEEDED".

It is therefore imperative that we have an amendment to the US Constitution that will, for the first time, establish a set of enforceable rights for crime victims. Then and only then can a true measure of justice be achieved.

Elaine & Gordon Rondeau
Co-Founders, Renée Olubunmi Rondeau Peace Foundation

Ms. Jacki Pick,
Deputy Chief of Staff
Counsel for the Subcommittee

Ms. Pick,

My name is Patty Lynn Wyatt, I am victim of a crime of murder by gunfire. My mom was shot and killed by a man she did not know nor had ever met.

It's time that a constitutional amendment be passed for Victims. Every ninety days over 3,000 new victims are walking the streets in a daze. We all need help.

My dad, siblings and I were not allowed to give our impact statements from our hearts at the court during trial. We each were required to write our statements and then have them reviewed by the Lawyers. Apparently to not let anything become emotional. I 'm not quite sure how this is considered justice. My father was awarded restitution in this case, but never received the restitution due to the courts failure to follow through after the defendant went to prison.

In order to gain restitution that was already awarded to my dad, he had to again hire an attorney. Funny how the defendant, a convicted murderer, is assigned two lawyers, paid for by the Taxpayers, to fight against paying the victim. Victims of course are not allowed lawyers assigned by the courts and paid for by taxpayers. Once again, I'm not quite sure how this is considered justice. I apologize for the cynics in my words. I know that are justice system is the best globally. I just know for a fact that we have intelligent and compassionate individuals who want it to be even better.

Please help us. Thank You.

Susan S. Russell, M.A.
Testimony for
HJ 106 III
112th CONGRESS
2d Session
H. J. RES. 106

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

While great progress has been made over the past decades in securing state and federal laws to enhance the rights of victims the sad truth of the matter is that these laws have failed and continue to fail to provide victims' rights and a recourse of action when their rights have been denied.

Twenty years ago, on June 19, 1992, a man by the name of Richard Laws, who resided in the same small rural community as I kidnapped, raped and nearly killed me. I was driving down the road late that night in a 1977 Ford Thunderbird when I realized I had a flat tire. I pulled into an Inn's parking lot to use the phone, but the Inn had closed for the night and back then there were no cell phones. Soon after I pulled into the Inn's parking lot, a man who I had met briefly earlier that night, pulled in alongside my car and offered me a ride. I recall at the time when he asked me for a ride that my instincts were telling me this might not be a good idea, but it was late and we lived in a small town where everyone knows just about everyone and everything. And at this time there were no such things as cell phones. Therefore I decided to accept the ride.

However, I believe that even if I had not accepted the ride he would have kidnapped me anyways, because we learned later on in the investigation that he had slashed 2 of my car tires and followed me. It is highly likely that he had been stalking me for some time as several years after my assault, I learned that he had broken into my husband's truck prior to my assault and had stolen identifying information. This man held no regard for life as after begging and pleading for my life he fractured my skull in three places with a tire iron, broke several facial bones and left me to die in a remote wilderness area.

I can recall gaining consciousness hours later, cold, shivering, naked and in intense pain. I recall touching my head and feeling something sharp and protruding. As a trained Emergency Medical Technician, I knew that I was in serious trouble and needed help. Somehow, I managed to stumble through the woods a tenth of a mile to where there were five teenagers camped. They managed to keep me warm and awake

and two of them hiked three miles to the nearest phone. I was taken to a near-by hospital where they stabilized my injuries and prepared me to be sent to another hospital that specialized in trauma. In addition, to sustaining what is medically known as a traumatic brain iujury, I had sustained several broken facial bones as a result of being punched in the face for trying to fight off my assailant.

Fortunately he was caught 4 days after my assault and in April 1993 he was sentenced as a result of a plea agreement to 20-35 years. However, he will "Max Out" serving a grand total of 23 yrs and be released into Vermont with no one and/or no agency watching over him. His only requirement will be to register on the Vermont Sex Offender registry.

Some of the core rights of victims that have been defined by victims, and those working within the victim service field and placed into state statutes are: Safety, Information, Notification and Restitution. Yet though these rights exist they have no teeth, if the victim's rights are denied or violated there is no recourse - no one is held accountable.

As a crime victim I have a right to restitution-yet the judge never order restitution claiming the offender had no ability to pay. Subsequently, I am still paying for the actions he committed. A Constitutional Amendment would ensure restitution is ordered. Interesting, in 2003, I learned that the offender in this case is earning $7.25 cents an hour working in prison and while 20% is given to the Victims Compensation program he does not have to pay any restitution to me, his victim. And he is able to keep 80% of his wages.

I was, fortunate to be eligible for Vermont Victim's compensation. I was allotted the full amount to cover medical expenses, and counseling. However, even after health insurance and victims compensation, I still had $12-13,000 in medical bills. Due to my medical injuries, I could not drive nor do anything much physically like something as simple as walking down the driveway. I had months of physical rehab and was not able to work. I lost my job due to the inability to perform the physical tasks associated with my employment at the time.

Over the years I have had my right to information and notification denied more than once and yet there continues to remain no action steps that I can take to ensure these rights are adhered too.

Here are some personal examples:

Notification: It is written in Vermont statutes that I have a right to 30 days notification of a parole board hearing - yet at least 3 times in the past decade this right has been denied, and I received less than 30 days notification. And in these situations no one was held accountable for failing to uphold my rights. I thought this might change with the implementation of victim automated information and notification system. Yet the automated system still has some bugs to be worked out as once again, I did not receive proper notice and one time the information was wrong-so not only was it not timely it was not correct.

Unfortunately, we as victims and survivors know first-hand how broken the system remains today. We know that gross injustice for victims remains the sad hallmark of our system not just in Vermont but all across the country. And we personal know how weakness in the cause of justice for victims has led to tragedy and trauma.

I recall working diligently to advocate for the passage of the Vermont Victims Bill of Rights. While I recognize that many states, including Vermont have enacted legislation, these laws are insufficient to fully vindicate victims' rights in the criminal justice system. There is no recourse or mechanism in place to hold anyone or any agency accountable when our rights have been denied, ignored or dismissed. A Constitutional Amendment will help balance the scales of justice and ensure that crime victims' rights are achieved.

Support for the Amendment is bipartisan and spans the range of views from liberal to conservative among politicians, scholars, victim services professionals and individual Americans. The rights proposed in HJ 106 IH will extend to crime victims a meaningful opportunity to participate in each critical stage of their cases. At the same time, they will not infringe on the fundamental rights of those accused or convicted of offenses. Despite our best efforts here in Vermont, crime victims are still routinely denied basic rights to Safety, Information, Notification and Restitution. These rights will only be protected and adhered to with mechanism to hold those accountable for failure to meet their rights when the Constitution of the United States is amended to protect the rights of crime victims.

Thank you.

Susan S. Russell, M.A.
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Twice in One Year

(I Have Victim Rights?)

By Jamie Foster

On January 8, 2011, in Randolph County, Illinois, a drunk driver caused a wreck. My kids remember too many details, and I don't remember any. We were all wearing seatbelts, which most likely saved our lives. My little girl, Kate, walked away with a few scratches and bruises, and Adam had to have stitches above his eye. By the time I found out my kids survived, all their injuries had healed. Mine were so severe, they kept me in a drug-induced coma, and for two weeks, I stayed in intensive care at SLU Hospital and St. John's Mercy Hospital in St. Louis. I had over fifteen breaks, including 8 along my spine, broken ribs, a clavicle bone, crushed sacrum and three fractures in my pelvis. Also, there was a punctured lung from the broken ribs, a ruptured spleen, and a brain injury. I was four months pregnant, and as a result of these injuries, three days after the accident (1/11/11), baby Jesse died. I had speech therapy for four months and physical therapy for over a year. I was hospitalized twice for attempting suicide. Surviving the accident and surviving the recovery are two very different things. To add to this, during this time, I was not contacted about anything concerning the drunk-driver who had hit me, or the case. What happened to him? Where is he now? Is he in jail? Is he out? What did he get charged with? Did they know I lost the baby? I hope they include that in the charges. All I had were rumors and hearsay. I wasn't aware of any "Victim Rights" until a separate case.

In Perry County, between December 2011 and January 2012, not quite a year since the accident (and still in physical therapy from it), my husband, Shawn Robertson physically abused me. Some of the things he did left bruises and marks, some of them didn't. In early January, I stayed with my family in Jackson County and had been granted an Emergency Order of Protection. Perry County took pictures of my face and neck. My lawyer, the Jackson County Victim Rights Advocate and I stayed active in this case, constantly calling to see where we were in the process. The Emergency Order of Protection had to be extended because no one could find Shawn. I stayed put at my parents' house until I knew when he was caught, and if I went anywhere, someone escorted me. Perry County issued a 10,000 warrant for him; they told me about that, so I knew they had my number. But I did not hear from them again. I did not know when he was picked him up, when he was in jail, if he was still in jail. ---After-the-fact, through some searching, my lawyer discovered Shawn had been picked up January 25 and released the next day because he plead guilty to a misdemeanor for aggravated battery. If anyone in Perry County had looked at his record, they would've found a previous conviction of aggravated battery and it would've been a felony for him, a bit more than a slap on the wrist, but they didn't look. If anyone in Perry County had contacted me, his wife, the person he abused, they would've known about the previous conviction. But they didn't. He was released the second day he was in jail, and, as if I was hit in the face by Perry County, he was *credited* for those two days served. Considering his record and the punishments he has had to go through, I'm sure he has learned his lesson to not hit an already injured woman. So maybe I should let it go like

Perry County did, and go back to him. If they think he's safe enough to be on the streets without even talking to me, then maybe I shouldn't be scared anymore. Maybe. Maybe not.

JAMIE FOSTER SPEECH ILLINOIS CAPITOL

In January 2011, in what we will call Illinois "County A", a drunk driver hit me and my kids in our car and nearly killed me. My little girl, Kate, and my son Adam had some relatively minor injuries. But mine were so severe, they kept me in an induced coma for several days. I stayed in intensive care for two weeks. I had over fifteen bone breaks, including 8 along my spine, broken ribs, a clavicle bone, crushed sacrum and three fractures in my pelvis. I also had a punctured lung from the broken ribs, a ruptured spleen, and brain injury.
Worst of all, I was four months pregnant. As a result of these injuries, three days after the accident, my baby Jesse died. I had speech therapy for four months and physical therapy for over a year. I had serious issues with depression. Surviving the accident and surviving the recovery are two very different things.

But what made all this even WORSE is that during this entire time, I was not contacted by the authorities about anything concerning the drunk-driver who had hit me, or the case. What happened to him? Where is he now? Is he in jail? Is he out? What did he get charged with? Did they know I lost the baby? I hoped they would include that in any charges. All I knew was rumors. I wasn't aware that I had any "Victim Rights" until a new and separate case.

So, then in Illinois "County B", three months ago, while I was still in physcial therapy from the car accident, my husband physically abused me. Some of the things he did left bruises and marks, other injuries were not visible. In early January, I stayed with family in another county and had been granted an Emergency Order of Protection. "County B" took pictures of my face and neck. My lawyer in the county I was staying is a Victim Rights Advocate. She and I stayed active in this case, constantly calling to see where we were in the process.

The Emergency Order of Protection had to be extended because no one could find my abuser. I stayed hidden with family and was escorted everywhere. "County B" issued a warrant for him. They told me, so I knew they had my contact information. But I did not hear from them again. I did not know when he was picked up, when he was in jail, if he was still in jail.

After searching, my lawyer discovered my abuser had been picked up January 25 and released the next day. He plead to a misdemeanor aggravated battery, despite a previous domestic violence conviction that should have meant a mandatory felony for him. This would have given him a sentence that would have kept me safer longer.

If anyone in "County B" had contacted me, they would've known about the previous conviction. But they didn't. He was released the second day he was in jail.

What I have learned from these two horrific and devastating crimes, in two different counties, is there is a pattern of victims rights being frequently violated in Illinois. And I have

learned that those violations of our rights have serious consequences. I have also learned the value of having a good victim advocate and attorney. She told me about this effort to amend the Illinois Constitution to protect crime victims and their rights. I am here to ask the Illinois Senate to PLEASE pass Marsys Law and finally give us the rights we need to protect ourselves.

Valerie J. Dodini, Esq.
3054 Evergreen Dr.
Fairfield, California 94533

Via email to: jacki.pick@mail.house.gov

April 20, 2012

Jacki Pick
Deputy Chief of Staff and Counsel for
H.J. Res. 106 Subcommittee
Washington, DC

Re: Support for Proposed Victims' Rights Amendment

Dear Ms. Pick:

I am writing to you to advise you of my support for H.J. Res. 106, the proposed Victims' Rights Amendment.

I am a former Deputy District Attorney and a victim of violent crime. I have witnessed firsthand, both as a Deputy D.A. and victim, the disregard and additional trauma perpetrated on the victim by a criminal justice system that is designed, by virtue of the rights afforded to defendants in the Constitution, to focus its attention and efforts on the offender only, to the detriment of justice for the victim.

Deputy D.A.'s are well informed about the offender's rights; however, their education as to victims' rights falls short. D.A.'s are extremely busy people, and it's much easier (quicker and safer) to adhere to the U.S. Constitution than it is to fight for the rights of victims as provided by state law.

As the co-founder of Families & Friends of Murder Victims, Inc., I have had parents of murder victims tell me that they were not allowed to give their victims impact statements because a plea bargain was arranged. They went to the sentencing with statements in hand, only to be told that they were not allowed to address the court because there was a plea bargain. According to California law, a plea bargain has no effect on the fact that the law gives the victim the right to deliver an impact statement at <u>any felony sentencing,</u> yet too few judges and D.A.'s are aware of the fine points of state law – but they are very aware of the provisions of the U.S. Constitution!

The one right and chance for a parent of a murder victim to be heard has not been provided to many victims. This disregard of victims' rights, although not intentional, has caused further trauma to many victims who wanted to tell the court what the crime has done to their lives. This disregard of the victim causes additional unnecessary pain (re-victimization by the system), thus hindering the healing process. However, if the victims' right to be heard was provided for in the

Constitution I have no doubt that they would be allowed to address the court at any felony sentencing.

My experience as to the disregard for the victim's right to be heard is just one example. California victims' rights laws regarding the right to be informed and present have also been disregarded by the system. **Only a Constitutional Amendment can guarantee that victims will be treated fairly in the criminal justice process.**

Thank you for your assistance with the proposed Amendment, and many thanks to Congressmen Trent Franks and Jim Costa for introducing this overdue and much needed piece of Legislation.

Very truly yours,

Valerie J. Dodini
Mother of murder Victim Daniel Fritts
Co-Founder, Families & Friends of Murder Victims
Attorney at Law

We agree with and support Valerie Dodini:

Harrison Mark Dodini
Husband

Audrey Fritts
Sister of Daniel Fritts.

Cc: Congressman John Garamendi (with original signatures)

Vance, Sarah

From: Duane & Jo Anna [duanelynn1@cableone.net]
Sent: Monday, April 16, 2012 8:50 AM
To: Pick, Jacki
Subject: Constitutional Amendment

Ms. Jacki Pick,
Deputy Chief of Staff
Counsel for the Subcommittee
Ms. Pick, my name is Duane Lynn. A victim of crime of murder by gunfire.
My wife was shot and killed by a man she did not know nor had ever met.
It's time that a constitutional amendment be passed for Victims. Every ninety days over 3,000 new victims are walking the streets in a daze. We all need help. My wife and I raised six children and we were not allowed to give our impact statements from our hearts. We each were required to write our statements and then have them reviewed by the Lawyers to be assured that we said nothing that might allow the Jury to become emotional. Is this justice? We were awarded restitution but did not receive it because the courts failed to follow up after the defendant went to prison. The defendant is assigned two lawyers, paid for by the taxpayers, to fight against paying the victim. Victims of course are not allowed lawyers assigned by the courts and paid for by taxpayers. Is this justice? Again, it is time something is done by passing the amendment to
give Victims rights. Please help us. Thank You. Duane Lynn

--
I am using the free version of SPAMfighter.
We are a community of 7 million users fighting spam.
SPAMfighter has removed 71 of my spam emails to date.
Get the free SPAMfighter here: http://www.spamfighter.com/len

The Professional version does not have this message

Vance, Sarah

From: Anne Seymour [annesey@atlantech.net]
Sent: Monday, April 16, 2012 9:36 AM
To: Pick, Jacki
Cc: Steve_Twist@sgagroup.com
Subject: HJR 106 commentaary

SUPPORT FOR HJR 106:

When President Reagan's 1982 Task Force on Victims of Crime included as its final recommendation "a proposed amendment to the Constitution,"
it sent a resounding philosophy and message to America: that crime victims' and survivors' rights can only be *truly balanced* with those of alleged and convicted defendants if they are ingrained in our Nation's Constitution. This philosophy remains highly relevant today where, in too many cases, victims' "rights" are treated as mere "recommendations" and not enforced with the full authority of law. HJR 106 is an important step in the right direction toward a justice system that is truly balanced, and toward victims' rights that would have a strong foundation for enforcement.

Anne Seymour
National Crime Victim Advocate
Washington, DC

Vance, Sarah

From: Spagnoletti, Frank [fspagnoletti@reptalent.com]
Sent: Monday, April 16, 2012 1:38 PM
To: Pick, Jacki
Subject: Victim's Rights Amendment

Dear Congressman Trent Franks,

I am very much in support for the Victim's Rights Amendment. I endorse your action to co-sponsor and support H.J. Res. 106.

Kindest regards,

Richard Lawrence, President
Rebel Entertainment Partners, Inc.
5700 Wilshire Boulevard, Suite 456
Los Angeles, CA 90036
(323) 935-1700 / (323) 964-0436 Fax
www.reptalent.com

Vance, Sarah

[redacted]

Subject: FW: Thank you to Congressman Franks for sponsoring H.J. Resolution 106
Attachments: Thank you to Congressman Franks.pdf

[redacted]

[redacted]

[redacted]

[redacted]

Subject: FW: Thank you to Congressman Franks for sponsoring H.J. Resolution 106

[redacted]

From: Shannon Rich [mailto:Shannon@azcadv.org]
Sent: Monday, April 16, 2012 4:17 PM
To: Anna.Hurley@mail.house.gov
Cc: Levey, Dan
Subject: Thank you to Congressman Franks for sponsoring H.J. Resolution 106

Good Afternoon, Ms. Hurley,

We wanted to express our gratitude to Congressman Franks for sponsoring House Joint Resolution 106 which further protects the rights of crime victims across the country. If you can please forward this letter on to the Congressman we would greatly appreciate it.

Have a good day.

Sincerely,

Shannon Rich, MSW
Systems Advocate

Arizona Coalition Against Domestic Violence
2800 N. Central Avenue, Ste. 1570
Phoenix, AZ 85004
602-279-2900 x413 or toll free 1-800-782-6400 x413
TTY: 602-279-7270
Fax: 602-279-2980
shannon@azcadv.org
www.azcadv.org

Our mission is to lead, to advocate, to educate, to collaborate, to end domestic violence in Arizona.

Please be advised that email is not a secure or confidential form of communication. Computer and email activity can be monitored and tracked. For safety and confidentiality, please contact me by phone.

Vance, Sarah

From: Paul Paulsen [paulpaulsen1@earthlink.net]
Sent: Monday, April 16, 2012 7:34 PM
To: Pick, Jacki
Cc: move@cox.net
Subject: U.S. Victims' Right Amendment

Dear Ms. Pick:

I am writing you in support of the proposed U.S. Victims' Right Amendment which is scheduled for a hearing on April 26, 2012. My sister was murdered in 1976 and I will never forget the agony my family experienced during the initial trial and subsequent trials including one as recent as five years ago. It is apparent the murderer has all the rights. The basic lack of rights for crime victims gives a huge edge to criminals. I find it appalling that there is not a single right for crime victims in our U.S. Constitution, yet there are twenty-three rights for the accused criminal. I sincerely believe the proposed U.S. Victims' Right Amendment is long overdue and an absolute necessity. Please, please do whatever it takes to get this legislation passed. If there is anything else I can do to help this cause, please let me now as soon as possible.

Sincerely,

Paul J. Paulsen
Brother of Debbie Paulsen (Murdered 7/12/1976)

1729 E. Sandalwood Ave.
Anaheim, CA 92805

Vance, Sarah

From: BeckieRose@aol.com
Sent: Monday, April 16, 2012 7:51 PM
To: Pick, Jacki
Cc: move@cox.net
Subject: PLEASE SUPPORT HJ Resolution 106

Please support Congressman Trent Franks (R-AZ) and Jim Costa (D-CA), and HJ R 106, the Crime Victims' Amendment to the Constitution. There has long been an imbalance in the judicial process that can only be resolved with a constitutional amendment. While most states have some measure of Crime Victims' Rights Legislation, many crime victims are still not being afforded those rights. This imbalance as (the criminal defendants rights are within the amendment already – 23 of them) has been long overdue and cannot be balanced fairly, as proven by the last thirty plus years of the victims' rights movement and we still each day in our courts have a victim not notified of an important proceeding, not allowed their impact statement, not allowed to know when their perpetrator was released, not treated with dignity, compassion and respect, and in Arizona especially, not granted a right to a speedy trial (as with one our members who is now going on eight years awaiting the judicial process to end in a verdict and sentencing).

I remember, more than twenty-years ago, being in court for the murderer of my son, Brian, who at age 18, was robbed and shot to death while walking his girlfriend home from work in our neighborhood of horse properties, by three errant gang members, bored and broke. In court, I was appalled at some of the treatment we endured: such as not being notified the preliminary hearing for those involved with our son's murder was changed and I learned a lesson of who were we in the judicial process .... seemingly non-important and yet we were the parents of a murdered child. And then came the day of the sentencing of the one who supposedly shot our son and we had already learned they had the wrong one of the three defendants on trial.... so his plea agreement sentencing came about and I was again, not notified about a time change and had to rush to court only to miss half of what had gone on and under great duress. Again, my husband and I felt abandoned by the system and non-important players in the system. And yet, it was we whose hearts were absolutely shattered, whose lives were devastated by the loss of our only son, an Air Force Junior ROTC cadet, leadership school awardee, honor student, brother to our fourteen-year old daughter, Christie, who then became an only child without a sibling. I gave birth to my son and the cord that could not be severed even by death creates an endless heartache and pain that I will take to my grave. Yet, who was I in the system that ignored giving me basic information and thus treated us without dignity and respect.

As chapter-leader of the Valley of the Sun Chapter of Parents Of Murdered Children for the past 19 years, I have seen countless cases of the rights of our members being violated but I have also seen the positive effects of when they aren't violated, when a crime victim feels the system did all it could to assist them through the absolute worst event in their lives. Murder in itself is the most devastating and painful event and does leave families absolutely shattered and society and the justice system needs to have the crime victims' rights as a top priority. America is too great a country to be failing this particular portion if its' citizens - the innocent victims of crime while bending over backward for the criminal defendants. We need the Crime Victims' Amendment so this country will be consistent across the board in every state in treating victims fairly. Otherwise, it is not a justice system but a failed judicial process. The constitutional amendment will help bring the scales of justice to balance for crime victims.

Please, we need each and every member of Congress to support this amendment that is too long overdue and is the next step we must take to make our country's judicial system all that it can and should be.

Beckie A. Miller, Chapter-Leader
Parents Of Murdered Children (POMC)
Valley of the Sun Chapter
PO Box 39603
Phoenix AZ 85069-9603
(602) 254-8818

Hope is the thing with feathers,
That perches in the soul,
And sings the tune without words,
And never stops at all . . .
(Emily Dickinson)

Vance, Sarah

From: James Bek [youcanreallydoit@yahoo.com]
Sent: Monday, April 16, 2012 7:56 PM
To: Pick, Jacki
Cc: move@cox.net
Subject: Victims' Rights Amendment, H.J. Res. 106

Ms. Pick,
We lost our 25 year old son to an arsonist in 2002 along with his girlfriend Donna, Donna's sister Rachel and their friend Beth.
As victims we were afforded the right in North Carolina to speak during the trial as well as being treated with respect and a speedy trial for which we will be forever grateful. Not all states have such rights and in many states the statutes are just not sufficient. We need a Victim's Rights Amendment for the entire country so all victims will have the same and perhaps even better rights than we have here in North Carolina.
We appreciate your help and thank you.
Sincerely,
Jim and Ginny Bek
Kill Devil Hills, North Carolina

Vance, Sarah

From: ARLYNE BARNES [pooch@lightningspeed.net]
Sent: Monday, April 16, 2012 8:01 PM
To: Pick, Jacki
Subject: HJ Res 106

As a mother who went through the tragedy of having her 29 year old son
murdered by his wife for his Air Force disability money, I know only too well how badly the "Unjustice System" has to be changed.

We went bankrupt trying to put his murderer behind bars, but she has not spent one minute behind bars because the little hick town sheriff told me he didn't have the manpower or money to investigate the crime.

The whole murder was handled in a "good old boy" area of Arkansas. I didn't think that was still the way crime was handled in the USA but it is.

The murderer had all the rights (including having the guard check ME for a gun before entering the courtroom) but we, the victims family had no right at all. I wasn't even allowed in the courtroom!

I could go on and on, explaining things to you that you wouldn't believe. I could show you binders full of information that I personally collected and still have but that nobody cares about.

My heart has a big hole in it, the tears flow and the pain that I feel when I want to hold my son but know that I can't is unbearable.

I beg of you, PLEASE support HJ Res 106... for me and the thousands of other victims and their friends and families. I hope you never have to suffer the pain we suffer in order to understand how important this is.

Arlyne Barnes

Vance, Sarah

From: wadej46@aol.com
Sent: Monday, April 16, 2012 8:10 PM
To: Pick, Jacki
Subject: Victim's Rights Bill

Ms Jacki Pick

I am asking that you support the Victims' Rights U.S. Constitutional Amendment, H.J. Res. 106.

There is not a single right for crime victims in our U.S. Constitution, yet there are 23 rights for the accused criminal. This is not far at all.
Victims should have the right to be notified of a hearing, trail or the release of the criminal. They should have the right to be present in the courtroom and to be heard. They should have the right to a speedy trial and be treated with dignity and respect.
In my case we were not informed of anything. The prosecutor would not even speak to us. We were not even allowed to give a victim impact statement which was our right. He would not release to us any of the information of the hearings and sentencing months after the plea bargan which became public information at that point. While the murderer was allowed to sit in court and laugh about the crime they committed. It was appauling.
The lack of any rights for crime victims gives a huge edge to criminals.

Please help make a difference to crime victims.

Thank you,

Julie Gulledge
Sister of Kyle Gulledge Murdered January 6. 1997

Vance, Sarah

From: George Miller [miller2900@charter.net]
Sent: Monday, April 16, 2012 8:32 PM
To: Pick, Jacki
Cc: fostercare@cwla.org
Subject: H.J. Res. 106 US Constitutional Amendment

Importance: High

Ms. Jacki Pick
Deputy Chief of Staff and Counsel for the Subcommittee

Re: VIICTIMS' RIGHTS AMENDMENT
H.J. Res. 106

Dear Ms. Pick,

Thirty years ago President Reagan's Task Force on Victims of Crime strongly urged Congress to support inclusion of a Victim's Rights Constitutional Amendment. Twenty two years ago my mother was brutally murdered in her home in South Carolina. Regrettably I and too many other citizens of this great country have suffered the horrors of having a loved one murdered then stumbling through the horrors of navigating through the legal system.

For years and years, the victims and the victim's families have begged to be heard. We are not asking for much, just a few simple requests. For example, IF we had a Victim's Rights Amendment there would be reasonable notification of public proceedings related to the case, the victim/loved ones would have the right to be heard at any plea or sentencing hearing and as hard as it is to believe the victim would have the right to be notified of release or escape of the accused. Simply, the fundamental rights of innocent citizens would be upheld if the Victims Rights Amendment is passed.

Sadly, this is not a request for me, twenty two years too late, but it is a request for the future of this country and it is the time to do the right and just thing for the "unknowing and innocent" people of this country. I pray that no one ever has to suffer the indignities that so many have suffered not just from the criminals but from our very own government. When I paid my taxes yesterday I could not help but wonder……

Thank you for taking the time to read my urgent request for your support.

With tremendous hope and so much appreciation,

Mary Ann Miller
FORCE ONE HUNDRED
South Carolina Chair
864-224-3460

Mary Ann Miller
miller2900@charter.net

Vance, Sarah

From: Mikkatjay@aol.com
Sent: Monday, April 16, 2012 10:12 PM
To: Pick, Jacki
Subject: RE: H.J. Res.106

I am writing in support of H. J. Res. 106. As a co-victim of homicide I was made aware that the victims and co-victims of violent crime does not have rights that are supported by our Constitution. The criminals have 23 rights under our Constitution and that is not right. I understand that those who have not experienced a crime don't understand that until you are a victim just how lope sided these rights are and how victims that are dealing with victims rights have to try to battle for what few rights individual states have. For there to be victims rights in our constitution would be one less thing for victims to have to worry about and they can get on to healing the wounds that have been inflected on them. Victims should also have the right to be heard and seen in the courts. They should have a voice and be shown the respect that all victims deserve. They should not be made out to be the villain as it is now without victims rights. We deserve to be keep informed on where the criminal is and what their status is. We deserve to know when and where they will be released.

Thank You,
Kathy Kuhlmann

Vance, Sarah

From: Wendy Glover [wendy.goldleaf@cox.net]
Sent: Monday, April 16, 2012 10:16 PM
To: Pick, Jacki
Subject: Ms. Jacki Pick, Deputy Chief of Staff and Counsel for the Subcommittee

Dear Jacki,

I support the Victims' Rights U.S.Constitutional Amendment, H.J. Res. 106. I am a homicide survivor and have been experiencing less rights than that of my local homicide survivors. My brother was murdered in 1993 on a military base in Fulda, Germany. I have been trying to get information on Stephen Schap (my brother's murder) and the military is completely unwilling to answer question or is just plain evasive.

I find it frightening that I am unable to get any information about the inmate but the inmate if given access to the internet could easily find me within just a few minutes. I am absolutely terrified of him getting out. Especially because I am starting the "Parole Block Program" with the help of the National Association of Parents of Murdered Children.

Victims should have the right to be notified of a hearing, trial or the release of the criminal. They should have the right to be present in the courtroom and to be heard. They should have the right to know of their behavior within the prison, especially Federal Prison and be able to monitor their records and behavior after their sentence is complete.

Sincerely,

Wendy Glover

Vance, Sarah

From: Sally Goelzer [sjgoelzer@midcircle.com]
Sent: Tuesday, April 17, 2012 12:32 AM
To: Pick, Jacki
Subject: Victims rights Res

Please see that this bill gets passed. I simply don't have the room to tell you how important a victims right is during murder trials. We experienced 12 years, YES 12YEARS IN THE CRIMINAL COURT SYSTEM WITH 3 trials and unlimited rights for the defendant. We who are for victim rights are NOT TRYING TO TAKE ANY RIGHTS AWAY FROM THE ACCUSED JUST BALANCE THE COURT SYSTEM AND GIVE VICTIMS THEIR RIGHTS.

MOST PEOPLE DON'T UNDERSTAND WHO IS THE VICTIM IN A MURDER TRIAL. THE VICTIMS ARE THE FAMILY OF THE DECEASED NOT THE ONE WHO DIED. THE COURT RECOGNIZES BY LAW THIS FACT. The ones who are left are the ones that suffer even more than anyone can imagine. I would love to talk with you directly about this issue and tell you how our lives changed when we finally got legal representation as victims in the courtroom right in the middle of one of our trials because Az has in our Constitution an AMMENDMENT to our state constitution. Our case was the first one in AZ to be adjudicated in the courts.

IT CHANGED LIKE NIGHT AND DAY THAT ONE DAY WE HAD LEGAL REPRESENTATION. MY YOUNGER BROTHER WHO IS DEAF LEANED OVER TO ME AND SAID, "something is different in the courtroom today, there is a whole diffferent feeling today. I can see it, I can feel it!"

I started to cry and it showed that me now we had some rights. I have kept a diary of our entire experience in all our trials and I have all the transcripts if you would like to see them and they tell a clear story of how it should be. It was a life changing experience and it needs to occur in our entire nation in the courtrooms..

Sent from my new iPad, Sally

Vance, Sarah

From: BLpallet@aol.com
Sent: Tuesday, April 17, 2012 8:04 AM
To: Pick, Jacki
Subject: Victim Rights

Good Morning:

Please support the proposed amendment.

Our daughter was murdered 17 years ago. Her confessed killer has all his appeals. During the last several month we have been trying to find out why the death penalty has not been carried out.

We have contacted my phone and letter the Governor of Missouri, the AG of Missouri and the head of the Department of Correction in Missouri.

Not one of the above mentioned offices have responded to our request. All that we want is a simple answer WHY. We are now calling each week again with no response.

It seems like the criminal has all the right and none for the victims.

John & Carol Angelbeck
1040 SE 59th Street
Ocala, FL 34480
352-861-7770

Vance, Sarah

From: Beverly Myers [beverlymyers2004@yahoo.com]
Sent: Tuesday, April 17, 2012 10:40 AM
To: Pick, Jacki
Subject: Victim Rights Res 106

Ms Jacki Pick,

My brother was murdered in 2002 and it took 6 years of repeated re-victimization to bring the 1st degree without parole justice to the man who killed him. In an effort to be give a fair trial to the defendant, (since he/she is the one the on trial), the justice system neglects the needs and emotional impact the long process takes on the loved ones of the victim. The family has to endure the de-humanizing comments made in court, the insensitive press leaks, and frighting comments made by the murderers family and friends. In our case the murderers family was allowed front row seats in the court room while members of our family had to seat in several rows back often not being able to hear what was being said. We were told our tears would impact the jury. Yet the defendants emotions were allowed. Threats have been made by the murderers family to family members of the victim since they entered and waited in the same area. This is not only further abuse to the victims family but dangerous. My family has spent thousands of dollars in therapy, loss or work time, babysitting cost to attend trials and hearings. We all had to travel great distances to attend a hearing only to be told the defense was not showing up or it was cancelled. The emotional toll before and after a hearing and trial is tremendous and expensive.

As a POMC Chapter leader I have spent the last 6 years deeply involved in the consistent aftermath of victims of violent crime and as a volunteer worked to support these families. Due to the lack of support given to the survivors of violent crime I have had people come from three different states, (MA., RI., Ct.), to attend my support meetings because there was nothing offered in their state.

Even certified counselors have not been trained to support victims of violent crime properly hence the support group is all they have to turn to. I can assure you that these families are some of the most neglected victims of our U.S. Constitution and I urge you and those who are in a position to make their rights heard, and aid in the support and care of this neglected group of victims.

Please watch the "Left Behind" NPR special our group did on this matter. It will help you understand. I will be happy to testify or help in any way to further victims rights.

Sincerely,
Beverly Myers Bailey
Chapter Leader for South Eastern Massachusetts Parents of Murdered Children

Vance, Sarah

From: KaKnotA@aol.com
Sent: Tuesday, April 17, 2012 2:05 PM
To: Pick, Jacki
Subject: Victims' Rights U.S.Constitutional Amendment, H.J. Res. 106

I am in strong support of the Victims' Rights U.S. Constitutional Amendment, H.J. Res. 106.

There is not a single right for crime victims in our U.S. Constitution, yet there are twenty-three rights for the accused criminal.

Statutes and state amendments have proven to not be enough. Although we have a Victims Rights Amendment in Colorado, I sat through a murder trial with the victims family, which was a death penalty case, and the judge wasn't going to allow the victims family to speak at the sentencing. When I questioned why, I was told that the US Constitution trumped the state statute.

Joe Cannata, Executive Director
Voices of Victims
625 E. Evans Avenue
Denver, CO 80210
(303) 777-0112
kaknota@aol.com
www.voicesofvictims.org

Vance, Sarah

From: waterskigranny33@aol.com
Sent: Tuesday, April 17, 2012 2:09 PM
To: Pick, Jacki
Subject: Victims Rights

Dear Sir:

My husband Frank Ferek, was murdered on May 11th, 2006, by a former employee of ours, David Archer. I have not gone to trial yet for this murder, because Archer was sent to Arizona State Hospital, in July of 2007, after being diagnosed as Paranoid Schizophrenic.

I have not heard a single word about him or my case since then, All I've heard is that he has Dr. / Patient confidentuality rights, and no one can tell me if he's being medicated and will be fit to stand trial some day, or if he's getting worse, and it'll never go to trial!

They also dropped the murder charges, because he was unfit to stand trial at the time! Even after fourteen eye witnesses stated they all saw him shoot my husband! I think it's outrageous that he has more rights than I do. We need more rights for the victims of crime, I think he should have lost his rights when he comitted murder! But as it turns out, because of him, I lost the love of my life, our kids lost their father, our grandkids, and great grandkids (there are 3 now) will never know him, I had to rent out our home, in order not to lose it, I now have to run our business alone, and am still trying not to lose it. I didn't have health care for 3 yrs, because I could no longer afford it until I could get medicare.

But all the time, he gets medical care, free, housing free, food free, and I get nothing, I should be collecting his social security...I paid into it for 3 yrs!

I'm very discouraged about the court system, and when I hear about other victims of crime, I find that very few if any, get justice. The murderer's even if they do get a death penalty....don't get it often enough. You can be on death row for 25 yrs, and who pays for it? The victims of crime!

WE NEED TO CHANGE THIS! WE NEED THE LAWS TO HELP THE VICTIMS, NOT THE CRIMINALS.

Sincerely,

Karen Ferek,

Widow of Frank Ferek

Vance, Sarah

From: Patricia Lemons [tricia_901@yahoo.com]
Sent: Tuesday, April 17, 2012 3:15 PM
To: Pick, Jacki
Subject: Proposed U.S. Constitutional Victims' Rights Amendment (H.J. Res. 106)

Dear Deputy Chief Jacki Pick:

I am writing in support of the Victims' Rights U.S.Constitutional Amendment, H.J. Res. 106. Victims of crimes should have the right to be notified of a hearing, trial or the release of the criminal. They should have the right to be present in the courtroom and to be heard. The should have the right to a speedy trial and be treated with dignity and respect. Presently, accused criminals have twenty-three rights while crime victims have none.

Due to the lack of rights for crime victims the accused criminal has the advantage wherein the crime victim is at a disadvantage. I was never notified of any part of the court processes in the murder case of my late son. The aguish, agony, and disrespect I personally experienced during the judicial trial proceedings could have been minimized and to some extent altogether avoided.

Please convey my wholehearted support for Victims' Rights U.S.Constitutional Amendment, H.J. Res. 106 to the relevant representatives and leaders of Congress. The enactment of this Bill would balance the scales of justice. It is important to the well being of our great country and justice for all. Thank you in advance.

With kindest regards,

Patricia Lemons

Patricia Lemons
Mother of murdered victim Leon Lemons, Jr.
Michigan's 13th District

Vance, Sarah

From: kaylof@comcast.net
Sent: Tuesday, April 17, 2012 5:00 PM
To: Pick, Jacki
Subject: victims rights amendment

Dear Ms. Pick,

I'm writing to you on behalf of the Victims' Rights U.S. Constitutional Amendment, H.J. Res. 106. I can't stress enough how vital this is. Having had a our only son murdered in 2001 and going through the "process" showed us just how needed this amendment.

There are 23 rights for offenders and not one for victims. These are should be basic rights, notification of hearing and release dates, which 11 years later when something knew in our case comes along most times we do the notifying. Our state of NJ has laws to this effect, but they are often ignored or overlooked. A federal amendment would make all the difference in the world.

In our case, we felt like the judge was on the side of the criminal. We were told that we could not show one bit of emotion or the judge would remove us from the courtroom. Our dignity was only an afterthought. The criminals family would follow us (even to the restroom) stare at us. Even laughed at the autopsy photos. We feel, if the judge understood that our rights were as important has the defendants he would have acted differently.

This lack of rights for victims gives a huge edge to criminals. This needs to stop. There is nothing fair and balanced about the judicial system. As a dear friend once told me, "Lady Liberty's eyes maybe covered but she is peeking out the bottom". It's up to people like yourself to help make things better for victims across our country.

Thank you, for taking the time to read our plea for justice.

Kay and Jim Loftus

Jim Loftus, Realtor
Century 21 Gilmartin & Co
1382 Lafayette Street
Cape May, NJ 08204
Fax 609 884 4844
Office 609 884 1800 or 18000 648 5558
Cell 609 602 8720

Vance, Sarah

From: Mike and Penny [mikeandpenny@san.rr.com]
Sent: Tuesday, April 17, 2012 6:35 PM
To: Pick, Jacki
Cc: Collene Campbell
Subject: H.J. Res. 106 Victims' Rights Amendment

Dear Ms. Pick

We urge your subcommittee to support H.J. Res 106. As parents of a murdered child, we have experienced firsthand how crime victims are neglected, ignored and treated unfairly in the justice system. Even in those states where victim rights are included in state constitutions, those rights are often not enforced. Only inclusion in the U.S. Constitution can ensure full, meaningful and consistent rights for all citizens throughout our nation. Only a constitutional amendment will begin to change the culture that treats crime victims with less than the fairness, dignity and respect to which they are entitled.

