

TESTIMONY OF PROFESSOR DOUGLAS E. BELOOF

Before the

House Judiciary Subcommittee on the Constitution

H.J. Res. 48

THE CRIME VICTIMS' AMENDMENT

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Those who are under the impression that victims' rights under state constitution or statute are adequate are mis-informed. Many state appellate courts are corrupting state constitutional and statutory rights of crime victims. These rights were enacted because constitutional rights had greater promise for compliance and enforce-ability than pre-existing statutory rights. The state constitutional rights were drafted and enacted in mandatory terms and placed in state court bills of rights to ensure their status as “real” constitutional rights. Like other rights, these constitutional civil liberties should be treated by appellate courts within established conventions of constitutional interpretation. With the exception of a few state courts,¹ the promise of these rights is being broken and the rights degraded.

Conventional constitutional analysis reveals that case-law has debased both victims' constitutional rights and the rule of constitutional law. Because there is no higher authority in the states than their respective constitutions, the states appellate courts' selective failure to use

¹ Arizona and Utah are the only states in which the state supreme courts have clearly enforced victims rights as mandatory and enabled rights where enforcement of the right was sought by a victim of crime.

conventional constitutional analysis breaks the promise of crime victims' state constitutional rights.

With the exception of Alabama,² all the states with a victims' rights amendment have placed it in the states respective Bill of Rights. In many states the victims' rights and criminal defendants' rights are in the same section of the state constitution, but listed as separate subsections. In other states the rights are listed separately. In conventional constitutional analysis, placement of rights in a Bill of Rights "...are usually considered self executing..."³ Thus, for example, civil liberties of privacy,⁴ freedom of speech and religion,⁵ Speedy trial⁶ are considered self-executing. Furthermore, modern State Constitutions "have been drafted with the presumption that they are self executing."⁷ Because all Victims' State constitutional rights amendments are "modern" the presumption is that they are all self-executing.⁸

Victims state constitutional rights, in all but perhaps two state constitutions,⁹ by their plain

² Alabama appears to have a unique way of numbering sequentially constitutional amendments.

³ 16 Am Jur Sec. 98, p. 486.

⁴ Davis v. Superior Court, 7 Cal. App.4th 1008, 9 Cal. Rptr. 209 (5th Dist.1992);

⁵Sheilds v. Gerhart, 163 Vt. 219, 658 A 2d 924 (1995).

⁶ Sykes v. Superior Ct. Of Orqange County, 9 Cal. 3d 83, 106 Cal. Rptr. 786, 507 P2d 96(1973).

⁷ 16 Am Jur. 2d Sec. 100, p. 488(string citing cases)

⁸ California passed the first victims Constitutional Amendment in 1982.

⁹ N.J. Const. Art. I, Sec. 42 ("A victim of crime shall be treated with...," "shall be entitled to those rights and remedies as are provided by the legislature ...") The New Jersey courts have interpreted legislation deriving from this to create; Va. Const. Art. I, Sec. 8-a Victims "as the General

language are mandatory rights. The mandatory nature of a constitutional right is made clear by the use of the word “shall.”¹⁰ The phrase “shall have the following rights,” or similar language, is present in seventeen states’ victims constitutional rights provisions.¹¹ Other state constitutions use slightly different mandatory language to the same effect. Five states provide that victims “has a right” or “have rights.”¹² Four states provide that victims “are entitled to rights.”¹³ Two states “grant” victims’ rights.¹⁴ One state

Assembly may be accorded rights....”“...These rights may include the following:[listing rights].” Virginia has interpreted these rights as....

¹⁰ 16 Am Jur. 2d. Const. Law, p 485-86, Sec. 97.

