

STATEMENT

OF

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BEFORE

THE HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON THE CONSTITUTION

ON

THE VICTIM'S RIGHTS AMENDMENT

ON

MAY 1, 2015

WASHINGTON, D.C.

I. INTRODUCTION

Mr. Chairman and Distinguished Members of the Subcommittee:

I am pleased to submit testimony in support of House Joint Resolution H.J. Res. 45.

Introduced by Representative Trent Franks from Arizona, House Joint Resolution 45 is a proposed amendment to the United States Constitution that would protect crime victims' rights throughout the criminal justice process. The Victims' Rights Amendment ("VRA") would extend to crime victims a series of rights, including the right to be notified of court hearings, the right to attend those hearings, and the right to speak at particular court hearings (such as hearings regarding bail, plea bargains, and sentencing). Similar proposed amendments have been introduced in Congress since 1996.

In my testimony, I attempt to comprehensively provide both a justification for the amendment as well as a description of what it would accomplish.

Following this introduction, Part II provides a brief history of the efforts to pass the Victims' Rights Amendment.

Part III discusses normative objections to a constitutional amendment protecting victims' rights — that is, objections to the desirability of the rights. This 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 all lack merit. I conclude by refuting the prosecution-oriented objections to victims' rights, which revolve primarily around alleged excessive consumption of scarce criminal justice resources. These claims, however, are inconsistent with the available empirical evidence on the limited cost of victims' rights regimes in the states.

Part IV considers what might be styled as justification challenges—challenges that a victims' amendment is unjustified because victims already receive rights under the existing amalgam of state constitutional and statutory provisions. This claim of an "unnecessary" amendment misconceives the undeniable practical problems that victims face in attempting to secure their rights without federal constitutional protection.

Part V 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.

Part VI provides a clause-by-clause analysis of the current version of the Victims' Rights Amendment, explaining how it would operate in practice. In doing so, it is possible to draw upon an ever-expanding body of case law from the federal and state courts interpreting state victims' enactments. The fact that these enactments have been put in place without significant

interpretational issues in the criminal justice systems to which they apply suggests that a federal amendment could likewise be smoothly implemented.

Part VII gives an illustration of a recent case in which the Amendment would have made a difference for crime victims.

Finally, Part VIII draws some brief conclusions about the project of enacting a federal constitutional amendment protecting crime victims' rights.

For background purposes, I am the Ronald N. Boyce Presidential Professor of Criminal Law from the S.J. Quinney College of Law at the University of Utah and a former U.S. District Court Judge from the District of Utah (2002 to 2007). I have been actively involved in representing crime victims on a pro bono basis in courts throughout the country and am a co-author of the law school casebook *Victims in Criminal Procedure*.

II. A BRIEF HISTORY OF THE EFFORTS TO PASS A VICTIMS' RIGHTS AMENDMENT¹

A. *The Crime Victims' Rights Movement.*

The Crime Victims' Rights Movement developed in the 1970s because of a perceived imbalance in the criminal justice system. The victim's absence from criminal processes conflicted with "a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement."² Victims' advocates argued that the criminal justice system had become preoccupied with defendants' rights to the exclusion of considering the legitimate interests of crime victims.³ These advocates urged reforms to give more attention to victims' concerns, including protecting victims' rights to be notified of court hearings, to attend those hearings, and to be heard at appropriate points in the process.

¹ This section draws upon the following articles: Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHOENIX L. REV. 301 (2012); Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U.L. REV. 599 (2010); Paul G. Cassell & Steven Joffe, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U. L. REV. COLLOQUIY 164 (2010); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861.

² *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (internal quotations omitted). See generally BELOOF, CASSELL & TWIST, *VICTIMS IN CRIMINAL PROCEDURE* (3d ed. Carolina Academic Press 2010) at 3-35; Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517; Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 [hereinafter Beloof, *Third Model*]; Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373 [hereinafter Cassell, *Balancing the Scales*]; Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 514 (1982); William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37 (1996); Collene Campbell et al., *Appendix: The Victims' Voice*, 5 PHOENIX L. REV. 379 (2012).

³ See generally BELOOF, CASSELL & TWIST, *supra* note 2, at 29-38; Douglas E. Beloof, *The Third Wave of Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255 [hereinafter Beloof, *Standing, Remedy, and Review*]; 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, 1380-82.

The victims' rights movement received considerable impetus in 1982 with the publication of the Report of the President's Task Force on Victims of Crime ("Task Force").⁴ The Task Force concluded that the criminal justice system "has lost an essential balance [T]he system has deprived the innocent, the honest, and the helpless of its protection. . . . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed."⁵ The Task Force advocated multiple reforms, such as prosecutors assuming the responsibility for keeping victims notified of all court proceedings and bringing to the court's attention the victim's view on such subjects as bail, plea bargains, sentences, and restitution.⁶ The Task Force also urged that courts should receive victim impact evidence at sentencing, order restitution in most cases, and allow victims and their families to attend trials even if they would be called as witnesses.⁷ In its most sweeping recommendation, the Task Force proposed a federal constitutional amendment to protect crime victims' rights "to be present and to be heard at all critical stages of judicial proceedings."⁸

In the wake of the recommendation for a constitutional amendment, crime victims' advocates considered how best to pursue that goal. Realizing the difficulty of achieving the consensus required to amend the United States Constitution, advocates decided to try and first enact state victims' amendments. They have had considerable success with this "states-first" strategy.⁹ To date, more than thirty states have adopted victims' rights amendments to their own state constitutions,¹⁰ which protect a wide range of victims' rights.

The victims' rights movement was also able to prod the federal system to recognize victims' rights. In 1982, Congress passed the first specific federal victims' rights legislation, the Victim and Witness Protection Act, which gave victims the right to make an impact statement at sentencing and expanded restitution.¹¹ Since then, Congress has passed several acts which gave further protection to victims' rights, including the Victims of Crime Act of 1984,¹² the Victims' Rights and Restitution Act of 1990,¹³ the Violent Crime Control and Law Enforcement Act of 1994,¹⁴ the Antiterrorism and Effective Death Penalty Act of 1996,¹⁵ the Victim Rights

⁴ LOIS HAIGHT HERRINGTON ET AL., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT (1982), available at <http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcprpt/87299.pdf>.

⁵ *Id.* at 114.

⁶ *Id.* at 63.

⁷ *Id.* at 72-73.

⁸ *Id.* at 114 (emphasis omitted).

⁹ See S. REP. NO. 108-191 (2003).

¹⁰ See ALA. CONST. of 1901, amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16a; CONN. CONST. art. XXIX, § b; FLA. CONST. art. I, § 16(b); IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. 1, § 13(b); KAN. CONST. art. 15, § 15; LA. CONST. art. I, § 25; MD. DECLARATION OF RIGHTS, art. 47; MICH. CONST. of 1963, art. I, § 24; MISS. CONST. art. 3, § 26A; MO. CONST. art. I, § 32; MONT. CONST. art. 2, § 28; NEB. CONST. art. 1, § CI-28; NEV. CONST. art. 1, § 8(2); N.J. CONST. art. I, para. 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST. art. I, §§ 42-43; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TENN. CONST. art. I, § 35; TEX. CONST. art. 1, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m.

¹¹ Pub. L. No. 97-291, 96 Stat. 1248 (1982).

¹² Pub. L. No. 98-473, 98 Stat. 1837 (1984).

¹³ Pub. L. No. 101-647, 104 Stat. 4789 (1990).

¹⁴ Pub. L. No. 103-322, 108 Stat. 1796 (1994).

¹⁵ Pub. L. No. 104-132, 110 Stat. 1214 (1996).

Clarification Act of 1997,¹⁶ and, most important, the 2004 Crime Victims' Rights Act ("CVRA").¹⁷ Other federal statutes have been passed to deal with specialized victim situations, such as child victims and witnesses.¹⁸

Among these statutes, the Victims' Rights and Restitution Act of 1990 ("Victims' Rights Act") is worth special discussion. This Act purported to create a comprehensive set of victims' rights in the federal criminal justice process.¹⁹ The Act commanded that "a crime victim has the following rights."²⁰ Among the listed rights were the right to "be treated with fairness and with respect for the victim's dignity and privacy,"²¹ to "be notified of court proceedings,"²² to "confer with [the] attorney for the Government in the case,"²³ and to attend court proceedings even if called as a witness unless the victim's testimony "would be materially affected" by hearing other testimony at trial.²⁴ The Victims' Rights Act also directed the Justice Department to make "its best efforts" to ensure that victims received their rights.²⁵ Yet this Act never successfully integrated victims into the federal criminal justice process and was generally regarded as something of a dead letter. Because Congress passed the CVRA in 2004 to remedy the problems with this law, it is worth briefly reviewing why it was largely unsuccessful.

Curiously, the Victims' Rights Act was codified in Title 42 of the United States Code—the title dealing with "Public Health and Welfare."²⁶ As a result, the statute was generally unknown to federal judges and criminal law practitioners. Federal practitioners reflexively consult Title 18 for guidance on criminal law issues.²⁷ More prosaically, federal criminal enactments are bound together in a single publication—the *Federal Criminal Code and Rules*.²⁸ This book is carried to court by prosecutors and defense attorneys and is on the desk of most federal judges. Because the Victims' Rights Act was not included in this book, the statute was essentially unknown even to many experienced judges and attorneys. The prime illustration of the ineffectiveness of the Victims' Rights Act comes from no less than the Oklahoma City bombing case, where victims were denied rights protected by statute in large part because the rights were not listed in the criminal rules.²⁹

Because of problems like these with statutory protection of victims' rights, in 1995 crime victims' advocates decided the time was right to press for a federal constitutional amendment. They argued that statutory protections could not sufficiently guarantee victims' rights. In their view, such statutes "frequently fail to provide meaningful protection whenever they come into

¹⁶ Pub. L. No. 105-6, 111 Stat. 12 (1997).

¹⁷ Pub. L. No. 108-405, 118 Stat. 2260 (2004).

¹⁸ See, e.g., 18 U.S.C. § 3509 (2009) (protecting rights of child victim-witnesses).

¹⁹ Pub. L. No. 101-647, § 502, 104 Stat. 4789 (1990).

²⁰ *Id.* § 502(b).

²¹ *Id.* § 502(b)(1).

²² *Id.* § 502(b)(3).

²³ *Id.* § 502(b)(5).

²⁴ *Id.* § 502(b)(4).

²⁵ *Id.* § 502(a).

²⁶ Pub. L. No. 101-647, 104 Stat. 4820 (1990); see 42 U.S.C. § 10606 (repealed by Pub. L. No. 108-405, tit. 1, § 102(c), 118 Stat. 2260 (2004)).

²⁷ See generally U.S.C. tit. 18.

²⁸ THOMSON WEST, FEDERAL CRIMINAL CODE AND RULES (2012 ed. 2012).

²⁹ See generally Cassell, *supra* note 3, at 515-22 (discussing this case in greater detail).

conflict with bureaucratic habit, traditional indifference, [or] sheer inertia.”³⁰ As the Justice Department reported:

[E]fforts to secure victims’ rights through means other than a constitutional amendment have proved less than fully adequate. Victims [sic] rights advocates have sought reforms at the State level for the past 20 years and many States have responded with State statutes and constitutional provisions that seek to guarantee victims’ rights. However, these efforts have failed to fully safeguard victims’ rights.

These significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims’ rights.³¹

To place victims’ rights in the Constitution, victims’ advocates (led most prominently by the National Victims Constitutional Amendment Network³²) approached the President and Congress about a federal amendment.³³ In April 22, 1996, Senators Kyl and Feinstein introduced a federal victims’ rights amendment with the backing of President Clinton.³⁴ The intent of the amendment was “to restore, preserve, and protect, as a matter of right for the victims of violent crimes, the practice of victim participation in the administration of criminal justice that was the birthright of every American at the founding of our Nation.”³⁵ A companion resolution was introduced in the House of Representatives.³⁶ The proposed amendment embodied seven core principles: (1) the right to notice of proceedings; (2) the right to be present; (3) the right to be heard; (4) the right to notice of the defendant’s release or escape; (5) the right to restitution; (6) the right to a speedy trial; and (7) the right to reasonable protection. In a later resolution, an eighth principle was added: standing.³⁷

The amendment was not passed in the 104th Congress. On the opening day of the first session of the 105th Congress on January 21, 1997, Senators Kyl and Feinstein reintroduced the amendment.³⁸ A series of hearings were held that year in both the House and the Senate.³⁹ Responding to some of the concerns raised in these hearings, the amendment was reintroduced the

³⁰ Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.

³¹ *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. 64 (1997) (statement of Janet Reno, U.S. Att’y Gen.).

³² See NAT’L VICTIMS’ CONST. AMENDMENT PASSAGE, <http://www.nvcap.org/> (last visited Mar. 22, 2012).

³³ See Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9 LEWIS & CLARK L. REV. 581 (2005) (providing a comprehensive history of victims’ efforts to pass a constitutional amendment).

³⁴ S.J. Res. 52, 104th Cong. (1996). A hearing was held on the proposal on April 23, 1996, before the Senate Judiciary Committee. *A Proposed Constitutional Amendment to Establish A Bill of Rights for Crime Victims: Hearing on S.J. Res. 52 Before the S. Comm. on the Judiciary*, 104th Cong. 29 (1996).

³⁵ S. REP. NO. 108-191, at 1-2 (2003); see also S. REP. NO. 106-254, at 1-2 (2000).

³⁶ H.R.J. Res. 174, 104th Cong. (1996).

³⁷ S.J. Res. 65, 104th Cong. (1996).

³⁸ S.J. Res. 6, 105th Cong. (1997).

³⁹ See, e.g., *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. (1997).

following year.⁴⁰ The Senate Judiciary Committee held hearings⁴¹ and passed the proposed amendment out of committee.⁴² The full Senate did not consider the amendment. In 1999, Senators Kyl and Feinstein again proposed the amendment.⁴³ On September 30, 1999, the Judiciary Committee again voted to send the amendment to the full Senate.⁴⁴ But on April 27, 2000, after three days of floor debate, the amendment was shelved when it became clear that its opponents had the votes to sustain a filibuster.⁴⁵ At the same time, hearings were held in the House on the companion measure there.⁴⁶

Discussions about the amendment began again after the 2000 presidential elections. On April 15, 2002, Senators Kyl and Feinstein again introduced the amendment.⁴⁷ The following day, President Bush announced his support.⁴⁸ On May 2, 2002, a companion measure was proposed in the House.⁴⁹ On January 7, 2003, Senators Kyl and Feinstein proposed the amendment as S.J. Res. 1.⁵⁰ The Senate Judiciary Committee held hearings in April of that year,⁵¹ followed by a written report supporting the proposed amendment.⁵² On April 20, 2004, a motion to proceed to consideration of the amendment was filed in the Senate.⁵³ Shortly thereafter, the motion to proceed was withdrawn when proponents determined they did not have the sixty-seven votes necessary to pass the measure.⁵⁴ After it became clear that the necessary super-majority was not available to amend the Constitution, victims' advocates turned their attention to enactment of a comprehensive victims' rights statute.

B. The Crime Victims' Rights Act.

The CVRA ultimately resulted from a decision by the victims' movement to seek a more comprehensive and enforceable federal statute rather than pursuing the dream of a federal constitutional amendment. In April of 2004, victims' advocates met with Senators Kyl and Feinstein to decide whether to again push for a federal constitutional amendment. Concluding that the amendment lacked the required super-majority, the advocates decided to press for a far-reaching federal statute protecting victims' rights in the federal criminal justice system.⁵⁵ In exchange for backing off from the constitutional amendment in the short term, victims' advocates received near universal congressional support for a "broad and encompassing" statutory victims'

⁴⁰ S.J. Res. 44, 105th Cong. (1998).

⁴¹ *A Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 44 Before the S. Comm. on the Judiciary*, 105th Cong. (1998).

⁴² See 144 CONG. REC. 22496 (1998).

⁴³ S.J. Res. 3, 106th Cong. (1999).

⁴⁴ See 146 CONG. REC. 6020 (2000).

⁴⁵ *Id.*

⁴⁶ H.R.J. Res. 64, 106th Cong. (1999).

⁴⁷ S.J. Res. 35, 107th Cong. (2002).

⁴⁸ Press Release, Office of the Press Sec'y, President Calls for Crime Victims' Rights Amendment (Apr. 16, 2002) (on file with author).

⁴⁹ H.R.J. Res. 91, 107th Cong. (2002).

⁵⁰ S. REP. NO. 108-191, at 6 (2003).

⁵¹ *Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 1 Before the S. Comm. on the Judiciary*, 108th Cong. (2003).

⁵² S. REP. NO. 108-191.

⁵³ Kyl et al., *supra* note 38, at 591.

⁵⁴ *Id.*

⁵⁵ *Id.* at 591-92.

bill of rights.⁵⁶ This “new and bolder” approach not only created a bill of rights for victims, but also provided funding for victims’ legal services and created remedies when victims’ rights were violated.⁵⁷ The victims’ movement would then see how this statute worked in future years before deciding whether to continue to push for a federal amendment.⁵⁸

The legislation that ultimately passed—the Crime Victims’ Rights Act—gives victims “the right to participate in the system.”⁵⁹ It lists various rights for crime victims in the process, including the right to be notified of court hearings, the right to attend those hearings, the right to be heard at appropriate points in the process, and the right to be treated with fairness.⁶⁰ Rather than relying merely on best efforts of prosecutors to vindicate the rights, the CVRA also contains specific enforcement mechanisms.⁶¹ Most important, the CVRA directly confers standing on victims to assert their rights, a flaw in the earlier enactment.⁶² The Act provides that rights can be “assert[ed]” by “[t]he crime victim or the crime victim’s lawful representative, and the attorney for the Government.”⁶³ The victim (or the government) may appeal any denial of a victim’s right through a writ of mandamus on an expedited basis.⁶⁴ The courts are also required to “ensure that the crime victim is afforded” the rights in the new law.⁶⁵ These changes were intended to make victims “an independent participant in the proceedings.”⁶⁶

C. The Less-than-Perfect Implementation of the CVRA.

Since the CVRA’s enactment, its effectiveness in protecting crime victims has left much to be desired. The General Accountability Office (“GAO”) reviewed the CVRA four years after its enactment in 2008, and concluded that “[p]erceptions are mixed regarding the effect and efficacy of the implementation of the CVRA, based on factors such as awareness of CVRA rights, victim satisfaction, participation, and treatment.”⁶⁷

Crime victims’ advocates have tested some of the CVRA’s provisions in federal court cases. The cases have produced uneven results for crime victims, with some of them producing crushing defeats for seemingly valid claims.

⁵⁶ 150 CONG. REC. 7295 (2004) (statement of Sen. Feinstein).

⁵⁷ *Id.* at 7296 (statement of Sen. Feinstein).

⁵⁸ *Id.* at 7300 (statement of Sen. Kyl); *see also* Prepared Remarks of Attorney Gen. Alberto R. Gonzales, Hoover Inst. Bd. of Overseers Conference (Feb. 28, 2005) (indicating a federal victim’s rights amendment remains a priority for President Bush).

⁵⁹ 18 U.S.C. § 3771 (2006); 150 CONG. REC. 7297 (2004) (statement of Sen. Feinstein); *see* Beloof, *Third Model*, *supra* note 7 (providing a description of victim participation).

⁶⁰ § 3771.

⁶¹ *Id.* § 3771(c).

⁶² *Cf.* Beloof, *Standing, Remedy, and Review*, *supra* note 8, at 283 (identifying this as a pervasive flaw in victims’ rights enactments).

⁶³ § 3771(d).

⁶⁴ *Id.* § 3771(d)(3).

⁶⁵ *Id.* § 3771(b)(1).

⁶⁶ 150 CONG. REC. 7302 (2004) (statement of Sen. Kyl).

⁶⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, CRIME VICTIMS’ RIGHTS ACT: INCREASING AWARENESS, MODIFYING THE COMPLAINT PROCESS, AND ENHANCING COMPLIANCE MONITORING WILL IMPROVE IMPLEMENTATION OF THE ACT 12 (Dec. 2008).

Among the most disappointing losses for crime victims has to be litigation involving Ken and Sue Antrobus's efforts to deliver a victim impact statement at the sentencing of the defendant who had illegally sold the murder weapon used to kill their daughter.⁶⁸ After the district court denied their motion to have their daughter recognized as a crime victim under the CVRA, the Antrobuses made four separate trips to the Tenth Circuit in an effort to have that ruling reviewed on its merits—all without success. In the first trip, the Tenth Circuit rejected the holdings of at least two other circuit courts to erect a demanding, clear, and indisputable error standard of review. Having imposed that barrier, the court then stated that the case was a close one, but that relief would not be granted—with one concurring judge noting that sufficient proof of the Antrobuses' claim might rest in the Justice Department's files.⁶⁹

The Antrobuses then returned to the district court, where the Justice Department refused to clarify the district court's claim regarding what information rested in its files.⁷⁰ The Antrobuses sought mandamus review to clarify and discover whether this information might prove their claim, which the Justice Department "mooted" by agreeing to file that information with the district court and not oppose any release to the Antrobuses.⁷¹ But the district court again stymied the Antrobuses' attempt by refusing to grant their unopposed motion for release of the documents.⁷²

The Antrobuses then sought appellate review of the district court's initial "victim" ruling, only to have the Tenth Circuit conclude that they were barred from an appeal.⁷³ However, the Tenth Circuit said the Antrobuses "should" pursue the issue of release of the material in the Justice Department's files in the district court.⁷⁴ So they did—only to lose again in the district court.⁷⁵ On a final mandamus petition to the Tenth Circuit, the court ruled—among other things—that the Antrobuses had not been diligent enough in seeking the release of the information.⁷⁶ With the Antrobuses' appeals at an end, the Justice Department chose to release discovery information about the case—not to the Antrobuses, but to the *media*.⁷⁷

Another case in which victims' rights advocates were disappointed arose in the Fifth Circuit's decision *In re Dean*.⁷⁸ In *Dean*, the defendant—the American subsidiary of well-known petroleum company BP—and the prosecution arranged a secret plea bargain to resolve the

⁶⁸ See generally Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U.L. REV. 599 (2010). In the interest of full disclosure, I represented the Antrobuses' in some of the litigation on a pro bono basis.

⁶⁹ *In re Antrobus*, 519 F.3d 1123, 1126-27 (10th Cir. 2008) (Tymkovich, J., concurring).

⁷⁰ *In re Antrobus*, 563 F.3d 1092 (10th Cir. 2009).

⁷¹ *Id.* at 1095.

⁷² *United States v. Hunter*, No. 2:07CR307DAK, 2008 U.S. Dist. LEXIS 108582, at *1-2 (D. Utah Mar. 17, 2008).

⁷³ *United States v. Hunter*, 548 F.3d 1308, 1317 (10th Cir. 2008).

⁷⁴ *Id.* at 1316-17.

⁷⁵ *United States v. Hunter*, 2009 U.S. Dist. LEXIS 90822, at *2-4 (D. Utah Feb. 10, 2009).

⁷⁶ *In re Antrobus*, 563 F.3d at 1099.

⁷⁷ Nate Carlisle, *Notes Confirm Suspicions of Trolley Square Victim's Family*, SALT LAKE TRIB., June 25, 2009, http://www.sltrib.com/news/ci_12380112.

⁷⁸ *In re Dean*, 527 F.3d 391 (5th Cir. 2008). In the interest of full disclosure, I served as pro bono legal counsel for the victims in the *Dean* criminal case. See generally Paul G. Cassell & Steven Joffe, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U. L. REV. COLLOQUY 164 (2010).

company's criminal liability for violations of environmental laws.⁷⁹ These violations resulted in the release of dangerous gas into the environment, leading to a catastrophic explosion in Texas City, Texas, which killed fifteen workers and injured scores more.⁸⁰ Because the Government did not notify or confer with the victims before reaching a plea bargain with BP, the victims sued to secure protection of their guaranteed right under the CVRA "to confer with the attorney for the Government."⁸¹

Unfortunately, despite the strength of the victims' claim, the district court did not grant the victims of the explosion any relief, leading them to file a CVRA mandamus petition with the Fifth Circuit.⁸² After reviewing the record, the Fifth Circuit agreed with the crime victims that the district court had "misapplied the law and failed to accord the victims the rights conferred by the CVRA."⁸³ Nonetheless, the court declined to award the victims any relief because it viewed the CVRA's mandamus petition as providing only discretionary relief.⁸⁴ Instead, the court of appeals remanded to the district court. The court of appeals noted that "[t]he victims do have reason to believe that their impact on the eventual sentence is substantially less where, as here, their input is received after the parties have reached a tentative deal."⁸⁵ Nonetheless, the court of appeals thought that all the victims were entitled to was another hearing in the district court.⁸⁶ After a hearing, the district court declined to grant the victims any further relief.⁸⁷

One other disappointment of the victims' rights movement is worth mentioning. When the CVRA was enacted, part of the law included funding for legal representation of crime victims.⁸⁸ And immediately after the law was enacted, Congress provided funding for this purpose. The National Crime Victim Law Institute proceeded to help create a network of clinics around the country for the purpose of providing pro bono representation for crime victims' rights.⁸⁹

Sadly, in recent years, the congressional funding for the clinics has diminished. As a result, six clinics have had to stop providing rights enforcement legal representation. As of this writing, the only clinics that remain open for rights enforcement are in Arizona, Colorado, Maryland, New Jersey, Ohio, Oregon, and my home state of Utah. The CVRA vision of an extensive network of clinics supporting crime victims' rights clearly has not been achieved.

