S. HRG. 106–269

A PROPOSED CONSTITUTIONAL AMENDMENT TO PROTECT CRIME VICTIMS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

S.J. Res. 3

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

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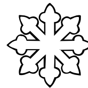

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S.J. RES. 3—A PROPOSED CONSTITUTIONAL AMENDMENT TO PROTECT CRIME VICTIMS

WEDNESDAY, MARCH 24, 1999

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Kyl, Ashcroft, Leahy, Kennedy, Feinstein, and Feingold.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. We will begin our hearing this morning. Today's hearing addresses the very important and complicated issue of amending the Constitution to protect victims' rights. I have long been an active supporter of efforts to provide victims of crime with meaningful participation in the judicial system. For example, as the principal author of the Federal Mandatory Victim Restitution Act, I have worked hard to make criminals pay for the damage their behavior causes.

For years, I fought for comprehensive habeas corpus reform to provide finality of criminal convictions, an effort which was finally successful in 1996 with the passage of the Antiterrorism and Effective Death Penalty Act. And just last week, I joined the Republicans on this committee in unveiling the 21st Century Justice Act of 1999. This initiative supports statutory changes to improve victim participation in Federal criminal proceedings and to improve procedures for collecting victim restitution awards.

In addition, the initiative recommends that Congress send a victims' rights constitutional amendment to the States for ratification. I intend to support a constitutional amendment to protect victims' rights. I believe it is the right thing to do. The question is what form should the amendment take.

Senators Kyl and Feinstein have introduced Senate Joint Resolution 3, which provides the context for our discussions. The text of S.J. Res. 3 happens to be identical to S.J. Res. 44, which the committee considered last year. Senators Kyl and Feinstein, in my opinion, deserve continued credit for tackling this landmark and very difficult set of issues. I also commend Senator Biden for his work to date on this issue. He deserves recognition for being willing to engage in this difficult debate.

This is the fourth hearing that this committee has had on a proposed victims' rights amendment. As I explained in my additional views accompanying last year's committee report on S.J. Res. 44, there are still issues that we need to examine. I will not go into those issues here, but I ask that my additional views be made part of the record and, without objection, I will do that.

[The information referred to follows:]

ADDITIONAL VIEWS OF SENATOR HATCH

I support consideration of a constitutional amendment to establish a guarantee of rights for victims of crime. In considering the text of S.J. Res. 44 last year, I provided these additional views to supplement the Committee's Report in order to clarify several concerns I had with the text of the proposed constitutional amendment to protect crime victims. This year, S.J. Res. 3 contains the identical text of S.J. Res. 44. Thus, I again submit my additional views for the record.

As an initial matter, I note that I have long been an active supporter of efforts to provide victims of crime with meaningful participation in the judicial system. For example, as the principal author of the federal Mandatory Victims Restitution Act, I have worked hard to make criminals pay for the damage their behavior causes. For years, I fought for comprehensive habeas corpus reform to provide finality of criminal convictions, an effort which was finally successful in 1996 with the passage of the Antiterrorism and Effective Death Penalty Act of 1996.

The Antiterrorism and Effective Death Penalty Act also included provisions I sponsored to provide the victims of mass crimes like the Oklahoma City bombing the opportunity to observe criminal trials through closed circuit television. That law also included a provision ensuring that the American victims of foreign terrorists could sue the state sponsors of terrorist acts. I take the issue of victims' rights seriously, as does all of Congress. This is evidenced by the speed at which correcting legislation was enacted in the 105th Congress, when two of the 1996 enactments proved inadequate to safeguard victim's participation.[1]

This year, I joined the Republicans on this Committee in unveiling the "21st Century Justice Act of 1999." This initiative supports statutory changes to improve victim participation in federal criminal proceedings and to improve procedures for collecting victim restitution awards. In addition, the initiative recommends that Congress send a victims' rights constitutional amendment to the States for ratification.

However, there are few tasks undertaken by Congress more serious than the consideration of resolutions proposing amendments to our national charter. With a constitutional amendment, every word and phrase must be scrutinized carefully. A poor choice of words or of drafting could significantly alter the meaning of the amendment, lead to years of unnecessary litigation, or even cause the amendment to fail in its intended purpose. We must remember that, unlike a statute which Congress can amend fairly easily, there is no such easy remedy to correct a mistake in drafting a constitutional amendment. It is with these thoughts in mind that I provide these additional comments on specific concerns I continue to have with the text of S.J. Res. 3.

Scope of the Amendment: S.J. Res. 3 includes in its text an important distinction—not reflected in the amendment's title—from earlier drafts of the proposed amendment. Previous versions of the amendment covered all victims of crime, but under S.J. Res. 3, only victims of violent crimes, as defined by law, would receive constitutional protection. This distinction, according to advocacy groups, might remove as many as 30 million victims of non-violent crimes from the amendment's safeguards.

I believe we must tread carefully when assigning constitutional rights on the arbitrary basis of whether the legislature has classified a particular crime as "violent" or "non-violent." Consider, for example, the relative losses of two victims. First, consider the plight of an elderly woman who is victimized by a fraudulent investment scheme and loses her life's savings. Second, think of a college student who happens to take a punch during a bar fight which leaves him with a black eye for a couple days. I do not believe it to be clear that one of these victims is more deserving of constitutional protection than the other. While such distinctions are commonly made

[1] H.R. 924, the Victim Rights Clarification Act of 1997 (Pub. L. 105–6, codified at 18 U.S.C. §§ 3510, 3481, 3593) was introduced on March 5, 1997 and was signed by the President on March 19, 1997; H.R. 1225, a bill to make a technical correction to title 28, United States Code, relating to jurisdiction for lawsuits against terrorist states, (Pub. L. 105–11) was introduced on April 8, 1997, and was signed by the President on April 25, 1997.

in criminal statutes, the implications for placing such a disparity into the text of the Constitution are far greater.

I would hope, for example, that courts would not use Congress' decision to exclude victims of non-violent crimes from the amendment as evidence that such victims deserve less protection under state amendments or statutes. The decision by the amendment's sponsors to exclude victims such as the elderly woman in my example has led important segments of the victims' rights community to oppose the current version of this proposed amendment.

On the other hand, in one important respect, the scope of the proposed amendment may be too broad, as well. It is important to note that the proposed amendment does not specify at what point the rights attach, or in other words, at what point a person becomes a "victim," particularly in the absence of legislation. Is one a victim at the time of the crime, at the time an arrest is made, when charges are filed against a suspect, when an indictment or information is issued, or at some later point in the process? This is particularly important to the issue of dropped or uncharged counts against a defendant who has committed multiple wrongs.

Frequently, criminal defendants are suspected to have committed crimes for which they are never charged or for which charges are later dropped, even though significant evidence may exist that the defendant did indeed commit the crime. Do the victims of these crimes have rights under the proposed amendment? If so, are they the same as the rights of the victims of charged counts, and how will their exercise affect the rights of victims of charged counts or of the defendant? Such victims, of course, would have the same rights of notice and allocution relating to conditional release, the acceptance of negotiated pleas (perhaps substantially complicating plea bargains), and sentencing. While the exercise of these rights is unlikely to collide with any defendant's rights,[2] the exercise of the right to an order of restitution for the victim of an uncharged count may indeed collide with the rights of the defendant.[3] At a minimum, I believe that deeper consideration ought to be given these matters before this amendment is sent to the States for ratification.

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[2] For instance, evidence admissible at a sentencing hearing or conditional release hearing is not limited in the same manner as evidence admissible at the guilt phase, and evidence of uncharged counts or acquitted conduct may be used. The Supreme Court has made clear for more than four decades that, as a matter of federal constitutional law, a sentencing court is, and should be, free to consider all relevant and reliable evidence. *See, e.g., Witte* v. *United States,* 115 S. Ct. 2199, 2205 (1995); *United States* v. *Tucker,* 404 U.S. 443, 446 (1972); *Williams* v. *New York,* 337 U.S. 241, 247 (1949). Evidence that a defendant has committed other crimes, even if they have not been proved beyond a reasonable doubt, surely is relevant and is not inherently unreliable. Unconvicted and even uncharged conduct may also be admitted at sentencing. The Supreme Court long has approved use of such evidence at sentencing. To identify just one area, the Supreme Court twice has held—most recently, in a unanimous opinion—that a district court may enhance a defendant's sentence if the court finds that the defendant committed perjury on the stand when the defendant testified. *United States* v. *Dunnigan,* 507 U.S. 87, 92–94 (1993); *United States* v. *Grgyson,* 438 U.S. 41 at 50–51 (1978). Moreover, 18 U.S.C. § 3661 provides that "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

[3] The Committee wrestled with this very issue during consideration of the Mandatory Victims Restitution Act of 1996 (MVRA). In the Committee Report describing what would become Section 209 of the MVRA (Pub. L. 104–132, 110 Stat. 1240, 18 U.S.C. 3551 note), directing the Attorney General to formulate guidelines to obtain restitution agreements for uncharged counts in plea agreements, the Committee noted:

This provision requires the Attorney General promulgate guidelines for U.S. Attorneys to ensure that, in plea agreements negotiated by the United States, consideration is given to requesting the defendant to provide full restitution to all victims of all charges contained in the indictment or information.

H.R. 665 * * * includes a provision authorizing the courts to order restitution to parties other than the direct victim of the offense. The House provision is intended to provide restitution to victims of so-called dropped or uncharged counts. For example, if a defendant is known to have committed three assaults, but is charged with, or pleads to, only two of these offenses, the House bill would permit the court to order the defendant to pay restitution to the victims of the remaining offense as well.

The Committee had grave concerns about the constitutionality of the House provision. It is the Committee's view that permitting the court to order restitution for offenses for which the defendant has neither been convicted nor pleaded guilty may violate the Due Process Clause of the Fifth Amendment.

However, the Committee shares the concern underlying the House provision that all an offender's victims receive restitution for their losses. * * * The Committee believes the victim's losses deserve recognition and compensation.

This provision is intended to address this problem by providing guidance to U.S. Attorneys to guarantee that the concerns of these victims are considered. The Committee is sensitive to

Continued

Requirement of Reasonable Notice of the Rights: I have significant concerns about the necessity and wisdom of the last clause of Section I of the amendment proposed by S.J. Res. 3, providing that covered victims shall have the right "to reasonable notice of the rights established" by the amendment. No other constitutional provision mandates that citizens be provided notice of the rights vested by the Constitution—not even the court-created *Miranda* warnings are constitutionally required. In an analogous context, Justice O'Connor noted that "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."[4] This clause in the proposed victims' rights amendment would create an affirmative duty on the government to provide notice of what rights the Constitution provides, turning this formulation on its head.

Moreover, I do not believe that sufficient consideration has been given to the practical aspects of this requirement. Which governmental entity would be required to provide the notice? Would it be the police, when taking a crime report? The prosecutor, prior to seeking an indictment or filing an information? Or perhaps the court, at some other stage in the process? At what point would the right attach—when the crime is committed? When an arrest is made? And, what is "reasonable" notice? Does the term presume that the governmental entity providing notice must have assimilated the Supreme Court's latest jurisprudence interpreting victims' rights when giving notice? I fear that this provision might generate a body of law which will make Fourth Amendment jurisprudence simple by comparison.

Finally, Congress will be empowered by Section 3 of the proposed amendment to enforce its provisions, presumably including the question of how governmental entities must provide victims notice. Will this permit Congress to micro manage the policies and procedures of our State and local law enforcement agencies, prosecutors, and courts? I believe greater consideration must be given to these questions before a right to notice of the rights guaranteed by the amendment is included in the Constitution.

Right to Reopen Certain Proceedings and Invalidate Certain Proceedings: The language of Section 2, which grants victims grounds to move to reopen proceedings or invalidate rulings related to, *inter alia,* the conditional release of defendants or convicts, ought to be given serious scrutiny. This provision in particular has perhaps the greatest potential to collide with the legitimate rights of defendants. All defendants and convicts have a constitutionally protected liberty interest in conditional release, once such release is granted. Permitting victims to move to reopen such proceedings or invalidate such rulings, would, of course, necessitate the re-arrest and detention of released defendants or convicts, likely implicating their liberty interest. This is not to say, of course, that the safety and views of victims ought not be considered in determining conditional releases, as provided for in the proposed amendment. However, serious reconsideration should be given to whether it is wise to include in the amendment the right of victims to unilaterally seek to overturn release decisions after the fact.

Enforcement Powers: Unlike previous versions of the proposed amendment, which permitted States to enforce the amendment in their jurisdictions, S.J. Res. 3 gives Congress exclusive power to "enforce this article by appropriate legislation." I believe that granting Congress sole power to enforce the provisions of the victims' rights amendment, and thus, *inter alia,* to define terms such as "victim" and "violent crime" and to enforce the guarantees of "reasonable notice" of public proceedings and of the rights established by the amendment, will be a significant and troubling step toward federalization of crime and the nationalization of our criminal justice system.

Most criminal justice questions are rightly left by the Tenth Amendment to be decided by the States and the People through their local governments. The Founders rightly determined that such questions are best left to those levels of government closest to the people. Even the bedrock defendants' rights included in the Constitution and incorporated in the Fourteenth Amendment permit flexible application adaptable to unique local circumstances. It is possible that the Victims' Rights Constitutional Amendment will lack this flexibility that is the hallmark of our federal system, and perhaps in the process invalidate many State victims rights provisions. Such a prospect should give us pause.

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the discretion inherent in the prosecutorial function. * * * However, it is the Committee's intent that this provision be implemented in a manner that ensures the greatest practicable restitution to crime victims. *S. Rept. 104–179,* at 23.

[4] *Lyng* v. *Northwest Indian Cemetary Protective Association,* 485 U.S. 439 (1988), at 451 (*quoting Sherbert* v. *Verner,* 374 U.S. 398 (1963) at 412 (Douglas, J., concurring).

Establishment of a "Compelling Interest" Standard to Enact Exceptions: I am also concerned that the proposed amendment inappropriately establishes a particular standard of review to enact inevitable exceptions to the amendment. First, I share the view of others on the Committee, and that of the Department of Justice, that the standard of a "compelling" interest for any exceptions to rights enumerated by the proposed article may be too high a burden.

The compelling interest test is itself derived from existing constitutional jurisprudence, and is the highest level of scrutiny given to a government act alleged to infringe on a constitutional right. The compelling interest test and its twin, strict scrutiny, are sometimes described as "strict in theory but fatal in fact."[5] I truly question whether it is wise to command through constitutional text the application of such a high standard to all future facts and circumstances.

I do not believe that suggestions of utilizing another standard in place of the compelling interest" test offer a solution, however, for such suggestions would replace one inflexible standard with another. Moreover, the "significant interest" test that some have proposed is uncharted waters. By adopting such a standard, we would be imbedding into the Constitution a new and untried term, ensuring years of litigation to resolve its meaning.

My view is that it is far better to leave the article silent on the standard of review, rather than enshrine any particular level of scrutiny in the text of the Constitution. Moreover, I believe it may not be necessary to provide a clause permitting the enactment of exceptions at all. It is axiomatic that no right is absolute, even though no other right guaranteed by the Constitution explicitly permits the enactment of exceptions. By way of example, the First Amendment Free Speech guarantee has been interpreted to allow reasonable time, place and manner restrictions.[6] The courts have generally utilized a pragmatic review in establishing whether a particular government act was a valid exception to a guaranteed right, establishing standards of review appropriate to the right and the circumstances. It may be best to follow this course again, leaving exceptions to be developed in the natural evolution of the law, rather than to attempt with one hand to empower Congress (and only Congress) to provide exceptions, and with the other hand constrain that power with a too-rigid standard.

Reference to "Immunities": Section 5 of the proposed amendment provides for the cases in which the "rights and immunities" established by the amendment will apply. In my view, a significant problem with this section is the use of the term "immunities," which is new to this version of the amendment and does not refer to any specific "immunity" named in the article. Indeed, the rest of the article refers only to "rights," and refers nowhere to "immunities". It is unclear to what this term is intended to refer. Considering the problems courts have had in defining and applying this term elsewhere in the Constitution, its use here is problematic, and deserves further consideration.

In conclusion, I am strongly in favor of victims' rights, and believe a federal constitutional amendment to be an appropriate national response. "Appropriate," however, does not, in my view, mean "necessary." I believe that many of the objectives of the proposed amendment could in fact be accomplished through a federal statute, state statutes, or state constitutional amendments. Indeed, our experience with state constitutional amendments is comparatively young. It may well be better to allow the jurisprudence to develop on these before we take the momentous step of amending the federal Constitution.

Finally, I note that a statutory approach would carry less peril of upsetting established State constitutional amendments now taking root to guarantee the rights of crime victims. A statute would also be more readily amendable should experience dictate that changes are needed, and, of course, would not preclude the later adoption of a constitutional amendment if the statute indeed proved insufficient or unable to protect the rights of victims. Indeed, this is the same course we have taken with the protection of the flag from desecration—we first enacted a federal statute, and, when the Supreme Court held it unconstitutional, and thus clearly inadequate to the purpose, have proposed amending the Constitution.

However, if an amendment is to be considered, we must be sure that its wording is clear, exact, and unambiguous. The concerns I have outlined here are but the most serious concerns I have with specific provisions of S.J. Res. 3. They are, how-

[5] *See, e.g., Fullilove* v. *Klutznick,* 448 U.S. 448 (1980).

[6] *See, e.g., Clark* v. *Communi1y for Creative Non-Violence,* 468 U.S. 288 (1984). *See also Walz* v. *Tax Commissioner of New York,* 397 U.S. 664, 668–9 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.")

ever, emblematic of the textual problems I feel must be addressed before this amendment is approved by Congress and submitted to the States for ratification.

The CHAIRMAN. Further, we should carefully consider the numerous Federal and State statutes and the many State constitutional provisions that currently grant rights to victims. How the Federal courts have interpreted these provisions in light of the Federal Constitution will illuminate our inquiry into these issues, and I look forward to working with my colleagues to address these issues in a meaningful way.

To help us achieve a consensus on the text of the amendment, we have three experts in the field of criminal rights who will testify today. We will hear from Professor Paul Cassell, a legal scholar from my own home State of Utah who has worked tirelessly for victims' rights. Professor Cassell has also worked extensively with this committee on this amendment. He is a person whom I have a great deal of confidence in and a great deal of appreciation for, and teaches law in our University of Utah.

We will also hear from Steve Twist, the former chief assistant attorney general of Arizona and a longtime advocate of victims' rights. In addition, Beth Wilkinson will testify. Ms. Wilkinson is a former Federal prosecutor in the Oklahoma City bombing case, and has also served in the Department of Justice.

These experts will shed light on the issues inherent in victims' rights, and I am sure that they share my view that victims' rights are too important not to be addressed, and the Constitution is too important not to be addressed carefully. I look forward to today's hearing as a careful and considered step toward a meaningful provision of victims' rights.

Now, shall we turn to Senator Feingold for the minority?

Senator FEINGOLD. Mr. Chairman, I actually want to make a statement in a few moments in proper order.

The CHAIRMAN. We are only going to have——

Senator FEINGOLD. But I do want to make one comment about the process and how this hearing came about. You and I have a very good working relationship and I know that will continue, but I do want to comment that this hearing was originally noticed at 5:57 p.m., March 17th, just barely complying with the Senate rule that hearings be noticed one week in advance. It was noticed as a hearing of the Subcommittee on the Constitution, on which I am the ranking member. Then a few days later, we learned that the hearing would be in full committee.

I would like to make two brief points, Mr. Chairman. The first and most important is that I do not believe we should be bypassing the relevant subcommittee as we consider legislation in this committee, and that is especially true when we are considering a constitutional amendment. We should use the committee process to deliberate and study the proposed amendment and consider all the arguments. We presumably have the subcommittee for a reason, and I don't understand why we aren't using it in this case, or in any case actually where amendments to the Constitution are going through the committee.

Second, I do think that there should be a little more consultation and discussion in the scheduling of hearings. When deadlines are flirted with as in this case, the usefulness of the committee process

is undermined. I think the 7-day process is intended as a safeguard. It should not become the norm.

Even if formal notice does not go out until the last minute, there is no great reason in my mind that members of the appropriate subcommittees can't be given at least tentative notice well in advance And especially in light of the length of some of the materials that were submitted near the end, it is very difficult to respond and prepare.

But, Mr. Chairman, obviously overall I think you demonstrate enormous fairness on this committee, so all I can do is make the plea that I think the subcommittee is the place where this process should begin on any legislation, but in particular when we are doing something as potentially profound as talking about amending the U.S. Constitution.

Thank you, Mr. Chairman.

The CHAIRMAN. Well, I appreciate the Senator's comments, and we will certainly do a better job in the future. I have to say that I think we have done this three times at full committee.

Senator FEINSTEIN. Four times.

The CHAIRMAN. Is it four times? Both Senators Kyl and Feinstein have reminded me of that, and so I decided to do that this time, which I think is not out of line under the circumstances. But the Senator raises some interesting points. This is a very important issue and that is one reason why we are holding it at the full committee. We will work on the Senator's suggestions.

Well, with that, I think what we will do is when Senator Leahy arrives, we will be happy to have any statement that he cares to make put in the record. But at this point, let me call on those who are going to testify here today.

Senator KYL. Mr. Chairman, might I just make a unanimous consent request to insert some additional statements and letters into the record at this point?

The CHAIRMAN. We will put all statements in the record.

Senator KYL. Thank you. This includes the statement of Professor Laurence Tribe.

The CHAIRMAN. That will be fine. We will put them all in the record, then.

[The statements and letters referred to are located in the appendix.]

The CHAIRMAN. So our panel will be Professor Paul Cassell, of the University of Utah College of Law. Steve Twist, Assistant General Counsel of VIAD Corporation; he is former chief assistant attorney general of Arizona and is on the Executive Committee of the National Victims' Constitutional Amendment Network. Beth Wilkinson is a partner in Latham and Watkins and a former Federal prosecutor and Department of Justice official, from Washington DC.

We will proceed in that order, then, if we can.

Senator FEINSTEIN. Mr. Chairman, if I may, the authors of this are not going to have an opportunity to make a statement?

The CHAIRMAN. Well, you can in the question period, yes. To save time, we need to keep it generally, to the chairman and the ranking member. But we will give you added leeway—how is that—when the time comes up? In fact, it may be that I will have to ask

Senator Kyl to chair this in a few short minutes, and I think he will be glad to give extra leeway—is that OK—to the Senator from California?

Keep Kennedy right on the time limit.

Senator KYL. In the spirit of Senator Kennedy, we will be exceedingly liberal with our——

[Laughter.]

Senator KENNEDY. I was going to say something nice about your performance last Sunday morning. [Laughter.]

Senator KYL. Well, isn't "liberal" a compliment, Senator Kennedy? [Laughter.]

Senator KENNEDY. We will work it out.

The CHAIRMAN. He was trying to be so nice to you.

Then if we will, we will begin with you, Mr. Twist, and then Ms. Wilkinson, and then we will wind up with Paul Cassell.

I wanted you to go first so I could stay and hear you, but if I don't, I will read what you have to say.

Go ahead.

PANEL CONSISTING OF STEVEN J. TWIST, ASSISTANT GENERAL COUNSEL, VIAD CORP., PHOENIX, AZ; BETH A. WILKINSON, LATHAM AND WATKINS, WASHINGTON, DC; AND PAUL G. CASSELL, PROFESSOR OF LAW, UNIVERSITY OF UTAH COLLEGE OF LAW, SALT LAKE CITY, UT

STATEMENT OF STEVEN J. TWIST

Mr. TWIST. Mr. Chairman, distinguished Senators, thank you very much for the opportunity to speak again with the committee. My name is Steve Twist. I am an assistant general counsel at VIAD Corp., in Phoenix, formerly chief assistant attorney general in Arizona, and a member of the board of directors of the National Organization for Victim Assistance, and on the Executive Committee of the National Victims' Constitutional Amendment Network.

I was honored to be the principal author of the Arizona constitutional amendment for victims' rights which the voters adopted in my State in 1990. And as, Mr. Chairman, you noted, I have been involved in the victims' rights movement for quite some time.

It is especially fitting that today we remember the victims of the Jonesboro, AR, school ground murders. One year ago today, that crime once again seared he conscience of the Nation with the ever-present reminder of the brutality of violent crime. And it is fitting also that particularly today we focus our attention on how victims of those brutal crimes suffer in the aftermath at the hands of an all too often indifferent justice system.

Since our last meeting, since your committee's last hearing, citizens of three States in our country have had the chance to speak at the polls on the question of whether or not constitutional rights should be established in State constitutions for crime victims.

In Montana last November, the voters spoke loudly, passing an amendment to their constitution which referred to the rights of victims for restitution by 71 percent of the vote. In Tennessee, the voters adopted an amendment that again I am proud to say is patterned largely after the Arizona State constitutional amendment, and it was adopted by the voters in Tennessee last November by

89 percent of the vote. And in Mississippi, the voters went to the polls since our last hearing, since your committee's last hearing, and adopted a constitutional amendment for rights for crime victims by 93 percent of the vote.

Those States now join others to make 32 where voters have had an opportunity to be heard not in a poll, but in a polling booth, on the question of whether there ought to be constitutional rights for crime victims. And overwhelming, in State after State, voters have endorsed the principle of constitutional rights for crime victims.

Some will review this developing State constitutional law as a reason not to support a Federal constitutional amendment for crime victims' rights. Indeed, James Madison was confronted with the same argument by some that a Federal bill of rights was unnecessary because the States had State versions of bills of rights. And when confronted with this argument, Madison replied succinctly, "Not all States have them, and some are inadequate."

We relive this history here today. Not all States have constitutional rights for crime victims, and some are not adequate. Victims in Federal cases have none at all. If you look at the record before the committee, you will see in Professor Tribe's testimony, in earlier testimony from Attorney General Reno and other representatives of the Justice Department, time and again they repeat the admonition that statutes are inadequate to the job of securing rights for crime victims.

So what is to be done? This is now, as, Mr. Chairman, you have pointed out, our fourth full committee hearing. We have been involved with lawyers from the White House, lawyers from the Justice Department, lawyers from U.S. attorneys' offices around the country, prosecutors, local prosecutors, victims' rights advocates, in extensive negotiations.

We are now on, I think, the 63rd draft of the amendment, in each case responding to issues that have been raised. In every case, we have modified or proposed language to meet every objection. It is clear that the American people in staggering numbers have demonstrated again and again at the polls that they support the principle of constitutional rights for crime victims. The President supports constitutional rights for crime victims. The Attorney General supports them; scholars of high renown and regard, practitioners in the field. In my State, every single county attorney supported our State constitutional amendment for crime victims' rights, and supports a Federal constitutional right.

So we are at a crossroads again. I believe it is a call for leadership. Leadership here requires crafting an amendment that is worthy of the American people and worthy of our Constitution. Mr. Chairman, I completely agree with you that we have to be prudent and cautious whenever the subject of amending our Constitution is raised. I think our efforts have been prudent and cautious and deliberate. And I think, as a consequence, we have a text now, S.J. Res. 3, that meets the high standard that is required for constitutional amendments.

So we turn inevitably to the language. In section 1, the amendment establishes meaningful rights for victims of violent crime—rights to notice, to no exclusion from public proceedings; the right to be heard at three critical stages, whenever a release decision is

going to be made, whenever there is a proceeding regarding a plea agreement, and whenever there is a proceeding involving sentencing; the right to notice of escape or release; and, importantly, the right to simply have the interests of the victim considered in a final conclusion free from unreasonable delay, in restitution, and in their rights to safety and to notice of their rights.

These are hardly radical. In fact, in reply to those who say that the enactment of these constitutional rights would have the effect of undermining our ability to do justice in the criminal justice system, I ask them to look to the States, look to States like Arizona and Utah and Michigan, where States have had constitutional rights, where the right to be heard at a plea agreement, where the right to be heard at sentencing, the right to consultation with prosecutors, the right to notice of proceedings, and the right to be present at those proceedings, are all being respected. It has not undermined the effectiveness of law enforcement or prosecution. Indeed, I think the case is profoundly made that it has enhanced the ability of the government to discharge its duty to be fair and to do justice, justice to both the accused and to the victim. As I say, the rights are hardly radical.

In section 2 and section 3, these meaningful rights are made enforceable. With limited exceptions, Section 2 establishes a clear grant of standing for crime victims to assert their rights, an unequivocal grant of standing. It also establishes the unequivocal and unambiguous right of a victim to go into court at the early stages of the case and seek prospective orders that secure the victims' rights that are granted in section 1.

This enforcement authority on the part of the victim is buttressed by the section 3 language which grants to Congress the power to enforce the amendment by appropriate legislation. The exceptions to this enforcement power in section 2 are important, but in the long run not meaningfully distractive of the power of the victim to enforce the rights granted in section 1. I know this is an issue about which there is still some debate, but I think the language that we have worked out on this point is the best possible compromise.

And so, Mr. Chairman and Senators, the question is now where do we go? We are happy as a movement to entertain any specific suggestions, and we are eager to work with the Chair and members of the committee on any particular issues that might be raised. And we think we have done that in good-faith. I think there is now an obligation for us to turn to action on the amendment, and we look forward to that in the near future, Mr. Chairman.

Thank you.

The CHAIRMAN. Thank you, Mr. Twist. I think you have worked very closely with the committee and we appreciate it.

[The prepared statement of Mr. Twist follows:]

THE CRIME VICTIMS' RIGHTS AMENDMENT AND TWO GOOD AND PERFECT THINGS

by Steven J. Twist

Every good and perfect thing carries within it the seeds of its own destruction through an excess of its virtue. Seneca

At the soul of America's justice system lie two "good and perfect" things: the principle that procedural and substantive rights of the accused must be preserved and protected as a proper restraint on the power of the state to infringe individual rights to life and liberty; and the practice of public prosecution, based on the sense that when a crime occurs, while it surely involves harm to a victim, it also represents an offense against the state, the body politic, that tears at the fabric of our peace and community and hence creates a harm that is greater than simply the harm to the victim involved.

These two "good and perfect things" have served America well. The first respects each individual as an end, as "created equal, [and] endowed by their Creator with certain unalienable Rights [to] Life, Liberty and the pursuit of Happiness."[1] Rights of habeas corpus[2], a speedy and public[3] jury[4] trial, to know the nature and cause of the accusation[5], to confront adverse witnesses[6] and have compulsory process[7], to counsel[8], due process[9] and equal protection[10], and rights against unreasonable searches and seizures[11], double jeopardy[12], self incrimination,[13] excessive bail or fines[14], cruel and unusual punishments[15], bills of attainder[16] and ex post facto laws[17], these rights form a zone of protection around the law abiding, as well as the lawless, and serve to deter the abuses of government power with which the history of the world is all too familiar.

These fundamental rights[18] formed the core of the essential fairness shown to accused and convicted criminals that became, and rightly so, a hallmark of our civilization. And through the course of history, while certainly not always faithful to them, we have seen their inexorable expansion even as we have seen repeated sacrifices at their altar. And so Justice Cardozo could write in 1934:

> The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof.[19]

And indeed there have been many times in the history of our country when the "pressure of incriminating proof has been "crushing," yet the criminal has been freed so that the "fundamental privileges" of the law-abiding could be preserved.[20]

The second "good and perfect thing" springs not from the rights of the individual so much as from the rights of the community. Private prosecutions, whereby the victim or the victim's relatives or friends, brought and prosecuted criminal charges against the accused wrongdoer, were the norm in the American justice system at

[1] The Declaration of Independence para. 2 (U.S. 1776).
[2] U.S. Const. art. 1, § 9, cl. 2.
[3] U.S. Const. amend. VI.
[4] U.S. Const. art. III, § 2, cl. 6.
[5] U.S. Const. amend. VI.
[6] U.S. Const. amend. VI.
[7] U.S. Const. amend. VI.
[8] U.S. Const. amend. VI.
[9] U.S. Const. amend. V; XIV.
[10] U.S. Const. amend. XIV.
[11] U.S. Const. amend. IV.
[12] U.S. Const. amend. V.
[13] U.S. Const. amend. V.
[14] U.S. Const. amend. VIII.
[15] U.S. Const. amend. VIII.
[16] U.S. Const. art. I, § 9, cl. 3.
[17] U.S. Const. art. I, § 9, cl. 3.
[18] Because of their fundamental nature, these rights have been applied to the states via Fourteenth Amendment incorporation doctrine. *See, e.g., Duncan* v. *Louisiana,* 391 U.S. 145 (1968).
[19] *Snyder* v. *Commonwealth of Massachusetts,* 291 U.S. 97, 121 (1934).
[20] *Arizona* v. *Hicks,* 480 U.S. 321, 329 (1987) ("but there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all").

the time of the colonial revolution and the drafting of the Constitution.[21] The origin of private prosecution has been traced to early English common law, but even today the civilized British retain the right privately to bring criminal charges.[22]

In America, however, while some vestiges of private prosecutions continue to this day[23] there was a "meteoric rise of public prosecutions"[24] and the office of public prosecutor grew in stature. The origin of the office remains an "historical enigma,"[25] but it certainly is consistent with the views that we often express about the nature of crime and its assault on the social compact. Former Chief Justice Weintraub, of the New Jersey Supreme Court, expressed a classic formulation of these views in 1971:

> The first right of the individual is to be protected from attack. That is why we have government, as the preamble to the Federal Constitution plainly says. In the words of *Chicago* v. *Sturgess,* 222 U.S. 313, 322, 32 S. Ct. 92, 93, 56 L. Ed. 215, 220 (1911):
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> > Primarily, governments exist for the maintenance of social order. Hence it is that the obligation of the government to protect life, liberty, and property against the conduct of the indifferent, the careless, and the evil-minded, may be regarded as lying at the very foundation of the social compact.[26]

To protect the social compact, government assumed the burden of maintaining the social order and marshaled for itself the powers of state to achieve its end. A virtuous goal. A "good and perfect thing."

But are there in these two good and perfect things "seeds of destruction"? I suspect so, and to preserve the essential goodness of them, I believe we must seek ways to temper the excesses of that virtue.

In combination, these two ideas, the centrality of both defendants' rights and state power, have been responsible for diminishing the role of the victim to that of just another witness for the state; just another piece of the evidence. In focusing on the centrality of the rights of the accused we have forgotten about the rights of the accuser. In stressing the centrality of the state, we have neglected the pain of the injured. We do these things at our own peril. For a justice system that abandons the innocent loses moral authority and will soon lose the confidence of those it is meant to serve.

Chief Justice Weintraub's opinion in *Bisaccia* was highly critical of Mapp's exclusionary rule,[27] but in expressing his criticism, he had an insight that stretched beyond merely the Fourth Amendment to the core of the principle of state centrality when, after noting the passage from the U.S. Supreme Court about the primary function of government, he wrote, "When the truth is suppressed and the criminal set free, the pain of suppression is felt, not by the inanimate state or by some penitent policeman, but by the offender's next victims for whose protection we hold office."[28] Here, in a few short words, is the sum of the "excess virtue" of the principle of state centrality. It goes too far when it ignores the pain of its victims.

Justice Cardozo, saw the dark horizon of the principle of the centrality of defendants' rights almost 65 years ago when he continued after the passage just quoted above: "But justice, 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 a true balance."[29]

Here also, stated succinctly, is the sum of the "excess virtue" of the principle of the centrality of defendants' rights. A justice system which affords its only rights to accused and convicted offenders, but preserves and protects none for its crime victims, has lost its essential balance. It is a system which continues to lose the confidence of the public and its claim to respect.

The idea of a federal Constitutional Amendment for Victims' Rights has a pedigree born of these same considerations. In 1982, the President's Task Force on Victims of Crime identified the need for a constitutional amendment in similar terms:

> In applying and interpreting the vital guarantees that protect all citizens, the criminal justice system has lost an essential balance. It should be clearly understood that this Task Force wishes in no way to vitiate the safeguards that shel-

[21] John D. Bessler, *The Public Interest and The Unconstitutionality of Private Prosecutors,* 47 Ark. L. Rev. 511, 515–21 (1994).
[22] Id. at 515.
[23] Id. at 518.
[24] Id. at 516.
[25] Id. at 517.
[26] *State* v. *Bisaccia,* 279 A.2d 675, 677 (1971).
[27] *Mapp* v. *Ohio,* 367 U.S. 643 (1961).
[28] *Mapp,* 367 U.S. at 589–90.
[29] *Snyder,* 291 U.S. at 122; also reaffirmed in *Payne* v. *Tennessee,* 501 U.S. 808, 827 (1991).

> ter anyone accused of crime; but it must be urged with equal vigor that the system has deprived the innocent, the honest, and the helpless of its protection.
>
> The guiding principles that provide 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 be augmented.[30]

The Crime Victims' Rights Amendment, as passed by the Senate Judiciary Committee,[31] is a modest proposal that embodies these goals and will preserve for victims a reasonable, but not intrusive, role in the matter of their case, and protect minimal rights to fair treatment. The rights it proposes may be grouped into two general categories: procedural and substantive.

In the procedural category, the Amendment includes the rights:

1. to reasonable notice of any public proceedings relating to the crime;
2. to not be excluded from any public proceedings relating to the crime;
3. to be heard, if present, at all public proceedings to determine a conditional release from custody;
4. to submit a statement at all public proceedings to determine a release from custody;
5. to be heard, if present, at all public proceedings to determine an acceptance of a negotiated plea;
6. to submit a statement at all public proceedings to determine an acceptance of a negotiated plea;
7. to be heard, if present at all public proceedings to determine a sentence;
8. to submit a statement at all public proceedings to determine a sentence;
9. to reasonable notice of a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;
10. to not be excluded from a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;
11. to be heard, if present at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;
12. to submit a statement at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;
13. to reasonable notice of a release from custody relating to the crime;
14. to reasonable notice of escape from custody relating to the crime;
15. to reasonable notice of the rights established by this article; and
16. to standing to assert the rights established by this article.

In the substantive category, the Amendment includes the rights:

17. to consideration for the interest of the victim in a trial free from unreasonable delay;
18. to an order of restitution from the convicted offender; and
19. to consideration for the safety of the victim in determining any release from custody.

These rights are hardly radical, and are reflected in state laws around the country.[32] Yet it is important to underscore why these rights are vital to victims. The right to be "informed" of proceedings is fundamental to the notions of fairness and due process that ought to be at the center of any criminal justice process. Victims have a legitimate interest in knowing what is happening to "their" case, and such information can sometimes allay a victim's fears about the whereabouts of a suspect or defendant.[33] On the other hand, holding criminal justice hearings without notifying victims can have devastating effects. For example, the Director of Parents Against Murdered Children recently testified at a Senate Hearing that many of the concerns of the family members she works with "arise from not being informed about the progress of the case. * * * [V]ictims are not informed about when a case is going to court or whether the defendant will receive a plea bargain."[34] What is

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[30] President's Task Force on Victims of Crime, Final Report 114 (1982). [hereinafter President's Task Force].

[31] S.J. Res. 44, 105th Cong. (1998).

[32] *See* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model,* Utah L. Rev. (forthcoming 1999).

[33] *See* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims Rights Amendment,* 1994 Utah L. Rev. 1373, 1389.

[34] *A Bill Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims:* 1996: *Hearings on S.J Res. 52 Before the Senate Comm. on the Judiciary,* 104th Cong. 35–36 (1996) [hereinafter Hearings]. (statement of Rita Goldsmith).

most striking about this testimony is that it comes on the heels of a concerted effort by the victims' movement to obtain notice of hearings. In 1982, the President's Task Force on Victims of Crime recommended that victims be kept appraised of criminal justice proceedings.[35] Since then many state provisions have been passed requiring that victims be notified of court hearings.[36] But those efforts have not been fully successful. As the Department of Justice recently reported:

> While the majority of states mandate advance notice to crime victims of criminal proceedings and pretrial release, many have not implemented mechanisms to make such notice a reality. * * * Victims also complain that prosecutors do not inform them of plea agreements, the method used for disposition in the overwhelming majority of cases in the United States criminal justice system."[37]

The Victims Rights Amendment will also guarantee that victims have the right to attend court proceedings. This also builds on the recommendations for the President's Task on Victims of Crime, which concluded that victims "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 provided for the exclusion of witnesses, be permitted to be present for the entire trial"[38] Allowing victims to attend trials has a variety of benefits for Victims.[39] The victim's presence may help to heal the psychological wounds from the crime.[40] Giving victims the right to be present also helps them to reassert control over their own lives, a dignity that criminals have often impaired by the criminal act.[41] Victims can even further the truth-finding process "by alerting prosecutors to misrepresentations in the testimony of other witnesses."[42] While some have argued that a victim's exclusion is needed to avoid the possibility of tailored testimony,[43] this concern can be addressed in other ways such as having the victim testify first or relying on pre-trial statements to police officers or the grand jury. After several hearings on the Victims Rights Amendment, the Senate Judiciary Committee recently concluded that there is "no convincing evidence that a general policy [of] excluding victims from courtrooms is necessary to ensure a fair trial."[44]

Victims also should be given the right to be heard at appropriate points in the criminal justice process. The Victims Rights Amendment does not propose to make victims "co-equal parties in the criminal justice process"[45] free to speak whenever they wish. Instead, the proposed Amendment extends victims the right to be heard where they have useful information to provide. One such point is a hearing to determine whether to accept plea bargains. As Professor Beloof has explained in his excellent casebook on victims' rights:

> The victim's interest in participating in the plea bargaining process are many. The fact that they are consulted and listened to provides 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 which need to be discussed with the prosecutor. * * * The victim may have a particular view of what * * * sentence [is] appropriate under the circumstances. * * * Similarly, because 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.[46]

Victims also deserve to be heard at bail hearings. By informing courts of the risks posed by criminal defendant, victims allow judges to reach appropriate decisions on pretrial release. This is not to say that victims should be able to dictate to judges whether and on what terms a defendant should be released. But it is to say that victims should have, while not a veto, at least a voice in the process. The failure

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[35] President's Task Force, *supra* note 31 at 83.

[36] U.S. Dept. of Justice, Office for Victims of Crime, New Directions from the Field: Victims' Rights and Services in the 21st Century 13 (1998). *See, e.g.,* Ariz. Const. Art. II, § 2.1.(A)(3); Utah Code Ann. §§ 77–38–3 to –4.

[37] U.S. Dept. of Justice, *supra* note 37, at 13.

[38] President's Task Force, *supra* note 31, at 80.

[39] *See generally* Paul G. Cassell, *The Victim's Right to Attend Trials: The Emerging National Consensus* (unpublished manuscript on file with *Utah Law Review*).

[40] Ken Eikenberry, *The Elevation of Victims' Rights in Washington State: Constitutional Status,* 17 Pepp. L. Rev. 19, 41, (1989).

[41] *See* Lee Madigan and Nancy C. Gamble, The Second Rape: Society's Continued Betrayal of the Victim 97 (1989).

[42] U.S. Dept. of Justice, *supra* note 37, at 15.

[43] *See, e.g.,* Robert Mosteller, *The Unnecessary Amendment,* Utah L. Rev. (forthcoming 1999).

[44] S. Rep. No. 105–409 at 14 (1998).

[45] *Cf.* Lynne Henderson, *Victim's Rights in Theory and Practice,* Utah L. Rev. (forthcoming 1999). (critiquing this possibility).

[46] Douglas E. Beloof, Victims in Criminal Procedure 464 (1999).

of the system to hear from victims of crime at this stage has sometimes lead to tragic consequences from release decisions, consequences that might well have been averted if the judge had heard from the affected victims.[47] Finally, victims should be heard before a judge imposes sentence. This furthers fundamental due process, for "[w]hen the court hears, as it may, from the defendant, his lawyer, his family and friends, his minister, and others, simple fairness dictates that the person who has borne the brunt of the defendant's crime be allowed to speak."[48] While all states now recognize some form of a victim's right to be heard at sentencing, shortfalls remain.[49] A federal constitutional amendment would clearly vindicate a victim's right to be heard in all these areas.

Victims also should be given the right to be notified whenever a defendant or a convicted offender is released or escapes. Without such notice, victims are placed at grave risk of harm. As the Department of Justice recently explained, "Around 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 cases, the victims were unable to take precautions to save their lives because they had not been notified of the release."[50] The risk of attack is particularly serious in cases involving domestic violence.[51] By providing victims with a right to "reasonable notice," the constitutional amendment would help alert such victims to potential dangers.

Victims should also be given a right to a trial "free from unreasonable delay." In today's criminal justice system, defendants are often able to prolong the start of trials for no good reason. Let me make plain that I am not speaking here of delays for legitimate reasons. But there can be no doubt that in a number of cases defendants have sought—and obtained—delay for delay's sake. The Senate Judiciary Committee recently concluded that "efforts by defendants to unreasonably delay proceedings are frequently granted, even in the face of State constitutional amendments and statutes requiring otherwise."[52] Such practices should be eliminated by plainly recognizing a victim's interest in a trial brought to a conclusion without "unreasonable delay." This right does not conflict with defendants' rights; defendants have, of course, long enjoyed their own right to a "speedy trial."[53]

Similar arguments could be offered in support of all of the other provisions of the Amendment, but I will not tarry any longer on the subject here. Indeed, it is interesting to observe that even the Amendment's most ardent critics usually say they support most of the rights in principle. 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.[54] But while supporting the rights "in principle," opponents in practice

[47] *See* Hearings, *supra* note 35, at 25–26 (statement of Katherine Prescott).

[48] President's Task Force, *supra* note 31, at 77; *see also* Paul Cassell, *Barbarians at the Gates,* Utah L. Rev. (forthcoming 1999).

[49] *See* U.S. Dept. of Justice, *supra* note 37, at 17.

[50] *See id.* at 14.

[51] *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. Family L. 915 (1996).

[52] S. Rep., *supra* note 45, at 19.

[53] U.S. Const. amend. VI. Professor Mosteller suggests that this argument refutes a "straw man" because a conflict potentially exists not with the defendant's right to a speedy trial, but with his right to a fair trial which might require delay. *See* Mosteller, *supra* note 44, at 23. But, in my view, Professor Mosteller never explains how a victims' right to a trial free from "unreasonable" delay could conflict with a defendant's interest in having a reasonable time to prepare.

[54] *See, e.g., A Bill Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims: Hearings on S.J Res 6 Before the Senate Comm. On the Judiciary,* 105th Cong. 45 (1997) [hereinafter *Hearings*] (statement of Roger Pilon): "Although I am opposed to amending the Constitution for the purpose of protecting the rights of crime victims, I want to make it very clear at the outset that I fully support the basic aims of this proposal" (Emphasis added.); *Hearings,* at 140–41 (reprinted letters from law Professors): *"Although we commend and share the desire to help crime victims, amending the Constitution to do so is both unnecessary and dangerous."* (Emphasis added.); Letter from *The Conference of Chief Justices,* (May 16, 1997) (on file with the author): *"The Conference is in favor of according the victims of crimes all rights that are consistent with * * * public safety * * * [w]e believe * * * state efforts provide a significantly more prudent and flexible approach for testing and refining novel legal concepts."* (Emphasis added.) (Parenthetically, that the Conference can believe that crime victims' rights to be informed, present, and heard, or the other rights that were enumerated in S.J. Res. 6, are "novel legal concepts" is evidence of how much crime victims lack in our criminal justice system and how far we have yet to go to achieve basic justice for them.); Letter from the *National Legal Aid and Defender Association* to Congressman Hyde, (August 19, 1996) (on file with the author): *"Like so many other groups, NLADA strongly supports the proposed con-*

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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 House Committee on the Judiciary, "* * * efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate."[55] The best federal statutes have proven inadequate to the needs of even highly publicized victim injustices, as Professor Cassell's writing about the plight of the Oklahoma City bombing victims has ably demonstrated.[56] 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 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."[57] The experience in my state is, sadly, hardly unique. A recent 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."[58] The victims most likely to be affected by the current haphazard implementation are, perhaps not surprisingly, racial minorities.[59]

The precise reasons that victims fail to be afforded all their rights today are complex. Some of the other participants in this symposium have ventured their attempts at explanations,[60] and others have offered their ideas elsewhere.[61] There is much wisdom in the problems they have identified, and I only want to add that part of the problem is due to perceived conflicts between victims' rights and defendant's rights. Our courts have already stated the obvious, that "the Supremacy Clause requires that the Due Process Clause of the U.S. Constitution prevail over state constitutional provisions."[62] Of course victims' rights advocates do not seek to diminish the constitutional rights of those accused of offenses, and nothing in the proposed Victims' Rights Amendment would do so. Even a cursory review of the rights proposed must lead one to the conclusion, as Professor Tribe has concluded, that "no actual constitutional rights of the accused or of anyone else would be violated by respecting the rights of victims in the manner requested."[63] But without parity in the Constitution, crime victims will always be second-class citizens and their rights will never be accorded the respect and protection they would and should otherwise receive. They will simply be left out of our "adversary" system.[64] Thus, it is the con-

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stitutional amendment's goals of protecting victim's rights." (Emphasis added.); *Hearings, supra* note 8, at 100 (prepared statement of Bruce Fein): *"I concur with the sentiments that animate the proposal. But I believe a constitutional amendment would detract from the sacredness of the covenant. * * *"* (Emphasis added.); *Hearings, Supra* note 8, at 96 (prepared statement of James B. Raskin): *"I am intrigued by Senator Kyl's proposed constitutional amendment because it shows us the way that the best intentions often go astray when we try to constitutionalize at the national level public policies that can be much more easily and straightforwardly implemented by the states or by statute.* (Emphasis added.)

[55] *Proposals to Provide Rights to Victims of Crime: Hearing on H.J Res 71 and H.R. 1322 Before the House Comm. On the Judiciary,* 105th Cong. 27 (1997) (statement of Janet Reno, Attorney General).

[56] *See* Paul G. Cassell, *Barbarians at the Gates, supra* note 49; *see also Hearings, supra* note 55, at 103 (testimony of Paul Cassel).

[57] Laurence H. Tribe and Paul G. Cassell, *Embed the Rights of Victims in the Constitution,* L.A. Times, July 6, 1998, at B5.

[58] U.S. Dept. of Justice, National Institution of Justice, The Rights of Crime Victims—Does Legal Protection Make a Difference? 10 (Dec. 1998).

[59] National Victim Center, *Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims: Sub-Report on Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights* 5 (1997).

[60] *See* Susan Bandes, *Victim Standing,* Utah L. Rev. (forthcoming 1999) (noting standing barriers to victim participation); Cassell, *supra,* note 57; (discussing multiple reasons for failure to respect victims rights); William T. Pizzi, *Victims Rights: Rethinking our "Adversary System",* Utah L. Rev. (forthcoming 1999) (discussing how victims are frozen out of the adversary system); Beloof, *supra* note 33; (noting how existing two-party paradigms are blind to victims).

[61] *See* Edna Erez, *Victim Impact Statements and Sentencing, British J of Criminology* (forthcoming 1999) (reviewing socialization of lawyers to discount victim participation); 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 (1992). (noting that victims' rights conflict with existing bureaucratic "turf" in the system).

[62] *State* v. *Riggs,* 942 P.2d 1159, 1162 (Ariz. 1997).

[63] Letter from Laurence H. Tribe, Professor of Law, Harvard University, to Senators Hatch and Biden and Representatives Hyde and Conyers, (September 11, 1996) (on file with author).

[64] For an excellent elaboration of this point, *see* Pizzi, *supra* note 61.

sensus view of victims' advocates recently assembled by the Department of Justice that "[a] victims' rights constitutional amendment is the only legal measure strong enough to rectify the current inconsistencies in victims' rights law that vary significantly from jurisdiction to jurisdiction on the state and federal levels. Such an amendment would ensure that rights for victims are on the same level as the fundamental right of accused and convicted offenders. Most supporters believe that it is the only legal measure strong enough to ensure that the rights of victims are fully enforced across the country." [65]

The criminal justice system we have evolved since our founding is now simply inadequate to meet the needs of the whole people. It has come to be respectful, perhaps more than ever, of the rights of those accused or convicted of crimes. It serves the interests of the professionals in the system fairly well: the judges, lawyers, and police, probation, and jail officers. But it does not serve the whole of the people well because it forgets the victim.

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, "his primary objective was to keep the Constitution intact, to save it from the radical amendments others had proposed. * * *" [66] In doing so he acknowledged that many Americans did not yet support the Constitution.

> 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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> 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 constitution, 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? [67]

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." [68] By adopting a bill of rights, Madison thought, the Constitution would live up to this purpose. He also recognized how the Constitution was the only document which could likely command this kind of influence over the culture of the country. Our goals are perfectly consistent with the goals that animated James Madison. There is a view in the land that the Constitution today does not serve the interests of the whole people in matters relating to criminal justice. And the way to restore balance to the system, in ways that become 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 them, 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. Madison responded with the observation that "not all states have bills of rights, and some of those that do have inadequate and even 'absolutely improper' ones." [70] Our experience in the victims' rights movement is no different.

Professor Tribe has observed this failure: "* * * there 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. * * *" [71] As a consequence he has concluded that crime victims' rights "are the very kinds of rights with which our Constitution is typically concerned." [72]

After years of struggle, we now know 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. The moment for constitutional rights for crime victims, properly understood, is neither an

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[65] U.S. Dept. of Justice, Office for Victims of Crime, New Directions from the Field: Victims' Rights and Services for the 21st Century 10 (1998).

[66] Robert A. Goldwin, *From Parchment To Power: How James Madison Used the Bill of Rights to Save the Constitution,* p. 73 (AEI Press 1997).

[67] Goldwin, *supra* note 67 at 79.

[68] Goldwin, *supra* note 67 at. 100.

[69] James Madison, *The Papers of James Madison* 1, 198 (1979).

[70] Madison, *supra* note 69 at 106.

[71] Laurence H. Tribe, *Victims' Rights,* Unpublished paper June 27, 1996, p. 1.

[72] Tribe, *supra* note 72 at 1.

attack on the rights of defendants, nor on the power of public prosecutors, but rather is a movement to save these two good and perfect things in the American justice system by tempering their excessive virtue with true balance. Indeed the amendment just might save the very things its critics fear it will destroy.

The CHAIRMAN. Ms. Wilkinson.

STATEMENT OF BETH A. WILKINSON

Ms. WILKINSON. Thank you, Mr. Chairman. I would like to thank all of the members of the Judiciary Committee for taking up this important subject and for allowing me to share my thoughts on the victims' rights amendment.

I come before you this morning as someone who understands the delicate balancing act between victims' rights and the pursuit of justice. I spent 2½ years as part of the Government team that successfully prosecuted Timothy McVeigh and Terry Nichols for the Oklahoma City bombing.

As you know, 168 people, including 19 children, were killed on that day, April 19, 1995. And for the survivors and the hundreds of relatives of the victims, the emotional struggle was enormous. I grew to understand their grief firsthand. During the process, it became clear to me that we had to listen to the victims, and yet balance their concerns with the need for a just trial. This experience transformed my views on the rights of victims, making me more sensitive to the issues that victims face throughout the judicial system.

Early in my career when I was a captain in the U.S. Army working on the Noriega prosecution and other criminal cases, I first encountered issues surrounding victims' rights. As a an assistant U.S. attorney in the Eastern District of New York, and later as the principal deputy chief of the Terrorism and Violent Crimes Section for the Department of Justice, I came to know the trauma victims confront when they take the stand and testify about the impact of a heinous crime.

I also know the frustration that they feel when the criminal justice system seems to move at a glacial pace toward the resolution of a criminal matter. But I also know, and I have seen, the relief and satisfaction that they experience when a criminal trial ends with a fair and just conviction of the guilty.

It is because of my experiences as a prosecutor in the Oklahoma City bombing trials and my involvement with numerous other terrorism and violent crime cases that I respectfully oppose the proposed victims' rights amendment in its current form. And I urge you to consider statutory alternatives to protect the rights of victims.

I firmly believe that the rights of victims must be recognized and honored throughout the criminal process. However, their most important right, the right to the just conviction of the guilty, must remain paramount. I spent many, many hours with the mothers and the fathers who lost their children in the America's Kids Daycare Center that was located in the Alfred P. Murrah Building. I talked to the husbands and the wives of law enforcement agents who were killed by McVeigh and Nichols. I listened to the people who were injured on April 19th and heard them describe the horror of being

trapped in the dark, collapsed and frightening remains of the Murrah building.

Because of people like Marsha Kight, who attended the trial day in and day out and is here with us today, I had the honor of witnessing the courage of the survivors and the families as the horrific story unfolded before them once again at trial.

While victims and family members often expected vastly different results from the judicial system, they uniformly asked me and the other members of the prosecution team to do two things on their behalf; first, to prove to them and to the jury that the defendants were guilty beyond a reasonable doubt. They wanted to make sure that we had charged the right people, a concern, I submit, of every crime victim.

Second, they asked us to prosecute the cases in a fair and just manner so that the convictions would be upheld on appeal. No victim of a crime, especially those who have suffered through such a gut-wrenching trial and penalty phase, want to see a conviction overturned and face a retrial of the defendants.

In the Oklahoma City bombing trials, we endeavored to achieve these goals, and I am proud to say in the end both McVeigh and Nichols' convictions were supported by overwhelming evidence and have thus far been upheld on appeal. Achieving this result was not easy, and it could have been substantially impaired if the current version of the victims' rights amendment had been in place.

For example, just months after the bombing, the prosecution team who was responsible for determining the most effective strategy for convicting those most culpable determined that it was in the best interests of the case to accept a guilty plea from Michael Fortier. While not a participant in the conspiracy to bomb the building and the people inside of it, Fortier knew of McVeigh and Nichols' plans and he failed to prevent the bombing.

If the victims had had a constitutional right to address the court at the time of the plea, I have no doubt that many of them would have vigorously and emotionally opposed any plea bargain between the Government and Fortier. From their perspective, their opposition would have been reasonable. Due to the secrecy rules of the grand jury, we could not explain to the victims why Fortier's plea and cooperation was important to the prosecution of McVeigh and Nichols.

What if the judge had rejected the plea based on the victims' opposition, or at least forced the Government to detail why Fortier's testimony was essential to the Government's case? Timothy McVeigh's trial could have turned out differently. Significant prosecutorial resources would have been diverted from the investigation and prosecution of McVeigh and Nichols to pursue the case against Fortier, and we would have risked losing the evidence against McVeigh and Nichols that only Fortier could provide. In the end, the victims would have been much more disappointed if Timothy McVeigh had been acquitted than they were that Michael Fortier was permitted to plead guilty.

In criminal cases, it is not that the victims should not have a right to speak out about the case and its impact on their lives. They should, and they do. It is the timing of their statements and their input that should be carefully examined.

Victims were able to attend Michael Fortier's plea. Their testimony regarding the plea and the impact of Fortier's crimes on them and their families was appropriately expressed at the time of Fortier's sentencing. It was then, after the convictions of McVeigh and Nichols, that the court listened to the victims express their views on the just sentence for Michael Fortier.

Without compromising the victims' rights to address the court and the defendants, the current constitutional framework permitted the prosecution team to obtain Fortier's testimony and the other defendants' convictions and allow the victims to testify during the sentencing hearing of the defendants.

Some point to the Oklahoma City bombing trials as support for this proposed victims' rights amendment, but I believe that the trials prove that the interests of victims can be vindicated without a constitutional amendment. This Congress passed a statute that worked—the Victims' Rights Clarification Act of 1997. On its very first application at the McVeigh trial, no victim was precluded from testifying during the penalty phase who had sat through the Government's case-in-chief. Just 3 months later, at the Nichols trial, all of the survivors and the families were able to view the trial and testify during the penalty phase if they so desired, thanks to the recent congressional statute.

There are many things that can and should be done to assure that victims are part of the criminal process. Most importantly, the justice system needs additional resources to fund victim-related programs. We also must educate prosecutors, law enforcement agents and judges about the impact of crimes so they better understand the importance of addressing victims' rights from the outset.

I learned these important lessons from the victims of the Oklahoma City bombing. The survivors and family members of the Oklahoma City tragedy waited patiently and with dignity for a just result. Their eloquent statements and testimony during the trials, the penalty phases and the sentencing hearings, coupled with the trial judge's vigilant protection of the defendants' rights, resulted in the vindication of the victims' most important right, the fair and just conviction of the guilty.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Well, thank you, Ms. Wilkinson.

[The prepared statement of Ms. Wilkinson follows:]

PREPARED STATEMENT OF BETH A. WILKINSON

Thank you Mr. Chairman. I would like to thank all of the members of the Judiciary Committee for taking up this important subject and allowing me to share my thoughts on the proposed Victims' Rights Amendment.

I come before you this morning as someone who understands the delicate balancing act between victims rights and the pursuit of justice. I spent 2½ years as part of the government team that successfully prosecuted Timothy McVeigh and Terry Nichols for the Oklahoma City bombing. As you know, the bombing killed 168 people, including 19 children. For the survivors and the hundreds of relatives of the victims, the emotional struggle was enormous. I grew to understand their grief first hand. Starting with the day I was assigned to the case, I met with the victims and their families to discuss the losses they had suffered and to prepare them for their testimony. As a member of the prosecution team, I spoke to several hundred victims and their families at pretrial informational meetings during which we fielded questions, pertaining to the key issues in the case. Everyday in the courtroom I spoke to the victims, listening to their thoughts and opinions about the trial. During the

process it became clear to me that we had to listen to the victims yet balance their concerns with the need for a just trial.

This experience transformed my views on the rights of victims making me more sensitive to the issues that victims face throughout our judicial system. Early in my career, when I was a Captain in the Army working on the Noriega prosecution and other criminal cases, I first encountered the issues surrounding victims rights. As an Assistant United States Attorney for the Eastern District of New York , and later, as the principal deputy chief of the Terrorism and Violent Crime Section of the Criminal Division, I came to know the trauma victims confront when they take the stand and testify about the impact of a heinous crime. I also know the frustration they feel when the criminal justice system seems to move at a glacial pace toward the resolution of a criminal case. But I also know the relief and satisfaction they experience when a criminal trial ends with the fair and just conviction of the guilty.

It is because of my experience as a prosecutor in the Oklahoma City bombing trials and my involvement with numerous other terrorism and violent crime cases, that I respectfully oppose the Victim's Rights Amendment in its current form and urge you to consider statutory alternatives to protect the rights of victims. I firmly believe the rights of victims must be recognized and honored throughout the criminal process, however, their most important right—the right to the just conviction of the guilty—must remain paramount.

I spent many, many hours with the mothers and fathers who lost their children in the America's Kids Daycare Center that was located in the Alfred P. Murrah Building. I talked to the husbands and wives of law enforcement agents who were killed by Timothy McVeigh and Terry Nichols. I listened to the people who were injured that day and heard them describe the horror of being trapped in the dark, collapsed and frightening remains of the Murrah building.

While victims and family members often expected vastly different results from the judicial system, they uniformly asked me and the rest of the prosecution team to do two things on their behalf. First, prove to them and the jury that the defendants were guilty beyond a reasonable doubt. They wanted to make sure we had charged the right people, a concern, I submit, of every crime victim. Second, they asked us to prosecute the cases in a fair and just manner so that the convictions would be upheld on appeal. No victim of a crime, especially those who suffered through such a gut-wrenching trial and penalty phase, wants to see a conviction overturned and face a re-trial of a defendant.

In the Oklahoma City bombing trials, we endeavored to achieve these goals and, in the end, both the McVeigh and Nichols convictions were supported by overwhelming evidence and upheld on appeal. Achieving this result was not easy and could have been substantially impaired if the Victims Rights Amendment had been in place.

For example, just months after the bombing, the prosecution team, which was responsible for determining the most effective strategy for convicting those most culpable, McVeigh and Nichols, determined that it would be in the best interest of the case to accept a guilty plea from Michael Fortier. While not a participant in the conspiracy to bomb the building and the people inside of it, Fortier knew of McVeigh and Nichols' plans and he failed to prevent the bombing. If the victims had had a constitutional right to address the Court at the time of the plea, I have no doubt that many would have vigorously and emotionally opposed any plea bargain between the Government and Fortier. From their perspective, their opposition would have been reasonable. Due to the secrecy rules of the grand jury, we could not explain to the victims why Fortier's plea and cooperation was important to the prosecution of Timothy McVeigh and Terry Nichols.

What if the judge had rejected the plea based on the victims' opposition or at least forced the government to detail why Fortier's testimony was essential to the Government's case? Timothy McVeigh's trial could have turned out differently. Significant prosecutorial resources would have been diverted from the investigation and prosecution of McVeigh and Nichols to pursue the case against Fortier and we would have risked losing the evidence against McVeigh and Nichols that only Fortier could have provided. In the end, the victims would have been much more disappointed if Timothy McVeigh had been acquitted than they were when Michael Fortier was permitted to plead guilty.

In criminal cases, it is not that the victims should be not have a right to speak out about the case and its impact on their lives: they should and they do. It is the timing of their statements and their input that should be carefully examined. Victims were able to attend Michael Fortier's plea. Their testimony regarding the plea and the impact of Fortier's crimes on them and their families was appropriately expressed at the time of Fortier's sentencing. It was then, after the convictions of Tim-

othy McVeigh and Terry Nichols that the Court listened to the victims express their views on the just sentence for Michael Fortier. Without compromising the victims' right to address the Court and the defendants, the current constitutional framework permitted the prosecution team to obtain Fortier's testimony and the other defendants' convictions and allowed the victims to testify during the sentencing hearings of the defendants.

Some point to the Oklahoma City bombing trials as support for the proposed Victims' Rights Amendment, but in fact I believe that the trials proved that the interests of victims can be vindicated without a constitutional amendment. When the victims found themselves having to choose between attending the trial and testifying about the impact of the crime, Congress responded with the Victim Rights Clarification Act of 1997, enabling the victims to view the trial and speak during the penalty phase of the proceedings. The statute worked. No victims were precluded from testifying. Indeed 37 witnesses appeared over two and a half days during the sentencing hearing for Timothy McVeigh. The jurors, who had to decide whether to sentence McVeigh to life or death, listened to the testimony of each of those witnesses.

. There are many things that can and should be done to assure that victims are part of the criminal process. All crime victims should receive notice of public proceedings in a case and be permitted to attend if they so choose. We kept the victims of the Oklahoma City bombing informed by establishing a victim-witness unit which maintained contact with all of the victims and their family members. We also sent letters detailing the progress of the case, and met with people on a regular basis to answer questions and prepare them for the difficult testimony and issues that would arise at trial. Through interviews of family members and survivors in preparation for the trial, we gained insight into the needs of those who grieved. Over time, the victims learned to trust our judgment and to believe that we would pursue justice without compromising their interests.

An amendment to the Constitution, or even a statute guaranteeing the rights of victims, could not mandate some of the most needed reforms to the criminal justice system. We must educate prosecutors, law enforcement and judges about the impact of crimes so that they better understand the importance of addressing victims' rights from the outset. I learned those lessons from the victims of the Oklahoma City bombing.

The survivors and the family members of the Oklahoma City bombing waited patiently and with dignity for a just result. Their eloquent statements and testimony during the trials,penalty phases and sentencing hearings coupled with the trial judge's vigilant protection of the defendant's rights resulted in the vindication of the victim's most important right—the fair and just conviction of the guilty.

The CHAIRMAN. Professor Cassell.

STATEMENT OF PAUL G. CASSELL

Mr. CASSELL. Thank you, Mr. Chairman and distinguished members of the committee. I appreciate the opportunity to be here today to urge you to pass this victims' rights amendment and send it on its way speedily to the States for ratification there.

Around the country, a clear consensus has developed that victims of crime deserve protection in our criminal justice process. Thirty-one States now have State constitutional amendments protecting the rights of crime victims, and all States have some form of statutory recognition of the rights of victims to be involved in the process.

Now, where these rights have been implemented, the results have been to improve the criminal justice system. Victims who are kept informed about the process can be more effective in helping the prosecution. They can help judges by providing information about whether to release a defendant on bail or what the appropriate sentence is. And this involvement in the process helps victims themselves to cope with debilitating psychological injuries inflicted by terrible crimes.

So it is not surprising to find that those who take a global view of an effective criminal justice system strongly support the victims'

rights amendment. For example, the Attorney General testified before this committee that “The President and I have concluded that a victims’ rights amendment would benefit not only crime victims, but also law enforcement. Victims will be that much more willing to participate in the process if they perceive that we are striving to treat them with respect and to recognize their central place in any prosecution.”

Yet, while a clear consensus has developed that victims deserve these rights, disturbing evidence continues to mount that victims are too often denied these rights in court rooms around the country. Hard statistical evidence of these denials comes from a National Institute of Justice study released just three months ago. The study concluded that, “Enactment of State laws and State constitutional amendments alone appears to be insufficient to guarantee full provision of victims’ rights in the process.”

For example, even in two States the National Institute of Justice identified as providing strong protection for crime victims, fewer than 60 percent of victims were notified of sentencing hearings, and fewer than 40 percent were notified of the pre-trial release of the defendant. A follow-on analysis of this same data found, perhaps not surprisingly, that those who are worse off today are racial minorities who are disproportionately affected by the haphazard administration and provision of victims’ rights.

Now, these conclusions are simply the latest in a long line of findings that the criminal justice system is not providing the rights that have been promised to victims. Perhaps most noteworthy among these is the conclusions of the U.S. Department of Justice, who carefully reviewed this issue and, as the Attorney General reported to this committee, found that State efforts are simply not sufficiently consistent, comprehensive, or authoritative to safeguard victims’ rights.

Similarly, Harvard law professor Laurence Tribe, after looking at all the evidence, has concluded that State protections provide too little protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia, or any mention of the accused’s rights, even when those rights are not genuinely threatened.

It is against this backdrop that we should consider claims by Ms. Wilkinson and others that victims’ rights can be fully protected by statutes. Indeed, the very case that she discusses, the Oklahoma City bombing case, proves the need for an amendment. Now, in many ways this case should have been a model, here where ample resources devoted to a prosecution, the public was watching, and this was in the Federal system, a model for protecting victims’ rights, one would think.

Yet, in spite of this, at a number of points in the process victims’ rights were not respected, and indeed a good illustration is the very point that Ms. Wilkinson talks about, the plea agreement that the Government entered with Mr. Fortier. Now, under the Act that this Congress passed in 1990, the Victims’ Rights and Restitution Act, the Department was required to use its best efforts to confer with victims about that plea agreement and to notify them of the plea hearing.

Yet, the Department failed to do so, and the result of the surprise plea bargain was, quite predictably, hostility in the victims' community. Now, based on this hostility, prompted in no small part by the Department's failure to trust the victims, Ms. Wilkinson builds conjecture upon conjecture to say that the prosecution of Timothy McVeigh and Terry Nichols would have been impaired if the victims' rights amendment had been in place.

Now, this conjecture assumes irrationality both on the part of crime victims and on the part of Federal judges. Had Ms. Wilkinson and her colleagues trusted the victims and explained to the victims why this plea agreement was necessary, they would have supported the agreement. And we needn't speculate about this. We have with us today Marsha Kight, one of the leaders of the victims' community in Oklahoma City, and she has released a statement to this committee that the great majority of victims would have supported that plea agreement had the Government taken the time to talk to them about it.

And there is also no need to speculate about how a victim's right to be heard on plea agreements would operate in practice. Today, approximately 36 States already have on their books provisions allowing victims to be heard at plea agreements, and yet the sky has not fallen. In fact, to the contrary, it has improved the plea bargaining process.

Now, even if the victims oppose a plea agreement, we should remember that the final decision is made by a judge. And if this plea agreement with Mr. Fortier was so critical, certainly a Federal judge would have accepted it, and indeed the Federal judge did accept it. So, if anything, the situation with Michael Fortier's plea agreement shows the need for the Federal amendment, not any problems with it.

Now, this is not the only illustration of a problem in the Oklahoma City bombing case that arose without constitutional protection for victims' rights. The committee is well aware of the difficulties that victims had in enforcing their rights to attend trial. The trial judge sua sponte ordered that any victims in the case who were going to testify at the penalty phase would have to be sequestered and could not watch the proceedings.

And in reaching this ruling, the court was apparently entirely unaware of the 1990 statute, the Victims' Rights and Restitution Act, that gave victims the right to attend hearings. Even after we filed a motion calling the statute to the attention of the judge, based on a vague reference to a defendant's constitutional rights, he refused to enforce its provisions.

I then represented Marsha Kight and 89 other victims in the Tenth Circuit, and we were thrown out of the Tenth Circuit on the grounds that we lacked standing to even be heard to present our case that these victims of the bombing should have the opportunity to watch the trial. And I should point out to this committee that that decision remains on the books, and in all six States in the Tenth Circuit it is the law today that neither victims of crime nor the Department of Justice has any standing to go into court and enforce these rights.

Congress then passed, as you know, the 1997 Victims' Rights Clarification Act to address this specific problem, and we presented

that law, then, to the judge immediately after this committee and Congress had approved it. And yet the judge deferred ruling on the validity of that law, deferring his ruling until after the trial, forcing the victims once again to make the painful choice about whether to watch the trial and to risk losing the opportunity to testify at the impact phase of the trial.

Ms. Wilkinson has testified that the statute worked, but the prosecutors at the time, including, I believe, Ms. Wilkinson, were forced to advise victims that if they went into the trial and watched, they would be creating substantial uncertainty and risk about whether they would be denied the opportunity to testify at the penalty phase. And some of the victims decided not to run that risk and lost forever the rights promised to them by Congress to watch the trial.

Now, these again are not the only examples of problems in this case. At the sentencing of Timothy McVeigh, victims were not given the opportunity to make a statement. When Timothy McVeigh was sentenced, no order of restitution was imposed against him, an apparent oversight by both the Department of Justice and perhaps the court as well.

If this is the treatment of victims in the very best of circumstances, when the spotlight is on and the Nation is watching, the committee can well imagine what the treatment is like of victims in ordinary, day-to-day criminal justice hearings. It is time to end this glaring mistreatment of victims. Our criminal justice system provides ample rights for criminal defendants. It should do the same for their innocent victims as well.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Cassell follows:]

PREPARED STATEMENT OF PAUL G. CASSELL

Mr. Chairman and Distinguished Members of the Committee, I am pleased to be here today.

I am a Professor of Law at the University of Utah College of Law, where I teach a course devoted exclusively to the rights of crime victims. I have represented crime victims (always on a *pro bono* basis) on a number of legal issues and written and lectured on the subjects of crime victims rights, as explained at greater length in my attached biography. I serve on the executive board of the National Victim Constitutional Amendment Network, an organization devoted to bringing constitutional protection to crime victims across the country.

I have previously provided extensive testimony to this Committee supporting the Crime Victims' Rights Amendment.[1] I will not reiterate all that I have said there, but did want to briefly note that a strong national consensus appears to be developing that the rights of crime victims deserve protection and that a federal constitutional amendment is the only way to fully guarantee that protection. A substantial majority of the states have passed amendments to their own state constitutions protecting victims' rights and more amendments are passed at every national election. The amendments provide strong evidence that the citizens of this country believe that victims should be respected in the criminal process.

Unfortunately, however, the state amendments and related federal and state legislation are generally recognized by those who have carefully studied the issue to have been insufficient to fully protect the rights of crime victims. The United States, Department of Justice has concluded that current protection of victims is inad-

[1] *See The Victims Right Amendment: Hearings Before the Senate Comm. on the Judiciary,* 105th Cong., 2nd Sess. (Apr. 28, 1998); *Crime Victims' Rights Amendment: Hearing Before the Senate Comm. on the Judiciary,* 105th Cong., 1st Sess. (Apr. 16, 1997); The Victims' Bill of Rights Amendment: Hearings Before the Senate Comm. on the Judiciary, 104th Cong., 2d Sess. (April 23, 1996).

equate, and will remain inadequate until a federal constitutional amendment is in place. As the Attorney General explained:

> 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 20 years. * * * 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.[2]

A number of legal commentators have reached similar conclusions. For example, Harvard Law Professor Laurence Tribe has explained that the existing statutes and state amendments "are likely, as experience to date sadly shows, to provide too little real protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia, or any mention of an accused's rights regardless of whether those rights are genuinely threatened."[3] Similarly, Texas Court of Appeals Justice Richard Barajas has explained that "[i]t is apparent * * * that state constitutional amendments alone cannot adequately address the needs of crime victims."[4]

That only a federal amendment will protect victims is the view of those in perhaps the best position to know: crime victims and their advocates. The Department of Justice recently convened a meeting of those active in the field, including crime victims, representatives from national victim advocacy and service organization, criminal justice practitioners, allied professionals, and many others. Their report—published by the Office for Victims of Crime and entitled "New Directions from the Field: Victims' Rights and Services for the 21st Century"—concluded that "[t]he U.S. Constitution should be amended to guarantee fundamental rights for victims of crime."[5] The report went on to explain,

> 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. * * * Today, many victims do not report crime or participate in the criminal justice system for a variety of reasons, including fear of revictimization by the system and retaliation by the offender. Victims will gain confidence in the system if their rights are recognized and enforced, their concerns for safety are given serious consideration, and they are treated with dignity and respect.[6]

These impressionist conclusions find strong support in a December, 1998 report from the National Institute of Justice (NIJ) finding that many victims are denied their rights and concluding that "enactment of State laws and State constitutional amendments alone appears to be insufficient to guarantee the full provision of victims' rights in practice."[7] 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 percent of the victims were notified of the sentencing hearing and fewer than 40 percent were notified of the pretrial release of the defendant.[8] 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.[9]

For reasons such as these, the Victims Rights Amendment has attracted considerable bi-partisan support, as evidenced by its endorsement by the President[10] and strong approval in this Committee at the end of the 104th Congress.[11] Based on this

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[2] *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing Before the Sen. Judiciary Comm.,* 105th Cong., 1st Sess. 41 (Apr. 16, 1997) (statement of Attorney General Janet Reno).

[3] Laurence Tribe, *The Amendment Could Protect Basic Human Rights,* Harv. L. Bull., Summer 1997, at 19, 20.

[4] Chief Justice Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance,* 49 Baylor L. Rev. 1, 13 (1997).

[5] U.S. Dep't of Justice, Office for Victims of Crime, New Directions from the Field: Victims' Rights and Services for the 21st Century 9 (1998).

[6] *Id.* at 10–12.

[7] Nat'l Inst. of Justice, Research in Brief, The Rights of Crime Victims—Does Legal Protection Make a Difference? 1 (Dec. 1998).

[8] *Id.* at 4 exh. 1.

[9] National Victim Center, Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims: Sub-Report on Comparison of White and Non-White Crime Victim Responses Regarding Victims Rights 5 (1997).

[10] *See* Announcement by President Bill Clinton on Victims Rights, available in LEXIS on Federal News Service, June 25, 1996.

[11] *See* S. Rep. No. 105–409 at 37 (Amendment approved by 11–6 vote).

vote, the widely-respected *Congressional Quarterly* has identified the Amendment as perhaps "the pending constitutional amendment with the best chance of being approved by Congress in the foreseeable future."[12]

As the Victims' Rights Amendment has moved closer to passage, defenders of the old order have manned[13] 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"[14]) to the pragmatic (it will "lay waste to our criminal justice system."[15]) to the esthetic (it will "trivialize" the Constitution[16]). 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—no, 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 victim pleas for recognition are legitimate, what does that say about how the system has treated them for so many years?

My aim here focus on how victims' rights would specifically operate under the Victims Rights Amendment. In particular, my testimony analyzes the objections that the Amendment's opponents have raised.[17] 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 our criminal justice system," and—for good measure—"trivialize" the Constitution" are not all true. My testimony 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 testimony 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 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.

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[12] Dan Carney, *Crime Victims Amendment Has Steadfast Support, But Little Chance of Floor Time,* Cong. Quart., July 30, 1998.

[13] 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,* www.nvc.org/newsltr/sexass2.htm; Joan Zorza, *Victims' Rights Amendment Empowers All Battered Women* (www.nvc.org/newsltr/battwom.htm); *see also infra* notes 248–52 and accompanying text (discussing woman and children who have died from lack of notice of an offender's release).

[14] *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings before the Sen. Comm. on the Judiciary,* 105th Cong, 1st Sess. 141 (1997) (hereinafter *1997 Sen. Judiciary Comm. Hearings*) (letter from various law professors opposing the Amendment).

[15] *Proposals for a Constitutional Amendment to Provide Rights for Victims of Crime: Hearings Before the House Judiciary Comm,* 104th Cong., 2d Sess. 143 (1996) (hereinafter *1996 House Judiciary Comm. Hearings*) (statement of Ellen Greenlee, President, National Legal Aid and Defender Association).

[16] *A Proposed Constitutional Amendment to Establish a Bill of Rights for Crime Victims: Hearings Before the Sen. Judiciary Comm.,* 104th Cong., 2d Sess. 101 (1996) (hereinafter *1996 Sen. Judiciary Comm. Hearings*) (statement of Bruce Fein).

[17] My testimony draws heavily on an article that will appear shortly in a symposium issue of the *Utah Law Review* devoted to the rights of crime victims. *See* Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment,* 1999 Utah L. Rev.— (forthcoming). I extend my thanks to the editors of the law review for allowing me to use some of that material here.

This claim of an "unnecessary" amendment[18] 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. 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, 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 this Committee's 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, the vast bulk of the opponents flatly concedes the vitality of victim participation in the criminal justice system. For example, the senators on this Committee who dissented from supporting the Amendment[19] 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.'"[20] 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. * * *"[21]

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. Strong evidence of this agreement comes from the federal statute proposed by the dissenting members of this Committee, which would extend to victims in the federal system most of the same rights provided in the Amendment.[22] Other critics, too, have suggested protection for victims in statutory rather than constitutional terms.[23] 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.*[24] This harmony suggests that the Amendment satisfies a basic requirement for a constitutional amendment—that it reflect values widely shared throughout 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 near consensus has been reached on the desirability of many of the values reflected in the Amendment, critics dispute 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 prosecutors'.

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[18] *See, e.g.,* Robert P. Mosteller, *The Victims' Rights Amendment: The Unnecessary Amendment,* 1999 Utah L. Rev.—(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 (1997) (hereinafter Mosteller, *Recasting the Battle*).

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

[20] S. Rep. No. 105–409 at 50 (minority views of Sens. Leahy, Kennedy and Kohl).

[21] 1997 Law Professors Letter, *reprinted in 1997 Sen. Judiciary Comm. Hearings, supra* note 14, at 141.

[22] *See* S. 1081, 105th Cong., 1st Sess. 1997; *see also* S. Rep. No. 105–409 at 77 (minority views of Sens. Leahy, Kennedy and Kohl) (defending this statutory protection of victims rights).

[23] *See, e.g.,* 1997 Law Professors Letter ("crime victims deserve protection, but this should be accomplished by statutes, not a constitutional amendment. * * *"), *reprinted in 1997 Sen. Judiciary Comm. Hearings, supra* note 14, at 141.

[24] *See generally* Stephen J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things,* 1999 Utah L. Rev.—(forthcoming) (noting frequency with which opponents of the Victims' Rights Amendment endorse the goals in the amendment).

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-repeatedly 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 defendant's."[25] Similarly, Senator Joseph Biden agrees that "I am now convinced that no potential conflict exists between the victims' rights enumerated in the [proposed Amendment] and any existing constitution right afforded to defendants."[26] A recent summary of the available research on the purported conflict of rights supports these views, finding that victims' rights do not harm defendants:

> Studies 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 right to the crime victim indicated that the balance was not improperly tipped in favor of the victim. One article studied victim participation in plea bargaining found that 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: "Victim satisfaction with prosecutors and the criminal justice system was increased without infringing on the defendant's rights."[27]

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 the experience suggests that the parade will never materialize, particularly given the redrafting of the proposed amendment to narrow some of the rights it extends.[28] A careful examination of the most-often advanced claims

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[25] *See* 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 15, at 238 (letter from Professor Tribe).

[26] S. Rep. 105–409 (additional views of Sen. Biden).

[27] Richard Barajas & Scott Alexander 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 22; Sarah N. Welling, *Victim Participation in Plea Bargains,* 65 Wash. U.L.Q. 301, 355 (1987)).

[28] As originally proposed, the Amendment extended victims a broad right "to a final disposition of the proceedings relating to the crime free from unreasonable delay." S.J. Res. 6 (1995). 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 (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 14, at 155 (statement of Mark Kappelhoof, ACLU Legislative Counsel).

As originally proposed, the Amendment also promised victims a broad right to "be reasonably protected from the accused." S.J. Res. 6 (1995). It now provides victims a right to "have the safety of the victim considered in determining a release from custody." S.J. Res. 3 (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." *See 1997 Senate Judiciary Comm. Hearings, supra* note 14, 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. 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 the way in which these changes responded to concerns expressed by advocates of defendants' rights, including Mosteller himself. *See* Mosteller, *Recasting the Battle, supra* note 18, 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 121–41 and accompanying text, but it does not attempt to achieve such favorite goals of prosecutors: overturning the exclusionary rule. *Cf.* Cal. Const. art. I, § 28 (victims initiative re-

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of conflict with defendants' legitimate interests reveals that any purported conflict is illusory.[29]

1. The right to be heard

Some opponents of the Amendment object that the victim's right to heard will interfere with a defendant's efforts to mount a defense. At least some of these objections appear to misunderstand the scope of the Amendment. For example, to prove that a victim's right to be heard is undesirable, objectors sometimes claim (as was done in the minority report of this Committee) that the proposed Amendment "gives victims a constitutional right to be heard, if present, and to submit a statement at *all* stages of the criminal proceeding."[30] 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.[31] Yet, 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. * * *"[32] 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 a legislative proposal by several dissenting members of this Committee. While criticizing the right to be heard in the constitutional amendment, these senators simultaneously sponsored federal legislation to extend to victims in the federal system precisely the same rights.[33] 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. * * *"[34] In defending their bill, they saw no difficulty with giving victims a chance to be heard,[35] a right that already exists in many states.[36]

A more detailed critique of the victim's right to be heard is found in a recent prominent article by Professor Susan Bandes.[37] Like most other opponents of the Amendment, she concentrates her intellectual fire on the victims' right to be heard at sentencing, arguing that victim impact statements are inappropriate narratives to introduce in capital sentencing proceedings. 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.[38]

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stricting exclusion of evidence); Or. Const., art. I, § 42 (same), *invalidated, Armatta* v. *Kitzhaber,* 959 P.2d 49(Or. 1998) (initiative violated single subject rule). *See generally* President's Task Force on Victims of Crime, Final Report 24–26 (1982) (urging abolition of exclusionary rule on victim-related grounds).

[29] 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. 105–409 at 22–23 (explaining reasons for rejecting balancing language in the Amendment).

[30] S. Rep. 105–409 at 66 (minority views of Sens. Leahy, Kennedy and Kohl) (emphasis added).

[31] *Id.* (minority views of Sens. Leahy, Kennedy and Kohl).

[32] S.J. Res. 3, § 1 (1999).

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

[34] S. Rep. 105–409 at 50 (minority views of Sens. Leahy and Kennedy).

[35] *See, e.g.,* Cong. Rec., July 29, 1997, at S8275 (statement of Sen. Kennedy); Statement of Sen. Patrick Leahy on the Introduction of the Crime Victims Assistance Act, July 29, 1997.

[36] *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.

[37] *See* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements,* 63 U. Chi. L. Rev. 361 (1996).

[38] *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 non-capital 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 non-homicide cases. This extension of her argument seems unconvincing, as the case for excluding victim statements is stronger for capital cases than for others. 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 case 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. *Card,* 825 P.2d 1081, 1089 (Idaho 1991); *State* v. *Johnson,* 594 N.E.2d 253, 270 (Ill. 1992); *State* v. *Beaty,* 762 P.2d 519, 531 (Ariz. 1988), *cert. denied,* 491 U.S. 910 (1989); *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

Professor Bandes' objection is important to consider carefully because it presents one of the most thoughtfully developed cases against victim impact statements.[39] 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. 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. * * *"[40] Bandes then contends that victim impact statements divert sentencers from that inquiry to "irrelevant fortuities" about the victims and their families.[41] 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.[42] 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.*[43] Kight's compelling book is not unique, as equally powerful accounts from the family of Ron Goldman,[44] children of Oklahoma City,[45] Alice Kaminsky,[46] George Lardner Jr.,[47] Dorris Porch and Rebecca Easley,[48] Mike Reynolds,[49] Deborah Spungen,[50] John Walsh,[51] and Marvin Weinstein[52] make all too painfully clear. Intimate third party accounts offer similar insights about the generally unrecognized yet far-ranging consequences of homicide.[53]

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 victim impact statement at issue in

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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 "wholesale condemnation of victim participation under all circumstances is surely unwarranted").

[39] Several other articles have also focused on and carefully developed a case against victim impact statements. *See,* e.g., Lynne N. Henderson, *The Wrongs of Victim's Rights,* 37 Stan. L. Rev. 937, 986–1006 (1985); Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint,* 28 Am. Crim. L. Rev. 233 (1991). Because Professor Bandes' is the most current, I focus on it here as exemplary of the critics' position.

[40] *See* Bandes, *supra* note 37, at 398 (emphasis added).

[41] *See id.* at 398–99.

[42] *See, e.g., Booth* v. *Maryland,* 482 U.S. 496, 509–515 (1987); *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); *United States* v. *McVeigh,* 1997 WL 296395 (various victim impact statements at sentencing of Timothy McVeigh); *United States* v. *Nichols,* 1997 WL at 790551 (various victim impact statements at sentencing of Terry Nichols).

[43] Marsha Kight, Forever Changed: Remembering Oklahoma City, April 19, 1995 (1998).

[44] The Family of Ron Goldman, His Name is Ron (1997).

[45] Nancy Lamb and Children of Oklahoma City, One April Morning: Children Remember the Oklahoma City Bombing (1996).

[46] Alice R. Kaminsky, The Victim's Song (1985).

[47] George Lardner Jr., The Stalking of Kristin: A Father Investigates the Murder of His Daughter (1995).

[48] Dorris D. Porch & Rebecca Easley, Murder in Memphis: The True Story of a Family's Quest for Justice (1997).

[49] Mike Reynold & Bell Jones, Three Strikes and You're Out * * * A Promise to Kimber: The Chronicle of America's Toughest Anti-Crime Law (1996).

[50] Deobrah Spungen, And I Don't Want to Live This Life (1984).

[51] 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." Lynne Henderson, *Victims Rights in Theory and Practice,* 1999 Utah L. Rev.—(forthcoming). 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.

[52] Milton J. Shapiro with Marvin Weinstein, Who Will Cry for Staci? The True Story of a Grieving Father's Quest for Justice (1995).

[53] *See, e.g.,* Shelley Neiderbach, Invisible Wounds: Crime Victims Speak (1986); Gary Kinder, Victim (1982); Joseph Wambaugh, The Onion Field (1973); Deborah Spungeon, Homicide: The Forgotten Victims (1998); Janice Harris Lord, No Tine for Goodbyes: Coping with Sorrow, Anger and Injustice After a Tragic Death (4th ed. 1991).

Payne v. *Tennessee,* 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]

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 "heartbreaking" and "nearly unbearable to read" about what it is like for a three-year-old to witness the murder of his mother and his two-year-old sister? The answer, judging from why my heart broke as I read the passage, is that we can no longer treat the crime as some abstract event. In other words, we begin to realize the nearly unbearable heartbreak—that is, the actual and total harm—that the murderer inflicted.[58] Such a realization may 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]

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' 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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[54] Bandes, *supra* note 37, at 361 (*quoting Payne* v. *Tennessee,* 501 U.S. 808, 814–15 (1991)).

[55] *Id.* at 361.

[56] *Id.* at 401.

[57] *See* Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 4.5. at 197 (1995).

[58] *Cf.* Erez, *Who's Afraid of the Victim?, supra* note 69, at [13] ("legal 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 victimization, how much they have learned * * * about the impact of crime on victims").

[59] *See* Brooks Douglas, *Oklahoma's Victim Impact Legislation: A New Voice for Victims and Their Families,* 46 Okla. L. Rev. 283, 289 (1993) (offering an example of a jury denied the truth about the full impact of a crime).

[60] In addition to allow assessment of the harm of the crime, victim impact statements are also justified because they provide "a quick glimpse of the life which the defendant choose to extinguish." *Payne* v. *Tennessee,* 501 U.S. at 822 (internal quotations 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 (indicating that the Victims' Rights Amendment does not alter laws precluding victim opinion as to the proper sentence).