The proposed amendment does not diminish defendants' rights in any way. It only assures that victims will be treated equally with respect and dignity as they go through the justice system.

Mike and Penny Moreau

Vance, Sarah

From: Maxine Anderson [maxalfred42@hotmail.com]
Sent: Tuesday, April 17, 2012 9:41 PM
To: Pick, Jacki
Subject: Victim Rights

My daughter was murdered on March 14, 2011 by a young man (18) trying to kill his mother and father. We are in the process of going back and forth to court and I have found that the rights of victims are either non-existing or court staff are not aware of them. Each time I go to court I feel violated over and over again. The young man has had 11 psychological test, with the majority of the results indicating that he is able to stand trial. Hundreds of documentation show from his parents that he was the shooter. A speedy trial would have relieved some of the pain that I live with, however, he has more rights than I do, and this madness continues.

I beg you to assist in getting the Victim Right's Bill HJR 106 passed, so that the millions of victims, like myself can at least start feeling that some form of justice for us is in place.

A Grieving Mother
Maxine Anderson
Phoenix, AZ

Vance, Sarah

From: Ralph Myers [mrslowgo@yahoo.com]
Sent: Wednesday, April 18, 2012 1:11 AM
To: Pick, Jacki
Cc: Collene Campbell
Subject: Urgent need for a Victim's Rights Amendment to the U.S. Constitution

Dear Jacki:

Since the murder of our son Tom Myers or July 24, 1993 in Los Angeles my wife and I have met, albeit under the most unfortunate of circumstances imaginable, the loss of a loved one to murder, many wonderful and decent people that have experienced the same fate. Since that horrible night we were thrown into living and experiencing the American criminal justice system first hand as ***victims.*** Until then our knowledge of the system was essentially zero. As victims and looking back now I think one could best understand the plight you have unknowingly and unwittingly been thrown into as being comparable to waking up one day and finding you have been cast onto a deserted island and abandoned without knowing where you are, having no tools to use for survival, not even a map or compass to guide you. You are at the mercy of a system that favors the predators that have already devoured a loved one and will do to you as well, walking in a maze trying to find a way out, a pathway to emotional healing, understanding and most importantly now as you continue the journey in the justice system, ***justice, you merely hope for and one would think and rationally expect, if not for you at least for your murdered loved one.***

In 1998 I had the distinct privilige to work with California Senator Dianne Feinstein and Arizona Senator Jon Kyl as they introduced a *Victim's Rights Amendment to the Constitution* which ultimately did not pass. Also, being quite active in the Victim's Rights Movement I was blessed to work with Collene Campbell the founder of M.O.V.E. (Memroy of Victims Everywhere) and also Justice for Homicide Victims as well as P.O.M.C. (Parents of Murdered Children.) Sadly, we didn't succeed then and now we are being given another chance to assure that all future victims will be given some standing in the Constitution as the persons that murdered our loved ones are. Without a victim's standing in the U.S. Constitution please note the following injustices will continue;

- Victims will not have a single right in our U.S. Constitution, yet there are twenty-three rights for the accused criminal.
- Statutes and state amendments have proven to not be enough..
- The lack of any rights for crime victims gives a huge edge to criminals.

Please, let's not put future victims alone on a deserted island of the American Criminal Justice System without any tools for survival, knowledge or hope. They deserve and must have equal justice in the system and the only way that will ever be possible is through an amendment to the U.S. Constitution. This time we must succeed!

Sincerely yours,
Ralph L & Francine J. Myers
Parents of Tom A. Myers
4752 Corona Court
Bellingham, WA 98226
(360) 303-6960

Vance, Sarah

From: pbodnar@frontiernet.net
Sent: Wednesday, April 18, 2012 12:29 PM
To: Pick, Jacki
Cc: move@cox.net
Subject: Constitutional amendment

I am writing At this time to urge you to pass the victims rights constitutional amendment I am A crime victim and survivor of a homicide victim Victims should have the right to be notified of a hearing Trial or release of the criminal They should have the right to be present in the courtroom and to heard They should have the right to a speedy trial and be treated with dignity and respect At the sentencing of the defendant I was not allowed to speak I would have liked to face him Tell him how my life was ruined after my husband was murdered and ask him why he did it

Sincerely

Patricia bodnar

Sent from my iPhone

Vance, Sarah

From: Mariellen Duerr [sales@circuitaccess.com]
Sent: Wednesday, April 18, 2012 1:34 PM
To: Pick, Jacki
Subject: Attn: Ms Jacki Pick

Ms Jacki Pick,

I hope you never have to become a victim of a horrific crime, before you realize just what few rights we have. The criminals have all these prison rights. I cringe when I hear yet another

prisoner suing, because they can't get creamy peanut butter instead of crunchy. I have been fighting the system for 23 years, to keep the man who savagely and brutally murdered my only

child. It's about time we get some right of our own. Please help us. We need all the help we can get.

There is not a single right for crime victims in our U.S. Constitution, yet there are twenty-three rights for the accused criminal.

Statutes and state amendments have proven to not be enough..

Victims should have the right to be notified of a hearing, trial or the release of the criminal. They should have the right to be present in the courtroom and to be heard.

They should have the right to a speedy trial and be treated with dignity and respect.

The lack of any rights for crime victims gives a huge edge to criminals.

Thank you so much.

Regards,

Maryellen & Ronald Ducharme

Vance, Sarah

From: LARRY MASSEY [tymsy@msn.com]
Sent: Wednesday, April 18, 2012 3:35 PM
To: Pick, Jacki
Subject: Constitutional Amendment Needed

The proposed Victims' Rights Amendment, H.J. Res. 106, introduced to the 112th Congress on March 26, 2012 by Congressmen Trent Franks (R-AZ) and Jim Costa (D-CA) is coming up April 26, 2012. Please consider the following facts first:

1. There are twenty-three rights for the accused criminal, but at this time, there is not a single right for crime victims in our U.S. Constitution.

2. Statutes and state amendments in the past have proven to not be enough.

3. Victims should have the right to be notified of a hearing, trial or the release of the criminal. They should have the right to be present in the courtroom and to be heard. They should have the right to a speedy trial and be treated with dignity and respect.

4. The lack of any rights for crime victims gives a huge edge to criminals.

5. Victims know better than anyone else the dire need for this constitutional amendment.

My sister, Tresia Jester, was a victim of homicide in Pine Bluff, Arkansas in March 1992. Due to victim's outcry of injustice , our judicial systems have made some changes to give some rights for the victims and/or their families. These changes have not been enough to equal the scale of justice in comparison to the rights of the criminals. This is itself is a disgrace to our country! This year marks 20 years since this brutal act became a detrimental life-changing event to my family. Two of the three that killed her, walk the streets of America, free. The other murderer tries at every given opportunity to be granted clemency to increase his chances to pardon out, even though he received a Life Without Parole sentence.

This past summer, my only child, a daughter, was brutally attacked in Florida. She was raped and beaten, her vehicle taken, before she jumped to safety in front of a security guard for a hospital. This trial is due to come up next month.

I have not been unaffected or ill informed of the needed rights and lack of justice. For 20 years, I still remain appalled at the injustice for victims. My family never thought our loved ones would be a victim, nor did we ever dream that in this great country we live, that our loved ones would have no rights in our Constitution, while murderers do! Please know Tresia Jester's family, friends and acquaintances are in support of the Victim's Rights U.S. Constitutional Amendment, H.J. Res. 106. We ask that you support it as well!

Sincerely,

Terry Massey and Family of Homicide Victim, Tresia Jester

cc: Collene (Thompson) Campbell

Vance, Sarah

From: Jayann Sepich [jsepich@dnasaves.org]
Sent: Wednesday, April 18, 2012 5:07 PM
To: Pick, Jacki
Subject: Support for the Victims' Rights Amendment to the U.S. Constitution, JJ Res 106

Ms. Jacki Pick,
Deputy Chief of Staff and Counsel for the Subcommittee

Dear Ms. Pick:

Victims of crime and those wrongfully accused of a crime are both innocent and both have been victimized. But those accused of a crime are protected by our constitution with twenty-three separate protected rights, and yet those who are victims of crime have no constitutional protections. This is fundamentally wrong and should be corrected. That is why I am writing to support the Victims' Rights Amendment to the United States Constitution, JJ Res. 106.

My beautiful daughter Katie was a 22-year-old graduate student pursuing her Masters of Business Administration when she was brutally raped, strangled, and her body set on fire. Our family was more fortunate than most as the district attorney and law enforcement were truly caring individuals and kept us informed and treated us with respect and dignity. This simply is not always the case. Many victims and survivors I have met have had very different and heart-breaking experiences.

Since my daughter Katie was murdered, our family has founded the non-profit organization DNA Saves. Our mission is to see the science of DNA used to its fullest potential to solve and prevent crime. And as a member of the Surviving Parents Coalition, a 501{c)4 non-profit organization, I also work toward ensuring legislative support for the progress of child safety and ensuring the rights of all.

Innocence must be protected. Our constitution does a good job of protecting those innocent of a crime who are wrongfully accused. Our constitution also offers rights and protections to those accused that are not innocent. But there are no protections for the innocent victims of crime, who are only at most guilty of being at the wrong place at the wrong time.

Unfortunately statutes and state amendments, though needed and appreciated, have simply not been enough. We need to amend the U.S. Constitution to give victims the rights they deserve.

Thank you for your consideration.

Sincerely,

Jayann Sepich
Co-founder
DNA Saves
Member, Surviving Parents Coalition
www.dnasaves.org
575-361-1931

Vance, Sarah

From: brharris9@comcast.net
Sent: Wednesday, April 18, 2012 8:50 PM
To: Pick, Jacki
Cc: move@cox.net
Subject: Victims' Rights U.S. Constitutional Amendment, H.J. Res 106
Attachments: Synopsis of the murder of JHP.docx

To Who It May concern:

I am writing to you as a third generation American citizen and the mother of a murdered child. I am asking you to support and vote for the passage of H.J. Res 106 Federal Victims' Rights Amendment. Because every murder is a complicated and painful story, I have attached a synopsis of my son's murder on July 17, 2008 and the ensuing prosecution and incarceration of the killer. While going through this process it became crystal clear to me as to why there is so much violent crime in the U.S. The criminals and murderers have 23 rights granted to them by the United States Constitution while victims and survivors have **none**. Passing an amendment to the Constitution granting rights to victims and survivors would make it the "law of the land." Perhaps this would help to change the culture of violence that exits in this country.
Again, I ask for your support in passing H.J. Res 106. For the sake of your children and for the memory of mine.

Sincerely,
Berkie Harris
Mother of Jesse Harris Pejko, of blessed memory
Director, Parents of Murdered Children, Frontrange Chapter
1133 Madison St.
Denver, CO 80206
303-321-3107
brharris9@comcast.net

Vance, Sarah

From: Joan Berry [jberry5916@bellsouth.net]
Sent: Thursday, April 19, 2012 2:37 PM
To: Pick, Jacki
Subject: U.S. Victims' Rights Amendment (H.J. Res.106)

Ms. Pick,
My name is Joan Berry. My daughter Johnia was murdered December 6, 2004 in Knoxville TN. It was brought to my attention in a bad way the lack of victims' rights, in and out of the court system. As a member of the Surviving Parents Coalition it is our goal to work for better laws for child safety and victims' rights and ask for support for H.J. Res.106. Thanks for your help, it is our wish that victims have rights previously only afforded the accused criminals.

Thank You,
Joan Berry (Johnia's Mother)

Vance, Sarah

From: Jbreilley@aol.com
Sent: Friday, April 20, 2012 3:56 PM
To: Pick, Jacki
Subject: We Support H.R.106

Support of H.J. Res.106 – Victims' Rights U.S. Constitutional Amendment

We are Genelle and John Reilley of Laguna Beach, CA. We strongly support H.R.106. We believe constitutionally gnaranteed victims' rights would have lessened onr grief of 27 years with is no justice yet in sight. H.R.106 will provide victims legal standing in all states' criminal justice systems; we will have rights to stand up for our murdered and violated children and families to defense attorneys, criminal support groups and, when necessary, abusive law enforcement and prosecutors. No one represents the victim; all focus is on the rights of the criminal. H.R.106 will provide victims and survivors a champion in the system.

Hopefully, 106 will allow victims and survivors of crime to have legal standing in all states regardless of residence.

Robbin was murdered January 18, 1986 on the campus of Saddleback Community College, Mission Viejo, Orange County, California. Robbin was viciously stabbed 41 times by unknown murderers; there was no robbery or sexual assault. The Sheriff's investigators claimed there was no motive or any physical evidence; it was pure evil.

Out of the blue, a murderer, Andrew Urdiales, confessed 11 years later, in 1997. Robbin, a stranger to Urdiales, was his first victim. Urdiales murdered seveu more women in Southern California and Illinois. He was finally extradited to Orange County in 2011, 14 years after his confession, only because the Illinois governor ended capital punishment in that state.

The Orange County Sheriff and District Attorney offices conducted a purposefully inept investigation and a deliberately stalled and delayed extradition. For 27 years we have been ignored, abused, cursed with vile language, ridiculed and aggressively harassed by law enforcement because we demanded answers on the status of the investigation, the evidence, the suspects and the extradition.

In 2008, we campaigned vigorously for passage of Marsy's Law, Proposition 9, a California initiative to incorporate victims' rights into the California constitution. Prop 9 won despite vigorous opposition from criminal rights groups, some public service unions and the politicians who take their money.

Victims now have an array of California constitutionally protected rights. Many states have or are responding positively and aggressively to victims' rights movement.

It is time now to do the right thing and amend the U.S. Constitution: add victims' rights and bring national standards for victims' rights and to fairly balance the criminal system.

Thank you for reading this.

Genelle and John Reilley
28812 Shady Place
Laguna Beach, CA 92651
jbreilley@aol.com

Vance, Sarah

From: Elaine Runyan-Simmons [elaine.runyan-simmons.cvmw@statefarm.com]
Sent: Friday, April 20, 2012 8:38 PM
To: Pick, Jacki
Cc: Elaine Runyan-Simmons
Subject: RE: VICTIMS' RIGHTS U.S. Constitutional Amendment

PLEASE CONSIDER THESE ITEMS LISTED:

1. There is not a single right for crime victims in our U.S. Constitution, yet there are twenty-three (23) rights for the accused criminal.

2. Statutes and state amendments have proven to not be enough.

3. Victims should have the right to be notified of a hearing, trial or the release of the criminal. They should have the right to be present in the courtroom and to be heard. They should have the right to a speedy trial and be treated with dignity and respect.

4.The lack of any rights for crime victims gives a huge edge to criminals.

My 3 year old daughter, Rachael Marie Runyan, was abducted in 1982 from Sunset, Utah. She was found murdered and hidden in a mountain canyon stream 24 days later. I have been actively involved in victims' rights ever since. Whether founding Missing Children of Utah, speaking at congressional hearings, being involved in HB 209 and the local and national missing children's act, involved in the Alert, which was the Rachael Alert in Utah when Elizabeth Smart was kidnapped, which is now known nationally as the Amber Alert, and so much more experience with these issues. Criminals have more rights and help than the victims. I don't understand this. My case is still unsolved to date, but I still want the laws in place for myself and others. Hopefully we can have resolution one day.

As a member of the Surviving Parents Coalition, a 501{c}4 non-profit organization, I also work toward ensuring legislative support for the progress of child safety and ensuring the rights of all. I am writing to ask you to support the Victims' Rights Amendment to the United States Constitution, J.J. Res. 106.

As a surviving mother I have had to endure the loss and have kept involved all these years and am hoping for progress to continue in behalf of victims' rights. Please help us to have rights at least equal to criminals. Common decency would dictate that victims and their families be treated with respect through the difficult judicial process, but only defendants have such a right. I pray I have a fair time in court one day.

Sincerely,

Elaine Runyan-Simmons
Layton, UT 84040
801 644 6004 cel

Vance, Sarah

From: Jan [jan@janmcquaid.com]
Sent: Saturday, April 21, 2012 9:41 AM
To: Pick, Jacki
Subject: Victims' Rights

Mr. Pick.
I agree that victims' should have equal rights included in the U.S. constitution.
Our son was murdered in 1990 and became victims for a second time do an error of not being notified of a trial that took place. As a result we must now attend parole hearings and pray "she" is never released due to that error that never should have taken place.
If anything, those that murder and take someone's life should not have any rights.

You may go to my website at www.janmcquaid.com and read the first ten pages of my book which is my true story and how my husband I have been fighting for victims' Rights.

I know what it is to live in a, "HELL ON EARTH!"

Sincerely,

Jan McQuaid

Vance, Sarah

From: carolyn Walters [iedanse2@comcast.net]
Sent: Saturday, April 21, 2012 9:49 AM
To: Pick, Jacki
Subject: Victims rights

Ms. Jacki Pick,

I am told I can't do very much concerning our case because I may jeopardize the trial to come, or it would also make for Appeal fodder.

My daughter and grandson were murdered 3 years ago. 2 judges, 2 prosecutors and SEVEN!!!!! defense attorneys later and we are not anywhere near a trial. The inmate fires the attorneys provided BY THE STATE!!!! or they want off the case. Can't a judge or someone put a stop to this CIRCUS!!!!. Meanwhile our life is on hold, but worse yet it seems the slaughter of half my family means nothing. Thank You for your work.

Vance, Sarah

From: Robert Murphey [rmmurphey@ucdavis.edu]
Sent: Sunday, April 22, 2012 8:42 PM
To: Pick, Jacki
Subject: H.J. Res. 106

Dear Ms Pick:

My daughter was brutally raped and murdered, not necessarily in that order, thirteen years ago. Her decomposing body was discovered in a particularly gruesome way far from where the crime occurred. From the onset of the case we survivors were frustrated and victimized by inept police work, lack of information regarding hearings, and the way that prosecution was handled. Meanwhile, the perpetrator was nearly set free because his recorded response was inaudible when asked if he understood the Miranda Rights that had just been read to him. Even though there was DNA evidence, he was allowed to plea-bargain and sentenced to a prison term of 21 years, less the time that he served while awaiting prosecution.

I realize that a House Resolution and a Constitutional Amendment cannot address all contingencies that might happen to the families of crime victims as they try to cope with their loss while dealing with law enforcement and the court and prison systems. Even so, recognition that victims have legal rights by approving the constitutional amendment proposed in H.J. Res. 106 would be an important step forward. I earnestly hope that it will receive bipartisan support by the hearing committee and by the full House of Representatives.

Thank you and best wishes.

Robert M. Murphey, Ph.D.
Professor Emeritus
Department of Psychology
University of California
Davis, California 95616-8686
home telephone (530) 756-4463
skype: r.m.murphey

Mr. FRANKS. I would look forward to hearing from the witnesses today on this critical issue, and I thank you all for coming.

I now yield to the Ranking Member, in this case Mr. Quigley, for his opening statement.

Mr. QUIGLEY. Thank you, Mr. Chairman. I would like to thank the Chairman for putting this together and all of our panelists for being here today.

I need to apologize in advance. There is a markup next door in which I will go vote and come back, so don't take it as any sort of insult or slight.

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 that everyone in the criminal justice system plays their part in assisting people 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, not without justification, that they were considered almost extraneous to the process.

With great awareness and legal protections enacted at the State and Federal levels, victims 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 much more. We could provide adequate funding for crime victim programs. We could provide proper training and resources to Federal, State, and local law enforcement to ensure that our existing laws, which require notice and assistance to crime victims, are fully enforced.

One thing we can do immediately is to reauthorize and fully fund the Violence Against Women Act, a landmark piece of legislation that provides invaluable resources to victims of some of the most heinous crimes. This vital legislation has not been reexamined in 7 years, and it is in need of some updates to ensure full protection of victims. For instance, the bill needs to be updated to include language that protects gay, lesbian, bisexual, and transgender individuals from discrimination at domestic violence shelters. It also needs to be amended to ensure undocumented workers who are victims of abuse feel safe reporting that abuse to authorities. And finally, the bill must be expanded to give American Indian authorities jurisdiction over non-Indians who have abused Indian women.

As we discuss protecting victims today, I can think of no better way of safeguarding their rights than updating, fully funding, and reauthorizing the Violence Against Women Act to ensure protection of the rights of all victims of abuse.

Crime victims also need to see the guilty parties 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 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. For instance, under most versions of the amendment, victims would have a constitutional right to call for a faster disposition of a matter in their case. While certainly we want to see quick resolution of such cases, allowing the victim to demand a faster trial may infringe on the right of the accused person to adequately prepare. It may also impede the ability of a prosecutor to prepare. Similarly, giving victims the right to attend the entire criminal trial, even if hearing the testimony of other victims, could compromise the victim's testimony, could jeopardize the fairness of the trial.

We have a law, the crime victims' right law, that achieves all the objectives sought by the proposed amendment. Let's look at improving and fully funding that law before we jump to amend the Constitution.

As Mr. Cassell points out in his testimony, congressional funding for the National Crime Victims Law Institute clinics has been diminished. As a result, six clinics have stopped providing rights, enforcement, legal representation. The CVRA vision of an extensive network of clinics supporting crime victims' rights clearly has not been achieved.

The Crime Victims' Right Act could also be improved by, for example, more clearly defining what is meant to be reasonably heard in court. Offering symbolic gestures to crime victims and weakening legislation that would provide assistance to them is not the best way to help victims of crime. Debating yet another constitutional amendment that we know from long experience is going nowhere will certainly not help victims of crime.

I want to thank the Chairman and welcome our panel today, and I look forward to their testimony. I yield back.

Mr. FRANKS. And I thank the gentleman.

And without objection, other Members' opening statements will be made part of the record.

I will now introduce our witnesses. Brooks Douglass is a lawyer, a former State senator in Oklahoma, and a film producer and actor. Mr. Douglass' 2010 film, Heaven's Rain, is the true story of the 1979 tragic murder of his parents, Dr. and Pastor R. Douglass and Marilyn Douglass, and the attempted murders of his younger sister and himself.

Two criminals entered the Douglass home, bound the family, raped the 12-year-old daughter, and shot all four members of the family. Only the two children survived.

Mr. Douglass went on to earn his M.B.A., J.D. and an M.P.A. At Harvard's Kennedy School of Government. He now devotes his life to working for victims' rights.

Jesselyn McCurdy is a senior legislative counsel for the American Civil Liberties Union, the ACLU, with a focus on civil liberties in the areas of criminal justice. Prior, she was a counsel for the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security. Ms. McCurdy has also worked as the assistant section director of the American Bar Association Section of Individual Rights and Responsibilities. She was a staff attorney for the American Prosecutors Research Institute, affiliated with the National District Attorneys

Association. Ms. McCurdy received her J.D. from Catholic University of America and the Columbus School of Law.

Paul Cassell is an endowed chair at the University of Utah College of Law. Professor Cassell received a J.D. from Stanford University, where he was president of the Stanford Law Review. He clerked for then-Judge Antonin Scalia, D.C. circuit at the time, and for Chief Justice Warren Burger. He then served as an Associate Deputy Attorney General; an assistant U.S. attorney, EDVA in Virginia; and a U.S. district court judge in Utah. Professor Cassell resigned his Federal judgeship to teach and litigate issues to advance victims' rights.

And I would thank all the witnesses for appearing today. We appreciate you taking the time to come out and speak to us on this very important issue.

Each of the witnesses' written statements will be entered into the record in its entirety. And I would ask each of the witnesses to summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have expired.

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

[Witnesses sworn.]

Mr. FRANKS. Thank you. Please be seated.

Also, to the witnesses, please turn on your microphone before speaking. That nearly gets about half of the witnesses.

And I would recognize our first witness for 5 minutes. Mr. Douglass, thank you for being here, sir.

TESTIMONY OF BROOKS DOUGLASS, CARROLLTON, TX

Mr. DOUGLASS. First, thank you, Chairman Franks, for considering this issue and for giving me the honor to come before this Committee and testify. As you said, it is an incredibly important issue. And really what I wanted to do was tell a little bit about my story, and you eloquently presented most of it, or a lot of it, for me.

But as you said, in 1979, Glen Ake and Steven Hatch came to my front door. I let them in to use the phone. They over the next few hours, hog-tied us all face down on our living room floor in our home, took turns raping my 12-year-old sister Leslie, and then sat down and ate the dinner that my mother had been fixing, and then shot us all in the back and left us for dead. My mother and father both died there in front of me. And Leslie and I were able to get out of the house, get to—drive to a doctor's house and get medical help.

That began our experience with the criminal justice system, beginning right at the start of speaking to the Oklahoma Highway Patrol, even when we didn't know if we were going to survive or not.

About 6 weeks later Glen Ake and Steven Hatch were caught. They had also killed two people in south Texas. That time they shot them with a shotgun so they made sure they finished them off. I went on to college. Well, they were both tried within a year and given the death sentence.

Over the next few years, I went on to college, was called back three times in the course of those 4½ years that I was in college to testify again against Steven Hatch in particular. In my senior year the Glen Ake case was heard by the U.S. Supreme Court. It was reversed and remanded for a new trial, which was held 7 years after the original trial—after the murders, and he was given life sentences at that time with possibility of parole because there was no life without parole in Oklahoma.

So all told—we went back and testified then. All told, my sister and I testified nine different times against these guys that committed the crime. Seventeen years later, in 1996, Steven Hatch was finally executed.

There were things that happened within the system, like the day we got out of the hospital, when we were discharged, we were handed a bill for over $500 that included the rape exam kit that was used on my sister Leslie to collect evidence of the rape. There was no provision in the law to reimburse us for that. I paid $117 to get my car back that had been impounded as evidence, and there was no provision in the law to reimburse us.

In 1990, I was elected to the State senate, and as I said in my statement, I would love to say it is for lots of noble reasons, but the fact is I just needed a job, and there was an opening. So I ran at 26 and was elected, and was 27 when I took office and, you know, had the chance to—or I went on the judiciary committee about a year later or the appropriations committee. And I was on the subcommittee that funded the judiciary. Just then I got a call from a reporter saying—and I was avoiding victims' rights. I just wanted to pretend it wasn't an issue, I think, and didn't want to look like a crusader. So I didn't take that up until I got this call saying that the Hatch case was now the slowest-moving case on death row in Oklahoma. After 13 years it was on the third step of a nine-step appellate process, and a lot of it was because for 2 years the Oklahoma Court of Criminal Appeals had lost the file in the case.

So going on the appropriations committee right then, I had a chance to discuss this with the chief judge and, you know, keeping it as impersonal as I could, but at the end of the day, I couldn't help myself. I finally said, you know, until you guys find that file, get a decision handed down, and I really don't care what the decision is, you had better learn how to do your job with a number 2 pencil and a big cheap writing tablet because that is all you are going to have. And fortunately the other Members of the Subcommittee agreed with me. But miraculously they got the decision handed down within about 30 days.

Our experiences, you know, in dealing with the criminal justice system, there are a lot of things that I did as a senator. There were 28 pieces of legislation that I initiated, I sponsored, that got signed into law in Oklahoma, including one of them being a constitutional amendment, as you mentioned.

The problem is that they are routinely ignored when it is not convenient for the court and even the prosecution. The prosecution does the best that they can. They have victim-witness coordinators. They try to do what we have asked them to do in the statute. But, yeah, there have been multiple times, one as recently as a few

months ago, where I got a call from a victim who was not allowed to give a victim impact statement.

So I see that my time is up, and I will take whatever questions you have.

[The prepared statement of Mr. Douglass follows:]

April 26, 2012

Testimony of Brooks Douglass - Victims Rights Amendment

First I would like to thank Congressman Trent Franks and his staff for giving me the opportunity to tell my story to this committee. I would also like to thank the members of the committee for taking the time to read and listen.

My name is Brooks Douglass and I am the survivor and victim of a crime that took the lives of my father, Reverend Richard Douglass, and my mother, Marilyn Douglass and in which my sister Leslie and I were shot.

On October 15, 1979 Glen Ake and Steven Hatch came to the door of our home, located on a small acreage just outside of Oklahoma City. They said they needed help locating one of our neighbors' homes and wanted to use the phone. I let them in and within minutes Hatch brandished a double-barreled shotgun. When I turned back to Ake he had a .357 magnum pointed in my face.

We were forced at gunpoint to lie face-down on our living room floor. They took my mother, father and me, each in turn, throughout the house to look for money or anything else of value. Then they hog-tied us, hands and feet behind our backs and gagged us with clothes and curtain sashes. After they tied all of us but my 12-year old sister Leslie, Glen Ake took her through the house looking for telephones, which he tore out of the walls, and money. But he didn't stop there, ultimately he took Leslie into her bedroom and raped her. Although we could not see this we could clearly hear as Leslie pleaded and begged him not to do this. The sound of her tearful sobbing will ring clearly in my mind for the rest of my life.

I tried to comfort my mother who was laying next to me. When I spoke to her, Steven Hatch put his shotgun to the back of my head and told me that if he heard any more talking he would blow our heads off. My father lay there powerless to protect his family.

When Hatch wasn't standing over us he was rummaging through dresser drawers, closets and anything he could find that looked like a hiding place for money. When Ake was finished raping Leslie, Hatch went in and took his turn with her. While Hatch was with her, Ake was threatening and terrorizing us. Then Ake went back and raped Leslie again.

Afterward, they hog-tied and gagged Leslie along with the rest of us, then sat down and ate the dinner my mother had been fixing before they arrived. About 3 hours after they came to our home Ake sent Hatch out to "Start the car and listen for the sound". He then shot all of us in the back. He unloaded the 6-shot revolver into us hitting my mother and me with one shot each and my father and sister with 2 shots each, and ran out of the house leaving us all for dead. When they left they took my parents' wedding rings, a couple of credit cards and $43 in cash.

I told Leslie to go find a knife as I struggled to untie my mother and father with my teeth.

I managed to get my mother untied but she died before she could help me. My father also died there in front of me.

Leslie was eventually able to get herself loose and cut me loose as well. I drove us about 6 miles to the nearby town of Okarche to a doctor's home where we were initially treated. The Oklahoma Highway Patrol was called and came to question us immediately. We were taken to a hospital in Oklahoma City where we underwent surgery and spent a week and half in intensive care and three weeks in the hospital, altogether. We weren't able to attend our parents' funeral.

We were kept under guard at the hospital, and then in a home owned by our church until Ake and Hatch were caught 6 weeks later. While on the run they murdered two other people in TX. They met up with a woman at a carney, to whom they gave my mother's wedding ring. When they were caught, my father's wedding ring had to be sawed off of Glen Ake's finger. When they arrived in Oklahoma they both confessed to the murders and shootings. Ake, in fact, gave a 44-page, signed, confession detailing the events of that night along with their travels before they were caught.

A few days after Ake and Hatch were captured in Colorado, we held an auction to pay for our medical bills and the expenses for our parents' funerals. Virtually everything we owned, including the house itself, was sold. When I left the hospital I was given only an hour to go through the house and get the things I needed. Most everything was covered with fingerprint dust. I left the house with 2 grocery sacks of clothing. Almost everything else was sold.

Leslie and I were separated once we were no longer under guard. She went to live with my mother's cousins in a small farm town about an hour and a half outside of Oklahoma City. I remained in Oklahoma City living with members of our church, since I was starting my last semester of high school. We tried as much as possible to get back to a normal life, but obviously this was completely impossible. Although we were able to go to school, the focus of our lives became the collection of evidence and prosecution of Ake and Hatch. We met for dozens of hours with prosecutors and investigators. Each time we went through the whole story, whether it was reviewing transcripts, discussing testimony or just trying to psychologically prepare for facing Ake and Hatch again, in court.

I testified against Ake and Hatch in the preliminary hearing in February, 1980. Hatch was tried before a Judge who found him guilty of 2 counts of murder and sentenced him to death in February, 1980. Leslie and I both testified at this trial.

Ake plead insanity and was also initially found incompetent to stand trial. Later that year, after undergoing psychiatric treatment he was found competent to stand trial, by independent psychiatric evaluation. Another psychiatric examination found that he was legally sane at the time he committed the crime. He finally did stand trial and a jury found him guilty of two counts of first degree murder and sentenced him to death.

Throughout the process we discovered that we were really nothing more than a piece of evidence. We were treated kindly and respectfully by the prosecutor's office and Sheriff's department. Yet all along it seemed as all of this was just happening TO us rather than something in which we were participants, with a voice.

Leslie and I really thought this would be the end of it. We believed that while we would have to wait some time, eventually the sentences would be carried out. That was not to be the case.

I left for college the next fall thinking I could now go on with my life. I dropped out, before I flunked out, of 2 colleges and quit 2 good jobs before I finally began to settle and get my head in the game. I remember waking up one morning about two years after the crime and realizing I had just slept through the night. It wasn't til that moment that it dawned on me that I hadn't slept for more than a few minutes at a time since the crime.

I was 18 years old and was just beginning to get a grip on what was happening. I continued to have problems and was eventually suspended from Baylor University. I returned to Baylor after the suspension only to be notified that due to a recent court decision, Hatch was being given a new sentencing hearing and that Leslie and I would have to testify again. My grades dropped again and I narrowly escaped being permanently kicked out of the school.

In the fall of 1984, at the beginning of my senior year, I found out that the U.S. had agreed to hear Glen Ake's case. Just before I graduated in 1985, the Supreme Court vacated Ake's conviction and sentence, in a landmark decision, and sent the case back for a new trial.

Frustrated by the system, and frankly not sure what else to do, I decided to go to law school. I started law school in the fall of 1985 and in February of 1986 I testified against Glen Ake again. This time although he was convicted, he did not get the death sentence but life in prison. This meant that I would need to attend parole hearings every two years for the rest of my or Glen Ake's life, whichever came first. Ultimately my grades fell and I was suspended from law school. I sat out for two years and then returned to law school in the fall of 1988.

All told, Leslie and I testified against Glen Ake and Steven Hatch 9 times trying to keep them behind bars.

During law school I clerked for the Oklahoma Attorney General's Office as well as for the Oklahoma Supreme Court. While working in these capacities I found that there were many ways the system could be improved. So during my last year, I decided to run for the Oklahoma State Senate. I won the race and was sworn in as a State Senator in November, 1990.

To be perfectly honest about it, I realize that the members of this committee had very noble reasons for running for the high office they now hold. I know that they want to

make the world a better place for their constituents. In my case I was about to graduate from law school and needed a job. I saw an opening when my predecessor announced he wasn't running again.

At first, I avoided the subjects of Criminal Justice and Victims Rights altogether. I never talked about them in my campaign as I didn't want to come off as a crusader. But a year into my first term I found out that the Hatch case was the slowest moving case on death row in Oklahoma and partly so because the Oklahoma Court of Criminal Appeals had lost the file, for over two years. Just by the chance of a few events I happened to go on the Appropriations Committee and was actually assigned to the Judiciary Subcommittee. When the Chief Judge came to a hearing asking for a supplemental appropriation I had the chance to hold him accountable. Miraculously the file was found and a decision handed down within about 30 days.

What I realized at that moment was that I had never known of another crime victim who was able to be in that position -- the position to hold someone accountable who wasn't doing their job. To hold someone accountable who had so much control and impact on their lives. It angered me that anyone should ever have to be in that position. So when I got up from that table I went straight to my office and called in our staff. I told them how for years I had been told about victims' rights yet I had never, in fact seen one. I wanted to know what we had on the books, if there was anything being proposed and what any other state had done or was proposing to do. Within a few weeks I filed the first Victims Rights Act in Oklahoma history, which became law later that session. All told, over an 11-year period there were 28 laws dealing with victims' rights signed into law, including an Oklahoma Constitutional Amendment. Once we got this through the legislature by referendum, it passed a statewide vote with 90% approval.

Some of the laws passed were things that had touched my family personally. The car that I drove to the doctor's house the night we were shot was towed and impounded as evidence by the OSBI. The charges for this were $117 and I know this because that is what I had to pay to get my car back.

The "Rape Kit" used to collect evidence of the rapes from my sister, once we made it to a hospital, cost over $500 and was part of our medical expenses when we were discharged. In both this instance and the return of my car, there was no provision in the law to reimburse us for these expenses.

While visiting family in Tennessee during the holidays following the shootings we received an urgent phone call that we needed to return to Oklahoma early so that they could pull hair from our bodies. They needed this so they could distinguish our hair from samples taken from Ake and Hatch and those found at the house. It was humiliating and expensive to change our flights, at our own expense. But we did it because it was expected of us if we wanted to successfully prosecute these guys.

One day I realized that 14 years after my parents' murders we still weren't able to get their wedding rings back because they were being held as evidence. A provision

mysteriously appeared in a bill permitting the District Attorney's Office to return the rings to us.

As a member of the Oklahoma Senate I discovered that it wasn't just the need for laws, if we wanted to change things. There needed to be a change in the culture of the criminal justice system. We passed statutes allowing for victims to give victim impact statements, something Leslie and I were never permitted to do in any of the trials or hearings.

A year or so after the first bill passed I received a call from an acquaintance of mine whose mother had been murdered asking if the victim impact statement (VIS) had become law. I told him it had. He went on to tell me that the person who committed the murder had just been convicted and was about to be sentenced. He and his family began preparing to make their statements to the jury when the judge told them he would not allow them. The prosecutor had pleaded with the judge, citing the statute as well as the fact that the U.S. Supreme Court had recently ruled that victim impact testimony was admissible during the sentencing phase of the trial. The judge still refused. My friend asked me to contact the judge and I did.

When I called the judge, he in effect told me that he didn't like VIS and that he would not hear them. He didn't think they were constitutional no matter what the Supreme Court said about it. He said that he didn't like being told what to do in his court room and to sum up he said, "What are you going to do about it?" My answer was that I was going to file a bill that day creating a judicial review panel that dealt with decisions regarding crime victims. I informed him that there would be at least one victim, if not a majority of victims, on that panel. Their job would be to review decisions like this one and if they found that a judge had wrongfully denied a victim of a right under the laws of Oklahoma they would ultimately have the power to take away the judge's pension. That judge decided he was going to hear the evidence and did so that afternoon.

I could site dozens of such examples that happened during my time in office and continued even after we had an amendment to the Oklahoma Constitution. The fact is that judges and courts, defense counsel and even prosecutors will ignore the rights of victims when it proves inconvenient or difficult to enforce or apply them. Victims and their families are shut out of court proceedings as a matter of course. They may not even be informed of hearings or other events regarding their case unless they are a witness or stay on the back of the prosecution. They are not usually informed when there has been a plea agreement or when the offender has been released from incarceration.

There are many inequities that may never be able to be fully addressed. Offenders, by virtue of their incarceration, are fed, housed and clothed and provided with free medical care. And while it may not be particularly desirable it may be better than the conditions in which they left their victims. They can also get a free college education and some even earn law degrees, at taxpayer expense. My college education wasn't paid for. In fact, I worked several jobs along the way and took out student loans, which I'm still repaying.

But when it comes to the fairness of the system, we have forgotten the ones the system was designed to protect in the first place. The **civil** court system is designed specifically to redress wrong-doing and make the victims of a **civil** offense whole. At its core, that is what the **criminal** justice system is about. A crime, at least a violent crime, presumes a victim. It is the job of the state to seek justice on behalf of that victim, even if it does so in the name of the state. Our founding fathers understood that but sought, as they should have, to protect the rights of the accused. There are 23 enumerated rights in the constitution to protect the accused. There are **none** for the victim. Arguably it is because during their time the founding fathers were dealing with a system that effectively had no rules. The accused were locked up and held without bail, without trial and with no counsel or opportunity to confront their accusers. This is not the system we have today and I'm glad. I fully support every right that the accused has guaranteed to them under the constitution of the United States. But what we have now is a system that literally steps over the body of the victim to read the criminal those rights. This is unjust. We have forgotten the reason we bring offenders to justice in the first place and for whom we do it.

As long as the rights of victims are not on the same footing as the rights of the accused, there will be no justice or fairness and the statutory rights, both federal and state, provided to victims will continue to be ignored and trampled over. An amendment to the U.S. Constitution for victims is not designed to infringe on the rights of the accused. It serves to force courts to take victims' rights seriously and to balance them with the rights of the accused in such a way as to protect both. Sometimes this is difficult but they do it every day in every other area of the law. There is no area of the law as important as this.

In February 1995 I was asked to speak to a group of state leaders at the Oklahoma State Penitentiary, which at the time was home to both Glen Ake and Steven Hatch. I remember feeling terribly afraid as I toured the prison, knowing that Glen Ake was now in "general prison population". I had been told that at one time he could dead lift 900 pounds and could break hand-cuffs both in front of him and behind his back. I had gone into the military and had a great deal of training but I knew if I saw him it was not going to end well.