D. Recent Efforts to Pass the Victims' Rights Amendment.

Because of the problems with implementing the CVRA, in early 2012 the National Victim Constitutional Amendment Network ("NVCAN") decided it was time to re-approach Congress

⁷⁹ See *United States v. BP Prods. N. Am. Inc.*, No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008).

⁸⁰ See *In re Dean*, 527 F.3d at 392.

⁸¹ *Id.* at 394.

⁸² See *id.* at 392.

⁸³ *Id.* at 394.

⁸⁴ *Id.* at 396.

⁸⁵ *Id.* at 396.

⁸⁶ *Id.*

⁸⁷ *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655, 730 (S.D. Tex. 2009).

⁸⁸ See *National Clinic Network*, NAT'L CRIME VICTIM L. INST., http://law.lclark.edu/centers/national_crime_victim_law_institute/projects/clinical_network/.

⁸⁹ See *id.*

about the need for constitutional protection for crime victims' rights.⁹⁰ Citing the continuing problems with implementing other-than-federal constitutional protections for crime victims, NVCAN proposed to Congress a new version of the Victims' Rights Amendment. In 2012, Representatives Trent Franks (R-AZ) and Jim Costa (D-CA), introduced House Joint Resolution 106, a proposed constitutional amendment protecting victims right. This Subcommittee held a hearing on the proposal on April 26, 2012, but no further action was taken in that year. Again in 2013, Representatives Franks and Costa introduced a proposed amendment, House Joint Resolution 40. The Subcommittee held a hearing on the proposal on April 25, 2013,⁹¹ but took no further action.

This year, Representative Frank has introduced the proposed amendment as House Joint Resolution 45.

III. NORMATIVE CHALLENGES⁹²

The most basic level at which the proposed 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 concede the need for victim participation in the criminal justice system. For example, during the 2013 hearing before this Committee, Representative Conyers, while raising concerns about the Amendment, called on Congress to consider "what more we can do to aid the victims of crime."⁹³ Similarly, the senators on the 1998 Senate Judiciary Committee who dissented from supporting the Amendment⁹⁴ 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.'"⁹⁵ 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."⁹⁶ Further, Professor Mosteller agrees that "every

⁹⁰ NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, <http://www.nvcap.org/>. This organization is a sister organization to NVCAN and supports the passage of a Victims' Rights Amendment. *Id.*

⁹¹ See Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm., Apr. 25, 2013 (Serial Nol. 113-18) (available at http://judiciary.house.gov/_files/hearings/printers/113th/113-18_80543.PDF) (hereinafter cited as 2013 House Hearing).

⁹² This Part draws upon Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479. For additional discussion of these issues, compare, e.g., Steven J. Twist & Daniel Seiden, *The Proposed Victims' Rights Amendment: A Brief Point/Counterpoint*, 5 PHOENIX L. REV. 341 (2012), and Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369, with Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443. See generally BELOOF, CASSELL & TWIST, *supra* note 2, at 713-28; Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 856-58 (1997); Victoria Schwartz, Recent Development, *The Victims' Rights Amendment*, 42 HARV. J. ON LEGIS. 525 (2005); Rachele K. Hong, *Nothing to Fear: Establishing an Equality of Rights for Crime Victims Through the Victims' Rights Amendment*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 207, 219-20 (2002).

⁹³ 2013 House Hearing, *supra* note 91, at 7.

⁹⁴ Unless otherwise specifically noted, I will refer to the minority views of Senators Leahy, Kennedy, and Kohl as the "dissenting Senators," although a few other Senators also offered their dissenting views.

⁹⁵ S. REP. NO. 105-409, at 50 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl).

⁹⁶ 1997 Senate Judiciary Comm. Hearings, *supra* note 39, at 140-41 (letter from various law professors).

sensible person can and should support victims of crime” and that the idea of “guarantee[ing] participatory rights to victims in judicial proceedings . . . is salutary.”⁹⁷

Many of the critics of the Amendment agree not only with the general sentiments of victims’ rights advocates but also with many of their specific policy proposals. For example, Representative Nadler stated during the 2013 hearing before this Subcommittee that protecting victims’ rights is “a subject of great importance to every Member of this House” and noted “our responsibility to ensure that the victims of crime have their rights respected [and] their needs met.”⁹⁸ Striking evidence of this agreement comes from the federal statute, originally proposed by the dissenting senators, which extends to victims in the federal system most of the same rights provided in the Amendment.⁹⁹ Other critics, too, have suggested protection for victims in statutory rather than constitutional terms.¹⁰⁰ Reviewing the relevant congressional hearings and academic literature reveals that many of the important provisions of the Amendment 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*.¹⁰¹ 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, and these disagreements are analyzed below. But the natural tendency to focus on points of conflict should not obscure the substantial points of widespread agreement.

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

A. Defendant-Oriented Challenges to Victims’ Rights.

Perhaps the most frequently repeated claim against the Amendment is that it would harm defendants’ rights. Often this claim is made in general terms, relying on little more than the reflexive view that anything good for victims must be bad for defendants.¹⁰² But, as the general consensus favoring victims’ rights suggests, rights for victims need not come at the expense of

⁹⁷ Robert P. Mosteller, *Victims’ Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 Geo. L.J. 1691,1692 (1997).

⁹⁸ 2013 House Hearing, *supra* note 91, at 8.

⁹⁹ See S. REP. NO. 105-409, at 77 (1998) (minority views of Sens. Leahy and Kennedy) (defending this statutory protection of victims’ rights). This approach later became 18 U.S.C. § 3771 (2012) (providing victims with, among other rights, “[t]he right not to be excluded” from most public court proceedings; “[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding”; and “[t]he right to proceedings free from unreasonable delay.”).

¹⁰⁰ See, e.g., 1997 Senate Judiciary Comm. Hearings, *supra* note 39, at 141 (letters from various law professors) (“Crime victims deserve protection, but this should be accomplished by statutes, not a constitutional amendment.”).

¹⁰¹ See generally Twist, *supra* note 92, at 376 (noting frequency with which opponents of Amendment endorse its goals).

¹⁰² See, e.g., 2013 House Hearings, *supra* note 91, 7-8 (statement of Rep. Conyers).

defendants. Strong supporters of defendants' rights agree. Harvard Law Professor Laurence Tribe, for example, has concluded that an earlier version of the proposed Amendment is "a carefully crafted measure, adding victims' rights that can coexist side by side with defendants'."¹⁰³ Similarly, then-Senator (now Vice President) Joseph Biden reports: "I am now convinced that no potential conflict exists between the victims' rights enumerated in [the Amendment] and any existing constitutional right afforded to defendants"¹⁰⁴ A summary of the available research on the purported conflict of rights supports these views, finding that victims' rights do not harm defendants:

[S]tudies show that there "is virtually no evidence that the victims' participation is at the defendant's expense." For example, one study, with data from thirty-six states, found that victim-impact statutes resulted in only a negligible effect on sentence type and length. Moreover, judges interviewed in states with legislation granting rights to the crime victim indicated that the balance was not improperly tipped in favor of the victim. One article studying victim participation in plea bargaining found that such involvement helped victims "without any significant detrimental impact to the interests of prosecutors and defendants." Another national study in states with victims' reforms concluded that: "[v]ictim satisfaction with prosecutors and the criminal justice system was increased without infringing on the defendant's rights."¹⁰⁵

Given these empirical findings, it should come as no surprise that claims that the Amendment would injure defendants rest on a predicted parade of horrors, not any real-world experience. Yet this experience suggests that the parade will never materialize, particularly given the redrafting of the proposed amendment to narrow some of the rights it extends.¹⁰⁶ A careful examination of the most-often-advanced claims of conflict with defendants' legitimate interests reveals that any purported conflict is illusory.¹⁰⁷

1. The Right to Be Heard

Some opponents of the Amendment object that the victim's right to be heard will interfere with a defendant's efforts to mount a defense. At least some of these objections refute straw men,

¹⁰³ 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 , at 238 (letter from Prof. Tribe).

¹⁰⁴ S. REP. NO. 105-409, at 82 (1998) (additional views of Sen. Biden).

¹⁰⁵ Chief Justice Richard Barajas & Scott A. Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 18-19 (1987) (quoting Deborah P. Kelly, *Have Victim Reforms Gone Too Far—or Not Far Enough?*, 5 CRIM. JUST., Fall 1991, at 28, 28; Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 355 (1987)) (internal footnotes omitted).

¹⁰⁶ See generally Part VI, *infra*.

¹⁰⁷ Until the opponents of the Amendment can establish any conflict between defendants' rights under the Constitution and victims' rights under the Amendment, there is no need to address the subject of how courts should balance the rights in case of conflict. Cf. S. REP. NO. 105-409, at 22-23 (1998) (explaining reasons for rejecting balancing language in Amendment); *A Proposed Constitutional Amendment to Protect Crime Victims: Hearings on S.J. Res. 44 Before the Senate Comm. on the Judiciary*, 105th Cong. 45 (1998) [hereinafter *1998 Senate Judiciary Comm. Hearings*] (statement of Prof. Paul Cassell), discussed in Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443, 462-63 (discussing how balancing language might be drafted if conflict were to be proven).

not the arguments for the Amendment. For example, to prove that a victim's right to be heard is undesirable, objectors sometimes claim (as was done in the Senate Judiciary Committee minority report) that "[t]he proposed Amendment gives victims [a] constitutional right to be heard, if present, and to submit a statement at *all* stages of the criminal proceeding."¹⁰⁸ 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.¹⁰⁹ This constitutes an almost breathtaking misapprehension of the scope of the rights at issue. Far from extending victims the right to be heard at "all" stages of a criminal case including the trial, the Amendment explicitly limits the right to public "proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence."¹¹⁰ At these three kinds of hearings—bail, plea, and sentencing—victims have compelling reasons to be heard and can be heard without adversely affecting the defendant's rights.

Proof that victims can properly be heard at these points comes from what appears to be a substantial inconsistency by the dissenting senators. While criticizing the right to be heard in the Amendment, these senators simultaneously sponsored federal legislation to extend to victims in the federal system precisely the same rights.¹¹¹ 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."¹¹² In defending their bill, they saw no difficulty in giving victims a chance to be heard,¹¹³ a right that already exists in many states.¹¹⁴

A much more careful critique of the victim's right to be heard is found in a prominent article by Professor Susan Bandes.¹¹⁵ Like most other opponents of the Amendment, she concentrates her intellectual fire on the victim's right to be heard at sentencing, arguing that victim impact statements are inappropriate narratives to introduce in capital sentencing proceedings.¹¹⁶ 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.¹¹⁷

¹⁰⁸S. REP. NO. 105-409, at 66 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl) (emphasis added).

¹⁰⁹*Id.* (emphasis added).

¹¹⁰S.J. Res. 3, 106th Cong. § 1 (1999).

¹¹¹*See* S. 1081, 105th Cong. 1st Sess. § 101 (1997) (establishing right to be heard on issue of detention); *id.* § 121 (establishing right to be heard on merits of plea agreement); *id.* § 122 (establishing enhanced right of allocution at sentencing). (now codified at 18 U.S.C.A. § 3771 (d) ("The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.")).

¹¹²S. REP. NO. 105-409, at 77 (1998) (minority views of Sens. Leahy and Kennedy).

¹¹³*See, e.g.*, 143 CONG. REC. S8275 (daily ed. July 29, 1997) (statement of Sen. Kennedy) (supporting statute expanding victims' rights to participate in all phases of process); *id.* at S8269 (statement of Sen. Patrick Leahy) (supporting Crime Victims' Assistance Act).

¹¹⁴*See* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1394–96 (collecting citations to states granting victims a right to be heard); *see also* Elizabeth N. Jones, *The Ascending Role of Crime Victims in Plea-Bargaining and Beyond*, 117 W. VA. L. REV. 97, 134 n.101 (2014) ("The seven states with constitutional amendments that mention the right of crime victims to be heard during a proceeding involving the plea-bargaining process are: Arizona, California, Connecticut, Idaho, Missouri, Oregon, and South Carolina.").

¹¹⁵*See* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 364 (1996).

¹¹⁶*See id.* at 390–93.

¹¹⁷*See id.* at 392–93.

Professor Bandes' objection is important to consider carefully because it presents one of the most thoughtfully developed cases against victim impact statements.¹¹⁸ 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.¹¹⁹ 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."¹²⁰ Bandes then contends that victim impact statements divert sentencers from that inquiry to "irrelevant fortuities" about the victims and their families.¹²¹ 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.¹²² 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*.¹²³ Kight's compelling book is not unique, as equally powerful accounts from the family of Ron Goldman,¹²⁴ children of Oklahoma City,¹²⁵ Alice Kaminsky,¹²⁶ George Lardner Jr.,¹²⁷ Dorris Porch and Rebecca Easley,¹²⁸ Mike Reynolds,¹²⁹ Deborah Spungen,¹³⁰ John Walsh,¹³¹ and Marvin

¹¹⁸ Several other articles have also focused on and carefully developed a case against victim impact statements. *See, e.g.,* Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 235 (1991) (arguing that "the fundamental evil" associated with victim statements is "disparate sentencing of similarly situated defendants"); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 986–1006 (1985) (outlining why goals of criminal statements do not support victim participation in sentencing). Because Professor Bandes's article is the most current, I focus on it here as exemplary of the critics' position.

¹¹⁹ *See* Bandes, *supra* note 115, at 398.

¹²⁰ *Id.* (emphasis added).

¹²¹ *Id.*

¹²² *See, e.g.,* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 Ohio St. J. Crim. L. 611, 618 (2009) (victim impact statement of Sue and Ken Antrobus); *Booth v. Maryland*, 482 U.S. 496, 509–15 (1987) (attaching impact statement to opinion); *United States v. Nichols*, No. 96-CR-68, 1997 WL 790551, at **1–47 (D. Colo. Dec. 29, 1997) (various victim impact statements at sentencing of Terry Nichols); *United States v. McVeigh*, No. 96-CR-68, 1997 WL 296395, at **1–53 (D. Colo. June 5, 1997) (various victim impact statements at sentencing of Timothy McVeigh); *A Federal Judge Speaks Out for Victims*, AM. LAWYER, Mar. 20, 1995, at 4 (statement by Federal Judge Michael Luttig at the sentencing of his father's murderers).

¹²³ *See* MARSHA KIGHT, *FOREVER CHANGED: REMEMBERING OKLAHOMA CITY, APRIL 19, 1995* (1998).

¹²⁴ *See* THE FAMILY OF RON GOLDMAN, *HIS NAME IS RON: OUR SEARCH FOR JUSTICE* (1997).

¹²⁵ *See* NANCY LAMB AND CHILDREN OF OKLAHOMA CITY, *ONE APRIL MORNING: CHILDREN REMEMBER THE OKLAHOMA CITY BOMBING* (1996).

¹²⁶ *See* ALICE R. KAMINSKY, *THE VICTIM'S SONG* (1985).

¹²⁷ *See* GEORGE LARDNER JR., *THE STALKING OF KRISTIN: A FATHER INVESTIGATES THE MURDER OF HIS DAUGHTER* (1995).

¹²⁸ *See* DORRIS D. PORCH & REBECCA EASLEY, *MURDER IN MEMPHIS: THE TRUE STORY OF A FAMILY'S QUEST FOR JUSTICE* (1997).

¹²⁹ *See* MIKE REYNOLDS & BILL JONES, *THREE STRIKES AND YOU'RE OUT . . . A PROMISE TO KIMBER: THE CHRONICLE OF AMERICA'S TOUGHEST ANTI-CRIME LAW* (1996).

¹³⁰ *See* DEOBRAH SPUNGEN, *AND I DON'T WANT TO LIVE THIS LIFE* (1983).

¹³¹ *See* JOHN WALSH, *TEARS OF RAGE: FROM GRIEVING FATHER TO CRUSADER FOR JUSTICE: THE UNTOLD STORY OF THE ADAM WALSH CASE* (1997). Professor Henderson describes Walsh as "preaching [a] gospel of rage and revenge." Henderson, *supra* note 118, at [18]. This seems to me to misunderstand Walsh's efforts, which Walsh has explained

Weinstein¹³² make all too painfully clear. Intimate third-party accounts offer similar insights about the generally unrecognized, yet far-ranging consequences of homicide.¹³³

Professor Bandes acknowledges the power of hearing from victims' families. Indeed, in a commendable willingness to present victim statements with all their force, she begins her article by quoting from the victim impact statement at issue in *Payne v. Tennessee*,¹³⁴ 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.¹³⁵

Bandes quite accurately observes that the statement is "heartbreaking" and "[o]n paper, it is nearly unbearable to read."¹³⁶ She goes on to argue that such statements are "prejudicial and inflammatory" and "overwhelm the jury with feelings of outrage."¹³⁷ 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.¹³⁸ Bandes appears to believe that a sentence imposed following a victim impact statement rests on unjustified prejudice; alternatively, one might conclude simply that the sentence rests on a fuller understanding of all of the murder's harmful ramifications. Why is it "heartbreaking" and "nearly unbearable to read" about what it is like for a three-year-old to witness the murder of his mother and his two-year-old sister? The answer, judging from why my heart broke as I read the passage, is that we can no longer treat the crime as some abstract event. In other words, we begin to realize the nearly unbearable heartbreak—that is, the actual and total harm—that the murderer inflicted.¹³⁹ Such a realization undoubtedly will hamper a defendant's efforts to escape a capital sentence. But given that loss is a proper consideration for the jury, the statement is not unfairly detrimental to the defendant. Indeed, to conceal such evidence from the

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.

¹³² See MILTON J. SHAPIRO WITH MARVIN WEINSTEIN, WHO WILL CRY FOR STACI? THE TRUE STORY OF A GRIEVING FATHER'S QUEST FOR JUSTICE (1995).

¹³³ See, e.g., GARY KINDER, VICTIM 41–45 (1982); JANICE HARRIS LORD, NO TIME FOR GOODBYES: COPING WITH SORROW, ANGER AND INJUSTICE AFTER A TRAGIC DEATH xii (4th ed. 1991); SHELLEY NEIDERBACH, INVISIBLE WOUNDS: CRIME VICTIMS SPEAK 19 (1986); DEBORAH SPUNGEN, HOMICIDE: THE HIDDEN VICTIMS xix–xxiii (1998); JOSEPH WAMBAUGH, THE UNION FIELD 169–71 (1973).

¹³⁴ 501 U.S. 808 (1991).

¹³⁵ Bandes, *supra* note 115, at 361 (quoting *Payne*, 501 U.S. at 814–15).

¹³⁶ *Id.* at 361.

¹³⁷ *Id.* at 401.

¹³⁸ See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.10, at 194 (2d ed. 1999).

¹³⁹ Cf. Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM. L. REV. (1999) ("[L]egal professionals [in South Australia] who have been exposed to [victim impact statements] have commented on how uninformed they were about the extent, variety and longevity of various victimizations, how much they have learned . . . about the impact of crime on victims . . .").

jury may leave them with a distorted, minimized view of the impact of the crime.¹⁴⁰ Victim impact statements are thus easily justified because they provide the jury with a full picture of the murder's consequences.¹⁴¹

Bandes also contends that impact statements “may completely block” the ability of the jury to consider mitigation evidence.¹⁴² It is hard to assess this essentially empirical assertion, because Bandes does not present direct empirical support.¹⁴³ Clearly many juries decline to return death sentences even when presented with powerful victim impact testimony, with Terry Nichols's life sentence for conspiring to set the Oklahoma City bomb a prominent example. Indeed, one recent empirical study of decisions from jurors who actually served in capital cases found that facts about adult victims “made little difference” in death penalty decisions.¹⁴⁴ A case might be 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 1987¹⁴⁵ and then rose when the Court reversed itself a few years later.¹⁴⁶ As discussed in greater length in elsewhere,¹⁴⁷ however, this conclusion is far from clear and, in any event, the effect on likelihood of a death sentence would be, at most, marginal.

¹⁴⁰See Brooks Douglass, *Oklahoma's Victim Impact Legislation: A New Voice for Victims and Their Families: A Response to Professor Coyne*, 46 OKLA. L. REV. 283, 289 (1993) (offering example of jury denied truth about full impact of a crime).

¹⁴¹ In addition to allowing assessment of the harm of the crime, victim impact statements are also justified because they provide “a quick glimpse of the life which a defendant chose to extinguish.” *Payne*, 501 U.S. at 822 (internal quotation omitted). In the interests of brevity, I will not develop such an argument here, nor will I address the more complicated issues surrounding whether a victim's family members may offer opinions about the appropriate sentence for a defendant. See *id.* at 830 n.2 (reserving this issue); S. REP. NO. 105-409, at 28–29 (1998) (indicating that Amendment does not alter laws precluding victim opinion as to proper sentence).

¹⁴² Bandes, *supra* note 115, at 402; Susan A. Bandes, Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1045 (2014) (“[W]hen a victim impact statement elicits a juror's anger toward the defendant or empathy toward the victim, those emotions may interfere with the juror's ability to remain open to the defendant's mitigation evidence.”).

¹⁴³ See Cassell, *Barbarians at the Gates?*, *supra* note 92, at 491 n.62. Bandes's has a very recent article, which does cite to studies showing that, while sadness lead to increased juror processing, anger lead to shallower processing. Susan Bandes & Jessica Salerno, *Emotion Proof and Prejudice* 46 Ariz. St. L.J. 1003, 1045–46 (2015). While interesting, the sources she cites are not direct empirical support for her theories about victim impact statements.

¹⁴⁴ Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1556 (1998), discussed in Cassell, *Barbarians at the Gates?*, *supra* note 92, at 491 n.63. Some support for the conclusion that real world juries take their tasks extremely serious is provided by research suggested that find that “mock jurors might be less emotionally invested in their task than real jurors” and that “this translated into completely opposite verdicts from almost identical trials, apparently stemming from the fact that one jury believed the consequences of its decision were real while the other knew they were not.” David L. Breau & Brian Brook, “Mock” Mock Juries: A Field Experiment on the Ecological Validity of Jury Simulations, 31 LAW & PSYCHOL. REV. 77, 89 (2007). This common sense conclusion undercuts the claim that mock juror research supports the conclusion that “the use of victim impact evidence in capital proceedings produces arbitrary results.” Joe Frankel, *Payne, Victim Impact Statements, and Nearly Two Decades of Devolving Standards of Decency*, 12 N.Y. City L. Rev. 87, 122 (2008) (citing James Luginbuhl and Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death*, 20 Am. J. Crim Just. 1, 16 (1995); Brian Myers and Jack Arbutnot, *The Effects of Victim Impact Evidence on the Verdicts and Sentencing of Mock Jurors*, 29 J. Offender Rehabilitation 95, 112 (1999)).

¹⁴⁵ See *Booth*, 482 U.S. at 509 (concluding that introduction of impact statement in sentencing phase of capital murder violates Eighth Amendment).

¹⁴⁶ See *Payne*, 501 U.S. at 830 (overruling *Booth*).

¹⁴⁷ See Cassell, *Barbarians at the Gates?*, *supra* note 92, at 540–44.

The empirical evidence in noncapital cases also finds little effect on sentence severity. For example, a study in California found that “[t]he right to allocution at sentencing has had little net effect . . . on sentences in general.”¹⁴⁸ 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.”¹⁴⁹ A careful scholar reviewed comprehensively all of the available evidence in this country and elsewhere, and concluded that “sentence severity has not increased following the passage of [victim impact] legislation.”¹⁵⁰ It is thus unclear why we should credit Bandes’s assertion that victim impact statements seriously hamper the defense of capital defendants.

Even if such an impact on capital sentences were proven, it would be susceptible to the reasonable interpretation that victim testimony did not “block” jury understanding, but rather presented enhanced information about the full horror of the murder or put in context mitigating evidence of the defendant. Professor David Friedman has suggested this conclusion, observing that “[i]f the legal rules present the defendant as a living, breathing human being with loving parents weeping on the witness stand, while presenting the victim as a shadowy abstraction, the result will be to overstate, in the minds of the jury, the cost of capital punishment relative to the benefit.”¹⁵¹ Correcting this misimpression is not distorting the decision-making process, but eliminating a distortion that would otherwise occur.¹⁵² This interpretation meshes with empirical studies in noncapital cases suggesting that, if a victim impact statement makes a difference in punishment,

¹⁴⁸ NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, EXECUTIVE SUMMARY, VICTIM APPEARANCES AT SENTENCING HEARINGS UNDER THE CALIFORNIA VICTIMS’ BILL OF RIGHTS 61 (1987) [hereinafter NIJ SENTENCING STUDY].

¹⁴⁹ Robert C. Davis & Barbara E. Smith, *The Effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting*, 11 JUST. QUART. 453, 466 (1994); accord ROBERT C. DAVIS ET AL., VICTIM IMPACT STATEMENTS: THEIR EFFECTS ON COURT OUTCOMES AND VICTIM SATISFACTION 68 (1990) (concluding that result of study “lend[s] support to advocates of victim impact statements” since no evidence indicates that these statements “put[] defendants in jeopardy [or] result in harsher sentences”).