[61] Bandes, *supra* note 37, 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 1980's. 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, –1.2 (Mich. Supp. 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), *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

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] This conclusion, however, is far from clear[66] and, in any event, the likelihood of a death sentence would be, at most, marginal. The empirical evidence in non-capital cases also finds little effect on sentence severity. For example, a study in California found that "[t]he right to allocution at sentence 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 recent comprehensive review of all of the available evidence in this country and elsewhere by a careful scholar concludes "sentence severity has not increased following the passage of [victim impact] legislation."[69] It is thus unclear why we should credit Bandes' 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 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

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impose death if the victim was a child, *id,* 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. EMAIL from Prof. Stephen P. Garvey 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,*—Psychology, Crime & Law—(forthcoming 1999); Edith Greene & Heather Koehring, *Victim Impact Evidence in Capital Cases: Doe the Victim's Character Matter?,* 28 J. Applied Social Psychology 145 (1998); James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in Capital Trial: Encouraging Votes for Death,* 20 Am. J. Crim. Just. 1 (1995); *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 Social Psychology 1315 (1994) (meta-analysis of previous research finds that effects of victim characteristics on juror's 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 Confession,*—Harv. J.L. & Pub. Pol'y—, —(forthcoming 1999); *Free* v. *Peters,* 12 F.3d 700, 705–06 (7th Cir. 1994) (en banc). 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 & Human Behavior 185, 191 (1992) ("the very nature of the [death] penalty decision may render it an inappropriate topic for jury simulation studies").

[64] *See Booth* v. *Maryland,* 482 U.S. 496 (1987).

[65] *See Payne* v. *Tennessee,* 501 U.S. 808 (1991).

[66] A full discussion of the data is found in Appendix B of my forthcoming article in the *Utah Law Review, supra* note 17.

[67] *See* U.S. Dep't of Justice, Nat'l Inst. of Justice, Victim Appearances at Sentencing Hearings Under the California Victim's 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).

[69] Edna Erez, *Wno's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice,—Crim. L. Rev.*—(forthcoming 1999) (hereinafter Erez, *Who's Afraid of the Victim?); accord* Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On* * * *, 3 Int'l Rev. of Victimology 17, 22 (1994) ("[r]esearch on the impact of victims' input on sentencing outcome is inconclusive. At best it suggests that victim input has only a limited effect") (hereinafter Erez, *Victim Participation*). For further discussion of the effect of victim impact statements, *see, e.g.,* 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 ABA Criminal Justice Section Victim Witness Project 159 (1989); *see also* Edna Erez & L. Roeger, *The Effect of Victim Impact Statements on Sentencing Patterns and Outcomes: The Australian Experience,* 23 J. Crim. Justice 363 (1995) (Australian study); R. Douglas et al., *Victims of Efficiency: Tracking Victim Information Through the System in Victoria, Australia,* 3 Int'l Rev. of Victimology 95 (1994) (same); Edna Erez, *Victim Impact Statements and Sentencing Outcomes and Process: The Perspectives of Legal Professionals,* 39 British J. of Criminology 216 (forthcoming 1999) (same).

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 non-capital 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]

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 * * * 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 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 a 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. Before the sentencing phase began, Marvin Weinstein asked the prosecutor to speak to the jury because the defendant's mother would have the chance to do so. The prosecutor replied that Florida law did not permit this. Here was Weinstein's response to the prosecutor:

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

[71] *See id.*

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

[73] *See* Erez, *Perspectives of Legal Professionals, supra* note 69, at [30] (South Australian study); *see also* Edna Erez, *Victim Participation in Sentencing: Rhetoric and Reality,* 18 J. Crim. Justice 19 (1990).

[74] *See, e.g.,* Bandes, *supra* note 37, at 408.

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

[76] *See* Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial,* 90 Nw. U.L. Rev. 863, 882 (1996).

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

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

[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] Gewirtz, *supra* note 76, at 880–82; *see also* Beloof, *supra* note 89 (noting this value as part of a third model of criminal justice); President's Task Force on Victims of Crime, Final Report 16 (1982).

[82] *Id.* 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).

> 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 set there and let the jury see her cry for him while I was barred.[84] * * * 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?[85]

There is no good answer to this question,[86] 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.[87] These prevailing views lend strong support to the conclusion that equal justice demands the inclusion of victim impact statements, not their exclusion.

These arguments sufficiently dispose of the critics' main contentions.[88] 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.[89] As Professor Doug 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.[90] This trauma stems 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."[91] 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."[92] On the other hand,

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[84] Weinstein was subpoenaed by the defense as a witness and therefore required to sit outside the courtroom. *See* Shapiro, *supra* note 52, at 215–16.

[85] *Id.* at 319–20.

[86] 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.

[87] *See, e.g., Ariz. Rev. Stat.* § 13–4410(C), –4424, –4426; Md. Code (1957, 1993 Repl. Vol.), Art. 41, S 4–609(d); N.J. Stat. Ann. 2C:11–3c(6); Utah Code Ann. 76–3–207(2). *See generally State* v. *Muhammad,* 678 A.2d 164, 177–78 (N.J. 1996) (collecting state cases upholding victim impact evidence in capital cases); *Payne* v. *Tennessee,* 501 U.S. at 821 (Congress and most states allow victim impact statements). These laws answer Bandes' brief allusion to the principle of *nulla poena sine lege* (the requirement of prior notice that particular conduct is criminal). *See* Bandes, *supra* note 37, 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* v. *Tennessee,* 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. Ct. Crim. Apps. 1989), not crafting of appropriate penalties for a previously-defined crime like capital murder.

[88] Professor Bandes and others also have suggested that the admission of victim impact statements would lead to offensive minitrials on the victim's character. *See, e.g.,* Bandes, *supra* note 37, 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, *Who's Afraid of the Victim?, supra* note 69, at 6. In neither the McVeigh nor Nichols trials, for example, did aggressive defense attorneys cross-examine the victims at any length about the impact of the crime.

[89] For general discussion of the harms caused by disparate treatment, see Lee Madigan & Nancy C. Gamble, The Second Rape: Society's Continued Betrayal of the Victim 97 (1989); Linda E. Ledray, Recovery from Rape 125 (2d ed. 1994); Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective,* 34 Wayne L. Rev. 51, 58 (1987); Deborah P. Kelly, *Victims,* 34 Wayne L. Rev. 69, 72 (1987); Douglas Evan Beloof, *A Third Model of Criminal Process: The Victim Participation Model,* 1999 Utah L. Rev.—(forthcoming).

[90] *See generally* Douglas Evan Beloof, *Constitutional Civil Rights of Crime Victim Participation: The Emergence of Secondary Harm as a Rational Principle,* in Beloof, *supra* note 124, at [10–18] (explaining concept of secondary harm); Spungeon, *supra* note 11, at 10 (explaining concept of secondary victimization).

[91] Task Force on the Victims of Crime and Violence, Final Report of the APA Task Force on the Victims of Crime and Violence, 40 Am. Psych. 107 (1985).

[92] Kilpatrick and Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning,* 34 Wayne L. Rev. 7, 21 (1987) (collecting

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there is mounting evidence that "having a voice may improve victims' mental condition and welfare." [93] For some victims, making a statement helps restore balance between themselves and the offenders. Others may consider it part of a just process or may want to communicate the impact of the offense to the offender.[94] 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.[95]

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.

2. The right to be present at trial

The victim's right to be present at trial creates the most frequently alleged conflict between the Amendment and the defendant's rights.[96] The most detailed and careful explication of this view is Professor Mosteller's, advanced in various articles[97] and recently relied upon by the dissenting senators of this Committee.[98] 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. 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.[99] 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." [100] 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." [101] 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." [102]

Professor Mosteller also seems to concede that defendants currently have no constitutional right to exclude victims from trials,[103] meaning that his argument rests purely on policy. 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 accu-

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evidence on this point); Erez, *Who's Afraid of the Victim?, supra* note 69, at [9] ("[t]he cumulative knowledge acquired from research in various jurisdictions * * * suggests that victims often *benefit* from participation and input"); Ken Eikenberry, *The Elevation of Victims' Rights in Washington State: Constitutional Status,* 17 Pepperdine L. Rev. 19, 41 (1989); *see also* Jason N. Swensen, *Survivor Says Measure Would Dignify Victims,* 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).

[93] Erez, *Who's Afraid of the Victim?, supra* note 69, at [10].

[94] *Id. see also* S. Rep. 105–409 at 17.

[95] Erez, *Who's Afraid of the Victim?, supra* note 69, at [10] ("the 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").

[96] Technically the right is "not to be excluded." *See infra* notes 130–33 and accompanying text (explaining reason for this formulation).

[97] *See* Mosteller, *Unnecessary Amendment, supra* note 18; *see also* Mosteller, *Recasting the Battle, supra* note 18, at 1698–1704.

[98] S. Rep. 105–409 at 66 & n.44.

[99] *See* Paul G. Cassell, *The Victim's Right to Attend the Trial: The Emerging National Consensus* (working paper—to be submitted for publication shortly); *see also 1996 Sen. Judiciary Comm. Hearings, supra* note 16, at 73–81 (explaining why victim's right to attend does not conflict with defendant's rights).

[100] Mosteller, *Recasting the Battle, supra* note 18, at 1699.

[101] *Gannett Co.* v. *DePasquale,* 443 U.S. at 428 (Blackmun, J., concurring in part and dissenting in part).

[102] *Richmond Newspapers, Inc.* v. *Virginia,* 448 U.S. 555, 571 (1980) (plurality opinion); *see also* William Pizzi, *Rethinking Our System,* 1999 Utah L. Rev.—(forthcoming) (noting importance of victim right to attend trials).

[103] *See* Mosteller, *Recasting the Battle, supra* note 18, at 1701 n.29.

racy and fairness in adjudicating the guilt or innocence of the defendant."[104] 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.[105] 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.[106] 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.[107] In addition, the defense attorney may argue to the jury that victims' have tailored their testimony even when they have not[108]—a fact that leads some critics of the Amendment to conclude this provision will, if anything, help defendants rather than harm them. The dissenting senators, for example, make this harms-the-prosecutor argument,[109] although at another point they appear to present a contrary harms-the-defendant claim.[110] 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 victims' 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"[111] 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."[112] Similarly Professor Mosteller advances the claim that this right "also affects substantial interests of the defendant and may alter the outcomes of cases."[113]

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.[114] 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

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[104] Mosteller, *Recasting the Battle, supra* note 18, at 1699; *see also* Mosteller, *Unnecessary Amendment, supra* note 18.

[105] Mosteller, *Recasting the Battle, supra* note 18, at 1700; *see also* Mosteller, *Unnecessary Amendment, supra* note 18.

[106] *See* Eraz, *supra* note 201, 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, *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).

[107] *See* Cassell, *supra* note 99.

[108] *See* S. Rep. 105–409 at 82 (additional views of Sen. Biden).

[109] S. Rep. 105–409 at 61 (minority views of Sens. Leahy, Kennedy, and Kohl) ("there 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").

[110] *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").

[111] S.J. Res. 44, § 1.

[112] S. Rep. 105–409, at 66 (minority view of Sens. Leahy, Kennedy and Kohl).

[113] Mosteller, *Unnecessary Amendment, supra* note 18; Mosteller, *Recasting the Battle, supra* note 18, at 1706–07.

[114] American Bar Association, Suggested Guidelines for Reducing Adverse Effects of Case Continuances and Delays on Crime Victims and Witnesses 4 (Dec. 1985).

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.[115]

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.[116] Abusive delays appear to be particularly common when the victims of the crime is a child, for whom each day without the case resolved can seem like an eternity.[117] 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."[118] 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.[119] 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.[120] 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.

B. PROSECUTION-ORIENTED CHALLENGES TO THE AMENDMENT

Some objections to victims rights rest not on alleged harm to defendants' interests but rather those of the prosecution. Often these objections surprisingly come from persons not typically solicitous of prosecution concerns,[121] suggesting 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,[122] 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 the victim can follow her "own case down the assembly line" in Professor Beloof's colorful metaphor,[123] 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' amend-

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[115] S. Rep. 105–409 at 3; *see also* The Victims Right Amendment: Hearings Before the Senate Comm. on the Judiciary, 105th Cong., 2nd Sess. (Apr. 28, 1998) (statement of Paul G. Cassell at 17–18).

[116] *See, e.g., 1997 Sen. Judiciary Comm. Hearing, supra* note 14, at 115–16; *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.

[117] *See* Cassell, *supra* note 36, at 1402–05.

[118] Mosteller, *Unnecessary Amendment, supra* note 18.

[119] See President's Task Force on Victims of Crime, Final Report 76 (1982).

[120] *Cf.* Henderson, *supra* note 10 (conceding that "reasonableness" language might "allow judges to ferret out instances of dilatory tactics while recognizing the genuine need for time," but concluding that a constitutional amendment is not needed to confer this power on judges).

[121] *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 the National Legal Aid and Defender Association warning that Amendment would harm police and prosecutors).

[122] *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 (1989). 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 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 (1985); 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); Juan Cardenas. *The Crime Victim in the Prosecutorial Process,* 9 Harv. J.L. & Pub. Pol'y 358, 384 (1986); William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim,* 13 Amer. Crim. L. Rev. 649 (1976).

[123] Beloof, *supra* note 89.

ments, and few have been heard to argue that these systems interfere 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 interferes with 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.[124] 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.[125]

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.[126] The possibility of an 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 the 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 apparently made mistakes in rejecting a plea, so too they have rejected plea bargains that were unwarranted.[127] The 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[128] 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.[129] Here again, prominent critics misread the language of the Amendment. For example, the dissenting Senators have advanced the position 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."[130] This objection appears to be 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

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[124] For cogent explication of the law, *see* Douglas Beloof, Victims in Criminal Procedure (1999); *see also* National Conference of the Judiciary on The Rights of Victims of Crime, Statement of Recommended Judicial Practices 10 (1983) (recommending victim participation in plea negotiations).

[125] *See, e.g.,* D. Buchner et. al., Inslaw, Evaluation of the Structured Plea Negotiation Project: Executive Summary (1984).

[126] *See, e.g.,* S. Rep. 105–409, at 66 (minority view of Sens. Leahy, Kennedy and Kohl).

[127] *See, e.g., People* v. *Stringham,* 206 Cal. App. 3d 184 (Cal. App. 1988); *People* v. *Austin,* 566 N.W.2d 547 (Mich. 1997).

[128] *See* Beloof, *supra* note 124, at 462.

[129] 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. *See* Henderson, *supra* note 51, at [72–73]; *see also* Henderson, *supra* note 221, at 606. But there is no compatibility between passing the Amendment and expanding such programs. Indeed, if the experience at the state level is any guide, passage of the federal 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.

[130] S. Rep. 105–409 at 63 (minority views of Sens. Leahy, Kennedy and Kohl).

proceedings." [131] 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.[132] 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.[133]

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-circuit broadcasting have proven feasible.[134] As for the victims' right to be heard, the state experience reveals only a modest cost impact.[135]

Most of the cost arguments have focused on the Amendment notification provisions. It is already recognized as sound prosecutorial practice to provide notice to victims. The National Prosecution Standards prepared by the National District Attorney Association recommends that victims of violent crimes and other serious felonies should be informed, where feasible, of important steps in the criminal justice process.[136] 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.[137] 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 requires alone are staggering. * * *" [138] This suggestion is 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 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,[139] yet prosecutors have not found the expense burdensome in practice.[140] 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

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[131] *See, e.g.,* S. Rep. 105–409 at 26.

[132] For right to "be present" formulations, *see, e.g.,* 42 U.S.C. § 10606(b)(4); Alaska Const. art. I, § 24; Ariz. Const., art. 2, § 2.1(A)(3) & (4)1 Idaho Const., art. I, § 22(4) & (6); Ill. Const., art. I, § 8.1; Ind. Const. Art. I, § 13(b); Miss. Rev. St. 99–36–5; Mo. Const. art. I, § 32(1); Mont. Const., art. 3, § 26A(1); Nev. Const., art. I, § 8(2); N.M. Const., art. 2, § 24; N.C. Const., art. I, § 37(a); Okla. Const., art. II, § 34A; S.C. Const. Art. I, § 24(A)(3); Utah Const. art. I, § 29(1)(b); *see also* Ark. Stat. Ann. § 16–41–101 (1994) (rule 616). For a right "to attend" formulation, see Mich. Const., art. I, § 24(1).

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

[134] *See* 42 U.S.C. 10608(a) (authorizing close circuit broadcast of trials whose venue has been moved more than 500 miles). This provision was used to broadcast proceedings in the Oklahoma City bombing trial in Denver back to Oklahoma City.

[135] *See, e.g.,* NIJ Study, *supra* note 67, at 59 (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 (no noteworthy change in the 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 (expanded victim impact program did not delay dispositions in New York).

[136] National District Attorneys Association, National Prosecution Standards § 26.1 at 92 (2d ed. 1991).

[137] *See* National Victim Center, 1996 Victims' Rights Sourcebook: A Compilation and Comparison of Victims' Rights Legislation 24 (collecting statutes).

[138] S. Rep. 105–409 at 62 (minority views of Sens. Leahy, Kennedy, and Kohl).

[139] 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. § 2.1(A)(3); § 2.1(C) *with* S.J. Res. 3 (1999).

[140] *See* Richard M. Romley, *Constitutional Rights for Victims: Another Perspective,* The Prosecutor, May 1997, at 7 (noting modest cost of the state amendment in Phoenix); Statement of Barbara LaWall, Pima County Prosecutor, in *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings Before the Sen. Judiciary Comm.,* 105th Cong., 1st Sess. 97 (1997) (noting cost has not been a problem in Tucson).

on the Federal courts and the Federal prison system. * * * However, CBO does not expect any resulting costs to be significant."[141]

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 soon-to-be-published article, entitled "The Victims' Rights Amendment: The Unnecessary Amendment."[142] 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.[143]

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."[144] Rules to assist victims "frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, or sheer inertia. * * *"[145] The view that state victims 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."[146]

Professor Mosteller attempts to minimize the current problems, conceding only that "existing victims' rights are not uniformly enforced."[147] 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.[148] 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, 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.[149]

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[141] Congressional Budget Office Report on S.J. Res. 44, *reprinted in* S. Rep. 105–409 at 40.

[142] Mosteller, *The Victims' Rights Amendment: The Unnecessary Amendment,* 1999 Utah L. Rev.—(forthcoming).

[143] *Id.; see also* Mosteller, *Recasting the Battle, supra* note 18 (developing similar argument).

[144] Tribe & Cassell, *supra* note 25, at B5. *See, e.g., 1996 Sen. Judiciary Comm. Hearings, supra* note 16, at 109 (statement of Steven Twist); *id.* at 30 (statement of John Walsh); *id.* at 26 (statement of Katherine Prescott).

[145] *See* Tribe & Cassell, *supra* note 25, at B5.

[146] *1996 House Judiciary Comm. Hearings, supra* note 15, at 147.

[147] Mosteller, *Unnecessary Amendment, supra* note 18.

[148] *See, e.g., 1998 Sen. Judiciary Committee Hearings* [not yet in print] (statement of Marlene Young).

[149] *1997 Sen. Judiciary Comm. Hearings, supra* note 14, at 64 (statement of Attorney General Reno).

Similarly, a 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 level."[150]

Hard statistical evidence on non-compliance with victims' rights confirms these general conclusions about inadequate protection. As mentioned at the outset of this testimony, a 1998 report from the National Institute of Justice NIJ) found that many crime 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." [151] The report provided numerous situations in which victims were 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 percent of the victims were notified of the sentencing hearing and fewer than 40 percent were notified of the pretrial release of the defendant.[152] 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.[153] 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.[154] However, the data themselves were collected by an independent polling firm.[155] Mosteller also 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.[156] The conclusion of the NIJ review process, however, after hearing from all reviewers (including apparently favorable peer reviews) was to publish the study.[157] Finally, Mosteller criticizes the data as resting on unverified self-reported data from crime victims. But 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 83 percent response rate from the victims interviewed,[158] 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 percent 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.[159]

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 percent of all cases, or 90 percent, or even 98 percent. America is so far from a 98 percent 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 percent compliance rate demonstrate that the amendment is "unnecessary"? Even a 98 percent 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 "only" about 2 percent of all cases in this country, "small percentages * * * mask a large absolute number of" cases.[160] A rough calculation suggests that even if the Victims Rights Amendment improved treatment for only 2 percent of the violent crime cases it affects, a total of about 30,000 victims would benefit each year.[161] Even more importantly, we would not tolerate

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[150] New Directions from the Field, *supra* note 5, at 10.

[151] Nat'l Inst. of Justice, *supra* note 7, 151, at 1.

[152] *Id.* at 4 exh. 1.

[153] National Victim Center, Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims: Sub-Report on Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights 5 (1997).

[154] *See* Mosteller, *Unnecessary Amendment, supra* note 18.

[155] Nat'l Inst. of Justice, *supra* note 7, 151, at 11.

[156] *See* Mosteller, *Unnecessary Amendment, supra* note 18 (citing McQuade to Travis memorandum).

[157] *See* Nat'l Inst. of Justice, Guide to Writing Reports for NIJ: Policy, Requirements, and Procedures at 3 (noting peer review process).

[158] Nat'l Inst. of Justice, *supra* note 7, 151, at 3.

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

[160] *United States* v. *Leon,* 468 U.S. 897, 907 n.6 (1984); *see also* Craig M. Bradley, The Failure of the Criminal Procedure Revolution 43–44 (1993).

[161] FBI estimates suggest an approximate total of about 2,303,600 arrests for violent crimes each year, broken down as follows: 729,000 violent crimes within the crime index (murder, forc-

a mere 98 percent "success" rate in enforcing other important rights. Suppose that, in opposition to the Bill of Rights, it had been argued that 98 percent of all Americans could worship in the religious tradition of their choice, 98 percent of all newspapers could publish without censorship from the government, 98 percent of criminal defendants had access to counsel, and 98 percent 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 percent. 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 constitutional amendment will "not automatically eliminate[]" the problem of official indifference to victims' rights.[162] 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.

The best view of the Amendment's effects is a moderate one that avoid 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.[163] 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.[164] 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.[165] 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."[166] Professor Mosteller seems to agree generally with this view, explaining that "officials fail to honor victims' rights largely as a result of inertia and past learning, insensitivity to the unfamiliar needs of victims, lack of training, and inadequate or misdirected institutional incentives."[167] 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 such a change in culture as "entirely speculative."[168] Yet this means nothing more than that, until the Amendment passes, we will not have an

ible rape, robbery, aggravated assault), 1,329,000 other assaults, 95,800 sex offenses, and 149,800 offenses against family and children. U.S. Dep't of Justice, Fed. Bureau of Investigation, Uniform Crime Reports: Crime in the United States —1996 at 214 tbl. 29 (1997). A rough estimate is that about two-thirds of these cases (66 percent) will be accepted for prosecution, either within the adult or juvenile system. *See* Brain Forst, *Prosecution and Sentencing,* in Crime 363, 36 (James Q. Wilson & Joan Petersilia eds. 1995). Assuming the Amendment would benefits 2 percent 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. & Crimnology 497, 514–16 (1998).

[162] Mosteller, *Unnecessary Amendment, supra* note 18, at [7].

[163] *See* S.J. Res. 3, § 2 (1999). *See generally* Cassell, *supra* note 36, at 1418–21 (discussing damage actions under victims' rights amendments).

[164] *See* U.S. Const., art. V.

[165] *Cf.* 1 Bruce Ackerman, We The People *passim* (1990) (discussing "constitutional moments").

[166] Erez, *Victim Participation, supra* note 69, at 29; *see also* William Pizzi, Trials Without Truth (1999) (discussing problems with American trial culture); Pizzi, *supra* note 102, at [11] (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, 41 (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")

[167] Mosteller, *Unneccesary Amendment, supra* note 18.

[168] *Id.* at 4.

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."[169] 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.[170]

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.[171] Professor Mosteller, however, rejects this argument on the ground that there is no "currently valid appellate case in which a defendant's conviction was reversed because of a provision of state or federal law or state constitution that granted a right to a victim."[172] As a result, he concludes, there is no evidence of "a significant body of law that would warrant the cure of a constitutional provision."[173]

This argument does not refute the case for the Amendment, but rather a strawman erected 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 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.[174] 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.[175] 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 on-going 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' soon-to-be-published article cogently demonstrates.[176] In light of all these hurdles, appellate opinions about victims issues seem, to put it mildly, quite unlikely.

One can read 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-cre-

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[169] NIJ Study, *supra* note 7, at 10.

[170] *See supra* note 9 (noting minority victims least likely to be afforded rights today). *Cf.* Henderson, *supra* note 51 (criticizing "lottery approach to affording victims' rights).

[171] *See, e.g., infra* notes 182–226 and accompanying text (discussing victims rights in the Oklahoma City bombing case).

[172] Mosteller, *Unnecessary Amendment, supra* note 18.

[173] *Id.* at 7–8.

[174] *Cf.* Yale Kaimsar, *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 the context of police interrogation).

[175] *See* Henderson, *supra* note 51. Hopefully this situation may improve with the publication of Professor Beloof's law school casebook on victim's rights, *see* Beloof, *supra* note 124, which may encourage more training in this area.

[176] *See* Susan Bandes, *Victim Standing,* 1999 Utah L. Rev.—(forthcoming); *see also* Susan Bandes, *The Negative Constitution: A Critique,* 88 Mich. L. Rev. 2271 (1991); Susan Bandes, *The Idea of a Case,* 42 Stan. L. Rev. 227 (1990).

ated 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.[177] Narrow readings will be encouraged by the asymmetries of appeal—defendants can force a new trial if their rights are denied, while victims cannot.[178] Victims, too, may be reluctant to attempt to assert untested rights for fear of giving defendant a grounds for a successful appeal and a new trial.[179]

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.[180] 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[181] 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 of volume of logic.[182] To be sure, one can cite examples of victims who have received fair treatment in the criminal justice system.[183] Nonetheless, this and other examples hardly make the case against reform given the pressing need for improvement in other cases.[184] 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 hearing on a motion to suppress, 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.[185] The court based its ruling on Rule 615 of the Federal Rules of Evidence—the so-called "rule on witnesses."[186] 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.[187]

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.*[188] The victims noted that

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[177] As shown *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) the denial of victims rights.

[178] *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 (1990); *see also* Erez, *Perspectives of Legal Professionals, supra* note 69, at 20 (noting reluctance of South Australian judges to rely on victim evidence because of appeal risk).

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

[180] Mosteller, *Unnecessary Amendment, supra* note 18.

[181] *See* S.J. Res. 3, § 2.

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

[183] *See e.g.,* Henderson, *supra* note 51.

[184] *See id.* (Conceding this point).

[185] *United States* v. *McVeigh,* No. 96–CR–68 (D. Colo.), 6/26/96 Tr. at 5.

[186] *See* Fed. R. Evid. 615. *United States* v. *McVeigh,* 6/26/96 Tr. at 4–5.

[187] *See 1997 Sen. Judiciary Comm. Hearings, supra* note 14, at 73 (statement of Marsha Kight).

[188] 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 (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 at Robert Hoyt, Arnon Siegel, Karan Bhatia, and Reg Brown at the Washington,

Continued

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." [189]

The District Court then held a hearing to reconsider the issue of excluding victim witnesses.[190] The court first denied the victims' motion asserting standing to present their own claims, allowing them only the opportunity to file a brief as *amici curiae.*[191] After argument by the Department of Justice and by the defendants, the court denied the motion for reconsideration.[192] 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.[193] 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.[194]

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.[195] Because the procedures for victims appeals were unclear, the victims filed a separate set of documents appealing from the ruling.[196] 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 United States' 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.[197] The Tenth Circuit also found the victims had no right to attend the trial under any First Amendment's right of access.[198] Finally, the Tenth Circuit rejected, on jurisdictional grounds, the appeal and mandamus petition filed by the United States.[199] Efforts by both the victims and the Department to obtain a rehearing were unsuccessful,[200] even with the support of separate briefs urging rehearing from 49 members of Congress, all six Attorneys General in the Tenth Circuit, and some of the leading victims groups in the nation.[201]

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. Rep-

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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 my statement in *1997 Sen. Judiciary Comm. Hearing, supra* note 14, at 106–13.

[189] 42 U.S.C. § 10606(b)(4). The victims also relied on a similar provision found in the authorization for closed circuit broadcasting on the trial, 42 U.S.C. § 10608(a), and on a First Amendment, right of access to public court proceedings. *See Richmond Newspapers, Inc.* v. *Virginia,* 448 U.S. 555 (1980).

[190] *United States* v. *McVeigh,* No. 96–CR–69 D. Colo.), 10/4/96 Tr.

[191] *Id.* at 499–500.

[192] *Id.,* at 519.

[193] *Id.* at 517.

[194] *Id.* at 519.

[195] Petition for Writ of Mandamus, *Kight et al.* v. *Matsch,* No. 96–1484 (10th Cir. Nov. 6, 1996).

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

[197] *Id.* at 334.

[198] *Id.* at 335.

[199] *Id.* at 329–35.

[200] Order, *United States* v. *McVeigh,* No. 96–1469 (10th Cir. Mar. 11, 1997).

[201] *See* Br. of *Amici Curiae* Washington Legal Foundation and United States Senators Don Nickles and 48 other members of Congress, *United States* v. *McVeigh,* No. 96–1469 (10th Cir. 1997) (warning that decision meant victims of federal crimes will never be heard for violations of their rights); Br. of *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,* No. 96–1469 (10th Cir. Feb. 14, 1997) (warning decision created "an 'important problem' for the administration of justice within the Tenth Circuit"); Br. of *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,* No. 96–1469 (10th Cir. Feb. 17, 1997) (warning that decision will "preclude anyone from exercising any rights afforded under the Victims' Bill of Rights").

resentative McCollum, a sponsor 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.[202]

The 1997 measure passed the House by a vote of 414 to 13.[203] The next day, the Senate passed the measure by unanimous consent.[204] The following day, President Clinton signed the Act into law,[205] explaining that "when someone is a victim, he or she should be at the center of the criminal justice process, not on the outside looking in."[206]

The victims then promptly filed a motion with the district court asserting a right to attend under the new law.[207] The victims explained that the new law invalidated the court's earlier sequestration order and sought a hearing on the issue.[208] Rather than squarely uphold the new law, however, the district court entered a new order on victim-impact witness sequestration.[209] The court concluded "any motions raising constitutional questions about this legislation would be premature and would present issues that are not now ripe for decision."[210] Moreover, the court held that it could address issues of possible prejudicial impact from attending the trial by conduct a voir dire of the witnesses *after* the trial.[211] 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."[212]

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 exclusion of testimony from victims who attended the trial.[213] 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.[214] To end this confusion, the victims filed a motion for clarification of the judge's order.[215] The motion noted that "[b]ecause of the uncertainty remaining under 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."[216] 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.[217] Nonetheless, the court refused to allow the victims to be represented by counsel during argument on the law or during voir dire about the

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[202] 142 Cong. Rec. H1050 (daily ed. Mar. 18, 1997) (statement of Rep. McCollum).

[203] *Id.* at H1068 (daily ed. Mar. 19, 1997).

[204] *Id.* at S2509 (daily ed. Mar. 19, 1997).

[205] Pub. L. 105–6, codified as 18 U.S.C. § 3510.

[206] Statement by the President, Mar. 20, 1997.

[207] Memorandum of Marsha Kight *et al.* on the Victims Rights Clarification Act of 1997, *United States* v. *McVeigh,* No. 96–CR–68–M (D. Colo. Mar. 21, 1997).

[208] Motion of Marsha Kight *et al.* for Hearing, *United States* v. *McVeigh,* No. 96–CR–68–M (D. Colo. Mar. 21, 1997).

[209] Order Amending Order Under Rule 615, *United States* v. *McVeigh,* No. 96–CR–68–M (D. Colo. Mar. 25, 1997).

[210] *Id.*

[211] *Id.* at 4–5.

[212] Order Declaring Motion Moot, *United States* v. *McVeigh,* No. 96–CR–68–M (D. Colo. Mar. 25, 1997).

[213] *See 1997 Sen. Judiciary Comm. Hearing, supra* note 14 (statement of Paul Cassell); *id.* (statement of Marsha Kight).

[214] *See 1997 Sen. Judiciary Comm. Hearing, supra* note 14 (statement of Paul Cassell).

[215] 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 (Apr. 4, 1997).

[216] *Id.* at 2.

[217] 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–M (June 2, 1997).

possible prejudicial impact of viewing the trial.[218] 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.[219]

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." [220] In the Senate, 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." 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 has been 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 six lawyers working to press their claims in court—a law professor familiar with victims rights, four 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 poor position to retain counsel.[221] 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 timely 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 for the victims under either of those statutes. For all practical purposes, the treatment 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.

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[218] *See Hearing on Victims Rights Clarification Act, U.S.* v. *McVeigh,* available in 1997 WL 290019, at *7 (concluding that statute does not "creates standing for the persons who are identified as being represented by counsel in filing that brief").

[219] *See, e.g.,* Examination of Diane Leonard, *U.S.* v. *McVeigh,* June 4, 1997, available in 1997 WL 292341.

[220] H.R. Rep. 105–28 at 10 (Mar. 17, 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 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. 105–28 at 10 (Mar. 17, 1997).

[221] U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Violent Crime in the United States 8 (March 1991). *Cf.* Lynn Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment,* 10 St. Thomas L. Rev. 579 (1998) (noting many crime victims come from disempowered groups).

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 all public proceedings relating to the crime."[222] This would have prevented the sequestration order from being entered in the first place. Moreover, the Amendment affords victims the right "[t]o be heard, if present, at a public * * * trial proceeding to determine a * * * sentence. * * *"[223] 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,"[224] 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 "capability of victims to secure their interests through popular political action"[225] and "a paradigmatic example of how statutes, when properly crafted, can and do work."[226] This sentiment is 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 agency 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. CLAIM 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."[227] 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.[228] Indeed, the argument concludes, to do so would "detract from the sacredness of the covenant."[229]

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 elsewhere explained:

> 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.[230]

Indeed, our Constitution has been amended a number of times to protect participatory rights of citizens. For example, the Fourteenth Amendment and Fif-

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[222] S.J. Res. No. 3, § 1, 106th Cong., 1st Sess. (1999).
[223] *Id.*
[224] *Id.,* § 2.
[225] Mosteller, *Unnecessary Amendment, supra* note 18.
[226] S. Rep. 105–409 at 56 (minority view of Sens. Leahy, Kennedy, and Kohl).
[227] *Proposals to Provide Rights to Victims of Crime: Hearings Before the House Judiciary Comm.,* 105th Cong., 1st Sess. 96 (1997).
[228] *See 1996 Sen. Judiciary Comm. Hearings, supra* note 16, at 101 (statement of Bruce Fein).
[229] *Id.* at 100. For similar views, *see, e.g., Cluttering the Constitution,* N.Y. Times, July 15, 1996; Stephen Chapman, *Constitutional Clutter: The Wrongs of the Victims' Rights Amendment,* Chi. Trib., Apr. 20, 1997.
[230] Tribe & Cassell, *supra* note 25, at B7.

teenth Amendment was added, in part, to guarantee that the newly-freed slaves could participate on equal terms in the judicial and electoral processes, while the Nineteenth Amendment and Twenty-Sixth Amendments were added to protect the voting rights of women and eighteen-year-olds.[231] 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* v. *Virginia,*[232] the Court agreed that the First Amendment guaranteed the right of the public and the press to attend criminal trials. 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.[233] My sense is that the victims' request should be entitled to at least as much respect as the media request. Yet 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 First Amendment interest in challenging their exclusion from the trial.[234] The point here is not to argue that victims deserve greater constitutional protection than the press, but simply that if press interests can be read into the Constitution without somehow violating the "sacredness of the covenant," the same can be done for victims.[235]

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 developed."[236] 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 they support individual dignity and autonomy.[237] 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, "Love it or loath it, the law now acknowledges the importance of victim participation in the criminal process."[238]

A further variant on the unworthiness objection is that our Constitution protects only "negative" rights against governmental abuse. Professor Henderson writes, for example, that the Amendment's rights differs from others in the Constitution, which "tend to be rights *against* government."[239] Setting aside the possible response that the Constitution ought to recognize affirmative duties of government,[240] the fact re-

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[231] U.S. Const. amends. XIV, XV, XIX, XXVI.

[232] 448 U.S. 555 (1980).

[233] *See* notes 182–226 *supra* and accompanying text.

[234] *Compare United States* v. *McVeigh,* 918 F. Supp. 1452, 1465–66 (W.D. Okl. 1996) (recognizing press interest in access to documents) *with United States* v. *McVeigh,* 106 F.3d 325, 335–36 (10th Cir. 1997) (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 (10th Cir. 1997) (recognizing First Amendment interest of the press in access to documents, but finding sufficient findings made to justify sealing order).

[235] In this way, the Victims' Amendment expands First Amendment liberties, not detracts from them. *But cf.* Henderson, *supra* note 51 (suggesting that victims' rights arguably could affect First Amendment liberties, but conceding that "no one has argued for a balancing of victims' rights against the rights of the press. * * *").

[236] *Id.*

[237] *See id.*

[238] Beloof, *supra* note 89; *see also id.* at Appdendix A (collecting numerous examples from around the country). *See generally* Beloof, *supra* note 124 (legal case book replete with examples of victims' rights in the process).

[239] Henderson, *supra* note 51 (emphasis in original; *see also 1996 House Judiciary Comm. Hearings, supra* note 6 (statement of Roger Pilon (Amendment has the "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"); The Nation, Feb. 10, 1997, at 16 (Amendment "[u]pends the historic purpose of the Bill of Rights").

[240] *See* Susan Bandes, *The Negative Constitution: A Critique,* 88 Mich. L. Rev. 2271 (1971).

mains that the Amendment's thrust is to check governmental power, not expand it.[241] 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, not extract benefits for victims. Thus, the state must give notice before it proceeds with a criminal trial; the state must respect a victim 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.[242]

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.[243] 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,[244] and to date the victims' movement has failed to achieve many of its ambitions. Victims have not, for example, generally 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.[245] 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.[246] 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.[247]

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[241] *See* Beloof, *supra* note 89.

[242] Perhaps some might quibble with this characterization as applied to a victims' 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 also 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 (1988). *See generally* Henderson, *supra* note 51 (noting "good arguments" that the Thirteenth Amendment "applies to individuals"); Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney,* 105 Harv. L. Rev. 1359 (1992) (discussing contours of Thirteenth Amendment).

Similarly, some might argue that the Constitution does not generally require that the government give citizens notice of their rights. Whatever the merits of this claim as a general matter, it has little application to the criminal justice system. To cite but one example, the Sixth Amendment right to counsel, requires notice to criminal defendants, indeed express notice. *See Faretta* v. *California,* 422 U.S. 806, 835–36 (1975). Along the same lines it would be unheard of to schedule a trial without providing notice to a criminal defendant. Thus notice to victims simply follows in these well trodden paths.

[243] *See, e.g,* Henderson, *supra* note 51; Mosteller, *supra* note 18; *1996 Senate Judiciary Comm. Hearings, supra* note 16 (statement of Bruce Fein).

[244] *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 Commentary 157, 162–69 (1992).

[245] *See Abrams* v. *United States,* 250 U.S. 616, 629 (1919) (Holmes, J., dissenting); *see also* Vincent Blasi, *The Pathological Perspective and the First Amendment,* 85 Colum. L. Rev. 449 (1985).

[246] *See* Karmen, *supra* note 244 (explaining why criminal justice professionals are particularly unlikely to honor victims' rights for marginalized groups).

[247] 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 (June 5, 1997).

A final worthiness objection is the claim that victims' rights "trivialize" the Constitution,[248] 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 were unable to take precautions to save their lives because they had not been notified."[249] 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,[250] 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."[251] 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.[252] 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 statutes, not an inflexible constitutional amendment. If victims' rights are placed in the Constitution, the argument runs, it will be impossible to correct any problems that might arise. The Judicial Conference explication of the argument for statutory protection 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 necessary or desirable by Congress after the various concepts in the Act are applied in actual cases across the country."[253]

This argument contains a kernel of truth because its premise—the Constitution is less flexible than a statute—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, statutes are "far easier to ignore,"[254] and for this very reason victims seek to have their rights protected in the 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"[255] 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.[256] 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[257] and, presumably, go on to impose some

[248] *1996 Senate Judiciary Comm. Hearings, supra* note 16, at 101 (statement of Bruce Fein).

[249] U.S. Dep't of Justice, Office for Victims of Crime, New Directions from the Field: Victims' Rights and Services for the 21st Century 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. Family L. 915 (1996).

[250] *See supra* notes 89–95 and accompanying text.

[251] *1997 Sen. Judiciary Comm. Hearings, supra* note 14, at 110 (statement of Paul Cassell) (quoting victim).

[252] *See supra* notes 90–92 and accompanying text.

[253] 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, at 2 (Apr. 17, 1997), quoted in S. Rep. No. 105–409 at 53.

[254] *1996 House Judiciary Comm. Hearings, supra* note 15, at 147.

[255] *See Cluttering the Constitution,* NY Times, July 15, 1996, at A12.

[256] *See* S. Rep. No. 105–409 at 22–37.

[257] *See* S. Rep. 105–409 at 50–51 (dissenting views of Sen. Leahy, Kennedy, and Kohl).

contrary and damaging meaning. This prediction that courts would leap over these explanations seems unpersuasive because courts routinely look to the intentions of drafters, in interpreting constitutional language no less than other enactments.[258] 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 needing flexibility being leveled against a defendant's right to a trial by jury.[259] What about petty offenses?[260] What about juvenile proceedings?[261] How many jurors will be required?[262] 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,[263] they will not construe the Victims Rights Amendment as requiring bizarre results.[264]

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 to precisely 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."[265] 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.

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."[266] 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."[267]

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 to now launch an attack on the federalization of our criminal justice system and to try and return power to the states. Certainly quite plausible arguments could be advanced in support of trimming the reach of some federal provisions.[268] But whatever the law professors and the ACLU may think, it is unlikely that we will ever retreat from our national commitment to afford

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

[259] U.S. Const. amend. VI ("the accused shall enjoy the right to a * * * trial[] by an impartial jury").

[260] *See Baldwin* v. *New York,* 399 U.S. 66 (1970).

[261] *See McKeiver* v. *Pennsylvania,* 403 U.S. 528 (1971).

[262] *See Thompson* v. *Utah,* 170 U.S. 343 (1898).

[263] Holmes.

[264] Critics of the Amendment have been forced to use improbable examples to suggest that the Amendment will create unintended difficulties. *See 1997 Sen. Judiciary Comm. Hearings, supra* note 14 (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* 1997 Letter from Law Professors, in *1997 Sen. Jud. Comm. Hearings, supra;* 1996 Letter from Law Professors, in *1996 House Jud. Comm Hearings, supra* note 15.

[265] S.J. Res. 44, § 3.

[266] 1997 Law Profs Letter, *reprinted in 1997 Sen. Judiciary Comm. Hearings, supra* note 14, at 140, 141; *see also* Mosteller, *Recasting the Battle, supra* note 18.

[267] *1997 Sen. Judiciary Comm. Hearings, supra* note 14, at 159.

[268] *See, e.g.,* Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination,* 78 J. Crim. L. & Criminology 699 (1988); Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation,* 87 J. Crim. L. & Criminology 63 (1996).

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.[269]

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 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 Govenor'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."[270]

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. * * *"[271] 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.[272] 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[273]).

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.[274] It is critics of the Amendment who, by opposing congressional approval, deprive the states of their opportunity to consider the proposal.[275]

CONCLUSION

This testimony 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 resistance 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.

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[269] If federalism were an important concern of the law professors, one would also expect to seem them supporting language in the Amendment guaranteeing flexibility for the states. Yet the professors found fault with language in any earlier version of the Amendment that gave both Congress *and the states* the power to "enforce" the Amendment, apparently encouraging the deletion of this language. *See* 1997 Law Profs Letter in *1997 Sen. Judiciary Comm. Hearings, supra* note 14, at 141.

[270] National Govenors Association, Policy 23.1 (effective winter 1997 to winter 1999).

[271] S.J. Res. 3, § 1 (1999) (emphasis added).

[272] *See* Beloof, *supra* note 124, at 41–43.

[273] *See United States* v. *Reiter,* 897 F.2d 639, 642–44 (2d Cir.), *cert. denied,* 498 U.S. 817 (1990).

[274] U.S. Const. Amend. V; S.J. Res. 3 (1999), preamble; *see also* The Federalist No. 39.

[275] *Cf.* Mosteller, *Unnecessary Amendment, supra* note 18 (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 state would have approved imposing the requirement on themselves"); Richard B. Bernstein, Amending America 220 (1993) (recalling defeat of the Equal Rights Amendment in the states and observing "[t]he significant role of state governments as participants in the amending process is thriving").

Stepping back from these individual objections and viewing them as a whole reveals one puzzling feature emerges that is worth a few concluding observations. While some of the objections are carefully developed,[276] many others 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 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."[277] 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."[278]

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 a lawyer" 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.[279] 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. The most popular criminal procedure casebook, for example, spans some 1692 pages;[280] yet victims' rights' appear directly only in two paragraphs, made necessary because in California a victims' rights initiatives affected a defendant's right to exclude evidence.[281] 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.[282] 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' concluding remarks in his dissenting opinion in *Payne.* 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."[283] 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."[284] To be sure, the Court must not allow our rights to be swept away by popular enthusiasm. But when the question before the

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[276] *See especially* the views of the dissenting Senators in this Committee's Report and Bandes, *supra* note 176; Mosteller, *Unnecessary Amendment, supra* note 18; Henderson, *supra* note 51.

[277] Erez, *Victim Participation, supra* note 69, at 28.

[278] *Id.* at 29; *see also* Erez, *Perspectives of Legal Professionals, supra* note 69, at [29] (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,* (unpublished manuscript on file with author Dec. 16, 1998).

[279] For a good example of the standard criminal law curriculum, see Ronald N. Boyce & Rollin M. Perkins, Criminal Law and Procedure: Cases and Materials (7th ed. 1989).

[280] Yale Kamisar et al., Modern Criminal Procedure: Cases, Comments and Questions (8th ed. 1994).

[281] *See id.* at 60 (discussing Cal. Const., art. I, § 28, the "truth-in-evidence" provision).

[282] One hopeful sign of impending change is the publication of an excellent casebook addressing victims in criminal procedure. *See* Beloof, *supra* note 89.

[283] *Payne,* 501 U.S. at 867 (Stevens, J., dissenting).

[284] *Id.* at 867 (Stevens, J., dissenting).

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, "The 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." [285]

Justice Stevens' views were, on that day at least,[286] in the minority. But in countless other ways, his antipathy to recognizing crime victims prevails in the day-today workings of our criminal justice system. Fortunately, there is a way to change this hostility, to require the actors in the process to 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." [287] Our nation, through its assembled representatives here 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. Congress should approve the carefully crafted current version of the Victims' Rights Amendment and send it on its way to the states for ratification. Our criminal justice system already provides ample rights for the accused and the guilty; it can—and should—do the same for the innocent.

ATTACHMENT A—BIOGRAPHY

I am a Professor of Law at the University of Utah College of Law, where I teach victims rights and criminal procedure among other subjects. I have written and lectured on the subjects of crime victims rights. *See, e.g.,* 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. I serve on the executive board of the National Victim Constitutional Amendment Network, an organization devoted to bringing constitutional protection to crime victims across the country.

I am also a member of the Utah Council on Victims, the statewide organization in Utah responsible for monitoring the treatment of crime victims in the courts of our state. In 1994, I was chair of the Constitutional Amendment Subcommittee of the Council, where I helped to draft and obtain passage of the Utah Victims Rights Amendment. I have also represented crime victims in legal actions to enforce their rights, including several actions on behalf of the victims of the Oklahoma City bombing, as discussed in more detail in my testimony.

By way of further background, from 1988 to 1991, I served as an Assistant United States Attorney in the Eastern District of Virginia, where I was responsible for prosecuting federal criminal cases and working with the victims in those cases. From 1986 to 1988, I served as an Associate Deputy Attorney General at the United States Department of Justice, handling various matters relating to criminal justice. I have also served as a law clerk to then-Judge Antonin Scalia and Chief Justice Warren E. Burger. I graduated from Stanford Law School in 1984, after serving as President of the *Stanford Law Review.*

The CHAIRMAN. Senator Leahy.

[285] Gewirtz, *supra* note 76, at 893.

[286] *See, e.g., Booth* v. *Maryland,* 482 U.S. 496 (1987) (rejecting victim impact statements); *South Carolina* v. *Gathers,* 490 U.S. 805 (1989) (same).

[287] Thomas Jefferson, Letter to C.W.F. Dumas, Sept. 1787, in John P. Foley ed., The Jeffersonian Cyclopidia (1900).

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman, and I appreciate the courtesy. I had wanted to hold off until after Prof. Cassell had testified. When he was here last year—I think it was his third appearance before the committee—I had asked him whether he could identify any currently valid appellate decisions anywhere in the country in which a victim's right under a statute or a State constitutional amendment was ruled invalid because of a defendant's right under the Federal Constitution.

I believe the professor was working on book at that time and would get back to us, but I notice he has not yet identified one. And I hope when the question time comes, if there has been even one anywhere in the 50 States or the thousands of smaller jurisdictions, you would let us know because it might give more weight to why we would have to make a change.

I think proposals for amending the Constitution of the United States are serious matters. I have often said that declarations of war, the impeachment of the President, and constitutional amendments are the most significant actions any Senate can. I also believe strongly that victims of crime ought to be treated with respect, and questions of crime victims' rights ought to be treated with dignity.

When I was a prosecutor, long before it was a fad, we insisted that victims be heard at sentencing and in plea negotiations and everywhere else. We did this without a constitutional mandate.

This hearing was originally going to be before the Subcommittee on the Constitution. Then a couple of days ago, it was moved to a hearing before the full committee. So it has been a little bit difficult arranging some of the people who might come here. Mr. Twist and Mr. Cassell have already testified here, and I am sure that they will be adding to their previous testimony. We did not get their written testimony until yesterday afternoon, so it is hard to make that comparison.

We are now in the third month, Mr. Chairman, of the 106th Congress. There have been 30 proposals to amend the Constitution already. That is more proposed amendments in 3 months than the country adopted in 200 years. My friend from Arizona, I think, has introduced at least three constitutional amendments and cosponsored a couple more.

One of the proposed amendments in the House is aimed at easing the ability to amend the Constitution in the future. I would like to enter into the record the guidelines developed by Citizens for the Constitution for when and how the Constitution should be amended. This is a non-partisan organization of former public officials, constitutional scholars, and others. And if that could be part of the record, Mr. Chairman?

The CHAIRMAN. Without objection.

[The information referred to is located in the appendix.]

Senator LEAHY. They point out the fact that we ought to have full consideration of all proposed amendments before votes are taken either in committee or on the floor. I know that many times—and I know the concern I have when I see actions in this country, and you have the momentary passion that we amend the

Constitution. Usually, cooler heads prevail and we find a good legislative way to do it, but that means full consideration on two types of questions, policy questions, whether the idea is sound; operational questions, whether there are problems with the way it would work.

To date, we have only looked at the first question. Do we really need a victims' rights amendment? That is an important question. We should consider it. There are 32 States with constitutional protection of crime victims' rights. And as I said, I am not aware of any case that has been overturned on this.

But then how would the amendment work in practice? I am concerned that the proposed constitutional amendment could impede the effective prosecution of violent crimes. I think Ms. Wilkinson's testimony was very significant in that regard. She is a former principal deputy chief of the Terrorism and Violent Crime Section of the Criminal Division of the U.S. Department of Justice.

I was one who watched very closely her work in the Oklahoma City bombing case. In fact, I thought she was very much a prosecutor's prosecutor in that, and I commend you and your whole team for the work you did there. I think her testimony about how the proposed amendment might have impaired the prosecution of that case merits some very serious thinking.

We should also consider the views of the many crime victims' rights groups that oppose the amendment. They were not able to testify today, given the late notice and limited nature of the hearing. But some did manage to write to the committee—for example, the National Clearinghouse for the Defense of Battered Women, the National Network to End Domestic Violence—and I would ask that their letters and some others be also placed in the record at this point.

The CHAIRMAN. Without objection.

[The letters referred to are located in the appendix.]

Senator LEAHY. I should note the letter from Victims' Services, the largest victim assistance agency in the country. They serve over 200,000 crime victims every year. They don't support a constitutional amendment. They urge us to take a statutory approach.

I think that there should be some meaningful legislation, and I think there can be. And knowing how State courts tend to follow the procedure in the Federal system, I think that we could have meaningful legislation. Senator Kennedy and I and others introduced a bill that would have provided real relief for victims immediately, real rights, and the resources to back them up.

I know we have been busy, Mr. Chairman, but we haven't had a minute to consider that legislative initiative in the past year. And I know we probably will have more hearings on the constitutional amendment, but I would hope that we might have a hearing on the other because even if this Congress were to pass a constitutional amendment on victims' rights, it still has to go through all the other processes, whereas the statutory provisions that we have talked about could be done immediately.

I would put my whole statement in the record. I don't want to hold you up here.

The CHAIRMAN. We will put it in the record.

Senator LEAHY. I appreciate your usual courtesy.

The CHAIRMAN. Thank you, Senator Leahy.
[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF HON. PATRICK LEAHY

Proposals for amending the Constitution of the United States are serious matters. I have often said that declarations of war, the impeachment of the President and constitutional amendments are the most significant actions any Senate can take. I also believe strongly that victims of crime ought to be treated with respect and questions of crime victims' rights ought to be treated with dignity.

This brief "hearing" was not noticed until the last possible minute last week as a hearing before the Subcommittee on the Constitution, Federalism, and Property Rights. On Friday, the majority unilaterally chose to bypass the Subcommittee, in spite of its express jurisdiction over constitutional amendments, and to redesignate this as a "hearing" before the full Judiciary Committee.

The Committee is proceeding to hear again from two witnesses who have already testified repeatedly on this issue. I will be interested to hear what they have to add to their previous testimony. I understand that their written testimony was not made available until yesterday afternoon. This slapdash mini-hearing is no way to go about the serious business of constitutional change.

As James Madison argued in Federalist 49, the "constitutional road" to amendment should be "marked out, and kept open," but only "for certain great and extraordinary occasions." Whether this rush to judgment can provide the type of record that would be needed to provide the factual, policy and legal basis for the Senate to determine whether, in the language of Article V of the Constitution, such a constitutional amendment is "necessary" is extremely doubtful.

I am concerned that this Committee, and this Congress, is not approaching the constitutional amendment process with anywhere near the gravity it deserves. We are in only the third month of the 106th Congress, and already there have been over 30 proposals to amend the Constitution introduced in this Congress. That is more proposed amendments in three months than this country has seen fit to adopt in over 200 years. I see that Senator Kyl has introduced at least three constitutional amendments and cosponsored two more. It is perhaps a sign of the times that one of the proposed amendments in the House is aimed at easing the requirements for future constitutional amendments.

I would like to enter into the record the guidelines developed by Citizens for the Constitution for when and how the Constitution should be amended. Citizens for the Constitution is a non-partisan organization of former public officials, constitutional scholars, and other prominent Americans who urge restraint in the consideration of proposals to amend the Constitution. Its guidelines address the problems Congress has often fallen into of moving popular amendments with little hearing or debate, and more quickly than is prudent.

Citizens for the Constitution emphasizes the need for full consideration of all proposed amendments before votes are taken either in Committee or on the floor. That means full consideration of two types of questions—*policy questions,* which include whether the basic idea is sound, and *operational questions,* including whether there are problems in the way that the amendment would work in practice.

To date, what modest work this Committee has done on this issue has concentrated on the first question—do we really need a Victims' Rights Amendment. That is an important question, and it is appropriate that we consider it fully. There are now at least 32 States with constitutional protections of crime victims, rights. That is three States more than when this Committee last considered the proposed amendment. I asked Professor Cassell last year, at his third appearance before this Committee, whether he could identify any currently valid appellate decisions anywhere in the country in which a victim's right under a statute or State constitutional amendment was ruled invalid because of a defendant's right under the federal Constitution; he did not identify a single case.

I have expressed the view that Congress should not be rushing to amend the Constitution to resolve problems that can and should be addressed through other less drastic means. The progress on victims, rights that is being achieved by the States, the good work that is being done in prosecutors' offices across the country, the efforts being made in State legislatures and at the ballot boxes ought not be ignored.

As for the second question—how would the amendment work in practice—this Committee has barely scratched the surface. As a former prosecutor, I am particularly concerned with whether the proposed constitutional amendment could impede the effective prosecution of violent crimes. I am pleased that we have with us today Ms. Beth Wilkinson, formerly the principal deputy chief of the Terrorism and Violent Crimes Section of the Criminal Division of the United States Department of

Justice, and a lead prosecutor in the Oklahoma City bombing case. Her testimony about how the proposed amendment might have impaired the prosecution of that case merits serious attention.

We should also consider the views of the many crime-victims, rights groups that oppose the amendment. They were not able to testify today given the late notice and limited nature of this hearing, but some of them did manage to write to the Committee about S.J. Res. 3—National Clearinghouse for the Defense of Battered Women; National Network to End Domestic Violence; and Victim Services. I ask that their letters be included in the record.

I would also like to put in the record letters I recently received from the Conference of Chief Justices, Professor Robert Mosteller of Duke University Law School, and Professor Lynne Henderson of Indiana Law School, all in opposition to the proposed amendment.

Special note should be made of the letter from Victim Services, which is the largest victim assistance agency in the country. They serve over 200,000 crime victims every year, and they say do not support this constitutional amendment. They want crime victims, rights as much as anybody, but they understand the dangers of monkeying around with the United States Constitution. They urge us to consider a statutory alternative.

I agree that crime victims deserve meaningful legislation. Last Congress, Senator Kennedy and I introduced a bill that would have provided real relief for victims—real rights and the resources to back them up. Unfortunately, this Committee has devoted not a minute to consideration of the legislative initiatives that Senator Kennedy and I have introduced over the past years to assist crime victims and better protect their rights. Like many other deserving initiatives, it has taken a back seat to the constitutional amendment debate that continues. I regret that we did not do more for victims last year or the year before. Over the course of that time, I have noted my concern that we not dissipate the progress we could be making by focusing exclusively on efforts to amend the Constitution. Regretfully, I must note that the pace of victims legislation has slowed noticeably and many opportunities for progress have been squandered.

As Chairman Hatch noted in his additional views last year on the proposed constitutional amendment, ordinary legislation could achieve many of the objectives of the proposed amendment, without the peril of upsetting the States' experimentation in this area. Last Friday Chairman Hatch indicated in a press conference that he would be introducing legislation to assist crime victims. I would welcome the opportunity to work with the Chairman on legislation that would provide needed relief to victims, and provide it now. I hope that this Committee and the Congress will take a look at his proposals and those that Senator Kennedy and I will be reintroducing and pass federal legislation on these matters that can be enacted this year and effective immediately.

With a simple majority of both Houses of Congress, the Crime Victims Assistance Act could have been enacted last Congress. Its provisions could be making a difference in the lives of crime victims throughout the country without delay. There would be no need to achieve super-majorities in both Houses of Congress, no need to await ratification efforts among the States and no need to go through the ensuing process of enacting implementing legislation.

The CHAIRMAN. Let me turn to you, Mr. Twist, first. In your prepared testimony, you quote an Arizona case that states, "The Supremacy Clause requires that the Due Process Clause of the U.S. Constitution prevail over State constitutional provisions." Now, which of the victims' rights provided by the proposed amendment are not cognisable under the current due process jurisprudence?

Mr. TWIST. In that case, Mr. Chairman, the right implicated was the State constitutional right not to be forced to submit to a pretrial interrogation by the defendant or the defendant's attorney. That same proposal is not offered in S.J. Res. 3 because that practice which was occurring in Arizona was such an aberrant one which allowed defendants to force victims to go through pretrial depositions or interviews.

And in that particular case, the rights at issue were the State constitutional right of the victim to not be forced to an interview and the due process right of the defendant to obtain exculpatory in-

formation. And in the balance of those, the court came to what I think is a sensible conclusion that when a State constitutional right is balanced against Federal constitutional right that the Federal constitutional right will be supreme.

The CHAIRMAN. But even so, could you list any rights that would not be covered under the current due process law?

Mr. TWIST. Any rights of a defendant that would not?

The CHAIRMAN. No; any rights of the victims.

Mr. TWIST. I am sorry, Mr. Chairman. I am not following your question.

The CHAIRMAN. Which of the victims' rights provided by the proposed amendment are not cognisable under current due process jurisprudence?

Mr. TWIST. Well, to my knowledge, Mr. Chairman, there is no case in the country that has found a constitutional right for a victim under the 14th amendment to assert any of the specifics that we have included in section 1 of the amendment.

The CHAIRMAN. OK. You have been a tireless advocate for victims' rights in Arizona. I recognize that, and your State constitution is a model of what concerned citizens can accomplish for a good cause. Now, in your experience, what have been the most important and the least important protections for victims that the Arizona constitutional amendment provision has provided?

Mr. TWIST. Mr. Chairman, I think this is a question that was put to me in written form during the last round of hearings, and I believe my answer was it was very difficult to pick out one or two that are more important than others. There are so many different stories and so many different cases.

Certainly, the basic rights to notice and to presence and the right to be heard at some critical stages are fundamental. Are they more important than the right to a final conclusion free from unreasonable delay? Not in some cases. In some cases, that is critical. I think that the rights that we have listed in section 1 of S.J. Res. 3 form the core values that victims seek in their desire for justice in the system, and I think all of them are important because of that.

The CHAIRMAN. That sums it up pretty well.

Professor Cassell, I believe that amending the Constitution should be reserved for only the most serious problems which cannot be resolved by legislation. Thus, I have led the fight for the balanced budget amendment, the flag protection amendment, that really cannot be solved by legislation. In those cases—the Supreme Court cases in both of those instances defining the parameters of legislation before we acted on the amendments.

Now, in your prepared testimony you discuss the difficulties encountered by the victims of the Oklahoma City bombing case in the district court and in the Tenth Circuit Court of Appeals. How have other courts, including the Supreme Court, treated the existing victims' rights protections?

Mr. CASSELL. Senator, the difficulty has been frankly getting into court to be heard on many of these issues. The Oklahoma City case that you mention is a prime example. There, we had several Federal statutes passed; indeed, one of them precisely on point to the issue that we sought to raise in court. We assembled a legal team

of myself and four experienced lawyers from Wilmer, Cutler and Pickering. We had a local counsel in Colorado assisting us, so we had six lawyers working on this project.

The result was that we were not even able to be heard in the Tenth Circuit on the merits of our claim. And that has been a problem around the country in the cases that I have seen. Victims simply lack standing to enforce these rights, to even be heard. That is just one of the obstacles that victims face today. As you know, victims are not entitled to counsel at State expense. It is only in relatively unusual situations where someone steps forward to take the matter on a pro bono basis that they will even have counsel to move forward. Yet, there are these standing problems and other problems. Senator Leahy was referring to the appellate law jurisprudence. We don't have appellate law jurisprudence on this at this point because victims are simply not given their day in court.

The CHAIRMAN. In your prepared statement, you note the existence of numerous State constitutional and statutory protections for victims, but you conclude that these protections are not solving the practical problems of victims. How much of these practical problems are caused by a lack of vigorous enforcement by State authorities and how much is caused by specific Federal constitutional barriers to victims' rights?

Mr. CASSELL. I think it is a combination of a variety of things. Part of it is lack of resources, but I think much of it is simply a lack of education, a lack of awareness of victims' rights. I gave some illustrations in the Oklahoma City case where the Federal judge and even the Federal prosecutors were apparently unaware of a number of provisions that existed for Federal statutes.

And the way that this has to be overcome, then, is with something that basically changes the "zeitgeist" in the criminal justice process, that changes our feeling about the importance of crime victims. The best way to do that is, of course, with a Federal amendment that elevates the importance of these rights and sends a clear signal to State actors, to prosecutors, to judges, to defense attorneys, to all who are involved in the process that victims' rights have to be respected.

The CHAIRMAN. Now, it is not entirely clear what the phrase "crime of violence" actually means or covers. For example, if a person commits treason by turning over information to a foreign government and that foreign government uses the information to uncover and kill American agents, would the families of the victims be entitled to rights under this amendment?

Mr. CASSELL. Yes, Senator, in that situation there would be identifiable victims. And let me just comment briefly. I think this committee has pointed the way to defining the phrase "crime of violence." As you know, I believe, Mr. Chairman, you were involved in the efforts to pass the right for victims of crimes of violence to make statements in Federal sentencing hearings. I think we can use that same definition for the Federal amendment.

The CHAIRMAN. Will this phrase cover attempted crimes or conspiracy crimes when the underlying substantive offense is a crime of violence?

Mr. CASSELL. Yes. If somebody points a gun and shoots someone, that is clearly a crime of violence. The mere fact that the bullet

misses the victim would not eliminate the violent nature of the offense.

The CHAIRMAN. There are also other crimes in which notice and restitution may be very important; for instance, defrauding the elderly of their savings. Should the amendment exclude that type of a crime?

Mr. CASSELL. In my view, the amendment ought to cover that, but I understand there is a need for consensus to focus the amendment in on consensus points. So if consensus could be achieved on that, absolutely, the reach should be expanded.

The CHAIRMAN. As an example of the complex issues raised by this amendment, there is a question about when the rights granted by this amendment vest in a victim. Often, a defendant might be suspect in several similar crimes, but will not be charged with all of them, for various legitimate prosecutorial reasons. The committee in the past has wrestled with this very issue during the adoption of the Mandatory Victim Restitution Act.

Recognizing the need to provide restitution to all victims while still cognizant of the very real constitutional dangers of requiring restitution for conduct for which the defendant has not been charged or convicted, the MVRA requires Federal prosecutors to attempt to negotiate restitution for all victims in any plea agreements.

Now, would the proposed amendment create a similar conflict between the constitutional right of the victims of such uncharged counts to a restitution order and the due process rights of the defendant?

Mr. CASSELL. I don't think there would be any conflict with the rights of defendants. In fact, I think the victims' rights would be treated in the same way as defendants' rights are treated. Currently, as you know, defendants' rights attach once formal criminal charges are filed in the process. The Federal amendment would operate in the same way.

Once criminal charges are filed, then the victims of those charged crimes would have rights. So victims in uncharged crimes would not have the mandatory right to restitution. Now, as you are suggesting, that raises some issues and I think the way to address it is exactly the way that you, Mr. Chairman, have worked on trying to address it by encouraging prosecutors to reach plea agreements or to provide full charging of various crimes. But there is not going to be a conflict with defendants' rights because unless a charge is filed, victims' rights do not attach.

The CHAIRMAN. One final question and then I will turn to Senator Leahy. The proposed amendment requires that victims be given notice of their constitutional rights. When will the victims receive such notice? Would that be after arrest, after charging, after bail? Also, who would be responsible for giving the notice, the police, the prosecutor, the court, who?

Mr. CASSELL. The notice would be given after charging. The rights of the victim would attach in the same way as a defendant's rights attach. So defendants get notice today of when court hearings are scheduled. Those notices are given after charges are filed against the defendant. The same thing can be done for victims.

Now, who would provide notice? As you know, the amendment provides for reasonable notice. It leaves the implementation to be done by the various State agencies. My sense is that most States will leave that duty with the prosecutors' offices. However, there are varying local circumstances, and the amendment is certainly written in flexible terms that would allow various jurisdictions to structure notice in whichever way they thought was reasonable.

The CHAIRMAN. You have been very helpful here.

I have some questions for you, Ms. Wilkinson, but I will submit them because my time is up.

Can I just ask one question of Ms. Wilkinson?

Senator LEAHY. Of course, of course.

The CHAIRMAN. Then I will turn to Senator Leahy. I think it might be helpful just from the debate standpoint here so we can understand, because you and Professor Cassell differ on some matters.

You have heard Professor Cassell's comments on the Oklahoma City bombing case. I would like to give you a chance to respond to any of his comments, since you were there. And keep in mind, I have deep respect for both of you. Professor Cassell is one of the truly leading lights in criminal law in this country, and you have done a terrific job as I have watched what you have done in the past, not only on the Oklahoma City case, but also at the Department of Justice.

So let me just ask you if you have any comments you would care to make.

Ms. WILKINSON. Thank you, Mr. Chairman.

The CHAIRMAN. And then I will allow you to make final comments.

Ms. WILKINSON. I would like to clarify two points. I appreciate that. As you said, I was there everyday for about 2½ years, and I believe there are some representations that are misleading about what did occur and there are three I would like to clarify.

The first is Mr. Cassell stated that no one was permitted to testify at Mr. McVeigh's sentencing. That is incorrect. As you know, it is the jury in a death penalty case that determines the defendant's sentencing, and that phase of the trial is called the penalty phase. There were 37 witnesses, including by and large almost all victim impact witnesses, who testified during that phase of the trial.

So I believe the proceeding he is referring to is when the judge imposed the sentencing, but that was a proceeding that is just pro forma under the rules where the judge has no discretion. He takes the sentence that the jury announced, which was death for Mr. McVeigh, propounds it upon the defendant. He doesn't hear from the defendant's witnesses or from the government.

So I think it is very misleading if you are left with the understanding that no one testified regarding Mr. McVeigh's sentence. Thirty-seven people who I believe talked about the loss of young children, about adults, a father who talked about losing his grown daughter, and many other relationships that were destroyed as a result of the Oklahoma City bombing were discussed with the jury who had to make that life-and-death decision.

The second issue I would like to clarify is about the statute that you all passed that assisted us and permitted victims to sit through the McVeigh trial. Mr. Cassell believes that that did not work and that the court did not honor the statute, and I respectfully disagree.

What happened in that case was once you all passed the statute, the judge said that the victims could sit in, but they may have to undergo a voir dire process to determine under rule 403 whether their testimony would have been impacted and could be more prejudicial.

What we told the victims is not what you heard here today. We told them that they could sit through the process and that all they had to understand was that they would have to undergo the voir dire by the judge. I am proud to report to you that every single one of those witnesses who decided to sit through the trial, including a woman named Diane Leonard who was married to a Secret Service agent who had protected six Presidents and died on April 19th, survived the voir dire, and not only survived, but I think changed the judge's opinion on the idea that any victim impact testimony would be changed by sitting through the trial. So Ms. Leonard and the rest of the witnesses underwent the voir dire and testified during the penalty phase for Mr. McVeigh.

It worked in that case, but it worked even better in the next case. Just 3 months later when we tried the case against Terry Nichols, every single victim who wanted to watch the trial either in Denver or through the closed-circuit television proceedings that were provided also by statute by this Congress, were permitted to sit and watch the trial and testify against Mr. Nichols in the penalty phase.

That operated smoothly. The defendant had no objection, and the judge allowed every one of those witnesses to testify without even undergoing a voir dire process in the second trial. I think that proves, Senator Hatch, your point, which is you do not want to amend the Constitution if there are some statutory alternatives. And I saw the Victim Rights Clarification Act work. Within a year of passage, it had been tried two times and I believe by the second time it had operated smoothly and rectified an interest and a right that I think the victims were entitled to that had not been recognized until passage of that statute.

The third thing that I would like to clarify is that the plea with Mr. Fortier was taken before Mr. McVeigh and Mr. Nichols were even indicted. It was just less than 2 months after the bombing when he pled guilty. That plea was public and the public was notified. The victims were not organized either through our victim witness unit, which recognized 2,500 victims of this crime, or through their own organizations at that time. So I think it is unfair to suggest that the prosecution team did not sit down with all of the victims and explain the consequences of the plea.

We had a limited ability to do that, due to our duty under the grand jury secrecy rules to keep the information that we were collecting in the grand jury secret and not to disclose it to anyone, unfortunately, including victims. And that is something, regardless of whether you pass this constitutional amendment or not, we will be stuck with. The prosecutors will still during the investigatory stage

of a case be precluded from revealing any grand jury material to victims or anyone else in the public.

The CHAIRMAN. Professor Cassell.

Mr. CASSELL. Let me talk about each of those three situations because I think that there are perhaps a few points that ought to be clarified.

First of all, with respect to whether anyone was permitted to testify at the sentencing of Timothy McVeigh, the proceeding in question was the point at which the judge actually imposed sentence. And as you know, Congress has passed a law requiring the judge not only to address the defendant at that point—and Judge Matsch addressed Timothy McVeigh—but also to address the victims. The judge did not do that, and as a result a number of victims were denied any opportunity to speak when Timothy McVeigh was sentenced.

This was not a pro forma matter, as Ms. Wilkinson has suggested, for such victims as Marsha Kight, who is seated here today. She forever lost the opportunity to tell the world and to tell Timothy McVeigh what that crime did to her and her family. And so to suggest that this is some pro forma opportunity that, well, we should go on with business as usual, I think, frankly is unfair to the victims that were denied that right. And I feel very strongly about that.

Also, I should point out that this pro forma hearing ended up making a mistake, a very serious mistake potentially. The hearing did not follow Federal law in requiring that a restitution order be imposed against Timothy McVeigh. That is part of the Mandatory Victim Restitution Act that Senator Hatch and a number of other members of this committee worked on that required restitution be imposed. Yet, as a result of an apparent oversight by the Department of Justice and perhaps the court, no restitution order was entered.

Now, perhaps Timothy McVeigh will never have any money and so this will be a moot point. But it is also possible that tomorrow "Hard Copy" or some other scurrilous publication might come along and offer him money if he would tell his story. If that were to be the case, it will then be very difficult to get the restitution back to the victims where it ought to go. So those are some points about the McVeigh sentencing.

The second issue is what about whether victims were denied the opportunity to watch the trial of McVeigh and Nichols' case after the passage of the Victims' Rights Clarification Act of 1997. I think here we really ought to go to the victims and ask them, what were the prosecutors telling you at that time?

I talked to Marsha Kight and a number of the other people that were involved and we were getting reports that the prosecutors were saying, well, you know, if you go in there, there are certainly going to be some questions that will be asked. So it is up to you, but you will avoid an appellate issue if you don't go into the trial.

The fact of the matter is that after receiving that advice, some victims did not exercise their congressionally-protected right to watch the trial of Timothy McVeigh. So to say that the statute worked simply does not recognize the reality that some victims were denied the opportunity to see the McVeigh trial.

And the last point that was discussed was this issue about the plea agreement with Mr. Fortier. My suggestion is that the Department should have sat down with all the victims at the time and said, look, we are preparing to enter into a plea; here is how we want to do that. They did that later on in the process with great success. However, they didn't do this with the Fortier plea, and I think that was a mistake.

Now, I realize there are grand jury secrecy rules. But as you well know, the grand jury secrecy rules only cover materials and proceedings that are happening within the grand jury. There was a vast collection of materials that was outside of grand jury secrecy rules. Certainly, that could have been disclosed to the victims and it could have been made clear why the plea agreement with Mr. Fortier was necessary.

Even if it was necessary to go into grand jury secrecy—and I don't think it was, but even if it was necessary, rule 6(e) of the Federal Rules of Criminal Procedure authorizes the Department of Justice to seek a court order to release the information. And yet it never occurred to the Department and the prosecutors to think about trying to get that court authorization to release information and to talk to Marsha Kight and the other victims.

That is the kind of mind set that the victims' rights amendment will change. It will bring victims into the process, and I think it will make the system work better not just from a victims' point of view but also from a law enforcement point of view.

The CHAIRMAN. Thank you.

We will turn to the ranking member, Senator Leahy.

Senator LEAHY. Thank you.

The CHAIRMAN. Senator Kyl, I am going to ask you to preside from here on in.

Senator LEAHY. Mr. Chairman, I might say I have a much higher opinion of the work law enforcement did in both of these cases than I believe Mr. Cassell does. I realize he advocates from a position there, but I think that the law enforcement people—both the investigators and the prosecutors—did a superb job.

In the McVeigh case, victims were allowed to speak at the sentencing phase before the jury and elsewhere. I am not sure, if they were to come in and speak again, whether Mr. McVeigh—what greater penalty he might have received than the death penalty. That is something that can be argued, but frankly I for one feel in a very terrible situation that the prosecutors and law enforcement did a very good job.

I cannot even begin to imagine how hard it was for the family members and loved ones of those who were killed. I know how shocked all the rest of us were who were not related to the people killed. But I am not sure that some of the efforts to second-guess law enforcement and prosecutors on this helps a great deal.

Mr. Twist, in *Romley* v. *Superior Court,* from the Arizona Court of Appeals in 1992, the defendant, Anne Roper, was charged with stabbing her husband. She claimed that she had been the victim of horrendous emotional and physical abuse by her husband during their marriage, that the husband was a violent and psychotic individual who had been treated for multiple-personality disorder for over a decade, that he was manifesting one of his violent personal-

ities at the time of the assault, and that she had acted in self-defense.

It was undisputed as I read the case that the husband was mentally ill, that he had three prior arrests and one conviction for domestic violence toward the defendant, and that the defendant, Anne Roper, not the husband, the victim of the stabbing, as he made out to be—the defendant made the 911 call to the police, asking for help because her husband was beating her and threatening her with a knife. I know you are familiar with this case, but for those who are not, I wanted to go through it.

Under these circumstances, the Arizona Court of Appeals came to what I believe is a very sensible conclusion that the defendant's due process rights superseded the State law right of the husband victim, as he was claiming to be, having been stabbed, to disclose his medical records.

Now, do you agree that *Romley* v. *Superior Court* was correctly decided in Arizona, one, as a matter of policy and, two, as a matter of constitutional interpretation?

Mr. TWIST. Yes, to both questions, Senator.

Senator LEAHY. You do not see any other way the court could have, or should have balanced the competing interests of the defendant and her, in this case, victim?

Mr. TWIST. I think the court came to the right conclusion, and I think it is an example of how courts properly can balance rights in conflict and reach appropriate conclusions. And if S.J. Res. 3 were the law, I would not expect the conclusion to be any different.

Senator LEAHY. You don't think S.J. Res. 3 would have affected the court's holding in any way?

Mr. TWIST. No, sir.

Senator LEAHY. And there is no necessity to change any of the wording of S.J. Res. 3 as it now is to make sure that they would not override Arizona?

Mr. TWIST. Senator, I cannot think of an area where we would have to do that. If someone were to make the case, as always we would be happy to look at it. But I think, in fact, that the result would be the same if S.J. Res. 3 were the law. And, indeed, the exceptions clause of section 3 of S.J. Res. 3 allows this Congress more latitude to craft appropriate exceptions for exactly these kinds of cases.

Senator LEAHY. Mr. Cassell, as I understand it, you have argued that the court in the Oklahoma City bombing trials ignored the Victim Rights Clarification Act of 1997 in excluding victims who could be called to testify at sentencing, something we have discussed here this morning. Judge Matsch read that Act as reversing the presumption of a prejudicial effect on victim impact testimony of observation of the trial proceedings.

He permitted victims to observe the trial proceedings. He later made individual determinations of which victims, having sat through the trial, could not give fair testimony at the capital sentencing hearing. And then as I recall, once he did that, not one victim was prevented from testifying at sentencing on the ground that he or she had observed part of the trial.

Would the proposed constitutional amendment require that all those victims be allowed to testify across the board regardless of

their individual ability to testify fairly, regardless of what a court might find?

Mr. CASSELL. Well, there are a couple of different things in your question, Senator. First of all, with respect to whether Judge Matsch ignored the law, I think I gave more nuanced presentation as to precisely what happened and I will just rest on my prepared——

Senator LEAHY. Your presentation is in the record and we will rely on that, but on my question, would the proposed constitutional amendment require that all victims be allowed to testify across the board even if a judge were to find that they could not testify fairly?

Mr. CASSELL. It depends on what you mean by "not testify fairly," I suppose. The victims' rights amendment would establish a right for all victims to be heard at sentencing. When you say "not testify fairly," I would assume you are referring to a situation where the victim's testimony might somehow unfairly affect the jury.

It seems to me in those situations—and we are talking in hypotheticals now; if we had a tangible example, we could play with that. But hypothetically, in that situation it seems to me the court could well do a couple of things. First of all, the court could limit what that victim would testify to. Typically, of course, it is not the mere fact of testifying that is prejudicial; it is some particular aspect of the testimony.

Senator LEAHY. Is there anything in the amendment—then what does the amendment provide that the Victims' Rights Clarification Act does not provide?

Mr. CASSELL. It provides—one thing, for example, is this clear standing to enforce the rights. One of the difficulties that we had even when we went back to Judge Matsch is we were never allowed to appear in front of them. We were filing these motions and they were sometimes ruled on; sometimes they were deferred, sometimes postponed.

The victims' rights amendment would have given us standing. So as a lawyer for Marsha Kight and the other victims, I would have had a right to say, judge, I would like a hearing on this; here is our motion, here is our reason for being heard. We never got past first base on many of these issues, which is why we had such great difficulty in getting those rights protected.

Senator LEAHY. But the victims did testify. The victims were able to observe the trial. The victims did testify. Mr. McVeigh was given the death penalty, but you feel more could have been done?

Mr. CASSELL. The difficulty is that some of the victims were not able to watch the McVeigh trial because of the legal uncertainties that were swirling around their status. The victims' rights amendment, had it been in place, would have ended all of those uncertainties and spoken in no uncertain terms and told all of the victims that they had an unequivocal right to watch the trial.

Senator LEAHY. Well, let's speak of the unequivocal rights that come under the Constitution. You seem to take—and I don't want to put words in your mouth, but the constitutional approach here is preferable to a statutory approach?

Mr. CASSELL. Yes.

Senator LEAHY. But in *United States* v. *Dickerson,* you seemed to prefer the flexibility of a statutory solution, and let me tell you how I interpret that in implementing Fifth Amendment rights. In that case, you argued that a voluntary confession should be admissible in a criminal case irrespective of whether it was obtained in violation of *Miranda.* Then you said in an interview, "*Dickerson* really highlights this issue whether the *Miranda* rights are constitutional rights or whether they are just prophylactic safeguards, and that ends up making a big difference. If they are constitutional rights, then they are essentially set in stone and it is very difficult to change them. On the other hand, if they are mere evidentiary safeguards, then Congress can tinker with them or replace them. And so that is the question. Are we locked into this one approach with the Constitution or is there some play in the joints?"

Now, I understand your appreciation of flexibility when it comes to defendants' rights. Why is it necessary then to lock the country into one constitutional approach regarding victims' rights? Couldn't Federal legislation and State amendments give exactly the same type of play in the joints that you have talked about, or do we need to override the States with a constitutional amendment?

Mr. CASSELL. This case you are talking about, *United States* v. *Dickerson,* would be entirely unaffected by the victims' rights amendment.

Senator LEAHY. No, no, no. I understand that. What I am saying, though, there when we talked about what is seen as a constitutional right under *Miranda,* you said this should be more flexible. And you argued there that the statutory ability gives you more flexibility than locking something into a constitutional right. I understand your feeling about that when we are talking about defendants' rights.

Should we not have the same test of the same kind of flexibility when we are talking about victims' rights?

Mr. CASSELL. What we should do, Senator—I have said that the Fifth Amendment rights of defendants should be fully protected. The victims' rights amendment would fully protect the rights of crime victims as well.

One other just brief point about the *Dickerson* case. Again, this is an entirely separate matter. My arguments in that case on behalf of the clients there have been to support what this committee did. As you know, the Senate Judiciary Committee passed a statute, and I have simply been defending the work of this committee and that is really all that is involved in that case.

Senator LEAHY. We love defenders anywhere we can get them.

Mr. CASSELL. Well, unfortunately, I have had to step up to the plate where the current Department of Justice is not willing to do so.

Senator LEAHY. You have been here three or four times. I have more questions, but I am told by Senator Kyl that some of the other Senators have scheduling difficulties. So I will yield back the——

Senator KYL [PRESIDING]. Well, we can get back to you.

Senator LEAHY. No. That is all right. I will yield back the time, but I will put other questions in the record.

[The questions of Senator Leahy are located in the appendix.]

Senator KYL. Great. OK, thank you.

Both Senator Ashcroft and Senator Feingold are going to have to leave. I know Senator Ashcroft has to be on the floor by 11:30, so let me call upon you, Senator Ashcroft, and then Senator Feingold, and Senator Feinstein and I. If that is all right with you, Senator Feinstein, we can defer.

Senator FEINSTEIN. Fine.

Senator KYL. In any event, we have the chairman and the ranking member of the subcommittee, and so I think it is appropriate that they proceed.

Senator Ashcroft.

STATEMENT OF HON. JOHN ASHCROFT, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator ASHCROFT. Well, thank you, and good morning. I want to thank Chairman Hatch for holding the hearing. And, of course, I want to thank Senators Kyl and Feinstein for their work on this proposed constitutional amendment. I appreciate it.

I have long been a supporter of recognizing the rights of victims of crime. We must never forget that the best protection for crime victims is effective law enforcement, but we do need to do more than strive to enforce the laws with vigor. The criminal justice system must act with greater compassion for victims, with a sensitivity to the suffering that is inflicted by murderers, rapists and other criminals.

For too long, victims were forgotten in the criminal justice system. As the Warren Court expanded the rights of criminal defendants well beyond their original scope, the rights of victims were ignored. In the name of promoting individual rights, the Warren Court sided with criminal defendants over State prosecutors, while the individual rights of victims were not part of the Court's calculus.

As a consequence, movements started in many States to guarantee victims of crime a place at the table. Victims were afforded the essential components of due process—notice of proceedings affecting them and an opportunity to be heard. I supported this process in Missouri. Indeed, when I was Governor of Missouri, the State enacted its own constitutional amendment protecting victims of crime.

Unfortunately, these State efforts, while an important step in the right direction, have failed to provide sufficient protection for crime victims. When the Federal constitutional rights created for criminal defendants clash with the statutory or State constitutional rights of victims, the Supremacy Clause dictates that the criminal defendant's rights must prevail. The only way to ensure that the victims stand on equal footing with those who perpetrate the crimes is equally to enshrine their rights in the Constitution. The proposed amendment we are considering today does just that.

Although I am generally supportive of protecting victims' rights, I have two concerns about this proposed amendment that I would like to explore at today's hearing. First, I am concerned that the proposed amendment does not expressly provide any rights to the victim when a State official commutes or pardons the sentence of a convicted criminal.

The amendment provides victims with the right to notice and, where appropriate, an opportunity to be heard at every other critical stage in the process, from trial to incarceration to release. It provides rights to victims when a court imposes a sentence and the parole board reviews the sentence, but it denies victims any rights when an executive considers overturning a sentence with a stroke of his pen. Victims of crime deserve more compassion from our system of justice. The emotional impact on a victim's family of the commutation or pardon of a cold-blooded killer is at least as distressing as an early release by a parole board.

A recent commutation in Missouri should make all Senators sensitive to the suffering that a commutation can cause to a family already scarred by violent crime. In this case, the family experienced the horror of having three family members murdered—one, a handicapped teenager. After shooting all three of them, the killer then shot each of them once more in the head at point-blank range. As the Missouri Supreme Court observed, the killer was, "a cold, calculating, highly motivated assassin who planned and executed three murders, with chilling attention to the details of ensuring the death of his victims."

After the family suffered through the stress of a capital murder trial for their paraplegic son's brutal slaying, the killer was sentenced to death by a Missouri jury. Years passed as the family waited for the killer to be executed. No credible evidence disputed the jury's careful judgment based on the killer's confession, but just days before the sentence was to be carried out, without notice, without opportunity to comment, the death sentence of the confessed triple murderer was commuted.

Family members did not get a phone call, even a letter. They learned of the decision on the news. That is just wrong, and it violates our basic sense of decency, fairness and compassion. Should the Constitution be amended to guarantee a right to be present at sentencing if the State retains the right to revise that sentence through a commutation with no notice to the victims? Throughout the entire process, our system of justice should care about victims' suffering, not cause more pain. This committee should show compassion and protect victims from sentence commutations or pardons without notice.

The second concern I have about the constitutional amendment is that it limits its protections to the victims of violent crime. We know that violent crimes certainly are serious, but victims of non-violent crimes are no less deserving of protection. The courts certainly did not distinguish between violent and non-violent crime in creating constitutional rights for criminal defendants.

There does not seem to be any better basis for making such a distinction in protecting the rights of victims. Indeed, the victims of some non-violent crimes, such as fraud, where criminals carefully select their victims to prey on the elderly or the ailing, are perhaps the most deserving of protection. Victims of elder fraud and identity theft should be protected.

There are few government functions that are more important than the protection of crime victims. The proposed constitutional amendment makes important strides to guarantee victims a seat at the table to ensure that the rights of criminal defendants are not

the only individual rights considered by judges and parole officers and executives. The current draft falls short of the full measure of protection that I believe crime victims deserve, and I hope that today's hearing will provide a basis for amendments that can move forward to protect crime victims, whether they be violent or nonviolent crime victims, and whether they are to be protected from arbitrary actions by the court or by the executive.

If I might, may I have just one question?

Senator KYL. Certainly.

Senator ASHCROFT. I would address it to Professor Cassell. Do you think that the emotional effect of a parole board's early release of a convicted criminal, or pardon thereof, is substantially different than the emotional effect of a commutation or a pardon of the same criminal by an executive?

Mr. CASSELL. I think from a victim's point of view, you are essentially looking at very equivalent actions that can have devastating effects on crime victims. And it is very important, as I think your remarks were suggesting, to have victims involved in the process. Now, that is not to say that the victims can order the governor what to do, but it is to say that the governor ought to certainly listen to victims, consider their point of view in reaching a careful, measured, considered judgment, and not act precipitously without at least getting some suggestions or advice, just basically input from the victims in the process.

Senator ASHCROFT. Thank you, and I thank the chairman.

Senator KYL. Thank you. Let me just ask the other two witnesses, and I recognize that Ms. Wilkinson may not support the amendment, but in the abstract, would you both agree with Senator Ashcroft and Mr. Cassell on this point regarding commutation?

Mr. TWIST. Yes, Mr. Chairman. It is not immediately obvious looking at the language that it extends to the problem that the Senator has raised, and I think he is wise to raise it because the emotional harm, not to say the possibility of future physical harm, is indistinguishable. And so I think we look forward to the chance to work with Senator Ashcroft to fashion appropriate language to deal with this.

Senator KYL. Thank you. Ms. Wilkinson.

Ms. WILKINSON. Yes. I agree with Senator Ashcroft, also, and I believe his second point about limiting these proposed constitutional rights to the victims of violent crimes is a mistake, in that I have prosecuted myself many of these fraud cases where the victims are not only elderly, but mentally handicapped, and those were some of the most difficult cases that I ever saw. And I believe those victims deserve the same type of protections you all are discussing today, as well as the victims of violent crimes.

Senator KYL. Thank you very much. I will turn to Senator Feingold now, but let me just reiterate what I think Professor Cassell said before, in that, when this amendment was first drafted, we did include all crime. Out of a sense of necessity to gain support from other members sufficient to pass the amendment, we agreed to a compromise to limit it to violent crime. That is to say, we, Senator Feinstein and I.

But I think any effort to broaden that would certainly not be inappropriate. And I share my agreement with you and I appreciate your bringing this matter of commutation to our attention, Senator Ashcroft.

Now, Senator Feingold, I know you have to run, too, so please go ahead.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman. I need to be somewhere by 11:30 and it is 11:30, so I will keep it extremely short. Let me ask that my full statement be included in the record.

Let me compliment you and Senator Feinstein for your leadership on this issue. I voted for Wisconsin's constitutional amendment on victims' rights when I was a State senator and thought that was an appropriate place for that. But I do hesitate with regard to a constitutional amendment to the U.S. Constitution both because of the tremendous proliferation of these proposed constitutional amendments in general which Senator Leahy outlined—there is far too much of that going on. I will be candid with you. This is certainly not the worst of the bunch. This one at least relates to a difficult problem and interesting question of whether we should really change the U.S. Constitution to deal with this. But given the serious concerns about victims' rights, I think it is properly before the committee.

The other reason that I certainly am not convinced yet is the potential adequacy of statutory alternatives, both ones that have already passed and ones that have been proposed in this committee. So I will do the best I can to keep an open mind about many aspects of it, but at this point I still am not persuaded that it is worth changing the Constitution, the basic structure of individual rights and criminal defendants' rights, in order to do this.

Let me just ask one question because that is all the time I have. One of the key provisions of the proposed constitutional amendment is to provide crime victims with the right to attend proceedings and to be heard at those proceedings.

In *Payne* v. *Tennessee,* however, the Supreme Court held that victims have a right to be present and testify at the sentencing phase of a trial, even a capital case. The only exception to this rule occurs when the victim's presence would result in a constitutional unfairness to the accused on trial.

With respect to this particular part of the proposed amendment, and given the Court's decision in *Payne,* isn't establishing a constitutional right for victims only necessary if it is intended to create an absolute right that would be used to overcome a constitutional right currently afforded defendants?