¹¹ Alaska Const. Art I, Sec. 24 (“Shall have the following rights...”); Colorado Const. Art. II (“...shall have the right to...”); California Const. Art. I Sec. 28 (“...shall have the right...”); Conn. Const. (“shall have the following rights”); Ill. Const. Art I, Sec. 8.1 (“Crime victims,...., shall have the following rights”); Ind. Const. Art I Sec. 13 (“Victims of Crime,...., shall have the right to”); Ks. Const. Art. 15 Sec. 15 Victims of crime,...., shall be entitled to certain basic rights...”); La. Const. Art. I, Sec. 25 (“shall be treated with,”“shall be informed of the rights,”“shall have the right to”); Mi. Const. Art. I, Sec. 24 (1) (“Crime victims,...., shall have the following rights”); Mississippi Const. Art. 3, Sec. 26A (victims of crime, ...,shall have the right to...”); Missouri Const. Art. I, Sec. 32 (“Crime Victims,...., shall have the following rights...”); Neb. Const. Art. I, Sec. 28 (A victim of crime,...., ...shall have: The right”); Nevada Const. Art. I, Sec. 8(2) (The legislature shall provide by law for the rights of victims of crime, personally or through a representative, to be...”); Ohio Const. Art. I Sec. 10a (“shall be accorded rights to”); N. M. Const. (“A victim of ...[listing specific crimes]... shall have the following rights”); R.I. Const. Art. I, Sec. 23 (A citim of crime, as a matter of right, shall be treated”“Such person shall be entitled to receive” “shall have the right to”); Wi. Const. Art I, Sec. 9m (“This state shall treat crime victims,” “This state shall ensure that crime victims have all of the following privileges and protections”).

¹² Arizona Const. Art. II, Sec. 2.1 (“...a victim of crime has a right...”); Id. Const. Art. I, Sec. 22 (“A crime victim,...., has the following rights”); Ok Const. Art. 2 Sec. 34(A) “The victim... has the right to”); S.C. Const. Art. I, Sec. 24 (“victims of crime have a right to”); Texas Const. Art. I sec. 30 (“a victim of crime has the following rights”); Utah Const. Art. I, Sec.28 (“victims of crime have these rights”)

¹³ Alabama Const. Amend. No 557 (“Crime victims are entitled to the right to....”); Fla. Const. Art. I, Sec. 16 (“are entitled to the right to”); N.C. Const. Art. I, Sec. 37 (“Victims of crime,...., shall be

has mandatory language with conditions on notice of the rights. The Maryland constitution states that “shall have the right to be informed...and if practicable, to be notified of [listing rights].”¹⁵

Most state constitutions are silent about what remedies are appropriate. The absence of specific remedies “is not necessarily an indication that it was not intended to be self-executing.”¹⁶ The maxim...where there is a right there is a remedy is as old as the law itself....and ‘tends to tip the balance in favor of vindicating constitutional rights,...’¹⁷ This has been true despite the fact that most states have a provision that rights shall have remedies.¹⁸ Moreover, civil rights within bills of rights written as mandatory rights, typically leave to the courts, as final arbiters of constitutions, to determine what should be appropriate remedies.

With near uniformity, offending state courts violate constitutional conventions by reaching constitutional issues despite no need to reach it. Eg., *State v. Holt*, 874 P.2d 1183 (Kan. 1994);

entitled to the following basic rights”); Tenn. Const. Art I Sec. 35 (“victims shall be entitled to the following basic rights”).

¹⁴ Or. Const. Art. I, Sec. 42 (“The following rights are hereby granted to victims”); Wa. Const. Art. I Sec. 35 (“victims of crime are hereby granted the following basic and fundamental rights”).

¹⁵ Md. Const. Art. 47.

¹⁶ Am Jur

¹⁷ 16 Am Jur 2d Sec. 104, p.492.