¹⁵⁰ Edna Erez, *Who’s Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM. L. REV., July 1999, at 545, 550-51; accord Francis X. Shen, *Sentencing Enhancement and the Crime Victim’s Brain*, 46 LOY. U. CHI. L.J. 405, 445 n.13 (2014); Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 634-36 (2009) (collection studies on this point); Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 CRIME & JUST. 347, 373-75 (2009) (concluding that there is no aggregate effect on sentencing from victim impact statements); Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On . . .*, 3 INT’L REV. OF VICTIMOLOGY 17, 22 (1994) [hereinafter Erez, *Victim Participation*] (“Research on the impact of victims’ input on sentencing outcome is inconclusive. At best it suggests that victim input has only a limited effect.”). For further discussion of the effect of victim impact statements, see, for example, Edna Erez & Pamela Tontodonato, *The Effect of Victim Participation in Sentencing on Sentence Outcome*, 28 CRIMINOLOGY 451, 467 (1990); SUSAN W. HILLENBRAND & BARBARA E. SMITH, VICTIMS RIGHTS LEGISLATION: AN ASSESSMENT OF ITS IMPACT ON CRIMINAL JUSTICE PRACTITIONERS AND VICTIMS, A STUDY OF THE AMERICAN BAR ASSOCIATION’S CRIMINAL JUSTICE SECTION VICTIM WITNESS PROJECT 159 (1989). See also Edna Erez & Leigh Roeger, *The Effect of Victim Impact Statements on Sentencing Patterns and Outcomes: The Australian Experience*, 23 J. CRIM. JUSTICE 363, 375 (1995) (Australian study finding no support for claim that impact statements increase sentence severity); R. Douglas et al., *Victims of Efficiency: Tracking Victim Information Through the System in Victoria, Australia*, 3 INT’L REV. VICTIMOLOGY 95, 103 (1994) (concluding that greater information about nature of victimization makes little difference in sentencing); Edna Erez & Linda Rogers, *Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals*, 39 BRIT. J. CRIMINOLOGY 216, 234-35 (1999) (same).

¹⁵¹ David D. Friedman, *Should the Characteristics of Victims and Criminals Count?: Payne v. Tennessee and Two Views of Efficient Punishment*, 34 B.C. L. REV. 731, 749 (1993).

¹⁵² See *id.* at 750 (reasoning that *Payne* rule “can be interpreted . . . as a way of reminding the jury that victims, like criminals, are human beings with parents and children, lives that matter to themselves and others”).

the description of the harm sustained by the victims is the crucial factor.¹⁵³ The studies thus indicate that the general tendency of victim impact evidence is to enhance sentence accuracy and proportionality rather than increase sentence punitiveness.¹⁵⁴

Finally, Bandes and other critics argue that victim impact statements result in unequal justice.¹⁵⁵ 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.”¹⁵⁶ This kind of difference, however, is hardly unique to victim impact evidence.¹⁵⁷ 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.”¹⁵⁸ In another case, a defendant introduced evidence of having won a dance choreography award while in prison.¹⁵⁹ 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;¹⁶⁰ yet, it is routinely allowed. One obvious reason is that if varying persuasiveness were grounds for an inequality attack, then it is hard to see how the criminal justice system could survive at all. Justice White’s powerful dissenting argument in *Booth* went unanswered, and remains unanswerable: “No two prosecutors have exactly the same ability to present their arguments to the jury; no two witnesses have exactly the same ability to communicate the facts; but there is no requirement . . . [that] the evidence and argument be reduced to the lowest common denominator.”¹⁶¹

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.¹⁶² Victims and the public generally perceive great unfairness in a sentencing system with “one side muted.”¹⁶³ The Tennessee Supreme Court stated the point bluntly in its decision in *Payne*, explaining that

¹⁵³ See Erez & Tontodonato, *supra* note 150, at 469.

¹⁵⁴ See Erez, *Perspectives of Legal Professionals*, *supra* note 150, at 235 (discussing South Australian study); Edna Erez, *Victim Participation in Sentencing: Rhetoric and Reality*, 18 J. CRIM. JUSTICE 19, 29 (1990).

¹⁵⁵ See, e.g., Bandes, *supra* note 115, at 408 (arguing that victim impact statements play on our pre-conscious prejudices and stereotypes).

¹⁵⁶ *Booth*, 482 U.S. at 505, *overruled in* *Payne v. Tennessee*, 501 U.S. 808, 830 (1991).

¹⁵⁷ See Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 882 (1996) (“If courts were to exclude categories of testimony simply because some witnesses are less articulate than others, no category of oral testimony would be admissible.”).

¹⁵⁸ *Payne*, 501 U.S. at 826.

¹⁵⁹ See *Boyde v. California*, 494 U.S. 370, 382 n.5 (1990). See generally Susan N. Cornille, Comment, *Retribution’s “Harm” Component and the Victim Impact Statement: Finding a Workable Model*, 18 U. DAYTON L. REV. 389, 416–17 (1993) (discussing *Boyde*).

¹⁶⁰ Cf. *Walton v. Arizona*, 497 U.S. 639, 674 (1990) (Scalia, J., concurring) (criticizing decisions allowing such varying mitigating evidence on equality grounds).

¹⁶¹ *Booth*, 482 U.S. at 518 (White, J., dissenting).

¹⁶² See Gewirtz, *supra* note 157, at 880–82 (developing this position); see also Beloof, *supra* note , at 291 (noting that this value is part of third model of criminal justice); PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 16 (1982) (for laws to be respected, they must be just—not only to accused, but to victims as well).

¹⁶³ *Booth*, 482 U.S. at 520 (Scalia, J., dissenting); accord PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 77 (1982); Gewirtz, *supra* note 157, at 825–26.

“[i]t is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant . . . without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.”¹⁶⁴ With simplicity but haunting eloquence, a father whose ten-year-old daughter, Staci, was murdered, made the same point.¹⁶⁵ Before the sentencing phase began, Marvin Weinstein asked the prosecutor for the opportunity to speak to the jury because the defendant’s mother would have the chance to do so.¹⁶⁶ The prosecutor replied that Florida law did not permit this.¹⁶⁷ Here was Weinstein’s response to the prosecutor

What? I’m not getting a chance to talk to the jury? He’s not a defendant anymore. He’s a murderer! A convicted murderer! The jury’s made its decision. . . His mother’s had her chance all through the trial to sit there and let the jury see her cry for him while I was barred.¹⁶⁸ . . . 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?¹⁶⁹

There is no good answer to this question,¹⁷⁰ 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.¹⁷¹ 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. 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.¹⁷² As Professor

¹⁶⁴ *Tennessee v. Payne*, 791 S.W.2d 10, 19 (1990), *aff’d*, 501 U.S. 808 (1991).

¹⁶⁵ See SHAPIRO, *supra* note 132, at 215.

¹⁶⁶ See *id.* at 215–16.

¹⁶⁷ See *id.*

¹⁶⁸ Weinstein was subpoenaed by the defense as a witness and therefore required to sit outside the courtroom. See *id.* at 215–16.

¹⁶⁹ *Id.* at 319–20.

¹⁷⁰ 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.

¹⁷¹ See Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 615 (2009). See, e.g., ARIZ. REV. STAT. §§ 13-4410(C), -4424, -4426 (2014); MD. CODE art. 41, § 4-609(d); N.J. STAT. ANN. § 2C:11-3c(6); UTAH CODE ANN. § 76-3-207(2) (2014). See generally *Payne*, 501 U.S. at 821 (finding that Congress and most states allow victim impact statements); *State v. Muhammad*, 678 A.2d 164, 177–78 (N.J. 1996) (collecting state cases upholding victim impact evidence in capital cases).

¹⁷² For general discussion of the harms caused by disparate treatment, see LINDA E. LEDRAY, *RECOVERING FROM RAPE* 125 (2d ed. 1994) (noting that it is important in healing process for rape victims to take back control from rapist and to focus their anger towards him); LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY’S CONTINUED BETRAYAL OF THE VICTIM* 97 (1989) (noting that during arraignment, survivors “first realized that it was not their trial, [and] that the attacker’s rights were the ones being protected.”); Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 72

Douglas Beloof has nicely explained, a justice system that fails to recognize a victim's right to participate threatens "secondary harm"—that is, harm inflicted by the operation of government processes beyond that already caused by the perpetrator.¹⁷³ 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."¹⁷⁴ 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."¹⁷⁵ On the other hand, there is mounting evidence that "having a voice may improve victims' mental condition and welfare."¹⁷⁶ For some victims, making a statement helps restore balance between themselves and the offenders.¹⁷⁷ Others may consider it part of a just process or may want "to communicate the impact of the offense to the offender."¹⁷⁸ And if the judge acknowledges what the victim has said in the statement, the judge's words can be (as one victim put it) "balm for her sole."¹⁷⁹ 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.¹⁸⁰

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

(1987) (noting that "victims want[] more than pity and politeness; they want[] to participate"); Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 58 (1987) (discussing ways in which victims feel aggrieved from unequal treatment).

¹⁷³ See generally SPUNGEN, *supra* note 133, at 10 (explaining concept of secondary victimization).

¹⁷⁴ Task Force on the Victims of Crime and Violence, *Executive Summary: Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 AM. PSYCHOLOGIST 107, 109 (1985).

¹⁷⁵ Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 21 (1987) (collecting evidence on this point); see also Ken Eikenberry, *The Elevation of Victims' Rights in Washington State: Constitutional Status*, 17 PEPP. L. REV. 19, 26–32 (1989) (studying positive impacts of Washington's victims' rights constitutional amendment); Erez, *supra* note 139, at 8–10 ("The cumulative knowledge acquired from research in various jurisdictions . . . suggests that victims often *benefit* from participation and input."); Jason N. Swensen, *Survivor Says Measure Would Dignify Victims*, THE DESERET NEWS (Salt Lake City), Oct. 21, 1994, at B4 (noting anguish widow suffered when denied chance to speak at sentencing of husband's murderer).

¹⁷⁶ Erez, *supra* note 139, at 10.

¹⁷⁷ See *id.*

¹⁷⁸ *Id.* at 10; see also S. REP. NO. 105-409, at 17 (1998) (finding that victims' statements have important "cathartic" effects).

¹⁷⁹ Amy Proppen & Mary Lay Schuster, *Making Academic Work Advocacy Work: Technologies of Power in the Public Arena*, 22 J. BUS. & TECH. COMM. 299, 318 (2008).

¹⁸⁰ See Erez, *supra* note 150, at 555 ("[T]he majority of victims of personal felonies wished to participate and provide input, even when they thought their input was ignored or did not affect the outcome of their case. Victims have multiple motives for providing input, and having a voice serves several functions for them . . .") (internal footnote omitted).

The allegation that the Amendment will impair defendants' rights is most frequently advanced in connection with the victim's right to be present at trial.¹⁸¹ The most detailed explication of the argument is Professor Mosteller's, advanced in the *Utah Law Review* Symposium on crime victims' rights.¹⁸² 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.¹⁸³ While I admire the doggedness with which Mosteller has set forth his position, I respectfully disagree with his conclusions for reasons articulated at length elsewhere.¹⁸⁴ 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."¹⁸⁵ 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."¹⁸⁶ 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."¹⁸⁷

Professor Mosteller also seems to suggest that defendants currently have no constitutional right to exclude victims from trials, meaning that his argument rests purely on policy.¹⁸⁸ Mosteller's policy claim is not the general one that most victims ought to be excluded, but rather the much narrower one that "victims' rights to attend . . . proceedings should be guaranteed unless their presence threatens accuracy and fairness in adjudicating the guilt or innocence of the defendant."¹⁸⁹ 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.¹⁹⁰ This is a rare circumstance indeed, and it is hard to see the alleged disadvantage in this unusual circumstance outweighing the more

¹⁸¹ Technically, the right is "not to be excluded." See Part VI, *infra* (explaining reason for this formulation).

¹⁸² See Mosteller, *Unnecessary Amendment*, *supra* note 92, at 455–67; see also Mosteller, *Recasting the Battle*, *supra* note 97, at 1698–1704.

¹⁸³ See Mosteller, *Unnecessary Amendment*, *supra* note 92, at 463 (finding that in specific situations, defendant's "due process right to a fair trial may require exclusion of [victim-] witnesses").

¹⁸⁴ See Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005).

¹⁸⁵ Mosteller, *Recasting the Battle*, *supra* note 97, at 1699.

¹⁸⁶ *Gannett Co. v. DePasquale*, 443 U.S. 368, 428 (1979) (Blackmun, J., concurring in part and dissenting in part).

¹⁸⁷ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (plurality opinion).

¹⁸⁸ See Mosteller, *Recasting the Battle*, *supra* note 97, at 1701 n.29 ("I question whether the practice [permitting multiple victim-eyewitnesses to remain in the courtroom and hear the testimony of others] would violate a defendant's constitutional rights, although I acknowledge that the result is not entirely free from doubt.").

¹⁸⁹ Mosteller, *Recasting the Battle*, *supra* note 97, at 1699; see also Mosteller, *Unnecessary Amendment*, *supra* note 92, at 447–48 (finding that "the most important reason" that victims' rights are not fully enforced is lack of resources and personnel).

¹⁹⁰ See Mosteller, *Recasting the Battle*, *supra* note 97, at 1700 (arguing that, in cases of multiple victims, "a substantial danger exists" that victim-witnesses will be influenced during testimony of others); Mosteller, *Unnecessary Amendment*, *supra* note 92, at 463 (similar argument).

pervasive advantages to victims in the run-of-the-mine cases.¹⁹¹ Moreover, even in rare circumstances of multiple victims, other means exist for dealing with the tailoring issue.¹⁹² 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.¹⁹³ In addition, the defense attorney may argue to the jury that victims have tailored their testimony even when they have not¹⁹⁴—a fact that leads some critics of the Amendment to conclude that this provision will, if anything, help defendants rather than harm them. The dissenting Senators, for example, make precisely this helps-the-defendant argument,¹⁹⁵ although at another point they present the contrary harms-the-defendant claim.¹⁹⁶ In short, the critics have not articulated a strong case against the victim’s right to be present.

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

Opponents of the Amendment sometimes argue that giving victims a right to “proceedings free from unreasonable delay” would impinge on a defendant’s right to prepare an adequate defense. For example, in 2013, Representative Conyers argued that the amendment “could wreak havoc” because it could allow a victim “to demand that a trial move ahead when the prosecution or the defense are trying to assemble a case.”¹⁹⁷ This argument fails to consider the precise scope of the victim’s right in question. The right the Amendment confers is one to “proceedings free from *unreasonable* delay.”¹⁹⁸ The opponents never seriously grapple with the fact that, by definition, all of the examples that they give of defendants legitimately needing more time to prepare would constitute reasons for “reasonable” delay. Indeed, it is interesting to note similar language in the American Bar Association’s directions to defense attorneys to avoid “unnecessary delay” that might harm victims.¹⁹⁹

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

¹⁹¹ See Erez, *Victim Participation*, *supra* note 150, at 29 (criticizing tendency of lawyers “to use an atypical or extreme case to make their point” and calling for public policy in the victims area to be based on more typical cases); cf. Robert P. Mosteller, Book Review, *Popular Justice*, 109 HARV. L. REV. 487, 487 (1995) (critiquing George P. Fletcher’s book, *WITH JUSTICE FOR SOME: VICTIMS’ RIGHTS IN CRIMINAL TRIALS* (1995), for “ignor[ing] how the criminal justice system operates in ordinary” cases).

¹⁹² For one contemporary example of how a court dealt with the problem, see Elizabeth Van Doren Gray & Tina Cundari, *Who Can Stay and Who Must Go: The Tension Between Witness Sequestration and the Right of Crime Victims to Be Present*, S.C. Law., March 2010, at 38 (discussing example of a resolution).

¹⁹³ See Steven J. Twist & Daniel Seiden, *The Proposed Victims’ Rights Amendment: A Brief Point/counterpoint*, 5 PHOENIX L. REV. 341, 369-70 (2012).

¹⁹⁴ See S. REP. NO. 105-409, at 82 (1998) (additional views of Sen. Biden).

¹⁹⁵ See *id.* at 61 (minority views of Sens. Leahy, Kennedy, and Kohl) (“[T]here is also the danger that the victim’s presence in the courtroom during the presentation of other evidence will cast doubt on her credibility as a witness Whole cases . . . may be lost in this way.”).

¹⁹⁶ See *id.* at 65 (minority views of Sens. Leahy, Kennedy, and Kohl) (“Accuracy and fairness concerns may arise . . . where the victim is a fact witness whose testimony may be influenced by the testimony of others.”).

¹⁹⁷ 2013 House Hearing, *supra* note 91, at 8.

¹⁹⁸ See Twist & Seiden, *supra* note 92, at 374.

¹⁹⁹ A.B.A., SUGGESTED GUIDELINES FOR REDUCING ADVERSE EFFECTS OF CASE CONTINUANCES AND DELAYS ON CRIME VICTIMS AND WITNESSES 4 (1985).

a case.²⁰⁰ Abusive delays appear to be particularly common when the victim of the crime is a child, for whom each day up until the case is resolved can seem like an eternity.²⁰¹ Such cases present a strong justification for this provision in the Amendment.

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.²⁰² In the years since then, it has been hard to find critics of victims' rights willing to contend, on the merits, the need for protecting victims against abusive delay.²⁰³ 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 or to concede that, here too, a strong case for the Amendment exists.

B. Prosecution-Oriented Challenges to the Amendment

Some objections to victims' rights rest not on alleged harm to defendants' interests but rather on alleged harm to the interests of the prosecution. Often these objections surprisingly come from persons not typically solicitous of prosecution concerns,²⁰⁴ suggesting that some skepticism may be warranted. In any event, the arguments lack foundation.

It is sometimes argued (as Representative Conyers did in 2013) that the Amendment would allow "a victim who objected to the prosecution's strategy . . . [to] sue an assert that his or her constitutional rights had been violated under this Amendment."²⁰⁵ But the VRA does not allow victims to initiate or otherwise control the course of criminal prosecutions.²⁰⁶ Instead, 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,

²⁰⁰ See, e.g., 1997 Senate Judiciary Comm. Hearings, *supra* note 6, at 115–16 (statement of Paul G. Cassell) (describing such a case); see also Paul G. Cassell & Evan S. Strassberg, *Evidence of Repeated Acts of Rape and Child Molestation: Reforming Utah Law to Permit the Propensity Inference*, 1998 UTAH L. REV. 145, 146 (discussing case where defendant delayed trial three years by refusing to hire counsel and falsely claiming indigency).

²⁰¹ See Cassell, *supra* note 2, at 1402–05 (providing illustration).

²⁰² See PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 76 (1982).

²⁰³ Cf. Henderson, *supra* note 118, at 417 (conceding that "reasonableness" language might "allow judges to ferret out instances of dilatory tactics while recognizing the genuine need for time").

²⁰⁴ See, e.g., Scott Wallace, *Mangling the Constitution: The Folly of the Victims' Rights Amendment*, WASH. POST, June 28, 1996, at A21 (op-ed piece from special counsel with National Legal Aid and Defender Association warning that Amendment would harm police and prosecutors).

²⁰⁵ 2013 House Hearing, *supra* note 91, at 8.

²⁰⁶ Cf. Peter L. Davis, *The Crime Victim's "Right" to a Criminal Prosecution: A Proposed Model Statute for the Governance of Private Criminal Prosecutions*, 38 DEPAUL L. REV. 329, 330 (1989) (proposing statute to govern private criminal prosecutions). See generally BELOOF, CASSELL & TWIST, *supra* note 2, at 234–39 (discussing current means of victim involvement in charging process). Allowing victims to initiate their own prosecutions is no novelty, as it is consistent with the English common-law tradition of private prosecutions, brought to the American colonies. See 1 SIR JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 493–503 (1883); Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 521–22; Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 359, 384 (1986); Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 125–26 (1984); William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 651–54 (1976).

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,²⁰⁷ the fact remains that the prosecutor runs the assembly line. This general approach of grafting victims’ rights onto the existing system mirrors the approach followed by all of the various state victims’ amendments, and few have been heard to argue that the result has been interference with legitimate prosecution interests.

Perhaps an interferes-with-the-prosecutor objection might be refined to apply only against a victim’s right to be heard on plea bargains, since this right arguably hampers a prosecutor’s ability to terminate the prosecution. But today, it is already the law of many jurisdictions that the court must determine whether to accept or reject a proposed plea bargain after weighing all relevant interests,²⁰⁸ and these kinds of problems have not materialized.²⁰⁹ 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.²¹⁰ 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.²¹¹

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.²¹² 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 judicial review does more good than harm—that is, whether, on balance, courts make more right decisions than wrong ones. Just as cases can be cited where judges possibly made

²⁰⁷ Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 290 (referring to HERBERT PACKER, *THE LIMITS OF CRIMINAL SANCTION* 163 (1968)).

²⁰⁸ See BELOOF, CASSELL & TWIST, *supra* note 2, at 462–88 (1999). See also NATIONAL CONFERENCE OF THE JUDICIARY ON THE RIGHTS OF VICTIMS OF CRIME, U.S. DEP’T OF JUSTICE, STATEMENT OF RECOMMENDED JUDICIAL PRACTICES 10 (1983) (recommending victim participation in plea negotiations).

²⁰⁹ Steven J. Twist & Daniel Seiden, *The Proposed Victims’ Rights Amendment: A Brief Point/Counterpoint*, 5 PHOENIX L. REV. 341, 365 (2012) (describing how “[i]n the over two decades since the passage of the Victims Bill of Rights in Arizona the right to be heard at a proceeding involving a plea has not obstructed plea agreements.”)

²¹⁰ See Paul G. Cassell & Steven Joffe, *The Crime Victim’s Expanding Role in A System of Public Prosecution: A Response to the Critics of the Crime Victims’ Rights Act*, 105 NW. U.L. REV. COLLOQUY 164, 181 (2011).

²¹¹ See, e.g., Elizabeth N. Jones, *The Ascending Role of Crime Victims in Plea-Bargaining and Beyond*, 117 W. Va. L. REV. 97, 132–33 (2014) (concluding that while “[v]ictim participation in proceedings necessarily increases the time, however slight, involved in resolving cases,” the “financial costs of allowing victims to participate during the plea-bargaining process in particular are minimal.”); DEBORAH BUCHNER ET AL., INSLAW, INC., EVALUATION OF THE STRUCTURED PLEA NEGOTIATION PROJECT: EXECUTIVE SUMMARY 15, 21 (1984) (examining effects of structured plea negotiations in which judge, defendant, victim, prosecutor, and defense attorney all participate).

²¹² See, e.g., S. REP. NO. 105–409, at 60–61 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl).

mistakes in rejecting a plea, so too cases exist where judges rejected plea bargains that were unwarranted.²¹³ These reported cases of victims persuading judges to reject unjust pleas form just a small part of the picture, because in many other cases, the mere prospect of victim objection undoubtedly has restrained prosecutors from bargaining cases away without good reason. My strong sense is that judicial review of pleas by courts after hearing from victims more often improves rather than retards justice. The failure of the critics to contend on the issue of *net* effect and the growing number of jurisdictions that allow victim input is powerful 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.²¹⁴ But 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.²¹⁵ As for the victim's right to be heard, the state experience reveals only a modest cost impact.²¹⁶

Most of the cost arguments have focused on the Amendment's notification provisions. Yet, it has long been recognized as sound prosecutorial practice to provide notice to victims. The National Prosecution Standards prepared by the National District Attorneys Association recommend that victims of violent crimes and other serious felonies should be informed, where feasible, of important steps in the criminal justice process.²¹⁷ In addition, many states have required that victims receive notice of a broad range of criminal justice proceedings. For nearly two decades, every state provides notice of the trial, sentencing, and parole hearings.²¹⁸ 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]

²¹³ See, e.g., *People v. Stringham*, 253 Cal. Rptr. 484, 488–96 (Cal. App. 1988) (rejecting unwarranted plea bargain).

²¹⁴ Sometimes the argument is cast not in terms of the Amendment diminishing prosecutorial resources, but rather victim resources. For example, Professor Henderson urges rejection of the Amendment on grounds that "we need to concentrate on things that aid recovery" by spending more on victim assistance and similar programs. Henderson, *supra* note , at 439; see also Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 606 (1998) (noting benefits of programs to help victims deal with trauma). But there is no incompatibility between passing the Amendment and expanding such programs. Indeed, if the experience at the state level is any guide, passage of the Amendment will, if anything, lead to an increase in resources devoted to victim-assistance efforts because of their usefulness in implementing the rights contained in the Amendment.

²¹⁵ See 42 U.S.C.A. 10608(a) (authorizing closed circuit broadcast of trials whose venue has been moved more than 350 miles). This provision was used to broadcast proceedings in the Oklahoma City bombing trial in Denver back to Oklahoma City.

²¹⁶ See, e.g., NAT'L INST. OF JUSTICE, RESEARCH IN BRIEF, THE RIGHTS OF CRIME VICTIMS—DOES LEGAL PROTECTION MAKE A DIFFERENCE? 1, 59 (Dec. 1998) (stating that right to allocute in California "has not resulted in any noteworthy change in the workload of either the courts, probation departments, district attorneys' offices or victim/witness programs"); *id.* at 69 (finding no noteworthy change in workload of California parole board); Erez, *Victim Participation*, *supra* note 69, at 22 ("Research in jurisdictions that allow victim participation indicates that including victims in the criminal justice process does not cause delays or additional expense."); see also DAVIS ET AL., *supra* note 68, at 69 (noting that expanded victim impact program did not delay dispositions in New York).

²¹⁷ NATIONAL DISTRICT ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS § 26.1, at 92 (2d ed. 1991).