And that is just another way of my asking you why do you oppose adding a provision to the amendment, such as the one that is contained in the Wisconsin constitutional amendment that I supported that makes it clear that the amendment is not intended to, and should not be interpreted to limit the rights of those accused of crimes.

I would ask each of you to respond, if you could. Professor Cassell.

Mr. CASSELL. The result in *Payne* you referred to, of course, came on the heels of two defeats for the victims movement in the Supreme Court. There were two earlier cases, the *Booth* case and the *Gathers* case, in which precisely the argument that prevailed in *Payne* had been rejected. In those two earlier cases, the Supreme Court had denied a victim an opportunity to provide an impact statement at sentencing.

So the reason for the amendment is to make sure that the *Payne* result stays in place; that is, to make sure that the Supreme Court down the road doesn't get a few more members that see things differently and end up going back to that other rule of denying victims an opportunity to be heard.

In my testimony last year, I gave some proposed language if that were thought to be necessary. But, frankly, I don't think any such language is necessary. The opponents of the amendment have not provided specific examples, in my mind, to illustrate where there would be a conflict between victims' rights and defendants' rights. We can do both. We can have victims' rights and defendants' rights. This victims' rights amendment has been very carefully drafted. I know Professor Laurence Tribe at Harvard and Senator Biden and others who have been very solicitous of defendants' rights have looked at this and don't see the potential for conflict.

Senator FEINGOLD. Mr. Twist.

Mr. TWIST. Mr. Chairman and Senator Feingold, I think it is important to focus on a slightly different aspect of your question, and it is made real for us today because of Marsha Kight's presence in the hearing room. In her situation, she was not afforded an opportunity to be heard at sentencing because of her personal opposition to the death penalty.

And this is an example, I think, of an often overlooked point in the argument for victims' rights that these are rights that exist and ought to exist independent of the government's prosecution of the case at these critical stages, so that if the victim chooses to assert a right to be heard at sentencing and offer her own—in Marsha's case, her own heartfelt view, she ought to be afforded that opportunity as a matter of constitutional right regardless of what the outcome is. And I think that it is important to focus on that aspect as well.

Senator FEINGOLD. Ms. Wilkinson.

Ms. WILKINSON. I believe, Senator Feingold, that that would be a worthy addition to the amendment, and that is because of really the continuum of rights that we talk about. I think there is a mistake when we use the term the criminal's rights versus the victim's rights. As we all know, these defendants are presumed innocent in our system until they are convicted, and so the rights are weighed differently during the pre-trial and trial process.

However, once a defendant is convicted, I believe that is when most of the victim's substantive rights kick in, where they are allowed to speak at the sentencing and talk to the judge or the jury about the appropriate sentencing. And so I believe if you added that provision to the amendment, it would allow courts to do that balancing test and determine at what point in the process those rights must be recognized.

That is not to say that victims don't have rights during the pretrial phase and the trial, but many of those even described in the current proposed amendment are procedural to have notice, to be present at those proceedings, and I believe those rights should be protected. But they must be balanced against a defendant's rights while the defendant is still a defendant and not a convicted criminal.

Senator FEINGOLD. Thank you very much, and thank you for your courtesy, Mr. Chairman.

Senator KYL. You are very welcome.

[The prepared statement of Senator Feingold follows:]

PREPARED STATEMENT OF HON. RUSSELL D. FEINGOLD

Thank you, Mr. Chairman, for holding this hearing. I want to commend Senators Feinstein and Kyl for their dedication to this important issue of protecting crime victims' rights.

I want to make it clear, Mr. Chairman, that I share the sponsors' concern for the victims of crime. I share their desire to make sure that those in our society who most directly feel the pain callously inflicted by criminals do not suffer yet again at the hands of a criminal justice system that ignores victims. A victim of a particular crime has a personal interest in the prosecution of the alleged offender. Victims want their voices to be heard. They want and deserve to participate in the system that is designed to redress the wrongs that they—and society—have suffered at the hands of criminals. That is why I voted for a crime victims amendment to the Wisconsin state constitution in 1991 when I was a member of the Wisconsin state senate.

But there are strong differences of opinion as to how victims rights should be protected. And I approach any effort to amend the United States Constitution with great trepidation. In the 207 year history of the U.S. Constitution, only 27 amendments have been ratified—just 17 since the Bill of Rights was ratified in 1791. Yet, nine proposed amendments to the Constitution received a hearing or floor consideration in the 104th Congress and nine were also considered in the 105th Congress. Literally hundreds of constitutional amendments have been introduced in the past few Congresses. So far, in just the first few months of this 106th Congress, 10 constitutional amendments have been introduced. Twenty-nine constitutional amendments have already been introduced in the House.

I view this as a very disturbing trend. Frankly, I doubt it can be stopped. It is awfully easy to score political points by drafting a constitutional amendment and introducing it with a passionate speech. But I think it trivializes the great and historic governing document of our democratic system when we so easily turn to the amendment process to address contemporary and often transient policy problems. I have enormous respect for the Constitution. I certainly do not believe we should amend if there are other means by which we can achieve our goals.

These concerns are especially important in the case of this particular proposed amendment. Issues related to crime are primarily the province of state and local governments. Twenty-nine states have passed victims' rights amendments and every state has enacted statutes protecting victims. I know that there is some disagreement on this, but I think the majority of these amendments and statutes, like the Wisconsin state constitutional amendment for which I voted, are functioning as effective tools to protect victims.

In addition, we have not yet tried a thorough federal statutory approach to protecting victims' rights. For instance, during the last Congress, Senators Leahy and Kennedy introduced S. 1081, a bill which I cosponsored, that would be more effective than the proposed amendment. That bill contained specific language and authorized funds that would provide crime victims with rights that could effectively be enforced by federal, state, and local officials. I simply do not believe it is necessary to turn to a constitutional amendment when we have not yet tried to address the problems with a workable and enforceable statute.

A statutory approach to these issues has one distinct advantage: It would not present the potential of expanding victims rights at the expense of narrowing the rights of other citizens, including criminal defendants, which this constitutional amendment plainly does. Professor Mosteller of Duke gave us one excellent example when he testified last year, which I think is worth repeating. He described an Oregon statute that requires pretrial detention of anyone arrested for a crime for

which there is a mandatory minimum sentence, unless the person arrested can prove by clear and convincing evidence that he or she will not commit another crime while on pretrial release. That statute obviously presents serious due process problems before any court, but a constitutional amendment that guarantees "consideration for the safety of the victim in determining any conditional release from custody" would almost certainly change the constitutional analysis of that statute. It might actually narrow the right to due process of law in criminal cases.

Some people believe that our Constitution provides too many rights to criminal defendants. I don't share that view, but I know it exists. If there are particular provisions or court decisions that seem to go too far in defining the rights of defendants, then perhaps we should debate measures designed to narrow the courts' understanding of those guarantees. But an amendment to protect victims' rights should not provide a "backdoor" route to narrowing the rights that all citizens may exercise if they are charged with a crime. I do not understand why proponents of this amendment are unwilling to assure that the rights of victims that they wish to enshrine in the Constitution do not lessen the precious rights that the Constitution already guarantees to other citizens.

In conclusion, I want to state again: All of us on this Committee support victims' rights and understand that these rights must be protected. But because of my great respect for the Constitution, I cannot support this amendment so long as the normal legislative process offers significant promise as a means to address the rights of victims. I therefore urge my colleagues to consider other alternatives before amending the Constitution.

Senator KYL. Well, Senator Feinstein, it is left to you and me. Why don't I call upon you, since you have been so supportive and so important to getting this where we are? I guess I would just note that as I think you pointed out before, this is the fourth hearing that has been held before the full Judiciary Committee on this constitutional amendment. By my count, we have had 31 witnesses so far and 62 drafts of the proposed amendment. As a result, we have significant bipartisan support for it.

And I know that victims may be wondering why it takes so long, but I am sure they also appreciate that amending the Constitution is a very serious proposition. We want to make sure we are doing it right. I can only hope that as a result of this hearing today, we will very soon get to a markup so that we can then pass out the amendment and have it considered on the floor of the full Senate. That is our goal. We even have kind of a secret goal to have that done during National Crime Victims' Rights Week. That is a fairly ambitious goal, but we will at least work toward it.

Senator Feinstein.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Well, thank you very much, Mr. Chairman, and I want you to know what a pleasure it has been for me to work with you these past 3 years on our 60-plus drafts.

Let me just begin by thanking Professor Cassell and Mr. Twist. There are few people, I think, in this Nation that take the time and that have the energy and talent that the two of you have to really devote themselves to improving the rights of victims. And I want you both to know how much it means, I think, both to Senator Kyl and to myself. You have been with us every step of the way through what has been a very difficult process, and I want to just extend to you my heartfelt thanks.

Mr. TWIST. Thank you.

Senator FEINSTEIN. Mr. Chairman, I would also like to acknowledge the fact that in addition to Ms. Kight, there are other victims

present here in the audience today—Marlene Young and John Stein, sitting in the second row, representing the National Organization for Victims Assistance, and Roberta Roper, sitting in the first row, representing the Stephanie Roper Committee. They have been with us every step of the way as well and I want them to know how much your support and looking out and seeing your faces present here today mean to both of us. We hope to prevail in this and if we do, it will be because of the support of victims.

Mr. Chairman, you mentioned that this is the third hearing. I also want to point out that the amendment was actively considered and debated at no less than five markups, and several members of the committee even remarked, I think, at the end of some of those markups what a good discussion we had. Then the amendment was passed and voted out on a bipartisan vote of 11 to 6. Unfortunately, the action came too late in the last session to allow time for the amendment to be considered on the floor.

So I just want to reiterate your statement that we would hope that we could have a markup very shortly, and that we would hope that the amendment could be on the floor during National Victims' Rights Week, which is April 25th to May 1st. The amendment that we are considering today is identical to the amendment that was marked up and voted out by this 11 to 6 vote, so we hope we can replicate that once again.

I am glad that you entered into the record the statement of Professor Larry Tribe, whose statement in support of this amendment and the guarantee that the amendment provides for victims' rights is very important.

I would like just basically to call everybody's attention to the chart up there, which to me has been kind of the overwhelmingly important statement of all of this, and that is that defendants have 15 specific rights guaranteed to them by the Constitution of the United States, and victims have no rights guaranteed to them.

Now, I had always wondered, not being an attorney, how does this happen, until I read that when the Constitution was written in 1789, the Founding Fathers wrote the Constitution without providing any specific rights for victims. Now, in the first place, in 1789, there weren't 9 million victims of violent crime every year; there weren't even 9 million Americans of the 13 colonies.

Now, there was another reason, and that was the way the criminal justice system worked in 1789. Victims didn't really need constitutional rights because in America, in the late 18th century and well into the 19th century, public prosecutors didn't exist, such as Ms. Wilkinson, at least in her former life. There weren't public prosecutors. Victims could, and did, in fact, bring criminal cases themselves. They hired a sheriff to arrest the defendant and they initiated a private prosecution. The core rights of our amendment—notice, the ability to attend and to be heard—were inherently made available to the victim.

Now, all this changed in the mid–1850's when the concept of the public prosecutor was developed and the State took on that right, and the victim in the process was essentially left out. And for me, that is the rub because no matter what you do in the 31 States that have enacted individual State constitutional amendments, once the rights of the defendant come into conflict with the rights

of the victim, the defendant's rights automatically trump those rights.

Now, for me, I became involved in this—and I didn't even realize I was really becoming involved—in 1974 when I was a supervisor in San Francisco. And there was one particularly horrifying case and it was known as the *Pavajo* case. It took place when a man invaded a home on Portrero Hill in San Francisco and he tied one of the victims to a chair; he bludgeoned him to death with a hammer, a chopping block and a vase. And then he repeatedly raped the man's 24-year-old wife, broke her bones, slit her wrists, tried to strangle her and, before fleeing, set the home on fire.

Ms. Carlson survived the fire and she testified against the defendant, and her testimony really resulted in the conviction of this person. And then her life became a terrible life because he threatened to get her when he was released. And every year she would call me and say, please, you have got to help me; I have got to know when the parole hearing is coming up; I live in dread of this man being released. She changed her name. To this day, she lives anonymously. Now, no one in the United States of America should have to live this way.

Then in 1982, California really led all of the States in passing the first victims' rights constitutional amendment. It was called Proposition 8. I supported its passage. So those who saw the family of Nicole Brown Simpson or Mr. Ronald Goldman in court, it was really because of Proposition 8 that they had certain rights to be able to come into court.

Just this past November, Mississippi, Montana and Tennessee added victims' rights amendments to their State constitutions. These amendments were overwhelmingly passed by 71 percent and 89 percent of the vote, respectively. So as Professor Cassell testified, today there are 32 different State constitutional amendments and they differ from one another. Some present certain rights, others present other rights. So they form kind of a patchwork quilt of rights that vary from State to State.

We believe that victims deserve a basic floor of rights, and that these rights be guaranteed to them by the Constitution of the United States. And those rights constitute the right to be present, the right to make a statement, the right to notice of a release, and so on and so forth, as indicated in our amendment today.

Now, to those who believe it is enough to have a State provide these rights, I would like to point out that Maryland has a State amendment, but when Cheryl Ray Resch was beaten to death by her husband, her mother wasn't notified of the killer's early release only 2.5 years into his 10-year sentence. And she was not given the opportunity to be heard about this release, in direct violation of Maryland's State amendment.

Arizona has a State amendment, but an independent audit—and I am sure Senator Kyl can testify to this—found that victims were not consistently notified of hearings. Victims were not consistently conferred with by prosecutors regarding plea bargains. Victims were not consistently provided with an opportunity to request post-conviction notification.

Ohio has a State amendment, but when the murderer of Maxine Johnson's husband changed his plea, Maxine was not notified of

the public hearing and was not given the opportunity to testify at the sentencing, as provided by the Ohio law.

Now, as Professor Cassell also stated, the Justice Department took a look at this and their study made a similar finding, "Even in States with strong legal protections for victims' rights, the victims' rights study revealed that many victims are denied their rights. Statutes themselves appear to be insufficient to guarantee the provision of victims' rights. Nearly two-thirds of crime victims, even in States with strong victims' rights protections, were not notified that the accused offender was out on bond." And that has got to be a primary right that a victim has the right to know when their assailant is released, if only so that that victim can protect themselves.

The study also found that a substantial number of victims reported they were not given an opportunity to make a victim impact statement at sentencing or parole. These are the basic rights that this amendment would afford to every victim of a crime of violence anywhere in the United States, a basic floor of basic rights so that that scale of justice can be somewhat equalized. So here we are today.

Ms. Wilkinson, the case of the McVeigh and Nichols defendants in the Oklahoma City case has been raised, and my staff handed me a copy of the judge's order and I want to read into the record one part of that order because I think it indicates the equivocation that exists even with the Federal statute clarifying this.

"If there is a conviction, the court can protect against any prejudicial effect from victim impact witnesses' attendance at the trial, including closed-circuit telecast of the trial proceedings, by permitting voir dire," as you suggested, "of victim witnesses outside of the presence of the jury before they testify. All interests, including the public interest in proceeding with Mr. McVeigh's trial, can be accommodated by construing Public Law 105–6 as simply reversing the presumption of a prejudicial effect on victim impact testimony of observation of the trial proceedings. Thus, the distinction between the effects of the crime of conviction and any effects from the adjudicative process will still be preserved if this court now reverses the exclusionary order, permits observation of the trial proceedings by potential penalty phase victim impact witnesses, and reserves ruling on the admissibility of the testimony of particular witnesses who observed any part of the trial proceedings," therefore, it seems to me setting in doubt that if a victim is present in the case, they might not be able to later testify and present a victim impact statement.

That is the kind of equivocation that I believe is present in this court order, and I would like to ask that the full order be entered into the record, if I might.

Senator KYL. It will be entered into the record.

[The order referred to follows:]

UNITED STATES of America, Plaintiff,
v.
Timothy James McVEIGH and Terry Lynn Nichols, Defendants.

Criminal Action No. 96-CR-68-M.

United States District Court,
D. Colorado.

March 25, 1997.

In prosecution of defendants accused of perpetrating Oklahoma City bombing, the District Court, Matsch, Chief Judge, held that: (1) constitutionality of provisions of Victim Rights Clarification Act of 1997 allowing victim of offense to observe trial of defendant accused of that offense even if it is possible that victim will give "victim impact" testimony at sentencing was premature issue that was not ripe for decision, and (2) victims of bombing would be permitted to attend or observe trial insofar as their potential participation was limited to providing victim impact evidence.

Ordered accordingly.

See also, 955 F.Supp. 1281.

[1] CONSTITUTIONAL LAW ⚷46(1)
92k46(1)
Constitutionality of provisions of Victim Rights Clarification Act of 1997 allowing victim of offense to observe trial of defendant accused of that offense even if it is possible that victim will give "victim impact" testimony at sentencing was premature issue that was not ripe for decision, where there would be no sentencing hearing and therefore no justiciable issue if acquittal were to occur, especially considering that case in which issue arose was pending when provisions were enacted and was about to go to trial. U.S.C.A. Const.Amends. 5, 8; 18 U.S.C.A. §§ 3510(b), 3593(a, c).

[2] CRIMINAL LAW ⚷665(1)
110k665(1)
Victims of Oklahoma City bombing would be permitted to attend or observe trial of defendants accused of perpetrating the bombing, insofar as their potential participation was limited to providing written "victim impact" statements or testimony at capital sentencing hearing should defendants be convicted, as court could protect against any prejudicial effect of victims' attendance by permitting voir dire outside jury's presence before allowing victims to testify. 18 U.S.C.A. §§ 3510(b), 3593(a, c); Fed.Rules Evid.Rule 615, 28 U.S.C.A.

[3] CRIMINAL LAW ⚷665(1)
110k665(1)
Provisions of Victim Rights Clarification Act of 1997 allowing victim of offense to observe trial of defendant accused of that offense even if it is possible that victim will give "victim impact" testimony at sentencing would be construed as simply reversing presumption of prejudicial effect on victim impact testimony of observation of trial proceedings. 18 U.S.C.A. §§ 3510(b), 3593(a, c).

***513** Patrick Ryan, U.S. Atty. for the Western Dist. of Oklahoma, Oklahoma City, OK, Joseph Hartzler, Sp. Asst. U.S. Atty., Assigned from S.D. Illinois, Denver, CO, for plaintiff.

Stephen Jones, Richard H. Burr, III, Robert Nigh, Jr., Jones, Wyatt & Roberts, Enid, OK, Jeralyn E. Merritt, Denver, CO, for McVeigh.

Michael Tigar, Ronald G. Woods, N. Reid Neureiter, Denver, CO, for Nichols.

ORDER AMENDING ORDER UNDER RULE 615

MATSCH, Chief Judge.

On October 20, 1995, the government filed notices of intention to seek the death penalty as to each of the defendants upon conviction of any of the charges against them, thereby invoking the provisions of the Federal Death Penalty Act, 18 U.S.C. §§ 3591-3596. Among the aggravating factors identified in those notices is the following:

> 4. Victim impact evidence concerning the effect of the defendant's offense(s) on the victims and the victims' families, as evidenced by oral testimony and victim impact statements that identify the victims of the offense(s) and the extent and scope of injury and loss suffered by the victims and the victims' families.

Congress expressly authorized including this factor in such a notice pursuant to § 3593(a) but did not particularize the scope of the information that may be presented to the jury at a sentencing hearing. As observed in this court's earlier Memorandum

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Opinion and Order on Motions Addressed to Death Penalty Notice, entered September 25, 1996, 944 F.Supp. 1478 (D.Colo.1996), this is the most problematical of the aggravating factors and may present the greatest difficulty in determining the admissibility of information at a penalty hearing. In 1987, the Supreme Court declared in Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), that the use of a victim impact statement based on interviews with the family survivors of a murdered elderly couple violated the Eighth Amendment. Two years later, the Court held in South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), that a prosecutor's closing argument was grounds for reversing a death sentence in a murder case because of extensive reference to inferences regarding the victim because a prayer card and a voter's registration card were found near his body.

In 1991, the Supreme Court overruled those prior decisions insofar as they imposed a per se rule of inadmissibility of victim impact evidence. The Court held in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), that there was no Eighth Amendment violation in a penalty hearing which included testimony from a grandmother about the effects on her young grandson of the murders of his mother and sister and ***514** the prosecutor's comments on those effects in his closing argument. In the Court's opinion and in concurring opinions, the justices recognized the potential for inflammatory effects of such evidence and cautioned that it could render the proceeding fundamentally unfair in violation of the Due Process Clause. In reversing the per se exclusion in the prior cases, the Court expressly recognized the requirement that trial courts exercise their discretion to avoid the influence of passion or prejudice. Id. at 825, 111 S.Ct. at 2608.

Because § 3593(a) refers to "the effect of the offense on the victim and the victim's family," this court concluded that persons scheduled to testify about such effects at a penalty hearing should be excluded from pretrial proceedings and the trial to avoid any influence from that experience on their testimony. Accordingly, such potential penalty witnesses were excluded from the courtroom under Fed.R.Evid. 615 in an oral ruling on the first day of a suppression hearing on June 26, 1996. On July 29, 1996, the government filed a motion to reconsider that ruling, arguing that § 3593(c) explicitly provides that "information" at capital sentencing hearings is not limited by the rules governing admission of evidence at criminal trials "except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury."

At a hearing on October 4, 1996, the court denied the motion for reconsideration and adhered to the exclusion order to avoid any prejudicial impact from possible emotionally traumatizing effects of what penalty phase witnesses may see and hear at the trial. Thus, the court elected to continue to apply Rule 615 as a prophylactic measure.

On March 19, 1997, the President signed Public Law 105-6, bearing the short title "Victim Rights Clarification Act of 1997." That statute, now in effect, enacted a new provision, codified as 18 U.S.C. § 3510, which includes the following:

> (b) Capital Cases.--Notwithstanding any statute, rule, or other provision of law, a United States district court shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may, during the sentencing hearing, testify as to the effect of the offense on the victim and the victim's family or as to any other factor for which notice is required under section 3593(a).

It also amended 18 U.S.C. § 3593(c) to read, in pertinent part, as follows:

> Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. For the purposes of the preceding sentence, the fact that a victim, as defined in section 3510, attended or observed the trial shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury.

(Amended language in italics.)

This legislation began as H.R. 924. The House Committee on the Judiciary published its report on March 17, 1997, together with dissenting views. The members of Congress who were signatory to those dissenting views expressed concern about the

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constitutionality of the legislation as applied to this case, and the floor debate on March 18, 1997, published in the Congressional Record for March 18, 1997, includes statements of concern about constitutionality from two of those dissenters.

[1] The trial of Timothy McVeigh is scheduled to begin on March 31, 1997. A debate now on the constitutionality of this new legislation would result in a delay of that trial. In this court's view, any motions raising constitutional questions about this legislation would be premature and would present issues that are not now ripe for decision. It is clear that the new legislation has no application to fact witnesses testifying at the trial of the charges against Mr. McVeigh. If Timothy McVeigh is acquitted of these charges there will be no sentencing hearing and, therefore, no justiciable issue will arise.

[2][3] If there is a conviction, the court can protect against any prejudicial effect from victim impact witnesses' attendance at ***515** the trial, including the closed circuit telecast of the trial proceedings, by permitting voir dire of victim witnesses outside the presence of the jury before they testify. All interests, including the public interest in proceeding with Mr. McVeigh's trial, can be accommodated by construing Public Law 105-6 as simply reversing the presumption of a prejudicial effect on victim impact testimony of observation of the trial proceedings. Thus, the distinction between the effects of the crime of conviction and any effects from the adjudicative process will still be preserved if this court now reverses the exclusionary order, permits observation of the trial proceedings by potential penalty phase victim impact witnesses and reserves ruling on the admissibility of the testimony of particular witnesses who observed any part of the trial proceedings. Accordingly, it is

ORDERED that the order excluding witnesses under Rule 615 of the Federal Rules of Evidence is amended to permit observation of the trial proceedings in the courtroom and through means of the closed circuit telecast by persons whose potential participation is limited to providing written victim impact statements or testimony at a capital sentencing hearing.

END OF DOCUMENT

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Senator FEINSTEIN. So, Mr. Chairman, let me just say in conclusion we have a Constitution that was written when there weren't 8 million victims of violent crime, when the circumstances of trial were totally different than they are today. And for the last century-and-a-half, victims have essentially been left out of the process. What we want to do is see that there are certain basic rights that the Constitution will guarantee.

Now, we, as you have said, have had to compromise because we have to produce 67 votes on the floor of the Senate, and that is not an easy thing to do. Both you and I originally had this amendment so that it applied to all victims, not just victims of violence. But we increase our votes, we know, if we limit it just to violence, and that is the only reason we made the change in this amendment.

I believe it is extraordinarily important that victims of crimes of violence have the right to be noticed of a hearing, have the right to be present, have the right to give testimony, have the right to at least know when their assailant is released, and have the right to give testimony at a parole hearing. These are basic rights, and unless they are provided in the Constitution of the United States, any time they come into conflict with these basic rights for the accused, they will be trumped.

Thank you.

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you very much, Senator Feinstein. That is an eloquent statement. Let me now make a very brief statement and then ask a couple more questions.

It seems to me that most of the arguments of opponents have been pretty well dispensed with. We are now down to arguments like the ranking member made when he was here that there are an awful lot of proposed constitutional amendments floating around. Well, that is not to suggest that any one of them is not necessarily a good one.

We all agree that the Constitution should not be lightly amended, but it is not the Senate that does the amending. All we can do is pass it out of here with 67 votes, hope that the House of Representatives will do the same thing, and then it goes to the States. That is where the amendment process occurs if three-fourths of the State legislatures agree. So it is a huge burden, but it can't get started until we get it out of the Senate.

Therefore, I think it is not too much to ask our colleagues to help us in that endeavor. And we have worked very hard to make sure that we have the most perfect document we can under the circumstances drafted for that purpose. So as to the first point that there are a lot of constitutional amendments floating around, my response is so what? That doesn't mean that at least one of them isn't very, very good and that we shouldn't move it forward.

The second argument has been that State statutes and constitutional provisions are adequate to the task. And I think that particularly, Professor Cassell, your opening remarks in that regard, as well as statements by Professor Tribe, the Department of Justice and others who have spoken to the issue refute that claim. It is more honored in the breach, it appears. And so it seems to me that

as long as we are not finding that these statutes are providing the kind of protection that we all want, it is appropriate to turn to the constitutional amendment.

The third is not really spoken, but there is an implication that we are really rushing this along. Well, it has been 17 years since President Reagan's 1982 task force, and I am not sure that some of you were around at that time. I am not even going to inquire, but some of you were. In any event, along the way a lot of victims and victims' rights groups have been created to advance this cause.

And so for 17 years, in our case after 31 State constitutional changes, even State statutory, action here in the U.S. Congress, now the fourth year of work on it and the fourth hearing before this full committee, it doesn't seem to me that one could contend that we are rushing this along. We have tried to meet every objection, every question, including even a suggestion here that we add one more concept, which I am pleased to say that all three witnesses were in general agreement on.

So it seems to me that we have come a long way, and for those who might say why aren't there more witnesses at this hearing, it is that the testimony that we have received from the victims' rights groups over the years, I think, has been overwhelmingly persuasive. The only thing we are arguing about now is a few nits and gnats in the language, and that is why we wanted to have three lawyers here, each of whom have a slightly different view, but all of whom have certainly added to the record here today.

So what I am hopeful of is that if there are others out there who still have some question about specifics, they should come forward so that we can get this thing into its final draft and marked up and onto the floor of the U.S. Senate. I think that victims of crime deserve that, and that any further delay or obstruction or nit-picking frankly is unwarranted. Let me just put it that way.

Now, in an effort to bend over backwards here and provide the rationale for some things that we have done, in case there is any question about it, because some questions have been raised, let me ask a couple of questions here and maybe we can just have a very brief response.

Let me start with you, Professor Cassell. Some have argued that the Constitution protects only negative rights, i.e. rights against the government—"the State shall not." What do you think of this argument as an argument against this proposed amendment?

Mr. CASSELL. That argument obviously fails. What the victims' rights amendment would do would be to protect the rights of citizens like Marsha Kight against government power. She and some of the other victims were told by Judge Matsch that they either had to leave the court room or they would not be able to present testimony down the road. So it is to protect against the use of government power to exclude victims, for example, that the victims' rights amendment would exist.

Senator KYL. Thank you. Incidentally, there are numerous representatives of victims groups in the audience, but Marsha Kight has been referred to so many times, I might hold up her book, *Forever Changed: Remembering Oklahoma City April 19, 1995,* compiled by Marsha Kight, Director of Families and Survivors United. And if anybody in the audience would like to see some evidence of

lives forever changed, come to my office or come to Senator Feinstein's office. There are two large—what would you call them—banners from the Oklahoma City bombing case that have literally thousands of names, signatures and messages penned on them. And they are separate; there is one in my office and one in Senator Feinstein's office. Lives were forever changed, and we appreciate your presence here, Marsha Kight, and all of the other representatives.

One more question, Professor Cassell. I am actually trying to get an appropriation this year for a grant to advance a cause which has become apparent to me, and that is that law schools don't appear to be focusing on victims' rights, which suggests to me that it may be one of the reasons why the Crime Victims' Rights Amendment is not perceived as well in the legal profession as it should be.

What is your take on that?

Mr. CASSELL. I think you have put your finger on a very serious problem in legal education today. I am teaching at the University of Utah College of Law this semester for the first time a course focusing on crime victims' rights. There is a new law school textbook out by Professor Doug Beloof that will be very useful in that regard.

But apart from my class and Professor Beloof's class and just really one or two others around the country that I am aware of, victims' rights are not part of the law school curriculum. If you go to the bar exam, which is the process by which lawyers are certified, they are not asked questions about victims' rights, but they are asked questions about defendants' rights and prosecutors' interests, and so forth.

So I think there is a real gap in legal education there, and one of the things that would come out of a victims' rights amendment would be an encouragement to the legal community to begin educating on this, focusing on this, dealing with some of the questions that victims present.

Senator KYL. Thank you.

Mr. Twist, one of the things that has been raised is how to deal with the exceptional case, and certainly the Oklahoma City bombing case would be an example of that where you have a large number of victims. What is the reason for the exceptions clause in this amendment?

Mr. TWIST. Senator Kyl, it is for precisely the reasons that opponents of the amendment have offered from time to time in their opposition, examples of hypothetical horrors which might result if the amendment were to be enacted, by arguing that the language of the amendment is a straightjacket that would put the criminal justice system and the prosecutor and the court without anywhere to turn in hard cases.

It is appropriate that the amendment include this exception language so that it is clear that it is the Congress, the legislative body, that will have the authority to, after a deliberative process, craft exceptions to the otherwise unequivocal language in order to accommodate those cases.

For example, where a victim of domestic violence may, in her anguish, strike out at her batterer, and frankly be prosecuted and

convicted and incarcerated for that, the language of the amendment would allow an exception to be created whereby that batterer, the underlying batterer, would not have to get notice of the release of the victim of that domestic violence, exceptions like that that will be the product of a deliberative process in Congress, where those debates ought to occur.

Senator KYL. I also think that the point made earlier with respect to notice was important because I have heard some say this is going to be an extraordinarily burdensome and costly process to notify everyone. I think prosecutors who are conscientious already do that and try very hard to do it. But it wouldn't necessarily be the prosecutor.

As we have drafted this, the individual State legislatures would decide. Maybe it is the clerk of the superior court in Arizona. But the State legislators can determine who should have that responsibility and they can see to it that the funds, as needed, are provided to the entity, whether it be the clerk of the court, the county attorney's office or whoever, to ensure that that notice is provided. That seems to me to be quite a bogus argument. I know I talked to the county attorney in the fastest growing county in the country, Maricopa County, Arizona, who said that he thought the notice requirement would take about the equivalent of one-half the time of a full-time equivalent employee. So I don't think that is a significant objection.

One final question has to do with the balancing. There were some other questions asked, I think, by Chairman Hatch about this. May I ask you, Mr. Twist, if I am incorrect on this? There is at least one of the rights that would be provided—and there may be others, but I can only think of cases where it would arise in connection with the right to be present at the trial, as opposed to a defendant's right to a fair trial, which in some circumstances in the past has resulted in exclusion of a victim or a victim's family from the court room, in which there could be a conflict between a right of the defendant which has been held to be constitutionally guaranteed and a right of the victim which would now be constitutionally guaranteed.

I can't think of any other situation in which you would have those two rights conflict, but there may be some. I view this as similar to the right of the free press to cover a trial, but the judge's ability to protect the right of a defendant to a fair trial, and in some cases therefore exclude the press. Now, the First Amendment is the first among the 10 and is usually held up as inviolate. But courts have historically balanced those two complete rights and have struck the balance to ensure that both of them are satisfied to the extent that they can be when there is a conflict.

Is there any difference with respect to the granting of a constitutional right here where finally the victim would have equal standing in at least this one situation? But with respect to Senator Feingold's concern that maybe we have to have a separate little tag line that says, however, any of the defendant's rights are still number one, would you have to have that?

Mr. TWIST. No, Senator. In fact, I think the consequences of that language could be quite pernicious. In fact, you are exactly right that courts are in the business of balancing rights that come into

conflict, whether those rights are grounded in the Constitution or elsewhere. And that is exactly what courts would do with this amendment. If this amendment were to be the law, they would balance these amendments against other enshrined amendments in the Constitution for persons accused or convicted.

And the only way for the balance to be true, for the assessment to be fair among these competing rights is if they both reside in the fundamental law of the country, the U.S. Constitution. And without that, there is forever an imbalance in the way courts go about their decision to weigh the rights of the victim and the rights of the defendant.

We think it is absolutely clear throughout the history of our constitutional law that courts will balance rights when they come in conflict. And in earlier testimony from Professor Cassell, we have even proposed, if some feel it is necessary to codify that principle, some language that would codify the principle of striking a balance. Certainly, no one could ask for more. Certainly, no one should ask for a defendant to have codified into the Constitution an automatic victory regardless of the facts, regardless of the circumstances, regardless of the context, whenever rights come in conflict.

Senator KYL. Well, I thank you. I know we have that language, but we can add that if we need to.

Let me say we have gone over our time. There will be 1 week for people to submit statements to the record, for additional questions to be posed and for their response, one week from today's hearing. Let me also again thank, in their absence, Senator Ashcroft and Senator Feingold, the chairman and ranking member of the subcommittee, who did not insist on their jurisdiction in this case, Senator Feingold keeping an open mind on the amendment and Senator Ashcroft supporting it, with a couple of suggestions as to how we might strengthen it; to Senator Feinstein for all of her extraordinarily hard work and efforts at ensuring a very strong bipartisan support for the amendment; to thank Senator Hatch for conducting the hearing; and for all of the guests who are here, and most especially for the three members of the panel. We very much appreciate your presence here today.

If there is nothing further, I will declare the hearing adjourned.

[Whereupon, at 12:10 p.m., the committee was adjourned.]

APPENDIX

IIA

PROPOSED LEGISLATION

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

JOINT RESOLUTION

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

1 *Resolved by the Senate and House of Representatives*
2 *of the United States of America in Congress assembled*
3 *(two-thirds of each House concurring therein),* That the fol-
4 lowing article is proposed as an amendment to the Con-
5 stitution of the United States, which shall be valid for all
6 intents and purposes as part of the Constitution when
7 ratified by the legislatures of three-fourths of the several

1 States within seven years from the date of its submission
2 by the Congress:

3 "ARTICLE —

4 "SECTION 1. A victim of a crime of violence, as these
5 terms may be defined by law, shall have the rights:

6 "to reasonable notice of, and not to be excluded
7 from, any public proceedings relating to the crime;

8 "to be heard, if present, and to submit a state-
9 ment at all such proceedings to determine a condi-
10 tional release from custody, an acceptance of a nego-
11 tiated plea, or a sentence;

12 "to the foregoing rights at a parole proceeding
13 that is not public, to the extent those rights are af-
14 forded to the convicted offender;

15 "to reasonable notice of a release or escape
16 from custody relating to the crime;

17 "to consideration of the interest of the victim
18 that any trial be free from unreasonable delay;

19 "to an order of restitution from the convicted
20 offender;

21 "to consideration for the safety of the victim in
22 determining any conditional release from custody re-
23 lating to the crime; and

24 "to reasonable notice of the rights established
25 by this article.

1 "SECTION 2. Only the victim or the victim's lawful
2 representative shall have standing to assert the rights es-
3 tablished by this article. Nothing in this article shall pro-
4 vide grounds to stay or continue any trial, reopen any pro-
5 ceeding or invalidate any ruling, except with respect to
6 conditional release or restitution or to provide rights guar-
7 anteed by this article in future proceedings, without stay-
8 ing or continuing a trial. Nothing in this article shall give
9 rise to or authorize the creation of a claim for damages
10 against the United States, a State, a political subdivision,
11 or a public officer or employee.

12 "SECTION 3. The Congress shall have the power to
13 enforce this article by appropriate legislation. Exceptions
14 to the rights established by this article may be created
15 only when necessary to achieve a compelling interest.

16 "SECTION 4. This article shall take effect on the
17 180th day after the ratification of this article. The right
18 to an order of restitution established by this article shall
19 not apply to crimes committed before the effective date
20 of this article.

21 "SECTION 5. The rights and immunities established
22 by this article shall apply in Federal and State proceed-
23 ings, including military proceedings to the extent that the
24 Congress may provide by law, juvenile justice proceedings,

1 and proceedings in the District of Columbia and any com-
2 monwealth, territory, or possession of the United States.".

○

QUESTIONS AND ANSWERS

RESPONSE OF STEVEN J. TWIST TO A QUESTION FROM SENATOR HATCH

Question 1. In your prepared testimony, you quote an Arizona case that states, "the Supremacy Clause requires that the Due Process Clause of the U.S. Constitution prevail over state constitutional provisions."

If all the rights set forth in the proposed constitutional amendment were incorporated into a federal statute or into a state constitutional provision, which of these rights would be struck down or curtailed under the Due Process Clause of the federal Constitution as currently interpreted by the federal courts.

Answer 1. The sad truth is that any one of them *could* be. The principle has been articulated by at least one court, Division One of the Arizona Court of Appeals, several times, most recently in *Romley* v. *Martin,* 1 CA–SA 98–0085, Memorandum Decision, (June 18, 1998). In this case the court wrote, "We also understand that "when the defendant's constitutional right to due process conflicts with the Victim's Bill of Rights in a direct manner, * * * then due process is the superior right.'" [quoting *Romley* v. *Superior Court.,* 172 Ariz. 232, 236, 836 P.2d 445, 449 (App. 1992)]. As I said in response to Senator Leahy's question on this point:

> This black-letter principle is the very point that proponents of the Crime Victims' Rights Amendment have been making. One need look no further than these cases for evidence that courts in fact adopt the principle. The only way to strike a fair balance when the defendant's rights and the victim's are alleged to be in conflict is to elevate victims' rights to the same fundamental status accorded to defendants' rights. Only then will courts be able to truly accommodate the legitimate rights of both.

RESPONSES OF STEVEN J. TWIST TO QUESTIONS FROM SENATOR LEAHY

Question 1. When you testified on this issue last April, I asked you whether you knew of any appellate cases in which defendants had successfully overturned their convictions based on the presence of victims at trial, or other provisions of state or federal victims' rights provisions. You directed me to an unpublished decision of the Arizona Court of Appeals, *Romley* v. *Martin [1 CA–SA 98–0085 May 7, 1998 (Mem. Decision)],* which held that the defendant's due process right to present a defense took precedence over the victim's right, under the Arizona Constitution, to refuse a pre-trial demand that she submit to a psychological examination.

As is typical of cases presented as examples of defendants' rights "trumping" victims' rights, the Arizona Court of Appeals subsequently reversed itself in *Romley* v. *Martin,* issuing an amended decision on June 18, 1998, which concluded, on the facts of that case: "[T]he victim's right to refuse a defense examination is superior to Defendants' interest in having her examined," and, "[T]he Defendants constitutional rights are not violated by upholding the victim's constitutional rights."

The amended decision in *Romley* v. *Martin* appears consistent with other recent decisions by the Arizona courts. For example, just this month, the Arizona Supreme Court upheld a victim-witness's constitutional right to be present in the courtroom against a defendant's due process challenge. *[State* v. *Fulminante, 1999 WL 102251, at *17–18 (Ariz. Mar. 2, 1999).]* Similarly, in August 1998, the Arizona Court of Appeals upheld a parent's right to attend trial proceedings with and on behalf of her child, even though the parent would later testify. *[State v. Uriarte, 1998 WL 540998 (Ariz. App. Div. 1, Aug. 27, 1998).]*

I am aware of one Arizona case which held that a victim's right under the state Constitution to refuse discovery requests by the defendant must yield to the defendant's due process right. *[Romley v. Superior Court, 835 P.2d 445 (Ariz. Ct. App. 1992).]* Other than that case, which you agreed at the hearing was correctly decided, are you aware of any appellate cases anywhere in the United States that were finally decided and not subsequently reversed in which a defendant's right under the Federal Constitution was held to "trump" a victim's right under a state or federal victims' rights provision?

Answer 1. The second Martin opinion did not "reverse" the first opinion on the legal principle which is the focus of your question, in fact, on that issue, it reaffirmed the principle. In the second opinion, the court wrote, at page 5, "We also understand that, "when the defendant's constitutional right to due process conflicts with the Victim's Bill of Rights in a direct manner, * * * then due process is the superior right.'" [quoting *Romley* v. *Superior Court.,* 172 Ariz. 232, 236, 836 P.2d 445, 449 (App. 1992)].

This black-letter principle is the very point that proponents of the Crime Victims' Rights Amendment have been making. One need look no further than these cases for evidence that courts in fact adopt the principle. The only way to strike a fair balance when the defendant's rights and the victim's are alleged to be in conflict is to elevate victims' rights to the same fundamental status accorded to defendants' rights. Only then will courts be able to truly accommodate the legitimate rights of both.

Question 2. As you know, this Committee reported a resolution identical to S.J. Res. 3 toward the end of the last Congress. The Majority Report accompanying that resolution contended that, "consistent with the plain language of [Section 3]," the States would retain the power to implement the amendment, including the power to flesh out the contours of the amendment by providing definitions of "victims" of crime and "crimes of violence." As I read Section 3, only "The Congress" would have the power to implement the amendment. Please discuss how much latitude you think that the States would have in implementing this amendment and any necessary exceptions to it.

Answer 2. Professor Cassell and I have both been asked similar questions. We have collaborated on our answer to provide you with the benefit of our collective thinking on this point.

We agree with the language of the Majority Report you quote. As the Majority Report explained:

> This provision [section 3 of the Amendment] is similar to existing language found in section 5 of the 14th amendment to the Constitution. This provision will be interpreted in similar fashion to allow Congress to "enforce" the rights, that is, to insure that the rights conveyed by the amendment are in fact respected. At the same time, consistent with the plain language of the provision, the Federal Government and the States will retain their power to implement the amendment. For example, the States will, subject to the Supremacy Clause, flesh out the contours of the amendment by providing definitions of "victims" of crime and "crimes of violence."

S. Rep. 105–409 at 35.

The important point to distinguish here is between "enforcement" power under the Amendment and implementation power. The question posed seems to conflate the two points, referring to a general congressional power to implement the Amendment. While Congress will surely have the power to implement the Amendment in the federal system, it does not have this implementation power in the state system. Section 3 of S.J. Res. 3 confers on Congress only the power to "enforce" the Amendment. This enforcement power is not unlimited, as the Supreme Court's recent decision in *City of Boerne* v. *Florida,* 117 S. Ct. 2157, 2163–64 (1997), makes clear in the context of similar language found in the Fourteenth Amendment. As a consequence, this grant of a congressional enforcement power does not remove from the states their plenary power over their criminal justice systems. Thus, we believe, as did the majority of this Committee, that the states have considerable implementation power under the Amendment.

Question 3. The International Association of Chiefs of Police (IACP) has raised concerns that the proposed Victims' Rights Amendment could "allow delays in the swift administration of justice, or the creation of civil or criminal liability for failure to protect the victims' or their survivors' rights." Can you assure us that the IACP's concerns are unfounded?

Answer 3. Yes. Professor Cassell and I have both been asked similar questions, so we have collaborated on our answer to give you the benefit of our collective thinking on this point.

We do not have IACP document to which this question refers before us, so we will answer this question without reference to the IACP. Indeed, we know that many law enforcement offices and chiefs of police around the country support the Victims Rights Amendment. They have good reason for doing so. The Victims Rights Amendment will not delay justice. To the contrary, it contains a provision that should speed up the administration of justice—the victims right to "consideration of the interest of the victim that any trial be free from unreasonable delay." Nor would it allow the creation of civil or criminal liability for failure to protect victims. This concern appears to have been raised with respect to an earlier version of the proposed Amendment. S.J. Res. 3 does not contain a right of a victim to be protected from a defendant. Instead, it contains specific rights dealing with court consideration of the victims' interest in safety. Moreover, section 2 of S.J. Res. 3 states that the amendment does not create civil damages actions against state entities, so any concern about new liability is unfounded.

Question 4. The proliferation of state laws and constitutional amendments protecting victims rights is a relatively recent phenomenon. Just last year, Mississippi, Montana and Tennessee approved state constitutional amendments providing rights to crime victims, joining 29 other states that have adopted such amendments since 1982. Why shouldn't we learn from the experience of the states before imposing a single federal standard in this area?

Answer 4. Professor Cassell and I have been asked similar questions, so we have collaborated on our answer to give you the benefit of our collective thinking.

We certainly agree that the country should learn from the experience of the states in considering whether to pass a victims rights amendment. As was explained at greater length at the hearing (in Professor Cassell's prepared statement), on this point it is useful to consider the result of a meeting recently convened by the Department of Justice of those active in the field, including crime victims, representatives from national victim advocacy and service organization, criminal justice practitioners, allied professionals, and many others. Their report—published by the office for Victims of Crime and entitled "New Directions from the Field: Victims' Rights and Services for the 21st Century"—concluded that "[t]he U.S. Constitution should be amended to guarantee fundamental rights for victims of crime." The report went on to explain,

> 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. * * * Today, many victims do not report crime or participate in the criminal justice system for a variety of reasons, including fear of revictimization by the system and retaliation by the offender. Victims will gain confidence in the system if their rights are recognized and enforced, their concerns for safety are given serious consideration, and they are treated with dignity and respect.

These impressionist conclusions find strong support in a December, 1998 report from the National Institute of Justice (NIJ) finding that many victims are denied their rights and concluding that "enactment of State laws and State constitutional amendments alone appears to be insufficient to guarantee the full provision of victims' rights in practice." 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 percent of the victims were notified of the sentencing hearing and fewer than 40 percent were notified of the pretrial release of the defendant. 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.

Of course, at some point the time for learning passes and the time for action begins, particularly because each day that passes in a "learning" process means denials of rights to victims of crime. We believe the time for action on a federal amendment has come.

Question 5. (A) What is the state of the law regarding crime victims' rights in each of the states that does not currently provide such rights in its constitution?

(B) What efforts are being made in these states to support passage of state constitutional amendments regarding crime victims' rights?

(C) What efforts are being made in these and other states to increase the protection of crime victims' rights *other than* efforts at constitutional change (state and federal)?

(D) In states with victims' rights constitutional amendments, please provide examples of cases in which the constitutional rights of victims came into conflict with the constitutional rights of the accused.

Answer 5. Professor Cassell and I have been asked similar questions, so we have collaborated on our answer to provide you with the benefit of our collective thinking.

(A) Providing precise information on the "state of the law" in states without state constitutional amendments is difficult. We are aware of no readily-available source that contains this information. Indeed, this is one problem that victims face in attempting to assert their rights. The treatise Professor Beloof and Professor Cassell are working on will provide further information about the state of the law around the country.

(B) The National Victims Constitutional Amendment Network (NVCAN) supports state victims amendments. An information packet has been prepared that is provided to persons interest in state amendments.

(C) Each year in the states, of course, various statutory changes are made or proposed in laws concerning crime victims. For example, this year in Utah, the Utah Council on Victims attempted to change procedures for collecting restitution. We were unsuccessful, but will make further efforts next year. Again, we do not have

available a comprehensive listing of all such efforts around the country. The National Center for Victims of Crime attempts to keep track of various legislative initiatives pursued on behalf of victims, and they may be able to provide you with more comprehensive information.

(D) See our answers to question 1, above, which provides detailed information on this question.

RESPONSES OF BETH WILKINSON TO QUESTIONS FROM SENATOR HATCH

Question 1. As you know, the Department of Justice has a long standing tradition of defending the constitutionality of Acts of Congress whenever "reasonable" arguments to that effect can be made. Terry Nichols has argued that it is a violation of the Ex Post Facto Clause of the Constitution to apply the provisions of the 1996 Mandatory Victim Restitution Act (MVRA), 19 U.S.C. §§ 3664(f)(1)(A) (Supp. II 1996), retroactively to the 1995 bombing as Congress intended. In its decision last month, the 10th Circuit rejected Nichols' position, concluding that restitution serves to compensate victims rather than punish defendants and therefore that the Act could be applied to his sentencing. *United States* v. *Nichols,* No. 98–1231 (10th Cir. Feb. 26, 1999). Do you think that the 10th Circuit's position (following, a 7th Circuit ruling in *United States* v. *Newman,* 144 F.3d 531 (7th Cir. 1998),) is a "reasonable" one and, if so, shouldn't the Department's lawyers be defending this ruling and helping victims around the country obtain restitution from violent offenders?

Answer 1. While the 10th Circuit recently ruled that the 1996 Mandatory Victim Restitution Act (MVRA) applies retroactively, most other circuits have decided differently. In light of the split in the circuits, the Department of Justice is right to take the most conservative position to ensure that victims obtain restitution from violent offenders without risking a reversal of the order on appeal. In *United States* v. *Terry Nichols,* the government successfully persuaded the trial court to order $14.5 restitution under the prior statute. Thus, the restitution order would have been upheld on appeal regardless of how the 10th Circuit interpreted the MVRA.

Question 2. Given the 10th and 7th Circuits' recent rulings on the retroactive application on the MVRA rejecting the Department's views, it seems clear that victims of crimes of violence in a number of cases would have benefitted from having separate legal representation to help them obtain the maximum possible restitution. In the cases you have seen, what steps did the Department take to see that the victims were aware of their right to separate legal representation on this issue and what steps, in your view, should it have taken? For example, given the difficulties that victims of violent crime have in obtaining separate legal representation, would it have been desirable for the Department of Justice to at least lay out to courts around the country the argument recently adopted by the 10th and 7th circuits so that these were aware of what the victims' legal arguments would be?

Answer 2. It would be wise for the Department of Justice to advise victims of crime of their right to separate legal representation. There are times when crime victims may want to seek counsel from those other than the prosecution team. That counsel for victims take different positions from Justice Department attorneys does not mean such arguments will prevail. Lawyers for some of the victims in *United States* v. *Terry Nichols* made arguments to the trial court that were unsuccessful. The Justice Department attorneys are obligated to take reasonable positions based on a fair interpretation of the law of the case and the law or the circuit.

Question 3. Why didn't Department of Justice lawyers seek any order of restitution against Timothy McVeigh, particularly given the possibility that he might be able to "sell his story" by giving an "exclusive" interview to some curious media outlet?

Answer 3. Timothy McVeigh received a sentence of death from the jury and Judge Matsch imposed that sentence without considering restitution. Neither the prosecutors nor the victims, some of whom had their own counsel, asked Judge Matsch to order restitution.

RESPONSES OF BETH WILKINSON TO QUESTIONS FROM SENATOR LEAHY

Question 1. In your experience, are Federal prosecutors and courts equipped with sufficient resources to identify and locate victims and assist them with their special needs, or would additional resources be necessary to ensure that the rights proposed in this amendment could be carried out?

Answer 1. To address the needs of victims, Congress must bolster the presently limited resources of the judicial system. At present, prosecutors and courts labor to fulfill the social and legal requirements of criminal prosecution without sufficient funds and administrative support necessary to assist victims of crime. The resources

marshaled in the Oklahoma City bombing cases were atypical and most prosecutors struggle to successfully try their cases and meet the needs of the victims. Any effort to redress the shortcomings of society's response to victims will fail if not sufficiently funded and staffed.

Question 2. In your experience, do victims generally want the same thing from the judicial process, or do their expectations differ? If the former, what do they seek? If the latter, please explain the differences.

Answer 1. One of the most delicate aspects of working with victims of crime is recognizing that each survivor and each family member deals differently with the judicial system. As a prosecutor, I spoke to survivors and family members of victims of crime who had vastly different expectations of the criminal justice system. Some wanted little from the process other than the just conviction of the perpetrators. Many of the victims of the Oklahoma City bombing avoided any contact with the system. They chose not to attend the trials, some vehemently refused to testify as penalty witnesses. Others attended nearly every proceeding that occurred in the cases and felt a need to testify about their losses.

It would be inappropriate to believe that the opinions of the most vocal are shared by those who choose to deal with their grief in a different way. Because the reactions to the criminal justice system are as varied as the victims themselves, it is difficult to generalize about the expectations of crime victims.

Question 3. You have given us examples of how the proposed constitutional amendment could have impeded the effective prosecution of the Oklahoma City bombing defendants. Can you identify other examples from your experience in which the amendment could have impaired the criminal justice process?

Answer 3. The other major terrorism case that I handled could have been put at risk if the proposed constitutional amendment were adopted. In *United States* v. *Dandeny Munoz Mosquera,* a case prosecuted in the Eastern District of New York, the defendant was convicted, among other things, of bombing an airplane in Bogota, Colombia. The proposed amendment would have required us to contact all of the victims, most of whom resided in Colombia. To further complicate matters, we encountered difficulties with elements of the Colombian government when we sought cooperation and evidentiary testimony. The drug cartels threatened law enforcement officials and made communication with witnesses and victims extremely difficult.

Although the requirements of the proposed amendment may not be burdensome in some local cases, the difficulties multiply when the United States prosecutes crimes that occurred outside its borders. If, for example, the government was prosecuting members of a foreign terrorist organization, the prosecutorial strategy behind a plea with a less culpable member of the organization may be best left unexplained until the time of trial. With the requirements of the proposed amendment, the victims could insist that the prosecution team explain the rationale for the plea, thereby jeopardizing the prosecution of the main perpetrators.

Question 4. The Committee has heard testimony that prosecutors did not allow a victim of the Oklahoma City bombing to be heard at the sentencing of Timothy McVeigh because she was opposed to the death penalty. Is that correct? Please explain your response.

Answer 4. No one who opposed the death penalty was prohibited from testifying during the penalty phase of the *McVeigh* trial. If a family member or survivor chose to testify, the prosecution team explained that the statement would be used to support the government's request for the death penalty. Some who opposed a death sentence felt it would be inappropriate for them to testify in a proceeding in which the government would argue that death was the just sentence.

Whether a victim-witness supported or opposed the death penalty was not, in any event, proper subject of testimony. No victim-witness was permitted to testify regarding their personal views on the death penalty.

Question 5. You suggested during the hearing that the rights of victims should be balanced with the rights of the accused. (A) In cases of irreconcilable conflict, where accommodation cannot protect the rights of both the victim and the accused, do you believe that the accused's historical constitutional right to a fair trial must be preserved? (B) Would you support the addition to S.J. Res 3 of the following language: "Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by this Constitution"?

Answer 5. Until a defendant is convicted of a crime, a conflict between the rights of a victim and the rights of the accused must be decided in such a way as to preserve the right to a fair trial for the accused. One way of ameliorating a deficiency in the current proposed amendment would be to add the following language: "Nothing in this article shall be construed to deny or diminish the rights of the amused as guaranteed by this Constitution."

Question 6. You testified that, in your opinion, the proposed constitutional amendment should not be limited to victims of violent crimes, but should instead extend to all crime victims. Is it your testimony that you would support the adoption of S.J. Res 3 were it so broadened?

Answer 6. No, I do not support the adoption of S.J. Res 3 in its current form, for the reasons I have stated. I also think any proposed amendment to protect crime victims should include all victims, not just victims of violent crimes.

RESPONSES OF BETH WILKINSON TO QUESTIONS FROM SENATOR KYL

Question 1. In your testimony, you explain that it was desirable for victims to be heard at sentencing. Could you elaborate on the positive aspects of victims making statements at sentencing?

Answer 1. There are several reasons that victim testimony at sentencing is beneficial to the criminal justice system. First, whether it is a judge or jurors who must decide the sentence of a convicted defendant, it is essential that the impact of the crime be considered. In most cases, survivors and family members are in the best position to describe the loss to society. Second, many victims of crime want to express their views to the defendant and the sentencing court. Speaking at a sentencing hearing provides them with the opportunity to express their views in a dignified and serious setting. Finally, when victims of crime speak at a sentencing hearing, the community benefits from hearing about the after effects of a crime.

Apart from the cathartic and retributive attributes of sentencing hearings, the essential purpose is to determine the just sentence for a defendant. Unlike the trial proceeding, during the sentencing hearing a judge or jury should consider the impact of the crime when deciding that just sentence. Of course, the court must always ensure that a sentencing decision is based on reason and not on emotion or passion.

Question 2. During the Oklahoma City bombing case, Department of Justice lawyers held several mass meetings with victims of the bombing to explain developments in the case. Do you think these meetings helped the victims understand the proceedings or were useful in other ways?

Answer 2. The meetings we held with the victims of the Oklahoma City bombing were helpful to the victims and the prosecution team. During those meetings we explained the proceedings and the issues we anticipated would arise during the trial. The victims were able to ask questions and express their views. One of the most important aspects of the meetings was the time we had to get to know the victims and the opportunity they had to get to know us. Victims who have suffered such severe trauma and loss need to know the people who are responsible: for the prosecution of the defendants. Likewise, it was a privilege for me and the rest of the prosecution team to get to know the survivors and family members and to understand the issues they were confronting.

Question 3. On June 26, 1996, Judge Matsch sua sponte ordered victims of the Oklahoma City bombing who wish to be eligible to give victim impact statements at sentencing to stop watching any of the proceedings in the case. Judge Matsch gave the victims the lunch break to make this wrenching decision of whether to stop watching the proceedings or lose any opportunity to make an impact statement. What was it like for the victims to make such an important decision with so little time to deliberate?

Answer 3. The decision for some of the victims was very difficult and was only exacerbated by the lack of time they had to make that decision. Fortunately, the passage of the Victims Rights Clarification Act of 1997 allowed many of the victims who had initially decided to avoid watching the proceedings to attend the trials.

Question 4. On March 25, 1997, Judge Matsch ruled that the victims request for a ruling clearly upholding the Victims Rights Clarification Act of 1997 was moot. After that ruling, were Department lawyers able to assure prospective victim impact witnesses unequivocally that they would run no risks from watching the proceedings and, if not, what risks did the Department lawyers see?

Answer 4. When Judge Matsch first ruled on the Victims Rights Clarification Act of 1997, we could not unequivocally assure prospective victims impact witnesses that they would be permitted to testify if they viewed the trial. Judge Matsch did suggest that he would determine at a hearing after the initial phase of the trial whether attendance at the trial adversely affected the impact testimony of any potential witnesses. Fortunately, none of the victims who chose to watch the trial was precluded from testifying. The issue was resolved in the *McVeigh* case and no victim had to face that choice during the *Nichols* case.

Question 5. The proposed Victims' Rights Amendment would give "a victim of a crime of violence" the right to be heard before a plea bargain is accepted. Federal

Rule of Criminal Procedure 32(c)(3)(E) gives a victim of "a crime of violence" a right to be heard at the sentencing of a defendant. Our Committee has expressed the view that the two phrases should be given identical constructions. See S. Rep. 105–409 at 23. Do you believe that Marsha Knight and other victims of the Oklahoma City bombing were victims of a "crime of violence" by Michael Fortier under the Victims Rights Amendment and under the Rules of Criminal Procedure. (As you know, he pled guilty to misprision of a felony in violation of 18 U.S.C. § 4 in connection with failing to alert government authorities to the bombing.) If so, why did you and other Department attorneys decline to join the victims' argument that they were victims of such a "crime of violence" when they sought the right to be heard at Fortier's sentencing under Rule 32(c)(3)(E)?

Answer 5. Victims did testify at the sentencing hearing for Michael Fortier and the Justice Department advocated for their right to do so. The Department argued that the court should exercise its discretion to hear from any victim who wanted to speak; and the court agreed. Whether Michael Fortier committed a crime of violence is irrelevant. I believe victims of crime, regardless of whether the crime qualifies as a crime of violence, should be permitted to speak at the sentencing hearing of a defendant.

Question 6. After the 10th Circuit's ruling in *United States* v. *McVeigh,* 106 F.3d 325 (10th Cir. 1997), how difficult is it for victims and the Department of Justice to seek appellate review of decisions by district court judges who fail to provide to victims of crime their rights under the Victims Bill of Rights, 42 U.S.C. 10606(b)? Would passage of the Victims Rights Amendment, particularly with its provisions conferring "standing" on victims, improve the prospects of obtaining appellate review of trial level denial of victims rights?

Answer 6. The provisions conferring standing to victims in the proposed Victim's Rights Amendment need to be clarified as to when a victim of crime would have a stand to seek appellate review. Any standing problems that currently exist for victims could easily be addressed through legislation. An amendment to the Constitution is unnecessary to rectify those problems. To the extent some may suggest that victims should have more interlocutory appeals, it should also be understood that such appeals could unnecessarily delay a trial, thus adversely impacting a case.

Question 7. Do you believe it would have been desirable for Marsha Knight and other victims who were not able to testify at the penalty phase of Timothy McVeigh's trial to have had the opportunity to give an impact statement later when Judge Matsch actually imposed the capital sentence?

Answer 7. It is not accurate to state that some victims were unable to testify at the penalty phase for Timothy McVeigh. There were approximately 37 witnesses who testified in front of the jury which decided the just sentence for McVeigh. Any impact statement given later when Judge Matsch actually imposed the capital sentence would have had no effect on the sentence. The jury had already determined that the death penalty was the appropriate sentence. If one of the purposes of victim impact testimony is to provide the jury with information to consider when sentencing a defendant, testimony at the imposition of the sentence would not serve that purpose.

RESPONSES OF PAUL CASSELL TO QUESTIONS FROM SENATOR LEAHY

I appreciate the opportunity to respond to your questions concerning the Victims Rights Amendment and hope that my answers will allay some of the concerns that have lead you to oppose the Amendment.

Question 1. When you testified on this issue last year, I asked you to provide a list of all appellate cases in which defendants had successfully overturned their convictions based on the presence of victims at trial, or other provisions of state or federal victims' rights provisions. You did not respond by citing a single case. Instead, you noted that you and Professor Doug Beloof were preparing a treatise on the rights of crime victims that would comprehensively survey the relevant case law, and that the relevant chapters had not yet been completed.

Professor Beloof's casebook on victims has now been completed. Are you aware of (A) any decisions that were not eventually reversed in which victims' rights laws or state constitutional amendments were not given effect because of defendants' rights in the federal Constitution or (B) any cases in which defendants' convictions were reversed because of victims' rights legislation or state constitutional amendments?

Answer 1. My answer last year mentioned a treatise that Professor Beloof and I are preparing on victims' rights. This is a separate, more comprehensive work than the Beloof casebook that your question references. The Beloof casebook is a very useful teaching tool. I am teaching a course on crime victims rights and the book

has done an excellent job in exposing the students to the various issues raised by victims' demand for fair treatment in the process. However, the casebook does not comprehensively collect appellate case law on victims' right.

Only the treatise will review all the caselaw. Until such a treatise is prepared (we estimate the task will take several years), it is impossible to report on the precise status of victims' case law in all fifty states. While I am not aware of any appellate cases today of the type you describe that pertain directly to the rights contained in the proposed Victims Rights Amendment, I should hasten to point out that appellate cases of any sort involving victims are quite rare. This is because of the difficulties victims have in protecting their rights. As I explained at greater length in my prepared statement:

> 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 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 [see footnote 174 in my prepared statement]. 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 [see footnote 175 in my prepared statement]. 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 on-going 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' soon-to-be-published article cogently demonstrates [see footnote 176 in my prepared statement]. In light of all these hurdles, appellate opinions about victims issues seem, to put it mildly, quite unlikely.
>
> One can read 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 [see footnote 177 in my prepared statement]. Narrow readings will be encouraged by the asymmetries of appeal—defendants can force a new trial if their rights are denied, while victims cannot [see footnote 178 in my prepared statement]. Victims, too, may be reluctant to attempt to assert untested rights for fear of giving a defendant a grounds for a successful appeal and a new trial [see footnote 179 in my prepared statement].
>
> 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.

Question 2. One of the rights enumerated by S.J. Res. 3 is the right "to reasonable notice of the rights established by this article." You have written that this provision is necessary because "Rights for victims are of little value if victims remain unaware of them." *[Prepared statement of Paul G. Cassell, Hearing before the Senate Comm. on the Judiciary on S.J. Res. 44, 105th Cong., 2d Sess., Apr. 28, 1998 (S. Hrg. 105–798), at p. 40.]* Aren't you in fact advocating for a governmental duty to warn victims along the lines of *Miranda*?

Answer 2. No. No one disputes the rights of criminal defendants to information about governmental processes *after* charges have been filed. For example, to my knowledge, no one argues against informing indigent defendants of their right to court-appointed counsel at the court arraignment. The Sixth Amendment's right to

counsel requires a criminal defendant be notified expressly of this right, typically by a judge in court. *See, e.g., Faretta* v. *California,* 422 U.S., 806, 835 (1975). The *Miranda* apparatus is controversial because it does not follow along these lines of rights within court proceedings but rather extend rights to criminal suspects even before they have been formally charged. Moreover, these rights are extended to suspected lawbreakers in a manner that makes it difficult for police to obtain voluntary confessions, significantly harming law enforcement efforts to control crime. In stark contrast, the Victims Rights Amendment does not extend rights before the formal initiation of criminal charges. As a result, it does not impair law enforcement efforts to solve crimes.

Question 3. As you know, Rule 615 of the Federal Rule of Evidence authorizes courts to exclude witnesses from the courtroom so that they cannot hear the testimony of other witnesses. Rule 615 was amended last year to create an exception for persons authorized by statute to be present. It could have been amended to create an exception for victims. In, your opinion, would such an amendment (A) be effective in guaranteeing victims the right to attend trials, and (B) provide a clear and visible test of whether a statutory/rule approach can work?

Answer 3. The recent amendment of rule 615 is an interesting illustration of the delays in effectively implementing victims rights. In 1990, Congress passed the Victims Rights and Restitution Act, more commonly known as the Victims Bill of Rights, 42 U.S.C. § 10606(b), extending victims the right to be present at trial in certain circumstances. This statute obviously superseded the blanket authorization of Rule 615 to exclude victims who happened to be witnesses. Yet it took the Federal Rules Committee a full eight years to amend the Rule to reflect this fact. Even then, the amendment they passed is a very narrow one.

Even if Rule 615 had been more broadly amended to create an exception for victims back in 1990, it is improbable that this would have been "effective in guaranteeing victims the right to attend trials" in, for example, the Oklahoma City bombing case. As I testified at greater length in my prepared statements submitted at the hearing, in excluding the victim-impact witnesses, Judge Matsch referenced not only the rules of evidence but also the common law and the Constitution as a basis for removing them from the courtroom. Only a constitutional amendment would clearly have invalidated the judge's ruling.

You also ask whether an amendment to Rule 615 would provide a "clear and visible test" of whether a statutory approach could work. It would provide *a* test, no less than the 1990 Victims' Bill of Rights (among other enactments) provided a "clear and visible" test. Of course, that 1990 test (among others) demonstrated that the statutory approach to victims rights is not fully effective.

Question 4. As I understand it, Utah Rule 615, which gives victims "an absolute right to attend trial, *provided that the prosecutor agrees,*" was left unchanged when in the mid-1990's legislation implementing the Utah's Victims' Rights Amendment was enacted. I believe you were very involved in that legislative effort as Chair of the Utah Council of Victims Constitutional Amendment Committee.

In your article entitled "Balancing the Scales of Justice" that appeared in the 1994 *Utah Law Review,* you defended the language in Utah Rule 615 concerning agreement of the prosecutor, which was added at the suggestion of the Statewide Association of Public Attorneys, by saying:

> The prosecutors' concern was that there might be circumstances in which, if a victim was present during trial, a defense attorney might convince a jury that the victim's testimony was irretrievably tainted from hearing the testimony of other witnesses. Because prosecutors are in the best position to make the tactical decision of when to prevent such an attack by the defense, prosecutors were given the sole power to exclude victim-witnesses. Such prosecutorial power generally serves victims' best interests because effective prosecution is good for victims.

Have you changed your mind about the impact of this provision on effective prosecution? If so, as someone who has remained very active in litigating and drafting provisions regarding victims' rights, have you proposed legislation to rectify this obvious invitation to violate victims' participatory rights?

Answer 4. This question appears to misunderstand one critical point about the timing of passage of victims initiatives in Utah. Both the Utah Victims Rights Amendment and its accompanying implementing legislation were passed on the same day in the Utah legislature. Thus, it is not clear what the question means when it says that this provision "was left unchanged when in the mid-1990's legislation implementing the Utah's Victims' Rights Amendment was enacted." In fact, this provision was put in at the suggestions of some prosecutors to obtain the broad con-

sensus support necessary to move the Utah amendment through the Utah legislature.

Since the passage of that provision, the Utah Council on Victims of Crime (on which I serve as the Chair of the Legislative Committee) has not made a priority of changing this provision. Although the general view of the our Council is (I believe) that victims deserve a blanket right to attend trials, we have had so many other complaints' about inadequate protection of victims' rights, particularly with respect to enforcement of our existing rights, that we have focused our efforts on these more pressing problems. Moreover, the Council is well aware of efforts to pass the federal constitutional amendment, the passage of which would obviate this peculiar glitch in Utah's efforts to extend rights to victims.

Finally, you quote my law review article about the Utah provision. I should point out that this article was a statement of the intentions of the drafters of the Utah Victims Rights Amendment, see footnote * in the article, not necessarily an explication of how a perfect victims rights amendment should be drafted.

Question 5. Do you agree that Megan's law has been effective in notifying communities regarding the whereabouts of registered sex offenders? If so, why won't the same approach work with victims' rights generally? If not, why isn't community notification included in the proposed victims' rights constitutional amendment?

Answer 5. To take the last part of your question first, community notification has not been included in the Amendment because the focus has been on extending rights to individuals. As you know, the Constitution generally protects the rights of persons, not communities, and the victims rights amendment follows in that venerable tradition.

Turning to the first part of your question, I have the general impression (although I have not fully studied all the ramifications of Megan's laws) that the notification provisions have not been fully effective in notifying communities about registered sex offenders. In any event, even were these laws fully effective, they would not answer questions about how to implement victims rights in the context of on-going criminal proceedings. Megan's laws apply only when a convicted offender is about to be released from prison. These laws thus shed no light on how statutes work to protect victims during the pre-trial, trial, and sentencing proceedings. Moreover, the focus of Megan's laws is prevent future crimes by a particular offender. It thus sheds little light on the Victims Rights Amendment, whose primary focus is on protecting the rights of victims within a process that focuses on an already-committed act. Finally, my sense is that criminal defendants find the provisions of Megan's law notifying entire communities of past sex offenses much more onerous than any of the provisions of the Victims Rights Amendment.

Question 6. The proliferation of state laws and constitutional amendments protecting victims rights is a relatively recent phenomenon. Just last year, Mississippi, Montana and Tennessee approved state constitutional amendments providing rights to crime victims, joining 29 other states that have adopted such amendments since 1982. Why shouldn't we learn from the experience of the states before imposing a single federal standard in this area?

Answer 6. Steve Twist and I have been asked similar questions, so we have collaborated on our answer to give you the benefit of our collective thinking.

We certainly agree that the country should learn from the experience of the states in considering whether to pass a victims rights amendment. As was explained at greater length at the hearing (in Professor Cassell's prepared statement), on this point it is useful to consider the result of a meeting recently convened by the Department of Justice of those active in the field, including crime victims, representatives from national victim advocacy and service organization, criminal justice practitioners, allied professionals, and many others. Their report—published by the Office for Victims of Crime and entitled "New Directions from the Field: Victims' Rights and Services for the 21st Century"—concluded that "[t]he U.S. Constitution should be amended to guarantee fundamental rights for victims of crime." The report went on to explain,

> 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. * * * Today, many victims do not report crime or participate in the criminal justice system for a variety of reasons, including fear of revictimization by the system and retaliation by the offender. Victims will gain confidence in the system if their rights are recognized and enforced, their concerns for safety are given serious consideration, and they are treated with dignity and respect.

These impressionist conclusions find strong support in a December, 1998 report from the National Institute of Justice (NIJ) finding that many victims are denied

their rights and concluding that "enactment of State laws and State constitutional amendments alone appears to be insufficient to guarantee the full provision of victims' rights in practice." 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 percent of the victims were notified of the sentencing hearing and fewer than 40 percent were notified of the pretrial release of the defendant. 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.

Of course, at some point the time for learning passes and the time for action begins, particularly because each day that passes in a "learning" process means denials of rights to victims of crime. We believe the time for action on a federal amendment has come.

Question 7. (A) What is the state of the law regarding crime victims' rights in each of the states that does not currently provide such rights in its constitution?

(B) What efforts are being made in these states to support passage of state constitutional amendments regarding crime victims' rights?

(C) What efforts are being made in these and other states to increase the protection of crime victims' rights *other than* efforts at constitutional change (state and federal)?

(D) In states with victims' rights constitutional amendments, please provide examples of cases in which the constitutional rights of victims came into conflict with the constitutional rights of the accused.

Answer 7. Steve Twist and I have been asked similar questions, so we have collaborated on our answer to provide you with the benefit of our collective thinking.

(A) Providing precise information on the "state of the law" in states without state constitutional amendments is difficult. We are aware of no readily-available source that contains this information. Indeed, this is one problem that victims face in attempting to assert their rights. The treatise Professor Beloof and Professor Cassell are working on will provide further information about the state of the law around the country.

(B) The National Victims Constitutional Amendment Network (NVCAN) supports state victims amendments. An information packet has been prepared that is provided to persons interest in state amendments.

(C) Each year in the states, of course, various statutory changes are made or proposed in laws concerning crime victims. For example, this year in Utah, the Utah Council on Victims attempted to changes procedures for collecting restitution. We were unsuccessful, but will make further efforts next year. Again, we do not have available a comprehensive listing of all such efforts around the country. The National Center for Victims of Crime attempts to keep track of various legislative initiatives pursued on behalf of victims, and they may be able to provide you with more comprehensive information.

(D) See our answers to question 1, above, which provides detailed information on this question.

Question 8. Would the proposed constitutional amendment make it possible for victims to bring federal class actions against non-complying state prosecutors and law enforcement authorities? Could such class actions result in "extensive lower federal court surveillance of the day to day operations of State law enforcement operations," as the Conference of Chief Justices has warned?

Answer 8. If a federal amendment passes, there is every reason for believing that state prosecutors and law enforcement authorities will protect the constitutional rights of victims that have been sanctioned through the amendment process. Thus, the need for enforcement will likely be limited to rare situations. Even in those rare situations, class actions seem very unlikely.

The experience with the state amendments supports this conclusion, as state class action suits have been quite rare, if not in fact nonexistent. I am not aware of any such suit in Utah, for example. It is also interesting that the Conference of Chief Justice provided no example of the surveillance-of-day-to-day-operations concern actually materializing under the state amendments through state class action suits. The reason for the rarity of class action suits is probably due to various factors, one of which is the requirement that such suits show common issues of law and fact in a large number of cases. Denials of victims rights not infrequently occur in situations were it can be argued that such commonality is lacking. Moreover, it is unclear why victims would pursue collateral litigation when they could avail themselves of a prospective order directly in their own criminal case. Section 3 of the proposed amendment confers "standing" on victims to enforce their rights in their own criminal case. This will, no doubt, be far and away the predominant way in

which victims rights are enforced rather than through the collateral class action approach.

Further information about this subject is also found in my answer to the next question.

Question 9. What do you think is meant in Section 2 by the victim's standing with respect to reopening proceedings or invalidating rulings "to provide rights guaranteed by this article in future proceedings"? Does this contemplate an injunction? If so, against whom?

Answer 9. As to the meaning of Section 2 of the Amendment, I can do little to improve the detailed statement found in the Senate Report 105–409 at pp. 34–35, which lays out the meaning of the provision in considerable detail. I think that this statement answers your question, particularly with its description of the circumstances in which court orders could be granted requiring the admission of victims to "future proceedings." As the Report suggests, these orders would not be in the form of an injunction, but rather in the form of a court order in the context of a particular case.

The exclusion of victims from proceedings in the Oklahoma City bombing case will serve to illustrate this point. There the victims did not seek an injunction against Judge Matsch. Rather, they sought initially reconsideration by Judge Matsch of his ruling. When that was unsuccessful, they sought a writ of mandamus from the Tenth Circuit requiring Judge Matsch to admit the victims. (Because the procedural vehicle for challenging Judge Matsch's ruling was unclear, the victims also took an appeal from his order.) As recounted at greater length in my testimony, these efforts to obtain a writ of mandamus were unsuccessful because the Tenth Circuit concluded the victims lacked "standing" to challenge the order. Section 2 of the Amendment would, in essence, reverse the Tenth Circuit's result by conferring standing on the victims to seek such a writ.

Question 10. As you know, this Committee reported a resolution identical to S.J. Res. 3 toward the end of the last Congress. The Majority Report accompanying that resolution contended that, "consistent with the plain language of [Section 3]," the States would retain the power to implement the amendment, including the power to flesh out the contours of the amendment by providing definitions of "victims" of crime and "crimes of violence." As I read Section 3, only "The Congress" would have the power to implement the amendment. Please discuss how much latitude you think that the States would have in implementing this amendment and any necessary exceptions to it.

Answer 10. Steve Twist and I have both been asked similar questions. We have collaborated on our answer to provide you with the benefit of our collective thinking on this point.

We agree with the language of the Majority Report you quote. As the Majority Report explained:

> This provision [section 3 of the Amendment] is similar to existing language found in section 5 of the 14th amendment to the Constitution. This provision will be interpreted in similar fashion to allow Congress to "enforce" the rights, that is, to insure that the rights conveyed by the amendment are in fact respected. At the same time, consistent with the plain language of the provision, the Federal Government and the States will retain their power to implement the amendment. For example, the States will, subject to the Supremacy Clause, flesh out the contours of the amendment by providing definitions of "victims" of crime and "crimes of violence."

S. Rep. 105–409 at 35.

The important point to distinguish here is between "enforcement" power under the Amendment and implementation power. The question posed seems to conflate the two points, referring to a general congressional power to implement the Amendment. While Congress will surely have the power to implement the Amendment in the federal system, it does not have this implementation power in the state system. Section 3 of S.J. Res. 3 confers on Congress only the power to "enforce" the Amendment. This enforcement power is not unlimited, as the Supreme Court's recent decision in *City of Boerne* v. *Florida,* 117 S. Ct. 2157, 2163–64 (1997), makes clear in the context of similar language found in the Fourteenth Amendment. As a consequence, this grant of a congressional enforcement power does not remove from the states their plenary power over their criminal justice systems. Thus, we believe, as did the majority of this Committee, that the states have considerable implementation power under the Amendment.

Question 11. In his Additional Views accompanying S.J. Res. 44, Chairman Hatch agreed with the Department of Justice that the standard of a "compelling interest"

for any exceptions to rights enumerated by the proposed constitutional amendment may be too demanding and inflexible. He wrote:

> The compelling interest test is itself derived from existing constitutional jurisprudence, and is the highest level of scrutiny given to a government act alleged to infringe on a constitutional right. The compelling interest test and its twin, strict scrutiny, are sometimes described as 'strict in theory but fatal in fact.' I truly question whether it is wise to command through constitutional text the application of such a high standard to all future facts and circumstances.

[S.Rpt. 105–409, 105th Cong., 2d Sess., p. 45.] In your opinion, would the "compelling interest" standard provide the necessary flexibility when the proposed amendment (A) imposes costs on corrections officers to transport incarcerated victims to court proceedings; or (B) is invoked against true victims who are wrongly charged in domestic violence cases?

Answer 11. (A) I do not see the "compelling interest" interest standard as coming into play in circumstances involving the transportation of incarcerated victims. Those victims do not have a right to compel transportation to court proceedings, as explained in greater length in my prepared testimony.

> This objection [that victims might be able to compel the state to transport them to court] appears to be 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" [see footnote 131 in my prepared statement]. 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 [see footnote 132 in my prepared statement]. 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 [see footnote 133 in my prepared statement].

(B) It is not clear to me how the proposed Amendment could be "invoked against" victims of domestic violence who have been wrongfully charged. The Amendment is designed to create rights for victims rather than take them away from defendants. Thus, it is unclear from the question how one should envision a wrongfully charged victim of domestic violence—no less than any other criminal defendant—finding the Amendment deployed against her.

Hypothetically, were such circumstances to arise, it is important to recognize that, while the "compelling interest" standard is a significant one, it is not an impossible one to meet. The example of yelling "Fire!" in a crowded theater is widely-cited example, *Schenck* v. *U.S.,* 249 U.S. 47, 52 (1919) (Holmes, J.), but recent cases specifically allow First Amendment exceptions to be made for compelling reasons in a variety of circumstances. *See, e.g., Burson* v. *Freeman,* 504 U.S. 191 (1992) (prohibition of campaigning close to a voting booth upheld); *Osborn* v. *Ohio,* 495 U.S. 103 (1990) (prohibition of child pornography upheld). Accordingly, were the circumstances you describe to materialize—involving the "invocation" of a victims rights enactment against the type of person it was designed to protect—the exceptions clause offers sufficient flexibility to cover it.

Question 12. The Majority Report (at p. 9) cites the case of Virginia Bell, and criticizes the system for ordering restitution in an amount that was "arbitrary and utterly inadequate." Roughly, 90 percent of criminal defendants are indigent, yet the amendment would seem to require judges, prosecutors and public defenders to calculate, argue and decide upon the amount of a restitution order—an order that would be completely unenforceable as to indigent defendants. Is this a good use of the scarce resources in the criminal justice system?

Answer 12. Here again, I find myself in agreement with this Committee. The Committee previously made findings on the need for mandatory restitution in connection with the passage of the Mandatory Victims Restitution Act. There the Committee explained that "[i]t is essential that the criminal justice system recognize the impact that crime has on the victim, and, to the extent possible, ensure that [the] offender be held accountable to repay these costs." S. Rep. 104–179 at 18. The Committee went on to explain why, even though many defendants lack substantial resources, a system of mandatory restitution orders is important. My impression is

that these views on the desirability of mandatory restitution were widely shared in Congress, as my understanding is that the Mandatory Victim Restitution Act ultimately was enacted with strong, bipartisan support.

Question 13. I am also concerned that the routine issuance of unenforceable restitution orders could lead to citizen contempt for government. If a defendant is indigent, the federal constitutional right to restitution is meaningless, isn't it? It might also suggest that the constitutional right should be against the government, so that it will pay victims for the injuries inflicted upon them by criminal defendants. Do you advocate extending the constitutional right to guarantee compensation from government resources to pay restitution for victims who were injured by indigent defendants?

Answer 13. These questions were, I believe, carefully considered by this Committee when the Mandatory Victim Restitution Act was passed. With respect to the possible indigency of a defendant, for example, the Committee explained that "this position underestimates the benefits that even nominal restitution payments have for the victim of crime, as well as the potential penalogical benefits of requiring the offenders to be accountable for the harm caused to the victim." S. Rep. 104–179 at 18. Since the passage of the federal Mandatory Victim Restitution Act, I am not aware of any evidence that it has lead to victim "contempt" of the federal courts.

Extending the proposed Victims Rights Amendment to require government compensation to victims would extend the amendment beyond the traditional bounds of the state victims amendments. The consensus that appears to support S.J. Res. 3 might begin to dissipate were the Amendment to be extended to such less charted terrain. Because the existing provisions in S.J. Res. 3 are so important, I would not be in favor of possibly jeopardizing their passage through such an extension of the language of the Amendment.

Question 14. If I'm an indigent victim, and all it takes to "exclude" me from the proceedings is to refuse to pay my travel expenses, would the proposed amendment give me a constitutional right to bus fare?

Answer 14. No. See my answer to question 11(A), above.

Question 15. The International Association of Chiefs of Police (IACP) has raised concerns that the proposed Victims' Rights Amendment could "allow delays in the swift administration of justice, or the creation of civil or criminal liability for failure to protect the victims' or their survivors' rights." Can you assure us that the IACP's concerns are unfounded?

Answer 15. Yes. Steve Twist and I have both been asked similar questions, so we have collaborated on our answer to give you the benefit of our collective thinking on this point.

We do not have the IACP document to which this question refers before us, so we will answer this question without reference to the IACP. Indeed, we know that many law enforcement offices and chiefs of police around the country support the Victims Rights Amendment. They have good reason for doing so. The Victims Rights Amendment will not delay justice. To the contrary, it contains a provision that should speed up the administration of justice—the victims right to "consideration of the interest of the victim that any trial be free from unreasonable delay." Nor would it allow the creation of civil or criminal liability for failure to protect victims. This concern appears to have been raised with respect to an earlier version of the proposed Amendment. S.J. Res. 3 does not contain a right of a victim to be protected from a defendant. Instead, it contains specific rights dealing with court consideration of the victims' interest in safety. Moreover, section 2 of S.J. Res. 3 states that the amendment does not create civil damages actions against state entities, so any concern about new liability is unfounded.

Question 16. At the hearing, you suggested that victims' rights under the proposed constitutional amendment should attach at the moment that a suspect in the case has been charged with the crime. I am concerned about the effect of naming a "victim" before the accused, who must be presumed innocent, has been found guilty. This problem is particularly acute in cases where the defendant claims self-defense? As one commentator has written:

> "[A] defendant in an assault case who claims he acted in self defense is asserting that the act was not a criminal offense, and, a *fortiori,* that there is no victim. Under these circumstances, the state cannot give the complaining party the rights of a 'victim' unless it presumes that the defendant's justification is invalid and that an actual criminal offense did occur. To allow the state to make such a presumption prior to any judicial finding necessarily renders a defendant presumptively guilty prior to trial and puts a jury in the position of reconsidering a factual finding that the state has already made."

[Comment, "Arizona Criminal Procedure After the Victims' Bill of Rights Amendment," 23 Az. St. L.J. 831, 836.] Under the proposed amendment, would victims' rights "attach" upon charging when the defendant claims he acted in self-defense? What if the defendant does not notice an intention to claim self-defense until weeks or months after he or she is charged?

Answer 16. It is important here to be precise about the rights in the Amendment to which one is referring. For example, the right of a victim to speak at sentencing will not exist until a sentencing proceeding takes place—that is, until a defendant has been convicted by proof beyond a reasonable doubt and rejection of all defenses that have been raised. on the other hand, for example, a victim's right to be notified of court proceedings pertaining to a defendant will attach once formal criminal charges are filed. Thus, once a defendant is charged with criminal assault, a victim will be informed when future public court proceedings concerning those charges will take place. It is important to emphasize that charges do not proceed in our criminal justice system unless a finding of probable cause has been made by a judge. That determination is, of course, subject to challenge by the defendant at trial, including the presentation of defenses such as self-defense. The victims rights amendment will not interfere with the opportunity to present such defenses. The victim, however, should be notified of public court proceedings in which such defenses will be presented and should be able to attend those proceedings.

U.S. Department of Justice
Office of Justice Programs
Office for Victims of Crime

New Directions from the Field:

Victims' Rights and Services for the 21st Century

CHAPTER 1

Victims' Rights

Victims' Rights: Two Decades of Dramatic Change

The enactment of the nation's first state bill of rights for crime victims in 1980 in Wisconsin ushered in an era of dramatic progress for victims' rights.[1] In 1982, the passage of the federal Victim and Witness Protection Act[2] and the release of the *Final Report* of the President's Task Force on Victims of Crime brought national prominence to crime victims' concerns. The *Final Report* established a broad agenda for implementing victims rights and services, and most of its 68 recommendations are highlighted throughout this report. This section reviews many of the state and federal initiatives to expand the rights of crime victims since these seminal events.

Let us make sure that we give our victims the right to be heard not in some dispassionate way in an impact statement, but in a courtroom if they want to be heard, so that people can know what it's like to be a victim. Let us give them an opportunity to participate, to be there, and to hold the criminal justice system at every level accountable.

U.S. Attorney General
Janet Reno
New York City National
Candlelight Vigil
April 25, 1993

State Initiatives

State progress in legislating rights for crime victims within the criminal and juvenile justice systems since the 1982 *Final Report* has been remarkable. When the Task Force began its work, only four states had enacted a set of basic rights for crime victims in the criminal justice system, commonly referred to as victims' bills of rights.[3] Today, every state has laws protecting victims' rights. Moreover, victims' rights have been strengthened in 29 states by constitutional mandate.[4]

The scope of rights extended to crime victims also has expanded significantly.[5] Although states have not established one standard set of rights for victims, most bills of rights contain basic provisions for victims to be treated with dignity and compassion, to be informed of the status of their case, to be notified of hearings and trial dates, to be heard at sentencing and parole through victim impact statements, and to receive restitution from convicted offenders.

Most states afford victims the right to notice of events and proceedings at various stages of the judicial process. Moreover, 35 states give victims the right to attend most criminal justice proceedings and 24 constitutionally protect that right.[6] Every state now allows courts to consider victim impact information at sentencing, and at least 41 states allow victims to make oral statements during sentencing hearings.[7] Virtually every state requires victim impact information as part of the presentence report, and at least half of the states expressly require the court to consider that information in sentencing decisions.[8]

Each year, hundreds of new victims' rights laws and innovative practices are enacted and implemented across the country. Since 1990, after cases of stalking received national attention from the media and victim advocacy groups, all 50 states and the District of Columbia modified their laws to criminalize stalking.[9] Some state legislatures also reacted swiftly to the escalation of juvenile crime to record levels in the early 1990s by extending at least some rights to victims of juvenile offenders. In 1992, for example, only five states provided victims the right to be notified of a disposition hearing involving a juvenile. By 1995, 25 states provided this right.[10]

Despite this record of success, however, victims are still being denied their right to participate in the justice system. Many victims' rights laws are not being implemented, and most states still have not enacted fundamental reforms such as consultation by prosecutors with victims prior to plea agreements, victim input into important pretrial release decisions such as the granting of bail, protection of victims from intimidation and harm, and comprehensive rights for victims of juvenile offenders.[11]

Sadly today, victims' rights largely remain 'paper promises.' For too many victims and families, the criminal justice system remains more criminal than just when it comes to protecting their rights.

Roberta Roper, Founder, Stephanie Roper Committee, Co-chair, National Victims' Constitutional Amendment Network

Federal Initiatives

The 1982 passage of the federal Victim and Witness Protection Act and the release of the *Final Report* of the President's Task Force on Victims of Crime were the catalysts for a decade of advances in victims' rights.[12] The Act became a national model for state victims' rights laws, while the *Final Report's* 68 recommendations spurred legislative reforms and initiatives to improve criminal justice and allied professionals' response to crime victims.

Congress' strong advocacy for crime victims was reflected in the Victim and Witness Protection Act's statement of purpose: "to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; to ensure that the federal government does all that is possible to assist victims and witnesses of crime, within the limits of available resources, without infringing on the constitutional rights of the defendant; and to provide model legislation for state and local governments."[13] Congress instructed the Attorney General to develop and implement guidelines for the Victim and Witness Protection Act within 270 days of its enactment. In response, the *Attorney General Guidelines for Victim and Witness Assistance (AG Guidelines)* were issued in 1983, establishing standard policies and procedures and a code of conduct for federal criminal justice officials who interact with crime victims.[14] The *AG Guidelines* have been updated periodically to incorporate new rights for victims, such as those set forth below.

In 1990, the Crime Control Act established a new framework for victims' rights by creating the first federal bill of rights for victims of crime.[15] This legislation, referred to as the Victims' Rights and Restitution Act of 1990, or the Victims' Rights Act, requires federal law enforcement officers, prosecutors, and corrections officials to use their "best efforts" to ensure that victims receive basic rights and services.[16] These include the right to be treated with fairness and with respect for the victim's dignity and privacy, to be reasonably protected from the accused, to be notified of court proceedings, to be present at all public court proceedings unless the court determines otherwise, to confer with the prosecutor, to restitution, and to information about the offender's conviction, sentencing, imprisonment, and release. The "best efforts" standard, however, made the federal law weaker than many state victims' rights laws, which make the provision of victims' rights and services mandatory.