To make a long story short, I asked to meet with him and Steven Hatch. I was initially told that it would not happen. Having learned by then to assert some of my weight as a Senator, eventually the corrections officials decided to allow the meeting. Hatch initially agreed meet with me then changed his mind. Glen Ake did agree to meet me.

This scene is played out in the movie, "Heaven's Rain", based on my story. But the upshot is that as I was walking to the meeting I was playing out the entire night of the crime in my mind. I relived it all. I became filled with rage, again. I wanted nothing more than for him to die. I began to feel like my life was making sense for the first time in many years. Glen Ake had escaped justice. Maybe the reason I survived, went into the military and had the training I did, went to law school and was elected to the senate was all bringing me to this moment. The meeting would not be happening were I not a senator.

Once I sat across the table from Ake, I felt the anger even more. But over the course of the hour and a half meeting, something changed. I remember my father's teachings came to the forefront of my mind and I couldn't escape them. They had taught me to forgive, and as much as I didn't want to, when it was all over I looked at Glen Ake and said, "I forgive you". I still believe he deserved to die for what he did to my family. He apologized for what he did, and I believe he sincerely meant it. It simply was no longer my fight to make sure he died.

Steven Hatch was executed a year and a half later. We were able to witness his execution because of a statute I sponsored. I am grateful for the meeting I had with Glen Ake but wish I hadn't had to fight to get it.

As difficult as it was for me to be able to participate in the system, I think about how hard it is for those who don't have political power to make things like this happen. They still are without remedy when the system ignores or tramples over them. The only alternative they have is to try and create public outrage. Then the situation is bent to accommodate them, or not. This is completely unnecessary and wrong. People should have confidence that the system is going to recognize their rights. The culture won't change and the system won't change until we have rights for victims in the U.S. Constitution.

I believe that had Leslie and I had the opportunity to give VIS in Ake's last trial, it would have made a difference in the outcome. But we were not afforded that opportunity. If we had maybe it would have gone something like this:

"My parents took our family as they served as missionaries to Brasil for almost 4 years, and then to Oklahoma where my father pastored a 3,000-member church. Watching them, I learned a life of service. My mother was a singer who was accepted to Julliard School of Music to study voice. She decided instead, to marry my father and go along beside him in his ministry. She sang, taught music and directed choirs at every church my father pastored. When we returned to Oklahoma she was appointed by the Governor to serve as a member of the Oklahoma Arts Council. She considered her most important work to be raising my sister and me. Having accomplished these things, she died at the age of 36.

My father began pastoring churches when he was 16 years old. He continued pastoring churches throughout his life, except when he actually started churches throughout equatorial Brasil, throughout the Amazon Rain Forest. But during his life he published over 2,500 articles and one book. He visited the sick in hospitals, counseled with church members. He had his own radio program. He also served 2 terms as President of the Baptist Convention of Oklahoma. All of this before is death at the age of 43.

Now they are gone. I have tried to use the lessons they taught me to keep moving forward, to hope that my life would get better and that one day I could still have a family again, of my own.

I miss them deeply every day. It makes me said that I will never hear them tell me they love me or are proud of me. I will never be able to tell them how much I love them or how grateful I am to them for the opportunities that their example and reputations have given me.

During college I never got to go home for the weekend or the holidays. I stayed in my apartments and occasionally was able to see my sister. I was usually working 1 or 2 jobs to make money to put myself through school.

The rage that I carried inside me wrecked marriages and friendships. It kept me from succeeding at times when I should have. It changed the way I saw people.

All of this is at least partly related to the Glen Ake having pulled the trigger and senselessly killing my mother and father. For this I think he should be sentenced to death."

I'd like to thank the committee again, for taking the time to read and hear my story.

Brooks Douglass

Mr. FRANKS. Well, thank you, Mr. Douglass, very much. And your testimony that you ran at 26 and elected at 27 also happens to be my own testimony in the legislature, and I would just caution you that that can lead to some pretty frightening ends. So you might want to be careful there.

Mr. DOUGLASS. They just told us where the bathroom was for about a year.

Mr. FRANKS. Ms. McCurdy, I would now recognize you, ma'am, for 5 minutes.

TESTIMONY OF JESSELYN McCURDY, SENIOR LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. MCCURDY. Thank you, Mr. Chairman.

I would like to thank——

Mr. FRANKS. Ms. McCurdy, could you pull that microphone a little closer to you?

Mr. MCCURDY. Thank you.

I would like to thank Chairman Franks, Ranking Member Nadler, and also acknowledge my former boss Representative Scott for inviting the American Civil Liberties Union to testify at today's hearing on the victims' rights amendment.

The victims' rights constitutional amendment introduced by the Chairman would extend various rights to all crime victims. This amendment would profoundly alter the Nation's founding charter. It would fundamentally compromise the Bill of Rights protections for accused persons in every Federal, State, and local criminal case.

While the proposed amendment would attempt to codify a role for criminal victims in the criminal justice process, the ACLU is concerned that it will be difficult to provide the rights of victims while preserving the constitutional rights of people accused of crimes whose fundamental liberty interest is directly at stake.

The Framers created a two-party adversarial criminal justice system with the public prosecutor, a criminal defendant, and a neutral judge. The Framers were aware of the enormous power of the government to deprive a person of life, liberty, and property. The VRA will jeopardize the basic safeguards put in place to protect criminal defendants by infringing on their presumption of innocence and right to a fair trial.

In the past 220 years, the Federal Constitution has been amended only 17 times. Amending the Constitution is a serious matter and should be reserved for those issues where there are no other alternatives available. Many of the provisions of the victims' rights amendment reflect laudable goals, but it is unnecessary to pass a constitutional amendment to achieve them.

On October 30, 2004, Congress enacted the Crime Victims' Rights Act of 2004, legislation that enumerates eight statutory rights for victims of crime. In addition, every State has either a State constitutional amendment or statute protecting victims' rights.

The constitutional protections afforded the accused in criminal proceedings are among the most precious and essential liberties provided in the Constitution. The VRA undermines the presumption of innocence by conferring rights to an accuser at the time in a criminal case when the accuser is still presumed innocent. Not every person accused of a crime is actually guilty of committing a crime, but giving the accuser the constitutional status of victim could impact the judge and jury, making it extraordinarily difficult for fact-finders to remain unbiased when the victim is present at

every court proceeding, and potentially prejudicing those who will determine guilt or innocence.

The VRA makes the accuser a third party in a criminal case even before a judge or jury has determined the accused is actually a victim.

The VRA would give crime victims a constitutional right to attend the entire criminal trial, even if the victim is going to be a witness in the case. In many instances, the testimony of a prosecution witness will be compromised if the person has heard the testimony of other witnesses. Typically trial witnesses are barred from the proceedings prior to their testimony for this very reason. Despite the possibility of tainting his or her testimony, the VRA gives the victim a constitutional right to be present, even over the objections of the defense or prosecution.

The crime victims' rights was established in October of 2004, establishing eight rights for Federal crime victims and two mechanisms to enforce those rights. Congress enacted CVRA after another version of the victims' rights constitutional amendment failed. In passing the CVRA instead of a constitutional amendment, Congress intended to preserve the system the Framers created, with the public prosecutor charged with acting in the public interest, and a criminal defendant with a full panoply of constitutional rights, and a neutral judge.

The CVRA also directed the General Accounting Office to conduct an evaluation of limitations of the CVRA. GAO found that there were very few victims having asserted their CVRA rights in court.

According to the GAO, several key issues have developed since the implementation of the CVRA that require the courts to interpret provisions of the law. For example, it is unclear whether the CVRA applies to victims of local offenses prosecuted in the District of Columbia. It is also unclear what stage of the criminal justice process the CVRA rights begin to apply and what standard of appellate review should be used for writs of mandamus. These should all be noncontroversial changes that Congress could make to the legislation in order to facilitate and exercise the victims' rights without passing a constitutional amendment.

The VRA would give victims rights at least equal the defendants' constitutional rights; however, some of these same rights are given in the statute.

The ACLU opposes any effort to enact a victims' rights constitutional amendment because it would undermine the presumption of innocence and the right to a fair trial for the accused.

Mr. FRANKS. Thank you, Ms. McCurdy.

[The prepared statement of Ms. McCurdy follows:]

Written Statement of Jesselyn McCurdy

Senior Legislative Counsel

American Civil Liberties Union

Submitted to the House Committee on the Judiciary

Subcommittee on the Constitution

Hearing on "Victims' Rights Amendment"

Thursday, April 26, 2012

I would like to thank Chairman Trent Franks and Ranking Member Jerrold Nadler for inviting the American Civil Liberties Union ("ACLU") to testify at today's hearing on "The Victims' Rights Amendment." The American Civil Liberties Union (ACLU) is a non-partisan advocacy organization with over a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of equality and justice set forth in the U. S. Constitution and in our laws protecting individual rights.

H.J. Res 106, the constitutional amendment introduced by Chairman Franks, would extend to *all* crime victims the right: (1) to reasonable notice of and to attend public proceedings relating to the offense; (2) to be heard at any release, plea, sentencing, or other such proceeding involving any right established under the amendment; (3) to proceedings free from unreasonable delay; (4) to reasonable notice of the release or escape of the accused; (5) to due consideration of the victim's safety; and (6) to restitution. Also, crime victims would have standing to fully assert and enforce any of the above rights in court. While this proposed amendment would attempt to codify a role for crime victims in the criminal justice process, the ACLU is concerned that it will be difficult to provide for the rights of victims' while preserving the constitutional rights of people accused of crimes, whose fundamental liberty interests are directly at stake.

The American Civil Liberties Union opposes H.J. Res. 106, the "Victims' Rights Constitutional Amendment," (VRA) because the amendment would profoundly alter the nation's founding charter. It would fundamentally compromise the Bill of Rights protections for accused persons in every federal, state and local criminal case. The Framers created a two-party adversary criminal justice system, with a public prosecutor, a criminal defendant, and a neutral judge. The Framers were aware of the enormous power of the government to deprive a person of life, liberty and property. The VRA will jeopardize the basic safeguards put in place to protect criminal defendants by infringing on their presumption of innocence and right to a fair trial.

Many of the provisions of the amendment reflect laudable goals, but it is unnecessary to pass a constitutional amendment to achieve them. On October 30, 2004, Congress enacted the Crime Victims' Rights Act of 2004, legislation that enumerates eight statutory rights for victims of crime. Based on a recent GAO report,[1] few crime victims are asserting their rights under the law and there was little dissatisfaction among crime victims about the rights provided by the federal statute. In addition, every state has either a state constitutional amendment or statute protecting victims' rights[2] and the proponents of a constitutional amendment have not made the

[1] U.S. Gen. Accounting Office, *Crime Victims' Rights Act: Increasing Victim Awareness and Clarifying Applicability to the District of Columbia Will Improve Implementation of the Act September 29,* 2009 [hereinafter GAO Crime Victims' Rights Act Testimony].

[2] U.S. Gen. Accounting Office, *Crime Victims' Rights Act: Increasing Awareness, Modifying the Complaint Process, and Enhancing Compliance Monitoring Will Improve Implementation of the Act 2* (2008) [hereinafter GAO Crime Victims' Rights Act Report]. ("According to the National Conference of State Legislatures, 33 states have incorporated victims' rights into their state constitutions, and all 50 states and the District of Columbia have some form of legislation affording rights to crime victims.")

case that those measures do not protect victims' interests.

Background

There have been several attempts to amend the U.S. Constitution to recognize the role of the crime victim in the criminal justice process, as well as the enactment of statutes to address the subject. Between 1996 and 2003 there were nine hearings held in Congress on amending the Constitution to incorporate victims' rights, but the legislation proposing to amend the Constitution was never brought up for votes in either the House or the Senate[3]. After several failed attempts to pass a constitutional amendment, Congress did enact statutes that established certain rights for federal crime victims and made funding available to provide services to crime victims.[4]

Over the last 30 years, a number of laws that address the role of the crime victim in the criminal justice system have passed Congress, including the Victim and Witness Protection Act of 1982,[5] Victims of Crime Act of 1984,[6] Victims' Rights and Restitution Act of 1990,[7] Violent Crime Control and Law Enforcement Act of 1994,[8] Mandatory Victims Restitution Act of 1996,[9] Victim Rights Clarification Act of 1997,[10] and Crime Victims' Rights Act of 2004.[11] Some of these laws provided crime victims with rights as well as directed federal officials to provide victims with services, such as notification of certain public court proceedings.

The Constitution Should Only Be Amended When There Are No Other Alternatives Available.

In the past 220 years, the Federal Constitution has been amended only 17 times. Amending the Constitution is a serious matter and should be reserved for those issues where there are no other alternatives available. H.J. Res. 106 does not meet this standard because there are other alternatives available to protect the interests of crime victims. In fact there is a federal statute currently in place[12]that protects most of the same rights this amendment would create. Thirty-three states have passed constitutional amendments protecting victims' rights and every state has either a state constitutional amendment or statute that protects victims' rights.[13] If in fact victims are not receiving the benefit of these rights, the answer is not to amend the

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[3] GAO Crime Victims' Rights Act Report at 14. (2008).
[4] Id.
[5] Pub. L. No. 97-291, 96 Stat. 1248 (1982).
[6] Pub. L. No. 98-473, ch. XIV, 98 Stat. 1837 (1984).
[7] Pub. L. No. 101-647, tit. V, 104 Stat. 4789 (1990).
[8] Pub. L. No. 103-322, 108 Stat. 1796 (1994).
[9] Pub. L. No. 104-132, tit. II. 110 Stat. 1214 (1996).
[10] Pub. L. No. 105-6, 111 Stat. 12 (1997).
[11] Pub. L. No. 108-405, tit. I, 118 Stat. 2260 (2004).
[12] The Crime Victims' Rights Act of 2004 18 U.S.C. 3771 (2004)
[13] See footnote 2 *Supra*

Constitution, but rather authorities should make a greater effort to enforce existing laws.

The Victims' Rights Amendment Erodes The Presumption Of Innocence.

The constitutional protections afforded the accused in criminal proceedings are among the most precious and essential liberties provided in the Constitution. The VRA undermines the presumption of innocence by conferring rights to an accuser at the time in a criminal case when the accused is still presumed to be innocent.

Not every person accused of a crime is actually guilty of committing a crime. But giving the accuser the constitutional status of victim could impact the judge and jury, making it extraordinarily difficult for fact finders to remain unbiased when the "victim" is present at every court proceeding and potentially prejudicing those who will determine guilt or innocence. The VRA makes the accuser a third party in the criminal case, even before a judge or jury has determined that the accuser is actually a "victim."

The VRA interjects crime victims into the early stages of the criminal justice process before a person is convicted without providing adequate safeguards. Traditionally, victims who are witnesses only testify during pre-trial hearings to the extent that their testimony is relevant. H.J. Res. 106 would give victims "[t]he right . . . to be heard at any release, plea, sentencing or other such proceeding involving any right established by this article." For example, if a victim is a witness during a bail hearing and makes prejudicial statements, but the accused is unable to cross-examine the victim to verify the credibility and relevance of his statements, the accused's rights are impacted. Such statements could be relied upon when a judge determines whether to detain a person for months or years prior to trial, during a period of time when the accused is still absolutely entitled to a presumption of innocence. If the charges are dropped or the accused is later found to be innocent, he or she cannot regain those months or years spent in jail before the trial.

The Victims' Rights Amendment Jeopardizes The Right To A Fair Trial.

H.J. Res. 106 would give crime victims a constitutional right to attend the entire criminal trial—even if the victim is going to be a witness in the case. In many instances, the testimony of a prosecution witness will be compromised if the person has heard the testimony of other witnesses. Typically, trial witnesses are barred from the proceedings prior to their testimony for this very reason. Despite the possibility of tainting his or her testimony, H.J. Res. 106 gives the victim a constitutional right to be present—even over the objections of the defense or prosecution.

H.J. Res. 106 would also confer "a right to proceedings free from unreasonable delay."

Any victim or representative of a victim of a crime has standing under the amendment to intervene and assert a constitutional right for a faster disposition of the matter. While judges will determine when delays are unreasonable, a victim should not have a "right" to infringe on an accused person's right to prepare a defense in a case. Defendants' rights to effective assistance of counsel could be threatened if they are required to go to trial before their attorneys are prepared. Furthermore, such a right could compromise the prosecution's case if it is not ready to proceed to trial, but must do so at the victim's insistence. Under the first scenario innocent people may be wrongfully convicted; under the second scenario guilty people may go free. Most important, protecting the rights of a person accused of a crime would no longer be a preeminent focus of a criminal trial.

The Amendment Could Hinder Effective Prosecutions And Place Enormous New Burdens On State And Federal Law Enforcement Agencies.

Instead of putting their resources towards prosecuting crimes, states would be required under the new amendment to divert resources to make sure that victims are given notice about every hearing and given the opportunity to be heard "at any release, plea, sentencing or other such proceedings."

It is unclear how much weight a judge will give to the views of a crime victim if he or she objects to an action of the prosecutor or judge. What if a victim opposes a negotiated plea agreement? Over 90 percent of all criminal cases are resolved through negotiation rather than going to trial. Even a small increase in the number of cases going to trial would burden prosecutors' offices. There are many reasons why prosecutors enter into plea agreements such as allocating scarce prosecutorial resources, concerns about weaknesses in the evidence, or strategic choices to gain the cooperation of one defendant to enhance the likelihood of convicting others. Prosecutorial discretion would be seriously compromised if crime victims could effectively obstruct plea agreements or require prosecutors to disclose weaknesses in their case in order to persuade a court to accept a plea. Ironically, this could backfire and result in the prosecution being unable to get a conviction against a guilty person, which would not serve society's or victims' interests.

The Amendment Would Impose Requirements On States That Many Will Not Be Able To Meet.

Under H.J. Res. 106, law enforcement would be constitutionally required to make reasonable efforts to find and notify crime victims or their representatives every time a case went to trial, every time a criminal case was resolved, and every time a prisoner was released from custody. To comply with H.J. Res. 106, some jurisdictions will need to send out hundreds of thousands of notification forms. This will impose significant new costs on the states. Regardless

of how efficient a state tries to be, it will be difficult to provide notice to the accuser in a timely manner. For example, when a person accused of a crime must be presented for arraignment within 48 hours or arrest, it will be difficult to provide notice to victims.

When a state fails to fulfill its duty to provide notice, what remedies would be available to the "victim"? Section one reads, "Nothing in this article provides grounds for a new trial or any claim for damages." However, this still leaves open the possibility that the victim could re-open a case if he or she disagreed with a plea agreement. It also leaves open the possibility of seeking injunctive relief against the judge, prosecutor or police when they fail to follow through with every requirement under the amendment.

Section one of H.J. Res. 106 may also authorize appointment of counsel for victims. The section reads, "The crime victim or the crime victim's lawful representative has standing to fully assert and enforce these rights in court." The term "lawful representative" is undefined, and could be interpreted as meaning an attorney. If victims are entitled to have attorneys represent them, then in order to extend this right equally across the board, the state will have to subsidize the cost of attorneys for those who cannot afford to hire their own.

State and federal criminal justice systems are in crisis because they are unable or unwilling to provide adequate counsel for indigent accused persons. The additional cost of providing counsel to victims as well as defendants in criminal cases would be prohibitively expensive. Adding the financial burden of providing counsel to victims will likely further limit defendants' access to counsel. It will tax an already severely overtaxed system, make it less likely for accused persons to retain adequate counsel, and therefore increase the likelihood of wrongful conviction.

The Crime Victims' Rights Act (CVRA) of 2004

On October 30, 2004, the Crime Victims' Rights Act (CVRA) was enacted, establishing eight rights for federal crime victims and two mechanisms to enforce those rights. The following rights were established by the legislation:

(1) "to be reasonably protected from the accused"
(2) "to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused"
(3) "not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding"
(4) "to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding"

(5) the "reasonable right to confer with the attorney for the Government in the case"
(6) "to full and timely restitution as provided in law"
(7) "to proceedings free from unreasonable delay"
(8) "to be treated with fairness and with respect for the victim's dignity and privacy[14]"

Congress enacted the CVRA after another version of the victims' rights constitutional amendment failed.[15] The fundamental objection to the 2003 version of the victims' rights constitutional amendment was that it would have replaced the two-party adversary system the Framers created with a three-party system in which criminal defendants would face both the public prosecutor and one or more private prosecutors (i.e. victims) with rights equal to or greater than the rights of the accused. In passing the CVRA instead of the constitutional amendment, Congress intended to preserve the system the Framers created -- with a public prosecutor charged with acting in the public interest, a criminal defendant with the full panoply of constitutional rights, and a neutral judge.[16]

Few Victims Have Asserted Their Rights Under The CVRA And Those that Have Are Generally Satisfied

The CVRA also directed General Accounting Office (GAO) to conduct an evaluation of the implementation of the CVRA. GAO reviewed, among other things: "(1) efforts made to implement the CVRA, (2) mechanisms in place to ensure adherence to the CVRA, (3) key issues that have arisen in the interpretation of the CVRA by the federal courts and (4) perspectives of criminal justice system participants on the CVRA."[17] GAO found that, the Department of Justice (DOJ) and the federal judiciary have updated internal guidelines, trained DOJ staff and judges, provided victims with services such as emergency housing for protection, and proactively asked victims if they would like to speak in court in order to implement the CVRA. [18]

GAO found that very few victims have asserted their CVRA rights in court. Of the hundreds of thousands of cases charged in the U.S. district courts over the 5-year period GAO studied, it found 49 instances in which victims, or victims' attorneys or prosecutors on behalf of victims, asserted CVRA rights by filing a motion with the district court.[19] Also, GAO found 27

[14] 18 U.S.C. § 3771(a).
[15] 150 Cong. Rec. at S4262 (Apr. 22, 2004) ("It is clear to me that passage of a Constitutional amendment is impossible at this time.") (statement of Sen. Feinstein).
[16] *See United States v. Turner*, 367 F.Supp.2d 319, 333 n.13 (E.D.N.Y. 2005)
[17] Pub. L. No. 108-405, tit. I, 118 Stat. 2260 (2004).
[18] U.S. Gen. Accounting Office, *Crime Victims' Rights Act: Increasing Victim Awareness and Clarifying Applicability to the District of Columbia Will Improve Implementation of the Act September 29*, 2009 [hereinafter GAO Crime Victims' Rights Act Testimony].
[19] *Id* at 12

petitions for writs of mandamus that were filed with the appellate courts, most of which were in response to motions denied in the district court.[20]

Victims' attorneys and federal judicial officials gave several possible reasons for the small number of motions filed by victims, including the fact that victims are satisfied with how they were treated. Some suggested that victims could be intimidated by the judicial process or too traumatized by the crime to exercise their rights in court.[21] Nevertheless, most thought that a lack of awareness of this enforcement mechanism was the reason so few motions were filed. The results of GAO's victim survey are consistent with the belief that victims lack this awareness about the process. One hundred and thirty four (134) of the 236 victims who responded to the question regarding filing motions reported that they were not aware they could file a motion to assert their rights, and an additional 48 did not recall whether they were aware.

The results were mixed as to the overall effect that the CVRA has had on victims, the DOJ and judicial officials. Most of those surveyed indicated that CVRA has improved victim treatment. For example, 72 percent of the victim-witness professionals who responded to GAO's survey thought that the CVRA has resulted in at least some increase in victim attendance at court proceedings.[22] Others interviewed thought that the federal government and the courts were treating victims well before the implementation of the Act. Victims responding to GAO's survey also reported mixed views on their knowledge of, and satisfaction with, the provision of various rights. 141 of the 167 victims who responded to GAO's survey question regarding participation in the judicial process reported that they did not attend any of the proceedings related to their cases, primarily because it was too far to travel to the court or they were not interested in attending. Thus, crime victims are rarely asserting their statutory rights and are not expressing concerns or dissatisfaction with their rights established in accordance with the CVRA.

Improvements Should Be Made To CVRA As Opposed To Considering a Constitutional Amendment

According to GAO, several key issues have developed since the implementation of the CVRA that require the courts to interpret provisions of the law, including "(1) when in the criminal justice process CVRA rights apply, (2) what it means for a victim to be 'reasonably heard' in court, and (3) what legal standard should be used to review victim appeals of district court decisions.[23]" Although it is not unusual for courts to interpret different aspects of a new law after they are enacted, Congress could also address the issues that have emerged during implementation of the CVRA with legislation. For example, it is unclear whether the CVRA applies to victims of local offenses prosecuted in the District of Columbia Superior Court. Also,

[20] *Id.*
[21] *Id.* at 13.
[22] *Id.* at 17
[23] *Id* at 14

Congress could clarify at what stage of the criminal justice process CVRA rights begin to apply and what standard of appellate review should be used for writs of mandamus. Finally, it is important for victims to understand what being "reasonably heard" means under the law—whether it means a written statement or the ability to speak at a proceeding? These should all be noncontroversial changes that Congress could make to the legislation in order to facilitate the exercise of victims' rights.

Conclusion

H. J. Res. 106 would give victims' rights at least equal to defendants' constitutional rights. However, the 2004 CVRA also gives victims most of these same rights under the law, while effectively protecting the rights of the accused, whose liberty interests are directly at stake. The ACLU opposes any effort to enact a victims' rights constitutional amendment because the VRA would undermine the presumption of innocence and the right to a fair trial for the accused. Moreover, because few crime victims are asserting their rights under CVRA in court and even fewer are expressing dissatisfaction with the law, there is little evidence to justify the need for a constitutional amendment providing the same rights as those provided in the statute.

Mr. FRANKS. And I would now recognize Professor Cassell for 5 minutes.

TESTIMONY OF PAUL G. CASSELL, RONALD N. BOYCE PRESIDENTIAL PROFESSOR OF CRIMINAL LAW, S.J. QUINNEY COLLEGE OF LAW AT THE UNIVERSITY OF UTAH

Mr. CASSELL. Thank you, Mr. Chairman and distinguished Members of the Committee. I am pleased to be here today——

Mr. FRANKS. Professor Cassell, let us try to pull that a little closer. I know it is always——

Mr. CASSELL. Is that better there?

Mr. FRANKS. Not much. Is the microphone on?

Mr. CASSELL. Is the microphone on? Is it on now? Is that working?

Mr. FRANKS. Not very well, sir. Let us try to pull it even closer.

Mr. CASSELL. All the way up here. Is that better?

Mr. FRANKS. I guess it will have to work. Yes, sir.

Mr. CASSELL. All right. Mr. Chairman and distinguished Members of the Subcommittee, I am pleased to be here today to testify in support of House Joint Resolution 106, the victims' rights amendment.

The victims' rights amendment would expand civil liberties by adding a bill of rights for crime victims to our Federal Constitution. In doing so, the victims' rights amendment would build on the experience of more than 30 States who have all amended their constitutions to add protections for victims' rights.

Now, while these efforts have been valuable, they have not been fully successful in protecting crime victims. As Attorney General Janet Reno reported after a comprehensive review by the Justice Department, these significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.

Research has shown that the crime victims most likely to be deprived of their rights under the current patchwork regime are racial minorities, residents of inner cities, and the poor. Only an unequivocal constitutional mandate will translate paper promises into real guarantees for crime victims.

The victims' rights amendment builds on the fact that there is a national consensus that crime victims deserve respect in our criminal justice process. It would protect basic rights, like the right to be notified about court hearings, the right to attend those hearings, and the right to be heard at relevant points in the process, like bail hearings, plea hearings and sentencing. These are the kinds of rights that our Constitution is typically and properly concerned about, the rights of individuals to participate in governmental processes that seriously affect their lives. As President Clinton explained in endorsing the victims' rights amendment, participation in all forms of government is the essence of democracy.

Criticisms of the amendment are often based on uninformed speculation about how the language might be misinterpreted or misapplied by courts. But as I detail at greater length in my written testimony, the victims' rights amendment draws on the experience in the various States and Federal legislation that is out there. For example, the victims' rights amendment begins by promising

all victims that their rights to, quote, fairness, respect, and dignity shall not be denied or abridged by the United States or any State. Similar provisions are found in the Crime Victims' Rights Act and in the State constitutions of Arizona, Idaho, Illinois, Maryland, New Jersey, Texas, Wisconsin, and my home State of Utah. State and Federal courts have taken that language and applied it without the kinds of difficulties that have been speculated by the ACLU or other opponents. I have never heard any serious argument about giving—against giving victims the right to be treated with fairness, dignity, and respect in the process, and these rights should be enshrined in our Constitution.

Now, sometimes it is argued, as it has been this afternoon, that crime victims' rights will come at the expense of defendants' rights. But House Joint Resolution 106 is a very carefully crafted measure that adds victims' rights that would coexist alongside with defendants' rights. For example, paralleling a defendant's Sixth Amendment right to a speedy trial, House Joint Resolution 106 gives victims the right to proceedings free from unreasonable delay. According to Harvard law professor Larry Tribe, who has endorsed a version of the amendment, these rights cannot collide since, by definition, they are both designed to bring matters to a close within a reasonable period of time.

Now Mr. Quigley was wondering whether or not this right would be used to force prosecutors to go to trial before they were ready or defense attorneys to go before they were fully prepared. It would not. The victims' rights amendment simply extends to victims the right to proceedings free from unreasonable delay. If a prosecutor or defense attorney needs additional time, they certainly would be entitled to receive it under the amendment.

Now, the amendment specifically addresses the concern about protecting the legitimate interests of criminal defendants by identifying crime victims' rights as those, quote, capable of protection without denying the constitutional rights of the accused. This language was included in the amendment at the suggestion of Harvard law professor Larry Tribe. And I noticed that in neither Ms. McCurdy's prepared remarks or her testimony this afternoon does she even mention this direct language, let alone explain how courts could somehow ignore it and deny rights to criminal defendants. It is hard to understand how the amendment could be used to deny defendants their rights when the explicit text provides exactly the opposite.

While the amendment would not in any way interfere with the legitimate interests of criminal defendants, it would protect vital interests of crime victims. It would protect victims from being excluded from court proceedings, proceedings that they desperately want to attend to learn all they can about crimes that have been committed against them. It would guarantee victims the right to be heard at bail, plea, and sentencing hearings not to veto the decisions that judges would make in those hearings, but simply to have a voice in the process. And it would mandate that victims receive reasonable notice of the release or escape of accused persons or defendants, which can sometimes be literally a matter of life or death for victims who need to take appropriate steps to protect themselves against criminals on the street.

These rights are not controversial. They command broad bipartisan support, which is why President Clinton first proposed a victims' rights amendment and later saw it endorsed by President George Bush. Public opinion polls consistently show overwhelming majorities of Americans want constitutional protection for crime victims' rights.

Now, I understand that in Washington today, delay has occurred on some issues because of partisan disagreement on how to proceed, but I hope there will be no delay in moving forward with the victims' rights amendment. The Framers of the Constitution undoubtedly believed that victims of crime would receive adequate respect in our criminal justice system. Because experience has not vindicated that expectation, it is now necessary to add a corrective amendment to our Constitution, the victims' rights amendment.

Mr. FRANKS. Thank you Professor Cassell.

[The prepared statement of Mr. Cassell follows:]

STATEMENT

OF

PAUL G. CASSELL

RONALD N. BOYCE PRESIDENTIAL PROFESSOR OF CRIMINAL LAW

S.J. QUINNEY COLLEGE OF LAW AT THE UNIVERSITY OF UTAH

BEFORE

THE HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON THE CONSTITUTION

ON

THE VICTIM'S RIGHTS AMENDMENT

ON

APRIL 26, 2012

WASHINGTON, D.C.

I. INTRODUCTION

Mr. Chairman and Distinguished Members of the Subcommittee:

I am here today as the Ronald N. Boyce Presidential Professor of Criminal Law from the S.J. Quinney College of Law at the University of Utah to testify in support of House Joint Resolution 106. Introduced by Representatives Trent Franks (R-AZ) and Jim Costa (D-CA), House Joint Resolution 106 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 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

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[1] *Compare, e.g.*, Steven J. Twist & Daniel Seiden, *The Proposed Victims' Rights Amendment: A Brief Point/Counterpoint*, 5 PHOENIX L. REV. (forthcoming 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.

[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.

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 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 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]

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

[5] This section draws upon the following articles: 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.

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 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

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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.

[11] *Id.* at 63.

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' 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

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[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. I, § 25; MD. DECLARATION OF RIGHTS, art. 47; MICH. CONST. of 1963, art. I, § 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. I, 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. 1, § 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. 97-291, 96 Stat. 1248 (1982).
[17] Pub. L. No. 98-473, 98 Stat. 1837 (1984).
[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).

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.

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

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[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).
[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)).

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.
>
> 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

[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.
[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.).

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 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,

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[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).
[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).

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 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

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[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.
[59] *Id.*

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 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

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[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).
[65] § 3771.
[66] *Id.* § 3771(c).

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.

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

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[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).

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 Justice Department's files in the district court.[79] So they did—only to lose again in the district

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[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).
[79] *Id.* at 1316-17.

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

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[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.

III. THE PROVISIONS OF THE VICTIMS' RIGHTS AMENDMENT

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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.*

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.[95] 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 March 2012, Representatives Trent Franks (R-AZ) and Jim Costa (D-CA) introduced the VRA as H.R.J. Res. 106.[96] 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 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 harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime.
>
> SECTION 3. . . . This article shall take effect on the 180th day after the date of its ratification.[97]

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

[95] NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (last visited Mar. 22, 2012). This organization is a sister organization to NVCAN and supports the passage of a Victims' Rights Amendment. *Id.*
[96] H.R.J. Res. 106, 112th Cong. (2012).
[97] *Id.*

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."[98] While the Constitution does draw lines in some situations,[99] ideally crime victims' rights would extend to victims of both violent and property offenses. The previous limitation appeared to be a political compromise.[100] There appears to be no principled reason why victims of economic crimes should not have the same rights as victims of violent crimes.[101]

The VRA defines the crime victims who receive rights in Section 2 of the amendment. This definition is discussed below.[102]

The VRA also extends *rights* to these crime victims. The enforceable nature of the rights is discussed below as well.[103]

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[98] 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).

[99] 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.

[100] S. REP. NO. 106-254, at 45 (2000).

[101] *See* Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39 (2001).

[102] *See infra* Part III.B.

. . . 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"[104] and that "justice, though due to the accused, is due to the accuser also."[105] 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.[106] 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."[107] 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."[108]

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 the victim, or the release of personal identifying or locating information about the victim."[109] 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

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[103] *See infra* notes 212-16 and accompanying text.
[104] Morris v. Slappy, 461 U.S. 1, 14 (1983).
[105] Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).
[106] *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).
[107] ARIZ. CONST. art. II, § 2.1(A)(1).
[108] 18 U.S.C. § 3771(a)(8) (2006).
[109] Kyl et al., *supra* note 39, at 614.

crime victim's motion for three months raised fairness issues.[110] 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.[111] 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.[112] 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.[113]

The CVRA rights of victims to be treated with respect for their dignity and privacy have also been applied in various settings.[114] Trial courts have used the rights to prevent disclosure of sensitive materials to defense counsel[115] and to the public,[116] particularly in extortion cases where disclosure of the material would subject the victim to precisely the harm threatened by the defendant.[117] 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.[118] Still another district court used 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.[119]

> *. . . being capable of protection without denying the constitutional rights of the accused . . .*

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[110] *In re* Simons, 567 F.3d 800, 801 (6th Cir. 2009).
[111] 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).
[112] United States v. Mitchell, No. 2:08CR125DAK, 2009 WL 3181938, at *8 n.3 (D. Utah Sept. 28, 2009).
[113] United States v. Heaton, 458 F. Supp. 2d 1271, 1272-73 (D. Utah 2006).
[114] *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).
[115] United States v. Darcy, No. 1:09CR12, 2009 WL 1470495, at *1 (W.D.N.C. May 26, 2009).
[116] Gucits 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).
[117] United States v. Robinson, Cr. No. 08-10309-MLW, 2009 WL 137319, at *1-3 (D. Mass. Jan. 20, 2009).
[118] United States v. Spensley, No. 09-CV-20082, 2011 WL 165835, at *1-2 (C.D. Ill. Jan. 19, 2011).
[119] 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).

This preamble was authored by Professor Laurence Tribe of Harvard Law School.[120] 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.[121] For example, just as a defendant possesses a right to speedy trial,[122] 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.[123] 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.[124] 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 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'

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[120] *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).
[121] *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).
[122] U.S. CONST. amend. VI.
[123] *See* Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.
[124] *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").

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.[125] Since the passage of the Fourteenth Amendment,[126] however, the great bulk of criminal procedure rights have been "incorporated" into the Due Process Clause and thereby made applicable in state proceedings.[127]

It is true that plausible arguments could be made for trimming the reach of incorporation doctrine.[128] 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 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

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[125] *See* Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).
[126] U.S. CONST. amend. XIV.
[127] U.S. CONST. amend. V.; *see, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Malloy v. Hogan, 378 U.S. 1 (1964).
[128] *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).

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.[129]

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.[130] 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.

It is important to emphasize that the amendment would establish a floor—not a ceiling—for crime victims' rights[131] 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.[132]

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[129] NAT'L GOVERNORS ASS'N, POLICY 23.1 (1997).
[130] *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.").
[131] *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.").
[132] *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983).

> *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.[133] Even larger percentages of failure to provide required notices were found in a survey of various state criminal justice systems.[134] Distressingly, the same survey found that racial minority victims were less likely to have been notified than their white counterparts.[135]

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.[136] Similar formulations are found in state constitutional amendments. For instance, the California State Constitution promises crime victims "reasonable notice" of all public proceedings.[137]

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

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[133] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 73, at 82.
[134] National Victim Center, *Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights*, *in* BELOOF, CASSELL & TWIST, *supra* note 1, at 631.
[135] *Id.*
[136] 18 U.S.C. § 3771(a)(2) (2006).
[137] CAL. CONST. art. 1, § 28(b)(7).

victims of the crime contained in the charges, except as otherwise provided in this chapter."[138] The initial notice must contain information about "electing to receive notice of subsequent important criminal justice hearings."[139] 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.[140] 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.[141]

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.[142] 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.[143]

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[138] 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).

[139] § 77-38-3(2). The notice will also contain information about other rights under the victims' statute. *Id.*

[140] *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.*

[141] *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.*

[142] United States v. Peralta, No. 3:08cr233, 2009 WL 2998050, at *1-2 (W.D.N.C. Sept. 15, 2009).

[143] 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).

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.[144]

Several strong reasons support this right, as Professor Doug Beloof and I have argued at length elsewhere.[145] 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."[146]

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.[147] 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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> Testifying can be a harrowing experience, especially for children, those subjected to violent or terrifying ordeals, or those whose loved ones have been

[144] HERRINGTON ET AL., *supra* note 10, at 80.
[145] *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).
[146] Ken Eikenberry, *Victims of Crimes/Victims of Justice*, 34 WAYNE L. REV. 29, 41 (1987).
[147] *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).

> 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.[148]

Without a right to attend trials, "the criminal justice system merely intensifies the loss of control that victims feel after the crime."[149] 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."[150] One crime victim put it more directly: "All we ask is that we be treated just like a criminal."[151] In this connection, it is worth remembering that defendants never 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.[152]

To ensure that victims can attend court proceedings, the Victims' Rights Amendment extends them this unqualified right. Many state amendments have similar provisions.[153] 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.[154]

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[148] HERRINGTON ET AL., *supra* note 10, at 80.
[149] Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 72 (1987).
[150] Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 58 (1987).
[151] *Id.* at 59 (quoting Edmund Newton, *Criminals Have All the Rights*, LADIES' HOME J., Sept. 1986).
[152] *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.").
[153] *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).
[154] *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).

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.[155]

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.[156] When court proceedings are closed to the public pursuant to these provisions, a victim will have no 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."[157] 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'

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[155] *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").

[156] *See generally* WAYNE R. LAFAVE ET. AL., CRIMINAL PROCEDURE § 23.1(b) (3d ed. 2007) (discussing court closure cases).

[157] 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).

rights. Defendants have a right to be present during criminal proceedings, which stems from both the Confrontation and Due Process Clauses of the Constitution.[158] Courts have consistently held that these constitutional rights do not confer on defendants any right to engage in disruptive behavior.[159]

> *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 involving release, plea, or sentencing."[160] A number of states have likewise added provisions to their state constitutions allowing similar victim participation.[161]

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

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[158] *See* Diaz v. United States, 223 U.S. 442, 454-555 (1912); Kentucky v. Stincer, 482 U.S. 730, 740-44 (1987).

[159] *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).

[160] 18 U.S.C. § 3771(a)(4) (2006).

[161] *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).

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."[162]

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 a case before trial must be submitted to the trial court for approval.[163] If the court believes that the bargain is not in the interest of justice, it may reject it.[164] 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."[165] 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.[166]

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[162] 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).
[163] *See generally* BELOOF, CASSELL & TWIST, *supra* note 1, at 422 (discussing this issue).
[164] *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").
[165] HERBERT S. MILLER ET AL., PLEA BARGAINING IN THE UNITED STATES 70 (1978).
[166] BELOOF, CASSELL & TWIST, *supra* note 1, at 423.