²¹⁸ See NATIONAL VICTIM CENTER, 1996 VICTIMS' RIGHTS SOURCEBOOK: A COMPILATION AND COMPARISON OF VICTIMS' RIGHTS LEGISLATION 24 (collecting statutes).

constitutionally mandated notice requirements alone are staggering.”²¹⁹ Perhaps these predictions should simply be written off as harmless political rhetoric, but it is important to note that these suggestions are inconsistent with the relevant evidence. The experience with victim notice requirements already used at the state level suggests that the costs are relatively modest, particularly since computerized mailing lists and automated telephone calls can be used. The Arizona amendment serves as a good illustration. That amendment extends notice rights far beyond what is called for in the federal amendment;²²⁰ yet, prosecutors did not find any incremental expense burdensome in practice.²²¹ Indeed, during the 2013 hearing, Maricopa County Attorney William Montgomery testified strongly in favor of the Amendment, explaining that even though his office is the fourth largest prosecuting office in the United States handling more than 35,000 felony each year, providing notice has not been burdensome and that “having crime victims present in a court room has actually assisted in prosecuting a because because they are often essential to the truth seeking function we serve.”²²²

The only careful and objective assessment of the costs of the Amendment also reaches the conclusion that the costs are slight. In 1998, the Congressional Budget Office reviewed the financial impact of not just the notification provisions of the Amendment, but of all its provisions, on the federal criminal justice system. The CBO concluded that, were the Amendment to be approved, it “could impose additional costs on the Federal courts and the Federal prison system However, CBO does not expect any resulting costs to be significant.”²²³

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.

IV. JUSTIFICATION CHALLENGES²²⁴

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. An illustration of this attack is found in Professor Mosteller’s testimony before this Committee in 2013,²²⁵ building on a longer article entitled “The Unnecessary Victims’ Rights Amendment” published in a 1999 *Utah Law Review* Symposium.²²⁶ Mosteller

²¹⁹ S. REP. NO. 105-409, at 62 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl).

²²⁰ The Arizona Amendment extends notification rights to all crime victims, not just victims of violent crime as provided in the federal amendment. *Compare* ARIZ. CONST. art. II § 2.1(A)(3), (C), *with* S.J. Res. 3, 106th Cong. § 2 (1999).

²²¹ *See* Richard M. Romley, *Constitutional Rights for Victims: Another Perspective*, THE PROSECUTOR, May 1997, at 7 (noting modest cost of state amendment in Phoenix); 1997 *Senate Judiciary Comm. Hearings*, *supra* note 39, at 97 (1997) (statement of Barbara LaWall, Pima County Prosecutor) (noting that cost has not been problem in Tucson).

²²² 2013 House Hearing, *supra* note 91, at 20.

²²³ CONGRESSIONAL BUDGET OFFICE COST ESTIMATE, S.J. RES. 44, *reprinted in* S. REP. NO. 105-409, at 39–40 (1998).

²²⁴ *See generally* Cassell, *Barbarians at the Gates?*, *supra* note 92, at 507–22.

²²⁵ *See* 2013 House Hearings, *supra* note 91, at 34–39.

²²⁶ Mosteller, *Unnecessary Amendment*, *supra* note 92.

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.²²⁷

Professor Mosteller’s 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.”²²⁸ Rules to assist victims “frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia.”²²⁹ The view that state victim provisions have been and will continue to be often disregarded is widely shared, as some of the strongest opponents of the Amendment seem to concede the point. For example, Ellen Greenlee, President of the National Legal Aid and Defender Association, bluntly and revealingly told Congress that the state victims’ amendments “so far have been treated as mere statements of principle that victims ought to be included and consulted more by prosecutors and courts. A state constitution is far . . . easier to ignore[] than the federal one.”²³⁰

Professor Mosteller attempts to minimize the current problems, conceding only that “existing victims’ rights are not uniformly enforced.”²³¹ 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.²³² 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.²³³

Similarly, an exhaustive report from those active in the field concluded that “[a] victims’ rights constitutional amendment is the only legal measure strong enough to rectify the current

²²⁷ *Id.* at 447; see also Mosteller, *Recasting the Battle*, *supra* note 97, at 1711–12 (developing similar argument).

²²⁸ Tribe & Cassell, *supra* note 103, at B5; see, e.g., 1996 *Senate Judiciary Comm. Hearings* (Apr. 23, 1996) at 109 (statement of Steven Twist) (“There are victims of arson in Atlanta, GA, who have little or no say, as the victims . . . of an earlier era had about their victimization.”); *id.* at 30 (statement of John Walsh) (stating that victims’ rights amendments on state level do not work); *id.* at 26 (statement of Katherine Prescott) (“Victims’ roles in the prosecution of cases will always be that of second-class citizens” if victims’ rights are only specified in state statutes).

²²⁹ Tribe & Cassell, *supra* note 103, at B5.

²³⁰ See, e.g., 2013 House Hearings, *supra* note 91, at 16–17.

²³¹ Mosteller, *Unnecessary Amendment*, *supra* note 92, at 445.

²³² See, e.g., 1998 *Senate Judiciary Comm. Hearings*, *supra* note 41, at 103–06 (statement of Marlene Young).

²³³ 1997 *Senate Judiciary Comm. Hearings*, *supra* note 39, at 64 (statement of Att’y Gen. Reno).

inconsistencies in victims' rights laws that vary significantly from jurisdiction to jurisdiction on the state and federal levels."²³⁴

Hard statistical evidence on noncompliance with victims' rights laws confirms these general conclusions about inadequate protection. A 1998 report from the National Institute of Justice ("NIJ") found that many victims are denied their rights and concluded that "enactment of State laws and State constitutional amendments alone appears to be insufficient to guarantee the full provision of victims' rights in practice."²³⁵ The report found numerous examples of victims not provided rights to which they were entitled. For example, even in several states identified as giving "strong protection" to victims' rights, fewer than 60% of the victims were notified of the sentencing hearing and fewer than 40% were notified of the pretrial release of the defendant.²³⁶ 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.²³⁷

Given such statistics, it is interesting to consider what the defenders of the status quo believe is an acceptable level of violation of rights. Suppose new statistics could be gathered that show that victims' rights are respected in 75% of all cases, or 90%, or even 98%. America is so far from a 98% rate for affording victims' rights that my friends on the front lines of providing victim services probably will dismiss this exercise as a meaningless law school hypothetical. But would a 98% compliance rate demonstrate that the amendment is "unnecessary"? Even a 98% enforcement rate would leave numerous victims unprotected. As the Supreme Court has observed in response to the claim that the Fourth Amendment exclusionary rule affects "only" about 2% of all cases in this country, "small percentages . . . mask a large absolute number of" cases.²³⁸ A rough calculation suggests that even if the Victims' Rights Amendment improved treatment for only 2% of the violent crime cases it affects, a total of about 16,000 victims would benefit each year.²³⁹ Even more importantly, we would not tolerate a mere 98% "success" rate in enforcing other

²³⁴ OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 10 (1998).

²³⁵ NAT'L INST. OF JUSTICE, RESEARCH IN BRIEF, THE RIGHTS OF CRIME VICTIMS—DOES LEGAL PROTECTION MAKE A DIFFERENCE? 1 (Dec. 1998) [hereinafter NIJ REPORT]. An earlier version of essentially the same report is reprinted in *1997 Senate Judiciary Comm. Hearings*, *supra* note 39, at 15.

²³⁶ NIJ REPORT, *supra* note 235, at 4 exh.1.

²³⁷ See NATIONAL VICTIM CENTER, STATUTORY AND CONSTITUTIONAL PROTECTION OF VICTIMS' RIGHTS, IMPLEMENTATION AND IMPACT ON CRIME VICTIMS, SUB-REPORT: COMPARISON OF WHITE AND NON-WHITE CRIME VICTIM RESPONSES REGARDING VICTIMS' RIGHTS 5 (1997) [hereinafter NVC RACE SUB-REPORT] ("[I]n many instances non-white victims were less likely to be provided those [crime victims'] rights . . .").

²³⁸ *United States v. Leon*, 468 U.S. 897, 907–08 n.6 (1984); see also CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 43–44 (1993) (worrying about effect of exclusionary rule, if 5% of cases are dismissed due to *Miranda* violations and 5% are dismissed due to search problems).

²³⁹ FBI estimates suggest an approximate total of about 1.1634 million arrests for violent crimes each year and 12.1 million property crimes. See Crime in the United States 2013, Table 1, available at http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/1tabledatacoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1994-2013.xls. A rough estimate is that about 70% of these cases will be accepted for prosecution, within the adult system. See Brian Forst, *Prosecution and Sentencing*, in CRIME 363–64 (James Q. Wilson & Joan Petersilia eds., 1995). Assuming the Amendment would benefit 2% of the victims within these charged cases produces the figure in text. For further discussion of issues surrounding such extrapolations, see Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 438–40; Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And From Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497, 514–16 (1998).

important rights. Suppose that, in opposition to the Bill of Rights, it had been argued that 98% of all Americans could worship in the religious tradition of their choice, 98% of all newspapers could publish without censorship from the government, 98% of criminal defendants had access to counsel, and 98% of all prisoners were free from cruel and unusual punishment. Surely the effort still would have been mounted to move the totals closer to 100%. Given the wide acceptance of victims' rights, they deserve the same respect.

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.²⁴⁰ 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.²⁴¹ 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.²⁴² 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."²⁴³

Professor Mosteller seems to agree generally with this view, noting that these rights "may not be fully enforced," but contending that this "is through ineptitude, lack of resources, or difficulty of accomplishing the task."²⁴⁴ 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."²⁴⁵ Yet this means nothing more than that, until the Amendment passes, we will not have an opportunity to precisely assay its positive effects. Constitutional amendments have changed our legal culture in other areas, and clearly the logical prediction is that a victims' amendment would go a long way towards curing official indifference.

²⁴⁰ See S.J. Res. 3, 106th Cong. § 2 (1999). See generally Cassell, *supra* note 2, at 1418–21 (discussing damages actions under victims' rights amendments).

²⁴¹ See U.S. CONST. art. V.

²⁴² Cf. 1 BRUCE ACKERMAN, *WE THE PEOPLE passim* (1990) (discussing "constitutional moments").

²⁴³ Erez, *Victim Participation*, *supra* note 150, at 29; see also WILLIAM PIZZI, *TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT* 196–97 (1999) (discussing problems with American trial culture); William Pizzi, *Victims' Rights: Rethinking our Adversary System*, 1999 UTAH L. REV. 349, 359–60 (noting trial culture emphasis on winning and losing that may overlook victims); William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 37–40 (1996) ("So poor is the level of communication that those within the system often seem genuinely bewildered by the victims' rights movement, even to the point of suggesting rather condescendingly that victims are seeking a solace from the criminal justice system that they ought to be seeking elsewhere.").

²⁴⁴ 2013 House Hearing, *supra* note 91, at 35. See also Mosteller, *Unnecessary Amendment*, *supra* note 92, at 447 (conceding 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.").

²⁴⁵ Mosteller, *Unnecessary Amendment*, *supra* note 92, at 445.

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."²⁴⁶ 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.²⁴⁷

Professor Mosteller challenges 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. Professor Mosteller, however, rejects this argument on the ground that there is no "currently valid appellate opinion reversing a defendant's conviction because of enforcement of a provision of state or federal law or state constitution that granted a right to a victim."²⁴⁸ As a result, he concludes, there is no evidence of a "significant body of law that would warrant the remedy of a constitutional amendment."²⁴⁹

This argument does not refute the case for the Amendment, but rather is a mere straw man created by the opponents. The important issue is not whether victims' rights are thwarted by a body of *appellate* law, but rather whether they are blocked by *any* obstacles, including most especially obstacles at the trial level where victims must first attempt to secure their 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.²⁵⁰ 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.²⁵¹ Time will be short, since many victims' issues, particularly those revolving around sequestration rules, arise at the start of or even during the trial. Even if a lawyer is found, she must arrange to file an interlocutory appeal in which the appellate court will be asked to intervene in ongoing trial proceedings in the court below. If victims can overcome all these hurdles, the courts still possess an astonishing arsenal of other

²⁴⁶ NIJ REPORT, *supra* note 235, at 10.

²⁴⁷ See *supra* note 237 and accompanying text (noting that minority victims are least likely to be afforded rights today); cf. Henderson, *supra* note 118, at 419–20 (criticizing "lottery approach" to affording victims' rights).

²⁴⁸ Mosteller, *Unnecessary Amendment*, *supra* note 92, at 450.

²⁴⁹ *Id.* at 451; see also S. REP. NO. 105-409, at 51–52 (1998).

²⁵⁰ Cf. Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in YALE KAMISAR ET AL., CRIMINAL JUSTICE IN OUR TIME 19 (1965) (famously developing this analogy in context of police interrogation).

²⁵¹ See Henderson, *supra* note 118, at 427.

procedural obstacles to prevent victim actions, as many commentators have recognized.²⁵² In light of all these hurdles, appellate opinions about victim issues seem, to put it mildly, quite unlikely.

One can interpret the resulting dearth of rulings as proving, as Professor Mosteller would have it, that no reported appellate decisions strike down victims' rights. Yet it is equally true that, at best, only a handful of reported appellate decisions uphold victims' rights. This fact tends to provide an explanation for the frequent reports of denials of victims' rights at the trial level. Given that these rights are newly created and the lack of clear appellate sanction, one would expect trial courts to be wary of enforcing these rights against the inevitable, if invariably imprecise, claims of violations of a defendant's rights.²⁵³ Narrow readings will be encouraged by the asymmetries of appeal—defendants can force a new trial if their rights are denied, while victims cannot.²⁵⁴ Victims, too, may be reluctant to attempt to assert untested rights for fear of giving a defendant grounds for a successful appeal and a new trial.²⁵⁵

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.²⁵⁶ 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 victims²⁵⁷ 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.

²⁵² See, e.g., 2013 House Hearing, *supra* note 91, at 43-45 (testimony of Prof. Beloof); Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331, *passim*; see also Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273 (1991) [hereinafter Bandes, *The Negative Constitution*] (discussing courts' reluctance to review government inaction in protection of constitutional rights); Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 229-30 (1990) (noting how courts limit and define issues in case).

²⁵³ As shown earlier, 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.

²⁵⁴ See Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 5-7 (1990) (examining consequences of asymmetric risk of legal error in criminal cases); see also Erez & Rogers, *supra* note 69, at 228-29 (noting reluctance of South Australian judges to rely on victim evidence because of appeal risk).

²⁵⁵ See Paul G. Cassell, *Fight for Victims' Justice is Going Strong*, THE DESERET NEWS, July 10, 1996, at A7 (illustrating this problem with uncertain Utah case law on victim's right to be present).

²⁵⁶ Mosteller, *Unnecessary Amendment*, *supra* note 92, at 462.

²⁵⁷ See S.J. Res. 3, 106th Cong. § 2 (1999) ("Only the victim or the victim's legal representative shall have standing to assert the rights established by this article . . .").

V. STRUCTURAL CHALLENGES²⁵⁸

A final category of objections to the Victims' Rights Amendment can be styled as "structural" objections. These objections concede both the normative claim that victims' rights are desirable and the factual claim that such rights are not effectively provided today. These objections maintain, however, that a federal constitutional amendment should not be the means through which victims' rights are afforded. These objections come in three primary forms. The standard form is that victims' rights simply do not belong in the Constitution as they are different from other rights found there. A variant on this critique is that any attempt to constitutionalize victims' rights will lead to inflexibility, producing disastrous, unintended consequences. A final form of the structural challenge is that the Amendment violates principles of federalism. Each of these arguments, however, lacks merit.

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

Perhaps the most basic challenge to the Victims' Rights Amendment is that victims' rights simply do not belong in the Constitution. Of course, it is common ground that the Constitution should not be amended for small concerns. But every member of this Subcommittee is currently supporting at least one constitutional amendment addressing other concerns. Crime victims' rights fit comfortably among this list:

I. Republican Members.

1. Rep. Ron DeSantis.

- "28th Amendment" to prohibit congressional exemptions from legislation
- Balanced Budget Amendment
- Amendment to repeal the 16th Amendment of the U.S. Constitution
- An Amendment to create term limits for members of Congress

2. Rep. Peter King.

- An Amendment to prohibit the burning of the U.S. flag
- An Amendment to define marriage as an act between a man and woman
- An Amendment to require a 2/3rds vote by Congress when it amends tax law
- An Amendment to prohibit laws or rules that impose liability for action taken prior to its enactment
- An Amendment to authorize a Presidential line item veto in appropriations bills
- A Balanced Budget Amendment
- An Amendment to prohibit retroactive income taxation

3. Rep. Louie Gohmert.

- An Amendment to define marriage as an act between a man and woman
- A Balanced Budget Amendment
- An Amendment to prohibit Congress from making any law imposing a tax on a failure to purchase goods or services
- An Amendment to grant the States power to repeal federal law if two-thirds of the

²⁵⁸ See generally Cassell, *supra* note 92, at 522-33.

States concur

An Amendment to require a 2/3rds vote by Congress when it amends tax law

An Amendment prohibiting the United States from owning stock, or other equity interest

An Amendment providing that a parent's right to parent their children is a fundamental right

An Amendment prohibiting the President of the United States from adopting any legal currency other than the United States Dollar

An Amendment to allow the death penalty for a person found guilty of raping a child twelve years or younger and providing that it does not violate the Eighth Amendment

4. Rep. Jim Jordan.

An Amendment to prohibit the burning of the U.S. flag

An Amendment to allow the death penalty for a person found guilty of raping a child twelve years or younger and providing that it does not violate the Eighth Amendment

An Amendment to define marriage as an act between a man and woman

An Amendment to grant the States power to repeal federal law if two-thirds of the States concur

A Balanced Budget Amendment

An Amendment to prohibit annual spending from exceeding one-fifth of the economic output of the United States

An Amendment providing that a parent's right to parent their children is a fundamental right

An Amendment requiring that Representatives be apportioned based on each state's resident U.S. citizens

II. Democratic Members.

1. Rep. Steve Cohen.

An Amendment to reverse *Citizens United*, and provide for content neutral regulations of political contributions, etc.

An Amendment to provide a fundamental right to vote in any public election

An Amendment stating that corporations are not within the constitutional definition of "people"

An Amendment declaring that men and women have equal rights under the law

An Amendment to change the President's pardon powers and require Congressional or Supreme Court approval

2. Rep. Jerrold Nadler.

An Amendment declaring that men and women have equal rights under the law.

An Amendment to reverse *Citizens United*, and provide for content neutral regulations of political contributions, etc.

An Amendment to elect the U.S. President and Vice President by popular vote

An Amendment to change how vacancies are filled in the U.S. House of

Representatives

3. Rep. Ted Deutch.

An Amendment declaring that men and women have equal rights under the law.

An Amendment to reverse *Citizens United*, and provide for content neutral regulations of political contributions, etc.

An Amendment to declare that the rights of natural persons "do not extend to for-profit corporations," etc.

An Amendment to grant Congress and the States unequivocal power to regulate expenditures related to any election

One exponent of the view that victims' rights do not belong in the Constitution is scholar Bruce Fein, who has testified before Congress that the Amendment is improper because it does not address "the political architecture of the nation."²⁵⁹ 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.²⁶⁰ Indeed, the argument concludes, to do so would "detract from the sacredness of the covenant."²⁶¹

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

These are rights not to be victimized again through the process by which government officials prosecute, punish and release accused or convicted offenders. These are the very kinds of rights with which our Constitution is typically and properly concerned—rights of individuals to participate in all those government processes that strongly affect their lives.²⁶²

Indeed, our Constitution has been amended a number of times to protect participatory rights of citizens. For example, the Fourteenth and Fifteenth Amendments were added, in part, to guarantee that the newly freed slaves could participate on equal terms in the judicial and electoral processes, the Seventeenth Amendment to allow citizens to elect their own Senators, and the Nineteenth and Twenty-Sixth Amendments to provide voting rights for women and eighteen-year-olds.²⁶³ 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

²⁵⁹ *Proposals to Provide Rights to Victims of Crime: Hearings on H.J. Res. 71 & H.R. 1322 Before the House Comm. on the Judiciary*, 105th Cong. 96 (1997) (statement of Bruce Fein).

²⁶⁰ *1996 Senate Judiciary Comm. Hearings*, *supra* note 34, at 101 (statement of Bruce Fein).

²⁶¹ *Id.* at 100. For similar views, see, for example, Stephen Chapman, *Constitutional Clutter: The Wrongs of the Victims' Rights Amendment*, CHI. TRIB., Apr. 20, 1997, at A21; *Cluttering the Constitution*, N.Y. TIMES, July 15, 1996, at A12.

²⁶² Tribe & Cassell, *supra* note 103, at B5.

²⁶³ U.S. CONST. amends. XIV, XV, XIX, XXVI.

attending trials. In *Richmond Newspapers, Inc. v. Virginia*,²⁶⁴ the Court agreed that the First Amendment guaranteed the right of the public and the press to attend criminal trials.²⁶⁵ 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.²⁶⁶ My sense is that the victims' request should be entitled to at least as much respect as the media request. However, under the law that exists today, the television station has a First Amendment interest in access to the documents, while the victims' families have no constitutional interest in challenging their exclusion from the trial.²⁶⁷ 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.

A further variant on the unworthiness objection is that our Constitution protects only "negative" rights against governmental abuse. Professor Henderson has written, for example, that the Amendment's rights differ from others in the Constitution, which "tend to be individual rights *against* government."²⁶⁸ Setting aside the possible response that the Constitution ought to recognize affirmative duties of government,²⁶⁹ the fact remains that the Amendment's thrust is to check governmental power, not expand it.²⁷⁰ Again, the Oklahoma City case serves as a useful illustration.²⁷¹ When the victims filed a challenge to a sequestration order directed at them, they sought the liberty to attend court hearings. In other words, they were challenging the exercise of government power deployed against them, a conventional subject for constitutional protection. The other rights in the Amendment fit this pattern, as they restrain government actors, rather than extract benefits for victims. Thus, the State must give notice before it proceeds with a criminal trial; the State must respect a victim's right to attend that trial; and the State must consider the interests of victims at sentencing and other proceedings. These are the standard fare of

²⁶⁴ 448 U.S. 554 (1980).

²⁶⁵ See *id.* at 557 (stating that right to attend criminal trials is implicit in guarantees of First Amendment).

²⁶⁶ See Cassell, *Barbarians at the Gates?*, *supra* note 92, at 515-22.

²⁶⁷ Compare *United States v. McVeigh*, 918 F. Supp. 1452, 1465-66 (W.D. Okla. 1996) (recognizing press interest in access to documents), with *United States v. McVeigh*, 106 F.3d 325, 335-36 (10th Cir. 1997) (finding that victims do not have standing to raise First Amendment challenge to order excluding them from trial). See also *United States v. McVeigh*, 119 F.3d 806, 814-15 (10th Cir. 1997) (recognizing First Amendment interest of press in access to documents, but sufficient findings made to justify sealing order).

²⁶⁸ Henderson, *supra* note 118, at 395; see also 1996 *House Judiciary Comm. Hearings*, *supra* note 36, at 194 (statement of Roger Pilon) (stating that Amendment has "feel" of listing "'rights' not as liberties that government must respect as it goes about its assigned functions but as 'entitlements' that the government must affirmatively provide"); Bruce Shapiro, *Victims & Vengeance: Why the Victims' Rights Amendment Is a Bad Idea*, THE NATION, Feb. 10, 1997, at 16 (suggesting that Amendment "[u]pends the historic purpose of the Bill of Rights").

²⁶⁹ See Bandes, *The Negative Constitution*, *supra* note 252, at 208-09 (suggesting that Constitution should be read to recognize and protect affirmative rights).

²⁷⁰ See Beloof, *supra* note 2, at 295 n.32.

²⁷¹ See Cassell, *Barbarians at the Gates?*, *supra* note 92, at 515-22.

constitutional protections, and indeed defendants already possess comparable constitutional rights. Thus, extending these rights to victims is no novel creation of affirmative government entitlements.

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.²⁷² 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,²⁷³ 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.²⁷⁴ 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.²⁷⁵ 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.²⁷⁶

A final worthiness objection is the claim that victims' rights "trivialize" the Constitution,²⁷⁷ 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 has explained that

²⁷² See, e.g., 1996 Senate Judiciary Comm. Hearings, *supra* note 34, at 100 (statement of Bruce Fein) (stating that defendants are subject to whims of majority); Henderson, *supra* note 118, at 398 (asserting that victims' rights are protected through democratic process); Mosteller, *supra* note 92, at 472 (maintaining that defendants are despised and politically weak, thus needing constitutional protection).

²⁷³ See Andrew J. Karmen, *Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. OF LEGAL COMMENT. 157, 162–69 (1992) (stating that if victims gain influence in criminal justice process, they will inevitably conflict with officials).

²⁷⁴ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (stating that we should be vigilant against attempts to infringe on free speech rights, unless danger and threat is immediate and clear); see also Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–52 (1985) (arguing that First Amendment should be targeted to protect free speech rights even at worst times).

²⁷⁵ See Karmen, *supra* note 273, at 168–69 (explaining why criminal justice professionals are particularly unlikely to honor victims' rights for marginalized groups).

²⁷⁶ See NVC RACE SUB-REPORT, *supra* note 237, at 5 (“[I]n many instances non-white victims were less likely to be provided [crime victims’] rights . . .”).

²⁷⁷ 1996 Senate Judiciary Comm. Hearings, *supra* note 39, at 101 (statement of Bruce Fein); see also S. REP. NO. 105-409, at 54 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl) (“We should not diminish the majesty of the Constitution . . .”).

[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.²⁷⁸

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, 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."²⁷⁹ 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. In short, the claim that the Victims' Rights Amendment trivializes the Constitution is itself a trivial contention.