In 1994, passage of the Violent Crime Control and Law Enforcement Act created new rights for victims of sexual assault, domestic violence, sexual exploitation, child abuse, and telemarketing fraud. The legislation also included significant funding for combating domestic violence and sexual assault, placing 100,000 community police officers on the street, and launching a variety of other crime prevention initiatives.[17]

In 1996, the Megan's Law amendment to the Jacob Wetterling Crimes Against Children and Sexual Violent Offender Act was enacted to help ensure that communities are notified of the release and location of convicted sex offenders.[18] President Clinton also signed the Antiterrorism Act that year to strengthen efforts against terrorists and to make restitution mandatory in violent crime cases.

In 1997, Congress passed the Victims' Rights Clarification Act, asserting that victims should have the right to both attend proceedings and deliver or submit a victim impact statement. This clarification was issued in response to a judicial ruling prior to the first trial regarding the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, that precluded victims who chose to attend the trial from providing a victim impact statement at sentencing. Also in 1997, Congress adopted the Federal Antistalking Law, which made it a federal offense to cross a state line to stalk another. The act also made stalking within federal jurisdictions a federal offense.[19]

Even in states with a victims' rights constitutional amendment, the overall protection of victims is varied and uneven. In addition, without federal constitutional protection, victims' rights are always subject to being automatically trumped by defendants' rights.

Robert E. Preston, Co-chair, National Victims' Constitutional Amendment Network

The Proposal for a Federal Victims' Rights Constitutional Amendment

The 1982 Presidential Task Force urged the passage of federal constitutional protection for victims' rights, advocating that the Sixth Amendment to the U.S. Constitution be amended to create specific rights for crime victims.[20] Subsequently, at a meeting sponsored by the National Organization for Victim Assistance (NOVA) and Mothers

Against Drunk Driving (MADD), victim activists and national victims' organizations created the National Victims' Constitutional Amendment Network (NVCAN) to provide leadership and coordination of efforts to amend the federal constitution.[21]

A decision was made by NVCAN to seek amendments to state constitutions before addressing a federal amendment. This strategy was adopted to enhance knowledge about the impact of state constitutional reforms for victims' rights and to establish a strong base of support prior to seeking a federal amendment. NVCAN spent the next decade assisting states in their efforts to pass amendments. One of the NVCAN members, the National Victim Center (NVC), played an important role during this period by serving as the central repository for information regarding constitutional amendment efforts around the country. Efforts to pass state constitutional amendments produced impressive results. In each of the 29 states where victims' rights amendments were put to a vote of the electorate, they won by an overwhelming majority, receiving 80 to 90 percent of the vote in most states.[22]

When someone is a victim, he or she should be at the center of the criminal justice process, not on the outside looking in.

President William J. Clinton, Rose Garden, June 25, 1996

In 1996, federal lawmakers focused on the significance of federal constitutional rights for crime victims when resolutions to add crime victims' rights to the Constitution were introduced in the Senate by Senators Jon Kyl and Dianne Feinstein and in the House by Representative Henry Hyde. Constitutional protection of victims' rights has prover to be a nonpartisan issue. The proposed federal constitutional amendment received bipartisan support in the U.S. Congress and was supported in both political party platforms and by both Presidential candidates in 1996.

In a Rose Garden ceremony on June 25, 1996, President Clinton endorsed a federal victims' rights constitutional amendment, stating:

> Participation in all forms of government is the essence of democracy. Victims should be guaranteed the right to participate in proceedings related to crimes committed against them. People accused of crimes have explicit constitutional rights. Ordinary citizens have a constitutional right to participate in criminal trials by serving on a jury. The press has a constitutional right to attend trials. All of this is as it should be. It is only the victims of crime who have no constitutional right to participate, and that is not the way it should be.

Rights for Victims of Juvenile Offenders

The President's Task Force recognized that many reforms in the juvenile justice system focused "solely on the benefits to be extended to offenders while ignoring the needs of a society burdened by their offenses."[23] The *Final Report* challenged the federal government to evaluate the juvenile

justice system from the perspective of the victim who, the report argued, is "no less traumatized because the offender was under age."[24]

For most of this century, the emphasis on rehabilitating youthful offenders and protecting their confidentiality in the juvenile justice system has overshadowed the needs of their victims. The 1980s brought a decade of reforms to America's juvenile justice system, but few addressed the needs of crime victims. For example, when rights for victims of crime were enacted in state bills of rights in the 1980s, few states extended rights to the juvenile justice system. Of the 45 states that had enacted some form of victims' rights legislation by 1988, only 13 specifically defined their population to include victims of juveniles.[25] However, the dramatic increase in juvenile crime in the late 1980s and early 1990s, particularly the increase in the violent nature of such crimes, prompted demand for greater accountability from the juvenile justice system.[26]

To ensure that victims of juvenile crimes are protected, states are enacting or amending victims' bills of rights to extend basic rights to victims of offenders in the juvenile justice system. While 46 states now allow courts to order restitution from juvenile offenders as part of the disposition of a delinquency proceeding or as part of an informal disposition, only half of the states have legislated comprehensive notification and participatory rights for victims of serious juvenile offenses.[27] With respect to victim notification, at least 25 states provide the right for victims to be notified of the disposition hearing, 23 states provide the right for victims to be notified of the adjudication hearing, and at least 25 states provide the right for victims to be notified of final adjudication.[28] With respect to victim participation, at least 28 states allow victims of juvenile offenders to submit a victim impact statement at disposition hearings, and 25 states allow victims to attend the disposition hearing.[29] Some of these states, however, only recognize these rights in cases involving offenses that would be considered felonies if committed by adults.[30]

The rights of victims of juvenile offenders should mirror the rights of victims of adult offenders in the United States. Crime victims should not be discriminated against based upon the age of their offenders.

Sharon English,
Deputy Director,
Office of Prevention
and Victim Services,
California Youth Authority

In the important area of plea consultation, by 1995, only 16 states had extended the right to victims of juvenile offenders to receive an explanation of or consultation about plea agreements.[31] While protection from intimidation and harm remains important, laws in only 15 states establish the right of victims to be notified of juvenile offenders' bail and predisposition release.[32] Texas has addressed this problem by passing a statute that gives victims the right to have the court consider their safety when determining if a juvenile should be detained prior to adjudication.[33]

By 1997, eight states had raised victims' rights in the juvenile system to constitutional status. Alaska, Idaho, Missouri, Oregon, and South Carolina have included victims of juvenile offenders in their victims' rights constitutional amendments, and Arizona, Oklahoma, and Utah

have authorized legislative extension of victims' constitutional rights to juvenile proceedings.[54]

At the national level, juvenile crime and victimization received considerable attention in the 1990s. In 1991, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) of the U.S. Department of Justice released a nationwide evaluation of juvenile justice-based victim service programs, *Helping Victims and Witnesses in the Juvenile Justice System*, which served as an important early roadmap for federal action.[55] OJJDP also sponsored, in cooperation with the American Probation and Parole Association, the development of juvenile restitution programs, policies, and procedures.

In 1994, the Victims Committee of the American Correctional Association issued a report on victims of juvenile offenders, which found that the majority of victims' rights statutes enacted up to that time did not include protections for victims of juvenile offenders and that most state juvenile codes were silent about victims.[56] In 1996, crime victims' rights and services within juvenile justice systems were elevated to national importance with the release of the *National Juvenile Action Plan*, a comprehensive strategy to address juvenile violence, victims of juvenile offenders, and the juvenile justice system.[57] The document, developed by the Coordinating Council on Juvenile Justice and Delinquency Prevention, chaired by Attorney General Janet Reno, with extensive input from the Office for Victims of Crime, called for the expansion of victims' rights and services within juvenile justice systems.

While much has been accomplished for victims of juvenile offenders through state and federal action to reform the juvenile justice system, much remains to be done. Not only are rights for victims within the juvenile justice system inconsistent nationwide, many are not enforced. According to the National Victim Center, which conducted an in-depth review of victims' rights within the juvenile justice system, "most of the rights for victims of juvenile offenders should more accurately be called suggestions, or recommendations, as they are only advisory in nature."[58] As additional laws are enacted across the nation, enforcement of victims' rights in the juvenile justice system must be made as great a priority as it is in the adult criminal justice system.

Recommendations From the Field for Victims' Rights

A global challenge issued by the field that serves as the foundation for every recommendation in this section is that **consistent, fundamental rights for crime victims should be implemented in federal, state, juvenile, and tribal justice systems, as well as in administrative disciplinary proceedings, including military hearings.**

The rights described in this section are among the most significant recommendations in *New Directions*. While victims' rights have been enacted in states and at the federal level, they are by no means consistent nationwide. All too often they are not enforced because they have not been incorporated into the daily functioning of *all* justice systems and are not practiced by *all* justice professionals. Moreover, most systems lack enforcement mechanisms, leaving crime victims without adequate legal remedies to enforce their rights when they are violated.

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #1

The U.S. Constitution should be amended to guarantee fundamental rights for victims of crime. Constitutionally protected rights should include the right to notice of public court proceedings and to attend them; to make a statement to the court about bail, sentencing, and accepting a plea; to be told about, to attend, and to speak at parole hearings; to notice when the defendant or convict escapes, is released, or dies; to an order of restitution from the convicted offender; to a disposition free from unreasonable delay; to consideration for the safety of the victim in determining any release from custody; to notice of these rights; and to standing to enforce them.[a]

A federal constitutional amendment for victims' rights is needed for many different reasons, including: (1) to establish a consistent "floor of rights" for crime victims in every state and at the federal level; (2) to ensure that courts engage in a careful and conscientious balancing of the rights of victims and defendants; (3) to guarantee crime victims the opportunity to participate in proceedings related to crimes against them; and (4) to enhance the participation of victims in the criminal

[a] On June 25, 1996, President Clinton announced his support for a victims' rights amendment to the Constitution. The President did not endorse any particular language, but made clear that any amendment should establish several rights, including the right: (1) to be notified about public court proceedings and not to be excluded from them; (2) to be heard, if present, regarding bail, sentencing and the acceptance of a plea; (3) to be told about parole hearings and to attend and speak at such hearings if present; (4) to notice of a defendant's release or escape; (5) to appropriate restitution; (6) to input concerning conditions of confinement and release to protect the victim from the defendant; and (7) to notice of their rights. At a June 1997 hearing before the U.S. House of Representatives Judiciary Committee, Attorney General Janet Reno testified to the Administration's belief that the victims' rights amendment must not erode defendants' fundamental protections. The Attorney General further testified that this goal can be achieved most effectively by including express language to that effect in the amendment.

justice process. 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. Such an amendment would ensure that rights for victims are on the same level as the fundamental rights of accused and convicted offenders. Most supporters believe that it is the only legal measure strong enough to ensure that the rights of victims are fully enforced across the country. They also believe, however, that the efforts to secure passage of a federal constitutional amendment for crime victims' rights should not supplant legislative initiatives at the state and federal level.

Granting victims of crime the ability to participate in the justice system is exactly the type of participatory right the Constitution is designed to protect and has been amended to permanently ensure. Such rights include the right to vote on an equal basis and the right to be heard when the government deprives one of life, liberty, or property.

While the Justice Department has not endorsed specific language for a victims' rights constitutional amendment, the importance of extending constitutional rights to crime victims has been strongly supported by Attorney General Janet Reno. In August 1996, she stated:

> [It] is clear to me that the best way to secure consistent and comprehensive rights for victims is by including those fundamental rights within the U.S. Constitution. . . . What victims want is a voice, not a veto, in our criminal justice system. Today, victims' rights vary significantly from state to state. The federal government, adult and juvenile justice systems, and the military all provide different rights for victims. Victims' rights should not depend upon the state in which they live, whether the crime is federal or state, or whether it occurs on a military base or in Indian country. Fundamental rights for victims should apply in every forum.[39]

The Attorney General reiterated her support for a victims' rights constitutional amendment in testimony before the Senate Judiciary Committee on April 16, 1997, and before the House Judiciary Committee on June 25, 1997.

While the vast majority of national victims' organizations and a number of other groups including the National Governors Association, the American Correctional Association, and the Victims' Committee of the International Association of Chiefs of Police favor a victims' rights constitutional amendment, some victims' organizations and civil rights and civil liberties groups do not support such an amendment.[40] Many of these organizations believe that such an amendment would undermine the rights of the accused, particularly the right to due process, and that

reforms should be achieved through statute rather than constitutional amendment. Organizations that advocate for battered women have expressed concern that victims of domestic violence who are tried as offenders may be disadvantaged by a victims' rights constitutional amendment. In addition, judges have raised concerns over the potential increase in federal court supervision of state court activities, and prosecutors and other justice officials have expressed concerns, including that they do not have the resources to implement victims' rights laws in cases involving large numbers of victims.

Advocates for a victims' rights constitutional amendment respond to these concerns by indicating that they are not proposing that victims' rights be given more weight than the rights of the accused. Rather, they want victims' rights to be given equal weight which would require courts to engage in a careful and conscientious balancing of the rights of both. They note that many judges across the country routinely bar victims of violent crime from attending the trials of the individuals accused of committing those crimes and do not consider whether prohibiting attendance actually would violate the defendant's right to due process. In addition, a victims' rights constitutional amendment is needed to ensure that courts do not determine that victims' statutory rights are automatically trumped by defendants' federal constitutional rights.

Proponents of a federal amendment also note that while states' victims' rights statutes and constitutional amendments have led to positive reforms, states have failed to implement state statutory and constitutional rights for victims in significant numbers of cases. In the mid-1990s, the National Victim Center, under a grant from the National Institute of Justice, studied implementation of victim rights laws in four states.[41] Two states were selected because they had strong state statutory and constitutional protection of victims' rights, and two were selected because they had weaker protection. The study surveyed more than 1,300 crime victims and was the largest of its kind ever conducted. It found that many victims were still being denied their rights, even in states with strong legal protection.[42] It concluded that state protections alone are insufficient to guarantee the provision of victims' rights.[43]

It is our hope that putting victims' rights in the same document which guarantees the rights of the accused and convicted offenders, that they will not be subject to violation at will, nor subject to changing political winds. It is our hope that victims' rights will be taken just as seriously, and treated with as much respect, as the rights of the accused.

David Beatty,
Director of Public Policy,
National Victim Center

Key findings of the study included:

- Nearly half of the victims, even in the two states with strong protection, did not receive notice of the sentencing hearing—notice that is essential for victims to exercise their right to make a statement at sentencing.
- While both of the states with strong statutes had laws requiring that victims be notified of plea negotiations, and neither of the weak protections states had such statutes, victims in both groups of states

were equally unlikely to be informed of such negotiations. Laws requiring notification of plea negotiations were not enforced in nearly half of the violent crime cases included in the study.

- Substantial numbers of victims in states with both strong and weak protection were not notified of other important rights and services, including the right to be heard at bond hearings, the right to be informed about protection against harassment and intimidation, and the right to discuss the case with the prosecutor.[41]

National victims' organizations have reported several cases that illustrate how easily victims' statutory rights can be violated in the judicial process. In one case, a woman and her family were injured by a drunk driver. The defendant was charged with a felony. The woman told the prosecutor she wanted to provide a victim impact statement in open court, a right secured by the state's victims' bill of rights. The judge denied her request, citing his "busy docket."

Many victim advocacy groups believe that a federal constitutional amendment is needed to increase the involvement of victims in judicial proceedings. Today, many victims do not report crime or participate in the criminal justice system for a variety of reasons, including fear of revictimization by the system and retaliation by the offender. Victims will gain confidence in the system if their rights are recognized and enforced, their concerns for safety are given serious consideration, and they are treated with dignity and respect.

When my 16-year-old son was killed by a drunk driver, I wasn't allowed to give a victim impact statement or to tell the judge how the death of my child had affected our family. But the defendant brought a parade of witnesses on his behalf. Our forefathers recognized that as the times changed, so would the Constitution—and indeed it has. A time came for slavery to be abolished—and the Constitution was amended to assure it. A time came for women to vote—and the Constitution was amended to assure it. The time now has come for victims of crime to have a balanced voice with those of their offenders, and the United States Constitution must be amended to ensure it.

Katherine Prescott, former National President, Mothers Against Drunk Driving

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #2

Crime victims should have the right to notice of public court proceedings, including pretrial release hearings, plea agreements, sentencing, appeals, and appropriate postconviction release proceedings such as probation and parole hearings. Victims should also have the right to notice of any significant change in the status of defendants and to receive timely notice, upon request, of inmates' temporary or permanent release, or inmates' escape or death.

The right for crime victims to be notified about public court proceedings in a timely fashion is fundamental to their exercise of other rights such as the right to be present and heard. Without timely notification of proceedings, victims cannot exercise other participatory rights.

The 1982 Task Force on Victims of Crime recommended legislation and policies to ensure that victims are furnished case status information, prompt notice of scheduling changes for court proceedings, and prompt notice of defendants' arrest and bond status. Fifteen years later, many states, but not all, have adopted laws requiring such notice. While the majority of states mandate advance notice to crime victims of criminal proceedings and pretrial release, many have not implemented mechanisms to make such notice a reality. Procedures for notification, if defined at all, vary widely. Some states require immediate notice of a defendant's pretrial release. Others only provide victims with a telephone number to call to find out whether the arrested defendant has been released.

Many states do not require notification to victims of the filing of an appeal, the date of an appellate proceeding, or the results of the appeal. Also, most do not require notification of release from a mental facility or of temporary or conditional releases such as furloughs or work programs.

Some state laws require that notice be made "promptly" or within a specified period of time. Both prosecutors and victims often complain that in many instances the time between the scheduling of a hearing and the date of that hearing is too short to give victims adequate notice. Victims also complain that prosecutors do not inform them of plea agreements, the method used for disposition in the overwhelming majority of cases in the United States criminal justice system. Many state victims' rights laws do not require this type of notice.

Many states require victims to request notice, and most require victims to maintain a current address and telephone number on file with the notifying agency. In such cases, efforts should be made to establish a system whereby a single request will entitle victims to notice throughout the criminal justice process. Similarly, victims should be required to keep their addresses current with one agency that would serve as a central source of information for other officials within the criminal justice system. The most effective means of implementing this recommendation is to establish a centralized case tracking system that allows all relevant agencies to both access and update victim notification files, which would then be incorporated on secure, confidential screens. Victims could request notice and maintain contact information with all agencies by notifying only one agency.

Notification of victims when defendants or offenders are released can be a matter of life and death. Around 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 were unable to take precautions to save their lives because they had not been notified of the

For three years I was a victim of domestic violence, including being kidnapped, and raped. I consider myself a 'fortunate victim' as a conviction put the perpetrator in prison for many years. My concern at this point is his coming release. Upon his release my entire life will change. I hope and pray to remain stable...

A survivor of domestic violence

release. Notice of release is an essential part of a victim's right to reasonable protection, a fundamental right described more fully in Recommendation 6.

Our world is clearly hurtling into the next century at a rapid pace. New technologies are on the street that were unimaginable only a few years ago. Criminal justice practitioners have to be able to tap into these advances to ensure an effective and efficient response to violent crime and to respond to an increasing offender population. Indeed, we must all become part of the technological revolution that is changing our lives, our workplaces, and our world.

Laurie Robinson, Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice

Today, some communities use automated voice response technology to notify victims of release information, including systems that phone victims repeatedly until they are reached. Other jurisdictions are implementing victim notification systems that combine several technological solutions.

Georgia's law requires officials to notify a stalking victim by telephone before an offender is released, or, if such notice cannot be made, to call the victim at least twice in no less than 15 minute intervals within 1 hour of the offender's release.[45] The court is also responsible for notifying victims of bail hearings by telephone.

The nation's largest offender release notification system was recently implemented in New York City, where 133,000 inmates are released annually from city jails. Any victim with access to a telephone can register for notification simply by calling a number and providing an inmate's name, date of birth, and date of arrest, or the inmate's state identification number. When the inmate is released or transferred from custody for any reason, the victim receives periodic telephone calls for 4 days or until the victim confirms receipt of the notification by entering a personal code. The police, local prosecutors, victim assistance providers, and local hotline staff have all been trained to explain the system and to encourage victims and intimidated witnesses to use it. Other systems in operation around the country allow victims and members of the public to determine the status of any incarcerated offender by calling an automated telephone information system.

Technology offers increasingly powerful tools for providing immediate notification to large numbers of crime victims through the Internet, televised press conferences, and community meetings when victim contact information is limited or when usual procedures are impractical. The Illinois Department of Corrections website allows victims to track the status and location of all inmates 24 hours a day, 7 days a week. Similar approaches are being developed in Ohio and Missouri. During the cases concerning the bombing of the Alfred P. Murrah Federal Building, prosecutors and victim-witness coordinators held several highly publicized meetings in the community for victims who wanted updated information and an opportunity to interact with prosecutors and other staff members. Representatives of prosecutors and victims organizations should meet to discuss protocols for ensuring appropriate notification in cases involving hundreds of victims, not only in cases of massive criminal violence, but also in white collar crime cases such as telemarketing fraud.

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #3

Federal and state laws should be strengthened to ensure that victims have the right to be present throughout all public court proceedings.

The right of crime victims to attend proceedings is fundamental and essential to the meaningful exercise of the other participatory rights described in this report. Notice of proceedings means little if the victim must remain outside the court or hearing room while the proceedings take place.

The most common justification for denying a victim's right of attendance in court is the need to keep them sequestered as potential witnesses. There can be no meaningful attendance rights for victims unless they are generally exempt from this rule. Just as defendants have a right to be present throughout the court proceedings whether or not they testify, so too should victims of crime. Moreover, the presence of victims in the courtroom can be a positive force in furthering the truth-finding process by alerting prosecutors to misrepresentations in the testimony of other witnesses.

The legitimacy of victim attendance has been recognized in a number of states that provide that victims should not be subjected to court exclusion if they are potential witnesses, or in states where laws have been enacted that generally recognize an essentially unqualified right for victims to be present at these proceedings.[46] A number of states provide that crime victims should have the right to attend every proceeding that the defendant has the right to attend[47], or that victims be sequestered only on the same basis by which defendants are sequestered.[48] Louisiana deals with the sequestration issue by providing that victims must testify first and thereafter may attend the proceedings. Alabama allows victims to sit at the prosecutor's table during trial.[49] Statutes to give victims the right to attend proceedings should be adopted in more states, extended to the juvenile justice system, and strengthened and clarified in states that already purport to provide that right. In many states, the right to attend and be heard often attaches to "all crucial proceedings," with no clear definition of which proceedings are covered by the statute.

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #4

Prosecutors should provide victims an opportunity for meaningful consultation prior to major case decisions such as dismissal,

reduction of charges, or acceptance of plea agreements. Judges should not accept plea agreements without first asking prosecutors on the record if they have consulted the victim, and judges should take the views of the victim into account before making a final sentencing decision. Special procedures should be developed for cases involving multiple crime victims, such as acts of mass violence, massive antitrust or telemarketing cases, where consultation may be difficult.

Many states give victims a right to consult with prosecutors. The most common of these laws require prosecutors to consult with victims prior to accepting plea agreements.[50] Others require prosecutors to consult with victims prior to dismissing charges,[51] declining prosecution,[52] or making other disposition decisions.[53] State laws also compel consultation with victims prior to trial.[54]

Some states extend the right to consultation to victims in juvenile cases.[55] In addition, legislators have attempted to address victims' lack of knowledge about the justice system by requiring prosecutors to provide explanations of procedures and dispositional decisions in nontechnical language.[56] Typical are the Nebraska statutes requiring consultation "regarding the content of and reasons for the plea agreement."[57] Louisiana goes further by giving victims the right to retain private counsel to confer with the prosecution regarding disposition.[58]

Enforcing victims' right to consultation, however, is another matter. Some states specifically require prosecutors to consider the recommendations of victims when making diversion decisions. Other states require prosecutors to confirm their consultation with the victim before a plea agreement may be accepted. In these states, prosecutors must state on the record that the victim was notified and the plea discussed, or explain why consultation was not possible.[59]

Lack of communication about a proposed plea agreement continues to be one of the highest sources of victim dissatisfaction with the criminal justice system.[60] Victims should have the opportunity for meaningful consultation with the prosecutor at the plea agreement stage or prior to the dismissal of charges. While victims should not have the ability to veto prosecution decisions in a case, they should have a voice.

Victims' rights laws should recognize that cases involving large numbers of victims may call for exceptions to the requirement for victim consultation. This recognition should not, however, excuse prosecutors from their obligation to use any appropriate and reason-

able means of consulting with victims. In the Alfred P. Murrah Federal Building bombing case, which involved hundreds of crime victims, prosecutors held widely publicized community meetings to give victims numerous opportunities for consultation. Representatives of prosecutors and victims organizations should meet to develop a protocol for ensuring appropriate consultation in cases involving numerous victims.

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #5

Crime victims should have the right to be heard in major court proceedings including pretrial release hearings, bail hearings, at sentencing, and before the disposition of plea agreements, probation, parole, and commutation. Input should be permitted through both allocution and submission of written, videotaped, or audiotaped statements.

In recognition of the special safety risks victims face when offenders are released, some states have also passed laws granting victims the right to attend and participate in pretrial release hearings. Many legislatures have adopted laws allowing judges to consider the risks offenders pose to the community in general and to individual victims when ruling on their release.[61] Maryland has taken the concept one step further by passing a law that establishes a rebuttable presumption that those accused of violent crime constitute an inherent danger to other persons or to the community at large.[62] Allowing the victim to be heard on the issue of pretrial release helps to inform the court about the degree of danger posed by a defendant.

I don't believe half of the American population or even a small portion knows what can happen to you when you are a victim of a crime going through the criminal justice process.

A victim

Because most criminal cases are resolved through negotiated pleas, the right of victims to be heard by judges before a plea is accepted is essential to meaningful participation in the justice process.

In sentencing proceedings, convicted offenders traditionally have been given the right of allocution, while their victims have not. While all jurisdictions have adopted rights for victim input, not all states permit allocution, an oral statement provided in court by the victim or his or her representative. In addition, the right of victims to provide impact statements has not been extended to all victims, including those in the juvenile justice system. These shortfalls in existing laws must be corrected.

States should consider adopting the use of vertical impact statements and include them in criminal and juvenile case files at the

outset. When necessary, victims should be allowed to update these statements to record the impact of victimization as time passes. While the right to be heard at sentencing is well-established, statutes allowing victim input at other stages of the justice process are just now gaining prominence. A few states provide that victims may make a written statement at the outset of the case; the statement then remains in the file for the court's consideration throughout the criminal justice proceedings. Victims should also have the right to submit audio- or videotaped statements, or statements via teleconferencing, particularly in parole and other postsentencing hearings, when appearing in criminal or juvenile justice proceedings would create a physical, emotional, or financial hardship for victims or put their safety at risk.

Crime victims' rights laws strive to give victims' standing in the criminal justice system, which is all about them, but has traditionally been without them.

State Senator William Van Regenmorter, Chairman of the Judiciary Committee, Michigan Senate

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #6

Victims and witnesses of crime should have the right to reasonable protection, including protection from intimidation. The safety of victims and witnesses should be considered in determining whether offenders should be released from custody prior to completing their full sentence.

The right to protection from intimidation, harassment, and retaliation by offenders and the accused is becoming a major focus of public and law enforcement attention. Justice officials report an increase in the harassment and intimidation of witnesses, making it increasingly difficult to obtain convictions because crime victims and witnesses are afraid to testify.[65] Legislatures have attempted to address this problem by mandating "no contact" orders as a condition of pretrial or posttrial release. In addition, victims' bills of rights generally require victims to be notified at the outset of the judicial process about legal action they can take to protect themselves from harassment and intimidation.

Harassment or intimidation of a victim or witness by a defendant or convicted offender should result in automatic revocation of pretrial or supervised posttrial release, and should be considered an aggravating factor in sentencing. Such violations should be charged and prosecuted under relevant antiharassment, intimidation, and stalking laws. Any punishment imposed for the separate crime of intimidation should run consecutively after the sanction for the original crime. All protective orders, including those issued as a condition of release, should be maintained in a central, automated database that can be accessed by law enforcement and other justice officials throughout the country. Violations of protective orders should be taken seriously, swiftly

sanctioned, and enforced not only within states but across state lines in accordance with current federal law.

Courts must have clear authority to detain defendants whose danger to victims or others cannot be controlled adequately by other means. Retaliation against a victim or witness when an offender is sentenced to probation or released on parole should result in revocation of that release.

States should also increase security in the courthouse to reduce the likelihood of violence when offenders and victims come into contact before, during, and after justice proceedings. Waiting areas for victims should be separate from those for defendants. Victim awareness education should be required for corrections, parole, and probation officials to increase their understanding of the dangers victims face and to help them communicate with victims about their concerns for safety.

These needs have been met in varying degrees by the states. Many states have enacted laws requiring courts to establish separate and secure waiting areas to protect witnesses and victims waiting to testify from contact with a defendant or his family and friends.[64] Many states have established specific offenses for the harassment of victims and witnesses[65] and made harassment grounds for bail revocation and reincarceration.[66] Some state legislatures have provided that victims need not submit to defense counsel requests for interviews or contact prior to trial.[67] At least 30 states have taken steps to limit or control face-to-face confrontations at parole hearings by holding separate proceedings for offenders and victims, permitting victims to testify outside the presence of the offender, including outside the prison setting, and teleconferencing offenders into parole hearings at which only parole officials and the victim are present.[68]

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #7

Orders of full restitution for crime victims should be mandatory. Restitution orders should be automatically entered as civil judgments at the end of the offender's supervisory period if not paid. Alternatively, legislation could be enacted giving judges and paroling authorities jurisdiction for enforcing restitution orders until they are fully paid.

Restitution is one of the most significant factors influencing victim satisfaction with the criminal justice process.[69] While restitution has

always been available via statute or common law, it remains one of the most underutilized means of providing crime victims with a measurable degree of justice. In part, this neglect led the President's 1982 Task Force to call for mandatory restitution in all criminal cases unless the presiding judge can offer compelling reasons why restitution should not be ordered.[70] More than half of the states (29) passed laws in response to this recommendation by the end of 1995.[71] The exceptions permitted in state restitution laws vary considerably from state to state. South Carolina's statute requires that "compelling and substantial" reason be given for not ordering restitution, while courts in West Virginia need only show that restitution would be impracticable.[72] In 1996, Congress made restitution mandatory in federal criminal cases involving violent crimes with the enactment of the Mandatory Victim Restitution Act, Title II of the Antiterrorism and Effective Death Penalty Act.[73]

Historically, only persons who have suffered physical injury or financial loss as a direct result of crime have been eligible to receive restitution for out-of-pocket expenses. But as restitution statutes have evolved, definitions of who qualifies and the losses covered have broadened. Today, in some states, family members, victims' estates, and victim service agencies and private organizations that provide assistance to victims are eligible for restitution.[74] Definitions for compensable losses under state restitution laws have broadened as well. They now include the costs of psychological treatment, sexual assault exams, HIV testing, and occupational or rehabilitative therapy, as well as lost profits, moving and meal expenses, case-related travel expenses, and burial expenses.

Judges should be encouraged to order full restitution, which can be more effectively enforced through recent legislative innovations. Offenders who willfully fail to pay risk being held in contempt, imprisoned, or having their parole or probation extended or revoked. In some states, authorities are authorized to seize financial assets and property to satisfy restitution orders. Other states allow restitution orders to be enforced as civil judgments at the time of the order or at the end of the offender's supervisory period. During incarceration, prison wages, inheritances, federal and state income tax refunds, and lottery winnings should be automatically attachable. Moreover, probation and parole officials must be provided the motivation and means to administer restitution collection, and both must play an active role in enforcing orders when offenders refuse to pay. (For more information on restitution, see Chapter 15.)

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #8

Victims should have the right to disposition of proceedings free from unreasonable delay.

One of the greatest hardships victims endure in the criminal justice process is the delay of scheduled proceedings. Just as defendants have the right to a speedy trial, so too should crime victims. Repeated continuances cause serious hardships and trauma for victims as they review and relive their victimization in preparation for trial, only to find the case has been postponed. Delays are sometimes used as a defense tactic. As a case drags on, witnesses move away, die, give up in frustration, or lose clear recollections of the facts. The impact of continuances is particularly difficult for victims whose memories may fade over time or whose health may deteriorate.

The schedule and concerns of victims should be taken into consideration by judges before they grant continuances. A disposition free from unreasonable delay helps to ensure that victims as well as defendants receive speedy trials and that the impact of delay on victims is considered by judges in response to requests for continuances. Several states have already adopted such standards as law. As of 1996, 12 states gave crime victims a constitutional right to a speedy trial or prompt disposition of proceedings. At least 13 others have enacted statutes to give victims such a right or to ensure that their interests are considered in rulings on continuances.[75]

The vision of America died at 9:02 a.m., April 19, 1995. Everyone feels so personally violated here. We have a single mission. The goal is to go from victim to survivor.

Jim Horn
FBI Agent, Retired
Behavioral Sciences Unit
Quantico, Virginia
Comments following the Alfred P. Murrah Federal Building bombing, Oklahoma City, Oklahoma

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #9

All crime victims should have the right to a full range of services and support to help them recover physically, psychologically, and in practical ways from the effects of crime, whether or not they report the crime or become involved in related criminal prosecutions or juvenile adjudications.

In the aftermath of victimization, victims may have many different needs. Victims who report crime need information, assistance and protection when they choose to participate in the criminal and juvenile justice process. Not only should victims have the right to be heard or consulted in decisions that affect them, but they should receive protection if they are witnesses and transportation to and from legal proceedings.

Victims respond differently to their experiences. Some victims may be reluctant or unwilling to report the crimes committed against them and may fear involvement in the justice system. For example, some battered women may be too frightened to report violent incidents to the police. Sexual assault victims fear the loss of privacy in coming forward to report the crime. Other victims distrust law enforcement agencies, and immigrants who become victims sometimes fear deportation.

Regardless of whether they report the crime, many victims need emergency and ongoing services such as health care, shelter, lock replacement, cash assistance, social and community services and support, mental health counseling, victim compensation, child care services, referrals to support groups, translators, and transportation. Chapters 6 and 14 address these issues in greater detail.

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #10

Crime victims should have fundamental rights that are enforced in all juvenile justice proceedings.

Traditionally, juvenile justice systems have been cloaked in secrecy. Victims have had limited rights within those systems, which were designed years ago to protect the confidentiality of juvenile offenders. Although some state victims' bills of rights and constitutional amendments include rights for victims of juvenile offenders, most states have extended only selected rights to these victims. Moreover, victims' rights enacted on the federal level do not apply to victims of juvenile offenders. The participation of victims in juvenile justice proceedings is important because it recognizes the impact of the crime on victims and encourages young offenders to consider the personal impact of their offenses. Putting a human face on the results of their destructive behavior helps offenders take responsibility for their actions and deters future crime.

The rights of victims of juvenile offenders should mirror the rights of victims of adult offenders. Victims of juvenile offenders should receive information and notification about the status of the case and the offender from the point of arrest through the juvenile corrections system. Victims of juvenile offenders are frustrated by their chronic inability to access vital information about their case due to confidentiality restrictions. Confidentiality protections for juvenile offenders which preclude victims from receiving vital information must be lifted

Victims of juvenile offenders should have the right to provide input through victim impact statements. While all states now allow victim impact statements at sentencing in the criminal justice system, only

28 states had extended this right to victims of juvenile offenders as of 1995.[76] Without victim impact information, the financial, physical, and emotional injuries of crime cannot be considered when determining adequate restitution or appropriate sentencing.

Victims of juvenile offenders should have the right to restitution, and states should aggressively pursue collection and disbursement of such awards. Restitution is underutilized for victims of juvenile offenders. Restitution has two important benefits. It compensates the victim for losses suffered as a result of the juvenile's behavior, and it holds the juvenile accountable for the damages he or she has caused. Forty-six states have statutory authority to order juvenile offenders to pay restitution.[77] Some states make juveniles and their parents jointly responsible for damages in a civil action or restitution. The majority of the statutes place limits on the amount of damages or restitution that can be ordered.[78] Nonetheless, this important right is underutilized. A 1991 nationwide study found that only 17 states collect restitution from juvenile offenders, and only 13 state juvenile corrections agencies disperse the restitution to victims.[79]

Finally, victims of juvenile offenders should have the same right to reasonable protection they would have enjoyed had the offender in their case been older. Half of the states give victims of adult offenders the right to be reasonably protected from the offender during the criminal justice process, while this right in most cases is not extended to victims of juvenile offenders. Given the increase in violent crimes by juveniles,[80] the need for protection is plainly present.

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #11

All criminal and juvenile justice agencies, including courts, as well as victim assistance programs, should help ensure that victims receive information about their rights in a form they understand.

Justice system and allied professionals who come into contact with victims should provide an explanation of their rights and provide written information describing victims' rights and the services available to them. Furthermore, rights and services should be explained again at a later time if the victim initially is too traumatized to focus on the details of the information being provided. Explanations of rights and services should be reiterated by all justice personnel and victim service providers who interact with the victim.

To provide this critical information, justice and allied professionals need specialized training on the most effective communication

techniques to use with victims, including child and elderly victims, victims who do not speak English, victims from diverse cultures, and victims with disabilities, including those who are blind or deaf or who have cognitive or developmental disabilities. Brochures describing victims' rights and services should be developed in the languages used by crime victims in each community, and all brochures and critical victim information written in English should include a sentence offering the literature in other languages as needed. Special provisions should be made for communicating with victims who are blind or visually impaired using audiotapes, special computer disks, Braille, or other communication technologies. Service providers should be trained to use sign language interpreters and TDD technology to communicate with victims who are deaf or hard of hearing.

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #12

Victims of crime should receive assistance in exercising their participatory rights. Advocates should be available to explain rights to victims, help them to exercise those rights and, when necessary, serve as their representatives in court and other key justice processes when victims are underage or incapacitated or if representation is otherwise appropriate.

One of the greatest barriers to victims participating in justice proceedings is their not having the means to do so. Many victims cannot afford to pay for parking, child care, or time off from work. Others do not have the resources to cover transportation costs to courts, especially if the trial or hearing is held outside their community. In these cases, every effort should be made to facilitate victim participation by providing special services such as child care, or paying for transportation and lodging expenses. For example, in the Alfred P. Murrah Federal Building bombing cases, government and non-profit agencies and the private sector formed a partnership to provide funding for victim travel expenses after the trial was moved from Oklahoma City to Denver, Colorado in 1997. In addition, the court in Denver set up a closed-circuit television communication in Oklahoma City to allow victims there to view the proceedings in Denver. New uses of technology should be considered to provide access to trials and other proceedings for victims who are physically unable to attend them. Furthermore, more consideration must be given to the tremendous diversity among victims in the design and delivery of victim services.

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #13

States should review their victims' rights statutes and constitutional amendments to determine if fundamental rights are extended to all crime victims.

Victims' rights in many states apply only to a special "class" of crime victims—victims of felonies. Many serious domestic violence and drunk driving cases prosecuted as misdemeanors are thus not covered by victims' rights statutes. States should consider extending victims' rights in all cases, regardless of their classification as felony or misdemeanor or violent or nonviolent.

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #14

States that have not already done so should adopt truth in sentencing reforms to ensure that victims know how long offenders will actually be incarcerated.

Why are there laws if they only protect the criminal?

A crime victim

Under traditional sentencing practices in most jurisdictions, release dates for offenders were set by parole authorities, and the actual periods of incarceration served by offenders had little relationship to the prison terms specified in criminal sentences. In recent years, many jurisdictions have adopted truth in sentencing reforms to limit or abolish parole and to make the time an offender serves more predictable. In federal cases, for example, parole has been abolished and "good time" credits are limited to 15 percent of sentences, forcing federal offenders to serve at least 85 percent of the sentence imposed in court.[81]

In addition to furthering penal objectives, truth in sentencing reforms serve important interests of victims. Victims as well as the public are entitled to know how long an offender will actually be incarcerated. Victims should not be burdened with the anxiety that offenders will be released prematurely, compelling them to appear repeatedly at postconviction hearings.

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #15

Federal and state laws should prohibit employers from taking adverse action against victims who must miss work to participate in the criminal or juvenile justice process.

In his statement endorsing a Victims' Rights Constitutional Amendment on June 25, 1996, President Clinton indicated that "[t]here ought to be . . . in every law, federal and state, a protection for victims who participate in the criminal justice process not to be discriminated against on the job because they have to take time off. That protection today is accorded to jury members; it certainly ought to extend to people who are victims who need to be in the criminal justice process." Without this protection, many workers cannot exercise their fundamental right to participate in justice proceedings. All jurisdictions should adopt the reform proposed by the President, and it should be enacted into federal law.

While protections for jurors are limited, victims should have, at minimum, the same levels of protections as jury members. To the extent possible, employers should be required to work with employees and their unions to ensure that victims maintain their employment after absences due to attendance at criminal and juvenile justice proceedings. Victims should continue to receive salaries or wages, reduced by any witness fees received, for a designated period of time. Afterwards, they should be able to use vacation and sick leave. In addition, judges should be encouraged to take employment concerns of victims and their employers into consideration when scheduling proceedings.

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #16

In cases where there is good cause to believe that bodily fluids were exchanged, victims should have the right to be tested and to have the accused or convicted offender tested at appropriate times for the HIV virus and sexually transmitted diseases. State statutes should require these tests to be conducted by specially trained personnel who can advise victims of the reliability, limitations, and significance of the test, as well as HIV treatment options. In addition, laws should specify the agency that will pay for HIV testing and pre- and posttest counseling, as well as treatment for any victims who test positive.

According to the National Victim Center, as of the end of the 1995 legislative session, 44 states had adopted laws providing mandatory testing of sexual offenders in cases involving sexual penetration or other exposure to an offender's bodily fluids. Of those, 16 make testing mandatory before conviction, and 33 require testing after. Six states

make testing mandatory both before and after conviction. Twenty-six states have a mandatory testing law that applies to juvenile offenders.[82] In 1990, the Federal Government passed legislation making HIV testing of convicted sexual assault offenders mandatory for states to be eligible for certain prison grants.[83] The Violent Crime Control and Law Enforcement Act of 1994 gives Federal victims of sexual assault the right to obtain an order requiring the defendant to submit to an HIV test, and to obtain the results of that test.[84] It also provides for follow-up testing and counseling.

Typically, pretrial testing of defendants is left to the discretion of the court, which must find that there has been significant exposure and that the health and safety of the victim may be threatened. The court is required to hold a hearing, during which the victim must show that the defendant has been charged with a sexual offense and that the test would provide information necessary to protect the health of the victim and his/her partner(s). Some statutes permit a series of tests at 6-month intervals for up to 2 years to detect viruses that do not show up on initial tests.

When victims have possibly been exposed to HIV, they should be referred to an anonymous testing site that uses the most advanced technologies, guarantees maximum reliability of test results, and provides pre- and posttest counseling regarding transmission of the virus and the testing process. If after receiving pretest counseling the victim wants to determine the offender's HIV status, the offender should be tested as soon as possible, including prior to conviction, with a second test at least 3 months later. Regardless of the decision to test the offender or the test results, victims should be encouraged to be tested to determine their HIV status. Although testing the offender may be important to the victim, it should be emphasized that testing the offender does not replace focusing on the victim's medical and emotional needs. Testing the victim in the immediate aftermath of a victimization will only provide information about the victim's HIV status prior to the crime. If a victim was exposed to HIV during the crime, testing 1 month and then 3 months after the event (or at other times recommended by health authorities) will provide a clearer indication of whether the virus was transmitted by the crime. While there is a relatively low risk of transmission, victims who test positive should be given access to free FDA approved medical treatments of their choice.

Counseling is an essential part of responding to the risk of HIV transmission in a crime. Victims may not understand the latency of the disease, and may not fully appreciate the limited reliability of a negative test result. States frequently require counseling in conjunction with testing, but specifications vary widely from jurisdiction to jurisdiction. In some states, counseling must be provided contemporaneously with

the test, as in Maine, where counseling must discuss the nature, reliability, and significance of the test, as well as its confidential nature.[85] In contrast, other states such as Michigan simply require that the agency notifying the victim of the results of the test also refer the victim to counseling.[86] Oklahoma specifies that the victim receive counseling before and after the test.[87] Florida requires the testing agency to afford "immediate opportunity for face-to-face counseling" when the results are revealed to the victim.[88] In some states, the statute fails to provide for counseling.

Most laws require confidentiality of test results, but advocates still report problems with insurance companies that, upon learning of the victim's HIV test or results, raise health insurance premiums or cancel the victim's policy altogether. Minnesota has enacted a law to prohibit such practices.[89] Wisconsin's law provides that the results of a test ordered by the court will not become part of a person's permanent medical record. States should enact legislation to protect victims from such practices.

It is essential to recognize the impact of crime on a neighborhood and to give residents the information and means to get involved.

United States Attorney
Thomas Schneider,
Eastern District of Wisconsin

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #17

State and federal laws should allow, and criminal and juvenile justice agencies should facilitate, community impact statements as a means for members of a neighborhood or community that has been impacted by crime to have input into sentencing.

In many cases, neighborhoods and communities as well as individuals are victims of crime. This is especially true in drug, gang, and prostitution cases where criminal activity endangers and degrades entire neighborhoods, affecting property values and quality of life issues. A few prosecutors have pioneered the use of community impact statements, which are, in effect, an expanded version of the victim impact statement. For example, as noted in Chapter 3, the District Attorney for Milwaukee, Wisconsin and the United States Attorney for the Eastern District of Wisconsin notify members of the community when drug arrests are made and encourage them to become involved in the criminal proceedings by submitting impact statements. These offices inform residents in affected neighborhoods of arrests and trial dates and coordinate outreach efforts in concert with probation agencies to help them prepare their statements. To encourage this important type of participation in criminal justice proceedings, both state and federal laws should recognize communities as victims and permit this form of input.

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #18

Victims should have standing to enforce their rights, and sanctions should be applied to criminal and juvenile justice professionals who deny victims their fundamental rights.

Although more than 27,000 state and federal laws have been enacted to protect and enforce the interests, rights, and services for crime victims, the *consistent* implementation and enforcement of these laws is an area of great concern. Victims report that criminal and juvenile justice officials at times disregard their statutory and constitutional rights, and that they have no legal recourse when their rights are violated. States should enact provisions that give victims measures to enforce their rights when they are disregarded.

While limited legal remedies such as court-ordered injunctions and writs of mandamus are generally available to force criminal justice personnel to comply with the law, states are beginning to pass laws that provide specific statutory remedies and recourse for crime victims. A Maryland statute enables victims of violent crimes to apply for "leave to appeal" any final order that denies victims certain basic rights.[90] Arizona law grants victims the right to challenge postconviction release decisions resulting from hearings at which they were denied the opportunity to receive notice, attend, or be heard. Arizona law allows victims to sue for money damages any government entity responsible for the "intentional, knowing or grossly negligent violation" of the victims' rights.[91]

It is critical that effective measures be available to remedy violations of victims' rights, including authority for the government to obtain redress through applications for mandamus and appeal. The need for this reform in federal proceedings is illustrated by the first trial in the bombing of the Alfred P. Murrah Federal Building, in which the trial court ruled that victims would not be allowed to attend the trial if they wished to be heard at the sentencing stage. On review, the Tenth Circuit Court of Appeals held that victims had no standing to assert their right to be present and that the government could not enforce that right by appeal or by seeking a mandatory order.[92]

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #19

States and the federal government should create compliance enforcement programs, sometimes referred to as victim ombudsman programs, to help facilitate the implementation of victims' rights.

State victims' rights compliance enforcement programs oversee justice officials' and agencies' compliance with crime victims' statutory and constitutional rights and investigate crime victim complaints relevant to those rights being violated.[93] A few states have created such programs within an existing agency or have established a new, state-level oversight authority. In initiating such a program, officials should consider the importance of meaningful remedies and sanctions for noncompliance with victims' rights laws; and ensure that victims, victim service providers, advocacy groups, and victim-sensitive justice professionals are involved in the program planning process. In addition, justice agencies should consider increasing crime or court surcharges to support a compliance enforcement functions, and should evaluate overall compliance enforcement system.

Innovative approaches to victims' rights oversight have been implemented in several states:

- The Minnesota Office of the Crime Victims Ombudsman (OCVO) protects the rights of victims by investigating statutory violations of victims' rights laws and mistreatment by criminal justice practitioners. OCVO is authorized to initiate its own investigation of alleged violations, recommend corrective action, and make its findings public to both the legislature and the press.
- The South Carolina Office of the Crime Victims' Ombudsman is empowered to act as a referral entity for victims in need of services, a liaison between victims and the criminal and juvenile justice systems in the course of their interaction, and a resolver of complaints made by victims against elements of those systems and against victim assistance programs. In addressing complaints, the South Carolina Ombudsman program is not limited to inquiries into violations of specific statutory rights, but may review other conduct that is potentially unfair to victims.[94]
- Colorado has recently enacted a state-level coordinating committee that serves an ombudsman function for victims' rights implementation.[95] The Colorado Victims' Compensation and Assistance Coordinating Committee and its Victims' Rights Act (VRA) subcommittee help victims enforce their rights by overseeing the actions of local government agencies. The subcommittee and full coordinating committee have the power to investigate VRA violations and to recommend action with which an agency must comply to rectify victims' complaints. The two bodies also monitor the implementation of those suggestions and may refer issues of noncompliance to the governor or attorney general.[96]
- Wisconsin has a state-level victims' services office—the Victim Resource Center (VRC)—which provides information and service referrals to victims and acts as a liaison between victims and

criminal justice agencies in resolving complaints concerning unlawful or inappropriate agency action. Though it lacks enforcement authority, the VRC protects victims' rights by investigating complaints and presenting its recommendations for corrective action to state criminal justice officials. The Wisconsin legislature is currently debating a measure that would prescribe remedies for violations of victims' rights laws and provide for the enforcement of Wisconsin's victims' rights constitutional amendment.[97]

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #20

Federal crime victims' rights should apply in military proceedings.

The extensive range of information, notification, and participatory rights that have been enacted on the federal level should be fully implemented for victims' rights within military justice proceedings. Some victims' rights established at the federal level are not implemented in military courts. Restitution for victims is frequently ordered as part of sentences for federal crimes, but there is no authority to do so under the Uniform Code of Military Justice.[98] Moreover, the military justice system has failed to adopt "truth in sentencing" reforms and continues to parole offenders, a practice that generally has been abolished in federal criminal cases. The Uniform Code of Military Justice should be amended to make restitution mandatory.

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #21

Indian tribes should review their legislation, policies, and court systems to enhance the fundamental rights of Native American victims.

There are 621 federally recognized tribes in the United States; each of these tribes is a separate sovereign with legislative and adjudicatory authority. There are 242 separate tribal court systems, trial and appellate, as well as numerous traditional dispute resolution forums unique to each tribal culture.[99] While many major crimes that occur in Indian country are prosecuted in federal or state courts, tribes retain concurrent criminal jurisdiction over Native American defendants.[100] Moreover, tribal courts are often the sole forum for prosecuting crimes and juvenile offenses involving child abuse and domestic violence.

Tribes should analyze and amend their laws and policies, as well as observe and change procedures of their courts, law enforcement offices, and human services agencies in order to protect and enhance the fundamental rights of Native American victims. Tribes should

establish joint tribal-state and federal forums to ensure that Native American victims are not lost in the jurisdictional complications of Indian country. They should also train their leaders, justice personnel, and community members on prevention measures and effective responses to crime in Indian country.

Not withstanding political pressures and lack of economic resources, a number of tribes have successfully implemented crime victims' rights ordinances, mandatory arrest policies for domestic violence, safe houses, community education projects, and an array of culturally appropriate systems for protecting Native American crime victims. Some tribes have included the rights of crime victims in their codes. For example, the Uniform Sentencing Policy of the Courts of the Navajo Nation includes the rights for victims to have input into plea agreements, proposed sentences, and restitution decisions. The Salt River Pima-Maricopa Indian Community Council passed a Children's Bill of Rights, and the Crow Tribal Council developed rights for domestic violence victims that are set forth in its Domestic Abuse Code.

From tribal police intervention to tribal court proceedings, the victims of violent crime in Indian country must have rights available to them. They must be informed of their rights, encouraged to exercise their rights, and be protected from further harm. This is the basic responsibility of a tribal criminal justice system.

Joseph Myers,
Executive Director,
National Indian Justice Center

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #22

Victims of crime should have rights at administrative proceedings, including the right to have a person of their choice accompany them to the proceedings, the right to input regarding the sanction, and the right to notification of the sanction.

Agencies and institutions that seek to hold their employees or students accountable for their alleged criminal or negligent behavior often do so through administrative proceedings, including disciplinary hearings on college campuses in sexual assault cases and other crimes that violate college rules. Governmental and private sector organizations also conduct administrative hearings when an employee is accused of misconduct, which sometimes also constitutes a criminal act. These hearings are held to determine whether an employee or student should be dismissed or sanctioned.

Victims often complain about their lack of rights and protections at these hearings. For example, at disciplinary hearings on college campuses and in schools, as well as administrative proceedings when criminal justice personnel are accused of conduct violations, victims are frequently not allowed such fundamental rights as the right to be accompanied by a person of their choice and the right to submit a victim impact statement before the offender is sanctioned. Agencies and institutions should review their disciplinary codes and ensure that

fundamental victims' rights are incorporated. In addition, all cases involving criminal conduct should be referred to law enforcement for further investigation.

State laws should be strengthened to ensure that these victims receive appropriate rights. For example, California recently amended its Education Code to provide victims of sexual assault and harassment in public schools with the rights to: be accompanied by a parent or other support person during testimony in disciplinary hearings; adequate notice prior to being called to testify; testify at a hearing closed to the public; and have evidence of irrelevant sexual history excluded.[101] The law also requires school districts to take further steps to provide a nonthreatening environment for child victims by adopting procedures that have become the standard across the country for children who testify as witnesses in other legal proceedings. Support for the law was initiated by the Santa Monica-UCLA Rape Treatment Center after the rape of a 12-year-old middle school student in a Los Angeles school by a fellow student. She had to face the accused attacker, his parents, and his attorney alone during an expulsion hearing.[102]

The *Student Right to Know Campus Security Act of 1990*,[103] and *The Campus Sexual Assault Victims' Bill of Rights*[104] passed by Congress should be fully implemented. These laws should be amended to ensure that the same rights to be informed, present, and heard in criminal proceedings apply equally to disciplinary proceedings in school settings.

Other victims whose rights are woefully overlooked are victims of mentally ill offenders whose cases are adjudicated through an involuntary mental commitment process. Where applicable, these victims should receive the same rights as other victims, including the right to receive notice of release.

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #23

Criminal and juvenile justice agencies should establish a means of monitoring their own compliance with crime victims' rights laws and require public documentation showing that victims were provided their rights or indicating an appropriate reason why they were not. In addition, independent audits should be conducted of state and federal agency compliance with victims' rights laws.

Criminal and juvenile justice agencies and institutions should develop and implement policies and procedures to ensure that all

crime victims are afforded the opportunity to exercise their rights. Monitoring should be mandatory at all stages of the justice systems. Criminal and juvenile justice agencies should document whether or not crime victims receive notice of and an opportunity to exercise their rights and, if not, why not. Such documentation is a significant step toward holding officials accountable and will enable agencies to monitor their compliance with legal mandates.

Further information is needed about the level of state and federal compliance with victims' rights laws to determine how to improve implementation of these laws. This information should be obtained through independent audits that can evaluate levels of compliance and propose needed reforms to improve the system.

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #24

Introductory and continuing education for all criminal and juvenile justice professionals should address victims' rights, needs, and services, and incorporate involvement from crime victims themselves.

To increase compliance with victims' rights laws, states must make education on the rights of crime victims a priority during orientation and continuing education training programs for criminal and juvenile justice officials. Implementing victims' rights remains the responsibility of these officials. They must be educated about the importance of their victim-related responsibilities and sensitized to the critical needs of crime victims.

Training programs for law enforcement officers, prosecutors, and judges, as well as probation, parole, and corrections officials, have been developed and implemented on a broad scale through training and technical assistance grant projects funded by the Office for Victims of Crime. Some institutions responsible for educating and training these professionals are beginning to incorporate victim-related sensitivity training into their permanent curricula. In some states, such training is mandated by statute, but in others, the incorporation of victims' issues is voluntary.[105]

Victim input into such educational programs is critical. Victim impact panels provide a vehicle for victims to tell justice professionals firsthand about the physical, financial, and emotional impact of crime. Developed by Mothers Against Drunk Driving as an educational tool in court-ordered probation programs for DUI offenders, and for youth offenders by the California Youth Authority, they are increasingly being

incorporated into numerous types of programs.[106] Moreover, victim sensitivity education and state-of-the-art curricula in victim issues must be included in academia in the fields of health care, medicine, psychology, social work, theology, business, law, and education.

VICTIMS' RIGHTS RECOMMENDATION FROM THE FIELD #25

New funding mechanisms must be developed to support the expansion and implementation of victims' rights and services nationwide.

Since its establishment in 1984, the Crime Victims Fund has provided more than $2 billion to states to help implement victims' rights and services. Additional financial resources are needed at the federal, state, and local levels, however, to ensure consistent, comprehensive implementation of victim rights' laws and the provision of needed services to every crime victim.

While a federal constitutional amendment would provide the legal framework for securing victims' rights, many justice officials and victim advocates believe that the lack of implementation of rights is due in part to inadequate funding. In many places, a lack of funding has had the practical effect of denying victims their basic rights.

One potential new source of revenue on the federal level is funding generated under the False Claims Act, which triples the damages and penalties imposed in civil cases involving fraud against the federal government.[107] In past years, several hundred million dollars have been deposited into the Federal Treasury from judgments rendered in these cases. A significant portion of these funds should be used to ensure that state and federal victims' rights laws are enforced. In addition, provisions should be made to provide needed counseling to "whistle blowers" in these cases because they often suffer serious personal and professional consequences for reporting these crimes.

Another promising source of funding for crime victims is the Federal Racketeer Influenced and Corrupt Organizations Act, referred to as RICO.[108] RICO makes it a federal crime to engage in activities related to a "pattern of racketeering activity" related to the operation of any "enterprise" engaged in, or affecting, interstate commerce.[109] Penalties for violation of RICO include fines up to $25,000 and prison terms up to 20 years, in addition to allowing the government to bring forfeiture proceedings against the organizations and the individuals involved in the organizations. Since the statute also specifically allows victims to bring civil suits in federal civil court for damages up to three times their actual economic damages and attorneys fees, victims (particularly victims of economic crimes such as fraud) should be made aware of

Fairly early in the history of the victims' movement, victim 'counselors' were taught that they also had to become victim 'advocates' if their clients were to avoid revictimization by the very institutions that were meant to help them. In time, the advocates were taught that 'case advocacy' was insufficient to ensure that the dignity of crime victims was to be respected—their rights to be heard had to be codified in law. Those who taught us these lessons include legal scholars, mental health researchers, and a host of other thoughtful academics. But most of all it was the victims themselves, against whom palpable injustices were being committed daily, who taught us that providing effective victim assistance is impossible in the absence of effective victim rights.

John H. Stein,
Deputy Director,
National Organization for
Victim Assistance

their right to bring RICO actions against such offenders. Congress should also consider earmarking RICO fines and forfeitures to benefit crime victims in the same manner as most other federal criminal fines.

States depend on a variety of sources to fund victim assistance programs, and they must communicate more with each other about which strategies have been most successful. Sources of funding include following the VOCA funding formula of criminal fines and penalty assessments; using a portion of license fees such as fees for marriage licenses; incorporating checkoff boxes for donations to victim services on tax forms; inmate fund raisers; dedicating special, one-time legislative appropriations; and incorporating victim services funding into the annual legislative appropriations process.

More than half of the states impose some type of additional penalty assessment or cost as a condition of an offender's sentence to be used to provide funding for general victim services and assistance. Some states attach a nominal $5 or $10 court fee in all cases.[110] Other states take into consideration the severity of the offense or the offender's age, and establish enhanced assessments in relation to such factors.[111] Another group of states bases offender penalties on the other court-imposed fines and penalties, adding on a certain percentage of the fine and/or penalty as a type of surcharge.[112] Still other states use a combination of approaches.[113]

In most states, license fees are used for a specific type of service as opposed to general victim assistance. The most prominent of these are fees attached to marriage licenses which generally are used to fund domestic violence shelters and programs.[114] In other instances, the additional fees for marriage licenses or birth certificates are used for funding of child abuse treatment and prevention.[115] A number of states include income tax designations as an income source for children's trust funds which provide services to abused or neglected children.[116] Michigan estimates the costs of providing crime victims' rights services as well as the estimated revenue available for such services. The legislature is then notified to determine whether an appropriation should be requested.[117]

In Missouri, a special appropriation in 1996 financed the construction of shelters for battered women across the state. Oregon takes a percentage of punitive damages off the top of civil suits to fund victim compensation and assistance programs. States are also exploring creative funding mechanisms such as tapping into lottery money, taxes on tourism, and fees for hunting, gaming, and liquor licenses.

In a survey of state VOCA administrators conducted for this report, a majority responded that establishing a stable, predictable funding base for victims' services was one of the greatest challenges to implement-

ing comprehensive victims' services. Collections under VOCA have been unusually high in the past two years; however, since collections may fluctuate in future years, states must expand their sources of funding to protect and expand the remarkable advances for crime victims made in the past two decades.

On the local level, communities also must begin to fund victim assistance programs. Voters in Washtenaw County, Michigan were the first in the nation to approve a special one-time millage or tax to build and provide funding for a countywide domestic violence shelter. In some communities such as Maricopa County, Arizona, and San Diego, California, private foundations have been established to provide financial compensation to victims as well as to support local victim service programs.

In other communities victim services funds are designated as an "untouchable" portion of the city's budget. In Jacksonville, Florida, city funds are combined with state and federal funds to support a comprehensive victim services center. Local annual funding for the center is currently about $900,000. It includes all of the profits from the county prison's canteen. Center staff screen 2,300 police reports monthly for appropriate outreach and work with 1,400 victims each month, providing a wide range of services. The philosophy of Jacksonville's approach is to establish crime victim services in such a way that victim assistance becomes an essential part of the infrastructure of the community, not an afterthought funded through sporadic or discretionary funding mechanisms.

The recommendations in this chapter were based upon input from participants at public hearings and reaction and working groups, as well as papers submitted by experts in the field, identified in Appendix A. The recommendations do not necessarily reflect all of the views of the contributors, nor do they necessarily represent the official views of the Department of Justice.

Endnotes

1 National Organization for Victim Assistance, *1988 NOVA Legislative Directory*, Washington, D.C.: National Organization for Victim Assistance, 1988:191.

2 *Victim Witness Protection Act of 1982*, Pub. L. No. 97-291, § 4, 96 Stat. 1249 (codified at 18 U.S.C. §§ 1512-1515; Fed. R. Crim. P. 32); President's Task Force on Victims of Crime, *Final Report*, Washington, D.C.: U.S. Government Printing Office, December 1982.

3 Office of Justice Programs, *President's Task Force on Victims of Crime: Four Years Later*, Washington, D.C.: U.S. Government Printing Office, May 1986:4.

4 As of November 1997, victims' rights constitutional amendments have been ratified by voters in the following 29 states: AL, AK, AZ, CA, CO, CT, FL, ID, IL, IN, KS, MD, MI, MO, NE, NV, NJ, NM, NC, OH, OK, OR, RI, SC, TX, UT, VA, WA, and WI.

5 The National Victim Center's Legislative Tracking Database Project has collected, as of May 1996, more than 27,000 federal and state statutes related to the rights and interests of crime victims. The Center utilizes nearly 1,000 victim issue categories and subcategories to catalog the statutes.

6 National Victim Center, *1996 Victims' Rights Sourcebook: A Compilation and Comparison of Victims Rights Laws*, Arlington, VA: National Victim Center, 1997:§ 9 (hereinafter *1996 Victims' Rights Sourcebook*). As of 1995, the following states provide victims a right to attend most criminal justice proceedings: AL, AK, AZ, AR, CA, CO, CT, DE, FL, GA, ID, IL, IN, IA, KS, LA, MA, MI, MS, MO, NH, NJ, NM, OH, OK, SC, SD, TX, UT, VA, WA, WI. In November 1996, North Carolina, Oregon and Nevada passed constitutional amendments that, for the first time, guaranteed such access to victims. N.C. CONST., art. I, § 37(1)(a); OR. CONST., art. 1, § (1); NEV. CONST., art. 1, § 8(b). In addition, at the same time, Connecticut, Oklahoma, and South Carolina elevated to constitutional level rights of access previously provided by statute. CONN. CONST., art. 17(b); OKLA. CONST., art. II, § 34(A); S.C. CONST., art. I, § 24(A).

7 *Id.* States providing for oral testimony or a statement by the victim at a sentencing hearing are: AL, AK, AZ, AR, CA, CO, CT, DE, FL, GA, HI, IL, IN, KS, LA, ME, MD, MA, MI, MN, MO, MT, NB, NV, NH, NJ, NY, ND, OH, OK, OR, RI, SC, SD, TN, WV, UT, VT, WA, WI, WY.

8 *Id.* at § 9 (Table 9-B).

9 Violence Against Women Grants Office, *Domestic Violence and Stalking: The Second Annual Report to Congress*, Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Violence Against Women Grants Office, July 1997 :15

10 Szymanski, L., *Rights of Victims of Juvenile Crimes Statutes Analysis, 1993 Update*, National Center for Juvenile Justice, 1994:1-9. See also National Victim Center, 1996 *Victims' Rights Sourcebook*, § 13 (discussions of victims' rights at the juvenile level).

11 *See generally*, Beatty, D., S. Howley, and D. Kilpatrick, *Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims, Sub-Report: Crime Victim Responses Regarding Victims' Rights*, Arlington, VA: National Victim Center, 1997.

12 *Victim Witness Protection Act of 1982*, Pub. L. No. 97-291, § 4, 96 Stat. 1249 (codified at 18 U.S.C. §§ 1512-1515; Fed. R. Crim. P. 32); President's Task Force on Victims of Crime, *Final Report*.

13 *Id.* at § 2(b), reprinted at 18 U.S.C. § 1512.

14 U.S. Department of Justice, *Guidelines for Victim and Witness Assistance*, Washington, D.C.: U.S. Department of Justice, Office of the Attorney General, 1983. These Guidelines have been revised several times, and between 1983 and 1995, the title was changed to *Attorney General Guidelines for Victim and Witness Assistance*. The *Guidelines* will be revised and reissued in fiscal year 1998.

15 *Crime Control Act of 1990*, Pub. L. No. 101-647, Title V, §§ 502-503, 104 Stat. 4820 (codified at 42 U.S.C. §§ 10606-10607 (1990)).

16 42 U.S.C. § 10606(a); U.S. Department of Justice, *Attorney General Guidelines for Victim and Witness Assistance*, Washington, D.C.: U.S. Department of Justice, Office of the Attorney General, 1995:2,5 (hereinafter *1995 A.G. Guidelines*).

17 *Violent Crime Control and Law Enforcement Act of 1994*, Pub. L. No. 103-322, Title IV, §§ 40113, 40221, 40503; Title XXV, § 250002(a)(2); Title XXIII, § 230101(b), 108 Stat. 1904-2078 (codified at 42 U.S.C. §10607(c)(7), 14011(b); 18 U.S.C. §§2263-2264, 2248, 2259 and at Fed. R. Crim. P. 32 (1994)).

18 Megan's Law amendment to the Jacob Wetterling Crimes Against Children and Sexual Violent Offender Act, 42 U.S.C. §14071.

19 18 U.S.C. §2261A.

20 President's Task Force on Victims of Crime, *Final Report*, 114-115.

21 For further information, see "Constitutional Amendments for Crime Victims" by J. H. Stein, available from the National Organization for Victim Assistance in Washington, D.C. NVCAN was created following a meeting sponsored by the National Organization for Victim Assistance (NOVA) and Mothers Against Drunk Driving (MADD) in 1985. Robert Preston, president of the Florida-based Justice for Surviving Victims forcefully advocated that the group support the Task Force recommendation for a victims' rights amendment to the federal constitution. The coalition has grown to include many other victims, advocates, elected officials, and others from local, state, and national groups that represent all types of criminal victimization.

22 This information has been compiled by the National Victims' Constitutional Amendment Network, (NVCAN) and the National Victim Center and appears in NVCAN's 1996 *Constitutional Amendment Action Kit*.

23 President's Task Force on Victims of Crime, *Final Report*, 51.

24 *Id.*

25 Bourque, B., and R. Cronin, *Helping Victims and Witnesses in the Juvenile Justice System: A Program Handbook*, American Institutes for Research, Office of Juvenile Justice and Delinquency Prevention, April 1991.

26 Since the release of the report in 1982, the number of crimes committed by juveniles skyrocketed between 1985 and 1994, and juvenile crime became much more violent. Between those years, murder arrests of juveniles increased 150 percent, robbery arrests of juveniles increased by 57 percent, and aggravated assault arrests of juveniles increased by 97 percent. Snyder, H. ET AL., *Juvenile Offenders and Victims: 1996 Update on Violence: Statistics Summary*, Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, February 1996:12 (report prepared by the National Center for Juvenile Justice, National Council of Juvenile and Family Court Judges). Crimes committed by juveniles against juveniles is also a growing concern. In 1992, 1.5 million violent crimes were committed against juveniles aged 12 to 17, a 23 percent increase in just 5 years. Moone, J., *Juvenile Victimization: 1987-1992*, Washington, D.C.: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, June 1994:1. However, in 1995, violent juvenile crime arrests—contrary to predictions—declined by three percent. In relative terms this decline was small, but the nature of the decline gives hope for the future. The decline in juvenile murders in 1995 was mostly in gun-related murders by African-American males. "What's Behind the Recent Drop in Juvenile Violent Crime?" *Juvenile Justice*, Volume III, Number 2, Washington, D.C.: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, September 1997.

27 National Victim Center, *1996 Victims' Rights Sourcebook*, § 13 (Table 13-A, Victims' Rights at the Juvenile Level). As of 1996, only Arkansas, Nebraska, North Dakota, South Dakota and the District of Columbia do not allow the court to order restitution from juvenile offenders.

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*; TEX. JUV. JUS. CODE ANN. § 57.002 (2) (West).

34 *National Victim Center Legislative Tracking Database Project*, §13. As of 1995, the constitutions of Alaska, Idaho and Missouri provide rights for victims of juvenile offenders; the constitutions of Arizona and Utah permit the legislature to extend the rights to juvenile proceedings. In addition, in November 1996, the constitutions of Oregon and South Carolina were amended to provide rights to victims at the juvenile level. OR. CONST., art. 1, § 1(1); S.C. CONST., art. 1, § 24(A)(1). Moreover, the constitution of Oklahoma was amended to authorize the legislature to extend the rights to juvenile proceedings. OKLA. CONST., art. 2, § 34(C) (amended 1996).

35 Bourque, B. and R. Cronin, *Helping Victims and Witnesses in the Juvenile Justice System: A Program Handbook*, Washington, D.C.: Office of Justice Programs, Office of Juvenile Justice and Delinquency Programs 1991.

36 Seymour, A. and S. English, *Report and Recommendations on Victims of Juvenile Crime*, American Correctional Association Victims Committee, 1994:17-18.

37 Coordinating Council on Juvenile Justice and Delinquency Prevention, *Combating Violence and Delinquency: The National Juvenile Justice Action Plan - Report*, Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, March 1996.

38 National Victim Center, *1996 Victims' Rights Sourcebook*, §13.

39 August 1996, Keynote address, annual conference of the National Organization for Victim Assistance. Tulsa, Oklahoma.

40 Among victim groups and criminal justice and other allies endorsing a Victims' Rights Constitutional Amendment as of November, 1997, are: Association of Traumatic Stress Specialists, Concerns of Police Survivors (COPS), Mothers Against Drunk Driving, National Association of Crime Victim Compensation Boards, National Center for Missing and Exploited Children, National Coalition Against Sexual Assault, National Organization for Victim Assistance, National Victim Center, Neighbors Who Care, Parents of Murdered Children, Security on Campus, Victim Assistance Legal Organization, American Correctional Association, the Victims' Committee of the International Association of Chiefs of Police, the National Criminal Justice Association, and the National Governors Association. Victim groups and other national organizations that have expressed opposition to a federal crime victims' rights amendment include: the American Civil Liberties Union, Murder Victims Families for Reconciliation, the NOW Legal Defense and Education Fund, the National Clearinghouse for the Defense of Battered Women, National Network to End Domestic Violence, and the National Legal Aid and Defender Association. The Criminal Law Committee of the Judicial Conference of the United States and the Conference of Chief Justices have expressed concerns.

41 Beatty, D., S. Howley, and D. Kilpatrick, *Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims, Sub-Report: Crime Victim Responses Regarding Victims' Rights*, Arlington, VA: National Victim Center, 1997.

42 *Id.*

43 *Id.*

44 *Id.*

45 GA. CODE ANN. § 16-5-93 (1993).

46 ARK. R. EVID. 616 (right to be present); ALA. R. EVID. 615 (exception to witness exclusion rule for victims); OR. R. EVID. 615 (same).

47 ARIZ. REV. STAT. ANN. § 13-4420; MO. CONST., Art. 1, § 32.

48 ALA. CODE § 15-14-54; ILL. COMP. STAT. ANN. § 725-120/4(5); S.D. CODIFIED LAWS § 23A-24-7.

49 ALA. CODE §§ 15-14-51 to -57 (victim has right to be present and to sit at prosecutor's table). Maryland has also attempted to extend the victim's right to attend to include "attendance" by the homicide victim through an "in life" photograph at the trial of the defendant. This extension is under consideration in the Maryland courts. See *Maryland v. Broberg*, No. 95-22, (Ct. App. Md.)

50 As of 1995, 29 states required the prosecutor to consult with the victim or obtain the victim's views prior to entering a plea agreement. See National Victim Center, *1996 Victims' Rights Sourcebook*, 135-37.

51 By 1995, fourteen states required the prosecutor to consult with the victim prior to dismissing charges See National Victim Center, *1996 Victims' Rights Sourcebook*, 135-37.

52 Four states required victim consultation by the prosecutor regarding decision not to prosecute the case, as of 1995. See National Victim Center, *1996 Victims' Rights Sourcebook*, 135-37.

53 Such disposition decisions include pretrial diversion, reduction of charges, and sentence recommendation. See National Victim Center, *1996 Victims' Rights Sourcebook*, 135-37.

54 As of 1995, ten states specifically required a prosecutor to consult with a victim prior to trial, but other states gave victims a general right to consult the prosecutor. National Victim Center, *1996 Victims' Rights Sourcebook*, 135-37.

55 *See e.g.*, FLA. STAT. ANN. § 960.001(1)(e)(1) (1996); HAW. REV. STAT. § 801D-4(1) (1996); See also National Victim Center, *1996 Victims' Rights Sourcebook*, § 13 (discussing victims' rights at the juvenile level).

56 N.D. CENT. CODE § 12.1-34-02 (1996); See also National Victim Center, *1996 Victims' Rights Sourcebook*, §5 (discussing victims' right to confer with the prosecutor).

57 NEB. REV. STAT. § 23-1201, § 29-120 (1996).

58 LA. REV. STAT. ANN. § 46:1844 (1996).

59 *See e.g.*, ARIZ. REV. STAT. ANN. § 13-4423 (1996); DEL CODE ANN. tit. 11, § 5106 (1996); IND. CODE ANN. § 35-35-3-2 (1996); *See also* National Victim Center, *1996 Victims' Rights Sourcebook*, § 5 (discussing victims' right to confer with the prosecutor).

60 *See* North Carolina Victim Assistance Network, *The Status of Victim Services & Rights in North Carolina*, North Carolina: North Carolina Victim Assistance Network, 1994:4.

61 See e.g., DEL. CODE ANN. tit. 10, § 940; ILL. COMP. STAT. ANN. § 725-5/110-4; KAN. STAT. ANN. § 22-2802.

62 MD. CODE ANN. art. 27, §616 2(a-l) (1993).

63 Duggan, P., "Reward Program Targets Witnesses to D.C. Homicides," *Washington Post*, March 23, 1994.

64 *E.g.*, ARIZ. REV. STAT. ANN. § 13-4331 (West 1991); ARK. CODE ANN. § 16-21-106(a)(5) (1983); N.Y. EXEC. § 642(2) (McKinney 1986); *See also* National Victim Center, *1996 Victims' Rights Sourcebook*, § 4 (discussing victims' right to protection from offender harm).

65 *E.g.*, COLO. REV. STAT. § 18-8-704 (1990); ILL. COMP. STAT. Ch. 720, § 5/32-44a (1993); KY. REV. STAT. ANN. § 524.05 (1986).

66 *E.g.*, ARIZ. REV. STAT. ANN. § 18-1-1001 (1991); D.C. CODE ANN. §§ 23-1321, 23-1329 (1981); N.Y. CRIM. PROC. § 530.13 (McKinney 1986).

67 *E.g.*, ARIZ. REV. STAT. ANN. § 13-4433 (1991); OR. REV. STAT. § 135.970(2) (1987). Oregon's 1996 constitutional amendment for victims' rights contains a similar provision. OR. CONST., art. I, § 1(d). It is not yet clear how the statutory and constitutional provisions will interact.

68 *E.g.*, ILL. COMP. STAT. Ch. 730, § 5/3-3-4(7) (1996); S.C. CODE ANN. § 24-21-710 (Law Co-op. 1995). *See also* National Victim Center, *1996 Victims' Rights Sourcebook*, §4 (discussing victims' right to protection from offender harm), §9, (as of 1995, a total of 43 states allow victims to be heard at parole hearings). National Victim Center ET AL., *National Victim Services Survey of Adult and Juvenile Corrections and Parole Agencies Final Report*, Arlington, VA: National Victim Center, September 1991:14.

69 *See* Smith, B., ET AL., *Improving Enforcement of Court-Ordered Restitution: Executive Summary*, American Bar Association, Washington, D.C.:1989:15.

70 President's Task Force on Victims of Crime, *Final Report*, 18, 34, 72 and 78-80.

71 National Victim Center, *1996 Victims' Rights Sourcebook*, § 11.

72 S.C. CODE ANN. § 16-3-1530 (1996); W.VA. CODE ANN. § 61-11A-4 (1996).

73 The Mandatory Victim Restitution Act, Title II of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (1996), 18 U.S.C. § 3663A (1996).

74 National Victim Center, *1996 Victims' Rights Sourcebook*, § 11 (discussing victims' right to restitution from the offender).

75 National Victim Center, *Legislative Database*, Arlington, VA: 1997.

76 *See* National Victim Center, *1996 Victims' Rights Sourcebook*, § 13 (Table 13-A).

77 *Id.*

78 As examples, see CONN. GEN. STAT. §52-572 (civil liability, limited to $5,000); NEV. REV. STAT. § 41.470 (civil liability, limited to $10,000); N.M. STAT. ANN. § 32A-4-26 (civil liability; limited to $4,000), TEX. FAM. CODE ANN. §54.041 (restitution).

79 Seymour, A., *National Victim Services Survey of Adult and Juvenile Corrections and Parole Agencies: Crime Victims and Corrections: Implementing the Agenda for the 1990s*, Arlington, VA: U.S. Department of Justice, Office for Victims of Crime/National Victim Center, 1991.

80 Snyder, H. ET AL., *Juvenile Offenders and Victims: 1996 Update on Violence: Statistics Summary*, Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, February 1996:12 (report prepared by the National Center for Juvenile Justice, National Council of Juvenile and Family Court Judges).

81 See 18 U.S.C. §3624.

82 See National Victim Center, *1996 Victims' Rights Sourcebook*, § 8:205.

83 42 U.S.C.§ 3756.

84 Violence Against Women Improvements Act, 42 U.S.C. §14011.

85 ME. REV. STAT. ANN. tit. 5 §§ 19203 et. seq.

86 MICH. COMP. LAWS §333.5129.

87 OKLA. STAT. tit. 63 §§ 1-524.-525.

88 FLA. STAT. ANN. § 960.003

89 MINN. STAT. § 72A-29

90 MD. CODE ANN. Art. 27, § 776 (1993).

91 ARIZ. REV. STAT. ANN. § 13-4437 (West 1991).

92 *United States* v. *McVeigh*, 106 F.3d 325 (1997)

93 The concept of a victim ombudsman was first discussed in Dussich, J., "The Victim Ombudsman: A Proposal," in *Victimology: A New Focus*, Volume II, Society's Reactions to Victimization, Eds. I. Drapkin and E. Viano. Lexington, MA: Lexington Books, 1974.

94 South Carolina Victim Ombudsman Program, S.C. CODE ANN. § 16-3-1610.

95 COLO. REV. STAT. § 24.4.1-117.5(2)(a) (1996) Colorado Coordinating Committee.

96 COLO. REV. STAT. § 24-4.1-303(17) (1992).

97 Wisconsin Victim Resource Center: WISC. STAT. ANN. § 950.08.

98 See 18 U.S.C. §§3663, 366A; 42 U.S.C. §10606(b) (6).

99 Notice of Indian Entities Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs, 61 Fed. Reg. 58211 (1996). As of 1996, the Bureau of Indian Affairs (BIA) had officially recognized a total of 621 Indian entities, including tribes and Native Alaskan villages.

100 *United States* v. *Wheeler*, 435 U.S. 313 (1978); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978).

101 CAL. EDUC. CODE §§48918, 48918.5, as amended by 1996 Cal. Stat. Ch. 915 §4 (A.B. 692).

102 Pyle, A., "New Rights for Campus Victims," *Los Angeles Times*, Wednesday, October 2, 1996.

103 *The Student Right to Know and Campus Security Act of 1990*, Title II, P.L. 101-542 (1990) and 20 U.S.C. §1092(f)(1-6).

104 *Campus Sexual Assault Victims' Bill of Rights*, 20 U.S.C. §1092(f)(7) (1992).

105 *See e.g.*, FLA. STAT. ANN. § 943.172 (1996) (training for law enforcement, probation, and other corrections officials); N.J. STAT. ANN. § 52:4B-47 (1996) (training for police, assistant prosecutors, county detectives, and investigators).

106 A how-to booklet and video on implementing victim impact panels or manuals for victim impact classes is available from Mothers Against Drunk Driving.

107 *See* False Claims Act, 31 U.S.C. §§ 37-31. A draft bill being developed by Senators Leahy and Kennedy in May of 1997 proposes using a portion of the money collected under the False Claims Act to fund victim services.

108 18 U.S.C. §1962.

109 *Id.*

110 For example, see KY. REV. STAT. ANN. § 346.185.

111 For example, see WIS. STAT. ANN. § 973.045.

112 For example, see UTAH CODE ANN. § 63-63a-1.

113 For example, see COLO. REV. STAT. ANN. § 24-4.2-104.

114 For example, see IDAHO CODE § 39-5213.

115 For example, see MISS. CODE ANN. § 93-21-305.

116 For example, see ALA. CODE §§ 26-16-30 and 31.

117 MICH STAT. ANN. § 28.1287(909).

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Jeremy Travis, Director

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Issues and Findings

Discussed in this Brief: *The impact of legal protection on crime victims' rights. This survey of more than 1,300 crime victims, the largest of its kind, was conducted by the National Center for Victims of Crime to find out whether State constitutional amendments and other legal measures designed to protect crime victims' rights have been effective. The researchers sought the views of victims in two States representative of those in which legal protection of victims' rights is strong and two States representative of those in which such protection is weak, testing whether victims from the "strong-protection States" had better experiences with the justice system.*

Key issues: *All States have some form of statutory protection of victims' rights, and more than half have constitutional amendments protecting these rights. Until this study, little research had been directed at whether these legal guarantees mean crime victims are kept informed of the events in their cases and of their rights as victims, whether they are adequately notified of services, and whether they are satisfied with the criminal justice system's handling of their cases.*

Key findings: *Strong victims' rights laws make a difference, but in many instances, even where there is strong legal protection, victims' needs are not fully met. In the*

continued...

The Rights of Crime Victims—Does Legal Protection Make a Difference?

by Dean G. Kilpatrick, David Beatty, and Susan Smith Howley

The President's Task Force on Victims of Crime concluded in its 1982 Final Report that there was a serious imbalance between the rights of criminal defendants and the rights of crime victims. This imbalance was viewed as so great that the task force proposed an amendment to the U.S. Constitution to provide crime victims with "the right to be present and to be heard at all critical stages of judicial proceedings."[1] The recommended amendment has not been enacted by Congress, but the report led to a proliferation of victims' rights legislation at the State level.

By the early 1990s, every State had enacted statutory rights for crime victims, and many had adopted constitutional amendments protecting victims' rights. Today, all 50 States have passed some form of a statutory crime victims' bill of rights, and 29 have amended their constitutions to include rights for crime victims.[2] At the Federal level, the Victim's Rights and Protection Act of 1990, and several subsequent statutes, gave victims of Federal crime many of the rights accorded at the State level.

Despite the widespread adoption of legal protection, the implementation of such protection and its impact on victims have not been widely studied, nor has much research been directed at how this legislation has influenced victims' views of the criminal justice system.[3] One reason the latter issue is important is that victims who view the criminal justice system unfavorably are likely to share that opinion with others, thereby undermining confidence in the system. The current debate in the U.S. Congress over a proposed crime victims' rights constitutional amendment highlights the relevance of victims' rights legislation and the need for research in this area.

This research project, conducted by the National Center for Victims of Crime,[4] was designed to test the hypothesis that the strength of legal protection for crime victims' rights has a measurable impact on how victims are treated by the criminal justice system and on their perceptions of the system. A related hypothesis was that victims from States with strong legal protection would have more favorable experiences and greater satisfaction with the system than those from States where legal protection is weak.

Overall, the research revealed that strong legal protection makes a difference, but it also revealed that even in States where legal protection is strong, some victims are not afforded their rights. In other words, enactment of State laws and State constitutional amendments alone appears to be insufficient to guarantee the full provision of victims' rights in practice. The likely reason is that a host of other factors mediates the laws' effects. Thus, although the disparities between strong

Issues and Findings

continued...

two States studied where legal protection is strong, victims were more likely than in the two selected weak-protection States to be afforded their rights, to be involved, and to feel the system is responsive. They were more likely:

- *To be notified of events in their cases.*

- *To be informed of their rights as crime victims and of services available.*

- *To exercise their rights (though not at all stages of the criminal justice process).*

- *To give high ratings to the criminal justice system and its various agents, such as the police.*

Legal protection is not sufficient, however, to guarantee victims' rights. More than one in four victims from the two strong-protection States were very dissatisfied with the criminal justice system. Nearly half of them were not notified of the sentence hearing, and they were as unlikely as those in weak-protection States to be informed of plea negotiations. Substantial proportions of victims in both the strong- and weak-protection States were not notified of other rights and services, including the right to be informed about protection and to discuss the case with the prosecutor.

Strong legal protection—either through State constitutional amendments or other means—appears to be a necessary but not a sufficient condition for ensuring the protection of crime victims' rights, because a host of intervening factors, such as knowledge, funding, and enforcement, mediates the actual "delivery" of victims' rights.

Target audience: *Victims' rights organizations, criminal justice officials, and other government officials at State and local levels.*

and weak victims' rights laws indicate the need to strengthen legal protection, additional steps may be necessary to address the other, intervening factors, to better ensure that the laws have their intended effects.

Assessing the implementation of victims' rights

The experiences of crime victims in the two States studied where legal protection of victims' rights is strong were compared with those in the two States studied where protection is weak. In each group, the victims were asked whether they were afforded their rights in several areas. Were they kept informed of case proceedings and their rights as victims? Did they exercise those rights? Did they receive adequate notification of available victim services?[5] Did they receive restitution for the crime committed against them? They also were asked what losses they suffered as a result of the crime, and they rated their satisfaction with the criminal justice process and its various representatives.

Representatives of the criminal justice system are the implementors of laws that provide victims access to information and facilitate victims' participation in the criminal justice process. For this reason, officials from various components of the system, as well as victim assistance professionals, were asked how much they were aware of victims' rights and how well they believed these rights are implemented in their jurisdiction. (For further details of the study's methodology, including the definition of "strong-protection" and "weak-protection" States, see "Measuring the Effectiveness of Victims' Rights Laws—the Study Design," on page 3.)

Notification of case events and proceedings

Perhaps the most fundamental right of a crime victim is the right to be kept informed by the criminal justice system. Notification plays a key role in a victim's ability to participate in the system because victims cannot participate unless they are informed of their rights and of the time and place of the relevant criminal justice proceedings in which they may exercise those rights. Victims clearly attested to the importance of their rights to attend and be heard at proceedings (see "The Importance of Victims' Rights to Victims Themselves" on page 4), but unless they receive notice of proceedings and of their rights, cannot exercise those rights.

At most points in the criminal justice process, from arrest through the parole hearing, victims in strong-protection States were much more likely to receive advance notification than those in weak-protection States. (See exhibit 1.) At certain other points in the process, however, the difference between the two groups was not significant. For example, the proportions of victims who were not informed of plea negotiations were nearly the same in strong- as in weak-protection States, despite the fact that both strong-protection States—but neither weak-protection State—had a law requiring that victims be informed of such negotiations. In other words, the relative strength, and even the existence, of laws providing this right made no difference to the provision of the notice.

In other cases, while the strength of the legal protection for a victim's right did appear to affect the rate at which the right was provided, it was not sufficient to ensure that most victims in fact received the right. For example, far more victims in strong-protection than weak-protection States were notified of the defendant's pretrial release, but more than 60 percent of victims in those strong-protection States did not receive such notice. (See exhibit 1.) Similarly, nearly twice as many victims in strong-protection States as in weak-protection States were notified in advance of the sentencing hearing, but more than 40 percent of such victims were not notified (See exhibit 1.) Lack of such advance

Measuring the effectiveness of victims' rights laws—the study design

The first step in the study was identifying States that were weak in protecting victims' rights and those that were strong. Next, crime victims from two "weak" States and two "strong" States were asked about their experiences in the criminal justice process. Their experiences were compared and contrasted to find out whether there is a measurable difference in the two groups of States in victim protection. State and local level criminal justice professionals, policymakers, and victim assistance professionals in both groups of States were asked their opinions of victim protection, and their responses were also compared and contrasted.[a]

Selecting strong and weak States. *To identify strong and weak States, a legal analysis of victims' rights laws in all 50 States was conducted. Criteria were developed to rate statutory and State constitutional protection of victims' rights on the basis of comprehensiveness, strength, and specificity. The criteria were then used to rate each State in four areas: (1) the right to notification, (2) the right to be present, (3) the right to be heard, and (4) the right to restitution. Applying these ratings, each State was ranked according to the strength of its legal protection of victims' rights. Groups of strong- and weak-protection States were identified, and two States from each group were selected as sites for study. (Both strong States had constitutional amendments covering victims' rights, whereas neither weak State did.)*

Crime victims' views. *From the four States, adult (age 18 and older) crime victims' names and locational information were obtained from department of corrections and victims' compensation agencies. Of the 2,245 victims who could be located, 665 (29.6 percent of the contacted sample) denied that they or a family member had been a recent victim of crime.*[b] *Of the remaining 1,580 respondents, interviews were completed with 1,308 crime victims (83 percent of the victims who could be located and disclosed their victimization).*

The sample consisted of victims of physical assault (25 percent), robbery (24 percent), sexual assault (11 percent), other crimes (10 percent), and relatives of homicide victims (30 percent).[c]

Interviews were conducted by phone, and information was obtained about the crime, experiences with the criminal justice system, satisfaction with treatment by the system, and crime-related injuries and losses.[d] *Interviews averaged 40.2 minutes and were conducted between April and October 1995.*

Views of government and victim assistance professionals. *Criminal justice officials, other government officials, and professionals in victim assistance organizations were asked their opinions, perceptions, and suggestions about the rights of crime victims and crime victim services. These individuals, 145 at the local level and 53 at the State level, fell into the following categories:*

Local	State
*Judges**	*Agency directors*
Prosecutors	*Legislators*
Parole and probation officials	*Victim coalition directors*
Victim assistance coordinators	*Other government officials*
Victim-witness staff	
Defense attorneys	
Police and sheriffs	

**Judges constituted almost half the people interviewed at the local level.*

Can the findings be generalized? *By their very nature, the findings of social science studies that are not true experiments can establish relationships among various factors; more difficult is establishing definitive, cause-and-effect relationships. In this study, strong- and weak-protection States were not identical in certain factors that might determine case outcomes or how victims are treated; the differences may have affected the findings. Another limitation to generalizing the findings is that the victims selected for this study were not a representative sample of all crime victims. That is because most crimes are not reported to the police and, if they are, do not progress beyond the report stage. Because the cases in this study progressed further, the victims surveyed were likely to be more satisfied than the average crime victim. In addition, the legal analysis of State laws and State constitutional amendments reflected the situation at a single point in time (January 1, 1992), and many changes in applicable statutes and constitutional provisions have been made since then.*

a. Unless stated otherwise, chi-square analyses were used to test differences between the groups of States. In addition, unless otherwise indicated, all findings are significant at the 0.05 level or less. Percentages were rounded to whole numbers. Because not all victims progressed equally far in the criminal justice process, percentages are based on the number of victims who had each type of relevant experience.

b. Failure of crime victims who have reported crimes to the police to disclose the crime when contacted by victimization survey interviewers is consistent with the results of reverse records check studies (e.g., Reiss, A.J., Jr., and J.A. Roth, eds., Understanding and Preventing Violence, Washington, D.C.: National Academy Press, 1993: appendix B).

c. Because the distribution of types of crime victims differed among the four States, interview data were weighted by State, using the proportion of victims in the entire sample as case weights. Thus, the distribution of crime types in strong and weak protection States was identical. The weighted number of crime victims in the sample was 1,312.

d. All interviews were conducted by SRBI, a New York-based survey research firm, using a computer-assisted telephone interview procedure.