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, 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.[167] 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.[168] 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

[167] *See, e.g.*, FED. R. EVID. 32(i)(4)(A); UTAH R. CRIM. P. 22(a).
[168] Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009).

fairness of sentencing.[169] 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.[170]

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 consideration.[171] Defendants can respond to the information that victims provide in appropriate ways, such as providing counter-evidence.[172]

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.[173]

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.

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[169] *Id.* at 619-25.

[170] *Id.* at 615; *see also* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 299-305 (2003).

[171] 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).

[172] *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).

[173] 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)).

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.[174]

. . . 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.[175] The defendant's right is designed, *inter alia*, "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."[176] 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.[177]

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

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[174] *See* FED. R. CRIM. P. 43(b)(3) (noting circumstances in which disruptive conduct can lead to defendant's exclusion from the courtroom).
[175] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . .").
[176] Smith v. Hooey, 393 U.S. 374, 378 (1969) (citing United States v. Ewell, 383 U.S. 116, 120 (1966)).
[177] Barker v. Wingo, 407 U.S. 514, 519 (1972).

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.'"[178] 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.[179] 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 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."[180] Victims cannot heal from the trauma of the crime until the trial is over and the matter has been concluded.[181]

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.[182] A number of states have already established similar protections for victims.[183]

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.[184] 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.*

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[178] LAFAVE ET. AL., *supra* note 157, at § 18.1(b) (footnote omitted).
[179] *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).
[180] Telephone Interview with Betty Mueller, Victim/Witness Coordinator, Weber Cnty. Attorney's Office (Oct. 6, 1993).
[181] *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.").
[182] 18 U.S.C. § 3771(a)(7) (2006).
[183] *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.
[184] *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).

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.[185] 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.[186] 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 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.[187] Rather, the circumstances of the defendant's assertion of the right is given "strong evidentiary weight" in evaluating his claims.[188] 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."[189] 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

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[185] Barker v. Wingo, 407 U.S. 514, 530-33 (1972).
[186] *See id. See generally* LAFAVE ET AL., *supra* note 157, at § 18.2.
[187] *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.").
[188] *Id.* at 531-32.
[189] *Id.* at 532.

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.[190] In the wake of the passage of a Victims' Rights Amendment, Congress could revise the Speedy Trial Act to include not only defendants' interests but also victims' interests, thereby answering any detailed implementation questions that might remain. For instance, one desirable amplification would be a requirement that courts record reasons for granting any continuance. As the Task Force on Victims of Crime noted, "the inherent human tendency [is] to postpone matters, often for insufficient reason," and accordingly the Task Force recommended that the "reasons for any granted continuance . . . be clearly stated on the record."[191]

. . . 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.[192] Authorities soon placed him in jail for violating that order.[193] He later posted bail and tracked McHugh to a relative's apartment, where on January 20, 1994,

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[190] Pub. L. No. 96-43, 93 Stat. 327 (codified as amended at 18 U.S.C. §§ 3161-74) (2008).
[191] 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 fnrther delays").
[192] 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).
[193] *See id.*

he fatally shot both Colleen McHugh and himself.[194] No one had notified McHugh of Boettcher's release from custody.[195]

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.[196] The administrative burdens associated with such notification requirements have recently been minimized by technological 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.[197]

. . . 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."[198] 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."[199]

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.[200]

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[194] *Id.*
[195] *See id.* (providing this and other helpful examples).
[196] *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").
[197] *See About VINELink*, VINELINK, https://www.vinelink.com/ (last visited on Mar. 23, 2012).
[198] 18 U.S.C. § 3771(a)(1) (2006).
[199] CAL. CONST. art. I, § 28(b)(2)-(3).
[200] 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.

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 order.[201] For instance, in many domestic violence cases, courts may release a suspected offender on the condition that he[202] 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 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"),[203] 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 court *shall* order . . . that the defendant make restitution to the victim of the offense."[204] In justifying this approach, the Judiciary Committee explained:

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[201] *See generally* BELOOF, CASSELL & TWIST, *supra* note 1, at 310-23.
[202] Serious domestic violence defendants are predominantly, although not exclusively, male.
[203] 18 U.S.C. §§ 3663A, 3664 (2006).
[204] § 3663A(a)(1) (emphasis added).

> 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.[205]

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."[206] 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.[207]

The Victims' Rights Amendment would effectively operate in much the same fashion as the MVRA, although it would elevate the importance of restitution.[208] 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 the means to make full restitution payments. Accordingly, the courts can establish an appropriate

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[205] 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).
[206] S. Rep. 104-179, at 13.
[207] CAL. CONST. art. 1, § 28(b)(13).
[208] 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 have received information about what I believe to be failure of the restitution statutes in a federal case and will supplement my testimony to the Committee with this information if I am able to confirm that its release does not violate any judicial sealing orders.

repayment schedule and enforce it during the period of time in which the offender is under the court's jurisdiction.[209] 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.[210] 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.[211]

> *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]."[212]

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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[209] *Cf.* 18 U.S.C. § 3664 (2006) (establishing restitution procedures).
[210] *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).
[211] *See* § 3663A.
[212] § 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.[213]

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.[214] 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.[215] In Arizona, for example, the courts have allowed an unindicted co-conspirator to take advantage of a victim's provision.[216] 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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[213] *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).

[214] *See* BELOOF, CASSELL & TWIST, *supra* note 1, at 61-64 (discussing representatives of victims).

[215] *E.g.*, KAN. CONST. art. 15, § 15(c).

[216] *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.[217]

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.[218] 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

[217] *See* Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 350 (1987).
[218] 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.[219] 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.[220] 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.[221]

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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[219] *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).

[220] *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. I, § 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.").

[221] *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,[222] Fifth Amendment rights,[223] and Sixth Amendment rights.[224] 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.[225] 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.[226] To help provide legal

[222] Mapp v. Ohio, 367 U.S. 643 (1961).
[223] Arizona v. Fulminante, 499 U.S. 279 (1991).
[224] Gideon v. Wainwright, 372 U.S. 335 (1963).
[225] 18 U.S.C. § 3771(d)(3) (2006).
[226] *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.[227]

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 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."[228] 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 offense has been committed."[229] 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]."[230] A ruling by

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[227] *See, e.g.*, § 3771(d)(1); UTAH CODE ANN. § 77-38-9(6) (West, Westlaw through 2011 Legis. Sess.).
[228] ARIZ. CONST. art. II, § 2.1(C).
[229] *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).
[230] 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).

the Arizona Court of Appeals, however, invalidated that definition, concluding that the legislature had no power to restrict the scope of the rights.[231] 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 harmed by the commission of a crime. This definition is somewhat broader than the definition of victim found in the CVRA, which defines "victim" as a person "directly *and proximately* harmed" by a federal crime.[232]

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.[233] 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.[234] Whatever the merits of this conclusion as a matter of interpreting the CVRA, it makes little sense as a matter of public policy. The district judge should have heard the Antrobuses before imposing sentence.[235] The Victims' Rights Amendment adopts a broader approach in requiring the victim to establish only direct harm.

In defining a victim as a person suffering direct harm, the VRA follows a federal statute that has been in effect for many years. The Crime Control Act of 1990 defined "victim" as "a person that has suffered *direct* physical, emotional, or pecuniary *harm* as a result of the commission of a crime."[236]

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[231] 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.").
[232] 18 U.S.C. § 3771(e) (2006) (emphasis added).
[233] *See supra* notes 73-82 and accompanying text.
[234] United States v. Hunter, No. 2:07CR307DAK, 2008 WL 53125, at *5 (D. Utah 2008).
[235] *See* Cassell, *supra* note 169, at 616-19.
[236] 42 U.S.C.A. § 10607(e)(2) (Westlaw through 2012 P.L. 112-89) (emphasis added).

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.[237] 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,[238] the Victims' Rights Amendment would—like other constitutional protections—extend to corporate entities that were crime victims.[239] 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 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.[240] 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

[237] *See, e.g.*, UTAH CODE ANN. § 77-38-2(1)(a) (West, Westlaw through 2011 Legis. Sess.) (implementing UTAH CONST. art. I, § 28).
[238] *See id.*
[239] *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (First Amendment rights extend to corporate entities).
[240] *See, e.g.*, Brian J. Willett, *Juvenile Law vs. Criminal Law: An Overview*, 75 TEX. B.J. 116 (2012).

fact by extending rights to victims in both adult criminal proceedings and juvenile delinquency proceedings. Many other victims' enactments have done the same thing.[241]

IV. CONCLUSION

As explained in this testimony, 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 attempts to demonstrate how this law provides a sound basis for interpreting the scope and meaning of the Victims' Rights Amendment.

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."[242] 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

[241] *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).
[242] 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."[243]

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). 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.

[243] 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).

EXHIBIT A

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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[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 heart-break—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).

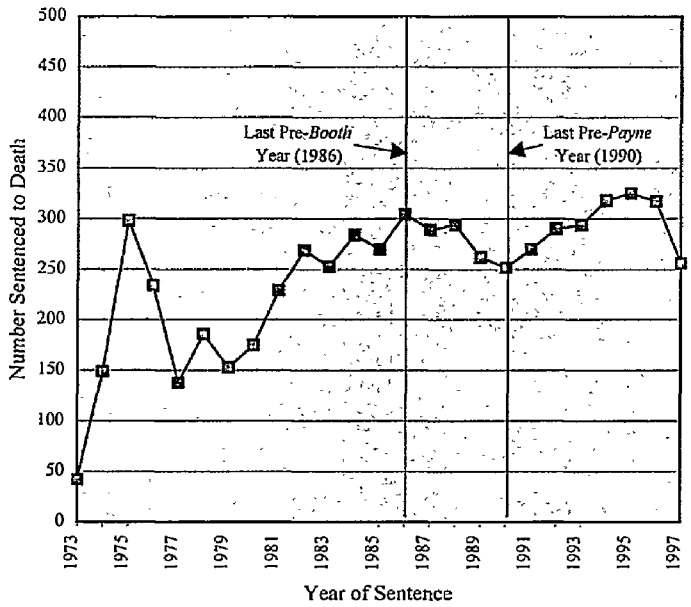
[302] *See, e.g.*, Jonathan H. Levy, Note, *Limiting Victim Impact Evidence and Argument After* Payne v. Tennessee, 45 STAN. L. REV. 1027, 1046 (1993) (asserting that victim impact statements will motivate jurors to impose death penalties out of emotion); Beth E. Sullivan, Note, *Harnessing* Payne*: 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).

Mr. FRANKS. And I will now begin the questioning time by recognizing myself for 5 minutes. I again appreciate all of you for your testimony.

Mr. Douglass, I will begin with you. I have had the opportunity to hear many different witnesses express very moving testimony, but I will say to you, sir, that your testimony here today was one of the most moving and compelling that I have heard as the Chairman of this Committee. And I will suggest to you that your parents would be and are quite proud of you for your performance and presence here today.

Mr. DOUGLASS. Thank you.

Mr. FRANKS. And I would ask you, if you would, to describe real-life examples that you have discovered in your own life or experience where existing crime victims statutes or State constitutional amendments have failed to provide the protections that they promised to crime victims.

Mr. DOUGLASS. Certainly. Thank you, Mr. Chairman. I will give one example.

After we passed the initial victims' rights act in Oklahoma—and that included, actually amended in 1992, the U.S. Supreme Court handed down a decision saying that victim impact statements were constitutional. About a year later, after our statute had passed, I got a call from someone that I knew in Tulsa, Oklahoma. His mother had been murdered, and they had held the trial, and the person—someone had just been convicted of committing that murder.

He called me and said that they were all getting ready to give their victim impact statements, and the judge literally said, I am not going to hear it. So the prosecutor went in and argued the Supreme Court decision and our statutes and said, you have to hear this testimony. And he just said, I am not going to do it. So they had called me and asked me to call the judge and discuss it with him, which I did. And the judge basically said, I don't think it is constitutional, and I am not going to hear it. I don't like being told what to do in my courtroom.

And the upshot was, what are you going to do about it? And to make a long story short, I wound up bringing in the Court of Criminal Appeals chief judge. We had a conversation with him, and I said the same thing to both of them. I said, well, I understand you have a job to do. You don't want to be told what to do in your courtroom. And I have a job to do as a State senator, and now I am going to do mine. I said, I am going to go down and I am going to get staff. I am going to author a bill that creates a review committee, and what their job will be is to review decisions dealing with crime victims' rights, and if they find that you have wrongfully denied a victim of one of their rights under the statutes or the Constitution of Oklahoma, they are going to ultimately have the power to take away your pension.

Well, you know, pretty quickly he decided then that—I don't know if it would be constitutional for me to do that or not, frankly, but I didn't have to file the bill. He wound up actually deciding it was a good idea to hear the victim impact testimony.

But there have been countless—even after I left the senate, just as I think I said in my testimony a few months ago, a judge, a sitting judge who I went to law school with, and maybe it wasn't a

very good law school, but at the end of the day, he just said, I don't think it is constitutional. He doesn't bother looking up Supreme Court decisions. As you mentioned in your initial statement, just the mention of the constitutional rights of the accused is enough for them. Whether it has any basis or not, the victims' rights are ignored.

As I have said many, many times from the senate floor in Oklahoma, we have a system that literally steps over the body of the victim to read the criminal his rights, or the suspect his rights, and as long as there is not equal footing, as long—the victims will continue to be second-class citizens in our system.

Mr. FRANKS. Well, thank you, Mr. Douglass, very much. And I again appreciate your presence here today, sir.

Professor Cassell, it seems I have been mispronouncing your name, and I apologize. But how widespread, in your opinion, is the problem described by Mr. Douglass; that is, this failure of State victims' rights laws to protect crime victims? And I suppose I should add, what reason is there for thinking that if a Federal constitutional amendment were enacted, that the protection of crime victims' rights would improve?

Mr. CASSELL. Let me address both of those questions. There was a comprehensive Justice Department review done by Attorney General Janet Reno, and she found that the State enactments failed to fully safeguard victims' rights because they were not sufficiently consistent, comprehensive, or authoritative. She relied in part on a National Institute of Justice study that looked at, I think, eight different States to see how the State amendments were being implemented, and they found significant problems. For example, fewer than 60 percent of crime victims were notified of sentencing hearings, and fewer than 40 percent of victims were notified of pretrial release.

Now, those error rates are simply astounding. I mean, I wonder what the Committee would do if it found out, for example, that even 5 percent of criminal defendants were not getting their right to be represented by counsel or something along those lines. I am assuming there would be hearings and immediate steps taken to rectify the situation. But that is the level of the problem that is out there.

Now, we have heard some discussion, too, about the Federal system and the new Crime Victims' Rights Act. I wanted to say just a couple of words about that. Let us remember that the Federal Crime Victims' Rights Act applies to fewer than 5 percent of the criminal prosecutions in this country. Most of the prosecutions are done at the State and local level, and certainly most of the violent crimes or extremely violent crimes, such as the one Mr. Douglass is talking about, are handled by State and local prosecutors. So the Federal system, I think, is a little bit unusual. But even here the General Accounting Office found significant situations, such as the fact that less than half of Federal victims were even aware that they had a right to confer with Federal prosecutors.

So that is the level of the problem that we have out there. A constitutional amendment would immediately change the culture. The kinds of examples we have been hearing about today simply wouldn't happen. You don't see judges ignoring a defendant's right

to counsel, because they are taught that in law school, they know it is in the Constitution, and they respect it. The same kind of change would happen if we passed a victims' rights amendment.

Mr. FRANKS. Well, thank you, Professor. And related to your testimony about the Janet Reno study, did I hear it—was it Janet Reno?

Mr. CASSELL. Yes.

Mr. FRANKS. Okay. From my memory on that part, that she has been accused of being part of a right-wing conspiracy here.

But with that I would yield to Mr. Quigley for 5 minutes for questions.

Mr. QUIGLEY. Thank you, Mr. Chairman.

Mr. Douglass, I apologize for being out of the room when you testified. One of the few absolute responsibilities we have here is voting, and I was next door doing that. But I read your testimony. It is quite compelling and very important for us to appreciate.

To all of our panelists, having been in the trenches of the justice system as a criminal attorney at 26 in California and Chicago for 10 years, probably 220 trials, I can tell you it isn't easy. We all speak of a balance, but the balance is played out every day.

And, Professor, when I talk about my reservations, it comes from that experience, because after I left that work, I was a Cook County commissioner on the litigation committee. Our first act was to deal with a lawsuit of four men, the Ford Heights Four, who went to jail or on death row. One was lined up on death row. One was raped in prison. And it was the wrong guys, right? In Illinois—we talk about the balance, the horrific unfortunately goes to both sides.

Before they got rid of the death penalty, they exonerated more people on death row through DNA and so forth than they executed. So if no one cares about that aspect from the issue of justice, the county had to settle the Ford Heights case for $36 million.

So that no one thinks this is just about the alleged perpetrators' rights being taken away, being put on death row, we want to get this right because the victims want the right people punished. So my concern, Professor, is we got to get this right. And when it comes to speedy trials, you say—you quoted someone from Harvard saying they can't collide. Well, they do. And I am telling you, it is not easy to sort out, you know? We put people on the bench. Some are good, and some are bad.

But you have to appreciate from a veteran's point of view, I have seen haste make horrible mistakes. I mean, how do you balance that out with the language that you are trying to address here beyond just that word "unreasonable," which courts struggle with?

Mr. CASSELL. Well, I was a Federal prosecutor for 4 years, and I was a Federal district court judge for 5 years, so I have been in the trenches as well and have seen a number of the cases that are out there.

I think I agree with Harvard law professor Laurence Tribe. He was the law professor that I was quoting. And the idea here is not to take away rights from criminal defendants, but to expand rights for crime victims.

So let us talk about the one you have been pointing to, and the language, I think, is very carefully drafted. It says that crime vic-

tims would have the right to proceedings free from unreasonable delay. And by definition, and the situation in which the prosecutor needs to prepare a case or the defendant needs to collect evidence, that would be reasonable delay. But we have all seen situations—I am sure you have—where delay is happening for delay's sake or for no good reason at all. The amendment would give a victim a right to go in and say, wait a minute, Judge, we need to get this case moving along.

The other thing I should point out is that there are a number of States—and my prepared testimony actually lists them—that already have in their State constitutions a constitutional right to proceedings free from unreasonable delay. So the fact that these States have been able to provide these rights without the kinds of problems that I think some have been suggesting bodes very well for the Federal constitutional amendment.

Mr. QUIGLEY. And I appreciate what you are saying. I still think, though, beyond the simple words of what you are trying to do, every case is unique, and every case is bound upon that. And I think to a certain degree you are creating unrealistic expectations that with the stroke of a pen and the passage of a constitutional amendment, judges are going to have a much easier time sorting out that troubling aspect of this right now, and that is lost witnesses, complicated data, experts' cost, pending litigation. You know, perhaps much better than I, a dozen other reasons that this could be held off and could be extraordinarily complicated, and we get it wrong both ways. You know, it is something we struggle with.

I just have fears that it is hard to do the most important thing we do, and that is seek justice, with the language that has to be so broad as a constitutional amendment, and you want to be balanced. But I just think it is harder than that, what you have tried to explain here in just these few minutes, and there is just so much at stake in our attempts to do so, because, again, it does the victims no good to have a hearing—to have a trial take place, and we get the wrong people.

But I will yield back.

Mr. FRANKS. Thank you, Mr. Quigley.

We will now recognize Mr. Scott for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

I think we all want dignity, respect, and protection for our witnesses, and the question is whether the constitutional amendment would create more problems than it solves. Professor Cassell mentioned the State measures. They are all subservient to the Federal Constitution.

You also mentioned the right to counsel and how that is not ignored. Well, a right to counsel, if you violate that, that is reversible error. That is why the judge has to pay attention to that. There is nothing in here that creates any remedy that is apparent. I guess mandamus.

If you really want to provide respect, dignity, consultation, protection, what we ought to do is have more victim advocates, more prosecutors so they have actual time. A lot of State prosecutors come in with a stack of files. They don't have time to talk to anybody, so of course they are going to be rude. If you had more pros-

ecutors and more marshals to provide protection. Unfortunately the budget that we are trying to work under this year eliminates a lot of the funding for the victims' advocates, cuts the Department of Justice budget significantly, and has about a 10 percent cut for the marshal services. So who is going to be doing the protection?

Let me ask a couple of questions, because some of this is all in theory, and I just want to know what this kind of looks like.

If a victim has, in fact, been disrespected and goes in the court and presents a case—it says any court, so I assume if it is a State court proceeding, they can go into Federal court to make the case that they are being disrespected in State court. What does a judge do? Does a prosecutor get subpoenaed to testify, no, I didn't disrespect them?

Mr. CASSELL. The way the enforcement would work is if there was a problem in State court, the victim would go into State court to address that.

Mr. SCOTT. Well, it says in here any court, enforce those rights in any court, has a standing to enforce these rights in any court.

Mr. CASSELL. So you would have standing to enforce them in both State and Federal court.

Mr. SCOTT. So you would go to Federal court and present to a judge that you are being disrespected in State court?

Mr. CASSELL. You would go initially, though, to the State court, because the State court is the—you have to exhaust remedies before you can proceed to some other forum to vindicate your rights. And the way that this would work—again, there are real-world examples of a right to be treated with respect, and my prepared testimony collects specific examples.

For example, in a child pornography prosecution, if somebody is showing the pornography around in ways that are not respectful to the victim, the victim can go to that judge and say, wait a minute, these materials should be kept under seal, only disclosed to people that have a need to see that information. That is the kind of enforcement that becomes possible if a Federal constitutional amendment——

Mr. SCOTT. Well——

Mr. CASSELL [continuing]. Around the country.

Mr. SCOTT. Let us get back to disrespect. If you are in court and approved your case, can you subpoena the prosecutor?

Mr. CASSELL. You wouldn't need to subpoena the prosecutor. The prosecutor would be right there during the proceedings, and so you would assert——

Mr. SCOTT. Now, if you are in any court, you can go into any court and—so let us say the judge is the problem, and you want to go into another court to show that you are being disrespected. And you present it to the court: Won't return phone calls, didn't notify me of this and that. Is that an ex parte proceeding? Can you go ex parte in Federal court?

Mr. CASSELL. No, you don't go ex parte. Again, there are real-world examples of how these rights are handled, and you don't go to a different court, you don't subpoena the judge. Just as you pointed out, if a defense attorney is not appointed for a defendant, you don't go and subpoena——

Mr. SCOTT. No. That is reversible error. You don't have to worry.

If you have shown that you are being disrespected, what is the remedy?

Mr. CASSELL. Well, the remedy is to correct the disrespect.

Mr. SCOTT. And if they don't do it, what is the remedy?

Mr. CASSELL. The remedy then is to go to the appellate court and say the lower court is not following the directive in the United States Constitution. Again, there are real-world examples.

Mr. SCOTT. Is that an ex parte proceeding?

Mr. CASSELL. No. It is a judicial proceeding that is handled with notice to both sides with service of process on both sides.

Mr. SCOTT. And you don't have enough prosecutors to begin with. So they are sitting up in all these other courts.

Unreasonable delay. How will a judge determine whether or not the delay is reasonable or not?

Mr. CASSELL. Right. There would be typically a four-factor balancing test. In my prepared remarks, I indicate the four factors that the judges have used. And remember, defense attorneys now——

Mr. SCOTT. I am running out of time. So if the delay is because the prosecutor's witness has disappeared, and the defense doesn't know about it, or refuses to testify, or the prosecution has lost the evidence and is trying to find it, would that be an open trial with the defendant there listening to the proceedings as to why they haven't gone forward?

Mr. CASSELL. The question would be for the judge whether the delay was reasonable or not, and a record would be made on that. In certain situations records can be made in sealed proceedings. So that is how that issue would be handled.

Mr. SCOTT. Well, I mean, so the defendant would have the opportunity to hear that the prosecutor's case has all fallen apart, and that is why they are asking for a continuance?

Mr. CASSELL. That is the way it happens today in many cases.

Mr. SCOTT. No, they just—the defendant knows he did it, so he doesn't want—if the prosecutor wants a continuance, fine with me.

Now you have got an idea that the witness isn't going to show up, and the victim says it is unreasonable delay. And the judge says, this is unreasonable; Mr. Prosecutor, why aren't you going forward? Then what does the prosecutor say?

Mr. CASSELL. All I can say, Congressman, is that that has not been a problem, for example, in my home State of Utah, where there is such a right. And that is probably why the National District Attorneys Association just this week endorsed the amendment saying it would actually strengthen the prosecution.

Mr. SCOTT. Mr. Chairman, can I ask one additional question?

Mr. FRANKS. Without objection, please.

Mr. SCOTT. The language in section 1 starts off with the rights of the crime victim, fairness, respect, and dignity, being capable of protection without denying the constitutional rights of the accused. Do you interpret that as being a priority for rights of the accused or a statement, in fact, that you can provide fairness, respect, and dignity without denying the constitutional rights? Is that a question of fact, a statement of fact, or a statement of priority?

Mr. CASSELL. What it is is a statement of coexistence, that both victims' rights and defendants' rights can coexist without compro-

mising each other. The language, I should point out, was drafted by Harvard law professor Laurence Tribe, again who is frequently cited as one of the leading advocates for civil liberties in this country. So we think the language would actually work very well to make sure that both defense interests and crime victims' interests are——

Mr. SCOTT. Well, my question is if there is—if somebody believes there is a conflict, would the right of the accused trump the rights of the victim? Or is this a statement of—trying to be a statement of fact that there is, in fact, no conflict, and that the crime victims' rights will be respected notwithstanding any denying of constitutional rights to the accused?

Mr. CASSELL. It does not provide a basis for denying defendants' rights. It does not provide a basis for denying victims' rights. It says that both rights can coexist. And again, nobody has provided a real-world example of how the rights are going to interfere with the defendants' interests.

Mr. FRANKS. Mr. Scott, I am going to have to ask you to leave it there, sir. I have got a vote in the Committee next door that I have got to—and that means I am going to have to be pretty direct here.

But we have had a good hearing, and I want to thank all of the witnesses for coming. And, without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond to as promptly as they can so that their answers may be made a part of the record.

Without objection, all Members will have 5 legislative days within which to submit any additional materials for inclusion into the record.

With that, again, I sincerely thank the witnesses. I thank the Members and observers. And this hearing is now adjourned.

[Whereupon, at 3:25 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Supplement to the Testimony of Paul G. Cassell, Ronald N. Boyce Presidential Professor of Criminal Law, S.J. Quinney College of Law at the University of Utah

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May 10, 2012

Hon. Lamar Smith
Chairman, Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515-6216
(202) 225-3951

Re: Supplement to Testimony of April 26, 2012
Regarding Victims' Rights Amendment

Dear Chairman Smith:

I am writing to provide a supplement to my testimony concerning the Victim's Rights Amendment, which I delivered before the Subcommittee on April 26, 2012. I am writing to report that I believe that I have information which would support the need for a constitutional amendment. Unfortunately, I am not able to transmit this information because I have not been able to determine whether doing so would violate judicial sealing orders. I wanted to call this unusual circumstance to your attention, without disclosing the underlying (possibly sealed) information.

In my initial testimony, I discussed inadequacies in providing crime victims restitution and included the following footnote:

> 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 have received information about what I believe to be failure of the restitution statutes in a federal case and will supplement my testimony to the Committee with this information if I am able to confirm that its release does not violate any judicial sealing orders.

Cassell Testimony at 37 n.208.

When I wrote this testimony, I was aware from public and other sources of a case in which it appeared to me that the Government had failed to obtain restitution for crime victims because it wanted cooperation from a defendant. The case, however, had been subject to extensive litigation concerning the existence and scope of various sealing orders that had been obtained by the U.S. Attorney's Office for the Eastern District of New York.

Because I wished to communicate my information to Congress while fully complying with court orders, I prepared testimony describing my concern about this 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 them 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 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 my 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?
>
> 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 [order]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 my 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 (via Assistant U.S. Attorney Evan Norris) 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 send 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.

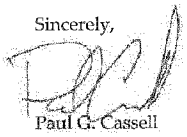
On May 9, 2012, the U.S. Attorney's Office sent the following reply: "We have received your letter from earlier today. In connection with the matter to which your letter refers, the government complied in all aspects with the law. We are unable to answer your other questions as doing so would require 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."

I do not believe that the Government has complied with the law in the case referred to in my letter. However, because I am not certain as to the scope of the sealing

orders and because I want to remain in strict compliance with any sealing orders, I will continue to pursue the issue with the Justice Department further. I hope that I will then be able to provide to Congress more information about crime victims' rights. I will also attempt to determine status of the Government's motion to unseal, as the granting of this motion might permit me to transmit my information. In the meantime, I have received legal advice from the University of Utah Office of General Counsel that providing this supplement to my testimony is appropriate at this time.

I ask that this supplemental information be added to my testimony in this case and made a part of the record of the Committee's hearing.

Sincerely,



Paul G. Cassell
Ronald N. Boyce Presidential Professor
of Criminal Law

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

A BRIEF POINT/COUNTERPOINT

THE PROPOSED VICTIMS' RIGHTS AMENDMENT:[1] A BRIEF POINT/COUNTERPOINT

Steven J. Twist[*] and Daniel Seiden[**]

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[1] NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (last visited Mar. 21, 2012) [hereinafter Proposed VRA] (providing the full text of the proposed Victims' Rights Amendment). The key provisions include:

> 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 to restitution. The crime victim or the crime victim's lawful representative has standing to fully assert and enforce these rights in any court.

Id.

[*] Phoenix School of Law, Adjunct Professor. The author volunteers as general counsel for the National Victims' Constitutional Amendment Network ("NVCAN") and its 501c4 component, the National Victims' Constitutional Amendment Project ("NVCAP"). NVCAN and NVCAP are collectively part of a national coalition of the major victims' rights groups and advocates in America, including: Mothers Against Drunk Driving, the National Organization for Victim Assistance, Force 100, Memory of Victims Everywhere, the International Organization for Victims Assistance, the National Organization of Parents of Murdered Children, the Maryland Crime Victim Resource Center, the Colorado Organization for Victim Assistance, Arizona Voice for Crime Victims, and many others.

[**] Phoenix School of Law, Adjunct Professor. The author serves as Special Assistant to the Maricopa County Attorney, in charge of legislation and policy.

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I. INTRODUCTION

A federal constitutional amendment for the rights of crime victims was first proposed by President Ronald Reagan's Task Force on Victims of Crime ("Task Force") in 1982.[2] The Task Force understood the serious implications of proposing an amendment to the U.S. Constitution:

[2] LOIS HAIGHT HERRINGTON ET AL., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT 114 (1982), *available at* http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/87299.pdf. The Task Force wrote:

> 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.
>
> We propose that the Amendment be modified to read as follows:

> 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 progress affirm that an essential change must be undertaken; the fundamental rights of innocent citizens cannot adequately be preserved by any less decisive action. In this we 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."[3]

The proposal to amend the Constitution sprang from an understanding developed by the Task Force over the course of many hearings across the country.[4] Those hearings confirmed that "[t]he innocent victims of crime have been overlooked, their pleas for justice have gone unheeded, and their wounds—personal, emotional, and financial—have gone unattended."[5]

Efforts to seek an amendment to the U.S. Constitution were not immediate; indeed the proposal lay dormant for fourteen years while advocates for victims' rights turned instead to the laboratories of the states.[6] In 1982, no state had either a comprehensive constitutional amendment for victims' rights or comprehensive statutes.[7] Just a decade later, every state had

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> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense. *Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings.*

Id.

[3] *Id.* at 114-15.

[4] *Id.* at 126-33 (detailing the list of witnesses before the Task Force in six separate hearings throughout 1982).

[5] *Id.* at ii.

[6] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[7] *See* CAL. CONST. art. I, § 28. In 1982, California passed a constitutional amendment that included victims' rights to restitution and other reforms not directly related to participatory or substantive rights for victims. *Id.*

statutes addressing victims' rights and thirty-three states had constitutional amendments.[8] However, despite the legislative successes of the reform movement, even this robust level of legislative activity brought little real reform to the culture of the criminal justice system in the way it treated victims of crimes.[9] By the mid-1990s the unjust treatment of victims persisted. The nature of that injustice continued to be both procedural and substantive. In too many cases across America, victims were still not given notice of court proceedings, still not allowed to be present in the courtroom during trial, still not given a voice at critical stages, still not free from unreasonable delay, still not receiving restitution, still not having their safety considered when release decisions were made, and still not treated with respect, dignity, or fairness.[10]

In 1996, Senator Jon Kyl (R-AZ) and Senator Dianne Feinstein (D-CA) introduced Senate Joint Resolution 52,[11] a comprehensive constitutional amendment for victims' rights. From 1996 through 2004, hearings were held in the Senate and House to consider the proposals.[12] While there has always been strong majority support for the amendment, there has also been strong minority opposition. Given the Constitution's command that amendments can only be referred to the States upon a two-thirds vote of both houses,[13] the minority has always

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[8] *See State Victim Rights Amendments*, NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (follow "state vras" hyperlink on left side of page) (last visited Mar. 21, 2012) (providing a map of states with amendments and the dates of their enactment).

[9] *See* S. REP. NO. 108-191 (2003) (providing a more complete assessment of this conclusion); *see also* OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 9-12 (1998) (repeating the call for a federal constitutional amendment during President Clinton's second term).

[10] OFFICE FOR VICTIMS OF CRIME, *supra* note 9, at 11-22.

[11] *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, 589-90 (2005) (providing a more complete history of the congressional consideration of the federal amendment).

[12] S. REP. NO. 108-191, at 2-6 (outlining the legislative history of previous proposals for a victims' rights federal amendment).

[13] U.S. CONST. art. V.

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be

been sufficient to stop the passage. The purpose of this article is to set forth in short hand form the major arguments against passage of the Victims' Rights Amendment ("VRA") and to offer responses to those arguments. Perhaps the best articulation of the minority view is found in the views of Senators Leahy, Kennedy, Kohl, Feingold, Schumer, and Durbin (collectively "Minority Senators") found in the 2003 Senate Report.[14]

Essentially, the arguments against passage fall into four categories: first, the U.S. Constitution does not have to be amended to provide rights for crime victims, statutes and state constitutions are adequate, and where the constitution need not be amended it should not be amended; second, the rights proposed will diminish the more important rights of the accused; third, the VRA will infringe on the rights of the States; and fourth, many of the individual rights are problematic. Let us take each of these in turn.

II. POINT AGAINST THE AMENDMENT: RIGHTS FOR VICTIMS DO NOT NEED TO BE INCLUDED IN THE U.S. CONSTITUTION; FEDERAL AND STATE STATUTES AND STATE CONSTITUTIONS ARE ADEQUATE[15]

As the Task Force conceded, proposing an amendment to the U.S. Constitution should not be done lightly.[16] Yet there is something compelling about the notion of basic fairness for crime victims. Even the VRA's most ardent critics usually say they support most of the rights in principle.[17] If there is one thing certain in the victims' rights debate, it is that these words, 'I'm all for victims' rights but . . .,' are heard repeatedly. But while supporting the rights in principle,

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> valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several states . . . .

Id.

[14] S. REP. NO. 108-191, at 56-110.

[15] The points and counterpoints in this Part are adapted and expanded upon from previous Senate hearings, regarding previous proposals for a federal constitutional VRA. *See Victim's Rights Amendment: Hearing on H.J. Res. 91 Before the Comm. on the Judiciary*, 107th Cong. 10-11 (2002) (statement of Steven J. Twist, Steering Committee for the National Victims' Rights Constitutional Amendment Network); *see also* Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369 (1999).

[16] *See supra* note 2 and accompanying text.

[17] S. REP. NO. 108-191, at 56 ("The treatment of crime victims certainly is of central importance to a civilized society. The question is not whether we should help victims, but how.").

opponents in practice end up supporting, if anything, mere statutory fixes that have proven inadequate to the task of vindicating the interests of victims.

As Attorney General Reno testified before the Committee on the Judiciary, "[e]fforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate."[18] The Crime Victims' Rights Act[19] ("CVRA"), after almost eight years of being tested in the courts, has proven inadequate to change the culture of our justice system in ways that make it fairer for all Americans.

In many states, statutes have proven inadequate to change the justice system. Despite its successes, Arizona's state constitutional amendment has proven inadequate to fully implement victims' rights. While the state's amendment has improved the treatment of victims, it does not provide the unequivocal command that is needed to completely change old ways. In Arizona, as in other states, the existing rights too often "fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia or the mere mention of an accused's rights—even when those rights are not genuinely threatened."[20]

A study by the National Institute of Justice found that "even in States where victims' rights were protected strongly by law, many victims were not notified about key hearings and proceedings, many were not given the opportunity to be heard, and few received restitution."[21] The victims most likely to be affected by this continuing haphazard implementation are, perhaps not surprisingly, racial minorities.[22] These problems persist today. In Arizona, most crime victims still are not given notice of initial appearances, despite the fact that for some the chance

[18] S. REP. NO. 108-191, at 12.
[19] 18 U.S.C. § 3771 (2006).
[20] Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.
[21] Dean G. Kilpatrick et al., *The Rights of Crime Victims—Does Legal Protection Make a Difference?*, NAT'L INST. JUST., Dec. 1998, at 1, 10, *available at* https://www.ncjrs.gov/pdffiles/173839.pdf.
[22] *See id.* at 1, 7.

to see a judge before a release decision is made may be a matter of life or death. This is true even though the right to notice has been a command of the Arizona Constitution for almost twenty-two years.[23]

To answer the question, whether the VRA should be added as a constitutional amendment, it is useful to turn to an organization calling itself Citizens for the Constitution ("the Citizens"), which formed under the auspices of The Century Foundation's Constitution Project.[24] Their purpose is to call for restraint in the consideration of amendments to the U.S. Constitution.[25] The group has propounded eight guidelines which, they argue, should be satisfied before any constitutional amendment would be justified.[26]

Indeed, the Citizens raise some questions, in the commentary following their guidelines, about the VRA itself.[27] Application of these rigorous guidelines, however, despite the reservations of the Citizens themselves, demonstrates the strength of the case for why the rights proposed need to be adopted as an amendment to the U.S. Constitution.

A. The Proposed Eight Guidelines for Constitutional Amendments, Per the Citizens

What follows is a discussion of each of the eight guidelines proposed by the Citizens.

1. "Does the proposed amendment address matters that are of more than immediate concern and that are likely to be recognized as of abiding importance by subsequent generations?"[28]

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[23] ARIZ. CONST. art. II, §2.1(A) ("To preserve and protect victims' rights to justice and due process, a victim of crime has a right: 1. *To be treated with fairness*, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process. 2. *To be informed, upon request, when the accused* or convicted person *is released from custody* or has escaped. 3. *To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.* 4. *To be heard at any proceeding involving a post-arrest release decision*, a negotiated plea, and sentencing." (emphasis added)).

[24] CITIZENS FOR THE CONSTITUTION, GREAT AND EXTRAORDINARY OCCASIONS: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE viii (1999); *see About the Century Foundation*, CENTURY FOUND., http://tcf.org/about (last visited March 21, 2012). The Century Foundation, founded in 1919, calls itself a "progressive non-partisan think tank." *Id.*

[25] *See* CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 3-6.

[26] *See id.* at 7.

[27] *See id.* at 13.

[28] *Id.* at 7.

Answer: Yes.

Even as the constitutional rights of persons accused or convicted of crimes address issues of abiding importance, so too do the proposed rights of crime victims. Indeed, the Minority Senators concede the point, stating "[t]he treatment of crime victims certainly is of central importance to a civilized society."[29] Surely something of "central importance to a civilized society" is of "abiding importance."[30]

The legitimate rights of the accused to notice, the right to be present, the right to be heard or remain silent, the right to a speedy and public trial, or any of the other constitutional rights of the accused are surely of abiding importance.[31] But the rights of the accused are no more enduring than the legitimate interests of the victim to notice, presence, the right to be heard, or any of the other rights proposed by the VRA.

Indeed, it is precisely because these values for victims are of enduring, or *abiding* importance that they must be protected against erosion by any branch or by majoritarian will. That they do not exist today broadly across the country is evidence that they are not adequately protected despite general acceptance of their merit.

Two leading constitutional law scholars reached similar conclusions:

> [The proposed VRA] would protect basic rights of crime victims, including their rights to be notified of and present at all proceedings in their case and to be heard at appropriate stages in the process. 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.*[32]

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[29] S. REP. NO. 108-191, at 56 (2003).
[30] *Id.*; CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 7.
[31] *See generally* U.S. CONST.
[32] Tribe & Cassell, *supra* note 20 (emphasis added).

2. "Does the proposed amendment make our system more politically responsive or protect individual rights?"[33]

Answer: Yes.