B. The Problem of Inflexible Constitutionalization.

Another argument raised against the Victims' Rights Amendment is that victims' rights should receive protection through flexible state statutes and amendments, not an inflexible, federal, constitutional amendment. If victims' rights are placed in the United States Constitution, the argument runs, it will be impossible to correct any problems that might arise. The Judicial Conference explication of this argument is typical: "Of critical importance, such an approach is significantly more flexible. It would more easily accommodate a measured approach, and allow for 'fine tuning' if deemed necessary or desirable by Congress after the various concepts in the Act are applied in actual cases across the country."²⁸⁰

This argument contains a kernel of truth because its premise—that the Federal Constitution is less flexible than state provisions—is undeniably correct. This premise is, however, the starting point for the victims' position as well. Victims' rights all too often have been "fine tuned" out of existence. As even the Amendment's critics agree, state amendments and statutes are "far easier . . . to ignore,"²⁸¹ and for this very reason victims seek to have their rights protected in the Federal Constitution. To carry any force, the argument must establish that the greater respect victims will

²⁷⁸ OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 13–14 (1998); see Jeffrey A. Cross, Note, *The Repeated Sufferings of Domestic Violence Victims Not Notified of Their Assailant's Pre-Trial Release from Custody: A Call for Mandatory Domestic Violence Victim Notification Legislation*, 34 J. FAM. L. 915, 932–33 (1996) (arguing for legislation that requires notification to victim when assailant is released from prison).

²⁷⁹ 1997 Senate Judiciary Comm. Hearings, *supra* note 39, at 110 (statement of Paul Cassell) (quoting victim).

²⁸⁰ S. REP. NO. 105-409, at 53 (1998) (reprinting Letter from George P. Kazen, Chief U.S. District Judge, Chair, Comm. on Criminal Law of the Judicial Conference of the United States, to Sen. Edward M. Kennedy, Senate Comm. on the Judiciary 2 (Apr. 17, 1997)).

²⁸¹ 1996 House Judiciary Comm. Hearings, *supra* note 36, at 147 (statement of Ellen Greenlee, Nat'l Legal Aid & Defender Assoc.).

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,"²⁸² 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.²⁸³ 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 Amendment²⁸⁴ and, presumably, go on to impose some contrary and damaging meaning. This is an unpersuasive leap because courts routinely look to the intentions of drafters in interpreting constitutional language no less than other enactments.²⁸⁵ Moreover, the assumption that courts will interpret the Amendment to produce great mischief requires justification. One can envision, for instance, precisely the same arguments about the need for flexibility being leveled against a defendant's right to a trial by jury.²⁸⁶ What about petty offenses?²⁸⁷ What about juvenile proceedings?²⁸⁸ How many jurors will be required?²⁸⁹ 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,²⁹⁰ they will not construe the Victims' Rights Amendment as requiring bizarre results.

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."²⁹¹ Similarly, the American Civil Liberties Union

²⁸² *Cluttering the Constitution*, N.Y. TIMES, July 15, 1996, at A12 (arguing that political expediency is no excuse for amending Constitution).

²⁸³ See S. REP. NO. 105-409, at 22-37 (1998) (considering specific analysis of each section of Amendment).

²⁸⁴ See *id.* at 50-51 (minority views of Sens. Leahy, Kennedy, and Kohl) (arguing that "courts will not care much" for analysis in Senate Report).

²⁸⁵ See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 790 (1995).

²⁸⁶ See U.S. CONST. amend. VI ("[T]he accused shall enjoy the right to a . . . trial[] by an impartial jury . . .").

²⁸⁷ See *Baldwin v. New York*, 399 U.S. 66, 73-74 (1970) (holding that jury trial is required for petty offenses as long as possible jail time exceeds six months).

²⁸⁸ See *McKeiver v. Pennsylvania*, 403 U.S. 528, 549-51 (1971) (holding that jury trial is not required in juvenile proceedings).

²⁸⁹ See *Williams v. Florida*, 399 U.S. 78, 103 (1970) (holding that six-person jury satisfies Sixth Amendment).

²⁹⁰ See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (noting that First Amendment does not allow person to yell "Fire!" in crowded theater).

²⁹¹ 1997 *Senate Judiciary Comm. Hearings*, *supra* note 39, at 140-41 (letter from law professors); see also Mosteller, *Unnecessary Amendment*, *supra* note 92, at 442 (suggesting that "flexible uniformity" may be accomplished through federal legislation and incentives).

warned that the Amendment “constitutes [a] significant intrusion of federal authority into a province traditionally left to state and local authorities.”²⁹²

The inconsistency of many of these newfound friends of federalism is almost breathtaking. Where were these law professors and the ACLU when the Supreme Court federalized a whole host of criminal justice issues ranging from the right to counsel, to *Miranda*, to death penalty procedures, to search and seizure rules, among many others? The answer, no doubt, is that they generally applauded nationalization of these criminal justice standards despite the adverse effect on the ability of states “to decide for themselves.” Perhaps the law professors and the ACLU have had some epiphany and mean now to launch an attack on the federalization of our criminal justice system, with the goal of returning power to the states. Certainly quite plausible arguments could be advanced in support of trimming the reach of some federal doctrines.²⁹³ But whatever the law professors and the ACLU may think, it is unlikely that we will ever retreat from our national commitment to afford criminal defendants basic rights like the right to counsel. Victims are not asking for any retreat, but for an extension—for a national commitment to provide basic rights in the process to criminal defendants *and* to their victims. This parallel treatment works no new damage to federalist principles.²⁹⁴

Precisely because of the constitutionalization and nationalization of criminal procedure, victims now find themselves needing constitutional protection. In an earlier era, it may have been possible for judges to informally accommodate victims’ interests on an ad hoc basis. But the coin of the criminal justice realm has now become constitutional rights. Without those rights, victims have not been taken seriously in the system. Thus, it is not a victims’ rights amendment that poses a danger to state power, but the *lack* of an amendment. Without an amendment, states cannot give full effect to their policy decision to protect the rights of victims. Only elevating these rights to the Federal Constitution will solve this problem.

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*.”²⁹⁵ 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.²⁹⁶ The Amendment also is written in terms that will give the states considerable latitude to accommodate legitimate local interests. For example, the Amendment only

²⁹²1997 Senate Judiciary Comm. Hearings, *supra* note 39, at 159.

²⁹³See, e.g., Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 701–02 (1988) (arguing for reduction of federal involvement in *Miranda* rights); Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 63–70 (1996) (arguing that state constitutional development has reduced need for federal protections).

²⁹⁴If federalism were a serious concern of the law professors, one would also expect to see them supporting language in the Amendment guaranteeing flexibility for the states. Yet, the professors found fault with language in an earlier version of the Amendment that gave both Congress *and the states* the power to “enforce” the Amendment. See 1997 Senate Judiciary Comm. Hearings, *supra* note 39, at 141 (letter from law professors).

²⁹⁵S.J. Res. 3, 106th Cong. § 1 (1999) (emphasis added).

²⁹⁶See BELOOF, CASSELL & TWIST, *supra* note 2, at 41–43 (discussing and listing various legal definitions of “victim”).

requires the states to provide “reasonable” notice to victims, avoiding the inflexible alternative of mandatory notice (which, by the way, is required for criminal defendants²⁹⁷).

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.²⁹⁸ It is critics of the Amendment who, by opposing congressional approval, deprive the states of their opportunity to consider the proposal.²⁹⁹

VI. THE PROVISIONS OF THE VICTIMS’ RIGHTS AMENDMENT³⁰⁰

The proposed amendment is a carefully-crafted provision that provides vital rights to victims of crime while at the same time protecting all other legitimate interests. In its current form – H.J. Res. 45 -- the amendment would extend crime victims constitutional protections as follows:

Section 1. The following rights of a crime victim, being capable of protection without denying the constitutional rights of the accused, shall not be denied or abridged by the United States or any State. The crime victim shall have the rights to reasonable notice of, and shall not be excluded from, public proceedings relating to the offense, to be heard at any release, plea, sentencing, or other proceeding involving any right established by this article, to proceedings free from unreasonable delay, to reasonable notice of the release or escape of the accused, to due consideration of the crime victim’s safety, dignity, and privacy, and to restitution. The crime victim or the crime victim’s lawful representative has standing to assert and enforce these rights. Nothing in this article provides grounds for a new trial or any claim for damages. Review of the denial of any right established herein, which may include interlocutory relief, shall be subject to the standards of ordinary appellate review.

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

²⁹⁷See *United States v. Reiter*, 897 F.2d 639, 642–44 (2d Cir. 1990) (requiring notice to apprise defendant of nature of proceedings against him).

²⁹⁸See U.S. CONST. amend. V; S.J. Res. 3, 106th Cong. Preamble (1999); *see also* THE FEDERALIST No. 39 (James Madison) (discussing process of amending Constitution).

²⁹⁹*Cf.* RICHARD B. BERNSTEIN, AMENDING AMERICA 220 (1993) (recalling defeat of Equal Rights Amendment in states and observing that “[t]he significant role of state governments as participants in the amending process is thriving”); Mosteller, *Unnecessary Amendment*, *supra* note , at 449 n.21 (noting that “unfunded mandates” argument is “arguably inapposite for a constitutional amendment that must be supported by three-fourths of the states since the vast majority of states would have approved imposing the requirement on themselves”).

³⁰⁰This section draws heavily on Paul G. Cassell, *The Victims’ Rights Amendment: A Sympathetic, Clause-By-Clause Analysis*, 5 PHOENIX L. REV. 301 (2012).

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

Because those who are unfamiliar with victims' rights provisions may have questions about the language, it is useful to analyze the amendment section-by-section. Language of the resolution is italicized and then discussed in light of generally applicable legal principles and existing victims' case law. What follows, then, is my understanding of what the amendment would mean for crime victims in courts around the country.

A. Section 1

The following rights of a crime victim . . .

This clause extends rights to victims of both violent and property offenses. This is a significant improvement over the previous version of the VRA—S.J. Res. 1—which only extended rights to “victims of violent crimes.”³⁰¹ While the Constitution does draw lines in some situations,³⁰² ideally crime victims' rights would extend to victims of both violent and property offenses. The previous limitation appeared to be a political compromise.³⁰³ There appears to be no principled reason why victims of economic crimes should not have the same rights as victims of violent crimes.³⁰⁴

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

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

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

³⁰¹ S.J. Res. 1, 108th Cong. (2003). The previous version of the amendment likewise did not automatically extend rights to victims of non-violent crimes, but did allow extension of rights to victims of “other crimes that Congress may define by law.” Compare *id.* with S.J. Res. 6, 105th Cong. (1997). This language was deleted from S.J. Res. 1, 108th Cong. (2003).

³⁰² Various constitutional provisions draw distinctions between individuals and between crimes, often for no reason other than administrative convenience. For instance, the right to a jury trial extends only to cases “where the value in controversy shall exceed twenty dollars.” U.S. CONST. amend. VII. Even narrowing our view to criminal cases, frequent line-drawing exists. For instance, the Fifth Amendment extends to defendants in federal cases the right not to stand trial “unless on a presentment or indictment of a Grand Jury”; however, this right is limited to a “capital, or otherwise infamous crime.” U.S. CONST. amend. V. Similarly, the right to a jury trial in criminal cases depends in part on the penalty a state legislature decides to set for any particular crime.

³⁰³ S. REP. NO. 106-254, at 45 (2000).

³⁰⁴ See Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39 (2001).

This preamble was suggested by Professor Laurence Tribe of Harvard Law School.³⁰⁵ It makes clear that the amendment is not intended to, nor does it have the effect of, denying the constitutional rights of the accused. Crime victims' rights do not stand in opposition to defendants' rights but rather parallel to them.³⁰⁶ For example, just as a defendant possesses a right to speedy trial,³⁰⁷ the VRA would extend to crime victims a corresponding right to proceedings free from unreasonable delay.

If any seeming conflicts were to emerge between defendants' rights and victims' rights, courts would retain the ultimate responsibility for harmonizing the rights at stake. The concept of harmonizing rights is not a new one.³⁰⁸ Courts have harmonized rights in the past; for example, accommodating the rights of the press and the public to attend criminal trials with the rights of criminal defendants to a fair trial.³⁰⁹ Courts can be expected to do the same with the VRA.

At the same time, the VRA will eliminate a common reason for failing to protect victims' rights: the misguided view that the mere assertion of a defendant's constitutional right automatically *trumps* a victim's right. In some of the litigated cases, victims' rights have not been enforced because defendants have made vague, imprecise, and inaccurate claims about their federal constitutional due process rights being violated. Those claims would be unavailing after the passage of a federal amendment. For this reason, the mere fact of passing a Victims' Rights Amendment can be expected to bring a dramatic improvement to the way in which victims' rights are enforced, even were no enforcement actions to be brought by victims or their advocates.

. . . shall not be denied or abridged by the United States or any State.

This provision would ensure that the rights extended by Section 1 actually have content—specifically, that they cannot be denied in either the federal or state criminal justice systems. The VRA follows well-plowed ground in creating criminal justice rights that apply to both the federal and state cases. Earlier in the nation's history, the Bill of Rights was applicable only against the federal government and not against state governments.³¹⁰ Since the passage of the Fourteenth Amendment,³¹¹ however, the great bulk of criminal procedure rights have been “incorporated” into the Due Process Clause and thereby made applicable in state proceedings.³¹²

It is true that plausible arguments could be made for trimming the reach of incorporation doctrine.³¹³ But it is unlikely that we will ever retreat from our current commitment to afford

³⁰⁵ *Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 1 Before the S. Comm. on the Judiciary*, 108th Cong. 230 (2003) (statement of Steven J. Twist).

³⁰⁶ See generally Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 16-19 (1997).

³⁰⁷ U.S. CONST. amend. VI.

³⁰⁸ See Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.

³⁰⁹ See, e.g., *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 9 (1986) (balancing the “qualified First Amendment right of public access” against the “right of the accused to a fair trial”).

³¹⁰ See *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

³¹¹ U.S. CONST. amend. XIV.

³¹² U.S. CONST. amend. V.; see, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Malloy v. Hogan*, 378 U.S. 1 (1964).

³¹³ See, e.g., Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 701–02 (1988) (arguing for reduction of federal involvement in

criminal defendants a basic set of rights, such as the right to counsel. Victims are not asking for any retreat, but for an extension—for a national commitment to provide basic rights in the process to criminal defendants *and* to their victims. This parallel treatment works no new damage to federalist principles.

Indeed, precisely because of the constitutionalization and nationalization of criminal procedure, victims now find themselves needing constitutional protection. In an earlier era, it may have been possible for judges to informally accommodate victims' interests on an ad hoc basis. But the coin of the criminal justice realm has now become constitutional rights. Without such rights, victims have all too often not been taken seriously in the system. Thus, it is not a victims' rights amendment that poses a danger to state power, but the *lack* of an amendment. Without an amendment, states cannot give full effect to their policy decisions to protect the rights of victims. Only elevating these rights to the Federal Constitution will solve this problem. This is why the National Governor's Association—a long-standing friend of federalism—endorsed an earlier version of the amendment, explaining:

The rights of victims have always received secondary consideration within the U.S. judicial process, even though states and the American people by a wide plurality consider victims' rights to be fundamental. Protection of these basic rights is essential and can only come from a fundamental change in our basic law: the U.S. Constitution.³¹⁴

It should be noted that the States and the federal government, within their respective jurisdictions, retain authority to define, in the first instance, conduct that is criminal.³¹⁵ The power to define victim is simply a corollary of the power to define criminal offenses and, for state crimes, the power would remain with state legislatures.

It is important to emphasize that the amendment would establish a floor—not a ceiling—for crime victims' rights³¹⁶ and States will remain free to enact (or continue, as indeed many have already enacted) more expansive rights than are established in this amendment. Rights established in a state's constitution would be subject to the independent construction of the state's courts.³¹⁷

The crime victim shall have the rights to reasonable notice of . . . public proceedings relating to the offense . . .

Miranda rights); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965) (criticizing interpretation that would become so extensive as to produce, in effect, a constitutional code of criminal procedure); Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 63–70 (1996) (arguing that state constitutional development has reduced need for federal protections).

³¹⁴ NAT'L GOVERNORS ASS'N, POLICY 23.1 (1997).

³¹⁵ See, e.g., *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 87 (1921) ("Congress alone has power to define crimes against the United States.").

³¹⁶ See S. REP. NO. 105–409, at 24 (1998) ("In other words, the amendment sets a national 'floor' for the protecting of victims' rights, not any sort of 'ceiling.' Legislatures, including Congress, are certainly free to give statutory rights to all victims of crime, and the amendment will in all likelihood be an occasion for victims' statutes to be re-examined and, in some cases, expanded.").

³¹⁷ See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

The victims' right to reasonable notice about proceedings is a critical right. Because victims and their families are directly and often irreparably harmed by crime, they have a vital interest in knowing about any subsequent prosecution. Yet in spite of statutes extending a right to notice to crime victims, some victims continue to be unaware of that right. The recent GAO Report, for example, found that approximately twenty-five percent of the responding federal crime victims were unaware of their right to notice of court hearings under the CVRA.³¹⁸ Even larger percentages of failure to provide required notices were found in a survey of various state criminal justice systems.³¹⁹ Distressingly, the same survey found that racial minority victims were less likely to have been notified than their white counterparts.³²⁰

The Victims' Rights Amendment would guarantee crime victims a right to *reasonable notice*. This formulation tracks the CVRA, which extends to crime victims the right "to reasonable . . . notice" of court proceedings.³²¹ Similar formulations are found in state constitutional amendments. For instance, the California State Constitution promises crime victims "reasonable notice" of all public proceedings.³²²

No doubt, in implementing language Congress and the states will provide additional details about how reasonable notice is to be provided. I will again draw on my own state of Utah to provide an example of how notice could be structured. The Utah Rights of Crime Victims Act provides that "[w]ithin seven days of the filing of felony criminal charges against a defendant, the prosecuting agency shall provide an initial notice to reasonably identifiable and locatable victims of the crime contained in the charges, except as otherwise provided in this chapter."³²³ The initial notice must contain information about "electing to receive notice of subsequent important criminal justice hearings."³²⁴ In practice, Utah prosecuting agencies have provided these notices with a detachable postcard or computer generated letter that victims simply return to the prosecutor's office to receive subsequent notices about proceedings. The return postcard serves as the victims' request for further notices. In the absence of such a request, a prosecutor need not send any further notices.³²⁵ The statute could also spell out situations where notice could not be reasonably provided, such as emergency hearings necessitated by unanticipated events. In Utah, for instance, in the event of an unforeseen hearing for which notice is required, "a good faith attempt to contact the victim by telephone" meets the notice requirement.³²⁶

³¹⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 67, at 82.

³¹⁹ National Victim Center, *Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights*, in BELOOF, CASSELL & TWIST, *supra* note 2, at 631-34.

³²⁰ *Id.*

³²¹ 18 U.S.C. § 3771(a)(2).

³²² CAL. CONST. art. I, § 28(b)(7).

³²³ UTAH CODE ANN. § 77-38-3(1). The "except as otherwise provided" provision refers to limitations for good faith attempts by prosecutors to provide notice and situations involving more than ten victims. *Id.* § 77-38-3(4)(b), (10). See generally Cassell, *Balancing the Scales*, *supra* note 7 (providing information about the implementation of Utah's Rights of Crime Victims Act and utilized throughout this paragraph).

³²⁴ § 77-38-3(2). The notice will also contain information about other rights under the victims' statute. *Id.*

³²⁵ *Id.* § 77-38-3(8). Furthermore, victims must keep their address and telephone number current with the prosecuting agency to maintain their right to notice. *Id.*

³²⁶ *Id.* § 77-38-3(4)(b). However, after the hearing for which notice was impractical, the prosecutor must inform the victim of that proceeding's result. *Id.*

In some cases, i.e., terrorist bombings or massive financial frauds, the large number of victims may render individual notifications impracticable. In such circumstances, notice by means of a press release to daily newspapers in the area would be a reasonable alternative to actual notice sent to each victim at his or her residential address.³²⁷ New technologies may also provide a way of affording reasonable notice. For example, under the CVRA, courts have approved notice by publication, where the publication directs crime victims to a website maintained by the government with hyperlinks to updates on the case.³²⁸

The crime victim shall . . . not be excluded from, public proceedings relating to the offense . . .

Victims also deserve the right to attend all public proceedings related to an offense. The President's Task Force on Victims of Crime held hearings around the country in 1982 and concluded:

The crime is often one of the most significant events in the lives of victims and their families. They, no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial.³²⁹

Several strong reasons support this right, as Professor Doug Beloof and I have argued at length elsewhere.³³⁰ To begin with, the right to attend the trial may be critical in allowing the victim to recover from the psychological damage of a crime. "The victim's presence during the trial may also facilitate healing of the debilitating psychological wounds suffered by a crime victim."³³¹

Concern about psychological trauma becomes even more pronounced when coupled with findings that defense attorneys have, in some cases, used broad witness exclusion rules to harm victims.³³² As the Task Force found:

[T]his procedure can be abused by [a defendant's] advocates and can impose an improper hardship on victims and their relatives. Time and again, we heard from victims or their families that they were unreasonably excluded from the trial at which responsibility for their victimization was assigned. This is especially difficult for the families of murder victims and for witnesses who are denied the supportive presence of parents or spouses during their testimony.

³²⁷ United States v. Peralta, No. 3:08cr233, 2009 WL 2998050, at *1-2 (W.D.N.C. Sept. 15, 2009).

³²⁸ United States v. Skilling, No. H-04-025-SS, 2009 WL 806757, at *1-2 (S.D. Tex. Mar. 26, 2009); United States v. Saltsman, No. 07-CR-641 (NGG), 2007 WL 4232985, at *1-2 (E.D.N.Y. Nov. 27, 2007); United States v. Croteau, No. 05-CR-30104-DRH, 2006 U.S. Dist. LEXIS 23684, at *2-3 (S.D. Ill. 2006).

³²⁹ HERRINGTON ET AL., *supra* note 4, at 80.

³³⁰ See Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005).

³³¹ Ken Eikenberry, *Victims of Crimes/Victims of Justice*, 34 WAYNE L. REV. 29, 41 (1987).

³³² See generally OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, *THE CRIME VICTIM'S RIGHT TO BE PRESENT* 2 (2001) (showing how defense counsel can successfully argue to have victims excluded as witnesses).

....
Testifying can be a harrowing experience, especially for children, those subjected to violent or terrifying ordeals, or those whose loved ones have been murdered. These witnesses often need the support provided by the presence of a family member or loved one, but these persons are often excluded if the defense has designated them as witnesses. Sometimes those designations are legitimate; on other occasions they are only made to confuse or disturb the opposition. We suggest that the fairest balance between the need to support both witnesses and defendants and the need to prevent the undue influence of testimony lies in allowing a designated individual to be present regardless of his status as a witness.³³³

Without a right to attend trials, “the criminal justice system merely intensifies the loss of control that victims feel after the crime.”³³⁴ It should come as no surprise that “[v]ictims are often appalled to learn that they may not be allowed to sit in the courtroom during hearings or the trial. They are unable to understand why they cannot simply observe the proceedings in a supposedly public forum.”³³⁵ One crime victim put it more directly: “All we ask is that we be treated just like a criminal.”³³⁶ In this connection, it is worth remembering that defendants never suggest that *they* could be validly excluded from the trial if the prosecution requests *their* sequestration. Defendants frequently take full advantage of their right to be in the courtroom.³³⁷

To ensure that victims can attend court proceedings, the Victims’ Rights Amendment extends them this unqualified right. Many state amendments have similar provisions.³³⁸ Such an unqualified right does not interfere with a defendant’s right for the simple reason that defendants have no constitutional right to exclude victims from the courtroom.³³⁹

The amendment will give victims a right not to be excluded from public proceedings. The right is phrased in the negative—a right *not* to be excluded—thus avoiding the possible suggestion that a right “to attend” carried with it a victim’s right to demand payment from the public fisc for travel to court.³⁴⁰

The right is limited to *public* proceedings. While the great bulk of court proceedings are public, occasionally they must be closed for various compelling reasons. The Victims’ Rights

³³³ HERRINGTON ET AL., *supra* note 4, at 80.

³³⁴ Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 72 (1987).

³³⁵ Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims’ Perspective*, 34 WAYNE L. REV. 51, 58 (1987).

³³⁶ *Id.* at 59 (quoting Edmund Newton, *Criminals Have All the Rights*, LADIES’ HOME J., Sept. 1986).

³³⁷ See LINDA E. LEDRAY, *RECOVERING FROM RAPE* 199 (2d ed. 1994) (“Even the most disheveled [rapist] will turn up in court clean-shaven, with a haircut, and often wearing a suit and tie. He will not appear to be the type of man who could rape.”).

³³⁸ See, e.g., ALASKA CONST. art. I, § 24 (right “to be present at all criminal . . . proceedings where the accused has the right to be present”); MICH. CONST., art. I, § 24(1) (right “to attend the trial and all other court proceedings the accused has the right to attend”); OR. R. EVID. 615 (witness exclusion rule does not apply to “victim in a criminal case”). See Beloof & Cassell, *supra* note 184, at 504-19 (providing a comprehensive discussion of state law on this subject).

³³⁹ See Beloof & Cassell, *supra* note 184, at 520-34. See, e.g., *United States v. Edwards*, 526 F.3d 747, 757-58 (11th Cir. 2008).

³⁴⁰ Cf. ALA. CODE § 15-14-54 (right “not [to] be excluded from court . . . during the trial or hearing or any portion thereof . . . which in any way pertains to such offense”).

Amendment makes no change in court closure policies, but simply indicates that when a proceeding is closed, the victim may be excluded as well. An illustration is the procedures that courts may employ to prevent disclosure of confidential national security information.³⁴¹ When court proceedings are closed to the public pursuant to these provisions, a victim will have no right to attend. Finally, the victims right to attend is limited to proceedings relating to the offense, rather than open-endedly creating a right to attend any sort of proceedings.