The importance of victims' rights to victims themselves

The right to participate in the process of justice, including the right to attend criminal proceedings and to be heard at various points in the criminal justice process, is important to crime victims. The researchers reached this conclusion by presenting victims with the following list of rights and asking them to rate the importance of each one:[a]

- *Being informed about whether anyone was arrested.*
- *Being involved in the decision to drop the case.*
- *Being informed about the defendant's release on bond.*
- *Being informed about the date of the earliest possible release from incarceration.*
- *Being heard in decisions about the defendant's release on bond.*
- *Discussing the case with the prosecutor's office.*
- *Discussing whether the defendant's plea to a lesser charge should be accepted.*
- *Making a victim's impact statement during the defendant's parole hearing.*
- *Being present during the grand jury hearing.*
- *Being present during release hearings.*
- *Being informed about postponement of grand jury hearings.*
- *Making a victim's impact statement before sentencing.*
- *Being involved in the decision about what sentence should be given.*

On each item, more than three-fourths of the victims rated the particular right as "very important." Topping the list was the right to be informed about whether there was an arrest, rated "very important" by more than 97 percent of the victims. The sole item rated "very important" by less than 80 percent was involvement in the decision about the sentence.

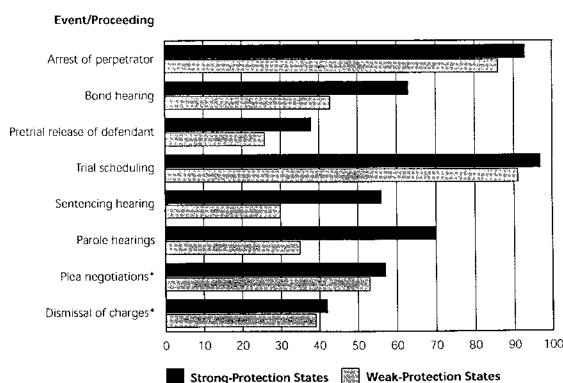
a. The rights are listed in descending order of their rating.

notice would directly affect the ability of victims to exercise their rights to attend and/or be heard at such proceedings.

Notification of their rights as victims

Crime victims not only need to be notified about events and proceedings in the criminal justice process, they also need to be informed of their legal rights. They need to know, for example, not only that the trial has been scheduled, but also that they have a right to discuss the case with the prosecutor. As expected, there were significant differences on this score between strong- and weak-protection States. It was much more common in the strong-protection States for crime victims to be notified of their various rights and of the availability of services. (See exhibit 2.) For example, almost three-fourths of victims in strong-protection States were informed of the availability of victim services,

Exhibit 1. ***Notification of events in the case—percentage notified***



** Difference between groups is not statistically significant.*

while less than half in weak-protection States received such information.

There were similar differences when it came to being informed of the right to discuss the case with the prosecutor, make a victim's impact statement, and make a statement at the parole hearing. Victims in the strong-protection States fared better. But again, as with notification of case-processing events, even in the strong-protection States large proportions of crime victims were not notified of their rights and of available services. Thus, almost 40 percent of victims in the strong-protection States were not informed they could make an impact statement at the parole hearing.

Exercising their rights

Notifying crime victims in advance of events and proceedings in the criminal justice process, and informing them of their rights to participate in that process, are prerequisites to the exercise of the rights to participate. Researchers asked crime victims who indicated they had received such information whether they had in fact exercised their rights to attend, make statements at, or otherwise participate in the criminal justice process. The responses of victims in strong-protection and weak-protection States were then compared.

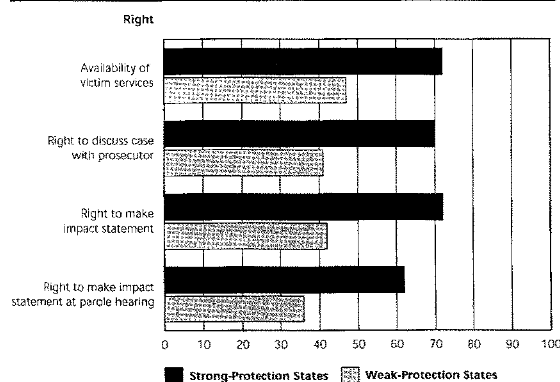
At some points in the criminal justice process, among victims who had received the prerequisite notice, victims in the strong-protection States were more likely to exercise their rights than those in weak-protection States. They were more likely to make recommendations at bond hearings, to make recommendations about sentences, and to make an impact statement at the parole hearing. (See exhibit 3.) At other stages, such as making an impact statement at sentencing, or attending the parole hearings, similar percentages of victims from both groups of States, who knew of the proceeding and of their legal rights, exercised those rights.

While the strength of the legal protections of victims' rights to participate did appear to influence the numbers of victims who exercised some rights to participate, victims in both groups of States were more likely to exercise some rights than others. For instance, most victims in both strong- and weak-protection States who were notified of the sentencing hearing and their rights to participate attended sentencing hearings (72 percent) and made an impact statement at sentencing (93 percent). Relatively few victims in either group, even when they were aware of their rights and of the proceeding, exercised their rights to make recommendations at bond hearings or to attend parole hearings. (See exhibit 3.)

Obtaining restitution

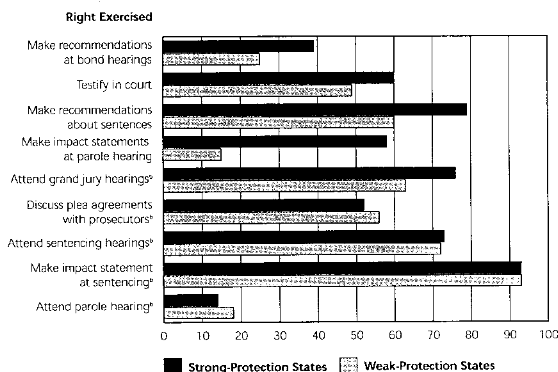
Another important area of victims' rights examined in this study was the right of victims to restitution–the court orders a convicted defendant to repay the victim for crime-related economic losses. Contrary to the hypothesis that judges in strong-protection States would be more likely to order restitution whenever a victim had sustained economic losses, they were significantly *less* likely to do so (22 percent, in contrast to 42 percent in the weak-protection States).[6] In the cases in which restitution was ordered, there was no significant difference in the percentages of victims from strong- and weak-protection States who actually received restitution (37 percent versus 43 percent). Overall, victims in strong-protection States who were eligible for restitution were significantly less likely than their counterparts in weak-protection States ever to receive *any* restitution (8 percent, in contrast to 18 percent).

Exhibit 2. ***Notification of services and rights—percentage notified***



Note: All figures are statistically significant at the 0.05 level or less.

Exhibit 3. ***Exercising their rights as victims—percentage exercising their right***[a]



a. *In each case, percentages are based on number of relevant cases. For example, the percentages that attended the grand jury hearing were based on the number of victims who knew of the hearing; the percentages who testified in court were based on the number of cases that went to trial.*

b. *Difference between groups is not statistically significant.*

Because these results were contrary to the hypothesis, exploratory analyses were conducted to determine if other factors might explain them. The analyses revealed that defendants in restitution-eligible cases in strong-protection States were more likely than those in weak-protection States to have been incarcerated (89 percent, in contrast to 72 percent). Restitution in both groups of States was less likely to have been ordered in cases involving a sentence of incarceration. However, the analyses also revealed that weak-protection States were significantly more likely to order restitution than strong-protection States, regardless of whether the sentence included incarceration (44 percent, in contrast to 23 percent), or did not include incarceration (61 percent, in contrast to 36 percent). Thus, the analyses were unsuccessful in identifying the incarceration of convicted defendants as a reason for the superiority of the weak-protection States in ordering restitution.

The most striking finding was the relatively small percentage of eligible victims overall (less than 20 percent) who received *any* restitution (whether ordered or not). The low percentage suggests that factors other than legislative mandates are driving whether restitution is paid. When criminal justice officials were surveyed (see "How the criminal justice system views crime victims' rights," page 8), they indicated that the factors influencing the ordering of restitution might include lack of knowledge about victims' economic losses or the amount of defendants' assets, lack of knowledge about the victims' right to restitution, and opinions about the appropriateness of ordering restitution.

Rating the criminal justice process and its agents

Crime victims need to have confidence in the criminal justice process. To measure their level of confidence, the researchers asked them to assess the adequacy of criminal justice system performance at several points in the criminal justice process. Again, the findings were consistent with the hypothesis: victims who came from States where legal protection is strong were more likely to rate the system favorably. (See exhibit 4.) Still, the comparative figures cannot conceal the fact that many victims, even in States where legal protection is strong, gave the system very negative ratings.

Rating the outcome of the case. As predicted by the hypothesis, victims in weak-protection States were more likely to believe the fairness of the sentence was "completely inadequate" (the lowest rating). However, a sizeable minority of victims in the strong-protection States also believed the sentence imposed was "completely inadequate" (34 percent in weak-protection versus 25 percent in strong-protection States).

Similarly, more than one in four victims from weak-protection States and one in five from strong-protection States believed the fairness of the verdict or plea was completely inadequate. More than 25 percent of victims from weak-protection States and 15 percent from strong-protection States felt the speed of the process was completely inadequate. Finally, 22 percent of victims from weak-protection States and 15 percent from strong-protection States said support services for victims were completely inadequate.

These negative ratings are particularly noteworthy in view of the fact that, from the victims' perspective, the

outcomes of these cases were much more favorable than most; that is, a higher than usual proportion resulted in a plea or verdict of guilty that led to incarceration of the defendant. Clearly, to many crime victims, even in cases resulting in a conviction and imprisonment of the defendant, the criminal justice process did not meet their expectations.

Rating the system and its agents. Victims gave high marks to the various agents of the criminal justice system, such as the police. Again, victims in the strong-protection States tended to be more satisfied than those in the weak-protection States. But the proportions who said they were very satisfied or somewhat satisfied with the performance of police, prosecutors, victim/witness agency staff, and judges were high across the board, irrespective of the strength of legal protection. Thus, in the strong-protection States, 83 percent of the victims were very or somewhat satisfied with the police and, at 77 percent, the proportion in the weak-protection States was similarly high. (See exhibit 5.)

Exhibit 4. ***Victims rate criminal justice processing—percentage who rate it more than adequate or completely inadequate****

Aspect of Processing	Strong-Protection States		Weak-Protection States	
	More Than Adequate	Completely Inadequate	More Than Adequate	Completely Inadequate
Efforts to apprehend the perpetrator	44	6	27	11
Efforts to inform the family about progress on the case	29	9	13	19
Their ability to have input in the case	21	15	9	25
Thoroughness of case preparation	28	10	14	20
Fairness of the trial	20	11	10	20
Fairness of the verdict or plea	17	21	6	28
Fairness of sentence	14	25	5	34
Speed of the process	17	15	6	27
Support services	16	15	8	22

** The ratings continuum was "more than adequate," "adequate," "somewhat less than adequate," and "completely inadequate."*

Note: All figures are statistically significant at the 0.05 level or less.

The criminal justice system overall was rated somewhat lower than each of its component representatives: Only 55 percent of victims in strong-protection States and 47 percent in weak-protection States were very satisfied or somewhat satisfied with it. At the other end of the scale, the proportion of victims expressing strong dissatisfaction with the system was relatively high—more than one-fourth of the victims in the strong-protection States and more than one-third in the weak-protection States.

What explains victims' satisfaction levels

Knowing whether and to what extent crime victims are satisfied (or dissatisfied) with the criminal justice system is not the same as knowing why. To shed light on the issue, three scales were constructed, each of which comprised several questions asked of victims. The scales measured overall satisfaction with the criminal justice system, the extent to which victims thought they were informed of their rights, and victims' perceptions of the effectiveness of their impact statements. They were called, respectively, the Victim Satisfaction Scale, the Informed Victim Scale, and the Victims' Impact Scale.

As measured by the Victim Satisfaction Scale, satisfaction with the criminal justice system was greater among female than male victims, among white than African-American victims, and among higher income than lower income victims. Age made no difference. As expected, in the strong-protection States the Victim Satisfaction Scale scores were higher than in the weak-protection States, and this was true after controlling for the effects of gender, race, and income level.

Are victims more satisfied if they are informed of their rights? And are they more satisfied if they believe their participation in the system has had an impact on the decision process? To answer the first question, Victim Satisfaction Scale scores were analyzed in relation to the Informed Victim Scale scores, with the results revealing a strong correlation between the two: victims who were informed of their rights were more satisfied with the justice system than those who were not. To answer the second question, the Victim Satisfaction Scales were again

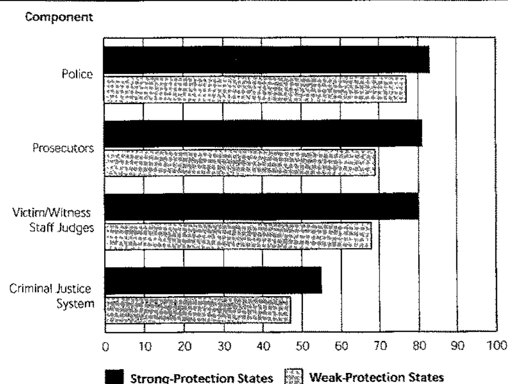
analyzed, this time in relation to the Victims' Impact Scale scores. Again, the analysis revealed a strong correlation, indicating that victims who thought their participation had an impact on their cases were more satisfied with the system.

Crime-related physical, financial, and mental health problems

Crime victims experience a variety of losses relating to the crime. They may sustain physical or psychological injuries, with some victims requiring counseling. They may lose money or suffer property destruction, loss, or damage. Victims may lose time from work or school as a result of their injuries or as a consequence of time spent consulting with law enforcement or prosecutors, or attendance at court proceedings.

Whether they were from weak- or strong-protection States, victims reported several major crime-related losses. For certain kinds of losses—property damage or destruction, property or monetary loss, time away from work or school to consult with the police, and canceled insurance coverage or increased premiums—strong legal protection made no difference, because victims in both weak- and strong-protection States were equally affected. (See exhibit 6.) For other kinds of problems resulting from the crime—time lost from work or school because of injuries and receiving medical treatment for those injuries—victims from the weak-protection States were more likely to be affected. But victims in strong-protection States were more likely to note a loss of time from work or school because of consultations with prosecutors, attending trial, or receiving counseling. This could be viewed not so much as a greater problem than as a greater opportunity: Although the time these victims lost cannot be discounted, they spent it participating in the justice system and obtaining services.

Exhibit 5. ***Victims' satisfaction with the criminal justice system—percentage who are very or somewhat satisfied***



Note: All figures are statistically significant at the 0.05 level or less.

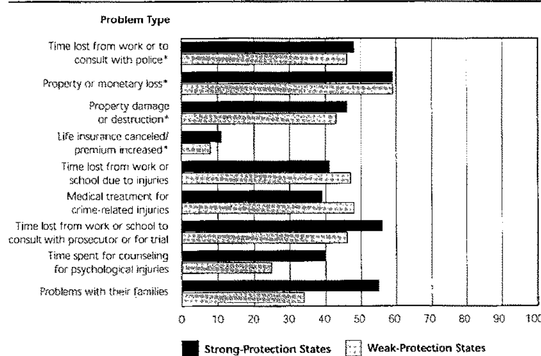
How the criminal justice system views crime victims' rights

This study also included a survey of criminal justice and victim assistance professionals at the State and local levels. There were two reasons for their inclusion. The first is that those professionals can affect crime victims' ability to recover and to cope with the aftermath of the offense and the stress of participation in the criminal justice system. The average citizen, newly thrust into the criminal justice system as a victim of crime, often has little understanding of the basic workings of the system. Representatives of the various components of the criminal justice system and victim assistance professionals can play key roles in helping facilitate access and understanding as cases progress.

There was another important rationale for surveying such professionals. The survey of crime victims produced a wealth of data on whether the strength of victims' rights laws influenced the rate at which victims received their rights and on victims' satisfaction with the criminal justice system. However, it could not suggest reasons that laws might or might not produce such an effect. Local and State professionals were surveyed to begin to explore such reasons.[7] The data produced by these surveys inform the discussion of influences on the implementation of victims' rights, and suggest additional avenues for research.

Thus, State and local officials and advocates were surveyed to determine the extent to which they were aware of the legal rights of victims, their views of how victims' rights are ensured, and their thinking about what further steps may be necessary to strengthen the protection of victims' rights. The interviews with such officials revealed much the

Exhibit 6. ***Victims' crime-related problems—percentage who experienced problems***



** Difference not statistically significant.*

same pattern as the interviews with victims: strong legal protection tended to translate in practice as greater implementation of those rights, but in many cases did not guarantee the provision of such rights.

Views of local criminal justice and victim service professionals. If the local officials came from strong-protection States, they were more likely than those from weak-protection States to say they "always" or "usually" provide crime victims with their rights to notification of events in the case, to be present at the various stages of the criminal justice process, and to be heard. These local officials were also about one-third more likely than their counterparts in weak-protection States to believe that victims' rights are "adequate."

Yet, large proportions of local criminal justice officials, even from States where legal protection is strong, were not aware of many victims' rights and how they are being provided. For example, only 39 percent of the local professionals in the strong-protection States knew that their State had a constitutional amendment enumerating victims' rights. For a majority of questions about victims' rights, a substantial number of officials incorrectly identified the source of the victims' right as a policy or practice, rather than a statute or State constitutional amendment. Many officials were also unclear about which agency had the duty to provide victims a given right.

State leaders' views. The opinions of State leaders indicate the extent to which crime victims' rights have achieved understanding and acceptability at high levels of government. At the State level, awareness of legally mandated victims' rights tends to be higher than it is locally. Such leaders as governors, attorneys general, heads of State criminal justice agencies, and heads of State crime victims' organizations generally were aware of the status of victims' rights and the challenges of implementing them.

At the State level, as at the local level, strong legal protection made a difference, though not in all respects. Leaders from the strong States were more likely to believe their criminal justice system was performing well, particularly in protecting victims' rights. However, even where legal protection was strong, a large majority also indicated they were aware of problems victims are experiencing in obtaining benefits and services. The problems most frequently cited had to do with victim notification.

Barriers to implementation

Criminal justice and victim advocate professionals at the State and local levels were asked for their suggestions for improving the provision of victims' rights. Their responses basically fell into three groups: increased funding, increased training, and increased enforcement of victims' rights.

Resource limitations were cited by officials as the most common reason for being unable to fulfill their responsibilities. Local officials from the strong-protection States were more likely than those from weak-protection States to believe that funding for the implementation of victims' rights was adequate. (In the strong-protection States, 55 percent of local officials, in contrast to 34 percent in the weak-protection States, felt funding for victim services was adequate; 39 percent in the strong-protection States, but only 27 percent in the weak-protection States, felt funding for implementation of victims' rights was adequate.) At the same time, a considerable percentage of these local leaders, even those from the strong-protection States, believed funding for victim services was very inadequate (15 percent, and 35 percent of those in the weak-protection States).

When asked if their office had funding for use in victim services programs or

for implementing victims' rights, only about one-third of *all* officials at the local level said it had (and there was little difference between the weak- and the strong-protection States). What is more, very few of those without funding said they had actively sought it in the previous year.

At the State level, officials offered a similar assessment of funding; that is, those from strong-protection States were more likely to believe that funding was adequate than were those from weak-protection States. (Half the State leaders in strong-protection States, in contrast to 31 percent in the weak-protection States, believed funding for implementation of victims' rights was adequate.) The State leaders also cited increased funding—specifically for additional staff (victim/witness coordinators and criminal justice staff)—more often than any other need. And whether they were from States with weak or strong legal protection, these leaders most often cited increased funding or staffing when they were asked how they would minimize problems in providing victims' services.

In prioritizing suggestions to improve the treatment of crime victims in their criminal justice systems, leaders in weak-protection States most frequently named the establishment, enhancement, and/or enforcement of victims' rights laws as their top priority; increased funding was a secondary priority. By contrast, among leaders in the strong-protection States, the largest percentage of responses dealt with issues of increased funding and resources for victim-related services and programs, followed by the need for better education of criminal justice officials regarding victims' rights.

What more needs to be done

The findings offer support for the position of those who advocate strengthening legal protection of crime victims' rights. Where 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. Moreover, the levels of overall satisfaction in strong-protection States are higher. Strong legal protection produces greater victim involvement and better experiences with the justice system. A more favorable perception of the agents of the system—police, prosecutors, victim/witness staff, and judges—is another benefit. Because strong legal protection at the State level is associated with victim awareness, participation, and satisfaction, some have advocated a Federal constitutional amendment to protect victims' rights.

On the other hand, legal protections *per se*, regardless of their relative strength in State law or State constitutions, are not always enough to ensure victims' rights. As the study revealed, 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. In the strong-protection States examined in this study, more than one in four victims were very dissatisfied with the criminal justice system as a whole.

Mediating factors. Several mediating factors were identified as influencing the provision of victims' rights, beyond the strength of the statute or State constitutional amendment. The first among these is knowledge of victims' rights. The survey of local criminal justice officials and victim service professionals revealed a lack of awareness of victims' rights and how those rights are implemented. The level of criminal justice officials' and victims' knowledge of victims' rights influences their conduct with respect to those rights. Criminal justice officials are not likely to enforce victims' rights laws if they are unaware they exist. They may be less likely to seek funding for services they do not know they have a duty to provide. Victims are unlikely to attempt to assert rights they do not know they have.

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. It can be assumed that there is a relationship between the strength of legal mandates and the provision of funding to implement those mandates. In other words, it is reasonable to assume that States with stronger legal mandates for the provision of victims' rights tend to provide more funds for implementation than States with weaker mandates. While this study did not attempt to measure the actual levels of funding, officials in the States with strong legal protections of victims' rights were more likely to believe that funding was adequate.

Finally, even where strong laws exist and are fully understood, and where resources are adequate, there may be a need for additional enforcement mechanisms to ensure that victims are given their rights. While some enforcement mechanisms may involve giving victims the power to assert their legal rights, others might involve procedures that better allow criminal justice agencies to monitor their own compliance with victims' rights laws.

Strengthening victim protection. In view of these considerations, the States and/or the criminal justice system can take several steps, on a variety of fronts, to strengthen victim protection:[8]

- Keep victims informed, provide them with opportunities for input, and

consider that input carefully for, as the study revealed, informed victims, and those who thought their input had influenced criminal justice decisions, were more likely to be satisfied with the criminal justice system.

- Make changes to ensure that restitution is ordered, monitored, paid, and received.[9]
- Offer criminal justice officials and crime victims additional education about victims' rights and their legal mandates.
- Take steps to seek and ensure adequate funding for victims' services and the implementation of victims' rights.
- Institute mechanisms to monitor the provision of victims' rights by criminal justice officials whose duty is to implement the law, and provide a means by which victims who are denied their rights can enforce those rights.[10]

Dean G. Kilpatrick, Ph.D., professor of psychology and Director of the National Crime Victims Research and Treatment Center at the Medical University of South Carolina (Charleston, South Carolina), was the study's Research Director. David Beatty, J.D., Director of Public Policy, National Center for Victims of Crime (Arlington, Virginia), was the Project Director; Susan Smith Howley, J.D., who also contributed to the report, is Assistant for Legislative Services at the National Center for Victims of Crime. The survey interviews were conducted by Schulman, Ronca, and Bucavalas, Inc., under the direction of Dr. John Boyle. The research was conducted and the report prepared under a cooperative agreement between the National Center for Victims of Crime and the National Institute of Justice (# 93-IJ-CX-K003).

Notes

1. *President's Task Force on Victims of Crime Final Report*, Washington, D.C.: President's Task Force on Victims of Crime, December 1982:114.

2. For current information about the status of crime victims' rights laws, contact the National Center for Victims of Crime at 2111 Wilson Boulevard, Suite 300, Arlington, VA 22201 (703–276–2880).

3. For a recent review of research, see Kelly, D.P., and Erez, E., "Victim Participation in the Criminal Justice System," in R.C. Davis, A. J. Lurigio, and W.G. Skogan, eds., *Victims of Crime* (second edition), Thousand Oaks, California: Sage, 1997. Currently under way is a survey, conducted by the Council of State Governments, Eastern Regional Conference, of the attitudes of citizens, including crime victims, toward the criminal justice system. The survey, which will cover 10 Northeastern States, will cover the extent and nature of victimization, perceptions of victims' rights and victims' services, and victims' experiences in reporting crime.

4. Formerly the National Victim Center.

Copies of the full report, "Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims," by David Beatty, Susan Smith Howley, and Dean G. Kilpatrick (Washington, D.C., National Victim Center, December 20, 1996), are available from the National Criminal Justice Reference Service. Through NIJ's Data Resources Program, the data generated by the study have been deposited with the National Archive of Criminal Justice Data (NACJD) for public availability. The data can be accessed early in 1999 at the Web site of the Inter-university Consortium for Political and Social Research (ICPSR), which administers the NACJD: http://www.icpsr.umich.edu/NACJD/archive.html or by contacting ICPSR, University of Michigan, Institute for Social Research, P.O. Box 1248, Ann Arbor, MI 48106–1248 (phone 734–998–9900; fax: 734–998–9889; e-mail: netmail@icpsr.umich.edu).

5. The term "victim services" refers to a wide range of programs and policies (such as crisis counseling, transportation, and employer intercession) that provide assistance directly to crime victims.

6. Restitution-eligible cases are those in which the victims sustained economic losses and the defendants pleaded guilty or were convicted. Findings are significant at the .05 level or less.

7. Because in this part of the analysis the sample size for each type of State was relatively small, the data were not subjected to the same type of statistical analysis as were the data from victims.

8. The Council of State Governments-Eastern Regional Conference (see note 3) is currently planning a regional conference that will address such issues as identifying victim issues that could be addressed through legislation, modifying existing victims' rights legislation, and developing model legislation that could meet crime victims' needs.

9. There is a useful discussion of restitution issues in "Making Victims Whole Again," by B.E. Smith and S. W. Hillenbrand, in R.C. Davis, A. J. Lurigio, and W.G. Skogan, eds., *Victims of Crime.*

10. A recent report by the Office for Victims of Crime presents recommendations from crime victims, victim advocates, criminal justice practitioners, health professionals, and researchers. See *New Directions from the Field: Victims' Rights and Services for the 21st Century*, Washington, D.C.: U.S. Department of Justice, Office for Victims of Crime, 1998. NCJ170600.

This and other NIJ publications can be found at and downloaded from the NIJ Web site (http://www.ojp.usdoj.gov/nij).

The National Institute of Justice is a component of the Office of Justice Programs, which also includes the Bureau of Justice Assistance, the Bureau of Justice Statistics, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime.

Findings and conclusions of the research reported here are those of the authors and do not necessarily reflect the official position or policies of the U.S. Department of Justice.

NCJ 173839

PREPARED STATEMENT OF DOUGLAS BELOOF AND DEAN JAMES HUFFMAN ON BEHALF OF NORTHWESTERN SCHOOL OF LAW OF LEWIS & CLARK COLLEGE

My name is Douglas Beloof, I am a visiting Professor of law at Northwestern School of Law at Lewis & Clark College. I have written the casebook, Victims in Criminal Procedure. I have also written The Third Model of the Criminal Process: The Victim Participation Model 99 Utah L.Rev. v. 4 (pending May 1999), which explores the value underlying victim participation. I have devoted most of my professional career to crime victims. I am joined in my support of the Crime Victims Rights Amendment by the Dean of our law school, James Huffman.

The question before the Senate is whether or not the victim of crime should obtain very modest constitutional rights in the criminal justice system. While various rationales are articulated in opposition, at bottom the opposition is that these minimal victim accommodations are not valued highly by the opponents.

There are those who will rely upon any and all rationales to deny crime victims modest constitutional rights. Distilling the opposition to its essence, the opposition believes that the human dignity of crime victims should not be valued highly enough to allow for modest victim rights to co-exist with the criminal defendant's rights. To say that statutes provide adequate protections for crime victims is to say that victim rights just aren't important enough for constitutional status. To put this argument in perspective, no one would suggest that we should reduce a criminal defendant's rights from constitutional to statutory status. If it is necessary to protect the dignity of the defendant in the constitution, it is also appropriate to provide the dignity of the crime victim with the same protection. This is because the human dignity of both the criminal defendant and the crime victim are worthy of constitutional recognition. I do not expect to change the minds of those adamantly opposed to the future. The future is revealed in an emerging reality of criminal procedure which includes the victim in various stages of the criminal process. But, for those with an open mind, consider that the real issue before the Senate is how highly the Senate values the dignity of the crime victim. It is easy to find rationales to deny crime victims these modest rights. But these opposing rationales only rule when the human dignity of crime victims is devalued and is valued below the human dignity of the criminal defendant. The rationales used in opposition to the Crime Victim Rights Amendment carry weight only when basic human rights of crime victims are perceived as trivial compared to the rights of others. In particular these opposing rationales carry weight when the human dignity of crime victims is perceived as trivial compared to the human dignity of criminal defendants.

Principles of federalism are but one example of a rationale used to deny the human dignity of crime victims. But, principles of federalism only interfere with enacting victim rights legislation if a lower value is placed on civil rights for crime victims than civil rights for others. No one would suggest that the First Amendment be repealed so that the states, in the name of federalism, could experiment with freedom of religion or freedom of the press. No one would suggest this because fundamental civil rights are more highly valued than federalism principles. To say that the principle of federalism, or any other principle, trumps basic rights for crime victims is to devalue the human dignity of crime victims. It is to say that while federalism principles do not prevent other fundamental rights from attaining constitutional status, crime victim rights are citizens whose dignity ought not to be constitutionally recognized along with the human dignity of the criminal defendant. It is to say that crime victims are citizens who are not as worthy as criminal defendants. Of course, it is not necessary for the states to "experiment" with basic human rights before the Senate elevates such rights to constitutional status. Experimentation was never intended for fundamental civil rights but for less important matters. The Amendment is designed not to reduce the dignity of criminal defendants, but to acknowledge at a constitutional level the similar dignity of the crime victim.

If you come to the Crime Victims Rights Amendment with an open mind, then ask yourself these questions: Should the victims of the Oklahoma City bombing have had the accommodation of these modest constitutional rights? Should the families of the security officers killed while protecting Members of Congress have these modest rights? Should your constituents have these modest rights when they are victimized by crime? These questions are not intended to appeal to emotion. Rather, they are intended to assist you in prioritizing values. Prioritization of values is the fundamental exercise in creating laws. When values are prioritized, can there be any question that these fundamental civil rights and the values they represent are worthy of constitutional status? Throughout my career as lawyer and law professor, it has always been true that conservatives, moderates and liberals have joined together to create constitutional rights for victims in state constitutions. Professors Lawrence Tribe and Paul Cassell, as persons from the left and right who support

the Crime Victim's Amendment, agree that victims rights are fundamental civil rights. We agree and add our voices to those of Professors Cassell and Tribe to urge you to support the Crime Victim Rights Amendment. We hope you will see that a vote for the Crime Victim Amendment is a vote that moves all of us farther down the road liberty and justice for all.

PREPARED STATEMENT OF JAMES E. DOYLE

VICTIMS' RIGHTS CONSTITUTIONAL AMENDMENT—SENATE JOINT RESOLUTION 3

As Attorney General of the State of Wisconsin, I wish to reaffirm my support for a federal constitutional amendment which recognizes the fundamental right of crime victims to have access to the criminal justice process.

As a district attorney more than 20 years ago, I began one of the first victim/witness programs in the nation. Since that time in 1978, I have watched the development of rights and services for victims of crime. I have seen prosecutors, judges and law enforcement officials become more sensitive to the needs of crime victims.

This increased awareness came, not because leaders in the criminal justice system were great visionaries, but because victims who were treated badly by the system demanded better treatment. Victims, advocates and family members who have fought for a voice in the criminal justice process should receive our respect for what they have endured and our thanks for enlightening us.

Due to the work of victims and their advocates, Wisconsin has a long history of recognizing and addressing the needs of victims of crime. One of the nation's first two victim/witness programs was started in Milwaukee in 1975 and we enacted the nation's first victims' bill of rights in 1980. Wisconsin was among the first states to amend its constitution to recognize crime victims' rights in 1993.

I believe that prosecutors today at the local, state and federal levels share a sincere appreciation for the critical role that victims play in ensuring that the criminal justice system functions to protect all of us. Those of us who are responsible for public safety should treat crime victims with fairness, dignity and respect. It is the right thing to do.

Respect for victims' rights also has improved our ability to fight crime. When victims are treated well by the criminal justice system, other victims are encouraged to report crimes and cooperate with law enforcement officers and prosecutors.

I believe that most prosecutors strongly support victims' rights. The major issues of concern to prosecutors have dealt with ensuring that an amendment does not diminish the discretion of prosecutors or their ability to carry out effectively their responsibility for enforcing the law. I believe those concerns are more than adequately addressed in S.J. Res. 3.

Wisconsin law, effective December 1, 1998, provides for greater accountability and enforceability of our state statutory and constitutional rights. In many respects, Wisconsin's crime victims' rights amendment is broader than S.J. Res 3. They are similar in that it is left to the legislature to define who are "crime victims." Our new law affords all rights to all crime victims (misdemeanors and felonies) in both adult and juvenile proceedings. It applies to business, corporate and governmental victims as well as natural persons.

In addition to those rights contained in S.J. Res. 3, our state constitution gives victims the right to confer with the prosecution, the right to receive compensation and, importantly, requires that the legislature provide remedies to victims. The guiding philosophy is that government has a firm obligation to ensure that victims are adequately informed about their rights, but that all victims should be afforded the courtesy of deciding whether they wish to exercise those rights.

Among the more noteworthy provisions of this law is the creation of a Crime Victims Rights Board that, among other powers, may seek the imposition of a civil forfeiture for intentional violations of victims' rights.

I raise this because many of the issues we debated in Wisconsin in developing this legislation are similar to those that have been discussed with respect to the federal amendment. What I think is quite significant about the Wisconsin experience was that our prosecutors, including those in our major metropolitan areas, supported effective and meaningful enforcement of victims' rights. (Indeed, a principal drafter of the new law was the then-president of our state prosecutor's association.) In other words, please do not be misled into thinking that meaningful victims' rights in anyway impedes effective law enforcement.

In closing, I believe that we can achieve reasonable and workable approaches to the implementation of constitutional rights for crime victims. It is our duty to ensure that innocent victims of crime who have already suffered at the hands of a criminal do not suffer again because the criminal justice system does not care.

I strongly urge you to support S.J. Res. 3.

PREPARED STATEMENT OF MARSHA A. KIGHT

My name is Marsha Kight, I am Director of Families and Survivors United, a Oklahoma based advocacy organization.

On April 19,1995 I lost my daughter, Frankie Merrell, in the worst act of terrorism in the history of this country. A day of *Infamy.* In the months that followed I found myself in a downward spiral. There was no question—my life had to change if I was to continue to live.

I knew that, for myself I must find a voice to survive this tragic loss. I became an advocate for victims' of the Oklahoma City bombing, and through that experience, I exposed myself to the plight and pain of so many others. For all of us who joined together in this way, the veil of innocence was removed. Among other things, we determined that the silence of the victims had to end.

In the years following the bombing, as that crime has been prosecuted in the courts, I have learned that it is not sufficient for the victims to speak just to anyone willing to listen, they must also have the right to be heard in the justice system.

There have been millions of victims' before the Oklahoma bombing and sadly, many are yet to follow. My hope is that the good which comes from this tragedy will shine as a beacon of hope for all victims' of crime, everywhere, and act as the catalyst for positive change in American laws on victimization. That hope has yet to be realized.

Every time innocent people are murdered, it should and does affect us all everytime an act of violence happens, every American loses some sense of security and freedom.

How many more of our sons and daughters, brothers and sisters, friends, spouses, mothers and fathers have to be slaughtered before we unite and cease to tolerate violence in our country, or to be treated disrespectfully by our government afterwards.

I have experienced the indignities of the justice system first hand, for me this debate is not about abstract constitutional theory, it is not about what the lawyers or the law professors or the experts have to say. For me this debate is about my daughter and the voice that I must now be for her.

The constitutional protections, so important in criminal proceedings, were put in place by our founding fathers to "provide for the common defense and ensure domestic tranquillity." Civil liberties were recognized as fundamental for everyone in establishing this nation.

On a June 1996 morning, Judge Richard P. Matsch informed family members and survivors, who were seated in his courtroom, that they had the lunch hour recess to decide whether or not they would remain as observers of the trial, either in the Denver courtroom or in Oklahoma City on the closed-circuit television, or be impact witnesses during the penalty phase of the trial, if McVeigh was found guilty. For victims', who had lost their loved ones and survivors, this was a shocking, painful event and yet another victimization this time by the judicial process.

Although a grueling decision like this normally requires very careful thought, we were given no time. Every family member and survivor present tearfully made his or her choice that noon hour. Many, who had just arrived for the hearings, left in dismay, excluded from the most important judicial process in their lives and in the history of this nation.

I opted to remain and upon return to Oklahoma City began seeking a way to reverse Judge Matsch's decision on behalf of families and survivors, as well as all victims' of crime.

Paul Cassell, a Utah attorney and professor of law, and Bob Hoyt and his associates at the Washington, D.C., law firm of Wilmer, Cutler and Pickering took up our plight. They filed an emergency petition with the Tenth Circuit Court of Appeals in Denver, Colorado, asking that the court rescind Judge Matsch's order. Professor Cassell specifically cited an act of Congress that permitted victims to observe court proceedings without prejudicing their right to also speak at sentencing. Without a hearing, the Appeals Court's three-judge panel ruled that victims' did not have the right to be heard on this violation of their rights, that they had no "standing" to even our challenge to this cruel exclusion from judicial proceedings, considered, much less vindicated.

We then filed an *En Banc* petition, asking that all judges in the Tenth Circuit Court of Appeals review this decision. Supporting our request for review were all the Attorney Generals in the Tenth Circuit, 49 members of Congress, and the Department of Justice. The Court refused to even hear the case, once again, we were turned away.

Knowing the time constraints before the trial, the decision was made by all concerned to take our case to the United States Congress. In a non-partisan act, our President and this Congress took a giant step toward the fair treatment of victims' by enacting the "Victims' Clarification Act of 1997."

We returned once again to the courts and asked that Judge Matsch rescind his Order, however, incredibly he left open the possibility that victims' may still be excluded during the sentencing phase if they choose to remain in the courtroom throughout the trial. He said that there may be a Constitutional defect in the new law and that our hearing the trial testimony may improperly influence the impact testimony of some individuals, but the time to hear these challenges would come after the conviction, if there was one.

Because of this cloud over his ruling, on April 4, 1997 we filed another motion seeking clarification, stating that "the victims' impact witnesses continue to face the exclusion of their impact testimony, or remaining eligible to testify but not being able to observe the trial." The prosecutors advised the family members, "notwithstanding our new law, victims' should still stay out of the trial if they want to be heard at sentencing, if there is a conviction."

The prosecution team told me that, under the current rules, that I was ineligible to be an impact witness because I am a member of a minority group, those who oppose the death penalty.

If a Constitutional Amendment had already been passed, I could have accepted an implementation statute limiting the number of impact witnesses, since 2,500 of us qualified as victims' of this crime. I could also accept that I might not win a random drawing to speak. What I could not accept is some ideological, religious, or philosophical test that automatically excluded me from speaking.

The victims' right to be heard must be made as sacred as the defendant's right to counsel, and must be protected as zealously as the accused right to remain silent.

Indeed, we cherish the constitutional protections for the accused, to ensure that all participants in the criminal justice system perform their duties honorably, ethically, and in accord with the highest standards. We also support the ideal that no one should be convicted of a crime unless that conviction is backed up with proper evidence, obtained in full compliance with the rules of criminal procedure.

But we have learned from experience that these protections for defendants must be balanced with constitutional considerations for the rights of victims', their families and representatives, to fully participate in each and every stage of the justice process through the investigation, indictment, bail, motions, trial, sentencing, appeals and parole.

Society, itself, is harmed by violent crime, through assaults on the peace, dignity and good order of its people. Only the direct victims' of a criminal act can testify to both the physical and emotional pain caused by such an act. Just as defendants have the right to introduce mitigating circumstances at sentencing and parole hearings, victims, too, must have the right to share the impact of the crime on their lives with presiding officials.

The right of victims' to present impact statements at all appropriate stages of the judicial process must be absolute. Never before, in the history of our country, have so many been so negatively impacted as victims, of ever increasing violent crime. And even if the annual roster of new victims is declining, it is well to remember that they join a huge number of other victims, whose wounds have not healed.

Crime Victims' are liberals and conservatives, rich and poor, for and against the death penalty, vengeful and forgiving, weak and strong, black, white and every color between and none of us should be barred from speaking as a result of our views or social status.

I do not take lightly the idea of advocating an amendment to the, U.S. Constitution. I am aware of the fact that this country has seen fit to add only twenty-seven such amendments since its inception a little over 200 years ago. But never before, in the history of our country, has violent crime been so pervasive, and never before, in the history of our country, have so many victims, been impacted by such horrific crimes.

I have been saddened, confused and hurt by my experience, with the criminal justice system which seems to defend itself by sending conflicting messages to victims'.

Now is the time for all of us to make certain that the voices, their experiences and the presence of the victims' are given legitimate standing in every Court, on every level, throughout America. The only way to guarantee that is by *enforceable and meaningful* rights enshrined in the U.S. Constitution.

It now falls upon Congress to interpret the conflicting messages and suggested legal theories, in a manner consistent with securing the blessings of liberty upon us and our descendants. And, in a manner that provides equal protection to the innocent, as has been and is applied to the protection of the accused.

Let me say, the hole in my heart remains unfilled and will always be open, but your actions may help give me, hope. I ask you if not the Oklahoma City bombing what will it take to bring about change? Or maybe the question is * * *. Who's next? Possibly someone you love or your child?

LET VICTIMS' RIGHTS RING ACROSS AMERICA

Marsha Kight

April 19, 1995, was the worst attack of terrorism in the history of this country. Its target was the U.S. government, but instead it shattered innocent lives. I lost my daughter, Frankie Merrell, and my five-year-old granddaughter, Morgan, lost her mother. In the months that followed I found myself in a downward spiral. There was no question my life had to change if I was to continue to live.

I knew that, for myself, I must find a voice to survive this tragic loss. I became an advocate for victims of the Oklahoma City bombing, and through that experience, I exposed myself to the plight and pain of so many others. For all of us who joined together in this way, the veil of innocence was removed. Among other things, we determined that the silence of the victims had to end.

This book has been our effort to act on that belief, to put our memories into words. I am proud of our collaborative efforts to give voice to our pain. But in the years following the bombing, as that crime has been prosecuted in the courts, I have learned that it is not sufficient for the victims to speak to anyone willing to listen, they must also have the right to be heard in the justice system.

There have been millions of victims before the Oklahoma bombing and, sadly, many are yet to follow. My hope is that the good which comes from this tragedy will shine as a beacon of hope for all victims of crime everywhere, and that it will act as the catalyst for positive change in American laws on victimization. That hope has yet to be realized.

Every time innocent people are murdered, it should and does affect us all. Every time an act of violence happens, every American loses some sense of security and freedom.

How many more of our sons and daughters, brothers and sisters, friends, spouses, mothers, and fathers have to be slaughtered before we unite in an effort to stop violence in our country, and the disrespectful ways in which our government treats victims afterward?

The constitutional protections, so important in criminal proceedings, were put in place by our founding fathers to "provide for the common defense and ensure domestic tranquility." Civil liberties were recognized as fundamental for everyone in establishing this nation.

On a June 1996 morning, Judge Richard P. Matsch informed family members and survivors who were seated in his courtroom that they had the lunch-hour recess to decide whether or not they would remain as observers of the trial, either in the Denver courtroom or in Oklahoma City on the closed-circuit television, or be impact witnesses during the penalty phase of the trial, if McVeigh was found guilty. For the victims, who had lost their loved ones, and the survivors, this was a shocking, painful event and yet another victimization—this time by the judicial process.

Although a grueling decision like this normally requires very careful thought, we were given no time. Every family member and survivor present tearfully made his or her choice that noon hour. Many, who had just arrived for the hearings, left in dismay, excluded from the most important judicial process in their lives and in the history of this nation.

I opted to remain in the courtroom as an observer, but upon my return to Oklahoma City I began seeking a way to reverse judge Matsch's decision on behalf of families and survivors, as well as all victims of crime.

Paul Cassell, a Utah attorney and professor of law, and Bob Hoyt and his associates at the Washington, D.C., law firm of Wilmer, Cutler and Pickering took up our cause. They filed an emergency permit with the Tenth Circuit Court of Appeals in Denver, Colorado, asking that the court rescind judge Matsch's order. Professor Cassell specifically cited an act of Congress that permitted victims to observe court proceedings without prejudicing their right to also speak at sentencing. Without a hearing, the Appeals Court's three-judge panel ruled that victims did not have the right to be heard on this violation of their rights, that we had no "standing" to even have our challenge to this cruel exclusion from judicial proceedings considered, much less vindicated.

We then filed an *En Banc* petition, asking that all judges in the Tenth Circuit Court of Appeals review this decision. Supporting our request for review were all the attorneys general in the Tenth Circuit, forty-nine members of Congress, and the

Department of Justice. The court refused to hear the case. Once again we were turned away.

Knowing the time constraints before the trial, the decision was made by all concerned to take our case to the United States Congress. In a nonpartisan act, the president and the Congress took a giant step toward the fair treatment of victims by enacting the Victim Allocution Clarification Act of 1997.

The victim's right to be heard must be made as sacred as the defendants right to counsel, and must be protected as zealously as the accused's right to remain silent.

Indeed, we cherish the constitutional protections for the accused, to ensure that all participants in the criminal justice system perform their duties honorably, ethically, and in accordance with the highest standards. We also support the ideal that no one should be convicted of a crime unless that conviction is backed up with proper evidence, obtained in full compliance with the rules of criminal procedure.

But we have learned from experience that these protections for defendants must be balanced with constitutional considerations for the rights of victims, their families and representatives, to fully participate in each and every stage of the justice process: through the investigation, indictment, bail, motions, trial, sentencing, appeals, and parole.

Society itself is harmed by violent crime, through assaults on the peace, dignity, and good order of its people. Only the direct victims of a criminal act can testify to both the physical and emotional pain caused by such an act. Just as defendants have the right to introduce mitigating circumstances at sentencing and parole hearings, victims, too, must have the right to share the impact of the crime on their lives with presiding officials.

The right of victims to present impact statements at all appropriate stages of the judicial process must be absolute. Never before in the history of our country have so many been so negatively impacted as victims of ever-increasing violent crime. And even if the annual roster of new victims is declining, it is wise to remember that they join a huge number of other victims whose wounds have not healed.

Crime victims are liberals and conservatives; rich and poor; for and against the death penalty; vengeful and forgiving; weak and strong; black, white, and every color in between—none of us should be barred from speaking as a result of our views or social status.

I do not take lightly the idea of advocating an amendment to the U.S. Constitution. I am aware of the fact that this country has seen fit to add only twenty-seven such amendments since its inception a little over two hundred years ago. But never before in the history of our country has violent crime been so pervasive, and never before have so many victims been impacted by such horrific crimes.

I have been saddened, confused, and hurt by my experiences with the criminal-justice system, which seems to defend itself by sending conflicting messages to victims.

Now is the time for all of us to make certain that the voices, the experiences, and the presence of the victims are given legitimate standing in every court on every level, throughout America. The only way to guarantee that is by enforceable and meaningful rights enshrined in the U.S. Constitution. I call upon each person who reads this book to contact their members of Congress and ask them to support this amendment. If not the Oklahoma City bombing, what will it take? The death of your loved one?

PREPARED STATEMENT OF MARSHA A. KIGHT IN RESPONSE TO THE TESTIMONY OF BETH A. WILKINSON

My daughter, Frankie Merrell, was murdered in the Oklahoma City bombing, and in tribute to her and all the others, I founded Families and Survivors United, which took a leading role in advocating for the victims and survivors before and during the trials which followed. This is how I first came to meet Beth Wilkinson.

Having attended every day of the McVeigh trial, I came to regard Beth Wilkinson as the most effective advocate on the prosecution team. More than that, I and others trusted her to bring the victims' perspective into the courtroom, and she lived up to that trust. So, I believe that her statement before the Judiciary Committee today is from the heart—that she really believes that if our Victims Rights Amendment were in place, it might have jeopardized a very basic right—the "right of the just conviction of the guilty," as she puts it.

But she is wrong. As she describes so well, the prosecution team worked hard to earn our trust, and for the great majority of the 2,000-plus of us who were designated victims under the law, we gave them our trust. But on the one tactical issue

she says argues against the Amendment, the prosecution team chose not to trust us for the reasons she describes, and in the process, that team broke both our trust and the law.

She claims that, had the Amendment been in place, its right for victims to be heard before a plea bargain is accepted might have harmed the prosecution. Specifically her suggestion that might have persuaded the judge to not accept the guilty plea of Michael Fortier—and thus might have jeopardized the eventual conviction of Timothy McVeigh and Terry Nichols. There are three things wrong with this conjecture.

First, Michael Fortier's testimony was not crucial to either conviction, as several jurors later made clear to me.

Second, had the Justice Department taken us into its trust on the usefulness of the Fortier plea, the great majority of us would have reciprocated that trust and encouraged the judge to accept the plea. I think from everything else Beth Wilkinson describes about the trust-building between the prosecution and the victims confirms this belief. We were not blind sheep, willing to accept everything the prosecutors said was so—we were, most of the time, informed citizens who were persuaded by the prosecutors' reasoning. Beth Wilkinson as much as admits this when she notes that the victims overwhelming asked for a provable and sustainable case against the guilty.

And third, the prosecution team's mistrust of us over the Fortier plea agreement was so great that it chose not to notify us over the hearing in which the plea was offered, and it chose not to confer with any of us beforehand about the plea—both of which were in violation of existing federal law.

So when Beth Wilkinson says that statutory reform will meet our just demands, we must ask, what happened to the statutes already on the books?

I am increasingly persuaded that the most formidable enemy of crime victims' aspirations for getting justice under our Constitution are criminal Justice officials—even well-meaning ones like Beth Wilkinson—who believe that only government lawyers know best. Her testimony is in fact Exhibit A in the case *for the Amendment* because it is the voice of a superior government extending handouts as an act of grace, not protecting legitimate rights of a free people. She says that the "concerns", of the victims must be balanced with the "need for a just trial," as though these important values were somehow in conflict, and that only the government knows how to achieve this goal.

I cannot tell you how these words hurt me; they confirm my worst fears about the treatment of victims in our justice system and how nothing will change without constitutional rights.

It is painfully obvious to me that she thinks of us as mere meddlers who must be kept out of this important government business for fear that we might break something. Beth Wilkinson may believe that she "grew to understand my grief first hand," but clearly she does not. For me and so many of our families our grief was profoundly extended when our government minimized and discounted our interests by refusing to consult with us about this important development early in the case.

For example, consider the point Beth Wilkinson makes about grand jury secrecy. She says, "Due to the secrecy rules of the grand jury, we could not explain to the victims why Fortier's plea and cooperation was important to the prosecution of Timothy McVeigh and Terry Nichols." Under existing federal law, however, courts are authorized to enter appropriate orders allowing for the disclosure of grand jury information in advance of a court proceeding. It apparently did not even occur to her then, nor does it today, to have sought such a court order for disclosure. Nor is it clear that such an order would even have been necessary, as surely there would have been ways to explain the circumstances to the victims without going confidential grand jury matters.

Perhaps most disturbing of all to me is Beth Wilkinson's assertion that the Victims Rights Clarification Act of 1997 "worked"—no victims were precluded from testifying." In fact, I was precluded from testifying in the sentencing phase of the trial. As she is well aware, I very much wanted to be a penalty phase witness. But because of my philosophical beliefs in opposition to capital punishment, I was not allowed by the government prosecutors to testify. Clearly the statute did not work for me.

In addition, a number of victims lost their right to attend the trial of Timothy McVeigh because of legal uncertainties about the status of victims' rights. As I testified before the Senate Judiciary Committee in 1997, Judge Matsch rejected a motion made by a number of us to issue a final ruling upholding the new law as McVeigh's trial began. His reluctance led the prosecution team (including Beth Wilkinson) to tell us that, if we wanted to give an impact statement at the penalty phase, we should seriously consider not attending the trial. Some of the victims on the pros-

ecution's penalty phase list followed this pointed suggestion and forfeited their supposedly protected right to attend McVeigh's trial. Our lawyers also sought further clarification from the judge (unsuccessfully), but had to do so without further help from the prosecution team. The prosecutors were apparently concerned about pressing this point further because the judge might become irritated.

Beth Wilkinson urges the Congress to "consider statutory alternatives to protect the rights of victims." While she says that she opposes the Victim's Rights Amendment in its "current form," the context of this statement makes it clear that she opposes any constitutional rights for crime victims. She concludes with the following prescription: "We must educate prosecutors, law enforcement and judges about the impact of crimes so that they better understand the importance of addressing victims' rights from the outset." But the truth is that there will be no real rights to address, as my experience makes clear, unless those rights are enshrined in the United States Constitution. Only then will victim's rights be meaningful and enforceable.

Prepared Statement of Anne McCloskey

The Maryland Coalition Against Crime supports passage of S.J. Res. 3 because it will provide meaningful and enforceable rights for crime victims. Just as the accused defendants' rights are ensured by the United States Constitution, crime victims also must be guaranteed certain basic rights under this fundamental law of our country. A victims' rights amendment to the Constitution is vital to establish balance in our criminal justice system. Nothing in this amendment diminishes the rights of the accused. It simply allows victims access to information and limited participation in the criminal justice system.

Crime victims throughout our country should be allowed consistent rights in the judicial process. At this time, 32 states have passed constitutional amendments that articulate victims' rights in various ways. While the plight of crime victims has improved through these efforts, there is no unifying law that would treat all these victims in a fair manner. In fact, 18 states provide no constitutionally protected rights for crime victims. Only through the passage of a U.S. Constitutional Amendment can we be sure that all crime victims are guaranteed the same rights.

In 1994, Maryland voters overwhelmingly approved a comprehensive Constitutional Amendment for crime victims' rights. I co-chaired the coalition of victims' rights organizations that campaigned for eight years for this amendment. During that time, I became very knowledgeable about the benefits and the problems with various proposals. Opponents argued that defendants would be denied rights; the justice system would be bogged down; appeals would proliferate; it would be too costly to the state. I am pleased to say that after four years of implementation none of the dire predictions has come to pass. The amendment works, not only for the victims, but for the benefit of society and the criminal justice system.

Our country can no longer continue to deny basic rights to so many of its citizens. MCAC urges you to support S.J. Res. 3 and provide a framework for all states to utilize in protecting crime victims' rights.

Prepared Statement of Karolyn V. Nunnallee

People victimized by drunk driving crashes too often get hit with a cruel double whammy. First, they lose loved ones who do not survive and/or they themselves suffer injuries that range from minor to disabling. Then, when their cases get to the courthouse, they learn that they have far fewer guaranteed rights than the accused drunk driving offenders.

Consider how Marilyn Mathis must have felt after her husband, Minister, was killed by a drunk driver. Marilyn felt the last thing she could do to honor her husband was to give a victim impact statement at the trial. "I wanted to let the court know how lost our family was without him," said Marilyn. "I was astounded, then sad, then angry when the defense attorney asked the judge to keep me out of the courtroom during the trial. The judge acted as if he had no choice since the defense attorney asked for it. So, I sat outside, upset and alone. Because of my continual pleading with the prosecutor to allow me in, she did arrange for me to address the jury, but only *after* the offender had been sentenced."

Marilyn's story poignantly captures the plight of surviving drunk driving victims. As of March 1997, 32 states have victims' rights constitutional amendments to ensure that victims have rights throughout the judicial process. Forty-eight states have enacted victims' bills of rights. However, the U.S. Constitution includes rights for defendants and none for victims, leaving them seriously shortchanged.

Even in states with strong victims' bills of rights and state constitutional amendments, a substantial number of victims are denied their rights, according to survey

research funded by the National Institute of Justice, U.S. Department of Justice and conducted by National Victim Center in spring 1997. The survey showed that a majority of victims—63.3 percent in states with "strong" victims' rights laws and 74.5 percent in "weak" states—are not informed of the offender's bail release.

In strong states, only half the victims whose cases concluded in a plea agreement are being informed of negotiations, although prosecutors are required by law to consult with victims in advance. One-fourth of the victims in these so-called strong states are not given the opportunity to present a victim impact statement at sentencing.

In addition to disturbing research findings like these, there is abundant anecdotal evidence that victims are not receiving their day in court. Stories like the saga of Sue Phillips of Louisiana are unfolding every day in towns across America and illustrate how easily victims' rights can be violated in the judicial process. When a drunk driving crash left Sue Phillips and her family injured, the defendant was charged with a fclony. At the sentencing hearing, the judge denied Sue's request to give her victim impact statement even though the state Victims' Bill of Rights guaranteed her the right to do so. The judge cited his "busy docket" as the reason for denying her request.

Victims of all crimes experience these injustices on a daily basis. The infamous Oklahoma City bombing case victimized hundreds of people. The trial court judge, Richard Matsch, ruled that victims would not be allowed to attend the trial if they wished to present a victim impact statement at sentencing. The Tenth Circuit Court of Appeals upheld the trial court, saying that victims had no legal standing to assert their right to be present and that the government could not enforce that right by appeal or by seeking a mandatory order. Shortly after, President Clinton signed a federal bill that had been overwhelmingly passed by both the Senate and the House allowing victims whose only testimony would be impact statements to attend the trial. Still, Judge Matsch ruled ambiguously, including the fact that those who wished to give a victim impact statement would be subject to voir dire.

It will take an amendment to the U.S. Constitution for crime victims to have their say in court and every other room in the courthouse where decisions are made daily about their cases. The U.S. Constitutional Amendment for Victims Rights is now pending before Congress. In late 1996, Senators John Kyl (R–AZ) and Dianne Feinstein (D–CA), introduced the federal amendment in the Senate and Congressman Henry Hyde (R–IL) introduced it in the House. Constitutional protection for victims is not a partisan issue. It has support on both sides of the aisle on Capitol Hill. Also, it was supported in both political party platforms and by both Presidential candidates in 1996. "Participation in all forms of government is the essence of democracy," said President Bill Clinton when he announced his support for the Victims Federal Constitutional Amendment in June 1996, "Victims should be guaranteed the right to participate in proceedings related to crimes committed against them," said the President. "People accused of crimes have explicit constitutional rights. Ordinary citizens have a constitutional right to participate in criminal trials by serving on a jury. The press has a constitutional right to attend trials. "All of this is as it should be. It is only the victims of crime who have no constitutional rights to participate, and that is not the way it should be. When someone is a victim, he or she should be at the center of the criminal justice process, not on the outside looking in."

The Victims' Rights Constitutional Amendment was reintroduced at the opening of the 106th Congress. If passed by a simple majority in each committee, the amendment should reach the floor or both chambers in 1999. If passed by a two-thirds majority in both the House and the Senate, it will go to the states for ratification. Three-fourths of the state legislatures (38) must ratify it before the amendment becomes part of the U.S. Constitution.

The journey from idea to law of the land has been long and arduous, and it isn't over yet. It began in 1982 as a vision of Frank Carrington, founder of Victims Assistance Legal Organization (VALOR), Washington State Attorney General Kenneth Eikenberry and other members of President Reagan's Task Force on Victims of Crime which published its Final Report in December of that year.

Although some members of the task force were skeptical about it, Eikenberry practically demanded that the report call for a sixth U.S. constitutional amendment to create specific rights for crime victims, foremostly the right to be informed of as well as present and heard at criminal justice proceedings.

The next milestone came in 1984 when Mothers Against Drunk Driving (MADD) and the National Organization for Victim Assistance brought together leaders from key national organizations and grassroots self-help advocacy groups. The purpose of the meeting was to share information and insight on successful strategies for grassroots activism and to explore ways to assist each other.

During an early plenary session, a vocal victims' rights advocate put a spotlight on the Presidential Task Force's recommendation. Robert Preston, President of Florida-based Justice for Surviving Victims implored the victims' rights movement to take the idea seriously. The next evening, about 30 advocates—including 10 from MADD—gathered informally to strategize about the process of amending the federal constitution.

After everyone returned home to their communities, this initial group continued dialogue among one another, culminating in the November 1987 founding of the National Victims' Constitutional Amendment Network (NVCAN). Bob Preston served as the coalition's first chair and Janice Lord, who was then MADD's director of Victim Services, was the first secretary.

The coalition decided the best strategy would be to first generate support from the states for victims' rights. The coalition's specific objective became ratification of state constitutional amendments for victims' rights in 38 states—the number required to ratify a federal constitutional amendment. Passage by the states would create a strong foundation of support for federal reform.

NVCAN labored for the next decade to push through state amendments. The National Victim Center became a repository for information about amendment efforts throughout the country. Victims' rights advocates were onto something powerful. In each of the 32 states where victims' rights amendments have made it to a vote of the people, they have passed by an overwhelming majority, receiving 80 to 90 percent approval in most states.

By 1995, NVCAN decided it was time to move forward with the proposed federal amendment. By directive of its national board of directors, MADD, too, joined the federal push.

U.S. Attorney General Janet Reno, a staunch victims' rights supporter, immediately supported the amendment. "Let us make sure that we give our victims the right to be, heard—not in some dispassionate way in [only a written] impact statement, but in a courtroom if they want to be heard, so that people can know what it's like to be a victim," said Reno at a Candlelight Vigil for Victims in New York City. "Let us give them an opportunity to participate, to be there, and to hold the criminal justice system accountable at every level."

Reno has continued to be outspoken on the issue. "Efforts to secure victims' rights through means other than a constitutional amendment have proven less than fully adequate," Reno testified before the U.S. House Judiciary Committee in June 1997. "Unless the Constitution is amended * * * we will never correct the existing imbalance in this country between defendants' constitutional rights and the current haphazard patchwork of victims' rights."

The proposed victims rights constitutional amendment is the only constitutional amendment that the U.S. Justice Department and the President currently support. Without a federal Constitutional Amendment, victims will never be assured that their rights are balanced with those of their offenders.

The time has come to balance the scales of justice to ensure that crime victims are guaranteed a voice in the criminal justice process in which they have become unwitting participants. The drafters of the Constitution designed this document to help remove tyranny and control over the powerless and to assure that all Americans would have. a voice in the very system of government that could control their daily lives. Our forefathers intended for the Constitution to be a living and growing document. If this were not so, we would still have slavery today, women would not have the right to vote and defendants in criminal cases would not have the enumerated rights they enjoy today in the criminal justice system. We do not seek to take away the rights guaranteed to criminal defendants. We only seek to assure that our Constitution protects the innocent victims of crime to the same degree that it protects those who are accused of committing the crime.

All crime victims want is fairness, and as the late U.S. Supreme Court Justice Potter Stewart observed, "Fairness is what justice really is."

Prepared Statement of William T. Pizzi

Dear Senator Kyl:

I am writing in support of the Victims' Rights Amendment and have enclosed with this letter the draft of an article that will appear in the Utah Law Review explaining why I think such an amendment is needed.

I have also enclosed a second article published in the Stanford Journal of International Law comparing the advantages that victims have in the German trial system with the disadvantages victims have in our trial system. I enclose this second article simply as background so that those interested might understand why our trial system needs a Victims' Rights Amendment.

I. INTRODUCTION

The Austrian philosopher Ludwig Wittgenstein describing a certain philosophical problem wrote that "a *picture* held us captive. And we could not get outside of it because it lay in the nature of our language."[1] I want to borrow his metaphor, specifically his claim that a picture holds us captive and we have difficulty getting outside it because I see running through American legal scholarship and judicial opinions a picture of our trial system that holds us captive. It is the picture of a trial as a two-sided contest between the state and the individual.

The Victims' Rights Amendment is important because it challenges our two-sided trial model and forces us to confront some difficult and painful realities about our trial system that we have avoided for too long. The Victims' Rights Amendment carries with it fonnal acknowledgement that victims of violent crime have a stake in the trial that is different from that of the general public or even the prosecutor. One can see this most clearly in the first part of the amendment providing that victims of a crime of violence have the right "not to be excluded from any proceedings relating to the criime." But it also is evident in other parts of the amendment, such as the section giving victims of violent crimes the right to be heard on the merits of any proposed plea bargain.

While much that is contained in the Victims' Rights Amendment has already been enacted through state constitutional amendments as well as state and federal statutes, recognition of the interests of crime victims in the Constitution is important because it may encourage us to rethink our trial system. In this article I want to use the Victims' Rights Amendment to raise questions about our trial system and the system's priorities. I think reexamination of our trial system is long overdue. To help provide perspective on the treatment of victims in our trial system, I will contrast with our system the treatment of crime victims in other western trial systems.

II. MULTI-SIDED CRIMINAL TRIALS

The picture of criminal trials as two-sided has a powerful hold on us. As a way of representing the fact that we have moved away from system of private prosecution—like other western countries—to one in which prosecutorial power is vested in a public official, I see nothing wrong with thinking of criminal cases as two-sided. Normally our criminal courts usually have two tables in the front of them, one for the prosecution and one for the defense. Also we caption our criminal cases "*State* v. *Jones*" or "*The People* v. *Jones*" which seems to suggest a two-sided contest. But when this generalization about criminal cases is put forward as if it were the metaphysical structure of criminal cases in this country, it becomes inaccurate, artificial, and confining. Hence the importance of the Victims' Rights Amendment.

When you examine the structure more closely, it quickly becomes clear that there is no metaphysical constraint that demonstrates that criminal cases have two and only two sides. Take the courtroom, for example. The courtroom is set up for convenience, and there is nothing to stop us from changing it to make it work better or to permit more people to sit in the front of the courtroom. While usually we have two tables, sometimes we put more in the front of the courtroom, particularly when there are two or more defendants on trial. More importantly, when there are two defendants, our system recognizes that the interests of the defendants will almost always differ. The *American Bar Association Standards for the Defense Function* state that because "the potential conflict of interest in representing multiple defendants is so grave," ordinarily a lawyer should decline to represent more than one defendant in the same criminal case.[2] Because the potential conflict is so serious, some public defender offices have a policy of never representing more than a single defendant in multiple defendant cases.[3]

But somehow it is easier to see divergent interests on the defense side of a criminal case than on the prosecution side. Perhaps it is because those supposedly on the prosecution side are masked with a sweeping label, "the state" or "the people." But what does it mean to say that "the state" is opposed to the defendant? The prosecutor is usually not even an employee of the state, but an employee of a much smaller entity, be it a county, borough, parish or city. The police who investigate the case may be employees of the same governmental unit, but quite often they may be employees of a different geographical unit, or even employees of the federal govern-

[1] *Ludwig Wittgenstein, Philosophical Investigations* 48e (G.E.M. Anscombe, translator) (1953) (emphasis in original).

[2] American Bar Association, Standards for Criminal Justice, The Defense Function, § 4–3.5 (c) (1992).

[3] See Gary Lowenthal, *Joint Representation in Criminal Cases,* 64 Va. L. Rev. 939, 950 (1978).

ment. The prosecutor does not represent the police and sometimes there are differences between the police and the prosecution over the handling of a criminal matter before trial and even at trial.

One example of differences between the police and the prosecution becoming public occurred in the murder investigation of Jon Benet Ramsey in Boulder. There have been indications throughout the investigation that the police and the district attorney's officer were having troubling cooperating.[4] Eventually, one of the lead detectives resigned from the investigation and submitted an angry resignation letter that alleged that the district attorney's office was crippling police efforts and compromising the case.[5]

More importantly, even if the investigators and the prosecutors are employees of the same governmental unit, isn't it clear that the police and the prosecutor ought to have different responsibilities in a strong criminal justice system? It is certainly true that in a serious criminal case that the police and the prosecution will want to see the person who committed the criminal act convicted and sentence appropriately. That will often be true of the trial judge as well, and perhaps even of the defense attorney where the crime is particularly horrendous. But each has a distinct professional role to play in the system and they need to perform that role whatever their personal feelings about the crime and what the desirable outcome of the criminal case should be.

Yet when it comes to the police and the prosecutor our system tends to see them as working together "on the same side" against the defendant. But if the police are part of the prosecution team, who is supposed to seek-out evidence at the crime scene that may be important for the defense? In those cases in which the perpetrator may not be apprehended for several weeks after the crime, the police must see themselves as duty-bound to do a complete and thorough investigation that considers possible exculpatory evidence as well as incriminating evidence. When a criminal justice system falls to emphasize the need for thorough and objective investigators, the results of an investigation can more easily become slanted and biased against the defendant. We should be shocked that a once-prestigious entity such as the FBI laboratory began to shade its reports and distort its findings to favor the prosecution.[6] But it is not surprising that it would occur in a system that often fails to distinguish between the police and the prosecution. Instead of driving them closer together as our system does and conceptualizing the police and prosecution as a single entity, the "state," which is trying to convict the defendant, our system should encourage the police to see themselves as having responsibilities independent of the prosecution of the case.

The relationship between the victim and the prosecutor presents a similar situation to the police and the prosecutor. For starters, the prosecutor doesn't represent the victim and cannot give the victim the same advice that a private attorney might give. A victim may, for example, want advice from the prosecutor as to whether she should meet with the defense investigator who is trying to interview trial witnesses. A private attorney representing the victim, who knows what a good defense attorney can do at trial with even minor inconsistencies in prior statements, would often advise the victim not to meet with the investigator. But tempting as it may be to a prosecutor to give the same advice, it would be unethical for a prosecutor to do so. The *American Bar Association Standards Relating to the Prosecution Function state that it "is improper for a prosecutor * * * to suggest to a witness that the witness not submit to an interview by opposing counsel."*[7]

While the interests of the victim and the prosecutor will often converge in many cases, there will sometimes be cases in which the interests of the victim and the prosecutor may sharply diverge. This will often reflect the fact that the victim's focus is on the particular criminal case while a prosecutor often has to see the same case in broader terms that may be influenced by limited resources, prosecutorial priorities, and even political considerations. An obvious example where some divergence would manifest itself would be a relatively serious case where the prosecutor believes the chances of conviction are not sufficiently high to merit prosecution while the victim feels that the crime should be prosecuted even if conviction is not

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[4] See Hector Gutierrez, Assistant DA apologizes to Boulder cops, Rocky Mountain News, February 15, 1997 4A.

[5] See Hector Gutierrez, *Detective Blasts DA's Handling of Jon Benet Ramsey Slaying,* Pittsburgh Post Gazette, August 8, 1998, A4; Detective Blasts DA's Handling of Jon Benet Ramsey Slaying in Thomas Resignation Letter, Boulder Daily Camera, August 7, 1998, http://www.insideboulder.com/extra/ramsey/1998/07thomle.html.

[6] Roberto Suro and Pierre Thomas, Justice Dept. Cites Failures Of FBI Lab; Evidence Was Flawed In Several Major Cases, Washington Post, April 16, 1997, A01.

[7] American Bar Association, Standards for Criminal Justice, The Prosecution Function, § 3–3.1 (C) (1992).

likely. There is no right or wrong in this situation but rather both the victim and the prosecutor are looking at the case from different perspectives. A prosecutor these days usually has no choice but to make difficult decisions about how limited prosecutorial resources are to be invested. At the same time, a victim may not agree with the prosecutor's priorities or the decision about the way that the case involving the victim is to be handled.

Crime victims have often expressed frustration with our trial system because they are to a considerable extent invisible in the system.[8] They have a legitimate interest in the way a criminal case is handled, yet it has been a battle to get prosecutors, judges, and defense attorneys to respect that interest. The Victims' Rights Amendment represents formal acknowledgement that victims have a role in the system that can be different from the prosecutor or the police.

This is not to say that the interests of the victim should be paramount to those of the prosecutor but the victim's interest should be understood and considered before an important decision affecting the victim is reached. A nice example is plea bargaining. The Victims' Rights Amendment gives victims the right to be heard, if present, prior to the acceptance of a negotiated plea.[9] There will be cases in which the victim is completely supportive of the proposed plea agreement and may desire to tell this to the court. But there will be cases in which the victim is strongly opposed to the plea agreement, perhaps because the victim believes that the charge to which the defendant wishes to plea guilty or the sentence to be imposed does not adequately reflect the seriousness of the crime. It is important that the victim have the right to be heard on the proposed plea bargain.

Permitting the victim to express opposition to the agreement provides a check on plea bargains that do not serve the public interest. But one suspects that in the vast majority of cases where the victim is opposed to the proposed bargain, the prosecutor's view of the public interest ought to lead to acceptance of the bargain by the court. But even if it is a rare case in which the victim's opposition to a plea agreement is likely to alter the proposed plea bargain, it is still very important that the victim be heard. We have a criminal justice system in which lawyers and judges spend a great deal of their time talking to each other. But the system does it a very poor job of listening to citizens, and that includes not only victims but defendants as well. Sometimes it is easier to accept decisions with which one disagrees if one feels that one's views have been heard and have been considered before the decision was made. This is what the Victims' Rights Amendment gives victims.

III. VICTIMS IN THE COURTROOM

Defense attorneys understand that constitutional recognition of a status for victims of serious crimes independent of the prosecutor has a tremendous symbolic value and they don't want to see it accorded victims. Gerald Lefcourt, a leading criminal defense attorney and then president of the National Association of Criminal Defense Lawyers, wrote an article in The Champion, the magazine of the NACDL, attacking the Victims' Rights Amendment in extreme terms.[10] One of the first worries that he expresses is his concern that such an amendment "would give victims equal standing in what amounts to a place at their own counsel table."[11]

I want to reply to this remark by considering his worry that victims might be permitted to sit in the front of the courtroom at their own counsel table. To Lefcourt, this seems so clearly wrong as to need no further explanation for why it is wrong.

I think he is correct that the Victims' Rights Amendment might encourage more states to rethink where the victim should be seated at criminal trials but this is exactly the sort of question that we ought to be thinking about. While it is rare for a state to permit victims to sit in the front of the courtroom at criminal trials,[12] it is not unusual among western countries to find victims in the front of the court-

[8] See, e.g., Steve Baker, *Justice Not Revenge: A Crime Victim's Perspective on Capital Punishment,* 40 U.C.L.A. L. Rev. 339, 340 (1992) ("The criminal justice equation does not include the relatives or friends of victims.")

[9] See S.J. Res. 44, Section 1.

[10] See Gerald B. Lefcourt, President's Column, *Of Danger To All, Of Benefit to None,* The Champion, 5 (July 1998).

[11] Id.

[12] See, e.g., Ala Code section 15–14–54 ("A victim of a criminal offense shall not be excluded from court or counsel table during the trial or hearing or any portion thereof conduct by any court which in any way pertains to such offense. * * *"). This statute was upheld in *Pierce* v. *State,* 576 So. 2d 236, 251 (Ala. Crim. App. 1990).

room, even occasionally participating in the trial. In Belgium,[13] France,[14] and Italy,[15] victims have long had a right to participate in the criminal trial on a rather equal basis with the state's attorney and the defense attorney. One of the reasons why victims often choose to participate at the criminal trial is that the victim may be awarded civil damages at the criminal trial. It is cheaper for the victim to join in the criminal case and seek damages rather than later having to bear the expense of a separate civil case.

Obviously, this is a different model from our country where civil damages would have to be pursued separately from the criminal cases. But my point is not that these countries are a model for us. But I use these countries simply to point out that permitting some form of victim participation in a criminal trial may seem radical to American lawyers, but it is not at all radical among westem countries.

Another country with a somewhat different model of victim participation at trial is Germany.[16] Damages are not a possibility at a German criminal trial so victim participation at trial is not generally permitted, except for a small category of serious crimes.[17] Among the crimes permitting such participation are murder, kidnapping, and rape.[18] Victims rarely wish to participate in the trial, feeling that they can rely on the state's attorney and the judges to reach a fair verdict and sentence.[19] But the exception is sexual assault where a high percentage of victims always wish to participate in the trial.[20] Victims feel they have a stake in the trial and want to be present and be represented.

That most sexual assault victims would wish to participate at trial through counsel while victims of other serious crimes rarely wish to do so should not be surprising. For one thing, the victim's character and credibility is likely to come under a much more severe attack in a sexual assault case. Often, for example, in acquaintance-rape cases the attack on the victim includes the allegation that no crime ever took place because the victim consented to have sex with the defendant. The defense may attack the victim on almost every aspect of her testimony in an attempt to suggest that she is lying and trying to convict the defendant for corrupt reasons. Additionally, it is not unusual in such cases for issues having to do with the prior relationship between the victim and the defendant to be raised, which may mean delving into very private events separate from the crime in question. When one considers the nature of the crime and the likelihood that the victim may be "put on trial," it is easy to see why sexual assault victims in Germany tend to see the trial as "their trial" and want to participate in the trial through counsel.

If some continental countries think that it is appropriate for victims of serious crimes to participate in criminal trials, why is the Victims' Rights Amendment so controversial? Notice that the Victims' Rights Amendment is very modest in what it provides victims with regard to the trial. It gives victims no right of participation at trial, nor even a right to sit in the front of the courtroom. In fact, it doesn't even give victims "a right to be present" at the trial. Instead, it provides victims only the right "not to be excluded from any proceedings relating to the crime."[21] Presumably, this would allow the victim of a violent crime who is a witness to resist a motion for sequestration and remain in the back of the courtroom. Given the fact that some states already exempt victims from sequestration orders and permit them to remain in the courtroom at trial,[22] what is being sought with respect to trial for victims in the Victims' Rights Amendment is very limited. And when one compares being able to remain in the courtroom with the participatory role that victims have at trial in the European countries just mentioned, the change proposed becomes even more modest.

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[13] Christine Van Den Wyngaert, *Belgium,* 17–18, in Criminal Procedure Systems in thE European Community (Christine Van Den Wyngaert, editor) (1993).

[14] R.L. Jones, *Victims of Crime in France,* 158 Justice of the Peace & Local Government Law 795–96, December 3, 1994.

[15] William T. Pizzi and Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation,* 17 Yale J. Int. L. 1, 14 (1992).

[16] See generally William T. Pizzi and Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems,* 32 Stan. J. Int. L. 37 (1996).

[17] Id. at 54–55.

[18] See StPO § 395.

[19] See William T. Pizzi and Walter Perron, supra note at 55, n. 76.

[20] Id. at 59.

[21] See S.J. Res. 44, Section 1.

[22] See, e.g., Ariz. R. Crim. Proc. 9.3 (a) (1998); Ala. Rules of Evid. R. 615 (4) (1998); Or. Evid. Code R. 615 (1998).

IV. OUR "ADVERSARY SYSTEM"

In the previous section I described some European trial systems that give victims a participatory role in the courtroom in some cases. If those countries think it appropriate to recognize an active role for victims in some criminal cases, why is the Victims' Rights Amendment so wrong in thinking that the interests of victims of violent crime deserve some formal recognition in our Constitution? I think that one argument that American lawyers are likely to raise is that European trial systems and our American trial system are fundamentally different. Under the traditional dichotomy, we are supposed to have "an adversary system" and European countries are supposed to have "an inquisitorial system."[23]

I think this distinction has become blurred over time and that all western trial systems are adversarial to a degree today.[24] Obviously, "to a degree" means that there are considerable differences from system to system, with some systems not very adversarial and others more adversarial. To try to make this point, I want to turn to explore briefly what it might mean when American lawyers say that our trial system is "an adversary system" and that this is supposed to distinguish our trial system from European trial systems.

Recently, Professor Monroe Freedman has written an article in which he argues that our adversary system is built into our Constitution.[25] I think he is wrong in making that claim but I don't intend to dispute that point here. What I want to do is use the definition he uses as a basis for trying to understand what is special about an adversary system as opposed to the supposedly inquisitorial systems on the continent. He begins his article with the following definition: "In its simplest terms, an adversary system resolves disputes by presenting conflicting views of fact and law to an impartial and relatively passive arbiter, who decides which side wins what."[26] Working with this definition, which aspects of the definition distinguish American trials from those that occur on the continent?

a. Hotly contested factual and legal issues

Surely, it is not the idea the presentation of conflicting views of fact and law at trial as there are often hotly contested factual or legal issues in all trial systems. To follow up with the acquaintance-rape example from the previous section, such trials will often be bitterly contested in any country and in any trial system, with the victim insisting that she did not give consent and the defense insisting that the victim consented and is not telling the truth. Several years ago, I witnessed a rape trial in a courtroom in Freiberg, Germany, where the victim, an admitted drug addict, claimed that she had been raped by the two defendants.[27] They in turn insisted that she had agreed to have sex with them on the promise that they would give her heroin the following day. The defendants and their lawyers launched a major assault on the victim's credibility and her character. They brought in witnesses who testified that the victim had prostituted herself for heroin on past occasions. In each case the victim was recalled to the stand to answer the allegations. It was a very bitterly contested trial, yet it took place within a trial system that is supposedly not an adversary system. In short, I don't think "hotly contested" serves to distinguish among western trial system those that are adversary systems from those that are not.

b. Impartial and relatively passive judges

Perhaps the distinction lies in the fact that the trial takes place before "an impartial and relatively passive arbiter." The first part of this element—that the judge be "impartial" draws no meaningful distinction among trial systems as every western trial system wants its factfinders, be they professional judges, lay judges, jurors, or some combination thereof, to be impartial in the important task before them. Article 14 of the International Covenant of Civil and Political Rights, which has been ratified by all western countries, states that anyone charged with a crime is entitled to a trial before "a competent, independent and impartial tribunal."[28] All western countries hope that their judges and factfinders are impartial.

[23] See Monroe H. Freedman, *Our Constitutionalized Adversary System,* 1 Chapman L. Rev. 57, 84–85 (1998).

[24] I make this point at some length using the countries of the Netherlands, Germany, Norway, and England in chapter five of William T. Pizzi, Trial without Truth 89–116 (1998).

[25] Monroe H. Freedman, *Our Constitutionalized Adversary System,* 1 Chapman L. Rev. 57 (1998).

[26] Id.

[27] See Pizzi and Perron, supra note at 63 n. 124.

[28] International Covenent on Civil and Political Rights (adopted December 19, 1966, entered into force March 23, 1976, 99 U.N.T.S. 171), § 14, 1.

The second part of this element—that the arbiter be "relatively passive" does draw a distinction among western trial systems but the distinction is not as clear as some might think. Certainly judges on the continent often take the primary responsibility for calling and questioning witnesses at trial and they can be very active in controlling the conduct of the trial to the point that the lawyers play a greatly reduced role at trial.[29] But there are other continental countries where the parties call the witnesses and do the bulk of the questioning of witnesses. In Norway[30] and Italy,[31] for example, the public prosecutor and the defense attorney call their own witnesses and do the initial questioning, rather on the American model. In fact, Italy considers its trial system to be an adversarial trial system[32] and yet victims have broad rights of participation at trial including questioning witnesses and making legal arguments. Is Italy an adversary system because the judges are relatively passive compared to judges in other continental countries?

What makes this notion of a "relatively passive arbiter" somewhat difficult as a feature that should distinguishes an adversary systems from an inquisitorial system is the fact that American trial judges have the power to ask questions.[33] While in jury trials, American judges tend to be very passive, at bench trials some judges ask many questions.[34] When you consider that individual judges often vary considerably in their willingness to intervene and ask questions at trial, "relatively passive" seems to suggest a difference of degree among trial systems rather than a bright line that would separate our trial system from those on the continent.

c. Winning

What really stands out in Freedman's definition of adversary systems is the last part of Freedman's description of our adversary system. It states that the duty of the impartial arbiter is to decide "which side wins what." End of definition. American trials are about winning. European trials are not conceptualized in that way: trials are supposed to aim at the truth and to that end judges (and also the state's attorney) have a responsibility to pursue relevant issues even if not raised by the parties or to call witnesses if that becomes necessary.[35] In short, European judges feel responsible for the outcome of the trial and the justice of the result.

I think a trial system defined in Freedman's terms is ultimately sterile. Any trial system that is to have credibility has to place heavy emphasis on trial verdicts that are accurate and reliable. But there is no emphasis on truth or reliability in Freedman's definition and, unfortunately, his definition accurately reflects a trial cultural where winning and losing are central and heavily emphasized. In an expensive and extremely complicated system, the winner will often be the side that has greater resources or the side with the more skillful advocate, not the side with the stronger evidence. What should be the responsibility of the trial judge in such a situation?[36]

Surprisingly, there is no guidance for trial judges in such a situation. Franklin Strier in his book *Reconstructing Justice* points out that the ABA Code of Judicial Conduct fails to impose any obligation on the trial judge to seek justice.[37] Instead, the only adjudicative constraint on a trial judge is to perform her task impartially. Strier warns that when impartiality is thought to require passivity that "can make the judge an unwilling abettor of intolerable injustice."[38]

Some strong European trial systems permit victim participation in some criminal cases but some strong European trial systems, such as those in the Netherlands[39]

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[29] See generally, John H. Langbein, Comparative Criminal Procedure: Germany, 3–60 (1977).
[30] Robin Thrap-Meyer, Introduction to the Legal System of Norway, p. 12.
[31] See William T. Pizzi and Luca Marafioti, supra note at 14.
[32] See Lawrence J. Fassler, Note, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe,* 29 Colum. J. Transnat'l L. 245 (1991).
[33] See Fed. R. Evid. 610.
[34] Further complicating the American criminal trial system is the fact that we have a system of military trials where the fact-finders are encouraged to ask questions during the trial and sometimes play an active role at trial. See Schleuter, Military Criminal Justice: Practice and Procedure 630 (1996).
[35] See Mirjan Damaska, *Evidentialy Barriers to Conviction and Two Models of Criminal Procedure,* 121 U. Pa. L. Rev. 506, 586 (1973); John H. Merryman, The Civil Law Tradition (2d ed. 1985).
[36] American trial judges have the power to call their own witnesses at trial, see Federal Rule of Evidence 614 (a), but there is no guidance as to when or why that power should be used so it is rarely exercised.
[37] See Franklin Strier, Reconstructing Justice 83 (1994).
[38] Id.
[39] See A.H.J. Swart, *The Netherlands,* at 291–92 in Criminal Procedure Systems in the European Community (Christine Van Den Wyngaert, editor) (1993).

or Denmark,[40] do not pen-nit victim participation at trial. But those countries would not define their trial systems as being aimed at deciding "who wins what." The case for victim participation at trial is much stronger in a system like ours that places a low priority on truth and a high priority on winning. If you are not a winner in such a system, you will be a loser, and that is exactly the way that victims are often portrayed after an acquittal. Has anyone ever heard a defense attorney on the courthouse steps following an acquittal say anything other than that the verdict shows that the jury believed the defendant and obviously didn't believe the defendant?

V. A TRIAL SYSTEM UNSURE WHAT IT IS

Of course judges do care about the justice of the results that take place in their courtrooms, but they often seem unsure whether this concern should temper the system's adversarial excesses. A case that nicely illustrates the difficulties for judges in our trial system is the Louise Woodward case which received international publicity.[41] As you may recall, Woodward was the English au pair charged in Massachusetts with first and second degree murder in the death of Matthew Eappen, the infant in her care. While murder was a possible verdict, the case always seemed more appropriate as a manslaughter case. It seemed to fit better the facts of the case in which the teenage defendant was supposed to have become frustrated with the infant in her care and caused his death through the very rough way she shook him in frustration.

But at the end of the trial, the defense team, led three experienced defense attorneys, asked that the lesser included charge of manslaughter not be given to the jury.[42] This was viewed as an audacious gamble because the jury would be left with the difficult choice of either returning a verdict of second-degree murder or a verdict of acquittal.[43] Making the stakes very high for the defendant was the fact that first-degree murder carried with it a mandatory life sentence, while second-degree carried with it a life sentence, but permitted parole after a minimum of fifteen years in prison.[44] Manslaughter had no minimum.

If you want to understand how extremely adversarial our trial system can be and how invisible victims are at times in the system, there could hardly be a better example. The trial judge did not see it as his responsibility to put to the jury the option that seemed most likely to fit the facts. We can rationalize this decision by saying that the prosecution "blew it" by charging murder instead of manslaughter, but is it fair to visit this decision on the victim and the victim's family? As mentioned earlier, victims in our trial system feel like they are invisible and this is a nice example. The judge went to great lengths to make sure that Woodward approved of the daring gamble that was going to take place. He brought in an additional attorney to make sure that she was fully informed of the risks of the decision not to instruct on manslaughter.[45] After meeting with the additional attorney, Woodward told the court that she agreed with the decision only to put murder or an acquittal to the jury.

What this judge, a judge with an excellent reputation,[46] was saying to the world watching this trial is that trials in the United States are more about winning and losing than they are about accurate verdicts.

Obviously, if the defense had won there would have been high praise for the brilliance of the defense advocates and their bold strategy. But we all know what happened. The prosecutor gave a tremendous summation, and the defendant "lost," receiving a life sentence as she knew she would if she were to be convicted. When

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[40] See Vagn Greve, Denmark, at 59–60 in Criminal Procedure Systems in the European Community (Christine Van Den Wyngaert, editor) (1993).

[41] When the author was lecturing in China in late October of 1997, he was able to follow developments in the trial on CNN International.

[42] See William F. Doherty, Woodward team wins bid to limit verdict to murder or acquittal; Boston Globe, October 28, 1997, A1; David Usborne, *Will it be 'noose-or-loose'?;* The Independent, October 26, 1997, 17; CourtTV, *Daily Updates from Commonwealth* v. *Woodward, Highlights from October 27,* http://www.courttv.com/trials/woodward/week4.html#oct27.

[43] See Tunku Varadarajan, Au pair risks 'noose or loose' verdict, The Times, October 28, 1997, Home News.

[44] See William F. Doherty, supra note at A1.

[45] Id.

[46] See David Nyhan, *But can he make the case for attorney general?,* Boston Globe, October 26, 1997, E4 (Zobel is a "savvy trial judge"); Don Aucoin, *While millions watch, Trial of Woodward in infant's death is touchstone for US, British television,* Boston Globe, October 9, 1997 (Judge Zobel "runs a tight ship"). Judge Hiller Zobel, the judge in the Woodward case, is also an amateur historian. See Hiller B. Zobel, *The Jury on Trial,* American Heritage, July/August 1995 at 42.

a system emphasizes winning and losing so heavily and openly permits such an audacious gamble, losing is possible.

But it is at this point that our supposedly "adversary system" took a different turn. A few days later, the same judge entered the courtroom now concerned about the injustice of the result.[47] But where does this judge come from in an "adversary system" and where was a judge with these concerns at trial? Having permitted the defense to gamble and having made sure that the defendant was fully informed of the consequences of the gamble, where in an adversary system does this judge get the authority to question the second degree murder conviction? The judge substituted a manslaughter verdict and dropped Woodward's sentence from life (meaning a fifteen year minimum) to time served, permitting her immediate release.[48] (Massachusetts sentencing guidelines had suggested a prison sentence of from three to five years.[49])

What you see in the *Woodward* case is a trial system that doesn't know what its goal is. I don't dispute the justice of the manslaughter verdict in the *Woodward* case or even the sentence that was imposed. But the way the system got there raises serious questions about the premises of our trial system. In a trial system where judges are supposed to be "relatively passive arbiters," a single judge rejects the verdict of a jury and imposes the verdict he feels is correct. He then goes on to impose a very lenient sentence, based on a view of the facts that some jurors plainly did not accept.[50]

I think it is time to put aside the convenient labels and cliches that dominate our descriptions of our trial system—that "we have an adversary system," that "we don't trust judges," "that we believe in jurors of 'our peers,'" and so on—and look at what we really have. When I do this I see a trial system that doesn't know what it wants to happen at trial and doesn't know itself very well. It swings from extremely adversarial to extremely inquisitorial, from vesting incredible power injuries to permitting judges to undo or effectively overrule jury verdicts with which they disagree, from incredibly weak judges at times to judges vested with tremendous power over the liberty of citizens at other times. I don't think any of these extremes are healthy for victims, or for defendants.