Clearly the proposed amendment is offered to protect individual rights. That is its sole purpose. The Citizens, however, suggest that "Congress should ask whether crime victims are a 'discreet and insular minority' requiring constitutional protection against overreaching majorities or whether they can be protected through ordinary political means. Congress should also ask whether it is appropriate to create rights for them that are virtually immune from future revision."[34] Let us review these two questions.

"[O]rdinary political means"[35] have proven wholly inadequate to establish and protect the rights reviewed above. If this were not so, the rights would exist and be respected in every state and throughout the federal government. The evidence that the rights are not in existence is as compelling as it is overwhelming. From every state, we continue to see stories of victims who are denied notice, the right to be present, the right to be heard, the right to timely proceedings, the right to have their safety considered, the right to restitution, and the right to standing. Why is this so? Are crime victims unpopular? No, but as a class they are ignored; their interests subordinated to the interests of the defendant and the professionals in the system. And those interests are entrenched as deeply as any in this society. Crime victims become a "discreet and insular minority"[36] by virtue of their transparency in a justice system that has come to be characterized as a contest wholly between the state and the defendant.[37]

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[33] CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 7.
[34] *Id.* at 13.
[35] *Id.*
[36] *Id.*
[37] The role of the victim in the criminal justice system has been relegated to that of mere evidence. *See* Linda R. S. v. Richard D., 410 U.S. 614, 619 (1973) ("[I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

With respect to the second question, it is precisely because establishing rights for crime victims is a matter of "central importance to a civilized society"[38] that they must be established in a manner that keeps them immune from the shifts of majoritarian whim or an indifference that is not compatible with deference accorded to constitutional rights. For the same reasons that we preserve the rights of defendants from political revision, we must do the same for their victims.

> 3. "Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?"[39]
>
> Answer: Yes.
>
> The Citizens write:
>
> > The proposed victims' rights amendment raises troubling questions under this Guideline. Witnesses testifying in Congress on behalf of the federal amendment point to the success of state amendments as reason to enact a federal counterpart. But the passage of the state amendments arguably cuts just the other way: for the most part, states are capable of changing their own law of criminal procedure in order to accommodate crime victims, without the necessity of federal constitutional intervention. While state amendments cannot affect victims' rights in federal courts, Congress has considerable power to furnish such protections through ordinary legislation. Indeed, it did so in March 1997 with Public Law 105-6, which allowed the victims of the Oklahoma City bombing to attend trial proceedings.[40]

Steve Twist was one of those witnesses to whom the Citizens referred. They should have read the complete testimony. No witness before Congress said the U.S. Constitution should be amended to add victims' rights because the state amendments were working so well. Let us repeat again one of the Twist statements:

> In my state, the statutes were inadequate to change the justice system. And now, despite its successes, we realize that our state constitutional amendment will also prove inadequate to fully implement victims' rights. While the amendment has improved the treatment of victims, it does not provide the unequivocal command that is needed to completely change old ways. In our state, as in others, the existing rights too often "fail to provide meaningful protection whenever they

[38] S. REP. NO. 108-191, at 56 (2003).
[39] CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 7.
[40] *Id.* at 15-16 (citation omitted).

> come into conflict with bureaucratic habit, traditional indifference, sheer inertia or the mere mention of an accused's rights—even when those rights are not genuinely threatened."[41]

Moreover, our courts have now made explicit in a series of cases what was always understood: that the U.S. Constitutional rights of the defendant will always trump any right of the victim without any fair attempt to balance the rights of both.[42]

On the Oklahoma City bombing point that the Citizens make, they should have read the whole testimony of Professor Paul Cassell, who convincingly demonstrates how the statute cited by the Citizens was inadequate to the task of fully protecting even these high profile and compelling victims.[43] The law did not work for them. How much less must it work for victims who do not have the clout to get an act of Congress passed? Those "other means," to use the Citizens phrase,[44] have simply proven inadequate, as has been concurred in by a broad consensus that included past Justice Departments under bi-partisan leadership, constitutional scholars of the highest regard from both ends of the political spectrum, Presidents George H. W. Bush, William J. Clinton, and George W. Bush, the platforms of both major political parties, a bi-partisan coalition of Members of Congress and Senators, and crime victim advocates throughout our country.

> 4. "Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves intact?"[45]

Answer: Yes.

The proposed rights[46] are perfectly consistent with the constitutional doctrine that fundamental rights for citizens in our justice system need the protection of our fundamental law.

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[41] S. REP. NO. 106-254, at 16 (2000) (quoting Tribe & Cassell, *supra* note 20).
[42] *See generally* State *ex rel.* Romley v. Superior Court (*Wilkinson*), 891 P.2d 246 (Ariz. Ct. App. 1995).
[43] S. REP. NO. 108-191, at 23-25; CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 16.
[44] CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 14-17.
[45] *Id.* at 7.

The Constitution was established "in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty."[47] The proposed VRA directly relates to establishing "Justice," insuring "domestic Tranquility," promoting "the general Welfare," and securing "the Blessings of Liberty."[48] Each of these goals is furthered by the establishment of participatory and substantive rights for crime victims. The constitutions of several states now recognize victims' rights as matters of justice.[49] It is a long-acknowledged view that creating a justice system, which treats victims with fairness, promotes domestic tranquility by promoting the reporting of offenses to authorities rather than encouraging victims to rely on private vengeance.[50] Surely, it will be conceded that promoting justice and fairness for victims of crime also promotes the general welfare. Moreover, the VRA directly secures the blessings of liberty by limiting the power of the state to adjudicate criminal cases without respect for the victim.

The VRA leaves intact the rights of accused and convicted offenders.[51]

5. "Does the proposed amendment embody enforceable, and not purely aspirational, standards?"[52]

Answer: Yes.

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[46] *See* Proposed VRA, *supra* note 1.
[47] U.S. CONST. pmbl.
[48] *Id.*; *see* Proposed VRA, *supra* note 1.
[49] *See, e.g.*, ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; OR. CONST. art. I, §§ 42-43; S.C. CONST. art. I, § 24; TENN. CONST. art. I, § 35; UTAH CONST. art. I, § 28.
[50] William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 663-65 (1976) ("Therein lies the exquisite irony of modern law. The age-old struggle of civilization has been to persuade people not to take justice into their own hands but rather to let their vengeance and righteous indignation be wrought by the law[,] . . . settling for the more intangible satisfaction of knowing that justice would be done. Now, the modern criminal justice system operates . . . without bothering to give the victim even the minimal satisfaction of knowing what happened to his case and why. . . . However, while pursuing the ideal of impersonal justice, the system has neglected the continuing struggle of all societies to convince their members not to resort to personal vengeance to settle their grievances. Lawfulness in society is increased or diminished to the extent that this struggle is successful." (footnotes omitted)).
[51] *See infra* Part III.
[52] CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 7.

The text of the proposed amendment[53] grants to crime victims constitutional standing to appear before the appropriate court and seek orders protecting and enforcing the established rights. This is the essence of enforceability. This enforcement parallels the defendant's right to seek orders in the criminal case protecting the constitutional and statutory rights of the defendant. For victims, these orders can include the vacating of decisions reached in violations of the victims' rights and ordering that proceedings be re-done.[54]

> 6. "Have proponents of the proposed amendment attempted to think through and articulate the consequences of their proposal, including the ways in which the amendment would interact with other constitutional provisions and principles?"[55]

Answer: Yes.

More than simply think through the proposal, proponents of the VRA have taken over two decades of experience with state statutes and constitutional provisions to develop a very refined understanding of the limits of state and federal law, the need for a federal amendment, and how that amendment would work in actual practice and be interpreted.[56] No other constitutional amendment has had this degree of vetting.

> 7. "Has there been full and fair debate on the merits of the proposed amendment?"[57]

Answer: Yes.

Congress has had the VRA under consideration since 1996.[58] There have been major hearings in both bodies on multiple occasions. The record of debate and discussion throughout the country is extensive.

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[53] Proposed VRA, *supra* note 1.
[54] *See* ARIZ. REV. STAT. ANN. §§ 13-4436, 4437 (Westlaw through 2012 Legis. Sess.); State v. Ariz. Bd. of Pardons & Paroles, 875 P.2d 824, 831 (Ariz. Ct. App. 1993) ("We turn now to the remedy for a violation. If a victim does not receive notice of a post-conviction release hearing to which she was entitled, she may have the results of that hearing set aside and have a new hearing ordered.").
[55] CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 7.
[56] *See* S. REP. NO. 108-191 (2003); S. REP. NO. 106-254 (2000); *see generally* Proposed VRA, *supra* note 1.
[57] CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 7.

> 8. "Has Congress provided for a nonextendable deadline for ratification by the states so as to ensure that there is a contemporaneous consensus by Congress and the states that the proposed amendment is desirable?"[59]
>
> Answer: Yes.

The proposal establishes a definitive fourteen-year deadline for state ratification. The proposed amendment passes each of the tests set forth in the Citizens' Guidelines.[60] More importantly, it is fully faithful to the spirit and design of James Madison.

The Citizens' pamphlet, *Great and Extraordinary Occasions*,[61] takes its name from a line in The Federalist No. 49, authored by James Madison.[62] There Madison rightly argued for restraint in the use of the amendment process.[63] And consistent with the principle of rightful restraint he proposed the first twelve amendments.

B. Constitutional Amendments and the views of James Madison

When James Madison took to the floor and proposed the Bill of Rights during the first session of the First Congress, on June 8, 1789, "[h]is primary objective was to keep the Constitution intact, to save it from the radical amendments others had proposed."[64] In doing so, he acknowledged that many Americans did not yet support the Constitution. As Robert Goldwin has stated, discussing the speech Madison gave to the First Congress and the timing of the proposed amendments:

> Prudence dictates that advocates of the Constitution take steps now to make it "as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them."

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[58] S. REP. NO. 108-191, at 2-6; *see also* Kyl et al., *supra* note 11, at 588-93 (providing a more complete history of the congressional consideration of the federal amendment).
[59] CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 7.
[60] *Id.*
[61] *See generally* CITIZENS FOR THE CONSTITUTION, GREAT AND EXTRAORDINARY OCCASIONS: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE (1999).
[62] THE FEDERALIST NO. 49 (James Madison).
[63] *Id.*
[64] ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 73, 75 (1997).

> The fact is, Madison said, there is still "a great number" of the American people who are dissatisfied and insecure under the new Constitution. So, "if there are amendments desired of such a nature as will not injure the [C]onstitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens," why not, in the spirit of "deference and concession," adopt such amendments?[65]

Madison adopted this tone of "deference and concession" because he realized that the Constitution must be the "will of all of us, not just a majority of us."[66] By adopting a bill of rights, Madison thought, the Constitution would live up to this purpose.[67] He also recognized how the Constitution was the only document, which could likely command this kind of influence over the culture of the country.[68]

The goals of the VRA are perfectly consistent with the goals that animated James Madison. There is substantial evidence that the Constitution today does not serve the interests of the whole people in matters relating to criminal justice. The way to restore balance to the system in a manner that becomes part of our culture is to amend our fundamental law.

"[The Bill of Rights will] have a tendency to impress some degree of respect for [the rights], to establish the public opinion in their favor, and rouse the attention of the whole community . . . . [They] acquire by degrees the character of fundamental maxims . . . as they become incorporated with the national sentiment . . . ."[69] Critics of Madison's proposed amendments claimed they were unnecessary, especially so in the United States, because states had bills of rights.[70] Madison responded, in part, with the observation that "not all the states have bills of rights, and some of those that do have inadequate and even 'absolutely improper'

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[65] *Id.* at 79 (quoting James Madison).
[66] *Id.* at 79, 100.
[67] *Id.* at 101 ("Madison saw that the proposed amendments could make the Constitution universally revered.").
[68] *Id.* at 101 ("A bill of rights added to the intact Constitution would bring to it the only thing it presently lacked—the support of the whole people.").
[69] *Id.* at 92, 99 (quoting James Madison).
[70] *Id.* at 92.

ones."[71] The experience in the victims' rights movement is no different. Not all states have constitutional rights, nor even adequate statutory rights. There are thirty-three state constitutional amendments and they are of varying degrees of value.[72]

Harvard Law School Professor Lawrence Tribe has observed this failure: "[T]here appears to be a considerable body of evidence showing that, even where statutory or regulatory or judge-made rules exist to protect the participatory rights of victims, such rights often tend to be honored in the breach . . . ."[73] As a consequence, Professor Tribe has concluded that crime victims' rights "are the very kinds of rights with which our Constitution is typically and properly concerned."[74]

After years of experience, it is now clear that the only way to make respect for the rights of crime victims "incorporated with the national sentiment," is to make them a part of the "sovereign instrument of the whole people," the Constitution.[75] Just as James Madison would have done.

More than thirty years ago, the Task Force concluded that a federal constitutional amendment was necessary to protect the rights of crime victims.[76] Specifically, the Task Force noted: "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."[77]

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[71] *Id.* at 93 (quoting James Madison).
[72] *See State Victim Rights Amendments*, *supra* note 8.
[73] Laurence H. Tribe, *In Support of a Victims' Rights Constitutional Amendment*, RESPONSIVE COMMUNITY, Winter 1997-98, at 53, 55.
[74] *Id.* at 53-54.
[75] GOLDWIN, *supra* note 64, at 99, 102 (quoting James Madison).
[76] HERRINGTON ET AL., *supra* note 2, at 113-15.
[77] *Id.* at 114.

In fact, the Committee on the Judiciary of the United States Senate concluded that the VRA was consistent with "the great theme of the Bill of Rights—to ensure the rights of citizens against the deprecations and intrusions of government—and to advance the great theme of the later amendments, extending the participatory rights of American citizens in the affairs of government."[78]

Further, the Committee concluded:

> [I]t is appropriate that victims' rights reform take the form of a Federal constitutional amendment. A common thread among many of the previous amendments to the Federal constitution is a desire to expand participatory rights in our democratic institutions. For example, the 15th Amendment was added to ensure African-Americans could participate in the electoral process, the 19th Amendment to do the same for women, and the 26th amendment expanded such rights to young citizens. . . .
>
> Other provisions of the Constitution guarantee the openness of civil institutions and proceedings, including the rights of free speech and assembly, the right to petition the Government for redress of grievances, and perhaps most relevant in this context, the right to a public trial. It is appropriate for this country to act to guarantee rights for victims to participate in proceedings of vital concern to them. These participatory rights serve an important function in a democracy. Open governmental institutions, and the participation of the public, help ensure public confidence in those institutions. In the case of trials, a public trial is intended to preserve confidence in the judicial system, that no defendant is denied a fair and just trial. However, it is no less vital that the public—and victims themselves—have confidence that victims receive a fair trial.[79]

Indeed, the National Governors Association, in a resolution supporting a federal constitutional amendment observed:

> 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.[80]

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[78] S. REP. NO. 108-191, at 2 (2003).
[79] *Id.* at 10-11.
[80] *Id.* at 3-4 (quoting NAT'L GOVERNORS ASS'N, POLICY 23.1(1997)).

Additionally in a letter to Congress restating their support for a VRA, the Attorneys General of forty-eight states, the Virgin Islands, and Washington, D.C. wrote:

> Despite the best intentions of our laws, too often crime victims are still denied basic rights to fair treatment and due process that should be the birthright of every citizen who seeks justice through our courts. We are convinced that statutory protections are not enough; only a federal constitutional amendment will be sufficient to change the culture of our legal system.[81]

Finally, Attorney General Reno, after careful study, reported:

> 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, 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.[82]

Likewise, a comprehensive report prepared by the U.S. Department of Justice during the Clinton Administration and by those active in the field of crime victim rights "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 level.'"[83]

Perhaps those who argue that the VRA need not be put into the U.S. Constitution know more about our Constitution than Professors Tribe and Cassell, every administration since Ronald Reagan, the Department of Justice, a bi-partisan majority of the Senate Judiciary Committee, the National Governor's Association, fifty State Attorneys General, and the mainstream of the victims' movement in the United States. The reasons for such a conclusion are not evident.

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[81] Letter from Nat'l Ass'n of Attorneys Gen. to Jon Kyl & Dianne Feinstein, U.S. Senators (Apr. 15, 2004) (on file with author).
[82] S. REP. NO. 108-191, at 12 (citing *The Victims' Bill of Rights Amendment: Hearing on the Victims' Bill of Rights Amendment Before the Comm. on the Judiciary*, 105th Cong. 64 (1997) (statement of Attorney General Reno)).
[83] *Id.* at 12 (quoting OFFICE FOR VICTIMS OF CRIME, *supra* note 9, at 10).

III. POINT AGAINST THE AMENDMENT: AN AMENDMENT WOULD UNDERMINE THE RIGHTS OF DEFENDANTS

Nothing in the VRA undermines rights of the accused. The rights proposed are clear and straightforward, expressed in language that does not undermine, but rather confirm the constitutional rights of the accused: "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."[84]

This language reaffirms the constitutional rights of the accused. And none of the specific rights which follow the first sentence undermine in any way the constitutional rights of the accused.

> 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 to restitution. The crime victim or the crime victim's lawful representative has standing to fully assert and enforce these rights in any court.[85]

The right to reasonable notice of public proceedings does not undermine in any way the constitutional rights of the accused. There is no constitutional right for a defendant to prevent a victim, or anyone else, from receiving notice of public court proceedings.

The right to reasonable notice of releases or escapes does not undermine in any way the constitutional rights of the accused. There is no constitutional right for a defendant to prevent a victim from knowing when the defendant has escaped or is released.

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[84] Proposed VRA, *supra* note 1.
[85] *Id.*

The right to not be excluded does not undermine in any way the constitutional rights of the accused. There is no constitutional right for a defendant to exclude a victim from trial, even when the victim is also a witness.[86]

The rights to be heard at release, plea, and sentencing proceedings do not undermine in any way the constitutional rights of the accused. While there remain limits regarding relevancy and due process, there is no constitutional right for a defendant to silence completely a victim who wants to be heard at these proceedings.[87]

The right to due consideration for the victim's safety does not undermine in any way the constitutional rights of the accused. There is no constitutional right for a defendant to prevent a court from considering the victim's safety when decisions are made. Indeed, victim safety is a legitimate and, according to the United States Supreme Court, constitutional consideration when making release decisions.[88]

The right to be free from unreasonable delay does not undermine in any way the constitutional rights of the accused. It is undisputed that the defendant has a right to a fair and speedy trial and the right to counsel which, according to the United States Supreme Court, includes the right to an effective lawyer—one who has had enough time to prepare a defense.[89] These rights do not prevent a victim's interest in avoiding *unreasonable* delay, meaning delay that is unrelated to the legitimate rights of the accused or the state.

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[86] *See* State v. Fulminante, 975 P.2d 75, 92 (Ariz. 1999); Stephens v. State, 720 S.W.2d 301, 302-03 (Ark. 1986); Wheeler v. State, 596 A.2d 78, 86-89 (Md. Ct. Spec. App. 1991); *see also The Victims' Bill of Rights Amendment: Hearing on the Victims' Bill of Rights Amendment Before the Comm. on the Judiciary*, 104th Cong. (1996) (statement of Paul G. Cassell, Professor of Law, University of Utah College of Law), *available at* http://www.nvcap.org/cassell2.htm ("In sum, there is no constitutional footing for concluding that, under contemporary constitutional principles, a criminal defendant has a federal constitutional right to exclude victims from trials."); Douglas E. Beloof & Paul G. Cassell, *The Crime Victims Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005) (providing definitive work on this question).

[87] *See* Payne v. Tennessee, 501 U.S. 808 (1991); Lynn v. Reinstein, 68 P.3d 412 (Ariz. 2003), *cert. denied*, 540 U.S. 1141 (2004).

[88] United States v. Salerno, 481 U.S. 739 (1987).

[89] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel.").

The right to due consideration for the victim's safety does not infringe on any right of an accused or convicted offender. A defendant has no constitutional right to deny to a court the ability to consider victim safety when making release, sentencing, or other decisions or to a victim to assert that interest. Indeed, the safety of the public and victim is one of the fundamental purposes of the justice system.[90]

The right to restitution does not undermine in any way the constitutional rights of the accused. There is no constitutional right for a convicted offender to prevent the law from requiring, nor the court from ordering, restitution for the victim.

The right to standing to enforce these rights does not undermine in any way the constitutional rights of the accused. There is no constitutional right for a defendant to prevent a victim from asserting his or her rights in court.

IV. POINT AGAINST THE AMENDMENT: PASSAGE OF THE VRA WOULD INFRINGE ON THE RIGHTS OF THE STATES AND WOULD LEAD TO FEDERAL COURT SUPERVISION OVER THE STATES

While it is certainly healthy to see the commitment the Minority Senators and others have to states' rights, it is odd that it should be addressed so vigorously in the context of criminal procedure. Few areas of the law have been more fully occupied by the federal government than the law of criminal procedure through the U.S. Supreme Court's interpretation of the U.S. Constitution and the incorporation of the Bill of Rights into every State's justice system. Nowhere have the Minority Senators objected to this federalization of state criminal law. Yet, the Minority Senators characterize the amendment as "locking States into an absolutist national

[90] *See* ARIZ. REV. STAT. ANN. §13-101 (Westlaw through 2012 Legis. Sess.) ("It is declared that the public policy of this state and the general purposes of the provisions of this title are: . . . 5. To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized . . . .").

pattern regarding the participation of victims in the criminal justice system."[91] It seems that only the federal constitutional rights of the accused are a more acceptable absolutist national pattern.

A. The Amendment Will Not End Constructive Experimentation by the States

The Minority Senators assert, "State experimentation with victims' rights initiatives is relatively new and untested; the laboratory evidence is as yet inconclusive."[92] The record before the Congress refutes this assertion. The experiment with state laws, even strong state laws, has proven inadequate to fully protect the rights of victims. Even so, the amendment does not end constructive experimentation by the States. Setting a floor of national rights does not mean that States may not add to those rights as they see fit.[93] Nor does it mean that implementation of the rights must be in a uniform manner. For example, in one state notice may be provided by courts, in another state by prosecutors, and in a third state by a different manner altogether. States may vary in how they permit special actions to enforce the rights in state court.

In the end, the objection of the Minority Senators rings hollow. It is factually wrong and bespeaks a double standard in the protection of the rights of defendants and victims that does not befit a country that pledges itself to "justice for all."[94]

B. The Amendment Does Not Impose an Unfunded Mandate on the States

The Minority Senators express the concern that "[w]e need more information from the States about how much it costs to implement these programs, and what sort of resources are needed to be successful before we rush to validate a series of rights that could overwhelm

[91] S. REP. NO. 108-191, at 88 (2003).
[92] *Id.* at 90.
[93] *See, e.g.*, Michigan v. Long, 463 U.S. 1032 (1983) (recognizing that state constitutions can provide independent grounds for extending greater rights); Arizona v. Ault, 724 P.2d 545 (Ariz. 1986) (holding that the Arizona Constitution's right to privacy provision has stronger protection for an accused offender than the U.S. Constitution's Fourth Amendment protections).
[94] 4 U.S.C. § 4 (2006) (providing the "Pledge of Allegiance to the Flag").

the Nation's criminal justice system."[95] The rights proposed are not a *program* but rather in large part limitations on the state from proceeding with a criminal matter without fairness to the victim. The only right with any fiscal consequence is the right to notice and each state will be able to determine how to provide notice, indeed most already claim to do so today. And these costs are already carried by the Crime Victims Fund established by 42 U.S.C. §10601.[96] Rights to be not excluded, to speak, to have safety considered, or to be free from unreasonable delay do not impose additional costs on the system; they may reduce costs in fact by injecting a degree of discipline into the system that it has not had. There is more than enough money collected from criminal defendants across the country to cover the costs.[97]

C. The Amendment Will Not Lead to Extensive Federal Court Supervision of State Law Enforcement Operations

The fear that state sovereignty will be lost is especially curious in the context of criminal procedure given the supremacy of federal law that already pervades the area.[98]

More importantly, the more fundamental purpose of the Constitution is not to enshrine state sovereignty for itself; state sovereignty was merely another means of securing liberty from encroachments of the federal government on the liberty of the people. The purposes of the Constitution include to "secure the Blessings of Liberty."[99] The federal nature of the government formed under the Constitution, the limitation on the power of the federal government, and the checks and balances among the separate branches are all established to protect individual liberty. When the right to liberty is written directly into the Constitution, as in

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[95] S. REP. NO. 108-191, at 92.
[96] 42 U.S.C. § 10601 (2006); *see also VOCA Funding*, NAT'L ASS'N VOCA ASSISTANCE ADMIN., http://www.navaa.org/budget/index.html (last visited Mar. 21, 2012) (providing more information on funding).
[97] *See VOCA Funding*, *supra* note 96.
[98] *See, e.g.*, Klopfer v. North Carolina, 386 U.S. 213 (1967) (establishing that the defendant's right to a speedy trial applies to the States); Malloy v. Hogan, 378 U.S. 1 (1964) (establishing that the privilege against forced self-incrimination applies to the States); Mapp v. Ohio, 367 U.S. 643 (1961) (establishing that the exclusionary rules apply to the States).
[99] U.S. CONST. pmbl.

the case of the VRA, the limitation on the power of the states, in fact, advances liberty. When the courts exercise the power to enforce the rights established by the VRA they will be advancing the cause of liberty and the Constitution.

V. POINT AGAINST THE AMENDMENT: THE INDIVIDUAL RIGHTS PROVIDED TO VICTIMS BY PASSAGE OF THE VRA WILL BE PROBLEMATIC

A. The VRA Would Not Leave Victims Without Adequate Remedies

The proposed VRA has an explicit grant of standing to victims so that they may pursue remedies independent of the government.[100] It is standing that provides the keys to remedies. Experience under the CVRA has demonstrated that victims can pursue and obtain remedies for violations of rights without any disruption in the fair administration of justice.[101]

B. The Obligation Imposed by the VRA to Provide Notice of Proceedings Would Not Impose Enormous Costs on the System

The Minority Senators fear that the right to reasonable notice will lead to staggering costs.[102] It has not. The costs are far from staggering and testimony before the Senate Judiciary Committee confirmed this early on.[103] On May 12, 1997, Rick Romley, then Maricopa County Attorney, offered the following prepared statement for the Senate Judiciary Committee:

> During the victims' rights debate, detractors argued that such an amendment would be cost prohibitive. They predicted that such rights would bankrupt our criminal justice system. While I agree that there are costs associated with victims' rights services, those costs are minor when balanced with the benefit to our state. The citizens of Arizona voiced their opinion—affording victims' constitutional guarantees to participation is worth the expense.
>
> My Office provides victims [sic] rights services to over 19,000 victims of felonies perpetrated by adult offenders and over 10,000 victims of juvenile delinquents. Victim Advocates provide victims' rights notification and services to help victims navigate their way through what can be an intimidating process.

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[100] *See* Proposed VRA, *supra* note 1.

[101] *See* Kenna v. U.S. Dist. Court, 435 F.3d 1011 (9th Cir. 2006) (granting the victim's petition for writ of mandamus and finding the district court erred in denying the victims the right to be heard at the sentencing proceeding).

[102] S. REP. NO. 108-191, at 80 (2003).

[103] *Constitutional Amendment to Protect the Rights of Crime Victims: Hearing on S.J. Res. 6 Before the Comm. on the Judiciary*, 105th Cong. (1997) (statement of Richard M. Romley, Maricopa County Attorney).

> The costs associated with these services account for no more than 3% of my entire budget. Costs associated with victims' rights services are far less than those associated with ensuring that those accused of crime are afforded their constitutional rights.
>
> To enhance the ability of criminal justice entities to provide victims' rights services, the Arizona legislature adopted a funding measure to offset these costs. Every offender who has been ordered to pay a fine must pay an additional surcharge, a percentage of which is dedicated to funding victims' rights services. As a result, more than two-thirds of the costs my Office incurs as a result of providing victims' rights services are offset by monies paid by convicted offenders.[104]

Congress enacted the CVRA in 2004.[105] The CVRA provides, *inter alia*, that crime victims have "[t]he right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused."[106] In the seven and one half years since the enactment of this provision of the CVRA, the U.S. Department of Justice has not once complained to Congress that it cannot meet the requirements of providing notice. Notice is routinely provided to victims in federal cases. Notice continues to be provided in large local jurisdictions like Maricopa County, Arizona without complication. Moreover, with technological advances, the costs continue to reduce. The VRA establishes the right to *reasonable* notice. This permits the use of alternative means of notice in mass victim cases, rendering cost issues inconsequential.[107]

Despite the fact that the cost argument has been shown to be a red herring, there is a deeper, more significant point to be made about the nature of this argument in opposition

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[104] *Id.*

[105] Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified at 18 U.S.C. § 3771 (2009)). The Act is commonly referred to as the Crime Victims' Rights Act ("CVRA"), but the full title is the *Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, Nila Lynn Crime Victims Rights Act* named in honor of the murdered loved ones of leaders in the national victims' rights movement. *See id.* Statements of these leaders are also included in this volume. 5 PHOENIX L. REV. (forthcoming April 2012).

[106] 18 U.S.C. § 3771(a)(2) (2009).

[107] The CVRA itself helps define the standard of reasonableness that can be applied. "In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings." *Id.* § 3771(d)(2) (2009).

because it portrays a telling approach to the entire debate. Would costs stop the opponents of the VRA from defending notice for defendants, or the state? Why should victims be excluded from this basic element of fairness? There is an element of second-class citizenship that underlies the role the opponents want to maintain for crime victims. Defendants and the government are surely entitled to notice, but crime victims are not. Surely, in America we are a great enough, decent enough, and compassionate enough country to extend to victims of crime the same notice we give to defendants and the government. Critics, however, say otherwise.

Critics of the VRA may inexplicably argue that just as the court's interpretation of the Sixth Amendment has lead to a vast increase of cost to the criminal justice system by requiring publicly funded defenders, the same issue of requiring publicly funded victim's attorneys could happen. However, the Sixth Amendment comparison offered by opponents is flawed; clearly there is no parallel 'right to counsel' expressly written into the proposed amendment.[108] Additionally, under the VRA no sheriff would be required to transport an inmate victim to court because the right not to be excluded only applies when victims can otherwise present themselves at the courthouse.[109]

C. The VRA Would Not Impair the Ability of Prosecutors to Prosecute; It Will Not Effectively Obstruct Plea Agreements Nor Require Prosecutors to Disclose Weaknesses in Their Case to Persuade a Court to Accept a Plea

The National District Attorneys Association was a strong supporter of S.J. Res. 1,[110] the amendment considered in 2003 and 2004.[111] In 2004, the Attorneys General of forty-eight states, the Virgin Islands, and Washington, D.C. signed a letter supporting S.J. Res. 1.[112] It is unlikely

[108] *See* Proposed VRA, *supra* note 1.
[109] *See id.*
[110] Letter from Nat'l Ass'n of Attorneys Gen. to Jon Kyl & Dianne Feinstein, *supra* note 81.
[111] *See generally Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 1 Before the Comm. on the Judiciary*, 108th Cong. (2003).
[112] Letter from Nat'l Ass'n of Attorneys Gen. to Jon Kyl & Dianne Feinstein, *supra* note 81.

that these prosecutors would support a constitutional amendment if it would impair their ability to prosecute cases.

History confirms good reason for their lack of concern on this point. In the over two decades since the passage of the Victims Bill of Rights ("VBR") in Arizona[113] the right to be heard at a proceeding involving a plea[114] has not obstructed plea agreements. Indeed, roughly the same percentage of cases is today resolved by plea as was resolved by plea before the VBR was passed.[115] Even in those cases involving a failure to inform the victim of the plea, the subsequent proceedings to assert the right of the victim does not impair the process.

The VBR has not required a disclosure to the defense of weaknesses in the government's cases. Pleas are submitted based on an agreed factual basis, which must establish the elements of the offense to which the defendant pleads guilty. The way victim allocution has worked in real practice has not confirmed the fears of opponents.

No language in the VRA would allow a victim to "compromise prosecutorial discretion and independence" to "effectively dictate policy decisions," to place "unknowing, and unacceptable, restrictions on prosecutors" or to "override the professional judgment of the prosecutor" regarding investigation, timing, disposition, or sentencing.[116] These assertions by the Minority Senators are all the more remarkable given their claim to support comprehensive statutory rights.

The VRA gives victims the right to be heard at a public plea proceeding;[117] it is a right simply to a voice, not a veto, not an override, nor the power to dictate, as the opponents assert.

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[113] Proposition 104, 1990 Leg., 39th Sess. (Ariz. 1990). The proposition became effective November 26, 1990, upon adoption of the official canvass. *Id.*

[114] ARIZ. CONST. art. II, § 2.1 (A)(4). The victim has the right "[t]o be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing." *Id.*

[115] Interview with Hon. Bill Montgomery, Maricopa County Attorney, in Phoenix, Ariz. (Jan. 7, 2011).

[116] S. REP. NO. 108-191, at 74 (2003).

[117] Proposed VRA, *supra* note 1.

From this simple right, opponents project "dangerous" consequences.[118] In the real world, no such consequences unfold. That a judge has the discretion to reject a plea when he or she determines it not to be in the best interests of justice and that a judge may exercise that discretion after hearing from the victim of the crime, does not undermine in any way the prosecutor's authority, any more than when a defendant speaks at a plea proceeding.

Merely giving victims a voice hardly gives victims the power or the right to "obstruct plea proceedings," as opponents assert.[119] No prosecutor could ever be "forc[ed]," as asserted by the Minority Senators, "to disclose investigative strategies or weaknesses in their case" under the amendment.[120] Fearful concerns to the contrary notwithstanding, the real life experience in Arizona, with more than two decades of history and the actual experience of literally hundreds of thousands of cases, confirms no threat to prosecution. At some point the fears of hypothesis must yield to reality. No hands are tied by extending this simple voice to crime victims.

Nor should the Federal Civil Rights laws concern prosecutors. Congress has the power to define the scope of any such remedy and civil rights action will lie for a prosecutor's unpopular choice. Indeed, under Arizona law, a victim may file an action for damages against those who intentionally, knowingly, or grossly violate the rights of a victim.[121] No such action has been filed in the twenty-one years the law has been on the books.

The Minority Senators posit a world in which prosecutors are regularly pitted against victims. Nothing could be further from the truth. In the real world, prosecutors are not threatened by a victim's voice, and victims understand that prosecutors are their champions. Prosecutors do not represent victims in a criminal case as a lawyer represents a client, and the

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[118] *See* S. REP. NO. 108-191, at 110.
[119] *Id.* at 74.
[120] *Id.*
[121] ARIZ. REV. STAT. ANN. § 13-4437 (Westlaw through 2012 Legis. Sess.).

suggestion from the Minority Senators that a conflict between the victim and the prosecutor would require prosecutors "to recuse themselves from the case" is unfounded.[122] Victims do not see collateral civil litigation against prosecutors as a meaningful way to enforce rights in a criminal case for good reason: it would never work.[123]

Nothing in the amendment could possibly be construed to "[force] prosecutors to try cases before they are fully prepared."[124] The right to avoid unreasonable delay carries with it no power to *force* cases to trial prematurely; indeed, such a result itself would be inherently unreasonable.

D. Giving Victims Rights at the Accusatory Stage of Criminal Proceedings Does Not Undercut the Presumption of Innocence

The Minority Senators asserted that "the proposed amendment would undercut . . . the presumption of innocence."[125] This was a display of rhetorical exuberance that must now embarrass its author. The presumption of innocence remains robust and inviolate in Arizona and other jurisdictions whose victims of crime are afforded participatory rights, albeit inadequately. The presumption of innocence fundamentally places on the government the burden to prove beyond a reasonable doubt each element of the offense charged.[126] It does not require that the

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[122] S. REP. NO. 108-191, at 76; *see* Berger v. United States, 295 U.S. 78, 88, (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."); State *ex rel.* Romley v. Superior Court (*Wilkinson*), 891 P.2d 246, 250 (Ariz. Ct. App. 1995) ("Given this unique role of a prosecutor in a criminal action, we hold that the prosecutor does not 'represent' the victim as a 'client' in a way that runs afoul of the Rules of Professional Conduct. The prosecutor has no incentive to induce the victim in this case to 'please' the prosecutor in a way that would prejudice defendants' rights to a fair trial. We will not presume that the prosecutor will seek defendants' convictions at all costs, when his duty is to see that justice is done on behalf of both the victim and the defendants.").

[123] *See* Kilpatrick et al., *supra* note 21 ("Even when criminal justice officials know what the law requires of them, they may not have the means to carry out their duties. Victims' rights can be ensured only if resources are sufficient, and resource limitations were cited by officials as the most common reason for being unable to fulfill their duties under the law.").

[124] *See* S. REP. NO. 108-191, at 78.

[125] *Id.* at 83.

[126] *See In re* Winship, 397 U.S. 358, 363-644 (1970).

defendant remain at large pending the outcome of the trial.[127] It does not mean that the government may not be heard on matters of release, or other issues directly affecting the liberty interests of the defendant.[128] Indeed, as the Minority Senators concede, the Supreme Court has established that no provision of the Constitution prohibits courts from considering the safety of the victim in making pretrial detention decisions.[129] It would be odd indeed to conclude that the Bill of Rights could be read to allow consideration of the victim's safety but silence the very voice which expresses the need for that safety.

The example provided by the Minority Senators of an assault defendant who claims self-defense is unpersuasive.[130] The Minority Senators would continue a system in which the defendant may be present and speak and the government may be present and speak, but where only the victim may do neither.

The Minority Senators show a disappointing disregard for the safety of victims that itself demonstrates the need for the VRA. They write, "[w]hile society certainly has an interest in preserving the safety of the victim, this fact alone cannot be said to overcome a defendant's liberty interest as afforded to him under the due process and excessive bail clauses."[131] Where to begin? First, while the statement displays a somewhat grudging acceptance of society's interest in the safety of the victim, it ignores altogether the victim's interest in the safety of the victim. This is precisely the kind of indifference to the plight of the victim that the amendment

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[127] *See* Carbo v. United States, 82 S. Ct. 662 (1962) (Douglas, J., as Circuit Judge, stating that bail may be denied if granting bail would jeopardize the safety of the community); Stack v. Boyle, 342 U.S. 1, 5 (1951) (holding that bail may be denied if the accused poses a substantial flight risk; "[T]he fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.").

[128] Albright v. Oliver, 510 U.S. 266, 278 (1994) ("A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command . . . [and to] seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction."); United States v. Salerno, 481 U.S. 739, 748 (1987) ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest.").

[129] *See* S. REP. NO. 108-191, at 57.

[130] *See id.* at 83-84.

[131] *Id.* at 84.

addresses. Second, according to the Supreme Court, the "interest in preserving the safety of the victim"[132] does overcome a defendant's liberty interest when pre-trial detention is necessary to protect the victim or the community.[133] The failure of the Minority Senators to recognize the centrality of the need to protect the victim is evidence of the cultural divide that crime victims face and is a compelling argument for the amendment.

E. The Right for a Victim to Not Be Excluded Would Not Interfere with the Accused's Right to a Fair Trial

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."[134] Professor Cassell's analysis confirms the conclusion that, if anything, the text of the Constitution provides support for the victim's attendance:

> Instead, there are three provisions that support, if anything, the opposite view that a victim of a crime should remain in the courtroom: the Sixth Amendment's guarantee of a "public" trial, not a private one; the Sixth Amendment's guarantee of a right to "confront" witnesses, not to exclude them; and the Fifth and Fourteenth Amendments' guarantee of "due process of law," which construed in light of historical and contemporary standards suggests victims can attend trials.[135]

The Minority Senators oppose the victim's right to be in the courtroom, speculating that victims will lie to conform their testimony to that of other witnesses.[136] The Minority Senators assert that "sequestration rules . . . are in effect in every jurisdiction in the country."[137] As applied to crime victims, this statement is untrue. Arizona and other states allow victims to be

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[132] *Id.*
[133] *Salerno*, 481 U.S. 739.
[134] Gannett Co. v. DePasquale, 443 U.S. 368, 428 (1979) (Blackmun, J., concurring in part and dissenting in part).
[135] *The Victims' Bill of Rights Amendment: Hearing on the Victims' Bill of Rights Amendment Before the Comm. on the Judiciary*, 104th Cong. (1996) (statement of Paul G. Cassell, Professor of Law, University of Utah College of Law), *available at* http://www.nvcap.org/cassell2.htm (footnote omitted).
[136] S. REP. NO. 108-191, at 77.
[137] *Id.*

present throughout trial: in Alabama, crime victims even sit at counsel table.[138] Exceptions are made to the sequestration rule for important reasons, for the defendant, and for the government's chief investigator. No rule excludes parties in civil cases, who are also witnesses, and we surely value truth no less in civil cases.

Moreover, the Minority Senators' concern about victims lying is unproven speculation. And, there is no need to speculate; there are States that have not applied the sequestration rule to victims for decades without evidence of resulting perjury.