Occasionally the claim is advanced that a Victims' Rights Amendment would somehow allow victims to "act[] in an excessively emotional manner in front of the jury or convey their opinions about the proceedings to that jury."³⁴² Such suggestions misunderstand the effect of the right-not-to-be-excluded provision. In this connection, it is interesting that no specific illustrations of a victims' right provision actually being interpreted in this fashion have, to my knowledge, been offered. The reason for this dearth of illustrations is that courts undoubtedly understand that a victims' right to be present does not confer any right to disrupt court proceedings. Here, courts are simply treating victims' rights in the same fashion as defendants' rights. Defendants have a right to be present during criminal proceedings, which stems from both the Confrontation and Due Process Clauses of the Constitution.³⁴³ Courts have consistently held that these constitutional rights do not confer on defendants any right to engage in disruptive behavior.³⁴⁴

The crime victim shall have the rights . . . to be heard at any release, plea, sentencing, or other such proceeding involving any right established by this article
...

Victims deserve the right to be heard at appropriate points in the criminal justice process, and thus deserve to participate directly in the criminal justice process. The CVRA promises crime victims "[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, or sentencing."³⁴⁵ A number of states have likewise added provisions to their state constitutions allowing similar victim participation.³⁴⁶

³⁴¹ See generally WAYNE R. LAFAVE ET. AL., CRIMINAL PROCEDURE § 23.1(b) (3d ed. 2007) (discussing court closure cases).

³⁴² Mosteller, *Recasting the Battle*, *supra* note 97, at 1702.

³⁴³ See *Diaz v. United States*, 223 U.S. 442, 454-555 (1912); *Kentucky v. Stincer*, 482 U.S. 730, 740-44 (1987).

³⁴⁴ See, e.g., *Illinois v. Allen*, 397 U.S. 337 (1970) (defendant waived right to be present by continued disruptive behavior after warning from court); *Saccomanno v. Scully*, 758 F.2d 62, 64-65 (2d Cir. 1985) (concluding that defendant's obstreperous behavior justified his exclusion from courtroom); *Foster v. Wainwright*, 686 F.2d 1382, 1387 (11th Cir. 1982) (defendant forfeited right to be present at trial by interrupting proceeding after warning by judge, even though his behavior was neither abusive nor violent).

³⁴⁵ 18 U.S.C. § 3771(a)(4) (2006).

³⁴⁶ See, e.g., ARIZ. CONST. art II, § 2.1(A)(4) (right to be heard at proceedings involving post-arrest release, negotiated pleas, and sentencing); COLO. CONST. art. II, § 16a (right to be heard at critical stages); FLA. CONST. art. I, § 16(b) (right to be heard when relevant at all stages); ILL. CONST. art. I, § 8.1(4) (right to make statement at sentencing); KAN. CONST. art. 15, § 15(a) (right to be heard at sentencing or any other appropriate time); MICH. CONST. of 1963, art. I, § 24(1) (right to make statement at sentencing); MO. CONST. art. I, § 32(1)(2) (right to be heard at guilty pleas, bail hearings, sentencings, probation revocation hearings, and parole hearings, unless interests of justice require otherwise); N.M. CONST. art. II, § 24(A)(7) (right to make statement at sentencing and post-sentencing hearings); R.I. CONST. art. I, § 23 (right to address court at sentencing); WASH. CONST. art. I, § 35 (right to make statement at sentencing or release proceeding); WIS. CONST. art. I, § 9m (opportunity to make statement to court at disposition); UTAH CONST. art. I, § 28(1)(b) (right to be heard at important proceedings).

The VRA identifies three specific and one general points in the process where a victim statement is permitted. First, the VRA would extend the right to be heard regarding any *release* proceeding—i.e., bail hearings. This will allow, for example, a victim of domestic violence to warn the court about possible violence should the defendant be granted bail. At the same time, however, it must be emphasized that nothing in the VRA gives victims the ability to veto the release of any defendant. The ultimate decision to hold or release a defendant remains with the judge or other decision-maker. The amendment will simply provide the judge with more information on which to base that decision. Release proceedings would include not only bail hearings but other hearings involving the release of accused or convicted offenders, such as parole hearings and any other hearing that might result in a release from custody. Victim statements to parole boards are particularly important because they “can enable the board to fully appreciate the nature of the offense and the degree to which the particular inmate may present risks to the victim or community upon release.”³⁴⁷

The right to be heard also extends to any proceeding involving a plea. Under the present rules of procedure in most states, every plea bargain between a defendant and the state to resolve a case before trial must be submitted to the trial court for approval.³⁴⁸ If the court believes that the bargain is not in the interest of justice, it may reject it.³⁴⁹ Unfortunately in some states, victims do not always have the opportunity to present to the judge information about the propriety of the plea agreements. Indeed, it may be that in some cases “keeping the victim away from the judge . . . is one of the prime motivations for plea bargaining.”³⁵⁰ Yet victims have compelling reasons for some role in the plea bargaining process:

The victim’s interests in participating in the plea bargaining process are many. The fact that they are consulted and listened to provide them with respect and an acknowledgment that they are the harmed individual. This in turn may contribute to the psychological healing of the victim. The victim may have financial interests in the form of restitution or compensatory fine [B]ecause judges act in the public interest when they decide to accept or reject a plea bargain, the victim is an additional source of information for the court.³⁵¹

It should be noted that nothing in the Victims’ Rights Amendment requires a prosecutor to obtain a victim’s approval before agreeing to a plea bargain. The language is specifically limited to a victim’s right to be heard regarding a plea proceeding. A meeting between a prosecutor and a defense attorney to negotiate a plea is not a *proceeding* involving the plea, and therefore victims are conferred no right to attend the meeting. In light of the victim’s right to be heard regarding any deal, however, it may well be the prosecutors would undertake such consultation at a mutually convenient time as a matter of prosecutorial discretion. This has been the experience in my state of Utah. While prosecutors are not required to consult with victims before entering plea

³⁴⁷ Frances P. Bernat et al., *Victim Impact Laws and the Parole Process in the United States: Balancing Victim and Inmate Rights and Interests*, 3 INT’L REV. VICTIMOLOGY 121, 134 (1994).

³⁴⁸ See generally BELOOF, CASSELL & TWIST, *supra* note 2, at 422 (discussing this issue).

³⁴⁹ See, e.g., UTAH R. CRIM. P. 11(e) (“The court may refuse to accept a plea of guilty”); *State v. Mane*, 783 P.2d 61, 66 (Utah Ct. App. 1989) (following Rule 11(e) and holding “[n]othing in the statute requires a court to accept a guilty plea”).

³⁵⁰ HERBERT S. MILLER ET AL., PLEA BARGAINING IN THE UNITED STATES 70 (1978).

³⁵¹ BELOOF, CASSELL & TWIST, *supra* note 2, at 423.

agreements, many of them do. In serious cases such as homicides and rapes, Utah courts have also contributed to this trend by not infrequently asking prosecutors whether victims have been consulted about plea bargains.

As with the right to be heard regarding bail, it should be noted that victims are only given a voice in the plea bargaining process, not a veto. The judge is not required to follow the victim's suggested course of action on the plea, but simply has more information on which to base such a determination.

The Victims' Rights Amendment also would extend the right to be heard to proceedings determining a sentence. Defendants have the right to directly address the sentencing authority before sentence is imposed.³⁵² The Victims' Rights Amendment extends the same basic right to victims, allowing them to present a victim impact statement.

Elsewhere I have argued at length in favor of such statements.³⁵³ The essential rationales are that victim impact statements provide information to the sentencer, have therapeutic and other benefits for victims, explain the crime's harm to the defendant, and improve the perceived fairness of sentencing.³⁵⁴ The arguments in favor of victim impact statements have been universally persuasive in this country, as the federal system and all fifty states generally provide victims the opportunity to deliver a victim impact statement.³⁵⁵

Victims would exercise their right to be heard in any appropriate fashion, including making an oral statement at court proceedings or submitting written information for the court's consideration.³⁵⁶ Defendants can respond to the information that victims provide in appropriate ways, such as providing counter-evidence.³⁵⁷

The victim also would have the general right to be heard at a proceeding involving any right established by this article. This allows victims to present information in support of a claim of right under the amendment, consistent with normal due process principles.³⁵⁸

The victim's right to be heard under the VRA is subject to limitations. A victim would not have the right to speak at proceedings other than those identified in the amendment. For example, the victims gain no right to speak at the trial. Given the present construction of these proceedings, there is no realistic design for giving a victim an unqualified right to speak. At trial, however,

³⁵² See, e.g., FED. R. EVID. 32(i)(4)(A); UTAH R. CRIM. P. 22(a).

³⁵³ Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009).

³⁵⁴ *Id.* at 619-25.

³⁵⁵ *Id.* at 615; see also Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 299-305 (2003).

³⁵⁶ A previous version of the amendment allowed a victim to make an oral statement or submit a "written" statement. S.J. Res. 6, 105th Cong. (1997). This version has stricken the artificial limitation to written statements and would thus accommodate other media (such as videotapes or Internet communications).

³⁵⁷ See generally Paul G. Cassell & Edna Erez, *Victim Impact Statements and Ancillary Harm: The American Perspective*, 15 CAN. CRIM. L. REV. 149, 175-96 (2011) (providing a fifty state survey on procedures concerning victim impact statements).

³⁵⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) ("For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard." (internal quotation omitted)).

victims will often be called as witnesses by the prosecution and if so, they will testify as any other witness would.

In all proceedings, victims must exercise their right to be heard in a way that is not disruptive. This is consistent with the fact that a defendant's constitutional right to be heard carries with it no power to disrupt the court's proceedings.³⁵⁹

. . . to proceedings free from unreasonable delay . . .

This provision is designed to be the victims' analogue to the defendant's right to a speedy trial found in the Sixth Amendment.³⁶⁰ The defendant's right is designed, *inter alia*, "to minimize anxiety and concern accompanying public accusation" and "to limit the possibilities that long delay will impair the ability of an accused to defend himself."³⁶¹ The interests underlying a speedy trial, however, are not confined to defendant. Indeed, the Supreme Court has acknowledged that:

[T]here is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system.³⁶²

The ironic result is that in many criminal courts today the defendant is the only person without an interest in a speedy trial. Delay often works unfairly to the defendant's advantage. Witnesses may become unavailable, their memories may fade, evidence may be lost, or the case may simply grow stale and receive a lower priority with the passage of time.

While victims and society as a whole have an interest in a speedy trial, the current constitutional structure provides no means for vindication of that right. Although the Supreme Court has acknowledged the "societal interest" in a speedy trial, it is widely accepted that "it is rather misleading to say . . . that this 'societal interest' is somehow part of the right. The fact of the matter is that the 'Bill of Rights, of course, does not speak of the rights and interests of the government.'"³⁶³ As a result, victims frequently face delays that by any measure must be regarded as unjustified and unreasonable, yet have no constitutional ability to challenge them.

It is not a coincidence that these delays are found most commonly in cases of child sex assault.³⁶⁴ Children have the most difficulty in coping with extended delays. An experienced victim-witness coordinator in my home state described the effects of protracted litigation in a recent case: "The delays were a nightmare. Every time the counselors for the children would call

³⁵⁹ See FED. R. CRIM. P. 43(b)(3) (noting circumstances in which disruptive conduct can lead to defendant's exclusion from the courtroom).

³⁶⁰ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . .").

³⁶¹ *Smith v. Hooey*, 393 U.S. 374, 378 (1969) (citing *United States v. Ewell*, 383 U.S. 116, 120 (1966)).

³⁶² *Barker v. Wingo*, 407 U.S. 514, 519 (1972).

³⁶³ LAFAYETTE ET. AL., *supra* note 341, at § 18.1(b) (footnote omitted).

³⁶⁴ See *A Proposed Constitutional Amendment to Establish A Bill of Rights for Crime Victims: Hearing on S.J. Res. 52 Before the S. Comm. on the Judiciary*, 104th Cong. 29 (1996) (statement of John Walsh).

and say we are back to step one. The frustration level was unbelievable.”³⁶⁵ Victims cannot heal from the trauma of the crime until the trial is over and the matter has been concluded.³⁶⁶

To avoid such unwarranted delays, the Victims’ Rights Amendment will give crime victims the right to proceedings free from unreasonable delay. This formulation tracks the language from the CVRA.³⁶⁷ A number of states have already established similar protections for victims.³⁶⁸

As the wording of the federal provision makes clear, the courts are not required to follow victims demands for scheduling trial or prevent all delay, but rather to insure against “unreasonable” delay.³⁶⁹ In interpreting this provision, the court can look to the body of case law that already exists for resolving defendants’ speedy trial claims. For example, in *Barker v. Wingo*, the United States Supreme Court set forth various factors that could be used to evaluate a defendant’s speedy trial challenge in the wake of a delay.³⁷⁰ As generally understood today, those factors are: (1) the length of the delay; (2) the reason for the delay; (3) whether and when the defendant asserted his speedy trial right; and (4) whether the defendant was prejudiced by the delay.³⁷¹ These kinds of factors could also be applied to victims’ claims. For example, the length of the delay and the reason for the delay (factors (1) and (2)) would remain relevant in assessing victims’ claims. Whether and when a victim asserted the right (factor (3)) would also be relevant, although due regard should be given to the frequent difficulty that unrepresented victims have in asserting their legal claims. Defendants are not deemed to have *waived* their right to a speedy trial simply through failing to assert it.³⁷² Rather, the circumstances of the defendant’s assertion of the right is given “strong evidentiary weight” in evaluating his claims.³⁷³ A similar approach would work for trial courts considering victims’ motions. Finally, while victims are not *prejudiced* in precisely the same fashion as defendants (factor (4)), the Supreme Court has instructed that “prejudice” should be “assessed in the light of the interests of defendants which the speedy trial right was designed to protect,” including the interest “to minimize anxiety and concern of the accused” and “to limit the possibility that the [defendant’s presentation of his case] will be impaired.”³⁷⁴ The same sorts of considerations apply to victims and could be evaluated in assessing victims’ claims.

It is also noteworthy that statutes in federal courts and in most states explicate a defendant’s right to a speedy trial. For example, the Speedy Trial Act of 1974 specifically implements a

³⁶⁵ Telephone Interview with Betty Mueller, Victim/Witness Coordinator, Weber Cnty. Attorney’s Office (Oct. 6, 1993).

³⁶⁶ See HERRINGTON ET AL., *supra* note 4, at 75; *Utah This Morning* (KSL television broadcast Jan. 6, 1994) (statement of Corrie, rape victim) (“Once the trial was over, both my husband and I felt we had lost a year and a half of our lives.”).

³⁶⁷ 18 U.S.C. § 3771(a)(7) (2006).

³⁶⁸ See ARIZ. CONST. art. II, § 2.1(A)(10); CAL. CONST. art. I, § 29; ILL. CONST. art. I, § 8.1(a)(6); MICH. CONST. art. I, § 24(1); MO. CONST. art. I, § 32(1)(5); WIS. CONST. art. I, § 9m.

³⁶⁹ See, e.g., *United States v. Wilson*, 350 F. Supp. 2d 910, 931 (D. Utah 2005) (interpreting CVRA’s right to proceedings free from unreasonable delay to preclude delay in sentencing).

³⁷⁰ *Barker v. Wingo*, 407 U.S. 514, 530-33 (1972).

³⁷¹ See *id.* See generally LAFAYE ET AL., *supra* note 341, at § 18.2.

³⁷² See *Barker*, 407 U.S. at 528 (“We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right.”).

³⁷³ *Id.* at 531-32.

³⁷⁴ *Id.* at 532.

defendant's Sixth Amendment right to a speedy trial by providing a specific time line (seventy days) for starting a trial in the absence of good reasons for delay.³⁷⁵ In the wake of the passage of a Victims' Rights Amendment, Congress could revise the Speedy Trial Act to include not only defendants' interests but also victims' interests, thereby answering any detailed implementation questions that might remain. For instance, one desirable amplification would be a requirement that courts record reasons for granting any continuance. As the Task Force on Victims of Crime noted, "the inherent human tendency [is] to postpone matters, often for insufficient reason," and accordingly the Task Force recommended that the "reasons for any granted continuance . . . be clearly stated on the record."³⁷⁶

. . . to reasonable notice of the release or escape of the accused . . .

Defendants and convicted offenders who are released pose a special danger to their victims. An unconvicted defendant may threaten, or indeed carry out, violence to permanently silence the victim and prevent subsequent testimony. A convicted offender may attack the victim in a quest for revenge.

Such dangers are particularly pronounced for victims of domestic violence and rape. For instance, Colleen McHugh obtained a restraining order against her former boyfriend Eric Boettcher on January 12, 1994.³⁷⁷ Authorities soon placed him in jail for violating that order.³⁷⁸ He later posted bail and tracked McHugh to a relative's apartment, where on January 20, 1994, he fatally shot both Colleen McHugh and himself.³⁷⁹ No one had notified McHugh of Boettcher's release from custody.³⁸⁰

The VRA would ensure that victims are not suddenly surprised to discover that an offender is back on the streets. The notice is provided in either of two circumstances: either a *release*, which could include a post-arrest release or the post-conviction paroling of a defendant, or an *escape*. Several states have comparable requirements.³⁸¹ The administrative burdens associated with such notification requirements have recently been minimized by technological advances. Many states have developed computer-operated programs that can place a telephone call to a programmed number when a prisoner is moved from one prison to another or released.³⁸²

. . . to due consideration of the crime victim's safety . . .

³⁷⁵ Pub. L. No. 96-43, 93 Stat. 327 (codified as amended at 18 U.S.C. §§ 3161-74) (2008).

³⁷⁶ HERRINGTON ET AL., *supra* note 4, at 76; *see* ARIZ. REV. STAT. ANN. §13-4435(F) (Westlaw through 2012 Legis. Sess.) (requiring courts to "state on the record the specific reason for [any] continuance"); UTAH CODE ANN. § 77-38-7(3)(b) (Lexis Nexis, LEXIS through 2011 Legis. Sess.) (requiring courts, in the event of granting continuance, to "enter in the record the specific reason for the continuance and the procedures that have been taken to avoid further delays").

³⁷⁷ Jeffrey A. Cross, Note, *The Repeated Sufferings of Domestic Violence Victims Not Notified of Their Assailant's Pre-Trial Release from Custody: A Call for Mandatory Domestic Violence Victim Notification Legislation*, 34 U. LOUISVILLE J. FAM. L. 915, 915-16 (1996).

³⁷⁸ *See id.*

³⁷⁹ *Id.*

³⁸⁰ *See id.* (providing this and other helpful examples).

³⁸¹ *See, e.g.,* ARIZ. CONST. art. II, § 2.1 (victim's right to "be informed, upon request, when the accused or convicted person is released from custody or has escaped").

³⁸² *See About VINELink*, VINELINK, <https://www.vinelink.com/> (last visited on Mar. 23, 2012).

This provision builds on language in the CVRA guaranteeing victims “[t]he right to be reasonably protected from the accused.”³⁸³ State amendments contain similar language, such as the California Constitution extending a right to victims to “be reasonably protected from the defendant and persons acting on behalf of the defendant” and to “have the safety of the victim and the victim’s family considered in fixing the amount of bail and release conditions for the defendant.”³⁸⁴

This provision guarantees that victims’ safety will be considered by courts, parole boards, and other government actors in making discretionary decisions that could harm a crime victim.³⁸⁵ For example, in considering whether to release a suspect on bail, a court will be required to consider the victim’s safety. This dovetails with the earlier-discussed provision giving victims a right to speak at proceedings involving bail. Once again, it is important to emphasize that nothing in the provision gives the victim any sort of a veto over the release of a defendant; alternatively, the provision does not grant any sort of prerogative to *require* the release of a defendant. To the contrary, the provision merely establishes a requirement that *due consideration* be given to such concerns in the process of determining release.

Part of that consideration will undoubtedly be whether the defendant should be released subject to certain conditions. One often-used condition of release is a criminal protective order.³⁸⁶ For instance, in many domestic violence cases, courts may release a suspected offender on the condition that he³⁸⁷ refrain from contacting the victim. In many cases, *consideration* of the safety of the victim will lead to courts crafting appropriate *no contact* orders and then enforcing them through the ordinary judicial processes currently in place.

. . . to due consideration of the crime victim’s . . . dignity, and privacy . . .

The VRA would also require courts to give “due consideration” to the crime victim’s dignity and privacy. This provision building on a provision in the CVRA, which guarantees crime victims “[t]he right to be treated with fairness and with respect for the victim’s dignity and privacy.”³⁸⁸ Various states have similar provisions. Arizona, for example, promises crime victims the right “[t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.”³⁸⁹ Similarly, California extends to victims the right “[t]o be treated with fairness and respect for his or her privacy and dignity”³⁹⁰ The federal constitution appropriately should include such rights as well.

. . . to restitution . . .

³⁸³ 18 U.S.C. § 3771(a)(1) (2006).

³⁸⁴ CAL. CONST. art. I, § 28(b)(2)-(3).

³⁸⁵ In the case of a mandatory release of an offender (*e.g.*, releasing a defendant who has served the statutory maximum term of imprisonment), there is no such discretionary consideration to be made of a victim’s safety.

³⁸⁶ See generally BELOOF, CASSELL & TWIST, *supra* note 2, at 310-23.

³⁸⁷ Serious domestic violence defendants are predominantly, although not exclusively, male.

³⁸⁸ 18 U.S.C. § 3771(a)(8).

³⁸⁹ ARIZ. CONST., art. II, § 2.1.

³⁹⁰ CAL. CONST., art. I, § 28(b)(1).

This right would essentially constitutionalize a procedure that Congress has mandated for some crimes in the federal courts. In the Mandatory Victims Restitution Act (“MVRA”),³⁹¹ Congress required federal courts to enter a restitution order in favor of victims for crimes of violence. Section 3663A states that “[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [a crime of violence as defined in 18 U.S.C. § 16] . . . the court *shall* order . . . that the defendant make restitution to the victim of the offense.”³⁹² In justifying this approach, the Judiciary Committee explained:

The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.³⁹³

While restitution is critically important, the Committee found that restitution orders were only sometimes entered and, in general, “much progress remains to be made in the area of victim restitution.”³⁹⁴ Accordingly, restitution was made mandatory for crimes of violence in federal cases. State constitutions contain similar provisions. For instance, the California Constitution provides crime victims a right to restitution and broadly provides:

(A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.

(B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.

(C) All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim.³⁹⁵

The Victims’ Rights Amendment would effectively operate in much the same fashion as the MVRA, although it would elevate the importance of restitution.³⁹⁶ Courts would be required to enter an order of restitution against the convicted offender. Thus, the offender would be legally obligated to make full restitution to the victim. However, not infrequently offenders lack the means to make full restitution payments. Accordingly, the courts can establish an appropriate repayment schedule and enforce it during the period of time in which the offender is under the court’s

³⁹¹ 18 U.S.C. §§ 3663A, 3664.

³⁹² § 3663A(a)(1) (emphasis added).

³⁹³ S. REP. NO. 104-179, at 12-13 (1995) (*quoting* S. REP. NO. 97-532, at 30 (1982)). This report was later adopted as the legislative history of the MVRA. *See* H.R. CONF. REP. NO. 104-518, at 111-12 (1996).

³⁹⁴ S. Rep. 104-179, at 13.

³⁹⁵ CAL. CONST. art. I, § 28(b)(13).

³⁹⁶ A constitutional amendment protecting crime victims’ rights would also help to more effectively ensure enforcement of existing restitution statutes. For example, the federal statutes do not appear to be working properly, at least in some cases. I discuss this issue at greater length in Part VII, *infra*.

jurisdiction.³⁹⁷ Moreover, the courts and implementing statutes could provide that restitution orders be enforceable as any other civil judgment.

In further determining the contours of the victims' restitution right, there are well-established bodies of law that can be examined.³⁹⁸ Moreover, details can be further explicated in implementing legislation accompanying the amendment. For instance, in determining the compensable losses, an implementing statute might rely on the current federal statute, which includes among the compensable losses medical and psychiatric services, physical and occupational therapy and rehabilitation, lost income, the costs of attending the trial, and in the case of homicide, funeral expenses.³⁹⁹

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

This language will confer standing on victims to assert their rights. It tracks language in the CVRA, which provides that "[t]he crime victim or the crime victim's lawful representative . . . may assert the rights described [in the CVRA]."⁴⁰⁰

Standing is a critically important provision that must be read in connection with all of the other provisions in the amendment. After extending rights to crime victims, this sentence ensures that they will be able to *fully* enforce those rights. In doing so, this sentence effectively overrules derelict court decisions that have occasionally held that crime victims lack standing or the full ability to enforce victims' rights enactments.⁴⁰¹

The Victims' Rights Amendment would eliminate once and for all the difficulty that crime victims have in being heard in court to protect their interests by conferring standing on the victim. A victim's lawful representative can also be heard, permitting, for example, a parent to be heard on behalf of a child, a family member on behalf of a murder victim, or a lawyer to be heard on behalf of a victim-client.⁴⁰² The VRA extends standing only to victims or their representatives to avoid the possibility that a defendant might somehow seek to take advantage of victims' rights.

³⁹⁷ Cf. 18 U.S.C. § 3664 (establishing restitution procedures).

³⁹⁸ See generally Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of Criminal Courts*, 30 UCLA L. REV. 52 (1982). Cf. RESTATEMENT (FIRST) OF RESTITUTION (2011) (setting forth established restitution principles in civil cases).

³⁹⁹ See § 3663A.

⁴⁰⁰ § 3771(d)(1).

⁴⁰¹ See, e.g., *United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997); Cassell, *Barbarians at the Gates?*, *supra* note 92, at 515-22 (discussing the *McVeigh* case). The CVRA's standing provisions specifically overruled *McVeigh*, as is made clear in the CVRA's legislative history:

This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process. This legislation is meant to ensure that cases like the *McVeigh* case, where victims of the Oklahoma City bombing were effectively denied the right to attend the trial [do not recur] and to avoid federal appeals courts from determining, as the Tenth Circuit Court of Appeals did [in *McVeigh*], that victims had no standing to seek review of their right to attend the trial under the former victims' law that this bill replaces.