VI. VICTIMS IN OTHER COMMON LAW TRIAL SYSTEMS

I want to return to Gerald Lefcourt's worry that victims might have a seat at counsel table to make one more point about trial systems, this time about other common law trial systems. I have to confess that I don't know of any common law country that would permit the victim to sit in the front of the courtroom at counsel table which is the worry Lefcourt expresses. This might seem to support Mr. Lefcourt's assumption that pennitting a victim to sit in the front of the courtroom ought to be unthinkable.

But the problem is that in the common law countries I have visited, the defendant also doesn't sit in the front of the courtroom at counsel table. The defendant sits in a small box, usually next to a uniformed guard, at the very back or at one side of the courtroom.[51] Enter any Crown Court in London and it is easy to tell who is on trial and I mean that on more than one level.[52]

Imagine how Mr. Lefcourt would feel if it was proposed that defendants at serious criminal trials had to sit in a small box at the very back of the courtroom, far removed from their attorneys and often even farther from the proceedings than some members of the public. American defense lawyers sometimes complain about the difficulty "personalizing the defendant" to the jury.[53] They are quite fortunate compared to defense banisters in England who must work at considerable distance from the defendant.[54] The barrister cannot personalize the defendant to the jury by putting an arm on the shoulder of a defendant or chatting quietly with him.

Now I am not advocating that we build docks in American courtrooms or that we make defendants sit outside the bar in our courtrooms and only permit lawyers inside the bar. But the Victims' Rights Amendment has to be understood against a

[47] Tom Mashberg, *Judge rules manslaughter in nanny case,* Boston Herald, November 10, 1997, 004.

[48] See Associated Press, Au pair freed after judge reduces verdict, Chicago Tribune, November 10, 1997, Zone C, 1.

[49] Davi Usborne, *Ordinary girl who put justice on trial;* The Independent, June 17, 1998, 3.

[50] See Joe Ryan and Anne E. Kornblut, Juror 'appalled' at sentence Boston Globe, November 11, 1997, B1.

[51] See Michael H. Graham, Tightening the Reins of Justice in America, 69–70 (1983).

[52] See William T. Pizzi, *Discovering Who We Are: An English Perspective on the Simpson Trial,* 67 U. Colo. L. Rev. 1027, 1028–29 (1996).

[53] Id.

[54] See Michael H. Graham, supra note at 69.

background in which defendants have many advantages in our trial system that they don't have in other trial systems and conversely victims have many disadvantages at trial that they don't have in other trial systems. It is against this background that the limited "right" provided victims at trial in the Victims' Rights Amendment—a right "not to be excluded" from at trial should be seen as completely appropriate for our trial system.

VII. A FINAL OBSERVATION ON VICTIMS' RIGHTS "VERSUS" DEFENDANTS RIGHTS

One attack on the Victims' Rights Amendment is try to set victims' rights against defendants' rights. Consider again Gerald Lefcourt's attack on the Victims' Rights Amendment. He states that "the amendment establishes rights that would, by definition, overwhelm protections the Constitution affords defendants including the presumption of innocence."[55] This is complete hyperbole. The amendment has been carefully crafted so that its provisions do not conflict with any of the constitutional rights of defendants. Basically, the amendment tracks the law that has been put into effect in the majority of states through state constitutional amendments.

But having argued that our trial system doesn't treat victims well at trial, one might think that this means that our present system treats defendants well. But this is a complicated issue. I think this is not a good system for the vast majority of defendants and they have little to fear from the Victims' Rights Amendment.

Sure, comparatists often say that if a defendant is really guilty, that defendant would prefer to be tried in the United States,[56] and they don't mean that as a compliment. What they mean is that no matter how strong the evidence, with a good lawyer, who knows what might happen at trial?

But the dark side is that the system doesn't want defendants to exercise their constitutional rights and it has evolved very effective means of coercing defendants to waive their constitutional rights. What the system does is threaten defendants with very high punishments if they have the temerity to try to exercise their constitutional rights.[57] What we have seen over the last twenty years has been a tremendous increase in habitual offender statutes, statutes with high mandatory punishments, very high sentencing ranges, and other sentencing statutes that put tremendous pressure on defendants to waive their rights and avoid trial.[58] The result is a system that works to the advantage of wealthy and sophisticated defendants but is not a good system for the vast majority of defendants who are neither wealthy nor sophisticated.

A great deal of sentencing power has been shifted from judges to prosecutors and they use it to pressure defendants to plead guilty or face some very unattractive alternatives.[59] In many states, the number of cases going to trial is shrinking. The system is completely given over to plea bargaining. Why would any sane prosecutor want to go to trial if a trial is a crapshoot? And it is pretty tough for a defendant to turn down a one year offer if knows he will get a five or ten year minimum if convicted at trial.

This is not a criticism of plea bargaining per se. Every western system has some mechanism for the expedited disposition of a large percentage of its criminal cases that offer defendants some discount for avoiding trial or at least avoiding a prolonged trial.[60] But there is good plea bargaining and bad plea bargaining and United States draws no distinction between the two. Today one should worry less about false convictions at trial than about defendants with credible defenses who go to prison because the pressure on them to plead guilty often from their own lawyers is intense.[61]

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[55] See Gerald B. Lefcourt, supra note at 5.

[56] See John H. Merryman, supra note at ?.

[57] See William T. Pizzi, *Punishment and Procedure: A Different View of the American Criminal Justice System,* 13 Const. Comm. 55 (1996).

[58] The growing harshness of American sentencing laws and the political pressure that have encouraged this development have been the subject of book length studies. See, e.g., Michael Tonry, Sentencing Matters (1996); Katharine Beckett, Making Crime Pay (1997).

[59] A shocking example of prosecutorial sentencing power and the risks to a defendant of trying to withstand that power is *Bordenkircher* v. *Hayes,* 434 U.S. 357 (1978). Hayes turned down a plea bargain offer of a five year sentence to go to trial. He was convicted and received a mandatory life sentence.

[60] See William T. Pizzi and Luca Marafioti, supra note at 35–37 (describing plea bargaining analogs in Denmark, Spain, France and Germany).

[61] In a recent article, William Stuntz has warned that a highly complicated legal system like the American system encourages defense lawyers to work hard at procedural issues and puts pressure on them to avoid factual lines of inquiry that require much more time to develop. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice,* 107 Yale L. J. 1, 35–47 (1997).

VIII. CONCLUSION

What the Victims' Rights Amendment does in terms of expanding the law for victims is very minimal. Many of the provisions of the amendment, such as the right to file a victim impact statement or the right to be informed and heard on the merits of proposed plea bargain agreements, are already embodied in the law of many states. In fact, because the amendment is limited to crimes of violence, the provisions of the amendment are significantly less extensive than the existing law in many jurisdictions.

But the symbolism of recognizing victims in our Constitution is tremendously important and this article has tried to show why. There is nothing inconsistent in having a strong and reliable trial system that, at the same time, acknowledges that victims have an interest in the prosecution of a criminal case, including the trial.

Victims are very angry at the treatment they receive in our criminal justice system and I have tried to show that they have a right to be angry. Unfortunately, anger is not a good basis on which to make important public policy decisions and it contributes to the increasing harshness we see in our system. Crime is a serious problem in all western countries and politicians have to get elected in these countries as well. But we need to ask ourselves why judges and lawyers in these other countries have been more successful in fending off calls for the death penalty, for harsh mandatory minimums, tough habitual offender statutes, and the like. Part of the answer is that the judges in those systems have greater credibility with the public and, in some of the countries at least, the trial system commands greater respect and public confidence. I think we need the balance that a Victims'Rights Amendment offers to restore some of the public confidence our system has lost. I think victims need it, but so do defendants.

ARTICLE PREPARED BY WILLIAM T. PIZZI* AND WALTER PERRON**

CRIME VICTIMS IN GERMAN COURTROOMS: A COMPARATIVE PERSPECTIVE ON AMERICAN PROBLEMS***

Introduction: The Victims' Movement in the United States and the Need for a Comparative Perspective

The victims' movement in the United States is a powerful political force that has achieved some significant victories in its fight to improve the treatment of victims within the American criminal justice system. In 1982, for example, Congress passed the Victim and Witness Protection Act.[1] This legislation encouraged sentencing judges to impose requirements of restitution on convicted defendants[2] and required the filing of victim impact statements as part of any presentence report supplied by the Department of Probation to a sentencing judge.[3] While the Act is applicable only

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**Professor of Law, Johannes Gutenberg-Universitat Mainz, Fachbereich Rechts- und Wirtschaftswissenschaften, Germany. The author is also grateful to Beate Weik and to Roland Grimm, a law student at the Universitat Konstanz, for their valuable help.

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[1] Victim and Witness Protection Act of 1982, Pub. L. No. 97–291, 96 Stat. 1248 (codified as amended in scattered sections of 18 U.S.C.).

[2] *Id.* § 5 (codified as 18 U.S.C. § 3579). Few offenders, except in white collar criminal cases, have the skills earning power, and employment opportunities to make meaningful restitution. Consequently, it has been argued that tough language mandating restitution in the Victim and Witness Protection Act, and those state statutes modeled on it, raise false expectations in the minds of crime victims. *See* Emilio Viano, *Victim's Rights and the Constitution: Reflections on a Bicentennial,* 33 Crime and Delinq. 438, 446 (1987).

[3] Fed. R. Crim. P. 32(c)(2)(C).

in federal courts, it has served as a model for similar reform legislation that has since been passed in most states.[4]

Just two years later, Congress passed another major piece of legislation aimed at improving the treatment of victims in the criminal justice system. The Victims of Crime Act of 1984[5] established a Crime Victims Fund that disburses monies (collected from fines, penalties, and bond forfeitures) to state victim compensation funds and to victim assistance projects throughout the country.[6] As a result of this legislation and the funding it provided, as well as similar legislation at the state level, victim service programs are now almost universal in sizable communities throughout the United States. These programs provide services to victims such as emergency care, crisis intervention, counseling, help with victim compensation and restitution, and victim advocacy.[7]

Over the last several years, however, the victims' movement in the United States has been trying to achieve something much more controversial: recognition of a victim's right to participate at each stage of the criminal process, including the trial. The drive to establish such a right began with the 1982 report of the President's Task Force on Victims of Crime, which proposed adding to the Sixth Amendment a sentence guaranteeing victims "the right to be present and to be heard at all critical stages of judicial proceedings."[8] While this seems a radical proposal, the Task Force report concluded that no alternative short of amending the Sixth Amendment would secure to victims proper treatment and respect in the criminal justice system.[9]

Rather than try initially to amend the U.S. Constitution, which would be controversial and difficult, the victims' rights movement decided that it was politically wiser to push first for the passage of state laws or constitutional amendments that would establish a right for victims to participate at some level in the criminal process.[10] While focusing on amending a majority of state constitutions, the movement remained committed to the ultimate goal of seeking a federal constitutional amendment guaranteeing rights for victims.[11] Having achieved the adoption of victims' rights amendments in twenty states since 1986,[12] the National Victims' Constitutional Amendment Network, an umbrella group representing all major victims' rights organizations, unanimously adopted on September 15, 1995 the specific language that it will seek to have added to the Sixth Amendment.[13] The existing state

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[4] In 1989, 48 states had authorized consideration of victim impact statements at sentencing, Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal,* 27 Am. Cri. Rev. 391, 399 (1989). Victims do not use their statutory rights with frequency. In California, where victims have the right of allocution at sentencing, victims exercise this right in less than three percent of felony cases. *Id.* at 399–400 (citing to *Edwin Villmoare & Virginia V. Neto, Victim Appearances at Sentencing Hearings Under the California Victims' Bill of Rights* 42 (National Institute of justice Executive Summary, 1987)). *See also* Lynn Weisberg, *Victim Appearances at Sentencing in California,* 71 Judicature 166, 166 (1987).

[5] Pub. L. 98–473, 98 Stat. 2170 (1984).

[6] *Id.* §§ 1402–04. *See* Robert C. Davis & Madeline Henley, *Victim Service Programs, in Victims of Crime: Problems, Policies, and Programs* 157, 161 (Arthur J. Lurigio et al. eds., 1990).

[7] As of 1992, 47 states and the District of Columbia had passed legislation setting up victim compensation programs. Christopher R. Goddu, *Victims' "Rights" or a Fair Trial Wronged?,* 41 Buff L. Rev. 245, 250 (1993). *See also* John R. Anderson & Paul L. Woodard, *Victim and Witness Assistance: New State Laws and the System's Response,* 68 Judicature 221, 222 (1985).

[8] *See* President's Task Force on Victims of Crime, Final Report 114 (1982).

[9] *Id.* at 114–15.

[10] *See* LeRoy L. Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment,* 34 Wayne L. Rev. 115, 132 (1987).

[11] *See id.* at 131–33.

[12] *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, 1382 (noting that Alabama, Alaska, Arizona, California, Colorado, Florida, Idaho, Illinois, Kansas, Maryland, Michigan, Missouri, New Jersey, New Mexico, Ohio, Rhode Island, Texas, Utah, Washington, and Wisconsin have all passed victims' rights amendments). Professor Cassell also reports that at least eight other states are actively considering victims' rights amendments. *Id.* at 1383.

[13] The National Victims' Constitutional Amendment Network proposes that the following paragraph be added to the Sixth Amendment:

> Moreover, to establish, preserve, and protect the rights of the people to liberty, justice and due process, a victim of a serious crime shall be informed of and enjoy the following fundamental rights throughout the criminal justice process: to be treated with fairness, respect, and dignity; to timely notice of and, unless incarcerated, to be present at all proceedings where the accused has the right to be present; to be heard at any proceeding concerning post-arrest release, a negotiated disposition, a sentence, post-conviction release, and any other matter where victim participation will serve the ends of justice; to confer with the appropriate officials regarding post-charging disposition of a case, sentencing recommendations, and post-conviction supervision decisions posing a significant threat to the safety of the victim; to a speedy trial and final disposition free from

constitutional amendments [14] and those statutes enacted pursuant to them vary considerably in their language and content, but they are generally consistent in providing that a victim: (1) be kept informed of the progress of the case as it moves from step to step, (2) receive notice about any hearings in the case, and (3) have the right to be heard on certain issues when the victim has relevant testimony to provide.[15]

Some aspects of these state amendments ought not to be controversial. It seems entirely proper for a victim to be kept informed about the progress of the case and to have a right to be heard on matters that may directly affect her, such as a reduction of bail or a trial continuance. But what does it mean in these amendments for the victim to be granted the right to be present and to be heard at the trial itself?.

These amendments may give victims no more rights to participate at the trial than what they already have: the "right" to observe the trial, like any member of the public, subject to normal sequestration rules; and the "right" to be heard at trial, if the victim is called by either the prosecution or the defense. Clearly, if victims' rights amendments turn out in fact to be much more symbolism than substance, this will provoke the ire of the victims' movement. But what exactly are the problems with the American criminal justice system from the victims' point of view, and how will a right to participate somehow solve these problems?

Unfortunately, the issue of victims' rights in the United States is one on which there is very poor communication between those outside the system—victims and their families; and those inside the system—judges, lawyers, and scholars. While victims are quite articulate in communicating their frustration and anger with the system,[16] their complaints are often expressed at a level of generality that does not indicate the specific structural problems they would like to see remedied. For example, victims complain of being made to feel like "an outsider to the criminal justice system," [17] or like "another piece of evidence." [18] But such complaints, though powerful, communicate very little about any specific changes in the structure of American trials that would make victims feel more included in the process.

At the same time, those within the system who are accustomed to viewing criminal trials as two-sided battles between the state and the defendant, have a great deal of difficulty seeing how a criminal trial can be altered in any significant way to give victims more comfort and visibility in the courtroom without depriving the defendant of a fair trial.[19] So poor is the level of communication that those within the system often seem genuinely bewildered by the victims' rights movement, even

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> unreasonable delay; to receive prompt and full restitution from the convicted offender, to be free from an unwarranted release of confidential information; to be reasonably protected from the accused or convicted offender; and to be informed, upon request, when the accused of convinced offender is given any release from secure custody, or has escaped. The exercise of denial of any right granted under this paragraph shall not entitle the accused or convicted offender to any relief.

Letter from Mary McGhee, co-chair of the National Victims' Constitutional Amendment Network, to William T. Pizzi (Nov. 11, 1995) (on file with the *Stanford Journal of International Law)*.

[14] See Ala. Const. amend. 557; Alaska Const. art. I, § 24; Ariz. Const. art. II, § 2.1; Cal. Const. art. I, § 28; Colo. Const. art II, § 16a; Fla. Const. art. I, § 16(b); Idaho Const. art. I, § 22; Ill. Const. art I, § 8.1; Kan. Const. art. XV, § 15; Md. Decl. of Rights art. XLVII; Mich. Const. art. I, § 24; Md. Const. art. I, § 32; N.J. Const. art. I, ¶ 22; N.M. Const. art. II, § 24; Ohio Const. art. I, § 10a; R.I. Const. art. I, § 23; Tex. Const. art. I, § 30; Utah Const. art. I, § 28; Wash. Const. art. I, § 35; Wis. Const. art. I, § 9m.

[15] For an excellent overview of the range of "rights" granted to victims under various state amendments and accompanying legislation, *see generally* Lamborn, *supra* note 10, at 143–72.

[16] "My life has been permanently changed. I will never forget being raped, kidnapped, and robbed at gunpoint. However, my sense of disillusionment with the judicial system is many times more painful. I could not, in good faith, urge anyone to participate in this hellish process." Anne M. Morgan, *Criminal Law Rights: Remembering the "Forgotten Person" in the Criminal justice System,* 70 Marq. L. Rev 572, 572 (1987) (quoting a crime victim's statement at a Senate subcommittee hearing on the Victim and Witness Protection Act of 1982).

[17] A good deal of my frustration stemmed from the feeling that, as a crime victim, I was an outsider to the criminal justice system. * * * Like other family members of murder victims, I found myself excluded from the system, unable to participate in the formal proceedings. The criminal justice equation does not include the relatives and friends of victims. Steve Baker, *Justice Not Revenge: A Crime Victims Perspective on Capital Punishment,* 40 U.C.L.A. L. Rev 339, 340 (1992).

[18] Betty Jane Spencer, *A Crime Victims Views on a Constitutional Amendment for Victims,* 34 Wayne L. Rev. 1, 2 (1987).

[19] *See* M. Dolliver, *Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come,* 34 Wayne L. Rev. 87, 90 (1987) ("Any attempt to use the Constitution to enhance a victim's rights by placing the victim in direct conflict with the accused in court reverts to a process that history has shown is less than fully civilized."); Goddu, *supra* note 7, at 271–72 ("To avoid any chance of a miscarriage of justice, victim participation, at the trial level, should be limited to spectator access to the courtroom and nothing more.").

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,[20] or that it might even be harmful to victims to participate in the process.[21]

This Article offers no solutions to any of the structural and constitutional questions that seem certain to arise in the years ahead as victims' rights groups push for some level of participation at trial. It may, however, offer American readers something that is noticeably lacking in the American literature; perspective on the problems that victims face in American courtrooms. The authors hope to bridge the communication gap that exists between those outside and those working within the American system by leaving it entirely and examining how victims are treated at criminal trials in Germany. For a number of reasons, the authors believe that victims of serious crimes fare better in the German trial system than they do in American courtrooms, and this Article will explain why the authors have reached that conclusion.

This Article, however, is not reformist in nature. Germany, like most western countries other than the United States and England, is a civil law country, and many aspects of the treatment of victims at German trials reflect a trial structure grounded in the civil law tradition. For example, because civil law trials in Germany are directed and controlled by trial judges and are not structured as adversarial contests, it is easier to accommodate the interests of victims at trial without disturbing the adversarial balance that is central to American criminal trials. Thus, there are no easy solutions to the difficult problems that lie ahead for the American legal system as it tries to address the concerns of victims within the confines of a rigorously adversarial trial structure.

But the debate over the right of victims to some level of participation at trial will continue to be emotional and unproductive until those within the system acknowledge and better understand the sources of victims' frustration in their encounters with the American criminal justice system. It is toward that understanding that the authors hope to contribute.

This Article is divided into two parts. Part I explains why certain central features of the German trial system, most of which are common to other countries that share the civil law tradition, offer definite advantages to victims when compared to criminal trials that take place in the American legal system. Part II deals with the right granted victims of certain serious crimes to participate directly in the German criminal trial as *Nebenklager*, which translates roughly as permitting the victim to act as a "secondary accuser." We describe the major reforms made to the *Nebenklage* procedure in 1986 and show how it works in practice, using as an illustration a rape prosecution in which the victim has chosen to take advantage of the procedure.

The authors have chosen to discuss the *Nebenklage* procedure in detail partly because it does not provide all crime victims with a general right of participation at trial. Rather, the procedure is available only for the most serious crimes, and its major impact, as we shall explain, is on victims of sexual assault. Thus, while the *Nebenklage* procedure is important and its impact is significant in sexual assault cases, it needs to be kept in perspective: it is only one aspect of a trial tradition that offers victims a number of advantages, both direct and indirect, in comparison to the American adversarial system and the difficulties that victims face in American courtrooms.

I. VICTIMS IN THE CIVIL LAW SYSTEM

A. The German trial system prefers narrative testimony

One of the biggest differences between German trials and American trials is the way that witnesses—victims, defendants, police officers, experts, etc.—are questioned in court. After the presiding judge has informed the witness of her obligation to testify truthfully and completely about the matter at hand, and has obtained a few pieces of background information from the witness, such as her name and address, the presiding judge will always ask the witness to explain fully and completely what happened. In short, the witness is invited to tell all she knows about the crime and its surrounding circumstances in a narrative fashion.

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[20] *See* Vivian Berger, *Payne and Suffering—A Personal Reflection and a Victim-Centered Critique,* 20 Fla. St. U. L Rev. 21, 59 (1992) ("The system is not equipped to nurture victims or their representatives."); *id.* at 65 ("Private forums will better serve to mend hearts and honor the dead.").

[21] Justice James M, Dolliver of the Washington Supreme Court suggests that increased participation in the process by the victim might have a negative psychological and economic effect on victims. *See* Dolliver, *supra* note 19, at 90.

This preference for narrative testimony, which is embodied in section 69 of the German Criminal Procedure Code (*Strafprozeβ*ordnung),[22] reflects an important epistemological premise, common in civil law countries,[23] that evidence should be presented to the court in as near to its original form as possible. This means that the presiding judge will never try to "control" the examination of a witness who has important evidence to present at trial by using a series of questions to take the witness through the events in question step by step, as is customarily done by attorneys on direct examination in an American criminal trial.

While the presiding judge will ask the witness questions, this will not occur until the witness has had an opportunity to give a detailed narrative of the events in question, in her own words. It is not unusual for the victim of a serious crime, such as a rape or a serious assault, to testify uninterrupted for thirty to forty minutes or longer, as she explains how the crime occurred, what steps she took after the crime occurred, and what happened to her subsequently. Only after the witness has finished giving her account will the judge begin to ask her questions.[24]

Because the German system prefers to let witnesses testify relatively freely about the events in question, it is not unusual for a witness at a German criminal trial to mention something that would bring an immediate objection in an American courtroom—perhaps because it is hearsay, contains an opinion, or is not directly relevant to the matter at hand, and may even be prejudicial to the defendant. The German system is less worried about evidentiary problems of this nature than is the American system. Chiefly this is because trials in Germany, as in most civil law countries, take place in front of professional judges when the offense is minor, or in front of "mixed" panels of professional and lay judges when the crime is more serious.[25] Perhaps because there will always be professional judges among the factfinders, the German system is more optimistic that the factfinders will be able to separate the more probative from the irrelevant evidence.[26] Moreover, continental systems tend to be skeptical about the entire intellectual enterprise of erecting elaborate evidentiary structures to distinguish relevant from irrelevant evidence.[27] For these reasons, there is no direct analog in Germany to the technical set of rules that tightly controls the production of evidence at trial in most American jurisdictions.[28]

The German system's preference for narrative testimony also reflects a desire that judges hear testimony that has not been "shaped" by lawyers' preparation. While witness preparation is considered ethically proper and even necessary in an important criminal case in the United States, in Germany it is unethical to influence a witness; the shaping of testimony in which both prosecution and defense routinely engage in the United States would be improper.[29] The German system would prefer to hear witnesses testify in their own words rather than hear from witnesses who

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[22] *See* Strafprozeβordnung [StPO] § 69(1) (F.R.G.).

[23] *See* Mirjan Damasika, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study,* 121 U. Pa. L. Rev. 506, 517–18 (1973).

[24] It needs to be emphasized that this preference for narrative testimony applies to all witnesses, and thus a defendant will also be permitted to give his account of the events in a detailed narrative form.

[25] *See* Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?,* 18 B.C. Int'l. & Comp. L. Rev. 317, 321–22 (1995). Lay Judges in Germany serve for a period of four years and sit twelve days a year. There is no procedure for challenging lay judges as there is for challenging jurors in the United States, and the only grounds for removing a lay judge are those that would require recusal for a professional judge. *See generally* John H. Langbein, Comparative Criminal Procedure: Germany 141–44 (1977).

[26] *See* Damaska, *supra* note 23, at 514–15.

[27] *Id.*

[28] It is not correct to say that there are no evidentiary rules at German trials. German law embodies a rough analog of the common law hearsay rule, namely, the principle of orality and immediacy which requires that the judges examine in court a witness who has information about a matter of fact rather than simply admitting a prior statement of the witness into evidence. *See* StPO § 250. StPO § 244(2) obliges the judges to examine and take into consideration all evidence that is relevant to the issue. This requires that the judges investigate and hear the best possible version of evidence. *See* Damaska, *supra* note 23, at 516–17. Thus, judges can admit hearsay, but if it relates to an important issue, they would also have to hear direct testimony, if available. Because the judges are under a duty to examine all of the relevant evidence about the matter at hand, the law of evidence is of rather minor importance in Germany compared to the central role it plays in the American trial system. *See* Mirjan Damaska, *Structures of Authority and Comparative Criminal Prodecure,* 84 Yale L.J. 480, 526 (1975).

[29] *See* Gerhard Jungfer, *Eigene Ermittlungstatigkeit des Strafverteidigers—Strfprozessuale und standesrechtliche Grenzen in* Die Eigene Ermittlungstatigkett des Strafverteidigers, Strafprozessuale und Standesrechtliche Moglichkeiten und Grenzen 7, 11 (1981); Elmar Muller, Strafverteidigung im Uberblick, 67 n.32 (1989).

have been coached and rehearsed. The result is a trial that is less technical and less influenced by lawyers than is typical in the American legal system.

In part, of course, this difference reflects the fact that the German system is not an adversarial system in which the prosecution and defense present witnesses to the court. Rather, it is an inquisitorial system in which the judges have an obligation at trial to examine, evaluate, and weigh all relevant evidence in order to reach an accurate determination of the issues. Because the judges have an affirmative obligation to inquire into the charges, it is the judges, not the parties, who have the primary responsibility for deciding which witnesses will be heard at trial, and it is the judges, not the parties, who usually conduct the bulk of the examination of those witnesses.[30] If the judges investigate in an incomplete manner and refuse to seek out and examine all available and potentially relevant evidence, an appellate court will be likely to reverse.[31]

These differences point to the apparent ambivalence in the American legal system about what exactly it seeks to elicit from victims and other witnesses. Witnesses are sworn to tell "the whole truth," but the system does not seem to want to hear what the victim considers to be the whole truth about the event in question. Certain aspects of the crime that may be important to the victim will be inadmissible at trial. And the testimony of the victim has to be shaped so that it not only comports with our rules of evidence but also has the effect the lawyer is seeking.

Clearly, the United States lies at one extreme in the way that lawyers are free to manipulate evidence for presentation at trial. Even in England, which also has an adversarial trial structure, the sort of pretrial witness preparation that is standard practice in serious American criminal cases would be considered improper.[32] The American system fosters an extreme form of advocacy, and it is important to fully understand the impact of this approach on victims. If a primary goal of a criminal trial is to provide a cathartic and beneficial effect for victims, it seems that such benefits will more likely accrue to victims in a system that not only permits them to tell everything they know about the crime in their own words, but actually prefers such testimony to that which has been shaped and prepared. In short, a trial system that encourages a witness to be herself in the courtroom and that demonstrates a willingness to listen to what she has to say offers an advantage to victims that should not be underrated.

B. German trials determine the sentence as well as the issue of guilt

Another major difference between German and American criminal trials is that the factfinders at a German trial will determine the defendant's sentence should they find the defendant guilty.[33] There is no separate sentencing procedure.[34]

This has direct and indirect implications for the victim. The direct implication is that the court will always inquire into the impact the crime has had on the victim. In fact, such information is always relevant because it is a sentencing factor under the German Penal Code.[35] Thus, crime victims not only have more freedom to describe the crime in question, as explained in the previous subsection, but also have the ability to complete the picture by explaining the impact that the crime has had on them in the period since it occurred. The result is testimony that, from the victim's perspective, is a coherent whole: "here is where I was and what I was doing when the crime occurred; here is what happened to me during the crime; here is what I did following the crime; and here is how the crime has affected me."

There are also at least two indirect benefits for victims that result from addressing sentencing at a German criminal trial. First, the stress on the victim and the

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[30] For an excellent overview of criminal trials in Germany, *see* Langbein, *supra* note 25, at 3–60.

[31] *See* StPO§§ 244(2)–(5), 337.

[32] Paragraph 6.1 of the General Standards, Code of Conduct of the Bar of England and Wales (1990) provides:

> Generally a barrister should not discuss a case or the evidence to be given in a case with any potential witness other than the lay client, a character witness or an expert witness. * * * A barrister should not rehearse, practise or coach any witness, in relation either to the evidence itself or to the way in which to give it.

See also Michael M. Graham, *Tightening the Reins of Justice in America* 66–67 (1983).

[33] *See Langbein, supra* note 25, at 36–38; Damaska, *supra* note 23, at 517–18.

[34] This dual inquiry at trial into guilt and possible sentence is not unusual among civil law countries. *See* Comparative Law 479 (Rudolph B. Schlesinger et al. eds., 5th ed. 1988). However, the system of dual inquiry is not without its critics. In fact, German academics have suggested that the issues of guilt and sentencing should be decided separately. *See* Arbeitskreis deutscher und schweizerischer Strafrechtslehrer (Arbeitskreis AE), Alternativ-Entwurf, Novelle zur Strafprozeβordnung, Reform der Hauptverhandlung 4 ff., 53 ff. (Tubingen 1985). However, such calls for reform have not yet resulted in any changes to the German trial structure.

[35] *Strafgesetzbuch* (StGB) § 46(2).

victim's family is reduced to the extent that the whole criminal matter is resolved in a single trial. By contrast, in the United States the trial and sentencing are very different in tone and function, and often are separated by a significant amount of time to permit a presentence investigation to take place. Because in the United States the victim frequently is an important prosecution witness at trial, the victim's credibility, and sometimes also the victim's character, may come under sustained attack. But it would be considered not only irrelevant but prejudicial for the victim to dwell on the impact of the crime at trial.[36] It is only at the sentencing hearing, if the defendant is convicted, that the victim will have the opportunity to explain the crime's impact on her and her family.[37] Sentencing hearings, also differ from trials in that they are usually inquisitorial in format, with the judge, armed with the presentence report, controlling the proceeding.[38]

A second indirect consequence of resolving guilt and possible sentencing in one proceeding is that it tends to make trials in the civil law system somewhat less adversarial in tone. In the United States, because the defendant will get another opportunity to present mitigating evidence prior to sentencing, he has more freedom to deny responsibility for the crime and to attack the credibility of prosecution witnesses in an effort to gain acquittal or a hung jury. For example, the defense can insist at trial that the victim brought the charges against the defendant out of spite or anger. If that defense fails, at the sentencing hearing the defense can offer as mitigating evidence an entirely different theory, such as alcohol-induced poor judgment, or genuine remorse on the defendant's part. At German trials, in order for the court to consider mitigating evidence in sentencing, the defense must present it at trial, which makes arguing two such disparate approaches very difficult. Thus, in Germany the defense must make some hard choices about the arguments that it will raise. It should also be noted that German factfinders will be aware of the defendant's prior convictions and his character to the extent that they bear on sentencing. As a result, the defense strategy of attacking the victim's character while keeping the defendant's prior record away from the jury, used in certain cases in the United States, is simply not available in Germany.

Another aspect of continental criminal procedure worth mentioning in connection with the dual inquiry of German trials is the opportunity given the defendant to respond to the charges at the very beginning of the case, a right which is almost universally exercised.[39] This allows the defendant to give her version of the events before any witnesses have been called to give evidence.[40] This initial step, coupled with the dual nature of the trial inquiry, makes it very clear at the outset what the defense will and will not contest, both of which are important to the judges and the other witnesses. Once the defendant has addressed the charges, and the issues are more focused, the victim may find it somewhat less stressful to testify.

The dual inquiry of the German trial, as well as the timing of the defendant's evidence,[41] offer definite advantages for victims compared to the American system, in which defendants are somewhat more free to concede nothing and attack all elements of the prosecution's case. This is certainly not to say that the credibility of victims is never attacked at German trials. Indeed, sometimes the credibility of a crime victim is viciously attacked. Still, the risks to the defense of an abusive examination strategy coupled with the relevance of the defendant's character and background at trial make the entire proceeding less stressful for the victim in comparison to the American system.

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[36] It is frequently urged that even permitting victims an oppportunity to speak at sentencing, where such remarks will often be directed only to the judge, is also overly prejudicial. *See, e.g,* Andrew Blu, *Impact of Crimes Shakes Sentencing,* Nat'l L.J., June 26, 1995, at A1; Robert C. Black, *Forgotten Penological Purposes: A Critique of Victim Participation in Sentencing,* 39 Am. J. Juris. 225 (1994); Lynne Henderson, *The Wrongs of Victim's Rights,* 37 Stan. L. Rev. 937, 999–1001 (1985).

[37] Sometimes the victim is only allowed to do this in writing and not in person. *See* Lamborn, *supra* note 10, at 151–52.

[38] *See* William T Pizzi, *Lessons from Reforming Inquisitorial Systems,* 8 Fed. Sent. Rep. 42 (1995).

[39] Almost all continental defendants choose to respond to the charges when asked to do so, the only refusals occurring in political trials where they are used to signify defiance of the legal system as a form of political protest. *See* Damaska, *supra* note 23, at 527 n.42.

[40] *See id.* at 528–29.

[41] The defendant is permitted to respond to the charges, but is not a witness at the trial in that he is not put under oath. It is considered unfair in continental systems to force a defendant to give testimony at a trial charging him with a crime and yet threatening him with perjury. *See* Damaska, *supra* note 23, at 516 n.13.

C. Trials are controlled by the professional judges

As mentioned earlier, Germany, like most civil law countries, uses "mixed" panels of judges, composed of both professional and lay judges.[42] In the case of a serious crime, such as murder or sexual assault, the trial will take place in front of three[43] professional judges and two lay judges. Though lay judges are considered an important safeguard in the system, control over the trial rests as a practical matter in the hands of the professional judges. In preparation for trial, two of the professional judges carefully study the entire investigative file and take the lead in deciding what evidence they need to examine at trial. and who they should call to testify.[44] This power is not absolute, as both the state's attorney and the defense attorney may suggest to the judges that additional evidence be examined or that other witnesses be called to testify. Because these requests are rarely rejected, they serve as an important check on the power of judges.[45] In most criminal cases, however, there are few or no such motions because the issues in the case are clear, and the judges will have done a thorough job of reviewing the files to see which witnesses should be called.

The judges' primary control over witness selection and the production of evidence at trial extends to the questioning of witnesses as well. While the lay judges, state's attorney, defense attorney, and even the defendant will each have an opportunity to ask questions of any witness, that opportunity will arise only after the presiding judge and the second professional judge have finished examining the witness. However, because the professional judges are usually very well prepared and very thorough in their questioning, it is normally the case that the bulk of the testimony given by a witness is elicited by the presiding judge or the second professional judge.[46]

This procedure presents certain advantages to victims in comparison to the more partisan examination and cross-examination that takes place in American courtrooms. It is often easier for victims to answer questions concerning painful, distasteful, or embarrassing events when these questions come from professional judges who are expected to be both impartial and fair. Yet, this advantage should not be overvalued, as defense attorneys in Germany will eventually have the opportunity to question the victim and may be quite aggressive in attacking the victim's credibility or character in appropriate cases. Nevertheless, because the system relies to a considerable extent on professional factfinders at trial, certain arguments or attacks on the victim made by defense lawyers in front of American juries are less likely to be made at a corresponding German trial. In the United States, a defense attorney may find it advantageous to attempt to shift the jury's attention to issues that may be peripheral or even irrelevant to the alleged crime. For example, an American defense lawyer at a rape trial may feel compelled to argue to the jury that the victim put herself at risk by being out alone at night or dressing provocatively. In contrast, such arguments are unlikely to be raised at a German rape trial because the professional judges know well what issues are relevant to the case at hand.[47]

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[42] *See* text accompanying note 25, *supra.*

[43] *See* Gerichtsverfassungsgesetz [GVG] § 76(l)–(2) (1974).

[44] Langbein, *supra* note 25, at 62–63. Lay judges are not permitted to read the dossier. *Id.* at 67.

[45] The power that the state's attorney and the defense attorney can wield by filing motions for additional evidence or to request that additional witnesses be called is considerable because the judges can reject these motions only in very limited circumstances. *See* StPO §§ 244(3)–(5), 245 (1974). There is high risk of reversal on appeal if such a motion is denied. This has considerable importance in white-collar criminal cases where motions for additional evidence filed by the defense can prolong the trial significantly. Thus this power is considered not only a check on the system, but also a powerful defense weapon. *See* Walter Perron, Das Bewwisantragsrecht des Beschuldigten im Deutschen Strafprozeβ, 314–42, 380–81, 477 (1995). *See, e.g.,* Heinrich Kintzi, *Moglichketen der Vereinfachung und Beschleunigung von Strafverfahren de lege ferenda* Deutscher Richterbund 325 (1994); Walter Perron, *Beschleunigung des Strafverfahrens mit rechtsstaalichen Mitteln,* Juristen· Zeitung, 823 (1994). Helmut Frister, *Beschleunigung der Hauptverhandlung durch Einschrankung von Verteidigungsrechten?, Strafverteidiger* 445 (1994).

[46] *See* Damaska, *supra* note 28, at 525; Langbein, *supra* note 25, at 64.

[47] There is also perhaps a bit more freedom on the part of German judges to intervene to restrict certain irrelevant or unfair questions. StPO § 241 (2) gives judges the authority to reject questions which are clearly irrelevant or which are unlikely to produce relevant evidence from witness. *See* Lutz Meyer-Goβner, in Kleinknecht/Meyer/Meyer-Goβner, Strafprozeβordnung, Gerichtsverfassungsgesetz, Nebengesetze und Erganzende Bestimmungen, 42. Auflage, § 241 Nr. 6–15 (1995). In addition, StPO § 68a prohibits questions which could do harm to the witness' honor, unless they are absolutely necessary.

But because the German system is nonadversarial in conception, to a large extent the system requires a consensus among the lawyers and the judges as to how a trial should properly be conducted and when a lawyer does not conform to the expectations of the system, judges are not well-equipped to control such behavior. For that reason there is now discussion in Germany

This discussion of the factfinding role of German judges illuminates systemic differences between the German and American systems. European countries believe that factfinding is an art, and that having professional factfinders among those who will decide the defendant's fate is important because professionals will generally do a better job of sorting and evaluating the evidence.[48] Obviously, vesting strong power in the judiciary entails risks of abuse, but European systems try to protect against such abuse through a variety of means: (1) spreading factfinding authority among more than one judge,[49] (2) giving the defense and the state's attorney the right to participate actively in all evidentiary proceedings, including the right to request the examination of additional witnesses,[50] (3) requiring that verdicts be fully explained and justified by the law and the evidence, and (4) providing for far broader appellate review of the trial judgment than is permitted in the United States.[51]

In contrast, the American criminal justice tradition places less emphasis on official power and thus American judges play a more passive role at criminal trials. Even commenting on the evidence by the judge at the end of the case—a practice that is viewed as desirable and necessary in other common law countries[52]—is disfavored in most American jurisdictions.[53] The notable exception is the federal system, where comment on the evidence is permitted, but even there most federal judges choose not to exercise the right to comment.[54] The American legal system places the issue of guilt before a body of nonexperts, who come entirely from outside the system and are expected to draw conclusions based only on what they hear at trial, with no additional review of the investigative file. As a result, the system is open to a broader range of arguments and more aggressive treatment of witnesses than is the case in German criminal trials, making the procedure more emotionally trying for victims of serious crimes.

D. Verdicts must be explained and justified at German trials

At any trial—whether in the United States or in Europe—the rendering of the decision is often a tense and dramatic moment. But the conclusion of criminal trials in the United States is fundamentally different from the conclusion of criminal trials in Germany and other continental countries. In the United States, the verdict for each count of the charging document is limited to one or two words: guilty or not guilty. While the trial may have taken a substantial period of time, the conclusion is swift. The jury is never required to provide any formal explanation of how or why it reached the verdict in question.[55]

Trials in Germany conclude in a similarly dramatic fashion: the panel of judges enters the courtroom and the presiding judge announces the judgment, which will also indicate the sentence, if the defendant has been found guilty. However, the presiding judge also gives an oral explanation of how the judges reached their verdict, as well as how they decided upon the particular sentence.[56] The judges' reasoning will later be incorporated into a formal written account of the verdict that reviews the evidence at trial and, depending on the nature of the trial, explains: (1) which

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about whether certain broad procedural rights accorded to the defendant should be limited to prevent the abuse of those rights. *See, e.g.,* Heinrich Kintzi, *Moglichkeiten der Vereinfachung und Beschleunigung von Strafverfahren de lege ferenda,* Deutscher Richterbund 325 (1994); Walter Perron, *Beschleunigung des Strafverfahrens mit rechtsstaalichen Mitteln,* Juristen Zeitung, 823 (1994). Helmut Frister, *Beschleunigung der Hauptverhandlung durch Einschrankung von Verteidigungsrechten?,* strafverteidiger 445 (1994).

[48] *See* Damaska, *supra* note 28, at 507–08.

[49] Except for the most minor cases, continental trial systems are always multi-judge panels. *See* Damaska, *supra* note 23, at 510.

[50] *See* text accompanying note 45, *supra.*

[51] Continental systems view appellate review as simply an extension of the trial process and not an additional step, so that reconsideration of what happened at trial is considered a normal part of the process. *See* Damaska, *supra* note 28, at 490–91.

[52] *See* Graham, *supra* note 32, at 94–95.

[53] *See* Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 23.6(c), at 889 (Student ed. 1985). Scholars view the state restrictions on judicial comment as a manifestation of American populism. *See* Fleming James et al., Civil Procedure § 7.22, at 372–73 (4th ed. 1992).

[54] *See* Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries,* 118 F.R.D. 161, 169 (1988) (citing statistics showing that federal judges summarize the evidence in only 27 percent of their cases and comment on the evidence in only 18 percent of their cases).

[55] While special verdicts that include the jury's answers to a series of questions are possible in civil trials in the United States, they are generally frowned upon and rarely used in criminal trials. *See Heald* v. *Mullaney,* 505 F.2d 1241, 1245 (1st Cir. 1974); *United States* v. *Spock,* 416 F.2d 165, 181–82 (1st Cir. 1969).

[56] A criminal judgment (*Urteil*) at a German trial contains both (1) a dispositive judgment (*Urteilsformel*), which explains what action the court took, and (2) a statement of the reasons for the judgment (*Grunde, Urteilsgrunde*). Langbein, *supra* note 25, at 56.

legal issues were raised by the evidence and how each was decided by the judges, (2) what the factual evidence was and how the judges resolved any issues of credibility, and (3) how the judges determined the sentence, if appropriate.[57]

Depending on the complexity of the case, the judges usually draft this document within a few weeks of the conclusion of the trial. Once completed, it serves as the basis for an appeal. Such a document, which may take ten or fifteen pages in even a fairly straightforward criminal case, is possible only because the factfinding panel includes professional judges, who understand the requirements of the law and have the legal sophistication to draft it.[58] The judgment is drafted to conform with the statement of the trial decision announced in court, and it is then signed by the professional judges.[59]

A trial that results in a written verdict with well-articulated reasons for the judges' decision offers victims (and defendants) important advantages. First, it is easier to accept a verdict as fair and just when there is a written document demonstrating that the judges have done their job fairly, conscientiously, and in conformity with the law. One can be disappointed with a verdict, yet conclude after listening to the reasoning behind it that it is, nonetheless, understandable or even justifiable.

No better example contrasts an unexplained and an explained verdict than the acquittal of a defendant. Such a verdict, in the American criminal justice system, is often highly ambiguous. For example, in an acquaintance-rape trial, did the jury acquit because it found the victim's testimony not worthy of belief, thus concluding there was no crime, or did the jury find that although the evidence was very strong, it was not sufficient to establish guilt beyond a reasonable doubt?

When such a trial takes place in a civil law system it is possible for the factfinders to say some things that might be of considerable consolation to the victim, but which would remain hidden behind a two-word verdict at an American trial. For example, the judges might explain that they found the testimony of the victim to be entirely credible but, because the issue was the defendant's mens rea, they concluded that there was not enough evidence to convict. Or the judges might explain that it was not possible to resolve a conflict of credibility between the victim and the defendant and, for that reason, they had no choice but to return a verdict acquitting the defendant of the crime.

An American criminal trial seems more and more to be about winning and losing, and verdicts absent justification or explanation seem to say that if you are not the winner, you must be the loser. Because it is very difficult to prove a defendant guilty beyond a reasonable doubt, we have to expect that in any credible criminal justice system there will be cases where the evidence is very strong, but still insufficient to support a conviction. In such a case, an explanation that sums up the evidence fairly and accurately, and explains why the evidence was strong, yet insufficient, is much more likely to be accepted as just by the victim and the defendant as well as the public. It also prevents the press from claiming, as sometimes happens in the United States after a verdict of not guilty, that the jury "found the defendant innocent," when that is not what the jury had intended by its verdict.

E. German judges have the duty to seek the truth

Because the structure of criminal trials in civil law systems differs from that in adversarial systems, the issues to be determined at trial are different as well. At a European trial, the factfinders must determine whether or not the defendant committed the crime in question and, if so, what sentence is appropriate for that defendant for that crime. A German criminal trial is structured as a search for the truth; the system believes that the best way to reach the truth is to place responsibility on a panel of judges to examine and weigh all relevant evidence in order to determine whether the defendant is guilty of the alleged crime.[60]

An American trial operates on different epistemological assumptions and has a completely different structure. The issue at an American criminal trial is whether or not the state can prove the defendant's guilt beyond a reasonable doubt. Neither

[57] The court is required to disclose the grounds of its decision in a general way when it announces the dispositive judgment in court within four days after the close of trial. *See* StPO § 268(2). The court must file a written judgment thereafter. *See* StPO § 275(1). *See* Ellen Schluchter, in Systematischer Kommentar zur Strafprozeβordnung und Zum Gerightsverfassungsgesetz, § 260 Nr. 38 (Neuwied, Kriftel, Berlin 1994); Langbein, *supra* note 25, at 56.

[58] *See* Langbein, *supra* note 25, at 56–57.

[59] *Id.* at 57.

[60] Professor Mirjan Damaska connects the reluctance of continental systems to embrace exclusionary rules of various sorts to the higher commitment such systems make to the search for truth. *See* Damaska, *supra* note 23, at 578–87.

the judge nor the jury in an American courtroom has the duty to seek out the truth about the charges against the defendant. Instead, the trial is a testing of the state's case to see if the state has sufficient evidence and sufficient skill to prove the defendant guilty beyond a reasonable doubt. In this trial structure, the professional judge's role is to be a neutral referee between the opposing parties, and the judge, consequently, is not expected to play an active role in the production of evidence. The jury also has a passive role: questions from the jury are discouraged by the trial setting, and it is practically unheard of for the jury to ask to hear additional witnesses or to call for the production of additional evidence.

The American criminal justice system is also more ambitious in terms of what it attempts to accomplish from within. It is much more willing than the German system to suppress reliable evidence at trial in order to punish police for violating the rules of search and seizure, even at the cost of a false acquittal.[61] In addition, the United States is also proud of its tradition of jury nullification which permits a jury to nullify the law and acquit a defendant if it believes that the law or the prosecution is unfair.[62] The concept of a group of factfinders—lay factfinders at that rejecting the law in order to follow its own conception of what is fair and just would never find a home in the German system, which places much greater emphasis on accurate fact finding and on the uniform application of the law.[63]

The American political tradition is much more distrustful of governmental power generally,[64] and public officials in particular, than is the German system,[65] and thus would find it difficult to accept the dominant trial role that is accorded professional judges in the civil law tradition. Some of that distrust is evident in the fact that many of our judges are elected to their position, and attempts to move states away from the partisan election of judges are usually soundly defeated.[66] American distrust of public officials is also evident in the reluctance to permit judges to comment on the evidence at trial, even though such comment was permitted at common law.[67] Instead of vesting control of the trial in judges, the American trial tries to balance control among the prosecutor, the defense attorney, the judge, and even the jury. This system of shared power over the trial naturally requires a much more complicated set of procedures if the balance is to be maintained and truth is to be

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[61] While Germany has a constitutionally based exclusionary rule, it is considerably narrower than the American version and the idea of excluding all the fruits of an illegal search for the purpose of deterrence has never been accepted in Germany. Claus Roxin, Strafverfahrensrecht § 24, at 155–65 (1993). On the philosophical difficulty that exclusion of reliable and probative evidence presents to continental lawyers and judges because it conflicts with the duty to find the truth, *see* Damaska, *supra* note 23, at 522–24.

[62] Rather than requiring that a verdict be justified and explained, the American system goes in the other direction, permitting juries to temper the law in a particular case to fit their own conception of fairness and justice. In *Duncan* v. *Louisiana,* in which the Supreme Court held that the Sixth Amendment right to a jury trial applied to the states, Justice White referred to the power that juries have to disagree with the law and to nullify it in appropriate cases. *Duncan* v. *Louisiana,* 391 U.S. 145, 156–58 (1968). But the American system is clearly ambivalent about jury nullification. Most courts refuse to instruct juries on their power to nullify the law. *See United States* v. *Dougherty,* 473 F.2d 1113 (D.C. Cir. 1972).

[63] *See* Damaska, *supra* note 28, at 491–92.

[64] *See* Alexis De Tocqueville, 1 Democracy in America 346–47 (Henry Reeve trans., New York, Century Co. 1898) (1835). This aversion to strong centralized governmental power runs deep in the American political tradition. *See* Grant McConnell, Private Power and American Democracy 5 (1966).

[65] Professor Mirjan Damaska describes the relationship between the state and the individual in continental systems as one that borders on the "mutual love" that a parent has for a child. Damaska, *supra* note 28, at 530. Professor Damaska believes that the continental tolerance of strong centralized authority has its roots in the feudal period, when the emergence of a strong centralized governmental authority provided relief to citizens from the constant strife among local fedual lords that had preceded that period, and which had been a barrier to stability and economic development. *See id.* at 539–41.

[66] In Ohio there have been four attempts to reform its judicial system by moving away from the partisan election of judges. *See* John D. Felice & John C. Kilsein, *Strike One, Strike Two * * *: The History of and Prospect for Judicial Reform in Ohio,* 75 Judicature 193, 194 (1992). The latest attempt lost by a two to one margin despite endorsement of the reform by the Ohio Bar Association and the Ohio League of Women Voters. *Id.* at 193.

In Texas, the partisan election of judges has directly affected the development of tort law in that state. *See* Christi Harlan, *Texas Supreme Court Race Pits Lawyers Against Business Interests,* Wall St. J., Nov. 2, 1992, at B4. Proposals for reform have gone nowhere in Texas, despite campaign contributions totaling over four and one-half million dollars spent in the 1986 elections for four seats on the state supreme court. *See* Anthony Champagne, *Judicial Reform in Texas,* 72 Judicature 146, 149, 158–59 (1988).

[67] *See* Weinstein, *supra* note 54, at 163–64. Weinstein suggests that American restrictions on judicial comment began as a result of the low regard for judges that existed in colonial times because such judges were often appointed not for their legal skills but because they could be relied upon to be loyal to the crown. *Id.*

discovered. Yet at the same time, these procedures often need to be subtle and indirect precisely because power in the system is shared and must be balanced carefully. Thus, even procedures that are independent of the production and examination of evidence at trial, such as discovery,[68] or the selection of the jury,[69] have adversarial aspects and can be time consuming and quite complicated.

The problem with a system as complicated as the American trial system is that, at some point, the complexity can itself become a weakness. Breaking up testimony too often with sidebar conferences, or shuttling juries in and out of the courtroom so lawyers can argue evidentiary points of law, can easily distract juries from the task at hand. It can also be alienating to victims (and other witnesses) when they feel they are in a system in which the lawyers and judges seem to be talking among themselves, rather than to the victim or the public at large. Because the German system vests so much power in the judges to control the trial, it is less likely to get mired in technical evidentiary issues than the American system, increasing the likelihood that victims will feel comfortable within the system. Trials are generally stressful events, but the American system exacerbates the situation by placing victims in the middle of heated battles between the prosecution and the defense that victims may not fully understand.

There is another aspect of the American trial system that underlies the matters discussed in this subsection but needs to be discussed directly: that is, it appears to be somewhat easier to convict the guilty in continental systems than in the American criminal justice system. One can argue this on several levels—that lay factfinders tend to be more inclined to acquit than professionals;[70] that continental systems admit more evidence than the American system;[71] that European systems tend not to have broad exclusionary rules on the model of the Fourth Amendment exclusionary rule in the United States;[72] that decisionmakers in the complex American system have more freedom to make decisions than their European counterparts whose findings of fact can be directly reviewed on appeal;[73] and, finally, that continental decisionmakers need not be unanimous.[74] To the extent that trials are more certain propositions in the German system and conviction of the guilty is easier, victims are certainly favored—especially in those cases pitting the victim's testimony against that of the defendant.

II. THE RIGHT OF THE VICTIM TO PARTICIPATE AS SECONDARY ACCUSER AT CRIMINAL TRIALS IN GERMANY

A. The Nebenklage *procedure in perspective*

The German *Nebenklage* procedure permits victims to participate through counsel at trial on nearly equal footing with the state's attorney and the defense. Since the purpose of this Article is to provide perspective on current efforts of the victims' rights movement in the United States to secure a right to participate and to be heard at critical stages of the criminal process, one might ask why the authors did

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[68] In federal court, for example, the defense does not have a right to examine witness statements prior to trial nor does the defense even have a right to a list of the prosecution's witnesses in advance of trial. *See* Fed. R. Crim. P. 16(a)(2). But under due process the Court has ruled that a prosecutor must turn over to the defense exculpatory material. *See Brady* v. *Maryland,* 379 U.S. 83 (1963). But what exactly constitutes exculpatory evidence is not always clear. *See Weatherford* v. *Bursey,* 429 U.S. 545 (1977). In turn, the defense does not have to indicate the nature of its defense or any of its witnesses to the government, unless the defense is that of alibi, insanity or mental condition, or public authority. However, these enumerated defenses trigger a responsibility on the part of the government to then turn over possible rebuttal evidence to the defense, which then has the option of not putting on such a defense at all. *See* Fed. R. Crim. P. 12.1–12.3.

[69] *See* William T. Pizzi, *Batson* v. *Kentucky: Curing the Disease But Killing the Patient,* 1987 Sup. Gt. Rev. 97, 139–42 (describing a survey which found that jury selection in New York state took forty percent of the trial time and often tool longer than the trial itself). Because the selection of the jury is thought to be nearly as important as the evidence that is presented, the are books that aim at helping lawyers pick juries. *See e.g.,* Walter E. Jordan & James J. Gobert, *Jury Selection: The Law, Art and Science of Selecting a Jury* (2d ed. 1990). For wealthy defendants there are consultants available to assist lawyers in the selection itself by conducting surveys of the community in advance of trial or by assisting in the courtroom in the courtroom during the selection process. *See* Stephen J. Adler, *Consultants Dope Out the mysteries of Jurors for Clients Being Sued,* Wall St. J., Oct. 24, 1989, at A1.

[70] *See* Damaska, *supra* note 23, at 538–39.

[71] *See* William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform,* 54 Ohio St. L.J. 1325, 1359 (1993); Damaska, *supra* note 23, at 513–25.

[72] *See* Damaska, *supra* note 23, at 522–24.

[73] *See Id.* at 528–29.

[74] *See Id.* at 537.

not begin with an examination of the *Nebenklage* procedure. There are several reasons for which the authors believe that discussion of the *Nebenklage* procedure should follow a more general and thorough discussion of the treatment of victims at German criminal trials.

In the first place, the *Nebenklage* procedure has to be understood as only one difference, among several, in the way victims are treated in the German criminal justice system. Second, the *Nebenklage* procedure is limited in its availability. It is not a general right of victims to participate in all criminal trials, but rather is available only in the case of serious crimes that have a very personal impact on the victim (or the victim's family), including murder, assault, kidnapping, and sexual assault.[75] Third, even where the *Nebenklage* procedure is available, victims do not frequently choose to participate at criminal trials as *Nebenklager,* with the exception of sexual assault victims whose participation as *Nebenklager* is much more common.[76]

Finally, the *Nebenklage* procedure can only be understood against the background of a trial system that is structured very differently from that of the American adversarial tradition, as was explained in Part I. Where a criminal trial is conceived of as a battle between the prosecution and the defense in front of a neutral judge, and where the victim will often be the prosecution's "key witness," it is harder from a structural perspective to understand how the victim's independent interests fit into what will usually be a pitched, two-sided battle.[77] By contrast, in German criminal trials, where the judges are obligated to examine all the relevant evidence in the case, and where judges play the central role in both the production and examination of witnesses,[78] no such structural problem exists. Evidence is not divided into "the prosecution's case" to be followed by "the defense case," and the examination of a witness in a German trial is not broken down into a direct examination to be followed by a cross-examination as it is in American trials. In short, the nonadversarial structure of civil law trials makes it easier to accommodate questions from the victim as *Nebenklager* without seeming to create an imbalance at trial.

Given this background, it is not surprising that a willingness to grant victims a right to intervene and participate at various stages of the criminal process is common today among countries that share the civil law tradition.[79]

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[75] *See* StPO § 395.

[76] In 1989 in the district of Baden-Wuurttemberg there was participation by a *Nebenklager* in only 3.21 percent of the criminal trials, and in only 19.2 percent of the cases in which a *Nebenklage* was possible did the victim actually choose to participate. *See* Michael Kaiser, *Die Stellung des Verletzten im Strafverfahren* 224, 251 (1992).

In an empirical study by Dr. Staiger-Allroggren of the years 1988–1990, about 20 percent of the victims having the legal option of participating in the trial as a *Nebenklager* did actually choose to participate. *See* Peony Staiger-Allroggen, *Auswirkungen des Opferschutzgesetzes auf die Stellung des Verletzten im Strafverfahren* 99–100 (1992) (unpublished dissertation, Gottingen University). But in sexual assault cases the numbers are much higher. The study by Staiger-Allroggen found that 67 percent of the victims of sexual assault chose to use the *Nebenklage* procedure. *Id.* at 99. Today that number appears to be even higher. In the Freiburg area for example, it is estimated that close to 100 percent of the victims of sexual assault participate at as *Nebenklager,* due in part to a well-known rape crisis center, contacted in all cases by the police, which makes sure that victims have information about the *Nebenklage* procedure. Interview with Silvia Fodor, State's Attorney, in Freiburg, Germany (June 23, 1993) (on file with the *Stanford Journal of International Law*).

[77] There is considerable force in the argument that, unless the American system is prepared to accept major structural changes, victims' rights cannot be grafted onto the existing system without remaining largely cosmetic. *See* Deborah P. Kelly, *Victim Participation in the Criminal Justice System, in Victims of Crime: Problems, Policies and Programs, supra* note 6, at 172, 183–84.

[78] *See supra* text accompanying notes 43–47.

[79] For an overview of a victim's right in France to participate at a criminal trial as "partie civile," *see* R.L. Jones, *Victims of Crime in France,* 158 Just. Peace & Loc. Gov't Law 795 (1994).

Recent Italian efforts to modify its criminal procedure illustrate how deep the notion of victim participation runs in civil law countries. In 1989, Italy attempted to reform its civil law system of criminal procedure by instituting an adversarial trial system which shifted responsibility for the production of evidence from the judges to the parties and thus restricted the powers of the judges. *See generally,* William Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation,* 17 Yale J. Int'l L. 1, 14 (1992). But the new Code of Criminal Procedure did not touch the tradition of permitting victim participation at trial, so that a victim's attorney participates on an equal basis with the *pubblico ministero* (the equivalent of the state's attorney in Germany) and the defense attorney. Codice di Procedura Penale [C.P.P.] arts. 410, 493, 496, 498, 523, 493 para. 2.

B. The Nebenklage *procedure today*

Although the *Nebenklage* procedure has been a part of German criminal procedure since 1877,[80] a major reform of the *Nebenklage* procedure took place in 1986. It had become clear by the early 1980's that the procedure needed reform, and there was considerable discussion and debate at that time over possible changes.[81] Part of the impetus for reform came from the unsatisfactory way in which the *Nebenklage* procedure was working in practice. For example, the category of crimes that permitted victim participation seemed at the same time to be too broad and too narrow. It was too broad in that it allowed injured traffic accident victims to intervene as *Nebenklager,* which they frequently did. In such cases, victim participation was driven by the desires of the insurance companies, rather than the wishes of the victims, because the *Nebenklage* procedure permitted insurance companies to obtain discovery about the accident more efficiently and without the costs that would be involved if the insurance company had to use the civil process to obtain such information.[82] The use of the *Nebenklage* procedure to further the private interests of insurance companies was certainly not the objective of the procedure, and it was generally recognized that the Code needed reform to prevent this.

At the same time, the category of crimes for which victims were permitted to participate as secondary accusers at trial was too narrow in that sexual assault was not specifically included. Sexual assault victims had been able to use the *Nebenklage* procedure on the theory that sexual assault involved an assault (which was a listed crime) and also had the sort of personal impact on the victim that justified the use of the procedure.[83] Nonetheless, women's groups argued that the *Nebenklage* procedure needed to be improved to give victims of sexual assault greater rights to participate at trial; without these rights, such victims arguably were being victimized a second time by the system.[84] Opposition to broadening the *Nebenklage* procedure came primarily from the defense bar, which argued that adding a secondary accuser, who would stress the victim's point of view at trial, would strengthen the position of the state's attorney in a dispute over procedure or evidence, making it more difficult for the defense attorney to prevail in such confrontations.[85]

The upshot of the debate was a number of important changes to the *Nebenklage* procedure.[86] First, in order to stop abuse of the *Nebenklage* procedure by insurance companies interested only in obtaining discovery for civil purposes, assault victims must now allege serious physical injury, or some other damage to themselves or their reputation,[87] in order to join the trial as *Nebenklager.* A second important change was the addition of sexual assault to the list of *Nebenklage*-eligible crimes. This means that sexual assault victims no longer have to justify their participation indirectly using the theory that sexual assaults involve assaults,[88] but now can participate based on the sexual assault itself. Because sexual assault is the category of crime in which victims overwhelmingly elect to participate in the trial, the decision to list sexual assault specifically among the crimes in the *Nebenklage* statute was an important recognition of the special problems that rape victims face in court.

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[80] The origins of the *Nebenklage* procedure in Germany go back to Germany's creation of a code of criminal procedure in 1877. *See* Thomas Weigend, Deliktsopfer und Strafverfahren, 131–34 (1989). There was apparently no historical precedent for the *Nebenklage* concept, and it is unknown from where the drafters of the German code developed it. Up until the adoption of the code the victim had been excluded from the trial process in Germany. *Id.*

[81] *See generally* Peter Rieβ, *Die Rechtsstellung des Verletzten im Strafverfahren, Gutachten C fur den* 55. Deutschen Juristentag, C 28–C 33 (1984); Peter Rieβ & Hans Hilger, *Das neue Strafverfahrensrecht,* 1987 Neue Zeitschrift fur Strafrecht 145, 153 nn. 184–85.

[82] *See* Jan Schulz, Beitrage zur Nebenklage 102–03, 166 (1982); Verhandlungen des Deutschen Bundestages, 10. Wahlperiode, Drucksache 10/5305, 12 (1986).

[83] *See* Reinhard Bottcher, *Das neue Opferschutzgesetz,* 1987 Juristische Rundschau 133, 135.

[84] *See* Felicitas Selig, Qpferschutzgesetz-Verbesserung fur Geschadigte in Sexualstrafverfahren?, Strafverteidiger 1988, 498, 499.

[85] *See* Eberhard Kempf, *Opferschutzgesetz und Strafverfahrensanderungsgesetz* 1987, *Gegenreform durch Teilgesetze,* Strafverteidiger 1987, 215, 216–20; Bernd Schunemann, *Zur Stellung des Opfers im System der Strafrechtspflege,* Neue Zeitschrift fur Strafrecht 1986, 193, 196–99; Hans-Joachim Weider, *Pflichtverteidigerbestellung im Ermittlungsverfahren und Opferschutzgesetz,* Strafverteidiger 1987, 317–18.

[86] *See* Opferschutzgesetz (BGBl.I 1986, 2496).

[87] For example, if it were alleged that the victim had contributed to a traffic accident through his own unlawful or negligent behavior, and the judges needed to inquire into such contributory negligence in order to pronounce a just sentence, then the victim would have a sufficient interest to permit participation at trial. *See* Lutz Meyer-Goβner, *supra* note 47, § 395 Nr. 11.

[88] Nevertheless, prior to the 1986 reform, in most rape cases the victim could also participate as a Nebenklager because the German courts saw in every sexual assault a personal insult and, frequently, a physical assault as well (which both qualified for the Nebenklage). *See* text accompanying note 83, *supra.*

The third change was to broaden the *Nebenklage* procedure to permit a lawyer representing the victim to participate at pretrial proceedings as well as at trial.[89] This extension has given the victim's lawyer the opportunity to examine the investigative file in advance of trial and to suggest further factual investigations to the state's attorney if the file appears incomplete from the victim's point of view. Psychologically, it has placed the victim's attorney on a more even footing with both the state's attorney and the defense attorney throughout the criminal process.[90]

A fourth major change in the *Nebenklage* procedure has made it easier for indigent victims to receive legal advice by providing for the payment of their legal fees, including those for pretrial consultation between the victim and an attorney. Such fees will be paid even if the victim ultimately decides not to participate at trial as *Nebenklager.*[91] This encourages victims to explore their legal options by assuring them that their indigence will not stand in the way of obtaining legal representation.[92] In fact, the extension of legal fees to cover a victim's pretrial consultations with counsel gives an indigent victim some advantages over even an indigent defendant: because the defendant will be responsible for the victim's legal fees should she be convicted, the defendant's financial burden could be considerably greater than the victim's.[93]

This last reform might seem to threaten the German system with a heavy financial burden. However, the provision of legal counsel to indigent victims so that they can participate at trial as *Nebenklager* is not as costly as it may appear for two reasons. The primary reason is that, as explained earlier,[94] most victims do not choose to participate in the process as *Nebenklager,* with the important exception of those who have been victims of sexual assault. A second reason is that legal fees for *Nebenklager* are not nearly as high as they would be in the United States.[95] Because professional judges have the main burden of preparing the case for trial in the German system, pretrial preparation on the part of lawyers is much more limited than it would be for a similar case in the United States. It is not the function of the victim's lawyer (or the defense lawyer or even the state's attorney[96]) to seek out witnesses and to interview such witnesses prior to trial; indeed, the system prefers that lawyers not conduct such interviews.[97] If the victim (or the defendant) tells her lawyer that a certain witness can corroborate her story, the attorney's function is to bring the name of that witness to the attention of the state's attorney, who will then see that the witness is interviewed by the police and that the interview is made a part of the file.[98] Thus, pretrial preparation by the victim's attorney usually entails a careful review of the file, and a discussion of its contents with the vic-

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[89] *See* StPO §§ 406g(1)–(2), 406e (1988).

[90] One difference between the defendant and the victim—and one restriction on the rights of Nebenklager enacted in 1986—is that the victim is not permitted to appeal in order to seek a harsher sentence for the defendant. *See* StPO § 400(1). But given the fact that victims and their attorneys usually do not see it as their function to get too involved in the specifics of sentencing—since it is more a matter for the state's attorney (*see* text accompanying note 121, *infra*)—this restriction is not significant. *See* Dirk Fabricius, *Die Stellung des Nebenklagevertreters,* Neue Zeitschrift fur Strafrecht 1994 257, 260.

[91] *See* StPO § 406g(3)–(4) (1988). For more details, see Bottcher, *supra* note 83, at 137; Georg Kaster, *Prozeβ*kostenhilfe fur Verletzte und andere Berechtigte im Strafverfahren, Monatsschrift Fur Deutsches Recht 1994 1073–1077.

[92] While a victim's indigency will usually be determined quickly, no victim will be responsible for those legal fees incurred prior to the determination of indigency in the event that the victim is later determined not to be indigent. *See* StPO § 406g(4) (1988).

[93] *See* Weider, *supra* note 85, at 318.

[94] *See* text accompanying note 76, *supra.*

[95] This is true of fees both for victims' attorneys and for defense attorneys. For a typical rape case, the minimum fee set by the bar association in 1993 was DM 1000 or approximately $650. Interview with Regina Schaaber, *Rechtsanwaltin,* in Freiburg, Germany June 15, 1993) (on file with the *Stanford Journal of International Law*). This is the same for both the victim's lawyer and the defense lawyer in such a case. *Id.* A defendant could, of course, choose to pay more for an attorney.

[96] Even the state's attorney does not prepare witnesses to testify at trial as would an American prosecutor. The state's attorney is more of a judicial figure. Also, a state's attorney who interviewed such a witness might well be recused from the case on the ground that he or she had become biased. Interview with Silvia Fodor, *supra* note 76.

[97] *See* Part I.A *supra* (describing the German system's strong preference for narrative testimony).

[98] In Germany, there is a highly professional police force that has specialized units for crimes such as murder and tape. It is the job of the police to handle the investigation. This includes making sure that any laboratory or crime scene tests are undertaken, that all witnesses who may have relevant evidence have been interviewed, and that these interviews have been reduced to detailed statements that have been read and signed by the witnesses. Interview with Silvia Fodor, *supra* note 76.

tim to make sure that it is complete from her point of view; not much more is required in the way of preparation for trial.[99]

C. The Nebenklage *procedure and sexual assault cases*

As stated earlier, it is only in a relatively small percentage of those cases in which the victim is eligible to participate through the *Nebenklage* procedure that she chooses to do so.[100] Presumably, most crime victims in Germany do not think their participation at trial is likely to benefit them directly; instead, they may be content to leave the investigation and the adjudication of the criminal case in the hands of the judges. The exception to this is the category of sexual assault crimes, where there has been a considerable increase in the percentage of victims who wish to participate in the criminal process as secondary accusers.[101] In the area around Freiburg, for example, virtually all adult victims of sexual assault choose to exercise their right to participate at trial using the *Nebenklage* procedure because they feel a personal stake in the trial and want their own lawyer present.[102] Sexual assault victims' desire for legal representation may be due to the highly personal and demeaning nature of the crime, as well as the nature of such trials, where it is not unusual for the character or reputation of the victim to come under attack.

Because sexual assault cases have become so closely linked with the *Nebenklage* procedure, this part of the article will use the crime of sexual assault as an example to show how the procedure works in practice.

There are two main avenues whereby a sexual assault victim will learn about the *Nebenklage* procedure. The first is through the German police, for whom it is now standard practice to inform rape victims about their right to participate at the trial as *Nebenklager.*[103] The other avenue by which victims learn of this right is through rape crisis centers, to which rape victims will often obtain referrals. Such centers will inform victims of their rights under the *Nebenklage* statute, and will usually be able to provide a list of lawyers who customarily represent victims in such cases.[104] In a typical case, where counsel is contacted by the victim or the victim's family shortly after the crime was reported to the police, the attorney will meet with the victim soon thereafter to discuss what will follow procedurally.[105] After the investigation of the case is complete and trial has been set, the attorney for the victim will examine the investigative file to make sure that it is complete from the victim's perspective. The inspection of the investigative file is an important step in the process because it provides an idea of what evidence will be presented at the trial and how the trial may affect the victim.[106] Usually counsel for the victim will meet with her briefly prior to trial, unless the case is very straightforward, to explain the trial procedures and to give her some idea of what is likely to happen.[107]

A victim who chooses to participate at trial as a secondary accuser becomes, in essence, a party at the criminal trial and receives treatment equal to that afforded the defendant in the courtroom. What this means as an initial matter is that the victim is entitled to remain in the courtroom throughout the proceedings and can participate through counsel much like the defendant. The majority of rape victims choose to remain in the courtroom because they view the trial as "their" trial.[108] If a victim wishes to remain in the courtroom throughout the trial, she will sit next to her attorney at one of the tables in the front of the courtroom, just as the defendant sits next to his attorney. But it is not necessary for the victim to remain in the courtroom in order to use the *Nebenklage* procedure, For those victims who find it too painful and stressful to remain in the courtroom throughout the trial, the *Nebenklage* procedure ensures that they will nonetheless have an attorney present

[99] Interview with Regina Schaaber, *supra* note 95.

[100] *See supra* text accompanying note 76.

[101] *Id.*

[102] Interview with Regina Schaaber, *supra* note 95; interview with Silvia Fodor *supra* note 76. With respect to children who have been sexually assaulted or abused, in some cases by a family member, the percentage of those choosing to participate at trial is much lower, but is estimated to be slightly more than half. Interview with Regina Schaaber, *supra.*

[103] Interview with Silvia Fodor, *supra* note 76; *see also* Staiger-Allroggen, *supra* note 76, at 81. A copy of the standard notice provided by the German police to crime victims informing them of their right to avail themselves of the *Nebenklage* procedure is on file with the *Stanford Journal of International Law.*

[104] Interview with Silvia Fodor, *supra* note 76; interview with Regina Schaaber, *supra* note 95.

[105] Interview with Regina Schaaber, *supra* note 95.

[106] *Id.*

[107] *Id.*

[108] *Id.*

to represent their interests and to keep them informed of the progress of the trial.[109]

The primary function of the victim's attorney is to represent her interests at trial. Generally, this means that the victim's attorney functions rather like the attorney for the state or the defense. All three will be consulted on any scheduling matters and each, in turn, will have an opportunity to question witnesses, bring appropriate motions, and present a closing argument at the end of the trial.[110]

Victims of sexual assault in Germany have certain testimonial protections-protections which are somewhat broader than those granted rape victims in the United States[111]—that would normally be asserted by the victim's attorney at the appropriate point in the trial. A rape victim at a German trial can seek to have the public removed from the courtroom when she is testifying, and this motion will be granted unless the judges determine that the public interest in hearing the victim's testimony outweighs the interest of the victim.[112] Such motions are generally granted and thus provide some privacy for the victim by permitting her to testify with the public gallery cleared of spectators.[113]

The victim may also move to have the defendant removed from the courtroom while she testifies. Such a motion may be granted if the victim is under the age of sixteen, and the judges fear that she will suffer additional damage from having to testify in the presence of the defendant.[114] If the defendant is removed from the courtroom during the victim's testimony, his defense attorney will remain in the courtroom and will be able to question the witness. After the victim has finished giving her account of the crime and answering questions, she will then leave the courtroom. At that point, the defendant will be brought back in and the presiding judge will relate to the defendant the substance of the victim's testimony. If the defendant has questions for the victim, the presiding judge will again remove the defendant from the courtroom, recall the victim, and put those questions to her.[115] This process will continue until the defendant has no more questions for the victim.

German trials reverse the order in which the defendant and victim give their testimony from that in which they give it in the United States. At an American criminal trial, the defendant does not testify until the state's case has been completed; thus the defendant, who cannot be sequestered, will give his version of the events after the victim has testified and after all the state's evidence has been presented. The opposite is true in Germany: the defendant will typically respond to the charges at the start of the trial before any witnesses have testified, so that the victim's testimony will follow the defendant's response to the charges.[116] Since the victim who participates at the trial as *Nebenklager has a right to remain in the courtroom and is not subject to sequestration before she testifies, she will have heard the defendant's account of the events in question before giving her evidence.*

A primary concern about victim participation in criminal trials in the United States is that it might destroy the adversarial balance and force the defendant to respond to pressure from both the prosecutor and the victim's attorney.[117] This ap-

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[109] *Id.*

[110] *See* StPO § 397(1).

[111] Exclusion of the public at an American trial would require a hearing and showing that injury to the victim would be likely. *See Globe Newspaper Co.* v. *Superior Court,* 457 U.S. 596, 607–09 (1982). There is no parallel to the removal of the defendant from the courtroom during the examination of the victim. The furthest the Court has gone has been to uphold a conviction where a rape victim who was six at the time was permitted to testify from outside the courtroom but the victim's testimony was broadcast into the courtroom so that the defendant could see the witness as the witness testified. *See Maryland* v. *Craig,* 497 U.S. 836 (1990).

[112] *See* GVG § 171b.

[113] *See* Bottcher, *supra* note 83, at 139–40; Regina Schaaber, *Strafpozessuale Probleme bei Verfahren wegen seuellen Mi*ßorauchs, Streit 1993, 143, 151–52; Staiger-Allrogen, *supra* note 76, at 90–93.

[114] *See* StPO § 247. If the victim of the sexual assault is under 16, the court has discretion to remove the defendant from the courtroom where there is reason to fear substantial damage to the victim's general welfare from the confrontation. *Id.* Such motions will usually be granted. If the victim is 16 or older, there is also the possibility, of removing the defendant if there is reason to fear that the victim might not tell the truth or if there is a high risk of severe damage to the victim's health, such as a situation where the victim is receiving psychotherapy as a consequence of the crime. *See* Bottcher, *supra* note 83, at 138–39; Schaaber, *supra* note 113, at 150–53. As a statistical matter, it is not often that courts remove the defendant while the victim is testifying. *See* Kaiser, *supra* note 76, at 193; Staiger-Allroggen, *supra* note 76, at 90–93.

[115] *See* Schaaber, *supra* note 113, at 151.

[116] *See* Damaska, *supra* note 23, at 527–29.

[117] It has been argued that even permitting the victim to sit at the prosecution table during trial is "inherently prejudicial" because it poses "an unacceptable risk" that the defendant's right to a fair trial will be compromised. *See* Goddu, *supra* note 7 at 266–67. Even the participation

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pears not to be a problem in the less adversarial German trials because the judges do the bulk of the questioning of the witnesses, and lawyers play more of a supplemental role. In addition, as mentioned earlier, it is easier to accommodate questions from the victim's attorney when others who have a certain perspective on the evidence are also permitted to ask witnesses questions.[118] For example, a forensic or psychiatric expert who gives testimony during the trial will usually remain in the courtroom to ask a witness questions if the testimony touches on her area of expertise.

There remains, of course, the possibility that a victim's attorney will be overly aggressive at the trial, pursuing a line of questioning that the defendant believes to be very unfair and overly hostile. In such a situation, however, the defendant and his attorney have an easy solution: the defense attorney can advise her client to stop answering questions from the victim's attorney.[119] Unlike in the United States where, having testified on direct examination at trial, a defendant must answer relevant questions on cross-examination, the defendant at a German trial always has a right to refuse to answer any questions and would be likely to do so if he believes that the victim's attorney is being unfair.[120]

While the victim's attorney participates at the trial on rather an equal basis with the state's attorney in questioning the witnesses and addressing the judges, their roles remain distinct and the function of the victim's attorney is limited to representing the victim. For example, there is an almost unwritten rule that victims' attorneys do not request or recommend a specific length of sentence in their closing argument to the court.[121] That is considered a matter more properly the responsibility of the state's attorney.[122] In the United States, by contrast, the role of the victim seems to center on the sentencing phase.[123]

D. Victims of sexual assault in the courtroom: a final caveat

The danger that readers may get a misimpression of the nature of sexual assault trials in Germany based upon the above account warrants a final caution. While victims of sexual assault in German courtrooms have a number of advantages over their counterparts in American courtrooms—such as the ability to give testimony in narrative form, the fact that the professional judges will usually conduct the bulk of the questioning, and the option of participating at trial through their own counsel—one should not conclude that trials in Germany are necessarily "easy" on the victim. Although the system is not structured as an adversarial trial system, trials in Germany do have adversarial features and safeguards. This means that in cases involving a battle of credibility between the defendant and the victim over what occurred at the time of the alleged crime, as is common in "acquaintance rape" cases, there will often be demanding and sustained questioning of the victim by the defense attorney. Where directly relevant to issues in the trial, aspects of the victim's character may also be called into question and attacked aggressively.[124]

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of victims at sentencing, which all states now permit, has been strongly attacked as inappropriate and prejudicial. *See, e.g.,* Henderson, *supra* note 36, at 996, 1002; Abraham Abramovsky, *Victim Impact Statements: Adversely Impacting upon judicial Fairness,* 8 St. John's J. Legal Comment, 21 (1992).

[118] *See* StPO §§ 240, 80(1), 243(4); Meyer-Goβner, *supra* note 47, at 240 Nr 3.

[119] Interview with Ulf Kopcke, *Rechtsanwalt,* in Freiburg, Germany June 18, 1993) (on file with the *Stanford Journal of International Law*); interview with Regina Schaaber, *supra* note 95.

[120] There is an important difference between the defendant and others who give evidence at a criminal trial: the defendant is never considered to be a witness. *See* StPO § 80(2). While the defendant is asked to respond to the charges at the start of the trial, and usually does give his version of the facts, the defendant may refuse to answer any question precisely because he is not a witness. *See* Damaska, *supra* note 23, at 526–30. Thus, unlike other witnesses, who may be put under oath and who are required to answer relevant questions (assuming no privilege exists), the defendant in civil law systems is never required to take an oath and is always free to exercise his right to remain silent. *Id.*

[121] Interview with Ulf Kopcke, *supra* note 119; interview with Regina Schaaber, *supra* note 95.

[122] Interview with Ulf Kopcke, *supra* note 119; interview with Regina Schaaber, *supra* note 95.

[123] The statutory right of victims in the United States to file victims' impact statements is a subject of heated controversy. *See supra* text accompanying notes 3–4; Berger, *supra* note 20.

[124] In June of 1993 the authors watched a trial in the Groβe Strafkammer (the highest state trial court) in Freiburg, Germany, in which two defendants stood charged with rape. Both the victim and the defendants admitted that they drove out of town and injected themselves with heroin. The victim claimed that she was then raped by both defendants, while the defendants maintained that the victim had wanted to have sex with both of them and had expected them in return to try to procure more drugs for them to share the following day. The defendants insisted that the victim prostituted herself for drugs regularly to support her drug addiction, and

In short, while the structure of German trials offers rape victims many procedural advantages over the more highly adversarial trial system in the United States, there are adversarial aspects to the German system that must not be overlooked in evaluating the treatment of victims in that system.

CONCLUSION

This Article concludes that victims of serious crimes have a number of advantages in the German system, due to the nature of civil law criminal proceedings, and the availability of the *Nebenklage* procedure. However, this does not mean that the German criminal justice system is preferable to or stronger than the American one; how a criminal justice system treats victims is only one of many important measures by which it can be evaluated. This Article is limited in scope to the victim's perspective within the German system. Any system that treats, or strives to treat, victims with dignity and respect must not risk tolerating false convictions or the abuse of citizens by the police. Thus, a thorough examination of the German system and a blueprint for specific reforms of the American one would have to take these broader concerns into account. Moreover, victims' rights in the German system may not be directly translated into the American adversarial system due to the different political and epistemological assumptions on which the two systems are based.

Nevertheless, this Article's examination of the differences in the ways that victims are treated in the two trial systems should further the goal of encouraging productive discussion between victims of crime and those within the American criminal justice system over the frustrations that victims feel. Such discussion has been painfully lacking in this country for a long time. While it is often difficult for victims to explain exactly what it is about the system that makes them feel excluded or mistreated,[125] and those educated in the American adversarial tradition seem equally at a loss to understand what can be done for victims beyond the state constitutional amendments now in place,[126] bridging this communication gap becomes increasingly important as the victims' rights movement continues to grow. It is the authors' hope that this Article's comparative perspective will add depth and understanding to the debate.

PREPARED STATEMENT OF ROBERTA ROPER ON BEHALF OF THE NATIONAL VICTIM'S CONSTITUTIONAL AMENDMENT NETWORK

On behalf of the National Victims' Constitutional Amendment Network (NVCAN), I am honored to speak in, support of Joint Resolution 3, a Constitutional Amendment for crime victims' rights. In addition to co-chairing NVCAN, I am director of the Stephanie Roper Committee and Foundation, Inc., a Maryland crime victims' group bearing the name of our slain daughter.

I believe that the experiences of victims and families like my own clearly demonstrate the need to alter our constitution to protect crime victims' rights for all time. While great progress has been made to improve the treatment of America's victims of violent crime, it is abundantly clear that these efforts are insufficient. Our nation's fundamental charter must include protected rights for victims as well as offenders.

The experiences of countless victims reflect the failure of our criminal justice system to acknowledge the reality of crime. While the *state* is the *legal* victim, the reality is that the state is not raped or robbed * * * does not bleed or die * * * individual citizens suffer the physical, financial and emotional consequences of crime. Acknowledging this reality means that crime victims should *never* be treated as pieces of evidence or shut out of proceedings that are the most important events in their lives. Seventeen years ago, our oldest child, our daughter Stephanie, was kidnaped, raped and murdered. Our family learned first hand, that unlike the men who chose to take our daughter's life, we had no right to be informed, to be present or to be heard at criminal justice proceedings. To our horror, we were not kept informed of proceedings, we were excluded from observing the trial, and were denied the right to provide an impact statement at sentencing. Stephanie became another statistic, a faceless stranger whose voice was silenced.

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some of their friends testified that she was even doing so during the trial. Each time that a witness came forward and alleged that he had seen the victim acting as a prostitute, the victim was recalled to give testimony about the incident (always denying either that the incident took place or that she was prostituting herself). This meant that during the three-week trial, the victim had to give testimony on several different occasions, A copy of the judgment in this case is on file with the *Stanford Journal of International Law.*

[125] *See* text accompanying notes 17–18, *supra.*

[126] *See* text accompanying notes 19–21, *supra.*

As parents, my husband and I struggled to preserve our family of four surviving children. For them, the American dream was shattered. Everything our children were taught to respect and believe in was challenged and all but destroyed. Over the succeeding years, advocating for and assisting other victims and families has been a major part of our efforts to preserve our family and become survivors.

Since 1982, we have led a Maryland advocacy and assistance organization that is considered one of the most effective voices for victims in our nation. We have seen great progress in our state, and across the nation. Our efforts in Maryland have resulted in the passage of more than fifty laws including a state constitutional amendment for crime victims' rights passed in 1994. Yet sadly today, those rights largely remain "*paper promises*". For too many victims and families, the criminal justice system remains more criminal than just when it comes to protecting their rights. Consequently, the proposed federal amendment, is for them, an issue whose time has come.

As you have heard, this issue was first identified by the President's Task Force on Victims of Crime who recommended a constitutional amendment in its final report in December, 1982. The Task Force concluded that the American criminal justice system's treatment of victims was a national disgrace * * * victims too often were treated like "pieces of evidence" * * * used and then thrown away. The Task Force recognized that in order to restore an essential balance to this system, the United State's Constitution would have to be amended to identify and protect certain rights of crime victims. These rights would not diminish those of an accused or convicted person, but would share equal protection under the law.

The United State's Constitution is the supreme law of the land. It surrounds an accused person with numerous protected rights, and rightly so. However, it is *silent* in regard to victims. Until a federal constitutional amendment is passed that balances the rights of a victim with those of an accused person, victims will remain second class citizens.

I am proud to say that the Maryland State Constitutional Amendment for victims' rights has vastly improved the treatment of victims. Nevertheless, many victims' rights are ignored or denied because unlike the defendant's rights, they are not rooted in the Constitution of the United States. And unlike a criminal defendant, a victim of criminal violence has no legal standing under the Constitution to assert their rights.

Everyday, my work as an advocate brings me in contact with victims and survivors in my state. Contacts include individuals like Teresa Baker, whose only son was murdered. When her son's killer pled guilty to 2nd degree murder and was sentenced to thirty years, no one explained that under the terms of the plea agreement the offender would have a sentencing reconsideration and be released in less than three years! And while Mrs. Baker fulfilled the victim's requirement to request notification, she was not notified and came upon this information by chance. As painful as that discovery was, her primary question was, "why didn't someone tell me the truth?"

In another recent Maryland case, parents, whose infant son was killed, had good reason to question the effectiveness of victims' rights laws. Despite a statutory and constitutional right to attend the trial, the judge ruled to exclude them. They believe that their right to learn the painful truths of the case was unfairly denied.

The late Justice of the Supreme Court William Brennan, whenever asked for his definition of the Constitution answered: It is "the protection of the dignity of the human being and the recognition that every individual has fundamental rights which government cannot deny him." Sadly, that is why this amendment is needed for victims. When our founding fathers drafted the Constitution, they were very careful to protect persons who were accused of or convicted of crime from the abuses of government. They never envisioned a time when millions of innocent American citizens would suffer abuses of government, and be denied the protection of basic human rights because they were made victims of crime Clearly, if we are to preserve a criminal justice system that protects all of us, we should not re-injure those for whom the system is most dependent upon!

Critics may tell you that we must not "tinker" with the constitution. And we agree that constitutions should not be amended except for the most serious reasons. We must remember and respect the wisdom of our founding fathers. They were creating a "more perfect union," not a perfect one. They recognized that laws and institutions would require the ability to change to meet the needs of an evolving society. If that were not so, black American citizens would still be someone's property, and women would not be able to vote! The whole history of our country had taught us that basic human rights must be protected in our fundamental law * * * our constitution.

Some opponents will argue that we need not amend our Constitution, but only strengthen federal statutes for victims' rights. Our nation's tragedy in the Okla-

homa City bombing case demonstrates the inadequacy of such an argument. In addition to their personal sufferings and losses, victim survivors not only bore the financial burdens of going to another state for a trial, but were forced to choose *either* to observe the trial *or* to submit victim impact statements at sentencing. As a result, most survivors sacrificed the right to be heard so that they could better learn the truths that might emerge from the trial. As you know, Congress passed the Victim Allocution Clarification Act of 1997, in the hope of remedying this problem. *Still* the court denied victims their statutory rights, and ruled that the defendant's *Constitutional rights* would prevail.

Other critics argue that an amendment will create an overwhelming burden on the states. The truth is that there is no evidence that the cost of a phone call or letter, or applying a victim's rights has created financial burdens or delays. The truth is that our nation spends millions of dollars for criminal needs and pennies for victims! The reality is that many states and the federal government have created crime victim funds based on convicted offenders' fees and fines to provide for the delivery of victim services.

The cruelest and most undeserved opposition however, is voiced by those who say that allowing victims or survivors to be heard at sentencing will inject irrelevant emotion and create classes of victims. To the contrary, this is not about the character of the victim, but about the consequences of the crime that a convicted offender chose to inflict! If my daughter had been a homeless person or a prostitute, she had the right *not* to be violated. The information brought by victims to sentencing courts or at post-sentencing proceedings is *not a mandate or a veto, but a voice.* The court retains the discretion to decide the value of that information, recognizing that every crime's consequences are unique.

I urge all of you to listen to the law-abiding citizens of our land. Ask the people of America how they would wish to be treated if they were victims of crime. In 1994, the people of Maryland responded with an astounding 92.5 percent vote of approval for our amendment. I am confident that your constituents will tell you that it is time to protect victims' rights for all time in the U.S. Constitution. Never before has there been a proposed law, bipartisan in support, that could make such a significant and positive difference in the lives of so many Americans every year. We must remember that the Constitution belongs to the people. As part of our social contract with government, the people not only expect protection, but when that protection fails, deserve fairness and justice * * * even for crime victims. Joint Resolution 3 is the only amendment that advances the rights of citizens to protect them from abuses of government. It is also the only amendment that expands rights of individual citizens to participate in government. America supports a victims' rights amendment. Victims' rights and this amendment are right for America!