Common sense is enough to conclude why the exception does not create the evils predicted by the Minority Senators. First, it is perjury and the victim might go to prison. Second, changing a statement subjects the victim to devastating cross examination because of prior inconsistent statements, all of which would have been recorded and made available to the defendant. Third, it would undermine the victim's true goal, which is to see the guilty punished, not the innocent. While a guilty defendant may have a self-interested motive to lie to escape justice, a victim has no similar self-interested motive to see an innocent person convicted while the guilty offender remains at large.

Perhaps these are the reasons why, in twenty-one years, no tailored testimony has been found in Arizona, nor is there any evidence from the real world of a jury discrediting or discounting a victim's testimony as the Minority Senators speculate.[139] The Minority Senators surely know this experience from Arizona. Where their speculative theory conflicts with hard facts, the Minority Senators seem to choose theory every time.

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[138] *See* Crowe v. State, 485 So. 2d 351, 363 (Ala. Crim. App. 1984), *rev'd sub nom. Ex rel.* Crowe, 485 So. 2d 373 (Ala. 1985) ("Alabama Code § 15–14–53 (1975), provides that '[t]he victim of a criminal offense shall be entitled to be present in any court exercising any jurisdiction over such offense and therein to be seated at the counsel table of any prosecutor prosecuting such offense or other attorney representing the government or other persons in whose name such prosecution is brought.'").

[139] *See* S. REP. NO. 108-191, at 77-78.

The VRA protects a victim's right not to be excluded from "public proceedings."[140] It leaves untouched the law that defines when proceedings may be closed.[141] As was stated in the Committee Report:

> Victims' rights under this provision are also limited to "public" proceedings. Some proceedings, such as grand jury investigations, are not open to the public and accordingly would not be open to the victim. Other proceedings, while generally open, may be closed in some circumstances. For example, while plea proceedings are generally open to the public, a court might decide to close a proceeding in which an organized crime underling would plead guilty and agree to testify against his bosses. See 28 C.F.R. 50.9. Another example is provided by certain national security cases in which access to some proceedings can be restricted. See The Classified Information Procedures Act, 18 U.S.C. app. 3. A victim would have no special right to attend. The amendment works no change in the standards for closing hearings, but rather simply recognizes that such nonpublic hearings take place.[142]

The Minority Senators challenge the application of section 50.9, yet their hypothetical of the pleading mob soldier fits squarely within the four corners of the rule.[143] The rule permits the government to seek closure when, among other standards, there is "[a] substantial likelihood of imminent danger to the safety of parties, witnesses, or other persons; or . . . [a] substantial likelihood that ongoing investigations will be seriously jeopardized."[144] These are the very circumstances the Minority Senators posit.

F. The Right for a Victim to Be Heard Would Not Interfere with the Accused's Right to Due Process

By advocating that the victim's right to be reasonably heard would "risk[] the denial of defendants' due process rights," the Minority Senators defend a system in which the defendant may make a sentencing recommendation to the jury, the defendant's family and friends may do

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[140] Proposed VRA, *supra* note 1.
[141] *See id.*
[142] S. REP. NO. 108-191, at 34.
[143] *Id.* at 76 & n.67.
[144] 28 C.F.R. § 50.9(c)(6)(ii)-(iii) (1998).

so, the defendant's lawyer may do so, and the prosecutor may do so, but the victim *may not*.[145] With this argument, the Minority Senators misconstrue the Due Process Clause[146] and display an all-too-common callous disregard toward victims' rights.

As evidence for their position, the Minority Senators cite a singular case, in which the victim in a capital case seeks to make a sentencing recommendation to the jury, emphasizing that sentencing decisions need to be reached "without fear, favor, or sympathy."[147] It seems impossible to ignore the irony of that concern, especially regarding sympathy, considering the Minority Senators appear to accept a system that condones repeated pleas for sympathy for the defendant, but would deny victims the right to make, without undue prejudice, a simple statement as to the victim's desired sentence. This double standard of justice is another reason for the VRA.

The Minority Senators' argument is far from novel and has in fact been refuted by their own voting records, the courts, and by modern statutes. For instance, Professor Paul Cassell has already provided a response to the notion that giving victims a right to be heard at a few critical stages somehow undermines the Bill of Rights:

> 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." 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. 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

[145] S. REP. NO. 108-191, at 84-85.
[146] U.S. CONST. art. V.
[147] S. REP. NO. 108-191, at 86 n.87.

> conditional release from custody, an acceptance of a negotiated plea, or a sentence." At these three kinds of hearings—bail, plea, and sentencing—victims have compelling reasons to be heard and can be heard without adversely affecting 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 system precisely the same rights. 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." In defending their bill, they saw no difficulty in giving victims a chance to be heard, a right that already exists in many states.[148]

Another common argument used to support the Minority Senators' assertion is that victims' participation at sentencing, specifically victim impact statements, somehow results in unequal justice for varying defendants. Again, Professor Cassell examined this argument and provided a rebuttal and analysis supported by the courts:

> 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." This kind of difference, however, is hardly unique to victim impact evidence. To provide one obvious example, current rulings from the Court invite defense mitigation evidence from a defendant's family and friends, despite the fact the 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." In another case, a defendant introduced evidence of having won a dance choreography award while in prison. 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; 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."

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[148] Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 486-87 (1999) (citations omitted).

> 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. Victims and the public generally perceive great unfairness in a sentencing system with "one side muted." 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."[149]

Fortunately, the majority of jurisdictions in the United States now admit victim impact statements in all cases. Regardless, in spite of their own votes to the contrary, the Supreme Court ruling to the contrary, and the majority of states creating laws to the contrary, the Minority Senators still believed that the defendant's due process rights could be impacted by allowing victims to be heard. Their disregard for these facts, as well as, the evidence of the negative emotional impact on victims who are denied the ability to speak, demonstrates the need to make victims' rights a part of the "sovereign instrument of the whole people."[150] If not, victims in the United States will never enjoy the true balance Justice Cardozo described in his statement: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[151]

G. A Victim's Right to Expedite Trial Proceedings Would Not Undermine the Accused's Sixth Amendment Right

The Minority Senators assert that the language of the VRA, giving victims the right to be free from unreasonable delay,[152] will result in defendants being forced to trial before they are prepared, thus undermining basic Sixth Amendment protections. This is simply unfounded, as any fair reader of the actual proposed text will conclude. The amendment speaks of

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[149] *Id.* at 494-95 (citations omitted).
[150] GOLDWIN, *supra* note 64, at 102.
[151] Snyder v. Massachusetts, 291 U.S. 97, 122 (1934), *overruled in part by* Malloy v. Hogan 378 U.S. 1 (1964).
[152] Proposed VRA, *supra* note 1.

unreasonable delay, not any delay. It requires due consideration, not submission to the will of the victim. What is it that the Minority Senators can fear from this measured, balanced language, other than any fairness for victims? What the amendment will do, and why it is more than "hortatory" as the Minority Senators simultaneously suggest,[153] is give victims a voice in the matter of trial scheduling and continuances. This voice will simply permit a fuller consideration of all the interests at stake when scheduling decisions are made. Today, victims' interests are routinely ignored in these matters.

Professor Cassell offered in his 1999 prepared statement a rebuttal to this objection:

> Opponents of the Amendment sometimes argue that giving victims a right "to consideration" of their interest "that any trial be free from unreasonable delay" would impinge on a defendant's right to prepare an adequate defense. For example, the dissenting Senators in the Judiciary Committee argued 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." Similarly Professor Mosteller advances the claim that this right "also affects substantial interests of the defendant and may alter the outcomes of cases."
>
> These arguments fail to adequately 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." The opponents never discuss 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. The victim's right, moreover, is to "consideration" of victims' interests. The proponents of the Amendment could not have been clearer about the intent to allow legitimate defense continuances. As this 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.
>
> 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

[153] S. REP. NO. 108-191, at 87 (2003).

> rather than actual preparation of the defense of a case. Abusive delays appear to be particularly common when the victims of the crime is [sic] a child, for whom each day without the case resolved can seem like an eternity. Such cases present a strong justification for this provision in the Amendment. Nonetheless, in his most recent article Professor Mosteller advances the proposition that this right "should be debated on [its] merits and not as part of a campaign largely devoted to giving victims' rights to notice and to participate in criminal proceedings." 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. In the years since then, it has been hard to find critics of victims' rights willing to contend on the merits of the need for protecting victims against abusive delay. If anything, the time has arrived for the opponents of the victim's right to proceedings free from unreasonable delay to address the serious problem of unwarranted delay in criminal proceedings to concede that, here too, a strong case for the Amendment exists.[154]

Just over thirty years ago, after the Task Force issued its call for constitutional rights for crime victims, they remain "oppressively burdened" by our justice system.[155] Consider how our system treats victims of domestic or sexual violence.

When the accused is arrested he is given a hearing, usually within twenty-four hours. This hearing determines whether the accused will be released on his own recognizance or on a bond, the amount of the bond, and what the other conditions of release will be. Routinely, the victim will never be given notice of this proceeding, will be denied any meaningful opportunity to attend, and will be given no voice regarding the release or other matters that may be crucial to her safety. Typically, she will not be informed of the defendant's release, or of the conditions of that release. Her safety will not be a factor in determining release conditions.[156]

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[154] *A Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 3 Before the Comm. on the Judiciary*, 106th Cong. 37-38 (1999) (prepared statement of Paul G. Cassell, Professor of Law, University of Utah College of Law) (footnotes omitted).
[155] HERRINGTON ET AL., *supra* note 2.
[156] *See id.* at 4-5, 22-24.

These failures, at the very beginning stages of a criminal case, set the tone throughout and are of far more than academic interest. For women who are raped and beaten, these failures can be fatal.

As the case progresses, there will be little, if any, consideration for the victim's interest in a speedy trial. The defendant will ask for, and the court will grant, one continuance after another, without giving the victim a voice in the matter, and without regard to the often harmful effects the delay will have on her.[157]

It most cases, the defendant will be offered a plea bargain without the victim ever knowing about it. The plea bargain will be presented to the court at a formal proceeding, but the victim will be given no notice of this proceeding and she will have no right to attend. Even if she finds out about it, and even if she wants to tell the judge what she thinks about the plea bargain before the judge accepts it, she will have to stand silent, having no right to speak to the court.

If the case does go to trial, the victim will not be allowed in the courtroom during the trial, except when she testifies, even though the defendant will have a right to be there, along with the defendant's family and friends, and even the state's chief investigator, who is also a witness.

After a conviction, the defendant will be sentenced, but the victim will not be allowed to speak at the sentencing proceeding, unless the prosecutor decides to call her as a witness, or if she is allowed an independent right to speak, what she says may be severely limited and she, unlike the defendant, may be subject to cross examination. Typically, the rapist or abuser will not be ordered to pay restitution. Her safety will not be considered when release decisions and probation conditions are established.

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[157] *See id.* at 6-9.

When the convicted offender is eligible for a parole or clemency hearing, the victim will routinely not be given notice and will have no fair opportunity to be heard. Again, her safety will not be considered when release decisions are made.

These conditions of injustice persist, despite the best efforts of the victims' rights movement; they persist despite more than two decades of efforts to pass and enforce victims' rights laws in every state.

When passed and ratified by the states, the VRA will establish basic rights to justice and fairness that no legislative body or court will be able to deny. The amendment will establish for victims of violent crime the right to reasonable notice of public proceedings in their cases, the right not to be excluded from those proceedings, and the right to be heard at release, plea, sentencing, and clemency proceedings.[158] It will require that the victim's interests in restitution, safety, and avoiding unreasonable delay be given due consideration.[159] It will establish for victims standing to enforce these rights.[160] The amendment's provisions are simple and direct, yet they will profoundly improve the quality of justice for crime victims.

Imagine the importance for a victim of sexual or domestic violence to have her safety considered when release decisions are made. Imagine the importance of giving her a voice at release, plea, sentencing, and clemency proceedings, or respecting her right to restitution, or her right to a speedy trial. These crimes often take from the victim her control over her own body, over her own life. The criminal justice system, by treating her as just another piece of evidence, perpetuates her loss of control. Imagine the importance of our system telling her that, as a matter of our fundamental law, she has the independent right, at crucial stages, to participate; that she is a person with worth and dignity and that the law will respect her.

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[158] *See* Proposed VRA, *supra* note 1.
[159] *Id.*
[160] *Id.*

A BRIEF POINT/COUNTERPOINT

How could anyone who truly advocates for victims of sexual or domestic violence oppose these measures? There are some who say that giving rights to crime victims will diminish the rights of the accused, as though rights competed in a zero-sum game.[161] No constitutional right of a defendant prevents a victim from receiving notice of proceedings, from being present at proceedings, from being heard at release, plea, sentencing, or clemency proceedings, or from having the victim's interest in safety, restitution or a speedy trial considered.

VI. CONCLUSION

Only through a federal constitutional amendment will the goal of justice for crime victims be achieved. For thirty years we have tried statutes and state constitutional amendments, and they have failed to change the culture of our justice system in any meaningful way. Amending the Constitution is the right way, indeed the only way, to secure lasting, meaningful, and enforceable civil rights for victims—rights that are beyond the ability of a legal culture, hidebound to its own power, to change. This is how it has been throughout the history of our country. James Madison argued that the Bill of Rights needed to be in the Constitution because over time the rights would take on "the character of fundamental maxims . . . [and be] incorporated with the national sentiment."[162] Victims' rights deserve no less. Those who argue that victims' rights do not need to be in the Constitution are simply condemning victims to perpetual second-class citizenship.

A constitutional amendment is necessary because no government should be allowed to treat crime victims the way they are treated today. No government should refuse to tell a crime

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[161] *See supra* Part III.

[162] James Madison, *James Madison to Thomas Jefferson, Oct. 17, 1788*, *in* 1 THE FOUNDERS' CONSTITUTION: MAJOR THEMES 477 (Philip B. Kurland & Ralph Lerner eds., 1987), *available at* http://press-pubs.uchicago.edu/founders/print_documents/v1ch14s47.html.

victim about the release of her batterer, nor force her into silence about her safety or the offender's plea bargain or sentence, nor exclude her from the courtroom during trial, nor force her to endure years of delays, or go without restitution. The time for action has come so that no government will be able to treat crime victims with the gross injustice that continues, thirty years after the Task Force's report, to be the sad hallmark of our current system.

CLAUSE-BY-CLAUSE ANALYSIS

THE VICTIMS' RIGHTS AMENDMENT: A SYMPATHETIC, CLAUSE-BY-CLAUSE ANALYSIS

Paul G. Cassell*

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I. INTRODUCTION

Recently, Representatives Trent Franks (R-AZ) and Jim Costa (D-CA) introduced 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*

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[1] *Compare, e.g.*, Steven J. Twist & Daniel Seiden, *The Proposed Victims' Rights Amendment: A Brief Point/Counterpoint*, 5 PHOENIX L. REV. (forthcoming 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:*

Review symposium regarding the VRA.[2] There, I argued that the Constitution should be amended to enshrine crime victims' rights.[3] I reviewed the various objections leveled against the VRA, finding them all wanting.[4] I contended that the "values undergirding it are widely shared in our country, reflecting a strong consensus that victims' rights should receive [strong] protection."[5] Contrary to the claims that a constitutional amendment is somehow unnecessary, practical experience demonstrates that only federal constitutional protection will overcome the institutional resistance to recognizing victims' interests. And while some have argued that crime victims' rights do not belong in the Constitution, in fact the VRA addresses subjects that have long been considered entirely appropriate for constitutional treatment.

My goal in this article is not to revisit these policy debates surrounding the VRA. Instead of a normative project, my aim here is a descriptive one: to 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 article 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

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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.

[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.

[5] *Id.*

state provisions. Part IV 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[6]

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."[7] 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.[8] 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.[9]

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").[10] The Task Force

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[6] This section draws upon the following articles: 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.

[7] 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).

[8] *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 7, at 1380-82.

[9] *See* sources cited *supra* note 8.

[10] 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.

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."[11] The Task Force advocated multiple reforms, such as prosecutors assuming the responsibility for keeping victims notified of all court proceedings and bringing to the court's attention the victim's view on such subjects as bail, plea bargains, sentences, and restitution.[12] 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.[13] 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."[14]

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.[15] To date, more than thirty states have adopted victims' rights amendments to their own state constitutions,[16] which protect a wide range of victims' rights.

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[11] *Id.* at 114.
[12] *Id.* at 63.
[13] *Id.* at 72-73.
[14] *Id.* at 114 (emphasis omitted).
[15] *See* S. REP. NO. 108-191 (2003).
[16] *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. I, § 25; MD. DECLARATION OF RIGHTS, art. 47; MICH. CONST. of 1963, art. I, § 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. I, § 8(2); N.J. CONST. art. I, 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.

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.[17] Since then, Congress has passed several acts which gave further protection to victims' rights, including the Victims of Crime Act of 1984,[18] the Victims' Rights and Restitution Act of 1990,[19] the Violent Crime Control and Law Enforcement Act of 1994,[20] the Antiterrorism and Effective Death Penalty Act of 1996,[21] the Victim Rights Clarification Act of 1997,[22] and, most recently, the Crime Victims' Rights Act ("CVRA").[23] Other federal statutes have been passed to deal with specialized victim situations, such as child victims and witnesses.[24]

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.[25] The Act commanded that "a crime victim has the following rights."[26] Among the listed rights were the right to "be treated with fairness and with respect for the victim's dignity and privacy,"[27] to "be notified of court proceedings,"[28] to "confer with [the] attorney for the Government in the case,"[29] and to attend court proceedings even if called as a witness unless the victim's testimony "would be materially affected" by hearing other

[17] Pub. L. No. 97-291, 96 Stat. 1248 (1982).
[18] Pub. L. No. 98-473, 98 Stat. 1837 (1984).
[19] Pub. L. No. 101-647, 104 Stat. 4789 (1990).
[20] Pub. L. No. 103-322, 108 Stat. 1796 (1994).
[21] Pub. L. No. 104-132, 110 Stat. 1214 (1996).
[22] Pub. L. No. 105-6, 111 Stat. 12 (1997).
[23] Pub. L. No. 108-405, 118 Stat. 2260 (2004).
[24] *See, e.g.*, 18 U.S.C. § 3509 (2009) (protecting rights of child victim-witnesses).
[25] Pub. L. No. 101-647, § 502, 104 Stat. 4789 (1990).
[26] *Id.* § 502(b).
[27] *Id.* § 502(b)(1).
[28] *Id.* § 502(b)(3).
[29] *Id.* § 502(b)(5).

testimony at trial.[30] The Victims' Rights Act also directed the Justice Department to make "its best efforts" to ensure that victims received their rights.[31] 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.

Curiously, the Victims' Rights Act was codified in Title 42 of the United States Code—the title dealing with "Public Health and Welfare."[32] 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.[33] More prosaically, federal criminal enactments are bound together in a single publication—the *Federal Criminal Code and Rules*.[34] 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.[35]

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

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[30] *Id.* § 502(b)(4).
[31] *Id.* § 502(a).
[32] 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)).
[33] *See generally* U.S.C. tit. 18.
[34] THOMSON WEST, FEDERAL CRIMINAL CODE AND RULES (2012 ed. 2012).
[35] *See generally* Cassell, *supra* note 3, at 515-22 (discussing this case in greater detail).

conflict with bureaucratic habit, traditional indifference, [or] sheer inertia."[36] 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.
>
> These significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.[37]

To place victims' rights in the Constitution, victims advocates (led most prominently by the National Victims Constitutional Amendment Network[38]) approached the President and Congress about a federal amendment.[39] In April 22, 1996, Senators Kyl and Feinstein introduced a federal victims' rights amendment with the backing of President Clinton.[40] 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."[41] A companion resolution was introduced in the House of Representatives.[42] 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

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[36] Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.
[37] *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.).
[38] *See* NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (last visited Mar. 22, 2012).
[39] *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).
[40] S.J. Res. 52, 104th Cong. (1996).
[41] S. REP. NO. 108-191, at 1-2 (2003); *see also* S. REP. NO. 106-254, at 1-2 (2000).
[42] H.R.J. Res. 174, 104th Cong. (1996).

trial; and (7) the right to reasonable protection. In a later resolution, an eighth principle was added: standing.[43]

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.[44] A series of hearings were held that year in both the House and the Senate.[45] Responding to some of the concerns raised in these hearings, the amendment was reintroduced the following year.[46] The Senate Judiciary Committee held hearings[47] and passed the proposed amendment out of committee.[48] The full Senate did not consider the amendment. In 1999, Senators Kyl and Feinstein again proposed the amendment.[49] On September 30, 1999, the Judiciary Committee again voted to send the amendment to the full Senate.[50] 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.[51] At the same time, hearings were held in the House on the companion measure there.[52]

Discussions about the amendment began again after the 2000 presidential elections. On April 15, 2002, Senators Kyl and Feinstein again introduced the amendment.[53] The following day, President Bush announced his support.[54] On May 2, 2002, a companion measure was

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[43] S.J. Res. 65, 104th Cong. (1996).
[44] S.J. Res. 6, 105th Cong. (1997).
[45] *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).
[46] S.J. Res. 44, 105th Cong. (1998).
[47] *A Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 44 Before the S. Comm. on the Judiciary*, 105th Cong. (1998).
[48] *See* 144 CONG. REC. 22496 (1998).
[49] S.J. Res. 3, 106th Cong. (1999).
[50] *See* 146 CONG. REC. 6020 (2000).
[51] *Id.*
[52] H.R.J. Res. 64, 106th Cong. (1999).
[53] S.J. Res. 35, 107th Cong. (2002).
[54] Press Release, Office of the Press Sec'y, President Calls for Crime Victims' Rights Amendment (Apr. 16, 2002) (on file with author).

proposed in the House.[55] On January 7, 2003, Senators Kyl and Feinstein proposed the amendment as S.J. Res. 1.[56] The Senate Judiciary Committee held hearings in April of that year,[57] followed by a written report supporting the proposed amendment.[58] On April 20, 2004, a motion to proceed to consideration of the amendment was filed in the Senate.[59] Shortly thereafter, the motion to proceed was withdrawn when proponents determined they did not have the sixty-seven votes necessary to pass the measure.[60] 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.[61] 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.[62] 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

[55] H.R.J. Res. 91, 107th Cong. (2002).
[56] S. REP. NO. 108-191, at 6 (2003).
[57] *Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 1 Before the S. Comm. on the Judiciary*, 108th Cong. (2003).
[58] S. REP. NO. 108-191.
[59] Kyl et al., *supra* note 39, at 591.
[60] *Id.*
[61] *Id.* at 591-92.
[62] 150 CONG. REC. 7295 (2004) (statement of Sen. Feinstein).

when victims' rights were violated.[63] The victims' movement would then see how this statute worked in future years before deciding whether to continue to push for a federal amendment.[64]

The legislation that ultimately passed—the Crime Victims' Rights Act—gives victims "the right to participate in the system."[65] 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 be heard at appropriate points in the process, and the right to be treated with fairness.[66] Rather than relying merely on best efforts of prosecutors to vindicate the rights, the CVRA also contains specific enforcement mechanisms.[67] Most important, the CVRA directly confers standing on victims to assert their rights, a flaw in the earlier enactment.[68] 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."[69] The victim (or the government) may appeal any denial of a victim's right through a writ of mandamus on an expedited basis.[70] The courts are also required to "ensure that the crime victim is afforded" the rights in the new law.[71] These changes were intended to make victims "an independent participant in the proceedings."[72]

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

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[63] *Id.* at 7296 (statement of Sen. Feinstein).
[64] *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).
[65] 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).
[66] § 3771.
[67] *Id.* § 3771(c).
[68] *Cf.* Beloof, *Standing, Remedy, and Review*, *supra* note 8, at 283 (identifying this as a pervasive flaw in victims' rights enactments).
[69] § 3771(d).
[70] *Id.* § 3771(d)(3).
[71] *Id.* § 3771(b)(1).
[72] 150 CONG. REC. 7302 (2004) (statement of Sen. Kyl).

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."[73]

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.

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.[74] 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.[75]

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.[76] 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

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[73] 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).

[74] *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.

[75] *In re* Antrobus, 519 F.3d 1123, 1126-27 (10th Cir. 2008) (Tymkovich, J., concurring).

[76] *In re* Antrobus, 563 F.3d 1092 (10th Cir. 2009).

with the district court and not oppose any release to the Antrobuses.[77] But the district court again stymied the Antrobuses' attempt by refusing to grant their unopposed motion for release of the documents.[78]

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.[79] However, the Tenth Circuit said the Antrobuses "should" pursue the issue of release of the material in the Justice Department's files in the district court.[80] So they did—only to lose again in the district court.[81] 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.[82] 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*.[83]

Another case in which victims' rights advocates were disappointed arose in the Fifth Circuit's decision *In re Dean*.[84] 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.[85] 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.[86] Because the

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[77] *Id.* at 1095.
[78] United States v. Hunter, No. 2:07CR307DAK, 2008 U.S. Dist. LEXIS 108582, at *1-2 (D. Utah Mar. 17, 2008).
[79] United States v. Hunter, 548 F.3d 1308, 1317 (10th Cir. 2008).
[80] *Id.* at 1316-17.
[81] United States v. Hunter, 2009 U.S. Dist. LEXIS 90822, at *2–4 (D. Utah Feb. 10, 2009).
[82] *In re Antrobus*, 563 F.3d at 1099.
[83] Nate Carlisle, *Notes Confirm Suspicions of Trolley Square Victim's Family*, SALT LAKE TRIB., June 25, 2009, http://www.sltrib.com/news/ci_12380112.
[84] *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).
[85] *See* United States v. BP Prods. N. Am. Inc., No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008).
[86] *See In re* Dean, 527 F.3d at 392.

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."[87]

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.[88] 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 the CVRA."[89] Nonetheless, the court declined to award the victims any relief because it viewed the CVRA's mandamus petition as providing only discretionary relief.[90] 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."[91] Nonetheless, the court of appeals thought that all the victims were entitled to was another hearing in the district court.[92] After a hearing, the district court declined to grant the victims any further relief.[93]

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.[94] 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

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[87] *Id.* at 394.
[88] *See id.* at 392.
[89] *Id.* at 394.
[90] *Id.* at 396.
[91] *Id.* at 396.
[92] *Id.*
[93] United States v. BP Prods. N. Am. Inc., 610 F. Supp. 2d 655, 730 (S.D. Tex. 2009).
[94] *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).

around the country for the purpose of providing pro bono representation for crime victims' rights.[95]

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.

III. THE PROVISIONS OF THE VICTIMS' RIGHTS AMENDMENT

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 March 2012, Representatives Trent Franks (R-AZ) and Jim Costa (D-CA) introduced the VRA as H.R.J. Res. 106.[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 to restitution. The crime victim or the crime victim's lawful representative has standing to fully assert and enforce these rights in any court.

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[95] *See id.*
[96] NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (last visited Mar. 22, 2012). This organization is a sister organization to NVCAN and supports the passage of a Victims' Rights Amendment. *Id.*
[97] H.R.J. Res. 106, 112th Cong. (2012).

> 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 harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime.
>
> SECTION 3. . . . This article shall take effect on the 180th day after the date of its ratification.[98]

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

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[98] *Id.*

[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

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]

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

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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).

[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).

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 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

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[108] ARIZ. CONST. art. II, § 2.1(A)(1).
[109] 18 U.S.C. § 3771(a)(8) (2006).
[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).

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 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

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[117] Gucits 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).
[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.

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 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]

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[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").
[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).

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 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]

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[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).

[130] NAT'L GOVERNORS ASS'N, POLICY 23.1 (1997).

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.

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

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[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.").
[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.

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 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

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[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).
[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.*

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]

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]

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[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.*

[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.

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]

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

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[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).
[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).

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 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

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[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).
[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 146, 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").

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 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 . . .*

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[157] *See generally* WAYNE R. LAFAVE ET. AL., CRIMINAL PROCEDURE § 23.1(b) (3d ed. 2007) (discussing court closure cases).

[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).

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 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

[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).

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 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

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[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).
[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. Manc, 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.

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, 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

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[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 be

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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.

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

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[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 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"),[204] 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 court *shall* order . . . that the defendant make restitution to the victim of the offense."[205] 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.[206]

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."[207] 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:

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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. §§ 3663A, 3664 (2006).
[205] § 3663A(a)(1) (emphasis added).
[206] 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).
[207] S. Rep. 104-179, at 13.

> (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.[208]

The Victims' Rights Amendment would effectively operate in much the same fashion as the MVRA. 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 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.[209] 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.[210] 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

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[208] CAL. CONST. art. I, § 28(b)(13).
[209] *Cf.* 18 U.S.C. § 3664 (2006) (establishing restitution procedures).
[210] *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).

occupational therapy and rehabilitation, lost income, the costs of attending the trial, and in the case of homicide, funeral expenses.[211]

> *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]."[212]

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 overrules derelict court decisions that have occasionally held that crime victims lack standing or the full ability to enforce victims' rights enactments.[213]

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.[214] The VRA extends standing only to victims or their

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[211] *See* § 3663A.

[212] § 3771(d)(1).

[213] *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).

[214] *See* BELOOF, CASSELL & TWIST, *supra* note 1, at 61-64 (discussing representatives of victims).

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.[215] In Arizona, for example, the courts have allowed an unindicted co-conspirator to take advantage of a victim's provision.[216] 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.

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.[217]

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

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[215] *E.g.*, KAN. CONST. art. 15, § 15(c).
[216] *See* Knapp v. Martone, 823 P.2d 685, 686-87 (Ariz. 1992) (en banc).
[217] *See* Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 350 (1987).

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.[218] 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 actions in limited circumstances.[219] 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.[220] Other states have reached the same destination by providing explicitly that the remedies for violations of the victims' amendment

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[218] 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.

[219] *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).

[220] *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. I, § 32(3) (same); TEX. CONST. art. 1, § 30(c) ("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.").

will be provided by the legislature, and in turn by limiting the legislatively-authorized remedies to other-than-monetary damages.[221]

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 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,[222] Fifth

[221] *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].").
[222] Mapp v. Ohio, 367 U.S. 643 (1961).

Amendment rights,[223] and Sixth Amendment rights.[224] 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.[225] 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.[226] To help provide legal 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.[227]

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 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

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[223] Arizona v. Fulminante, 499 U.S. 279 (1991).
[224] Gideon v. Wainwright, 372 U.S. 335 (1963).
[225] 18 U.S.C. § 3771(d)(3) (2006).
[226] *Cf. Gideon*, 372 U.S. 335 (defendant's right to state-paid counsel).
[227] *See, e.g.*, § 3771(d)(1); UTAH CODE ANN. § 77-38-9(6) (West, Westlaw through 2011 Legis. Sess.).

committed."[228] 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 offense has been committed."[229] 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]."[230] 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.[231] 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 harmed by the commission of a crime. This definition is somewhat broader than the definition of victim found in the CVRA, which defines "victim" as a person "directly *and proximately* harmed" by a federal crime.[232]

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 article.[233] In that case, the district court concluded that a woman who

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[228] ARIZ. CONST. art. II, § 2.1(C).
[229] *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).
[230] 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).
[231] 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.").
[232] 18 U.S.C. § 3771(e) (2006) (emphasis added).
[233] *See supra* notes 74-83 and accompanying text.

had been gunned down by a murderer had not been "proximately" harmed by the illegal sale of the murder weapon.[234] Whatever the merits of this conclusion as a matter of interpreting the CVRA, it makes little sense as a matter of public policy. The district judge should have heard the Antrobuses before imposing sentence.[235] The Victims' Rights Amendment adopts a broader approach in requiring the victim to establish only direct harm.

In defining a victim as a person suffering direct harm, the VRA follows a federal statute that has been in effect for many years. The Crime Control Act of 1990 defined "victim" as "a person that has suffered *direct* physical, emotional, or pecuniary *harm* as a result of the commission of a crime."[236]

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.[237] 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,[238] the Victims' Rights Amendment would—like other constitutional protections—extend to corporate

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[234] United States v. Hunter, No. 2:07CR307DAK, 2008 WL 53125, at *5 (D. Utah 2008).
[235] *See* Cassell, *supra* note 169, at 616-19.
[236] 42 U.S.C.A. § 10607(e)(2) (Westlaw through 2012 P.L. 112-89) (emphasis added).
[237] *See, e.g.*, UTAH CODE ANN. § 77-38-2(1)(a) (West, Westlaw through 2011 Legis. Sess.) (implementing UTAH CONST. art. I, § 28).
[238] *See id.*

entities that were crime victims.[239] 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 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.[240] 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.[241]

IV. CONCLUSION

As explained in this article, 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 article attempts to demonstrate how this law provides a sound basis for interpreting the scope and meaning of the Victims' Rights Amendment.

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

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[239] *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (First Amendment rights extend to corporate entities).
[240] *See, e.g.*, Brian J. Willett, *Juvenile Law vs. Criminal Law: An Overview*, 75 TEX. B.J. 116 (2012).
[241] *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).

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."[242] 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."[243]

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). In tracing the language used in the Victims' Rights Amendment to those earlier enactments, this article 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

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[242] 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).

[243] 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).

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.

Jack, FYI - please acknowledge

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May 4, 2012

Honorable Trent Franks
Chairman, House Subcommittee on the Constitution
7121 W. Bell Road, Suite 200
Glendale, AZ 85308

Dear Congressman Franks:

As one who has served as a career prosecutor and as a victim rights advocate, I am grateful for your work and that of Congressman Jim Costa. Together, you recognize that, in order to honor our pledge of "justice for all," an amendment to our Constitution is essential to protect victims of crime in our criminal justice system. After being apprised of testimony offered by the ACLU and questions regarding the ability of prosecutors to effectively carry out our duties and responsibilities alongside the rights to be protected by the Victim Rights Amendment, I offer the following.

The Maricopa County Attorney's Office is the fourth largest prosecution office in the United States with over 300 prosecutors, serving the four million people of Maricopa County; the fourth most populated county in the United States. Every day we pursue justice in each and every one of the over 35,000 felony cases we handle, on average, each year. I have had the privilege of leading this office since November of 2010 and previously served the office as a line prosecutor, personally prosecuting hundreds of felony cases, and as a supervisor of auto theft prosecutions. I have also worked on behalf of 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 constitutional protections and participatory rights, including standing to assert their rights. 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. Unfortunately, state-level

constitutional protections of rights for victims of crime sometimes fall short due to the lack of similar protections in our federal constitution. 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 2012 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."

Jesselyn McCurdy's, Senior Legislative Counsel for the ACLU, written statement before the House Committee on the Judiciary, Subcommittee on the Constitution Hearing on "Victims' Rights Amendment" on Thursday, April 26, 2012 is stunningly inaccurate, obsolete, and presents a false choice: rights for victims of crime or rights for the criminal defendant. Besides parading out the same cast of decades old arguments with little basis in fact or analysis, the ACLU continues to ignore the decades of evidence indicating that the sky will not fall if our Constitution is amended to provide crime victims with minimal protections to ensure that our criminal justice system is just for all involved throughout our land.

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 ACLU would like to portray the advancement of victim's rights as a vilification of the United States Constitution. If a victim is guaranteed a right to dignity and respect, 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 the ACLU argues. The ACLU, an organization that markets itself as being dedicated to the principles of "equality and justice" ... fails its mission by not supporting the VRA. With little research, the ACLU would find that indeed crime victim's rights and defendant's rights under the Constitution can coexist. This should be a banner issue for the ACLU were it to be true to its stated mission. 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 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 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.

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. Sadly, it does not. 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.

Sincerely,

Bill Montgomery
Maricopa County Attorney

House Engrossed

State of Arizona
House of Representatives
Fiftieth Legislature
Second Regular Session
2012

HOUSE MEMORIAL 2002

A MEMORIAL

URGING THE UNITED STATES CONGRESS TO PROPOSE AN AMENDMENT TO THE UNITED STATES CONSTITUTION TO PROVIDE RIGHTS TO VICTIMS OF CRIME.

(TEXT OF BILL BEGINS ON NEXT PAGE)

H.M. 2002

To the Congress of the United States:

Your memorialist respectfully represents:

Whereas, criminal defendants are afforded numerous federal rights and procedural protections in the Constitution of the United States; and

Whereas, victims of crime are not afforded any federal constitutional rights or protections; and

Whereas, the people of this state believe in the individual rights and liberties of all persons and have amended the Constitution of Arizona to provide crime victims with rights, and yet it is clear that without federal constitutional rights, crime victims' rights are less meaningful and enforceable.

Wherefore your memorialist, the House of Representatives of the State of Arizona, prays:

1. That the Congress of the United States pass House Joint Resolution 106 proposing to the people an amendment to the Constitution of the United States that provides rights to crime victims and that embodies the following principles:

(a) The rights of a crime victim to fairness, respect and dignity.

(b) The right to be informed of and not excluded from any public proceedings relating to the crime.

(c) The right to be heard at any release, plea, sentencing or other such proceeding involving the right of a victim.

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

(e) The right to receive notice of release or escape.

(f) The right to due consideration of the crime victim's safety.

(g) The right to restitution.

2. That any amendment to the Constitution of the United States to establish rights for crime victims grant standing to victims of crime to assert all rights established by the Constitution.

3. That the Secretary of State of the State of Arizona transmit copies of this Memorial to the President of the United States Senate, the Speaker of the United States House of Representatives and each Member of Congress from the State of Arizona.

Honorable Collene (Thompson) Campbell
27552 Rolling Wood Lane
San Juan Capistrano, California 92675
(949) 496-4647 collenecampbell@cox.net

June 11, 2012

RECEIVED JUN 14 2012

Representative Lamar Smith
Chairman, House Judiciary Committee
21st Congressional District
1100 NE Loop 410, Suite 640
San Antonio, Texas

2409 Rayburn House Office Building
Washington, DC 20515

RE: The proposed Victims' Rights U.S. Constitutional Amendment.
H.J.Res. 106, introduced by Rep. Trent Franks, R., AZ. and
Rep. Jim Costa, D., CA. on March 26, 2012; Ref. to House Sub Committee On the Constitution, April 9, 2012.

Note: A complete copy of the Special Issue of the "Phoenix Law Review" was sent to you and every Congressman regarding the proposed Victims' Rights Amendment to the Constitution.
Note: I have personally tried to give you a very tiny insight into the "real world" of a being a crime victim.

Dear Representative Smith;

As the Chair of the House Judiciary Committee, that makes you THE MAN who can help save the lives and additional pain of many hundreds of thousands of Americans. As one of the hardest hit crime victims in our nation, along with millions of other victims, my family has been continually trampled by the justice system for three decades. Hopefully, you will become fully educated regarding the real problems and obtain a complete understanding of why crime victims also need rights. We need YOUR help to move this amendment along quickly. You have been a supporter of victims however, this is the "big one" that will implement the badly needed improvements in our Nation's justice system. By obtaining true facts and sharing your wisdom with your colleagues in Congress, our nation will be closer to eliminating agonizing abuse of victims of crime.

Congressman, just like us, you have two children, a Son and a Daughter that you dearly love. We idealized our son, who along with **21,010 other** Americans were murdered in 1982. Our Son was savagely murdered when two men stole his sports car, both killers should have been in prison, but were out on early release. We were excluded from all three trials of our Son's murder and not allowed to be heard. We were not notified of hearings or the killer's release from custody. Victims can often help with facts if they are in the courtroom.
Again, the lack of justice continued to hit our family in 1988: In addition to 20,678 other murdered victims that year, my only sibling, auto racing legend Mickey Thompson was murdered along with his fantastic wife, Trudy. Yet again, the justice system did not work. Only the accused has the right for a speedy trial, therefore it took eighteen years for us to get to trial. In addition to the horrible murders in our family, a few years later our retirement was stolen in a ponzi scheme.

We are an honest, hardworking and a law enforcement family and yes, I could go on and on. However, you certainly must know it is past time to "stand up and be counted" and begin saving the lives of our nation's citizens and giving crime victims some of the constitutional rights that benefit the accused.

Our Founding Fathers would be ashamed that our leaders of today have not brought our U.S. Constitution up to date in the most important aspect of all, PUBLIC SAFETY. It is obvious that our justice system has changed dramatically,as victims no longer represent themselves, and that alone must be addressed. Iit has caused victims to be excluded from the courtroom, often disallowing facts known by the victim.

During the last 50 years, (*not counting all the millions of other vicious crimes)* there have been fourteen times more Americans murdered here in the United States than were killed in all the wars, including the Vietnam War, the Gulf War, the Iraq War and the Afghanistan War. Is there truly a question or a debate whether those nearly ONE MILLION killers should have more rights in our U.S. Constitution than their victims???? Yes, we give the killers, evil perpetrators and all of those accused twenty-three rights in our U.S. Constitution and their victims do not have a single right in that great document. Believe me, it is extremely difficult to be eliminated from the courtroom during the trials of your loved one's killers, while the family of the accused is seated in the courtroom and treated with respect. Please, put yourself in the position of a victim and try to relate the true facts of what needs to be amended

Tthirty-one years ago, in 1982, , President Ronald Reagan's "Task Force on Victims of Crime" recommendation that the U. S. Constitution must be amended to also protect victims. This goal remains unfinished. It leaves a system that heavily favors the rights of defendants and imposes enormous costs on victims.