150 CONG. REC. 7303 (2004) (statement of Sen. Feinstein).

⁴⁰² See BELOOF, CASSELL & TWIST, *supra* note 2, at 61-64 (discussing representatives of victims).

This limitation prevents criminals from clothing themselves in the garb of a victim and claiming a victim's rights.⁴⁰³ In Arizona, for example, the courts have allowed an unindicted co-conspirator to take advantage of a victim's provision.⁴⁰⁴ Such a result would not be permitted under the Victims' Rights Amendment.

Nothing in this article provides grounds for a new trial or any claim for damages .

..

This language restricts the remedies that victims may employ to enforce their rights by forbidding them from obtaining a new trial or money damages. It leaves open, however, all other possible remedies.

A dilemma posed by enforcement of victims' rights is whether victims are allowed to appeal a previously-entered court judgment or seek money damages for non-compliance with victims' rights. If victims are given such power, the ability to enforce victims' rights increases; on the other hand, the finality of court judgments is concomitantly reduced and governmental actors may have to set aside financial resources to pay damages. Depending on the weight one assigns to the competing concerns, different approaches seem desirable. For example, it has been argued that allowing the possibility of victim appeals of plea bargains could even redound to the detriment of crime victims generally by making plea bargains less desirable to criminal defendants and forcing crime victims to undergo more trials.⁴⁰⁵

The Victims' Rights Amendment strikes a compromise on the enforcement issue. It provides that *nothing in this article* shall provide a victim with grounds for overturning a trial or for money damages. These limitations restrict some of the avenues for crime victims to enforce their rights, while leaving many others open. In providing that nothing creates those remedies, the VRA makes clear that it—by itself—does not automatically create a right to a new jury trial or money damages. In other words, the language simply removes this aspect of the remedies question for the judicial branch and assigns it to the legislative branches in Congress and the states.⁴⁰⁶ Of course, it is in the legislative branch where the appropriate facts can be gathered and compromises struck to resolve which challenges, if any, are appropriate in that particular jurisdiction.

It is true that one powerful way of enforcing victims' rights is through a lawsuit for money damages. Such actions would create clear financial incentives for criminal justice agencies to comply with victims' rights requirements. Some states have authorized damages actions in limited circumstances.⁴⁰⁷ On the other hand, civil suits filed by victims against the state suffer from several disadvantages. First and foremost, in a time of limited state resources and pressing demands for

⁴⁰³ E.g., KAN. CONST. art. 15, § 15(c).

⁴⁰⁴ See Knapp v. Martone, 823 P.2d 685, 686-87 (Ariz. 1992) (en banc).

⁴⁰⁵ See Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 350 (1987).

⁴⁰⁶ Awarding a new trial might also raise double jeopardy issues. Because the VRA does not eliminate defendant's rights, the VRA would not change any double jeopardy protections.

⁴⁰⁷ See, e.g., ARIZ. REV. STAT. ANN. § 13-4437(B) (Westlaw through 2012 Legis. Sess.) ("A victim has the right to recover damages from a governmental entity responsible for the intentional, knowing or grossly negligent violation of the victim's rights . . ."); see also Davya B. Gewurz & Maria A. Mercurio, Note, *The Victims' Bill of Rights: Are Victims All Dressed Up with No Place to Go?*, 8 ST. JOHN'S J. LEGAL COMMENT. 251, 262-65 (1992) (discussing lack of available redress for violations of victims' rights).

state funds, the prospect of expensive awards to crime victims might reduce the prospects of ever passing a Victims' Rights Amendment. A related point is that such suits might give the impression that crime victims seek financial gain rather than fundamental justice. Because of such concerns, a number of states have explicitly provided that their victims' rights amendments create no right to sue for damages.⁴⁰⁸ Other states have reached the same destination by providing explicitly that the remedies for violations of the victims' amendment will be provided by the legislature, and in turn by limiting the legislatively-authorized remedies to other-than-monetary damages.⁴⁰⁹

The Victims' Rights Amendment breaks no new ground but simply follows the prevailing view in denying the possibility of a claim for damages under the VRA. For example, no claim could be filed for money damages under 18 U.S.C. § 1983 per the VRA.

Because money damages are not allowed, what will enforce victims' rights? Initially, victims' groups hope that such enforcement issues will be relatively rare in the wake of the passage of a federal constitutional amendment. Were such an amendment to be adopted, every judge, prosecutor, defense attorney, court clerk, and crime victim in the country would know about victims' rights and that they were constitutionally protected in our nation's fundamental charter. This is an *enforcement* power that, even by itself, goes far beyond anything found in existing victims' provisions. The mere fact that rights are found in the United States Constitution gives great reason to expect that they will be followed. Confirming this view is the fact that the provisions of our Constitution—freedom of speech, freedom of the press, freedom of religion—are all generally honored without specific enforcement provisions. The Victims' Rights Amendment will eliminate what is a common reason for failing to protect victims' rights—simple ignorance about victims and their rights.

Beyond mere hope, victims will be able to bring court actions to secure enforcement of their rights. Just as litigants seeking to enforce other constitutional rights are able to pursue litigation to protect their interests, crime victims can do the same. For instance, criminal defendants routinely assert constitutional claims, such as Fourth Amendment rights,⁴¹⁰ Fifth Amendment rights,⁴¹¹ and Sixth Amendment rights.⁴¹² Under the VRA, crime victims could do the same.

No doubt, some of the means for victims to enforce their rights will be spelled out through implementing legislation. The CVRA, for example, contains a specific enforcement provision designed to provide accelerated review of crime victims' rights issues in both the trial and appellate courts.⁴¹³ Similarly, state enactments have spelled out enforcement techniques.

⁴⁰⁸ See, e.g., KAN. CONST. art. 15, § 15(b) ("Nothing in this section shall be construed as creating a cause of action for money damages against the state . . ."); MO. CONST. art. I, § 32(3) (same); TEX. CONST. art. 1, § 30(e) ("The legislature may enact laws to provide that a judge, attorney for the state, peace officer, or law enforcement agency is not liable for a failure or inability to provide a right enumerated in this section.").

⁴⁰⁹ See, e.g., ILL. CONST. art. I, § 8.1(b) ("The General Assembly may provide by law for the enforcement of this Section."); 725 ILL. COMP. STAT. ANN. 120/9 (West, Westlaw through 2011 Legis. Sess.) ("This Act does not . . . grant any person a cause of action for damages [which does not otherwise exist].").

⁴¹⁰ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁴¹¹ *Arizona v. Fulminante*, 499 U.S. 279 (1991).

⁴¹² *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴¹³ 18 U.S.C. § 3771(d)(3).

One obvious concern with the enforcement scheme is whether attorneys will be available for victims to assert their rights. No language in the Victims' Rights Amendment provides a basis for arguing that victims are entitled to counsel at state expense.⁴¹⁴ To help provide legal representation to victims, implementing statutes might authorize prosecutors to assert rights on behalf of victims, as has been done in both federal and state enactments.⁴¹⁵

. . . Review of the denial of any right established herein, which may include interlocutory relief, shall be subject to the standards of ordinary appellate review. .

This provision simply insures that the VRA will provide victims access to appellate courts. Under current statutes, courts have sometimes concluded that victims cannot receive the same appellate protection of their rights as other litigants. This has proven to be a particular problem with the CVRA.⁴¹⁶ The language discussed here simply eliminates this problem.

B. Section 2

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

Obviously an important issue regarding a *Victims' Rights Amendment* is who qualifies as a victim. The VRA broadly defines the victim, by offering two different definitions—either of which is sufficient to confer victim status.

The first of the two approaches is defining a victim as including any person against whom the criminal offense is committed. This language tracks language in the Arizona Constitution, which defines a “victim” as a “person against whom the criminal offense has been committed.”⁴¹⁷ This language was also long used in the Federal Rules of Criminal Procedure, which until the passage of the CVRA defined a “victim” of a crime as one “against whom an offense has been committed.”⁴¹⁸ Litigation under these provisions about the breadth of the term *victim* has been rare. Presumably this is because there is an intuitive notion surrounding who had been victimized by an offense that resolves most questions.

Under the Arizona amendment, the legislature was given the power to define these terms, which it did by limiting the phrase “criminal offense” to mean “conduct that gives a peace officer or prosecutor probable cause to believe that . . . [a] felony . . . [or that a] misdemeanor involving physical injury, the threat of physical injury or a sexual offense [has occurred].”⁴¹⁹ A ruling by the

⁴¹⁴ Cf. *Gideon*, 372 U.S. 335 (defendant's right to state-paid counsel).

⁴¹⁵ See, e.g., § 3771(d)(1); UTAH CODE ANN. § 77-38-9(6).

⁴¹⁶ See generally Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U.L. REV. 599 (2010).

⁴¹⁷ ARIZ. CONST. art. II, § 2.1(C).

⁴¹⁸ See FED. R. CRIM. P. 32(f)(1) (2000) (amended 2008); see also FED. R. CRIM. P. 32 advisory committee's note discussing 2008 amendments).

⁴¹⁹ ARIZ. REV. STAT. ANN. § 13-4401(6)(a)-(b), held unconstitutional by State ex. rel. Thomas v. Klein, 214 Ariz. 205 (2007).

Arizona Court of Appeals, however, invalidated that definition, concluding that the legislature had no power to restrict the scope of the rights.⁴²⁰ Since then, Arizona has operated under an unlimited definition—without apparent difficulty.

The second part of the two-pronged definition of victim is a person who is directly and proximately harmed by the commission of a crime. This definition follows the definition of victim found in the CVRA, which defines “victim” as a person “directly and proximately harmed” by a federal crime.⁴²¹

The proximate limitation has occasionally lead to cases denying victim status to persons who clearly seemed to deserve such recognition. A prime example is the Antrobus case, discussed earlier in this testimony. In that case, the district court concluded that a woman who had been gunned down by a murderer had not been “proximately” harmed by the illegal sale of the murder weapon.⁴²² Whatever the merits of this conclusion as a matter of interpreting the CVRA, it makes little sense as a matter of public policy. The district judge should have heard the Antrobuses before imposing sentence.⁴²³ And hopefully other courts will broadly interpret the term “proximately” to extend rights to those who most need them. It is interesting in this connection to note that a federal statute that has been in effect for many years, the Crime Control Act of 1990, has broadly defined “victim” as “a person that has suffered *direct* physical, emotional, or pecuniary *harm* as a result of the commission of a crime.”⁴²⁴

One issue that Congress and the states might want to address in implementing language to the VRA is whether victims of *related* crimes are covered. A typical example is this: a rapist commits five rapes, but the prosecutor charges one, planning to call the other four victims only as witnesses. While the four are not *victims* of the charged offense, fairness would suggest that they should be afforded victims’ rights as well. In my state of Utah, we addressed this issue by allowing the court, in its discretion, to extend rights to victims of these related crimes.⁴²⁵ An approach like this would make good sense in the implementing statutes to the VRA.

Although some of the state amendments are specifically limited to natural persons,⁴²⁶ the Victims’ Rights Amendment would—like other constitutional protections—extend to corporate entities that were crime victims.⁴²⁷ The term person in the VRA is broad enough to include corporate entities.

The Victims’ Rights Amendment would also extend rights to victims in juvenile proceedings. The VRA extends rights to those directly harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime. The need for such language stems

⁴²⁰ State *ex rel.* Thomas v. Klein, 150 P.3d 778, 782 (Ariz. Ct. App. 2007) (“[T]he Legislature does not have the authority to restrict rights created by the people through constitutional amendment.”).

⁴²¹ 18 U.S.C. § 3771(e) (2006) (emphasis added).

⁴²² United States v. Hunter, No. 2:07CR307DAK, 2008 WL 53125, at *5 (D. Utah 2008).

⁴²³ See Cassell, *supra* note 68, at 616-19.

⁴²⁴ 42 U.S.C.A. § 10607(e)(2) (Westlaw through 2012 P.L. 112-89) (emphasis added).

⁴²⁵ See, e.g., UTAH CODE ANN. § 77-38-2(1)(a) (implementing UTAH CONST. art. I, § 28).

⁴²⁶ See *id.*

⁴²⁷ See Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876 (2010) (First Amendment rights extend to corporate entities).

from the fact that juveniles are not typically prosecuted for crimes but for delinquencies—in other words, they are not handled in the normal criminal justice process.⁴²⁸ From a victim’s perspective, however, it makes little difference whether the robber was a nineteen-year-old committing a crime or a fifteen-year-old committing a delinquency. The VRA recognizes this fact by extending rights to victims in both adult criminal proceedings and juvenile delinquency proceedings. Many other victims’ enactments have done the same thing.⁴²⁹

VII. AN ILLUSTRATION OF A CASE WHERE THE AMENDMENT WOULD MAKE A DIFFERENCE.

I know that others will be providing important testimony to the Subcommittee about how the VRA would make an real world difference for crime victims across the country. But I wanted to offer one illustration of how, even in the federal system under the CVRA, statutory crime victims’ rights are being subverted. I attempted to provide this testimony to the Subcommittee in 2012, but was unable to do so because I was unable to determine whether judicial sealing orders precluded me from informing the Subcommittee what has happened.⁴³⁰ Since then, a number of the documents involved in the case have been unsealed and entered into the public record. Sadly these documents and other public record information show that the U.S. Attorney’s Office for the Eastern District of New York has not complied with important provisions in the MVRA and CVRA. I provided testimony on this subject in 2013 and expand on these points here. That an Office (led by recently-confirmed Attorney General nominee Loretta Lynch) apparently believes it can ignore federal statutes protecting crime victims’ rights provides one clear illustration of the need to elevate crime victims’ protections to the constitutional level.

*Factual Background of the Sater Case.*⁴³¹

The disturbing case involves a defendant named Felix Sater.⁴³² Sater pled guilty in 1998 to racketeering for running a stock fraud that stole more than forty million dollars from victims.⁴³³ Sater then provided unspecified cooperation to the Government. In 2004, he came up for sentencing. The U.S. Attorney’s Office declined to provide the list of Sater’s victims to the

⁴²⁸ See, e.g., Brian J. Willett, *Juvenile Law vs. Criminal Law: An Overview*, 75 TEX. B.J. 116 (2012).

⁴²⁹ See, e.g., *United States v. L.M.*, 425 F. Supp. 2d 948 (N.D. Iowa 2006) (construing the CVRA as extending to juvenile cases, although only *public* proceedings in such cases).

⁴³⁰ See Letter from Paul G. Cassell to Hon. Lamar Smith, Chairman, Comm. on the Judiciary (May 10, 2012), reprinted in PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO PROTECT THE RIGHTS OF CRIME VICTIMS: HRNG BEFORE THE SUBCOMM. ON THE CONSTITUTION OF THE HOUSE JUDICIARY COMM., Serial No. 112-113 (Apr. 26, 2012), at p. 202. I discuss these circumstances at greater length below.

⁴³¹ All of the information recounted in this testimony comes from public sources. For a general overview of the proceedings in the case, see the unsealed docket sheet for *U.S. v. Doe*, No. 98-CR-1101-01 (E.D.N.Y.) (docket entries from Dec. 3, 1998, to Mar. 27, 2013). Two courageous attorneys – Fred Oberlander and Richard Lerner – deserve tremendous credit for bringing these facts to light, as otherwise Congress would not have this clear-cut example of the need for constitutional protection of victims’ rights. In the interest of full disclosure, I have worked briefly on the case, *inter alia*, in the Second Circuit (attempting to lift a sealing order) and in the U.S. Supreme Court (representing that National Organization for Victim Assistance, NOVA).

⁴³² Sater’s name is now public record, as the judge presiding over the matter unsealed it and the press has widely discussed it. See, e.g., Andrew Keshner, *Judge Orders Unsealing in U.S. Cooperation Case*, N.Y.L.J., Mar. 14, 2013; see also *United States v. John Doe*, No. 98-CR-1101-01, doc. #101, at 1 (government motion to put Doe’s name into the public record in the case). When I testified in 2013, out of an abundance of caution I referred to him as “John Doe.”

⁴³³ Petn. for Writ of Certiorari at 4-6, *Roe v. United States*, No. 12-112 (U.S. Supreme Court May 10, 2012).

probation office, preventing the probation office from contacting the victims.⁴³⁴ As a result, the pre-sentence report did not include any restitution, even though a restitution order was “mandatory” under the Mandatory Victim Restitution Act.⁴³⁵ In any event, when he was ultimately sentenced five years later in 2009, Sater escaped paying to his victims any restitution for the more than forty million dollars that he pilfered.⁴³⁶ Sater’s victims received no notice of the sentencing, even though the Crime Victims’ Rights Act requires notice to victims of all public court hearings.⁴³⁷

Of course, Sater’s 1999 conviction should have signaled the end of Sater’s business career and created the possibility of restitution for the victims of his crimes. Unfortunately, the Government concealed what it was doing by keeping the entire case under unlawful seal.⁴³⁸ And it appears that Sater wasted little time in defrauding new victims.⁴³⁹ By 2002, he had infiltrated a real estate venture and apparently used it to launder tens of millions of dollars, skim millions more in cash, and once again defraud his investors and partners.⁴⁴⁰ An attorney, Fred Oberlander has diligently and fearlessly represented many of Sater’s victims.⁴⁴¹ While preparing a civil RICO complaint against Sater, Oberlander received – unsolicited – documents from a whistleblower at Sater’s company that provided extensive information about Sater’s earlier crimes.⁴⁴² Those documents included a presentence report (“PSR”) from the 1998 case, which revealed that Sater was hiding his previous conviction from his partners in the new firm.⁴⁴³ In May 2010, Oberlander filed the RICO complaint on behalf of Sater’s victims in U.S. District Court for the Southern District of New York, with portions of the PSR attached as an exhibit.⁴⁴⁴ Instead of taking steps to help Sater’s victims recover for their losses, two district courts quickly swung into action to squelch any public reference to the earlier criminal proceedings and, apparently, to punish Oberlander for disclosing evidence of Sater’s crimes.⁴⁴⁵ The S.D.N.Y. court sealed the civil RICO complaint four days after Oberlander filed it.⁴⁴⁶ And the E.D.N.Y. court in which Sater was secretly

⁴³⁴ *Id.* at 7.

⁴³⁵ *Id.*

⁴³⁶ *Id.* at 22. *See* United States v. John Doe, No. 98-CR-1101-01, doc. 35, at 4 (available on PACER); Petition for Rehearing at 5-6, *Roe v. United States*, No. 12-112 (U.S. Supreme Court Apr. 19, 2013). *Cf.* United States v. John Doe, No. 98-CR-1101-01, doc. 137 at 23-24 n.5 (“John Doe” agrees that MVRA applied at his sentencing but contends that identification of victims was impractical).

⁴³⁷ Petition for Rehearing at 1-6, *Roe v. United States*, No. 12-112 (Apr. 19, 2013) (public record pleading awaiting docketing in the Supreme Court).

⁴³⁸ As to whether the case was ever actually sealed, it remains unclear whether the district judge ever actually entered a formal sealing order. Thus, without a sealing order, it is more accurate to say not that the case has been “under seal” but rather that it has been “hidden.” Petn. for Writ of Certiorari at 1, *Roe v. United States*, No. 12-112 (Mar. 5, 2013); *see also* Petition for Rehearing at 1-6, *Roe v. United States*, No. 12-112 (Apr. 19, 2013) (discussing uncertainty about sealed nature of the case)..

⁴³⁹ Reply in Support of Petn. for Writ of Certiorari at 1, *Roe v. United States*, No. 12-112 (Mar. 5, 2013).

⁴⁴⁰ *Id.*

⁴⁴¹ In some materials, Oberlander is referred to pseudonymously as “Richard Roe.” His name is not currently under any sealing order that I am aware of, and accordingly I refer to him here.

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*; *see also* Petition for Rehearing at 1-6, *Roe v. United States*, No. 12-112 (Apr. 19, 2013).

⁴⁴⁶ Reply in Support of Petn. for Writ of Certiorari at 2, *Roe v. United States*, No. 12-112 (Mar. 5, 2013); *see also* John Doe’s Memo. of Law in Support of Order Directing Return of Sealed and Confidential Materials, U.S. v. Doe, No. 11-CR-1101-ILG (May 18, 2010) (doc. #51).

prosecuted issued a temporary restraining order barring Oberlander from disseminating the PSR and other documents – even though Oberlander was not a party to that case, and even though the court could not identify any actual sealing or other order that applied to Oberlander.⁴⁴⁷ The court subsequently converted the TRO into a permanent injunction, and the Second Circuit affirmed.⁴⁴⁸

Oberlander sought review in the U.S. Supreme Court by filing a petition for a writ of certiorari, raising both First Amendment argues and crime victims’ rights arguments.⁴⁴⁹ The National Organization for Victim Assistance (NOVA) filed an amicus brief, highlighting the fact the petition presented important issues about crime victims’ rights – specifically the fact that the Government believed it could avoid compliance with crime victims’ rights statutes through the simply expedient of hiding the case from the victims and other members of the public.⁴⁵⁰ The Solicitor General filed an opposition to the certiorari petition, studiously avoiding any discussion of whether the Government had complied with the crime victims’ rights statute.⁴⁵¹ The Supreme Court denied review. The net result is that victims of Sater’s crimes, including a number of Holocaust survivors, have yet to recover any of their lost funds.⁴⁵² And Sater continues to live well, apparently off of money that he stole from his victims.⁴⁵³

Violation of the Mandatory Victim Restitution Act.

The Sater case illustrates how, without constitutional protection, even a federal statute can be insufficient to full assure that crime victims receive their rights. In 1996, Congress enacted a statute – the Mandatory Victim Restitution Act (MVRA) -- to guarantee that victims of certain crimes would always receive restitution.⁴⁵⁴ As the title indicates, the specific purpose of the MVRA was to make restitution “mandatory.”

Congress enacted the MVRA specifically to eliminate any judicial discretion to decline to award restitution. The MVRA amended the Victim and Witness Protection Act of 1982 (VWPA), which had provided for restitution to be ordered in the court’s discretion. Congress was concerned that leaving restitution to the good graces of prosecutors and judges resulted in few victims recovering their losses. As the legislative history explains, “Unfortunately, . . . while significant

⁴⁴⁷ Reply in Support of Petn. for Writ of Certiorari at 2, *Roe v. United States*, No. 12-112 (Mar. 5, 2013).

⁴⁴⁸ *Roe v. U.S.*, 428 Fed.Appx.60, 2011 WL 2559016 (2d Cir. 2011). I assisted Mr. Roe as legal counsel for part of the proceedings before the Second Circuit.

⁴⁴⁹ Roe was represented by two very capable appellate attorneys, Richard E. Lerner, Esq., and Paul Clement, former Solicitor General of the United States.

⁴⁵⁰ Brief *Amicus Curiae* of the National Organization for Victim Asst., *Roe v. U.S.*, No. 12-112 (Aug. 27, 2012). Along with Professor Douglas Beloof of Lewis & Clark Law School and Professor Amy Wildermuth of the University of Utah College of Law, I served as counsel on the brief.

⁴⁵¹ (Redacted) Brief for the U.S. in Opposition, *Roe v. U.S.*, No. 12-112 (Feb. 2013). The only comment that the Solicitor General made on this question was that the Second Circuit had not reached the issues below and therefore, in the view of the Solicitor General, the Supreme Court should not reach the issue. *Id.* at 17.

⁴⁵² Reply in Support of Petn. for Writ of Certiorari at 12, *Roe v. United States*, No. 12-112 (Mar. 5, 2013); Petition for Rehearing at 5-6, *Roe v. United States*, No. 12-112 (Apr. 19, 2013).

⁴⁵³ Reply in Support of Petn. for Writ of Certiorari at 24 (*citing* Petn. for Writ of Certiorari at 8). *See, e.g., High Court Reveals Secret Deal of Trump Developers’ Crimes*, Palm Beach Post, Aug. 1, 2012 (noting Sater’s ownership of a \$4.8 million condo on Fisher Island), available at <http://www.palmbeachpost.com/news/news/state-regional/high-court-reveals-secret-deal-trump-developers-cr/nP79k/>

⁴⁵⁴ Pub. L. 104-132, Title II, § 204(a), Apr. 4, 1996, 110 Stat. 1227, codified at 18 U.S.C. § 3663A.

strides have been made since 1982 toward a more victim-centered justice system, much progress remains to be made in the area of victim restitution.”⁴⁵⁵ Congress noted that despite the VWPA, “federal courts ordered restitution in only 20.2 percent of criminal cases.”⁴⁵⁶

To fix the problem of inadequate restitution to victims, Congress made restitution for certain offenses – including the racketeering crime at issue in *Sater*⁴⁵⁷ – mandatory. As the Supreme Court recently explained:

Amending an older provision that left restitution to the sentencing judge's discretion, the statute before us (entitled “The Mandatory Victims Restitution Act of 1996”) says “ [n]otwithstanding any other provision of law, when sentencing a defendant convicted of [a specified] offense . . . , the court *shall* order ... that the defendant make restitution to the victim of the offense.” § 3663A(a)(1) (emphasis added); cf. § 3663(a)(1) (stating that a court “may” order restitution when sentencing defendants convicted of other specified crimes). The Act goes on to provide that restitution shall be ordered in the “full amount of each victim's losses” and “without consideration of the economic circumstances of the defendant.” § 3664(f)(1)(A).⁴⁵⁸

To help implement restitution for crime victims, the federal judiciary has also acted. The Federal Rules of Criminal Procedure provide that the pre-sentence report “must” contain “information that assesses any *financial*, social, psychological, and medical impact on any victim.”⁴⁵⁹ And specifically with regard to cases where the law provides for restitution, the pre-sentence report “must” contain “information sufficient for a restitution order.”⁴⁶⁰

It is ancient law that Congress has the power to fix the sentence for federal crimes.⁴⁶¹ Indeed, it is well settled that “Congress has the power to define criminal punishments without giving the courts any sentencing discretion.”⁴⁶² In the *Sater* case, the U.S. Attorney’s Office for the Eastern District of New York decided that it could simply override the Congress’ command that restitution is mandatory in the name of securing cooperation from Sater – and then conceal what it is doing from public scrutiny. It did this first by refusing to provide victim information to the probation office, in contravention of the Federal Rules of Criminal Procedure. And then it

⁴⁵⁵ S. Rep. 104-179 at 13, 104th Cong., 1st Sess. (Dec. 6, 1995).