Roberta Roper is the director of the Stephanie Roper Committee and Foundation, Inc. Following the brutal murder of their oldest child, Stephanie, in April, 1982, Roberta and Vince Roper founded the Committee and Foundation, a non-profit, volunteer advocacy and assistance organization that is nationally recognized as an effective voice for victims of criminal violence. The Committee advocates for victims' rights and services in Maryland, and the Foundation provides information, assistance, court accompaniment, and free peer support groups for families and friends of homicide and drunk driving victims.

Since 1982, Roberta has actively participated in a wide variety of victims' services, assistance and advisory groups. She currently chairs Maryland's State Board of Victim Services, is co-chair of the National Victims' Constitutional Amendment Network, and co-chaired the Maryland Coalition for a Constitutional Amendment for Crime Victims' Rights from 1988–1994. Roberta has been a member and technical resource for the National Organization for Victim Assistance and the National Center for Victims of Crime, and recently served on the Maryland Commission on Criminal Sentencing Policy. She has been recognized by Presidents Reagan (1988) and Clinton (1994) and received their awards for outstanding service to victims of crime.

Prepared Statement of Joe Sikes on Behalf of the Mothers Against Drunk Driving

My fifteen-year-old daughter was killed in April 1992 by a drunk driver. My experience with the justice system taught me, first hand, how badly skewed the scales of that justice, system have become. No amount of victim's rights would have eased the pain and grief I felt following Alisa's death. I don't expect that. But I also don't expect to be treated as a non-entity in the most wrenching experience of my life. And I do expect the opportunity to present my dear Alisa as a beautiful, vivacious girl whose life was stolen by a seventeen year old boy who pled guilty to vehicular

manslaughter. I was denied that opportunity because a clever defense attorney was able to manipulate his guilty client's rights, so that his sentence was determined without our presence.

I spent 30 years in the Navy defending the rights guaranteed by our Constitution. I am not seeking to reduce the rights of the accused. I am only seeking balance. First of all victims deserve to be kept informed during the most painful, intense experience of their lives. But the legal system has no incentive to deal with victims and their pain. Victims are at the mercy of good intentions of prosecutors, unless they have rights of their own. Secondly, once guilt has been determined, defense attorneys paint their clients in as favorable light as possible. They put a real person in front of judge or jury, in hopes of gaining some leniency. My Alisa was a real person too, but she was not there when the sentence was passed. And I was denied the opportunity to represent her.

I have met and helped many victims since Alisa was killed. I have seen their pain increased by poor treatment by our justice system. It is absolutely clear that victims need constitutional rights to protect them in this system Before Maryland had a constitutional amendment, our state statute guaranteeing victim's rights was easily ignored both by lawyers and judges. While abuses still occur our scales are now more balanced here. But I can't be content to wait for each state to act individually. I have family living in Arizona, Connecticut, Alabama, and California. And, in today's mobile society, they all travel regularly between states. Without federal constitutional protection I fear the same shoddy treatment I faced following Alisa's death should anything happen in the future.

I believe the founding fathers allowed for our constitution to be amended when rights became unbalanced. And I believe this amendment will go far towards balancing our woefully unbalanced scales of justice. Please support this amendment for me and for Alisa.

PREPARED STATEMENT OF VIRGINIA E. SLOAN ON BEHALF OF THE CITIZENS FOR THE CONSTITUTION

Great and Extraordinary Occasions: Developing Guidelines for Constitutional Change

INTRODUCTION

When the Constitution's framers met in Philadelphia, they decided to steer a middle course between establishing a constitution that was so fluid as to provide no protection against the vicissitudes of ordinary politics, and one that was so rigid as to provide no mechanism for orderly change. An important part of the compromise they fashioned was embodied in Article V.

The old Articles of Confederation could not be amended without the consent of every state—a system that was widely recognized as impractical, producing stalemate and division. Accordingly, Article V provided for somewhat greater flexibility: The new Constitution could be amended by a proposal adopted by two thirds of both Houses of Congress or by a convention called by two thirds of the states, followed in each case by approval of three fourths of the states.[1]

In the ratification debate that ensued, Article V played an important role. The new, more flexible amendment process served to reassure potential opponents who favored adding a bill of rights, or who worried more generally that the document might ultimately prove deficient in unanticipated ways. It also reassured the Constitution's supporters by making it more unlikely that a second constitutional convention would be called to undo the work of the first.

Precisely because the legal constraints on the amendment process had been loosened somewhat from those contained in the old Articles, many of the framers also believed that the legal constraints should be supplemented by self-restraint. Although the new system made it legally possible to change our foundational docu-

[1] Article V provides:

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 valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ment even when there was opposition, the framers believed that even dominant majorities should hesitate before using this power. As James Madison, a principal author of both the Constitution and the Bill of Rights, argued in Federalist 49, the constitutional road to amendment should be "marked out and kept open," but should be used only "for certain great and extraordinary occasions."

For the first two centuries of our history, this reliance on self-restraint has functioned well. Although over 11,000 proposed constitutional amendments have been introduced in Congress, only thirty-three of these have received the requisite congressional supermajorities, and only twenty-seven have been ratified by the states. The most significant of these amendments, accounting for half of the total, were proposed during two extraordinary periods in American history—the period of the original framing, which produced the Bill of Rights,[2] and the Civil War period, which produced the Reconstruction amendments. Aside from these amendments, the Constitution has been changed only thirteen times.

Most of these thirteen amendments either expanded the franchise or addressed issues relating to presidential tenure. Only four amendments have ever overturned decisions of the Supreme Court, and the only amendments not failing within these categories—the Prohibition Amendments—also provide the only example of the repeal of a previously enacted amendment.[3]

In recent years, however, there have been troubling indications that this system of self-restraint may be breaking down. To be sure, no newly-proposed amendment has been adopted since 1971. Nonetheless, there has been a sudden rash of proposed amendments that have moved further along in the process than ever before and that, if enacted, would revise fundamental principles of governance such as free speech and religious liberty, the criminal justice protections contained in the Bill of Rights, and the methods by which Congress exercises the power of the purse. Within the last few years, six proposed constitutional amendments—concerning a balanced budget, term limits, flag desecration, campaign finance, religious freedom, and procedures for imposing new taxes—have reached the floor of the Senate, the House, or both bodies. Two of these—the balanced budget amendment and the flag desecration amendment—passed the House, and a version of the balanced budget amendment twice failed to win Senate passage by a single vote. Still other sweeping new amendments—including a "victim's rights" amendment, an amendment redefining United States citizenship, and even an amendment to ease the requirements for future amendments—have considerable political support.

There are many explanations for this new interest in amending the Constitution. Some Republicans, in control of both Houses of Congress for the first time in several generations, want to seize the opportunity to implement changes that many of them have long favored. Some Democrats, frustrated by a political system they view as fundamentally corrupted by large campaign contributions, want to revisit the relationship between money and speech. Some members of both parties have blamed what they consider to be the Supreme Court's judicial activism for effectively revising the Constitution, thereby necessitating resort to the amendment process to restore the document's original meaning.[4] There may well be merit to each of these views. Unfortunately, however, very little attention has been devoted to the wisdom of engaging in constitutional change, even to advance popular and legitimate policy outcomes. We believe that the plethora of proposed amendments strongly suggests that the principle of self-restraint that has marked our amending practices for the past two centuries may be in danger of being forgotten.

There are several good reasons for attempting to reaffirm this self-restraint.

- Restraint is important because constitutional amendments bind not only our own generation, but future generations as well. Constitutional amendments may entrench policies or practices that seem wise now, but that end up not working in practice or that reflect values that become no longer widely shared. Contested policy questions should generally be subject to reexamination in light of the experience and knowledge available to future generations. Enshrining a

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[2] The Twenty-seventh Amendment, relating to changes in congressional compensation, was part of the original package of amendments proposed by the first Congress, but was not ratified by the states until 1992.

[3] A list and brief description of all twenty-seven ratified amendments, grouped according to category, is attached as an appendix.

[4] Issues concerning the appropriate techniques of constitutional interpretation are beyond the scope of this project. Some, but by no means all, of our members believe that, in some cases, the Supreme Court has inappropriately "amended" the Constitution through a strained reading of its text. We believe that it is entirely appropriate for Congress to respond to what it perceives as erroneous constitutional interpretation by passing corrective amendments. However, we also believe that, even in the face of perceived judicial overreaching, Congress should not compound the problem by responding with poorly drafted or ill-considered amendments.

particular answer to these questions in the Constitution obstructs that opportunity. Our experience with three previously proposed amendments, one that was adopted and later repealed, and two others that moved far along in the process, but were not adopted, serve to illustrate these points:

First, when the Prohibition Amendment was adopted in 1919, many Americans thought that it embodied sensible social policy. Yet within a short time, there was broad agreement that the experiment had failed, in part because enforcing it proved enormously expensive in dollars and social cost. Had prohibition advocates been content to implement their policy by legislation, those laws could have been readily modified or repealed when the problems became apparent. Instead, the country had to undergo the arduous and time-consuming process of amending the Constitution to undo the first change. This is an experience we should be eager not to repeat.

The second example might have had far more serious consequences. On the eve of the Civil War, both Houses of Congress adopted an amendment that would have guaranteed the property interest of slave-holders in their slaves and would have forever prohibited repeal of the amendment. Fortunately, the proposed amendment was overtaken by events and never ratified by the states. Had it become law, the result would have been a constitutional calamity.

Finally, in our own time, there is the failed effort to add to the Constitution an equal rights amendment, prohibiting denial or abridgment of rights on account of sex. Within three months of congressional passage in 1972, twenty states had ratified the amendment. Thereafter, the process slowed, and even though Congress extended the deadline, supporters ultimately fell short of the three-fourths of the states necessary for ratification. The struggle for and against ratification produced much dissension and consumed a great deal of political energy. Yet today, even some of the amendment's former supporters would concede that the amendment may not have been necessary. Moreover, the amendment would have added to the Constitution a controversial and broadly worded provision of uncertain and contested meaning, with the Supreme Court given the unenviable job of providing it content. Instead of years of judicial wrangling concerning its application, we have seen Congress pass ordinary legislation, and the Court engage in the familiar process of explicating existing constitutional and statutory text, to achieve many of the goals of the amendment's proponents. This process has been more sensitive and flexible, while also less contentious and divisive, than what we could have expected had the amendment become law.

- Restraint is also important in order to preserve the Constitution as a symbol of our nation's democratic system and of its cherished diversity. In a pluralistic democracy, where people have many different religious faiths and divergent political views, maintaining this symbol is of central importance. The Constitution's unifying force would be destroyed if it came to be seen as embodying the views of any temporarily dominant group. It would be a cardinal mistake to amend the Constitution so as to effectively "read out" of our foundational charter any segment of our society.
- The Constitution's symbolic significance might also be damaged if it were changed to add the detailed specificity of an ordinary statute in order to control political outcomes. The Constitution's brevity and generality serve to differentiate it from ordinary law and, so, allow groups that disagree about what ordinary law should be to coalesce around the broad principles it embodies.
- Finally, restraint is necessary because proposed amendments to the Constitution often put on the table fundamental issues about our character as a nation, thereby bringing to the fore the most divisive questions on the political agenda. Two centuries ago, James Madison warned of the "danger of disturbing the public tranquility by interesting too strongly the public passions" through proposed constitutional change. It is not only wrong to trivialize the Constitution by cluttering it with measures embodying no more than ordinary policy; it is also a mistake to reopen basic questions of governance lightly. Occasional debates about fundamental matters can be cleansing and edifying, but no country can afford to argue about these issues continuously. Our ability to function as a pluralistic democracy depends upon putting ultimate issues to one side for much of the time, so as to focus on the quotidian questions of ordinary politics. As Madison argued shortly after the Constitution's drafting, changes in basic constitutional structure are "experiments * * * of too ticklish a nature to be unnecessarily multiplied."

None of this is to suggest that the Constitution should never be amended or that its basic structural outlines are above criticism. There have been times in our history when arguments for restraint have been counterbalanced by the compelling need for reform. Some individuals may believe that this is such a time, at least with

regard to particular issues, and if they do, there is nothing illegitimate about urging constitutional change.

Some constitutional amendments are designed to remedy perceived judicial misinterpretations of the Constitution. Some earlier constitutional amendments—for example, the Eleventh Amendment establishing state sovereign immunity and the Sixteenth Amendment authorizing an income tax—fall into this category. There is nothing *per se* illegitimate about amendments of this sort, although here, as elsewhere, their supporters need to think carefully about the precise legal effect of the amendment in question and about how the amendment will interact with other, well-established principles of constitutional law.

More generally, advocates of amendments of any kind should focus not only on the desirability of the proposed change, but also on the costs imposed by attempts to achieve that change through the amendment process as contrasted with other alternatives. In the Guidelines that follow, we propose some general questions that, we hope, participants in debates about constitutional change will ask themselves. We do not pretend that the answers to these questions will always be dispositive or that the Guidelines can be mechanically applied. If the circumstances are extraordinary enough, all of these warnings might be overcome. Nor do we imagine that the Guidelines alone are capable of resolving all disputes about currently pending proposals for constitutional change. We ourselves are divided about some of these proposed amendments, and no general Guidelines can determine the ultimate trade-offs among the benefits and costs of change in individual cases.[5]

Instead, our hope is that the Guidelines will draw attention to some aspects of the amending process that have been ignored too frequently, provoke discussion of when resort to the amending process is appropriate, and suggest an approach that will ensure that all relevant concerns are fully debated. At the very moment when this country was about to embark on the violent overthrow of a prior, unjust constitutional order, even Thomas Jefferson, more friendly to constitutional amendments than many of the founders, warned that "governments long established should not be changed for light and transient causes." In the calmer times in which we live, there is all the more reason to insist on something more before overturning a constitutional order that has functioned effectively for the past two centuries. The Guidelines that follow attempt to raise questions about whether such causes exist and how we should respond to them.

GUIDELINES FOR CONSTITUTIONAL AMENDMENTS

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?
2. Does the proposed amendment make our system more politically responsive or protect individual rights?
3. Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?
4. Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves intact?
5. Does the proposed amendment embody enforceable, and not purely aspirational, standards?
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?
7. Has there been full and fair debate on the merits of the proposed amendment?
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?

Commentary on the Guidelines

The following commentary explains each of the Guidelines and illustrates how each might be applied in the context of some previous and currently pending proposals for constitutional amendment. It is significant that the Guidelines are written in the form of questions to think about, rather than commands to be obeyed. The Guide-

[5] As an organization, we generally take no position on the merits of proposed amendments. We have made a single exception in the case of an amendment that would, itself, make the amendment process less arduous. This proposal runs afoul of our core commitment to restraint, and we strongly oppose it.

lines alone cannot determine whether any amendments should be adopted or rejected. Instead, most of the Guidelines are designed to raise concerns that those considering amendments might want to weigh against the perceived desirability of the changes embodied in the amendments. The last three Guidelines—concerning the need to articulate consequences, the fairness of the procedure, and the requirement of a non-extendable deadline—are in a somewhat different category. Although each of the other concerns might be overcome if one were sufficiently committed to the merits of a proposed amendment, it is hard to imagine the circumstances under which adopting an amendment would be appropriate without an articulation of its consequences, a full and fair debate, and measures designed to assure that it reflects a contemporary consensus.

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?

James Madison, one of the principal architects of Article V of the Constitution, which contains the procedures for amendment, cautioned against making the Constitution "too mutable" by making constitutional amendment too easy. Hence his insistence that any constitutional amendment command not only majority, but super-majority, support. Implicit in Madison's caution is the view that stability is a key virtue of our Constitution and that excessive "mutability" would undercut one of the main reasons for having a Constitution in the first place. As Chief Justice John Marshall observed in *McCulloch* v. *Maryland,* the Constitution was "intended to endure for ages to come." Similarly, in his prophetic dissent in *Lochner* v. *New York,* Justice Oliver Wendell Holmes cautioned that the Constitution ought not be read to "embody a particular economic theory" that might be fashionable in a particular generation. It is crucial to our constitutional enterprise to preserve public confidence—over succeeding generations—in the stability of the basic constitutional structure.

Thus, the Constitution should not be amended solely on the basis of short-term political considerations. Of course, no one can be certain whether future generations will come to see a policy as merely evanescent or as truly fundamental. Still, legislators have an obligation to do their best to avoid amendments that are no more than part of a momentary political bargain, likely to become obsolete as the social and political premises underlying their passage wither or collapse.

To be enduring, constitutional amendments should usually be cast, like the Constitution itself, in general terms. Both powers and rights are set forth in our basic document in broad-and open-ended language. To quote Marshall in McCulloch again, an enduring Constitution "requires that only its great outlines should be marked," with its "minor ingredients" determined later through judicial interpretation in each succeeding generation. Of course, sometimes specificity will be necessary, as in changing the date of the presidential inauguration. But in general, the nature of our Constitution is violated if amendments are too specific in the sense that they reflect only the immediate concerns of one generation, or if they set forth specifics more appropriate in an implementing statute.

To illustrate this point, contrast the experience of the state constitutions with our sparse tradition of federal constitutional amendments. While the federal Constitution has been amended only 27 times in over 200 years, the fifty state constitutions have had a total of more than 6000 amendments added to them.[1] Many are the products of interest-group politics characteristic of ordinary legislation. State constitutions thus suffer from what Marshall called "the prolixity of a legal code"—a vice he praised the federal Constitution for avoiding.[2]

Even when amendments are not overly detailed, they may be inappropriate because they focus on matters of only short-term concern. For example, consider various proposals that seek to carve specific new exceptions out of the broad concept of freedom of speech set forth in the First Amendment. The proposed flag-desecration amendment would rewrite the Constitution to say that while the government generally may not prohibit speech based on dislike of its message, it may do so in the case of flag desecraters. The proposed campaign finance amendment would alter the First Amendment to say that the quantity of speech may never be diminished—except in modem election campaigns.

Each of these amendments is a response to contemporary political pressures. Future generations, like Americans today, can easily perceive the broad purposes and

[1] The Council of State Governments, *The Book of the States,* 1998–99 Ed.

[2] It may be that differences between the state and federal governments justify more detailed constitutions on the state level. Detailed constitutional structures that might work well at the state level might work poorly at the federal level.

enduring legacies underlying the majestic generalities of our original guarantee of freedom of speech: the quest for truth, for self-government, and for individual liberty. But future generations may not understand, let alone revere, the motivations behind a flag-desecration or campaign finance amendment. Such particularized amendments may instead be perceived as the political victory of one faction in a particular historical moment. Flag-desecration is not an immortal form of political protest; we cannot know whether political dissidents will have the slightest interest in this gesture generations from now. Similarly, the campaign tactics used by todays candidates might change in ways that we cannot now imagine as we enter an age of instantaneous global communication over new electronic and digital media. Thus, there may be legitimate questions about the enduring nature of the perceived problem, as well as about the proposed solution.

In general, we should not embed in the Constitution one generation's highly particular response to problems that a later generation might view as ephemeral. To add such transient amendments to the Constitution trivializes and undermines popular respect for a document that was intended to endure for the ages.

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

Of the twenty-seven amendments to the Constitution, seventeen either protect the rights of vulnerable individuals or extend the franchise to new groups. With the notable exception of the failed Prohibition Amendment, none of the amendments simply entrenches a substantive policy favored by a current majority.

There are good reasons for this overwhelming emphasis either on individual rights or on democratic participation. In a constitutional democracy, most policy questions should be decided by elected officials, responsible to the people who will be affected by the policies in question. It follows that the Constitution's main thrust should be to ensure that our political system is more, rather than less, democratic. Many amendments serve this function. For example, the Fifteenth, Seventeenth, Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments all broaden the franchise.

Of course, the Constitution is also designed to protect vulnerable individuals from majority domination, whether temporary or permanent. Hence, many other Amendments guarantee minority rights. For example, the First Amendment protects the rights of religious and political minorities; the Fifth Amendment protects the rights of property holders whose property might be seized by legislative majorities without compensation or due process; the Fourth, Fifth, Sixth, and Eighth Amendments all protect the rights of criminal defendants, who were deemed especially vulnerable to majority hatred and overreaching; and the Thirteenth, Fourteenth and Fifteenth Amendments were all motivated by the desire to protect former slaves.

There is an obvious tension between the twin goals of majority rule and protection for individuals, and this Guideline does not seek to resolve it. On some occasions, it is important to provide constitutional protection for individuals from government overreaching; yet on others, it is equally important to allow majorities to have their way. Although the protection of individual rights is a central aim of the Constitution, it is not the only aim, and it is emphatically not true that every group that comprises less than a majority is entitled to constitutional protection because of its minority status.

One need not finally determine when majority rule should trump minority rights to see the problem with amendments that do no more than entrench majority preferences against future change. Amendments of this sort can be justified by neither majoritarianism nor a commitment to individual rights. On the one hand, they restrict the scope of democratic participation by future generations. On the other, they entrench the will of a current majority as against minority dissenters.

Amendments of this sort should not be confused with power-granting amendments. To make possible ordinary legislation, favored by a current majority, it is sometimes necessary to enact amendments that eliminate constitutional barriers to its passage. For example, the Sixteenth Amendment eliminated a constitutional obstacle to the enactment of a federal income tax, and the Fourteenth Amendment eliminated federalism objections to civil rights legislation. Such amendments may be legitimate when they widen the scope of democratic participation, although, as noted above, they may also raise difficult issues regarding the appropriate tradeoff between majority control and minority rights.

In contrast, amendments that merely entrench majority social or economic preferences against future change make the system less rather than more democratic. They narrow the space for future democratic deliberation and sometimes trammel the rights of vulnerable individuals. It is a perversion of the Constitution's great purposes to use the amendment process as a substitute for ordinary legislative proc-

esses that are fully available to groups proposing popular changes and equally available to future majorities that may take a different view.

This Guideline raises important questions concerning a number of proposed constitutional amendments. Consider first the "victims' rights" amendment, which would grant a number of rights in the trial process to the victims of crime. Congress should ask whether crime victims are a "discrete 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.

The balanced budget amendment poses a close question under this Guideline. On the one hand, the amendment can be defended as democracy-enhancing by protecting the interests of future generations, or by counterbalancing the power of narrow interest groups that have succeeded in gaining a disproportionate share of the public fisc for themselves. On the other hand, these gains are achieved at the cost of dramatically shrinking the area of democratic participation. Discussions of economic theory and the size of the federal budget deficit are central to democratic politics. Americans' views concerning the propriety of deficit financing have changed dramatically over time, and there is no reason to think that this evolutionary process has come to a sudden end. Locking in a currently popular position against future change, including, perhaps, turning the problem of remedies over to unelected federal judges, would significantly alter the democratic thrust of the Constitution and obstruct the ability of future generations to make their own economic judgments.

Finally, consider the flag desecration amendment. In form, the amendment is power-granting: it opens previously closed space for democratic decision-making without requiring any particular result. In general, such power-granting amendments pose no problems under this Guideline. Yet the flag desecration amendment grants power at the behest of an already dominant majority and at the expense of an extremely unpopular and utterly powerless minority. True, current constitutional doctrine prevents the majority from working its will with regard to one particular matter—the criminalization of flag desecration. But the majority on this issue has considerable power and is hardly disabled from expressing its views in a wide variety of other fora. Granting to the majority the power to prohibit an overwhelmingly unpopular form of expression may serve to entrench currently popular views, at the expense of an unpopular minority, without providing any real gains in terms of democratic participation.

3. Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?

The force of the Constitution depends on our ability to see it as something that stands above and outside of day-to-day politics. The very idea of a Constitution turns on the separation of the legal and the political realms. The Constitution sets up the framework of government. It also sets forth fundamental political ideals—equality, representation, and individual liberties—that limit the actions of a short-term majority. This is our higher law. All the rest is left to day-to-day politics. Those who lose in the short run of ordinary politics obey the winners out of respect for the long-run rules and boundaries set forth in the Constitution. Without such respect for the constitutional framework, the peaceful operation of ordinary politics would degenerate into fractious war.

Accordingly, the Constitution should not be amended to solve problems that can be addressed through other means, including federal or state legislation or state constitutional amendments. An amendment that is perceived as a surrogate for ordinary legislation or executive action breaks down the boundary between law and politics that is so important to maintaining broad respect for the Constitution. The more the Constitution is filled with specific directives, the more it resembles, ordinary legislation. And the more the Constitution looks like ordinary legislation, the less it looks like a fundamental charter of government, and the less people will respect it.

A second reason for forgoing constitutional amendments when their objectives can be otherwise achieved is the greater flexibility that political solutions have to respond to changing circumstances over time.[3] Amendments that embody a specific and perhaps controversial social or economic policy allow one generation to tie the hands of another, entrenching approaches that ought to be more easily revisable by future generations in light of their own circumstances. Such amendments convert

[3] This reason also relates to a separate set of concerns outlined in Guideline Two.

the Constitution from a framework for governing into a statement of contemporary public policy.

For these reasons, advocates of a constitutional amendment should consider whether they have exhausted every other means of political redress for a problem before they seek to solve it by amending the Constitution. If other action under our existing constitutional framework is capable of achieving an objective, then writing that objective into the Constitution is unnecessary and therefore will clutter that basic document, reducing popular respect. One might wonder why anyone would resort to the difficult and time-consuming effort to secure a constitutional amendment if the same objectives could be accomplished by ordinary political means. Unfortunately, some now believe that a legislator is not serious about a proposal unless he or she is willing to amend the Constitution. Experience has also demonstrated that the amendment process (and even the mere sponsorship of an amendment, if the amendments sponsor suspects that actual passage is unlikely) can be a tempting way to make symbolic or political points or to prevent future change in policy even when nonconstitutional means are available to achieve current public policy objectives.

For example, our experience with the failed equal rights amendment suggests the virtues of resort to ordinary political means to achieve desired, change. Today, many of the objectives of the amendment's proponents have been achieved without resort to the divisive and unnecessary amendment process.

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 in Public Law 105–6 (codified as 18 U.S.C. § 3510), which allowed the victims of the Oklahoma City bombing to attend trial proceedings. If this generation's political process is capable of solving a problem one way, then future generations' political processes should be free to adjust that solution over time without the rigid constraints of a constitutional amendment.

This Guideline does not caution against resort to constitutional change when there are significant legal or practical obstacles to ordinary legislation. Consider in this regard the proposed flag desecration amendment. After the Supreme Court invalidated a state statute prohibiting flag desecration, Congress responded by attempting to draft a federal statute that prohibited desecration without violating the Court's interpretation of the First Amendment. This effort to exhaust nonconstitutional means is precisely the course of conduct this Guideline recommends. Now that the Supreme Court has also invalidated the federal statute, use of the amendment process in this context would fully comport with this Guideline unless a different statute could be devised that would pass constitutional muster.

Closer questions arise when there are practical, rather than legal, obstacles to ordinary legislation. The balanced budget amendment provides an interesting example. On the one hand, experience prior to 1997 suggested that there might have been insurmountable practical difficulties in dealing with budgetary problems through ordinary legislation, that interest group politics would inevitably stymie efforts to cut expenditures through the ordinary budget process, and that perhaps interest group politics could be transcended only by use of a general, constitutional standard. To the extent that this was true, utilization of the constitutional amendment process might well have been justified under this Guideline.

On the other hand, a constitutional amendment is a far cruder instrument than is congressional or presidential action to address the issue of federal spending, for it lacks the flexibility to permit tailoring fiscal policy to the nation's changing economic needs. There are no formal legal barriers to solving the problem through existing legislative and executive means, and recent success in achieving budgetary balance suggests that it is sometimes a mistake to overestimate the practical obstacles to change. This example counsels caution before resort to the amendment process in any context.

In any event, advocates of constitutional change should be certain that they have exhausted other means before resorting to the amendment process. Our history counsels that the federal Constitution should continue to be altered sparingly and only as a last resort. Only amendments that are absolutely necessary should be proposed and enacted. And amendments are not necessary when there are no legal or practical barriers to pursuing solutions to problems through existing political means.

4. Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves intact?

Because the Constitution gains much of its force from its cohesiveness as a whole, it is vital to ask whether an amendment would be consistent with constitutional doctrine that it would leave untouched. Does the amendment create an anomaly in the law? Such an anomaly is especially likely to occur when the proposed amendment is offered to overrule a Supreme Court decision, although the danger exists in other circumstances as well.

To be sure, every amendment changes constitutional doctrine. That is, after all, the function amendments serve. A difficulty occurs only when the change has the unintended consequence of failing to mesh with aspects of constitutional doctrine that remain unchanged. This problem does not arise when whole areas of constitutional law are reformulated. For example, the Sixteenth Amendment, permitting Congress to enact an income tax, was necessitated by the Court's ruling in *Pollock* v. *Farmers Loan & Trust Co.* that a specific limitation on the taxing power in the Constitution precluded a tax on income. That provision was grounded in our history as colonies and in concerns among slave-holding states that the federal government would impose a "direct tax" on slaves. With passage of the Thirteenth Amendment, ending slavery, the tax limitation itself became anomalous and a constitutional amendment was necessary to remove the anomaly. The Sixteenth Amendment reflected a repudiation of the original decision of the framers in light of changed circumstances, which is precisely the kind of broad change in policy for which the amendment process was designed.

It does not follow, however, that an amendment must always overrule an entire body of law in order to comport with this Guideline. Although the Dred Scott decision was embedded in the law of property, Congress did not revisit all of property law when it enacted the Thirteenth Amendment, and its failure to do so in no way damaged the coherence of constitutional doctrine.

In contrast, some proposed amendments make changes that are difficult to reconcile with underlying legal doctrine that the amendments leave undisturbed. This problem arises most often when framers of amendments focus narrowly on specific outcomes, without also thinking more broadly about general legal principles.

The proposed flag desecration and campaign finance amendments illustrate this difficulty. The Supreme Court's flag desecration decisions, although commanding only 5-4 majorities, were consistent with several lines of the Court's well-established First Amendment decisions. In those cases, the Court had recognized both that some forms of conduct are primarily symbolic speech, and hence are entitled to full First Amendment protection, and that laws designed to suppress a particular point of view are almost never permissible, especially when the speech is a form of protest against the very government that is seeking to prohibit the activity.

If an amendment were enacted to permit the government to criminalize flag desecration, it would create the first exception to the First Amendment by specifically allowing government to censor only one type of message—one that expressed an anti-government point of view.[4] This result is difficult to reconcile with other principles that the amendment's drafters would apparently leave intact. One wonders, for example, whether the amendment would permit legislation outlawing only those flag burnings intended as a protest against incumbent office holders.

Similarly, the campaign finance amendment presents at least two sets of anomalies in First Amendment jurisprudence. The amendment would overrule that portion of *Buckley* v. *Valeo* that struck down a limitation on the amount of money that candidates for elected office can spend, either from lawfully raised contributions or from their own personal funds. The theory of the decision is that money is the means by which candidates amplify their messages to the electorate and that placing limits on spending is equivalent to a limit on speech, which violates the First Amendment, particularly in the context of an election.

The proposed amendment would allow Congress and the states to set limits on the amount a candidate could spend on elections, but would not alter the law regarding governmental attempts to control the amounts spent on other types of speech. If the amendment were narrowly construed to apply only to express advocacy for or against a candidate, it would have the effect of shifting money to issue advocacy, which is often not-so-subtly designed to achieve the same ends—election of a particular candidate. For example, the advertisements against cuts in Medicare

[4] It might also create exceptions to other First Amendment doctrines, such as the prohibitions on prior restraint, overbreadth and vagueness. Whether it would in fact have this effect is far from clear, however, because there has been remarkably little substantive discussion of the ramifications of the amendment. This problem is addressed more fully in the commentary to Guideline Six.

and social security in the 1996 campaign were plainly efforts to aid Democratic candidates, and those against certain abortion procedures were intended to aid Republican candidates. On the other hand, if the amendment were broadly construed, it would have the anomalous effect of placing a greater limit on speech in the context of elections than in the context of commercial products or cultural matters, a result that is difficult to square with the core notion of what the First Amendment is intended to protect.

One of the underlying reasons for the result in Buckley is the fear that statutory spending limits would be set by incumbents, who would make these limits so low that challengers would, as a practical matter, be unable to succeed. But the amendment would allow legislatures to set "reasonable" spending limits. The Court would therefore find itself in the anomalous and unenviable position of deciding whether the amounts chosen by incumbents, or perhaps by state ballot initiatives, met the new constitutional standard, instead of doing what it does in all other First Amendment cases: forbidding the government from setting any limits on the amount of speech, whether reasonable or not.

5. Does the proposed amendment embody enforceable, and not purely aspirational, standards?

The United States Constitution is not a theoretical enterprise. It is a legal document that spells out a coherent approach to government power and processes while also guaranteeing our most fundamental rights. More than two centuries of experience underscore the wisdom of continuing that approach. The addition of purely aspirational statements, designed solely for symbolic effect, would lead interest groups to attempt to write their own special concerns into the Constitution.

It follows that advocates of amendments should think carefully about how the amendments will be enforced. In his seminal *Common Sense,* Thomas Paine expressed the revolutionary notion that was the founding wisdom of our nation: in America, "the law is King." Everyone, regardless of social station or political rank, must follow the law. A provision susceptible of being ignored because no one can require its observance permits the kind of executive or legislative lawlessness that our founders wished to prevent. A provision that may be willfully ignored when those charged with observing it find the result inconvenient or undesirable undermines the rule of law, the governments own legitimacy, and the Constitution's special stature in our society.

The proposals for a balanced budget amendment illustrate the need to think carefully about means of enforcement. The amendment itself does not specifically set forth the means by which it would be enforced. A Congress that has had difficulty reaching a balanced budget without a constitutional amendment might have similar difficulties if it was not subject to a judicial or presidential check. Without such a check, a balanced budget amendment might be nothing more than an aspirational standard.

Of course, most existing constitutional amendments are also silent regarding the means of enforcement. Since *Marbury* v. *Madison,* however, there has been a presumption that judicial enforcement will generally be available. If its proponents intend and the courts find the balanced budget amendment to be similarly enforceable, it raises no issues under this Guideline. But it is not clear that the proponents so intend. Granting to courts the right to determine when outlays exceed receipts and to devise the appropriate remedy for such a constitutional violation would arguably constitute an unprecedented expansion of judicial power, If proponents of the amendment do not intend these consequences, there is a risk that the amendment will be purely aspirational or that it will be enforced in ways they might find objectionable.

Questions also arise about other means of enforcement. Could the President refuse to spend money in order to remedy a looming unconstitutional deficit? The practice, known as impoundment, is generally thought to be unavailable to the President unless specifically authorized by Congress. However, an official from the Department of Justice testified in hearings before the Senate Judiciary Committee that, if the amendment were enacted, the President would be duty-bound to impound money or take other appropriate action to prevent an unbalanced budget.[5] Moreover, in such event, and absent some controlling statute, the choice of which programs to cut and in which amounts would be entirely up to the President.

[5] Hearing before the Senate Judiciary Committee on S.J. Res. 1, 104th Cong., 1st Sess., Jan. 5, 1995 (testimony of Assistant Attorney General Walter Dellinger).

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?

When the original Constitution was drafted, the delegates to the Constitutional Convention regarded the new document as a unified package. Much energy was directed to considering how the various parts of the Constitution would interact with each other and to the political philosophy expressed by the document as a whole. The amendment process is necessarily much more ad hoc. Consequently, proponents of new amendments need to be especially careful to think through the legal ramifications of their proposals, considering, for example, how their proposals might shift the balance of shared and separated powers between the branches of the federal government, or affect the distribution of responsibilities between the federal and state governments. They should also explore how their proposals mesh with the Constitution's fundamental commitment to popular sovereignty and to the guarantees of liberty, justice and equality.

Consider an example: a proposed textual limitation on some forms of free speech might provide a rationale for limiting other speech. The campaign finance proposal would authorize Congress and the states to place limits on political campaign spending. While purportedly aimed at limiting the influence of wealthy donors, the amendment might establish as constitutional law that the government could ration core political speech to serve a variety of legitimate government interests. If the amendment were broadly construed, not only could a legislature then act to equalize participation in political debate by limiting spending, but it could also limit spending relevant to a particular issue in order to secure greater equality in the discussion of that issue.

Moreover, even though its sponsors do not intend to impose financial limits on the press, the proposed amendment itself contains no such restriction. Certainly the value of a newspaper endorsement, at least equivalent to the cost of a similarly-sized and placed advertisement, could easily violate an expenditures limit. Traditional jurisprudence treats freedom of the press no more expansively than freedom of speech. Rather than maintain the uninhibited, robust and wide-open dialogue that the Constitution presently guarantees, the proposed amendment arguably permits the rationing of speech in amounts that satisfy the most frequent targets of campaign criticism—current officeholders, who would have a self-interest in limiting the speech of those who disagree with them. It is also not unreasonable to anticipate that officeholders would attempt to apply such restrictions to a wide range of press commentary, or to other areas where wealth or access enhance the speech opportunities of their political opponents—on the theory of equalizing speech opportunities. The result would be yet another advantage for incumbents, who already enjoy advantages due to higher name recognition, greater free media opportunities as officeholders, and a well-developed fundraising network.[6]

The failed attempt to add an amendment to the Constitution expressly prohibiting gender discrimination provides another example. Proponents of the equal rights amendment were never able to satisfy some who questioned the specific legal effects of the amendment. Questions were raised, for example, about whether the amendment would completely prohibit the government from making gender distinctions in assigning troops to combat or individuals to military missions. This failure to explain its legal implications caused many to doubt the wisdom of the amendment.

7. Has there been full and fair debate on the merits of the proposed amendment?

The requirement that amendments must be approved by supermajorities makes it more difficult to amend the Constitution than to enact an ordinary law. In theory, this requirement should produce a more deliberate process, which, in turn, should mean that the issues are more fully ventilated in Congress. Unfortunately, reality does not always comport with theory. The result is that the process becomes more like voting to approve a symbol than deciding whether to enact a binding amendment to our basic charter. Congress should thus adopt procedures to ensure that full consideration is given to all proposals to amend the Constitution before votes are taken either in committee or on the floor.

For most amendments, there are two types of questions: (a) the policy questions, which include whether the basic idea is sound, and whether the amendment is the type of change that belongs in the Constitution, and (b) the operational questions, including whether there are problems in the way that the amendment will work in practice. If the answer to either part of the policy inquiry is "no," then the operational set of questions need not be asked. Even when there is a tentative "yes" an-

[6] The difficulties discussed here overlap with those set forth in Guideline Four.

swer to the policy questions, the answer may become "no" when the operational problems are recognized. Thus, in general, it is appropriate that Congress hold at least two sets of hearings, one for each set of issues. At each set of hearings, both the prime hearing time (normally at the start of the day) and overall hearing time should be equally divided between proponents and opponents.

The balanced budget amendment illustrates this need for dual-track consideration. Proponents and opponents of the amendment have debated the policy questions at length. These include whether the existing statutory avenues have failed, whether social security and perhaps other programs should be excluded, and whether minorities of one House should be given the absolute power to block both tax increases and increases in the debt ceiling.

Unfortunately, there has been less consideration of operational questions. These include how the amendment is to be enforced, how the exception for declarations of war would be triggered, and whether the use of cash receipts and disbursements would both be subject to evasion and lead to uneconomical decisions, such as to enter into leases rather than purchases for federal property in order to bring the budget into balance for the current year.

Similarly, campaign finance proposals illustrate the need for a two-track approach. Most of the debate in Congress concerning constitutional reform of our campaign finance practices has centered around the "big picture" issues. Members of Congress deserve praise for their efforts to come to grips with these issues. They have debated whether First Amendment rights are necessarily in tension with the integrity of our political campaigns, whether the First Amendment should be amended at all, and whether spending large amounts of money in campaigns is bad. However, members have spent relatively little time considering operational problems created by ambiguity in the language of a proposed amendment. For example, what are "reasonable" limits and who would determine this? What effect does the amendment have on issue advocacy and on educational and "get out the vote" efforts of parties and civic groups?

These examples demonstrate that careful deliberation by congressional committees is essential. Committees should not move proposed amendments too quickly, and they should ensure that modifications to proposed amendments receive full consideration and a vote before they reach the floor, with a committee report explaining the options considered and the reasons for their adoption or rejection. Perhaps a two-thirds committee vote should be required to send a proposed constitutional amendment to the floor, thereby mirroring the requirement for final passage. If two-thirds of those who are most knowledgeable about a proposed constitutional amendment do not support it, the amendment probably should never be considered by the full House or Senate.

Although the relevant committees may have the greatest expertise regarding a proposed constitutional amendment, its enactment will have far-reaching impact. Thus, floor debates should not be cut short even if there has been previous floor debate on an amendment in this or a previous Congress, and there should be opportunities for full discussion and votes on additions, deletions, and modifications to the reported language. The flag desecration amendment highlights this issue. At the end of the 105th Congress, the Senate Majority Leader sought unanimous consent for consideration of the amendment, with a two hour limit on debate equally divided between proponents and opponents and with no amendments or motions in order.

To ensure that floor votes are taken only on language that has been previously scrutinized, each House should adopt rules requiring that only changes to a proposed constitutional amendment that have been specifically considered in committee be eligible for adoption on the floor, with one exception: votes on clarifying language should be permitted with the consent of the committee chair and ranking member, or by a waiver of the rules passed by a supermajority vote. Otherwise, substantive changes not previously considered, but approved by a majority vote on the floor, should be referred back to committee for such further proceedings, consideration, and possible modification as needed to ensure that they have been thoroughly evaluated, followed by a second vote on the floor.

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?

The Constitution should be amended only when there is a contemporaneous consensus to do so. If the ratification process is lengthy, ultimate approval by three-quarters of the states may no longer reflect such a consensus. Accordingly, there should be a non-extendable time limit for the ratification of all amendments, similar to the seven-year period that has been included in most recent proposed amendments.

If extensions are permitted at all, they should be adopted by the same two-thirds vote that approved the amendment originally. Moreover, states that ratified the amendment during the initial time period should be allowed to rescind their approvals, thereby assuring a continuing consensus. Congress's decision to extend the ratification period for the equal rights amendment on the eve of the expiration of the allotted time illustrates the problems that this Guideline addresses. Although many states ratified the amendment in the period immediately after initial congressional approval, there had been a shift in public opinion by the time that Congress extended the deadline. It was therefore far from clear that the legislatures in all the ratifying states would have approved the amendment if it had been presented to them again after the ratification extension. The perception that the amendment might be adopted despite the absence of a contemporary consensus supporting it contributed to the divisiveness that surrounded the struggle over its adoption.

APPENDIX: A COMPENDIUM OF CONSTITUTIONAL AMENDMENTS

I. The Original Amendments

Amendment I (1791). Prohibits establishment of religion; guarantees freedom of religion, speech, press, and assembly.

Amendment II (1791). Prohibits infringement of the right of the people to keep and bear arms.

Amendment III (1791). Prohibits the quartering of soldiers in any house during times of peace without consent of owner or during time of war in manner not prescribed by law.

Amendment IV (1791). Guarantees security against unreasonable searches and seizures; requires that warrants be particular and be issued only on probable cause supported by oath or affirmation.

Amendment V (1791). Requires presentment to grand jury for infamous crimes; prohibits double jeopardy; prohibits compelled self-incrimination; guarantees due process of law; requires that property be taken only for public use and that owner be justly compensated when taken.

Amendment VI (1791). Guarantees right to speedy and public trial by impartial jury, compulsory process, and counsel in criminal prosecutions.

Amendment VII (1791). Guarantees right to jury trial in suits at common law where value in controversy exceeds twenty dollars.

Amendment VIII (1791). Prohibits excessive bail or fines; prohibits cruel and unusual punishment.

Amendment IX (1791). Guarantees unenumerated rights which are retained by the people.

Amendment X (1791). Reserves to the states or the people rights not delegated to the United States by the Constitution.

Amendment XXVII (1992).[1] Provides that no law changing compensation for members of Congress shall take effect until after next House election.

II. Reconstruction Amendments

Amendment XIII (1865). Prohibits slavery; authorizes Congressional enforcement of Amendment's provisions.

Amendment XIV (1868). Defines U.S. and state citizenship and prohibits state abridgment of privileges and immunities of U.S. citizens; guarantees due process of law and equal protection of law against state infringement; requires reduction of representation in Congress when right to vote infringed; prohibits public officers who participated in rebellion from holding public office; prohibits questioning of public debt; makes void any debt incurred in aid of rebellion against U.S.; authorizes Congressional enforcement of Amendment's provisions.

Amendment XV (1870). Prohibits abridgment of the right to vote on account of race; authorizes Congressional enforcement of Amendment's provisions.

III. Other Amendments

A. Extensions of the Franchise

Amendment XVII (1913). Provides for popular election of Senators.

Amendment XIX (1920). Prohibits denial of right to vote on account of sex; authorizes Congressional enforcement of the Amendment's provisions.

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[1] Although this amendment was part of the original package sent to the states by the first Congress in 1791, it was not ratified until 1992.

Amendment XXIII (1961). Grants right to vote in presidential elections to citizens of the District of Columbia; authorizes Congressional enforcement of the Amendment's provisions.

Amendment XXIV (1964). Prohibits poll taxes for federal electiions; authorizes Congressional enforcement of the Amendments provisions.

Amendment XXVI (1971). Prohibits denying right to vote on account of age to citizens over eighteen; authorizes Congressional enforcement of the Amendment's provisions.

[NOTE: two reconstruction amendments also relate to the franchise:

Amendment XIV (1868). Requires reduction in representation in Congress for states that deny the right to vote to male citizens over the age of twenty-one.

Amendment XV (1870). Prohibits denying the right to vote on account of race, color, or previous condition of servitude.]

B. Regulation of Election and Tenure of President

Amendment XII (1804). Provides for separate electoral college voting for President and Vice-President.

Amendment XX (1933). Provides that presidential term ends on January 20; provides rules covering situations where President-elect or Vice President-elect dies before inauguration.

Amendment XXII (1951). Prohibits President from serving more than two terms.

Amendment XXV (1967). Provides that in case of removal or death of President, Vice President shall become President; provides mechanism for filling vacancies in office of Vice President; provides mechanism for dealing with Presidential disability.

C. Amendments Overruling Supreme Court Decisions

Amendment XI (1798). Prohibits suits in U.S. courts against state by citizen of another state (overruling *Chisholm* v. *Georgia,* 2 U.S. (2 Dall.) 419 (1793)).

Amendment XVI (1913). Authorizes income tax (overruling *Pollock* v. *Farmers Loan & Trust Co.,* 157 U.S. 429 (1895)).

[NOTE: two other amendments, one a Reconstruction amendment and one dealing with the right of 18 year olds to vote—listed above under extending the franchise—also overruled Supreme Court decisions:

Amendment XIV (1868). Grants U.S. citizenship to all persons born or naturalized in U.S. (overruling *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1857)).

Amendment XXVI (1971). Prohibits abridgment of right to vote on account of age for citizens who are eighteen and over (overruling *Oregon* v. *Mitchell,* 400 U.S. 112 (1971)).]

D. The Prohibition Amendments

Amendment XVIII (1919). Establishes Prohibition; grants to Congress and the states concurrent power to enforce the Amendment's provisions.

Amendment XXI (1933). Repeals Prohibition; prohibits importation of intoxicating liquors into a state in violation of the laws of that state.

PREPARED STATEMENT OF DEBRA A. TALL ON BEHALF OF THE ANNE ARUNDEL COUNTY, MARYLAND POLICE DEPARTMENT

As the Program Director for a victim assistance unit in a police department for the past 16 years, I would like to urge you to pass Joint Resolution 3. While I am fortunate to be from the State of Maryland where we do have a State Constitutional Amendment for Victims' Rights, which a little over half of the states have at the present time, we still need a Federal Constitutional Amendment for victims' rights to give more coverage to victims who come under military Federal jurisdiction and other areas not covered by the State amendments. The basic rights listed for victims of crimes of violence are really mostly courtesies rather than rights. Anyone would want to be a part of public proceedings which pertain to them and their family. People should be able to submit a written or oral statement at the proceedings to reveal the impact and losses that they have endured as a result of the crime. Safety of the victim should be considered when an offender is released from or escapes from a placement. Restitution from the convicted offender should be ordered to repay the victim for his/her financial losses as a result of the offense.

None of the fisted rights impose on the rights of the offender or accused. A federal amendment on victims' rights would ensure that all victims of violent crime would receive the same treatment and the same rights despite where the offense occurred and what jurisdiction it fell under. A federal amendment gives rights to victims in the states that have not passed state constitutional amendments on victims' rights and gives more assurance to the states who do have state amendments that action

can be taken if the victims' lights are denied. No rightful conclusion, decision, or judgement can be reached in any matter without having all parties involved being able to express information about the effects of the offense or crime. Once everyone has provided the facts and impact of the crime, then a better decision can be made because more of a complete or total picture has been provided.

Please strongly consider passing Joint Resolution 3.

PREPARED STATEMENT OF LAURENCE H. TRIBE, TYLER PROFESSOR OF CONSTITUTIONAL LAW, HARVARD UNIVERSITY LAW SCHOOL [1]

I regret that I was unable to accept the invitation to testify in person at the hearing of March 24, 1999, on the proposed Victims' Rights Constitutional Amendment. Other commitments—including a final push to complete a quite massive book that constitutes the first of two volumes of my treatise, *American Constitutional Law* (3d. edition, 1999), which I must get to the publisher by early April—limit me to making a brief written statement. As luck would have it, part of the volume that I am now completing (sections 1–18 through 1–21) deals with the topic of constitutional amendments—how they differ from changes in constitutional interpretation; when changes in interpretation, coupled with new legislation, are inherently insufficient; what processes must be followed in amending the Constitution; what to make of the suggestions by some scholars that the Constitution can be informally "amended" outside the parameters of Article V; how to assess the suggestions of others that some properly ratified amendments may be substantively unconstitutional; and what criteria should be used in evaluating the necessity and propriety of a proposed amendment. Because my expertise is focused primarily on this kind of issue, it seems appropriate to leave to others the detailed discussion of specific questions posed by the drafting of the Victims' Rights Amendment and to concentrate my own attention on the broader questions of whether this proposed amendment addresses a problem that cannot be satisfactorily resolved by anything less than a change in the text of the Constitution, and whether this proposed amendment is consistent with basic rights and principles elsewhere protected by the Constitution.

Beginning with the premise that the Constitution should not be amended lightly and should never be amended to achieve short-term, partisan, or purely policy objectives, I would argue that a constitutional amendment is appropriate only when the goal involves (1) a needed change in government structure, or (2) a needed recognition of a basic human right, where (a) the right is one that people widely agree deserves serious and permanent respect, (b) the right is one that is insufficiently protected under existing law, (c) the right is one that cannot be adequately protected through purely, political action such as state or federal legislation and/or regulation, (d) the right is one whose inclusion in the U.S. Constitution would not distort or endanger basic principles of the separation of powers among the federal branches, the division of powers between the national and state governments, or the constitutional rights of the accused or other individuals, and (e) the right would be judicially enforceable without creating open-ended or otherwise unacceptable funding obligations.

I believe that S.J. Res. 3 meets these criteria. The rights in question—rights of crime victims not to be victimized yet again through the processes by which government bodies and officials 2 prosecute, punish, and/or release the accused or convicted offender—are indisputably basic human rights against government, rights that any civilized system of justice would aspire to protect and strive never to violate. To protect these rights of victims does not entail constitutionalizing the rights of private citizens against other private citizens; for it is not the private citizen accused of crime by state or federal authorities who is the source of the violations that victims' rights advocates hope to address with a constitutional amendment in this area. Rather, it is the government authorities themselves, those who pursue (or release) the accused or convicted criminal with insufficient attention to the concerns of the victim, who are sometimes guilty of the kinds of violations that a properly drawn amendment would prohibit.

Pursuing and punishing criminals makes little sense unless society does so in a manner that fully respects the rights of their victims to be accorded dignity and respect, to be treated fairly in all relevant proceedings, and to be assured a meaningful opportunity to observe, and take part in, all such proceedings. These are the very kinds of rights with which our Constitution is typically and properly concerned. Specifically, our Constitution's central concerns involve protecting the rights of individuals to participate in all those government processes that directly and immediately involve those individuals and affect their lives in some focused and particular way.

[1] For identification purposes only.

Such rights include the right to vote on an equal basis whenever an issue is put to the electorate for resolution by voting; the right to be heard as a matter of procedural due process when government deprives one of life, liberty, or property; and various rights of the criminally accused to a speedy and public trial, with the assistance of counsel, and with various other participatory safeguards including the right to compulsory process and to confrontation of adverse witnesses. The parallel rights of victims to participate in these proceedings are no less basic, even though they find no parallel recognition in the explicit text of the U.S. Constitution.

Because I will not be able to participate personally in the hearing scheduled for March 24, 1999, and will be closeted away between that time and mid-April finishing the book I have been writing, I thought I should take this opportunity to respond to what I believe are likely to be the basic objections to the proposed amendment from those law professors who do not share my views of this proposal. I suspect that those objections will be essentially the same as the objections set forth in the letter written by a group of law professors to Senator Orrin Hatch, Senator Joseph Biden, Congressman Henry Hyde, and Congressman John Conyers on April 4, 1997, attacking the proposed Victims' Rights Constitutional Amendment. Although I share many of the broad views set forth in the letter—including the views that the Constitution should not be amended without a strong need and that the constitutional rights of persons accused of crime should not be sacrificed in order to serve other values—I do not believe the letter makes a convincing case for its ultimate conclusions. The case for the proposed amendment need not rest on some nebulous notion that the playing field must be balanced as between criminal defendants and crime victims. It rests on the twin propositions (1) that victims have important human rights that can and should be guaranteed protection without endangering the genuine rights of those accused or convicted, but (2) that attempts to protect these rights of victims at the state level, or through congressional legislation, have proven insufficient (although helpful) in light of the concern—recurring even if misguided—that taking victims' rights seriously, even when state or federal statutes or state constitutions appear to require doing so, will somehow be unfair to the accused or to others *even when no actual constitutional rights of the accused or of anyone else would be violated by respecting the rights of victims in the manner requested.* The proposed amendment would, in essence, counteract this problem.

Courts have sometimes recognized that the Constitution's failure to say anything explicit about the right of the victim or the victim's family to observe the trial of the accused should not be construed to deny the existence of such a right—provided, of course, that it can be respected consistent with the fair-trial rights of the accused. In *Richmond Newspapers* v. *Virginia,* 448 U.S. 555 (1980), for example—a case that I should confess I argued on behalf of the press—the plurality opinion, written by Chief Justice Burger, noted the way in which protecting the right of the press and the public to attend a criminal trial—even where, as in that case, the accused and the prosecution and the trial judge all preferred a closed proceeding—serves to protect not only random members of the public but those with a more specific interest in observing, and right to observe—namely, the dead victim's close relatives. *See* 448 U.S. at 571 ("Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution."). Although the Sixth Amendment right to a public trial was held inapplicable in *Richmond Newspapers* on the basis that the Sixth Amendment secures that right only to the accused, and although the First Amendment right to free speech was thought by some (*see, e.g.,* 448 U.S. at 604–06 (Rehnquist, J., dissenting)) to have no direct bearing in the absence of anything like government censorship, the plurality took note of the Ninth Amendment, whose reminder that the Constitution's enumeration of explicit rights is not to be deemed exclusive furnished an additional ground for the Court's holding that the Constitution presupposed, even though it nowhere enumerated, a presumptive right of openness and participation in trial proceedings. *See* 448 U.S. at 579–80 & n.15 ("Madison's efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.").

I discuss *Richmond Newspapers* in some detail here because it illustrates so forcefully the way in which victims' rights to observe and to participate, subject only to such exclusions and regulations as are genuinely essential to the protection of the rights of the accused, may be trampled upon in the course of law enforcement simply out of a concern with administrative convenience or out of an unthinking assumption that, because the Constitution nowhere refers to the rights of victims in so many words, such rights may and perhaps even should be ignored or at least downgraded. The happy coincidence that the rights of the victims in the *Richmond Newspapers* case overlapped with the First Amendment rights of the press pre-

vented the victims in that case—the relatives of a hotel manager who had been found stabbed to death—from being altogether ignored on that occasion. But many victims have no such luck, and there 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, *not* on the entirely understandable basis of a particularized determination that affording the victim the specific right claimed would demonstrably violate some constitutional right of the accused or convicted offender, but on the very different basis of a barely-considered reflex that protecting a victim's rights would represent either a luxury we cannot afford or a compromise with an ignoble desire for vengeance.

As long as we do so in a manner that respects the separation and division of powers and does not invite judges to interfere with law enforcement resource allocation decisions properly belonging to the political branches, we should not hesitate to make explicit in our Constitution the premise that I believe is implicit in that document but that is unlikely to receive full and effective recognition unless it is brought to the fore and chiseled in constitutional stone—the premise that the processes for enforcing state and federal criminal law must, to the extent possible, be conducted in a manner that respects not only the rights of those accused of having committed a crime but also the rights of those they are accused of having victimized.

The fact that the States and Congress, within their respective jurisdictions, already have ample affirmative authority to enact rules protecting these rights is not a reason for opposing this amendment. For the problem with rules enacted in the absence of such a constitutional amendment is not that such rules, assuming they are enacted with care, would be struck down as falling outside the affirmative authority of the relevant jurisdiction. The problem, rather, is that such rules are likely, as experience to date sadly shows, to provide too little real protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia, or any mention of an accused's rights regardless of whether those rights are genuinely threatened.

Of course any new constitutional language in this area must be drafted so that the rights of victims will not become an excuse for running roughshod over the rights of the accused. This amendment has been written so that courts will retain ultimate responsibility for harmonizing, or balancing, the potentially conflicting rights of all participants in any given case. Assuring that this fine-tuning of conflicting rights remains a task for the judiciary is not too difficult. What is difficult, and perhaps impossible, is assuring that, under the existing system of rights and rules, the constitutional rights of victims—rights that the Framers of the Constitution undoubtedly assumed would receive fuller protection than has proven to be the case—will not instead receive short shrift.

To redress this imbalance, and to do so without distorting the Constitution's essential design, it may well be necessary to add a corrective amendment on this subject. Doing so would neither extend the Constitution to a purely policy issue, nor provide special benefits to a particular interest group, nor use the heavy artillery of constitutional amendment where a less radical solution is available. Nor would it put the Constitution to a merely symbolic use, or enlist it for some narrow or partisan purpose. It would instead, help solve a distinct and significant gap in our existing legal system's arrangements for the protection of basic human rights against an important category of governmental abuse.

Prepared Statement of David L. Voth on Behalf of the Crime Victim Services

I believe the United States Constitution must be amended to protect the rights of victims of violent crime. Only a Constitutional provision can provide this nation the fundamental human right to be informed and involved through the justice process.

The definition and implementation of "justice" in America must include crime victims. The Preamble to the Constitution introduces the principals of "domestic tranquility," which was stolen from victims of violent crime, and the goal to "establish justice," which generations later excludes victims. Our pledge of allegiance concludes with, "* * * justice for all." However, no "due process" rights have been presumed for victims participation in our government controlled justice system because those rights have not been articulated in the Constitution. Crime victims often report they feel, "treated like the criminal." In reality, victims need to be treated with the same respect in our constitution as those accused or convicted of crime. Victims deserve to be accorded a meaningful role, neither ignored by the justice process nor in control of decisions.

Without a Constitutional foundation there are inadequate grounds to correct violations of victims rights passed in the states, or to provide the same floor of rights across all states. Only the U.S. Constitution is the repository of our nation's core beliefs and protections. During the era of our Founding Fathers, a victim of violence could hire a prosecutor to initiate, prosecute and conclude a criminal case, The Constitution did not alter this arrangement which was an acknowledgment of the right of victims to participate, However, those earlier rights of victims have evaporated, and now must be reestablished with the wisdom that nearly 250 years of experience have taught our nation.

The information, participation, and protection rights for victims of violent crime in the proposed constitutional amendment are critical to restoring victims, offenders, and the community to healthy, accountable, and fair relationships. Having worked with thousands of crime victims, I have found no reason that a stalking or domestic violence victim should not be informed their perpetrator has been arrested. I can conceive of no justification that family members of a murdered loved one need to be excluded from a trial to which constitutional guarantees exist for the accused, the public, and the media. I have found no variation of justice in human relations that alters my belief that offenders have an obligation to attempt repayment for victim losses, and that the safety of the accuser from the accused must be a consideration in determining the least restrictive control and best rehabilitation method for a defendant. Only harm can come to human relations and societal respect for public order when crime victims are not treated with fairness, dignity, and respect.

I support the passage of the Senate Joint Resolution 3, The Victims Rights Constitutional Amendment in order that we might have a more perfect union.

Prepared Statement of Jan Withers on Behalf of the Stephanie Roper Foundation and Mothers Against Drunk Driving

I have been active in the victims' movement since 1992, when our daughter was killed by a drunk driver. Like most law-abiding citizens, I believed that the American judicial system was in place to protect the rights of our citizens. I believed that the defendant's constitutional rights should be upheld. I still do. What came as a horrific shock, was that I had no constitutional rights in the criminal justice proceeding. The defendant pleaded guilty to vehicular manslaughter, with the sentencing scheduled for a later date. The defense attorney changed the sentencing date, we were not informed, and so we were not present. We were kept away from the most important proceeding of our lives relating to our daughter's brutal death. The defendant had a constitutional right to be present and to be heard at his own sentencing. I still adamantly support that. However, because there was no constitutional support of my rights—what I consider just basic rights—to be notified, to be present and to be heard—I was denied the choice to be at that hearing.

I have subsequently listened to opponents of a federal constitutional amendment for victims' rights say that we must not tinker with the Constitution. I heard one legislator state two years ago, that there were over 100 proposed amendments that year. I believe that *only* where basic human rights of our American people are being denied—and those rights cannot be upheld by state laws or constitutions—should any amendment be considered. I submit to you that this is the case regarding a large population of American people—innocent people who have been victims of criminal acts. We go to court believing that the judicial system will treat us fairly, with the same dignity and respect afforded the accused. We quickly feel revictimized, because we are treated as outsiders. This happens because there is no constitutional support of our rights.

I was taken by a quotation of Franklin Roosevelt's engraved in stone at his memorial. It reads, "We must scrupulously guard the civil rights and civil liberties of all citizens, whatever their background. We must remember that any oppression, any injustice, any hatred, is a wedge designed to attack our civilization."

Victims do not ask for rights protected by our Constitution of the United States at the expense of rights for the accused. This is not an "*either-or*" issue. This is not a surprising new concept—to have *equal* rights in America.

As a victim services provider for the past five years, I have accompanied hundreds of victims and their families to court proceedings. Today, in Maryland, we have strong statutes and a constitutional amendment supporting victims' rights, and still I watch those laws be overlooked and rights denied. Victims are vulnerable and fragile during these times, so even if they could afford to stand up and fight for their "statutory rights", they seldom have the stamina.

I submit to you that if those statutes were upheld by the Constitution of the United States, there would be little, if any, disregard for victims' basic rights to be notified and present at the proceedings. Is that not treating them fairly, with the

dignity and respect that our founding fathers intended when creating this sacred document? Furthermore, did they not foresee that they *could not* foresee all things, and that is why they were brilliant enough to allow for amendments? Without these important additions, I would not be able to voice my opinion at the polls as a woman, nor would my African American friends. Little did I know, however, that as a law-abiding citizen I would not be permitted to be present at the sentencing and to speak for my daughter, who's basic right to live had been stolen from her.

I urge you to *balance* the scales of justice and support SJR 3, the proposed constitutional amendment for victims' rights. Allow *all* your citizens in the judicial setting to be afforded basic constitutional rights that were intended by our forefathers and is fundamental to our nation's integrity.

PREPARED STATEMENT OF MARLENE A. YOUNG ON BEHALF OF THE NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE

Chairman Hatch and Members of the Committee, I appreciate the opportunity to write on behalf of the National Organization for Victim Assistance to support Senate Joint Resolution 3, a proposed Constitutional amendment for victim rights.

I am proud to do so as a representative of the 4,500 agencies and individuals from all across the United States who are our members, and the Board of Directors whom they have elected to serve as trustees of the victims' movement.

Most of what follows is adapted from my April 28, 1988, testimony before the Committee on an identical bill. Obviously, our basic views on the issue have not changed, although this statement does reflect additional ideas that have developed over the past year.

I. NOVA'S PLACE IN THE VICTIMS' MOVEMENT

Founded in 1975, NOVA is the oldest and most far-reaching organized champion of victim rights and services in what has become a worldwide movement to bring healing and justice to crime victims. Historically, those elected to our Board represent the true strength and diversity of the victims' movement in America:

- Among our past Presidents are two clergy members and university professors, the Executive Director of the International Association of Chiefs of Police, the founder and operator of a battered women's shelter, the founder and administrator of a rape crisis center, a state corrections administrator, three elected prosecutors, a state victim services administrator, and a county-based victim assistance director.
- Of the current Board members, two are founders of the sexual assault treatment programs in their counties, and another founded her county's domestic violence program;
- Two have turned their own victimizations into a life of activism in behalf of fellow survivors of a life-threatening explosion and homicide, respectively;
- One is a noted pioneer in bringing crisis intervention services to victims right at the crime scene;
- Several have been part of volunteer teams to bring such skills to whole communities traumatized by crime—including Oklahoma City and Jonesboro, Arkansas;
- One heads her state's crime victim compensation program, and one administers his state's victim assistance grants program;
- A number are leaders in providing victim services within the institutions of law enforcement, prosecution, and corrections;
- Several hold office within the justice system—in law enforcement, prosecution, and the judiciary—where they work for improved treatment of victims within their professions;
- Others do so within the mental health professions;
- One is a preeminent leader in improving the institutions of justice—including justice for victims—in Indian Country;
- One is the author—literally—of his state's constitutional amendment for victim rights.
- And a few, while retired from direct involvement with victims, cannot and will not retire from the victims' movement.

There is another measure of the diversity of NOVA's board: like the victims' movement it leads, our Board membership is a "coalition of bleeding-heart conservatives and hard-nosed liberals," in the apt phrase of one of our past Presidents. This represents more than an ideological spectrum; it also describes the active engagement of many of them in electoral politics.

I stress this point because our diverse and sophisticated Board was the first national organization in the victims' movement to endorse the adoption of a victim rights amendment to the U.S. Constitution, and in recent years has considered with great care the changes in the draft language that its lead sponsors have made. Twice it has acted on motions to treat these changes as an honorable, productive step forward in our quest to see victims obtain their Constitutional rights, and twice it has voted, without abstention or dissent, to support the leadership of Senators Kyl and Feinstein in moving us to our ultimate goal.

I hope, Mr. Chairman, that the NOVA Board's unanimous endorsement of S. J. Res. 3 is treated with great weight by the United States Congress. I am honored to report that it is so treated by the victims' movement as a whole.

II. THE VICTIM'S INTEREST IN SEEING JUSTICE DONE

Proud as I am to speak for an institution I admire, I am also privileged to be here to represent the millions of Americans who fall victim of crime each year. Like so many in this room, I too have known the fury, the terror, and the pain of victimization.

I cannot tell you how stunned I was to enter my dream home in rural Oregon in 1980 to find it had been virtually wiped clean of all my belongings. Nor can I fully express my fear, two weeks later, when alone in my partly-refurbished house, I observed two people, one with a handgun in his pocket, go to the side of my house and hear them break the same basement window that the earlier burglars had used to gain entry. Though I quietly dialed the state law enforcement agency, I knew it might take them an hour or more to get to me, so I slipped outside and banged a ladder on the wall to scare the intruders away. I was successful in my efforts, but simply to recall that event brings back tremors to my body.

I cannot convey the pain that my husband and his family endured, and I with them, after the partial, butchered remains of his cousin were discovered buried in her Indiana garden.

I cannot fairly describe my rage at having my car broken into, not once or twice, but three times, and each time finding its stereo ripped out of it. It was, I should say, the first new car I had ever owned, a special possession. I often raise these three violations of my property in my training courses, always often remembering my pledge at the time to lead a nationwide campaign to seek the death penalty for car stereo thieves.

That joke usually gets a chuckle. The outrage behind it was, and remains, no laughing matter.

And I cannot express the horror, shame, and terror I experienced when a university professor I respected sexually assaulted me in his office. The police officer I approached just after I fled the building knew of no way to investigate this one-on-one crime—this was before there were DNA tests to identify the semen on my body—so he merely drove me home. When I later confronted my professor with his crime, he coldly told me my grades would suffer if I reported it to the university. I didn't, they didn't, and the next year, I chose to continue my studies 3,000 miles away.

This is only the second time I have publicly referred to this crime—the first was at the 1979 hearings of the Victims Committee of the American Bar Association on witness intimidation—and I repeat it now not because the proposed amendment before you would have brought justice to my case. In truth, only one of the crimes my family and I have endured over the years ever resulted in an arrest and prosecution, and, in that case, we were very gratified with the treatment we received before and after the conviction of Robert Lee for the murder of Ellen Marks, my husband's cousin.

I can report that some of the patrol officers I encountered after reporting the crimes against me treated me very well, and some very poorly. None of them, however, read me my rights—because I had none.

That much will change when victims have the Constitutional right to be told of their Constitutional rights.

My main purpose in reviewing my own distresses endured at the hand of criminals is to underscore as strongly as I can the alliance I feel with the thousands of crime victims I have come to know in my two decades of work in the victims' movement. Far too many of those friends and acquaintances have been made to feel contaminated, not vindicated, by the justice system. And I take personally the injustices inflicted on them. They are good people, all of them, who deserved better. They include:

- Sharon Christian, 20 years old, a young victim of rape who reported the crime and whose offender was arrested. She was doubly victimized when, two weeks

later, she was walking down the street in her neighborhood and saw the young man hanging out on the corner. He had been released on personal recognizance with no notice to her, and she had been given no opportunity to ask for a restraining order or for the court to consider the possibility of bond.

- Nancy Slaven Peters, mother and survivor of Cassie Slaven, age 2½, when she was murdered by drowning in 1981 by two boys, ages 6 and 10, in Greene County, Ohio. To this day she has no idea what happened to the boys. As she said to me, "For all I know, they have raped and murdered others * * * but I didn't get any information at the time and I haven't had any since."
- Roberta Roper, the extraordinary advocate who is now co-chair of the National Victims Constitutional Amendment Network, and who has worked tirelessly for victim rights in Maryland and across the nation. Among the many outrages in her case, she was denied the right to sit in the courtroom at the trial of her daughter's murderer because she might, by her presence, influence the outcome.
- Virginia Bell, a retired civil servant, who was accosted and robbed some five blocks from the U.S. Capitol, suffering a broken hip. Her medical expenses were over $11,000 and the resulting debilitation sent her to live with her daughter in Texas. While her assailant pled guilty, she was not informed, and the impact of her victimization was never heard by the court. I know her anger when the judge did order restitution but in the random, insulting amount of $387.
- Harley Wilson, a gentleman in his early sixties when he was shot in the back by a robber of a convenience store. He was there to buy powdered sugar for his wife's baking—in the wrong place at the wrong time. The crime occurred before there was no compensation or rights for victims in that state. The crime cost him over $550,000 in medical expenses, his home, his business, and his health. He and I have been friends over the years, and I wept over his letter which said he was ready to die because life was so hard.
- Ross and Betty Parks, parents of a murdered daughter Betsy. The Parks waited seven years for a murder trial. As Betty Parks explained, "It was * * * six and one half years after Betsy died when Gary Coleman was extradited from a prison in Georgia to North Carolina and charged with her murder. For the next fourteen months he was able to delay going to trial with motion after motion—thirty-one of them at one point."

I have become friends with every one of these doubly-wronged victims of violent crime, and the kind of maltreatment they received has been repeated to me hundreds of times by victims I have met in my travels. The problems addressed by the resolution before you are painful, persistent, and pervasive.

III. THE MERITS OF THE PROPOSED AMENDMENT

From the evening of April 13, 1985, to this day, there has been a nationwide coalition of victim advocates committed to the passage and ratification of a U.S. Constitutional rights for victims. In many respects, S. J. Res. 3 goes farther than the proposal we originally backed, that recommended by 1982 Presidential Task Force on Victims of Crime.

In some respects, that coalition—the National Victims Constitutional Amendment Network (NVCAN)—is responsible for expanding the breadth of the earlier proposal. Our members held several retreats to examine anew the core values deemed worthy of constitutional protection, and we ended up going beyond our old formula of giving victims the right to be informed of, present, and heard at every critical proceeding. That more expansive list of values—including a right to know their rights, standing to assert them (at least prospectively), a right to know of one's offender's release or escape, to something like a speedy trial, to restitution, and to strong authority to craft legislation to enforce the rights—remains intact in Section 1 of the proposed amendment.

One may say of the changes in the language after it came under the wise patronage of its Senate sponsors, after considerable consultation with representatives of the Justice Department, the criminal justice community, and others, that it is now infected with a "rule of reason." So instead of a right to restitution, it offers a right to the order of restitution—the former a "promise" on which government could not guarantee delivery, the latter one it can. The right to notice is now required to be "reasonable," a "speedy trial" becomes one "without unreasonable delay." This is not the watering down of our handiwork, but the perfection of it, for at no time did we seek to be the agents of draconian, unintended consequences. The watch-word of all our campaigns for victims' rights is "a voice, not a veto." And we are grateful to Senators Kyl and Feinstein for holding to that spirit of reasonableness in the recrafting of the resolution.

We are also very supportive of the "exceptions" provision—authorized to achieve "a compelling interest"—so that, for example, the victim will not be notified of an inmate's release when that victim had been the primary abuser in a violent domestic relationship. True, Congress and the states will have act affirmatively to insure such an exception is put on the books, but we have no doubt that they will do so.

Now, added to the reasonableness of the draft before you are two elements of pragmatism, both designed to reduce the disruptiveness of the new amendment upon ratification. One would limit the scope of coverage to victims of violent crime, and the other would expand the scope of actions for which victims could *not* get retrospective relief to include sentencing already rendered and pleas already accepted.

As a basic policy matter, NOVA strongly preferred to leave these items out of the resolution. But at higher policy level—seeking the adoption of the rights we most care about, for the people we work for the most—we were completely persuaded that the additions greatly served that higher cause, and we embrace them—trusting to the proven good faith and legislative acumen of their principle proponent, Senator Joseph Biden.

We thank him for his contributions—the medicine was hard to swallow, but now that it is digested, we feel far more optimistic about the prospects of achieving our mission.

And we feel far less pessimistic about the consequences of the two revisions.

First, as to the need to act statutorily to bring victim rights to property crime victims, that was already a requirement of the last version we supported. Furthermore, after Congress and the states enact statutes implementing the rights for violent crime victims, and the culture of our justice system grows accustomed to the new rules, it seems to us inevitable that legislators and justice officials who are now wary of too much change too fast will enthusiastically extend the same procedural decencies to the victims of theft, and fraud, and other property crimes—and this time, in a completely new Constitutional environment, the broadened statutes will be honored.

Second, while judges reading just the words of the amended Constitution will have few opportunities to give retroactive redress to victims whose rights were violated, they will clearly have the authority to order those who commit such violations to never do so again. More, when they read the provisions of future implementing statutes, judges will be empowered to act more forcibly, even to correct past misdeeds. For again, in time, it seems to us certain that Congress and the states will devise remedies that buttress the rights we hope you will place in our charter of ordered liberty.

IV. JUSTICE FOR ALL

I would like to conclude with some thoughts expressed by my husband, John Stein, some five years after he attended the trial of the man who killed his cousin, a trial in which his family asked him to speak for them at the sentencing hearing. Some of his concerns were written as follows:

> "I am * * *"
> "*I am* * * *"
> "* * * somebody!"
> "* * * *somebody!*"
>
> Anyone who has seen the Reverend Jesse Jackson preach his interactive, secular sermons with African-American youth has been witness to hand-to-hand combat with despair. If anyone doubts that these young people feel themselves relegated to the fetid backwaters of society, let that skeptic try to explain the fervor with which they merely assert their human existence.
>
> The sense of alienation Reverend Jackson seeks to lift from the shoulders of his young parishioners is one which millions of crime victims have come to experience. Of all the losses victims bear, perhaps none is more lasting or harmful to more victims than the felt loss of autonomy, of control over their lives, of connection to the social order.
>
> Crime victims have ample reason to feel a certain kinship with racial minorities—particularly African-American youth of the inner city—partly because of a shared sense of powerlessness, and sometimes—often, in fact—they *are* African-American youth of the inner city. We often lament that they have the highest arrest rates for violent crime among our various subpopulations, but rarely remember that their victimization rates are also the highest.
>
> Some people like me have a passion for victim rights because they were fully accorded to me when I needed them—and they made a positive difference in my family's reconstruction. But the victim rights revolution is a

spotty one. It is not reaching everyone, whatever the laws on the books may say. Those most likely to be left behind are lower income Americans and racial minorities.

These are the findings of extensive research conducted by the National Victim Center (NVC) in four states, two with relatively weak statutory protections for victims, two with strong ones, backed up by state victim rights amendments. The overall disparities between the two groups of states are telling. Thus, for example, only 42 percent of the victims in the "weak" states were informed of their right to submit a victim impact statement at sentencing, whereas 75 percent of the victims in "strong" were so informed. This suggests that state constitutional amendments make a very significant difference—but not big enough—not by a wide margin.

And especially not to non-whites. Even the "strong" states displayed weaknesses in honoring certain rights to minority victims. While 80 percent of white victims whose offenders were up for parole were told of their right to speak at the parole hearing, only 41 percent of the non-white victims were so informed. Sixty-three percent of white victims were informed of a possible plea agreement; only 43 percent of non-whites were. The figures for information about a suspect's bail release were 63 and 43 percent respectively.

Not surprisingly, the levels of dissatisfaction with the justice process had a pronounced racial characteristic, most notably in the weak states, where only 38 percent of white victims were dissatisfied with the opportunities to be heard at pleas and dismissals, a rate that rose to 62 percent among racial minorities. Comparable dissatisfaction rates over sentencing were 48 and 70 percent respectively.

We have long had a saying in the victims' movement: "Justice for all—even the victim." We are slowly achieving that ideal, at least for people whose demographic characteristics match mine. For those of us who care about *all* victims, especially those most likely to become victims by virtue of their demographics, our "progress" is bittersweet indeed.

John's discouragement is felt by most of us in the victims' movement. As a nation, we will not provide equal protection of the law—at least, not of victim rights law—until we make its application an American birthright. Until that happens, it will not just be racial and economic minorities whose claims to be treated to dignity will be unheeded in the justice system, for we see the systemic indifference imposed on victims who are also people with disabilities, or who are elderly.

So the resolution before you, when favorably acted on by the Congress and the states, will finally let every crime victim proclaim within the halls of justice, "I am somebody."

Thank you for this opportunity to write to you in behalf of NOVA, of the victims it represents, and of justice.

PREPARED STATEMENT OF BRUCE FEIN ON BEHALF OF THE CITIZENS FOR THE FAIR TREATMENT OF VICTIMS

WASHINGTON—Saying it would offer crime victims theoretical rights rather than concrete assistance, a national coalition today urged the United States Senate to reject a so-called victims' rights amendment to the United States Constitution.

The coalition, Citizens for Fair Treatment of Victims, said that the proposed amendment fails to meet the real needs of crime victims. It neglects concrete assistance—which can be secured by statute—such as victim-witness advocates, training for prosecutors and judges, funding for shelters, safe havens and counseling services that would more effectively improve the treatment of victims as they come in contact with the criminal justice system.

"Although we commend and share the desire to help crime victims, amending the Constitution to do so is both unnecessary and dangerous," said Bruce Fein, a constitutional scholar who served in the Justice Department during the Reagan Administration. "Ultimately the amendment would likely be counter-productive, hindering effective prosecution and putting an enormous burden on state and federal law enforcement agencies."

Fein noted that more than 25 states have already amended their state constitutions to protect victims' rights and most of the others have adopted legislation to achieve the same result. "Crime victims are not forgotten stepchildren in the political process," Fein added. "Indeed, they command virtually universal sympathy. In other words, crime victims occupy the political catbird seat; no amendment is necessary to rescue them from obscurity."

Fein underscored that the varied and evolving state approaches to victims' rights reflected federalism at its best, and was sympathetic to an array of recent congressional action restoring state options in areas from welfare and education reform to health care for the indigent. The proposed constitutional amendment would obstruct the state victims' rights learning process and ability to correct initial errors or misjudgments.

Sue Osthoff, Executive Director of the National Clearinghouse for the Defense of Battered Women, said that the proposed amendment could actually harm battered women. "All too frequently, women who have been battered and have not received protection from the police or legal system, are forced to resort to violence to defend their lives and those of their children," Osthoff said. "Sadly, these women, who are victims, then become the accused. Under this amendment, their batterers could perversely gain new rights."

Citizens for Fair Treatment of Victims is a coalition of advocates for victims, women and scholars. Its members include the National Clearinghouse for the Defense of Battered Women, the National Coalition Against Sexual Assault, the National Network to End Domestic Violence, the Arizona Coalition Against Domestic Violence and the National Association for the Advancement of Colored People.

Other groups that have spoken out against the proposed amendment include the National Sheriffs Association, the Federal Public and Community Defenders, NOW Legal Defense and Education Fund and more than 450 law professors from around the country.

March 10, 1999.

To: Senate Committee Hearings Concerning National Crime Victims Bill of Rights Amendment.

From: Helene Cantrell, Talisheek, LA.

On September 8, 1996 my daughter, Rachel Prejean, was in labor and on her way to the hospital to deliver her baby when she was hit head on by a drunk driver. Sadly, my beautiful granddaughter, Abby Danielle, died and my daughter was severely injured. The drunk driver plea bargained his sentence and only served one year in the parish jail. He was released from jail in November 1998 the same month that Louisiana's crime victims bill of rights went into effect. After his release he applied for his driver's license to be reinstated. Thanks to our newly imposed bill, we were notified that he was to go before the judge to get his license back and were able to be in that court room to make sure he didn't. He withdrew the motion when he knew the judge was not going to give him back his license.

We can not even begin to convey how we feel about this crime victims bill of rights. Had it not been for this, I'm quite sure he would have gotten his license back and we would not have even known. We feel it is very important for this crime victims bill of rights to become national so that every victim has the right to be informed and protected.

VICTIM SERVICES ADVISORY BOARD,
Montgomery County, MD, March 10, 1999.

Senator BARBARA MIKULSKI,
U.S. Senate,
Washington, DC.

DEAR SENATOR MIKULSKI: The Montgomery County Victim Services Advisory Board (VSAB) commits itself to working with victims of every type of crime. Part of our Board's responsibility is to ensure the existence of victims' rights and fairness to victims.

All Victims deserve to be present at trials and other judicial hearings involving their assailant and receive plea agreement notifications. Of course, family members should be included as victims in a case involving a homicide victim. Attendance at various types of judicial hearings has helped many victims with their recovery from a crime. In many cases, witnessing their assailant being sentenced gives victims a small amount of closure to their or their family member's tragic experience.

While our legal system can't make the crime "go away," the right to attend public proceedings relating to the crime and to be heard, if present, or be able to submit impact statements offer victims a sense of control after a crime experience that has rendered them powerless. Some victims may choose not to attend court proceedings but this should always be their option. After all, while the State is the legal victim, we must never forget that behind it are the real victims, the ones who are raped, robbed and murdered. They are the ones who suffer the emotional, physical and fi-

nancial devastation because they become victims of crime. The State does not bleed or die, individual victims do!

Foreseeing the positive impact that Joint Resolution 3 could have on the lives of victims, the Victim Services Advisory Board strongly support the proposed amendment to the Constitution of the United States to protect the rights of crime victims.

Just as the rights of the criminals and defendants are protected by the Constitution, so must the rights of crime victims be also protected in the name of equal justice! The VSAB urges you to balance the scale of justice by passing Joint Resolution 3.

We thank you for your concern about fairness to victims.

Sincerely,

KAY CUMMINS,
Co-Chair, VSAB.

STATE OF WISCONSIN,
GOVERNOR'S COUNCIL ON DOMESTIC ABUSE,
Madison, WI, March 11, 1999.

Representative PAUL RYAN,
Longworth House Office Building,
Washington, DC.

DEAR REPRESENTATIVE RYAN: The Governor's Council on Domestic Abuse supports Joint Resolution 3, which proposes an amendment to the Constitution of the United States to protect the rights of crime victims. A victims rights amendment will be an important starting point for greater rights for crime victims and for the empowerment of victims of domestic abuse. We believe that as more victims of domestic abuse are actively engaged in the criminal justice process, a stronger message will be sent to batterers that their violence will not be tolerated.

We ask your support in securing the passage of this bill. Thank you.

Sincerely,

SENATOR JOANNE HUELSMAN,
Co-Chair.

EILEEN CONNOLLY-KEESLER,
Co-Chair.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Montgomery County, MD, March 8, 1999.

DEAR SENATOR KYL: I am writing in support of SJR 3, The National Victims' Constitutional Amendment. I am the father of two girls who disappeared on March 25, 1975 from a shopping mall in Wheaton, Maryland. I now work as a victim assistant for Montgomery County, Maryland. Since the crime we have had no word on the whereabouts of the girls, Sheila and Kate. They were 12 and 10 at the time. As we approach the 24th anniversary of their disappearance, no more is known to us now than it was then. I realize that our situation is a bit unique from other crime survivors but working with victims brings it home everyday. Crime victims need insulation from a world that has gone wrong for them. If it takes protection in the form of legislation, all the better. Maryland passed the victims rights amendment a few years ago and now we are hearing from victims and survivors in the courtroom feeling better about having the opportunity to tell their story, being advised of hearings concerning their cases feeling that they are finally included, however slightly, in the judicial process. A small thing to ask when one has lost a loved one to a violent crime.

I guess I could relate these feelings on behalf of my coworkers here at the Montgomery County Victim Assistance and Sexual Assault Program in Rockville, Maryland. I am just one voice however, as are you, but together perhaps we can form a chorus on behalf of victims across the county.

Sincerely,

JOHN LYON,
Victim Assistant.

NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN,
Philadelphia, PA, March 22, 1999.

Hon. ORRIN HATCH,
Chairman, Judiciary Committee,
U.S. Senate,
Dirksen Senate Office Building,
Washington, DC.

Hon. PATRICK LEAHY,
Ranking Member, Judiciary Committee,
U.S. Senate,
Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIRMAN HATCH and SENATOR LEAHY: Last year, the National Clearinghouse for the Defense of Battered Women sent in a position paper outlining our opposition to S.J. Res. 6, the proposed Victims' Rights Amendment to the United States Constitution.

After reviewing S.J. Res. 3, the newly proposed amendment to the Constitution of the United States to protect the rights of crime victims, the National Clearinghouse for the Defense of Battered Women stands firm in our opposition. Although the proposed amendment addresses some of the issues we raised last year, we continue to have grave concerns about the new proposal and continue to oppose it.

We have enclosed the position paper of the National Clearinghouse for the Defense of Battered Women opposing S.J. Res. 3. We believe that our arguments remain compelling and relevant to the newly proposed amendment.

We would appreciate it if this paper could be placed in the hearing record.

We look forward to assisting the Committee in its deliberations on this important subject.

Sincerely,

SUE OSTHOFF,
Director.

POSITION PAPER ON PROPOSED VICTIMS' RIGHTS AMENDMENT

INTRODUCTION AND OVERVIEW

The National Clearinghouse for the Defense of Battered Women strongly opposes the proposed Victims' Rights Amendment to the United States Constitution.[1] Our opposition to the proposed amendment does not reflect a lack of support for, or empathy with, victims of crime. We, like the proponents of the amendment, are extremely disturbed by the way in which crime victims are treated by our criminal justice system. As an organization that assists battered women, we know only too well the paucity of services and supports afforded to victims, and we see firsthand the tragic consequences that result from society's and the criminal justice system's devaluing and misunderstanding of the experiences of victimization.

The National Clearinghouse is a unique victims' advocacy organization; we assist battered women who, in response to their victimization, end up in conflict with the law. All too frequently, women who have been battered and have not received the protection of society's institutions, including the police and the legal system, resort to violence or other illegal acts to defend their lives and those of their children against on-going abuse. Sadly, these women, who are victims, then become the accused; they become defendants in criminal prosecutions. Our mission, since we opened our doors in 1987, has been to advocate for these victims of violence who continue to fill our nation's courtrooms as defendants and continue to fill our nation's prisons.

The National Clearinghouse for the Defense of Battered Women opposes the amendment for the many reasons outlined below.

- *Too many victims of domestic violence become the accused.* We work with battered women who, as a result of responding to the abuse they experienced, are accused of a crime. Do these women lose their "victim" status once they have defended their lives and become defendants? And, once battered women defend themselves against their abusers' violence, do these batterers who terrorized and victimized their partners deserve the exalted constitutional status as "victims"? The Amendment refers to victims and criminal defendants as though they were mutually exclusive and designates someone a victim *solely* by virtue of the fact that another person has been charged with a crime. The basic error in this absolutist position—that the defendant is the perpetrator and the complaining witness is the victim—is revealed in the cases of battered women

[1] Legislators have drafted numerous versions of the Amendment, the most recent of which (S.J. Res. 3) was introduced by Senators Kyl and Feinstein on January 19, 1999.

charged with crimes. It would, for example, permit a husband who has repeatedly beaten his wife to stand before a judge and object to her release on bail, even when she is the only parent who has cared for their minor children. Or, if the battered woman ended up getting convicted of a crime against her batterer, the Amendment would require her to pay restitution to her abuser because he is considered the "victim."

- *The federal constitution is the wrong place to try to "fix" the complex problems facing victims of crimes; statutory alternatives and state remedies are more suitable.* Our nation's constitution should not be amended unless there is a compelling need to do so *and* there are no remedies available at the state level. Instead of altering the US Constitution, we urge policy makers to consider statutory alternatives and statewide initiatives that would include the enforcement of already existing statutes, and practices that can truly assist victims of crimes, as well as increased direct services to crime victims.

Much of the impetus for the proposed amendment has been the shameful realization that crime victims are often neglected, if not ignored, in the criminal process. We understand and sympathize with the fact that closure of the criminal case can be an important component of healing for some victims of crime. We fully believe that the victim of a crime should be kept thoroughly apprised of all scheduling, hearings and developments in the case, and that s/he should be provided the right of access as long as it does not interfere with the defendant's fair trial rights. We fully support prosecutors' paying greater attention to, being more sensitive to, and more respectful of the needs of their victims/witnesses, and, where appropriate, we support the provision of advocates for victims.

However, all of these things can and should be accomplished within the present system, through legislation on the state level or through federal statutes. The healing that may happen when victims are heard, informed and respected during the criminal legal process is extremely important. But, as we have found in working with victims of domestic violence, the criminal system is often a particularly poor forum in which to try to solve the complex of social and other problems inherent in victimization. Unfortunately, the grave injustices of being victimized probably cannot be fully addressed or remedied in the criminal justice system. We urge, instead, that additional time, money and energy go into providing the support and services that many victims of crime very much need and certainly deserve.

- *The proposed amendment's real benefit to crime victims is speculative at best and, in fact, may end up* hindering, *rather than helping, victims.* It is entirely unclear how the proposed amendment would increase basic courtesies and respect for victims (particularly in light of the amendment's explicit provision for governmental immunity from civil actions). In addition, there are particular problems with the mandatory restitution clause. By forcing restitution to a constitutional level, restitution payments will be given priority over the payment of federal fines. This will certainly end up seriously undercutting payments to the Victims of Crime Act Fund (VOCA) in cases where defendants lack the resources to fully satisfy both. VOCA currently provides funds to more than 3,000 local victims' services organizations, including many domestic violence and sexual assault programs. If this Amendment passes there will ironically be *less* money available for victims' services.
- *While the amendment promises much to victims, it provides virtually no remedies for victims whose rights are violated.* As is inherently the case with federal constitutional amendments, the proposed amendment is broadly worded and suggests many rights without corresponding remedies (or methods for enforcing these lights). In fact, the amendment specifically prevents victims from receiving monetary damages.
- *If passed, the enforcement of the amendment will divert critically needed resources from already underfunded victim assistance programs and from all key branches of the criminal justice system.* The National Clearinghouse is persuaded that the constitutional financial mandate this amendment imposes upon the states would require their already overburdened governments to divert funds from agencies that provide meaningful assistance to battered women, and that the implementation of the amendment would create numerous practical, administrative and financial burdens for courts, prosecutors, law enforcement personnel, and corrections officials. Congress has a responsibility to investigate thoroughly the cost of the proposed amendment to the 50 states, and the drastic shift in resources that would result if the amendment were ratified. Congress has not undertaken this analysis and the passage of the resolution before completion of this analysis does a disservice to the public.