Please, "Stand on the gas" as my murdered brother, Mickey Thompson, would say and quickly help get this job done.

Congressman, we don't want other Americans to suffer the inequities that today are forced upon innocent victims of crime. The lack of any rights for crime victims gives a huge edge favoring crime and the criminals with a large disadvantage for the victims and a conviction of the perpetrator.

Note: The Board of Directors for the National District Attorney's Association has unanimously endorsed the current Victims' Rights Constitutional Amendment, S.J. Res 106.

With tremendous hope for the future,

Collene Campbell

Collene (Thompson) Campbell

For more information on the Proposed Victim's Rights Amendment, I encourage you to go up on the web site: www.NVCAP. ORG

Or check out victims' stories on: www.FORCE100.ORG

cc: AP

Additional Crime Victims' Information

MILLIONS OF VICTIMS' AND FAMILIES DENIED RIGHTS!

From: Three time murder victim, Collene (Thompson) Campbell

Three-hundred, ninety-two million, two-hundred, thirty-nine thousand, five-hundred and ninety-four (392,239,594)* crimes have been committed since the 1982 President's Crime Victims' Task Force recommended the Constitution be amended whereby victims also have rights in that document (not just the accused criminal).

Without following the President's task's force's recommendation, victims have continued to suffer additional hardship without a single right in our nation's constitution. Currently in our Constitution the accused criminal has 23 rights, while there is not a single right for the victims of crimes, causing unjust decisions, heartbreaks for victims. Many feel the inequities are barbaric.

To have killers' rights' greater than their murdered victims is shameful and it is far past time to balance America's justice system.

My own family is just one example of the millions of victims excluded from the courtroom during their trial, plus, not informed of hearings, not notified of the release of the killer, not allowed to be heard in trial, not protected after receiving death threats and having a parole hearing cancelled off after driving five hours to get to the prison and another two hours to get inside.

Just last month, our wonderful crime victim friends went through the agony of attending the parole hearing for the killer of their daughter, only to receive a call a few weeks later from the parole board office informing the parents that the board had (allegedly) lost the recording of the parole hearing. Therefore, the parents would need to again travel the 1534 mile roundtrip drive to the prison and again endure the grief, plus the travel expense and lodging. This is more than cruel and certainly a lack of respect and concern for parents and their additional pain.

How long are our legislators going disregard and continue to allow evil criminals to prevail in our U.S. Constitution? Obviously, due to the inequity of rights, victims continue to suffer from the discrimination and unfairness that continues to be ignored and does not stop, even after a conviction of the accused as they contine filing appeals and having ridiculous parole hears. Crime victims do not have the money nor the resources to sway their legislators like the defense attorneys and the ACLU. However, crime victims' have what is "ethical" and right on their side and hopefully they will help bring to reality a justice system that is more life protecting and fairly balanced.

(392,239,594)** ***This number includes crimes of: murder, forcible rape, robbery, aggravated assault, burglary, larceny theft, vehicle theft, property crimes and violent crimes.

Maryland Crime Victims' Resource Center, Inc.

Continuing the Missions of the Stephanie Roper Committee and Foundation, Inc.

Email: mail@mdcrimevictims.org • Web Page: www.mdcrimevictims.org
Toll Free: 1-877-VICTIM 1

1001 Prince George's Blvd
Suite 750
Upper Marlboro, MD 20774
301-952-0063 (phone)
240-929-0526 (fax)

D.C. Crime Victims' Resource Center
Ronald Reagan Building & International Trade Center
1300 Pennsylvania Ave, N.W., Suite 700
Washington, DC 20004
202-531-3346 (phone)
202-747-7518 (fax)

216 E. Lexington Street
Suite 401
Baltimore, MD 21202
410-234-9885 (phone)
410-234-9886 (fax)

May 4, 2012

Honorable Trent Franks also Minority Representative Jerrold Nadler
Chairman, Sub-committee on the Constitution
U.S. House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Dear Congressman Franks and Nadler:

We wish to express the strong support of the Maryland Crime Victims' Resource Center, Inc. for HJ Res. 106 – an amendment to the U. S. Constitution for crime victims' rights. As veteran crime victim advocates having served thousands of crime victims in our state over the past thirty years, we continue to see first-hand the gross unfairness and injustice with which all too often crime victims are still treated. It is time for us as a nation to end this injustice once and for all.

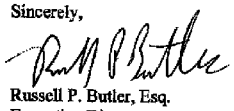
Despite the best intentions of our laws, too often crime victims are still denied basic rights to fair treatment and due process that should be the birthright of every citizen who seeks justice through our courts. We are convinced that statutory protections are not enough; only a federal constitutional amendment will be sufficient to change the culture of our legal system. Nothing has changed in the 8 years since the passage of the federal Justice for All Act of 2004 (Crime Victims' Rights Act) to alter our real life experiences as advocates.

The rule of law and liberty and justice for all must include victims of crime. Despite numerous state laws and a state constitutional amendment, Maryland laws lack enforceability. Victims of crime in Maryland and in every state should have baseline rights and a viable mechanism of enforcement. If a state denies the enforceability of victims' rights, victims should be able to petition the United States Supreme Court to review and a federal constitutional amendment would provide a clear basis for a federal review in a similar manner as when defendant's rights are denied under the United States Constitution. We would draw your attention to several published Maryland cases that demonstrate the need for a constitutional amendment:

1. *Cianos v. State*, 338 Md. 406 (1995)
2. *Lopez-Sanchez v. State*, 388 Md. 214 (2005)
3. *Lamb v. Kontgias*, 169 Md.App. 466 (2006)
4. *Hoile v. State*, 404 Md. 591 (2008)

In each of these cases, the victims' rights were improperly denied and the state appellate court made the state constitutional and statutory rights meaningless. There needs to be a federal basis of judicial review so that when the rule of law is denied to crime victims, the United States Supreme Court will have a clear federal basis to review and reverse state courts based upon federal law. Otherwise, justice for all will continue to exclude crime victims.

Sincerely,



Russell P. Butler, Esq.
Executive Director

Roberta Roper
Founder/Board Chair

18 April 2012

Re: House Joint Resolution 106

Dear Honorable Congressmen 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 House Joint Resolution 106.

H. J. Res. 106 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 H.J. Res. 106 further affirms the inalienable rights of life, liberty and the pursuit of happiness. H. J. Res. 106 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.

Sadly, I have personal experience with the chasms that exist within our justice system. My beloved brother Michael Jeffries, 22, was kidnapped and beaten in Colorado Springs, Colorado and brutally murdered in the Rocky Mountains on November 3, 1981. In the course of the prosecution and conviction of Michael's murderers, I was denied what should be even most fundamental, the right to be heard at sentencing.

Some argue that we don't need H. J. Res. 106 since victims' rights are found in many state constitutions. However, victims in 17 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.

Providing victims long-overdue constitutional rights will not take away rights from the accused. The 23 constitutional rights of the accused will remain. We seek to rectify that there are currently no rights for victims of crime.

Most sincerely,

Hon. Tim Jeffries, KM
President, NOVA Board of Directors

510 King Street, Suite 424 • Alexandria, VA 22314 • 703-535-6682 • www.trynova.org • timjeffries@trynova.org

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Attorney & Counselor At Law
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MESA, AZ 85201
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Fax: 800.362.3901

April 23, 2012

CASE FOR SUPPORT OF H.J. RES. 106
HEARING DATE 26 APRIL 2012

Congressman Trent Franks
C/O Ms. Jacki Pick,
Deputy Chief of Staff and Counsel for the Subcommittee

I write in support of the Victim's Rights Amendment, now known as H.J. Res. 106.

My perspective is different than most. For twenty-three years I practiced Criminal Defense law in three states, Ohio, New Mexico and Arizona. My son was to join me in that practice and all was going to plan until October 17, 2010 when he was the victim of a robbery gone bad; two young men decided they wanted the lap top computer he was carrying home from the college library. They shot him, killed him and they took his computer, leaving him dead on the black asphalt.

Now, eighteen months later, the case against the shooter is still pending in the Maricopa County Superior Court, State of Arizona, and there is no end in sight. The defendant is manipulating the Justice System, ignoring and manipulating his attorney, mocking me and my family and because Judges, particularly at the State level, do not like to be reversed, it appears he will get his way.

Despite the fact that he is firing his appointed attorneys, after a year and a half, for no good reason. Despite the fact that members of his family are regularly removed from the courtroom by the Judge for aggressive behavior. Despite the fact that the defendant and his family threaten and lecture me and my family. And, despite that fact that these behaviors, are calculated and intentional, he is cloaked by practical Constitutional immunity. Any move by the Court to protect us, years from now, may be interpreted as a violation of the defendant's Constitutional rights causing reversible error. So the path of least resistance is to give in to his demands, and this trial will be delayed until 2014, at the earliest.

Now I ask you: To whom do WE turn?

The answer is, nowhere and to no one.

While the defendant schemes delay, my family and I sit silently, shaking our collective heads, only sobbing later, in the privacy of our respective homes.

Understand that for years, and I wholly admit this, I exploited the Bill or Rights in favor of my client's interest. Of course I did, it was my duty, it was my job and I was ethically obligated to do so. But one of the main reasons I was able to be so manipulative is that there is no countervailing interest. In a Criminal Courtroom, only the defendant matters. Justice, whatever one's concept of justice might be, is merely a probability, a hoped for end result of the Process Due only the defendant. And since there is no counterweight to the defendant's interest, justice is blind only insofar as Victims are concerned; but she sees clearly the interest of the accused.

In the State of Arizona there is a Victim's Bill of Rights in the state constitution. But because it does not have any Federal teeth, even the limited rights of notice, presence, the right to be heard, and the right to a speedy trial are really of no effect. Whether a State has a Victim Bill of Rights or not, the Victim of a heinous crime will endure three or more years of pretrial process fraught with delay after delay and hearing after hearing. With no mechanism to be heard, we are mere patrons to the passion play; watching and suffering in silence because we are excluded from the process. Excluded. Of no force and effect. Irrelevant. Impotent.

So long as our meager state right is weighed against, for example, the Fourth or Fifth Amendment to the Constitution of the United States, the phrase "Victim Rights" remains a slogan and political ploy. The fact is, a Judge knows when he or she is treading on reversible territory, so does the Prosecutor, and the defense simply exploits those fears.

But, if we, the only innocent persons sitting in the courtroom, had some small amount of equal standing, then the Prosecutors could argue, and the Judges could order, for once, a reasoned decision that actually includes the interests of ALL parties to the proceeding. Absent a Federal Amendment, this will not and cannot happen. Continuances will be granted without our input, bail and conditions of release will be set without consideration for our safety and hearings will be held without our presence because we were not notified. And worse of all, our dead sons and daughters will be identified only by case number with a cursory nod of the head acknowledges the presence of the surviving family. Dignity? There is none in a courtroom for a victim of crime.

The murder of my son has obviously caused me to re-evaluate many long-held philosophical positions, inside and outside the practice of law. A view from the perspective of the "victim's bench," changes a person. Although this experience has changed my life on so many different levels, the relevant shift is in my perception of the role of the victim in the Criminal process. Prior to my son's death, I believed the victim played no role and was wholly irrelevant to any proceeding in the Court. And, that view prevails throughout the land today. I was not alone!

What I now conclude, through reflection, is not only is there room for the victim in the courtroom, but that "fundamental fairness" dictates that the victim play a small role in the proceedings; to at least give voice to their concerns regarding their own safety and the safety of the family unit and the passage of time and the absurdness of the defendant's motions.

The "natural law" that guided the constitutional principles penned by our Founding Fathers must not be allowed to lay fallow; it must be allowed to evolve naturally with societal realities.

Just as the law regarding the rights of the accused changed in response to government excess, so now must the law react to protect the victim from the excess of today's criminal defendants. The Courts and the Prosecutors need safe harbor to make arguments everyone already knows should be made. It is sad, but true.

In addition to being acquainted with the courtroom from a new perspective, I have become involved with, or have met, scores of other victims of crime. They are a silent group, isolated by their own grief, by their fear of the defendant, by their own guilt and by their ignorance of the criminal process. And, very early in the process, they realize that they are relevant to the criminal process only in so far as they are relevant to the crime itself.

Victims do not want to interfere with the system, but over two hundred years, the Criminal process has evolved so skewed against any fair treatment of the victim, that, at times, the Criminal process feels more like a play than reality; that the case number represents nothing, least of all, my son, and all the sons and daughters who have been felled, through no fault of their own, victims who end up simply a corpus delecti, whose life is reduced to being no more than an element of a crime; just a matter of proof.

I have practiced criminal defense law for more than two decades. I know the importance, in a free society, of protecting the rights of the accused. I know that nothing in the proposed amendments will infringe on those rights. And I now know, from the vantage of the father of a murdered son, that a free society can no longer tolerate the unfairness with which crime victims are treated. I urge you to pass the amendments and let the People through their vote, have their say. I would hazard to guess, it will pass.

Thank you for your time and attention in this matter.

Sincerely,

Daniel Joseph Marco
father to Zachary Joseph Marco, deceased

National Organization of
Parents Of Murdered Children, Inc.
For the families and friends of those who have died by violence.
100 East Eighth Street, Suite B-41 • Cincinnati, OH 45202 • Toll Free: (888) 818-POMC
Fax (513) 345-4489 • Website: www.pomc.com • Email: natlpomc@aol.com

April 20, 2012

Ms. Jacki Pick
Deputy Chief of Staff
Counsel for the Constitution Subcommittee of the House Judiciary Committee
Email: jacki.pick@mail.house.gov.

Re: Support of H. J. Res. 106

Dear Ms. Pick:

The National Organization of Parents Of Murdered Children, Inc (POMC) wants to strongly express our support for H.J. Res. 106, a Constitutional Amendment for Victims of Crime.

POMC was founded in 1978 and has provided services to countless numbers of survivors who have lost a loved one to murder. Each year our national staff provides services to thousands of victims throughout our nation. POMC is one of the oldest national victim organizations in America.

Our organization has seen and heard firsthand the frustration of survivors at times, by having their victims rights ignored. Thirty years after the President's Task Force on Victims of Crime first proposed a federal constitutional amendment for victim's rights, the need is never more evident than now. A parent, child, husband, wife, sibling or any loved one should not have to have the additional burden of worrying about their victim's rights and if their voice will be heard—today in parts of the United States a victim right somewhere is being ignored. Victims need their rights in the constitution and statutes have proved ineffective.

POMC is strongly in favor of passing a constitutional amendment for victims for some of the following reasons;

1. Only a federal constitutional amendment can establish meaningful and enforceable rights for every crime victim in the country.
2. Statutes do not have the same power to change the culture that the U.S. Constitution will have.
3. When the rights are enforced, the system does not break down; indeed it becomes more just.

Sincerely,

Howard S. Klerk, Jr.
National President

STATEMENT FROM THE AUTHOR

Hon. Collene (Thompson) Campbell*

> Scott Campbell, 27, the only son of Gary and Collene Campbell, was last seen on April 16, 1982. He had planned to fly in a private plane to Fargo, North Dakota with a man named Larry Cowell. Unbeknownst to Scott, Cowell and another man, Donald Dimascio, planned to murder Scott. Dimascio was hiding in the back of the plane. He broke Scott's neck and then the killers threw Scott's body into the ocean, somewhere between the mainland of Southern California and Catalina Island. His body was never found. During the trials, Scott's family was barred from entering the courtroom, while the defendants' families were ushered to reserved seats. Gary and Collene were never notified of proceedings in the case in the District Court of Appeals, or of the pre-trial release of one of the killers. They were never allowed to speak at critical stages of the proceedings, including the sentencing for both murderers.[1]

Unintended by our Forefathers, possibly the cruelest discrimination in our country is caused by the total absence of crime victims' rights in our United States Constitution. In huge contrast, the accused criminal has twenty-three rights in that same great document.[2] Over the years, with the changing of our judicial system, the lack of any constitutional rights for crime victims has escalated into a huge stain on justice. This imbalance of rights has become increasingly unjust and causes additional grief and damage to the already devastated victims of crime. In addition, this inequity makes fair and balanced justice impossible.

It is tragic that through our nation's most supreme document, the United States Constitution, crime victims are forced to endure incredibly cruel discrimination. The crime victim does not have a single right in our nation's Constitution. In huge contrast, the accused criminal, who may be a killer, a rapist, a child molester—their crime does not matter—is entitled to twenty-three rights in that same document.

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* The author is writing on behalf of the Gary and Collene Campbell Family, in memory of crime victims everywhere, and MOVE Force 100.

[1] 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, 582 (2005).

[2] *See generally* U.S. CONST.

Obviously, the authors of our Constitution did not intend to allow preferential treatment to accused criminals against the rights of their victims. However, at the time our Constitution was written, the court system worked much differently. Victims were their own prosecutors. For the reasons I discuss here, our nation must now move quickly to balance justice by passing a twenty-eighth amendment, giving victim's rights in our United States Constitution.[3] Every day of delay is costing lives, pain, injustice, and millions of taxpayers' dollars. The Victims' Rights Amendment is not political; it is not intended to favor democrats, republicans, different religious beliefs, or favor any ethnic group, but it will assist America to produce a better balanced justice system for all.

Thirty years ago, President Ronald Reagan's Task Force on Victims of Crime ("Task Force") produced a recommendation that the U.S. Constitution must be amended to also protect victims. This goal remains unfinished. It leaves a system that heavily favors the rights of defendants and imposes enormous costs on victims. However, excluding the wasted costs and time and just focusing on additional crimes permitted because of the lack of rights for victims, the additional pain to victims is astronomical. Obviously, this biased treatment not only causes additional grief for victims, but it frequently allows more crimes to be committed by the accused.

To help equalize justice, victims, among other rights, must have constitutional rights to be treated with fairness and respect, to be notified, heard, and not excluded from proceedings, to be free from unnecessary delay, and to have their safety considered. And they must have standing to assert these rights in court if they are to be meaningful.

I am going to try and relate a tiny bit of our family's life as victims of crime. In my attempt to give you a little better understanding of the crime victims' situation, I will try to

[3] *See generally Renewed Effort for Federal Victims' Rights Amendment Underway*, NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (last visited Mar. 17, 2012) (providing the full text of the proposed Victims' Rights Amendment).

express a very brief history regarding our family's experience, education, and our on-the-job-training concerning the subject of victims' rights.

Often, you hear that a victim's lifestyle could have caused the crime. That theory is a sad scenario for most victims. I feel compelled to expose a tiny bit regarding our honest and giving American family, which has endured thirty years of devastating murders, lies, justice delays, trials, exclusion from trials, death threats, appellant courts, and parole hearings.

My father, Marion L. Thompson was a dedicated and hard-working Chief of Detectives on the Alhambra, California Police Department, and he volunteered and served in the armed forces during World War II. My mother, Geneva C. Thompson was president of the Marguerita School PTA and volunteered her services nearly full time to the American Red Cross throughout those war years.

I met my husband, Gary Campbell, in the second grade. Gary's father, Martin J. Campbell, retired from the Alhambra Post Office, and his mother, Corean A. Campbell, worked as a secretary for the high school district and volunteered time helping others.

Shortly after our marriage in 1951, Gary enlisted in the Navy and served in the combat zone during the Korean conflict. In 1954, we were blessed with a wonderful son, Scott, and in 1957, our dreams were fulfilled with the birth of our daughter, Shelly.

We had a hard-working, fun-loving, awesome family and life was wonderful. We vacationed together going water and snow skiing and we spent every holiday together. We were honest, law-abiding, and hard-working.

Yes, life was good, until three decades ago, on April 17, 1982, when our world drastically changed as we first encountered the results of a vicious murder and its aftermath.

We have endured a *real life* education regarding the justice system and are living through the never-ending brutal murders of our family. Yes, the justice system has kicked us around for thirty straight years without a break.

The first crime committed against our small, honest family came in 1982, the exact year the Task Force recognized the lack of justice for victims of crime and recommended that our U.S. Constitution be amended to establish rights for victims.

It is a painful reality that many of our legislators, after thirty years, just don't get it. I wish on behalf of our country they were better informed—maybe, like our family, they need to live the life of good American citizens who, through no fault of their own, become victims of violent crime. It is way past time for our legislators to, as my brother used to say, "Stand on the gas and get headed in the correct direction" to help save victims of crime from being thrust into a system that treats them with such unfairness.

We are only one of millions of crime victims' families devastated by crime, then treated unjustly due to the absence of any victims' rights in our U.S. Constitution. Why do I believe so strongly and feel so well educated on the harm continually being done due to the lack of victims' rights in our U.S. Constitution?

Please permit me to share with you a tiny example of the real world of crime. This is not easy for someone to read; I can assure you, it is also not easy to write. Hopefully, we are doing this for the good of others, which is my motivation and intention. I am a lady who has a very extensive and knowledgeable crime victim's education. I have three very complex degrees. I absolutely do not want others to receive this education nor obtain the degrees, which my husband, Gary, and I have received.

In April 1982, we received our first horrifying degree. Regrettably, it was the first-degree murder of our only son, Scott.

In March 1982, Scott, our twenty-seven-year-old electronics genius, mentioned he was going to see Larry Cowell to introduce and familiarize him with Scott's digital speedometers. Scott had invented and had a patent pending on the first digital speedometer and was marketing it to the automotive aftermarket and original equipment manufacturers industries. My brother, auto-racing legend Mickey Thompson, and Scott modified the invention for Mickey to use in his Baja off-road racing vehicles.

However, we had heard that sadly Cowell had been involved in illegal activities, though we didn't know to what extent. As a typical concerned mom, when Scott said he was going to see Cowell, I said, "Scott, you'd better stay away from him, he's trouble." Scott answered with, "Mom, the guy *is* in trouble and has a lot of problems, but maybe I can be a friend and help him with my invention so he can utilize it at his Pantera Shop."

Immediately after that conversation, on April 17, 1982, Scott disappeared. We desperately searched for him for eleven agonizingly long months, before we learned the horrible truth.

Anyone would be hard pressed to think of a murder that was more calculated, barbaric and cold-blooded than the savage act planned and performed by the cowardly killers of our son. Cowell planned and calculated Scott's barbaric murder. He rented an airplane and told Scott that Don Dimascio was a flight instructor; when in fact, Dimascio was an ex-convict and paid killer that Cowell had hired. Cowell arranged to rob Scott of his Pantera sports car, then cruelly and viciously murder him, and callously dispose of his body by pushing it out of the plane into the

ocean off Catalina Island. Cowell and his family watched as we searched for our son for eleven months.

Prior to killing Scott, Dimascio made certain that he had Scott's Pantera sports car in his possession. After murdering Scott, he proceeded to disassemble Scott's car, selling off and utilizing the parts.

By the time Scott's car was found in Cowell's shop and identified by Scott's Uncle Mickey, Cowell had filed off the car's vehicle identification number and changed the plates. It was indeed, a well-planned, premeditated murder for hire; lying in wait for the opportune moment to kill Scott and to commit robbery.

We are among millions of other Americans who have become victims of evil repeat predators who should have been in prison when their murders were committed. One of the killers had previously been sentenced to three indeterminate life sentences but was released in only four years, providing him with the opportunity to kill our son. The other killer was out of prison on work furlough, even after killing his passenger in a drug and alcohol related accident. Scott is dead because of a weak and forgiving criminal justice system that does not respect the rights of its victims to safety. Had his killers remained incarcerated, Scott would be alive today.

Six years later, on March 16, 1988, we obtained two additional degrees. They were the first-degree murders of my only sibling, my brother, auto racing legend Mickey Thompson and his wife, Trudy. Some years ago, Mickey was the best man at our wedding and still today, we feel he is the *best* and a great and accomplished man who did so much for others. He and Trudy were murdered by two killers who had been hired by a former business partner of Mickey's. Michael Goodwin ordered the murders to avoid paying a judgment Mickey had obtained against Goodwin because of Goodwin's fraudulent business practices. Goodwin had become a

convicted felon (after his relationship with Mickey ended) who should have been in prison when he ordered the murders.

As horrible as these crimes have been for our family to bear, our treatment in the justice system was just as bad. We have endured the criminal justice system for thirty years, since 1982 when Scott first disappeared. Like many others, our family has continued in our efforts to deal with the never ending, grueling inequalities, while attempting to bring justice for three murders within our family, and trying to maintain a decent life for our family and friends. The battle for justice concerning our family's murders has been long and exhausting and it continues non-stop.

Hopefully, as you read my words you will understand there are degrees and then there are *degrees*. I will leave it up to each individual to decide which are the most significant and educational in our fight for justice and obtaining due process for the law-abiding crime victim. Most of us wish we did not have the experience to address these issues. However, not only the knowledge, but the scars and the pain are a constant reminder that no American crime victim should be controlled by cruel and senseless discrimination fostered by the lack of rights in our U.S. Constitution. As it stands now, it is cruel and un-American and it must be stopped by the addition of victim's rights.

Please consider our experience, and know that what happened to us continues to happen to families in cases all across our country, even today.

- We were excluded from the courtroom during all three of our son's murder trials, while the murderers' family and friends were allowed reserved seats.
- We were not allowed to be heard at any critical stage during any of the three trials.
- We were not notified of the convicted killer's appeal hearing; the killer's family and supporters were all notified and present. We were uninformed and not in the courtroom because we did not have the right to be notified.

- The murder trial of one of the convicted killers of our son was over-turned and we learned about that ruling through the media. Again, we were not notified because we had no rights.

- The convicted killer of our son was released and again we were not notified. We learned he was back on the streets through friends and the media. We did not have the right to be notified or heard regarding the matter of his release.

- During the time I was mayor in the city of San Juan Capistrano, California, naturally, I was very easily located. Even though I had previous death threats from the suspected killer of my brother, I did not have the right to have my safety considered. After leaving a city council meeting, my car was blocked by a large van with darkened windows. It was an attempted murder. Had I not had a concealed weapon permit and been proficient with a gun, I probably would be dead. As a crime victim, I did not have a right to be protected from the killer of my brother and sister-in-law.

- We did not have a right to a speedy trial unlike the accused criminals, whose attorneys continued to cause delay after delay. The trials of the killer of our son took nearly eight years, appearing before more than twenty judges. At none of these delay hearings did we have the right to be heard about the impact of the delay on our family.

- The trial and conviction of the killer of my brother and his wife began after sixty-five court appearances, delays caused by forty defense motions. The killer's conviction took nineteen years to obtain. Obviously, this was not only costly in many ways to the victims' family, but it was also very financially devastating to the taxpayers. We did not have a right to a speedy trial.

- In both of our family's murder cases, the defense lied and continually tried to demean our family, both in court and to the media. Painfully, some of the untruths were picked up and used by the media. It is difficult for grandparents to explain to their grandchildren that the killers of their loved ones can get by with lying and there is no consequence, as the victims don't have the right to be treated with respect.

- After nineteen years, the killer of Mickey and Trudy was finally convicted of murder and sentenced to two life sentences without the possibility of parole. From prison he continues to try to hurt and demean our family and witnesses. He is obtaining access to the internet and posting hurtful and vicious lies about the homicide detective on the case, plus the witnesses and our family. Our ordeal continues.

- A year ago, in 2011, the third parole hearing was scheduled for the killer of our son. Because I have served on many boards and commissions, I called to make certain there was not a conflict due to the fact I might know the assigned parole commissioner. I was told they could not tell me who the commissioner would be, as I might try to bribe him! As it worked out, we drove the five hours to the prison, went through the process of getting inside the prison, only to have one of the parole commissioners stand up and give me a hug. Yes, it was a gentleman with whom I had served on a state commission. Due

to a possible conflict, the hearing naturally could not go forward and a new date had to be set, again wasting time and dollars.

- The parole hearing date for the killer of our son was reset for three months later. At the hearing the inmate was denied his request for parole and told he could reapply in five years. However, the parole commissioner said to me, "Mrs. Campbell, this hearing is no longer about the crimes this inmate committed, it is about if he has been good in prison." I guess that means it should no longer matter that our son was murdered. That statement and thinking is more of no respect for the victim and their family. The killer of our son has a long history of crime and violence that apparently is no longer relevant for release. This was shocking news to us, that his crimes no longer mattered, we must realize he only killed two people and hurt many others. Apparently in the future California inmates will be judged by their actions, while under supervision, in the prison. There is no right to justice in this, no right to consideration for our safety or the safety of others, no right to be treated with fairness.

Mickey Thompson will always be remembered as a fantastic, kind man and a hero to many. He is an admired legend whose notoriety was totally unimportant to him. During Mickey's life, he cared most about aiding and working with needy and blind children. He also worked with high school students helping in their auto shop classes. Mickey developed important automotive safety equipment and tires used throughout the entire world.

Why am I telling you this? I feel it is tremendously important to recognize what we can and do lose when justice is denied. If our justice system worked properly, Mickey, Trudy, and Scotty would all be alive, as their killers would have been previously incarcerated and off the streets.

If Mickey were here to help, he would say, "Let's go, stand on the gas, let's get the job done and get to the finish line, making certain our nation has justice for all citizens, including crime victims. Get across that finish line and don't stop in the middle of such an important race, get it done."

We hope everyone will agree and race forward quickly to receive that checkered flag and be a winner for America.

As one of the millions of Americans that has endured crime and the justice system, I ask the question, "What are our legislators waiting for?" They have had the recommendation from the Task Force for thirty years. Think of the extended damage and pain that has taken place during that period of no action.

I believe the authors of our Constitution would be ashamed of our federal legislators' lack of concern, knowledge, or ability to update and right the Constitution. Again, I ask the question, are those elected legislators uninformed regarding the imbalanced justice system, or do they just not care enough?

It is not my intent to be a complainer; however, I will say again, I feel it is extremely important to in *some way* make our legislators better understand the ramifications caused by the lack of victims' rights. Those lawmakers need to become familiar with the real and truthful world of being a victim of crime, without any federal constitutional rights. Unfortunately, our victims' experiences are not that extraordinary in our current justice system.

How long are our elected Congressmen and Senators going to allow this unfairness and inequality to continue? I do not wish pain and grief on anyone. However, if our national representatives were forced to endure an evil crime, like many of us, they would become educated, more aware, and hopefully they would quickly move to eliminate the inequalities victims face and work to better balance our justice system by giving victims of crime rights in the Constitution.

Sadly, victims of crime have learned through tough experiences that our American justice system is not fair, causing a huge blow to our once trusting and now devastated victims. Obviously, the concept of justice is that everyone should be treated fairly, which is the worthy and noble necessity on which our nation was founded. All Americans should be entitled to a fair

and balanced justice system and know it is a level playing field for both the criminal and their victim. Neither side should have an advantage such as the accused criminal has today.

I am forced to ask myself this question: How does a law-abiding American family get the attention of our nation's legislators to get busy and balance our country's justice system and place victims' rights in our U.S. Constitution?

We do not desire our decision makers to be forced to endure and live through one minute of our crime victims' agony. However, if they experienced it by living it, they would certainly understand and hopefully their conscience, responsibility, and good judgment would cause them to take action and get going.

Hopefully, by painfully revealing a tiny bit of the often hidden truth and the factual world of victims of violent crimes, I am taking on the huge challenge of attempting to bring a little improved understanding of the desperate need for victims' rights to be included in our U.S. Constitution. Yes, sadly, I am a very experienced victim of violent crime and I would be tremendously honored, in memory of my three murdered and greatly loved family members, plus all other victims of crime, *if* our nation's leaders and our states would better help preserve the lives of our families by balancing the justice system.

It is amazing that hundreds of thousands of vicious crimes are committed in our nation and the legislators refuse to take action that would save lives and taxpayers' dollars and help balance the justice system.

As we all listen to the presidential candidates, on both sides of the aisle, we do not hear a single word about public safety, the single greatest responsibility of government. Do you not find it disgraceful that many more people are murdered in America than all of our wars over the years? Our families and their safety must be our top priority.

For three decades, without a break, my husband and I have been forced to endure the torture of being continually demeaned and treated unfairly by our nation's justice system which does not balance the rights of accused criminals, murderers, sex offenders, robbers, and the all-around evil offenders with rights for their victims.

Why is this happening? I will repeat it again: Sadly, in our noble United States Constitution, the accused criminal has twenty-three rights. Conversely, the victims of crime have not a single right in that document. Unless you have personally endured a violent crime, there is no way you can comprehend the overwhelming results and the damage caused by the victims being eliminated from having rights within our justice system, caused by the lack of rights in our U.S. Constitution. Yes, if you have not suffered the murder of a loved one, it might be difficult for you, our legislators, to even begin to understand the additional cost to taxpayers and the torture and lack of justice that emanates from this tremendous imbalance of no rights for victims in our Constitution.

I am standing as a caring citizen who wants to save others from our fate and the devastation of millions of Americans. Obviously, in this written piece it would be impossible for me to clearly depict our small family's years of enduring three murders, searching for our son's body, coping with the lack of justice, having no protection for our safety, no notification of court dates, and the killer's release. In addition to the lies and demeaning by the defense, death threats, and lack of respect, we have endured our exclusion from the three murder trials of our son, our not being allowed to be heard, having no right to a speedy trial and being forced through five drawn-out murder trials during a twenty-five year span.

I am a police officer's daughter and considered to be a strong, hard-working, and honest American. I was taught early in life to always give more to your community and your country

than you take and my family has done this for generations. The men have fought for their country and the women have donated their time to help others. I am a two-term mayor, served on many state and national commissions, including the California Peace Officer Standards and Training, where I was elected chairman numerous times during my eighteen years of volunteering my services. The members of my family are dead because of a justice system that does not respect victims or the law-abiding. If one knows the facts, it does not take too many brains to figure that the honest law-abiding citizen who becomes a victim should, at the very least, have equivalent rights to their perpetrator.

Writing this piece is certainly not easy for me; in fact, it is very difficult. However, to help save others I am attempting to give you just a few of the undistorted facts regarding the torture of an American victim of crime.

Even through this effort of trying to briefly describe a true example of a crime victim's life, it causes additional agony. No one wants to volunteer their time to do this. Believe me, I write this with the hope that it can make a difference and others will not be forced to endure the constant pain of vicious crime, ridiculous defense motions, lack of information, being treated without respect, unnecessary parole hearings, appeals, and then convicted inmates having the right to place spiteful lies on the web regarding law enforcement, witnesses, the victim and their family.

It is so difficult to endure the never-ending sleepless nights and the continual visualizing and reliving of the horrifying crime, enduring the very graphic nightmares, which are expanded and generated by the constant and forever maneuvering of the defense. Yes, thirty years is a long time to have the killers continuing to invade our small family's life, but *they* have that right.

Does our nation truly feel that the killers of our loved ones deserve rights, but that we, the victims deserve none?

STATEMENT FROM THE AUTHOR

Timothy Jeffries*

> Michael Jeffries, 22, the beloved older brother of Tim Jeffries, was kidnapped and beaten in Colorado Springs, Colorado and brutally murdered in the Rocky Mountains on November 3, 1981. After stabbing Michael 65 times, the two murderers were enraged that Michael was still alive, so they slit his throat and crushed his skull. The two murderers and the driver left Michael's massacred body in the Rocky Mountains for the animals to devour. After the horrific crime, the two murderers fled to Sioux Falls, Iowa. The driver and another assailant fled to Boston, Massachusetts. As a result of an unexpected tip, Michael's body was miraculously found in the Rockies and the four perpetrators were captured several weeks after the vicious murder. Victims' rights did not exist in Colorado or the United States at this time. For example, Tim Jeffries was denied the opportunity to speak at the sentencing of his brother's surviving killer. It is a scar Tim carries still to this day.[1]

"We the People of the United States, 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, do ordain and establish this Constitution for the United States of America."[2]

Whenever I read the Preamble of the Constitution of the United States of America, I am struck by its brevity and magnitude, its simplicity and grandeur, its sobriety and joy, its pledge and promise. The constitutions of other countries have echoed these words, but no country has been so committed to securing the "Blessings of Liberty" for her citizens and their "Posterity."[3] As eloquently and powerfully stated in the Declaration of Independence, "with a firm reliance on the protection of divine Providence,"[4] one can reasonably state no country in the history of mankind has been so blessed.

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* The author is the Board President of the National Organization of Victims Assistance and serves as President of Arizona Voice for Crime Victims.

[1] This is an original synopsis, by Mr. Jeffries, and formatted as a block quote to maintain uniformity between sections.

[2] U.S. CONST. pmbl.

[3] *Id.*

[4] THE DECLARATION OF INDEPENDENCE para. 6 (U.S. 1776).

There have only been twenty-seven Amendments to the Constitution of the United States of America,[5] and rightfully so. Our Founding Fathers, who risked their honor, fortunes, and lives, envisioned a prosperous country devoid of tyranny and focused on her citizens. Within fifteen years of the ratification of the U.S. Constitution, the first twelve Amendments, including the Bill of Rights, were ratified by our fledgling democracy.[6] Sixty years passed before the Thirteenth Amendment was ratified in 1865.[7] During the next seventy years, eight additional Amendments were ratified, including the repeal of the Eighteenth Amendment in 1919 by the ratification of the Twenty-first Amendment in 1933.[8] Over the next sixty years, only six Amendments were ratified, including the Twenty-seventh Amendment, which had been part of the proposed Bill of Rights in 1789.[9] In short, it is a rare and sacred event to amend our Constitution.

Two decades have passed since the Twenty-seventh Amendment was ratified 202 years after it was originally proposed.[10] It is now time to propose, pass, and ultimately ratify the Twenty-eighth Amendment to the Constitution of the United States of America.[11] The Victims' Rights Amendment would rebalance the Scales of Justice. It would ensure the democratic vision of our Founding Fathers is honored and the "Blessings of Liberty"[12] are secured for our citizens,

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[5] *See* U.S. CONST. amends. I-XVII.
[6] U.S. CONST. amend. XII (ratified 1804); U.S. CONST. amend. XI (ratified 1795); U.S. CONST. amends. I-X (ratified 1791); U.S. CONST. art. VII (ratified 1787).
[7] U.S. CONST. amend. XIII (ratified 1865).
[8] U.S. CONST. amends. XX-XXI (ratified 1933); U.S. CONST. amend. XIX (ratified 1920); U.S. CONST. amend. XVIII (ratified 1919); U.S. CONST. amends. XVI-XVII (ratified 1913); U.S. CONST. amend. XV (ratified 1870); U.S. CONST. amend. XIV (ratified 1868).
[9] U.S. CONST. amend. XXVII (ratified 1992); U.S. CONST. amend. XXVI (ratified 1971); U.S. CONST. amend. XXV (ratified 1967); U.S. CONST. amend. XXIV (ratified 1964); U.S. CONST. amend. XXIII (ratified 1961); U.S. CONST. amend. XXII (ratified 1951).
[10] U.S. CONST. amend. XXVII (proposed 1789; ratified 1992).
[11] *Renewed Effort for Federal Victims' Rights Amendment Underway*, NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (last visited Mar. 21, 2012) [hereinafter Proposed VRA] (providing the full text of the proposed Victims' Rights Amendment).
[12] U.S. CONST. pmbl.

specifically our citizens who have been impacted by the horrors of crime that plague our great country every day.

My beloved big brother, Michael, was a kind, simple, and beautiful soul. We grew up in a low-middle income family in Sacramento, California when former President Ronald Reagan was Governor of the Golden State. Like so many families, our parents divorced during our teenage years, and bitter acrimony persisted between them. Michael struggled academically due to a learning deficiency and struggled socially due to a lack of self-confidence. Michael loved others, but was not typically loved in return. Despite his challenges, Michael was consistently kind, joyous, and loving to me. Despite the darkness of his oft-trying youth, Michael was always a bright, glowing light for me. Subsequently, as a young boy then young man, it vexed me to see Michael treated so unkindly by so many. Michael was the classic target for bullies, both physical and emotional.

Four days prior to Michael's kidnapping, beating, and murder on November 3, 1981, Michael lovingly assured me he was not worried about the transient gang of petty criminals who had beaten him up twice in the past month. With the sweet and unfortunate innocence that prevailed throughout his twenty-two years of far-too-short life, Michael said, "Don't worry about me, Tim. You know me, I always take care of myself. Besides, they are on one side of town, and I am on the other." With my heart aching and my worry soaring, I asked Michael if he would contact the police in Colorado Springs, Colorado. He quickly yet lovingly replied, "No, no, no, I don't want any more trouble." Tears are welling in my eyes as I recall and type this. Alas, thirty plus years later, time has not healed these wounds; it has only numbed them.