⁴⁵⁶ *Id.* (citing United States Sentencing Commission Annual Report 1994, table 22).

⁴⁵⁷ The MVRA covers crimes of violence and any offense against property under Title 18, including crimes of fraud and deceit. 18 U.S.C. § 3663A(c)(1)(A). The Second Circuit (along with many other courts) has held that RICO offenses, including “pump and dump” stock frauds, are covered by the MVRA. *See, e.g., United States v. Reifler*, 446 F.3d 64 (2d Cir. 2006) (noting that MVRA applies to “pump and dump” stock frauds and collecting supporting cases).

⁴⁵⁸ *Dolan v. United States*, 130 S.Ct. 2533, 2539 (2010) (emphasis in original). Congress did allow courts to dispense with restitution in cases where it would be impracticable to order, due either to the large number of victims or the difficulty of calculating restitution. 18 U.S.C. § 3663A(c)(3). Nothing in the certiorari petition suggests any such findings were made here. Nor does it seem plausible that such findings could have been made, since Doe’s co-defendants were apparently ordered to pay restitution without difficulty. *See* Cert. Petn. at 5-6.

⁴⁵⁹ Fed. R. Crim. P. 32(d)(2)(B) (emphasis added).

⁴⁶⁰ Fed. R. Crim. P. 32(d)(2)(D).

⁴⁶¹ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820).

⁴⁶² *Chapman v. United States*, 500 U.S. 453, 467 (1991) (citing *Ex Parte United States*, 242 U.S. 27 (1916)).

asked for – and received from the district court – a sentence without restitution. In doing so, the U.S. Attorney’s Office violated the MVRA.

While the MVRA mandates restitution in cases such as *Sater*, it is important to understand that the MVRA does not require disclosure of the names of confidential informants. Rather, the MVRA only requires that convicted defendants pay full restitution. Any legitimate Government interest in keeping the defendant’s name confidential does not interfere with requiring that defendant to pay restitution to his victims. Restitution payments can, of course, be made through intermediaries, such as the U.S. Attorney’s Office or the Probation Office, which could screen out any locating information about a defendant. The Government is also free to pursue its interests through other means, such as placing an informant into the witness protection program,⁴⁶³ or by limiting disclosure of only the fact of his cooperation.

The one thing the MVRA clearly precludes, however, is the Government buying cooperation with crime victims’ money. The Government is not free to tell a bank robber, for example, that he can keep his loot bag if he will testify in other cases. And in the *Sater* case, the U.S. Attorney’s Office was not free to tell Sater that he could keep millions of dollars that he had fraudulently obtained from crime victims rather than requiring him to pay the money back.⁴⁶⁴

Violation of the Crime Victim’s Rights Act.

The U.S. Attorney’s Office’s violations of victims’ rights in the *Sater* case are not confined to the MVRA. Unfortunately, the Office also disregarded another important crime victims’ rights statute: The Crime Victim’s Rights Act (CVRA).⁴⁶⁵

As discussed earlier,⁴⁶⁶ in 2004 Congress passed the CVRA because it found that, in case after case, “victims, and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by prosecutors too busy to care enough, by judges focused on defendant’s rights, and by a court system that simply did not have place for them.”⁴⁶⁷ To avoid having crime victims “kept in the dark,” Congress enacted a bill of rights for crime victims extending them rights throughout the criminal justice process.⁴⁶⁸

In *Sater*, the U.S. Attorney’s Office violated the CVRA at the 2009 sentencing of John Sater, if not much earlier in the process, by keeping crime victims in the dark.⁴⁶⁹ It is not clear

⁴⁶³ See 18 U.S.C. § 3521 *et seq.* The Witness Protection Program statutes provide ways in which civil judgment creditors can pursue actions against persons in the witness protection program. See 18 U.S.C. § 3523.

⁴⁶⁴ The Government actions not only violated the MVRA, but also another important provision of law: 18 U.S.C. § 1963(a)(3). This provision requires a court to order a convicted RICO defendant to forfeit “any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly from racketeering activity.”

⁴⁶⁵ 18 U.S.C. § 3771.

⁴⁶⁶ See Part II.B., *supra*.

⁴⁶⁷ 150 CONG. REC. 4262 (Apr. 22, 2004) (statement of Sen. Kyl). See generally Hon. Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9 LEWIS & CLARK L. REV. 581 (2005).

⁴⁶⁸ 18 U.S.C. § 3771.

⁴⁶⁹ While John Doe was indicted before the CVRA’s 2004 enactment, he was sentenced on October 23, 2009 – five years after the Act was in place. At his sentencing, the CVRA’s procedures plainly applied. See *United States v.*

from the record whether Sater was sentenced in public or not. It appears to be the position of the U.S. Attorney's Office is that Sater "was sentenced in public, though under the name Doe" ⁴⁷⁰ If Sater truly was sentenced in public, then his sentencing was a "public court proceeding" and Sater's crime victims were entitled to (among other rights) accurate and timely notice of that proceeding, as well as notice of their right to make a statement at sentencing. ⁴⁷¹ So far as appears in the record, the U.S. Attorney's Office never gave the victims that notice of any public hearing. ⁴⁷²

On the other hand, even assuming for sake of argument that Sater was properly sentenced in secret, ⁴⁷³ then other provisions of the CVRA would have been in play. At a minimum, the U.S. Attorney's Office would have been obligated to notify the victims in this case of the rights that they possessed under the CVRA. ⁴⁷⁴ Moreover, the U.S. Attorney's Office would have been obligated to provide crime victims' rights that were not connected to public proceedings, such as the right to confer with prosecutors and the right to receive full restitution. ⁴⁷⁵ Here again, nothing in the record shows that the victims received any of these rights – or, indeed, that the U.S. Attorney's Office gave even a second's thought to crime victims' rights. ⁴⁷⁶

To be clear, it is not the case that crime victims' rights require public disclosure of everything in the criminal justice process. In some situations, secrecy can serve important interests, including the interests of crime victims. ⁴⁷⁷ And strategies no doubt exist for accommodating both crime victims' interests in knowing what is happening in the criminal justice process and the Government's legitimate need for secrecy. ⁴⁷⁸ The limited point here is that federal prosecutors cannot use an interest in securing cooperation as a basis for disregarding the CVRA.

In the *Sater* case, the U.S. Attorney's Office's willingness to ignore the CVRA has a "business as usual" feel to it – suggesting that many other victims are having their rights violated by the Government though the simple expedient of hiding the case. ⁴⁷⁹ For example, in a recent case in the Southern District of New York, an experienced defense attorney candidly revealed during sentencing that "in many cases . . . the cooperation is never publicly revealed and *some*

Eberhard, 525 F.3d 175, 177 (2d Cir. 2008) (rejecting defendant's Ex Post Facto challenge to application of the CVRA to a sentencing for a crime committed before the Act's passage).

⁴⁷⁰ Petn. for Writ of Certiorari at 9, *Roe v. United States*, No. 12-112 (Mar. 5, 2013); Petition for Rehearing at 5-6, *Roe v. United States*, No. 12-112 (Apr. 19, 2013).

⁴⁷¹ 18 U.S.C. § 3771(a)(2) & (4).

⁴⁷² Petition for Rehearing at 5-6, *Roe v. United States*, No. 12-112 (Apr. 19, 2013).

⁴⁷³ This issue of closed sentencing proceedings is a complicated one that I do not address here.

⁴⁷⁴ See 18 U.S.C. § 3771(c)(1).

⁴⁷⁵ 18 U.S.C. § 3771(a)(5) & (6).

⁴⁷⁶ Petition for Rehearing at 5-6, *Roe v. United States*, No. 12-112 (Apr. 19, 2013).

⁴⁷⁷ See Tim Reagan & George Cort, Fed. Judicial Ctr., Sealed Cases in Federal Courts 19-20 (2009) (discussing sealing of cases to protect victims of sexual offenses) (available at [http://www.fjc.gov/public/pdf.nsf/lookup/sealcafc.pdf/\\$file/sealcafc](http://www.fjc.gov/public/pdf.nsf/lookup/sealcafc.pdf/$file/sealcafc)). See also *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 608 (1981) ("A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim" during a sex offense trial).

⁴⁷⁸ See Brief Amicus Curiae of the National Organization for Victim Asst. at 14-15, *Roe v. U.S.*, No. 12-112 (Aug. 27, 2012).

⁴⁷⁹ The claim has been made by others that there is a "secret docket" in the Eastern District of New York designed to hide such issues from the public. See <http://observer.com/2015/01/loretta-lynch-and-other-prosecutors-stand-accused-of-allowing-criminals-to-operate/>.

sentencing proceedings and even some complete dockets remain under seal.”⁴⁸⁰ Perhaps in these cases, as well, victims are being deprived of their statutory rights. Given the Government’s apparent belief that it can ignore federal statutes, one way to insure compliance with victims’ rights enactments is to elevate them to the status of constitutional rights.

This Subcommittee Should Ask the U.S. Attorney’s Office to Explain Its Actions

This Committee may wish to consider sending an inquiry to the U.S. Attorney’s Office for the Eastern District of New York to explain how it has handled crime victims’ rights in the *Sater* case. Sadly it is my conclusion that the U.S. Attorney’s Office is hindering the public and this Subcommittee from learning how it treated crime victims in this case. I know this is a serious suggestion, so I set out a detailed chronology of what has happened so that the Subcommittee and others can reach their own conclusion on these issues.⁴⁸¹

When I was preparing testimony for the Subcommittee in 2012, I was aware from public and other sources of the *Sater* case and the fact that the U.S. Attorney’s Office had failed to obtain restitution for crime victims because it wanted cooperation from a defendant. I thought that this would be an important illustration of the need for a constitutional amendment. The case, however, had been subject to extensive litigation concerning the existence and scope of various sealing orders.

Because I wished to communicate my information to this Subcommittee while fully complying with court orders, I prepared draft testimony outlining my concerns about the *Sater* case. On April 9, 2012, I sent a full draft of my proposed testimony to the U.S. Attorney’s Office for the Eastern District of New York, asking it to confirm that the testimony was accurate and in compliance with any applicable sealing orders. I further asked, if it did transgress a sealing order, for instruction on how the testimony could be redacted or made more general to avoid compromising any legitimate government interest reflected in the sealing order.

On April 19, 2012, the Office responded that, in its view, my testimony was not accurate and that “[w]e are unable to comment further because the case is sealed.” The Office further responded that it believed my testimony would violate applicable sealing orders, particularly an order entered by the Second Circuit on March 28, 2011 in the *Roe* case. Specifically, the Office stated: “While it is unclear what the source of your proposed testimony regarding the *Roe* case is, to the extent that you rely on any of the documents that were or remain the subject of litigation in *Roe*, those documents are under seal. We believe it would violate the relevant sealing orders for you to reveal in any way, and in any forum, those documents or their contents.” The Office also noted that the Second Circuit order had appointed Judge Cogan of the Eastern District of New York for the purpose of ensuring compliance with court sealing orders. The Office attached the Second Circuit order to its letter and offered to answer any further questions that I had.

⁴⁸⁰ *U.S. v. Monsegur*, No. 1:11-cr-00666-LAP, DE 34 at 8 (June 5, 2014).

⁴⁸¹ The following information comes from correspondence with the identified parties, copies of which I retain at my office at the University of Utah.

I then received permission from the U.S. Attorney's Office to contact the General Counsel's Office for the University of Utah to receive legal advice on how to deliver the substance of my testimony.

On April 21, 2012, John Morris, the General Counsel for the University of Utah, sent a letter to Judge Cogan, writing on my behalf to determine whether my proposed testimony would violate any judicial sealing orders and, if a portion of his testimony violates any sealing order, whether the testimony could be made more general or redacted so that Congress is made aware of the legal issue that has arisen in this case without compromising the identity of any cooperating individual and thereby bringing it into compliance with the court's sealing orders.

In addition, two days later, on April 23, 2012, I took up the Office's offer to answer questions and sent six additional questions to the Office. Specifically, my questions were:

1. You indicate that you are unable to "comment further" about the underlying criminal case because it is under seal. Are you able to at least indicate whether the Government believes that it complied with all provisions of the Crime Victims' Rights Act, 18 U.S.C. § 3771, and with all provisions of any applicable restitution statute, *e.g.*, 18 U.S.C. § 3663 and 3663A – in other words, are you able to indicate whether the Government fully complied with the law?

2. You sent me a copy of the Second Circuit's June 29, 2011, decision, remanding to the district court for (*inter alia*) a ruling on the government's unsealing motion filed March 17, 2011. Can you advise as to whether a ruling has been reached on that unsealing motion, which has been pending for more than a year?

3. Would any of my testimony be permissible if the Government's unsealing motion were granted?

4. If parts of my testimony would not be permissible even if the Government's unsealing motion were granted, is the Government willing to file an additional motion allowing unsealing to the very limited extent necessary to permit me to deliver my testimony?

5. If my testimony is not currently permissible under the sealing motion and the Government is not willing to file an additional unsealing motion, is the Government willing to advise me how to comply with its view of the sealing orders it has obtained, by me either making my testimony more general or redacting a part of my current testimony? In other words, is there a way for Congress to have the substance of my concern without jeopardizing your need for secrecy about the name of the informant? I thought I had struck this balance already, but apparently you disagree. Can you help me strike that balance?

6. Is there some way for the Government to assist me to make my testimony more accurate. You assert that it is inaccurate, but then refuse to provide any further information. Can you, for example, at least identify which sentence in my proposed testimony is inaccurate?

On April 24, 2012, the U.S. Attorney's Office sent a letter to Mr. Morris indicating that it "was appropriate under the circumstances" for me to have inquired of Judge Cogan, through counsel, about whether his proposed testimony would violate any sealing orders. The Office

further stated that “we believe the best course at this juncture is to await further guidance from Judge Cogan” on the request. The Office also indicated that it preferred to deal through legal counsel on the subject of any additional questions.

On April 25, 2012, Mr. Morris wrote on my behalf to repeat the six questions for me. On April 25, 2012, the Office sent an e-mail in which it stated that the previous letter would serve as the response to the questions for “the time being.”

On May 7, 2012, Mr. Morris received a letter from Judge Cogan in which he stated “I do not believe it would be appropriate to furnish what would in effect be an advisory opinion as to the interpretation of the injunctive orders entered by Judge Glasser and the Second Circuit.”

On May 9, 2012, Mr. Morris sent a letter to the U.S. Attorney’s Office, pointing out Judge Cogan’s decision not to provide further clarification and seeking additional assistance from the Office in answering the six questions I had asked and in helping me provide testimony that would not violate any judicial sealing orders but would communicate the substance of my concern to Congress.

On May 9, 2012, the U.S. Attorney’s Office sent the following terse reply: “We have received your letter from earlier today. In connection with the matter to which your letter refers, the government complied in all aspects with the law. We are unable to answer your other questions as doing so would require us either to speculate or to comment on matters that have been sealed by the United States Court of Appeals for the Second Circuit and the United States District Court for the Eastern District of New York.”

In light of all this was unable to provide testimony on the subject to the Subcommittee in 2012. On May 10, 2012, I sent a letter to the Subcommittee informing it what had happened.⁴⁸²

In 2013, I was again invited to provide testimony to the subcommittee, including a specific request that I provide information (if possible) about the *Sater* case.⁴⁸³ Accordingly, in light of this request, on April 11, 2013, Mr. Morris sent a letter on my behalf to the U.S. Attorney’s Office. The letter included a full draft of my testimony and requested that the Office advise if the testimony was covered by any sealing order, particularly in light of the fact that many documents in the *Sater* case had recently been unsealed. The letter also requested the Office’s assistance in confirming whether or not the recounting of the facts in the *Sater* case was accurate.

On April 18, 2013, the Office sent back a short (two-sentence) letter to Mr. Morris, indicating that it could not give any advice on my testimony. This response was at odds with the response that the Office had sent the previous year (in the April 19, 2012 letter), in which at that time the Office claimed that delivering my testimony would have been (at that time) in violation of the Second Circuit’s sealing order and was inaccurate. Now the Office claimed that it could not

⁴⁸² See Letter from Paul G. Cassell to Hon. Lamar Smith, Chairman, Comm. on the Judiciary (May 10, 2012), reprinted in PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO PROTECT THE RIGHTS OF CRIME VICTIMS: HRNG BEFORE THE SUBCOMM. ON THE CONSTITUTION OF THE HOUSE JUDICIARY COMM., Serial No. 112-113 (Apr. 26, 2012), at p. 202. I discuss these circumstances at greater length below.

⁴⁸³ Letter from Trent Franks, United States Congress, to Professor Paul G. Cassell (Apr. 5, 2013).

provide advice on these same subjects. As a result, in 2013 I made my own determination that I could relay this information to the Subcommittee because it all relied on public record information, as indicated by the extensive footnotes attached to the testimony. I also believed that it was accurate, in view of the U.S. Attorney's Office's unwillingness to contest any of the facts discussed. I provided detailed written testimony on the case to this Subcommittee.⁴⁸⁴

More recently, earlier this year, this case was once again the subject of inquiry. Loretta E. Lynch was nominated to serve as Attorney General. She was the U.S. Attorney for the Eastern District of New York, which handled the Sater prosecution. On February 9, 2015, Senator Hatch submitted a question to Ms. Lynch about the case.

On April 25, 2013, Professor Paul Cassell of the University of Utah College of Law testified before the House Judiciary Subcommittee on the Constitution regarding implementation of crime victims' rights statutes. These include the Mandatory Victim Restitution Act, 18 U.S.C. §3663A, and the Crime Victims Rights Act, 18 U.S.C. §3771, both of which I helped to enact. He suggested that your office had failed to follow these statutes in a sealed case involving a racketeering defendant who had cooperated with the government. Specifically, he cited documents appearing to show that your office failed to notify victims of the sentencing in that case and had arranged for the racketeer to keep the money he had stolen from victims, even though the law makes restitution mandatory. Please explain in detail how your office protected the rights of crime victims in this case and, in particular, how it complied with the mandatory restitution provisions of these two statutes.

In response, Ms. Lynch declined to contest the central point I have been pressing: That the Government used sealing orders to cover up the fact that it allowed Sater to keep money he had stolen from his victims. Ms. Lynch responded to Senator Hatch that “[d]uring my most recent tenure as the United States Attorney for the Eastern District of New York, the Office’s only activity related to this matter was to address whether certain materials should remain sealed.”⁴⁸⁵ Ms. Lynch also wrote that “[t]he initial sealing of the records related to Sater—which pre-dated my tenure as United States Attorney—occurred by virtue of a cooperation agreement under which Sater pled guilty and agreed to serve as a government witness.” On the subject of restitution specifically, Ms. Lynch ducked: “With respect to Sater’s case, the information in the record that concerns the issue of restitution remains under seal. As a matter of practice, however, the prosecutors in my Office work diligently to secure all available restitution for victims, whether the defendants convicted in their cases cooperate with the government or not.” Critically, this answer does not deny that the Government maneuvered to allow Sater to escape a mandatory restitution obligation and profit from his crimes – by keeping money from his victims.⁴⁸⁶

⁴⁸⁴ See Written Statement of Paul G. Cassell before the Subcomm. of the Const. of the House Judiciary Comm., (April 25, 2013), reprinted in 2013 House Hearing, *supra* note 91, at 127-88.

⁴⁸⁵ A copy of the question to and answer by Ms. Lynch can be found here: <http://c6.nrostatic.com/sites/default/files/Lynch%20response%20to%20Hatch%20%281%29.pdf>.

⁴⁸⁶ While not central to the purposes of this hearing, it is also noteworthy that Ms. Lynch’s answer is problematic in another way. According to *The Observer*, Ms. Lynch was inaccurate in stating (as quoted above) that the initial sealing of records “pre-dated” her tenure as the U.S. Attorney. According to *The Observer*, “Loretta Lynch signed the criminal racketeering, money-laundering, and securities fraud charges originally filed against Mr. Sater in December 1998. Her name and signature appear on the Information as Acting United States Attorney. And there being no motion or order

Another recent development is that Felix Sater, though his lawyer, has threatened me with a lawsuit – apparently for providing this information to this Committee in 2013. On December 23, 2014, Robert S. Wolf of the New York law firm Moses & Singer sent me a letter stating: “Please be advised that this firm represents Felix Sater in connection with pursuing potential claims against you arising out of your past and continued conduct. To avoid the commencement of litigation against you, we are offering you the opportunity to execute the enclosed Tolling Agreement.”⁴⁸⁷ I enquired of Mr. Wolf what was the “potential claim” he was considering. I received no clarification. I declined the “opportunity” to sign a tolling agreement.

In light of what seemed to be a threat to file a lawsuit arguing that I had previously provided inaccurate information to Congress, before submitting my testimony this year I sent a letter to Mr. Wolf, asking for his help in ensuring that my testimony was completely accurate: “In order to assure that I haven’t overlooked anything or made any inaccurate statements, I am writing to ask you to review my 2013 testimony and let me know if there are any errors. If you identify any errors, I would appreciate receiving relevant documentation on the point so that I can confirm I have made an error and then fix any problem.”⁴⁸⁸ I asked Mr. Wolf to answer eight specific questions about the case, such as: “Can you confirm that Sater paid no restitution to his victims as part of his sentence in the . . . case – which is what docket entry #35 appears to show.” Wolf responded by email to ask when I needed to hear back from him. I replied and gave a date. Wolfe never responded to me after that. This intimidating threat to sue me – and refusal to answer questions about the case – appear to confirm that my testimony is entirely accurate and the Sater is (in tandem with the Government) working to conceal this clear violation of crime victims’ rights.

For all the reasons outlined above, it continues to be my view that the U.S. Attorney’s Office has not complied with crime victims’ rights statutes in this case – specifically the CVRA and the MVRA. And more important given the subject on this hearing, based on this fact, it continues to be my view that it is more desirable now than ever to elevate the prominence of crime victims’ rights by placing them into the Constitution.

The Subcommittee should, however, have not merely my thoughts on this case but rather full information about it in reaching its own conclusions. Accordingly, the Subcommittee may wish to send an inquiry to the U.S. Attorney’s Office asking it to provide information on how it has handled crime victims’ rights in this case – information that could then form part of the Subcommittee’s record. The Subcommittee may also wish to ask attorneys Oberlander and Lerner about their assessment of the case. They are far more familiar with the details about these subjects than I am and could assist the Subcommittee in determining how congressional statutes protecting victims’ rights have been so cavalierly ignored by the Government – and how the facts regarding these violations are continuing to be concealed.

on the docket to seal the case back in 1998, one can surmise only that it was all hidden for a decade at her request.” <http://observer.com/2015/03/breaking-loretta-lynch-caught-in-deceptive-disclaimer/#ixzz3XlgJsSRe>. *The Observer* goes on to note that “Ms. Lynch claims the issue of Mr. Sater’s restitution remains sealed to this day, but if he was ordered to pay any, it should have appeared on the docket along with his meager fine. It’s hard to imagine a reason for concealing an order of restitution—and it would certainly be a newsflash to his victims, who haven’t received any.” *Id.*

⁴⁸⁷ Letter from Robert S. Wolf to Paul G. Cassell (Dec. 23, 2014).

⁴⁸⁸ Letter from Univ. of Utah law professor Paul G. Cassell to Robert S. Wolf (Mar. 30, 2015).

VIII. CONCLUSION

In my testimony, I have 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.

As also explained in this testimony, H.J. Res. 45, the proposed Victims' Rights Amendment, improves the treatment of victims by drawing upon a considerable body of crime victims' rights enactments at both the state and federal levels. Many of the provisions in the VRA are drawn word-for-word from these earlier enactments, particularly the federal CVRA. In recent years, a body of case law has developed surrounding these provisions. This testimony has attempted to demonstrate how these precedents provide a sound basis for interpreting the scope and meaning of the Victims' Rights Amendment. This testimony has also tried to provide a real world example of how even crime victims' rights protected by federal statute can be ignored – and are continuing to be ignored.

In light of all these facts, we need to draw crime victims move heavily into the criminal justice system. Fortunately, there is a way to require our criminal justice 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.⁴⁸⁹

Our nation, through its assembled representatives in Congress and the state legislatures, should use the recognized amending power to secure a place for victims' rights in our Constitution. While conservatism is often a virtue, there comes a time when the case for reform has been made. Today the criminal justice system too often treats victims as second-class citizens, almost as barbarians at the gates that must be repelled at all costs. The widely-shared view is that this treatment is wrong, that victims have legitimate concerns that can—indeed must—be fully respected in a fair and just criminal justice system. 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.

⁴⁸⁹ Thomas Jefferson to C. W. F. Dumas, 1787, Papers 12:113.