- *This Amendment will not reduce the number of battered women being charged with crimes.* Some proponents of the Amendment have been arguing that passage of the Amendment will reduce the numbers of battered women who end up as defendants because, if the Amendment were passed, battered women would be much more likely to turn to the criminal justice system for assistance *before* they get arrested. While we acknowledge that criminal justice reform is essential in helping to reduce violence against women and is a very effective tool for some battered women, for others, however, it fails to offer any real protection. We also know that many women will never turn to the criminal justice system and will not do so *even if* the Amendment *were* able to provide all the support and services it promises to victims (which is highly unlikely). Unfortunately, for many battered women, the first time the system "pays attention" to them is when they enter it as defendants. The same system that failed to protect them or couldn't seem to find any resources to assist them *before* they get arrested, suddenly finds all sorts of resources to prosecute them vigorously. In fact, one of the unintended consequences of many mandatory and pro-arrest policies has been a massive increase in the numbers of battered women being arrested in many communities. Until all women are safe, battered women will continue to become defendants. This Amendment will not change that reality.
- *Defendants are facing loss of liberty and life at the hands of the state, and their rights must not be eroded.* Much has been made of the need for this amendment in order to "balance" the rights of victims with the fights of defendants. We agree that, if the playing field were level and the consequences of the "imbalance" equal, the goal of "balance" would be a germane one. But such an argument is completely inappropriate when talking about balancing the rights of victims and the rights of defendants. In this instance, the playing field is *far* from level; the power of the state far outstrips that of the defendant and his or her attorney, and the consequences at trial are dramatically different for victims and defendants. For example, a defendant may lose her liberty or even her life as result of the trial; the harsh reality is that the victim has very little to lose as a result of the trial—the victim's losses occurred long before the trial. We understand that victims have experienced (often) tragic consequences as a result of being victimized; and we take their experiences and losses extremely seriously.

  We also understand that victims can *gain* a sense of control and a host of other important psychological and emotional results when they are kept informed, are actively listened to, and are respected throughout the trial process. But the role of the criminal justice system is to determine whether or not the defendant committed the offense he or she is charged with, not to restore the victim. We believe that victims *should* be restored and should be informed, heard and respected throughout the proceedings, but this cannot and should not be achieved by eroding the rights of defendants.
- *If passed, the Amendment is sure to wreak havoc on the Bill of Rights, and will inevitably erode the basic constitutional guarantees that are designed to protect all of us—including victims of violence who are criminal defendants—from wrongful convictions.* There is no question that the primary constituents of the National Clearinghouse—battered women who have been victimized and then have become defendants—will be hurt by this Amendment. For example, depriving the trial courts of their historic authority to sequester witnesses—including alleged victims—from the courtroom until they testify would permit victim-witnesses to be influenced because they would hear the testimony and cross-examination of other witnesses. As a result, jurors will be far less likely to receive independent, truthful testimony and the possibility of a fair, reliable and just verdict will be diminished. In cases involving battered women charged with crimes, the abuser and/or his family become the "victims;" if not sequestered, they would have the right to be present and heard at all stages of the process. We know that batterers' families often collude in keeping the violence secret for many reasons (denial, their own experiences of abuse, d/or fear of retribution if they speak out against the abuser). If passed, the Amendment would make it possible for batterers and their families to listen to one another's testimony and to tailor their own testimony so as to avoid effective cross-examination when called as a witness. Additionally, passage of the Amendment would make it much more difficult for judges to limit testimony of "victims" at all stages of the proceeding, even if their testimony is not relevant or is so inflammatory that justice would be undermined.
- *Justice rushed is justice denied—for all, including victims of crimes.* The proposed Amendment says victims have the right to "a final disposition of the proceedings * * * free from unreasonable delay." In our work at the National

Clearinghouse, we see the tragic results that occur when attorneys rush to trial without proper investigation and preparation. Many battered women are unable to discuss their experiences of abuse candidly until they have established a relationship of trust and confidence with their defense counsel, a process which can take considerable time. The amendment would allow batterers to force cases to trial before the battered woman's attorney has adequately investigated or prepared for the case, thereby substantially affecting reliable determinations of guilt and creating an intolerable risk of wrongful conviction.

- *Victims* should *be restored and should be informed, heard and respected throughout the proceedings, but this cannot and should not be achieved by eroding the rights of defendants.* All of us who work within the criminal legal system and are committed to justice need to be concerned about due process and the fights of defendants. One of the purposes of the constitution is to protect individuals from government abuses and to preserve liberty, not to "get a conviction at any cost," or to provide victim advocacy. None of us who are committed to justice (including many victims of crime) has an interest in diluting rights intended to prevent wrongful deprivation of liberty and unreliable determinations of guilt. As victim advocates, we need to be in the forefront of advocating for justice—which includes supporting the right of defendants to get fair trials and this Amendment will erode this light.
- *The proposed amendment would radically alter and jeopardize basic constitutional principles that protect us all.* The proposed amendment would mark a radical and unprecedented change in our system of criminal justice and to the foundation of our Bill of Rights, a change which would jeopardize those rights and undermine the truth-seeking function of the criminal justice process. Our system of justice is built on the concept of public, rather than private, prosecutions. The accuser is the government, not the aggrieved individual. The structural integrity of our entire justice system depends on this equation—between the accused and the government, not the accused and the individual victim of crime.

  The very purpose of the Bill of Rights is to curtail the power of the government against the rights of the accused. It arms the accused with basic guarantees, such as the presumption of innocence and the need of proof beyond a reasonable doubt. These fundamental guarantees are necessary to ensure that the government's power is not abused; that the innocent do not fall prey to the weight and power of the government; and that only the guilty are convicted.

  To elevate victim participation in the criminal process to the level of a federal constitutional amendment would jeopardize the critical balance between accuser and accused, as reflected in the Bill of Rights, and threatens to diminish those rights. None of us, including victims of crime, has an interest in diluting rights intended to prevent wrongful deprivation of liberty, and unreliable determinations of guilt.
- *The criminal justice system does not overprotect; rather it* re-victimizes *battered women defendants.* Much support for the proposed amendment is grounded on the assumption that criminal defendants have too many rights, and that victims have none. While we agree that victims should have greater support, advocacy and respect, it is a fallacy that the criminal justice system overprotects the rights of the defendants, especially the rights of indigent defendants and defendants of color. On a daily basis, we assist countless battered women defendants who have been denied basic due process. We assist women who did not receive fair trials and were wrongfully convicted because, for example, their attorneys did not investigate, understand, or properly present vital defense evidence. Many of these women were denied funds for expert testimony that would have enabled the jury to hear and understand the basis of their defense. Thus, in our experience, the criminal justice system does not overprotect; rather, it often *re-victimizes* battered women defendants, as can be attested to by the thousands of wrongfully convicted and incarcerated battered women defendants who fill jails and prisons across this country.

CONCLUSION

In conclusion, the National Clearinghouse for the Defense of Battered Women agrees that crime victims have much to gain when they are kept informed, actively listened to, and respected throughout the adjudication of a criminal case, but passage of a Constitutional Amendment is the wrong way to achieve these goals. Enhanced victim participation in the justice system can be, and largely has been, made by statutory enactments at the state level. At the federal level, Congress has ample authority to enact new laws, as well as to expand and amend the laws it has al-

ready passed, to improve the treatment of crime victims without jeopardizing our cherished constitutional protections.

VICTIM SERVICES,
New York, NY, March 23, 1999.

Senator ORRIN G. HATCH,
Chairman.

Senator PATRICK LEAHY,
Ranking Minority Member,
U.S. Senate Committee on the Judiciary,
Dirksen Senate Office Building,
Washington, DC.

DEAR SENATORS HATCH and LEAHY: I write to set out Victim Services' opposition to S.J. Res. 3, which proposes a Constitutional amendment for victims' rights.

Victim Services is the nation's largest victim assistance agency. Our mission is to heal the wounds of violence and prevent victimization. We started out in 1978 as a small project in the Criminal Court in Brooklyn, New York, helping to give victims a stronger voice and role in the criminal justice system. In the 20 years since then, we have pioneered victim assistance programs in criminal and civil courts, schools, police precincts, and communities throughout the City of New York and beyond. We also work on policy and legislative initiatives to expand victims' rights and choices through research and analysis that is also informed by experience with our clients.

Victim Services assists over 200,000 clients each year. One of the core tasks of Victim Services' staff is to advocate for victims' meaningful participation in the criminal justice system. Every day, in our family and criminal court offices, in police programs, domestic violence legal services program, domestic violence shelters and community offices, our staff inform victims about their rights, support them with counseling and practical assistance, and intervene when necessary to ensure that their rights and choices are respected. The positions we take on policy and law are grounded in the lives of these victims. We listen to their voices and strive to advocate in ways that are meaningful to them. Thus, our opposition on S.J. Res. 3, outlined in the points set out below, is informed by the urban victims we serve who are, most often, poor people of color living in economically depressed neighborhoods who find it harder than others to effectively assert their rights.

- *Victims rights are critical but not the same as defendants' rights:* It goes without saying that we believe participatory rights for victims are essential. However, our clients' experiences teach us that, although victims of violent crime suffer in numerous and often devastating ways, unlike defendants, they do not face the loss of fundamental rights or liberty at the hand of the government. The risk of unwarranted state power being used against the individual was historically, and still is at the core of the constitutional safeguards for criminal defendants. These remain essential protections in a society where it is easy for someone to become a criminal defendant, especially when, like many of our clients, they suffer race, gender, and other forms of discrimination and are voiceless and powerless. For them, above all, it is critical to guard the rights of the accused.
- *Constitutional rights of victims and defendants will inevitably clash:* Our concerns about S.J. Res. 3 are not allayed by the argument that it merely accords victims equal status with defendants. The proposed new Constitutional rights have serious practical implications. For example, in York State (as in other states) potential witnesses are routinely excluded from the courtroom so that their testimony will not be tainted by the testimony of other witnesses and thereby unfairly prejudice the defendant. The proposed amendment creates a victim's right not to be excluded from the proceedings. These interests inevitably must conflict, and a judge faced with this scenario would be forced to weigh a defendant's rights to a fair trial against a victim's new Constitutional right not to be excluded from the proceedings.
- *Some domestic violence victims are especially at risk:* We are also concerned about the potential impact of S.J. Res. 3 on domestic violence victims. Victim Services helps about 75,000 domestic violence victims each year, who provide compelling examples of why we cannot support S.J. Res. 3. Batterers frequently make false claims of criminal conduct against their victims. This is yet another weapon in the batterer's arsenal, and can result in an arrest even where a long, documented history of abuse against the true victim exists. These cases result in profound injustice; the victims are jailed, often their children are removed from their care, and the victims risks ending up with a criminal conviction.

Nevertheless, under S.J. Res. 3, it appears that the batterer would initially be accorded "victim" status and benefit from all of the new Constitutional rights. The same would be true in cases where domestic violence victims strike back at their batterers in self-defense.

Proponents of the amendment state that the power to create exceptions to the new rights in section 3 of S.J. Res. 3 would protect domestic violence victims in the domestic violence scenarios to which we refer. However, it remains totally unclear how these exceptions would be made, by whom, and according to what criteria. Numerous questions arise. Does the provision allow or require the creation of exceptions? At what point in the trial process would there be a ruling about this? How and when would domestic violence victims assert their status? Would they be able to do so without compromising their Fifth Amendment rights? What evidence would be sufficient to persuade a court that the defendant is a victim of domestic violence—particularly if there are no police records or orders of protection, as is often the case. These unanswered questions illustrate the difficulty of knowing, from the brief, general wording of S.J. Res. 3, whether the proposed rights would be meaningful and practicable or whether they would result in harm to some victims.

In conclusion, S.J. Res. 3 may be well intentioned, but good intentions do not guarantee just results. Victim Services remains wholeheartedly committed to advancing the interests and addressing the needs of victims. We believe much progress has been made in New York and other states, and that information about the implementation of victims' rights has only recently begun to emerge. Federal intervention is usually reserved for situations where the states need to be pulled along—but almost everywhere legislative frameworks of rights now exist and 33 states have passed state constitutional amendments. We have difficulty justifying the extensive resources needed to pass a Constitutional amendment when so much remains to be done in terms of enforcing existing victims' rights and providing the vital support services victims deserve. We believe that the amendment would at best be merely symbolic, at worst harmful to some of the most vulnerable victims, and meaningless for the majority of victims whose cases are not prosecuted.

Thank you for considering the concerns expressed in this letter and the points previously raised in our letter to you of June 9, 1998.

Sincerely,

GORDON J. CAMPBELL,
Executive Director.

NATIONAL NETWORK TO END DOMESTIC VIOLENCE,
Washington, DC, March 23, 1999.

Hon. ORRIN HATCH,
Chairman, Judiciary Committee,
U.S. Senate,
Dirksen Office Building,
Washington, DC.

DEAR CHAIRMAN HATCH: I write to apprise you of our continued opposition to the proposed constitutional amendment to protect the rights of crime victims. After careful review and consideration of S.J. Res. 6, we find that despite some minor changes since the 105th Congress our concerns with this proposed constitutional amendment have not changed.

The National Network to End Domestic Violence is a membership organization of state domestic violence coalitions from around the country, representing nearly 2,000 domestic violence programs nationwide. As you may be aware, many of our member coalitions and programs have supported the various state constitutional amendments and statutory enactments similar to the proposed federal constitutional amendment. And yet, we view the proposed federal constitutional amendment as a different proposition, both in kind and in process.

For a victim of domestic violence, the prospect of participating in a protracted criminal proceeding against an abusive husband or father of her children is difficult enough without the added burden of an unforgiving system. Prosecutors, police, judges, prison officials and others in the criminal justice system may not understand her fear, may not have provided for her safety, and may be unwilling to hear fully the story of the violence she's experienced and the potential impact on the impending criminal proceeding, sentencing and release of the defendant. Each of these potential failures in the system underscore the need for the criminal justice system to pay closer attention to the needs of victims. Unfortunately, S.J. Res. 6 promises much for victims, but guarantees little on which victims can count to address these practicalities.

Let me outline some of our concerns.

First, if a constitutional right is to mean anything at all, it must be enforceable fully by those whose rights are violated. The proposed amendment expressly precludes any such enforcement rights during a proceeding or against any of those who are charged with securing the constitutional rights. The lack of such an enforcement mechanism is a fatal flaw—a mere gift at the leisure of federal, state and local authorities.

Second, the majority of the existing similar state statutes and constitutional amendments have been on the books fewer than 10 years. Thus, given our very limited experience with their implementation, it will be many years before we have sufficient knowledge to craft a federal amendment that will maintain the delicate balance of constitutional rights that ensure fairness in our judicial process. Without benefiting from the state experience, we run the risk of harming victims. We must explore adequately the effectiveness of such laws and the nuances of the various provisions before changing the federal constitution. State constitutions are different—they are more fluid, more amenable to adjustments if we need to "fix" things. A change in the federal constitution would allow no such flexibility, thus potentially harming victims by leaving no way to turn back.

And, lastly preserving constitutional protections for defendants, ultimately protects victims. This is especially true for domestic violence victims. The distinctions between defendant and victim are sometimes blurred by circumstance. For a battered woman who finds herself thrust into the criminal justice system for defending herself or having been coerced into crime by her abuser, a justice system that fairly guarantees rights for a defendant may be the only protection she has. Her ultimate safety may be jeopardized in a system of inadequate or uneven protections for criminal defendants, as is likely with the enactment of S.J. Res. 6.

Chairman Hatch, these are concerns that compel us to exercise restraint before proceeding with a constitutional amendment. As you know, in this country each year, too many fall victim to violent crime. These crimes cause death and bodily injury, leaving countless victims—women, men, boys and girls—to pick up the pieces. Tragically, the criminal justice system is less a partner and more an obstacle to the crime victim's ability to attain justice. A constitutional amendment is not the answer for this problem. But, improving policies, practices, procedures and training in the system would help tremendously.

Like you, we are committed to ensuring safety for domestic violence victims through strong criminal justice system enforcement and critical services for victims. However, the resources that must be invested into the process of passing such an amendment and getting it ratified by the states could be better invested in training and education of our judiciary, prosecutors, police, parole boards and others who encounter victims and in changing the regulations and procedures that most adversely impact victims. For those of us working in the field of domestic violence, we know the harm that can be caused directly to victims when policies are pushed without some experience to know whether they will work. And, while this may seem an inconsequential concern, for a battered woman whose safety may be jeopardized by such swift but uncertain action, the difference may be her life.

Please understand that our opposition to S.J. Res. 6 is not opposition to working through the traditional legislative channels to deliberate these issues and to support legislative changes that will allow us to explore various ways in which we can provide victims the voice they deserve in the criminal justice system.

Thank you for your consideration. If you have additional questions, please do not hesitate to be in touch with me at 202–543–5566. We have appreciated your leadership on issues concerning domestic violence over the years and look forward to continuing to work with you.

Sincerely,

DONNA F. EDWARDS,
Executive Director.

DUKE UNIVERSITY SCHOOL OF LAW,
Durham, NC, March 23, 1999.

Senator PATRICK J. LEAHY,
Senate Judiciary Committee,
Dirksen Senate Office Building.

DEAR SENATOR LEAHY: I appreciated the opportunity to testify before the Judiciary Committee in April 1998 in opposition to the proposed Victims' Rights Amendment. During the past year, I have examined the assertions of supporters of the proposed Victims' Rights Amendment that it is necessary to protect the legitimate in-

terests of victims against what is sometimes called "trumping" by the constitutional rights of defendants. I conclude that those claims are clearly unfounded.

My research will be published later this year in the Utah Law Review in a symposium on victims' rights. I have prepared a somewhat more succinct version for consideration by the Judiciary Committee as it examines the proposed amendment further. I ask that this essay be made a part of the record on this amendment.

Because the proposed amendment is unnecessary, I hope that the Judiciary Committee will not support it. Amending the Constitution is too momentous an event to take unless such action is required. Moreover, if the amendment were to be approved, I fervently hope it will be modified by adding the provision offered by Senator Durbin last year that "Nothing in this article shall be construed to deny or diminish the rights of an accused as guaranteed by this Constitution."

Sincerely,

ROBERT P. MOSTELLER,
Professor of Law.

THE UNNECESSARY VICTIMS' RIGHTS AMENDMENT:[1] PROFESSOR ROBERT P. MOSTELLER, DUKE UNIVERSITY LAW SCHOOL

Those who advocate amending the United States Constitution should bear the burden of persuasion and must be able to justify their proposed amendment as necessary. Amending the United States Constitution is simply too momentous for any other standard to apply. After studying the claims of proponents, I conclude that the proposed Victims' Rights Amendment is *not necessary,* and therefore its proponents have failed to make their case.

Proponents make two basic types of claims. First, they argue that, regardless of the existence or nonexistence of defendants' rights, governmental officials ignore victims' rights found in federal or state statutes and state constitutional provisions.[2] Second, the Amendment's backers claim that either through the actual operation of defendants' constitutional rights or excessive deference to defendants' constitutional claims, victims are denied their established rights under statutory law and state constitutional provisions.[3] They sometimes make a third argument, which I want to deal with quickly. It is that national uniformity is required with respect to a fundamental set of victims, rights.[4] If absolute, formal uniformity is demanded, the argument for a constitutional amendment is valid to that extent. However, if some degree of variation is acceptable, then federal legislation setting standards for state legislation, buttressed by federal financial incentives would serve as an effective way to accomplish a type of "flexible uniformity." As demonstrated by "Megan's Law" on community notification, that mechanism can operate very effectively and could successfully encourage states to adopt a detailed group of victims' rights as well.[5] Indeed, specific aid and guidance in implementing rights is likely more important to their full enjoyment than is uniform national recognition of a minimal set of rights.[6]

Uniformity is not required or, for that matter, even preferred when it comes to establishing a set of victims' rights. Our collective thinking on the precise definition of victims' rights is in its infancy, and we are hardly ready to embed a set of largely unchangeable rights into the Constitution. Rather, patience is particularly appropriate because of the extraordinary political popularity of victims' rights, which will ensure that the issue will not be ignored.

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[1] A more detailed version of this essay with be published in 1999 Utah L. Rev.

[2] *See* Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution,* LA Times, July 6, 1998, at B5.

[3] National Victims Constitutional Amendment Network (NVCAN), Background Kit, p. 9 (April 1998) <www.nvcan.org.>.

[4] *See* Paul G. Cassell & Steven J, Twist, *Rule of Law: A Bill of Rights for Crime Victims,* Wall St. J., Apr. 24, 1996, at A15.

[5] *See* 42 U.S.C. § 14071 (1996) & 62 Fed. Reg. 39,009 (1997) (DOJ implementation guidelines).

[6] In their Op/Ed piece, Professors Tribe and Cassell cite a recent study that "victims' rights are more frequently denied to racial minorities and presumably other disfavored groups who are unable to assert their interests effectively. Only an unequivocal constitutional mandate will translate paper promises into real guarantees for all victims." Tribe & Cassell, *supra* note 2, at B1. Surely Tribe and Cassell cannot be arguing that when the issue is unequal protection of minorities as to state guaranteed rights, which is the issue examined in the study, the problem is the lack of constitutional protection. Protection against such racial discrimination is already explicitly in the Equal Protection Clause of the Fourteenth Amendment.

A. THE ASSERTED NEED TO CURE "OFFICIAL INDIFFERENCE"

No governmental bureaucracy operates perfectly, and the criminal justice system is hardly an exception. Given this context, it is preordained that existing victims' rights are not uniformly enforced, This is the result in substantial part of various institutional failures that may collectively be termed "official indifference."

In a recent commentary, conservative constitutional scholar Bruce Fein discussed this official indifference to victims' rights, noting that a federal constitutional right both is unnecessary and would provide no guarantee of effectiveness:

> * * * Nothing in the Constitution or in any Supreme Court precedent inhibits the enactment of state or federal laws that protect crime victims. Indeed, victims rights legislation is a staple of contemporary political life and seems destined to remain so. The beneficiaries command virtual universal sympathy, a fail-safe formula for legislative success. Crime victims need no constitutional protection from political overreaching.
>
> It is said by amendment proponents, however, that state judges and prosecutors often short-change the scores of existing victims' rights statutes. If so, they would equally be inclined to flout the amendment. The judicial oath is no less violated in the first case as in the second.[7]

Feins argument is simple and compelling. Enacting a federal constitutional amendment will not cure the failures by judges and prosecutors to follow existing laws. Indeed, if such "bureaucrats" are willing to ignore the requirements of existing, binding law that they have sworn to uphold, adding another layer of law supporting the same right has no necessary impact.

Significantly, the vast majority of the provisions in the proposed Victims' Rights Amendment fall into this category of correcting official indifference. Their enforcement does not conflict with any constitutional right of defendants, and therefore, violations occur as a consequence of governmental officials' either purposefully or inadvertently ignoring their existing legal obligations. The right to notice of all proceedings unequivocally falls into this category, as does the right of notice of release or escape of the defendant. Similarly, the right to be present and to be heard at many types of proceedings, such as hearings to determine conditional release from custody, acceptance of a negotiated plea, and parole can also receive protection either by demanding compliance by state officials with established laws or by passing such laws and promulgating appropriate administrative procedures, The problem with enforcing these victims' rights does not and cannot result from judicial protection of defendants' constitutional rights because such rights are nonexistent in these areas. Finally, as a matter of legal entitlement, the right to restitution may be granted as fully and effectively by statutory or state constitutional right as it can be by federal constitutional right, and the defendant convicted of an unlawful act against the victim has no basis for constitutional challenge to such an order.

Of course, one cannot know whether enshrining the right in a federal constitutional amendment would cause judges and prosecutors to take their oaths more seriously. Perhaps, but the impact is almost entirely speculative, The necessity of giving the additional dignity to these rights that a federal constitutional provision would entail is particularly questionable given the extraordinary popularity of victims' rights provisions. Normal political processes will, with time, effectively punish those administrative officials and even judges, many of whom are elected, who ignore the popular mandate to give victims greater notice and voice in the process.

Moreover, the existence of constitutional rights will not automatically eliminate official indifference to specific individual rights. A recent ABC news report described how thousands of people arrested in New York City between 1996 and 1997 for minor offenses, such as driving with a suspended license or selling sneakers on the street without a vender's permit, were subjected to strip searches that federal courts had previously ruled illegal under the Fourth and Fourteenth Amendments to the Constitution.[8] The existence of a federal constitutional right did not prevent this huge "bureaucratic snafu," which is likely to cost the city millions of dollars.

This official indifference to the Fourth Amendment rights of arrested suspects serves as a good point of departure for evaluating the impact of enacting a constitutional amendment for victims. While I have used the term "official indifference" to describe the failure of officials to enforce fully existing victims' rights, that term is perhaps too negative in characterizing motivation, Most officials are not disdainful of victims or their rights, as is sometimes the case in the highly contentious and occasionally combative relationship between defendants and those in law enforce-

[7] Bruce Fein, *Deforming the Constitution,* Wash. Times, July 6, 1998, at A14.

[8] *See* John Miller & Peter Jennings, *A Closer Look: Why People Were Strip Searched for Minor Crimes,* World News Tonight, April 23, 1998.

ment. Indeed, malevolence, or even true indifference towards victims' rights is largely unknown. Instead, I believe 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. However, the most important reason that existing victims' rights are not more fully enforced is the lack of resources and personnel needed to accomplish this new and additional set of tasks.

Since non-recognition of victims' rights results from the system's inability to find the time and personnel necessary to notify, consult, and protect, this problem can be overcome by greater resources in most instances and by administrative sanctions for failure to comply in those rarer cases that approach actual indifference. A commitment of resources and administrative will surely will exert a major impact in making victims' rights a reality for large numbers of victims; enacting a federal constitutional amendment, a largely symbolic act with respect to enforcing existing rights, is of speculative value by comparison. The proposed constitutional amendment's lack of direct effectiveness is particularly clear because the Amendment prohibits damage awards for violations of its provisions,[9] though damages are even available for violations of the Fourth Amendment rights of citizens, such as the improper strip searches cited earlier.

Although the amendment is not *necessary* to achieve enforcement of victims' participatory rights, such as notice and opportunity to be heard, I want to acknowledge that a federal constitutional amendment could operate as a helpful mechanism for enforcing victims' rights against public officials through federal class action litigation that I doubt many of its political supporters would endorse. Damage actions are barred by Senate Joint Resolution 3, but suits for declaratory and injunctive relief are not. Class actions to enforce participatory rights against states also appear available. The Minority Report on Senate Joint Resolution 3 indicates that, in response to inquiry, the Justice Department acknowledged that federal court orders against states, like those in prison reform litigation, would be possible.[10] Indeed, this "specter of extensive lower federal court surveillance of the day to day operations of state law enforcement operations" has led the Conference of Chief Justices to oppose the Amendment.[11]

One may imagine various scenarios for how the Victims' Rights Amendment, if enacted, might affect activities in the federal and state courts. The prospect of the lower federal courts' closely superintending the operations of state law enforcement to ensure that victims' rights are protected is one that might trouble traditional conservatives most. Nevertheless, federal supervision of state criminal proceedings is clearly a possible consequence of adopting the proposed amendment. Enforcing the Amendment in this fashion likely would have a substantial impact upon the effectiveness of victims' rights, but that fact does not make enacting the Amendment necessary to effective enforcement. Because of the political popularity of victims' rights, alternatives are available that less harshly impact federalism concerns. By contrast, such alternatives are generally unavailable to protect the rights of the politically unpopular.

B. ARGUMENTS THAT THE AMENDMENT IS REQUIRED TO COUNTER DEFENDANTS' RIGHTS THAT ALLEGEDLY TRUMP VICTIMS' RIGHTS OR TO ELIMINATE EXCESSIVE JUDICIAL DEFERENCE TO DEFENDANTS' INTERESTS

The second argument advanced by the Amendment's supporters centers on the courts' treatment of defendants' rights and takes two forms: first, that a federal constitutional provision is required to eliminate the ability of defendants to trump legislation and state constitutional provisions through invocation of federal constitutional provisions; second that the Amendment will eliminate the current excessive judicial deference to those constitutional provisions protecting defendants' rights. Here, I challenge the factual premise. I assert that victims' rights simply have not been thwarted by defendants' claiming constitutional protection. If a federal constitutional provision is required, those who support it should bear a burden of proof,

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[9] *See* S.J. Res. 3 (1999) at § 2 (stating that "[n]othing in this article shall give rise to or authorize the creation of a claim for damages against the United State, a State, a political subdivision, or a public officer or employee").

[10] *See* Minority Views of Senators Leahy, Kennedy and Kohl, S. Rep. No. 105–409, 105th Cong., 2d Sess. 70 (1998); Minority Views of Senator Thompson, S. Rep. No. 105–409, 105th Cong., 2d Sess. 49 (1998).

[11] Letter by Joseph R. Weisberger, Chief Justice of the Rhode Island Supreme Court and Chairperson of the Task Force on Victim Rights of the Conference of Chief Justices to Senator Orrin Hatch on Senate Joint Resolution 6, May 16, 1997, at 1–2.

not conjecture, that the problem of defendant "trumping" is real. However, they cannot produce the evidence.[12]

Let us look at four rights—to be notified, to be present, to be heard, and to receive restitution—and ask for the evidence that a constitutional provision is required. The first of these rights can be eliminated from the search. No one can argue that anything in the federal constitution protecting defendants inhibits the right of notice regarding any public criminal proceeding. Enforcement of three rights—to be present, to be heard, and to receive restitution—are thus of interest.

As to these three rights, I shall examine two related but distinct types of cases: (1) the reversing of a conviction under the federal constitution because a victim had exercised a state or federal right and (2) the invalidation of a victims' right under the federal constitution without an impact upon a criminal conviction. The first task, which one would assume should be easy for the Amendment's supporters, is to find ANY 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. I have challenged supporters of the amendment to produce such a case, but they have failed to produce even one.[13] Obviously, the type of significant body of law that would warrant the remedy of a constitutional amendment simply does not exist.[14] Moreover, the Amendment's supporters cannot claim that defendants or prosecutors would not be motivated or equipped to litigate these cases at the appellate level. If the cases cannot be found, and they cannot, the reason must be because they do not exist. No failure of motivation or explanation that the cases occurred but were not reported would logically explain their absence.

The second category for inquiry consists of cases where no conviction was reversed but instead where the victim's statutory or state constitutional right to a protection was ruled invalid because of a defendant's federal constitutional right. I challenged amendment supporters to produce cases in this category and received only one, *State ex rel. Romley* v. *Superior Court.*[15]

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[12] In an Op/Ed piece, Professors Tribe and Cassell quote from a report "that today 'large numbers of victims are being denied their legal rights.'" Tribe & Cassell, *supra* note 2, at B1. However, the National Victim Center Report that they cite does not show that defendants' rights prevented victims' rights from being enjoyed. All violations identified result from failures of officials to comply with legal requirements. In some instances, the legal structure in the states chosen did not even permit a testing of the possibility that defendants' constitutional rights were trumping victims' statutory rights. In the important area of the right to attend trial, the laws on witness sequestration in three of the four states involved in the study did not have a specific provision covering victims, and in the fourth state, a victim/witness was to be sequestered until after he or she testified as the first witness. There is no indication that judges failed to comply with the letter of the existing established law because of a valid claim by the defendant of constitutional rights or excessive deference to an invalid claim. Thus, the claim is only that state officials failed to enforce fully provisions in the law according to the reports of victims. *See* National Victim Center, Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims 88 (1996).

[13] The challenge was issued before I attended a symposium on victims' rights organized by Professor Cassell. Other conference participants included Steve Twist, member of the Executive Committee of the National Victims Constitutional Amendment Network, Professor Douglas Beloff, author of a new textbook on victims, and Professor William Pizzi, Also, in connection with the 1998 Senate hearings, Senator Leahy asked Professor Cassell to provide the appellate cases of which he was aware in which defendants successfully overturned their convictions based on the victim's presence in the courtroom or other state or federal victims' rights provision. Professor Cassell deferred response until the completion of a treatise on the subject with Professor Beloof and referred the Senator to a collection of cases by the National Victim Center. *See* Questions for the Record from Senator Leahy for the Hearing on S.J. Res. 44 on April 28, 1999, at 3. The National Victim Center listing contains no cases in this category or the one discussed below involving cases where victims' rights, rather than defendants' convictions, are "trumped" by federal constitutional provisions. The challenge was unanswered.

[14] The closest case I can find in any of the writings of Professor Cassell or the case listings by the National Victim Center/NVCAN to one that reverses a criminal conviction based on action enforcing a victim's right is *State* v. *Guzek,* 906 P.2d 272 (Or. 1991). In *Guzek,* a defendant's conviction was reversed because a citizen initiative was passed that permitted victim impact evidence to be introduced but no change was made in the death penalty statute. The state supreme court found the evidence irrelevant and reversed. However, the error is not one of federal constitutional stature. Indeed, *State* v. *Moore,* 827 P.2d 1073 (Or. 1996) decided the next year stated that a change in the statute rendered *Guzek* irrelevant. *State* v. *Muhammad,* 678 A.2d 164 (N.J. 1996) and *Noel* v. *State,* 960 S.W.2d 439 (Ark. 1998) both recognize that *Guzek* is a product of the nature of the state's own construction of its death penalty statute, not of federal constitutional law. The Majority Report on Senate Joint Resolution 44 indicates that enacting the amendment would not change the *Guzek* result but would leave determinations of relevancy of victim impact evidence to state determination. *See* S. Rep. No. 105–409, 105th Cong., 2d Sess. 29–30 (1998).

[15] 836 P.2d 445 (Ariz. Ct. App. 1992).

Romley fits the bill in one sense, but is beside the point in another. It fits in that a state constitutional right of victims—here Arizona's far-reaching right of victims to be free of discovery by the defense—was rendered ineffectively by a federal constitutional provision—the due process right to present a defense. However, the case is inapposite in that the proposed federal Victims' Right Amendment apparently would not affect the results, because in its present formulation, the Amendment does not protect victims against discovery or release of confidential information.[16]

More significantly, *Romley* presents one of the most powerful arguments against an aggressive form of the victims' rights movement, which I label its "Prosecutorial Benefit/Defendant Damage" dimension.[17] *Romley* appears to involve a classic case of a battering relationship in which the female spouse uses violence against her abusive spouse and is labeled, perhaps erroneously, the defendant. As the case recites:

> The defendant, not the victim, made the "911" call to the police at the time of the alleged incident, asking for help. * * * She requested help, according to the transcript of the call, because her husband was beating her and threatening her with a knife. When the police arrived at the home, they found the husband (victim) bleeding from a stomach wound allegedly inflicted by the wife (defendant) with a knife. A police report reveals that the victim has been arrested three times for assaulting the defendant and was convicted in Florida in 1989 for assaulting the victim.
>
> The defendant alleges that the stabbing of her husband was not an unjustifiable attack but an act of self-defense, The defendant claims that she has been the victim of horrendous emotional and physical abuse by her husband during their marriage; that the victim is a mental patient with a multiple personality disorder who, on the date of the alleged aggravated assault, was manifesting one of his violent personalities, a personality who was resisting "integration" during treatment by his psychiatrist and a Christian pastor.[18]

What the "defendant" sought but what the Arizona Victims' Rights Amendment protected was the psychiatric records that could have aided her in establishing the truth of her defense. As the Supreme Court of Arizona stated in ruling, that federal due process right required production of the records:

> [The Victim's Bill of Rights] should not be a sword in the hands of victims to thwart a defendant's ability to effectively present a legitimate defense. Nor should the amendment be a fortress behind which prosecutors may isolate themselves from their constitutional duty to afford a criminal defendant a fair trial.

Romley constitutes the only clear case where the federal Constitution "trumped" a state victims' right provision. If enactment of the proposed Victims' Rights Amendment were to change that result, it would constitute a very strong argument against, rather than in favor of, enactment. A domestic violence case like *Romley* shows the danger of using the label of victims' rights to deny procedural protections important to determining guilt. Here the identity of the true victim is profoundly uncertain, and a provision is dangerous and unwise that presumes conclusively that the person initially labeled as the victim by the prosecution is entitled to protections that would help alter outcomes.

The National Victims Constitutional Amendment Network (NVCAN) asserts that the defendant's constitutional right to a fair trial has been used to deny victims the right to be present.[19] This result is clearly possible under our present constitutional scheme. The right to a fair trial guaranteed under the federal Constitution might be denied by a victim's presence. Therefore, a judge would be correct in excluding a victim/witness from some part of the trial where that result would occur. How frequently does that conflict arise? I believe Professor Cassell correctly noted several

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[16] The 1995 proposal by the National Victims Constitutional Amendment Network contained a right of victims "to be free from unwarranted release of confidential information." William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems,* 32 Stanford J. Int. L. 37, 39 (1996). That provision did not make its way into S.J. Res. 3.

[17] *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 (1998). Perhaps the more appropriate term is "Defendant Damage" rather than "Prosecutorial Benefit" because the changes appear more directed at harming defendants' interests than at necessarily benefiting the prosecution.

[18] 836 P.2d. at 450.

[19] *See* NVCAN, *supra* note 3, at 9.

years ago that "[s]uch an argument seems unlikely in all but the most extreme circumstances."[20]

By allowing the exclusion of witnesses from the courtroom during the testimony of others, sequestration rules aim to keep witnesses from purposefully or unconsciously shaping their testimony to that of the earlier witnesses. Such rules are of ancient and venerable origin.[21] A jurisdiction may, however, decide that allowing victims who are also witnesses to be present throughout the proceedings is of greater value than the threat of tainting the victim/witness' testimony. To minimize the degree to which victims will be excluded, the first step a state should take is to make crystal clear that it considers the interests of victims in attending all aspects of judicial proceedings to outweigh the potential taint to the testimony of victims who are also witnesses. This decision is most effectively accomplished through a positive statement in the law governing the sequestration of witnesses, typically codified in Rule 615 of the jurisdiction's rules of evidence, that victims may not be excluded from the courtroom under the rule. A number of states have taken this action and excepted victims as a class from their sequestration rules.[22]

As one should reasonably expect, these evidentiary provisions have effectively allowed victims to sit in the courtroom throughout the proceeding. These provisions work because sequestration is generally a matter of statutory or common law.[23] I have found one case, *Martinez* v. *State,*[24] that may qualify as limiting victim access allowed under a specific rule based on constitutional principles, albeit state rather than federal constitutional principles.[25] In *Martinez,* the defendant challenged the

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[20] Paul G. Cassell, Balancing the Scales of Justice: The Case for and the Effect of Utah's Victims' Rights Amendment, 1994 Utah L. Rev. 1373, 1393.

[21] Wigmore traces the origin of the rule to the story of Susanna in the Apocrypha. *See* 6 Wigmore, Evidence § 1837 (Chadbourn rev. 1976). Two elders, who coveted Susanna but were rebuffed by her, falsely accused her of adultery with a young man whom they claim overpowered them and fled. Those assembled believed the accusation and were ready to punish Susanna, but Daniel asked first to examine the two accusers *separately.* They had claimed to have seen Susanna committing adultery in the garden. As each came to be examined, Daniel asked where in the garden had Susanna and the young man committed the adulterous act. The first answered under one tree, but when the other was brought in, he testified it happened under an entirely different tree. At that point those assembled saw that the accusers had lied and rose against them. *Id.*

[22] *See* Ala. R. Evid. 615(4) (victim or representative of victim who cannot attend exempt); Ariz. R. Evid. 615(4) (victim exempt); Ark. R. Evid. 616 (adult victim and guardian of minor victim exempt); Or. Rev. Stat. § 40.385 (1995) (victim exempt); N.H. R. Evid. 615(1) (victim exempt). Other states exempt victims but not through a blanket provision. *See* Fla. Stat. Ann. § 90.616(d) (West Supp. 1998) (victim, victim's next of kin, parent or guardian of minor child victim, of lawful representative exempt from exclusion "unless, upon motion, the court determines such person's presence to be prejudicial"); Okla. Stat Ann. tit. 12 § 2615(5) (West Supp. 1997–98) (victim, representative, or parent exempt "upon the motion of the state to bar such exclusion, unless the court finds such exclusion to be in the interest of justice"); Utah R. Evid. 615(1)(d) (exempting adult victims of crime "where the prosecutor agrees with the victim's presence"). Still other states forbid exclusion of the victim/witness after giving testimony. *See* La. Code Evid. art. 615(A)(4) Mich. Comp. Laws Ann. § 708.761; Wash. Rev. Code Ann. § 7.69.030(11). Presumably, enactment of the Victims' Rights Amendment would render unconstitutional all the provisions except those that grant victims a blanket exclusion from sequestration.

[23] The opinion of the Arkansas Supreme Court in *Stephens* v. *State,* 720 S.W.2d 301 (Ark. 1986) appears sensible and gives an example of when reversal might be required under federal constitutional principles.

> Inasmuch as the rule permitting the exclusion of witnesses originated with the legislature, we can conceive of no reason why the rule cannot be modified in the same manner, or by court rule if need be. We can suppose that there would be circumstances when the victim's presence throughout the trial could be seen as putting the fairness of the trial in jeopardy, as occurred in *Commonwealth* v. *Lavelle,* 277 Pa. Super. 518, 419 A.2d 1269 (1980).

In *Lavelle,* a failure to sequester witnesses upon defense request resulted in a reversal. The record did not reveal whether the witnesses had ever identified the defendant through pretrial identification procedures. Nevertheless, these witnesses identified the defendant, who was in the courtroom throughout, after they had heard police officers testify that he was the perpetrator and had been photographed in the bank where the crime occurred, and after some witnesses had heard other bank tellers identity the defendant. *See* Lavelle, 419 A.2d 1269, 1273–74 (1980). Those facts present the type of situation where our system of laws should require the sequestration of victims who are eyewitnesses. This is one of the rare cases where the defendant's constitutional right to a fair trial could and should overcome alleged victims' participatory rights interest in being present.

[24] 664 So. 2d 1034 (Fla. 1996).

[25] The court found the failure to sequester the witness during opening statement violated the state rather than the federal constitution, relying on Article 1, § 16(b) of the Florida Constitution, which gives victims the right to be present "to the extent that these rights do not interfere

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trial court's decision to permit the victim to remain in the courtroom during opening statement. The state supreme court ruled that, because the facts of the case were hotly disputed, the trial judge should have excluded the victim from the opening statement, the only part of the trial that the victim would have missed. However, the court found that the error was harmless, and thus affirmed the conviction.[26]

The more typical result is reflected by the experience in Utah where, as judged by reported opinions and anecdotal evidence at the trial court level,[27] the rule has been uniformly effective in allowing victims to remain in the courtroom throughout the proceeding. For example, in *State* v. *Beltran-Felix,*[28] the Utah Court of Appeals upheld its version of Rule 615 against constitutional challenge, even when the victim appeared as the last witness in the state's case, which is significant because the danger that sequestration rules seek to avoid only grows the later the witness appears in the trial.[29]

In the face of these substantial successes of statutory or rule provisions, Professor Cassell and NVCAN declare, not victory, but defe4at. Referring to *Beltran-Felix,* NVCAN notes that "[a]lthough the Court of Appeals agreed with the trial court that the victim properly attended the trial in this case, it pointedly refused to hold clearly that victims always have such rights."[30] Professor Cassell characterizes the nonabsolute decision as

> an intolerable burden on crime victims through in future cases [who] * * * will now have to decide whether to exercise their right to attend a trial at the expense of giving the defendant an issue to raise on appeal and to possibly even overturn his conviction. * * *
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> * * * The only way to clearly end this dilemma for crime victims is through a federal constitutional amendment.[31]

Professor Cassell also argues that Judge Matsch's treatment of victims in the Oklahoma City Bombing Case demonstrates the need for a constitutional amendment protecting victims.[32] The record. however, does not support the claim. While Judge Matsch's rulings imposed burdens and some uncertainties on the victims in their efforts both to attend the proceedings and to offer victim impact statements, three points are significant. First, the case does not show that a clear statutory entitlement to be present is ineffective. Federal Rule 615, in effect at the time of the trial, called for exclusion of witnesses upon motion of either party, and unlike a number of states made no exception for victims.[33] Although those opposing the rul-

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with the constitutional rights of the accused." *Id.* at 1035. *See also Gore* v. *State,* 599 So. 2d 978, 985–86 (Fla. 1992).

[26] *See Martinez,* 664 So. 2d at 1036.

[27] I can find no evidence that any trial court in Utah has violated the rule and excluded a victim from the courtroom. I have repeatedly asserted this claim to Professor Cassell, and he has given no indication that he is aware a violation has occurred since the rule became effective.

[28] 922 P.2d 30 (Utah Ct. App. 1996).

[29] *See* id. at 33–35. *See also State* v. *Cosey,* 873 P.2d 1177, 1181 (Utah Ct. App. 1994) (upholding victim's presence without reaching constitutional issue); *State* v. *Rangel,* 866 P.2d 607, 610–12 (Utah Ct. App. 1993) (same).

[30] NVCAN, *supra* note 3, at 17. The reference is to *Beltran-Felix, supra,* 922 P.2d at 35 n.6.

[31] *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings on S.J. Res. 6 Before the Senate Comm. On the Judiciary,* 105th Cong. 115 (1997) (prepared statement of Paul G. Cassell, Professor, University of Utah Law School). Since the Utah Rule 615 was modified to allow victims to be present, there is no reported opinion in which a court found exclusion required under the Constitution. Nevertheless, the possibility that such exclusion would occur in the interest of a fair trial is in Professor Cassell's judgment intolerable. On the other hand, Utah Rule 615 explicitly authorizes the prosecutor to exclude the victim without providing justification, which he finds "a largely theoretical point" because he is "unaware of any Utah prosecutor seeking to use this authority to exclude a victim from attending a proceeding that a victim wished to attend." Professor Cassell's 1998 Answers, *supra* note 13, at 3. In an earlier article, he defended giving prosecutors the power to deny victims the opportunity to be present "because effective prosecution is good for victims." Cassell, *supra* note 20, at 1393. Apparently, neither type of exclusion has ever occurred under Utah's present rule. I suggest that, with regard to the victim's interest of the victim in being present at trial, the possible exclusion by the court to ensure a fair trial should be no more intolerable than the possible exclusion by the prosecutor to assist with a successful prosecution.

[32] *See* Professor Cassell's 1997 Statement, *supra* note 31, at 105–13.

[33] An amendment to Federal Rule 615 that took effect December 1, 1998 makes explicit that it is to yield to contrary statutory authorization, but the change does not create a clear statutory right for victims to attend trials. That amendment provides in exception to sequestration for "a person authorized by statute to be present." The Committee Note to the proposed amendment states: "The amendment is in response to (1) the Victim's Rights and Restitution Act of 1990, 42 U.S.C. § 10606, which guarantees, *within certain limits,* the right of a crime victim to attend the trial, and (2) the Victim Rights Clarification Act of 1997 (18 U.S.C. § 3510)" (emphasis added).

ing argued that authority of the court to exclude victims under Rule 615 was eliminated by 42 U.S.C. § 10606(b)(4), that latter provision is qualified. It permits victims to be present "unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.[34] Second, the case demonstrates the enormous political power of victims. Twice, while the McVeigh case was pending, Congress passed legislation to aid victims to attend and view the trial. The ability of victims to secure their interests through popular political action could not be clearer.[35] Finally, the court did not ultimately bar any victim who wanted to attend the trial from doing so because they were subsequently to be a witness, and victims who attended the trial were not prevented from testifying as a result of their attendance. Although the court ruled that attending the trial might result in exclusion if attending the trial was found to affect testimony,[36] upon holding a hearing, the court ruled that the victims who witnessed the trial had not been affected and could testify.[37]

Perhaps more importantly, the conduct of Judge Matsch and the events of the Oklahoma City Bombing Trial simply do not support the basic position argued by Cassell that victims were denied their proper role. The bombing killed and injured hundreds, but it was also an act of domestic terrorism against America. Direct victims had an interest in participating, which was honored. As every observer of the trial knows, their voice was heard clearly and powerfully both during the trial of McVeigh and at his sentencing. For the country, the critical issue was whether justice was done under extraordinarily difficult circumstances of intense media scrutiny and great emotional tension. Judge Matsch performed admirably, if not perfectly, as be balanced his duties toward all interests, including society, his judicial duty to enforce the laws and the Constitution, and his prudential responsibility to avoid needless error.[38] He gave us all an expeditious, orderly, and fair trial. To cite

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Given that the Senate Judiciary Committee is proposing to amend the United States Constitution to grant an unfettered right of victims not to be excluded, it is remarkable that the Committee did not propose to grant that right in federal cases through rule. Could the reason that this obvious action was not taken be that enacting the rule might have proved effective and undercut the argument that an amendment was necessary?

[34] 42 U.S.C. § 10606(b)(4). A panel of the Tenth Circuit agreed that through this language, "[i]n essence, the statute acknowledges that the policies behind Rule 615 inherently limit the victim's right to attend criminal proceedings." *United States* v. *McVeigh,* 106 F.3d 325, 335 (10th Cir. 1996).

[35] *See* Chris Casteel, *Law Sets Bomb Victims, Families Free to Testify, View Trials,* Daily Oklahoman, Mar. 20, 1997, at 15; Jeffrey Toobin, *Victim Power,* The New Yorker, Mar. 24, 1997 at 40, 40–43.

[36] *See* United States McVeigh, No. 96–CR–69–M, 1997 WL 136343 at *2–*3 (D. Colo. Mar. 25, 1997 (order amending order under Rule 615) (reversing decision to exclude victim impact witnesses from trial but in order not to delay trial for litigation of constitutional issues raised by newly passed legislation, judge reserved for later individual determination whether victim impact witnesses who saw trial were prejudicially affected by it).

[37] *See* Penny Owen & Nolan Clay, *Judge Questions Victims, Allows Four to Testify,* Daily Oklahoman, June 5, 1997, at 12 (describing judge's rulings to permit victims who witnessed trial to give impact evidence).

[38] Professor Cassell unfairly criticizes Judge Matsch for failing to rule immediately that the Victims Rights Clarification Act, of 1997 was constitutional, requiring victims to "make a painful decision." Cassell, 1997 Statement *supra* note 31, at 111. A fair examination of the record shows that Matsch was reasonably trying to do justice and succeeded. *See* United States McVeigh, No. 96–CR–68–M, 1997 WL 136343 (D. Colo. Mar. 25, 1997).

As stated by Judge Matsch in his order, applying the new legislation to the McVeigh trial would have raised a novel but substantial constitutional issue, not from the Bill of Rights, but regarding separation of powers. The issue would have been raised by applying a new act of Congress to a specific on-going criminal case, Judge Match noting that this constitutional argument was raised in the House of Representatives debate. *See id.* at *2. *See also* 143 Cong. Rec. H1052 (statement of Rep. Delahunt). The legislation was signed on March 19, 1997. *See* United States McVeigh, No. 96–CR–68–M, 1997 WL 136343 at *2 (D. Colo. Mar. 25, 1997). In his order issued less than a week later on March 25, 1997, Matsch noted that in another six days later, the "trial of Timothy McVeigh is scheduled to begin," and "[a] debate now on the constitutionality of this new legislation would result in a delay of that trial." *Id.* at *3. He modified his order, lifting his ban on attending trial by victims who were expected to be witnesses in the sentencing phase. He then delayed until later resolution through a voir dire process whether those who chose to attend the trial had their testimony relevant to sentencing affected by witnessing it. *Id.* If not, they would have been able to testify even before the new law was passed. Under that circumstance, the new law would be irrelevant, and he could avoid the constitutional issue entirely. *Id.*

At the end of the guilt phase of the trial, Judge Matsch held a voir dire, and as noted earlier, ruled that no witness' testimony had been affected, eliminating any further issue as to their testimony. He thus avoided delay, which be said in his order was in the "public interest," *id.,*

Continued

this trial as a failure of justice for victims or as a clear illustration of the mistreatment of victims is both objectively unreasonable and, I believe, contrary to the experience of the American public, who shared with more direct victims and survivors a personal stake in the trial, its outcome, and its fairness.

If the Oklahoma City Bombing Case requires enactment of a federal constitutional amendment, that is because its proponents find the mere existence of uncertainty as to their role intolerable. Neither such uncertainty nor putting victims at some minor risk of creating an appellate issue for defendants with regard to sequestration provides a sufficient justification for a federal constitutional provision.

The reasonable interpretation of constitutional principles and of the caselaw is that in extreme factual situations, the due process right to a fair trial may require exclusion of witnesses. Those cases are rare and reasonably easy to recognize, but admittedly some uncertainty will remain in the few cases that approach the constitutional requirement of exclusion. However, the uncertainty is hardly intolerable given the limited period of time a victim needs to be excluded if sensibly called as the prosecution's first witness and given the importance of guaranteeing a fair trial to the defendant where the constitutional claim has arguable merit.

I want to amplify my position on the constitutional basis for sequestration, which goes to the lack of wisdom in granting victims a blanket right to be present when they could tailor their testimony to that of others who testify. Indeed, a byproduct of eliminating the possibility of sequestration may be to eliminate other checks on contrived testimony. In this discussion, I will concentrate on a group of cases where defendants are often innocent.

The mere fact that multiple alleged victims are also eyewitnesses does not mean that failure to sequester the victims/witnesses would be a per se constitutional violation of either the Sixth Amendment right to effective cross-examination [39] or the due process right to a fair trial. With respect to the right to effective cross-examination, the Supreme Court, I believe, would be very unlikely to declare this one imperfection in the right to cross-examine to be automatically constitutionally deficient. Constitutional violations of fair trial rights are understandably rather difficult to show and depend upon the precise circumstances of the case, including the impact of the failure to sequester on testimony or whether other avenues of defense attack and proof are available. Only in the atypical case and in context will failure to sequester multiple alleged victims/eyewitnesses result in a constitutional violation.

In terms of the innocent defendant, why is a rule allowing alleged victims/eyewitnesses to remain in the courtroom a bad policy and why is it particularly a bad constitutional rule? I want to concentrate on a very troubling class of cases in American criminal law where the identity of the true victim is sometimes ambiguous. That is the class of cases where *either* the police used excessive force toward a suspect, often the member of a minority group, *or* the police were the victims of an assault by that suspect and rightfully defended themselves with force. Two cases—Rodney King in Los Angeles in 1991 [40] and Abner Louima in New York City in 1997 [41]—provide excellent examples to examine. In both cases, we know that the police were the perpetrators, not the victims. In King's case, we know the truth because a bystander made a videotape of the beating; in Louima's case, our knowledge came from his punctured intestine, which permitted no pro-police explanation. However, in both cases, the true victim was on his way to being the defendant and the police officers the victims before the irrefutable proof got in the way.[42]

Imagine the alternative scenario under which the proof of police brutality did not surface, and Officers Koon and Powell and Louima's attackers would be cast as victims/witnesses. Further, recognize that there must be a substantial number of cases like King's and Louima's where fortuity or physical evidence does not prevent the police from covering their excessive violence with a charge against the true victim. These were not isolated incidents [43] or an example of a notorious case warping anal-

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and avoided entirely a constitutional issue from the case. He did the tough work of being a fair and reasonable judge.

[39] *See* Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation,* 85 Geo. L. J. 1691, 1699–1701 (1997).

[40] *See, e.g.,* Tracy Wood & Faye Fiore, *Beating Victim Says He Obeyed Police,* L.A. Times, Mar. 7, 1991, at A1.

[41] *See* Blaine Harden, *Angry Giuliani Orders Shake-up at Police Station; Alleged Assault on Immigrant "Reprehensible," Mayor Says,* Wash. Post, Aug. 15, 1997, at A.3.

[42] *See* Wood & Fiore, *supra* note 40; Harden, *supra* note 41.

[43] *See* Robert P. Mosteller, *Moderating Investigative Lies by Disclosure and Documentation,* 76 Or. L. Rev. 833, 945–46 (1997).

ysis. The literature in the field is replete with the seriousness of this problem of police abuse being covered by charges of violence by the suspect.[44]

Now consider the impact of a rule allowing all alleged victims/witnesses to be present during the testimony of all other alleged victims/witnesses and the further impact of a victims' rights constitutional amendment. As noted above, that there are multiple alleged victims/eyewitnesses does not mean that a rule of evidence or statute that guarantees victims' presence violates the Constitution, and the fact that the defendant is innocent has no automatic impact on this analysis. In providing procedural protection, the Constitution is not a precise instrument. Thus, if a domestic rule of evidence were to permit all alleged victims/witnesses to remain in the courtroom, the rule would typically pass constitutional muster, and in cases of police brutality, it would help the perpetrators of violence extend the injustice by convicting the true victim.

The outcome under the proposed constitutional amendment is worse, however. Even the rare cases where under our existing Constitution sequestration would have been required, the new provision would trump justice. Officers Koon and Powell would have the constitutional right to be present if preliminarily labeled the victims of Rodney King's violence regardless of whether other ways to ensure effective cross-examination and overall fairness existed. Contrived joint testimony may be even more effective if the case is prosecuted in a state where the proposed federal Victims' Rights Amendment has been supplemented with an aggressive state amendment designed to inhibit defense efforts.

Let us examine Arizona. Several years after a victims' rights amendment was approved there, the legislature attempted by statute interpreting the amendment to exclude police officers from the discovery protection provision discussed earlier in connection with the *Romley* case. The statute allowed discovery interviews "if the act that would have made him a victim occurs while the peace officer is acting in the scope of his official duties."[45] However, that legislation was ruled unconstitutional because it was inconsistent with the plain language of the amendment.[46] Thus, in Arizona, a police officer cannot be forced to provide, an interview.[47] Moreover, if the defense attorney comments on the victim's refusal to be interviewed, the trial judge is required to instruct the jury that the victim had the right of refusal under the state constitution.[48] The state supreme court also ruled that, absent a showing that the refusal was done "for or a reason or in a manner bearing on [the witness'] credibility,"[49] the trial court could properly cut off cross-examination about the refusal to be interviewed because the witness would be presumed to have acted solely because he or she had a constitutional right to do so.[50]

In the absence of a federal victims' rights amendment that gave alleged victims the constitutional right to be present at trial, the combination of conditions in an Arizona police brutality case might mean that sequestration was constitutionally required to assure a fair trial. If the proposed federal victims' rights amendment is adopted, police officers who use excessive force and cover that violence with charges that they were assaulted will have an important new weapon in their arsenal of deception. The federal victims' rights amendment and related state constitutional provisions, if enacted, could make the dangers even greater in that some presently available alternative methods to reveal contrived testimony might disappear. Thus, the passage of the amendment would increase the chances that sequestration was required for a fair trial and at the same time mean that as to both true and contrived victims sequestration could no longer be ordered under the Constitution.

NVCAN also claims that claims that the defendant's right to be free from cruel and unusual punishment has been used to deny victims the right to be heard at sentencing, and that the criminal's right to equal protection has been used to deny victims the rights to be heard at parole hearings.[51] However, the argument that the Eighth Amendment's cruel and unusual punishment provision forbids victim impact evidence is largely untenable after *Payne* v. Tennessee,[52] which held that victim impact evidence did not violate this constitutional provision.

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[44] *See, e.g.,* Paul Chevigny, Police Power: Police Abuses in New York City 51–62 (1969); Charles G. Oglegree, Jr., et al., Beyond the Rodney King Story 42–44 (1995).

[45] Ariz. Rev. Stat. Ann, § 13–4433(G) (West Supp. 1998) (formerly subsection (F)).

[46] *See State* v. *Roscoe,* 912 P.2d 1297 (Ariz. 1996). This is an example of a state victims' rights amendment producing unintended consequences.

[47] *See id.* at 1302–03.

[48] See Ariz. Rev. Stat. Ann. § 13-4433(F) (West Supp. 1998) (formerly subsection (E)).

[49] *State* v. *Taggart,* 942 P.2d 1159, 1163 (Ariz. 1997).

[50] *See id.* at 1161–63.

[51] NVCAN, *supra* note 3, at 9.

[52] 501 U.S. 808 (1991).

The Court in *Payne* did not decide whether "victim's family members characterizations and opinions about the crime, the defendant, and the appropriate sentence" were admissible because those questions were not presented.[53] Thus, *Payne* did not resolve whether a victim's family members could express their opinion regarding the proper punishment.[54] Similarly, the Court refused to eliminate limitations on the admissibility of victim impact evidence based, not on Eighth Amendment principles, but on relevancy. The relevancy of victim impact evidence depends on the structure of the jurisdiction's death penalty statute and the role defined for impact evidence in it,[55] and as a result, most relevancy objections likely could be eliminated by statutory modifications without any amendment.

Enacting the proposed constitutional amendment and giving victims the right "to be heard * * * at all proceedings to determine * * * a sentence" could be read as changing these relevancy rules, and could specifically be seen as overriding determinations in some jurisdictions that family members of murder victims are forbidden from expressing their opinion that the death penalty should not be imposed.[56] However, the drafters of Senate Joint Resolution 44 claimed that this constitutional right does not affect the relevance issue. Indeed, these drafters claim that the constitutional right to be heard at sentencing does not affect the relevance issue. The Majority Report asserts that while the victim may not be prevented from providing a statement when the sentence is mandatory and therefore the statement is irrelevant to the outcome,[57] the federal and state governments continue to have the ability to exclude such evidence by setting limits on what is considered relevant impact testimony, including the expression of an opinion on the "desirability or undesirability of a capital sentence."[58] Thus, if after *Payne,* victims' rights advocates continued to worry about the scope of permissible impact evidence and the possibility that such evidence could be "trumped" by state law, much the same concern would remain after enactment of Senate Joint Resolution 3. In capital cases, the victims' right to be heard would continue to be constrained by state and federal law; more generally, the right to be heard at sentencing would remain subject to legislative relevancy determinations except where, under traditional terminology, such testimony was irrelevant to the outcome of the sentencing proceedings in that the sentence was mandatory and such statements could have no impact on it.[59]

Finally, NVCAN's claim that equal protection had been used to prevent victims from being heard at parole hearings was correct for a time under one federal district court opinion. However, that opinion was soon vacated. In *Johnson* v. *Texas Department of Criminal Justice,*[60] a district court judge held that victim protest letters that were kept from the inmate and used to deny parole violated equal protection.

[53] *Id.* at 830 n.2.

[54] In *Booth* v. *Maryland,* 482 U.S. 496 (1987), the earlier Supreme Court case that *Payne* largely overruled, the Court had held opinions of the proper sentence by victim's family members inadmissible. Since that issue was not addressed in *Payne, Booth's* holding on this point remains technically valid. Nevertheless, the Oklahoma Court of Criminal Appeals has found that such evidence is admissible and has determined that *Booth* was implicitly overruled on this point. *See Ledbetter* v. *State,* 933 P.2d 880, 890–91 (Okla. Crim. App. 1997).

[55] *See State* v. *Moore,* 827 P.2d 1073 (Or. 1996).

[56] *See Robison* v. *Maynard,* 943 F.2d 1216 (10th Cir. 1991) (holding such evidence not proper mitigating evidence and not required to be admitted under Court's ruling in *Payne*).

[57] *See* Majority Report on S.J. Res. 44, S. Rep. No. 105–409, 105th Cong., 2d Sess. 28 (1998).

[58] *Id.* at 28–29 (citing specifically *Robison* v. *Maynard*).

[59] Marsha Kight, whose child was killed in the Oklahoma City bombing, is a well known advocate for victims' rights and the constitutional amendment. She testified at the 1997 Senate hearings on the amendment that as a death penalty opponent she supported a constitutional amendment so that she could give victim impact evidence. In her case, the statement would have included a statement regarding that opposition, and she had been told by the prosecution team she could not give under existing law. *See A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings on S.J. Res. 6 Before the Senate Comm. On the Judiciary,* 105th Cong. 71–72 (1997) (testimony of Marsha A. Kight). According to the Majority Report, after the amendment, Ms. Kight could not be prevented from testifying as long as she was satisfied not to express her opinion about the death penalty and thereby to have her statement used in support of the prosecutor's effort to secure the death penalty. However, any statement about her opposition to capital punishment would be just as inadmissible after the amendment as before, *see* Majority Report on S.J. Res. 44, S. Rep. No. 105–409, 105th Cong., 2d Sess. 28–29 (1998), and the government's decision to use victim impact evidence to support its goal of securing a death penalty would have continued to bar her from testifying. To be admissible, the testimony must be authorized by statute, which likely would have permitted admissibility under current law without a constitutional amendment. The predominant concern appears to be insuring that the legislature can protect prosecutorial interests and only to guarantee full "Participatory Rights" to be heard at sentencing where irrelevant to the legislatively determined result.

[60] 910 F. Supp. 1208, 1226–29 (W.D. Tex. 1995).

As is typical for trial court opinions unfavorable to victims' rights, the case was reversed.[61]

In sum, a body of caselaw documenting significant "trumping" of victims' rights by defendants and court officials using the federal Constitution simply does not exist. The best supporters of the proposed amendment can do is to suggest arguments why these cases cannot be found. However, the extraordinary step of amending the United States Constitution should require real documentation rather than conjecture, unfounded assertions, and outdated claims. When challenged to produce the cases of defendants' rights running rough shod over victims' rights, the Amendment's supporters have come up empty. When the question is whether to amend the United States Constitution, evidence must be produced, not just speculation.

C. THE (INTENDED) DAMAGE TO DEFENDANTS' RIGHTS FROM THIS UNNECESSARY AMENDMENT

One consequence of using a constitutional amendment rather than legislation to guarantee victims' rights is that defendants' constitutional rights can be undermined by enactment of an amendment. If this is the intended effect of the proposed Victims' Rights Amendment, then I must concede that the constitutional form is necessary. However, I hope that if this purpose is recognized, it will be rejected as substantively illegitimate.

I have already discussed at some length how the proposed amendment may impact witness sequestration issues, by affecting where the balance is drawn between defendants' fair trial rights and victims' presence. In addition, the Amendment would grant several more rights to victims that would alter present protections for the defendant. First, the proposed amendment contains the right "to consideration of the interest of the victim that any trial be free from unreasonable delay." Second, the Amendment establishes the right "to consideration of safety of the victim in determining any conditional release from custody relating to the crime." These provisions would almost inevitably threaten fairness to some defendants.

Although the defendant has the right to a speedy trial, he or she may waive that right explicitly or implicitly and seek a continuance to provide more time to prepare a defense or to allow the effects of pretrial publicity to dissipate. A victim's right to consideration of his or her interest in a speedy trial would, in some cases, alter a judge's treatment of the defendant's request for a delay. That denial may threaten the defendant's interest in a fair trial.[62] Similarly, a victim's right to consideration of safety in the decision to grant conditional release would alter the results in some number of bail decisions resulting in denial of release.[63]

These provisions giving victims' interests consideration in a "speedy trial" and in denying bail to defendants constitute changes in a balance of advantage that affect the victim, but also affect substantial interests of the defendant and may even alter the outcomes of cases. If these specific changes are to be made, they first should undergo rigorous debate an their 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.

However, as I have noted in an earlier article, the most significant substantive impact of the proposed amendment in denigrating defendants' rights may be in the reconceptualizing of criminal trials to be between a defendant and a victim, each

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[61] *See Johnson* v. *Rodriguez,* 110 F.3d 299 (5th Cir. 1997). For other cases following this pattern, *see, e.g., State* v. *Taggart,* 925 P.2d 710 (Ariz. Ct. App. 1996) (failure to permit cross-examination about victim's refusal to be interviewed pretrial as allowed by provision of the state's victim's rights amendment violated defendant's Confrontation Clause rights but was harmless), *rev'd, State* v. *Riggs,* 942 P.2d 1159, 1165–66 (Ariz. 1997) (en banc) (no violation of confrontation right); *State* v. *Muhammad,* 678 A.2d 164 (N.J. 1996) (reversing trial court ruling finding victim impact evidence statute unconstitutional).

[62] Professors Tribe and Cassell argue that the defendant's constitutional rights and victim's rights in the proposed amendment would coexist without conflict, using the claim that the two rights relating to a speedy trial "[b]y definition * * * could not collide, since they are both designed to bring matters to a close within a reasonable time." Tribe & Cassell, *supra* note 2, at B5. The argument is a strawman. The conflict is not between defendants' Sixth Amendment right to a speedy trial and the similar guarantee in the proposed amendment, but is rather between the defendant's fair trial rights when they require delay and the proposed victim's right to a speedy resolution.

[63] Denying release to those charged with crime may appear appealing to reduce additional victimization by the accused while awaiting trial. However, clearly not all those accused of crime are guilty. Scholars have noted the consistent tendency of more restrictive release conditions to result in disproportionate denial of release to members of minority groups. *See* Coramae Richey Mann, Unequal Justice: A Question of Color 167–71 (1993). Also, pretrial confinement may interfere with the defendant's ability to help develop a successful defense and thereby increases the prospects of conviction of the innocent.

with constitutional entitlements.[64] At a recent symposium on victims' rights, probably the most significant point was the acknowledgment by Professor William Pizzi, who supports the proposed amendment, that he finds such a reconceptualization quite possible. He expressed the hope that enactment of the Amendment would add a new weight to the balance and cause courts to eliminate the exclusionary rule for some Fourth Amendment violations:

> [W]here the crime is a serious one and the police have made a good faith mistake or have acted at most carelessly, is it fair to the victim to suppress evidence of the crime? A Victims' Rights Amendment suggests that victims of crimes of violence have an interest in a fair trial and it may cause the Court to rethink the exclusionary rule.[65]

As argued in earlier sections, the proposed amendment is unnecessary to accomplish what I consider its legitimate aims with respect to ensuring participatory rights of victims. It is, however, both specifically and generally dangerous in allowing substantive harm to important procedural protections presently accorded to defendants.

D. GIVING VICTIMS EQUALITY WITH DEFENDANTS IN THE CONSTITUTION

The Amendment's proponents often claim that since defendants are protected in the Constitution, victims should have rights guaranteed there as well.[66] Sometimes the Amendment's supporters highlight the apparent imbalance by noting that fifteen rights are enumerated in the Constitution to protect the accused and none specifically protect victims.[67]

The rhetorical argument is: flow could we possibly have federal constitutional provisions that protect those charged with crimes—the vast majority of whom are guilty and many of whom have committed horrible offenses—and not give similar protection to their innocent victims? This is a superficially attractive argument that engenders great popular political appeal. However, this claim mistakes the fundamental reason for embedding a principle in a constitutional amendment. Indeed, the enormous political popularity of the argument almost by itself refutes its validity as an argument for amending the Constitution.

The major purpose of a constitutional amendment of the type considered here is to protect the despised, the politically weak, and insular minorities against the whims of the political majority.[68] Victims and victims' rights do not fall into any of these categories; they are extremely popular politically. That is not the case with criminal defendants. If the protections and the advantages afforded criminal defendants in the Constitution are eliminated or "equalized" by the Victims' Rights Amendment, there will be no political majority passing legislation and appropriating money to provide offsetting protections for defendants. Without the proposed amendment, the political majority can and will protect victims. Thus, the "imbalance" in the Constitution must remain if anything approaching a balance is to be achieved at the end of the process, after the political forces have had their impact.

E. CONCLUSION

The above analysis demonstrates that the proposed Victims' Rights Amendment is not necessary to achieve the goals of its advocates. My position is far from radical. Senator Hatch, who nevertheless last year supported the proposed Amendment, has stated a similar view:

> In conclusion, I am strongly in favor of victims' rights, and believe a Federal constitutional amendment to be an appropriate national response. "Appropriate," however, does not, in my view mean "necessary." I believe that many of the objectives of the proposed amendment could in fact be accomplished through a Federal statutes, State statutes, or State constitutional amendments.

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[64] *See* Mosteller, *supra* note 39, at 1710–11 (noting that the ancient statement of preference that it is better that ten guilty defendants erroneously escape punishment than that one innocent defendant be punished is more difficult to maintain if the state also recognizes the constitutional rights of victims against the state).

[65] William T. Pizzi, Rethinking Our System 9 (Rough draft, Sept. 3, 1998) (on file with Utah Law Review). This view was reiterated during the victims' right symposium at the University of Utah. Professor Pizzi has reoriented his paper for final publication, but he authorized me to quote and cite his initial draft.

[66] *See* Cassell & Twist, *supra* note 4, at A15.

[67] *See, e.g.,* Dianne Feinstein, *Senate Judiciary Committee Passes Kyl–Feinstein Crime Victims' Rights Constitutional Amendment,* Press Release, July 7, 1998, available in Westlaw, Allnews file.

[68] *Cf. United States* v. *Carolene Products Co.,* 304 U.S. 144, 152 n.4 (1938).

> Indeed, our experience with State constitutional amendments is comparatively young. It may well be better to allow the jurisprudence to develop on these before we take the momentous step of amending the Federal Constitution.
>
> Finally, I note that a statutory approach would carry less peril of upsetting established State constitutional amendments now taking root to guarantee the rights of crime victims. A statute would also be more readily amendable should experience dictate that changes are needed, and, of course would not preclude the later adoption of a constitutional amendment if the statute indeed proved insufficient or unable to protect the rights of victims. * * * [69]

Under this set of affairs, the Constitution should not be amended.

DIANA UNIVERSITY,
SCHOOL OF LAW BLOOMINGTON,
Bloomington, Indiana, March 23, 1999.

The Hon. PATRICK J. LEAHY,
Ranking Minority Member, Committee on the Judiciary, U.S. Senate Washington, DC.

DEAR SENATOR LEAHY: I have recently completed a new article on the problems presented by the proposed crime victim's amendment to the Constitution of the United States. The article, *Revisiting Victim's Rights,* will appear in the Utah Law Review's June, 1999 issue.

I understand that the Committee on the Judiciary is holding hearings on the amendment on March 24, 1999. I am sending you a short summary of my arguments concerning the role of such an amendment under our Constitution, with a request that the summary be placed in the record of the Hearings as a statement in opposition to the amendment.

Thank you for your consideration and all your work in opposing the proposed amendment.

Sincerely,

LYNNE HENDERSON,
Professor of Law.

SUMMARY OF ARGUMENTS CONTAINED IN "REVISITING VICTIM'S RIGHTS" BY LYNNE HENDERSON FORTHCOMING, 1999 UTAH LAW REVIEW

The proposed victim's rights amendment to the Constitution of the United States has undergone numerous revisions since it was first introduced, on such continuously shifting ground, it is difficult to criticize any one provision, because those provisions keep changing. More general criticisms, however, are possible. Indeed, any victim's rights amendment holds grave implications for constitutional law, practice, and crime victims themselves. Urging caution and painting to flaws does not indicate lack of care for crime victims; rather, it is essential before we embrace such a major change in our fundamental charter of government.

1. OUR CONSTITUTIONAL SYSTEM PROTECTS INDIVIDUALS AGAINST GOVERNMENT INTRUSIONS; GOVERNMENT AID TO INDIVIDUALS IS LEFT TO THE POLITICAL PROCESS

Constitutional rights for individuals are primarily those that limit the states power to interfere with their liberty. The Bill of Rights and the Fourteenth Amendment contain restraints on the state's power over individuals, with few exceptions.[1] Our history and traditions, as well as Supreme Court decisions, have seldom recognized positive entitlements from the government. On those rare occasions where a constitutional right obliges the government to do something, it is seen as necessary to preserving a negative right against government or to ensure fairness in deprivation of statutory or constitutional rights. Thus, the Sixth Amendment's right to counsel provision requires government to provide counsel for indigent defendants; due process requires a hearing before an individual is denied a liberty or property interest such as welfare.

The proposed victim's rights amendment would be unique in requiring the government to involve private parties in court proceedings that do not involve the government's attempt to deprive these parties of a life, liberty or property interest, perhaps with the exception of an interest in restitution. In the instance of victims who

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[69] Additional Views of Senator Hatch, S. Rep. No. 105–409, 105th Cong., 2d Sess. 46 (1998).

[1] The Seventh Amendment right to a jury trial in civil suits could be said to embody a positive claim on the state's resources.

are not witnesses, including the survivors of a homicide victim, the government may make no demands whatsoever on these victims, yet the victims would have a right to participate in all proceedings related to custody of the offender.

2. VICTIMS OF CRIME ARE NEITHER POLITICALLY POWERLESS NOR IN NEED OF PROTECTION FROM MAJORITY TYRANNY

If a majority in our democracy support a policy or approach, there is nothing to prevent it from acting on that preference beyond certain constitutional limitations. Thus, a major reason for protecting individual rights in our constitutional system is to ensure political participation and to prevent abuses of individuals by majorities who disagree with or are prejudiced against them.

The facts that a majority of states have victim's rights amendments, that all states have legislation responding to victim concerns, and that the political process is receptive to victims are strong indications that victims have been extremely influential in the political process. The fact that a majority supports some kind of rights for victims means that those rights can he achieved through the political process, including legislation and election of prosecutors, judges, and legislators responsive to victims' concerns. Indeed, no one can argue with a straight face that legislators and government agencies have been deaf to victims, concerns about defining crimes, determining sentences, limiting probation and parole, or providing notice of the release of offenders. Victim access to the process has hardly been thwarted by a hostile majority.

Victims of crime are hardly an insular minority, nor are they the victims of prejudice and hostility. Rather, it is those charged with or convicted of crimes who are disliked and denied access to the political process. They have no organized lobbying group, felons in a number of states have no right to vote, and so on. Special treatment of victims under the constitution is not necessary to insure that their interests be preserved or recognized.

3. THE CONSTITUTION GIVES THE STATES AND FEDERAL GOVERNMENT THE POWER TO ENACT AND ENFORCE CRIMINAL LAW, AND A VICTIMS RIGHTS AMENDMENT WOULD ABROGATE THAT POWER

Although Prof. Tribe has stated that "The ultimate concern of the criminal justice system ought to be with the victim," neither our history or our practice would support such a claim. The concern for negative liberties against the government contained in the Constitution stems in large part from the government's monopoly on the use of force and the criminal law. Crimes are legally defined as offenses against the community and the state, even though individuals are affected. The state and community are negatively affected by crime, and the criminal law is the community's response. The community has a strong interest in deterring and punishing crime apart from any individual victim's interests.

No serious scholar would advocate a return to reliance on private prosecutions and private enforcement of the criminal law for a number of reasons. The values of uniformity, certainty, coherence, and equal application of the law require that it not be enforced in an ad hoc manner, depending on the preferences of individual victims. In criminal cases, the state bears the burden of investigating, prosecuting, punishing, and executing offenders; individual victims do not bear these costs beyond paying their taxes, and perhaps incurring expenses for trials. Yet the amendment would give victims special claims on these resources.

4. THE AMENDMENT WOULD LEAD TO CONFUSION AND INCREASED LITIGATION ABOUT THE CONTINUING EXISTENCE OF RIGHTS FOR DEFENDANTS

Sponsors of the amendment like to point out all the provisions of the Constitution that give rights to the accused and contrast these provisions with the absence of provisions for victims. Again, many of the provisions of the Fourth, Fifth, Sixth, and Eighth Amendments are based on concerns about the abuse of state power over individuals. Advocates of the victim's rights amendment are quite clear in their opposition to certain Supreme Court rulings aimed at preserving Fourth, Fifth, Sixth, Eighth Amendment rights.

A victim's rights amendment at a minimum would create conflicts between the rights of defendants and the rights of individual victims. Courts would be faced with "balancing" in a number of conflicting rights cases. For example, courts would have to balance a defendant's right to confrontation against a victim's right to make a statement at a custody hearing. "Balancing" rights has been widely criticized for the ad hoc nature of such decisions and this approach certainly would leave important decisions to judges that might better be made by the elected branches of state and federal government.

S.R. 44 states that a victim's rights may only be abridged if there is a "compelling" reason. Under the compelling interest rationale, courts could he expected to decide that victim's rights "trump" defendant's rights in all cases. At a minimum, the compelling interest language puts a thumb on the scales weighing in favor of victims at the expense of important Bill of Rights provisions that have protected us all against government abuses for over 200 years.

5. THE ARGUMENT THAT CRIME VICTIMS SHOULD BE TREATED WITH DIGNITY AND RESPECT DOES NOT DISTINGUISH CRIME VICTIMS FROM OTHER VICTIMS OF PRIVATE OR PUBLIC WRONGDOING

It should go without saying that all persons who are involved in legal processes should be treated with "equal dignity and respect." Thus far, victims of racism and private prejudice have no *cons—titutional* claims against private parties, despite the injurious effects of these practices. Individuals harmed by war, wrongful internment, or government malfeasance have no *constitutional* rights against the government in most instances. Providing a special amendment for one group of citizens and privileging them above those who have been injured by another's negligence or by the government itself is not justifiable under the theory of equal concern and respect.

6. THE AMENDMENT COULD APPLY TO LARGE NUMBERS OF PEOPLE WITH PLAUSIBLE CLAIMS OF VICTIMIZATION WHILE SIMULTANEOUSLY EXCLUDING MANY VICTIMS

As self-evident as "victim of crime" or "victim of violent crime" may initially appear, the status of those claiming to be victims is not that easy to establish. The amendment may create incentives for some to make victim-claims that are plausible and it will be difficult to draw lines.

If harm or trauma are the definitive concerns of victim groups, then pressures on legislatures to include a number of people as victims for the purposes of the amendment will grow. The expansion of victim impact statements in death penalty cases to include family members and friends ought to make it clear that lines are not easily drawn.

In the case of violent crimes such as robbery, rape, assault with a deadly weapon, as well as homicide, issues of "co-victimization" arise.[2] Family, friends, and coworkers can suffer trauma from violence against someone they know; moreover, violent crime can cause trauma throughout a community. Witnesses to terrible crimes suffer trauma. Children growing up in violent homes suffer trauma. All these groups—and more—could make claims to be victims entitled to rights.

This line blur further when victims are also offenders: Robert Mosteller's article in the *Georgetown Law Journal,* points out the difficulties of sorting through who is a victim at a given time, using the Rodney King case as an example. King was beaten brutally, but he also was a "criminal"—he evaded the police, he was driving recklessly, etc. He tried to defend himself, so he was guilty of assault. King—and Officers Koon and Powell at least—could claim rights against each other under this amendment. How would this be resolved? Other examples include the battered woman or abused child who strikes back at the person who has assaulted her. A batterer would be able to obtain important information and to invoke the criminal process to maintain control over his partner or child under this amendment.

Under current versions, the amendment appears not to give crime victims rights until there is an arrest. Do these rights remain if the prosecution decides it cannot or does not want to proceed?

Determining if and when someone qualifies as a "victim" presents other difficulties: Although several proponents of the amendment opine that rape victims will be better off because they will have "rights', there is no grounds to believe this claim: What it takes to be a "real" rape victim is affected not at all by this amendment. Given the skepticism that exists about the veracity of rape charges even today, a woman may not be able to persuade authorities that she is indeed a victim, much less see the case got to the point where charges are filed and her "victim's rights" attach.

7. THE ARGUMENT THAT THE PROCESS "TRAUMATIZER" VICTIMS CANNOT JUSTIFY THIS AMENDMENT

One of the humane impulses behind this amendment is to limit trauma to victims and to create a "therapeutic" vision of the criminal process, to spare victims such

[2] The term is from a book by an advocate for the amendment, Deborah Spungen. *See* Spungen, *Homicide: The Hidden Victims* 9 (1998).

trauma. It does seem "only fair" that the victim be allowed to relate the trauma to officials. But *when* and under what conditions a victim should speak is not at all clear. The amendment apparently gives some opportunity to say something at various stages of the process, but it does not provide for an unchallenged, unexamined, or empathic hearing. Rather, it appears that the amendment will necessarily be constrained by what is legally relevant.

Moreover, the persistence of the theory that all testimony is "cathartic" is unsupported by empirical evidence. The movie version of cure after one cathartic moment is a fantasy. For trauma narrative to be useful for healing, it must take place at the right time, under the right circumstances, with a trained therapist or support group; it may require repeated telling under controlled conditions to be therapeutic. The essence of law is judgement about facts and normative issues, not psychotherapy. A victim's testimony at legal proceedings must serve to aid understanding and evaluation of relevant legal considerations.

8. ASSUMING PROSECUTORS COULD REPRESENT VICTIMS IN ENFORCING THEIR RIGHTS UNDER THE AMENDMENT IS ERRONEOUS

If victims are to have constitutional rights, questions of representation are sure to arise. Indigent victims will not be able to afford counsel, although they may be in most need of counsel to aid them in dealing with a sophisticated legal system. But providing crime victims with counsel, as is done for indigent criminal defendants, would be expensive. Accordingly, advocates of the amendment, including prosecutors, often assume prosecutors can effectively represent victims' interests.

This assumption is erroneous. Although prosecutors and victims have some interests in cooperation, their interests can diverge dramatically. There is a potential for conflicts of interest between the victim and the prosecutor at every stage of the proceedings. If a surviving family member of a homicide victim opposes the death penalty, and the prosecutor determines that her ethical responsibility is to seek the death penalty in a given case, the prosecutor cannot represent the survivor's interests in avoiding capital punishment for the offender.

Prosecutors have a duty to see that justice is done and to represent the community and state's interests in criminal cases. The victim might not share these interests. For example, some jurisdictions have adopted mandatory prosecution policies in domestic abuse cases.[3] Many domestic abuse victims do not want the perpetrator prosecuted or jailed; they simply want the abuse to end. But the community has an interest in punishing batterers in order to send the message that battering is a crime and will be punished, in order to gain some ability to force batterers to reform, and to prevent future battering incidents or even deaths. The community also has interests in lessening the effects on children of violence in the home, while the victim may have economic and personal reasons other than fear of retaliation to decline prosecution. But under a mandatory prosecution system, victims could be subpoenaed and jailed for contempt by prosecutors and courts. Thus, the prosecutor is not representing the victim's interests or wants.

In instances where the prosecutor believes she cannot prove a case beyond a reasonable doubt, she has an ethical obligation not to pursue the case. Lest this seem far-fetched, recent revelations of prosecutorial failures to honor this obligation in Chicago, San Diego and elsewhere should make it clear that the obligation is an important one to society, first to make sure the innocent are not wrongly convicted and second, to make sure that those who are guilty are apprehended and punished. If the victim disagrees, then the prosecutor cannot represent the victim.

The role of counsel for victims of course is unclear at this time, but those who would adopt this amendment ought to be explicit about representation of victim's interests.

9. CONCLUSION

States and Congress are currently experimenting with statutory and state constitutional formulations for victims' rights and entitlements. We do not know yet which works best and are most helpful to victims, nor do we have enough information about what helps victims recover. It is far too early to enact a constitutional amendment without knowing anything empirical and without a stronger constitutional case for the amendment.

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[3] This discussion is based on Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions,* 109 Harv. L. Rev. 1849 (1996).

CONFERENCE OF CHIEF JUSTICES,
OFFICE OF GOVERNMENT RELATIONS,
Arlington, VA, March 19, 1999.

Re: Senate Joint Resolution 3, "Proposing an amendment to the Constitution of the United States to protect the rights of crime victims"

The Hon. JOHN ASHCROFT,
Chairman, Subcommittee on the Constitution, Federalization and Property Rights, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN ASHCROFT: The Conference of Chief Justices (CCJ) has an ongoing Task Force on Victims' Rights, which I chair, to consider Congressional proposals to protect the rights of crime victims. By letter dated May 16, 1997 to Chairman Hatch we commented on S.J. Res. 6 in the 105th Congress. We recently were informed that the Subcommittee on the Constitution, Federalization and Property Rights will hold a hearing on S.J. Res. 3 on March 24, 1999. We would hope that you would enter this letter in the record of your hearing and consider our views as you process this legislation.

As we stated in 1997, CCJ is in favor of according the victims of crime all rights that are consistent with the paramount duty of insuring public safety by the prosecution of criminal offenders. CCJ applauds the noble goals of S.J. Res. 3 as we did its predecessor, S.J. Res. 6. However, we remain concerned with the federalism issues presented in S.J. Res. 3.

The CCJ concurs with the recommendations of the U.S. Judicial Conference regarding a statutory alternative to this issue. In its most recent official position (statement of U.S. Chief Judge George P. Kazen before the Committee on the Judiciary of the House of Representatives, June 25, 1997), Chief Judge Kazen stated, " In the event that Congress chooses to affirmatively act on the issue of victims' rights, the Judicial Conference would strongly prefer that Congress pursue a statutory approach to this issue as opposed to a constitutional amendment." It is their and our position that a statutory provision enacted by Congress would give the federal judiciary a more measured opportunity to refine untested legal concepts and rights in order to develop a body of precedent that would pave the way for an eventual possible constitutional amendment.

As you know, all states have some type of statutory guarantee for the protection of victims' rights, most of which have been enacted recently. At least 31 of the states also have constitutional provisions and these enactments provide victims with the opportunity to be heard at the various stages of criminal litigation, particularly at the point of sentencing and in respect to release on bail or on parole. More states are considering further constitutional changes. If the sponsors of S.J. Res. 3 are searching for a single settled law governing victims, the goal will not be achieved through a Federal Constitutional Amendment. Preempting each State's existing laws in favor of a broad Federal law will create additional complexities and unpredictability for litigation in both State and Federal courts for years to come. We believe that the existing extensive state efforts provide a significantly more prudent and flexible approach for testing and refining the evolving legal concepts concerning victims rights.

The Conference cannot emphasize too strongly our great concern with creating the potential for extensive Federal court surveillance of the day to day operations of State law enforcement operations in this area. It is almost a forgone conclusion that if a Federal victims rights constitutional amendment is enacted, then there would be an increase in oversight by the lower Federal Courts of such issues as :

- A definition of who is a "victim";
- A conflict between the right "to reasonable notice of, and not to be excluded from, any public proceedings relating to the crime" and the common law rationale for witness sequestration;
- The implications of the amendment for the numerous States where juvenile proceedings are kept confidential.

There are also numerous practical questions about the ancillary costs of a Federal constitutional amendment for the State court systems. For instance, it is not clear which State entity would be responsible for the notice requirements proposed by S.J. Res. 3. An Amendment also raises resource issues for States handling indigent crime victims and their need for court-appointed counsel. All of these issues eventually would involve increased conflicts between State and Federal judiciaries similar to the habeas corpus litigation of the past.

Another grave concern of the Conference is that since damages against state and federal officials are prohibited under S.J. Res. 3, an alternative remedy for victims would be to seek injunctive relief against state officials in federal courts. This type

of litigation is reminiscent of federal civil rights cases under 42 U.S.C. 1983 (See *Pulliam* v. *Allen,* 452 U.S. 522 (1984), which were only recently modified by Congress to limit abuses (Sec. 309 of S. 1887, P.L. 104–317).

In the event that the Senate is determined to embark upon the process of a constitutional amendment, the CCJ would suggest that its provisions be applicable only to federal criminal proceedings. In this way experience would be gained within the federal judiciary concerning the identification of and solution to problems that would invariably arise.

We recognize that the present draft of the amendment pending before the Senate would be applicable both to the federal judiciary and to the states. Section 3 provides that "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." The Conference notes that this is a change from S.J. Res. 6 which also allowed state legislative implementation of the Amendment. We would urge your Subcommittee to review this section and allow the state legislatures to implement this article with respect to state proceedings. Such power is more appropriately exercised by state legislatures within their respective jurisdictions.

The Conference would further urge your Subcommittee to include language that would prohibit federal judicial oversight of the implementation of this article save by the Supreme Court of the United States through its discretionary review of state courts by writ of certiorari.

To summarize our comments CCJ suggests, alternatively:

(1) That victims' rights be protected in the federal system by a statutory enactment;

(2) That if a constitutional amendment be proposed, it be applicable only to federal judicial proceedings;

(3) If S.J. Res. 3 is to be proposed by Congress that implementation of the article be enforced within the states only by state legislative action; and,

(4) That federal judicial oversight of interpretation of the article be limited to discretionary review of the state court action by the U.S. Supreme Court by writ of cretiorari.

On behalf of the Conference of Chief Justices, I thank you for your consideration of the suggestions which are set forth in this letter. I would further volunteer myself and other members of the Conference of Chief Justices to be available to appear and testify at any further hearings conducted by your Subcommittee on this pending resolution.

Very truly yours,

CHIEF JUSTICE JOSEPH R. WEISBERGER,
Supreme Court of Rhode Island Chairperson, CCJ Task Force on Victim Rights.