Michael was stabbed sixty-five times on a dark, lonely mountain in the Rocky Mountains. His two murderers stated Michael was still alive after their incomprehensibly

vicious assault. Angered by Michael's amazing and heroic struggle to live, the two barbaric killers slit Michael's throat and crushed his skull. With Michael's final breath expelled, the evildoers left him there for the animals to feed on. If this pains you for me, I ask you to redirect your pain to my parents, particularly my mother. By the Grace of God, I was home from college the weekend prior to Thanksgiving when Detective Lou Smit of the Colorado Springs Police Department called. Several hours later, I had the unenviable task of telling my dear mother that her first born child had been brutally murdered. Suffice it to say, I witnessed a part of my mother die that day as she cried from a place that no man possesses.

Having served for several years with noble and venerable organizations, such as the National Organization for Victims Assistance, Parents of Murdered Children, and Arizona Voice for Crime Victims, I have come to learn and understand my family has been more fortunate than most families who are subjected to similar evils and burdens. For example, by way of an unexpected tip, Michael's body was miraculously found in the Rocky Mountains outside of Colorado Springs, Colorado several weeks after he was butchered. With information from the tipster and the evidence of his murder, Michael's two murderers were quickly apprehended in Sioux Falls, Iowa, and two accomplices were quickly apprehended in Boston, Massachusetts.

Within a year of Michael's murder, three of the perpetrators had accepted plea agreements in exchange for testimony against the lead murderer. Shortly thereafter, the lead murderer (nicknamed "The Joker") hung himself in jail, albeit unsuccessfully; he then hung himself a second time, quite successfully. The surviving murderer continues to serve a life sentence with the possibility of parole in the Sterling Correctional Facility in Sterling, Colorado. The two accomplices in the kidnapping and beatings served their plea deals, and probably matriculated to additional mayhem. In summary, within one year of laying Michael to rest

outside of Sacramento, California, we were able to focus exclusively on grieving for the next twenty years until the surviving murderer's first parole hearing in 2001. Unfortunately, we have endured two other parole hearings in 2004 and 2009, and must endure another one in 2014. Assuming justice is served and parole is denied, we will still endure several other parole hearings after 2014.

However, most families of murder victims and victims of heinous crime are not so fortunate, assuming the word *fortunate* can even be applied to a nightmare that no family should ever suffer and endure. Many families have not found their loved ones or all of their loved ones. (Yes, I did mean, "all of their loved ones." I will never forget meeting the sister of a murder victim and the tears she shed when she shared that the police had only found her sister's two arms.) Alas, many families, even with support from the proper authorities, have not found the murderers of their loved ones. Countless rape victims are haunted by their rapists, particularly when the rapists have not been caught. Quite often, crime victims and the supporting authorities have not found the evidence needed to bring justice to bear. Typically, the pursuit and implementation of justice takes numerous years which more often than not is wrenching for the victims and their families. Tragically, the pursuit of justice can last an entire life time. Consequently, it is reasonable to say it is difficult, and sometimes impossible, to enjoy the "Blessings of Liberty"[13] if justice has not been truly and fully administered to the perpetrators.

I have sought to comfort numerous crime victims in our country not only because they have suffered breathtaking evils, but also because they have suffered the justice system. Quite often, crime victims are re-victimized when the very justice system that should exist to protect the innocent and punish the guilty criminals further punishes the innocent victims.

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[13] *Id.*

There are twenty-three different protections for the defendants in the U.S. Constitution, but there are absolutely *zero* constitutional protections for crime victims.[14] Thirty-three states have constitutional protections for victims, but seventeen states have absolutely *zero* constitutional protections for crime victims. In short, there is a sub-standard—better yet an unacceptable—patchwork of laws throughout our country to provide crime victims various protections. Far too many crime victims are denied the "Blessings of Liberty"[15] because they have no federal constitutional protections. And, it should be noted, a heartbreaking and disproportionate share of the most violent crime in our country is inflicted on the poor, the downtrodden, and the suffering. These are the very people that federal, state, county, and municipal officials often purport to care about deeply, but often overlook because they typically lack power.

The Victims' Rights Amendment provides a *right to fairness* for crime victims.[16] "[I]n Order to form a more perfect Union"[17] our Founding Fathers risked treason and death. There are twenty-three different protections for defendants in the U.S. Constitution.[18] Hopefully, it strikes you as just, and preferably paramount, that crime victims should enjoy federal protections too. "[A] more perfect Union"[19] can and will exist when a right to fairness for crime victims is enshrined in our U.S. Constitution.

The Victims' Rights Amendment provides a *right to respect* for crime victims.[20] Our Founding Fathers sought to "establish Justice"[21] throughout our sacred land. The United States of America is unparalleled in her successes and prosperity for many reasons, one being the Rule

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[14] *See generally* U.S. CONST.
[15] U.S. CONST. pmbl.
[16] Proposed VRA, *supra* note 11.
[17] U.S. CONST. pmbl.
[18] *See generally* U.S. CONST.
[19] U.S. CONST. pmbl.
[20] Proposed VRA, *supra* note 11.
[21] U.S. CONST. pmbl.

of Law. The Rule of Law is rooted in the faithful administration of justice. The justice system exists to do the just, not perpetuate injustice. When just things are done, respect is bestowed. Yet, crime victims have no federal constitutional guarantee of the *right to respect*, so many unjust things are done.

The Victims' Rights Amendment provides a *right to dignity* for crime victims.[22] As a great nation, we must "insure domestic Tranquility"[23] by granting crime victims the simple, basic and just *right to dignity*.[24] Our justice system should exist to protect the innocent and punish the guilty. Throughout our country, the Scales of Justice must respectfully be rebalanced, so crime victims are not further stripped of their dignity. This will not happen without federal constitutional protections.

The Victims' Rights Amendment provides a *right to reasonable notice* for crime victims.[25] The Preamble of our U.S. Constitution called on our young federal government to "promote the general Welfare"[26] of America's new citizens. The "general Welfare"[27] of crime victims, who are often the poor and downtrodden of our country, will be significantly improved with the granting of the *right to reasonable notice*.[28] There is no desire for unreasonable or impossible notice. There is only a desire, if not a collective cry, for just and fair notice. This right would ensure crime victims can prudently tend to the important matters of the justice system that they never wished upon themselves.

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[22] Proposed VRA, *supra* note 11.
[23] U.S. CONST. pmbl.
[24] *See* Proposed VRA, *supra* note 11.
[25] *Id.*
[26] U.S. CONST. pmbl.
[27] *Id.*
[28] *See* Proposed VRA, *supra* note 11.

The Victims' Rights Amendment provides a *right not to be excluded* for crime victims.[29] Our Founding Fathers proclaimed, "We the People."[30] They did not write "some of the people" or "certain types of people." They wrote, "We the People."[31] Crime victims carry heavy burdens. These burdens are seen and unseen, tangible and intangible, known and unknown. Their burdens should not be worsened by being excluded when they should not be excluded. Our country should never permit a crime victim to be excluded from a legal proceeding that any reasonable person would view as the fair and just fulfillment of the Founding Fathers' pledge for the "Blessings of Liberty."[32]

The Victims' Rights Amendment provides a *right to be heard* for crime victims.[33] The First Amendment of our U.S. Constitution outlines several foundations for our country, of which "freedom of speech" is bedrock.[34] Among the many things crime victims seek to exercise is the right to free speech during key proceedings at appropriate moments. Crime victims often seek to give voice to their horrors, their concerns, and their grievances. When the surviving murderer of my beloved big brother, Michael, was sentenced to life in prison, I thought I had the right to be heard during the heart-wrenching proceeding. Unfortunately, I was wrong! I was terribly wrong. Although I had a respectful eight-to-ten minute speech prepared, I was denied the opportunity to speak for Michael, my mother, and my family. It was heart-breaking to be denied the opportunity to be heard. Instead, I had to wait twenty years to be heard during the first parole hearing. Countless others have been subjected to much worse.

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[29] *Id.*
[30] U.S. CONST. pmbl.
[31] *Id.*
[32] *Id.*
[33] Proposed VRA, *supra* note 11.
[34] U.S. CONST. amend. I.

The Victims' Rights Amendment provides a *right to proceedings free from unreasonable delay* for crime victims.[35] The First Amendment of our U.S. Constitution also provides citizens the right "to petition the Government for a redress of grievances."[36] It is wrenching and tragic to behold crime victims mired in the very justice system that should prudently, expeditiously, and justly serve them. The multi-year delays that I have witnessed many crime victims suffer are not only unreasonable, they are inhumane. A vexing grievance exists in America, and should be constitutionally rectified. "[T]he Government,"[37] our federal government, should right this egregious wrong once and for all.

The Victims' Rights Amendment provides a *right to reasonable notice of release or escape of the accused* for crime victims.[38] How could anyone secure the constitutionally aspired "Blessings of Liberty"[39] if they suffer the indignity of last minute notice or no notice at all? How could anyone secure the constitutionally aspired "Blessings of Liberty"[40] if they suffer the distress and fear of discovering after the fact that their criminal has been released or has escaped? Suffering the evils of crime causes enough life-long pain. These excruciating burdens should not be compounded by an uncaring justice system.

The Victims' Rights Amendment provides a *right to restitution* for crime victims.[41] Unfortunately, crime victims often do not receive fair restitution even when it is deserved. Furthermore, it is a national embarrassment when criminals profit from their crimes and crime victims receive no restitution. In these wretched situations, crime victims are victimized again

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[35] Proposed VRA, *supra* note 11.
[36] U.S. CONST. amend. I.
[37] *Id.*
[38] Proposed VRA, *supra* note 11.
[39] U.S. CONST. pmbl.
[40] *Id.*
[41] Proposed VRA, *supra* note 11.

and suffer even greater injustice. In these abhorrent situations, the criminals may enjoy the "Blessings of Liberty,"[42] but the crime victims are unjustly burdened with it.

The Victims' Rights Amendment provides a *right to standing to assert these rights* for crime victims.[43] Specifically, Section 1 of the proposed Twenty-eighth Amendment states, "The crime victim or the crime victim's lawful representative has standing to assert these rights in any court."[44] This prudent right is absolutely paramount for crime victims who seek to participate in the relevant judicial proceedings in the aftermath of the evil they have suffered. Furthermore and notably, this pragmatic right honors the First Amendment right "to petition the Government for a redress of grievances."[45]

When our heroic Founding Fathers pledged their sacred honor to "provide for the common defence"[46] our young nation faced enemies near and far. Unfortunately, our nation still has enemies. America's enemies wish us harm and hope for our demise. America must be defended from these enemies. Yet, while doing so, we should never forget evil lives and thrives within our borders too. Based on federal crime statistics, someone is forcibly raped every 6.2 minutes in our country.[47] Someone is murdered every 35.6 minutes in our country.[48] In fact, every twelve weeks more people are murdered in America than died on the horrific morning of September 11, 2001.[49] Sadly, over 150,000 people have been murdered in America since 9/11.[50]

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[42] U.S. CONST. pmbl.
[43] Proposed VRA, *supra* note 11.
[44] *Id.*
[45] U.S. CONST. amend. 1.
[46] U.S. CONST. pmbl.
[47] *2010 Crime Clock Statistics*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/offenses-known-to-law-enforcement/crime-clock (last visited Mar. 17, 2012).
[48] *Id.*
[49] *Compare* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 1-2 (2004), *with Crime in the United States, 2010 Murder*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime/murdermain (last visited Mar. 17, 2012).
[50] *See* FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2004 15, 72 (2005); *Preliminary Semiannual Uniform Crime Report, January-June, 2011*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/preliminary-annual-ucr-jan-jun-2011/data-tables/table-1 (last visited Mar. 18,

The "Blessings of Liberty"[51] providing, the Victims' Rights Amendment will become the Twenty-eighth Amendment to our U.S. Constitution. In the heroic, people-focused tradition of our Founding Fathers, the proposed Twenty-eighth Amendment calls for "fairness, respect, and dignity" for crime victims throughout our great land.[52] These are noble and pragmatic ideals, that should simply be present in our justice system, but often cannot be found. Many state constitutions possess such words yet grave injustices still exist. Tragically, seventeen state constitutions do not have any such words. In these states, there are no constitutional protections for crime victims whatsoever.

Various federal statutes have been enacted to provide rights for crime victims. Despite great hope and intent, the federal statutes have not been as effective as our citizens deserve. In short, our country has a patchwork quilt of crime victim rights that is tattered and worn. Even when enshrined in the law, crime victim rights are not uniformly applied nor embraced. Reprehensibly, there are courtrooms and jurisdictions where crime victim rights are not enforced. This is a huge problem for our country, not just for crime victims. It is a national wrong that must be made right, and it can only be made right with the proposed Twenty-eighth Amendment to our U.S. Constitution.

Our Founding Fathers were heroes of the first order. They risked treason and death when they pledged their sacred honor to our young country. Although they were imperfect men, they

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2012); *Crime in the United States 2010 Murder*, *supra* note 49; *Crime in the United States, 2009 Murder*, FED. BUREAU OF INVESTIGATION, http://www2.fbi.gov/ucr/cius2009/offenses/violent_crime/murder_homicide.html (last visited Mar. 18, 2012); *Crime in the United States, 2008—Murder*, FED. BUREAU OF INVESTIGATION, http://www2.fbi.gov/ucr/cius2008/offenses/violent_crime/murder_homicide.html (last visited Mar. 18, 2012); *Crime in the United States, 2007*—Murder, FED. BUREAU OF INVESTIGATION, http://www2.fbi.gov/ucr/cius2007/offenses/violent_crime/murder_homicide.html (last visited Mar. 18, 2012); *Crime in the United States, 2006 Murder*, FED. BUREAU OF INVESTIGATION, http://www2.fbi.gov/ucr/cius2006/offenses/violent_crime/murder_homicide.html (last visited Mar. 18, 2012); *Crime in the United States, 2005—Murder*, FED. BUREAU OF INVESTIGATION, http://www2.fbi.gov/ucr/05cius/offenses/violent_crime/murder_homicide.html (last visited Mar. 18, 2012).

[51] U.S. CONST. pmbl.

[52] Proposed VRA, *supra* note 11.

were God-loving men. They believed Providence would bless our young nation at its founding and for centuries to come. Therefore, our Founding Fathers are not 235-year-old anachronisms that should not be considered during the noble and just pursuit of the Twenty-eighth Amendment to the U.S. Constitution. Our Founding Fathers are eternal patriots with living voices of wisdom and worth that call us to build an even better country. Our Founding Fathers call us to pledge our sacred honor to "secure the Blessings of Liberty to ourselves and our Posterity."[53] Let us demonstrate we are worthy of this inspiring and humbling charge.

[53] U.S. CONST. pmbl.

STATEMENT FROM THE AUTHOR

Bob Preston*

> Wendy Preston, 22, was murdered on June 23, 1977 in her parents' Florida home. She was a geriatric nurse, and was visiting her mother and father, Bob and Pat Preston, before leaving for the New York School of Ballet to begin a new career. While out with her friends, she mentioned that her parents would not be home for awhile. The killer overheard her, found her parents' home, broke in to find money to buy drugs, and murdered Wendy. Friends found her body six days later. Her parents were told that the state of Florida was the "victim" in this case, and that they would be notified only if they were to be called as witnesses.[1]

My continuing commitment is to establish a constitutional guarantee that federal legislation passed to offer federal crime victims certain rights does not get overturned, as we experienced in Florida in 1987, and that crime victims all across our country will have a baseline of fair and meaningful rights.

My daughter, Wendy Preston, was murdered in 1977, at our Florida home. After first-degree murder charges were filed, my wife and I were told that Florida was the victim, and we would be notified if we were to be called as witnesses. After that, it became extremely difficult for us to get information about the case—the case that we regarded as our case. Ultimately, after a series of misadventures that I will not relate here, the murderer was allowed to plead to a second-degree murder charge.

David Tal-Mason, the murderer of my daughter, had constitutional rights. What, I wondered, were the constitutional rights of victims? There were none. We were told by the Office of the State Attorney of Broward County, Florida that it was a crime against the state and we were not the victims. We would be called if needed as witnesses

In 1979, we joined with other homicide survivors in a volunteer effort to seek legislation

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* The author is a Co-Chair of the National Victim Constitutional Amendment Network.

[1] 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, 582 (2005).

enabling crime victims to participate in the American justice process, and we established Justice for Surviving Victims. Many well-intentioned bills were passed by the Florida legislature, attempting to do something for victims.[2] Yet our fear was that without constitutional guarantees, much of it would turn out to be poetry.

In 1984, Florida voters approved a twenty-eight page Victim and Witness Protection Act, which offered victims and survivors some rights to participate in the justice process.[3] In 1987, while, as part of the plea, David Tal-Mason had agreed that he would not ask for or receive credit for time served in a mental institution, he immediately appealed on that basis and was given credit for time served. The Florida Supreme Court said that to not give him credit would "implicate significant constitutional rights."[4]

In 1988, article 1, section 16, of the Florida Constitution was amended to ensure crime victims had the constitutional guarantee "to be informed, to be present, and to be heard *when relevant*, at all *crucial* stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused."[5] After the passage of the Florida amendment, we were present at all subsequent parole hearings for the next twenty years. But the limitations of the State amendment are evident.

While thirty-three states now have similar constitutional rights for victims, seventeen states do not,[6] and the ones that do differ in force and effect. My fear is that the well-intended legislation passed by the U.S. House and Senate and in the states has proven inadequate to really make our system fair for victims everywhere. Just as the rights of the offender are protected in

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[2] *See generally* FLA. STAT. §§ 960.001-960.298 (2011), *available at* http://www.flsenate.gov/Laws/Statutes/2011/Chapter960.
[3] Press Release, Dep't of Justice, 1987 National Victims Crime Week Honorees (Apr. 29, 1987), http://www.ojp.usdoj.gov/ovc/ncvrw/1987/press.htm.
[4] Tal-Mason v. State, 515 So. 2d 738, 740 (Fla. 1987).
[5] FLA. CONST. art. 1, § 16(b) (emphasis added).
[6] *State Victim Rights Amendments*, NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (follow "state vras" hyperlink on left side of page) (last visited Mar. 17, 2012).

our U.S. Constitution, so should the rights of the victim. This is a simple matter of common sense and fairness.

STATEMENT FROM THE AUTHOR

Hon. John Gillis*

> Louarna Gills, 22, John Gillis' . . . daughter, was murdered on January 17, 1979 as part of a gang initiation in Los Angeles. The quickest way to be initiated into the "Mexican Mafia" was to murder the daughter of a Los Angeles Police Department officer; John had been a homicide detective with the department and was at the time serving as a sergeant on the Los Angeles Police Commission. The killer targeted Louarna because he knew that she was the daughter of a police officer. He picked her up a few blocks from her home, drove her to an alley, shot her in the head as she sat in the car, pushed her into the alley, and then fired additional shots into her back. The family was not notified of critical proceedings in the killer's trial, including the arraignment. John, [former] Director of the Office for Victims of Crime of the U.S. Department of Justice, was not allowed to enter the courtroom during the trial.[1]

For more than five decades I have been involved with the criminal justice system and during that time not a lot has changed for victims of crime. As a child, long before my involvement with the system, I remember watching the cowboy movies and the gangster movies that had one predominant scene. The bad guys would commit a crime, mount their favorite mode of travel, and head for the county or state line because they knew the pursuing authorities had no jurisdiction once they crossed that magic line. Victims of today face a similar dilemma. The treatment depends on where they are victimized.

At the time of the writing of the U.S. Constitution, victim rights were not perceived to be an issue. The victim, or next of kin, was an active and primary participant in the entire process. There was never a question about the victim being present at the hearings. There was no question regarding the victim's participation in the proceedings and no restriction about the victim talking about the impact of the crime at the hearing. When the government began taking over the role of prosecuting crimes on behalf of the victim, things dramatically changed for the

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* The author is the former Director of the Office for Victims of Crime, for the United States Department of Justice.

[1] 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, 582 (2005).

victim. The victim became the necessary piece of evidence to prove the case, and nothing more. The victim had no other role than to be the *corpus delecti* of the crime. If other evidence could be produced without the victim, the victim was relegated to the halls of the courthouse. I have been there. I was that next of kin, required to wait in the hallway while the trial for the murderer of my daughter took place.

In 1979, I was a sergeant with the Los Angeles Police Department. My daughter, Louarna Gillis, was murdered by a young gang member who wanted move up in the ranks of the Mexican Mafia. The quickest way for him to do that was to kill a cop or a family member of a cop. Louarna was a twenty-two-year-old nursing student, and she was employed part-time as a nurse's aide. One week after Louarna's twenty-second birthday, the defendant told her he had been designated by her friends to pick her up and take her to a surprise birthday party. He picked her up as planned, drove her to an alley where he shot her in the head, and emptied the gun in her back as she lay on the ground. The defendant was arrested a few months later and shortly thereafter we were in trial. My wife and I were both excluded from the courtroom for the entire process. We sat in the hallway while the defendant's friends and family paraded in and out of the courtroom. At times they would look at us and laugh, other times they would give us dirty looks as they flashed signs and wore their colors. Although the trial took place in 1979, this scenario still plays out day after day across America. Victims and next of kin are still stuck in the hallways of justice while the government panders to the every need of the defendant. Defenders of the indefensible still believe that victims in the courtroom might cause a juror or judge to disregard the facts of the case and convict the defendant. They do not mention it may be a little more difficult for the defense to puff or lie while the aggrieved parties are listening.

In the case of my daughter's murderer, the jury came back with a verdict of eleven for first degree murder and one not guilty. I don't know what was said during the trial that caused one juror to come back with a not guilty verdict, but I believe my family could have corrected any misinformation put forth by the defense. Our input may have been enough to save the case.

As we were rapidly preparing for a retrial the defendant offered to plead to second degree murder. We accepted the plea, but again, we were not in court for sentencing, and impact statements were things of the future. It is unconscionable that victims, even as we speak, do not have the constitutional rights to be in court and to be heard. Our Constitution should give as much protection to the injured party as it does to the accused. While no innocent party should ever be wrongly convicted there is little or no guesswork when it comes to identifying the victim of a violent crime. Recognizing the victim's rights in no way violates the defendant's right to a fair and impartial hearing.

After Louarna's murderer was sentenced to state prison he contacted federal authorities and volunteered to testify in a RICO hearing. When he finished his testimony the feds moved him to a hideout federal prison—they say for his protection—where he has been since 1992. He is eligible for parole and thereby gets parole suitability hearings to determine if he should be released. Since my family and I are not permitted to know where he is, or what he is doing, the Department of Corrections makes all the arrangements and then tells us where to be if we want to be present at the hearing. For one hearing in the late 90's, my wife and I were at a prison in California and we were connected to another prison somewhere in the United States; the hearing was conducted by conference call. The next hearing, held five years later, was held at a prison in Chicago, Illinois. My wife and I had to pay all travel and lodging expenses to attend the hearing in Chicago. This year the hearing was held in California. The expenses for us just keep piling

up, but I know about the many families across the United States that have been financially devastated. These families are not able to attend the hearings and in many instances are never notified that a hearing is taking place.

In April of 2001, I was nominated by President George W. Bush to serve as Director, Office for Victims of Crime, United States Department of Justice. I was confirmed by the U.S. Senate during the week of September 11, 2001 and served until January 20, 2009. During my tenure with the Office for Victims of Crime I heard and saw, first-hand, the pain and suffering of crime victims all across America. I talked with scores of families who had literally lost their jobs, their homes, their self-pride, and respect because they had the misfortune of becoming a crime victim. And those who were hurt the most were those who were inter-state victims. They were victimized in one state and resided in another. Although many states have amended their constitutions to include rights for victims, the constitutions are not binding outside the state borders. Even within the state, the state's constitution too often has the clout of a marshmallow! It is time we amended the U.S. Constitution to include rights for victims of crime. Americans who become crime victims in any state should have the same rights as any crime victim anywhere in the United States.

The Preamble of the U.S. Constitution states that it is established to "promote the general Welfare";[2] therefore it is imperative that victims' rights be included as an amendment.

[2] U.S. CONST. pmbl.

STATEMENT FROM THE AUTHOR

Duane Lynn*

> Nila Lynn, 69, of Peoria, Arizona, was murdered at a homeowner's association meeting on April 19, 2000 by a man unhappy with the way the association had trimmed the bushes in his yard. Nila and another woman were killed, and several other men were injured. Nila died on the floor in the arms of her husband, Duane. They were three months short of their 50th wedding anniversary. Their children paid for her casket with the money they had saved for an anniversary gift. Duane wanted the killer to be sentenced to life without parole, rather than endure the lengthy appeals of a capital case. Despite having clear constitutional and statutory rights, Duane was not allowed to make a sentencing recommendation. The killer received the death penalty.[1]

Ventana Lakes is a senior community and has its own home owners association with a seven-person board of directors. In April, 2000, I was a member of that board and was in charge of the landscaping for the grounds. The first Wednesday of each month we held our board meeting. On April 19th, my wife, Nila Ruth, was going to the meeting with me.

We arrived at the meeting hall about thirty minutes early so I asked Nila if she would sit with a lady by the name of Ester LaPante for a few minutes because she was new to our board and that was to be her first meeting. Little did I know that in about two hours both Nila Ruth and Ester would be dead.

About thirty minutes before we closed the meeting, a man entered the room and began shooting a pistol at the board members. I later learned he had four guns with him and about 700 rounds of ammunition. About eight months earlier I had taken a lawn maintenance crew and cleared off his lawn. We trimmed his trees, cut his shrubs, and cleared off his lawn. All of this type of maintenance was required by our rules and regulations. He had refused to follow these rules. A few weeks after I had done this he and his wife moved. We all were very glad to hear

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* The author is a retired officer with the Arizona Highway Patrol.

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

this; however, what we did not know was that he had been evicted for non-payment by his mortgage company.

There were ten shots fired; my wife and Ester were killed, and three men were hit and wounded. It all took place in twenty seconds. My entire life changed forever in that short period of time.

Almost three years later the trial for the murders of Nila Ruth and Ester began. It was to be a capital trial seeking the death penalty. I was very much against the death penalty and let the county attorney's office know my views. But I was only talking to a wall. Nobody cared and of course nobody heard my cries. For the sake of my life and that of my family, I wanted to have the increased certainty that would come with a life sentence, but my reasons were ignored.

I was told that in Arizona crime victims had a constitutional right to be heard at sentencing. We had moved during this time from judge sentencing to jury sentencing after the *Ring* case.[2] Even before trial, I asked the judge to protect my right to be heard and to tell the jury that I wanted to ask for life imprisonment and not the death penalty, and I wanted to tell them my reasons.

With an organization called Arizona Voice for Crime Victims representing me, I filed a motion before the trial judge but it was denied.[3] We sought a review of this decision before the Arizona Court of Appeals and the Arizona Supreme Court.[4] We lost in both courts, again on the basis of the Eighth Amendment.[5] The Arizona Supreme Court concluded that for me to exercise my right to be heard under the Arizona Constitution to ask for life imprisonment and not the death penalty would deny the defendant his Eighth Amendment right against cruel and unusual

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[2] Ring v. Arizona, 536 U.S. 584 (2002).
[3] Minute Entry at 1, 5, Arizona v. Glassel, CR 2000-006872 (Super. Ct. Ariz. Nov. 12, 2002).
[4] Lynn v. Reinstein, 68 P.3d 412, 414 (Ariz. 2003).
[5] *Id.*

punishment.[6] We asked the Supreme Court of the United States to review this but they refused to accept it.[7] So it seemed that my rights were of little value. My right to be heard was not the only right of mine that was ignored.

During the long period of time that it was taking to start the trial, I asked why so long and again it was never explained. I asked where the *speedy* part of our Constitution was, and was told that it only applied to criminals—not to victims. Also, I was requested to remain quiet so the trial could begin. I asked where was the part of our Constitution that covered *freedom of speech* and again I was told that victims had no right to be heard at the start of a trial. It turns out that the Constitution of the United States of America is only for accused or convicted criminals and there is nothing in the Constitution for the victims of crimes. Why? What is being done today for victims to allow them to have a voice in how their lives will be lived and how they will forever cope with that new life they are now living?

Everything the victims go through is done in a very hard way. There was a short hearing after conviction for restitution. A certain small portion was to be taken from monies received by this inmate and given to the victims for the cost they had to bear. Ten years after the trial, I had yet not received any money from this man, and I learned that he was receiving money each month from his wife. I had to go back to the courts to fight for my rights again. I truly believe that the court should have seen that restitution was being taken from his money. After all, my right to restitution is also written into the Arizona Constitution.[8] It ended up again with my having to fight for my rights. I ended up once again in the Arizona Court of Appeals. It took eleven years after the death of my wife before I received any funds for restitution. If you are a victim, nothing is simple; even with so called state rights we are treated as second-class citizens.

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[6] *Id.*
[7] Lynn v. Reinstein, 540 U.S. 1141 (2004).
[8] ARIZ. CONST. art. II, § 2.1.

What I don't understand is why our lawmakers cannot see the need for victims across the nation to be able to have *rights* just like the criminals have. One day, maybe somebody can really explain this to me. In the meantime, we as victims of crime will just have to go on living in the valley of death and walk in our shoes alone.

STATEMENT FROM THE AUTHOR

Roberta Roper*

> Stephanie Roper, 22, was the daughter of Roberta and Vince Roper of Maryland. She was kidnapped by two men after her car broke down on April 3, 1982. Over the next five hours, they repeatedly raped and tortured her. They then took her to a deserted shack in another county and repeated these crimes. Stephanie made several attempts to escape. When the killers recaptured her for the last time, they beat her with logging chains, shot her to death, burned her body, and attempted to dismember her. During the trials of the killers, the court excluded Stephanie's family from the courtroom and never notified them of continuances.[1]

April 3, 2012, is the thirtieth anniversary of the murder of our daughter, Stephanie Ann Roper. That date is also the eighth anniversary of the drunk-driving crash that took the life of our first grandchild, Samia Roper. 2012 is also the thirtieth birthday of the organization that was founded by my husband, Vincent, and me in tribute to our slain daughter. Originally created as the Stephanie Roper Committee & Foundation, Inc. ("Committee & Foundation"), this statewide non-profit began on a grass-roots level and today continues to serve victims of all crimes as the Maryland Crime Victims' Resource Center, Inc.

People often ask how we can do this work. They believe that serving crime victims and their families must be very difficult, depressing, and challenging work. My reply is, "How could I not!" Difficult and challenging, it has been. Yet victim advocacy and assistance is work inspired by the strength, courage, and dignity of victims and survivors themselves. We speak on behalf of those who do not have a voice and cannot stand up for their rights. And these efforts are sustained by the satisfaction that other crime victims have been given new hope and healing to live as survivors.

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* The author is the founder of the Maryland Crime Victims Resource Center.

[1] 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, 582 (2005).

Reflecting on these thirty years, we are humbled at the extraordinary efforts and achievements that have changed the treatment of crime victims and have brought distinction to Maryland as a national leader for crime victims' rights and services. From the *dark ages* of our family's experience beginning in 1982, to a more *enlightened* time today, crime victims' rights and services have advanced from nothing *(then)* to a wealth of statutory and state constitutional rights (*today*). Additionally, programs provide support and legal services to enable crime victims and their families to access tools to rebuild lives shattered by criminal violence. And while these achievements have made a difference in the criminal justice system's treatment of crime victims, we should not be deceived or complacent that justice for victims has been achieved. Far too many American citizens have suffered the consequences of a criminal justice system that is flawed in regard to the role of crime victims.

The heinous crimes committed against our daughter, Stephanie, and the criminal justice proceedings that followed became the catalyst for changes and created a movement to establish rights and support services for crime victims in Maryland. Ours was but one example of thousands of families who suffered similar undeserved consequences. Like other victim survivors across America, my husband and I were desperate to find hope and healing for our family as well as preventing others from enduring our experience. As we struggled to find new meaning and purpose in our lives, we began an uncharted journey for victim justice that continues today.

Stephanie was the oldest of our five children, a bright and gifted young artist about to graduate *magna cum laude* from Frostburg State University. In that early spring of 1982, she came home to Croom, Maryland for a weekend visit with her family and to prepare for her senior art show. Upon returning from an evening out with friends, Stephanie's car became disabled on

a country road in Brandywine, Maryland. Two men stopped, but instead of helping her, they kidnapped her and, over a five-hour period, repeatedly and brutally raped and tortured her. They took her to a deserted shack in St. Mary's County, where they fractured her skull with a logging chain, shot her, dismembered her body, and set it on fire.

Stephanie had done nothing to deserve becoming a victim of crime. We, her parents and her four surviving siblings, should have been treated with dignity and respect, received information, and been given the right to observe the trial and to provide a victim impact statement to the sentencing court. This did not happen. Instead, we were shut out of the courtroom and silenced at sentencing. Unlike Stephanie's convicted killers, we had no rights to information, no rights to observe the trial, and no right to be heard at sentencing. Likewise, the court's lenient sentence did not match the severity of the crimes. Our children asked us why liberty and justice for all did not include us. As parents, we were challenged to explain to them that the system we had taught them to believe in, to trust, and to respect, was responsible for these additional injuries.

Somehow despite this tragedy and injustice, we would find ways to triumph over evil. With the support of many, and through the advocacy of our organization, more than seventy-five pieces of legislation would be enacted to provide victims with rights and support services.[2] The most significant achievement was the passage of a Maryland State Constitutional Amendment for crime victims' rights passed in 1994, and approved by voters by 92.5%.[3] Despite the opponents who said our efforts would make a victim of the constitution, these accomplishments stand as a beacon of hope to all crime victims today.

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[2] *See The History of Crime Victims' Rights in Maryland*, MD. CRIME VICTIMS' RESOURCE CENTER, http://www.mdcrimevictims.org/laws-and-policies/history-of-crime-victims-rights-in-maryland/ (last visited Mar. 17, 2012).

[3] GOVERNOR'S OFFICE OF CRIME CONTROL & PREVENTION & THE MD. STATE BD. OF VICTIM SERVS., THE RIGHTS OF CRIME VICTIMS IN MARYLAND para. 1 (2007); *see* MD. CONST., DECLARATION OF RIGHTS, art. 47.

The crimes against Stephanie and the response of the criminal justice system captured public attention and mobilized citizen support for the efforts of the Committee & Foundation in ways that are rarely seen. Ordinary people identified with Stephanie and with our family. Ordinary people rolled up their sleeves and were prepared to work!

In light of this success, one might then question, "What is there left to do today? Why are efforts to amend the United States Constitution for victims' rights necessary to pursue?" Advocates in Maryland and across America have learned, despite their best efforts and successes, that until the fundamental law of the land provides equal justice for victims as well as those accused or convicted of crime, crime victims and survivors will remain second class citizens! We have learned that enacting statutes and state constitutional amendments without enforcement power and without the power of the nation's highest law continues to leave victims' rights dependent upon individuals, not imbedded in the law of the land. Victims' rights, like those of the accused or convicted, deserve the protection of our Constitution. They should not be a-roll-of-the-dice and dependent upon the will of an individual. As one victim said when comparing his rights to those of the person who committed the crime, "Treat us like a criminal. Then we know our rights will be protected and enforced because the Constitution requires it!"

Acting upon the final recommendation of President Ronald Reagan's Task Force on Victims of Crime and the results of efforts in their respective states, advocates banded together as a national coalition to seek the passage of an amendment to the United States Constitution beginning in the late 1980's. We worked with diligence, did our homework and overcame many of the misperceptions of our critics. And yet we have been held hostage by political power brokers and amendment opponents, despite the truth that this is neither a liberal nor conservative issue, but simply a human rights issue that is the *right thing* to do.

On April 22, 2004, the U.S. Senate passed a federal statute in lieu of a federal constitutional amendment.[4] In good faith, advocates accepted the Crime Victims' Rights Act,[5] as a critical opportunity to prove, once and for all, that statutes are simply not enough. A constitutional amendment is the only means to ensure that crime victims' rights are fully applied and that victims are treated with fairness, dignity, and respect.

Since the passage of the federal law, we continue to witness the failure of this statute to protect the rights of crime victims. We have witnessed exemplary programs that offer legal representation to crime victims shut down and funding ended. And without legal representation, enforcement of victims' rights once again becomes dependent upon the good will of an individual. While we are deeply grateful to the amendment's sponsors, Senators Jon Kyl (R-AZ) and Dianne Feinstein (D-CA) for their unwavering bi-partisan leadership, we are left with the evidence that this failure represents yet another broken promise to America's victims of crime.

We ask everyone to pause and remember with us and to celebrate our accomplishments and those of the victims' rights movement to date. Stephanie believed that *one person can make a difference and every person should try*. We also ask citizens to commit or to re-commit to keeping this legacy of hope alive. We urge them to actively support the passage of an amendment to the U.S. Constitution so that "justice for all" includes all victims of crime.

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[4] *See* Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified at 18 U.S.C. § 3771 (2009)).
[5] *Id.*

Statement of Jan Withers
National President, Mothers Against Drunk Driving
Written Statement in support of H.J. Res. 106
Constitution Subcommittee of the House Judiciary Committee
April 26, 2012

Chairman Franks and Ranking Member Nadler, on behalf of Mothers Against Drunk Driving, I write in strong support of House Joint Resolution 106, which provides for a Crime Victims' Rights Constitutional Amendment.

In 2010, 10,288 people were killed in a crash involving a driver with a blood alcohol content of .08 or higher. In addition, 350,000 people were injured in these crashes. Each of these deaths and injuries equals countless numbers of DUI victims. Last year, MADD and its victim services team served over 60,000 of drunk driving crashes.

As the leading DUI victim assistance organization in the nation, passage of the Crime Victims' Rights Constitutional Amendment is critical to ensuring that DUI victims are heard, present, and informed.

Right now, criminal defendants have over 20 constitutional rights guaranteed to them, but crime victims have none. Victims are often not notified when a criminal has been paroled or escaped, not able to present the impact of the crime to a jury before sentencing, and not even allowed in the courtroom to face the defendant.

Current laws are not enough. Even in states with strong victims' rights laws, victims are not notified of bail release over half of the time. Additionally, the current federal laws which give victims the right to be present at all public court hearings and the right to present impact statements at sentencing hearings in capital cases are not being enforced. Even in the Oklahoma City bombing, victims were forced to choose between impact statements and attendance at the proceedings, in violation of the current federal law.

To remedy these injustices towards those already victimized by crime, Representative Trent Franks introduced the Crime Victims' Rights Amendment. The amendment would grant victims of violent crime the rights to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused, to not be excluded from such public proceedings and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings, and to adjudicative decisions that consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender. It has been crafted to avoid hurting the rights of the accused while protecting those who have already lost so much.

In short, MADD believes that a constitutional amendment to protect victims' rights is the right thing to do for victims and for the system.

Thank you for your consideration of this resolution.

April 16, 2012

Congressman Trent Franks
2435 Rayburn House Office Building
Washington, DC 20515

On behalf of the Arizona Coalition Against Domestic Violence, I would like to thank Congressman Franks for sponsoring House Joint Resolution 106, an amendment to the Constitution of the United States that would protect the rights of crime victims.

Fittingly introduced during the 30-year anniversary of the creation of the President's Task Force on Victims of Crime, we believe that passage of this amendment will establish meaningful and enforceable rights that are desperately needed by crime victims everywhere, including victims of domestic violence. Conformity on a national level will help ensure that all victims, regardless of who they are or where they live, receive the same rights.

We are grateful to Congressman Franks for his vision and support, and we wish to express our appreciation to him for sponsoring this Resolution. If we can be of any assistance, please let us know.

Sincerely,

Elizabeth Ditlevson
Acting Exective Director
Arizona Coalition Against Domestic Violence

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VOICE

Voices Of Innocent Citizens Empowered
Support Group

Mending Hearts

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April 4, 2012

To Whom It May Concern:

I am writing this letter in reference to H.J. Res. 106, we are asking for your support. This is very important to victims and their families.

My world as I knew it was changed forever eighteen years ago, when my only child, Dean Theriot was brutally murdered. My family and I had to endured fifteen months of pure torture not knowing who did this horrible crime. Myself and others that had to endured the same pain of losing a loved one started VOICE. VOICE is a support group for victims of crime and their families. I would like you to know a little about VOICE, we are committed to providing positive attitudes necessary to address crime related issues, especially as those issues relate to innocent crime victims and their families. VOICE will provide understanding, respect, and assistance to the victims of crime and will, through its membership, provide a more secure law abiding community. VOICE works closely with the Legislature by coordinating and reviewing new and changing legislation affecting victims' rights. Just to name a few of our accomplishments'. April 21, 2004 was recognized as VOICE Day at the Louisiana House of Representatives. VOICE passed HB877 which provides with respect to victim impact statements. First case in Louisiana in which this new legislation was used was for the family of Geralyn Desto, in the Derrick Todd Lee's case. VOICE was instrumental in passing HB 586 to change the penalty for Vehicular Homicide from 20 years to 30 years. So, please keep us in your thoughts and prayers in our journey to make this world a better place.

Sincerely,
Catalene B. Theriot
VOICE President

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