¹⁸ Comment, *State Constitutions’ Remedy Guarantee Provisions Provide More than Mere ‘Lip Service’ to Rendering Justice*. 16 Tol. L.Rev. 585 (1985)

Bandoni v. State, 715 A2d 580 (RI. 1998); Dix v Superior Court, 53 Cal.3d 442, 807 P2d 1063 (Cal. 1991) Despite plain mandatory language, and placement of the rights in state's respective Bills of rights, rights are labeled "directory" and unenforceable. Eg., Bandoni v. State, 785 A2d 580 (RI. 1998); People v Super, Ct. (Thompson), 154 Cal. App. 3d 319, 202 Cal. Rptr. 585 (2d. Dist. Cal. App. 1984); Dix v Superior Court 53 Cal.3d 442, 807 P2d 1063 (Cal. 1991); State v. Holt, 844 P.2d 1183 (1994) Where rights are correctly identified by courts as mandatory, victims are erroneously found to have no standing for reasons that are constitutionally unprincipled or simply wrong as a matter of law. Offending courts deny standing to exercise and enforce victims rights because: victims are not full or harmed parties; victims have no interest in a criminal case; victims have no interest in punishment; victims lose their rights at the conclusion of a criminal proceeding; victims' were indirectly deprived of their right (People v Pfeiffer, 523 NW2d 640 (Mich. App. 1994);specific remedial provisions are not expressly articulated in the bill of rights itself, Bandoni, supra; Holt, supra People v Super, Ct. (Thompson), 154 Cal. App. 3d 319, 202 Cal. Rptr. 585 (2d. Dist. Cal. App. 1984);. the potential for prosecutors' unethical manipulation of the rights. People v. Pfeiffer, 207 Mich. App., 151, 523 NW2d 640(1994).

Statutory rights fare no better. Eg., Hagen v. Commonwealth, 772 NE.2d 32 (Mass. 2002) (victims do not have standing); Gansz v. People, 888 P2d 256 (Colo 1985) (victims are not a party because they suffer no injury in fact); Kehoe v State, 1992 Westlaw 141156 (Tex App. 1992)(unpublished opinion)(Statutory victims right to be present not enforceable).

Other jurists and scholars have also commented on the denigration of victims' rights in state courts. Dissenting from the disastrous opinion by the Rhode Island Supreme Court gutting the Rhode Island constitution victims rights amendment, Justice Flanders has it right when he dissented:

By means of the Court's decision in this case the constitutional right of crime victims to address the court before sentencing of the criminal who injured them "regarding the impact which the perpetrator's conduct has had upon the victim," has been judicially emasculated. As a result, a right that our Constitution declares to be "essential and unquestionable," has been rendered nonessential and questionable; a right that our Constitution decrees is to be "established, maintained, and preserved," has been disestablished, dismembered, and disserved; and a right that our Constitution proclaims to be "of paramount obligation in all * * * judicial * * * proceedings," has been judicially subordinated to a vision of legislative hegemony over the protection of constitutional rights. And I especially regret that Rhode Island's Supreme Court, charged by the Constitution to say what that law is, to be the guardian of our constitutional rights, and to uphold these paramount provisions in all judicial proceedings, has relegated itself to the sidelines in this case when it comes to enforcing the State's Constitution. Instead of functioning as a key player in the protection of constitutional rights, the Court has withdrawn from the field to cower in the shadows of its intended constitutional role. Instead of serving as "an impenetrable bulwark against every assumption of power in the Legislative or Executive * * * [and] resist[ing] every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights," the Court has allowed itself to become a penetrable bullseye for those who would shoot down crime victims' constitutional right. Instead of independently enforcing and protecting these constitutional rights against all violations (whether they come from within or without the government), the Court has consigned the Judiciary in this constitutional case to serving as the liveried footservants of the General Assembly, waiting for some sign on high that it is permissible for this Court to enforce the constitutional rights that are so dear to the People of this State but which, says the majority, this Court is powerless to uphold without express legislative authorization to do so. I emphatically disagree with this shrunken and withered vision of judicial power, responsibility, and independence. *Bandoni v. State*, 715 A2d 580, 60 (R.I. 1998)(Flanders, J., dissenting)(footnotes omitted).

More troubling still are similarly unprincipled decisions concerning victims rights where there is

no dissent at all.

No less a constitutional scholar than Laurence Tribe has observed the state judicial destruction of state-based victim laws. In his testimony to the Senate, Professor Tribe writes about the outcome of the statutory case of *Hagen v. Commonwealth*, 772 NE.2d 32 (Mass. 2002) in his home state supreme court of Massachusetts:

A case argued in Spring 2002 in the Supreme Judicial Court of Massachusetts, in which a woman was brutally raped a decade and a half ago but in which the man who was convicted and sentenced to a long prison term had yet to serve a single day of that sentence, helps make the point that the legal system does not do well by victims even in the many states that, on paper, are committed to the protection of victims' rights. Despite the Massachusetts Victims' Bill of Rights, solemnly enacted by the legislature to include an explicit right on the part of the victim to a "prompt disposition" of the case in which he or she was victimized, the Massachusetts Attorney General, who had yet to take the simple step of seeking the incarceration of the convicted criminal pending his on-again, off-again motion for a new trial – a motion that had not been ruled on during the 15 years that this convicted rapist had been on the streets – took the position that the victim of the rape did not even have legal standing to appear in the courts of this state, through counsel, to challenge the state's astonishing failure to put her rapist in prison to begin serving the term to which he was sentenced so long ago. And the Supreme Judicial Court's ruling on the case left the victim a quintessential outsider to the State's system of criminal prevention and punishment.

If this remarkable failure of justice represented a wild aberration, perpetrated by a state that had not incorporated the rights of victims into its laws, then it would prove little, standing alone, about the need to write into the United States Constitution a national commitment to the rights of victims. Sadly, however, the failure of justice of which I write here is far from aberrant. It represents but the visible tip of an enormous iceberg of indifference toward those whose rights ought finally to be given formal federal recognition. Professor Laurence Tribe, Letter of April 8, 2003 to United States Senators Dianne Feinstein and Jon Kyl in Support of the Crime Victims Rights Amendment, S.J. Res 1.

As wrongheaded as these court opinions and others measured by conventional constitutional analysis are, there is no authority beyond these State Supreme Courts which can rectify the error. As a

practical matter, the most effective next step is to refer to the states the proposed Victims' Rights Amendment to the United States Constitution.

There is little concern that the United States Supreme Court would denigrate this federal Victims Rights Amendment one enacted. The Supreme Court, attuned to the concept of victim harm originating in the criminal act, the potential for further harm from the criminal process, and the inclusion of victim participation in the states' criminal proceedings, has shown increasing respect for the legitimate interests of crime victims. In *Morris v. Slappy*, 461 U.S. 1, 103 S. Ct. 160 (1983) the court recognized that a criminal defendant's rights should not be applied in a manner that unnecessarily harms the crime victim.¹⁹ For example, according to the Court in *Payne v Tennessee*, 501 U.S. 808, 111 S. Ct. 2597 (1991) a murdered person is a "uniquely individual human being" for sentencing purposes.²⁰ Recently, the Supreme Court embraced the legitimacy of victim harm in the capital case of *Calderon v. Thompson*, 523 U.S. 538 11 S. Ct. 1489 (1998).²¹ In *Calderon*, the Court addressed the seemingly endless delay in the post-conviction process, explaining that to unsettle expectations in the execution of moral judgment "is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and the victims of crime alike."²² Closely related to this interest is

¹⁹ 461 U.S. 1, 14–15 (1982).

²⁰ *Payne*, 501 U.S. at 818 (quoting *Booth v. Maryland*, 482 U.S. 496, 504 (1987) (internal quotation marks omitted)).

²¹ 523 U.S. 538 (1998).

²² *Id.* at 556 (quoting *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring)) (emphasis added) (citation omitted).

the victim's interest in the imposition of an appropriate punishment.

While 33 states have victims' rights amendments, and all have statutes, the lesson learned by reviewing state judicial opinions where victims attempt to enforce law is that by no means do state constitutional Amendments or statutes creating victims rights ensure that these same rights will be upheld as mandatory and enforceable by state supreme courts. The most effective solution remaining is this federal amendment, (HJ Res 48; SJ Res 1) which, extended to the states through the Fourteenth Amendment, would ensure adherence to victims rights by state courts. It is my hope that those of you on this Honorable Committee will support this essential Amendment in a spirit of bipartisanship.

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